Spring 2-6-2003

The International Review | 2003 Spring

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The International Review
NYLS Center for International Law

Spring 2003

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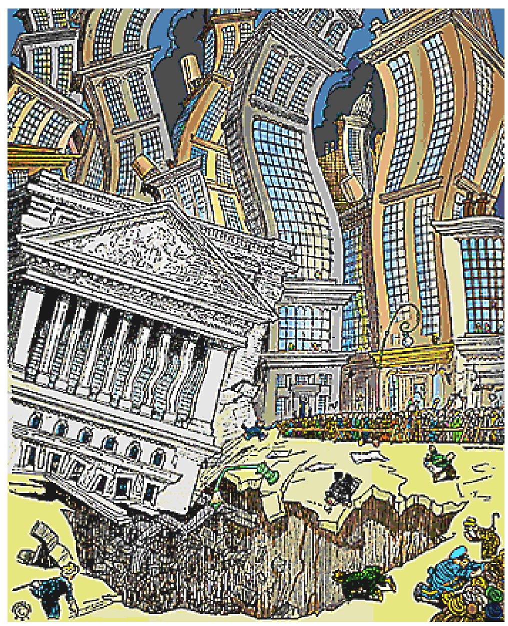
Corporate Governance: A Thread Unraveling Throughout the Global Economy?



Do existing governance standards adequately protect against corporate abuse? Or are stronger standards needed to protect the global economy from corporate wrong-doing?

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Corporate Governance: A Thread Unraveling Throughout the Global Economy?

During the past year, issues concerning corporate governance have become a major concern for many investors. Allegations that senior managers, executives, and directors at several large public companies (such as WorldCom and Enron) had engaged in many improprieties − such as inflating revenues by billions of dollars, failing to oversee accountants who reviewed and approved questionable financial practices, and misusing company funds − led to a sharp decline in investor confidence that rattled stock markets around the world.

After a public outcry from investors who, analysts say, lost hundreds of billions of dollars of their savings in these scandals, US lawmakers approved sweeping changes in securities laws and corporate governance regulations. While some argue that these companies do not represent the broad spectrum of financially-responsible businesses, and that existing governance standards adequately protect against corporate abuse, others say stronger standards may be needed to prevent corporate wrong-doing from unraveling the global economy.

Analysts say that as countries around the world further reduce barriers to trade and try to attract more foreign investment, businesses and governments will have a greater incentive to reform − or even begin to put into place − the institutional framework supporting corporate governance standards, which, they say, helps to ensure accountability. What standards are in place today in the US and around the world? Have they proven effective in protecting the interest of shareholders? Or does the world need to adopt stronger standards in light of the recent accounting scandals?

A corporate shell game? Critics argue that lax enforcement of corporate governance standards allowed some executives in large public companies to make poor financial decisions or even engage in possible criminal activity. They cite the release of misleading financial disclosures, conflicts of interest between managers and outside auditors, and the failure of board members to monitor closely a company's operations. Cover illustration by Farr, "A Great Crash of the Stock Exchange" © 1927.

The unraveling of corporate governance? Legal observers say that while interest in corporate governance issues has mostly been confined to business and legal circles, recent corporate scandals have generated broader public concern in this area. Critics argue that in the current scandals, company executives and directors ignored or didn't sufficiently enforce their governance and oversight standards which were designed to protect the best interests of millions of shareholders.

For example, Federal and congressional investigators have accused senior executives at Enron Corporation of improperly using off-the-book partnerships to boost profits and hide debts totaling over $1 billion. The company later filed for bankruptcy protection, and some of its executives have pleaded guilty to several felony charges. A jury also convicted Enron's outside auditor, Arthur Anderson, LLP, of obstruction of justice when it shredded documents relating to Enron even after the federal government announced an inquiry into that company's financial activities. Many have also accused the auditor of approving Enron's questionable accounting practices in hopes of winning lucrative consulting contracts from that company.

Government authorities have also accused executives at Adelphia Communications Corp. and Tyco International, Ltd., of receiving improper loans, tax evasion, and receiving hundreds of millions of dollars in unauthorized compensation. Adelphia recently filed for bankruptcy protection and is also suing the company founders for $1 billion for breaching their fiduciary duties to the company. It also filed suit against its outside auditor, Deloitte & Touche, LLP, arguing that it had failed to inform the company about questionable loans made to executives.

As these scandals mounted, stock exchanges in the US suffered significant losses (at times approaching levels seen only after the September 11, 2001, terrorist attacks on the World Trade Center) as investors began to sell securities associated with troubled companies. This, in turn, led to drops in major exchanges around the world. One think tank estimated that these corporate governance scandals will reduce US gross national product by $40 billion during 2002-03.

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What is corporate governance? While legal experts and critics say that many factors allowed company executives to carry out their alleged misdeeds, the experts also consistently point to laxity in adhering to corporate governance standards as a major contributing factor. But what does this term signify?

In the US, corporate governance popularly applies to large, public companies where shareholders entrust their investments to a board of directors, executives, and senior managers. In a typical corporate structure, say legal scholars, a board of directors serves as the elected representatives (and the first line of defense in protecting the best interests) of a company's shareholders. One expert says that "the board primarily exists to hire, fire, monitor, and compensate management, all with an eye toward maximizing shareholder value." The board, in turn, monitors the company's executives and managers who run the company's daily operations. The shareholders (i.e. the actual stock holders of the corporation) generally consist of individual investors, financial institutions such as insurance companies, and other large institutional investors, including mutual and pension funds.

Because ownership in large, public companies is fragmented among thousands or even millions of investors, shareholders find it difficult to monitor a company's daily activities. To assure investors that a company will use their investments for agreed to business purposes, government regulatory agencies and the private sector established a system of corporate governance. Legal authorities broadly describe such a system as those federal and state regulations, stock exchange listing rules, voluntary codes of governance practices, and societal expectations which allow a company to hold accountable its officials and employees, monitor its financial performance, and reduce the likelihood of fraud and abuse in company operations. Experts say that a system of corporate governance usually specifies the roles and responsibilities of various actors in a corporation (such as the shareholders, board of directors, and managers). It also regulates how a company must legally deal with issues such as financial disclosure requirements, audit and accounting standards, the sale of securities, and majority and minority shareholder rights.

Commentators point out that, in the US, there is no single body of laws that governs or even one government agency that exclusively oversees corporate governance practices. Instead, a wide variety of agencies and institutions at both the federal and state level (in cooperation with the private sector) promulgate various rules and standards concerning corporate governance. The Securities and Exchange Commission (SEC), for instance, is the country's main enforcer of federal securities laws (which include corporate governance provisions) and the primary regulator of the country's securities industry.

The SEC, in turn, works with the country's stock exchanges and other self-regulating intermediaries such as accounting and law firms to enforce these laws. Under federal securities laws, stock exchanges must create and enforce their own rules (which are reviewed and approved by the SEC) concerning, among other things, corporate governance standards for companies listed on their exchanges. For example, the New York Stock Exchange specifically requires its listed companies to have independent directors on its audit committee who don't have "significant financial or personal ties to management." There are also other federal agencies that deal, in some respect, with corporate governance standards. For example, analysts point out that the Department of Labor oversees company pension funds. The Treasury Department and the Federal Reserve are responsible for the governance of banks.

In addition to the federal level, every state has its own securities laws regulating corporate governance standards. In the state of New York, for instance, the Investor Protection and Securities Bureau enforces that state's securities laws. Legal experts also note that "many aspects of corporate governance are controlled by state rather than federal law," and that the federal government may give deference to state law on this matter. Finally, Congress (as the nation's top legislative body) has direct legal authority to deal with issues of corporate governance. In July 2002, Congress passed what commentators

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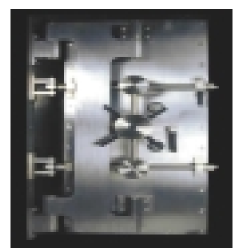
In the case of WorldCom, Inc., Federal investigators say that the company overstated its cash flow by over $9 billion by improperly booking regular operating expenses as long-term expenses. The company may have also given the company's founder over $400 million in improper loans. WorldCom filed for bankruptcy protection, and investigators later arrested (and paraded in public view) several company executives for criminal fraud.



Keeping a tight watch on your money: A leading expert on corporate governance (who is also a graduate of New York Law School) writes: "Effective governance is a check on the power of the relatively few individuals within the corporation who control large amounts of other people's money."

In the US, there is no single body of laws that regulates or even one government agency that exclusively oversees corporate governance standards. One expert summarized the existing system of corporate governance as “a complex web of self-regulation, peer-pressure, legal liability, and raw commercial self-interest that keep [the markets] honest, most of the time.”

say were the most significant changes to securities and corporate governance laws since the 1930s in response to the recent accounting scandals.

Legal analysts note that there are no legally-binding international standards of corporate governance in place today, and that governance standards around the world reflect a particular country’s societal values, different ownership structures, and level of economic development. While some countries have corporate governance standards that somewhat resemble the mix of rules and standards found in the US, many others rely on voluntary codes of conduct.

In the US, United Kingdom, Canada, and Australia, scholars say that the primary focus of corporate governance is generally to protect the interests of shareholders and maximize their investments. Also, ownership in US public companies “rarely [means] a controlling block shareholder” but is, instead, scattered among a large number of investors. In Germany, France, other areas of Europe, and Japan, corporate governance largely aims to protect not only the interests of a company’s shareholders, but also those of a variety of *stakeholders* such as a business’s employees, unions, suppliers, creditors, and the surrounding community. Analysts also say that, in Europe, firm ownership is often concentrated among a few investors such as banks.

In Japan, they say, firm ownership is characterized by *cross-shareholdings* where large businesses in a corporate family (or keiretsu) share ownership in each other. One analyst said that “a keiretsu firm usually owns less than 2 percent of any other member firm, but it typically has a stake of that size in every firm in the group, so that between 30 percent and 90 percent of a firm is owned by other group members.” Legal scholars note that many developing countries are still in the process of implementing a regulatory structure and private sector initiatives which will support and enforce a system of corporate governance. Some of these efforts include the creation of stock markets, the passage of corporate governance laws and standards, and the reform of auditing and accounting standards.

Look before you speak: Some experts argue that poor corporate governance practices led to the Asian financial crisis in 1997. At the height of this crisis, a prominent American business school professor declared that, in contrast to its Asian counterparts, the American economy had “a very tight corporate governance system, and provides enormous scrutiny of corporate behavior and corporate investments.”

Does a system of corporate governance provide complete protection against financial misdeeds? Supporters of a strong system of corporate governance concede that such a system will neither prevent all instances of corporate abuse nor guarantee “improved corporate performance.” In fact, they point to company executives at Enron and WorldCom who simply skirted these oversight standards. But others, such as the Teachers Insurance and Annuity Association-College Retirement Equities Fund (TIAA-CREF) and the California Public Employees’ Retirement System (CalPERS) − which are the world’s largest pension funds holding hundreds of billions of dollars in securities and other investments − cite studies showing that having strong corporate governance standards can reduce investment risk and could actually increase returns for investors.

Still, critics of corporate governance reforms point out that policymakers and experts are still debating the effectiveness of existing governance rules in protecting the interests of shareholders, and that poorly thought-out reforms may actually hurt their interests. Yet most experts generally agree that without clear standards and controls even in place, companies are more likely to develop poor business practices which could lead to financial problems in the future. They also argue that investors would be less willing to make investments, thereby impeding economic growth, especially in developing countries trying to attract foreign capital.

A source of global economic instability? Many experts assert that weak corporate governance standards have caused trade disputes among nations and have also “triggered” several economic crises, many of which required expensive bailouts by governments and international financial institutions. For example, while there is still an on-going debate on the direct causes of the Asian financial crisis in 1997, many analysts say that weak domestic systems of corporate governance in Indonesia, Korea,

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and Thailand − characterized by misleading financial disclosures by companies, inadequate oversight by regulatory agencies and corporate boards, and non-transparent lending systems − allowed businesses and private financial institutions across the region to engage in risky investment practices. The International Monetary Fund eventually was called upon to provide support for these struggling economies with tens of billions of dollars in loans and credits.

Citing another example, critics say that poor corporate governance practices have contributed to a growing crisis in Japan's banking sector. Analysts say that major banks had engaged in speculative financial activities and also used personal and political relationships as a basis for money lending. With Japan's economy now in its fourth recession in the last decade, they say that these banks are unlikely to collect hundreds of billions of dollars in loans given to failing and unproductive businesses, and that stronger adherence to corporate governance standards would have reduced the likelihood of risky lending practices. US officials say that Japan's economic problems have dampened the region's economic forecasts, and that large bank failures in Japan could even hurt the struggling American economy.

Some analysts say that several governance reform efforts have helped to stabilize these troubled economies in East Asia. But they also argue that many companies must implement still stricter accounting, auditing, and disclosure standards to prevent similar problems from recurring in the future. (On the other hand, many prominent economists dispute the idea that poor corporate governance practices had played a direct role in causing the Asian financial crisis.)

Experts at a prominent think tank also assert that weak corporate governance standards have caused trade disputes among nations. They say that weak governance standards in major steel producing nations in Europe and Asia have allowed executives to overproduce steel (rather than consolidating their operations) and then export the surplus to the US, which responded by slapping tariffs on these imports. This soon lead to accusations that the US government was engaging in protectionism, and several major trading partners threatened to impose similar tariffs on US exports to their markets.

Although experts concede that while corporate governance reform won't serve as a cure-all for the world's economic problems, they say that it could reduce the likelihood of large-scale economic meltdowns requiring expensive bailouts at the public's expense.

Corporate governance reform at home? Many economic historians say that they are not surprised by the so-called breakdown of corporate governance practices in recent months. They point out that, for the past several hundred years, accounting scandals have usually followed the start of an economic recession. (Economists say that the US recession began in March 2001.) They also note that public officials then try to implement reform measures in order to assure the investing public that wrong-doers will be punished.

Political commentators note that when the accounting scandals first erupted into public view (starting with the Enron Corporation in October 2001), many lawmakers − backed by the securities industry − actively resisted any measure tightening corporate governance practices, arguing that the misdeeds of a single company did not merit an overhaul of corporate governance regulations. But as several more large companies reported financial irregularities, US lawmakers approved the Sarbanes-Oxley Act of 2002 (the "Act"), which advocates say will improve the accuracy and reliability of corporate disclosures required under federal securities laws and strengthen corporate governance rules. (See the sidebar on the right for examples.)

But after a barrage of criticism from auditors, law firms, bar associations, and corporations who say that many provisions of the Act would produce unintended (and

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The Sarbanes-Oxley Act of 2002 is supposed to strengthen corporate governance standards. But is the watchdog already muzzled? The Act:

- Requires executive officers to file sworn statements certifying the accuracy and completeness of periodic financial disclosure reports.
- Requires all public accounting firms to register with a newly created *Public Company Accounting Oversight Board*, which will be responsible for establishing audit report standards. (Will this Board, in fact, "audit the auditors"?)
- Prohibits auditors from offering certain types of non-audit services which could create conflicts-of-interest. (Will it stop an auditor from creating a tax-savings plan which it will later audit itself?)
- Establishes new rules on how attorneys must report material violations of securities laws or breaches of fiduciary duties. (Will the SEC dilute or eliminate the toughest proposals?)

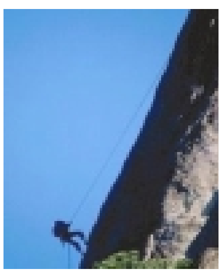
harmful) consequences, one commentator noted that "some of the toughest proposals [of the Act] appear to be dead, watered down, or postponed." For example, the SEC diluted a proposed rule (labeled as the "noisy withdrawal requirement" by opponents) which would have required a lawyer to cease representing a client and also to report his resignation to the SEC if top corporate executives had failed adequately to address possible violations of securities laws. Legal groups say that this requirement would have forced lawyers to disclose attorney-client confidences protected by ethical rules. Instead, the new rules require a lawyer to report possible securities law violations to corporate executives, but not directly to the SEC. Furthermore, say observers, the new rules provide a much more complex definition as to when a lawyer must alert corporate executives of possible wrong-doing.

A complete overhaul? Many countries have already undertaken efforts to reform existing corporate governance standards. But legal analysts note that these efforts consist mostly of "issuing guidelines and tweaking existing corporate practices rather than rushing in tough new laws in the mold of the Sarbanes-Oxley Act."

Reform efforts abroad? Legal practitioners note that many foreign governments had already undertaken efforts to reform their own corporate governance standards, and that these efforts have gained further momentum in light of the recent accounting scandals in the US. For instance, in April 2000, the government of Japan initiated a two-year program to modernize existing corporate governance laws affecting disclosure requirements and shareholder rights. Canada created a regulatory board that same year to oversee auditors of public companies. Brazil, the largest economy in South America, passed legislation in 2001 amending its "Corporation Law" and the "Brazilian Securities and Exchange Commission Law," which include many corporate governance provisions. One commentator said that Brazil had strengthened its own standards primarily to attract more foreign investment, and that corporate governance issues had been "relatively neglected in Brazil" in previous years.

Legal experts also say that while the European Union (EU) does not have a single standard of corporate governance, individual member nations have undertaken their own efforts to review existing standards. Political analysts note that these efforts have not involved major revisions of existing corporate governance standards in the mold of the Sarbanes-Oxley Act. Instead, they say, EU countries and companies are generally "tweaking existing corporate practices."

For example, Spain released its Aldama report in January 2003, which recommends more independent corporate board members. During the same month, Great Britain released two government-commissioned reports (known as the Higgs report, and the Smith report) recommending new guidelines for corporate board and audit committee members. For instance, the Higgs report recommends that at least half of corporate board membership consist of independent, non-executive directors. Experts say that the UK government will most likely incorporate these recommendations into existing codes of corporate governance by the summer. In February 2003, France introduced new legislation recommending the formation of a regulatory body overseeing independent company auditors. And just last year, Germany released its Cromme Code of corporate governance, which calls for the public disclosure of board compensation and requires companies to explain instances of noncompliance.



Taking the higher ground: While some companies inform investors that they follow governance standards and rules "to the letter of the law," other businesses say they follow their own codes of good corporate practices in addition to adhering to existing regulations. Critics say that voluntary codes inhibit the enactment of stronger standards.

Private sector codes: Others note that the private sector (including stock exchanges, investor associations, large institutional investors, corporate director associations, and even large companies themselves) has been pushing reforms for the past decade, largely in the form of voluntary codes of corporate governance. Though skeptics complain that these are publicity stunts aimed at thwarting the enactment of legally-binding regulations, it has been noted that several groups are seriously committed to changing governance practices. They say that these voluntary codes usually "promote practices designed to enhance accountability to shareholders, improve board independence, and foster corporate responsibility."

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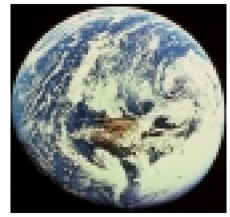
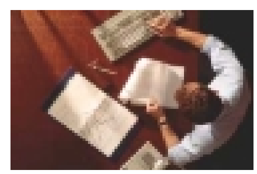
In the US, for instance, business associations such as the Business Roundtable and the Council of Institutional Investors have issued several voluntary codes which are designed to guide private companies in tightening their existing governance standards. Legal groups, including the American Law Institute and the American Bar Association, have released generally recognized guidebooks and recommendations on how to implement effective standards of corporate governance. Some institutional investors are also aggressively pushing for significant reform. For example, CalPERS and TIAA-CREF have undertaken an active campaign to pressure businesses around the world to adopt a single system of corporate governance. These pension funds have also engaged in several proxy battles to pressure the worst-performing companies in their portfolios to strengthen their corporate governance structures.



No world standard: Reformers who support the creation of a legally-binding standard of international corporate governance must settle for a voluntary set of principles agreed to by the member nations of the Organization for Economic Cooperation and Development. Advocates say that these principles set out, for the first time, an “international benchmark” of good corporate governance practices.

A single global standard? Many experts say that – given the legal, regulatory, economic, and even cultural differences among countries – the world will probably never agree to a single, legally-binding standard of corporate governance. Instead, they point out that most industrialized countries have already reached a general consensus on the minimum principles needed for effective corporate governance. In 1999, the 30 member nations of the Organization for Economic Cooperation and Development (OECD) – the 30 leading industrialized countries which share information on economic and social policies – adopted the “OECD Principles of Corporate Governance.” These Principles (which include fairness, transparency, accountability, and responsibility) address different aspects of corporate governance such as the rights of shareholders, disclosure of information, and the responsibilities of the board of directors. The OECD has urged its member governments to adopt these principles when trying to improve or strengthen their own systems of corporate governance. It is unclear, however, whether the OECD Principles have helped to increase accountability.

There are also other international efforts to reform and strengthen corporate governance standards. In 2000, the World Bank and the OECD jointly established a “Private Sector Advisory Group on Corporate Governance” and also a “Global Corporate Governance Forum” in order to coordinate public and private sector efforts in improving governance rules.

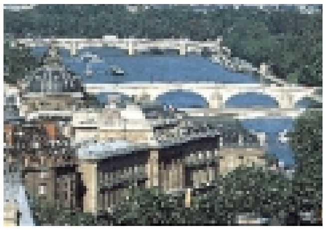


Other international efforts include a movement for countries to adopt international accounting standards (IAS) over generally accepted accounting standards (GAAP), which is used primarily in the US. The EU recently adopted a regulation requiring all EU companies to adopt IAS rules by January 1, 2005, when preparing their financial accounts.

In other efforts to prevent future accounting scandals, several governments are urging US regulators to adopt some aspects of international accounting standards (IAS) rather than solely relying on generally accepted accounting standards (GAAP) and rules, which are used primarily by US companies when preparing financial disclosure statements. The EU, through a regulation, has adopted IAS beginning in 2005. Some critics say that, under GAAP, businesses in the US must comply with thousands of different accounting rules, and that this complex system actually invites abuse by creative accountants trying to find loopholes. Other countries also complain that their businesses in the US must prepare two financial statements – one using IAS rules and another using GAAP in order to satisfy US regulators.

Advocates of IAS standards claim that they set out broad accounting principles that require “blanket assurances that audited accounts are true and fair.” But critics of IAS say that these principles allow too much room for varying interpretations. Still, US regulators have recently started preliminary talks with other governments, such as those of the EU, to coordinate changes in accounting rules and practices. But experts note that there is no conclusive evidence showing that either system can better prevent accounting frauds.

Although political commentators, legal experts, and financial analysts believe that recent efforts to strengthen corporate governance standards could help restore investor confidence and encourage other governments to pursue reform efforts, many skeptics say that because there are so many differing standards of governance around the world (which sometimes overlap or even contradict each other), it remains to be seen whether recent efforts for reform will be enduring and effective. ❖



NYLS Alumnus Profile

Name and Year: Edward Okeke '97 (Evening Division)

Title: Legal Officer, United Nations Educational, Scientific and Cultural Organization (UNESCO), Paris. Formerly with the Administrative Law Unit, United Nations, New York.

My work and responsibilities at the UN: When I worked as a Legal Officer in the Administrative Law Unit of the Office of Human Resources Management at the UN, my primary responsibility was to advise on international administrative law issues (i.e. the law of administration and management in international organizations). For example, I defended the organization against appeals filed by staff members and also represented the administration during disciplinary proceedings. On a day-to-day basis, I drafted legal opinions, respondent's replies to appeals, charges, and written presentations in disciplinary cases. I also appeared in oral hearings before the joint advisory bodies that advise the UN Secretary-General in both appeals and disciplinary cases.

I held this position for about six years until I joined UNESCO. Its primary mission – as one of the Specialized Agencies of the UN – is to contribute to peace by promoting collaboration among nations through education, science, culture, and communication. As a Legal Officer in the Office of International Standards and Legal Affairs at UNESCO, my responsibility is to provide legal advice on that organization's operational and normative activities. For example, I prepare legal opinions on issues dealing with the application or interpretation of the UNESCO Constitution, its Resolutions and Decisions, Staff Regulations and Rules, and other legal instruments. I also defend the organization against grievances filed by staff members, and in disputes with contractors or other third parties. In addition, I advise on matters relating to the preparation and execution of the organization's program, privileges and immunities, and host country agreements. On a daily basis, I examine cases and dossiers, draft opinions, attend meetings, and provide both written and oral advice.

I decided to work for UNESCO because the assignment offered me an opportunity for career development. My assignment in the Administrative Law Unit at UN headquarters in New York was somewhat specialized and narrow in scope while the assignment in UNESCO is more generalized and broad. UNESCO is also a smaller organization than the UN, and has a Legal Office of only seven lawyers dealing with all legal questions pertaining to that organization. In other words, the assignment in UNESCO offers diversification of experience, which is encouraged and normally rewarded in international organizations. I love New York, but I must admit that the opportunity to live and work at UNESCO headquarters in Paris also played a role in my decision.

I enjoy a lot of things about my work as a legal officer in the UN system, but a few things stand out: working in a multicultural environment, and dealing with global legal issues. Having lived in Nigeria and America has imbued me with an appreciation of and respect for diversity.

Employment at the UN: The beginning of my career as a UN legal officer was accidental and non-traditional. Before I joined the UN, I worked variously as a newspaper columnist, computer programmer, and business manager. I joined the UN in 1992 on a short-term appointment in the area of administration before I began law school in 1993 as an evening division student. My short-term appointment was later converted into a fixed-term appointment, and was successively renewed thereafter. During my third year in law school, I was given the opportunity to work in the Administrative Law Unit and help it deal with the deluge of cases that the office had at the time. The Unit needed someone with knowledge of UN administrative and management practices, as well as a legal background, and I fitted this profile. I passed a test usually given to new legal officers in the Administrative Law Unit only and, consequently, was given the tasks of a legal officer in the Unit.

I did not have the opportunity to take the National Competitive Recruitment Examination (NCRE) because I come from Nigeria which is an "over-represented" member state at the UN for recruitment purposes. Moreover, the legal officer position that I assumed was not an "established post," that is, one of the core (or career) positions funded through the regular UN budget. Other than established posts, there are positions that are funded through the General Temporary Assistance budget (which can be eliminated when funding runs out) and positions in the international criminal tribunals or peacekeeping missions.

At the UN, all entry-level legal officer positions for established posts are filled through the NCRE. NYLS students desiring such legal officer positions would be required to take the NCRE if they met the eligibility requirements. For example, only individuals from a designated list of "under-represented" and "non-represented" member states of the UN may be invited to take the exam. (This list of countries changes from year-to-year, and candidates from the United States were able to take the 2003 exam.) A candidate must also be 32 years old or younger as of December 31 of the year of the exam. Successful candidates in the NCRE must then be interviewed. At the end of the 2001 selection process, the UN placed the names of 21 legal affairs applicants on a roster of qualified candidates for appropriate future vacancies. (Sample examination questions are available on the Center for International Law's bulletin boards outside of C-305.)

Alternatively, students interested in working at the UN as legal officers (but not qualified to take the NCRE) will

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have to acquire experience elsewhere and then seek mid-level legal officer positions which are not subject to recruitment by NCRE. Since established posts are more difficult to secure, it is advisable first to seek out posts in the field (such as those in peacekeeping missions), which could then increase the chances of getting an established post at UN Headquarters in New York or other duty stations at a later time.

How quickly legal officers move up the career ladder at the UN depends on several factors, such as qualifications, experience, and demonstrated competence. Most important is the availability of a vacant post to which one can be promoted. Staff members do not have a right to promotion, which is made at the discretion of the executive head of an international organization. Moving up the career ladder is usually through appointments and promotions, and occasionally through reclassification of functions. Mobility is valued in the UN system, and one might need to move around in order to move up.

General Advice – Get a solid legal education: My advice to students who want to work in the UN system is first to get a solid legal education. Legal officers in the UN system deal with a wide range of legal areas, including public international law, private international law, arbitration, international criminal law, intellectual property, commercial law, labor law, and employment law. Although I managed successfully to practice international administrative law in the UN without having taken any labor or employment law courses or having any experience in these fields, taking these courses during law school would have definitely helped me.

The electives courses in law school that I found to be the most helpful in my work today are international law and comparative law. Without a background in international law, it will be difficult – if not impossible – to achieve a successful career as a legal officer in the UN system. Since most legal officers are trained in the civil law tradition (as opposed to the common law tradition), a study of comparative law provides a good introduction to both approaches of law. Law-making and -practice in international organizations are a synthesis of both legal traditions.

While grades and credentials are important, students also need to acquire relevant experience. The UN rarely hires students straight from law school. Law firm, government, or court system experience is always desirable. Law students should also engage in extracurricular activities, such as bar association and international law society activities. Negotiation, interpersonal, and communication skills are also indispensable to work at the UN.

The Write Way: I did not make it to moot court or any of the law reviews and journals, but I did engage in extracurricular writing. There is a big premium on drafting skills at the UN, and law students should take as many writing courses as possible and try to get published. I remember taking a course on drafting legal documents such as contracts. Furthermore, I took courses that required research papers (as opposed to sit-in exams) to help sharpen my writing skills. An additional benefit of taking a course requiring a research paper is that a good paper could become a law review article.

During law school, I managed to publish a law review article and win two writing awards – the Otto L. Walter Distinguished Writing Award for Outstanding Published Scholarly Writing from New York Law School, and the Albert S. Pergam International Law Writing Competition from the New York State Bar Association. Most bar or law associations have writing competitions where students may submit research papers written for a particular course.

I believe that these accomplishments, in addition to my subsequent publications, have been very helpful in my job today. Also, having written professionally as a newspaper columnist helped me with the drafting aspect of my work. Although you have to earn your stripes in any organization in which you work, there is no better objective measure of one's analytical and drafting skills than through his or her publications or awards.

Language Skills: Although I am not yet fluent in French (again, UNESCO headquarters is located in Paris), I do have a working knowledge of that language, which means that I can read, understand, and draft simple and routine correspondence in French, and also participate in meetings conducted in both French and English. UNESCO works mainly in both languages. I do not know if I would have been hired by UNESCO without a working knowledge of French. (I must point out that because I had stated that I had a working knowledge of French, part of my job interview was conducted in that language.)

The language requirement for most professional positions in UNESCO (and most of the organizations in the UN system) is fluency in English or French. Since hiring is very competitive, knowledge of some of the official UN languages – Arabic, Chinese, English, French, Russian, and Spanish – may tip the scale in favor of certain candidates. In New York, one can get by with only English but it will be difficult in Paris, or Geneva (which is the seat of most international organizations in the UN system). ❖

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Global Business and Financial Round-up

A bigger and stronger European Union?

Like people, institutions can undergo makeovers to reveal a new image. By next year, after decades of mostly playing second fiddle to the United States in global affairs, the EU will have transformed itself into a 25-nation political and economic bloc. But will enlargement translate into a more agile and united Europe that can claim to be a world power in its own right?

The EU last admitted new members into its ranks in 1995. The current enlargement will be its most challenging because the EU will be admitting ten countries – Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia – whose scale of economic development is far lower than that of its current members. After these ten nations join (or accede to) the EU, it will rival the North American Free Trade Agreement (NAFTA), whose members are the US, Canada, and Mexico.

The EU is, of course, not a single nation. It is currently a union of 15 countries established through a series of international treaties beginning in the 1950s. Its members created 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. Some of these institutions are the Council of the European Union, the European Commission, the European Parliament, and the European Court of Justice. The EU also negotiates as a single entity in the event of a trade dispute with non-EU members. Furthermore, all EU members follow uniform standards dealing with tariffs and market rules. While EU nations cooperate in many areas of governance, all members still retain their sovereignty in areas such as security and defense.

The US Department of Commerce reported that the EU and US traded nearly $2 trillion in goods and services in 1999. In fact, the EU is America's second-largest trading partner in the world. Only Canada trades more with the US. In 2000, the EU (whose population will grow to 450 million people after enlargement compared to 284 million in the US) had a combined gross domestic product of almost $9 trillion (compared to $11 trillion for the US).

What are the benefits of enlargement? Economists say that businesses in Europe and across the world (including US companies) will benefit from the efficiency that arises from having to deal with a single set of tariffs, market rules, and administrative procedures spanning much of Europe. Analysts also point out that a larger EU will open new markets for goods and offer consumers a wider choice of products. According to political observers, enlargement will also help to strengthen democracy and stability in the new member nations because these countries had to meet certain political criteria (such as respecting human rights) in order to join the EU. Scholars believe that a delay in enlargement could set back these reform efforts and invite political instability in Europe.

But the road to enlargement has been paved with skepticism. While the EU plans to provide financial assistance to help new members continue their reform efforts, many critics say that these countries will absorb a disproportionate share of EU resources. Others fear that a wave of immigrants will flood current members and strain social welfare budgets. Nationalists assert that, in order to deal efficiently with many more members, the EU bureaucracy will strengthen its own powers at the expense of the sovereignty of member nations.

Certain candidate countries are complaining that the EU will be giving them too little in development aid and agricultural subsidies. They point out that while German reunification had cost over $585 billion, the new EU members will receive a paltry $23 billion in agricultural subsidies and structural assistance for activities such as building roads and strengthening their educational and administrative systems. Experts point out that agricultural subsidies account for almost half of the $90 billion annual budget of the EU.

Accession has been an arduous process for some of these aspiring members, all of whom had to meet specific political and economic criteria to join the EU. Applicants must: (i) have stable institutions guaranteeing democracy, the rule of law, and human rights, (ii) have a functioning market

Continued on next page

The International Review

Spring 2003

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Founded in 1996, the Center for International Law provides in-depth support for instruction in private international law, particularly in the areas of international business, trade, and finance. The Center organizes events whereby students, faculty, and guests of New York Law School may interact with experts who link theory and practice.

economy, and (iii) be able to adopt all EU laws and regulations (known collectively as the "acquis communautaire") upon accession and also create domestic institutions which will actually implement and enforce the acquis. In order to organize the accession negotiations, the EU divided the acquis into 31 chapters, each dealing with a different area of EU policy such as competition, taxation, education and training, environment, free movement of goods and capital, and financial controls. (The actual body of EU laws and regulations is, of course, found not in 31 neat chapters, but throughout a complex body of legislation, rules, and jurisprudence.) Each applicant then had to negotiate with current EU members on how it would adopt, implement, and enforce each chapter upon accession to the EU. To prevent a single applicant from delaying the accession of others, every candidate nation will join the EU on its own merits.

Although most applicant nations will have signed their accession treaties by April 2003, the parliaments of all existing EU members (and also in the candidate countries themselves) must then ratify every accession treaty in order for enlargement to become official. Recent polls show that only a slim majority of Europeans favor enlargement. But if all goes as planned, EU leaders say that all ten applicants will officially become members on May 4, 2004. Economists note that, upon accession, the new members will not adopt the common currency – the euro – until they fulfill certain criteria. For example, to adopt the euro, a new member must have: (i) a budget deficit less than three percent of GDP, (ii) a debt ratio of less than 60 percent of GDP, and (iii) low inflation and interest rates close to the EU average. (The euro is the common currency of 12 of the present 15 EU members.)

Despite the excitement surrounding accession, many skeptics warn that the existing decision-making process in the EU – which can be cumbersome, and fraught with infighting among its current 15 members – could slow down further when the union expands to 25 members. To prepare for enlargement, current EU members reached an agreement in 2000 (embodied in the Nice Treaty), which, they say, will streamline the decision-making process, even with a much larger EU membership. Bigger countries will receive more votes and smaller members will no longer have the automatic right to fill important posts. Yet some critics say that the Nice Treaty (which must be must be ratified by the 15 current members by the end of 2003) doesn't offer any true reforms. So far, 12 member nations have ratified this treaty. Ireland had to hold a second referendum after voters initially rejected the Nice Treaty.

In a recent poll, more than half of all Europeans indicated that, after its enlargement, the EU will become a world and economic superpower equal to the US. But others are not optimistic. One critic stated, "Europe will never achieve the common foreign, defense, and fiscal policies of a superpower." Others note that three EU members have not adopted the euro, and that some current members are deviating from EU economic policy by allowing their budget deficits to increase beyond prescribed limits. ❖

Biotech debate meets real-world starvation

For the past several years, the US and the European Union (EU) have engaged in a heated debate on the alleged dangers of using and consuming genetically-modified organisms (GMOs). While the US vouches for the safety of GMOs, the EU says that scientists still don't know enough about their long-term effects on human health and the environment, and that it will not re-approve the distribution of GMOs in Europe until new regulations are implemented later this year. Officials say that a bitter trade dispute could be imminent unless the two sides resolve their differences. But critics point out that while the US and the EU may have the luxury to debate the theoretical dangers of GMOs, many developing countries are making life-and-death decisions on whether to distribute GMOs to their famished populations.

Scientists make GMOs such as seeds, animals, and microbes by transferring desirable traits from one species to another species. For example, they have made plants which can produce their own insecticide and survive adverse conditions such as dry weather. The US started using GMOs on a wide scale in the early-1990s because they proved to be very effective in resisting pests and in increasing agricultural output dramatically. The US is also the largest producer of GMOs in the world today, and exports about one-third of its crops every year valued in the hundreds of millions of dollars. Although the US claims to have certified the safety of using GMOs, public distrust in many countries has grown considerably in the past few years, particularly in the EU.

In 2000, over 100 countries successfully negotiated the Cartagena Protocol on Biosafety, an international treaty which would regulate the trade of and protect biological diversity from potential risks posed by GMOs. But until the treaty comes into force (which will occur when it is ratified by a majority of legislatures of its signatory nations), every country will continue to regulate the import and distribution of GMOs through its own domestic laws and regulations.

The EU once approved the sale of GMO products during the early-1990s through Directive 90/220/EEC, which regulated the importation and sale of GMOs in the European marketplace. The directive also addressed environmental and health concerns related to the experimental release and consumption of GMOs. But in 1998, partly in response to public outcry over several public health scandals unrelated to GMOs, the EU announced a moratorium on the importation and approval of sale of all GMOs until the European Parliament approved a more stringent directive in 2002. Analysts point out that the EU itself has not taken an anti-GMO stance and only advocates further testing to ensure the safety of GMOs. Instead, they say, most of the harsh rhetoric against GMOs comes from anti-GMO groups based in the EU. Still, many farmer and business groups say that the EU's

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moratorium only helps to fuel the perception that GMOs constitute health and environmental hazards.

On October 17, 2002, the EU passed Directive 2001/18/EC, which requires a stricter approval process for GMO products before they are sold in the European marketplace. The new directive also calls for a more rigorous environmental risk-assessment process, mandatory dissemination of information to the public concerning GMO products, and also term limits of 10 years for companies granted licenses to distribute GMOs.

But several EU members (led by France, Belgium, and Italy) have said that they would delay the implementation of the new directive – and continue to maintain the moratorium on GMOs – until all EU members have reached agreement on several unresolved issues, including stricter rules on labeling and traceability of GMO products. For example, while some countries have demanded labels for products containing at least 0.9 percent GMOs, others have insisted on labels for any trace of GMOs. Another proposal would require farmers to keep complete records (for at least five years) on whether GMOs were used during any stage of a food's production process so that they would be able to track any source of contamination. Political analysts say that until the EU member states resolve these issues, the moratorium could be in effect at least through late-spring of 2003.

The US and other large exporters of GMOs, including Australia and Chile, have described the moratorium as a disguise for protectionism. The US is now threatening to challenge the legality of the EU moratorium before the World Trade Organization (WTO), saying that WTO rules prohibit such measures in the absence of strong scientific evidence, and that the current ban has cost US farmers over $300 million in exports to Europe. The EU argues that it is taking a so-called precautionary approach on the issue of GMOs, saying that it would rather err on the side of public safety. Critics of the US approach say that a legal challenge before the WTO would do nothing to convince EU consumers that GMOs are safe to use and consume.

But political observers argue that a formal WTO ruling against the moratorium would discourage other countries from implementing their own bans on GMO products. They cite a similar case in 1997 where the WTO declared that an EU ban on the sale of beef treated with growth hormones violated WTO rules because there was no conclusive evidence showing that the consumption of such beef was harmful to human health.

In the midst of this theoretical debate, many countries in Africa are banning the distribution of GMOs. According to humanitarian organizations, Mozambique, Zambia, and Zimbabwe are facing severe food shortages caused by recent droughts and floods, and almost 13 million people in these countries could face starvation. Many countries have already donated food. Although the US has pledged to donate 65,000 tons of GMO corn – 26,000 tons of which have already arrived in the region – the recipient governments have blocked the distribution of these food supplies (citing studies from the EU purportedly showing the dangers of consuming GMOs) and have placed the donated corn in warehouses under armed guard.

But critics argue that these governments have based their decisions on commercial reasons. They point out that the EU is the premier export market for African agricultural goods, and that African countries don't want emergency GMO food supplies to contaminate local crops and taint exports to the EU. Moreover, others say that agricultural exporters from these countries (given their limited resources) will be unable to comply with the EU's proposed traceability and labeling requirements if GMO supplies contaminate local crops.

In the meantime, groups opposed to the use of GMOs – including Greenpeace and Friends of the Earth – have urged African governments to distribute the food to avert a possible famine. One critic said: "Whatever hypothetical risk may exist in genetically modified crops is trivial compared with the very real danger of starvation faced by some 13 million people" in Africa. ❖

Zombies in Japan's banking system?

Ten years after a plunge in Japan's real estate and stock markets, have that country's banks turned into zombies – only acting as if they were alive? In addition to Japan's slow growth and rising unemployment, economists point to Japan's inability to deal with its growing banking problem as a prime example of the economic and political inertia that has captured the world's third largest economy.

Banks in most industrialized countries make most of their profits by (and stake their survival on) lending a multiple of their capital and then collecting the interest and principal payments from these loans on a regular basis. In the early-1990s, a sharp drop in Japan's stock and real estate markets struck that country's banking sector very hard. More than 75 percent of all bank loans in Japan went to real estate, construction, and retail companies. And as asset prices dropped, many of these borrowers were unable to repay their loans.

As a result, Japanese commercial banks say that they have accumulated over $430 billion in loans that are non-performing, meaning that the borrowers (such as large companies) have delayed or are not even making the principal and/or interest payments. Other experts assert that the value of these nonperforming loans probably exceeds $1 trillion because many banks have masked the seriousness of their financial problems. Last year, government bank inspectors declared that banks underestimated their bad loans by 36 percent.

Banking officials state that they have written off over

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$650 billion in nonperforming loans since the mid-1990s (i.e. many banks have reduced their assets to reflect the nominal value of these uncollectible loans). But critics argue that the banks are, in fact, accumulating more bad loans at a faster rate. Instead of forcing their indebted borrowers into bankruptcy, they say, many banks continue to extend to them billions of dollars in credit. While some banks are hoping that their borrowers will pay off their loans in the future once the economy begins to improve, others say that it is easier for troubled banks to allow these companies to die slowly.

Analysts fear that if banks aggressively and more quickly wrote off the true amount of their bad loans, they could find themselves undercapitalized (meaning that they would lack sufficient funds to perform normal business operations) or even insolvent. An undercapitalized or failing bank might seek a government bailout using taxpayer money to stabilize and restore confidence in the banking system. This, however, would allow the government to force out the banks' current management (which bank executives are, of course, resisting). Government officials add that if the banks forced their heavily-indebted borrowers into bankruptcy, these companies would have to lay off almost 2.5 million workers (or four percent of the labor force), which could then touch off a deeper recession. Japan is currently going through its fourth recession in a decade, and its unemployment rate currently stands at 5.5 percent – the highest since the end of World War II.

Because the seven largest banks in Japan extend 42 percent of all credit in the country and hold 47 percent of all non-performing loans, economists say that the banking problem is hindering an economic recovery in that country. As the rate of nonperforming loans has increased through the years (which, according to analysts, represent 15 percent of all loans), Japanese banks have reduced lending to otherwise healthy borrowers. In other words, say experts, money and financial resources that could have been invested in more productive and healthy businesses are tied up in otherwise struggling companies which are unlikely to pay back their debts ever. Statistics show that bank lending in Japan has decreased six years in a row.

Critics say that the Japanese government has taken only half-hearted measures to deal with the bad loan problems, and that vested political and financial interests have stopped more aggressive attempts to have banks write off their uncollectible loans. For example, the government created an agency, the Resolution and Collection Corporation, to buy $70 billion in bad debt using public money, although it cannot sell the loans at a loss. The government also passed nine economic stimulus packages totaling $1.2 trillion since 1992 to spur domestic demand, none of which has successfully revived Japan's economy.

Last year, in an effort to force a government bailout of troubled banks, the Bank of Japan (the central bank) proposed to spend $16 billion of its own money to buy stock in troubled banks. The government could also, in conjunction with the central bank's stock plan, use public money to bail out troubled banks by absorbing their losses from bad loans. But under Japanese law, the government cannot bail out a bank unless it declares a crisis, an approach that entails the risk that one bank failure could lead to a chain reaction of other bank closings.

Under an aggressive plan initially proposed late last year by Heizo Takenaka, the country's finance minister, banks would have to adhere to stricter rules on classifying and assessing nonperforming loans, write off bad loans at a much faster rate under specific deadlines, use different methods to determine whether they were adequately capitalized, and make their lending practices more transparent. News of these plans soon rattled Japanese markets and sent stock prices for Japanese banks plummeting by double-digits.

Under harsh criticism from bankers and even members of his own political party, the finance minister later released much softer proposals described by critics as "vague and watered-down." Analysts noted that the proposals not only failed to mention the use of public money to bail out insolvent banks, but that these plans were strictly voluntary. One critic said: "Mr. Takenaka's failure to field concrete bank-overhaul steps bodes ill for ... Japan's prospects of launching a tough, coherent economic-revival program, especially in the face of strong political opposition." Government officials say that they will devise more options to address the country's banking problems after March 2003 when banks in Japan issue financial statements and undergo a round of inspections. ❖

International trade to become less taxing?

Flippantly put, the Bush administration's tariff policy manifests that it has never met a tax cut it didn't like. President Bush has taken his tax-cutting campaign into a new area when the US recently proposed to eliminate completely (although very slowly) the tariffs that people pay when they buy goods made in other countries.

Under a plan submitted to the World Trade Organization (WTO), the Bush administration proposed that countries around the world phase out import taxes − better known as tariffs − on all consumer and industrial goods, which make up over 90 percent of world trade in goods. Not only would this include everyday items, such as toys, furniture, film, clothing and textiles, handbags, electronic goods, and pharmaceuticals, but it would also apply to more expensive and durable goods such as cars, agricultural equipment, chemical products, civil aircraft, steel, and construction equipment.

Many governments impose tariffs on imported goods to raise revenue for their general operations. (In fact, the

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US government once depended on tariff revenue to run its daily activities during the early days of the republic.) Businesses then seek to pass along the cost of the tariffs to consumers in the form of higher prices for the imported products. Nowadays, critics say, governments use tariffs mainly to protect politically-sensitive domestic industries (such as the agricultural and textile sectors) from foreign competition. They also say that governments use tariffs to protect and promote industries which, otherwise, would not survive on their own.

The actual plan proposed by the US calls for a two-phase approach in eliminating tariffs on all consumer and industrial goods. Under the first phase, every WTO member nation (including the US) would gradually eliminate ad valorem tariffs of five percent or less from 2005 to 2010. The remaining tariffs (i.e. those higher than five percent) would be lowered to around eight percent by 2010. During the second phase from 2010 to 2015, WTO members would make equal annual cuts to these remaining tariffs until they reached zero percent.

According to officials from the Office of the US Trade Representative, the elimination of these tariffs will lower prices that consumers pay for imported goods and help them save over $18 billion a year (or $1,600 every year for a US family of four). Proponents say that the proposal, if implemented, will especially help low-income families who spend a higher share of their income on import taxes. Other supporters say that the Bush proposals will increase US exports by $83 billion every year, since other countries will have to eliminate tariffs on US goods. Business groups point out that exports support over 12 million jobs in the US, and that the Bush proposal could create thousands of new jobs. The World Bank also estimates that the elimination of many high tariffs could result in hundreds of billions of dollars in benefits for developing countries (which translates into $544 every year for a family of four).

But critics say that, under the Bush proposal, developing countries – which impose the highest tariffs in the world, ranging from 16 to 36 percent on many goods – will have to cut their tariffs much more quickly and drastically than the US (whose tariffs average just five percent). Officials from developing countries also state that it would be politically impossible to rally popular domestic support for the US plan if they had to carry most of the burden in lowering tariffs.

Others accuse the Bush administration of trying to divert attention away from trade policies that, they say, hurt developing countries. Critics − including officials from the World Bank and the International Monetary Fund − have accused the US, the European Union, Canada, and Japan of having closed their markets to products made by developing countries at much lower cost than their counterparts in the industrialized world (such as textiles and agricultural goods). Under pressure from politically-strong lobbies at home, critics assert, these countries have enacted a combination of high tariffs and subsidies that run in the hundreds of billions of dollars to keep out these goods. They also note that the dollar amount of these measures far exceeds the $50 billion in annual foreign aid given by industrialized countries to the developing world. Last year, the chief economist at the World Bank estimated that while most of the people in sub-Sahara Africa lived on less than $2 a day, a cow in Europe received $2.50 in government subsidies a day while a cow in Japan received almost $7.

Political observers conclude that the Bush proposal is not workable in its current form and that the US probably announced the measure simply to jump-start the enormous round of trade negotiations currently being negotiated by the member nations of the WTO. ❖

US to WTO: Don't tell us how to spend our money

Late last year, a WTO dispute settlement panel ruled that an obscure law passed by Congress violated international trade rules by allowing American companies to receive hundreds of millions of dollars in "anti-dumping" duties imposed on foreign companies accused of unfair trading practices. Many US lawmakers have, in turn, accused the WTO of violating this country's sovereignty by supposedly telling Congress how to spend these duties. Yet critics say that the US is the only country in the world to distribute these duties directly to affected companies and that WTO trade rules clearly prohibit this practice.

Businesses in the US rely on a variety of laws to protect themselves from foreign companies that engage in unfair trade practices. But none has caused as much international controversy as the US's "anti-dumping" laws. According to lawmakers, these laws protect American business from foreign companies that engage in practices such as dumping, where one country sells its products below cost in another country. The US primarily uses the Tariff Act of 1930 to protect its industries from dumping.

Under this act, if the US government determines that sales at less than normal price from another country have caused (or have the potential to cause) substantial injury to a certain US industry, the US government can impose and then collect extra import taxes (or duties) from the offending companies. The US then sends these duties directly to the US Treasury. Legal analysts say that other countries do the same when they enforce their own anti-dumping laws. But critics, including major trading partners, respond that these laws are biased against them and allow financially unsound companies to use these laws to shield themselves from foreign competition.

The World Trade Organization (WTO) allows its member nations, under specific circumstances, to impose anti-dumping duties in order to protect injured domestic industries. While it doesn't impose its own anti-dumping

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rules on member nations, the WTO instead provides specific guidelines on how member nations can or cannot react to dumping. The member countries themselves use their own domestic anti-dumping laws (which must conform to WTO rules) to impose these extra duties. The WTO also allows its members to impose an extra tax called a "countervailing duty" against goods whose production is illegally subsidized by other governments.

In 2000, the US amended the Tariff Act of 1930 (at the behest of Senator Robert Byrd of West Virginia) so that the collected duties would be forwarded directly to the industries hurt by dumping. Also called the "Continued Dumping and Subsidy Offset Act of 2000" (CDSOA), the new law requires the Customs Service to collect and then distribute on an annual basis these duties to the parties which filed the original anti-dumping complaints for their "qualifying expenses," such as health care costs, pension benefits, and research and development expenses beginning in October 2001.

While Congressional analysts initially estimated that the Customs Service would distribute approximately $39 million a year under the CDSOA to companies affected by unfair trade practices, that agency – in fact – distributed almost $320 million to various companies in 2001. Last year, it distributed over $270 million in anti-dumping and countervailing duties to American companies ranging from US Steel to Hershey Foods.

In July 2001, eleven WTO members (including the European Union, Australia, India, Japan, Brazil, and Korea) formally asked the WTO to rule on the legality of the CDSOA, arguing that it violated WTO rules governing the use of anti-dumping and countervailing measures. Political analysts note that this is the most number of countries to have come together in a single dispute to challenge another WTO member's trade law. The complainants argue that while WTO rules allow member nations only to impose anti-dumping duties to counteract any injury caused to domestic industries by dumping, they do not allow member nations to take further *specific* actions against dumping. In other words, they say, the US can only counteract dumping by imposing and then collecting antidumping duties, but cannot then take further action such as distributing these duties to the complaining companies.

To distribute these duties directly to affected domestic industries, argue the complainants, would be to provide additional relief beyond what is allowed to protect domestic industries against dumping. They point out that the Contracting Parties to the General Agreement on Tariffs and Trade ruled in a similar case that the US Antidumping Act of 1916 violated its rules because, in addition to imposing anti-dumping duties, the 1916 Act also allowed other sanctions (such as criminal penalties) to counteract dumping. The complainants also argue that the CDSOA provides a financial incentive for US companies to file frivolous anti-dumping claims, and that any duties distributed to affected companies amount to illegal subsidies, which are prohibited by WTO rules.

US officials responded that the distribution of anti-dumping duties to complaining companies neither constituted an illegal subsidy nor a specific action taken to counteract dumping from other nations. They replied that the CDSOA "has nothing to do with the administration of US anti-dumping and countervailing duty laws" since the duties collected under the law have become part of the general tax revenue of the US, which is now free to spend this revenue any way it sees fit. Moreover, they argued, the CDSOA is, in fact, "a government payment program. Like all governments, the US federal government makes payments to individuals or groups for all sorts of purposes such as health care, public welfare, agriculture, etc."

The US also noted that WTO rules do not specify "any ban on spending this revenue," arguing that "spending this money cannot per se be action against dumping or a subsidy – otherwise duties once collected could never be spent." US officials concluded that the WTO had to determine whether its international trade rules limited what a government can do with revenues collected from anti-dumping duties.

In September 2002, a WTO dispute settlement panel ruled that the CDSOA violated international trade rules by setting out a specific form of action against dumping or subsidization. In its decision, the WTO stated that "CDSOA offset payments follow automatically from the collection of anti-dumping duties, which in turn may only be collected following the imposition of anti-dumping orders, which may only be imposed following a determination of dumping (injury and causation) . . . Thus there is a clear, direct and unavoidable connection between the determination of dumping and CDSOA offset payments." The panel also ruled that the CDSOA provided a financial incentive for companies to file anti-dumping claims. It concluded that the only way for the CDSOA to come into compliance with the WTO's ruling is for Congress to withdraw the legislation.

The WTO Appellate Body, in January 2003, upheld the panel's decision, stating that "it is clear from the text ... that the CDSOA offset payments are inextricably linked to, and strongly correlated with, a determination of dumping." But the Appellate Body reversed the panel's finding that the CDSOA provided a financial incentive for US companies to file anti-dumping claims. Although the Bush administration has indicated that it wants to withdraw the legislation, 67 senators have stated their continued support for the CDSOA. Instead of repealing the law outright and to the dismay of major trading partners, US officials later announced that they would amend the CDSOA so that it would comply with the ruling of the Appellate Body. ❖

Past newsletters are available online on the Center's homepage

www.nyls.edu/content.php?ID=98

C.V. Starr Symposium: Corporate Governance in the US and Europe: An Emerging Consensus or Growing Disparity?

During the past year, issues concerning corporate governance have become a major concern for many Americans and Europeans. Allegations that executives and directors at large public companies (such as WorldCom and Enron) had engaged in financial and accounting improprieties led to a sharp decline in investor confidence that affected stock markets around the world. While it might be argued that existing US corporate governance practices adequately protect against fraud, many critics have expressed the view that stronger measures are needed to safeguard the international economy against further corporate wrong-doing, and point to standards in other countries. What standards and practices of corporate governance are in place today in the US and in Europe – the world's two largest economies? Have they proven effective in promoting the interests of shareholders and stakeholders alike? Are tougher standards needed in light of the recent accounting and financial scandals? Will today's global forces produce a growing international consensus on good practices in corporate governance or greater friction between different jurisdictions that adopt overlapping or conflicting laws? The faculty will discuss these and related questions.

MARCO BECHT
Executive Director, European Corporate Governance Institute

AMY L. CHUA
Professor of Law, Yale Law School; author, "World on Fire: How Exporting Free Market Democracy Breeds Ethnic Hatred and Global Instability"

HOLLY J. GREGORY '86
Partner, Corporate Governance Group, Weil, Gotshal & Manges, LLP

JAMES L. GUNDERSON
Former Secretary and General Counsel, Schlumberger Limited

SHELDON LEADER
Professor of Law, University of Essex, United Kingdom

ARTHUR LINDENAUER
Chairman, Schlumberger Technology Corporation

Tuesday, March 25, 2003, Wellington Conference Center, 3:00 pm – 6:00 pm
(Approved for 2.5 CLE credits in Professional Practice)

HOST: SYDNEY M. CONE, III, C.V. Starr Professor of Law and Director, NYLS Center for International Law

The Otto L. Walter Lecture
April 8, 2003

The Appellate Body of the World Trade Organization: Discussion with a former Appellate Body Chairman

The World Trade Organization (WTO) is one of the most powerful international bodies in the world today. Its seven-member Appellate Body – the highest tribunal in the WTO dispute-settlement process – can uphold, modify, or reverse legal findings in dispute panel reports and shape the rules governing global trade. **Mr. Claus-Dieter Ehlermann**, one of the original members appointed to the Appellate Body, will discuss his six years on that tribunal (including his role as its Chairman). He will also address the strengths and weaknesses of the WTO dispute-settlement process and the challenges it faces in the future. Mr. Ehlermann, before joining the WTO, was a senior official of the European Union.

The C. V. Starr Lecture
April 22, 2003

The Regulation of Foreign Lawyers in New York: Former N.Y. Court of Appeals Judge Howard A. Levine

New York can claim to be the leading center of international legal practice both in this country and worldwide. Foreign lawyers and law firms readily establish themselves in New York to practice law under liberal rules adopted by the New York Court of Appeals in 1974. In addition, 95 percent of the foreign-trained lawyers who join a US bar join the New York Bar under New York's liberal rules. Former New York Appeals Court Judge Howard A. Levine – who supervised the relevant New York rules – will speak about the policies and objectives underlying the rules. Judge Levine will also discuss how the rules affect the practice of law not only in New York, but also in many other centers of international practice.

Both lectures will be held in the Wellington Conference Center, 4:00 pm - 6:00 pm
(Approved for 2 CLE credits in Professional Practice)
For more information, visit the Center's webpage at www.nyls.edu.