International Law and Litigation for U.S. Judges

Sunday, November 12 – Tuesday, November 14, 2006
Thurgood Marshall Federal Judiciary Building, Washington, D.C.

Federal Judicial Center
American Society of International Law

Overview

International law and transnational legal issues are appearing with increasing frequency in the U.S. courts, raising complex and diverse questions of law and procedure: Do international conventions create justiciable rights? Should a U.S. proceeding be stayed pending resolution of a parallel court action abroad? Must a foreign judgment be enforced if U.S. constitutional issues are implicated? The legal issues raised by these questions illustrate not only the growing importance of familiarity with international law norms, instruments, and tribunals, but also the complexity of adjudicating disputes in a transnational context.

This conference will address these issues from the perspective of the judiciary, examining the ways in which international law sources and transnational procedures pose unfamiliar methodological and interpretative challenges. In addition to providing an overview of international law principles, treaty law, and transnational litigation, this program will include opportunities for judges to discuss emerging issues and practical problems in these areas. There will also be sessions offering a review of the jurisdiction and jurisprudence of international tribunals and an analysis of the differences between common-law and civil-law judicial practice, issues that often have relevance in transnational proceedings.

This program represents a collaborative effort between the Federal Judicial Center and the American Society of International Law, bringing together their complementary missions of providing educational resources to the U.S. judicial branch and fostering the study of international law. Leading the conference proceedings are three distinguished facilitators, the Honorable Theodor Meron (Judge and Former President, International Criminal Tribunal for the Former Yugoslavia (ICTY)), the Honorable Diane P. Wood (United States Court of Appeals, 7th Circuit), and Lucy Reed (Partner, Freshfields Bruckhaus Deringer LLP). These facilitators will play an active role throughout the program, contributing to substantive sessions and identifying topics that merit further exploration during participant discussions or as part of follow-up programming and materials.

Sunday, November 12, 2006

Tillar House, American Society of International Law

5:00 p.m. **Reception**

5:10 p.m. **Opening Remarks**
Welcome; introduction of facilitators.

- *Honorable Barbara J. Rothstein, Director, Federal Judicial Center*
- *Elizabeth Andersen, Executive Director, American Society of International Law*

5:20 p.m. **International Law: Challenges for Judges and Judiciaries Around the World**
Introduction: Honorable Ruth Bader Ginsburg, Associate Justice, Supreme Court of the United States

- *Honorable Richard J. Goldstone, Former Justice, Constitutional Court of South Africa; Former Chief Prosecutor, International Criminal Tribunals for the Former Yugoslavia and Rwanda; Chancellor, University of the Witwatersrand*

Monday, November 13, 2006

Federal Judicial Center Education Center, Auditorium

8:30 a.m. **Introduction**
Overview of conference goals, structure, methodology, and materials.

Program Facilitators:
- *Honorable Theodor Meron, Judge and Former President, ICTY*
- *Honorable Diane P. Wood, United States Court of Appeals, 7th Circuit*
- *Lucy Reed, Partner, Freshfields Bruckhaus Deringer LLP*

8:45 a.m. **What Is International Law?**
This session will provide an overview of international law. Among the topics to be addressed are the sources of international law, principally treaties and customary international law; how customary international law is recognized as a part of federal common law; the role of international institutions in the creation and implementation of international law; and the application of international law in the U.S. courts.

- *Honorable Rosemary Barkett, United States Court of Appeals, 11th Circuit*
- *Professor Sean Murphy, The George Washington University Law School*

10:00 a.m. **International Law in the U.S. Courts: Current Issues, Future Trends**
The U.S. courts are increasingly called upon to resolve international law issues. Some of the more prominent cases have included challenges to the detention of foreign nationals at Guantanamo and attempts to enforce rulings by the International Court of Justice. International law questions also arise in cases that generate less publicity but are of no less importance to the development of international law jurisprudence. This panel will review recent court decisions involving international law and identify emerging litigation trends. Among the areas of law that will be addressed are the Geneva Conventions, the Alien Tort Statute, the Vienna Convention on Consular Relations, and the Convention Against Torture.

Moderator: Honorable Margaret McKeown, United States Court of Appeals, 9th Circuit
- *Donald Francis Donovan, Partner, Debevoise & Plimpton LLP*
- *Professor Beth Stephens, Rutgers Law School*
- *Professor Edward T. Swaine, The George Washington University Law School*

10:45 a.m. **Break**

11:00 a.m. **International Law in the U.S. Courts** (continued)

11:30 a.m. **International Law in the Domestic Courts of Other Nations**
As the scope of international law has expanded in recent years through both treaty and custom, so too has its appearance in domestic courts around the globe. This panel will provide a comparative perspective on how international law is interpreted and applied by courts outside of the United States. Judges from common-law and civil-law traditions will discuss substantive and procedural issues related to the domestic incorporation of international law principles and international conventions in

their jurisdictions, including the impact of regional instruments, such as the European Convention on Human Rights and the American Convention on Human Rights.

Moderator: Honorable Diane P. Wood, United States Court of Appeals, 7th Circuit

- *Honorable Maria Teresa Zoppi de Caballero, National Judge, Argentina*
- *Honorable Justice Louis LeBel, Justice of the Supreme Court of Canada*
- *Kurt Riechenberg, Senior Legal Secretary, Court of Justice of the European Communities*

12:45 p.m. **Lunch**

Luncheon Speaker: Honorable Stephen G. Breyer, Associate Justice, *Supreme Court of the United States*

2:15 p.m. **International Treaties in U.S. Practice**

International treaties and conventions have become important mechanisms for countries to use in structuring their foreign relations, carrying out cross-border transactions, and securing the rights of citizens. This session will examine the rules of treaty interpretation and application as a discrete mode of legal analysis, with an emphasis on issues that pose unfamiliar challenges for the courts, such as the role of reservations in treaty provisions. There will also be an overview of treaties that arise with greater frequency in U.S. courts, such as the Warsaw Convention and the Hague Convention on the Civil Aspects of International Child Abduction. This session will conclude with a discussion of some of the more controversial questions of treaty interpretation, including the relationship between international treaties and domestic law and the conditions under which treaties confer judicially enforceable remedies.

- *Honorable John M. Rogers, United States Court of Appeals, 6th Circuit*
- *Robert Dalton, Assistant Legal Adviser for Treaty Affairs, U.S. Department of State; Adjunct Professor of Law, Georgetown University*

3:30 p.m. **Break**

3:45 p.m. **Small Groups: Public International Law**

Training Rooms A, B, C

Conference participants will select one small-group topic from the options described below. Each session will provide an opportunity to explore in greater detail the application of international law in U.S. courts, using hypothetical fact patterns based upon actual cases. The sessions will open with a 10-minute presentation on relevant substantive law, and the remaining time will be used to discuss the designated fact patterns and related legal issues. One non-U.S. judge/expert will also participate in each group to offer insights based upon how these legal issues would be resolved in his/her jurisdiction.

Protection Against Return to Persecution Under the UN Refugee Convention and the Torture Convention

The 1951 Convention relating to the Status of Refugees and the 1984 Convention Against Torture both have *nonrefoulement* provisions barring expulsion or return of foreign nationals who face persecution or torture in their country of origin, under the precise specifications of the respective treaties. Thousands of cases arise each year under the United States statutes and regulations implementing these treaty provisions, posing difficult questions of interpretation and implementation. This session will set forth the basic legal framework and then will consider in detail hypothetical cases that present challenging current issues.

- *Professor Maryellen Fullerton, Brooklyn Law School*

International Treaties in U.S. Courts
International treaties have been increasingly invoked in U.S. courts as a source of individual rights, as they were in two notable Supreme Court cases of the 2005 Term, *Sanchez-Llamas v. Oregon,* 126 S. Ct. 2669 (2006), and *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). This session will examine the issues that arise when private parties rely on treaties, focusing in particular on how and when treaties create judicially enforceable rights and the related distinction between self-executing and non-self-executing treaties. The session will also consider the weight to be given in U.S. courts to the interpretation of treaties by international tribunals.

- *Professor Carlos M. Vázquez, John Carroll Research Professor of Law, Georgetown University Law Center*

***Alien Tort Statute After* Sosa**
The Alien Tort Statute (ATS), or Alien Tort Claims Act, grants federal court jurisdiction to non-U.S. plaintiffs seeking relief for torts in violation of the 'law of nations.' In recent years, the ATS has been invoked to assert a broad range of international human rights claims, including genocide, murder, torture, and environmental torts. The meaning and scope of this eighteenth century statutory remedy has generated considerable debate. In 2004, the Supreme Court provided some clarity, holding that the ATS empowers courts "to hear claims in a very limited category defined by the law of nations and recognized at common law." *Sosa v. Alvarez Machain,* 542 U.S. 692, 712 (2004). This session will address strategies courts have employed to discern which claims constitute violations of international law. It will also explore recent trends in ATS litigation, including the liability of transnational corporations, and commonly arising defenses such as forum non conveniens, the political question doctrine, and the act of state doctrine.

- *Professor Ralph Steinhardt, The George Washington University Law School*

5:00 p.m. **Closing**
Wrap-up.

Program Facilitators

Tuesday, November 14, 2006

Federal Judicial Center Education Center, Auditorium

8:30 a.m. **Alphabet Soup: The International Tribunals**

The establishment and use of international courts and tribunals is one of the most important developments in international law in the past century. There are now a significant number of international courts, tribunals, and other dispute settlement bodies, including the International Court of Justice (ICJ or "World Court"), the European Courts of Justice and Human Rights, the Inter-American Court on Human Rights, the international criminal tribunals for Yugoslavia and Rwanda, the International Criminal Court (ICC), the NAFTA dispute resolution bodies, and the WTO. This panel will provide an overview of these institutions and discuss their relevance to U.S. jurisprudence and court proceedings.

Moderator: Honorable Theodor Meron, Judge and Former President, ICTY
- *Honorable Patricia M. Wald, Former Judge, International Criminal Tribunal for the Former Yugoslavia; Former Judge, United States Court of Appeals, D.C. Circuit*
- *Professor Allison Danner, Vanderbilt University Law School*

9:45 a.m. **International Law Applied: Audience-Response Quiz**

A series of international law and litigation-related questions and vignettes will be presented to conference participants on an auditorium screen. Using an audience-response system, participants will vote on correct answers, and facilitators will lead discussions of relevant law.

Program Facilitators:

- *Honorable Diane P. Wood, United States Court of Appeals, 7th Circuit*
- *Lucy Reed, Partner, Freshfields Bruckhaus Deringer LLP*

10:30 a.m. **Break**

10:45 a.m. **Comparative Judicial Practice**

Although the past twenty years have brought considerable convergence between the common-law and civil-law systems, differences in legal practice and the role of judges remain. U.S. courts are sometimes called upon to resolve disputes that involve parties from other countries, evidence located abroad, parallel proceedings, or questions of foreign law. Some of these cases implicate procedural issues that may be unfamiliar to U.S. judges or may require communication or cooperation with foreign jurisdictions. This session will address key differences between common-law and civil-law judicial practice, including the scope (or absence of) discovery, legal privileges, and other procedural matters relevant to the adjudication of transnational cases in the United States.

Moderator: John Fellas, Partner, Hughes Hubbard and Reed LLP

- *Honorable Zou Bihua, Shanghai High Peoples Court, China*
- *Honorable Jean-François Thony, Former Magistrate; Assistant General Counsel, International Monetary Fund*
- *Honorable Peter J. Messitte, U.S. District Court, District of Maryland*

12:00 p.m. **Lunch**

***Luncheon Speaker**: Harold Hongju Koh, Dean and Gerard C. and Bernice Latrobe Smith Professor of International Law, Yale Law School*

The Historical Role and Relevance of International Law in U.S. Jurisprudence—Implications for Contemporary Times

In 1900, the Supreme Court held: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending on it are duly presented for determination." *Paquette Habana,* 175 U.S. 677, 700 (1900). International law has played a role in U.S. jurisprudence throughout history, with varying degrees of prominence and acceptance. Dean Harold Koh of Yale Law School will discuss this history, its implications in the context of contemporary international law cases, and its relevance to some of the international law topics addressed during this conference.

1:45 p.m. **Transnational Civil Litigation in the U.S. Courts: The Fundamentals**

What special challenges are posed by cases involving international litigation issues? This session will attempt to answer this question and address some of the more frequently recurring procedural issues in international litigation, including discovery proceedings, parallel litigation, the use of foreign law, questions of extraterritoriality, and the enforcement of judgments and arbitration awards. A moderated conversation with brief overviews of relevant law will be followed by discussion of a hypothetical fact pattern designed to illustrate the legal issues presented.

Moderator: John Fellas, Partner, Hughes Hubbard and Reed LLP

- *Honorable John Koeltl, United States District Court, Southern District of New York*
- *Honorable Victor Marrero, United States District Court, Southern District of New York*

3:15 p.m. **Break**

3:30 p.m. **Small Groups: Transnational Litigation Problems**

Training Rooms A, B, C

Conference participants will select one small-group topic from the options described below. Each session will provide an opportunity to explore transnational litigation issues in greater detail, using hypothetical fact patterns based upon actual cases. The sessions will open with a 10-minute presentation on relevant substantive law, and the remaining time will be used to discuss the designated fact patterns and related legal issues.

Managing Cases Involving Proof of Foreign Law
This session will review practical aspects of managing cases in which a party gives notice that there is an issue of foreign law. Rule 44.1 of the Federal Rules of Civil Procedure and the corresponding provisions of many states (e.g., New York CPLR § 4511) provide that foreign law is to be proved as law. Judges are to determine the content of the foreign law through research in relevant materials and expert testimony. A recent report of the Committee on International Commercial Disputes of the Association of the Bar of the City of New York concluded that these rules "have had to be modified in practice to allow for practical realities." This session will consider findings of the Association of the Bar report and review some hypothetical cases that highlight challenges U.S. judges may face when foreign-law issues are implicated in trade and investment disputes. We will also discuss the possible utility of an international treaty that would facilitate proof of foreign law in domestic courts.

- *Peter Trooboff, Partner, Covington & Burling*

Foreign Sovereign Immunity
This small-group discussion will explore the principles of sovereign or state immunity from litigation in foreign courts, with specific reference to the U.S. Foreign Sovereign Immunities Act and the new UN Convention on the Jurisdictional Immunities of States and their Properties. In particular, we will discuss the immunities of foreign states, foreign officials, and their agencies and instrumentalities as they might arise in several hypothetical situations involving (a) commercial transactions, (b) ordinary torts (personal injury and property damage), and (c) alleged human rights violations.

- *David P. Stewart, Adviser for Private International Law, U.S. Department of State*

The Antisuit Injunction
The United States (and other) courts are seeing an increasing number of motions for antisuit injunctions to try to stop lawsuits and international arbitration proceedings in foreign jurisdictions. As the First Circuit recently wrote, "Determining the appropriateness of an international antisuit injunction is a highly-nuanced exercise." *Quaack v. Klynveld Peat Marwick Goerdeler Bedriifsrevisoren*, 361 F.3d 11, 16 (1st Cir. 2004). Using scenarios involved in recent cases, this small group will explore the legal principles and strategic analysis that judges must apply in ruling on such motions.

- *Lucy Reed, Partner, Freshfields Bruckhaus Deringer LLP*

4:45 p.m. **Closing**
Wrap-up.

Evaluation forms distributed.

Program Facilitators