

Spring 2-10-2004

The International Review | 2004 Spring

Michael Rhee

Follow this and additional works at: https://digitalcommons.nyls.edu/international_review_newsletter



Part of the [International Law Commons](#)

The International Review

NYLS Center for International Law

Spring 2004

Many countries around the world have adopted bankruptcy laws for individuals and businesses seeking to reschedule indebtedness. But no such legal framework exists for national governments with debt problems.

An International Bankruptcy Plan for Countries in Financial Difficulty?

Is it time for the international community to create a formal bankruptcy procedure for sovereigns? What are the prospects of implementing such a proposal, and where does the debate stand today? (See page 2)



Contents

Bankruptcy Plan for Bankrupt Countries?	2	The Vanishing Global Warming Treaty?	13
Alumna Profile: Ms. Saori Kilthau '00	7	Struggling for a single EU patent	14
Biosafety Protocol	8	A New Trend in Clothing?	15
Free Trade Agreement of the Americas	9	A Toxic Plan to Test Everyday Chemicals?	16
Central American Free Trade Agreement	10	Anti-Tobacco Treaty	18
Does the WTO Say No to Drugs?	11	Will the WTO Create Higher Deficits in U.S.?	19
United Nations Anti-Corruption Treaty	12	Upcoming Events	20

AN INTERNATIONAL BANKRUPTCY PLAN FOR SOVEREIGN DEBTORS?

Many countries around the world have in place a legal framework – in the form of national bankruptcy law – which allows individuals and businesses with unmanageable debt burdens to try to negotiate new payment terms with their creditors. But what happens when the debtor is a national government (or “sovereign”) having trouble making payment on tens or hundreds of billions of dollars of indebtedness? Are there laws in place to guide a sovereign and its creditors in working out an arrangement to reschedule debt payments?

Since the late-1990s, there has been a stream of well-publicized cases where sovereigns have had difficulties in meeting or even stopped paying their debt obligations. In some cases, the result was an international financial crisis. Critics point out that because there is no international equivalent of domestic bankruptcy laws, many sovereigns and their creditors have managed debt problems in a haphazard fashion. Critics also say that this has only served to exacerbate a sovereign's economic difficulties and even threatened the financial stability of neighboring countries.

Is it time for the international community to create a formal legal framework which could assist sovereigns and their creditors in renegotiating unmanageable debt? If so, what entity will coordinate such a task? Are there other alternatives to dealing with sovereign debt problems? What are the prospects of implementing such a proposal, and where does the debate stand today?



Unable to bond with bondholders? In order to finance a variety of projects, governments around the world have raised hundreds of billions of dollars by issuing bonds to thousands of creditors. But unforeseen economic problems or mismanagement have made it difficult for these governments to pay back their debts. Failure to reach agreements with foreign creditors in resuming debt payments has caused financial crises in many regions of the world since the 1990s.

Cover page illustration courtesy of *Financial Literacy*, New Zealand.

Problems paying back high debt

In order to finance an assortment of expensive public projects ranging from repairing water pipelines to building new roads and bridges, sovereigns borrow capital through a variety of means such as issuing bonds or borrowing from banks. Financial experts say that, unlike years past, sovereign debt now lies more in tradable securities such as sovereign bonds – which are issued to hundreds, if not thousands, of foreign creditors ranging from large institutional investors to private investment groups – than in loans from bank syndicates. According to one expert, “bond debt has become more than 1.5 times as high as bank debt, \$365 billion compared to \$219 billion” in 1999 alone. The rise of sovereign bond debt has also seen a corresponding increase in the number of foreign creditors (from a wide variety of legal jurisdictions) holding these sovereign bonds, say analysts.

In recent years, unforeseen economic crises or financial mismanagement have made it difficult for many sovereigns to service their existing debt levels (i.e. to make debt payments to creditors on a regular basis according to an agreed upon schedule). Furthermore, several cases illustrate the constraints faced by sovereigns in trying to work out debt problems with their creditors.

For example, analysts note that in late 1994, when over 75 percent of Mexico's short-term notes would have matured in the following months, Mexico's currency – the peso – had declined in value by half against the dollar. Because of the drop in the value of the peso, it became much more expensive for Mexico to pay back its dollar-denominated indebtedness, and efforts to work out a more feasible plan for that country to pay its various creditors were deemed unrealistic in a short period of time. In the end, the United States and the International Monetary Fund (IMF) provided Mexico with a line of credit of nearly \$27 billion to meet its debt obligations.

In 1997, at the start of the Asian financial crisis, foreign creditors refused to extend the maturity of over \$67 billion in short-term debt owed by private Korean banks. Although the Korean government announced that it would not let these banks fail, economists said that it didn't have the foreign reserves needed to satisfy the creditors' claims. (Legal experts say that although the Korean debt problem mainly centered on

Continued on next page

private banks, it became a sovereign debt problem because the Korean government was determined to support the financial viability of these banks.) Scholars and policymakers noted that heavy pressure from the U.S. and the IMF finally convinced Korea's creditors to extend the maturity of that country's short-term indebtedness. But by that time, the IMF had already given Korea access to \$8 billion in emergency funds, which, say critics, were effectively paid out to Korea's foreign creditors.

Throughout the 1990s, Russia experienced frequent difficulties in making debt payments to its foreign creditors. In order to stem an economic crisis in 1998, the IMF provided Russia with over \$22 billion in emergency aid. But Russia was unable to work out a plan with its creditors in servicing its indebtedness, and, by the end of the summer, defaulted on domestic and foreign obligations.

In 2001, after failing to negotiate with its creditors more lenient terms for its heavy indebtedness, Argentina announced a default on its foreign debt obligations. As of February 2004, that country was still in default on \$50 billion in debt to its private lenders. Said one commentator, Argentina "has shown no interest in negotiating a debt workout" (i.e. a plan to resume making its debt payments) with its foreign creditors.

Set rules and procedures for bad debt at home

Legal experts say that when individuals, businesses, corporations, or even city governments have trouble making debt payments to their creditors, many countries rely on their domestic bankruptcy laws to help these parties resolve their debt problems in an orderly and predictable fashion. For example, bankruptcy laws in the United States are found in Title 11 of the U.S. Code. There are two basic types of bankruptcy proceedings. Under a Chapter 7 bankruptcy proceeding (known as "liquidation"), a trustee liquidates the property of a debtor and distributes the proceeds to the creditors. Under a Chapter 11 proceeding (also called "reorganization"), a debtor and its creditors try to negotiate a plan "reorganizing the debtor's finances and activities" so that the debtor may resume regular debt payments. Under a reorganization plan, the parties may agree to stretch out the payments of a debt, ease or even reduce the terms of debt payments, replace the current management of a company with other personnel, or seek additional funds from new creditors.

Although bankruptcy laws vary around the world, many countries share similar practices which allow debtors and creditors to carry out a debt restructuring agreement in a prompt and orderly manner. For example, a "stay" on creditor enforcement prevents various creditors from collecting their debts or enforcing the original terms of a debt agreement in a court of law. Experts say that such a provision gives debtor parties the "breathing space" to work out a debt restructuring agreement.

There are also provisions which provide incentives to creditors to participate in a debt reorganization proceeding. For example, under such a proceeding, debtors are prevented from favoring certain creditors, and also from transferring certain assets out of the reach of creditors. Furthermore, a "cram down" provision binds all creditors to a restructuring agreement reached by a qualified majority. Without such a provision, say legal experts, a minority of creditors would be able to block a debt restructuring agreement and simply hold out for greater benefits.

An absence of procedures for sovereign debt

While domestic bankruptcy laws help individuals and businesses work out debt problems, these laws aren't applicable to sovereign debtors. In fact, legal experts say that a formal reorganization process currently does not exist at the international level for sovereigns with unmanageable debt obligations.

Without such a framework in place to provide a sovereign debtor and its creditors with incentives to pursue debt restructuring talks, financial analysts say that countries "will go to extraordinary lengths to avoid restructuring their debts to foreign creditors."



Hold it, hold it: In the United States and other countries around the world, provisions in their bankruptcy codes – ranging from a "stay" which prevents creditors from enforcing the original terms of a debt agreement to a "cram down" provision which binds a minority of creditors to a final debt restructuring agreement – allow debtors and creditors to resolve debt problems in an orderly and predictable fashion.



A global bankruptcy vacuum? A legal bankruptcy framework does not exist at the international level for sovereigns with debt problems. According to one expert, "the international financial system lacks a strong legal framework for the predictable and orderly restructuring of sovereign debt."

Continued on next page



A case of denial:

According to financial experts, sovereign debtors and their creditors usually try to avoid renegotiating unmanageable debt payments. When these parties finally agree to a debt restructuring, it is usually done "in the most extreme circumstances" when a country's economy is already experiencing high unemployment and widening social unrest. Negotiations are then conducted in an ad hoc fashion since formal rules for conducting a sovereign debt restructuring do not exist at the global level.



IMF to the rescue?

Over the years, governments around the world and even some private lenders have complained about the absence of a formal process to guide sovereign debt restructurings. In November 2001, the IMF proposed a sovereign debt restructuring mechanism (SDRM).

Why are many sovereign debtors and their creditors reluctant to pursue debt restructuring negotiations? Legal experts and policymakers cite various problems, all of which stem from the absence of a formal set of rules governing a sovereign debt restructuring process.

For example, analysts say that sovereigns face the formidable task of trying to reach a collective restructuring agreement with potentially thousands of private creditors who hold a variety of debt instruments (such as bonds, bills, and notes). Even assuming that a sovereign debtor begins debt restructuring talks with its creditors, there are currently no international regulations which would bind a minority of creditors to the terms of a debt restructuring plan approved by a qualified majority. In some cases, experts say, a minority of creditors have attempted to block restructuring agreements by holding out for a more favorable settlement. Moreover, a debt restructuring, even one that runs smoothly, will usually damage a country's economy and also its credit worthiness in international markets.

So how do sovereign debtors and creditors currently manage debt burdens that have become, according to one analyst, "unpayable for all practical purposes"? Policymakers say that sovereign debtors and creditors renegotiate unmanageable debt burdens through an ad hoc process, which varies from one case to the next. While parties in some cases eventually manage to work out a debt restructuring agreement, economists say that lenders in other cases have held out for better terms.

Sovereign debtors have also looked to international organizations such as the IMF as a "lender of last resort" to provide emergency rescue packages to stabilize a country's economy. One leading legal scholar said "IMF crisis lending has grown enormously" in the last few years. According to one official, from the mid-1990s to 2001, emergency IMF lending to faltering economies reached \$250 billion. Sovereigns have also resorted to "last ditch policies" which, experts say, only worsen a country's financial situation. For example, sovereigns sometimes use their foreign currency reserves to maintain the stability of the domestic currency and will wait until the last moment to acknowledge a debt problem. But experts note that these reserves sometimes reach dangerously low levels and even prevent domestic businesses from paying their foreign debts.

A proposal for a sovereign debt restructuring process

Economists note that sovereign debt problems are not a recent phenomenon and that policymakers have recognized the need for a more formal procedure to reorganize such debt since the early-1980s. Many policymakers believe that recent financial crises around the world have given greater momentum for the creation of a formal procedure to resolve sovereign debt problems.

Beginning in the late-1990s, some policymakers and commentators proposed that the IMF take a lead role in studying the feasibility of implementing a formal debt restructuring process for sovereign nations. The IMF is the international financial organization concerned with countries having balance-of-payment problems such as shortages in their foreign currency reserves (which are used to pay back debts to foreign creditors). Member nations of the IMF having such problems can request a variety of temporary loans, which must be paid back in full.

Views differ as to whether the IMF has the means, influence, and experience to administer and oversee such a process. It seems clear that the IMF already influences current sovereign debt restructuring efforts by sometimes requiring a country to work with its creditors on a restructuring agreement before receiving emergency IMF funding. Some commentators have criticized the IMF for creating "moral hazard" whereby private institutions will recklessly lend to sovereigns with weak economies, believing that the IMF will provide emergency loans (which are essentially provided by IMF member countries) in the event of a financial crisis.

In November 2001, IMF officials presented a proposal for a *sovereign debt*

Continued on next page

restructuring mechanism (SDRM), or simply a set of formal rules and procedures which would “provide a framework for the orderly, predictable, and rapid restructuring of debt problems” for sovereign countries. Under current proposals (which were drawn from various domestic bankruptcy laws and practices from around the world), the SDRM will allow a sovereign and a yet unspecified supermajority of creditors to approve a restructuring agreement that would be legally binding on all creditors. Supporters say that this provision will discourage dissenting creditors from blocking a restructuring agreement. Also, even if a sovereign had issued various debt instruments ranging from bonds to notes, the SDRM would give a sovereign and its creditors a unified way to “restructure multiple debt instruments.” Some financial experts say that this will speed up a debt restructuring by allowing a sovereign debtor and its creditors to deal with a wide range of outstanding debts at one time.

If adopted, the SDRM will also include many incentives to encourage creditors to participate in debt restructuring negotiations. For example, certain provisions will allow creditors to have information concerning how a sovereign is treating other creditors. Analysts say that this provision will alleviate fears that some creditors are receiving favorable treatment during a restructuring process. Furthermore, the SDRM envisions the creation of an impartial dispute resolution process to “protect creditors against fraud.” But unlike its domestic counterparts, “the SDRM does not include an automatic stay on the enforcement of creditors’ rights.”

To ease concerns that the IMF will turn into an international bankruptcy court, IMF officials say that a sovereign and its creditors will be left to make the crucial decisions during debt restructuring negotiations, and that the organization itself will not be given new legal powers. Moreover, a sovereign debtor won’t be able to initiate an SDRM process on its own. Instead, the envisioned SDRM process will not only specify the “circumstances under which debt would be restructured,” but will also require the consent of a supermajority of creditors to begin the SDRM process.

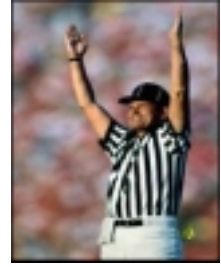
IMF officials say that in order to turn the SDRM process into a formal procedure, three-fifths of the member nations of the IMF representing at least 85 percent of total voting power must agree to amend that organization’s rules. The legislatures of these countries must then vote to approve the amendment.

An alternative approach to debt restructuring

Although there are many groups, including some private creditors, who support the implementation of an SDRM process, others are opposed to such a system. For example, an alliance of banks, bondholders, and large institutional investors called the Institute of International Finance (IIF) has challenged a central assumption underlying the need for an SDRM process – that holdout creditors have delayed debt restructuring agreements between a sovereign and its creditors, and that only a formal SDRM process would remedy such a problem.

Instead, the IIF argues that “the influence of free riders on debt restructurings has not increased despite the proliferation of creditors and [financial] instruments during the course of the last 10 years.” It also asserts that “not one restructuring [agreement] has been prevented from moving ahead by the actions of holdout creditors.” They claim that during the Russian financial crisis in August 2000, over 99 percent of creditors participated in debt restructuring talks before Russia defaulted on its debts. Other creditors worry that the availability of an SDRM process will make it easier for sovereign debtors to renegotiate their debt payments, and thus actually increase the likelihood of debt restructurings. Developing countries such as Brazil, Mexico, Poland, and Turkey have opposed an SDRM process, arguing that it will increase the costs of borrowing capital if creditors believe that a sovereign is more likely to restructure the terms of its debt obligations in the future under an SDRM process.

Furthermore, many creditors and legal experts believe that the IMF won’t be



Serving as referee?

Current proposals for an SDRM mirror practices found in domestic bankruptcy laws around the world. To alleviate fears that the IMF will become a global bankruptcy court, an IMF official said that “we are not proposing a bankruptcy mechanism for countries, but simply a mechanism to facilitate debt workout negotiations between a debtor and its creditor.”



A government for sale?

In the event that a sovereign and its creditors cannot reach an agreement on a debt restructuring plan under an SDRM process, creditors cannot unilaterally begin insolvency proceedings to liquidate the assets of a state or even demand a change in its leadership. Said one expert: “Sovereigns are not businesses and are not for sale.”

Continued on next page



Leave it to the market: Stating that “market-based solutions are the only viable means of addressing international financial crises,” opponents of the SDRM process have proposed a wider use of collective action clauses, which they say will facilitate debt restructuring negotiations between sovereign debtors and their creditors.



Back to the drawing board: The IMF bankruptcy mechanism failed to attract sufficient political support from the United States, the international financial community, and even several developing countries. But all is not lost. Even opponents of the IMF’s proposals said that they are exploring the use of an SDRM process “in the longer term.”

impartial during an actual SDRM process because that institution itself is already a creditor to many sovereign debtors. They say that the IMF will have an obvious interest in seeing its own funds repaid ahead of those of other creditors. Moreover, political analysts say that it will be very difficult to amend IMF rules in order to establish a formal SDRM process. They point out that the organization has amended its rules only three times since its inception in 1945.

As an alternative to an SDRM process, groups such as the IIF say that sovereigns and their creditors should make greater use of “collective action clauses” (or “CACs”), which are legal provisions inserted into sovereign bond agreements allowing for “a supermajority of holders of a particular bond issue to agree to a restructuring that would be binding on all holders of that issue.” In fact, supporters say that many sovereign bonds already contain these clauses, and that relying on CACs allows investors, underwriters, and bond issuers to determine when a debt restructuring is needed without having to go through the difficult process of amending IMF rules.

But opponents of making greater use of CACs say that such provisions will not facilitate sovereign debt restructurings. They argue that many private creditors and sovereign debtors have already rejected the use of CACs (which would remain voluntary), and believe that inserting such provisions will indicate to creditors that a default could be likely, hence leading to an increase in borrowing costs for sovereign debtors. Financial analysts also point out that close to 70 percent of all outstanding sovereign bonds do not contain CACs, and that it could take close to a decade to replace these non-CAC bonds during which time another sovereign debt crisis could emerge to threaten global financial stability.

Moreover, IMF officials say that CACs only apply to particular sovereign debt issues and not to a wider spectrum of debt instruments. In such a case, they say, it will be difficult to reach a debt restructuring agreement among different creditors. One expert said that this drawback of CACs would “do nothing with loans, trade debt, and other debt at issue in any potential sovereign restructuring.”

Where does the debate stand?

The creation of an SDRM process received general support from several countries in Europe and around the world. But political analysts say that parties such as the United States, the international financial community, and many developing countries have generally opposed its implementation. In April 2003, after an official from the U.S. Treasury Department declared that the SDRM proposal was “not practical right now,” top IMF officials conceded that there wasn’t enough political support to implement an SDRM process, let alone make changes to IMF rules to establish such a procedure. The U.S. currently holds over 15 percent of IMF votes, and political analysts say that, without U.S. support, it will be very difficult to implement a formal SDRM procedure.

Although some discussions concerning an SDRM process among IMF member nations were extended to September 2003, many experts said that current proposals have still not attracted enough political support to move forward. But some supporters of an SDRM process have taken comfort in the fact that the U.S. and some private banks are still supporting an “exploration of the use of SDRM in the longer term.”

IMF officials say that the SDRM project was just one of many reforms that are being pursued by the organization to strengthen the international financial system. For example, some critics say that many private banks and bondholders have made credit too easily available for sovereigns with weak economies, and have called on these creditors to develop more rigid criteria when lending money to sovereign borrowers. Still, others call for stricter limits on IMF lending itself. Although support for an SDRM process is not strong, many experts believe that, as countries become more closely linked through growing international banking and commerce, the implementation of an SDRM procedure will only be a matter of time.



NYLS Alumna Profile

Name and Year: Ms. Saori Kilthau '00

Title: Senior tax consultant (International Tax Group), Ernst & Young, LLP (E&Y)

My work and responsibilities: I have been a senior tax consultant at Ernst & Young, LLP, for over two years. (E&Y is one of the Big Four accounting firms in the United States.) I joined E&Y right after I finished the LL.M. tax program at New York University (NYU). My specialty is international tax planning, which generally involves assisting a client minimize its worldwide tax liability. Because many of my clients are Japanese corporations that have subsidiary companies in the US, a large part of my work relates to transfer pricing, which is a term used to describe all aspects of intercompany pricing arrangements between related business entities. It also applies to intercompany transfers of tangible and intangible property.

My main responsibilities lie in researching tax law and drafting tax memoranda for multinational corporations. In addition, my transfer pricing work involves drafting transfer pricing studies, preparing advance pricing agreement submissions, meeting with representatives from

the Internal Revenue Service (IRS), answering follow-up questions, and representing a client in negotiating an advance pricing agreement with the IRS. Recently, I started to expand my field of work to include research and development studies. Also, at times, I work on general corporate tax, and mergers and acquisition issues.

Bear in mind that lawyers working for accounting firms are not allowed to practice law (i.e. give legal advice). The separation of accounting work and legal work is very strict. (For example, I cannot even draft a contract for clients.) When I represent a client in negotiating an advance pricing agreement with the IRS, I am not acting as the client's tax attorney. Furthermore, I cannot represent my clients in tax court. For the services I provide through E&Y, I am strictly a tax consultant.

Some of you may be wondering why a lawyer would choose to work at an accounting firm rather than a law firm where he or she will be able to give legal advice. I believe that an accounting firm provides many opportunities where a person can use her legal knowledge and skills. In fact, in the International Tax Group, a good portion of my work consists of research and memo-writing, which are skills I gained during law school.

Indeed, many lawyers work in tax consulting groups in accounting firms. For instance, of the 20 people that work in the International Tax Group at the Pacific South West area of E&Y, 12 are attorneys. And just as working in a law firm, you work with other professionals in an accounting firm. The only difference is that all of those professionals are not attorneys. Some are, for example, accountants and economists, which makes the workplace interesting.

General advice for students: I was always interested in international law during law school. But I wasn't sure what areas to pursue. I have to thank Professor Ann Thomas for helping me focus my career path. I enjoyed taking her individual and corporate taxation courses. Tax law and my interest in international law just seemed to blend together in the end.

If you are thinking about a career in tax law, I recommend that you take as many tax law classes as possible. At New York Law School, I only took the Individual Income Tax and Corporate Income Tax courses. So after graduation, I enrolled in the LL.M. program at NYU in order to expand my knowledge of tax law. (The LL.M. tax program at NYLS did not yet exist.) During the program, I learned the tax language, where to find answers for tax questions, and how to analyze tax issues. Some of the more helpful and practical classes in the LL.M. tax program were: Tax Procedures (IRS procedures), International Taxation, Corporate Reorganization, and, most of all, Income Taxation (which is the basic tax class where you learn about depreciation, like-kind exchange, and other important topics.) However, my favorite class was Tax Policy.

The International Review

Spring 2004

Center for International Law
New York Law School
57 Worth Street, New York, NY 10013-2960
Tel: (212) 431-2865 • Fax: (212) 966-6393
www.nyls.edu • Email: mrhee@nyls.edu

Director: Professor Sydney M. Cone, III
Assistant Director: Michael Rhee
Research Assistants: Christine Laurent '05, Sophie Raven '04

Founded with funding from the C.V. Starr Foundation, the Center for International Law supports teaching and research in a broad range of areas of international law. The Center organizes events whereby students, faculty, and guests of New York Law School may interact with experts who link theory and practice.

Continued on next page

A tax LL.M. is not necessary to practice tax law. In fact, some of the best tax attorneys do not have an LL.M. But I know many tax lawyers who eventually obtained a tax LL.M. in order to advance their careers.

In addition, it will be helpful to take basic accounting classes if you decide to practice tax law. While having a background in accounting or finance isn't necessary to practice in this area of law, it will be a big plus. I did not have that background, so I struggled at the beginning of my career. Since then, I have been taking accounting courses in order to increase my knowledge in this area. Keep in mind that clients expect tax professionals to have general accounting knowledge in addition to their areas of expertise.

Because drafting memoranda to clients or to the government is a large part of tax consulting work, it is crucial to develop good research and writing skills during law school. Also, for me, a contract drafting course at New York Law School was helpful since I sometimes review (not draft) contracts for both transfer pricing and international tax purposes. Foreign language skills will also help you, especially in an international accounting firm. In my case, being able to speak and write Japanese has offered me a variety of opportunities at E&Y.

I had two externships during law school (the derivatives seminar and a judicial externship), both of which were not related to tax law. For students who are interested in entering a field of tax law, I recommend that they try to get a tax-related externship so that they can experience what it is like to practice tax law and determine whether they actually like it.

Since there are many different tax specialties, it can be very difficult to choose one. But you will need to decide on a specialty once you enter the field. As I mentioned before, because of my clientele base, I deal with a lot of transfer pricing issues. At the same time, I am required to perform core international tax work. Sometimes it can be difficult to balance all of my responsibilities.

I have been fortunate enough to have been able to work with partners with distinguished tax backgrounds at E&Y. Also, I get to work with a variety of small and large clients in various industries. Furthermore, E&Y offers great international resources and opportunities. Because there are many opportunities available at E&Y, I would like to take advantage of such an environment to expand my knowledge so that I can provide high quality services to my clients and meet their needs in tax planning.

Contact: Saori.Kilthau@ey.com

READ MORE ALUMNI PROFILES ON THE
CENTER'S HOMEPAGE

www.nyls.edu/pages/350.asp

Global Trade and Financial Round-up



Biosafety Protocol: Impending collision with global trade rules?

Last year, the world's first agreement regulating the trade of living modified organisms (LMOs) became a legally-binding international treaty. Supporters say that the treaty will provide more uniform procedures on transporting LMOs across national boundaries and better address the environmental concerns surrounding the use of these products. But legal experts warn that it may be on a collision course with existing international trade agreements such as those administered by the World Trade Organization (WTO). Are the provisions in this treaty compatible with global trade rules? In the event of a conflict with existing international treaties, which agreement will prevail?

During the 1990s, many countries began to trade extensively in biotechnology products such as genetically-modified seeds, plants, and fish (also popularly known as genetically-modified organisms). But without any international agreement specifically regulating the transboundary movement and sales of LMOs, many countries began to fill this gap by passing their own laws overseeing these products. However, critics characterized these regulations as a hodgepodge of overlapping and sometimes contradictory rules which failed to address several concerns over sales of LMOs.

For example, some scientists have claimed that releasing LMOs directly into the environment without proper risk assessments and studies could lead to the emergence of super weeds or genetically-altered animal life which could then drive out native species. Furthermore, many government officials have complained that they did not have sufficient information to determine whether it would be safe to introduce a certain LMO in their markets.

In order to address some of these deficiencies, over 130 countries reached an agreement in January 2000 to implement the Cartagena Protocol on Biosafety to the Convention on Biological Diversity (or simply the "Biosafety Protocol"). In September 2003, the Biosafety Protocol came into force after the required 50 countries ratified the agreement (meaning that the legislatures in these countries formally agreed to comply with the treaty's provisions). Legal experts say that the Biosafety Protocol is the first legally-binding international agreement to provide

Continued on next page

a harmonized set of international rules and procedures “for the safe transfer, handling, and use of LMOs” across national boundaries. While over 80 countries have ratified the protocol since February 2004, the United States has indicated that it will not become a party to the agreement.

The Biosafety Protocol requires a party exporting LMOs across national boundaries to provide the importing party with “a detailed, written description of the LMO in advance of the first shipment.” Experts say that this will allow the importing party to make an informed decision about introducing an LMO – such as genetically-altered seeds or fish – into its environment and marketplace.

The Biosafety Protocol requires that an importing country, in deciding whether to admit a certain LMO product, make its decision “in accordance with scientifically sound risk assessments.” If there is insufficient scientific information concerning the safety of using a certain LMO product, the Biosafety Protocol allows the importing party “to use precaution in making their decisions on import.” So even without sufficient scientific evidence, a country may err on the side of caution in prohibiting a certain LMO in order to protect human, animal, or plant health. Legal circles have dubbed this approach the “precautionary principle.”

Although some opponents have expressed concerns over the scope of the Biosafety Protocol, analysts point out that it covers only “living modified organisms produced through modern biotechnology techniques,” and not LMOs produced through traditional breeding methods. Furthermore, the protocol does not apply to inanimate products made from living modified organisms.

While the Biosafety Protocol does not prohibit the movement of LMOs between parties and non-parties to the agreement, a company, for example, based in a country that did not ratify the Biosafety Protocol must still comply with its provisions when exporting LMOs to a country that has ratified the agreement. Many experts note, however, that the treaty does not contain any measures to enforce compliance.

Although analysts say that the Biosafety Protocol has filled a regulatory gap in a growing area of international trade, others have expressed concern over what they perceive to be an inevitable conflict between the protocol and other international treaties. Like many other international treaties, the Biosafety Protocol contains a provision called a “savings clause,” which says that a party to the protocol will not be forced to violate its obligations under already-existing international treaties to which it is a party. Without a savings clause, legal scholars say, countries around the world would be unable to ratify different international treaties because carrying out the provisions in one treaty may violate a country’s obligations under other existing agreements.

At the same time, the Biosafety Protocol also contains a provision stating that its savings clause “is not intended to subordinate this Protocol to other international agreements.” But legal scholars have asked, if the Biosafety Protocol neither supersedes nor is subordinate to other existing international agreements, what will happen if its provisions come into direct conflict with the provisions of another

treaty? Which treaty will prevail? One commentator said that “this question lies at the legal heart of the perceived conflict between global trade and environmental protection.”

In the case of the Biosafety Protocol, many analysts note that its provisions concerning the use of the precautionary principle may clash with existing global trade rules administered by the WTO, which is the premier international organization that regulates global trade and the settlement of trade disputes. The WTO administers three main agreements regulating trade in goods, services, and intellectual property, respectively. Although the WTO does not have any agreement that specifically regulates the trade in LMOs, many experts say that such trade would fall under that organization’s agreement concerning trade in goods.

Legal experts point out that, like the Biosafety Protocol, the WTO allows countries to take precautionary measures in prohibiting the import of a certain good where there may be insufficient scientific evidence attesting to its safe use. However, unlike the Biosafety Protocol, the WTO requires countries taking these precautionary measures to review them within a reasonable time frame and seek further scientific evidence in order to make better risk assessments. Analysts say that these standards will prevent a country from using the precautionary principle as a disguise for protectionism.

Opponents of the Biosafety Protocol say they are concerned that, in the future, those parties invoking the precautionary principle when blocking the sale of certain LMOs from its markets may conveniently declare that the Biosafety Protocol’s precautionary provisions take precedence over similar rules administered by the WTO.

Despite confusion over whether the Biosafety Protocol or the WTO agreements take precedence in the event of a conflict, the U.S. has publicly stated that “the Protocol does not undermine an exporting country’s right to challenge, under the WTO, an unwarranted decision of an importing country not to accept a bio-engineered product.” But several countries have indicated that they do not agree with these statements. Although no WTO member has yet challenged the compatibility of the Biosafety Protocol with WTO rules, legal experts say that it is only a matter of time before such a dispute arises.



As some trade negotiations hit bumps . . .

Free trade, which receives a regular barrage of criticism at home and abroad, has recently faced fierce opposition. In September 2003, the member nations of the World Trade Organization (WTO) – amid protests from thousands of anti-globalization protestors – failed to move forward its latest round of global talks aimed at reducing trade barriers around the world. There is also a loud debate as to whether the North American Free Trade Agreement (NAFTA), which marks its

Continued on next page

tenth anniversary this year, has lived up to its expectations of creating more economic opportunities in Canada, Mexico, and the United States.

The latest target – the Free Trade Agreement of the Americas (FTAA) – has also run into several bumps along the road to globalization. In 1998, trade ministers from virtually every country in the Western Hemisphere (including the U.S.) began to craft an FTAA agreement which would progressively eliminate tariffs and create common rules and regulations governing, for example, market access, agriculture, competition, intellectual property, and capital investment. In 2001, they consolidated their draft agreements on these sectors and are now ironing out differences on a final text. Trade ministers had also agreed to approach negotiations as a “single undertaking,” meaning that all FTAA member nations had to agree on every issue in order to finalize the agreement.

According to policymakers, an FTAA – if successfully implemented by its deadline of January 1, 2005 – would become the largest trade agreement in the world, covering over 800 million people in every nation in the Western Hemisphere (except Cuba). The FTAA would have a combined income exceeding \$3.4 trillion.

Why do many governments support the creation of an FTAA? They say that by lowering trade barriers across the region, an FTAA agreement will allow member countries to sell their products in more markets, which, in turn, could create more jobs. On the other hand, opponents – such as labor unions and anti-globalization protestors – claim that free trade agreements such as the FTAA will benefit only certain corporate interests while weakening environmental and labor standards, and sending American jobs overseas.

Last year, the co-chairs of the FTAA negotiations – the U.S. and Brazil – began to disagree over the scope of the agreement, which had not been a subject of contention in the past. While the U.S. and most FTAA countries supported a comprehensive agreement covering most areas of trade, Brazil and a few other nations wanted to limit the number of topics addressed by the FTAA. Brazil also complained that the FTAA would mainly benefit the U.S. and allow it to keep its markets closed to competitive goods from South America, such as citrus products and sugar. The U.S. responded that issues concerning agriculture (where South America has a competitive advantage) should only be discussed in a larger forum such as the WTO.

Brazil later threatened to oppose negotiations in sectors that would benefit American companies (such as investment, services, and telecommunications) unless the U.S. opened its agricultural markets further. Because all decisions affecting the FTAA must be made by consensus, political analysts said that this disagreement threatened to derail further talks. But during an important meeting in November 2003, in Miami, Florida, trade ministers formulated a compromise where countries would be able to assume “different levels of commitments” during the continuing negotiations (i.e. nations will be able to pick and choose those areas of negotiations in which they wish to participate and to opt out

of other sectors).

Political analysts and businesses say this compromise (which they have dubbed “FTAA-lite”) undermined the concept of a “single undertaking” whereby all countries were obligated to agree on all issues before implementing the FTAA agreement. But U.S. officials stated that such a compromise was necessary to avoid a breakdown in the talks, which could have subsequently affected confidence in global markets. However, some corporate executives argue that this compromise will reduce the effectiveness of the agreement because the final rules will not apply uniformly to every FTAA participant.

Many policymakers believe that final negotiations are unlikely to conclude by the January 2005 deadline. Negotiators recently cancelled several preparatory meetings that were to be held prior to the final round of FTAA negotiations beginning in February 2004. Furthermore, commentators note that 7,000 disagreements remain unresolved in the actual text of the agreement.



... one agreement
moves forward to
an uncertain
future

Negotiators from the United States and four Central American nations reached an agreement in December 2003 to create a Central American Free Trade Agreement (CAFTA), representing the only successful conclusion of any kind of trade talks involving the U.S. last year.

American officials say that, under the terms of the CAFTA agreement (whose other parties include El Salvador, Guatemala, Honduras, Nicaragua, and late-comer Costa Rica, which joined in January 2004), over 80 percent of U.S. exports of consumer and industrial goods and over 50 percent of its agricultural products will receive duty-free treatment once the treaty goes into effect following its ratification by all signatory parties.

Economists say that by not having to pay any duties (i.e. import taxes), U.S. companies and their products will become more competitive in Central American markets. Remaining tariffs on most U.S. products will be phased out over a 15-year period. Business executives say that CAFTA will also provide American service providers with substantial new access to several sectors such as telecommunications, insurance, and banking in Central America.

But many critics accuse administration officials of overstating the benefits from CAFTA. For example, they say that the annual trade between the U.S. and the other CAFTA parties was valued at only \$15.4 billion last year. They also claim that over 75 percent of all goods coming from these countries enter the U.S. duty-free through previously established preferential trade programs.

Continued on next page

Other critics state that while the U.S. will gain further entry into many protected economic sectors in these Central American economies, it made very few concessions in return. They also point out that American officials are not even arguing that CAFTA will create jobs in the U.S. or improve its economy. Indeed, one government official merely said that “CAFTA and other trade agreements are important components to creating an overall robust economic picture.”

Unions oppose the CAFTA agreement because it does not contain provisions to help improve labor conditions in the five Central American countries. Instead, they point out that the agreement simply requires that parties enforce their existing labor laws, many of which they consider to be ineffective in protecting workers’ rights.

U.S. officials say that they will officially sign the treaty in the coming months and then submit the actual text to Congress for its approval (at which time the treaty will be made available to the public). Although political analysts say that Congressional approval of the CAFTA treaty this year is not assured, they claim that “no trade deal had ever been rejected in Congress.” But many political commentators say that CAFTA opponents could turn President Bush’s support of open trade into a liability. Some polls show that many people believe that increasing global commerce is partly responsible for the loss of millions of manufacturing jobs in the U.S. over the last several years, and that that the approval of CAFTA will only accelerate this trend.

On the other hand, supporters hope that Congressional approval of the CAFTA agreement will push forward other stalled trade negotiations at the World Trade Organization and talks concerning the Free Trade Agreement of the Americas. Some economists contend that the successful conclusion of these trade talks “will increase global wealth by hundreds of billions of dollars.”



Does the WTO say no to drugs?

Is the World Trade Organization (WTO) making it more difficult for or taking away incentives from countries trying to fight illicit drug production and trafficking? In a recent decision, the WTO found that its rules have been violated by certain provisions in a European Union (EU) trade program granting special preferences to products from developing countries helping to counter the illegal drug trade. What are the implications of this decision on similar trade programs fighting the illegal drug trade such as those administered by the United States and other countries?

The WTO is the premier international organization which sets the rules for global trade and the settlement of trade disputes. The WTO administers three main agreements governing the trade in goods (the General Agreement on

Tariffs and Trade or GATT), services, and intellectual property, respectively. All agreements administered by the WTO operate under the principle of “most-favored-nation” (MFN) status, which requires that when one WTO member nation grants a trade benefit to another member, it must grant to all other members benefits that are not less favorable. The principle of MFN serves “as one of the pillars of the WTO trading system.”

But legal experts point out that, given the economic difficulties faced by many WTO member nations (80 percent of which are developing countries), the WTO agreements contain exceptions to the principle of MFN so that more prosperous WTO member governments may treat the developing countries more favorably. For example, some developing countries are given longer time periods to implement their obligations under the WTO agreements.

In addition, another GATT provision called the “Enabling Clause” serves as the legal basis for special trade preferences and programs (which would otherwise violate the principle of MFN) to benefit certain developing countries. This clause requires such programs to provide “non-reciprocal and non-discriminatory preferences” to their beneficiary nations.

Although the Enabling Clause has existed for decades, the WTO has never clarified that clause’s formal relationship with the principle of MFN. Some legal scholars argue that the MFN principle applies to trade programs created under the Enabling Clause (i.e. a country creating a special trade program under the Enabling Clause must apply that program’s benefits equally to all designated beneficiaries). They also say that the sole purpose of the Enabling Clause is to allow a WTO member to justify a trade measure that is inconsistent with the principle of MFN.

But others argue that the Enabling Clause and the MFN principle are both separate and distinct provisions in the GATT agreement. They say that a WTO member nation cannot use the MFN principle in challenging the legality of a trade program created under the Enabling Clause because that clause “excludes the operation of” the principle of MFN.

One such program created under the Enabling Clause to benefit developing countries is a “generalized system of preferences” (or GSP) program. Under a GSP program, an industrialized country gives non-reciprocal, preferential treatment to specific products originating in designated developing countries, an action that would ordinarily violate the MFN principle. The GSP program administered by the EU not only reduces tariffs for particular goods from certain developing countries, but provides *further* benefits in the form of duty-free access to certain products from those countries agreeing to take steps to combat the illegal drug trade, for instance.

In January 2003, India filed a formal complaint in the WTO, arguing that the special trade preferences given under the anti-drug provisions in the EU’s GSP program violated both the principle of MFN and provisions in the Enabling Clause. (It did not challenge the legality of the GSP itself.)

India first took the position that the MFN principle

Continued on next page

applied to trade measures created under the Enabling Clause such as a GSP program. India argued that by granting *more* trade preferences only to those developing countries taking steps to curb drug trafficking and denying these benefits to others, the EU had violated the MFN principle which, India argued, requires WTO members to extend trade benefits under a GSP program equally to all designated members.

India also said that if the EU tried to justify the legality of its anti-drug provisions by using the Enabling Clause as its main defense, it would argue that these anti-drug provisions violated that clause itself which, again, requires that a GSP program provide “non-reciprocal and non-discriminatory preferences” to its beneficiary nations. By offering only some countries *more* benefits under its anti-drug provisions, argued India, the EU unfairly discriminated against other WTO members which did not take further steps to curb trafficking in illegal drugs.

Analysts say that India filed its case in the WTO after Pakistan (a neighboring country with which it has tense relations) had taken steps to combat the narcotics trade and, subsequently, received additional benefits from the EU for its textile and clothing exports. India – which also has a large textile industry and did not take additional measures to combat illicit drug production under the EU’s GSP program – claimed that the EU’s trade preferences put India’s textile industry at a disadvantage in world markets.

In response, the EU formally took the position that the Enabling Clause was “a self-standing regime which excludes the application” of the principle of MFN. Because India primarily used the MFN principle in challenging the legality of the anti-drug provisions in the GSP program, the EU argued that the WTO should dismiss India’s case. Furthermore, if the WTO later decided that the principle of MFN was applicable to the anti-drug provisions in its GSP scheme, the EU would argue that Article XX of the GATT allows exceptions from MFN for those trade measures deemed to protect human life or health. The EU claimed that the anti-drug provisions in its GSP program protected human life and health in Europe.

In December 2003, a WTO dispute settlement panel issued a ruling upholding India’s complaint. The panel (agreeing with India) first ruled that “the legal function of the Enabling Clause is to authorize derogation from” the principle of MFN and also “to provide GSP to developing countries.” It also ruled that both the Enabling Clause and the principle of MFN “apply concurrently, with the Enabling Clause prevailing to the extent of inconsistency” between the two provisions. The panel then decided that the anti-drug preferences in the EU’s GSP program violated both the principle of MFN and also provisions in the Enabling Clause because not every beneficiary country under the GSP program received the same benefits.

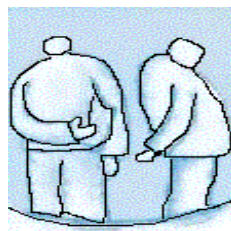
It also rejected the EU’s claim that the special trade preferences should be viewed as an exemption allowed under Article XX of the GATT. The panel decided that the EU had failed to show that the anti-drug provisions were actually designed or were necessary “for the purpose of protecting

human life or health in the European Communities.”

The EU later announced that it would appeal the decision to the WTO’s Appellate Body. An EU official said that India’s challenge to the anti-drug provisions in its GSP scheme would “hamper all developed countries’ efforts to address the developmental problems of developing countries that urgently need assistance.”

Legal analysts say that this decision could put into jeopardy similar GSP programs (such as those administered by the U.S.) granting additional benefits to those developing countries helping to fight the illegal drug trade, protecting the environment, or complying with core labor standards. The GSP program administered by the U.S., for example, grants duty-free access to almost 6,000 products worth \$17.6 billion from over 140 designated countries. And like its EU counterpart, the American GSP program also provides additional incentives to beneficiary nations agreeing to help counter the illegal drug trade. According to analysts, over \$1.7 billion in exports from several countries in South America (a major drug-producing region of the world) benefit from preferential tariff treatment under the anti-drug provisions of the American GSP program.

The WTO Appellate Body is expected to issue a final decision later this year.



Can a global treaty curb corruption?

In October 2003, the member states of the United Nations concluded negotiations on a new anti-corruption agreement. Legal experts say the United Nations Convention against Corruption (or the “Convention”) is the world’s first treaty criminalizing certain corrupt activities on a global scale. Over 95 countries – including the United States – signed the treaty in December 2003. While supporters of the Convention say that such a treaty will make it easier for governments to fight corruption, many still harbor doubts as to whether the Convention can actually curb this long-standing and pervasive problem.

Experts agree that no country is immune from corruption. They say that corrupt activities – such as bribing government officials, embezzling public funds, and laundering ill-gotten proceeds – undermine the rule of law and respect for public institutions. Anti-corruption experts argue that corruption is on the rise across the world, especially in developing countries. In a recent report, one group stated that 70 percent of all nations “have a serious problem with corruption.” They also point out that, in the past several years, corrupt government leaders and officials have embezzled tens of billions of dollars intended for essential public services such as medical care and education.

Continued on next page

The Convention itself does not include a legal definition for “corruption” because, according to government officials, corruption is a “fluid” concept which can mean different things to different people. Instead, the Convention requires its member nations to adopt specific domestic legislation criminalizing various forms of corruption – such as bribery, embezzlement, and money laundering – perpetrated by their own officials or foreign officials. The Convention does not address instances of corruption in the private sector.

Supporters point out that the Convention also includes “ground-breaking” provisions which will allow governments to identify and recover assets stolen by corrupt officials. United Nations officials say that recovering stolen assets is a “particularly important issue for many developing countries where high-level corruption has plundered the national wealth.” For example, Mexican officials are still trying to recover over \$600 million stolen by corrupt officials. Nigeria’s government accuses a former general of stealing more than \$2 billion from state coffers.

Experts also note that the Convention requires a higher degree of cooperation among member nations in gathering evidence and extraditing suspects. Furthermore, the agreement requires its member states to establish anticorruption agencies and to set up mechanisms to monitor suspicious financial transactions.

While there are existing international treaties that address corruption, scholars point out that these treaties are regional in scope and involve a handful of nations. For example, the Organization for Economic Cooperation and Development (OECD) – which is an organization composed of the 30 leading industrialized countries of the world – adopted a “Convention on Combating Bribery of Foreign Public Officials in International Business Transactions” in 1997. But the agreement does not apply to developing countries where corruption is a much greater problem.

Legal scholars say that if more countries sign a treaty such as the Convention, crooked officials will find it more difficult to continue their illicit activities. Said one U.N. official: “The idea is to leave criminals nowhere to hide. Individuals will no longer be able to escape their home countries and live without fear of prosecution.”

The Convention will come into force when 30 nations have ratified it. Ratification occurs when a country’s legislative branch formally approves the treaty and commits itself to abide by its provisions. In the U.S., the Senate must approve international agreements by a two-thirds majority. Political analysts say that the Senate is unlikely to approve the Convention this year. As of March 2004, one country (Kenya) has ratified the treaty.

Many legal experts agree that the Convention will allow governments to take a more coordinated approach in fighting corruption. But some skeptics say that the treaty will be successful only to the extent that a ratifying country actually complies with and enforces its legal obligations. Critics point out that, outside of the U.S., there has been no enforcement action under the OECD anti-corruption treaty except for one case in Canada.

Businesses also worry about a provision in the Convention which they say will allow private individuals to sue for damages arising from corruption. Executives say that this provision’s vague language will invite frivolous lawsuits against companies with ties to government. Scholars also note that the Convention does not envision any penalties for countries that fail to carry out their obligations.

Others point out that while many developing countries want to combat corruption, they don’t have the financial resources and manpower needed to implement and carry out their obligations under the new treaty. Some commentators say that even with such an international treaty, the Convention still seems “as quixotic as a decree outlawing greed, lust, and the other deadly sins.”



Kyoto global warming treaty: Vanishing before our eyes?

Many people across the world breathed a sigh of relief when over 150 countries concluded negotiations in 1997 on an international treaty to address global warming. But recent events have left many wondering whether this treaty will simply disappear into thin air.

Scientists say that emissions of industrial gases and pollutants – such as carbon dioxide and methane – trap heat in the atmosphere and cause temperatures to rise around the world in a so-called “greenhouse effect.” They claim that without a sustained and coordinated international effort to reduce the emissions of these gases, temperatures could further rise in the next decade and lead to catastrophic natural disasters such as rising ocean levels and the expansion of deserts. On the other hand, some skeptics argue that the consequences of this greenhouse effect have been exaggerated by environmentalists, and that drastically reducing industrial emissions would reduce a country’s economic productivity and lead to job losses.

Efforts to control and even reverse the effects of global warming culminated in an international treaty called the Kyoto Protocol in 1997. State parties to this treaty are legally bound to reduce total emissions of industrial gases to five percent below 1990 levels. In order to achieve this reduction, the treaty will require state parties to lower their emission levels to specified targets between the years 2008 and 2012. (In subsequent years, additional targets will be set through further negotiations.)

Experts note that these targets will apply mainly to industrialized nations and will be set according to various criteria, including a country’s economic situation and the amount of gases that it emits every year. Countries producing large quantities of emissions will, accordingly, have to reduce these emissions by a greater amount. For example, the

Continued on next page

United States, which scientists say is the world's largest producer of emissions (accounting for over 36 percent of the world's total), will have to lower its emission levels to seven percent below 1990 levels.

Countries in the European Union will have to reduce their emission levels to eight percent below 1990 levels. And Japan will be required to reduce its emissions by six percent. These countries are expected to reach their targets through a combination of efforts such as burning less fossil fuel, financing energy-efficient technologies, and promoting alternative energy sources such as solar and wind power.

On the other hand, developing countries such as Brazil, China, and India will not have to abide by any specific targets under the Kyoto Protocol because, according to experts, these countries have historically released much lower emissions than their industrialized counterparts. This became a sore point during negotiations in 1997 as officials from the developed world argued that developing countries will gain an unfair economic advantage under the treaty.

During negotiations, the U.S. and several other countries pushed for a provision allowing countries to engage in "emissions trading." Under such a system, if a country reduces its emission levels by more than the specified target, it can sell that excess as an "emissions credit" to another country. The purchasing country could then use that credit if it fails to reach its own target. Critics say that this would allow industrialized countries to "buy off" their responsibilities and continue their current rate of emissions. At the conclusion of the talks, officials agreed that they would revisit the issue of emissions trading at a later date.

Although 120 nations have already ratified the treaty (i.e. the legislative bodies of these countries have approved and adopted the treaty's provisions into their national laws), it will not become legally-binding until the number of industrialized countries that have ratified the treaty accounts for more than 55 percent of the emissions produced in 1990. Legal experts point out that the 120 countries that have ratified the treaty currently emit around 44 percent of emissions, and that the treaty cannot come into force unless the U.S. or Russia (the largest and fourth largest producers of global emissions, respectively) ratify the agreement. Although the U.S. signed the Kyoto Protocol, it announced, in March 2001, that it would not ratify the treaty.

Political analysts say that the U.S. decision effectively gave Russia a veto over the implementation of the treaty. In December 2003, Russia also announced that it, too, would not ratify the Kyoto Protocol. One commentator said "barring a reversal by Russia, the treaty appears all but dead." A government representative argued that complying with the treaty would hurt the Russian economy which depends on the production and burning of fossil fuels.

Some policymakers speculate that Russia may simply be posturing for more incentives to ratify the Kyoto Protocol. Economists note that because Russian economic activity (and its corresponding emission of greenhouse gases) plunged during the 1990s, it could have easily exceeded its target goals and could have also sold emission credits for a

"handsome profit" to countries such as the U.S. Others argue that even if the Kyoto Protocol doesn't come into force in the near future, many countries are planning to implement measures independent of the treaty to reduce the emission of greenhouse gases. But one scholar noted that without an international treaty setting targets and defining a nation's legal responsibility in curbing industrial emissions, it will be much harder to contain the effects of global warming.



EU: Struggling for a simpler patent system

Will the European Union (EU) soon implement a less complicated patent system which will allow its companies to better compete in the global intellectual property market? Although EU member states have reached an agreement to streamline their various patent systems, disputes between some countries are delaying the final implementation of reforms that have been demanded by businesses for decades.

The EU is a union of 15 member nations which have delegated sovereignty to common institutions in order to manage certain political and economic areas of mutual concern such as trade and finance, environmental and consumer protection, and agriculture. Until recently, legal experts say, EU member states have struggled to create a common system for patents, which give an inventor exclusive rights to make, use, and sell an invention for a certain period of time.

The EU currently has in place three different patent application systems which, some critics say, make it difficult and expensive for European businesses to file for and then protect their patents. First, a company or individual may simply apply for a patent in a specific EU country (since each country has its own patent laws and procedures for resolving disputes). Second, a company may apply for a so-called European Patent through the European Patent Office (EPO) located in Munich, Germany. The EPO offers a single patent application procedure which supposedly saves an applicant the trouble of having to file several applications in different EU countries. Third, a company may apply for a patent through the Patent Cooperation Treaty (CPT). The CPT also offers a single international patent and allows its applicants to select specific countries where it wants the patent to apply.

But legal experts have cited several drawbacks in these overlapping systems. For example, in order for a European Patent to be legally valid in a particular EU country, it must be translated into the official language of that country. Statistics show that translation fees constitute a significant cost when filing a patent application in the EU. The average cost of filing a patent application in the EU is \$50,000. On the other hand, the average fees for filing patent applications are \$10,000 in the U.S. and \$16,000 in Japan.

Continued on next page

Critics also say that procedures for resolving patent disputes in the EU are complex and inefficient. If a plaintiff decides to file a patent infringement suit against another party or even challenge the validity of a patent, he may (in many instances) have to file suit in a number of EU states, which are individually responsible for resolving patent disputes. Some legal experts claim that, in some cases, several national courts have issued different rulings in the same patent dispute.

In the last few decades, the EU has undertaken several efforts to develop a more streamlined patent application process. For example, in 1973, the EU member nations signed the European Patent Convention which established the EPO and a single procedure for granting patents. But critics have already noted deficiencies in this particular system. In another attempt to streamline its various patent systems, the EU also implemented the Luxembourg Convention on European Patents in 1989. But because fewer than half of all EU member states have ratified the Luxembourg Convention, it has not yet come into force.

In its latest attempt, the EU, in July 2000, proposed the creation of a "Community Patent" which would not only create a single patent legally valid throughout the EU, but also address deficiencies in the EU's existing patent systems. For example, the Community Patent system will require the translation of the "use and function" portions of any patent application into all 11 official EU languages while the remaining sections will have to be translated into English, German, and French only. Supporters say that this should cut the costs of filing patent applications in the EU by half from 50,000 euros to 25,000 euros.

The EU also decided to create – over a seven-year transition period – a single patent court with jurisdiction over patent disputes. Political analysts say that although Germany voiced strong opposition to a new patent court because its regional patent courts were an important source of revenue for that country, it later agreed to the transition period.

Supporters believe that the Community Patent system would not only lessen the burden of filing for and protecting patents in Europe, but also encourage innovation. In addition, it would allow companies to compete with American and Japanese intellectual property markets where the costs of attaining a patent are much lower than in Europe.

Legal experts say that although EU member states have reached compromises on most provisions for a Community Patent system, several factors have delayed a final agreement since October 2003. For example, EU member states have not reached an agreement as to when translations for Community Patents must be completed. Furthermore, many EU member states still disagree as to when a government can grant a compulsory license for particular patents. (A compulsory license granted by a government allows a company to make a patented product without the patent holder's permission so long as that company provides compensation to the patent holder.)

Intellectual property experts believe that EU member states will have to make several more compromises before

the new Community Patent system comes into force. But given the current delays, analysts say that companies will not be able to apply for a Community Patent until 2006 at the earliest. Moreover, experts believe that a new patent court will not come into operation until 2010. In the meantime, national courts will continue to settle patent disputes.



Will 2005 bring a new trend in clothing?

On January 1, 2005, international rules governing trade in textiles and clothing are to undergo significant changes benefiting consumers around the world. Experts say that current international trade rules have insulated this area of trade from foreign competition. But while many textile manufacturers are bracing for these changes, others are demanding further protection. Will this foreshadow difficulties ahead for those countries and textile businesses trying to adjust to overseas competition?

Experts say that trade in textiles (such as yarns, fabrics, and clothing) is one of the most politically controversial sectors of international trade. While developing countries argue that their lower labor costs make their textile products highly competitive in world markets, their counterparts in the industrialized world – such as those in the U.S. and Europe – say that they face unfair competition from these lower cost manufacturers. These industries have, in turn, pressured their governments to protect domestic industries from foreign competition through various legal measures.

Since 1948, trade in manufactured goods has been governed by an international treaty called the General Agreement on Tariffs and Trade (or GATT), which experts say should have also included textiles. But because of its politically-charged nature, trade in textiles was governed, instead, by a separate agreement called the Multifibre Arrangement (MFA), which allowed industrialized countries to impose quotas on a "large portion" of textile products, mostly from developing countries.

Many economists say that quotas implemented under the MFA stifled competition, leading to higher textile and clothing prices. According to one retail executive, the cost of a quota "constitutes anywhere from 10 percent to 50 percent of the price paid by U.S. companies for a garment." They say that the elimination of quotas would have brought down clothing prices over the last few decades. But defenders of the MFA agreement say that this treaty essentially "guaranteed poor countries reliable access to apparel racks in the U.S. and Europe by using quotas."

In 1995, with the creation of the World Trade Organization (WTO), developing and industrialized countries agreed to replace the MFA with the Agreement on Textiles and Clothing (ATC), which is just one of many international

Continued on next page

trade agreements administered by the WTO. Under the provisions of the ATC, trade in textiles would come under the jurisdiction of the GATT (which is now administered by the WTO) over a 10-year transition period during which time countries would phase out existing quotas. On January 1, 2005, the ATC itself will expire; by that time, GATT rules will fully govern the international trade in textiles. Legal experts say that the ATC is the only WTO agreement with a self-destruction clause.

From a legal standpoint, when the GATT fully applies to trade in textiles beginning in 2005, WTO members will no longer be able to discriminate among similar textile products coming from different countries. Under the GATT, every WTO member nation has “most-favored-nation” (or MFN) status, meaning that when one member nation grants a trade benefit to a certain product from another member, it must act no less favorably regarding similar products from all other members. (In contrast, MFA provisions violated the principle of MFN since countries were allowed to impose different quotas on similar products from different countries.)

In practical terms, the gradual removal of textile quotas (which are largely maintained by industrialized countries) should lead to greater competition and lower prices for goods in this \$350 billion sector of trade. Financial analysts say that retailers will be able to buy as much clothing as they want from competitively-priced foreign manufacturers. And analysts have largely speculated as to how much consumers will save when quotas are completely eliminated, citing figures ranging from \$6.5 billion to \$324 billion annually. They also say that prices for clothing could drop between five and 10 percent after 2005.

Even though the ATC is being phased in (and quotas phased out) over a 10-year period, many still predict abrupt changes in the global textile industry. Trade experts point out that, under the ATC agreement, countries such as the U.S., the EU, and Canada have phased out only 20 percent of quotas since 1995, and that the remaining 80 percent of quotas must be abolished by the end of this year. Many say that the U.S. will feel the greatest impact because it maintains the most number of quotas (710) of any developed country, compared with the EU’s 167 quotas and Canada’s 239 quotas. Labor economists predict tens of thousands of job losses in the textile and related industries in Europe and the U.S.

Many policymakers also believe that the phasing out of textile quotas will quicken the shift of textile production from industrialized countries to developing countries, which have lower labor costs. While some believe that countries with large and established textile industries – such as Brazil, India, and Pakistan – will largely benefit from the end of textile quotas, many more say that China will be the biggest beneficiary. According to the International Labor Organization, China is the world’s second largest exporter of textiles and clothing in the world (after the EU).

Other economists also argue that the production of textiles will shift among developing countries as well. They

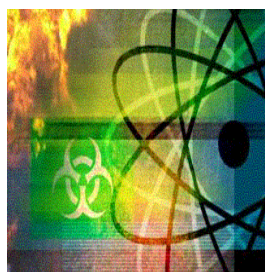
predict that without a quota system guaranteeing market share, textile industries in poorer developing countries – such as Bangladesh, Cambodia, Indonesia, and the Philippines – will be unable to compete against those in China. Statistics show that clothing makes up almost 80 percent of Cambodian exports. And in Bangladesh, almost half of the country’s workforce works in the garment industry.

Despite concerns over greater foreign competition, legal analysts point out that there are provisions under WTO rules which allow member nations to impose “safeguard” (or emergency) measures in the form of higher tariffs against sudden surges of cheaper imports which may damage domestic textile businesses. Furthermore, countries will still be able to impose tariffs (i.e. import taxes) and other legal measures designed to make foreign textile imports less competitive in domestic markets.

In fact, many countries are vowing to protect their textile industries. For example, the EU announced that it will not lower its tariffs on textile and clothing imports unless developing countries grant better access to non-textile EU products in their markets. The EU also indicated that it wants to give special preferences to textile imports from least-developed countries, which is allowed under WTO rules under certain circumstances.

In November 2003, the U.S. enacted temporary quotas against Chinese exports of brassieres, robes, and knit fabrics, claiming that a sudden surge of these items in recent months had depressed prices and led to job losses in the U.S. Government statistics show that Chinese exports of these goods climbed quickly after quotas were lifted in 2002 as part of the ATC.

But major retailers argued that improved productivity in the U.S. is responsible for these price drops. One retail executive said that the Bush administration made a political decision to impose the quotas (which will last for 12 months) in order to attract voters in hard hit textile states such as North Carolina during this year’s presidential election. They point out that these quotas will affect only \$628 million worth of goods from China.



A Toxic Plan to Test Everyday Chemicals?

How safe are the chemicals that we use in our daily lives ranging from detergents to hairspray, and those chemicals that are needed to make everyday products like nail polish, coffee filters, and consumer appliances? Do we need a new regulatory system to re-evaluate the potential health and environmental hazards posed by these chemicals?

Under a controversial proposal drafted by the European

Continued on next page

Union (EU), thousands of chemicals already in use in the EU and other industrialized countries may have to undergo more rigorous testing before they are approved for commercial use in the EU market. While advocates say that this new regulatory system will strengthen current rules governing the use of chemicals and better protect consumer health and the environment, opponents say that the EU's proposal will hurt the global chemicals industry and impede its international trade worth tens of billions of dollars.

Last year, the EU introduced draft legislation for a Registration, Evaluation, and Authorization of Chemicals (REACH) system which, it says, is designed to provide "a high level of protection for the environment and for human health" from potential health risks posed by chemicals. EU officials say that mounting public concern over the safety of using certain chemicals, their effects on the environment, and the tremendous costs of cleaning up toxic waste sites spurred the idea for a REACH system three years ago.

Under initial proposals, all companies that manufacture over one ton of chemicals in or export chemicals to the EU every year would have to register their existing and new chemicals with a new government agency. Those chemicals would then be tested for potential health risks. Furthermore, all countries exporting chemicals to the EU would have to comply with the REACH system, including the United States, which exports over \$20 billion worth of chemicals to Europe every year. Moreover, the 1,200-page proposal would force the chemicals industry to pay for the testing and registration requirements under the REACH system, which would be phased in over a 10-year period, and will cost between \$2 billion and \$8 billion to implement, according to EU officials.

Policymakers say that the REACH system would replace the 40 separate pieces of regulation that currently govern the use of over 50,000 chemicals in the EU. According to government statistics, the EU is the world's largest producer of chemicals (accounting for 28 percent of global output). The industry itself directly and indirectly employs over 4.7 million people.

Supporters describe the draft REACH legislation "as the most important policy addressing toxic chemicals in 30 years," claiming that a single, comprehensive system governing chemicals would better inform consumers about the health risks posed by certain chemicals and protect the environment. They assert that current laws require little documentation on the chemicals themselves and also allow for their use without sufficient testing for possible health risks. In fact, some analysts claim that almost 99 percent of the 400 million tons of chemicals sold in the EU every year are not subject to testing under current EU rules.

Some also contend that the regulations governing the use of chemicals in the U.S. under the Toxic Substances Control Act of 1976 are just as weak as their EU counterparts. They say that these weak regulations allowed the use of dangerous chemicals in the U.S. for decades "before they were found to be potentially cancer-causing."

But opponents – composed mainly of the chemicals

industry in both the EU and the U.S., and even some European governments (including those in Britain, France, and Germany) – argue that the provisions under the REACH system could become a financial burden on the chemicals industry. Industry executives dispute figures provided by government officials, saying that the full implementation of the REACH system could cost over \$70 billion over a 10-year period. They also say that the legislation will disproportionately hurt smaller manufacturers who may not be able to afford the testing of their products, and could lead to the loss of almost 2 million jobs.

Other industry officials say that the REACH system could paralyze international chemicals trade because manufacturers in other countries will have to spend much more time and resources in testing their chemicals before exporting them to the EU.

Some legal experts also believe that several provisions in the REACH system could violate World Trade Organization (WTO) rules. For example, one expert argued that the proposed regulations could be viewed as technical barriers to trade. According to WTO rules, "technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective." Opponents of the REACH system thus could argue that the EU could have implemented a less costly but comparatively effective set of regulations with minimum effects on international trade.

In response to complaints from the chemicals industry about the potential costs of implementing the REACH system, one EU official declared: "This is a very modest investment in environmental protection, especially in comparison to the billions of dollars spent on health care, pollution control, and clean-up of contamination caused by chemicals." The EU says that the total cost of implementing the REACH system will be equivalent to 1.4 percent of annual chemical sales in the EU. Furthermore, public health officials argue that the reduced health care costs arising from greater awareness of the risks posed by chemicals will substantially outweigh the costs of implementing the REACH system. One group estimates savings of almost \$270 billion in reduced health care costs by the year 2020.

Many political analysts say that, under heavy pressure from the chemicals industry and several governments, the EU presented a modified version of the law in October 2003. Under new proposals, companies producing or exporting less than 10 tons of chemicals need only to register their products while all others will have to register and test their products for hazardous risks. Experts say that these changes will not only lower the number of chemicals covered under the REACH proposal (from 50,000 to 30,000), but also the costs of implementing the regulations (by \$2.7 billion over 10 years).

Yet despite these changes, the chemicals industry remains opposed to the REACH system. Other executives still say that the entire proposal remains unworkable.

Government officials point out that it will take at least another two years for the REACH proposal to pass through the EU's legislative process and that it will probably undergo

Continued on next page

further changes before its planned implementation in 2006. However, political analysts say that with the EU welcoming 10 new member nations into its ranks in May 2004, consideration of the REACH system could be further delayed until the new members have had a chance to examine the proposal more closely.



Anti-Tobacco Treaty: Gasping for Breath

Efforts to tighten regulations on the use of tobacco products in the United States – and also to reach a multi-billion dollar legal settlement with the tobacco industry over health care costs arising from tobacco-related illnesses – has involved hard-fought battles spanning several decades. Recently, the World Health Organization (WHO) adopted a treaty which will attempt to regulate tobacco use on a global level. But what is the likelihood that this treaty will attract enough support to become a legally-binding agreement? And what challenges does it face in the future?

Last year, the 141 member nations of the WHO reached an agreement on the world's first public health treaty regulating the use of tobacco products – the Framework Convention on Tobacco Control (or FCTC). At the national level, the treaty requires state parties to adopt national legislation regulating the use of tobacco products. For example, the FCTC encourages signatory nations to adopt laws banning tobacco advertising and the use of misleading terms such as "light" and "mild" when describing cigarettes.

The FCTC would also require that tobacco companies disclose the ingredients of tobacco products and print warning labels that cover at least 30 percent of tobacco packaging. Finally, the FCTC recommends that its signatory nations heavily tax tobacco products and pass laws that impose broad liability on tobacco manufacturers. Treaty advocates say that national governments (and not the WHO) are ultimately responsible for implementing the provisions of and carrying out the obligations under the FCTC agreement.

At the international level, the FCTC agreement will require the cooperation of signatory nations in developing tobacco control policies; working with intergovernmental organizations to implement the FCTC; and combating tobacco smuggling by marking all packages in a way that specifies the origin and final destination of each package.

As of March 2004, 92 nations have signed the FCTC agreement, which simply means that these nations support the goals and various measures of the treaty. However, 40 countries must ratify the treaty in order for it to take its first breath of life and become a legally-binding agreement (i.e. the legislative branch of each signatory nation must formally approve the treaty).

The WHO began working on this treaty in 1999 to combat what officials say is the number one preventable

cause of death in the world today. They point out that over five million people die from illnesses caused by tobacco use every year, and that this number will rise to 10 million people by the year 2010 (with over 70 percent of these deaths occurring in developing countries). Advocates of the FCTC treaty argue that given the widespread use of tobacco products, an international treaty was the most appropriate vehicle to begin addressing tobacco control measures.

But critics say that the treaty will be ineffective so long as it lacks an enforcement mechanism needed to ensure compliance. Others believe that the treaty will disrupt the livelihood of tobacco farmers and countries that depend on tobacco revenue. Constitutional scholars are concerned with the legal implications surrounding the FCTC's requirement on the ban of tobacco advertising. In the U.S., the advertising ban may violate the First Amendment's provisions on freedom of speech, which legal scholars say extend to businesses that want to advertise their products or services.

But proponents of the FCTC counter that countries not signing and ratifying the treaty will deprive themselves of the many legal tools needed to begin regulating tobacco use. Furthermore, they say that those nations that have not yet signed the treaty won't be able to participate in future negotiations concerning the advertising ban and general issues on smuggling. The U.S. is one nation that has not yet signed (let alone ratified) the FCTC treaty.

Supporters also say that economies that depend on tobacco production will not suffer immediate losses as a result of the FCTC agreement. Health officials say that even under the most optimistic scenario where global tobacco control efforts are highly successful, there will still be over one billion smokers around the world in the year 2020. Furthermore, economists argue that economies that depend on tobacco production will see revenue shifting to other sectors (i.e. consumers who stop buying tobacco will spend their money on other products). Proponents further argue that if certain treaty provisions conflict with a country's laws, the signatory nation should do its best to follow the provision while keeping within the bounds of its laws. For example, proponents say that the U.S. could restrict, but not completely prohibit, tobacco advertising.

Supporters of the FCTC say that the large number of countries that have signed the treaty is a testament to dedication in beginning to control tobacco use. But, as of March 2004, the number of nations that have ratified the treaty stands at nine (those countries being Fiji, India, Malta, Mongolia, New Zealand, Norway, Palau, Seychelles, and Sri Lanka), and critics say that these countries hardly represent a significant portion of the world's smoking population.

Despite widespread support for the FCTC treaty, its advocates worry that several nations could challenge its legality before the World Trade Organization (WTO), which strives to facilitate global commerce by prohibiting trade measures deemed unnecessarily "trade-restrictive." Legal experts point out that the WTO rules permit trade measures deemed trade-restrictive but which are "necessary to protect human, animal or plant life or health." Even so, a nation

Continued on next page

restricting imports of tobacco products in order to protect human health must prove to the WTO that such a measure was actually designed to protect public health and not simply, say, to protect domestic tobacco industries from foreign competition.

Several legal scholars and health officials point out that not every country agrees that smoking presents a health hazard, and that, as a result, trade measures restricting the import of tobacco on these grounds may be declared WTO-incompatible. Advocates say that they may begin a campaign to increase awareness of the health dangers of using tobacco products so that the treaty can withstand scrutiny under a possible WTO challenge. But even supporters of the FCTC treaty say that this may be an uphill battle.



Will the WTO create higher deficits in the US?

In a ruling issued over four years ago, the World Trade Organization (WTO) declared that certain tax breaks given to exporters under the United States tax code violate global trade rules. While the U.S. has considered adopting several measures in order to abide by the original decision, the WTO ruled that these efforts have fallen short of compliance. The U.S. says that it will present several new proposals to the WTO in the coming months. But critics say that these plans could, instead, end up increasing the U.S. budget deficit.

In a case brought by the European Union (EU), a WTO dispute settlement panel ruled in September 1999 that the tax breaks given under the "foreign sales corporation" (FSC) provisions in the U.S. tax code – whereby American companies export U.S.-manufactured goods through offshore subsidiaries set up in places like the Virgin Islands and Barbados – constituted an illegal export subsidy under WTO rules. Tax analysts say that under these provisions, U.S. companies saved over \$3.5 billion in taxes every year on export sales. The EU argued that the FSC provisions gave an unfair advantage to American exports, and that the WTO rules generally prohibited member nations from subsidizing exports to make them more competitive. The WTO Appellate Body upheld the original panel decision in February 2000.

Corporate executives say that the EU and many other countries have tax systems under which companies don't pay taxes on exports, and that the FSC provisions have allowed American products to stay competitive abroad.

In order to comply with the WTO's ruling, Congress enacted the "Extraterritorial Income Exclusion" (ETI) Act in November 2000, which repealed the FSC provisions and replaced them with special income tax rates for export and non-export foreign sales. But another WTO dispute settlement panel ruled in July 2001 that the ETI Act also

violated the original 1999 decision. The WTO Appellate Body upheld this ruling some time later.

Late last year, both chambers of Congress worked on legislation which would revise the ETI Act and bring the U.S. into compliance with the WTO's decision. Committees in the House and the Senate passed competing legislation which would benefit not only American companies with extensive operations abroad but also domestic manufacturers. But as of March 2004, negotiators from the House of Representatives and the Senate were still trying to work out compromise legislation for passage later in the year.

The House bill would give corporations over \$128 billion in new tax breaks over 10 years through a variety of measures, including tax rate cuts, deductions, and new tax relief. Experts say that although the original purpose of the bill was to help American multinational companies, more than two-thirds of the proposed tax relief would go to domestic manufacturers. Political analysts say that because the manufacturing sector of the U.S. economy had lost close to three million jobs in the last few years, lawmakers wanted to avert further job losses before the 2004 presidential elections. But critics argue that the House proposal would increase the U.S. deficit (which is expected to top over \$500 billion this year) because the legislation does not offset the cost of the tax cuts with similar cuts to spending programs.

On the other hand, the Senate bill provides \$70 billion of tax relief and other benefits for U.S. domestic manufacturers and American multinational companies in roughly the same percentage as the competing House bill. But unlike the House proposal, the Senate bill would also provide a one-time tax holiday for American companies with foreign profits being held outside of the U.S. (estimated to be as large as \$400 billion), and which would be taxed at a rate of 5.25 percent if brought back to the U.S. Supporters of the Senate proposal point out that the bill would pay for itself by eliminating certain corporate tax shelters and requiring more rigorous corporate disclosure requirements.

The EU announced that it will impose sanctions on the U.S. starting on March 1, 2004, for its failure to comply with the original WTO decision, which – it points out – was issued over four years ago. The EU claimed that European companies had suffered \$4 billion in damages as a result of the FSC regime, and that relief did not seem imminent in the next few months. Observers say that sanctions will probably take the form of 100 percent tariffs on various American products, ranging from aircraft parts to sports accessories.

Past issues of the
International Review are
available online
www.nyls.edu/pages/272.asp



The 2004 Otto L. Walter Lecture: The First Steps of the International Criminal Court with Chief Prosecutor Luis Moreno Ocampo

Ratified by over 90 countries and coming into force in July 2002, the Rome Statute of the International Criminal Court created the world's first permanent international criminal tribunal. The International Criminal Court (ICC) is to try individuals accused of genocide, crimes against humanity, or war crimes. The ICC has wider jurisdiction than tribunals which were formed on an ad hoc basis for specific conflicts such as those in Rwanda and the former Yugoslavia. The ICC has jurisdiction over individuals from those countries (States Parties) that have ratified the Rome Statute for crimes committed anywhere, as well as individuals from any country for crimes committed in the territory of a State Party.

Wide as this jurisdiction may seem, it is limited by both formal and informal constraints. Because it may hear cases only in instances where States Parties are unable or unwilling to do so, the ICC is a "court of last resort" in the words of some legal experts. Furthermore, while a national prosecutor normally commands the monopoly of investigative and law enforcement powers of the state, the Chief Prosecutor of the ICC has no such monopoly. He must operate in collaboration with national and local investigative and police authorities, diplomats, NGOs, and other constituencies with a stake in the success of his mission.

Luis Moreno Ocampo – the Chief Prosecutor – views the private sector as a key partner in that mission. Mr. Moreno Ocampo will discuss the relevance of the private sector to hypothetical ICC investigations and prosecutions, and will offer his views on the dialogue in which he would like to engage that sector.

Wednesday, March 24, 2004
4:00 pm - 6:00 pm

Wellington Conference Center
Open to the NYLS community



C.V. Starr Lecture: Moving Beyond "Drugs and Thugs": A New Strategy for the Andean Region with John G. Heimann, former Comptroller of the U.S. Treasury

Over the past two decades, the United States has spent billions of dollars trying to staunch the flow of illegal drugs from the Andean countries of Colombia, Venezuela, Peru, and Bolivia. Experts say that the combination of the illegal drug trade with insurgency movements and pervasive corruption in these countries has made this region of South America one of the most politically volatile in the world today. United States anti-narcotics policy has been characterized as a "drugs and thugs" approach which concentrates on stemming the actual flow of narcotics, apprehending drug lords and producers, and assisting local security forces in these efforts. A report released by an independent commission sponsored by the Council on Foreign Relations challenges the effectiveness of these policies.

Because funding for current anti-drug policies expires this year, policymakers expect a vigorous debate on the future of American drug policy in the coming months. In his C.V. Starr lecture at New York Law School, a Co-Chair of the commission, the Honorable **John G. Heimann**, will discuss the findings of the report and comment on current developments in the Andean region of South America.

Wednesday, March 31, 2004
4:00 pm - 6:00 pm

Wellington Conference Center
Open to the NYLS community