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In This Issue

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Letter from the Chair

Dear Members and Colleagues:

What an exciting year the Section has had so far! We have made great strides in our efforts to re-focus on the "purpose" of the Section. I want to commend the Section Officers, members of the Council, and Committee Chairs and Co-Chairs for embracing this year's theme, ***Project NIA: "Fulfilling the Mission – Pathways to Success."***

We have continued the tradition of past years by offering the Section the opportunity to hear from dynamic people in the fields of international law, business, and policy. At our December meeting, Robert Smolik, who is currently the U.S. Department of State Diplomat in Residence at the University of Michigan's Gerald R. Ford School of Public Policy, was our featured speaker. Mr. Smolik, who specialized in economic issues, is currently the U.S. Deputy Permanent Representative to the OECD in Paris. At the meeting, Mr. Smolik facilitated an insightful discussion on his work experiences with the U.S. Department of State, including his current role of managing a team of seven federal agencies that work on issues such as anti-corruption, counter-terrorism financing, trade and investment, and education. In February, we were honored to have the Honorable Vincente Sanchez**,** Consul General of Mexico, as our guest speaker. He gave an interesting talk on the relations between Mexico and the United States and the current political and economic climate in Mexico. I would especially like to thank Onnie Barnes Jacque, Assistant General Counsel of the University of Michigan, and Nick Stasevich and Marie Galindo, both of Butzel Long, for their assistance in arranging for our guest speakers.

At our April meeting, the Section traveled to East Lansing to visit Michigan State University College of Law. Each year, the Section holds a meeting at one of

Speakers from the Career Opportunities in Interantional Law and Business event

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 the Faculty Editor:

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Articles due July 15

Winter Issue
Articles due November 15

Spring/Summer Issue
Articles due March 15

the area law schools. This was the Section's first visit to MSU College of Law since the former Detroit College of Law relocated to East Lansing. Mary Bedekian, Professor of Law and the Director of Alternative Dispute Resolution Program at MSU College of Law, spoke on "International Arbitration: The Need for Transparency." Ms. Bedekian, a longtime advocate and practitioner of alternate dispute resolution methods, was the former President of the American Arbitration Association.

The Section has continued its support of law students interested in a career in international law. In February, the Section hosted Panel and Round Table Discussions for area law students on Career Opportunities in International Law and Business. The DoubleTree Hotel in Dearborn was the location for this well-attended and well-received event. Law students representing our area law schools heard from a distinguished panel of speakers who provided a well-rounded and diverse discussion on the topic. The following speakers are to be commended for their participation: Ken Duck, Esq. (Foley & Lardner); Howard Hill, Esq. (Quatrro Legal Solutions); M. Dujon Johnson, J.D., Ph.D candidate (National Sun Yat-sen University-Institute of Mainland China Studies, Kaoshuing, Taiwan, Republic of China); Eve Lerman, Esq. (U.S. Department of Commerce); Andrew Thorson, Esq. (Warner Norcross & Judd LLP); Wilfred Eric Steiner, Esq. (Weisman, Young, Schloss & Ruemenapp); Aimee Guthat, Esq. (Fragomen, Del Rey, Bernsen & Loewy); and Jesse Goldstein, Esq. (Vercruysse Murray & Calzone).

The law students were extremely appreciative of the Section's effort.

> "I wanted to thank you for putting the panel together, as it was a great, eye-opening experience for me and has made me very excited about the section of the Bar Association and the area of law."
> *—Michael Root, WSU Law School, JD Candidate 2009*

> "Thanks a lot for organizing this very important discussion session. It really helped me understand how I should plan for my future international career."
> *—Rima Abou-Mrad, WSU Law School, LLM Candidate in Corporate and Finance Law*

Students from MSU College of Law were so excited about the presentation that one week later the Associate Director of Career Services at the law school invited me to speak at a "Meet the Lawyer" session to focus on international law. On the same day of our April meeting at MSU, I had a great time fielding questions from about twenty five law students. There are many different paths to developing and sustaining a practice in international law. Law students are always willing to hear and hopefully learn from your story. If you're willing to tell your story, please let me know as the Section often gets requests for speakers from the law schools.

The above is just a glimpse of the many activities the Section has been involved in this bar year. On the administrative front, the Section is actively working on its Five Year Strategic Plan. The 2006-2007 Budget for the Section was approved by the Council and is provided in this issue. In addition, the proposed amendments to the Bylaws of the Section are provided in this issue. The Section will vote to adopt the proposed Bylaws at the upcoming Annual Meeting of the Section to be held on September 20, 2007 at the Fairlane Club in Dearborn. Finally, to fill two vacancies on the Council, we welcome our newest Council members: Ashish Joshi of Lorandos and Associates and Margaret Dobrowitsky of Brinks, Hofer, Gilson & Lione.

I renew my invitation to you to become an active participant in ***Project NIA.*** Join me and the many members of the Section who are hard at work making the International Law Section the *best* Section of the State Bar of Michigan.

See you at the next Section event!

Lois Elizabeth Bingham, Chair

Lois Elizabeth Bingham

Section Events At-a-Glance

ILS Calendar of Upcoming Events

for regular updates, see ILS Website

"Global Outsourcing: Extending Michigan's Enterprises"

A seminar sponsored in conjunction with the 2007 Annual Meeting
Thursday, September 20, 2007

Meeting: 1:30 p.m. – 2:30 p.m.
Program: 2:30 p.m. – 5:30 p.m.
Reception immediaely following

The Fairlane Club
5000 Fairlane Woods Drive
Dearborn, Michigan 48124

Attendance is free and open to interested persons.
RSVP with Fred Frank, ILS Secretary at *fjf@honigman.com* by September 14.

Send Us Your News

about past and upcoming events, developments, and accomplishments.

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Recent Developments in the Application of the Foreign Sovereign Immunities Act

Paul J. Carrier, Associate Professor, Thomas M. Cooley Law School

Paul J. Carrier

Recently, the federal courts have decided several cases that should have a significant impact on when U.S. courts may exercise subject matter jurisdiction over foreign governments and their various institutions. First, the federal courts have reiterated the position that the Foreign Sovereign Immunities Act of 1976 (the "FSIA")[1] is the only source for determining whether there is subject matter jurisdiction over a foreign sovereign in U.S. courts.[2] Second, it is now clear that the FSIA may be applied to the activities of foreign sovereigns that occurred prior to the enactment of the FSIA.[3] Third, the Second Circuit has reaffirmed a "restrictive" theory of foreign sovereign immunity.[4] Fourth, in harmony with a "restrictive" interpretation of the exceptions authorizing subject matter jurisdiction over foreign sovereigns, the Second Circuit has concluded that subsequent commercial uses of "expropriated" property do not qualify under the "commercial" exception to immunity.[5] Finally, the Second Circuit applied the more restrictive "core functions" test to determine whether the Polish Ministry of the Treasury was "the government" or an "organ" of the government such that it was entitled to foreign sovereign immunity for its role in expropriations in keeping with the "restrictive" nature of the FSIA.[6]

The recent federal decisions stem from a host of claims by individuals and entities of Jewish origin or affiliation for the return of real and personal property that was taken as part of the Nazi victimizations of World War II, as well as of property taken by the governments of certain Central and Eastern European countries by communist authorities in the aftermath of World War II after the defeat of the Axis powers.[7] All of these takings occurred before the enactment of the FSIA, and the plaintiffs in these various cases asserted a host of violations of international law as the basis of their claims. The question in the U.S. federal courts about the legality of takings that occurred in Europe during and after World War II was never reached.[8] Instead, the federal courts focused on the issue whether the federal courts had authority to exercise subject-matter jurisdiction over the claims in light of the doctrine of foreign sovereign immunity. Pivotal to the claims is the question whether the law and practice at the time of the alleged takings is to be used. The answer, currently, is "probably not," although this cannot be said with complete certainty.

U.S. law has long recognized the concepts of foreign sovereign immunity, the "act of state" doctrine, and, in U.S. courts, the related "political question" doctrine. Perhaps unfortunately, the concepts overlap and, therefore, the distinctions between them are not always clear.[9] The "act of state" doctrine, in the context of international obligations to be decided in the municipal courts, is substantive and constitutional rather than procedural in that its focus is on foreign relations and the mutual recognition of the sovereign right to take intra-state actions without external interference, absent consent.[10] In effect, this does not fall under the purview even of the executive branch and its authority over foreign relations. Rather, it is the overarching notion that no state, or any instrumentality thereof (e.g., a state's judicial branch), has the authority to question the acts of a sovereign over affairs that have only internal effects. In contradistinction, the "political question" doctrine relates to the consideration of whether it is the executive, the legislative, or the judicial branch which should address an issue involving the actions of a foreign state.[11] It would appear that some form of jurisdiction is presumed in that it is not *whether* an act of a foreign sovereign is subject to assessment and possible remedy, but *which branch* of government is the most appropriate to handle the matter (even if it is left to a political solution which favors non-action). The constitutional underpinnings are clear. The foreign sovereign immunity doctrine is procedural in that it asks whether a domestic court (state or federal) has subject-matter jurisdiction over a sovereign for some activity.[12]

Relevant Doctrines

The "Political Question" Doctrine

The "political question" doctrine has been described as a "prudential justiciability doctrine."[13] This connotes discretion rather than strict adherence to an established rule, and these questions are to be decided on a case-by-case basis.[14] Since the late 1800s, nations started to shift away from an absolute theory of sovereign immunity and began to recognize judicial authority over the commercial, rather than the sovereign, acts of foreign nations. There is further the notion of extra-national effects which may shift an act from within the purview of the executive or the legislative to that of the judicial branch. From an historical perspective, there have been efforts by U.S. courts to preserve the powers of the judiciary from usurpation by other branches. Taken in this context, the "political question" doctrine may be seen as applying either when the facts

surrounding a sovereign and internal act are not clear, or when another branch declines to forcefully assert superior authority on a constitutional basis. As a practical matter, the Executive as a matter of policy may approve of lawsuits against foreign sovereigns for nuisance value, for political pressure, etc. This potential "passing of the constitutional buck," so to speak, would not make for clear distinctions.

"Acts of State" and Foreign Sovereign Immunity

U.S. courts have also recognized a common law "act of state" doctrine, which respects the foreign relations powers as supreme.[15] Any action seeking redress for acts of a sovereign that qualify under this category is not justiciable. In other words, foreign sovereigns are immune from lawsuits in the courts of other nations *unless*, as a matter of comity (and procedure), there has been consent to suit or an exception to foreign sovereign immunity is recognized.

The federal courts' treatment of foreign sovereign immunity issues has its genesis in the *Schooner Exchange* case,[16] where the Supreme Court in an opinion by Justice Marshall concluded that while no acts of a foreign sovereign within the United States enjoyed any innate immunity, as a matter of respect and comity the courts may defer to the political branches of government on the issue of whether to decline jurisdiction so as to avoid political difficulties. More particularly, Justice Marshall recognized that sovereigns held "full and absolute" or "complete" power within their own territories, and that the courts of other nations should not "degrade the dignity" of other nations by exercising judicial jurisdiction over a foreign sovereign absent consent or waiver.[17] This judicial decree, very deeply rooted in positivist international legal theory and notions of reciprocity and sovereignty, articulates the standard of absolute sovereign immunity[18] and reigned supreme in this country for one hundred and forty years.[19]

Following a State Department letter (the "Tate Letter") advocating on behalf of the Executive Branch the use of a "restrictive" rather than an "absolute" form of the sovereign immunity doctrine in 1952,[20] and in the face of pressure by the courts for some legislative guidance on the foreign sovereign immunity question,[21] Congress enacted the FSIA in 1976. The FSIA codified the position set out in the Tate Letter,[22] and therefore begins with the presumption of sovereign immunity from suits in U.S. federal (and state) courts[23] but goes on to except from immunity activities that are commercial, rather than sovereign, in nature.[24] Worthy of note, however, is the fact that the opinions of the Executive on the political ramifications of exercising jurisdiction in a particular case, typically through the State Department, are still considered regularly by the courts. In other words, the provisions of the FSIA do not appear to be applied rigidly and without some further consideration of the possible need of judicial deference to the political branches, which would be in addition to the up-front consideration of whether a "political question" is involved.

The FSIA[25]

The relevant sections of the FSIA for purposes of this article begin with § 1604, which creates immunity from suit in state and federal courts except as otherwise addressed in existing international agreements. Technically, this may be understood as the legislative adoption of "act of state" doctrine. Once the prior, absolute form of immunity began to develop holes, such as for commercial activities, creation of a "limited" or "restrictive" theory became acceptable. Thus followed the creation of exceptions by the U.S. Congress, which are contained in § 1605. The primary exceptions, which are relevant to this analysis, are found in § 1605(a)(1)-(3). Subsection (a)(1) covers express or implied waivers of immunity, regardless of attempts to withdraw such a waiver. Subsection (a)(2) makes justiciable commercial activities either carried on in the United States, or for acts in the United States connected to commercial activities elsewhere, or for acts outside of the United States of a commercial nature with *direct effects* in the United States. Subsection (a)(3) addresses expropriated property in violation of international law (or the results of its exchange) where the property is present in the United States in connection with some commercial activity of the foreign state, or where the property is owned or operated by an agency or instrumentality (i.e., not really "sovereign" but "commercial) and such agency or instrumentality engages in commercial activity in the United States. The difference between subsections (a)(2) and (a)(3) is that the first, the "commercial activity exceptions," has an *in personam* character, whereas the second, the "takings exceptions," has either an *in rem* character (property used for commercial purposes in the United States) or modified *in personam* characteristics. By the latter is meant that while illegally expropriated property or that acquired in exchange therefor is not in the United States, a non-sovereign agency or instrumentality that holds such property operates commercially within the United States.

Cases

Altmann

In this U.S. Supreme Court ruling, the Justices' views may be split into two different camps with regard to whether the FSIA applies retroactively. The majority agreed that there is no reason why the FSIA may not be applied to conduct that occurred prior to its enactment.[26] At the heart of the ruling was the notion that the foreign sovereign immunity doctrine is based on current political realities and the desire in appropriate cases to afford protection from lawsuits in U.S. courts as a matter of comity, rather than to focus on the aim of allowing pri-

vate parties (here, foreign sovereigns) to shape their conduct in reliance on existing law without fear of unknown, future liabilities.[27] It is this somewhat subtle shift of purpose that led the majority to conclude that the presumption of anti-retroactivity as spelled out in cases such as *Landgraf v. USI Film Products*[28] did not have to be applied, and that current law and practice could be utilized. While the majority did not forbid the use of an historical approach to the foreign sovereign immunity question by looking to law and policy at the time of the act at issue, it did indicate its disfavor with the "kind of detailed historical inquiry that the FSIA's clear guidelines were intended to obviate."[29]

The majority, in dicta, further noted that the United States did not submit a statement of its foreign policy interests in the case, but that an opinion on the exercise of jurisdiction over particular foreign sovereigns could be entitled to deference in light of the Executive's view of foreign policy.[30] In his concurrence, Justice Scalia believed that the point for measuring the retroactivity question was the law and policy at the time when judicial jurisdiction is invoked, not when the act occurred, such that retroactivity was not really a question.[31] Justice Breyer's concurrence added six more justifications for denying the presumption of anti-retroactivity, with particular emphasis on the fact that sovereign immunity deals with the status of a respondent, *not* the respondent sovereign's conduct.

In the second camp are the dissenters. Justice Kennedy believed that the majority's *sui generis* approach to the retroactivity issue lacked a principled basis.[32] Justice Rehnquist, joined by Justices Scalia, Kennedy and Thomas, disfavored the rejection of "widely held intuitions about how statutes ordinarily operate"[33] and noted the danger of increased intervention by the Executive for political reasons because the *sui generis* approach blurs the distinction between public and private acts.[34]

Whiteman

The *Whiteman* case uniquely does not (specifically) involve the FSIA. Instead, the Second Circuit wrestled with the political question doctrine. In effect, the political question doctrine is akin to the federal preemption doctrine, only applied extraterritorially. When a case filed in a U.S. court involves issues that are already being addressed by a political branch of the government, typically by the Executive pursuant to its foreign affairs power,[35] that court should consider the prudence of adjudication in light of longstanding, historical deference to the Executive on questions of foreign policy.[36] Relying on the *Baker v. Carr*,[37] the *Whiteman* majority identified and relied upon six "independent" tests for determining whether to defer to a political branch of government in a "case-by-case" inquiry:

> (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department;
>
> (2) a lack of judicially discoverable and manageable standards for resolving it;
>
> (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;
>
> (4) the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government;
>
> (5) an unusual need for unquestioning adherence to a political decision already made; or
>
> (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[38]

The *Whiteman* majority concluded that the fourth test, namely the inability to pass judicial pronouncement without impinging upon the deference owed to another branch of government, was met.[39] The backdrop is roughly fifty years of negotiations between the United States and Austria over settlement of Nazi-era claims, culminating, *inter alia*, in two major international agreements.[40] Accordingly, the majority ruled in favor of deferring to the Executive Branch pursuant to the political question doctrine, which inquiry comes before consideration of subject matter jurisdiction as set forth in the FSIA. The dissenting judge did not believe that there was sufficient conflict with a political branch to justify application of the political question doctrine, and further believed that the majority confused the political question doctrine and the executive deference doctrine.[41]

Garb

The plaintiffs in the *Garb* class action cases sought return of real property taken either by the Republic of Poland or by the Ministry of Treasury of Poland in the aftermath of World War II by the recently installed communist authorities. The Second Circuit in a 2-1 opinion ruled that the federal courts did not have subject matter jurisdiction over the sovereign at issue (both the Republic of Poland and its Ministry of Treasury). In so ruling, the majority relied on *Altmann*, wherein a majority of the Supreme Court expressed its disapproval of a historic approach to sovereign immunity questions and its focus on pre-FSIA policy.[42] Instead, the *Altmann* majority determined that the FSIA contains the most recent reflection of "current political realities and relationships" of the legislative and executive branches, thereby making clear that application of the prevailing policy and practice on foreign sovereign immunity at the time of said act is not required. [43]

The trick utilized by the majority in reliance on *Altmann* is in continuing to recognize sovereign immunity, and thereby giving comfort on an international level that international consensus on the issue of non-justiciability of sovereign acts will be honored, but by subjecting the question of sovereign

immunity to policy at the time that the question is posed to the judiciary (if it gets that far) rather than at the time when an act was taken. Incidentally, international law does recognize general principles of law such as the requirement of "good faith," full compensation for damage, etc. Arguably, if this issue were to be decided by another tribunal that harbored leadings toward the "natural law" theory rather than the "positivist" theory,[44] it is possible that general principles of "legitimate expectations/non-retroactivity" could be applied.

The *Garb* majority further ruled that post-taking commercial use of expropriated property did not convert such property from a § 1605(a)(3) expropriation to a § 1605(a)(2) commercial activity usage. Moreover, the majority concluded that the Ministry of Treasury was a state actor, *not* the kind of agency or instrumentality whose nature distanced it, based on commercial activities, from qualifying as an organ of the sovereign. In so ruling, the majority applied the "core functions" test to conclude that the Ministry of the Treasury of Poland was an organ of the Polish government instead of the kind of agency or instrumentality that engages in commercial activities for purposes of § 1605(a)(3) (which requires an expropriation together with a form of commercial use described above). The dissenting judge advocated the application of the "legal characteristics" test to the question whether the Ministry was an organ of government or the kind of "agency or instrumentality" that qualifies under § 1605(a)(3). That test focuses on factors such as the right to take independent action and the nature of the actions, as well as the possibility of being sued. Worthy of note is the recognition by the majority of Congress's superior role in foreign policy by adopting the more conservative "core functions" test.

Conclusion

At the end of the day, the courts in the cases described herein found different ways to defer to the political branches in cases of expropriations by European sovereigns during and following World War II. A majority of the U.S. Supreme Court in *Altmann* has pronounced that the FSIA may be applied to pre-FSIA events. However, the *Altmann* majority has not definitely ruled out the use of an historical approach despite its clear disfavor of such approach. Nevertheless, for its ease of application, the adoption of this approach by the federal courts is likely. Ultimately, the FSIA does not truly represent a clear-cut distinction between the respective authorities of the executive, judicial, and legislative branches and when the courts should, or must, afford deferential treatment to the political branches. At least the overt recognition of the superior executive authority, by looking at pre-FSIA State Department policy and practice, was dodged by deferring to the "current thinking" as expressed by the FSIA. In *Whiteman*, the Second Circuit found a way to avoid the sticky issue of World War II-era restitution claims by relying on the political question doctrine in light of serious and pervasive efforts by the Executive Branch to resolve the problem. This provides little guidance, however, in cases where executive and/or legislative efforts are less significant or non-existent. The Second Circuit, via the *Garb* majority opinion, has sanctioned the application of the FSIA to pre-FSIA events. The majority has nevertheless paid obeisance to the political branches by applying the "core functions" test (in deference to restrictive theory that respects the political aspects of an issue) to the question whether a state actor is an "agency or instrumentality" for purposes of § 1605(a)(3). Granted, the *Garb* majority also clarified the distinction between § 1605(a)(2) commercial activity property and § 1605(a)(3) expropriated property being used commercially.

In short, the law surrounding the act of state and foreign sovereign immunity remains highly nuanced, and the deference owed by the judiciary to the political branches (and vice versa) is far from clear. It would make things simpler if the question of sovereign immunity could be de-politicized by some straightforward test. The FSIA was an attempt to do just this, i.e. to recognize sovereign immunity other than for certain exceptions relating to commercial uses and external effects. However, judicial deference to the other branches of government, and particularly that of the executive, continues by way of application of the "political question" doctrine and even the deferential use of the "core functions" test of government, versus quasi-commercial, activity. On the other hand, the separation of powers is still preserved, and further, the judiciary's right to weigh in on sovereign immunity questions is not seriously impaired by these decisions. At least in the case of Jewish property, the U.S. courts appear now to agree with the political branches that the either the judiciary is not the ultimate arbiter or that the issue needs to be laid to rest.

About the Author

Paul J. Carrier is an Associate Professor at the Thomas M. Cooley Law School, where he teaches property law in Grand Rapids and European Union Law and other international law courses in Lansing. Professor Carrier has just finished teaching an international business transactions course at Cooley's Foreign Study in Toronto Program and has been appointed the U.S. co-director of the program. Before accepting the position at Cooley, Professor Carrier worked at major international U.S. and British law firms in Central Europe.

Endnotes

1 28 U.S.C. §§ 1330, 1602-1611.
2 *See* Garb v. Republic of Poland, 440 F.3d 579, 581 (2006).
3 *See* Republic of Austria v. Altmann, 541 U.S. 677 (2004).
4 *Garb*, 440 F.3d at 585-86.
5 *Id.* at 587-88.
6 *Id.* at 593-94. The dissenting judge believed that the developing law on

foreign sovereign immunity, as codified by the FSIA, was never intended to create such a sharp distinction for the test of immunity, i.e., based on whether an action was "governmental" in nature or "commercial," and would have applied the "legal characteristics" test, with its focus on factors such as the authority to act and to be sued independently of the "government" under domestic law. *Id.* at 600-02 (Straub, J., dissenting).

7 *See id.* at 581 (citing Michael R. Marrus, The Unwanted: European Refugees in the Twentieth Century 335-36 (1985)). *Altmann*, 541 U.S. 677, involved a claim filed in a California federal court for the return of six paintings by Gustav Klimt from the Republic of Austria and the Austrian Gallery (the national gallery). *Republic of Austria v. Whiteman*, 431 F.3d 57 (2005), concerned a class action lawsuit brought in the Second Circuit against the Austrian government and a number of its instrumentalities, including the Dorotheum GmbH (an auction house owned and controlled by the government) and Osterreichische Industrieholding AG (a Republic of Austria-owned holding company that operated a number of commercial enterprises). *Garb*, 440 F.3d 579, involved expropriations of real property and their subsequent uses by the Republic of Poland and the Ministry of the Treasury of Poland. *Garb* was also decided by the Second Circuit Federal Court of Appeals.

8 More specifically, the U.S. Supreme Court did not consider the merits of the Ninth Circuit's ruling on expropriation; instead it considered which policy to apply to pre-FSIA activities. *Altmann*, 541 U.S. at 692.

9 *See id.* at 694 ("[I]t is appropriate to ask whether the [FSIA] affects substantive rights . . . or addresses only matters of procedure . . . [b]ut the FSIA defies such categorization."). *Cf.* Malcolm N. Shaw, International Law 165 (5th ed., Cambridge Press 2003) ("[I]n practice, it is often difficult to disentangle the diff erent conceptual threads [of non-justiciability for act of state and of sovereign immunity], although the end result in terms of the inability of the plaintiff to surmount the sovereign hurdle may often be the same."). *See also, e.g.*, J.W. Dellapenna, Suing Foreign Governments and Their Corporations 268-69 (1988) (noting the "utter confusion" over the "act of state" doctrine); Paul B. Stephan III, Don Wallace Jr., and Julie A. Roin, International Business and Economics: Law and Policy 188 (3d. ed. 2004) (indicating the lawless nature of foreign sovereign immunity in U.S. law and Congress's attempt, after much prompting, to provide some form of guidance via the FSIA in 1976).

10 *See* Shaw, *supra* note 9, at 163.

11 For an interesting federal pre-emption case involving the invalidation of a Massachusetts state law due to its conflict with the federal executive and legislative powers over foreign policy, as decided by the U.S. Supreme Court, see Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000).

12 *See* Shaw, *supra* note 9, at 162-63 (act of state and justiciability); 621-24 (sovereign immunity).

13 *Whiteman*, 431 F.3d at 69.

14 *See id.* (referring to the six-part test of *Baker v. Carr*). *See infra* n. 38 and accompanying text.

15 *See, e.g.,* Underhill v. Hernandez, 168 U.S. 250, 252 (1897) ("Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of any grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.") *See also* Oetjen v. Central Leather Co., 246 U.S. 297 (1918) ("The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative--'the political'—departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.") (citations omitted).

16 Schooner Exchange v. McFaddon, 7 Cranch 116, 3 L.Ed. 287 (1812).

17 *Id.* at 137 (opinion of Justice Marshall).

18 *Garb*, 440 F.3d at 585. *Cf.* Shaw , *supra* note 9 at 625-28 (discussing absolute sovereign immunity internationally and as recognized in the United Kingdom).

19 Acting Legal Adviser to the Department of State, Jack B. Tate, called for continued recognition of sovereign immunity for public acts of state but not for private acts. *See* Letter of Jack B. Tate, Acting Legal Advisor, Department of State, to Philip B. Perlman, Acting Attorney General (May 19, 1952), *reprinted in* 26 Dep't of State Bull. 984, 984-85, *and in* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 711-15 app. 2 (1976). This new "restrictive" sovereign immunity theory has been followed ever since.

20 *Id.*

21 *Cf. Altmann*, 541 U.S. at 690-91.

22 *Garb*, 440 F.3d at 586 (citing Sugarman v. Aeromexico, Inc., 626 F.2d 270, 274 (3d Cir. 1980) and H.R. Rep. No. 94-1487, 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6604).

23 28 U.S.C., §1604

24 28 U.S.C. §1602 (generally); 28 U.S.C. § 1605 (specified activities that qualify as "commercial" or otherwise not entitle to immunity).

25 28 U.S.C. §§ 1330, 1602-1611.

26 *Altmann*, 541 U.S. at 700. Justice Scalia joined in the opinion but added some further thoughts, as did Justice Breyer, in which concurrence Justice Souter joined.

27 *Id.* at 696.

28 511 U.S. 244 (1994) (spelling out a default rule of anti-retroactivity in a civil rights case).

29 *Altmann*, 541 U.S. at 700.

30 *Id.* at 702.

31 *Id.* at 703.

32 *Id.* at 732.

33 *Id.* at 737-38.

34 *Id.* at 736-37. *Cf. supra* n. 24 and accompanying text.

35 The foreign affairs power has as its constitutional genesis U.S. Const. art. 2, § 2 (referring to the Commander-in-Chief of the Armed Forces and the treatymaking power). *Cf. supra* n. 15 (the *Oetjen* language). In what further obfuscates the separation of powers issue are pronouncements such as the executive's power to make "executive

agreements without the need for Senate or Congressional approval. *See, e.g.* Dames & Moore v. Regan, 453 U.S.654, 680-82 (1981), and the combined executive/ legislative federal supremacy over state legislatures as ruled in *Crosby*, 530 U.S. 363.

36 *Whiteman*, 431 F.3d at 69 (citing Baker v. Carr, 369 U.S. 186 (1962)).

37 *Baker*, 369 U.S. 186.

38 *Whiteman*, 431 F.3d at 70 (citing *Baker* and other cases).

39 *Id.* at 72.

40 *Id.* at 63-64 (referring to State Treaty for the Re-Establishment of an Independent and Democratic Austria, May 15, 1955, 6 U.S.T. 2369, particularly art. 26; and Agreement Between the Austrian Federal Government and the Government of the United States of America Concerning the Austrian Fund "Reconciliation, Peace and Cooperation," Oct. 24, 2000, 40 I.L.M. 523 (2001), which was negotiated partly in response to class action litigation in U.S. courts).

41 *Id.* at 78, 81-82.

42 *See Altmann*, 541 U.S. at 700.

43 *Id.* at 696.

44 *See* Shaw, *supra* note 9, at 48-53 (addressing natural law and positivist theories of international law) and 93-94 (considering the use of general principles as sources of international law under natural law and positivist theories).

2007 China Legal Update: Tax Reforms

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By all accounts, China's track record in attracting foreign investment has been successful. One oft-cited factor underpinning that success is a system of preferential tax treatments. Reforms are under way in China's tax system.

The preferential tax system, evolving since the late 1970s and codified in the early 1990s,[1] ended on March 16, 2007,[2] when China adopted a new *2007 Income Tax Law.* Taking effect on January 1, 2008,[3] the new law will do away with key preferential tax treatments that have been available to foreign investors for close to two decades. To minimize disruptions to foreign investors, the new law has also provided for a five-year transitional period.[4]

To be sure, only a general contour of the new tax law is emerging. Exact details and effects will likely become more transparent as regulations are implemented. Thus, this 2007 China Legal Update attempts to summarize key tax reform items in a broad stroke. We will provide further updates as reforms are rolled out.

Genesis of tax reforms. Equalization of the effective corporate income tax ("**CIT**") rates of foreign invested enterprises ("**FIE**s") and domestic Chinese enterprises ("**DCE**s") was a significant factor prompting the current round of tax reforms. By way of background, foreign investors have enjoyed "supernational" tax treatment in China, even after it has acceded to the WTO. While both FIEs and DCEs were subject to a nominal CIT rate of 33%, due to various preferential tax treatments which were not available to DCEs, the effective rate for FIEs was 15%,[5] 10% lower than DCEs' rate.[6] That difference was widely perceived as unfair to DCEs.[7] Calls for leveling the playing field have grown more numerous over the years and have become louder in recent years as China's nationalistic sentiments have arisen. It is not surprising that a center piece of China's tax reforms is the unification of China's bifurcated tax system, with more favorable treatments accorded to foreign investors.

Fairness aside, tax unification has a dual aim of closing a legal loophole commonly referred to as "**round-tripping.**"[8] Many DCEs have been known to use this loophole to avail themselves of preferential tax treatments otherwise unavailable to them. In "round-tripping," DCEs would set up offshore vehicles and use them to make China investments. Given that such investments nominally came from overseas, they were considered "foreign investments" and, thus, eligible for preferential tax treatments.

Aside from tax equalization, other items of tax reforms have generally been viewed as overdue.[9] While China's economic conditions have undergone profound changes over the last fifteen years, many for the better, China's mounting challenges[10] resulting from heavy emphasis on growth and manufacturing have necessitated a re-assessment of China's development model. There has also been growing recognition of tax law as an attendant policy tool to achieve China's many goals, among them, re-orientation of China's industry structure and modernization of China's tax system such that it is more simplified, fairer, and more transparent.

Controversy and timing of tax reforms. Tax equalization was not without controversy in China. The foreign investment community, a strong influence in China's economy, took the view that CIT rates are but one of many factors of a leveled playing field. They pointed out that, while the tax cost base

may be much higher for DCEs, compliance cost base has been much higher for FIEs. Compared to DCEs, FIEs are generally known to have been more compliant with China's laws and regulations (including those relating to tax and employee benefits), to have encountered more selective enforcement actions on compliance, and to have faced many more investment restrictions. In addition, FIEs face many challenges[11] that DCEs do not, such as the difficulties of navigating China's licensing and regulatory approval procedures, China's use of unique Chinese domestic standards that disadvantage foreign investors, and China's lack of national treatment of foreign investors generally. In the last several years, the foreign investment community has lobbied the Chinese government to re-assess the timing of implementing the tax equalization reform. In addition to tax equalization, it has also encouraged the government to address challenges foreign investors face that would level the playing field for them.

The views among China's governmental ministries on tax unification were by no means monolithic. China's foreign investment approval authority, i.e. the Ministry of Commerce (and its predecessor) ("**MOC**"), favored a go-slow approach for fear of tempering with a time-tested mechanism of attracting foreign investments. China's Ministry of Finance (and its subordinate State Administration of Taxation) ("**MOF**"), on the other hand, favored a more expeditious approach of leveling the playing field. Both sides were able to point to evidence in favor of their respective views.

Proponents of fast-track reform point out that, even in the absence of preferential tax treatments, China would likely remain an attractive place to invest. That view seems supported by surveys and foreign direct investment statistics of recent years. For example, in 2006, 81% of the member companies of the U.S.-China Business Council ("**USCBC**"), a major trade group, are reported to be profitable, and 50% reported their profitability rates to meet or exceed their global profit margins.[12] Since the 1990s, FIEs have recorded over USD 200 billion of post-tax profits.[13] In addition, 190 countries are conducting trade with China,[14] and 450 of the world Fortune 500 companies have Chinese investments.[15] Viewed together, the proponents argue, these macro trends hardly support the fear that tax unification would lead to a massive exodus of foreign investments.

According to the advocates of cautious reform, given the ever expanding importance and reach of foreign investment in China's economy, at a minimum there were uncertainties about the ramifications of tax unification on foreign investments. Thus, the pace of reform must be judicious. The importance of reach of foreign investments cannot be over-emphasized. By the end of 2006, 594,000 FIEs have been approved.[16] By the end of 2005, they employed twenty four million Chinese citizens.[17] In 2006, they accounted for close to USD 100 billion[18] or 21.12%[19] of China's total corporate income tax and represented 58% of China's foreign trade .[20] China's eastern seaboard has become prosperous and developed due in no small part to a pivotal and catalytic role played by sustained foreign investments over the last two decades. China's interiors, i.e. the Central and Western Areas ("**CWAs")** and the Rust Belt in northeastern China, are struggling. In order for them to develop and catch up, foreign investments must be allowed to play a similar role. That, the argument goes, means only incremental changes should be introduced to a tax system that has otherwise worked well to attract foreign investments.

2005 and 2006 have been confidence-boosting years for China. In both years, its economic growth has been spectacular,[21] its trade surplus hitting new highs[22] and its foreign-exchange reserve swelling.[23] While the foreign direct investment amount was 4% less in 2006 than in 2005, the total amount for 2006 was still an impressive USD 69.5 billion.[24] Measured on purchasing power parity, the Chinese economy is now the world's fourth largest.

Viewed against this background, in the end, the MOF's reform view seems to have prevailed, though MOC's go-slow approach also seem reflected in the new law.[25]

Previous preferential tax treatments. Preferential tax treatments under the pre-reform system have developed over the years. They were manufacturing- and export-oriented, coupled with a geography-based special zone focus.

If qualified, FIEs were generally accorded one or many of the following preferential tax treatments:

- the "**2+3 policy**"--i.e. from the first profitable year, a two-year CIT exemption and a three-year 50% reduction of CIT for manufacturing FIEs with a term of ten years or more;[26]
- the "**export incentive**"--an additional one-year 50% CIT reduction for export-oriented FIEs in each year in which the FIEs export no less than 70% of their productions;[27]
- the "**high-tech incentive**"--a two-year CIT exemption and a three-year 50% CIT reduction for FIEs classified as "high-tech enterprises";[28]
- the "**CWAs incentive**"--a flat 15% CIT rate for additional three years for FIEs established in China's Central and Western Areas ("**CWAs**") and engaged in activities in certain "encouraged" sectors;[29]
- the "**reinvestment rebate**"--a rebate of 40%[30] to 100%[31] of CIT paid on profits if FIEs reinvest the profits in China to establish new FIEs with a term of at least 5 years;[32]
- the "**loss carryovers**"--carryover of losses incurred by FIEs for up to 5 years;[33]

- the "**dividend exemption**"--an exemption from CIT on dividends derived by foreign investors from FIEs;[34] and
- the "**local incentive**"--reductions or exemptions from local income tax if FIEs are engaged activities in encouraged sectors[35] or operate in various locally established special zones (rather than those established by the national government).

The myriad of special zones established by China's central government[36] provided additional incentives and benefits to foreign investors, such as flat CIT rates of 10%,[37] 15%,[38] or 24%,[39] a "**5+5 policy**"[40] (modeled after the "2+3 policy"), or even a "**1+2 policy**" (also modeled after the "2+3 policy") for FIEs in the service sectors.[41] The availability of these rates and policies depended on a variety of considerations, such as location, industry sectors, industry classification of being a FIE engaged in activities in encouraged sectors, being a manufacturing FIE, or being a knowledge/technology-intensive FIE, and total investment amount.

Summary of the tax reforms. Key items of the tax reforms enshrined in the *2007 Income Tax Law* include:

- **Phase-out of preferential tax treatments.** Key preferential tax treatments formerly accorded only to FIEs (such as the "2+3 policy," the "export incentive") will be phased out during a 5-year transition period.[42]
- **Equalization.** With the phasing out of preferential tax treatments, CIT rates of FIEs and DCEs will be equalized. In addition, application of the remaining preferential tax treatments will generally disregard whether an otherwise eligible enterprise has foreign investors.
- **Lower CIT rate.** With limited exceptions, the new CIT rate for both FIEs and DCEs will be 25%,[43] 8% lower than the rate of 33%[44] under the pre-reform system.
- **Preferential CIT rates.** CIT rate for qualified small-scale and thinly-profitable enterprises will be 20%.[45] CIT rate for new and high-tech enterprises supported by the State will be 15%.[46]
- **Favored industry sectors.** The remaining preferential tax treatments will move away from manufacturing- and export-oriented FIEs and, with limited exceptions, from a geography focus. Instead, they will shift to technologically progressive,[47] environmentally friendly,[48] water and energy conserving,[49] safe-production-friendly,[50] qualified venture capital investments,[51] projects, or enterprises.
- **Retention.** With some variations, preferential treatments have been retained for the followings:
  - high-tech enterprises generally;[52]
  - new and high-tech enterprises newly established in SEZs and Pudong;[53]
  - enterprises in encouraged sectors established in CWAs;[54]
  - income derived from agriculture, forestry, animal husbandry, fishery and infrastructure projects and from infrastructure projects supported by the State;[55]
  - loss carryovers for up to five years;[56]
  - the dividend exemption.[57]
- **Anti-avoidance.** Tax avoidance schemes in general,[58] and "round-tripping" in particular,[59] have been expressly outlawed. Related rules concerning transfer-pricing,[60] thin-capitalization,[61] and controlled foreign corporations[62] and their enforcement[63] have been given renewed emphasis.
- **Tax Resident Enterprise.** A twin concept of "Tax Resident Enterprise" ("**TRE")** and "Non Tax Resident Enterprise" ("**NTRE**") has been introduced.[64]
- **Scope of taxation.** TRE will be taxed on its worldwide income. NTRE will be taxed on its China-sourced income and non-China-sourced income that is effectively connected with NTRE's entity (机构) or place of business (场所) that has been established in China.[65]

Though the new law has not directly addressed "reinvestment rebate," it is widely understood that this treatment has been eliminated. Though "dividend exemption" has been retained, dividends must be qualified.[66]

Analysis. With the new CIT rate of 25%, China should remain competitive as an investment destination. As compared to China, the average tax rate of the eighteen surrounding countries is 26.7%[67] and the average rate of the world's 159 economies is 28.6%.[68]

The overall impact of the new tax system on China's treasury seems contained. According to the government, tax equalization will result in a net revenue loss of approximately USD 11.6 billion[69] (taking into account a net loss of approximately USD 16.7 billion [70] from the DCEs and a net gain of approximately USD 5.1 billion[71] from the FIEs). That loss should be manageable for an economy the size of China's, which has exceeded USD 1 trillion.

The immediate impact on the foreign investment flows to China will likely be limited. Tax equalization has not made it to the top ten operating issues for USCBC members in China in a 2006 survey. China's shift of preferential policy away from manufacturing and export has also dove-tailed with the change of China investment goals of many foreign investors, as borne out in the same survey.[72] Even for many existing manufacturing- or export-oriented FIEs, impacts may be minimal. For those granted CIT rates lower than 25%, they

are accorded a 5-year transition period.[73] For those granted the "2+3 policy," the unused portion of the tax holiday will be permitted to sun-set as originally scheduled.[74] For many that have operated for more than 5 years, the "2+3 policy" may have already expired[75].

The most hard hit FIEs would likely be those manufacturers of low-end items whose margins were heavily dependent on the availability of preferential tax treatments. For them, however, relocation to even lower cost jurisdictions in Southeast Asian nations, such as Vietnam and Thailand, might just have been a matter of time, an inevitable result as China's economy matures and its cost base changes.

For all FIEs that are service providers, tax equalization has been good news. As they were not eligible for preferential tax treatments anyway (since they engage in neither manufacturing nor export activities) and were subject to the 33% CIT, tax unification has effectively lowered their CIT rates by 8%.

The abilities of most of China's various special zones to continue to offer benefits and incentives to foreign investors (i.e. their *raison d'être)* have become less than clear under the new tax law. This may lead to a re-assessment of investment opportunities in these zones. However, the special status of SEZs and Pudong has been reaffirmed. Enterprises newly established there will continue to receive various preferential tax treatments afforded for the 5-year transition period.[76]

Conclusion. Decades of torrent growth, particularly in manufacturing, has resulted in alarming environmental degradation, severe depletion of limited natural resources, uneven development of China's geographical regions, and acute income disparity. The Chinese government seems aware of these challenges. A more balanced and sustainable growth is now a stated government policy.[77]

To that end, China's economy will undergo many changes, as China promotes technological advancement, upgrades its industry sectors, and optimizes its economic structure. Like the rest of the world, China is also focusing more on the quality of foreign investments. In that regard, it wants to attract more high-tech industries, modern service industries, high-end manufacturing, and infrastructure development. This has been evident in the recently issued Foreign Investment Directives.[78] This has also been reinforced by the many sweeping reforms introduced in the *2007 Income Tax Law*.

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Endnotes

1 The Income Tax Law of the People's Republic of China for Enterprises with Foreign Investment and Foreign Enterprises, April 9, 1991 [hereinafter 1991 Income Tax Law]; Detailed Rules for the Implementation of Income Tax Law of the People's Republic of China for Enterprises with Foreign Investment and Foreign Enterprises, June 30, 1991 [hereinafter 1991 Tax Implementing Rules].

2 Enterprise Income Tax Law of the People's Republic of China, March 16, 2007 [hereinafter 2007 Income Tax Law].

3 2007 Income Tax Law, *supra* note 2, art. 60.

4 2007 Income Tax Law, *supra* note 2, art. 57.

5 Finance Minister of China (Mr. Jin RenQin), *Report to National People's Congress Regarding the Draft 2007 Enterprise Income Tax Law of the People's Republic of China*, part I (March 8, 2007) [hereinafter *Jin Report*].

6 *Jin Report*, *supra* note 5, part I.

7 *Id.*

8 *Id.*

9 *Id.*

10 These challenges include alarming environmental degradation, severe depletion of limited natural resources, uneven development of China's geographical regions, and acute income disparity.

11 *The 2006 U.S.-China Business Council Member Priorities Survey*, USCBC, Aug. 2006, available at http://www.uschina.org/public/documents/2006/08/member-priorities-survey.pdf [hereinafter *2006 Survey*].

12 *2006 Survey*, *supra* note 11; *Foreign Investment in China*, USCBC, Feb. 2007, *available at* http://www.uschina.org/info/forecast/2007/foreigninvestment.html [hereinafter *Foreign Investment in China, 2007*].
13 *Foreign Investment in China, 2007*, *supra* note 12.
14 *Id*.
15 *Id*.
16 *Jin Report*, *supra* note 5, part I.
17 *Foreign Investment in China*, 2007, *supra* note 12.
18 *Jin Report*, *supra* note 5, part I.
19 *Id*.
20 *Foreign Investment in China*, 2007, *supra* note 12.
21 *China's Economy*, USCBC, Feb. 2007, *available at* http://www.uschina.org/info/forecast/2007/china-economy.html [hereinafter *2006 Economic Indicators*]. According to the estimates by USCBC, in 2006, as compared with 2005, the Chinese economy grew by 10.7%, the fastest in 11 years.
22 According to the *2006 Economic Indicators*, *supra* note 21, China's 2006 trade surplus surged 74%, hitting a record USD 177.5 billion.
23 According to the *2006 Economic Indicators*, *supra* note 21, in 2006, China's foreign-exchange reserve topped USD 1 trillion, overtaking Japan and becoming the world's largest.
24 *Foreign Investments in China, 2007*, *supra* note 12.
25 2007 Income Tax Law, *supra* note 2, art. 57.
26 1991 Income Tax Law, *supra* note 1, art. 8, para. 1.
27 1991 Tax Implementing Rules, *supra* note 1, art. 73, para. 1, art. 75, para. 7.
28 1991 Tax Implementing Rules, *supra* note 1, art. 75, para. 8; High-Tech Zones Tax Provisions, art. 6, paras. 1,2.
29 State Council Notice on Implementing the Development of Western China, Oct. 20, 2000 [hereinafter Western China Development Notice], para. 1, part 3; SAT Notice on Implementing Preferential Treatments to FIEs Established in Central and Western China, Sept. 17, 1999 [hereinafter CWA Tax Notice], paras. 1,2.
30 1991 Income Tax Law, *supra* note 1, art. 10.
31 1991 Tax Implementing Rules, *supra* note 1, art. 81, para. 1.
32 1991 Income Tax Law, *supra* note 1, art. 10; 1991 Income Tax Implementing Rules, *supra* note 1, art. 81, para. 1, art. 80.
33 1991 Income Tax Law, *supra* note 1, art. 11; 1991 Income Tax Implementing Rules, *supra* note 1, art. 76.
34 1991 Income Tax Law, *supra* note 1, art. 19(1), (3); 1991 Income Tax Implementing Rules, *supra* note 1, art. 18.
35 1991 Income Tax Law, *supra* note 1, art. 9.
36 Examples of national-level special zones include, among others, the Special Economic Zones such as Shenzhen, Zhuhai, Hainan, Xiamen and Shantou ("**SEZs**"), the Shanghai Pudong New Area ("**Pudong**"), the Economic and Technological Development Zones ("**ETDZs**"), the High-technology Zones ("**HTZs**"), and the Coastal Economy Open Areas ("**CEOAs**").
37 Provisions on the Taxation of the National New and High Technology Industrial Development Zones, March 6, 1991 [hereinafter High-Tech Zones Tax Provisions], art. 5.
38 1991 Income Tax Law, *supra* note 1, art. 7, paras. 1, 3; 1991 Tax Implementing Rules, *supra* note 1, art. 73, paras. 1,4, 5; 1991 Capital Cities Notice, art. 1.
39 1991 Income Tax Law, art. 7, para. 2; SAT Notice on Certain Tax Policies Issues Involving Foreign Investment in Capital Cities, Sept. 18, 1992 [hereinafter 1992 Capital Cities Notice], art. 1.
40 1991 Tax Implementing Rules, *supra* note 1, art. 75, paras. 1-3. The "5+5 policy" was offered by the SEZs and Pudong. The policy required FIEs to have a term of over 15 years and to engage in certain preferred projects such as airports, harbors, railways, or power stations.
41 1991 Tax Implementing Rules, *supra* note 1, art. 75, para. 4. Though FIEs in the service sectors were generally not accorded special tax treatments, at one point SEZs were permitted to offer the "1+2 policy" for service sector FIEs with a term of ten years and a minimum investment of USD 5 million.
42 2007 Income Tax Law, *supra* note 2, art. 57.
43 2007 Income Tax Law, *supra* note 2, art. 4.
44 1991 Income Tax Law, *supra* note 1, art. 5.
45 2007 Income Tax Law, *supra* note 2, art. 28.
46 *Id*.
47 2007 Income Tax Law, *supra* note 2, arts. 27, 28, 30, 32, 33. Article 27 permits CIT exemption or reduction for qualified technology transfer. Article 33 permits accelerated depreciation for technology upgrading.
48 2007 Income Tax Law, *supra* note 2, arts. 27, 33, 34. Article 27 permits CIT exemption or reduction for incomes derived from qualified projects that can protect the environment or conserve on the use of energy or water. Article 33 permits a deduction for income derived from the manufacturing of products compliant with State industrial policies provided the manufacturing involves comprehensive use of resources.
49 2007 Income Tax Law, *supra* note 2, arts. 27, 34. Article 34 permits a tax reduction for purchases of specialized equipment that is environmentally friendly, safe-production-friendly, or that conserves the usage of energy or water.
50 2007 Income Tax Law, *supra* note 2, arts. 27, 34. Article 34 permits a tax reduction for purchases of specialized equipment that is environmentally friendly, safe-production-friendly, or that conserves the usage of energy or water.
51 2007 Income Tax Law, *supra* note 2, art. 31. Article 31 provides that investments made by venture capital enterprise that are supported by the State may be given a deduction calculated based on a percentage of the investment amounts.
52 2007 Income Tax Law, *supra* note 2, arts. 27, 28, 30, 32.
53 2007 Income Tax Law, *supra* note 2, art. 57; *Jin Report*, *supra* note 5, part III.
54 2007 Income Tax Law, *supra* note 2, art. 57; *Jin Report*, *supra* note 5, part III.

55 2007 Income Tax Law, *supra* note 2, art. 27.
56 2007 Income Tax Law, *supra* note 2, art. 18.
57 2007 Income Tax Law, *supra* note 2, art. 26.
58 2007 Income Tax Law, *supra* note 2, art. 47
59 *Jin Report*, *supra* note 5, part I.
60 2007 Income Tax Law, *supra* note 2, arts. 41, 42, 43, 44.
61 2007 Income Tax Law, *supra* note 2, art. 46.
62 2007 Income Tax Law, *supra* note 2, art. 45.
63 2007 Income Tax Law, *supra* note 2, art. 48.
64 2007 Income Tax Law, *supra* note 2, art. 2. An enterprise that has been registered in China or, even if not, an enterprise that has an "effective management entity" (实际管理机构), in China, is considered a TRE. An enterprise that has been registered outside of China and does not have an "effective management entity" (实际管理机构), but has established an entity (机构) or a place of business (场所), or has China-sourced income (if it does not have an entity (机构) or a place of business (场所) in China) is considered a NTRE.
65 2007 Income Tax Law, *supra* note 2, art. 3. Under Article 4 of the 2007 Income Tax Law, the China-sourced income of an NTRE that does not have an entity (机构) or a place of business (场所) in China will be taxed at 20%.
66 2007 Income Tax Law, *supra* note 2, art. 26. Dividends between TREs are exempt. So are dividends paid by a TRE to an NTRE, if the dividend is otherwise effectively connected with the NTRE's entity (机构) or place of business (场所) established in China.
67 *Jin Report*, *supra* note 5, part III.
68 *Id.*
69 *Jin Report*, *supra* note 5, part IV.
70 *Id.*
71 *Id.*
72 According to the *2006 Survey*, *supra* note 11, 57% of the respondents indicated that their main investment objective was to access the China market. Only 18% invest in China as an export platform to the U.S. market and the remaining 25% export to other countries in Asia or the rest of the world.
73 2007 Income Tax Law, *supra* note 2, art. 57.
74 *Id.* While the original "2+3 policy" is tolled until an FIE's first profitable year, under Article 57 the sun-set period starts from the year 2008.
75 It is possible that for some, the "2+3 policy" has not expired as the 5-year holiday starts from the first profitable year of an FIE's China operation.
76 2007 Income Tax Law, *supra* note 2, art. 57; *Jin Report*, *supra* note 5, part. III.
77 China's National Development and Reform Commission ("NDRC"), Foreign Investment Directives, Nov. 2006.
78 China's Ministry of Commerce ("MOC"), Foreign Investment Directives, March 6, 2007.

The Lanham Trademark Act: Balancing the Competing Concerns of Foreign Sovereignty and Extraterritorial Application

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Introduction

The underlying tension from which the discussion of extraterritorial application arises is international relations between States. States desire to maintain their own sovereign boundaries while simultaneously keeping other States under control. The extraterritorial application of U.S. domestic law could be a violation of a foreign country's sovereignty. Under the Paris Convention for the Protection of Industrial Property (Paris Convention), enforcement of trademark rights is left open to interpretation by signatory States and, arguably, allows for extraterritorial application of laws. The question is: how should the United States craft its policy for the extraterritorial application of laws, namely the Lanham Trademark Act (Lanham Act)?

Sources of Authority for Extraterritorial Application of U.S. Trademark Law

The 1883 Paris Convention for the Protection of Industrial Property

The Paris Convention has under its mandate the protection of trademarks, as well as all other forms of industrial property.[1] Article 10*bis* provides that "countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition."[2] The United States, as a signatory to the Paris Convention, has the responsibility of preventing (1) any acts that create confusion with the goods or activities of a competitor; (2) false allegations that attempt to or succeed in discrediting the goods or activities of a competitor; and (3) any acts that could mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity of the goods.[3] Notably, the Paris Convention does not suggest in what manner protection should be effectuated, nor does it place territorial limits upon Members enforcing the required protections.

The Lanham Trademark Act

The Lanham Act incorporates into domestic law the provisions of treaties signed by the United States concerning intellectual property rights.[4] Under subsection (a), all marks communicated to the United States by international bureaus shall be kept in a register in accordance with the treaties and conventions signed by the United States.[5] Subsection (b) of the Lanham Act discusses the benefits for persons whose country of origin is a party to one of the treaties or conventions referenced under subsection (a).[6] Subsection (h) of the Lanham Act provides for the protection of foreign nationals against unfair competition. The provision states:

> Any person designated in subsubsection (b) of this subsection as entitled to the benefits and subject to the provisions of this chapter shall be entitled to effective protection against unfair competition, and the remedies provided in this chapter for infringement of marks shall be available so far as they may be appropriate in repressing the acts of unfair competition.[7]

It is subsection (h) from which the United States bases its authority for the extraterritorial reach of the Lanham Act.

The Supreme Court of the United States of America

The United States Supreme Court outlined factors to consider in determining the extraterritorial reach of United States law in *Steele v. Bulova Watch Co*.[8] An American watch company sued a U.S. citizen for trademark infringement and sought an injunction against further use of the trademark.[9] The watch company, which had a registered trademark in the United States, believed the citizen was intentionally deceiving the public.[10] The American citizen was domiciled in Texas, but assembled the watches in Mexico from American and Swiss parts.[11]

Defendant U.S. citizen challenged the jurisdiction of the United States Court based on the fact that he had a trademark registration of "Bulova" pending in Mexican courts.[12] The U.S. trial judge originally dismissed the cause with prejudice citing no illegal acts had actually taken place in the United States.[13] The U.S. Court of Appeals reversed the decision, finding a cause of action under the Lanham Act.[14] The Mexican Court subsequently extinguished defendant's registration of the trademark in Mexico, and the U.S. Supreme Court granted certiorari to decide the issue of "whether a United States District Court has jurisdiction to award relief to an American corporation against acts of trade-mark infringement and unfair competition consummated in a foreign country by a citizen and resident of the United States?"[15]

After examining the Lanham Act and the congressional intent behind it, the U.S. Supreme Court came to the conclusion that domestic legislation does not extend beyond the territorial boundaries of the United States, unless there is specific intent.[16] The Lanham Act was found to have the requisite congressional intent for extraterritorial application. In reaching this conclusion, the Supreme Court analyzed three factors: (1) the citizenship of the defendant; (2) whether there exists a conflict between foreign and domestic laws; and (3) what the effect on the United States commerce was.[17]

In this case, defendant was a U.S. citizen which allowed the U.S. Court to have personal jurisdiction over him. There was no conflict of laws or danger of sovereign infringement between the United States and Mexico once defendant's Mexican case was adjudicated. Though the illegal acts occurred outside of the U.S. territory, the effect on United States commerce was felt by U.S. consumers who purchased illegitimate watches believing them to be genuine. This effect on commerce enabled the United States to have subject matter jurisdiction over the case. In answering the Supreme Court's "questions" posed in *Bulova*, the United State Circuit Courts have developed a variety of nuances for justifying extraterritorial jurisdiction under the Lanham Act.

Factors Considered in the Extraterritorial Application of the United States Trademark and Unfair Competition Law

Citizenship of the Defendant

One of the questions posed by the Supreme Court in *Bulova* was whether or not the defendant was a United States citizen. Some jurisdictions, such as the Second Circuit, interpret the Lanham Act and Paris Convention as requiring defendant to have actual citizenship in the United States for any extraterritorial application of the law. The Court in *Vanity Fair Mills v. T. Eaton Co.*[18] did not agree with plaintiff's contention that the Paris Convention created a private right of action under U.S. law against a foreign defendant's acts of unfair competition occurring in foreign countries.[19] The Fourth, Fifth, and Ninth Circuit Courts follow the actual citizenship requirement as well.[20]

Some jurisdictions have augmented the citizenship requirement to allow for extraterritorial application in the event constructive citizenship exists. In *Calvin Klein Industries, Inc. v. BFK Hong Kong, Ltd*,[21] plaintiff sued to enjoin the distribution or sale of defective Calvin Klein clothing, which remained in Pakistan where it was produced.[22] The court held that despite defendant not being a U.S. citizen, his New York corporation and residence provided constructive citizenship for purposes of the Lanham Act.[23] Thus, courts may expand the definition of citizenship to include constructive citizenship when applying the Lanham Act extraterritorially.

Effects on United States Commerce

Another factor courts consider when evaluating extraterritorial application of the Lanham Act is the effect of unfair competition on United States commerce. Three standards have emerged in the U.S. Circuit Courts: "substantial" effect, "significant" effect, and "some" effect. A "substantial" effect on commerce is more than a "significant" effect or "some" effect. In *C-Cure Chemical Co. v. Secure Adhesives*, indirect effects on United States commerce, including purchases of trademark infringing products and loans to trademark infringing companies, were held to satisfy the "substantial" threshold.[24]

The diversion of sales from the foreign licensee of a U.S. company also survived the "substantial" effect test, as seen in *Calvin Klein*.[25] The Court looked to the place of contracting and determined that, regardless of licensees being foreign, the remedy for breach of contract would be in the United States and, therefore, a "substantial" effect on United States commerce existed.[26]

Further, harm to plaintiff's reputation was deemed to have a "substantial" effect on U.S. commerce in *Warnaco Inc. v. V.F. Corp*.[27] Pursuant to a contract termination agreement between a U.S. corporation and a Spanish company, the Spanish company was to sell its stock of the "Warner" trademark until exhausted.[28] The Spanish company sold the goods in an accelerated fashion, damaging the reputation of the U.S. corporation.[29] The fact that the U.S. corporation's harmed reputation in Spain could diminish its reputation in the United States was found to be a "substantial" effect on U. S. commerce.

In other jurisdictions, courts have held that defendant's conduct need only have a "significant" effect on United States commerce. A "significant" effect is something more than "some" effect, but a slightly lesser effect than "substantial." The court in *Nintendo of America, Inc. v. Aeropower Co.*,[30] defined a "significant" effect on U. S. commerce to be the importation of trademark infringing goods.[31]

Finally, some jurisdictions, such as the Fifth Circuit, have employed the "some" effect test. In *Wells Fargo & Company v. Wells Fargo Express Co.*, [32] the Court found "some" effect to be a foreign company operating a subsidiary corporation in the United States. Regardless of the label, the Circuit Courts have made it clear there must be an effect on U. S. commerce to warrant extraterritorial application of the U.S. trademark law.

Valid Trademark Registration in the Foreign Country and Conflict with Trademark Rights Conferred by that Foreign Country.

There are three circumstances, when considering the registration of trademarks, in which extraterritorial jurisdiction may exist. Situation one involves countries where both parties sold goods and defendant had not established a right to use its mark. Situation two concerns countries where both parties sold goods and defendant had established by local law the right to

use its mark. Situation three pertains to countries where defendant was selling goods but plaintiff had not proved that it sold or was likely to do so. The *George W. Luft Co. v. Zande Cosmetic Co*. court held that extraterritorial jurisdiction only exists in situation one, where defendant had not established a right to use its mark.[33] This case was decided before the Supreme Court decision in *Bulova*, but the holding has remained relevant even in light of the *Bulova* decision.

A more current case in which foreign trademark registration was considered is *Sterling Drug, Inc. v. Bayer AG*.[34] As to the issue of extraterritorial application of the Lanham Act, the *Sterling* court felt it necessary to modify *Vanity Fair Mills*, holding:

> A more careful application of *Vanity Fair* is necessary because the instant case is not on all fours with *Vanity Fair.* In *Vanity Fair,* the plaintiff sought a *blanket prohibition* against the Canadian retailer's use of "Vanity Fair" in connection with the sale of defendant's products in Canada. Sterling, on the other hand, seeks to enjoin only those uses of the "Bayer" mark abroad that are likely to make their way to American consumers.[35]

Citing the *George Basch Co.*[36] decision, the court held the Lanham Act does not necessarily require a junior user to be completely banned from using an infringing mark, but rather the injunctive relief should be no broader than necessary to rectify the harm caused by the infringing mark.[37]

An interesting case, also out of the Second Circuit, established the rule that a trade embargo may be taken into consideration when ascertaining a foreign national's rights under U.S. trademark law. The court in *Empresa Cubana Del Tabaco v. Culbro Corp*. held that a Cuban cigar manufacturer had no claim to U. S. trademark rights due to the United States trade embargo with Cuba.[38]

On the whole, courts are reluctant to apply the Lanham Act extraterritorially if there exists a valid trademark in a foreign country and that trademark may confer conflicting rights in the foreign country. However courts are willing to modify that rule, as seen in *Bayer*, and even modify the rule to the extent of denying a foreign user rights under the American law for public policy reasons, as seen in *Empresa.*

A Balancing Test v. All Factors Fulfilled. There are conflicting views as to whether a balancing test of factors should be employed or whether each factor must be fulfilled for extraterritorial application. In *Atlantic Richfield Co. v. ARCO Globus International Co.*, the court held that all three factors considered must be satisfied for extraterritorial application of the Lanham Act.[39] The court essentially held the defendant must be a U. S. citizen, that there can be no conflict between defendant's foreign trademark rights and plaintiff's domestic trademark rights, and defendant's conduct must have had a substantial effect on U. S. commerce.

On the other hand, some jurisdictions employ a balancing test and no one factor is dispositive. In *Nintendo*, the court's analysis found that even though all the factors for extraterritorial application must be considered, no one factor should be fatal. The court mentioned the holding in *Totalplan Corp. of America v. Colborne*,[40] in which the absence of two factors were fatal to issuance of injunction, as well as the *Vanity Fair Mills* holding, in which the conflict with foreign law and defendant's foreign citizenship precluded an injunction.[41] Depending on which jurisdiction a claim falls into, an injunction may or may not be granted— based solely on which method of evaluation the court uses to apply the Lanham Act extraterritorially.

What should the United States Policy on Extraterritorial Application of the Lanham Act Be?

The factors set forth by the United States Supreme Court, and modifications by United States Circuit Courts, are excellent domestic indicators of whether or not the United States should apply the Lanham Act extraterritorially. The requirement that the defendant be a citizen of the United States, either through actual or constructive citizenship, guarantees that the United States is not attempting to unlawfully assert jurisdiction over a foreign citizen. The condition that the defendant be an actual citizen of the United States is preferable to constructive citizenship to prevent sovereign infringement.

Further, though the Circuit Courts of the United States have created three distinct labels through which to analyze the effect on U. S. commerce, the threshold appears to be the same. Assuming, *arguendo*, a difference in magnitude between "significant," "substantial," and "some" does exist, the lowest threshold has been held to meet extraterritoriality requirements. This requirement is necessary because it provides the United States with a viable reason—the protection of its citizens' livelihood—to intervene. However, reconciling the nominal distinctions from jurisdiction to jurisdiction would provide for a clearer understanding by trademark holders.

The final factor to be considered is whether or not a valid trademark exists in a foreign country that confers competing rights. The requirement that no foreign trademark rights exist effectively prevents the United States from attempting to interpret the laws of another country. Customarily, courts will dismiss any action that requires the application of foreign regulations due to the "practical difficulty of importing a foreign regulatory system, but also because of the traditional attitude that one nation will not become another's political agent by giving effect to foreign governmental rights, barring special local statutory direction to do otherwise."[42] The United States should refrain from varying this constraint in order to respect the sovereignty of other States.

The Circuit Courts have competing views on whether the factors should be considered as a balancing test or if one dispositive factor should preclude extraterritorial application. It would be

in the United States best interests to afford other countries the utmost respect in sovereign affairs by requiring all three factors be fulfilled.

Despite an initial presumption against extraterritorial application of laws during the nineteenth century, the current international system contains extraterritorial application of various laws.[43] The extraterritorial application of anti-trust law, in particular, can serve as a caution about problems that may arise with the extraterritorial application of the Lanham Act. It has been noted that there exists

> the prospect of international conflict over the propriety of a nation's antitrust enforcement actions. Significant disagreements may arise because other nations resent what they regard as an unjustifiable exercise of extraterritorial jurisdiction by the prosecuting nation, as in the U.S. pursuit of the uranium cases of the 1970s.[44]

Though the United States may justify its extraterritorial application of the Lanham Act as fulfilling its Paris Convention obligations, other countries may not view the United States' actions in the same light.

Another method for determining the extraterritorial application of laws is the doctrine of jurisdictional rule of reason. This doctrine, which has been heavily relied upon in anti-trust cases, calls for "U.S. courts to balance the positive pro-competitive effects of extraterritorial application of U.S. law against its negative effects on foreign interests and U.S. foreign policy interests."[45]

To create the best method for extraterritorial application of the Lanham Act, the United States' courts should use the current factors in conjunction with the jurisdictional rule of reason. The United States Courts should first evaluate the citizenship of the defendant, the effects on United States commerce, and whether a trademark exists in a foreign country with competing rights. Once all three factors have been satisfied, the United States should further consider what effects the application of the Lanham Act extraterritorially would have on foreign interests and U. St. foreign policy interests. If the negative effects of those interests outweigh the benefits of the Lanham Act, it should not be applied extraterritorially. The United States will achieve greater success in the international arena if it takes the sovereign rights of other countries into consideration when applying the Lanham Act extraterritorially.

About the Author

Casey A. Fry is the Associate Director of the Institute for Trade in the Americas, an independent, non-profit educational and legal research center at Michigan State University College of Law. In her role as Associate Director, she oversees the Institute's activities, which include trade promotion and educational outreach to the U.S. business community, trade policy workshops for government and practitioners, academic conferences, and a trade policy paper series. Ms. Fry graduated cum laude from Michigan State University College of Law with a concentration in International and Comparative Law. She is admitted to the Illinois State Bar and the United States Court of International Trade and the United States Court of Appeals for the Federal Circuit. She can be reached at *frycasey@law.msu.edu* or (517)432-6980. For more information on the Institute for Trade in the Americas, please visit *http://ita.law.msu.edu/*.

Endnotes

1 Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, amended October 2, 1979, 21 U.S.T. 1538, 828 U.N.T.S. 305.
2 *Id.* at art.10*bis*(1).
3 *Id.* at art.10*bis*(3).
4 15 U.S.C. § 1126(a) (2000).
5 *Id.*
6 *Id.* at § 1126(b).
7 *Id.* at § 1126(h).
8 344 U.S. 280, 281 (1956).
9 *Id.*
10 *Id.*
11 *Id.*
12 Bulova Watch Co. v. Steele, 194 F.2d 567, 568 (5th Cir. 1952).
13 *Id.*
14 *Id.* at 573.
15 *Id.* at 281.
16 *Id.* at 285.
17 *Id.* at 281, 285, 287.
18 234 F.2d 633, 637 (2d Cir.1956).
19 *Id.* at 640.
20 *See, e.g.,* Nintendo of Am., Inc. v. Aeropower Co., 34 F.3d 246 (4th Cir. 1994), Am. Rice, Inc. v. Ark. Rice Growers Co-op. Ass'n, 701 F.2d 408 (5th Cir. 1983), and Reebok Int'l, Ltd. v. Marnatech Enters., Inc., 970 F.2d 552 (9th Cir. 1992).
21 714 F. Supp. 78 (S.D.N.Y. 1989).
22 *Id.*
23 *Id.* at 80.
24 571 F.Supp. 808 (W.D.N.Y. 1983).
25 714 F. Supp. 78.
26 *Id.* at 80.
27 844 F. Supp. 940 (S.D.N.Y. 1994).
28 *Id.* at 946.
29 *Id.* at 945.
30 34 F.3d 246, 248 (4th Cir. 1994).
31 *Id.* at 249.
32 556 F.2d 406 (9th Cir. 1977).
33 142 F.2d 536 (2d Cir. 1944).
34 14 F.3d 733 (2d Cir. 1994).
35 *Id.* at 746.
36 *See* George Basch Co., Inc. v. Blue Coral, Inc., 968 F.2d 1532 (2d. Cir. 1992).
37 14 F.3d at 750.
38 399 F.3d 462, 484-85 (2d. Cir. 2005).
39 150 F.3d 189 (2d Cir.1998).
40 14 F.3d 824, 830-31 (2d Cir.1994).
41 *Nintendo*, 34 F.3d 246 .
42 Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Bewteen Public and Private International Law*, 76 A.J.I.L. 280, 290 (1982).
43 Joan R. Goldfarb, *Extraterritorial Compliance with NEPA Amid the Current Wave of Environmental Alarm*, 18 B.C. Envt'l Aff. L. Rev. 543, 552 (1991).
44 Danial K. Tarullo, *Norms and Institutions in Global Competition Policy*, 94 A.J.I.L. 478, 481 (2000).
45 David J. Gerber, *Afterword: Antitrust and American Business Abroad Revisited*, 20 NW. J. Int'l L. & Bus. 307, 308 (2000).

Comprehensive Immigration Reform Update: Compromise to Collapse

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Larry Lanphear

That MIL's summer 2006 article by Tom Williams about proposed Comprehensive Immigration Reform ("CIR") legislation was titled *Comprehensive Immigration Reform: A Work in Progress* shows just how slow such progress has been. That the 2007 "grand compromise" CIR bill was soundly rejected—twice—by the full Senate this spring shows just how difficult comprehensive reform can be.

After the Senate's 2006 CIR Act, approved last May by a 62–36 vote, died in the House, immigration reform legislation faded from view while lawmakers focused on other issues and the November elections. But legislative failure did not lessen the widespread national consensus in favor of reform. Unfortunately, such consensus breaks down when deciding exactly what such reform should entail and whose concerns it should address. President Bush has pressed CIR reform as one of his top domestic priorities; immigrants' rights groups have held huge rallies across the country, while their opponents voice their opinions on the airwaves, the internet, and in print; worksite raids targeting undocumented workers frequently make headlines; employers, organized labor, and nearly every interest group seem to have a position on immigration. The sometimes subtle interplay of issues leads to internal divisions between Democrats and Republicans, as well as unlikely alliances between traditional political enemies (for example, the latest bill's strongest proponents were President Bush and Senator Kennedy)—divisions and alliances made all the more complex when trying to craft a huge piece of legislation at once meant to increase border security, resolve the status of the estimated 12 million aliens in the United States without legal status, satisfy the labor needs of U.S. companies while protecting U.S. workers, and address the myriad other issues falling under the broad category of "immigration."

These contentious issues came to light in dramatic fashion when the Senate announced in May that intense bipartisan negotiations had resulted in a "grand compromise" agreement between twelve Senators, led by Democrat Edward Kennedy and Republican Jon Kyl. With strong backing from the Bush Administration, the proposed bill, The Secure Borders, Economic Opportunity, and Immigration Reform Act of 2007, was revealed to the full Senate and the American people on May 21. Criticism was immediate and intense, and the fragile compromise began to crumble. Feeling pressure from highly-mobilized constituents, Senators scrambled to propose hundreds of amendments, and even some of the bill's sponsors began to waver in their support. By June 7, Majority Leader Harry Reid withdrew the bill from consideration.

Despite the almost universal belief that the bill was flawed, many felt it had been abandoned too quickly. The President personally appealed to Senate Republicans for support, promising an extra $4.4 billion for internal enforcement of the laws to satisfy some of the bill's most strident conservative critics. Hispanic and church groups, employers, and other interested parties also pushed for continued negotiations, seeing this as the best chance at comprehensive reform in the foreseeable future—until at least after the 2008 elections. The Senate negotiators went back to work and on June 15 announced that debate would resume late in the month, based on the earlier agreement and amendments that had passed thus far. Further amendments would be limited to a negotiated list of only 27, thus avoiding the hundreds of proposals that doomed the earlier attempt. The revised agreement, S. 1639, was introduced by Senator Kennedy on June 18. Debate resumed on June 26. The same contentious issues from three weeks earlier were back in the news, and the sides seemed no closer to agreement. On June 28, by a 53–46 vote, the Senate rejected a motion to end debate. The bill was again defeated.

Highlights and Controversies of the Compromise Agreement

At over 400 pages, the "grand compromise" indeed sought to be comprehensive. But the trade-offs, concessions, and accommodations required to reach even a mere proposal made the result unpalatable to nearly everyone. A major dynamic of the negotiations was the primary importance to the Administration and the Democrats of providing a path to legal status for the millions already in the United States illegally. Before agreeing to anything approaching the dreaded perception of "amnesty" for "lawbreakers," Kyl and the conservatives were able to insert a series of restrictive measures relating to family, employment, and security issues**:**

Border Security: The compromise agreement would have provided additional resources for border security, including 18,000 new Border Patrol agents (increased by amendment to 20,000), construction of new fencing,

vehicle barriers, and other systems. As mentioned, conservatives felt more funding for internal enforcement was essential.

Legalization: The bill would have allowed undocumented aliens who entered the United States before 2007 to apply for a new "Z" visa, allowing them to live and work in the United States and eventually providing a path to lawful permanent residence and citizenship. To avoid the perception of an overly-generous "amnesty," the bill included several cumbersome hurdles for Z visa applicants, including payment of thousands of dollars in fees, passing a criminal background check, maintaining employment, and receiving a biometric identity card. Despite these hurdles, conservatives still decried the provision as unacceptable amnesty. The legalization proposal was also seen as unfair by some other immigrants who had taken great care to follow all the rules themselves.

Guest Worker Program: The bill would have created a temporary-worker program meant to discourage future illegal entry while still providing necessary labor in the United States. This new "Y" visa would be valid for two years and could be renewed twice, as long as the worker spent one year outside the United States between each admission. The original proposal allowed for up to 600,000 Y visas per year, but an approved amendment reduced that to 200,000. Among other complaints, critics felt the number was too low to reduce the flow of workers entering the country illegally.

The bill would have also imposed severe new restrictions on employers and employees using the H-1B and L-1 temporary work visas categories, while increasing the annual H-1B quota. Employers objected to the ever more cumbersome restrictions and increased costs of the H-1B visa program and felt the proposed quota increase, while welcome, was still far too low.

Changes to Permanent Residence Process: The bill would have eliminated most of the current employment-based and family-based permanent residence ("green card") categories, replacing them with a newly-created, merit-based point system. Proponents described this as a desirable "rebalancing" of the current immigrant visa allocation system, deemphasizing family ties in favor of applicants with advanced education, desirable work skills, and English-language proficiency. The traditional system allowing immigrants who have become U.S. citizens or permanent residents to sponsor family members for eventual immigration, historically praised as desirable "family reunification," was now derided by critics as fostering "the evils of chain migration." Immigrants' rights groups, the Catholic Church, and others strongly opposed this fundamental shift away from family unity. As for family-based applications currently in the pipeline, the bill would have set aside 567,000 visas annually to clear the years-long backlog currently applicable to most family-based categories. But these visas would have applied only to backlogged applications filed prior to May 1, 2005. Unlucky applicants, who "played by the rules," but who filed after this apparently randomly-chosen date, would have been rejected. At least two proposed amendments, one of which was adopted in the revived bill, sought to address this issue.

Employers objected to the merit-based point system as well, as it would decrease their current ability to hand-pick and sponsor employees of their choice for permanent residence. The bill would also have led to rejection of Immigrant visa petitions filed under the current employment-based system after May 15, 2007, and made no provisions for filing new employment-based petitions between that date and the time the new merit-based system was up and running—likely in late 2008. Such a long period of uncertainty and inactivity would be sure to wreak havoc among employers and intending immigrant employees.

Workplace Enforcement: The bill proposed increased penalties for employers hiring illegal immigrants and made mandatory a system of electronic employment verification. Businesses objected to the new enforcement procedures and penalties and anticipated complications with the electronic verification system.

The bill's defeat has been blamed on its overwhelming complexity and resulting doubt that it could ever be successfully enforced, the secretive way the "bargain" was achieved and forced on the full Senate without the usual committee hearings and opportunity for review, and the fact that the give-and-take of the compromise resulted in a bill that few fully supported. Near the end, even its main supporters were reduced to arguing that "something is better than nothing," and that the bill's admitted flaws could be "fixed" by the House. Despite this bill's failure, scarcely anyone favors maintaining the status quo. With comprehensive reform perhaps even less likely in the election-year of 2008, some portions of the bill will likely return as Congress addresses immigration problems in a non-comprehensive way. We will have to stay tuned.

About the Author

Larry Lanphear attended Michigan State University and the University of North Carolina School of Law. He practices immigration law in Ann Arbor.

Minutes of Council Meetings

Regular Council Meeting
October, 19, 2006

On Thursday, October 19, 2006, the Council of the International Law Section of the State Bar of Michigan held a Regular Meeting at Yazaki North America, Inc., in Canton, Michigan, pursuant to a notice duly circulated to all Section members by email.

Call to Order. The Chair, Lois Elizabeth Bingham, called the meeting to order at 4:35 p.m. A quorum was present.

Introductions. Section members in attendance in person and by telephone introduced themselves and described their professional affiliations.

Attendees: Debra Auerback Clephane, Onnie Barnes-Jacque, Bruce Birgbauer, Lois Bingham, Michele Compton, William (Bill) Dance, Cam DeLong, Michael Domanski, Andrew Doornaert, Pamela Emenheiser, Scott Fenstermaker, Fred Frank, Richard (Dick) Goetz, Howard Hill, Narinder Kathuria, Eve Lerman, Christi Patrick, Julia Qin, Nicholas Stasevich, Piotr Swiecicki, Randolph Wright and Michele Zinn.

Approval of Agenda. The Agenda that was circulated and approved.

Approval of Minutes. The Minutes of the Regular Meeting of the Council held on June 20, 2006 were presented for review and approval. Upon motion duly made, seconded and carried, the Minutes were approved.

Treasurer's Report. The Chair-Elect, Peter Swiecicki, presented the Treasurer's Report in the absence of the Treasurer. For the 12 months ended September 30, 2006, income was $12,433.00, and expenses were $17,204.41, for a net income of ($4,770.41). When (added) to the beginning fund balance of $30,312.96, the Section had an ending fund balance of $25,541.55. Discussion followed on the Report. Upon motion duly made, seconded and carried, the Treasurer's Report was approved.

Chair's Report. The Chair reported.

- *Revitalization of ILS Committees.*
  (1) Structure
  (2) Council Approval of New Committee Structure (3) Committee Responsibilities (4) ILS Committee Chair Assignments (5) Committee Member Solicitation

  The Chair reviewed a proposed new Committee Structure, Committee Chair asignments and ways to solicit additional members for committees. Discussion followed. Upon motion duly made, seconded and carried, the Committee Chair Responsibilities and a list of Committees were each approved. The final documents, with Chairs of Committees listed, are posted on the Section website.
- *ILS Bylaws Review; Creation of Ad-Hoc Committee, Chair, Peter Swiecicki, ILS Chair Elect.* The Chair and Peter Swiecicki led a discussion of the need to review the Section's Bylaws. Upon motion duly made, seconded and carried, the creation of the proposed Ad Hoc Committee was approved. Peter Swiecicki will chair the Committee.
- *ILS 5 Year Strategic Plan: Creation of Ad-Hoc Committee, Chair, Randolph M. Wright, ILS Ex-Officio* The Chair and Randy Wright led a brief discussion of this proposed Committee and its charge. Upon motion duly made, seconded and carried, the creation of the proposed Ad Hoc Committee was approved. Randy Wright will chair the Committee.
- *Section Diversification* The Chair discussed the need to diversify participation in the Section, including background, public international law and criminal law, not just business law and immigration, geographic area and so forth. The Council Members continued the discussion.
- *Substantive Programs* The goal, as explained by the Chair, is to have three substantive programs: one at the annual meeting, one coordinated with a legal association or group, and one with a non-legal group or association. The Council Members discussed this goal and indicated approval.
- *Career Panel Discussion for Law Students* To increase the Section's service to law students, the Chair reported that Section Members will be organizing this panel and she requested volunteers.
- *ILS Pro Bono Activity* To increase the Section's service to the public, the Chair suggested involvement in pro bono activity or public interest programming at least once per year.
- *Section Directory* The Chair reported that she and the Section Secretary would look into the possibility of a Section directory and, in particular, an on-line directory.
- *ILS List Serv* The Section's List Serv was discussed by the Chair. In addition, the Chair noted that the Section has a pass code for conference calls and that will be used when possible.
- *MIL* (Michigan International Lawyer)

The Chair reminded Committee Chairs that each Committee has committed to produce one substantive article for the MIL once every two years.

There was also discussion about each law firm being asked to commit to an article every three years.

The Chair thanked those who reported and who are involved with the Section's Committees.

Michigan International Lawyer. Julia Qin reported on the state of the *MIL*, including publication dates and the need for articles. The commitments made by Committee Chairs to produce articles was noted. The Chair stated that a conference call will be scheduled to discuss the *MIL* in detail.

Program Reports.

- *Law School Scholarship Program* - Howard Hill discussed the existing program and that was followed by discussion of various alternatives to holding the scholarship competition and whether to hold it at all. Upon motion, duly made, seconded and carried (7 yeas, 5 nays, 1 abstention), the Section Members approved continuing the scholarship competition with a $1,000.00 prize.
- *India/China Program in Western Michigan* - Bruce Birgbauer reported on efforts to hold this program. Suggestions were made by Council Members. The program committee will continue its work.

The Chair thanked the program chairs and others involved with planning the programs.

Old Business

- *Annual Meeting* The Chair reported that Chair-Elect Peter Swiecicki will be in charge of the Annual Meeting Program. A brief discussion followed.
- *International Bar Association* Bruce Birgbauer reported on his attendance at the recent ILB conference. He noted that 3000-4000 lawyers were at the opening session. The Section is a sustaining member of the ILB.

New Business

- *Strategic Plan*

Randy Wright followed up on the earlier discussion

- *Meeting Schedule and Structure*
  The Chair distributed the schedule and there was a discussion of speakers at meetings.
- *ILS Leadership Roster*

The Chair reported on the roster. It will be placed on the Section's website.

Adjournment. There being no further Council business, the meeting was adjourned. The Reception followed the meeting.

Respectfully submitted,

Frederick J. Frank, Secretary
International Law Section,
State Bar of Michigan

Regular Council Meeting
February 13, 2007

On Tuesday, February 13, 2007, the Council of the International Law Section of the State Bar of Michigan held a Regular Meeting at Honigman Miller Schwartz and Cohn LLP in Detroit, Michigan, pursuant to a notice duly circulated to all Section members by email.

Call to Order. The Chair, Lois Elizabeth Bingam called the meeting to order at 4:40 p.m. A quorum was present.

Introductions. Section members in attendance in person and by telephone introduced themselves and described their professional affiliations.

Attendees: Debra Auerback Clephane, Lois Bingham, Onnie Barnes Jacque, Bruce Birgbauer, Michael Domanski, Andrew Doornaert, Pamela Emenheiser, Richard (Dick) Goetz, Reginald Pacis, Elissa Noujaim Pinto, Tricia Roelofs, Nicholas Stasevich, Piotr Swiecicki, Andrew Thorson, Kate Weaver and Thomas Williams

Approval of Agenda. The Agenda that was circulated and approved.

Treasurer's Report. The Treasurer, Nicholas Stasevich, presented the Treasurer's Report for the four months ending January 31, 2007. The income was $12,720.00 and expenses were $518.56 for a net income of $12,306.44. The beginning fund balance was $25,541.55, and the Section had an ending fund balance of $37,847.99. Upon motion duly made, seconded and unanimously carried, the Treasurer's report was accepted as presented. The Treasurer presented the Section Budget for Fiscal Year ending September 30, 2007, which will also be separately circulated to the Council. Those in attendance approved of the Budget.

Chair's Report. The Chair reported.

- *Council vacancy* – Mark McGuire (Delphi) resigned. His term was to expire at the 2008 annual meeting. A notice will be sent to the Section about a replacement.
- *ILS Calendar of Events* – The calendar was distributed and events noted.
- *WSU Law School – Litigation Strategies at the International Criminal Tribunals* – the news release for this program was distributed and noted.
- *State Bar of Michigan – Position Statement on Tax on Legal Services* – The SBM's statement was distributed and discussed. Questions, contact Janet Welch, Interim Executive Director (SBM); anecdotal information was requested, as well as how Section members would be affected.
- *State of the Law* – SBM prepares a CD and a request will be made as to international law issues; Tricia Roelofs (MIL Staff) volunteered to assist with research; other volunteers were requested. Also comments are being solicited as to proposed uniform acts – *www.nccusl.org* and Janet Welch (SBM) was noted as a key contact.

Chair Elect's Report. Chair Elect Piotr Swiecicki, reported.

- *Annual Meeting* – Based on surveys preferred dates are September 20, 2007 and then October 11, 2007, within Metro Detroit, the topic is global outsourcing - practitioners, in-house counsel and business people will present; suggestions were requested.
- *Bylaws Ad-Hoc Committee* – The Committee has a draft it is working on and expects to send it out prior to the next Council meeting; the Council will need to approve the changes,

then it is published before being voted up on at the annual meeting. The SBM Board of Commissioners also needs to ratify any amendments.

Michigan International Lawyer. The new issue was distributed at the meeting. It was reported the next issue is on track for publication in May and each Section Committee Chair has committed to submit an article during the year.

Program Reports.

- *Careers in International Law and Business* –Handout distributed, February 22, 2007, the program was discussed and requests made for participation by Section members.
- *Citizenship Day in Metro Detroit* – Handout distributed; March 24, 2007 – Co-hosting with others, including Michigan Chapter of the American Immigration Lawyer Association; this program furthers the goal to be involved in civic activities and volunteers were requested to help with applications for naturalization.
- *Business and Legal Challenges for Automotive Suppliers in China and India* Program is scheduled for May 22, 2007 in Grand Rapids; topics and possible and planned speakers were discussed; questions about imbursement of speakers' expenses were addressed; it was noted that there may be need to be future discussions about reimbursement of expenses and honoraria for speakers.
- *Reasonable Care Standard for Importers in 2007* Ideas include having three panels, speakers from various companies and a customs broker; at Automation Alley and charge a fee; capacity of about 50 people; possibly look for businesses to help underwrite.

The Chair thanked the program chairs and others involved in planning.

Committee Reports.

- *International Business and Tax* Report was the China and India program report
- *International Trade* Recent MIL article on customs was noted
- *International Employment & Immigration* No report other than upcoming immigration program noted above.
- *International Human Rights* No report other than international criminal trials program noted above.
- *Emerging Nations* Nothing new to report
- *Strategic Planning* It was noted that there will be a program at the June Council meeting and the Committee will be meeting.

The Chair thanked the chairs and members of committees

Old Business.

- *Section Directory* Volunteers requested to assist with development a Section Directory; areas of interest, practice areas and countries of interest are suggested to be included; is there a possibility of an on-line directory; suggestion made to have a picture directory.
- *B.* MIL *Strategy* Discussion included suggestions to explore other places and methods to distribute the *MIL*; asking law firms to commit to submit an article.
- *Webinar on UK Bankruptcy* Participation and topic was discussed; may need to learn more about the topics Section members would like to learn about; possible survey as to topics; those who participated reported they were pleased; and will look to plan more webinars in the future.

New Business. No new business reported.

Adjournment. There being no further Council business, the meeting was adjourned.

Presentation by Vincente Sanchez, Counsul General of Mexico – "U.S. – Mexico Relations"; followed by reception.

Respectfully submitted,

Frederick J. Frank, Secretary
International Law Section,
State Bar of Michigan

Proposed Amendments to ILS Bylaws

For a Summary of Proposed Changes, see ILS Website

Article I
NAME AND PURPOSE

SECTION 1. NAME. This Section shall be known as the International Law Section ~~("Section")~~ of the State Bar of Michigan ("State Bar").

SECTION 2. PURPOSE. The purpose of ~~this~~ the International Law Section shall be to promote the objects and purposes of the State Bar in the field of international law by:

a. Conducting studies, analyses and conferences with respect to federal, state and foreign law,~~legislation, new and~~ existing or proposed, affecting transnational legal matters and business transactions~~,~~;
b. Preparing reports and other educational material with respect to such studies, analyses and conferences for presentation to and the enhancement of the skills of the interested members of the State Bar;
c. Cooperating and working with the various law schools of the state, institutions and foundations in their work in the international field and to encourage the exchange of law professors and students between other nations and this state and the United States;
d. Cooperating and working with the American Bar Association and any of its sections or committees, with the American Society of International Law and any of its sections or committees, with bar associations of the various states and their various sections and committees that work in the area of international law, and with foreign and international bar organizations, including the International Bar Association;
e. Encouraging cordial association and exchange of ideas and visits between officers and members of the State Bar and officers and members of the bars of other countries in order to promote greater understanding of the differences and similarities of the various legal systems;
f. Undertaking and promoting such other work and projects as might reasonably be expected to enhance and advance the knowledge and understanding of international legal problems and the availability of such knowledge and understanding to the members of the State Bar and others; and
g. Where appropriate and where in compliance with the Bylaws and other guidelines of the State Bar relative to taking policy positions in Michigan, and elsewhere, by commenting or taking positions, or both, on existing law, on proposed legislation and on matters under consideration by regulatory bodies and by filing *amicus* briefs in legal proceedings.

Article II
MEMBERSHIP

SECTION 1. DUES AND ENROLLMENT. ~~Each member of the Section shall pay annual dues in such amount as the Council shall determine, the initial amount of which shall be Thirty Dollars ($30.00) per annum.~~ Any member of the State Bar, upon request to the Executive Director of the State Bar and upon payment of dues for the current fiscal year (October 1 - September 30) shall be enrolled as a member of the International Law Section. The annual dues shall be Thirty Dollars ($30.00) or such other amount as the Council shall determine. Thereafter, the annual International Law Section dues shall be paid concurrently with an International Law Section member's payment of dues to the State Bar.~~in advance each year, beginning on the first day of October next succeeding such enrollment.~~ Members so enrolled and whose dues are so paid shall constitute the membership of the International Law Section. Any member of the International Law Section whose annual dues shall be more than six (6) months past due shall thereupon automatically cease to be a member of the International Law Section.

SECTION 2. NEW MEMBERS. Newly admitted members of the State Bar, upon written request pursuant to Article VII, Section 5 of the Bylaws of the State Bar, shall become members of the International Law Section ~~for the balance of the fiscal year in which application is made,~~ without payment of dues to the International Law Section for the first two years following his/her original admission to practice~~, if such written request is made during the first year of membership in the State Bar~~.

SECTION 3. LAW STUDENTS. ~~Law student m~~Members of the Law Student Section of the State Bar may become non-voting members of the International Law Section upon payment of annual dues of Five Dollars ($5.00) or~~in~~ such other amount as the Council shall determine.~~, the initial amount of which shall be Five Dollars ($5.00) each, in addition to the payment required to be made to the State Bar.~~

SECTION 4. ASSOCIATES. Persons interested in the purpose~~s~~ of the International Law Section, such as consuls-general of other countries, members of the Upper Ontario Bar Association, professors at accredited law schools and federal and state government officials may participate in the International Law Section's activities as associates (without, however, voting privileges). A~~The~~ person desiring to become an associate shall agree to pay the annual dues applicable to members, as provided in Article II, Section 1. Associates will be allowed to receive International Law Section mailings, participate in committees and attend all annual meeting programs (without, however, voting privileges). Any associate who is not an active member of the State Bar shall not, through his or her participation in the International Law Section, convey to the public that he or she is a licensed attorney or qualified to render legal services. With the concurrence of ~~a majority of~~ the Executive Committee of the International Law Section, any associate ~~member~~ can be removed from participation in International Law Section activities, including the receipt of mailings, by the Chairperson.~~ of the Section.~~

Article III
OFFICERS AND COUNCIL

SECTION 1. OFFICERS. The officers of the~~is~~ International Law Section shall be the Chairperson, Chairperson-Elect, Secretary and Treasurer. All officers must be members of the International Law Section.

SECTION 2. SECTION COUNCIL. There shall be an International Law Section Council (the "Council"). The Council shall consist~~ing~~ of ~~a minimum of~~ the four (4) officers (the "Executive Members") plus a minimum of six (6) ~~ten (10) members~~ and a maximum of twelve (12) Non-Executive Members, who shall be~~sixteen (16) members, including the Chair, Chair-Elect, Secretary and Treasurer, all of whom shall be~~ members of the International Law Section~~, together with twelve (12) other members who shall be elected by the membership of the Section as hereinafter provided~~. The exact number of Non-Executive Members shall be determined, from time to time, at a membership meeting. Past Chairpersons shall remain *ex officio* (non-voting) members of~~to~~ the Council for as long as they choose to serve in that capacity and shall not be subject to removal for failure to attend meetings. Each year, the Chairperson, with the approval of ~~a majority of~~ the Executive Committee, shall also appoint at least one (1) and no more than five (5) law student(s) as *ex officio* (non-voting) members.

Article IV
NOMINATION, ELECTION AND TERMS OF OFFICERS AND MEMBERS OF THE COUNCIL

SECTION 1. ELECTION AND TERM OF OFFICERS. The Chairperson-Elect, Secretary and Treasurer shall be elected at each Annual Meeting of the International Law Section. The officers serve for the year beginning with the close of the Annual Meeting at which they have been elected and ending at the close of the next succeeding Annual Meeting. The Chairperson-Elect automatically succeeds to the office of Chairperson. The Chairperson shall not serve for more than one (1) consecutive term (not including a partial term in case the Chairperson-Elect

succeeds the Chairperson in mid-term). The Secretary and Treasurer shall be eligible to serve for not more than two (2) consecutive terms.

SECTION 2. ELECTION AND TERM OF NON-EXECUTIVE MEMBERS OF THE COUNCIL. The Non-Executive Members of the Council shall be elected at each Annual Meeting of the International Law Section, for a term ending with the third Annual Meeting following election. These terms shall be staggered so that the terms of at least one third of the Non-Executive Members expire each year. No person shall serve, or be eligible for election to serve, as a member of the Council if that person has then served as a Council member continuously for a period of two (2) full terms, provided that this limitation shall not apply to a member of the Council who shall be nominated and elected as an officer.

SECTION 3. NOMINATIONS. Prior to each annual meeting of the International Law Section, the Chairperson shall appoint a Nominating Committee of three (3) members of the International Law Section, which Committee may include any officer or Council member.~~,~~ The ~~which~~ Committee shall make and report nominations to the International Law Section of the offices and Non-Executive Council memberships that shall have expired, and to fill vacancies then existing for unexpired terms. Other nominations for the same offices or Council memberships may be made ~~from the floor~~ by any member of the International Law Section from the floor at an Annual Meeting.

SECTION ~~4~~2. ELECTIONS. All elections shall be by voice vote at an Annual Meeting of the International Law Section, ~~written ballot~~ unless the members present at the Annual Meeting adopt a resolution for voting by written ballot,~~otherwise ordered by resolution adopted by the Section at the meeting at which the election is held,~~ and be based on a plurality of the votes cast~~majority of the quorum then present~~.

~~**SECTION 3. TERMS OF OFFICERS.** The terms of the officers of the Section shall be a period of one (1) year. The Chair shall not serve, or be eligible for election to serve, for more than one (1) consecutive term. The Secretary and Treasurer shall be eligible to serve for not more than two (2) consecutive terms.~~

~~**SECTION 4. TERMS OF COUNCIL.** The terms of the Council elected at and after the 1998 Annual Meeting shall be a period of three (3) years. These terms shall be staggered so that the terms of at least one third of the members of the Council, who are not officers, expire each year. No person shall serve, or be eligible for election to serve, as a member of the Council if that person has then served as a Council member continuously for a period of two (2) full terms, provided that this limitation shall not apply to a member of the Council who shall be nominated and elected as an officer.~~

~~**SECTION 5. BEGINNING AND END OF "TERM".** The Chair, Chair-Elect, Secretary and Treasurer shall be nominated and elected in a manner hereinafter provided, at each annual meeting of the Section, to hold office for a term beginning at the close of the Annual Meeting at which they shall have been elected and ending at the close of the next succeeding Annual Meeting of the Section (or until their successor shall have been elected and qualified).~~

Article V
DUTIES OF OFFICERS

SECTION 1. CHAIRPERSON. The Chairperson shall preside at all meetings of the International Law Section and of the Council. The Chairperson shall be present at each Annual Meeting of the State Bar and present a report of the work of the International Law Section for the past year. The ~~Chair~~ Chairperson shall perform such other duties and acts as usually pertain to the office.

SECTION 2. CHAIRPERSON-ELECT. The Chairperson-Elect shall perform the duties assigned by the Chairperson. Upon the death, resignation or during the disability of the Chairperson, or

upon his or her refusal to act or absence from a meeting of the Council or members, the Chairperson-Elect shall perform the duties of the Chairperson for the remainder of the Chairperson's term or during the period of such disability, refusal or absence. ~~Upon expiration of the Chair's term, the Chair-Elect shall succeed in office as Chair for the period for which he or she was elected.~~

SECTION 3. SECRETARY. The Secretary shall be the custodian of all books, records, papers, documents and other property of the International Law Section. He or she shall keep a true record of the proceedings of all meetings of the International Law Section and of the Council. With the Chair, he or she shall prepare the International Law Section's Annual Report.

SECTION 4. TREASURER. The Treasurer shall keep a true record of all monies received and disbursed and shall report thereon to the Council whenever requested. Annually, he or she shall submit a financial report for presentation to the membership of the International Law Section. Consistent with the Bylaws of the State Bar, he or she shall be responsible for forwarding all monies of the International Law Section which shall come into his or her hands to the bookkeeping department at State Bar Headquarters in Lansing for deposit and credit to the account of the International Law Section. Further, unless waived on a meeting-by-meeting basis by vote of the Council, the Treasurer shall present a current financial report at each meeting of the Council.

Article VI
EXECUTIVE COMMITTEE

SECTION 1. MEMBERS. The Chairperson, Chairperson-Elect, Secretary and Treasurer shall constitute the Executive Committee of the International Law Section.

SECTION 2. DUTIES. The Executive Committee shall be authorized to act on behalf of the Council in the intervals between meetings of the Council, provided that any action taken by the Executive Committee shall not be inconsistent with any action taken or any policy adopted previously by the Council and, provided further, that the Chairperson shall report any such action at the next meeting of the Council.

SECTION 3. APPROVAL. Concurrence by a majority of members of the Executive Committee shall constitute a decision of the Executive Committee.

SECTION 4. RATIFICATION. Any actions taken by the Executive Committee, which are solely within the purview of the Council of the International Law Section as set forth by these Bylaws, must be ratified by the Council of the International Law Section at its next duly constituted meeting.

~~**SECTION 5. NULLIFICATION.** Any action taken by the Executive Committee can at any time be nullified by the Council of the Section at a duly constituted meeting.~~

Article VII
DUTIES AND POWERS OF THE COUNCIL

SECTION 1. PRIMARY DUTIES AND POWERS. The Council shall have general supervision and control of the affairs of the International Law Section, subject to the provisions of the Bylaws of the International Law Section. The Council shall specifically authorize or ratify all commitments or contracts which shall entail the payment of money, and shall authorize the expenditure of all monies appropriated for the use or benefit of the International Law Section. The Council shall not, however, without prior approval of the State Bar Board of Commissioners, authorize commitments or contracts which shall entail the payment of more money during any fiscal year than the total of:

(a) the amount received in International Law Section dues for such fiscal year; and (b) any expended funds remaining in the International Law Section treasury from prior years.

SECTION 2. VACANCIES. The Council, during the interim between Annual membership Meetings of the International Law Section, shall have the authority to fill vacancies in its own membership or in the offices of Secretary and Treasurer and (in the event of a vacancy in both the office of Chairperson and Chairperson-Elect) in the office of Chairperson. Members of the Council and officers so appointed shall serve until the close of the next annual membership meeting of the International Law Section; at that meeting the vacancies shall be filled in accordance with the normal election practices set forth in Article IV.

SECTION 3. REGULAR MEETINGS. Regular meetings of the Council shall be held at times and in ~~such~~ placesmanner ~~to be~~ determined by the Chairperson, provided that at least one regular meeting of the Council shall be held in each fiscal year.

SECTION 4. SPECIAL MEETINGS. Special meetings of the Council may be called by the Chairperson or a majority of the voting members of the Council at such times and in such placemanner as theyeither may respectively determine.

SECTION 5. NOTICE OF MEETINGS. Notice of regular or special meetings shallcan be made by in writing by mail or email or by other ten, electronic or telephonic means, as long as such notice is reasonably calculated so as to be timely and to provide adequate notice to all Council members of the time, place and purpose of said meetings.

SECTION 6. QUORUM. Five (5) voting members of the Council physically present, whether in person or as an active participant, shall constitute a quorum for both regular and special meetings of the Council.

SECTION 7. VOTING. The Council shall act pursuant to a majority of those present at regular and special meetings of the Council at which business may be transacted.

SECTION 8. FAILURE TO ATTEND MEETINGS. If any officer or Council member fails to attend two (2) consecutive Council meetings without excuse, or fails to attend three (3) consecutive Council meetings for any reason, such failure shall constitute an automatic and irrevocable notice of resignation, which shall be voted on for approval at the next Council meeting. If the Council accepts the resignation, the Council may then fill the vacancy in accordance with Section 2 of this Article.

~~**SECTION 9. PLACE.** All regular and special meetings of the Council shall be held at such time, date, and place or means, if by telephonic or electronic means, as may be designated in the notice therefor.~~

SECTION 9~~10~~. PARTICIPATION BY COMMUNICATION EQUIPMENT. The Council may hold its meetings in any manner by which all persons participating in the meeting can hear each other or, if electronic means are employed, can communicate with one another in real time or without undue delay. Participation in a meeting pursuant to this provision by one or more members of the Council constitutes presence in person at the meeting.

SECTION 10~~1~~. RATIFICATION BY COUNCIL MEMBERS. Action required or permitted to be taken pursuant to authorization voted at a meeting of the Council may be taken without a meeting if before or after a majority of the Council consent thereto in writing, including by email. The written consent shall be filed with the minutes of the proceedings of the Council. The consent has the same effect as a vote of the Council for all purposes.

SECTION 11~~2~~. ABSENCE OF QUORUM. In the absence of a quorum at a meeting of the Council, action required or permitted to be taken pursuant to authorization voted at a meeting of

the Council may be taken with the written consent (including by email) of sufficient members not present so that the number of members voting at the meeting and voting pursuant to written consent constitute a majority of the Council.

Article VIII
MEMBERSHIP MEETINGS

SECTION 1. ANNUAL MEETING. As determined by the Council, t~~T~~he Annual Meeting of the International Law Section shall be held either (a) during and at the same place as the Annual Meeting of the State Bar or (b) at a place and time other than the place and time of the Annual Meeting of the State Bar, but not more than two months prior or two months after such Annual Meeting of the State Bar. The Annual Meeting of the International Law Section~~and~~ shall include such programs and order of business as may be arranged by the Council.

SECTION 2. SPECIAL MEETINGS. Special meetings of the International Law Section may be called by the Chairperson, by a majority of the voting members of the Council, or by twenty-five percent (25%) of the members, at such times and places as shall be determined by the Secretary. Notice thereof shall be mailed out at least seven (7) days prior to such special meetings and stating the purpose thereof.

SECTION 3. QUORUM. Twenty (20) members of the International Law Section physically present at any International Law Section meeting shall constitute a quorum for the transaction of business.

SECTION 4. VOTING. All actions of the International Law Section, other than the amendment of the Bylaws, shall be taken pursuant to a majority vote of the members present at a membership meeting at which business may be transacted.

Article IX
COMMITTEES

SECTION 1. The Executive Committee shall from time to time establish committees of the International Law Section ~~shall consist of such committees as are from time to time established~~ for such purposes as the Executive Committee shall ~~be~~ determin~~ed by the Executive Committee~~.

~~**SECTION 2.** The establishment of initial committees of the Section shall be voted upon by the members of the Section at the organizational meeting, taking into account the proposed committees contained in the Petition submitted and approved by the State Bar Board of Commissioners.~~

SECTION 2~~3~~. A new committee may also be established ~~either by the Executive Committee of the Section or~~ by the petition of at least~~more than~~ ten~~five~~ (10~~5~~) members of the International Law Section.~~ and the vote of a majority of the members of the Section at a meeting at which business may be transacted.~~

SECTION 3~~4~~. Any committees established by the Executive Committee can be dissolved by ~~a vote of the majority of~~ the Executive Committee.~~ of the Section.~~ Any committees established by the petition of at least ten (10) members of the International Law Section can be dissolved by the Council.

SECTION 4~~5~~. At the beginning of his or her term, the Chairperson~~ of the Section~~ shall designate the Chair(s) and any other officers of each Committee.

SECTION 5~~6~~. At the request of the ~~Chair~~ Chairperson~~of the Section~~, the Chair of every committee, or his or her delegate, shall deliver a written or oral report on the activities of the committee.

Article X
SPECIAL AND HONORARY POSITIONS

SECTION 1. DESIGNATION. With the approval of the Executive Committee, the Chairperson can designate members, associate members, or law student members to special or honorary positions, including but not limited to liaisons, counselors, advisors, or any other capacity, for the period for which he or she is the Chairperson of the International Law Section.

SECTION 2. VOTING STATUS. Designation by the Chairperson to special or honorary positions shall not alter the designee's voting status with the International Law Section.

Article XI
MISCELLANEOUS PROVISIONS

SECTION 1. FISCAL YEAR. The fiscal year of the International Law Section shall be the same as that of the State Bar.

SECTION 2. DEBTS. All expenditures of~~debts incurred by~~ the International Law Section, before being forwarded to the Treasurer or to the Executive Director of the State Bar for payment, shall first be approved by the Chairperson or the Treasurer.

SECTION 3. NO COMPENSATION. No salary or compensation of any kind shall be paid to any officer or Council member.

SECTION 4. PUBLIC POLICY POSITIONS AND STATE BAR APPROVAL~~STATE BAR APPROVAL~~. The International Law Section, by resolution of the members adopted at a meeting or by action of the Council, may take positions on policy issues, provided that such public advocacy is fully compliant with the provisions of Article VIII of the Bylaws of the State Bar. Any action by the ~~is~~ International Law Section must be approved by the Board of Commissioners or the Representative Assembly of the State Bar before it becomes effective as an official act of the State Bar. ~~No public statement of a Section or Council position may be made unless in full compliance with the provisions of Article IX of the Bylaws of the State Bar.~~ Any resolution adopted or action taken by the International Law Section may, on request of the members of the International Law Section or the Council, be reported by the Chairperson ~~of the Section~~ to the Board of Commissioners or Representatives Assembly of the State Bar for action.

SECTION 5. EFFECTIVE DATE. These Bylaws shall become effective immediately upon their approval by the Board of Commissioners of the State Bar.

Article XII
AMENDMENTS

SECTION 1. ~~AMENDMENTS~~PROCEDURE. These Bylaws shall be amended in accordance with the following procedure:

The proposed amendment shall be set forth either: (a) in a petition signed by at least ten (10) members of the International Law Section and presented to the Council at a Council meeting or (b) in a motion made by a Council member at a Council meeting.

a.

If a majority of the Council members voting at the meeting approve the proposed amendment, the Council shall publish the full text of the proposed amendment in the *Michigan Bar Journal* or in the International Law Section newsletter at least thirty (30) days prior to the membership meeting at which the proposed amendment will be considered.

b.

c. Following such Council approval and publication, the proposed amendment shall become effective if it is approved~~only~~ by a two-third (2/3) vote of the members of the International Law

Section physically present and voting at a meeting (including an ~~A~~annual ~~M~~meeting) called for that purpose and then ~~at which business may be transacted, *provided* that no amendment so adopted shall become effective until~~ ratified by the Board of Commissioners of the State Bar.

~~**SECTION 2. PROCEDURE.** Any proposed amendment of these Bylaws shall first either be prepared pursuant to resolution adopted by the Council at a regular or special meeting, or submitted in writing to the Council in the form of a petition signed by at least ten (10) members of the Section, and shall be considered by the Council at a regular or special meeting prior to the membership meeting of the Section at which it shall be addressed. The Council shall consider the proposed amendment at its meeting and shall prepare recommendations thereon which, together with a complete and accurate text of said proposed amendments, shall be published in the *Michigan Bar Journal* or Section newsletter at least thirty (30) days prior to the membership meeting of the Section at which the amendment is to be considered.~~

ILS Budget

International Law Section

Submitted by Nicholas Stasevich, Treasurer

For the Fiscal Year Ending September 30, 2007

Income:	
International Law Section Dues	12,720.00
International Stud/Affil Dues	105.00
Seminar Income*	2,400.00
Total Income	15,225.00
Expenses:	
ListServ	300.00
Meetings	1,750.00
Seminars	2,500.00
Annual Meeting Expenses	3,000.00
Travel Expenses	1,300.00
Copying/Printing	200.00
Newsletter	4,500.00
Postage	100.00
Scholarship	1,00.00
Telephone	250.00
Miscellaneous	200.00
Total Expenses	15,100.00
Net Income	125.00
Beginning Fund Balance: Fund Bal-International Law Sec	25,541.55
Total Beginning Fund Balance	25,541.55
Net Income	125.00
Ending Fund Balance	25,666.55

* Assumes 50 people @$30 for Trade Seminar and 30 people @$30 for China/India Seminar

To view the Section's latest financial report, please visit *http://www.michbar.org/international/*

Event Calendar:
Meetings, Seminars, & Conferences of Interest

July 4-6, 2007
5th World Chambers Congress
Istanbul, Turkey
http://www.asil.org/events/calendar.cfm

July 9-12, 2007
Modern Law for Global Commerce
Vienna, Austria
http://www.asil.org/events/calendar.cfm

July 10, 2007
Backlog Elimination Center (BEC) Practice: Notice of Findings (NOFs) & Other Challenges
Audio/Web Seminar
http://www.aila.org/content/default.aspx?bc=1010

July 17, 2007
Careers in International Law
Washington, DC
http://www.asil.org/events/calendar.cfm

July 17, 2007
How to Represent a Client in Removal Proceedings
Audio/Web Seminar
http://www.aila.org/content/default.aspx?bc=1010

July 24-August 4
The UN and Regional Organizations: Partners for Peace and Security
Ghent, Belgium
http://www.asil.org/events/calendar.cfm

July 24, 2007
PERM Strategies and Open Q&A for Newer Practicioners
Audio/Web Seminar
http://www.aila.org/content/default.aspx?bc=1010

July 25, 2007
International Prisoner Transfer Application Developments
Washington, DC
http://www.asil.org/events/calendar.cfm

July 25-July 28, 2007
Law and Society in the 21st Century
Berlin, Germany
http://www.asil.org/events/calendar.cfm

July 26, 2007
The Elusive U.S. Passport
Audio/Web Seminar
http://www.aila.org/content/default.aspx?bc=1010

July 31, 2007
H-2B: The Other H Cap
Audio/Web Seminar
http://www.aila.org/content/default.aspx?bc=1010

August 5-12, 2007
AILA Cruise CLE Conference
Vancouver, BC
http://www.aila.org/content/default.aspx?bc=1010

August 7, 2007
The Paralegal's Role in the Preparation of Nonimmigrant Business Visas
Audio/Web Seminar
http://www.aila.org/content/default.aspx?bc=1010

August 8, 2007
ABA International Section Leadership Retreat
Sonoma, CA
http://www.abanet.org/intlaw/calendar/home.html

August 10-12, 2007
ABA/Section Annual Meeting
San Francisco, CA
http://www.abanet.org/intlaw/calendar/home.html

August 14, 2007
How to Represent Clients After a Final Order
Audio/Web Seminar
http://www.aila.org/content/default.aspx?bc=1010

August 21, 2007
Representing Small and Start-up Businesses
Audio/Web Seminar
http://www.aila.org/content/default.aspx?bc=1010

August 23, 2007
Introduction to Mandamus for Newer Practicioners
Audio/Web Seminar
http://www.aila.org/content/default.aspx?bc=1010

August 27-29, 2007
Good Governance and Non-State Actors in International Law: An African Perspective
Pretoria, South Africa
http://www.asil.org/events/calendar.cfm

August 28, 2007
Strategies for Pursuing Green Cards in an Age Without H-1Bs
Audio/Web Seminar
http://www.aila.org/content/default.aspx?bc=1010

August 30-31, 2007
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