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Focus on International Cross-Border Transactions

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Message From the Chair

The Many Facets of International Cross-Border Transactions

By Carlos F. Osorio

CARLOS F. OSORIO

In this edition of the *International Law Quarterly*, we address international cross-border transactions, a large umbrella of practice areas covering international mergers and acquisitions, international trade, international taxation, international estate planning, cross-border technology and communications, cross-border intellectual property, government relations, and regulatory issues. The industries that cover these areas of practice are too many to list. The types of clients that need these services range from the immense multinational or financial institution to the multigenerational, high-net-worth family with diverse nationalities. The time zones covered while representing these clients are global, the international flights taken to represent these clients are frequent, and the languages spoken are too many to count. And add to all of this the differences in local laws, from the civil law tradition to the common law tradition, and the different regulatory frameworks within each country, region, and trade bloc, not to mention political interests, sanctions, embargos, etc.

What one lawyer can handle all of the above?

Although some practitioners over time may have become a jack-of-all-international trades and logged millions of frequent-flyer miles, it is the team approach, with lawyers in different countries and different specialties, working in different languages, who can "get the deal done," who can handle the international cross-border transaction at the speed-of-the-deal, using the generally accepted methods of negotiating a letter of intent, due diligence, documenting and negotiating the deal, and handling the complexity of the closing, with nothing falling apart along the way. Surely some late nights and lengthy business trips will be called upon. But when it is said and done and the plaque is put on the desk or the credenza celebrating the closed transaction, there must be a deep sense of satisfaction.

In the International Law Section of The Florida Bar, there are many attorneys who dedicate themselves to international business transactions and some of them have contributed excellent, timely articles to this edition of the *ILQ*. As you read this edition, keep in mind the practitioners who shared these articles and call upon them and their firms as a resource when you may be involved in a cross-border deal and need a pointer or a contact in another country.

On a personal note, I write now in conclusion of my tenure as chair of the International Law Section of The Florida Bar. It has been a rewarding experience, and I am honored to have had this time to steer the ship. I applaud the *ILQ* editors for keeping our great publication printing and at its high standards. We had an excellent iLaw this year, a great series of Lunch-and-Learns, a new offshore conference in India, a new Human Rights Conference, and an offshore conference in Panama City, Panama. I hope these conferences will be continued. We highlighted human rights issues, we strengthened relations with local law schools, and we outreached to other cities in Florida. I made a strong push to promote diversity and to promote women in the section. For the coming years, I challenge the International Law Section to develop a mentorship program for our young lawyers so the section continues to invite and promote young people through a fair promotional track that rewards merit and sustained involvement.

Lastly, I want to personally thank my executives for their hard work and support, as well as my committee chairs, the Executive Council, Angie Froelich at the Bar, and my partners, past and present. I personally thank incoming ILS Chair Clarissa Rodriguez and former ILS Chairs Arnoldo Lacayo and Eduardo Palmer for all of their support over the years. The ILS should be proud of all that it accomplishes and its place in The Florida Bar.

Carlos F. Osorio
Chair
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From the Editors . . .

ANA M. BARTON

LAURA M. REICH

For as long as people have traveled, there have been international cross-border transactions. At first, before the creation of countries or nation states, "international" transactions simply meant trade with other tribes, peoples, or faraway lands. As early as the eighth century B.C.E., traders routinely carried spices, silk, and gold on the fabled Silk Road connecting China, India, Persia, the Middle East, and Europe. Later, Arabian Bedouins led trade caravans through the North African deserts. The Roman Empire enacted comprehensive laws regulating such trade and other forms of international business, including standardizing weights and measures. The world has never looked back.

In our modern world, it is nearly impossible to imagine unregulated international commerce and business. Many date our modern international system to 1946 with the introduction of the Bretton Woods international economic structure. As barriers to free trade were considered one of the causes of the Second World War, governments turned to such international economic structures to draw nations closer together and prevent future crises. A year later, in 1947, the General Agreement on Tariffs and Trade treaty, also known as the GATT, was enacted, and a decade later the European Economic Community was born, which later became the European Union (EU) in 1993.

Bilateral and multilateral international treaties were signed, and free trade zones sprang up around the globe. The World Trade Organization was created in 1995 to ensure "most favored nations" trading status between its members. Regional trade and business alliances were formed on every continent except Antarctica. The EU created the Eurozone and the single-currency Euro to facilitate international business. Today, the EU, the United States, and China are the biggest players in international business. Indeed, the history of the world is the history of international and cross-border economic transactions and commerce. Simply turn on the TV and watch any 24-hour news network: they are dominated by talk of trade, tariffs, American companies doing business abroad, foreign companies investing in America, etc.

Businesses and entrepreneurs in Florida must compete in this complex and ever-changing world. Thus, Florida must remain focused on providing a welcoming and open environment for businesses to operate effectively. The International Law Section of The Florida Bar (the ILS) is dedicated to this goal and strives to keep Florida on the forefront of business-friendly laws and regulations to promote international cross-border transactions. ILS members have expressed their continuing interest in this topic, and as a result, the editorial staff of the *International Law Quarterly* is proud to present this issue focused on international cross-border transactions.

We begin with a fascinating look at doing business and investing in our southern neighbor, Mexico. **Elizabeth Tabas Carson** and **Alejandro Isaac Beas** offer us an in-depth look at Mexican law and financing options for large investments and cross-border deals. Next, we continue the *ILQ* tradition of offering opportunities to extraordinary law students who, while still in school, have already begun to wrestle with complex issues of international law. **Rebecca Sambursky**, a student at FIU College of Law, offers thoughts on the United States' continued efforts to combat corruption and bribery overseas via the Foreign Corrupt Practices Act and explores the issue of whether monetary sanctions are sufficient to achieve the United States' goals.

For entrepreneurs and legal practitioners alike, **Nouvelle L. Gonzalo** next explores and offers strategies for

From the Editors, continued

expanding a business into the global marketplace, as well as provides both practical and legal steps to help ensure success in a foreign market. And for domestic businesses that rely on workers with H-1B and L-1 visas, **Larry S. Rifkin** considers the "Requests-for-Evidence Dilemma" and addresses legal strategies practitioners can use for successful representation in H-1B and L-1 nonimmigrant cases.

Finally, we turn to the perennially thorny issue of Cuba, specifically Cuba's new 2019 Constitution. **Osvaldo Miranda** considers the implications of the new Cuban Constitution in the areas of government and human rights, and provides an analysis of the changes to come: a must read for anyone considering doing business in Cuba.

The editorial staff is pleased to bring you this *ILQ* focused on international cross-border transactions and offers our heartfelt thanks to all our contributors. You make this publication worthwhile! And to our readers, we hope you will enjoy this issue and find it useful as you and your clients consider doing business both in the United States and abroad.

Sincerely,
Ana M. Barton—co-Editor-in-Chief
Laura M. Reich—co-Editor-in-Chief

Investment in Mexico: Changes in Investor Preference, Loan Standardization and Documentation, and Bankruptcy Laws Create the Opportunity for Term Loan B Issuances and Other New Investment Products in Mexico

By Elizabeth Tabas Carson, Philadelphia, and Alejandro Isaac Beas, Mexico City, with special thanks to Mauricio Cuellar

Latin American debt issuances have traditionally been more conservative than issuances for similarly sized companies in the United States and Europe. This may be explained, in part, by the relatively smaller volume of leveraged buyouts and merger and acquisition (M&A) transactions in the region, as well as investors' concerns about the transparency and certainty of political, legal, and bankruptcy regimes and complications in the region. At present, in larger Mexican deals (over US$200 million), there is still a preference by investors for New York law rather than local law, and the typical financing structure in large Mexican M&A transactions remains a New York law governed bridge-to-bond structure provided by a relationship lender or the M&A advisor. In this article, we will focus on the keenness of the Mexican debt market for large Term Loan B (TLB) issuances to replace bonds as the debt instrument of choice in Mexican transactions in the near future.

In addition to the global trends making TLB issuances popular (favorable pricing, limited call protection, and the convergence of covenants with high-yield bonds, to name a few), certain other changes have occurred in Mexico and in the loan market more generally that we believe will lay the groundwork for large Mexican TLB issuances. This article focuses on the following three factors that are creating the opportunity for such products:

Investment in Mexico, continued

1. The introduction by the Loan Syndication & Trading Association (LSTA) of model credit agreement provisions and secondary trading documents tailored to Mexican transactions, which is a step forward in creating transparency, boosting investor confidence, and creating ease of exchange among debt holders.
2. Changes in the Mexican and global debt markets including increased competition from non-bank lenders, new products, and competitive pricing have encouraged investors to look toward Mexico in their search for better credit issuers with better yields.
3. Changes in Mexican bankruptcy laws in reaction to the United States' Fifth Circuit decision in *In Re Vitro*[1] have helped modernize Mexican bankruptcy law to foster greater efficiency, fairness, and transparency in the administration of a Mexican bankruptcy, which, in turn, leads to greater investor confidence in the Mexican bankruptcy process.

The Movement Toward Standardization in Mexico: LatAm MCAPs create a path for standardized Mexican law primary and secondary forms

Unlike the New York and London loan markets, the Mexican domestic market does not currently have its own standard-setting, self-regulatory body like the LSTA in New York or the Loan Market Association (LMA) in London. Most issuances governed by Mexican law do not have a common set of boilerplate terms, nor do all investors use the same standard trading documents—each bank and lender uses its own forms or precedents based on a prior deal. That said, the publication of the LSTA's Latin America-focused model credit agreement provisions (LatAm MCAPs) in 2016, plus the secondary trading forms in 2017 and the Mexican law related provisions added in 2018, suggest that a movement toward standardization in Mexico has begun and that investors' appetite for access to such markets has begun to increase substantially. We anticipate that a push toward the standardization of key terms in Mexican law governed loan documents is not far behind.

The LatAm MCAPs provide a starting point for loan provisions to be included in New York loans involving Mexico and a baseline standard for agency, defaulting lenders, successors and assigns, voting, indemnities and basic cross-border representations regarding exchange control, steps for enforcement, and stamp taxes, if any. The articulation of such standards along with secondary trading forms focused on the local market requirements makes investing in (and trading) such loans more accessible. We do not expect that the existence of forms will lead to a reduction in commercial negotiations on important terms in Mexican deals (including tax gross up or withholding), but we do expect that a deviation from the standards provided in the forms will highlight for investors the importance of focusing on those provisions when considering an investment. Similarly, while the LatAm MCAPs do not yet adopt a market position on the use of dual jurisdiction, Mexican law governed promissory notes (*pagarés*) (and we still see almost all bonds and a significant number of loans involving Mexico with solely New York law governed notes), we do see the LatAm MCAPs creating a starting point for broader discussions on standardization in the Mexican market, and we believe this standardization will help create a more efficient market and bring more competitive loan terms to Mexican companies.

The Benefits of Standardization—Growth From a Global and U.S. Perspective

While the Mexican market has its own unique political and legal concerns, it is important to recognize that increasing standardization is one of the factors that has helped accelerate the growth of the loan market globally, investors' appetite for loans, and the ability of borrowers to command ever more competitive deal terms as a general matter.

The modern syndicated loan, as a product, grew out of the leveraged buyout boom of the 1980's and the recession of the early 1990's. The LSTA and the LMA were founded in 1995 and 1996, respectively, in response to a demand for greater efficiency and flexibility by banks looking to move syndicated loans

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The United States' Fight Against Corruption and Bribery in International Business Transactions: Are Monetary Settlements Enough to Deter Illegal Business Activity?

By Rebecca Sambursky, Miami

Corruption and bribery are huge issues in the international law community—especially when dealing with international business transactions. According to the World Economic Forum, the cost of global corruption is at least US$2.6 trillion. Additionally, the World Bank has stated that businesses and individuals pay more than US$1 trillion in bribes every year. The problem of corruption is present in all nations—"rich and poor, North and South, developed and developing."

Robert F. Kennedy Department of Justice Building in Washington, D.C. (Wikipedia.org)

To combat this activity, the Organization for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Convention) has made it a criminal offense for any individual person to intentionally offer, promise, or give any unjustified pecuniary or other advantage, whether directly or through intermediaries, "to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business."

Prior to the OECD Convention, however, the United States passed the well-known Foreign Corrupt Practices Act (FCPA), a federal law enacted to guarantee that no payments are being made to foreign government officials in order to obtain or retain business. Specifically, the anti-bribery provisions of the FCPA prohibit the willful use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of any offer, payment, promise to pay, or authorization of the payment of money or anything of value to any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to a foreign official to influence the foreign official in his or her official capacity, to induce the foreign official to do or omit to do an act in violation of his or her lawful duty, or to secure any improper advantage in order to assist in obtaining or retaining business for or with, or directing business to, any person.

Corruption and Bribery, continued

The FCPA defines a *foreign official* as follows:

> any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

The FCPA was passed when the Watergate special prosecutor discovered that companies were making campaign contributions to U.S. politicians and giving money to foreign entities. When the FCPA was passed in 1977, some 400 U.S. companies voluntarily acknowledged that they paid foreign officials in order to gain business advantages. Further, there is evidence that at that time companies were routinely paying bribes to heads of governments and other foreign officials to buy business opportunities in those countries. Accordingly, the FCPA provides that if an American business is giving anything of value to a foreign official to influence that official to promote the business, to get a contract, or to receive any other benefit, the business has violated the FCPA.

Enforcement of the FCPA is carried out by two entities: the U.S. Department of Justice (DOJ) and the U.S. Securities Exchange Commission (SEC). The DOJ is responsible for the criminal prosecution of FCPA violations, while civil penalties are imposed by both the DOJ and the SEC. "The DOJ is responsible for civil prosecution against violations of the anti-bribery provisions by domestic concerns and those falling under territorial jurisdiction. The SEC, on the other hand, is responsible for civil action taken against issuers, their directors, employees, officers, and the like who violate anti-bribery or accounting provisions of the FCPA."

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Taking Your Business Global: The Legal Case for It

By Nouvelle L. Gonzalo with Kristen Motola and Farhaan Anjum, Cleveland and Gainesville

Alone we can do so little; together we can do so much. — Helen Keller

As a full-time practicing attorney and a professor of international corporate law, I see the power companies have when they collaborate to expand abroad. As technology continues to advance at a rapid pace, the world is becoming smaller.[1] Modern innovations make it easier to connect with the rest of the world.[2] In addition, the U.S. market is substantial yet not large enough to sustain all U.S. businesses.[3] Global expansion offers companies a plethora of opportunities;[4] however, establishing a new business entity or entering a foreign market with an existing business entity is a long-term goal for many companies.[5]

The Strategy

An international expansion strategy requires a strategic focus on four areas:

1. **Markets:** Identifying target markets the company wants to reach and the reasons why that makes sense;
2. **Customers:** Determining target customers and confirming there is a sufficient number of them to assist;
3. **Resources:** Allocating resources and positioning the brand to serve the market effectively; and

4. **Operating Model:** Identifying an effective preexisting operating model or creating an operating model to follow. This includes researching international and local law, and local cultural customs.[6]

A successful market penetration strategy should use corporate resources efficiently. Calculating the cost for lawyers and a team skilled in international work is an imperative part of this process.[7] The team must include legal counsel that will complete the legal due diligence on international legal restrictions, cross-border experts in tax and accounting, industry experts, trade organizations with expertise in the region, and strategists to consider creative ways to break into a new market to serve clients' needs. The strategists will identify target markets and clients.

Lawyers and businesspeople can assist with resource allocation and work from a solid operating model. From this point, a company that is expanding can elect the proper legal structure and ensure that its U.S. equivalent is appropriately selected. For example, if owners in Canada have a Canadian corporation, then the corresponding operating model in the United States is a U.S. corporation. They must decide if a C corporation or an S corporation will be the most effective. Unless other considerations have come into play, the Canadian owners will not want to open a U.S. branch that is an LLC if the U.S. company is to be a continuation of the Canadian structure. Knowing this in advance is key.

Getting Started

When a business decides to expand into international markets, it should consider several factors. International markets are not all the same, and each country will have varying laws. Once a demonstrated client base and a need for products and/or services are identified in the target country, legal counsel must examine the business legal structure in the target country and work accordingly. This must be followed by an analysis of the implications that U.S. corporate polices will have in the target country. European employment laws offer significantly distinct protections to employees, protections with which U.S. employers should become familiar.[8] For example, in many civil law countries, employers do not use an offer letter when hiring job candidates. This is because the concept of an offer letter of employment in these countries is very different from what is understood from an offer letter in the United States.[9] In some countries an offer letter is considered a binding and enforceable contract.[10]

In the United States, few employers include sufficient legal rights and responsibilities in an offer letter to intend it to be binding, yet it could be binding in the target country. This is why it is often recommended that U.S. employers not send an offer letter, but rather the full

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The RFE Dilemma: How to Strategize Your Response to Requests for Evidence for H&L Visas

By Larry S. Rifkin, Miami

On 18 April 2017, President Donald Trump issued the Executive Order "Buy American and Hire American," which directed the U.S. Department of Homeland Security to devise policies to limit the issuance of H-1B visas to only the most skilled or highest paid petition beneficiaries.[1] As a direct result of that Executive Order, U.S. Citizenship and Immigration Services (USCIS) started to increase both the requests for evidence (RFEs) it issued and its denials for nonimmigrant petitions, specifically H-1B and L-1 petitions. When USCIS challenges that a prima facie case for eligibility of the benefit has not been met, it may issue an RFE to request missing initial or additional evidence from applicants or petitioners who filed for immigration benefits.[2] Applicants and petitioners are normally allowed eighty-four days to respond to the RFE before USCIS makes a final decision on the case.[3]

According to a ten-page report from the National Foundation for American Policy (NFAP) released in July 2018, the number of RFEs for H-1B cases in the fourth quarter of FY 2017 almost equaled the total number of those issued by USCIS adjudicators for the first three quarters of FY 2017 combined (63,184 vs. 63,599).[4] Thus, for FY 2017, USCIS issued applicants and petitioners more than 126,000 RFEs, yet the total number of H-1B petitions rose by less than 3% in the same period.[5] The denial rate for H-1B cases increased by 41% from the third to the fourth quarter of FY 2017, rising from a denial rate of 15.9% in the third quarter to 22.4% in the fourth quarter.[6] Similarly, RFE rates for L-1A petitions increased from 34.7% in the first quarter to 39.6% in the fourth quarter. Overall, L-1A denial rates increased by 67%, from 12.8% to 21.4% between the first quarter and the fourth quarter of FY 2017.[7]

Another contributing factor to the spike in RFEs was USCIS's Policy Memorandum issued on 23 October 2017, directing adjudicators to review nonimmigrant extension petitions with the same scrutiny as an initial petition.[8] This new memo rescinded USCIS's 2004 Policy Memorandum of giving deference to prior determinations of eligibility when there were no material changes in employment.[9] It is now common for USCIS to issue RFEs for H-1B and L-1 extensions

based on initial petitions that were previously approved without issue. The issuance of these RFEs grinds the adjudication process to a halt and causes significant delays for companies that need a prospective employee's services immediately, or that need a current H-1B or L-1 employee to continue working in that status. The RFEs, often consisting of multiple pages, are also burdensome, complex, and sometimes lacking in common sense, thereby creating additional expense for the petitioner and the foreign national beneficiary in retaining legal counsel for the additional work in drafting a legal memorandum in response.

Common Issues in USCIS's Requests for Evidence in the H-1B Context

Level 1 Wages – Entry Level

A common issue raised in USCIS's RFEs in the H-1B context since 18 April 2017 is with regard to the use of Level 1 wages. In its RFEs, USCIS claims that a Level 1 wage is not appropriate for a specialty occupation given the complexity of the job duties and/or that the position is not a specialty occupation because the Level 1 wage indicates that the position is entry level.

When applying for H-1B classification, employers must attest to the Department of Labor (DOL) that they will pay wages to the H-1B nonimmigrant workers that are at least equal to the actual wage paid by the employer to other workers with similar experience and qualifications for the job in question, or the prevailing wage for the occupation in the area of intended employment, whichever is greater.[10] For purposes of establishing the prevailing wage, Congress mandated that government wage surveys set forth at least four wage levels.[11] The DOL Prevailing Wage Determination Policy Guidance provides step-by-step procedures and worksheets to

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Cuba's New Constitution of 2019: Understanding the Changes to Come

By Osvaldo Miranda, Miami

Introduction

On 24 February 2019, the Cuban people approved a new constitution (New Constitution) through a popular referendum in which 86.85% of voters (6.82 million people) ratified the constitution, while 9% (706,000 people) voted against it. The remaining 4.1% of the votes were blank or null (198,674 blank and 127,100 nulls).[1]

While the former constitution (Constitution of 1976) had 137 articles, the New Constitution has 229 articles, organized under 11 titles, with 13 transitional provisions and 2 final provisions.

In the past, Cuba's constitutions were generally known by the names of the localities in which they were enacted, mostly during the war of independence. There was the Constitution of Guáimaro (1869), the Constitution of Baraguá (1878), the Constitution of Jimaguayú (1895), and the Constitution of La Yaya (1897). After Cuba won its independence from Spain—as a republic—Cuba had the Constitution of 1901, and then the Constitution of 1940. Once Fidel Castro's Revolution took power, Cuba enacted its first socialist constitution in 1976, which was amended in 1978, 1992, and 2001. Today, the New Constitution seeks to update the constitutional mandate to reflect the changes that the Cuban people and their government have lived throughout the last decades.

The National Capitol Building in Havana, Cuba

This article highlights issues that arise for the first time under the New Constitution, and issues that remain from the Constitution of 1976. The topics covered in this article fall into two general categories: Cuba's governmental structure and civil rights.

Government Structure

President of Cuba, First Since 1976

Under the Constitution of 1976, the Cuban government was organized such that the maximum authority of the state was vested in a collective body, the Council of State, elected by and from the National Assembly.[2] It was a common error to refer to the "president" of Cuba, as that position was nonexistent; the highest-ranked government official would have been the president of the Council of State. The president of the Council of State was also the president of the Council of Ministers, being the head of both the state and the government. Rulers such as Fidel Castro and Raúl Castro held all of these positions, along with the position of first secretary of the Communist Party (the highest position in the party).

Within six months of the New Constitution going into effect, the National Assembly will have to pass a new electoral law. Within three months after the approval of the electoral law, the National Assembly will have to elect the president and vice president of the Republic of Cuba from among its members.

The New Constitution becomes effective as of the date of its publication in the Official Gazette.[3] Assuming the New Constitution is promptly published in the Official Gazette, presidential elections must be held by the end of 2019, which will result in Cuba having its first president since Osvaldo Dorticós Torrado, who left office in 1976 upon the implementation of the Constitution of 1976.

New High-Ranking Positions

Council of State: The National Assembly elects, from among its members, the Council of State, which represents the National Assembly on a permanent basis between its biannual sessions.[4]

The legal decrees and agreements adopted by the Council of State are submitted for ratification to the National Assembly during the forthcoming session.[5]

The president, vice president, and secretary of the National Assembly are also the president, vice president, and secretary of the Council of State.[6]

Members of the Council of Ministers, the highest authorities of the judicial branch, members of the electoral committees, and members of any state entity of control cannot be members of the Council of State.[7]

Vice president: Like the position of president, the position of vice president appears in the New Constitution for the first time. The National Assembly elects both the president and vice president among its members every five years.[8] Both positions require that the candidate be a Cuban citizen by birth, hold no other citizenship, and be between the age of thirty-five and sixty[9] at the time of the first election.[10]

Governor and vice governor: The positions of governor and vice governor are also new in the New Constitution. The governor and vice governor are the head of the executive branch in each of the Cuban provinces, such as Havana, Matanzas, and Santiago de Cuba.[11] Both positions are first proposed by the president and then elected by the legislature of each municipality in each province every five years. The candidate must be over thirty years old, a Cuban citizen by birth, a resident of the province, and hold no other citizenship.[12]

The creation of the governor position is a substantial achievement for the Cuban structure of government. Before the New Constitution, the same person held positions as head of the legislature and executive in the province. Municipalities had the same governmental structure, in which the same person was elected as both the head of the legislature and executive in the locality.[13]

With the New Constitution, the governor will control executive actions, while the local legislatures in the municipality, with a separate president, will control the legislative branch. The governor must not be a member of the legislature, as the position required prior to the New Constitution. This differs from the positions of president and vice president; both of these office holders must be members of the National Assembly.[14]

Before the New Constitution, each province had its own legislative body. Now, the legislature will remain only at the municipal level (Municipal Assembly) and at the national level (National Assembly). This change is considered to be a positive one because it eliminates mid-level bureaucracy that had a high level of control and decision-making power over a territory, thereby creating more autonomy at the municipal level.

Each province will have a Provincial Council composed of the governor, vice governor, and other members of the municipal assemblies in the province.

Prime minister: Another new position in the government structure is that of prime minister, proposed by the president and appointed by the National Assembly for a five-year term. The prime minister must be over thirty-five years old, a Cuban citizen by birth, and hold no other citizenship.[15]

Under the New Constitution, the prime minister is the head of the government of Cuba. Before the New

Constitution, the same person held the offices of president of the Council of State and president of the Council of Ministers.[16]

The separation of the branches of government is considered to be a significant achievement of the New Constitution. The previous structure created confusion, political bias, and conflicts of interest, due to the same people holding office in both the legislative and the executive branches. Some Cubans defend the position that there is no such thing as separation of powers—represented in branches of government such as legislative, judicial, and executive—they believe that the state holds a centralized power delegating separate and distinctive duties or functions. Either way, beyond this academic discussion, the creation of bright lines in the government structure, isolating legislative and executive offices, represents a big step forward for Cuba.

Another example of the separation of functions or duties in the government under the New Constitution is that members of the Council of Ministers are prohibited from also being members of the Council of State.[17] Before the New Constitution, one person holding membership in both councils was often the case.

Elections: Presidential and Gubernatorial

The Cuban people are banned from having a direct and free vote for the president, vice president, governor, and vice governor. Posts such as president and governor are elected by the legislative bodies of the nation and the municipalities, accordingly.

The president and vice president are elected by the National Assembly.[18] The governors and vice governors are elected by the members of each of the municipal assemblies within each province, after being proposed by the president.[19]

The New Constitution has no provision regarding the majority required for electing such positions. This matter is expected to be included in the upcoming Electoral Law.

The Cuban people freely and directly elect only the members of the municipal assemblies and the members of the National Assembly.

Communist Party and Its Role in Cuban Politics

Like the Constitution of 1976, the New Constitution specifies that the Communist Party remains the only political party permitted in Cuba.

Common to both constitutions is the provision that the leadership of the Communist Party constitutes a fundamental pillar and a guarantee of the political, economic, and social order in Cuba.[20] Additionally, the Communist Party is declared to be the leading political force of society and the state.[21]

Since the Communist Party is the only political party in Cuba, it faces no opposition in local and national elections on the island. A common indicator of democracy is a multi-political-party system, whereby different sectors of the population can express and channel their opinions in areas like politics, the economy, the environment, and international affairs.

Cuban leaders, such as Fidel Castro, have espoused the position that a multi-political-party system is a "luxury" for third-world countries, and consider that it is "the great instrument of Imperialism to keep societies fragmented, divided into a thousand pieces []."[22]

The New Constitution follows the words of Fidel Castro: "the existence of a single party is, and should be, in a very long historical period that nobody can predict for how long, the form of political organization of our society []."[23]

An even more concerning issue is the role of the Communist Party in relation to the government structure. The New Constitution maintains the institutionalization and protection of the Communist Party as an elite group of leaders, placed over elected offices such as the presidency itself. While the people of Cuba do not elect officials of the Communist Party, they are elected among the members of the party.

A clear example of the Communist Party's control over the government are the guidelines usually issued during each session of the Communist Party. The Communist Party's sessions, known as *Congresos del Partido Comunista de Cuba* (or *PCC*), usually occur during an

Cuba's New Constitution, continued

era of change or challenge that will require the creation of guidelines for the government to address such challenges or changes in Cuba. So far, there have been seven sessions, the last of which took place in April 2016.[24]

Illustrative examples of the foregoing are seen in the fourth, sixth, and seventh sessions of the Communist Party. The fourth session was in 1991, just after the collapse of the Soviet Union. That session focused on the crisis to come after the collapse of the Soviet Union, and the Communist Party issued plans and guidelines for the government to follow as it took measures to face this difficult crisis without losing the socialist and communist principles of the Cuban regime.

The sixth session was in 2011, after Raúl Castro officially took the presidency after serving for years as the interim president. After Raúl Castro became president of the Council of State and of the Council of Ministers, certain changes in the economy were envisioned through the so-called Guidelines for the Economic and Social Policy of the Party and the Revolution (Guidelines). The draft Guidelines were first presented and discussed during the sixth session, but approved during the seventh session of the Communist Party in 2016.

Once a session of the Communist Party ends, the government starts a process of restructuring based on the guidelines or directives approved by the Communist Party. For example, after the fourth session, the Cuban government passed legislation, including the foreign investment law of 1995. The private sector was recognized in a limited space of the market in 1993.[25] The use and circulation of U.S. dollars was decriminalized[26] in 1993. Even the Constitution of 1976 was modified to contemplate such plans being adopted during the fourth session, such as permitting foreign investment in Cuba.[27]

With the anticipated New Constitution, there was an expectation that Cuba's private sector would be given more support for its development, including permitting the import and export of goods and services, access to wholesale markets, and the right to organize its members in business associations, such as corporations or partnerships. The New Constitution, however, follows the Guidelines limiting the activities of the private sector.

Guideline number four specifies that "[i]n non-state management forms, the concentration of property and material and financial wealth in non-state natural or legal persons will not be allowed."[28] Article 30 of the New Constitution states that "[t]he concentration of property in individuals or non-state legal entities is regulated by the State, which also guarantees an ever more fair redistribution of wealth, in order to preserve the limits

... continued on page 53

SECTION NEWS

International Law Section and Indian National Bar Association Collaborate on INBA's Seventh Annual International Conference and Sign Bar Cooperation Agreement

By Neha S. Dagley, Miami

On 26 November 2018, at the Shangri La's Eros Hotel in New Delhi, India, the newly formed ILS Asia Committee and its India Subcommittee collaborated with the Indian National Bar Association (INBA) on its seventh annual International Conference titled "69th Constitution Day." The joint conference brought together legal and business professionals from various parts of India, Europe, and the United States for an open dialogue on various topics impacting law, business, and investments in India. The successful collaboration in this conference was a key initiative of the ILS Asia Committee.

The ILS delegates presented at panels during the conference on various topics:

- *2018 U.S. Tax Changes – Effect on Investments in the U.S. and India* (Alan Lederman, Margarita Muina)
- *Navigating Commercial Disputes in the U.S. & Managing Risk – Best Practices for Indian Attorneys* (Tiffany Comprés, Neha Dagley, Prof. Manual Gomez)
- *U.S. Immigration Law Update – Gateways Into North America* (Joseph McFarland, Susanne Leone)

During the conference, a Bar Cooperation Agreement was signed between The Florida Bar International Law Section and the Indian National Bar Association as a symbol of collaboration and a mutual desire to strengthen the relationship between Florida and India. This significant achievement was signed in both English and Hindi. Also significant, two ILS members received recognition from the Indian National Bar Association: Neha Dagley received an award for Lawyer of the Year 2018 (NRI), and Susanne Leone received an award for Emerging Lawyer of the Year 2018 (corporate and tax).

The conference was mentioned in India's second most widely read national English newspaper, the *Hindustan Times*. The morning after the conference, a photo appeared in the *Hindustan Times* with two ILS delegates honoring the legal team of HT Media Limited with an INBA Award for Legal Team of the Year 2018.

The conference was followed by a U.S.-India Symposium on 27 November 2018, in which ILS delegates were introduced to several organizations and their members and had the opportunity to participate in roundtable discussions at the Delhi Management Association (DMA) and the Centre for Trade and Investment Law (CTIL) in New Delhi. Of particular interest to the delegates was the CTIL (a think tank of the government of India) roundtable discussion where they had an opportunity to discuss topics pertaining to the regulatory gaps and flaws in the rules of professional conduct governing non-litigious services in India. ILS delegates were asked to share experiences in their jurisdiction in the context of such regulatory gaps and flaws.

During their time in New Delhi, the ILS delegates enjoyed a tour of local courts and mediation facilities. They also had the unique opportunity to mingle with various members of the Supreme Court of India's Bar and senior advocates practicing in the Supreme Court at a reception and dinner hosted by R. S. Suri, senior advocate, Supreme Court of India and former president of the Supreme Court Bar Association.

INBA's Seventh Annual International Conference, continued

Many of the ILS delegates also visited the Taj Mahal and Jaipur and enjoyed sightseeing in New Delhi and Old Delhi. The official program concluded on 29 November 2018, with the delegates enjoying vibrant Indian culture, music, and homemade Indian cuisine at a party hosted by Delhi locals in their residence.

The ILS Asia Committee and its India Subcommittee are planning to return for the conference in 2019. Please join us!

***Neha S. Dagley** is the founding partner of Dagley Law PA, located in Miami, Florida. She serves as chair of the India Subcommittee to The Florida Bar International Law Section's Asia Committee. Her practice focuses primarily on early stage and seed stage start-ups. She advises local and overseas (inbound) entrepreneurs on business, corporate, and brand protection matters. Neha is a native of Mumbai, India, and is fluent in Hindi and Gujarati.*

The ILS delegation at the conference welcome reception

Neha Dagley and Susanne Leone

Delegates Alan Lederman, Joseph McFarland, Tiffany Comprés, and Professor Manuel Gomez

Award recipients Neha Dagley and Susanne Leone are joined by Professor Manuel Gomez, Margarita Muina, Joseph McFarland, Alan Lederman, and Tiffany Comprés.

ILS delegates and others at the Centre for Trade and Investment Law roundtable discussion

Alan Lederman speaks at the conference.

Bar Cooperation Agreement – The Florida Bar International Law Section and the Indian National Bar Association

Professor Manuel Gomez speaks at the conference.

WORLD ROUNDUP

INDIA

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PepsiCo withdraws lawsuit against Gujarat potato farmers.

In April 2019, PepsiCo filed a patent infringement suit against potato farmers where it accused them of cultivating a certain potato variety known as FC5. The food and beverage conglomerate claims that it has exclusive rights to grow this type of potato crop based on certain Plant Variety Protection Act rights. PepsiCo further claims that it developed this potato variety with a low moisture content to make snacks such as potato chips and registered it in 2016.

The suit was filed in Ahmedabad, Gujarat, and sought to restrain the farmers from growing the FC5 potato crop, together with damages in excess of 10 million rupees from each farmer. The decision to sue the farmers invited significant backlash and outrage from activists and farmers unions. PepsiCo was further criticized when days after filing the lawsuit, it offered to settle, where the settlement was framed as "either join us or grow other potatoes." PepsiCo proposed that the farmers become a part of its farming program, which would allow them to plant the FC5 variety and sell it back to PepsiCo for a fixed price; if they did not want to join the program, they would sign an agreement with the company to cultivate other varieties. This was perceived as intimidation and legal harassment of farmers, many of whom are not fully aware of their rights.

Thereafter, in May 2019, less than a month after filing the lawsuits, PepsiCo announced its withdrawal of the patent infringement suit. A PepsiCo spokesperson stated, "After discussions with the government, the company has agreed to withdraw cases against farmers." Notably, this decision happened at a critical time, during India's 2019 General Election.

India's General Election 2019: Update

India is the world's largest democracy, and this year's General Election will decide if Hindu Nationalist Prime Minister Narendra Modi will run the country for another five years. India's first election took place in 1951-52, after its independence from the UK in 1947. India's current population is at more than 1.35 billion, and a fascinating part about India's elections is the staggering number of eligible voters. In 2019, there are 900 million eligible voters and nearly 1 million polling stations. The General Election is to be conducted in seven phases, between 11 April 2019 and 19 May 2019, with the results announced on 23 May 2019. The Indian Parliament has two houses: Rajya Sabha and Lok Sabha. The focus here will be on Lok Sabha, the lower house. Lok Sabha has 543 seats, and in order to form a government, a party needs a minimum of 272 MPs.

This year's contenders are Prime Minister Narendra Modi and opposition leader Rahul Gandhi, leader of the Congress Party. In the 2014 elections, the Congress Party only took 44 seats of 543 seats, with 282 going to Modi's Bharatiya Janata Party (BJP). And until a few months ago, Modi and BJP were seen as the frontrunners for the current election. This view, however, changed after BJP lost key states in December 2018's regional elections; the party lost control over the states of Chhattisgarh, Madhya Pradesh, and Rajasthan, which helped Modi win in 2014. Nevertheless, the February 2019 aerial bombings by India and Pakistan could result in a nationalism pull in favor of Modi, who has expressed in clear terms that he will not hesitate to retaliate in the event of another attack on Indian soil. The 2019 General Election will essentially be a referendum on Modi, who is the primary target of the opposition's campaign. Whether or not Modi will continue presiding over the world's largest democracy for the next five years will soon be determined.

Breaking News
Modi and his ruling BJP were clear winners in the election, taking 303 seats in the Lok Sabha (lower house).

***Neha S. Dagley** is the founding partner of Dagley Law PA, located in Miami, Florida. She serves as chair of the India Subcommittee to The Florida Bar International Law Section's Asia Committee and chair of the Foreign Legal Consultants Committee. Her practice focuses primarily on advising start-ups and small to mid-size businesses. She advises local and overseas (inbound) entrepreneurs on business and trademark law.*

JAPAN

Takashi Yokoyama
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Japan launches new Offshore Renewable Energy Act.

The Act to Promote Offshore Use by Offshore Renewable Energy Facilities (the Renewable Energy Act or the Act) became effective on 1 April 2019, establishing coordinative mechanisms with stakeholders and requirements for the extended occupation of general sea areas by offshore renewable energy facilities. Specifically, the Act calls for the minister of Economy, Trade and Industry (METI) and the minister of Land, Infrastructure, Transport and Tourism (MLIT) to designate certain sea areas as "promotion zones," each of which will then be granted to operators for up to thirty years through a public bidding process that considers price among several other factors.

The procedures are as follows: (1) the prime minister drafts a general policy for use of sea areas by offshore renewable energy facilities and the Cabinet approves it; (2) the METI and the MLIT designate promotion zones and decide the public bid guidelines through consultation with the minister of Agriculture, Forestry and Fisheries, the minister of the Environment, and other provincial governmental agencies and third-party committees (including local stakeholders); (3) operators submit public bid plans to the METI and the MLIT; (4) the METI and the MLIT select a successful bidder in consideration of the public bid plan including business substance, procurement price, and other factors; (5) the successful bidder applies for Feed-in Tariff approvals and the METI issues them under the Act on Special Measures Concerning Procurement of Electricity from Renewable Energy Sources by Electricity Utilities; and (6) the successful bidder applies for an occupation permission in a promotion zone and the MLIT issues its permission for a maximum of thirty years. The coasts of Aomori, Akita, Saga, and Nagasaki prefectures are expected to be designated as promotion zones for offshore wind power projects.

The crux of the Act is that the responsibilities of securing sufficient grid capacities in promotion zones for offshore wind projects will not be borne by the government, but by operators. On the other hand, even if operators apply for grid connections and secure grid capacities for offshore wind projects, there is no assurance they will be selected for occupation rights in promotion zones through the public bid process. In other words, an operator that secures grid capacities for the project will not always be a successful bidder in the bid process. Furthermore, while an operator that secures grid capacities but is not selected in the bid process will have to surrender its grid rights to the successful bidder, there are no criteria for the succession to prevent losses by the operator that has already secured the grid. In reality, there are several offshore wind projects in general waters areas that might fully or partially overlap in promotion zones. It is also reported that some of these projects have already initiated employment and briefing sessions to local communities.

In this regard, the government has issued the guidance that these ongoing projects can be evaluated as one factor in the bid process in terms of equity, fairness, and transparency. This author, however, humbly opines that the succession to the successful bidder in the bid process (and the fairness surrounding the terms of the succession) should be further clarified for investors under its decrees, or in detailed rules, in order to provide legal certainty and predictability in cross-border transactions in Japan.

Takashi Yokoyama *is a legal intern of the International Arbitration Group at Wilmer Cutler Pickering Hale and Dorr LLP in London. While completing the JD and LLM program at the University of Miami School of Law, he interned in the international investment treaty practice at Energy Charter Secretariat in Brussels. Prior to that, Mr. Yokoyama engaged in corporate law practice and litigation management as a legal advisor in the legal departments at Sojitz Corporation and a global pharmaceutical company in Tokyo for nine years.*

MIDDLE EAST

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Qatar convicts three arbitrators in absentia.

Qatar's future as an arbitration hub in the Middle East is in doubt after a Qatari court convicted three arbitrators in absentia. In October 2018, a Qatari court sentenced three arbitrators to three years in prison for allegedly participating in criminal activity to cause harm to a prominent Qatari sheikh. The arbitrators had transferred a dispute involving the sheikh and a construction company from the Qatar International Centre for Conciliation and

Arbitration (QICCA) to ad hoc proceedings in Tunisia. Despite objections, the proceedings went ahead, with the tribunal issuing an award against the sheikh. The Qatari sheikh then brought criminal proceedings in Qatar and the Qatari court convicted all three arbitrators.

Qatar's BeIN Sports threatens international arbitration regarding cancellation of exclusive rights in Saudi Arabia.

In March 2019, the Asian Football Confederation (AFC) cancelled BeIN Sports' exclusive broadcast rights to soccer matches in Saudi Arabia. BeIN has been proceeding in an international investment arbitration against the Kingdom of Saudi Arabia under the Organisation of the Islamic Conference (OIC) Agreement since October 2018, where BeIN is alleging it was unlawfully driven out of the Saudi market. The Saudi Arabian Football Federation (SAFF) said AFC's recent decision was the result of major legal and regulatory violations by BeIN. BeIN has stated that it will be bringing a separate arbitration against AFC with the Singapore International Arbitration Centre.

Abu Dhabi Global Market courts announce court-annexed mediation service.

Abu Dhabi Global Market (ADGM) courts have announced the launch of a court-annexed mediation service to better serve the increasing demand for mediation solutions for litigants before ADGM courts. The service is designed to ensure that litigants can explore and achieve settlement of their disputes by accessing alternative dispute resolution options with mediators from ADGM courts. The process is both without prejudice and confidential.

Threat of imprisonment for arbitrators in the UAE has been removed.

Previously Federal Law No. 7 of 2016 amended Article 257 of the UAE Penal Code and created a risk of imprisonment for arbitrators in the UAE if they failed to maintain "integrity" and "impartiality" in their capacity as an arbitrator. There was a tangible and negative impact to the image of Dubai as an arbitration-friendly jurisdiction. Federal Decree No. 24 of 2018 amends Article 257 to remove this threat. Although arbitrators have been removed from the scope of Article 257, experts, translators, and investigators are still included and could be subject to imprisonment "if they confirm a matter contrary to what is true and misrepresent a matter while knowing the truth about it." It remains to be seen how this provision will be interpreted.

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NORTH AMERICA

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One hundred thousand-plus asylum-seekers reach the U.S.-Mexican border in March 2019.

In March 2019, more than 100,000 asylum-seekers reached the southern U.S. border—the highest number in more than a decade. A significant number of these migrants are from the so-called "Northern Triangle" of El Salvador, Guatemala, and Honduras. The spike in asylum-seekers comes on the heels of the Trump Administration's proposed cuts to the U.S. foreign aid budgets aimed at cutting American aid spending in the region by more than one-third in 2019, with a proposed budget request to cut funding to the region by another 30% in 2020.

The Trump Administration also announced the end of Temporary Protected Status (TPS) designations for refugees from Nicaragua, Haiti, El Salvador, and Honduras. In a presidential memorandum signed in late April 2019, President Trump gave the Justice Department and the Department of Homeland Security just ninety days to require that asylum-seekers pay an application fee. The presidential memorandum also instructs the executive agencies to deny work permits to asylum-seekers and to "fast track" new asylum cases to final hearing within 180 days.

Implementation of provision in Helms-Burton Act allows lawsuits against companies using property nationalized by Cuban government.

Breaking with twenty-three years of precedent, the Trump Administration announced its plan to enforce Title III of the 1996 Helms-Burton Act, also known as the "Libertad Act." Enforcement of Title III will permit U.S. citizens to file lawsuits in federal courts against businesses that use or operate on property nationalized by the Cuban government during the 1959 revolution. While prior administrations have waived enforcement of Title III to avoid protracted litigation and potentially damaging trade issues, the Trump Administration hopes that allowing billions of dollars of legal claims to be filed will pressure Cuba to end its support for Venezuela's Maduro government. The first wave of lawsuits, potentially heralding a tsunami to come, have been filed.

"Extinct" Canadian First Nations tribe wins recognition.

The Sinixt, a First Nations people declared extinct by the federal government of Canada more than sixty years ago, won a court battle to have their existence recognized. Specifically, on 2 May 2019, a court of appeal in British Columbia recognized a Sinixt individual's right to hunt in Canada, even though that individual had American citizenship. That individual had traveled to Canada to hunt in order to challenge the B.C. Wildlife Act and the Canadian government's 1956 declaration of the Sinixt as an extinct people. The Sinixt maintained that they were pushed off the Canadian portion of their traditional territory by settlers and miners, but that they retained their existence as a people living in the United States. The tribe presented evidence of more than 3,000 Sinixt people living in southern British Columbia and the northern United States. The case is expected to be heard by the Supreme Court of Canada.

Canadian Prime Minister Justin Trudeau investigated for accepting private gifts.

Federal conservatives launched an investigation into whether Prime Minister Justin Trudeau broke the law by accepting family vacations on the Aga Khan's private Caribbean island. The Canadian Criminal Code contains an express provision that prohibits a government official from accepting any benefit of any kind from someone who has dealings with the government. In December 2017, the federal ethics committee found that PM Trudeau had on several occasions stayed on holiday at the private retreat of the Aga Khan, a billionaire philanthropist. The investigation is ongoing.

The Mexican Congress approves legal rights for domestic workers.

Benefitting millions of domestic workers, the Mexican Congress voted to grant the country's domestic workers new rights such as paid vacations and more limited work hours. The new law requires that domestic workers have a written contract providing for a minimum wage and other benefits. The law also bans hiring domestic workers younger than fifteen and provides for mandatory personal time for live-in housekeepers. While this new law is being hailed as an important step forward in Mexican labor law, enforcement will be difficult in a country where more than half of workers are informally employed.

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

WESTERN EUROPE

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New regulation for foreign direct investment screening entered into force on 10 April 2019.

The European Union has one of the world's most open investment rules and is one of the main destinations for foreign direct investment (FDI) in the world. FDIs are substantial for innovation, growth, and jobs in the EU. But takeovers of EU companies by non-EU investors in the past years and their cross-border effects raised concerns and led to new legislation that regulates foreign direct investment screening. This regulation is fundamental because it is the first time the screening of FDI is regulated at the European Union level, although major trading partners of the EU have already established such frameworks.

The regulation does not propose an FDI screening process at the EU level. Rather, it establishes a cooperation mechanism between the European Commission and member states such that a member state will be required to inform the commission and other member states of any FDI review that has been initiated. This legal framework needs to be completed by each member state. The member states are solely responsible for deciding if they wish to set up a screening mechanism or to screen a particular foreign direct investment. Currently, only about half of the member states have investment control laws in place.

Key elements of the new regulation are as follows:

1. The new regulation contains primarily constitutional requirements for the structure of the screening mechanism for reasons of security or public order, transparency, setting a time frame for checks, confidentiality of information, and opportunity for legal protection;
2. The new framework creates a cooperation mechanism. Member states and the commission shall exchange information and raise concerns related to specific investments;
3. Each member state is required to submit an annual report by 31 March of each year to the European Commission on foreign direct investment in their territory. Also, each member state is obligated to report on the application of their screening mechanisms.

One of the possible effects of the new regulation is that the cooperation mechanism will most likely lead to a more extensive and time-consuming investment screening. It may no longer be possible for the competent national authorities to comply with the time limit of the closing condition, which is often provided for in purchase contracts, or when a clearance certificate is required within a certain period. This must be considered when drafting contracts in the future. Additionally, the obligation to exchange and disclose information regarding FDIs may possibly increase the risk of trade and company secrets being disclosed.

Over the next eighteen months, the European Commission and EU member states will take the necessary steps to make sure that the EU can fully apply the investment screening regulation. The new EU legislation will be instrumental in safeguarding Europe's security and public order in relation to foreign direct investments into the EU, will enhance cooperation and information-sharing between the commission and member states, and will increase legal certainty.

Susanne Leone *of Leone Zhgun PA in Miami, Florida, advises national and international business start-ups, enterprises, and individuals engaged in cross-border international business transactions or investments in various sectors related to Europe and the United States. She is licensed to practice law in Germany and Florida.*

Section Scene

iLaw 2019 • The ILS Global Forum on International Law
22 February 2019
JW Marriott Marquis • Miami, Florida

Kristin Drecktrah Paz, Jaqueline Villalba, Clarissa Rodriguez, and Cristina Vicens

Luncheon speaker Mark Lanterman, chief technology officer with Computer Forensic Services

Hot Topics in International Law panelists Edward M. Mullins (moderator), Annette Escobar, Leif Simonson, Tiffany N. Comprés, and Jose Ferrer

Opening Plenary Session speakers Alvin F. Lindsay, Manuel A. Gómez (moderator), Carmen Cartaya, Ralph Losey, and Kinny Chan

International Litigation Track presenters Arnoldo Lacayo (moderator), Henry Stewart, Sophia Rolle, Susana Hidvegi Arango, and Alejandro Pignataro Madrigal

Richard Montes de Oca, Eric Bustillo, Michelle Estlund, and David Rodrigues Gonçalves

Arnoldo Lacayo, Cristina Vicens, and Richard Montes de Oca

Attendees enjoy one of the many panel discussions offered at iLaw 2019.

Section Scene

Richard DeWitt Memorial Vis Pre-Moot
23 February 2019
The Offices of JAMS • Miami, Florida

Carlos Osorio and Skye Musson, a graduating 3L from Florida State University

Averil Andrews

Clarissa Rodriguez, Melissa Roca Shaw, and Ana Barton

Alicia Menendez, Marycarmen Soto, Averil Andrews, and Adrian Nuñez

The Stetson Law School team with Adrian Nuñez and Phil Whit Engle

John Rooney (center) with University of Miami Law School team

Section Scene

ILS Conference on Defending Human Rights Presented by the ILS Standing Committee on Public International Law, Human Rights, and Global Justice

19 April 2019
University of Miami Newman Alumni Center
Coral Gables, Florida

ILS Conference on Defending Human Rights co-chairs Elizabeth Iglesias and Richard Alton

Carlos Osorio, James "Jim" Meyer, Elizabeth Iglesias, Richard Alton, and Arnoldo Lacayo

Elizabeth Iglesias, Richard Alton, and Emmett Egger

Speakers on human rights in Nicaragua: Felix Maradiaga, Maria Augusta Montealegre, and Danilo López Román

Keynote speaker Felix Maradiaga, Nicaraguan opposition leader, and Arnoldo Lacayo

Rosa María Payá of Cuba Decide

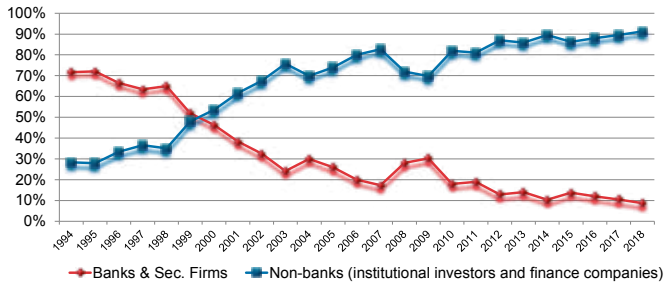
Speakers on human rights in Cuba: David Abraham, José Gabilondo, James "Jim" Meyer, and Carlos Osorio

Investment in Mexico, from page 9

off their balance sheets and to investors. Prior to that period, loan trading was a labor-intensive affair requiring significant time, cost, and negotiation for what are now standard market terms. The key benefits of the standardization of forms were that it allowed commercial parties to focus their efforts on key commercial terms, it provided a benchmark against which parties could base their negotiations, and it provided relative certainty that the parties could enter into, exit, and assign loans on terms that would be generally acceptable. The fact that New York and English law are the most popular governing laws for large syndicated loan transactions globally, and that the New York and London loan markets are the most liquid markets for issuers, is due in no small part to the success of the LSTA and the LMA and the innovations driven by their primary and secondary market documentation. Their role in the development of forms and best practices for primary issuance documentation, as well as confirmation and settlement documentation, coupled with credit ratings for loans, mark-to-market pricing, and electronic clearing platforms, created the groundwork for today's efficient and liquid market.

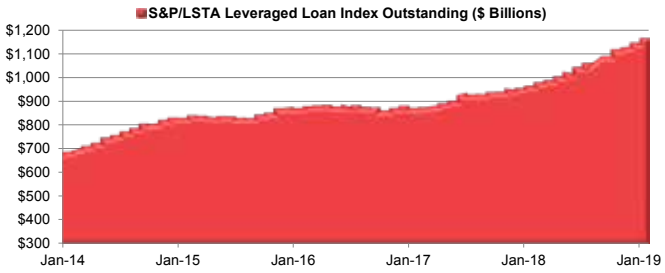
To provide some statistics to support these claims, consider that in 1994, banks accounted for 71% of the primary investors in the highly leveraged loan market in the United States, but by 1999, non-bank lenders (institutional investors and finance companies) surpassed banks, and by 2018, non-banks made up over 90% of all primary market loan purchases.[2] The same period also saw explosive growth in the U.S. secondary markets for loans. Trading volume in highly leveraged loans has grown ninety times, from just US$8 billion in 1991, to US$145 billion in 2003, to US$520 billion in 2007, and by 2018, to US$720 billion.[3] In the last three months of 2018, as volatility intensified in the U.S. market, the monthly secondary trading volume increased (meaning that the market became more liquid with volatility). The rapid diversification and increase in trading volumes suggest that standardization and transparency help attract a broader range of investors and allow issuers flexibility to exit and enter those investments as circumstances change.

U.S. Trends in the Primary Market for Highly Leveraged Loans



Reed Smith LSTA Creel [Source: The LSTA Trade Data Study]

U.S. Secondary Loan Market Grows to $1.2 Trillion in Outstandings



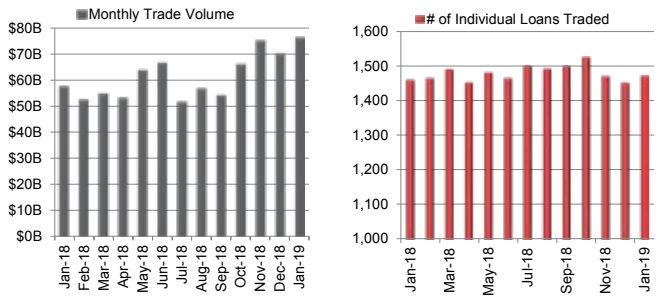
Reed Smith LSTA Creel [Source: The LSTA Trade Data Study]

U.S. Secondary Loan Trading Volumes in 2018 Totaled a Record $720B

Reed Smith LSTA Creel [Source: The LSTA Trade Data Study]

Investment in Mexico, continued

U.S. Secondary Loan Market
Liquidity Levels Spiked as Volatility Intensified



Reed Smith

[Source: The LSTA Trade Data Study]

The syndicated loan is now a product that bridges the private and public fixed-income markets and provides borrowers with a competitively priced alternative to high-yield bonds and illiquid bilateral commercial bank loans. In the United States, the strong sponsor-dominated M&A market over the last few years, along with the abundance of liquidity and market competition from non-bank lenders, has created a favorable market for borrowers. This has allowed issuers to negotiate "top-of-the-market" large syndicated deal terms into middle-market credits. Loans in the U.S. market feature incremental facilities, pari passu debt, covenant-lite (springing or no financial maintenance covenants), and/or cure rights, flexibility in investments and restricted payments, EBITDA-based grower baskets, non-GAAP/IFRS-based EBITDA add-backs,[4] and narrower mandatory repayment requirements.

It is interesting to note, however, that although there are more covenant-lite issuances now and there has been a broad convergence in terms between high-yield bonds and loans, a 2018 New York TLB loan is likely to have more operational reporting than a similar issuance would have had in 2006. This operational reporting (sometimes in the form of board observation rights and quarterly investors' calls with the company) is an outgrowth of influence of the private and specialty credit market replacing pure bank syndicated deals. It is also interesting to note that even in the frothy markets, it has been the preference of many sponsors to exchange a slightly cheaper, broadly syndicated bank loan for a relationship loan with a club of private credit issuers. The flexibility offered by such privately arranged credits along with the ability to execute amendments quickly and privately with a small group of lenders has changed the look and feel of loans in the post credit-crunch era.

The trend in the United States and Europe for these very flexible, operationally focused issuances and the growing preference for TLB issuances over high-yield bonds have been well publicized, yet the emergence of the TLB trend in Latin America is less well publicized. While neither the M&A activity nor these aggressive features are as common in the Mexican market, we are starting to see issuances in Mexico offered by non-bank lenders that have some of the TLB features, and we are aware of at least three US$500 million-plus covenant-lite New York law governed TLB issuances involving companies doing business in Latin America that were marketed to institutional investors in the United States in 2018.[5] We have every reason to expect there is an appetite for similar Mexican TLB issuances to follow.

Structural Changes in the Mexican Market and New Products That Are Positioning Mexico for Greater Market Competition and Flexibility

Despite the current political uncertainty in Mexico, the Mexican financing market is well positioned for growth, and growth in the Mexican market is already happening. Based on publicly available information, as of year-end 2018, the Mexican equity market had a market capitalization of approximately US$372.497 million, with 145 public companies (140 local and 5 foreign) and 80.077 million shares traded and 862 bonds listed, representing a total value of US$39.49 million (bond trading value). Mexico has a growing middle class and a resource-rich economy, which makes Mexico attractive to non-domestic investors, and a dynamic financing market with local, international bank, and non-bank financing sources helping to drive financial innovations.

Investment in Mexico, continued

Mexico already has seen significant growth in structured finance in recent years. In addition to the reemergence of traditional asset-backed securitizations in Mexico, as a result of recent regulatory changes, there are several new structured products that expand the reach of Mexican pension funds and diversify the offering of investment products in Mexico. A few of the structures facilitating this growth are CKDs, FIBRAs, and CERPIs.

- CKDs are securities issued by a Mexican trust (Trust) by means of a public offering. The Trust holds direct or indirect interests in the underlying assets. CKDs can invest in diverse asset classes, private equity, real estate, debt, hybrid instruments, and infrastructure projects, among others.
- FIBRAs are Mexican real estate investment trusts. FIBRAs issue what are called *certificados bursatiles fiduciarios*, which are placed by means of a public offering. The main purpose of the FIBRA must be: (1) the acquisition or construction of real property for leasing purposes; (2) the acquisition of rights to receive revenues from leased properties; or (3) the granting of financing in connection with the activities described in (1) and (2) above, provided that such financing must be secured with a mortgage over the real property.
- CERPIs are investment project trust certificates, and are a restricted issuance offered to qualified investors for investment on a deal-specific project-by-project basis (rather than a portfolio of projects).

The growth of CKDs, FIBRAs, and CERPIs is changing the Mexican market. Currently, FIBRAs trade on the Mexican stock exchange with a market capitalization of 250,224 million pesos and CKDs with a market capitalization of approximately 207,000 million pesos. We also have observed at least fifteen CERPIs trading on the Mexican stock exchange and Mexican pension funds using CERPIs to facilitate investment in projects outside of Mexico. These products are exciting because they provide financing alternatives—they allow sponsors to create flexible structures depending on the capital needs of the projects, and they allow Mexican pension funds to invest in broader investments domestically and internationally than were previously available. This growth in products and investors is attracting interest and investment in the Mexican market.

Mexican loans and companies still tend to be more conservative and less leveraged than their U.S. and European counterparts, but the diversity of products is creating an opportunity for companies to demand products that are not plain vanilla, New York law governed bank loans and bonds with extensive

financial maintenance covenants. Non-bank issuers are becoming a dynamic force in the Mexican markets. In our experience, Mexican market issuances still have covenants, but we are seeing that the more flexible and expedited credit approval and underwriting process from non-bank lenders in Mexico is creating changes in the market and in market preferences. While we are not yet seeing large whole credit solutions on TLB terms in Mexico from non-bank lenders, we are seeing non-bank lenders offer loans in pesos in amounts of up to US$100 million to US$200 million on flexible terms. These loans still have financial covenants and are likely to have more expensive pricing up front than bank debt, but they are attractive for issues because the non-bank lenders are more likely to be more flexible in an amendment or restructuring process than traditional banks, which can help provide optionality and can limit amendment and consent fees in a downside case. We would expect as the Mexican non-bank market and product offerings expand, borrowers will continue to push for better terms and more flexibility in their deals with non-bank lenders in the same way we have seen in the U.S. and European markets.

Changes in Mexican Bankruptcy Law—Creating a Sound Exit Plan for Investors

Big changes that we anticipate will help drive investor confidence in Mexico (and documents governed by Mexican law) are the recent developments in Mexico's Commercial Bankruptcy Law (*Ley de Concursos Mercantiles*) (the LCM), which are intended to provide investors with confidence that when trouble strikes, they will be able to achieve a successful workout and exit plan. The 2014 amendments effected comprehensive changes to the insolvency laws in Mexico and established new rules for bankruptcy proceedings. The reforms were drafted in reaction to *In Re Vitro*'s cram-downs imposed on creditors and the protracted Mexicana de Aviación insolvency, and with the express intent of improving the position of creditors dealing with the insolvency of local companies and eliminating long-standing bankruptcy law loopholes and the lack of certainty over the results of collection and foreclosure efforts by lenders that undermined Mexico being considered by international investors as a safe jurisdiction for the adjudication of legitimate bankruptcy claims. Following the 2014 amendments, intercompany debtholders are now subject to stricter rules when forming a sufficient majority for approvals of a reorganization plan in order to minimize the opportunity for intercompany debt to "cram down" other creditors (as experienced in *In Re Vitro*). The changes to the LCM establish the subordination of intercompany loans, articulate clear rules for debtor-in-possession (DIP) financings and pre-packaged bankruptcies, and create creditor-protection measures that ensure the effective right to recover claims from financially distressed debtors and to quickly realize upon assets. The changes to the LCM were aimed at creating a more balanced and transparent relationship between the debtor and its creditors, as well as expediting the bankruptcy process in order to maximize the value of the bankruptcy estate for the benefit of all stakeholders. The LCM provides (subject to certain exceptions) hard deadlines for the reorganization of an insolvent company (i.e., mediation stage of the *concurso mercantil* procedure may not exceed a 185-day initial period with two possible 90-day extensions); such changes help mitigate the risk of endlessly delayed proceedings and uncertainty as to the application of the law. The LCM also introduced the concept of a "pre-pack" proceeding in order to reduce the time to conclude an insolvency proceeding with a valid reorganization plan. In addition, the concept of DIP financing was introduced in Mexican proceedings, which allows lenders to achieve a "super-priority" status in an insolvency proceeding, to the extent that such financing: (a) is granted with the prior authorization of the court or mediator; and (b) does not contravene any resolutions issued by the court or any authorization granted by the mediator.

In our view, the changes to the bankruptcy laws are a win for creditors' rights and part of the reason investors are becoming more confident in Mexican insolvency processes and the ability to realize upon assets. We are already seeing cases (mainly in the housing sector)

showing that the new hard deadlines and pre-packs are being used and that such changes are resulting in shorter *concurso mercantil* procedures. The DIP financings are not yet yielding the same results due to strict capital reserve requirements and bank exposures to certain industries, but lenders are cautiously optimistic. The facts and resolutions of future cases will measure the success of such amendments, but assuming that such results follow the positive trend seen in the Mexican housing sector, we view the impact of these changes as potentially increasing the ability of Mexican corporations to demand better financial terms in their loans and to push non-Mexican lenders to agree to issuances under local law in the future.

Looking to the Road Ahead

While 2018 was a relatively slower year for Mexican issuances compared to the rest of the global economy and there is still lingering uncertainty regarding the policies of the new administration, it is important to recognize the larger trend: Mexican corporate debt issuances have been steadily growing. Mexican companies (large and small) are benefitting from increased competition and an increasing diversity of products that offer better pricing while still satisfying global investors' demand for transparency and yield. Mexico is well positioned for growth and is benefitting from changes to its legal regime, which aim to increase liquidity in the markets while providing greater certainty to investors in a downside case. We expect that the introduction of the LSTA's LatAm MCAPs and Mexico-focused secondary trading documentation is only the first innovative step toward helping investors enter and exit Mexican credit issuances more easily. We expect this trend to continue. While it remains to be seen over the next few years whether there will be Mexican LSTA equivalents and large Mexican law governed TLB issuances from non-bank lenders, we do expect to see increasing diversity and competition in Mexican issuances building on the success of the CKDs, FIBRAs, and CERPIs; changes to Mexico's bankruptcy laws; and the increasing diversity of investors and investments in the market.

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4 EBITDA refers to earnings before interest, tax, depreciation, and amortization; GAAP refers to generally accepted accounting principles; and IFRS refers to International Financial Reporting Standards set by the IFRS Foundation.

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Corruption and Bribery, from page 11

Although the DOJ and the SEC work together to fight corruption amongst international business, the SEC deals with the majority of the settlements; indeed, most violations of the FCPA lead to monetary settlements rather than criminal prosecutions.

In 2010, the SEC's enforcement division created a specialized foreign corrupt practices unit that assists in the enforcement of the FCPA. For example, just in 2019, the SEC has enforced actions against Mobile TeleSystems PJSC, a Russian-based telecommunications provider; Fresenius Medical Care AG & Co., a German provider; and Cognizant, a New Jersey-based company. All three incurred monetary fines ranging from US$25 million to US$850 million.

Other companies and countries have also been caught in the FCPA web. In 2008, Siemens AG pled guilty to violating the FCPA, reaching settlements with both the DOJ and the SEC. Siemens paid a criminal fine of US$450 million in the DOJ settlement and US$350 million in the disgorgement of profits under its agreement with the SEC. Ten years later, the DOJ and the SEC assessed penalties and disgorgement of US$1.78 billion against Brazil's state energy company, Petrobras, to resolve FCPA violations involving bribes to both politicians and political parties in Brazil. Petrobras entered into a non-prosecution agreement (NPA) with the DOJ that included a criminal penalty of US$853.2 million. The SEC settled the case through an internal administrative order and did not go to court—the SEC ordered Petrobras to disgorge US$933.5 million.

Corruption and Bribery, continued

Although the 2008 Siemens case remains in the top ten of FCPA enforcement actions based on penalties and disgorgement assessed in U.S. enforcement documents, most of the other cases on that list have occurred within the last five years. The top ten FCPA enforcement actions are: Petrobras (Brazil) for US$1.78 billion in 2018; Telia Company AB (Sweden) for US$965 million in 2017; MTS (Russia) for US$850 million in 2019; Siemens (Germany) for US$800 million in 2008; VimpelCom (Holland) for US$795 million in 2016; Alstom (France) for US$772 million in 2014; Societe Generale SA (France) for US$585 million in 2018; KBR/Halliburton (United States) for US$579 million in 2009; Teva Pharmaceutical (Israel) for US$519 million in 2016; and Keppel Offshore & Marine Ltd. (Singapore) for US$422 million in 2017.

Aside from prosecuting the guilty for engaging in a practice that creates an unfair playing field for businesses around the world, the true goal of the FCPA is to deter companies in general from engaging in this illegal business activity. The FCPA was created not only to end corruption and bribery in international business, but to change the way the world conducts international business. When President Jimmy Carter signed the FCPA, he stated:

> During my campaign for the Presidency, I repeatedly stressed the need for tough legislation to prohibit corporate bribery. S. 305 provides that necessary sanction. I share Congress's belief that bribery is ethically repugnant and competitively unnecessary. Corrupt practices between corporations and public officials overseas undermine the integrity and stability of governments and harm our relations with other countries. Recent revelations of widespread overseas bribery have eroded public confidence in our basic institutions.

The ideals of the FCPA still hold water, but the question is whether these monetary penalties are sufficient to reduce the corruption and bribery occurring in the international business community. As a world power must consider how its actions impact the rest of the world, so the United States must consider how other countries respond to the increasingly common FCPA monetary settlements rather than criminal prosecutions. Indeed, when looking at the statistics now versus ten years ago, bribery and corruption in international business transactions seem to be just as prominent now as they were then. The only difference is that monetary penalties are becoming larger. From 2008 until now, FCPA penalties have doubled, yet companies around the world are still engaging in illegal business activity.

In a recent case, German medical products company Fresenius Medical Care AG & Co. (Fresenius) entered into an NPA with the DOJ agreeing to pay a total criminal penalty of US$84.7 million. Additionally, Fresenius "agreed to continue to cooperate with the Department's investigation, enhance its compliance program, implement rigorous internal controls and retain an independent corporate compliance monitor for at least two years." Furthermore, Fresenius agreed it "will pay $147 million in disgorgement and prejudgment interest to the SEC, which the Department credited in its resolution, bringing the total amount paid by Fresenius to over $231 million." In return for paying the monetary penalties, however, Fresenius will not face any criminal charges or civil actions.

Such penalties fail to deter future illegal conduct in international business—companies conducting international business all over the world view these penalties as little more than a slap on the wrist or a simple cost of doing business, while behind closed doors they do what they believe is necessary for the success of their business. In 2011, President Barack Obama said:

> Too often, we've seen Wall Street firms violating major antifraud laws because the penalties are too weak and there's no price for being a repeat offender. No more. I'll be calling for legislation that makes those penalties count so that firms don't see punishment for breaking the law as just the price of doing business.

President Obama called for more than just monetary penalties—he sought real punishments for FCPA violations to deter companies from engaging in illegal business practices, not merely emptying the pocketbooks of these companies. Although the FCPA authorizes jail time when dealing with these issues, corporate cases rarely even get to court when prosecutors allow these

companies to enter into NPAs with agreed monetary penalties. Additionally, many federal judges seem unwilling to impose prison terms on these "white collar" offenders who present little threat of future violations.

Monetary penalties remain the prominent remedy when dealing with FCPA violations. Although the Trump Administration stated that it will continue to enforce the FCPA and other anticorruption laws, it is important to consider whether monetary penalties alone are sufficient deterrence for a violation that is very difficult to detect. Although some companies in the United States may be deterred by significant monetary penalties, companies around the world continue to engage in illegal international business transactions that ultimately put U.S. businesses at a disadvantage. The United States must consider whether increased criminal prosecution would truly deter illegality when it comes to such international business transactions.

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contract once they are ready to engage a job candidate in a different country. Legal counsel must consider such areas as local employment requirements, taxes, import/exports, intellectual property, contracts, real estate, data protection, and dispute resolution.

Understanding Local Laws and Customs

Apart from the legal considerations of which a business must be aware, the cultural norms of the target country are also a significant factor in the business's international expansion strategy. This is because not adhering to a country's cultural norms could lead to failure in the international expansion. For example, in Saudi Arabia and in several parts of the Middle East, a woman is not permitted to be in public with a man who is not her husband.[11] This is true even if the woman is conducting business. Except under limited circumstances, women are not allowed to mix freely with members of the opposite sex.[12] Women conducting business in this region must plan to adhere to strict requirements such as these, or risk severe penalties.

In short, a U.S. employer, large or small, that simply duplicates its U.S. processes without accounting for local laws and customs can face difficulties and costly mistakes when it expands abroad. A company can overcome these challenges by working with local experts. In addition, the company should work with experts on protecting the company's intellectual property in a foreign country. It is important for a company to register the trademarks, patents, and copyrights for its business prior to entering the target market when possible.[13] If a company is operating under a U.S. intellectual property filing, the business will not automatically be protected in a foreign market.[14] Moreover, the company should review the intellectual property restrictions for each country in which it plans to operate.[15]

Internal Business Procedures

We now turn our attention to company operations when entering a new market. To be successful in any international business expansion, a company must ensure the internal procedures of the business will be a cultural fit in the new market. It need not be a perfect fit; rather, it can be complementary.[16] Identifying the strengths and weaknesses of a business's internal processes will help the business improve its performance in the new market.[17]

Conducting Market Research

Before entering a new international market, a business must conduct market research on potential target countries to increase the chances of success for the endeavor.[18] For example, if a coffee business is performing exceptionally well in the United States, Latin America, and France, that does not necessarily mean the coffee business will succeed in China or in Greece. There are many reasons why a business will do well in one market and not another. Even though success in a new market can never be guaranteed, understanding the market motivations and the target customer when entering a region is key.[19]

Cultural Considerations

When expanding abroad, cultural differences must also be considered.[20] Cultural factors include language, limitations on business practices, gender roles, dietary restrictions, and religious and business attributes that can be considered offensive or rude when engaging local customers.[21] If a business's practices or product does not fit within the culture of the target country, it likely will not succeed. For example, Fanta soda is orange flavored in the U.S. market, but Coca-Cola, which produces Fanta, has adapted the flavor for certain markets to take cultural taste preferences into account.[22] Fanta is peach flavored in Botswana, tastes of passion fruit in France, and is flavored to taste like flowers in Japan.[23] Speaking to local experts on the culture and market of an area provides a tremendous advantage when a business is deciding whether or not to expand its operations into another country. Advising clients of these considerations is as much a part of structuring a deal as the legal and financial considerations. This is because of the direct impact cultural context has on a project.

In some countries, women are not allowed to work or are required to dress a certain way. These cultural considerations should be entered into the equation of how a business in the United States hires employees abroad and how it selects the person to lead that expansion. For example, if a business expands into a country where men refuse to speak to a woman in leadership, the business must structure the deal with this in mind. Dietary restrictions should also be considered. If a restaurant is expanding into a new country, its menu may need to be altered before opening because some countries do not eat certain types of meat. For example, in India it is illegal to kill a cow, per

the Indian Constitution.[24] This is very important for a restaurant to know if beef is a part of its standard menu. The restaurant will not want to include on its menu a sacred animal whose killing is illegal. There are many different types of intricate cultural, ethical, and legal considerations that can impact a business when it is trying to expand globally. Due diligence in these areas is key.

Financing Business Expansion

As with any global growth plan, expanding internationally requires financing. Financing for a business should be secured before any expansion begins. Also, businesses should be wary of any potential hidden fees, unforeseen costs, and banking regulations when opening a new business.[25] Thankfully there are multiple resources for businesses trying to secure financing for an international expansion. These resources include but are not limited to traditional loans from financial institutions, crowdfunding, working with investors, the Overseas Private Investment Corporation (OPIC), and the Small Business Administration (SBA).[26]

Considerations for Lawyers

Building a Team

Entering international markets requires a variety of skillsets, and legal counsel should focus on his or her own strengths and add experts to the team in other necessary areas.[27] Lawyers may seek to engage linguistic experts if there is a different language used in the target country. This is prudent for two reasons: (1) a linguistic expert can translate the language; and (2) this expert can identify how terms or phrases common in the United States hold different meanings in the target country and vice versa.[28] We can learn from the cautionary tale of the Chevrolet Nova. Chevrolet had great success selling its Nova vehicles in various countries, yet that success came to a halt in Spanish-speaking countries. This was because Nova translates to *no va* in Spanish, which means "doesn't go."[29] Customers in Spanish-speaking countries did not want to buy a car called Doesn't Go.[30] Employing a linguistic expert to understand the translation of the name in each market would have avoided this costly mistake.

In addition, lawyers should always seek the help of local counsel in the country a business owner is planning to enter.[31] Even if U.S. legal counsel retains a focus on a particular region, local counsel will be the most up-to-date on changes to the law. This also helps minimize any concerns of misrepresentation or even malpractice.[32] Further, attorneys should also make sure that local and U.S. accountants familiar with cross-border deals are engaged.[33]

International Agreements

Legal counsel should be well versed on the treaties implicated when researching a foreign market.[34] Counsel should confirm if a foreign country has signed any tax treaties with the United States.[35] Doing business in a country that has a tax treaty with the United States prevents double taxation from occurring.[36] Double taxation in the international context refers to a taxpayer being taxed twice due to the application of the tax laws of both the domestic and the foreign country.[37] The United States alone has tax treaties with more than fifty nations, with varying provisions, so legal counsel knowing which treaties apply before going abroad is key to reducing the tax liability of clients.[38]

Next, it should be determined if the foreign country is a signatory on any international trade agreements with the United States.[39] Business owners can send goods, hire employees, and protect intellectual property with greater ease when dealing with a country that has entered into a trade agreement with the United States.[40] Similar to whether the foreign country is a signatory on any international trade agreements, an additional consideration is whether that foreign country has adopted the Convention on Contracts for the International Sale of Goods (CISG), in full or part.[41] The CISG is ratified by eighty-nine parties across the globe, with the notable exceptions of the United Kingdom, India, and South Africa.[42] It is important to note that the CISG applies to contracts for the sale of goods only, and not services.[43]

The corresponding U.S. legislation to the CISG is seen in the Uniform Commercial Code (UCC). Parties to an international contract for the sale of goods can determine which one will apply. There are noteworthy differences between the UCC and the CISG. Unlike the UCC, the CISG does not include a statute of frauds, which requires that certain contracts be in writing, signed by the party to be charged, and demonstrate sufficient evidence.[44] The CISG also does not contain a parol evidence rule that determines the type of evidence that can be introduced in a dispute.[45] The CISG does closely follow a mirror image rule, similar to the UCC's, which allows an acceptance to be adequate despite altering the terms of the offer.[46]

While there are many additional distinctions between the UCC and the CISG of which lawyers should be aware, perhaps the most important aspect of the CISG is that a contract may be written to expressly state that the CISG will not apply in that transaction.[47] It is key for lawyers to know this because there are times when the CISG can take precedence over the UCC.[48] A lawyer that fails to keep the CISG in mind when helping to write a contract for the sale of goods may face an undesirable outcome for clients.

Foreign Direct Investment – Joint Ventures, Licensing, and New Joint Venture Companies

There may be times when investing in an existing company in the target market is more effective to minimize potential risks. One solution is to embark on an international joint venture.[49] If a market is particularly volatile or has a high barrier to entry, a company can utilize the goodwill of a local company as a means of kick-starting growth.[50] For example, Sony partnered with Shanghai Oriental Pearl to sell PlayStation consoles and games in China.[51] Sony and Shanghai Oriental Pearl were collaborating in response to the suspension of the ban on game consoles within Shanghai's free trade zone.[52] Sony utilized the connections and goodwill of Shanghai Oriental Pearl, a local company, to help infiltrate a market that previously had very restrictive barriers.

Second, a company can license its intellectual property to a partner in the foreign market as part of a joint venture.[53] Even if this is not the largest revenue stream for the company, this strategy allows the company to diversify its revenues and invest less of its own capital. It also capitalizes on the goodwill of a joint venture partner in the target market that can sell the goods of the company in the target market.[54] Depending on how the licensing arrangement is structured, once the joint venture expires, a company can expand into the foreign market more easily by building on the goodwill and brand recognition generated by working with its joint venture partner.[55]

Lastly, a company can utilize its respective resources, such as a manufacturing plant, ability to offer human capital, or through

its services, to work with a partner for an excellent outcome.[56] For example, Mazda and Toyota established a joint-venture company called Mazda Toyota Manufacturing, U.S.A., Inc.[57] Mazda and Toyota are both Japanese multinational auto manufacturers, and their new joint-venture company plant will be located in Huntsville, Alabama.[58] The companies believe by combining the best of their technologies and corporate cultures, they will not only produce high-quality cars, but also create a plant in which employees will be proud to work. Mazda and Toyota believe this will contribute to the further development of the local economy and the automotive industry.[59] In short, partners for either type of joint venture must be selected carefully and with appropriate due diligence.[60]

Conclusion

Expanding a business globally requires an immense amount of research, preparation, strategy, and financing. As discussed, companies must identify the target market need, the financing required, any legal restrictions, how the business will perform in the market, and cultural considerations. While the United States is home to many successful companies, a company can reduce its dependence on one market by expanding globally. In the event of an economic decline, a company can improve its overall growth potential by diversifying into additional markets. Legal counsel is imperative for completing due diligence, building a capable team, and identifying the most effective structure for the expansion. Once more, we see how alone we can do so little, yet together we can do so much.

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The RFE Dilemma, from page 15

The Trump Administration's "Buy American – Hire American" initiative can result in burdensome reporting for employers seeking H1-B or L-1 visas for employees.

guide employers through the correct mathematical calculation to arrive at the appropriate wage level (Levels 1-4) for a position.[12] More specifically, DOL states:

> All prevailing wage determinations shall start with an entry level wage and progress to a wage that is commensurate with that of a qualified, experienced, or fully competent worker only after considering the experience, education, and skill requirements of an employer's job description (opportunity).[13]

Practitioners should utilize the following strategies in responding to USCIS's RFEs with regard to Level 1 wages. When USCIS claims that a Level 1 wage is inappropriate given the complexity of the job duties, practitioners should direct the USCIS adjudicator to the statutory language and argue that DOL's analysis of the relevant factors for determining a prevailing wage and the corresponding wage level are "the nature of the job offer, the area of intended employment, and jobs duties for workers that are similarly employed."[14] There is no analysis in the statute with regard to the complexity of the job duties for the position offered, only with the requirements for the position (i.e., experience, education, and skills) and the geographical area. Thus, wage levels are not an appropriate indicator of the complexity of the job duties to determine whether the position qualifies as a specialty occupation. Furthermore, DOL's four-tier wage system was intended to determine wage structures, not to determine whether a position qualifies as a specialty occupation for H-1B purposes.

Practitioners should also argue that USCIS adjudicators cannot blindly rely on wage levels to determine if a profession qualifies as a specialty occupation. For some

positions, such as doctors, lawyers, engineers, and other professional occupations, underlying degrees (bachelor's, master's, etc.) and many years of study in the specialty are the minimum requirements for entry into these professions. For example, an attorney who recently graduated from law school and passed the Bar exam, but without much professional experience, most likely would be paid a Level 1 entry-level wage. That fact is irrelevant in determining whether an attorney position would qualify as a specialty occupation. On the other hand, a plumber could be paid a Level 4 wage, the highest wage possible, yet no one would argue that a plumber is a specialty occupation requiring, at a minimum, a bachelor's degree in a specific field. Thus, practitioners should argue in their responses that some occupations are inherently specialty occupations, regardless of wage levels.

As practitioners, we must question the implicit argument advanced by USCIS in these RFE challenges—that specialty occupations cannot be entry level—as according to USCIS, entry-level doctors and engineers, for instance, who may not have work experience but have spent years learning technical skills, do not qualify for H-1B purposes. It is our duty to educate USCIS adjudicators that reliance on the wage level system for H-1B purposes is erroneous in determining whether a profession with a bachelor's degree in a specific field is a specialty occupation.

Specialty Occupation

Another common issue raised by USCIS adjudicators in H-1B RFEs is whether a position qualifies as a specialty occupation for H-1B purposes. USCIS adjudicators will normally state in the RFE that the position offered does not require a bachelor's degree in a *specific* field, but rather multiple disciplines can qualify for the position. They argue that if multiple disciplines can qualify, then the position is not a specialty occupation.

In this setting, practitioners need to follow the regulations and prove that one or more of the following holds true in order for the position to qualify as a specialty occupation:

1. A bachelor's degree or higher is normally required for the position;
2. The degree requirement is normal to the employer for the position;
3. A degree requirement is normal to the industry, or the position is so complex or unique that the duties could be performed only by a degree holder; or
4. The nature of the duties for the particular position is so highly specialized and complex that the knowledge required is usually associated with the attainment of a bachelor's or higher degree.[15]

Practitioners can establish one or more of these prongs by submitting job postings or advertisements for the position, as well as copies of the degrees of other individuals performing the job with the employer in similar positions. Practitioners may also submit expert opinions from professionals in the relevant field or industry-related professional associations attesting that a degree is a normal requirement for the position or that the duties are so complex and specialized that a bachelor's degree in a specific field is required. The expert should cite to research conducted in his or her opinion that was the basis for his or her conclusions. Achieving favorable results for our clients is still a viable option with the proper preparation and legal arguments.

Foreign Degrees

When a beneficiary does not possess a bachelor's degree from an accredited university in the United States, USCIS will issue an RFE requesting documentation establishing that the beneficiary's foreign degree is equivalent to a bachelor's degree from the United States in his or her field. Practitioners can avoid this issue by preemptively submitting a credentials evaluation of the beneficiary's foreign degree with the initial submission.

Maintenance of Status in Extension Petitions

USCIS requires that an H-1B beneficiary submit evidence that he or she has maintained status as an employee working in a specialty occupation if he or she wishes to receive an extension for an H-1B or to change his or her immigration status. Practitioners often forget to include W-2 wage statements and recent pay statements when submitting H-1B extension requests to evidence that the foreign worker has been paid the salary indicated in the prior petition and labor condition application. This evidence should be included in the initial submission to avoid this issue.

Common Issues in USCIS's Requests for Evidence in the L-1 Context

Ownership and Control of U.S. Entity

To transfer an employee from a foreign entity to a U.S. entity as an L-1 nonimmigrant, a qualifying relationship must exist between the two entities. Qualifying relationships may occur between branches of the same employer, or amongst parent companies, affiliates, or subsidiaries.[16] To establish this relationship, practitioners must provide evidence of ownership and control by one of these parties over the other.[17] For the purposes of L-1 classification, ownership means the legal possession of an organization, while control means the legal or actual ability to exercise authority or influence over an organization.[18]

A common error that practitioners make in establishing ownership and control in the L-1 context is to simply submit copies of the share certificates for the U.S. and foreign companies. As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity.[19] The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control.[20] Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity.[21]

As a general strategy, to establish the affiliate/subsidiary relationship, practitioners should submit complete copies of the corporate records book

of the U.S. company, which contains the articles of incorporation/organization, bylaws, operating agreement, unanimous written consent of members, meeting minutes, stock certificate ledger, stock certificates, stock transfer documents, and other relevant documentation depending on whether the company is incorporated or a limited liability company. Practitioners should also submit with the initial L-1 filing evidence of the foreign company's capital contribution to the establishment of the U.S. entity, as this is routinely requested by USCIS to establish control over the U.S. entity. This evidence typically consists of wire transfer receipts, bank statements, cancelled checks, or deposit receipts of the transfer of funds from the foreign entity to the U.S. entity.

Generality of Job Duties to Establish Executive or Managerial Capacity

Language now prevalent in many USCIS RFEs is that the submitted description of the beneficiary's foreign or U.S. position describes only generalized duties and responsibilities, making it impossible for USCIS to determine if the beneficiary's job duties meet the statutory definition of "executive" or "managerial" capacity. This request is common despite practitioners detailing the beneficiary's specific duties by percentage of time spent on each. To avoid this issue, practitioners may wish to further break down the beneficiary's duties on a daily basis by hour (if possible), as well as include expert opinions from renowned professionals or professors in the field who can attest that the job description provided is sufficiently detailed and meets the pertinent statutory definition to qualify for L-1 purposes. The expert opinion, obtainable from credentials evaluations agencies, should include language that the expert either visited the beneficiary's worksite or spoke to someone at the beneficiary's place of business and is knowledgeable about the type of industry involved, if possible, to avoid USCIS not giving the opinion any deferential value.[22] Expert opinions are valuable tools that practitioners can use to bolster their cases. For example, in a recent case, the submission of an expert opinion was successful in arguing that a beneficiary's negotiation of contracts with clients and legal representation as president of the company were evidence of executive capacity.

Size of the U.S. Entity

USCIS commonly issues RFEs when the U.S. entity consists of fewer than ten employees, requiring an explanation of how the beneficiary will exercise managerial or executive capacity given the company's staffing levels. Practitioners should argue that the size of the company at the time of filing should not be used as a detrimental factor to deny the instant L-1 petition. The L-1 regulations were not intended to limit managers or executives to persons who supervise a large number of employees or a large enterprise. Section 101(a)(44)(C) of the Immigration and Nationality Act specifically provides:

> If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Attorney General shall take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function. An individual shall not be considered to be acting in a managerial or executive capacity (as previously defined) merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.[23]

Practitioners should develop legal arguments, depending on the industry involved and if accurate to the particular case, that the U.S. business, in general, hires many independent contractors as part of its normal hiring practices and that the beneficiary supervises these contractors. Supervision includes supervision of independent contractors as well as employees.[24] This is common in the construction, trucking, and other industries. Practitioners should also stress the amount of the foreign company's investment in the U.S. entity, if substantial. Expert opinion letters are also persuasive evidence that the beneficiary will exercise managerial capacity over the company's employees and independent contractors.

Financial Ability to Remunerate the Beneficiary in Extension Petitions

USCIS is also now commonly questioning the U.S. and/or foreign company's financial ability to remunerate the beneficiary at the salary listed on the I-129 petition

for extension. Practitioners should be cognizant that the financial documentation provided for the U.S. entity establishes the company's financial ability. The initial submission of the U.S. entity's tax returns, wage statements (if applicable), and bank statements should clearly evidence the company's ability to pay the executive's or manager's salary. The net assets analysis of Schedule L on the company's corporate tax return, which is acceptable evidence of a company's financial ability for I-140 purposes, also applies in the L-1 context. Practitioners should calculate the net assets (Lines 1-6 of Schedule L minus Lines 16-18) for the examiners in their cover letters, if necessary, to address this issue at the outset.[25] If applicable, practitioners can also argue that the foreign company is already paying the beneficiary's salary and submit the requisite evidence of its assets.[26]

Conclusion

Since the issuance of President Trump's "Buy American, Hire American" Executive Order, the submission of H-1B and L-1 petitions has become significantly more difficult and stringent. Prior USCIS policy memoranda have been rescinded, and USCIS is issuing voluminous requests for evidence questioning the beneficiary's eligibility for benefits at unprecedented rates. With knowledge of the issues commonly questioned by USCIS and the appropriate legal strategies, practitioners can still be successful in their representation of H-1B and L-1 nonimmigrant cases.

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compatible with the socialist values of equity and social justice."[29]

The New Constitution states that the private sector shall be limited to a "complementary role" in the Cuban economy. Additionally, only two months before the enactment of the New Constitution, in December 2018, a number of new regulations for the private sector entered into force that implement such complementary role by means of restricting its activity in the local market.[30]

An important note about the role and powers of the Communist Party in Cuban politics is that, for many, the Communist Party is above the constitution. In other words, the Cuban constitution cannot restrict the powers of the Communist Party.

Indeed, when commenting on the referendum for the New Constitution, the chair of the Committee for Constitutional Matters of the National Assembly, José Luis Toledo (former dean of the Law School of the University of Havana and, before that, vice attorney general), stated that "there is a force that is above the State, which is leader and superior, that is the [Communist] Party. Hence, the Constitution cannot chart the [Communist] Party's guidelines []."[31]

The preceding analysis illustrates two conclusions: the Communist Party is not only a political party, but part of the Cuban government; and the Communist Party must previously sanction any substantial change in the government's structure, legislation, and policy.

Civil Rights

Private Property

The New Constitution recognizes the right to private property—this is a big difference from the Constitution of 1976.

The constitutional provision classifies property into seven categories:

1. **Socialist property:** the State acts in representation of and benefit for the people of Cuba, which is the rightful owner of this property. An example would be any assets of or equity in state-owned companies.
2. **Property of cooperatives:** a cooperative is the only lawful business association in Cuba for private entrepreneurs. An example would be the trucks or buses owned by a transportation cooperative.
3. **Property of political and social organizations:** property owned by entities such as unions or social organizations, like the Cuban Women Federation (*FMC* by its Spanish initials) and the Cuban National Center for Sex Education (CENESEX), which is destined to the fulfillment of their purposes.
4. **Private property:** property owned by Cuban nationals or foreign entities with commercial or business purposes.
5. **Mixed property:** formed by the combination of two or more forms of property.
6. **Property of institutions and associations:** property owned by associations in Cuba with nonprofit purposes.
7. **Personal property:** property owned for the purpose of satisfying the material and spiritual needs of its owner and the owner's family. Examples include an owner's homestead, car for personal use, clothes, jewelry, and any other good with no commercial use or purpose.[32]

Property in Cuba will now be classified depending on its owner and purpose or ultimate use. For example, a car or a house could be classified under any of the seven categories. A house could be used as a personal abode, bed & breakfast inn, or office space for nonprofit associations or political and social organizations.

The introduction of private property should lead to substantial changes in civil legislation adopting the new forms of property.

The constitutional amendment opens the door to funding opportunities for the Cuban market, especially the private sector. Using assets as collateral is probably the easiest way to secure funding from a bank or lender. While civil laws in Cuba allow the creation of security interest in the property, the seizure of collateral in the event of default is limited.[33]

In the case of personal property, the rationale behind the creation of these rules might come from the fact that

personal property (one of the few types of property permissible for Cuban nationals before the New Constitution) has the sole purpose of satisfying the personal needs of the owner and the owner's family.[34] Thus, seizing such goods as collateral would affect the household. In this same vein, agricultural land cannot be seized,[35] despite the fact that its purpose is primarily commercial.

As an example, consider the case of a Cuban entrepreneur who decides to open a restaurant in Havana and, for that purpose, decides to use his only house (i.e., his homestead). The entrepreneur needs funds to convert the house into a restaurant, including to buy all the necessary kitchen appliances and furniture, so he applies for a loan with a lender and becomes a borrower. Under the current law, the lender can provide the funds for the venture (licenses may be required under local law),[36] and the lender will most likely formalize the loan with a promissory note, by means of which the entrepreneur recognizes the debt and grants an enforceable executive title to the lender. Additionally, a security interest in the house is also likely to be required (i.e., a mortgage).

If a promissory note is issued to formalize a loan and a security interest over the house is created, the promissory note will be considered lawful and enforceable, but the security interest will probably be considered void and null because the real estate will be deemed as homestead and, therefore, cannot be seized.

The new classification of private property may lead to corollary legislation addressing these important issues.

LGBT Rights

The recognition of same-sex marriage was included in the first draft of the New Constitution, but was removed before its passage.

The same-sex marriage issue spurred significant discussion among the Cuban people and the international community. For the first time, Cuba was to consider legalizing LGBT rights, particularly the right of same-sex marriage. This provision had the potential to redeem many actions of the Cuban government against members of the LGBT community, who suffered significant political and social harassment, and were even sent to forced-labor fields—known as Military Units to Aid Production or UMAP's—under the rationale that hard work would "cure" their sexual orientation or gender identity. Terribly, homosexuality was understood as a "disease."[37]

The first draft of the New Constitution defined marriage as the union "between two people," instead of "between a man and a woman," as in the Constitution of 1976. Unfortunately, the New Constitution defines marriage as the consensual union of "spouses" (*cónyuges*).

This step back maintains the right of marriage exclusively for persons of different sexes. The term *spouses* allows the National Assembly to amend the Family Act, defining the term *spouse* in an inclusive way for all Cubans, of the same or a different sex, but even assuming this change to the Family Act will come, the right to same-sex marriage will not be a constitutional right.

The "change of heart" reflected in the New Constitution's final stance against same-sex marriage may have been due to the great opposition to the policy demonstrated by Christian groups—mostly evangelical—which deployed a campaign against the constitutional provision.[38] Also, the Cuban people had the opportunity to share and discuss their opinions regarding all provisions in the draft, including the same-sex-marriage article.

Nevertheless, in November 2018, the Center for Population and Development Studies and the Center for Women's Studies released the National Survey on Gender Equality, which showed substantial support for LGBT rights. The joint report shows that 77% of Cubans between the ages of fifteen and seventy-four believe that gays and lesbians should have the same rights as heterosexuals (80.5% of women and 73.3% of men).[39]

Yet, only 49.1% of the population agrees with same-sex marriage (52.7% of women and 45.5% of men). The number decreased even more concerning a same-sex couple adopting children, with 31% in favor in the case

of male couples (29.1% of men and 32.8% of women) and 34.6% in favor in the case of female couples (32.9% of men and 36.2% of women).[40]

Data Protection and Access to Personal Information

The New Constitution recognizes the right of an individual to access personal data in any public records, files, or other databases. The constitutional provision also recognizes the right to request the nondisclosure of such personal information. The owner of the information also has the right to request a rectification, modification, update, or cancellation of such personal information.[41]

The development of the right to access personal information and protection of personal data will depend on future legislation.[42]

Due Process

The Constitution of 1976 had only a single provision granting and limiting, at the same time, the right to legal counsel, and only after the defendant was indicted. This restriction to access to legal representation at the early stages of a legal proceeding was amended by the New Constitution, which states that every person will have the right to legal counsel from the beginning of a legal proceeding.[43] While this provision applies only to criminal cases, a separate provision recognizes the right to legal counsel in any other legal process of which the person might be part.[44]

Other important due-process rights were included in the New Constitution, such as:

- The presumption of innocence;
- The right to equal treatment before courts of law and all other bodies administering justice;
- The right to provide evidence and to request the exclusion of evidence obtained in violation of the law;
- The right to be tried by a competent, independent, and impartial tribunal;
- The right not to be deprived of rights, except by reasoned resolution of a competent authority or final judgment of a court;
- The right to appeal and challenge a judicial or administrative ruling through effective legal remedies;
- The right to a process without delay;
- The right to obtain compensation for material and moral damages suffered;
- The right not to be deprived of freedom, except by a competent authority, and for a legally established period of time;

- The right to respect for someone's physical, mental, and moral integrity, and not to be harassed or coerced with the purpose of obtaining a statement under duress;
- The right not to be compelled to declare against oneself and one's spouse, domestic partner, or relatives, up to the fourth degree of consanguinity and second degree of affinity;
- The right to be informed about any indictment against an individual;
- The right to be judged by a court of law and under existing laws; and
- The right to communicate with relatives or close associates immediately after being detained. In the case of foreign detainees, they have the right of consular notification.[45]

Additionally, anyone who is illegally deprived of liberty has the right, by oneself or by a third party, to request a writ of habeas corpus.[46]

A weakness remains in the New Constitution: the role of the attorney general as controller of the criminal investigation and process. This provision, inherited from the Constitution of 1976, grants the Attorney General's Office the role and authority of judge from the beginning of the process up to the indictment date (the pre-court phase).

During the pre-court phase (before indictment), there is no court intervention in the criminal process. All documentation of and from the defendant or defendant's counsel must be presented to the investigator of the case (i.e., police or detective), and invocation of evidence must be requested to said investigator. Denial by the investigator of any petition from the defendant, such as a request for an expert witness (which the defendant cannot enter into the record if not accepted by the investigator), entitles the defendant to challenge such decision by filing a claim with the prosecutor's office, which has the role of both judge and plaintiff.[47]

Due to the inexistence of control over the legal proceedings by a court of law during the pre-court phase, and the constitutional grant of control to the prosecutor over the pre-court phase, a defendant is very limited in his or her defense since every single action must be filtered through the prosecutor's office. Even the admissibility of evidence to be presented is subject to the prosecutor's ultimate approval.[48]

The process may be even more unbalanced against the defendant. Under applicable law, the prosecutor could block the defendant's right to produce any evidence during the pre-court phase. Defendants are only entitled to request the admissibility of evidence after the prosecutor or the court has granted parole, bail bond, or any other action to secure the defendant's detention.[49] Considering that the court will have no access to the case until after the indictment, and that the prosecutor has the authority to grant parole or bail bond, defendants who are denied parole or a bail bond may not have the opportunity to present evidence.

These provisions place defendants in an anomalous position—the procedural result is that defendants who are not granted bail or parole will be deprived of the right to present evidence on their own behalf.

A modern constitution in 2019 is expected to amend these important issues. The simple statement in the New Constitution that "every person enjoys due process"[50] is not a magic formula that cures due process per se. Due process is more than a constitutional principle; it must be seen as fair treatment through the normal judicial system, which is only achieved in a civil law tradition country, such as Cuba, through complementary legislation and regulation providing a strong set of rights and guarantees to defendants so they receive fair treatment.

Freedom of Speech and Press

Freedom of speech and the press is still limited under the New Constitution. The New Constitution used a formula that recognizes freedom of speech, but limits it at the same time. Freedom of speech must not violate existing laws in Cuba.[51]

Along with the New Constitution, Decree 349 was enacted. The statute is an example of how the freedom

of speech is restricted by complementary statutes and regulations, which, as seen above, is totally permissible under the New Constitution.

Decree 349 sets forth penalties for violations and offenses against regulations regarding artistic manifestations. The statute prohibits independent artists—those without state permit or license—from displaying their art in public or private spaces. This restriction includes the fact that Cuban artists cannot be retained to perform services at business places, such as bars or restaurants, without the required permits.[52] These permits vary depending on the kind of art displayed, whether theater, painting, or music.

Artists must be admitted to state-owned representation agencies, which are the only entities allowed to sign a contract for artistic services with a client seeking to use the services of such artists (e.g., musicians for a wedding). This system is widely used by performers, such as musicians and dancers. Visual artists, such as sculptors and painters, must be registered in the National Registry of the Creator of Plastic and Applied Arts—a registry created in 1988 for visual artists. Entry into this registry is not guaranteed. The applicant must pass a challenging application process in which the outcome could easily be a denial.[53]

Other limitations are aimed directly at the content of the artwork, and apply to censorship. Decree 349 penalizes authors of works of art with content related to:

- national symbols, such as the flag;
- pornography;
- violence;
- sex and obscene language;
- discrimination due to skin color, gender, sexual orientation, disability, and any other harm to human dignity;
- affecting the normal development of childhood and adolescence; and
- any other expression that violates legal provisions regulating the normal development of the Cuban society in cultural matters.[54]

All the violations above are deemed "very serious"[55] and can be punishable with a fine and confiscation of property.[56] Additional penalties, such as cancellation of the business license, can be imposed on private entrepreneurs (*trabajadores por cuenta propia*) who retain the services of artists without the required permits or in violation of the conducts above.[57]

The requirement of membership for artists into state-owned agencies and the censorship of the content of their artwork represent a flagrant violation to freedom of speech. Notwithstanding the New Constitution's formula of delegating to complementary laws the standard of protection of civil rights, such as the freedom of speech, it leaves no constitutional defense to the Cuban people. It also opens the door for statutory violations of freedom of speech.

Freedom of the press is highly restricted as well. While the press is recognized, it can only be official, that is, working for the government, and all media must be owned and controlled by the government. Independent press is banned in Cuba.[58]

Human Rights and International Standards

The draft constitution circulated for discussion before the referendum on the New Constitution included an important provision on human rights that unfortunately was removed. Civil rights recognized in the New Constitution were to be interpreted under international human rights treaties ratified by Cuba.[59] This provision would have represented a higher standard for civil-rights protection.

Foreign Investment and the New Constitution

The New Constitution made no change that could lead to increased opportunities for foreign investors. This matter has been developed by complementary legislation, such as Law 118-2014 of Foreign Investment, Law Decree 313-2013 of Mariel Special Development Zone, and numerous secondary resolutions enacted by several ministers supporting and implementing foreign investment in Cuba. The New Constitution was not intended to make any change in this policy.

Defense of the Constitution

There is no institutional structure for the defense of the New Constitution in Cuba. The lack of an independent judicial body with authority to decide constitutional violations is the weakest point for the defense of Cuba's constitution.

Cuba does not have a constitutional court like Spain, or a supreme court with constitutional authority like the United States. Either alternative constitutes an independent body invested as the supreme interpreter of the constitution with the power to determine the constitutionality of acts and laws made by any public body, whether it is central, regional, or local.[60]

No words synthesize better the importance of judicial control over the constitution than those of James Madison: ". . . constitutional interpretation must be left to the reasoned judgment of independent judges, rather than to the tumult and conflict of the political process."[61]

The New Constitution in Article 99 states that any person has the right to seek indemnification and restitution of rights before Cuban courts if the State, its public officials or employees, or any private entity or individual violates any right recognized in the constitution by the means of any action or omission depriving or affecting such constitutional rights.[62]

Article 99 poses new questions and issues, such as which is the competent court for such constitutional matters? Courts in Cuba are separated by jurisdictional matters, such as civil, criminal, military, labor, and administrative, but there is no constitutional jurisdiction. Thus, if a person seeks to challenge a statute recently passed by the National Assembly or a resolution enacted by a minister with constitutional bases, alleging that such actions violate a right recognized in the constitution, there is no actual court where the claimant could file a motion. The result is that the constitutional mandate in Article 99 is unenforceable for lack of a court with constitutional jurisdiction.

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Cuba's New Constitution, continued

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