

# Michigan International Lawyer

INTERNATIONAL LAW SECTION

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## Dear Members and Colleagues:

This edition of the *Michigan International Lawyer* is the first for our new Senior Editor, Melina Lito, and the new Student Editors, Jennifer Gross, Zachee Pouga, and Siola Hashorva. On behalf of the International Law Section, I want to thank Melina, Jennifer, Zachee, and Siola for their dedication and hard work in the publication of this edition and for those that will be published during the coming Bar Year. I would also like to express our appreciation to Professor Julia Qin from WSU Law School, who is the Faculty Editor for the *Michigan International Lawyer*, for her continuing support and guidance for our student editors. Finally, I would like to thank Tricia Roelofs for all her hard work, as well as last year’s Senior Editor Michelle Burns, and Student Editors Stacy Jitianu, Yvonne London, Tim O’Dwyer, and Julianna Rivera.



Richard G. Goetz

Planning is well advanced for the International Law Section’s Annual Meeting and Program on September 23<sup>rd</sup> at 12:30 PM at the Fairlane Club in Dearborn. Please save the date and join your colleagues for a very interesting and topical program discussing *How International Trade Will Help Bring Michigan New Jobs and Business Opportunities*. It is always a great opportunity to network with your peers.

As this is the last opportunity I will have to address you in the MIL as Chairperson, I would like to express my deep appreciation to the Section’s Officers, Council Members and each of you for your support, counsel, patience and good humor during my tenure in the leadership of the Section. It has been a very enjoyable, educational and stimulating experience. For those of you who are well advanced in your careers, but have not actively participated in Section activities, I am proof that it is never too late to begin. For those of you who are just beginning your careers, don’t wait, engage now. It is a terrific opportunity to learn from and share experiences with really interesting people. For everyone in the middle, join your peers in creating a bigger and better International Law Section to support an area of practice that is rapidly growing and evolving and is of critical importance to how we will live in the future.

Kind regards,

*Richard G. Goetz*  
Chairperson

## Michigan International Lawyer Submission Guidelines

The *Michigan International Lawyer*, which is published three times per year by the International Law Section of the State Bar of Michigan, is Michigan's leading international law journal. Our mission is to enhance and contribute to the public's knowledge of world law and trade by publishing articles on contemporary international law topics and issues of general interest.

The *Michigan International Lawyer* invites unsolicited manuscripts in all areas of international interest. An author is encouraged to submit a brief bio and a photograph for publication. An article, including footnotes, should contain between 1000 and 3000 words.

Articles can be submitted for consideration in hard copy or electronic format. Manuscripts and photographs cannot be returned unless accompanied by a \$5 check or money order made payable to Wayne State University Law School for shipping and handling.

The *Michigan International Lawyer* will consider articles by law-school students and may publish student articles as part of a regular column. A student should submit the article either through a law-school faculty member or with a law-school faculty member's recommendation.

Submissions should be forwarded to:  
Professor Qin, Faculty Editor  
Michigan International Lawyer  
Wayne State University Law School  
471 W. Palmer  
Detroit, Michigan 48202  
Telephone: (313) 577-3940  
E-Mail: ya.qin@wayne.edu

## Michigan International Lawyer

### Publication Deadline Dates

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# The U.S. Nuclear Posture Review and International Law

By John Burroughs

"It is in the U.S. interest and that of all other nations that the nearly 65-year record of nuclear non-use be extended forever," declares the U.S. Nuclear Posture Review Report (NPR) released April 6, 2010.<sup>1</sup>

"All States parties commit to pursue policies that are fully compatible with the Treaty and the objective of achieving a world without nuclear weapons."<sup>2</sup> This is a provision of the Action Plan on Nuclear Disarmament included in the Final Document adopted May 28 by the 2010 Nuclear Non-Proliferation Treaty (NPT) Review Conference.<sup>3</sup>

It also is U.S. policy. The United States is a party to the NPT; the Action Plan was adopted by consensus, with the United States playing a leading role in its negotiation; and the commitment reflects President Barack Obama's speech in Prague on April 5, 2009.

Non-use of nuclear weapons and achieving their global elimination are not only U.S. policy objectives; they are also embedded in international law. The question this article addresses is whether the U.S. nuclear posture meets the relevant requirements of international law. Part I examines doctrine on use of nuclear weapons. Part II examines policy on nuclear disarmament, with reference to the outcome of the Review Conference and the concept of good faith.

## Part I—Doctrine on Use of Nuclear Weapons

The NPR signals that it is desirable for the United States to move toward a policy of "detering" only a nuclear attack, though it says nothing about a policy of "no first use" that would rule out preemption.<sup>4</sup> Nevertheless, for now, the longstanding elements of U.S. doctrine remain in place. In brief, in "extreme circumstances" involving the "vital interests of the United States or its allies and partners," the United States may use nuclear weapons, preemptively or responsively, in relation to both nuclear and non-nuclear (conventional, chemical, biological) capabilities and attacks of states possessing nuclear weapons, or states deemed not to be in compliance with the NPT.<sup>5</sup>

With respect to doctrine, the NPR is fundamentally deficient in its treatment of—or rather ignoring of—international law. Despite the fact that the U.S. military accepts and claims to apply International Humanitarian Law (IHL) in its conventional military operations, it is not mentioned in the NPR.

In contrast, the Action Plan on Nuclear Disarmament includes an important innovation in the NPT context. It states that the Review Conference "expresses its deep concern at the catastrophic humanitarian consequences of *any* use of nuclear weapons, and reaffirms the need for all states *at all times* to comply with applicable international law, including international humanitarian law."<sup>6</sup> The provision was adopted as a result of a Swiss initiative, reinforced by an April 20 statement of the International Committee of the Red Cross (ICRC), which says that "the ICRC finds it difficult to envisage how any use of nuclear weapons could be compatible with the rules of international humanitarian law."<sup>7</sup>

The reach of the Action Plan provision on IHL can be illustrated by a comparison with the 1996 International Court of Justice (ICJ) Advisory Opinion on nuclear weapons.<sup>8</sup> The Court explained that the principles of IHL protecting civilians and combatants



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are “fundamental” and “intransgressible,” and that “methods and means of warfare, which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited.”<sup>9</sup> It found that “[i]n view of the unique characteristics of nuclear weapons, . . . the use of such weapons in fact seems scarcely reconcilable with respect for such requirements.”<sup>10</sup> However, given the facts and law available to it, the Court felt that it could go only so far as stating that threat, or use of nuclear weapons, would “generally be contrary” to international law, and could not reach a conclusion, one way or the other, regarding an “extreme circumstance of self-defence, in which the very survival of a State is at stake.”<sup>11</sup>

The Review Conference’s reference to the catastrophic humanitarian consequences of “any” use of nuclear weapons, directly coupled with the call for compliance with law, implies that use of nuclear weapons is unlawful in all circumstances. Since there is no doubt that IHL applies to armed conflict, the insistence on compliance with applicable international law “at all times” weighs against any suggestion that IHL bends or wavers, depending upon the circumstances. That includes the “extreme circumstance” referred to by the ICJ, or second use in “reprisal” purportedly aimed at preventing further attacks. The IHL provision in the Action Plan is consistent with the position of the Lawyers Committee on Nuclear Policy, that the uncontrollable collateral effects of nuclear weapons make it impossible to ensure compliance with the IHL requirements of necessity, proportionality, and discrimination and that their use is therefore unlawful in all circumstances.<sup>12</sup>

Some elements of the NPR, notably the call for maintaining the record of non-use “forever,” reveal an awareness of at least the moral unacceptability of use of nuclear weapons. But the United States must now take the next steps: unflinching application of the law it accepts in the conventional military sphere

to the nuclear sphere, and acknowledgment of the unlawfulness of threat or use of nuclear weapons. One consequence would be the vigorous pursuit of an objective already acknowledged to be a U.S. obligation, the global elimination of nuclear weapons through good-faith negotiations, discussed below.

#### *Non-Use Against Non-Nuclear Weapon NPT Parties*

A positive aspect of the NPR in relation to doctrine concerns a U.S. assurance dating back to 1978 of non-use of nuclear weapons against non-nuclear weapon states parties to the NPT. The NPR prominently features the assurance and retracts a Clinton-administration qualification which reserved the option to respond with nuclear weapons to a non-nuclear weapon state’s chemical or biological weapon attack or capability.<sup>13</sup> Complications are raised, however, by the stipulation that states entitled to the assurance have to be “in compliance with their nuclear non-proliferation obligations.”<sup>14</sup> A U.S. official has said that Iran is not covered by the assurance, at least in part due to its lack of compliance with UN Security Council resolutions.<sup>15</sup> Yet, Iran does not have nuclear weapons, and is not the only state to have violated safeguards reporting rules.

Issues regarding eligibility, and who determines it, would be addressed in negotiations on a treaty to confirm the legally binding nature of the assurances.<sup>16</sup> This is a longstanding demand of non-nuclear weapon states, once again acknowledged in the Action Plan on Nuclear Disarmament.<sup>17</sup> But the NPR does not refer to such a process, or even to seeking a binding Security Council resolution on the subject.

### Part II—Policy on Nuclear Disarmament

#### *The 2010 NPT Review Conference*

The Nuclear Non-Proliferation Trea-

ty entered into force in 1970 and currently has 189 states parties. Three states, all now with nuclear arsenals, never joined the treaty, India, Pakistan, and Israel; a fourth, North Korea, withdrew in 2003 and has a few nuclear weapons. Under Articles II and III, member states that had not conducted a nuclear test prior to 1968 are obligated not to acquire nuclear weapons and to accept monitoring of their civilian nuclear programs through safeguards administered by the International Atomic Energy Agency. Article IV recognizes the right “to develop research, production and use of nuclear energy for peaceful purposes” and provides for “the fullest possible exchange of equipment, materials and scientific and technological information” for peaceful uses. Five states that had carried out nuclear tests prior to 1968 – China, France, Russia, the United Kingdom, and the United States – are acknowledged to have nuclear weapons but are obligated by Article VI to pursue nuclear disarmament.

The 2010 Review Conference addressed all aspects of the treaty.<sup>18</sup> Some of the key takeaways include:

- Regarding non-proliferation, the Final Document encourages states parties to accept enhanced IAEA inspection powers (the “Additional Protocol”) and to consider establishing multilateral mechanisms to assure supply of fuel for nuclear reactors. It does not specifically address issues of non-compliance raised by the Iranian and other nuclear programs, but generally underscores the importance of complying with non-proliferation obligations and addressing all compliance matters by diplomatic means.
- Regarding peaceful uses, the Final Document stresses the need to meet the highest possible standards of nuclear security and safety.
- Regarding the need for “universality,” bringing in states outside the treaty, the Final Document calls for a 2012 conference on the subject of a Middle Eastern zone free of

nuclear weapons and also chemical and biological weapons and the appointment of a facilitator to make it happen.

- Regarding disarmament, the Final Document reaffirms commitments made at the 2000 Review Conference, including the unequivocal undertaking to accomplish the total elimination of nuclear arsenals; bringing into force the Comprehensive Nuclear-Test-Ban Treaty; negotiating a treaty banning the production of fissile materials for weapons; accomplishing verified, irreversible reductions; and reducing the role of nuclear weapons in security policies. It also introduces some new elements, addressed in the next section.

#### *The Nuclear Posture Review and Nuclear Disarmament*

Article VI of the NPT provides that “[e]ach of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a Treaty on general and complete disarmament under strict and effective international control.” The NPR contends that “reducing the role and number of nuclear weapons” will demonstrate compliance with the NPT disarmament obligation.<sup>19</sup>

While welcome, such reductions do not suffice. The International Court of Justice unanimously concluded that Article VI and other international commitments require that states “pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.”<sup>20</sup> An annual U.N. General Assembly resolution welcoming the ICJ’s conclusion calls for negotiations on a convention prohibiting and eliminating nuclear weapons globally as the means of meeting the obligation.<sup>21</sup> Secretary-General Ban Ki-moon is on re-

cord as saying that the model convention developed by the Lawyers Committee on Nuclear Policy and others is a “good starting point” for negotiations.<sup>22</sup>

Moreover, and importantly, for the first time the Action Plan on Nuclear Disarmament affirms “that all states need to make special efforts to establish the necessary framework to achieve and maintain a world without nuclear weapons.”<sup>23</sup> It then notes “the Five-Point Proposal for Nuclear Disarmament of the Secretary-General of the United Nations, which proposes *inter alia* consideration of negotiations on a nuclear weapons convention or agreement on a framework of separate mutually reinforcing instruments, backed by a strong system of verification.”<sup>24</sup> The Review Conference thus acknowledged that elimination of nuclear weapons will require a global institutional and legal system.

The NPR bows in the direction of preparing for such a global system, recording a decision to initiate “a comprehensive national research and development program to support continued progress toward a world free of nuclear weapons, including expanded work on verification technologies.”<sup>25</sup> But it makes no mention of seeking near-term negotiations on a convention or framework for elimination. What the NPR does address is U.S.-Russian negotiations and (much) later “engaging” other states with nuclear arsenals.

On April 8, two days after the NPR was released, Presidents Obama and Medvedev signed the New START treaty in Prague. Under that agreement, the number of deployed strategic warheads permitted to each side would be up to several hundred in excess of 1550 due to a counting rule equating one bomber to one warhead.<sup>26</sup> The NPR states that pursuant to “follow-on analysis,” further negotiations will take place, this time encompassing all U.S. and Russian nuclear weapons, deployed and non-deployed, strategic and non-strategic.<sup>27</sup> However, the NPR does not come to grips with the serious obstacles to this path.

For many in the U.S. nuclear establishment, the New START levels may be as low as they are prepared to support. Those levels still enable the performance of missions historically assigned to U.S. nuclear forces. For truly deep reductions, the missions will have to be redefined, but the NPR does not undertake this task.

Another obstacle is that Russia will be reluctant to pursue reductions while the United States engages in research and development regarding anti-missile systems, holds open the option of deploying space-based strike and interceptor systems, and makes advances in non-nuclear strategic strike systems.<sup>28</sup> As to the latter, the Obama administration has proposed about \$440 million in 2011 spending on “Long Range Strike” and “Prompt Global Strike,”<sup>29</sup> and spending on related work is scattered throughout the budget. The NPR does not broach limitation of any type of non-nuclear system, saying only that the United States will engage in “strategic dialogue” with Russia regarding its concerns.<sup>30</sup>

U.S. unilateral reductions are an alternative path, and are encouraged by NPT commitments. Unfortunately, the NPR ties U.S. reductions, whether by formal agreement or “parallel voluntary measures,” to the need to avoid “large disparities in nuclear capabilities” with Russia, not for any articulated strategic reason, but because they “could raise concerns on both sides and among U.S. allies and partners.”<sup>31</sup> The reality is that the United States could reduce to much lower levels on its own, in the tens or low hundreds of weapons, without putting in question the option of making a nuclear response to a nuclear attack.

Once New START has entered into force, and there have been “substantial” further U.S.-Russian reductions, the NPR envisages that the United States would “engage other states possessing nuclear weapons, over time, in a multilateral effort to limit, reduce, and eventually eliminate all nuclear weapons worldwide.”<sup>32</sup> The problem with this approach is that it delays indefinitely

the involvement of states other than the United States and Russia. The Action Plan on Nuclear Disarmament provides a means for the NPT nuclear weapon states to speed up the schedule. It calls upon them “to promptly engage with a view to . . . rapidly moving toward an overall reduction in the global stockpile of all types of nuclear weapons” and to report on this and other undertakings at the 2014 preparatory meeting for the 2015 NPT review.<sup>33</sup>

A transformational NPR, as some had hoped for in the wake of President Obama’s Prague speech, would have launched an effort to accomplish the near-term global prohibition and elimination of nuclear weapons. Nonetheless, the elements of the NPR identified above, in combination with new NPT commitments, do form a basis for moving ahead constructively, if pursued vigorously. Of greater concern is that the NPR firmly commits to maintenance and modernization of nuclear forces and their technical infrastructure.

#### *Maintenance and Modernization of Nuclear Forces and Infrastructure*

While the NPR proclaims a U.S. commitment to the “long-term goal” of global elimination of nuclear weapons,<sup>34</sup> in many respects it conveys quite the opposite intention, projecting reliance on nuclear forces as central instruments of national security strategy for decades to come. Regarding deployment, no substantial changes are made in the nuclear force structure of heavy bombers, land-based missiles, and ballistic missile submarines, or in their alert states. The nuclear forces the United States would deploy under New START would enable a full-scale, Cold-War style preemptive or responsive attack on Russian nuclear forces, airfields, command and control centers and military-industrial targets.

Regarding modernization, the NPR takes an aggressive approach. It states that the United States plans to develop and deploy new generations of nuclear weapons delivery systems in the next

two decades, including ballistic missile submarines and land-based missiles;<sup>35</sup> is replacing existing nuclear-capable fighter-bombers with the F-35 Joint Strike Fighter;<sup>36</sup> and will study whether and how to replace the current air-launched cruise missiles.<sup>37</sup> A subsequent report to the Senate in connection with New START ratification states that “[o]ver the next decade the United States will invest well over \$100 billion in nuclear delivery systems to sustain existing capabilities and modernize some strategic systems.”<sup>38</sup>

The NPR also says that warhead “life extension” work will proceed for the W76, deployed on submarine-launched ballistic missiles; the B61, deployed on fighter-bombers; and the W78, deployed on land-based missiles.<sup>39</sup> While the NPR claims that the work will not “support new military missions or provide for new military capabilities,”<sup>40</sup> in fact life extension for the W76 is adding to the capability to hit hard targets.<sup>41</sup>

Major investments in new weapons production facilities are approved, supposedly to hedge against “technical or geopolitical surprise” while carrying out reductions in deployed and non-deployed nuclear warheads, now totaling about 5,000, not counting the several thousand awaiting dismantlement.<sup>42</sup> Guarding against unexpected technical problems and military challenges was a central theme of previous reviews.<sup>43</sup> The NPR approves building two new facilities, each costing several billion dollars: the Chemistry and Metallurgy Research Replacement Nuclear Facility at Los Alamos National Laboratory, which would produce plutonium cores for warheads; and the Uranium Processing Facility at Oak Ridge, Tennessee, which would build the warheads’ uranium secondaries. The administration plans to spend \$80 billion in the next decade on the nuclear weapons complex, going from about \$6.5 billion in 2009 to a high point of \$9 billion in 2018.<sup>44</sup>

Building new facilities that among other things provide the capability for

expanding the arsenal is a circumvention of the NPT principle of irreversibility reaffirmed by the Action Plan on Nuclear Disarmament.<sup>45</sup> More generally, the maintenance and modernization of nuclear forces and infrastructure projected by the NPR seem contrary to the commitment made in the Action Plan “to pursue policies that are fully compatible with . . . the objective of achieving a world without nuclear weapons.”<sup>46</sup>

#### *The Imperative of Good Faith*

“Good faith is a fundamental principle of international law, without which all international law would collapse,” declared Judge Mohammed Bedjaoui, former President of the International Court of Justice.<sup>47</sup> One key aspect of the principle is codified in Article 26 of the Vienna Convention on the Law of Treaties, which provides: “*Pacta sunt servanda*: Every treaty in force is binding upon the parties to it and *must be performed by them in good faith*.”<sup>48</sup> Essentially, good faith means abiding by agreements in a manner true to their purposes and working sincerely and cooperatively, by negotiations or other means, to attain agreed objectives.<sup>49</sup>

Acts undermining the achievement of such objectives are incompatible with good faith. In the NPT context, Judge Bedjaoui explained, good faith proscribes “every initiative the effect of which would be to render impossible the conclusion of the contemplated disarmament treaty” eliminating nuclear weapons globally pursuant to Article VI.<sup>50</sup> Especially given the concurrent failure even to attempt multilateral negotiations on disarmament, modernization of nuclear forces and infrastructure by the United States and other states with nuclear arsenals does not show good faith.

Good faith also requires implementing NPT commitments agreed at the 2000 and 2010 Review Conferences – among them bringing the test ban treaty into force, negotiating a treaty banning production of fissile materials for nuclear

weapons, reducing the role of nuclear weapons in security policy, and accomplishing verified, irreversible reductions. The United States has proclaimed its intent to fulfill the commitments, but the test will be whether it acts accordingly and with determination.

Most fundamentally, good faith requires complying with Article VI by commencing negotiations on nuclear disarmament. Attaining the goal of a world free of nuclear weapons set by the NPT will require broadening the scope of participation beyond the United States and Russia and negotiating a convention or framework for global elimination. Once negotiations are commenced, they must be conducted in good faith. That requires making the negotiations meaningful, showing willingness to compromise, avoiding delay, and generally negotiating with a genuine intention to achieve a positive result.<sup>51</sup>

Indeed, the ICJ held that the disarmament obligation encompasses both conduct and result.<sup>52</sup> States must not only negotiate with serious efforts to achieve the elimination of nuclear weapons but must actually achieve that result. With regard to comprehensive negotiations, the United States and other states with nuclear arsenals have yet to even start them. 🌐

### About the Author

**John Burroughs, J.D., Ph.D.,** is Executive Director of the New York-based Lawyers Committee on Nuclear Policy (LCNP), the UN office of the International Association of Lawyers Against Nuclear Arms (IALANA). He represents LCNP/IALANA in Nuclear Non-Proliferation Treaty review proceedings, the United Nations, and other international forums, and prepares briefing papers for consultations with governments organized by the Middle Powers Initiative. He is co-editor of *Nuclear Disorder or Cooperative Security? U.S. Weapons of Terror, the Global Proliferation Crisis, and Paths to Peace (2007)*, and author of *The Legality*

of Threat or Use of Nuclear Weapons: A Guide to the Historic Opinion of the International Court of Justice (1997). His articles and op-eds have appeared in the *Bulletin of the Atomic Scientists*, the *World Policy Journal*, the *Harvard International Review*, *Newsday*, and other publications. Dr. Burroughs is also an adjunct professor of international law at Rutgers Law School, Newark.

### Endnotes

- 1 Department of Defense, *Nuclear Posture Review Report*, April 2010 (“NPR”), p. 16. This article draws on John Burroughs, “The U.S. Nuclear Posture Review: A Study in Contradictions,” *Disarmament Times*, Summer 2010.
- 2 Final Document of the 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons (Final Document), NPT/CONF.2010/50 (Vol. I), p. 19, I(A)(i), available at <http://www.reachingcriticalwill.org/legal/npt/revcon2010/FinalDocument.pdf>.
- 3 The Action Plan on Nuclear Disarmament is set forth at pp. 19-24 of the Final Document. At p. 19, the Final Document states that “the Conference agrees on the following action plan on nuclear disarmament which includes concrete steps for the total elimination of nuclear weapons.” It is included in the second part of the Final Document entitled “Conclusions and recommendations for follow-on actions,” which also addresses non-proliferation, peaceful uses, the Middle East, and the North Korean situation. The second part was adopted by consensus. The first part, entitled “Review of the operation of the Treaty,” includes a footnote saying that it is the “responsibility of the President”; with that understanding, it was also adopted by consensus.
- 4 NPR at p. 16
- 5 *Id.*
- 6 Final Document at p. 19, I(A)(v) (emphasis supplied).

- 7 “Bringing the era of nuclear weapons to an end,” Statement of Jacob Kallenberger, President of the International Committee of the Red Cross, Geneva, April 20, 2010, available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/nuclear-weapons-statement-200410>.
- 8 *Legality of Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 2006, I.C.J. Reports 1996, p. 226 (“Nuclear Weapons Advisory Opinion”).
- 9 *Id.* at ¶¶ 79, 95..
- 10 *Id.* at ¶ 95.
- 11 *Id.* at ¶ 105(2)E. This result was reached by a 7-7 tie, with President Mohammed Bedjaoui’s support considered the “casting vote.” Three of the dissenting judges found threat or use of nuclear weapons to be categorically illegal. Thus ten of the 14 judges found threat or use to be generally or categorically illegal.
- 12 See Lawyers Committee on Nuclear Policy, “Ending U.S. Reliance on Nuclear Weapons and Achieving Their Global Elimination: Wise Policy and Required by Law,” March 2008, available at <http://lcnp.org/disarmament/LCNPstatement2008.pdf>; LCNP Letter re Nuclear Posture Review and the Law, August 10, 2009, available at <http://lcnp.org/pubs/NPRandLawfinal.pdf>.
- 13 NPR at pp. 15-16 (with a caveat regarding biological weapons).
- 14 *Id.* at p.15.
- 15 Gary Samore, “International Perspectives on the Nuclear Posture Review,” Carnegie Endowment for International Peace, April 22, 2010, p. 8, available at [www.carnegieendowment.org/files/0422carnegie-samore.pdf](http://www.carnegieendowment.org/files/0422carnegie-samore.pdf). Samore is White House Coordinator for Arms Control and Weapons of Mass Destruction, Proliferation, and Terrorism.
- 16 The assurances as formally stated in declarations by the United States and other NPT nuclear weapon states appear already to be legally binding. They reflect a basic element of the

- NPT bargain, though not one that was captured in the treaty text: states that have renounced possession of nuclear weapons are entitled to a guarantee that the weapons will not be used against them. The United States first made an assurance in 1978, and restated it in 1995, joined by the other NPT nuclear weapon states (China's is in the form of a general policy of no first use). Non-nuclear weapon states relied upon the assurances that year in supporting a legal decision to extend the NPT indefinitely, and reliance of course is a key factor in determining whether promises are binding.
- 17 Final Document, at p. 22, Action 7.
  - 18 See Beatrice Fihn, "Summary of the 2010 NPT final outcome document," News in Review, June 1, 2010, *available at* <http://www.reachingcriticalwill.org/legal/npt/NIR2010/finaldocsummary.html>
  - 19 NPR at p. 7.
  - 20 Nuclear Weapons Advisory Opinion at ¶ 105(2)E.
  - 21 Follow-up to the advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*, G.A. Res. GAOR 64/55, UN Doc. A/RES/64/55 (December 2, 2009).
  - 22 UN Secretary-General address, "The United Nations and Security in a Nuclear-Weapon-Free World," October 24, 2008, East-West Institute conference, "Seizing the Moment," United Nations, New York, *available at* <http://www.un.org/News/Press/docs/2008/sgsm11881.doc.htm>. For the model Nuclear Weapons Convention and a book explaining it, *Securing Our Survival*, see <http://lcnp.org/mnwc/index.htm>. In 2008, the Secretary-General circulated the model convention to UN member states at the request of Costa Rica and Malaysia.
  - 23 Final Document at p. 20, I(B)(iii).
  - 24 *Id.*
  - 25 NPR at p. 47.
  - 26 See Pavel Podvig, "New START treaty in numbers," Russian strategic nuclear forces blog, March 27, 2010, at [http://russianforces.org/blog/2010/03/new\\_start\\_treaty\\_in\\_numbers.shtml](http://russianforces.org/blog/2010/03/new_start_treaty_in_numbers.shtml); Hans Kristensen, "New START Treaty Has New Counting," FAS Strategic Security Blog, March 29, 2010, at <http://www.fas.org/blog/ssp/2010/03/newstart.php>; Jeffrey Lewis, "Prague Treaty Cuts Are Modest, Real," ARMSCONTROLWONK.COM, April 5, 2010, at <http://www.armscontrolwonk.com/2682/prague-treaty-cuts-are-modest-real>.
  - 27 NPR at pp. 30, 47.
  - 28 See Viktor L. Vasiliev, Statement to the UNGA First Committee, New York, 15 October 2009, at [http://www.reachingcriticalwill.org/political/1com/1com09/statements/15Oct\\_Russia.pdf](http://www.reachingcriticalwill.org/political/1com/1com09/statements/15Oct_Russia.pdf).
  - 29 Exhibit R-2A, RDT&E Project Justification, PB 2011 Air Force, Long Range Strike, Vol. 2, p. 274, February 2010: estimated spending of \$198,957,000 in FY2011 to support the industrial base for a future long range strike program; Exhibit R-2A, RDT&E Project Justification, PB 2011 Office of Secretary of Defense, Prompt Global Strike, Vol. 3, p. 847, February 2010: estimated spending of \$239,861,000 in FY 2011 on research, development, test & evaluation.
  - 30 NPR at p. 28. It is estimated that the Cold War average for such spending was on the order of \$5 billion in inflation-adjusted dollars. See Nuclear Watch New Mexico, "Follow the Money: A Nuclear Weapons-Free World? Energy Dept. Budgets 1989 – 2018," June 7, 2010, *available at* <http://nukewatch.org/facts/nwd/FollowTheWeaponsMoneyChart.pdf>.
  - 31 NPR at p. xi.
  - 32 *Id.* at p. 47.
  - 33 Final Document at p. 21 Action 5.
  - 34 NPR at p. 48.
  - 35 *Id.* at p. 23.
  - 36 *Id.* at p. 27.
  - 37 *Id.* at p. 24.
  - 38 Office of the Press Secretary, The White House, "Fact Sheet on the '1251 Report': The New START Treaty – Maintaining a Strong Nuclear Deterrent," May 13, 2010 ("Fact Sheet on the '1251 Report'").
  - 39 NPR at p. 39.
  - 40 *Id.*
  - 41 See Greg Mello, "That Old Designing Fever," The Bulletin of the Atomic Scientists, January/February 2000, Vol. 56, No. 1, pp. 51-57. Also, military capability does not depend on the warhead alone, and there are ongoing improvements in delivery systems, for example the F-35, targeting, and command and control.
  - 42 NPR at pp. vi, 41-42. Regarding the size of the U.S. arsenal, see Department of Defense, "Fact Sheet: Increasing Transparency in the U.S. Nuclear Weapons Stockpile," May 3, 2010, and Hans Kristensen, FAS Strategic Security Blog, "United States Discloses Size of Nuclear Weapons Stockpile," May 3, 2010.
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## Disclosure of Climate Change Risk under Financial Regulatory Schemes

By Eric M. Jamison and Brea Engel

Though the debate continues over the climate, many nations and regulatory bodies have enacted policies to address climate change. Such action has not been limited to environmental regulatory agencies, but has also included financial regulators. This article will briefly examine the regulatory activity of the international community, policy initiatives of select nations, and the implications for companies operating under the diverse, and sometimes competing, regulatory infrastructures.

### Regulatory Action in Relation to the Climate

The Kyoto Protocol was adopted in 1997 by 182 nations to minimize the adverse effects of climate change by setting binding emissions targets for greenhouse gases (“GHG’s”).<sup>1</sup> The Protocol reduction targets took effect in 2005.<sup>2</sup> The Protocol included, among other compliance mechanisms, an emission trading scheme (“ETS”), or in other words, a cap-and-trade system.<sup>3</sup> The ETS allows effected countries to trade on a carbon market to comply with emissions targets.<sup>4</sup> The United States signed the Protocol in

1998, but was not bound by it because it was not ratified by the Senate.<sup>5</sup>

The international community tried to reach a legally binding treaty to replace the soon expiring Kyoto Protocol in December of 2009 in Copenhagen, Denmark.<sup>6</sup> The result of the meetings was the Copenhagen Accord, a politically, not legally, binding agreement to take specific actions toward reducing emissions and mitigating climate change.<sup>7</sup> Although the agreement is only politically binding, nations have begun to enact policies to comply with the commitments made under the Accord.<sup>8</sup> The prospects of an internationally binding treaty to replace the Kyoto Protocol are uncertain.

Australia has implemented a mandatory reporting system for GHG emissions called the National Greenhouse and Energy Reporting System (“NGER”).<sup>9</sup> According to the Australian government’s Department of Climate Change and Energy Efficiency, the purpose of the NGER is to “ensure Australia’s action to reduce carbon pollution is effective” through measuring and monitoring of “corporate greenhouse gas emissions, energy production and energy consumption.”<sup>10</sup>

New Zealand has developed a cap-

and-trade emissions system called New Zealand Emissions Trading Scheme (“NZ ETS”), which will comprise all GHG’s covered in the Kyoto Protocol.<sup>11</sup> According to New Zealand’s Ministry for the Environment, the NZ ETS was implemented in the forestry sector in January of 2008 and will be implemented in “July of 2010 for the transport (liquid fossil fuels), stationary energy and industrial processes sectors; 1 January 2013 for the waste and synthetic gas sectors; and 1 January 2015 for the agriculture sector.”<sup>12</sup>

The U.S. House of Representatives passed climate legislation in the summer of 2009, and the U.S. Senate released its version of the climate bill in mid-May 2010.<sup>13</sup> In light of the polarizing healthcare legislation and the pending mid-term election season, the prospects of Congressional action on a climate bill are weakening.

While waiting for the U.S. Congress to act, federal agencies have been active in climate regulation. In September of



Eric M. Jamison



2009 the U.S. Environmental Protection Agency (“EPA”) issued its mandatory greenhouse gas reporting rule, which requires entities emitting over certain thresholds to measure and report their emissions to the EPA.<sup>14</sup> The Agency issued its Endangerment Finding in December of 2009 which allows it to regulate greenhouse gases under the Clean Air Act.<sup>15</sup> In May 2010, the EPA released the tailoring rule that outlines when permits are required under the Clean Air Act for new and existing industrial facilities emitting greenhouse gases.<sup>16</sup> Regulation of greenhouse gas emissions are an expected and usual source of climate regulatory activity.

## Financial Regulation of the Climate

### *SEC Activity for U.S. corporations*

Federal agencies that do not have a direct connection with the environment are also taking action on climate change. The U.S. Securities and Exchange Commission (“SEC”) has recently issued two guidance letters related to the climate.

On October 27, 2009 the SEC issued Staff Legal Bulletin No. 14E, broadening the scope of what is an appropriate topic for shareholder proposals under SEC Rule 14a-8 of the Securities and Exchange Act of 1934.<sup>17</sup> The 2009 proxy season saw a record number of climate focused shareholder resolutions, seeking information regarding the corporation’s impact on the environment and going as far as requesting corporate action to mitigate climate change.<sup>18</sup> Under Rule 14a-8 shareholders are allowed to have their proposals included with corporate proxy materials for consideration by the shareholders at the annual shareholder meeting.<sup>19</sup> However, a company may exclude shareholder proposals from its proxy statement if the proposal falls under one of the 13 exceptions.<sup>20</sup> Historically, corporations have been able to exclude shareholder proposals that involved assessments of risk or interfered with ordinary management functions.<sup>21</sup>

Thus, under the traditional framework, corporations would be able to exclude shareholder proposals seeking an evaluation of climate risk or taking action to reduce the corporations’ impact on the environment.

The guidance introduced a new analytical framework that the SEC will utilize in evaluating whether corporations can exclude shareholder proposals from their proxy materials.<sup>22</sup> It potentially allows climate related shareholder proposals to be included with a corporation’s proxy materials if it (1) raises significant policy issues that (2) transcend the day-to-day business matters of the company.<sup>23</sup> Many will argue that climate change is a significant policy issue that transcends the day-to-day business matters of the company, and thus is an appropriate topic for shareholder proposals under the new analytical framework.<sup>24</sup>

On February 8, 2010 the SEC published interpretative guidance in the Federal Register regarding the disclosure of corporate climate change risk.<sup>25</sup> As interpretative guidance on existing disclosure rules, the guidance becomes immediately effective upon publication in the Federal Register, which may have imposed disclosure obligations for companies filing their 10-K forms for the year ending 2009.<sup>26</sup> Form 10-K is an annual report filed by publicly held companies with the SEC that summarizes the corporation’s annual performance. The guidance is not intended to create new legal requirements, but to clarify the disclosure requirements under the existing reporting infrastructure.<sup>27</sup>

The interpretative guidance identified some areas that may trigger disclosure obligations:<sup>28</sup>

- **The impact of legislation and regulation** - When assessing potential disclosure obligations, a company should consider whether the impact of certain existing laws and regulations regarding climate change is material. In certain circumstances, a company should also evaluate the potential impact of pending legisla-

tion and regulation related to this topic.

- **Impact of international accords** - A company should consider, and disclose when material, the risks or effects on its business of international accords and treaties relating to climate change.
- **Indirect consequences of regulation or business trends** - Legal, technological, political and scientific developments regarding climate change may create new opportunities or risks for companies. For instance, a company may face decreased demand for goods that produce significant greenhouse gas emissions or increased demand for goods that result in lower emissions than competing products. As such, a company should consider, for disclosure purposes, the actual or potential indirect consequences it may face due to climate change related regulatory or business trends.
- **Physical impacts of climate change** - Companies should also evaluate for disclosure purposes the actual and potential material impacts of environmental matters on their business.

The potential disclosure triggers outlined by the SEC include very broad and ambiguous requirements. Two potential triggers may present the biggest challenges to corporations as they evaluate the new guidance.

First, the amount of pending federal, regional, state and international regulatory and legislative action is enormous.<sup>29</sup> Adding to the complexity of the problem is the lack of clear federal and international action. Many regional, state and even local programs have emerged to address emissions regulation, green building codes and disclosure of energy use in real estate transactional matters.<sup>30</sup> The impact of legislation on business is a complex issue encompassing many layers of analysis of operations under different regulatory schemes, the reach of the supply chain and a myriad of pending

regulation from a number of sources.

Second, the physical effects of climate change present special challenges to businesses. The best scientists in the world have struggled with forecasting the effects of climate change and establishing the connection between the climate and GHG emissions. It leaves corporations in the precarious position of trying to evaluate and disclose the potential physical impacts of climate change on their business.

Despite the challenges posed by the new guidance, disclosure of climate risk moves the market towards transparency. One of the purposes of the SEC disclosure rules is to facilitate investor understanding of the risks faced by corporations. Securities regulations require the disclosure of material information, or information that a reasonable investor would find important.<sup>31</sup> A reasonable investor may find information regarding a corporation's impact on the environment and risk from the climate to be material as they consider their investment strategy.

#### *SEC Regulation of Foreign Private Issuers*

The interpretive guidance also discusses the disclosure obligations of foreign private issuers under the current regulations.<sup>32</sup> A foreign private issuer is a company listed on the U.S. exchange that is incorporated outside the U.S. and that satisfies two conditions: 1) U.S. residents do not hold a majority of the company's shares, and 2) any of the following: a majority of directors and officers are not US citizens or residents; its business is administered outside the U.S.; or a majority of its assets are located outside the U.S.<sup>33</sup> While foreign private issuers are not subject to Regulation S-K, they are subject to Form 20-F's which may require the disclosure of climate related information.<sup>34</sup> The SEC guidance states: "the following provisions of Form 20-F may require a foreign private issuer to provide disclosure concerning climate change matters that are material to its business:

- Item 3.D, which requires a foreign private issuer to disclose its material risks;
- Item 4.B.8, which requires a foreign private issuer to describe the material effects of government regulation on its business and to identify the particular regulatory body;
- Item 4.D, which requires a foreign private issuer to describe any environmental issues that may affect the company's utilization of its assets;
- Item 5, which requires management's explanation of factors that have affected the company's financial condition and results of operations for the historical periods covered by the financial statements, and management's assessment of factors and trends that are anticipated to have a material effect on the company's financial condition and results of operations in future periods; and
- Item 8.A.7, which requires a foreign private issuer to provide information on any legal or arbitration proceedings, including governmental proceedings, which may have, or have had in the recent past, significant effects on the company's financial position or profitability."<sup>35</sup>

Thus, even foreign companies that are on the US exchange may be required to disclose corporate climate liabilities in their annual filings with the SEC. The items referenced that may trigger disclosure obligations present the same challenges faced by corporations subject to disclosure in their 10-K filings. Specifically, the challenge of trying to forecast the impact of the climate on their business, or try to determine at what point the climate will become a material issue to reasonable investors. These disclosures may be in addition to the disclosures required under other financial regulatory schemes, discussed *infra*, or voluntary disclosure initiatives such as the Carbon Disclosure Project.<sup>36</sup>

#### *Canadian Financial Regulatory Action*

In Canada financial regulatory oversight is provided by provincial securities commissions, not a national regulatory agency like the SEC. Like the SEC, the Ontario Securities Commission ("OSC") also appears to be moving to require businesses to disclose corporate environmental impacts to mitigate climate change.<sup>37</sup> In December 2009, the OSC issued Staff Notice 51-717, giving notice that they plan to enact a clarifying rule regarding environmental disclosure rules under the existing Continuous Disclosure Obligations by December 2010.<sup>38</sup> During 2010, the Commission will undertake a review of the current "disclosure in information circulars filed by issuers in spring 2010" for adequacy of the disclosures.<sup>39</sup> As part of its review the OSC agreed to:

- "review existing disclosure requirements under Ontario securities legislation for reporting issuers (other than investment funds) regarding corporate governance and environmental matters
- consult with investors, issuers, advisors and other stakeholders on these matters, and
- make recommendations to the Minister of Finance by January 1, 2010 regarding 'next steps' to enhance disclosure of these matters, if determined necessary and appropriate"<sup>40</sup>

Due to the OSC's rapid move toward corporate disclosure of environmental impacts on climate change, corporations subject to Continuous Disclosure Obligations must stay abreast of emerging disclosure obligations.

#### **Impacts on Publicly Held Corporations**

Corporations must be cognizant of the myriad of regulatory obligations that are emerging from several sources. This regulatory activity begs the question: how can corporations that are subject to such obligations compete in a global econo-

my? Companies that are not subject to such regulation are absolved of the due diligence required to investigate, measure and disclose impacts on the climate. Will such policies drive business abroad to trade on exchanges that have a more attractive regulatory setting? Or will businesses that are required to disclose the risks, adjust their business practices to mitigate the risk and become more competitive in the process?

However, the disclosure of climate risk moves the market towards transparency. Securities regulations require the disclosure of material information or information that a reasonable investor would find important.<sup>41</sup> A reasonable investor may find information regarding a corporation's impact in the environment and climate change risk to be material as they consider their investment strategy.

As discussed *supra*, the SEC guidance involves very broad and ambiguous language regarding corporate disclosure obligations. Companies must be cautious in their disclosures to ensure that they are not disclosing too much information. Indeed the SEC warned that "the effectiveness of Management Discussion & Analysis decreases with the accumulation of unnecessary detail or duplicative or uninformative disclosures that obscures material information. Registrants ... should focus on material information and eliminate immaterial information that does not promote understanding of registrant's financial condition, liquidity and capital resources, changes in financial condition and results of operations"<sup>42</sup> Companies are directed to disclose risks that are difficult to quantify and predict, yet are cautioned to not disclose too much information.

In addition, if companies disclose the information, they must be cautious to ensure consistent disclosures. Publicly traded corporations may disclose information in their 10-K filings to the SEC, they may disclose information to voluntary initiatives such as the Carbon Disclosure Project and they may tout their environmental accomplishments

on their webpage. If the information is inconsistent, corporations may be opening themselves up to legal risks. The judiciary continues to struggle with the first wave of climate change law suits after the landmark *Massachusetts v. EPA* case.<sup>43</sup> Public disclosures may be one source of information for litigants seeking to bring legal action against companies with an impact on the environment.

Furthermore, if corporations disclose potential impacts of the climate on their business and the corporation fails to act to mitigate such risks, are they in breach of a fiduciary duty?

The regulatory landscape of securities disclosure is evolving and will continue to change in the foreseeable future. Regulatory agencies will continue to grapple with balancing what is an adequate amount of information to protect investors and what level of disclosure is too onerous on corporations faced with fierce competition in the global marketplace. 🌐

### About the Authors

**Eric M. Jamison** is a third year law student at Wayne State University and is focusing his studies on corporate environmental law. He is a nationally published author on the topic of SEC disclosure obligations of climate change risk.

**Brea Engel** is a third year law student at Wayne State University.

### Endnotes

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# The “Foreign Cubed” Case: The Supreme Court’s Problematic Clarification of the Territorial Application of the U.S. Securities Laws

By Zachee Pouga Tinhaga

On the 24<sup>th</sup> day of June 2010, the United States Supreme Court, after granting Certiorari in 2009 and hearing the case in March 2010, affirmed dismissal of an alleged securities fraud action brought by foreign investors.<sup>1</sup>

In 1998, National Australia Bank Ltd (NAB)<sup>2</sup> incorporated in Australia, purchased HomeSide Lending Inc, a Florida based Corporation (HomeSide).<sup>3</sup> After about two years of ownership, the Australian corporation announced that the value of HomeSide was overstated, causing the corporation’s stock to plunge on public exchanges.<sup>4</sup>

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The Court thus took the position that the United States securities laws are not meant to apply out of the United States territory.

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A group of NAB shareholders filed a lawsuit in the United States District Court for the Eastern District of New York for alleged violation of the security laws under the 1934 Act,<sup>5</sup> and specifically for violating Rule 10b-5(b). Petitioners alleged that HomeSide made untrue and misleading statements, and produced untrue information about its value at the time of its purchase by NAB. Further, petitioners argued that NAB’s managers knowingly admitted this untrue information, and overstated the contribution of HomeSide to NAB worthiness.

The District Court, later affirmed by the Second Circuit Court, dismissed the case on the grounds that the link between the wrongdoing and its connection with U.S. investors was not strong enough to grant jurisdiction to U.S. Courts.<sup>6</sup>

After a troubling silence of Congress on the issue of extraterritoriality of U.S.

securities laws since the enactment of the Acts in the thirties,<sup>7</sup> and after various uncoordinated positions from different courts of appeals on the issue,<sup>8</sup> the Supreme Court of the United States finally broke its silence by issuing this clear cut opinion whose extreme clarity could be part of its weakness.

The Court rightfully reached the same conclusion as the lower courts, and dismissed the case.<sup>9</sup> However, the Court based its dismissal on totally different grounds than the lower courts. This article discusses the strict approach adopted by the Court on the issue of extraterritoriality of the security laws, and then it expresses potential dangers that could generate an extreme obedience to words used in the twentieth century to solve issues of the twenty first century.

In the now known as the “Foreign-Cubed” case,<sup>10</sup> the Court held that the U.S. Securities Laws only apply to: “purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States.”<sup>11</sup> Justice Scalia in writing the opinion of the Court, indicated that “In short, there is no affirmative indication in the Exchange Act that § 10(b) applies extraterritorially, and we therefore conclude that it does not.”<sup>12</sup>

This language stated the very strict interpretation of the U.S. securities laws. The Court thus took the position that the United States securities laws are not meant to apply out of the United States territory.

This position of the court can find legitimate roots under the bold text of the thirties Acts,<sup>13</sup> and can be supported with at least three main justifications. First, the United States Congress is the legislator for the United States territory.

Congress enacts laws to apply primordially in the U.S.<sup>14</sup> When the Securities regulations were adopted in early thirties, an immediate problem of territorial application arose. The main

question then was what companies were subject to registration, and reporting requirements under these Acts.<sup>15</sup> Congress later resolved that issue by enacting Regulation S.<sup>16</sup> Security laws are applicable in the United States as a general preemption, and this is true of the 10b-5 Disclosure Rule which stems from Rule 10b enacted by Congress in its primary duty and power to regulate for the United States’ territory.<sup>17</sup> Second, this decision clarifies the territorial application of the antifraud provisions. The Court stated a clear rule of application of the United States securities laws; the focus of Rule 10(b) and thus Rule 10(b)-5 is not merely about deceptive conducts, but most importantly, it is about deceptive conduct in the United States. The Court stated that “Section 10(b) does not punish deceptive conduct, but only deceptive conduct ‘in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered’.”<sup>18</sup> In that respect, Jordan Eth, the co-chair of securities litigation at Morrison & Foerster LLP, called the court’s decision: “a victory for predictability”.<sup>19</sup> Investors have a clear rule now, they know in advance of their investment which jurisdiction would be qualified if needed.

Finally, there can be an argument made that this opinion will allow foreign disputes to be solved in foreign countries



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where they arguably can be better understood. Supporting this view, Painter,<sup>20</sup> University of Minnesota law professor who co signed the Amicus urging the court to adopt a bright line view on this issue stated: “This ruling will provide predictability for transacting parties in the global securities market and avoid burdening U.S. courts with foreign disputes that are better resolved by the courts of countries involved.”<sup>21</sup> Further, this decision may avoid the risk of transforming U.S. courts into a worldwide litigation destination. By allowing foreigners to sue in the U.S. for foreign matters, there is a risk of getting U.S. courts extremely encumbered.

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. . . this opinion could transform the U.S. into a manufacturer of fraud for export.

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Despite its merits, this opinion presents clear dangers as to its pragmatism with the modern business world. Nowadays, only countries have borders: businesses, and better yet the economy, have no borders. The world is so economically connected that fraud anywhere is a threat to investors’ protection everywhere. As a consequence, the extreme obedience, and strict interpretation of the words of the securities Acts in this opinion present at least three legitimate concerns.

First, in today’s global economy, watching out for only what is going on within the U.S. does not guarantee protection of the U.S. economy. The recent financial crisis is a great proof that what may happen in the London Stock exchange for example, is able to totally destroy investors in the U.S.. Furthermore, the situation of Greece, just recently, impacted U.S. investors. These facts may not justify the transformation of the U.S. Congress into a worldwide business legislator. But the attitude of the Court should be to sanction as much fraud as it can around the world as long as it impacts or somehow includes the

U.S., thus applying the “conduct and effect”<sup>22</sup> test it just rejected.

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**By allowing foreigners to sue in the U.S. for foreign matters, there is a risk of getting U.S. courts extremely encumbered.**

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Second, this opinion puts investors in a vulnerable position because it leaves them with no choice but to rely on foreign judicial systems that might not be as favorable to them as the U.S. legal system. Investors will be subject to judicial systems in some countries whose protection is not strong enough to fight fraud, sometime prepared in the U.S.. As Professor Eth acknowledged, this decision means fewer remedies for investors, reduced ability to hold the management accountable.<sup>23</sup> To support this view, Daniel Sommers a Washington lawyer, called this decision: “A bad news for investors.” Mr. Sommers stated that such decision will be an encouragement to mislead investors of foreign companies.<sup>24</sup>

Finally, this opinion will limit the ability of the Securities Act to catch fraud prepared in the U.S.. The opinion may avoid transformation of the U.S. into a worldwide litigation destination; however, this opinion could transform the U.S. into a manufacturer of fraud for export. Fraud could be engineered in the U.S. and remain unsanctioned as long as it is utilized for foreign companies with no strong ties in the U.S..

In conclusion, it was time for the United States Supreme Court to decide on the so called “foreign cubed” cases. Unfortunately, the Court seems to have taken a dangerous approach to solve the issue of extraterritoriality of the U.S. securities laws. As Justice Stevens stated in his concurrent opinion, “If one confines one’s gaze to the statutory text, the Court’s conclusion is a plausible one. But the federal courts have been construing § 10(b) (... ) and the Court’s textual analysis is not nearly so compelling.”<sup>25</sup> The approach adopted for decades by the

Second Circuit followed by several of its sisters bore some uncertainties, and was not perfect. The Supreme Court had a chance to make this approach more objective. The Court had the opportunity to standardize the “conduct and effect” test. A wiser move of the Court would have been to make the Second Circuit’s “conduct/effects” test more predictable by setting out clear criteria for its application. Rather, the Court rejected it and provided a “transactional test” which seems totally detached from today’s business world. Therefore, the opinion of the Supreme Court did not solve the issue. The issue in these cases is and should be, as Justice Stevens indicated in his concurrent opinion, “how much, and what kinds of *domestic* contacts are sufficient to trigger application of § 10(b).”<sup>26</sup> For, this framing respects the text of the Thirty Acts, and takes into account the evolution and real concerns of the business world today.

Assuming silence of the Congress meant approval of the handling of these “foreign cubed” cases under the Second Circuit approach, eyes will be turned over to Congress now, in order to take action and enact a clear solution to extraterritorial application of the U.S. securities laws because this seems urgent to avoid disastrous effect that may produce the present opinion of the supreme court. 🌐

### About the Author

Zachee Pouga is completing his LLM in Corporate and Finance Law at Wayne State University School of Law. He holds a LLB (second of his class), and a Masters Degree in Business Law (with a focus on African Harmonized Business Law) from the University of Douala-Cameroon. Zachee worked at Wayne Law as Research Assistant on the “Right to Credit” project.

### Endnotes

- 1 Morrison v. Nat’l Australia Bank, Ltd., 2010 WL 2518523, (U.S. June 24, 2010.)

- 2 National Australia Bank is the largest Bank in Australia, and said to be the 17<sup>th</sup> largest bank in the World. Its ancestor, National Bank of Australasia, was first established in 1858. This institution did not become National Australia Bank until 1981.
- 3 HomeSide Lending Inc. was a leading US mortgage originator and servicer based in Florida.
- 4 See *Morrison v Nat'l Australia Bank, Ltd.*, WL 3844465 (S.D.N.Y Oct. 25, 2006) (opinion of the case revealing the fact that the value of HomeSide was overstated, and this situation caused the value of NAB stock to plunge for about 15%).
- 5 15 U.S.C.A. § 78 a
- 6 *Morrison v Nat'l Australia Bank, Ltd.*, 547 F.3d 167 (C.A.2, 2008)
- 7 See *Itoba Ltd. v. Lep Group PLC*, 54 F.3d 118, 121 (2d Cir.1995).
- 8 See *Bersch*, 519 F.2d 974 (2d Cir.1975); but See *S.E.C. v. Berger* 322 F.3d 187 C.A.2 (N.Y. 2003).
- 9 *Morrison v. Nat'l Australia Bank, Ltd.*, 2010 WL 2518523, (U.S. June 24, 2010).
- 10 *Id.* at 12
- 11 *Id.* at 11
- 12 *Id.* at 11
- 13 15 U.S.C.A. § 78 a
- 14 1 U.S.C.A. Const. Art. I § 8 (Talking about Powers of the US Congress).
- 15 *Id.*
- 16 Reg S clarified the scope of the registration and reporting requirements on businesses.
- 17 See *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991) (*Aramco*)
- 18 *Morrison*, 2010 WL 2518523. At 14
- 19 BNA's securities regulation & law report staff, U.S. Supreme Court Affirms Dismissal Of 'Foreign-Cubed' Case, Limiting Reach Of U.S. Securities Laws,(U.S. July 2010).
- 20 Pr. Richard Painter is a Law professor at the University of Minnesota. He is one of the author and co-signer of the Amicus Curiae sent to the Supreme Court in this case by a group of law professor and practitioners, and urging the court to adopt a bright line rule prohibiting application of US securities laws in foreign affairs.
- 21 2010 WL 740747 (the amicus curiae of Law professors in support to respondent in this case)
- 22 Conduct and effect test was established by the second Circuit Court thanks to the hard work of Judge Friendly. Under this test, US courts have jurisdiction if the alleged improper conduct which involves foreign entities has an "impact" on US investors, or the improper act was "performed" in the US.
- 23 Prof Eth contributing through a phone conversation with the BNA's securities regulation & law report staff, U.S. Supreme Court Affirms Dismissal Of 'Foreign-Cubed' Case, Limiting Reach Of U.S. Securities Laws,(U.S. July 2010)
- 24 Daniel Sommers is lawyer in Washington; he is the Co-Chair of Cohen Milstein Seller and Toll PLLC's securities fraud/investor protection practice group. He also contributed to the BNA's article above
- 25 *Morrison*, 2010 WL 2518523. At 15 (Stevens, J. Concurring). Justice GINSBURG joined this concurrence to the opinion of the Court.
- 26 *Id.* at 18 (Steven, J. Concurring).



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We have many great ideas but need your help. Make a commitment to give the Section 5-10 hours of your time each year. Think about it: the equivalent of no more than one working day. Please join a committee of the Section and support the objectives of the Section:

- International Business and Tax
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# Accessing BP's Liability

By Melina Lito

With businesses suffering the consequences of the oil spill, President Obama asked that BP compensate for the damages the oil spill is causing businesses.<sup>1</sup> Problems further arise as the strategy for dispersing that compensation fund to the victims has not been laid out, resulting in hesitance among the victims to file claims to be included in the fund.<sup>2</sup> The less people that sign on, the higher the legal liability BP faces. Thus, as BP attempts to remedy the damages to the victims, its partners refuse to accept any responsibility.<sup>3</sup> Meanwhile, victims are not rushing to accept the offered help.<sup>4</sup> There are those who suggest that BP was forced into allocating these funds.<sup>5</sup> Others opine that this compensatory fund is advantageous to BP, as it decreases its potential legal liability.<sup>6</sup>

## Background

Located in the UK, "BP is the third largest oil company in the world after ExxonMobil and Royal Dutch Shell."<sup>7</sup> Originally British Petroleum, BP merged with Amoco, ARCO, and Castrol and, since 2000, has branded itself as Beyond Petroleum.<sup>8</sup> With a Swedish chairman, and a British CEO, the company's Board of Directors is 50% American and its American employees amount to 23,000, of which 7,000 are located in the Texas offices.<sup>9</sup> British employees compose 10,000 of the staff members.<sup>10</sup> Further, "around 40 per cent of BP's shares are held on either side of the atlantic. More than \$4 billion of BP's now disputed dividend was due to be paid to American pensioners and investors this year."<sup>11</sup>

In 2008, BP purchased a track of "[t]he mineral rights for...the 5,700-acre Mississippi Canyon Block 252."<sup>12</sup> From that bundle of rights, it sold 35% to Anadarko Petroleum Company and

MOEX Offshore 2007 LLC, a Mitsui Oil Exploration Company subsidiary.<sup>13</sup> Mitsui, a Japanese company, bought 10% and Anadarko, a US company, bought 25% of the rights.<sup>14</sup> Since 2007, BP had rented Deepwater Horizon, the drilling rig that blew up on April 20, 2010, from Transocean, Ltd.<sup>15</sup> Transocean is a US company, but located in Switzerland.<sup>16</sup>

## The Request and the Problems

BP apologized for its accident in the oil spill, in the form of statements by the Chairman of the British owned company, as well as in a compensatory fund.<sup>17</sup> Carl-Henric Svanberg, chairman of BP, "apologized for the worst environmental disaster in U.S. history and backed up his vow to regain Americans' trust by agreeing to set aside \$20 billion for victims of the Gulf Coast oil spill."<sup>18</sup> In addition, there will be \$100 million targeted specifically toward oil rig workers that are now out-of-work.<sup>19</sup> Those who choose to receive this compensation must, however, forfeit their right to file a legal suit against BP in the future.<sup>20</sup> There will be an escrow account created in which to deposit this amount, to be managed by attorney Kenneth Feiberg.<sup>21</sup>

In its press release, BP notes that it "will initially make payments of \$3bn in Q3 of 2010 and \$2bn in Q4 of 2010."<sup>22</sup> After that, it promised to pay \$1.25 billion every quarter, which will come to an end only when the \$20 billion has been paid in full.<sup>23</sup> In the meantime "[w]hile the fund is building, BP's commitments will be assured by the setting aside of U.S. assets with a value of \$20bn. The intention is that this level of assets will decline as cash contributions are made to the fund."<sup>24</sup>

Speculations arise as to whether such a compensatory fund will come in due time to fix the consequences of the oil spill.<sup>25</sup> Compensation claims are

constantly increasing, with 48,500 claims yet to be paid and 2,000 arising daily, despite the \$158 million that have already been paid to 51,000 claimants.<sup>26</sup> As Rick Jervis and Alan Levin write, some of the business owners that have already filed claims with BP for compensation have yet to receive full monetary relief.<sup>27</sup> Instead, they are getting a "fraction of the...profits the spill is costing."<sup>28</sup> These monies are dispensed from an emergency compensation fund ("emergency comp"), and cover business expenses such as mortgages and boat payments.<sup>29</sup> Given the unanswered questions that remain on the disbursement of the monies and the management of the disbursement process, it is uncertain whether the fund will be effective.<sup>30</sup> The efficacy of the compensation fund is especially uncertain because "[t]he ripple effect out on this thing is beyond what the average person can fathom."<sup>31</sup>

Mr. Feinberg's stated objective is to "get this program clearly articulated so that everybody understand their choices," and he encourages people to file for compensation under the emergency fund.<sup>32</sup> Affected persons are encouraged to file a claim.<sup>33</sup> If the claim is approved as being "eligible" then the person will receive emergency comp, without any conditions that they waive any rights to pursue legal action.<sup>34</sup> Should their claims be valid, claimants will receive aid for a maximum of six months.<sup>35</sup> Then, "[a]t some point in the future the independent facility will offer a global amount full satisfaction and then each claimant will have to voluntarily decide, up to them . . . I'd rather have this money than litigate."<sup>36</sup> It has proven difficult to persuade affected



Melina Lito



individuals and businesses to file claims.<sup>37</sup> There are those who prefer to be paid in cash, and only in cash, and filing a claim raises concerns on whether IRS will be subsequently notified.<sup>38</sup>

In summary, regardless of the unanswered questions that surround the compensation fund, Mr. Feinberg noted in a CNBC interview that he is hopeful that the BP compensation will match that of the 9/11 compensation, in which only 94 people sought legal action.<sup>39</sup>

#### Consequences of Allocation to BP

BP has assumed the responsibility to “regain the trust of Americans.”<sup>40</sup> However, it is bearing this initiative alone because its business partners are unwilling to accept liability.<sup>41</sup> This, in turn, is taking a toll on British pension funds.<sup>42</sup>

The British pension funds are affected by the \$20 billion allocation because they depend on the dividends which “the oil giant would be forced to suspend . . . to its shareholders until at least next year.”<sup>43</sup> “Almost every pension investor has a stake in BP’s fortunes, as the oil giant accounts for £1 of every £7 of dividend income paid out by the companies in the FTSE 100 index of leading shares.”<sup>44</sup> Although pension funds are taking a hit with previously existing millions now no longer available to investors, the consequences may not be as dire as one may think.<sup>45</sup> The average pension fund has about 8% of BP shares, compared to the remaining 92% of shares that can be invested in the other stocks, thus softening the fall.<sup>46</sup>

BP is also reaching out to its partners to help it share the bill, but such attempts have been unsuccessful.<sup>47</sup> For example, Anadarko, who owns 25% of the project and liability, has argued that “[t]he mounting evidence clearly demonstrates that this tragedy was preventable and the direct result of BP’s reckless decisions and actions.”<sup>48</sup> Similarly, Mitsui has attempted to renounce any liability in the crisis by giving up its interest in the oil.<sup>49</sup> Bound by the operating agreements with BP, Anadarko is exempt from any liability upon proving that the oil spill could have been prevented had it not been for BP’s

negligence.<sup>50</sup> Under the Joint Operating Agreement, BP has a duty to its partners to drill in a “good and workmanlike manner” and “is responsible to its co-owners for damages caused by its gross negligence or willful misconduct.”<sup>51</sup>

Finally, BP has also maintained that Transocean is liable as well.<sup>52</sup> After all, as American BP chairman reasons, “Transocean had been carrying out the drilling, owned the rig and a crucial piece of safety equipment. . . . which failed to stop the accident.”<sup>53</sup> While liability is likely for both companies, Transocean has a contract clause saying that “BP would ‘assume full responsibility for and defend, release and indemnify us from any loss, expense, claim, fine, penalty or liability for pollution or contamination, including control and removal thereof, arising out of or connected with operations under the contract.’”<sup>54</sup>

Thus, issues regarding the pension fund are not the end of BP’s liability problems, as concerns have also arisen with regard to BP’s environmental legal liability.

#### Remaining Liability

In his blog, Wayne Law Professor Noah Hall comments on the legal liability that BP may face in the coming months, in particular in light of the Attorney General’s statements that it will investigate potential civil and criminal charges.<sup>55</sup> BP may face criminal liability, most likely resulting in fines, under the Migratory Bird Treaty Act and the Refuse Act, for damage to the environment.<sup>56</sup> As Prof. Hall comments, “both. . . use strict liability, so the government would not need to show that BP intended to violate the law or was even negligent in its operation and response.”<sup>57</sup> All that the government needs to show to hold BP liable is that there was a violation; it does not matter whether said violation was accidental or intentional.<sup>58</sup> Another determinant factor weighing on whether BP will be charged would be how it would handle the clean up process and cooperation with the investigations;

though, in this case, political pressure will also be a factor.<sup>59</sup> As Wayne Law Professor Peter Henning writes, should BP be found negligently or “knowingly” liable, its penalty will be either a max of \$25,000 a day and one year in prison, or \$50,000 a day and three years in prison, respectively.<sup>60</sup>

Moreover, “BP is also liable under the Oil Pollution Act of 1990 for all clean-up and response costs, which could total another \$20 billion in addition to the compensation fund. And further, BP could face Clean Water Act penalties of up to \$4300 per barrel of oil released, which could total another \$20 billion (although they would most likely reach a settlement for far less).”<sup>61</sup>

Furthermore, BP liability will extend to the fishing industry and the coastline, resulting in legal action from businesses and property owners.<sup>62</sup> The recovery time for such liability for those claimants could take up to twenty years, as was the case with the Exxon spill.<sup>63</sup>

BP currently faces a potentially infinite liability risk. In the meantime, it struggles with the accessibility problems of the compensation fund, and the consequences on the British pensions. Mr. Feinberg himself is not able to determine if the \$20 billion allocated by BP is going to be sufficient, because they have yet to have “a handle on the comprehensiveness of the claim population”<sup>64</sup>

#### About the Author

*Melina Lito is a third year law student at Wayne State University.*

#### Endnotes

- 1 *Obama v. BP*, THE ECONOMIST, (June 17, 2010), <http://magic.economist.com/node/16377269> (last visited July 14, 2010).
- 2 See *Squawk Box: Ken Feiberg: Victims Who Receive Money From Compensation Fund Must Give Up Right to Litigate Against BP*, (CNBC broadcast June 21, 2010), <http://www.bpoilspilllawblog.com/2010/06/>

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- 4 Ken Feiberg, *supra* note 2.
- 5 *Id.*
- 6 *Id.*
- 7 *BP Plc.* THE NEW YORK TIMES, (July 13, 2010), [http://topics.nytimes.com/top/news/business/companies/bp\\_plc/index.html?inline=nyt-org](http://topics.nytimes.com/top/news/business/companies/bp_plc/index.html?inline=nyt-org) (last visited July 16, 2010).
- 8 See *Id.*; See also, BP Brand and Logo, <http://www.bp.com/sectiongenericarticle.do?categoryId=9014508&contentId=7027677> (last visited July 21, 2010).
- 9 Richard Pendlebury, *Special Investigation: Why is BP taking ALL the Blame?* MAIL ONLINE, (June 18, 2010), <http://www.dailymail.co.uk/news/article-1287226/GULF-OIL-SPILL-Whys-BP-taking-blame.html> (last visited July 16, 2010).
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- 12 *Id.*
- 13 *Id.*
- 14 *Id.*
- 15 *Transocean, Ltd.*, THE NEW YORK TIMES, (July 8, 2010), available at [http://topics.nytimes.com/top/news/business/companies/transocean\\_ltd/index.html?inline=nyt-org](http://topics.nytimes.com/top/news/business/companies/transocean_ltd/index.html?inline=nyt-org) (last visited July 16, 2010).
- 16 Pendlebury, *supra* note 9.
- 17 Hall, *supra* note 3.
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- 19 *Id.*
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- 22 Press Release, BP Establishes \$20 Billion Claims Fund for Deepwater Horizon Spill and Outlines Dividend Decisions, BP, (June 16, 2010), <http://www.bp.com/genericarticle.do?categoryId=2012968&contentId=7062966> (last visited July 16, 2010).
- 23 *Id.*
- 24 *Id.*
- 25 Rick Jarvis and Alan Levin, *BP payments help, but don't match the loss*, USA TODAY, [http://www.usatoday.com/news/nation/2010-07-08-BP-reimbursement\\_N.htm?csp=obinsite](http://www.usatoday.com/news/nation/2010-07-08-BP-reimbursement_N.htm?csp=obinsite) (last visited July 14, 2010)
- 26 *Id.*
- 27 *Id.*
- 28 *Id.*
- 29 *Id.*
- 30 *Id.*
- 31 Jarvis, *supra* note 25.
- 32 Ken Feiberg, *supra* note 2.
- 33 *Id.*; see also, *State of the Union with Candy Crowley: Feinberg Promises Accelerated Six Months Emergency Payment Without Release Requirement Beginning in August*, (CNN broadcast July 12, 210) <http://www.bpoilspilllawblog.com/> (last visited July 14, 2010).
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- 35 *Id.*
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- 41 *Liability Questions Loom for BP and Ex-Partners*, *supra* note 3.
- 42 David Gardner, *Obama bullies BP into 13.5bn fund for oil spill victims... but British pensioners will pick up the bill*, MAIL ONLINE, (June 17, 2010) <http://www.dailymail.co.uk/news/article-1287222/BP-oil-spill-British-pensioners-pick-BP-compensation-fund.html> (last visited July 14, 2010).
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- 61 E-mail from Noah Hall, Associate Professor of Law, Wayne State University Law School, (July 15, 2010, 1:39pm) (on file with the author).
- 62 Hall, *supra* note 55.
- 63 *Id.*
- 64 *Feinberg Promises Accelerated Six Months Emergency Payment Without Release Requirement Beginning in August, supra* note 33.

## Event Calendar: Meetings, Seminars, & Conferences of Interest

### July 26, 2010

2010 ASIL Summer Associate Briefing Series: The Crossroads of Public and Private International Law  
San Francisco, CA  
<http://www.asil.org/events-il-calendar.cfm>

### July 26 - August 07, 2010

Summer School on European Business Law 2010  
Duesseldorf  
<http://www.asil.org/events-il-calendar.cfm>

### August 4-5, 2010

2010 Section Leadership Retreat  
Berkeley, CA  
<http://www.abanet.org/intlaw/calendar/home.html>

### August 15-20, 2010

International Law Association Conference 2010: De iure humanitatis  
The Hague, Netherlands  
<http://www.asil.org/events-il-calendar.cfm>

### August 30, 2010

Korean Bar Association Annual Grand Meeting  
Seoul, Korea  
<http://www.abanet.org/intlaw/calendar/home.html>

### September 16, 2010

AILA: Gang-Based Asylum Applications Web Seminar  
<http://www.aila.org/content/default.aspx?docid=9352>

### September 17-18, 2010

4th Biennial IBA Conference on Construction Projects from Conception to Completion  
Brussels, Belgium  
[http://www.ibanet.org/Conferences/conferences\\_home.aspx](http://www.ibanet.org/Conferences/conferences_home.aspx)

### September 20-22, 2010

8th Annual Anti-Corruption Conference  
Prague, Czech Republic  
[http://www.ibanet.org/Conferences/conferences\\_home.aspx](http://www.ibanet.org/Conferences/conferences_home.aspx)

### October 3-8, 2010

IBA Annual Conference 2010  
Vancouver, Canada  
[http://www.ibanet.org/conferences/Conferences\\_home.cfm](http://www.ibanet.org/conferences/Conferences_home.cfm)

### October 8-10, 2010

AIC/AILA Litigation Institute  
Leesburg, VA (Greater Washington, DC Area)  
<http://www.aila.org/content/default.aspx?docid=9352>

### October 14-16, 2010

Beyond National Security: Immigrant Communities & Economic, Social, and Cultural Rights  
Boston, MA  
<http://www.asil.org/events-il-calendar.cfm>

### October 21-23, 2010

International Law Weekend 2010: International Law and Institutions: Advancing Justice, Security and Prosperity  
New York, New York  
<http://www.asil.org/events-il-calendar.cfm>

### October 28-30, 2010

Canadian Council on International Law 39th Annual Conference  
Ottawa, Ontario CANADA  
<http://www.asil.org/events-il-calendar.cfm>

### November 2-5, 2010

International Private Law Conference  
Barcelona, Spain  
<http://www.asil.org/events-il-calendar.cfm>

### November 3, 2010

Islamic Finance Conference  
Dubai, UAE  
[http://www.ibanet.org/Conferences/conferences\\_home.aspx](http://www.ibanet.org/Conferences/conferences_home.aspx)

### November 11-12, 2010

6th Balkan Legal Forum  
Sofia, Bulgaria  
[http://www.ibanet.org/Conferences/conferences\\_home.aspx](http://www.ibanet.org/Conferences/conferences_home.aspx)

**November 17-19, 2010**

2nd Asia Pacific Regional Forum  
Conference

Tokyo, Japan

[http://www.ibanet.org/Conferences/  
conferences\\_home.aspx](http://www.ibanet.org/Conferences/conferences_home.aspx)

**November 25-26, 2010**

4th Law Firm Management  
Conference

Moscow, Russia

[http://www.ibanet.org/Conferences/  
conferences\\_home.aspx](http://www.ibanet.org/Conferences/conferences_home.aspx)

**December 1, 2010**

13th Annual AILA New York Chapter  
Symposium

New York, New York

[http://www.aila.org/content/default.  
aspx?docid=9352](http://www.aila.org/content/default.aspx?docid=9352)

**January 6, 2011**

Internationalizing the Faculty  
San Francisco, CA

<http://www.asil.org/events-il-calendar.cfm>

**February 9-13, 2011**

Gujarat National Law University  
International Moot Court Competition  
(GIMC 2011)

Gujarat, India

<http://www.asil.org/events-il-calendar.cfm>

**April 8, 2011**

2011 Spring CLE Conference  
Washington, D.C.

[http://www.aila.org/content/default.  
aspx?docid=9352](http://www.aila.org/content/default.aspx?docid=9352)

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aspx?bc=1010](http://www.aila.org/content/default.aspx?bc=1010)

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## Section Annual Meeting



To: Council of the Michigan International Law Section

Please mark your calendar for Thursday, September 23, 2010. The annual meeting of the International Law Section of the State Bar of Michigan will be held at the Fairlane Club, 5000 Fairlane Woods Drive, Dearborn, Michigan 48126 on Thursday, September 23, 2010, beginning with a networking lunch at 12:30 p.m. to be paid for by the Section.

After lunch, there will be a program with speakers who will focus their presentations on the general topic of "How International Trade Will Help Bring Michigan New Jobs and Business Opportunities." The program will conclude about 5 p.m. More details about the program and speakers will follow in the coming weeks.

All members of the Council are expected to attend the Section's annual meeting and program.

Best regards,

Cam DeLong

Chair-Elect

Michigan International Law Section



# State Bar of Michigan 2009-2010 Section Annual Report



**Bar Year:** 2009-2010

**Section Name:** International Law Section

**Mission Statement:** The International Law Section of the State Bar of Michigan provides education, information, and analysis about the field of international law through meetings, seminars, the Section’s website, public service programs, and publication of the *Michigan International Lawyer*.

**Officers and Council Members:**

<u>Officer</u>	<u>Name</u>	<u>Address</u>	<u>Telephone</u>	<u>E-mail</u>
Chairperson	Richard G. Goetz	Dykema Gossett PLLC 400 Renaissance Center, 23 <sup>rd</sup> Floor Detroit, MI 48243-1668	(313) 568-5390	rgoetz@dykema.com
Chairperson- Elect	Cameron S. DeLong	Warner Norcross & Judd LLP 900 Fifth Third Center 111 Lyon Street, NW Grand Rapids, MI 49503-2487	(616) 752-2155	cdelong@wnj.com
Secretary	Margaret A. Dobrowsky	Brinks, Hofer, Gilson & Lione 524 S. Main Street Suite 200 Ann Arbor, MI 48104	(734) 302-6026	mdobrowsky@usebrinks.com
Treasurer	Jeffrey F. Paulsen	Paulsen Law Firm PLLC 6632 Telegraph Road #127 Bloomfield Hills, MI 48301	(248) 456-0646	jfp@paulsenlawfirm.com

<u>Council Member</u>	<u>Term Expires</u>	<u>Law Student</u>	<u>Term Expires</u>
Aziza N. Yuldasheva	2010	Nick Hawatmeh	2010
Eve C. Lerman	2010	Sonia A. Salah	2010
Ashish S. Joshi	2010		
Michael E. Domanski	2011	<b>Immediate Past Chair</b>	
Andrew H. Thorson	2011	Nicholas J. Stasevich	
Linda J. Armstrong	2011		
Debra Auerbach Clephane	2012		
A. Reed Newland	2012		
Tricia Lynn Roelofs	2012		

**Council Meeting Schedule:**

<u>Meeting Type</u>	<u>Date</u>	<u>Location</u>
Annual	September 17, 2009	SBM Annual Meeting Hyatt Regency, Dearborn, MI
Regular	November 17, 2009	Brinks, Hofer, Gilson & Lione – Ann Arbor, MI
Regular	January 27, 2010	Butzel Long, PC – Detroit, MI
Regular	April 6, 2010	Alumni House at Wayne State University - Detroit, MI
Regular	May 19, 2010	Charles H. Wright Museum of African American History – Detroit, MI
Annual	September 23, 2010	Fairlane Club, Dearborn, MI

**Events and/or Seminars:**

<u>Event or Seminar Title</u>	<u>Date</u>	<u>Location</u>
<b>International Legal Aspects of the Global Financial Crises</b>	September 17, 2009	SBM Annual Meeting – Hyatt Regency, Dearborn, MI
Creating the Next Generation of International Lawyers –  Clinical Assistant Professor Deborah Burand, Director of the International Transactions Clinic at the University of Michigan Law School.	November 17, 2009	Brinks, Hofer, Gilson & Lione – Ann Arbor, MI
<b>A New Automotive Industry and Alternative Fuels –</b>  John F. Monk, Managing Partner of autoPOLIS gave a presentation entitled “ <i>A New Automotive Industry and Alternative Fuels.</i> ”  Debra Auerbach Clephane, Partner at Vercruyse Murray & Calzone, P.C. gave a presentation entitled “ <i>H-1B Anti-Fraud Initiatives</i> ”  Linda Armstrong, Shareholder at Butzel Long gave a presentation entitled “ <i>H-1B Public Access File Investigations and Employment Eligibility Verification: Form I-9</i> ”  Margaret A. Dobrowitsky, Shareholder at Brinks Hofer Gilson & Lione gave a presentation entitled “ <i>It’s Good to be Green</i> ”	January 27, 2010	Butzel Long, PC – Detroit, MI

Event or Seminar Title	Date	Location
<p><b>Nuclear Non-Proliferation Treaty (NPT).</b> Gregory Fox, Professor of Law, Director, Program for International Legal Studies at Wayne State University Law School lead a Panel Discussion among the following Participants:</p> <p>Deepti Choubrey, Deputy Director of the Nuclear Policy Program at the Carnegie Endowment for International Peace in Washington, D.C.</p> <p>John Borroughs, Executive Director of the New York-based Lawyers' Committee on Nuclear Policy</p> <p>Anabel Dwyer, Member of the International Law Section and the Board of Directors for the Lawyers' Committee on Nuclear Policy</p>	<p>April 6, 2010</p>	<p>Alumni House at Wayne State University - Detroit, MI</p>
<p><b>Symposium on Sub-Saharan Africa</b></p> <p>Dr. John F. Kelly, Associate Dean, Africa Center for Strategic Studies provided political overview, and trends, risks and opportunities.</p> <p>Professor Lisa D. Cook, Assistant Professor of Economics and International Relations, Michigan State University discussed bank reform in Nigeria and Africa's recent growth.</p> <p>Professor Alan Schenk, Wayne State University Law School spoke on Tax Reform in Sub-Saharan Africa: revenue, capital formation, and international trade.</p> <p>Clinical Assistant Professor Deborah Burand, University of Michigan Law School discussed legal issues in advancing financial access in Africa and the evolution of microfinance institutions</p>	<p>May 19, 2010</p>	<p>Charles H. Wright Museum of African American History – Detroit, MI</p>
<p><b>How International Trade Will Bring Michigan New Jobs and Business Opportunities</b></p>	<p>September 23, 2010</p>	<p>Fairlane Club, Dearborn, MI</p>

**Other Information:**

The Section publishes the *Michigan International Lawyer* approximately three times a year with assistance from Wayne State University School of Law. The mission of the *Michigan International Lawyer* is to enhance and contribute to the public's knowledge of world law and trade with articles of contemporary international law topics and issues of general interest. The journal is mailed to all Section members and is also available on the Section's website at [michbar.org/international](http://michbar.org/international).

# Treasurer's Report

## For the nine months ending June 30, 2010

### INTERNATIONAL LAW SECTION

For the nine months ending June 30, 2010

	Current Activity June	Year-to-date June
<b>Income:</b>		
International Law Section Dues		11,910.00
International Stud/Affil Dues		65.00
<b>Total Revenue</b>		<b>11,975.00</b>
<b>Expenses:</b>		
ListServ	25.00	225.00
Meetings	1,150.00	8,989.66
Travel Expenses		1,664.40
Telephone		84.58
Newsletter		826.00
Postage		1.56
Miscellaneous		322.99
<b>Total Expenses</b>	<b>1,175.00</b>	<b>12,104.27</b>
<b>Net Income</b>	<b>(1,175.00)</b>	<b>(129.27)</b>
<b>Beginning Fund Balance:</b>		
Fund Bal-International Law Sec		26,599.79
<b>Total Beginning Fund Balance</b>		<b>26,599.79</b>
<b>Ending Fund Balance</b>	<b>(1,175.00)</b>	<b>26,470.46</b>



STATE BAR OF MICHIGAN

# International Law Section Leadership Roster 2009-2010

**CHAIR:**

**Richard G. Goetz**

Int'l Practice Group Leader  
Dykema Gossett, PLLC  
400 Renaissance Center  
Detroit, MI 48243  
Telephone: (313) 568-5390  
Fax: (313) 568-6832  
E-mail: rgoetz@dykema.com

**CHAIR-ELECT:**

**Cameron S. DeLong**

Partner  
Warner Norcross & Judd LLP  
111 Lyon St NW, Ste 900  
Fifth Third Ctr  
Grand Rapids, MI 49503  
Telephone: (616) 752-2155  
Fax: (616) 222-2155  
E-mail: cdelong@wnj.com

**SECRETARY:**

**Margaret A. Dobrowsky**

Brinks, Hofer, Gilson & Lione PC  
524 S. Main Street, Ste 200  
Ann Arbor, MI 48104  
Telephone: (734) 302-6026  
Fax: (734) 994-6331  
E-mail: mdobrowsky@usebrinks.com

**TREASURER:**

**Jeffrey F. Paulsen**

Paulsen Law Firm PLLC  
6632 Telegraph Rd # 127  
Bloomfield Hills, MI 48301  
Phone: (248) 456-0646  
Fax: (248) 332-9452  
E-mail: JFP@paulsenlawfirm.com

**COUNCIL:**

**Term Expiring 2010**

**Ashish S. Joshi**

Lorandos & Associates  
214 N 4th Ave  
Ann Arbor, MI 48104  
Phone: (734) 327-5030  
Fax: (734) 327-5032  
E-mail: a.joshi@lorandoslaw.com

**Eve C. Lerman**

Sr Intl Trade Specialist  
U. S. Department of Commerce  
250 Elizabeth Lake Road  
Ste 1300W  
Pontiac, MI 48341  
Telephone: (248) 975-9605  
Fax: (248) 975-9606  
E-mail: evelerman@hotmail.com

**Aziza N. Yuldasheva**

Sr Associate—Intl Corporate Tax  
KPMG LLP  
150 W Jefferson Ave, Ste 1200  
Detroit, MI 48226  
Telephone: (313) 230-3356  
Fax: 313-447-2436  
E-mail: ayuldasheva@kpmg.com

**Term Expiring 2011**

**Linda J. Armstrong**

Butzel Long PC  
150 W Jefferson Ave Ste 100  
Detroit, MI 48226  
Telephone: (313) 983-746  
Fax: (313) 225-7080  
E-mail: armstrong@butzel.com

**Michael W. Domanski**

Honigman Miller Schwartz & Cohn LLP  
660 Woodward Ave Ste 2290  
First National Bldg  
Detroit, MI 48226  
Phone: (313) 465-7352  
Fax: (313) 465-7353  
E-mail: mdomanski@honigman.com

**Jeffrey F. Paulsen**

Paulsen Law Firm PLLC  
6632 Telegraph Rd # 127  
Bloomfield Hills, MI 48301  
Phone: (248) 456-0646  
Fax: (248) 332-9452  
E-mail: JFP@paulsenlawfirm.com

**Andrew H. Thorson**

Warner Norcross & Judd LLP  
2000 Town Ctr Ste 2700  
Southfield, MI 48075  
Phone: (248) 784-5165  
Fax: (248) 603-9465  
E-mail: athorson@wnj.com

**Term Expiring 2011**

**Debra Auerbach Clephane**

Vercruyse Murray & Calzone PC  
31780 Telegraph Rd Ste 200  
Bingham Farms, MI 48025  
Telephone: (248) 540-8019  
Fax: (248) 540-8059  
E-mail: dclephane@vmclaw.com

**A. Reed Newland**

Assistant Corporate Counsel  
Plastipak Packaging Inc  
41605 Ann Arbor Rd E  
Plymouth, MI 48170  
Telephone: (734) 354-7142  
Fax: (734) 354-7398  
E-mail: rnewland@plastipak.com

**Tricia Lynn Roelofs**

Dykema Gossett PLLC  
400 Renaissance Ctr  
Detroit, MI 48243  
Telephone: (313) 568-6530  
Fax: (313) 568-6691  
E-mail: troelofs@dykema.com

**Law Student**

**Term Expires 9/30/2010**

Nick Hawatmeh,  
Sonia A. Salah, Detroit

**Immediate Past Chair**

**Nicholas J. Stasevich**

Butzel Long PC  
150 W Jefferson Ave Ste 100  
Detroit, MI 48226  
Telephone: (313) 225-7035  
Fax: (313) 225-7080  
E-mail: stasevich@butzel.com

**EX-OFFICIO:**

**Lois Elizabeth Bingham**

Yazaki North America, Inc.  
6801 Haggerty Road, Ste 4625E  
Canton, MI 48187  
Telephone: (734) 983-5054  
Fax: (734) 983-5055  
E-mail: lois.bingham@us.yazaki.com

**Bruce D. Birgbauer**

Miller Canfield Paddock & Stone PLC  
150 W Jefferson Ave., Ste 2500  
Detroit, MI 48226  
Telephone: (313) 496-7577  
Fax: (313) 496-8451  
E-mail: birgbauer@millercanfield.com

**Stuart H. Deming**

229 E Michigan Ave, Ste 445  
Kalamazoo, MI 49007  
Telephone: (269) 382-8080  
Fax: (269) 382-8083  
E-mail: Stuart.Deming@DemingGroup.com

**Godfrey J. Dillard**

Law Offices of Godfrey J. Dillard  
PO Box 312120  
Detroit, MI 48231  
Telephone: (313) 964-2838  
Fax: (313) 259-9179  
E-mail: godfreydillard@ameritech.nt

**Frederick J. Frank**

Honigman Miller Schwartz & Cohn LLP  
660 Woodward Ave., Ste 2290  
Detroit, MI 48226  
Telephone: (313) 465-7384  
Fax: (313) 465-7385  
E-mail: ffrank@honigman.com

**Stephen W. Guittard**

131 E 66<sup>th</sup> St. #2A  
New York, NY 10065  
Telephone: (212) 628-6963  
E-mail: sguittard@acedsl.com

**Howard B. Hill**

President & CEO  
Quattro Legal Solutions Inc  
PO Box 36632  
Grosse Pointe Farms, MI 48236  
Telephone: (727) 488-6841  
E-mail: howardbhill@comcast.net

**Professor John H. Jackson**

Georgetown University Law Center  
600 New Jersey Avenue, N.W.  
Washington, D.C. 20001  
Telephone: (202) 662-9837  
Fax: (202) 662-9408  
E-mail: jacksonjh@law.georgetown.edu

**Robert D. Kullgren**

Varnum Riddering Schmidt  
Howlett LLP  
333 Bridge St NW  
PO Box 352  
Grand Rapids, MI 49501  
Telephone: (616) 336-6000  
Fax: (616) 336-7000  
E-mail: rdkullgren@varnumlaw.com

**Clara DeMatteis Mager**

Butzel Long PC  
150 W. Jefferson, Ste 100  
Detroit, MI 48226  
Telephone: (313) 225-7077  
Fax: (313) 225-7080  
E-mail: mager@butzel.com

**Jan Rewers McMillan**

Law Offices of Jan Rewers McMillan  
400 Galleria Officentre #117  
Southfield, MI 48034  
Telephone: (248) 352-8480  
Fax: (248) 354-9656  
E-mail: jrmmcmillan@provide.net

**J. David Reck**

Miller, Canfield, Paddock & Stone  
150 W Jefferson Ave, Ste 2500  
Detroit, MI 48226  
Telephone: (313) 410-9891  
Fax: (313) 496-7500  
E-mail: reck@millercanfield.com

**Professor Logan G. Robinson**

University of Detroit Mercy  
School of Law  
651 E Jefferson Ave  
Detroit, MI 48226  
Telephone: (313) 596-9412  
E-Mail: loganr@comcast.net

**Timothy F. Stock**

3830 9<sup>th</sup> St. N, Apt. 901E  
Arlington, VA 22203  
Telephone: (703) 524-2960  
Fax: (703) 465-9834  
E-mail: tfstock@aol.com

**Bruce C. Thelen**

Dickinson Wright PLLC  
One Detroit Center  
500 Woodward Ave #4000  
Detroit, MI 48226-3425  
Telephone: (313) 223-3500  
Fax: (313) 223-3598  
E-mail: bthelen@dickinsonwright.com

**Anthony P. Thrubis**

37700 River Bnd  
Farmington Hills, MI 48335  
Telephone: (248) 478-2490  
E-mail: thrubis@earthlink.net

**Thomas R. Williams**

Kerr, Russell and Weber, PLC  
One Detroit Center  
500 Woodward Ave #2500  
Detroit, MI 48226-3406  
Telephone: (313) 961-0200  
Fax: (313) 961-0388  
E-mail: trw@krwlaw.com

**Donald E. Wilson**

Senior Tax Counsel  
Deloitte & Touche Tohmatsu Ltd  
3955 Holden Dr  
Ann Arbor, MI 48103  
Telephone: +61 2 9322 7543  
Fax: (734) 995-1101  
E-mail: donwilsona2@mac.com

**Randolph M. Wright**

Berry Moorman PC  
255 E. Brown St #320  
Birmingham, MI 48009-6210  
Telephone: (248) 645-9680  
Fax: (248) 645-1233  
E-mail: rwright@berrymoorman.com



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