

# INTERNATIONAL LAW

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QUARTERLY

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## *Focus on North America*

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## 8 • The 2026 USMCA Joint Review and the Future of North American Trade Integration

The 1 July 2026 joint review of the United States-Mexico-Canada Agreement (USMCA) represents a pivotal moment for North American trade integration, where the interplay of power, right, and national interest will determine the region's economic and strategic future. This article summarizes the history of the North American trade bloc and discusses the issues that are creating uncertainty as to whether the USMCA will survive.

## 10 • Will America's Electric Vehicle Infrastructure Be a Casualty of the Global Trade War?

Recent U.S. trade policy is expected to increase costs for electric vehicles (EVs) and EV charging infrastructure projects, potentially hindering their adoption and disrupting supply chains and the expansion of charging networks. The combination of U.S. tariffs and Chinese export controls is likely to create disruptions for the EV sector.

## 12 • The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the United States-Mexico-Canada Agreement (USMCA): A Return to Calvo?

This article seeks to argue that: (1) states' withdrawal from ISDS procedures in investment treaties is reflective of developed states' attitude in favor of investor-state disputes resolution returning to municipal courts; (2) withdrawing from ISDS procedures in investment treaties is, generally, more disruptive to the efficient resolution of investor-state disputes; and (3) ISDS procedures ought to remain the primary means of dispute resolution for investor-state disputes.

## 14 • Criminal Enforcement of Import Duty Evasion in the United States

Trade fraud and tariff evasion have become a focus of the U.S. Department of Justice, resulting in increased enforcement efforts and criminal prosecutions. This article discusses the new emphasis on criminal enforcement of import duty evasion in the United States, various schemes to evade import duties, the laws implicated, recent prosecutions, and guidance for compliance and best practices to avoid illegal duty evasions.

## 16 • No Top-Up, No Shell, No Revenge Tax: U.S. Multinationals in a Fragmented Global Tax Landscape

This article explains the political and legal developments of mid-2025 that led to the abandonment of the Anti-Tax Avoidance Directive 3 and

the proposed exemption of U.S. multinational enterprises from Pillar Two's Income Inclusion Rule and Undertaxed Profits Rule, considers how global tax harmonization is giving way to fragmented national enforcement within the EU, analyzes how jurisdictional differences in transfer pricing enforcement and economic substance requirements now drive structuring decisions, and provides practical guidance for U.S. outbound investment.

## 18 • International Judgment Recognition in an Age of North American Disunity

North American nations are changing rapidly, in ways that may challenge international legal norms and institutions that encourage cooperation. This article considers whether changes to the United States' political relations will make it more likely that U.S. courts will decline to enforce judgments from nations in disfavor with the current administration or public opinion.

## 20 • Working in the United States as a TN Professional: Visa Requirements for Canadian and Mexican Citizens

This article evaluates the Trade NAFTA (TN) visa's qualifications, discusses its advantages over other employment visa options, outlines the different visa processes for Canadian and Mexican citizens, and serves as a practical guide for preparing a case to maximize the chances of a successful adjudication before the U.S. Department of Homeland Security and the U.S. Department of State.

## 22 • Artificial Intelligence and Data Protection: Regulatory Convergences and Divergences in North America—Lessons and Cross-Border Insights From Brazil

This article explores the current state of AI regulation across the United States, Canada, and Mexico, with comparative insights from Brazil's recent legislative developments. The author provides timely and practical guidance for international practitioners, particularly given the regulatory uncertainty following the failure of Canada's Artificial Intelligence and Data Act and Mexico's recent data protection reforms.

## 24 • Trading Places: Realignment of Turtle Island at the Subnational Level: Intermestic Diplomacy for States and First Nations in North America

The author provides an in-depth look at the historical underpinnings of land acquisition and resource exploitation by colonial powers and what may be in store for nation-states reenacting those policies on a continent known to her original inhabitants as "Turtle Island."



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# From the Chair . . .



CRISTINA VICENS BEARD

**A**s chair of the International Law Section, one of my priorities this year is to ensure continuity in our section's leadership by honoring the goals of our past chairs while laying the groundwork for future ones. That means attracting and engaging members beyond South Florida, expanding our programs to new regions

of Florida, and returning to an international footprint with events abroad—like our October 2025 retreat in the Dominican Republic. It also means broadening our CLE offerings to meet the needs of practitioners across disciplines and elevating our profile internationally so that the ILS continues to be recognized as a leader in the practice of international law.

It is with these goals in mind that I have the privilege of introducing the first *International Law Quarterly* published during my term. This issue, focused on North America, could not be more timely in light of the questions and challenges facing our region today.

North America is often seen as a region of stability and prosperity, yet today it finds itself at a crossroad. Questions about the strength of democratic institutions, debates over trade and industrial policy, the struggle to balance innovation with privacy, and the complex relationships among the United States, Canada, Mexico, and their subnational actors all point to a continent in flux. From border disputes to environmental concerns, from energy

policy to migration, the region is confronting challenges that are at once deeply local and undeniably global.

What is striking is not only the scale of these issues, but also the degree to which they transcend national boundaries. North America has always been defined by interdependence—economically, politically, and culturally. Yet, as we confront rising protectionism, disunity, and the rapid acceleration of technologies like artificial intelligence, we are reminded that our shared future depends on cooperation as much as on competition. For international lawyers, this reality demands a practice that is both outward-facing and deeply attuned to the regional dynamics shaping our clients' worlds.

Taken together, the articles in this issue remind us that North America remains both deeply interconnected and occasionally divided. The region is marked by convergence and divergence, cooperation and competition, shared values and contested interests. As international lawyers, we are uniquely positioned to help clients and institutions navigate these cross-currents with creativity, rigor, and foresight.

I invite you to explore this issue with the same curiosity and engagement that animates our work as a section. Whether your practice centers on litigation, arbitration, compliance, trade, or tax, you will find insights here that speak to the present challenges and future possibilities of our region.

Un abrazo,

**Cristina Vicens Beard**  
**Chair, International Law Section of The Florida Bar**



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# From the Editor ...



JENNIFER MOSQUERA

**C**lose to every day, it seems, there are concerning developments in the relationships between North American countries, with the face of the region's complexion shifting rapidly.

The Fall 2025 edition of the *International Law Quarterly* includes articles that discuss a wide breadth

of topics affecting the North American region in a time of unprecedented change. The authors in this edition provide thoughtful feedback on what is happening in North America and explore what the future may hold in a variety of areas.

Of course, a focus on North America would be incomplete without a substantial discussion in the arena of trade, tariffs, and tax consequences, penned by authors with expertise in each respective field.

Our first article, "The 2026 USMCA Joint Review and the Future of North American Trade Integration" written by **Robert M. Kossick, Ph.D., Daniel Kiselbach, and Luis F. Martinez** provides an in-depth analysis of the United States-Mexico-Canada Agreement and discusses the uncertainty it faces. Next, the article "Will America's Electric Vehicle Infrastructure Be a Casualty of the Global Trade War?" written by **Odette Ponce, Li Massie, and Carolina Nogal** looks at recent changes in U.S. trade policy regarding electric vehicles that might cause disruptions in the industry. "The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the United States-Mexico-Canada Agreement (USMCA): A Return to Calvo?" written by **Inigo Kwan-Parsons** shares an outlook on the withdrawal of states from the Investor-State Dispute Settlement procedure and the impact that will have on future dispute resolutions.

**Robert Becerra's** "Criminal Enforcement of Import Duty Evasion in the United States" discusses policy changes that have led to an increase in criminal prosecutions of import duty evasions, and includes which laws are implicated in this enforcement ramp-up. **Laura McCaskill's** "No Top-Up, No Shell, No Revenge Tax: U.S. Multinationals in a Fragmented Global Tax Landscape" provides a practical perspective on the fragmentation of tax enforcement abroad and what that means for outbound U.S. investments.

This edition further covers discussions of recognition of foreign judgments, immigration, data protection, and land acquisition. **Joe Rome's** "The Future of International Judgment Recognition in an Age of North American Disunity" discusses changes in the U.S. political landscape and the effects of these changes on the recognition of foreign judgments within the United States. "Working in the United States as a TN Professional: Visa Requirements for Canadian and Mexican Citizens" written by **Larry Rifkin** provides insight on various visa options for Canadian and Mexican citizens as well as practice tips for how to maximize the success of these visa applications. "Artificial Intelligence and Data Protection: Regulatory Convergences and Divergences in North America—Lessons and Cross-Border Insights From Brazil" written by **Luiz Alberto de Carvalho Barros Filho** provides a discussion of current artificial intelligence regulations within the United States and delves into recent failures in data protection within Canada and Mexico. And last, but certainly not least, **Bret Clark's** "Trading Places: Realignment of Turtle Island at the Subnational Level: Interstitial Diplomacy for States and First Nations in North America" provides a historical background on land acquisition and resource exploitation in the North American region.

As usual, we present the ILS Section Scene, which in this edition features the ILS Lunch & Learn with Eduardo Palmer and the annual Florida Bar Convention in June in Orlando, Florida. We also showcase the World Roundup, which includes important legal updates and current events from all over the world. This edition, we feature updates from the Caribbean, Italy, Western Europe, and Off-World.

We hope these articles and updates provide you with a nuanced understanding of some of the changes occurring in the North American legal landscape. Please enjoy reading this edition of the *ILQ*. We look forward to continuing to publish novel and substantive international law perspectives in the next one.

Best regards,

**Jennifer Mosquera**  
Editor-in-Chief  
Sequor Law



# The 2026 USMCA Joint Review and the Future of North American Trade Integration

By Robert M. Kossick, Ph.D., Seattle; Daniel Kiselbach, Vancouver, BC; and Luis F. Martinez, Monterrey, Nuevo León, Mexico



photo: iStock/Evgeny Groimov

The multilateral trading system, in tandem with a reevaluation of the liberal orthodoxy and security interests underlying the American order, is undergoing a profound reset, the likes of which have not been seen in almost 100 years.<sup>1</sup> The Bretton Woods institutions created in 1944 for the purpose of avoiding the balance of payments, security, development, and trade crises that fueled the march to WWII have become weak, ineffectual, and roundly disregarded. The World Trade Organization (WTO), stymied by its inability to negotiate via consensus, to introduce reforms directed at non-market economy countries (NMEs), and to resolve the Appellate Body crisis, now passively stands by while powerful countries impose tariff deals on weaker countries, transnational trade and investment certainty evaporates, and neo-mercantilist restrictive trade measures proliferate. The unipolar nature of the post-cold war period, in partial response to the phenomenon of “China shock,” has morphed into a multipolar geopolitical landscape, one characterized by great power competition to secure the resources, technology, alliances, infrastructure, and ideological alignments that will underpin globalization 2.0 and industry 5.0. And finally, the specter of conflict,

climate change, contagion, and demographic collapse,<sup>2</sup> notwithstanding the peace dividend and progress that were supposed to flow from the “end of history,” increasingly disrupts trade and lives around the world. These developments, spurred on by policies designed to promote strategic decoupling and nearshoring/reshoring, have led to the fragmentation and realignment of long-standing trade relationships. This outcome, in turn, has had the effect of making regional trade integration more important than ever.

## The Foundations of North American Trade Integration

As the world works its way through this period of unprecedented change and uncertainty, the countries of North America are, as an economically and industrially integrated trade bloc, well positioned to weather the storm that is buffeting the international trade space.

Having first achieved trilateral trade integration in 1994 under the North American Free Trade Agreement (NAFTA), intra-Canada-U.S.-Mexico trade comprises a market of approximately 510 million people and accounts for nearly

30% of the global economy. The NAFTA was renegotiated between 2018 and 2020, with an eye to shifting the agreement's focus away from reducing costs and maximizing efficiency and toward sustainability, traceability, and resilience. The resulting agreement, the United States-Mexico-Canada Agreement (USMCA), is considered to be the "gold standard" of free trade agreements (FTAs). Though not the largest trading bloc in intra-regional trade terms—the member states of the European Union (EU) and the Regional Comprehensive Economic Partnership (RCEP) account for larger total volumes of trade (approximately US\$4.2 trillion and US\$2.6 trillion, respectively) than that achieved by the combination of Canada, the United States, and Mexico (US\$1.8 trillion)—the USMCA is the world's largest trading bloc when measured in terms of economic output.

Consistent with the foregoing, trade integration is generally considered to have had a beneficial impact on the economic trajectory and national security of the USMCA countries. Canada, the United States, and Mexico have leveraged the region's natural resources, biodiversity, youthful population, skilled workforce, shared geography, diverse industrial capabilities, dynamic markets, and general ideological alignment to (i) drive investment, job creation, trade flows, innovation, and development; (ii) strengthen supply chain integration (co-manufacturing), logistical interconnectivity, cargo security, digital trade, process automation, the rule of law (especially in connection with the environment, labor rights/forced labor, and intellectual property rights), dispute resolution mechanisms, transparency, and intergovernmental cooperation; (iii) reduce tariffs, non-tariff barriers, and currency manipulation; and (iv) advance shared security interests.

While North America's integration record cannot be described as perfect—trade does, after all, create winners and losers—the region is not constrained by the demographic shortfalls, environmental crises, tech dependence, unfavorable geography, and regional conflicts that are projected to limit the prospects of other regional trade blocs in the years and decades to come.<sup>3</sup> These characteristics and considerations endow the North American region with a significant competitive advantage going forward.

### **The Future of North American Trade Integration**

Notwithstanding the region's relatively strong position, the future of North American trade integration is not guaranteed and should not be presumed. Some thirty years after the NAFTA's entry into force, cracks are starting to

show in the ramparts of fortress North America. Recent negotiations involving the aggressive and sometimes questionable imposition of tariffs on Canada and Mexico have violated the spirit and letter of the USMCA, disregarded fundamental notions of sovereignty, harmed the profitability of essential industries, reignited debate on the wisdom of the logic, assumptions, and cost-benefit calculus underlying regional trade integration, motivated initiatives to diversify trade and reduce dependence on the United States, inspired anti-U.S. product boycotts and protests, rekindled historical grudges, and engendered distrust, anger, and uncertainty. Canadian Prime Minister Mark Carney captured the zeitgeist of the moment when he remarked, "The old reality that we had with the United States based upon deepening integration of our economies and tight security and military cooperation—is over."<sup>4</sup> Former Deputy U.S. Trade Representative C. J. Mahoney took this one step further when he questioned "whether the USMCA will even survive 2025."<sup>5</sup> These remarks are echoed in Canadian and Mexican opinion polls that show a growing opposition to and concern about the issue of regional trade integration. These developments have, predictably, complicated what will likely be the greatest test of integration yet faced by the USMCA partners, i.e., the forthcoming 2026 joint review.

### ***The 2026 Joint Review***

Art. 34.7 of the USMCA mandates the Free Trade Commission (i.e., party ministers or their delegates), on the sixth anniversary of the agreement's entry into force (1 July 2026), to meet for the purpose of conducting a joint review of the agreement's operation, receiving recommendations for action submitted by parties, and deciding on appropriate actions.<sup>6</sup> Parties may submit action recommendations to the Commission at least one month before the joint review meeting. If, at the conclusion of the joint review, parties agree to continue the USMCA, its term will be automatically extended for a sixteen-year period. Should a party not confirm its wish to so extend the term of the USMCA, the Commission will conduct annual joint reviews for the remainder of the current term (the so-called "extra innings" option). A party that withholds support for extending the agreement can reverse course and provide written confirmation of its wish to extend the agreement at any point prior to the expiration of the current term. If all non-confirming parties take such action, the term of the agreement will be extended for sixteen years. If consensus on the issue of extending the term of the agreement is not reached, the USMCA will expire in 2036.

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# Will America's Electric Vehicle Infrastructure Be a Casualty of the Global Trade War?

By Odette Ponce, Miami; Li Massie, Tallahassee; and Carolina Nogal, Mexico City, Mexico



photo: iStock/Love Employee

**T**he United States' introduction of additional and widespread tariffs on China and other major trading partners has resulted in changes to global trade policies that increasingly target critical goods. These changes could have significant consequences for the development of electric vehicle (EV) infrastructure and the broader adoption of sustainable technologies globally.

## Tariffs on Imported Automobiles and Specified Auto Parts

On 26 March 2025, the White House announced the imposition of a 25% tariff on imported automobiles and specified auto parts, citing Section 232 of the Trade Expansion Act of 1962 and a threat to U.S. national security.<sup>1</sup> The White House stated that the tariffs aim to strengthen American manufacturing, reduce reliance on foreign auto content, and address the significant trade deficit in this sector.<sup>2</sup> These increased duties will apply to passenger vehicles and light trucks, as well as key parts such as engines, transmissions, powertrain parts, and electrical components.<sup>3</sup> Notably, for automobiles qualifying

under the United States-Mexico-Canada Agreement (USMCA), the tariff may be applied only to the non-U.S. content, with a similar process to be developed for USMCA-compliant parts.<sup>4</sup>

On 11 February 2025, the Trump administration increased tariffs on imported aluminum from 10% to 25%, citing Section 232. Additionally, it terminated all alternative agreements and exclusions that were previously in place for steel and aluminum imported from countries such as Argentina, Australia, Canada, Mexico, the European Union (EU), and the United Kingdom (UK), effective 12 March 2025.<sup>5</sup> The administration also terminated the Section 232 product exclusion process for both steel and aluminum, and expanded the process to include additional steel and aluminum derivative articles within the scope of the 25% tariff.<sup>6</sup> On 3 June 2025, the administration further increased the tariff on steel and aluminum products to 50%.<sup>7</sup>

Many EVs, like traditional cars, are imported, and even those assembled in the United States often rely on imported parts, particularly batteries, charging stations,

and other components. For example, Tesla, which is a U.S.-based manufacturer, imports some of its EV models and other EV components, and will likely face higher costs due to the recent string of tariffs on cars, car parts, and goods imported from China.<sup>8</sup> EVs also rely more heavily on aluminum than traditional vehicles to reduce weight and enhance efficiency, which is crucial for extending their range and counteracting the weight of batteries.<sup>9</sup>

The tariffs may lead to additional costs, which trickle down and impact consumer prices, making EVs more expensive for the daily commuter and potentially hindering their wider adoption.<sup>10</sup> Higher prices could push EV models above the eligibility price limits for federal tax credits, resulting in fewer EVs being eligible for these incentives in the limited time remaining for these tax credits.<sup>11</sup> The tariffs are also expected to disrupt existing EV supply chains that rely on international sourcing of materials and components for batteries, charging stations, and motors.<sup>12</sup> Additionally, tariffs may negatively impact both fleet and general EV charging networks by increasing production costs for charging station development due to tariffs on imported electronic components and charging station equipment manufactured abroad.<sup>13</sup>

While domestic manufacturers may see a temporary advantage, the combination of tariffs on imported EVs and parts, increased steel and aluminum tariffs, and potential duties on battery materials poses a significant challenge to the EV industry. These factors can lead to increased production costs, disrupted supply chains, and potentially reduced demand because of higher prices for consumers and diminished tax incentives.

### China Tariffs, Rare Earths, and Clean Technologies

During the first half of 2025, the ongoing trade tensions between China and the United States intensified significantly, as both countries engaged in a series of retaliatory measures that included the United States imposing successive rounds of reciprocal tariffs on a broad range of Chinese goods. Some of these tariff rates reached as high as 125%. This situation further exacerbated the already strained economic relationship between the two nations and contributed to heightened uncertainty in global trade markets.<sup>14</sup> On 12 May 2025, the White House announced a new U.S.-China trade agreement that reduces tariffs by 115% on both sides while retaining a 10% baseline tariff. The deal also suspended recent retaliatory measures and set a path for future trade discussions. The deal was extended on 11 August 2025 until 10 November 2025.<sup>15</sup> While offering short-term relief, key U.S. tariffs on Chinese

goods—including EV-related components and critical minerals—remain in place, maintaining pressure on the EV industry and its supply chains.<sup>16</sup>

Materials used in batteries for EVs and stationary storage are considered critical materials, including cobalt (Co), lithium (Li), and natural graphite. All have strategic importance in battery chemistries and are essential for the growth of the EV industry.<sup>17</sup>

The United States has initiated several investigations related to these critical materials. On 15 April 2025, the Trump administration launched a Section 232 investigation into the national security risks posed by U.S. reliance on imported processed critical minerals, such as the ones used for EVs and EV chargers.<sup>18</sup>

In July 2025, the U.S. Department of Commerce issued a preliminary affirmative determination in its antidumping (AD) duty investigation regarding anode grade graphite material imported from China, a crucial input used in manufacturing batteries for EVs and energy storage.<sup>19</sup> This means that, pending a final determination, importers of active anode material from the named Chinese companies will have to deposit cash equal to an additional 93.5% of the import value to the U.S. government, raising costs for downstream battery and EV manufacturers.<sup>20</sup> China is the world's dominant supplier of battery-grade graphite, and the new tariff is expected to drive up production costs across all U.S. and North American EV manufacturers.<sup>21</sup>

China responded to earlier U.S. trade actions with matching tariffs and sector-specific export controls, including rare earth elements (REEs) critical to EV and clean energy technologies.<sup>22</sup> The United States' initial exemption of REEs from tariffs created a strategic gap that China exploited through tighter export restrictions—posing ongoing risks to global EV supply chains despite recent efforts to ease tensions.<sup>23</sup>

On 4 April 2025, China's Ministry of Commerce and the General Administration of Customs issued Announcement 18 on the decision to implement stricter export controls on medium and heavy REEs and related items.<sup>24</sup> Effective on the date of publication, exporters must obtain approval (licenses) from China's Ministry of Commerce under the Export Control Law and Dual-Use Items Export Control Regulations to export REEs.<sup>25</sup> The elements subject to these export controls include samarium, gadolinium, terbium, dysprosium, lutetium, scandium, and yttrium-related items.<sup>26</sup> This will impact REE supply on a global scale.

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# The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the United States-Mexico-Canada Agreement (USMCA): A Return to Calvo?

By Inigo Kwan-Parsons, Perth, Australia



photo: iStock/keanu2

In recent investor-state disputes, certain states have expressed their intentions to withdraw from investor-state dispute settlement (ISDS) procedures in investment treaties to which they are a party, instead electing to resolve any investor-state disputes before their respective municipal courts. The rescission of states from ISDS procedures in investment treaties appears to be a regression in how investor-state disputes are resolved, returning to circumstances similar to those in the early 1900's. By doing so, several complications arise that cause uncertainty as to how investor-state disputes are to be resolved, potentially risking investors' confidence in having a transparent and predictable mechanism of resolving their disputes.

This paper seeks to argue that: (1) states' withdrawal from ISDS procedures in investment treaties is reflective of developed states' attitude in favor of investor-state disputes resolution returning to municipal courts; (2) withdrawing

from ISDS procedures in investment treaties is, generally, more disruptive to the efficient resolution of investor-state disputes, due to their complex ramifications; and (3) ISDS procedures ought to remain the primary means of dispute resolution for investor-state disputes.

## Background

For the last eighty or so years, ISDS procedures in investment treaties (bi-lateral (BIT), multilateral, and regional alike) have dictated that parties resolve their respective disputes via an international tribunal. Thus, investor-state arbitration jurisprudence emerged, notably from the significant number of investor-state arbitral proceedings regarding the provisions of the North American Free Trade Agreement (NAFTA).<sup>1</sup>

The concept of resolving investment disputes in an international forum arose in the late 1800's, due to concerns that foreign investors were at the mercy of the

host state, without any protection save for pleading with their home state to advocate/negotiate on their behalf with the state in which the investment was based (i.e., invoking diplomatic protection).<sup>2</sup> In the absence of an established forum to resolve investment disputes in a peaceful manner, states used economic, political, and military means to resolve disputes, frequently leading to state-to-state conflicts (i.e., gunboat diplomacy).<sup>3</sup> International arbitration was put forward as a means to avoid escalation of investment disputes to state military conflict.<sup>4</sup>

Criticisms of ISDS being referred outside of a host state are, of course, not novel. Notably, Argentine jurist Carlos Calvo argued that foreigners must assert their rights before domestic courts and that they have no right of diplomatic protection by their home state or access to international tribunals (Calvo Doctrine).<sup>5</sup> More recent critics of ISDS have expressed their disapproval, primarily on the basis that such proceedings take place out of view of the public eye and impinge on a state government's ability to exercise its sovereign rights.<sup>6</sup>

### Contemporary Issue(s)

This tension regarding the appropriateness of ISDS remains a lively conversation to this day, although state practice indicates a preference for investor-state arbitration as the primary means of resolving investment disputes. This preference is exemplified in: (1) model BITs from states such as the United States,<sup>7</sup> European Union,<sup>8</sup> and Canada;<sup>9</sup> and additionally, (2) recently concluded multilateral and region investment treaties, such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).<sup>10</sup>

Notably, despite the inclusion of provisions requiring the resolution of investment disputes through arbitration, some state parties to the CPTPP have expressly agreed otherwise:

- a. by exchange of side letters, Aotearoa New Zealand and Australia have independently agreed that neither state's investors "shall have recourse to dispute settlement against [the other state] under Chapter 9, Section B (Investor-State Dispute Settlement) of the Agreement";<sup>11</sup> and
- b. also by exchange of side letters, Australia and the United Kingdom reached an agreement with similar wording, expressing that neither state's investors "shall have recourse to dispute settlement against [the other state] under Chapter 9, Section B (Investor-State Dispute Settlement) of the Trans-Pacific Partnership Agreement as incorporated into the Comprehensive and Progressive Agreement for

Trans-Pacific Partnership (the TPP as incorporated into the CPTPP)."<sup>12</sup>

As indicated in their exchange of side letters, these states are waiving the requirement under the CPTPP to have investment disputes resolved by international arbitration.

Similarly, in the United States-Mexico-Canada Agreement (USMCA),<sup>13</sup> Canada has opted out of the dispute settlement chapter of USMCA,<sup>14</sup> a chapter that would otherwise require investment disputes under the USMCA to be resolved by international arbitration.<sup>15</sup> This is yet a further example of states contracting out of ISDS provisions in investment treaties, which raises similar ramifications as those concerning the CPTPP, as considered below.

### Ramifications

Without the stipulated dispute resolution processes in the CPTPP (and the USMCA, concerning Canadian investors and investments in Canada) being followed, the question arises: how are investment disputes to be resolved? Relevant to this question are considerations including: (1) in which forum is any dispute to be heard? and (2) which laws are to be applied?

Relevantly, the identified states have agreed to opt out of only the ISDS procedures (for the CPTPP, Chapter 9, Section B, and for the USMCA, Chapter 31). Accordingly, the remaining provisions regarding investments will be effective and binding upon states.<sup>16</sup> The corollary of this position is that the identified states remain bound by their waiver of sovereign immunity (both from jurisdiction and execution) as per the relevant provisions of the CPTPP but have agreed for such disputes to be resolved before a state's municipal judiciary.

### Forum

In the absence of any written agreement between a foreign investor and a state stipulating that disputes are to be referred to an arbitral tribunal for resolution, a foreign investor has no choice but to litigate any dispute before the host state's judiciary or to seek diplomatic protection through its host state's government. As indicated above, this limitation on investors has (historically) led to undesirable effects on international trade and relations.<sup>17</sup>

Notably, for the CPTPP, Aotearoa New Zealand, Australia, and the United Kingdom are all considered "capital exporting countries," with reputable judiciaries. The assumption about these states withdrawing from ISDS procedures is that each state reciprocally trusts the other

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# Criminal Enforcement of Import Duty Evasion in the United States

By Robert J. Becerra, Coral Gables



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2025 has become the “Year of the Tariff,” with an explosive increase in U.S. tariffs, also known as import duties, on products imported into the United States from every nation in the world. This rise in tariffs has led some U.S. importers to seek ways to evade payment through illegal evasion schemes. Under the Trump administration, trade fraud and tariff evasion have become a focus of the U.S. Department of Justice (DOJ), resulting in increased enforcement efforts and criminal prosecutions. In the past, U.S. Customs and Border Protection (CBP) relied heavily on its administrative remedies to enforce customs regulations and laws regarding import duties. This article will discuss the new emphasis on criminal enforcement of import duty evasion in the United States, various schemes to evade import duties, the laws implicated, recent prosecutions, and guidance for compliance and best practices to avoid illegal duty evasions.

## DOJ’s New MGCF Unit

On 12 May 2025, the DOJ announced in its Memorandum addressing “Focus, Fairness and Efficiency in the Fight

Against White Collar Crime” that it will focus resources on threats to the U.S. economy. These threats include “[t]rade and customs fraudsters, including those who commit tariff evasion . . . [p]rosecuting such frauds will ensure that American businesses are competing on a level playing field in global trade and commerce.”<sup>1</sup> In furtherance of the 12 May Memorandum, the DOJ announced on 10 July 2025 a significant shift in its strategy for enforcement. This shift involved consolidating resources from the Criminal Division and the Civil Division to create the Market, Government and Consumer Fraud Unit (MGCF). This consolidation includes resources, including approximately thirty-five prosecutors from the DOJ Criminal Division’s Market Integrity and Major Frauds Unit (MIMF) combined with personnel from the Civil Division’s Consumer Protection Branch, which had both civil and criminal enforcement authority over consumer protection matters.<sup>2</sup> This consolidated MGCF Unit will focus resources on the criminal investigation and prosecution of trade fraud and tariff evasion in conformity with the announcements contained in the 12 May Memorandum. The MGCF Unit will most likely target companies engaged in misconduct such

as misclassification under the Harmonized Tariff Schedule (HTS), undervaluation of goods, and falsifying country of origin through, among other methods, transshipment, where goods are routed and relabeled for the purpose of hiding the true identity of the country of origin in order to evade high import duties. In addition to promoting the use of corporate voluntary self-disclosures and whistleblowers and awards to discover illegal activity,<sup>3</sup> it is expected the MGCF Unit will partner with the U.S. Department of Commerce to analyze the Automated Export System data to identify suspicious shipments with red flags such as changes in value, classification, and ship tracking data, and to review CBP's Automated Commercial Environment (ACE) Portal for changes to patterns of trade.<sup>4</sup> As a result, increased scrutiny of the activities of international trade participants is in the offing, including not only criminal investigations, but also civil investigative demands using data analytics to identify and pursue high-profile cases in order to deter violators and refocus compliance efforts for international actors.

### Common Schemes to Evade Import Duties

U.S. importers aiming to evade import duties and tariffs utilize a number of illegal schemes. Many of these schemes were used to evade duties on imports from China when the first Trump administration raised duties on Chinese goods, but now that high import duties have proliferated to include goods originating in most countries of the world, and tariffs levied against Chinese goods have markedly increased, these schemes are becoming more prevalent. Examples of the most common schemes include:<sup>5</sup>

- **Undervaluation (False Invoicing)**  
Importers understate the value of goods on customs documents—often via “double invoices,” where a low-value invoice is submitted to U.S. Customs while a higher, true value is recorded internally;
- **Misclassification**  
Goods are incorrectly described, labeled, or categorized in commercial invoices and Customs entry documentation under a tariff classification that carries a lower duty rate;
- **Country-of-Origin Fraud/Transshipment**  
Importers reroute goods through third countries (e.g., shipping from China through Vietnam, Malaysia, Canada, or Mexico) and falsely declare the transit country as the origin, exploiting preferential tariffs or evading high-duty countries. These schemes often involve repacking and relabeling the cartons or pallets in the transit country so that when they arrive in the

United States, they contain false country of origin information.

Industries that produce commodities such as steel, aluminum, solar panels, consumer electronics, autos, tires, building products, pharmaceuticals, and products subject to antidumping and countervailing duties are often involved in these common tariff evasion schemes.

### Laws Violated by Evasion of Import Duties

The federal criminal statutes most often violated by those who evade import duties and commonly prosecuted by the DOJ include: (1) Smuggling, 18 U.S.C. Sec. 545, which makes it a crime to knowingly and willfully import merchandise contrary to law. “Contrary to law” encompasses misconduct such as making false statements on entry documentation regarding country of origin, misclassification, and mislabeling. Sec. 545 violations carry a statutory maximum of twenty years imprisonment.<sup>6</sup> (2) Wire Fraud and Conspiracy to Commit Wire Fraud, 18 U.S.C. Sec. 1343 and 1349, make it a crime to engage, or agree to engage, in a scheme to defraud to obtain something of monetary value, such as savings in import duty payments. A violation of either Secs. 1343 or 1349 is punishable by a statutory maximum imprisonment of twenty years.

Additionally, due to President Trump's novel use of the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. Sec. 1701, to levy reciprocal tariffs on a worldwide basis, the DOJ may begin utilizing this statute to prosecute importers who evade such tariffs. IEEPA criminalizes the willful evasion or violation of regulations issued under national emergency declarations concerning international commerce, and would apply to evasions of those reciprocal tariffs, or those ordered by the president in response to issues such as fentanyl trafficking.<sup>7</sup> Lastly, the DOJ has the “catch all” false statements statute, 18 U.S.C. Sec. 1001, which makes it a felony to make a false statement to a federal agency, such as CBP. Conspiracies to violate 18 U.S.C. Secs. 545, IEEPA, or 18 U.S.C. Sec. 1001 are punishable by up to five years imprisonment pursuant to 18 U.S.C. Sec. 371.

### Recent Prosecutions

Below are examples of recent prosecutions for import duty evasion, which occurred before the DOJ's Memorandum dated 12 May 2025 was issued. The Memorandum's new guidance and the DOJ's prioritization of tariff evasion cases, whether the evasion occurred in the past or

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# No Top-Up, No Shell, No Revenge Tax: U.S. Multinationals in a Fragmented Global Tax Landscape

By Laura McCaskill, Tampa



photo: iStock/alfexe

If 2025 has been eventful in general, it has been doubly so in the international tax arena. As the second financial quarter ended, so too did political support behind two major international tax initiatives, both carrying significant implications for multinational enterprises (MNEs), particularly those headquartered in the United States with holding companies (HoldCos) or financing companies (FinCos) in the European Union (EU), which has been a strong advocate of recent global tax reforms and an early implementer of global tax reform efforts, and is thus highly relevant to U.S. MNEs and asset managers.

Despite this progressive stance on global tax reforms, on 18 June 2025, the Council of the European Union quietly abandoned<sup>1</sup> efforts to finalize a proposed directive designed to prevent the misuse of shell entities for tax purposes (ATAD 3).<sup>2</sup> Ten days later, on 28 June 2025, the secretary-general of the Organisation for Economic Co-operation and Development (OECD) welcomed the G7's "side-by-side" solution (the "Proposed Solution") that would exclude U.S. MNEs from Pillar Two's Income Inclusion

Rule (IIR) and Undertaxed Profits Rule (UTPR) under the OECD's global minimum tax framework (Global Anti-Base Erosion Rules, or GloBE) in recognition of existing U.S. minimum tax rules.<sup>3</sup>

Since it shields U.S. MNEs from double taxation and preserves existing minimum tax rules without politically impractical reform, the Proposed Solution appears to be a strategic victory for the United States, but the implications may prove more symbolic or incremental than transformative.

The Proposed Solution currently represents a political understanding. The path to legally binding implementation within the EU requires formal action by the OECD Inclusive Framework, an additional directive or guidance from the European Commission, and transposition by each EU member state. Each step, of course, entails considerable uncertainty in timing and content.

## The Global Framework Is Fractured Not Fixed

From the perspective of U.S. MNEs, the abandonment of ATAD 3 and the Proposed Solution signal a more fragmented enforcement landscape in which individual EU member states increasingly shape outcomes through diverging transfer pricing (TP) enforcement, economic substance requirements, and now, differing Qualified Domestic Minimum Top-up Tax (QDMTT) implementation.

This article explains the political and legal developments of mid-2025 that led to the abandonment of ATAD 3 and the proposed exemption of U.S. MNEs from Pillar Two's IIR and UTPR, considers how global tax harmonization is giving way to fragmented national enforcement within the EU, analyzes how jurisdictional differences in transfer pricing enforcement and economic substance requirements now drive structuring decisions, and provides practical guidance for U.S. outbound investment in this fractured post-BEPS landscape.

### Back to the Basics: A Quick Brush-Up on BEPS

In 2015, the OECD/G20 Base Erosion and Profit Shifting (BEPS) project<sup>4</sup> released fifteen action points targeting tax avoidance strategies commonly employed by MNEs. ATAD 3 represented the EU's attempted implementation of BEPS Action 6, which aimed to restrict treaty benefits in cases of treaty shopping. BEPS 2.0 introduced the Two-Pillar Solution<sup>5</sup> in 2019 in response to the digitization of the economy. While Pillar One<sup>6</sup> reallocates taxing rights to the jurisdiction of users or customers, Pillar Two establishes a 15% global minimum tax.

### ATAD 3 Withdrawn: The Anti-Shell Directive That Wasn't

For decades, U.S.-based MNEs have used EU-based HoldCo and FinCo structures to centralize operations, access favorable tax treaties, and benefit from EU directives such as the Interest and Royalties Directive (IRD) and Parent-Subsidiary Directive (PSD). While often commercially justified, these structures have long attracted scrutiny from regulators and tax authorities, concerned that they facilitate treaty shopping and base erosion.

ATAD 3, which was born from these concerns, aimed to impose a series of gateway tests and rebuttable presumptions of abuse unless certain minimum economic substance criteria were met. Failure to meet these criteria would have resulted in denial of tax residency certificates and loss of IRD and PSD exemptions. ATAD 3 faced immediate resistance due to significant compliance burdens, legal uncertainty, overlap with existing regimes

such as DAC6,<sup>7</sup> and potential conflicts with EU fundamental freedoms, leading to its formal abandonment.

Although ATAD 3's withdrawal lifts a significant compliance threat, the ECOFIN report of 18 June 2025 announcing its removal from the council's legislative agenda noted that many EU member states were of the view that clarifications or amendments of hallmarks in DAC6 could be used to achieve the aims of ATAD 3.<sup>8</sup> This signals that DAC6, through reportable cross-border arrangements, will now provide the main avenue to scrutinize the economic substance of the entities that would have been reportable under ATAD 3. Therefore, while the abandonment of ATAD 3 looks significant at first glance, the economic substance-related provisions may merely shift into a different, arguably more complex framework, DAC6.

The ECOFIN report notes that any changes to DAC6 can only be "scrutinised once the Commission has finalised its analyses and submitted a possible new legislative proposal on DAC,"<sup>9</sup> creating ongoing legal uncertainty, though legislative reform is anticipated for 2026.

### The Uncertain Promise of Pillar Two Relief

Pillar Two applies to MNEs with consolidated revenues of €750 million or more in at least two of the four fiscal years preceding the tested year.<sup>10</sup> For qualifying MNEs, it aims to ensure a 15% effective tax rate (ETR) in each jurisdiction in which it operates through the implementation of three coordinated top-up taxes:<sup>11</sup> (1) the Income Inclusion Rule (IIR), which allows parent jurisdictions to impose top-up tax on low-taxed subsidiaries; (2) the Undertaxed Profits Rule (UTPR), which acts as a backstop, reallocating taxing rights where no IIR applies; and (3) the Qualified Domestic Minimum Top-Up Tax (QDMTT), which enables low-tax jurisdictions to impose domestic top-ups before foreign jurisdictions can apply the IIR or UTPR.

#### *Pillar Two in the EU*

The EU adopted the Pillar Two Directive<sup>12</sup> in December 2022, requiring member states to implement the IIR and, optionally, the QDMTT by 1 January 2024, with UTPR implementation becoming effective in 2025.

Despite this implementation progress, Pillar Two's future in the EU now faces substantial headwinds. While a long journey still lies ahead with respect to transforming the Proposed Solution from a statement of understanding into a legislative reality, perhaps more significantly, support for Pillar Two appears to be wavering in EU member states.

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# International Judgment Recognition in an Age of North American Disunity

By Joseph Rome and Giovanna Filippi Del Nero, Miami



photo: pexels/Hugo Magalhaes

To a certain extent, North American courts have long been at the forefront of developing the global legal system. Nearly all the current nations of North America and the Caribbean were founding members of the United Nations and were early signatories to the various multilateral treaties following the Second World War that bound nations together under public international law. No less importantly, the courts of these countries, in step with many other members of the international community, developed mechanisms to recognize and enforce judgments and orders from foreign jurisdictions, ensuring that private international law kept pace with public international law. Nonetheless, recognition of foreign judgments in the United States has always been subject to a certain amount of judicial discretion to ensure that laws that run contrary to public policy are not condoned by U.S. courts.

Now, North American nations are again changing rapidly, though this time in ways that may challenge the international legal norms and institutions encouraging cooperation. On the one hand, under the administrations of Donald Trump, the United States has announced intentions to reconsider its political alliances and adjust its

treaty relationships accordingly. Will changes to the United States' political relations mean that U.S. courts will be more likely to decline to enforce judgments from nations in disfavor with the administration or public opinion? On another hand, Mexico has recently enacted a sweeping reform allowing for the election of judges at all levels of the judiciary, resulting in what some observers have criticized as an increased politicization of the judiciary that will invite corruption. Will the forthcoming judgments from Mexico's new judiciary face greater challenges to enforcement in the United States? How should Florida attorneys advise clients seeking to enforce foreign judgments, from neighboring countries in North America and beyond, in U.S. courts?

## Foreign Money Judgments and Political Assumptions

The United States, by far the largest country in North America and a crux of the global economy, has elected not to codify the standards for recognition of foreign country judgments at a national level.<sup>1</sup> Without any treaty or statute governing judgment recognition, the enforcement of foreign country money judgments generally is governed

by state statutory and common law, regardless of whether the foreign country money judgment is enforced in state or federal court.

Most, though not all, U.S. states have adopted a version of the Uniform Foreign Money-Judgments Recognition Action (UFMJRA), which largely adopts the previous common law considerations for judgment recognition.<sup>2</sup> The twelve states that have not adopted any version of the UFMJRA continue to follow the common law principles of judgment recognition articulated over a century ago in *Hilton v. Guyot*.<sup>3</sup> In addition, even in states that have adopted one of the Uniform Acts, a common law analysis is still followed for non-money judgments.<sup>4</sup> Ultimately, the touchstone for recognition under the common law is “comity.” As explained by the U.S. Supreme Court in *Hilton*, comity “is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.”<sup>5</sup>

Both common law and the Uniform Acts generally consider four elements for the recognition of a foreign money judgment: (1) the defendant had an opportunity to have a full and fair trial abroad before a court of competent jurisdiction; (2) the defendant was given notice of the foreign proceedings or voluntarily appeared in those proceedings; (3) the foreign country’s system of jurisprudence was likely to secure an impartial administration of justice; and (4) there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the public policy or comity of the United States should not allow it full effect.<sup>6</sup>

Both the third and fourth elements may require a U.S. court to consider matters of foreign law and politics, matters on which they are rarely required to opine. Both embody concepts only occasionally interpreted and applied by the civil courts and may seem to invite judges to apply their own views of U.S. policy. Yet this would be error—U.S. courts have elaborated rules constraining the interpretation of both public policy and comity in ways that do not change based on a presidential administration’s foreign policy regardless of the popular perception of a foreign regime.

### High Bar to Find Systemic Lack of Due Process

The third factor mentioned above, whether a foreign justice system is capable of producing a judgment that accords with due process, does not invite a judge to insert their

personal opinion of a foreign country. Thus, this factor has rarely resulted in the denial of recognition of a foreign judgment. Perhaps the clearest example of a case properly denying recognition due to a systemic failure to apply due process in a foreign system is *Bridgeway Corp. v. Citibank*, where a court found that Liberia’s court system had so collapsed during its civil war that any judgment purporting to be from a court during that period could not be relied upon.<sup>7</sup>

Other courts, however, have had difficulty distinguishing between a systemic failure to provide due process and a failure to provide due process to a particular litigant. For example, in *Chevron Corp. v. Donziger*, the court found that the Ecuadorian court system could not provide a fair trial to a particular litigant, and in *Bank Melli Iran v. Pahlavi*, the court held that the Iranian court system could not be fair to American litigants.<sup>8</sup> There were no findings that either country’s judicial system was incapable of providing fair hearings to any litigant. Both decisions were upheld on appeal based on specific findings that the particular judgments at issue were tainted by improper political interference, but the Second Circuit Court of Appeals in both cases declined to approve the reasoning related to systemic lack of fairness.<sup>9</sup>

More recent authorities, however, have clarified that the denial of recognition based on a systemic lack of due process is not meant to be an examination of a particular judgment or class of litigant. For example, in 2015 the Fifth Circuit Court of Appeals, interpreting Texas’s 1986 version of the UFMJRA, reversed on appeal a trial court finding that a particular litigant could not obtain a fair trial in Morocco because “Morocco’s judicial system is not in a state of complete collapse, and there is no evidence that Moroccan courts or the Moroccan government routinely disregard constitutional provisions or the rule of law.”<sup>10</sup> Further clarifying that the focus of a systemic analysis should be on a system as a whole, the 2005 UFMJRA maintained the mandatory ground for denying recognition for systemic failure to provide due process while adding a new discretionary ground for a failure of due process in “the specific proceeding in the foreign court leading to the judgment.”<sup>11</sup>

Several cases relating to the People’s Republic of China have clarified the systemic analysis in greater detail. Indeed, these cases have been particularly helpful because they expressly reject the increasing political competition between the United States and China. In *Shanghai Yongrun*

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# Working in the United States as a TN Professional: Visa Requirements for Canadian and Mexican Citizens

By Larry S. Rifkin, Miami



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Qualified citizens of Canada and Mexico have a unique option in the form of the TN visa to seek temporary nonimmigrant entry into the United States to engage in business activities in defined professional roles. The TN (Trade NAFTA) visa was established as part of the North American Free Trade Agreement (NAFTA) in 1994 and was continued under the United States-Mexico-Canada Agreement (USMCA), which replaced NAFTA in 2020. This visa was designed to foster economic cooperation and mobility between the three nations by allowing qualified professionals to work in the United States without many of the restrictions common to other employment visas. This visa program also facilitates cross-border partnerships, bolsters trade relationships, and promotes innovation and economic growth within North America.

This article evaluates the TN visa's qualifications, discusses its advantages over other employment visa options, outlines the different visa processes for Canadian and Mexican citizens, and serves as a practical guide for preparing a case to maximize the chances of a successful adjudication before the U.S. Department of Homeland Security (DHS) and the U.S. Department of State.

## General Requirements for TN Visa

According to U.S. Citizenship and Immigration Services (USCIS), citizens of Canada and Mexico (not permanent residents)<sup>1</sup> are eligible to work in the United States as USMCA professionals under the TN nonimmigrant classification if they meet the following conditions:

- Their profession is included in the USMCA list.
- The position in the United States requires a USMCA professional.
- The foreign national will work in a prearranged full-time or part-time job for a U.S. employer or entity.
- The foreign national has the qualifications to practice the profession in question.<sup>2</sup>

## Qualifying Professional Occupations & Credentials

To qualify for TN classification, a Canadian or Mexican citizen must demonstrate "business activity at a professional level in one of the professions set forth in Appendix 2 to Annex 16-A of Chapter 16."<sup>3</sup> Business activities at a professional level are defined as "undertakings which require that, for successful completion, the individual has at least a baccalaureate

degree or appropriate credentials demonstrating status as a professional” in a qualifying occupation.<sup>4</sup> There are approximately sixty professional occupations listed in the regulations, including accountant, architect, computer systems analyst, economist, engineer, hotel manager, lawyer, social worker, nurse, pharmacist, biologist, chemist, teacher, and university professor, among others.<sup>5</sup>

Each occupation on the list specifies the educational or professional credentials that the visa applicant must meet to qualify for that profession. For example, for an architect, the foreign national must establish they have a baccalaureate or *licenciatura* degree, or state/provincial license.<sup>6</sup> A state/provincial license is defined as “any document issued by state, provincial, or federal government, as the case may be, or under its authority, but not by a local government, that permits a person to engage in a regulated activity or profession.”<sup>7</sup> For a computer system analyst, the requirements are baccalaureate or *licenciatura* degree, or post-secondary diploma or post-secondary certificate, and three years of experience.<sup>8</sup> The majority of the professions on the list require a baccalaureate or *licenciatura* degree.

If the profession is not listed in Appendix 2 to Annex 16-A of Chapter 16 of the USMCA, then the individual is not eligible for TN classification. There is no mechanism to obtain a TN visa for a profession not included on the list.

### **Job Offer**

The TN visa allows Canadian and Mexican citizens to seek temporary entry into the United States to “engage in business activities at a professional level,” defined as the “performance of prearranged business activities for a United States entity, including an individual.”<sup>9</sup> The visa “does not authorize the establishment of a business or practice in the United States in which the professional will be, in substance, self-employed. A professional will be deemed to be self-employed if he or she will be rendering services to a corporation or entity of which the professional is the sole or controlling shareholder or owner.”<sup>10</sup>

To establish the existence of a qualifying offer of employment for TN purposes, government authorities require a contract or employment letter that includes:

- The purpose of the foreign national’s entry;
- A detailed description of the anticipated business activities or job responsibilities;
- The applicant’s anticipated length of stay in the United States;
- The applicant’s educational qualifications or appropriate credentials demonstrating professional status;

- Evidence of the applicant’s compliance with DHS regulations and/or state laws; and
- Arrangements for the applicant’s salary.<sup>11</sup>

### **Temporary Entry**

The regulations define “temporary entry” as an “entry without the intent to establish permanent residence.”<sup>12</sup> For a TN applicant, it is essential to “demonstrate to the satisfaction of the inspecting immigration officer that his or her work assignment in the United States will end at a predictable time and that he or she will depart upon completion of the assignment.”<sup>13</sup>

Because the TN visa is a nonimmigrant visa, applicants must overcome the statutory presumption of immigrant intent found in Section 214(b) of the Immigration and Nationality Act.<sup>14</sup> Therefore, TN visa applicants have to demonstrate to the satisfaction of the adjudicator that they have permanent ties to their home country and clearly intend to return to their home country at the conclusion of their TN employment.

### **Validity Period**

TN visas are initially granted for up to three years and are valid for multiple entries.<sup>15</sup> The visa can be renewed indefinitely, provided the foreign national continues to engage in TN business activities for a U.S. employer or entity at a professional level and otherwise continues to properly maintain TN nonimmigrant status.<sup>16</sup> TN visa holders may bring their spouses and unmarried children (under twenty-one years old) to the United States under the TD visa category.<sup>17</sup> However, TD visa holders are not permitted to work while in the United States, although they are permitted to study.<sup>18</sup>

### **TN Procedures for Canadian Citizens**

Canadian citizens residing outside the United States are not required to apply for a TN visa at a U.S. consulate.<sup>19</sup> Instead, Canadian citizens may seek admission to the United States pursuant to TN classification by presenting the required documentation to a U.S. Customs and Border Protection (CBP) officer at certain CBP-designated U.S. ports of entry or at a designated pre-clearance/pre-flight inspection station.<sup>20</sup> There are four pre-clearance stations optimized for TN visa processing in Canada: Calgary International Airport (Alberta), Lester B. Pearson International Airport (Ontario), Montreal Trudeau International Airport Québec, and Vancouver International Airport (British Columbia).<sup>21</sup>

Canadian citizens must present the following documentation to the CBP officer:

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# Artificial Intelligence and Data Protection: Regulatory Convergences and Divergences in North America—Lessons and Cross-Border Insights From Brazil

By Luiz Alberto de Carvalho Barros Filho, Maceió, Alagoas, Brazil



photo: iStock/MustafaU

The rapid proliferation of artificial intelligence (AI) technologies across international business operations has created an urgent need for sophisticated legal frameworks that can effectively govern cross-border AI implementation while preserving the benefits of technological innovation. For international practitioners, particularly those serving clients engaged in North American commerce, understanding the evolving AI-regulatory landscape presents both significant challenges and substantial opportunities for professional specialization.

The legal frameworks governing AI and data protection in the United States, Canada, and Mexico reflect distinctly different philosophical approaches to technological governance, each shaped by unique constitutional structures, economic priorities, and regulatory traditions. These divergences create complex compliance challenges for businesses operating across North American borders, while simultaneously presenting opportunities for legal

practitioners who are capable of navigating the intricate web of overlapping and sometimes conflicting regulatory requirements.

This analysis examines the current state of AI and data protection regulation across North America, with particular attention to the practical implications for cross-border legal practice. The examination includes a comparative perspective from Brazil, whose recent legislative developments offer valuable insights into alternative approaches to AI governance that may influence future North American regulatory evolution. The Brazilian experience, particularly the interaction between the *Lei Geral de Proteção de Dados Pessoais* and Brazil's emerging AI legislation, provides a useful counterpoint for understanding the challenges and opportunities facing North American jurisdictions.

The significance of regulatory convergence and divergence extends beyond academic interest to immediate practical concerns for international legal practitioners. As artificial

intelligence becomes increasingly central to business operations across industries—from financial services and health care to manufacturing and logistics—the ability to provide sophisticated guidance on multi-jurisdictional AI compliance has become a critical competitive advantage for international law firms and corporate legal departments.

### **United States: Federal Framework and International Implications**

The United States has adopted a distinct approach to AI governance, characterized by voluntary frameworks, sectoral regulation, and a preference for industry self-regulation over comprehensive federal legislation. This approach reflects both the federal system's structural limitations and a philosophical commitment to technological innovation unencumbered by premature regulatory intervention.

The National Institute of Standards and Technology (NIST) has emerged as the primary federal body providing AI governance guidance through its comprehensive AI Risk Management Framework.<sup>1</sup> Released on 26 January 2023 following an extensive 18-month consultation process involving more than 240 organizations from private industry, academia, civil society, and government, the NIST framework represents the most significant federal effort to establish coherent AI governance principles. The framework's voluntary nature reflects a traditional preference for market-based solutions, while its comprehensive scope demonstrates growing recognition of AI's potential societal impacts.

The NIST framework's international significance extends well beyond its domestic applications. Its emphasis on trustworthiness characteristics—including accountability, explainability, fairness, and reliability—influences AI governance discussions globally and provides a foundation for international businesses seeking to establish consistent AI governance practices across multiple jurisdictions.<sup>2</sup> The framework's risk-based approach, which organizes AI systems into categories based on their potential for harm, offers a practical methodology that international practitioners can tailor for multijurisdictional compliance strategies.

Complementing the NIST framework, various federal agencies have developed sector-specific guidance that affects international business operations. The Committee on Foreign Investment in the United States has increasingly scrutinized foreign acquisitions of U.S. AI companies, while the Export Administration Regulations have expanded to cover certain AI technologies, creating compliance

obligations for international technology transfers.

At the state level, California's privacy legislation continues to exert extraterritorial influence through the California Consumer Privacy Act and its successor, the California Privacy Rights Act. These statutes include specific provisions addressing automated decision-making that affect international businesses processing California residents' data, regardless of a business's physical location. The extraterritorial reach of California privacy laws creates de facto national standards that international practitioners must navigate carefully when advising clients on AI implementation strategies.

The United States' emphasis on voluntary compliance and sectoral regulation creates both opportunities and challenges for international businesses. While the absence of comprehensive federal AI legislation provides flexibility for innovative business models, it also creates uncertainty about regulatory development and potential compliance obligations. International practitioners must therefore counsel clients to prepare for potential federal legislation while working within the current voluntary framework.

### **Canada: AIDA's Legislative Journey and Current Uncertainty**

Canada's proposed approach to AI regulation represents one of the most ambitious attempts to create comprehensive national AI legislation, though this effort ultimately failed to achieve enactment. The Artificial Intelligence and Data Act (AIDA), proposed as part of Bill C-twenty-seven, the Digital Charter Implementation Act of 2022, would have established the world's first national regulatory framework specifically designed to govern AI systems across all sectors of the economy.<sup>3</sup>

The proposed AIDA took a risk-based approach similar to the European Union's AI Act, categorizing AI systems based on their potential impact and establishing corresponding regulatory obligations. High-impact AI systems would have been subject to comprehensive requirements including impact assessments, risk mitigation measures, and ongoing monitoring obligations. The legislation would have created a new AI and Data Commissioner with significant enforcement powers, including the ability to impose substantial monetary penalties and operational restrictions.<sup>4</sup>

AIDA's legislative history reveals the complex political and practical challenges involved in developing comprehensive AI regulations. Despite extensive consultation and multiple

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# Trading Places: Realignment of Turtle Island at the Subnational Level: Inter-mestic Diplomacy for States and First Nations in North America

By Bret Shawn Clark, Englewood



photo: iStock/Tom Chalky – Digital Vintage Library

Throughout history, the world has experienced the rise and fall of empires. They were built on a drive for territorial conquest fueled by imperialistic ambition. Midway through the first half of the twenty-first century, there is scant evidence that this cyclical phenomenon of political, economic, and social boom-and-bust will not repeat itself in the case of the United States, the last superpower to remain standing after the geopolitical tumult of the preceding century. This holds true despite statements from the current administration to resume the territorial expansion of the United States outside its current borders, consuming most of the North American continent,

as well as Greenland,<sup>1</sup> Panama,<sup>2</sup> and as far away as the Gaza strip<sup>3</sup> and war-torn Ukraine.<sup>4</sup>

Initially thought of as fanciful, the proposal to annex Canada as the fifty-first state of the union was met with tongue-in-cheek counter proposals to incorporate U.S. states as Canadian provinces.<sup>5</sup> Once it became clear that the annexation of Canada was in fact under serious consideration, the idea was no longer seen as a laughing matter.<sup>6</sup> Still, while the prospect of some Canadian provinces trading places with U.S. states remains dim, the potential realignment of political subdivisions between these nation-states, and other polities in their

immediate vicinity, does present interesting challenges and opportunities for the people living in a part of the world that some observers anticipate to be the last of the great empires.

A better understanding of what the process of integration and subsequent disintegration of an empire will most likely entail is discernable by a brief examination of the history of one of the most famous antecedent superpowers that is now no more, and those that came after.

## The Rise and Fall of European Empires

By any measure, the breathtaking ascent and just as spectacular collapse of the Roman Empire sets the gold standard for understanding the mechanics of the life cycle of global superpowers in the Western world, and the constituent states under their control.

Rome began as a settlement in the late Bronze Age at the end of the second millennium BCE, developing into a city-state during the first few centuries of the first millennium,<sup>7</sup> before evolving away from the Etruscan monarchy to become a republic in 509–507 BCE.<sup>8</sup> By then, the central role of the city-state as a polity and colonizing force<sup>9</sup> had been set in motion as they expanded into “one of the most enduring network of cities history has ever known.”<sup>10</sup> As the empire began to expand outward, the territories under Rome’s dominion spread.<sup>11</sup>

While the existence of city-states was vital to an undertaking of this magnitude, so too was the development of a system of provincial governance that together with the central government and the army were the central pillars of the Roman state.<sup>12</sup> Eschewing a treaty system of governance that was in place on the Italian peninsula,<sup>13</sup> administration of areas that came under Roman control (*provincia*) included communities (*civitates*) that had their own leaders and officials.<sup>14</sup>

On the face of it, one could easily conclude that the Roman Empire simply out stretched its capacity to manage an expanding territorial reach stitched together by a network of city-states, provinces, and other forms of localized regional governance. Other explanations abound as to the reasons for the disaggregation of the empire,<sup>15</sup> but the fact remains that the governing systems put in place by the Romans to rule the Western half of the European continent fell apart.

The disintegration of the Roman Empire ushered in the beginning of the Middle Ages. In the resulting power vacuum, a new political system (feudalism<sup>16</sup>) accompanied by a new society (manorialism<sup>17</sup>) took hold, gradually giving

way to the rise of more centralized monarchical rule,<sup>18</sup> which was preceded by an era in which approximately 1,800 “states”<sup>19</sup> served as the tenuous glue that kept civilization from completely unravelling. In the great period of European state building (from ca. 1400 to ca. 1800),<sup>20</sup> the continent transitioned from a hodgepodge of “states” organized in a feudal/manorial mode of operation to areas controlled by imperial rulers anxious to expand their spheres of influence beyond the borders of their assigned state.<sup>21</sup>

As these rulers competed for control of territory within the confines of the European continent, newly discovered land allowed for these conflicts to spill over into areas outside the empires’ immediate periphery—areas that had the unrealized potential to realign the capital of these emerging empires to a place known to its inhabitants as Turtle Island.<sup>22</sup>

## Where is Turtle Island?

Turtle Island refers to planet Earth or, Eurocentrically, the North American continent.<sup>23</sup>

The name arises from oral traditions expounding upon creation myths of the Haudenosaunee (Iroquoian-speaking confederacy of the Northeastern Woodlands peoples), among other inhabitants of the continent.<sup>24</sup> According to these traditions, the earth began as a place of eternal peace covered by water (the “great cloud sea”).<sup>25</sup> Animals in the wild fetched dirt from the ocean floor (often at the cost of their lives) and piled it on top of a turtle’s back, which grew in size until it became a large expanse of land (a continent referred to by westerners as North America).<sup>26</sup> Through this process (at least in the Haudenosaunee telling of the story), all living things had a spiritual connection to the soil of the earth, even in death, giving the land itself the ability to act and to shape creation.<sup>27</sup>

This underlying philosophical view of the relationship between humans and the natural world on Turtle Island persisted for thousands of years at the same time that a very different view of this relationship insinuated itself on the European continent. This difference of opinion lies at the heart of the tragedy that was to unfold on the continent.

## The Clash Between Land Stewardship Versus Land Ownership

The origin stories of First Nation peoples imply a philosophical basis for their approach to land and land

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# ILS Lunch & Learn With Eduardo Palmer

## 11 June 2025 • Coral Gables

During the ILS Lunch & Learn held 11 June 2025, ILS Past Chair Eduardo “Eddie” Palmer of Eduardo Palmer P.A. shared stories about his career path, described some of his fascinating cases as an assistant United States attorney in the Southern District of Florida and his work before the Organization of American States in support of Cuban political prisoners. Fiduciary Trust International hosted the event at its Coral Gables headquarters, and ILS Past Chair Jackie Villalba served as moderator.

Eddie is a seasoned litigator with over 30 years of experience in both the private and public sectors, specializing in complex commercial litigation, international arbitration, and white-collar criminal defense. Fluent in Spanish and deeply engaged in international law, he has played a key role in cross-border arbitration, compliance training, and major litigation across Latin America, often speaking at global legal conferences.



Eddie Palmer and Jackie Villalba



Michael Cabanas, regional managing director at Fiduciary Trust International, welcomes the group.



Jackie Villalba introduces Eddie Palmer to an overflow crowd of Lunch & Learn attendees.



A perfect afternoon in beautiful Coral Gables

# ILS Events at the Annual Florida Bar Convention 25-28 June 2025 • Boca Raton

## ***End-of-Year Chair's Reception***

The International Law Section held its End-of-Year Chair's Reception on 26 June 2025 at Yard House in Boca Raton. The Thursday evening gathering provided a chance for ILS members to catch up with each other before getting down to business at the ILS Executive Council Meeting the next day.



Thanks to our ILS sponsors for all they do!



Cristina Vicens Beard, Arnie Lacayo, and Javier Fernandez-Samaniego



ILS members enjoy a relaxing evening at Yard House.



Katherine Doble, Michelle Lenhart, Ana Barton, and Valeria Angelucci



Laura Reich, Jeff Hagen, Penelope Perez-Kelly, and Ana Barton

# ILS Executive Council Meeting



The ILS Executive Council conducts business at its end-of-year meeting on 26 June 2025.



Chair Ana Barton (right) recognizes Laura Reich for her contributions as ILS secretary and for leading the Student & Membership Drive.



Cristina Vicens Beard (right) presents gifts of appreciation to Chair Ana Barton for her leadership of the section.



Chair Ana Barton recognizes Matthew Akiba for his service as editor of the *ILS Gazette*.



Chair Ana Barton recognizes Cristina Vicens Beard for her service as ILS chair-elect and website and graphic designer.



Chair Ana Barton (right) recognizes Jeff Hagen for his service as ILS vice treasurer, co-editor of the *International Law Quarterly*, and chair of the International Tax Committee, as well as Jennifer Mosquera for her service as co-editor of the *International Law Quarterly*.

# ILS Executive Council Meeting

## Awardees Not Pictured

- Jacqueline Villalba, chair, Lunch & Learn Committee
- Priscila Bandeira, chair, Richard DeWitt Memorial Vis Pre-Moot
- Frederic Rocafort, co-chair, Asia Committee; leadership of Cooperation Agreement with Barra Mexicana Colegio de Abogados
- Davide Macelloni, ILS treasurer, and co-chair of iLaw 2025
- Adrian Nuñez, co-chair of iLaw 2025



Peter Quinter, Ana Barton, and J. Brock McClane



Ed Davis, Cristina Vicens Beard, and Arnie Lacayo



Peter Quinter and Richard Montes de Oca



Jeff Hagen, Laura Reich, Davide Macelloni, Cristina Vicens Beard, and Ana Barton



J. Brock McClane, C. Ryan Reetz, Richard Montes de Oca, James Meyer, Ed Davis, Ana Barton, Peter Quinter, Robert Becerra, and Arnie Lacayo

# WORLD ROUNDUP

## CARIBBEAN



**Ambar Delgado, Panama City, Republic of Panama**  
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### Nevis is a modern jurisdiction on the rise.

Nevis, one of the islands that make up the Federation of St. Kitts & Nevis, is recognized as the smallest country in the Americas, both in terms of land area and population. Despite its size, it has managed to strategically position itself in the international finance sector.

After gaining independence, Nevis established a robust legal framework that enables the formation of various types of entities with flexible structures, high levels of confidentiality, and notable operational efficiency.

As a result of this approach, Nevis has managed to increase its portfolio of institutional and individual clients who use these entities, as they offer simplified, low-cost management without compromising compliance with international standards that seek to prevent the misuse of these structures. This is coupled with confidence in the ability of authorized corporate service providers to ensure their proper use and implementation of effective controls.

The combination of modern legislation and a diverse portfolio of legal vehicles has allowed Nevis to establish itself as an attractive option for those seeking to plan and protect their assets while maintaining confidentiality, as it allows documents containing private information to remain in the office of the Registered Agent without being publicly filed, and these only need to be available upon the request of the competent authorities.

One of the most notable features of Nevis is its Multiform Foundations Act, which offers the possibility for entities from any jurisdiction to be continued, transformed, or converted into foundations (of any type), which would allow them to adapt to various estate planning strategies.

*Ambar Delgado serves as a special projects executive in the Estate Planning Department at Morgan & Morgan. She holds an LL.B. from the Universidad de Panamá and has completed a Finance for Non-Financial Professionals program. With over thirteen years of experience in estate planning, company formation, and corporate management, Ms. Delgado brings deep expertise and a strategic approach to delivering tailored solutions for clients.*

## ITALY



**Giovanna Vaglio Bianco, Milan**  
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### “Inpatriates” working in Italy may qualify for a favorable tax regime.

Art. 5 of Legislative Decree No. 209/2023 regulates a new special tax regime for “inpatriate” workers. The article states that, under certain conditions, workers who transfer their tax residency to Italy are eligible for a favorable tax regime: only 50% of the income earned in Italy (up to a maximum of €600,000 annually) is considered for tax purposes.

Application of the special tax regime is subject to the following conditions: the worker (1) must keep their tax residency in Italy for at least four years; (2) must not have been a tax resident in Italy for the previous three years before the transfer (If the employee works in Italy for the same entity with which they were employed abroad before the transfer, or if they work for an entity of the same company group with which they were employed abroad, the minimum requirement of time spent abroad to benefit the tax regime is extended according to Art. 5, (b)(1)(2), Legislative Decree No. 209/2023.); (3) must carry out the majority of their employment activity in Italy during the tax period; and (4) must have a high level of qualification or specialization, set out in Legislative Decree No. 108/2012 and Legislative Decree No.206/2007.

A most favorable tax regime (only 40% of the income earned in Italy taxed) is available to inpatriate workers who have minor children residing in Italy.

Unlike its interpretation of the previous special tax regime that was in force until 31 December 2023, the Italian Revenue Agency will no longer require a direct connection between the transfer of tax residency and the start of work in Italy. The agency clarified in its statement No. 66/2025 that it is no longer necessary to verify the existence of a connection (*i.e., collegamento funzionale*) between the transfer of tax residency to Italy and the commencement of a taxable work activity carried out in Italy.

Therefore, not only may the special tax regime be applied in cases where a worker has already signed an employment agreement in Italy when transferring their tax residency, but also to a worker who transfers their tax residency and only some months later enters into an employment agreement that involves working in Italy for the majority of the tax period.

*Giovanna Vaglio Bianco is an Italian attorney and member of the Milan Bar Association. She focuses her practice on employment and labor law, assisting national and international clients on labor law issues, including employment and self-employment contracts, employees' transfers, disciplinary proceedings, and dismissals.*

## WESTERN EUROPE



**Susanne Leone, Miami**  
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### EU Artificial Intelligence Act enters phased implementation.

The AI Act is the first comprehensive legal framework for AI in the world, and it's poised to have global influence similar to the General Data Protection Regulation (GDPR). The AI Act was formally adopted in 2024 and has entered into its phased implementation. The focus has shifted to compliance and enforcement. As of 2 August 2025, the second enforcement obligations for General Purpose AI (GPAI) model providers became enforceable, with associated penalties up to €35 million or 7% of global revenue. Below is a short summary of the EU Artificial Intelligence Act.

#### 1. Risk-Based Regulatory Framework

The AI Act adopts a tiered, risk-based structure:

- Unacceptable-risk systems are prohibited (e.g., social scoring and subliminal manipulation).
- High-risk systems are subject to extensive regulatory requirements and constitute the principal focus of the Act.
- Limited-risk systems are subject to transparency obligations; providers and deployers must disclose that users are interacting with AI (e.g., chatbots, deepfakes).
- Minimal-risk systems remain largely unregulated, for example, AI used in video games or spam filters, though this may evolve with the rise of generative AI.

#### 2. Regulatory Obligations for High-Risk AI Providers

Most of the compliance obligations under the Act fall on providers of high-risk AI systems. These include:

- Entities placing high-risk AI on the Union market or putting it into service, regardless of their place of establishment (EU or third country).
- Third-country providers where the output of a high-risk system is used within the EU.

#### 3. Obligations of Deployers (Users) of High-Risk AI

Users, defined as natural or legal persons deploying AI in a professional context, are subject to more limited obligations,

such as usage monitoring and ensuring appropriate human oversight. These apply to:

- Users established in the EU.
- Third-country users where the AI system's output affects the EU market or individuals within the EU.

#### 4. Regulation of General-Purpose AI (GPAI) Models

GPAI model providers, regardless of intended downstream use, face graduated obligations:

- All GPAI providers must publish training data summaries, provide documentation and instructions for use, and comply with the Copyright Directive.
- Open-source GPAI providers are exempt from full compliance and only need to conform with copyright and publish the training data summary, unless their models pose systemic risk, in which case additional requirements apply.
- Systemic-risk GPAI models (both open and closed) must undergo model evaluation, adversarial testing, incident tracking and reporting, and implement cybersecurity measures.

As the AI Act enters into its second enforcement stage, affected entities must transition from regulatory awareness to implementation, as compliance obligations are now a matter of legal necessity rather than strategic discretion.

#### ECJ landmark ruling: National courts may review CAS decisions.

The European Court of Justice (ECJ) ruled that arbitration decisions by the Court of Arbitration for Sport (CAS), headquartered in Lausanne, Switzerland, may be reviewed by national courts in EU member states when they implicate EU legal standards. This follows a case involving Belgian soccer club RFC Seraing, which challenged a CAS decision upholding FIFA sanctions. The ECJ emphasized that national courts must be able to conduct in-depth reviews of such awards to ensure compliance with EU public policy and fundamental rights, particularly when arbitration is mandatory and no alternative forum is available. The ruling may limit CAS's autonomy and expand judicial oversight over international sports governance within the EU.

*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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## OFF WORLD



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### **Proposed EU Space Act offers a unified legal framework for Europe's space future.**

On 25 June 2025, the European Commission released a draft regulation aimed at harmonizing the legal framework for space activities across the European Union. Informally known as the “EU Space Act,” the proposal marks a significant step toward consolidating the fragmented landscape of national space laws currently in place across EU member states. Today, more than a dozen member states maintain separate domestic laws regulating space operations, often leading to regulatory inconsistencies, legal uncertainty, and barriers to market access.

The proposed regulation is structured around three key pillars: *safety*, *resilience*, and *sustainability*. Each pillar reflects the EU's broader policy goals for security, competitiveness, and responsible use of outer space. *Safety* provisions would require operators to strengthen collision avoidance protocols, coordinate launches and re-entries with aviation authorities, and improve tracking and cataloging of space objects. These measures include end-of-life planning for satellites and mandatory debris mitigation procedures, applying to both large constellations and smaller, single-mission spacecraft. The goal is to reduce the proliferation of orbital debris and minimize risks to both space and terrestrial assets. *Resilience* focuses on cybersecurity and operational continuity. Space operators would be required to conduct mission-specific cyber risk assessments, establish reporting procedures for incidents, and secure supply chains against vulnerabilities. The draft Act also anticipates the formation of specialized European networks to coordinate response efforts to threats targeting space infrastructure. *Sustainability* obligations address both orbital and terrestrial environmental concerns. Operators would need to assess the environmental footprint of their activities, including emissions from launches and the risk of creating orbital debris. A voluntary “Union Space Label” is proposed to recognize missions that meet advanced sustainability standards, providing market visibility to environmentally responsible actors.

#### **Scope and Applicability**

The draft regulation has a broad territorial scope. It would apply not only to EU-based space operators but also to foreign entities offering space-related services within the EU internal market. Non-EU operators would be required to register and seek authorization for their missions, regardless of where they are launched or operated from, effectively leveling

the regulatory playing field across jurisdictions. To promote innovation and lower entry barriers, the Act proposes a simplified regulatory track for research institutions, start-ups, and small-scale operators. These entities would be subject to reduced compliance obligations, with requirements tailored to the risk profile and societal value of their missions. While this framework is still under development, it reflects the Commission's intention to encourage early-stage innovation without compromising safety or oversight.

#### **Authorization and Oversight**

Under the proposed framework, national authorities of member states would remain responsible for issuing authorizations and conducting compliance checks. However, these procedures would be standardized across the EU. The European Union Agency for the Space Programme (EUSPA) and the European Space Agency (ESA) would provide technical support and coordinate oversight for missions involving EU-funded assets or international cooperation. A centralized Union Register of Space Objects would be created to record all authorized missions. This register is intended to support greater transparency, improve space traffic coordination, and contribute to long-term debris mitigation efforts.

#### **Legal Uncertainties and Open Questions**

While the EU Space Act represents a major step toward harmonized regulation, several definitions and procedural details remain underdeveloped. Terms such as “space services provider,” “collision avoidance space services,” and “environmental sustainability” are currently vague or circular in formulation, creating potential compliance uncertainties. These ambiguities will need to be addressed through the legislative process before the Act can provide the legal certainty operators require. The EU Space Act remains a legislative proposal, subject to review and negotiation by the European Parliament and Council under the ordinary legislative procedure. A transitional phase is anticipated, with the regulation expected to come into full effect on 1 January 2030. Until then, existing national laws will remain applicable, providing operators and regulators time to adjust to the unified framework.

*Neha S. Dagley is an attorney with nearly two decades of experience representing foreign and domestic clients in complex litigation and arbitration. She holds an Advanced LLM in Air and Space Law from Leiden University in the Netherlands and recently presented at the United Nations in Vienna on Advancing Private Human Spaceflight: International Law, Regulatory Frameworks, and Public-Private Collaboration. Ms. Dagley is a member of the Executive Council of The Florida Bar's International Law Section and serves as co-chair of its Asia Committee.*

## The 2026 USMCA Joint Review ..., continued from page 9



photo: iStock/wildpixel

USMCA Art. 34.7 is new and untested. While review and amendment provisions can be found in other U.S. FTAs, the inclusion of a review process tied to a sunset mechanism is unique to the USMCA. USMCA Art. 34.7 is, moreover, controversial. Two points of view have emerged.

The first sees USMCA Art. 34.7 as a difficult but necessary—and ultimately beneficial—mechanism. Former U.S. Trade Representative Katherine Tai makes this argument when she notes:

The whole point is to maintain a certain level of discomfort, which may involve a certain level of uncertainty, to keep the parties motivated to do the really hard thing, which is to continue to reevaluate our trade policies and our programs to ensure they are really responding to the changes that are happening around us. These changes, they are on multiple levels. They're happening really, really fast. And if we don't stay motivated to respond, then we are going to lose. And so that review mechanism is important. It is important for us to come to that conversation responsibly. But we also have to be honest, and we have to understand that that discomfort is actually a feature, not a bug.<sup>7</sup>

This basic notion is reiterated by C. J. Mahoney, the former deputy U.S. trade representative, who observes:

The idea behind this provision, which I maintain was a sound one, was to create an incentive for policymakers to continue to upgrade the agreement periodically, so that we would never find ourselves again in a situation like we were in 2017, with an agreement that was badly outdated and politically unpopular.<sup>8</sup>

The second perspective, embraced by trade policy experts in Canada and Mexico, is less charitable. Starting from the position that the USMCA was “negotiated under duress with a Trump administration that was threatening to tear up NAFTA” (and thereby eliminate the preferential access vital to the economic well-being of Canada and Mexico), this perspective views the joint review mechanism set forth in USMCA Art. 34.7 as problematic. Allowing the repeated reopening of core issues that have been resolved undermines the security and stability that trade agreements are meant to provide. Canadian scholar Blayne Haggart makes precisely this point when he writes: “Trade agreements are bigger than specific rules. Their real importance lies in how they provide smaller parties with certainty and protection from the coercive power of the larger partners.”<sup>9</sup> Failures in this regard—for example, of the type facilitated by the operation of the joint review mechanism—have a chilling effect on domestic regulatory processes that can, by extension, erode a nation’s political autonomy.

While there is merit to each perspective, the prevalence of the latter view held in Canada and Mexico, considered in conjunction with the tough negotiation dynamics that have transpired between the United States and its North American partners so far this year, diminish the likelihood of securing an agreement to extend the USMCA for a sixteen-year term through the joint review mechanism.

### **Preparatory Measures**

As the summer of 2025 winds down, USMCA parties are, in accordance with their internal laws and procedures, undertaking preparatory measures geared toward consulting with stakeholders, identifying issues of concern, developing negotiating positions, and framing recommendations. These processes and timelines entail:

#### **Canada**

The federal agency tasked with representing Canada in the joint review process is Global Affairs Canada (GAC). GAC conducted an initial round of consultations with stakeholders in the fall of 2024.<sup>10</sup> The Canadian House of Commons Standing Committee on International Trade has, since June 2024, held its own series of hearings on the subject.<sup>11</sup> It is possible that GAC conducts an additional stakeholder consultation if/when a “deal” is reached with the United States on the International Emergency Economic Powers (IEEPA) fentanyl and Section 232 tariffs. The results of any subsequent consultation will, to the extent it provides up-to-date insight into stakeholder thinking on

the tradeoffs between ensuring access to the U.S. market, upholding Canadian sovereignty, protecting Canada's economic interests, and pursuing alternative trade, investment, and security pathways, have an important bearing on Canada's approach to the 2026 joint review.

## United States

The federal agency responsible for representing the interests of the United States in the 2026 joint review is the Office of the United States Trade Representative (USTR). The United States has begun preparing for the joint review by conducting an internal policy review to define the positions it will assert. This initial effort, per the USMCA Implementation Act, will be expanded to include a public consultation process allowing for submission of comments, and public hearings will be held 270 days in advance of the joint review (i.e., October 2025).<sup>12</sup> These outreach initiatives, the details of which are to be published in a Federal Register notice, will provide business and industry associations with an invaluable opportunity to make their views known. The USTR will submit the results of the internal policy review and public consultations in a report to Congress at least 180 days prior to the joint review (i.e., January 2026).<sup>13</sup> This report will be closely watched by USMCA parties inasmuch as it is, per Sec. 611 of the USMCA Implementation Act, required to articulate the Trump administration's assessment of the operation of the USMCA, precise recommendation for action to be taken at the joint review, and position with respect to whether to extend the term of the USMCA.<sup>14</sup>

## Mexico

The federal agency that will have the primary responsibility for representing Mexico in the 2026 joint review is the Office of the Secretary of the Economy. This agency will be backstopped by the Office of the Secretary of Exterior Relations and the Office of the Secretary of the Treasury and Public Credit. Similar to Canada, Mexico's approach to the joint review will be guided by an interconnected set of developmental, constitutional, political, economic, and security considerations. President Sheinbaum has, through the medium of the *Plan México* initiative, signaled her administration's intent to defend and improve the USMCA.

Mexico kicked off its joint review consultations at the United States-Mexico CEO Dialogue in October 2024. Since then, the Secretary of the Economy has been conducting a comprehensive sectorial review of the agreement. This review has been advanced through the formation of coalitions of U.S. and Canadian companies/industries and the development of public-private working groups with

the *Consejo Coordinador Empresarial* (CCE). There is also discussion of conducting an online public consultation similar to the one carried out in 2017 in connection with the NAFTA renegotiation.

## Joint Review Issues

There is, at present, a diverse set of issues that USMCA parties might address in the upcoming joint review. Some of these are old issues that have been a source of disagreement for years or even decades. Others are new issues that have emerged in conjunction with the winds of changes currently blowing across the international trade landscape. Each of these issues present, in keeping with their "offensive" or "defensive" nature, a distinct challenge or opportunity.

## Legacy Issues

In terms of older, "legacy" issues, the following have an elevated probability of becoming part of the 2026 joint review:

**Auto Rules of Origin:** This has been an issue of concern ever since a 2022 USMCA dispute resolution panel reached a conclusion that went against the United States' position on how to calculate regional value content (RVC) on core auto parts.<sup>15</sup> Former USTR Robert Lighthizer has suggested this issue needs to be renegotiated, and this view has received congressional support. The United States can be expected to push for a stricter interpretation of the USMCA's roll-up provision.

**Canadian Supply Management System:** Canada's supply management system uses tariff walls and tariff-rate quotas (TRQs) to create stable prices and production levels. This system has been especially beneficial for farmers in Québec and Ontario. Canada's supply management system has been a point of contention between the United States and Canada for years. A 2023 USMCA dispute resolution panel found that Canada's TRQs are not inconsistent with the USMCA, a conclusion the U.S. industry would like to revisit.<sup>16</sup> The disproportionate importance of the Québec and Ontario voting blocs in national elections serves to put Canada between a rock and a hard place on this issue.

**Canadian Softwood Lumber:** This dispute—sometimes referred to as a "saga"—involving the alleged subsidization of stumpage rates has been ongoing for four decades. Any issues raised with respect to this dispute will be an extension of the various USMCA Chapter 10 binational panel reviews Canada has sought in connection with recent U.S. Department of Commerce (DOC) and U.S. International Trade Commission (ITC) decisions to maintain or increase anti-dumping (AD) and countervailing (CV)

duties on Canadian softwood lumber.<sup>17</sup> The tension surrounding this issue will likely be exacerbated by (i) the August 2025 decision to increase CV duties to 14.63% for most Canadian lumber companies, thereby producing a combined AD/CV duty rate of 35.19%<sup>18</sup> and (ii) the specter of additional duties being imposed on Canadian softwood lumber pursuant to Section 232 of the Trade Expansion Act of 1962.<sup>19</sup> Given the significant role this industry plays in supporting different provincial economies, Canada will, in political terms, continue to find itself hard-pressed to change course.

**Mexican Energy and Mining Policy:** Since 1938, Mexico has strictly controlled investment, extraction, and production activities relating to subsurface oil and minerals. This disposition is reflected in USMCA Chapter 8, the title of which recognizes Mexico's "direct, inalienable, and imprescriptible ownership of hydrocarbons."<sup>20</sup> While historic oil and gas reforms were carried out by Mexico in 2014, they were later reversed in the name of energy sovereignty. In July 2022, the United States and Canada submitted requests for consultations with Mexico regarding the company PEMEX and the Federal Electricity Commission's (CFE's) allegedly unfair practices.<sup>21</sup> The consultations encompass subject matter that spans various chapters of the USMCA (market access, investment, and state-owned enterprises) and are ongoing. The persistently unresolved nature of these issues makes it likely that they will be raised by the United States and/or Canada at the 2026 joint review. Given the severe political consequences that would follow from a failure to preserve its energy sovereignty, Mexico is expected to vigorously defend its interests on this point.

**Mexican Labor Rights:** The United States (primarily) and Canada have invoked the USMCA's rapid response labor mechanism (RRM)<sup>22</sup> approximately thirty times in connection with different Mexican labor practices (freedom of association, collective bargaining, receipt of backpay and severance benefits, etc.).<sup>23</sup> Several of these predominantly auto industry-related cases have evolved into RRM panels. While Mexico considers the USMCA's labor provisions and procedures to be settled and non-negotiable, political and other considerations in the United States suggest the issue will be placed on the agenda of the 2026 joint review. Any discussions regarding the reform of the RRM will likely be contentious in light of Mexico's commitment to exercising sovereignty over labor issues.

**Genetically Engineered Food:** In an attempt to preserve the biodiversity and security of its food supply chain, Mexico endeavored to restrict the introduction of genetically engineered corn. The United States, with Canada joining as

a third party, challenged this action and in December 2024 prevailed in a dispute panel proceeding brought under USMCA Chapter 31.<sup>24</sup> The panel concluded that Mexico's measures lacked scientific justification and violated the USMCA's market access provisions. Notwithstanding this adverse outcome, Mexico continues to introduce legislation, including at the constitutional level, restricting the introduction of genetically modified products into its food supply. This is not surprising given the importance of corn and other distinctly native food items as staples in the traditional Mexican diet. Nor is Mexico's persistence on this point surprising in light of the potential that the 2024 USMCA panel report has to serve as precedent with respect to other genetically modified products. Viewed against this backdrop, it is possible that Mexico will take a second bite at this apple in the 2026 joint review.

### Emerging Issues

Several new and emerging issues of pressing national, regional, or geopolitical concern could become part of the 2026 joint review agenda. These include:

**Rules of Origin:** Revise these rules to crack down on third-country processing and illegal transshipment operations, thereby preventing China or China-affiliated entities from using Mexico or Canada as a back door to the U.S. market.

**China (a k a the elephant in the room):** Add a chapter that defines and implements a harmonized policy toward China trade and investment. Ideas that have been floated include the conduction of inbound and outbound investment reviews, the creation of common external tariffs for goods coming within strategic sectors, and the introduction of measures designed to restrict China's ability to export its overcapacity.

**Critical Minerals:** Expand the scope of existing initiatives (for example, the Canada-U.S. Joint Action Plan, Canada's Critical Minerals Strategy, etc.) to strengthen critical mineral supply chains throughout North America. This could encompass the extraction and processing of critical minerals in the Arctic region.

**Nearshoring/Reshoring:** Develop and implement policies and incentives to facilitate the nearshoring/reshoring of strategic products and sectors.

**Forced Labor:** Strengthen the USMCA's forced labor provisions for the purpose of motivating compliance and improving enforcement.

**AI:** Introduce new disciplines, incentives, and restrictions relating to AI governance, innovation, and dissemination,

with an eye to preserving North American leadership in this vital space.

**Mexico's Judicial Reforms:** The United States and Canada are concerned that the constitutional-level judicial reforms<sup>25</sup> recently undertaken by Mexico will adversely impact the independence, impartiality, and integrity of the country's federal- and state-level justice systems and, by extension, diminish the quality of judicial certainty that is essential to the attraction and retention of foreign direct investment (FDI).

**Section 232 Sectoral Tariffs:** Canada has requested USMCA Chapter 31 consultations with the United States in connection with the imposition of Section 232 "national security" tariffs on steel, aluminum, autos, and auto parts.<sup>26</sup> These requests have asserted that the U.S. sectoral tariffs are both USMCA inconsistent and in violation of previously agreed terms memorialized in side letters and joint statements. Given the detrimental economic impact of these tariffs, Canada and Mexico will, if necessary, use the 2026 joint review to press for the granting of special preferences and guarantees of downstream exclusions. That said, it is important to note that Section 232 relief for Canada and Mexico is expected to be forthcoming, now that different baseline tariffs are coming into focus for other major trading partners (i.e., Japan, the U.K., etc.).

**National Emergencies Involving Immigration and Drugs:** The United States has declared immigration- and drug-related national emergencies at its northern<sup>27</sup> and southern<sup>28</sup> borders. These emergencies have been used to justify the imposition of tariffs on non-USMCA qualifying goods under the authority of the IEEPA.<sup>29</sup> The practical effect of the so-called IEEPA fentanyl tariffs has been moderated by the fact that a growing percentage of goods exported from Canada and Mexico to the United States are entered subject to a USMCA preference claim. The legality of these tariffs is being litigated in the U.S. federal court system. Should the IEEPA fentanyl tariffs be upheld by the U.S. courts, it is probable that Canada and/or Mexico will push for their removal at the 2026 joint review.

**Accession Mechanism:** The escalating global competition for resources, allies, frameworks, and advanced technology has led to the suggestion that now might be a good time to open the USMCA to new ideologically minded and strategically located members such as Australia, the UK, and Colombia. According to this line of thinking, such action could help lay the foundation for a new global trading system.

## Conclusion

The authors do not have a crystal ball and are therefore not in a position to make predictions about the outcome of the 2026 USMCA joint review. We are, however, able to draw on our experience as Canadian, U.S., and Mexican trade lawyers to offer some informed observations on the subject.

We are, broadly speaking, at a high-stakes, consequential moment in the international trade space. The multilateral trading system is at a crossroad as it goes through the so-called "Trump Round."<sup>30</sup> In this environment, regional trade arrangements have become more important than ever.

The intermediate and long-term prospects that correspond to different regional trading blocs are conditioned on a number of factors, not all of which can be controlled or managed. The North American trading bloc, thanks to its unique mix of economic, political, natural, logistical, historical, cultural, geographic, demographic, linguistic, and climatic attributes, enjoys significant competitive advantages over other regional trading blocs. The promise of these competitive advantages has, in the past, augured in favor of North American integration. But this calculus is changing.

Today there are concerns that the United States is leveraging its status as the dominant regional partner to reshape the terms that apply to intra-Canadian-American-Mexican trade in its favor, sometimes in ways that elevate raw power over what is right. These concerns have been triggered by President Trump's casual remarks about "adjusting or terminating" the USMCA,<sup>31</sup> exacerbated by U.S. Secretary of Commerce Harold Lutnick's statement that the United States is "absolutely going to renegotiate the USMCA,"<sup>32</sup> and underscored by Ontario Premier Doug Ford's remark that the United States can, on account of its unwillingness to follow the rules, "pull the carpet out from under us" at any time.<sup>33</sup>

The coercive, offensive, and at times questionable measures underlying the near zero-sum approach the United States has taken to the issue of North American trade integration have left Canada and Mexico wondering about the reliability of the United States as a strategic partner, the desirability of being a USMCA party, and the sustainability of development and security strategies that lead to a position of overreliance. In the absence of a true "give-get" dynamic, there is a growing sense on the part of Canada and Mexico that there are alternative pathways for achieving economic and security objectives beyond the structure of the USMCA.<sup>34</sup> It is striking to note how distant this sentiment is from the unified vision President John F.

Kennedy laid out before the Canadian Parliament in 1961:

Geography has made us neighbors. History has made us friends. Economics has made us partners. And necessity has made us allies. Those whom nature hath so joined together, let no man put asunder.<sup>35</sup>

The future of North American integration will, for the first time since the Turnberry System eclipsed the American order, come to the forefront during the 2026 USMCA joint review.

If North American trade integration is to endure, the USMCA parties must embrace a formula that balances power, right, and national interest in a way that respects the lessons of history and recognizes the arc of international trade's current trajectory. The path of continued integration unlocks many important benefits, examples of which include: (i) ensuring USMCA parties' access to secure sources of energy, critical minerals, and the inputs needed to co-manufacture goods; (ii) facilitating the development of a common front toward China; (iii) supporting North American values regarding labor, the environment, human rights, and the rule of law; (iv) enhancing the region's competitiveness on a global scale; (v) enabling USMCA parties to better weather economic downturns and recessions; and (vi) safeguarding North American peace and prosperity.

Should the USMCA parties fail to strike the right balance of power, right, and national interest, several adverse consequences would likely follow. Regional business certainty and confidence would plummet, thereby provoking a slowdown of FDI, nearshoring activity, and economic growth. Supply chains would, in accordance with the diminished preference for regionally sourced energy, critical minerals, and manufacturing inputs, become less resilient and secure. The USMCA countries would become less prosperous and secure—and coincidentally, more vulnerable to Chinese competition. And finally, the idea of using the USMCA as a platform for building a new trade order amongst like-minded countries would fade into historical memory.

The 2026 USMCA joint review represents a pivotal moment for North American trade integration, where the interplay of power, right, and national interest will determine the region's economic and strategic future. The competitive advantages of the North American trading bloc offer immense potential for shared prosperity, enhanced global competitiveness, and regional stability. However, the growing concerns over U.S. dominance and unilateral tactics risk eroding trust among Canada,

Mexico, and the United States, threatening the viability of the USMCA framework. For the agreement to endure, the USMCA parties must, in the spirit of mutually beneficial compromise, recommit to the cooperative and equitable approach embodied in the neighborly partnership envisioned by President Kennedy in 1961. Failure to do so could unravel decades of progress, diminishing economic resilience, security, and the collective ability to address important geopolitical challenges. Regardless of how events unfold in the months to come, the one certainty is that the choices Canada, the United States, and Mexico make in the USMCA joint review process will reverberate, for better or for worse, throughout the emerging brave new world of trade.



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## Will America's Electric Vehicle Infrastructure Be a Casualty ..., continued from page 11



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The export restrictions by China on REEs may have a direct impact on companies in the EV and cleaner energy industries because REEs are mined and refined almost exclusively in China and are vital in the manufacturing of EVs and other clean energy technologies.<sup>27</sup> For example, dysprosium and terbium are used in smartphones, and neodymium is used to power the motors of some EVs.<sup>28</sup> Permanent magnets made with REEs are essential components in wind turbine generators, certain types of solar cells, and certain energy storage systems.<sup>29</sup> REEs can also be found in everyday consumer electronics such as televisions, tablets, and cameras.<sup>30</sup>

The United States' reliance on China for raw materials and rare earth elements adds another layer of uncertainty for the EV industry, as it is difficult to transition to less volatile supply chains overnight. Presently, the United States has only one REE mine, and industry professionals have noted that it will take years to develop the capability to mine and process REEs in the United States at the rate needed to sustain their commercial need.<sup>31</sup> Developing alternative international supply lines presents a similar problem, as the only heavy REE mine outside of China, Serra Verde in Brazil, ships minerals to China for processing.<sup>32</sup>

The struggle to diversify the acquisition of REEs is not unique to the current administration and has been an important and ongoing goal for many global companies that have suffered under prior impositions of export restrictions by China.<sup>33</sup> For now, the combination of high reciprocal duties for imports and the added requirement of Chinese export licenses for REEs has the potential to slow exports and disrupt supply chains globally in the EV industry.

### Buy America Requirements and EV Chargers Waiver Phase-Out

Simultaneous to the tariffs on key EV supply chain materials, recent changes in domestic sourcing and manufacturing requirements for EV chargers and key components are increasing costs and posing additional challenges to EV infrastructure expansion in the United States.

The Build America, Buy America Act (BABA), enacted by the Infrastructure Investment and Jobs Act (IIJA), in combination with the complex web of Buy America (BA) related regulations, requires that federally funded EV charging infrastructure projects use domestically manufactured products made primarily from U.S.-sourced materials such as iron, steel, and other components.<sup>34</sup> The chargers must also undergo final assembly in the United States and meet specific domestic content thresholds.<sup>35</sup>

To accelerate early EV charger deployment, a temporary waiver was issued in March 2023.<sup>36</sup> Phase one of this waiver allowed EV chargers with final assembly in the United States to bypass full domestic content requirements if manufactured before 1 July 2024. Phase two of the waiver mandates that EV chargers purchased with federal funds after 1 July 2024 must now meet the specific domestic content requirements, including final assembly in the United States and that the cost of components manufactured in the United States is at least 55% of the cost of all components.<sup>37</sup> Certain components predominantly made of steel and iron (e.g., charger housings and cabinets) are excluded from earlier waivers and have always needed to meet the BA standards.<sup>38</sup>

By 1 October 2026, the requirements that apply to EV chargers and those that apply to other manufactured products will effectively be the same, mandating that all such products used on federal-aid projects must be "produced in the United States."

The waiver phase-out for domestic sourcing requirements is designed to transition the EV industry away from its current reliance on partial domestic assembly and foreign sourcing. The primary goal is to incentivize and drive a shift toward comprehensive U.S.-based manufacturing and raw material sourcing for EV infrastructure. While this transition, combined with existing tariffs on key EV supply chain materials, is expected to create short-term supply challenges, the overarching objective is to stimulate domestic manufacturing growth, strengthen domestic

supply chains, and reduce dependence on foreign suppliers of essential materials in the long term.

Despite these domestic content requirements, there is some relief on the horizon as the Trump administration recently announced it will reopen a federal program to fund the installation of high-speed EV chargers along freeways nationwide under the National Electric Vehicle Infrastructure (NEVI) program.<sup>39</sup> Under this announcement, a number of requirements will be streamlined with the goal of delivering EV chargers more quickly.<sup>40</sup>

## Conclusion

While the latest U.S.-China trade agreements may offer some short-term relief, EVs remain deeply entangled in a volatile geopolitical landscape. Tariffs on key components, limited access to critical minerals like REEs, stricter domestic sourcing and manufacturing requirements, and ongoing supply chain disruptions continue to drive up costs and hinder widespread EV adoption. Without a coordinated strategy to secure essential inputs and stabilize trade relations while continuing to push for domestic manufacturing growth, the EV industry in the United States risks becoming a long-term casualty of the broader trade war.

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<sup>20</sup> *Id.*

<sup>21</sup> U.S. Energy Information Administration, “China processes over 90% of...,” <https://www.eia.gov/todayinenergy/detail.php?id=65305#:~:text=China%20processes%20over%2090%25%20of,of%20mainly%20cobalt%20from%20Africa.>

<sup>22</sup> “Trump Tariffs Stocks China,” THE NEW YORK TIMES, 11 Apr. 2025; <https://www.nytimes.com/live/2025/04/11/business/trump-tariffs-stocks-china>.

<sup>23</sup> The White House, “Annex II,” April 2025; Chatham House, “Liberation Day: President Trump Revealed America’s Strategic Vulnerabilities,” April 2025; <https://www.whitehouse.gov/wp-content/uploads/2025/04/Annex-II.pdf>; <https://www.chathamhouse.org/2025/04/liberation-day-president-trump-revealed-americas-strategic-vulnerabilities>.

<sup>24</sup> Ministry of Commerce of the People’s Republic of China, “Announcement 18,” 4 Apr. 2025; [https://www.mofcom.gov.cn/zwgk/zcfb/art/2025/art\\_9c2108ccaf754f22a34abab2fedaa944.html](https://www.mofcom.gov.cn/zwgk/zcfb/art/2025/art_9c2108ccaf754f22a34abab2fedaa944.html).

<sup>25</sup> *Id.*; “China Hits Back US Tariffs with Rare Earth Export Controls,” REUTERS, 4 Apr. 2025; <https://www.reuters.com/world/china-hits-back-us-tariffs-with-rare-earth-export-controls-2025-04-04/>.

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<sup>27</sup> “China Trump Tariffs Retaliation,” THE NEW YORK TIMES, 4 Apr. 2025; <https://www.nytimes.com/2025/04/04/business/china-trump-tariffs-retaliation.html>.

<sup>28</sup> “Rare Earth China Tariffs Metals Minerals,” TIME, <https://time.com/7275818/rare-earth-china-tariffs-metals-minerals/>.

<sup>29</sup> Kleinman Center for Energy Policy, University of Pennsylvania, “Rare Earth Elements: A Resource Constraint of the Energy Transition,” <https://kleinmanenergy.upenn.edu/research/publications/rare-earth-elements-a-resource-constraint-of-the-energy-transition/>.

<sup>30</sup> Thermo Fisher Scientific, “Growing Popularity of Hybrid Vehicles Drives Demand for New Sources of Rare Earth Elements,” <https://www.thermofisher.com/blog/mining/growing-popularity-of-hybrid-vehicles-drives-demand-for-new-sources-of-rare-earth-elements/>.

<sup>31</sup> “China Hits Back US Tariffs with Rare Earth Export Controls,” REUTERS, 4 Apr. 2025; <https://www.reuters.com/world/china-hits-back-us-tariffs-with-rare-earth-export-controls-2025-04-04/>.

<sup>32</sup> *Id.*

<sup>33</sup> “World Battles Loosen China’s Grip Vital Rare Earths Clean Energy Transition,” REUTERS, 2 Aug. 2023; <https://www.reuters.com/markets/commodities/world-battles-loosen-chinas-grip-vital-rare-earths-clean-energy-transition-2023-08-02/>.

<sup>34</sup> Federal Register, “Buy America Requirements for Manufactured Products,” 14 Jan. 2025; <https://www.federalregister.gov/documents/2025/01/14/2024-31350/buy-america-requirements-for-manufactured-products>.

<sup>35</sup> *Id.*

<sup>36</sup> Alternative Fuels Data Center, U.S. Department of Energy, “Waiver of Buy America Requirements for Electric Vehicle Chargers,” 21 Feb. 2023; <https://afdc.energy.gov/laws/13184>.

<sup>37</sup> Federal Register, “Waiver of Buy America Requirements for Electric Vehicle Chargers,” 21 Feb. 2023; <https://www.federalregister.gov/documents/2023/02/21/2023-03498/waiver-of-buy-america-requirements-for-electric-vehicle-chargers>.

<sup>38</sup> *Id.*

<sup>39</sup> Camila Domonoske, “After a freeze, Trump administration reluctantly agrees to fund EV chargers,” NPR (15 Aug. 2025), available at <https://www.npr.org/2025/08/15/nx-s1-5501584/ev-charger-nevi-funding>.

<sup>40</sup> *Id.*



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## The Comprehensive and Progressive Agreement ..., continued from page 13



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states' judiciaries (as well as their own) to competently and effectively resolve investment disputes.

However, Canada unilaterally withdrew from the ISDS mechanisms in the USMCA (as opposed to Aotearoa New Zealand, Australia, and the United Kingdom each agreeing to withdraw from ISDS by way of mutually exchanged side letters). Notably, Mexico is largely considered not to be a capital exporting country (unlike the United States and Canada), and, as a state, fairs considerably less well in international corruption indices.<sup>18</sup> The key difference in this instance is that the reciprocal trust in the other states' judiciaries cannot be as readily assumed. It is questionable whether Canadian investors will be willing to invest in Mexico, where their only form of recourse for resolving investment disputes will be before Mexican municipal courts.

In both instances of withdrawal from ISDS procedures in the CPTPP and the USMCA, the remaining operative provisions of those investment treaties remain effective (as identified above). This is particularly relevant with reference to the "most-favored-nation treatment" clauses in both the CPTPP<sup>19</sup> and the USMCA.<sup>20</sup>

The most-favored-nation treatment standard is designed to ensure equality and nondiscrimination in the treatment of protected investors vis-à-vis other foreign investors in the host state.<sup>21</sup> In both the CPTPP and the USMCA, there are state parties who have not consented to withdrawing from the ISDS provisions contained in those investment treaties. This potentially creates an argument that investors being

forced to litigate any investment dispute before the host state's municipal courts are being treated less favorably than investors from states who are able to refer any investment dispute(s) only to an arbitral tribunal.

The question of applying the most-favored-nation treatment standard in relation to dispute resolution mechanisms arose in early cases, such as *Anglo-Iranian Oil Co.*<sup>22</sup> (albeit only in the context of public international law). Although in *Anglo-Iranian Oil Co.* the ICJ did not ultimately address this issue, the court identified key limitations as to claims based on the most-favored-nation treatment, critically that the treatment alleged to have not been provided must in some way be incorporated into the relevant treaty and cannot alter the terms of any other treaty.<sup>23</sup> Specifically in the context of investment arbitration, commentators have noted that ISDS procedures serve "to depoliticize the dispute by removing the Home State from the proceedings," ensuring a neutral forum for the resolution of investment disputes and thus conveying favorable treatment (as opposed to investors who are required to litigate before a state's municipal courts).<sup>24</sup>

Under the CPTPP, most-favored-nation treatment is codified in article 9.5. However, this article also provides a specific carve-out for the most-favored-nation treatment to being applied to ISDS procedures:<sup>25</sup>

For greater certainty, the treatment referred to in this Article does not encompass international dispute resolution procedures or mechanisms, such as those included in Section B (Investor-State Dispute Settlement).

In light of the specific carve-out limiting the application of most-favored-nation treatment under the CPTPP, it would appear difficult for investors from Aotearoa New Zealand, Australia, or the United Kingdom to argue that they should be afforded the option of ISDS procedures, as offered to investors from other state parties, solely on the basis of the most-favored-nation treatment clause under the CPTPP. As discussed below, there are alternative investment treaties in force between Aotearoa New Zealand and Australia and between Australia and the United Kingdom that each (1) include a most-favored-nation treatment clause; and (2) stipulate investor-state arbitration as the means of dispute resolution.

However, further complications arise when considering which is the appropriate forum for disputes with other states. There are other investment treaties that Aotearoa New Zealand, Australia, and the United Kingdom have each

entered into with other states that: (1) include a most-favored-nation treatment clause; and (2) stipulate investor-state arbitration as the means of dispute resolution:

- a. For Aotearoa New Zealand, investment treaties include the New Zealand and China Agreement on the Promotion and Protection of Investment.<sup>26</sup>
- b. For Australia, investment treaties include the Agreement Between Australia and the Oriental Republic of Uruguay on the Promotion and Protection of Investment.<sup>27</sup>
- c. For the United Kingdom, investment treaties include the Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Mexican States for the Promotion and Reciprocal Protection of Investments.<sup>28</sup>

In light of the above investment treaties, their most-favored-nation treatment clauses appear to negate the exclusion of ISDS restricted to Aotearoa New Zealand, Australia, and the United Kingdom. This issue could arise, for example, if an investor from Aotearoa New Zealand commenced arbitral proceedings against Japan. In such a case, Japan could legitimately argue that the investor from Aotearoa New Zealand ought to be subjected to resolving the investment dispute before a municipal Japanese court (by virtue of the Aotearoa New Zealand's position regarding the CPTPP that allows resolution of disputes before Aotearoa New Zealand's municipal court). From this perspective, Aotearoa New Zealand, Australia, and the United Kingdom's opting out of investor-state arbitration under the CPTPP can potentially have (presumably unintentional) adverse effects on investors within their own jurisdictions and their ability to efficiently resolve investor-state disputes.

Conversely, the most-favored-nation treatment clause in the USMCA contains no such similar carve-out provision for dispute resolution procedures.<sup>29</sup> In absence of any wording limiting the application of the most-favored-nation treatment, it appears open for investors from Canada to argue that they ought to be afforded the benefit of resolving disputes in a neutral forum, such as investment arbitration, on the basis of most-favored-nation treatment.

Notably, Aotearoa New Zealand, Australia, the United Kingdom, and Canada have each elected not to be bound by the ISDS provisions in their respective investment treaties, meaning that there is no agreed dispute resolution procedure (as opposed to explicitly specifying an exclusive forum for disputes to be resolved). This difference is

significant as it means that parties to an investment dispute must determine themselves how to select the appropriate forum for the resolution of their dispute(s). This absence of an agreed dispute resolution procedure returns the state of investor-state dispute resolution to that seen in the late 1800's, prior to the prominence of investor-state arbitration, in which claimants seeking diplomatic protection under international law is an option available to investors.

These circumstances also, in turn, influence the investor's requirement under customary international law to exhaust all local remedies (i.e., exhaust domestic dispute resolution procedures) before seeking diplomatic protection and commencing international dispute resolution procedures. The requirement on an investor to exhaust all local remedies before seeking diplomatic protection is a "well-established rule of customary international law," recognized by international courts and tribunals.<sup>30</sup> Additionally, this requirement has also been reflected in the International Law Commission's Draft Articles on Diplomatic Protection,<sup>31</sup> a consolidation of principles of customary international law relevant to investor-state dispute resolution.

Exceptions to an investor needing to exhaust all local remedies before seeking diplomatic protection under international law are also reflected in the Draft Articles on Diplomatic Protection.<sup>32</sup> Relevantly, one such exception is that a state has waived the requirement to exhaust all local remedies.<sup>33</sup> International courts and tribunals have noted that the requirement to exhaust local remedies is a rule that protects the interests of a state and can thus be waived by that state.<sup>34</sup> Notably, waiver is a contextual analysis, in which it can be express or implied, and can occur before or after the dispute(s) in question have arisen. If such waiver occurs, it is irrevocable.<sup>35</sup>

In considering whether Aotearoa New Zealand, Australia, the United Kingdom, and Canada have waived the requirement for an investor to exhaust all local remedies before seeking diplomatic protection under international law, it is relevant and significant that all of these states are state parties<sup>36</sup> to the ICSID Convention,<sup>37</sup> which in article 26 stipulates:

Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.

Immediately, one can see that Aotearoa New Zealand, Australia, the United Kingdom, and Canada, by virtue of being state parties to the ICSID Convention, have independently of any other investment treaty, consented to investment disputes being arbitrated “to the exclusion of any other remedy” (considering that each of the states merely opted out of ISDS provisions in the CPTPP and the USMCA, as opposed to expressly stipulating that their municipal courts are the exclusive forum for investment disputes). The permissive (and thus not mandatory) option for states to require the exhaustion of local remedies is not engaged given that neither the CPTPP nor the USMCA contain articles imposing such requirement. Further, a state being a party to the ICSID Convention has been interpreted by several tribunals as being an express waiver of the requirement to exhaust local remedies.<sup>38</sup>

Accordingly, even though Aotearoa New Zealand, Australia, the United Kingdom, and Canada have each elected not to be bound by the ISDS provisions in the CPTPP and the USMCA respectively, it may nevertheless be open to investors to seek diplomatic protection under international law, despite this withdrawal. Additionally, investors may also have legitimate arguments that they need not exhaust all local remedies before seeking diplomatic protection on the basis of the states’ waiver, as discussed above.

### **Substantive Law**

Relevantly, Aotearoa New Zealand, Australia, and the United Kingdom have not agreed to contract out of Chapter 9, Section A of the CPTPP. Chapter 9, Section A contains the substantive provisions of the CPTPP, enshrining: (1) standards of treatment for foreign investors, such as national treatment;<sup>39</sup> most-favored-nation treatment;<sup>40</sup> and “treatment in accordance with applicable customary international law principles, including fair and equitable treatment and full protection and security”;<sup>41</sup> as well as (2) compensation for expropriation.<sup>42</sup> To this extent, the state parties remain bound by their obligations at international law to provide the agreed standards of treatment to foreign investors and to provide compensation for expropriation.

Complications arise, however, when the appropriate forum for resolving investment disputes is based in a state’s domestic court, but the obligations the state is required to adhere to are based in international law only (not ratified in that state’s domestic legislation). In the United States and Canada, international law is directly applied domestically. Once a treaty is ratified by signatory states, that treaty then becomes part of said state’s domestic law (and therefore, the provisions of that treaty are bound to be applied in domestic courts).

For states such as Aotearoa New Zealand and Australia, as a general position, international law is not directly enforceable in a state’s domestic law (although many jurisdictions apply the presumption of conformity, that a domestic legislation be interpreted in conformity with that state’s international obligations).<sup>43</sup> This creates the risk that, while Aotearoa New Zealand, Australia, and the United Kingdom have not agreed to contract out of Chapter 9, Section A of the CPTPP, substantively, the obligations therein cannot be enforced in a state’s domestic court (unless ratified in that state’s domestic legislation). This risk is exacerbated where a state has express domestic legislation that would contradict the application of Chapter 9 of the CPTPP.<sup>44</sup> In such circumstances, investors will be left unable to rely on the standards of treatment expressed in the CPTPP but instead will need to establish the state’s liability through its domestic law. This position is contrasted in states such as the United States, where international agreements, once ratified, automatically became enforceable domestically.

In this regard, transactional documents concerning the relevant investment (documents such as concession agreements, power purchase agreements, etc.) between investors and state parties will become critically important. If those documents specify that the applicable law is the domestic law or third-party law, then courts (particularly domestic courts) will be bound to apply such law. Inevitably, such circumstances will lead to conflict of law issues, which will need to be resolved in accordance with the domestic laws of the state court in which the proceeding is being heard (i.e., the *lex fori*).

### **Enforcement**

Litigating investor-state disputes in municipal courts can raise issues as to enforcement of any subsequent court judgment. A hallmark of arbitration (and thus investment arbitration) is the ability for a party to efficiently enforce any award in multiple jurisdictions, without the need to relitigate disputes before multiple courts.<sup>45</sup> Enforcement is a critical consideration for any successful party to a dispute, thus allowing them to recover assets in multiple countries. By withdrawing from ISDS procedures, investors, and states alike, forfeit this benefit of swift enforcement, subject to alternative means for enforcing domestic court judgments, through: (1) reciprocal bilateral domestic legislation; and (2) international conventions.

As discussed above, the identified states appear to place significant trust in the others’ judiciaries. This trust is presumably explained by the close international relationships those states have with one another. Regarding

the CPTPP, the United Kingdom, Australia, and Aotearoa New Zealand have historically had (and have) close diplomatic ties as well as close legal relationships (with Australia and Aotearoa New Zealand having adopted the United Kingdom's common law system).<sup>46</sup> These close connections are also reflected in their respective bilateral and reciprocal domestic legislation. As between Aotearoa New Zealand and Australia, both states specifically acknowledge the mutual recognition and enforcement of their municipal courts, providing a streamlined enforcement mechanism.<sup>47</sup> As between Australia and the United Kingdom, a similar reciprocal process also exists.<sup>48</sup>

Regarding the USMCA, there is no bilateral reciprocal domestic legislation between Canada and Mexico that provides for the mutual recognition and enforcement of their municipal court judgments. In this regard, clear difficulties arise as to how an investor or a state will be able to enforce any judgment of a court. In absence of stipulated procedures, parties will be forced to seek enforcement through common law principles.<sup>49</sup> As between Canada and the United States, court judgments from selected U.S. state courts have an expedited enforcement process in Canada.<sup>50</sup> If such judgment is from a U.S. state court not covered by specific legislation, enforcement action must be taken through common law principles. Conversely, the enforcement of judgments between Canada and the United States is not reciprocated, with Canadian judgments seeking to be enforced in U.S. courts being possible only through common law principles.

In addition to specific reciprocal bilateral enforcement legislation, there also exists a multi-state international agreement that provides a basis for mutual recognition of foreign court judgments: the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (Judgments Convention).<sup>51</sup> However, the Judgments Convention has twenty-eight state parties, of which Aotearoa New Zealand, Australia, Canada, Mexico, and the United Kingdom are not included. The United States has signed, but not yet ratified, the Judgments Convention.

While foreign court judgments can be enforced in other jurisdictions, the enforceability of arbitral awards provides a simpler and more efficient enforcement procedure, in addition to being enforceable in more jurisdictions.<sup>52</sup> Enforcement of foreign court judgments is significantly more complex and difficult than enforcing arbitral awards.

### ***Joinder of States as Parties***

Another complication is how a state is to be included as a party to the proceeding. Typically, foreign investors do

not contract directly with a state but with state-owned entities and private entities within the host state. So, while contracts between these parties may include an arbitration clause, the host state nevertheless remains outside of such agreement. Thus, in order to adjoin the host state in domestic court proceedings, the appropriate procedures pursuant to the relevant *lex fori* must be followed, adding a further legal hurdle for investors seeking recourse against a state for a breach of investment treaties.

### **Alternatives Means of Resolution**

Despite the potential complications arising from Aotearoa New Zealand, Australia, and the United Kingdom contracting out of the ISDS mechanism in the CPTPP, there remain other investment treaties between these states that still contain ISDS procedures requiring disputes to be resolved by arbitration. These investment treaties include:

- a. Between Aotearoa New Zealand and Australia, the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area,<sup>53</sup> and the Regional Comprehensive Economic Partnership (RCEP).<sup>54</sup>
- b. Between Australia and the United Kingdom, the Australia-United Kingdom Free Trade Agreement (AUKFTA).<sup>55</sup>

Additionally, both the RCEP<sup>56</sup> and the AUKFTA<sup>57</sup> contain most-favored-nation treatment clauses that are not restricted from applying to dispute resolution procedures.

Similarly, alternative investment treaties that contain enforceable ISDS procedures for state parties to the USMCA requiring disputes be resolved by arbitration include:

- a. Between Canada and Mexico, the CPTPP.
- b. Between Canada and the United States, no other alternatives are in force.

Accordingly, with the above investment treaties remaining in force, it is open to investors to utilize the provisions of these treaties to initiate arbitral proceedings against a state, should they prefer to do so (as opposed to commencing domestic litigation before the host state's judiciary).

### **Conclusion**

In summary, resolution of investor-state disputes in municipal courts ultimately creates more issues and complexities than using investor-state dispute resolution.

However, in certain instances, contracting out of ISDS procedures may be appropriate due to states having robust bilateral systems in place that can adequately provide the

benefits seen in arbitration. An example of such instance is Aotearoa New Zealand and Australia, both of which are considered “capital exporting states” that enjoy the benefits of close diplomatic connections reflected in domestic legislation that governs reciprocal enforcement of court judgments, and both with respected and competent judiciaries capable of interpreting international law. However, even circumstances such as these can create issues for the resolution of investment disputes, including: (1) residual effects on other investment treaties and disputes by virtue of most-favored-nation treatment clauses; and (2) whether investors are required to exhaust local remedies before seeking diplomatic protection (by virtue of states merely opting out of ISDS provisions in investment treaties). Ultimately, these issues limit the efficiency of resolving investor-state disputes.

At least in the instance of the CPTPP, as between Aotearoa New Zealand and Australia and between Australia and the United Kingdom (and the USMCA as between Canada and the United States), investor-state dispute resolution appears to have returned to a position favored by the Calvo Doctrine. This has caused uncertainty as to how investor-state disputes are to be resolved, risking investors’ confidence in having a transparent and predictable mechanism of resolving their disputes.

Although there remain alternative investment treaties that contain provisions for resolution of investment disputes by international arbitration, whether the renouncement of international arbitration as the preferred mechanism for resolving investment disputes is isolated to the circumstances identified above, or is reflective of a wider international attitude toward resolving investment disputes, remains to be seen.



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## Endnotes

<sup>1</sup> With 79 recorded investor-state arbitrations concerning the provisions of NAFTA. See the United Nations Conference on Trade and Development search engine, *Investment Dispute Settlement Navigator* (online) <<https://investmentpolicy.unctad.org/investment-dispute-settlement>>.

<sup>2</sup> Dolzer, Kriebaum and Schreuer, *Principles of International Investment Law* (3<sup>rd</sup> Ed., Oxford University Press 2022), 2.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*, citing Secretary John Adams.

<sup>5</sup> *Supra* note 2, at 3.

<sup>6</sup> See, e.g., a consolidation of criticisms in: Nottage, ‘Australia’s (Dis) Engagement with Investor-State Arbitration: A Sequel’ *Kluwer Arbitration Blog* (21 Dec. 2022) (online).

<sup>7</sup> Art 24.

<sup>8</sup> Art 24(2).

<sup>9</sup> Art 28.

<sup>10</sup> *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, signed 8 Mar. 2018 (entered into force 30 Dec. 2018), art 9.19.

<sup>11</sup> Hon Steven Ciobo MP, Letter to Hon David Parker dated 8 Mar. 2018.

<sup>12</sup> Rt Hon Kemi Badenoch MP, Letter to Hon Tim Ayes dated 16 July 2023.

<sup>13</sup> United States-Mexico-Canada Agreement, signed 30 Nov. 2018 (entered into force 1 July 2020).

<sup>14</sup> Art 32.12.

<sup>15</sup> Art 31.3.

<sup>16</sup> Regarding the CPTPP, articles such as: (1) art 9.1, stipulating key definitions including: who is a “claimant,” a “respondent,” or a “non-disputing party,” and what is considered an “investment” and a “covered investment”; (2) art 9.4, national treatment; (3) art 9.5, most-favored-nation treatment; (4) art 9.6, “treatment in accordance with applicable customary international law principles, including fair and equitable treatment and full protection and security”; and (5) art 9.8, compensation for expropriation. Regarding the USMCA, Chapter 14 generally, specifically articles: (1) art 14.4, “national treatment”; (2) art 14.5, “most-favored-nation treatment”; (3) art 14.6, “minimum standard of treatment”; and (4) art 14.8, “expropriation and compensation.”

<sup>17</sup> *Supra* note 2.

<sup>18</sup> See, e.g., Transparency International, Corruption Perceptions Index (CPI) (2022), ranking Mexico 126 of 180 states <<https://www.transparency.org/en/cpi/2022/index/mex>> (retrieved online on 20 Nov. 2023). The CPI assesses a state’s “how corrupt each country’s public sector is perceived to be,” that includes factors such as: “[b]ribery,” “[o]fficials using their public office for private gain without facing consequences,” “[the][a]bility of governments to contain corruption in the public sector,” “[l]aws ensuring that public officials must disclose their finances and potential conflicts of interest,” and “[l]egal protection for people who report cases of bribery and corruption” <<https://www.transparency.org/en/news/how-cpi-scores-are-calculated>> (retrieved online on 20 Nov. 2023).

<sup>19</sup> Art 9.5.

<sup>20</sup> Art 14.5.

<sup>21</sup> *İçkale v. Turkmenistan* ICSID Award (8 Mar. 2016), [328].

<sup>22</sup> *Anglo-Iranian Oil Co. (U.K. v. Iran)*, Judgment on Jurisdiction, (22 July 1952) I.C.J. 93.

<sup>23</sup> As summarized by Tony Cole in T. Cole, “The Boundaries of Most Favored Nation Treatment in International Investment Law” (2012) 33(3) MICH. J. INT’L L. 537, 562–563.

<sup>24</sup> T. Cole, “The Boundaries of Most Favored Nation Treatment in International Investment Law” (2012) 33(3) MICH. J. INT’L L. 537, 571–572.

<sup>25</sup> Art 9.5(3).

<sup>26</sup> *New Zealand and China Agreement on the promotion and protection of investment*, signed 22 Nov. 1988 (entered into force 25 Mar. 1989), most-favored-nation treatment clause (art 4), and arbitration clause (art 13).

<sup>27</sup> *Agreement Between Australia and the Oriental Republic of Uruguay on the Promotion and Protection of Investment*, signed 5 Apr. 2019 (entered into force 27 Jan. 2022), most-favored-nation treatment clause (art 5), and arbitration clause (art 13).

<sup>28</sup> *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Mexican States for the Promotion and Reciprocal Protection of Investments*, signed 12 May 2006 (entered into force 25 July 2007), most-favored nation treatment clause (art 5(b)), and arbitration clause (art 11).

<sup>29</sup> Art 14.5.

<sup>30</sup> See, e.g., *Interhandel, Preliminary Objections, Judgment*, I.C.J. Reports (1959), 27.

<sup>31</sup> *Draft Articles on Diplomatic Protection* (2006) U.N. Doc. A/CN.4/SER.A/2006, art 14.

<sup>32</sup> Art 15.

<sup>33</sup> Art 15(e).

<sup>34</sup> See, e.g., *Viviana Gallardo et al., Decision of 13 November 1981, No. G 101/81*, Inter-American Court of Human Rights, Series A Judgments and Opinions, [26].

<sup>35</sup> *Viviana Gallardo et al., Decision of 13 November 1981, No. G 101/81*, Inter-American Court of Human Rights, Series A Judgments and Opinions, [26]-[27].

<sup>36</sup> Becoming enforceable on: (1) 2 May 1980 for Aotearoa New Zealand; (2) 1 June 1991 for Australia; (3) 1 Dec. 2013 for Canada; and (4) 18 Jan. 1967 for the United Kingdom.

<sup>37</sup> *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, signed 18 Mar. 1965, 575 UNTS 159 (entered into force 14 Oct. 1966).

<sup>38</sup> *Draft Articles on Diplomatic Protection* (2006) U.N. Doc. A/CN.4/SER.A/2006, arts 14-15 (commentary).

<sup>39</sup> Art 9.4.

<sup>40</sup> Art 9.5.

<sup>41</sup> Art 9.6.

<sup>42</sup> Art 9.8.

<sup>43</sup> Donald R. Rothwell, *Australia* 120, 152-56, in *THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT* (David Sloss, ed., Cambridge 2009).

<sup>44</sup> *See, e.g.,*, Aotearoa New Zealand's newly elected government's proposed policies to ensure its domestic law as supreme to its international obligations, pursuant to a proposed "national interests" test: Radio New Zealand News, "Coalition details at a glance: What you need to know" (24 Nov. 2023) (online) <<https://www.rnz.co.nz/news/political/503153/coalition-details-at-a-glance-what-you-need-to-know>>.

<sup>45</sup> Pursuant to both the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed 10 June 1958, 330 UNTS 4739 (entered into force 7 June 1959) (New York Convention); and Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature 18 Mar. 1965, 575 UNTS 159 (entered into force 14 Oct. 1966) (ICSID Convention).

<sup>46</sup> In addition to both Australia and Aotearoa New Zealand having the Privy Council (based in the United Kingdom) as their highest court until 1968 and 2003, respectively.

<sup>47</sup> For Aotearoa New Zealand, see the Trans Tasman Proceedings Act 2010 (NZ). For Australia, see the Trans-Tasman Proceedings Act 2010 (Cth) (AUS).

<sup>48</sup> Foreign Judgments (Reciprocal Enforcement) Act 1933 (UK).

<sup>49</sup> *See, e.g., Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52, [31] (CAN).

<sup>50</sup> *See, e.g.,* Reciprocal Enforcement of Judgments Act, RSPEI 1988, c R-6, s. 2 (CAN); and Reciprocal Enforcement of Judgments Act, RSO 1990, c R.5, s. 2(1) (CAN).

<sup>51</sup> Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, 2 July 2019.

<sup>52</sup> Currently more than 170 states under the New York Convention and more than 150 states under the ICSID Convention.

<sup>53</sup> Ch 11, art 20.

<sup>54</sup> Ch 19, art 19.5.

<sup>55</sup> Ch 30 art 30.5.

<sup>56</sup> Ch 10, art 10.4.

<sup>57</sup> Ch 13 art 13.6.

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## Criminal Enforcement of Import Duty Evasion in the United States, continued from page 15



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contemporaneously with the Memorandum, will mean an increase in criminal investigations and prosecutions for trade fraud and import duty evasion.

### ***United States v. Akua Mosaics***

Akua Mosaics, a Puerto Rico-based company that imported and distributed porcelain tile, was charged with evading antidumping and countervailing duties of more than 300% on porcelain tiles imported from China. The Chinese exporter suggested a scheme to Akua Mosaics in which containers of porcelain tiles would be transshipped from China to Malaysia. There, the tiles would be repacked and relabeled to make it appear as if they had been made in Malaysia, and then shipped to Puerto Rico. Akua Mosaics agreed to this scheme and, as the U.S. importer, submitted documentation to CBP stating the porcelain tiles were made in Malaysia, which had a much lower tariff rate than China. However, CBP discovered the scheme, and in 2024, Akua Mosaics and its president pleaded guilty to conspiracy to commit smuggling in violation of 18 U.S.C. Sec. 545. Akua Mosaics and its president received felony sentences of probation and were required to pay the evaded duties in the sum of US\$1,090,000.<sup>8</sup>

### ***United States v. Esquijerosa***

Esquijerosa was president of a tire importing and distributing company based in Miami. Beginning in 2019, antidumping duties of approximately 75% were imposed against tires made in China. Esquijerosa's company began to undervalue the tires imported from China in order to reduce the duties assessed, and routing the Chinese tires through Canada, from where tires could be imported into the United States duty-free. The defendant also purchased tires that were transshipped through Thailand and Malaysia in order to evade the high duties imposed on Chinese-origin tires. The tires routed through Malaysia were rebranded

to make it appear they were manufactured by a Malaysian company. Ultimately, CBP seized a shipment of these tires and discovered the falsification of the country of origin. In December 2024, Esquijerosa pleaded guilty to conspiracy to commit customs smuggling in violation of 18 U.S.C. Sec. 545 and was sentenced in 2025 to one year of house arrest followed by two years of supervised release. The defendant also had to repay approximately US\$1.9 million in unpaid import duties.<sup>9</sup>

### ***United States v. Quintana***

In this prosecution, the Quintanas, a Florida couple, were charged in Miami federal court under the Lacey Act, which protects trade in plant and animal products, as well as under customs laws for illegally importing plywood products. The couple engaged in a scheme to evade antidumping and countervailing duties of about 200% totaling US\$42 million owed on hardwood products imported from China. They falsely declared the species and country of origin or country of harvest of the wood. The wood was often transshipped from China to Malaysia or Sri Lanka where the wood was repacked in order to conceal the wood's Chinese origin to evade the import duties. The couple pleaded guilty to conspiring to violate the Lacey Act and customs laws, including smuggling. The Quintanas were sentenced in February 2024 to fifty-seven months imprisonment along with three years of supervised release and were ordered to pay over US\$40 million in forfeitures and storage costs.<sup>10</sup>

Customs violations as highlighted in the prosecutions mentioned above are often referred to the DOJ by CBP, which uses sophisticated algorithms in its ACE Portal to identify fraudulent conduct in import entries; through voluntary disclosures from corporations; and whistleblowing under the Criminal Division's Corporate Whistleblower Awards Pilot Program, which can generate awards for the whistleblower, along with referrals in conjunction with civil claims brought by relators under 31 U.S.C. Sec. 3729, known as the civil False Claims Act.

### **Guidance and Best Practices**

Given the DOJ's expressly stated prioritization of criminal enforcement of trade fraud and tariff evasion, what actions should companies engaged in international trade take to avoid being ensnared in the government's widening net? First, companies should review their policies and procedures governing international trade practices, and

if they lack such policies, they should create them. It is important to update the company's risk profile, considering factors like the countries from which it imports, the types of products involved, and any supply chain issues in light of the current trading environment. Next, compliance monitoring procedures should be updated and tested to ensure proper internal reporting. Companies should also engage in internal investigations and remediation of noncompliance with the new tariffs. Reviewing ACE data on past imports is crucial, especially for those products that are now subject to enhanced tariffs, to ascertain any unexplained or deviant patterns.

Furthermore, how the company classifies and values its imports and determines country of origin should be reviewed for compliance with applicable Customs regulations and to ensure the company is exercising reasonable care in managing its supply chain. As part of its compliance monitoring, a company should engage in periodic post-entry reviews to ensure those entries comply with existing Customs regulations. Compliance monitoring should also be used to inform the company when it would be advantageous to engage in voluntary self-disclosures of existing misconduct or violations to mitigate potential civil penalties, to avoid criminal prosecution, and to mitigate criminal sanctions. Engaging outside counsel with international trade experience to review the company's compliance procedures and monitoring will ensure an unbiased overview of those activities. A company considering an acquisition must make certain that a thorough review of the acquisition target's international trade practices is part of the acquirer's due diligence.

## Conclusion

The Trump administration's focus on tariffs as a major tool of the United States' foreign relations policy has raised tariffs' profile in the public eye like never before. The DOJ's creation of the MGCF Unit to fight trade fraud and import duty evasion evidences an increased use of the hammer of criminal law to enforce the administration's trade and foreign policies. Now, the DOJ can prosecute trade fraud and import duty evasion with the same seriousness as bank fraud, tax evasion, and health care fraud, where perpetrators have been subjected to lengthy prison terms. This raises the risk for any U.S. importer involved in international trade, especially with countries subject to high tariffs. In response, companies must assess and strengthen their compliance efforts to avoid what could result in catastrophic consequences to their operations.



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## Endnotes

<sup>1</sup> The 12 May 2025 Memorandum also announced amendments to the Criminal Division's Corporate Whistleblower Awards Pilot Program to allow awards for tips relating to "[t]rade, tariff and customs fraud by corporations." See, Memorandum dated 12 May 2025 from Matthew R. Galeotti, head of the Criminal Division, at <https://www.justice.gov/criminal/media/1400046/dl?inline>.

<sup>2</sup> *DOJ Expands Enforcement of Trade Fraud and Tariff Evasion*, DLA Piper Insights, 14 July 2025 at <https://www.dlapiper.com/en-us/insights/publications/2025/07/doj-expands-enforcement-of-trade-fraud-and-tariff-evasion>; *The Frontline is Everywhere: What General Counsel Need to Know About the Department of Justice's Strategic Pivot Toward Customs Fraud and Tariff Evasion*, NAT'L L. REV., at <https://natlawreview.com/article/frontline-everywhere-what-general-counsel-need-know-about-department-justices>, posted 4 Aug. 2025.

<sup>3</sup> Including the ability to submit allegations regarding an importer's evasion of anti-dumping and countervailing duties under the Enforce and Protect Act (EAPA) along with submitting an "e-Allegation" where suspected trade violations of any kind can be reported anonymously to Customs and Border Protection.

<sup>4</sup> *DOJ Expands Enforcement of Trade Fraud and Tariff Evasion*, DLA Piper Insights, 14 July 2025 at <https://www.dlapiper.com/en-us/insights/publications/2025/07/doj-expands-enforcement-of-trade-fraud-and-tariff-evasion>.

<sup>5</sup> *Tariff Evasion Is Within DOJ's Crosshairs: Potential Criminal and Civil Consequences for Noncompliance with Increased U.S. Tariffs*, White Collar Update, Sidley Austin LLP, 1 Aug. 2025 at <https://www.sidley.com/en/insights/newsupdates/2025/08/tariff-evasion-is-within-doj-s-crosshairs-the-potential-criminal-and-civil-consequences>.

<sup>6</sup> Also used, but less commonly, is 18 U.S.C. Sec. 542, which similarly makes it a crime to enter goods through misrepresentations on paperwork. However, and importantly, the intent requirement of that statute only requires that a violator have "reason to know" that the documentation contains misrepresentations, not that they intentionally made a false statement. A violation of Sec. 542 has a statutory maximum imprisonment range of two years.

<sup>7</sup> President Trump's authority to order tariff increases under the IEEPA is currently the subject of court challenges before the Court of International Trade and the Federal Circuit.

<sup>8</sup> *United States v. Akua Mosaics, et al.*, Case No. 24-Cr-105-ADC, District of Puerto Rico.

<sup>9</sup> *United States v. Esquijerosa*, Case No. 24-20436-Cr-CMA, Southern District of Florida.

<sup>10</sup> *United States v. Quintana*, Case No. 21-20245-Cr-BB, Southern District of Florida, <https://www.justice.gov/usao-sdfl/pr/florida-conspirators-sentenced-nearly-five-years-prison-each-evading-over-42-million>.

## No Top-Up, No Shell, No Revenge Tax: U.S. Multinationals ..., continued from page 17



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Notably, on 15 July 2025, and in response to concerns that EU MNEs will be put at a global disadvantage, German Chancellor Friedrich Merz openly called for the Pillar Two Directive to be suspended. Only two days later, the Belgian Constitutional Court ruled that five U.S. business groups could bring legal challenges against the UTPR and referred the case to the European Court of Justice to decide whether the UTPR breaches EU law. This litigation underscores what practitioners have already flagged, that the EU's top-up tax framework, particularly the UTPR, may violate fundamental freedoms and thus be incompatible with EU law.<sup>13</sup>

While rollback of the UTPR would be modest, a broader suspension of the Pillar Two Directive would be transformative. Only time will tell whether the EU will amend its Pillar Two enactment.

### **The U.S. Minimum Tax Landscape**

The United States never enacted the GloBE Rules that underpin Pillar Two, instead choosing to rely on preexisting minimum taxation tools, such as Global Intangible Low-Taxed Income (GILTI) and Base Erosion Anti-Abuse Tax (BEAT), as well as the Corporate Alternative Minimum Tax (CAMT) enacted in 2022.

Recent changes under the One Big Beautiful Bill Act (OBBBA) significantly modified GILTI, now named "Net CFC Tested Income." OBBBA eliminated the Qualified Business Asset Investment deduction and reduced the foreign tax credit (FTC) from 20% to 10%, while also reducing the Section 250 deduction from 50% to 40%, thus increasing the nominal tax rate from 10.5% to 12.6%.<sup>14</sup> BEAT and CAMT provide minimum tax backstops for large MNEs.<sup>15</sup>

Although these regimes serve similar policy objectives to Pillar Two, they differ significantly. While GILTI applies on a global blending basis, Pillar Two uses country-by-country calculations.<sup>16</sup> Pillar Two top-up taxes kick in if any jurisdiction has an ETR below the desired minimum of 15%, while GILTI applies its minimum tax where the blended global ETR falls below its minimum tax rate. With this being said, OBBBA modifications make GILTI both harsher and more aligned with Pillar Two.<sup>17</sup>

### **The Pre-Agreement Double Taxation Risk**

Prior to the Proposed Solution, U.S. MNEs faced severe double taxation exposure under Pillar Two. Consider the following structure: U.S. ParentCo owns a Luxembourg FinCo, which holds a Dutch or Irish HoldCo. These three jurisdictions have been selected due to their established prominence as leading jurisdictions for the establishment of HoldCos and FinCos within the EU.

Assume the Irish HoldCo is subject to a 10% ETR. Ireland can preemptively apply a QDMTT to cover the shortfall to 15%. Under the pre-agreement rules, if Ireland had not imposed a QDMTT, then Luxembourg, as an intermediate parent entity would apply an IIR since the jurisdiction of the ultimate parent entity (UPE), being the United States, lacked an IIR. If Luxembourg did not apply an IIR, then any other jurisdiction in the corporate chain could have collected the top-up tax under the UTPR.<sup>18</sup>

In all scenarios, ParentCo faced double taxation because U.S. GILTI would tax the same CFC income without allowing FTCs for Pillar Two top-up taxes since they are not paid by the ParentCo or deemed paid under specific statutory provisions. For U.S. MNEs with larger taxable bases or active in multiple low-tax jurisdictions, the exposure had the potential to multiply quickly, which underscores U.S. Treasury's reasoning for seeking the Proposed Solution.

### **The Proposed Solution**

The severity of these double taxation risks prompted G7 finance ministers to seek a coordinated solution: the Proposed Solution, under which U.S. GILTI and Pillar Two could operate as parallel systems. Essentially this means that the minimum tax framework in the United States would be accepted as a side-by-side solution that would exempt U.S. MNEs, including asset managers, from the IIR and UTPR in respect to both their domestic and foreign profits. At the time of writing, this remains a political commitment rather than a legally binding framework.

The political breakthrough came after U.S. Treasury Secretary Scott Bessent announced removal of the retaliatory Section 899 “revenge tax,” which would have allowed tax increases on foreign investors from countries implementing “unfair foreign taxes,” from OBBBA in exchange for the G7 side-by-side agreement. The removal of this provision was crucial for securing international cooperation.

The G7 statement announcing the Proposed Solution reveals that significant work remains to implement the Proposed Solution. Successful implementation depends on “material simplifications” to Pillar Two’s administration and compliance framework, unspecified changes to Pillar Two’s “treatment of substance-based non-refundable tax credits that would ensure greater alignment with the treatment of refundable tax credits,” and a continuing “commitment to ensure any substantial risks that may be identified with respect to the level playing field, or risks of base erosion and profit shifting, are addressed.”<sup>19</sup> These principles indicate that the Proposed Solution is contingent on substantial and broad Pillar Two reforms that have yet to be agreed upon.

The text of the G7 statement also highlights that the successful implementation and impact of QDMTTs is another important consideration for the Proposed Solution. The OECD has been increasingly emphasizing that point in public comments to fend off claims that the Proposed Solution creates an uneven playing field, favoring U.S. MNEs.<sup>20</sup> This uncertainty, combined with the rise of QDMTTs as Pillar Two’s primary enforcement tool, underscores the broader shift toward fragmented national discretion.

Notably absent from the G7 statement is any reference to digital services taxes (DST), which has also been a point of major contention between the United States and the EU, suggesting that the United States will continue addressing DST challenges through trade negotiations.

### ***Continuing Exposure and Uncertainty***

Even if the Proposed Solution is fully implemented, QDMTTs remain a live threat since U.S. MNEs have not been carved out. U.S. Treasury’s main concern is that the QDMTT rule order restricts countries from crediting GILTI against their QDMTT.<sup>21</sup> Furthermore, U.S. subsidiaries of foreign parented groups may still face IIR and UTPR exposure (if the jurisdiction of the UPE has not implemented an IIR) since the exclusion applies only to “U.S. parented groups.”

Questions also remain regarding whether GloBE Information Returns (GIR), which are first due in mid-2026, will still be required. While the United States

seeks exemption from GIR filing requirements, local tax authorities still need entity-level data for QDMTT calculations, meaning that the information provided on local QDMTT returns will likely be expanded to include information that otherwise would have been reported through GIR.<sup>22</sup>

If implementation efforts of the OECD Inclusive Framework, and eventually, the EU and EU member states, stall, Section 899 may reemerge in future budget reconciliation legislation, and then it is back to square one with respect to Pillar Two implementation. The G7 agreement does not bind the broader 147-jurisdiction OECD Inclusive Framework. Translating this understanding beyond the G7 presents considerable complexity, particularly given the November 2025 timeline for administrative guidance from the OECD. Section 899 could also reemerge if EU member states begin rolling out DSTs.

Finally, until binding legislation reflects the Proposed Solution, provisions within OBBBA may still leave U.S. MNEs below 15% ETR, leaving them exposed to UTPR top-up tax.<sup>23</sup> Until the OECD issues administrative guidance, significant implementation uncertainty persists.

As Pillar Two hangs in the balance, enforcement is increasingly shifting toward national tools, most notably transfer pricing enforcement and economic substance challenges. At the same time, QDMTTs, though introduced under a harmonized framework, reflect member state discretion in both transposition and implementation, adding another layer of complexity for U.S. MNEs.

### **The New Enforcement Reality: Fragmentation and National Discretion**

The abandonment of ATAD 3 and the uncertain status of Pillar Two relief signal that a fragmented tax environment will remain an indefinite reality in the EU. With these harmonized enforcement mechanisms rendered largely ineffective against U.S. MNEs, TP audits and economic substance enforcement are likely to emerge as the favorite tools of EU tax authorities. Indeed, a recent International Bureau of Fiscal Documentation study notes that TP documentation “has been a focal point of disputes between MNEs and tax authorities across the EU.”<sup>24</sup>

The European Commission has acknowledged<sup>25</sup> that disparities in TP enforcement across the EU have created a fragmented environment, resulting in differences in compliance costs and dispute risks in its justification for the Proposal for a Council Directive on Transfer Pricing.<sup>26</sup> The status of the Council Directive on Transfer Pricing itself, which has stalled after facing heavy opposition from

certain EU member states, highlights this point. Economic substance requirements reveal similar jurisdictional variations between EU member states.

Although optional under the Pillar Two Directive, the Netherlands, Luxembourg, and Ireland have all implemented QDMTTs. While Pillar Two aimed to harmonize minimum taxation, EU member state discretion in QDMTT implementation, particularly regarding GILTI creditability, indicates an environment where national choices may continue shaping outcomes.

#### **Transfer Pricing and Economic Substance Enforcement Divergence**

The most relevant jurisdictions for U.S. MNEs, the Netherlands, Luxembourg, and Ireland, each present distinct risk profiles that materially affect compliance burdens and audit outcomes. High thresholds may reduce routine filing, but also increase the scope of targeted reviews.

**TP Documentation Requirements and Penalties.** The Netherlands and Ireland currently follow the Master File/Local File approach to TP documentation laid out in the OECD Guidelines and BEPS Action 13.<sup>27</sup> In Luxembourg, Draft Bill No. 8186<sup>28</sup> would introduce mandatory Master File and Local File requirements, but until then, Luxembourg requires TP documentation to be readily available and provided upon request but has no statutory thresholds. The Netherlands and Ireland mandate that TP documentation be prepared and available by the tax return filing deadline.<sup>29</sup>

The key differences between the three jurisdictions are summarized below:<sup>30</sup>

<b>Jurisdiction</b>	<b>Master File Threshold</b>	<b>Local File Threshold</b>	<b>TP Documentation Penalties</b>
<b>Luxembourg</b>	Draft Bill: <€750M and standalone entity has turnover ≥ €100M or assets ≥€400M	Draft Bill: <€750M	No specific TP penalties, but an administrative penalty of up to €25,000 may apply. Additional penalties ranging from 5% to 25% of the avoided taxes may apply. <sup>31</sup>
<b>Netherlands</b>	<€50M	<€50M	Fines up to €10,300; imprisonment up to six months for deliberate noncompliance <sup>32</sup>
<b>Ireland</b>	<€250M	<€50M	Fines up to €25,000 plus €100/day continuing penalties

*All figures represent consolidated group revenue, unless otherwise indicated.*

Notably, Circular L.I.R. No. 164/1 (January 2025), which tightened requirements for arm's length interest on shareholder and intragroup current accounts in Luxembourg, reinforced the need for robust TP documentation.<sup>33</sup>

**Burden of Proof.** Ireland places burden of proof on taxpayers as standard practice in TP cases.<sup>34</sup> In the Netherlands, the burden of proof can reverse from the tax authorities to the taxpayer, as confirmed by a July 2024 Court of Appeal decision, where a taxpayer knowingly files an incorrect return, meaning a return that indicates substantially less tax than is due.<sup>35</sup> Luxembourg taxpayers initially bear the burden of proof with respect to the arm's length principle and the method applied, but if the tax authority challenges a return, it bears the legal burden to justify an upward adjustment.<sup>36</sup> Similar to the Netherlands, weak or missing documentation often shifts the practical burden back to the taxpayer.

**Economic Substance Requirements.** Economic substance serves as both a foundational TP compliance concept and a key element of General Anti Abuse Rule (GAAR) enforcement. Tax authorities often leverage economic substance to justify both TP adjustments and GAAR-based challenges to IRD or PSD tax benefits.

The Netherlands applies the most rigorous substance tests.<sup>37</sup> Luxembourg and Ireland, with significant economic stakes in maintaining their attractiveness to international business, use more flexible frameworks. In practice, this means that establishing economic substance is likely to be easier in Luxembourg or Ireland than in the Netherlands,

where HoldCo/FinCo service companies must commit to a twenty-four-month office lease and incur at least €100,000 in local salary costs.<sup>38</sup>

**Enforcement and Audit Practices.** Even with robust TP documentation and demonstrated economic substance, U.S. MNEs may face unexpected compliance costs due to information requests by EU tax authorities.

Ireland's thirty-three TP interventions between 2015–2023 yielded €748 million in additional revenue,<sup>39</sup> though its first and, so far, only TP case decided before the Tax Appeals Commission in February 2024 resulted in a taxpayer victory on stock-based compensation allocations.<sup>40</sup>

Recent Dutch rulings demonstrate an increasingly aggressive approach. A €128 million business restructuring adjustment set a key precedent for substance-based scrutiny, signaling the Dutch tax authority's willingness to challenge intragroup pricing methodology,<sup>41</sup> and on 18 July 2025, the Dutch Supreme Court denied withholding tax treaty benefits despite active business operations, requiring actual economic involvement for functional attribution.<sup>42</sup>

TP has become “the main point of attention in Luxembourg taxation.”<sup>43</sup> The Luxembourg tax authorities are hiring former Big Four professionals, increasing TP documentation requests, and even challenging positions supported by Big Four TP reports. Though, a recent Luxembourg Administrative Court of Appeal ruling sided with the taxpayer, allowing notional interest deductions on an interest-free intragroup loan, rejecting the tax authority's attempted reclassification of the interest-free loan as a hidden capital contribution.<sup>44</sup>

### ***The Future of QDMTTs***

Although the Pillar Two Directive made QDMTTs optional and provided limited domestic implementation flexibility, member states' ability to repeal QDMTTs is constrained by EU law and political commitments under the G7 agreement. Notably, the Netherlands, Luxembourg, and Ireland do not grant credit under their QDMTTs for GILTI. While theoretically possible, such credits appear unlikely given revenue considerations. Similarly, the repeal of QDMTTs also seems improbable due to political commitments under the G7 agreement.

There have been no reported cases or published assessments indicating QDMTT collections to date, making it too early to assess their impact on structuring decisions. If and when QDMTTs begin generating meaningful revenue, U.S. MNEs, including asset managers, may see an uptick in local audits and information requests tied to QDMTT reporting obligations.

### **Navigating the Fragmented Landscape; Practical Guidance: It's 2025, not 2015**

U.S. MNEs, including asset managers, should consider several practical solutions.

**Transfer Pricing Insurance:** U.S. MNEs with significant EU operations should view TP insurance as a strategic necessity rather than a luxury. For HoldCos or FinCos with intercompany arrangements exceeding €50 million annually, the cost-benefit analysis increasingly favors coverage, which typically costs between 2% and 8% of the insurance limit.<sup>45</sup>

### **Enhanced Local Counsel and Domiciliation Coordination:**

The jurisdictional divergences make close collaboration with experienced local counsel and qualified domiciliation agents non-negotiable. Local counsel must demonstrate genuine business operations for HoldCos and FinCos through operational bank account management, proper board composition, quarterly meetings, locally maintained corporate records, timely financial statement filing, and documentation of credit monitoring functions and key business decisions occurring locally.

**Advance Pricing Agreements (APAs):** The key to obtaining an APA is demonstrating genuine economic substance and a clear business rationale. Where APAs can be obtained, they remain valuable for high-risk or high-value structures.

**Pillar Two Readiness:** Reliance on the Proposed Solution as a basis to pause compliance efforts is premature. U.S. MNEs should maintain full Pillar Two compliance capabilities, including data readiness and quarterly provision modeling. Companies should not assume that future legislative relief will apply retroactively; if the side-by-side system is delayed until 2026, Pillar Two top-up taxes for 2024 and 2025 remain a possibility.

### **Luxembourg Regulated Funds and Securitization Funds:**

Where it makes sense from an operational perspective, asset managers and MNEs with financing platforms may want to consider Luxembourg's specialized regimes or securitization vehicles (SVs) as an avenue for navigating the post-BEPS tax compliance. Luxembourg's regulated funds (SIFs, RAIFs, SICARs) remain primarily outside Pillar Two's scope under the investment fund exclusion and benefit from ATAD safe harbors, including the Collective Investment Vehicles (CIVs) exemption, which excludes CIVs from the scope of ATAD II's reverse hybrid entity rule, and ATAD's interest limitation carve-outs for financial undertakings. While SVs are in principle subject to Pillar Two, predictability can be achieved through their deployment due to Luxembourg's adoption of Option 3

QDMTT allocation, which shifts any top-up tax to another Luxembourg constituent entity to avoid possible double taxation under IIR or UTPR, thereby reducing extra compliance and cash flow headaches. These features mean that Luxembourg investment structures and SVs remain attractive, provided that operational alignment is genuine and demonstrable.

## Conclusion

The path ahead remains unsettled. The G7's side-by-side framework is only a political accord, not a binding solution, meaning Pillar Two compliance remains a present obligation, and delays in formal agreement into 2026 could leave top-up tax exposure in place for prior years. Political volatility adds to the uncertainty. This reflects a broader retreat from global tax harmonization toward national enforcement discretion. U.S. MNEs should expect continued jurisdictional variations in substance requirements and enforcement intensity. Robust documentation and genuine economic substance will remain critical for managing audit risk and financial exposure, while jurisdictional choice will increasingly hinge on enforcement predictability, compliance cost, and reputational risk.



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## Endnotes

<sup>1</sup> Elvinger Hoss Prussen, "ATAD 3 / Unshell Directive Proposal Officially Dropped!" Lux. Tax (25 June 2025), <http://elvingerhoss.lu/insights/publications/ataad-3-unshell-directive-proposal-officially-dropped?ff=true>; Council of the EU, "Report from the ECOFIN Council (ST 9960 2025 INIT) – Proposal for a Directive to Prevent the Misuse of Shell Entities ("Unshell" / ATAD 3) Officially Not Pursued," at 1 (18 June 2025), <https://data.consilium.europa.eu/doc/document/ST-9960-2025-INIT/en/pdf>.

<sup>2</sup> Proposal for a Council Directive Laying Down Rules to Prevent the Misuse of Shell Entities for Tax Purposes and Amending Directive 2011/16/EU, COM (2021) 565 final (22 Dec. 2021).

<sup>3</sup> OECD, *Statement by the OECD Secretary-General on G7 Progress on International Tax Co-operation* (28 June 2025), <https://www.oecd.org/en/about/news/speech-statements/2025/06/statement-by-the-oecd-secretary-general-on-g7-progress-on-international-tax-co-operation.html>.

<sup>4</sup> OECD, *BEPS Project Explanatory Statement: 2015 Final Reports*, OECD/G20 Base Erosion and Profit Shifting Project, OECD PUBLISHING (2016), <https://doi.org/10.1787/9789264263437-en>.

<sup>5</sup> OECD, *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy* (8 Oct. 2021), <https://www.oecd.org/content/dam/oecd/en/topics/policy-issues/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf>.

<sup>6</sup> The collapse of Pillar One, which sought to reallocate taxing rights to the jurisdiction of users or customers through a coordinated implementation of digital services taxes, left a fragmented landscape similar to what we are seeing in relation to Pillar Two. Following BEPS2.0, a moratorium on digital services taxes was put in place among OECD member states until Pillar One could be implemented. This moratorium has now expired, returning taxing rights over digital activity reverted to national jurisdictions. Many are now reviving or reshaping their own DSTs and reasserting nexus-based rules.

<sup>7</sup> Council Directive 2018/822 of 25 May 2018 Amending Directive 2011/16/EU as Regards Mandatory Automatic Exchange of Information in the Field of Taxation in Relation to Reportable Cross-Border Arrangements (DAC6), 2018 O.J. (L 139) 1.

<sup>8</sup> Council of the European Union, *Report to the European Council on Tax Issues, ST-9960-2025-INIT* (27 June 2025), <https://data.consilium.europa.eu/doc/document/ST-9960-2025-INIT/en/pdf>.

<sup>9</sup> *Id.*

<sup>10</sup> Lily Batchelder & Kaitlin Fritz, "Base Erosion & Profit Shifting: Anti-Avoidance Policies with Pillar 2," TAX FOUNDATION (30 Mar. 2024), <https://taxfoundation.org/research/all/global/base-erosion-profit-shifting-pillar-two/>.

<sup>11</sup> *Id.*

<sup>12</sup> Council Directive 2022/2523 of 14 December 2022 on Ensuring a Global Minimum Level of Taxation for Multinational Enterprise Groups and Large-Scale Domestic Groups in the Union, 2022 O.J. (L 315) 1.

<sup>13</sup> Maarten de Wilde & Ciska Wisman, "Why All Top-Up Tax Variants in the EU Pillar Two Directive Collide with the EU's Fundamental Freedoms (and How to Solve This)," KLUWER INT'L TAX BLOG (30 May 2023), <https://legalsblogs.wolterskluwer.com/international-tax-law-blog/why-all-top-up-tax-variants-in-the-eu-pillar-two-directive-collide-with-the-eus-fundamental-freedoms-and-how-to-solve-this/>.

<sup>14</sup> PwC, "Cross-Border Tax Talks: One Big Beautiful Podcast Part 3" (July 2025), <https://www.pwc.com/us/en/services/tax/multinationals/podcasts/cross-border-tax-talks-one-big-beautiful-podcast-part-3.html>.

<sup>15</sup> *Id.* (noting that BEAT imposes a 10.5% minimum tax for large corporations after 31 Dec. 2025 and CAMT imposes a 15% minimum tax on the adjusted financial statement income of large corporations with average annual financial statement income exceeding US\$1 billion).

<sup>16</sup> DLA Piper, "US GILTI and Pillar 2: A Closer Look at the Administrative Guidance" (Feb. 2023), <https://www.dlapiper.com/en/insights/publications/2023/02/us-gilti-and-pillar-2-a-closer-look-at-the-administrative-guidance/>.

<sup>17</sup> "Cross-Border Tax Talks: One Big Beautiful Podcast, Part 3: Return of the G7," *supra* note 14 (noting that the elimination of QBAI and increased rate create a more punitive regime than the original GILTI and strengthen the policy argument for the Proposed Solution).

<sup>18</sup> de Wilde & Wisman, *supra* note 13.

<sup>19</sup> G7 Statement on Global Minimum Tax, U.S. Dep't of Treasury (28 June 2025), <https://home.treasury.gov/news/press-releases/sb0181>.

<sup>20</sup> Inside International Tax, "From the OB3 to the OECD: What Does the G7 Agreement Mean for Pillar Two?" (KPMG 31 July 2025), <https://podcasts.apple.com/us/podcast/inside-international-tax/id1618997033>.

<sup>21</sup> *Id.*

<sup>22</sup> Orbitax, "Pillar Two QDMTT FAQ for U.S. Multinationals" (2025), <https://orbitax.com/newsroom/pillar-two-qdmtt-faq-for-us-multinationals>.

<sup>23</sup> "Cross-Border Tax Talks: One Big Beautiful Podcast, Part 3: Return of the G7," *supra* note 14.

<sup>24</sup> IBFD, "Transfer Pricing Documentation in the EU: Courtroom Battles and Tax authorities' Scrutiny" (Jan. 2025), [https://www.ibfd.org/sites/default/files/2025-02/tp-etf\\_0.pdf](https://www.ibfd.org/sites/default/files/2025-02/tp-etf_0.pdf).

<sup>25</sup> European Commission, "Proposal for Harmonised Transfer Pricing Rules in the EU," [https://taxation-customs.ec.europa.eu/taxation/business-taxation/transfer-pricing-eu/proposal-harmonised-transfer-pricing-rules-eu\\_en](https://taxation-customs.ec.europa.eu/taxation/business-taxation/transfer-pricing-eu/proposal-harmonised-transfer-pricing-rules-eu_en) (last visited 31 July 2025).

<sup>26</sup> European Commission, "Proposal for a Council Directive on Transfer Pricing," COM (2023) 529 final (12 Sept. 2023) (draft directive aiming to harmonize EU TP rules by 2026; not yet adopted as of July 2025).

<sup>27</sup> Grant Thornton, "Transfer Pricing in the Netherlands" (6 Jan. 2021), <https://www.grantthornton.global/en/insights/articles/transfer-pricing->

guide/transfer-pricing--the-netherlands/; Grant Thornton, “*Transfer Pricing in Ireland*” (10 Mar. 2021), <https://www.grantthornton.global/en/insights/articles/transfer-pricing-guide/transfer-pricing---ireland/>.

<sup>28</sup> Draft Grand Ducal Regulation on Transfer Pricing Documentation (Luxembourg), introduced 28 Mar. 2023 under Bill No. 8186 (pending); Grant Thornton, “*Transfer Pricing in Luxembourg*” (6 Jan. 2021), <https://www.grantthornton.global/en/insights/articles/transfer-pricing-guide/transfer-pricing---luxembourg/>; Chambers & Partners, “*Transfer Pricing 2025 – Luxembourg: Trends and Developments*” (2025), <https://practiceguides.chambers.com/practice-guides/transfer-pricing-2025/luxembourg/trends-and-developments>.

<sup>29</sup> CMS, “*Expert Guide to Transfer Pricing Documentation – The Netherlands*” (14 Nov. 2024), <https://cms.law/en/int/expert-guides/cms-expert-guide-to-transfer-pricing-documentation/the-netherlands>; Grant Thornton, “*Netherlands Guide*,” *supra* note 27.

<sup>30</sup> Grant Thornton, “*Netherlands Guide*,” *supra* note 27; Grant Thornton, “*Luxembourg Guide*,” *supra* note 28; Grant Thornton, “*Ireland Guide*,” *supra* note 27.

<sup>31</sup> Vanessa Ramos Ferrín, “*Luxembourg’s New Transfer Pricing Rules for Current Accounts*,” SFF MAG., June 2025, <https://sff-camara.com/sff-magazine-june-2025/luxembourgs-new-transfer-pricing-rules-for-current-accounts/>.

<sup>32</sup> Commenda, “*Netherlands Transfer Pricing Compliance Guide*,” <https://www.commenda.io/netherlands/transfer-pricing>.

<sup>33</sup> *Id.*

<sup>34</sup> William Fry Tax Advisors, “*Ireland*,” TAXAND (May 2025), <https://www.taxand.com/wp-content/uploads/2025/05/Ireland.pdf>.

<sup>35</sup> Huygens Tax, “*Dutch Court of Appeal Rules on Reversal and Increase of the Burden of Proof in Transfer Pricing Disputes*,” HUYGENS TAX (July 2024), [https://huygenstax.com/news/dutch-court-of-appeal-rules-on-reversal-and-](https://huygenstax.com/news/dutch-court-of-appeal-rules-on-reversal-and-increase-of-the-burden-of-proof-in-transfer-pricing-disputes/)

[increase-of-the-burden-of-proof-in-transfer-pricing-disputes/](https://huygenstax.com/news/dutch-court-of-appeal-rules-on-reversal-and-increase-of-the-burden-of-proof-in-transfer-pricing-disputes/).

<sup>36</sup> Ferrín, *supra* note 31.

<sup>37</sup> CMS, “*CMS Expert Guide to Substance Issues Across Europe: Netherlands*,” CMS LAW (2024), <https://cms.law/en/int/expert-guides/cms-expert-guide-on-substance-issues-across-europe/netherlands>.

<sup>38</sup> Chambers & Partners, “*Transfer Pricing 2025 – Netherlands*” (noting the 24-month office and annual salary expense requirements).

<sup>39</sup> Forvis Mazars, “*Transfer Pricing in Ireland: Reflections and Outlook*” (2024).

<sup>40</sup> Tax Appeals Commission, Case No. 59 TACD 2024 (17 May 2024).

<sup>41</sup> *Rechtbank ZWB, Netherlands v. Zinc Smelter Restructuring BV*, No. BRE 15/5683 (19 Sept. 2017).

<sup>42</sup> Dutch Supreme Court, 18 July 2025 (dividend withholding tax exemption cases), see Loyens & Loeff, “*Dutch Supreme Court Clarifies Anti-Abuse Rule in Dividend Tax Cases Involving International Holding Companies*” (18 July 2025), <https://www.loyensloeff.com/insights/news--events/news/dutch-supreme-court-clarifies-anti-abuse-rule-in-dividend-tax-cases-involving-international-holding-companies/>.

<sup>43</sup> Lexology, “*Transfer Pricing in Luxembourg*” (noting systematic requests since 2016).

<sup>44</sup> Lux. Admin. Ct. App., Case No. 48125C (23 Nov. 2023).

<sup>45</sup> Marsh JLT Specialty, “*Risk Management for Transfer Pricing – The Insurance Solution*” (2020), <https://www.marsh.com/content/dam/marsh/Documents/PDF/UK-en/marsh-jlt-specialty-risk-management-for-transfer-pricing-the-insurance-solution.pdf>.



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## International Judgment Recognition in an Age of North American Disunity, continued from page 19



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*Investment Management Co. v. Maodong Xu*, trial court Judge Arthur Engoron reflected the mood of many in the United States over the last decade that China did not respect the sort of rights foundational to the United States when he found that U.S. Department of States' Human Rights reports established that the Chinese Communist Party and corruption systemically undermined Chinese court proceedings.<sup>12</sup> The appellate court reversed, holding that the Human Rights reports were not proper "documentary evidence" under relevant New York procedure, but also, more importantly, that the reports, "which primarily discuss the lack of judicial independence in proceedings involving politically sensitive matters, do not utterly refute plaintiff's allegation that the [Chinese] civil law system governing this breach of contract business dispute was fair."<sup>13</sup> Lacking any allegations that the civil judgment in question was tainted by lack of due process, the trial court later recognized the Chinese judgment. Other courts have followed suit and recognized civil judgments from China, rejecting allegations that no Chinese judgment ever comports with due process.<sup>14</sup>

Mexico's new judicial reforms present the sort of systemwide change that may require an analysis of systemic due process. Thus far, no court has found that Mexico's entire judicial system fails to guarantee any form of due process; though, multiple U.S. courts have denied recognition of Mexican judgments based on case-specific showings of corruption.<sup>15</sup> Although no court has held that electing judges is itself a violation of due process, if the worst predictions of Mexico's reforms come true and political interference and corruption become endemic, then there may be valid grounds to hold that the system has lost

its ability to impartially adjudicate civil disputes. Regardless of whether Mexico's problems truly rise to a systemic level, Florida attorneys and judges will likely see judgment debtors alleging new arguments about the systemic due process afforded by Mexico's courts that will take time to analyze and resolve.

### Public Policy

Unlike the broad mandatory analysis of systemic due process in a foreign country, courts may also, in their discretion, decline to recognize judgments that were specifically tainted by corruption, political interference, or other failure of due process. Public policy, which has codified this aspect of the more general comity analysis for money judgments subject to the Uniform Acts, has been described as the refusal of recognition when the foreign judgment is deemed injurious to public health, public morals, or public confidence in the purity of the administration of the law; violative of individual rights; or otherwise repugnant to fundamental notions of justice or the fundamental interests of the forum.<sup>16</sup> Nonetheless, a court's discretion does not allow it to deny recognition merely because a particular judgment or procedure differs from U.S. practice.<sup>17</sup>

U.S. courts frequently consider whether the cause of action underlying a judgment offends U.S. notions of comity or public policy. As has been long established, the United States' interpretation of comity, in line with the practice of many other countries, has excluded the recognition of foreign country money judgments for unpaid taxes and penal judgments. Accordingly, pursuant to Section 1 of the UFMJRA, foreign country judgments for taxes, fines, or other penalties are not enforceable.<sup>18</sup> Many states, including Florida, also raise the bar for recognizing foreign defamation judgments.<sup>19</sup> These restrictions have been incorporated into the Uniform Acts, as well.<sup>20</sup>

For most other civil causes of action, a judgment debtor may not avoid the recognition of a foreign country judgment based on the mere fact that the laws of the country that rendered the foreign judgment are different from the laws of the United States.<sup>21</sup> For example, the public policy exception will not prevent enforcement of a foreign country money judgment merely because the forum court would not provide for the recovery of the damages recoverable under the laws of the foreign country in which the judgment was rendered.<sup>22</sup> However, a U.S. court may consider whether some aspect of the foreign law

underpinning the foreign judgment results in a deprivation of a U.S. citizen judgment debtor's constitutional rights.<sup>23</sup>

A court may decline to recognize a foreign judgment that resulted from a failure of due process, such as fraud or lack of notice, but a foreign procedure that merely differs from U.S. procedure does not amount to a lack of procedural due process.<sup>24</sup> In the case of Mexico, there have been several court rulings denying recognition due to particularized allegations of fraud, even before the recent judicial reforms.<sup>25</sup> So far, there is not enough evidence of the effect of Mexico's new reforms on the functioning of Mexico's justice system, but the threatened ills of corruption and political influence appear to be the same sort of grounds for nonrecognition that courts generally analyze on a case-by-case basis. Although courts may be more willing to investigate Mexican judgments for signs of fraud or corruption before recognizing them in the United States, there is no reason to diverge from the same time-worn analyses of the particular judgments before them.

## Conclusion

It may be in a party's interest to refer to executive branch actions or public opinion when opposing recognition of a foreign judgment in the United States. For example, a party seeking to oppose recognition of a Brazilian judgment will no doubt refer to the current U.S. Treasury sanctions against Brazilian Supreme Federal Court Justice Alexandre de Moraes for his role in the ongoing legal proceedings against former Brazilian President Jair Bolsonaro, citing concerns about freedom of expression and arbitrary detentions. While these criticisms may have relevance to any future civil judgment on Mr. Bolsonaro himself, Judge de Moraes's actions are merely an isolated data point when analyzing systemic due process in Brazil, and would not be applicable at all to an analysis of whether any particular Brazilian civil judgment would be repugnant to U.S. public policy. In short, U.S. courts should continue to ignore the vagaries of politics and executive actions and continue to recognize foreign judgments according to the same principles developed since before *Hilton v. Guyot*.



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## Endnotes

<sup>1</sup> The United States signed the Hague Convention on the Choice of Court Agreements, which deals in part with the manner of enforcement of foreign judgments, in 2009, but it has not ratified it. See Hague Convention on Choice of Court Agreements, <https://www.hcch.net/en/instruments/conventions/conventions/full-text/?cid=98> (30 June 1995).

<sup>2</sup> To be clear, there are three uniform acts with similar names that apply to the enforcement of "foreign" judgments. The Uniform Enforcement of Foreign Judgments Act applies only to judgments issued by a state within the United States for enforcement within another state. The UFMJRA was first adopted and proposed by the Uniform Law Commissioners in 1962. In 2005, those commissioners adopted an updated version of the UFMJRA, the Uniform Foreign-country Money Judgments Recognition Act (UFCMJRA). Twenty-nine states have adopted the UFCMJRA, and nine states (including Florida) have adopted only the UFMJRA. Although the UFMJRA and UFCMJRA differ in many material respects, they retain similar language related to the grounds for declining to enforce discussed in this article, although the UFCMJRA clarifies that either the foreign cause of action or the judgment itself may violate the forum's public policy. Therefore, this article refers to both the UFMJRA and UFCMJRA together as the "Uniform Acts."

<sup>3</sup> *Hilton v. Guyot*, 159 U.S. 113, 16 S.Ct. 139, 40 L.Ed. 95 (1895). Puerto Rico relies on a civil law exequatur procedure. See Judicial Branch of Puerto Rico, <https://poderjudicial.pr/eng/community-education/legal-topics/civil-cases/exequatur/#:~:text=Rule%2055%20of%20the%20Puerto,a%20court%20outside%20Puerto%20Rico>.

<sup>4</sup> See § 488 Restatement (fourth) of the Foreign Relations Law of the U.S. 481 (noting that the UFMJRA does not prohibit the recognition of non-monetary judgments, such as injunctions, declaratory judgments, or judgments establishing a particular legal status).

<sup>5</sup> *Hilton*, 159 U.S. at 164.

<sup>6</sup> Some courts, including Florida's, continue to add an additional, fifth element for recognition: reciprocity. See Fla. Stat. § 55.605(2)(g). Lack of reciprocity remains a permissive ground for refusal to enforce a foreign country money judgment in several states. See, e.g., *Banque Libanaise pour le Commerce v. Khrelch*, 915 F.2d 1000 (5th Cir. 1990) (affirming Texas court's refusal to recognize Abu Dhabi judgment for lack of reciprocity). In a large number of civil law countries, which include most countries in South America and much of Europe, recognition and enforcement of foreign country money judgments are contingent upon a finding of reciprocity. See, e.g., *Wolff v. Wolff*, 389 A.2d 413, 416-17 (Md. Ct. Spec. App. 1978) (holding that UFMJRA "was intended to promote principles of international comity by assuring foreign nations that their judgment would, under certain well-defined circumstances, be given recognition" by U.S. courts); *aff'd*, 401 A.2d 479 (Md. 1979). Therefore, the enforcement of foreign country judgments in the United States increases the chances that a foreign country will enforce a U.S. judgment.

<sup>7</sup> *Bridgeway Corp. v. Citibank*, 201 F.3d 134, 142 (2d Cir. 2000) (affirming district court's refusal to recognize a 1993 Liberian judgment because the Liberian judicial system then did not provide impartial tribunals or procedures compatible with the requirements of due process).

<sup>8</sup> *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 617 (S.D.N.Y. 2014) (finding that Ecuador's courts failed to provide "impartial tribunals or procedures compatible with due process of law" under President Correa, though affirmed on other grounds), *affirmed* 201 F.3d 134, 144 (2d Cir. 2000); *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1413 (9th Cir. 1995) (affirming summary judgment finding that Americans could not receive fair treatment in the Iranian justice system in the early 1980's).

<sup>9</sup> See also *Osorio v. Dow Chem. Co.*, 635 F.3d 1277, 1279 (11th Cir. 2011) (affirming refusal to recognize Nicaraguan judgment, but expressly declining

“to adopt the district court’s holding” that Nicaragua as a whole does not provide impartial tribunals).

<sup>10</sup> *Dejoria v. Maghreb Petroleum Expl., S.A.*, 804 F.3d 373, 380-83 (5th Cir. 2015) (reversing order declining to recognize judgment from Morocco); see also *Ingersoll Milling Mach. Co. v. Granger*, 833 F.2d 680, 688 (7th Cir. 1987) (evaluating a similar provision of the Illinois Recognition Act and noting that “the issue is only the basic fairness of the foreign procedures”). This concept sets a high bar for non-recognition.

<sup>11</sup> UFCMJRA § 4(c)(8).

<sup>12</sup> *Shanghai Yongrun Inv. Mgmt. Co. v. Kashi Galaxy Venture Capital Co.*, 2021 NY Slip Op 31459(U), ¶ 6 (N.Y. Sup. Ct. 2021) (refusing to recognize Chinese civil judgment).

<sup>13</sup> *Shanghai Yongrun Inv. Mgmt. Co., Ltd v. Maodong Xu*, 2022 NY Slip Op 01523, ¶ 1, 203 A.D.3d 495, 496, 160 N.Y.S.3d 874, 874 (N.Y. 1st Dept. 2022).

<sup>14</sup> *Tianzhu Coal Co. Ltd. Under Yaojie Coal v. Ju*, No. 620508/2023, 2024 N.Y. Misc. LEXIS 56832, at \*19 (N.Y. Sup. Ct. Aug. 12, 2024) (refusing to find that political interference in some cases meant that the Chinese judicial system as a whole could never be impartial); *Huizhi Liu v. Guoqing Guan*, 225 A.D.3d 749, 207 N.Y.S.3d 589 (N.Y. 2d Dept. 2024) (affirming recognition because U.S. Department of States’ Human Rights report was not sufficient to prove that Chinese judgment was rendered under a system that did not comport with due process); cf. *Armadillo Distribution Enters. v. Hai Yun Musical Instruments Mfr. Co.*, No. 8:12-cv-1839-T-33EAJ, 2014 U.S. Dist. LEXIS 85015, at \*16 (M.D. Fla. June 23, 2014) (refusing to find that the Chinese judicial system could never impartially resolve civil disputes or that the judgment at issue was not based on due process).

<sup>15</sup> See *In re Ford Motor Co.*, 580 F.3d 308, 314 (5th Cir. 2009) (noting that Fifth Circuit case law has “create[d] a nearly airtight presumption that Mexico is an available forum” that provides sufficient due process in tort cases); see also *Langsam v. Vallarta Gardens*, No. 08 Civ. 2222, 2009 U.S. Dist. LEXIS 52597, at \*37 (S.D.N.Y. June 15, 2009) (dismissing on forum non conveniens grounds in part because Mexico was a proper, impartial forum); *Zions First Nat’l Bank v. Moto Diesel Mexicana, S.A. de C.V.*, No. 08-10528, 2009 U.S. Dist. LEXIS 30538, at \*7 (E.D. Mich. Apr. 1, 2009) (same).

<sup>16</sup> See *Somportex, Ltd. v. Phila. Chewing Gum Corp.*, 453 F.2d 435, 442 (3d Cir. 1971) (recognizing English default judgment), 453 F.2d at 443; see also *Tahan v. Hodgson*, 662 F.2d 862, 867 (D.C. Cir. 1981) (refusing to apply public policy exception to foreign default judgment where second notice was not provided as required by Rule 55(b)(2) of Federal Rules of Civil Procedure); but see *Overseas Inns S.A. P.A. v. United States*, 685 F. Supp. 968, 972 (N.D. Tex. 1988) (refusing to enforce Luxembourg court’s reorganization plan that treated the IRS as a general, rather than a priority, creditor).

<sup>17</sup> See *Tianzhu Coal Co. Ltd. Under Yaojie Coal v. Ju*, No. 620508/2023, 2024 N.Y. Misc. LEXIS 56832, at \*21 (N.Y. Sup. Ct. Aug. 12, 2024) (“The Court of Appeals has long recognized that “[t]he public policy inquiry rarely results

in refusal to enforce a judgment unless it is inherently vicious, wicked or immoral, and shocking to the prevailing moral sense”); see also *Naoko Ohno v. Yuko Yasuma*, 723 F.3d 984, 1003 (9th Cir. 2013) (“[F]ew judgments fall in the category of judgments that need not be recognized because they violate the public policy of the forum.”).

<sup>18</sup> See UFCMJRA, 13 U.L.A. 261 § 1 (1986); see also *Attorney Gen. of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103 (2d Cir. 2001) (dismissing claim on grounds of “revenue rule,” which holds that courts of one sovereign will not enforce tax judgments or tax claims of another sovereign); *Republic of Honduras v. Philip Morris Cos., Inc.*, 341 F.3d 1253, 1256 (11th Cir. 2003) (same).

<sup>19</sup> See Fla. Stat. § 55.605(2)(h) (only requiring recognition if the court determines that the foreign defamation judgment comports with the U.S. and Florida standards of free speech).

<sup>20</sup> *E.g.*, 2005 Uniform Act § 4, Comment 11 (explaining that the “party resisting recognition of the judgment must make ‘a showing of corruption in the particular case that had an impact on the judgment that was rendered.’”).

<sup>21</sup> See, e.g., *Ackerman v. Levine*, 788 F.2d 830, 842-43 (2d Cir. 1986) (holding that German attorneys’ fees judgment was not contrary to public policy merely because the fees awarded were greater than what might be proper under U.S. laws).

<sup>22</sup> See, e.g., *Ingersoll Milling Mach. Co. v. Granger*, 833 F.2d 680, 691 (7th Cir. 1987) (recognizing foreign country award granting prejudgment interest even though forum state did not permit recovery of such damages); *Somportex*, 453 F.2d at 443 (recognizing foreign country award granting compensatory damages for good will and costs even though state’s law did not permit recovery of such damages); but see *Ackermann v. Levine*, 788 F.2d at 844 (refusing to recognize foreign country judgment for attorneys’ fees where there was lack of evidence in the record of the authorization for and work performed by counsel as required under New York law).

<sup>23</sup> *De Fontbrune v. Wofsy*, 39 F.4th 1214, 1227 (9th Cir. 2022) (but declining to hold “a clearly meritorious fair use defense would render a foreign judgment repugnant to the public policy of the United States or of California”).

<sup>24</sup> See *Trejos Hermanos Sucesores S.A. v. Verizon Commc’ns Inc.*, No. 1:21-cv-08928 (JLR), 2024 U.S. Dist. LEXIS 7021, at \*19 (S.D.N.Y. Jan. 12, 2024) (holding that “it is not necessary that the due process rights in the foreign tribunal [in Costa Rica] match precisely the due process rights that might be afforded in New York”).

<sup>25</sup> *Transportes Aereos Pegaso v. Bell Helicopter Textron, Inc.*, 623 F. Supp. 2d 518, 521 (D. Del. 2009) (declining to enforce Mexican judgment under the UFCMJRA because the court was not satisfied that the judgment was not obtained by fraud); *de Manes Lopez v. Ford Motor Co. (In re Bridgestone/Firestone, Inc. Tires Prod. Liab. Litig.)*, 470 F. Supp. 2d 917, 918 (S.D. Ind. 2006) (refusing to enforce Mexican order that the court concluded, based on circumstantial evidence and adverse inferences, were obtained by fraud).

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## Working in the United States as a TN Professional ..., continued from page 21



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- Professional license and/or educational credentials (if applicable), along with any applicable fees.<sup>22</sup>

If the CBP officer is satisfied that the applicant is admissible to the United States and eligible for TN classification, the officer will issue a visa stamp in the applicant's passport, admitting them as a TN nonimmigrant for up to three years.

Alternatively, a prospective TN employer in the United States may choose to file a Petition for Nonimmigrant Worker on behalf of a Canadian citizen outside the United States by submitting Form I-129 to USCIS, which is eligible for premium processing if the employer so elects.<sup>23</sup> If USCIS approves Form I-129, the Canadian citizen may then apply to CBP at one of the designated locations for admission to the United States as a TN nonimmigrant by presenting proof of Canadian citizenship and the I-129 approval notice from USCIS.<sup>24</sup> The Canadian citizen should also bring a copy of the I-129 and all supporting documentation submitted to USCIS in order to respond to any questions about their eligibility. If the CBP officer finds the applicant eligible for admission, the Canadian citizen will be admitted as a TN nonimmigrant.

### TN Procedures for Mexican Citizens

The issuance of TN visas for Mexican citizens differs from the process for Canadian citizens. Mexican citizens cannot

apply directly with CBP for admission as TN nonimmigrants. If they are residing outside of the United States, they must apply for a TN visa directly at a U.S. embassy or consulate in Mexico.<sup>25</sup> The TN processing posts in Mexico are the U.S. embassies in Mexico City, Guadalajara, and Ciudad Juarez.

The first step for a Mexican citizen is to complete and submit the DS-160, Online Nonimmigrant Visa Application, to the U.S. Department of State. The second step is to schedule a visa interview at one of the three aforementioned posts. While official waiting times for TN visa appointments are not posted, they may take several weeks or months to be scheduled. During the interview, the Mexican citizen must present a valid passport, a contract or offer of employment letter, and documentation that establishes they meet the minimum education and/or work experience requirements (such as, degrees, diplomas, certificates, professional licenses, prior work experience letters, etc.).<sup>26</sup> The Mexican citizen should also present evidence of their ties to their home country to overcome the INA § 214(b) presumption.

At the interview, the consular officer may question the applicant about the proffered position and their qualifications to determine eligibility for TN classification. If the consular officer approves the visa, the embassy will issue a visa stamp in the applicant's passport. Under the current Visa Reciprocity Schedule, Mexican citizens may request a twelve-month TN visa validity period by paying a reciprocity fee of \$79.00, or a forty-eight-month validity period by paying a visa reciprocity fee of \$357.00.<sup>27</sup> This option is also available for TD dependents.<sup>28</sup> With a valid TN visa stamp, the Mexican citizen can then apply for admission to the United States at a port of entry.

### Comparison of TN Visa and H-1B Professional Visa

The TN visa offers several significant advantages compared to the H-1B visa: (1) the TN visa is not subject to a lottery selection process or numerical limit on the number of admissions per fiscal year; (2) unlike the H-1B visa's six-year maximum limit, the TN visa can be renewed indefinitely in three-year increments, so long as the qualifying employment continues; (3) the process is more streamlined and expedited, as Canadian citizens can present their application directly to CBP at the port of entry and receive immediate adjudication; (4) upon admission, TN visa holders may immediately start working. In contrast, first-time H-1B visa holders cannot commence employment until

the start of USCIS's fiscal year in October; and (5) employers of TN visa holders pay lower application costs, as the process typically requires only a supporting employment letter, rather than more extensive documentation and fees.

One key drawback of the TN visa program is that it is restricted solely to citizens of Canada and Mexico, whereas the H-1B program is open to all nationalities. In addition, unlike TN visa holders, H-1B beneficiaries are not subject to the INA § 214(b) presumption of immigrant intent because the H-1B is a dual intent visa, permitting both nonimmigrant and immigrant intent.

### **Key Considerations When Preparing for TN Visa Reviews by CBP, USCIS, and Department of State**

Practitioners should be aware of several common reasons for the denial of TN applications: failing to demonstrate how the job title and duties correspond to one of the enumerated occupations; failing to provide sufficiently comprehensive documentation to satisfy eligibility requirements (e.g., comprehensive job offer letters or evidence of the applicant's professional or academic qualifications); and failing to demonstrate the applicant's strong ties to their home country, including a clear intent to return at the end of the temporary stay in the United States.

#### ***Job Must Be Listed on Professional Occupations List***

The first step a practitioner should take before representing a Canadian or Mexican applicant is to compare the proffered job with the USMCA list of professional occupations to ensure the profession qualifies for TN classification. As stated earlier, if the profession is not on the list, the applicant will not qualify. Indeed, adjudicators must confirm that the applicant will "perform the duties associated with the listed profession, and not the duties of a similar but distinct profession for which TN classification is inappropriate."<sup>29</sup>

The Foreign Affairs Manual provides a helpful illustration: an "Economist" must demonstrate engaging in activities consistent with the profession of an economist and "not primarily include[ing] the activity of other occupations, such as, but not limited to, those performed by financial analysts, market research analysts, and marketing specialists."<sup>30</sup> When determining TN eligibility, the focus should be on the "nature of the duties of the occupation itself, rather than job title used."<sup>31</sup> Therefore, practitioners should ensure that the duties of the proffered position match the professional functions of the occupation listed under USMCA.

#### ***Sufficiency of Offer of Employment Letter***

The offer of employment letter from the U.S. entity is one of the most important pieces of evidence a Canadian or Mexican citizen will present to CBP, the U.S. Department of State, or USCIS. Therefore, practitioners should carefully prepare the letter to ensure regulatory compliance. The letter must include the following information:

1. A detailed listing of the activities in which the applicant will be engaged;
2. The purpose of entry;
3. The anticipated length of stay;
4. Educational qualifications or appropriate credentials demonstrating professional status; and
5. Arrangements for remuneration.<sup>32</sup>

The letter should be on corporate letterhead and clearly state the U.S. employer's name, address, and contact information to establish the company's legitimacy. Further, it should include a brief description of the company's history, services, number of locations/offices, and personnel to familiarize the adjudicator with the company's operations.

The letter should clearly indicate the job title and the category under which TN classification is being sought for the foreign national. As discussed, the job description must detail duties and responsibilities that align with the selected TN profession, reflecting professional-level work consistent with the job title. According to the U.S. Department of State, "applying this language is very straightforward when the applicant is a professional who intends to do the basic work of a profession in the United States (e.g., an architect who goes to work as an architect)."<sup>33</sup> In the cases of managers or supervisors seeking TN classification, practitioners must ensure the management or executive position requires professional-level knowledge to meet the job requirements.<sup>34</sup>

Practitioners should be aware that if the supervisory position is "more administrative in nature, e.g., ensuring compliance with company regulations and policies," the TN visa will most likely be denied.<sup>35</sup> Therefore, it is imperative that the letter describes the relevant occupational duties in a way that clearly reflects the professional-level functions typically associated with that position. The U.S. Department of Labor's Occupational Outlook Handbook and O\*Net Online are valuable resources to determine the qualifying job duties for each occupation.

The company's offer of employment letter should specify that the applicant meets the specific qualifications listed on the USMCA list for the particular occupation, which typically includes relevant education (such as a bachelor's

degree in the field), licensure, or experience. Since the TN visa is a temporary nonimmigrant visa, the letter should clarify that the employment is not indefinite, that the position is for a specific or temporary period, and that the employee intends to return to their home country upon completion of the period of employment.

It is also important to include details about compensation, such as annual salary or hourly rate and any additional benefits. Unlike H-1B visas, TN visas do not have a prevailing wage requirement; however, practitioners should ensure that the proposed salary is indicative of professional-level employment in the United States.<sup>36</sup>

Practitioners may consult the U.S. Office of Foreign Labor Certification (OFLC) Wage Search website to identify the four-tier wage levels for any occupation within a specific Metropolitan Statistical Area in the United States.<sup>37</sup> The U.S. Department of Labor's website lists Level 1 wages for each occupation, and if the proffered salary falls below this threshold, it may serve as a basis for visa denial. Practitioners should therefore ensure that the offered compensation is commensurate with a professional-level position.

Finally, the offer of employment letter must be signed by an authorized representative of the U.S. company and submitted in its original form to CBP, the U.S. Department of State, or USCIS. Alternatively, the applicant may provide an employment contract in support of the TN visa application, provided it includes all required information.

#### ***Applicant's Professional or Academic Qualifications***

The applicant must "submit evidence that the applicant meets the minimum education requirements or has the alternative credentials set forth in Appendix 2 of Annex 16.A.2 of Chapter 16 of USMCA, which provides specific guidance on the professional qualifications required for entry into each profession."<sup>38</sup>

Mexican citizens may "present either a *cedula* professional (a professional credential issued by the Public Education Secretariat [SEP]) or a *título* (a university diploma) as evidence of completion of a degree program for categories that require the equivalent of a bachelor's degree (*licenciatura*)."<sup>39</sup>

An applicant "may also present a *cedula* professional issued by one of the Mexican state governments, which is also a recognized credential."<sup>40</sup> Educational degrees from institutions outside Canada, Mexico, or the United States "must be accompanied by an evaluation by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials."<sup>41</sup>

Practitioners should verify their clients possess the required documents for their particular occupation. Where the position requires professional work experience, the applicant should submit detailed experience letters from former employers.<sup>42</sup>

#### ***Evidence of Applicant's Foreign Ties***

To avoid a Section 214(b) denial based on a presumption of immigrant intent, it is imperative that TN visa applicants present substantial evidence of home country ties. Such evidence can include family ties, property deeds, bank statements, utility bills, memberships in foreign associations, and future offers of employment upon their return home.

The applicant's economic, family, and social ties outside the United States must be persuasive enough to convince the adjudicator that the applicant will depart at the end of the authorized stay and that their intended activities in the United States will remain consistent with TN visa requirements.

Practitioners should be mindful of this presumption against their clients and thoroughly prepare them to respond to questions and to present supporting evidence during the airport or consular interview.

#### **Conclusion**

For qualifying Canadian and Mexican citizens, the TN visa classification offers a streamlined pathway for temporary employment in the United States for specific professional occupations. At the same time, it is important that practitioners be aware of the legal requirements and potential pitfalls in the process to properly prepare the case and their clients for a successful outcome.



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#### **Endnotes**

<sup>1</sup> <https://www.cbp.gov/travel/canadian-and-mexican-citizens> (last modified on 16 May 2025).

<sup>2</sup> <https://www.uscis.gov/working-in-the-united-states/temporary-workers/tn-usmca-professionals> (last updated on 4 June 2025).

<sup>3</sup> 8 C.F.R. § 214.6(c).

<sup>4</sup> *Id.* at § 214.6(b).

<sup>5</sup> *Id.* at § 214.6(c).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at § 214.6(b).

<sup>10</sup> *Id.*

<sup>11</sup> <https://travel.state.gov/content/travel/en/us-visas/employment/visas-canadian-mexican-usmca-professional-workers.html#:~:text=A%20contract%20or%20letter%20of,qualifications%20for%20a%20TN%20visa>.

<sup>12</sup> *Supra* note 4.

<sup>13</sup> *Id.*

<sup>14</sup> 8 U.S.C. § 1184(b).

<sup>15</sup> 8 C.F.R. § 214.6(e).

<sup>16</sup> *Id.* at § 214.6(h)(1)(iv).

<sup>17</sup> *Id.* at § 214.6(j)(1).

<sup>18</sup> *Id.* at (j)(4).

<sup>19</sup> *Supra* note 2.

<sup>20</sup> *Id.*

<sup>21</sup> <https://www.cbp.gov/travel/canadian-and-mexican-citizens/traveling-tn-or-l1-visa-canada> (last modified on May 30, 2024).

<sup>22</sup> [https://www.help.cbp.gov/s/article/Article-1723?language=en\\_US](https://www.help.cbp.gov/s/article/Article-1723?language=en_US) (published on 18 Dec. 2024).

<sup>23</sup> *Supra* note 2.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Supra* note 11.

<sup>27</sup> <https://travel.state.gov/content/travel/en/us-visas/Visa-Reciprocity-and-Civil-Documents-by-Country/Mexico.html>.

<sup>28</sup> *Id.*

<sup>29</sup> 9 FAM 402.17-4(A).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 402.17-5(B).

<sup>33</sup> *Id.* at 402.17-12.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 402.17-6.

<sup>37</sup> <https://flag.dol.gov/wage-data/wage-search>.

<sup>38</sup> *Supra* note 29 at 402.17-5(C).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> 8 C.F.R. § 214.6(d)(3)(ii).

<sup>42</sup> *Supra* note 38.

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## Artificial Intelligence and Data Protection ..., continued from page 23

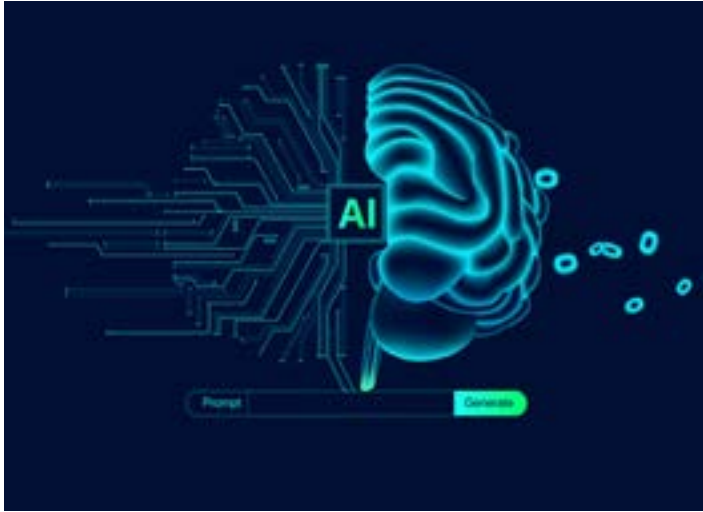


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revisions, the bill failed to advance through Parliament and died with the prorogation of Parliament in early 2025. This failure resulted from several factors, including concerns regarding regulatory burden on industry, questions about the legislation's scope and clarity, and broader political instability within the federal government.<sup>5</sup>

The collapse of AIDA creates significant uncertainty for both businesses operating in Canada, as well as international practitioners advising clients on Canadian AI compliance. While existing privacy legislation under the Personal Information Protection and Electronic Documents Act continues to apply to AI systems that process personal information, Canada currently lacks an AI-specific regulatory framework. This regulatory gap becomes particularly significant given Canada's substantial AI research and development sector and the country's role in North American technology supply chains.

The change in federal government leadership following the AIDA failure suggests that future Canadian AI regulation may take a different approach. Conservative Party leadership has indicated skepticism toward comprehensive federal AI regulation, favoring instead a more limited approach focused on specific high-risk applications. This potential shift in regulatory philosophy would align Canada more closely with the United States' voluntary framework approach, though significant uncertainty remains about the timing and scope of any future legislation.

For international practitioners, the Canadian regulatory uncertainty requires careful attention to evolving political developments and proactive client counseling about potential future compliance obligations. The failure of AIDA does not eliminate the need for AI governance in Canadian

operations, but rather shifts responsibility to private compliance frameworks and existing sectoral regulations.

### Mexico: Data Protection Evolution and Emerging AI Governance

Mexico's approach to AI and data protection regulation reflects the country's position as both a major North American trading partner and an emerging technology market with distinct regulatory traditions. Recent developments in Mexican data protection law provide insights into the country's likely approach to AI regulation, while pending AI legislation suggests growing government interest in comprehensive technology governance.

The Mexican data protection landscape underwent significant transformation in early 2025 with the enactment of a new Federal Law on Protection of Personal Data Held by Private Parties.<sup>6</sup> This legislation, effective in March 2025, modernized Mexico's data protection framework and dissolved the National Institute for Transparency, Access to Information and Personal Data Protection, transferring its authority to the newly created Secretariat of Anti-Corruption and Good Governance. The institutional reorganization reflects broader changes in Mexican administrative structure while maintaining substantive data protection obligations for businesses operating in the Mexican market.

The updated Mexican data protection law includes enhanced penalties that can reach up to 320,000 times the Unit of Measurement and Update, or approximately US\$3.8 million in maximum fines. These penalty levels represent a significant increase from previous legislation and demonstrate Mexican authorities' commitment to robust data protection enforcement. For international businesses, this enhanced penalty structure requires carefully considering compliance programs and risk management strategies.

Several AI-specific legislative initiatives have emerged in the Mexican Congress, though none have yet achieved enactment. In April 2024, Senator Ricardo Monreal presented an initiative for a Federal Law Regulating Artificial Intelligence that would establish a minimum legal framework for AI systems and include three levels of risk classification.<sup>7</sup> More recently, in December 2024, Senator Juanita Guerra Mena introduced the National Law Regulating the Use of Artificial Intelligence, proposing a more comprehensive framework including national AI coordination mechanisms and privacy-by-design principles.<sup>8</sup>

These legislative initiatives reflect the Mexican government's growing interest in AI regulation, though the timing and scope of eventual enactment remain uncertain. The proposed legislation generally follows risk-based approaches similar to those adopted in other jurisdictions, suggesting potential for regulatory harmonization across North America despite unique institutional structures.

Mexico's position within the United States-Mexico-Canada Agreement (USMCA) creates additional considerations for AI and data protection compliance. The trade agreement's digital commerce provisions, particularly those addressing cross-border data flows and digital service delivery, interact with domestic Mexican data protection requirements in ways that require careful legal analysis for international business operations.

### **USMCA Digital Trade Framework: Foundation and Limitations**

The USMCA represents the most comprehensive attempt to establish integrated digital trade rules across North America, though its provisions were developed before the current AI revolution and consequently address artificial intelligence only indirectly. The agreement's digital trade chapter establishes important foundations for cross-border AI commerce while revealing significant gaps that future trade negotiations must address.

Art. 19.11 of the USMCA prohibits restrictions on cross-border information transfers, including personal information, when such transfers support the business activities of covered persons.<sup>9</sup> This provision provides crucial protection for AI systems that rely on cross-border data flows for training, operation, and continuous improvement. Similarly, Art. 19.12 prevents USMCA parties from requiring businesses to domestically relocate computing facilities as a condition for market access, protects cloud-based AI services, and distributes computing architectures that are essential for modern AI implementation.<sup>10</sup>

The USMCA also includes innovative provisions on algorithmic transparency that are particularly relevant to AI governance. Art. 19.16 prevents USMCA parties from requiring disclosure of source code or algorithms as a condition for market access, while allowing regulatory authorities to request such information for legitimate regulatory purposes. This balance attempts to protect intellectual property rights while maintaining regulatory oversight capabilities, although the provision's application to AI systems raises complex questions about transparency and accountability in automated decision-making.<sup>11</sup>

Despite these important protections, the USMCA's digital trade framework reveals significant limitations when applied to contemporary AI governance challenges. The agreement lacks specific provisions addressing AI system liability, algorithmic bias, or automated decision-making rights. The rapid evolution of AI technology since the USMCA's negotiation has created new categories of cross-border commerce that existing trade rules do not adequately address.

The agreement's investment and intellectual property chapters provide additional relevant frameworks for AI commerce, though these provisions also predate current AI governance challenges. The USMCA's investment protections cover AI-related foreign direct investment, while its intellectual property chapter addresses patent and copyright issues relevant to AI development. Neither chapter addresses AI-specific concerns such as training data rights, model ownership, or liability for AI-generated content.

The USMCA includes a scheduled review process that provides opportunities for updating the agreement's digital trade provisions to address AI governance challenges. The six-year review process, scheduled to begin in 2026, offers a forum for addressing regulatory harmonization, updated intellectual property protections, and enhanced cross-border data flow protections specifically designed for AI commerce.

### **Regulatory Convergences and Strategic Opportunities**

Despite significant differences in approach and implementation, the three North American jurisdictions demonstrate notable convergences in AI governance principles that create opportunities for harmonized compliance strategies. These convergences reflect shared values regarding human rights protection, economic innovation, and democratic governance, even as specific regulatory mechanisms vary substantially across jurisdictions.

All three countries have embraced risk-based approaches to AI governance, though they implement this principle through different institutional mechanisms. The United States implements risk-based governance through voluntary frameworks and sectoral regulation, Canada proposed mandatory risk assessment for high-impact systems through AIDA, and Mexico proposed legislation that includes three-tier risk classification systems. This shared commitment to risk-based governance provides a foundation for developing integrated compliance strategies to address requirements across multiple jurisdictions.

The convergence toward international standards provides another opportunity for harmonized approaches. All three North American countries participate in OECD AI governance initiatives and endorse similar principles regarding AI trustworthiness, transparency, and accountability. Alignment with international standards creates opportunities for businesses to develop compliance frameworks that satisfy requirements across multiple jurisdictions, while maintaining operational efficiency.

Cross-border data protection presents both convergences and opportunities for enhanced cooperation. While specific regulatory requirements vary, all three countries recognize the importance of protecting personal information in AI systems while facilitating legitimate business uses of data. The challenge lies in developing practical mechanisms for demonstrating compliance across different regulatory frameworks while maintaining the cross-border data flows essential for modern AI systems.

Financial services regulation represents a particularly promising area for convergence, as all three countries have developed specific guidance for AI use in banking, insurance, and investment services. The shared commitment to financial system stability and consumer protection creates common ground for developing harmonized approaches to AI governance in financial services, with potential applications to other regulated sectors.

### **Critical Divergences and Risk Management**

The fundamental differences in North American AI governance approaches create significant challenges for international businesses and their legal advisors. These divergences extend beyond technical regulatory requirements to reflect different philosophical approaches to technology governance, federalism, and the relationship between government and private industry.

The most significant divergence lies in the choice between voluntary and mandatory compliance frameworks. The United States has embraced voluntary frameworks that encourage but do not require specific AI governance practices, while Canada proposed comprehensive mandatory requirements for high-impact AI systems. Mexico appears to be moving toward mandatory requirements, although their specific scope and implementation mechanisms remain unclear. These different approaches create fundamentally different compliance obligations and risk profiles for international businesses.

Enforcement mechanisms represent another critical area of divergence. The United States relies primarily on existing sectoral regulators and market forces to encourage AI governance, while Canada proposed creating a specialized AI commissioner with significant enforcement powers. Mexico's evolving approach suggests reliance on an expansion of existing data protection authorities to cover AI governance. As each unique enforcement structure requires its own compliance strategy, these divergences create varying levels of regulatory risk for international operations.

The definition and treatment of high-risk AI systems vary significantly across jurisdictions, creating potential conflicts for businesses operating across borders. While all three countries recognize that certain AI applications pose greater risks than others, they differ substantially in how they define and regulate these high-risk systems. These definitional differences can result in AI systems being subject to different regulatory requirements depending on their jurisdiction of deployment or operation.

Liability frameworks present particularly complex challenges for international businesses. The three countries have different approaches to product liability, professional liability, and corporate responsibility that affect AI governance in various ways. These differences become particularly significant for AI systems that operate across borders or affect individuals in multiple jurisdictions simultaneously.

Legal practitioners advising on multijurisdictional AI compliance should carefully consider representational scope and risk management, particularly in the context of professional liability obligations. The uncertainty inherent in evolving regulatory frameworks, combined with the technical complexity of AI systems, creates significant professional liability exposure for attorneys providing AI compliance advice. Effective risk management requires clear engagement letters, appropriate scope limitations, and regular updates to reflect evolving regulatory requirements.

### **Brazilian Comparative Insights**

Brazil's approach to AI governance offers valuable comparative insights for North American jurisdictions, particularly regarding the integration of data protection and AI regulation within existing legal frameworks. The Brazilian experience demonstrates both the opportunities and challenges involved in comprehensive technology governance while providing a useful perspective on

alternative approaches to regulatory structure and enforcement.

The *Lei Geral de Proteção de Dados Pessoais (LGPD)*, Brazil's comprehensive data protection law, has provided a foundation for AI governance even in the absence of AI-specific legislation. The National Data Protection Authority has actively applied *LGPD* provisions to AI systems, including enforcement actions against social media platforms regarding the use of personal data for AI training.<sup>12</sup> This approach demonstrates how existing data protection frameworks can address certain AI governance challenges while highlighting the limitations of technology-neutral regulation when applied to AI-specific concerns.

In December 2024, the Brazilian Senate approved Bill 2338/2023, establishing the first comprehensive AI regulatory framework in Latin America.<sup>13</sup> The legislation takes a risk-based approach similar to the European Union's AI Act, with categories ranging from prohibited applications to basic requirements for lower-risk systems. Significantly, the Brazilian approach creates a distributed enforcement system that builds on existing sectoral regulatory authorities rather than establishing a single specialized AI regulator.

The Brazilian model's emphasis on distributed enforcement through sectoral authorities offers an alternative to both the American voluntary approach and Canada's proposed centralized commissioner model. This approach leverages existing regulatory expertise while avoiding the institutional challenges involved in creating entirely new regulatory bodies. The model may provide insights for North American jurisdictions seeking to balance comprehensive AI governance with practical implementation constraints.

Brazil's experience also demonstrates the importance of stakeholder engagement in AI regulatory development. The legislative process for Bill 2338/2023 included extensive consultation with industry, civil society, and academic stakeholders, though critics argued that certain interests were given disproportionate influence in the final legislation. This experience highlights the challenges involved in balancing different stakeholders' interests while maintaining democratic legitimacy in technology governance.

The integration of copyright protection into Brazilian AI legislation provides another area of comparative interest. The Brazilian law includes specific provisions addressing the use of copyrighted material in AI training, an issue that has received limited attention in North American AI governance discussions. These provisions may influence future North

American approaches to intellectual property issues in AI governance.

For North American businesses engaged in Latin American commerce, Brazil's AI regulatory development creates both opportunities and challenges. Early engagement with Brazilian AI governance requirements may provide competitive advantages, while the development of expertise in Brazilian AI compliance may create opportunities for legal practitioners seeking to expand their Latin American practice.

### **Practical Compliance Framework for International Practice**

Developing effective compliance strategies for multijurisdictional AI governance requires a systematic approach that addresses both current regulatory requirements and potential future developments. The complexity of cross-border AI compliance demands sophisticated legal analysis combined with practical business understanding and proactive risk management.

The foundation of effective multijurisdictional AI compliance lies in comprehensive risk assessment that considers both technical AI system characteristics and regulatory requirements across relevant jurisdictions. This assessment must evaluate not only current compliance obligations but also potential future requirements based on pending legislation and regulatory trends. The dynamic nature of AI regulation requires regular updates to risk assessments and compliance strategies as regulatory frameworks evolve.

Contract structuring for cross-border AI transactions requires careful attention to governing law selection, liability allocation, and dispute resolution mechanisms. The choice of governing law can significantly affect compliance obligations and liability exposure, particularly when AI systems operate across multiple jurisdictions or affect individuals in different countries. Effective contract drafting must address these jurisdictional complexities while providing practical frameworks for ongoing compliance management.

Liability allocation presents particular challenges in cross-border AI transactions, as different jurisdictions may have different approaches to product liability, professional liability, and corporate responsibility. International practitioners must carefully consider how these different liability frameworks interact and develop allocation strategies that provide appropriate protection for their clients while maintaining commercial feasibility.

Data governance represents a critical component of international AI compliance, as AI systems typically require

extensive cross-border data flows for training, operation, and improvement. Compliance strategies must address data protection requirements in all relevant jurisdictions while maintaining the data flows necessary for effective AI system operation. This requires sophisticated understanding of international data transfer mechanisms and privacy law interactions.

Ongoing compliance management requires systematic monitoring of regulatory developments and proactive client communication about evolving requirements. The rapid pace of AI regulatory development means that compliance strategies must be regularly updated to reflect new requirements and enforcement approaches. Effective practice management requires systems for tracking regulatory changes and communicating updates to clients in a timely and actionable manner.

Professional development in AI compliance requires ongoing education about both technical AI capabilities and evolving regulatory frameworks. The intersection of technology and law in AI governance demands lawyers who can understand both the technical capabilities and limitations of AI systems and the complex regulatory frameworks that govern their use. This expertise represents a significant competitive advantage for international practitioners and their clients.

### **Strategic Recommendations and Future Outlook**

The evolution of AI governance in North America presents both challenges and opportunities that require proactive strategic planning by international legal practitioners and their clients. The current regulatory uncertainty creates risks that must be managed, but also opportunities for competitive advantage through early adoption of sophisticated compliance frameworks and strategic positioning in emerging markets.

Legal practitioners should focus on developing specialized expertise in multijurisdictional AI compliance as a key differentiator in an increasingly competitive international legal market. The complexity of AI governance across multiple jurisdictions creates opportunities for lawyers to offer substantial value by providing sophisticated guidance on cross-border compliance strategies. This specialization requires ongoing investment in technical education and regulatory monitoring, but offers significant potential returns through premium billing and client retention.

The upcoming USMCA review process, scheduled for 2026, provides an important opportunity to address current gaps in North American digital trade rules. Legal practitioners should monitor this process closely and consider providing

input on behalf of clients regarding needed updates to accommodate AI governance challenges. The review process may result in significant changes to cross-border AI commerce rules that could affect client compliance strategies and business models.

Regulatory harmonization efforts across North America are likely to accelerate as AI governance frameworks mature and cross-border commerce expands. Practitioners should position themselves to take advantage of increased harmonization by developing expertise that spans multiple jurisdictions and by building relationships with regulatory authorities and industry stakeholders across the region.

The Brazilian experience and other international AI governance developments provide valuable comparative perspectives that can inform North American regulatory evolution. Practitioners who develop expertise in international AI governance approaches will be better positioned to advise clients on emerging requirements and to participate in regulatory development processes.

Client education and proactive compliance planning will become increasingly important as AI governance frameworks continue to evolve. Practitioners should work with clients to develop compliance frameworks that can adapt to changing regulatory requirements while maintaining operational effectiveness. This requires ongoing dialogue about regulatory developments and their business implications.

The intersection of AI governance with other areas of international business law, including trade regulation, intellectual property, and corporate governance, creates opportunities for sophisticated legal practice that goes beyond simple compliance advice. Practitioners who can integrate AI governance with broader business strategy and legal risk management will provide greater value to clients and command premium compensation.

As artificial intelligence continues to transform international commerce, the legal profession must evolve to meet the sophisticated compliance and strategic challenges that AI governance presents. The current period of regulatory uncertainty and rapid technological development creates both risks and opportunities that require careful navigation. Legal practitioners who invest in developing sophisticated AI governance expertise and who can provide practical, actionable guidance to clients operating across multiple jurisdictions will be well-positioned to succeed in this evolving landscape.

The future of AI governance in North America will likely involve continued evolution toward greater regulatory

harmonization, though the specific mechanisms and timeline remain uncertain. The success of international businesses and their legal advisors will depend on their ability to navigate this evolution while maintaining operational effectiveness and competitive advantage. Through proactive compliance planning, strategic positioning, and ongoing professional development, international legal practitioners can help their clients succeed in the AI-driven economy while contributing to the development of effective and balanced AI governance frameworks.



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#### Endnotes

<sup>1</sup> Nat'l Inst. of Standards & Tech., AI Risk Management Framework (AI RMF) 1.0, at 1-3 (26 Jan. 2023), available at <https://www.nist.gov/itl/ai-risk-management-framework> (last visited 31 July 2025).

<sup>2</sup> *Id.* at 8–12.

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<sup>5</sup> Blair Attard-Frost, “The Death of Canada’s Artificial Intelligence and Data Act: What Happened, and What’s Next for AI Regulation in Canada?” Montreal AI Ethics Inst. (18 Feb. 2025), <https://montrealethics.ai/the-death-of-canadas-artificial-intelligence-and-data-act-what-happened-and-whats-next-for-ai-regulation-in-canada/> (last visited 31 July 2025).

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<sup>9</sup> United States-Mexico-Canada Agreement, art. 19.11, 1 July 2020, available at <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement> (last visited 31 July 2025).

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<sup>12</sup> Artificial Intelligence 2025—Brazil, Chambers & Partners, <https://practiceguides.chambers.com/practice-guides/artificial-intelligence-2025/brazil/trends-and-developments> (last visited 31 July 2025).

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## Trading Places: Realignment of Turtle Island at the Subnational Level ..., continued from page 25



Sky Woman, by Ernest Smith. 1936. Produced as part of the “Indian Arts Project” Federal Art Project. Collection of the Rochester Museum and Science Center, Accession # 36.331.1. Public Domain.

ownership. To Native Americans, land cannot be “owned” by humans. This is because the Earth is a “living, sentient being.”<sup>28</sup> Mother Earth is a “relative” that encompasses all living things, which are in turn deserving of respect and care, as are all the animals and plant life the land supports. Since a person cannot “own” other living things (such as a relative), owning land is an impossibility—one can only act as a steward in caring for it.

These views are reflected in the similar traditions of the Quechua peoples of the Andes that led to Ecuador becoming the first nation-state to codify the Rights of Nature<sup>29</sup> in Article 10 and Chapter 7, Articles 71–74 of the 2008 Ecuadorian Constitution that recognizes the inalienable rights of ecosystems to exist and flourish, contrary to the Western legal concepts that regard nature in general (and land in particular) as nothing more than an inanimate object.<sup>30</sup> In this way Ecuador incorporated recognition of the nation’s indigenous groups and inherently their concepts of *sumak*

*kawsay* and *Pachamama* (“Mother Nature”),<sup>31</sup> giving it “plurinationality.”<sup>32</sup>

The efforts by Ecuador to incorporate First Nations into its national governance did not, for the most part, find purchase in its neighbors to the north. There, European imperial powers proceeded to eject the indigenous population from lands they had previously occupied for thousands of years, obliterating whole civilizations.<sup>33</sup>

The destruction of these civilizations meant more than just the ethnic cleansing of a people:

Every part of this earth is sacred to my people. Every hillside, every valley, every clearing and wood, is holy in the memory and experience of my people. Even those unspeaking stones along the shore are loud with event and memories in the life of my people. \*\*\* Fate hunts the red man down. Wherever he goes, he will hear the approaching steps of his destroyer, and prepare to die, like the wounded doe who hears the steps of the hunter.<sup>34</sup>

The Europeans marching their way onto and then through Turtle Island saw it as neither an island nor as land that could be considered a sentient being. At its core, their values concerning man’s relationship to the earth was a God-given right to exploit it.<sup>35</sup> This view evolved from Roman law, which held that, as with other forms of property, land was a thing a human could own.<sup>36</sup> Later, in medieval Europe property law became ingrained in the feudal system, at the center of which was the form of land ownership referred to as the “fief.” This system developed in response to the chaos engendered by the collapse of the Roman Empire, and served as the basis for the exercise of control over the people and the land they occupied by rulers, such as William the Conqueror, who would be king.<sup>37</sup> In time, the previous Roman law distinction between property and sovereignty, separating dominium (power to rule over things by an individual) and imperium (the power to rule over all individuals by the prince), merged such that “ownership of the land and local political sovereignty were inseparable.”<sup>38</sup>

### Displacement of People and Ideas on Turtle Island

European conquest of Turtle Island began in earnest with Christopher Columbus in 1492–1506. The colonial empires of Spain, Portugal, Great Britain, France, Russia, the Netherlands, Denmark, and even Sweden participated in this endeavor on the continent (later named for

Italian explorer Amerigo Vespucci). They all laid claim to natural resources<sup>39</sup> and “human capital”<sup>40</sup> (the indigenous population) in a process that led to the displacement of the people who had been living there undisturbed for thousands of years.<sup>41</sup> They then established numerous settler colonial states,<sup>42</sup> through which colonial rule was asserted over the land, displacing its inhabitants and replacing the prior civilization with that of the conquerors.<sup>43</sup>

First Nation peoples who survived the onslaught found themselves herded into ever smaller areas on the continent by the Wasichu (white man) and their tendency toward avarice:

Once we were happy in our own country and we were seldom hungry, for then the two-leggeds and the four-leggeds lived together like relatives, and there was plenty for them and for us. But the Wasichus came, and they have made little islands for us and other little islands for the four-leggeds, and always these islands are becoming smaller, for around them surges the gnawing flood of the Wasichu; and it is dirty with lies and greed.<sup>44</sup>

This occupation of Turtle Island was rationalized by alleged provisions of international law that allowed for imperialist nations to acquire territory on the continent through conquest, cession by agreement, occupation of land that belongs to no one (*terra nullius*), or prescription (the continuous exercise of sovereignty).<sup>45</sup> In the case of Turtle Island, the international law concept known as the “Doctrine of Discovery”<sup>46</sup> gave European monarchs “ownership rights in newly discovered lands and sovereign and commercial rights” over the indigenous peoples—if discovered by European Christians.<sup>47</sup> Other views are to the contrary.<sup>48 49</sup>

These views of the legality of land expropriation were shared by English philosopher and physician John Locke, regarded as the “father of liberalism” and ardent supporter of social contract theory.<sup>50</sup> Despite this pedigree, his legal arguments for the expropriation of land by the invading colonial powers proceed upon a premise that political institutions of First Nation peoples were inferior to those of the Europeans<sup>51</sup> the latter of which took precedence over the contrary views held by the inhabitants of Turtle Island.<sup>52</sup>

The rationalizations of the conquest of areas on Turtle Island by Spain are particularly harsh. They are based on writings by Francisco de Vitoria, the sixteenth-century Spanish jurist whose work *De Indis Noviter Inventis* is widely regarded as the first international law text.<sup>53</sup> Vitoria reaches a startling conclusion that First Nations did not achieve that status because they were not Christian. As such, indigenous

people lacked the capacity to defend themselves against armed attack and consequently were at the mercy of the conquistadors.<sup>54</sup>

Netchev, Simeon. “European Colonization of North America c.1750.” Courtesy World History Encyclopedia.

## The Rise of Nation-States on Turtle Island

Of the eight empires vying for control of Turtle Island, four emerged as the front runners (Great Britain, France, Spain, and Russia). With the continent in the mid-eighteenth century being “owned” by European sovereigns, the process of recognizing the acquisition of land by one sovereign over another commenced under then-existing international law. But, as was the case with the Roman Empire, in time the empires were unable to assert dominion over Turtle Island.

British rule over their thirteen colonies ended when they declared independence and reformatted themselves into states. Once recognized as a sovereign nation-state, the United States was entitled under international law to expand its reach across the continent (and elsewhere). To the north, Canada (from the St. Lawrence Iroquoian *kanata*, meaning “settlement” or “village”)<sup>55</sup> eventually emerged as an independent nation-state, displacing other claims to its lands. To the south, the nation-state of Mexico eventually became independent from imperial claims to its lands as did the seven countries comprising Central America (Belize, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and Panama). In the Caribbean, thirteen independent sovereign nations are now recognized<sup>56</sup> in addition to a number of dependent territories.

Disappearing from this landscape are the First Nations of Turtle Island.

Because indigenous populations throughout Turtle Island are non-European, they were (and remain) unable to assert a personality as sovereign “states” under the European-devised scheme of international law.<sup>57</sup> This lack of status on the part of people who regard themselves as a discreet civilized society creates an ambiguity for them when attempting to deal with the international order of things, dominated as it is by Eurocentrism. The Westphalian system, which holds that each nation-state has exclusive sovereignty over a defined territory, cements this lack of status into place. Developed after the Peace of Westphalia in 1648, this system was premised on “state theory” authored by Jean Bodin and the natural law teachings of Hugo Grotius.<sup>58</sup>

The Westphalia regime was thought necessary by the rise of “classical” nationalism in the nineteenth century,

elevating “states” to the status of “nations”<sup>59</sup> to the exclusion of other polities.<sup>60</sup> Subnational governance under this ancient system was left to an amalgamation of jurisdictions involving former colonies with an ambiguous status, First Nations with claims to nation-state status but unrecognized as such, stateless people, territories also of ambiguous status under international law, and a collection of states, provinces, municipalities, and city-states.

### Realignment of States on Turtle Island

Like lines of demarcation on a turtle’s back, fixed borders of a handful of nation-states define recognized polities on the North American continent. While inhabitants of these nation-states are presumed to have fundamental rights to self-determination under international law, those rights are defined by—and confined to—the nation-state assigned to them. With all of the available land now carved up into these defined national territorial limits, and the rigid borders of the nation-states set in stone, the ability to expand beyond these borders is limited.

This is because, while colonial empires during the Age of Discovery were able to rationalize their conquest of land under various (and dubious) legal theories, those theories are no longer available to nation-states such as the United States that have expressed a desire to expand its borders to incorporate territory now owned by other nation-states. The Kellogg-Briand Pact of 1928 outlawed the use of war to resolve such disputes between nations. This includes acts of aggression to expand a nation’s borders, now specifically prohibited by international law.<sup>61</sup>

This leaves an act of secession by a subnational polity (or portion thereof) as the lone avenue by which the borders of the nation-states occupying Turtle Island can be legally readjusted.

Modern theories of international relations acknowledge secession as the sole means to achieve true self-determination of peoples in a post-colonial world constrained by nationalism, statehood, and territorialism,<sup>62</sup> but have had difficulty formulating a coherent framework and intellectual basis on how best to organize an orderly means by which a polity residing within a nation-state can separate and assert meaningful autonomy from its parent.<sup>63</sup> In the absence of a consensual “divorce,” separation of states on Turtle Island is unlikely to occur.<sup>64</sup>

In the case of the radical proposal made by the United States to annex all of Canada by making it the fifty-first state, all of the provinces and territories of the latter would have to consent to such an arrangement, as would their central government, presumably by a treaty. What

the United States would tender in compensation to a now extinct nation-state in such a transaction is but the first of a number of impediments to such a proposal. But conceivably, an alternative would be that one or more provinces of Canada could apply to become a U.S. state,<sup>65</sup> which would require consent of the Canadian national government and every province, under terms that would respect principles of democracy, minority rights, aboriginal rights, and boundaries.<sup>66</sup>

The U.S. Constitution in Article 4, section 3 states that “new States may be admitted by the Congress into this Union” with the only restriction being that no new State can be formed within the jurisdiction of another State, or the joinder of two or more States (or parts of them) without the consent of such States and Congress.<sup>67</sup> The power to admit a state is “not a mandate, but a power to be exercised with discretion” that Congress may condition on a stipulation that “the organic laws of a new State at the time of admission shall be such as to meet its approval.”<sup>68</sup>

By a similar token, a U.S. state (or other polity on Turtle Island) applying for admission to the central government of Canada as a province would be obliged to separate itself from its parent nation-state. This would be a near impossibility for a U.S. state, which, although “endowed with all the functions essential to separate and independent existence,” became part of an “indestructible Union composed of indestructible States” consisting of “an indissoluble relation” with the national government that was “final” in nature.<sup>69</sup> As stated by the U.S. Supreme Court in the case of the effort by Texas to secede from the union:

The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration or revocation, except through revolution or through consent of the States.<sup>70</sup>

In order to realign the political boundaries on Turtle Island, a chaotic and unwieldy process of revolution, secession, and integration (or independence) would have to take place where states, provinces, or other subnational polities would disengage from their respective parent nation-states, or conceivably one or more of the Central American or Caribbean island countries, becoming absorbed into one of the extant parent nation-states on the continent, or forming an entirely new one. Such a process would do little to address the underlying issues for the indigenous populations on Turtle Island, who are in essence stateless under international law:

A right of secession in these cases only encourages groups to remain isolated and separate and works against beneficial co-operation and political integration. The question then should not be whether or not a group has “title” to territory, but whether the rights of the group as citizens and human beings are being protected by the existing political machinery.<sup>71</sup>

### International Relations at the Subnational and Supranational Level

Polities at the subnational level who wish to assert a more effective right of their own self-determination beyond those afforded by their assigned nation-state are not without recourse. Their options include pursuing an expansion of their powers within the existing federal structures that control them, constitutional reforms of those structures, secession, or direct involvement in international legal regimes. In practice, none except the latter is an efficacious means for peoples operating at the subnational level to assert transnational sovereignty.

The three main nation-states (plus Costa Rica) as federations do allow for the exercise of jurisdiction with varying levels of autonomy at the subnational level. The United States system of federalism as interpreted by the judicial branch is thought by some observers to leave states very weak, to the extreme where it “do(es) not even have a viable form of federalism”<sup>72</sup> although there has been a concerted push to rectify the situation.<sup>73</sup>

The Canadian experience by contrast has been more flexible, and more in line with what the U.S. framers intended for their nation.<sup>74</sup> In the Mexican federation, the ability to exercise power (for both states and municipalities) has been augmented to a limited extent among subnational units.<sup>75</sup> In Costa Rica, the seven provinces have no separate governance, but the people living in those provinces have direct participation in selecting the national legislature through proportional representation.<sup>76</sup> The second tier of governance in the country is at the municipal level (cantons) where the leaders are selected by the people through popular elections.<sup>77</sup>

First Nations in the United States are nominally independent sovereigns designated as “domestic dependent nations”<sup>78</sup> subject to plenary powers of Congress. Canada has a similar system<sup>79</sup> by which indigenous peoples (living both on “reserves” and at large) are, in essence, treated as a protectorate<sup>80</sup> under international law.<sup>81</sup> Costa Rica has a similar arrangement whereby territories give indigenous populations limited

self-rule. Mexico regards itself as a pluricultural nation, following the Ecuadorian model. Indigenous people in sufficient numbers living within a state are given, in theory, some self-rule in that state.<sup>82</sup>

Interestingly enough, even those polities at the subnational level with no “international personality” can and often do participate in making international law. Subnational governments have become increasingly involved in international relations and the formulation of global policy (sometimes referred to as “glocalization”). U.S. states and Canadian provinces are active participants in this practice, as are Australian states, subnational governments (including cities) in Belgium, Germany, Spain, and within federal systems in India and Nigeria. The breadth of issues has expanded beyond trade to intermestic<sup>83</sup> issues of border security, energy, environmental protection, human rights, and immigration.<sup>84</sup>

The trend of increasing globalization of economics at the end of the twentieth century and beginning of the twenty-first century led to a parallel building of continental macro-regions and the evolution of local microeconomic actors at the subnational level, with a concomitant spill-over effect into national politics. This geopolitical regionalization “tends to challenge the concept of the nation-state,” deeply challenging the ways in which federalism as practiced by these nations have been conceived and implemented.<sup>85</sup>

On Turtle Island, the ability of U.S. states to conduct what would otherwise look like foreign policy has been taking place in plain sight for several decades in the form of international agreements with foreign governments, including Canada and its provinces. This has taken place despite provisions of the U.S. Constitution (most notably the Supremacy Clause) that sought to rectify problems with the conduct of foreign affairs under the Articles of Confederation.<sup>86</sup> Tacitly approved through inaction or acquiescence by Congress and the executive branch, a recent study<sup>87</sup> indicated that more than 600 international agreements have been concluded between virtually all 50 states and Canadian provinces as well as foreign governments.<sup>88</sup>

California has been particularly active in concluding international accords (with Québec, the UK, Mexico, Scotland, New Zealand, and China, to name a few). In 2007, ten U.S. states joined ten European nations, the European Commission, two Canadian provinces, and New Zealand to form an International Carbon Action Partnership. Such agreements have also dealt with subjects that include agriculture, education, energy, environmental cooperation, family support, hazardous waste, homeland security,

investment, military cooperation, pollution, sister-state relations, tourism, trade, transportation, and water issues.<sup>89</sup>

Noticeably absent from this plethora of international agreements are any in which First Nations on Turtle Island are a party. Having no “international personality” under the Westphalia system of territorial sovereignty, they presumably lack the legal capacity to participate.<sup>90</sup>

Necessity being the mother of invention, sovereign states at the subnational level have been in these ways devising ways to work around a Westphalia system increasingly seen as anachronistic. In an emerging “glocalized” world that must find ways to accommodate an intermestic way of thinking about what the ideal of self-determination is to mean in practice, inhabitants of a continent such as Turtle Island have little by way of precedent to guide them.

But the cyclical rise and then fall of the empires on the European continent, who authored the current Westphalian regime, is instructive. Those empires were consumed yet again by a second world war that continued their path of self-destruction, despite their earlier protestations that the first global war would be the last. They seem to have learned their lesson, at least in part.

With the kind assistance of the United States, the former empires reconstituted themselves into an organized assembly of nation-states that were part of a larger consortium of similarly constituted sovereigns (the United Nations<sup>91</sup>). These nations formed a supranational polity (European Union) that is part federation and part confederation in nature.<sup>92</sup> The idea of a supranational union<sup>93</sup> consisting of a common market, joint border control, a designated judiciary to manage dispute resolution, and popular elections lies at the heart of the EU plan of political integration on the continent.<sup>94</sup> The EU attempts to reconcile the principle of equality among nation-states with the principle of equality among citizens through a sectoral approach as to functional aspects of governance in its Consultative Committees (e.g., European Economic and Social Committee)<sup>95</sup> and at the subnational level through the European Committee of Regions, established by the Maastricht Treaty to give subnational authorities (regions, counties, provinces, municipalities, and cities) a direct voice within the EU’s institutional framework.<sup>96</sup>

No serious attempt has been made to replicate the European experiment with supranational governance on Turtle Island<sup>97</sup> (nor, for that matter, anywhere else on the planet).

## Swan Song for the Last Empire?

Being the last remaining superpower on planet Earth is an unenviable position in which the United States finds itself in the first quarter of the twenty-first century.

While there is certainly no proof positive that empires are subject to a geopolitical law of gravity that makes their downfall inevitable, since even before Polybius (200–118 BC) authored his famous anacyclosis<sup>98</sup> theory of cyclical boom and bust, Plato had outlined the concept,<sup>99</sup> as have a number of other historians, social cycle theorists, and others in the millennia since Polybius wrote *Histories*.<sup>100</sup> George Modelski, in his 1987 book *Long Cycles in World Politics* (1987), perceives cycles (or waves) of global hegemony that can last from 70 to 100 years or more.<sup>101</sup>

The U.S. administration enters this era of potential decline as a global power by acknowledging that the nation has seen better days<sup>102</sup> and a desire to, in many respects, return to policies of old such as mercantilism,<sup>103</sup> supposed isolationism,<sup>104</sup> and, most significantly for Turtle Island, the Monroe Doctrine.<sup>105</sup> The administration has also begun the process of undoing decades of involvement in multilateralism and international institutions since the end of World War II, directing the secretary of state to review “all international organizations” of which the United States is a member and “all conventions and treaties” to which it is party to determine whether these “are contrary to the interests of the United States and whether [they] can be reformed,” barring which the secretary will be obliged to recommend to the president whether the United States should withdraw from those commitments.<sup>106</sup>

Implied in these policies is that the United States intends to consolidate power at the nation-state level through the acquisition and Western-style development of even more land on Turtle Island than it already owns in an attempt to reprise the process of colonization.<sup>107</sup> That approach is not likely to succeed in a world governed by rights to territorial integrity belonging to the other nation-states occupying the premises, and to some extent, states operating at the subnational level. More esoterically, that approach is likely to fail given the injunction imposed by Polybius:

That all existing things are subject to decay and change is a truth that scarcely needs proof; for the course of nature is sufficient to force this conviction on us. There being two agencies by which every kind of state is liable to decay, the one external and the other a growth of the state itself, we can lay down no fixed rule about the former, but the latter is a regular process. *Histories* Book VI, Chapter VIII (fragment 57).

As part of the “regular process” of disaggregation on Turtle Island, the current effort of the United States to stave off the inevitable by, paradoxically enough, weakening the national government<sup>108</sup> seems counterintuitive. With the added impetus of a “new federalism”<sup>109</sup> the unintended result could be the devolution of the United States as a nation, returning to its roots as initially conceived under the Articles of Confederation, and the continent to a supranational construct, evolving in a manner similar to that taking place in Europe.

In this way, the past becomes prologue on the continent, returning it to a state of being closer to its pre-empire origins. Closer—but not quite. In its original iteration, the civilizations occupying Turtle Island before the Europeans came did not look at this place as one in which people were regarded as things to be conquered, land to be exploited, or as a landscape to be owned.

They saw Turtle Island as a place to be lived.



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<sup>8</sup> Stepanyuk, T. “The Cambridge Ancient History Volume VII Part 2,” n.d. at 94.

<sup>9</sup> Between approximately 850 B.C. and 700 B.C., a profound social transformation started in Greece and spread to Italy, the outcome of which was the creation of the classical city-state and resulting “displacement of groups which either went to remote places, often overseas, in what we call colonization or simply created a new town in the neighborhood where they used to live. Forcible removal of inhabitants from one place to another was not excluded.” *Id.* at 52.

<sup>10</sup> *Id.* at 53.

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<sup>13</sup> After initially enjoying special legal treatment that distinguished it from the provinces, as the Roman Republic evolved into an empire, Italy lost its status and was itself subdivided into provinces. Cooley, A. (2016) “Italy during the High Empire, from the Flavians to Diocletian” in Cooley, A. (ed.) “A Companion to Roman Italy,” *Wiley-Blackwell*, 130–131.

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<sup>15</sup> Coincidentally enough, in the year the 13 colonies declared independence, Edward Gibbons attempted to account for Rome’s demise in *The History of the Decline and Fall of the Roman Empire*. His six-volume set suggests that moral decay, along with the internal decline of political, economic, military, and social institutions in addition to external pressures from “barbarians” led to the demise of the empire. Two hundred ten different theories as to the reasons for the collapse were offered by one German historian. Demandt, A. (August 2003) “210 Theories,” *Crooked Timber*.

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<sup>19</sup> By the 18th century, territorial units that comprised The Holy Roman Empire enjoyed many attributes of sovereignty, most of which were tiny estates owned by families of Imperial Knights. Gagliardo, G., “Reich and Nation, The Holy Roman Empire as Idea and Reality 1763–1806,” *Indiana University Press*, 1980, 4–5; 12–13.

<sup>20</sup> Adams J. & Pincus S. “Imperial States in the Age of Discovery” in Morgan, K. J. & Orloff A. S. (eds.); “The Many Hands of the State: Theorizing Political Authority and Social Control,” *Cambridge University Press*, 2017 at 335.

<sup>21</sup> *Id.* at 336.

<sup>22</sup> In the 18th century, some thought the colonies would become more economically dynamic than the heartland, so much so that Adam Smith and Benjamin Franklin believed it was likely that the British capital would move to North America, much as the Roman capital had moved from Italy to Byzantium. In fact, the seat of the Portuguese monarchy in the 19th century was in Brazil, not Iberia. *Id.* at 336.

<sup>23</sup> Robinson, A. “Turtle Island,” *The Canadian Encyclopedia*. *Historica Canada*, 6 Nov. 2018.

<sup>24</sup> For millennia the mytheme of a cosmic turtle carrying the world on its back appears in disparate cultures across the globe, likely first appearing as part of Hindu mythology. Tylor, E. B., Sir, (1832–1917) “Researches Into the Early History of Mankind and the Development of Civilization,” *Boston: Estes & Lauriat* at 342–3.

<sup>25</sup> Converse, H. M. & Parker, A. C. (1906) “Myth and Legends of the New York State Iroquois,” *Albany, New York: New York State Museum* at 33.

<sup>26</sup> Johansen, B. & Mann, B., eds. (2000) at 90 *Encyclopedia of the Haudenosaunee (Iroquois Confederacy)*, Westport, Conn.: Greenwood Press; Porter, T., Forrester, L., & Ka-Hon-Hes (2008) “And Grandma Said . . . : Iroquois Teachings, As Passed Down Through the Oral Tradition” at 52–53, Philadelphia, Pennsylvania: Xlibris Corp.

<sup>27</sup> Hills, S. M. (2017) "The Clay We Are Made Of: Haudenosaunee Land Tenure on the Grand River," Winnipeg, Manitoba: University of Manitoba Press, 16–25.

<sup>28</sup> Mark, J. J. "Native American Concept of Land Ownership," *World History Encyclopedia*. 17 Oct. 2023.

<sup>29</sup> Rights of nature is a jurisprudential theory that inherent rights associated with ecosystems and species exist, contrary to Western legal theories that regard nature as a resource to be owned, used, and degraded. Stone C. D., "Should Trees Have Standing? Toward Legal Rights for Natural Objects," *S. CAL. L. REV.* 1972, 45:450; Kaufmann, W. Los Altos, 1974 p. 8; Cullinan, C. (2011) "Wild Law: A Manifesto for Earth Justice" (2<sup>nd</sup> ed.) United States: Chelsea Green Publishing.

<sup>30</sup> Chapter 7, Article 71 Constitution of Ecuador (2008).

<sup>31</sup> Becker, M. (2011) "Correa, Indigenous Movements, and the Writing of a New Constitution in Ecuador," *Latin American Perspectives* 38(1):47–62.

<sup>32</sup> Plurinationality is the coexistence of two or more sealed or preserved national groups within a polity whereby nationality is thought of as pluralistic (many nationals within an organized community). Plurinationality avoids the division of societies within a state or country. Keating, M. (2015) "Plurinational Democracy in a Post-Sovereign Order," *Queen's Papers on Europeanisation* No 1/2002.

<sup>33</sup> Prior to the arrival of Europeans, the Native Americans lived as autonomous nations (sometimes referred to as "tribes") across the continent from present-day Alaska, across Canada, and throughout the lower 48 United States. Mark, J. J. (6 May 2021) "Pre-Colonial North America," *World History Encyclopedia*.

<sup>34</sup> Remarks of Chief Seattle given in 1854 to first Governor Issac Stevens of the Washington Territory, as re-translated from Lushootseed and read at the first Earth Day, 22 Apr. 1970.

<sup>35</sup> Mark, J., quoting the injunction from God in Genesis 1:28: "Be fruitful and multiply; fill the earth and subdue it. Rule over the fish in the sea and the birds in the sky and over every living creature that moves on the ground."

<sup>36</sup> Getzler, J. (1998) "Roman Ideas of Land Ownership," *Oxford University*.

<sup>37</sup> The term "feudalism" and what it meant in practice is the subject of much debate among historians that cannot be reduced to simplistic accounts of the lived experience of people "on the ground" so to speak. But the central role of the fief during feudalism and the incorporation of this means of land management—and ultimately control of the land and population by sovereigns, cannot be questioned. Brown, E. (see n. 16 *supra*) at 1071–72; 1077.

<sup>38</sup> One scholar remarked that "the whole constitutional history of England seems at times to be but an appendix to the laws of real property." Cohen, M. (1927) "Property and Sovereignty," 13 *CORNELL L. REV.* 8 at 7–8, quote at n.3.

<sup>39</sup> Whitt, L. & Clarke, A. W., eds. (2019) "Settler Colonialism and Indigenous Nations," *North American Genocides: Indigenous Nations, Settler Colonialism, and International Law*. Cambridge: Cambridge University Press.

<sup>40</sup> Resendez, A. (2016) "The Other Slavery: The Uncovered Story of Indian Enslavement in America," *Houghton Mifflin Harcourt*.

<sup>41</sup> Thornton, R. (1987) "Overview of Decline: 1492 to 1890–1900: American Indian Holocaust and Survival: A Population History Since 1492," *The Civilization of the American Indian Series*. Vol. 186. Norman, Oklahoma: University of Oklahoma Press, 42–158.

<sup>42</sup> Taylor, A. (2001) "American Colonies," London and New York: Penguin Books.

<sup>43</sup> Carey, J., & Silverstein, B. (2 Jan. 2020) "Thinking with and beyond settler colonial studies: new histories after the postcolonial," *POSTCOLONIAL STUDIES* 23 (1): 1–20.; Veracini, L. (2017) "Introduction: Settler colonialism as a distinct mode of domination"; McKay, D., Vinyeta, K., & Norgaard, K. (Sept. 2020) "Theorizing race and settler colonialism within U.S. sociology," *John Wiley & Sons; Whyte, K.* (1 Sept. 2018) "Settler Colonialism, Ecology, and Environmental Injustice," *ENV'T & SOC'Y* 9 (1): 125–144.

<sup>44</sup> Black Elk, Oglala Lakota leader and spiritual visionary as translated and quoted in *Black Elk Speaks* by non-native John Neihardt (1932).

<sup>45</sup> Mickelson, K. (2014) "The Maps of International Law: Perceptions of Nature in the Classification of Territory," *LEIDEN J. INT'L L.* 27 (3): 621–639; Grant, J. & Barker, J. C. (2009) *Encyclopaedic Dictionary of International Law* (3<sup>rd</sup> ed.), Oxford University Press, 161, 596, 599.

<sup>46</sup> The questionable discovery doctrine was approved in *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823).

<sup>47</sup> Miller, R., Ruru, J., Behrendt, L., & Lindberg, T. (2010) "Discovering indigenous lands, the doctrine of discovery in the English colonies," *New York: Oxford University Press*, 12.

<sup>48</sup> "[I]t is not apparent that such a rule was ever part of the European law of nations." McNeil, K. (2016) "The Doctrine of Discovery Reconsidered: Reflecting on Discovering Indigenous Lands," *OSGOODE HALL L.J.* 53 (2): 707.

<sup>49</sup> The *Johnson* case, which lays "the foundations of landownership in the United States" has been compared to the *Dred Scott* case and is described as "discomforting" as well as being "rooted in a Eurocentric view of the inferiority of the Indian people." Stuart B. (2005) "How the Indians Lost Their Land: Law and Power on the Frontier," *Harvard Univ. Press* at 11–12.

<sup>50</sup> Korab-Karpowicz, W. (2010) "A History of Political Philosophy: From Thucydides to Locke," *New York Global Scholarly Publications*, 291.

<sup>51</sup> Murray, C. (2022) "John Locke's Theory of Property, and the Dispossession of Indigenous Peoples in the Settler-Colony," *AMERICAN INDIAN L.J.*, Vol. 10, Iss. 1, Article 4 at 5.

<sup>52</sup> *Id.* at 5–6 (citations omitted).

<sup>53</sup> Anghie, A. (2004) "Imperialism Sovereignty and the Making of International Law," *Cambridge University Press* at 9.

<sup>54</sup> This allowed for the "indiscriminate spoliation of all enemy-subjects alike and the seizure of all their goods" as well carrying "all enemy-subjects off into captivity, whether they be guilty or guiltless" concluding that it is indubitably lawful to carry off both the children and women of the Saracens into captivity and slavery." *Id.* at 27 (citation omitted).

<sup>55</sup> Olson, J. & Shadle, R. (1991) "Historical Dictionary of European Imperialism," *Greenwood Publishing Group*, 109.

<sup>56</sup> Antigua and Barbuda, Bahamas, Barbados, Cuba, Dominica, Dominican Republic, Grenada, Haiti, Jamaica, Saint Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, and Trinidad and Tobago. "Map of the Caribbean," *One World Nations Online* (accessed 23 July 2025).

<sup>57</sup> *Id.* at 74–76.

<sup>58</sup> The Westphalia system developed out of the highly centralized and unequal relations in international affairs that predated it. A Westphalian order was designed to promote sovereign equality of states. Simpson, G. (2006) "Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order," *Cambridge University Press*.

<sup>59</sup> (2020) "Nationalism," *The Stanford Encyclopedia of Philosophy*. Metaphysics Research Lab, Stanford University.

<sup>60</sup> In the Westphalian system, cities are subsumed within states whereas prior to that time, they were not necessarily seen as internal to states. Curtis, S. & Klaus, I. (2024) "The Belt and Road City: Geopolitics, Urbanization, and China's Search for a New International Order," *New Haven and London: Yale University Press*, 24.

<sup>61</sup> The right of a nation-state to territorial integrity is guaranteed by Article 2(4) of the United Nations Charter and by customary international law. Corten, O. (2011) "Territorial Integrity Narrowly Interpreted: Reasserting the Classical Inter-State Paradigm of International Law," *LEIDEN J. INT'L L.* 87: 88.

<sup>62</sup> Mayall, J. & Simpson, M. "Ethnicity is not Enough: Reflections on Protracted Secessionism in the Third World," *INT'L J. COMP. SOCIO.* 33; Whiter (1993) "Self-determination Reconsidered: Should there be a Right to Secede?" *OXFORD INT'L REV.* 4, no. 1: 4–6; Fawn, R. & Mayall, J. (1996) "Recognition, Self-Determination and Secession in Post-Cold War International Society," in "International Society After the Cold War: Anarchy and Order Reconsidered" (Fawn & Larkins, eds.), London: Macmillan, 193–219.

<sup>63</sup> Bishai, L. (1999) thesis: "Secession and the Theory and Practice of International Relations" submitted to London School of Economics and Political Science; Proquest at 11–40.

<sup>64</sup> Territorial withdrawal by a disaffected group weakens a state economically and politically, and redefines its very identity. The remaining state must redefine itself as an amputated entity and, although its name may remain the same, it is no longer identical with its pre-secession population, borders and sovereignty. *Id.* at 43.

<sup>65</sup> A small number of citizens of Alberta have expressed interest in separating from Canada, fewer still indicating a desire to join the United States. Mitchell, L. (2 July 2022) "Alberta has lots of separatists but now fewer want to be a part of the USA," *DailyHive.com*.

<sup>66</sup> An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference, S.C. 2000, c. 26 (Clarity Act).

<sup>67</sup> *Coyle v. Smith*, 221 U.S. 559, 566 (1911).

<sup>68</sup> *Id.* at 568.

<sup>69</sup> *Texas v. White*, 74 U.S. 700, 725–6 (1868).

<sup>70</sup> *Id.* at 726.

<sup>71</sup> Bishai at 48–9, quoting Birch, A. (1989) “Nationalism & National Integration,” London: Unwin Hyman at 64.

<sup>72</sup> Field, M. (1992) “The Differing Federalisms of Canada and the United States,” *Law and Contemporary Problems*, Harvard University at 110, citation at n.7 omitted.

<sup>73</sup> Gerken, H., Bulman-Pozen, J., Gluck, A., LaCroix, A., & Rodríguez, C. (15 Apr. 2012) “Federalism as the New Nationalism,” *YALE L.J.*

<sup>74</sup> Field, *supra* note 72 at 107–8.

<sup>75</sup> *Flamand, L. (2008) “The New Role of Subnational Governments in the Federal Policy Process: The Case of Democratic Mexico,” New Voices in the Study of Democracy in Latin America*, Woodrow Wilson International Center for Scholars, 79–118.

<sup>76</sup> Proportional representation is where candidates earn seats in a legislative body in proportion to the number of votes cast for them as opposed to a “winner-take-all” method used in the United States. Proportional representation is the most common electoral system among the world’s democracies. Greenwood, R., Penrose, D., & Apau, D. (21 May 2024) “Proportional Representation,” *American Bar Association, ABA Task Force for American Democracy*.

<sup>77</sup> Alfaro & Zeledón (2006) “Derechos ciudadanos y el gobierno local en Costa Rica [Rights of citizens and local governments in Costa Rica] (in Spanish) San José: Lara Segura & Assoc., 35.

<sup>78</sup> Wilkinson, C. (1988) “Indian tribes as sovereign governments: a sourcebook on federal-tribal history, law, and policy,” *AIPI Press*; Eisner, E. (January 2024) “The Law-of-Nations Origins of the Marshall Trilogy,” *YALE L.J.*, *Yale Law School*; “The 574 Federally Recognized Indian Tribes in the United States,” *Congress.Gov*. Retrieved 17 July 2025.

<sup>79</sup> Leslie, J. (2002) “The Indian Act: An Historical Perspective,” *CAN. PARLIAMENTARY REV.* 25 (2).

<sup>80</sup> The concept of protectorates under international law dates back to the Roman *civitates foederatae* and are among the oldest features of international relations. Eilers, C. (2010) “Local Government, Roman” in Gagarin, M. (ed.) *The Oxford Encyclopedia of Ancient Greece and Rome*. Oxford University Press, 73–275; Mousourakis, G. (2007) “A Legal History of Rome,” *Routledge*.

<sup>81</sup> Protectorates are a dependent territory under the protection of a parent state for defense against aggression and other violations of international law. They exercise autonomy while ceding ultimate sovereignty to their more powerful parent. Hoffmann, G. (1987) “Protectorates,” *Encyclopedia of Disputes Installment 10*. Elsevier, 336–339. A protectorate differs from a colony in that it is not directly owned by the parent, and in those instances where it retains an “international personality” is called a “protected state.” Meijknecht (2001) “Towards International Personality,” 42.

<sup>82</sup> Anaya-Muñoz, A. (1 Jan. 2005) “Multicultural Legislation and Indigenous Autonomy in Oaxaca, Mexico” in “*International Law and Indigenous Peoples*,” *Brill*, 225–26.

<sup>83</sup> Intermestic is a term used to denote the interconnectedness and relevance between domestic policy and international policy. Brown, G., McLean, I., & McMillan, A. (eds.) (2018) *A Concise Oxford Dictionary of Politics and International Relations* (4th ed.), Oxford University Press.

<sup>84</sup> McMillan, S. (26 Sept. 2017) “The Foreign Relations of Subnational Governments,” *Oxford University Press*.

<sup>85</sup> Gress, F. (1996) “Interstate Cooperation and Territorial Representation in Intermestic Politics” *PUBLIUS: J. FEDERALISM* 26:1 Oxford University Press.

<sup>86</sup> “Federalist No 15” (1 Dec. 1787) in *The Federalist Papers*, edited by Rossiter, C. (1961) New York: Penguin Books USA 106. *See also* Perkins, B. (1993) “The Creation of a Republican Empire, 1776–1865,” 1 *Cambridge History of American Foreign Relations* 56 (“[b]ecause the states retained so much power, the government at Philadelphia could not bargain effectively, could not assure other nations that any agreements it made would actually be observed by the states, could not develop a unified commercial policy to extort concessions from other countries, could not maintain an effective military or naval force”).

<sup>87</sup> *See* Bradley, *infra* at 121, n.43, citing Scoville, R. (2023) “The International Commitments of the Fifty States,” 70 *UCLA L. REV.* 310 at 324, n. 59.

<sup>88</sup> Bradley, C. (2023) “State International Agreements: The United States, Canada, and Constitutional Evolution,” *Canadian Yearbook of International Law*, Cambridge University Press, 15–16.

<sup>89</sup> *Id.* at 15–17.

<sup>90</sup> The UN Declaration on the Rights of Indigenous Peoples is a non-binding aspirational document that defines the individual and collective rights (including ownership rights) of indigenous populations who nonetheless remain unrepresented and unrecognized, except through the

Unrepresented Nations and Peoples Organization. Kyris, G. & Brisland, M. (2024) “International Society and Its Many Contestations: A Study of the Unrepresented Nations and Peoples Organization,” *GLOBAL STUDIES QUARTERLY* 4 (2).

<sup>91</sup> The UN, while certainly more effective than its predecessor (League of Nations) has found enforcing the concept of the right of nation-states to territorial integrity challenging. Jeria, M. (2016) “The Challenges to International Law in the 21st Century,” *Proceedings of the ASIL Annual Meeting*. 110: 3–11; Mulligan, M. (2020) “The Re-Emergence of Conquest: International Law and the Legitimate Use of Force,” *LIVERPOOL L. REV.* 41 (3): 293–313. Some U.S. politicians have advocated for the withdrawal of the U.S. from the UN and ejecting it from U.S. soil. “Rep. Paul Introduces American Sovereignty Restoration Act,” *US Fed. News Service*. 1 Mar. 1997.

<sup>92</sup> Burgess, M. (2000) “Federalism and European Union: The building of Europe, 1950–2000,” *Routledge*, 49. “Our theoretical analysis suggests that the EC/EU is neither a federation nor a confederation in the classical sense (but rather is) a new form of international organization, namely, a species of ‘new’ confederation.”

<sup>93</sup> In an April 1948 address at Carnegie Hall, Albert Einstein repeated his proposal to internationalize the control of military power among the remaining superpowers (except for local law enforcement): “There is only *one* path to peace and security: the path of supranational organization.” Einstein, A. (1954) “Ideas and Opinions,” New York: Crown/Bonanza, 147 (emphasis in original); cf. 118–61. *See also* Isaacson, W. (2007) “Einstein: His Life and Universe,” New York: Simon and Schuster ch. 22, 487–500.

<sup>94</sup> Helfer, L. & Slaughter, A. (1 Jan. 1997) “Toward a Theory of Effective Supranational Adjudication,” *YALE L.J.* 107 (2): 273–392.

<sup>95</sup> Ingolf, P. & Pistor, K. (2004) “Institutional settlements for an enlarged European Union,” in Bermann, G. A. & Pistor, K. (eds.), “Law and governance in an enlarged European Union: essays in European law,” *Hart Publishing*, 3–38.

<sup>96</sup> Wagstaff, P. (1999) “Regionalism in the European Union,” *United Kingdom: Intellect Books*, 185.

<sup>97</sup> An effort to follow the European example in some respects was attempted with the creation of a trading bloc between Mexico, the United States, and Canada (North American Free Trade Agreement (NAFTA) now the Agreement between the United States, the United Mexican States, and Canada (USMCA).

<sup>98</sup> Paton, W.R. (translator), Excerpt from the *Histories* by Polybius c. 133 B.C. Book VI, Chapter II, *The Institute for Anacyclosis*.

<sup>99</sup> Plauche, G. (2011) “The Cycle of Decline of Regimes in Plato’s Republic” (self-published).

<sup>100</sup> Anacyclosis postulates that a polity such as the Republic of Rome would endure by incorporating into its governance a separation of powers and system of checks and balances, as well as allowing participation by “the people” in an early form of democracy and self-determination. His ideas influenced Montesquieu’s *The Spirit of the Laws*, John Locke’s *Two Treatises of Government*, and the framers of the United States Constitution. Lloyd, M. (1998) “Polybius and the Founding Fathers: the separation of powers” (1999 Donald E. Glover Award, outstanding final project, Mary Washington College).

<sup>101</sup> According to his theory, the reign of the United States as leader of the free world began at the end of World War II and will expire sometime between the years 2015 and 2045.

<sup>102</sup> James, H. & James, M. (28 May 2025) “How Nostalgia Ruins Economies: Trump and the Troubled History of Trying to Turn Back the Clock,” *FOREIGN AFFAIRS*.

<sup>103</sup> Nelson, D. (2019) “Facing up to Trump administration mercantilism: The 2018 WTO trade policy review of the United States,” *THE WORLD ECONOMY*. 42. 3430–3437.

<sup>104</sup> Lindsay, J. (April 2024) “Election 2024: Is Donald Trump an Isolationist?” *Council on Foreign Relations*.

<sup>105</sup> DeYoung, K. (28 Feb. 2025) “Trump revives Monroe Doctrine in U.S. relations with Western Hemisphere,” *THE WASHINGTON POST*.

<sup>106</sup> Executive Order dated 4 Feb. 2025 “Withdrawing the United States from and Ending Funding to Certain United Nations Organizations and Reviewing United States Support to All International Organizations.”

<sup>107</sup> Another observer attributes the collapse of colonial empires to the process of “surplus extraction” that inevitably leads to the self-destruction of the beneficiaries of this exploitation of the land (what Polybius and Plato refer to as oligarchs). The best hope to avoid this outcome is to end the excess and strike a balance between reasonable extraction and reckless exploitation, thereby producing a more egalitarian and socially just society, if not only for the sake of the many, but for the elites who have the most to lose. Perkin, H. (3 Apr. 2002) “The Rise and Fall of Empires,” *History Today* (THE GUARDIAN).

<sup>108</sup> Freeman, J. & Jacobs, S. (12 Feb. 2025) "President Trump's Campaign of 'Structural Deregulation': The administration's aggressive approach aims to compromise the capacity of the federal government to fulfill its core functions," Brookings Lawfare Institute.

<sup>109</sup> New Federalism, originating with the Nixon administration, is a political philosophy of devolution consisting of a transfer of powers from the central

government back to the states, resulting in a restoration of autonomy and power to subnational sovereigns that were seen as having been lost as a result of Franklin Roosevelt's New Deal regime. Katz, B. (11 Aug. 2014) "Nixon's New Federalism 45 Years Later," Brookings Institution.



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