Politics and Privacy in Panama

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It may be summer in Europe, but here in Panama we are in the middle of the rainy season. Nothing, however, can dampen the spirits of those local voters who elected Ricardo Martinelli, candidate of the Democratic Change Party, Panama's president and who took office on 1 July 2009. He won 60% of the vote in May compared with just 5% at the last elections in 2004 and he is the first presidential candidate in the country's modern history to have won an absolute majority. Not only that, he and his allies enjoy a comfortable majority in the National Assembly which will doubtless be the envy of some presidents in other countries in the region. His closest rival, Balbina Herrera, the candidate who represented the previous president's centre-left Revolutionary Democratic Party, was only able to get 37% of the vote. So it's all change at the Palacio de las Garzas (Heron's Palace), the formal residence of Panamanian presidents.

A Martinelli victory will not be celebrated in Caracas. The new president is a businessman who ran as a centrist independent and financed his own election campaign. The 57 year old self-made multimillionaire, who owns the largest supermarket chain in Panama, is a family man with three children. His background is not restricted to the commercial field: back in the 1990s he served the government of the defeated Revolutionary Democratic Party as Director of Panama's social security service. In addition to this, he has been chairman of the board of directors of the Panama Canal Authority as well as Minister of Canal Affairs at the time that the decision was made to approve the USD5.25 billion canal expansion presently underway. Considering the current economic slowdown in the region, this background will give President Martinelli an acute awareness of the challenges facing both social security funding and the canal's profits; the waterway has represented 19% of Panama's Gross Domestic Product and produced 28% of the government's tax revenue.

Although the global economic woes have affected Panama, the Economic Commission for Latin America and the Caribbean thinks that the region's GDP growth as a whole will be just under 2% with the highest increase expected in Peru (5%) followed by Panama (4.5%) and Uruguay (4%). If Panama's economy grows as expected, then this will be good news for Panamanians.

One of the first issues President Martinelli will have to address is the 2006 bilateral free trade agreement with the United States of America which was signed by Panama but which has still to be ratified by the US Congress. Since Panama signed the agreement a further hurdle has appeared. The US now wants Panama to dilute its strict bank secrecy rules in the wake of a worldwide drive for more transparency as countries search for tax revenues to bolster their feeble finances. The behaviour (not just in lending practices) of Switzerland's UBS bank, as reported in newspapers and on television screens, has, unfortunately, added fuel to the fire and given traction to the argument for an all-out assault on financial services centres with bank secrecy, such as Panama.

It was Anton Chekhov who said that every person lives his real, most interesting life under the cover of secrecy. Many Latin Americans have felt that they have had little choice in doing so in the past in order to protect their assets from unstable governments; although in the 21st century those threats have diminished, the region's culture of privacy has not. Most businessmen in the region are cautious and try to keep their business affairs as private as possible. Sensitive information is given only to relatives (family is the cornerstone of the culture) or to trusted third parties; this is in stark contrast, for example, with the US culture where people normally will freely give information (solicited or not) about themselves – as any frequent flyer will attest to. Trust is at the root of all business relations and a guarantee of privacy in the conduct of banking affairs is highly prized. I learned this first hand when I managed an office in Miami that catered for South Americans who were sheltering assets offshore from political instability in their own countries where, in certain cases, the pervading climate of uncertainty was palpable. Having lived through turbulent (and violent) political times myself in Africa, where exchange controls saw people smuggling cash in their shoes when they travelled abroad, I have some empathy for them.

So Panamanians, by their very nature, will be hesitant to relinquish bank secrecy as a sine qua non to having the three year old free trade agreement ratified by the US. Senator John F. Kerry, chairman of the US Senate Foreign Relations Committee, is hammering home the point that although Panama has made progress (the senator, incidentally, will still find it easier to open a bank account in Miami than Panama) much has still to be done. In wishing to see an agreement in place, he nonetheless says that the issue has to be "weighed against the necessity of persuading countries that cater to tax evaders, terrorists and drug lords to change the way they do business". As far as facilitating such activity goes, the US does not have clean hands: the Delaware defect comes to mind (see my article "Man, Angels and Brazil" – Issue 193).

Even so, some members of the US Senate Finance Committee have argued that economic considerations should outweigh tax concerns because of the importance of the treaty to the US economy. It has been pointed out that although John Kerry has argued that offshore tax abuses cost the US USD100 billion every year in lost taxes, even the US Internal Revenue Service Commissioner, Doug Shulman, has testified before the US House of Representatives Appropriations sub-committee that this calculation was based on "wild estimates", adding that "pretty broad numbers" were used.

The US has tried for seven years to have Panama sign a treaty that would require tax information to be shared with the American authorities. I doubt that recent events in Switzerland will speed the process up. UBS bank agreed in February to pay USD780 million to settle criminal charges brought by the US Justice Department and the Securities and Exchange Commission over its banking activities involving wealthy US clients. But a related civil action by the US Internal Revenue Service is still, at the time of writing, pending, it calls for the disclosure of information on some 50,000 account holders only suspected of possible tax evasion; no specific evidence – a standard tax treaty pre-requisite – has been submitted, so it is tantamount to a fishing expedition. If UBS were to comply with this demand it would be flouting the terms of the existing Swiss-American Double Taxation Convention; and, according to the Swiss government which has filed an *amicus curiae* brief with the US District Court in Miami, it would also have adverse consequences for Swiss law and sovereignty (Article 26 of the Organisation for Economic Co-operation and Development's Tax Convention states that information should not be supplied when "disclosure of which would be contrary to public policy").

If this impasse is not solved, the repercussions could prejudice the success of current negotiations taking place between Switzerland and the US over revisions to the existing tax treaty. What defence will the IRS present to justify the request? (Note Marshall Langer's comments in Langer's Treaty Notes – Issue 196). Switzerland has always insisted that absent "a justified request" bank secrecy will remain in force, so doubtless the IRS will choose its words carefully in countering the Swiss government's arguments.

Alice in Wonderland was told by Humpty Dumpty that a word means what he chooses it to mean. "The question is", said Alice, "whether you can make words mean so many different things".

"The question is", said Humpty Dumpty, "which is to be master – that's all."

Panama's new president should heed the maxim, *"festina lente"*, and hasten slowly in negotiating any US tax treaty because if the fundamental fishing ban can be circumvented, the credibility of the initiative is at stake.

The author, C.R.W. Spedding, wrote that it's the second mouse that gets the cheese and Panama's new government would be wise to remember this, because sometimes he who hesitates is not necessarily lost but saved. At the very least, the IRS issue should ruffle feathers in the Heron's Palace.