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Focus on Legal Globalization

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Contact: Laura M. Reich at laura@reichrodriguez.com

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Message From the Chair

We, the Pioneers of Legal Globalization

JAMES M. MEYER

As international lawyers, we may be living through what could be looked back upon someday as the renaissance of international law. This is a bold statement but somewhat undeniable given the current discussions amongst most of the nations in the world and within the international legal and political communities with respect to a variety of collaborative efforts including, for example: (1) a global minimum tax to combat tax-base erosion; (2) efforts by the Organization of Economic Co-operation and Development to create a uniform legal system of financial and economic transparency to combat crime, corruption, terrorism, and tyranny; and (3) a worldwide network of laws demanding compliance with the UN's Sustainable Development Goals (SDGs) and corresponding Environment, Social, and Governance (ESG) initiatives and metrics. Again, these are to name just a few. With that realization, we have dedicated this Winter 2022 issue of the *International Law Quarterly* to what appears to be an acceleration of a legal evolutionary process that we have decided to call "legal globalization."

Of course, an aspiration for legal globalization has been around for millennia and well-documented in modern times, just over a century ago in the Charter of the League of Nations and the Permanent Court of International Justice and supplanted not long after by the United Nations and the International Court of Justice, also known as the World Court. Even so, many legal scholars and practitioners alike seemed to have a hard time taking seriously the notion of any true form of an enforceable body of international law. Except for maybe only the most fundamental, basic, irrefutable, and uniformly accepted principles of human rights, it seemed naïve to think that governments around the world would ever surrender their sovereignty for lofty notions of the greater good of mankind. For decades, most discussions regarding this topic have usually ended with somebody saying, "That might be a great idea in theory, but it will never happen in our lifetime." Given the current technological revolution, however, which historians and sociologists alike agree is unprecedented in human history, the old adage "never say never" rings true.

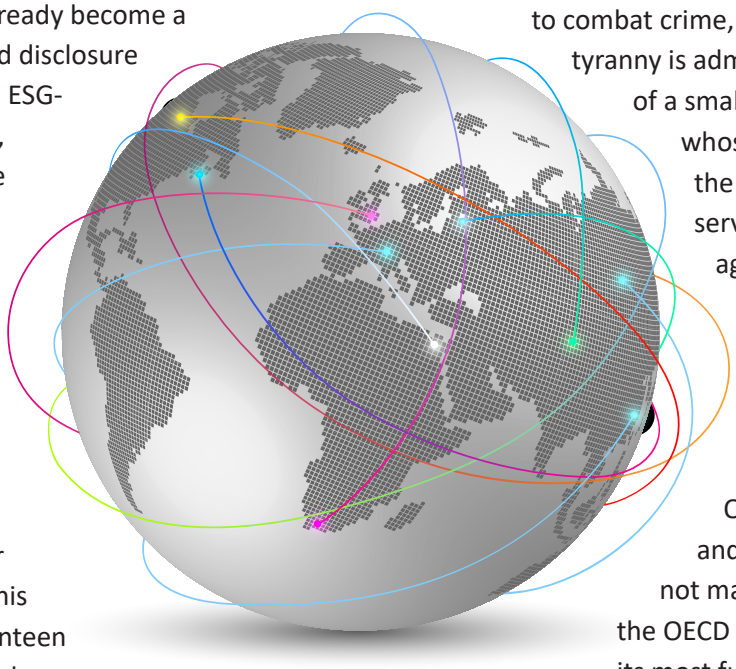
To comprehend what legal globalization might entail, we need to understand what international law comprises in the first place. For those of you who have been fortunate enough to read the International Law Section's International Law Desk Book, edited by Pamella Seay, you might remember that Chapter 1, written by our very own Laura Reich (who is also editor-in-chief of this periodical) and Clarissa Rodriguez, is entitled "What is International Law?" The first sentence of their chapter begins by asking the question "Does international law exist?" Their article goes on to explain that international law, also sometimes known as "law of nations" can be described as a body of rules that regulate the conduct of *sovereign states* in their relations with one another. Sources of international law include treaties, international customs, and widely recognized general principles of law, as well as the decisions of national and lower courts, and scholarly writings, which are nonbinding as judicial precedent. Therefore, when we speak about legal globalization, we are actually speaking about treaties, customs, and practices that fit into at least one of those categories, which are nothing new. What is new is the recent worldwide propensity to enter into such treaties, to promulgate such laws, and to engage in such practices and customs in such a far-reaching and globally encompassing manner.

Going over just a of the few previously mentioned examples of legal globalization, the concept of a global minimum tax of 15% was recently accepted as a mutual

Message From the Chair, continued

goal by more than 136 countries around the world. Jeff Hagen's article in this issue of the *International Law Quarterly* explores some of the extremely significant ramifications and complexities of this measure. Other prominent examples of global legal measures include the concepts best known alphabetically as ESG and SDG.

ESG, that is, the Environmental, Social, and (corporate) Governance initiatives are ubiquitous in new legislation around the world. The concept of ESG was initially used by the United Nations some twenty years ago, when it created indices using the three named metrics, and it has become almost like a social responsibility credit score in the corporate world. From the global legal perspective, ESG has already become a spiderweb of compliance and disclosure laws and regulations. In fact, ESG-linked professional practices, products, and businesses are now part of a multibillion-dollar global industry.



SDG, on the other hand, refers to Sustainable Development Goals as announced by the United Nations Department of Economic and Social Affairs in its 2030 Agenda for Sustainable Development. This agenda specifically lists seventeen sustainable development goals: (1) no poverty; (2) no hunger; (3) good health and well-being; (4) quality education; (5) gender equality; (6) clean water and sanitation; (7) affordable and clean energy; (8) decent work and economic growth; (9) industry innovation and infrastructure; (10) reduced inequities; (11) sustainable cities and communities; (12) responsible consumption and production; (13) climate action; (14) life below water; (15) life on land; (16) peace, justice, and strong institutions; and (17) partnerships to implement the goals. Framing these goals as templates for laws being promulgated in countries around the world leads to the inevitable conclusion that legal globalization is a true phenomenon.

By the way, both ESG and SDG will be the overarching themes of the International Law Section's iLaw Conference, being held once again at the Marriott Marquis in Downtown Miami on 1 April 2022.

So, why has this evolution taken so long, and what might be the social, economic, and political consequences of this transition to a global legal system? Some of the answers to those questions are somewhat obvious while others are not. The goals and interests of serving a global citizenry are often likely to be starkly different from those of a sovereign nation and its citizenry. Again, just as an example, the OECD's efforts to create a uniform legal system of financial and economic transparency to combat crime, corruption, terrorism, and tyranny is admirable; however, citizens of a small Caribbean country whose economy depends upon the viability of the financial services industry might not agree with the OECD's heavy-handed transparency measures, which could very likely cause a financial crisis in their country. As such, is the OECD suggesting the voices and votes of that citizenry do not matter, and in doing so, is not the OECD then undermining one of its most fundamental societal goals of promoting democracy? In other words, despite the fact the OECD's efforts in combating crime and corruption are specifically designed to protect and preserve democratic states, in essence, democracy is being sacrificed in the name of democracy. Moreover, those same OECD measures could eventually eliminate or make significantly less feasible estate planning solutions for non-U.S. taxpayers who own assets in the United States. More specifically, there may soon no longer be a corporate solution offered by the financial services sectors of many small Caribbean jurisdictions (commonly referred to as "blockers") by which non-U.S. taxpayers are spared a draconian and seemingly "unfair"

Message From the Chair, continued

40% U.S. estate tax on their U.S. assets upon their death while U.S. residents and citizens enjoy a US$11 million exemption from the same tax. The OECD measures will also have significant impact on multijurisdictional transactions, which have, until now, been able to enjoy "neutral ground" to conduct their mergers, acquisitions, and financing without incurring cost-prohibitive multiple layers of taxation. Finally, it seems that the age-old and somewhat sacred rights to financial and personal privacy have been all but tossed aside in favor of the OECD goals. These are very important and fundamental value judgments, which have, until now, been wholly within the domain of sovereign nations and their local governments and, in democratic societies, their citizenry. Given all of these issues in this one seemingly straightforward example of legal globalization, the myriad of other issues that are likely to arise in its implementation is almost unimaginable.

Many lawyers in Miami, regardless of their specialty, can often be heard joking that they practice international law simply because they are practicing law in Miami. That "joke," however, is increasingly based in reality. In truth, more and more law practices throughout Florida are being permeated by international legal concepts. For those of us who profess to already practice international law in a more sincere manner, these are exciting times indeed. We are still pioneers in the practice of international law, but from our unique vantage point we can already see what is coming. Soon, our colleagues throughout the profession and the world will likely be making the same joke about practicing international law.

Welcome to the dawn of the Golden Age of Legal Globalization.

James M. Meyer
Chair, International Law Section of The Florida Bar
Board Certified in International Law
Harper Meyer

From the Editor . . .

LAURA M. REICH

Following the end of World War II in 1945, fifty-one nations founded the United Nations (UN) with the goals of increasing cooperation among nations, increasing standards of living across the globe, and maintaining international peace. At that time, many leading intellectuals, including Albert Einstein, hoped the UN would serve as a supernational authority—settling disputes between nations before they could lead to armed conflict. And since that time, many other leaders and influencers have decried the concept of global governance, claiming that such a "world government" would be undemocratic, destroy individual autonomy and national sovereignty, and even usher in the Biblical apocalypse!

Whether global governance was welcomed or feared, it ultimately has never materialized. Instead, more than seventy-five years later, we have an "alphabet soup" of nongovernmental organizations and treaties forming a web of international, regional, and global regimes. Some, like the UN Security Council or the World Trade Organization, have real coercive authority; others simply make recommendations or even less.

Yet international lawyers still talk about internationalism, and important global legal issues (specifically the UN's Sustainable Development Goals and corresponding Environment, Social, and Governance initiatives and metrics) will be highlighted at the ILS's upcoming iLaw Conference in April 2022. Thus, this edition of the *International Law Quarterly* is focused on Legal Globalization. Although the world does not have legal globalization on a "macro" level, i.e., we do not live under a single set of global laws, we have increasing legal globalization in specific areas, e.g., world trade, human rights, and environmental regulations to name just a few.

Increasing legal globalization provides new issues and opportunities for international lawyers, many of which are addressed by our authors in this edition of the *ILQ*. First, Peter Quinter asks the question "Is the International Supply Chain Functioning Properly?" in an article addressing facts and misconceptions about global trade. Jeffrey Hagen investigates the proposal for a 15% global minimum tax and asks, "Deal or No Deal?" As immigration issues remain front and center in the global marketplace for workers, Larry S. Rifkin explores "Alternatives for Clients Where Permanent Residence or a Nonimmigrant Visa Is Not an Option."

Turning to the shady side of the international marketplace, Bob Becerra explains how trading in precious metals can be used by criminal enterprises to launder money in his article "Gold at the End of the Rainbow: Money Laundering Through the Precious Metals Markets." Attorney Nouvelle Gonzales returns us to consideration of legal trade arrangements, specifically the United States-Mexico-Canada Agreement (USMCA), and offers practical information for practitioners in her article, "There's No Place Like Home: Ten Reasons the United States-Mexico-Canada Agreement (USMCA) Strengthens Its Home Countries and What Practitioners Should Know About It." Finally, Penelope Perez-Kelly offers a review of private-sector privacy policies—including the California Consumer Privacy Act and the European Union's General Data Protection Regulation—from a global legal perspective.

As always, the *ILQ* editors thank our dedicated volunteer authors who have given their time to write articles for this edition. In addition to the authors listed above, the editors thank Paula Black, who has contributed to our "Best Practices" column with her piece on choosing quality networking opportunities over mere quantity. I also want to personally thank the ILS editorial team—Jeff Hagen and Neha Dagley—as well as copy editor Susan Trainor for another year of dedication to the *ILQ*. Your hard work shows, and we can all be very proud of the results!

Respectfully,

Laura M. Reich
Editor-in-Chief

Is the International Supply Chain Functioning Properly?

By Peter A. Quinter, Miami

Every day, the news media has headline news of the disruption in the international supply chain. From cars to TVs, Americans are told it is taking longer to get merchandise from overseas into the department stores for your purchase. You have probably seen video of dozens of mega-size cargo vessels off the coast of California waiting to unload containers into the Port of Los Angeles/Long Beach. It seems as if the way cargo moves from overseas to the United States no longer works, or at least is in serious jeopardy. My thesis is that the international supply chain has never worked so well in getting the massive amount of cargo from overseas (mostly Asia) to the United States to satisfy the consumption demands of American consumers.

As a U.S. Customs and international trade legal expert, I have been involved in the movement of cargo into and out of the United States since 1989. I interact daily with the federal law enforcement agencies tasked with enforcing the various laws and regulations at the border, especially U.S. Customs and Border Protection (CBP), Homeland Security Investigations (HSI), U.S. Food and Drug Administration (FDA), Transportation Security Administration (TSA), Environmental Protection Administration (EPA), the Consumer Product Safety Commission (CPSC), the Trade and Tax Bureau (TTB), and the U.S. Department of Agriculture (USDA). Altogether, these agencies have the mission to identify, stop, and examine any merchandise entering the United States that could cause harm to an American consumer. Each of these agencies has sets of requirements for cargo to enter the United States with which an importer, or its designated customs broker, must comply. If they do not comply, the cargo is refused entry or seized. This definitely slows down the entry of cargo into the commerce of the United States; nevertheless, government regulations are not the reason for the growing disruption in our international supply chain.

What is the "international supply chain" anyway? A supply chain involves a series of steps involved to get a product or service to the customer. The steps include moving and transforming raw materials into finished products, transporting those products, and distributing

International Supply Chain, continued

them to the end user. Unlike most readers of this article, I spend a lot of time at airports and seaports, often daily, and I see the international supply chain in action. But if you think about your morning cup of coffee or tea, you may realize that it is derived from beans or leaves grown in Brazil, Colombia, China, or Vietnam. The car you are driving is made of parts from all over the world, even if it was ultimately assembled in Tennessee or Michigan. The mobile phone you are using was probably made in China. The clothes you are wearing right now could be from places as varied as India, Honduras, or Haiti. Wherever you look, there are products all around you that were made in some country other than the United States. Those products were made from raw materials, manufactured overseas, and then transported to the United States. Once in the United States, they had to travel through the labyrinth of the above-named federal agencies, go to a distribution center, and then eventually to a store for your purchase. This process is even more urgent for perishable products such as fresh fish, fresh flowers, and fruits and vegetables that are shipped by air into the United States.

Every day, CBP processes about 700,000 passengers into the United States, and about 80,000 truck, rail, and sea containers enter the United States, including about 100,000 separate shipments for which CBP collects about US$225 million in customs duties. Every day! Statistically, CBP is busier than ever, with record amounts of cargo being shipped to the United States as American corporate and individual consumers go on a buying binge. With limited capacity aboard cargo vessels, limited marine cargo terminals for vessels to dock and unload, limited chassis, limited number of truck drivers, and limited square footage of cargo warehousing space, the rules of demand and supply result in the cost of international transportation going up. The cost of moving a forty-foot ocean container from China to the United States is up over 400%+ in the past two years. Additionally, labor costs are up everywhere, and the combined result is the inflation of prices on the goods and services Americans purchase.

The White House has issued executive orders to attempt to deal with supply chain issues. For example, in the 24 February 2021 Executive Order on America's Supply Chain, President Biden stated, "It is the policy of my Administration to strengthen the resilience of America's supply chains." On 8 June 2021, the Biden-Harris administration created a Supply Chain Disruptions Task Force, which was described as "the launch of a new effort aimed at addressing near-term supply chain disruptions." While well intentioned, especially because the approach involves public-private cooperation, these efforts will not result in real benefits anytime soon.

The simple fact is that Americans are buying more merchandise (electronics, food, motor vehicles,

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Global Minimum Tax of 15%: Deal or No Deal?

By Jeffrey S. Hagen, Miami

Accelerated by recent world events, the global economy's mechanics have evolved into somewhat of a legal quagmire. Now, commonplace transactions may involve intangible digital products developed in country A, by a company formed in country B, that are purchased by an individual located in country C, who happens to be a resident of country D. The world's wealthiest nations aim to capitalize on these changing times by establishing a new international tax regime, which, they claim, is intended to result in economics that are fair and equitable. Unlike previous multilateral agreements, though, this time the United States appears to be onboard, brought to heel by digital services taxes imposed unilaterally by other nations that tax the largest U.S. technology companies on a portion of their foreign source income. Perhaps the most striking element of this worldwide government collaboration is the establishment of a global minimum tax rate of 15%, a divergence from hundreds of years of national sovereignty over taxation of a nation's citizenry.

This article will briefly summarize Pillar One and Pillar Two, promulgated by the Organization of Economic Co-operation and Development (OECD) and agreed to by 136 nations on 8 October 2021, and what they hope to accomplish. It will then discuss the reasons for skepticism from legal experts over whether the ambitious rules and regulations that have been proposed can be smoothly effectuated. These reasons include: (1) difficulty in synchronizing the international tax and accounting rules of different countries; (2) roadblocks in obtaining U.S. congressional approval; and (3) political and social realities existing in foreign countries. The article concludes with the short- and long-term impacts that the implementation of this new tax regime would have on our representation of international clients.

The OECD, Pillar One and Pillar Two

Twenty years ago, the OECD was commonly referred to as a tax cartel,[1] but in today's hyperglobalized economic environment it has been touted as a panacea to cure tax irregularities brought about by the digital revolution. Over the years, the nonelected technocrats of this international group collaborated on ambitious projects, like the fifteen action items of Base Erosion and Profit Shifting (BEPS),

Global Minimum Tax, continued

aspiring to produce data that would change how global cooperation was perceived with respect to taxation. In recent years, those efforts have borne fruit in the form of Pillar One and Pillar Two.

Pillar One aims to address the fact that the traditional method of taxing a company based on it maintaining a permanent establishment in a jurisdiction makes seemingly little equitable sense these days, as companies like Google and Meta earn billions of dollars in foreign countries with little to no physical presence there. In response, in recent years many countries have unilaterally imposed digital service taxes (DSTs) that tax a company based on where consumption of its products occurs. For example, when a French resident looks at an ad on Instagram on his or her phone in France, Instagram's revenue received from the advertiser is taxed at 3% in France due to the French DST, as opposed to tax being collected mostly outside of France in a jurisdiction where Instagram maintains business headquarters or where one of its subsidiaries is incorporated.

Several countries have imposed their own DSTs with varying thresholds and formulas, creating a whale of a task for tax advisors. The United States has primarily agreed to Pillar One to harmonize how digital taxation will impact large companies that are predominantly American. Adam Cohen, Google's director of economy policy, is on record as stating that the main objective of Pillar One should be to reestablish certainty for international taxpayers through consistent implementation of the new rules around the world once they are finalized.[2] Additionally, implementation of Pillar One should allow the United States to participate as a market jurisdiction in the reallocation of profits from foreign-based digital companies with U.S. consumers. According to Pascal Saint-Amans, director of the Center for Tax Policy and Administration at the OECD, Pillar One could actually result in revenue-positive developments for the United States.[3] A company is considered to be "in scope" if it has over 20 billion euros in annual revenue and profitability above 10%; in the case of those 100 or so "in scope" global enterprises, 25% of the "residual profits" would be reallocated to the jurisdictions where the consumers and users of those companies' products are located.[4] The OECD estimates that taxing rights on more than US$125 billion of profit are expected to be reallocated to market jurisdictions each year due to Pillar One.[5]

Reasonable minds can debate whether the reallocation of digital profits and the departure from the permanent establishment standard deserve to be implemented in this new digitized global economy; however, the inclusion of Pillar Two and its impact warrant further consideration. Pillar Two puts a floor on tax competition by establishing a global minimum tax rate of 15%. Prior to this global agreement, jurisdictions such as the British Virgin Islands and Cayman Islands, among others, applied more traditional principles of national sovereignty, attracting foreign investment to and supplying jobs in their jurisdictions by drafting their own laws that utilized low tax rates or in some cases a 0% tax rate. To this point, it has been well within these countries' rights to establish laws that stimulate the corporate services industries for thousands of their citizens, creating job opportunities and foreign investment in their economies. While Pillar Two does not directly force these jurisdictions to change their own laws, it places mechanisms on the global economy as a whole that inevitably result in a tax of at least 15% to the end recipient, effectively negating the benefits of forming companies in these jurisdictions (at least for now, at a particular revenue threshold).[6] While Pillar One will apply to about 100 of the world's biggest companies, Pillar Two will cast a wider net over a larger contingent, as it applies to multinational enterprises with annual revenue (not profit) of over 750 million euros.[7] The OECD's goal is that Pillar Two be implemented by 2023.

Mechanical Issues With Implementation

While politicians may conceptually agree with this new global tax order, legal experts maintain that crafting a multilateral instrument to dictate how this new tax regime will operate will prove to be quite complicated. Given the wide array of issues described below, the timelines proposed for implementation of these yet to be finalized rules seem unrealistic. Some of the issues associated with implementing Pillars One and Two are:

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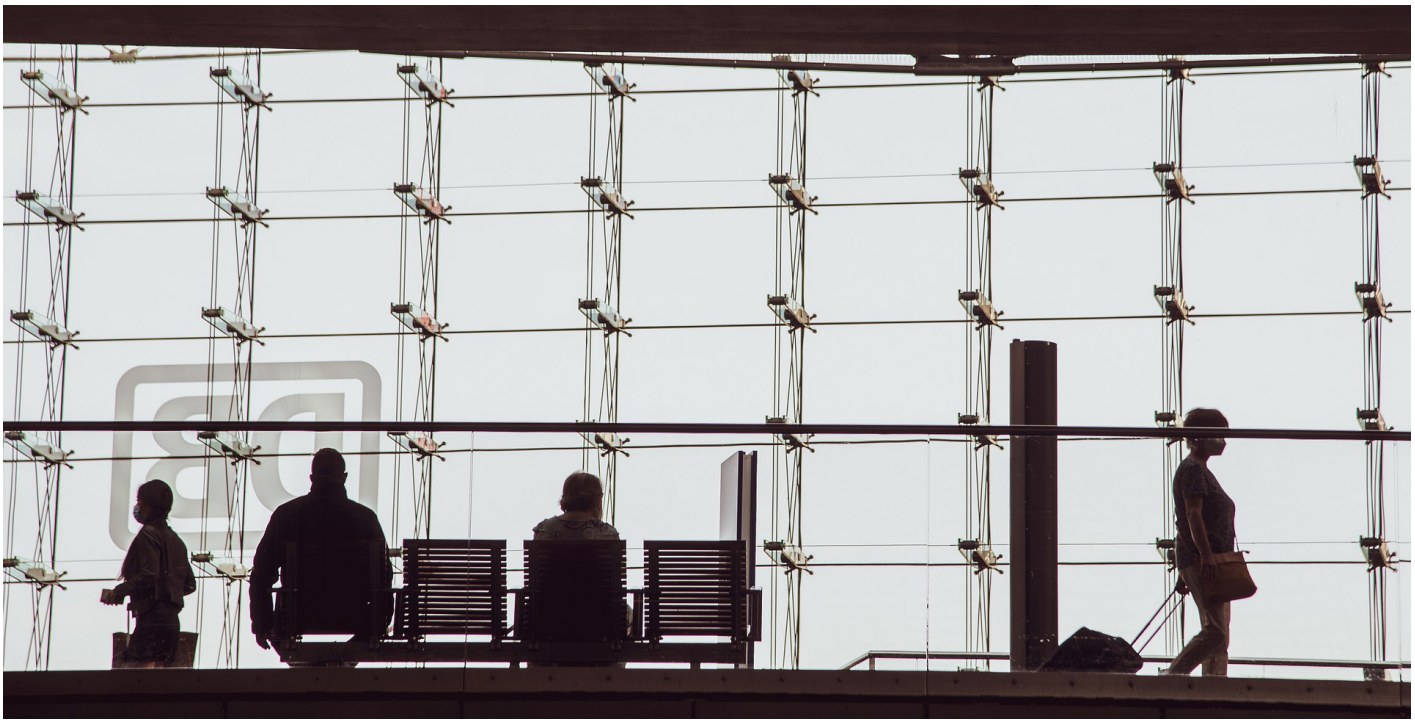
Alternatives for Clients Where Permanent Residence or a Nonimmigrant Visa Is Not an Option

By Larry S. Rifkin, Miami



Foreign travelers seeking entrance to the United States have a limited number of visa options. There are two categories of U.S. visas: immigrant and nonimmigrant. Immigrant visas are issued to foreign nationals who intend to live permanently in the United States. Nonimmigrant visas are issued to foreign nationals wishing to enter the United States on a temporary basis, such as for tourism, medical treatment, business, temporary work, study, or other similar reasons. Some clients, however, want to reside near the United States in a stable country, but do not want to reside full time in the United States, be it for tax issues, physical presence issues, or simply because they have difficulty qualifying for a visa. This article will examine the immigration requirements for foreign nationals who wish to reside in The Bahamas, Cayman Islands, or Turks and Caicos. This article will also review visa alternatives that may limit the tax obligations of foreign nationals should they choose to reside in the United States for an extended period.

Tax Consequences for Foreign Nationals

One of the principal reasons that clients, especially high net worth individuals, may not wish to reside in the United States, either as an immigrant or a nonimmigrant, is because of their tax liability under our Internal Revenue Code.

Immigrants

The taxation of an individual who is not a U.S. citizen or U.S. national is dependent on the residency status of such individual. In general, the controlling principle is that U.S. tax residents are taxed in the same manner as U.S. citizens on their worldwide income while nonresidents are generally subject to U.S. income tax on only their U.S. source income.[1] High net worth clients whose income is principally derived from outside of the United States will prefer to be taxed as nonresident aliens. An individual who is granted lawful permanent residence ("green card") or an immigrant

Residence Options, continued

visa is considered a U.S. tax resident for U.S. federal tax purposes.[2] A U.S. resident must report all interest, dividends, wages, or other compensation for services; income from rental property or royalties; and other types of income on his or her U.S. tax return, regardless of whether these amounts are earned within or outside the United States.[3]

Nonimmigrants: Substantial Presence Test

An individual who holds a nonimmigrant visa will be considered a U.S. resident for tax purposes if he or she meets the substantial presence test for the calendar year. To meet this test, the individual must be physically present in the United States on at least:

- 31 days during the current year, and
- 183 days during the 3-year period that includes the current year and the 2 years immediately before that, counting:
  - All the days the individual was present in the current year, and
  - 1/3 of the days the individual was present in the first year before the current year, and
  - 1/6 of the days the individual was present in the second year before the current year.[4]

Thus, an individual will automatically be a tax resident for any year in which said individual spends 183 days or more in the United States. The following days are not counted as days of presence in the United States for the substantial presence test:

- Days the person commutes to work in the United States from a residence in Canada or Mexico if he or she regularly commutes from Canada or Mexico;
- Days the person is in the United States for less than twenty-four hours, when he or she is in transit between two places outside the United States;
- Days the person is in the United States as a crew member of a foreign vessel; and
- Days the person is unable to leave the United States because of a medical condition that develops while he or she was in the United States.[5]

For purposes of the substantial presence test, the following individuals are exempt:

- An individual who is temporarily present in the United States as a foreign government-related individual under an A or G visa, other than individuals holding A-3 or G-5 class visas;
- A teacher or trainee temporarily present in the United States under a J or Q visa who substantially complies with the requirements of the visa;
- A student who is temporarily present in the United States under an F, J, M, or Q visa who substantially complies with the requirements of the visa; and
- A professional athlete temporarily in the United States to compete in a charitable sports event.[6]

"Closer Connection" Exception

An alien individual who meets the substantial presence test may nevertheless be considered a nonresident alien for the current year if the following conditions are satisfied:

- The individual is present in the United States for fewer than 183 days in the current year;
- The individual maintains a tax home in a foreign country during the current year; and
- The individual has a closer connection during the current year to a single foreign country in which he or she maintains a tax home than the connection he or she has to the United States.[7]

An individual cannot claim to have a closer connection to a foreign country if either of the following applies:

- He or she personally applied, or took other steps during the year, to change status to that of a lawful permanent resident, or
- He or she had an application pending for adjustment of status to lawful permanent resident during the year.[8]

In determining whether an individual has maintained more significant contacts with a foreign country than with the United States, the facts and circumstances to be considered include, but are not limited to, the location of the individual's home, family, personal belongings, social/political/cultural/religious memberships, banking activities, business activities, driver's license jurisdiction, voting jurisdiction, and designation of country of residence on forms and documents.[9]

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Gold at the End of the Rainbow: Money Laundering Through the Precious Metals Markets

By Robert J. Becerra, Miami

Precious metals have had an irresistible allure for humankind for eons. The acquisition of gold, silver, platinum, and the like has started wars and disrupted monetary systems and financial markets. Their use in jewelry is inextricably intertwined with human traditions involving marriage and gift giving. They are part of our folklore, like the leprechaun and his pot of gold at the end of a rainbow. Why, then, should precious metals also not cast their spell upon those seeking to launder ill-gotten gains with those magical metals? That spell has been cast; money laundering though precious metals is booming.

Trade-Based Money Laundering

Trade-based money laundering has been defined as the process of disguising the proceeds of crime and moving value through the use of international trade transactions. More simply put, trade-based money laundering uses the international movement of funds as payments for goods and services to hide and transport illicit dollars.[1] For the purposes of this article, precious metals such as gold are the "goods" being paid for with illicit funds. Gold is seen as a useful way to launder funds in part because it is easily shipped. As such, bad actors will frequently trade gold through shell or front companies using bogus documentation and then smuggle that gold in an effort to hide its true source. Ultimately, the gold may be imported into the United States for sale to precious metals refineries.[2]

Gold is a particularly good medium for money laundering because it is accepted universally, its value is ascertainable, and it is difficult to trace. Once refineries receive imported gold, the sellers, often criminals, receive wires in payment at the bank of their choice. The transaction appears to be a legitimate transaction for the sale of gold rather than from any underlying criminal activity.[3] Due to the attractiveness of money laundering

Precious Metals, continued

through precious metals, the Bank Secrecy Act requires precious metals dealers to establish written anti-money laundering (AML) programs. These programs are required to be reasonably designed to prevent precious metals dealers from being used to facilitate money laundering and the financing of terrorist activities through the precious metals markets.[4] Due to the sheer volume of precious metals, such as gold, being imported into South Florida, such AML programs may be seen as merely putting a finger in a leaky dike. In 2016, over US$4 billion worth of gold, excluding jewelry, was imported into South Florida;[5] in 2019-2020, the value of gold imports into Florida was approximately US$3 billion.[6]

The U.S. Department of Justice has recognized that Miami in recent years has emerged as a major international gold trading hub, particularly for both legal and illegal Latin American gold. Illegal gold, mined in violation of foreign law, is a significant problem responsible for the devastation of large portions of Latin American rainforests. The environmental damage is severe because of chemical contamination from mercury used in the mining process. Moreover, illegal mining is often controlled by organized crime and supported by human trafficking, forced labor, and prostitution. In November 2018, then President Trump signed an executive order to ban U.S. persons from dealing with "corrupt or deceptive" gold sales from Venezuela.[7]

Operation Arch Stanton

To try to stem the flow of gold derived from money laundering activities, the Organized Crime Drug Enforcement Task Force (OCDETF) is conducting Operation Arch Stanton. The OCDETF is a partnership between federal, state, and local law enforcement agencies focused on disrupting and prosecuting drug trafficking enterprises. Operation Arch Stanton has resulted in investigations and prosecutions of gold refining companies in Texas and South Florida for engaging in money laundering through gold markets.[8] As recently as September 2021, the U.S. Department of Treasury's Office of Foreign Asset Control levied sanctions against a network of Lebanese and Kuwaiti financial conduits for Hezbollah due to the network's use of gold as a vehicle to move illicit funds through shell companies to fund Hezbollah's terrorist activities.[9]

Closer to home, in South Florida, the United States Attorney's Office in Miami through Operation Arch Stanton prosecuted Elemetal LLC, based in Dallas, Texas, and doing business as NTR Metals, for its willful failure to maintain an adequate anti-money laundering program, in violation of the Bank Secrecy Act. Elemetal purchased and refined billions of dollars of gold from Central America, South America, Europe, and the Caribbean. Elemetal pled guilty and admitted that it (1) accepted gold from persons and entities without requesting and obtaining adequate identification and information regarding the source of the gold; (2) accepted gold from foreign gold suppliers who represented themselves to be "gold collectors," which involves nothing more specific than someone who buys gold from others without

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There's No Place Like Home: Ten Reasons the United States-Mexico-Canada Agreement (USMCA) Strengthens Its Home Countries and What Practitioners Should Know About It

By Nouvelle L. Gonzalo, Gainesville

Canada and Mexico are more than just our northern and southern neighbors. They are our top two trading partners and export markets.[1] One-third of all U.S. exports in 2021 went to Canada and Mexico.[2] Almost thirty years ago, the United States, Mexico, and Canada created the largest free trade region in the world with the landmark North American Free Trade Agreement (NAFTA). The agreement's intention was to create a free market among the three counties.[3] Its big-picture goals were to generate robust economic growth and to improve the standard of living for people in the member countries. Economists mostly agree that NAFTA benefited North America's economies.[4] Yet NAFTA had some unanticipated results. Some argue that it disrupted U.S. industries by moving production jobs to Mexico and frequently putting U.S. workers in a position to accept lower wages and benefits. Mexico criticized the exploitation of Mexican workers. Some criticized NAFTA as the worst trade deal ever signed by the United States, so lawmakers negotiated a new one.

The new trade deal, the United States-Mexico-Canada Agreement (USMCA), went into effect in July 2021. It addresses both the criticisms of NAFTA and the rapid technological change that has occurred over the past quarter-century. For example, the USMCA modernizes the trade agreement for the digital era by including a chapter on digital trade that was not in the original NAFTA. It grants new intellectual property protection for internet companies and e-books, technologies that were in their infancy when NAFTA was drafted in the early 1990's. USMCA is also the first trade agreement to recognize small and medium enterprises (SMEs),

USMCA, continued

which will now be able to benefit from the removal of tariff and nontariff barriers to trade. To increase the standard of living among people who live in the member countries, the USMCA creates a more level playing field for workers by requiring more vehicle parts to be made by workers who earn $16 per hour and more automobile components to be made within the participating nations to qualify for zero tariffs.

Ten Reasons the USMCA Strengthens Its Home Countries and What Practitioners Should Know About It

1. **The USMCA is the first trade agreement to recognize SMEs**.

The USMCA recognizes the fundamental role of SMEs as engines of the North American economy.[5] In fact, Mexico and Canada are the top two export destinations for U.S. SME goods.[6] The USMCA promotes cooperation between the participating nations to increase SME trade and investment opportunities. It establishes information-sharing tools that will help SMEs better understand the benefits of the agreement and provides other information useful for SMEs doing business in the region. The agreement also establishes a committee on SME issues comprising government officials from each country, which helps to do the following:

- ***Reduces Paperwork on Smaller Shipments.*** Creates a new informal shipment level of US$2,500 so that express shipments under that amount benefit from reduced paperwork.
- ***Raises De Minimis Level for Exempt Shipments From Canada.*** Raises the de minimis level for Canada for express shipments for the first time in decades, with up to C$40 exempt from duties and taxes (increased from C$20) and up to C$150 exempt from duties.
- ***Raises De Minimus Level for Exempt Shipments From Mexico.*** Sets the de minimis level for Mexico up to US$50 exempt from duties and taxes, and raises it up to US$117 duty-free for express shipments.
- ***Reduces the International Trade Compliance Requirements for SMEs.*** Reduces the requirements for documentation of customs clearance and procedures to correct errors. In addition, includes an expanded scope of advanced rulings by customs authorities, provisions to provide an online searchable database of customs information, and ways to expedite the release of express shipments.[7]

These are benefits the USMCA provides the SMEs that had not existed before. This is in addition to new IP protections and digital protections geared to SMEs.

2. **The USMCA provides new intellectual property protections.**

The USMCA provides strong and progressive protection and enforcement of IP rights critical to driving innovation and economic growth. Some examples include:

- ***Requires a Minimum Term of Protection for Copyrighted Works.*** Requires a minimum copyright term of life of the author plus 70 years, and for those works with a copyright term that is not based on the life of a person, a minimum of 75 years after first authorized publication.
- ***Prevents Circumvention of Technological Protection.*** Implements strict guidelines to prevent the

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Overview of U.S. Private-Sector Privacy: A Global Legal Perspective

By Penelope B. Perez-Kelly, Orlando

In the United States, there is no comprehensive federal privacy law. Instead there are industry-specific laws that regulate privacy for those sectors. There are also states that have enacted privacy regulations applicable to companies conducting businesses in those states and providing goods or services to residents of those states, most notably the California Consumer Privacy Act (CCPA or the Act).[1] The CCPA provides consumer protection and strict privacy rights covering a broad range of businesses. While there are strict privacy laws regulating certain sectors, such as the health care and financial sectors, the CCPA applies to any business meeting the criteria specified in the Act. This article will provide a general legal perspective for companies trying to navigate the myriad U.S. laws and regulations when creating and implementing their privacy policies, with an emphasis on the CCPA and the European Union's General Data Protection Regulation (GDPR).[2]

A company's privacy policy covers the collection, use, and sharing of personal information (also referred to as personal identifiable information or PII).[3] In the United States, PII is generally defined as information that makes it possible to identify an individual.[4] The name, address, social security number, and driver license are examples of PII.[5] Privacy policies set standards for how PII must be handled internally, and privacy notices disclose to customers the way PII is being handled by the company.[6] As cross-border transactions and e-commerce increase, companies have to decide whether to implement one global policy or multiple policies for different jurisdictions.[7] While the idea of implementing one uniform privacy policy may seem attractive, companies with only one global privacy policy may create contractual obligations that are not a legal requirement when doing business in countries with less stringent privacy laws.[8]

Privacy policies, at a minimum, should incorporate fair information practices (FIPs), also referred to as fair information privacy practices or principles (FIPPs).[9] "FIPs are guidelines for handling, storing and managing data with privacy, security and fairness in an information society that is rapidly evolving."[10] The main principles of

Private-Sector Privacy, continued

FIPS are notice, choice, access, and data security.[11]

Notice. Privacy notices should identify the type of PII the company is collecting, how the information is used, and generally to whom it is disclosed.[12] If necessary to comply with applicable laws, privacy notices should detail the rights of individuals to access, modify, or in certain cases delete their PII (this right is also known as the "right to be forgotten" under the GDPR).[13] The notice should also identify the privacy officer and his/her contact information. The notice should succinctly describe the company's retention (how the company stores and disposes PII and for how long the company retains the information) and security procedures used to protect the PII. Care should be taken to disclosed what is required while protecting the company's sensitive information (e.g., identity of critical systems or information security processes).

Choice. Consent is a key issue in privacy practices. Companies should get consent (implicit or explicit) when processing data containing PII.[14] The term *processing* includes the collection, recording, organization, access, storage, updating or modification, retrieval, consultation, or use of PII.[15] Consent can be given affirmatively or expressly (opt-in) or can be given implicitly by simply using or accepting the services or products provided by the company (no option).[16] The U.S. Federal Trade Commission has issued a report stating that "companies do not need to provide choice before collecting and using data for practices that are consistent with the context of the transaction, consistent with the company's relationship with the consumer, or as required or specifically authorized by law" (no option).[17] It should be the best practice for companies to give consumers a choice to opt-out if consumers do not wish for their PII to be disclosed to third parties (opt-out).[18]

Access. U.S. consumers generally have the right, with certain exceptions, to access their PII held by companies and also have the right to update and correct their PII if necessary.[19]

Data security. Privacy notices usually state that the company has implemented generally accepted and appropriate procedures of technical and operational security in order to protect PII from loss, destruction, or unauthorized use or disclosure. Companies must comply with these standards and implement the stated security procedures. Companies should put in place reasonable security safeguards to protect the information and mechanisms to provide notice in the event of a data breach if legally necessary. Companies should have training and should conduct audits to assess potential risks in the event of a data breach to help improve their technical and operational security measures.

CCPA

But what if the company is conducting business in California? Enacted on 28 June 2018, the CCPA is the most comprehensive privacy law in the United States. The CCPA applies to for-profit businesses doing business in California that have the authority to determine the purposes and means of processing consumers' personal information and meet one of the following criteria:

- "Has annual gross revenue exceeding $25 million;
- Alone or in combination, annually buys, receives for the business's commercial purposes, sells or shares for commercial purposes, alone or in combination, the personal information of 50,000 or more consumers, households, or devices; or
- Receives 50% or more of annual revenue results from sales of consumers' personal information."[20]

The CCPA only applies to California residents. The CCPA defines personal information more broadly than other statutes. The CCPA defines personal information as "information that identifies, relates to, describes, is capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household."[21] Name, address, email address, social security number, and driver license number are examples of personal information along with IP addresses, biometric information, geolocation information, and even information derived from the above-mentioned information.[22]

Many companies that may be subject to the CCPA have added additional language to their privacy notices that apply only to California residents. One of the requirements

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BEST PRACTICES

Networking in the New Normal: Choose Quality Over Quantity

By Paula Black

This article originally appeared on Forbes.com.

One sign that life is (slowly) returning to "normal" is that in-person, face-to-face networking events are starting to happen again. After more than a year of Zoom conversations, this is welcome news for many people. But, as a coach who has advised thousands of professionals over the last two decades, I can tell you that a lot of the networking people engage in is a waste of time. Before you jump back into your pre-pandemic networking routine, there are a few things that I encourage you to consider.

While it's true that professionals develop business in large part through relationships, it's equally true that deep, valuable relationships aren't created through sixty seconds of forced small talk. The problem with so many networking groups and events is that they focus on quantity not quality. Most participants are focused on making as many superficial connections as possible so that they can hand out all of their business cards—which doesn't leave much time for real relationships to develop.

Generally speaking, I counsel my clients to avoid this type of networking event. Instead, I encourage them to take a strategic, deliberate approach to their networking. Here's how:

1. Get clear on who you'd like to meet.
Who are the types of people who could become great clients or referral sources? Many of my clients have built their businesses primarily through referrals, and many of their referrals come from a very small group of people. Look for opportunities to connect with other professionals who serve similar clients as you do, but don't offer the same services. For example, if you're a financial planner, developing relationships with family law attorneys could be very helpful.

2. Get clear on where you're going to find these people.
The problem with many networking events is that they're generic. You never know who you're going to meet. And while there could be thirty people in the room, the vast majority likely aren't good sources of business or referrals for your practice. Instead, get hyper-targeted. If you're targeting family lawyers, look for family law-specific events and organizations that you can get involved with. Often, volunteering with an organization (serving on the board of directors, for example) is a great way to build deep relationships. It's much better to be deeply involved with just one or two carefully selected organizations than it is to join dozens and never have time to create real relationships within any of them.

3. Provide value before you ask for anything in return.
As you begin building relationships, look for opportunities to create value for the other person. If they mention a problem or a challenge within their

business or their life, look for opportunities to make a referral or recommendation. If they're struggling with a project, see if there's a way that you can help. Find a way to make their life better—this is how you take your relationship to the next level. And yes, it may not happen overnight, but if you give enough, you will eventually get plenty out of the relationship as well.

4. Stay in touch with your network.
As you begin to cultivate relationships and build your network, don't let the connections grow cold. Stay in touch with your network by connecting on LinkedIn and by including them on your email newsletter. But don't neglect real human connection either. Look for opportunities to send thank you cards and notes. Pick up the phone every once in a while. Don't just text, call! And schedule time for lunches and one-on-one coffee meetings. These "touches" are essential as you continue to develop key relationships.

5. Take full advantage of digital networking opportunities.
One positive side effect of the pandemic is that it forced most business professionals to get comfortable operating virtually. And even as life begins to feel more "normal," there are still great opportunities available to build your network digitally. For example, Zoom makes it very easy to have a one-on-one conversation with somebody on the other side of the country. LinkedIn makes it easy not only to connect with potential clients and referral sources, but also to stay top-of-mind by creating and sharing content consistently. Take advantage of these tools as you sharpen your networking strategy.

Relationships are essential for developing your professional practice. But as traditional networking opportunities begin to open back up, be strategic about how you use your time. Focus on quality, not quantity. Build meaningful relationships instead of superficial exchanges. Take full advantage of digital tools. In my experience, the relationships you create will benefit your career for years to come!

***Paula Black** is one of the world's leading business development coaches for lawyers, entrepreneurs, and service providers. She teaches her clients how to attract more clients and grow their businesses while still having the personal life they want. Ms. Black has been voted the Top Legal Business Development Coach by the readers of the* Daily Business Review*, for the past three years and is a member of the Forbes Coaches Council. She is an award-winning bestselling author of* A Lawyer's Guide to Creating a Life Not Just a Living *and her collaboration with Jack Canfield,* A Recipe for Success*. During the pandemic she published her sixth book,* Retirement or A THIRD ACT—What Will You Choose?

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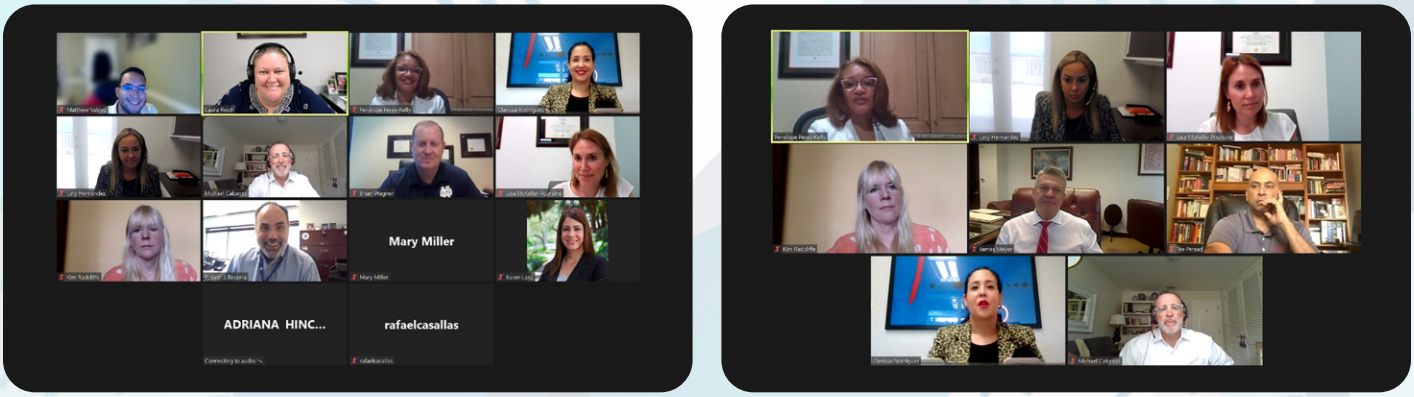
ILS Lunch & Learn With Penelope Perez-Kelly 8 September 2021

Penelope Perez-Kelly answers questions from moderator Clarissa Rodriguez.

On 8 September 2021, Fiduciary Trust International hosted another meeting of the popular ILS Lunch & Learn series. Moderator Clarissa Rodriguez interviewed Penelope Perez-Kelly, a Florida Bar board certified international lawyer with Fisher Rushmer PA in Orlando. Mrs. Perez-Kelly's practice centers in the areas of commercial litigation, business law, international law, and intellectual property law. Mrs. Perez-Kelly has experience in a broad variety of complex commercial international and domestic litigation in federal and state courts. She has represented clients in real estate developer disputes, shareholder disputes, fraud and deceptive and unfair trade practices, collection and enforcement of judgments, and commercial landlord and tenant disputes.



ILS members enjoy the latest Lunch & Learn presentation via Zoom.

Joelle Cerge, Dreema Stokes, and Ireọlá Ọláifá

Jim Meyer admires some of the items offered for auction.

ILS Benefit for Ayiti Community Trust 22 September 2021 • Coconut Grove, Florida

On 22 September 2021, the International Law Section and Haitian Lawyers Association hosted "Cocktail Night for a Cause" at Glass & Vine in Coconut Grove to benefit the Ayiti Community Trust whose mission is to mobilize Haitians and friends of Ayiti to invest in Haitian-led asset-based innovation using a community foundation model backed by an endowment. The evening included a silent auction of items including Haitian artwork, football memorabilia, and gift baskets. Thank you to all who attended to support the people of Haiti in these difficult times.

Patrick Martin and Joelle Cerge

Dr. Guerda Nicolas and Ghislain Gouraige (board chairman, Ayiti Community Trust Board of Directors)

Iris A. Elijah (president-elect, The Florida Bar Young Lawyer's Division), Dr. Guerda Nicolas (co-founder & president, Ayiti Community Trust), Vladimir St. Louis (president, Haitian Lawyer's Association)

William Reich, Laura Reich, and Cristina Vicens

Jackie Villalba, Dr. Guerda Nicolas, and Varzi Jeanbaptiste

Jeff Hagen, Natalie Jacobs, and Andrea Villa

Barbie Hernandez and Regla Barrios greet attendees as they arrive.

Jim Meyer, Nadine Gedeon, Michaèl's Déborah Saint-Vil, Vladimir St. Louis, and Dr. Guerda Nicolas

Varzi Jeanbaptiste and Ana Barton

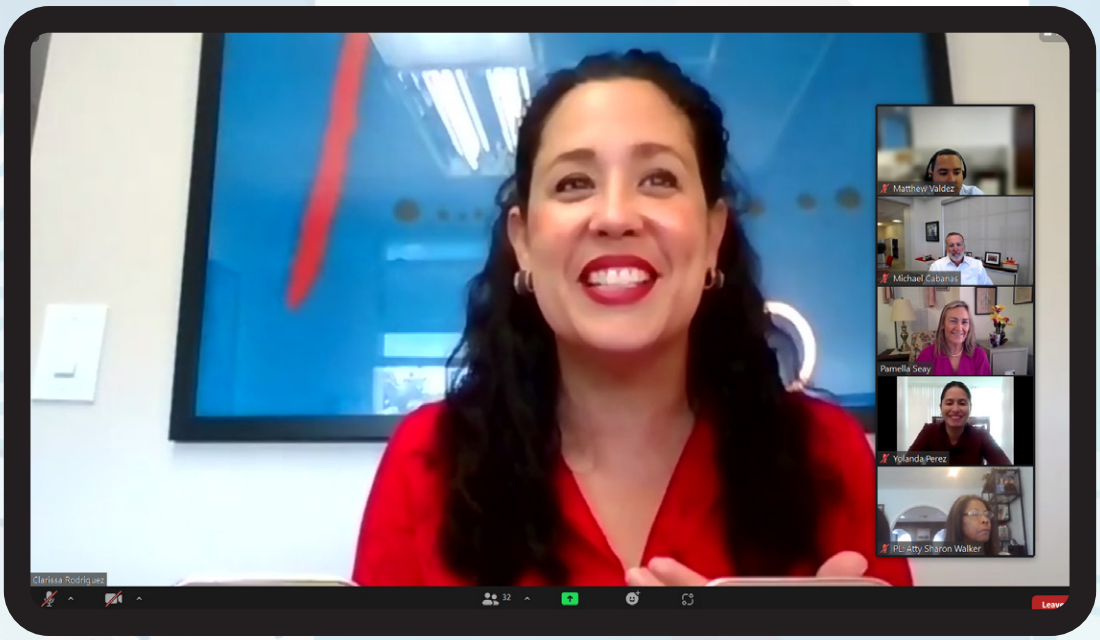
Nic Watkins emcees the live auction.

These brightly painted papier-mâché animal heads were popular auction items.

ILS Lunch & Learn With Pamella A. Seay 27 October 2021

October's ILS Lunch & Learn, hosted by Fiduciary Trust International, featured a discussion with Professor Pamella A. Seay, moderated by Clarissa Rodriguez. Prof. Seay is a founding faculty member and full professor at Florida Gulf Coast University where she teaches law-related courses. She is licensed to practice law in Florida and South Carolina and is Florida Bar board certified in international law. As an attorney, she continues to provide legal advice and consultation for foreign and domestic businesses on international legal issues and ethics. She has published numerous articles on a wide range of international topics and is the author of a book on international businesses in South Carolina and a textbook on study abroad programs, and is a co-author of a book on sovereign immunity and public airport operations. Prof. Seay served six years on The Florida Bar Professional Ethics Committee and is a past chair of The Florida Bar International Law Certification Committee. She also served on the 20th Judicial Circuit Fee Grievance Committee for The Florida Bar.

Pamella Seay shares both serious and humorous stories about her career in international law during the ILS Lunch & Learn on 27 October 2021.



Moderator Clarissa Rodriguez is pictured with five of the nearly thirty Lunch & Learn participants.

Global Legal Landscape of Hospitality & Tourism Roundtable 18 November 2021 • FIU Campus North Miami, Florida

2021 brought a series of important challenges to the hospitality and tourism industry worldwide. From an unprecedented disruption in supply chains to shifts in consumption patterns and the sudden implementation of new technologies, legal professionals have played a key role in helping navigate this new reality. This roundtable held at Florida International University featured a discussion among experts about the most relevant legal issues affecting the food, beverage, and hospitality sectors in the United States and abroad. The roundtable was followed by a cocktail reception, live demonstration, and the opportunity for attendees to craft cocktails, led by student members of the FIU Bartenders Guild and a professor of FIU's Chaplin School of Hospitality & Tourism Management.

Roundtable attendees enjoy an opportunity to socialize during the cocktails demonstration led by members of the FIU Bartenders Guild.

Cristina Vicens and Bob Becerra (front row) and Jeff Hagen, Jim Meyer, and Ana Barton (back row)

Cristina Vicens (right) speaks with a member of the FIU Bartenders Guild as Ana Barton (seated) looks on.

Bob Becerra and Jeff Hagen try their hand at crafting cocktails.

ILS Holiday Party
15 December 2021 • THēsis Hotel
Coral Gables, Florida

Now more than ever, members of the International Law Section are enjoying every opportunity to get together in-person to renew friendships and to welcome newcomers to the section. This year's holiday party, held at Mamey on 3rd, the rooftop restaurant at the THēsis Hotel in Coral Gables, was a festive time of celebration as we close the door on 2021 and look forward to great things in 2022.

Richard Montes de Oca and Jackie Villalba

Sabryna Raymond, Maggy Leonard, Francis Curiel, Tracey Joseph, Cristina Vicens, Norma Meyer, Laura Reich, and Jim Meyer

Eddie Palmer, Laura Reich, Gary Davidson, and Ava Borrasso

ILS Chair Jim Meyer appears to be trying to lead the group in a holiday dance. They're just not into it. Seriously, Jim is pictured here welcoming everyone to this long awaited in-person gathering.

Juliana Lamardo, Elina Santana, Jackie Villalba, and Juan Villalba, Jr.

Susanne Leone and William Diab (Richard and Jeff can be seen "photo bombing" this shot.)

Clarissa Rodriguez, Fabio Giallanza, Richard Montes de Oca, and Lisa McKellar Poursine

Laura Reich, Clarissa Rodriguez, and Fabio Giallanza

Clarissa Rodriguez, Fabio Giallanza, and Sherman Humphrey

Omar Ibrahem, Richard Montes de Oca, Davide Macelloni, and Jeff Hagen

WORLD ROUNDUP

AUSTRALIA

Donald Betts, Jr., Melbourne
donald.betts@jaramer.legal.com.au

Bevan Mailman is named Lawyers Weekly 2021 Indigenous Leader of the Year.

Congratulations to Bevan Mailman, managing principal at Jaramer Legal and global indigenous representative for the North American Australian Lawyers Alliance, for being awarded Indigenous Leader of the Year at the Lawyers Weekly 2021Australian Law Awards.

Yoo-rrook Justice Commission to issue reports in 2022 and 2024.

The Yoo-rrook Justice Commission is due to provide an interim report in June 2022 and a final report in June 2024.

I acknowledge the aboriginal people as the traditional custodians of the land of Australia.[1]

Northern Territory Treaty negotiations have commenced.

The First Nations and the Northern Territory government face an immense opportunity of historical and symbolic significance to negotiate a treaty or treaties. Equally significant is the prevailing view that any treaty must be practical and lead to material improvements in the lives of children and grandchildren. Aboriginal people can now look, realistically, to the future for a practical treaty that will lead to material improvements in the lives of their children and grandchildren.

The Northern Territory (NT) is not a state within Australia's federal system, thus creating fundamental limitations on any treaty negotiation with the NT. As a Commonwealth Territory, the powers exercised by the NT government are conferred and defined by the Commonwealth under the Northern Territory (Self Government) Act of 1978 (Self Government Act). NT legislation giving effect to a treaty must be consistent and comply with the Self Government Act and all other Commonwealth laws in operation across the NT. If the terms of a treaty exceed the powers of the NT (legal and constitutional), or are inconsistent with any element of Commonwealth legislation, they will have no legal effect.

The terms of a treaty or treaties may relate to the transfer of land and rights over resources, matters about cultural heritage and language, and financial compensation.

Principles Guiding the Treaty Consultation Process

The following principles are laid out in a memorandum of understanding (MOU) that serves as guidance for the treaty consultation process:

1. It is envisaged that should a treaty ultimately be negotiated, it will be the foundation of lasting reconciliation between the First Nations of the Territory and other citizens with the object of achieving a united NT.
2. All aboriginal people of the NT need to be heard, and the consultation process agreed to in this MOU needs to be inclusive, accessible, and transparent to all.
3. Traditional owners, as the original owners and occupiers of the NT, and represented by the Aboriginal Land Councils, are integral to consultation concerning a treaty.
4. All territorians should ultimately benefit from any treaty that is agreed to in the NT.
5. The NT government must not exclude from discussions any legitimate issue raised by the parties or other aboriginal people for inclusion in a treaty while the consultation process agreed to in this MOU is underway.
6. It is agreed that:
   a. Aboriginal people, the First Nations, were the prior owners and occupiers of the land, seas, and waters that are now called the Northern Territory of Australia;
   b. The First Nations of the NT were self-governing in accordance with their traditional laws and customs; and
   c. The First Nations peoples of the NT never ceded sovereignty of their lands, seas, and waters.
7. It is also agreed there have been deep injustices done to the aboriginal people of the NT, including violent dispossession, the repression of their languages and cultures, and the forcible removal of children from their families, which have left a legacy of trauma and loss that needs to be addressed and healed.
8. The treaty must provide for substantive outcomes and must honor the Articles of the United Nations Declaration on the Rights of Indigenous Peoples.

***Donald Betts, Jr.**, is an Australian lawyer. Mr. Betts is a former Kansas state senator and U.S. congressional candidate. He is an inaugural member of the 2019 AMCHAM Global Leadership Academy, cofounder and president of the North American Australian Lawyers Alliance (NAALA), and graduate of the RMIT Global Indigenous Trade Routes Program. He has overcome*

enormous hurdles to serve as the youngest state senator in Kansas's history when elected and Australia's first African-American to achieve a JD at Monash University.

Endnote

1 This is a traditional acknowledgement made to respect and recognize the First Nations peoples.

INDIA

Neha S. Dagley, Miami
neha.dagley@gmlaw.com

Cairn Energy ends long-standing tax dispute with the Republic of India.

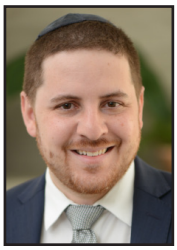
Britain's Cairn Energy PLC (now known as Capricorn Energy PLC) dropped various lawsuits against the Government of India, and its entities, in the United States and the United Kingdom. According to a press release, Cairn changed its company name effective 13 December 2021; the press release further states, "[g]iven the recent legislative change in India and our participation in the related tax refund process, we are now putting in place the planned name change." In December 2020, Cairn received a favorable award, in the amount of US$1.2 billion plus interest and costs, against India in connection with certain retroactive taxation laws enacted by India. Throughout 2021, Cairn was engaged in various efforts to identify and seize Indian state assets across the world. In May 2021, Cairn filed suit against Air India in the United States District Court for the Southern District of New York seeking to hold it liable as the alter ego of the Republic of India. Other similar actions were filed in various jurisdictions, including France, where Cairn sought to seize real estate in Paris owned by the Indian government. The move toward dropping the various lawsuits, in multiple jurisdictions, came at the heels of a settlement of the tax dispute. As announced by Cairn, it "entered into undertakings with the Government of India in order to participate in the . . . [Taxation Amendment Act] allowing the refund of taxes previously collected from Cairn in India." Cairn further indicated that it would commence the filing of necessary documentation under Indian Income Tax Rules intimating the "withdrawal, termination and/or discontinuance of various enforcement actions." These recent events signal the end of a long-standing tax dispute between Cairn Energy and India.

Delhi High Court quashes order rejecting trademark application for "And Then There Were None" filed by Agatha Christie Limited.

On 5 December 2017, Agatha Christie Limited filed an application for the registration of the trademark "AND THEN THERE WERE NONE" under Classes 9, 16, and 41 of the Schedule to the Trademarks Rules 2017. The order rejecting the application stated, in pertinent part, as follows: "To my mind, applied mark is a kind of mark where one needs to educate the people that its not just any phrase but a trademark and is intended to be so used. Applied mark is only proposed to be used. There is no substantive evidence that the applied mark has been used as a trademark ever. Applied mark lacks distinctiveness. Objection sustained. Refused." In an order dated 8 December 2021, the Honorable Mr. Justice C. Hari Shankar of the Delhi High Court found, among other reasons, that the order should be set aside because it failed to set forth sufficient reasons to justify the decision. The Delhi High Court further recognized that the right to register a mark is a "valuable right, partaking of the character of Article 19(1)(g) of the Constitution of India," and it therefore had to be "informed by reasons which should be apparent on the face of the decision." Interestingly, Justice Shankar noted at the outset of his opinion that he provided respondent's counsel with an opportunity to object to him presiding over the matter on grounds that he was "an avowed aficionado" and "admirer" of Agatha Christie; respondent's counsel responded with an emphatic no and stated that he, too, is one. It is hoped this decision of the Delhi High Court will pave the way for a new trend where the trademark registry in India will be required to provide the reasons for rejection of a mark.

***Neha Dagley** is senior counsel in the litigation practice group at Greenspoon Marder LLP. She focuses her practice on representing and advising clients—both plaintiffs and defendants—in a wide array of commercial and business litigation in state and federal courts, including disputes encompassing contracts, commercial and corporate transactions, fraud and misrepresentation issues, and real estate matters. A native of Mumbai, Ms. Dagley is fluent in Hindi and Gujarati. She is the cofounder and president of the Australia United States Lawyers Alliance, Inc. (AUSLA), and currently serves as chair of the India Subcommittee of The Florida Bar's International Law Section Asia Committee.*

LATIN AMERICA



Cintia D. Rosa, São Paulo, Brazil, and Rafael Szmid, New York
cintia.rosa@hlconsultorialtda.com.br; rafael.szmid@hoganlovells.com

Brazil's pandemic anticorruption investigations lead to legislative recommendations.

Particularly for Brazil, 2021 was marked by investigations launched to address alleged misconduct from measures adopted to fight the pandemic. Amid harsh criticisms of the federal government, particularly regarding the acquisition of vaccines and the

lack of efforts to contain the spread of the virus, on 15 January 2021, the Congress requested the launch of a Parliamentary Inquiry Commission (CPI)—as defined as an investigation under the Congress's jurisdiction—to investigate possible irregularities in the public management of the pandemic.

The CPI was formally launched on 27 April 2021, a time when Brazil's official lethality coefficient was 2.73% higher than the world's 2.18% average. The coefficient provided by health research institutes, such as Fundação Oswaldo Cruz (Fiocruz), pointed out that Brazil's coefficient would be close to 4.4% if it were not for the underrecording of deaths due to a lack of testing in the country. On 27 October 2021, the CPI's closing date, the scenario was already quite different, with Brazil reaching more than 60% of the population vaccinated; however, despite the positive change in the critical scenario that gave rise to the investigation, the conclusions the CPI made in its final report (the CPI Report) were considered quite harsh, attributing various violations to the public administration (including representatives, politicians, and even President Jair Bolsonaro) and to private entities and individuals (such as physicians, hospitals, and corporations).

Although the CPI Report is extraordinarily detailed and presents evidence of the violations described, it is strictly instructional and recommendatory, as jurisdiction for criminal prosecution lies with the judiciary—in particular, the public prosecutors and the Supreme Court. Nevertheless, the CPI Report also brings detailed and robust legislative proposals to prevent similar conduct, which may have a more expedited effect than the enforcement of individual liabilities. Among the recommendations, the following stand out:

Law against fake news: The CPI Report recommended the creation of a specific law to curb the dissemination of fake news, specifically providing for official media vehicles to be held liable for the distribution of fake news or failure to combat it. It is noteworthy that there are several bills on this subject in progress in Congress, including to make the distribution of fake news a crime under certain circumstances.

Increased penalty for violations committed in periods of public calamity: The CPI Report also recommends amending the Brazilian Criminal Code to provide for increased penalties for crimes (e.g., fraud in public procurement and corruption) committed during a period of public calamity, such as a pandemic.

Improper influence of private entities in the public sphere: According to the CPI Report, a significant share of the violations observed involved individuals from the private sector who influenced the federal government's decision-making process. Therefore, the CPI Report recommended making it a crime to adversely influence the public administration's decision-making process, with increased penalties for such actions during a public calamity.

Increased enforcement and regulation in the health sector: The CPI Report pointed out the need to improve the management of the public health system, especially concerning the adoption of instructions to implement scientifically proven treatments. For the private sector, the CPI Report highlighted an urgent need for regulation in the industry, particularly for health plan providers that adopt the vertical model, in order to curb the interference of health operators in the choice of treatments offered to patients.

Corporate transparency: The CPI Report proposed that the National Department of Business Registration should update the regulations and procedures necessary to ensure the timely updating of the registrations of commercial companies in the event of the death of a partner in order to ensure transparency, authenticity, safety, and effectiveness of the corporate records.

Although Brazil's population has closely watched the development of the CPI and the practical results of the CPI Report are being closely followed by the media, its concrete results are still uncertain, particularly given the 2022 presidential election, which has tended to slow legislative development in Congress. Nevertheless, it is expected that oversight by the international community of the conduct revealed by the CPI Report will support the enforcement of its recommendations.

Cintia Rosa *focuses her practice on internal corporate investigations and compliance matters, leveraging her experience with criminal proceedings and white-collar crime from when she worked at the Brazilian Federal Police. She earned her law degree (LLB) from the Pontifical Catholic University of São Paulo (PUC-SP) and has specialization in compliance from the GV São Paulo Law School.*

Rafael Szmid *is a dual qualified lawyer (NY/USA and Brazil) with ten-plus years of experience advising clients on anticorruption, antitrust, compliance, and corporate governance matters. He also has experience working at the Brazilian Competition Authority and as a compliance lawyer of a Fortune 100 multinational conglomerate. He holds a PhD from the University of São Paulo, an LLM from Stanford Law School, and a Master of the Science of Law from the University of São Paulo. He was a visiting student at the University of Barcelona, Spain.*

MIDDLE EAST

Omar K. Ibrahem, Miami
omar@okilaw.com

Bounced check cases decriminalized in Dubai.

Beginning in December 2021, Dubai courts are no longer treating bounced checks as criminal matters. Previously, bounced checks were treated as criminal matters with offenders facing penal penalties. Under the new legal regime, beneficiaries can go to court to ask for a check to be enforced, and banks are obligated to release any available funds in the bank account for the benefit of the check. Cases where people deliberately issue checks to con others will still be criminalized.

DIFC Courts launch specialized court to settle digital economy disputes.

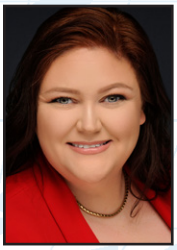
The Dubai International Financial Centre Courts (DIFC Courts) are launching a Specialized Court for the Digital Economy aimed at simplifying the settlement process of complex civil and commercial disputes related to the digital economy. The new specialized court will deal with national and international disputes related to current and emerging technologies such as blockchain technologies, artificial intelligence, cloud services, unmanned aerial vehicles, 3D printing technologies, and robotics.

Kingdom of Saudi Arabia reaps benefits from ultimatum.

In February 2021, Saudi Arabia stated that it will stop signing contracts with foreign companies with hubs in other countries starting in 2024. Many questioned what multinational companies would do because while many do business in Saudi Arabia, they have preferred to have their regional headquarters in the neighboring UAE. The ultimatum appears to have worked with forty-four international corporations, including PepsiCo, Siemens, and Unilever, having moved their headquarters to Riyadh.

Omar K. Ibrahem *is a practicing attorney in Miami, Florida. He can be reached at omar@okilaw.com.*

NORTH AMERICA



Laura M. Reich and Clarissa A. Rodriguez, Miami
laura@reichrodriguez.com; clarissa@reichrodriguez.com

U.S. Department of Justice pursues Facebook, Microsoft over immigration-related discrimination claims.

The U.S. Department of Justice's investigations into tech giants Facebook and Microsoft resulted in significant fines for the companies arising from discriminatory hiring practices. The Justice Department had brought suit against Facebook, accusing it of unfairly favoring job candidates with temporary work visas, such as H-1B visas, over U.S. citizens and permanent residents. To resolve the action, Facebook agreed in October 2021 to pay US$4.75 million in civil penalties to the federal government and US$9.5 million to U.S. workers, as well as revise some training and hiring policies. The Justice Department's Civil Rights Division reported that the Facebook settlement is the largest fine and monetary award in the history of the Immigration and Nationality Act's antidiscrimination provision.

In December 2021, the Justice Department announced it reached a settlement with Microsoft to resolve allegations that the company had discriminated against non-U.S. citizens by asking them for unnecessary, specific immigration documents to prove they could work for the company without needing its sponsorship for work visas. The settlement also resolves claims that Microsoft improperly asked lawful permanent residents for unnecessary or different documents than legally required to verify or reverify their permission to work in the United States.

While the Immigration and Nationality Act requires employers to verify a worker's permission to work in the United States, it also prohibits employers from asking applicants for unnecessary documentation or limiting the types of valid documentation that an applicant is permitted to offer to show permission to work. Under the settlement, Microsoft will pay a civil penalty and overhaul parts of its hiring process.

Mexican leader rebuffs calls for Mexico to deal in cryptocurrency.

Both the Bank of Mexico and the Mexican National Bank and Securities Commission in June 2021 warned Mexican banks and other financial institutions not to deal in digital currencies, even as some Mexican lawmakers called for Mexico to follow El Salvador's lead in allowing cryptocurrencies like Bitcoin to be used as legal tender. Mexican President Andrés Manuel López Obrador rebuffed those calls in late 2021, saying that Mexico would not change its position on cryptocurrency. Highlighting concerns over tax evasion, money laundering, and other crime, President López Obrador stated that, despite many innovations in finance, Mexico "must maintain orthodoxy" in its financial management.

Although athletes will compete, United States and Canada plan diplomatic boycott of 2022 Beijing Winter Olympics.

The United States intends a "diplomatic boycott" of the Winter Olympics in Beijing in February 2022 to protest Chinese human rights abuses, a move that China pledged to greet with "firm countermeasures." In announcing the boycott, the White House stated that U.S. athletes will continue to compete and will "have our full support," but

added "we will not be contributing to the fanfare of the games."

Canada has also announced it will not send any official representatives to the Beijing Winter Olympics as part of the growing diplomatic boycott over China's record of human rights abuses. Canadian President Justin Trudeau stated that he does not believe the move from Canada or by allies will "come as a surprise" to China.

While a full boycott would see U.S. and Canadian athletes unable to compete at the 2022 Winter Olympics, there are concerns that such a full boycott would unfairly penalize athletes. A diplomatic boycott refers only to a boycott by those diplomatic missions that typically attend Olympic Games and events. While many are applauding a diplomatic boycott to stand for human rights, others are calling it only a half-measure and are continuing calls for a full boycott.

Canadian Council on International Law meets to discuss "getting international law back on track" in Canada.

In October 2021, the Canadian Council on International Law (CCIL) held its 50th annual conference where the key topic of debate was getting international law back on track in Canada and beyond. Recognizing that the "coronavirus pandemic and ever-deepening economic and strategic rivalries have called the durability of the international economic order into question," the CCIL invited policymakers, practitioners, academics, and students of international law to gather and consider the future of international law. The CCIL seeks to encourage the study of international law and to broaden relations and dialogues between international lawyers, scholars, individuals, and organizations across Canada and around the world.

Laura M. Reich *and* ***Clarissa A. Rodriguez*** *are the founding shareholders of Reich Rodriguez PA. The firm specializes in commercial litigation, international arbitration, and alternative dispute resolution. Reich Rodriguez's practice areas include art law disputes with an emphasis in recovery and restitution of stolen and looted art, with a focus on European art and art of the Americas.*

WESTERN EUROPE

Susanne Leone, Miami
sleone@leonezhgun.com

European anti-SLAPP initiative aims to protect journalists and human rights defenders.

The EU recently launched an anti-SLAPP initiative, which is part of the European Democracy Action Plan. The initiative aims to protect journalists and human rights defenders against a strategic lawsuit against public participation (SLAPP). These abusive lawsuits brought against persons such as journalists to prevent them from informing the public and reporting on matters of public interest. SLAPPs can take several forms, but the allegations typically relate to defamation. SLAPPs are a threat to democratic values and fundamental rights, including freedom of expression and people's right to receive and impart information and ideas without external interference. Such lawsuits are increasingly seen across many EU member states. Hostile activity against journalists is growing, including assassinations in the most tragic cases.

The EU initiative aims to develop a common understanding of what is considered a SLAPP and also provides legal professionals with awareness, expertise, and effective means to deal with SLAPPs. Further, the initiative aims to ensure necessary support is available for those facing SLAPPs.

EU citizens and member states, journalists, nongovernmental organizations, judges, and legal professionals were invited to express their views on the anti-SLAPP initiative during a public comment period that ended on 10 January 2022.

The EU adopts recommendation to strengthen safety of journalists and other media professionals.

In addition to the anti-SLAPP initiative, the EU Commission adopted Recommendation 2021/1534 (the Recommendation) on 16 September 2021 to strengthen the safety of journalists and other media professionals in the European Union. Due to the increasing number of physical, legal, and online threats against media professionals, the Recommendation calls on member states to be more observant and to investigate and prosecute criminal acts. EU member states are encouraged to involve European authorities, such as Europol and Eurojust, if necessary. Member states shall assist in furthering cooperation between law enforcement and the media to identify and tackle the threats journalists are facing and to protect those whose safety is at risk.

The EU has called for the creation of independent national support services including helplines, legal advice, psychological support, and shelters for media professionals facing threats. The media shall also gain nondiscriminatory access to information including press conferences and documents held by public authorities.

Journalists are most frequently attacked during protests and demonstrations. One in three attacks occurred during demonstrations in 2020. The Recommendation suggests training for law enforcement authorities to enable media professionals to work safely during such events. Additionally, liaison officers shall inform journalists about potential risks in advance of planned events.

While safety concerns arise mostly during protests and demonstrations, they are also a concern in the context of online safety and digital empowerment, as well as in regard to female and minority journalists. In the context of online safety, a major concern for journalists is online incitement to hatred, threats of physical violence, as well as cybersecurity risks and illegal surveillance.

As a next step, the EU Commission will discuss implementation of the Recommendation with EU member states and stakeholders in appropriate forums, such as the European News Media Forum. Additionally, the Commission will provide funding, perform evaluations, and continue to analyze the safety of journalists in the EU as part of the annual Rule of Law Report.

Susanne Leone *is one of the founders of Leone Zhgun, based in Miami, Florida. She concentrates her practice on national and international business start-ups, enterprises, and individuals engaged in cross-border international business transactions or investments in various sectors. Ms. Leone is licensed to practice law in Germany and in Florida.*

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furniture, construction materials, etc.) from overseas than ever before. China remains our number one trading partner, and there is no reason to expect that to change. In fact, our trade with China remains strong despite former President Trump's additional tariffs of 25% on some Chinese goods, the record number of antidumping duty orders on Chinese products, and the intensive examinations by CBP officials of Chinese-manufactured products. The rapid decrease in imports in 2020 because of COVID-19, and the equally rapid increase in 2021, challenged the international supply chain, but over time, the new law titled the Infrastructure Investment and Jobs Act passed by Congress and signed into law by President Biden in November 2021 will help. The United States is far behind other countries in terms of the quality of U.S. seaports, airports, rail, and road construction.

Have you ever tried to count the number of ship-to-shore cranes operating around the clock at the Port of Shanghai? Or stood on a wharf next to a vessel that can hold 12,000 20-foot shipping containers? Or watched cargo operations at "smart" ports in Hamburg, Germany, or Rotterdam, The Netherlands? If you do, you will realize the gargantuan business of international trade, even with all its challenges, still works very well! Enjoy your Starbucks coffee from beans sourced from Colombia, drive a Lexus made in Japan, taste delicious Chilean sea bass, and watch Manchester United play soccer on your iPad made in China. These are the benefits of a successful international supply chain. While health care workers certainly deserve praise for valiantly helping during the pandemic, the same respect should be accorded the men and women who are involved in the international supply chain—24 hours a day, 365 days a year. Next time you see a trucker, a longshoreman, or maybe even a CBP officer, wave and say, "Thank you!"

Peter A. Quinter *is chair of the U.S. Customs and International Trade Law Group at the law firm of GrayRobinson PA. Based in Miami, Florida, for the past 27 years, he provides advice and representation to U.S. and foreign companies regarding their import, export, and international trade compliance with federal law enforcement agencies, especially U.S. Customs and Border Protection. Previously, he was a senior attorney in the Office of Chief Counsel, U.S. Customs, Miami. He can be reached at peter.quinter@gray-robinson.com or (305) 416-6960.*

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- The OECD has proposed establishing a mandatory binding arbitration procedure for resolving disputes.[8] Not only does this change treaty relationships between jurisdictions, but it cedes authority from elected governments to a nonelected OECD procedure with regard to settling disputes over international taxing rights.
- Pillar One's threshold is largely tied to profits. According to U.S. Securities and Exchange Commission (SEC) filings, Amazon may technically not qualify under Pillar One because its global profit rate is 4.3%.[9] This is largely due to reinvestment, company segmentation, and accounting mechanisms. If large companies are able sidestep rules by getting creative with their books, the global tax deal will not have much effect without the lowering of thresholds.
- Pillar Two consists of three main components that lead to an Effective Tax Rate (ETR) of at least 15%: (1) an Income Inclusion Rule (IIR) that imposes a top-up tax on a parent entity if its subsidiary has a tax lower than the minimum rate; (2) an Undertaxed Payment Rule (UTPR) that denies deductions hand-in-hand with the IIR based on the tax rate; and (3) a Subject to Tax Rule (STTR) that allows jurisdictions to impose tax on certain related party payments.[10] How all three will work together to ensure the ETR of 15% is met on a global scale could be handled in a number of ways, but compliance will undoubtedly play a sizeable role in effectively implementing this web of cross-payments. This begs the obvious question of whether developing nations can support the necessary compliance infrastructure needed to participate.
- The issue of double taxation has yet to be resolved. For example, companies could end up paying tax twice on the same income if they do not receive a tax credit or an exemption for the amount of income reallocated to a market jurisdiction. These issues could become political in nature, resulting in a new system that designates clear winners and losers.[11] It is not unreasonable to think that certain companies could owe zero tax to their home countries because of taxes paid to market countries.
- Another large elephant in the room is the necessity for accounting rules to be made uniform. Financial accounting is not designed to be exact, as different countries value goodwill and intangibles differently, some use book value and others do not, and many countries use different times of the year to calculate corporate tax. At this time, it is anticipated that the OECD will adopt a system known as "deferred tax accounting," but many governments are hesitant to adopt a system of accounting with which they have little experience.[12] There is significant ongoing lobbying on this issue, as companies try to influence negotiators to take into account these companies' own estimates.[13]

The above laundry list of items seems cumbersome, at best, and does not even fully delve into the overly technical aspects of "multijurisdictional blending" that will need to be harnessed by those who police the implementation of these new, complex rules.

U.S. Ratification Issues

In addition to the various mechanical issues associated with drafting a set of international laws that works for each country, there is a question of how the process of implementation would work in *this* country.

Article II, Section 2 of the U.S. Constitution requires

Global Minimum Tax, continued

a two-thirds Senate vote to enter into a bilateral or multilateral tax treaty. Due to the reallocation provisions of Pillar One, most U.S. income tax treaties would need to be revisited, as those income tax treaties contain various provisions that would be trumped by this global agreement. For example, Model Article 5 of U.S. income tax treaties is based on the permanent establishment standard, which Pillar One directly contradicts by taxing based on remote presence in a jurisdiction. Model Article 7 of U.S. income tax treaties is based on allocation of business profits to a permanent establishment as well. Pillar One is likely doomed if it needs a supermajority in the Senate. So, how will this global tax deal pass in the United States?

Treasury Secretary Janet Yellen stated recently that the Article II process was but "one way" to go about it, suggesting there is an alternate approach in mind.[14] Following these comments, Senator Mike Crapo of Idaho penned a letter on 8 October 2021 to the Treasury, accusing it of contemplating procedural steps that would undermine the Senate's constitutionally granted authority. Despite this opposition, there is reason to believe the global tax agreement can bypass Senate supermajority by being implemented as a revenue measure through a process beginning in the House. Treasury official Rebecca Kyser described in her 2013 *Yale Journal of International Law* article that the requirement that revenue bills originate in the House is inherently at odds with not including the House in the tax treaty ratification process, dismissing the fact that tax treaties are not revenue-raising as they reduce, not raise, taxes.[15]

In fact, there is precedent for the executive branch overriding the financial system, as recently as the Obama administration, when the Foreign Account Tax Compliance Act (FATCA) and its flurry of bilateral intergovernmental agreements originated with the executive branch and the House. In this case, however, only the exchange of financial information was considered, not a reallocation of taxable profits. At that time, Senator Rand Paul challenged the validity of FATCA, arguing its unorthodox passage denied him his constitutional right as a senator to freeze its progress.[16] Even Treasury General Counsel Neil MacBride has acknowledged treaty rules would need to be updated.[17]

Considering the Democratic Party's internal division and slim Senate majority, it is unclear whether both Pillars will be approved. Although Pillar Two could be implemented in the House, adoption of Pillar One is less certain. Some U.S. senators are touting the two-pillar agreement for its aid to U.S. businesses, but they don't seem to understand the far-reaching impact of the establishment of these international standards, and how the global accord could negatively impact U.S. sovereignty going forward. For example, Rep. Lloyd Doggett of Texas stated that the pending agreement means "small businesses will compete on a more even playing field, as their larger competitors—some of whom have paid nothing in tax year after year—will now contribute to the physical and social infrastructure that makes our American economy possible."[18] In reality, a 15% global minimum tax rate still undercuts the U.S. corporate rate of 21%, which the Biden administration has already proposed raising. Colombia University professor and economist Joseph Stiglitz might summarize it best: "In the United States, major changes in tax law require economic analysis before adoption. It's just so disappointing that they are asking countries to sign a blank check—to sign up without knowing how this is going to work out."[19]

Foreign Political Resistance

Similar to the United States, other sovereign nations must navigate their own political processes in order to implement new tax laws. Even before that, though, certain countries have voiced opposition to the establishment of a global minimum tax, or in some cases, have disagreed with other countries over the 15% proposed rate.

While nearly all countries consented to the broad political agreement reached on the plan on 1 July 2021, Ireland, Estonia, Hungary, Kenya, Nigeria, and Sri Lanka did not.[20] Ireland, for example, for years had attracted significant foreign investment due to its tax rate of 12.5% combined with its European Union status. Ireland would not agree initially to a global minimum tax rate of 15% as it was sure to deter new business from coming to its shores; however, on 7 October 2021, Ireland agreed to join the agreement (perhaps grudgingly) after the minimum rate, previously written as "at least 15%" dropped "at least"

Global Minimum Tax, continued

from its language.[21] Estonia had supported Pillar One, but was also hesitant on Pillar Two as its finance minister noted the deal "was too vague, with a number of details that could prove harmful to a small open economy such as ours."[22] Argentina is particularly concerned with how developing countries will obtain the infrastructure to measure use of data to determine in-scope payments.[23] Canada is concerned that the global agreement will lead to increased foreign government taxes on Canadian multinational operations and potentially a decrease in Canada's GDP.[24]

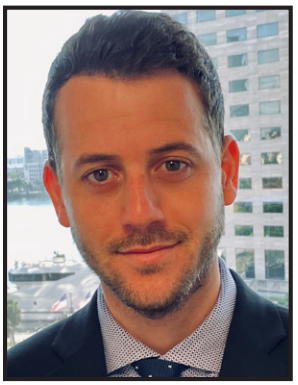
There is little doubt that countries reliant on the corporate services industry, such as British Virgin Islands and Cayman Islands, oppose these global deals. While the corporate service industry will not go away overnight, thanks to the high thresholds in place, these laws give the impression that the sovereignty of less wealthy countries is not as important as the large GDP nations of the world as they allocate income and taxing rights as they see fit. A clear degradation of a nation's rights to rule over its independent land is transpiring as this agreement moves forward.

Despite the above pleas for reconsideration, some countries are steadfastly in favor of the agreement due to the reallocation of income, particularly cash-strapped countries that could use it, such as Greece.[25] Some members of the EU Greens coalition are pushing for the agreement to go even further—they claim the 15% minimum effective tax rate is too low and that the 750 million euro threshold for multinational companies is far too high.[26] The Czech Republic and Slovenia agree with these assertions and would have preferred the possibility of the 15% tax rate being raised.[27]

What's Next for Legal Practitioners?

Most legal practitioners are likely wondering how this directly applies to their clients. It is well within the realm of possibility that these rules do not impact companies that most attorneys represent, that is, those companies that generate under 750 million euros in revenue annually. That is not to say, however, that the infrastructure provided by Pillar One and Pillar Two will not eventually be relevant to most legal practices in the future.

In fact, increasing the number of companies that will be covered under these agreements by lowering revenue thresholds over time is well within the intent of the drafters. Once adopted and implemented, it will become a tough sell as to why it should be limited to only a few of the world's largest companies. Once this global tax system is in place and operational, the sovereignty of each nation in how it taxes its citizenry will be forever changed, and at least this author believes that the lowering and possible eventual removal of thresholds and caps will come. With that, every international practitioner will be looking not only to the Internal Revenue Code, but also to a new OECD playbook for how finances must be reallocated in international deals. Ultimately, the reverberations of the deal will be borne by the end consumer, and it will be the duty of international legal professionals to serve as global tax advisers to ensure their clients are aware of this new economic reality in their cross-border business dealings.



Jeffrey S. Hagen *is an international tax attorney with Harper Meyer LLP, located in Miami. He is a member of The Florida Bar International Law Section's Executive Council, is chair of the ILS Tax Committee, and is* International Law Quarterly's *special features editor. If you have questions relating to Pillar One or Pillar Two, or other international tax issues, please reach out to Mr. Hagen at jhagen@harpermeyer.com or 305-577-3443.*

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Immigration Requirements to Reside in The Bahamas

Clients wishing to avoid severe tax liabilities in the United States may consider residing in The Bahamas, due to its politically and economically stable government, warm climate, and convenient location, as it about thirty minutes' flying time from Miami, Florida, with direct flights to London, New York, Toronto, and other major cities. In addition, the country imposes no income, capital gains, wealth, inheritance, succession, gift, or unemployment taxes on its residents.[10]

In general, foreign travelers seeking to visit The Bahamas for less than thirty days require only a valid passport;[11] however, citizens of some countries require visas, so it is best to check the webpage of the country's Ministry of Foreign Affairs.[12] Visitors are allowed to stay in the country for up to three months.[13] For non-Bahamian clients seeking to reside in The Bahamas, one viable option is to apply for a Certificate of Permanent Residence, a document of legal status, which is issued to an individual for the duration of his or her life, unless revoked, and gives him or her the right to reside and/or work in the country.[14] Unless they have been married to a Bahamian spouse for at least five years, the only viable option to obtain permanent residence for foreign nationals will be to invest a minimum of BSD$500,000 in a residence or the Bahamian economy, with investments of BSD$750,000 or more receiving expedited processing (twenty-one days) instead of the normal three-month processing time.[15] The period of the ownership of the investment is ten years, and the permanent residency can be revoked if an investor violates the terms of the investment, such as selling a home before the ten-year holding period has expired, is convicted of a crime, or fails to spend at least ninety days per year in the country.[16]

Another option for non-Bahamians who own second homes in The Bahamas is to apply to the director of immigration for an annual Homeowner's Resident Card, which entitles the owner, spouse, and any minors endorsed on the owner's card to enter The Bahamas hassle-free and to reside in the country for the duration of the card (one year).[17] The intended purpose of the card is to facilitate entry into The Bahamas with minimal formalities, as there is no need for a return ticket to the owner's country and the card is renewable annually.[18]

Immigration Requirements to Reside in the Cayman Islands

The Cayman Islands is another valid option for foreign nationals who do not want to reside in the United States. The Cayman Islands is one of the most well-known tax havens for corporations in the world, as this country has no income, corporate, inheritance, capital gains, or gift tax.[19] The country also imposes no property taxes or rates, and no controls on foreign ownership of property and land on its residents.[20]

Foreign visitors are allowed to visit the Cayman Islands for a period of up to six months.[21] There are several options for foreign nationals seeking to reside in the Cayman Islands. The first is by applying as a person with independent means, which grants a temporary residency permit, valid for twenty-five years, which allows the individual to include his or her spouse and any dependents.[22] This permit does not allow the individual

Residence Options, continued

or his dependents to work in the country. To establish Cayman Islands residency to reside on Grand Cayman as a person of independent means, the individual must establish the following:

- An annual income of about CI$120,000 derived from outside of the Cayman Islands;
- Maintain a Cayman Islands bank account with a minimum deposit of CI$400,000; and
- Have invested the sum of CI$1 million, of which at least CI$500,000 must be in developed real estate in Grand Cayman.[23]

The figures are lower if the foreign national wishes to reside in Cayman Brac or Little Cayman: annual income of CI$75,000 and an investment sum of CI$500,000 of which at least CI$250,000 must be in developed real estate in Cayman Brac or Little Cayman.[24]

Another option for foreign nationals wishing to reside in the Cayman Islands is a Certificate of Direct Investment, which is issued to individuals who are willing to make a CI$1 million investment into a business that creates local jobs and who will take an active role in managing that business (of which at least 30% of the employees are Caymanians) .[25] In addition to the raw investment, applicants for a Certificate of Direct Investment must also prove they have a substantial business track record or an entrepreneurial background, including specific professional, technical, and other knowledge relevant and necessary to carry on the pertinent business.[26] Similar to the residency program for persons of independent means, the Certificate of Direct Investment is valid for twenty-five years and spouses and dependents are included on the application.[27] The Certificate of Direct Investment has a physical presence requirement: the investor must live in the country for at least ninety days per year.[28]

The final option for foreign nationals seeking to reside in the Cayman Islands is to invest in a local business or be employed in senior management to qualify for a Cayman Islands Residency Certificate through Substantial Business Presence. To establish a Substantial Business Presence, the individual must own (or propose to own) at least 10% of the shares in a business in an approved industry.[29] These approved industries primarily include financial and insurance services.[30] Alternatively, the individual can also establish a Substantial Business Presence if his or her employer can prove the applicant works in a senior management position.[31] This certificate is valid for twenty-five years and also has a ninety-day annual physical presence requirement.[32]

Immigration Requirements to Reside in Turks and Caicos

Like the other countries discussed in this article, the Turks and Caicos Islands offers foreign nationals a highly attractive tax environment, with no income, capital gains, property, inheritance, or corporation tax for residents.[33]

Foreign visitors are allowed entry to the Islands for a period of up to ninety days with a valid passport and a return ticket.[34] There are a couple of options for foreign nationals to reside in the Turks and Caicos Islands. The first option is a renewable Annual Temporary Residence Permit, granted in the case of persons with independent means who have made a qualifying investment in a home or business in the Turks and Caicos (the investment amount must be a minimum of US$500,000 on the islands of Providenciales and West Caicos, or US$250,000 on any of the other islands in the country).[35]

The second option for foreign nationals to reside in Turks and Caicos is to apply for a Permanent Residence Certificate via investment in real estate, a business, or a public sector project in the archipelago, for which there is a fee of US$25,000.[36] For real estate investments, the minimum amount is US$1 million on Providenciales, or US$300,000 on the other islands in the country.[37] For business investments, the minimum is US$1.5 million on Providenciales, or US$750,000 on the other islands.[38] The minimum investment in a public sector project is US$1 million.[39]

U.S. Visa Alternatives for Clients Who Wish to Limit Their Tax Liability

Foreign nationals who wish to reside in the United States but still limit their tax liability on their worldwide income have a couple of options available to them.

Residence Options, continued

Student Visas

As discussed earlier in this article, individuals who are temporarily present in the United States under an F, J, M, or Q visa are exempt from the substantial presence test and are taxed as nonresident aliens under the Internal Revenue Code. Individuals entering the United States to attend a university or college, high school, private elementary school, seminary, conservatory, or another academic institution, including a language training program, are issued F visas.[40] Individuals entering the United States to attend vocational, technical, or other recognized nonacademic institutions, other than a language training program, are issued M visas.[41] Exchange visitor (J) visas are nonimmigrant visas for individuals approved to participate in exchange visitor programs designated by the U.S. Department of State.[42] Exchange visitor categories include au pairs, camp counselors, interns, physicians, scholars, students, teachers, and trainees.[43] The Q nonimmigrant visa is for participants of international cultural exchange programs designated by the U.S. Department of Homeland Security.[44]

E-2 Treaty Visas

Another option for qualifying foreign nationals wishing to limit their tax liabilities is an E-2 investor visa. The E-2 nonimmigrant classification allows a national of a treaty country (a country with which the United States maintains a treaty of commerce and navigation) to be admitted to the United States when investing a substantial amount of capital in a U.S. business.[45] The validity period of the visa depends on the treaty country, but the majority of the treaty countries issue visas valid for five years and multiple entries. Qualified treaty investors and employees will be allowed a maximum initial stay of two years on their I-94 cards, but an E-2 nonimmigrant who travels abroad will generally be granted an automatic two-year period of readmission by U.S. Customs and Border Protection when returning to the United States.[46] As long as the treaty national complies with the original E-2 visa requirements, he or she can extend the E-2 visa indefinitely. Since U.S. Citizenship and Immigration Services does not impose any limit on the time the E-2 visa holder spends abroad, foreign nationals in E-2 status can monitor their days in the United States to avoid triggering the U.S. resident alien taxation rate that is imposed on foreign nationals who spend 183 days or more in the United States. Under this approach, foreign nationals will be taxed on their U.S. income solely at the nonresident taxation rate.

Some E-2 visa holders, who are subject to the U.S. resident taxation rate on worldwide income and cannot establish the "closer connection" exception previously discussed in this article, have one additional argument to avoid severe tax liability. This exception lies in that most U.S. tax treaties include clauses that either allow foreign nationals of the country to continue to remain nonresidents of the United States even if they spend 183 days or more in the United States in a single calendar year or require the United States to tax some of their income at a lower rate and may exclude some income completely. To invoke a treaty's protection, an individual must file IRS Form 1040-NR and attach to it Form 8833, the form for disclosing a treaty-based return position.[47]

Conclusion

Foreign national clients not wishing to reside in the United States have options if they wish to live close to the United States in the Caribbean. For those clients seeking to avoid severe tax liabilities and yet reside in the United States, the various student and investor visas are viable options. Consultation between the foreign national and a certified public accountant is crucial in this area of the law to properly advise clients and avoid severe tax liability.

***Larry S. Rifkin, Esq.**, is the managing partner of Rifkin & Fox-Isicoff PA. The firm's specialty is immigration law with its principal office in Miami, Florida. He is also the chairman of the USCIS, ICE, CBP, Labor, and State Department Liaison Committee for the International Law Section of The Florida Bar.*

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Residence Options, continued

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Precious Metals, from page 17

requesting or obtaining adequate information regarding the source and origin of the gold; (3) accepted gold from countries and customers where Elemetal's own records indicated the gold was likely smuggled across borders and that its customers were using front companies without obtaining adequate information as to the source and origin of the gold; (4) accepted gold from specific suppliers where publicly available information indicated those customers were supplying criminally derived gold; and (5) failed to obtain adequate information as to the source of gold being purchased by Elemetal, where publicly available information indicated that Elemetal or its agents were purchasing criminally derived gold.[10]

According to court documents, Elemetal received approximately US$114 million in gold from suppliers in Peru from which it had no information about the identity of the suppliers or the source of the gold. In 2014 and 2015, Elemetal purchased about US$250 million in gold from a Bolivian company with no information at all regarding the source of the gold, which turned out to be smuggled from Peru. As a result, the government stated that as a result of Elemetal's anti-money laundering failures, "hundreds of millions, if not billions of dollars of laundered gold entered the U.S. financial system."[11] Elemetal agreed to forfeit US$15 million to the government and be subject to five years of probation during which time it is prohibited from purchasing precious metals outside the United States, killing a large part of its business. Three employees of Elemetal were convicted and sentenced to imprisonment terms ranging from six to seven and a half years.[12]

Operation Arch Stanton also snared Republic Metals Corporation (RMC), a gold refinery based in Miami. There, the government's investigation centered on RMC failing to maintain the required anti-money laundering program, finding that RMC's program was deficient. In stark contrast to the Elemetal case, the government declined to prosecute RMC and instead entered into a written non-prosecution agreement. The government, in deciding not to prosecute RMC, found that the refinery, although its anti-money laundering program had failed to prevent RMC from doing business with illicit or suspicious suppliers, had proactively taken steps to address its program's vulnerabilities by severing ties with those suppliers before RMC became aware it was being investigated. Furthermore, RMC fully cooperated with the government's investigation, including turning over the results of RMC's own internal investigation, which included more than 100,000 emails and WhatsApp messages. In deciding not to prosecute RMC, the government noted that RMC had spent more than US$1 million implementing a compliance team and sourcing procedures that eliminated "metal aggregators" from its supply chain, thereby reducing its money laundering risk.[13]

More recently, the Department of Justice through Operation Arch Stanton filed a criminal case against Jesus G. Rodriguez, Jr., CEO and president of Transvalue, Inc., a prominent armored car service often used to safely transport precious metals. Rodriguez is charged with conspiracy to commit money laundering by engaging in transactions with gold designed to promote specified unlawful activity.[14] It is alleged that Rodriguez conspired with employees of Elemetal (formerly known as NTR Metals) to import thousands of kilograms of illicitly sourced gold from Curacao worth hundreds of millions of dollars. Rodriguez would then cause his company's fleet of armored cars to thwart the anti-money laundering (AML) policies of Elemetal in receiving the gold. One method of thwarting the AML policies was by importing gold from a company in Curacao, immediately exporting it to the Cayman Islands, and then re-importing it into Miami. The armored car company would then transport the gold to NTR/Elemetal and intentionally send invoices to the refinery showing the origin as Cayman Islands, instead of Curacao where it knew the gold was actually sourced. This false declaration of origin was a violation of customs smuggling laws, constituting a "specified unlawful activity" under the money laundering statutes.[15] Rodriguez waived indictment and was charged by "information" with entry of goods by means of false statements, a less serious offense than money laundering (the former is punishable by up to two years in prison; the latter by up to twenty years).[16] The charging by information instead of indictment is often indicative that the defendant will be pleading guilty to

the lesser charge.

Criminal penalties are not the sole enforcement mechanism the government can use in its struggle against money laundering through precious metals. Civil monetary penalties are available as well. For example, in 2015 the Financial Crimes Enforcement Network of the Department of Treasury (FinCEN) assessed US$200,000 in civil penalties against a Los Angeles precious metals business as well as its owner for willfully violating federal anti-money laundering laws in the first action of its kind against a dealer in precious metals. FinCEN delegated to the Internal Revenue Service (IRS) the authority to examine dealers in precious metals for compliance with the Bank Secrecy Act and its regulations. The precious metals dealer, when the subject of a compliance examination by the IRS, failed to have an AML program in place even though it had been in business for five years at the time of the examination. When examiners returned two years later, the IRS found that the AML program was deficient and often ignored by the dealer's owner. The dealer often failed to conduct any due diligence on its highest risk customers. It began dealing in transactions ranging from US$14 million to US$23 million, reaching a total of US$120 million annually. Despite this increase in business, the dealer failed to require any documentation or identification prior to conducting business with many of its high-volume customers. In addition to the civil money penalties, FinCEN required the dealer to hire an external auditor and to provide a comprehensive annual report to FinCEN outlining the implementation of its improved AML program and its results.[17]

What are the elements of a robust AML program for precious metals dealers?

As can be seen from the cases and situations discussed above, the government, whether through FinCEN or the Department of Justice, will examine whether precious metals dealers and refineries have strong or robust AML programs, as required by the Bank Secrecy Act and its regulations. Willful failures to have such programs can result in severe criminal and civil penalties to dealers and their employees. What then are the elements of such an AML program for those in the precious metals industry? Those elements must include, at a minimum, the following:

1. Incorporating policies, procedures, and internal controls based upon the dealer's assessment of the money laundering and terrorist financing risks associated with its line of business, including provisions for complying with the Bank Secrecy Act;[18]
2. Designating a compliance officer who will be responsible for ensuring the AML program is implemented effectively and is updated as necessary to reflect changes in risk assessment, regulations, or guidance from the Department of Treasury and for training employees concerning their responsibilities under the AML program;[19]
3. Providing on-going education and training on the AML program;[20] and
4. Providing for independent testing to monitor and maintain an adequate AML program.[21]

For the purpose of making risk assessments as required under the rules and regulations, a precious metals dealer must consider all relevant factors, including:

1. Types of products the dealer buys and sells as well as the nature of its customers, suppliers, distribution channels, and geographic locations;
2. The extent to which the dealer engages in transactions other than with established customers or sources; and
3. Whether the dealer engages in transactions for which payment is routed from accounts located in jurisdictions identified by the U.S. Department of State as sponsors of terrorism, designated as non-cooperative with international anti-money laundering principles by an intergovernmental organization to which the U.S. representative concurs, or otherwise is designated by the secretary of the Treasury as warranting special measures due to money laundering concerns.[22]

A precious metals dealer's AML program must incorporate policies, procedures, and controls that assist the dealer in identifying transactions that may involve

the use of the dealer to facilitate money laundering transactions, including making reasonable inquiries to identify or determine involvement in such transactions. The program must have policies and procedures for refusing to consummate, or otherwise terminate, such transactions. Factors to be considered include unusual payment methods, unwillingness of customers or suppliers to provide information, unusual degrees of secrecy by the customer or supplier, and purchases or sales that are unusual for that kind of customer or supplier, or are otherwise not in conformity with industry practice.[23]

The Departments of Treasury and Justice have placed the onus on the dealers of precious metals to be the gatekeepers tasked with preventing the purchase and sale of those commodities, so well-suited as vehicles for trade-based money laundering, to be used in the washing of criminals' ill-gotten gains. Precious metals dealers must, in accordance with established laws and regulations, maintain strong anti-money laundering programs or else risk criminal prosecution. Only by adherence to these AML programs can criminals be deprived of the cover they need, such as opaque shell companies or unusual payment methods, to callously use legitimate businesses to facilitate their money laundering. Giving in to the allure of high profits and lucrative transactions in gold and the like, such that greed results in cutting corners and failing to conduct necessary due diligence on customers and suppliers, can be a siren song as deadly to a precious metals business as it was to Greek sailors who gave in to the sirens during the time of Ulysses. Sometimes a pot of gold at the end of the rainbow is just a fairy tale.

***Robert J. Becerra, BCS**, founder of Becerra Law PA in Miami, Florida, is board certified by The Florida Bar as an expert in international law. He concentrates his practice in the areas of civil litigation, white collar criminal defense, grand jury investigations, cargo loss, federal agency investigations, disputes between exporters and importers, trade-based money laundering, export enforcement, FDA detentions and investigations, customs seizures and civil forfeitures, and other proceedings related to international trade.*

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circumvention of technological protection measures and helps protect works such as digital music, movies, and books.

- ***Copyright Safe Harbors to Prevent Infringement.*** Sets up copyright safe harbors to protect intellectual property for those companies that use their marks in good faith and do not directly benefit from infringement of those marks. Also allows for reciprocity and full national treatment for copyright and related rights, so United States creators have access to the same protections that domestic creators receive in a foreign market.
- ***Increased Trademark Protection.*** Enhances provisions for protecting trademarks, including well-known marks, to help companies prevent infringement.
- ***Additional Protections in Agriculture and Pharmaceuticals.*** Provides strong protection for pharmaceutical and agricultural innovators.
- ***Establishes a Committee on Intellectual Property Rights.*** The Committee on Intellectual Property Rights is explicitly charged with, among other things, engaging on intellectual property issues particularly relevant to SMEs.

3. The USMCA provides new digital trade protections.

The USMCA modernizes relations between its member countries by including a significant section on digital trade. This section represents the strongest provisions of any international agreement when it comes to technology trade. It promotes small businesses that are internet powered and have e-commerce exports. Further, the section provides:

- ***No Discrimination Against Electronic Products.*** Prevents customs, duties, and any discriminatory measures from being applied to digital products distributed electronically. This includes such items as e-books, videos, music, software, and games.
- ***Greater Ease of Data Transfer.*** Ensures data can be transferred cross-border and places limits on where data can be stored and processed thereby enhancing and protecting the international digital ecosystem.
- ***Increased Privacy.*** Includes consumer protections for enhanced consumer privacy and limits unsolicited communications, especially in the digital marketplace. Allows U.S. companies to store their data on in-country servers or outside of the country, with no requirement for one or the other. Also ensures U.S. companies cannot be sued in Canada or Mexico for certain content that appears on their platforms.

4. The USMCA restrictions on trade agreements with China contain a non-market economy clause.

Hidden away near the end of the USMCA is perhaps its most unusual provision:

- ***An Unusual Provision***. Chapter 32.10 requires parties to inform each other if they plan to negotiate any free trade agreements with any non-market country. A non-market country is defined as one which a "Party has determined to be a non-market economy (NME) for purposes of its trade remedy laws" and "with which no Party has signed a free trade agreement."[8]
- ***The Unnamed Target***. Under U.S. law, an NME is any foreign country that the U.S. Department of Commerce deems *not to* "operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of that merchandise."[9] Eleven countries are currently designated as NMEs, and one of them (China) has the second largest economy in the world.[10] Although Chapter 32.10 does not mention China, it is clear the provision is aimed directly at our major competitor. Jeffrey Gerrish, former deputy trade representative, characterized the provision as "an attempt to influence trade relations with China, and ensure that China is not able to benefit from preferences and advantages provided by the USMCA through the back door."[11]
- ***Member Countries Must Inform Each Other If Negotiating With an NME.*** The restrictions require any member country considering trade negotiations with an NME (*i.e.*, China) to provide three months' notice to the other parties with "as much information as possible regarding the objectives for those negotiations" and an opportunity for the other parties to review the proposed text thirty days before signature so the reviewing parties may "assess its potential impact on this agreement."[12] If a party enters into such a trade agreement with an NME (namely China), the other parties have the option to terminate the USMCA with regard to that party on six months' notice and replace it with a bilateral

agreement between the remaining two parties.[13]

5. The USMCA provides for a new committee to promote regional competitiveness.

The USMCA includes a chapter on competitiveness—a first in a U.S. trade agreement. This chapter establishes a Committee on Competitiveness that discusses and develops "cooperative activities to incentivize production in North American and facilitate regional trade and investment."[14] Its key goals include:

- ***Increasing SME and Underrepresented Group Participation.*** Generates advice and recommendations to enhance the participation of SMEs and enterprises owned by underrepresented groups including women, indigenous peoples, youths, and minorities.
- ***Developing Collective Action to Combat Market-Distorting Practices by Non-Parties.***
- ***Improving the Movement of Goods and Provision of Services.***
- ***Identifying Projects and Policies to Develop a Digital-Trade and Investment-Related Infrastructure.***

In mid-December 2021, the tri-national committee held its first major event, a two-day meeting on boosting workforce development hosted by the George W. Bush Institute. Participants discussed raising skill levels to meet the needs of rapidly evolving, technology-powered workplaces and creating portable credentials among the North American workforce.[15] How the committee will meet these and its other big goals remains to be seen. Daniel Watson, assistant U.S. trade representative, stressed that the committee "is very new—and we are sort of figuring it out as we move along."[16] Despite its slow start, this innovative Competitiveness Committee is one of the most promising mechanisms of the USMCA.

6. The USMCA establishes new rigorous state-owned enterprise rules.

State-owned enterprises (SOEs) are increasingly competing with U.S. private-sector businesses and workers on a global scale. To level the playing field, the USMCA establishes new SOE rules that are the toughest in the world. These rules ensure that private-sector businesses and workers can compete on fair terms with SOEs, especially when SOEs receive government backing to engage in commercial activity. Key new rules include:

- ***Broad, Expanded Definition of SOE.*** Expands SOE definition as entities in which the government holds a majority stake to also include entities in which the government owns a minority of the equity. Also lowers the minimum revenue thresholds required for SOEs to be subject to the rules, which guarantees more SOEs are covered.
- ***Prohibitions on Subsidies to SOEs.*** Prohibits three types of subsidies: (1) subsidies to SOEs that are insolvent or on the brink of insolvency; (2) loans or loan guarantees from SOEs such as state-owned banks to other uncreditworthy SOEs; and (3) noncommercial SOE debt-to-equity swaps.
- ***Public Access to SOE Information.*** Requires SOEs to share, upon request, information about the extent of government ownership and control, the subsidies provided to them, and government equity investments made in the SOE.

7. The USMCA establishes new rules for the automotive industry.

The USMCA also made big changes for auto manufacturers in hopes of ensuring more vehicles and parts are made in North America. These changes include:

- ***Higher Regional Value Content (RVC).*** RVC rules require that a product contain a certain percentage of originating content. The new agreement maintains zero tariffs on all goods that meet the rules of origin, which are the criteria that a product must meet to be deemed as originating in one of the three member countries and eligible for preferential tariff treatment. Some rules of origin have changed. The USMCA specifies that 75% of automobile components must be manufactured within the participating nations to qualify for zero tariffs, up from 62.5% under NAFTA. Also, at least 70% of steel and aluminum purchases must originate within North America. "These changes will make it more difficult for semifinished products from Asia to move through Mexico and then qualify for USMCA treatment, as sometimes happened under NAFTA," according to Dan Ujczo, an international trade attorney.[17]
- ***New Labor Value Content (LVC).*** A new provision

under the USMCA, with no NAFTA predecessor, requires that 40% to 45% of labor used on passenger vehicles must come from workers earning an average of US$16 per hour. As of September 2021, the average Mexican auto worker's wages were slightly under US$3 per hour.[18] This new provision is designed to shift more factory production to the United States and reverse the flow of auto industry jobs to Mexico. It could also result in a higher standard of living for Mexican workers.

8. The USMCA provides stronger labor and employment laws, especially for Mexico.

The USMCA also includes expansive changes that should help level the playing field among workers in the United States, Canada, and Mexico, as well as improve working conditions, especially in Mexico. The labor chapter of the USMCA requires member countries to adopt and maintain laws consistent with rights stated in the International Labor Organization (ILO) Declaration of Fundamental Principles and Rights at Work. Key provisions include:

- ***Labor Issues Take Center Stage.*** Unlike NAFTA, which addressed labor issues in side agreements, the USMCA labor chapter is the main text of the agreement and subject to the same dispute settlement mechanisms and potential trade sanctions as the rest of the agreement.
- ***Establishes Labor Rights Consistent With the ILO.*** Chapter 23.3 requires each member country to adopt and maintain laws that protect freedom of association and collective bargaining, elimination of all forms of compulsory labor, effective abolition of child labor, and elimination of discrimination in respect to employment and occupation.
- ***Mexico Commits to Collective Bargaining.*** USMCA provisions mirror the amendments to the Mexican Constitution of February 2017 and the recent ratification by Mexico of the 98th Convention of the ILO. Mexico commits to specific legislative actions to provide for the recognition of the right to collective bargaining. Required actions include the right of workers to conduct a secret vote, to elect union leadership, to challenge existing bargaining representatives, and to register a new collective bargaining agreement.

9. The USMCA opens the door to new considerations for investors regarding dispute settlements.

Investor-State Dispute Settlement (ISDS) is a mechanism in a trade agreement or investment treaty that gives foreign investors the right to access an international tribunal to resolve investment disputes against a member of a host country. Under the USMCA, the reformed approach to ISDS in the Investment chapter is generally aimed at disincentivizing foreign investment—or encouraging U.S. investors to invest at home—by reducing ISDS protections and increasing the likelihood of expensive litigation in foreign courts. Key takeaways include:

- ***No Canada-U.S. IDS Arbitrations.*** Eliminates ISDS arbitrations between Canadian parties invested in the United States and vice versa. This means parties will have to pursue more costly and time-intensive litigation in the courts of the defendant's home country rather than seek faster and less expensive arbitration in an international forum. This encourages U.S. investors to spend in the United States rather than abroad and prevents foreign investors in the United States from avoiding U.S. courts.
- ***Limited Mexico-U.S. Arbitrations.*** Significantly narrows the circumstances under which U.S. parties investing in Mexico or vice versa can bring ISDS actions. Prevents many U.S. and Mexican investors from asserting claims under the "fair and equitable" treatment standard, which is a frequent basis for ISDS claims. Also precludes U.S. and Mexican investors from asserting claims for indirect expropriation, another common basis for ISDS claims, nor can they assert discrimination claims (*i.e.*, that they were discriminated against in favor of a domestic competitor).

10. Under the USMCA, the Certificate of Origin is eliminated.

Another impressive change the USMCA made to its predecessor, NAFTA, is that the USMCA changed the requirement of exporters to complete a Certificate of Origin form. That is the form that certifies the goods being exported qualify for preferential tariff treatment

accorded by NAFTA. A producer or manufacturer also could complete the certificate, which then would be the basis for an exporter's Certificate of Origin.

Alternatively, the USMCA requires companies to identify nine data elements to claim preferential treatment. These include the name and contact information for the certifier, importer, exporter, and producer and a description of the goods and their tariff classification. This information may be provided on an invoice or any other document. This change is significant for multiple reasons. First, although the information required under the USMCA is similar to those required under NAFTA, companies do not need to complete a separate form. That will reduce administrative work and make it easier to apply for preferential treatment. Second, under the USMCA, companies need to know their suppliers. Some USMCA practitioners explain that data is the key, and companies will need to be able to demonstrate they did the analysis under USMCA.

In conclusion, although the USMCA has its challenges, it presents many excellent opportunities for SMEs.

Nouvelle L. Gonzalo, Esq., *is a U.S. and international corporate lawyer who works with companies across the globe. She is the managing attorney of Gonzalo Law LLC, a U.S. and international corporate law firm with offices in Florida and Ohio. In addition to the active practice of law, she has served as adjunct faculty of international corporate law at the University of Florida, Levin College of Law for three years. She was recognized as a rising star by the national organization Super Lawyers from 2019 to 2022. Her practice areas include U.S. corporate acquisitions, international corporate law, and intellectual property law.*

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of the CCPA is the "Right to Opt Out" notice.[23] Companies must include a link generally titled "DO NOT SELL MY PERSONAL PROPERTY" giving individuals the choice to opt-out from selling their personal information to others.[24] Sale includes any disclosure of personal information to another business or third party for value of any kind, monetary or otherwise. California residents must be given notice of their individual rights, including the right to request disclosure of data collection practices, the right to request specific personal information that has been collected, the right to have certain information deleted absent an applicable exception, the right to opt-out of the sale of their personal information to third parties, and the right not to be discriminated against for exercising those rights.[25]

"The CCPA provides consumers with a private right of action and is the first U.S. statute to expressly allow consumers to recover statutory damages as a result of data security incidents."[26] The statutory damages range from $100 to $750 per incident along with actual damages and other remedies.[27] "These remedies do not apply to personal information that has been encrypted or redacted."[28] These remedies do not apply to all personal information collected but only to sensitive personal information.[29] Individuals are required to provide a thirty-day written notice and an opportunity to cure prior to bringing an action for damages under the CCPA.[30] These additional requirements and potential penalties had many companies (and their legal counsel) scrambling to update and revise their privacy policies before 1 January 2020. Companies continue to assess the impact of the CCPA on their privacy practices and whether the CCPA will become a model law for other states or for a comprehensive federal privacy law.

Other Applicable U.S. Privacy Laws

What other laws should a U.S. company be concerned about? The Health Insurance Portability and Accountability Act (HIPAA)? The Health Information Technology for Economic and Clinical Health Act (HITECH)? The Graham-Leach Bliley Act (GLBA)? The Children's Online Privacy Protection Act (COPPA)? The Controlling the Assault of Non-Solicited Pornography and Marketing (CAN-SPAM)? The answer is it depends if these laws are applicable to the company's industry. A discussion of the reach of these particular laws is beyond the scope of this article.

GDPR

Should companies also be concerned with the GDPR? The GDPR came into effect in 2018. The GDPR is a set of comprehensive EU privacy regulations. The GDPR applies to companies with assets and employees in the EU; companies that sell to individuals in the EU; and companies that store data in the EU.[31] "Companies doing business in the EU have the legal obligation to comply with these comprehensive privacy requirements, subject to potentially large fines."[32] The GDPR defines *personal data* as supposed to *personal information* as any data that relates to an identified or identifiable natural person.[33] Examples of personal data that may not be considered PII are IP addresses (CCPA does include IP addresses as personal information) and cookie ID.[34]

Key participants are regulated or protected by the GDPR. The *data subject* is the person whose data is being processed.[35] The *controller* is the entity or person that determines the purposes and the means of the processing of personal data, and the *processor* is the person or entity that processes data on behalf of the controller.[36] "Under the GDPR, a data subject may express their consent by statement or by clear affirmative action" (opt-in).[37] Privacy notices under the GDPR should include the controller's identity, purposes of processing for which consent is sought, types of data that will be collected, information about the right to withdraw consent, information about automated processing, and risks of transfers outside Europe. Companies should identify the data protection officer (DPO).[38] The DPO of a company is the primary point of contact on data protection for a company that is based in the EU.[39] For companies that do not have a physical presence in the EU, the company must appoint an EU representative.[40]

A key issue under the GDPR is "providing individuals with control over their personal data." EU residents have the following rights:[41]

- Right to be informed of transparent communication and information;
- Right to access their personal data (subject access request);

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- Right to rectification (this principle allows data subjects to require controllers to confirm the accuracy of their personal data);
- Right to erasure ("Right to be Forgotten");
- Right to restriction of processing;
- Right to data portability (this right allows data subjects to port data to themselves or to another controller);
- Right to object; and
- Right not to be subject to automated decision making (this right prohibits the controller from carrying out automated decision making unless the decision is necessary for the performance of a contract between the data subject and the controller or is authorized by law or is based on the data subject's explicit consent).[42]

In the event of a breach, the GDPR requires controllers to report data breaches to the relevant data protection authority (DPA).[43] DPAs are responsible for enforcing data protection laws at a national level.[44] There is a DPA in each EU member state.[45] Fines can be as large as 4% of worldwide revenues.[46] Either the data subject or the DPA can file a complaint against the company.[47] A U.S. company needs to be concerned with data transfers between the United States and a EU member state.[48] Under the GDPR, transfers of data to the United States are only permitted under certain circumstances.[49] U.S. companies must comply with various requirements including incorporating standard data protection clauses adopted by the European Commission or adopted by a DPA and approved by the European Commission, as well as other appropriate safeguards.[50] The GDPR also provides derogations (exceptions) or conditions under which transfers may occur.[51] "The derogations allow for a transfer if the data subject has provided explicit consent to the transfer or if the transfer is necessary for:

- The performance of a contract between the data subject and controller (including pre-contractual measures) and the transfer is occasional;
- Important reasons of public interest;

- The establishment, exercise, or defense of legal claims and the transfer is occasional; or
- The protection of the vital interests of an individual incapable of giving consent."[52]

Even though the adequacy of privacy in the United States keeps being challenged in Europe (Schrems I and II),[53] companies continue to rely on one of the following compliance mechanisms to transfer data between the United States and Europe:

- **Standard contractual clauses (SCCs).** SCCs contractually bind the companies to comply with EU laws and to submit to jurisdiction to one of the DPAs. (Schrems II challenged the validity of data transfer to the United States. Schrems II held that SCCs are still valid but additional safeguards should also be in place.)[54]
- **Binding corporate rules (BCRs).** BCRs provide that a multinational company can transfer data between countries after certification of its practices by a DPA.[55]

U.S. companies transferring personal data of EU residents from the EU to the United States need to make sure they are in compliance with the GDPR to avoid being liable for substantial penalties.

Vendors

It is not only critical for companies to comply with the particular legal regime in each country where they do business, but companies are also responsible for the actions of their vendors and subcontractors that have access to or process the PII of their customers. Therefore, companies should ensure that written contracts with their vendors and subcontractors are in place that include confidential provisions, nondisclosure agreements, provisions requiring subcontractors to have privacy policies consistent with the privacy policies of the company, prompt notification in the event of a breach or potential breach, representations regarding implementation of security information controls, and indemnification provisions.[56] Companies should be able to monitor each vendor's activities to ensure it is complying with its contractual obligations.[57]

Conclusion

Companies will continue to face challenges in today's fast-paced business environment and must adapt and update their privacy practices in order to keep up with the constant development of new technology, the increased amount of personal data being collected and processed, and the evolving legal landscape of privacy laws around the world. Legal, information technology, marketing, and other departments must work together to achieve fair and effective privacy standards that are in compliance with applicable privacy laws that limit access, purpose, and storage while achieving the company's objectives.

Penelope B. Perez-Kelly *is board certified in international law by The Florida Bar. Ms. Perez-Kelly is an attorney with the law firm of Fisher Rushmer PA in Orlando, Florida. The opinions expressed in this article are her own and not necessarily those of the firm or its clients.* *Ms. Perez-Kelly wishes to express her thanks and give credit to Peter Swire, CIPP/US, and DeBrae Kennedy-Mayo, CIPP/US, the authors of the book* U.S. Private-Sector Privacy Law and Practice for Information Privacy Professionals Third Edition *from the International Association of Privacy Professionals (IAPP). This article is a summary overview of some chapters of the book.*

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