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The Perils of Panama--Are United States Employees of the Panama Canal Commission Exempt from United States Income Taxation?

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THE PERILS OF PANAMA—ARE UNITED STATES EMPLOYEES OF THE PANAMA CANAL COMMISSION EXEMPT FROM UNITED STATES INCOME TAXATION?

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I. INTRODUCTION

Since the enactment of the Panama Canal Treaty (the Treaty)[1] on October 1, 1979, United States citizens employed by the Pan-

1. The Panama Canal Treaty, Sept. 7, 1977, United States-Panama, T.I.A.S. No. 10030. After years of negotiation, the United States and the Republic of Panama signed the Panama Canal Treaty and the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, Sept. 7, 1977, United States-Panama, T.I.A.S. No. 10029. The treaties superseded the Isthmian Canal Convention, Nov. 18, 1903, United States-Panama, 33 Stat. 2234, T.S. No. 431, in which Panama had granted to the United States the right to build the 10-mile wide Canal and exclusive sovereign rights over the 50-mile wide Canal Zone. The Panama Canal Treaty returned full sovereign control of the Canal Zone to Pan-

ama Canal Commission have come to the United States federal courts seeking exemption from income taxation.[2] The Commission employees have based their claims on an executive agreement which accompanied the Treaty. Specifically, they have relied on the language found in article XV of the Agreement in Implementation of Article III of the Panama Canal Treaty (the Implementation Agreement):[3]

ARTICLE XV

Taxation

1. By virtue of this Agreement, the Commission, its contractors and subcontractors are exempt from payment in the Republic of Panama of all taxes, fees or other charges on their activities or property.

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ama. Under the Treaty, however, Panama granted to the United States the right to manage, operate, and maintain the Canal until the year 2000. The Panama Canal Commission, a United States agency, replaced the former Panama Canal Company and became responsible for the management and operation of the Canal. The Panama Canal Treaty also provided for increasing participation by Panama in the management of the Canal in preparation for Panama's assumption of full responsibility in the year 2000. For example, the nine-member Board of Directors of the Panama Canal Commission has thus far consisted of five United States citizens and four Panamanian citizens; the majority will shift in 1990. The Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal required both parties to defend the Canal and to keep it open to ships of all nations. On Sept. 16, 1977, President Carter transmitted both treaties to the Senate. The Senate approved the treaties subject to a variety of amendments, conditions, restrictions, and understandings to which Panama assented.

2. Historically, United States citizens employed by the Canal Zone received favorable tax treatment. Until 1951, the employees' income was totally exempt from federal income taxation. The United States Government began taxing these employees' income in 1951, at a lower effective tax rate than mainland taxpayers. Harris v. United States, 768 F.2d 1240, 1241-42 (11th Cir. 1985).

3. Agreement in Implementation of Article III of the Panama Canal Treaty, Sept. 7, 1977, United States-Panama, T.I.A.S. No. 10031 [hereinafter cited as The Implementation Agreement]. The Implementation Agreement contains 21 articles governing such subjects as land and water use, housing, telecommunications, entry and departure, vehicle registration, criminal jurisdiction, and taxation. President Carter transferred this Agreement and the Agreement in Implementation to Article IV of the Panama Canal Treaty to the Senate along with the two treaties. These agreements were not formally ratified by the Senate, but were considered during negotiation hearings.

2. *United States citizen employees and dependents shall be exempt from any taxes, fees, or other charges on income received as a result of their work for the Commission.* Similarly, they shall be exempt from payment of taxes, fees or other charges on income derived from sources outside the Republic of Panama.

3. United States citizen employees and dependents shall be exempt from taxes, fees or other charges on gifts or inheritance or on personal property, the presence of which within the territory of the Republic of Panama is due solely to the stay therein of such persons on account of their or their sponsor's work with the Commission.

4. The Coordinating Committee may establish such regulations as may be appropriate for the implementation of this Article. (Emphasis added).

Article III, paragraph 9 of the Panama Canal Treaty incorporates by reference article XV and all other provisions of the Implementation Agreement.[4]

Commission employees have claimed that paragraph 2 of article XV exempts them from *all* taxation on income derived from their work for the Commission—including taxation by the United States. In response, the United States has maintained that the exemption in paragraph 2 applies only to Panamanian taxation. According to the United States government, Commission employees remain, like all United States citizens, subject to income taxation by the United States.

While most federal courts that have considered the question have upheld the government's position,[5] some have found the ar-

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4. Art. III, para. 9 of the Panama Canal Treaty, *supra* note 1, entitled "Canal Operation and Management," states the following:

> The use of the areas, waters and installations with respect to which the United States of America is granted rights pursuant to this Article, and the rights and legal status of United States Government agencies and employees operating in the Republic of Panama pursuant to this Article, shall be governed by the Agreement in Implementation to this Article, signed this date.

5. *See* Rego v. United States, 591 F. Supp. 123 (W.D. Tenn. 1984); Corliss v. United States, 567 F. Supp. 162 (W.D. Ark. 1983); Highley v. United States, 574 F. Supp. 715 (M.D. Tenn. 1983); Watson v. United States, 592 F. Supp. 701 (W.D. Wash. 1983); Swearingen v. United States, 565 F. Supp. 1019 (D. Colo. 1983); Hollowell v. United States, 84-1 U.S. Tax Cas. (CCH) ¶ 9142, 53 A.F.T.R.2d (P-H) 84-698 (M.D. Fla. 1983); Stabler v. United States, 84-1 U.S. Tax. Cas. (CCH) ¶ 9153, 53 A.F.T.R.2d (P-H) 84-1156 (N.D. Tex. 1983); Pier-

gument of the Commission employees more persuasive.[6] Specifically, two federal courts of appeals have rendered conflicting decisions on the issue. In *Coplin v. United States*,[7] the Federal Circuit held for the government, reversing a lengthy opinion written by Chief Judge Kozinski of the United States Claims Court.[8] Although Chief Judge Kozinski's opinion presented the single most comprehensive and scholarly discussion of the issue, the Federal Circuit did not agree with his decision to exempt Commission employees from United States income taxation. However, in *Harris v. United States*,[9] the Eleventh Circuit found the Kozinski analysis persuasive. In affirming the judgment of a Georgia federal district court, the Eleventh Circuit in *Harris* held that Commission employees were exempt both from Panamanian taxation *and* United States taxation on their income from the Commission.

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point v. United States, 83-2 U.S. Tax Cas. (CCH) ¶ 9647, 52 A.F.T.R.2d (P-H) 83-6198 (D.S.C. 1983); Stokes v. United States, 83-2 U.S. Tax Cas. (CCH) ¶ 9644, 52 A.F.T.R.2d (P-H) 83-6137 (W.D. Wash. 1983); Snider v. United States, 53 A.F.T.R.2d (P-H) ¶ 84-349 (W.D. Wash. 1983); Long v. United States, No. 83-158, slip op. (D. Or. July 22, 1983); Smith v. Commissioner, 83 T.C. 702 (1984); Vamprine v. Commissioner, 49 T.C.M. (CCH) 210 (1984); McCain v. Commissioner, 81 T.C. 918 (1983); Collins v. Commissioner, 47 T.C.M. (CCH) 713 (1983).

6. *See* Harris v. United States, 768 F.2d 1240 (11th Cir. 1985); Coplin v. United States, 6 Cl. Ct. 115 (1984), *rev'd*, 761 F.2d 688 (Fed. Cir. 1985), *cert. granted sub nom.* O'Connor v. United States, 54 U.S.L.W. 3460 (U.S. Jan. 13, 1986) (No. 85-558).

7. 761 F.2d 688 (Fed. Cir. 1985).

8. Coplin v. United States, 6 Cl. Ct. 115 (1984), *rev'd*, 761 F.2d 688 (Fed. Cir. 1985), *cert. granted sub nom.* O'Connor v. United States, 106 S.Ct. 784 (1986). The Federal Circuit reversed Kozinski's opinion after admitting a diplomatic note into evidence on the day of oral arguments before the circuit court. This note was from a Panamanian foreign minister, and it supported the U.S. government's position. This note was not a part of the record when Kozinski issued his opinion, and the absence of such a note at the claims court level was one reason that Kozinski held for the taxpayer. Thus, the Federal Circuit's reversal was based predominantly on the diplomatic note rather than on any flaws in Kozinski's analysis. Because the Kozinski opinion presents the most comprehensive analysis available, this recent development article must necessarily cite to that opinion. Although the decision has been reversed, Kozinski's discussion of the legislative and negotiating history of article XV, paragraph 2 remains unquestionably accurate. Also, as this article will suggest, courts should rely on Kozinski's legal analysis because it is the most exhaustive and well-thought-out discussion of the issue. *See* notes 169-181 and accompanying text.

9. 768 F.2d 1240 (11th Cir. 1985).

In light of these conflicting holdings in the Eleventh Circuit and the Federal Circuit, the United States Supreme Court has granted certiorari in the *Coplin* case.[10] With approximately 1700 similar cases pending,[11] involving over $32 million in tax revenue,[12] the issue of United States taxation of Panamanian Commission employees is particularly appropriate for Supreme Court review.

II. LEGAL BACKGROUND

A. The Force of Law of the Implementation Agreement

The interpretation problem presented by article XV, paragraph 2 of the Implementation Agreement becomes significant only if the Implementation Agreement carries the force of law. The United States Government has argued that the Implementation Agreement does not carry the force of law because the President lacks the power to create exemptions to tax laws by means of an executive agreement that is not made subject to the advice and consent of the Senate.[13] In fact, President Carter did not formally seek the Senate's advice and consent to the Implementation Agreement. The President, however, did submit the text of the Agreement and a brief analysis of its contents to the Senate along with the texts of the Canal Treaties.[14] The Senate subsequently reviewed the report of the Foreign Relations Committee that recommended ratification of the Panama Canal Treaty and discussed and summarized the Implementation Agreement.[15] Thus, although the Implementation Agreement was not actually mentioned in the Senate's resolution of ratification,[16] it is probable that in ratifying the Panama Canal Treaty, the Senate considered

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10. *Supra* note 8, *cert. granted sub nom.* O'Connor v. United States, 106 S. Ct. 784 (1986).

11. There were 1714 cases pending as of Jan. 20, 1986. 30 *Tax Notes* (Tax Analysts) 229, Jan. 20, 1986.

12. *Id.*

13. *See, e.g., Coplin supra* note 8, 6 Cl. Ct. at 120.

14. S. EXEC. DOC. N., 95th Cong., 1st Sess. vi-vii, 1 (1977). *See also* 124 CONG. REC. 2693-94 (1978).

15. *Panama Canal Treaties: Hearing Before the Senate Comm. on Foreign Relations*, 95th Cong., 1st Sess., Pt. 1 at 268-69 (1977), Pt. 3 at 702-21 (1977), Pt. 5 at 117-21 (1978). *See also* S. EXEC. REP. No. 12, 95th Cong., 2d Sess., 34-35 (1978).

16. *See* 124 CONG. REC. 10,541 (1978).

and approved the Implementation Agreement.[17]

Rarely does a United States government agency assert that the President has exceeded his authority in the field of foreign relations. An ultra vires challenge of this nature rarely succeeds because of the broad powers vested in the President by the United States Constitution. Article II of the Constitution grants executive power to the President[18] and states that he must act as the Commander in Chief of the Army and the Navy.[19] Article II also provides the President with the power to perform certain functions with the advice and consent of the Senate. These functions include appointing public ministers and making treaties.[20] Finally, the Constitution requires the President to assure that the laws of the nation are faithfully executed.[21] Based on these expressed grants of power, the President possesses a wide range of authority in foreign affairs, including the power to enter into executive agreements[22] with other countries.

The President's ability to make executive agreements with other nations also derives from the notion that the President officially represents the United States in its correspondence with foreign powers.[23] Because the President alone is privy to the complex and delicate information on which foreign policy is based, he must maintain independent authority to address those issues for the United States. Although he can depend on the Senate's advice and consent in making treaties to address such problems, he must negotiate the treaties without the aid of the other governmental branches.[24] Because he plays this unique role in United States foreign relations, the President needs the authority to enact executive agreements.

Most courts that have considered the validity of executive agreements have sustained the President's authority to bind the nation by such agreements without the advice and consent of the

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17. See Kozinski's discussion of this in *Coplin*, *supra* note 8, at 123.

18. U.S. CONST. art. II, § 1.

19. *Id.*, art. II, § 2.

20. *Id.*, art. II, § 3.

21. *Id.*

22. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS § 121 comment (1965).

23. 2 C. HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 1215 (2d rev. ed. 1945).

24. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).

Senate.[25] In the recent decision *Weinberger v. Rossi*,[26] the Supreme Court upheld the legality of a 1968 Base Labor Agreement between the United States and the Philippines that was signed by the President but not ratified by the Senate. The Base Labor Agreement gave Filipinos preferential consideration for civilian positions on United States military bases in the Philippines. The Base Labor Agreement became a matter of controversy in 1971 when Congress enacted a statute prohibiting employment discrimination against United States citizens on overseas military bases unless permitted by "treaty."[27] In determining whether the term "treaty" included executive agreements or whether it was limited to traditional article II treaties made subject to Senate ratification, the Court noted that Congress has been inconsistent in distinguishing between the two types of international agreements.[28] The Court cast aside the traditional article II definition and relied instead on international law, which defines a treaty as any agreement concluded between sovereigns, regardless of the manner in which the agreement comes into force.[29] Under this definition, the Court determined that the Base Labor Agreement was a binding international obligation which the United States could not implicitly repeal without jeopardizing the future use of military bases in the Philippines and elsewhere. The Court thus sustained the executive agreement and held that it was a treaty within the meaning of the statute.

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25. *See* Wilson v. Girard, 354 U.S. 524 (1957) (Court upheld the validity of an administrative agreement covering U.S. jurisdiction over offenses committed in Japan by members of the U.S. Armed Forces); United States v. Pink, 315 U.S. 203 (1942) (Court upheld the validity of the Litvinov Assignment, which was part of an executive agreement whereby the Soviet Union assigned to the U.S. amounts owed to it by American nationals so that outstanding claims of other American nationals could be paid).

26. 456 U.S. 25 (1982).

27. Military Selective Service Act, Pub. L. No. 92-129, § 106, 85 Stat. 348, 355 (1971).

28. *Weinberger*, 456 U.S. at 30-31. *See* Case Act, 1 U.S.C. § 112b(a) (Supp. IV 1976) (Congress requiring the Secretary of State to "transmit to the Congress the text of any international agreement, . . . other than a treaty, to which the United States is a party" no later than 60 days after the agreement comes into force); Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801-02 (Supp. V 1976) (Congress defining "treaty" according to U.S. CONST. art. II); 39 U.S.C. § 407(a) (1976) (Congress authorizing the postal service to negotiate postal treaties with nothing more than Presidential consent).

29. *Weinberger*, 456 U.S. at 29-30.

In *Dames & Moore v. Regan*,[30] the Supreme Court upheld executive agreements known as the Algiers Accords which abrogated the right of United States nationals to sue the government of Iran in United States courts. The Court maintained that the President had the power to enter into the agreements, even without the advice and consent of the Senate.[31] The Court stated that the failure of Congress to delegate specifically such authority did not imply any congressional disapproval of the executive action.[32] Because Congress had never expressly objected to such agreements, the Court found a presumption that the President was acting pursuant to congressional consent.[33] Relying on Justice Jackson's celebrated concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*,[34] the Court reasoned that any presidential action taken pursuant to congressional authorization must be "supported by the strongest of presumptions and the widest latitude of judicial interpretation"[35] and that anyone attacking the action must carry a heavy burden of persuasion.[36] On this basis, the Court upheld the executive agreements.

Although *Weinberger* and *Dames & Moore* represent the majority of cases that have dealt with executive agreements,[37] in other cases the validity of such agreements has not been a matter of absolute certainty. In *Security Pacific National Bank v. Iran*,[38] a federal district court struggled with and upheld the same executive action that was at issue in *Dames & Moore*. Quoting the Jackson concurrence in *Youngstown*,[39] the court stated that when the President acts pursuant to express or implied congressional authorization, he operates under maximum authority—both that which is inherently his plus that which Congress delegates to him.

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30. 453 U.S. 654 (1981).

31. *Id.* at 682.

32. *Id.* at 678. *See* Haig v. Agee, 453 U.S. 280, 291 (1981).

33. *Dames & Moore*, 453 U.S. at 686. *See* United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915).

34. 343 U.S. 579 (1952).

35. *Dames & Moore*, 453 U.S. at 668 (quoting *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)).

36. *Dames & Moore*, 453 U.S. at 668; *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

37. See cases cited *supra* note 25.

38. 513 F. Supp. 864 (C.D.Cal. 1981).

39. *Id.* at 870-71 (quoting from *Youngstown*, 343 U.S. at 635-38 (Jackson, J., concurring)). *See supra* notes 30-32 and accompanying text.

Conversely, when he acts without congressional authorization, the President relies only on his independent constitutional powers.[40] Also, the court recognized the existence of a gray area in between—a "twilight zone"—in which the Congress and the President apparently have concurrent authority to act.[41] The court noted that with respect to this gray area, the judiciary has never drawn the line between matters that are within the treaty power of Congress and those which are subject to executive agreement.[42] Yet, as the court pointed out, traditionally Presidents have entered into numerous international agreements on many subjects without the advice and consent of the Senate. Although these agreements are a source of agitation for the Congress, the *Security Pacific* court determined that the President has the power to enter into such agreements—but only by means of his constitutional authority and pursuant to valid statutory delegation.[43]

Assuming the judiciary's general willingness to acknowledge the President's authority to make executive agreements, one must consider the scope of the Implementation Agreement to determine its validity. In the international arena, if the Implementation Agreement is binding, the United States has an absolute obligation to comply with its terms. Even if a court holds that the President lacked the power to make the Implementation Agreement, the nation's obligation of compliance owed to Panama would nevertheless remain intact.[44]

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40. *See supra* text accompanying notes 15-19.

41. *Security Pacific*, 513 F. Supp. at 870-71. In reference to this twilight zone in which there is an uncertain distribution of authority, Justice Jackson wrote that "congressional inertia, indifference or acquiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility." *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring). He stated that the test of power in this area "is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law." *Id.*

42. *Security Pacific*, 513 F. Supp. at 872-73. The court pointed to two instances where courts held executive agreements beyond presidential authority. *E.g.*, Reid v. Covert, 354 U.S. 1 (1957) (executive agreement subjecting overseas dependents of U.S. armed forces personnel to military courts-martial violated Fifth Amendment right to jury trial); United States v. Guy W. Capp, Inc., 204 F.2d 655 (4th Cir. 1953) (executive agreement attempted to regulate areas specifically delegated to Congress by the Constitution).

43. *Security Pacific*, 513 F. Supp. at 872. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS § 12-21 (1965).

44. 2 C. HYDE, *supra* note 23, at 1465; Vienna Convention on the Law of

On the domestic front, if the Implementation Agreement has the force of law, it implicitly repeals prior inconsistent laws.[45] As a treaty, the Implementation Agreement is the "Supreme Law of the Land,"[46] and it supersedes prior conflicting acts of Congress, including provisions of the Internal Revenue Code.[47] Some courts, however, have asserted that executive agreements, unlike treaties, cannot supersede prior congressional acts because they do not require Senate approval and are not directly described in the Constitution.[48] But, according to the *Restatement (Second) of Foreign Relations*, an executive agreement made under the authority of a treaty is coextensive with the treaty and carries the same effect and validity as the treaty itself.[49] In addition, the *Weinberger* court asserted that an executive agreement is a treaty.[50] Therefore, the Implementation Agreement, like a treaty, repeals all prior inconsistent laws, including conflicting parts of the Internal Revenue Code.

Even if the Implementation Agreement has the effect of law, the fact that article XV, paragraph 2 deals with taxation further complicates the situation. Arguably, because the House of Representatives plays no role in making treaties,[51] a treaty that exempts citizens from United States taxation interferes with that chamber's exclusive constitutional right to originate bills for raising revenue.[52] There is, however, a statutory mechanism that

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Treaties, 24 U.N. GAOR Conf. at 293, art. 27, U.N. Doc. A/Conf. 3927 (1969), *reprinted in* 63 AM. J. INT'L L. 875, 884 (1969) [hereinafter cited as Vienna Convention]. Although the Vienna Convention is not yet in force in the United States, it is an authoritative source of international treaty law for the courts and the executive branch. *See Coplin*, *supra* note 8, 6 Cl. Ct. at 121.

45. *See Dames & Moore*, 453 U.S. at 685 (1981); TVA v. Hill, 437 U.S. 153, 190 (1978); Nebraska Pub. Power Dist. v. 100.95 Acres of Land, 719 F.2d 956, 958 (8th Cir. 1983); *Coplin*, *supra* note 13, 6 Cl. Ct. at 124.

46. *See* U.S. CONST. art. VI, cl. 2.

47. Section 616 of the Internal Revenue Code taxes "all income from whatever source derived." 26 U.S.C. § 61(a) (1982). *See* Edwards v. Carter, 580 F.2d 1055, 1058 (D.C. Cir. 1978), *cert. denied*, 436 U.S. 907 (1978); Swearingen v. United States, 565 F. Supp. 1019, 1021 (D. Colo. 1983).

48. *See, e.g.*, United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953); *Swearingen*, 565 F. Supp. at 1021; RESTATEMENT (SECOND) OF FOREIGN RELATIONS § 144(1) (1965).

49. RESTATEMENT (SECOND) OF FOREIGN RELATIONS § 119 comment a (1965).

50. *See supra* text accompanying notes 22-25.

51. *See Swearingen*, 565 F. Supp. at 1022.

52. U.S. CONST. art. I, § 7, cl. 2.

remedies this problem and avoids the issue of implied repeal of other laws. Under the statutory definition, "gross income" does not include income "excluded by any treaty obligation of the United States."[53] As clarified in *Weinberger v. Rossi*, the term "treaty" is broad enough to include executive agreements like the Implementation Agreement with Panama.[54] By this reasoning, article XV, paragraph 2 of the Implementation Agreement has the force of law even though it conflicts with certain sections of the Internal Revenue Code.

B. Interpreting Article XV, Paragraph 2

Assuming that the Implementation Agreement of article III of the Treaty is valid and binding, the primary issue becomes interpretation of article XV, paragraph 2. Employees of the Panama Canal Commission have come to court claiming that the language "any taxes" in paragraph 2 refers to taxes imposed by both Panama and the United States. The United States, however, has interpreted "any taxes" to mean only those that are imposed by Panama. Determining the correct position is not an easy task for courts because there is substantial support for both views.

Interpretation of a treaty always begins with an analysis of the language of the treaty itself.[55] According to the general rules of treaty interpretation set forth in the Vienna Convention,[56] a treaty shall be interpreted in accordance with the ordinary meaning of the words taken in their context and in light of the treaty's purpose. The clear meaning of the language controls unless its literal meaning is inconsistent with the expectations of the signing parties.[57]

Read literally, the language of paragraph 2 exempts United

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53. 26 U.S.C. § 894(a) (1982). *See* Harris v. United States, 778 F.2d 1240, 1247 (11th Cir. 1985); *Coplin*, *supra* note 18.

54. *See supra* text accompanying notes 22-25.

55. Although the Implementation Agreement is actually an executive agreement, the Supreme Court has determined that such agreements qualify as treaties. *See* Weinberger v. Rossi, 456 U.S. 25, 29-31 (1982) *See also supra* notes 28-29 and accompanying text. Thus, the basic rules of treaty interpretation apply to the interpretation of Article XV, paragraph 2 of the Implementation Agreement.

56. Vienna Convention, *supra* note 44, art. 31 (1); RESTATEMENT (SECOND) OF FOREIGN RELATIONS § 147(1)(a) (1965).

57. Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 180 (1982); Harris v. United States, 778 F.2d 1240, 1242 (11th Cir. 1985).

States citizens who are Commission employees from taxation by Panama and the United States.[58] Courts relying on this reading have compared paragraph 2 with paragraphs 1 and 3 of the same article.[59] Unlike paragraph 2, both paragraphs 1 and 3 of article XV specify that the particular tax exemption language refers to Panamanian taxation. Other taxation provisions found elsewhere in the treaty documents also specify the country to which a provision applies.[60] Because the drafters apparently knew how to use precise language referring to only one signatory, and because they chose not to use such language in paragraph 2, some courts have held that paragraph 2 refers to both United States and Panamanian taxation.[61]

Other courts, however, have read the language of paragraph 2 in context with paragraphs 1 and 3 and have decided that paragraph 2 refers only to Panamanian taxation. These courts have determined that the purpose of article XV, taken as a whole, was to protect the Panama Canal Commission and its employees from Panamanian taxation on income or property acquired through employment in the Commission.[62] According to these courts, United States taxation was not at issue in paragraph 2; therefore, the employees' income was still subject to United States income tax.

Because the use of particular language is not always determinative of what the signatory parties intend, courts must look beyond the words and construe article XV, paragraph 2 of the Implemen-

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58. *See Coplin, supra* note 8, 6 Cl. Ct. at 127; Harris v. United States, 585 F. Supp. 862, 863 (S.D. Ga. 1984), *aff'd*, 768 F.2d 1240 (11th Cir. 1985); Swearingen v. United States, 565 F. Supp. 1019, 1020 (D. Colo. 1983).

59. *See, e.g.*, Coplin, *supra* note 8; Harris v. United States, 768 F.2d 1240 (11th Cir. 1985). For the text of paragraphs 1-3 of article XV, see text following note 3, *supra*.

60. *See* Panama Canal Treaty, Sept. 7, 1977, United States-Panama, Art. IX, para. 9, T.I.A.S. No. 10030 (vessels passing through the Canal "shall [be] exempt from any taxes. . .by the Republic of Panama"); The Implementation Agreement, *supra* note 3, art. XI, para. 2(e) (U.S. Contractors of the Commission "shall not be obligated to pay any tax. . .to the Republic of Panama").

61. *Harris*, 768 F.2d at 1244; *Swearingen*, 565 F. Supp. at 1020. For an excellent discussion of this, see also *Coplin, supra* note 8, 6 Cl. Ct. at 126-27.

62. *See* Rego v. United States, 591 F. Supp. 123, 124 (W.D. Tenn. 1984); Corliss v. United States, 567 F. Supp. 162, 164 (W.D. Ark. 1983); Snider v. United States, 53 A.F.T.R.2d (P-H) ¶ 84-315 , at 84-349 (W.D. Wash. 1983); Smith v. Commissioner, 83 T.C. 702, 708 (1984); McCain v. Commissioner, 81 T.C. 918, 926 (1983).

tation Agreement to effectuate both the intent of the signing parties and the purpose of the Treaty.[63] A court should not give effect to the literal language of the Implementation Agreement unless this meaning accurately reflects the intentions of both the United States and Panama.[64] To insure that the intent of both countries is carried out, some commentators have argued that courts must construe a treaty literally, as they would a private contract between two parties.[65] Yet some courts, giving effect to the apparent intention of the parties, construe treaties more liberally than private contracts.[66] When two different language constructions are possible, and one is enlarging while the other is restrictive, courts usually prefer the more liberal interpretation.[67] Thus, there is a persuasive rationale for reading article XV, paragraph 2 broadly and for incorporating into the provision exemption from both Panamanian and United States income taxation.

C. Negotiation History of the Implementation Agreement

Because the meaning of article XV, paragraph 2 of the Implementation Agreement is so uncertain, courts interpreting paragraph 2 must look beyond the actual language to other factors.[68] In determining intent, a court will consider the conditions which were present at the time of the Treaty's adoption including the mischief that paragraph 2 was intended to remedy.[69] A court also will look to the negotiations and to the diplomatic correspondence

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63. Reed v. Wiser, 555 F.2d 1079, 1088 (2d Cir. 1977); GreatWest Life Assurance Co. v. United States, 230 Ct. Cl. 477, 481 (1982).

64. *See* Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 180 (1982); GreatWest Life Assurance Co. v. United States, 230 Ct. Cl. 477, 481 (1982).

65. 1 J. KENT, COMMENTARIES IN AMERICAN LAW 174 (1900) (cited with approval in Tucker v. Alexandroff, 183 U.S. 424, 437 (1902). *See also* Santovincenzo v. Egan, 284 U.S. 30 (1931) (international agreements are contracts between foreign states); Harris v. United States, 768 F.2d 1240, 1247 (11th Cir. 1985) (international agreements should be construed more like contracts than statutes).

66. *See* Valentine v. United States ex rel. Niedecker, 299 U.S. 5, 10 (1936); Pierpoint v. United States, 83-2 U.S. Tax Cas. (CCH) ¶ 9647, 52 A.F.T.R.2d (P-H) 83-6198 (D.S.C. 1983).

67. Neilsen v. Johnson, 279 U.S. 47, 52 (1929); *Coplin*, *supra* note 8, 6 Cl. Ct. at 148-49.

68. *See* Vienna Convention, *supra* note 44, art. 32.

69. *See* Reed v. Wiser, 555 F.2d 1079, 1088 (2d Cir. 1977); ECK v. United Arab Airlines, 360 F.2d 804, 812 (2d Cir. 1966); GreatWest Life Assurance Co. v. United States, 230 Ct. Cl. 477, 481 (1982).

of the signatory parties relating to each party's independent practical construction of the provision at issue.[70] Because the language has more than one construction, a court may consider any relevant extraneous matter in determining the intent and expectations of the signatories.[71]

Although no official transcript was kept during the 1977 Panama Canal treaty negotiations,[72] the available records indicate that the United States and Panama vehemently disagreed on the subject of taxation of Commission employees. The disagreement was more than a quibble over tax revenues; instead, it was a fundamental discord concerning the nature of the Panama Canal Commission and the extent of each country's sovereignty over the Commission.

Panama wanted United States citizens employed by the Commission to pay Panamanian taxes on their salaries, effective three years after the Treaty's entry into force. The United States, viewing the Commission as a United States governmental agency, felt that Panamanian taxation of Commission employees would be the equivalent of taxing the United States government. Allowing Panama to tax Commission employees would set a bad precedent and would expose the United States to taxation demands by other governments which have U.S. agencies operating on their soil.[73] Ambassador Sol M. Linowitz of the United States expressed this sentiment on several occasions during the negotiation procedure. At the June 30, 1977, negotiating round the Ambassador stated:

> The third thing, on the Income Tax question which you raised with us . . . does pose a very great problem.

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70. *See* Sumitomi Shoji America, Inc. v. Avagliano, 457 U.S. 176, 180 (1982); Arizona v. California, 292 U.S. 341, 359-60 (1934); Neilsen v. Johnson, 279 U.S. 47, 52 (1929).

71. Hidalgo County Water Control v. Hedrick, 226 F.2d 1, 8 (5th Cir. 1955), *cert. denied*, 350 U.S. 983 (1956); Harris v. United States, 768 F.2d 1240, 1245 (11th Cir. 1985); Rego v. United States, 591 F. Supp. 123, 124 (W.D. Tenn. 1984); Corliss v. United States, 567 F. Supp. 162, 164 (W.D. Ark. 1983); McCain v. Commissioner, 81 T.C. 918, 927 (1983).

72. *See* Letter from John L. Haines, Jr. (Deputy General Counsel) to David Slacter (U.S. Dept. of Justice, Tax Division) (Dec. 20, 1982). Each side was to keep records of half of the negotiating sessions; when put together, these notes were to constitute an agreed record. In some instances, however, no notes were kept.

73. For an excellent discussion of this, see *Coplin*, *supra* note 8, 6 Cl. Ct. at 129.

> This is not done anywhere in the world. No employee of a Government, of the United States government or of a government agency, is now subject to taxes in a foreign country; and it would therefore call for a wholly new approach to this problem—which is being very strongly resisted.[74]

On July 11, 1971, Linowitz reiterated the United States Government's view of the matter:

> We have been advised that the problem is one that we cannot deal with as you have proposed. The taxation of income received by U.S. employees from the United States Government, wherever earned, would run counter to the policy that the United States has adopted throughout the world; and this would be the first effort to have a breach in that kind of relationship. And, therefore, we have no authority to accede to your request on this score.[75]

In contrast, Panama viewed the Commission as a commercial enterprise operated jointly by the United States and Panama. The Panamanian negotiators argued that the Commission was unlike other United States agencies which performed purely governmental functions solely on behalf of the United States.[76] In support of this position, Panamanian negotiators stated the following at the July 12, 1977, negotiation meeting:

> Now, I understand . . . that the people—I assume from the IRS—who were consulted about this matter think that in your case there's no precedent anywhere in the world for this. But if I understand the argument advanced, there haven't been any cases either in which you've had an operation like this—a joint operation between two countries.
>
> We're not talking about income tax to be paid by the military assigned to Panama; we're talking about income tax to be paid by citizens whose wages would be derived from the Panama Canal. In other words, the salaries to be paid by the U.S. nationals don't come from the United States but, rather, they would be derived from the operation of the Canal.[77]

In further support of this position, Panamanian negotiators argued that if the National Bank of Panama, an agency of the government, established a branch in the United States, its Panama-

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74. Record of Panama Canal Treaty negotiations, June 30, 1977 session.
75. Record of Panama Canal Treaty negotiations, July 11, 1977 session.
76. *See Coplin, supra* note 8, 6 Cl. Ct. at 129.
77. Record of Panama Canal Treaty negotiations, July 12, 1977 session.

nian employees would have to pay United States income tax. In addition, the Panamanians pointed to the Volvo corporation, a Swedish government-owned company with assembly plants in the United States. Both United States and Swedish employees in these Volvo plants pay income tax to the United States.[78] The Panamanian negotiators reasoned that the Panama Canal Commission should be treated in Panama the same as foreign government commercial enterprises are treated in the United States.

As the negotiations progressed, the positions of the parties hardened and their differences intensified. Both parties recognized that the sovereignty issue at stake was much more important than the amount of money involved.[79] By July 18, 1977, the last session at which a contemporaneous record was kept, the negotiators still had not resolved the problem. The parties kept no record of negotiation after that time. Thus there is no documentation of the sessions during which the final language of article XV, paragraph 2 was discussed.[80] The only available evidence on the consideration of the language in paragraph 2 is the affidavit of Dr. Carlos Alfredo Lopez Guevara, Panama's Ambassador Extraordinary and Plentipotentiary for Canal Treaty negotiations.[81] According to Dr. Guevara, the parties met for a final session in Panama in August, and at that time the United States negotiators presented the language of article XV. Guevara maintains that the text of paragraph 2 was then tabled without explanation and that the Panamanian delegation raised no objections. Therefore, according to his affidavit, the parties agreed to the provision. He further states that the parties intended that the language of paragraph 2 preclude taxation of Commission employees by both the United States and Panama, and most significantly, that the Panamanian delegation read paragraph 2 exactly that way.[82]

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78. *See Coplin, supra* note 8, 6 Cl. Ct. at 130.

79. *See id.* at 131.

80. *Id.*

81. For discussion of this affidavit, see *id.* at 131 & n.16. Guevara was present when the language of paragraph 2 was discussed.

82. *Accord* Sworn Statement of Juan Antonio Tack, Minister of Foreign Relations and head of the Panamanian negotiation staff 1970-1976; Sworn Statement of Demetrio B. Lakas, President of Panama. Tack and Lakas each stated that the language referred to exemption both from Panamanian and from American income taxation. Harris v. United States, 768 F.2d 1240, 1245 (11th Cir. 1985). *Contra Tratados del Canal de Panama* at 313 (1980) (official Panama-

The affidavit of Michael G. Kozak, Deputy Legal Adviser for the United States Department of State conflicts with the Guevara affidavit.[83] Kozak, a member of the negotiating team, was one of the drafters of the Panama Canal Treaty and its Implementation Agreements. Although he does not claim to have been at the session during which the language of article XV was discussed,[84] he states that the purpose of the language in paragraph 2 was to insure that the United States employees of the Commission would not be subject to host country taxation by Panama. He further states that the issue of an outright exemption from United States taxation was never even considered as a subject for inclusion in the Treaty or its Implementation Agreements.

Thus, there is every indication that the language finally adopted in paragraph 2 did not reflect the original intentions of either party; instead, it achieved certain results but neatly sidestepped the sovereignty issue. By providing that neither country could tax the salary of Commission employees, the United States avoided the undesirable precedent that Panamanian taxation would have set. For Panama, the language was acceptable for several reasons. First, the language showed that the Commission was not a typical United States government agency and that it enjoyed a special status.[85] Also, the language was a potential boost for the Panamanian economy because Commission employees would have more money to spend in Panama.[86] Finally, the language provided incentive for current Commission employees to remain in Panama and to work for the Commission even in the absence of United States sovereignty over the Canal.[87]

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nian government publication of the Canal Treaties and related agreements). That publication has an index which contains the heading "IMPUESTOS (Republica de Panama)" (or "TAXES (Republic of Panama))." Beneath this heading are the words "Exenciones a los por razon de su trabajo" (Exemptions to the U.S. citizen employees and their dependents by reason of their work). No mention is made of exemption from U.S. taxation.

83. For discussion of this affidavit, see *id.* and Pierpoint v. United States, 83-2 U.S. Tax Cas. (CCH) P9697, 52 A.F.T.R.2d (P-H) 83-6198 (D.S.C. 1983).

84. Although the Kozak affidavit has been used as support for the government's position, one court has concluded that the affidavit actually undermines the government's position since Kozak was not present during the negotiation of the paragraph 2 language. Harris v. United States, 768 F.2d 1240, 1245 (11th Cir. 1985).

85. *See Coplin, supra* note 8, 6 Cl. Ct. at 133.

86. *Id.*

87. *Id. See also* Sworn Statement of Juan Antonio Tack, *supra* note 83:

Although the final language is probably not that which either party originally intended, in all likelihood it reflects the agreement finally reached by both nations.[88] Because the language does not drastically depart from past practice, it is not unthinkable that the parties could have actually agreed to it.[89] When United States citizens live and work abroad, the issue of taxation becomes important to both the United States and the host country. In such a situation, it is not unusual for the two governments to apportion the amount of tax that can be collected by each.[90] Often, to avoid double taxation, the United States will enter into treaties that limit the amount that the United States may collect from its own citizens.[91] Also, the United States is a party to numerous Status of Forces Agreements (SOFAs) which exempt United States personnel from taxation by the host state.[92] These

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"The general spirit of such a provision was that the U.S. citizens working in the canal administration should be granted some type of economic incentive, in addition to their salaries, for obtaining the highest yield in their specialized functions." Harris v. United States, 768 F.2d 1240, 1245 (11th Cir. 1985) (quoting Sworn Statement of Juan Antonio Tack, *supra* note 83). This notion is consistent with the fact that many provisions in the Treaty secure employee's rights and create special inducements for them to remain on the job. The Panama Canal Treaty, *supra* note 1, art. X, para. 10(b) (affirmative duty on the part of the U.S. to seek legislation to provide more liberal retirement benefits), art. XII (Entry and Departure), art. VIII (Services and Installations), art. XIV (Licenses), art. XVI (Import Duties), art. XVIII (Claims), art. XIX (Criminal Jurisdiction).

88. *Coplin, supra* note 8, 6 Cl. Ct. at 134.

89. *Id.* at 134-35.

90. *Id.*

91. *See, e.g.*, U.S. Draft Model Income Tax Treaty, June 16, 1981, Tax Treaties (P-H) ¶ 1022; Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, July 1, 1957, United States-Pakistan, art. XV, 10 U.S.T. 684, T.I.A.S. No. 4232; Agreement on Double Taxation: Taxes on Income, March 14, 1942, United States-Canada, art. XV, 56 Stat. 1399, T.S. No. 983, *supplemented and modified* June 12, 1950, 2 U.S.T. 2235, T.I.A.S. No. 2347, *and* Aug. 8, 1956, 8 U.S.T. 1619, T.I.A.S. No. 3916, *and* Oct. 25, 1966, 18 U.S.T. 3186, T.I.A.S. No. 6415; Agreement on Double Taxation: Income and Other Taxes, March 23, 1939 United States-Sweden, art. XIV, 54 Stat. 1759, 75 No. 958, *supplemented* Oct. 22, 1963, 15 U.S.T. 1824, T.I.A.S. No. 5656. *See also* Convention for the Avoidance of Double Taxation with Respect to Taxes on Income, July 22, 1954, United States-Germany, art. V, 5 U.S.T. 2768, T.I.A.S. No. 3133; *Coplin, supra* note 8, 6 Cl. Ct. at 134.

92. *See, e.g.*, Agreement on Status of Forces, July 9, 1966, United States-Korea, art. XIV, 17 U.S.T. 1677, T.I.A.S. No. 6127; Agreement on Status of Forces, May 9, 1963, United States-Australia, art. 6, 14 U.S.T. 506, T.I.A.S. No.

SOFAs contain provisions similar to article XV of the Implementation Agreement except that they are specific about which country is providing the tax exemptions.[93] Finally, the United States sometimes negotiates treaties which preclude certain types of income taxation by both the United States and the host country.[94] Therefore, it is reasonable to believe that Panama and the United States each agreed to the language in paragraph 2 in order to preclude income taxation by both countries.

D. Legislative History of the Implementation Agreement

Just as the drafters' intent is significant in interpreting article XV of the Implementation Agreement, the legislative intent at the time of treaty ratification is also an important factor. Although the President did not formally submit the Implementation Agreement to the Senate for official advice and consent, the

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5349; Agreement on Status of Forces, Jan. 19, 1960, United States-Japan, art. XIII, 11 U.S.T. 1652, T.I.A.S. No. 4510; Agreement on Status of Force, July 30 and Aug. 6, 1958, United States-Lebanon, 10 U.S.T. 2166, T.I.A.S. No. 4387; Agreement on Status of Forces, June 19, 1951, NATO, art. X, 4 U.S.T. 1792, T.I.A.S. No. 2846. In the message from the President transmitting the Treaties and Implementation Agreements to the Senate, the President compared the Implementation Agreement of Article III to SOFAs with countries around the world. S. EXEC. DOC. N. 95th Cong., 1st Sess. 3 (1977). The Kozak affidavit indicates that language of article XV was taken from the standard SOFA. Harris v. United States, 768 F.2d 1240, 1244 (11th Cir. 1985).

93. *Harris*, 768 F.2d at 1244; *Coplin*, *supra* note 8, 6 Cl. Ct. at 137-38. *See, e.g.*, The Implementation Agreement, *supra* note 3, art. XV:

> Members of the Forces or the civilian component, and dependents, shall be exempt from any taxes, fees, or other charges on income received as a result of their work for the United States Forces or for any of the service facilities referred to in Articles XI or XVIII of this Agreement. Similarly, *as is provided by Panamanian law*, they shall be exempt from payment of taxes, fees, or other charges on income derived from sources outside of the Republic of Panama. (emphasis added.)

In *Harris*, 768 F.2d at 1244, the court referred to a July 26, 1977 draft of paragraph 2 which contained an explicit reference to Panamanian law. The court concluded that deletion of this qualifying language during negotiation must have been deliberate.

94. *Coplin*, *supra* note 8, 6 Cl. Ct. at 134-35. *See, e.g.*, Convention for Avoidance of Double Taxation with Respect to Taxes on Income and the Prevention of Fraud and Fiscal Evasion, April 17, 1984, United States-Italy, art. 18(3); Convention with Respect to Taxes on Income and Capital, Sept. 26, 1980, United States-Canada, art. XVIII (6)(b), *reprinted in* S. EXEC. DOC. T., 96th Cong., 2d Sess. (1980); Convention for the Avoidance of Double Taxation, United States-Pakistan, *supra* note 92, art. VI(i).

Agreement did accompany the Panama Canal Treaty for the Senate's consideration.[95] Although the Implementation Agreement was not mentioned in the Senate's resolution of ratification of the Treaty,[96] the Foreign Relations Committee noted that the Agreement would be "entered into pursuant to the authority of [the] Treaty."[97]

During the hearings on the Panama Canal Treaty, the Senate Committee on Foreign Relations discussed the language and intended meaning of article XV, paragraph 2 of the Implementation Agreement. The Committee heard the testimony of Hubert J. Hansell, Legal Advisor to the State Department. In general reference to article XV, Hansell stated, "[w]ith regard to exemption from Panamanian taxes, the implementing agreements provide exemptions from Panamanian taxes for United States agencies and their personnel, including dependents and contractors."[98] More specific discussion of article XV, paragraph 2 occurred during an interchange between Herbert Hansell and Senator Richard Stone:

> *Senator Stone*: [W]hen [paragraph 2] was announced, the press reported the glee of the Zonians that they were now exempt from U.S. income tax. When Senator Glenn asked you, are there any words that you would like to see in the treaty, I was just asking myself, would you like to see the words, United States, in there somewhere?
>
> *Mr. Hansell:* I am sorry to be a source of disappointment for the Panamanians, but obviously we are not entering into an agreement between the United States and Panama that would exempt U.S. citizens from U.S. tax. The purpose of this, of course, was to exempt them from Panamanian tax.
>
> *Senator Stone:* How would you clarify that in words of writing?
>
> *Mr. Hansell:* I believe that is actually under way by the authorities in Panama. The Army, I think, is preparing some information for the zone residents on all aspects of this, including the tax aspect.

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95. S. EXEC. DOC. N., 95th Cong., 2d Sess. 1 (1977).

96. 124 CONG. REC. 10,541 (1978).

97. S. EXEC. REP. No. 12, 95th Cong., 2d Sess. 75 (1978). *Contra* Swearingen v. United States, 565 F. Supp. 1019, 1021 (D. Colo. 1983) (Implementation Agreement not intended to be part of the Treaty since the president did not choose to include the tax provision in the Treaty).

98. *Panama Canal Treaties: Hearings Before the Committee on Foreign Relations of the United States Senate,* pt. 1, 95th Cong., 1st Sess. 214 (1977).

Senator Stone: Wouldn't you think that we could put in the understanding that I suggested to you, the clarification of our interpretation which then, when ratified by the Congress, by the Senate, and deposited, would clarify that in a little more formal way than simple advice, since you don't want to put words back in the treaty through negotiation?

Mr. Hansell: The one comment I would have with respect to that, and this relates to a couple of other points, is that we are dealing now with an internal U.S. matter, not a matter between the United States and Panama. That is, we don't agree with Panama how we are going to tax our citizens. That is obviously an internal matter. I would hope we could find ways of dealing with internal matters other than as understandings.

Senator Stone: You understand that if the Zonians want to try to exert their exemption from U.S. taxes that you will be in for some lawsuits. I just wanted to figure out a way to avoid that.[99]

This testimony by Hansell before the Senate Committee supports the conclusion that article XV, paragraph 2 was intended to exempt United States citizens employed by the Panama Canal Commission from Panamanian income taxation and not from United States taxation.[100] According to Hansell, the provision was not intended to make an exception to the rule that United States citizens are subject to income taxation by the United States on their worldwide income.[101]

Other legislative materials provide further support for the position that the article XV, paragraph 2 exemption applies only to Panamanian taxation. The Foreign Relations Committee, in its summary of the Panama Canal Treaty and other documents, described article XV as "exempting the Commission from all Panamanian taxes and United States citizen employees from Panamanian income, gift, inheritance and personal property taxes."[102] The Committee formulated this summary partially on the basis of a section-by-section analysis of the Treaties and Implementation

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99. *Id.* at 268-69.

100. *But see* Harris v. United States, 768 F.2d 1240, 1246 (11th Cir. 1985) (the Stone/Hansell colloquy underscores the significance of the governments failure to clarify the language and thereby supports the taxpayers' position).

101. Cook v. Tart, 265 U.S. 47 (1924); Income Tax Reg. § 1.1-1(b); *Contra Harris*, 768 F.2d at 1247 (tax treatment of Commission employees is unique, and they are not subject to principle that world wide income of U.S. citizens is subject to U.S. tax).

102. S. EXEC. REP. No. 12, 95th Cong., 2d Sess. 34 (1978).

Agreements which was prepared by the State Department.[103] The analysis described article XV, paragraph 2 as exempting United States employees of the Commission and their dependents from Panamanian taxation of income received from the Commission.[104] Although courts would generally give great weight to this interpretation ascribed by the government department charged with treaty negotiation,[105] there is a policy rationale behind refusal to give legal effect to such expressions of intent that are not actually contained in the ratification documents. Because of the impossibility of knowing whether the Senate actually consented to the State Department analysis, and because the President may not have given approval to the analysis, courts should not automatically assume that the analysis is authoritative. Also, courts must consider the official instrument of ratification as the primary expression of the full intent of the United States government. That instrument is the expression of intent upon which foreign govern-

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103. Accompanying the analysis was a letter from Douglas J. Bennett, Jr., State Dept. Assistant Secretary for Congressional Relations, to Senator John Sparkman, Chairman of the Committee on Foreign Relations:

> Enclosed are section-by-section analyses of the four principal agreements recently concluded with Panama . . . [including] the Agreement in Implementation of Article III of the Panama Canal Treaty. . . . These analyses were prepared by members of the treaty negotiating team and have been approved by the offices of the State and Defense Departments directly involved in the negotiations, including the Panama Canal Company. Accordingly, these comments may be considered as an authoritative source of information with respect to the negotiating background and interpretation of the Treaties.

S. EXEC. REP. No. 12, 95th Cong., 2d Sess. 127 (1978). The section-by-section analyses were actually prepared after the fact by Michael Kozak and Geraldine Chester, neither of whom were at the negotiating sessions when article XV was discussed. *Harris*, 768 F.2d at 1247.

104. It states in full:

> Paragraph 2 exempts United States citizen employees and dependents from the imposition by Panama of taxes on income received as a result of their work with the Commission and on the income derived from sources outside Panama. Such persons are subject, however, to Panamanian taxation of any income derived from sources outside [sic] Panama other than employment with the United States Government.

S. EXEC. REP. No. 12, 95th Cong., 2d Sess. 155 (1978). Obviously the word "outside" should be "inside"; otherwise the first and second sentences contradict each other. *See* Corliss v. United States, 567 F. Supp. 162, 166 (W.D. Ark. 1983).

105. *See* Kolovrat v. Oregon, 366 U.S. 187, 194 (1961); Smith v. Commissioner, 83 T.C. 709 (1984).

ments will always place their reliance.[106]

In the official instrument ratifying the Panama Canal Treaty, the Senate ignored a golden opportunity for clarification of the troublesome language of article XV, paragraph 2. In the resolution of ratification of Treaty, the Senate attached numerous reservations,[107] understandings, and modifications as conditions for giving its advice and consent to the Treaty.[108] None of these, however, attempted to clarify the language of article XV, paragraph 2 of the Implementation Agreement. Because the United States offered no reason for its failure to invoke reservations or to issue understandings, it is likely that United States officials feared that Panama would refuse to concur with an interpretation of article XV that made Commission employees subject to United States income tax.[109] So even if the Senate intended article XV, paragraph 2 to apply only to Panamanian taxation, it apparently knew that the Panamanian negotiators had not interpreted the provision in that way.

E. Deference to the United States' Position

In each case dealing with article XV, paragraph 2 of the Implementation Agreement, the United States has argued fervently that the provision does not exonerate Commission employees from the responsibility of paying income tax to the United States. Coming from the executive branch of the government, this particular interpretation of the Treaty is worthy of significant deference in the courts.[110] Because the executive branch participated directly in the treaty negotiation, it is in the position to know the intent of the parties when they agreed to paragraph 2. Also, because the foreign policy implications of the Panama Canal Treaty are specially within the purview of the executive branch, courts should give deferential weight to that branch's interpretation if it

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106. *See Coplin, supra* note 8, 6 Cl. Ct. at 145. *See also* New York Indians v. United States, 170 U.S. 1, 22-23 (1898) (when a treaty is put forth as embodying an agreement with a foreign nation, use by one party of a material provision unknown to the other party shocks the conscience).

107. *See* Vienna Convention, *supra* note 44, art. 2(1)(d) (reservation means unilateral statement made by a state ratifying a treaty whereby it excludes or modifies the effect of a certain provision), arts. 19-23.

108. *See Coplin, supra* note 8, 6 Cl. Ct. at 145.

109. *Id.* at 142-43.

110. *Id.* at 135; Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 184-85 (1982); Kolovrat v. Oregon, 366 U.S. 187, 194 (1961).

is a fair position. Courts should likewise minimize intrusion into the conduct of foreign affairs and leave the administration of the Implementation Agreement to the executive agencies which possess expertise in the matter.[111]

Although courts should give some degree of deference to the position proffered by the United States, deference does not require blind acceptance.[112] This discretion is especially appropriate when the government's interpretation conflicts with what the court determines was the intent of the parties when they agreed to the questioned provision. The degree of deference afforded to the government depends on whether the government's interpretation is unbiased and reasonable in light of the circumstances surrounding the making of the Treaty.[113] Courts are not bound by the unilateral interpretation of the United States, because the nation was only one of the signatories to the Panama Canal Treaty. Courts must interpret the Implementation Agreement and all treaties for themselves,[114] and they must interpret them "with the most scrupulous good faith."[115] So although the United States government maintains that article XV of the Implementation Agreement does not exempt Commission employees from United States income taxation, courts considering the matter are free to decide otherwise.

III. The Recent Development—The Cases

Since October 1, 1979, when the Panama Canal Treaty became effective, numerous United States employees of the Panama Canal Commission have attempted to claim exemption from United States income tax under the "any taxes" language of article XV, paragraph 2 of the Implementation Agreement. At first, many of these litigants found that the federal courts were generally unwilling to allow exemption from United States income taxation for United States citizens employed by a United States agency. When a federal district court in Georgia and the United States Claims Court, however, rendered decisions in favor of the Commission

111. *See Coplin, supra* note 8, 6 Cl. Ct. at 135-36. The meaning attributed to a treaty by the government agency charged with negotiation and enforcement is entitled to great weight. *Sumitomo Shoji America*, 457 U.S. at 185.

112. *Coplin, supra* note 8, 6 Cl. Ct. at 136.

113. *Id.* at 136.

114. *Id. See also* Kolovrat v. Oregon, 366 U.S. 187, 194 (1961).

115. Tucker v. Alexandroff, 183 U.S. 424, 437 (1902).

employees,[116] the employees finally had case law to substantiate their position. Although these two cases represented the minority view of the issue, they arguably presented more thorough and persuasive analysis than the many decisions holding in the government's favor. Thus, when the government appealed these two cases, both sides had valid and convincing arguments to support their claims. In *Coplin v. United States*,[117] the Federal Circuit found the government's arguments more persuasive and held that the commission employees were not exempt from United States income taxation. However, in *Harris v. United States*,[118] the Eleventh Circuit held that the employees were exempt from United States income taxation. Because of these conflicting decisions among the two circuits, the United States Supreme Court has agreed to resolve the question on a writ of certiorari.[119]

A. District Court and Tax Court Cases Favoring the Government

In *McCain v. Commissioner*[120] and in *Corliss v. United States*,[121] the courts applied the same rationale in determining that paragraph 2 does not exempt Commission employees from United States taxation. Both courts began with an analysis of the language of paragraph 2 and conceded that the language "any taxes" could literally be read to grant a broad exemption both from Panamanian and United States taxes. The courts, however, did not focus exclusively on paragraph 2; instead they read the provision in context with paragraphs 1 and 3 of the same article. Reading article XV in its entirety, the courts concluded that the sole purpose of the article was to protect the Commission and its employees from taxation by Panama on property or work activities related to the Commission.[122] Although the United States in negotiating a treaty would clearly be concerned with preventing foreign taxation of a United States agency, the courts maintained that the imposition of taxes by either sovereign on its own citi-

116. *Coplin, supra* note 8; Harris v. United States, 585 F. Supp. 862 (S.D. Ga. 1984), *aff'd*, 768 F.2d 1240 (11th Cir. 1985).
117. 761 F.2d 688 (Fed. Cir. 1985).
118. 768 F.2d 1240 (11th Cir. 1985).
119. O'Connor v. United States, 106 S.Ct. 784 (1986).
120. 81 T.C. 918 (1983).
121. 567 F. Supp. 162 (W.D. Ark. 1983).
122. *Corliss*, 567 F. Supp. at 164; *McCain*, 81 T.C. at 926-27.

zens would not have been a proper subject for negotiation. Looking to the legislative history of the provision,[123] the courts agreed with the State Department's analysis[124] and held for the government in both cases.

In *Collins v. Commissioner*,[125] the tax court echoed the analysis which it had fashioned in *McCain* and again held that article XV, paragraph 2 did not preclude United States taxation of Commission employees. As in *McCain*, the court looked at paragraph 2 in context with the remainder of article XV. The court also considered the likelihood of whether the United States would negotiate a treaty which would restrict its sovereign right to tax its own employees.[126] Because the court found it doubtful that the United States would agree to such a restriction, it held that paragraph 2 did not exempt Commission employees from United States income taxation.[127]

In both *Vamprine v. Commissioner*[128] and *Smith v. Commissioner*,[129] the tax court relied again on its *McCain* decision. In *Vamprine*, the court simply stated that *McCain* was dispositive and that Commission employees therefore were not exempt from United States income taxation.[130] Similarly, the court in *Smith* reiterated its *McCain* analysis by reading paragraph 2 of article XV in context with both paragraphs 1 and 3.[131] As in *McCain*, the court relied on the section-by-section analysis prepared by the State Department and the treaty negotiators.[132] However, unlike *McCain*, the court in *Smith* scrutinized the Commission employee's argument that the Panamanian negotiators interpreted paragraph 2 as an exemption from both Panamanian and United States income tax. Because this argument was based on the conclusion that the provision's language was clear, the court concluded that the argument was irrelevant because it found that the language of paragraph 2 was unclear and ambiguous.[133] Thus, the

123. *Corliss*, 567 F. Supp. at 165; *McCain*, 81 T.C. at 928.
124. *See supra* notes 104-05 and accompanying text.
125. 47 T.C.M. (CCH) 713 (1983).
126. *Id.* at 715-16.
127. *Id.* at 716.
128. 49 T.C.M. (CCH) 210 (1984).
129. 83 T.C. 702 (1984).
130. *Vamprine*, 49 T.C.M. (CCH) at 211.
131. *Smith*, 83 T.C. at 708-09.
132. *Id.*
133. *Id.* at 710 n.10.

tax court ignored the view of the Panamanian negotiators and held again that the employees were not exempt from United States income taxation.

Other courts have also read the language of paragraph 2 in context with the remainder of article XV and have held that Commission employees are not exempt from United States income taxation. In *Snider v. United States*,[134] the court found that article XV, when considered in its entirety, was clearly meant to exempt United States citizens only from taxes imposed by Panama.[135] In *Highley v. United States*[136] and *Watson v. United States*,[137] the courts' analysis began with paragraph 1 and stated that this paragraph set forth the purpose of the entire article—to exempt the Commission and its employees from payment of Panamanian taxes on their activities or income. Both courts then read paragraph 2 as addressing the exemption of income from Panamanian taxation and paragraph 3 as addressing the exemption of gifts, inheritance, and personal property from taxation by Panama. Under this interpretation, the courts maintained that article XV was not intended to exempt Commission employees from United States income tax.[138]

In *Swearingen v. United States*[139] and *Hollowell v. United States*,[140] the courts went beyond the language of article XV, paragraph 2 and instead considered the provision's validity. In *Swearingen*, the court adopted a literal reading of the "any taxes" language in paragraph 2. The court maintained that the language was not at all vague or ambiguous and that it clearly purported to exempt United States employees of the Commission from all taxes on their income. Because the language of paragraphs 1 and 3 specifically limited the Implementation Agreement's application to Panamanian taxation, the court reasoned that the lack of such specificity in paragraph 2 meant that the provision applied to preclude United States taxation as well as Panamanian taxation.[141] Yet, in spite of what the court consid-

134. 53 A.F.T.R.2d (P-H) 84-349 (W.D. Wash. 1983).
135. *Id.*
136. 574 F. Supp. 715 (M.D. Tenn. 1983).
137. 592 F. Supp. 701 (W.D. Wash. 1983).
138. *Highley*, 574 F. Supp. at 716; *Watson*, 592 F. Supp. at 702.
139. 565 F. Supp. 1019 (D. Colo. 1983).
140. 84-1 U.S. Tax Cas. (CCH) ¶ 9142, 53 A.F.T.R.2d (P-H) 84-698 (M.D. Fla. 1983).
141. *Swearingen*, 565 F. Supp. at 1020.

ered as the plain meaning of the language, the court held the provision void because it conflicted with Section 616 of the Internal Revenue Code which taxes "all income from whatever source derived."[142] Although treaty provisions may supersede prior inconsistent acts of Congress, the court reasoned that executive agreements such as the Implementation Agreement could not do so because they require no Senate ratification and are not directly authorized by the Constitution.[143]

This same argument was also the basis for the discussion in the *Hollowell* case. The *Hollowell* court maintained that an Internal Revenue Code provision could be superseded only by a subsequently enacted statute or by a subsequently ratified treaty. Because the Implementation Agreement was not submitted to the Senate for advice and consent, it could not supersede Section 616.[144] Therefore, according to both the *Hollowell* and *Swearingen* courts, paragraph 2 was void and Commission employees remained subject to United States income taxation.

Commission employees seeking income tax refunds by way of article XV were also unsuccessful in *Stabler v. United States*,[145] *Pierpoint v. United States*,[146] and *Rego v. United States*.[147] In *Pierpoint*, the court stated that treaties such as the Implementation Agreement ought to be construed more liberally than private contracts in order to give effect to the apparent intention of the parties.[148] The court purported to look to the purpose of the Implementation Agreement and to the circumstances surrounding its adoption as a means of determining the parties' intent.[149] In fact, the court relied primarily on the affidavit of Michael G. Kozak and on the State Department analysis and concluded that article XV was not intended to exempt payment of income taxes to

142. 26 U.S.C. § 61(a) (1982).

143. *Swearingen*, 565 F. Supp. at 1021.

144. *Hollowell v. United States*, 84-1 U.S. Tax Cas. (CCH) ¶ 9142, 53 A.F.T.R.2d (P-H) 84-698.

145. 84-1 U.S. Tax Cas. (CCH) ¶ 9153, 53 A.F.T.R.2d (P-H) 84-1156 (N.D. Tex. 1983).

146. 83-2 U.S. Tax Cas. (CCH) ¶ 9647, 52 A.F.T.R.2d (P-H) ¶ 83-5334 (D.S.C. 1983).

147. 591 F. Supp. 123 (W.D. Tenn. 1984).

148. 83-2 U.S. Tax Cas. (CCH) at 88,329, 52 A.F.T.R.2d (P-H) at 83-6199.

149. *Id.*, 83-2 U.S. Tax. Cas. (CCH) at 88,319, 52 A.F.T.R.2d (P-H) at 83-6199.

the United States.[150] In *Stabler,* the court relied exclusively on the same affidavit and State Department analysis to rule against the Commission employees.[151] Similarly, in *Rego,* the court also considered the same section-by-section analysis. By construing the language of article XV in its entirety and pursuant to the State Department analysis, the *Rego* court also held in favor of the United States government.[152]

In *Stokes v. United States,*[153] the court rendered its decision against a Commission employee who formulated a unique but unpersuasive argument. While other Commission employees were attempting to invoke article XV, paragraph 2 as an exemption from United States taxation, Stokes came to court with an additional basis for his claim. Stokes claimed that he had accepted Commission employment because authorized Commission recruiters had told him that their employees did not have to pay income taxes.[154] Because he had relied on this representation, Stokes argued that the government should be estopped from collecting tax on his income. The court, apparently unimpressed by Stokes' originality, disagreed and held that his income was taxable by the United States. The court looked to the totality of the circumstances and concluded that Stokes did not reasonably rely on the recruiters' representation. Stokes had doubted all along that he could actually avoid taxation, and he had chosen not to investigate the question before commencing Canal employment. Also, Stokes had received and read Commission material explaining that he would be subject to United States income taxation. The court further reasoned that even if Stokes did rely on the recruiters' representation, the recruiters had no authority to bind the IRS because they were not involved in the administration of tax laws.[155]

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150. *Id.*, 83-2 U.S. Tax. Cas. (CCH) at 88,319, 52 A.F.T.R.2d (P-H) at 83-6199.

151. 84-1 U.S. Tax Cas. (CCH) at 83, 18586, 53 A.F.T.R.2d (P-H) at 84-1156.

152. 591 F. Supp. at 124.

153. 83-2 U.S. Tax Cas. ¶ 9644, 52 A.F.T.R.2d (P-H) 83-6137 (W.D. Wash. 1983).

154. *Id.*, 83-2 U.S. Tax Cas. at 88,319, 52 A.F.T.R.2d at 83-6138.

155. *Id.*, 83-2 U.S. Tax Cas. (CCH) at 88,319-20, 52 A.F.T.R.2d (P-H) at 83-6139.

B. District Court and Claims Court Cases Favoring Commission Employees

In each of the cases discussed thus far, the tax court and numerous federal district courts interpreting article XV, paragraph 2 accepted the position of the government and held that Commission employees are subject to United States income taxation. In two other decisions, another federal district court and the United States Claims Court decided the matter differently. When these courts in *Harris v. United States*[156] and *Coplin v. United States*[157] held that paragraph 2 exempted Commission employees from United States income taxation, they set the stage for the conflict that now exists between the federal courts of appeals.

In *Harris*, the district court based it decision upon what it considered to be the unambiguous language of article XV, paragraph 2 of the Implementation Agreement. The court read paragraph 2 as requiring no special interpretation and maintained that the provision "says what it says."[158] Even reading paragraph 2 in context with the entire article, the court found no ambiguity.[159] The court noted that the Senate had considered the problem and had chosen to leave the language as it was. Thus, the court refused to interpret paragraph 2 as applicable to only Panamanian taxes because the Senate by omission had not insured that result.[160]

In *Coplin*, the United States Claims Court also ruled that paragraph 2 exempts Commission employees from United States income taxation. To substantiate the court's decision, Chief Judge Kozinski delivered a lengthy and heavily documented opinion which now stands as the single most comprehensive analysis of the issue.

The *Coplin* court first confronted the government's argument that paragraph 2 was void because the President lacked the authority to create tax exemptions by means of an executive agreement that was not made subject to Senate approval. In response to this assertion, the court noted that the Implementation Agreement was an integral part of the United States' deal with Panama and that declaring it void would amount to a breach of that deal. Because such a breach would adversely affect United States rela-

156. 585 F. Supp. 863 (S.D. Ga. 1984), *aff'd*, 768 F.2d 1240 (11th Cir. 1985).
157. *Supra* note 13.
158. *Harris*, 585 F. Supp. at 863.
159. *Id.*
160. *Id.*

tions with all countries, the court refused to nullify the Agreement. Instead, the court held that the Agreement was valid and that the President clearly had authority to bind the nation under it.[161]

Once the *Coplin* court determined the validity of the Implementation Agreement, it turned to the matter of interpreting the meaning of article XV, paragraph 2. To determine the intent of the United States and Panama when they promulgated the provision, the court first looked to the treaty language. The court contrasted the "any taxes" language of paragraph 2 with the language of paragraphs 1 and 3 which refer specifically to Panamanian taxation. Under this reading, the court determined that paragraph 2 clearly exempted Commission employees from both Panamanian and United States taxation.[162] The court also looked to the negotiation history as a means of interpreting paragraph 2. Because the United States negotiators had viewed the Commission as a United States government agency, and because the Panamanians had viewed the Commission as a commercial enterprise operated jointly by both governments, the issue of taxation of the Commission was more a question of sovereignty than it was of revenue.[163] Because of this fundamental difference between the views of the Panamanian negotiators and the American negotiators, the court in *Coplin* determined that the final language of paragraph 2 purposely sidestepped the issue and that it did not accurately reflect either party's position. Thus, according to the court, the parties compromised and accepted the language which exempted Commission employees from both Panamanian and United States income taxation.[164]

In holding that the paragraph 2 exemption applied to both United States and Panamanian taxes, the *Coplin* court also considered other factors, including the amount of deference owed to the United States government's interpretation. While the court maintained that the executive branch's interpretation was entitled to significant deference, the court stated that deference did not require blind acceptance. Therefore, the court did not feel restrained by the United States' interpretation of paragraph 2.[165]

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161. *Coplin, supra* note 8, 6 Cl. Ct. at 120-24.
162. *Id.* at 126-27.
163. *Id.* at 129-31.
164. *Id.* at 133-4.
165. *Id.* at 135-36.

The court also considered the failure of the United States to clarify the language of paragraph 2 before allowing the Treaty to come into effect. Because the United States offered no reason for its failure to invoke a formal reservation or understanding concerning the provision, the court inferred that the United States government feared that Panama would refuse to concur with an interpretation of article XV which allowed the United States to tax Commission employees.[166] Finally, because the United States was a litigant with a financial interest[167] in the matter, and because the United States had proffered the language in question,[168] the court chose to construe the provision against the United States.

In summation, the court concluded that the weight of the evidence and policy considerations pointed to an interpretation of paragraph 2 which would exempt Commission employees from both United States and Panamanian income taxation.

C. The Conflict Between the Eleventh Circuit and the Federal Circuit

When the government appealed the *Harris* and *Coplin* decisions, both the Commission employees and the government had ample authority to support their positions. The government had the benefit of numerous decisions in the lower federal courts holding that United States employees of the Commission are subject to United States income taxation.[169] The employees, on the

166. *Id.* at 138-42.

167. *Id.* at 143.

168. *Id.* at 149.

169. *See* Rego v. United States, 591 F. Supp. 123 (W.D. Tenn. 1984); Corliss v. United States, 567 F. Supp. 162 (W.D. Ark. 1983); Highley v. United States, 574 F. Supp. 715 (M.D. Tenn. 1983); Watson v. United States, 592 F. Supp. 701 (W.D. Wash. 1983); Swearingen v. United States, 565 F. Supp. 1019 (D. Colo. 1983); Hollowell v. United States, 84-1 U.S. Tax Cas. (CCH) ¶ 91542, 53 A.F.T.R.2d (P-H) ¶84-424 (M.D. Fla. 1983); Stabler v. United States, 84-1 U.S. Tax. Cas. (CCH) ¶ 9153, 53 A.F.T.R.2d (P-H) 84-1156 (N.D. Tex. 1983); Pierpoint v. United States, 83-2 U.S. Tax Cas. (CCH) ¶ 9647, 52 A.F.T.R.2d (P-H) 83-6198 (D.S.C. 1983); Stokes v. United States, 83-2 U.S. Tax Cas. (CCH) ¶ 9644, 52 A.F.T.R.2d (P-H) 83-6137 (W.D. Wash. 1983); Snider v. United States, 53 A.F.T.R.2d (Pq-H) 84-349 (W.D. Wash. 1983); Long v. United States, No. 83-158, slip op. (D. Or. July 27, 1983); Smith v. Comm'r, 83 T.C. 702 (1984); Vamprine v. Comm'r, 49 T.C.M. 210 (1984); McCain v. Comm'r,81 T.C. 918 (1983); Collins v. Comm'r, 47 T.C.M. 713 (1983).

other hand, had two lower court decisions in their favor,[170] one of which was and still is the most thorough discussion of the exemption issue.[171] In considering these decisions, the Eleventh Circuit and the Federal Circuit were unable to agree on whether Commission employees are exempt from United States income taxation. Because these federal courts of appeals rendered conflicting decisions in *Harris*[172] and *Coplin*,[173] the United States Supreme Court is now considering the issue.[174]

In *Coplin*,[175] the Federal Circuit reversed Chief Judge Kozinski's opinion for the claims court even though that opinion presented the most comprehensive analysis available. Although the court of appeals held in the government's favor, it did not base its reversal of the lower court's decision on flaws in Kozinski's analysis. Instead, the court actually reiterated some of Kozinski's discussion in its holding that the Commission employees were not exempt from United States income taxes.[176] Surprisingly, the sole basis for the Federal Circuit's reversal was a set of documents offered into evidence on the morning of oral arguments before the court of appeals. These documents, favoring the United States government, filled a gap in the record that had been left open at the claims level.

According to the Federal Circuit, the claims court had recognized that it should not give effect to the actual language of the Implementation Agreement if the language did not accurately reflect the parties' intent.[177] However, because the record before the claims court was devoid of any official statement of the Panamanians' position on the issue, the intent of both parties was unclear. Because there was "no evidence whatsoever as to the interpretation given this language by Panama," the claims court had construed the language literally in favor of the Commission employees.[178]

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170. *Coplin, supra* note 8; Harris v. United States, 585 F. Supp. 862 (S.D. Ga. 1984), *aff'd*, 768 F.2d 1240 (11th Cir. 1985).

171. *Coplin, supra* note 8, 6 Cl. Ct. at 115.

172. 768 F.2d 1240 (11th Cir. 1985).

173. 761 F.2d 688 (Fed. Cir. 1985).

174. *Coplin, supra* note 8, *cert. granted, sub. nom* O'Connor v. United States, 106 S.Ct. 784 (1986).

175. 761 F.2d 688 (Fed. Cir. 1985).

176. *Id.* at 690-91.

177. *Coplin, supra* note 8, 761 F.2d at 690.

178. *Id.* at 690-91. The Court of Appeals, in making this statement, ignored

In contrast, at the court of appeals level, new evidence allegedly presenting the Panamanians' view became part of the record. The government submitted this evidence in a reply brief that was delivered to the court on March 4, 1985, the day of oral arguments.[179] In the reply brief, the government informed the court that "[o]n February 25, 1985, the United States received a diplomatic note from the Panamanian Foreign Minister in which he confirmed that the Panamanian Foreign Ministry shared the United States' view that the Implementing Agreement was not intended to affect United States taxation of Commission employees."[180] Included with that note were letters from the Panamanian negotiating team stating that article XV, paragraph 2 was "drafted exclusively with respect to the tax exemption that . . . Panama would grant to United States citizen employees of the Commission."[181] These letters, confirming that paragraph 2 did not deal with United States income taxation, were attached to the government's reply brief.

The Commission employees in *Coplin* promptly moved to strike these new documents from the record. In deciding whether or not to consider the new evidence, the court referred to the general rule that an appellate court cannot act on evidence that was not before the court below.[182] Because this court was construing treaty language, however, it determined that the general rule against supplementing the record did not apply.[183] Therefore, the Federal Circuit denied the employees' motions to strike and agreed to consider the new documents from the Panamanian For-

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the presence of the Guevera affidavit at the claims court level. *See supra* notes 82-83 and accompanying text.

179. *Id.* at 691.

180. *Id.*

181. *Id.*

182. *Id. See* Boone v. Chiles, 35 U.S. 177, 208 (1836). *Cf.* United States v. Miller, 80 U.S. 568, 576-77 (1872).

183. *Coplin, supra* note 8, 761 F.2d at 691. *See, e.g.,* Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 184 n.9 (1982) (Court considered diplomatic correspondence dated more than one year after the appellate court decision and within a few days before arguments before the court itself); Factor v. Laubenheimer, 290 U.S. 276, 295 (1933) (in construing a treaty the Court invited counsel to search through available diplomatic records in preparation for reargument); United States v. Reynes, 50 U.S. 127, 147-48 (1850) (in reviewing a lower court judgment of the validity of a land grant protected by treaties, the Supreme Court examined diplomatic records outside the trial record).

eign Ministry.[184]

As a result of the court's denial of the employees' motions to strike, the record no longer lacked an official statement of the Panamanians' position on the issue. Because both parties to the Treaty now had parallel statements of intent in the record, the Federal Circuit reversed the claims court and held that the Commission employees were subject to United States income taxation.[185] Thus, the court temporarily undermined the credibility of Chief Judge Kozinski's claims court opinion. Nevertheless, when a different federal court of appeals later held in favor of the Commission employees, the soundness of Kozinski's analysis again became apparent.[186]

In *Harris*,[187] the Eleventh Circuit chose not to follow the lead of the Federal Circuit in *Coplin*. Instead, the court affirmed the district court's holding that United States employees of the Commission are exempt from income taxation by the United States. The *Harris* court began by considering motions filed by the employees to strike certain evidence from the record. These challenged materials included two footnotes that purported to explain the Panamanian government's interpretation of article XV, paragraph 2.[188] In addition, the challenged materials included the same diplomatic note that the government had submitted in *Cop-*

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184. *Coplin*, *supra* note 8, 761 F.2d at 691.

185. *Id.* at 692.

186. *See* Harris v. United States, 768 F.2d 1240 (11th Cir. 1985).

187. *Id.*

188. *Id.* at 1242 n.1. The employees moved to strike two footnotes in the government's brief:

> 18. We are informed that the Government of the Republic of Panama has never expressed any difference of opinion with respect to the position taken by the United States with respect to the domestic taxation of United States citizens who are employed by the Commission.
>
> 19. Significantly, the official Panama Government publication of the texts of the Canal Treaties and related agreements, entitled *Tratados Del Canal de Panama* (1980), indicates that the Republic of Panama shares the United States' view that the exemptions in paragraph 2 of Article XV apply only to Panamanian taxes. The index of that publication (at 313) contains a heading entitled 'IMPUESTOS (Republica de Panama)'(TAXES (Republic of Panama)) and lists thereunder, *inter alia*, 'Exenciones a los empleados cuidadanos de los Estados Unidos y sus dependientes por razon de su trabajo' (Exemptions to the U.S. citizen employees and their dependents by reason of their work, Ac-III, Art. XV, paras. 23. No mention is made of exemption from United States taxation.

lin on the day of oral arguments.[189] The *Harris* court, in considering the admissibility of the note, referred to the employees' attack on the note's reliability in *Coplin*.[190] According to the employees in *Coplin*, the introduction of this note was "suspicious" in light of a recent $40 million gift from the United States to the Panamanian government, whose administration had changed in October, 1984. Also, the employees attacked the "strangely identical" letters accompanying the note that were from persons who were not active negotiators of article XV, paragraph 2. Finally, the employees argued that the note could not show the parties' intent in 1977, and at best, the note could only show intent as of February, 1985.[191] Although the Federal Circuit in *Coplin* had found this note dispositive, the Eleventh Circuit refused to consider it. According to the court, the evidence had to be rejected because it was self-serving evidence outside the record and because considering it would require additional information.[192] Additionally, the court refused to consider the two footnotes in the government's brief which purported to state the Panamanians' interpretation of paragraph 2.[193]

After granting the employees' motions to strike, the court turned to the matter of interpreting article XV, paragraph 2. Focusing on many of the same points considered by Kozinski in his claims court opinion in *Coplin*, the Eleventh Circuit concluded that the exemption in paragraph 2 applied to both Panamanian *and* United States income taxation. For example, the court considered the "any taxes" language of paragraph 2 in contrast with the limiting language of paragraphs 1 and 3.[194] According to the court, the presence of language referring specifically to Panama in paragraphs 1 and 3 was persuasive evidence that the absence of such language in paragraph 2 was intentional. Because the United States had been represented by a conscientious and distinguished negotiating team, the court could not accept the government's argument that the deletion of limiting language in paragraph 2 resulted from inadvertence or oversight.[195]

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189. *See supra* notes 178-80.
190. *Harris*, 765 F.2d at 1243.
191. *Id.* at 1243 n.6.
192. *Id.* at 1242.
193. *Id. See supra* note 189.
194. *Id.* at 1244.
195. *Id.*

The Eleventh Circuit in *Harris* also looked to the negotiating history of the Implementation Agreement. The court first considered the affidavit of Panamanian Ambassador Guevara which stated that the language of paragraph 2 was intended to preclude taxation by both Panama and the United States.[196] Because Guevara was present during the discussion and adoption of the paragraph 2 language, the court found his statement to be persuasive. In contrast, the court found the Kozak affidavit[197] unpersuasive. Although this affidavit by Kozak was the only one filed in support of the government's position, the court concluded that the affidavit actually undermined the government's argument because Kozak was not privy to the actual negotiations of paragraph 2.[198] Also, the court criticized past decisions that held for the government on the basis of an unimpeached Kozak affidavit.[199]

Finally, the court considered the legislative history of the Panama Canal Treaty and the government's failure to clarify the meaning of article XV, paragraph 2 of the Implementation Agreement. Although the government relied on the statement made by State Department Legal Advisor Hansell before the Senate Committee on Foreign Relations,[200] the court determined that this reliance was misplaced. Hansell's statement interpreted paragraph 2 as exempting Commission employees only from Panamanian taxation. Nevertheless, according to the court, instead of supporting the government's position, the statement actually underscored the government's failure to clarify paragraph 2 through an exchange of notes or an understanding.[201] Likewise, the court concluded that the section-by-section analysis[202] considered by the Senate was not helpful to the government's position because its drafters, Kozak and Geraldine Chester, were not present during the negotiating sessions when paragraph 2 was discussed.[203] Finally, because the government conceded that the analysis was prepared after negotiations had been completed and after the Treaty had been signed, the court rejected the government's attempt to establish the negotiators' intent through documents

196. *Id.* at 1245. *See supra* notes 82-83 and accompanying text.
197. *Harris*, 768 F.2d at 1245. *See supra* notes 84-85 and accompanying text.
198. *Harris*, 768 F.2d at 1245.
199. *Id.*
200. *Id.* at 1245-46. *See supra* text accompanying notes 96-102.
201. *Harris*, 768 F.2d at 1246.
202. *See supra* note 104 and accompanying text.
203. *Harris*, 768 F.2d at 1247.

completed after the fact.[204]

In sum, the court concluded that the actual language, the negotiating history, and the legislative history of article XV, paragraph 2 supported the employees' position. Thus, the Eleventh Circuit ignored the precedent set by the Federal Circuit in *Coplin* and held instead that United States employees of the Panama Canal Commission are exempt from United States income taxation.

IV. ANALYSIS

When Panama and the United States enacted article XV, paragraph 2 of the Implementation Agreement, Commission employees rushed to the courts demanding exemption from United States income taxation. The first courts to consider the matter took for granted the notion that the United States would never negotiate a treaty provision limiting its right to tax its own citizens and employees. Because these courts never seriously considered the possibility that the United States actually agreed to exempt Commission employees from United States taxes, they decided against the employees on the basis of shallow and superficial analyses. These courts delivered short, mechanical opinions in which they presented only the evidence supporting the United States government's contention. They glossed over every legitimate argument presented by the Commission employees and ignored the evidence which supported the employees' position. Although these holdings in favor of the United States often lacked substance, there were enough of them to present seemingly insurmountable odds for a Commission employee who chose to litigate a claim under paragraph 2.

The trend changed directions when a district court in *Harris v. United States*[205] and the claims court in *Coplin v. United States*[206] held that paragraph 2 exempted commission employees from both Panamanian and United States taxation. Although the court's analysis in *Harris* went no further than reading the actual language of paragraph 2, Chief Judge Kozinski of the claims court provided in *Coplin* the first comprehensive study of all the evidence supporting both sides of the issue.

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204. *Id.*

205. *Id. See supra* text accompanying notes 157-61.

206. *Supra* note 8, 6 Cl. Ct. 115 (1984). *See supra* text accompanying notes 158-62.

The claims court in *Coplin*, unlike the other courts, did not limit its examination to the language of paragraph 2 or to the State Department's interpretation of that language. Instead, the court considered those factors and others, including the negotiating and legislative histories of the Implementation Agreement and the foreign policy implications raised by the interpretation problem. After weighing all of the evidence, the claims court in *Coplin* ruled in favor of the Commission employees in spite of the precedent set by other courts in previous cases. While the Kozinski opinion in *Coplin* was contrary to all existing case law except for *Harris*, it was the result of more thorough judicial treatment than that which had been given to the matter in other courts. Thus, when the government appealed both the *Harris* and *Coplin* decisions, the courts of appeals had to decide whether Kozinski's analysis in *Coplin* was more persuasive than the majority of cases ruling in favor of the United States government.

In *Coplin*,[207] the Federal Circuit reversed the claims court decision, but not on the basis of any particular flaws in Kozinski's analysis. Instead, the court reversed in the government's favor because of new evidence submitted by the government to the court of appeals on the day of oral arguments. This evidence, including letters from a Panamanian foreign minister and Panamanian negotiators, stated that Panama did not intend for article XV, paragraph 2 to exempt United States Commission employees from United States income taxation. With the introduction of this evidence, the court found that the record at last contained statements of intent made by both governments that were parties to the Treaty. Thus, on the basis of these parallel statements, and not because of any error in Kozinski's analysis, the court concluded that article XV, paragraph 2 did not cover United States income taxation. So, although the Federal Circuit did not specifically refute points made by Kozinski, its reversal nevertheless undermined Kozinski's claims court analysis.

The credibility of the Kozinski opinion was arguably reinstated when the Eleventh Circuit in *Harris*[208] affirmed the district court's holding that paragraph 2 exempted Commission employees from United States income taxation. In *Harris*, the Eleventh

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207. *Supra* note 8, 761 F.2d 688 (Fed. Cir. 1985). *See supra* text accompanying notes 176-87.

208. 768 F.2d 1240 (11th Cir. 1985). *See supra* text accompanying notes 188-205.

Circuit refused to consider the additional documents that the Federal Circuit had admitted into evidence on the day of oral arguments in *Coplin*. Instead, the court relied on the Guevara affidavit and other factors that were also included in Kozinski's analysis. Thus, the Eleventh Circuit framed an opinion that is quite similar to the one written by Kozinski in *Coplin*. In rendering this opinion, not only did the court breathe new life into the Kozinski analysis, it also created a conflict among the circuits. Thus, the Supreme Court will have to resolve the issue either by way of the Kozinski/*Harris* analysis or on the basis of the numerous lower court decisions favoring the government. If it utilizes any other rationale, the Court will precipitate numerous policy consequences.

Because the litigation concerns the Implementation Agreement made by the President, resolution of the issue will necessarily affect future executive agreements made with foreign countries. The United States Government has argued that the President was without power to create a tax exemption by means of an executive agreement.[209] This contention, that the President has exceeded his authority in the area of foreign relations, carries serious implications. As a practical matter, the argument could be disastrous for the United States because it threatens to limit the broad interpretation that is given to the constitutional grant of executive authority. Because the President is charged with treaty negotiations and foreign relations, he is privy to some pertinent information that cannot be revealed to the legislative or judicial branches of government. He may, therefore, be the only person who can fully comprehend the delicate nature of some international matters.[210] Because he has this unique perspective in foreign affairs, the President should have full authority to act by means of an executive agreement whenever the national welfare so demands. For this reason, courts considering article XV, paragraph 2 should not hold that the President acted ultra vires when he bound the United States to the terms of the Implementation Agreement.

Because the executive branch carries the bulk of responsibility in foreign affairs, courts deciding the paragraph 2 issue must determine the amount of deference to be given to executive branch's interpretation of the provision. The State Department, as an

209. *See supra* text accompanying note 13.
210. *See supra* text accompanying notes 20-25.

agency of the executive, contends that paragraph 2 was not intended to exempt Commission employees from United States taxation. Because that contention comes from a body that participated directly in the negotiations with Panama, courts must necessarily give it due consideration. As a matter of judicial restraint and as a gesture of respect for the executive branch, a court should not lightly cast aside the opinion of the governmental branch charged with the negotiation and enforcement of the Panama Canal Treaty and its Implementation Agreements.[211] But when the executive branch's interpretation runs contrary to the weight of the evidence showing the signatories' intent, then judicial deference must give way to unholding the intended purpose of the treaty provision.[212]

In light of opposing views regarding which nation had sovereignty over the Commission, the record indicates that the negotiators intended paragraph 2 to mean exactly what it says. Because neither country was willing to allow the other to tax the Commission and its employees, they compromised with a provision precluding taxation by *both* the United States and Panama. Because this was the apparent intention of both nations, the courts should not interpret paragraph 2 otherwise merely because the State Department argues that they should.

The most significant issue confronting courts attempting to resolve the paragraph 2 question will be the potential foreign policy ramifications of their holdings. While the issue obviously has internal implications such as revenue from taxation, the scope of its effect extends far beyond the boundaries of the United States. If, during negotiations, the United States actually agreed to refrain from taxing Commission employees, then its obligation to abide by this agreement will remain, even if a United States court holds otherwise.[213] Therefore, a judicial determination that the United States may tax Commission employees could amount to a breach of the binding agreement with Panama. Such a breach could not only impair friendly relations with Panama; it could also jeopardize the entire Panama Canal Treaty. Also, breaching the Implementation Agreement would tarnish United States credibility in the eyes of other countries and thereby adversely affect United States relations with all nations. Therefore, in order to avoid such

211. *See supra* text accompanying notes 106-107.
212. *See supra* text accompanying notes 108-110.
213. *See supra* text accompanying note 40.

complications in the international arena, United States courts should resolve the issue by holding that paragraph 2 exempts Commission employees from both Panamanian and United States income taxation.

V. CONCLUSION

Although the majority of courts have held that article XV, paragraph 2 does not exempt Commission employees from United States income taxation, the courts that have decided the matter differently have done so on the basis of a comprehensive analysis. The approach set forth by the Eleventh Circuit in *Harris* and by Kozinski's Claims Court opinion in *Coplin* is more scholarly and persuasive than the opposing view. Thus, the Supreme Court in considering the issue will be wise to follow the lead of these two courts. By holding in favor of the Commission employees, the Court would preserve the integrity of the executive agreement as an instrument for implementation of foreign policy. Also, by applying the paragraph 2 language according to its literal meaning, the Courts would be upholding the interpretation which the United States and Panama apparently understood when they agreed to paragraph 2. Finally, by holding that paragraph 2 exempts Commission employees from United States income taxation, the Supreme Court will nurture United States relations with all nations that expect the United States to fulfill its treaty obligations to Panama.

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