

## An IFA Congress in Japan – at last!



Temple of the Golden Pavilion in Kyoto, Japan

From 30 September through 5 October 2007, the IFA family will gather in Kyoto, Japan. This is the first IFA Congress in Japan – and it is timely.

The Japanese Branch of IFA was established in 1975 at the initiative of Prof. Hiroshi Kaneko and Mr Toshio Miyatake. They have both been instrumental in the Kyoto Congress: Prof. Kaneko as President of the Congress and of the Japanese Branch of IFA, and Mr Miyatake as General Reporter on Subject 1. We thank these long-standing IFA friends and their colleagues for inviting us to Japan for a wonderful 61st IFA Congress.

Kyoto is one of the oldest cities in Japan. The area was settled in the seventh century, and the new city called Heiankyo became the seat of Japan's imperial court in 794. The Heian period, meaning "Peace and Tranquility", followed for the next four centuries. The city became Japan's cultural and commercial centre; arts and literature flourished. Until 1868 Kyoto was the home of Japan's imperial family. With its almost 2,000 Buddhist temples and Shinto shrines, the city is home to 20% of Japan's National Treasures, 15% of its Cultural Properties, and 17 UNESCO World Heritage sites.

After World War II, the Kyoto Revival Plan was drafted. In 1949, Kyoto University produced the first in a long line of Nobel Prize winners. And in 1997, Kyoto hosted the international conference which resulted in the Kyoto Protocol, setting binding standards to reduce greenhouse emissions 5.2% below the 1990 level by 2012. More than 100 countries have ratified it.

Kyoto is undoubtedly the perfect place to host an international congress with an attractive scientific and social programme.

At the centre of the scientific programme are again the two subjects.

### Subject 1: Transfer Pricing and Intangibles

On the basis of 33 Branch Reports, Mr Toshio Miyatake (Japan) delivered the General Report. It will be discussed by a panel led by Mr Robert Green (United States).

Special attention will be paid to the problems regarding the ownership of intangibles to which differing national rules apply. One of these is the creation of marketing intangibles such as the promotion of the brand and the

market by a local related distributor of products of its foreign parent bearing a trademark belonging to the parent. Under which circumstances is the local related distributor considered to have developed a new marketing intangible or to have enhanced an existing one? Further issues are raised in connection with the transfer of intangibles imbedded in the components and raw materials acquired and used by the foreign manufacturing subsidiary.

The discussion will also compare the transfer pricing methodologies of the *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* and the US Treasury Regulations under Sec. 482 of the Internal Revenue Code, in particular the comparable profits method and the commensurate-with-income standard.

## **Subject 2: Conflicts in the Attribution of Income to a Person**

Ms Joanna C. Wheeler (Netherlands) reviewed 32 Branch Reports. Her General Report shows that there are many differences in the principles of attribution of income for domestic tax purposes and also in how conflicts of attribution of income are to be resolved, if at all.

The panel led by Prof. Claus Staringer (Austria) will discuss these and other aspects. It will be interesting to hear the panellists' views on the General Reporter's suggestion: the same way that a limitation on benefits (LOB) provision fleshes out the residence requirement and states the requisite connection between a person and a country, a provision could be inserted into tax treaties delineating the factors that are necessary to form the required connection between the income and the person. The General Reporter expressed both hope and fear: "Given the variety of the situations it has to cover, the rule is unlikely to be simple, but simplicity of treaty drafting is in any event rapidly becoming a thing of the past."

Again, there will be a large panoply of seminars.

### *IFA/EU – Abuse and EU tax law*

First, Mr Michel Aujean, EU Director of Tax Policy, will explain the European Commission's current tax agenda. Then the panel, chaired Mr Jonathan S. Schwarz (United Kingdom), will comment on new developments: the EU dimension of transfer pricing and dispute resolution, the EU follow-up on the *Cadbury Schweppes* judgement of the European Court of Justice (ECJ) and the coordination of anti-abuse provisions within the European Union.

### *International tax aspects of trading in emission allowances*

Mr Krister Andersson (Sweden) will chair this genuine "Kyoto" seminar, focusing on the economic and tax aspects of the Kyoto Protocol and the EU Directive. The existing system of the timing of taxation and allocation of tax revenues will be scrutinized from both a *de lege lata* and a *de lege ferenda* perspective. As most of the dif-

ficulties spring from the uncertainty regarding how to classify, and thus treat, emission allowances for tax purposes, the discussion will cover matters of accounting (International Accounting Standard 38 or 39, activated or expensed?), double taxation treaties (applicable article, hybrid situations) and VAT (supply of goods or services?).

### *Transfer pricing and cost sharing arrangements*

Under the direction of Dr Barbara Kessler (Switzerland), the seminar will be devoted to a case study of a typical cost sharing arrangement in the pharmaceutical industry: A group wants to enter into a new therapeutic area. Some of its group companies join forces in a pool to research and develop drug substances and to centralize IT applications and, for that purpose, enter into a cost sharing arrangement. A molecule for a new therapeutic area is found for which another group company, not a member of the pool, has responsibility and wants to continue R&D on its own account. One group company wants to leave the pool and others want to join. Finally, the group is taken over by a competitor applying a different research strategy.

### *Treaty entitlement and limitation on benefits (LOB) clauses*

Prof. Otmar Thömmes (Germany) will chair the seminar that will first discuss LOB clauses as one kind of anti-abuse rule in tax treaties and domestic law. The seminar will then examine in detail the tests in the US Model Income Tax Convention: publicly traded test, ownership/base-erosion test and active trade or business test. Finally, the seminar will consider whether LOB clauses, aimed at preventing treaty misuse by residents of third countries, are compatible with the fundamental freedoms of EU law and the impact of the ECJ's *Open Skies* decisions holding that nationality clauses (ownership percentage tests based on a nationality percentage) infringe the freedom of establishment.

### *IFA/OECD – Non-discrimination issues*

As usual, in the first part, senior OECD officials will present the OECD's current tax agenda. The seminar, chaired by Dr John F. Avery Jones (United Kingdom) will then deal with the practical aspects of applying Art. 24 of the OECD Model Tax Convention.

### *Treaty entitlement and collective investment vehicles (including trusts)*

Mr Philippe Derouin (France) will lead this seminar. Presently, the value of assets managed by collective investment funds exceeds USD 16 trillion. A substantial part of these assets represents cross-border portfolio investments whose income is, in principle, entitled to treaty benefits. Nevertheless, numerous legal and practical obstacles may prevent such benefits from being granted. The subject is timely as the OECD is exploring ways to improve how treaty benefits are effectively granted with respect to investments through collective investment vehicles.

*Transfer pricing and indirect taxation*

While the General Report on Subject 1 concentrated on the direct tax aspects of transfer pricing, this seminar, led by Mr Satya Poddar (Canada), will deal with the VAT and customs issues of cross-border transactions. This seminar is the result of IFA's determination to attribute greater importance to VAT/GST at its annual congresses.

*Recent developments in international tax*

The subjects covered by this seminar, chaired by Mr Nick Pantaleo (Canada), will be selected at the last moment to assure actuality.

*Taxation of multinational service partnerships*

Partnerships that provide services throughout the world, such as law firms, confront particular tax difficulties because each country that deems service income to arise locally can seek to tax both the resident and non-resident partners. The problems encountered, legal as well as practical, will be identified and some solutions will be provided in this seminar, led by Mr Gregory May (United States).

*Tax treaty dispute resolution mechanisms*

IFA has been active in promoting mandatory arbitration as a means to resolve tax treaty disputes. In 2004, it commissioned the study by Profs. William "Rusty" Park and David R. Tillinghast on income tax treaty arbitration. This seminar, directed by Prof. Tillinghast (United States), will discuss the drawbacks of the mutual agreement procedure and concentrate on the new developments regarding dispute resolution by arbitration: The OECD proposal for a new paragraph of Art. 25 of the

OECD Model instituting mandatory arbitration (published in February 2007), the new United States–Germany protocol, and the new developments regarding the EU Arbitration Convention.

**YIN – Young IFA Network**

After the successful launch of YIN at the 2006 Amsterdam Congress, YIN will enjoy a prominent place at the Kyoto Congress. There will be a Meet & Greet Reception on Sunday, 30 September 2007, for young IFA members and those attending an IFA Congress for the first time. On Tuesday, 2 October, a special symposium will be held on recent developments in tax research, highlighting the winning thesis of the Mitchell B. Carroll Prize.

**Attractive Social Programme**

Not only is the scientific programme appealing, but the social programme is as well. On Sunday afternoon, 30 September, there will be a lecture on Japanese culture and history, a good start to a week's sightseeing in Kyoto.

At the reception at the Kyoto Studio Park on Monday, 1 October, we will take a journey back in time to the Japanese Edo city (now known as Tokyo) of some 400 years ago. We are told that samurai and ninja will be waiting for us!

The cultural event on Tuesday, 2 October, at the Kyoto Concert Hall will feature both Western and Japanese music. The Congress will close on Thursday, 4 October, with the Gala Dinner.

It may have taken a long time for IFA to hold its Congress in Japan. But it certainly has been worth waiting for!