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Section Growth: Serving the Profession and the Public

Message from the Chair

Jose A. Santos, Jr.

As the Section prepares to enter its twentieth year of existence, I feel it is appropriate for us to look back at much that has been accomplished over the past two decades. We should also take this opportunity to take the next year and set into motion initiatives and plans, just as every Chair has done in years past. It was not long ago that the Section embarked on a series of ambitious projects, projects that continue to dot the legal and regulatory landscape in Florida, and influence practitioners throughout the world. Today, the Section and Florida's international practitioners will find that we stand at the brink of significant change. I believe that the Section has been preparing for this moment, and it is now our job to ensure that we continue to be ready.

Florida's place in the international arena is as much an accident of geography as it is the result of the restless nature of humans. We can look at Florida as a place where the flags of four sovereign nations have flown since the 1500s– Spain, France, Great Britain and the United States. It also has a coastline of almost 1,200 miles, the first permanent European settlement in what is now the United States– St. Augustine, founded in 1565 by Spain– and with some 16 million inhabitants, a population that has grown some 60% in twenty years. Florida's economic engine is also very powerful. The gross state product is at $443 billion, generated by some 438,000 establishments and a workforce of 7.5 million. The interesting part of Florida's economic picture relates to the services sector. Roughly one-quarter of Florida's economic output is derived from the services sector, or about $108 billion. This is the fastest growing seg-

See "Section Growth" page 18

FTAA: Overview of the Draft Agreement

Part One of a Two-Part Series

Presented by the Free Trade Area of the Americas Committee "Background Information and Basic Overview"

by Francisco Corrales

The draft text of the FTAA agreement was released to the public on July 3rd, 2001.[1] This is the first time a trade agreement has been made public during its negotiation, resulting from increased political pressure and greater calls for transparency and public involvement.[2] For its part, the

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FTAA

from page 1

United States has indicated that it will seek public comment on the draft text of the agreement and should publish notice in the Federal Register later this year.[3]

At almost 400 pages, the text is divided into nine chapters, each covering one of the nine FTAA negotiating groups:

- Agriculture
- Dispute Settlement
- Government Procurement
- Services
- Investment
- Intellectual Property Rights
- Market Access
- Competition Policy
- Subsidies, Anti-Dumping and Countervailing Duties

It does not cover any of the special committees,[4] nor does it contain annexes, which would have the sectors, time schedules and reservations from the market opening measures.

The draft text is a work in progress, reflecting the FTAA negotiations at the midway point.[5] It indicates at the very beginning that it is not legally binding on any of the parties, and that it is subject to change as the negotiations progress.[6] Reflecting these two points, the parties used bracketed text [like this] to identify proposed language not yet adopted.[7] This is because the parties of the FTAA have agreed that progress in the negotiations will be done on a consensus basis,[8] meaning that all 34 countries must agree before proposed language can be adopted and included in the final agreement.

Here is a brief overview of the issues found in the nine chapters of the draft text:[9]

1. Chapter on Agriculture:

The parties deal with issues relating to import tariffs, non-tariff measures and import safeguards. Market distorting measures, such as domestic price supports, subsidies and export credits are also covered. The chapter addresses scientific and technical standards for sanitary and phytosanitary requirements and institutional issues such as state trading enterprises.

2. Chapter on Government Procurement:

The text of this chapter focuses on three main areas: market access issues, the foreign participant and the procurement process. Market access issues are comprised of the standards of treatment an FTAA party will give foreign participants and the areas that it excludes or reserves from the terms of the agreement. Foreign participant issues cover registration and rules of origin for its good(s) and service(s). Material on the procurement process addresses tender, award and review issues.

3. Chapter on Investment:

The investment chapter covers access issues such as the scope of its application, the standards of treatment for foreign investors/investments, and exceptions and reservations made by the parties. It addresses state practices such as performance requirements, management nationality requirements, expropriation and restrictions on capital transfers/repatriation of profits. There are also several proposals regarding dispute settlement mechanisms for resolving FTAA investment disputes: state-to-state and investor-to-state.

4. Chapter on Market Access:

Market access issues cover tariff and non-tariff measures, import safeguards and rules of origin. The chapter contains language on the terms and definitions common to market access negotiations as well as technical standards. It also addresses institutional issues involving customs and the FTAA.

5. Chapter on Subsidies, Anti-Dumping and Countervailing Duties:

This chapter covers the component parts of a dumping investigation, such as determinations of "dumping", "injury" and "domestic industry". There are proposals covering the procedure involved in a dumping investigation, as well as the use of emergency provisional measures (such as a "critical circumstances" determination). The chapter concludes with suggestions for standards of review as well as dispute settlement mechanisms for state-to-state disputes.

6. Chapter on Dispute Settlement:

The chapter contains terms and definitions relating to dispute settlement. It addresses who is qualified to sit as a panelist or testify as an expert. There is language on the proce-

Winners of the 2001 Writing for Reality Contest:

FIRST PLACE goes to **Thomas A. Stricklen** from St. Thomas University. Mr. Stricklen will receive a $500 cash prize from the International Law Section. *(See his article on page 5.)*

SECOND PLACE goes to **Miriam Latore Quinn** from St. Thomas University. Ms. Quinn will receive a $300 cash prize from the International Law Section. Ms. Quinn's article will appear in the Fall issue of the *International Law Quarterly.*

THIRD PLACE goes to **Noemi J. Cieciel** from Stetson University. Ms. Cieciel will receive a $200 cash prize from the International Law Section. Ms. Cieciel's article will appear in the Winter Issue of the *International Law Quarterly.*

dure for requesting consultations between the parties, proposals on the issuance of preliminary/final reports and coverage of the implementation process. Transparency issues are also addressed.

7. Chapter on Services:

The chapter begins with proposals on what service sectors are to be covered. It covers market access issues like standards of treatment and import safeguards. It addresses domestic issues such as the regulation of professional services, the establishment of professional standards and the use of subsidies. Common definitions, institutional issues and transparency proposals are also discussed.

8. Chapter on Intellectual Property Rights:

The chapter contains a discussion of the terms and definitions used in the sector, language on the scope of the agreement, and how the FTAA is to dovetail with other international agreements on intellectual property. Trademarks, copyrights, patents and other forms of intellectual property are discussed. The chapter covers market access issues such as standards of treatment, unfair competition and anti-competitive practices. It addresses procedural transparency, the enforcement of intellectual property rights, the treatment of undisclosed/ sensitive information, and technical cooperation/assistance issues.

9. Chapter on Competition Policy:

The chapter begins with an explanation of the its relationship to the domestic regulatory frameworks of the parties, examples of anti-competitive practices and practices with anti-competitive effects. There is discussion on regulatory policies and institutional issues, such as monopolies, state-owned enterprises and ways to develop cooperative mechanisms relating to dispute settlement and technical assistance. The chapter ends with terms and definitions relating to competition policy.

Conclusion–

Where are the FTAA negotiations headed?

The trade ministers of the 34 countries of the FTAA:

Antigua and Barbuda
Argentina
Bahamas
Barbados
Belize
Bolivia
Brazil
Canada
Chile
Colombia
Costa Rica
Dominica
Dominican Republic
Ecuador
El Salvador
Grenada
Guatemala
Guyana
Haiti
Honduras
Jamaica
Mexico
Nicaragua
Panama
Paraguay
Peru
St. Kitts and Nevis
St. Lucia
St. Vincent & the Grenadines
Suriname
Trinidad and Tobago
United States
Uruguay
Venezuela

have instructed the negotiating groups to "intensify efforts to resolve existing divergences and reach consensus, with a view to eliminating the brackets from the draft texts to the maximum extent possible. "[10] Furthermore, the parties agreed to the following negotiations timetable:[11]

April 1, 2002—
Deadline for agreement on basic terms and definitions for tariff reduction negotiations

May 15, 2002—
Deadline for the start of tariff reduction negotiations

January 1, 2005—
Deadline for FTAA negotiations to conclude

December 31, 2005—
Deadline for FTAA entry into force

With upcoming national elections in several FTAA countries, and the FTAA addressing such politically sensitive issues as foreign investment, agriculture and subsidies, eliminating the bracketed language by reaching agreement on a consensus basis will prove extremely difficult.[12] An FTAA agreement with meaningful trade harmonization and market opening measures will require strong political leadership, active support by the international trade and business communities, and a campaign to inform the people of the Western Hemisphere of the benefits of freer trade.[13]

Endnotes:

[1] Published in the Official FTAA website: http://www.flaa-alca.org
[2] Third Summit of the Americas, Declaration of Quebec City, Canada, April 2001. The heads of state of the 34 countries decided to publicize the draft text as a "... commitment to transparency and to increasing and sustaining communication with Civil Society."
[3] USTR Press Release, July 3, 2001
[4] The Committee of Government Representatives on the participation of Civil Society, The Consultative Group on Smaller Economies and the Joint Government-Private Sector Committee of Experts on Electronic Commerce.
[5] Formal negotiations began following the 1998 Summit of the Americas in Santiago, Chile. At the Toronto Ministerial in November, 1999, the FTAA trade ministers ordered the preparation of an initial draft with bracketed text to reflect the different negotiating positions.
[6] FTAA Draft Text, Index Page 1
[7]. Ibid
[8] Second Summit of the Americas, Declaration of San Jose, Costa Rica, March 1998
[9] In Part Two of this series, the Free Trade Area of the Americas Committee will provide more specific coverage on a chapter by chapter basis.
[10] FTAA Declaration of Ministers, Sixth Ministerial Meeting, Buenos Aires, Argentina, April, 2001
[11] Third Summit of the Americas, Declaration of Quebec City, Canada, April 2001
[12] If the United States is unable to negotiate with "trade promotion authority," reaching agreement will be next to impossible. There is also the issue of the opponents of free trade continuing to define the FTAA agenda. As an example, the author was unable to find out the date for the release of the FTAA draft text through official channels. The July 3rd date was only found through visiting the website for WTO Watch– an organization against freer trade.
[13] Get involved. Join the Free Trade Area of the Americas Committee.

Francisco Corrales *is an attorney practicing in Ft. Lauderdale. His practice includes international business transactions, foreign investment and E- commerce. He is the current chair of the Free Trade Area of the Americas Committee.*

France/Florida Forum: Bi-National Meeting of Jurists Slated for Paris in January 2002

Following its successful Florida-Quebec Forum in March 2001, The Florida Bar International Law Section is now organizing another conference with French-speaking jurists. Yet instead of meeting in nearby Fort Lauderdale, conference participants from Florida will travel this coming January 2002 to Paris and its environs to meet with French attorneys and notaries.

Scheduled for January 19 to 23, 2002, the France/Florida Forum will deepen and expand the knowledge of lawyers from both jurisdictions about key cross-border issues such as the legal aspects of business investments and transactions, immigration, labor laws, and real estate and tax matters involving both French and U.S. parties. During the Forum, participants will participate in conferences and workshops that are meant to stimulate interaction and dialogue among American and French attorneys and notaries. Members of The Florida Bar who participate will be entitled to earn CLE credits that will count towards meeting their Florida CLE reporting requirements.

While structured to maximize its participants' learning and networking opportunities, the Forum will not be without its unforgettable moments. For example, Forum participants will attend a meet-and-greet reception and dinner at an elaborate French chateau named Vaux-le-Vicomte Outside of Paris on January 20, 2002. This dinner will be followed by conferences on January 21, 2002, at the Maison des Notaires in Paris, which administers and oversees France's over five thousand notaries. Some fifty French notaries are expected to attend the conferences at the Maison des Notaires.

Following these events, the Forum participants will meet on January 22, 2001, at the Maison du Barreau, which administers and oversees France's lawyers. At this meeting, two distinguished speakers (Katherine Harris, Florida Secretary of State, being one of the speakers) will address the participants and focus on various themes of legal significance to both Florida and France. In the afternoon, the conference participants will meet to discuss issues including the international dimensions of real estate transactions, estate planning, and other cross-border issues.

Finally, on the last day of the Forum January 23, 2001), the participants will attend a half-day seminar at the Paris Chamber of Commerce and learn more about international trade issues between France and Florida. The Paris Bar has invited its Florida counterparts to participate as speakers in the various conferences and workshops planned.

The Florida Bar International Law Section encourages all who are interested to participate in this unique Forum. The estimated airfare and hotel costs for this five-day seminar will be approximately $1,000 to $1,200 per person. The cost of the seminars for Florida attorneys who seek to receive CLE credits is not yet established. If you have any questions about this exciting upcoming event, please contact Lucius Smejda or Zel Saccani at (305) 358-9995.

Get Involved!

Do you have an idea or want to get involved? Log on to the Section website — **www.lex-fl.org** — or call/e-mail any of the Section's Executive Committee members or Angela Froelich, Program Administrator for the Section. You'll see a calendar of Section activities and meeting schedule and contact details for **Section officers and CLE Co-Chairs.**

The *International Law Quarterly* is prepared and published by the International Law Section of The Florida Bar.

Articles between 10 and 20 pages involving the various disciplines affecting international trade and commerce may be submitted on computer disk with accompanying hard copy, or on typewritten, double-spaced 8 ½" x 11" paper (with the use of endnotes, rather than footnotes.) Please contact Francesca R. Di Staulo for submissions to the Quarterly and for any questions you may have concerning the Quarterly.

Get connected!

www.flabar.org
(The Florida Bar's website)

www.lex-fl.org
(International Law Section's website)

International Student Paper Competition – 1st Place Winner

Sex-Smuggling & The International Community's Inability To Respond[1]

by Thomas A. Stricklen

I. Introduction

International smugglers have a generous list of profitable objects to smuggle: drugs, guns, jewelry, etc. However this paper will focus the smuggling of women into the United States for prostitution in return for being brought here. The transnational business of smuggling for prostitution increased its economic return as prostitution gained acceptance. "The international trafficking of women … for the purpose of prostitution has been recognized as an international offense for almost one hundred years."[2] A fundamental belief is that women cannot be procured for illegal purposes, such as prostitution, as the result of her free choice.[3]

II. Problem Defined

Identifying sex smuggling as a global problem is simple. The globalization of organized crime has amplified interest in the multibillion-dollar business of smuggling human beings.[4] Now criminal organizations are combining financial and logistical operations to smuggle women across international borders.[5] According to United Nations Interregional Crime and Justice Institute profits reach up to seven billion dollars annually.[6] Other estimates show twenty-five million people are smuggled and profits may reach thirty billion dollars yearly.[7] Global organized crime was characterized by Clinton's administration as a full-fledged national security crisis for the United States with the substance of international terrorism.[8]

Although its presence is quickly identifiable, developing an acceptable definition of sex smuggling has proven to be a difficult task. The concept of human trafficking or sex smuggling has never been specifically defined in international law[9] and numerous definitions exist. One definition requires the "movement of people for the purpose of placing them in forced labour or other forms of involuntary servitude."[10]

Even if the international community does develop an agreeable definition, sex smuggling's intricate and pervasiveness requires a global response.[11] Immigrant exploitation offends our traditional notions of justice[12] and requires an international understanding and response.

A. Causes of the Problem

An effective response requires "…identify[ing] the root causes and perpetuating factors…."[13] Factors that contribute the sexual exploitation of women include origin states' economies and the criminal diversification of organized crime.

A poor economic environment in the origin country increases the probability that sex smuggling will occur. These conditions compel women to pursue the promise of a better life via employment abroad. There is a "…well-recognized link between poverty and sexual exploitation…."[14]

In fact poverty is the "leading factor behind the rise in the trafficking of human beings."[15] A women's employment in the United States exceeds the earning potential of many developing countries,[16] i.e., "the typical Mexican worker earns one-tenth his American counterpart."[17]

Unfortunately, those who unable to gain lawful access will turn to organized crime to provide their access to freedom.[18] The "Golden Venture" and Canadian Border Incidents demonstrate this. The Golden Venture ran aground on June 6, 1993 off the coast of New York killing ten (10) of the three hundred (300) aliens onboard after the aliens paid thirty thousand dollars … for the trip.[19] The Canadian border incident brought "the largest human smuggling ring to penetrate the United States' northern border" in a "sophisticated global operation" delivering one hundred fifty immigrants monthly over two years earning more than "one hundred seventy million dollars by charging the aliens forty-seven thousand dollars ($47,000.00) each."[20]

A risk/profit analysis weighs profits against the risk of detection, apprehension and prosecution. This is a simple assessment of society's desire to intervene. For comparison purposes sex smuggling will be analogized to drug smuggling. Like

continued, next page

Upcoming Section Events

Estate Planning for the International Client
October 12, 2001, Hotel Sofitel, Miami

International Bar Association Meeting
October 2001, Cancun, Mexico

Practice and Procedure before U.S. Court of International Trade
January 9-11, 2002, Hyatt Regency Hotel, Miami

Florida – Europe Cross Border Seminar
January 19-23, 2002 Paris / Versailles

23rd Annual Immigration Law Update
February 7-8, 2002, Hyatt Regency Hotel, Miami

Legal Aspects of Doing Business in Latin America
April 4-5, 2002, Hyatt Regency Hotel, Miami

drug smuggling, the potential for large profits and a low risk of apprehension lures those to smuggle women for prostitution. "Many ... countries, police, government, and immigration officials ignore, facilitate and even profit from the trade"[21] in human beings which further encourages sex smugglers.

Society's intervention desire is reflected by the amount of expenditures authorized for apprehension. Even with some commentators calling for "…an orderly withdrawal…"[22] of federal law enforcement agencies from the war on drugs, the federal government's involvement continues to skyrocket. Consider that federal expenditures to combat drug smugglers are in excess of sixteen billion dollars a year.[23] Both military and non-military assistance to law enforcement agencies further that intervention desire. As early as "…1989, Congress designated the Department of Defense as the 'single lead agency' in drug interdiction efforts."[24] The Coast Guard's peacetime non-military status even allows its involvement.[25] With these intervention efforts, the greed driven trade of drugs "…the probability of detection is conjectured to be fairly low…."[26]

Having established the apprehension improbability, the lucrative return with minimal risk calls many. Estimates indicate that "many thousands ... women and girls [are] lured, abducted, or sold into forced prostitution and other forms of sexual servitude"[27] and they "generate from $120,000 to $150,000 annually for an underworld boss."[28]

III. Established Standards

Establishing standards of accountability presents a combat obstacle. The international community struggles to determine whether international or domestic standards apply.

A. International Standards

The global community requires universal acceptance and has produced limited standards. A 1949 Convention sought to provide a civil remedy with limited application providing that victims could "...be repatriated if they wish[ed]", unless "expulsion was ordered in conformity with law."[29] Most immigration statutes require immediate deportation of an illegal alien.

The criminal response has been to establish an international standard by treaty. Recent treaties contain language that either encourages or requires the signators to enact or amend *domestic* legislation for prosecution offenders. Although modernization has reduced a state's sovereignty, its importance still "... underlies international law's requirement of state consent to treaties…"[30] in order to establish an enforceable international standard.

B. Domestic Civil Standards

The United States enacted and developed laws capable enforcing some international standards in civil and criminal law. For example, "The Alien Tort Act establishes that a United States federal court has "…jurisdiction for suits alleging torts committed anywhere in the world against aliens in violation of the law of nations."[31] In its original passage, the Alien Tort Act was found as a part of "…§9 of the first Judiciary Act of 1789" and "...later codified as 28 U.S.C. §1350…" with an emphasis on "…crimes includ[ing]... slave trading…."[32] The Alien Tort Act was to address a fear that the United States would fail to "…adequately adjudicate aliens' claims…" and an international incident may arise.[33] The Alien Tort Act has not always received a broad sweeping interpretation[34] because "federal courts rarely heard, and never upheld a claim brought under the Alien Tort Act until 1960."[35] Recently, however Courts have expanded jurisdiction allowing a family member in the United States to sue for a tort occurring in another country.[36] Even those seeking "…redress for torts including ... inhuman or degrading treatment…."[37] The Alien Tort Act's three-prong test establishes "…subject matter jurisdiction [exists] when (1) an alien sues (2) for a tort (3) committed in violation of the law of nations…."[38]

Secondly, with profit is recognized as a basis of prostitution, asset seizure could be utilized. The League of Nations "commission[ed] a special body of experts to engage in fact-finding ... in ... the Middle East, Europe, and North and South America"[39] and in 1959, another United Nations study suggested "…the confiscation of direct profits…" as a deterrent.[40] Some commentators have identified

Seminar on the U.S. Court of International Trade to be Held in Miami

The International Law Section of the Florida Bar is pleased to sponsor a seminar on ***Practice and Procedure before U.S. Court of International Trade*** ("CIT"). The seminar will be held at the scenic and centrally located Hyatt Regency Hotel in downtown Miami, Florida. The seminar is scheduled to take place during the Section's Mid-Year meeting between the 8th and 12th of January, 2002.

The guest speaker for this seminar is scheduled to be Leo M. Gordon, Clerk of the Court. Some of the topics to be discussed by Mr. Gordon, include the history of the Court, issues related to jurisdiction and an overview of the Court's current practice and procedure. Mr. Gordon will also discuss recent technological changes and advancements implemented by the Court such as video conferencing and the Case Management/Electronic Case filing system.

Further details will be forthcoming in future issues of the International Law Quarterly and through mailings to Section members. If you have any questions you may call Francesca Russo-Di Staulo at Sandler, Travis & Rosenberg, P.A., 305-267-9200. Ms. Russo-Di Staulo may also be reached by e-mail at fdistaulo@strtrade.com.

"disgorgement doctrines"[41] as a mechanism to assist in government enforcement. Thereby establishing asset seizure as a worthy tool. It seems with the implementation of The Bank Secrecy Act of 1970, The Money Laundering Control Act of 1986[42] and The Annunzio-Wylie Anti Money Laundering Act promulgated in 1992"[43] would provide ample seizure avenues for victims.

C. Domestic Criminal Standards

The United States has existing criminal statutes capable of utilization to combat the sex smuggling: Continuing Criminal Enterprise (CCE) and The Racketeer Influenced and Corrupt Organization (RICO). First, congress identified the detrimental affect that a criminal organization has on society and sought legislation that would "… 1) provide [a] debilitating punishment to criminal enterprises and 2) … deter the creation of new enterprises."[44] Congress was troubled by "…professional criminals who organized, supplied and managed the … networks"[45] seeking eradication of these organizations by impacting their creation.[46] The continuing criminal enterprise statute defines, in relevant part, a continuing criminal enterprise requires acts "which are undertaken by such person in concert with five or more … persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and from which such person obtains substantial income or resources."[47] Secondly, RICO presents another statute to be utilized to combat sex smuggling. RICO sought eradication by targeting those profiting. An actor needs merely to be "…an 'individual, partnership, corporation, association, . . . other legal entity,' or 'group of individuals associated in fact….' "[48]

IV. Past Trends[49]

The global community's splintered and piecemeal treaty response has netted limited results.[50] Treaties failed to effectively combat the exploitation of women for prostitution in the U.S. In spite of contradictory prosecutorial language[51] and delineation between the victim's ages,[52] the global community became more unified in eradicating sex smuggling and focused signatories' efforts internally through domestic legislative enactment or amendment.[53] Finally, the United Nations General Assembly adopted the Convention on the Elimination of All Forms of Discrimination Against Women in 1979;[54] however, Congress has failed to ratify the treaty even after its presentation by two Presidents (Carter and Reagan) and a favorable recommendation from the Senate Foreign Relations Committee.[55] In light of this significant treaty, the United States has failed to ratify the treaty.[56] If the United States wants to serve as a spoke person of humanity, its unyielding global ability and effect must not be subjected to a bureaucratic turtle pace, it must lead with swift and sure action in the name of humanity.[57]

Another significant treaty effort was presented in 1998, that of an International Crime Court (ICC) with a "… promise of universal justice."[58] The Lockerbie bombing trial illustrated the need of a permanent international court to hear crimes against humanity.[59] The Preparatory Commission for the International Criminal Court has finalized a draft text of elements establishing ICC jurisdiction over crimes of sexual slavery[60], forced prostitution[61], sexual violence[62] and other inhuman acts.[63] However, only twenty-seven of the necessary sixty national parliaments have ratified the agreement[64] possibly signaling the end to the universal promise.

An international police force brings forth insurmountable fear for most, however it is not a novel idea. The foundation of an international police force already exists. The United States has is working as a third party with a form of an international police with the European Union[65] and currently has law enforcement officers stationed in embassies and consulates in Europe.[66] The treaty establishing the ICC empowers the "… Office of the Prosecutor with the responsibility for conducting investigations" and invests the authority to "… appoint any necessary staff…" in carrying out his obligation.[67] The United States has demonstrated the desire to protect its borders by considering granting the power to the military to the "… enforcement of immigration and customs laws in border areas"[68] so an international police force may not be far off.

Recent legislation has condemned sex trafficking as "represent[ing] a violation of fundamental human rights"[69] and further created a visa classification entitled "Humanitarian / Material Witness Nonimmigrant Visa."[70] The Attorney General has the discretionary power "to convert nonimmigrants to permanent status when it is justified on humanitarian grounds or is otherwise in the national interest."[71] To qualify an alien must "possess[] material information concerning criminal or other unlawful activity"[72] and "is willing to supply or has supplied such information to Federal or State law enforcement officials"[73] that "would be helpful, were the alien to remain in the United States, to a properly authorized Federal or State investigation or prosecution of the criminal or other unlawful activity"[74] and the alien has "suffered significant physical or mental abuse as a result of the criminal or other unlawful activity."[75]

V. Appraisal

At the heart of a territorial debate on enforcement of international law is sovereignty and rips

> "…those who favor retaining exclusive control by the nation-state over the sanctioning of individual acts characterized as 'criminal' offenses and committed on its territory" [from] "those who view the international community as authorized, or even mandated, to characterize certain egregious violations of human dignity as 'international crimes' to be prosecuted potentially in any criminal court on the planet."[76]

Globalization has reduced a nation's sovereignty to a certain degree, but its importance "… underlies international law's requirement of state consent to treaties and customary international law."[77] It is within sovereignty issues that super powers generate treaty failure.

Secondly, U.S. challenges arise in determining whether the treaty is self-executing or not.[78] Is the treaty is instantaneously enforceable or is legislative action required? American courts have been criticized for not interpreting treaties as self-execut-

continued, next page

ing.[79] This challenge is demonstrated by the presidential and congressional struggles over treaty execution.

Thirdly, economic disparity presents a challenge for treaties. Ryan K. McKain addressed that fact that within the area of protecting a resource (human or otherwise), some countries are required to forgo a short term economic gain and there needs to be a corresponding benefit.[80] Sex-smuggling countries are economically challenged and are required to surrender some of their sovereignty by submitting to the ICC jurisdiction. In return they receive the opportunity to forgo the investigative and prosecutorial costs associated with sex smuggling detection and apprehension. However, the United States (the single highest United Nations contributor), endues a disadvantage by surrendering sovereignty and burdens itself with the majority of the cost.

The ICC treaty has triggered extensive concerns in Congress. United States Republican Senator Orin G. Hatch stated that the United States would not accept encroachments on its sovereignty, and if the United States did become subject to the ICC it would have to reconsider its international commitments.[81] Senator Hatch's concern is that judges, appointed by countries with a dislike of America, will impose their of judicial review on the United States.[82] Senator Chuck Hagel, in agreement stated, "'This institution could well put America in a position to be held hostage to blackmail, to threats based on our military presence around the world, our diplomatic efforts, our geopolitical economic interests.'"[83]

An international police force possessing unquestioned investigative authority, within normal restraints, is as appealing as it is scary. One of the largest impediments to U.S. law enforcement is political influence. However, far to many challenges exist for the creation of an international police force. Two primary problems are arrest authority and the mechanism of establishment.

To conclude any treaty appraisal we recognize that every country must "resolve sovereignty issues in favor of a more open international system, in which benefit to the collective nations is more significant than the territorial or national sovereignty concerns of one state."[84]

VI. Predictions

The eradication of sex smuggling will occur when countries abandon traditional sovereignty notions and create sanctions that outweigh financial gains. Countries with strong notions of sovereignty will hinder progress towards an international body that is bound together "in not a political but a cultural goal.... concerning the fight against the common enemy of humankind: the ordinary criminal."[85] By refusing to abandon notions of sovereignty, the international community is preventing the creation of "a fraternity with a moral purpose and a mission to perform for the good of society."[86]

The "American exceptionalism"[87] stems from the belief in maintaining the nation's sovereign veil to determine criminal liability of its citizens. The time has come to take a position that prevents the exploitation of the underprivileged and subjugated. The U.S. failure may indicate its distrust of one another, not a distrust of other cultures. A belief "*foreigners*" lack impartiality as adjudicators of American activities. For they themselves may be unable to impartially judge.

The world community must mount a two-pronged attack by establishing an international police force and criminal court. Otherwise, we are condemned to ill-fated effort to eradicate sex smuggling. This ill-fated effort is demonstrated when a country ratifies a treaty to prevent sex smuggling atrocities and its high court overturns a jury verdict for placing as many as 200,000 women into service as sex slaves.[88] Although the implementation of treaty agreements may generate some success, their overall performance will remain poor. Without enforcement mechanisms, any treaty is doomed to fail.

VII. Recommendations

"States have a duty under international law to prevent violations of human rights, to investigate violations, to take appropriate action against violators, and to afford remedies and reparation to those who have been injured as a consequence of such violations."[89] International efforts to address sex smuggling have failed to effectively address the crisis.[90] The effective response to *globalized* organized crime into sex smuggling requires the establishment of an international organization empowered to investigate and prosecute smugglers in a single forum. An international police force and a global court are such organizations.

First two avenues may be available to establish a court of international jurisdiction exist, the International Court of Justice (ICJ) and the International Criminal Court (ICC). However, the ICJ must be eliminated because its limited jurisdiction specified by the parties involved.[91]

Although the U.S. has participated in the development of several treaties, these efforts have failed, and will continue to fail. World leaders have taken steps to protect women from exploitation yet their exploitation continues.[92] This appears due to the sacred belief that a nation's sovereignty is absolute. However, the erosion of borders as the result of travel, trade and tourism, "[w]e can no longer regard sovereignty as an absolute and individual right of every State, as used to be done under old law founded on the individualist regime, according to which, States were only bound by the rules they had accepted."[93]

Concerning the International Criminal Court possibility, the statement of Mr. Lamberto Dini, Minister of Foreign Affairs of the Republic of Italy, said, "None of you can fail to sense that what is at stake is the legitimacy of the United Nations itself, and its capacity to lay down rules and principles that are consonant with the times and appropriate to the far-reaching changes that have taken place in recent years."[94] Further, Mr. Dini proclaimed that protecting human rights requires us to "prevent national sovereignty being used as a convenient shield" and that "international jurisdiction ... be superimposed on national jurisdiction"....[95]

While domestic law will determine the extent of damages awarded, the establishment procedures to freeze the offender's assets when plaintiffs prevail is critical. Especially when

"transfer or conceal[ment]" of their funds effectively deny a victim's right to recover.[96] "[A]llowing litigation to proceed to judgment and award... means little ... if the judgment is vulnerable."[97] The inability to enforce judgments when the offender possesses global assets is deserving of immediate international attention and requires a foreign court to render full recognition and enforcement.[98] Therefore, our tripartite system must bring forth its full energies to "identify and select rules of procedure ... that most effectively advance the goals of world civil society--human rights and international commerce."[99] We have no choice but to achieve a "reasonable balance among international interests for stability and predictability and effectiveness in achieving the values of world civil society."[100]

Proposals for an international criminal police organization will meet with much apprehension. This apprehension evolves from an unwillingness to cede authority and control resulting from ideas of sovereignty. However, we experienced a "...great expansion of federal statutory reach..." to encompass the war on drugs[101] because of local governments' failure to respond. Local governments failed to respond because of foreign countries involvement, the complexity of investigations and the lack of prosecutorial desire. The federal government has already used these factors to increase its "policing" involvement against drugs, how can our government not use these *justifying* factors to combat sex smuggling.

The first factor was the involvement of foreign countries. The smuggling of women involves multiple foreign countries. Sex smugglers originate in and commute through foreign countries. In fact, some commentators even believe that "[i]n some countries ... government officials and the local elites have come to accept the institutionalization of violence in the form of forced prostitution because they view the practice as the key to regional development and an important source of foreign currency."[102] Foreign country involvement interjects domestic agencies (federal, state and local) into an area involving national interests and such nation interests are generally reserved federal authority. Having established foreign countries involvement, then one turns to the investigative complexity.

Transnational investigative complexity limits the ability of domestic agencies to successfully dispose of the case because global investigations exceed the budget capacity of many agencies. What was true in the war on drugs is also true in the detection and apprehension of sex smugglers.

The final factor addresses domestic prosecutorial desire. With limited funds available, a balance must be achieved between the costs of prosecution and number of convictions achieved. Excluding the inadequate funding problems, domestic agencies are confronted with the limited availability of personnel and equipment. Finances complicate the investigative decision because local politicians, and citizens, are desirous of protecting themselves, not a foreign victim.

However, history reveals efforts to establish an international police force. Such examples include the Police Union of German States in 1851, the "Anti-Anarchist Conference of Rome" in 1898, and the "International Criminal Police Commission (ICPC) in 1923"[103] which was the forefather of the well known agency, "the International Criminal Police Organization ('Interpol')" created in 1956.

Interpol limited to the collection and sharing of information without any international enforcement authority. Interpol's limited authority must be considered ineffective to reduce sex smuggling because of its "power to investigate or arrest suspects, and [it] ... is limited to collecting and disseminating information regarding the whereabouts of international criminals."[104]

Relaxing America's immigration policies could combat sex smuggling. However rapid opposition would result. Such opposition would be without recognition of immigration law goals. History established immigration standards as a process of *permitting* immigration to those possessing "...certain physical and moral qualities...."[105] Smuggled victims possess these qualities. An amendment to Immigration Reform and Control Act of 1986 would aid in the prosecution of offenders. A deportation waiver would provide United States Attorneys' to secure and retain critical witnesses for prosecution. Following completion of the prosecution, a favorable evaluation of the alien's "...physical and moral qualities..."[106] should result in immigration proce-

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Section Offers Special Deal for IBA Cancun Meeting

The International Law Section of The Florida Bar has a special deal for those Florida Bar members who want to attend the Florida portion of the International Bar Association meeting to be held the end of October, 2001, in Cancun.

The Florida Bar International Law Section will be hosting a cocktail reception on Thursday evening, November 1st and will conduct a seminar on the advantages of doing business in Florida for the foreign attendees, entitled: "Florida: Gateway to the World". It will be an excellent opportunity for Florida practitioners to expand their network of contacts into the International Bar, the largest voluntary bar association in the world, with the most members and most countries represented.

The International Law Section has arranged with the Hilton of Cancun, where the cocktail reception and the seminar will be held, for Florida Bar attendees to receive a special rate for three nights at the Hilton. The entire cost for three nights (Thursday, Friday and Saturday) hotel and roundtrip airfare is $587, per person, double occupancy. The IBA will charge $250 for registration, in addition. For more information, contact Seminars at Sea Travel at 800/491-3567 or *Gorel@emailMSN.com*.

dures being implemented. It is interesting that some believe an alien, who as been packed into cargo hole for days, will have a lesser love for this country than a child born and raised here. Those opposing relaxation may change by understanding immigration goals.

A final recommendation requires training law enforcement personnel and employment training.[107] The training of law enforcement personnel requires identifying origin countries and training officer in the detection, prevention and apprehension of offenders. Additionally, those originating countries citizens would receive employment training. These "*potential*" immigrants would receive training necessary to increase their ability to gain employment at home reducing the desire to flee.[108]

VIII. Conclusion

Some commentators caution against restricting the authority of the ICC because it "...would simply become a tool [of the United Nations and] would not be seen as an independent court...."[109] On the international level, law enforcement's limited knowledge and aptitude, combined with inadequate collaboration between agencies accounts for the ineffective response to modern-day-traders-of-flesh.[110] The United States has the authority and the means to address this growing epidemic[111] but refuses to submit to an international authority without being capable of influencing the outcome.

In order to achieve victory against sex smugglers, the necessary elements remain the same today as they were reported in the United Nations 1959 Study and echoed in a 1982 by Jean Fernand-Laurent, Special Rapporteur, to the United Nations Economic and Social Council establishing four elements: "(1) before prostitution, preventive measures; (2) at the time of prostitution, elimination of isolating discrimination; (3) suppression of procuring: and (4) after prostitution, assistance in rehabilitation."[112] Four small steps for man, one great step for humanity!

Until the international community can create an acceptable enforcement entity and a judicial forum to adjudicate charges levied, we are forced to "...establish police cooperation without the signing of a legally binding document..." to address this global crisis[113] and such cooperation will produce only minimal results in the suppression of sex smuggling. "...[M]any of us would have liked a Court vested with even more far-reaching powers" and "unquestioned authority and the widest possible jurisdiction."[114]

Endnotes:

[1] This Paper Follows Professor's suggested outline in format.

[2] Nora V. Demleitner, *Forced Prostitution: Naming an International Offense*, 18 FORDHAM INT'L L.J. 163, 164-165, (1994).

[3] *See id.* at 188, (1994) (explaining that "post World-War II treaties implicitly assumed that procurement into prostitution can never be the product of a women's free choice").

[4] *See* Frank Viviano, *New Mafias Go Global*, SAN FRANCISCO CHRONICLE, January 7, 2001, at A1.

[5] *See id.* at 14.

[6] *See id.*

[7] *See id.* (citing to Britain's Immigration and Nationality Directorate).

[8] See *id.*

[9] See Organization for Security and Co-Operation in Europe Review Conference, September 1999, ODIHR Background Paper 1999/3, *available at* http://www.osce.org/odihr/docs/i3_index.htm. at 5 (last visited Apr. 5,2001).

[10] *Id.* at 2.

[11] *Id.* at 3.

[12] See Alan A. Stevens, Comment: *Give Me Your Tired, Your Poor, Your Destitute Laborers Ready to be Exploited: The Failure of International Human Rights Law to Protect the Rights of Illegal Aliens in American Jurisprudence*, 14 EMORY INT'L L. R. 405, 409 (2000).

[13] Siegfried Wiessner and Andrew R. Willard, *Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity*, 93 AM. J. INT'L L. 316, 322 (1999).

[14] Stephanie Farrior, *The International Law On Trafficking In Women And Children For Prostitution: Making It Live Up To Its Potential*, 10 HARV. HUM. RTS. J. 213, 214 (1997)(citing Cameron W. Barr, *Getting Adults To Think in New Ways*, Christian Science Monitor, Sept. 16, 1996 at 9.).

[15] *See* Associated Press, *Poverty Spurs Human Trafficking in Africa*, CNN.com/WORLD, *at* http://www.cnn.com/2001/WORLD/africa/02/20/nigeria.slavetrade.ap/index/html (visited Feb. 20, 2001).

[16] See Nora V. Demleitner, *supra*, at 163, 187.

[17] *See Illegal Immigration*, Center for Immigration Studies, *at* http://www.cis.org/topics/illegalimmigration.html (visited Feb. 10, 2001).

[18] *See Office for Democratic Institutions and Human Rights Background Paper 1999/3*, Organization for Security and Co-operation in Europe, *at* http://www.osce.org/odihr/docs/i3_index.htm (visited February 10, 2001).

[19] *See Alleged Mastermind of Fatal Alien Smuggling Ring Charged*, CNN.com, *at* http://www.cnn.com/US/9710/06/briefs.pm/golden.venture/index.html (visited Feb. 10, 2001).

[20] *See Chinese Smuggling Ring Said To Have Used Indian Reservation*, CNN.com, *at* http://www.cnn.com/US/9812/10/smuggling.ring.02/index.html (visited Feb 10, 2001).

[21] *See Office for Democratic Institutions and Human Rights Background Paper 1999/3*, Organization for Security and Co-operation in Europe, *at* http://www.osce.org/odihr/docs/i3_index.htm (visited February 10, 2001).

[22] Philip B. Heymann, *National Symposium on the Changing Role of U.S. Attorneys' Offices in Public Safety: Cautionary Note on the Expanding Role of the U.S. Attorneys' Office*, 28 CAPITAL U. L. REV. 745, (2000).

[23] See *id.* at 747 (stating that the 1998 Department of Justice budget expenditure in 1998 was 16 billion dollars, a 400% increase from 1986.).

[24] Matthew Carlton Hammond, *The Posse Comitatus Act: A Principle In Need of Renewal*, 75 WASH. U. L. QUARTERLY 953, 954 (1997).

[25] See *id.* at 963-964 (1997).

[26] Roger Bowles, Michael Faure and Nuno Garoupa, *Economic Analysis of the Removal of Illegal Gains*, 20 INT'L REV. OF L. & ECON. 537, 544 (2000).

[27] *See Office for Democratic Institutions and Human Rights Background Paper 1999/3*, Organization for Security and Co-operation in Europe, *at* http://www.osce.org/odihr/docs/i3_index.htm (visited February 10, 2001).

[28] *See* Frank Viviano, *supra*, at A2.

[29] Stephanie Farrior, *The International Law On Trafficking In Women And Children For Prostitution: Making It Live Up To Its Potential*, 10 HARV. HUM. RTS. J. 213, 219 (1997)(citing the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, opened for signature Mar. 21, 1950, 96 U.N.T.S. 271).

[30] Jack Goldsmith, Book Review: *Sovereignty, International Relations Theory, and International Law*, 52 Stan. L. R. 959 (2000)(reviewing Stephen D. Krasner, SOVEREIGNTY: ORGANIZED HYPOCRISY, Princeton Univ. Press (1991).

[31] M. O. Chibundu, *Making Customary International Law Through Municipal Adjudication: A Structural Inquiry*, 39 VA. J. INT'L L. 1069 at n.49 (1999)(citing *Kadic v. Karadzic*, 70 F.3d 232, 236 (2d Cir. 1995), *reh'g denied*, 74 F.3d 377 (2d Cir. 1996).

[32] Charles F. Marshall, *Development in Immigration Law Re-Framing the Alien Tort Act After Kadic v. Karadzic*, 21 N.C.J. INT'L L. & COM. REG. 591, 595-597 (1996).

[33] *Id.* at 598 (1996).

[34] 28 U.S.C.A. §1350 (West 1948), (United States Code Annotated Title 28, Judiciary and Judicial Procedure Part IV—Jurisdiction and Venue Chapter 85—District Courts; Jurisdiction §1350. Alien's Action for Tort. (citing Xuncax v. Gramajo, 886 F.Supp. 162 (D. Mass. 1995)).

[35] Charles F. Marshall, *Development in*

Immigration Law Re-Framing the Alien Tort Act After Kadic v. Karadzic, 21 N.C. J. INT'L L. & COM. REG. 591, 599 (1996) (citing Adra v. Clift, 195 F.Supp. 857 (D.Md. 1961)).

[36] See Adriana Kovalovska, *Rape of Muslim Women in Wartime Bosnia*, 3 ILSA J. INT'L & COMP. L. 931 at n.111 (citing Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

[37] Beth Ann Isenberg, *Genocide, Rape, and Crimes Against Humanity: An Affirmation of Individual Accountability in the Former Yugoslavia in the Karadzic Actions*, 60 ALB. L. REV. 1051, 1059 (1997) (citing Kadic v. Karadzic, 70 F.3d. 232 (1995) at 241.

[38] William Aceves, *Affirming the Law of Nations in U.S. Courts: The Karadzic Litigation and the Yugoslov Conflict*, Berkeley J. Int'l L. 137, 157 (1996) (citing the Decision of *Kadic v. Karodzic*, 70 F.3d 232 (1995) for the test originally developed in Filartigo v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

[39] Nora V. Demleitner, *supra*, at 171.

[40] *Id*. (citing U.N. Dept of Int'l Economic & Social Affairs, Study on Traffic in Persons and Prostitution at V-Vi, U.N. Doc. ST/SOA/50/8 (1959)).

[41] Bowles, Faure and Garoupa, *Economic Analysis of the Removal of Illegal Gains*, at 547, 2000.

[42] See Steven V. Melnik, *The Inadequate Utilization of the Accounting Profession in the United States Government's Fight Against Money Laundering*, 4 N.Y.U. J. LEGIS. & PUB. POL'Y 143, 148-149 (2000-2001).

[43] *Id* at 149.

[44] William G. Skalitzky, *Aider and Abettor Liability, The Continuing Criminal Enterprise, and Street Gangs: A New Twist in an Old War on Drugs*, 81 J. CRIM. L. AND CRIMIN. 348, 352 (1990).

[45] *Id*.

[46] See *id*. (The Annunzio-Wyle Anti Money Laundering Act, a third law in 1992, promulgated "...enables foreign bank's licenses to operate in the United States of anyone of their branch is convicted of money laundering).

[47] 21 U.S.C.A. §848(c) (West 1970).

[48] Susan W. Brenner, *RICO, CCE, and Other Complex Crimes: The Transformation of American Criminal Law?*, 2 WM. & MARY BILL RTS. J. 239, 250 (1993).

[49] Nora V. Demleitner, *supra*, at 167-173 (1994) (this sections substantially follows the chronological developments as presented by this author additions).

[50] The limited success of treaties such as the International Agreement for the Suppression of the White Slave Traffic Treaty of 1904, the International Convention for the Suppression of the White Slave Traffic of 1910, the International Labor Organization Treaty of 1919, the International Convention for the Suppression of Traffic in Women and Children of 1921, the Slavery Convention of 1926, the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, International Convention for the Suppression of the Traffic in Women of Full Age of 1933, the Convention for the Suppression of the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others Treaty of 1950, and the Convention on the Elimination of All Forms of Discrimination Against Women in 1979.

[51] Timothy Lee, *International Law: A Solution or a Hindrance Towards Resolving the Asian Comfort Women Controversy?*, 5 UCLA J. INT'L L. & FOREIGN AFF. 461, 485-486 (2001)(citing International Agreement for the Suppression of the White Slave Traffic Treaty of 1904 Article 1 stating "... whoever, in order to gratify the passions of another person, has procured, enticed, or lead away, even with her consent, a woman or girl under age, for immoral purposes, shall be punished" and Article 2 stating "...whoever, in order to gratify the passions of another person, has procured, enticed, or lead away, even with her consent, a woman or girl under age, for immoral purposes, should be punished").

[52] Nora V. Demleitner, *supra*, (citing International Convention for the Suppression of the Traffic in Women of Full Age).

[53] A. Yasmine Rassam, *Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade Under Customary International Law*, 39 VA. J. INT'L L. 303 338 (1999)(citing the Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others Treaty of 1950).

[54] Nora V. Demleitner, *supra*, at 189-190 (1994).

[55] Malvina Halberstam, *United States Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women*, 31 GEO. WASH. J. INT'L L. & ECON. 49, 50 (1997).

[56] *See Multilateral Treaties Deposited With The Secretary-General*, United Nations, at http://www.untreaty.un.org/ENGLISH/bibile/englishinternetbible/partI/ChapterIV/treaty9.asp (visited Apr. 27, 2001).

[57] Mark Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 52 HARV. INT'L L.J. 201, 240 (2001).

[58] Sheryl Grant, *The International Criminal Court: The Nations Of The World Must Not Give In To All Of The United States Demands If The Court IS To Be A Independent, International Organ*, 23 SUFFOLK TRANSNAT'L L. REV. 327 (1999).

[59] Robin Oakley, *Why Not An International Court?*, CNN.com European, Jan. 31, 2001, http://cnn.com/2001/WORLD/europe/01/31/lockerbie.oakley.icc/index.html, p.1.

[60] United Nations Report of the Preparatory Commission for the International Criminal Court, Part II, Finalized draft text of the Elements of Crimes, Article 7, Section 1, subsection g-2.

[61] United Nations Report of the Preparatory Commission for the International Criminal Court, Part II, Finalized draft text of the Elements of Crimes, Article 7, Section 1, subsection g-3

[62] United Nations Report of the Preparatory Commission for the International Criminal Court, Part II, Finalized draft text of the Elements of Crimes, Article 7, Section 1, subsection g-6

[63] United Nations Report of the Preparatory Commission for the International Criminal Court, Part II, Finalized draft text of the Elements of Crimes, Article 7, Section 1, subsection k.

[64] Robin Oakley, *Why Not An International Court?*, CNN.com European, Feb. 10, 2001, http://cnn.com/2001/WORLD/europe/01/31/lockerbie.oakley.icc/index.html, p.1.

[65] Jacqeuline Klosek, *The Development of International Police Cooperation Within The EU and Between the EU and Third Party States: A Discussion of the Legal Basis of Such Cooperation and the Problems and Promises Resulting Thereof*, 14 AM. U. INT'L L. REV. 599, 602 (1999).

[66] *Id*. at 604.

[67] Sheryl Grant, *The International Criminal Court: The Nations Of The World Must Not Give In To All Of The United States Demands If The Court IS To Be A Independent, International Organ*, 23 SUFFOLK TRANSNAT'L L. REV. 327, 340 (1999).

[68] Hammond, *The Posse Comitatus Act: A Principle In Need of Renewal*, at 972.

[69] Comprehensive Anti-Trafficking in Persons Act of 2000 §4007(2)(14) (stating in relevant part, "Trafficking is condemned by the United States an the international community and, at its core, represents a violation of fundamental human rights."

[70] Comprehensive Anti-Trafficking in Persons Act of 2000 §4007(7).

[71] *Id*. §4007(7)(a).

[72] *Id*. §4007(7)(b)(3)(i).

[73] *Id*. §4007(7)(b)(3)(ii).

[74] *Id*.§4007(7)(b)(3)(iii).

[75] *Id*.§4007(7)(b)(3)(iv).

[76] Siegfried Wiessner and Andrew R. Willard, *Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity*,93 AMERICAN JOURNAL OF INTERNATIONAL LAW 316, 326 (1999).

[77] *Supra* Foot Note 35.

[78] John B. Attanasio, *The Interaction Between National Courts and International Tribunal: Rapporteur's Overview and Conclusions: Of Sovereignty, Globalization, and Courts*, 28 N.Y. U. J. OF INT'L L. & POL. 1, 2 (1996) (explaining the determination as "whether some additional legislative act is required before a domestic court will afford the treaty's provisions such force.").

[79] *Id*.

[80] Ryan K. McKain, *A Critical Evaluation of the Development and Implementation of Forest Preservation Strategies*, 15 CONN. J. INT'L L. 235, 236 (2000).

[81] Robin Oakley, *Why Not An International Court?*, CNN.com/WORLD, *at* http://www.cnn.com/WORLD/europe/01/31/lockerbie/oakley.icc/index.html (Feb. 10, 2001).

[82] *Id*.

[83] *U.S. To Sign War Crimes Treaty*, CNN.com, *at* http://www.cnn.com/2000/US/12/31/war.tribunal/index.html (visited Feb. 10, 2001).

[84] Allison F. Gardner, *Environmental Monitoring's Undiscovered Country: Developing a Satellite Remote Monitoring System to Implement the Kyoto Protocol's Global Emissions Program*, 9 N.Y.U. ENVTL. L.J. 152, 210 (2000).

[85] Mathieu Deflem, *Bureaucratization and Social Control: Historical Foundations of International Police Cooperation*, 34 L. & SOC'Y REV. 34, 739 (2000).

[86] *Id* at 750-751.

[87] Lynn Sellers Bickley, Comment: *U.S. Resistance to the International Criminal Court: Is the Sword Mightier Than the Law*, 14 EMORY INT'L L. REV. 213, 216 (2000) (listing as explanation of the phrase the Senate's failure to ratify the League of Nations, a fractured attempt to fashion international human rights treaties of the 1950's, failure to sign the

continued, next page

Landmines Convention, refusal of Senator Helms to allow international treaties signed by the U.S. protecting the rights of women and children to come before the Senate).

[88] Associated Press, *Japan Court Nixes Sex Slave Funds*, Findlaw.com, *at* http://findlaw.com/ap/i/1104/3-29-2001/20010329121344630.html (last visited March 30, 2001).

[89] *See Office for Democratic Institutions and Human Rights Background Paper 1999/3*, Organization for Security and Co-operation in Europe, *at* http://www.osce.org/odihr/docs/i3_index.htm (visited February 10, 2001).

[90] *Id.*

[91] Statute of the International Court of Justice, Art. 34, subsection 1 stating that "**only states** may be parties in cases before the court."(emphasis added) available at http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasic statute.htm, last visited Apr. 17, 2001..

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[93] Mary C. Tsai, *Globalization and Conditionality: Two Sides of the Sovereignty Coin*, 31 LAW & POL'Y INT'L BUS. 1317, 1318 (2000) (citing Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 39, 43 (Apr.9) (Individual Opinion By Judge Alveraz)).

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[95] *Id.*

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[97] *Id.* at 515.

[98] Gordon A. Christenson, *Federal Courts and World Civil Society*, 6 J. TRANSNAT'L L. & POL'Y 405, 513 (1997).

[99] *Id.* at 515.

[100] *Id.*

[101] Philip B. Heymann, *National Symposium on the Changing Role of U.S. Attorneys' Offices in Public Safety: Cautionary Note on the Expanding Role of the U.S. Attorneys' Office*, 28 CAPITAL U. L. REV. 745, 746 (2000).

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[103] Mathieu Deflem, *Bureaucratization and Social Control: Historical Foundations of International Police Cooperation*, 34 L. & SOC'Y REV. 34, 746-747 (2000).

[104] Molly McConville, Note: *A Global War on Drugs: Why The United States Should Support the Prosecution of Drug Traffickers in the International Criminal Court*, 37 AM. CRIM. L. REV. 75, 80 (2000).

[105] Bina Kalola, *Immigration Laws and the Immigrant Women: 1885-1924*, 11 GEO. IMMIGR. L.J. 553, (1997).

[106] *Id.*

[107] See CNN, *Poverty Spurs Human Trafficking in Africa*, Feb. 20, 2001, available at http://www.cnn.com/2001/WORLD/africa/02/20/nigeria.slavetrade.ap/index/html, p.1 (citing to UNICEF West Africa Director Rima Salah speaking to participants of the First Pan-Africa Regional Conference on Trafficking in Persons) last visited Apr. 17, 2001.

[108] *Id.*

[109] *Id.* at 349.

[110] *See Office for Democratic Institutions and Human Rights Background Paper 1999/3*, Organization for Security and Co-operation in Europe, *at* http://www.osce.org/odihr/docs/i3_index.htm (visited February 10, 2001).

[111] *Id.* at 29.

[112] Nora V. Demleitner, *supra*, at 176-177 (1994).

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[114] Kofi Annan, International Criminal Court Adoption , Statement at Signing Ceremony, at (Jul. 18, 1998).

International Law Executive Council

Jose Antonio Santos, *Chair*
Greenberg Traurig, Pa
1221 Brickell Ave.
Miami, FL 33131-3224
(305) 579-0785
Fax: (305) 579-0717
Email: *santost@gtlaw.com*

Laurence Douglas Gore,
Chair-Elect
Gore Bell & Stults Pa
2400 E. Commercial Blvd. Ste. 70
Fort Lauderdale, FL 33308-4033
(954) 493-7400
Fax: (954) 493-7770
Email: *gorel@email.msn.com*

David Samuel Willig, *Secretary*
2837 S.W. 3rd Ave.
Miami, FL 33129-2316
(305) 667-7755
Fax: (305) 860-1882
Email: *dswchtd@aol.com*

Lucius Smejda, *Treasurer*
Smejda & McFarland, L. L. P.
100 S.E. 2ND St. Ste. 2315-B
Miami, FL 33131-2151
(305) 358-9995
Fax: (305) 358-9997
Email: *lex1usa@aol.com*

Todd Gerard Kocourek,
Immediate Past Chair
1351 N. Gadsden St.
Tallahassee, FL 32303-5668
(850) 222-5198
Email: *todd@attglobal.net*

John Marshall Kest,
Board Liaison
P.O. Box 568188
Orlando, FL 32856-8188
(407) 843-7060
Fax: (407) 843-5836
Email: *johnmkes@aol.com*

Samuel Kern Alexander, III
Professor of Law -IALS
17 Russell Square/London,Engl
U. K. WCIB 5DR, ZZ 00000
Fax: (352) 372-7777
Email: *kern.alexander@sas.ac.uk*

Drucilla E. Bell
830 4th Ave. N.W.
Largo, FL 33770-2315
(727) 588-9551
Fax: (727) 559-8847
Email: *dru@globalawfirm.com*

John Charles Bierley
Smith Clark Delesie, et al
P.O. Box 2939
Tampa, FL 33601-2939
(813) 226-1880
Fax: (813) 226-1879
Email: *jbierley@sclegal.com*

Peter Lanston Fitzgerald
Stetson Univ. Coll of Law
1401 61st St. S.
St. Petersburg, FL 33707-3246
(727) 562-7874
Fax: (727) 347-3738
Email: *fitz@law.stetson.edu*

Michael Wallace Gordon
Univ. of Fla.
College of Law
Gainesville, FL 32611
Email: *gordon@law.ufl.edu*

Robert Ryon Hendry
Hendry Stoner Et Al
200 E. Robinson St. Ste. 500
Orlando, FL 32801-1956
(407) 843-5880
Fax: (407) 425-7905
Email: *rhendry@hssb-law.com*

Richard Allen Jacobson
501 E. Kennedy Blvd. Ste. 1700
Tampa, FL 33602-5239
(813) 228-7411
Fax: (813) 229-8313
Email: *jacobson@fowlerwhite.com*

Richard Donald La Belle, III
La Belle & Staunton, P. A.
3446 Lake Dr.
Palm Harbor, FL 34683-6840
(727) 784-9494
Fax: (727) 781-0013
Email: *rjl87@aol.com*

Samuel Robert Mandelbaum
Mandelbaum & Fitzsimmons, P.A
P.O. Box 3373
Tampa, FL 33601-3373
(813) 221-0200
Fax: (813) 221-7335
Email: *srm@manfitzlaw.com*

Clyde Edward McFarland, Jr.
Lucent Tech Inc. Rm. 504-13
2333 Ponce De Leon Blvd.
Coral Gables, FL 33134-5422
(305) 569-3640
Fax: (305) 569-4893
Email: *cemcfarland@lucent.com*

Brian Harris Nelson
Akerman Senterfitt, Suntrust
1 S.E. 3rd Ave. Fl. 28
Miami, FL 33131-1715
(305) 374-5600
Fax: (305) 374-5095
Email: *bnelson@akerman.com*

William H. Newton, III
444 Brickell Ave. Ste. 300
Miami, FL 33131-2472
(305) 358-5800
Fax: (305) 358-6422
Email: *wnewton@law.miami.edu*

Laura Anne Quigley
Hendry Stoner Sawicki & Brown
200 E. Robinson St. Ste. 500
Orlando, FL 32801-1956
(407) 843-5880
Fax: (407) 425-7905
Email: *hssb@hssb-law.com*

Peter Alan Quinter
Becker & Poliakoff Pa
3111 Stirling Rd.
Fort Lauderdale, FL 33312-6566
(954) 985-4101
Fax: (954) 985-4176
Email: *pquinter@becker-poliakoff.com*

John Henry Rooney, Jr.
2655 S. Le Jeune Rd. Ste. 916
Coral Gables, FL 33134-5813
(305) 779-4942
Fax: (305) 779-4943
Email: *jrooney@joneswalker.com*

Francesca Russo-Di Staulo
Sandler Travis & Rosenberg
5200 Blue Lagoon Dr. Ste. 600
Miami, FL 33126-7002
(305) 267-9200
Fax: (305) 267-5155
Email: *FDistaulo@strtrade.com*

International Tax Briefs

by Richard A. Jacobson, Esq., Fowler White – Tampa

Withholding Tax Alert: New W-8s Required

Foreign clients are used to providing IRS Form W-8 to banks, stock brokers and the like in order to claim their Aforeign@ status and be properly treated for withholding taxes on dividends, interest and the like. New rules have completely revamped Form W-8: it now comes in 4 versions and attempts to identify the ultimate beneficial owner of income and to prevent improper claims for reduced rates and exemptions from U.S. withholding tax by foreign persons under U.S. tax treaties. After December 31, 2000, any existing U.S. tax forms (Forms W-8, 1001, 4224 and 8709) must be replaced with the appropriate new version of Form W-8. However, due to problems in implementing the new Forms, the IRS announced on December 8, 2000 that if the withholding agent can demonstrate that it made a good faith effort, but was unable to obtain the new forms, old forms can be used during calendar year 2001.

Offshore Credit Card Charges Furnished to I.R.S.

On October 30, 2000 a District Court in Miami ordered the enforcement of an I.R.S. John Doe summons to review the records of American Express, Master Card and Visa Card to examine the names of persons having signatory authority over charge, credit and debit card accounts with banks in Antigua and Barbuda, the Bahamas, or the Cayman Islands. The I.R.S. asserted that individuals who have evaded tax on income are using those credit card accounts to gain access to their hidden funds.

Richard Jacobson *is a shareholder and practices in the International Department at Fowler, White, Gillen, Boggs, Villa-real and Banker, P.A. in Tampa, Florida. He received his LL.M. in Taxation from New York University, his J.D. with honors from the University of Florida and his B.B.A with honors from the University of Georgia. He is a member of various bar associations and was appointed by the Governor of Florida to the Florida International Trade and Investment Council. Mr. Jacobson is the Director of the Tampa Bay Area Committee on Foreign Relations and is a Past President of the West Coast Chapter of the Florida Institute of Certified Public Accountants. He has lectured extensively on international tax topics and has published numerous articles on international tax, including a weekly newspaper column on international topics.*

2001 - 2002 International Law Section Budget

REVENUES:	
Dues	22,000
Less Retained by TFB	(11,000)
Net Section Dues	11,000
Affiliate Dues	425
Affiliate Dues Retained	(240)
Net Affiliate Dues	185
Total Dues	**11,185**
Course Income	18,681
Videotape Sales	300
Audiotape Sales	1,500
Book Sales/Material Sales	400
Newsletter Subscriptions	100
Member Service Programs	100
Sponsorship	10,000
Investment Income	9,481
Miscellaneous	500
Newsletter Advertising	650
TOTAL REVENUE	**52,897**

EXPENSES:	
Staff Travel	1,782
Postage	2,500
Printing	400
Officer/Council Office Expense	300
Newsletter	3,000
Membership Drive	100
Supplies	250
Photocopying	500
Officer Travel Expense	750
Meeting Travel Expense	1,000
Out-of-State Travel	500
CLE Speaker Expense	5,000
Committee Expense	300
Board or Council Meetings	1,000
Bar Annual Meeting	7,000
Midyear Meeting	700
Section Service Program	1,000
Section Retreat	7,500
Section Membership Directory	3,000
Awards	1,500
Scholarships	1,000
Writing Contest	1,000
Website	10,000
Council of Sections	300
Miscellaneous	100
CLER Credit Fee	150
Special Projects	500
Operating Reserve	5,113
TOTAL EXPENSES	**56,245**
Beginning Fund Balance	**135,439**
Net Operations	**(3,348)**
ENDING FUND BALANCE	**132,091**

The Florida Bar Continuing Legal Education Committee and the International Law Section present

Estate Planning for the International Law Client

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

Live Presentation: October 12, 2001 - Miami

Video Replays (3 locations): November 2, 2001 - December 6, 2001

Course No. 5091R

8:45 a.m. – 9:00 a.m.
Late Registration

9:00 a.m. – 9:45 a.m.
Foreign Law Considerations and the U.S. Definitions of Residence and Domicile
Shepard King, Esq., Greenberg Traurig, Miami

9:45 a.m. – 10:30 a.m.
U.S. Estate, Gift, and Generation-Skipping Transfer Taxation of Foreigners (Including Alternative Investment Structures) Investing in the United States
Michael DeSiato, C.P.A., McClain & Co., Miami

10:30 a.m. – 10:45 a.m.
Break

10:45 a.m. – 11:30 a.m.
Expatriation and Related Effects for Taxation Purposes
William Streng, Esq., University of Houston Law Center, Houston, TX

11:30 a.m. – 12:15 p.m.
New Developments in International Estate Planning Especially as Related to Offshore Versus Domestic Trusts
Michael Rosenberg, Esq., Packman, Neuwahl & Rosenberg, Coral Gables

12:15 p.m. – 1:30 p.m.
Lunch (on your own)

1:30 p.m. – 2:15 p.m.
Global Strategies Including Drafting Qualified Domestic Trusts and New Products and Insurance
Joel Karp, Esq., Coral Gables

2:15 p.m. – 3:00 p.m.
Viable Offshore Structures Available to the International Client For Investing in the United States
Robert F. Hudson, Jr., Esq., Baker & McKenzie, Miami

3:00 p.m. – 3:15 p.m.
Break

3:15 p.m. – 4:00 p.m.
Post Mortem Estate Planning for the International Client Including Probate and Foreign Legal Considerations
William H. Newton, III, Esq., Miami

4:00 p.m. – 4:45 p.m.
Coordinated Tax and Immigration Considerations for Foreigners Investing in U.S. Including Pre-Immigration Estate Planning and Ethics
Michael A. Bander, Esq., Bander, Fox-Isicoff & Associates, P.A., Miami

CLER PROGRAM
(Maximum Credit: 7.0 hours)
General: 7.0 hours
Ethics: .50 hours

CERTIFICATION PROGRAM
(Maximum Credit: 7.0 hours)

Immigration & Nationality	1.0 hour
International Law	7.0 hours
Real Estate	2.0 hours
Wills, Trusts & Estates	5.0 hours

Credit may be applied to more than one of the programs above but cannot exceed the maximum for any given program. Please keep a record of credit hours earned. RETURN YOUR COMPLETED CLER AFFIDAVIT PRIOR TO CLER REPORTING DATE (see Bar *News* label). (Rule Regulating The Florida Bar 6-10.5)

REFUND POLICY: Requests for refund or credit toward the purchase of the course book/tapes of this program **must be in writing and postmarked** no later than two business days following the course presentation. Registration fees are non-transferrable, unless transferred to a colleague registering at the same price paid. A $15 service fee applies to refund requests.

Register me for "Estate Planning for the International Law Client" Seminar

TO REGISTER OR ORDER COURSE BOOK/TAPES, MAIL THIS FORM TO: The Florida Bar, CLE Programs, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 with a check in the appropriate amount payable to The Florida Bar or credit card information filled in below. If you have questions, call 850/561-5831. ON SITE REGISTRATION, ADD $15.00. **On-site registration is by check only.**

Name _____ Florida Bar # _____

Address _____

City/State/Zip _____ Phone # _____

(ABF) **Course No. 5091R**

I PLAN TO ATTEND (check one):

- ❑ (161) Miami** (Hotel Sofitel) (10/12/01)
- ❑ (098) Fort Myers* (Lee County Bar Assoc.) (11/02/01)
- ❑ (068) Orlando* (Downtown Marriott) (11/08/01)
- ❑ (089) Tampa* (The Florida Bar Room C) (12/06/01)

***Live **Videotaping Session *Videotaped Replay

❑ Please check here if you have a disability that may require special attention or services. To ensure availability of appropriate accommodations, attach a general description of your needs. We will contact you for further coordination.

REGISTRATION FEE (check one):

- ❑ Member of the International Law Section: $100
- ❑ Non-section member: $115
- ❑ Full-time law college faculty or full-time law student: $57.50
- ❑ Persons attending under the policy of fee waivers: $0
  Includes Supreme Court, DCA, Circuit and County Judges, General Masters, Judges of Compensation Claims, Administrative Law Judges, and full-time legal aid attorneys if directly related to their client practice. *(We reserve the right to verify employment.)*

METHOD OF PAYMENT (check one):

- ❑ Check enclosed made payable to The Florida Bar
- ❑ Credit Card (Advance registration only. May be faxed to 850/561-5816.) ☐ MASTERCARD ☐ VISA

Name on Card: _____ Card No. _____

Expiration Date: _____/_____ (MO./YR.) Signature: _____

❑ Enclosed is my separate check in the amount of $25 to join the International Law Section. Membership expires June 30, 2002.

COURSE BOOK — AUDIO/VIDEOTAPES

Private taping of this program is not permitted.

Delivery time is 4 to 6 weeks after October 12, 2001. PRICES BELOW DO NOT INCLUDE TAX.

_____ COURSE BOOK ONLY: Cost $35.00 plus tax TOTAL $ _____

_____ AUDIOTAPES (includes course book)
Cost: $100 plus tax (section member), $115 plus tax (nonsection member) TOTAL $ _____

_____ VIDEOTAPES (includes course book)
Cost: $200 plus tax (section member), $215 plus tax (nonsection member) TOTAL $ _____

Certification/CLER credit is not awarded for the purchase of the course book only.

Please include sales tax unless ordering party is tax-exempt or a nonresident of Florida. If this order is to be purchased by a tax-exempt organization, the course book/tapes must be mailed to that organization and not to a person. Include tax-exempt number beside organization's name on the order form.

Musings Re: The Expatriation Tax

by William H. Newton, III

United States citizens who expatriate with a principal purpose of tax avoidance may be subject to special income, estate, and gift tax treatment for a period of ten years after the expatriation occurs. The same treatment extends to long-term residents–aliens who have been lawful permanent residents for at least eight out of a fifteen-year period–who cease to be lawful permanent residents of the United States.

For this purpose, a former citizen or long-term resident is automatically charged with the requisite tax avoidance intent if the individual's average annual net income tax liability for the preceding five-year period exceeds $100,000 or net worth is $500,000 or more as indexed to cost-of-living adjustments. Those falling below these thresholds may nevertheless be subject to expatriation treatment depending on the general rules governing burden of proof.

Even so, individuals who reach either threshold may be able to avoid the expatriation tax by obtaining a ruling from the Internal Revenue Service. To be eligible to apply for a ruling certain criteria must be satisfied. These are that the individual: (1) became a dual citizen at birth and retains only United States citizenships, (2) become, within a reasonable period after loss of United States citizenship, a citizen of the jurisdiction in which the individual, the individual's spouse, or one of the individual's parents was born, (3) was present in the United States for no more than thirty days for each year of the ten-year period immediately preceding loss of citizenship, or (4) relinquishes United States citizenship before reaching age 18½. Analogous criteria exist for former long-term residents. Moreover, individuals who narrowly fail to satisfy the criteria of an enumerated category may also submit a ruling request.

The information required to be included in the ruling request is quite detailed and is based on Notices issues by the International Revenue Service. To illustrate, along with other data it is necessary to include both a balance sheet of assets and liabilities as well as comparative computations of the United States and applicable foreign income taxes based on a deemed disposition of all assets immediately following the change of status if it is determined the individual did not expatriate with a principal purpose to avoid United States taxes and if the individual had remained a United States person.

If the ruling request is indeed complete and submitted in good faith, the Internal Revenue Service will then issue a ruling which will reach one of the following conclusions:

1. In those cases where the information submitted clearly establishes the lack of a principal purpose, that the individual's expatriation did not have as one of its principal purposes the avoidance of United States taxes; or
2. In those cases where the information submitted clearly establishes the existence of such a principal purpose, that the individual's expatriation did have as one of its principal purposes the avoidance of United States taxes; or
3. In those cases where the information submitted clearly establishes neither the existence nor lack of such a principal purpose, that while the ruling request constitutes a complete and good faith submission, no opinion is expressed on whether the individual's expatriation had for one of its principal purposes the avoidance of United States taxes.

If the ruling issued by the Internal Revenue Service rests on the third ground set forth immediately above, the presumption of a tax avoidance purpose created by satisfaction of the net income or net worth tests no longer exists. Even so, the Service may forward the information collected as part of the ruling process to the Office of Assistant Commissioner (International) to consider in any later examination of the individual's returns. In the event of any such subsequent examination, the individual may ultimately be found to have had a principal purpose of tax avoidance based on applicable facts and circumstances.

The neutral approach of expressing no opinion as to existence or non-existence of tax avoidance in issuing a ruling was adopted due to difficulties the Service encountered in making an ultimate determination regarding tax avoidance particularly because of the inherently factual and subjective nature of the inquiry. That is, while in some instances a deter-

continued, next page

The Board of Legal Specialization and Education and the International Law Certification Committee are pleased to announce the following attorney is now Board Certified.

Congratulations to her for achieving International Law Certification!

PAMELLA A. SEAY, Port Charlotte

Expatriation Tax
from preceding page

mination with respect to a tax avoidance purpose could be made, in others no definitive advance determination could be reached because the information submitted with the ruling request did not clearly establish the existence or lack of a principal tax avoidance purpose. The effect for those individuals eligible to submit a ruling request was to preclude issuance of a ruling altogether and thus adversely effect the individual by not addressing and thereby leaving in effect the tax avoidance presumption.

The Internal Revenue Service now regularly issues rulings. It has done so both based on the conclusion as to the absence of a principal purpose of tax avoidance. *See, e.g.*, Priv. Ltr. Rul. 200116029; Priv. Ltr. Rul. 200111002. Alternatively, it has also merely concluded the ruling request constitutes a complete and good faith submission. *See, e.g.*, Priv. Ltr. Rul. 200117027.

There is no bright dividing lines between those individuals who obtain a ruling as to the absence of a principal tax avoidance purpose and those merely making a complete and good faith submission. Even so, the rationale of *Rogers v. Beller*, 401 U.S. 815 (1971) may in this vein prove instructive. There, the Court held that failure to satisfy certain conditions subsequent regarding residence in the Unites States after birth of a child of a United States citizen parent abroad effectively out off the child's right of citizenship. Drawing on this rationale the citizen parent could with some force argue that since the parent's child is thus unable to obtain United States citizenship so also the parent should not be forced to retain that now undesired status. Analogous positions may also prove persuasive.

William H. Newton, III, *is a practicing attorney in Miami, FL, and advisor to law firms and international trust companies regarding international tax and international estate planning matters. He is author of the two volume treatise* International Income Tax and Estate Planning, *published by Clark, Boardman, Callaghan, and has been adjunct professor of law in the Master's of Tax and Master's of Estate Planning Programs at the University of Miami for over 20 years, author of numerous legal articles regarding international tax and estate planning. He is a graduate of MIT and SMU.*

Section Growth
from page 1

ment of the Florida economy as a whole, and Florida's services sector is outpacing the growth in the United States. Such growth in services, as well as Florida's pre-eminence in the area bodes well for our profession. Keep in mind that Florida's international trade in services is also at the top of the list, with international and domestic legal practitioners sharing in this bonanza.

You may wonder why I may be bringing these facts and figures to your attention. For one, I believe it is imperative that we understand where we stand so that actions taken can have meaningful and, hopefully, long-lasting effects. Additionally, the Section still has many challenges ahead, the most important of which is to ensure that the excellent stewardship that the leadership of this Section has provided for almost two decades serves as a continual launching pad for ideas and service to members. The Section has supported or undertaken a number of programs and initiatives over the years.

- The development and passage of Florida's Civil Law Notary statute, the first of its kind in the United States
- The development and administration of the Certification Program in International Law
- The development and passage of the Foreign Legal Consultant Rule (Chapter 16), and the implementation and administration of the program
- Top-rated Continuing Legal Education programs such as the Doing Business in Latin America series, the International Tax programs, Canada-Florida series and the Immigration Law Update
- The development and passage of the Florida International Arbitration Act
- The development and passage of the Uniform Foreign-Money Judgment Recognition Act
- Protocol-based relationships with The Barcelona, Quebec and Sao Paulo bar associations, as well as close relationships with the Inter-American Bar Association, the American Bar Association, the International Bar Association and the Union Internationale des Avocats
- In conjunction with Stetson University, the establishment and operation of the Florida Legal Opportunities Database

Our challenge today is to continue the fine tradition of the Section. It is with this in mind that I have pointed out a number of areas for focus this year.

The Foreign Legal Consultants' Rule needs to be reviewed by the Section and we have to determine how to make it a more effective and dynamic rule. The Section should look at the requirements of the rule to make the process easier and less time-consuming while at the same time protecting the public. I have asked the Foreign Legal Consultant Committee to begin this process. The Section also needs to educate all practitioners across the state of the existence of this program and the need to achieve 100 percent compliance. A good publicity and education campaign aimed at the public and potential legal consultants will be launched this year. All are welcome to participate in these projects, as I believe that the Foreign Legal Consultants Program is one of the most important programs the Section has implemented in the past 10 years.

Certification in International Law is well underway, now in its third year. The International Law Certification Review Course, which is being organized by Robin Abraham in conjunction with our Continuing Legal

Education Committee, will be held just before the next scheduled examination. The Section needs to look at the Certification process and requirements to ensure the program is serving the public adequately now that it has been implemented. Your help and ideas is requested.

Continuing Legal Education continues to be one of our strongest areas at the Section. The CLE Committee has always enjoyed strong leadership, resulting in timely and robust programs that serve the Section's membership as well as the rest of Bar well. Our CLE Committee Chair, Lucius Smejda, and its newly-appointed Vice-Chair, Tamela Stultz, are assisting various committees in the organization of programs covering a wide variety of topics.

- Estate Planning for the International Law Client – October 12, 2001 (Miami)
- Doing Business in Florida (in conjunction with the International Bar Association Business Law Section's Annual Meeting) – November 1-2, 2001 (Cancun, Mexico)
- International Law Certification Review (during the Bar's mid-year meeting) – January, 2002 (Miami)
- Florida-France Forum – January, 2002 (Paris, France)
- 23rd Annual Immigration Law Update – February, 2002 (Miami)
- Canadian Forum – March, 2002 (day-cruise from South Florida)
- Legal Aspects of Doing Business in Latin America – April, 2002 (Miami)

The CLE Committee will be strengthened further this year with the addition of new administrative guidelines for all committees so that we can ensure that, as the Section grows, and our responsibility to the Bar increases, we continue to deliver top-rated programming.

Membership is the one area that we have been developing during the past few years. We nearly topped 1,000 members and we have set a goal to surpass that number by the time of our Section Retreat in late August. We have also set a goal of 1,100 members by the time of our mid-year meeting in January and another goal of 1,200 members by June, 2002. I know that the Section can accomplish these modest targets when we tell practitioners throughout the State of Florida what this Section can do for them. In a state that sits at the crossroads of Europe, the Caribbean, Latin America, Africa and North America, many practitioners will deal with international legal issues in one way or another and should participate in Section activities and programs. If we want to attract new members and get them (as well as old members) to be more involved in Section activities, ask them to attend the Section Retreat in August. Invite an old, a new or even a prospective member to attend and get them involved.

Now to our committee structure. I will be asking each Committee Chair to present at least one program or project for the coming year. Much of this discussion will take place at the Section Retreat. Nonetheless, one way this can be accomplished is by ensuring that each CLE program already planned has the involvement of the relevant committees. Some, such as the Canadian Forum or the Doing Business in Florida program in Cancun, will necessarily require the participation of a number of substantive law and regional committees. Others may simply plan to do some of the Section's less visible work in such diverse areas as Foreign Legal Consultants and the Florida Legal Opportunities Database. In all instances, we must continue to promote the idea that a healthy committee is an active committee, especially as we continue to develop. To assist in this regard, I have created a number of ad hoc committees this year:

- Western European Law
- Inter-American Law
- Pan-Asian Law
- International Arbitration
- International Litigation
- International Organizations Relationship Oversight
- International Taxation

Appointments to these committees will be made shortly. Please let the Section know of your particular interests and sign-up today. Just as important, bring along a new or old member.

I know that these may seem like significant challenges in a world that seems to have less time each day, but the few things I list are part of the larger responsibility that the Section has already assumed and that it performs day in and out. It may appear that we have shifted some of our focus to increasing our membership base. Sheer numbers alone is not enough. We must ensure that the Section's growth is measured not just by its membership, but by its accomplishments as well, and that is the real challenge here. Each and every member of this Section owes it to the profession, to the public and to themselves to carry out the Section's responsibilities by assisting in the Section's work, even in what they may deem to be small ways. One can put together many boulders and stones, but remember that it is the mortar and sand that fills in the gaps, without which the structure will not last. My last challenge for this year to you is to ask that you put in just a small amount of your time, attend a meeting, help bring in a member, assist in organizing a CLE program, sit on one of our administrative committees, or sign-up your firm to participate in the law student database. This will ensure that we continue to grow as a Section.

Thinking About Becoming Board Certified in International Law?

The application filing period for the March 2002 examination starts on July 1 and ends on August 31, 2001.

You can obtain an application by downloading a copy from the Bar's website **(www.FLABAR.org).** (Click on the *Member Services* link, then *Certification*.) Or request an application by writing to: The Florida Bar, Legal Specialization and Education, 650 Apalachee Parkway, Tallahassee, FL 32399-2300. Please read the standards for international law certification located in your September 2000 issue of The Florida Bar *Journal* or you may access the rule (Chapter 6-21) on the Bar's website.

Questions? Call the Legal Specialization and Education Department at 850/561-5842.

Section Participates in Exchange Program with China

In December of 2000, Hubei Province, China set a delegation of lawyers to Florida where they were officially received in Fort Lauderdale by The Florida Bar's International Law Section. An agreement of cooperation and exchange was signed between the two Bar Associations. It was now the turn of The Florida Bar's International Section to return the visit. The delegation was led by chair-elect of the International Law Section, Laurence Gore, who had conducted a trade mission last year on behalf of the City of Ft. Lauderdale and it's Sister City program. It was during that trip, with several Florida attorneys and judges along that the initial contacts were made with The Florida Bar. Accompanying Mr. Gore was the vice chair of the CLE Committee of the International Law Section, Tamela Stults. Capt. Ed Fink, JAGC, United States navy (Ret.) conducted several seminars while in China along with Ms. Stults and Anita Cava an attorney and assistant professor at the University of Miami. The trip was also designed as a CLE "Doing Business In and With China" program. The participants learned about the various forms of joint ventures in China, the Chinese (revised) Constitution, the national and local legal systems, foreign investment guarantees, updates on the Foreign Corrupt Practices Act, Chinese maritime law, Chinese Alternative Dispute Resolution and toured foreign trade zones.

Developing local contacts for future business was also an essential ingredient of the program. Participants learned that while major U.S. and foreign companies were adequately represented, there existed a large number of medium and small Chinese firms in need of legal advice for doing business in the U.S. Chinese law firms are not allowed to have of counsel agreements with foreign firms, thus making it necessary for a U.S. law firm to go to the expense of opening its own office should it wish to do any business in China. On the other hand, Hong Kong legal firms are often a hodgepodge of nationalities. Though, now officially a part of China, Hong Kong remains much as before the takeover, with the necessity of border crossings, immigration and customs controls between the two regions. At the conclusion of forty-two more years the Hong Kong legal systems are to merge with Mainland China. However, although forty two years is short in the span of Chinese history, with the rapid development of industrialization and capitalism, already rampant in major Chinese cities, much can and is expected to change in China before then.

Section membersgather for a photo-op in Red Square, Beijing, China.

Section members at the Great Wall of China.

Treasury Undoes Treaty Benefits One More Time

by Margarita P. Muina, Esq.

Bilateral income tax treaties are afforded equal dignity with congressional statutes under the Supremacy Clause of the U.S. Constitution and, at least in theory, in the event of a conflict between the two, the later in time controls.[1] In practice, however, Congress has acted to expressly nullify a treaty obligation in pursuit of its own tax policy including statements to this effect in the legislative history of the overriding statute. For instance, the Foreign Investment in Real Property Act overtly indicated its intent to override the equal dignity and later in time rule to tax gain from disposition of a U.S. real property interest.[2] Sometimes, however, Congressional language purports to respect treaty obligations even as the practitioner's wonder how this is possible in light of the rule promulgated by the statute. This is the case with the final Regs. enacted pursuant to Internal Revenue Code § 894(c)(2) (the "final Regs.") which will have the effect of denying treaty benefits unless certain conditions set forth in the Regs. are met. Nevertheless, the preamble to the final Regs. states it is consistent with treaty obligations. and the actual text of the statute provides it will apply "to any taxpayer with due regard to any treaty obligation of the United States which applies to such taxpayer".

Despite these reassurances the final Regs. mandate 30% withholding on payments of interest, dividends, and royalties not connected with a U.S. trade or business even though most income tax treaties effectively exempt interest income from U.S. withholding tax and reduce the withholding rate for dividends and royalties to 5%, 10%, or 15%.[3] This means that before the payor remits the item of income, it must determine whether the entity or the entity's interest holders qualify as a fiscally transparent. This means that the item of income must be subject to tax at the entity level (entity is not an FTE) or alternatively, to the interest holders even if the entity has not distributed the item of income. Further the final Regs. require that the item of income retain its original character in the foreign jurisdiction and be subject to tax (if not outright taxable) in the tax year it is recognized by the FTE or in the following year at the latest.[4] To summarize the final Regs. extend the withholding regulations to cover foreign jurisdiction before permitting the payor of the income to observe the treaty's reduced or exempt withholding clauses for interest, dividends, and royalties. It must be observed that it is easier to impose withholding requirements on the payor who is usually the party over which the U.S. has full tax jurisdiction rather than the foreign payee. The effect of the final Regs. extend beyond a theoretical treaty override to create a negative rate of return for the investments; increase transactions costs to cover the costs of the payor's analysis of foreign law and implementing a system of withholding and perhaps give rise to a breach of promise situation between the parties.

The Paradigm Situation

The final Regs. supposedly were enacted to resolve the following situation. A certain Canadian parent company organized a single member limited liability company in the United States. The purpose of the LLC was to function as a finance subsidiary for the parent's U.S. operating company. Since the enactment of the check- the-box regulations in January 1, 1997, single member entities are disregarded under U.S. tax principles if the entity has not elected to be taxed under the dual tax system as a corporation by literally checking the box in the appropriate IRS form.[5] Article XI of the income tax treaty between the Untied States and Canada operated to exempt the payments of interest from withholding by the state from the United States. The effect of the treaty exemption was to allow the single member entity to remit the interest it received from the United States operating company up to the Canadian parent without any U.S. tax.

Canada applied a different set of tax principles to the situation. Under Canadian tax principles, the single member entity was treated as a corporation and the erstwhile interest was recharacterized as a dividend. Moreover, the dividend was not taxed under Canadian tax principles. Arguably this result was not intended by the treaty authorities. In fact most income tax treaties recite that their purpose is to avoid double taxation of the same item of income and, conversely prevent fiscal evasion. Here the interest income escaped taxation in the United States and in Canada even as the letter of the treaty was observed. Furthermore to add insult to injury the U.S. operating company was entitled to and did obtain a current deduction for the amounts paid up to the Canadian parent which were not taxed in either jurisdiction.

Income Tax Treaties and How They Supposedly Work

The situation above arguably could only be resolved if the treaty contained a provision specially designed for interest income derived by fiscally transparent entities (FTE) such as the single member limited liability Company above. This presupposes that a single member entity possesses sufficient legal personality to qualify as a person for treaty purposes while being considered a tax nothing as U.S. tax law provides. [6] Most pre Model Income Tax Treaty such as the current U.S./Canada's do not contain such a provision. The treaties neatly divide the tax nexus between a source state and a primary or domiciliary state. Under this scenario, income and capital gains are taxed by the state from which they derive, (the source state) as defined by the tax principles of the source estate. Conversely, the tax jurisdiction where the entity or individual resides or is domiciled is entitled to tax everything else not derived from the source state i.e., it only cedes ju-

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risdiction to the source state for items of income derived within the source state borders. Further the domiciliary jurisdiction is free to employ its own tax principles to define income and capital gains and to time the inclusion of the income in the taxpayer's tax base. The treaty scenario does not overtly delve into the tax definitions of each jurisdiction that may blur the neatness of the source/primary jurisdiction scenario.

Furthermore, Treaty benefits apply to parties qualifying as residents under the fiscal residency clause of the treaty provided the parties also meet the requirements of the limitation of benefits clause[7] Under the fiscal residency clause entities must be organized or have their place of management in one of the two jurisdictions at the very least. The fiscal residency clause is usually supplemented by the limitation of benefits clause (LOB) which mandates that at least 50% of the interest holders of an entity reside in one or the other of the jurisdictions covered under the treaty. The remaining interest holders may reside in a third or a fourth jurisdiction that may or not have entered into an income tax treaty with the United States

The Fiscal Residency Clause of the U.S. Model Income Tax Treaty

Article 4(1)(d) of the U.S. Model Income Tax treaty includes a special provision in its fiscal residency clause covering FTE which extends treaty benefits for "income, profit or gain *derived by* fiscally transparent persons from the source state . . .will be considered to be income, profit or gain of that resident to the extent it is treated as such for purposes of the taxation laws of the first mentioned (primary or domiciliary) state." [8] This definition may or may not cover single member entities unless the entity is granted a legal personality albeit deemed in effect, a tax nothing. Still, assuming that it covered single member entities, the treaty does not purport to extent the tax principles of the U.S. as the source estate to the foreign jurisdiction. For instance, the treaty does not distinguish between passive investment income and income derived from the conduct of a trade or business. Arguably, this distinction is peculiar to the Internal Revenue Code which subjects passive investment income to gross withholding and taxes income from the conduct of a trade or business net of related deductions at progressive marginal rates.[9] Once the payor determines whether the primary or domiciliary jurisdiction treats the income as derived by the FTE, the inquiry ceases and benefits are extended or denied on that basis. In no event does the Model Treaty seek to attribute the law of the Source State to the income derived through the FTE as the final Regs. below will show.

The Final Regs

Against the background of the Pre Model and the Model Treaty, the final Regs. will still operate to deny exemption or reduced withholding unless the item of income is taxed basically on a current basis to either the entity or to the entity's interest holders (even if no distribution has taken effect). Under this analysis final Regs., the payor of the income must determine before payment whether the entity qualifies as an FTE and if so whether its interest holders themselves qualify as FTE's and so on down the line in various jurisdictions depending on the residency or domicile of the interest holders themselves. In order not to qualify as an FTE, the foreign jurisdiction must have in effect a system of taxation of income similar to the basic principles applicable to partnerships and limited liability companies in the U.S. If the entity is not transparent but basically bears its own tax liability for the item of income, then the payor can extend treaty benefits and pay with exempt or reduced withholding. If the entity is transparent, then the payor's inquiry must continue down the line until it finds a fiscally non transparent entity or individual subject to tax in a jurisdiction which basically includes the item of income in the tax base in the current year. Furthermore, the interest, dividend or royalty must retain its character in the hands of the interest holder as when derived by the entity. In the usual U.S. terms if the item consisted of interest could not be recharacterized as principal or as a dividend once it had been distributed to the interest holders. Further, ordinary income could not be changed to capital gains; or perhaps passive income could not be deemed active income.

Unless the payor's analysis conclusively answered the above as to the entity or if the entity were deemed an FTE, as to each interest holder, regardless of how infinitesimally small its holdings, then the payor under the final Regs. would be required to withhold 30% of the interest, dividend or royalty income before remitting the balance to the entity or the FTE.

Application

For example, a GmbH[10] (basically an entity somewhat similar to a U.S. limited partnership under the relevant GmbH statutes in Germany) formed in Germany and having its place of management therein is 50% or more owned by German residents and the balance are equally divided between residents of Austria and residents of the adjacent Czech Republic. As such, it meets the fiscal residency clause and the limitation of benefits clause of the U.S./Germany income tax treaty. The GmbH is receiving interest payments from an unrelated party in the United States.

If one could graft a fiscal residency clause similar to Art. (4)(1) of the U.S. Model Income Tax Treaty into the existing U.S./Germany income tax treaty, the payor of the interest would look to see if Germany "considers" the interest income to be derived by the GmbH even if the GmbH is an FTE under German tax law. No further inquiry is required before treaty benefits are extended or denied to cover the payments made to the GmbH.

The analysis required under the final Regs. start with an analysis of German law. If under German law, the GmbH was deemed to be effectively transparent by virtue of not having to include the item in income in the year earned, then the final Regs. inquiry shifts to the FTE or non-FTE status of the interest holders. This determination, however, arguably extends beyond German law because it must determine if the Czech and Austrian interest holders are indeed domiciliaries of their respective jurisdictions and then if un-

der Czech and Austrian law the interest holders bear the burden of tax and so on down the line until the final Regs. locate a non-FTE in the same or a third jurisdiction. Furthermore, the analysis requires a determination of whether the item of income has retained its original character (as interest for our purposes) under the relevant law attributing the income to the non FTE interest holder and also if its includible in the interest holder's taxable base in the current year or the following year. All this inquiry is borne by the U.S. payor of the interest prior to remitting the first payment since at that point the obligation to withhold either 30% rate mandated by the Code, absent treaty benefits will attach.[11] In fact the Regs. stop just one small step short of requiring actual taxation under the tax laws of the foreign jurisdiction.

Conclusion

Despite the recitation found in their preface purporting to be consistent with treaty obligations, the Final Regs., require full 30% withholding of tax in the U.S. for payments of interest, dividends, and royalties unless the foreign entity is deemed a non FTE under the laws of the foreign jurisdiction or, alternatively, if the entity is deemed an FTE, its interest holders are not deemed FTE's under the law of the respective jurisdictions. This analysis is extraneous to most treaty language and goes further than the language used in the fiscal residency clause of the Model Income Tax Treaty, the negotiation base for many income tax treaties. Arguably treaty promises have been roughly disregarded in the Treasury's attempt to control the unintended and surprising leger-de-main allowed by the inconsistencies in the tax principles of two jurisdictions in combination with a treaty unadapted to FTE's. The double escape of taxation for certain income certainly seems preferable than the burden of withholding 30% placed on all transactions yielding interest, dividends, or royalties not connected with a U.S. trade or business unless the payor engages in the cumbersome analysis to determine FTE or non FTE status attempted above.

***Margarita P. Muina, Esq.**, is a board certified tax lawyer in Miami, Florida. She is of counsel to Baur, Klein, Matos, and Riedi, P.A. and specializes in international transactional tax. Margarita has an LL.M. in Taxation and a JD from the University of Miami School of Law and is a Florida CPA. She currently chairs the Florida Bar's Committee on Relations with CPA's.*

Endnotes:

[1] U.S. Const. Art VI, § 2.

[2] Revenue Act of 1962, Pub L No. 870834, § 31, 76 Stat 1052. Another example of Congressional treaty override in the estate and gift tax area is TAMRA 1988 which denied marital deduction for surviving spouses granted by treaties such as the French Estate and Gift Tax Treaty. Tamra enacted IRC § 2056(d) which denies a marital deduction at death if the surviving spouse of the decedent is not a citizen of the United States at the time of the death of the first spouse or is able to be naturalized shortly afterwards.

[3] The final Regs. became effective as of June 30, 2000 and basically apply at this point to basically passive investment income, which is used herein to mean fixed and determinable, annual or periodical income not derived with a U.S. trade or business as defined under IRC Sec. 871(a), 881(a), among others. Basically for our purposes this means interest, dividend, and royalty income derived by passive foreign investors.

[4] The final Regs. seem to stop one step short of requiring actual taxation by the foreign jurisdiction.

[5] The dual tax system taxes the item of income at the entity level and then again once it is actually or constructively received by the interest holders. The system generally treats the entity as responsible for its own tax obligations independent of the interest holders and applies a different set of principles than those applicable to individuals or pass through entities. S corporations are basically subject to the dual tax regime except that the interest holders are deemed currently taxable on corporate earnings whether or not distributed but otherwise they are treated as corporations and are not subject to the more flexible regime applicable to partnerships. The check the box regime permitted any foreign entity not included in the "per se" list to elect to be taxed as a partnership or as a corporation by literally checking the box in the IRS form provided for that purpose. Before the check the box regulations the legal relationships arising under foreign law were analyzed using a four-factor test developed by caselaw and later incorporated in the relevant regulations. The analysis required a finding of "two or more" of the following characteristics: continuity of life; centralized management; limited liability; and free transferability of interests, i.e. the historical characteristics associated with joint stock companies and generally found in those foreign entities included in the "per se"' list. If the analysis found that the foreign entity possessed "two or more" (i.e., if it leaned to) of these characteristics then it was deemed to be a corporation for U.S. income tax purposes and the entity and its interest holders were subjected to the dual tax regime in the U.S. This substantive analysis did not readily lend itself to organizing fiscally transparent entities with the certainty and ease afforded by check the box regulations. The advent of check the box basically allows a foreign entity not in the per se list to elect to be taxed as an aggregate (a flow through) or as a corporation (subject to dual tax regime) as stated above.

If the entity is taxed as an aggregate it is not itself liable for taxation rather its interest holders bear the burden of the tax on the undistributed income generated at the entity level and are also entitled to use deductions, credits, and other attributes generated at the entity level with some limitations. If the entity elects corporate treatment, then it is liable to pay tax on its own operating income or capital gains and the same income or capital gains is also taxed at the shareholders hands upon distribution. In certain cases shareholders may be allowed to offset the basis of their stock before recognizing income but generally corporate treatment presumes a dual tax regime. Although the Regs. are not altogether clear on this, if the entity is taxed as an aggregate, it is considered a fiscally transparent entity if it is not then it is not fiscally transparent. The common factor for all fiscally transparent entities is that the interest holders bear the tax burden and not the entity, hence the model treaty and the Regs take this concept one step further and provide that the interest holder may be the true beneficiary of the income and not the entity itself. This seems to be implicit in the Model Treaty's definition of income "derived by" which is echoed in the 894 Regs, but with a somewhat dissonant effect as will be seen below.

[6] Treas. Reg. 301.7701-3(b)(2).

[7] Usually income tax treaties also contain a savings clause under which the United States reserves the right to treat its own taxpayers under its own tax principles and to that extent disregard the treaty's provisions.

[8] U.S. Model Income Tax Treaty serves as the base to negotiate additional treaties. Italics mine.

[9] Passive Investment income is intended to roughly correspond to "fixed, determinable, annual or periodical income as defined in IRC § 871(a) and 881 (a) which is subject to taxation while in the hands of the U.S. payor before it leaves the U.S.

[10] A GmbH stands for Gesellschaft mit beschrankter Haftung & is a corporate structure used for family businesses and wholly owned subsidiaries. The GmbH statutes under German law limit liability to contributions to capital. Also the GmbH may be formed by a single person. German law may hold the GmbH or its interest holders liable for the tax burden hence for purposes of the final Regs., the GmbH itself or its interest holders may or may not be FTE's. If the GmbH or its interest holders are not FTE's, the final Regs. will excuse 30% withholding for interest, dividends, or royalties not connected with a U.S. trade or business under the U.S./Germany income tax treaty. The GmbH is not included as a per se corporation under Treas. Reg. 301.7701-2(b)(3) and may elect to check the box and be treated as a corporation. This may facilitate certain elections under U.S. tax law.

[11] This is effectively the basic tax principles embodied in the Internal Revenue Code, Subchapter K for domestic partnerships and limited liability companies.

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