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See page 23 for details!

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The Means of Production:

A Study of the Effects of International Trade by United States Multinational Corporations on the Labor Force of Less-Developed and Developing Countries

3

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Introduction

The February 2002 protests at the convening of the World Economic Forum in New York City[1] seemed tame in comparison to the 1999 protests in Seattle during the convening of the World Trade Organization ("WTO"). Indeed, in Seattle, fifty thousand protesters successfully disrupted the conference, thwarting the negotiation of a further trade round,[2] while a mere two thousand rallied in New York,[3] perhaps due to the shift of national focus in the aftermath of September 11th.

However, this recent resurgence of protests continues to tarnish the image of globalization.[4] This paper will attempt to separate myth from fact by focusing on the effects of international trade by multi-national corporations ("MNC") on the labor force of developing and less-developed countries.

To begin, MNCs[5] are corporations with business operations in several nation-states.[6] Control of the MNC is vested in a parent corporation, typically located in a developed country.[7] Corporate operations are highly centralized in the parent, with very little autonomy given to the subsidiaries.[8] Such centralization includes decisions regarding "production and pricing policies, choice of technology, appointment of key personnel, and determination of markets."[9] In turn, the subsidiaries, which are located in developing ("DC") and less-developed countries ("LDC"), repatriate profits to the parent.[10] It is this structure and the effects thereof that are the root of controversy. Hence, this paper will focus on the MNC generally and on United States MNCs specifically.[11] Further, the focus shall be on the problems to the labor force of LDCs and DCs because of the level of attention given to these issues during the recent protests.

In evaluating the legal relationship between United States-based MNCs and LDCs/DCs, the focus will be primarily on the General Agreement on Tariffs and Trade ("GATT") and the World Trade Organization ("WTO"). The reason for this narrow selection is that much of the controversy stems from the execution of this treaty. As such, this paper does not seek to imply that international trade is limited only to arrangements subject to GATT.

The first part ("Delimitation of the Problem") of this paper is devoted to explaining the labor problem through direct examples. The second part ("Conflicting Claims") discusses the conflict between the goals of the MNCs and the needs of the LDCs/DCs. In the third part ("Past Trends and Conditioning Factors"), there is summation of the WTO/GATT. The final part ("Recommenda-

continued...

tions") suggests improvements within the existing legal structure that would facilitate a positive resolution to the labor problem.

Delimitation of the Problem

Far from the air-conditioned, OSHA[12]-complying offices and factories of the average American employee, hundreds of people labor day and night for pennies a day or under threat of death, making shoes and clothes for Americans to wear. United States MNCs profit and their citizens benefit from forced labor, child labor and the sweatshop conditions of less-developed and developing countries.

Child Labor

"The International Labor Organization (ILO) . . . defines child labor as the employment of children under the age of fifteen."[13] Under this definition, although "[e]xact figures on the number of working children in any particular category of work or sector of activity are not known because the problem is frequently unreported, denied, or undetected in both developed and developing countries[,]"[14] child labor is rampant throughout parts of Asia, Africa and Latin America.[15]

In spite of the unavailability of *exact* figures, worldwide estimates place the employment of children under fourteen at 250 million, of which "[n]inety-five percent . . . are employed in developing countries."[16] Children are employed in lieu of adults because the former will accept lower wages while making few demands on employers.[17] The results are that children are open to exploitation by being underpaid, working in dangerous conditions,[18] sacrificing education, and taking jobs away from their adult counterparts.[19]

Working Conditions

Collective investigations by numerous non-governmental organizations ("NGOs") have documented the existence of deplorable working conditions for laborers in LDCs and DCs. *Por ejemplo,* such problems permeate the export-processing zones of some LDCs and DCs. "[E]xport [P]rocessing [Z]ones ["EPZs"] are fenced-in industrial estates specializing in manufacturing for exports."[20] MNCs contract with EPZs for numerous reasons. They include reduced host-country governmental regulations, long-term tax breaks, high-technology communications services and infrastructure, subsidized utilities, "unlimited duty-free imports of raw and intermediate inputs and capital goods needed for production."[21] In addition, there is the benefit of cheap labor. The use thereof is innocuous per se. However, the conditions under which some laborers work is reminiscent of laborers during the industrialization period of United States history.

The Beximco Factory is a case study. The factory is a contractor for a United States MNC located in the EPZ of Dhaka, Bangladesh.[22] The National Labor Committee in Support of Worker and Human Rights documents that on average, the typical Beximco Factory laborer works a weekly shift of eighty-seven hours due to strict production schedules that allow only limited, timed bathroom breaks.[23] For their efforts, these laborers are paid forty to seventy percent below the minimum wage for the region.[24] In addition, they are often cheated out of their legal overtime pay of sixty-six cents per hour.[25] The MNC who receives the end product is none other than Wal-Mart.[26]

"Just Do It!!!"[27]

The practices of the Wal-Mart Corporation[28] are not isolated, however. In fact, NGOs have discovered similar operations involving other household names such as Nike.[29] Interviews with laborers in Nike's Indonesian[30] factories revealed conditions similar to the Beximco Factory. In addition, refusal to work the requisite hours invokes verbal abuse or sometime acts of public humiliation by supervisors.[31] Three refusals to work overtime results in termination.[32] This strict hour requirement is an attempt to meet the high daily quota set by Nike.[33] Further, inadequate lighting, ventilation and sanitation facilities are common to many EPZs.[34]

In reaction to criticism regarding such working conditions, Nike amended its Code of Conduct[35] in March 1997.[36] Additional provisions include a ceiling of sixty hours per work week for each laborer. The revised Code kept the requirement of compliance with legally-imposed benefits such as menstrual leave.[37] These two provisions are not mere guidelines. The terms preceding these applicable Code sections state their binding nature.[38] Therefore, the actual working conditions violate Nike's own Code of Conduct.

The Limitations in Addressing the Labor Problem-Unionization in LDCs and DCs

In some countries, such as Bangladesh, unionization is problematic because such activities are restricted by law.[39] In fact, only one union is allowed for each company and only a few union officials are immune from involuntary transfers to another plant.[40] Further, Bangladesh excludes EPZs from coverage under labor and industrial relations laws altogether.[41] In countries without such restrictions, some NGOs help

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EPZ workers organize unions.[42]

For example, in one of Indonesia's Nike Factories, the Social Information and Legal Guidance Foundation uses theatre to teach the workers how to organize a union, which interestingly, Nike expressly supports.[43] In fact, Nike's Revised Code of Conduct contains the statement that it is committed to seeking partners that "recognize the dignity of the individual, the rights of free association and collective bargaining."[44] However, this particular code section is not binding.

Further, the factory allows unions to form but it employs other tactics that negate the efficacy of such organizations through strong-arm and indirect tactics, such as hiring gangsters to "break up strikes or threaten workers who are perceived to be 'troublemakers,'" and/or continually transferring suspected organizers to different jobs within the factory to discourage unity.[45] Other union members are simply terminated using trivial mistakes as a pretext.

Worst still, some host countries stay their EPZs from their labor laws altogether.[46] Further, in countries that do not extend such exclusion to MNCs, limited resources preclude effective inspection and enforcement of such labor laws, due to the rapid growth of business within the EPZs.[47]

Conflicting Claims

LDC/DC Government Perspective-Marketing Comparative Advantage

Problematic to resolution of the negative effects to labor is the financially depressed state of the economies of LDCs and DCs. The former are desperate for funds in order to survive. The latter need funding in order to continue their development.[48] This dynamic is consistent with the dictates of David Ricardo and Adam Smith's comparative advantage theory, the theoretical foundation for trade.[49]

Summarized, the theory holds that "Countries that produce certain goods and services more efficiently than other countries have a comparative advantage and can provide those goods and services [to] the needy countries in exchange for a different set of goods and services that the needy country has a comparative advantage for producing."[50]

In practice, the large population coupled with high unemployment rates gives LDCs and DCs a comparative advantage in labor, typically unskilled labor.[51] Hence, such countries attract industry which are unskilled labor-intensive, such as textiles,[52] sporting equipment, and shoes.[53] Indeed, the recent prosperity of some countries can be directly traced to expansion of such activities within their EPZs. Further, the high unemployment rates in some LDCs coupled with their typically high population growth rates compel the indigent laborer to accept harsh working conditions in exchange for meager wages. However lowly these wages in LDCs/DCs may seem by American standards, on average, these wages are often higher than those offered by local industry within the LDC/DC.[54]

For these reasons, it is not surprising that these countries aggressively compete with each other to attract EPZ investment. For example, the Honduran EPZ[55] website boasts of its "ample supply of trainable and productive labor" at forty-four cents per hour.[56] Further, in theory, the LDC/DC is able to graduate to a higher development status through the initial marketing of their unskilled labor.

That is, eventually, such developing countries could switch from labor-intensive to capital-intensive means of production, borrowing from the technology of their foreign investors.[57] Therefore, on its face, the problem seems unavoidable, e.g. in order to gain foreign investment, LDCs and DCs must market their unskilled labor. The harsh working conditions appear to be the price paid in the short-run for the acquisition of technological knowledge in the long-run.

In practice, generally, LDCs/DCs increased technological imports have neither resulted in increased productivity nor in increased demand for skilled labor.[58] This is problematic since it provides a disincentive for skill acquisition and/or education for the unskilled laborer.[59] Further, given the large supply of unskilled laborers, wages remain at low levels.[60] These factors, in turn, decrease the leverage of a potential union, due to the MNC's ability to hire replacements in the short run and relocate facilities to another country in the long run. As such, the LDC/DCs are forced, by this imbalance of power, to remain at the mercy of the MNC's imposition of the terms of investment.

Another problem is that, given the benefits derived from the employment of cheap labor, transferring US-like working conditions to MNCs in LDCs and DCs could hurt such countries. For example, improved working conditions would increase the cost of labor, thereby necessitating the MNC's immediate change to capital-intensive instead of labor-intensive means of production in order to reduce costs.[61] Unfortunately, it seems that the quality of the employee's life is not valued in financial terms because such value is inherently unquantifiable, and only quantifiable costs and benefits factor into business decisions.

NGOs-Toward a Universalistic Human Rights Perspective

There are numerous non-governmental, non-profit organizations working to improve the working lives of others and a discussion of each one is beyond the scope of this paper. However, there are a few notable organizations. For example, the Rugmark Foundation holds agreements with certain rug manufacturers, providing "incentives to manufacturers of hand-knotted carpets and … certification of carpets so that buyers can avoid merchandise made by children under [fourteen]."[62] Further, in response to the criticism of MNC activities during the 1960s and 1970s, some developed nations formed the Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises.[63] However, not only are the 'rules' merely guidelines, but the enforcement mechanism is weak, since dispute resolution merely results in clarifying the same non-obligatory guidelines.[64]

Past Trends In Decision and Their Conditioning Factors

WTO/GATT History

The General Agreement on Tariffs and Trade "[GATT] system [ ] devel-

continued, page 4

oped through a series of trade negotiations, or rounds,"[65] the first of which occurred in 1947. The World Trade Organization ("WTO") did not form until 1995,[66] as a result of the Uruguay Round.[67] After the WTO's establishment, the GATT agreement essentially merged into the WTO agreements, which includes the General Agreement on Trade in Services and Trade-Related Aspects of Intellectual Property.[68]

More than 140 countries are currently members[69] of the WTO.[70] Among its duties, the WTO is responsible for administering the trade agreements, overseeing trade negotiations, settling trade disputes,[71] and reviewing national trade policies.[72]

At the beginning of the WTO/GATT system, the high tariffs existing at the time helped prompt the need for the GATT. In fact, the passage of the Smoot-Hawley Act of 1930, protected "domestic producers by safeguarding the home market for their goods by erecting *tariff walls* to imports[.]"[73] This act helped cause "a sharp decline in the US share of international trade from 13.8% in 1929 to 9.9% in 1933."[74] To address this problem, the first round of negotiations which resulted in the General Agreement on Tariffs and Trade in 1947 focused almost exclusively on reducing tariffs.[75] Currently, the four guiding principles of the WTO/GATT are:

> (1) the unconditional most-favored nation obligation that prohibits WTO Members from discriminating against or giving preferences to any other Member, regardless of whether the latter has made any trade concessions to the former; (2) the national treatment obligation which requires that imports be treated the same as the domestic like product insofar as taxes and other domestic regulations are concerned; (2) binding commitments to reduce tariffs on imports; and (4) the elimination of quotas on imports.[76]

The treaty also includes special provisions for developing countries, permitting trade actions which contradict these promulgations of GATT.[77] In spite of this concession, the WTO's stated goal "is to help *producers* of goods and services, *exporters*, and *importers*, conduct their *business*."[78] The problem is that one means of production, laborers, are excluded from this stated goal. This omission is also apparent in the investment report(s), discussion paper(s), etc. issued by the WTO.[79] Critics argue that this omission is intentional.

Exporting U.S. lessons in Favorable Labor Conditions

The labor conditions of less-developed and developing countries are condemnable, but not novel. In fact, these same conditions once formed the backbone of everyday working life in newly industrialized America; long working hours for adults minus overtime, vacation pay, sick leave, health benefits, worker's compensation and restrictions on child labor were the norm. It was not until the formation of unions that safety standards and minimum wage standards were implemented.[80]

Key legislation, in turn, such as the National Industrial Recovery Act of 1933, the Wagner Act of 1935, the Fair Labor Standards Act of 1938, the Occupational Safety and Health Act, and Title VII of the Civil Rights Act of 1964 aided the formation and strength of these unions.[81] Therefore, America's historical example suggests that a pro-labor legal structure is necessary to promote and enforce negotiations between unions and industry. Indeed, it would be difficult to imagine how American labor rights could have been enforced without the intervention of the federal government generally and the National Labor Relations Board in particular.

Relatedly, the recognition by American unions and NGOs of the 'sweatshop' issue could only emerge from comparison to American labor standards. However, such recognition is neither paternalistic nor imperialistic. Rather, it is humanitarian in nature.[82] As such, it is part and parcel of a larger movement concerned with improving the lives of all. In addition, the International Labor Organization has worked for many years to promote labor rights in the international arena.

The ILO

The International Labor Organization[83] ("ILO"), formed in 1919,[84] predates the United Nations. The ILO structure is tripartite, with decisions made by a committee composed of representatives from labor, management and government.[85] The principal work of the ILO consists of conventions, which nation-states adopt individually.[86] Such adoption mandates that the adopting nation-state submit regular reports[87] to the ILO, delineating steps taken to effectuate the adopted convention.[88]

To date, forty-three nation-states have adopted all of the fundamental conventions, such as: the Convention on Forced Labour, the Convention on Freedom of Association, the Convention on Discrimination, the Convention on Child Labour, etc.[89] Due to the ILO's pro-labor stance, every ILO convention is important and should be adopted universally. However, a discussion of each convention is beyond the scope of this paper. Therefore, only some of the key conventions merit mention.

First, articles 2, 3 and 4 of *The Freedom of Association and Protection of the Right to Organise Convention* binds the adopting members to allow the formation of 'associations' generally and negates the adopting governments from creating legal hindrances to the creation of such entities.[90] Articles 1 and 2 of *The Right to Organise and Collective Bargaining Convention, 1950* delineates the right to form unions explicitly while protecting both the union and union members after such formation.

The *Minimum Age Convention, 1973* protects children by requiring that adopting nation-states set a minimum working age of "not less than 15 years" for developed countries and age fourteen for LDCs/DCs.[91] The convention also stipulates that such employment should not endanger the child's health nor interfere with the child's education or vocational training.[92]

However, in spite of the reporting requirement, the enforcement mechanism is weak.[93] The ILO cannot impose penalties upon a non-complying nation-state.[94] Despite this limitation, the only defense in international law to the obligation to obey customary law is that of persistent objection to the law in question,

and adoption of the ILO conventions negates the efficacy of raising this defense. The United States' failure to adopt most of the ILO conventions is due to their argument that such adoptions are unnecessary because U.S. domestic law already guarantees such rights to their citizenry and that the conventions "raise significant problems under a federal form of government."[95] Therefore, the US's lack of adoption is not based on objection to the principles *ipso facto.*

Recommendations

There is more than one avenue for resolving the labor problem. Ideally, all three resolutions delineated below should be adopted. The first option is to add a harmonized clause addressing labor within the GATT. The second option is for the United States to adopt *all* the fundamental conventions of the ILO. A last option is for MNCs to create individual Corporate Codes of Conduct reflecting the core rights of the fundamental conventions of the ILO. Each option will be discussed further.

Harmonization of Labor Standards within NAFTA/GATT

In the next round of negotiations, a new set of provisions should be added which ties the major GATT benefits of most-favoured nation, national treatment, tariff and quota reduction to the laborer conditions[96] of each member country. Such labor conditions would reflect the promulgations set forth in the ILO's fundamental conventions discussed previously. This new section would be termed, the "Anti-Social Dumping" code, modeled on GATT's current Anti-Dumping Code; the Anti-Social Dumping Code would effectively prevent MNCs from seeking lower working conditions in host countries.[97] Under this proposed clause,[98] a member country which failed to adhere to these proposed basic labor standards would suffer by suspension of GATT benefits. Further, such provision could not be negated by the development status of the affected country.[99] Of course, the affected country would not be without recourse, since it could bring its cause before the Dispute Settlement Body.[100] Incorporation of such a clause within the GATT framework should not be abandoned, but should be actively pursued.

Conventions and Codes

It is further recommended that the United States formally adopt the ILO's fundamental conventions, thereby publicly acknowledging its acceptance of these basic standards. Such adoption would help pressure MNCs into developing Corporate Codes of Conduct which reflect the principles of the fundamental conventions. These actions would attract public scrutiny through the media. In this way, an MNC would be publicly pressured to conform to these standards or risk negative publicity.

Conclusion

In conclusion, the rally cries heard and seen during recent protests have since died out, but the 'sweatshop' issue has not. Some MNCs continue to profit from the exploitation of laborers in LDCs/DCs. These conditions are more than simply harmful to the particular laborers involved. On a macroeconomic level, their continuance hinders the developmental progress of the LDCs/DCs. Additionally, the WTO's failure to address this issue within the GATT framework acts as a seal of approval upon such actions. Further, the ILO's weak enforcement mechanism cannot currently overcome this failure. However, both bodies offer the greatest hope for resolving the problem. To this end, the recommendations above should be adopted. Such adoption, reflecting the interaction between MNCs, international organizations, host country governments, the United States and NGOs would likely snowball into a pro-labor movement, improving the lives and future of our under-developed neighbors.

Endnotes

[1] Shaun Troetel, et. al., *Dozens Arrested at World Economic Forum Protests* (visited June 11, 2002) *http://www.cnn.com/2002/US/02/02/world.forum/index.html.*

[2] Human Rights, New Perspectives, New Realities 210-11 (Adamantia Pollis & Peter Schwab, eds., 2000).

[3] Shaun Troetel, et. al., *Dozens Arrested at World Economic Forum Protests* (visited June 11, 2002) *http://www.cnn.com/2002/US/02/02/world.forum/index.html.*

[4] Human Rights, New Perspectives, New Realities (Adamantia Pollis & Peter Schwab, eds., 2000). One definition of globalization is: "the emergence of a world economy in which international financial transactions; stock, bond, and futures markets exchanges; and currency mobility are supplemented by a worldwide *labor market* and global production facilities." *Id*. at 257 (emphasis added).

[5] Authorities vary upon the distinction between multinational and transnational corporations. *See* Research and Policy Committee, Committee for Economic Development, Transnational Corporations and Developing Countries 15 (Committee for Economic Development, 1981) (stating that only the latter refers to entities with a parent in one country and subsidiaries in foreign countries. For the purposes of this paper, both terms will be assumed to define the same entity). *But see* A. LeRoy Bennett, Historical Dictionary of the United Nations (1995) stating that the United Nations also prefers usuage of "transnational corporation" to denote multinational corporation as defined in this paper. *Id.* at 122.

[6] Edmund Jan Osmanczyk, The Encylopedia of The United Nations and International Relations, (2nd ed. 1990) (also known as World Corporation, Global Corporation, International Corporation, Multinational Company and Transnational Corporation, Multinational Enterprise, Transnational Enterprise).

[7] Glossary database, at http://dragon.acadiau.ca/-dagora/HRlP/Glossary/mnc2.htm 4 *Id. at* http://dragon.acadiau.ca/-dagora/HRlP/Glossary/mnc2.htm (this internet database glossary offers a definition of the entity superior to that available in most dictionaries or encyclopedias).

[8] *Id. at http://dragon.acadiau.ca/~dagora/HRIP/Glossary/mnc2.htm.*

[9] Research and Policy Committee, Committee for Economic Development, Transnational Corporations and Developing Countries 14 (Committee for Economic Development, 1981).

[10] *Id at http://dragon.acadiau.ca/-dagora/HRlP/Glossary/mnc2.htm.*

[11] For the purposes of acronym reduction, the term "MNC" will be used to denote "US MNC" throughout this paper.

[12] Occupational Safety and Health Act.

[13] Matthew C. Bazzano, *Child Labor: What the United States and its Corporations can do to Eliminate its Use,* 18 Hamline J. Pub. L. & Pol'y 200, 201 (1996).

[14] Joan M. Smith, *North American Free Trade and the Exploitation of Working Children*, 4 Temp. Pol. & Civ. Rts. L. Rev. 57, 63 (1994).

[15] Matthew C. Bazzano, *Child Labor: What the United States and its Corporations can do to Eliminate its Use,* 18 Hamline J. Pub. L. & Pol'y 200, 203 (1996).

[16] Christopher M. Kern, *Child Labor: The International Law and Corporate Impact*, 27 Syracuse J. Int'l L. & Com. 177, 177 & n. 4, n.5 (2000) citing International Labour Organization, Child Labor: Targeting the Intolerable 7 (1996) & Bureau of Int'l Labor, U.S. Dept. of Labor, By the Sweat and Toil of Children: The Use of Child Labor in American Imports 2 (1994).

17 Matthew C. Bazzano, *Child Labor: What the United States and its Corporations can do to Eliminate its Use,* 18 Hamline J. Pub. L. & Pol'y 200, 206- (1996).

[18] *See* Joan M. Smith, *North American Free Trade and the Exploitation of Working Children*, 4 Temp. Pol. & Civ. Rts. L. Rev. 57, 106-07 (1994) stating that "[i]n México, an underage worker was killed in a glass-crushing machine in a widely publicized industrial

continued...

accident at a subsidiary of United States Corporation." *Id.* at 106-07.

[19] Matthew C. Bazzano, *Child Labor: What the United States and its Corporations can do to Eliminate its Use,* 18 HAMLINE J. PUB. L. & POL'Y 200, 203, 206-07 (1996).

20 *See* Dorsati Madani, *A Review of the Role and Impact of Export Processing Zones* at http: //ideas.uqam .ca/ideas/data/Papers/wopwobaie2238.html.

[21] *Id. at* http://ideas.uqam.ca/ideas/data/Papers/wopwobaie2238.html.

[22] National Labor Committee in Support of Worker and Human Rights, *Wal-Mart's Shirts of Misery at* http://www.nlcnet.org/WALMART/bangwal.html.

[23] *Id.* at *http://www.nlcnet.org/WALMART/bangwal.html.*

[24] *Id.* at *http://www.nlcnet.org/WALMART/bangwal.html.*

[25] *Id.* at *http://www.nlcnet.org/WALMART/bangwal.html.*

[26] *Id.* at *http://www.nlcnet.or g/WALMART/bangwal.html.*

[27] The slogan was part of a past advertising campaign of NIKE, Incorporated (emphasis added).

[28] *See* United Nations Centre on Transnational Corporations, *World Investment Report 2000: Cross-border Mergers and Acquisitions,* UNCTAC/WIR/2000 (2000), stating that in 1998, Wal-Mart ranked fourteenth among the top 100 MNCs based in developed countries in terms of foreign assets held.

[29] Timothy Connor, *Like Cutting Bamboo Nike and Indonesian Workers' Rights to Freedom of* Association (September 2000) *at* http:/ /www .caa.org.au/campaigns/nike/association/report.html (The author interviewed workers from three NIKE factories in Indonesia as part of his research for a Ph.D thesis supervised by the University of Newcastle, Australia). *Id.* at http:/ /www .caa.org.au/campaigns/nike/association/report.html 23; *See also* Christopher L. Erickson, *The American Experience with Labor Standards and Trade Agreements*, 3 J. SMALL & EMERGING BUS. L. 41 (1999) (notes that Disney, The Gap and celebrity Kathie Lee Gifford have also been exposed for profiting from sweatshop labor).

[30] *See* Ana T. Romero, *Export Processing Zones: Addressing the Social and Labour Issues* 4 (1995) (stating that as of December 1994, Indonesia employed 95,000 workers within 145 enterprises located in its only EPZ. *Id.* at 28. (pagination my own), (this unpublished unpaginated paper was prepared for inclusion in the 1996 World Labour Report of the International Labour Organization. In spite of the fact that the report never materialized, parts of the paper were used by the ILO in its public relations efforts for its publication, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* in EPZs. *Id.* at n.1.

[31] Timothy Connor, *Like Cutting Bamboo Nike and Indonesian Workers' Rights to Freedom of* Association (September 2000) *at* http:// www .caa.org.au/campaigns/nike/association/report.html.

[32] *Id.* at http://www .caa.org.au/campaigns/nike/association/report.html.

[33] *Id.*

[34] *See* Ana T. Romero, *Export Processing Zones: Addressing the Social and Labour Issues* 16 (1995) (unpublished unpaginated paper) (pagination my own).

[35] *Nike introduces New Code of Conduct* (March 1997) *at* http:/ /www .caa.org.au/campaigns/nike/codes.html.

[36] *See* Lisa G. Baltazar, *Government Sanctions and Private Initiatives: Striking a New Balance for U.S. Enforcement of Internationally-Recognized Workers' Rights*, 29 COLUM. HUM. RTS. L. REV. 687, 718 (1998) discussing other MNCs' internally-imposed codes of conduct and the need for an external monitoring system for compliance therewith. *Id. at* 718-21.

[37] Community Aid Abroad Australia, *Nike introduces new Code of Conduct* (March 1997) *at http:/ /www .caa.org.au/campaigns/nike/codes.html.*

[38] *Id. at http:/ /www .caa.org.au/campaigns/nike/codes.html.*

[39] Andrew K. Sutzman, *Our Eroding Industrial Base: U.S. Labor Laws Compared with Labor Laws of Less Developed Nations in Light of the Global Economy*, 12 DICK. J. INT'L L. 135, 153 (1994).

[40] *Id.* at 153.

[41] INSTITUTE FOR INTERNATIONAL ECONOMICS, THE WTO AFTER SEATTLE, (Jeffrey J. Schott, ed. 2000).

[42] Timothy Connor, *Like Cutting Bamboo Nike and Indonesian Workers' Rights to Freedom of Association* (September 2000) *at* http:/ /www.caa.org.au/campaigns/nike/association/report.html.

[43] *Id. at* http:/ /www .caa.org.au/campaigns/nike/association/report.html.

[44] Community Aid Abroad Australia, *Nike introduces new Code of Conduct* (March 1997) *at http:/ /www .caa.org.au/campaigns/nike/codes.html.*

[45] Timothy Connor, *Like Cutting Bamboo Nike and Indonesian Workers' Rights to Freedom of Association* (September 2000) *at* http:/ /www.caa.org.au/campaigns/nike/association/report.html.

[46] Ana T. Romero, *Export Processing Zones: Addressing the Social and Labour Issues* 4 (1995) (unpublished unpaginated paper), (pagination my own).

[47] *Id.* at 4-5. (pagination my own).

[48] Lisa G. Baltazar, *Government Sanctions and Private Initiatives: Striking a New Balance for U.S. Enforcement of Internationally-Recognized Worker's Rights*, 29 COLUM. HUM. RTS. L. REV. 687, 695 (1998), For example, in relation to the Bangkok Declaration of the 1993 World Conference on Human Rights, Indonesia publicly declared the prioritization of "*economic development* over political and civil rights and the need for international standards to be interpreted according to the culture, political system and level of economic development of particular countries." (emphasis added). *Id.*

[49] Susan Tiefenbrun, *Free Trade and Protectionism: The Semiotics of Seattle*, 17 ARIZ. L. REV. 257, 260 (2000).

[50] *Id.* at 260-61.

[51] FRANK LONG, RESTRICTIVE BUSINESS PRACTICES TRANSNATIONAL CORPORATIONS AND DEVELOPMENT: A SURVEY, 60 & n. 64 (M. Nijhoff 1981) citing G.K.Helleiner, *Manufactured Exports from Less-Developed Countries and Multinational Firms,* ECONOMIC JOURNAL, March 1973.

[52] *See* Ana T. Romero, *Export Processing Zones: Addressing the Social and Labour Issues* 11 (1995) (unpublished unpaginated paper) (stating that textiles and electronics employ almost 96% of all EPZ workers worldwide, except for México and Togo). *Id.* at 11 (pagination my own).

[53] FRANK LONG, RESTRICTIVE BUSINESS PRACTICES TRANSNATIONAL CORPORATIONS AND DEVELOPMENT: A SURVEY, 60 (M. Nijhoff 1981).

[54] THE INTERNATIONAL DIVISION OF LABOUR AND MULTINATIONAL COMPANIES: A SYMPOSIUM ORGANISED BY THE EUROPEAN CENTRE FOR STUDY AND INFORMATION ON MULTINATIONAL CORPORATIONS 79 (John Robinson & P.K.M. Tharakan, eds, Gower, 1981).

[55] *See http:/ /www.ca-bc.com/zip_international/affecting_laws.html* (used interchangeably with the term 'Free Trade Zones' in Honduras).

[56] *See* Honduran EPZ website at *http:/ /www.ca-bc.com/zip_international/affecting_laws.html. See also* India's Falta EPZ website boasting of overall 5.24% wage as a percentage of total export cost at *http:/ /www.fepz.com/glance.html.*

[57] *Id.* at 23. (the paper discusses the theory in footnote 101 in the context of foreign direct investment generally which includes more than EPZ manufacturing, but is still applicable to our overall analysis).

[58] *Id.* at 23-24.

[59] *Id.* at 27.

[60] *Id.*

[61] *See* FRANK LONG, RESTRICTIVE BUSINESS PRACTICES TRANSNATIONAL CORPORATIONS AND DEVELOPMENT: A SURVEY, 104 (M. Nijhoff 1981), discussing the dispute between labor-intensive versus capital-intensive means of production in developing countries within the context of oligiopostic MNC's operating in same said countries. *Id.* at 104.

[62] Joan Louise Nix, *Governments, NGOs Work to Reduce Child Labor*, at http:// www.citechco.net/usdhaka/usis/cljan26.htm.

[63] *Id.* at 95.

[64] *Id.* at 95.

[65] *The WTO in Brief: Part I, The Multilateral Trading System-Past, Present and Future* at *http:/ /www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr01_e.*

[66] Cristina Baez, et. al, *Multinational Enterprises and Human Rights*, 8 UNIV. MIAMI INT'L & COMP. L. REV. 183, 195 (1999/2000).

[67] *The WTO in Brief: Part I, The Multilateral Trading System-Past, Present and Future* at *http:/ /www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr01_e.*

[68] *Id.* at 196.

[69] *See* Susan Tiefenbrun, *Free Trade and Protectionism: The Semiotics of Seattle*, 17 ARIZ. L.REV. 257, 277 & n. 153, n. 154 (2000) notes that "[t]wenty-nine of the world's forty-eight least developed countries are WTO members. Although these nations do not engage in much international trading, membership in the world body assures the developing nations that wealthier nations will not treat them less favorably than any other member body. They also receive benefits that wealthier countries do not receive, including exemptions from many WTO provisions, zero tariffs, technical expertise, and technical assistance." *Id.*

at 277.

[70] *The WTO in Brief*, WTO homepage *at http://www.wto.org/english/thewto_whatis_e/inbrief_e/inbr02_e.*

[71] JOHN H. JACKSON, ET. AL., 1995 DOCUMENTS SUPPLEMENT to LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS iv (West Publishing 3rd ed. 1995) (includes the functions of the WTO from the Agreement establishing the organization).

[72] *The WTO in Brief*, WTO homepage *at http://www.wto.org/english/thewto_whatis_e/inbrief_e/inbr02_e.*

[73] *The Transnational Political Econ-omy: A Framework for Analysis* at *http://www.jus.uio.no/lm/the.transnational.political.economy.a.framework.for.analysis.jarrod.* citing to E.E. SCHATTSCHNEIDER, POLITICS, PRESSURE, AND THE TARIFF: A STUDY IN FREE PRIVATE ENTERPRISE IN PRESSURE POLITICS, AS SHOWN IN THE 1929-1930 REVISION OF THE TARIFF (Prentice-Hall, 1935) and CHARLES KINDLEBERGER, THE WORLD IN DEPRESSION, 1929-1939 (Allen Lane and Penguin Press, 1973), (emphasis added).

[74] *Id.* at *http://www.jus.uio.no/lm/the.transnational.political.economy.a.framework. for.analysis.jarrod.*

[75] *Id.* at http://www.jus.uio.no/lm/the. transnational.political.economy.a. framework. or.analysis.jarrod.

[76] RAJ BHALA & KEVIN KENNEDY, WORLD TRADE LAW, THE GATT-WTO SYSTEM, REGIONAL ARRANGEMENTS, AND U.S. LAW 4 (Lexis Law Publishing, 1998).

[77] *Id.* at 399.

[78] *The WTO in Brief*, WTO homepage *at* http://www.wto.org/english/thewto_whatis _e/ (emphasis added).

[79] *See generally* The World Trade Organization website at *http://www.wto.org.*

[80] Terry Collingsworth, *American Labor Policy and the International Economy: Clarifying Policies and Interests*, 31 B.C. L. REV. 31, 37-41 (1990).

[81] *Id*. at 38-42.

[82] *Id*. at 55.

[83] *See* Lisa G. Baltazar, *Government Sanctions and Private Initiatives: Striking a New Balance for U.S. Enforcement of Internationally-Recognized Workers' Rights*, 29 COLUM. HUM. RTS. L. REV. 687, 697-98, n. 49 & n. 50 (1998) (stating that "[w]hile aggrieved workers and unions may rely upon these international conventions [referring to the International Convenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights] as a basis for a claim of a human rights violation, the [ ] labor provisions [of the covenants] serve primarily as statements of principle and have little effect for aggrieved workers who have a labor rights claim. Instead, workers and trade unions are likely to bring specific labor rights claims before the ILO") citing to Lance Compa & Tashia Hinchliffe-Darricarrere, *Enforcing International Labor Rights through Corporate Codes of Conduct,* 33 COLUM. J. TRANSNAT'L L. 663, 665 (1995). *Id.* at 697-98.

[84] Joan M. Smith, *North American Free Trade and the Exploitation of Working Children*, 4 TEMP. POL. & CIV. RTS. L. REV. 57, 92 (1994).

[85] Christopher L. Erickson & Daniel J.B. Mitchell, *The American Experience with Labor Standards and Trade Agreements*, 3 J. SMALL & EMERGING BUS. L. 41, 47 (1999).

[86] *See generally* Ratifications of the ILO Fundamental Conventions (as of April 15, 2001) at *http://www.webfusion.ilo.org/public/db/stan..normes/appl/appl-ratif8conv.cfm?Lang* for list of ratifications by adopting nation-state and convention.

[87] Handbook of Procedures Relating to International Labor Standards, *available at* http://www.ilo.org/public/english/standards/norm/sources/handbook/hb5 note: reports from each adopting country are required at either first, second, or fifth year following adoption of relevant convention in addition to non-periodic reports on application of adopted convention. *Id.* at *http://www.ilo.org/public/english/standards/norm/sources/handbook/hb5http://www.ilo.org/public/english/standards/norm/sources/handbook/hb5.*

[88] Explaination of the Regular System of Supervision, International Labor Standards, at *http://www.ilo.org/public/english/standards/norm/enforced/supervis/regsys2.*

[89] Ratifications of the ILO Fundamental Conventions (as of April 15, 2001) at http:// *www.webfusion.ilo.org/public/db/stan..normes/appl/appl-ratif8conv.cfm?Lang.*

[90] Freedom of Association and Protection of the Right to Organise Convention, 1948, July 9, 1948, art. 2, 3, 4, ILOLEX.

[91] Minimum Age Convention, 1973, June 26, 1973, art. 2, para. 3, 4, ILOLEX

[92] *Id*. at art. 7, para(s) 1(a), (b).

[93] Christopher L. Erickson, *The American Experience with Labor Standards and Trade Agreements*, 3 J. SMALL & EMERGING BUS. L. 41, 48 (1999).

[94] *Id.* at 48-49.

[95] *See* Joan M. Smith, *North American Free Trade and the Exploitation of Working Children*, 4 TEMP. POL. & CIV. RTS. L. REV. 57, 92-93 (1994), stating that although the United States "withdrew its membership [from the ILO] from 1977 to 1980," the country is still a member. *Id.* at 92.

[96] *See* Christopher L. Erickson, *The American Experience with Labor Standards and Trade Agreements*, 3 J. SMALL & EMERGING BUS. L. 41 (1999) (stating that "[t]he original General Agreement on Tariffs and Trade [ ] permitted countries to restrict imports made by prison labor, but was otherwise silent on labor standards"). *Id.* at 56; *See also* Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions,* 26 YALE J. INT'L L. 1, (2001) (stating that "…multilateral efforts to use international trade to encourage compliance with labor and human rights norms have been consistently rejected by developing countries, which criticize such efforts as protectionist and imperialist.") *Id.* at 3.

[97] JOHN H. JACKSON, ET. AL.., 1995 DOCUMENTS SUPPLEMENT TO LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 174 (West Publishing, 3rd ed., 1995) (includes the current Anti-Dumping Definition from Item 9 of the Agreement on Implementation of Article VI of the GATT)

Article 2

Determination of Dumping

1.1 For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country).

[98] *See* Katherine Van Wezel Stone, *To the Yukon and Beyond: Local Laborers in a Global Labor Market*, 3 J. SMALL & EMERGING BUS. L. 93, 105 (1999) inclusion of a labor rights clause was attempted at the 1996 WTO Ministerial Conference in Singapore; the article discusses the resistance to such a clause by the MNCs and the developing countries, the latter fearing that such a clause was merely a guise for protectionism. *Id.* at 105.

[99] RAJ BHALA & KEVIN KENNEDY, WORLD TRADE LAW, THE GATT-WTO SYSTEM, REGIONAL ARRANGEMENTS, AND U.S. LAW 433-34 (Lexis Law Publishing, 1998), discusses the loophole through which the anti-dumping provision can be held inapplicable to developing countries such that the dumping margin could be set higher than that for developed countries.

[100] *See generally* JAMES F. SMITH, INTERNATIONAL ECONOMICS LAW, THE WORLD TRADE ORGANIZATION AND THE NAFTA 73-74 (University of Houston, 1999) citing to selected rea JOHN H. JACKSON, ET. AL., LEGAL PROBLEMS OF INTERNATIONAL RELATIONS (West Publishing, 3rd ed., 1995) which describes the Dispute Settlement Body as having "the sole authority to establish panels, adopt panel and appellate reports, maintain surveillance of implementation of rulings and recommendations, and authorize retaliatory measures in cases of non-implementation of recommendations." *Id.* at 73-74; *See also* JOHN H. JACKSON, ET. AL., 1995 DOCUMENTS SUPPLEMENT TO LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS iv (West Publishing, 3rd ed., 1995) describing and including the applicable sections relating to Dispute Settlement as WTO, articles III:3, IV:3, GATT, articles XXII-XXIII, Item 18, and Item 33. *Id.* at iv.

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Child Status Protection Law & Employment Based Petitions

by Larry S. Rifkin and Mayra L. Gonzalez

The on-going enactment of Congressional laws and INS regulations has brought about some welcome changes in immigration law, especially in regard to "child" beneficiaries. For years, child beneficiaries saw their child status dissipate due to backlogs in INS and other agencies such as the Department of Labor. The recently enacted Child Status Protection Act of 2002 however seeks to rectify this problem by in essence prolonging the time that a child remains a "child" for immigration purposes.

The CSPA is not an all-encompassing statute as it only protects selected beneficiaries, most notably children of American Citizens (Section 2) and children of asylum applicants (Section 4).

However, the statute is more inclusive than originally thought. Section 3 of the CSPA impacts another potentially large group of child beneficiaries—derivative applicants of employment-based petitions.[1] Section 3 of the CSPA seeks to protect derivative children of employment-based petitions such as labor certifications and EB applicants. Unlike the more lucid instructions under Sections 2 & 4, the guidelines for determining child status under Section 3 have proved complex, confusing, and unpredictable. In fact, the State Department-issued guidance and procedures have acknowledged the unclear nature of Section 3 by stating that the language is "extremely complicated" and adding that refinements in interpretation with additional guidance will be forthcoming as needed. In addition, the State Department guidance & procedures instruct posts to seek Advisory Opinions on cases falling within this Section.

In the interim, practitioners must parse through the language of Section 3 and abstract from it one of the many possible interpretations in hopes that it will eventually be substantiated by the forthcoming interpretations and/or litigation.

Various factors lend to the confusion of Section 3, most notably the circuitous language. In addition to the somewhat convoluted language of the Section, more confusing is the recently enacted INS interim regulation allowing for concurrent filing of I-140 Petitions for Immigrant Worker and I-485 Adjustment of Status applications. It would indeed appear that Section 3 of the CSPA and the interim regulations were written independently of each other. This article seeks to briefly highlight the questions arising from Section 3 of the CSPA and also the interplay between Section 3 of the CSPA with concurrent I-140/I-485 filing regulations.

Section 3 of the CSPA provides that the age of an alien will be determined on "…. the date on which an *immigrant visa number becomes available* for such alien….(or for the alien's parent), but only if the alien has *sought to acquire the status of an alien lawfully admitted for permanent residence* within one year of such availability, REDUCED by the number of days in the period during which the applicable petition... was pending." [emphasis added].

If however under Section 3 the child beneficiary is determined to be 21 or over the petition will automatically be converted to the appropriate category and the alien will be able to retain the original priority date issued upon receipt of the original petition. The priority date on employment based cases needing labor certification would of course be the date the labor certification was filed.

Immigrant Visa Number Becomes Available

Although there are tenable interpretations as to when an immigrant visa number becomes available, the Department of State interpretations removed some of the conjecture by defining visa availability to require both a "current priority date and an approved petition". For employment based purposes this should mean the date the I-140 is approved and the priority date current. Assuming employment priority dates remain current then this date will be the date the I-140 is approved.

Once this date is determined the next step is to reduce the number of days in which the petition was pending. The petition in this case would appear to refer only to the I-140, thus in cases where labor certification is required this would not take into account the amount of time, in some regions years, that the Labor Certification Petition was stagnant in the State Employment Agencies and Department of Labor. Perhaps forthcoming guidelines will determine whether the time "petition was pending" only refers to the I-140 and not the labor certification. To be true to the Congressional intent however it would appear that the time the labor certification was pending should indeed be taken into account, especially in light of the unprecedented amount of time these applications linger in State and Region queues.

If the child applicant was under 21 at the time the I-140 was approved, and assuming the priority date was current on that date, then the child applicant freezes his age at that time and thus does not run the risk of losing his/her child status. The formula will come into play when the child turns 21 after the I-140 is filed—in that scenario the applicant will have to await the length of time the I-140 is adjudicated in order to determine whether he/she qualifies. Oddly it would appear that the longer the I-140 has been pending the more chances the child beneficiary has of retaining child status, even if by that time the child is well into adulthood.

While the unpredictability of whether a child applicant will be able to benefit from this new law may prove somewhat frustrating, it is a relative improvement to the "age-out" notices affixed to applications which stood little chance of being noticed to expedite their cases.

One notable discrepancy neither the statute nor the State Department guidelines address is the issue of consular processing for children who are not in the United States to adjust. 22 CFR 42.83 provides that visa availability for consular purposes is not determined until an interview is actually scheduled. In many cases the interview is not scheduled until years after visa availability. This would mean that the requirement of filing within one year of visa availability will be an impossibility and would disqualify the child applicant from the benefits of the CSPA.

Another issue that has not been addressed is what happens in the situations where the priority dates regress. Will the child's age be frozen despite this change or will this time be taken into account to the benefit of the child applicant?

Acquire Status of Alien Lawfully Admitted for PR w/I 1 yr of availability

One prong of Section 3 is relatively clear, and that is that in order for this statute to apply applicants must acquire status within one year of visa availability. The Department of State interpretations defines this as the date of visa application, as it relates to employment based (as well as family-based) cases it would mean the date the adjustment is filed via Form I-485. Now with the concurrent filing option the risk of the 1-year lapsing is non-existent as long as the concurrent filing method is utilized.

However, the problem of consular processing as previously mentioned would need to be clarified as most child applicants would not be able to "acquire status" within the one year limitation imposed by the new law due to the administrative backlogs in consular visa processing.

Application to Pending Cases

According to the State Department interpretation the CSPA applies only in the following 3 scenarios:

1) cases where petition OR visa application was filed on or after August 6, 2002-therefore CSPA does not apply to an I-485 filed on August 5 or before.

2) cases where the petition was filed prior to August 6, 2002 but was still pending on that date-any pending I-140 should be protected.

3) cases where the I-140 was approved prior to August 6, 2002, but only if final determination has not been made on the adjustment of status or visa application.

The interpretations provide certain scenarios as to when a final determination has been made on the particular case. For example, a 221g denial will not be considered a final determination. One interesting interpretation is that if an applicant had a petition approved before August 6, 2002 and had never applied for a visa prior to August 6 because they had aged out, that applicant will not be able to receive the benefits of Section 3. However, this appears to contradict with the requirement in Section 8 that no final determination has been made on the application for an immigrant visa or adjustment of status. A literal interpretation provides that as long as the principal member has not filed an adjustment petition and as long as the one-year time within which to apply has not lapsed, these applicants should still be able to benefit from this section. The interpretations however do note that these guidelines are preliminary and could change after further interagency discussions.

The interpretations do not address cases in the court system, which have been administratively closed and as such may not have a final determination.

Congressional Intent

As the intent of the CSPA is to remove the harsh penalties inflicted on children and their families due to the administrative backlogs it would seem appropriate that the date of the child determination should be at the time the I-140 *is filed* and the priority date is current. However, this determination should take into account the time lost while waiting for the priority date to be current (should in the future employment based petitions not be current), and in cases where labor certification is required the priority date should be the date the application for alien employment certification is filed. This places the onus on the petitioner to timely file and provides more predictability.

Regardless of the shortcomings of Section 3, the CSPA is a great step towards remedying an incongruence of immigration law: Where family unification is a key impetus for the shaping of immigration law, the administrative backlogs have proven the most pervasive impediment to family unification, by leaving behind a key member of the family—the child.

Endnote:

[1] Although Section 3 also provides protection for derivative children in all family based petitions this article will only deal with the employment-based petitions.

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Once Again a Success for the 4th Annual Florida-Canada Forum…

The 4th Annual Florida Canada Forum held in Quebec City and Montréal from September 13 to 16 was indeed a resounding success. Congratulation to the organizing committees from Quebec, Florida and Versailles (France) Bars and to the 22 speakers! Over 100 professionals attended 3 days of world-quality seminars and workshops. The first part of the symposium took place in Quebec City and the second one in Montreal. All that was completed by unforgettable fun!

The seminar began in Quebec City in the marvelous Chateau Frontenac. The International Law Section of the Florida Bar honored the Versailles and Quebec organizers with plaques and appropriate gifts (see the photograph). The morning conferences focused on the challenge of advising financially troubled businesses and the afternoon workshops analyzed business ethics in the wake of the Enron scandal. Speakers from Florida included: **Francis Carter, Benjamin S.W Leclercq, Thomas F. Morante, Thomas Raleigh** and **Lucius Smejda**. It was a great opportunity for all participants to make valuable contacts while expanding their knowledge.

Saturday (September 14th) was dedicated to a guided tour of the beautiful Ile d'Orléans near Quebec City. First, participants went to "The Domain Steinbach" to taste some delicacies and wines. Then, a sumptuous lunch was set in a terrace in the heart of Ile d'Orléans. Participants enjoyed a very tasty brunch before visiting the Montmorency waterfalls. This tour combined discoveries in the lovely Quebec region and networking with French and Canadian legal professionals.

On Monday (September 16th) conferences took place in Montréal. The morning focused on the International Civil Law Notary Practice both in the United-States and in Canada. The conferences contained presentations in French and in English and emphasized applicable laws and procedures comparing notarial practice in the US and in Canada.

From left to right: Bâtonnière Lise Malouin, President of the Quebec Bar, Me. Yann Le Guillou, French Lawyer, Me.Thomas F. Raleigh, Co-Chair (Florida), Me Anne Demers, Director of the Quebec Bar, Me. Frédéric Landon, President of the Versailles Bar, Me. Rachelle Journeault, President of the International Law Commitee, Me. Lucius Smejda, Co-Chair (Florida).

At the Workshop on "when and how should the legal advisors intervene? From left to right: Me. Pierre Gagnon (Quebec), Me. Benjamin S.W Leclercq (Florida – South Carolina), Bâtonnier Jean-Michel Reynaud (Versailles), Me. Thomas F. Morante (Florida).

The afternoon was a presentation of the International Financial Center (IFC) of Montréal held at the famous Saint James Club. The IFC offers certain special banking privileges as well as partial on-shore tax haven status. Tax and corporate practitioners took detailed notes! Valuable insights and perspectives were exchanged regarding the extent in which IFC could be helpful for international financial institutions.

The International Law Section through the organizers of this event would like to thank all of the 22 speakers and all of the participants who made this seminar a great success. We are currently planning the next major exchange program in Saint Petersburg, Russia, in collaboration with the International Notaries and the Bars of Russia, France, Canada, Belgium and other European states in May 2003.

We invite you to visit our website to get additional information *www. russia-florida-forum.com or to* contact the organizing chairmen:

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IFTTA Update

by John Downes, President of IFFTA

The Next Congress

I am determined to ensure that the planning for this congress takes place in plenty of time so that we can increase the attendance rate of our members and attract new people to our organisation.

The venue is the **Principality of Monaco** and the proposed dates are 1-4 May 2003. The proposed format is as follows:

THURSDAY 1 MAY:

Arrive in Monaco

Registration

Board of Directors' Meeting

Welcome Reception (Hosted by the Minister of Tourism)

FRIDAY 2 MAY:

Joint Sessions with UFTAA

Themes:

- Travel Agents, IATA and the Airlines
- Travel Agents Legislation and Codes of Conduct from Around the World: Establishing Best Practice
- Travel Agents, Tour Operators and the new General Agreement on Trade in Service
- Travel Agency Litigation Worldwide

Dinner Hosted by the Minister for Tourism

SATURDAY 3 MAY:

IFTTA Sessions

Themes:

- An Israeli Perspective on Travel Law Issues under the Peace Accords
- Deregulation of Tourism Services and the Need for a Standard Nomenclature in the Light of the new GATS Regime
- Strict Liability in Travel Law: Is it Still Justified?
- Legislative Frameworks for Tourism Ministries and National Tourist Organisations
- Travel Litigation Worldwide 2002-2003
- Travel Advisories and Travel Insurance. Post September 11th an "vicissitudes of life", role of Government d Bali: Force Majeure, the IFTTA AGM and Elections, IFTTA Annual Dinner

SUNDAY 4 MAY:

Tour of Monaco, Nice and environs

Departure for post conference tours
Departure Home

These are put forward for your comments and suggestions. The specific Israeli item is to allow colleagues to respond, if they wish, to my paper in Hungary. It is not intended to limit presentations on the abundance of Israeli travel jurisprudence on other matters.

We (Nicoll and I) propose to offer a conference package (I am nervous about using such terms in the context of the PT Directive and this sentence is not to be construed as such an undertaking!!!!) which will include helicopter transfer from Nice Airport to Monaco, hotel accommodation and the conference fee (which will include lunch on Friday and Saturday, coffee and biscuits and the conference dinners). We hope that by being linked with the UFTAA meeting (they expect 80 of their members) we will enjoy economies of scale.

2. The International Travel Law Centre

I have developed my ideas on this matter but will have to ask for your patience. My university is undergoing a radical reconfiguration at the moment and it is not at all clear what the role of law will be in the new look Business School. I have raised a lot of money for the university, have contributed to its international profile, am a member of the Board of Governors etc. I have been there for 20 years. It is possible that I may decide to move. It will be a difficult decision. I have been in Dundee for 27 years and have many attachments here but I am not entirely happy with what is being proposed. In view of that, if I do decide to go, I want to take the travel law centre with me and to hook for a university that would provide the necessary support, researchers and IT support. I am willing to travel beyond Scotland to do so. I think that the plan I have for the centre is exciting and I am determined to make it work.

I have discussed this with UFTAA and they are prepared to wait until matters are settled. In the interim, I have begun to supply them with materials for their website. I expect that all will be decided by the beginning of January.

3. The Journal

Gerry wants to get a new edition out SOON. He still does not get enough material from members. Can I IMPLORE you, as Board members to contribute an item to him. It doesn't have to be a long piece. Even a note on recent cases or legislation would suffice. Perhaps addressing a theme (e.g. E-commerce and Travel Law in your respective jurisdictions). Likewise I need material for the website. I have a whole host of UK material for Jason to put on the site and he will do so soon, but I need short items or papers from you.

4. The Travel Law Dispute Centre

Larry has completed the first course of training and it was extremely successful. We need to take this forward and I need your suggestions how. I would be most grateful if Larry would put forward his proposal again so that we can expedite an agreement on IFTTA's involvement.

TIAOJIE: China Amidst Changes

**by Kandel G. Eaton, Juris Doctor, Florida Coastal School of Law, 2001;
Certificate of Mediation, Indiana State University, 1999**

The Clan Mediation Tradition

"Tiaojie,"[1] translated as clan mediation, has been a grass-roots tradition in Chinese society for almost 2600 years. Confucius (623-551 B.C.) taught that "li" embodied "five relations": ruler and subject, father and son, husband and wife, elder and younger brother, and friend and friend. "Li" was the basis for social behavior and the way Chinese expressed their inner thoughts. He believed that "there is a perfect harmony between men and man and nature".[2]

Based on these "guanxi," relationships,[3] the value of "jang" (yielding or compromise) was the foundation of peace and social harmony.[4] As time went by, "jang" became the most common identifiable characteristic of the Chinese culture. There is an opposing force of "li," called "fa". "Fa" is the system of laws and regulation which can impair harmony. As a dominant force, private and individual rights become secondary and creates conflict and disharmony.[5] The Chinese say "it is better to die of starvation than to become a thief; it is better to be vexed to death than bring a lawsuit."[6] This historically reflects the Chinese fear of change and the legal attitude the Communists had to fight with.

Tiaojie v. Communism

The Chinese Communist Party (CCP) overthrew Chiang Kai-shek in 1949, after decades of political struggle. Led by Chairman Mao Zedong, "Communists have consciously opposed the use of [tiaojie]. The old style was passive and yielding, the new style demands activism."[7]

Tiaojie was transformed in the Socialist transition of the fifties. For the first time codified as the Provisional General Rules for the Organization, clan mediation became the People's Mediation Committees (PMCs).[8] Their main purpose undermined "li." PMCs were organized to compensate for the lack of paid patrolmen. Urban committees and rural communes provided surveillance and reduced the civil and minor criminal case load. The "li" of "tiaojie" became the "fa" of the PMCs. They were held accountable by the local People's Congress.[9]

"In China…the mediator is not…a neutral third person who…tries to serve…individual interests of the parties…she is an agent of society who insists that harmony must be maintained for the good of the social order …[and] what she thinks they should do to solve their dispute."[10]

"Maoism proposes that conflicts not be suppressed… disputants are encouraged to air their grievances and register complaints…this educates society as a whole and raises consciousness…a disruptive dispute is thus turned into a social good."[11] He waged a campaign to wipe out "tiaojie" by labeling it "unprincipled mediation." Accusations of ignoring politics and favoring one party over the other for whatever reason further diminished its use.[12] Centralization of the party-state is the key focus. The "result" and "success" of a mediation was made to be politically correct. The richest citizenry usually got their way in the PMCs "principled" state-sponsored mediations.[13]

Maoism changed family structures, from the ancient clans and lineage traditions to collectives, communes, and cadres. The citizenry had no choice but to follow the CCP or suffer at the hands of friends, family, and the military.[14] "Tiaojie" and its traditions were forgotten and replaced by the concepts of family and community towards the good of the State. But the Rules that governed the PMCs were not made to be enforceable law.

Mao's Cultural Revolution of 1966 was an awakening to international relations outside China. As President Nixon said to Chairman Mao in 1972: "Looking at the two great powers, the United States and China…we can find common ground, despite our differences, to build a world structure in which both can be safe to develop in our own ways on our own roads."[15] Chinese isolation was at an end. Her economic development would later boom. The PMCs ceased as a focal point of CCP policy though there was still some waning interest. The centralized structures of the PRC under Mao had begun to fragment with his age.

The post-Mao period was led by his heir apparent Deng Xiaoping. Deng's visionary "Four Modernizations," from 1979-82 repealed, legalized and codified a new civil rule of law in China. The Constitution of 1982, called the mother law, "Mufa," went into effect in late 1984. "Mufa" is the guideline that preempted all other Chinese laws, but is not enforceable in and of itself. Enforceable laws derived from it, called "zufas," meaning children, and was the source of government upheaval and restructuring. New legislation enforced the PRC's status as a global superpower. The by products of confusion and strife with layer upon layer of bureaucracy was quieted by privatization and individual wealth. The Middle Kingdom became an economic superpower. With nothing done about the PMCs, they were left to flounder.

Mediation is routinely criticized by the supporters of other forms Alternative Dispute Resolution (ADR) because it prolongs the civil law status quo.[16] The PMCs wers so blamed for the delay of long needed structural Chinese legal reforms. Protests to these slow and unfair structural changes led to the Tiananmen Square massacre in 1989. China wants to negotiate about human rights conditions, but only to protect its international reputation.

Tiananmen proved that the PMCs had finally lost its control of the people. The CCP has been losing some of its control along with the PMCs. More recently, followers of the ancient religion Falun Gong,[17] were branded evil cult outlaws and terrorists, to justify police intervention to stop its dangerous spread. Residents of the Xinjiang Province,[18] and Xizang, also known as Tibet,[19] have mounted continual protests over

military rule and spiritual interference.

As of 1994, China was the world's largest creditor. The CCP has been saddled with heavy debt due to all their reforms. This has been China's leading reason for private development with foreigners.

Power passed to Jiang Zemin after Deng's death in 1997. He has continued Deng's policies and was initially thought by the CCP to be a transient leader.[20] Zemin is the harbinger of Chinese global domination. His forte is technology. Armed with his electrical engineering and computer background, he has lead China into the digital age to build the infrastructure it needs to join the global paper-free society. He is a formidable international figurehead.

His many critics have been silenced by the routine visits of Western celebrities, businessmen, and scholars to China. Through him China has gained global renown. He holds frequent high profile foreign policy meetings and media interviews. Zemin met with President Bush at his Texas ranch, to discuss North Korea's nuclear capability, with united, but with inconclusive results.

He has continued the growth of Chinese sponsored international dispute resolution organizations. Newer and bigger policies in "international trade has established the growth of new arbitration commissions that follow and provide a cost effective additional alternative to formal adjudication that is more rigorous than people's mediation…"[21] It is necessary for "communications difficulties during the course of settling a dispute have in some cases served to exacerbate tensions between the parties, contributing to a breakdown in the resolution process. This helps explain the increased willingness of Chinese parties to turn disputes over to lawyers and other professionals…"[22]

International business protocols have helped to smooth and standardize global business functions to promote economic growth through better technology. International ADR techniques are coming of age to integrate most international business relations. Chinese arbitration, "zhongcai" has increased parallel to China's increased international trade activities. The UN and treaty regime have conditioned China's participation upon these legal changes.

By accommodating the economic boom with her legal system, China is more aligned with the treaty regime. The
"silk road," has been chosen as the preferred method international dispute resolution. From this acceptance, China appears to have decided that the Western profit motive has tremendous benefits.

Foreigners have had two options to mediate their cases with China: the China International Economic and Trade Arbitration Commission (CIETAC) or the China Maritime Arbitration Commission (CMAC), which do both arbitration and mediation cases. CIETAC created its Arbitration Rules in 1988, and the number of cases has been increasing exponentially. Since there is no formal international court, the choice of resolution by business people has been in China because of CIETAC. They handle the complex and valuable cases, with enforceability, of over one hundred countries. The major change from rules revisions in 1994 and 1995 includes recognized international standards. This has brought in more varied cases, not just contract cases.

CIETAC arbitration is the best means of dispute resolution in international business,[23] even though they do not hold true mediations. It works like this: the General Secretary or the Deputy General Secretary can act as mediators or the parties pick an arbitrator to mediate. When the mediation succeeds, a conciliation agreement is signed and an ar-

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bitration tribunal makes an award based on the agreement. If the mediation fails, the process continues as an arbitration. If the arbitration fails then the case goes to an international civil court or tribunal.

The needs of the parties to resolve their disputes has also led to the invention of a new form of mediation. "Joint Mediation" allows each foreign party to apply for mediation in their own country's arbital organization, then CIETAC and the municipal organization appoint mediators who have equal authority to hear and settle the dispute.[24]

The Beijing Mediation Centre was a spinoff of CIETAC, which provides only mediation for disputes. In 1995, twenty-three such Centres been opened. Both parties still sign a conciliation agreement, but the mediator decides on the dos and don'ts of the agreement before the case is closed. If the mediation fails, the mediator makes suggestions to the parties for settlement. This same mediator can also serve as an arbitrator for future proceedings.[25]

These have been the fundamental tools in Zemin's arsenal and garnered China's entry into the World Trade Organization (WTO). By late 1999, a deal was made for her membership in 2001.[26] The flux of rules, regulations, and opinions that comprise modern-day China has finally enjoined the CCP to the treaty regime. They must abide by the arbitration rules, as the newest member of the WTO. In 2000 China was the 7th leading exporter and 8th largest importer of merchandise trade - exports: 249.2 billion dollars (3.9% share), imports: 225.1 billion dollars (3.4% share). For commercial services China was the 12th leading exporter and the 10th largest importer - exports: 29.7 billion dollars (2.1% share), imports: 34.8 billion dollars (2.5% share).[27] For the Middle Kingdom, this marks begins their continuous participation in world economic affairs.[28] New treaties, updated business methods and training have allowed multinational corporations to open technology, research and development in China have created a Chinese silicon valley.[29] Zemin has earned his exalted status. China is poised to become the largest economy, second only to the USA, by 2020.[30]

His "modernizing" policies of the socialist market economy and newly stringent population controls in anticipation of a fourth baby boom[31] may be his undoing by a his newly democratized electorate.[32] Because China's family unit remains so small, the PMCs as a social structure will likely remain until there is population reform which allows freedom to marry and reproduce without state interference.

Zemin, age 76, is expected to step down as leader of the Communist Party in their November 2002 elections, which are held every five years. And next to step down as President in 2003 for a new generation of politicians, led by his Vice President Hu Jintao. Odds are slim that Zemin would remain in power, but this is not necessarily so.[33]

Chinese Mediation In Perspective

A comparison of "panjue,"[34] court cases by jury verdict, to PMCs,[35] shows the dramatic change in the Chinese legal system since 1990. Of the 1,849,728 cases, 64.6% were "xieshang," court sponsored mediation, and 19.1% were "zhongcai," arbitrated. There were 7,049,222 cases before the PMCs. By contrast, in 1996, there were 2,714,665 cases, 56.9% were "xieshang," and 42.6% were "zhongcai." There were 6,016,983 cases before the PMCs. In sum, since 1990, the caseload for the PMCs has declined 10% or a million cases, at an increasing rate. The caseloads in the new legal system increased those same million cases.

Both the PMCs and court mediations have declined in favor of "panjue," and "zhongcai," due to added legislation. As more rules and guidelines are implemented, it follows that more change would be created in China. This fallacy reveals a "paper tiger" of supposed changes, that are imposed and misunderstood by the Chinese.Dealing with the PMCS is just not a priority for the PRC.

The CCP wants the PMCs to close down by themselves. But, of the one billion plus population of China, ten million mediators still exist. And although in swift decline, China will continue to have the oldest and largest ADR system in the world.[36] Chinese mediation should be regarded as an ongoing, evolving process without a specific style, form or set of values.[37] All the recent changes firstly react to and directly affect "tiaojie." Clan mediation in all its incarnations reflects what changes have taken place in China. No sufficient structural changes can occur without the PMCs being affected first. "Tiaojie" is a cultural mechanism without which any structural change in China could not occur.

Lack of action towards the PMCs complicates other "guanxi," which is growing sizably bewtween the "minjan xiehui," civil associations, and trade groups, unions and other non-governmental organizations. These groups have sprung up by the thousands as new parties in the new legal system.[38] Both mediation agreements and court orders have equal binding force.[39] Recent surveys show that obeyance to either arrangement occurs:

- mostly to protect one's reputation,
- to a much lesser degree to perform one's moral duty,
- *and only lastly because of a legal duty.*[40]

"Panjue" will likely envelop the remaining PMCs.[41] "The Chinese are fully inclined to assert their rights when [such] institutions are available..."[42] The Chinese who can afford it favor the courts, corruption notwithstanding.

Mediation appears to be the form of ADR in global play.[43] Its decreasing use in China and increasing geometrically in the rest of the world. With digital technology involved, online ADR seems to bypass governmental structures and avoid the judicial system. More participants encourages the assignment of jurisdiction which can impair access to justice and parties' rights.[44]

Just who is making these decisions is very important to know. It will redefine the entire rule of law based on the cost of dispute resolution. Court cases typically can cost tens of thousand of dollars, arbitration in the thousands and mediation in the hundreds. International commerce in the next years will show who is and who is not a superpower.

Mediation in the USA is defined as "a process by which a third party seeks to help persons involved in a dispute come to a mutually satisfactory resolution of their conflict".[45] This definition takes on a duality when translated from the Chinese and can mean either mediation or conciliation.[46] Conciliation is the more apt term. However, its effect is best defined as coercion. There is *no voluntary consent* of the parties involved. The mediator makes all the decisions about the purpose and results of a mediation, and the only mutuality is signing the agreement with the mediator. This is very time consuming,[47] because it takes a long time to change behavior: "100% effort for 1% hope."[48]

Decentralization has been the major force that brought back the suppressed clan tradition and values of "tiaojie," but its usefulness in present-day China is uncertain. The return to "tiaojie" has coincided with the necessity to establish a written, formalized justice system. The expansion of the rule of law continues to modify both China and her "guanxi" with other countries. The internal debate centers on what to do with the remaining PMCs. Should they exist as separate legal entities or not?

There are two schools of thought trying to discern the way: the Legalists vs. the Populists. The Populists feel that mediation was not a part of the legal system; it has always been there for the people. PMCs are need state financial support to survive. One suggested form of relief was to start charging for these free services by implementing the security contracts for a fee and charging for noncompliance. This has not been successful. Better management is thought to best cure the ills associated with keeping the PMCs in tact.[49]

The Legalists want one uniform legal system, to make the PMCs more autonomous and limit its scope. They have succeeded in removing criminal mediation from the PMCs with the "zufas" passed in 1989. Law Professor Pittman B. Potter explains the problem goes beyond the mere existence of the PMCs:

> "On the one hand, the operation of formal law and legal institutions in China requires adaptation to local conditions. As well, the formalism that underpins official legal norms in requires a mediating mechanism to prevent rigid application of rules to the detriment of substantive fairness. Yet mechanisms for adaptation and mediation are not themselves incorporated effectively into the formal system..."[50]

PMC duties were codified to reign them in, thus divesting their many abuses of power. The new system is rife with procedural gaps.

The mediators who worked when the PMCs were in the glory days of the fifties have died and no is left with established expertise to take its place. With a court system in place there is no need to overburden the PMCs with prevention or cases that can be resolved in a court. The new laws reduced its jurisdiction so the PMCs can no longer, by law, reduce crime or the court's dockets. With its growing popularity, the new legal system has fared better than the PMCs, but its existing court structure is still a work in progress. As Professor Potter further explains:

> "The uncertainty in the relationship between the permitted scope of taking bribes and engaging in corrupt conduct is heightened by the formalism that pervades Chinese legal culture. This permits judges and legal and administrative officials to confine their decision-making processes to formalistic references to statutory provisions without the requirement of a detailed fact cum law analysis. Such a circumstance then permits decisions to be made with little explanation and insulates them from challenge. Whether driven by improper economic inducements or skilled persuasion, the legal or administrative decision need not be explained in detail and the decision-maker need not address how the balance of interests and arguments between the disputants was handled. This in effect insulates from scrutiny the judicial investigatory and analytic processes..."[51]

China does not yet have an independent judiciary. Her present dependence on the centralized authority of the CCP has raised myriad questions of abuse and corruption. The traditional v. new formal systems conflicts have deeply Rooted problems in both operations and credibility. As the court system is increasingly relied on, rifts between the extra-judicial v. judicial forms of mediation now practiced have emerged and lost its independence as a separate forum of ADR.

The courts are taking on creative forms of mediation to bring the people's cases to them, affirming the CCP's political agenda. This only adds to the confusing nature of "panjue." The establishment of Township and Village Legal Service Offices (TVLSOs), whose guidelines were implemented in 1991, provides broader access to China's legal system. State support ensures furied growth of the legal system. As a result, the PMCs have been displaced, not a part of the legal system.[52]

With mediation less popular than the new civil structures, the PMCS could help define China's private law, as a method of ADR, to make them profitable and efficient, a first in Chinese mediation. The USA model recognizes profitable private law and to a growing, but much lesser extent, "xieshang." However, due to higher case settlement rates, court mediations have gained popularity. The only law the Chinese have ever known is public law.

Privatization is a high priority issue for the PRC, And could be the solution: to break up the remaining PMCs monopoly and allow market forces to determine what the need really is. "Panjue," is only decades old in China, and the CCP has put out a widespread campaign to popularize it. They propagandize the courts as the conflict resolution method of choice for citizens to integrate their new civil and criminal laws into daily Chinese culture.

Future Prospects

"Tiajoie" is the Chinese means to global dominance. Its roots could devolve from "fa" back into "li." New Mediation Centres could merge from the remaining PMCs as local international fora, so businesses could expand outside existing urban areas. The PMCs have traditionally held singly political, prejudiced, and coercive positions favoring impunity, but could easily be modified to WTO standards, to develop all regions.

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China has proven its military might as its own enforcers. The old notions of the PMCs dealt with, and the Chinese future in "clans" of small international businesses would fill the gap in a needed informal conflict resolution system that is compatible with China's new legal structures would be filled.

International market forces have made China's dispute resolution techniques highly successful. Caution and attention to detail are needed as special and self-interested groups begin to saturate international relations. This is new and uncharted territory for all. Past relationships in the UN should not be allowed to hold back the future potential of growth. The risk of not being inclusive is economic and political destruction. The focus should be on "jang," towards a clear agreed upon direction for the future.

Unilateral "one way or else" positions should be denounced so economic expansion can continue on all levels of government. It is unreasonable to place specific conditions on economic inclusion, when it is obvious that a negative backlash of many excluded countries would ally in terrorist threat.

They can create undesirable fear and violence that could get lucky and ascend to globally dominance if there is no unity in the developed countries to disband them while their threat is still minimally serious. Terrorism remains because those countries supporting it have dictatorial governments who exploit their people to keep their personal power. The systems and all political and legal systems first priority should be to serve and adapt to the needs of their people. These governments presently have systems that do not serve their people.

Terrorism will exist until the international regimes find ways for those governments to serve and exist for their populace, not vice versa. Until then it will be a threat to every existing government on Earth. China's past influences drive her to succeed globally. While certain moderate conditions on Human Rights and level of per capita development have met with limited success, it does not follow that this would work for those countries surviving in extreme economic and humanitarian conditions.

As the 16th President of the Untied States said in his Gettysburg address "we here highly resolve that these dead shall not have died in vain—that this nation, under God, shall have a new birth of freedom—and that government of the people, by the people, for the people, shall not perish from the earth."[53] China began with the cheapest form of political and legal system to sparing no expense of people and natural resources to capitalize and create industry, to pay for the increased costs of its new and expensive political and legal system. She is leaning nearer and nearer to a democratic leadership, perhaps by necessity, perhaps to stay globally competitive. China is a model to other nations striving for their own productive economic place.

The major differences in the systems of the PRC, USA and EU are most visible in their respective militaries. The EU has moved to create its own Department of Defense and military structure by 2003[54], the USA under direct terrorist threat is revolutionizing its military[55],while the Chinese are redesigning its outmoded military on all fronts, sparing no expense to protect itself.[56]

Spy satellites and international threats of global nuclear holocaust keep military growth in check. But the bellwether of China's mood has been the evolution of Tiaojie into PMCs and again into international ADR. The subjects of these "guanxi" will reveal which future conflicts may occur across the globe as China becomes more secure with her actions and ambitions.

Civil unrest and protests, such as the Tiananmen Square massacre may have brought the Chinese into more confrontations with their government. The CCP needs to increase their responsiveness to the needs of their people. If the CCP continues to be unresponsive, all its imposed changes will avalanche to pit the government against its people.

Unresponsiveness stands out as the main factor the rest of the world has used to assessed Chinese character. Unchanged it will hinder her international status. The citizenry appears to be freer to express themselves as they become more aware of their legal rights. Perhaps thethe Chinese are satisfied that their new legal system and courts are working. But, it is an urban legend to assume that one voice speaks for the entirety of China.

The CCP, albeit still the biggest entity in China, tends to react violently to insure its own devolving existence, and has pitted the Chinese against each other, merely delaying attacks on themselves by the people. Communism is still very much alive. The CCP needs much reinventing to achieve actual, not superficial, credibility in both municipal and international "guanxi," to co-exist.

Few governments and organizations believe the reports of improvement: routinized torture and lack of independence color the Chinese legal and social procedures still in use.[57] China must show she means peace, and does not want to lose face, now that she is committed to the global economic regime.

There are still some years to go until the 2008 Summer Olympics in Beijing. And several possible scenarios may could occur during the interim. Chinese military could secretly launch a major offensive hidden by the focus on international ADR, to compensate her fears by of lost sovereignty. Breaking treaties and making war on countries violating her. Or, the CCP could continue its global adaptation for acceptance by using her vast market as leverage in declarations of economic wars. China has the manufacturing capabilities to achieve both wars simultaneously. Or hope and reason could win out over greed in the new streams of commerce formed through international ADR.

The highest priority, a human right to co-exist served by government, preserving the future for all. Experience has taught China in the long tradition of "tiaojie." Wisdom and shared knowledge can be secure in peaceable, if not harmonious "guanxi." We are one global clan.

Endnotes:

[1] *See* Stanley B. Lubman, *Dispute Resolution in China After Deng Xiaoping and Mediation Revisited,* 11 COLUM. J. AS. L. 287 (1997).

[2] Robert Perkovich, *A Comparative Analysis of Community Mediation in the*

United States and the People's Republic of China, 10 TEMPLE INT'L & COMP 313 (1996).

[3] Lubman, *supra* at note 1, at 238.

[4] *Id. at* 291. *See also* Fu Hualing, *Understanding People's Mediation in Post-Mao China,* 6 J. CHINESE L. 216 (1992).

[5] Perkovich, *supra* at note 2, at 313.

[6] Jun Je, *Mediation, Arbitration, and Litigation: Dispute Resolution in The People's Republic of China,* 15 UCLA PAC. BAS. L. J. 122 (1996).

[7] Hualing, *supra* at note 4, at 215.

[8] Ge, *supra* at note 6, at 213.

[9] Robert L. Worden, Andrea Matles Savada, & Ronald E. Dolan, eds., *China: A Country Study* (visited April 30, 1999) at <*http://lcweb2.loc.gov/cgi-Bin/query/r?frd/cstdy:@field(DOCID+cn0356)*> (July 1987).

[10] James A. Schellenberg, Conflict Resolution Theory, Research, and Practice 184 (1996).

[11] *Id.*

[12] *See* Lubman, *supra* at note 1, at 233.

[13] *See Id.* at 292.

[14] Worden, *supra* at note 9.

[15] Dan Ewing, *REALITY CHECK: 30 Years Later-Bush Following in Nixon's Footsteps* (visited October 26, 2002) at <*http://www.nixoncenter.org/publications/Reality%20Check/02_19_02_Nixon30th.htm*> (February 20, 2002).

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[18] Human Rights Watch Report 2001, *China and Tibet, Human Rights Developments* (visited August 14, 2001) at <*http://www.hrw.org/wr2kl/ asia/china.htm*> p. 6.

[19] *Id.* At 5-6.

[20] Jiang Zemin, *President of the People's Republic of China: Biographic Profile* (visited October 4, 2000) at <*http://www.chinaonline. com/refer/biographies/secure/REV-Zemin3.asp*> (2000).

[21] Lubman, *supra* at note 1, at 386-90.

[22] Pittman B. Potter, *Guanxi and the PRC Legal System: From Contradiction to Complementarity* (visited October 4, 2000) at *http://www.chinaonline.com/commentary analysis/legal/currentnews/…/c0002 1599 wilson-s.asp*> p. 4 (February 9, 2000).

[23] Beijing Concord International Consulting, Co., Ltd., *Settlement of Disputes* (visited April 24, 1999) at <*http://www.bcic. com/english/tips/settlement.htm*> (1999).

[24] *See* Lubman, *supra* at note 1, at 304.

[25] Ge, *supra* at note 6, at 126.

[26] *Id.* At 2.

[27] WTO NEWS: 2001 PRESS RELEASES, WTO successfully concludes negotiations on China's entry (visited October 27, 2002) <*http://www.wto.org/ english/news_e/pres01_e/pr243_e.htm*> (September 17, 2001).

[28] Lubman, *supra* at note 1, at 386-90.

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[35] *Id. at* 282.

[36] Ge, *supra* at note 6, at 124.

[37] *Id.* At 335.

[38] Potter, *supra* at note 22, at 1.

[39] Donald C. Clarke, *Dispute Resolution in China,* 5 J. CHINESE L. 272 (1991).

[40] Lubman, *supra* at note 1, at 367-9.

[41] Hualing, *supra* at note 4, at 218 (quoting James Seymour).

[42] Ge, *supra* at note 6, at 131-3.

[43] Reports on *www.mediate.com claim 3 million hits and growing.*

[44] Compiled from the 9 International Arbitration bodies listed (visited October 28, 2002) <*http://www.interarb.com/vl/pages / International_bodies_forCommercial_ Arbitration/*>.

[45] *See* Schellenberg*, supra* at note 10, at 182.

[46] Clarke, *supra* at note 38, at 288-9.

[47] Hualing, *supra* at note 4, at 236.

[48] *See Id.* At 239.

[49] Lubman, *supra* at note 1, at 300-1. *Also* Hualing, *supra* at note 4, at 230-3.

[50] Potter, *supra* at note 22, at 6.

[51] *Id.* at 5.

[52] Lubman, *supra* at note 1, at 281-2. *Also* Hualing, *supra* at note 4, at 230-3.

[53] *Biography of 16th President Abraham Lincoln, Gettysburg Address* (visited October 29, 2002) <*http://www. whitehouse.gov/history/presidents/ al16. html*> (November 19, 1863).

[54] Colin Robinson, *The European Union's Military Capability* (visited October 27, 2002) <*http://orbat.com*> (August 12, 2001).

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[56] Frank W Moore, *China's Military Capabilities* (visited October 27, 2002) <*http://www.comw.org/cmp/fulltext/iddschina.html*> (June 2000). *But see also*John Pomfret, *China to Buy 8 More Russian Submarines* (visited October 29, 2002) <*http://www.washingtonpost.com/ac2/wp-dyn?pagename=article& node=& contentId=A38496-2002Jun24&notFound=true*> (June 24, 2002).

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Alphabetical Glossary of Terms"

with Pinyin Mandarin tones from <*http://www.chinawestexchange.com/Mandarin/Pinyin/Chart/x.htm*>

ADR– Alternative Dispute Resolution
Various procedures for dispute resolution including arbitration, mediation, negotiation, mini-trials, etc., other than litigation.

Chiang Kai-shek– *Cheeong (as in song) Keye shuhk*
also known as *Chiang Chung-Cheng (1887-1975).* Nationalist Leader of China from 1928-49. He helped overthrow Imperial China in 1912 to establish, The PRC, The Republic of China. After being overthrown by civil war in 1949, he formed a government in exile on the island of Taiwan where martial law reigned until his death.

CCP– Communist Party of China
Unopposed since 1949, will call itself the "Chinese Socialist Party" within 5 years.The next 16th Central Party elections will be in November 2002, held every 5 years. With over 60 million members, it is just 5.1% of China.
<*http://ce.cei.gov.cn/frame_8.htm*>

CIETAC– *China International Economic and Trade Arbitration Commission was so named in 1998.*
Previously the Foreign Economic and Trade Arbitration Commission (FETAC) from 1980-98. The Foreign Trade Arbitration Commission (FTAC) began 1954.
<*http://www.cietac.org.cn/english/e_index.htm*>
E-mail: *CIETAC@public.bta.net.cn*
The Mediation Centres, started in Beijing (*bay jing*), were spun-off in 1987 and only mediates disputes.

CMAC– China Maritime Arbitration Commission
<*http://www.cmac.org.cn/ENGLISH/E_index.htm*>
All three above groups are subordinate sections of:

continued...

TIAOJIE
from preceding page

China Council for the Promotion of the International Trade (CCPIC) <*http://www.ccpit.org*> *Email: info@ccpit.org*

Deng Xiaoping– *Dung Show (as in how) - ping*
Credited with the birth of Modern China (1904-1997).
Communist Leader of China from 1976-97.

EU– European Union
A community of 15 member countries united to form a superpower. Expected to expand to 25 in the near future. The Treaty of Amsterdam effective since 5/1/99 governs.
<*http://eurpoa.eu.int/eur-lex*>
Formerly known as the European Community. The Treaty of Rome signed in 1957 created the first community membership.

Fa– *fah*
Impairs harmony using law, rules and principles to control. The opposing force of li.

Falun Gong– *Fahloon (oo as in good) Gone (past tense of "go")*
Founded in 1992 by Li Hongzhi (Lee Hong, as in song, jeuh), It mixes Doaism & Buddhism with Qigong (*Cheegone, p.t. go*), an ancient breathing exercise system, and meditations.

Guanxi– *Gwahnsee*
The group of the five traditional relationships upon which the Chinese based social peace and harmony.
IMPORTANTLY: includes today's business relations.

Jang– *Jong (as in song)*
This "yielding or compromise" is the foundation of social peace and harmony.

Jiang Zemin– *Johng (as in song) Zuhmeen,* also known as Chiang Tsemin (1926-?)
Credited with computerizing China and her WTO membership. Communist Leader of China since 1997 holds four positions: General Secretary of the 15th Central Committee (CCP), Chairman of the 9th People's National Congress, State President, and Chairman of the State Central Military Commission.

Li– *Lee*
The way the Chinese associated with one another for over 2,600 years in various guanxi. The opposing force of fa.

Legalists
The conservative interventionist political point of view.

Mao Zedong– *Mow(as in how) Zuhdong (as in song)*
also known as Mao Tse Tung or Mao Tze Dong (1893-1976). The first Communist Leader of China from 1949-76.

Minjan Xiehui– *Meenjahn Tseeah-whooee*
civil associations

Mufa– *Moo (as in book)- fah*
"The Mother" The Chinese Constitution of 1982 meant to serve as the guiding basis of all law in China, but not enforceable law in and of itself.
http://english.peopledaily.com.cn/constitution/constitution.html

Panjue– *Panjuh*
Litigation by jury verdict.

PMCs– The People's Mediation Committees
The Communist incarnation of Confucian clan mediation.

Populists
The liberal free market political point of view.

PRC– *The People's Republic of China.*
The superpower country of mainland China. Nicknamed the "Middle Kingdom," and "Silk Road"
from 13-14th century trade routes created by Marco Polo.
<*http://www.chinalegalchange.com*>, Chinese <*http://www.gov.cn*>.

Tiaojie– *Teeahawjeeuh*
Confucian "clan mediation" which in several incarnations has served as the basis for dispute resolution in China for millennia.

TVLSO– Township and Village Legal Services
CCP supported groups to encourage Chinese citizens to assert their legal rights in the new court system, replacing the PMCs.

USA– United States of America.
The superpower country in North America.
<*http://www.first.gov*>

WTO– World Trade Organization
United Nations arm through which all global trade flows.
<*http://www.wto.org*>

Xieshang– *Tseeuhshong (as in song)*
court sponsored mediation.

Xinjiang Uygur Autonomous Region
Sinjung Ooyeegoor (oo as in Sue)
A Province in NW China, borders the former Soviet Union, Pakistan, Afganistan, Tibet and India, has an active separatist movement (Afgani bases).
Capital is Urumqi (Ooreemsee). Pop: 17.2 million.

Xizang Autonomous Region
Zeetsong (as in song)
Also known as Tibet.

The other three autonomous regions are Mongolia, Guangxi (*Goowantsee*), and Ningxia (*Neeoongtseeah*).

Zhongcai– *Jong(as in song) keye*
arbitration.

Zufa– *Tzoo (as in book) fah*
"The children" a body of enforceable legislation based on the new Constitution of 1982.

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2003 Section Calendar

March 30 - April 4, 2003	**Brussels/London Program**
April 25, 2003	**International Litigation Update** Hyatt Regency, Miami
May 1-4, 2003	**IFTTA Update** Monaco
May 3-11, 2003	**Russian Forum** St. Petersburg, Russia
June 25, 2003	**International Arbirtration Update**
	- AND -
June 27, 2003	**International Law Section** **EXECUTIVE COUNCIL MEETING** at The Florida Bar's Annual Meeting, Orlando World Center Marriott, Orlando

Vive La Médiation!

by Marcia S. Cohen, Esq., St. Petersburg, Florida

Mediation as a means of resolving disputes has crossed the Atlantic and is alive and thriving in Paris, the city of love. The process differs in some respects from mediation in the United States, but the result is the same: the parties design their own resolution with the assistance of a trained professional, and the conflict is at an end.

In 1995, the Paris Chamber of Commerce and Industry created the Paris Mediation and Arbitration Center to provide alternative dispute resolution to commercial enterprises in an around Paris. In doing so, the Chamber of Commerce had three goals: to make mediation and arbitration more available as a quick, effective and confidential means of resolving disputes; to account for the needs of all companies, especially those of small and medium size; and to offer its members the guarantee of a solid structure composed of known partner entities, such as the Paris Bar, the Paris Commercial Courts, the French Arbitration Association, the French National Committee of the International Chamber of Commerce, and the Council of the Order of Accountancy.

The Paris Mediation and Arbitration Center (or CMAP) is the first center in continental Europe dealing solely with commercial mediation. As of 2002, CMAP completes 100 mediations per year. Mediation is typically begun with the request of one party for a dispute to be mediated. It is the job of CMAP staff to convince the opposing party to agree to mediate. 70% of the time, CMAP is successful in doing so.

After a unilateral request, CMAP sends a letter to the opposing party describing the organization and giving the party 15 days to respond, or one month for a party in another country. Though at least one of the parties must be French, many CMAP cases are international disputes, many between U.S. and French companies. Often, there will be no reply to CMAP's first letter, so a CMAP staff member will telephone the firm, urging it to agree to mediate the conflict.

The mediator is chosen by an independent commission headed by a well-known judge, and not by the parties. The mediator may be lawyer, a judge, an accountant, business executive, or a member of another profession. All CMAP mediators must undergo 40 hours of training, but there is no certification for mediators. Currently, there are approximately 130 names on CMAP's mediator roster. Continuing mediation training is desirable, but not necessary. Judicial mediation, or mediation of court cases, is regulated by the Bar, but commercial mediation, where the dispute has not been filed in the commercial court, is not. The Civil Procedure Code does not yet deal with commercial mediation, although CMAP officials see a need for a more formal definition, and perhaps regulation, of commercial mediation.

Once mediation has begun, either party has the right to end it at any time, and there is no obligation to reach agreement, but after this similarity, the French process diverges from the U.S. model. Usually, there are at least 2-3 mediation sessions totaling 10-20 hours in duration. Most are concluded within two months, but there is a maximum mediation period of six months. Judicial mediations can be longer because CMAP has found that the parties are more angry and stubborn after a lawsuit has been filed.

In a judicial mediation, the judge will issue an order designating CMAP as the mediation organization, CMAP will then forward the names of three mediators to the judge for selection. Once the judge has designated the CMAP mediator, the mediation process begins. The mediator then has three months within which to complete the mediation. On application to the court by one or more of the parties, this period can be extended an additional three months. Confidentiality rules are similar to those in most U.S. jurisdictions.

Most of the time, the parties are represented by counsel, but if only one party has a lawyer, CMAP will attempt to convince the represented party not to bring its attorney. If the represented party insists on mediating with counsel, CMAP will try to convince the unrepresented party to retain counsel to equalize the bargaining power between the parties. CMAP has an excellent success rate; 75% of its mediations settle the dispute. The eventual settlement agreement is prepared by CMAP.

CMAP also provides arbitration services, in which the resolution of the dispute by decision of an arbitrator is quicker and simpler than confiding the issues to a commercial court. Even after a demand for arbitration by a party, however, mediation is offered first, and only after it is declined by the parties, is arbitration undertaken. There is a clear preference for a mediated settlement, rather than a resolution imposed by an arbitrator.

CMAP is still underwritten by the Chamber of Commerce, but it is now an independent entity. Those using is mediation or arbitration services pay an administrative fee to CMAP in addition to the fee tot he mediator or arbitrator. The mediation can take place in the elegant offices of CMAP on the avenue Franklin D. Roosevelt, just off the Champs Elysées, or in the offices of the mediator or parties. The success of this commercial dispute resolution service is demonstrated by the repeated use of its services by many French companies. Perhaps its unique approach to early intervention in disputes between business enterprises can be a mode for a U.S. version. Further information about CMAP is available at its website *www.mediationetarbitrage.com*.

Marcia S. Cohen *holds a Bachelor of Arts degree in Education from Roosevelt University of Chicago, a Masters degree in Music Composition from Northwestern University, and received her Juris Doctor degree from Stetson University College of Law in 1984. Since becoming a member of The Florida Bar, she has practiced almost exclusively in the area of labor and employment law and mediation with a concentration in employ-*

ment discrimination and sexual harassment, and has the distinction of having had a successful case before the U.S. Supreme Court. Ms. Cohen was certified by the Florida Supreme Court as a circuit civil mediator after completing her AAA mediation training in December, 1989. She completed the Supreme Court Certified Arbitration Training Program in August, 1995. The same year, she was certified as a mediator in the U.S. District Court for the Middle District of Florida, and has also served as an arbitrator with that federal court. She has been a contract mediator for the Equal Employment Opportunity Commission since 1999, and has been appointed to the mediation panel of the Centre de Médiation et d'Arbitrage de Paris. Ms. Cohen is a member of the Florida Academy of Professional Mediators, Inc. You may contact Ms. Cohen at www.marciascohen.com.

Trade Agreements Update

Courtesy of the Free Trade Area of the Americas Committee of the International Law Section

Newly Signed Legislation to Spur Additional Trade Agreements

The Trade Act of 2002 (HR 3009) was signed into law by President Bush on August 6th, 2002. Among its notable points, it gives the President the Trade Promotion Authority (formerly "Fast Track") power which had expired in 1994, and which should spur the United States to negotiate additional trade agreements. The Act also renews the preferential market access to the American market under the Generalized System of Preferences (GSP) for developing countries and the Andean Trade Preference Act for Bolivia, Colombia, Ecuador and Peru. The text of the 304 page Act is available for download at *http://finance.senate.gov/leg/hr3009confrpt.pdf*

Request for Public Comment on Free Trade Agreement with Singapore

The United States Trade Representative seeks public comment on the draft copy of the environmental review of the proposed US-Singapore Free Trade Agreement. Written comment must be submitted by September 20th, 2002. The Federal Register notice, as well as the environmental review, is available for download at *http://www.ustr.gov*

U.S. Proposes Greater Transparency in WTO Dispute Resolution Panels

The United States recently submitted a proposal to the World Trade Organization for greater openness in the operation of the dispute resolution process. Its proposal includes public access to hearings, the publicizing of briefs submitted by the parties, earlier public release of the panel reports, and the possibility of allowing for the submission of amicus briefs. The press release is available at *http://www.ustr.gov/releases/2002/08/02-82.htm*

FTAA Conference Available on Webcast

On July 18th, 2002, the parties to the North American Free Trade Agreement (Canada, USA, Mexico) sponsored a one-day seminar on the Free Trade Area of the Americas in Merida, Mexico. The seminar includes substantive discussion on Market Access issues, Agriculture, Services, Investment, Greater Trans- parency and Increased Participation from sectors of Civil Society. Streaming video on the seminar is available on the Internet at *http://www.ustr. gov/new/ftaa-merida.htm* [Note: The video requires RealPlayer to view - Free copies are available for download on the site].

Request for Public Comment on Andean Trade Preference Eligibility

USTR seeks public comment on eligibility criteria for the Andean countries (Bolivia, Colombia, Ecuador and Peru) to qualify for preferential market access under the recently signed Trade Act of 2002. The Act sets out additional criteria (Title XXXI- "The Andean Trade Promotion and Drug Eradication Act") for the aforementioned countries to qualify, in addition to the original criteria found under the Andean Trade Preference Act. Public comment must be received by September 16th, 2002. The official Federal Register notice (dated August 15th) can be viewed at *http://www.ustr.gov*

Request for Public Comment on WTO Steel Panel

In response to the President's decision in March to impose safeguard measures on the import of certain steel products, the European Union, together with several other countries, requested the establishment of a dispute settlement panel to examine whether the US measures are consistent with its GATT and WTO obligations. The USTR is accepting comments on the issues raised in the dispute, which must be submitted by September 12th, 2002. The official Federal Register notice (dated August 13th) can be viewed at *http://www.ustr.gov*

International Tax Briefs

by Laura A. Quigley

A Plethora of Proposed Legislation Affecting International Tax After September 11, 2001

This column covers selected current international tax issues.

The 2002 Proposed Legislation seems to have two themes. First, American individuals and entities, directly or indirectly, must be for America! Second, America must help the competitiveness of American business.

Bill No.: H.R. 4880
Sponsors: Rangel (D-NY), Gephardt (D-MO)
Name: "To amend the Internal Revenue Code of 1986 to prevent the continued use of renouncing United States citizenship as a device for avoiding United States taxes"

This bill eliminates the ability to expatriate on an informal basis. Before an individual could avoid tax as a U.S. citizen, they must first do a formal renunciation of their citizenship.

"Tax Responsibilities of Expatriation" is added under new Section 877A. Section 877A requires that all property of covered expatriates is treated as sold on the day before the expatriation for its fair market value and that the gain or loss will be taken into account for the taxable year of the sale. Capital assets would be given the preferential capital gains tax rate.

The bill exempts the first $600,000.00 ($1.2 million for a married couple) of appreciation from this tax. The bill further provides exceptions for certain U.S. real property interests and certain retirement plans.

An expatriation election can also defer the tax with interest until the property is sold. Special rules apply to interests in trusts and qualified trusts.*

"Gifts and Bequests from Expatriates" is also added under Chapter 13 A. This includes Section 2681 imposing a tax on the receipt by U.S. citizens of gifts or bequests from expatriates.

This new tax does not apply where the gift or bequest is otherwise subject to U.S. estate or gift taxes. Further, any foreign estate or gift tax paid on the gift or bequest would reduce this U.S. tax.

Bill No.: H.R. 4993
Sponsors: Doggett (D-TX)
Name: "No Tax Breaks for Corporations Renouncing America Act of 2002"

This bill amends the Internal Revenue Code of 1986 to prevent corporations from exploiting tax treaties to evade taxation of United States income. This bill adds Section 894(d) to deny treaty benefits for certain deductible payments. Thus, a foreign entity cannot reduce the withholding tax rate for these foreign deductible payments under the U.S. income tax treaty with that foreign country, unless such entity is predominately owned by individuals who are residents of such foreign country.

Bill No. H.R. 3884
Sponsors: Neal (D-MA)
Name: "Corporate Patriot Enforcement Act of 2002"

This bill amends Section 7701 (a) of the Internal Revenue Code of 1986 to treat the acquiring corporation in a 'corporate expatriation transaction" as a domestic corporation. A "corporate expatriation transaction" is defined as a transaction in which a foreign corporation acquired, directly or indirectly, substantially all of the properties of a domestic corporation or partnership and immediately after the transaction, former ownere of the domestic corporation/partnership hold more than 80% of the foreign corporation stock. This 80% ownership requirement is lowered to 50%, if the foreign corporation does not have substantial business activities in the foreign country of its creation or organization and the stock of the corporation is publicly traded with the principal market being in the United States.

Bill No. H.R. 3922
Sponsors: Maloney (D-CT)
Name: "Save America's Jobs Act of 2002"

This bill includes the same amendment to Section 7701 (a) above. However, this bill grants authority to the Secretary of Treasury to modify the corporate tax rate for an acquiring corporation treated as a domestic corporation under the bill.

Bill No. H. R. 456
Sponsors: Maloney (D-CT)
Name: "Providing for consideration of the bill (H.R. 3884) to amend the Internal Revenue Code of 1986 to prevent corporations from avoiding the United States income tax by reincorporating in a foreign country"

Bill No.: H.R. 4756
Sponsors: Johnson (R-CT)
Name: "Uncle Sam Wants You Act of 2002"

This bill also amends Section 7701 (a) similar to that seen above under H.R. 3884, et. seq.

Bill No.: H.R. 4047 & 4151
Sponsors: Houghton (R-NY)
Names: "International Simplification and Fairness for American Competitiveness Act of 2002" & "Fairness, Simplification and Competitiveness for American Business Act of 2002"

These bills list a litany of provisions, such as increasing the de minimis exception under subpart F to $5 million, extending the carryforward period of the excess foreign tax credit, (deleted under H.R. 4151), repealing the Foreign Personal Holding Company and Foreign Investment Company rules, repealing the special capital gains tax on aliens

present in the United States for 183 days or more, repealing the withholding tax on dividends from certain foreign corporations.

Bill No.: S. 2339
Sponsors: Kerry (D-MA)
Name: "Tax Haven and Abusive Tax Shelter Reform Act of 2002"

This bill attacks tax abuses by disallowing tax benefits for transactions that lack substantial economic substance and are created through the use of identified tax havens. This bill further imposes greater penalties on parties involved in tax avoidance strategies.

If an underpayment is attributed to a lack of economic substance or lack of business purpose or other similar rules, a 40% penalty tax is imposed under Section 6662, the accuracy-related penalty. The threshold for the substantial understatement of income tax is changed to the lesser of $500,000.00 or the greater of 10% of the tax required to be shown on the return for the taxable year or $5,000.00.

A substantial promoter of a tax avoidance strategy will pay a penalty of 100% of the gross income they derive or will derive from that tax avoidance strategy. A substantial promoter is any promoter who offers tax avoidance strategies to more than one potential participant and receives a fee in excess of $500,000.00 in the aggregate for the strategy.

A person who aids or assists in the understatement of tax liability involving tax shelters and who does not maintain a list of investors in that tax shelter is subject to a a penalty of 50% of the gross proceeds derived or to be derived from each investor. For a person who fails to disclose a reportable transaction, the penalty is the greater of 5% (or 10% with a listed transaction) of any increase in Federal tax or $100,000.00.

Any person who transfers money or other property directly or indirectly to an identified tax haven and who does not furnish information on the transfer will pay a penalty of 20% of the amount of the transfer. Further, U.S. tax benefits are disallowed for transactions that have no real business purpose, and this bill imposes new penalties on taxpayers who fail to report an interest in an overseas account.

Endnote: Proposed Legislation, "Current Status of Proposed Legislation Affecting International Tax Rules," by David Benson, Esq., Marjorie A. RoUinson, Esq. and Peg O'Connor, Esq. Tax Management International Journal Vol. 31, No. 8, 428, August 9, 2002.

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Brussels & London Program

March 30 - April 4, 2003

The International Law Section is planning a two-day program in Brussels with the European Parliament and a two-day program in London with the British Parliament.

Departure from Miami would be Sunday March 30, 2003 with arrival in Brussels on March 31st. There we will be personally escorted, by a member of the EU Parliament, to a behind the scenes tour of the European Parliament facilities followed by meetings and dinner with several members of Parliament on Tuesday April 1st. Wednesday we will fly to London where on Thursday we will have a lunch at the House of Commons, another personally escorted tour, meetings with members. Thursday, dinner in House of Lord's and additional meetings with Parliament members.

Cost is projected at $1600.00 per person double occupancy and includes round-trip air (Miami-Brussels-London-Miami) first class hotels, transfers, and most meals. Registration would be an additional $100.00. The trip is very limited to a maximum of 30 participants not including spouses or significant others. If you are interested, please contact Angela Froelich at *afroelic@flabar.org* or Larry Gore at *gorel@msn.com*.

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