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New York International Chapter News

A publication of the International Law and Practice Section
of the New York State Bar Association

A Word From Our Chair

Our Section is truly special. We are comprised of some of the top lawyers from around the world, who really care about expanding the rule of law. While it's hard to imagine how we can improve our Section—one which consistently puts on quality CLE programs and participates in important policy issues that affect the practice of law, not just in New York, but around the world—improve we must. And we will. In fact, we are already doing so. For example, this year we aggressively expanded our committees (we now have 37), adding Insurance and Reinsurance, International M&A, Natural Resources, International Pro Bono, Africa, Middle East, etc.

To each of our committees we also appointed new co-chairs. And with those appointments, we tried whenever possible to increase the diversity of our membership. Our new committee chairs include:

1. International Privacy: Audrey Davidson-Cunningham of TIAA-CREF and Lisa Sotto of Hunton & Williams;
2. International Arbitration and ADR: Nancy Thevenin of the ICC and Guillermo Aguilar Alvarez of Weil Gotshal;
3. International Litigation: John Fellas of Hughes Hubbard & Reed;
4. International M&A: Jose Fernandez of Latham & Watkins and Valarie Hing of Curtis Mallet-Prevost;
5. International T&E: Glenn Fox of Alston & Bird;
6. International Employment: Elizabeth Hook of Citigroup;
7. Inter-American: Alyssa Grikscheit of Goodwin Procter;
8. International Antitrust: Boris Kasten of Hengeler Mueller;
9. Africa: Kofi Appenteng of Thacher Proffitt;

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10. International Corporate Compliance: Rick Morris of Goldman Sachs;
11. Western Europe: Diana Newcombe of Eversheds;
12. Insurance and Reinsurance: Chiahua Pan of Cadwalader;
13. International Entertainment and Sports: Howard Robbins of Proskauer;
14. Central and Eastern Europe: Daniel Rothstein of Flemming Zulack; and
15. International Tax: Jim Shorter of Thacher Proffitt.

These exceptional lawyers will help us breathe new life into our committees. Already many of them are busy planning CLE events and also participating in our upcoming "Seasonal" meeting in Peru.

And what an exciting meeting Peru will be. There are over 50 firms from throughout Latin America involved in the planning of the program. With such diverse participation, the CLE panels in Peru will undoubtedly be among the best that our Section has ever experienced.

The social program for Peru will include a mix of wonderful art, history, music, food and scenery. From the seaside JW Marriott in Lima to the ancient city of Cuzco to Machu Picchu (one of the wonders of the world), our Section is in for a real treat. It will be hard to match our 2007 meeting.

For the remainder of 2007, we will focus on increasing our International Chapters. Moving ahead, our Section looks forward to having more vibrant committees and foreign chapters to help grow our membership and I, as Chair, look forward to doing what I can to help make these goals a reality.

Oliver J. Armas

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International Law Practicum
New York International Law Review

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***New York International Chapter News, International Law Practicum* and *New York International Law Review* Index**

For your convenience there are also searchable indexes in pdf format.

A Word From Our Co-Editor

It is my pleasure to bring to you the fall edition of the *Chapter News*, which was printed in anticipation of our Section's Fall Meeting in Peru. In this edition, we have tried to develop a theme to the articles of international interest; thus we asked members to provide us updates on their domestic climates for foreign direct investment. The potential for national security concerns to trump liberalization efforts has always been apparent in the context of trade in goods, but we are now seeing national security concerns impacting certain foreign investment. Contributions in regard to this topic describe the investment climate in countries as diverse as Mauritius and Ecuador. Countries such as these exemplify domestic efforts to create an open and welcoming environment for foreign investment. These efforts provide an interesting contrast to other countries, which are implementing, or considering implementing, more stringent controls on foreign investment under the guise of national security.

Although we have attempted to provide an impetus for debate in this edition, which we hope will elicit future contributions, we have simultaneously remained true to the nature of this newsletter, which is to provide a platform for members to share their ideas, their domestic legislative changes, and their firm news. In that regard, we are pleased to provide you with legislative updates from Argentina, China, Mexico and Chile. Further, we are grateful to Mr. Sher for providing us with an update on this year's Willem C. Vis Commercial Arbitration Moot.

As a member-driven publication, *Chapter News* is really an organic product whose content is dependent on the participation of the members of this Section. I want to thank all those who have contributed to this edition, and encourage each one of you to reach out to your fellow members by participating in the next edition of the *Chapter News*.

Richard A. Scott

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Of International Interest

Congress Reforms CFIUS Review Process

Few can forget the intense political controversy that erupted last year when Dubai Ports World (DPW)—a company owned and controlled by the Government of Dubai—obtained the rights to manage several major U.S. container ports after receiving regulatory approval from the Committee on Foreign Investment in the United States (CFIUS). The hostile reaction from Congress quickly pressured DPW to sell these assets to a U.S. company, American International Group (AIG). What followed was an extended period marked by congressional hearings and legislative initiatives to restrict foreign investment in the United States in one way or another.

In the post-Dubai Ports environment, foreign firms seeking to acquire U.S. companies or assets have had to cope with the increased risk that their acquisition could be frustrated by political roadblocks—including economic protectionist opposition—and the concern that CFIUS approval may not always provide reliable protection from divestiture for national security reasons.

Fortunately, Congress and the Administration have now taken steps to address these concerns through the enactment of the Foreign Investment and National Security Act of 2007,[1] which becomes effective on October 24, 2007. This new legislation deserves high marks for striking the critical balance between maintaining open U.S. capital markets and protecting national security.

Significantly, because the new law codifies the CFIUS review process, the system now has "buy-in" from Congress, which should mean that CFIUS-approved deals will be less susceptible to political attacks in the future. At the same time, CFIUS is increasingly attaching conditions to regulatory approvals, and seems poised to self-initiate reviews of unreported transactions where it detects potential national security concerns. With these new considerations in mind, foreign investors will need to formulate a CFIUS strategy that accounts for the national security sensitivity of the particular transaction and the practical need to obtain a "safe harbor" from future government interference.

Background on the CFIUS Review Process

In 1988, in response to concerns about the "Japanese invasion" and the possible effects of foreign investment on U.S. national security, Congress enacted the Exon-Florio amendment to the Defense Production Act.[2] This law authorizes the President to investigate the national security impact of mergers, acquisitions, and takeovers that result in foreign control over a U.S. company or U.S. assets. The law also authorizes the President to block proposed transactions and to seek divestiture of completed transactions for national security reasons.

CFIUS is the federal inter-agency body charged with administering the Exon-Florio Law.[3] CFIUS is chaired by the Treasury Department and includes members from six Administration departments and six White House agencies.

Under the process, parties to a proposed transaction can file a voluntary notification with CFIUS in order to obtain a "safe harbor" from future divestiture for national security reasons. According to the Treasury Department, there have been more than 1,700 CFIUS notifications since 1988 and the numbers are clearly on the rise.[4] CFIUS also has the authority to self-initiate reviews, although in practice it will "request" a voluntary notification in situations where it believes that closer examination is warranted.

The process provides for a 30-day review period, which often leads to CFIUS approval without further investigation. In more complex cases, the 30-day review is followed by a 45-day investigation, which culminates in a formal recommendation to the President, followed by a 15-day window for the President to approve or reject the proposed transaction on national security grounds.[5]

Although the withdrawal of applications is common, and deals are sometimes canceled because of insurmountable national security-related concerns, there has been only one instance where the President formally forced divestiture pursuant to the Exon-Florio Law.[6] In the vast majority of cases, CFIUS approval is granted, although the practice of the current Administration is to sometimes require special undertakings to effectively mitigate potential national security concerns.

Legislative Reform in the Wake of the Dubai Ports Controversy

The Dubai Ports controversy ushered in a period of intense legislative focus on the CFIUS process and ignited economic protectionist elements within the Congress. In 2006, more than 20 bills restricting foreign investment were introduced, proposing such measures as:

- Expanding the reach of CFIUS to cover "economic security," as well as broad notions of "critical infrastructure";
- Giving Congress the power to review and overturn a CFIUS decision through a resolution of disapproval;

- Extending the time periods for CFIUS reviews; and
- Making the Defense Department—not Treasury—the CFIUS chair.

However, over the year that followed, Congress's approach to foreign investment and national security issues gradually moderated. This likely occurred because (1) the Administration made impressive efforts to better communicate with lawmakers regarding the CFIUS process and the circumstances of specific cases, and (2) Members of Congress developed an increased awareness of the importance of foreign investment in the United States for American jobs and economic growth. For example, attention focused on the fact that majority-owned U.S. affiliates of foreign companies:

- Employed more than 5.1 million workers (33 percent in the manufacturing sector) and indirectly supported an additional 4.6 million jobs;
- Provided an average annual compensation of $63,428;
- Accounted for 5.7 percent of U.S. economic output, as well as 10 percent of all plant and equipment in the United States;
- Exported $153.9 billion worth of goods, or 19 percent of all U.S. exports in goods; and
- Spent nearly $30 billion on research and development, or roughly 13 percent of total U.S. R&D.[7]

The enacted version of the Foreign Investment and National Security Act of 2007 is really more a codification of the pre-existing system than a sweeping "reform." To summarize, the new legislation includes the following basic elements:

- **Codifies Role of CFIUS, with Treasury Department as Chair.** Authorizes CFIUS to carry out its existing functions, confirms the Secretary of the Treasury as the CFIUS Chair, and names six members (the Secretaries of Homeland Security, Commerce, Defense, State, and Energy, and the Attorney General) and two agencies in an *ex officio* capacity (the Secretary of Labor and the Director of National Intelligence). The law also preserves authority for the President to designate additional members, including the heads of other White House agencies.
- **Guidance on Transactions Raising National Security Concerns.** Maintains existing focus on national security—not economic security—and defines the term "critical infrastructure" to apply only to systems or assets "so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on national security."
- **Lead Agencies and Mitigation Agreements.** Provides that the Treasury Department will select a "Lead Agency" for each transaction (depending upon its content), which shall be responsible for negotiating mitigation agreements on behalf of CFIUS and will be charged with monitoring and enforcing such agreements.
- **Senior-Level Involvement and Accountability.** Requires the involvement of senior-level officials in certifications provided to Congress and decisions not to investigate covered transactions involving foreign government ownership or certain transactions involving critical infrastructure. In addition, the law states that a Senate-confirmed official needs to sign off on all CFIUS approvals. These measures are designed to enhance CFIUS accountability.
- **Maintains Time Frames Under Existing Law.** The decision to leave existing time frames in place will have the effect of (1) maintaining harmony with the parallel Hart-Scott-Rodino (HSR) premerger notification period (which will avoid discrimination against foreign investors in the form of additional regulatory delays) and (2) minimizing the opportunity for politicization of sensitive transactions.
- **Congressional Oversight.** Provides for post-decisional reports and annual reports to Congress, as well as congressional briefings upon request. Significantly, the law does not require congressional briefings during the pendency of individual CFIUS reviews.

The final step in the reform process will be the promulgation of implementing regulations. This will provide the Administration with an important opportunity to issue clear guidance on the negotiation and enforcement of "mitigation agreements," i.e., the specific commitments or measures sometimes required by the Administration in order to mitigate national security concerns and clear the way for CFIUS approval. The prevalence of mitigation agreements—e.g., divestiture of sensitive assets prior to closing, data security agreements, removal of foreigners from Boards of Directors, etc.—is clearly on the rise (16 in the past year alone), and foreign investors are demanding greater transparency and predictability in this important area.

Conclusion

One of the key reasons why the Dubai Ports World acquisition sparked such congressional outrage was that the CFIUS process was relatively obscure and lawmakers did not have a high level of confidence in the system's effectiveness. Following a period of detailed congressional scrutiny and analysis, a prevailing view ultimately emerged that the CFIUS process is in fact quite effective at satisfying the dual goals of facilitating foreign investment in the United States while safeguarding U.S. national security.

Because the new law essentially codifies the CFIUS review process, the system now has “buy-in” from Congress. This should mean that if a transaction gets approved pursuant to the CFIUS process, the deal should be less susceptible to political criticism.

Of course, CFIUS notifications are still voluntary, and 95 percent of all foreign investments in U.S. companies never touch the CFIUS process.[8] But CFIUS seems poised to self-initiate reviews of unreported transactions where it detects potential national security concerns. The new regulatory environment—characterized by heightening CFIUS vigilance coupled with a growing reliance on mitigation agreements as a condition for CFIUS approval—will require foreign firms to reassess their U.S. investment strategy, taking into account the national security sensitivity of particular transactions and the practical need to obtain a “safe harbor” from future government interference.

Jack Alan Levy
DLA Piper
Washington, D.C.

Endnotes

1. Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, 121 Sta. 246 (July 26, 2007).
2. 50 U.S.C. app. § 2170.
3. *See* Interim Directive Regarding Disposition of Certain Mergers, Acquisitions, and Takeovers, 53 Fed. Reg. 43,999 (Oct. 26, 1988).
4. There were 113 notifications in 2006 and approximately 70 notifications in the first half of 2007.
5. *See generally* 31 C.F.R. Part 800 (Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons).
6. In 1990, President Bush ordered the China National Aero-Technology Import and Export Corporation to divest all of its interest in MAMCO Manufacturing Inc., a Seattle-based company that produced aircraft parts.
7. *See* <http://www.treasury.gov/press/releases/hp395.htm>.
8. *See id.*

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Canada to Tighten Foreign Investment Restrictions?

Opposition to foreign investment has been mounting in Canada of late, likely in reaction to a spate of foreign takeovers of prominent Canadian firms over the last two years, some in industries like mining, where Canadians have been traditional leaders and national pride is invoked. A recent government focus group reported uniform resistance to more foreign ownership of Canadian telecommunications companies; polling conducted for news organizations has reflected serious concern among the majority about levels of foreign ownership; and opposition Members of Parliament have been calling for urgent government action to halt the sellout of Canadian corporations. Some blue-chip chief executives, even, have called for special measures to protect “sensitive” sectors of the Canadian economy.

As matters currently stand, both the establishment of a new business in Canada by non-Canadians and the acquisition of control of an operating Canadian business by non-Canadians trigger requirements under the Investment Canada Act, the statute designed to ensure that foreign investment is effectively monitored by the government and that certain types of foreign investment are screened to certify that they provide a net benefit to the country. In most cases, a foreign investor setting up a new business in Canada need file only a short notice for information purposes only; in a culturally sensitive business such as publishing, however, that notice can be made subject to a full review after filing.

For the direct or indirect purchase of control of an active Canadian business, a foreign investor faces premerger review if the Canadian business has assets above specified thresholds, which vary and take into account whether a potential investor is from a World Trade Organization member country. Lower thresholds apply to require reviews in acquisitions of control over Canadian businesses involved in uranium production, financial services, transportation services or the cultural sector.

If an investment is reviewable, the foreign investor must generally file an application providing prescribed information about the investor and the Canadian business prior to completion of the transaction, with some exceptions. The information is treated as confidential. The application must incorporate a description of the investor’s plans for the Canadian business, and will be assessed on such criteria as the investment’s effect on employment, resource processing, the utilization of Canadian-produced inputs, and on exports from the country; the participation of Canadians in the business and its sector; the investment’s effect on competition and on productivity, industrial efficiency, technological development and innovation in Canada; and its compatibility with national industrial, economic and cultural policies.

The government’s review process is itself then subject to time limits that are enforced by provisions that deem the investment to be of net benefit to Canada in the absence of timely ministerial action. If official objections are raised within the prescribed time, the applicant can make representations and submit undertakings to seek to allay the government’s concerns and go forward. Ultimately, the government has authority to halt the investment or require the relinquishment of control over the Canadian business if the transaction was implemented without approval.

For certain special business sectors, restrictions on foreign investment apply, either under the mentioned review process or by reason of limits imposed under other statutes. These typically apply in culturally sensitive areas like publishing, broadcasting and telecommunications and also certain types of financial services.

The recent outcry for stronger foreign investment controls has run counter to the Conservative government's inclinations. The Minister of Industry had considered relaxing foreign ownership restrictions in the telecommunications sector, and the Prime Minister has rejected calls to place a moratorium on foreign acquisitions to permit a change in the rules: "I don't think players who are involved in takeovers or the subject of takeovers can expect the government to change the rules in midstream," he said, claiming it "would be a disaster" to "micromanage international investment flows."

Nonetheless, in a brief statement in the recent federal budget, the government promised to establish an independent study group to examine foreign takeovers and report in time for the 2008 budget. Finance Minister Jim Flaherty has said that the current "net benefit test" lacks sufficient definition, and when asked about the need for increased protection, he pointed to foreign, state-owned firms that may be beholden to another government's agenda in their search for acquisitions. The government has pledged that its review will probe concerns that the domestic corporate sector is being "hollowed out" by foreign interests.

Although Canada now appears willing to re-visit its current review regime, in this context it is important to note that the federal government has not blocked any foreign takeovers since the Investment Canada Act was enacted, although it has extracted concessions on job security and other matters.

Clayton Caverly
Fraser Milner Casgrain LLP
Toronto, Canada

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Mauritius and Africa Investments

Mauritius, a politically stable island that is strategically located in the southern Indian Ocean region to the east of Madagascar, has built a strong international reputation as a well regulated, user-friendly financial services center for conducting a host of offshore business activities and for efficient international tax planning.

Mauritius became a republic in 1992 and comprises four islands: Mauritius, Rodrigues, Saint Brandon, and Agalega. The island of Mauritius, with the exception of its coral reefs and beaches, is 710 square miles (1,865 sq. km.) of volcanic land origin. The other islands comprise another 67 square miles (175 sq. km.) of land area. About 90% of the cultivated land area is devoted to sugar cane.

The island of Mauritius, with a population of 1.2 million, offers a substantial university-educated workforce. The government is successfully encouraging the introduction of external financial institutions to stimulate investment and diversify the economy. Mauritius now has more than 30,000 global business company (GBC) registrations and 460 registered global funds with a Net Asset Value in excess of US$38.0 billion.

The Mauritian currency is the rupee (MR). Exchange controls were dismantled in stages between 1984 and 1994. Currently (2007) US$1 is equivalent to approximately MR30. Investors are still required to demonstrate the source of funds to be repatriated and must be up-to-date with local taxation.

Mauritius is a member of the World Trade Organization, the Common Market for Eastern and Southern Africa (COMESA) and the Southern African Development Community (SADC). It has the effective commercial and legal infrastructure required to support the development of a global business network. Mauritius is also party to a number of double taxation agreements (DTAs).

The jurisdiction is increasingly being favored by English- and French-speaking professionals and investors worldwide due to its highly developed business and infrastructural framework, pool of qualified and experienced professionals and confidentiality provisions enshrined in its modern and innovative legislation.

The island has transformed itself into among the best offshore platforms across Africa with the enactment of new legislation such as the modern Securities Act 2005 (in line with the IOSCO and OECD principles), Insurance Act 2005, and Business Facilitation Act 2005.

I. Mauritius's Legal System

Mauritius's legal system is a mixture of English Common Law and French Civil Law. Company and procedural law is based on English law. Substantive law is, in the main, modeled on the Napoleonic code. The Supreme Court of Mauritius is the highest court in the Republic. Final appeal remains to the Privy Council in England.

The court system consists of a Supreme Court (among others it can exercise jurisdiction as appellate court, court of first instance, court of civil/criminal appeal, etc.), Intermediate Court (civil and criminal division), industrial court, district courts, and the bankruptcy division of the Supreme Court.

A. Mauritius's Lawyers

The profession is regulated by the Law Practitioners Act 1984 and the Code of Ethics, inspired by the British legal system. The legal profession is divided into three branches: barristers, solicitors and notaries. Most of the barristers (having unlimited rights of audience) have either been called to the bar of England or completed their bar exams locally, whereas solicitors (limited rights of audience) can practice if they have passed the local solicitor finals only. Fairly recently, the legal profession has opened up new opportunities for foreign law firms to operate their corporate law African branches in the country. New policies are being considered to allow foreign lawyers to become law firm partnerships with Mauritian lawyers, in addition to further amendments to the Law Practitioners Act, which would enhance facilitation of a foreign presence.

II. Mauritius and Offshore Taxation

To create a more competitive and attractive taxation and business environment, the government of Mauritius has decided to enact a series of changes that will see income and corporate taxation slashed to just 15%.

The tax cuts are being introduced as part of the Mauritian government's two-phase approach to increasing Foreign Direct Investment, encouraging the inward migration of wealthy expatriates, reducing local unemployment, reducing the tax burden for lower-income families and lowering the nation's public debt.

The first phase of the government's approach is related to attracting high-wealth-and-income individuals to reside, purchase property and pay tax in Mauritius. Such individuals can now buy real estate over a certain value and automatically receive residency and as such, will be taxed at a flat rate of just 15% on income remitted to the nation from 2009, making Mauritius an interesting location for those seeking to reduce their overall personal taxation burden. As part of this phase, the government is also giving higher exemptions to lower-income Mauritian families with dependents to enable them to achieve a higher standard of living.

The second phase is related to the attraction of international business and foreign direct investment, which the government is hoping will boost the economy and create employment. Both the 2006 Finance Act and the Business Facilitation (Miscellaneous Provisions) Act have been approved and these Acts will implement a flat tax rate of just 15% implemented across the board for both income and corporate taxpayers between 2009 and 2012. There are no exchange controls, and Mauritius has entered into a growing number of Investment Promotion and Protection Agreements (IPPA) with several countries.

In addition, as mentioned, in an effort to become one of the most attractive nations taxation-wise in the world for international business, Mauritius is slashing corporate taxes to just 15% across the board. The implementation schedule, set to last until between 2009 and 2012, is dependent on the nature of the business and the license type companies have.

III. Mauritius and Offshore Global Business

Basically, all offshore business matters are strongly regulated by the Mauritius Financial Services Commission. There are two types of offshore business licenses; either a global business license 1 or 2.

A. Trust and Corporate Entities under Mauritian Law

With respect to setting up a trust, companies can be incorporated in Mauritius with either a Category 1 Global Business Licence (GBL1), formerly the Offshore Company, or a Category 2 Global Business Licence (GBL2), formerly the International Company.

A GBL1 can benefit from a DTA, and is taxed on its income at the rate of 15%. Thus, a GBL1 can deduct foreign taxes paid, up to the amount of tax due in Mauritius. In the absence of proof, the amount of foreign tax paid is presumed to be 90% (80% as from 1 July 2003) of the Mauritius tax. There is no capital gains tax, nor any withholding tax on distributed dividends and interest paid to non-residents. A GBL2 is not subject to any taxation.

Non-resident trusts are exempt from any taxation, as are their beneficiaries. Resident trusts are taxed at the rate of 15% on their chargeable income and they can also benefit from a DTA; a withholding tax of 15% is levied on their distributions.

B. The New Securities Act 2005 and Capital Markets

The main purpose of the Securities Act 2005 is to ensure a fair, efficient and transparent securities market and, most importantly, to strike an appropriate balance between the protection of investors and the interests of the securities market.

The Act, which replaces the Stock Exchange Act 1988, draws on modern legislation in analogous jurisdictions and underpins the Government's intention to expand financial services in Mauritius while assuring appropriate regulatory and supervisory standards, recognizing the ongoing development of the Mauritian financial sector and its continuing integration into the world economy.

The main features of the Act are to better regulate disclosure of information, protect investors and the making of takeovers, modernize terms such as investment dealers/advisers, provide a uniform framework for pooling of funds such as Collective Investment Schemes, and provide for administrative penalties for market abuses such as insider dealing, disgorgement, market rigging.

IV. Mauritius and Transshipment

Mauritius is strategically located and is the natural gateway to Eastern and Southern Africa. Being on a major sea route, Mauritius is serving as a bridge between Asia and Africa. Asia is 9 days away and Eastern Africa 5 days. Mauritius is beginning to capitalize on this strategic location and is acting as a transshipment base for cargo destined for Eastern and Southern African countries.

The Mauritian government has a strong commitment to developing into a leading seafood hub for the Indian Ocean and is currently undergoing a major study and development with the Commonwealth Secretariat.

V. Mauritius's Banking and Anti-Money Laundering Efforts

The Republic of Mauritius has joined in the efforts of the international community to combat money laundering and the financing of terrorism. Mauritius has adhered to the forty Recommendations of the Financial Action Task Force (FATF) and to the Nine Special Terrorist Financing Recommendations. Further, Mauritius has committed itself to the United Nations Minimum Performance Standards agreed to at the Global Programme Against Money Laundering Plenary held in the Cayman Islands in October 2000.

A. Existing Laws Consist of:

1. The Financial Intelligence and Anti-Money Laundering Act 2002 (FIAMLA) and subsequent regulations.
2. The Prevention of Terrorism Act 2002 and the Convention for the Suppression of the Financing of Terrorism Act 2003.
3. The Prevention of Corruption Act 2002.

B. Entities Involved in This Regulation Include:

1. Supervision: The Bank of Mauritius (the Central Bank); the Financial Services Commission (regulatory body for the offshore sector).
2. Reporting: The Financial Intelligence Unit (FIU—a member of the EGMONT Group).
3. Enforcement: The Independent Commission Against Corruption (ICAC—created under the Prevention of Corruption Act 2002).

C. Obligations of Financial Institutions:

It is a criminal offense for financial institutions in Mauritius to fail to take measures to prevent their institutions, or the services their institutions offer, from being used to commit or to facilitate the commission of money laundering and terrorist financing.

VI. Conclusion

In the coming months, investors across India and Africa will see Mauritius as one of the leading offshore centers for those who want to take advantage of the tax benefits under the Mauritius DTAs and new financial products, such as collective investment schemes and hedge funds.

Mauritius, an island with a politically stable economy, state-of-the-art telecommunications and airlines, as well as yearly massive inflows of tourists coming to the best international hotels, a university-educated workforce and a well-developed legal profession, is opening its arms to the world to say, "The star and the key of the Indian Ocean has arrived!"

Mr. Naiken Gopalla
Careys & Wilson LLP
London, England

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Direct Foreign and Sub-Regional Investments in Ecuador

Ecuador is a country that is striving to provide an atmosphere hospitable to the free trade of goods and free flow of investment. From a regional, multilateral perspective, Ecuador is a member of the Andean Community (CAN), whose members include Venezuela, Colombia, Ecuador, Peru and Bolivia. In its domestic legal system, Ecuador has enacted Decision 291 ("Decision 291"), "The Common Regime for the Treatment of Foreign Capital," as well as "The Law for Promotion and Guarantee of Investments," (The "Law") in regard to the treatment of foreign investment. In addition, it is important to note that since March of 2000, Ecuador has "dollarized" its economy and has adopted the United States dollar as its currency.

Decision 291 and the Law define "Direct Foreign Investment" as contributions originating abroad from individuals or juristic persons to a corporate capital in freely convertible currency or tangible assets (including plants, new and refurbished machinery, new or refurbished goods, spare parts, raw materials and intermediate products). It also considers direct foreign investment as investments made in national currency originating from resources with the right to be forwarded abroad and also to be reinvested.

Both rules define investments, those that come from any country member of the CAN, as a "Sub-Regional Investment." Such investment is considered as made by a national investor (both types of investments are collectively referred to as "DFI, Sub-Regional or Neutral").

The Law for Promotion and Guarantee of Investments also considers as DFI, Sub-Regional or Neutral, any type of transfer of capital to Ecuador from abroad, made by individuals or juristic persons destined to the production of goods and services.

I must emphasize that DFI, Sub-Regional or Neutral, may be accomplished in every sector of the Ecuadorian economy without authorization from any official government agency under the same conditions as Ecuadorian individuals or juristic persons.

The transfer of capital previously mentioned can include the following:

1. Financial resources from freely convertible currency. It will also consider foreign investment made in local currency arising from resources with the right to be forwarded abroad and also to be reinvested;
2. Tangible assets such as industrial plants, new or refurbished machinery, new or refurbished equipment spare parts, gaskets and fillings, raw or processed materials;
3. Intangible technological contributions such as trademarks, industrial patterns, technical assistance, technical know-how, patented or not, supported by contracts duly registered before the Ministry of Exterior Commerce Industrialization and Fisheries.

Although DFI can be accomplished without authorization from the government, every DFI, Sub-Regional or Neutral, must be registered with the Ecuadorian Central Bank (Banco Central del Ecuador). This registration is a must and has to be perfected no later than 40 days after the registration of the investment, counted from the actual date the foreign investment was made. If the registration is done out of term, a fine equivalent to 0.25% of the investment's nominal value will be levied.

As we can acknowledge from the statements and rules previously mentioned, the declaration of DFI, Sub-Regional or Neutral, is required to comply with Decision 291, per Ecuadorian legislation. There are no limitations, because the investment carried out by any corporation from Colombia, Venezuela, Peru or Bolivia, in order to be declared as Sub-Regional or Neutral or as a Foreign Investment, can be made in any sector of the economy under the same conditions established for Ecuadorian individuals or juristic persons.

If the investment is made outside of the appointed countries of the CAN, the investment must be declared as "Direct Foreign Investment." As such, it is considered as a reinvestment of the capitalization of patrimonial accounts and dividends and also any accounts of reserve.

All Direct Foreign Investment, duly registered will enjoy the following guarantees:

1. Transfer out of Ecuador in freely converted currency of all dividend generated by the registered investment.
2. Free remission of any resource once the corporation has been liquidated, or the sale of shares, quotas, once taxes are paid.
3. The transfer and sale of shares or quotas from a Direct Foreign Investment to another Direct Foreign Investment, which must be registered in the Central Bank of Ecuador, according to the rules mentioned above.
4. Complete liberty to negotiate its Direct Foreign Investment registered within Ecuador.
5. Freedom to access the Ecuadorian financial system and the stock exchange.
6. Liberal access to the promotion and technical assistance, and similar systems, on the same conditions as Ecuadorian corporations.
7. Right of property, within the limitations of the Ecuadorian law.
8. Free exchange of currency.
9. Tax stability according to the Law.

Evelyn López de Sánchez
Corral Sánchez Abogados S.A.
Quito, Ecuador

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Mexico

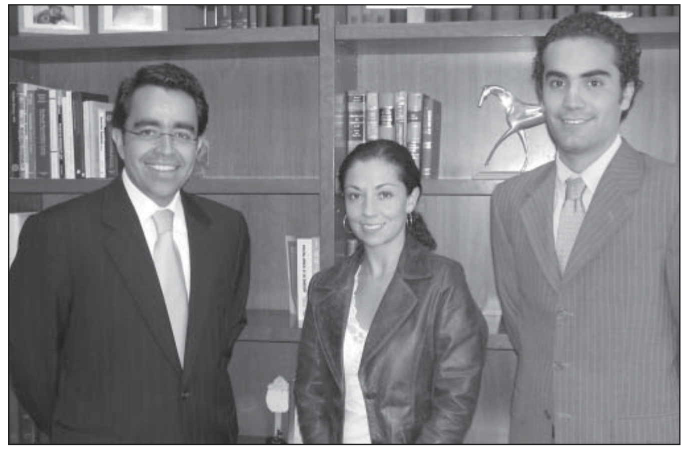
Recent Developments in Radio Broadcasting and Telecommunications Laws in Mexico

On April 11, 2006, in the heat of political campaigns leading to presidential elections, a major amendment to the Mexican Federal Telecommunications Law (*Ley Federal de Telecomunicaciones*; "*LFT*" for its acronym in Spanish) and to the Mexican Federal Radio and Television Law (*Ley Federal de Radio y Television*; "*LFRT*" for its acronym in Spanish) became effective (the "*Amendment*"). The Amendment obeyed the necessity of updating the LFRT (in force and effect since 1960) and the LFT (in force and effect since 1995), considering the technological advances that the radio broadcasting and telecommunications services have experienced and will continue to experience. The main items that were covered in the Amendment are the following:

(a) The Mexican Federal Telecommunications Commission (*Comisión Federal de Telecomunicaciones*; "*COFETEL*" for its acronym in Spanish) formally assumed the authority that was previously conferred to the Ministry of Communications and Transportation ("*SCT*" for its acronym in Spanish) in certain areas. This reflects the recommendations of the International Telecommunications Union and of the Organization for Economic Cooperation and Development, who, among others, propose a model of an entity that regulates both telecommunications and radio broadcasting services, in order to achieve an integral legal framework and plan for the use and exploitation of the radio-electric spectrum.

(b) As a result of the Amendment, the Board of COFETEL is now comprised of five Commissioners, designated by the President of the Republic. In this regard, it is important to mention that the Amendment originally provided for ratification of the President of the Republic's designation of the Commissioners by the Senate. Further, it provided that Commissioners in office upon the enactment of the Amendment were not allowed to be appointed for subsequent periods.

(c) The Amendment establishes a public bidding system to grant concessions for the use, enjoyment and exploitation of public domain goods and assets that are required to render radio broadcasting services. This system was already in place for telecommunications services. In order to participate in the public bidding process, the Amendment



Jorge Leon Orantes Baena, Paolo Morales Varqas and Pablo Laresgoiti Mtute

originally provided that the participants needed to file with their application a "copy of the request" for a favorable opinion with the Federal Competition Commission (*Comisión Federal de Competencia*; "*CFC*" for its acronym in Spanish). This requirement was aimed at avoiding the concentration of radio and television frequencies.

(d) Prior to the Amendment, the radio broadcasting concessions were granted for a 30-year term and the telecommunications concessions for a 20-year term. The Amendment reduced the 30-year term to 20 years and, therefore, the terms were unified. The right to renew was not modified or limited.

(e) The Amendment also modified the procedure for granting licenses under the LFRT for operation of Official, Cultural and Experimental stations, among others. The requirements became stricter, and permits may now be granted by SCT only for a 20-year term.

(f) The Amendment provided that subject to the compliance of the respective requirements, the concessionaires that render telecommunications services may be authorized to render restricted audio and/or television services, without necessarily having to carry out additional payments to the Mexican government.

(g) The Amendment also introduced certain changes to the Federal Registry of Telecommunications and established a benefit for independent producers of programming transmitted through the radio broadcasting systems. With respect to the latter, the Amendment basically provides that if the programming of broadcasting companies includes at least 20 percent of programs produced by independent producers, the broadcasting companies shall have the right to increase their advertisement time by 5 percent.

One of the items that was not addressed in the Amendment is the modification of the foreign investment regime for open radio and television services. Therefore, investment in such industries is generally reserved for Mexican investors, with certain limited exceptions (i.e., limited and non-voting shares). More foreign investment within certain areas of the telecommunications and radio broadcasting industries may eventually be permitted. If other countries were to take the first step in this regard, Mexico might consider providing reciprocal treatment.

One of the great positive results of the Amendment was the enactment in October 2006 of the *Acuerdo de Convergencia de Servicios Fijos de Telefonía Local y Televisión y/o Audio Restringidos Que Se Proporcionan a Través de Redes Públicas Alámbricas e Inalámbricas* (Convergence Agreement of Fixed Local Telephone Services and Restricted Television and/or Audio Services That Will Be Rendered Through Wire and Wireless Public Networks; the "*Convergence Resolution*"). The main purpose of the Convergence Resolution is to motivate the convergence and competition of telecommunications services and networks by allowing providers of restricted audio and/or television services, or of local telephone services, to provide restricted audio and/or television services or local telephone services, respectively, subject to the compliance of certain provisions. The Convergence Resolution also established simplified administrative and regulatory procedures that allow the rendering of local telephone and/or restricted audio and/or television services through public telecommunications networks.

In accordance with the Convergence Resolution, in June of this year COFETEL published the rules to implement the portability of geographical and non-geographical numbers (the "*Portability Rules*"). The Portability Rules will allow numeric portability, which allows users of fixed and mobile telephone services to keep their telephone numbers upon changing their telecommunications services supplier. This constitutes a favorable mechanism for both the telecommunications sector and the economy as a whole.

Not everything was positive with the Amendment. After the Amendment became effective, several Senators filed an unconstitutionality action against certain provisions of the Amendment before the Supreme Court of Justice of the Nation (*Suprema Corte de Justicia de la Nación*; "*SCJN*" for its acronym in Spanish), arguing that such provisions were unconstitutional. On June 7, 2007, the SCJN finally resolved the constitutionality of the Amendment, and declared unconstitutional certain provisions, as follows:

(a) The unconstitutionality of the ineligibility of the Commissioners, who integrated the Board of COFETEL when the Amendment became effective, to be appointed for subsequent periods. Said provision breaches the freedom-of-work guarantee.

(b) The unconstitutionality of the authority of the Senate of the Mexican Republic to object to the appointments of the Commissioners who integrate the Board of COFETEL. It limits the authority of the President of the Republic and breaches the principle of division of powers. Therefore, the Senate of the Republic no longer has said authority and the President of the Republic is authorized to independently carry out the aforementioned designations.

(c) The unconstitutionality of the automatic renewal of the radio broadcasting concessions without their need to participate in a public bidding process. The SCJN considered that the aforementioned provisions affect the economic regulation of the Nation and sovereignty over public domain assets.

(d) The requirement for participating in a public bidding process to obtain a concession does not consist in filing "a copy of the request" but rather in obtaining a "favorable opinion" from the CFC, in order to guarantee the constitutional prohibition of monopolies.

(e) The unconstitutionality of granting concessions through public auctions. The SCJN considered that it violated the equality and competence principles by privileging the economic aspects for their granting.

(f) The unconstitutionality of the broad discretional authorities of SCT for granting permits. The SCJN considered that such authorities generated legal uncertainty.

(g) The unconstitutionality of the possibility of a radio broadcasting concessionaire to request and receive authorization to render additional services through frequency bands. The SCJN considered that certain privileges were established in favor of radio broadcasting concessionaires over telecommunications concessionaires.

Although the resolution of the SCJN did declare certain provisions of the Amendment unconstitutional, other important provisions of the Amendment, as well as those issued thereunder, remain in full force and effect and serve the objective of updating the legal regime applicable to radio broadcasting and telecommunications services in Mexico. In fact, thanks to the Amendment and the Convergence Resolution, "triple play" and "numeral portability" are now a reality in Mexico, and developments as such are forcing our authorities to consider tendering the available radio-electric spectrum in order to promote competition and implement the convergence. This only follows the international tendencies aimed at facilitating unrestricted access to new communication technologies at low cost, fostering innovation, investment and easy access to new generation networks.

Jorge Leon Orantes Baena
Paolo Morales Varqas
Pablo Laresgoiti Mtute
Santamarina Y Steta, S.C.
Mexico City, Mexico

* * *

Argentina

Moderation of the Access System to the Foreign Exchange Market by Non-Residents

Argentina is sending positive signs to foreign investors upon moderating its system for non-residents to access the Foreign Exchange Market.

By means of Communiqué A-4662, the Central Bank of the Argentine Republic has provided that in regard to the repatriations of direct investments in local companies pertaining to the non-financial private sector, *non-residents* may freely transfer abroad any funds locally received for (i) the *sale of a direct investment*; (ii) the *final settlement of a direct investment*; (iii) the *capital reduction* resolved upon by the local company; or (iv) the *refund of capital contributions* by the local company. The former foreign exchange system had set a US$2 million cap per calendar month with respect to this type of transaction (a limit combined with that established for portfolio investment repatriations) and further, such former system did not permit the repatriation of funds pertaining to capital reductions or capital contribution refunds without the prior authorization of the Argentine Central Bank.

Under this new system (i) the investment must have remained in Argentina for at least 365 calendar days; (ii) the paying resident is allowed to make the transfer to the non-resident; (iii) supporting documentation of the transaction and such sworn statements as required by applicable regulations must be submitted (in certain cases an external auditor certificate is required); (iv) compliance with the foreign debt information system set forth in Communiqué A-3602 must be evidenced, as applicable; (v) compliance with the mandatory deposit of funds system (*encaje*) must be evidenced if such system would have been applicable to the inflow of such funds into Argentina; and (vi) the funds must have not been allocated to other investments in Argentina from payment to transfer thereof abroad.

The cap for portfolio investment repatriations and revenues obtained therefrom is still US$500,000 per calendar month. Likewise, the prior inflow of such funds into Argentina and the investment permanence in Argentina for at least 365 calendar days must be evidenced.

Argentine Energy Crisis

Argentina is facing a severe energy shortage that many experts blame on the lack of investments since the 2001-2002 economy crisis, despite sustained economic growth exceeding 8% over the last four years. Such lack of investments is said to be a logical consequence of government retention on oil and gas export proceeds destined to favor fiscal accounts and domestic supply through price-control mechanisms. Furthermore, Argentine oil production has been declining due to the exhaustion of fields compiled with the lack of new investments.

Additionally, Argentina is suffering a cold wave that on its independence day, July 9, saw Buenos Aires' first snowfall in almost 90 years.

At the same time, lower than expected rainfall has cut electricity output at hydro-electric dams. In midwinter, gas consumption has jumped as Argentines use the price-controlled fuel for heating their homes, while demand for electricity also rises, thus increasing the gas needs of power generators.

To ensure sufficient residential energy, President Nestor Kirchner has in the past month asked over 5,000 manufacturing companies to cut back on electricity use and applied gas restrictions of up to 40% to about 900 businesses. In addition, natural gas shipments to the neighboring country of Chile are suspended on a daily basis in order to ensure domestic supplies.

With regard to gasoline and gas-oil supply, the scenario is equally disturbing. Argentina has leaned on agricultural exports to balance fiscal surplus, taking advantage of the constant increase in prices of commodities. Agriculture production is almost exclusively dependant on gas-oil supply, and severe shortage thereof has in the past led to a general shortage of goods and tilted the trade balance toward importation.

This notwithstanding, it is clear that Argentina is not facing a long-term crisis. The energy crisis is far from a structural problem in terms of supply, as may be appreciated in Europe, but rather a consequence of poor administration and short-term government planning. The enhancement and promotion of a clear and stable regulatory and business law environment shall undoubtedly recuperate the level of investments necessary to heal the energy sector. Proof thereof has been the recent increase in the quotation of shares, between 3% and 6%, of all main companies involved in the energy industry.

Guillermo Malm Green
Brons & Salas
Buenos Aires, Argentina

* * *

Chile

Summary of Certain Provisions Contained in Law No. 20,190 (The "Capital Markets II Law" or "MKII")

Chile published Law No. 20,190 ("MKII") in the *Official Gazette* of June 5, 2007. MKII contains several provisions amending, among others, income, VAT and stamp tax regulations, the Banking Law, the Insurance Companies Law, the Securities Market Law, the Corporations Law, the Securities Deposit and Custody Law, the Mutual Funds Law and the Commerce Code.

This article summarizes the rules contained in MKII with respect to securities trading, derivative transactions and other securities market issues.

1. Banks

The Banking Law is amended to include, among others, the following provisions:

(a) The banks may carry out derivatives transactions, such as futures, options, swaps, forwards and other derivative instruments or contracts, in accordance with the rules and limitations set forth by the Central Bank of Chile.

(b) In the case of forced liquidation of a bank, the connected obligations arising from derivatives transactions carried out in accordance with (a) above may be compensated (set off) provided they arise from the same contract or the same negotiation, even if they are enforceable in different terms.

2. Issue of Bonds

Title XVI of the Securities Law, addressing the issue of bonds, is amended as follows:

Any amendments to the public deed regulating the issue of bonds, related to interest rates and/or adjustments and their payment schedule, to the amount and maturity of principal or to the original guarantees shall require the affirmative vote of the percentage set forth in the public deed, which may not be lower than 75%. In the absence of a determination in the public deed, a unanimous vote shall be required. Note that prior to this amendment, public deeds regulating the issue of bonds could only be modified on the above-mentioned matters by the unanimous vote of all bondholders.

3. Short-Term Debt

Short-term debt (i.e.. with a maturity of less than one year) may be issued only through promissory notes or other credit or investment securities.

The characteristics of the issue, whether through debt securities of a fixed amount or through debt security lines, must be recorded in a public deed executed by the representative of the issuer. Promissory notes, bills and other credit securities issued in a dematerialized manner shall be valid as such, even if they do not comply with the legal requirements applicable to their physical issue. Note that prior to this amendment, the public deed was not mandatory and there was no mention of dematerialized securities.

4. Securitization

The issue of securitized securities shall be exempt from stamp taxes in the same proportion represented, within the total underlying assets, by the documents which were subject to, or exempt from, stamp taxes upon their issue or execution.

5. Public Offering of Foreign Securities in Chile

Among other amendments, the Superintendency of Securities and Insurance ("SVS") is granted the discretion to exempt from the obligation to register foreign securities for their public offer in Chile when their issuer is under the supervision of entities with which the SVS has executed collaboration agreements permitting the SVS to obtain truthful, sufficient and opportune information on the foreign securities and their issuer.

6. Investment Funds

Investment Funds regulated by Law No. 18,815 are subject to the following new regulations:

(a) The term for the fund, which is to have at least 50 contributors, counted as of the date in which its internal regulations have been approved, is extended from 6 months to 1 year.

(b) These funds may not invest in (i) real estate located in Chile; (ii) quotas or rights in joint ownership of real estate or chattels; and (iii) real estate located abroad. This prohibition comes into force as of January 1, 2012.

(c) The internal regulations must be adapted to new requirements related to the funds' liquidity, indebtedness and diversification policies, matters allowing dissident participants to withdraw from the fund, the percentage of liens affecting the fund's assets and percentage of indebtedness (which was previously fixed by law in 50% of its patrimony), etc.

(d) Private investment funds must now invest in the same investments authorized for public investment funds, and in "any kind of securities, corporate rights, credit instruments and negotiable instruments."

7. Mutual Funds

(a) Mutual fund administrators are now under the obligation to execute a custodian agreement with a securities deposit entity regulated by Law No. 18,876, for the custody of the instruments representing the fund's investments. In the case of foreign securities, the SVS shall set forth the manner in which the deposit and custody must be made.

(b) The administration responsibility may not be delegated; however, the administrator may grant powers of attorney or execute agreements to engage external services to execute certain acts, business or activities necessary for its business. If such external services imply the administration of the fund's portfolio, the fees must be borne by the administrator and not by the fund.

(c) Cash of the funds must be maintained in one or more banking accounts, separate from the administrator's cash. Cash maintained on behalf of the fund may not be attached.

(d) Certain investment limits are modified.

(e) Letters (a) and (b) above are also applicable to administrators of foreign investment funds regulated by Law No. 18,657 and to administrators of investment funds ruled by Law No. 18,815.

8. Risk Capital Investment Funds

Tax incentives are established for participants in risk capital investment funds consisting basically in deeming the income received by such participants, arising from capital gains obtained by the fund in the sale of shares of closed stock corporations or stock companies not traded in the stock exchanges that comply with certain requirements, as non-taxable income.

Jimena Bronfman
Guerro, Olivos, Novoa u Errázuriz Ltda.
Santiago, Chile

* * *

China

China's Antitrust Law Draft Edges Closer to Promulgation

The Standing Committee of China People's Congress met in June 2007 to carry out its second reading of China's Anti-Monopoly Law Draft ("AML Draft"). This was the culmination of 12 months of redrafting since the first reading, and of 12 years of work since the draft was originally conceived.

While only limited structural changes were made to the 2006 draft, the 2007 draft contains several important amendments, which will impact foreign businesses in China.

Price Fixing

The 2006 draft generally categorized retail price fixing as a prohibited monopoly agreement. The 2007 draft, for the first time, distinguishes fixed and minimum prices, on one hand, and maximum resale prices, on the other. Minimum prices under international competition law pricing principles are inherently anti-competitive while maximum resale prices are often not anti-competitive, particularly if they serve to prevent a retailer with market power in an exclusive territory from raising retail prices.

The 2007 draft only specifically prohibits fixing or setting minimum retail prices. This development suggests that the setting of maximum retail prices by way of horizontal agreement will no longer be considered illegal per se and that a broader reasonableness test will be applied.

The 2007 draft, however, does not distinguish between independent distributors (whose need to set retail prices needs to be protected by competition law) and commercial agents who normally expect to resell products on behalf of a manufacturer at certain designated prices *(see Exhibit 1: Prohibited Monopoly Agreements)*.

Crisis Cartel

The 2006 draft has made crisis cartels one of the "safe harbors" to prohibited monopoly agreements. Crisis

Exhibit 1:
Prohibited Monopoly Agreements

Vertical Agreements—the following agreements between competing undertakings are prohibited:

- fixing or changing prices
- restricting production or sales
- allocating or sharing markets
- limiting the purchase of technology and equipment
- jointly boycotting transactions
- other monopoly agreements determined by the antitrust enforcement agency

Horizontal Agreements—the following agreements between an undertaking and its trading partners are prohibited:

- fixing the resale price
- limiting the minimum resale price
- other monopoly agreements determined by the antitrust enforcement agency

Exhibit 2:
Exceptions for Monopoly Agreements

(i) improve R&D

(ii) update product quality

(iii) improve efficiency

(iv) maintain public interest

(v) crisis cartel

(vi) foreign trade

(vii) other exceptions determined by the antitrust enforcement agency

cartels are defined as agreements to "cope with economic depression, to moderate serious decreases in sales volumes or distinct production surpluses." There is concern that the cartel crisis exception, without being made subject to conditions, will routinely be claimed by hard-core cartels as a convenient defense in such a way that it will undermine the purpose of the safe-harbor concept.

The 2007 draft narrows the circumstances under which crisis cartels can be applied by requiring undertakings to demonstrate that such agreements will not "substantially restrict competition in the relevant market" and can thereby enable consumers to "share the benefits provided by the agreements." This new requirement applies to those safe harbors listed in (i) to (v) set out in Clause 15 of the 2007 draft AML (*see Exhibit 2: Exceptions for Monopoly Agreements*).

Concentration Filing Threshold

The 2006 draft used a turnover threshold to determine whether statutory notification must be made to the antitrust enforcement authority for what is known as a "concentration" (e.g., acquisitions, mergers, etc). For example, a filing must be made if the worldwide sales volume of all the parties in the concentration for the preceding year exceeds RMB12 billion (approx. US$1.5 billion) and the sales volume for any one of the companies in the concentration in Mainland China for the preceding year exceeds RMB800 million (approx. US$1 million). The concentration will be rejected if it is deemed to (or is likely to) have the effect of eliminating or limiting competition.

This threshold was heavily debated during the second reading. The Standing Committee of the Congress was reportedly concerned that the threshold was too low and could limit the growth of State-owned business, which remains a priority on China's economic agenda. The members of the Standing Committee reportedly were not able to reach agreement on an appropriate threshold, and had therefore suggested that the threshold be removed from the 2007 draft and reserved for the State Council to determine in a separate merger filing guidance.

National Security Scrutiny

There are reported proposals from members of the Standing Committee to require acquisitions of domestic Chinese business by foreign capital to be subject to strict scrutiny to ensure the State's "economic safety." This arises in the context of rising disquiet within China that foreign companies command too much power in certain sectors of China's economy.

As a result, a new clause 29 has been added to the 2007 draft AML, which states that "where national security is concerned, acquisition of domestic undertakings by foreign capital or other concentrations involving foreign capital shall be examined according to the relevant regulations of the State."

Many commentators opine that national security may not be an appropriate standard for inclusion in a competition law. This clause may also give rise to questions under China's WTO obligations of non-discrimination and national treatment, given that competition policy with respect to concentrations should universally be applied to all transactions targeted by the AML, regardless of whether foreign capital is involved.

Penalties

The 2007 draft AML states that companies implementing prohibited monopoly agreements (*see Exhibit 1: Prohibited Monopoly Agreements*) or abusing their dominant market position (*see Exhibit 3: Abuse of Dominant Market Position*) will have their illegal gains confiscated by the antitrust enforcement agency, and be penalized up to 10% of their sales for the previous year.

Exhibit 3:
Abuse of Dominant Market Position

Undertakings are prohibited from engaging in the following behavior that amounts to abuse of dominant market position:

- predatory pricing
- refusal to trade
- exclusive trade
- tie-in clauses or unreasonable trading terms
- price discrimination

The 2007 draft, however, has reduced the penalty against unimplemented monopoly agreements from RMB2 million (approx US$0.25 million) to RMB0.2 million (approx US$25,000).

This low penalty amount, together with the removal from the 2007 draft of the antitrust enforcement authority's power to freeze a violating company's bank account, is likely to be insufficient to create any real deterrence. As a result, in some circumstances it may be profitable to engage in cartels, particularly in sectors monopolized by State-owned business.

In addition, the 2007 draft remains silent on criminal sanctions for directors and executives involved in cartels.

Antitrust Enforcement Agency

The 2006 draft provides that a new Anti-Monopoly Commission will be set up under the purview of the State Council, China's highest administrative body. The Commission will play only a coordination and advisory role, with routine responsibilities assumed by an enforcement agency to be designated by the State Council.

The creation of a single enforcement authority has been one of the most heavily debated issues in the preparation of the AML. The majority commentators are of the view that it is preferable to confer the application of competition law and policy exclusively to a single agency, regardless of whether it is a new agency or an existing one. This will help to promote efficiency, consistency and predictability in antitrust law enforcement, and will foster the development of institutional knowledge and a unified body of case law in this very complex area.

However, there are presently a number of existing agencies that have the authority to regulate national or sector-wide competition issues. Some of them have a very strong interest in the unified regulatory power to be offered by the new antitrust regime. The 2007 draft does not provide conclusion to this debate. It is likely that this issue will be reserved for the State Council to decide after the AML is promulgated by the end of 2007.

Steve Yu & Peter Corne
Eversheds LLP
Shanghai, China

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January 28 -
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International Law
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Wednesday,
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International News

177 Universities Participated in the14th Annual Willem C. Vis International Commercial Arbitration Moot in Vienna, Austria

On Friday evening, the thirtieth of March 2007, in the contemporary auditorium of the *Stadthalle*, Professor Eric E. Bergsten, 2003 recipient of the Section's Distinction in International Law and Affairs Award, welcomed approximately 1,200 law students from 177 universities based in 51 countries, their coaches and others to the Oral Rounds of the 14th Annual Willem C. Vis International Commercial Arbitration Moot. Approximately 500 arbitrators, lawyers and professors from throughout the world served as members of the three-member arbitration panels of the Moot.

The Moot was proposed by Michael L. Sher, a member of the Executive Committee, on Tuesday morning, the nineteenth of May 1992, during a speech he delivered from the main podium of the General Assembly hall of the United Nations at United Nations Headquarters in New York. He was speaking as a "Voice of International Practice" during the Silver Anniversary Congress of the United Nations Commission on International Trade Law (UNCITRAL) on "Uniform Commercial Law in the 21st Century," as a means to promote knowledge of the work of UNCITRAL and, more specifically, the United Nations Convention on Contracts for the International Sale of Goods (CISG). A valuable by-product was expected to be an increased awareness of international commercial arbitration.

Ultimately, the Institute of International Commercial Law of Pace Law School adopted the Moot. Since inception, Professor Bergsten has been the Director of the Moot. Some months after the commencement of the inaugural Moot, Willem C. Vis, Director of the Institute and former Secretary of UNCITRAL (1975–1980), succumbed to brain cancer and the Moot was named in his memory.

In 1993, Dr. Werner Meilis, head of the International Arbitral Centre at the *Wirtschaftskammer Österreich* in Vienna, agreed to arrange for the *Wirtschaftskammer* to provide the physical facilities in which to hold the inaugural Moot. It was a risk to contribute such significant resources to an untried concept. The oral arguments were held in rooms normally utilized for arbitrations and the final oral argument was held in the grand auditorium of the *Wirtschaftskammer Österreich*.

As the years passed, Professor Bergsten prudently and effectively grew the Moot from eleven universities to 177 universities based in 51 countries.

To provide for long-term continuance of the Moot, this past Spring a membership association formed under Austrian law, *Verein zur Ausrichtung und Förderung des Willem C. Vis International Commercial Arbitration Moot*, loosely translated as Association for the Organization and Promotion of the Willem C. Vis International Commercial Arbitration Moot, was established. Institutional members of the *Verein* include Pace University, the University of Vienna, Queen Mary (University of London), University of Stockholm, *Wirtschaftskammer Österreich,* Austrian Arbitration Association and UNCITRAL, through the individual membership of its Secretary.

The sponsors of the Moot include a who's who of the community of international arbitral organizations.

From inception, the Moot was envisioned to be a multi-cultural, multi-faceted educational experience. There is a balance between teams representing universities based in civil law and common law jurisdictions. In the oral general rounds, the pairings are structured to maximize mooting by teams of different legal systems.

The standard of the work-product (written memorandum for claimant, written memorandum for respondent, and oral arguments) of the participating students continues to be extraordinarily high.

In the oral general round, each team moots twice as claimant and twice as respondent. The top thirty-two teams in the general round proceed to the single elimination round. Most of the arguments in the general round and all but the final round in the elimination round are held in the Law Faculty of the University of Vienna (*Juridicum*). The final round is held in the same venue as the Moot Awards Banquet, which immediately follows the final round.

Prizes are awarded for the prevailing team in the final oral round, best oralist in the general round and best written memorandum for each claimant and respondent.

Rule Number 1 of the Moot has continuously remained in effect: "The Moot must be enjoyable for one and all." Pleasure can be, and has been, derived from the long hours of hard work in the research and drafting of written submissions and preparations for oral arguments. Pleasure is also derived in Vienna from pride in performance and social activities.

Socializing has always been an important component of the entire Moot experience. During the days of the oral rounds, persons serving as arbitrators, law students and their coaches gather in the spacious, airy *Dachgeschoss* (penthouse) of the *Juridicum* for coffee, to renew friendships and to network.

On the evening preceding the official Opening and Reception, the Moot Alumni Association ("MAA") hosts a "Welcome!" reception for the law students. The MAA also makes arrangements with a bar to serve as "MAA Social Central" for the ensuing evenings. After serving as "MAA Social Central" for a decade, *Ma Pitom*, a Viennese bar in the famous "Bermuda Triangle" section of Vienna, was closed by its owners. Graciously, they made arrangements with *Aux Gazelle*, a trendy bar and restaurant, to be the MAA's prime nighttime socializing spot for the participating students and others. *Aux Gazelle* was well received and a new tradition was started.

During the week of the Moot, many of the Vienna law offices host receptions for Moot arbitrators and others. The receptions have become so popular with both the law firms and their guests that law firms are now hosting luncheons so as not to over-schedule the evenings. In addition, on the Sunday evening of the "Moot week," the Moot organizes a *Heurigen* wine-tavern buffet dinner in *Neustift-am-Walde*, the colorful Vienna wine district.

The Moot concludes with the Moot Awards Banquet, to which all of the students, coaches and arbitrators are invited, and during which the awards are announced and presented.

Each year the problem to be mooted is specially crafted by Professor Bergsten. Traditionally, one of the two parties is based in the fictitious location of Port City, Equatoriana, and the other party is based in the fictitious location of Capitol City, Mediterraneo. The arbitration is held in the fictitious location of Vindobona, Danubia. Vindobona is the name of the ancient Roman city that is now Vienna. The fictitious state of Danubia derives its name from the famous Danube River, which flows by Vindobona.

The arbitration rules for the Moot change each year and are selected from those of the sponsors with a balance of those located in civil law and common law jurisdictions. The arbitration rules of the 15th Annual Moot (2007–2008) will be the JAMS International Arbitration Rules (<http://www.jamsadr.com/rules/international_arbitration_rules.asp>).

The Moot has progeny: the MAA (<http://www.maa.net/>) and Moot (East) (<http://www.cisgmoot.org/>). This year (2006–2007), 46 law schools based in 14 countries participated in the Moot (East). The oral rounds of the Moot (East) take place in Hong Kong shortly before the oral rounds in Vienna. This is, perhaps, the highest form of flattery and indicative of the achievement of the fundamental *raison d'être* and concept, which was to promote the knowledge and use of the CISG and international commercial arbitration.

There are several thousand young lawyers who have participated in the Moot and commenced their professional careers with a solid knowledge of, and deep appreciation for, the CISG, international commercial arbitration and UNCITRAL. Approximately 900 of them are dues-paying members of the MAA.

The MAA sponsors seminars throughout the year and publishes biannually the well-regarded *Vindobona Journal of International Commercial Law and Arbitration* (<http://www.maa.net/vindobonajournal/default.htm>). Participation in the Moot has become so respected in the international commercial arbitration community that lawyers and other professionals proudly note their participation in their *curriculum vitae*.

The "Moot week" schedule of the 15th Annual Moot (2007–2008) is:

Thursday, March 13, 2008
Moot Alumni Association "Welcome!" Party

Friday, March 14, 2008
Official Moot Welcome and Reception

Saturday–Tuesday, March 15–18, 2008
General Round of Oral Argument

Wednesday and Thursday, March 19 and 20, 2008
Elimination Rounds of Oral Argument

Thursday, March 20, 2008
Final Oral Argument and Awards Banquet

The Official Moot Welcome and Reception will be held in the magnificent historic *Wiener Konzerthaus* in central Vienna.

The General and Elimination Rounds will be held at the Faculty of Law (*Juridicum*) of the University of Vienna and at the offices of the law firm Dorda Brugger Jordis.

The final oral argument and Awards Banquet will again be held in the contemporary Reed Messe Congress Center.

For additional information visit the Moot Web site (<http://www.cisg.law.pace.edu/vis.html>).

Michael L. Sher
Founder of the Willem C. Vis International Commercial Arbitration Moot
New York, New York

Member and Firm News

The leading independent firm in M&A and private equity, Araoz & Rueda, has signed, after several months of conversations, J. Ignacio Trillo Garrigues, former General Secretary of Banco Urquijo, as partner of the firm to lead its banking and finance department, to which he will contribute his vast experience in this area, and has named Francisco Solchaga, associate in the firm since 2000, as a new partner in the firm.

Trillo has an extensive professional trajectory as an internal and external advisor. He began his career in prominent firms such as Uría Menéndez and Mayer Brown & Platt (Chicago). For almost sixteen years he worked as a legal advisor for the Chase Manhattan Bank (the leading foreign bank in Spain and pioneer in a great many products since the bank's inception as Manufacturers Hanover Trust Co. and through the course of its successive mergers with Chemical Bank, Chase Manhattan, Flemmings and JPMorgan). In this capacity, he was responsible for the design and the legal structuring of syndicated financing, debt restructuring, project and structured finance, leasing, factoring, confirming, off balance-sheet operations, financial and banking guarantees, derivative operations, custody and liquidation of securities, private banking, etc., collaborating in emblematic operations in multiple sectors (energy and utilities, media and telecom, infrastructure finance, as well as in the financing and securities derived from M&A operations), acting as Vice President and Chief Legal Counsel. He was later hired by Banco Urquijo as Legal Director and promoted in three years to Vice Secretary of the Board, member of the Management Committee, and Secretary General with direct responsibility for a team of 27 people.

According to the firm, "This incorporation involves a new impulse in our area of banking and finance law," demonstrating the firm's intention of maintaining progressive growth, both by incorporations of lawyers at all levels and by promoting associates of the firm to partner.

With the naming of Francisco Solchaga as a partner, the firm's commitment to internal promotion, which began in 2005 with the naming as partners of Lourdes Ayala and Ainhoa Veiga, is reaffirmed. "We are searching for the ideal, that is, organic and sensible growth," affirm sources within the firm. Solchaga, who has extensive experience in M&A/private equity and Energy Law transactions, has participated in important operations like the recent advising of Luzentia Promoción y Mantenimiento Renovable, S.A. in the investment of €188 million in a photovoltaic solar park, as well as advising the British private equity fund 3i in the acquisition from Gamesa of Gamesa Servicios, a company dedicated to the maintenance of wind farms, for €180 million.

For further information, contact Ángela Barco, Responsible for the Marketing Department at Araoz & Rueda (barco@araozyrueda.com; + 00 34 91 319 0233).

P de la Castellana
Madrid, Spain

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.

Oliver J. Armas
Editor

Richard A. Scott
Co-Editor

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Interntional Law and Practice Section Officers

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Oliver J. Armas,
Thacher Proffitt & Wood, LLP
Two World Financial Center, 27th Floor
New York, NY 10281
oarmas@tpw.com

Chair-Elect
Marco A. Blanco
Curtis, Mallet-Prevost, Colt & Mosle, LLP
101 Park Avenue
New York, NY 10178-0061
mblanco@cm-p.com

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Phillips Nizer LLP
666 Fifth Avenue
New York, NY 10103-5152
mgalligan@phillipsnizer.com

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Madrid 28004 Spain
chamilton@mmmm.es

Second Vice-Chair
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Whiteman Osterman & Hanna LLP
One Commerce Plaza
Albany, NY 12260
jhanna@woh.com

Secretary
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55 Smith Avenue
Mount Kisco, NY 10549
jking@smdhlaw.com

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Lawrence E. Shoenthal
Weiser LLP
135 West 50th Street, 12th Floor
New York, NY 10020
lshoenthal@weiserllp.com

Vice-Chairs
Christine A. Bonaguide
Hodgson Russ LLP
One M & T Plaza, Suite 2000
Buffalo, NY 14203
cbonagui@hodgsonruss.com

Sydney M. Cone, III
Cleary Gottlieb Steen & Hamilton
1 Liberty Plaza
New York, NY 10006
tcone@cgsh.com

Vice-Chair/CLE
John E. Blyth
141 Sully's Trail, Suite 12
Pittsford, NY 14534
blyth.john@gmail.com

Vice-Chair/Membership
Joyce M. Hansen
Federal Reserve Bank of New York
33 Liberty Street
Legal Group, 7th Floor
New York, NY 10045
joyce.hansen@ny.frb.org

Vice-Chair/Membership
Allen E. Kaye
Allen E. Kaye, PC
111 Broadway, Suite 1304
New York, NY 10006
akaye@kayevisalaw.com

Vice-Chair/Committees
Mark H. Alcott
Paul Weiss Rifkind Wharton
& Garrison LLP
1285 Avenue of the Americas, 28th Floor
New York, NY 10019-6064
malcott@paulweiss.com

Vice-Chair/
Co-Chair, International Chapters
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Eversheds, LLP
Senator House
85 Queen Victoria Street
London EC4V 4JL, UK
jonathanarmstrong@eversheds.com

Vice-Chair/Publications
David W. Detjen
Alston & Bird LLP
90 Park Avenue, 14th Floor
New York, NY 10016-1302
ddetjen@alston.com

Vice-Chair/
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Gerald J. Ferguson
Baker Hostetler
45 Rockefeller Plaza
New York, NY 10111
gferguson@bakerlaw.com

Vice-Chair/Liaison with Other International Bar Associations
Steven C. Krane
Proskauer Rose LLP
1585 Broadway
New York, NY 10036-8299
skrane@proskauer.com

Vice-Chair/Committees
A. Thomas Levin
Meyer Suozzi English & Klein, PC
PO Box 9194
Garden City, NY 11530-9194
atlevin@nysbar.com

Vice-Chair/
Co-Chair, International Chapters
Eduardo Ramos-Gomez
Duane Morris LLP
1540 Broadway
New York, NY 10036
eramos-gomez@duanemorris.com

Vice-Chair/Diversity
Lorraine Power Tharp
Whiteman Osterman & Hanna LLP
One Commerce Plaza
Albany, NY 12260
lptharp@woh.com

Seasonal Meeting Chair
Aaron J. Schindel
Proskauer Rose LLP
1585 Broadway, 21st Floor
New York, NY 10036-8299
aschindel@proskauer.com

Delegates to the House of Delegates
James P. Duffy III
Berg and Duffy, LLP
33 South Service Road, Suite 109
Jericho, NY 11753
jpduffy@bergduffy.com

Paul M. Frank
Hodgson Russ LLP
1540 Broadway. 24th Floor
New York, NY 10036
pmfrank@hodgsonruss.com

Robert J. Leo
Meeks & Sheppard
330 Madison Avenue, 39th Floor
New York, NY 10017-5002
robert.leo@mscustoms.com

International Law and Practice Section Committees and Chairs

Africa Committee
Kofi Appenteng
Thacher Proffitt & Wood LLP
Two World Financial Center, 27th Floor
New York, NY 10281
kappenteng@tpw.com

Asia and the Pacific Region
Junji Masuda
Masuda & Ejiri
Carnegie Hall Tower
152 West 57th Street, 37th Fl
New York, NY 10019-3310
jmasuda@masudalaw.com

Lawrence Darby III
410 Park Avenue, Suite 1530
New York, NY 10022
ladarby@gmail.com

Awards
Jonathan Blackman
Cleary Gottlieb Steen & Hamilton
1 Liberty Plaza, 42nd Floor
New York, NY 10006
jblackman@cgsh.com

Lauren Rachlin
Hodgson Russ
One M & T Plaza, Suite 2000
Buffalo, NY 14203-2391
lrachlin@hodgsonruss.com

Michael Maney
Sullivan & Cromwell
125 Broad St.
New York, NY 10004-2498
maneym@sullcrom.com

Central & Eastern Europe
Daniel Rothstein
Flemming Zulack Williamson & Zauderer LLP
One Liberty Plaza, 35th Floor
New York, NY 10006-1405
drothstein@fzwz.com

Serhiy Hoshovsky
Gvodz & Hoshovsky Attorneys At Law
33 West 19th Street, Suite 307
New York, NY 10011
shoshovsky@ghslegal.com

Chair's Advisory
John Zulack
Flemming Zulack Williamson & Zauderer LLP
One Liberty Plaza, 35th Floor
New York, NY 10006-1404
jzulack@fzwz.com

Robert Leo
Meeks & Sheppard
330 Madison Avenue, 39th Floor
New York, NY 10017-5002
robert.leo@mscustoms.com

Corporate Counsel
Allison Tomlinson
Parsons Brinckerhoff
1 Penn Plaza, 2nd Floor
New York, NY 10119
allison11955@aol.com

Barbara Levi
Unilever U.S. Inc.
700 Sylvan Avenue
Englewood Cliffs, NJ 07632-3100
barbara.levi@unilever.com

Cross Border M&A and Joint Ventures
Jose Walfredo Fernandez
Latham & Watkins LLP
885 3rd Avenue, Suite 1000
New York, NY 10022-4834
jose.fernandez@lw.com

Valarie Hing
Curtis, Mallet-Prevost, Colt & Mosle
101 Park Ave
New York, NY 10178-0002
vhing@cm-p.com

Immigration and Nationality
Jan Brown
Jan H. Brown, P.C.
1150 Avenue of the Americas, Suite 700
New York, NY 10036
jhb@janhbrown.com

Matthew Dunn
Kramer Levin Naftalis & Frankel, LLP
1177 Avenue of the Americas
New York, NY 10036-2714
mdunn@kramerlevin.com

Insurance/Reinsurance
Chiahua Pan
Cadwalader, Wickersham & Taft LLP
One World Financial Center, 32nd Floor
New York, NY 10281
chiahua.pan@cwt.com

Michael Pisani
Bryan Gonzalez Vargas & Gonzalez-Baz
444 Madison Avenue, Suite 805
New York, NY 10022
mpisani@bryanlex.com

Inter-American Committee
Alyssa Grikscheit
Goodwin Procter LLP
599 Lexington Avenue
New York, NY 10022
agrikscheit@goodwinprocter.com

Carlos Alfaro
Alfaro Abogados
630 Fifth Avenue, Suite 2518
New York, NY 10111
alfaro@alfarolaw.com

International Antitrust and Competition Law
Boris Kasten
Hengeler Mueller
Avenue De Cortenbergh, 118, Bte 2
Brussels B-1000, Belgium
boris.kasten@hengeler.com

Olivier Antoine
Simpson Thacher & Bartlett LLP
425 Lexington Avenue
New York, NY 10017
oantoine@stblaw.com

International Arbitration & ADR
Guillermo Aguilar-Alvarez
Weil Gotshal & Manges
767 Fifth Avenue
New York, NY 10153
guillermo.aguilar-alvarez@weil.com

Nancy Thevenin
Deputy Director Abritration
ADR North America
1212 Avenue of the Americas, 21st Floor
New York, NY 10036-1689
ntn@iccwbo.org

International Banking Securities & Financial Transactions
Eberhard Rohm
Duane Morris LLP
1540 Broadway
New York, NY 10036-4086
erohm@duanemorris.com

Joyce Hansen
Federal Reserve Bank of New York
33 Liberty Street
Legal Group, 7th Floor
New York, NY 10045
joyce.hansen@ny.frb.org

International Corporate Compliance
Rick F. Morris
534 Third Street
Brooklyn, NY 11215
rick.morris@gs.com

International Distribution, Sales & Marketing
Andre Jaglom
Tannenbaum Helpern Syracuse & Hirschtritt LLP
900 Third Avenue, Suite 1200
New York, NY 10022-4728
jaglom@thshlaw.com

International Employment Law
Aaron Schindel
Proskauer Rose LLP
1585 Broadway, 21st Floor
New York, NY 10036-8299
aschindel@proskauer.com

Elizabeth Hook
Citigroup Inc.
One Court Square, 9th Floor
Long Island City, NY 11120-0002
(718) 248-9762

International Entertainment & Sports Law
Gordon Esau
Fraser Milner Casgrain LLP
The Grosvenor Building
1040 Georgia Street, 15th Floor
Vancouver, BC V6E 4H8Canada
gordon.esau@fmc-law.com

Howard Robbins
Proskauer Rose LLP
1585 Broadway
New York, NY 10036-8299
hrobbins@proskauer.com

International Environmental Law
Andrew Otis
Curtis, Mallet-Prevost et al.
101 Park Avenue
New York, NY 10178-0061
aotis@cm-p.com

John Hanna, Jr.
Whiteman Osterman & Hanna LLP
One Commerce Plaza
Albany, NY 12260
jhanna@woh.com

Mark Rosenberg
Sullivan & Cromwell LLP
125 Broad Street
New York, NY 10004-2498
rosenbergm@sullcrom.com

International Estate and Trust Law
Glenn Fox
Alston & Bird LLP
90 Park Avenue, New York, NY 10016
gfox@alston.com

Michael Galligan
Phillips Nizer LLP
666 Fifth Avenue
New York, NY 10103-5152
mgalligan@phillipsnizer.com

International Human Rights
Arthur L. Galub
205 West End Avenue
New York, NY 10023-4804
agalub@yahoo.com

Rachel Lea Kaylie
Law Office of Rachel L. Kaylie
220 Fifth Avenue, Suite 1702
New York, NY 10001-7708
rkaylie@aol.com

International Insolvencies and Reorganizations
Robert Dremluk
Seyfarth Shaw LLP
620 8th Avenue
New York, NY 10018
rdremluk@seyfarth.com

International Intellectual Property Protection (International Patent Copyright and Trademark)
L. Donald Prutzman
Tannenbaum Helpern et al.
900 Third Avenue, Suite 1200
New York, NY 10022-4728
prutzman@thshlaw.com

Gerald Ferguson
Baker Hostetler
45 Rockefeller Plaza
New York, NY 10111
gferguson@bakerlaw.com

International Investment
Lawrence Shoenthal
Weiser LLP
135 West 50th Street, 12th Floor
New York, NY 10020
lshoenthal@weiserllp.com

International Law Practice Management
James P. Duffy III
Berg and Duffy, LLP
33 South Service Road, Suite 109
Jericho, NY 11753
jpduffy@bergduffy.com

International Litigation
John N. Fellas
Hughes Hubbard & Reed LLP
On Battery Park Plaza
New York, NY 10004
fellas@hugheshubbard.com

Thomas Pieper
Thacher Proffitt & Wood LLP
Two World Financial Center, 27th Floor
New York, NY 10281
tpieper@tpw.com

International Matrimonial Law
Rita Warner
Warner Partners PC
950 Third Avenue, 32nd Floor
New York, NY 10022
rwarner@cobwarner.com

International Privacy Law
Audrey Davidson-Cunningham
TIAA-CREF
730 Third Avenue, 14th Floor
New York, NY 10012
apcunningham@tiaa-cref.org

Lisa Sotto
Hunton & Williams
200 Park Avenue, 31st Floor
New York, NY 10166-0091
lsotto@hunton.com

International Real Estate Transactions
Thomas Joergens
Freshfields
520 Madison Avenue, 34th Floor
New York, NY 10022
thomas.joergens@freshfields.com

International Tax
Michel Collet
CMS Bureau Francis Lefebvre
101 Park Avenue, 30th Floor
New York, NY 10178-3099
mcollet@bflny.com

James Shorter
Thacher Proffitt & Wood LLP
Two World Financial Center
New York, NY 10281
jshorter@tpw.com

International Trade
Claire Kelly
Brooklyn Law School
250 Joralemon Street
Brooklyn, NY 11201
claire.kelly@brooklaw.edu

Stuart Rosen
Weil Gotshal & Manges
767 5th Avenue, New York, NY 10153-0001
stuart.rosen@weil.com

International Transportation
William Hull Hagendorn
25 Parkview Avenue
Bronxville, NY 10708-2936
whagendorn@aol.com

Alfred Yudes
Watson Farley & Williams LLP
100 Park Avenue, 31st Floor
New York, NY 10017-2513
AYudes@wfw.com

Publications/Editorial Board
Charles Biblowit
St. John's University School of Law
8000 Utopia Parkway
Jamaica, NY 11439
biblowic@stjohns.edu

Lester Nelson
Lester Nelson, Attorney at Law
60 East 42nd Street, 46th Floor
New York, NY 10165
lnelsonnylaw@aol.com

Richard A. Scott
Fraser Milner Casgrain LLP
1 First Canadian Place
41-100 King Street West
Toronto, ON M5X 1B2, Canada
richard.scott@fmc-law.com

Public International Law
Charles Biblowit
St. John's University School of Law
8000 Utopia Parkway
Jamaica, NY 11439
biblowic@stjohns.edu

United Nations and Other International Organizations
Jeffrey C. Chancas
Borah, Goldstein, et al.
377 Broadway
New York, NY 10013-3993
jchancas@borahgoldstein.com

Edward C. Mattes, Jr.
Edward C. Mattes Jr. LLC
375 Park Avenue, Suite 2409
New York, NY 10152-0002
ecmattes@earthlink.net

U.S. - Canada Committee
David Doubilet
Fasken Martineau DuMoulin, LLP
Toronto Dominion Bank Tower, Box 20
Toronto, ON M5K 1N6 Canada
ddoubilet@tor.fasken.com

Western Europe
Diana Newcombe
Eversheds LLP
85 Queen Victoria Street
London EC4V 4JL England
diananewcombe@eversheds.com

Michael Sher
Law Office of Michael L. Sher
166 East 61st Street
New York, NY 10021-8509
sher@jhu.edu

Women's Interest Networking Group
Jennifer Karen King
Shamberg Marwell Davis & Hollis, P.C.
55 Smith Avenue
Mount Kisco, NY 10549
jking@smdhlaw.com

Meryl Sherwood
Pavia & Harcourt LLP
600 Madison Avenue, 12th Floor
New York, NY 10022
msherwood@pavialaw.com

Interntional Law and Practice Section Chapter Chairs

Jonathan P. Armstrong (Co-chair)
Eversheds LLP
Senator House
85 Queen Victoria Street
jonathanarmstrong@eversheds.com

Eduardo Ramos-Gomez (Co-chair)
Duane Morris LLP
380 Lexington Avenue, 48th Floor
New York, NY 10168
eramos-gomez@duanemorris.com

Gerald J. Ferguson (Co-chair)
Baker & Hostetler LLP
666 Fifth Avenue
New York, NY 10103
gferguson@bakerlaw.com

Athens
Niovi Christopoulou
160 Riverside Blvd At Trump
New York, NY 10069
niovichris@aol.com

Barcelona
Jaime Malet
Malet & Acociados
Avda. Diagonal 490, Pral.
Barcelona 08006, Spain
jmalet@malet-net.com

Beijing
Chi Liu
Jun He Law Offices
China Resources Building, 20th Floor
8 Jianguomenbei Avenue
Beijing 100005 China
liuchi@junhe.com

Budapest
Andre H. Friedman
Nagy & Trocsanyi, LLP
599 Lexington Ave., Suite 2328
New York, NY 10022
ahfriedman@verizon.net

Buenos Aires
Juan Martin Arocena
Rattagan Macchiavello Arocena &
Peña Robirosa
Avenida De Mayo 701, Piso 18
Buenos Aires, Argentina
jma@rmlex.com

Guillermo Malm Green
Brons & Salas
Maipu 1210, 5th Floor
C1006ACT Buenos Aires, Argentina
gmalmgreen@brons.com.ar

Alberto Navarro
G. Breuer
25 De Mayo 460
C1002ABJ Buenos Aires, Argentina
gmalmgreen@brons.com.ar

Colombia
Ernesto Franco Cavelier
Parra, Rodriguez & Cavelier
Cr. 9 no. 74-08 Of. 504
Bogota, Colombia
ernesto.cavelier@prc-laws.com

Carlos Fradique-Mendez
Brigard & Urrutia Abogados
Calle 70 #4-60
Bogota, Colombia
(571) 346-2011

Cyprus
Dr. Christodoulos G. Pelaghias
Law Offices of Chr. G. Pelaghias
27 Gregory Afxentiou Avenue
PO Box 40672
Larnaca, 6021, Cyprus
pelaghias@swrd.com

Dublin
Eugene P. Fanning
E P Fanning & Co.
71 Ailesbury Rd., Ballsbridge
Dublin 4, Ireland
eugenefanning@eircom.net

Finland
Timo P. Karttunen
Vasallikatu 3 A 4
20780 Kaarina, Finland
timo.karttunen@ge.com

Florida
Leslie N. Reizes
Reizes Law Firm Chartered
Suite 308
1177 George Bush Boulevard
Delray Beach, FL 33483
reizes@bellsouth.net

Frankfurt
Dr. Rudolf Coelle
Dewey Ballantine LLP
Taunusanlage 1 (Skyper)
60329 Frankfurt Am Main, Germany
rcoelle@deweyballantine.com

Geneva
Nicolas Pierard
Borel & Barbey
2 Rue De Jargonnant
Case Postale 6045
Geneva 1211 6 Switzerland
nicolas.pierard@borel-barbey.ch

Pablo M. Bentes
World Trade Organization
Appellate Body Secretariat-Room 2002
Rue De Lausanne 154
21 CH-1211 Geneva, Switzerland
pablo.bentes@wto.org

Iceland
Asgeir A. Ragnarsson
BBA Legal
Skogarhlid 12
101 Reykjavik, Iceland
asgeir.ragnarsson@is.landwellglobal.com

Israel
Mitchell C. Shelowitz
Shelowitz Broder LLP
11 Penn Plaza, 5th Floor
New York, NY 10001
mshelowitz@shelbro.com

Eric S. Sherby
Sherby & Co. Advs.
South Africa Building
12 Menahem Begin Street
Ramat Gan 52521, Israel
eric@sherby.co.il

Istanbul
Dr. Mehmet Komurcu
Turk Telekomunikasyon
AS, Genel Mudurlugu
Hukuk Baskanligi Aydinlikevler
06103 Ankara Turkey
mkomurcu@yahoo.com

Japan
Shirou Kuniya
Oh-Ebashi LPC & Partners
Japan
530-0003 Osaka
Umedashinmichi Building 8f
1-5Dojima 1-Chrome, Kita-ku
kuniya@ohebashi.com

Lima
Guillermo J. Ferrero
Estudio Ferrero Abogados
Av. Victor Andrés Belaunde 395
San Isidro, Lima 27, Peru
gferrero@ferrero.com.pe

Jose Antonio Olaechea
Estudio Olaechea
Bernardo Montegudo 201
San Isidro, Lima 27, Peru
511-264-4040

Lisbon
Pedro Pais De Almeida
PACSA Law Firm
VAT PT 503 655 511
Av. da Liberdade 144 / 7 Dt
1250-146 Lisbon, Portugal
ppa@pacsa.pt

London
Jonathan P. Armstrong
Eversheds, LLP
Senator House
85 Queen Victoria Street
London EC4V 4JL, UK
jonathanarmstrong@eversheds.com

Randal John Clifton Barker
Resolution PLC, Juxon House
100 St. Paul's Churchyard
London EC4M 8BU, UK
randal.barker@resolutionplc.com

Anne E. Moore-Williams
310 The Whitehouse, 9 Belvedere Rd.
London SE1 8YS, UK
aemw@aemw.fsnet.co.uk

Luxembourg
Alex Schmitt
Bonn Schmitt & Steichen
44 Rue De La Vallee
L-2661 Luxembourg
aschmitt@bsslaw.net

Madrid
Calvin A. Hamilton
Monereo, Meyer & Marinel-lo
Bárbara De Braganza 11, 2°
Madrid 28004, Spain
chamilton@mmmm.es

Clifford J. Hendel
Araoz & Rueda
Castellana 164
Madrid 28046, Spain
hendel@araozyrueda.com

Manila
Efren L. Cordero
No. 44 A. Periquet Street, B.F. Heva
Las Pinas City
Metro Manila, Philippines
attyblue_boy@yahoo.com

Milan
Maurizio Codurri
FPC Partners LLP
Viale Bianca Maria, 24
Milano J-20129, Italy
maurizio_codurri@itpa.org

Montevideo
Nicolas Jorge Herrera
Guyer and Regules
Plaza Independenica 811
11100 Montevideo, Uruguay
nherrera@guyer.com.uy

Panama
Alvaro J. Aguilar
Lombardi Aguilar & Garcia
PO Box 0831-1110
Ocean Plaza
Panama 0831, Panama
aaguilar@nysbar.com

Juan Francisco Pardini
Pardini & Associates
Plaza 2000 Tower
50th Avenue, 10th Floor
PO Box 0815 01117
Panama City, Panama
pardini@padela.com

Paris
Yvon Dreano
Jeantet & Associés
87 Avenue Klebér
75116 Paris, France
(331) 45-05-80-15

Pascale Lagesse
Freshfields Bruckhaus Deringer
2 Rue Paul Cezanne
75008 Paris France
pascale.lagesse@freshfields.com

Quito
Evelyn L. Sanchez
Corral-Sanchez Abogados S.A.
San Javier N26-130 Y Ave. Orellana
Quito, Ecuador
evelyn@corral-sanchez.com.ec

Rome
Cesare Vento
Gianni Origoni & Partners
Via Delle Quattro Fontane, 20
Rome 00184, Italy
cvento@gop.it

Santiago
Francis Lackington
Baeza, Larrain & Rozas
Av. Apoquindo 3001, Piso 13
Santiago, 7550227, Chile
flackington@blr.cl

Stockholm
Carl-Olof Erik Bouveng
Advokatfirman Lindahl HB
PO Box 14240, SE-104 40
Stockholm, Sweden
carl-olof.bouveng@lindahl.se

Sydney
Richard Arthur Gelski
Level 30
64 George Street
Syndey, NSW 2000 Australia
richard.gelski@jws.com.au

David Graham Russell
180 Phillip Street
Ground Floor Wentworth Chambers
Sydney 2000 Australia
russell@gibbschambers.com

Toronto
David M. Doubilet
Fasken Martineau DuMoulin, LLP
Box 20, Toronto Dominion Bank Tower
Toronto M5K 1N6, Canada
ddoubilet@tor.fasken.com

Vancouver
Donald R.M. Bell
Davis LLP
1 First Canadian Place, Suite 5600
100 King Street West
Toronto, ON M5X 1E2, Canada
dbell@davis.ca

Vienna
Dr. Otto H. Waechter
Graf & Pitkowitz Rechtsanwaelte
Stadiongasse 2
1010 Vienna, Austria
waechter@gmp.at

Zurich
Martin E. Wiebecke
Anwaltsbüro Wiebecke
Kohlrainstrasse 10 Kusnacht
Zurich CH-8700, Switzerland
info@wiebecke.com

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Oliver J. Armas
Richard A. Scott

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New York International Chapter News

Editor:
Oliver J. Armas
Thacher Proffitt & Wood LLP
Two World Financial Center
New York, NY 10281
oarmas@tpw.com

Co-Editor:
Richard A. Scott
Fraser Milner Casgrain LLP
1 First Canadian Place
41-100 King Street West
Toronto, ON M5X 1B2, Canada
richard.scott@fmc-law.com

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NEW YORK STATE BAR ASSOCIATION
INTERNATIONAL LAW AND PRACTICE SECTION
One Elk Street, Albany, New York 12207-1002

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