



ILLINOIS STATE
BAR ASSOCIATION

THE GLOBE

The newsletter of the ISBA's Section on International & Immigration Law

Editor's comments

By Lewis F. Matuszewich

Leading off this issue of *The Globe* is the Chair's Column by Mark E. Wojcik. Mark has prepared information concerning the members of the Section Council to introduce them to the readers of *The Globe*.

The series by Rebecca L. Weinberg on NAFTA's interpretation of "Expropriation" continues with the third installment, "Does NAFTA's Interpretation of 'Expropriation' Favor Foreign Over Domestic Investors? Part 3: Advantages of NAFTA Over Domestic Investors in Canada and Mexico." The final installment, which will appear in a later issue, will explain the consequences of NAFTA's unequal protection of foreign investors.

The Midwest Immigration & Human Rights Center has sent a listing of asylum applicants. The center needs volunteer attorneys to provide pro bono assistance for the clients.

Howard L. Stovall is an active contributor to *The Globe*. Over the years, he has prepared summaries of commercial agency law for a number of Arab countries, including Bahrain, Egypt, Iraq, Jordan,

Kuwait, Lebanon, Libya, Oman, Qatar, Saudi Arabia, Syria, the United Arab Emirates and Yemen. He has prepared an updated description of the Qatar Commercial Agency and Distributorship Law for this issue of *The Globe*. In fact, he noted that his first ever publication in *The Globe* was a short article on a previous Qatari commercial agency law, published in November 1986!

Also included in this issue is a change of address notice from the Chicago Export Assistance Center.

In addition to working on *The Globe*, the members of the International and Immigration Law Section Council are active in continuing legal education and other programs.

The September 23 Section Council Open Meeting will include an international law update on recent decisions of the International Court of Justice (the Avena case from Mexico, and the Israeli Wall Advisory Opinion), and selected international decisions from the U.S. Supreme Court's most recent term (including the court's controversial cases involving alleged violations of the Geneva Convention and the detention of enemy combatants in Guantanamo). The principal speaker will be Section Council Chair Professor Mark Wojcik, although he will encourage active debate and discussion among all those attending the program. Under a new ISBA policy there is a \$35 charge for persons who are not members of the Section Council, but the cost includes lunch and materials. Call the ISBA (800-678-4009) to register in advance for the program or to inquire about student rates for attending the program.

The ISBA will participate in the Chicago Humanities Festival this fall as a sponsor of a government panel discussion of "Iraq: Constituting a Nation." As reported in the August issue of the *ISBA News*, Chicago attorney Ronald J. Guild, who facilitated inclusion of the program on the festival schedule, announced the event to

Get the electronic version of this newsletter

Go to www.isba.org for details.

the ISBA Board of Governors on July 16 during his presentation on activities of the Committee on Public Relations.

The panel discussion at the Festival will review challenges facing Iraqi leaders in creating a new constitution, and is scheduled from 3:30 to 5 p.m. Saturday, Nov. 13, in the student center of DePaul University's Lincoln Park campus.

The moderator will be Mark E. Wojcik, chair of the International and Immigration Law Section Council and director of global legal studies at The John Marshall Law School.

Scheduled panelists are M. Cherif Bassiouni, president of the International Human Rights Institute at DePaul's College of Law; Douglass W. Cassel Jr., director of the Center for International Human Rights at the Northwestern University School of Law; Feisal al-Istrabadli, vice president of the Iraqi Forum for Democracy, and *Chicago Tribune* writer Steve Franklin.

This year's Chicago Humanities Festival programs, based on the theme of Time, will be conducted from Oct. 30 to Nov. 14 at various locations around the city. Call Annie Tully, (312) 661-1028, ext. 12, for more information.

Also, an upcoming "Truth or Consequences: A Practitioner's Guide to Criminal Dispositions and Collateral Consequences," an ISBA Law Ed Series seminar, will be presented Friday afternoons, September 17 at the Par-a-Dice Hotel in East Peoria, and October 22 in the Chicago Regional Office.

The seminar is sponsored by the General Practice, Solo and Small Firm Section, with participation from the Criminal Justice Section, the International and Immigration Law Section and the Young Lawyers Division.

The scheduled event includes a 1:45 p.m. presentation on "Collateral Consequences of Criminal Disposition on

IN THIS ISSUE

- Editor's comments 1
- Chair's column: Meet the Section Council 2
- Does NAFTA's interpretation of "expropriation" favor foreign investors over domestic investors? Part 3: advantages of NAFTA investors over domestic investors in Canada and Mexico 5
- Midwest Immigrant and Human Rights Center 8
- Commercial agency and distributorship law in Qatar 10

Permanent Resident Aliens, the Immigration and Nationality Act and the Patriot Act," with Patrick M. Kinnally of Kinnally, Krentz, Loran, Hodge & Herman, in Aurora. Kinnally is a member of the General Practice, Criminal Justice, and International and Immigration Law Section councils, as well as the

Committee on Supreme Court Rules and Special Committee on Mentoring.

At 4 p.m. Mark Wojcik will discuss "Rights of Non-citizens When Arrested: Enforcing the Convention on Diplomatic Relations after Avena." In addition to being chair of the International and Immigration Law Section Council, Mark serves on the

Individual Rights and Responsibilities Section Council.

Lewis F. Matuszewich
Chmiel & Matuszewich
Telephone: (772) 279-8787;
Facsimile (773) 279-8872
E-MAIL: lmatuszewich@ameritech.net

Chair's column: Meet the Section Council

By Prof. Mark E. Wojcik

The members of an ISBA Section Council are largely unknown to many Section members. This is true of all Section Councils, not just the Section on International and Immigration Law. Yes, there is always a list of names in each newsletter, but many of those names are unknown to our section members. We have roughly 175 paid members and 200 guest members, including new lawyers and law students. This column—a first for this newsletter—will introduce members of the Section Council to our Section members. We are doing this for three reasons. First, if you have programs, policies, or publications that you think our section should support or organize, it will help you to know who we are so that you can contact us. We welcome your ideas and your active participation. Second, we want you to know that we, as guardians of the ISBA Section, represent a wide spectrum of international and immigration law practice and interest. Third, we expressly and actively encourage you to consider applying to join the Section Council in a future year. (Look for the application in the *Illinois Bar Journal* toward the end of the calendar year). Although we are a relatively active group, it is not particularly difficult to be a Section Council Member, and we believe that there are many personal and professional benefits in being a section council member.

Section Council Members attend periodic meetings (which, incidentally, are always open to any interested section member as well). We review, from time to time, proposed state legislation that may have international or immigration law implications—for example, as a public safety measure we have supported extending the right to obtain an Illinois Driver's License to non-citizens who live (and drive) here. We believe it is best to have safe drivers who must take the time to learn the local rules of the road. Section Council Members also propose CLE seminars and open meetings for the benefit of our section and the larger international law community, including, for example, members of the

consular community who attend our open meetings. And, as you might suspect, section council members write at least one article a year for the section newsletter. (Last year our section published seven newsletters).

In short, our Section Council Members help promote the missions of the section. These are:

- to improve the knowledge and skill of Illinois attorneys in the fields of international business law and immigration law and to inform the public about these growing areas;
- to raise the awareness of section members about the legal and political issues of international law, both public and private;
- to raise the consciousness of Illinois lawyers representing the foreign-born in general legal matters;
- to publish newsletters and sponsor seminars and conferences in furtherance of these goals.

Here then, is our "who's who" of the section council members:

Immediate Past Section Council Chair Jessica T. DePinto is an associate in the Chicago-based law firm of Hodes Keating & Pilon, concentrating in customs and international trade law. She is a graduate of the IIT Chicago-Kent College of Law. She has lectured on U.S. import and export regulations, and has been a frequent participant in our section's outreach programs for law students. She is a member of the Board of Directors of the International Trade Club of Chicago (ITCC) and the new Chair of the Chicago Bar Association's Customs and International Trade Law Committee. She also serves on the Board of the International Trade Club of Chicago and serves on the Chicago-Milan Sister Cities Committee.

In addition to her degree from Chicago-Kent, Ms. DePinto has a B.A. from University of Wisconsin at Madison and an M.A. from Indiana University at Bloomington. She also studied at the Università di Bologna, Bologna, Italy. In 1992, Jessica received a language perfec-

tion certificate from the University of Siena, Siena, Italy. She is fluent in Italian and is currently working toward a Diploma in Spanish as a Foreign Language (D.E.L.E.) at the Instituto Cervantes in Chicago.

Section Chair Professor Mark E. Wojcik is the Director of Global Legal Studies at The John Marshall Law School in Chicago, where he has taught courses in International Human Rights Law, International Trade Law, International Criminal Law, Torts, Lawyering Skills, and Lawyering Skills for International Lawyers.

He received his B.A. in International Studies and German from Bradley University in Peoria, his J.D. from The John Marshall Law School, and an LL.M. (in Trade Regulation) from New York University School of Law. He clerked at the Nebraska Supreme Court, the U.S. Court of International Trade, and served as Court Counsel to the Supreme Court of the Republic of Palau, a small country in the western part of the Pacific Ocean. He previously practiced customs and international trade law in New York before returning to Chicago.

In addition to serving as Chair of the ISBA Section on International and Immigration Law, he is a member of the Section Council of the ISBA Section on Individual Rights and Responsibilities. He is also a member of the ISBA Special Committee on Sexual Orientation and Gender Identity.

Within the American Bar Association Section of International Law and Practice (SILP), he has just been named the Editor-in-Chief of the *International Law News*. He is a Vice Chair of the International Health Law Committee, and he served previously as Co-Chair of the ABA SILP International Human Rights Committee. He has been asked to Co-Chair the ABA SILP's International Criminal Law Committee; he also serves as a Vice Chair of the International Criminal Law Committee of the ABA Criminal Justice Section.

Additionally, he is the Chair of the Association of American Law Schools (AALS) Section on North American Cooperation and the newsletter editor for

the AALS Section on International Legal Exchange and the AALS Section on Graduate Programs for Foreign Lawyers.

His recent publications include *Illinois Legal Research*, a book published by Carolina Academic Press. He is also the author of *Introduction to Legal English*, a guide for lawyers and law students who speak English as a second language, published (now in a second edition) by the International Law Institute in Washington D.C. He is the Director of the Legal English Program at the International Law Institute, where he teaches a summer course in English for lawyers who speak English as a second language.

Section Vice-Chair Juliet E. Boyd served last year as the Section Council Secretary. She works at the law firm of Richardson, Stasko, Boyd & Mack in Chicago. She is a native of South Africa, and received her B.A. from the University of Witwatersrand. She began her legal studies at the Randse Afrikaanse Universiteit. She received her J.D. from the University of Dayton School of Law. Juliet speaks Afrikaans and Dutch.

Section Council Secretary Scott D. Pollock is the principal of Scott D. Pollock & Associates, P.C., in Chicago. Scott was selected as a Leading Illinois Attorney in the field of immigration law, and his law practice concentrates in the area of immigration and nationality law. Scott has served as Chair of the Greater Chicago Chapter of the American Immigration Lawyers Association (AILA), Chair of AILA National's Consumer Protection/Authorized Representation Committee, and as a past Chair of the Immigration and Naturalization Law Committee of the Chicago Bar Association. He is also a member of the National Immigration Project of the National Lawyers Guild. He has published articles and lectured on immigration topics. He received his J.D. from Brooklyn Law School and is licensed to practice law in Illinois and New York. He speaks Spanish. Scott has been an active member of the ISBA Section Council and earlier this year spearheaded an ISBA initiative in teleconferencing when he put on a program on immigration law for hospitals and health care professionals.

Section Council Member Patricia M. Gibson works for the Catholic Diocese of Peoria. (Peoria is one of the favorite cities of Section Chair Mark Wojcik, as he is a graduate of Bradley University in Peoria, where he double-majored in International Studies and German).

Section Council Member Shannon Jackson graduated from the University of Georgia in 1998 and the John Marshall Law School in June 2003. After a long and

tedious summer studying for the bar exam, she felt free to take several vacations before beginning her job search. In December 2003, she became the newest associate at The Law Offices of John Z. Huang and Associates. There she is learning how to be an ace immigration lawyer as well as a multinational corporate law mogul. The general side to the practice has taken her to divorce court (for other people; Shannon is happily unmarried), housing court, administrative hearings, and real estate closings.

In her free time, Shannon enjoys baseball, cycling, and socializing with friends. Shannon looks forward to international travel, and hopes to visit six of the seven continents (Antarctica is not one of her priorities). She has already traveled to Europe, participating in study abroad programs in Italy and Ireland, but would like to go back someday as a "grown up."

Shannon became active in the Section of International and Immigration Law after attending one of the outreach programs that our Section Council put on at law schools. (Our Section Council, for several years now, has had a consistent and extensive outreach program to law schools in Illinois and Indiana as a way of advising students about careers in international law and about the tangible benefits of membership in the Illinois State Bar Association).

Section Council Member Kevin Ross Johnson practices family law, including divorce, child paternity, adoption, custody, and related issues. Some of his practice involves international aspects of family law. Kevin lived in Japan for six years, where he met his wife. He believes that his international experience broadened his perspective on life and the law. He presently works at the Austin Offices of the Chicago Legal Clinic, and would welcome the participation of any volunteer attorneys.

Section Council Member Patrick Kinnally is a principal of the law firm Kinnally, Krentz, Loran, Hodge & Herm in Aurora, Illinois. He received his B.A. cum laude from Loyola University of Chicago and his J.D. from The John Marshall Law School. He is an adjunct professor of immigration law at Northern Illinois University School of Law and he is scheduled to participate in the law student outreach program that the Section will present there on September 15, 2004. Patrick is also active in the ISBA General Practice, Solo, and Small Firm Section.

Section Council Member and Section Newsletter Editor Lewis Matuszewich is a principal in the law firm of Chmiel & Matuszewich, which he founded with former Section Chair Michael J. Chmiel. The

firm has offices in Chicago, Crystal Lake and Rockford. Lewis has been exceptionally active in the Section for many years; he is a former Chair of the Section Council and chaired the Twinning Project with the National Bar Association of Poland. Lewis serves as editor of *The Globe* and is a frequent contributor to the Section's law school outreach programs for law students. He is known by many students and new lawyers to be a wonderful mentor. He is also a past Chair of the Commercial Banking and Bankruptcy Section Council, the ISBA's Membership and Bar Service Committee and is a member of the Agricultural Law Section Council.

Section Council Member Mary Milano is currently Associate Director of the Illinois Criminal Justice Information Authority. She holds a B.A. (scl) from Mundelein College, a M.Div. from McCormick Theological Seminary, the J.D. (mcl) from Northern Illinois University, the D. Min. from Graduate Theological Foundation and a PGDip in EU Law from the University of Leicester. She has held fellowships in international law at Northwestern University, Universite Libre de Bruxelles, and the Istituto Superiore Internazionale di Scienze Criminali (Siracusa, Italy). Her interests include international human rights, as well as professional and social ethics, particularly as related to social and political justice issues. She has published and lectured in a variety of forums, including ISBA, ABA, and other professional and academic venues. She is the author of a curriculum on world hunger issues published by Bread for the World Institute. Mary has a background in both collegiate and graduate level teaching as well as a practice background specializing in representation of foreign investors with the international firm of Baker & McKenzie. She also served for a number of years in an Of Counsel capacity with the Chicago firm of Amari & Locallo. In addition to her section activities, she is current Vice Chair of the ISBA's Standing Committee on Law Related Education for the Public, a member of the Standing Committee on Sexual Orientation and Gender Identity, and is an elected delegate to the ISBA Assembly. She is also active in the American Bar Association and is a board member and Treasurer of the Italian American Political Coalition. Mary is a former chair of the International and Immigration Law Section, as well as a former chair of the Chicago Bar Association's Agribusiness Committee. In her spare time, she continues to hold a full professorship in the Graduate Program in Pastoral Theology at Saint Mary of the Woods College, teaching social ethics and law for ministry. She is also a priest of the Episcopal Diocese of Chicago.

Section Council Member Pradip Sahu

is a 2000 graduate of the Northern Illinois University College of Law and received his LL.M. (with Honors) in Intellectual Property Law from The John Marshall Law School in June 2004. He received his Bachelor of Science degree in Molecular Biology and Economics from the University of Wisconsin in 1993, and his Doctor of Chiropractic degree from the National University of Health Sciences in 1996. He is currently a Staff Attorney with the 18th Judicial Circuit Court of Illinois in DuPage County. Before joining the Circuit Court staff, Pradip spent three years with Schiff Hardin LLP in Chicago, where he worked on international trademark matters. While in law school, Pradip also worked full-time as a Chiropractic Physician delivering conservative health care using chiropractic, physical therapy, nutritional counseling, and acupuncture at the DeKalb Natural Health Center.

Pradip says that his primary interest in the ISBA's International and Immigration Law Section is the area of International Intellectual Property Law. (Earlier this year, the ISBA Section on International and Immigration Law held a joint luncheon meeting with the ISBA Intellectual Property Law Section to welcome a delegation of IP attorneys and patent examiners from the State Intellectual Property Office of the People's Republic of China).

Pradip feels that the Section offers a great forum to discuss areas of law that are as diverse as its membership. He also enjoys reading the Section newsletter, which offers discussions on a variety of interesting legal topics that otherwise would not come across his desk.

Section Council Member Thomas W. Simon

is a professor in Bloomington, Illinois. He has previously served as a member of the ISBA Section Council on Individual Rights and Responsibilities, where he advocated for international human rights law issues, including U.S. ratification of the Convention on the Rights of the Child and the Convention on the Elimination of Discrimination Against Women (CEDAW). He has also participated in activities of the American Bar Association Section of International Law and Practice, including a program in England that he attended with Section Chair Mark Wojcik (these ISBA members do get around). Tom is scheduled to participate in an upcoming ISBA program on the United Nations.

Violeta Balan has been appointed as Associate Editor of *The Globe* and she is a previous contributor to our newsletter. She graduated magna cum laude from Lake Forest College in 1998 with a dou-

ble major in International Relations and French, summa cum laude from *The John Marshall Law School* in January 2004. During her law school career, Violeta participated in almost all the honors programs offered at her school (Executive Production Editor for *The Journal of Computer and Information Law*, Member of *The John Marshall Law Review*, Runner-up Best Memorial Award in the 2003 *Philip C. Jessup International Law Moot Court Competition*). She externed for two federal judges (Hon. Ronald A. Guzman and Hon. Ann Claire Williams) and has found the experience invaluable. In addition, she worked for the Federal Trade Commission, a large firm and a small law firm as a law clerk.

Before going to law school, she had the privilege to work for the *United Nations Education, Scientific and Cultural Organization* (UNESCO) headquarters in Paris, France. She conducted research on refugee education issues in third-world countries, compiled materials for an educational methodology in key life skills areas, recommended projects for land mine awareness and trauma alleviation, and authored a report on the special needs of vulnerable refugee groups.

Violeta recently finished a fellowship with the American Bar Association's CEELI Project in Romania. As the first Public Interest Law Initiative fellow (PILI) to do her work outside Chicago, Violeta aided Romanian officials in their effort to increase the transparency, efficiency, effectiveness and accountability of their courts. Violeta's work was especially meaningful to her because she is a native of Romania. Her projects included: authoring a background memorandum instrumental in establishing criteria to evaluate Romanian judges, reviewing a report on a Pilot Court project concluded in Romania last year, drafting a booklet on ethics and anti-corruption based on the information gathered for and from several seminars sponsored by CEELI in conjunction with the Stability Pact for South Eastern Europe (SPA), and drafting pre-post tests for various seminars on ethics.

Violeta has accepted a position with Mayer, Brown, Rowe and Maw and she will start working in September 2004 with their Litigation and International Arbitration groups. She has this summer off and is enjoying every second of it. She recently traveled to the south of France and ate enough foie gras and "magret de canard" to last her at least a few years. She is currently taking a couple brush-up French courses at the Alliance Francaise and beginning Spanish at Instituto Cervantes.

Our **Section Board Liaison** is **Mark D. Hassakis**, of Mount Vernon, Illinois. The Section Board Liaison is a member of the

ISBA Board of Governors; he communicates our concerns to the Board of Governors, as well as informing them of our Section's great activity and accomplishments (such as our hugely successful open meetings for the membership and consular community, our law school outreach programs throughout the state, and the impressive number of newsletters we published last year). Mark is a graduate of Northwestern University and the St. Louis University Law School. He is a past president of the Illinois Bar Foundation, the charitable arm of the Illinois State Bar Association.

Stephen M. Komie, the elected **ISBA Secretary** and our former ISBA Board Liaison, acts as the **ISBA Liaison to the International Bar Association (IBA)**, which, we are happy to learn, will be meeting in Chicago in 2006. Stephen received a B.A. and M.A. from the University of Arizona, and a J.D. from the DePaul University College of Law. Stephen remains a member of the ISBA Board of Governors. As a long-time member of this committee, he practices international law with an emphasis on Hague Convention Child Abductions, extradition, commercial litigation, and criminal defense. He has been a nationally and internationally recognized speaker in his areas of practice and devoted to the development of the law. He was the dinner speaker at the IBA Transnational Criminal Conference in Dublin, Ireland, where he spoke on the subject of due process for detainees and enemy combatants. Stephen practices at Komie and Associates in Chicago.

Our ISBA Section Council would accomplish very little without the help of our professional support. ISBA Section Staff Member **Mary McClain Grant** has worked for the ISBA for more than 20 years. She is the point person not only for the Section Council, but also for seven section councils. She is also one of the three ISBA lobbyists, heading up the ISBA's Grassroots Lobbying efforts.

To attorneys and their clients who use the Chicago Export Assistance Center:

The Chicago Export Assistance Center has moved to a new office location at 200 West Adams, Suite 2450, Chicago, IL 60606. The e-mail addresses and telephone numbers for the staff remain the same.

Does NAFTA's interpretation of "expropriation" favor foreign investors over domestic investors? Part 3: advantages of NAFTA investors over domestic investors in Canada and Mexico

By Rebecca L. Weinberg

In the July 2004 issue of *The Globe*, Part 2 of this article appeared, dealing with Advantages of NAFTA Investors Over Domestic Investors in the United States. Part 3 continues the discussion of expropriations under NAFTA.

Domestic investors in NAFTA countries are not afforded the same protections as are given to foreign investors because of the broad meaning given to expropriation under NAFTA. NAFTA Chapter 11 allows an investor from one NAFTA Party to bring a claim against only a different NAFTA Party.¹ Therefore, a domestic investor cannot use NAFTA Chapter 11 to seek compensation from an expropriation by his own government while a foreign investor from another NAFTA Party can seek compensation from that same government.² Because the domestic law of each NAFTA Party is less protective than the NAFTA standard for expropriation, foreign investors from other NAFTA Parties are unfairly offered more protection under NAFTA than domestic investors in Canada and Mexico.³

Canadian law

1. Overview of Canadian law regarding expropriation

Recently, Canada made a deliberate political choice to maintain regulatory flexibility in economic matters⁴ and thereby released the Canadian government from any domestic constitutional obligation to protect the investments of its own citizens.⁵ The Canadian Constitution does not provide any property rights to its citizens, including protection against expropriation without compensation.⁶ Also, the Canadian Charter of Rights protects the rights of life, liberty and "security of the person," but not the right of property.⁷ Instead of having a constitutional obligation to protect investors, expropriation law of Canada is entirely a matter of statutory interpretation.⁸ Canadian courts rely on the Expropriations Act when land is expropriated or injured by statutory authority.⁹ Under the Expropriations Act, an expropriation occurs when a statutory authority takes part of an investor's land without the investor's consent, resulting in a reduction in market value to the remaining land.¹⁰ It is possible for the aggrieved landowner to receive compensation based on the market value of the land, damages attributable to the disturbance, damages for injurious

affection, and any special difficulties that may arise in relocation.¹¹ However, under Canadian law, a statute can expropriate private property without compensation with the only requirement being that it must use clear language to do so.¹² Even though the statutes of most Canadian provinces provide for compensation when real property is expropriated, it is not a requirement.¹³

In addition, Canada has a rule of statutory interpretation under which any statute that expropriates private property must be read, in absence of language to the contrary, as implicitly requiring that compensation be paid to the property owner.¹⁴ However, Canadian courts interpret this rule to require an aggrieved investor to prove not only that his land has been taken, but that the taking benefited the expropriating party.¹⁵ For example, in *A&L Investments Ltd. v. Ontario*, a domestic investor contended that a void of previously issued government orders permitting landlords to increase rents was a compensable expropriation under the Canadian Expropriations Act.¹⁶ The Ontario Supreme Court decided that the regulation voiding the orders was not a taking that required compensation under Canada law.¹⁷ According to the A&L Investments Court, in order for the presumption of compensation to apply, the state must take the property from its owner "for either its own use or for the purpose of destruction."¹⁸ Because the State did not benefit from the regulation, the government expropriation did not require compensation under Canadian law.

Canadian courts have applied this limitation on the right to compensation even to regulations prohibiting all effective use of the property in question.¹⁹ In *Hartel Holdings*, the Canadian Supreme Court declined to require compensation even after a law freezing land development had virtually eliminated any viable use of the domestic investor's land.²⁰ In *La Ferme Filiber Ltée v. The Queen*, the Supreme Court again refused compensation for a domestic investor forced to shut down his five-year-old fishing hatchery because of a new law in the area.²¹ The fishery owner's rights in the property were completely eliminated, but the Court awarded no compensation to the investor because the regulation had not transferred any property rights to the government.²² Because

Canadian law requires that the government benefit from the taking before an investor can be awarded compensation for an expropriation, Canadian law gives the government great freedom to regulate private property.²³ Therefore, Canadian domestic investors do not have extensive protection from expropriation.

2. NAFTA affords greater protection to foreign investors than is provided to domestic investors under Canadian law

The main difference between Canada's and NAFTA's protections from expropriation is that NAFTA has core explicit provisions in its supreme document that protect property against expropriation and require compensation for a taking.²⁴ In contrast, the Canadian government does not have any protections against expropriation in its supreme law.²⁵ Canadian authorities have traditionally enjoyed wide discretion in expropriating private property for the public interest. The Canadian Expropriations Act only permits compensation when there is an expropriation of real property²⁶ and thus the type of investments covered under domestic expropriation law is very narrow. Because of this broad authority allowed to the Canadian government, NAFTA Article 1110 is much more sensitive to regulatory action that negatively affects property value than the Canadian law is.²⁷ Because of this difference in theory between the two bodies of law, American and Mexican investors enjoy greater property rights in Canada than do Canadian investors.²⁸

The great disparity in treatment between foreign and domestic investors in Canada is evidenced by how Canada has continually voiced its concern that NAFTA foreign investment provisions prevent it from enforcing legitimate domestic regulations.²⁹ Canada would like to limit the scope of Chapter 11 so that foreign investors cannot seek compensation for "acts or measures [that] are non-discriminatory and within the normal exercise of a State's regulatory prerogative."³⁰ Along these lines, the Canadian government believes that privileges of investors should not surpass the sovereign responsibility of governments to legislate and regulate in the public interest.³¹

Mexican law

1. Overview of Mexican law

regarding expropriation

Like Canada, the Mexican government exercises wide discretion in regulating the property of its domestic investors.³² The substantive law of expropriation in Mexico is comprised of Article 27 of the 1917 Mexican Constitution and also the 1938 Law of Expropriation.³³ Authority to expropriate property is given to the Mexican government in Article 27 of the 1917 Mexican

Constitution, which allows the government to limit private property rights if the limitation is for the public purpose and subject to payment of indemnity.³⁴ This provision also allows expropriation in order "to regulate, for the collective good, the use of natural resources susceptible to appropriation, to ensure a more equitable distribution of public wealth, to conserve them, to achieve the well-balanced development of the country and the improvement of the living conditions of the rural and urban population."³⁵ The 1936 Law on Expropriation further defines takings regulation by providing clarifying details of expropriation procedure and acceptable purposes for which an expropriation can be taken.³⁶ For example, the Law on Expropriations broadly defines "causes of public utility" in the text of the Mexican Constitution to include and extend beyond items such as creation of rights of ways and municipal facilities.³⁷ The definition of "causes of public utility" creates broad justifications of expropriation by creating elements such as "establishment, exploitation or conservation of a public utility;" "defense, conservation, development or use of natural elements susceptible of exploitation;" "equitable distribution of wealth taken or monopolized with exclusive advantage of one or various persons and with prejudice of the collectivity in general or a class in particular;" and "creation, development or preservation of an enterprise for the benefit of the collectivity."³⁸

These two substantive sources, the 1917 Mexican Constitution and the 1936 Law on Expropriations, establish a clear division in Mexican law between expropriation, which consists of "legally taking a thing from its owner, for reasons of public utility, and giving the owner a fair indemnification,"³⁹ and limitations in the public interest, which do not require indemnification even though they may affect the value of property.⁴⁰ The second, non-compensable group, limitations, must be generally applicable instead of specifically directed towards an exact property.⁴¹ Additionally, limitations can only take away limited aspects of the owner's right to the property, rather than entirely transferring ownership of the property to the government.⁴² However, the Mexican Supreme Court, using this distinction between expropriation and limitation, has in the past not required compensation for laws of general application that take away property rights, such as regulations prohibiting the construction of ovens, chimneys or certain other potentially hazardous structures less than a prescribed distance from the property of another and also limiting use of property due to environmental regulation.⁴³

Mexican rules on compensation for

expropriation even further restrict the property rights of domestic investors. In the 1997 *Inmuebles Pridi* case, the Mexican Supreme Court clarified that inability of the State to pay compensation should not delay expropriation necessary to satisfy urgent social needs.⁴⁴ Along these lines, the Court ruled that although the Mexican government is required to pay compensation within a reasonable period of time, this reasonable period includes what is necessary to establish the appropriate amount of compensation and to acquire the revenues to pay the compensation.⁴⁵ Therefore, the Mexican Government has great power to take property away from domestic investors even when it may not have the ability to compensate those investors presently. For these reasons, Mexican domestic investors are not afforded numerous property rights.

2. NAFTA affords greater protection to foreign investors than is provided to domestic investors under Mexican law

Historically in Mexico and many other Latin American countries, foreign investors have never enjoyed property rights beyond the narrow scope of protection afforded to citizens under domestic law.⁴⁶ This lack of internal property protections created enormous incentive for treaties to provide security for foreign investment in Mexico by overriding domestic rules.⁴⁷ American NAFTA negotiators strived to protect U.S. investors from expropriation by liberalizing the Mexican investment regime and by removing investment disputes from the Mexican judicial process,⁴⁸ which negotiators considered corrupt.⁴⁹ Mexican economic self-interests are rapidly evolving due to increasingly global markets and growing need for foreign investment and therefore it was easier for Mexican negotiators to concede to American terms for NAFTA.⁵⁰ Mexican negotiators found it less detrimental to agree to NAFTA's expropriation and compensation terms than to be excluded from such a big trade covenant with Canada and the United States, two very important commerce partners.⁵¹ Nevertheless, an armed rebellion by the Zapatista National Liberation Army in Mexico demonstrated opposition to NAFTA's foreign investment provisions on the same day that the Agreement entered into force.⁵² Increased domestic opposition may one day possibly constrain Mexico's compliance with NAFTA.⁵³

There is no greater example of the disparity in treatment between NAFTA foreign investors and Mexican domestic investors in Mexico than the *Metalclad* case. The *Metalclad* Tribunal stated that an expropriation includes incidental interference with

The Globe

Published at least four times per year.

Annual subscription rate for ISBA members: \$20.

To subscribe, visit www.isba.org or call (217) 525-1760

Office

Illinois Bar Center
424 S. 2nd Street
Springfield, IL 62701
Phones: (217) 525-1760 OR
800-252-8908

Web site: www.isba.org

Co-Editors

Lewis Matuszewich
2121 N. Fremont, Ste. 400
Chicago, 60614
LFMatuszewich@cs.com
773-279-8787

Violeta I. Balan
1306 W. Pratt Blvd
Chicago, 60626

Managing Editor/Production

Katie Underwood
kunderwood@isba.org

International & Immigration Law Section Council

Mark E. Wojcik, *Chair*
Juliet E. Boyd, *Vice-Chair*
Scott D. Pollock, *Secretary*
Jessica T. DePinto, *Ex-Officio*
Patricia M. Gibson
Shannon M. Jackson
Kevin R. Johnson
Patrick M. Kinnally
Lewis Matuszewich
Mary L. Milano
Pradip K. Sahu
Thomas W. Simon

Mark D. Hassakis, *Board Liaison*
Mary McClain Grant, *Staff Liaison*

Disclaimer: This newsletter is for subscribers' personal use only; redistribution is prohibited. Copyright Illinois State Bar Association. Statements or expressions of opinion appearing herein are those of the authors and not necessarily those of the Association or Editors, and likewise the publication of any advertisement is not to be construed as an endorsement of the product or service offered unless it is specifically stated in the ad that there is such approval or endorsement.

POSTMASTER: Please send address changes to the Illinois State Bar Association, 424 S. 2nd St., Springfield, IL 62701-1779.

the use of property, which deprives the owner, in whole or in significant part, of "the use or reasonably to be expected economic benefit of property even if not necessarily to the obvious benefit of the host State."⁵⁴ This expansive view awards compensation even to an investor who is only partially deprived of his economic use of property.⁵⁵ It is much more expansive than the Mexican definition of expropriation, which only includes "legally taking a thing from its owner, for reasons of public utility."⁵⁶ Mexico's constitution provides that "[p]rivate property shall not be expropriated except for reasons of public use and subject to payment of indemnity."⁵⁷ Environmental preservation such as attempted by the Mexican authority in *Metalclad* qualifies as a legitimate public use that would not require payment of indemnification under Mexican law. If NAFTA did not exist, *Metalclad*, the American investor in Mexico, would have had no legal option for recourse against the Mexican government. Similarly, a dispute currently underway in Punta Banda, Mexico, involves several American investors whose property was taken by the Mexican government.⁵⁸ The Mexican Supreme Court ruled that the American investors are not entitled to compensation for an expropriation because the land originally belonged to an agrarian cooperative and was not acquired legally by the American investors.⁵⁹ However, even though the American investors have no further options under the Mexican legal system,⁶⁰ they now have recourse under NAFTA even though Mexican investors in the same dispute would not have any further recourse. Even counsel for the disputing American investors admits that "[i]f it weren't for NAFTA, this case would be over."⁶¹ This inequity indicates that NAFTA provides much greater protection to foreign investors in Mexico than the Mexican government provides to its own domestic investors.

Watch for the next and last installment of this series, which will explain the consequences of NAFTA's unequal protection of foreign investors over domestic investors and will describe current initiatives to change NAFTA to remedy this inequality.

Rebecca L. Weinberg is a 2004 graduate of University of Florida, College of Law, who also studied at Universidad de Guanajuato in Guanajuato, Mexico. She may be reached at rebecawlaw@yahoo.com.

1. North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States, and the Government of the United States,

Dec. 17, 1992, 32 I.L.M. 289, 605 (entered into force Jan. 1, 1994) [hereinafter NAFTA], Article 1101(1).

2. Stefan Matiation, *Arbitration With Two Twists: Loewen v. United States and Free Trade Commission Intervention in NAFTA Chapter 11 Disputes*, 24 U. Pa. J. Int'l Econ. L. 451, 452 (2003).

3. Jenny Harbine, *NAFTA Chapter 11 Arbitration: Deciding The Price Of Free Trade*, 29 Ecology L.Q. 371, 385 (2002).

4. A. Alvaro, *Why Property Rights Were Excluded from the Canadian Charter of Rights and Freedoms*, 34 CAN. REV. POL. SCI. 309 (1991); Jean MacBain, *The Implication of Entrenching Property Rights in Section 7 of the Charter*, 26 ALTA L. REV. 548 (1988).

5. Ana Tschen, *Chapter 11: The Efforts To Define Expropriation*, 8-WTR Currents: Int'l Trade L.J. 50, 56 (1999); Gregory M. Starnier, *Taking A Constitutional Look: NAFTA Chapter 11 As An Extension Of Member States' Constitutional Protection Of Property*, 33 Law & Pol'y Int'l Bus. 405, 409 (2002); PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 28-11 (Supp. 1999).

6. CONSTITUTION ACT OF 1982, CANADIAN CHARTER OF RIGHTS AND FREEDOMS § 7.

7. *Id.*

8. Starnier, *supra* note 5 at 409.

9. Marisa Yee, *The Future of Environmental Regulation After Article 1110 Of NAFTA: A Look at the Methanex and Metalclad Cases*, 9 Hastings W.-N.W. J. Envtl. L. & Pol'y 85 (2002); Expropriations Act, R.S.O., ch. E26 (1990) (Can.).

10. *Id.*

11. *Id.*

12. James McIlroy, *Private Investment Claims Against State and Provinces-The Impact of Nafta Chapter 11 on Sub-Federal Government Agencies*, 27 Can.-U.S. L.J. 323, 326.

13. *Id.*

14. HOGG, *supra* note 5 at 28-9; Starnier, *supra* note 5 at 409; Alt'y Gen. v. *De Keyser's Royal Hotel*, [1920] A.C. 508, 542 (H.L.).

15. J. Martin Wagner, *International Investment, Expropriation and Environmental Protection*, 29 Golden Gate U. L. Rev. 465, 510 (1999); Michelle Swenarchuk, *Stomping on the Earth: Trade, Trade Law, and Canada's Ecological Footprints*, BUFF. ENVTL. L.J. 197, 208 (1998); *Queen in Right of British Columbia v. Tener* [1985] 17 D.L.R.4th 1, 6.

16. *A&L Investments Ltd. v. Ontario*, [1997] D.L.R.4th 692.

17. *Id.* at 695-6.

18. *Id.* at 700.

19. Starnier, *supra* note 5 at 412; Wagner, *supra* note 15 at 510; Hartel Holdings Co. Ltd. v. Council of the City of Calgary [1984] D.L.R. 321 (Can.).

20. *Id.*

21. *La Ferme Filiber Ltée v. The Queen* [1980] F.C. 128, 128-9.

22. *Id.* at 130.

23. Jenny Harbine, *NAFTA Chapter 11 Arbitration: Deciding The Price Of Free Trade*, 29 Ecology L.Q. 371, 384 (2002).

24. Starnier, *supra* note 5 at 429.

25. Tschen, *supra* note 5 at 56; Starnier,

supra note 5 at 409; HOGG, *supra* note 5 at 28-11.

26. Expropriation Act, *supra* note 9 at Section 4(1).

27. Starnier, *supra* note 5 at 430.

28. Garry Breitkreuz, *News Release: Americans and Mexicans Have More Property Rights in Canada Than Canadians!*, November 6, 1996, <<http://teapot.usask.ca/cdn-firearms/Reform/19961106.txt>>. (last visited April 21, 2004).

29. Starnier, *supra* note 5 at 429; Canada Seeks Tighter NAFTA Rules to Limit Compensation; Trade Pact Curbs Sought on Ability of Companies to Sue Governments, FIN. TIMES, Jan. 22, 1999, at 14.

30. Nihal Sherif, *Canadian Memo Identifies Options for Changing NAFTA Investment Rules*, INSIDE U.S. TRADE, Feb. 12, 1999 at 21; Charles N. Brower & Lee A. Steven, *Developing The International Rule Of Law Under NAFTA Chapter 11*, 2 Chi. J. Int'l L. 193, 198 (2001).

31. Tschen, *supra* note 5 at 50.

32. Starnier, *supra* note 5 at 414.

33. Patrick Del Duca, *The Rule of Law: Mexico's Approach to Expropriation Disputes in the Face of Investment Globalization*, 51 UCLA L. Rev. 35, 50 (2003).

34. Const. of Mexico, Tit. I, Chap. I, art. 27, in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Apr. 1988 & Supp. June 1998).

35. *Id.*

36. "Ley de expropiación," D.O. 25 de noviembre de 1936, art. 1.

37. *Id.*

38. *Id.*

39. JUAN JOSE GONZALEZ MARQUEZ, NUEVO DERECHO AMBIENTAL MEXICANO (INSTRUMENTOS DE POLITICA))) 154 (Universidad Autónoma Metropolitana 1997) (translated); GABINO FRAGA, DERECHO ADMINISTRATIVO 375-76 (Mexico 1984) (translated); Wagner, *supra* note 5 at 514.

40. *Id.*; FRAGA, *supra* note 39 at 375-76; Debra F. Guajardo, *Redefining the Expropriation of a Foreign Direct Investment in Mexico*, 42 S. Tex. L. Rev. 1309, 1321 (2001).

41. *Id.*; Wagner, *supra* note 15 at 516; Starnier, *supra* note 5 at 413.

42. *Id.*; Wagner, *supra* note 15 at 516; Guajardo, *supra* note 40 at 1321.

43. *Id.*; Wagner, *supra* note 15 at 516; GONZALEZ MARQUEZ, *supra* note 39 at 165-66 (citing unanimous decision of Mexican Supreme Court of Justice, Tomo CXL, at 1918. Amparo civil en revisión 943/48. Díaz de Garza Consuelo, 14 Mar. 1952).

44. "Inmuebles Pridi, S.A.," 6 S.J.F. 10 (9a época 1997), Tesis: P. CXIX/97.

45. *Id.*

46. Brower and Steven, *supra* note 30 at 194.

47. Tschen, *supra* note 5 at 53; Evelyn Iritani, *Trade Pacts Accused of Subverting U.S. Policies; Commerce: Critics Say Agreements Such as NAFTA Give Foreign Interests Legal Ammunition to Influence Economy as Well as Safety, Health and Other Issues*, L.A. TIMES, Feb. 28, 1999 at A1.

48. Howard Mann & Konrad von Moltke, *NAFTA's Chapter 11 and the Environment:*

Addressing the Impacts of the Investor-State Process on the Environment 24, 11 (IISD, Working Paper, 1999), <<http://www.iisd.org/pdf/NAFTA.pdf>> (as of April 21, 2004); Daniel M. Price, *An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement*, 27 Int'l Law. 727, 727 (1993); Richard C. Levin & Susan Erickson Marin, *NAFTA Chapter 11: Investment and Investment Disputes*, 2 NAFTA L. & Bus. Rev. Am. 82, 83 (1996); Samrat Ganguly, Note, *The Investor-State Dispute Mechanism (ISDM) and a Sovereign's Power to Protect Public Health*, 38 Colum. J. Transnat'l L. 113, 133, 154 (1999); Charles H. Brower, II, *Investor-State Disputes Under NAFTA: A Tale Of Fear And Equilibrium*, 29 Pepp. L. Rev. 43, 47 (2001).

49. *Id.*; Julie A. Soloway, *Environmental*

Trade Barriers Under NAFTA: The MMT Fuel Additives Controversy, 8 Minn. J. Global Trade 55, 88 (1999); Stephen L. Kass, *Regulatory Takings Reopened: Surprising, Potentially Significant, Context Is NAFTA Chapter 11*, N.Y.L.J., Sept. 11, 2000, § 2, col. 1.

50. Tali Levy, *NAFTA's Provision for Compensation in the Event of Expropriation: A Reassessment of the "Prompt, Adequate and Effective" Standard*, 31 STAN. J. OF INT'L L. 423, 448 (1995).

51. *Id.*

52. David Schneiderman, *Investment Rules and the New Constitutionalism*, 25 LAW & SOC. INQUIRY 757, 766-7 (2000); Starner, *supra* note 2 at 433; Harbine, *supra* note 20 at 386.

53. *Id.*

54. *Metalclad Corp. v. United Mexican States*, 40 I.L.M. 36 (2001) at para. 30, <www.NAFTAclaims.com> (as of April 21, 2004).

55. Yee, *supra* note 9 at 89.

56. GONZALEZ MARQUEZ, *supra* note 39 at 154; GABINO FRAGA, *supra* note 39 at 375-76; Wagner, *supra* note 15 at 514.

57. Mexican Constitution, *supra* note 34.

58. Stephanie B. Gordon, *Application Of NAFTA's Investor-State Provisions: Is There A Remedy For The Punta Banda Eviction Chaos?* 9 Sw. J.L. & Trade Am. 173, 176-8 (2002-2003).

59. *Id.*; Marietta Morris Maxfield, *Why You Need Title Insurance*, Prob. & Prop., May/June 2001, at 8.

60. Bill Blum, *Kicked Out of Paradise*, Cal. Law., Aug. 2001, at 34, 38.

61. *Id.*

Midwest Immigrant & Human Rights Center

Attorneys interested in *pro bono* cases: Following is our current list of cases in urgent need of *pro bono* representation.

Our *pro bono* attorneys tell us that representing asylum seekers is one of the most personally enriching and rewarding experiences of their careers. Your representation could easily make the difference between an asylum seeker finding a safe haven in the U.S. or being deported to the home country, where she or he would face persecution, torture, or even death.

If you are reluctant to volunteer because you don't know anything about immigration law or political asylum, don't worry—we provide training and backup support.

You'll notice that our case list is organized into sections based on what stage of the asylum process the client's case is in. Within each section, the cases are loosely ordered by urgency. Some of our clients need assistance in putting together affirmative applications for political asylum and preparing for their interviews at the Asylum Office. Others already have Master Calendar or Merits Hearing dates set with the Immigration Court. Still others have appeals pending before the Board of Immigration Appeals or the Seventh Circuit Court of Appeals. Children's cases are included in a separate section of our list. Asylum trials usually last half a day, with little or no discovery and minimal pleading or motion practice. Please note that Master Calendar hearings are only preliminary hearings at which a final trial date is set. Master Calendars are similar to arraignment hearings in criminal cases, and require minimal preparation.

For more information about adult cases, please contact **Peter Wilson** at **312.660.1307** or e-mail pwilson@heartlandalliance.org

heartlandalliance.org. For more information about children's cases, please contact **Sharone Levy** at **312.660.1332** or slevy@heartlandalliance.org.

Affirmative Asylum Applications

1. E. is an anthropologist from Colombia. His affirmative asylum application must be filed no later than May 10, 2005. (138859)

E. is an anthropologist from Bogotá who earned his PhD from the Universidad Nacional de Colombia in 2002. Although E. does not consider himself especially politically active, La Nacional carries a reputation for liberalism in the minds of many Colombians. In 2003, E. joined the faculty of another major university in Bogotá, teaching qualitative methods for the social sciences. Although his courses did not deal directly with human rights, E. frequently connected his lectures to the ongoing civil strife in Colombia. In late 2003, E. met the director of Hasta Hoy, a community organization working with street children in impoverished Bogotá neighborhoods. E. and several colleagues began to collaborate with Hasta Hoy, launching a program aimed at helping children displaced by violence deal with trauma. In February, E. received a telephone call threatening him because of his affiliation with La Nacional and Hasta Hoy. Although E. downplayed the importance of the call, he received another threat at home in March. E. left Hasta Hoy and believed he would be safe, but he soon realized he was being followed by two individuals. In April, the pair who had followed him approached him and forced him into their car. They blindfolded him, placed a gun to his head, and performed a mock execution. E. received two more

phone threats to his house in April and May before fleeing to the United States.

Master Calendar Hearings

2. S. is from the Democratic Republic of Congo. His next Master Calendar hearing is September 1, 2004. (138699)

S. is a former medical student and member of the Army of Victory evangelist church. As a member of the Army of Victory Church, S. performed public relations work and was in charge of outreach to the university community. He helped organize a rally in March 2003 sponsored by the Church on the University campus on "divine justice." S. was forced to flee the debate after police forces stormed the building; shortly thereafter, however, he was arrested, held for two nights, beaten and questioned about his involvement in the debate. After his release, S. continued his activities with the church, and helped spread the word about a June rally with a prominent pastor. At the rally, attended by about 1,000 people, S. was publicly thanked for his work in organizing the event and turning out attendees. That same day, police forcibly broke up the rally, forcing S. into hiding. S. learned from his brother that the police had left two summonses for him at his home, looking for him. S. obtained his documents from his brother, fled to Brazzaville, and then to Angola. The Pastor of his Church in Angola helped arrange for him to escape the region and travel to the United States.

3. J. is a young woman from the Democratic Republic of Congo. Her next Master Calendar hearing is September 28, 2004. (138862)

J. and her family are from the Bas-

Congo region of the Democratic Republic of Congo, but lived in the country's capital, Kinshasa. J. attended the University of Kinshasa to study economics, and joined a religious cultural organization called Bundudiacongo. J. was first arrested in early 2000 after protesting the arrest of other Bundudiacongo members. She was held for three days before being released. She returned home and did not formally continue her studies. In 2002, J. attended a Bundudiacongo retreat in the Bas-Congo region. In the middle of the night, soldiers raided the retreat, killing approximately 15 people. J. was arrested and detained for a month. Finally, in early 2003, J. was taken from her home by soldiers in a jeep who drove her to Kibomango, where she was detained for four months before her family was able to bribe a guard to help her escape. J. first fled to the Republic of Congo but encountered difficulty in obtaining refugee status there, and subsequently migrated to the United States.

4. B. is from Cameroon. Her next Master Calendar hearing is September 30, 2004. (138961)

B. comes from Banyu division in the Southwest Province of Cameroon, one of the three Cameroonian provinces where female genital cutting is widely practiced in traditional villages. B. and her two sisters were raised in Limbe, a small city, but would return to their family's village every week. While B. and her sisters all completed secondary school, B. was the only one of the three to enter university. While B. was away at university, both of her sisters underwent the genital cutting ceremony in their village with the acquiescence of their parents, one in 1999 and one in 2001. Both died shortly thereafter. Although B.'s parents subsequently opposed B. undergoing the procedure, B.'s father passed away in 2003. When she returned to the village for his funeral, B. was approached by the village elders and told to appear for the upcoming cutting ceremony. She and her mother immediately arranged for her escape.

5. N. is a Shan activist from Burma. Her next Master Calendar is October 21, 2004. (139055)

N. is an ethnic Shan woman from Burma. Raised in Shan state, N. and her neighbors were compelled to work at a forced labor camp since 1988. After completing high school in 1990, N. decided to leave Burma, and escaped across the Thai border. N. worked on a construction site, but after getting hurt, she moved to Chiang Mai to work as a seamstress, and subsequently to Bangkok to work in a factory. After an arrest for working without documentation, N. decided to go home in

1993, but found conditions had not changed. She returned to Thailand and, working under a false identity, soon got involved in the Shan community in Thailand, first with a local church and then with the Burma Relief Center. In 1999, N. and some colleagues formed the Shan Women Action Network (SWAN) and began a series of activities aimed at empowering Burmese women working in the Thai sex industry. In 2002, N. and her colleagues released a documentary on the crimes of the Thai government against Burmese migrant workers, prompting a visit by a U.S. Congress representative. N. has visited the U.S. several times to participate in conferences, but always under her adopted Thai identity. She finally decided to apply for asylum out of fear that she would be arrested by the Thai government and mistreated or returned to Burma.

6. S. is an Assyrian Christian from Iraq. His next Master Calendar is April 14, 2005. (138960)

S., an Assyrian Christian, comes from Kirkuk, in Northern Iraq near the Turkish border. For 40 years, S. worked for the Iraqi Petrol Company. His first troubles with Saddam Hussein's Baathist regime began in 1988. After refusing to join the Baath party, S. was jailed for three months. During the first Gulf War, S. fled to Turkey and spent seven months there, but was denied refugee status. In 1992, he was arrested on suspicion of having worked with the Kurds. He subsequently moved to Baghdad, but was evicted along with all northerners in 1995. When he attempted to resist, he was jailed for five months. He was arrested in Baghdad again in 1997, and again in 2001, after his son, a soldier in the Iraqi army, deserted after being wrongly accused of killing a Muslim soldier. In 2002, when Saddam sought to draft all young men, S. was arrested again when his son did not appear. He was released in Saddam's 2003 amnesty and fled to Jordan, where his son lived in hiding. He subsequently came to the United States to live with his brother. S., who has no means of support in Iraq, fears his life will be at risk should he be forced to return as the present situation remains dangerous, particularly for Christians or perceived American sympathizers.

Cases with merits hearings dates

7. M. is a human rights activist from Zimbabwe. His Merits Hearing has been scheduled for March 15, 2006. (138114)

M. was born and raised in Harare, Zimbabwe. After his sister was shot and

killed in the late 70s during a period of civil war, he dedicated himself to the promotion of human rights. M. joined the Zimbabwean Human Rights Organization in high school, participating in meetings several times a month and helping organize voters. Later, after enrolling in Harare Polytech, he joined the Harare Polytech Student Representation Council, which lobbied for increased funding for students and organized rallies against the corrupt ZANU-PF party in conjunction with other universities. As a student of land surveying, M. was ideally positioned to criticize ZANU-PF's policies of land-grabbing during public meetings. In 2002, local youth hired by ZANU-PF assaulted M., beating him severely. After witnessing the continued targeting of political dissidents in Zimbabwe, he decided to flee to the United States.

Children's Cases

8. L is from Honduras. He is detained at the International Children's Center. His next Master Calendar is November 26, 2004. (138786)

L is a 17-year-old boy from Honduras. Hurricane Mitch destroyed everything L's family had when he was about 15 years old, causing the family to split up because they had nothing. Since then, L has been living on his own. He moved to a new town and looked for friends. Eventually, his group of friends became bigger, and they started getting tattoos and hurting people. L didn't want any part of this and decided to leave the group. The gang threatened L that they would kill him. L is afraid to return to Honduras and encounter the gang. L needs help completing an asylum application and with representation before the Immigration Court.

9. D is from Guatemala. He is detained at the International Children's Center. His next Master Calendar is November 26, 2004. (138503)

D is a 17-year-old boy from Guatemala. D joined a street gang when he was about 13 years old. As D got older, he became more and more afraid of a rival gang and began seeking ways to escape their notice. D was frightened to leave his gang because the rules dictated that anyone who left would be killed. D fled to the United States to escape this dangerous situation. D needs help completing an asylum application and with representation before the Immigration Court.

10. J is from Honduras. He is

detained at the International Children's Center. His next Master Calendar is November 26, 2004. (138759)

J is a 17-year-old boy from Honduras. J joined a street gang, but did not participate in all of their activities. When he refused to get a tattoo, he was severely beaten. J was also beaten by his mother. J decided to leave the gang life, and fled Honduras approximately three years ago for Guatemala, where he had a difficult life. J is afraid to return to Honduras because he fears he will be targeted by the gang for leaving. J needs help completing an asylum application and with representation before the Immigration Court.

11. D. is from Guatemala. His next Master Calendar is November 26, 2004. (138501)

D is a young indigenous man from Guatemala who fled his country due to harassment and threats at the hands of the "18th Street" Gang. D lived alone and is

very poor and was targeted by the gang. They attacked him on several occasions and expressly threatened his life. D does not want to associate with the gang and does not want to join. He believes they are thugs and is opposed to their tactics. D cannot relocate to any other part of Guatemala and is certain that the gang will come after him if he returns home.

12. C is from Honduras. He is detained at the International Children's Center. His next Master Calendar is May 4, 2005. (138433)

C is a 16-year-old boy from Honduras. C has suffered repeated physical abuse by his father, which his mother has been powerless to stop. C's father also physically assaults C's brothers and his mom. We would like the pro bono attorney to explore whether C might be eligible for special immigrant juvenile (SIJ) status, and follow up with both the Department of Homeland Security and the State's

Attorney's office to start dependency proceedings. C also needs help completing an asylum application and with representation before the Immigration Court.

Thank you,

Mary M. McCarthy, Director
Elissa Steglich, Managing Attorney,
Asylum Project
Sharone Levy, Staff Attorney, Children's Project
Peter Wilson, Asylum Project Coordinator
Midwest Immigrant & Human Rights Center
208 S. LaSalle St., Suite 1818
Chicago, IL 60604
Phone: 312.660.1370
Fax: 312.660.1505
Email: pwilson@heartlandalliance.org,
esteglich@heartlandalliance.org,
slevy@heartlandalliance.org, or mmc-carthy@heartlandalliance.org

Commercial agency and distributorship law in Qatar

By Howard L. Stovall

The Qatari government has issued a number of important commercial laws in recent years, liberalizing local trade rules and better integrating Qatar into the global marketplace. Among the more important recent developments, new Qatari laws have been issued applicable to foreign investment, commercial companies, customs duties, trademark and copyright, labor relations and, the subject of the following summary, commercial agency and distributorship.

1. Applicable Law

The primary Qatari law governing commercial agencies is Law No. 8 of 2002 (the "Commercial Agency Law"). The Commercial Agency Law contains a broad definition of the term "commercial agent":

... anyone who is solely licensed, to the exclusion of others, to distribute goods and products, to display for sale or circulation, or to provide certain services within the scope of agency on behalf of its principal in return for profit or commission ...

This definition appears to encompass both commercial agents and buy-resell distributors. However, the Qatari Court of Appeal has recently decided that the Commercial Agency Law does not apply

to distributors (which the Court described as 'mere' importers or re-sellers). The Court of Appeal viewed the nature of commercial agency as essentially involving the agent's representation of the principal; in contrast, the appellant's distributorship contract stated that the appellant would only act in its own name and account. Although the Qatari legal system does not have a doctrine of binding judicial precedent (and court decisions are not formally published), in practice lower courts generally follow decisions of the Court of Appeal.

In other contexts, the Qatari courts have treated distributors as similar to commercial agents. Moreover, in at least some instances the Ministry of Economy and Commerce (the "Ministry") has registered distributors under the terms of the Commercial Agency Law. In that light, references to "commercial agents" or "commercial agencies" in this summary should be read as possibly also encompassing "distributors" and "distributorships."

2. Qualifications for Commercial Agents

Under the Commercial Agency Law, only Qatari nationals or wholly-Qatar-owned companies may act as commercial agents. (The Qatari Foreign Investment Law, Law No. 13 of 2000, prohibits foreign investment in the field of commercial

agency). In addition, all commercial agencies must be registered in a special Commercial Agency Registry at the Ministry. Every commercial agent must also hold a valid commercial registration, with registered business "purposes" sufficient for the activities being undertaken. Qatari nationals must be at least 21 years old, and not convicted of a crime of honor or trust (unless rehabilitated), in order to act as commercial agents.

3. Direct and Exclusive Relationship

The Commercial Agency Law does not expressly require that the commercial agent have a direct contractual relationship with the foreign manufacturer, or otherwise be authorized directly by the manufacturer to act as a commercial agent in Qatar.

Under the Commercial Agency Law, a foreign company may limit the Qatari commercial agency to specific product lines and/or services; the principal could then appoint a different commercial agent(s) for different products and/or services in Qatar. However, Articles 2 and 3 of the Commercial Agency Law effectively require a Qatari commercial agent's appointment to be exclusive for the specified product lines and/or services and territory—for these purposes, the Qatari market cannot be split geographically.

The Ministry has refused to register a principal's appointment of multiple non-exclusive commercial agents for the same product lines or services.

The Commercial Agency Law allows other Qatari merchants registered as importers to import products already covered by another party's registered commercial agency agreement. In those circumstances, the registered Qatari commercial agent is entitled to commission on such import (up to a maximum 5 percent, as determined by rules in a ministerial decree) — unless the products were imported from the principal, in which case the commercial agent may seek recourse from its principal in accordance with their contract. The commercial agent is neither entitled to any commission on products intended for an importer's personal use, nor to any commission on products imported by others for the purpose of reexport.

The Commercial Agency Law obliges the commercial agent and its principal to provide consumers with spare parts and any maintenance required for the relevant products, at suitable prices.

4. Mandatory Use of Agents

A foreign company does not need a Qatari commercial agent to simply sell its products into the Qatari market. However, Qatari government ministries, departments and public corporations require overseas suppliers to conduct business through a duly registered commercial agent. In accordance with Article 15 of the Commercial Agency Law, the Ministry will issue certificates confirming the registration of commercial agents in the Registry.

5. Restrictions on Use/Payment

Qatari law does not contain any general prohibition on the use of, or payments to, commercial agents. More specifically, Ministry of Defense regulations do not generally prohibit a defense contractor's use of, or payment to, an agent in Qatari military procurement contracts.

However, there may be particular case-by-case restrictions based on Qatari customer requirements and/or local public policy. For example, there is in Qatar some sensitivity to the use of a sales agent or intermediary in contracts of national importance. The Ministry of Defense generally does not like to deal with intermediaries, and has occasionally discouraged a defense contractor from using a particular Qatari agent. The Ministry of Defense's actions in this regard might be based on a prohibition included in a particular tender, or on general principles of Qatari "public policy."

Furthermore, the Qatari Court of

Appeals has previously declared void a commission arrangement between a foreign company and a local intermediary, on the basis that the object of the contract was contrary to Qatari public policy. That case related to a Qatari oil sale, but the Court of Appeals went on to comment (as obiter dicta) that contracts of a sensitive nature should be negotiated directly with the relevant government department without the intervention of a sales agent or intermediary for the foreign supplier. Purchasers in crude oil sales by the Qatari government are required to sign a declaration to the effect that no third party has been involved in the transaction and that no commission has been paid to any third party. At least to date, the Ministry of Defense does not appear to have extended this requirement to suppliers of military equipment.

Qatari law does not contain any general ceiling or restriction on the commission paid to a Qatari commercial agent in connection with sales to private or public sector customers. However, there are selective maximum mark-up restrictions in connection with resale of some products to customers in Qatar.

Qatar has not enacted any general foreign exchange control regulations restricting transfers of funds in or out of Qatar, and Qatari nationals or companies may maintain bank accounts abroad. Qatari nationals and companies wholly-owned by Qatari nationals are not subject to Qatari income tax. Thus, these laws would not prohibit commercial agency commissions from being paid outside Qatar and in any currency.

6. Registration Requirements for Commercial Agents

As mentioned above, Qatari law requires commercial agencies to be registered in a special Commercial Agency Registry at the Ministry. The commercial agent should submit a completed application form to the Ministry, together with a duly legalized copy of the commercial agency agreement. (An Arabic translation may be required, if the agreement is not drafted in Arabic).

The Commercial Agency Law requires inclusion of certain provisions in a commercial agency agreement submitted for registration. Most of these provisions are customary, such as a description of the products covered under the agency, its territory and duration. One statutorily required provision is less customary: a contractual provision expressly obliging the commercial agent to provide spare parts and necessary maintenance for products sold into the market.

The Ministry has the authority to refuse a registration request, presumably if an agreement violates Qatari law or does not contain requisite information. According to Article 16 of the Commercial Agency Law, any commercial agency not registered in the Commercial Agency Registry shall be treated as non-existent, "and any dispute or difference resulting therefrom shall not be heard from whoever had breached the obligation or registration."

7. Termination or Non-renewal

The Commercial Agency Law provides that a fixed term commercial agency expires at the date specified in the commercial agency agreement, unless the parties subsequently agree otherwise. Notwithstanding any provision to the contrary in the commercial agency agreement, a commercial agent is entitled to seek compensation upon the expiration of a fixed term agreement if the commercial agent's activities led to an apparent success in the marketing of the principal's products or increased the number of its customers, and the commercial agent was unable to earn fees to which it was otherwise entitled as a result of the principal's failure to renew the agreement.

The Commercial Agency Law also provides that an indefinite term commercial agency cannot be terminated unilaterally by the principal, but rather by mutual agreement (e.g., a negotiated settlement) or an arbitral/court decision. Notwithstanding any provision to the contrary in the agreement, a commercial agent is entitled to seek compensation upon the principal's termination of an indefinite term agreement if the commercial agent's activities led to an apparent success in the marketing of the principal's products or increased the number of its customers, and the commercial agent was unable to earn fees to which it was otherwise entitled as a result of the principal's failure to continue the agreement.

If the principal terminates (or refuses to renew) the commercial agency agreement without legal reason, Qatari government departments may prohibit the importation into Qatar of the relevant products. In most instances, the Qatari government will allow products to enter the country during arbitration or litigation related to termination or non-renewal of the commercial agency. However, the Qatari government may ban the products from entry if the principal terminated an indefinite term agreement in contravention of the Commercial Agency Law, or if the public interest is served by such an import ban.

There is no standard formula for calculating termination or non-renewal compensation under the Commercial Agency

Law. Compensation will depend on the facts of each case. Compensation can include estimated loss of future income, based on the commercial agent's average yearly profit over a period of years. The commercial agent might also be compensated for unamortized expenses and the like. The Commercial Agency Law also imposes certain obligations on a successor commercial agent, such as a duty to purchase usable inventory from the former commercial agent.

8. Choice of Law and Dispute Resolution

Qatari law states that the contract is the law of the contracting parties. On that basis, the Qatari courts' practice is to uphold a foreign choice of law clause in a commercial agency agreement, at least if there is some connection between the parties or the subject matter and the governing law chosen. However, the Qatari courts would not uphold any provision of the foreign law that is contrary to mandatory provisions of the Commercial Agency Law (such as the termination and compensation provisions) or to Qatari public order/morals.

The Qatari courts have been reluctant to enforce contractual parties' choice of a foreign judicial forum to resolve disputes.

However, the Qatari courts should uphold a provision in a commercial agency agreement to settle disputes by arbitration, including in a foreign situs. Notably, the Commercial Agency Law grants jurisdiction to the Qatari courts "provided there is no agreement otherwise," and also states that "any arbitral award in a dispute arising out of the agency agreement shall be deemed final." Qatar has recently become a party to the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

9. Boycott Matters

Over the years, foreign companies have faced various problems relating to Qatar's participation in the Arab boycott of Israel. However, the difficulties faced when entering into a Qatari commercial agency agreement have varied from time-to-time. Qatar continues to enforce a primary boycott of Israel, e.g., no goods of Israeli manufacture may be imported into such a boycotting country. A few years ago, however, Qatar (together with a number of other Arab Gulf countries) suspended its secondary and tertiary boycott of Israel.

In general, the principal should include a clause in the commercial agency agreement providing that the commer-

cial agent is an independent contractor and does not have authority to act on behalf of the principal in any matter not expressly authorized in the commercial agency agreement. Such a contractual provision will weaken any assertion to the effect that the commercial agent has authority to furnish boycott-related certifications to the local boycott office or otherwise comply with boycott requirements on the principal's behalf.

Mr. Stovall is a Chicago-based attorney, devoting his practice exclusively to Middle Eastern commercial law matters. He is also an adjunct professor at John Marshall Law School, teaching Comparative Commercial Law of the Arab Middle East. In the past he has prepared summaries of commercial agency law for a number of Arab countries, including Bahrain, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Oman, Qatar, Saudi Arabia, Syria, the United Arab Emirates and Yemen. He may be reached at Howard@stovall-law.com.

This summary is based on information currently available in our Chicago law office, including correspondence with legal counsel in Qatar. The purpose of this summary is to highlight selected aspects of Qatari commercial agency law, but it is not intended to provide legal advice on any specific question of local law.



Non-Profit Org.
U.S. POSTAGE
PAID
Springfield, Ill.
Permit No. 820

The Globe
Illinois Bar Center
Springfield, Illinois 62701-1779
September 2004
Vol. 42, No. 2