INTERNATIONAL LAW QUARTERLY

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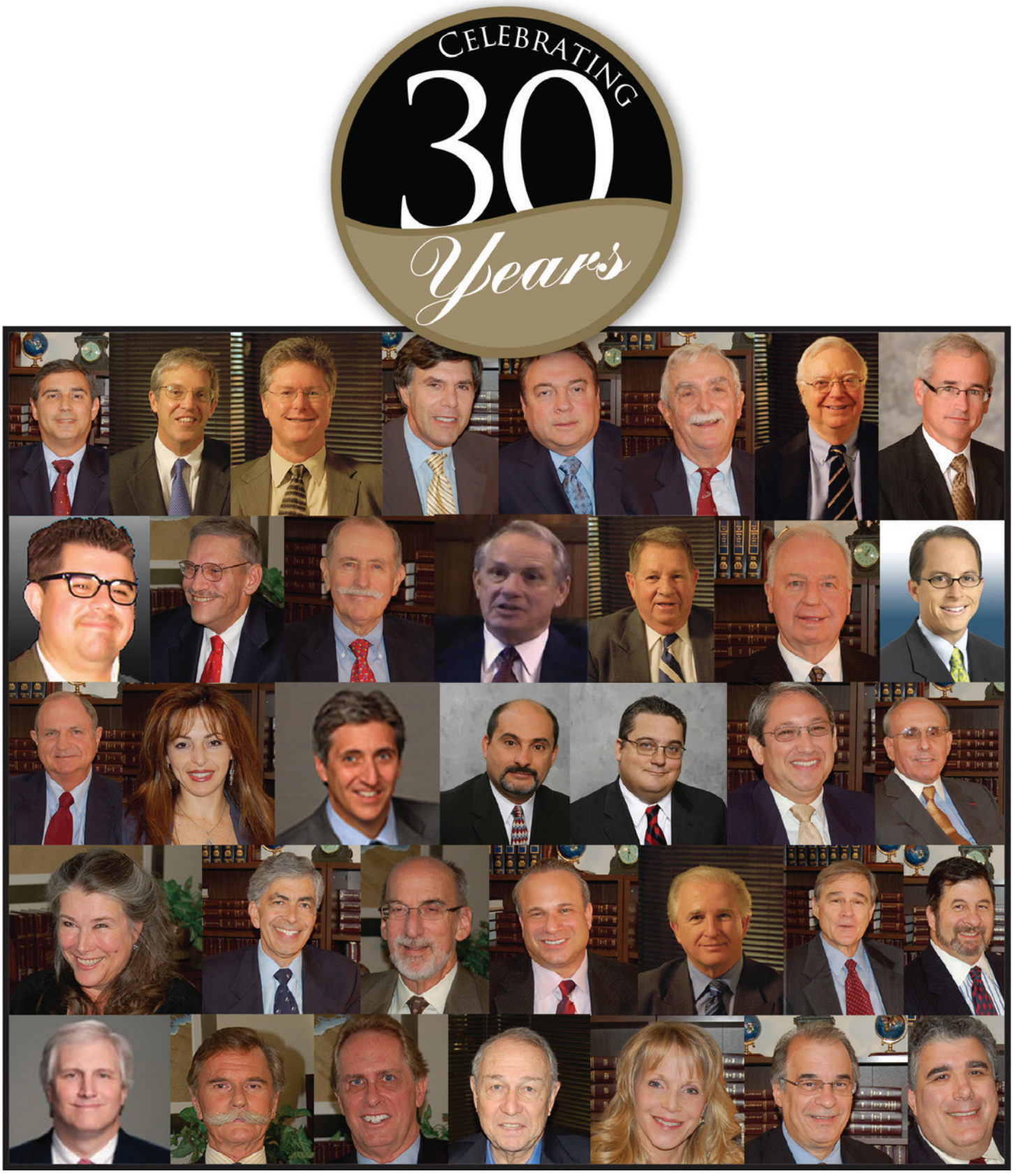

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THE FLORIDA BAR Vol. I. No. 1 DECEMBER 1982

Special to The Florida Bar

by Wayne Mixon
Lieutenant Governor, State of Florida

Florida has built an international sector that rivals that of any in the world.


Special CHINA Issue

THE INTERNATIONAL LAW QUARTERLY

A PUBLICATION OF THE FLORIDA BAR INTERNATIONAL LAW SECTION
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THE INTERNATIONAL LAW Quarterly

A PUBLICATION OF THE FLORIDA BAR INTERNATIONAL LAW SECTION
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Message From the Chair

With a little more than three decades behind us, the International Law Section (ILS) is focused on several related goals. The ILS represents Florida's international law practitioners; works to foster and maintain a legal environment that supports international commerce, human rights and the rule of law; and seeks to promote the understanding of international law and its role in the U.S. legal system and throughout the world. We pursue these broad goals through a wide range of activities, including conferences, seminars and webinars; electronic and print publications (including this International Law Quarterly (ILQ)); legislative, amicus and outreach work; a pre-moot competition (and scholarships) for participants in the Willem C. Vis International Commercial Arbitration Moot; a faculty council that liaises with Florida's law schools; and substantive and geographic committees that cover numerous areas of the law and the world.

This broad range of activities reflects the breadth of our membership, in terms of both our members' legal practices and their geographical locations. Our members are active in international litigation and arbitration, international corporate transactions, customs and trade law, international tax, global intellectual property, immigration and administrative law, travel law, energy law, international investment law and numerous other areas of international practice. As for geography, they are located not only throughout Florida and other parts of the United States, but also abroad in places ranging from Canada, Central America, South America and the Caribbean to Europe, the Middle East and Asia.

While our editorial format and available space do not permit a resume of the ILS's accomplishments during its first thirty years, a few representative items are worth noting. During its first three decades, the ILS has helped to pass *two* international arbitration statutes (the Florida International Arbitration Act in 1986 and Florida's enactment of the UNCITRAL Model Law on International Commercial Arbitration in 2010), helped to shape bar rules to permit the practice of international arbitration in Florida and resisted various legislative proposals that would have undermined important protections for international practice in Florida. The section has developed two leading annual conference series covering international business transactions and international litigation and arbitration (the latter now in its eleventh year). The *ILQ* has grown into a leading international journal. Our pre-moots have assisted Florida's law schools in repeatedly achieving great success at the Vis Moot. And the section has accomplished truly global projection, co-sponsoring numerous conferences with various national and international bars, sending speakers and representatives around the world and signing cooperative agreements with bar associations from Barcelona, Budapest, Buenos Aires, the Dominican Republic, Paris, Rio de Janeiro, the Organization of Eastern Caribbean States and elsewhere.

The passage of time, however, has brought us loss as well as accomplishments. Recently the section lost two of its founders and former leaders, **Robert R. Hendry** (1977 chair, International Law Committee) and **George C.J. Moore** (1994-1995 chair, International Law Section). Bob and George not only helped to build the section from the outset, but also continued to contribute actively and to inspire others for many years after their respective chairmanships. They are fondly remembered and deeply missed.

As we look to the future, we hope to continue the section's great progress in establishing Florida as a leading jurisdiction for the practice of international law in all of its myriad forms. Part of our challenge is continued outreach: encouraging members to participate more fully, obtaining new members, communicating with the various branches of government and pursuing additional outreach in the community at large. To this end, we have begun two new initiatives this year in an effort to further our inclusiveness—an In-House Counsel Forum and a Women in International Law Committee. We are also encouraging foreign lawyers, U.S. lawyers from outside of Florida and law students to join as associate members and participate in our activities. Finally, dear reader, if you have been kind enough to read this far, we ask that you please join with us and help the ILS to sustain its success as it begins the next thirty years.

C. Ryan Reetz, Chair
Bryan Cave LLP

In 1983 . . .

By Stephen N. Zack, Miami


S. ZACK

As the *International Law Quarterly* celebrates its thirtieth anniversary, our first chair, Stephen N. Zack, shares some thoughts about how things have changed since 1983.

When I wrote the "Chairman's Message" (thankfully, we have now evolved to call it the "Chair's Message") for the first issue of the International Law Section's newsletter, the world was vastly different.

In 1983, the Motorola Company introduced the first mobile phones to the public, Microsoft released its first edition of Microsoft Word and Florida ranked as the seventh largest state by population. Today, my granddaughter has a phone with which she can call and text me in China, it's a smartphone with a Word app, and Florida is the fourth largest state by population.

In 1983, there were very few lawyers in Florida who specialized in international law. Many members of The Florida Bar's International Law Section who called themselves international lawyers were working on a few real estate or commercial transactions, to which they devoted only a modest amount of time. Florida was becoming a great international center, but had not yet achieved that status, and was viewed primarily as a Latin American practice hub.

Some lawyers considered the international practice of law as esoteric and not affecting them. The section's predecessor, the International Law Committee, had no funds or projects; the new section focused on a broad range of projects, CLE courses and gatherings. The committee had few members; today the section has 1,080 members engaged in the practice of law all around the world. Just last year, members gathered in São Paulo, Brazil, for the section's International Business Transaction Conference. Interestingly enough, the International Law Section even has agreements with several bar associations throughout the world, including the Rio Bar in Brazil and the Budapest Bar in Hungary.

Almost every country has its own local organization of lawyers to help facilitate international practice. The American Bar Association's Section of International Law has 25,000 members, which demonstrates the breadth of international activity throughout our country.

Every solo and small firm practitioner has the ability to become an international practitioner through the use of the internet and today's technology. I recently met a lawyer in Arkansas who was representing countries around the world from her home office. The opportunities are limitless and will continue to be. Lawyers today are practicing in virtual law firms with cloud computers and video conferencing that make travel and local offices no longer essential for providing international clients with exceptional representation. Today, any lawyer can become an international practitioner if he or she is interested in doing so.

Florida continues to be viewed not only as a gateway to Latin America, but also as an excellent venue for resolution of legal disputes in courts and arbitration for multinational companies and future investors.

Florida's universities have concentrated on emphasizing international studies, and a look at the curriculum of any U.S. law school will clearly demonstrate the growing role of international practice throughout the country.

I don't know whether I will be around to write for the sixtieth anniversary edition, but I do know international law will continue to expand as the world continues to shrink.

* * *

***Stephen N. Zack** is the administrative partner of the Miami office of Boies, Schiller & Flexner LLP. In addition to his past chairmanship of the International Law Section of The Florida Bar, Mr. Zack is a former president of the American Bar Association and was the first Hispanic American to assume the ABA presidency. He was the first Hispanic American and youngest president of The Florida Bar. He has also served as president of the National Conference of Bar Presidents and as chair of the ABA's House of Delegates—one of the nation's most influential positions on matters relating to the legal profession.*

In 1983 . . .

Chairman's Message

Welcome to the new International Law Section! On July 1, the International Law Committee of The Florida Bar became the International Law Section by action of the Board of Governors of The Florida Bar.

For many years the International Law Committee was a place to meet for a handful of international practitioners in the State of Florida. In addition, for the last fifteen years the committee hosted the International Law Exchange Program. The program involved a Comparative Law Seminar held in various countries in South America and Europe.

While the committee was adequately functioning for the Florida international law practice of the 1950's and 1960's, the explosion of international law practice in Florida in the 1970's required a broader based, more sophisticated and highly organized structure. Because of the growth of international law in Florida in the last decade, three other sections of The Florida Bar had formed committees in various areas of international law. However, there was no central clearing house for the dissemination of information to the broad base of international law practitioners.

There are substantial differences between the old committee and the new section. The section is a self-governing body, electing its own officers, executive council and committee chairmen. The committee had a chairman appointed at the will of the president of The Florida Bar. The section has a budget comprised of dues and CLE revenues. The committee had no funds for projects or programs. The new section has numerous committees which are: Annual Meeting, Commercial Transactions, Customs Committee, Education Committee, Immigration, International Legal Exchange Committee, International Taxation, Legislative Committee, Liaison with Other Bar Committees, Membership, Newsletter Committee, and Nominations Committee. The section will have a quarterly newsletter to inform and communicate with international lawyers around our state and nation, of which this is the first edition.

The need for an International Law Section can best be demonstrated by the fact that over 1,000 lawyers in our state became dues paying members in our first year. It is to each of you that we dedicate this first issue.

In this and future publications you will learn of the many educational and social activities of the section. It is my sincere hope and desire that you will actively participate in the activities planned. Above all, please communicate your thoughts about the contents of this publication and any suggestions you may have on how the section can better serve your needs.

Stephen N. Zack
Chairman

Section Chairman, Steve Zack, received his B.A. and J. D. from the University of Florida. He practices with Floyd, Pearson, Stewart Richman & Greer in Miami.

This newsletter is prepared and published by the International Law Section of The Florida Bar.

Stephen N. Zack ..... Chairman
Miami

Thomas C. Travis ..... Chairman-elect
Miami

Roy B. Goras ..... Secretary
Coral Gables

Gilbert Lee Sandler ..... Editor
Miami

Deborah Linn ..... Section Coordinator
Tallahassee

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IN THIS ISSUE:

Chairman Zack's column from the December 1982 issue of the International Law Newsletter

From the Editor . . .


A. LINDSAY

Welcome to the thirtieth anniversary celebration of the founding of the *International Law Quarterly.* We are celebrating this significant milestone with a fresh new look and another issue that continues to deliver on the promise that the *ILQ* is one of the world's best journals covering all areas of international law.

Our features this month include two columns about our anniversary. We are honored that former ABA president and the International Law Section's first chairperson, **Stephen Zack**, was gracious enough to come back "home" to provide a message in which he shares his thoughts on the international practice in Florida and how it has evolved from 1983 to the present.

Melissa Cabrial Munárriz follows up on the theme with her wonderful history of the International Law Section titled Thirty Facts & Events: In Celebration of the International Law Section's 30th Anniversary. I know our readers will agree that the people and accomplishments of this section have been truly impressive in transforming what was a local real-estate and small commercial "international" practice to one that is truly world class.

> ". . . THE *ILQ* IS ONE OF THE WORLD'S BEST JOURNALS COVERING ALL AREAS OF INTERNATIONAL LAW."

In other areas, **Grant Stanton Smith** writes about what would happen if countries like the United States pass laws to lower carbon emissions through regulation of process and production methods of products, and how such unilateral legislation might affect trade agreements among World Trade Organization members.

International law board certified lawyer **Robert Becera** updates the law of forum non conveniens in Florida's state and federal courts, with a focus on the adequate alternate forum factor.

Food, drug, customs and trade attorney **Shelly Garg** provides a look at the recent Food Safety Modernization Act and its effect on U.S. import alerts in the near and long term.

International Law Section past chair **Larry Rifkin** examines the Supreme Court's finding that section 3 of the Defense of Marriage Act (refusing to recognize same-sex marriages) was unconstitutional, and examines the hot-button issue of the effect of that finding on immigration for same-sex couples.

Clarissa Rodriguez addresses the promising international trend of more women practicing international law and the resulting benefits that inure to the entire international law community.

And **Gustavo Lamelas** provides a truly visionary piece on how international arbitration can play a vital role in transitioning Cuba beyond its revolutionary leadership.

Finally, after over three years as editor-in-chief of the *ILQ*, I note that my time has come to bid farewell to my direct involvement with the publication in order to pursue other callings within the section. I would be remiss not to thank the authors, editors, regional editors and layout staff who have done such a great job over this time. Looking back, I am also proud of a number of advancements we have made over these years, including: the addition of the World Roundup section; the creation of "Special" and "Focus On" issues that concentrate on specific areas of interest; the increased use of graphics and color; the revamping (now twice) of the entire look of the publication; and the Editors' Choice Awards recognizing our most groundbreaking articles.

Of course, I am especially proud to be part of this, our thirtieth anniversary issue, which I believe could be no better testament to the importance of the International Law Section and its members to the legal community in Florida and around the globe.

Safe travels,

Alvin F. Lindsay, Editor-In-Chief
Partner, Hogan Lovells US LLP

THE FLORIDA BAR
INTERNATIONAL LAW SECTION

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Looking Back . . .

Special to The Florida Bar

by Wayne Mixon
Lieutenant Governor, State of Florida

Florida's emphasis on international trade and commerce in the past few years has catapulted our state into a leading position in the world marketplace, creating new opportunities which stand to benefit every segment of our economy.

By capitalizing on our extensive peninsular coastline and strategic geographic location, Florida has built an international sector that rivals that of any in the world.

Then-Lieutenant Governor Wayne Mixon of Florida wrote the first article for Volume 1, Number 1 of the *ILQ*, now over thirty years ago. In it he discussed how he and then-Governor Bob Graham were "personally committed to doing everything possible to encourage our international community to grow and flourish in the international arena."

Chair's Message

I am pleased to report to the members of our Section that we have a full agenda for 1996/1997 year. The first Continental Legal Education program sponsored by our Section on November 8, 1996, entitled "International Aspects of Litigation" was a resounding success. As our members know, Florida has become a gateway to North-South trade. A substantial amount of investment, including mergers and acquisitions of corporations located in Central and South American have taken place in recent years. When a dispute arises, Florida and Miami in particular, is normally the situs of the ensuing litigations. This CLE Program, which was orchestrated by Ricardo Cata, was well received by members of the Bar and once again indicates how our Section is on the cutting edge of providing programs that benefit members of our Section and of the Bar in many practice areas. We are looking forward to our other CLE Programs, including the 18th Annual Immigration Law Update and the 10th Annual Legal Aspects of Doing Business in Latin America, both of which are well attended and well received by members of the Bar.

Also, I am pleased to report to our Section's members the Section's participation in Enterprise Florida, Inc. As members of our Section may know, pursuant to Florida Statute, the Chair of the International Law Section is one of the Board of Directors of the International Trade and Economic Development Board for Enterprise Florida, Inc., a non-profit private board whose purpose is to advise and assist in promoting and developing international trade and investment, marketing the State of Florida for potential investment and creating, expanding and retaining Florida businesses. Our initial meeting in October was organizational in nature and we look forward to this Board's development of trade and investment in Florida as this new organization begins to take focus.

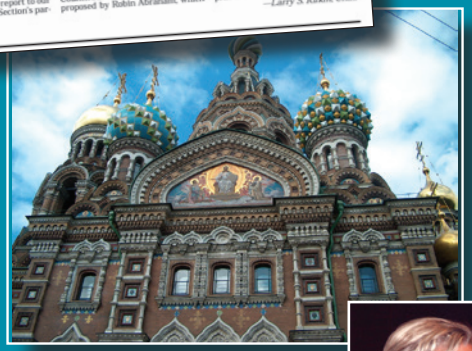
At our Section Retreat, a substantial amount of time was devoted to the subject of continuing our Section's goal of enabling international law specialists to certify as specialists in this practice area. Once again, former Section Chair Len Rosenberg, who has devoted a substantial amount of time to this quest, has "picked up the ball" and we sincerely hope that during the 1996/1997 year that this goal will become a reality for our Section.

The theme of our Section Retreat in September was one of inclusion, and it appears that we are broadening the base of participation in our Section. An example of the new and innovative ideas being brought to the Council's attention was the following, proposed by Robin Abraham, which initiated action by your Council to expand the goals of our Technology Committee and rename it our Technology and Telecommunications Committee. Ms. Abraham's proposal is to develop a database of International Telecommunication Regulations, comparing FCC regulations with applicable statutes of other nations, interfacing with counsel representing multinational corporations, developing convergence technology and relationships, fostering cooperation between and among domestic and foreign attorneys working in technology, telecommunications, corporate entertainment, encouraging commercial and social relationships among attorneys working in international telecommunications, fostering the information database of developing issues and responses, and developing seminar material and presentation for consideration at international telecommunications conferences, and incorporating convergence and multinational and telecommunication objectives is typical of the creative talent which is within the membership of our Section.

Our next meeting of the International Law Section is during the mid-year meeting of The Florida Bar, and it is my hope that other members of our Section will step forward and participate at the Executive Council meeting with their ideas on how this Section can enhance the services it provides to its members as the goals of this Section and the nature of its practice are everchanging.

—Larry S. Rifkin, Chair

Larry Rifkin's Chair's Message from the winter 1996 issue. Larry's new article on immigration ramifications after the repeal of DOMA is featured on page 45 of this issue.



Left: 2003-2004 ILS Chair David S. Willig with African jurists and members of the judiciary from Ecuador

"Bioterrorism Act" Goes Into Effect

By Peter Quinter, Esq.

Remember the phrase "You are what you eat"? Now, more than ever, the Government wants to protect you from eating food that has been intentionally contaminated by a terrorist. Hence, the idea of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 was born. Commonly known simply as the "Bioterrorism Act", the law went into effect on December 12, 2003, and requires companies in the United States that process, manufacture, pack or hold food or beverages for sale to humans or animals to obtain a registration number from the U.S. Food and Drug Administration (FDA). The law also requires foreign companies manufacturing and shipping food to the United States to obtain a United States agent as well as an FDA Registration Number. Moreover, shippers of food or beverages to the United States must notify the FDA hours before the food arrives at the land, ocean, or international airport border describing in detail the type, quantity, and origin of the food or beverage.

Obtaining an FDA Registration Number can be done on the FDA website for free at www.access.fda.gov/, but it is only in English and requires knowledge of the Bioterrorism Act and FDA regulations. The FDA itself expects the average person to take 2.5 hours to register a company. Private companies have established websites so that companies, for a fee, may more easily and quickly obtain an FDA Registration

See "Bioterrorism Act," page 10

Left: ILS Chair-Elect Peter Quinter has been a regular contributor to the *ILQ* for many years. For the winter 2004 issue, he wrote a cover story on the then-new Bioterrorism Act.

Section Activities at The Florida Bar's Annual Meeting

(Right) At the June 21, 1996 International Law Section Awards Luncheon, Larry Rifkin (left) awarded 1995-96 Section Chair Russell Carlisle with a globe as a gift of appreciation for a successful year as International Law Section chair.

(Left) The current president of the Sao Paulo Section of the Brazilian Bar, Guido Antonio Andrade, along with former president, Dr. Mario Sergio Duarte Garcia, and foreign legal consultant from Brazil, Jose Maria Carneiro Da Cunha, joined with International Law Section officers in signing a protocol between the two Bars at the Section's luncheon on June 21, 1996. (Pictured from left to right: L. Jana Sigars, Jose Maria Carneiro Da Cunha, Russell Carlisle, Paul Mason, Andrade and Duarte Garcia.

Macedonian Ambassador to the United States Ljubica Z. Acevska was the keynote speaker at the Section's annual awards luncheon.

The Section welcomed guests from the Quebec City Bar to The Florida Bar Annual Meeting. (Pictured, L-R: *front row:* Michel Lambert, Carolyn Rheaume, and Suzanne Villeneuve, the immediate past president of the Quebec City Bar. *back row:* Section Executive Council members Tom Raleigh and David Willig. Section member Joe McFarland.)

Russell and Janet Carlisle hosted a fabulous reception in their suite at the close of the day's activities.

ILS Chair Brock McClane, Best Oralist Aisha Sanchez and Vis Pre-Competition Chair Arnoldo Lacayo at the Vis Banquet in 2009


Fourth Annual Canadian Symposium

This year's venues for the annual CANADIAN FORUM are the exciting and cosmopolitan cities of Montreal and Québec, Canada. Activities, including outstanding CLE seminars, are scheduled from **September 12 to September 16, 2002.** Reserve now for this interesting package, which will include:

- twelve to fifteen hours of C.L.E. credits (including substantial "Ethics Hours");
- excellent networking opportunities; and
- an outstanding social/cultural program.

An interesting travel package is being negotiated. Call or fax for full information. You (and your companion) will absolutely enjoy this extraordinary symposium!

On **Thursday, September 12** (from 4 to 9 p.m.), the
be feted in full regalia (in the presence of the Chief Ju
Members of the Québec, Canadian, and French bar a
pants are invited thereafter to a most convivial event
jurists from Canada and France!

On **Friday, September 13** (from 9 a.m. to 5 p.m.)
gram commences with outstanding international sp
to the challenges of providing legal advice to financi
on these issues in the contexts of Florida, Canada,
- identifying problems regarding financially-trouble
- defining alternative approaches to such businesses;
- working out solutions; and
- maintaining business and professional ethics throughout this entire process.

A panel-oriented workshop will enable "hands on" exchanges with participants.

On **Saturday, September 14** (from 10 a.m. to 9 p.m.), our host, the Québec Bar, has arranged an absolutely **magnificent private tour** of premier local tourist attractions, including:
- a sightseeing tour of the Ile d'Orleans;
- complimentary lunch at an epicurean restaurant (La Goeliche); and
- a visit to the Chateau Frontenac (a magnificent hotel with views of the St. Lawrence Seaway.

On **Sunday, September 15** (around noon), participants will either drive, take a scenic train or fly to **Montreal** (approximately 180 miles to the south). In Montreal, we will regroup at a very famous hotel (the Queen Elizabeth) in the late afternoon in order to dine with the very prestigious Civil Law Notaries of Québec. Our dinner will be gastronomic, and will be filled with the wry humor and the witty pieces of wisdom of the international notarial practitioners. Eminent Florida Civil Law Notaries are already confirmed!

7


1999 International Law Section Retreat in Photos

(L-R) Rafael Castillo, Gary Davidson, G. Alexander Forster and Bob Hendry.

Jesus Buenrostro and Dru Bell

Kim Radcliffe and George Moore.

(L-R) Rafael Castillo, Clyde McFarland and G. Alexander Forster.

Tom Raleigh, Chair of the International Law Section, welcomes luncheon speaker, Jesus Buenrostro , V.P. of Tupperware for Latin America.

Roundtable Discussions

Larry Gore, Bob Hendry and G. Alexander Forster.

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Photo spread from the winter 2000 issue features many old friends, including one of the section's founders, Bob Hendry, who remained actively involved with the section until his recent passing. The International Law Section and the editorial staff of the *ILQ* express our most sincere condolences to Bob's family and friends.

The ILS plans many out-of-state meetings and adventures. In 2002, the Canadian Symposium was held in Quebec.


International Tax Briefs

by Laura A. Quigley

This column covers selected current international tax issues.

International Tax Enforcement Is On The Rise As Countries Cooperate

The U.S. and other countries are cooperating to prosecute criminal tax violations. These types of prosecutions are especially helpful, where these prosecutors may not be able to gather enough proof of bribes or other illegal activities. Thus, tax agents may be able to arrest and convict individuals or immobilize their assets through the vehicle of criminal tax violations such as unreported income.

By teaming together, the tax enforcement agents and prosecutors can often achieve their mutual goals by prosecuting a non-tax crime target for a tax crime. Conversely, tax enforcement agents who wish to prosecute tax crimes can often find roadblocks to obtaining information, while other law enforcement officials may be able to obtain that information.

cooperation, similar to Art. 26 of the OECD Model Income Tax Convention and specific tax information exchange agreements (TIEAs). The U.S. Treasury's continuing position has been to prevent tax evasion and to ensure that treaty benefits flow only to real residents of the other treaty country.

One advantage to the tax information exchange provisions is that they are not restricted to taxpayers and residents. Thus, the U.S. may inquire about an expatriated former U.S. citizen who is a national of one country but who has property in other countries. The U.S. could also request information about an international business company which may have been given this expatriate a beneficial interest, even though this company does not qualify for treaty benefits.

These provisions authorize the exchange of information, including taxpayers' confidential information, that may be necessary for the proper administration of the countries' tax laws. This information can be used for many purposes.

If, for example, our expatriate received royalties or interest from the U.S., which income the expatriate's U.S. citizen spouse living in Barbados did not report and its origin came from the expatriate, the U.S. can ask for Barbados bank information for both the expatriate and his spouse. Further, if the spouse works for a Barbados company that provides services to a related U.S. company and the IRS believes that this offshore company is overcharging to its U.S.

(MLATs).

Many clients think that tax authorities are still under the limitations of the 1950s or 1960s. Thus, they do not believe that their offshore bank accounts, underground cash transactions, or other activities will be unearthed.

Further, the IRS, with their arsenal of new reporting requirements in the transfer pricing, foreign trust, expatriation and withholding areas, et.al., along with the enhanced penalties for noncompliance, are now quite adept at identifying and punishing non-compliers. Thus, these areas need to be addressed with the clients.

Tax attorneys should also consider the possible use of international human rights treaties to argue a lack of due process and equality of arms a type of equal protection argument). These arguments may be viable due to the U.S.'s failure to provide for regulations on notice and an opportunity for taxpayers to participate in the response by the U.S. to requests for assistance under tax treaties and TIEAs.

As technology allows the easy movement of money, goods and people, governments are finding more intrusive ways to obtain information, pursue tax controversies and to protect their ability to obtain revenue by pre and post judgment attachment, seizure and freezing of assets. Tax counsel must now help their clients to minimize the often onerous and intrusive reporting requirements and the harsh penalties.'

Laura Quigley wrote her impressive International Tax Briefs column in the *ILQ* for many years.


First Attorneys Certified in International Law

The Board of Legal Specialization and Education along with the International Law Certification Committee have certified the first group of attorneys in international law. The examination was administered March 11, 1999 in Tampa and the following attorneys (along with the Committee members) are now certified. Congratulations to all!

Arturo J. Aballi, Jr. - Miami
Robin A. Abraham - Orlando
Alix Jean-Marie Apollon - Miami Lakes
Thomas Baur - Miami
John Charles Bierley - Tampa
Lucius M. Dyal, Jr. - Tampa
Philip W. Engle - Alpharetta, GA
John H. Friedhoff - Miami
Mark S. Guralnick - Mount Laurel, NJ
Robert R. Hendry - Orlando
Richard A. Jacobson - Tampa
Edward M. Jaffe - Miami
Samuel Robert Mandelbaum - Tampa
J. Brock McClane - Orlando
Andrew Joshua Markus - Miami
George C.J. Moore - West Palm Beach
Peter A. Quinter - Ft. Lauderdale
Jeremy Ross Page - Miami
Thomas L. Raleigh, III - Orlando
Stanley Frazer Rose - Naples
Thomas James Skola - Miami
Theodore Robert Walters - Miami

Then-Chair Ed Davis celebrated the twenty-fifth anniversary of the founding of the International Law Section in his message for the fall 2007 edition of the *ILQ*. This current issue celebrates thirty years publishing the *ILQ*.

In summer 1999, the ILS celebrated the first group of Florida attorneys to be board certified in international law.

Thirty Facts & Events:
In Celebration of the International Law Quarterly's *Thirtieth Anniversary*

By Melissa Cabral Munárriz, Miami

It isn't a secret that Florida's geographical proximity to the Caribbean, Central America and South America has lured an array of foreign investors to its sandy beaches while energizing a steady flow of commerce into the fertile economic "soil" of our state—yet as with any soil, its value and potential fruitfulness would be wasted without proper care.

Fortunately, the International Law Section (ILS) has been tending Florida's economic soil for many years. Throughout the ILS's three decades, a growing, brilliant and fervent group of attorneys has been able to foresee and cultivate international law, litigation and business in Florida.

Among some of the ILS's accomplishments are: recognition of the civil law notary figure in Florida statute; a certification program in international law; foreign-exchange agreements with foreign bar associations; the Foreign Legal Consultancy Rule; and the Florida International Commercial Arbitration Act.

"IN THE 1950'S, THE ILC COMPRISED ROUGHLY SEVENTY-FIVE MEMBERS. TODAY. . . THE ILS HAS 1,080 MEMBERS WORLDWIDE."

Nevertheless, there is still much to be done to ensure the increasing presence and economic benefits of international law, litigation and business in Florida. ILS Chair **Ryan Reetz** explains:

> One of the wonderful things about the evolution of international law, related to its practice in Florida, has been the development of a critical mass of highly qualified and interested practitioners who, in turn, have sought to nurture and further develop Florida's role as a hub for international practice. Florida's longtime involvement in international business and trade for decades has meant that Florida lawyers are virtually certain to encounter transactions and disputes involving international legal issues. The increasing frequency of those transactions and disputes in recent years, however, combined with increased awareness by practitioners of both the special issues raised by international matters and the unique opportunities for practice in the area, has given rise to a fairly large group of sophisticated, motivated Florida lawyers whose practices are focused on international matters. Florida has now become one of the leading states for international practice—and a significant part of this transformation is due to the work of the section and its terrific membership.

Now, in honor of the *International Law Quarterly's* thirtieth anniversary, here are thirty historical facts and events that showcase the section's past chairs, members and significant organizational accomplishments that have promoted the growth of international litigation, arbitration and business in Florida across the decades:

1. Recognized as the ILS by The Florida Bar in 1981, the group's inception dates back to 1956 with the **International Law Committee** (ILC) of The Florida Bar, chaired by **Marshall Langer**.
2. In the 1950's, the ILC comprised roughly **seventy-five members**, which was relatively large in comparison to other specialized committees of The Florida Bar. The late **Robert Hendry** attributed the large number of members to the fact that the committee sponsored various trips overseas.
3. Today—and more than 100 international trips later—the ILS has **1,080** members worldwide.
4. The ILS's transition from committee to section can be viewed as one of the major catalysts that organized the practice of international law in Florida and also provided a new mechanism to promote international law among members of The Florida Bar.
5. In 1982, **Stephen Neal Zack** served as the ILS's transition chair. Zack recalls that ILS members who "called themselves international lawyers were working on a few real estate or commercial transactions, which they devoted only a modest

Thirty Facts & Events, continued

amount of time to." Today, it is clear that any lawyer can build a stable and diverse career by practicing international law.

6. Outreach to new members was the ILS's main focus during its beginning years of operation. One of the most influential instruments that provided a strong and constant level of outreach was the ***International Law Quarterly*** (*ILQ*). **Gilbert Lee Sandler** was the *ILQ's* first editor—and essentially its creator.

7. In 1986, Florida became the first state to enact an international arbitration statute, the Florida International Arbitration Act (FIAA). Today, Florida is the preferred forum of global clients for international arbitrations.

8. By the 1980's, Florida was becoming an **international banking and trade epicenter** due to a conglomeration of events that had been building since the 1940's. One of these events was the legislation of international banking through the enactment of Florida's International Banking Act in 1977—a predecessor of the federal International Banking Act of 1978. The state act allowed foreign banks and representatives to provide services in Florida. An important objective of the ILC—which the ILS later continued—was the promulgation of this law to foreign banks around the world. This early initiative simultaneously promulgated international transactional and banking law while shaping the international business, litigation and arbitration we have in Florida today.

9. Many trace the **origin of international banking** to 1945 when Florida's geographical proximity to the Caribbean attracted a group of wealthy Puerto Rican families—the Serrallés, Cabassa and Ferré families—to establish the Pan American Bank of Miami in South Florida for their Caribbean and international customers. Additionally, Fidel Castro's revolution forced out of Cuba many prominent Cuban bankers and businessmen (along with U.S. corporations) who sought refuge in South Florida. Florida—specifically Miami—was developing into a bilingual paradise for many Central and South American executives who wished to invest and trade in the United States.

10. Europe also wanted in. The late **Clemente L. Vázquez-Bello** (ILS chair, 1986-1987) recognized the importance of the 1980's international banking boom for international lawyers in Florida. Vázquez-Bello described Florida as the "intermediary post between Europe and Latin America." During his chairmanship, Vázquez-Bello also noticed that due to the emerging personal and financial presence of Central and South Americans in Miami, many Latin American law firms felt the need to establish consulting services for their clients in Miami. Thus, Florida witnessed the inception of the Foreign Legal Consultancy Rule.

11. **Maureen O'Brien** was seated as ILS chair for 1990-1991, a time greatly influenced by the fall of the Berlin Wall. Under O'Brien's leadership, the ILS accomplished the first international lawyer exchange program. In honor and recognition of the pivotal and historic events evolving in international law and politics at the time, the first exchange was with the independent and newly formed Ukrainian Bar Association. The program successfully brought a female lawyer from Ukraine to Florida for three months. O'Brien recalls that the Ukrainian attorney was sponsored by three South Florida law firms, spoke at different seminars and made a valuable contribution to the integration of European international lawyers into the ILS.

12. Also during the early 1990's, foreseeing the importance of having more European representation in the section, the ILS sponsored an aggressive outreach to European members. Under the chairmanship of Maureen O'Brien, the ILS began reaching out not only to lawyers but also to other organizations and diplomatic figures, such as consulates, international diplomats and the bi-national chambers of commerce.

13. One of the primary objectives of the ILS is to provide **Continuing Legal Education (CLE)** credits to Florida attorneys that educate on—while concurrently creating awareness of—international law. An important figure in bringing this to fruition was **A. Joshua Markus**. During Markus's chairmanship (1991-1992), a new deal was made between The Florida Bar and the ILS, among other sections, to reconstruct framework inefficiencies regarding the payment of CLE's. This new deal permitted sections to retain a significant amount of the profits from their CLE events.

Thirty Facts & Events, continued

14. In 1992, the ILS accomplished another significant expansion of international law with the legislation of Rule 16: **Foreign Legal Consultancy Rule** (605 So. 2d 252). Under the chairmanship of **William Hardy Hill, Jr.**—and the fervent work of various past chairs and members of the ILS—a uniform rule and certification process was adopted to The Florida Bar Rules. In short, the rule allowed foreign attorneys to render limited consulting services in the state of Florida through a certification process.
15. Today, the Supreme Court of Florida certifies fifty-five **Foreign Legal Consultants** that render services regarding the laws of Argentina, Brazil, Colombia, Costa Rica, Mexico, Portugal, Spain and Venezuela, among other countries.
16. In 1997, Florida was the first state—followed by Alabama in 1999—to incorporate the legal figure of a **civil law notary** into its common law legal framework. *See* Fla. Stat. ch. 118.10; *see also* Fla. Admin. Code r. 1C-18.001 *et seq.*, 1N-5 and 1N-6. The statute was enacted primarily to enable legal documents authenticated by a civil law notary in Florida to have legal standing in civil law countries.
17. In 1999, after years of promoting the recognition of a specialization in international law, the ILS achieved an **international law certification** program. During the chairmanship of **Thomas L. Raleigh III**, the Certification Committee developed the first exam questions for the international law certification.
18. Today, out of the 4,559 board certified lawyers in Florida, **38 are certified in international law**.
19. Also in 1999, the ILS successfully signed the first foreign legal exchange agreement with the Barcelona Bar Association. The purpose of legal exchange agreements with foreign bars is to facilitate understanding and cooperation of attorneys in The Florida Bar with those in other countries.
20. Currently, the ILS has fostered a total of eight agreements with foreign bar associations. They are: Barcelona Bar (1999); Paris Bar (2002); Budapest Bar Association (2003); Organization of Eastern Caribbean States Bar Association—an umbrella organization for the bar associations of Anguilla, Antigua and Barbuda, British Virgin Islands; Dominica, Grenada, Montserrat, St. Kitts and Nevis, St. Lucia; and St. Vincent and the Grenadines (2005); Buenos Aires Bar Association (2007); Foro de Profesionales en Turismo (Forum of Tourism

Thirty Facts & Events, continued

Professionals) in Buenos Aires, Argentina (2007); Rio de Janeiro Bar Association (2007); and Dominican Bar Association (2009).

21. In the new millennium, when **Todd G. Kocourek** was chair—and 22 years after its establishment as a section—the ILS broke the **1,000 members** ceiling.
22. Under **Laurence Douglas Gore's** chairmanship (2002-2003), the ILS became the first Florida Bar delegation of any section to participate in a significant **legal exchange in China**. This Chinese exchange opened the door for the ILS to host delegations of Chinese lawyers on two reciprocal trips to Florida. At the time, the concept of doing business in China (and China doing business with Florida) was a novel concept that has now evolved into an important part of Florida's commercial success.
23. Two other successful exchange programs were in Brazil and Argentina. According to Gore, the **ILS's program in Buenos Aires** ". . . attracted, unimaginably, nearly a dozen federal senators to a meeting at the Argentine Senate." On another occasion, the head of the Argentina Stock Exchange directly hosted members of the ILS.
24. Gore emphasized "members are now the 'go to' legal experts in international business transactions very much as a result of these international legal exchanges. Foreign investment in Florida real estate is at an all-time high, I like to think much [of that is] because we have demonstrated such professionalism abroad."
25. Under the leadership of **David S. Willig** (2003-2004), the ILS began offering out-of-state seminars that integrated foreign attorneys and notaries alike. During Willig's chairmanship, the ILS sponsored two seminars, one in Russia and another in Barcelona, that attracted not only Florida attorneys and civil law notaries but also European and other foreign lawyers.
26. In 2005, thanks to the ILS's focus on international education and Florida's distinguished law schools, students from Stetson University's College of Law won the **Willem C. Vis International Commercial Arbitration Moot** in Vienna, Austria, against 153 law schools from 47 countries.
27. Since its foundation, the ILS's goal to promote international law, litigation and business in Florida has led the section to **host and co-sponsor seminars** in almost every corner of the world, including Mexico, Canada, Barcelona, Brazil, London, Grenada, the British Virgin Islands, Anguilla and Russia.
28. 2007 marked the ILS's **twenty-fifth anniversary**. Under the direction of **Edward H. Davis, Jr.**, chair, the ILS created a living history project that videotaped interviews with all of the ILC's and the ILS's former chairs. This historical contribution is available today through the ILS's official website at http://internationallawsection.org/portfolio/video-gallery/.
29. In 2010, after years of analysis and discussion within the ILS's Legislative Committee, Florida's Arbitration Act incorporated the **UNCITRAL Model Law on International Commercial Arbitration**.
30. During the chairmanship of **Ed Mullins** (2010-2011), the ILS began publishing the ***Weekly Gazette***, an electronic newsletter that provides members of the ILS, on a weekly basis, updates regarding the achievements of fellow members, advances in international law practices and upcoming section events.

"IN 2005, THANKS TO THE ILS'S FOCUS ON INTERNATIONAL EDUCATION AND FLORIDA'S DISTINGUISHED LAW SCHOOLS, STUDENTS FROM STETSON UNIVERSITY'S COLLEGE OF LAW WON THE WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT IN VIENNA, AUSTRIA, AGAINST 153 LAW SCHOOLS FROM 47 COUNTRIES."

For more information on the ILS, visit our website at internationallawsection.org, and follow us on Facebook.

Melissa Cabral Munárriz *is an International Law Section member and attorney whose practice in Miami, Florida, focuses on all areas of international law with an emphasis on issues relating to Puerto Rico.*

Increasing the Number of Women in International Law

By Clarissa Rodriguez, Miami

International law is experiencing an unprecedented boom. No longer a subset of immigration law or maritime law, international law stands apart. It affects and influences business law, family law, taxation, probate, real estate and litigation. Legal scholarship on international law increases by 8% on a yearly basis, more than any other practice area.[1] In London, there are an estimated 200 foreign law firms operating, yielding roughly £3.5bn (USD 5.3bn) in foreign earnings.[2] Recognized as a hub for international arbitration in Asia, Singapore's legal industry has increased by 23% in five years, with more than 25% of the attorneys being foreign.[3] And Miami, known as the gateway to Latin America, recently hosted the 2014 International Council for Commercial Arbitration that attracted a record of over 1,000 international lawyers and scholars from around the world.[4]

It also happens the number of women in law is rising. Of the 1,100 or so members of the ILS, 35% are women. Women represent over 31% of all attorneys worldwide. In some regions, 50% of the attorney population is women.[5] There are more women partners, judges, mediators and arbitrators than ever before. More and more women are beginning to argue before international institutions and governing bodies. A study of 254 concluded ICSID (International Centre for Settlement of Investment Disputes) cases from 1972 to 2012 found that 42 out of 746 arbitrators appointed (5.63%) were women.[6] The estimated percentage of women appointed arbitrators among arbitral institutions is roughly 6%.[7] And we finally see more women judges on the International Court of Justice (two out of fifteen), the International Law Commission (two out of thirty-four) and the World Trade Organization (one out of seven). While encouraging, these modest numbers reflect room for improvement.

With a growing demand for legal services and a growing number of women entering law (at a faster rate than men), the international law community can better meet today's clients' needs by tapping into this tremendous resource. That means women having better access to a successful international law career. Less attrition and less focus on preference will yield more highly trained women: a better reflection of current world demographics.

Labeled the "leaky pipeline," sometime between their fifth and seventh years, at the cusp for partner or promotion, women leave the legal profession. According to the ABA's "A Current Glance at Women in the Law" for February 2013, women associates make up nearly 45% of the workforce, with only 4% becoming managing partners and 15% becoming equity partners. In the United Kingdom, the estimate is that 40% of women attorneys quit after nine years, at an estimated loss of £125,000 (USD $191,850) each time a senior lawyer leaves.[8] In Singapore, where roughly 48% of entering attorneys are women, the attrition rate is estimated at 57% between the first and seventh years in practice.[9] And 87% of women attorneys choose not to renew their law license before their twelfth year of practice.[10] According to the Brazilian Bar Association, more than 52% of newly licensed attorneys are women.[11] But again, the attrition levels are staggering for junior-level associates. This is the

Women in International Law, continued

same across Latin America (where women make up 50% to 51% of the total population of practicing attorneys). Attrition and causes for attrition are pandemic. The high rate of turnover includes women's limited access to the opportunities, compensation and promotion enjoyed by their male counterparts, layered with a preconceived misconception about women in general and topped with an inherent preference for men over women. There are many more causes as well. No matter the reason, this high rate of attrition is unsustainable for the legal profession.

There needs to be change. A good start is the case of Australia. According to the Advancement of Women in the Legal Profession, a report prepared by the Law Society of New South Wales, the attrition rate for women in law is the lowest in ten years.[12] Women make up 64% of lawyers under age thirty and 58% of attorneys between thirty and thirty-nine, and 41% of women attorneys are partners. The study indicated a rise in mentorship, networking workshops, back-to-work workshops and resources geared toward assisting women with access pathways to professional success as direct causes for the drop in attrition.[13] The result is more talent available to meet more legal demands. Everybody wins.

International institutions, organizations and governing bodies are more challenging because the process of being appointed an arbitrator or a judge is nuanced itself. In international arbitration, for example, there

Women in International Law, continued

are institutions that safeguard their lists of potential arbitrators, making it challenging for anyone to be placed on a list or to have access to it. And there is the inherent tendency on the part of counsel to choose experienced individuals. Lesser known but qualified individuals fall through the cracks, and the result is a small pool of the usual suspects: older men.

Legal scholarship suggests an overhaul in the transparency and visibility for the appointment of potential arbitrators to promote more diversity.[14] Research also calls for a focused effort by law firms to convince themselves and their clients that appointing a fresh face to a tribunal is not a wildcard decision. And studies suggest that institutions themselves should be charged with promoting diversity on their panels by maximizing their exhaustive list of qualified candidates. Recent proactive steps taken by the London Court of International Arbitration and the Supreme Court of Canada to appoint more women on panels suggest the task is neither onerous nor insurmountable.[15] Again, the result is a more diverse pool of attorneys meeting more diverse needs of international clients. Everybody wins.

> "LESSER KNOWN BUT QUALIFIED INDIVIDUALS FALL THROUGH THE CRACKS, AND THE RESULT IS A SMALL POOL OF THE USUAL SUSPECTS: OLDER MEN."

Organizations promoting women are aiding in this endeavor. Arbitral Women offers an international directory of women practicing in international law aimed at advancing the interests and involvement of women in international dispute resolution.[16] International Law Girls is a group of more than 300 law students, professors, practitioners, advocates and judges covering global legal issues and promoting women at the forefront of international law.[17] Within the ILS there is a Committee on Women dedicated to mentoring and promoting women members. In South Florida there is Future of Arbitration: Miami, a group of law students and practitioners under age forty who promote and encourage greater involvement of women, and men alike, in alternative dispute resolution.

Promoting and advancing women from hire to higher up benefits the profession and improves the quality of service provided to the client. The international law community, through law firms, organizations and institutions, is best positioned to promote women in international law.

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Endnotes:

1 Westlaw Study: http://opiniojuris.org/2013/01/08/the-growth-of-international-law-scholarship/

2 http://www.theguardian.com/law/2013/jun/04/practice-makes-perfect-for-young-lawyers

3 http://www.asialawportal.com/2013/05/25/foreign-law-firms-flying-into-singapore/

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5 Michelson, Ethan. "Women in the Legal Profession, 1970-2010: A Study of the Global Supply of Lawyers", Indiana University-Bloomington, December 21, 2012.

6 http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/772/Getting-a-Better-Balance-on-International-Arbitration-Tribunals-Jrnl-of-London-Ct-of-Intl-Arb.aspx

7 *Id.*

8 The Lawyer (1 February 2010) statistic from Clare McConnell, chairwoman of the Association of Women Solicitors (AWS).

9 http://www.aware.org.sg/wp-content/uploads/Gender_In_Justice.pdf

10 *Id.*

11 http://www.usp.br/prolam/downloads/2009_1_5.pdf

12 http://hildebrandtblog.com/2013/07/10/fewer-lawyers-leaving-law-australian-survey-finds/

13 http://www.lawsociety.com.au/ForSolictors/advocacy/thoughtleadership/Advancementofwomen/index.htm

14 http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/772/Getting-a-Better-Balance-on-International-Arbitration-Tribunals-Jrnl-of-London-Ct-of-Intl-Arb.aspx

15 Since 2003, LCIA has increased the number of women it appoints to a panel by nearly 14% and SCC by almost 9%. See Greenwood.

16 http://www.arbitralwomen.org/

17 http://www.intlawgrrls.com/

WORLD ROUNDUP

ASEAN, INDONESIA

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Indonesia may assume greater political role in ASEAN.

ASEAN is the Association of Southeast Asian Nations, a regional trade association founded in 1967. The Secretariat is located in Jakarta, Indonesia (a venue from which this world roundup reporter gladly reports). The primary countries composing ASEAN include Singapore, Malaysia, Thailand, Philippines and Indonesia (the original five). Brunei later joined, followed more recently by Cambodia, Laos, Myanmar and Vietnam (known as the CLMV States). ASEAN has long been thought of as a hedge protecting U.S. interests in the region and counterbalancing Chinese economic and political aspirations in South and Southeast Asia.

In reality, ASEAN is often criticized as being weak in its resolve to address political crises and to provide stability in the region, including the recent crisis involving Chinese territorial claims in the South China Sea (against Philippine and Vietnamese claims, for instance). It is also often faulted as not living up to its potential for economic integration as a true regional free trade area. Separate bilateral arrangements have often dominated within and without ASEAN, and an Asian Free Trade Area (AFTA), aiming toward a single "Economic Community" by 2015, still languishes. China continues to dominate trade with ASEAN, accounting for nearly 25% of all external trade. ASEAN also appears hesitant to address various human rights issues among some of its members, especially in the CLMV States, and the same CLMV States generally are lagging behind in scheduled tariff reductions.

In some efforts to improve their mutual economic strength, private interests associated with ASEAN and India sponsored a seminar with business and government leaders, academics and professionals on 27 August 2013, in hopes of fostering greater economic cooperation between the two regions and to discuss maritime security. Part of the seminar included the signing of a Memorandum of Understanding between the Institute of South Asian Studies (ISAS) and the Federation of Indian Chambers of Commerce and Industry (FICCI) to further business connectivity between ASEAN and India. Up to this time, most ASEAN countries have been relying on trade with China as a means of spurring growth. The reach toward India is seen by many as a step in the right direction for improving U.S. interests in the region. By strengthening ASEAN-Indian trade, the region is hoping to become less dependent on trade with China. Chinese commercial expansion into the area, especially in countries such as Cambodia, has been rather conspicuous in recent times, and has also raised some political concerns within ASEAN and the United States.

Indonesia itself has been experiencing a foreign exchange crisis (lacking hard currency, especially the U.S. dollar), and this comes with a reduction in its energy exports. According to some, Indonesia is likely to assume a greater economic and political leadership role within the ASEAN community, including on security issues. One of the greatest challenges facing Indonesia in assuming that role is its lack of infrastructure, specifically the infrastructure's inability to keep up with Indonesia's vast trade potential. Several projects to resolve infrastructural problems are being considered in the government and private sectors.

AUSTRALIA

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U.N. finds Australia guilty in 150 cases.

Australia has been found guilty of almost 150 violations of international law over the indefinite detention of 46 refugees in one of the most damning assessments of human rights in this country by a United Nations committee. The federal government has been ordered to release the refugees, who have been in detention for more than four years "under individually appropriate conditions," and provide them with rehabilitation and compensation.

The U.N.'s Human Rights Committee concluded that the continued detention of the asylum seekers, most of them Sri Lankan Tamils, was "cumulatively inflicting serious psychological harm" and was in breach of the International Covenant on Civil and Political Rights.

The committee's investigation followed a complaint lodged on behalf of the refugees in August 2011 by Ben Saul, of the Sydney Centre for International Law, who said the finding proved the "grave lawlessness" of Australian refugee policies and that "it is a major embarrassment for Australia, which is a member of the Security Council and often criticises human rights in other countries. Australia should do the right thing by

World Roundup, continued

respecting its international obligations and treating the refugees decently."

Tobacco bid delays free trade deal.

The timetable for completing the world's largest free trade agreement is slipping as negotiators in Brunei express concern about U.S. proposals to give tobacco companies the power to sue governments and to weaken government control of state-owned enterprises. The Trans-Pacific Partnership negotiations now include Australia, Brunei, Canada, Chile, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam, as well as Japan, which joined this year.

Before the meeting, then-Mayor Michael Bloomberg of New York accused President Barack Obama of bowing to "pressure from the tobacco industry" to dump a so-called safe-harbor provision that would have protected nations such as Australia from being sued by tobacco companies for restricting the sale of tobacco products.

Australia's government has said it would not accept any provisions that would allow corporations to sue Australian governments.

BRAZIL

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President Rousseff signs anti-bribery legislation into law.

In perhaps the biggest news of the quarter, President Dilma Rousseff signed Law No. 12,846/2013, known as the Clean Company Act. The law imposes civil and administrative liability on companies for acts of corruption and became effective January 2014. The Clean Company Act grants authority to fine companies, confiscate corporate assets, suspend a business's operations and possibly dissolve certain violators. The Act further creates liability for acts in Brazil and those carried out by Brazilian companies abroad, following the model of the Foreign Corrupt Practices Act. The level of enforcement remains to be seen, but the legislation is seen as a response to recent protests and a fulfillment of Brazil's obligations as a party to the Organisation for Economic Co-operation and Development's anti-bribery convention.

New code of civil procedure looks set for presidential approval.

Delays in Brazilian civil procedure are well known, but it appears the country will adopt a new Code of Civil Procedure in the near future. The Brazilian Senate has approved the legislation, and the Câmara de Deputados is expected to follow suit. As currently drafted, the legislation will make it easier to convert individual actions into collective actions, will require that decisions from appellate tribunals are binding on cases with the same facts and will change the availability of appeals. The drafters have pushed the law as a means to speed up the often lengthy Brazilian court process.

Law regulating the profession of mediator or arbitrator appears dead.

Since 2005, various groups have tried to push a law regulating the profession of mediator or arbitrator. The law would have imposed certain requirements on becoming an arbitrator or a mediator and would have created regulatory bodies to carry out distinct tasks. The Brazilian Arbitration Committee staunchly opposed the legislation, and in one of the primary legislative committees analyzing the proposed law, the legislation was found to be unnecessary and contrary to the concepts underlying arbitration and the existing Brazilian Arbitration Law. For the time being, the project appears to be going nowhere.

World Roundup, continued

CARIBBEAN

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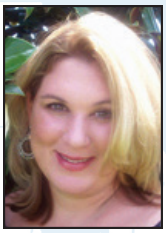
U.S. State Department and PortMiami collaborate on Caribbean security.

In recent years, traditional Latin American drug trafficking routes have come under enhanced scrutiny, making the routes more difficult for smugglers. The U.S. State Department expects that the pressure on Latin American drug routes will rekindle the use of "gray-haired" Caribbean routes popular in the 1970's and 1980's. On 28 August 2013, in an effort to preempt these routes from regenerating, the State Department's Bureau of International Narcotics and Law Enforcement Affairs ("INLA") and PortMiami entered into an agreement to increase Caribbean port security. The agreement provides that PortMiami will provide training on security matters, including cargo container inspection, to Caribbean ports and that INLA will finance the endeavor to improve Caribbean port security. The agreement is expected to have the added effect of eliminating long port delays in Miami caused by drug and contraband inspections.

MEXICO



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Mexico seeks to become a "world power in tourism."

President Enrique Peña Nieto has initiated a program to increase and remodel Mexico's tourism infrastructure. The 2013-2018 Investment Program in Infrastructure for Transportation and Communications is designed to "convert Mexico into a major global logistics hub with high added value," according to Peña Nieto. Through an investment of approximately US$300 billion, the president has proposed: (1) a network of highways that is safer, more complete and in good condition throughout the republic; (2) an increase in passenger transportation by train and promoting increased use of freight trains; (3) strengthening the capacity of Mexico's port system; and (4) expanding telecommunication access throughout the country.

Mexico strengthens ties with Asia.

As Latin America's biggest exporter, Mexico is looking to diversify its trade and to reduce its dependence on the U.S. market. Since 2009, imports have been rising faster than exports, and new demand from China will help bolster the Mexican economy. In doing so, Mexico will be implementing free market policies to spur growth and to boost foreign investment. President Peña Nieto and China's president, Xi Jinping, met in June and signed a number of agreements to strengthen economic ties, including opening up China to Mexican pork and tequila imports and providing Mexican oil monopoly Pemex a line of credit with China worth US$1 billion.

MIDDLE EAST

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Two Saudi judges are under investigation for using Twitter.

Two Saudi Arabian judges are under investigation for using Twitter. Saudi Arabian judges are banned from using social media sites such as Twitter. The ban is aimed to protect the nature of the judicial profession and to uphold the independence and sovereignty of the judiciary. If they are found to have violated the ban, the two judges may be removed.

Dubai-Australian contractor launches several lawsuits against Qatari sheikh.

Al Habtoor Leighton Group (HLG), the Dubai arm of Australian contractor Leighton Holdings, is seeking more than US$272 million from Qatari Sheikh Faisal Bin Qassim Al-Thani and his company Al Faisal Holding (AFH) for payment disputes arising from several construction projects in Doha City Center.

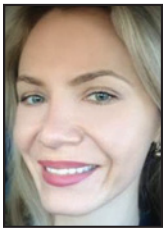
AFH accuses HLG of mismanagement and severe delays in the construction projects and contends that it has suffered more than US$410 million in damages because of HLG's delays.

Construction is the most corrupt industry in the Middle East.

The International Federation of Consulting Engineers (FIDIC) recently finished a study on the construction industry in the Middle East. It reported that various judicial bodies in the Middle East had issued rulings against more than 60,000 people over the last five years alone on myriad charges of construction related corruption. The violations involved developments on unsuitable land, favoritism in awarding public tenders, procurement of substandard construction material, unlawful subcontracted projects, neglecting inspection operations and bribery of officials and employees.

World Roundup, continued

RUSSIAN AND CIS



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IBA conference in St. Petersburg, Russia, addresses arbitration.

On 28 June 2013, the International Bar Association held its "White Nights" conference: *International arbitration at a crossroads: is there a coming backlash?* in St. Petersburg, Russia. Topics included: a need to regulate ethical standards in international arbitration; new and old challenges of public policy arguments; and challenges of state courts and arbitration. Speakers included top arbitration specialists from Debevoise & Plimpton, Clifford Chance, White & Case, Freshfields Bruckhaus Deringer, and Gibson Dunn & Crutcher. The discussions focused on the problems that Russian and Ukrainian courts have with understanding and accepting international arbitration, the problems of enforcing arbitration awards and the potential criminal ramifications for an arbitrator's misconduct, such as a failure to disclose material facts that can influence one's independence and impartiality. One of the major news items discussed was President Vladimir Putin's proposal to unify the Supreme Court and the Supreme Arbitrazh (Commercial) Court. The potential repercussions of such a unification might include longer time periods for appeals and fewer judges that are adequately familiar with the enforcement proceedings of foreign judgments and international arbitration awards. Currently this is the exclusive prerogative of the Arbitrazh courts.

Human rights commissioner files appeal of the Russian "foreign agent" law.

A federal law was passed last November requiring all NGOs engaged in political activity and receiving finance from abroad to register as "foreign agents" or face fines of up to US$15,000 to $20,000. An estimated 2,000 civil rights groups and NGOs in Russia have been raided by prosecutors and other officials. In February, eleven Russian NGOs filed a complaint with the European Court of Human Rights protesting the law. In late March 2013, the Justice Ministry stated that its goal was to check that these organizations' activities corresponded with the objectives of their charters and Russian legislation. President Putin has said before that he doesn't see any point in changing the law, stating "[s]ome clear criteria for political activity should be set." On 30 August 2013, Human Rights Commissioner Vladimir Lukin filed an appeal with the Russian Constitutional Court against some provisions of the controversial federal law that brand NGOs funded from abroad and engaged in political activities as "foreign agents." Lukin said, "[t]he document's provisions

World Roundup, continued

containing such definitions as 'foreign agents' and 'political activities' are politically and legally unspecific."

Russian *Dallah* to decide arbitral tribunal's jurisdiction.

In a pending real estate case that factually resembles *Dallah*, Russian courts are deciding whether an arbitral tribunal may extend its jurisdiction to the City of Moscow on the basis of an arbitration clause in a contract to which a department of the city government was a party. Courts in different jurisdictions have undertaken the issue whether non-signatory parties can be bound by an arbitration clause. In *Dallah*, the English and the French courts disagreed whether the government of Pakistan was bound by the arbitration clause between a private contractor and a trust created by the government for a mutual construction project.

In March 2013, the ICAC tribunal ruled that it had jurisdiction over the City of Moscow on the theory of corporate veil piercing. The Moscow Commercial Court set the award aside in May 2013 on the basis that the claimant had failed to establish that the department had acted on behalf of the City of Moscow because the contract between the claimant and the department was not properly executed (signed by the deputy head instead of by the head of the department). The court further disagreed with the application of veil piercing, observing that Russian law requires a written agreement between the parties for an arbitral tribunal to have jurisdiction. The court noted that the tribunal failed to explain why lifting of the corporate veil was justified as applied against the governmental entity. The Federal Commercial Court for the Moscow Circuit heard the appeal on 5 September 2013.

SOUTH AMERICA SOUTHERN CONE

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Argentina loses appeal of defaulted bonds case.

On 23 August 2013, the U.S. Court of Appeals for the Second Circuit (New York, N.Y.) affirmed a ruling that would force Argentina to pay in full holders of US$1.5 billion in its defaulted bonds when it makes a payment to investors who took discounted restructured debt. The case is *NML Capital Ltd. v. Republic of Argentina*, 12-00105 (2d Cir. Aug. 23, 2013).

In 2001, Argentina defaulted on a record US$95 billion of foreign debt. Holders of about 91% of the bonds agreed to take new exchange bonds in 2005 and 2010, at a deep discount. In 2005, Argentina's Legislature passed a law barring payment of the defaulted bonds, and the country's leaders have vowed never to pay its holders, whom they have called "vultures." Argentina has spent the past decade opposing claims brought in U.S. courts by holders of the defaulted bonds, who have won U.S. court rulings recognizing their right to be paid.

In February 2013, a three-judge panel of the U.S. Court of Appeals heard arguments in the case from both sides. Argentina argued that a ruling in favor of the defaulted debt-holders would violate its sovereignty and expose it to a fresh financial crisis by threatening a default of the new bonds. Referring to Argentina as "a uniquely recalcitrant debtor," the court said "[w]hat the consequences predicted by Argentina have in common is that they are speculative, hyperbolic and almost entirely of the republic's own making." The court also rejected Argentina's arguments that a ruling against it would hamper future efforts by overwhelmed debtor nations to restructure their debt. "Our decision affirms a proposition essential to the integrity of the capital markets: borrowers and lenders may, under New York law, negotiate mutually agreeable terms for their transactions, but they will be held to those terms." The court said it would delay the effect of its ruling until the U.S. Supreme Court decides whether to review the case.

On 28 August 2013, *Bloomberg* reported that Argentina had filed an appeal with the U.S. Supreme Court whereas NML Capital had filed a motion urging the Supreme Court to reject the appeal. The Supreme Court case is *Argentina v. NML Capital*, 12-1494.

World Roundup, continued

Paraguay wants to review all decisions adopted by Mercosur during its fourteen-month suspension.

In June 2012, when former President Fernando Lugo was removed from office following political impeachment in the Senate and replaced by Vice President Federico Franco, Paraguay was suspended from Mercosur (*see ILQ* Vol. XXX, No. 3, p. 9). During Paraguay's suspension, Venezuela was formally admitted to Mercosur, which is against Mercosur rules. Paraguay's suspension was lifted last 15 August when a new president, Horacio Cartes, took office.

The change of presidents notwithstanding, Paraguay does not accept Venezuela as a Mercosur member, and it is demanding an "institutional exit" to Venezuela's incorporation. In a press interview, Paraguay's foreign minister, Eladio Loizaga, said there will be no reincorporation of Paraguay because "as a founding member, Paraguay never abandoned Mercosur." However, Loizaga insisted on bilateral talks with member countries before addressing Mercosur as a group. He also said that Paraguay will request that all decisions adopted by Mercosur during Paraguay's suspension be formally reviewed.

UNITED STATES

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United States implements significant customs and international trade legal changes.

The U.S. Department of State has issued new regulations defining and expanding the definition of "brokering activities" regarding the export of military or defense articles and technology.

U.S. Customs and Border Protection now allows some foreign nationals to qualify for the Global Entry passenger program, which allows international arriving passengers expedited clearance through U.S. Customs without waiting in line.

South Florida has been declared the #1 area in the country for international commercial fraud (counterfeiting, undervaluation, false country of origin, substandard imported food, etc.), according to prosecutorial statistics revealed by the U.S. Department of Justice.

Enforcement of the Food Safety Modernization Act (FSMA) Likely to Result in More Companies on Import Alerts

By Shelly Garg, Miami

Overview

The Food Safety Modernization Act (FSMA or Act), enacted by Congress on 4 January 2011, is the most significant change to U.S. food supply regulations since 1938. With the rise of imported goods—approximately 50% of fresh fruits, 20% of vegetables and 80% of seafood are imported—the FSMA seeks to create, embrace and advocate for a comprehensive risk-based preventive approach to food safety. The Act also specifically addresses the need to ensure that foods imported from more than 150 countries are safe for consumers.

Such regulations and enforcement policy goals will likely increase, in the short term, through the U.S. Food and Drug Administration's (FDA) issuance of import alerts, a tool used to keep potentially hazardous products from other countries from entering the U.S. marketplace. The long-term regulations of the FSMA, including certifications for high-risk foods, and the FDA's importer qualification program, which are slated for implementation over the course of three to four years, will likely decrease the number of import alerts over the long term.

Key Provisions of the FSMA

The FSMA's new regulations and policies include: requiring importers to verify their foreign suppliers have preventive controls in place; requiring domestic and foreign facilities granting consent to expanded records and facility inspections through the simple re-registration requirement of such facilities; mandated inspection frequency; and the FDA's issuing of a final rule detailing its expanded discretionary ability to administratively detain food should the FDA have *reason to believe* it is adulterated or misbranded. The FSMA also provides the FDA the power to lawfully prohibit products from entering the United States from a specific country or producer if the producer denies U.S. investigators access to a food-producing facility.

With this revamped, risk-based approach toward food safety, enforcement of higher standards for higher quality goods to avoid facility suspensions or goods refusals is the FDA's primary objective. With mandated increased inspection (and consequently, re-inspection) frequency under the FSMA, the number of companies listed on import alerts is expected to increase in the short term, but will likely decrease after full implementation of certain key provisions.

The Way Import Alerts Work

The FDA's Division of Import Operations and Policy (DIOP) estimates there are 264 import alerts, representing 3,100 types of products from more than 11,000 manufacturers in 150 countries and regions. Products on import alert include seafood, fruits and vegetables, cheese, rice, cosmetics, drugs and medical devices. Generally, an import alert permits the FDA to detain, without physically examining, products that are actually or potentially violate the Food, Drug and Cosmetic Act. An import alert advises FDA field offices that the FDA has sufficient evidence to refuse admission of future shipments of an imported article. The information or a request to initiate an import alert can come from FDA field offices, FDA centers, other government agencies, state agencies or elsewhere. An import alert will likely go through an approval process before being formally implemented.

Various reasons guide the FDA to place a product, manufacturer, shipper, grower, geographical area and/or country on import alert. Placement on import alert may result from an inspection of the manufacturing site or issues relating to a product recall of goods already on store shelves. A manufacturer or a grower may have a specific violative history with a particular good and may fail to evidence proper remedial measures related to production, such as failing to correct harvesting from water that appears to be polluted.

Generally, when a shipment is refused admission to

the United States, an importer may introduce evidence within ten days to overcome the appearance of a violation. During this time, the product is usually held at a warehouse or at the importer's premises and cannot be distributed. If the shipment is not proven to be safe, the importer is required to destroy or export the product with the FDA's oversight within ninety days of the date of original refusal.

If a product, manufacturer, shipper, grower and/or country is placed on import alert, all incoming product to the United States is automatically detained without physical examination. Once an entry is detained, the importer must provide sufficient evidence, typically in the form of laboratory testing results showing no contamination, before the FDA can issue a "may proceed" with regard to the entry. On the other hand, if the testing results are positive for contamination, then the entry will be refused.

Companies that find themselves in these circumstances can initiate a process to seek removal from import alert. While different import alerts may stipulate varying requirements, generally a company is required to fulfill various specific criteria before it can be removed from import alert. These include: (1) undertaking a traceability exercise to identify the cause of the contamination; (2) developing a Corrective Action Plan (CAP) that effectively addresses the contamination; (3) adopting an updated Hazard Analysis and Critical Control Points (HACCP) plan that incorporates the CAP; and (4) producing evidence of five "clean" shipments that were successfully imported and that were produced under the updated HACCP plan. These four steps are usually performed under the guidance of a qualified FDA attorney or consultant who then petitions the FDA for removal from import alert. All the information generated in steps one through four is used as supporting evidence accompanying the petition.

FSMA Regulations and FDA Enforcement Priorities to Increase Import Alerts in the Short Term

The frequency of FDA-mandated foreign inspections has already increased since the passage of the FSMA. While it is estimated that in 2010 the FDA conducted approximately 350 inspections of foreign facilities, in 2011, it conducted 995 foreign facility inspections, a 300% increase. The FDA had a target of 2,400 inspections for fiscal year 2013 and hopes to inspect 9,600 foreign facilities in 2015. While various observers have stated that the FDA's budgetary challenges will make it unlikely the FDA reaches those inspection targets, even if the FDA inspects only 4,800 foreign facilities per year, it will have increased its inspection frequency sixteen-fold. Practitioners in the field are already reporting more Form 483's and warning letters issued to facilities as a result of the increased inspection frequency. It stands to reason that more companies will be placed on import alert because of this greater scrutiny at the facility level.

The increased inspection frequency, along with various mandates of the FSMA including § 103, hazard analysis and preventive controls, and § 105, standards for growing, harvesting, packing and holding of produce, highlights the elevated responsibility the FDA is placing on foreign and domestic growers of fresh produce and fruits and manufacturers of processed foods.

Additionally, the FSMA is ushering in other programs to safeguard imported food, namely the Foreign Supplier Verification Program and the Voluntary Qualified Importer Program. The Foreign Supplier Verification Program requires the U.S. importer to implement risk-based verification of exporters. The Voluntary Qualified Importer Program, pending implementation, provides quicker entry clearance for importers importing from third-party accredited facilities. Participation in the program is based on certain risk factors, which include known safety risks of food to be imported, compliance history of foreign suppliers and compliance of the importer with the Foreign Supplier Verification Program.

While both programs are aimed at minimizing common issues often observed with foreign manufacturers, the programs are not scheduled for implementation for a few years, signifying greater scrutiny on foreign suppliers in the immediate future.

Finally, one import provision that will exclusively affect foreign growers and manufacturers of processed foods is FSMA § 303, the FDA's new authority to require import certificates. Once fully implemented, this provision will require foreign exporters of what the FDA designates as "high risk foods" to undertake laboratory testing of

Food Safety, continued

each shipment destined for the United States to assure the entry is "clean." It is likely that many of the food categories and countries found on current import alerts will make up the "high risk foods" list the FDA eventually publishes.

In the end, this provision could in many ways reduce the importance of the import alert system because entries would arrive in the United States "pre-tested." But this will not happen anytime soon. Until these provisions are implemented, we are likely to continue seeing a progressive increase in the number of companies listed on import alerts.

What Should Companies Do?

While the enhanced authority of the FSMA helps the FDA to prevent potentially harmful food from reaching U.S. consumers and thereby improves the safety of the U.S. food supply, manufacturers, processors, packagers, importers and distributors will be required to take progressively greater preventive measures to ensure food products are compliant with FDA standards and to avoid possible detention, import alert placement, refusal or even worse, food facility registration suspension.

Because the FSMA is being implemented on a "rolling basis," all players in the food supply chain, foreign and domestic, must keep abreast of proposed rules and implementation deadlines. The rules of the game are changing in a dramatic fashion. Additionally, it will be important for industry members to provide comments on proposed rules so the FDA can appropriately adjust any regulations the industry sees as too heavy-handed or burdensome.

Finally, companies must seek knowledgeable support from FSMA experts so as to avoid unpleasant surprises or disruptions to their supply chain.

***Shelly Garg** is an attorney at C. Humphrey & Associates, P.A., in Miami, Florida, where she focuses her practice on food and drug regulatory compliance, customs and trade. If you would like further information or if you have any questions about how these changes may impact your business, Ms. Garg can be reached at sgarg@strtrade.com.*

International Litigation and Arbitration/ International Business Transactions Conference

JW Marriott Marquis Miami
27 February 2014

Christopher Johnson

Audience members enjoy discussions during a conference session.

Gustavo Lamelas

Incoming ILS Chair Ryan Reetz presents outgoing Chair Richard Lorenzo with a plaque in gratitude for his leadership.

Gaston Fernandez of Hogan Lovells speaks about transactions involving China at the International Business Transactions Conference.

Chair Ryan Reetz leads the ILS Executive Board meeting.

Diego Munoz Tamayo of Munoz, Tamayo & Associates in Bogota, Colombia, speaks at the International Business Transactions Conference.

Photos by Alvin Lindsay

Miami litigator and CNN analyst Kendall Coffey presents at the ILAC on international litigation.

U.S. Magistrate Judge John O'Sullivan speaks on international litigation issues at the ILAC as ILS Chair Ryan Reetz looks on.

Immediate Past ILS Chair Richard Lorenzo presents at the ILAC on current issues in international arbitration.

Carlos Loumiet of DLA Piper in Miami speaks at the International Litigation and Arbitration Conference.

FIU law professor Manuel Gomez asks a question during the ILAC.

General Magistrate Elizabeth Schwabedissen speaks about international issues in state court at the ILAC as Kendall Coffey looks on.

ILS Secretary Edwardo Palmer, ILS Chair Ryan Reetz and past ILS Chair and current Miami International Arbitration Society Director Burton Landy recognize Eleventh Circuit Chief Judge Bertila Soto for her work in establishing the International Commercial Arbitration Subsection within the Miami-Dade County Circuit Court. This initiative is another reason why Florida continues to be one of the world's leading sites for international commercial arbitration.

International Arbitration as a Path Forward for Cuba

By Gustavo J. Lamelas, Miami

International arbitration has a critical role to play in Cuba's transition beyond the revolutionary leadership that has dominated its affairs since 1 January 1959. International arbitration offers Cuba opportunities to create consensual frameworks for attracting foreign investment and for reconciling with the United States, through mechanisms that are consistent with Cuba's heightened sensibilities regarding its sovereignty. Although Cuba's economic isolation and polarized relationship with the United States remain extraordinary, Cuba has a legal framework for international arbitration that is similar to that adopted by many developing economies in Latin America to attract foreign direct investment. Opportunities are now developing for Cuba to activate this arbitration framework to stimulate the economic development it so desperately needs.

Cuba Is Transitioning Beyond Its Revolutionary Leadership

Although anticipation of political and economic change in Cuba has been common and largely unrealized for decades, the present existence of a fundamental transition process in Cuba cannot be denied, regardless of how opaque the intended destination of this transition may be. Seven years have now passed since Fidel Castro's 31 July 2006 temporary transfer of authority to his octogenarian "younger" brother, Raúl Castro. That temporary relinquishment of power was institutionalized as of 24 February 2008, when Raúl Castro was made president of Cuba's Council of State and Council of Ministers.

Numerous transition initiatives have been announced under Raúl Castro's leadership over the last several years.[1] The scope of permitted private business activity has been greatly broadened. A radical reduction in public employment rolls has been announced. The approximately US$1 billion of yearly remittances from the Cuban diaspora is increasingly being invested in private commercial activity in Cuba. Restrictions on international travel have been greatly liberalized. Prominent political dissidents have been permitted to travel internationally, receive extensive media coverage criticizing the regime abroad and return to Cuba. A post-revolution generation is moving into power. On 24 February 2013, Miguel Díaz-Canel became the first vice president of the Council of State of Cuba, which was formed after the assumption of power by the Castro brothers. Raúl Castro has announced that he does not intend to extend his current term in office and will relinquish power in 2018.

Cuba Has Adopted a Progressive Framework for International Arbitration

Cuba's economic experimentation under Raúl Castro's

International Arbitration as a Path Forward for Cuba, continued

leadership has extended to international arbitration with the 30 July 2007 issuance of Decree Law No. 250 creating the Cuban Court of International Commercial Arbitration (*La Corte Cubana de Arbitraje Comercial Internacional*). Law 250 is a highly progressive international arbitration instrument—albeit with significant caveats—that strengthens Cuba's long-standing international arbitration framework.

Cuba was one of the first countries in Latin America to adopt, in 1974, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Although Cuba is not a signatory to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), it has entered into more than forty bilateral investment treaties since 1993.[2] The new Cuban Court of International Commercial Arbitration created by Law 250 replaces Cuba's long-established Foreign Trade Arbitration Court (*La Corte de Arbitraje de Comercio Exterior*), which was created in 1965.

The Foreign Trade Arbitration Court was an appendage of Cuba's Chamber of Commerce and originally functioned primarily as a permanent forum for resolving disputes between the socialist nations of the Council for Mutual Economic Assistance. It had a sophisticated rule structure that was generally consistent with the rules of respected international arbitral institutions.[3] During its approximately 40-year existence, the Foreign Trade Arbitration Court reportedly resolved more than 1,000 disputes, with activity growing substantially following the collapse of the Soviet Union. One commentator has reported that between 1990 and 2006, the Foreign Trade Arbitration Court resolved 478 disputes, with a yearly average of 47 between 2000 and 2006.[4]

Cuba's new Court of International Commercial Arbitration is designed to broaden the appeal of international arbitration in Cuba. Law 250 and the Arbitration Procedural Rules that it has authorized (*Las Reglas de Procedimiento de la Corte Cubana de Arbitraje International*) create an arbitral process that is quite similar to much of the UNCITRAL Model Law on International Commercial Arbitration and include many of the accepted best practices of international arbitration. For example, jurisdiction is based upon pre-dispute party consent and extends to international commercial disputes.[5] Parties may generally choose foreign law (subject to an important exception), agree upon one or three arbitrators, seek the recusal of arbitrators, present evidence in a foreign language, agree upon confidentiality, invoke interim measures and request expedited procedures.[6]

Law 250 includes multiple provisions that emphasize the independence of the international arbitration process from Cuba's courts. Article 1 states that the Court of International Commercial Arbitration has complete functional independence in the development of its activities. Article 13 vests arbitral panels with the authority to determine their jurisdiction. Article 15 substantially limits interference by national courts in arbitrations. Articles 17 and 18 affirm that arbitrators are required to be independent and impartial, subject only to compliance with the law. Arbitrator independence and impartiality are further reaffirmed by a code of ethics that has been adopted by the new arbitral court, *El Código de* Ética *del* Árbitro.

The Limited Practical Utility of Cuba's International Arbitration Law

The structure of Cuba's new international arbitration law—and Cuba's extensive prior experience with

International Arbitration as a Path Forward for Cuba, continued

international arbitral institutions and treaties—confirms that there exists within the Cuban government a sophisticated understanding of international dispute resolution practices and procedures. This sophistication is evidenced both by the inclusions in and omissions from Law 250 and the supporting Arbitration Procedural Rules. Although Cuba's legal framework for international arbitration may appear comforting to some investors, it contains a number of important limitations that hinder its practical utility.

For example, although it is true that Law 250 generally permits parties to agree upon the law applicable to a controversy, Article 29 contains an important exception requiring controversies involving foreign capital to be governed by Cuban law. Similarly, while it is true that Article 11 of Law 250 gives the Cuban Court of International Commercial Arbitration jurisdiction over controversies involving joint ventures funded partially or entirely with foreign capital—where the parties have agreed to arbitration—Article 58 of Cuba's Foreign Investment Decree Law 77 requires such controversies to be resolved in Cuba's national courts.

The various references to arbitral independence in Law 250 are also balanced and perhaps undermined by the potential for judicial interference. Although arbitrators ostensibly have the right to determine their own jurisdiction, Article 15 permits a national court to exercise jurisdiction where it believes an arbitration agreement is void, ineffective or inapplicable. Article 38 confirms the finality of arbitral awards, yet only ten days are given to seek annulment under Article 41 and no standards are provided to guide courts in determining whether awards should be recognized, in notable contrast to UNCITRAL Model Law Article 35.[7]

The Limitations of Cuba's Broader Legal Structure

A more fundamental impediment to practical reliance upon Law 250 to manage the risk associated with large-scale investment in Cuba is posed by the broader legal structure (and political reality) of the country. The Constitution of Cuba, which was most recently amended in 2002, presents inherent risks for foreign investment in Cuba, include a warning in Article 11 that:

> The Republic of Cuba repudiates and considers illegal and void all treaties, agreements or concessions effectuated under conditions of inequality or that fail to recognize or diminish Cuba's sovereignty and its territorial integrity. Economic, diplomatic and political relations with any state may not ever be negotiated under aggression, threats or coercion of a foreign power.

The risk posed by Cuba's Constitution is more basic than a commitment by Cuba in Article 11 to defend its economic sovereignty. Cuba's Constitution is based upon a socialist concept of unity of power, in contrast to the separation of powers in the U.S. Constitution.[8] The Cuban Constitution concentrates power so narrowly that legal commitments cannot be viewed as having any force independent of the political interests of the state.

The Constitution of Cuba makes the Cuban National Assembly sovereign.[9] The National Assembly is in session for only a few weeks a year. It elects a Council of State and a Council of Ministers to legislate and administer the country's affairs while the National Assembly is not in session. The president of the Council of State and of the Council of Ministers is the same person. Although elections exist in Cuba for National Assembly seats, they differ fundamentally from the elections in western democracies. Cuba's electoral law requires that there be only one candidate for each available seat in the National Assembly. Authoritarian procedures are applied in the designation of such candidates to ensure the

International Arbitration as a Path Forward for Cuba, continued

Communist Party's control, whose domination of Cuban society and its government is confirmed by Article 5 of the Constitution.[10]

Consistent with the principle of unity of power, the dominance of the National Assembly and the Communist Party extends to legal affairs. Cuba does not have an independent judiciary. The justices of its Supreme Court are elected by the National Assembly, lack tenure and may be removed by the National Assembly.[11] The National Assembly acts as its own judge of the constitutionality of legislation and may revoke the laws or regulations adopted by any other governmental authority.[12]

Cuba is, of course, not alone in having a legal system that is subject to political pressure. International arbitration is commonly favored precisely because the national courts of one or both of the parties to a transaction are perceived to be unreliable. The degree of the concentration of power and overt politicization of Cuba's legal system is, however, exceptional. As long as all power is concentrated narrowly, and so overtly, any investment in Cuba must be viewed as entirely subject to political influence.

Cuba's Need for Change on Its Own Terms

The type of massive foreign direct investment required by Cuba to fundamentally change its depressed economic condition is unlikely until Cuba's current incremental economic and political experimentation extends to fundamental structural change, both internally and with respect to its relationship with its largest potential investment source, the United States. The extraordinary persistence of Cuba's leadership structure, despite decades of profound economic dysfunction, suggests that fundamental change will not result from a sudden political collapse, but must instead be fashioned voluntarily by Cuba's government. International arbitration, with which Cuba has substantial experience and sophistication, offers Cuba a potential mechanism for pursuing a fundamental change in its relationship with the United States—and a reconciliation with the Cuban diaspora upon which the U.S.-Cuba relationship largely depends—on terms that are consistent with Cuba's intense sensibilities regarding its sovereignty.

The persistence of Cuba's dysfunctional political system and the need for the type of consensual mechanisms for change afforded by arbitration are a consequence of the special role that the struggle for independence has played in Cuba's history. Although the "achievements" of the Cuban Revolution are the subject of considerable debate, informed opponents and sympathizers of the Cuban government might agree that one key achievement of the Cuban Revolution has been Cuba's independence. A central factor in the rise of the Cuban Revolution was the long-frustrated desire of Cubans for independence, first from Spain and then from the United States. Cubans suffered devastating wars of independence from Spain—in 1868-1878, 1879-1880 and 1895-1898—only to have independence co-opted by a U.S. declaration of war against Spain and an invasion of Cuba in 1898. Although the United States quickly overwhelmed Spain, Cuba's "independence" came at the price of the humiliating Platt Amendment in 1901, which authorized, under Cuban law, U.S. intervention into Cuba[13]—a right that was exercised repeatedly.

Cuban political institutions, which were often subjected

International Arbitration as a Path Forward for Cuba, continued

to debilitating pressure by the United States, remained fragile and ineffective in addressing many societal needs during the decades between independence and the Cuban Revolution. In addition to the external political interference suffered by the Cuban state, individual Cubans were subjected to intense internal economic competition from large-scale U.S. investment in Cuba and a massive Spanish migration to the country between 1875 and 1925. American interests dominated large-business concerns whereas Spanish immigrants created strong social and economic networks that dominated many smaller businesses, favoring Spaniards over Cubans.[14] These circumstances, and many others, intensified the broad dissatisfaction within Cuban society that was essential for the rise of the Cuban Revolution. Regardless of how profoundly flawed the Castro regime has been, it has been a Cuban government, wholly independent of Spain and the United States.

The survival of the Cuban Revolution over many decades, despite colossal economic failures, is due in substantial part to its heightened sense of independence and sovereignty, which the Castro regime has played upon effectively. The consensual character of international arbitration makes it a potentially attractive mechanism for Cuba to negotiate frameworks for political and economic transition on terms that do not require an abandonment of its sovereignty.

Political Change Through Arbitration

Ending the long-standing economic pressure imposed by the U.S. embargo against Cuba should become a key objective of the Cuban government as it assumes the already increasing risks of a more open society. Arbitral mechanisms present an opportunity for Cuba to move forward with the United States on its own terms. Cuba could negotiate a broad framework for the resolution of key issues with the United States, deferring ultimate determinations to a neutral arbitral mechanism. Such

International Arbitration as a Path Forward for Cuba, continued

a mechanism would enable Cuba to control, at least partially, the identity of the arbitrators that would resolve disputes, such as critical expropriation issues and the parameters within which any claims might be liquidated and satisfied.

The Iran-U.S. Claims Tribunal implemented pursuant to the Algiers Accords in 1981 is an instructive example of how a highly polarized economic and political impasse can be overcome through arbitration. Many parallels exist in the United States' relationships with Iran and Cuba. Both have involved ideological revolutions driven substantially by frustrated nationalism, which came to be directed against the United States. In each case, the United States was deeply involved in supporting unpopular governments that collapsed under revolutionary pressure. Each circumstance involved extensive expropriations of U.S. economic interests.

In the case of Iran, arbitration helped diffuse a hostage crisis that brought the parties to the brink of war and created a framework for addressing the implications of extensive expropriations of U.S.-related assets by the Iranian Revolution. In excess of 3,900 disputes have been resolved by the Iran-U.S. Claims Tribunal over the many years of its existence. Although subsequent tensions between Iran and the United States have perhaps obscured its benefits in the eyes of some, the fact remains that the arbitral mechanism enabled the parties to move past a mutually destructive stalemate without requiring either to abandon its interests.

In the case of Cuba, the risk of belligerence with the United States has long since passed, but a political and economic stalemate persists. The critical question is whether Cuba's current transitional process now encompasses or ultimately will lead to a desire by Cuba's leadership to pursue fundamental political and economic change. If it does, arbitration may facilitate the extension of Cuba's cherished independence beyond the narrow Communist Party and military leadership that have for so long dominated its affairs and to the Cuban people as a whole, making a fruitful relationship with the United States and its Cuban diaspora possible.

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Endnotes:

1 *See, e.g.,* Julia E. Sweig and Michael J. Bustamante, *Cuba After Communism: The Economic Reforms that are Transforming the Island*, Foreign Affairs, 23 July 2013; Carmelo Mesa-Lago, *Siete años con Raúl Castro*, El País, 28 August 2013.

2 Jorge F. Pérez-López and Matías F. Travieso-Díaz, *The Contribution of BITs to Cuba's Foreign Investment Program*, Association for the Study of the Cuban Economy, Cuba in Transition: Volume 10, 462-462 (2000).

3 Kevin S. Tuininga, *International Arbitration in Cuba*, 22 Emory Int'l. L. Rev. 570, 625-637 (2008).

4 *Id.* at 580-581.

5 *See* Law 250, Arts. 9 and 12.

6 *See* Law 250, Arts. 29 (applicable law), 16 (arbitrator selection), 19 (arbitrator recusals), 28 (use of foreign language), 34 (interim measures) and 25 (expedited procedures); and Arbitration Procedural Rules, Art. 27 (presumptive confidentiality).

7 Article 34 of the UNCITRAL Model Law on International Commercial Arbitration (1985) limits the bases for setting aside an arbitral award to those provided for in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

8 *See* Michael B. Wise, *Cuban Constitutionalism: Will There Be Changes?*, 51 Duq. L. Rev. 467, 478-480 (2013).

9 Constitution of Cuba, Art. 69.

10 *See* Jorge I. Domínguez, *A Constitution for Cuba's Political Transition: The Utility of Retaining (and Amending) the 1992 Constitution*, Cuba Transition Project, Institute for Cuban and Cuban-American Studies, University of Miami, 20-21 (2013).

11 *See* Constitution of Cuba, Art. 75.

12 *Id.*

13 Louis A. Pérez, *Cuba: Between Reform and Revolution*, Kindle Ed. at 36%, 2511-2516 of 7045.

14 *Id.* at 39, 2671-2697 of 7045.

See: "Cuba 2014: What the U.S. Legal and Business Communities Need to Know" CLE, page 58.

Carbon Emissions—An Introduction to What's Making the World Trade Organization Sweat

By Grant Stanton Smith, Miami

Background

The World Trade Organization (WTO) is an international body designed to promote free trade among its 159 member states[1] and to serve as a forum where states can go to negotiate their trade differences. Many trade differences arise when laws from an importing country attempt to influence an exporting member state's policies. This can occur when an importing country unilaterally passes a law that regulates the processes and production methods (PPM) of a product entering its borders. Unilateral PPM's[2] are some of the most controversial issues surrounding international trade because they dictate the manner in which a good is produced on foreign soil. Furthermore, they can inhibit trade by making it more costly while endangering a foreign state's sovereignty.[3]

Since 2012, the top five countries exporting to Florida are China, Mexico, Japan, Canada and Colombia.[4] Therefore, if the United States were to impose laws that affect the PPM's of a product from any of these states, then they could bring a complaint against the United States at the WTO. This article will address and analyze the probability of an upcoming complaint against a country that restricts the importation of a foreign "like" good based on carbon emissions stemming from unilateral PPM measures.

Beginning in the late 20th century, environmental issues started playing an increasingly larger role in international trade policies. Since that time, environmental concerns arising from globalization, industrialization and a growing global population have gradually been gaining a stronger foothold in our international consciousness. This awareness is evident in the new environmental policies adopted by countries, which can sometimes affect trade relations.

Recent changes in environmental policies by countries are justified. In 2011, global emissions of carbon dioxide increased by 3%, and in 2012, they are expected to increase by 2.6% once all the data has been accumulated.[5] Of all the greenhouse gases, carbon dioxide is the most responsible for climate change since the eighteenth century.[6] In terms of global commerce, carbon emissions due to trade activity—the manufacturing and transportation of goods—are higher in developing countries, especially those that rely more on coal-based energy. For example, emerging economies like China and India generate 500 tons of carbon for every $1 million of output; whereas, developed countries like the United States use 200 tons, and Europe and Japan use 100 tons, for every $1 million of output.[7] Therefore, the "carbon footprint" will be larger for manufacturing a toy soldier in India than in Japan.

A country, such as the United States, may attempt to pass laws that limit carbon emissions from trading partners, but these laws may be ruled inconsistent with the multilateral General Agreement on Tariffs and Trade (GATT). Most importantly, the WTO has yet to receive a case centered on unilateral PPM's associated with carbon emissions. In order to conform to the GATT, these laws must not discriminate between imported and domestically produced "like" products or "like" products from different member states. In the above mentioned example, if India believed that Japan's identical toy soldiers were

receiving preferential treatment from another member state, that dispute would fall under the authority of the WTO.

From a member state's perspective, the issue is then turned into an act of balancing environmentally friendly legislation and adhering to the rules expressed in the GATT. Could the United States enforce laws or regulations that protect the environment without violating any trade agreements with the WTO?

Principles of the World Trade Organization

According to the WTO, its purpose is to "help trade flow smoothly, fairly, freely and predictably."[8] The main way trade runs in this manner is through multilateralism and transparency—private companies, investors and governments should be able to easily predict member states' customs duties and tariff schedules, for instance. The nondiscrimination of goods—another key principle of the WTO—promotes the fair exchange of goods in an international market.[9] Additionally, the WTO fosters free trade by advocating the lowering of trade barriers such as customs duties, import bans, quotas or preferential treatment between member states through agreements and negotiations.

The WTO enforces these principles through the GATT—an agreed upon set of rules that govern the manner in which member states conduct trade with each other. Therefore, when trade is restricted by unilateral PPM's, it can be seen as a violation of the WTO. The WTO does permit some types of unilateral PPM's that are provided for in other WTO agreements, such as the Agreement on Sanitary and Phytosanitary measures (SPS measures) and the Agreement on Technical Barriers to Trade (TBT agreement). These agreements allow for member states to unilaterally ban or impose additional requirements on a product based on health or general welfare concerns. Nevertheless, a member state might still have to defend its actions under the GATT.

When a member state allegedly violates the GATT, the complaining member state can raise the issue in the WTO's Dispute Settlement Body.[10] The Dispute Settlement Body is made up of every member state in the WTO and has the sole authority to appoint a Dispute Settlement Panel made up of three to five experts from different countries.[11] After both parties to the dispute present their arguments, the Dispute Settlement Panel issues a decision after six months and presents the decision to the Dispute Settlement Body.[12] Either side may then appeal the Dispute Settlement Panel's ruling to the Appellate Body, which will issue a decision after sixty to ninety days.[13]

To date, the WTO has never received a complaint relating to carbon emissions stemming from PPM's of a product. The most common complaints received by the WTO involve violations of the GATT Article I and Article III. Both articles have touched upon the PPM's of a product and would serve as precedent to predicting how a future carbon emissions case would unfold.

Most-Favored Nation and National Treatment Explained

Articles I and III are defined by the GATT as Most-Favored Nation (MFN) and National Treatment. A PPM regulation could violate both articles and, if so, would then be reviewed by the Dispute Settlement Panel and, possibly, the Appellate Body to determine if the regulation falls under an Article XX exception.

MFN in Article I applies to the discrimination of "like" products by an importing country between different trading partners.[14] Discrimination can pertain to customs, tariffs, internal taxes and any advantage or differential treatment against a member state.[15] For example, if a country grants another member state a lower customs duty for one type of product, then that country must grant the same preferential treatment to all other member states for "like" products in order to avoid an MFN violation. Could an importing member state grant a lower customs duty or other preferential treatment to member states for following the importing state's unilateral PPM regulation?

In *U.S.–Shrimp*, the United States had a law (Section 609 of U.S. Public Law 101-102) stating that shrimp harvested using equipment that injured or killed sea turtles may not be imported into the United States.[16] The genesis of this case begins in Florida, where the federal government began protecting several "high density" nesting beaches for loggerhead turtles.[17] In fact, one of the largest loggerhead turtle nesting areas was located

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along the central and southern Atlantic beaches of Florida.[18] The law in question required that shrimpers fishing in waters with sea turtles use a "turtle excluder device" (TED) in their nets that allowed turtles to escape when accidentally captured.[19] India, Malaysia, Pakistan and Thailand filed a complaint against the United States alleging that, among other things, this trade practice violated Article I of the GATT.[20]

The Appellate Body of the WTO ruled against the United States because of evidence the U.S. had provided countries in the Caribbean with technical and financial assistance in implementing TED's.[21] To avoid an MFN violation, the United States should have provided these same advantages to countries in Asia.[22] In this case, the PPM at issue—the TED—did not affect the end product, much like carbon emissions do not affect a product. However, both PPM's have an adverse impact on the environment—in *U.S.–Shrimp*, eliminating turtles from the food chain harms the ocean's fragile ecosystem, and permitting carbon emissions depletes our atmosphere.

Article III of the GATT addresses National Treatment, which is the preferential treatment of "like" domestic products over imported products.[23] National Treatment can only take place after importation—meaning the foreign product must pass through customs and be competing in the domestic market. Preferential treatment may come in the form of "internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, purchase, transportation, distribution or use"[24] of an imported "like" product in order to afford protection to a domestic "like" product.

The definition of "likeness" varies in Article III (and is also applied to Article I), depending on the clause, in order to apply to different trade situations in which National Treatment may arise. Case law from the first sentence of GATT Article III:2 requires the complainant to demonstrate two requirements: (1) the taxed imported and domestic products are "like"; and (2) the taxes applied to the imported products are "in excess of" those applied to the "like" domestic products.[25] Here, the criteria used to determine "likeness" are the product's end uses, consumers' tastes and habits, the product's properties and the nature and quality of the product;[26] and the taxes must be more than a de minimis standard.[27] The first sentence must be construed narrowly and on a case-by-case basis.[28] If a complainant can prove both requirements, then there is a violation of Article III:2's first sentence. However, if a complainant cannot prove one of the requirements, then National Treatment can still be established by applying the second sentence of Article III:2.

The second sentence applies to a broader range of products not considered as "like" under the first sentence. Three issues must be examined to determine if Article III:2's second sentence has been violated:[29] (1) the imported and domestic products are "directly competitive or substitutable"; (2) the products are "not similarly taxed"; and (3) the dissimilar taxation is applied in a manner "so as to afford protection to a domestic industry."[30]

Article III:4 relates to non-fiscal or internal regulations of "like" products that achieve the same National Treatment result as fiscal regulations. More specifically, Article III: 4 deals with the sale, transportation and distribution of imported goods and is broader in scope than Article III:2's first sentence.[31] The WTO Dispute Settlement Body first dealt with the scope of Article III:4 in the *European Communities–Asbestos* case.

In that case, France banned the importation of chrysotile asbestos because of its widely acknowledged highly toxic properties. Canada, as the then second largest producer of asbestos in the world, contested the import ban and filed a complaint with the WTO.[32] In its complaint, Canada claimed that chrysotile asbestos fibers are "like" substitute fibers, which were allowed. Canada's argument concluded that, among other articles, the ban violated Article III:4 of the GATT.[33] The Appellate Body ruled that: "Under article III:4, evidence relating to health risks may be relevant in assessing *competitive relationships in the marketplace* between allegedly 'like' products."[34] Further, the two types of asbestos products were found to be not "like" by the Appellate Body since the substitute fibers were not toxic. The Appellate Body ruled in favor of France due to Article XX (b), not Article III.[35] Accordingly, due to past significant decisions by the Appellate Body on matters involving trade and environmental policies, it appears that Article XX offers

the best legal route for defending an environmental measure inconsistent with the GATT.

Article XX—The Exception to MFN and National Treatment?

The *chapeau*, or introduction, to Article XX sets out the limited occasions when a regulation may be inconsistent with the GATT. It states that the discrimination that violates the principles of the GATT cannot be arbitrary or unjustified between member states where the same conditions prevail. Moreover, the discrimination cannot be disguised as a restriction on trade.[36] The entirety of Article XX serves as an exception to the GATT when a country can show discrimination is necessary to protect human, animal or plant life or health (Article XX (b))[37] or to conserve exhaustible natural resources (Article XX (g))[38]. In the case of carbon emissions, a country can discriminate against the PPM's of "like" products based on carbon emissions if it can demonstrate one of the exceptions listed above. Although the WTO has yet to receive a complaint based on carbon emissions from "like" products, the Appellate Body has analyzed cases that could serve as precedent in a future dispute.

Article XX was examined by the Appellate Body in the earlier mentioned case of *U.S.–Shrimp*. The United States argued that Article XX (g) justified imposing a ban on importing shrimp from countries that did not use a TED. The Appellate Body noted that predetermining market access on whether exporting member states comply with a domestic policy of the importing member state is accepted as falling within the scope of Article XX.[39] In its analysis, the Appellate Body found there was a sufficient nexus—for purposes of Article XX (g)—between turtles and the U.S. law aimed at protecting them.[40] The Appellate Body found life to be an exhaustible natural resource.[41] Therefore, although the PPM's did not affect the end product—the shrimp—the procurement process harmed the environment by decreasing an exhaustible natural resource. Likewise, it could be argued that the atmosphere qualifies as an exhaustible natural resource that is being diminished by carbon emissions.

The Appellate Body also stated that countries have a right to take trade actions that protect the environment.[42] Ultimately, the Appellate Body ruled that the measure did not follow the norms of the *chapeau* in Article XX because of the unfair discrimination against Asian countries. However, the ruling could still be argued to support a connection between a member state's environmental policies and the protection of an exhaustible natural resource, like the atmosphere. Moreover, a unilateral trade measure that provides preferential treatment for "like" products with less carbon emissions could be accepted.

Another similar dispute is the case of *U.S.–Gasoline*. In this case, the U.S. Clean Air Act required that all gasoline sold within the United States must be of a certain quality in order to reduce air pollution.[43] This led to the United States enforcing stricter rules on the chemical properties of imported gasoline than it did for domestically refined gasoline.[44] The United States stated that the domestically refined gas and the imported gas were not "like" and that Article XX (b) and (g) justified the discrimination.

The Appellate Body found that the trade discrimination fell within Article XX (g), but failed the *chapeau* of Article XX.[45] Nevertheless, a positive aspect of the ruling was that the Appellate Body found that a policy for clean air conservation will fall within the scope of Article XX (g) as long as it does not violate the *chapeau*.[46] The United States did not meet the norms of the *chapeau* because it did not negotiate with other gasoline trading partners in order to show that the Clean Air Act was not a disguised trade restriction. Therefore, before passing any laws discriminating against products with higher carbon emissions, a country should attempt to negotiate and inform trading partners of this development.

If the WTO Received a Complaint Today About "Like" Products and Carbon Emissions

Unilateral PPM regulations are mostly seen as a protectionist measure because a government is usually looking to protect "like" domestic products. If an exporting member state were to bring a complaint to the WTO today based on carbon emissions level standards set by an importing country, it would be hard to predict an outcome.

To defend its position, the importing member state could argue that setting carbon emission limits for importing products is, in fact, a global interest.[47] This first point is significant because the importing member state could demonstrate that since this is a global interest, the consequences of high carbon emissions will harm the interests of its own citizens and is, therefore, not extrajudicial in nature—the prime contentious point with unilateral PPM's.[48]

The next step would be to apply an Article III, National Treatment, analysis. Article III:1 states, as a general principle, that internal measures should not be applied when those measures "afford protection" to domestic production.[49] The first sentence of Article III:2 requires the complainant to demonstrate that: (1) the taxed imported and domestic products are "like"; and (2) the taxes applied to the imported products are "in excess of" those applied to the "like" domestic products. As mentioned above, "likeness" is determined by analyzing the product's end uses, consumers' tastes and habits, the product's properties and the nature and quality of the product.

An exporting state would argue that both products' end uses are similar and provide the same type of gratification and purpose. Most importantly, both products' end uses cannot be differentiated from one another. The importing state would not have a viable counter argument regarding this element.

Consumers' tastes and habits also play a role in determining "likeness." The exporting country might state that tastes and habits are irrelevant since the products cannot be distinguished. Consumers in a more environmentally conscious world would make a habit of buying products with a lower carbon output if that information were readily accessible. In this respect, a consumer's tastes and habits are useful in determining that a product with a high carbon output is not "like" an identical product with a lower carbon output.

Since a PPM is being debated, it is important to point out that the nature and quality of the imported good are identical to those of the domestic good and have not been altered by the PPM. Regarding this element, the importing country could raise a question that has not been addressed by the Dispute Settlement Panel or the Appellate Body: Can the nature of a product supersede its end use? Meaning, if a product is known to be created with more carbon emissions than a "like" domestic product, will consumers value that fact over its end use?

On the contrary, the exporting country could present the idea that the nature of a product is defined by each stage of production and transportation to the store's shelf. Therefore, a person cannot aggregate the carbon emissions of each production stage. In the case of *U.S.–Shrimp*, although carbon output was not involved, the shrimp from the Indian and Pacific oceans were tainted because of the fishing method used. It is not clear whether the Dispute Settlement Panel or the Appellate Body would agree with this argument.

The exporting country could also argue Article III:2's second sentence, which deals mostly with the competitive relationship between the supposedly "like" products. This legal route requires the exporting country to prove the "like" products are "substitutable."[50] The importing country would argue that environmentally conscious consumers would not substitute the products due to the carbon output of the product manufactured in the exporting country's factories. Otherwise, the importing country would most likely prevail on the other requirements of Article III:2's second sentence, which states that the taxation must be dissimilar and must afford protection to domestically produced "like" products over imports.[51]

If this argument was not accepted, then the importing country could appeal to the Appellate Body with Article XX. This article could provide the legal exception to discriminating against "like" products based on their

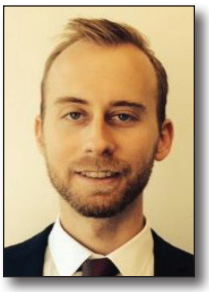
carbon output. The importing country would have to argue successfully that the discrimination is based on the necessity to protect human, animal or plant life or health or to conserve exhaustible natural resources.[52] It could argue that its purpose in taxing or showing any other type of discrimination based on carbon emissions is to protect human, animal and plant health and life; and furthermore, it is mandatory to preserve the most important exhaustible natural resource—our planet. These higher taxes would also incentivize more environmentally friendly production methods around the world. The last hurdle for the importing country would be proving that the tax held up to the *chapeau* of Article XX by proving that the tax is not just disguised trade discrimination. In *U.S.–Shrimp*, the United States failed the *chapeau* because it provided preferential treatment to countries from the Caribbean.

Conclusion

The WTO cannot predict how it will act on a unilateral PPM challenge based on carbon emission requirements. The fact that carbon emission prevention is gaining ground means the WTO will have to address this issue in the near future. Passing environmentally friendly trade laws must be balanced with nondiscrimination of products from either MFN or National Treatment. When differences do arise between those two agendas, Article XX may provide the exception and allow a country to discriminate in favor of domestic products or products from another country.

After an analysis of the above WTO disputes, it appears the exception in Article XX will be applied only if the discriminating country has informed its trading partners of the new law and the law is not disguised as a trade restriction. Unilateral PPM's can be defended and could be allowed by the GATT, but their enforcement and implementation must be done very carefully. Due to the lack of case law, the WTO will not be able to rely on any precedent should a complaint involving "like" products and unilateral PPM's based on carbon emissions be brought to the Dispute Settlement Panel.

More research by the WTO is needed on how to address this inevitable issue. For the time being, it is important for developed countries, like the United States, Japan and the countries of the European Union, to create momentum for lowering carbon emissions in order to set an example for the rest of the world.



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Life for Same-Sex Couples After Repeal of DOMA: What Immigration Benefits Are Available?

By Larry S. Rifkin, Miami

This article will briefly touch on the legislative history of the Defense of Marriage Act (DOMA) and will analyze the repercussions of: (1) the U.S. Supreme Court's Windsor decision and the finding that Section 3 of DOMA is unconstitutional; (2) the Board of Immigration Appeals' decision in Matter of Zeleniak; (3) the guidance issued subsequently by the U.S. Citizenship and Immigration Services (USCIS) and the U.S. Department of State (USDOS); and (4) the new landscape under which same-sex couples may petition for immigration benefits for their spouses, fiancés and derivative children in the immigrant and non-immigrant context. This article will focus on the unique and challenging issues that same-sex couples face to demonstrate the bona fide intent to marry as well as to engage in a bona fide relationship.

History of DOMA

Enacted on 21 September 1996, during the Clinton administration, the Defense of Marriage Act (Pub.L. 104–199, 110 Stat. 2419 and codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C) allowed states to refuse to recognize same-sex marriages granted under the laws of other states. Section 3 of DOMA, codified at 1 U.S.C. § 7, applies only to the federal government and defines the word "marriage" as only a legal union between one man and one woman as husband and wife, and the word "spouse" as referring only to a person of the opposite sex who is a husband or a wife. Pursuant to this section of law, the federal government refused to recognize same-sex marriages for all federal purposes, including insurance benefits for government employees, social security survivors' benefits, immigration, bankruptcy and the filing of joint tax returns, as well as myriad other benefits. The enactment's comprehensive definition of marriage for purposes of all federal statutes and other regulations or directives covered by its terms, however, does control more than 1,000 federal laws in which marital or spousal status is addressed as a matter of federal law.[1]

Windsor Decision

The Supreme Court, on 26 June 2013, in its decision in *United States v. Windsor*, 570 U.S. 12 (2013), overturned Section 3 of DOMA, holding that the federal government could not deny tax and other benefits to legally married same-sex couples. In the concluding paragraph of its decision, the Court states:

> DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper. DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment.[2]

The same day the decision was published, Secretary Janet Napolitano of the Department of Homeland Security issued a press release wherein she stated: "I applaud today's Supreme Court decision in *United States v. Windsor* holding that the Defense of Marriage Act (DOMA) is unconstitutional. This discriminatory law

denied thousands of legally married same-sex couples many important federal benefits, including immigration benefits."

On 1 July 2013, the DHS secretary issued another press release, wherein she stated that she had directed USCIS to review immigrant visa petitions filed on behalf of a same-sex spouse in the same manner as those filed on behalf of an opposite-sex spouse.

Matter of Zeleniak

On 17 July 2013, the Board of Immigration Appeals in *Matter of Zeleniak*, Int. Dec. #3787 (BIA 2013), held that DOMA is no longer an impediment to the recognition of lawful same-sex marriages and spouses under the Immigration and Nationality Act if the marriage is valid under the laws of the state where it was celebrated. The board further held that the U.S. Supreme Court's decision in *Windsor* is applicable to various provisions of DOMA, including, but not limited to, sections 101(a)(15)(K) (fiancé and fiancée visas), 203 and 204 (immigrant visa petitions), 207 and 208 (refugee and asylee derivative status), 212 (inadmissibility and waivers of inadmissibility), 237 (removability and waivers of removability), 240A (cancellation of removal) and 245 (adjustment of status), 8 U.S.C. §§ 1101(a)(15)(K), 1153, 1154, 1157, 1158, 1182, 1227, 1229b, and 1255 (2012).[3]

USCIS and DOS Guidance on Impact of *Windsor* Decision

On 26 July 2013, USCIS issued a Frequently Asked Questions (FAQ) guidance wherein it stated that same-sex couples could file an I-129F fiancé petition as well as an I-130 immigrant relative petition for his or her respective fiancé or spouse.

On 2 August 2013, USDOS issued guidance that, effective immediately, U.S. embassies and consulates will adjudicate visa applications that are based on same-sex marriage in the same way they adjudicate applications for opposite-gender spouses.

On 7 August 2013, USCIS released a revised FAQ adding that the law of the place where the marriage was celebrated determines whether the marriage is legally valid for immigration purposes, not the jurisdiction where the same-sex couple currently resides, and that USCIS will apply all relevant laws to determine the validity of a same-sex marriage.

Thus, at the present time, both USCIS and USDOS have issued guidance that they will process visa petitions and applications for same-sex couples in the same manner as for opposite-sex couples.

Same-sex couples face issues unique to them in processing immigration benefits based on marriage and/or bona fide relationships. Some of the challenging issues include the jurisdiction where the marriage took place, bona fides of the marriage or the relationship, the adjudicatory process and obligations that remain despite the termination of the relationship.

Legality of Marriage

Thirteen U.S. states and the District of Columbia currently recognize same-sex marriages.[4] Same-sex marriages are also recognized in fifteen other countries worldwide.[5] Brazil, France, Uruguay and New Zealand all passed their laws recognizing same-sex marriages in 2013. Pursuant to the Board of Immigration Appeals' decision in *Matter of Zeleniak* and the subsequent guidance from USCIS and USDOS, the proper interpretation on the validity of the marriage is the "law of the place where the marriage was celebrated."[6] Thus, as long as the couple married in a state or a country where same-sex marriage is recognized and legal, the marriage will be considered legally valid for immigration purposes. This is the case even if the same-sex couple currently resides and applies for benefits in a state or a jurisdiction where the marriage is not recognized.[7]

Proving Bona Fide Nature of Marriage

Beneficiaries of immigrant visa petitions based on marriage must establish to the satisfaction of the attorney general that the marriage is bona fide, i.e., that it was not entered into for the sole purpose of evading U.S. immigration laws. The petitioner has the burden of showing—by a preponderance of the evidence—that

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the marriage was entered into in good faith.[8] In general, USCIS will consider the intent of the parties to establish a life together at the inception of the marriage, as set out in *Matter of Laureano*.[9] In determining whether a marriage is fraudulent for immigration purposes, the conduct of the parties after the marriage is relevant as to their intent at the time of marriage. Evidence to establish intent may take many forms, including, but not limited to, proof that the beneficiary has been listed as the petitioner's spouse on insurance policies, property leases, income tax forms or bank accounts, and testimony or other evidence regarding the couple's courtship, wedding ceremony, shared residence and shared experiences.[10]

Unfortunately, the documentation that USCIS requires from the petitioner and the beneficiary to demonstrate the bona fide nature of a marriage can be challenging, if not impossible, for same-sex spouses to acquire. Evidence of joint assets and liabilities may not be available because some couples may not have commingled finances to avoid being "outed" or for fear of possible discrimination at the workplace. Same-sex married couples were prohibited from filing joint tax returns before 26 June 2013, the date of the *Windsor* decision, so that evidence, normally available for opposite-sex married couples, is not available. If the same-sex married couple lives in a state or a jurisdiction where their marriage is not recognized, then listing the spouse as a beneficiary on a bank account, life insurance policy or health insurance policy may be impossible.

Other evidence normally considered by USCIS, such as photographs of the couple with friends and family or affidavits from family members, may also prove challenging for same-sex couples to acquire. This is especially true if the couple is not open about their relationship or sexuality with the petitioner's or the beneficiary's immediate family members for fear of rejection, disinheritance or violence. Also, if the couple lives in an area or a jurisdiction where homosexuality is illegal or openly discriminated against, then it will be almost impossible for the couple to have photographs of themselves in public to establish the bona fide nature

of their relationship for fear of arrest, intimidation or violence by the local authorities or by society at large.

As previously stated, under current immigration law, the burden is on the petitioner to prove the bona fide nature of the marriage. If a same-sex couple held a simple, private wedding ceremony, with few guests, if any, and are limited in the production of commingled financial documents, how are they going to comply with the requirements set out in *Matter of Laureano*? The strategy in these cases will be to provide as much documentary and supporting evidence as available (affidavits from persons aware of the relationship, as many photographs as possible taken during the course of the relationship, even if those photographs are only of the couple, etc.).

Fiancé Visas

Under the K-1 fiancé visa, U.S. citizens may petition for their same-sex partners who are currently abroad. The couple must show they have a bona fide intention to marry and are legally able and actually willing to conclude a valid marriage in the United States within a period of ninety days after the alien's arrival.[11] In addition, the couple must establish that they have met in person within two years of filing the petition.[12] Again, the issue of establishing the bona fide intent to marry can be challenging for same-sex couples, especially if photographs of the couple with friends and family are not available due to the taboo nature of the relationship,

particularly if the alien partner lives in a country that does not recognize same-sex marriages. In that case, it is recommended that practitioners use other evidence, such as evidence of the petitioner's foreign travel (passport stamps, airline and hotel reservations, any photographs of the couple, etc.). In addition, given the limited evidence available, practitioners should focus on making the statements from the petitioner and the beneficiary regarding their intent to marry as detailed as possible, covering the entire course of the relationship, from first contact to meeting to the filing of the fiancé petition, to establish its bona fide nature.

Consular Process

Eventually, fiancé and immigrant petitions for aliens abroad result in interviews before U.S. consular officers at the U.S. Embassy with jurisdiction over the beneficiary's last place of residence. With regard to an alien's right of counsel to be present at the visa interview, USDOS takes the position that whether an attorney is permitted to represent a client at a visa interview, and under what circumstances, is at the sole discretion of the consular post and the individual consular officer.[13]

Regardless of whether the attorney is allowed to be present at the visa interview, the principal strategy of practitioners representing same-sex couples is to over-prepare their clients for the interview by going over all possible issues that could arise, starting with the bona fide nature of the relationship and the intent of the parties, inadmissibility issues and past immigration violations, if any. It is important to note that in both the fiancé and immigrant visa context, when few bona fides are presented or available, the common practice is for consular officers to separate the petitioner and the beneficiary to question them in detail about their relationship and married lives to determine if their responses coincide and the relationship is bona fide. Thus, practitioners should prepare their clients so they are not caught unaware should this occur at the consulate.

Though USDOS has issued guidance in its memorandum of 2 August 2013 that same-sex couples' visa applications should be treated the same as those of opposite-sex couples, if the alien encounters a hostile or a prejudiced consular officer at the interview, the suggested procedure for redress is first to try to contact the chief of the Immigrant Visa (IV) Section to report the behavior, followed by a letter requesting an interview with a supervisor. If no response is forthcoming from the chief of the IV Section, the attorney should contact the consul general. Another option at this juncture would be to contact the visa office in Washington, D.C., and ask to speak with the officer in charge of the country in question. If all else fails, the attorney should contact Legalnet (legalnet@state.gov) at USDOS.

Non-Immigrant Visas (NIV)

In its memorandum released on 2 August 2013, USDOS provided guidance that same-sex spouses and their children (stepchildren of the primary applicant when the marriage takes place before the child turns 18) can qualify as derivatives where the law permits issuance of the visa to a spouse or a stepchild without being named on a petition (or if a petition is not required). This would include: diplomat (A), Commonwealth of the Northern Mariana Islands transitional worker (CW), treaty trader or treaty investor (E), international organization employee (G), temporary worker (H), information media representative (I), intracompany transferee (L), North

Atlantic Treaty Organization (NATO), extraordinary ability (O), entertainer and athlete (P), religious worker (R) and North American Free Trade Agreement (TN) visa categories.

Some NIV classifications require certain documentation before a visa can be issued. Same-sex spouses (and stepchildren) of F and M student visa applicants (F-2 and M-2) will need to obtain an I-20a prior to issuance. Spouses of exchange visitors (J-2) will need an approved DS-2019.

Derivative spouses of E-2 visa holders, as well as J-2 and L-2 visa holders, are eligible to apply for employment authorization, which will be granted for a period of admission and/or status not to exceed two years. F-2 and M-2 derivative children may attend school through the twelfth grade.

Adjustment of Status

If the petitioner and the beneficiary have married in a jurisdiction where their same-sex marriage is legally recognized and the beneficiary is eligible to adjust in the United States, he or she can apply for adjustment of status (a green card) with USCIS. The same applies to stepchildren as long as the marriage between the petitioner and the beneficiary occurred prior to the children turning eighteen years of age. The U.S. citizen petitioner files an immigrant visa petition (I-130) and an application for adjustment of status (I-485) packet concurrently with USCIS on behalf of the beneficiary. Any derivative family members require their own I-130/I-485 packets. In certain cases, if the beneficiary has always maintained lawful status in the United States, a lawful permanent resident petitioner may also file concurrently for his or her spouse, if the visa numbers are available (which they are as of the writing of this article). While the I-130/I-485 applications are pending, the beneficiary is eligible for employment authorization and, in certain cases, travel authorization.

Eventually, USCIS will schedule both the petitioner and the beneficiary for a marriage interview at the local office with jurisdiction over the beneficiary's place of residence. As with the fiancé petitions, attorneys should prepare their clients for the possibility that they will be separated and questioned about their relationship and married lives. Because the adjudication of same-sex adjustment cases is very new, attorneys should anticipate prejudice or bias from USCIS officers. Clients have the right to have their counsel present at their I-130/I-485 interviews, and attorneys should be prepared to interrupt the proceedings and immediately request to speak to a supervisor or a field office director if the attorney believes the USCIS officer conducting the interview is being prejudicial or hostile toward the same-sex couple.

Divorce

As with all marriages, divorce is a realistic possibility that same-sex couples should consider before marrying. Of the thirteen U.S. states and the District of Columbia that currently recognize same-sex marriages, California and Washington are community property states while the other eleven are equitable property distribution jurisdictions. In equitable property distribution states, property acquired during the marriage belongs to the spouse who earned it. In case of divorce, the property will be divided between the spouses in a fair and equitable manner. There is no set rule in determining who receives what or how much. The court considers a variety of factors. For example, the court may look at the relative earning contributions of the spouses, the value of one spouse staying at home or raising the children and the earning potential of each. During a divorce, a spouse can receive between one-third and two-thirds of the marital property.

In a community property state, the spouses are deemed to own equally all income and assets earned or acquired during the marriage. This means that both spouses are deemed to own equally all money earned by either one of them during the marriage, even if only one spouse is employed. In addition, all property acquired during the marriage with "community" money is deemed to be owned equally by both spouses, regardless of who purchased it. In a community property state, equal ownership also applies to debts. This means both

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spouses are equally liable for debts. In most cases, this includes unpaid balances on credit cards, home mortgages and car loan balances.

Another issue to consider is that all of the fourteen jurisdictions that currently recognize same-sex marriages impose a residency requirement on the petitioner for divorce. Legal issues and challenges may arise for same-sex couples experiencing marital problems, especially if the law of the jurisdiction of their residence does not recognize same-sex marriages. Couples in same-sex marriages can generally obtain a divorce only in jurisdictions that recognize same-sex marriages, with some exceptions. Thus, a couple living outside a jurisdiction that recognizes same-sex marriages may find it very difficult to obtain a divorce until they meet certain residency requirements, usually six months or a year in the appropriate jurisdiction.

In the immigrant context, a U.S. citizen or a lawful permanent resident who has petitioned for his or her alien spouse must submit an Affidavit of Support (I-864) with USCIS, wherein the petitioner enters into a legally binding contract with the U.S. government that he or she will use his or her income and assets so that the beneficiary does not become a public charge of the United States.[14] By doing so, the petitioner agrees that his or her income and assets may be considered to be available to the alien in determining whether he or she is eligible for certain federal means-tested public benefits and also for state or local means-tested public benefits, if the state or local government's rules provide for consideration of his or her income and assets as available to the beneficiary. If the petitioner does not provide sufficient support to the beneficiary, the beneficiary can sue the petitioner for support. Furthermore, the petitioner's obligation to the beneficiary terminates only when the beneficiary becomes a U.S. citizen, has worked or can be credited with forty quarters of coverage under the Social Security Act, is no longer a lawful permanent resident and has departed the United States or the beneficiary dies.[15] Note the parties' divorce does not terminate the petitioner's obligation of support to the beneficiary.

Conclusion

The U.S. Supreme Court's decision in *United States vs. Windsor* has dramatically changed the landscape for same-sex couples applying for federal benefits, particularly with regard to immigration benefits. However, challenges remain in the interpretation, adjudication and review of same-sex marriages, immigrant petitions and visa applications, and practitioners will have to be diligent in preparing and guiding clients through this uncharted process.

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Endnotes:

1 *See* GAO, D. Shah, Defense of Marriage Act: Update to Prior Report 1 (GAO–04–353R, 2004).

2 *Id.* at 2695-96.

3 *Id.* at 159.

4 California, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont, Washington and parts of New Mexico.

5 Argentina, Belgium, Brazil, Canada, Denmark, France, Iceland, the Netherlands, New Zealand, Norway, Portugal, Spain, South Africa, Sweden, Uruguay and parts of Mexico. Great Britain (England and Wales) passed a law recognizing same-sex marriages that will go into effect in 2014.

6 *Matter of Zeleniak*, 26 I&N Dec. at 160 (citing *Matter of Lovo-Lara*, 23 I&N Dec. 746, 753).

7 *See DOS and USCIS guidance*, dated 2 August 2013 and 7 August 2013, respectively.

8 INA §291 (burden on petitioner to demonstrate eligibility for visa petition).

9 *Matter of Laureano*, 19 I&N Dec. 1, 2-3 (BIA 1983).

10 *Id.*

11 INA §214(d)(1).

12 *Id.*

13 9 FAM 40.4 N12.4.

14 INA § 213(a)(1)(A) ("the sponsor agrees to maintain the sponsored alien at an annual income that is not less than 125 percent of the Federal poverty line").

15 8 C.F.R. § 213a.2(e)(2)(i).

A Review of the Adequate Forum Factor in Forum Non Conveniens Analysis in Florida's State and Federal Courts

By Robert Becera, Miami

Introduction

With more and more litigation involving parties from different nations landing in Florida's courts, the judicially created doctrine of forum non conveniens is being invoked with greater frequency by defendants seeking to have cases dismissed in favor of what they believe are more convenient foreign forums. To obtain such a dismissal, the movant has the burden to show that the foreign forum is not only available, but is adequate to hear the dispute. This article examines the doctrine of forum non conveniens' requirement that the proponent demonstrate the adequacy of the foreign forum and reviews recent cases where the adequacy of the alternative forum was litigated.

The Forum Non Conveniens Analysis

In federal forums, the Supreme Court of the United States in *Piper Aircraft v. Reyno*[1] laid out the current three-part analysis used in evaluating forum non conveniens motions. The first part requires the court to determine whether the proposed country offered by the movant has an adequate alternative forum for the dispute. An alternative forum is usually considered adequate under this analysis if the defendant is subject to jurisdiction in that forum, even if the alternative forum has laws that are less favorable, as long as a satisfactory remedy exists.

The *Piper* court stated that in rare circumstances, if the remedy offered by the alternative forum is clearly unsatisfactory, then that forum may not be an adequate alternative. This statement in *Piper*, however, provides little guidance in determining what constitutes an adequate alternative forum. The adequacy of an alternative forum is a different inquiry from that of the availability of the forum. In any event, the threshold for establishing an adequate alternative forum under *Piper* has been described as a "low one."

In Florida, the Supreme Court of Florida formally adopted the doctrine of forum non conveniens in *Kinney v. Continental Insurance Co*.[2] In *Kinney*, the Supreme Court found that after it is established that a Florida court has jurisdiction over a dispute, a court may entertain a motion to dismiss for forum non conveniens. The doctrine and its "test" were codified in Fla. R. Civ. P. 1.061. In an effort to address the problem of Florida becoming the "courthouse of the world," and, in effect, having Florida taxpayers "pay to resolve disputes utterly unconnected with (Florida's) interests," Florida's Supreme Court adopted the federal test for dismissal on forum non conveniens grounds.

Thus, after determining it had jurisdiction over the dispute, a Florida court "must consider all relevant factors of private interest, weighing in the balance a strong presumption against disturbing the Plaintiff's initial forum choice." The Florida court must then weigh consideration of private and public interest factors to determine if they favor the alternative forum. Finally, if the court determines the balance of the factors weigh in favor of the alternative forum, then the plaintiff can reinstate the suit in the alternative forum without undue inconvenience or prejudice. The first factor to be considered, however, is whether there is another adequate forum to hear the case. Fla. R. Civ. P. 1.061(a).

Analysis of the Adequacy of Alternative Forums Federal Courts in the Eleventh Circuit

The Eleventh Circuit Court of Appeals has jurisdiction over appeals from all federal district courts in the states of Florida, Alabama and Georgia. The Eleventh Circuit addressed the adequacy prong of the forum non conveniens analysis in the context of a case involving a plane crash. In *Leon v. Millon Air*,[3] the plaintiffs, in opposing a motion to dismiss the case in Miami for forum non conveniens in favor of an Ecuadorian forum, challenged the adequacy of Ecuadorian forums to hear the dispute. The Eleventh Circuit affirmed the trial court's dismissal of the case, expressly finding Ecuador to be an adequate forum for the dispute. The trial court found the fact that punitive damages were unavailable in Ecuador did not render its courts "so clearly inadequate or unsatisfactory that it is no remedy at all."

In affirming, the Eleventh Circuit stated that "courts have been strict about requiring that defendants demonstrate that the alternative forum offers at least some relief," but that "an adequate forum need not be a perfect forum." In fact, "courts have not always required defendants to do much to refute allegations of partiality and inefficiency in the alternative forum" and "the argument that the alternative forum is too corrupt to be adequate does not enjoy a particularly good track record." Nevertheless, "extreme amounts of partiality or inefficiency may render the alternative forum inadequate." On this point, "defendants have the ultimate burden of persuasion, but only where the plaintiff has substantiated his allegations of serious corruption or delay. . . . where the allegations are insubstantially supported . . . a [court] may reject them without considering any evidence from the defendant."

But where the non-movant produces significant evidence documenting the partiality or delay typically associated with the adjudication of similar claims, and these conditions are so severe as to call the adequacy of the forum into doubt, the defendant then has the burden to persuade the court that the facts are otherwise. According to the Eleventh Circuit, this approach "forbids dismissal to alternative forums that realistically are not capable of producing a remedy for the plaintiff's injuries, without crediting cursory attacks on legal systems simply because they are somewhat slower or less elaborate than ours."

Florida Courts

Florida courts have recognized that the alternative forum does not have to be equivalent to the chosen forum, but "dismissal would not be appropriate where the alternative forum does not permit litigation of the matter of the subject dispute."[4] According to a Florida appellate court, "a foreign forum is adequate when the parties will not be deprived of all remedies or treated unfairly, even though they may not enjoy the same benefits as they may receive in an American court."[5] However, "a forum may be inadequate if it is grossly inefficient or given to extreme levels of partiality." The movant must demonstrate that the alternative forum "offers at least some relief."[6] Florida courts also look to federal case authority on forum non conveniens as "persuasive, though not necessarily binding" authority.[7] Unlike federal courts, the denial of a motion to dismiss for forum non conveniens in Florida courts is an appealable, non-final order.[8]

How Adequate Is Adequate?

Just how "adequate" must an alternative forum be to pass muster under the forum non conveniens analysis? A review of the case law shows that courts focus on two things: (1) whether a remedy is available; and (2) whether there is basic fairness in the alternative forum. The reviewed cases also teach what level of proof courts will require in deciding the adequacy prong of the forum non conveniens analysis.

Cases Where Alternative Forums Were Found to Be Adequate

In *Leon v. Millon Air*,[9] a case involving a plane crash in Ecuador, the Eleventh Circuit found Ecuador to be an adequate alternative forum despite challenges to the efficacy of the Ecuadorian legal system. The appellate

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court found the defendants have the ultimate burden of persuasion on adequacy, but only when the plaintiffs have substantiated the allegations of serious corruption or delay in the proposed forum.

Using this allocation of the burden of proof, the court found the defendants demonstrated that Ecuador was an adequate forum. An Ecuadorian law precluding the refiling of lawsuits when they have been first filed in a foreign country was found to be inapplicable to forum non conveniens dismissals. In addition, an alleged instability in the Ecuadorian legal system as a result of striking judges was found to be resolved, with the justice system functioning normally. Further, the plaintiffs maintained that Ecuador's legal system was deficient because it suffered from a lack of financial resources, the use of manual typewriters, the absence of computers in the courts, congestion and delays. The Eleventh Circuit found such evidence to be insufficient to satisfy the plaintiff's burden of production because this evidence did not prove "that such problems would preclude the fair and reasonably expeditious adjudication of the simple damages issues presented by the pending case."

In *Jiali Tang v. Synutra International*,[10] a case involving tainted baby formula from China, the court found China to be an adequate forum. The court noted that other courts had found China to be an adequate forum in the forum non conveniens context. Furthermore, the court found unpersuasive the plaintiff's claims that China's courts were prone to unreasonably long delays and were too corrupt. The court stated that "courts have rightly been reluctant to cast such aspersions on foreign judicial systems absent a substantial showing of a lack of procedural safeguards." Given the "low threshold" established by the Supreme Court in the *Piper* case, and although the Chinese forum "may not be ideal from plaintiff's perspective, '[an] adequate forum need not be a perfect forum.'" It need only provide a "remedy for [plaintiff's] injuries."

In *Mercier v. Sheraton International, Inc.*,[11] the First Circuit found Turkey to be an adequate alternative forum in a breach of contract action involving a Turkish casino, despite strong objections as to Turkey's adequacy as a forum. In *Mercier*, the plaintiff claimed she had a risk of arrest (she was a fugitive in Turkey on an unrelated matter) and that women had serious difficulties in litigating claims against men in Turkish courts. The court doubted the plaintiff's "personal difficulties with the Turkish system—as opposed to a showing of Turkish justice's systematic inadequacy—can provide an appropriate basis for a finding that Turkey is an inadequate forum."

The court also rejected the contention that the plaintiff would be handicapped in Turkish courts due to "a profound bias against Americans and foreign women." The court found the plaintiff's offer of proof on this issue to be insufficient to sustain such a claim and found that "it is not unfair that a plaintiff's conclusory claims of social injustice in a foreign nation where she deliberately chose to live, work and transact business out of which litigation arises should be accorded less than controlling weight in the selection of a judicial forum for the related litigation." Lastly, the court found the fact that Turkish courts afforded "less generous discovery procedures than are available under American rules" did not render the Turkish forum inadequate.

In *Delgado v. Shell Oil Co.*,[12] a case involving illnesses and injuries caused in foreign countries by pesticides manufactured by the defendants, the court concluded that "a forum that provides an impartial trier of fact and supplies an avenue to recover some measure of compensatory damages for physical injuries such as those suffered by plaintiffs is an adequate forum." The court, using this standard, found all twelve alternative forums raised by the defendants, Burkina Faso, Costa Rica, Dominica, Ecuador, Guatemala, Honduras, Ivory Coast, Nicaragua, Panama, Philippines, Saint Lucia and Saint Vincent, to be adequate.

In *Polanco v. H.B. Fuller*[13], despite the court characterizing Guatemala as "a nation which has always paid some lip service to democratic forms and institutions, even while ruled by absolute dictators, but has no real respect for law and individual rights and due process . . .," the court found Guatemala to be an adequate forum despite "no illusions that justice in

Review of the Adequate Forum Factor, continued

Guatemala is the same as justice in America." In *Polanco*, the court found the forum to be adequate because it distinguished between civil actions like the plaintiff's case, which involved a wrongful death action against a glue manufacturer, and ones involving sensitive issues like asylum or torture, where the court believed abuses of human rights in the alternative forum would be of more relevance.

In *Aguinda v. Texaco, Inc.*,[14] the court found Ecuador to be an adequate forum despite an unsuccessful coup attempt during the pendency of the case. The court stated that any evidence submitted of corruption in Ecuadorian courts was too generalized and conclusory with "scant reference to specifics, evidence or application to the instant cases." The court concluded this despite the U.S. State Department's statements that the judicial system of Ecuador was "politicized, inefficient, and sometimes corrupt."

Gonzales v. P.T. Pelangi Niagra Mitra International[15] illustrates how hard it may be to have a court deny a forum non conveniens motion on the grounds that the alternative forum is inadequate. In *Gonzales*, the Southern District of Texas granted a motion to dismiss in favor of an Indonesian forum. The court recognized that "only the most perilous obstacles to conducting litigation, evidenced by a complete absence of due process in the alternative forum, will render that forum inadequate." In *Gonzales*, the defendants provided the court with the affidavit of Indonesian counsel testifying to the procedural fairness of Indonesian courts. The defendants cited to previous cases finding Indonesia an adequate alternative forum.

In the face of the plaintiff's position that Indonesian courts were too corrupt for litigation of the claim, the court stated that "the overwhelming majority of courts addressing this argument have rejected allegations of corruption or bias on the part of the foreign forum as a means of preventing a forum non conveniens dismissal." More significantly, the court stated that it "refuses to sit in judgment upon the integrity of the entire Indonesian judiciary. Making a generalized pronouncement condemning the Indonesian court system as 'inadequate' is not the right nor the duty of this Court." Furthermore, according to the court, "principles of comity and the self-fulfilling consequences of a pronouncement of deficiency in the quality of justice of another state, compel judicial restraint from our courts in accepting invitations to engage in such value judgment." The court further found that generalized accusations of alleged corruption in the Indonesian judiciary were insufficient to render Indonesia an inadequate alternative forum.

These general principles are followed in Florida's state courts as well. In *Hilton International Co. v. Carrillo*,[16] the plaintiffs were victims of a terrorist attack in Egypt. They brought suit in Miami, but the hotel defendant filed a forum non conveniens motion in favor of Egyptian or Israeli forums. The Third District Court of Appeal reversed the trial court's denial of the motion to dismiss. The trial court had found Egypt to be an inadequate forum because it was where the terrorist attack had

taken place, there were strong anti-American and anti-Israeli sentiments there and the plaintiffs would not be allowed to testify under the Egyptian legal system.

The Third District found these reasons insufficient to find Egypt to be an inadequate forum. It found "no per se rule of inadequacy applicable to a country in which terrorists attack innocent persons." Also, Egypt's political and cultural climates would not make it an inadequate forum "absent some direct, demonstrated, and adverse connection to its legal system." The Third District also cited other U.S. cases that had previously found Egypt to be an adequate alternative forum despite the differences in its judicial system from that of the United States. Lastly, the court stated in concluding that Egypt is an adequate forum that "the trauma of returning to the country in which the traumatic and horrifying events took place is not a factor precluding resolution of the claims by the judiciary of that country."

Cases Where Alternative Forums Were Found to be Inadequate

Cases where courts found the alternative forum to be inadequate are far fewer than those that found foreign forums to be adequate. A sampling of cases where the alternative forum was rejected illustrates the degree of proof of inadequacy necessary to defeat a forum non conveniens motion on the adequacy prong of the forum non conveniens analysis.

In *Bhatnagar v. Surrendra Overseas, Ltd.*,[17] a personal injury case where the injury occurred on the high seas, the court found India was an inadequate forum because the courts were "in a state of virtual collapse" and the litigation would take decades to be completed there. Given the long delays in justice in that alternative forum, the court found the Indian courts offered, in effect, no remedy at all.

In *El-Fadl v. Central Bank of Jordan*,[18] the D.C. Circuit reversed a forum non conveniens dismissal to Jordan as the alternative forum in a wrongful termination case. The court found that the defendants, who had the burden of proof, presented insufficient evidence that Jordan was an adequate alternative forum because they failed to refute evidence from the plaintiff that certain aspects of Jordanian law would potentially prohibit the plaintiff from filing his claims in Jordan. As such, the court in *El-Fadl* was faced with the "rare circumstance[] in which the alternative forum does not permit litigation of the subject matter of the dispute." Interestingly, in *El-Fadl*, the court found unavailing the plaintiff's reliance on a U.S. State Department's report expressing concerns about the impartiality of the Jordanian court system. The prohibition of any remedy to the plaintiff under Jordanian law appeared to carry the day for the court in reversing the dismissal on forum non conveniens grounds. As stated by the court, "the trial judge must finally ensure that [El-Fadl] can reinstate [his] suit in the alternative forum without undue inconvenience or prejudice."

Other cases where courts found foreign forums to be inadequate involved evidence of extreme partiality, lack of due process or lack of remedy. For example, in *Sangeorzan v. Yangming Marine Transp. Co.*,[19] the court found Taiwan not to be an adequate alternative forum because the defendant was 48% owned by the Taiwanese government. In *Sablic v. Armada Shipping Aps*[20], the court found that the extreme political and military instability in Croatia, coupled with a large backlog of cases, rendered those courts inadequate. In *Cabiri v. Assasie-Gyimah*,[21] the court found Ghana to be an inadequate forum because the plaintiff was a political asylee after alleging torture by Ghanian officials. In *Rasoulzadeh v. Associated Press*,[22] Iran was found to be an inadequate forum because the court found that if the plaintiffs went to Iran, "they would probably be shot." In *Canadian Overseas Ores Ltd., v. Compania de Acero Del Pacifico, S.A.*,[23] the court found Chile an inadequate forum because a party was a state-owned corporation and the court had "serious questions about the independence of the Chilean judiciary vis a vis the military junta currently in power."

All of the cases above involved extreme situations that compelled the courts to find that the plaintiffs would be unable to refile the cases in the alternative forums without being treated unfairly and without being utterly deprived of a remedy.

Review of the Adequate Forum Factor, continued

Conclusion

A review of the cases above shows that when deciding a motion to dismiss for forum non conveniens, most courts reject claims that an alternative forum is inadequate to hear a dispute. The burden of proof for a non-movant to establish that an alternative forum is inadequate due to corruption or other due process factors is high, requiring that the evidence be specific in regard to the claims being litigated and the parties appearing in the case. Courts demand specific evidence that the particular dispute at bar will be subject to such adverse conditions in the proposed forum as to render the plaintiff without remedy if the case is dismissed in favor of the alternative forum.

Courts have found alternative forums adequate where there is no right to trial by jury, no class-action procedures, no contingent-fee arrangements, restrictions on a party's ability to testify, a lack of depositions and other severe limitations on evidentiary discovery. Given the "low threshold" announced in *Piper* for finding adequacy of the alternative forum, opponents of forum non conveniens motions have an uphill battle in convincing a court that the foreign forum is so inadequate as to render the plaintiff wholly without remedy if the court grants the motion to dismiss.

Ultimately, without further guidance from the Supreme Courts of the United States or Florida, plaintiffs will continue to have little success challenging the adequacy of alternative forums proposed by defendants in forum non conveniens motions.

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Endnotes:

1 454 U.S. 235, 254 n.22 (1981).

2 674 So. 2d 86, 90 (Fla. 1996).

3 251 F.3d 1305 (11th Cir. 2001).

4 *Cortez v. Palace Resorts, Inc.*, 2013 Fla. LEXIS 1226; 38 Fla. L. Weekly S 423 (Fla. June 20, 2013).

5 *Ciba-Geigy Ltd. v. Fish Peddler, Inc.*, 691 So. 2d 1111, 1115 (Fla. 4th DCA 1997).

6 *Cortez v. Palace Resorts, Inc.*, 2013 Fla. LEXIS 1226; 38 Fla. L. Weekly S423 (Fla. June 20, 2013).

7 *Id.*

8 *See*, Rule 9.130(a)(3)(C)(ix), Fla. R. App. P.

9 251 F.3d 1305 (11th Cir. 2001).

10 2010 U.S. Dist. LEXIS 29868 (D. Md. Mar. 29, 2010) *aff'd*, 656 F.3d 242 (4th Cir. 2011).

11 981 F.2d 1345 (1st Cir. 1992).

12 890 F. Supp. 1324 (S.D. Tex. 1995) *aff'd*, 231 F.3d 165 (5th Cir. 2000).

13 941 F. Supp. 1512 (D. Minn. 1996).

14 142 F. Supp. 2d 534 (S.D.N.Y. 2001) *aff'd and modified* 303 F.3d 470 (2d Cir. 2002).

15 196 F. Supp. 2d 482 (S.D. Tex. 2002).

16 971 So. 2d 1001 (Fla. 3d DCA 2008).

17 52 F.3d 1220, 1227-1231 (3d Cir. 1995).

18 75 F.3d 668 (D.C. Cir. 1996).

19 951 F. Supp. 650, 653-54 (S.D. Tex. 1997).

20 973 F. Supp. 745, 748 (S.D. Tex. 1997).

21 921 F. Supp. 1189 (S.D.N.Y. 1996).

22 574 F. Supp. 854 (S.D.N.Y. 1983).

23 528 F. Supp. 1337, 1342 (S.D.N.Y. 1982).

2012-2013
ILS Statement of Operations

Line Items Revenue	2012-2013 Approved Budget	Year End June 2013 Actuals	2013-2014 Approved Budget
Section Dues	45,000	41,100	45,000
Affiliate Dues	1,950	695	1,600
Admin Fee to TFB	-16,990	-14,906	-16,750
Admin Fee Adjustment	0	-547	0
Total Dues	**29,960**	**26,342**	**29,850**
CLE Courses	-2,000	-3,244	-1,000
Section Differential	6,250	3,900	6,250
Newsletter Subscription	245	0	250
Sponsorships	77,500	88,750	100,000
Member Service Program	0	0	0
Foreign Program Revenue	10,000	0	5,000
Retreat Registration	7,000	93	3,000
Newsletter Advertising	1,000	0	250
Investment Allocation	2,655	5,342	2,883
Miscellaneous	500	0	500
Other Revenue	**103,150**	**94,841**	**117,133**
TOTAL REVENUE	**133,110**	**121,183**	**146,983**
Credit Card Fees	600	344	150
Employee Travel	6,960	1,179	4,009
Telephone/Direct	1,000	965	900
Internet Charges	375	480	500
Postage	1,500	926	1,900
Printing	500	150	500
Newsletter	0	157	0
Membership	100	0	100
Supplies	250	193	250
Photocopying	300	151	300
ILQ Printing	5,000	2,084	5,000
ILQ Freelance Editor	10,000	4,020	10,000
Officers Travel Expense	1,000	867	1,000
Meeting Travel Expense	1,500	0	1,500
Out of State Travel	3,000	0	3,000
CLE Speaker Exp.	3,000	0	3,000
Reception	0	71	0
Committee Expenses	500	159	500
Board or Council Mtg.	1,000	335	1,000
Bar Annual Meeting	8,000	4,088	9,000
Midyear Meeting	3,500	6,987	3,500
Section Service Program	6,000	9	6,000
Retreat	5,000	0	5,000
Foreign Program Expense	10,000	0	10,000
Awards	3,000	690	3,000
Website	10,000	11,352	8,000
Intl Arb Pre-Comp	15,000	13,243	15,000
Vause Memorial	1,000	0	0
Council of Sections	300	0	300
Special Projects	4,000	3,920	4,000
Operating Reserve	13,276	0	12,940
Miscellaneous	500	44	500
Sponsorship Expenses	24,000	24,000	24,000
Course Credit Fee	150	0	150
Total Operating Expenses	**140,311**	**76,414**	**134,999**
Meetings Administration	1,306	492	2,178
Graphics & Art	4,419	6,250	5,162
Total TFB Support Services	**5,725**	**6,742**	**7,340**
Total Expenses	**146,036**	**83,156**	**142,339**
Net Operations	**-12,926**	**38,027**	**4,644**
Beginning Fund Balance	**88,489**	**58,275**	**96,087**
Ending Fund Balance	**75,563**	**96,302**	**100,731**

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THURSDAY, NOVEMBER 20, 2014

1:30 p.m. – 1:45 p.m. **Late Registration**

1:45 p.m. – 2:00 p.m. **Opening Remarks**

2:00 p.m. – 3:30 p.m.
Cuba: An Evolving Marketplace
Moderator: Luis Martinez-Fernandez, University Of Central Florida
Panelists:
Johannes Werner, Editor, Cubanews/Cuba Standard, Tampa
Philip Peters, Cuba Research Center, Washington, DC
Carlos Loumiet, DLA Piper, Miami

3:30 p.m. – 3:45 p.m.
Questions & Answers

3:45 p.m. – 4:00 p.m. **Break**

4:00 p.m. – 5:30 p.m.
U.S. Policy Towards Cuba - Changes Since 2008
Moderator: Bill Carlson, President, Tucker Hall, Tampa
Panelists:
Richard Feinberg, University Of California, San Diego, CA
Milton Vescovacci, Gray-Robinson, Miami
Peter Quinter, Gray-Robinson, Miami

5:30 p.m. – 5:45 p.m.
Questions & Answers

6:30 p.m. – 7:30 p.m.
Reception

FRIDAY, NOVEMBER 21, 2014

8:30 a.m. – 10:00 a.m.
The Impact Of The Cuban Diaspora In Cuba And The U.S.
Moderator: Ralph Patino, Patino & Associates, Coral Gables
Panelists:
Hugo Cancio, Editor, On Cuba
Tessie Aral, ABC Charters, Miami
Jorge Fernandez, Hope 4 Cuba, New Hope, PA

10:00 a.m. – 10:15 a.m.
Questions & Answers

10:15 a.m. – 10:30 a.m. **Break**

10:30 a.m. – 11:30 a.m.
The Legal Framework for Economic Development: Challenges
Moderator: Jose Gabilondo, Florida International University, Miami
Panelists:
Antonio Zamora, Lex International, Miami
Rolando Anillo, Florida Crystals Corp., West Palm Beach
Gregory Biniosky, Canadian Attorney In Cuba

11:30 a.m. – 11:45 a.m.
Questions & Answers

12:00 noon – 1:30 p.m.
Lunch (included in registration)
Presentation on Cuba and U.S. Cuba Policy by The Americas Society/Council of the Americas

1:30 p.m. – 3:00 p.m.
Issues relating to Energy, Mining and the Environment
Moderator: Rolando Anillo, Florida Crystals Corp.
Panelists:
Jorge Pinon, University Of Texas, Austin, TX
Dan Whittle, Environmental Defence Fund, Raleigh, NC
Edward Russo, Eco Study Cuba, Key West

3:00 p.m. – 4:30 p.m.
Issues relating to Agriculture and Trade
Moderator: Manuel Supervielle, Veritas, Miami
Panelists:
William Messina, University Of Florida, Gainesville
Parke Wright IV, Southeast Agnet, Naples
Paul Johnson, Illinois Cuba Working Group, Chicago, IL

4:30 p.m. – 6:00 p.m.
Case Studies relating to doing business in Cuba
Moderator: Antonio Zamora, Lex International
Panelists:
Jay Brickman, Vice President, Crowley Maritime Corporation, Medley
Suzanne Carlson, TSP Operator, Tampa
Alfredo G. Duran, Alfredo G. Duran, P.A., Miami

6:00 p.m.
Closing Remarks

INTERNATIONAL LAW SECTION

C. Ryan Reetz, Miami — Chair, 2013-2014
Peter A. Quinter, Miami — Chair, 2014-2015
Carlos E. Loumiet, Miami — Program Co-Chair
Milton A. Vescovacci, Miami — Program Co-Chair
Antonio R. Zamora, Miami — Program Co-Chair

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