

IPBA Journal

December 2014

No **76**

NEWS & LEGAL UPDATE



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IPBA 2015 HONG KONG



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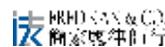


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IPBA Journal

The Official Publication of the Inter-Pacific Bar Association

Publisher Paul Davis

Editor Bruce Andrews

Editorial Kiri Cowie

Design Portia Le

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Internet: www.ninehillsmidia.com

ISSN 1469-6495

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Cover Image: stevenjfrancis

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The President's Message

William A. Scott
President



Dear Colleagues,

I am now over halfway through my term as President of our Association. It has been a busy time and I am pleased to report on developments over the last few months.

Work towards incorporating the Association continues apace. The Constitutional Review Committee was re-constituted and its members have been providing detailed input on the proposed Memorandum and Articles of Association for a corporatised IPBA. This has involved ensuring that key elements of the IPBA's existing Constitution are preserved in the new Articles while at the same time updating certain provisions to ensure that they reflect the IPBA's current practice and meet applicable legal requirements, as well as constitute best practice from a corporate governance perspective.

A draft of the proposed Memorandum and Articles has been circulated to Council members for their review, but all IPBA members are welcome (and indeed encouraged) to participate in this comment process. Please contact Secretary-General Yap Wai Ming to obtain copies of the draft incorporation documents. The plan is to finalise and forward a recommendation to the Council and all IPBA members early in the new year for consideration and approval at our meetings in Hong Kong next May.

We had a very productive, informative and enjoyable Mid-Year Council Meeting and two regional conferences in São Paulo and Rio de Janeiro, Brazil this past September. Our Brazilian hosts were exemplary in their efforts to make all of us feel very welcome. While Brazil is a long way from Asia (indeed, this was only the second time we have held

a Council meeting in South America), the ties between it, together with other Latin American countries, and the Asia-Pacific region continue to grow in importance from a trade and investment perspective, particularly in the natural resource sectors. Our steadily increasing Latin American membership have been steadfast supporters of the Association for many years and it was an honour to reciprocate their support by making the journey to South America to visit them in their home region.

Looking forward, we welcome the opportunity to hold our next Mid-Year Council meeting in Dubai. While our Brazilian hosts, Shin Jae Kim and Ronaldo Veirano, set a very high standard, I'm confident that Richard Briggs and his fellow Dubai organising committee members will be up to the challenge.

Turning to our upcoming annual conferences, in keeping with the stellar precedent set in 2002, our 25th anniversary get-together in Hong Kong next May, under the able leadership of Huen Wong, promises to be outstanding. What's more, we can look forward to similarly excellent events in 2016 in Kuala Lumpur and the proposed venue of Auckland in 2017. As I've noted previously, the organisation of an annual IPBA conference is an enormously time-consuming undertaking, particularly since the work is entirely on a volunteer basis. Vice-President Dhinesh Bhaskaran and Vice-President nominee Denis McNamara and their respective organising committees are to be commended for undertaking these challenges for the benefit of the Association as a whole. The foresight and professionalism they have all exhibited speak well of their commitment to the IPBA.

Finally, I attended the recent IBA conference in Tokyo this October in my capacity as your President. While in Tokyo, I and other IPBA leaders met with the President and leaders of the Korean Bar Association for the historic signing of a Memorandum of Understanding between the two associations. The MOU reflects the close cooperation that has developed between the two bodies over the last few years and it is hoped to be the first of many such collaborations between the IPBA and national bar associations in future. Special thanks must go to Korea JCM Chang-Rok Woo and Membership Committee Chair Yong-Jae Chang for their good work in putting this MOU in place.

We can now all look forward to our next annual conference in Hong Kong, 6-9 May 2015. The conference theme is *Vision for the Future* and will feature a strong and varied substantive program and a dazzling array of social functions. Apart from learning about recent developments in the Asia-Pacific legal arena, delegates will, as always, have the opportunity to renew old friendships and make many new ones. I hope to see you there!

William A. Scott
President

IPBA Upcoming Events		
Event	Location	Date
IPBA Annual General Meeting and Conference		
25th Annual General Meeting and Conference	Hong Kong	May 6-9, 2015
26th Annual General Meeting and Conference	Kuala Lumpur	April 13-16, 2016
IPBA Mid-Year Council Meeting		
2015 Mid-Year Council Meeting and Regional Conference	Dubai, UAE	October 22-26, 2015
Regional Events		
IPBA & Law Society: Asia Pacific Event	London, England	December 3, 2014
Supporting Events		
IFLR/IPBA Asia Capital Markets Forum	Hong Kong	December 4, 2014
Kluwer Law International's "2nd Indonesia and South East Asia: International Arbitration Summit"	Jakarta, Indonesia	December 12, 2014
ABA International Section's 2015 Asia Forum – Tokyo: "Doing Business in Asia: Recent Trends and Developments in the Regulatory Environment, Transactional Practice and Dispute Resolution"	Tokyo, Japan	March 2-3, 2015
IFLR/IPBA Asia M&A Forum 2015	Hong Kong	March 10-11, 2015
Chartered Institute of Arbitrators' Centenary Year Celebration	Hong Kong	March 19-20, 2015
innoXcell's "Asia Legal & Regulatory Compliance 2015"	Hong Kong	April 14-16, 2015
<p>More details can be found on our web site: http://www.ipba.org, or contact the IPBA Secretariat at ipba@ipba.org</p>		



The Secretary-General's Message

Yap Wai Ming
Secretary-General



Dear IPBA Members,

We held our Mid-Year Council meeting on 28 September 2014 in Rio de Janeiro. On behalf of the IPBA, I would like to thank Ronaldo Veirano of Veirano Advogados and Shin Jae Kim of TozziniFreire Advogados, our Brazilian hosts, who made a tremendous effort to make all of us feel so at home with their superb hospitality. In conjunction with our Council meeting, the first of a two-part seminar entitled "*The Global Inclusion of Latin America*" was held on 25 September 2014 in São Paulo, followed by the second part in Rio de Janeiro on 29 September 2014.

Some Council members who came to São Paulo made a detour to spend a short but fantastic vacation at *Iguazú Falls* before the Council meeting. The falls are reputed to be the world's finest, surpassing Niagara. Although I did not visit them myself, listening to tales of my fellow Council members' escapades at the falls made me rather envious.

The Mid-Year Council Meeting was held at the Windsor Atlântica Hotel, located just opposite the world famous Copacabana Beach. Ronaldo Veirano arranged for us to hold the Council Dinner at Churrascaria Fogo de Chão Restaurant, with traditional Brazilian fare for all meat lovers. I also had the good fortune to join Francis Xavier, Gerhard Wegen and Dhinesh Bhaskaran to watch a local soccer match at the Maracanã Stadium, where the World Cup finals were played a few months ago. It was truly a memorable experience to be in Brazil.

At the Rio Council meeting, the Council approved the re-establishment of our Constitution Review Committee (CRC) to update our Constitution and bring it in line with plans to corporatise the IPBA as a legal entity. The

proposed incorporation of the IPBA will take the form of a company limited by guarantee, to be formed either in Hong Kong or Singapore, with a "Memorandum and Articles of Association" modeled along the current IPBA constitution with suitable amendments to meet the legal requirements of the jurisdiction of incorporation. The Council has debated the corporatisation issue at length over the last several Council meetings. Members may request copies of the past minutes of Council meetings if they wish to follow these discussions.

Our Nominating Committee Chair, Lalit Bhasin, had proposed that the CRC be chaired by Ravi Nath, one of our former IPBA Presidents. The Vice-Chair will be our President, William Scott. Other members of the CRC are Alan Fujimoto, Miyuki Ishiguro, Caroline Berube, Sumeet Kachwaha and me (I will also act as convener). Our first IPBA President and former Japan Supreme Court Justice, The Honorable Kunio Hamada, and Mark Shklov will be advisors to the CRC.

Among other things, the CRC will consider amendments to streamline current practices that are not provided for at present in our Constitution, such as the existence of the committee co-chair position that has been adopted by several committees. Questions arise as to whether co-chairs have a vote on the Council, or whether their terms should be staggered or concurrent with the other committee co-chair. Some committee chairs have also set their own requirements for nominating vice-chairs only after the proposed candidate has participated actively in the committee's programmes for a minimum period. This is a good practice as it encourages the building of a strong committee and allows for better institutional

succession planning. We should consider whether this practice should be extended to all leadership positions within the IPBA. We also need to consider whether regional groupings such as Benelux (comprising Belgium, The Netherlands and Luxembourg) should be recognised as jurisdictions or are better served as additional At-Large Council regions. Either way, there may be a need to widen the jurisdiction definition or increase the number of At-Large Council Members. The CRC is proposing to elevate the Webmaster to an Officer of the IPBA given the importance of the internet and other social media outreach. In addition, given the ease with which we could hold teleconferences even for large meetings like Council meetings, the CRC is also proposing to remove the power of the Officers to make decisions for the Council in 'emergency situations', which was a provision that was inserted into our Constitution following the Pakistan-India political crisis that nearly affected the hosting of the Annual Meeting and Conference in New Delhi in 2003.

Therefore, there is much work for the CRC to do and, in fact, such work is well under way. We have prepared a 'public consultation' paper which, by the time you are reading this edition of the Journal, will have been circulated to all Council members, past Presidents and past Secretaries-General for feedback. Members who also wish to participate in this process should get in touch with me, and I will provide the relevant consultation paper for their review and feedback. The public consultation closes on 15 January 2015.

The CRC will gather the feedback and put together a formal proposal on incorporation of the IPBA, along with related constitutional amendments. This will be tabled with the Council and the Annual General Meeting (AGM) of members to be held on 9 May 2015 in Hong Kong. We strongly encourage all IPBA members to attend the AGM.

When I was first appointed as a Deputy Secretary-General some three years back, I learned that there was a parallel organisation called the IPBA Japan which, as stated in its website (<http://ipbajp.com>), is 'an association independently established by members of Inter Pacific Bar Association (IPBA) based in Japan for the purpose of supporting IPBA. IPBA Japan is a

separate association from IPBA'. IPBA Japan has its own constitution and officers with its main objectives being to encourage Japanese lawyers to join the IPBA and to run its own independent activities to promote the IPBA. The Japan Fund is an initiative of the IPBA Japan which has raised funds to support the IPBA scholars for several years since the Kyoto Annual Conference, for which the IPBA Scholarship Committee is ever so grateful. There is much to learn from the Japanese IPBA members in their promotional activities and the strong spirit of camaraderie that prevails among them.

The Council will consider the role of such independent organisations as branches of the IPBA and co-ordination of their activities with the Jurisdictional Council Members (JCMs). Other JCMs and members may wish to consider forming such branches within their respective jurisdictions to emulate IPBA Japan if it helps to better coordinate membership activities and to run local IPBA activities. There may need to be regular reporting of the various activities of these branches, in much the same way that JCMs report to the Council at each of the Council meetings.

The Council has also considered the venue and Vice-Presidential nominee for our 2017 Annual General Meeting and Conference. Auckland, New Zealand and Denis McNamara have been proposed, amidst 'fierce' competition as Denis alluded to in his introduction speech at the Rio Council Meeting. The choice of Auckland and Denis' appointment as Vice President of the IPBA will be formally tabled for approval at the AGM in Hong Kong.

Huen Wong, our President-Elect, continues to have a very busy schedule of promotional trips for the Annual Conference in Hong Kong. At the Council's request, Huen has agreed to extend the Early Bird registration for the Hong Kong conference to the end of January 2015. For those who would like to take advantage of this special rate, please register at <http://ipba2015hk.com>.

Hope to see all of you in Hong Kong next year!

Yap Wai Ming
Secretary-General

Mid-Year Council Meeting and Regional Conference in São Paulo and Rio de Janeiro, Brazil



The IPBA Council enjoyed cocktails and dinner at the Welcome Reception in Rio de Janeiro.

As most of you know, Brazil has recently hosted the 2014 World Cup, which has been rated internationally as one of the best of all times. In less than two years' time, Brazil will host another major international sporting event – the 2016 Summer Olympics in Rio de Janeiro. Having been granted the right to host two of the top international sporting events is a validation by the international community that Brazil has become a significant economic power on the world stage.

As the largest country and economy in Latin America, and one of the fastest growing economies in the world in the last decade, Brazil has indeed made significant strides as an up-and-coming world economic power. With an estimated population of over 200 million, Brazil is the largest Portuguese-speaking country in the world and has a fast growing middle class in South America. Brazil also maintains a very good relationship with all South and Latin American countries.



Speakers, hosts, and delegates enjoyed the social events in São Paulo.



Mark Stinson and his wife, and Robert W. Quon came all the way from Canada to participate.



Council members and other guests enjoyed the endless supply of meat, as well as fresh vegetables and wine at the Council Dinner.



The gracious hosts, Shin Jae Kim of TozziniFreire Advogados (At-Large Council Member for Latin America) and Ronaldo Veirano of Veirano Advogados (Co-Chair of the International Trade Committee).

Thus, the decision to host the Mid-Year Council Meeting in Brazil was welcomed and supported by the IPBA. The host team, led by Shin Jae Kim (TozziniFreire Advogados) and Ronaldo Veirano (Veirano Advogados), had a great idea of organising the first IPBA Regional Conference in the two largest cities in Brazil: São Paulo and Rio de Janeiro. The Regional Conferences were aptly named 'The Global Inclusion of Latin America.' The idea was to set up an event with speakers from different countries who could contribute to the discussions involving the current scenario of the region.

On 25 September, we started our long weekend with a welcome dinner for speakers and guests at Capim Santo, a fine restaurant in São Paulo serving Brazilian cuisine and famous for using organic and fresh local ingredients. The guests from various countries, speakers,

sponsors of the conference and host team members had a great evening, dining in the garden in a very refreshing atmosphere with a lot of caipirinhas. Everyone was able to get a flavour of what was about to come in the following days. The next morning, we held the first regional conference at the offices of TozziniFreire in São Paulo. We had gathered an interesting audience and it was successful because we could discuss a variety of topics from cross-border investments and M&A to highlights of securities-related transactions. Moreover, Brazil is one of the first countries in Latin America to enact its own anti-corruption law this past January, setting a trend in Latin America with respect to efforts to fight corruption and bribery of domestic and foreign public officials and the growing global cartel enforcement, which has reached unprecedented levels internationally and in Latin America as well.



IPBA Officers lead the Council Meeting in Rio de Janeiro.

The highlight of the event was a keynote speech by the Honourable Luciano Almeida (President of Invest São Paulo). He gave an excellent overview of the actions taken by the State of São Paulo to attract foreign and national investments within the State. Lastly, we cannot forget the memorable speeches delivered by the two senior founding partners of their respective firms, Ronaldo Veirano and Jose Luis de Salles Freire, who are both well-respected in the legal arena, about their views and the trends of the legal market in Brazil. The conference day ended with a nice cocktail party with a live band in the gardens of TozziniFreire which lasted into the night.



Seminar delegates in Rio had the privilege of listening to the keynote speaker, the Honourable Ellen Gracie Northfleet, former Justice of the Supreme Court of Brazil.



IPBA Officers discussed the work ahead of them during the last day's lunch at the Windsor Atlântica Hotel on Copacabana Beach.



On the following day (Friday), in Rio de Janeiro this time, the IPBA officers had a very productive meeting at the offices of Veirano Advogados. At night, a dinner was held at Casa de Arte e Cultura Julieta de Serpa, a palace located in the Flamengo district of Rio de Janeiro built in the 1920s, with elegant decoration and a nice ambience for the officers and spouses. The next day, a meeting of committees and officers was held at the Windsor Atlantica Hotel with a view of the famous Copacabana beach. While the meeting was taking place, the spouses went on a nice visit to the main attractions of Rio de Janeiro, including a visit to the famous H Stern headquarters to see how Brazilian gems are made and the stones artistically crafted, which was impressive. Dinner was at Churrascaria Fogo de Chão, which is located in Botafogo Bay with a view of the boats against the background of the city including Sugarloaf Mountain. The weather was pleasant for cocktails on the terrace. The high point was without doubt the meat and the salad bar. Some may still feel full just remembering that lovely night.

The second regional conference covering arbitration was well attended on Monday with excellent speakers and the participation of the enchanting former Justice of the Supreme Court of Brazil the Honorable Ellen Gracie

Northfleet. She emphasised the maturity of court institutions in Brazil, respect for arbitration and delivered an optimistic and encouraging view on the growth of arbitration as a dispute resolution mechanism in Brazil. Throughout the day each speaker gave way to provocative discussions making the conference a success.

As chairs of the event, we would like to thank the IPBA officers and members who came and joined us making this event a huge success. And for those who could not attend this time, we hope we will see you soon on another opportunity.

We appreciate the IPBA's support and wish to extend our special thanks to our sponsors BKBG Advogados, Veirano Advogados and TozziniFreire Advogados. Also to our institutional supporters IASP – Instituto de Advogados de São Paulo/Institute of Lawyers of São Paulo and CESA – Centro de Estudos das Sociedades de Advogados/Center for Studies of Law Firms.



Shin Jae Kim
At-Large Council Member for Latin America, Co-Chair of Host Committee, Partner, TozziniFreire Advogados

A member of TozziniFreire's Executive and Management Committees, Shin co-heads the firm's Corporate Compliance & Investigation practice group. With over 20 years of experience in mergers and acquisitions, she advises investors from various countries on their inbound and outbound investments, counsels clients' relationships with government bodies, compliance matters and corporate investigations.



Ronaldo Veirano
Co-Chair of International Trade Committee, Co-Chair of Host Committee, Founding Partner, Veirano Advogados

Founding partner of Veirano Advogados and a highly regarded legal expert, recognised internationally for his statesmanship, facility with sophisticated legal issues and a significant network of global contacts. He has served as an advisor to numerous corporations and their boards, along with governments and their officials from across the globe.

Interview with Justice Ellen Gracie Northfleet

On 29 September 2014, Leonard Yeoh, the Vice-Chair of the Publications Committee of the IPBA, had the honour of interviewing the Honourable Minister Ellen Gracie Northfleet, a former President of the Brazilian Supreme Court, for the *IPBA Journal*. We give special thanks to Shin Jae Kim of TozziniFreire Advogados and Ronaldo Veirano of Veirano Advogados for arranging this special opportunity.



Miss Ellen Gracie Northfleet

Justice Ellen Gracie Northfleet was the first woman to be appointed to the Supreme Court of Brazil and, subsequently, the first female president of the Supreme Court. She graduated from the Faculty of Law of the Federal University of Rio Grande do Sul. In 1989, she first joined the Judiciary as a judge in the Regional Federal Court. She was then appointed to the Supreme Court in 2000 by the then President of Brazil. In 2006, after her appointment by the President, she was elected through a unanimous vote to head the Court. In 2011, she retired from the Court.

Q: What was your best memory of Law School?

A: There were several good memories of Law School. I began my studies here in Rio. If I'm honest, at that point I didn't know exactly what I wanted to do with my life. So, I chose the pre-requisite exam that I could take without studying much, and lo and behold, that was for the Law School.

Perhaps it was a blessing in disguise – I did well in those exams. So that prompted me to pursue this course further. Little by little, I began to love the law. Year

by year, my interest grew. So much so that I began a two-year internship with a big law firm during my fourth and fifth years of Law School, and subsequently remained in the same firm for another two years.

One of the most significant moments in Law School must have been meeting my then course mates, some of whom are still friends today. Not forgetting the professors of the Law School; two of whom had a huge impact on my career path – one marked my path of thinking and gave me the right notion of public law and the other made us think a lot!

Q: How did you embark on your journey as a judge?

A: Two years into my job at the law firm, I took an entry examination into the public prosecutor's office. At the age of 25, I became a prosecutor for the southern region of Brazil, my parents' hometown, where I relocated with them after my first year of Law School. I was with the public prosecutor's office for 15 years.

Subsequently, there was an opening for the position as a federal prosecutor in the regional Appellate Courts, a new branch created by the Constitution. So I applied for that position. Among the three candidates short listed by the members of the Courts, I was selected by the President of the Republic. With that, in March 1989, I began my journey as a judge.

Q: Did you, in your wildest dreams, imagine being appointed as the first female Supreme Court judge and accordingly becoming the Chief Justice?

A: As a matter of fact, no. For a judge, at any level, the Supreme Court was in a league of its own. My ambition was to make my way up to the Superior Court of Justice, which is one level below the Supreme Court. I attempted to achieve this ambition of mine, but unfortunately I didn't succeed. However, soon after, lucky me – my name became known to the right people. I then received an invitation from the President to sit as a Supreme Court judge. The Senate approved the President's invitation, and consequently I was nominated and made a Supreme Court judge.

Q: What challenges did you face as the first female Supreme Court judge and Chief Justice?

A: That is a very common question, but let me tell you, I felt at ease holding those position(s). It was indeed a surprise, and such an honour, to first be nominated as a Supreme Court judge and thereafter to be appointed as the Chief Justice. Maybe it's because I've been involved in the judiciary for such a long time, so I knew most of the members of the Supreme Court personally. It felt like home.



Q: Is there a way to connect the question and answer in the same column?

A: There are two initiatives I'm very proud of. The first was the introduction of conciliation to the Brazilian courts – an alternative process to litigation which grabbed my attention when I was in the United States of America for a short stint studying Administrative Justice. I saw how this Alternative Dispute Resolution (ADR) was a way of lessening the burdens of the court, so I decided to do some light studying on ADR while I was in the USA. When I became the Chief Justice, I tried to introduce this adoption of ADR. So we began in 2006 with a 'one week of conciliation' effort in all the courts in the country. It was a great success and very good results were produced. The judges took this idea to heart and were very keen about this effort. Now, usually sometime in December of every year, we have one week dedicated to conciliation. I'm pleased to say that quite a lot of cases have been settled out of court.

The other would be modernisation of the electronic procedure used by the Brazilian courts. The electronic system of precedents was introduced, along with electronic filing. The most significant effect would be the system of precedents. This system is of great help when there is a matter involving the jurisprudence of the Supreme Court. Whenever the First Instance Court judges need to search to know what jurisprudence there is in the Supreme Court, they can do so with the newly implemented system of precedents. From then on, we started to build binding precedents. These mechanisms bring about the civil law system – the institution of a hybrid common law system.

This system greatly reduces and streamlines the workflow for the court system. There was a time when there were about 150,000 appeal cases. Had we used the traditional method of decision making, the workload would have doubled to 300,000 – assuming these cases involved public interest as the appellate court judges would first have to decide if they did fall under that category and if they did, the judges would then have to decide on their merits. How it works is that there is now a system of virtual meetings or what we refer to as our repertoire. So the abstract of the case appears before the 11 appellate court judges electronically. Each of them decides via a voting system to vote either a 'yes' or 'no' to any repercussions the case might have on the public interest. Thereafter, the lower courts are informed electronically. Should there be a decision on the merits of the case to be made, the proceedings of the case will be stayed pending the said decision.

Q: In a man's world, you have most definitely inspired many women to break away from the typical stereotype – that certain positions and/or roles are only to be assumed by men. How does a city in Brazil generally treat the female population in all classes and positions?

A: One of my joys during my term in the Supreme Court was seeing and meeting with young law students who visited the Court. Several young female law students told me that they aim to be a member of the Supreme Court, just as I was at the material time. Brazil has come a long way in integrating women in the workforce and in all positions. During my time in Law School, a woman being a member of the Supreme Court was unthinkable and unimaginable. But by convention and custom we broke through into cultural integration. Now we even have women running for presidency!

Q: We know that you've moved from a judge to becoming an arbitrator recently. What is it like being in this slightly different environment?

A: This was indeed a change since I stepped down from the Court. I didn't want to stay idle and as I've always had a big interest in ADR, I decided to choose arbitration as an area for me to practise in. I am glad

with my choice. In my opinion, arbitration provides more freedom to the arbitrator and more qualified information is received as to the reasons behind the dispute.

Q: I also understand that you are a part of the World Justice Project. Could you share a little on this? How has it contributed to the advancement of the Rule of Law around the world?

A: The World Justice Project is an international Non-Governmental Organisation (NGO) created by the American Bar Association (ABA). Its main task is to produce the Rule of Law Index, in particular to measure the adherence to the Rule of Law around the world. The Rule of Law Index encompasses the independence of the judiciary, transparency of institutions and accountability of officials, etc.

First, a survey is conducted among the population. A sample of the population is then taken, and the countries are grouped based on economic standards or its locality in the region. The results of this statistical exercise are submitted to experts from their respective country. Thereafter, based on verification from the respective experts as to the perception and true reality of such adherence, we reduce all these findings into a graph for comparison. Countries then may compare with other countries and look for better practices as a tool for self improvement. Indeed, I am very proud of this work for the advancement of the judiciary system around the world.



Leonard Yeoh Soon Beng
Head of Dispute Resolution,
Tay & Partners

Leonard has substantial trial, appellate and arbitration experience and has litigated as counsel at all levels of the Malaysian and Singaporean court hierarchy. He represents blue-chip corporate clients and foreign multinational companies in domestic and international arbitrations. Clients and peers have consistently identified Leonard as a leading litigation and employment lawyer in publications such as *Asia-Pacific Legal 500*, *Chambers Asia*, *Asialaw Leading Lawyers*, *Asian Legal Business* and *The Guide to the World's Leading Management Employment Lawyers*.

The New Regulation on Material Asset Reorganizations of Listed Companies

On 23 October 2014, the China Securities Regulatory Commission published the Administrative Measures for the Material Asset Reorganizations of Listed Companies, which simplifies administration of the material asset reorganisation of listed companies, perfects the classified approval system, strengthens information disclosure and intermediaries' responsibilities and implements the gradual return to marketisation of M&A and reorganisations. This article discusses these provisions and their implementation.

Background

The Administrative Measures for the Material Asset Reorganizations of Listed Companies ('the Measures for Reorganizations'), first enacted on 16 April 2008 and later revised on 1 August 2011, is the general formal provision to regulate material asset purchases and the sale or trading of assets in other ways beyond routine operations of listed companies and their holding or controlling companies. Asset purchases by means of stock issuance of listed companies must comply with the relevant provisions of the Measures for Reorganizations.

On 17 March 2014, the State Council enacted the Opinions of State Council on further Optimizing Market Environment of Enterprise Merger and Restructuring ('Circular 14'). Subsequently, on 8 May 2014, the State Council enacted the several opinions of State Council on further promoting healthy development of capital market ('Circular 17'). Circular 14 points to a gradual decrease in relevant administrative approvals for enterprise mergers and restructuring, an increase in approval efficiency, a further perfecting of the

market system and a gradual elimination of market barriers. Circular 17 encourages market-oriented M&A and restructuring, fully articulates the role of capital markets in the process of enterprise M&As and restructuring, strengthens property rights pricing and the trade functions of the capital market, broadens M&A financing channels, enriches M&A payment methods, displays respect for the autonomous decisions of enterprises, encourages various types of capital funds to participate in M&As fairly, eradicates market barriers and industry segmentation, and realises the smooth transfer across regions of ownership, property rights and control rights of companies.

In order to implement the spirit of Circular 14 and Circular 17 and taking into consideration practical need and market opinions, the Securities Regulatory Commission revised the Measures for Reorganizations, published the Administrative Measures for the Material Asset Reorganizations of Listed Companies ('the New Measures for Reorganizations') on 23 October 2014, which became effective on 23 November 2014.



The New Measures for Reorganizations implement bold and substantial improvements.

An Interpretation of the Main Revised Content

The New Measures for Reorganizations implement the programme of Circular 14 and Circular 17, further simplify governmental administration in relation to the material asset reorganisations of listed companies, perfect the classified approval system, further strengthen information disclosure in the process of reorganisations, reinforce government supervision during and after the course of enterprise M&As, urge intermediary organisations to be in place and responsible, make M&A and reorganisations gradually return to marketisation and realise the 'Survival of the Fittest' M&A and reorganisations mechanism.

Compared with the Measures for Reorganizations, the New Measures for Reorganizations implement bold and substantial improvements and these improvements are mainly reflected in the following aspects discussed below.

1. Perfecting the Classified Approval System

According to the provisions of the Measures for Reorganizations, trade which is in accordance with the regulation standard and conforms to the material asset reorganisations provisions must be submitted to the Securities Regulatory Commission for approval, and that which leads to the alteration of controlling rights of listed companies and other similar circumstances, must

be submitted to the sub-committee in charge of M&A and reorganisations for approval. The New Measures for Reorganizations cancels the requirement for approval of material asset reorganisations other than back door listings and strengthens the regulation of these types of asset reorganisations, mainly through the reinforcement of information disclosure and checks on intermediary organisations, to further increase the trade efficiency of material asset reorganisations of listed companies. However, according to article 44 of the New Measures for Reorganizations, for listed companies to issue shares to purchase assets, the compilation of a pre-arranged planning and asset report regarding the issuance of shares to purchase assets is required and must be reported to and approved by the Securities Regulatory Commission due to the need for shares issuance during the transaction.

In contrast to the above lowering of the approval requirement, the New Measures for Reorganizations further specify the standards for back door listings and require that asset reorganisations which constitute back door listings shall be reported to and approved by the sub-committee of M&A and reorganisations of the Securities Regulatory Commission. In addition, the corresponding business entity that will be purchased

by listed companies on the main board and small and medium-size enterprises board shall comply with the issuance conditions stipulated by the Measures for the Administration of Initial Public Offering and Listing of Stocks (Order 32 of the Securities Regulatory Commission) while listed companies on the growth enterprises market may not conduct back door listings. Compared to the previous Measures for Reorganizations that required the corresponding business entity of purchased assets to operate a business for three years and have an accumulated net profit of more than 20,000,000 yuan in the past two accounting years, the New Measures for Reorganizations are much stricter and equal the requirements of Initial Public Offerings. Furthermore, the new regulation specifies that the seller of a listed company's asset purchase can be the purchaser or their affiliated party, which includes the purchase circumstances that appeared in practice.

The New Measures for Reorganizations also add share exchange mergers by absorption to the scope of regulation and the relevant provisions regarding issuance of shares to purchase assets in the new regulation also apply to it.

The implementation of the classified approval system in the New Measures for Reorganizations and the substantial revision to cancel the approval for material asset purchases, sales and replacement of listed companies narrows down the approval scope of regulatory authorities for material asset reorganisations of listed companies, speeds up approval efficiency, and further encourages listed companies to hold more capital when conducting an M&A and to increase their capital usage efficiency.

2. Simplification of Administrative Measures and Lowering of Certain Standards

The New Measures for Reorganizations simplify many of the copy and report obligations to the Securities Regulatory Commission and its dispatched office in the process of asset reorganisations of listed companies, and alters the original copy and report obligations to an information disclosure mechanism, therefore providing more information to market investors for their reference. For example, the original stipulation required that listed companies shall disclose documents and file a copy with the dispatched office of the Securities Regulatory Commission in the place where the listed company is located after the board of directors made a resolution

on material asset reorganisation and submitted written reports to the Securities Regulatory Commission and its dispatched office after the implementation of the reorganisation strategy. These original stipulations have been cancelled by the New Measures for Reorganizations.

Secondly, the New Measures for Reorganizations cancel the mandatory requirement for listed companies to provide a profit forecasting report and alters it to a stipulation that in the material asset reorganisation report, the board of listed companies must provide a detailed analysis of the influence of this trade on its continuous operation capability, future development prospects, earnings per share in the present year and several financial indicators and non-financial indicators of such listed companies. In consideration of the uncertainty and lack of basis for profit forecasting, the new regulation cancels the profit forecasting report and changes it to information disclosure which is a more practical and effective method.

In addition, the New Measures for Reorganizations cancel the compensation obligation of listed companies during an asset purchase by share issuance from a non-affiliated third party. On one hand, it reserves the mandatory requirement of a compensation agreement for the material asset reorganisation concerned with the controlling shareholder and actual controller so as to continually provide security to medium and small market investors. On the other hand, it focuses more on the market-oriented game when trading with a non-affiliated third party and provides more negotiation space for both trade parties.

The New Measures for Reorganizations also cancel the lower limit for stock issuance scale in an asset purchase that uses an issuance of shares and creates conditions for M&As of medium and small-scale listed companies by the issuance of shares.

3. Strengthening of Reorganisations Disclosure and Subsequent Regulation

The new regulations under the New Measures for Reorganizations reserve a company's obligations to make a material assets reorganisation report as set forth in the Measures for Reorganizations and also add an information disclosure obligation for intermediary organisations under various circumstances. For example, it requires that an independent financial consultant

shall conduct a supplementary examination and issue a professional opinion if the Securities Regulatory Commission discovers any circumstance which might possibly damage the benefits of listed companies or market investors. Meanwhile, the New Measures for Reorganizations also strengthen the information disclosure obligation of listed companies in the pricing method of stocks and underlying assets, which also provides a reference to potential market investors.

In terms of subsequent supervision, the New Measures for Reorganizations perfect several terms of legal liability and specify the punitive measures under the circumstances of unfair pricing of assets reorganisation and unjustified benefits channeling, and they strengthen the investigation mechanism for finding the responsible personnel of listed companies, intermediary organisations and other participants who are liable for misconduct during enterprise M&As.

4. Protection of Medium and Small Market Investors

First, the New Measures for Reorganizations stipulate that internet voting and independent vote counting for medium and small shareholders shall be made available when listed companies host a shareholders' conference to approve material asset reorganisations.

Second, the New Measures for Reorganizations broaden the scope of parties liable for compensation from the directors, supervisors and senior managers of listed companies to also include the opposite trade parties in material asset reorganisations. In particular, it requires that the opposite trade party makes public promises as to the authenticity, accuracy and integrity of its provided information and bears the corresponding compensation liability according to the law.

Meanwhile, the new regulation stipulates in several places that when relevant units and individuals have an investigation initiated by a judicial authority against them, the transfer of such personnel's equity in the listed companies shall be suspended. It also establishes a civil compensation mechanism and requires the relevant parties to compensate for loss due to their false promises and/or disclosure.

5. Strengthening of Responsibility of Intermediary Organisations

The New Measures for Reorganizations add several

responsibility clauses regarding participating intermediary organisations. On one hand, it requires intermediary organisations to further perfect their obligation performance in the process of material asset reorganisations of listed companies. For example, it requires law firms to issue legal opinions on the procedures for convening and voting and the voting result of the shareholders' conference on material asset reorganisations of listed companies. On the other hand, it raises the requirements for intermediaries so that intermediaries shall not abet, assist or together with the issuer, make or disclose in a report a false record, misleading statement or material omission, and shall not engage in unfair competition and utilise material asset reorganisations to promote unfair interests. In addition, the new regulation also stipulates an accountability system for intermediary organisations so that when an intermediary makes and/or issues documents with a false record, misleading statement or material omission, it shall be subject to the corresponding punitive measures and prohibited from entry into the market.

6. Reformation of the Pricing Mechanism and Payment Method

The New Measures for Reorganizations reflect the reform of the pricing mechanism in two aspects. First, it legalises the practical operation that the assessment result is not a required basis of asset pricing, it cancels the requirement of adopting more than two methods to conduct the assessment and instead it requires more analysis and disclosure on the transaction made by the board of listed companies. Second, it relaxes the original excessively rigid pricing mechanism. In the past, price shall be no lower than the average stock trading price of 20 trading days before the announcement of the board of director's resolution; now, the price shall not be lower than 90 percent of the market reference price, which is the average stocks trading price of 20 or 60 or 120 trading days before the board announcement. Further, the revised new regulation also establishes a mechanism for the board of directors to adjust the offering price according to the material change in stock prices in the capital market, but the board of directors is required to specify beforehand the possible price adjustment strategy in the board of directors' resolution on an asset purchase by issuance of shares to afford a specific expectation for market investors. This revision considers that in the marketisation of M&A and reorganisations, it requires the adoption of the basic principle that the

price shall be determined by the market and creates a harmonious balance between not being excessively rigid but also not being without any restriction.

In terms of the payment method, the New Measures for Reorganizations specify that listed companies may issue preferred stock for reorganisations and asset purchases or merger with other companies. Meanwhile, listed companies also may issue convertible bonds and directional warrants to specified objects to purchase assets or to conduct company mergers. The New Measures for Reorganizations provide diversified choices for listed companies to design payment methods according to their practical needs. From the domestic and overseas practice of M&A, the payment method of M&A and reorganisations is always one of the important factors that influence the degree of M&A market prosperity. The New Measures for Reorganizations afford listed companies options of various payment methods and further strengthen the function of listed companies M&A and reorganisations for industry structure adjustment and optimisation of social resources allocation.

An Analysis of the Possible Influence of this Revision

This revision is the largest revision since the promulgation of the Administrative Measures for the Material Asset Reorganizations of Listed Companies in 2008 and it has a profound influence on the current pattern of listed companies' M&A and reorganisations in the Chinese capital market. In the authors' view, the following main influences are as follows:

- (1) The number of listed companies' material asset reorganisations will remarkably increase. The former long approval period and the uncertainty of listed companies' material asset reorganisations were always reasons why listed companies were cautious about material asset reorganisations. Now, regulation authorities implement the principle of 'relax the control and strengthen the regulation'.
- (2) The more flexible pricing mechanism and increasingly diversified payment methods will lead to the trade strategies of listed companies' M&A and reorganisations to be more diversified and complicated. After receiving relief from approval pressure, the focus of listed companies' M&A and reorganisations will be gradually turned to the

negotiations conducted between the participating parties in a reorganisation. Difficulties arising from negotiations will be further increased and the complexity of trade will also substantially increase.

- (3) Against the background of strengthening the regulation during and after the course of enterprise M&A and reorganisations, the responsibility of intermediary organisations will be further enhanced. On the one hand, the New Measures for Reorganizations add the express stipulations that they focus on the responsibility of intermediary organisations and provide corresponding punitive measures to require intermediary organisations to earnestly perform their duties. On the other hand, the diversification of trade plans also places an expectation on intermediary organisations to demonstrate better performances in trade negotiation, trade structure design, trade compliance judgment and trade process control.

Conclusion

In conclusion, this revision of the Measures for Reorganizations will further play a role in listed companies' M&A and reorganisations in increasing the value of listed companies, promoting industry structure upgrades and optimising the allocation of the capital market.



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China to US Investments: A Guideline for Structuring Small Business Investments in a Tax-efficient Manner

While there have been investments into and out of the PRC by major international corporations and Chinese state-owned enterprises, there is now developing a substantial amount of smaller businesses entering into cross-border transactions. This article focuses on the general tax and corporate structural issues for smaller companies doing business between the PRC and the US.

Introduction

The purpose of this article is to provide an introduction to the practical concepts and guidelines for structuring Chinese investments into the US in a tax-efficient manner. While most articles have focused on large multinational corporations, this article focuses on entrepreneurs and small- to medium-sized businesses investing or seeking to sell goods directly to consumers in the United States.

The author cautions that the tax laws in China and the US have changed dramatically in recent years, and that some tax law changes have been retroactive for up to two years. Thus, while we hope this article will be helpful as a good overview, entrepreneurs and their advisors entering businesses in the US should be careful to update conclusions.



Chinese Investors in the United States

In recent years, Chinese companies have begun large-scale overseas investments. State-owned enterprises and private-owned companies are growing rapidly and increasingly seek to expand overseas and compete in the global market with other multinational companies. In particular, Chinese companies with the support of the Chinese government have been particularly active in seeking to invest in natural resource companies and assets to lock in raw material supplies.

The PRC Ministry of Commerce ('MOFCOM') issued the Administrative Measures on Overseas Investment ('Circular No 5'), which came into effect on 1 May 2009, and lowered most required approvals for overseas investments to the provincial level, with central level approval only in the following circumstances:

- (1) where the overseas investment amount is US\$100 million or more;
- (2) investments in certain specified countries or regions (as determined by MOFCOM and Ministry of Foreign Affairs);
- (3) investments in countries that do not yet have diplomatic relations with China;
- (4) investments involving more than one country or region; or
- (5) an offshore Special Purpose Vehicle ('SPV') is to be established.

Circular No 5 permits all China-based enterprises (including WFOEs, CJVs, and EJVs) to provide loans to their wholly or partially owned overseas subsidiaries. However, powerful discretionary government control remains, including the ability to recover such foreign exchange if there is an imbalance in China's foreign exchange reserve.

Let's consider the following scenario:

Quality Cabinets is a Chinese company that manufactures kitchen cabinets. The company currently sells its cabinets to a US distributor who then sells the cabinets at retail. Owners of Quality Cabinets are considering opening their own US distributor to sell the cabinets directly in the US market.

Choice of Business Entity

For the US, state (not Federal) law governs business entities. Thus, it is important for Chinese investors to look at the different state laws when deciding where to establish its business entity. While the states offer a number of forms of business entities to choose from, there are four main choices of business entities in the US: (1) a branch; (2) a corporation; (3) a partnership; or (4) a limited liability company.

1. Branch

A branch is an unincorporated division of a foreign entity, and is not treated as a separate legal entity. In other words, the Chinese investor, as owner, is personally liable for the branch's activities and liabilities. There are no federal registration requirements to form or maintain a branch. However, most states require a simple registration to conduct business when activities in their jurisdiction reach a certain (usually quite low) threshold. Thus, a branch is convenient during the initial phase of the business where the Chinese investor is merely exploring the market.

2. Corporations

A corporation is a separate legal entity and provides limited liability to the Chinese investor. A corporation is relatively easy to form. The investor must choose a state in which to incorporate and file articles of incorporation. Like the PRC, the tax disadvantage of a corporation is double taxation, meaning the corporation itself is subject to taxation and the shareholders are subject to another level of taxation when dividend distributions are made.



3. Limited Partnerships

Limited Partnerships ('LPs') are also separate legal entities, but unlike corporations, must have more than one partner. LPs must have at least one general partner that is responsible for the management and control and at least one limited partner. Limited partners have limited liability, but the general partner is liable for the debts of the limited partnership. Unlike corporations, partnerships are pass-through entities and thus there is only a single level of US taxation. Each partner is taxed on his or her share of partnership income.

4. Limited Liability Companies

Limited Liability Companies ('LLCs') provide the limited liability benefit of a corporation and can be taxed as a partnership. Each LLC member's participation rights are addressed in an operating agreement. Unlike LPs, an LLC can have one member.

US Taxation of Chinese Investors

The US income tax code and the US-PRC Tax Treaty establish the rules for determining the US taxation of Chinese investors. The Chinese investor may choose whether to apply the rules under the US tax code or the US-PRC Tax Treaty where the statute and the treaty have conflicting rules. The Treaty rules are generally more favourable to the taxpayer. It is important to note that the foreign taxpayer may not choose to apply the rules under the Treaty for one purpose and the rules under the US tax code for another purpose.

Under the US-PRC Tax Treaty, jurisdiction to impose US taxation on a PRC person's business income exists only if the foreign person has a permanent establishment in the United States. A permanent establishment means a fixed place of business through which the business of an enterprise is wholly or partly carried on. Permanent establishment includes specifically a place of management, a branch, an office, a factory, a workshop and a mine, oil or gas well, a quarry or any other place of extraction of natural resources. However, preparatory or auxiliary activities are not considered a permanent establishment. Examples of such activities include: use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise; or maintaining a fixed place of business solely for the purpose of purchasing goods or merchandise or for collecting information for the enterprise.

Once the Chinese person has a permanent establishment in the United States, the United States can impose its taxing jurisdiction on its sales or services income that is effectively connected with the conduct of a US trade or business. Chinese persons are subject to the usual progressive US income tax rates on any net profits that are effectively connected with the conduct of a trade or business within the United States. In 2014, the highest tax rates for individuals is 39 percent and for corporations, 35 percent.

Whether a US trade or business exists is a highly factual analysis that is often left up to the courts to determine. To carry on a trade or business, the business activities must be ongoing, continuous and sustained. The mere management of investments and the collection of rents, interest, and dividends are insufficient to constitute the carrying on of a trade or business.

US agents may cause a foreign person to be engaged in a trade or business. For instance, a foreign corporation engages in a US trade or business where the foreign corporation makes arrangements with a US person for the exclusive sale of its products within the United States. If the US agent is acting wholly or almost wholly on behalf of the PRC person and habitually exercises an authority to conclude contracts in the name of the PRC person, then the US agent is deemed to be a permanent establishment of the PRC person.

If the Chinese person is not engaging in a US trade or business at any time during the tax year, then none of the Chinese person's income, gain or losses during that year is treated as effectively connected income or loss. For example, Chinese Co. is a PRC holding company that owns all of the voting stock in five corporations, two of which are US corporations. All of Chinese Co.'s subsidiaries are engaged in the active conduct of a trade or business. Chinese Co. has an office in the United States where its chief executive officer, who is also the chief executive officer of one of the US subsidiaries, spends a substantial portion of the taxable year supervising Chinese Co.'s investment in its operating subsidiaries and performing his function as chief executive officer of the US operating subsidiary. Chinese Co. is not considered to be engaged in a trade or business in the United States during the taxable year by reason of the activities carried on in the United States by its chief executive officer in the supervision of its investment in its operating subsidiary

corporations. Accordingly, the dividends from sources within the United States received by Chinese Co. during the taxable year from its US subsidiary corporations are not effectively connected for that year with the conduct of a trade or business in the United States by Chinese Co. However, the dividends are subject to the US withholding tax on passive income which is reduced to 10 percent under the Treaty.

If the Chinese person is engaging in a US trade or business, then the next question is whether the Chinese person's income is effectively connected to that US trade or business. To determine whether a Chinese person's income is effectively connected with the conduct of a US trade or business, the Chinese person's income should be sorted into two groups. The first group consists of US-sourced, fixed or determinable annual or periodical income, portfolio interest, and gains or losses from the sale or exchange of capital assets. Income under this first group is considered effectively connected to the conduct of a US trade or business if such income, gain or loss is (1) derived from assets held in, or held for use in, the conduct of a US trade or business; or (2) the activities of the US trade or business were a material factor in the realisation of the income, gain or loss.

The second group consists of all other US sourced income, gain or loss that is left out of the first group. All income, gain or loss in the second group is treated as effectively connected to the US trade or business regardless of whether such income has any connection to the US trade or business. This rule is often referred to as the 'force of attraction' rule.

To illustrate, let's imagine that Quality Cabinets, a Chinese enterprise, sells both kitchen cabinets and Chinese cooking instruments (e.g., woks, rice cookers). Quality Cabinets establishes a branch office in the US for the sole purpose of selling and installing kitchen cabinets, thus establishing a US trade or business with respect to its kitchen cabinets. The US branch does not sell any cooking instruments; instead, Quality Cabinets sells its cooking instruments to consumers outside of China through its online website, and on rare occasions, it receives orders from US customers. Sales of its cooking instruments are made directly from Quality Cabinet's home office in China to US customers, without any connection to its US branch office. However, under the force of attraction rule, sales by Quality Cabinets of its cooking instruments could nonetheless be treated as effectively connected with the conduct of a US trade or business. Additionally, if the Chinese person began (or ceased) its US trade or business in the middle of the tax year and the Chinese person has income realised before the business began (or after it ceased), such income could be treated as effectively connected to its US trade or business under the force of attraction rule.

The Treaty limits the effect of the force of attraction rule. Under the Treaty, the US is permitted only to tax a Chinese person on business profits attributable to that person's permanent establishment. Under the Treaty, the profits attributable to a permanent establishment are determined as if the permanent establishment were an independent entity. In the example of Quality Cabinets, a permanent establishment exists for Quality Cabinet's kitchen cabinet business, but a permanent establishment does not exist for its sale of cooking instruments. Thus, the profits from the sale of the cooking instruments are not subject to US taxation.



**The Treaty limits
the effect of the force
of attraction rule.**

It is also important to note that US tax law imposes an additional layer of tax for foreign corporations with a US branch (commonly referred to as the 'branch profits tax'), but the Treaty eliminates the branch profits tax for corporations that are qualified residents in China. Under the branch profits tax, a 30-percent tax is imposed on the after-tax earnings of the US branch if the earnings are not reinvested in the corporation's US business. A PRC resident enterprise is a qualified resident, unless (1) 50 percent or more (by value) of its stock is owned by individuals who are not residents of China and who are not United States citizens or resident aliens; or (2) if 50 percent or more of its income is used (directly or indirectly) to meet liabilities to persons who are not residents of China or citizens or residents of the United States.

Since the US branch profits tax is eliminated, for corporations that are residents of the PRC, investing in the US through a branch may be the most tax efficient structure. In contrast to establishing a US corporation where the US corporation is subject to tax on its worldwide income and an additional 10 percent withholding tax (under the Treaty) on any dividends paid by the US corporation to its PRC shareholder, establishing a US branch will eliminate this second layer of taxation.

Moreover, the company should get a foreign tax credit in China for US taxes paid, pursuant to the Treaty (see below). However, the PRC corporation will generally not have limited liability if a branch is established.

To accomplish the goals of: (1) single taxation on its US operations; (2) limited liability; and (3) a pass-through of its US tax expense for credit against PRC tax, a US single member limited liability company should be most effective. Such a company would be entirely disregarded under Federal and most states' income tax regimes (and thus, essentially be treated as a branch) while getting the benefit of limited liability protection against creditors. As a practical matter, a single member LLC seems more advantageous than a US branch.

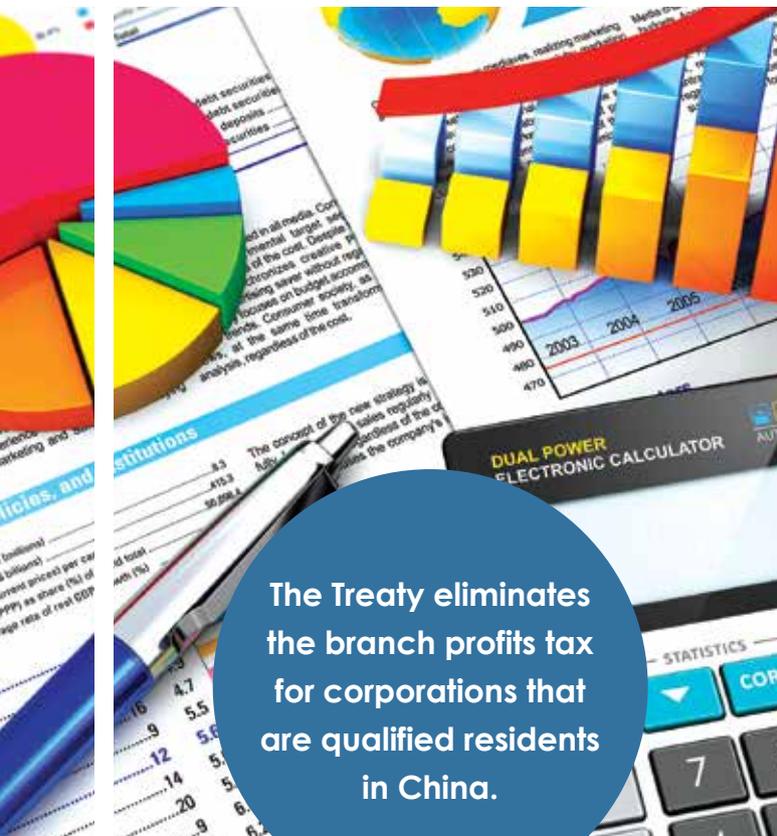
State Income Taxation

In addition to US federal taxation, many US states have their own income tax which, although deductible in calculating federal taxation income, is in addition to the federal tax. Several states impose no income taxes on individuals and/or corporations, and of the states that do impose an income tax, rates run from a low of 3 percent to a high of 13.75 percent. While any meaningful discussion of state taxation is beyond the scope of this article, it is important to note that state income taxation is predominantly based on the state in which the company does business, not merely where it is incorporated or formed (if a US entity is used). Thus, incorporation or formation in Delaware (which has no tax and is a common jurisdiction for entity formation), will not eliminate possible tax in any other state where the enterprise is engaged in business.

PRC Taxation of PRC Investors in the US

PRC residents are taxed on their worldwide income. As discussed in detail above, a PRC resident enterprise is one 'established inside China, or which is established under the law of a foreign country but the place of management is inside China.' An individual is a resident of the PRC if he or she is domiciled in China (e.g., PRC nationals and those normally or habitually resident in China) or if he or she has resided in China for one year or more.

A PRC enterprise is a separate taxpayer from its owners. A PRC enterprise can take a credit for taxes paid to the US for US source income, which is also subject to tax in China. Since US income tax rates are higher than PRC rates, the PRC credit is limited to the portion of PRC



The Treaty eliminates the branch profits tax for corporations that are qualified residents in China.

tax payable for the US source income. The remaining balance of the credit (amount in excess of the limitation) is carried forward for five years. However, the carried forward credit can only be used if the PRC taxpayer has foreign source income in subsequent years, which means that most of the excess US rate over the PRC rate of tax will be unusable against PRC taxes. If the Chinese enterprise receives a dividend from a US entity, the Chinese enterprise's payment of US taxes on the dividend can be credited against the enterprise's PRC income tax; but the Chinese enterprise must own at least 20 percent of the US entity to take the credit. However, unlike the US foreign tax credit, PRC law apparently does not permit Chinese shareholders of US corporations to take an indirect tax credit for US taxes paid by its US corporation. As noted above, a US limited liability company may favourably resolve this issue.

Under PRC law, individuals are taxed on certain categories of income and each category is subject to its own taxing regime. For instance, income from wages and salaries are taxed at a progressive tax rate and the rate ranges from 5 percent to 45 percent. Income from royalties, interest, stock dividend and bonuses, lease or

transfer of property and occasional income are taxed at a flat 20 percent tax rate. PRC individuals can also take a tax credit for foreign income taxes paid on income from US sources. The credit is also limited to the amount of PRC income tax payable on the US source income; and if the actual amount of US taxes paid exceeds the limit, then the taxpayer can carry forward the excess unused credit for five years.

The partnership structure is available to PRC persons. As of 1 June 2007, PRC natural persons, legal persons, and other organisations may establish general partnerships or limited partnerships under PRC law. A partnership is a pass-through enterprise and the partners are required to pay their respective income tax. Thus, a partner is subject to the EITL if the partner is an enterprise and a partner is subject to the IITL if the partner is an individual.

Finally, PRC individuals must consider that directly investing in a US corporation or partnership will subject them to the US estate and gift tax regime. The US taxes individuals on the transfer of property, over a certain value, at death (estate tax) and during life (gift tax). For PRC individuals who are not a resident of the US, the US estate and gift

ASIA PACIFIC LAW REVIEW

Asia Pacific Law Review is a bi-annual legal journal published by the City University of Hong Kong that provides indepth analysis of the key legal issues affecting the Asia Pacific region.



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tax will only apply if they have any assets 'situated in the US' In other words, if a PRC individual owns a US business then estate or gift tax could apply if the PRC individual transfers an interest in that business to another person as a gift or a bequest. US corporate stock is an asset 'situated in the US,' and thus, subject to this tax when a PRC individual directly owns the stocks. Likewise, interest in a US partnership may also be considered US situs property. Thus, if a PRC citizen and resident directly own a US entity at their death, they will be subject to US estate tax on these assets. Since interests in foreign entities are not considered US situs property, PRC individuals should consider investing in the US through a PRC enterprise.

Models for Investment

The following three models will illustrate the issues for a Chinese manufacturer to consider for investment in the US. To illustrate very simply, assume it costs Quality Cabinets ('Quality') \$100 to manufacture desks which are then sold to a US distributor entity for \$150, and then sold at retail for \$200. Quality will make a profit of \$50 (\$150 sales price less \$100 cost), but gives up the other \$50 profit when the product is sold at retail. Quality decides to set up its own US distributor entity and sell products directly to US consumers, which will allow the Chinese company to retain the full \$100 in profit.

Model #1

Quality can set up a US branch that is classified as a single member LLC. Since Quality is the sole owner of the LLC, the LLC is a disregarded entity. The company will pay a single level of US tax on its \$100 profit and receive a credit in China for the US taxes paid. Further, there is no branch profit or dividend withholding. Since there are no currency restrictions in the US, Quality will be free to repatriate its earnings from the US at any time or leave them for continued reinvestment in the US.

Model #2

To increase China profits, and thereby lower the overall tax rate from the 35 percent US (plus state tax) to the 25 percent PRC tax, Quality can set up a US corporation and sell the desks to the US Corporation for \$150. If the products are sold, F.O.B. China, then the \$50 profit is not taxed in the United States. The US corporation will then sell the product at retail for \$200, and make a \$50 profit. The \$50 profit will be taxed in the US but not in the PRC until the US corporation makes a distribution to the Chinese company shareholder.

US income tax can be further reduced by partially capitalising the US entity with debt. A portion of the \$50 profit can then be used to pay Quality interest on the outstanding debt. Assuming \$25 is used towards payment of interest to the Chinese shareholder on outstanding debt, the \$25 debt payment is only subject to US withholding of 10 percent, which will be creditable against Quality's PRC income tax. The 35 percent US tax is eliminated on this \$25 of income. Quality is also subject to income taxation in China at the 25 percent rate, but will receive a foreign tax credit for the US withholding tax. The remaining \$25 will be subject to US taxation at 35 percent rate and a withholding of 10 percent if distributed as a dividend to the Chinese company.

Model #3

To combine the benefits and eliminate some of the negative withholding tax on the balance if Models #1 and #2 are used, Quality Manufacturer sets up Quality US Distribution as a separate corporation under PRC law which then forms a new Quality US LLC. Quality Manufacturer sells the desks to Quality US Distribution for \$150, reporting \$50 as exclusively Chinese source income taxable at 25-percent. Quality US Distribution then sells its desks to US consumers through Quality US LLC for \$200. As the pass-through recipient of income from the LLC, Quality US Distribution must pay the tax credit from the 35-percent US tax on its \$50 of US connected income. However, it should also get a 25-percent PRC credit for the US taxes it must pay, and since the US LLC is disregarded and there is no branch profits tax under the US-PRC Tax Treaty, there is no further US withholding tax payable. Finally, if the US operations are appropriately capitalised with some debt (either borrowing by Quality US Distribution or US LLC), interest expenses as well as possibly other deductions can be used to further reduce US income tax.



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US Securities Regulation of Foreign Private Issuers

When a corporation's securities are publicly traded in the United States, it may have to register these securities with the US Securities and Exchange Commission ('SEC'). However, if it qualifies as a 'foreign private issuer', the corporation's SEC reporting and statutory compliance obligations can be significantly reduced or eliminated completely.

What is a Foreign Private Issuer?

There are a number of potential benefits to a foreign company having shareholders in the United States and becoming a public company in the United States, including among other things, ready access to the capital markets in the US, increasing its visibility in the global market place, broadening its shareholder base, and enhancing its ability to attract and retain key employees through an equity-based compensation plan.

However, even if a public foreign company does not directly offer its securities in the United States or list its securities on a US national securities exchange, it may find that it is required to register its securities with the SEC if the number of its US shareholders and its worldwide assets reach certain levels, as discussed below. If this happens, the publicly traded foreign company could benefit if it qualifies as a 'foreign private issuer'.

A 'foreign private issuer' is a company organised under the laws of a jurisdiction outside of the United States with respect to which (1) no more than 50 percent of its outstanding voting securities are held by residents of the United States; or (2) if more than 50 percent of its outstanding voting securities are held by residents of the United States, then none of the following three circumstances applies: (a) the majority of its executive officers or directors are US residents or citizens; (b) more than 50 percent of its assets are located in the United States; or (c) its business is administered principally in the United States.

Must a Foreign Private Issuer Register with the SEC?

The US federal securities laws require that a foreign private issuer register its securities with the SEC if it conducts a public offering of its securities in the United States, if it lists its securities on a US national securities exchange, such as the New York Stock Exchange, the NYSE Amex and the NASDAQ Stock Market, or on the Over the Counter Bulletin Board, or if the foreign private issuer's worldwide assets and worldwide/US shareholder bases reach certain levels. The relevant statutory and regulatory provisions are found in Section 12(g) of the Securities Exchange Act of 1934, as amended (the 'Exchange Act'), and in the SEC Rules 12g-1 and 12g3-2(a).

Specifically, with respect to asset and shareholder thresholds, a foreign private issuer is generally required to register a class of equity securities with the SEC if: (1) it has over US\$10 million in assets at the end of its fiscal year; (2) the number of record holders of its shares of equity securities is either 2,000 or greater worldwide, or 500 persons who are not 'accredited investors' or greater worldwide; and (3) the number of its US resident shareholders is 300 or more. In determining the number of its shareholders, an issuer must look through the record ownership of brokers, dealers, banks or nominees holding securities for the accounts of customers and consider any beneficial ownership reports or other information provided to the issuer in order to determine the residency of shareholders.

However, under SEC Rule 12g3-2(b), a foreign private issuer which may otherwise be required to register its equity securities with the SEC because it exceeds the above asset and security holder thresholds is automatically exempt from SEC registration if (a) it has not engaged in a public offering of its securities in the United States or listed its securities on a national securities exchange in the United States; (b) it has listed the subject class of securities on one or more exchanges in a non-US jurisdiction(s) that comprise more than 55 percent of its worldwide trading (its 'Principal Trading Market'); and (c) it publishes in English on its website (or through an electronic delivery system generally available to the public in its Principal Trading Market) material items of information as specified in Rule 12g3-2(b).

What are the Benefits of Qualifying as a Foreign Private Issuer?

A company which sells its securities in the United States, or lists its securities on a US national securities exchange, or has a large number of security holders in the United States and otherwise does not qualify as a foreign private issuer must comply with significantly more stringent SEC reporting obligations. These are the same SEC reporting obligations applicable to domestic US issuers of publicly traded securities. Thus, there are significant benefits to qualifying as a foreign private issuer if a foreign company has a large number of US security holders.

For example, a foreign issuer not qualifying as a foreign private issuer may be required to file an annual report with the SEC on Form 10-K as opposed to a Form 20-F annual report. It may also become subject to the SEC's quarterly and current reporting requirements on Forms 10-Q and 8-K, respectively. It may also have to begin complying with the SEC's proxy rules and the requirements of Section 16 of the Exchange Act requiring certain persons to report securities holdings in the company and prohibiting them from short-term profits in purchases and sales of the company's equity securities.

With respect to the benefit of being able to file the annual report with the SEC on Form 20-F instead of on Form 10-K, the Form 20-F must be filed within four months after the fiscal year covered by the report, whereas a Form 10-K must be filed between 60 and 90 days following the end of the company's fiscal year, depending on its capitalisation and other factors which determine whether it is a 'large accelerated filer' or an 'accelerated filer'.



There are significant benefits to qualifying as a foreign private issuer.

The reporting requirements for Form 20-F annual reports are not as strict as those required for Form 10-K annual reports, particularly in the area of audited financial statements. A Form 10-K filer must include US GAAP audited financial statements for the year for which the report is filed and for the prior year or two. A foreign private issuer filing its annual report on Form 20-F is also required to provide audited financial statements for the year for which the report is filed and for the prior year or two. However, the financial statements of the foreign private issuer may be prepared in accordance with either US GAAP, International Financial Reporting Standards ('IFRS') as issued by the International Accounting Standards Board ('IASB') (without a US GAAP reconciliation), IFRS other than as issued by the IASB (with US GAAP reconciliation), or local GAAP (with US GAAP reconciliation); with respect to US GAAP reconciliation, it must be provided for the last two fiscal years and any required interim periods.

Further, foreign private issuers are permitted to disclose executive compensation on an aggregate basis and, unlike US domestic companies, need not supply a Compensation Discussion & Analysis, a requirement often viewed by SEC reporting companies as quite burdensome.

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must be made in English and, if a document is in a foreign language, the foreign private issuer must submit a fair and accurate English translation of the document.

Another substantial benefit of qualification as a foreign private issuer is that officers, directors and substantial shareholders of foreign private issuers are exempt from filing beneficial ownership reports required by Section 16(a) of the Exchange Act, which requires that company insiders file public reports (on Forms 3, 4 and 5) of their holdings of, and transactions in, equity securities of the company which are registered with the SEC under Section 12 of the Exchange Act, and such persons are not subject to the short-swing trading rules under Section 16(b) of the Exchange Act. A 'short-swing transaction' is the purchase and sale, or sale and purchase, of any equity security of an issuer within a period of less than six months. Both Section 16(a) and Section 16(b), if applicable, would require compliance by executive officers, directors and holders of 10 percent or more of the publicly traded equity securities of the foreign private issuer.

Although a foreign private issuer does not have to file with the SEC a quarterly report on Form 10-Q or current reports on Form 8-K (which mandates prompt disclosure of material events), the foreign private issuer must furnish the SEC with reports on Form 6-K from time to time. Form 6-K is used to report information that is material to an investment decision in the securities of the foreign private issuer, such as press releases issued in its home country, reports furnished to its security holders, and other materials that it publishes in its home country in compliance with home-market custom or legal requirements.

Unlike Forms 10-Q and 8-K, Form 6-K does not require any specific disclosure. Rather, a Form 6-K must be filed by a foreign private issuer whenever (1) it makes or is required to make information public pursuant to the laws of its jurisdiction of domicile or in which it is incorporated; (2) it files or is required to file information with a stock exchange on which its securities are traded and which information was made public by such exchange; or (3) it distributes or is required to distribute such information to its stockholders. A Form 6-K must be filed promptly after the material contained in the report is made public. Not surprisingly, all filings made by a foreign private issuer, including any documents that are in a foreign language,

Foreign private issuers are also exempt from the proxy rules under Section 14 of the Exchange Act. These rules govern the solicitation of proxies from shareholders of the foreign private issuer and, if applicable, would require a foreign private issuer with securities registered pursuant to Section 12 of the Exchange Act to disclose information to its shareholders concerning matters for which proxies are being sought. However, if the foreign private issuer is required to file proxy materials pursuant to its home country's rules and regulations, it may also be required to furnish and distribute the same proxy materials, in English, to its US security holders under cover of Form 6-K.

Moreover, foreign private issuers are exempt from the disclosure requirements of Regulation FD, which is short for 'fair disclosure'. Regulation FD generally requires a company whose securities are registered with the SEC to disclose materially non-public information through public disclosure that is broadly available to all members of the public at the same time. If the company unintentionally discloses material non-public information to persons covered by Regulation FD, such as financial analysts, investment advisors or institutional investment managers, it must promptly make public disclosure of such information. Although foreign private issuers are exempt from the requirements of Regulation FD, a foreign private issuer still needs to avoid selective disclosure, such as



A foreign private issuer still needs to avoid selective disclosure.

tippling off security analysts or selective shareholders, to avoid potential liability that could arise under Rule 10b-5, the SEC's antifraud provision implementing Section 10(b) of the Exchange Act.

Finally, Rule 802 under the Securities Act of 1933 (the 'Securities Act') provides an exemption from the registration requirements of the Securities Act for securities to be issued by a foreign private issuer in connection with certain cross-border mergers, share exchange offers and certain other business combination transactions. However, a key to the ability of a foreign private issuer to rely on the Rule 802 exemption from Securities Act registration is that US holders of the securities to be exchanged for securities of the surviving company must hold no more than 10 percent of the shares of the non-surviving company, or in the case of a three-party merger, no more than 10 percent of the shares of the newly formed company, calculated on a pro forma combined basis and assuming completion of the transaction.

Can an Exempt Foreign Private Issuer Lose its Rule 12g3-2(b) Exemption?

A foreign private issuer exempt pursuant to Rule 12g3-2(b) from registration with the SEC must reassess its exempt status annually on the last business day of its second fiscal quarter. If the company determines that it no longer meets the criteria for the exemption, it must transition to US domestic reporting status and become subject to the SEC reporting requirements applicable to a domestic company beginning on the first day of the company's next fiscal year.

For example, a foreign private issuer that no longer qualifies as such as of the end of its second fiscal quarter in 2014 would file a Form 10-K in 2015 for its 2014 fiscal year. It would also need to begin complying with the proxy rules and Section 16 of the Exchange Act, and become subject to SEC reporting on Forms 8-K and 10-Q on the first day of its 2015 fiscal year.

Will Sales of Securities in the US Result in a Requirement to Register with the SEC or in a Loss of Foreign Private Issuer Exemption Status?

A foreign private issuer may make private or limited offerings of securities in the United States by relying on exemptions from the registration requirements of the Securities Act without losing its status as an exempt foreign private issuer. Among the exemptions from Securities Act registration are those provided by Section 4(a)(2) of the Securities Act and Regulation D and Rule 144A adopted by the SEC under the Securities Act.

A private offering qualifying for the exemption from registration provided by Section 4(a)(2) is an offering of securities to a limited number of financially sophisticated offerees who are given access to information relevant to their investment profile. The securities must be offered in a manner not involving any general advertising or solicitation. A prior relationship of the offeree with the issuer of the securities is also a positive factor. The factors required to establish that a private securities offering qualifies for the Section 4(a)(2) exemption from SEC registration are not stated in Section 4(a)(2) but have been articulated in judicial and regulatory interpretations. An issuer claiming the Section 4(a)(2) exemption has the burden of showing that the exemption is available for the particular securities offering.

Regulation D, a series of SEC Rules numbered 501 to 508 under the Securities Act, provides a 'safe harbour' from

the Securities Act registration requirements, thus giving a foreign private issuer greater certainty that a specific securities offering will be exempt from SEC registration. Effective 23 September 2013, offerings made pursuant to Rule 506(c) of Regulation D may be conducted using general solicitation and advertising, provided that the issuer sells its securities only to 'accredited investors' and takes 'reasonable steps' to verify that all purchasers are accredited investors in connection with the offering. Private offerings in reliance on the safe harbour contained in Rule 506(b) do not require such stringent verification, but may not involve general solicitation or advertising.

Rule 144A provides a nonexclusive safe harbour from the Securities Act registration requirements for certain offers and sales of qualifying securities by certain persons other than the issuer of the securities, but enables an issuer to first sell the newly issued unregistered securities to a broker-dealer in a private placement and then permits the broker-dealer to immediately reoffer and resell the unregistered securities to 'QIBs', or qualified institutional buyers. These are among the largest and most sophisticated investors.

Conclusion

As discussed above, it is possible for a foreign company to access the US capital markets, either by registering and offering its securities publicly in the US, by listing its securities on a US national securities exchange, or by privately selling its securities to QIBs and other sophisticated US accredited investors and limiting much of the regulatory burden imposed on such companies by the Exchange Act and the SEC if the company qualifies as a foreign private issuer and complies with the requirements of the applicable Rules of the SEC, or if the foreign private issuer qualifies for the exemption from SEC registration provided by Rule 12g3-2(b).



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The Trans-Pacific Partnership: Progress, Challenges and a Proposal for ASEAN

Developing countries, and particularly Least Developed Countries ('LDCs'), historically have not been capable of fully informed participation in FTA Negotiations. This article¹ proposes that certain ASEAN/TPP participating countries, such as Malaysia, take a leadership role in approaching ASEAN for assistance in forming a Trade Negotiations Trade Capacity Building Centre.



Overview

After nine years and 20 sets of negotiations, including seven formal Ministerial Rounds beginning in 2010, a political push is underway to finally conclude the Trans-Pacific Partnership ('TPP'), a Regional Free Trade Agreement ('FTA').² Yet, obstacles remain due to seeming intransigence by the Governments of Japan and the United States over, respectively, protection of rice farmers and light truck manufacturers.³ Further, other participating TPP negotiating countries have raised their own concerns, including, among others, Australia and New Zealand seeking greater market access for their dairy products exports and Vietnam's desire for greater market access for its exports of footwear and textiles.⁴

Not only is the negotiating fate of the TPP at risk, but also its country-by-country implementation. In the United States, the US Congress has been described as 'revolt' versus the Obama Administration's push for so-called 'Fast Track' implementing authority.⁵ This would provide that while a draft of implementing legislation would be provided to the relevant Congressional Committees for comment, final legislation would only be subject to an up or down vote by Congress. This is deemed important because no serious negotiating country will be willing to table its 'final offer' if they think the US Congress can then amend the Agreement via legislation to implement the TPP. Furthermore, in the United States, such important members of Congress as Senator Sander Levin and Rep Henry Waxman have expressed concerns over this process.⁶

As will be discussed in the following paragraphs, the TPP is not only procedurally complex, but also substantively complex, covering such issues, among others, as:

- trade in goods;
- rules of origin;
- customs duties;
- 'trade remedies' (import restriction proceedings such as Antidumping investigations);
- trade in services;
- financial services;
- e-commerce;
- telecommunications;
- investment;
- preferential import duty regimes;
- intellectual property;
- labour;
- environment; and

- 'horizontal' issues such as regulatory coherence and business facilitation.⁷

Clearly, the TPP is complicated. Furthermore, dozens of other regional and/or bi-lateral FTAs are currently being negotiated. For example, Malaysia alone is participating in eight such negotiations.⁸

The reason for the proliferation of regional and bi-lateral FTAs is simple – the inability to conclude a multilateral FTA. The last such one was 20 years ago, with the conclusion of the Uruguay Round.⁹ After that, the so-called 'Seattle Round' was stillborn in 1999. Then the so-called Doha Round was launched in 2001 and remains unconcluded and effectively comatose.

The challenges facing the world's trading partners, and especially the LDCs, is that most lack the trade negotiating capacity to fully participate in such negotiations on an informed basis. So this article, after illustratively discussing the justifications for, progress to date on, and remaining challenges for the TPP, concludes with a proposal that ASEAN take the lead in developing a Trade Negotiations Capacity Building Centre, perhaps in conjunction with the Inter-Pacific Bar Association (IPBA), among others.

The Evolution of FTA Negotiations

In the United States, the nadir for open trade occurred when, in 1930, in a demonstration of its capacity for seemingly infinite lack of wisdom, the US Congress passed the so-called Smoot-Hawley Tariff legislation.¹⁰ This legislation created a proverbial anti-import wall of high tariffs that not only dealt a body blow to US participation in international trade, but also exacerbated and accelerated the Great Depression in the United States. World War II changed this without the need for an FTA as Western economies reverted to a war footing and necessarily shipped military equipment and a host of other supplies to both Asia and Europe and, in effect, create a de facto FTA.¹¹

The first truly global FTA was created in 1948 with the establishment of the General Agreement on Tariffs and Trade ('GATT').¹² Largely, the GATT was and is a statement of open trade principals in that it lacked enforcement authority. This has led some pundits to refer to it as the 'General Agreement on Talk and Talk.'¹³

During the 1950s onward, a number of FTAs, such as the so-called Dillon and Kennedy Rounds, were devoted

principally toward lowering import duties globally.¹⁴ Then, in 1980, the Tokyo Round was concluded and it transformed international trade. After implementation in 1981, the import restriction laws, e.g., the antidumping and countervailing duty (anti-subsidy) laws, became 'user friendly.' This led to a proliferation of trade cases. Developing countries were targeted, particularly in import restriction cases brought in the US and in Europe. This led to complaints that these laws themselves constituted trade barriers.¹⁵

The last Multilateral FTA was the Uruguay Round, which concluded in 1994. In a celebrated speech at the World Bank in 1995, Indian Economist Jagdish Bagwati severely criticised the Uruguay Round as providing no benefits for the developing countries except for the agreed phase-out of the Multi-Fibre Agreement of global textile and apparel quotas.¹⁶ Even here, he criticised these provisions as 'back-loaded' with real market liberalisation occurring after 10 years. He criticised the Uruguay Round as being an FTA whose terms were dictated by, and primarily for the benefit of, the rich Developed Nations, such as the US and the European countries.¹⁷

So it should have come as no real surprise that another attempt to commence another Multilateral FTA in Seattle in 1999 was a stillborn fiasco.¹⁸ It was not the presence of 'turtle shelled' environmental activists in the streets of Seattle, as depicted in the film, *Battle in Seattle* that killed the Seattle Round.¹⁹ Rather, it was the incredibly arrogant stand of the developed countries and their industry representatives that the AD and CVD trade remedy laws would not even be on the agenda that led to a developing country revolt led by Brazil and Mexico and quietly backed by India and Japan.

Similarly, the so-called Doha Round, which was launched in 2001,²⁰ has been a failure, surviving like a comatose patient in name only. Predictably, the failure of Multilateral FTA initiatives over the past 20 years has led to a proliferation of Regional and Bilateral FTA negotiations and agreements.²¹ As noted earlier, more than two dozen FTAs are currently under negotiation.²² The dilemma facing Developing Countries, and in particular the LDCs, should be obvious. Namely, countries that cannot afford to develop trade 'cadres' of trade negotiators, such as those within the Office of the US Trade Representative or the European

Commission, must rely on outside companies to help them retain counsel for assistance and advice. But the LDCs are unlikely to have such resources available to them. Of course, some assistance is available, for example, for WTO members in Geneva and for Organization of American States ('OAS') members in Washington, D.C. But it is an expensive proposition to send government officials to partake in such training. In 2004, Claudio Grossman, the (Chilean) Dean of American University's Washington College of Law, launched the first ever Law School Training Program for Trade Negotiators.²³ This was a new "'Major'" in their Masters of Law Program, consisting of six (6) courses which were created by Mr. Aitken. But here too the expense is significant. The international development agencies such as the UNIDO and the World Bank do provide some funds to hire consultants. For example, the State Planning & Development Committee of China retained fifty-three (53) lawyers and consultants (including Mr. Aitken) to assist them in the late 1990s with WTO accession. But typically these contracts and scope of work were limited.

In the last decade, some other programs have begun to emerge to train trade negotiators, including the TPP itself. But there remains a serious trade negotiation capacity gap in the Developing Countries. What follows is a discussion of the history and substance of the TPP by way of illustration of the complexities involved in negotiation just one Regional FTA. This paper article then concludes with a proposal to form a Trade Negotiation Capacity Building Centre, perhaps within ASEAN, and including leadership and development assistance from such TPP members as the Malaysian Ministry of International Trade & Industry, and also such other groups as the inter-Pacific Bar Association (IPBA) and one or more Asian law and/or graduate business schools.

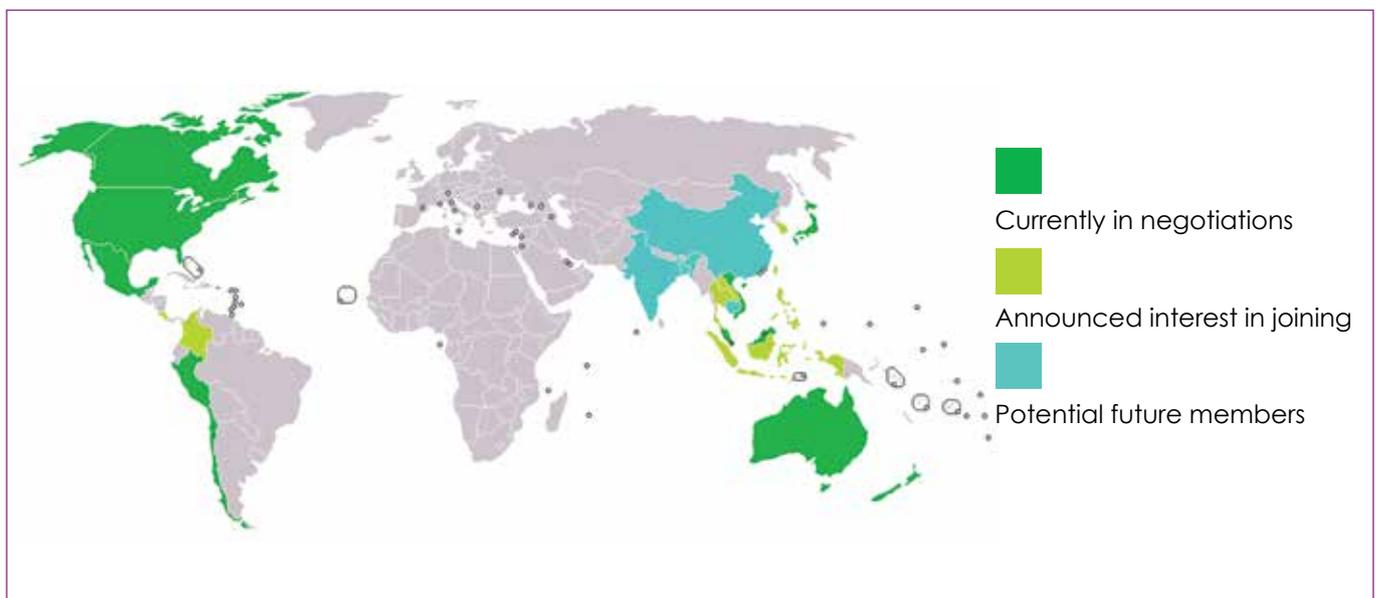
Trans-Pacific Partnership: History, Rationale, Progress, Challenges

1. History

The TPP was launched in July 2005 with a signing of the FTA in Wellington, New Zealand. The initial parties were Brunei, Chile, Singapore and New Zealand. By 2014, the participating countries include the following 12: Australia, Brunei, Chile, Canada, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam. Their accession is charted below:

Country/ Region	Status	Date
 Brunei	Original Signatory	June 2005
 Chile	Original Signatory	June 2005
 New Zealand	Original Signatory	June 2005
 Singapore	Original Signatory	June 2005
 United States	Negotiating	February 2008
 Australia	Negotiating	November 2008
 Peru	Negotiating	November 2008
 Vietnam	Negotiating	November 2008
 Malaysia	Negotiating	October 2010
 Mexico	Negotiating	October 2012
 Canada	Negotiating	October 2012
 Japan	Negotiating	March 2013

Seven other countries have expressed interest in TPP membership, including: Taiwan, the Philippines, Laos, Colombia, Indonesia, Bangladesh and India.²⁴ China has also expressed interest in eventual membership.²⁵ The geographic spread of the TPP is depicted in the chart below:



The TPP is considered to be a stepping stone for a future Free Trade Area of the Asia-Pacific ('FTAAP').²⁶ Despite the ongoing work of twenty (20) Working Groups and predictions for completion in late 2013 and then in 2014, contention remains over the TPP, and at the time of this writing, it still has not been concluded in final form for all its participants.²⁷ As to the disputes between Japan and the United States, their representatives met in bilateral discussion in Washington, DC in October, 2014 and the Government of Japan has stated they have committed to progress.

2. Rationale

As noted earlier, the failure of the attempt to conclude new multilateral FTAs over the past 20 years has led to a proliferation of regional and bi-lateral FTAs.²⁸ This, in turn, has led to greater international economic integration, particularly for trade-reliant countries such as Malaysia. If the TPP is finally concluded and implemented, it will help ensure that TPP member countries are an important part of regional trade and, in turn, make each such member a more attractive international investment, manufacturing and distribution centre.²⁹ Also, if concluded, it will offer increased market access to a single market of nearly 500 million people, given the present participants. And if the TPP leads to a future Free Trade Area of the Asia Pacific (FTAAP), it would lead to increased trade and exports for its members in a market of 2.7 billion people.³⁰ Further, if a TPP including the US is concluded, other TPP members may benefit from an increase in the number of their products afforded preferential import duty treatment.³¹ And TPP members may also benefit from an inflow of foreign investment from countries hoping to gain greater market access to TPP member countries. Additionally, the so-called horizontal issues mentioned above will likely facilitate production and supply chain benefits for TPP members.³²

3. Progress

To date, about one-third of the 29 chapters of the TPP have been finalised, covering such issues as regulatory coherence, competitiveness and business facilitation, temporary entry; competition policy and telecommunication.³³ And despite the continuing optimistic claims of progress after each failed attempt to conclude the TPP, particularly by the United States Trade Representative ('USTR'), the Australian Government, and the Canadian Government,³⁴ in fact major issues remain to be negotiated.³⁵ These include such issues as dispute resolution; comprehensive market access; intellectual property (pharmaceuticals, copyrights, enforcement,

etc.); investment; environment; and labour.³⁶ The most recent Ministerial meeting was held in Ho Chi Minh City in September, 2014 and, while progress was claimed, issues remain. For example, Barbara Weisel, US Chief Negotiator for the TPP claimed 'important progress on state-owned enterprises, Intellectual Property, Investment, Rules of Origin, transparency, anti-corruption and labor.' She also claimed that negotiators 'successfully resolved many issues and narrowed gaps in other areas.' Nonetheless, some issues remain unresolved. As recently as October, 2014, *Forbes* claimed the TPP faces ongoing challenges.

4. Challenges

As discussed above, not only are many issues still to be resolved, but also some issues are quite controversial. For example, a genuine dispute exists over the intellectual property provisions of the TPP, so far as leaked texts can be relied upon.³⁷ For example, certain countries like India have criticized the copyright provisions of the TPP as going beyond those in other FTAs, such as the South Korea-US FTA.³⁸ The concern is that the TPP provisions, if not modified, could make it more difficult to distribute generic drugs in developing countries. Further, environmental groups such as the Sierra Club claim the TPP could lead to environmental problems by giving new rights to corporations.³⁹ Celebrity activists such as Sean Penn, Cher, Woody Harrelson, Susan Sarandon and others have called for the US not to sign the TPP unless and until Japan bans the slaughter of dolphins.⁴⁰ Such issues have led to protests during TPP Negotiating Rounds, such as in March, 2012 in Melbourne, Australia; in December, 2012 in Auckland, New Zealand; and in February 2014 in Kuala Lumpur, Malaysia.⁴¹ Further, three China-led developments in November 2014 have brought pressure for a conclusion to the TPP: (a) the announcement of the conclusion of a China-Australia FTA; (b) the statement by Sun Yuanjiang, Chief Negotiator for China's Ministry of Commerce that negotiations for a tri-lateral China-Japan-Korea FTA is almost at its final stage; and (c) the agreement at the APEC meeting in Beijing by Asia's leaders to study China's proposal for a comprehensive Asia-Pacific FTA. Complementing this is the fact that the overwhelming victory by traditionally pro-trade Republicans in the US Congressional elections may help facilitate the passage of authority to implement a possible TPP.

Leadership Proposal for ASEAN/TPP

Given the complexity and controversy that inevitably accompanies FTA negotiations, this article proposes that certain of the countries participating in the TPP

negotiations, like Malaysia, approach the ASEAN about developing a Trade Negotiations Capacity Building Centre, in conjunction with one or more universities (law and/or business schools), and perhaps also in cooperation with the IPBA, which offered a Panel on FTAs at its 2013 Annual Meeting in Seoul.

ASEAN is a natural choice from which to seek assistance for such an initiative. When Cambodia, Laos, Myanmar and Vietnam joined ASEAN in the late 1990s, the issue of a 'development divide' was raised, given the gap in GDP between the new and older members.⁴² This led to an initiative for ASEAN integration with regional integration as its policy goal. Typically, ASEAN mobilised funding for country specific projects in this initiative, from international financial institutions and developed countries. This is a model worth considering for development of a Trade Negotiations Capacity Development Centre. The members, as depicted below, have a substantial overlap with TPP participating countries.

10 members

- Brunei
- Cambodia
- Indonesia
- Laos
- Malaysia
- Burma (Myanmar)
- Philippines
- Singapore
- Thailand
- Vietnam

2 observers

- Timor-Leste
- Papua New Guinea

As to the TPP itself, despite a reference to capacity building in the leaked negotiating text of the TPP⁴³, it appears that only 'lip service' is given to this important document.⁴⁴ Specifically, the preamble of the leaked text makes reference to this as one of the TPP objectives, which is to 'reduce impediments to trade and investment by promoting deeper economic integration through effective and adequate creation, utilisation, protection and enforcement of intellectual property rights, taking into account the different levels of economic development and capacity as well as differences in national legal

systems.'⁴⁵ Furthermore, despite the fact that the official text remains secret, despite leaks of drafts, it is obvious that the notion of 'capacity building' in the context of the TPP negotiations is aimed at implementation of the agreement, rather than steps to enhance the ability of developing countries to meaningfully participate in these and other FTA negotiations.

Sadly, with such a meaningless nod to capacity building, which is not even defined, it appears that no serious effort will result from the TPP. That is why a Trade Negotiating Capacity Building Centre deserves serious consideration. This is not a new issue. As indicated earlier, the first law school training program for trade negotiators was launched by American University's Washington College of Law in 2004. Later that year, a 2004 Doha Round Background Paper explained the concept generally, as follows:

'Providing Resources for Trade Negotiations Capacity-Building, national-level technical preparedness and the provision of sufficient human and other resources with which to undertake such preparations remains the best guarantee for ensuring that developing countries, individually or as a group, are able to participate fully and effectively in international trade negotiations. Resources, therefore, need to be provided in developing countries to support the development of such a national pool of experts through institutional linkages and training programmes between relevant government agencies, the domestic academe, and the domestic private sector and civil society. Educational or training programmes designed to increase the level of technical knowledge relating to trade and economic law and policy in the country should engage as broad a range of participants from various sectors (including government, academe, and the private sector and civil society) as possible. The financial resources required for such preparations can be sourced internally or externally.'⁴⁶

This is not to suggest that nothing has been done in the past decade to address this important issue. In 2010 for example, the UN Conference on Trade and Development ('UNCTAD') issued a report, which stated, '[t]he capacity-building needs of governments and other stakeholders involved in the formulation of trade policies and negotiating positions in African LDCs are still far from being fully met. The same can be said for local academic institutions, which still need to strengthen their

capacities to be able to act as providers of sustainable trade-related education/training, as well as analytical inputs for policymaking...¹⁴⁷

Furthermore, the UNCTAD report also stated that research capabilities of the stakeholders needed to be built or strengthened, to the extent that corresponded to their specific needs. Such research capabilities are were as follows: (1) Government – so that officials can perform analytical tasks, as well as comprehend and critically assess research supplied by others. (2) Potential suppliers of trade-related research (think tanks, universities, etc.) – so that they can provide locally grounded policy-oriented research as an input to government policymaking, as the scarcity of indigenous high quality research to support negotiating teams has been identified. (3) NGOs and private sector associations – so that they can conduct policy advocacy and help define the national interests in trade negotiations in a competent manner. Moreover, this report concluded:

'Partly due to the lack of internal capacities to generate and disseminate trade-related knowledge, many African LDCs fail to leverage trade for development and poverty reduction. The breadth of the trade and investment development agenda, which touches upon many issues, and the lack of emphasis on an integrated framework for building the essential capacities for trade and investment development, makes responding to pertinent challenges a daunting undertaking...' 'In order to make the results sustainable, Trade-Related Capacity Development that targets educational and training institutions should be at the centre of TRCB initiatives in ... LDCs.'¹⁴⁸

Conclusion

Developing Countries, and particularly LDCs, historically have not been capable of fully informed participation in FTA Negotiations. This came to a head in Seattle 1999 and has led to the slow death of the Doha Round of multilateral trade negotiations. The result has been a proliferation of Regional (like the TPP) and Bi-lateral FTAs. This has served to compound the challenge facing developing countries and the LDCs in particular. Accordingly, this paper article proposes that certain ASEAN/TPP participating countries, such as Malaysia, and perhaps others, take a leadership role in approaching the ASEAN for assistance in forming a Trade Negotiations Trade Capacity Building Centre. This can and should be done in concert with local law and



business schools, as suggested by the UNCTAD. The IPBA may wish to consider forming a task force to investigate this proposal.

Notes:

- 1 Written by Bruce Aitken of Aitken Berlin LLP (see www.AitkenBerlin.com) with grateful acknowledgement for the assistance of Mr Ngosong Fonkem of the Law Faculty of Multimedia University (MMU), Malaysia and the support of Dr Manique AE Cooray, Dean of MMU. This paper is based on a lecture the author gave at MMU on 21 April 2014. Thanks also to former IPBA President Tan Sri Dato' Cecil WM Abraham of Zul Rafique for his comments on the lecture outline in advance of the same.
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- 48 Ibid.



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Bruce Aitken is a lawyer with over 35 years of experience, primarily specialising in arbitration, customs/international trade and government procurement/homeland security. He is the only American to have been named to all of the major international dispute resolution panels, including the US-Canada Free Trade Agreement, the NAFTA, the WTO and the WIPO. In May 2014, Mr. Aitken (including his firm) was named a Super Lawyer in the Washington Post.



Ngosong Fonkem Lawyer/Law Lecturer, Multimedia University Malaysia

Ngosong Fonkem is a US-qualified lawyer currently attached to Multimedia University Malaysia as a law lecturer. He teaches courses in the area of 'International Trade & Shipping Law', 'Law and Economics,' and 'Politics and Governance.' His corporate experience includes seven years as a legal industry practitioner and founder of a management consulting company.

Land (Restrictions on Alienation) Act of Sri Lanka: A Panacea?

The transfer of land in Sri Lanka to foreigners has been prohibited from 2013 pursuant to a policy decision taken by the Government of Sri Lanka. The enabling legislation for such prohibition was enacted only recently. This article examines some of the implications of the implementation of the said policy.

Introduction

After a delay of more than two years, the contentious Land (Restrictions on Alienation) Act No 38 of 2014 ('Land Alienation Act') of Sri Lanka was finally enacted on 29 October 2014 with retrospective effect. One may contend that the enactment of a law to regulate the alienation of land is a commendable effort on the part of the Government considering the limited extent of land available in Sri Lanka, a small island situated in the Indian Ocean. Whilst the said contention cannot be rebutted in its entirety, it is submitted that the implications of enacting a law with retrospective effect, irrespective of the fact that such law seeks to address one of the key problems in the country, cannot be ignored.

The pathway that led to the enactment of the Land Alienation Act started with the Budget 2013 of the Government of Sri Lanka which proposed a landmark change in the national land policy in Sri Lanka. In the pre-Budget 2013 period, there was no prohibition on foreigners owning land in Sri Lanka. Moreover, when there was a transfer of ownership of any property in Sri Lanka to a person who was not a citizen of Sri Lanka, a tax equivalent to the value of such property was charged from the transferee of such property unless such transfer was within a specific exemption contained in the relevant law.¹

The Budget 2013 proposed to prohibit the sale of state land to foreigners and to impose a 100-percent tax on the lease of state land to foreigners.² In the context of a

country where the population is growing at a steady rate while the land available to the population is dwindling, the said policy decision certainly seemed an expedient one. In effect, Sri Lanka is certainly not the first country to impose restrictions on alienation of land to foreigners. Countries such as Singapore and Thailand have also imposed restrictions pertaining to the acquisition of land by foreigners.

Even though the immediate reason for the said proposal is subject to conjecture, the fact that the Government suffered substantial losses from the sale of state land to foreign investors is arguably one of the main reasons for the said proposal.

The policy of the Government as set out in the Budget 2013 was later documented in the form of directions/circulars. The Land Alienation Act, which was enacted recently, was the culmination of the change to the national land policy in Sri Lanka.

This article proposes to analyse the implications of the implementation of the said policy and the Land Alienation Act.

Change in the Documented Policy

The policy proposed by the Government was implemented with effect from 1 January 2013 by way of circulars/directions issued to the Registrar General of Lands.³ However, the policy as documented in the said

circulars/directions was significantly different from the proposed policy. As per the said circulars/directions, the transfer of any land, irrespective of whether it is state owned or privately owned, to a foreign national, a foreign company, or a company incorporated in Sri Lanka of which 50 percent or more of its shareholding is held by foreign nationals or a foreign company was prohibited subject to certain specified exemptions. Along similar lines, the lease of land to the persons mentioned above was permitted subject to the payment of a tax equivalent to 100 percent of the value of the lease on condition that the maximum period of the lease was limited to 99 years except in specified circumstances. Subsequently, the lease of land as aforesaid was permitted subject to the payment of an interim payment of 15 percent of the related value to the Commissioner General of Inland

Revenue, on the basis that the registration of the lease will be confirmed/perfected upon the payment of the amount due as per the proposed law.

Law vs Policy

Inasmuch as the circular/directions were merely documents evidencing the policy of the Government as opposed to actual legislation, the enactment of a law setting out the parameters within which the policy would operate was essential. Nonetheless, in the absence of the actual legislation, the Registrar General of Lands refused to register any transfer of land to foreigners, foreign companies or companies with foreign shareholding as aforesaid and refused to register any lease of land to the said persons unless and until the land lease tax has been paid to the Department of Inland Revenue.



**Budget 2013
proposed a
landmark change
in the national land
policy in Sri Lanka.**

The legislative power of the Parliament of Sri Lanka is enshrined in the Constitution of Sri Lanka.⁴ The Constitution, being the supreme law of Sri Lanka, contains an express prohibition on the abdication and alienation of its legislative power.⁵ Hence, it cannot be contemplated that the circulars/directions, being mere administrative instructions issued by the Ministry of Finance and Planning, amounted to law for the reason that such conception would necessarily have the connotation of Parliament abdicating or alienating its powers.

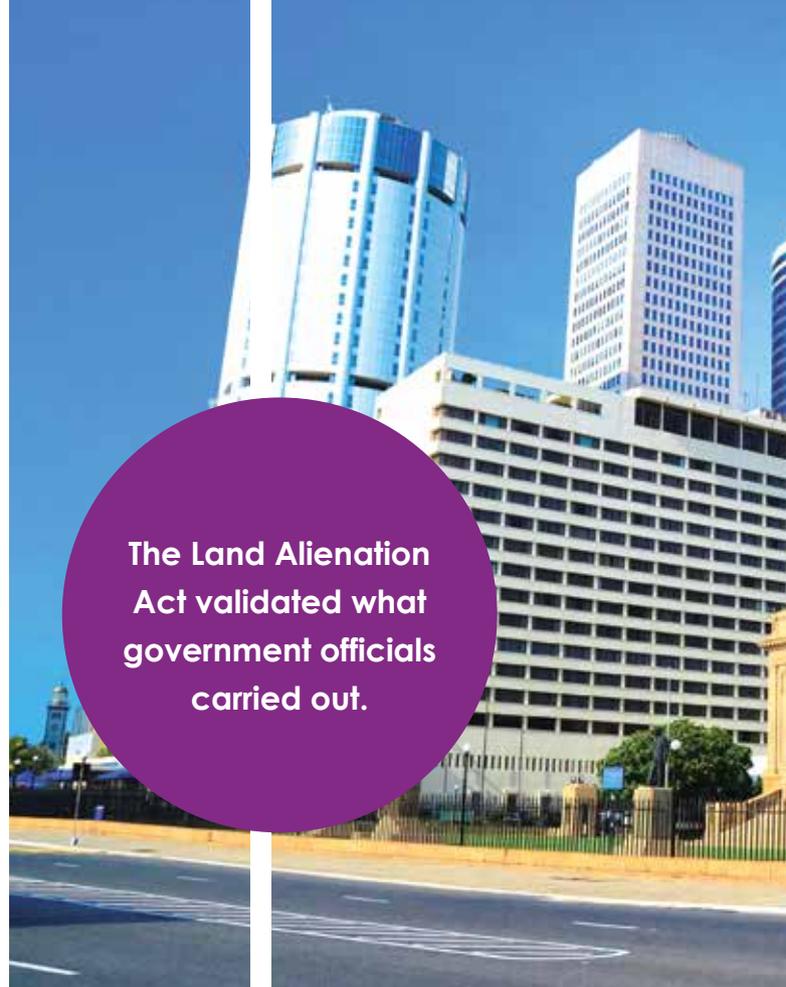
The counter argument in support of the practice adopted by the Government to give effect to administrative instructions in abeyance of the Finance Act No 1 of 1963 which permitted the transfer of land to foreigners and foreign companies subject to the payment of tax, is the fact that such acts of the Government were carried out in anticipation of the empowering legislation (i.e., the Land Alienation Act) which in fact validated such acts by virtue of having a retrospective effect.

It may be noted that the imposition of taxes in the absence of legislation and the subsequent validation through the empowering legislation is a disturbing tendency that has prevailed in Sri Lanka in recent times.⁶ The imposition of an absolute prohibition in addition to the imposition of a tax using the same methodology established a new trend in the legal system of Sri Lanka.

The Land Alienation Act

Whilst the enactment of the Land Alienation Act took a longer time than anticipated, when enacted it validated the acts of the government officials carried out pursuant to the circulars/directions as anticipated. The provisions of the Land Alienation Act are deemed to have come into operation with effect from 1 January 2013.⁷

In consonance with the circulars/directions, the Land Alienation Act contains provisions that the transfer of title to any land situated in Sri Lanka to a foreigner, to a company incorporated in Sri Lanka where any foreign shareholding in such company, either direct or indirect, is 50 percent or above or to a foreign company is prohibited.⁸ The term 'transfer' is defined in the Land Alienation Act as 'any sale, donation, gift or any conveyance by or under which the title of a land passes to another person'.⁹ The aforesaid prohibition does not apply inter alia to the following transfers of title:



The Land Alienation Act validated what government officials carried out.

- (a) A condominium parcel situated on or above the fourth floor of a building, excluding the ground level floor and floors which accommodates only common element or elements provided that, the entire value is paid up front through an inward foreign remittance prior to the execution of the relevant deed of transfer.¹⁰
- (b) Any land the title of which is transferred by intestacy, gift or testamentary disposition to a next of kin (who is a foreigner) of the owner of such land, in accordance with the applicable law of succession of Sri Lanka.¹¹
- (c) Transfer of title for a Strategic Development Project under the Strategic Development Projects Act No 14 of 2008.¹²
- (d) Transfer of title to a foreign company engaged in international commercial operations, for the purpose of locating or relocating its global or regional operations or to set up a branch office.¹³

The Land Alienation Act also contains the peculiar provision that for the purpose of maintaining the



legal validity of a transfer of land to a company incorporated in Sri Lanka, with less than 50 percent of foreign shareholding, the foreign shareholding of such company has to remain less than 50 percent for a minimum of consecutive period of 20 years from the date of the transfer.¹⁴ The inability to maintain the foreign shareholding as aforesaid renders the transfer of land void and of no effect in law from the date of increase of the foreign shareholding.¹⁵ In the event that the relevant company succeeds in restoring the foreign shareholding to less than 50 percent within the specified period,¹⁶ the transfer of land referred to above will be deemed to be legally valid with effect from the date of restoring the foreign shareholding as aforesaid.

As regards the imposition of a tax on lease of lands, the Land Alienation Act contains the provisions that the lease of land to a foreigner, to a company incorporated in Sri Lanka where any foreign shareholding in such company, either direct or indirect, is 50 percent or above or to a foreign company, for a period not exceeding 99 years is permitted, subject to the payment of a tax equivalent to 15 percent of the total rental payable for the entire duration of the lease.¹⁷

The rate of such tax is charged at the reduced rate of 7.5 percent of the total rental payable for the entire duration of the lease in certain specified circumstances including inter alia the following:

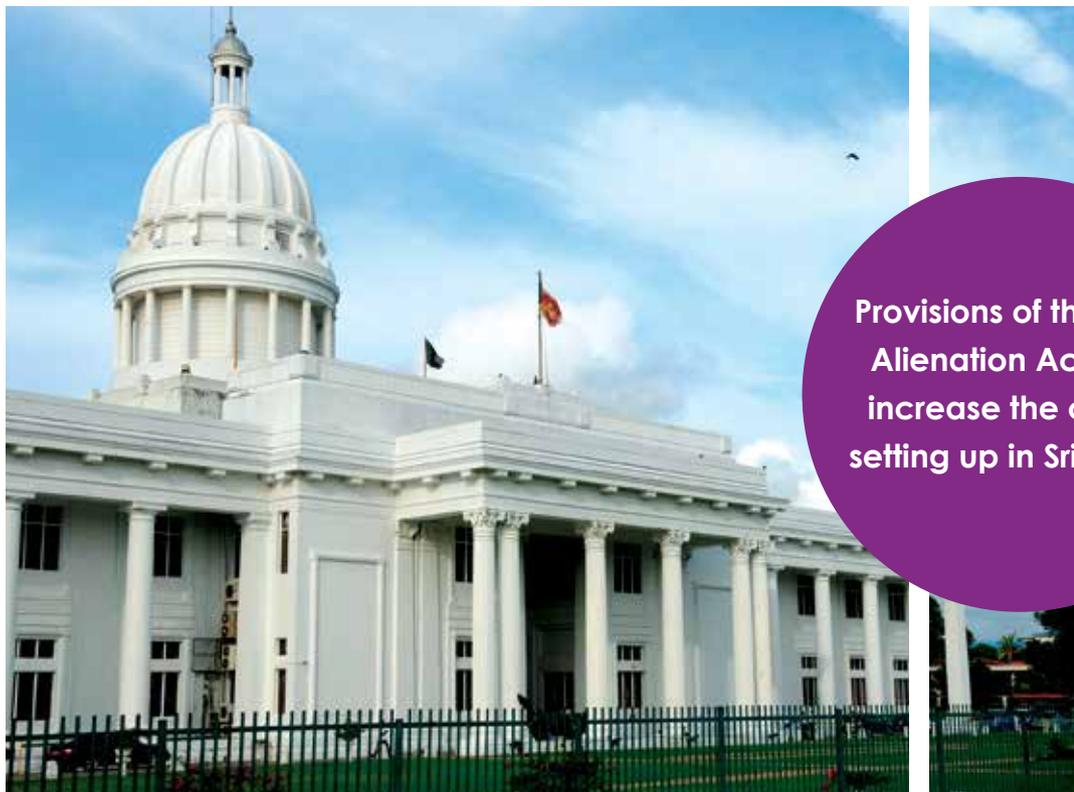
- (a) Lease of land to a company incorporated in Sri Lanka, where any foreign shareholding in such company is 50 percent or above, provided that such company has been actively operating in Sri Lanka for a consecutive period of not less than ten years, immediately prior to the date of the lease.¹⁸
- (b) Lease of land to a subsidiary of a holding company incorporated in Sri Lanka, where the shareholding of the holding company in such subsidiary is 50 percent or above and any foreign shareholding in the holding company is 50 percent or above and the holding company has been operating in Sri Lanka for a consecutive period of not less than ten years, immediately prior to the date of the lease.

Where the shareholding of the holding company in such subsidiary becomes less than 50 percent, the lease will be liable for 15 percent tax, with effect from the date of reduction of the shareholding on the total rental payable for the balance period of the lease.¹⁹

- (c) A condominium parcel situated on or above the fourth floor of a building, where the period of lease is less than 35 years²⁰ or a condominium parcel situated below the fourth floor of a building, where the period of lease is not more than 99 years.²¹

The following leases are exempt from the payment of the said tax:

- (a) A condominium parcel situated on or above the fourth floor of a building (excluding the ground level floor and floors which accommodate any common element or elements) where the period of lease is 35 years or above and the lease rental for the full period of lease is paid through inward remittance of foreign currency on or prior to the date of the execution of the relevant lease.²²
- (b) Lease of land for a project identified as a Strategic Development Project under the Strategic Development Projects Act No 14 of 2008.²³



Provisions of the Land Alienation Act may increase the cost of setting up in Sri Lanka.

(c) Lease of land by a foreign company engaged in international commercial operations, for the purpose of locating or relocating its global or regional operations or to set up a branch office.²⁴

The Land Alienation Act contains the express provision that any alienation of land, i.e., transfer, lease or mortgage of lands in contravention of the said Act will be void and shall have no effect in law.

Implications

Any foreigner seeking to make investments in the real estate market in Sri Lanka, either directly or through a company incorporated in Sri Lanka, is required to legally structure his investment in a manner that does not violate the provisions of the Land Alienation Act, unless a specific exemption is available for such investment, particularly in view of the blanket prohibition on acquisition of title and the inflation of the price of land as a consequence of the additional tax payable.

Even if the investment sought to be made by such investor is not in the real estate market, it is likely that the provisions of the Land Alienation Act may increase the cost of setting up in Sri Lanka which would eventually result in increasing the cost of investment. Whilst the

argument that such increase in cost will be negligible compared to the quantum of the investment has merit, the cumulative effect of such increase in investment costs consequent to the Land Alienation Act and the other costs to be incurred by such investor such as taxes etc. may have a substantial impact on an investor. All in all, it is crucial for a foreign investor to assess the risks and take all necessary precautions to avoid such risks prior to making an investment.

In this respect, it must be noted that the Land Alienation Act does not have the flexibility to provide exemptions depending on the policy of the government and the needs of the country from time to time, which may not fall within the purview of a Strategic Development Project but nevertheless be of value to the country. Further, considering that the acquisition of land as well as the continuous capital inflow are crucial factors for the expansion of companies, the requirement to maintain the foreign shareholding of a company for 20 years from the date of acquisition of a land will have an adverse effect on such companies. Given that a company may acquire lands regularly, the maintenance of the foreign shareholding for a period of 20 years from each such acquisition will be cumbersome. This will limit the investment opportunities in such companies to local investors and may result in unavailability of funds

for expansion. Further, the said requirement will create uncertainty regarding the value of companies listed in the Colombo Stock Exchange and will also impede the growth of the Colombo Stock Exchange itself.

The consequences that arise from a nullity of title to land will also have a serious impact on business. If the parties are to revert to their original positions (i.e., prior to the impugned transfer), questions arise relating to transfer of possession, return of transfer price, improvements made to the land, implications persons deriving 'title' from the transferee, i.e., subsequent purchasers, lessees, mortgagees etc. Whilst the legal rights and obligations of parties may be ascertained, it is likely that a nullity will lead to uncertainty that can be clarified definitely only by a court of law.

Conclusion

It has been accepted time and time again that Sri Lanka requires foreign direct investment to facilitate its targeted economic growth. For this purpose, the foreign exchange regulations have also been relaxed from time to time. In such circumstances, the enactment of the Land Acquisition Act was the antithesis to the facilitation of foreign investment. However, it must also be noted that the necessity to utilise the limited extent of land sparingly is as important as the encouragement of foreign investment. Whilst the Land Alienation Act has certain inherent problems, the salutary nature of the policy entrenched in it has to be acknowledged.

Notes:

- 1 Finance Act No 11 of 1963.
- 2 Budget Speech 2013 <http://www.treasury.gov.lk/depts/fpd/budgetspeech/2013/budgetSpeech2013-eng.pdf> accessed 16th November 2014.
- 3 Registrar General's Department, [Implementation of Budget Proposals 2013 Tax charged on the purchase of properties by foreigners] (Circular No 12/2012, 31.12.2012), Letter from KMM Siriwardana, Director General Ministry of Finance and Planning to the Registrar General, [Implementation of 2013 Budget Proposals- Revision of 100% Tax on Transfer of Property and Prohibition of Outright Transfer of Property to Foreigners] (FP/06/23/01/02(j), 27 March 2013), Letter from KMM Siriwardana, Director General Ministry of Finance and Planning to the Registrar General, [Implementation of 2013 Budget Proposals – Revision of 100% Tax on Transfer of Property and Prohibition of Outright Transfer of Property to Foreigners] (FP/06/23/01/03(j), 21 May 2013).
- 4 Article 75.
- 5 Article 76.
- 6 'A practical manifestation of this situation was observed when Parliament was dissolved in 2004 prior to certain fiscal statutes being certified by the Honourable Speaker of Parliament in the manner prescribed by Article 79 of the Constitution read with Standing Order 69 of the Standing Orders of Parliament. The resulting position was that Value Added Taxes continued to be levied at the rate of 15% and goods and services that were previously not taxed were subject

to Value Added Tax without empowering legislation from January until November 2004. This change in the tax regime had been in operation for a period of almost eleven months without legislative sanction.' Shivaji Felix, 'Taxation in the Absence of Legislation and Retroactive Validation a Matter for Grave Concern', <http://www.lawnet.lk/docs/articles/sri_lankan/HTML/CV43.html> accessed 17 November 2014.

- 7 Section 1(2).
- 8 Section 2(1).
- 9 Section 25.
- 10 Section 3(1)(b).
- 11 Section 3(1)(d).
- 12 Section 3(2).
 - A strategic Development Project means a project which is in the national interest and which is likely to bring economic and social benefit to the country and which is also likely to change the landscape of the country, primarily through:
 - a. the strategic importance attached to the proposed provision of goods and services, which will be of benefit to the public;
 - b. the substantial inflow of foreign exchange to the country;
 - c. the substantial employment which will be generated and the enhancement of the income earning opportunities; and
 - d. the envisaged transformation in terms of technology.
 The availability of this exemption is subject to the determination of the Minister in charge of the subject of Finance in consultation with the Minister in charge of the subject of land, with the prior approval of the Cabinet of Ministers and only available for specified areas of business.
- 13 Section 3(3).
 - The availability of this exemption is subject to the determination of the Minister in charge of the subject of Finance in consultation with the Minister in charge of the subject of land, with the prior approval of the Cabinet of Ministers and only available for specified areas of business.
- 14 Section 2(2)(a).
- 15 Section 2(2)(b).
- 16 For a company listed in the Colombo Stock Exchange, the specified period is 12 months from the date of increase of its shareholding. For any other company, the specified period is six months from the date of increase of its foreign shareholding.
- 17 Section 5(1).
- 18 Section 6(3)(a).
- 19 Section 6(3)(b).
- 20 Section 6(3)(c).
- 21 Section 6(3)(d).
- 22 Section 7(1)(b).
- 23 Section 7(2).
 - The availability of this exemption is subject to the determination of the Minister in charge of the subject of Finance in consultation with the Minister in charge of the subject of land, with the prior approval of the Cabinet of Ministers and only available for specified areas of business.
- 24 Section 7(3).
- 25 The views expressed in this article are those of the author and do not represent the views of F.J. & G. de Saram, Attorneys-at-Law.



Pavithra Navarathne-Rupasinha

Associate, F.J. & G. de Saram,
Attorneys-at-Law, Sri Lanka²⁵

Pavithra Navarathne-Rupasinha practises in the area of corporate and commercial law with a focus on taxation, acquisitions, investment, banking and employment law.

IPBA New Members

September 2014 – November 2014

We are pleased to introduce our new IPBA members who joined our association from September - November 2014. Please welcome them to our organisation and kindly introduce yourself at the next IPBA conference.

Australia , Annette Hughes <i>Corrs Chambers Westgarth</i>	India , Ratan K Singh <i>Chambers of Ratan K Singh</i>
Australia , Robert Newlinds SC <i>Banco Chambers</i>	Japan , Masao Dan <i>Shiroyama Sogo LPC</i>
Australia , Mel Andrew Schwing	Japan , Yasuhiro Kasahara <i>Nagashima Ohno & Tsunematsu</i>
Brazil , Carla Junqueira <i>BKBG</i>	Japan , Yoko Maeda <i>Nishimura & Asahi</i>
China , Jun (Heather) Han <i>V&T Law Firm</i>	Japan , Norio Nakamura <i>Yoshida & Partners</i>
China , Haixia (Jessica) Jia <i>ETR Law Firm</i>	Japan , Masato Shibata <i>Legal Profession Corporation CAST</i>
China , K Lesli Ligorner <i>Simmons & Simmons LLP</i>	Japan , Kanta Suzuki <i>Legal Profession Corporation CAST</i>
Costa Rica , Rolando Lacle Zuñiga <i>Consortium Centro América Abogados</i>	Korea , Hyo Jung Pang <i>Law Firm Daewon</i>
France , Benjamin Cohu <i>HMB Associés</i>	Malaysia , Celine Jeevamalar Chelladurai <i>Zaid Ibrahim & Co</i>
France , Benedicte Deleporte <i>Deleporte Wentz Avocat</i>	Malaysia , Kherk Ying Chew <i>Wong & Partners</i>
Germany , Till Liebau <i>CMS Hasche Sigle</i>	Malaysia , Kok Seng Chong <i>Raja, Darryl & Loh</i>
Germany , Stephanie Lumpf <i>Gleiss Lutz</i>	Malaysia , How Kun, Kenny Poon <i>Jeff Leong, Poon & Wong</i>
Hong Kong , Albert T. da Rosa, Jr. <i>Cheung Tong & Rosa Solicitors</i>	Malaysia , Saravana Kumar Segaran <i>Lee Hishammuddin Allen & Gledhill</i>
Hong Kong , Greg Knowles <i>Maples and Calder</i>	Malaysia , Raphael Choon Tien Tay <i>Chooi & Company</i>

Malaysia , Christopher Lee Sian Teik <i>Christopher & Lee Ong</i>	United Kingdom , Anneliese Day <i>4 New Square Ltd</i>
Mexico , Vidaur Mora <i>Rivadeneira, Treviño y de Campo S.C.</i>	United Kingdom , Justin Fenwick <i>4 New Square Ltd</i>
New Zealand , Peter Tritt <i>The College of Law Australia and New Zealand</i>	United Kingdom , Arfan Khan <i>Arfan</i>
Pakistan , Yasir Alibhai <i>Vellani & Vellani</i>	United Kingdom , Thomas Lowe <i>Wilberforce Chambers</i>
Pakistan , Maira Khamisani <i>Vellani & Vellani</i>	United Kingdom , Duncan McCombe <i>Maitland Chambers</i>
Pakistan , Sanaya Farokh Vachha <i>Vellani & Vellani</i>	United Kingdom , Graeme McPherson <i>4 New Square Ltd</i>
Singapore , Ming Kwang Kelly Yap <i>Oon & Bazul LLP</i>	United Kingdom , Sian Mirchandani <i>4 New Square Ltd</i>
Singapore , Seok Hui Lim <i>Singapore International Arbitration Centre</i>	United Kingdom , Nigel Peter Pleming <i>39 Essex Street Chambers</i>
Singapore , Ai Leen Tan <i>Singapore International Arbitration Centre</i>	United Kingdom , Roger Stewart <i>4 New Square Ltd</i>
Sri Lanka , Joseph Theoga Rushan Fernandopulle <i>Private Practitioner</i>	United Kingdom , Can Yeginsu <i>4 New Square Ltd</i>
Sri Lanka , Sankha Karunaratne <i>F.J. & G. de Saram</i>	Vietnam , Truong An Duong <i>Vietnam Brewery Ltd.</i>
Sri Lanka , Pavithra Navarathne-Rupasinha <i>F.J. & G. de Saram</i>	Vietnam , Tram Anh Ho Vu <i>Vietnam Brewery Ltd.</i>
Switzerland , David Hadad <i>Walder Wyss Ltd.</i>	Vietnam , Ding Thi Kieu Tien <i>Vietnam Brewery Ltd.</i>
Switzerland , Sarah Schulthess <i>Walder Wyss Ltd.</i>	Vietnam , Dung Ngo Thi <i>Vietnam Brewery Ltd.</i>
Thailand , Patthanawach Nuntawowart <i>Chandler & Thong-ek Law Offices Ltd.</i>	Vietnam , Soon Tat Benjamin Yap <i>PBC Partners & RHTLaw</i>
Thailand , Somchai Yungkarn <i>Chandler & Thong-ek Law Offices Ltd.</i>	USA , Sean Hanagan <i>Jackson Lewis P.C.</i>
Thailand , Sumit Masrungson <i>Chandler & Thong-ek Law Offices Ltd.</i>	USA , Shirley Lou-Magnuson <i>Carlsmith Ball LLP</i>
United Kingdom , Stephen Barnett Brown <i>4-5 Gray's Inn</i>	USA , Robert Stemler <i>Keesal, Young & Logan</i>
United Kingdom , Lucy Colter <i>4 New Square Ltd</i>	

Discover Some of Our New Officers and Council Members



Nimal Weeraratne

IPBA Leadership Position:
Regional Coordinator
Sri Lanka & Bangladesh

What was your motivation to become a lawyer?

The freedom and access a lawyer has in engaging and dealing with people and society influenced me to take up a career as a lawyer. I believed that a lawyer could put to good use his time and resources in a flexible manner. The socio-political environment that prevailed in Sri Lanka at the time and the challenging atmosphere further propelled me to take up studies to become a lawyer.

What are the most memorable experiences you have had thus far as a lawyer?

The most memorable one comes from the early years in my practice when a leading international construction company, which was awarded the construction of one of the most iconic building complexes in my country, offered

me the opportunity to provide professional services. It was a challenging and exciting experience in the early years of my career.

What are your interests and/or hobbies?

I enjoy golfing and good movies, keenly follow local and international politics and sporting events.

Share with us something that IPBA members would be surprised to know about you.

I had a dream to be a popular politician based on my thinking that they served society.

Do you have any special messages for IPBA members?

IPBA is not too big but unique in many aspects. The IPBA Annual Meeting & Conference offers a distinct opportunity to interact with likeminded professionals from many jurisdictions. The programmes with intellectually stimulating content provide members absolute value and the social programmes reflect the lighter and fun side of the proceedings which encourage fellowship. The journal is a good read to update on the happenings in other jurisdictions. Sri Lanka previously had Jurisdictional Status and our task now is to regain it and move forward with the IPBA.



Kapil Kirpalani

IPBA Leadership Position:
Chair, Corporate Counsel Committee

What was your motivation to become a lawyer?

None! I actually planned to go into politics and the study of law was a solid foundation for that career track.

What are the most memorable experiences you have had thus far as a lawyer?

Working through the global financial crisis – it was an incredible and unmatched learning experience.

What are your interests and/or hobbies?

Cross country, trail and marathon running.

Share with us something that IPBA members would be surprised to know about you.

I have always wanted to be a doctor.

Do you have any special messages for IPBA members?

Step out of your comfort zone and do something new every season and always give back to the community and those closest to you.



Jan Peeters

IPBA Leadership Position:
Chair, Banking, Finance & Securities
Committee

What was your motivation to become a lawyer?

Undergoing Latin and mathematics training at high school, the normal choice would have been to either become an engineer or a doctor. Having had enough of mathematics, engineering was not an option and, not being able to 'see blood', nor was medical school — law became almost a choice by default. Having said that, when taking the decision I was convinced that it was something that would be natural for me and I have indeed enjoyed every minute of it up to now.

What are the most memorable experiences you have had thus far as a lawyer?

Being a lawyer in Belgium, the first European Union country to be facing the risk of a collapse of its banking system, having had the privilege to work on two bank

rescues in close cooperation and as advisor to ministers and regulators and experience and appreciate how politicians (helped by lawyers) have had the courage and vision to keep the system afloat, including protecting individual depositors.

What are your interests and/or hobbies?

I appreciate good food accompanied by excellent wines, preferably red Bordeaux.

Share with us something that IPBA members would be surprised to know about you.

While being a law student, I also qualified as a (the youngest ever) tour guide of the City of Antwerp in Belgium. Happy to host you whenever you are in my hometown.

Do you have any special messages for IPBA members?

The IPBA is composed of a unique group of lawyers who manage to combine both their professional interests with 'camaraderie'. I have now been attending the annual conference since the 2007 Beijing one and have been impressed at how it allows one to appreciate the openness and personal friendship of its members, which is the basis for any professional relationship.



Members' Notes

Stephan Wilske, Germany

Stephan Wilske's most recent publications:

- What's New In European Arbitration? (with Isabelle Michou, Todd J Fox and Gerold Zeiler), *Dispute Resolution Journal*, Vol 69 No 2, pp 99-105.
- What's New In European Arbitration? (with Isabelle Michou), *Dispute Resolution Journal*, Vol 69 No 3, pp 117-125.
- Dissenting Opinion on Dissenting Opinions in International Arbitration, *Contribution to Liber Amicorum in Honor of Rolf A Schütze* (2014).

In addition, he successfully advanced to Fellow of the Chartered Institute of Arbitrators on 26 September 2014.

Publications Committee Guidelines for Publication of Articles in the IPBA Journal

Please note that the IPBA Publication Committee has moved away from a theme-based publication. Hence, for the next issues, we are pleased to accept articles on interesting legal topics and new legal developments that are happening in your jurisdiction. Please send your article to both **Maxine Chiang** at maxinechiang@chianglee.com and **Leonard Yeoh** at leonard.yeoh@taypartners.com.my. We would be grateful if you could also send (1) a lead paragraph of approximately 50 or 60 words, giving a brief introduction to, or an overview of the article's main theme, (2) a photo with the following specifications (File Format: JPG or TIFF, Resolution: 300dpi and Dimensions: 4cm(w) x 5cm(h)), and (3) your biography of approximately 30 to 50 words together with your article.

The requirements for publication of an article in the *IPBA Journal* are as follows:

1. The article has not been previously published in any journal or publication;
2. The article is of good quality both in terms of technical input and topical interest for IPBA members;
3. The article is not written to publicise the expertise, specialization, or network offices of the writer or the firm at which the writer is based;
4. The article is concise (2500 to 3000 words) and, in any event, does not exceed 3000 words; and
5. The article must be written in English, and the author must ensure that it meets international business standards.
6. The article is written by an IPBA member. Co-authors must also be IPBA members.



An Invitation to Join the Inter-Pacific Bar Association

The Inter-Pacific Bar Association (IPBA) is an international association of business and commercial lawyers who reside or have an interest in the Asian and Pacific region. The IPBA has its roots in the region, having been established in April 1991 at an organising conference in Tokyo attended by more than 500 lawyers from throughout Asia and the Pacific. Since then it has grown to over 1400 members from 65 jurisdictions, and it is now the pre-eminent organisation in the region for business and commercial lawyers.

The growth of the IPBA has been spurred by the tremendous growth of the Asian economies. As companies throughout the region become part of the global economy they require additional assistance from lawyers in their home country and from lawyers throughout the region. One goal of the IPBA is to help lawyers stay abreast of developments that affect their clients. Another is to provide an opportunity for business and commercial lawyers throughout the region to network with other lawyers of similar interests and fields of practice.

Supported by major bar associations, law societies and other organisations throughout Asia and the Pacific, the IPBA is playing a significant role in fostering ties among members of the legal profession with an interest in the region.

IPBA Activities

The breadth of the IPBA's activities is demonstrated by the number of specialist committees. All of these committees are active and have not only the chairs named, but also a significant number of vice-chairs to assist in the planning and implementation of the various committee activities. The highlight of the year for the IPBA is its annual multi-topic four-day conference, usually held in the first week of May each year. Previous annual conferences have been held in Tokyo (twice), Sydney (twice), Taipei, Singapore (twice), San Francisco, Manila, Kuala Lumpur, Auckland, Bangkok, Vancouver, Hong Kong, New Delhi, Seoul, Bali and Beijing attracting as many as 1000 lawyers plus accompanying guests.

The IPBA has organised regional conferences and seminars on subjects such as Practical Aspects of Intellectual Property Protection in Asia (in five cities in Europe and North America respectively) and Asian Infrastructure Development and Finance (in Singapore). The IPBA has also cooperated with other legal organisations in presenting conferences – for example, on Trading in Securities on the Internet, held jointly with the Capital Market Forum.

IPBA members also receive our quarterly IPBA Journal, with the opportunity to write articles for publication. In addition, access to the online membership directory ensures that you can search for and stay connected with other IPBA members throughout the world.

APEC

APEC and the IPBA are joining forces in a collaborative effort to enhance the development of international trade and investments through more open and efficient legal services and cross-border practices in the Asia-Pacific Region. Joint programmes, introduction of conference speakers, and IPBA member lawyer contact information promoted to APEC are just some of the planned mutual benefits.

Membership

Membership in the Association is open to all qualified lawyers who are in good standing and who live in, or who are interested in, the Asia-Pacific region.

- | | |
|--|---------|
| • Standard Membership | ¥23,000 |
| • Three-Year Term Membership | ¥63,000 |
| • Corporate Counsel | ¥11,800 |
| • Young Lawyers (35 years old and under) | ¥6000 |

Annual dues cover the period of one calendar year starting from January 1 and ending on December 31. Those who join the Association before 31 August will be registered as a member for the current year. Those who join the Association after 1 September will be registered as a member for the rest of the current year and for the following year.

Membership renewals will be accepted until 31 March.

Selection of membership category is entirely up to each individual. If the membership category is not specified in the registration form, standard annual dues will be charged by the Secretariat.

There will be no refund of dues for cancellation of all membership categories during the effective term, nor will other persons be allowed to take over the membership for the remaining period.

Corporate Associate

Any corporation may become a Corporate Associate of the IPBA by submitting an application form accompanied by payment of the annual subscription of (¥50,000) for the current year.

The name of the Corporate Associate shall be listed in the membership directory.

A Corporate Associate may designate one employee ('Associate Member'), who may take part in any Annual Conference, committee or other programmes with the same rights and privileges as a Member, except that the Associate Member has no voting rights at Annual or Special Meetings, and may not assume the position of Council Member or Chairperson of a Committee.

A Corporate Associate may have any number of its employees attend any activities of the Association at the member rates.

- Annual Dues for Corporate Associates ¥50,000

Payment of Dues

The following restrictions shall apply to payments. Your cooperation is appreciated in meeting the following conditions.

1. Payment by credit card and bank wire transfer are accepted.
2. Please make sure that related bank charges are paid by the remitter, in addition to the dues.

IPBA Secretariat

Roppongi Hills North Tower 7F, 6-2-31 Roppongi, Minato-ku, Tokyo 106-0032, Japan
Tel: 81-3-5786-6796 Fax: 81-3-5786-6778 E-Mail: ipba@ipba.org Website: ipba.org

See overleaf for membership
registration form





IPBA SECRETARIAT

Roppongi Hills North Tower 7F, 6-2-31 Roppongi, Minato-ku, Tokyo 106-0032, Japan
Tel: +81-3-5786-6796 Fax: +81-3-5786-6778 Email: ipba@ipba.org Website: www.ipba.org

IPBA MEMBERSHIP REGISTRATION FORM

MEMBERSHIP CATEGORY AND ANNUAL DUES:

- Standard Membership ¥23,000
- Three-Year Term Membership ¥63,000
- Corporate Counsel ¥11,800
- Young Lawyers (35 years old and under) ¥6,000

Name: _____ Last Name _____ First Name / Middle Name _____

Date of Birth: year _____ month _____ date _____ Gender: M / F

Firm Name: _____

Jurisdiction: _____

Correspondence Address: _____

Telephone: _____ Facsimile: _____

Email: _____

CHOICE OF COMMITTEES (PLEASE CHOOSE UP TO THREE):

- | | |
|---|--|
| <input type="checkbox"/> Anti-Corruption and the Rule of Law (Ad Hoc) | <input type="checkbox"/> Insurance |
| <input type="checkbox"/> APEC (Ad Hoc) | <input type="checkbox"/> Intellectual Property |
| <input type="checkbox"/> Aviation Law | <input type="checkbox"/> International Construction Projects |
| <input type="checkbox"/> Banking, Finance and Securities | <input type="checkbox"/> International Trade |
| <input type="checkbox"/> Competition Law | <input type="checkbox"/> Legal Development and Training |
| <input type="checkbox"/> Corporate Counsel | <input type="checkbox"/> Legal Practice |
| <input type="checkbox"/> Cross-Border Investment | <input type="checkbox"/> Maritime Law |
| <input type="checkbox"/> Dispute Resolution and Arbitration | <input type="checkbox"/> Scholarship |
| <input type="checkbox"/> Employment and Immigration Law | <input type="checkbox"/> Tax Law |
| <input type="checkbox"/> Energy and Natural Resources | <input type="checkbox"/> Technology and Communications |
| <input type="checkbox"/> Environmental Law | <input type="checkbox"/> Women Business Lawyers |
| <input type="checkbox"/> Insolvency | |

I AGREE TO SHOWING MY CONTACT INFORMATION TO INTERESTED PARTIES THROUGH THE APEC WEB SITE. YES NO

METHOD OF PAYMENT (PLEASE READ EACH NOTE CAREFULLY AND CHOOSE ONE OF THE FOLLOWING METHODS):

- Credit Card
- VISA MasterCard AMEX (Verification Code: _____)
- Card Number: _____ Expiration Date: _____

- Bank Wire Transfer – Bank charges of any kind should be paid by the sender.
- to The Bank of Yokohama, Shinbashi Branch (SWIFT Code: HAMAJPJT)
A/C No. 1018885 (ordinary account) Account Name: Inter-Pacific Bar Association (IPBA)
Bank Address: Nihon Seimei Shinbashi Bldg 6F, 1-18-16 Shinbashi, Minato-ku, Tokyo 105-0004, Japan

Signature: _____ Date: _____

PLEASE RETURN THIS FORM TO:

The IPBA Secretariat, Inter-Pacific Bar Association
Roppongi Hills North Tower 7F, 6-2-31 Roppongi, Minato-ku, Tokyo 106-0032, Japan
Tel: +81-3-5786-6796 Fax: +81-3-5786-6778 Email: ipba@ipba.org



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See you at the Inter-Pacific Bar Association's 25th Annual Meeting and Conference in May 2015.



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VITAL SUPPORT FOR CRITICAL INFORMATION



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