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New York International Chapter News

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of the New York State Bar Association

Message from the Chair

Marco A. Blanco

I am greatly honored to serve as the Chair of the International Law and Practice Section. The importance of international legal issues continues to increase with the rapid globalization of our economy and the Section serves as an important resource to lawyers trying to keep abreast of this cutting-edge area of the law. As Chair, I hope to strengthen the institutional organization of the Section, increase Section membership, and expand the Section's geographic reach.

Before looking to the future, I want to thank Oliver Armas for the leadership he provided as Chair during the past year. Oliver's work was highlighted by the historic meeting we held in Peru last fall. For the first time, we met in two different cities. Beyond the usual logistical challenges of planning such a conference, Oliver and our staff put together an enlightening program despite the aftermath of the devastating earthquake in Peru. To show our gratitude and support to the people of Peru, I am proud to say the Section donated $10,000 to the earthquake relief efforts in addition to individual donations made by many members of the Section.

One of the highlights of the coming year will be the Section's Annual Conference in Stockholm. This year's conference focuses on globalization and the harmonization of laws. The chairs for the Fall Meeting and its steering committee have put in a tremendous amount of work to produce another memorable meeting.

In January, the Section started the year with a successful Continuing Legal Education program entitled "A Convenient Truth: Greenhouse Gas Project Finance" at the NYSBA Annual Meeting in New York. Expert speakers from finance, risk management and engineer-

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ing joined lawyers from New York and Colombia to walk the audience through the nuts and bolts of financing a greenhouse gas emissions reduction project in Central America and marketing the credits in Europe. The presentation demonstrated the truly international nature of this emerging market, expected to be valued in the tens of billions of dollars in 2008. The program was developed and co-chaired by International Environmental Law Committee co-chairs John Hanna, Jr., Andrew D. Otis and Mark F. Rosenberg. Colombia Chapter co-Chair Ernesto Cavalier-Franco also spoke.

Of special note, I had the honor of presenting this year's Distinction in International Law and Affairs Award to Yasmeen Hassan of New York (United Nations Division for the Advancement of Women) on behalf of the lawyers and judges of Pakistan, represented by Aitzaz Ahsan, who were honored for their efforts for civilian rule in Pakistan following President Musharraf's dismissal of the chief justice of Pakistan in March 2007. Ahsan served as principal counsel for Iftikhar Muhammad Chaudhry, the removed Chief Justice. Chaudhry was restored to his position in July. We hope to honor further acts of courage in assuring legal justice around the world.

Looking ahead, a prime area of focus this year will be expanding activities in Asia, a region that is rapidly gaining stature as a place for international business. To strengthen our ties with the East, we will hold our 2009 Annual Conference in Singapore and are exploring other locations in Asia to hold the Conference in 2010. In the coming year, we also plan to establish ties with legal professionals in India.

In order to expand globally, we also need to strengthen the Section internally. To this end, we are working with each Committee Chair to energize the committee's current members and to recruit new committee members. I highly encourage anyone interested in joining one ore more of the Section's committees to do so through the Section's Web site. I also encourage all committee members to reach out to your respective Committee Chair if you have ideas for committee activities or have an interest in taking on a leadership role within the committee.

The State of New York serves as an epicenter for international business transactions and the resolution of international legal disputes, making the IL&PS one of the most important Sections of the NYSBA. The significance of international law will continue to grow for years to come. With your help and support, the Section can expand its reach and embrace the numerous opportunities that the future holds.

Marco A. Blanco

Note from the Editor

Dunniela Kaufman

As I begin my term as the editor of this publication, I would like to thank our outgoing co-editors, Rick Scott and Oliver Armas, for the contributions that they have made to the development of the Section's *Chapter News*. As both Rick and Oliver stressed during their tenure, this is a publication that belongs to our members. It is the vehicle through which we share our thoughts, our knowledge and our accomplishments. As a venue to highlight what our Section, Committees and Executive Committee are undertaking, I, as the incoming editor, will take my cue from you as to what each edition will highlight.

As an example of the organic nature of my editing style, as you will note, this edition focuses on insurance and re-insurance law. This focus is a result of an enthusiastic Committee looking for a venue to showcase its activities. In addition to two very interesting substantive articles, this Committee has also provided us with an update on a recent meeting that they convened. I want to thank this Committee for their participation and call on each of you to use this publication to highlight that which is relevant to your practice, and in so doing, share your knowledge with the rest of the Section. I cannot stress enough that the quality and efficacy of the Section's *News* is dependent only on what we, as a Section, put into it.

I look very forward to working with you to make the *New York International Chapter News* an effective tool for communication among ourselves.

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Errata

We would like to bring to your attention an editing error in the previous edition of this publication, Fall 2007, Vol. 12, No. 1. We want to properly thank the authors of the very informative article "Mexico: Recent Developments in Radio Broadcasting and Telecommunications Law in Mexico" for their contribution. Unfortunately, due to an editing error, two of the three authors were misidentified; therefore, we would like to formally acknowledge the following three lawyers from the law firm of Santamarina Y Steta: Jorge Leon Orantes Baena, Paola Morales Vargas and Pablo Laresgoiti Matute.

Request for Contributions

Contributions to the *New York International Chapter News* are welcomed and greatly appreciated. Please let us know about your recent publications, speeches, future events, firm news, country news, and member news.

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Contributions should be submitted in electronic document format (pdfs are NOT acceptable).

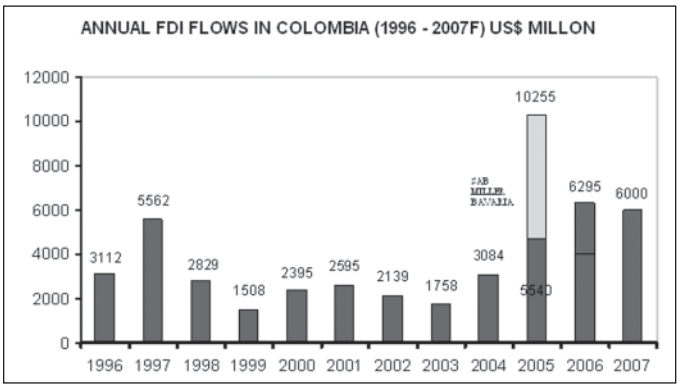
www.nysba.org/IntlChapterNews

Of International Interest

Foreign Investment in Colombia: Recent Regulations and Local Climate

Since 2002, when President Alvaro Uribe took office, which led to a reduction in violence and a number of privatizations, Colombia has seen a surge in both foreign and local investment.

According to the United Nations Conference on Trade and Development, in 2005, Colombia experienced the most significant growth in Foreign Direct Investment (FDI) within the South America region. In terms of economic growth, in 2006 the main sectors that received FDI were as follows: the oil sector (USD 831 million); the mining and quarrying sector, including coal (USD 765 million); the transportation, storage and communication sectors (USD 378 million); and finally the financial and the construction sectors (USD 83 million).[1]



Source: Colombian Central Bank

Standard & Poor's has been quoted as indicating, "Consolidation of reform could propel Colombia on a path to sustained economic growth, growing fiscal flexibility, higher exports and declining debt burden, which would strengthen creditworthiness and lead to an investment grade rating."

Colombia has a flexible system of exchange rules, characterized by registrations with the Colombian Central Bank, the main authority that administers and controls foreign investment in the country. An important role is also played by the Superintendency of Companies and the Tax Administration (DIAN), entities that jointly supervise compliance with the forex regime.[2]

1. Foreign Investment Basics

Nonresidents are allowed to invest in Colombia with a few exceptions: sectors such as defense and national security, and process and disposal of toxic waste, hazardous materials or radioactive substances not produced within the country. A foreign investment may be made as a i) portfolio investment or as a ii) direct investment.

i) Portfolio investment

Investments made by foreigners in stocks, bonds and other securities listed in the National Securities' Registry are considered portfolio investments.

Pursuant to Decree 2080 of 2000, all portfolio investment in the Colombian capital market must be made through a foreign investment fund ("Fund"), which must be organized as either i) an Institutional Fund or ii) an Individual Fund.

Institutional Funds:

- Funds incorporated by one or more foreign persons with proceeds derived from private or public placements of quotas or units of the fund, the principal purpose of which is to make investments in one or more capital markets.
- Omnibus Funds, created by international broker/dealers, investment managers and global custodians for their clients. These funds are comprised of collective accounts.

Individual Funds:

- Funds incorporated by foreign individuals and/or legal entities which use their liquidity excess in the capital markets.

ADR and GDR Funds:

- Local trust vehicles representing shares or bonds convertible into shares of local companies, under trust agreements executed with a local company subject to the supervision of the Superintendency of Finance.

ii) Direct Investment

On the other hand, the following are considered direct investments by foreigners:

- A company's capital contribution by means of the acquisition of shares, corporate quotas, bonds or convertible bonds;
- The acquisition of rights in trusts as a preliminary step in the process of developing a business or for purchasing, selling or managing companies not listed on the National Securities Registry;
- The acquisition of real estate, securities issued as a consequence of a real estate securitization or REITs.
- The contribution by investors in respect of Joint Ventures, concessions, management, technology transfer and license, if such contributions do not represent capital participation in the company and

revenues for the investor depend on the business's profit; and

- Capital or additional paid-in-capital investment in branches of foreign companies incorporated in Colombia.

Capital contributions may be made: i) in foreign currency, by transferring funds from abroad; ii) in-kind, by transferring to the local company tangible or intangible goods. In the case of tangible goods, the contribution is registered as non-reimbursable imports of equipment, machines or other physical goods. In the case of intangible goods, the contribution to the company's capital may be represented by technological contributions, trademarks, patents, and others, and, iii) in Colombian pesos, by means of investing funds received by the foreign investor in Colombia, as a result of registered foreign investments or forex transactions (i.e., amounts received by the performance of foreign loans, reimbursable imports, etc.).

Pursuant to Article 10 of Decree 2080 of 2000, foreign investors who have duly registered their foreign investments before the Colombian Central Bank are allowed to: i) reinvest dividends and income derived from the disposal of such investment and ii) transfer abroad any income derived from the sale of the investment or dividend payments.

2. Recent Developments

A little over a year ago, in May and June of 2007, the Colombian Central Bank issued different regulations aimed at controlling inflation and discouraging short term foreign capital inflows.

On May 23, 2007 the Colombian government issued Decree 1801, which established the obligation of foreign portfolio investors and local administrators of foreign portfolio investment funds to make a 40% deposit in respect of new portfolio investments.

According to Decree 1801, the deposit must be made in COP and denominated in USD into a non-interest bearing, non-negotiable account and must be made for a six-month period. The deposit may be redeemed prior to maturity subject to a discount ranging from 9.4% (if redemption is made six months prior to maturity) to 1.63% (if redemption is made one month prior to maturity).

Additionally, on June 29, 2007 the Colombian government, by means of Decree 2466, clarified that ADR (American Depository Receipts) and GDR (Government Depository Receipts) are expressly exempted from the obligation of making the investment deposit. This same regulation included the participation of non-residents in local private funds as a form of foreign direct investment in Colombia.

Notwithstanding the above, the COP continued on its revaluation trend in the first semester of 2008, recently hitting an exchange rate below COP 1,700 per USD, a figure not seen since June 1999.

As a consequence of the continued weakening of the USD vis-à-vis the COP, on May 30, 2008 the Colombian government issued Decree 1888 of 2008, which increased the percentage of the deposit applicable to foreign portfolio investments from 40% to 50% of the principal amount of the investment, and established that FDI must be made for at least a two-year term. Outflows associated with the liquidation of FDI could be transferred abroad only after the two-year period has elapsed. However, profits associated with such investments may be freely transferred abroad before the two-year period.

While some analysts consider that the new restrictions would have an impact on the revaluation of the USD (arguing that foreign direct investment has been the most important driver of the strengthening of the COP in the previous months), others are of the opinion that the revaluation will continue despite recent measures, as long as local interest rate levels remain high.

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Endnotes

1. Proexport Colombia—Second semester 2006.
2. Law 9 of 1991; Regulation 8 of the Colombian Central Bank; Regulation DCIN-83 of the Colombian Central Bank; Decree 2080 of 2000; Regulation 2 of 2007 of the Colombian Central Bank; Decree 1801 of 2007; and Decree 2466 of 2007.

* * *

Globalization of Technology and the Challenges of Managing a Global Reputation Online

In the 1990s it was a truism in European technology circles to say that where the U.S. leads, Europe follows. With the growing impact of technology, however, the legal world has become truly smaller. Nowadays new Internet plays are often launched simultaneously worldwide and many of the most talked about Internet phenomena, like KaZaa, Skype and the World Wide Web itself were born outside of the U.S.—despite perhaps what Al Gore might think!

One of the oldest areas of Internet litigation, yet also one which seems to be growing the most, relates to online reputation. Since the popularization of the Internet, major corporations that value their brands have been monitor-

ing the Internet to look for people profiting from their goodwill, or just simply out to get them. Tricksters and protesters alike have used the medium to disseminate inaccurate information about their targets leading astute corporations to set up Web sites dedicated to correcting the mass of inaccurate information about them. A good example is Coca-Cola's Myths and Rumors site (http://www.thecoca-colacompany.com/contactus/ myths_rumors/index.html), which definitively quashes a number of Coke's urban myths including the "fact" that the drink was originally green.

In the last few years, however, with the evolution of search engine technology, highlighted by the inexorable rise of Google, everyone wants to play at being an online detective. Searching has gotten personal. Neighbors now use the Internet to search each other's background, potential tenants are researched for apartment blocks and employers are compiling dossiers on what the Internet says about a candidate that the resume does not. Technology circles are awash with talk of so-called semantic Web searches—sites which have the ability to look at context, not just content. But unsurprisingly, their use is not without legal issues.

Many of the new breed of personal search engines exist to allow corporate research and former colleagues, college classmates and even prom dates to catch up with one another. One of the leaders, ZoomInfo, claims that it has profiles on just under 42 million people and over 3.8 million companies—including over 118,000 lawyers. ZoomInfo also powers a number of other sites who use its data for their own search tools including Amazon and *BusinessWeek*. The site operates like a conventional search engine, allowing users to type in a name and then searching its database to find matches. However, it is the accuracy of the matches it provides which could cause issues with mistaken identity, and may lead to a need for legal action. For example a search against UK Prime Minister "Gordon Brown" suggested 82 possible people including a gutter fitter in Oregon, Program Director of Precision Hoops Basketball Academy and a chimney sweep. Strangely a search for "George Bush" revealed only the current American President, but his profile had only been viewed around 100 times despite 8,000 Web references having been pinpointed. But ZoomInfo is not the only company attacking this market—a newer personal search engine spock.com, launched in August last year with $7 million of venture capital funding, claims 100 million personal profiles have already been indexed. By comparison spock claims it has over 2,000 different profiles of people called George Bush.

On both sides of the Atlantic there is already evidence that employers are using tools like ZoomInfo to check candidates' employment records. Last August a temporary judge in Las Vegas left office over a posting on his personal MySpace page that included among his hobbies "breaking my foot off in a prosecutor's ass." The judge said his comment was intended to provoke discussion rather than to be taken at face value. In the UK we have seen similar reports at two universities of staff logging onto social networking sites and using evidence they find on student profiles to discipline students. In one a student was questioned over photographs which seemed to show her celebrating the end of exams by throwing dead octopus parts over other students.

These new search techniques have caused even more concern in Europe, with questions being asked in particular about the U.S. government's use of aggressive data-aggregating techniques in response to 9/11. In particular the so-called "no-fly" list maintained by the Department of Homeland Security has led the European Court of Justice to rule as unlawful the European Commission's deal with the U.S. to transfer data to help compile the list after the European Parliament raised objections. It is said that just 16 names appeared on the U.S. list in 2001 compared with 44,000 in 2006 due to semantic Web technology being used to aid the collection of names. Whilst in the U.S. these techniques have caused public consternation with the reported seizure of U.S. Senator Ted Kennedy, when he was mistakenly identified on a terror watch list in the U.S., we have followed the refusal to admit into the country the artist formerly known as Cat Stevens and the subsequent BBC interviews with a once-forgotten rock band who happened to be on the same flight. European authorities have felt the same criticism at home when the European Commission announced similar plans in 2005, with detailed plans being left to the 27 Member States which make up the EU.

Those in business clearly need to monitor their own reputations by monitoring the information about them which is out there. However, exercising self-help is not without its own risks. Last year in Paris a former hacker built some software which he says allows him to detect companies whose computers have been used to alter their entries on Internet encyclopedia Wikipedia. Organizations which he says could have deleted information about them include the two main UK political parties, the Vatican, the Portuguese government, Amnesty International and the CIA. Some of those accused have embarrassingly admitted their employees have tried to alter the site, including some of the news organizations that first broke the story.

So how can the law in Europe help companies and individuals who fall victim to online inaccuracies? So far few cases have reached the courts, but in most, European privacy law is likely to be the first port of call. Broadly speaking, privacy law in Europe could open up a possible cause of action to any living individual who is resident in or a citizen of a European country with privacy law in

place. Around 34 jurisdictions in Europe currently have some form of legislation providing that information on individuals needs to be accurate and some countries have private rights of action for those who are damaged by inaccurate data. An extreme example of regulatory action is the $1.5 million fine in Spain for the leaking of personal profiles of the Spanish Big Brother contestants, upheld by the Supreme Court in Spain last year. Whilst in much of Europe action by the local privacy authority to correct a Web site is unlikely to be high on their list of priorities, a civil action for damages could bring results. In some countries a specific cause of action and specific remedies are laid down in the legislation. In Austria, for example, under the Bundesgesetz über den Schutz Personenbezogener Daten (Datenschutzgesetz 2000—DSG 2000) an individual can ask for rectification or removal of inaccurate personal data and can bring proceedings for compensation for damage caused by a breach of the law. Similar powers exist in other countries including Belgium, Finland, Germany, Italy, Portugal and the UK. Additionally defamation law might be an avenue open to those maligned online. In 2002 Irish politician David Trimble brought suit against bookseller Amazon for allegations made against him on a review of a book they offered for sale on their site. Another Irish case in 2001 shows just how damaging allegations like this can be. That case concerned a war of words between two sandwich shop owners in Castelrea, County Mayo. One posted the other's details on an escort site under the name "Exclusive Maureen," leading to more than 100 calls to her in the first two days alone and damages in excess of 10,000 pounds. More recently a 15-year-old Finnish schoolboy was fined for posting a video on YouTube showing a karaoke performance of his teacher and for claiming she was insane. He also was ordered to pay 800 euros in damages for "causing harm and suffering." Traditionally some courts in Europe have been happy to entertain Internet libel cases with little real connection with the U.S. Whilst damages might be less than a successful action in the U.S., in some cases remedy will be available in Europe where it would be denied by a U.S. court.

One of the great myths in life—alongside "the cheque is in the post" and "this won't really hurt"—is the myth that the Internet is the Wild West, a lawless place full of cowboys. Cowboys may roam the plains but the Internet can be more heavily regulated than the offline world. Global businesses know the tactics the cowboys use, and who and where the best sheriffs are to make sure their reputation stays intact.

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Legal Strategies for International Trade Problems: The Case of Food Shortages

Since 1947, multilateral trade negotiations have been tackling the reduction of tariffs with the objectives of regulating, liberalizing and stimulating trade. To that end, WTO Members had to adjust and report their industrial policies, convert all quotas into tariffs, bind their tariffs, and refrain from blocking imports by means of high tariffs—actions devised to foster trade through the removal of import barriers. Despite eight negotiation rounds, no one could have anticipated the current obstacle for trade developed by creative minds: export restraints.

"Export taxes," "suspension of exports," "price surges" and "food shortage" are the buzzwords most heard nowadays in the international trade scenario. Globalization creates excellent grounds for a boost in countries' exports as it increases demand. Conversely, the positive scenario produced by this growth is now provoking price peaks, affecting domestic supply and causing inflation. Countries are once again concerned with the rise of worldwide demand for commodities, as well as their prices, which, combined with substantial higher oil prices and freight rates, is exacerbating the inflation phenomenon even more. Governments, therefore, are creating barriers to their exports, not their imports, in order to level these internal distortions.

This situation may evoke the rebirth of postwar protectionism, in which countries raised trade barriers to make it economically feasible to domestically produce the main agricultural products needed and prevent food shortages. Blocking exports and imports can overcome internal problems faced by one country, but, then again, they can cause major disruptions in other markets. Food processing industries and end-consumers are the most affected, but they are also the ones least likely to resort to the legal solutions available to solve this kind of economic dilemma.

As an example, the price of wheat this year reached the highest level since 1997. Russia and Argentina, two of the biggest wheat producers and exporters, felt that the boom in wheat prices could affect their domestic economies. The Russian government enacted, on October 10, 2007, Resolution 660, which imposed an export tariff for wheat of 10%; subsequent Resolution 934, of December 28, 2007, raised the duty to 40%. Argentina, in turn, applied an export tax of 20% on wheat and wheat flour in 2002. In 2006, Argentina differentiated their export tariffs, trying to stimulate the sales of products with higher value-added, by imposing an export tariff of 20% for wheat and 10% for flour. On November 9, 2007, Argentina issued Resolution 369/2007, which increased the custom

duty for wheat exports to 28%, and, recently, Resolution 125, of March 10, 2008, which changed the scheme to a flexible regime with export taxes that are adjusted to the FOB price of wheat and flour, raising the export tax ("*retención*") as the crop prices increase.

Brazil is suffering from the main consequences of the decision of its neighbor. Approximately 60% of all Brazilian wheat imports used to come from Argentina, but after the series of factors mentioned above, the balance of this trade flow has been changed, resulting in a drastic shortage in the Brazilian market. Moreover, because wheat flour exports became more economically viable than the exports of wheat, the Brazilian wheat flour manufacturers, which could not predict or avoid these sovereign decisions, had to face the consequences of the newly imposed protectionist trade policy alone.

Export taxes, as well as regulated or supervised exports, are not on the radar of international trade legislation, nor are they being addressed in the Doha negotiations. WTO Agreements foresee export prohibitions only as an Article XI:1 violation, but do not forbid the use of export tariffs. For this case, the only restriction is Article 12 of the Agreement on Agriculture, which requires WTO Members to notify such export prohibitions or restraints to the Committee on Agriculture and be vigilant with the constraint effects on the food security of importers. Apart from the WTO, regional agreements are more emphatic in making export restraints illegal, such as the Mercosur, which prohibits trade limitations amongst its member countries.

As a means to overcome the consequences produced by this new economic scenario, and despite the lack of international regulation and jurisprudence on the matter, the Brazilian wheat industry developed a successful legal and political strategy. From the alternatives available, the first solution sought in conjunction with the Brazilian government was the reduction of the applied tariff, enabling the importation from other suppliers (i.e., USA and Canada). Together with this initiative, and with the objective of lowering the prices of the grain to the food chain and end-consumers, internal taxes were reduced for the commercialization of wheat, flour and bread. Other options are still being evaluated. With this successful legal and political strategy, the Brazilian wheat industry managed to gain precious time to survive—for the moment—and counteract the imbalance produced by the changes in the domestic policy of its alleged "*hermano*."

The real motives for the imposition of export prohibitions may vary: governments might want to avoid price volatility, increase government revenue with additional taxes, or stimulate exports of higher value-added goods. Regardless of their reasons, the effects are well known: the encouragement of inefficiencies in the world economy, distortion of prices and disruption of business.

Delegates in the Doha Round are focusing only on gaining access to other markets, but the real problem, in the future, might very well be how to access essential and strategic foreign goods. Meanwhile, private companies should seriously consider, as part of their business strategy, starting to develop approaches to overcome economic problems that hinder their day-to-day business. International trade practices and resolutions have to become part of the solution and have to be taken into consideration when defining corporate plans. The case of the wheat shortage in the Brazilian market serves as a good example to private companies that legal strategies, despite not being widely known as alternatives to commercial and economical problems, can comprise an interesting option to remedy an unfavorable scenario to business, creating, in this case, an alternative to price surges, food shortage and export taxes.

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Proving Causation in Jones Act Cases

A worker injured on board a ship is covered by the Jones Act. International lawyers are frequently involved with torts occurring on the High Seas, and actions under the Jones Act provide a fertile ground for litigation. This article will discuss some toxic exposures a seaman is subjected to on a ship, and the problems of proof involved with one of those toxic torts, exposure to diesel fuel.

Diesel fumes have been shown to cause lung cancer, respiratory diseases, lung diseases, and cardiovascular diseases.[1] Over 47 epidemiological studies have shown that exposure to diesel exhaust, for instance, is associated with an increased risk of lung cancer, chronic obstructive pulmonary disease, asthma, heart disease, and stroke.[2]

In the close quarters of a ship, workers are frequently exposed to unventilated diesel fumes in high quantities. Nevertheless, there are few if any cases where injuries related to those exposures have been discussed in reported decisions. This article submits that such cases may be established, under existing science, under the Jones Act.

In *Wills v. Amerada Hess Corp.*,[3] the Second Circuit Court of Appeals addressed the issue of whether a seaman had sufficiently established a causal link between exposure to toxic emissions on board a ship to warrant recovery under the Jones Act.[4]

In *Wills*, the plaintiff had served as a seaman for 10 years on vessels that transported petroleum-based fuels such as crude oil, jet fuel, kerosene and gasoline. He developed squamous cell carcinoma and died at the age of

39. His wife sued, claiming that exposure to benzene and polycyclic aromatic hydrocarbons (PAHs) caused, in part, his cancer.[5]

The Jones Act provides seamen with special statutory protections when they are injured.[6] The seaman may bring an action against his employer, because the ship owner is under a duty to provide a reasonably safe workplace.

The plaintiffs in *Wills* claimed that the defendants violated various Coast Guard regulations requiring ship owners to monitor benzene emissions, and various OSHA regulations governing the permissible levels of toxic emissions aboard vessels.[7]

The plaintiff sought to introduce the testimony of three expert witnesses; only the opinion of Dr. Bidanset, the forensic toxicologist, was at issue. That expert concluded that exposure to the petroleum products was the most probable cause of the squamous cell carcinoma.

He used a theory of causation which, by his own admission, was controversial. The most widely accepted scientific theory of causation, the "dose-response" theory, suggests that toxins are carcinogenic only when a person is exposed to concentrations over and above a specified threshold level. Below the specified threshold level, the effects of the toxin are thought to be benign. Dr. Bidanset's theory, on the other hand, was that there was no safe level of exposure to some toxins, because the cancer can be triggered by the interaction of a single molecule of the toxin with a single human cell. The defendants moved to exclude Dr. Bidanset's testimony, under principles of *Daubert*.[8]

The Court granted the defendant's motion to exclude the testimony, holding that *Daubert* is not relaxed in actions under the Jones Act. The Court found that there was no established link between benzene and PAH exposure and squamous cell carcinoma. The cancer linked to benzene exposure was leukemia. The Court held that the expert was not even sure whether benzene was capable of causing squamous cell carcinoma, which was the type of cancer that killed the plaintiff.[9]

The Court was hesitant to apply animal studies to humans, but scrutinized the studies anyway. The court found that the causal link from inhaling the toxin was tenuous in those studies. While rats that ingested the benzene had a stronger relationship, there was no suggestion that the decedent had ingested benzathine, much less at the quantities that the rats did.

The Court found that the expert's own, admittedly controversial, theory about a single exposure to a toxin causing the disease was rejectable under *Daubert* factors, because it had not been subjected to testing or peer review.

Since there were no epidemiological studies pointing to an increased risk of squamous cell carcinoma in those exposed to benzene or PAH, the Court excluded the expert's testimony and opinions.

Under the Jones Act, a plaintiff "shoulders a lighter burden [for establishing negligence] than his counterpoint on land would carry."[10] The Plaintiff argued that the District Court failed to appreciate this reduced burden in proving causation.

The Court said that where an injury has multiple potential etiologies, expert testimony is necessary to establish causation, even with a reduced burden to prove causation in a Jones Act case.

Therefore the question in the appeal was whether the trial court properly excluded the expert's testimony under *Daubert*.[11] The Plaintiff argued that since the burden of proof is less under the Jones Act, the standards of reliability of expert testimony is also relaxed. The Second Circuit rejected this argument.

Although both the Jones Act and FELA impose a reduced burden of proof of causation on the plaintiff,[12] the Court held that this does not alter the standard for determining the *reliability of expert testimony* and its admissibility. The reduced burden of proof could affect *Daubert*'s *relevancy* inquiry, but not the *reliability* requirement.

The District Court excluded the expert's testimony because it failed to quantify the dosage of the toxin to which the decedent was exposed. Moreover, the Plaintiff's expert contended that one exposure was enough to cause the cancer. The Court held that the plaintiff expert's opinion in this regard was not reliable, because the theory was based on the background, experience and reading of the expert, not upon scientific testing or peer-reviewed studies.

The Plaintiff argued that it was unfair to require proof of dosage, because failure to monitor the toxins was part of the defendant's negligence. The Court though did require evidence of dosage, and determined that the evidence on the issue of dosage; the affidavit testimony of the seaman who worked on the same ships as the decedent was insufficient. The seaman did not have the experience or training to analyze and quantify the dosage emitted aboard the ships. He would need some technical or professional expertise in detecting and quantifying toxic emissions to provide an adequate foundation for the expert's opinion. He was only on the same ship as the plaintiff for five months out of the decedent's 10-year career.

Without the technical or professional expertise, the expert's opinion lacked a critical step in reasoning: that the dose was sufficient to cause the disease. The opinion was therefore excluded under *Daubert*.

Without that expert testimony, the plaintiff had failed to get into evidence *any* admissible expert testimony on the issue of causation. Therefore, he failed to satisfy his burden that the employer's negligence played *even a slight part* in producing the decedent's injury.

This case illustrates the difficulties in proving a toxic tort case, whether involving a seaman, or for that matter, a railroad worker or other plaintiff but in so doing, it does chart the course for proving such a case.

Specifically, I would like to focus on one aspect of this case which was glossed over by the Plaintiff's counsel in his presentation, and is in fact the hypothesis underlying this article: *exposure to diesel fumes probably did contribute to causing, in part, the decedent's cancer*.

Diesel fumes have been shown to be associated with an increased risk of lung cancer. Therefore the case supporting an expert's opinion that diesel fumes caused the cancer would be more supportable. Diesel fumes contain particulate matter which has been shown to cause an increased risk of lung cancer, lung disease such as asthma and chronic obstructive pulmonary disease, and cardiovascular problems such as stroke and heart disease. Epidemiological studies have been conducted by numerous scientists who found the association. As this association is already established by scientific evidence, the sole remaining question would be whether in that particular plaintiff, or seaman, or railroad worker, the clinical findings support the expert's opinion that the plaintiff's cancer was caused by the exposure to diesel fumes.

In *Wills*, the defendant apparently did not argue that the diesel fumes contributed to causing the decedent's squamous cell carcinoma (a form of lung cancer). Had he done so, there are ample epidemiological studies that establish the association between the diesel fumes exposure and the lung cancer. The attempt to prove that benzene was the cause of a particular form of cancer was not supported by epidemiological studies that had been peer-reviewed, nor were these findings duplicated in independent studies.[13]

Conversely, there *have* been many studies where *diesel fume* exposure has been found to cause lung cancer.[14] Whether the exposure to diesel fumes in the ship environment was equivalent to the exposure in the studies would have to be shown by replicating the amount of exposure on the ship and comparing that to the exposures found in the study. Nevertheless, with adequate discovery as to the exposures, the linkage could very well be established.

The Courts favor epidemiological studies, rather than the mere *ipse dixit*, which is "because I said so, based on my knowledge and experience," which is the foundation of many an expert's testimony. The Courts will not rely upon such testimony because the scientific world will not rely upon such statements. Where there are sound epidemiological studies showing an association between an exposure and a disease, *Daubert* is satisfied. In Jones Act and FELA cases, where the burden of proof on the plaintiff is lessened, such cases will be very viable. Each case where a ship or railroad worker gets cancer, heart disease, or stroke should be evaluated to determine the degree of exposure that the worker had to toxins at the workplace. The burden of proof is easier to satisfy in those cases, once the proper foundation for the admission of expert testimony is laid.

The key to proving the case is understanding the expert testimony necessary to satisfy *Daubert*. Once the expert testimony is admitted as to causation, the burden of proving that the toxin contributed to causing the disease is much lighter than in other toxic tort cases.

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Endnotes

1. U.S. Environmental Protection Agency (EPA). (2002) Health assessment document for diesel engine exhaust. Prepared by the National Center for Environmental Assessment, Washington, DC, for the Office of Transportation and Air Quality; EPA/600/8-90/057F. Available from: National Technical Information Service, Springfield, VA; PB2002-107661.
2. For a judicial decision discussing the persuasiveness of the epidemiological studies on diesel fumes, *see Kennecott Greens Creek Mining Company v. Mine Safety and Health Administration*, 375 U.S. App. D.C. 13, 476 F.3d 946, 2007 U.S. App. LEXIS 2886, 37 ELR 20043 (2007).
3. 379 F.3d 32 (2004).
4. 46 App. U.S.C. 688.
5. Claims under New York law for negligence were brought, under general maritime law for wrongful death, unseaworthiness, and maintenance and cure, and under the Jones Act for negligence and wrongful death.
6. 46 App. U.S.C. 688.
7. 29 C.F.R. 1910.1000, 1910.1025, 1926.55.
8. *Daubert v. Merrell Dow Pharms., Inc*., 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993).
9. The expert further failed to account for the possibility that the decedent's cigarette smoking and alcohol consumption caused his squamous cell carcinoma. Most experts would consider this merely an oversight by the expert, since there is usually a synergistic relationship between cigarette smoking and other lung cancer causing agents. But the failure on the part of plaintiff's expert to articulate and account for the decedent's cigarette smoking and alcohol consumption as causes of the cancer was a flaw large enough in the expert's reasoning as to indicate that his conclusions were not grounded in reliable scientific methods.
10. In collision cases aboard a ship, there is a rule that shifts the burden of proof of causation to the defendant to show that they were not the cause of the injury. The plaintiff attempted to use the rule in *The Pennsylvania* to switch the burden of proving causation to the defendant, but the Court held that the rule in *The Pennsylvania* was only appropriate in cases where in light of the wide experience in maritime navigation, the logical probability

is that the fault of the ship was the cause of the disaster. In those cases, proving a violation of a statutory rule by one of the ships in the collision created a presumption that the ship was at fault. The Court of Appeals held that *The Pennsylvania* rule was limited to Jones Act cases where either common sense or the realities of Admiralty prompted the conclusion that the violation caused the injury.

The Court could not say that it was reasonably probable that the defendants' noncompliance with their obligation to monitor benzene was causally related to be decedent's cancer. Since the burden shifting of *The Pennsylvania* did not apply, the burden remained with the plaintiff to prove causation.

11. Under *Daubert,* the district court will not be reversed unless it abused its discretion in excluding the expert testimony.

12. The Jones Act and FELA are guided by the same case law.

13. The New York Court of Appeals had made a similar finding concerning benzene, excluding proof of causation where a gas station attendant had been exposed to benzene in gasoline. In *Parker v. Mobil Oil Co.*, 7 N.Y.3d 434, 857 N.E.2d 1114, 824 N.Y.S.2d 584 (2006), the New York Court of Appeals ruled that absent some showing that the benzene exposure was sufficient to cause cancer in humans, the case could not be proven. That Court also discussed the tests on mice, finding them inadequate in themselves to establish an association between benzene and, in that case, leukemia, and gas station attendants.

14. *See supra*, note 2.

* * *

Human Rights Icon: The International Criminal Court

The International Criminal Court (ICC) is dedicated to the protection of human rights. It is tasked with prosecuting crimes against humanity, war crimes, genocide and the crime of aggression when national judicial systems around the world are unwilling or unable to do so.

Background

A December 9, 1948 resolution adopted by the United Nations General Assembly mandating the International Law Commission to begin work on a draft statute of an international criminal court is the genesis of the ICC.[1] The Commission is made up of international law experts named by the Assembly to codify and continue to develop international law.[2] On the next day, December 10, 1948, the General Assembly adopted the Universal Declaration of Human Rights.[3]

Fifty years later, on July 17, 1998, 120 States voted to adopt the Rome Statute of the ICC, which is an international multilateral treaty setting forth the purpose, jurisdiction and laws to be followed by the Court.[4] By 2002 the Statute had obtained the required sixty ratifications for the ICC, which is not a United Nations body but an independent, permanent court, to become effective as of July 1, 2002.[5] As of October 17, 2007, States Parties to the Statute number 105 countries, with 29 African States, 13 Asian, 16 Eastern European, 22 Latin American and Caribbean, in addition to 25 from Western Europe and other States.[6]

The ICC sits in The Hague, the capital of the Netherlands which is also the site of the International Court of Justice (ICJ), known also as the World Court, where States litigate civil disputes.[7] The World Court is situated in a building called The Peace Palace and the ICC is in a separate building at The Hague.

Ad Hoc Tribunals

Prior to the formal creation of the ICC, events compelled the creation by the Security Council of courts on an ad hoc basis in order to address atrocities which were being committed. Examples are the International Criminal Tribunal for the Former Yugoslavia (1993) and the International Criminal Tribunal for Rwanda (1994), which share almost identical governing statutes and whose prosecutor is the same, as is the composition of the Appeals Chambers.[8] They also set legal precedents and provided a model for the subsequent formulation and adoption of the ICC.[9]

Jurisdiction and Governing Statute

As noted, the ICC is dedicated to the prosecution of the offenses of genocide, crimes against humanity, war crimes and the crime of aggression, which are considered "the most serious crimes of concern to the international community."[10] These crimes are specifically defined except for the crime of aggression, which requires a formal amendment to flesh out the term. This amendment cannot be entertained until the review conference to be held on July 1, 2009, seven years after the Statute became effective.[11]

The ICC is specifically stated to be "complementary to national criminal jurisdiction."[12] It can only consider crimes committed after July 1, 2002, the effective date of the ICC.[13]

If there is a dispute between two or more states as to interpretation or application of the Rome Statute (as the ICC treaty is known) the matter may be submitted to the Assembly of States to resolve. The price of ratification or accession[14] is agreement to cooperate with the Court with respect to the investigation, arrest and transfer of suspects.[15] States had to amend their rules prohibiting the extradition of their own nationals and assume responsibility for prosecuting subjects found in their territory.[16] States also amended their criminal codes to enact offenses of genocide, crimes against humanity and war crimes.

Of the States Parties and signatories to the Rome Statute[17] some have made certain declarations and reservations at the time of acceptance or ratification.[18] The U.S. Government on May 6, 2002 advised the Secretary-General of the United Nations that it did not intend to become a party to the treaty, because the Bush administration was concerned about politically motivated prosecutions,

and that it had no legal obligation arising from its earlier ratifying signature on December 31, 2000.[19] Israel made the same withdrawal on August 28, 2002.[20]

An interesting development since the United States advised it would not become a party and thus not be bound by the treaty, is the well-recognized trend in the United States Supreme Court toward acceptance of international law and norms. Recent decisions appear to substantiate that the Court is willing to incorporate international standards into domestic jurisprudence.[21]

The Rome Statute of the ICC, as noted the governing statute, is compromised of 128 Articles,[22] with a separate Elements of Crimes section[23] and a further Rules of Procedure and Evidence section consisting of 225 Rules.[24]

Judges and Presidency

There are eighteen judges elected by the Assembly of States Parties of whom three (a President and two Vice-Presidents) make up the Presidency of the Court. The Presidency of the court is responsible for the administration of the Court and the workload of the other fifteen judges.[25] There can be only one judge of any given nationality at one time on the entire Court.[26]

Candidates must have either criminal law experience or international law experience.[27] The latter is defined as expertise in international humanitarian law and the law of human rights.

Trial, Pre-Trial and Appeals Divisions

Six judges each are assigned to the Trial (called Trial Chamber) and Pre-Trial Divisions based on their qualifications and experience.[28] Usually judges with criminal law trial experience are chosen for these assignments. Judges with international law experience are mainly chosen for the Appeals Division.

The Trial Chamber sits in benches of three judges while the Pre-Trial Chamber sits in either a three-judge panel or as a single judge.[29] Decisions are by majority rule pursuant to Article 74 of the Statute.

No judge who has conducted a pre-trial phase of a case may sit on the Trial Chamber of that case. No judge may, of course, sit on matters they were involved with before taking the bench.

The Appeals Chamber consists of the President and four other judges, all of whom sit on each case.[30]

Judges serve nine years and first took office March 11, 2003.[31] The initial judges served staggered terms of three, six and nine years. Judges may not have any other professional occupation.[32]

Official Languages

The official working languages of the Court are English and French, which is also true of the World Court.[33] Interestingly, judges of the Court must be fluent in one of the official working languages. The Court has six official languages; thus judgments and significant decisions are published in Arabic, Chinese, English, French, Russian and Spanish.[34]

Office of the Prosecutor

The prosecutorial arm of the Court is a separate and independent office, headed by the Prosecutor, who is assisted by Deputy Prosecutors, all of whom must be of different nationalities.[35] They must have extensive practical experience in criminal trials and be fluent in either English or French. The Prosecutor is elected by secret ballot of a majority of the Assembly of States.[36] The Deputy Prosecutors are also chosen by the Assembly but from a list proposed by the Prosecutor. The term of both Prosecutor and Deputy Prosecutors is nine years. The first Prosecutor elected is Luis Moreno-Ocampo of Argentina.

Mr. Moreno-Ocampo was a prosecutor in his native Argentina, where he prosecuted the military officers responsible for the kidnap, torture and disappearance of his countryman in what is known as Argentina's "dirty war." Not since the Nuremburg trials at the end of World War II had any country tried any senior commanders for the mass killings of civilians.[37]

The Prosecutor may appoint legal experts as advisors, and hires investigators and other staff. An accused has the right to request disqualification of the Prosecutor or a Deputy Prosecutor.[38]

Registry

The principal administrative officer of the Court, handling all non-judicial aspects, is the Registrar who also heads the Registry.[39] The first Registrar elected for a five-year term by the judges of the Court in June 2003 is a French jurist, Bruno Cathala.[40] Deputy Registrars are also elected by the judges. Most importantly, the Registry appoints defense counsel for indigent accused and renders material assistance.

Defense Bar

The accused is entitled to an interpreter, defense counsel or advisory counsel, and to defend himself or herself in person.[41] The International Criminal Bar was established in 2002 and is an independent representative body of counsel and legal associations from which some defense counsel may be chosen.[42] Expertise and experience in criminal prosecutions, defense or international law are priorities. The Rome Statute and Rules of

Procedure and Evidence establish the required norms for defense counsel.[43]

Funding

Because, as previously noted, the court is not a United Nations body, it is responsible for its own funding.[44] It is funded by contributions assessed upon States Parties, following a basic scale already in use in the United Nations, which considers population and relative wealth.[45]

The three biggest contributors to the United Nations, whose budget is estimated to be $5.2 billion for the next two years, are the United States, Germany and Japan, with about 25% to be paid by the United States.[46] The ICC also takes funds from the United Nations itself, especially where cases have been referred to the ICC by the Security Council.[47]

Rights of Accused

Article 67 of the Rome Statute[48] provides for prompt and detailed charges, adequate time and facilities to prepare a defense with counsel of choice, a fair public trial in person without undue delay, cross examination of witnesses brought against the accused, interpreters and translations in the accused's language without charge, a right to remain silent without prejudice, to make an unsworn and/or written statement, and for the burden of proof to be on the Prosecutor.

There is a duty on the Prosecutor to disclose all evidence tending to show the innocence, or mitigate the guilt, of the accused or which affects the credibility of the prosecution's evidence. The Statute allows a defense of self-defense or defense of another person where an accused acts reasonably and in a manner that is proportionate to the degree of danger.[49]

Trials in absentia are not provided for under any circumstances in the Statute,[50] unlike at Nuremberg after World War II where Martin Bormann, a major war criminal, was tried in his absence (although it was later determined that he was already dead when the trial took place).[51]

Human Rights Law

Those on the Court or practicing before it have to be versed in the law of human rights, on which much of the Court's work is based. Thus the rights of the accused set forth in Article 67 of the Statute is modeled on provisions of the International Covenant on Civil and Political Rights (ICCPR), one of the principal human rights treaties, which became effective in 1966.[52]

There is also the Universal Declaration of Human Rights (1948), regional human rights conventions such as the European Convention on Human Rights[53] and the African Charter on Human and Peoples' Rights, and humanitarian law instruments such as the Geneva Conventions and the treatment of prisoners of war, protection of civilians (1950), as well as protection of victims of international and non-international armed conflicts (1979).[54]

Elements of Crimes/Defenses

The Elements of Crimes provisions to the Rome Statute aid the court in interpretation. There is a requirement that to be punishable, a crime must be "committed with intent and knowledge."[55]

Types of genocidal crimes include killing, causing serious bodily or mental harm, inflicting conditions calculated to bring about physical destruction, imposing measures to prevent births and forcibly transferring children.[56]

Crimes against humanity include murder, mass killing of a civilian population, enslavement, forcible transfer of a population (ethnic cleansing), apartheid, torture,[57] rape, sexual slavery, enforced prostitution, forced pregnancy, sexual violence (against either gender), enforced sterilization, enforced disappearance of persons, deprivation of fundamental rights and other inhumane acts.[58]

War crimes, by far the largest number of crimes set forth in the Elements of Crimes section, require an armed conflict and include those listed under genocide and crimes against humanity above and also include such crimes as biological experiments, destruction and appropriation of property, compelling service, denying a fair trial, unlawful deportation and confinement, taking hostages, attacking civilians, attacking undefended places, improper use of a flag of truce or flag, insignia or uniform of the hostile party, and medical or scientific experiments.[59]

The Court also has jurisdiction to preside over offenses relating to the proceedings before it such as perjury, false or forged evidence, influencing a witness, bribery of officials and the like.[60] It can sanction misconduct before the Court.

The Rome Statute provides for defenses of insanity, intoxication, self-defense, duress and necessity, but this does not limit the general right of the accused to raise uncodified defenses such as alibi, military necessity, abuse of process, consent and reprisal.[61]

Crimes within the jurisdiction of the Court have no statute of limitations.[62] The fact that domestic criminal law systems provide for a statutory limitation even for serious crimes is of no moment. Thus a state can not argue that it will not surrender an accused because the crime is time-barred under national legislation.

Penalties

The Court cannot impose the death penalty, unlike 37 states in the United States which can and do. Sentences are pronounced in public with terms of imprisonment of up to 30 years or, in exceptional circumstances, life imprisonment. The Court may, in addition, order a fine, and/or forfeiture of proceeds, property or assets derived from the committed crime.[63]

The Court may also order reparations to victims, including restitution, compensation and rehabilitation and may make an order directly against a convicted person.[64] A person who has been unlawfully arrested or detained is entitled to compensation.[65]

Initiation of Prosecution

The procedure utilized before the Court is a mixture of the English common law adversarial approach (state files charges and investigates case with evidence admitted under restrictive rules and presented to lay jurors) and the inquisitorial approach of the Napoleonic Code and other European models described as the civil law system (instructing magistrates to prepare case and all evidence is filed prior to start of trial, with the trial judge assessing the evidence; evidence rules more lax as professional judges assess it). The Rome Statute provides for an adversarial approach but the Court has wide powers to intervene at any stage, including investigation.[66]

The initiative to prosecute a case can come from a State Party, the Security Council or the Prosecutor.[67] But any international organization, individual non-governmental organization (NGOs often supply crucial information) and States not parties to the Rome Statute may prevail upon a Prosecutor to initiate proceedings. The Prosecutor is mandated to seek out information from reliable sources. Realistically speaking the Prosecutor still needs the Security Council to pursue a successful prosecution because that body has coercive powers not otherwise available to the Prosecutor.[68]

There is also a check on the Prosecutor as any prosecution, including the investigation, must be approved by the Pre-Trial Chamber composed of three judges.[69] If the Prosecutor concludes there is a reasonable basis to proceed with an investigation, the Pre-Trial Chamber then must approve it. That Chamber also must determine when an investigation has been completed by the Prosecutor, whether there is sufficient evidence to commit a person for trial.[70] If so, the Presidency then constitutes a Trial Chamber responsible for the trial.[71] The accused has a right to be informed of the charges, may apply for interim release, and is presumed innocent until proven guilty.[72]

Cases Before the ICC

As of December 2007, three States Parties (Uganda, Democratic Republic of the Congo and Central African Republic) have referred situations occurring on their own territories to the office of the Prosecutor, and the Security Council has referred a situation on the Territory of a non-State Party (Darfur, Sudan).[73] All four investigations have begun and a trial date has been set in the Democratic Republic of the Congo referral.[74]

Uganda

Uganda referred its situation in Northern Uganda to the Office of the Prosecutor in December 2003. In July 2004 there was found to be a reasonable basis to open an investigation by the ICC.[75] The matter deals with crimes allegedly committed by the Lord's Resistance Army (LRA), many of whose members are themselves victims, having been allegedly abducted and brutalized by the LRA leadership.

While there is an amnesty law enacted by Uganda for those not in leadership, in order to permit reintegration of these individuals into Ugandan society (which eliminates ICC jurisdiction over them), there is no amnesty for the leadership of the LRA for their alleged crimes against humanity.[76]

Being investigated, among others, are the deaths of 240 people in Atiak, Uganda in 1995 and the over 200 deaths in February 2004 in Barlonya Camp, North Eastern Uganda. Also the serious charges that children were abducted, raped repeatedly and forced to serve in the LRA and to kill, with their subsequent rejection by their families and communities.[77] Warrants of arrest were issued in July 2005 for five senior commanders of the LRA, but after a decision of the Pre-Trial Chamber, one warrant was terminated.[78]

Democratic Republic of The Congo

In March 2006, Thomas Lubanga Dyilo was the first person to be arrested and transferred to the ICC. A Congolese national and alleged founder and leader of the Union des Patriotes Congolois (UPC) and its military wing (FRPI), he is charged, with others, with committing war crimes in the territory of the Democratic Republic of the Congo from September 2002 to August 2003. Specifically he is charged with conscripting and enlisting children under the age of fifteen years and using them to participate actively in hostilities.[79] Multiple hearings have been held to date and trial was to commence March 31, 2008.[80] In October 2007, another FRPI Commander, Germain Katanga, surrendered to the ICC on three counts of crimes against humanity and six counts of war crimes for launching an attack against the civilian population of Bogoro Village and pillaging it and of using children

to participate in hostilities.[81] On June 16, 2008, the Court ordered the proceedings against Thomas Lubanga Dyilo to be suspended as the prosecution had received over 200 documents obtained from information providers with agreements not to be disclosed. The Judges concluded that the disclosure of exculpatory evidence in the possession of the prosecution is a fundamental aspect of the accused's right to a fair trial.[82] There are two other cases concerning The Congo still being processed.

Central African Republic

In 2002 and 2003, in the context of an armed conflict between the government and rebel forces, civilians were allegedly killed and raped and houses and stores looted. Hundreds of rape victims have told their stories detailing being raped in public, being gang raped, raped in the presence of family members and other outrages. The justice system in the referring state advised it was unable to carry out the complex proceedings required and the Court agreed to intervene because of this inability of the referring state.[83] The investigation was begun May 22, 2007.

Darfur, Sudan

After a twenty-month investigation by the Office of the Prosecutor, the evidence was presented to the three-judge Pre-Trial Chamber on February 27, 2007. Eurovision broadcast the live press conference internationally via satellite. Interviews with victims and witnesses were conducted outside Darfur because they could not be protected in Darfur. Witnesses came from 17 countries and almost 100 statements were collected. Showing the close connection to the United Nations, the investigation was aided by the U.N. Commission of Inquiry, which provided documents. High Sudanese officials also cooperated.

The Prosecutor concluded there were reasonable grounds to believe two individuals, one being the Minister of State of the Government of the Sudan, and the other commander of the Militia/Janjaweed, bear criminal responsibility in relation to 51 counts of alleged crimes against humanity and war crimes committed between August 2003 and March 2004. The attacks on civilian residents of four villages and towns in West Darfur occurred during a non-international armed conflict between the government of the Sudan and armed rebel forces, including the Sudanese Liberation Movement/Army and the Justice and Equality Movement. There was alleged mass murder, summary execution, and mass rape of civilians known not to be participants in the armed conflict and included forced displacement of entire villages and communities.[84]

On April 27, 2007 a Pre-Trial Chamber determined, with respect to 51 counts, that there were reasonable grounds to believe both charged individuals were criminally responsible and warrants for their arrest were issued.[85] One individual has been arrested to date.

This is an instance of the ICC taking jurisdiction in a situation referred by the Security Council over crimes committed in the territory of a state which is not a Party to the Rome Statute and by individuals of states not a Party to the Statute.[86]

On July 14, 2008, Luis Moreno-Ocampo, Prosecutor of the ICC asked the Security Council for an arrest warrant for Sudan's President, Omar Hassen al-Bashir, on an indictment charging crimes against humanity and genocide.

Hariri Assassination

While this does not involve the ICC it should be noted the Security Council has established a Lebanese-international tribunal under Chapter VII of the U.N. Charter to try the suspects in the February 2005 assassination of former Lebanese Prime Minister Rafig Hariri in Beirut.[87]

Summary

The ICC, not a United Nations body, but an independent permanent Court, came into existence on July 1, 2002. While limited to prosecuting people for war crimes, crimes against humanity and genocide committed only on and after its effective date, it represents an extraordinary step in terms of the global quest for justice. It was nurtured by the prior tribunals for the former Yugoslavia and Rwanda.

Only those states ratifying the Rome Statute, which is the formal mechanism of its birth and considered to be a treaty, must abide by its terms. The Court normally has jurisdiction only over crimes committed by people from States that are Party to it and also over crimes committed on the territory of a State Party.

Because crimes committed within countries that do not ratify the Statute will be exempt from prosecution (as in Rwanda), it has been criticized as being "a long way from a universal court that can sit in judgment over all atrocities of the world."[88] An exception to this is the right of the Security Council to vote to refer a situation to the ICC (as in Darfur, Sudan) for crimes committed in and over individuals from non-party states.

At the same time and even though the United States has not ratified the Rome Statute, an American can be indicted for crimes committed in a country that is a member of the Court, such as Afghanistan, which ratified the treaty.[89] But the United States as not a State Party to the Statute would not have to produce the individual to the Court, as member states are obliged to do. Given the United States Supreme Court's recent trend toward ac-

ceptance of international law and norms, and its willingness to incorporate international standards into domestic jurisprudence, this may eventually change.

The Court is powerless to apprehend a suspect. It is dependent on a national government to hand over suspects in their own territory (witness the problems caused by the Tribunal for the Former Yugoslavia in this respect).

The ICC is a court of last resort, trying only those accused of the gravest crimes. It will not act if a case is investigated or prosecuted by a national judicial system unless the national proceedings are a sham, such as formal proceedings undertaken solely to shield a person from criminal responsibility.[90]

Although not previously referred to, the Security Council of the United Nations has the right to block any prosecution for a renewable period of one year, if it determines that it would pose a threat to international peace and security.[91] However, and significantly, no single country can unilaterally block the ICC from taking action. A majority of the Council must vote to suspend an investigation or prosecution.[92] Moreover, the prosecution has the right, on its own, to initiate investigations, with consent of the Pre-Trial Chamber, and, as befitting its independent status, the Court is not dependent on the Security Council's approval for either investigations or prosecutions.

The ICC is a very young and promising institution representing an enormous step toward a system of international law reaching beyond state sovereignty.

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Endnotes

1. William A. Schabas, *An Introduction to the International Criminal Court*, Cambridge University Press (Second Edition) 2004, at ix. This work is considered the authoritative source for the ICC. The Court's Web site is: http://www.icc-cpi.int/home.html. *See also*: Jason Ralph, *Defending the Society of States: Why America Opposes the International Criminal Court and its Vision of World Society*, Oxford; New York: Oxford U. Press (2007); Joanna Harrington, Michael Richard Vernon, *Bringing Power to Justice?: The Prospects of the International Criminal Court (Studies in Nationalism and Ethnic Conflict)*, Montreal; Ithaca; McGill-Queens U. Press (2006); Dominic McGoldrick, Peter Rowe, and Eric Donnelly, *The Permanent International Criminal Court: Legal and Policy Issues (Studies in International Law)*, Oxford; Portland, OR.: Hart Pub. (2004).
2. Schabas at 8.
3. *Id.* at ix.
4. *Id.* at ix and 187. It is referred to as the Rome Statute of the International Criminal Court because it was initially adopted at the headquarters of the Food and Agriculture Organization of the United Nations in Rome. A treaty is a contract among states adhering to it.
5. *Id.* at 185 and see also "Funding" section, *infra*.
6. Web site, *supra* n.1, and link to States Parties.
7. The ICJ has no criminal jurisdiction. See also Gottsfield, *The International Court of Justice (World Court): A 60th Birthday*, printed in these pages at Vol. 11, No. 1, at 8–12, Spring 2006.
8. Schabas at 10–12. Other precedents were the International Military Tribunals such as the Nuremberg Charter Tribunal (1945) and the Tokyo Tribunal, which prosecuted the Nazis and Japanese war criminals after World War II.
9. *Id.* at 13.
10. Rome Statute of the International Criminal Court, Article 5, found in Schabas at Appendix 1, at 197.
11. *See* discussion in Schabas at 31–34.
12. Preamble to Rome Statute at Appendix 196.
13. *Id.* at 19.
14. States wishing to join the Court who did not deposit their signatures by December 31, 2000 are said to accede to, rather than ratify, the Statute. *Id.*
15. *Id.* at 20.
16. *Id.*
17. See Schabas, Appendix 4, at 416–420, for States agreeing to be bound by the Rome Statute as of 2004.
18. *See* Appendix 5, at 421–428.
19. *Id.* at 420 and see Anthony Dworkin, *Introduction, Crimes of War Project*, Dec. 2003, where Professor Dworkin advises the Clinton administration to delay signing on to the Rome Statute for a year and a half, and made no effort to submit it to the Senate for treaty ratification. The Bush administration, in addition to notifying the U.N. that it would not seek to ratify the treaty, then launched a worldwide campaign to sign bilateral agreements with countries (so-called Article 98 agreements after the relevant provision in the Rome Statute) requiring them not to hand over U.S. citizens but instead to return them to the United States.
20. *Id.* at 419.
21. Aya Gruber, Who's Afraid of Geneva Law, 39 Ariz. St. L. J. 1017 (Winter 2007); and see n. 53 *infra*; *See also* Note, Steven Arrigg Koh, *Respectful Consideration" After Sanchez-Llamas v. Oregon; Why the Supreme Court Owes More to the International Court of Justice*, 93 Cornell L. Rev. 243 (Nov. 2007). *In Sanchez–Llamas* the ICJ had previously determined that the United States had violated the Vienna Convention on Consular Relations by failing to inform 51 named Mexican nationals of their Convention rights by failing to inform them they had a right to contact their governments when arrested. The ICJ found that those individuals were entitled to review and reconsideration of their U.S. state court convictions and sentences. The Supreme Court held to the contrary that the Convention did not preclude the application of state default rules and suppression of the foreign suspects' statements to police was not required. After *Sanchez-Llamas* was decided, President Bush issued a memorandum stating that the United Sates would "discharge its international relations" under the ICJ judgment "by having State courts give effect to the decision." Relying on this, Medellin, one of the 51 named in *Sanchez-Llamas*, filed a second habeas corpus petition challenging his capital murder conviction. *In Medellin v. Texas*, __ U.S. __ (March 25, 2008) the Supreme Court in agreement with the Texas court, denied the petition holding that while the ICJ judgment creates an international law obligation on the part of the United States it is not directly enforceable as domestic law in a state court.
22. Schabas, Appendix 1, at 195–278.
23. Appendix 2, at 279–321.
24. Appendix 3, at 322–415.
25. *Id.* at 180.

26. *Id.* at 177.
27. For a list of judges (17 at that time) as of 2004 and their area of competence, see Appendix 6, at 429.
28. *Id.* at 181.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* at 179.
33. *Id.* at 180.
34. *Id.* at 184.
35. *Id.*
36. *Id.* at 181.
37. *Id.* at 182. *See also* 94 ABA Journal 54 (Jan. 2008).
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 147.
43. *Id.* at 184.
44. See Appendices 1, 2 and 3 at notes 22–24 *supra*.
45. *Id.* at 185.
46. *Id.*
47. *Id.* at 186 and W.S.J. December 24, 2007, opinion page at A10 under "Victory at the U.N."
48. *Id.*
49. See Appendix 1 at n. 22 *supra*.
50. *Id.* at 112.
51. *Id.* at 146.
52. *Id.* at 145. n. 10.
53. *Id.* at 98.
54. There is a European Commission on Human Rights and a European Court of Human Rights enforcing the Convention. Of interest is that when the United States Supreme Court in *Lawrence v. Texas*, 539 U.S. 558, 573 (2003) reversed convictions for consensual sodomy it referred to a decision of the European Court of Human Rights in a case called *Dudgeon v. United Kingdom* which held that laws prohibiting consensual sodomy are invalid under the European Convention on Human Rights.
55. *Id.* at 98.
56. *See* Elements of Crimes, General Introduction, Appendix 2, at n. 23 *supra*.
57. Elements of Crimes, Appendix 2, at n. 23 *supra*.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.* at 66.
62. *Id.* at 110–111.
63. *Id.* at 115–116.
64. Rome Statute, Articles 76 and 77.
65. *Id.* at Article 75(1) and 75(2).
66. *Id.* Article 85(1).
67. *Id.* at 119.
68. *Id.* at 119–120; Art. 13.
69. *Id.* at 120–121.
70. *Id.* at 121; Rule 50, Rules of Procedure and Evidence.
71. *Id.* at 140.
72. *Id.*
73. *See supra* notes 50–53, Articles 60, 66 and 67.
74. www.icc-cpi.int/cases.html Feb.2008.
75. *Id.*
76. www.icc-cpi.int/pressrelease_details&id=16&1=en.html Feb.2008.
77. *Id.*
78. *Id.* at www.icc-cpi.int/pressrelease_details&id=78&1=en.html Feb.2008.
79. www.icc-cpi.int/cases/UGD.html Feb.2008.
80. www.icc-cpi.int/pressrelease_details&id=132&1=en.html and www.icc-cpi.int/pressrelease_details&id=220&1=en.html Feb.2008.
81. www.icc-cpi.int/pressrelease_details&id=301&1=en.html Feb.2008.
82. *Id.*
83. ICC-01/04-01-06/1401.
84. www.icc-cpi.int/pressrelease_details&id=248&1=en.htm Feb.2008.
85. *Id.*
86. www.icc-cpi.int/library/cases/ICC-02-05-01-07-1_English.pdf Feb.2008.
87. Security Council acting under Chapter VII of the Charter, pursuant to Art. 13(b) of the Rome Statute. The tribunal will have offices in The Hague and judges have already been selected. It is said to be the first time the Security Council has overseen a political murder investigation. The United Nations investigation team, known as the International Independent Investigation Commission (UNIIIC) has been investigating the incident for over two years. W.S.J., Saturday/Sunday, January 26-27, 2008, at All.
88. Dworkin, *supra* n. 19.
89. *Id.*
90. www.icc-cpi.int/about.html Feb.2008.
91. Dworkin, *supra* n. 19.
92. *Id.*

Committee Focus
Insurance and Reinsurance Committee

Featured in the photograph taken at the Insurance and Reinsurance Committee Meeting, amongst other attendees, include Committee member Howard Fischer (2d from left), co-chairs Michael Pisani (right, back row) and Chiahua Pan (right, front row), and Jeffrey P. Schmidt, Hawaii Commissioner of Insurance (front row, center).

New Insurance and Reinsurance Committee's 2008 Activities and Plans

The newly formed Committee on Insurance and Reinsurance held a Committee Meeting on June 5, 2008 at the NYC offices of Morrison & Foerster. A highlight of the meeting was the guest appearance of the Honorable J.P. Schmidt, Insurance Commissioner of the State of Hawaii. Committee members attended in person and by teleconference.

Commissioner Schmidt provided the attendees with an insightful overview of changes in the insurance and reinsurance laws, as well as practice developments in Hawaii. He also covered the regulatory role of the Insurance Department in his state and his own efforts internationally. Among those areas covered were:

- Hawaii's effort to become a first choice, along with Bermuda, as a place for captive insurance and reinsurance companies. In particular, he noted:
  - Hawaii has adopted legislation authorizing special purpose financial captives, has knowledgeable and responsive staff and is encouraging its use as a jurisdiction for securitization efforts.
  - Moreover, notwithstanding a cap on premiums for captives, Hawaii is not considered a tax haven for Japanese purposes, unlike Bermuda or Singapore, and captives are thus not subject to penalties in Japan.
  - Hawaii's recent adoption of the NCOIL Model Act for life settlements will encourage activity in that area.
  - His state's efforts to promote Hawaii as a welcoming business jurisdiction, and not just as a vacation destination.
  - Hawaii is becoming a gateway for far eastern insurers, especially Japanese and Chinese companies, due to attractive geographical, regulatory, and cultural factors.
- In this regard, he also discussed concerns arising from attempts to federalize insurance in light of the ability of states, such as Hawaii, to be immediately responsive to local policyholders.

Commissioner Schmidt then entertained a spirited question-and-answer period for all the attendees and offered to respond to any subsequent additional inquiries from the Committee members.

Following Commissioner Schmidt's presentation, Co-Chair Mike Pisani reported that, as of early June, the Committee on Insurance and Reinsurance had 38 registered members from around the world. Co-Chair Chiahua Pan and Howard Fischer then reported on the Committee's plans to present a CLE program in October 2008, with a general panel discussion focusing on the risk concerns for the sponsor and the investor in insurance securitization. Also planned is a newsletter alert, summarizing current and global developments in insurance and reinsurance.

An example of articles that we hope to highlight in our committee's publication include the article published in this newsletter by Committee member Neftali Garro of BLP Abogados in Costa Rica and entitled "Costa Rica to Allow Private Insurers to Set Up Shop" (Mr. Garro was a co-sponsor of the bill that led to this new development and has been involved in that process since 2002) as well as the article on the subprime crisis by Colin Croly and David Abbott of Barlow Lyde & Gilbert LLP.

Finally, the Committee will present a panel program entitled "Current International Trends in Insurance & Reinsurance Regulation" during the Fall Section Meeting in Stockholm, Sept. 17-20, 2008. Howard Fischer of Schindler Cohen & Hochman will be the moderator of the panel that includes Helena Nelson of Skandia Insurance Company Ltd (Stockholm, Sweden); Joaquín Ruiz Echauri of Lovells LLP (Madrid, Spain); Ian Mason of Barlow Lyde & Gilbert LLP (London, UK)—formerly Head of Wholesale Group in the FSA's Enforcement Division; and Gregory V. Serio of Park Strategies, LLC (New York City)—former N.Y. State Superintendent of Insurance.

If you are interested in joining this new Committee or wish additional information, please contact Co-Chair Chiahua Pan of Morrison & Foerster at 1290 Avenue of the Americas, New York, New York 10104-0050 cpan@mofo.com or Michael Pisani of Bryan, Gonzalez Vargas & Gonzalez Baz at 444 Madison Avenue, Suite 805, New York, New York 10022 mpisani@bryanlex.com.

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The Subprime Crisis

Colin Croly

The subprime crisis is constantly developing. This article discusses the issues reinsurers may want to keep in mind when addressing potential claims arising from subprime liabilities.

Introduction

Reinsurers are unlikely to escape the ripple effects of the subprime crisis. As banks reveal increasing exposure to subprime debt, the (re)insurance industry is beginning to consider how it should prepare for potential claims. While the specific issues which may arise for reinsurers are some way off, it is worth drawing attention to some possible problem areas.

The subprime problem arose from the packaging and selling of subprime mortgage debt. "Subprime" mortgage debtors are those with poor credit ratings, with a higher risk of default on their mortgage payments. These debtors were often offered 100% mortgages at "sweetener" advantageous rates of interest for a fixed period. The rates would go up sharply at the end of that period. Mortgage lenders who provided these funds typically pooled this debt and sold it on; the debt was subsequently organised into tranches and sold on again, or became the subject of credit default swap products. However, at the roots of this spreading tree of products lies the real asset of subprime mortgages: if these lose value, then so do the securities relying on them as collateral.

The subprime related debt is very spread around the market—people are not entirely sure where some of the tranches involving subprime debt have ended up. In many ways, there are parallels between the current subprime issues and the LMX Spiral which affected the reinsurance market in the 1990s.

(Re)insurers are potentially exposed to subprime related losses in many different ways. Broadly speaking, these can be divided into three areas: liquidity, assets and claims.

Liquidity

There is generally less money in the market to inject into (re)insurance companies, startups or ART/capital market products. Capital that is already invested will need to be carefully watched. In the softening market, any difficulties which do arise will not be offset by rising premiums. Despite this, as is recognised by rating agencies and other market experts alike, the (re)insurance market is still very well capitalised after years of hard market and investment. However, if new injections of capital are required this may be more difficult. Also, with Solvency II requiring companies to retain more capital in the future, and the UK FSA regime already requiring a risk-based capital approach, it may be that books of business relating to subprime liabilities will be put into run-off and transferred or sold to free up capital.

David Abbott

Assets

Some insurers were reportedly note holders of securitized products or have other involvement in the subprime market which will have hit their balance sheets. In addition to investments in products, those (re)insurers who have invested in mono-line bond holders may also be facing difficulty.

Claims

This is undoubtedly the greatest potential area of concern for (re)insurers. The claims relating to subprime losses will principally be made on D&O and E&O policies.

Subprime related claims in the U.S. are growing apace. Class actions have been commenced for deceptive lending practices. Lending has also been described as discriminatory. Actions have been issued for misleading statements in violation of securities laws and in more extreme cases, securities fraud actions have been commenced. There are public nuisance cases against mortgage lenders alleging that predatory lending practices and the resultant foreclosures have left neighbourhoods abandoned and empty. The SEC and other government bodies have started administrative enforcement actions regarding the practices of mortgage lenders, hedge funds and even rating agencies. The rating agencies will also face action from companies and investors: a suit was issued in September 2007 against Moody's in the U.S. District Court in New York for its rating of securities containing subprime mortgages. Industry participants themselves are entering into a variety of commercial contractual disputes—investors against investors, banks, lenders and other participants. Last but not least, actions have been commenced against the professional advisors, who never escape accusations in a crisis such as this. Even now, it does not look as if the high point has been reached; March 2008 saw a surge of filings of actions.

In the UK, directors of the lending banks may be liable. Nonexecutives, in particular, may face difficulties, as they have the same duties as executive directors, but necessarily less knowledge of the company's day-to-day business. There may even be a shareholder class action in the UK. Hedge funds and asset managers are also exposed. They will have taken the decision to invest funds in subprime related debt and will have to explain those policies.

At every level of this crisis there are directors and advisors who will face D&O/E&O exposure. Many of them will be insured (though reportedly some are not) and therefore some losses will flow to the insurance market. In addition, as mentioned above, at each level of lending or investment, there will have been advisors involved, including lawyers and accountants. Their actions will no doubt be closely scrutinised to review whether they carry any liability in professional negligence for the causes of the losses experienced.

The reinsurance press has suggested that this (in terms of global size of loss) does not spell catastrophe for the reinsurance market. However, there can be no doubt that some liability underwriters will be hit hard, as will their reinsurers. Suggestions of size of market loss are being reviewed and may well move upwards. Whatever the true impact, it is important for reinsurers to be aware of the areas where there is potential for impact, now or in the future:

(i) Notification

Notification provisions are common in reinsurance contracts. They are often expressed as conditions precedent and therefore breach of such a clause will allow the reinsurer to reject the claim. If the clause is not a condition precedent, breach of it can only lead to damages, which will be very hard to establish. Accordingly, it can be crucial to determine whether a notification clause has been complied with. Standard clauses require notification upon knowledge of any losses which may give rise to a claim. This raises the question: what constitutes a "loss" for the purposes of the clause? In *AIG v. Faraday* (2007) the Court of Appeal held that "loss" meant not the insured's (or reinsured's) settlement but the underlying loss to the insured—in that case a fall in the share price following a restatement of accounts—which might cause legal proceedings. In this situation reinsureds face some difficulty deciding when to notify. Should they notify upon the write-down of assets upon which their insureds advised? This is the safest route for reinsureds. However, this may not be helpful to reinsurers. Being notified that the reinsured's insured has suffered loss and may be sued at some point must be of very little assistance. It scarcely indicates that a loss will be coming the reinsurer's way, only that there is a chance of that, if the loss precipitates an action, if that action is meritorious and if that action settles or succeeds.

(ii) Aggregation

If a loss in the value of a debt and the subsequent fallout is the subject of litigation there may be many potential targets, as we have seen in the past. It may well be that reinsureds would attempt to aggregate claims relating to each of these liability losses where they all stem from the loss in value of a debt or collapse of a fund. How one aggregates will depend upon the wording. Where there is event/occurrence wording, the question will be "What is the event to which the losses may be aggregated?" *Caudle v. Sharp* (1995) held that to be an event the common factor must be capable of creating legally relevant consequences—the event must be causative of the loss.

This raises the question of what is it that causes the loss. There is clear argument that each act of negligence causing liability causes the loss on the insurance policy, not the background to which the liability relates. *American Centennial Insurance Company v. Insco Limited* (1996) is an illustrative case and arises from the Savings & Loan collapse, which is often cited as a comparator for the current crisis. In that case, the reinsured claimed to be entitled to aggregate a number of losses on the basis that they all arose out of the same event: the collapse of a fund. However, the judge said that Insco's liability depended in each case upon the omissions of the directors, officers and auditors concerned. It was these acts or omissions, rather than the subsequent collapse of the fund, which rendered Insco liable. Arguably, an attempt to aggregate D&O losses, auditors' and other advisers' losses following a particular fund collapse may be difficult for similar reasons.

If the reinsurance aggregates on the basis of an "originating cause," the potential for aggregation is broader. Reinsureds may seek to aggregate on a very wide basis—perhaps even "subprime." This raises a further question of what would come within this identified cause. Many losses now hitting the markets (Northern Rock among them) are the result of the credit crunch or other market turmoil, rather than resulting directly from the loss in value of subprime collateral.

These differences in aggregation wording will cause difficulties where policies are not "back-to-back." If a reinsurer aggregates losses inwards on an originating cause basis and has retrocessional cover which aggregates on a per event basis, there may be a gap in cover.

(iii) Allocation

The reinsured must show that the losses sustained have occurred during the period of reinsurance. This is of particular relevance to "Losses Occurring During" policies. If it is established that poor decisions were taken over a period of time leading to subprime losses, it may be difficult to say which decisions/actions caused which losses. This is particularly so where underlying

allegations are of an ongoing level of misleading advice or investment policy. The courts may take the practical approach to allocation, (they have previously allocated equally between years in the case of *MMI v. Sea Insurance Co.* (1988)), and establishing a timeline will be important.

A different kind of allocation—between losses within a global settlement—may also be problematic. Following *Lumbermens Mutual Casualty Co v. Bovis Lend Lease* (2004), a global settlement of liabilities which does not show how individual losses related to the settlement sum may not be passed on to the reinsurers as individual liability will not have been clearly established. That case also held that in this situation, the reinsured could not return to the settlement and prove which sum related to which loss. Although this case has been criticized, it is currently the law. Settlements must, as far as possible, show detailed loss allocation.

(iv) Follow the Settlements

Reinsurers may also wish to look at their follow settlements provisions. Absent any follow settlement wording, and in some cases, even where a clause is in place, the reinsured must prove their loss. Where there is a follow settlements clause which does not require the reinsured to prove the loss, it must still show that the loss was settled in an honest and businesslike fashion and within the terms of the reinsurance contract. If insurers in the U.S. yield to any pressure to pay losses which fall outside policy terms, or do not take obvious defences, they may face difficulty in collecting from reinsurers.

It is difficult accurately to predict whether these will cause problems for the market. One thing that can be said is that there are constant developments in the subprime and credit crunch crisis; it is important to follow these developments carefully and to assess their potential impact.

(v) Non-disclosure?

The threat of non-disclosure is ever present, but very speculative at this stage as far as subprime losses are concerned. As is well known, a material non-disclosure or misrepresentation will make a policy voidable. The reinsurer must show that if this information had been disclosed, a prudent reinsurer would have wished to take this information into consideration as part of this evaluation of the risk and that the actual reinsurer would have altered the terms of business or refused to write the risk. It may be difficult to convince a tribunal that the reinsurer would have rated the business differently or rejected it when the rest of the financial world thought these securitized structures were working well. It is important, however, to consider what the reinsured knew and when. If the reinsured had concerns at placement, then this should potentially have been disclosed.

Conclusion

Subprime losses are continuing to hit the markets hard. The liabilities relating to the losses likewise continue to develop. This presents (re)insurers with a fluid scenario, difficult to assess or to predict. Certainly the reinsurance market will suffer losses, but only time will tell the full extent. Meanwhile, a consideration of the potential legal issues, we hope, assists in meeting the challenge presented by the subprime crisis.

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* * *

Costa Rica to Allow Private Insurers to Set Up Shop

The most significant development in Costa Rican insurance and reinsurance law in many years is the elimination of the current state monopoly on insurance in the context of the Central American Free Trade Agreement (CAFTA).

CAFTA contains a series of clauses regarding the Costa Rican insurance market. These commitments require Costa Rica to allow competition in insurance services that have been agreed to in the framework of chapter 12 (Financial Services) of CAFTA. They are further specified through a special Annex named "Specific Commitments of Costa Rica on Insurance Services" (hereinafter "Insurance Annex"). These special obligations can be categorized into general commitments and specific commitments; the first group is contained in chapter 12, while the second group is provided for in the Insurance Annex.

The General Commitments assumed by the parties are national treatment, most favored nation treatment and market access. "National" and "Most Favored Nation" treatment stipulate that investors from the other CAFTA countries be treated no worse than local ("National") investors or investors from any third-party ("Most Favored") nation. The "Market Access" clause prohibits exclusionary practices or quotas. These three concepts can be summarized as commitments to "level the playing field."

The text of the Insurance Annex establishes a mechanism through which the opening of the Costa Rican insurance market was to be achieved in an organized, programmed and gradual manner. However, since the approval of CAFTA has required more time than expected, most of the dates contained in the Insurance Annex have come and gone. (CAFTA was approved in Costa Rica by popular referendum on October 7th, 2007.)

Section II indicates the obligation of Costa Rica to establish an "independent insurance regulatory authority" no later than January 1st, 2007. Under CAFTA, this regulatory authority is required to act consistently with the "Core Principles" of the "International Association of Insurance Supervisors." These standards will ensure that Costa Rican supervision is in line with the latest international "best practices."

Section III of the Insurance Annex contains the specific commitments detailed by type of activity and date of liberalization, according to two major categories: cross-border commitments and right of establishment.

Cross-Border Commitments

On the date CAFTA enters into force for Costa Rica, Costa Rica must allow a series of cross-border activities including:

a) **The purchase of insurance services abroad:** This means that persons situated in Costa Rica (regardless of nationality) and Costa Rican citizens can buy any insurance product abroad from foreign insurers, except for mandatory auto insurance and mandatory workers' compensation insurance. However, Costa Rica is not required to allow those foreign companies to "do business" or "solicitation" of insurance business in Costa Rica. The definitions of "doing business" or "solicitation" can be established by Costa Rica freely in its legislation, while respecting CAFTA commitments.

b) **Cross-border sale of certain inherently cross-border or international insurance services:** Costa Rica must allow providers of insurance services located in the territory of one Party to sell in the territory of the other Party, on a cross-border basis, the following insurance services:

1. **Insurance for the launching of space cargo (including satellite cargo), maritime shipping and commercial aviation.**
2. **Goods in international transit.**
3. **Reinsurance and retrocession.**
4. **Services necessary to support global accounts.** From the text of the Insurance Annex it is understood that a "global account" is not really a cross-border insurance contract per se. It is a (global) master policy signed between a foreign insurer and a foreign insured in a territory other than Costa Rica. It is assumed that it is a non-regulated contract in Costa Rica that will be regulated and interpreted in accordance with the laws of another country. The only contact with Costa Rica refers to the location of certain risks covered under the contract, which are generally in the country because a company related with the insured exists and is included in the coverage offered.
5. **Services auxiliary to insurance.** CAFTA defines services auxiliary to insurance as those provided by advisors and actuaries, as well as evaluation of risks and loss adjustment, among others.
6. **Intermediation services provided by brokers and agents outside Costa Rica,** only in reference to the cross-border services listed above.

Additional Cross-Border Commitments

Subsequently, the gradual opening process was to continue on July 1st, 2007, when Costa Rica was to allow the establishment of representative offices and the cross-border sale of the following services:

1. **Services auxiliary to insurance** ***for all the lines of insurance.***
2. **Intermediation services provided by brokers and agents outside of Costa Rica** ***for all lines of insurance.***
3. **Surplus lines**. Surplus lines refer to insurance that is not available in the local market. CAFTA defines surplus lines as those lines of insurance (products covering specific sets of risks with specific characteristics, features and services) which meet the following criteria: (1) lines of insurance other than those that INS provides as of the date CAFTA is signed; or lines of insurance that are substantially the same as such lines; and (2) that are sold, either (i) to customers with premiums in excess of US$10,000 per year, or (ii) to enterprises or (iii) to customers with a particular net worth or revenues of a particular size or number of employees. As of January 1st, 2008, surplus lines are defined as insurance coverage not available from an admitted company in the regular market."

Right of Establishment

As indicated, the other main category of specific commitments in the Insurance Annex refers to the right of establishment. As the next stage of the purported gradual opening of the area, the right of establishment means that Costa Rica is obligated to allow "insurance service providers of any Party on a non-discriminatory basis, to establish and effectively compete to directly supply consumer insurance services in its territory." At the latest on January 1st, 2008, any other insurance provider that meets Costa Rican legal requirements for the issuance of a license must be allowed to offer and sell all lines of insurance (except mandatory auto insurance and workers' compensation insurance). Finally, no later than January 1st, 2011 they must be able to offer and sell all lines with no exception.

Costa Rican law establishes, in detail, the requirements to obtain authorization to become an established provider of insurance services in the country. These requirements were enacted by the Costa Rican Congress on July 1, 2008 as part of the "Insurance Market Regulatory Act." The regulation is likely to be similar to international standards because Costa Rica has committed to adopting regulations that are consistent with the Core Principles of the International Association of Insurance Supervisors (IAIS). The "Insurance Market Regulatory Act" will come into force once it is published in the official newspaper, *La Gaeeta*.

CAFTA is expected to enter into force by October 1st, 2008. By then, Costa Rica would have had to deposit its instrument of ratification with the Organization of American States and, with respect to its CAFTA insurance commitments, publish the "Insurance Market Regulatory Act" in the official newspaper in order for it to enter into force.

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Committee and Chapter News

Recent Programs of the Committee on Central and East Europe

- On June 13, the CEE Committee, together with host Goodwin Procter's New York office, sponsored a lunchtime visit by Judith Gliniecki of Eversheds-Warsaw, a 14-year veteran of law practice in Poland and author of the *Warsaw Business Journal*'s column "Legal Eye," who discussed the legal, business, and investment climate in Poland. Sixteen people attended the program, including the commercial and legal officers of Poland's New York consulate.
- On May 23, DLA Piper's New York office hosted a roundtable discussion on the current business and legal environment in Russia. Approximately 60 people attended. Together with the CEE Committee, other co-sponsors included the U.S. Department of Commerce and the Russian Federation's New York Trade Representation.
- On March 4, the CEE Committee held a panel discussion, "The Rule of Law in Russia: Historical and Contemporary Perspectives," which was hosted by Flemming Zulack Williamson Zauderer LLP, New York City, and attended by approximately 40 people. A transcript of the discussion is at www.nysba.org/ilp (Committee Meeting Materials).

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London Chapter

The London chapter of the NYSBA held a "drop-in" event sponsored at Eversheds LLP in March with Marc Powers from the New York office of Baker & Hostetler. Marc talked about a number of high-profile white-collar fraud cases he'd be involved with, including those involving Eliot Spitzer, Conrad Black and Martha Stewart. A small but engaged audience included representation from UK regulator the Financial Services Authority. The London chapter hopes to run more of these drop-in events led by leading NYSBA members visiting the UK. If you are in the UK and are recognized as an authority on a legal topic of general interest, we'd be delighted to hear from you.

Committee on the United Nations and Other International Organizations

On May 21, 2008, the Committee on the United Nations and Other International Organizations of the ILPS held a luncheon at the United Nations attended by members of the Section and guests, including students from the Princeton University International Relations Council, one of whose members is Carolyn Edelstein, the granddaughter of Section founder Lauren D. Rachlin.

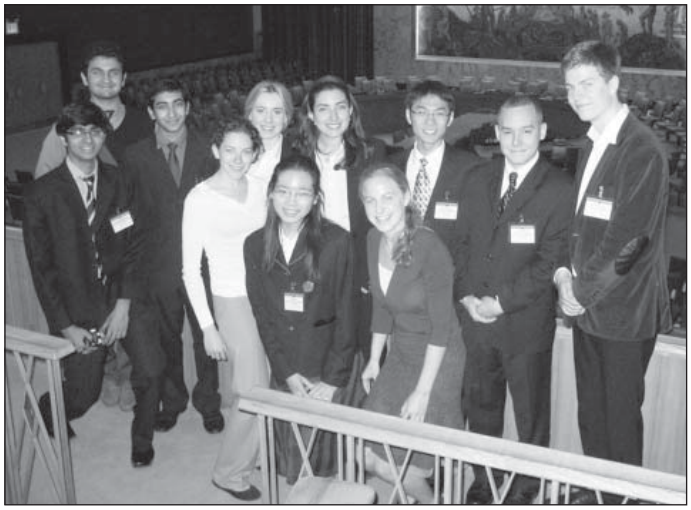
The luncheon was organized and hosted by the Committee's co-chairs Edward C. Mattes, Jr. and Jeffery C. Chancas. Members of the Princeton University International Relations Council were invited at the suggestion of Lauren Rachlin.

The luncheon speaker was Mr. Amir Dossal, Executive Director of the United Nations Office for Partnerships, who presented "How Ted Turner's Philanthropy Gave Rise to a New Era in United Nations Partnerships."

The luncheon afforded the Princeton students the opportunity for an up-close and personal exchange with

both a senior member of the UN Secretariat and members of the Section while simultaneously affording all in attendance the opportunity to learn about a fascinating aspect of the UN's work.

After the luncheon the students and some of the attorneys went on a personal tour of the UN conducted by a member of Mr. Dossal's staff.



New International Law and Practice Section Members

Dara Calvo Acusar
John Perry Adams
Oby Agu
Gurudev Das Allin
Roncevert David Almond
Sharon L. Ames
Davina A. Amiri
Natasha Holly Applewhite
Salvatore Arena
Andre Brickmann Areno
Robert D. Arenstein
Vivian Arias
Cortney Arnold
Troels Askerud
Michael S. Assouline
Jin Yung Bae
Sonia J. Baez
Patricia Ballner
Nilo Jorge Barredo
Annette Joy Bertulfo
Caroline Berube
Laura M. Bingham
Michael J. Biot
James Michael Black
Clifford Douglas Bloomfield
Ira Evan Blumenthal
Anne P. Bodley
Alicia Ann Bove
Gil Breiman
Annemarie Artemis Brennan
Kira Natalia Brereton
Jennifer K. Brooks
Daniel Steven Brower
Nicoleta Burlacu
Susanne Miriam Burstein
Mark Alan Calhoun
Paulo S. C. Calixto
Bayo Ayaba Callender
Brian Cameron
Carmen Candia
Pascal Louis Cardonnel
Stuart S. Carruthers
Marlene Fernanda Castillo
Ness Chakir
Janis Jin Chang
Sujata Chaudhri
Zainab A. Chaudhry
Yaffa R. Cheslow
Juan Pablo Chevallier-Boutell
Gurjit Kaur Chima
Yunseong Chun
Eunice Ryu Chung
Jack Wing Chee Chung
Elisabetta Cicigoi
Joya Cohen
Victoria T. Coleman
Andrew Collins
Daniel Mcgrayne Conaway
Venir Turla Cuyco
Joseph James Daniels
William J. David
Grant M. Dawson
Louis B.E. De Armas
Derek De Freitas
Jason Desiderio
Jeffrey Deutsch
Lauren Marie DiFilippo
Ihsan Dogramaci
Donald C. Dowling
Sharon M. Drew
Sandra DuBow
Andres Duran-Hareau
Obumneme K. Egwuatu
John C. Eichenberger
Aref Oussama El-Aref
Mark Elton
Bryan A. Elwood
Maria Angelica Espinosa
Jessica Ettman
Jack Evans
Ryan D. Fahey
Tammy Fastman
Valery C. Federici
Kerry Brian Flowers
Nuri G. Frame
Mildred Aleda Frishman
Maryellen Fullerton
Erik Christian Furu
Scott Michael Fusaro
Neftali Garro
Kristen Marie Genovese
Claudia Gigler
Davin Z. Goldsztajn
Andre Osorio Gondinho
Jason M. Gordon
Szymon Gostynski
Francis Paul Greene
Christian Grim
Eric Paul Gros-Dubois
James Benjamin Gwynne
Thomas J. Hall
Sean Gregory Hanagan
Maebh Harding
Adrienne Harrison
Sarah Levine Hartley
Peter H. Harutunian
Mohamed Moustafa Hassan
Mohamed Ramdan Hassanien
Elie R. Haymovitz
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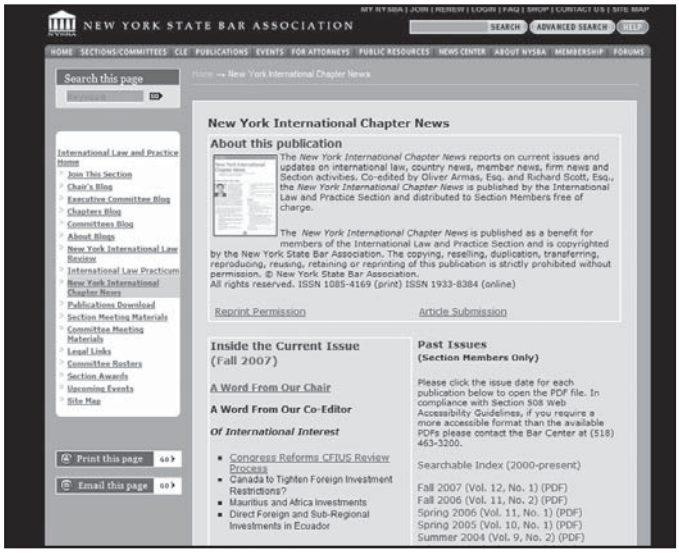

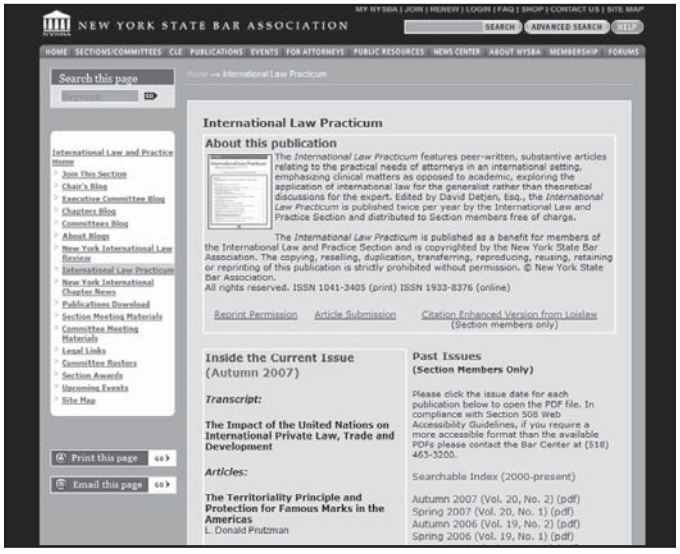

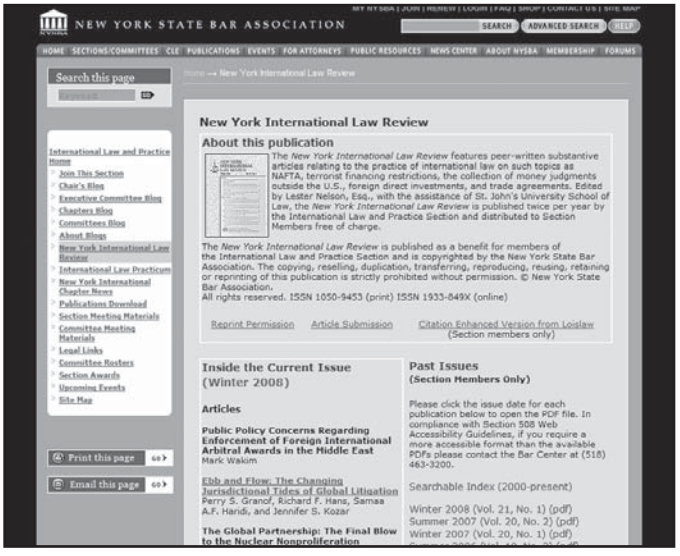

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