State Bar of Texas International Law Section

INTERNATIONAL NEWSLETTER

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The International Law Section continues its focus on Mexican legal issues by including four articles that address various topics related to Mexico, two of which are written by lawyers from Mexico.

INTERNATIONAL LAW SECTION
THE STATE BAR OF TEXAS

IN THIS ISSUE

DEPARTMENTS

ILS LEADERSHIP

ARTICLES

TOM WILSON
ILS Chair

MESSAGE FROM THE CHAIR

This International Newsletter is part of the continued effort by the ILS to bring important information to Texas lawyers on international legal issues that may impact their practice. This is consistent with the programming that the ILS has had so far this year and will have in the coming months.

The ILS provides information on the most important legal issues related to the international practice of law. In the past two months, during events in Austin and San Antonio, the ILS addressed international cyber security and multinational healthcare, respectively. We will continue to address cutting edge issues, including on January 31, 2019 when we'll have a panel discussion in Houston on international #MeToo issues. Obviously, immigration is a significant international issue. For that reason, during our event on February 27, 2019, in Dallas, the ILS will assemble a panel to address the immigration issue.

It is time to mark your calendars and make reservations to attend two big events produced by the ILS. First, the Annual Institute on March 28 and 29 will cover a number of topics including international arbitration, international human rights, anti-corruption and bribery, immigration and trade. There will be discussions of both legal issues and, with the assistance of the Baker Institute, discussions of policy issues that will impact many of our practices and the business of our clients.

With Mexico being the biggest trading partner for the state of Texas, all eyes turn south as Mexico has sworn in a new president who may have a significant impact on legal and business matters in Mexico. We will fully address those issues when we meet in Mexico City on April 4 and 5. Topics will include energy, tax and labor laws in Mexico. For example, one speaker will address the future of the fracking industry in Mexico with the backdrop of a comparison between how the fracking industry developed in the United States, where it certainly has been successful, and how it tried to develop in Poland but failed. Where will Mexico fall on this spectrum with regard to the fracking industry? Come to Mexico City in April and you may find out.

There is more information throughout this Newsletter about all of these events. Please become active in the ILS. We have a dedicated council of 16 lawyers and an action committee of 28 lawyers, but we always could use more ideas and more involvement. There are great opportunities for networking and generally showing off your practice, your abilities, and your interest in international legal topics. Please take advantage of these opportunities. ●

HUMAN RIGHTS WRITING CONTEST

As part of the State Bar of Texas International Law Section's commitment to providing information and guidance on international human rights issues, the Section sponsors a writing contest that is open to individuals attending law school (including LL.M. programs) within the State of Texas and Texas residents in law school outside of Texas.

PRIZES

A first-place prize of $1,500 will be awarded for the best entry as judged by representatives from the Section. If sufficient entries are received, second and third place prizes may also be given. The winner(s) will also be recognized at the State Bar of Texas International Law Section Annual Institute, to be held on March 28-29, 2019, and the Section will provide the first-place winner round-trip airfare and accommodation to attend the Section's Annual Institute. Additionally, the winning essay(s) will be published in the Section's Newsletter and, depending on the topic of the paper, in the International Bar Association's Human Rights Newsletter.

SUBMISSION

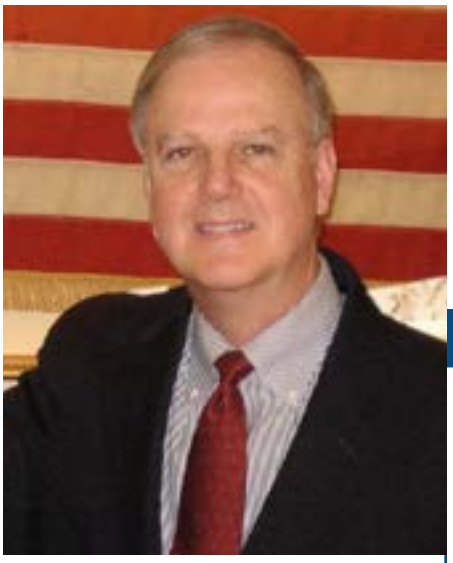
Submissions are due on or before 11:59 PM (Central Time) on March 1, 2019 and should be sent by email attachment to Karla Pascarella at KPascarella@pecklaw.com. The email should have the subject header "State Bar of Texas International Law Section Writing Contest" and contain the contact information for the author(s). *The contestant's name and other identifying markings such as school name are not to be listed in the attachment.*

GUIDELINES

The essay may address any aspect of international human rights law that the contestant chooses. There are no minimum or maximum word limits, and papers should be double-spaced, with twelve-point font and one-inch margins.

RULES

The first-place winner will be required to submit a completed W-9 form prior to receiving the award, and is responsible for all taxes associated with the award. The ideas and work reflected by each entry must be the author's or authors' own. This contest is governed by U.S. law and all relevant federal, state, and local laws and regulations apply. The winner will be required to submit proof of eligibility.



JAMES W. SKELTON, JR.
Editor in Chief
International Newsletter

EDITOR-IN-CHIEF MESSAGE

I'm pleased to introduce the second issue of the International Newsletter of the International Law Section of the State Bar of Texas. We are fortunate to have another excellent selection of articles for our members to enjoy.

The first issue of this International Newsletter contained a wide variety of articles, covering the following topics: the status of the Mexican energy industry reform movement; U.S. sanctions on the Russian oil industry; a hybrid due diligence approach to M&A litigation; European international trade matters, the legality of U.S. sanctions against Chinese corporations; the Colombian oil and gas regime; the limiting effect of the Jones Act on American energy independence; and a call for justice for Unit 731, a Japanese military unit in World War II (this article was the winner of the ILS Human Rights Committee writing contest).

For this second issue, we have chosen to increase the number of categories of topics for articles from five to eight, as follows:

1. Legal issues related to cross-border matters and business in Mexico;
2. NAFTA and the new U.S.-Mexico -Canada Agreement (USMCA);
3. Immigration;
4. Corruption issues including FCPA;
5. International litigation and arbitration;
6. Sanctions and trade;
7. Maritime and port regulations; and
8. International human rights.

We've also begun asking authors to provide a brief synopsis of the article, an "about the author" summary regarding the author and his/her practice, and an image suggestion using key words or topical direction that reflects the theme of the article. You'll find all of these additional aspects of the articles throughout this second issue.

We're delighted to have an extensive selection of articles in this second issue of the International Newsletter, dealing with the following subjects: investment claims under the USMCA; changes in U.S. foreign investment laws; corporate homicide and environmental crimes in Mexico; the new Singapore Convention on enforcing mediation awards; energy issues under the USMCA; anti-corruption laws in the USMCA region; consequences of false declaration of U.S. citizenship in the 2020 census; and victim participation in International Criminal Court proceedings (this article was the second place winner of the ILS Human Rights Committee writing contest).

We continue to be motivated by the fact that lawyers in Texas, whether they are in-house counsel, outside counsel advising corporations, counsel who advise or represent employees or indigenous people, or those who work for the government, are very likely to be exposed to many types of international legal problems. As such, we will strive to provide insights into a host of international legal issues that are both timely and interesting. ●

INTERNATIONAL LAW SECTION
THE STATE BAR OF TEXAS

THE INTERNATIONAL IMPACT OF THE #METOO MOVEMENT

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11:30 AM (LUNCH) 12:00-1:30 PM (PRESENTATIONS)

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Christopher V. Bacon
Counsel, Labor & Employment
Vinson & Elkins

Annell Bay
Non Executive Director at Apache Corporation; Hunting PLC; and Verisk Analytics

Lauren Fielder
Assistant Dean
School of Law
University of Texas at Austin

Fabiana I. Peek
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VICTIM PARTICIPATION IN INTERNATIONAL CRIMINAL COURT PROCEEDINGS: REVISING THE APPLICATION PROCESS TO BETTER SERVE THE INTERESTS OF VICTIMS

BY BROOKE OLSEN
Associate, Fragomen, Del Rey, Bernsen & Loewy, LLP, Dallas

The following article was declared the second place winner of the ILS International Human Rights Committee writing contest earlier this year. This article first appeared on the website of the Human Rights Law Committee of the Section on Public and Professional Interest of the International Bar Association, and is reproduced by kind permission of the International Bar Association, London, UK. © International Bar Association.

Victim participation is regarded as a "major innovation" of the International Criminal Court (ICC; hereinafter "the Court").[1] However, despite the emphasis placed on victim participation in both the drafting of the Rome Statute of the International Criminal Court ("the Rome Statute") and the Court's jurisprudence, the participatory regime that has evolved is unsustainable and does not best serve the interests and expectations of victims. The processing of applications from victim participants, in particular, is one of the most confused and inefficient areas of the participatory regime.

This paper argues that the Court can make victim participation more manageable and aligned with the interests of victims by accepting applications from victims of a case only, not victims of a situation. By excluding situation victims at the outset, the Court narrows the applicant pool, thereby reducing the Registry workload and delays in application processing, and avoids involving victims who are later deemed ineligible to participate. Additionally, permitting only case victims to submit applications allows applications to be submitted closer to the time of trial (as opposed to years before the trial actually begins) and ensures that only those who may be eligible for individual reparations are permitted to submit applications. Over time, the consistent application of this approach by judges will help the Court market itself as a criminal court, rather than as a truth and reconciliation commission, thereby encouraging realistic victim expectations.

A Workable Solution: Consistently Narrow the Applicant Pool to Case Victims

The *Lubanga* Appeals Chamber decision limited the general participatory right to only case victims by excluding Article 68(3) of the Rome Statute regarding participation at the investigations stage.[2] Applications can be submitted before charges have been confirmed, however, so situation victims can and do still submit applications.[3] Consequently, the Registry continues to receive and review thousands of applications, many from ineligible victims who will never end up participating.[4] Delays and resource issues with the Registry's application processing persist, therefore, and, as a result of this bottleneck, some case victims eligible for the general participatory right are not granted victim status until the trial has already begun.[5] In addition to eligible case victims missing out on their participatory right, eligible victims of unpursued or stalled cases miss out on participation.[6] Delays at the Court mean that over time, fewer cases are tried, and those that are tried proceed so slowly that reparations, the primary concern of victims, are not realized until years after the crime has occurred.[7] Moreover, the process of completing and submitting applications only to be told at a later date that they are not the "right type" of victim, takes an emotional toll on victims and, in their eyes, reduces the credibility of the Court.

Accepting Applications after Confirmation of Charges

To address the resource drain from victim applications in a way that serves the interest of victims, this paper argues the Court should consider accepting victim applications only after the charges have been confirmed. If the Court waits until charges have been confirmed to accept applications, two victim-oriented results can occur: (1) victims and their representatives are able to identify who is an eligible case victim versus ineligible situation victim; and (2) applications can be submitted closer to the time of trial.

Clarity as to who is a victim of the case may improve the applicant pool in the sense that fewer applications from ineligible situation victims will be submitted. If situation victims and their legal representatives know situation victims will not be granted victim status in a case, they are unlikely to submit applications, thereby reducing the overall number of applications the Registry must process.[8] In other words, victims and their legal representatives can do some of the Registry's work of determining who is eligible for victim status, making the application process more self-selecting. Over time, cross-Chamber consistency in accepting applications only after charges have been confirmed should encourage an understanding among all parties involved in the application process that naturally weeds out applications from ineligible victims, thus freeing up Registry resources.9

> "The Court can make victim participation more manageable and aligned with the interests of victims by accepting applications from victims of a case only, not victims of a situation"

From the victim perspective, accepting applications only from case victims at the time of trial addresses a number of the concerns that have been raised in victim interviews. For one, it avoids creating false hopes in situation victims that have led to devastating disappointment.[10] While excluding situation victims from the process from the beginning will bring about similar tensions and tough conversations, studies of victim participants indicate it is arguably better to make this distinction up front than to create false hopes by initially including them and later excluding them.[11] Also, the disappointment of situation victims from being excluded must be weighed against the concerns of two other victim groups: eligible case victims who are denied their participatory right because the Court did not process their applications in time for trial; and future case victims whose concerns are not heard by the Court because of delays that prevent situations and cases from moving forward to trial. Given the significant budgetary constraints of the Court and the repeated failures of the Registry to keep up with application processing, some groups of victims will miss out on participation;[12] the comments of victims themselves indicate excluding situation victims best serves the interests of victims.

Since the primary interest of victims appears to be reparations, accepting applications after charges have been confirmed better aligns with the concerns of victims. Only case victims are eligible for individual reparations, if and when they are distributed, because reparations that result from a convicted defendant are the monetary compensation given to those directly harmed by the defendant's conduct.[13] Therefore, narrowing the applicant pool to those who are eligible to eventually receive reparations is in line with victims' stated objectives. Including situation victims in the application process, especially when their primary motivation for applying may have been reparations, contributes to the false hopes that frustrate victims.14

Finally, accepting applications only after charges have been confirmed addresses the timing issues that are frequently cited by victims. Victims are dissatisfied with the slow pace of the Court and the lack of response received after they submit an application, noting that it impacts the credibility of the Court with victims.[15] Although changing the timing of application submission does not avoid the time-consuming process of reviewing the applications, including translating, redacting, and ensuring completeness, it does allow for a timeframe that is more consistent with victim expectations by requesting victim involvement closer to the time of trial.

Studies of victims support the notion that over time, with more consistency, victim expectations can be better aligned with the realities of the Court and its application processing.[16] With a uniform approach applied across all Chambers, Court staff and legal representatives can provide victims with more accurate and specific information.[17] Victims of more recent cases before the Court do seem to have more awareness of the Court and its victim participation regime: Kenyan victim participants had more understanding than victims in the Ugandan and the Democratic Republic of Congo situations;[18] victims in Cote d'Ivoire had a better understanding of the Court and viewed the application as an integral part of telling their story, rather than just an application for reparations.[19]

Counter-arguments

Adopting a consistent, cross-Chamber approach of accepting applications only after charges have been confirmed is not without cost or critique. The time required to process applications, for example, is justification for starting the review process as early as possible.[20] If eligible victims are missing trial due to Registry delays, it seems logical to start the process earlier rather than later. In fact, the 2012 Assembly of States Parties-initiated report on the application system put forth as one of the six options a requirement that the application process be contained to the pre-confirmation stage, to avoid a large number of applications coming in during trial.[21] However, such an option would require the Pre-Trial Chambers be given additional time and resources.[22] In other words, the resources must be expended at some stage or by some Chamber.

Also, this paper's proposed solution of accepting applications only after the confirmation of charges is focused on the earliest date an application can be submitted, not whether a deadline or final date by which an application can be submitted is advisable or possible under the Court's legal framework.[23] To the extent that postponing the submission of applications until charges have been confirmed results in fewer applications from situations victims, it is arguably more efficient and would require less resources to review applications at the post-confirmation stage.[24] Keeping in mind that the Court has received over 12,000 applications but granted victim status to just over 5,000 applicants,[25] timing the application process in a way that excludes situation victims from the application system could alleviate pressure on Registry resources.

A second counter-argument to accepting applications after the confirmation of charges is that victims, situation victims included, can contribute to the investigation stage by providing facts that help identify the defendant and formulate the charges against him.[26] However, while these are important contributions, it does not appear that victim applications are used in this manner.[27] Since victims are generally not granted Article 68(3) participation rights at the investigation stage, meaning they do not present their "views and concerns" at this stage, and the Court has restricted the access of victims to filings during investigation,[28] victims have limited ability to influence the investigation. As some victim participation scholars have phrased it, "the system is not set up in a way that would allow for victims to shape the scope of the case at the pre-trial stage."[29]

A final important counter-argument to this paper's proposal of a consistent cross-Chamber approach is that judicial flexibility is critical in the Court's cases, so Chambers need to be able to set their own protocol on victim application processing depending on the country involved and crime charged.[30] As the argument goes, if the confusion in victim participation is the result of the constructive ambiguity of the Statute, a cross-Chamber approach may go against the drafters' intent.[31] However, many of the problems in the current participatory regime, including eligible victims being denied their participatory right due to Court delays, also go against the drafters' intent. The current participatory regime must be changed in some way in order for the Court to survive, and given that the Court's judges themselves recognize the need for revision, the push for judicial discretion can likely be overcome.[32]

Conclusion

If the Court is to survive, it must revise its victim participation regime. The broad and inconsistent interpretations of the victim participation provisions of the Rome Statute by judges and the ad hoc application forms that have been used across the Chambers have made it difficult to develop a clear understanding of victim participation. Consequently, victims' expectations are not in sync with the realities of the Court's criminal proceedings. The Court's current participatory regime does not serve the interests of victims because it is not designed to meet their primary objectives: reparations, convictions, clarity, and efficiency.

This paper suggests a revision to the victim application process that could

free up Court resources to be used in areas of the process that matter more to victims. The proposed solution of permitting applications to be submitted only after the charges against the accused have been confirmed aligns better with the expectations and desires of victims because it encourages only those eligible for reparations to apply, and it avoids long delays between application submission and trial. Striving for a process that is predictable and transparent to all the Court's stakeholders allows self-selection to do some of the Court's work, and promotes an applicant pool that includes mainly or only eligible case victims. In the end, constraining the participatory regime may be the best way to protect the interests of victims.

●●●

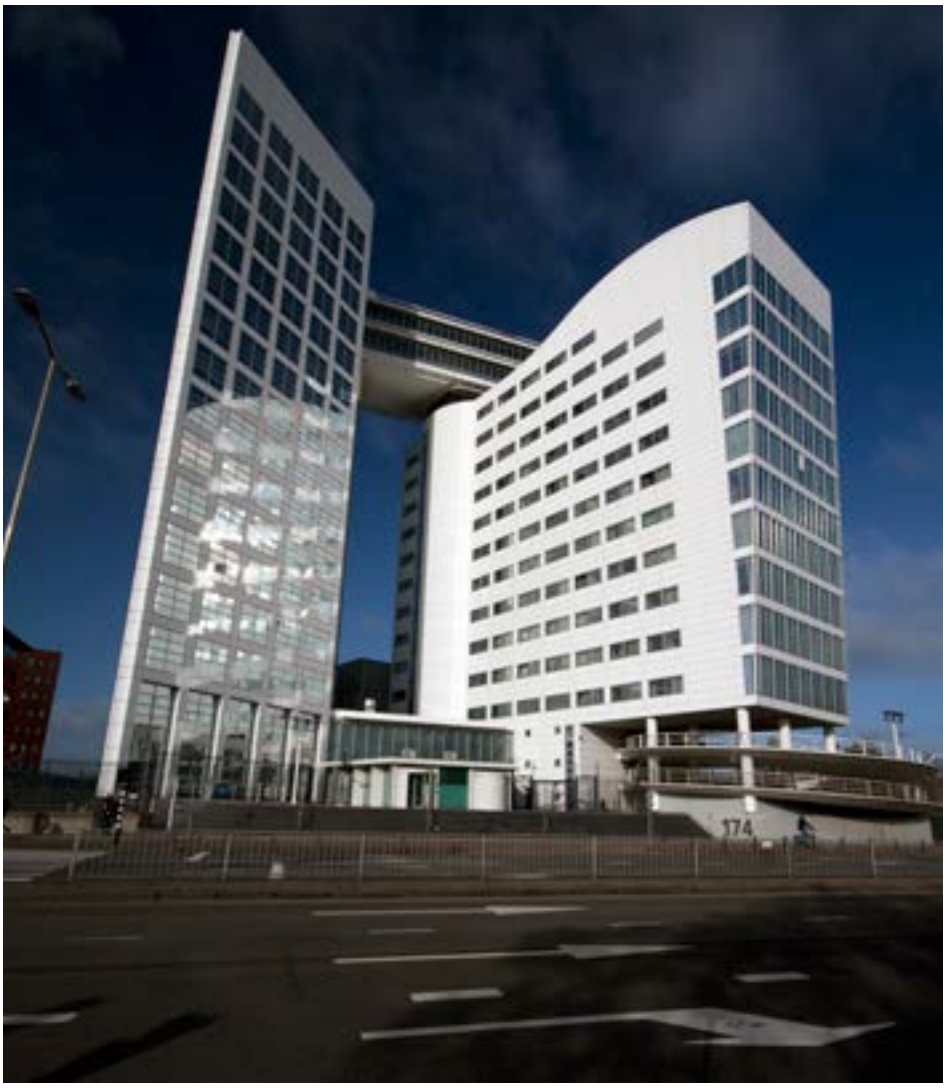
Brooke Olsen is an Associate in the Dallas office of Fragomen, Del Rey, Bernsen & Loewy, LLP, where she practices corporate U.S. immigration law. Brooke received a Juris Doctor degree from SMU Dedman School of Law in May 2018. ●

Endnotes

1 E.g., Maria Juliana Machado Forero et al., *The Victims Who Are Not Quite Victim Enough: How the International Criminal Court Creates Divides Within Victim Communities* (2013) 88 Die Friedens-Warte 207, 207; Miriam Cohen, *Victims' Participation Rights Within the International Criminal Court: A Critical Overview* (2009) 37 Denv. J. Int'l L. & Pol'y 351, 351-352; Christine Chung, *Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?* (2008) 6 Nw. J. of Int'l Hum. Rts. 459, 459; Hector Olasolo & Alejandro Kiss, *The Role of Victims in Criminal Proceedings Before the International Criminal Court* (2016) 81 Int'l Rev. of Penal L. 125, 125; Christine Van den Wyngaert, *Victims Before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge* (2011) 44 Case Western Reserve J. Int'l L. 475, 476.

2 Article 68(3) provides the general participatory right. As mentioned above, there are still limited forms of pre-trial participation available via other articles of the Statute. These limited forms do not grant a victim participant the general participatory right.

3 See Stephen Smith Cody et al., *The Victims' Court? A Study of 622 Victim Participants at the International Criminal Court*, University of California Berkeley School of Law Human Rights Center (2015), at 24; Forero, see above at note 1, at 216 (discussing how Court staff and local representatives include both situation victims and case victims in information meetings or other communications about the case and their applications); Thomas Hansen, *In the Shadow of Politics: Victim Participation in the Kenyan ICC Cases*, Transitional Justice Institute Research Paper No: 16-17, Impunity Watch (2016).



[4] Forero, see above at note 1, at 210 (providing the statistics stated above: the ICC has received over 12,000).

[5] Sergey Vasiliev, *Victim Participation Revisited – What the ICC is Learning about Itself* in Carsten Stahn (ed), THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT (OUP 2015), at 1150-52.

[6] See e.g., Charles P. Trumbull IV, *The Victims of Victim Participation in International Criminal Proceedings*, 29 Mich. J. of Int'l L. 777, 818-819 (2008).

[7] See *id*. *See also The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-3251 (the arrest warrant for Lubanga was issued in 2006 and the order approving the plan of the Trust Fund for Victims for the *Lubanga* case was issued in 2016); Van den Wyngaert, see above at note 1, at 495.

[8] See Cody et al at note 3, at 24; Forero, see above at note 1, at 216-17. See also REDRESS, 'Independent Panel of Experts Report on Victim Participation at the International Criminal Court,' July 2013 <http://www.redress.org/downloads/publications/.

[9] See generally Cody et al., at note 3, at 73 (discussing the need to train ICC staff and local representatives to inform victims as to what the Court can and cannot provide, finding that some victims developed unrealistic hopes about the process from what they were told by ICC staff and local representatives); Olasolo & Kiss, see above at note 1, at 139 (noting Trial Chamber II saved itself 'significant time and resources' by not reviewing applications from victims who had been granted status at the pre-trial stage and instead automatically granting them victim status).

[10] Forero, see above at note 1, at 208-09, 215-216. Hansen, see above at note 3, at 35-36, 57-58, 61.

[11] Forero, see above at note 1, at 208-09, 215-216; Chris Tenove, *International Justice for Victims? Assessing the International Criminal Court from the Perspective of Victims in Kenya and Uganda*, Africa Portal Research Paper No. 1 of 4, 13 -14 (September 2013); Hansen, see above at note 3, at 35-36, 57-58, 61.

[12] Forero, see above at note 1, at 210; Trumbull IV, see above at note 6, 818-19.

[13] See above e.g., Van den Wyngaert, at note 1, at 490-91.

[14] See above generally Forero, at note 1, at 208-09, 215-216. Hansen, at note 3, at 35-36, 57; Tenove, at note 11, at 13-14.

[15] See Cody et al. at note 3 above, at 4-5, 35, 44, 56; Hansen, see above at note 3, at 32.

[16] See Cody et al. at note 3 above, at 73. See above also Vasiliev, at note 5, at 1187.

[17] See Cody et al. at note 3 above, at 73; REDRESS, see at note 8 above, at 18, 25, 31.

[18] Cody et al., see at note 3 above, at 59.

[19] See Cody et al. at note 3 above, at 69.

[20] See REDRESS, at note 8 above, at 17 (suggesting the ICC should solicit and receive applications as soon as a situation is established).

[21] Vasiliev, see above at note 5, at 1161-62.

[22] *Id*.

[23] The idea of imposing a deadline for victim applications is beyond the scope of this paper, but the proposed solution does not preclude the institution of a deadline.

[24] See generally Olasolo & Kiss, above at note 1, at 139 (noting Trial Chamber II saved itself 'significant time and resources' by not reviewing applications from victims who had been granted status at the pre-trial stage and instead automatically granting them victim status).

[25] Forero, see above at note 1, at 210.

[26] E.g., Forero, see above at note 1, at 210; Trumbull IV, see above at note 6, at 791; Van den Wyngaert, see above at note 1, at 487.

[27] Forero, see above at note 1, at 214; Van den Wyngaert, see above at note 1, at 487.

[28] Forero, see above at note 1, at 214.

[29] *Id*.

[30] Vasiliev, see above at note 5, at 1137.

[31] See Trumbull IV, see above at note 6, at 790-91.

[32] See e.g., Van den Wyngaert, above at note 1.

INTERNATIONAL LAW SECTION
THE STATE BAR OF TEXAS

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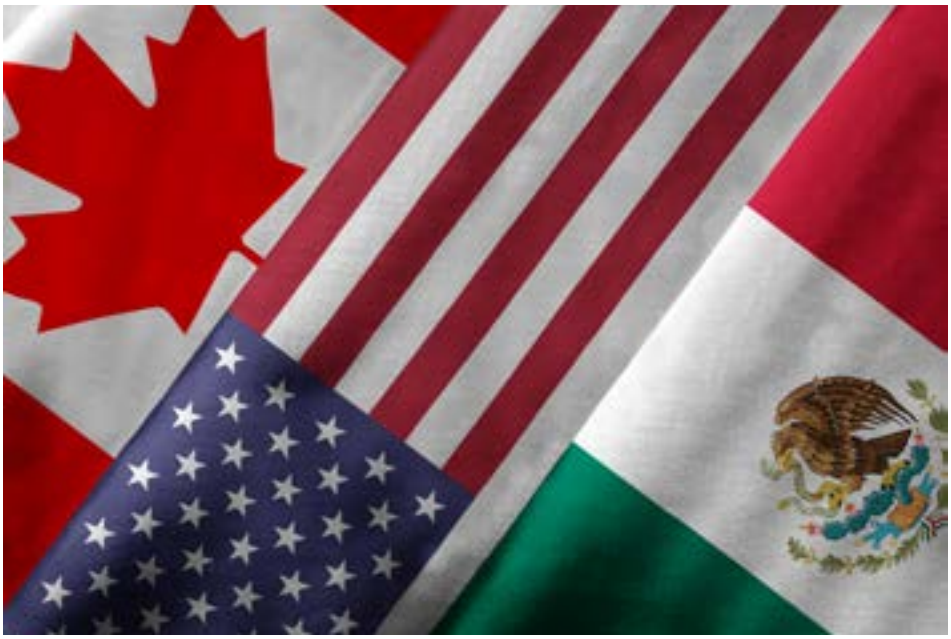
WHAT'S IN A NAME CHANGE? FOR INVESTMENT CLAIMS UNDER THE NEW USMCA INSTEAD OF NAFTA, NEARLY EVERYTHING

BY ROBERT REYES LANDICHO AND ANDREA COHEN
Vinson & Elkins LLP

President Trump's October 1, 2018 announcement that the United States, Canada, and Mexico have reached an agreement to replace the 1994 North American Free Trade Agreement (NAFTA) marks a veritable sea change in investor-state dispute settlement in the region. Previous and prospective users of NAFTA's dispute resolution procedures will immediately note that this new free-trade agreement departs substantively and significantly from NAFTA's investment chapter – which has been on the books since 1994. More than just a change in name, the new United States-Mexico-Canada Agreement (USMCA), is an ***identity*** change.

This article discusses preliminary impressions from the released text of the USMCA and addresses only the investor-state arbitration provisions in the USMCA, Chapter 14, that purport to replace Chapter 11 of NAFTA. It begins with a discussion of the implications for those with cases already before NAFTA tribunals, then moves to the relevant considerations for investors in Canada and Mexico, and then presents some key definitional changes in the new text. It concludes with some initial takeaways and a watchlist for readers while the USMCA Parties await U.S. Congressional approval. This paper is far from comprehensive – no doubt, the applicability, interpretation, and application of the USMCA's provisions will be the subject of increased discussion and scrutiny in the coming months.



For now, the USMCA is not yet the law of the land in the United States – as with any U.S. treaty, it must first be approved by Congress. Nonetheless, there are (at least) three key takeaways at this initial stage:

1. The USMCA would completely eliminate future investor-state arbitration between U.S. and Canadian parties under the USMCA. Moreover, the USMCA would limit the type of disputes that may be brought by investors of investments made between the United States and Mexico, and would force investors to file claims in national courts first and wait 30 months before initiating arbitration (unless the investor has a contract with the government relating to a "***covered sector***" expressly specified in the USMCA).
2. Under this proposed USMCA text, current NAFTA litigants need not fear that the USMCA will disrupt ongoing NAFTA arbitrations (*i.e.*, the shift to the USMCA will have no effect on the fourteen cases that have already been filed under Chapter 11 of NAFTA).
3. Although NAFTA has not yet been terminated, the USMCA provides that, once terminated, investors may nevertheless file NAFTA claims

within ***three years***, provided the investments were validly made in accordance with Chapter 11 of NAFTA already (or are made during the short remaining interval when NAFTA is still in force).

Thus, investors with existing investments covered by NAFTA who wish to bring arbitration against Canada pursuant to Chapter 11 of NAFTA would need to do so within three years of NAFTA's termination if the USMCA is approved by Congress and NAFTA is terminated, or otherwise risk losing their ability to file investor-state arbitration under the new USMCA altogether. Investors with qualified investments in Mexico may still have the option to bring an investor-state arbitration under the USMCA after filing a claim in national courts and waiting the requisite 30 months after initiating that lawsuit. They would do well, however, to confirm whether their potential investment claims are part of a covered sector under the USMCA (thereby enabling them to take advantage of the full remedies available under the USMCA), or if they will be limited in the types of claims they can file.

Claims for Investments Established or Acquired While NAFTA is in Force Must be Brought Within Three Years of NAFTA's Termination.

For those claimants with arbitrations that have already been filed under Chapter 11 of NAFTA, the current text of the USMCA would allow these NAFTA arbitrations to proceed uninhibited. Moreover, Annex 14-C of the USMCA, pertaining to "*Legacy Investment Claims and Pending Claims*," directly addresses whether (and in which circumstances) prospective claims might be "grandfathered" into NAFTA's existing investment protection regime.

A "*legacy investment*" is defined in Article 6(a) of Annex 14-C as "*an investment of an investor of another Party in the territory of the Party established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry of force of this agreement*." Accordingly, an investment must have been "*established or acquired*" when NAFTA is still in force, and remain "*in existence*" on the date of the USMCA's entry into force.

As users of investment arbitration are no doubt familiar, a State must express its consent to arbitrate investment claims against an investor from another State. In the context of the "*legacy investments*" discussed above, the new USMCA makes clear that an investor cannot wait to file its NAFTA claims *ad infinitum*. Rather, each State Party's consent to arbitrate in accordance with Section B of Chapter 11 of the NAFTA expires "*three years after the termination of NAFTA 1994*," under Article 3 of Annex 14-C.[1]

Chapter 14 also provides that "*an arbitration initiated pursuant to the submission of a claim under Section B of NAFTA 1994* while NAFTA 1994 is in force may proceed to its conclusion [...] the tribunal's jurisdiction with respect to such a claim is not affected by the termination of NAFTA 1994." Thus, Annex 14-C clarifies that the USMCA creates no jurisdictional impediment to the completion of already-filed NAFTA claims.

No Investment Claims for Future U.S. Investors in Canada (or vice-versa) After the NAFTA's Termination.

The USMCA's current text eliminates the possibility of future investor-state arbitration between U.S. and Canadian parties under the USMCA for investments made after the termination of NAFTA.[2] This is unequivocal in the text of Article 14.2 of the USMCA, which limits the scope of investor-state arbitration to Legacy Investment Claims and Pending Claims, Mexico-U.S. Investment Disputes, and Mexico-U.S. Investment Disputes Related to Covered Government Contracts only:

> *For greater certainty, an investor may only submit a claim to arbitration under this Chapter as provided under Annex 14-C (Legacy Investment Claims and Pending Claims), Annex 14-D (Mexico-United States Investment Disputes), or Annex 14-E (Mexico-United States Investment Disputes Related to Covered Government Contracts).*

Investors wishing to arbitrate claims will be forced to arbitrate in a forum other than a NAFTA investment tribunal (likely pursuant to a contract or other applicable instrument containing a valid arbitration clause), or be forced to bring claims in local courts if a domestic remedy is available.

The USMCA Imposes Limits on Investment Arbitration for U.S. Investors in Mexico (or vice-versa).

Although not as clear-cut as the prohibition on claims of U.S. investors against Canada (or vice-versa), the new USMCA provisions would substantially limit the availability of investor-state dispute settlement for claims pertaining to investments made by U.S. investors in Mexico (and vice-versa).

Investor-state arbitration for U.S.-Mexico investment claims survives under Annex 14-D, but only as to claims of direct expropriation[3], claims for violations of national treatment[4], or for violations of the most-favored-nation (MFN) provision of the USMCA[5] (except for any MFN or national treatment claims "*with respect to the establishment or acquisition of an investment*," which are expressly excluded).

An exception to the above limitation is found in Annex 14-E of Chapter 14, entitled "Mexico-United States Investment Disputes Related to Covered Government Contracts." Annex 14-E

does not apply ***unless*** the claimant is "*a party to a covered government contract*"[6] that grants rights in a "*covered sector*" expressly named in Article 6 of Annex 14-E, in which case a claimant may rely on other benefits in the treaty, including the possibility of bringing claims for violations of the minimum standard of treatment afforded under customary international law[7], claims of indirect expropriation[8], or claims with respect to the establishment of acquisition of an investment. The five "*covered sectors*" are:

(i) activities with respect to oil and natural gas that a national authority of an Annex Party controls, such as exploration, extraction, refining, transportation, distribution, or sale;

(ii) the supply of power generation services to the public on behalf of an Annex Party;

(iii) the supply of telecommunications services to the public on behalf of an Annex Party;

(iv) the supply of transportation services to the public on behalf of an Annex Party; or

(v) the ownership or management of infrastructure, such as roads, railways, bridges, canals, or dams, that are not for the exclusive or predominant use and benefit of the government of an Annex Party.[9]

The USMCA also adopts fundamental procedural changes for all remaining US-Mexico claims submitted to arbitration, even those in the covered sectors. Prospective claimants and their counsel will need to carefully plan a litigation strategy to comply with preconditions to arbitration under Annex 14-D.

1. Prior to initiating investor-state arbitration under the USMCA, under Article 5 of Annex 14-D, U.S. and Mexican claimants **must** file suit in national courts. The dispute may proceed to arbitration only after "*30 months have elapsed from the date the proceeding [in national courts] was initiated*," or after a final decision has been rendered in the national court of last resort. Recourse to national courts is not required where it would be "*obviously futile or manifestly ineffective*" – but it remains to be seen how national courts (or USMCA tribunals) will interpret this provision.
2. .Appendix 3 of the USMCA also provides that U.S. investors "*may not submit to arbitration a claim that Mexico has breached an obligation under this Chapter[…] if the investor or the enterprise, respectively, has alleged that breach of an obligation under this Chapter in proceedings before a court or administrative tribunal of Mexico*." Investors will likely question how Appendix 3 will be interpreted in light of Article 5 of Annex 14-D.
3. Moreover, ***arbitration*** under the USMCA must be filed within four years (*i.e.*, 48 months) of the alleged breach by the claimant under Article 5 of Annex 14-D. As a practical matter therefore, assuming that a final decision in the national court of last resort has not been rendered prior to the 30-month waiting period, and assuming that the investor had filed suit in national court immediately after "*the claimant first acquired, or should have first acquired, knowledge of the breach alleged … and knowledge that the claimant … or enterprise … has incurred loss or damage*," parties will have only 18 months (at most) to file their claims – roughly half of the time previously permitted under Chapter 11 of NAFTA.
4. Importantly, where the claimant is party to a "*covered government contract*" under Annex 14-E, i.e., investors contracting with a government to provide services in one of the five "*covered sectors*," the national courts requirement is waived[10] and the claimant may file anytime within a 3-year window. This means that – under the current USMCA text – those contracting with the government with respect to oil and gas activities, power generation, telecommunications, transportation, and infrastructure may not need to file in national courts first.

Regarding arbitrators, the USMCA explicitly adopts the IBA Guidelines on Conflicts of Interest in International Arbitration, including the guidelines on direct and indirect conflicts of interest, and any supplemental guidelines, in Article 6.5 of Annex 14-D. It also imposes a so-called "two-hats" bar, prohibiting arbitrators from "*acting as counsel or as party appointed expert or witness in any pending arbitration under the annexes to this Chapter*."

Canada-Mexico Investment Arbitration Might Survive Elsewhere, but Not Under the USMCA

Because no consent for investment arbitration has been included in the USMCA for investments between Canada and Mexico, investors seeking to bring investment claims are likely to rely on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) rather than the USMCA. The CPTPP, to which both Canada and Mexico are signatories, offers many of the same protections accorded to investors under both NAFTA and the USMCA.[11] Mexico has already ratified the CPTPP and Canada has pledged to do so.[12] The CPTPP will enter into force after 6 of the 11 signatory countries complete their ratification processes.

The USMCA Uses Lessons Learned from NAFTA to Clarify Legal Terms and Amend Arbitral Procedure

Incorporating lessons from past NAFTA arbitrations, the USMCA Parties took steps to clarify certain key terms (including the standards of investment protection) throughout the agreement, often in footnotes, which may prove relevant in the USMCA's interpretation. Some important changes are noted below:

1. Under the national treatment and most-favored-nation provisions of the USMCA, tribunals would be required to determine whether treatment is accorded in "*like circumstances*" based on a totality-of-the-circumstances test contained in Footnote 2 to Article 14.1: "*For greater certainty, whether treatment is accorded in "like circumstances" under this Article depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.*"
2. The USMCA offers more guidance on the definition of an "investment" in Article 14.1, stating that "*investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.*"
3. In determining whether an "*indirect expropriation*" occurred within the meaning of Article 14.8.1 (as defined in Annex 14-B), the USMCA expressly states in Annex 14-B, Article 3(a) that this "*requires a case-by-case, fact-based inquiry.*" (It should be recalled that, under the current USMCA text, only claimants with a "*covered government contract*" in one of five "*covered sectors*" may file a claim for breach of the USMCA, Article 14.8.1, for an indirect expropriation).
   a Annex 14-B Article 3(a) instructs tribunals to consider "*the economic impact of the government action*" (though economic impact alone is not determinative), "*the character of the government action, including its object, context, and intent*," and "the extent to which the government action interferes with distinct, reasonable investment-backed expectations."
   b Regarding "*reasonable, investment-backed expectations*," Footnote 19 of Annex 14-B offers the following factors as guidance: "*whether the government provided the investor with binding written assurances and the nature and extent of governmental regulation or the potential for government regulation in the relevant sector.*"
4. In contrast to the USMCA's above definition of "*indirect expropriation*," the USMCA specifically rejects that the "*minimum standard of treatment under customary international law*" should be defined by reference to an investor's legitimate, investment-backed expectations. Specifically, Article 14.6(4) provides that "*[f]or greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.*" This departs from investment tribunals' interpretation of the fair and equitable treatment standard under other investment treaties, or (some argue) the minimum standard of treatment under customary international law.
5. Codifying the interpretation from NAFTA's Free Trade Commission's trilateral "Notes of Interpretation of Certain Chapter 11 Provisions" from 2001,[13] Article 14.6(2) of the USMCA specifies that the term "minimum standard of treatment" is the customary international law standard, stating "*[f]or greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment"*[14] and *"full protection and security"*[15] *do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights.*"

Conclusion

As current and prospective investors await congressional approval for the USMCA and the termination of NAFTA, it might be asked: what happens next? The USMCA has created uncertainty for North American investors, which is likely to affect future foreign investment flows and raise new legal issues. Prudent investors and practitioners will watch for the following developments in the coming months:

- Will NAFTA officially be terminated, and if so, when? What date will the USMCA come into force?
- What are the likely issues that will emerge during the congressional approval process? How will industries respond to these changes, and what effect will their voices have on the USMCA's approval? Will there be any proposed changes to the text of Chapter 14 of the USMCA?

- Will the CPTPP be ratified before NAFTA's termination, and will it really offer Canadian and Mexican investors an effective avenue for future investor-state arbitration?
- Finally, in light of well-known developments in Europe pertaining to investor-state arbitration,[16] is the USMCA part of a global trend away from investor-state arbitration?

Given this uncertainty, current and prospective investors may consider whether certain investments may be structured (or restructured) through effective nationality planning. Investors should consult qualified counsel to discuss investment-protection alternatives to the new USMCA, including analysis of investment treaties between USMCA Parties and other States. These other investment treaties may contain more favorable standards of investment protection (or more advantageous procedural provisions) than those in the proposed USMCA text.

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Endnotes

1. Notably, under Article 2 of Annex 14-C, the consent and submission to arbitration must "*satisfy the requirements*" of Chapter II of the ICSID Convention.
2. Although investor-state arbitration is dead between the U.S. and Canada, state-to-state arbitration between the two very much survives. Canada won its fight over NAFTA Chapter 19, paying for it in dairy concessions, and there will be no change to those provisions. This means that Canada may continue to bring suit before a special panel over alleged unfair trade practices by the U.S. and Mexico, including anti-dumping and countervailing duties.
3. Direct expropriation under Annex 14-B, Clause 2 occurs when "*an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.*"
4. USMCA Article 14.4.1 defines national treatment as "*treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.*"
5. Under the USMCA Article 14.5.1, most-favored-nation claims arise when a state's treatment of an investor is "*less favorable than the treatment it accords, in like circumstances, to investors of any other Party or of any non-Party with respect*

to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory." Readers of the new USMCA will be particularly careful to read footnote 22 in Chapter 14, which provides that "*the 'treatment' referred to in Article 14.5 (Most-Favored-Nation Treatment)* ***excludes provisions in other international trade or investment agreements that establish international dispute resolution procedures or impose substantive obligations; rather, 'treatment' only includes measures adopted or maintained by the other Annex Party, which may include measures adopted or maintained pursuant to or consistent with substantive obligations in other international trade or investment agreements.***" (emphases added) Like other provisions in Chapter 14 of the USMCA, the language of this provision may depart substantially from the definitions used in other investment agreements.

[6] Article 6 of Annex 14-E defines "*covered government contract*" as "*a written agreement between a national authority of an Annex Party and a covered investment or investor of the other Annex Party, on which the covered investment or investor relies in establishing or acquiring a covered investment other than the written agreement itself, that grants rights to the covered investment or investor in a covered sector.*"

[7] The USMCA defines the minimum standards of treatment due to investors "*in accordance with customary international law, including fair and equitable treatment and full protection and security.*" (Article 14.6.1). It adds that "*(a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and (b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.*" (Article 14.6.2(a),(b)).

[8] Indirect expropriation refers to a situation "*in which an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure*." (Annex 14-B, Clause 3).

[9] *See Article 6 of Annex 14-E* (emphases added). It should be noted that the preservation of investor-state arbitration in these key sectors is likely due to successful lobbying by American industry groups during negotiations.

[10] *See* Footnote 31 to USMCA Chapter 14: "*For greater certainty, Article 5.1(a)-(c) of Annex 14-D do not apply to claims under paragraph 2 [of Annex 14-E].*"

[11] Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Article 9: Investment, available at http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/toc-tdm.aspx?lang=eng.

[12] "Canada, Japan Move Closer to CPTPP Ratification, Malaysia Calls for Trade Deal Review," *International Centre for Trade and Sustainable Development* (Jun. 28, 2018), available at: https://www.ictsd.org/bridges-news/bridges/news/canada-japan-move-closer-to-cptpp-ratification-malaysia-calls-for-trade.

[13] NAFTA Free Trade Commission, "Notes of Interpretation of Certain Chapter 11 Provisions (2001)," available at: http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp (1. "*Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party. 2. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.*")

[14] Article 14.6(2)(a) defines "fair and equitable treatment" as "*includ[ing] the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.*"

[15] Article 14.6(2)(b) defines "full protection and security" as "*requi[ring] each Party to provide the level of police protection required under customary international law.*"

[16] *See, e.g.,* Laurens Ankersmit, "Achmea: the Beginning of the End for INVESTOR-STATE ARBITRATION in and with Europe?", *Investment Treaty News*, International Institute for Sustainable Development (Apr. 24, 2018), available at https://www.iisd.org/itn/2018/04/24/achmea-the-beginning-of-the-end-for-investor-state arbitration-in-and-with-europe-laurens-ankersmit/.

WHAT CORPORATE LAWYERS NEED TO KNOW ABOUT CHANGES IN U.S. FOREIGN INVESTMENT LAWS

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On August 13, 2018, President Trump signed the John S. McCain National Defense Authorization Act for Fiscal Year 2019 ("NDAA") into law.[1] The NDAA contains the Foreign Investment Risk Review Modernization Act of 2018 ("FIRRMA"),[2] which is new legislation that significantly impacts foreign investments in the United States by expanding the jurisdiction of the Committee on Foreign Investment in the United States ("CFIUS"). FIRRMA became effective on August 13, 2018, and the U.S. Department of the Treasury ("Treasury") is in charge of issuing FIRRMA's implementing regulations on a rolling basis. To that effect, on October 10, 2018, Treasury issued two temporary regulations. The first interim rule includes several amendments to existing CFIUS regulations, 31 C.F.R. Part 800, to conform to FIRRMA provisions that became effective upon enactment.[3] The second interim rule establishes the FIRRMA pilot program, which will be effective November 10, 2018.[4] The temporary regulations are designed to protect critical American technology companies and intellectual property.[5] This article will discuss how FIRRMA significantly changes foreign investments in U.S. businesses and the temporary Pilot Program, which addresses specific risks of U.S. critical technologies.

Background: What is CFIUS and What are the Relevant Changes under FIRRMA?

For context, CFIUS is a United States federal interagency body that reviews foreign investments (or "covered transactions") in U.S. companies for national security implications. The Committee is chaired by the U.S. Secretary of the Treasury and composed of nine members from the federal executive branch, two ex officio members, and other members as appointed by the U.S. President. CFIUS operates pursuant to section 721 of Title VII of the Defense Production Act of 1950, commonly known as the Exon-Florio Act of 1988. In 2007, section 721 was substantially revised by the Foreign Investment and National Security Act of 2007. And now in 2018, section 721 was again significantly revised by FIRRMA, which became effective August 13, 2018.

FIRRMA passed both houses of Congress with overwhelming bipartisan support and it is intended to ensure CFIUS has the necessary tools to address national security concerns arising from foreign investments.[6] FIRRMA has

significantly expanded the term "covered transactions" to now include four new types of covered transactions: 1) real estate transactions; 2) non-controlling "other investments" involving "critical infrastructure," "critical technology," or "sensitive personal data" of U.S. persons; 3) change in foreign person's rights; and 4) evasion. Before FIRRMA, CFIUS' review of "covered transactions" involved any merger, acquisition, or takeover in which a foreign person could obtain control of a U.S. business.[7] In other words, CFIUS was mainly concerned with the "control" factor of a "U.S. business."[8] As previously discussed FIRRMA significantly expands CFIUS' jurisdiction and the "control" factor is no longer determinative for CFIUS review.

The expansion of CFIUS jurisdiction pursuant to FIRRMA was primarily to address the concern that foreign investors, particularly Chinese investors, were obtaining sensitive U.S.-based technology and know-how simply by entering into joint ventures with, or making minority investments in, U.S. businesses. These business transactions did not trigger CFIUS review because the foreign investors were not acquiring a controlling stake in a U.S. business. Consequently, one of the most noteworthy changes under FIRRMA is that a covered transaction now includes "other investments," including non-controlling foreign investments in U.S. businesses involving U.S. critical infrastructure, critical technology, or personal data, if it gives the foreign investor certain rights (as discussed below).

Furthermore, as mentioned above, FIRRMA includes additional types of covered transactions. Real estate transactions are now covered transactions and subject to CFIUS review. The real estate transactions now covered under FIRRMA include those in which a foreign person leases or purchases private or public real estate either: 1) at an air or maritime port; or 2) in close proximity to a U.S. military base or other sensitive U.S. government facility from a national security perspective.[9] The real estate transactions now include "greenfield" purchases of empty land, whereas previously these transactions were not covered since empty land is not a "U.S. business." Although under FIRRMA real estate transactions are now considered "covered transactions," real estate transactions related to single-family housing units or real estate in "urbanized areas" (as defined by the Census Bureau in the most recent census) are exempt.[10]

"The expansion of CFIUS jurisdiction pursuant to FIRRMA was primarily to address the concern that foreign investors, particularly Chinese investors, were obtaining sensitive U.S.-based technology and know-how simply by entering into joint ventures with, or making minority investments in, U.S. businesses."

In addition, a covered transaction now includes a foreign person whose rights have changed with respect to a U.S. business, if it results in foreign control of the U.S. business or it meets the criteria of an "other investment," which is a non-controlling investment involving critical infrastructure, critical technology, or sensitive personal data of U.S. persons. Finally, any transaction or arrangement that is designed or intended to evade or circumvent the jurisdiction of CFIUS is also subject to CFIUS scrutiny.[11]

In addition to FIRRMA's significant expansion of "covered transactions" now subject to CFIUS review, there have been a number of changes impacting foreign investments, among others, modifications to the CFIUS review and investigation process, including: 1) the modification of CFIUS timelines to expedite certain reviews while strategically targeting others for more in-depth review (*e.g.*, Chinese transactions); 2) new filing fees up to $300,000 per transaction[12] and potential "fast track" fees to presumably expedite filings for parties who pay an additional fee; 3) additional resources for CFIUS staffing;[13] 4) more authority for CFIUS to investigate transactions for which it was not notified; and 5) the introduction of "light" CFIUS filings, which will streamline the CFIUS notification process and aim to reduce the resources and costs involved in conducting the filing.

Notably, CFIUS is now instructed to review the foreign person's history of compliance with U.S. laws and also evaluate whether the proposed transaction could create cybersecurity risks for the United States. FIRRMA also requires CFIUS to establish formal plans to monitor mitigation plans imposed on approved transactions and is now empowered to impose penalties if the parties fail to comply with mitigation plan conditions imposed by the CFIUS clearance process.

FIRRMA Pilot Program

As previously discussed, FIRRMA expands CFIUS' jurisdiction to review "other investments" made by foreign persons and authorizes CFIUS to conduct pilot programs to implement the FIRRMA provisions. Consistent with FIRRMA, on October 10, 2018 Treasury issued interim

regulations to conduct a Pilot Program, which authorizes CFIUS to review non-controlling foreign investments in U.S. businesses involved in critical technologies related to specific industries (referred to in FIRRMA as "other investments").[14]

Additionally, the Pilot Program makes effective FIRRMA's mandatory declarations provision for transactions that fall within the specific scope of the Pilot Program. Starting November 10, 2018, CFIUS will be empowered to review non-controlling critical technology foreign investments, including any equity interest in which a foreign person has access to sensitive personal data of U.S. persons or membership/observer rights on a governing body.[15] The Pilot Program goes into effect on November 10, 2018 and the Pilot Program will not affect any transaction: 1) completed prior to November 10, 2018; or 2) where, prior to October 11, 2018 (i) parties to the transaction have executed a binding written agreement or other document establishing the material terms of the transaction; (ii) a party has made a public offer to the shareholders to buy shares; or (iii) a party has solicited proxies in connection with a board election or requested the conversion of convertible voting securities.[16] The temporary Pilot Program will end no later than March 5, 2020.

Under the new temporary Pilot Program foreign investors are now required to file mandatory declarations for transactions that fall within the scope of the Pilot Program, and failure to do so could result in civil monetary penalties up to the value of the transaction. The mandatory declarations are abbreviated notices that generally should not exceed five pages in length. Foreign investors, from any country, are required to make the mandatory declarations either by making the mandatory declaration at least 45 days before the expected completion date of the transaction or by filing a notice under CFIUS' standard procedures. CFIUS will have 30 days to act.

Parties can determine whether a proposed foreign investment in a U.S. business triggers the mandatory declaration under the temporary Pilot Program by determining two important matters: 1) whether the U.S. business is a Pilot Program U.S. Business (as defined below); and 2) whether the transaction is a Pilot Program Covered Transaction (as defined below).

The Pilot Program only covers a Pilot Program U.S. Business,[17] defined as any U.S. business that produces, designs, tests, manufactures, fabricates, or develops a critical technology that is either: 1) utilized in connection with the U.S. business's activity in one or more Pilot Program industries; or 2) designed by the U.S. business specifically for use in one or more Pilot Program industries. Additionally, the term "critical technology" as defined by FIRRMA includes:[18]

- Defense articles or defense services included on the U.S. Munitions List of the International Traffic in Arms Regulations ("ITAR");
- Items included on the Commerce Control List of the Export Administration Regulations ("EAR") that are controlled by multilateral regimes or for reasons relating to regional stability or surreptitious listening;
- Nuclear equipment, facilities, materials, software, and technology subject to export regulations by the Department of Energy or Nuclear Regulatory Commission;
- Select agents and toxins; and
- Emerging and foundational technologies controlled pursuant to the Export Control Reform Act of 2018.[19]

After determining that the proposed investment in a U.S. business is a Pilot Program U.S. Business, then the parties need to decide whether the covered U.S. business involved with critical technology is related to the 27 industries covered under the Pilot Program. The Pilot Program covers 27 specific industries, identified by their respective North American Industry Classification System (NAICS) code.[20] Annex A[21] to Part 801 lists the 27 industries. The 27 identified industries range from manufacturing operations for aircraft and space vehicles to high technology businesses focused on computer storage devices and semiconductor machinery; and defense manufacturing including military armored vehicles, among others.

Finally, if the proposed foreign investment in a U.S. business is a Pilot Program U.S. Business and it is related to one of the 27 Pilot Program industries, then the parties must evaluate the structure of the business transaction to determine whether it is a Pilot Program Covered Transaction. A Pilot Program Covered Transaction is defined as any Pilot Program Covered Investment, or any transaction by or with any foreign person that could result in control of any Pilot Program U.S. Business.[22] Furthermore, the Pilot Program Covered Investments are investments in a Pilot Program U.S. Business by which a foreign person obtains control, or alternatively where the investment would give the foreign investor:[23]

- Access to any material nonpublic technical information in the possession of the target U.S. business;
- Membership or observer rights on the board of directors or equivalent governing body of the U.S. business, or the right to nominate an individual to a position on the board of directors or equivalent governing body of the U.S. business; or
- Any involvement, other than through voting of shares, in substantive decision-making of the U.S. business regarding the use, development, acquisition, or release of critical technology.

In short, if a foreign investor gains control of a Pilot Program U.S. Business (as defined above), or if the foreign investor of a Pilot Program U.S. Business satisfies any of the three conditions of the Pilot Program Covered Investments, then the business transaction is a Pilot Program Covered Transaction. Therefore, as required by the FIRRMA Pilot Program the parties must file a mandatory declaration, or a voluntary notice in accordance with existing CFIUS regulations.

Conclusion

In sum, FIRRMA expands the foreign investments (covered transactions) that are subject to CFIUS review. The temporary Pilot Program only applies to non-controlling critical technology foreign investments in Pilot Program U.S. Businesses. As discussed, FIRRMA also expands CFIUS jurisdiction to transactions involving real estate, and non-controlling investments in critical infrastructure and sensitive personal data of U.S. persons, and contemplates mandatory declarations for certain critical infrastructure transactions. However, the Pilot Program does not apply to non-controlling investments in critical infrastructure and sensitive personal data of U.S. persons, nor to real estate investments: regulations implementing these FIRRMA provisions are expected to be issued at a later date. The temporary Pilot Program is just one of the several regulations that Treasury will be implementing to conform to FIRRMA. All of the future regulations that will be implemented pursuant to FIRRMA will significantly impact foreign investments. Therefore, any company involved in international mergers and acquisitions and other types of foreign investment transactions involving the Pilot Program U.S. Businesses and any U.S. businesses in critical infrastructure/ technologies and sensitive personal data of U.S. persons needs to be familiar with FIRRMA and its implementing regulations.

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Endnotes

1 John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, 132 Stat. 1636 (2018).

2 Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), Pub. L. 115-232, Div. A, Title XVII, §§ 1701-1793, 132 Stat. 2173 (2018).

3 Provisions Pertaining to Certain Investments in the United States by Foreign Persons, 83 Fed. Reg. 51,316 (Oct. 11, 2018) (to be codified at 31 C.F.R. pt. 800) [hereinafter Amendments to CFIUS Regulations].

4 Determination and Temporary Provisions Pertaining to a Pilot Program to Review Certain Transactions Involving Foreign Persons and Critical Technologies, 83 Fed. Reg. 51,322 (Oct. 11, 2018) (to be codified at 31 C.F.R. pt. 801) [*hereinafter Pilot Program Regulations*].

5 *See* Press Release, U.S. Dep't of the Treasury, Treasury Releases Interim Regulations for FIRRMA Pilot Program, (Oct. 10, 2018) (available at https://home.treasury.gov/news/press-releases/sm506).

6 Press Release, U.S. Dep't of the Treasury, Treasury Secretary Mnuchin Statement on Signing of FIRRMA to Strengthen CFIUS, (Aug. 13, 2018) (available at https://home.treasury.gov/news/press-releases/sm457).

7 It should be noted that prior to FIRRMA, CFIUS would still consider a foreign investor to have sufficient "control" even if the foreign investor had acquired control with less than a majority of the voting shares of a U.S. entity, such as 10% or less.

8 A "U.S. Business" means a person/entity engaged in interstate commerce in the United States. See FIRRMA § 1703(a)(13) (2018); 31 C.F.R. § 800.226 (2018).

9 FIRRMA § 1703(a)(4)(B)(ii).

10 *Id.* at § 1703(a)(4)(C)(i).

11 *Id.* at § 1703(a)(4)(B)(v).

12 *Id.* at § 1723(3)(B)(i).

13 *Id.* at § 1722.

14 *Pilot Program Regulations*, 83 Fed. Reg. at 51,324.

15 *Id.* at 51,322.

16 *Id.* at 51,327.

17 *Id.* at 51,328.

18 *Id.*

19 The Export Controls Act of 2018 ("ECA") is not part of FIRRMA, and it will control "emerging and foundational technologies" not covered under existing export control authorities such as the EAR or the ITAR. The ECA does not define "emerging and foundation technologies" further than technologies that are essential to U.S. national security, but are not considered "critical technology" under FIRRMA.

20 *See Pilot Program Regulations*, 83 Fed. Reg. at 51,333.

21 Scroll down to page 12 in pdf of Federal Register, 83 Fed. Reg. 51,322, 51,333.

22 *Pilot Program Regulations*, 83 Fed. Reg. at 51,328.

23 *Id.*

COMPLIANCE, CORPORATE HOMICIDE AND ENVIRONMENTAL CRIMES IN MEXICO

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On May 3, 1991, a pesticide plant explosion occurred in the industrial facility known as Anaversa in the southern state of Veracruz, Mexico. Twenty years after the incident more than one thousand deaths have been registered as a result of human contact with dioxins generated by the mixture and combustion of chemicals stored in Anaversa.[1] This event produced several social movements as well as intense social debate. A vast list of industrial accidents that produced large environmental damages and loss of life followed the Veracruz incident.

Starting in 2006, a new set of cases implicating industrial explosions, chemical spills and infrastructure failure in mining sites, offshore rigs, petrochemicals plants, gas transports, highways and even commercial property projects advanced the criminal liability debate in México. In 2016, just before the corporate legal reforms to the Federal Criminal Code (FCC) and the National Code of Criminal Proceedings (NCCP),[2] a new case in Veracruz produced 28 deaths that prompted the environmental investigation of the adverse effects of the release of chemicals of a transnational petrochemical corporation. One year later, social media outrage burst following the death of a father and son in a car accident produced by a sinkhole that opened in an eight-lane super highway in central México. The question about the criminal liability of public officials and the companies responsible for the structural failure of the highway is still pending.

All these incidents paved the way for the first criminal indictment of a corporation in México on October 16, 2018.[3] A hearing was held in a México City court where a criminal judge determined there was enough evidence to prosecute a company responsible for the structural design of an exclusive commercial shopping mall that collapsed in front of multiple bystanders who captured the event on video.

Corporate Criminal Liability Reforms

Corporate criminal liability was introduced for the first time in México on March 5, 2014, when the NCCP was enacted and the national criminal reform was completely implemented nationwide.[4] As with most Civil Law countries, Jurisprudence in México did not permit prosecution of corporations.[5] This legal theory was overturned when the NCCP was promulgated with a special investigation and prosecution procedure for legal persons. Article 423 states that when the public Prosecutor's Office is aware of the possible commission of a crime in which a legal person is involved, under the terms provided for in the FCC, a relevant investigation shall commence. As a result of the NCCP unifying federal and state criminal procedure, corporate criminal liability reform was impacted in all state and federal Departments of Justice. Nevertheless, few company

investigations were conducted, and those few criminal investigations continued to be directed only towards corporate employees and executive officers.

The state of affairs changed in June 2016. Before any criminal investigation within the structure of a corporation started, the NCCP and FCC were again reformed.[6] A list of corporate crimes was introduced in Article 11 BIS (which means twice) of the FCC and a new corporate criminal liability formula was incorporated in the law, following the model used by the Criminal Code of Spain. Article 421 of the NCCP states:

"Exercise of criminal action and autonomous criminal liability.

Legal persons shall be criminally liable for the offences committed in their name, on their behalf, for their benefit or through the means provided by them, when it has been determined that there was a failure to observe due control in the organization. The foregoing irrespective of the criminal liability in which their representatives or administrators may incur in fact or law."

Compliance and Criminal Litigation Practice

The concept of failure to observe due control in an organization introduced in Article 421 of the NCCP represents a major development for compliance professionals. The corporate criminal liability model requires the prosecution to produce evidence of a "failure to prevent" a crime listed under Article 11 BIS of the FCC. A new obligation for the implementation of organizational controls for corporations was created in June 2016, following the major industrial incidents, loss of life and vast environmental damages of the past.

Article 11 BIS of the FCC establishes:

"In all the cases provided for in article 422 of the National Code of Criminal Procedure, the penalties may be attenuated by up to one-fourth if, prior to an indictment, a legal person has developed and implemented a permanent supervisory body in charge of verifying compliance with the legal provisions that are applicable to follow up the internal policies of criminal prevention (…)"

The *duty to prevent*, the obligation to implement *organizational controls* within a company, the new *permanent supervisory body* and the *compliance duties* specifically directed to the required corporate *criminal prevention policy* demands a strong working relationship between compliance professionals and criminal defense attorneys. This relationship, however, is not new. In the anti-money laundering community, compliance with regulations and performing risk assessments demands constant communication with criminal counsel to identify risk factors, scenarios and money laundering typologies. The same is now applicable for environmental crimes, corporate homicide and a long list of corporate crimes.

List of Corporate Crimes

Corporations can only be prosecuted for the commission of specific crimes listed under Article 11 BIS of the FCC. They can also be prosecuted for crimes listed in the state Criminal Codes. Among these offences environmental crimes, corporate homicide, and hydrocarbons and corruption offences are especially relevant in the context of the Mexican energy reform and the US-México-Canada Agreement (USMCA).

USMCA contains important changes for some industrial sectors in México, introduces new policies on environmental standards and provides a new trilateral anti-corruption commitment in matters of bribery and other illegal activities frequently associated with industrial accidents and the loss of life. The Agreement is a recognition that environmental harm and corruption are two important problems that need to be addressed specially by México where industrial risks, failure to prevent and corruption have resulted in major environmental degradation and multiple victims of chemical and industrial incidents.

In the context of the Mexican energy reform, in June 2016, the Federal Law for the Prevention and Prosecution of Crimes Committed in the Hydrocarbon Sector was enacted (the Hydrocarbon Crimes Act) with the purpose of establishing special crimes (hydrocarbons crimes) and penalties applicable in the field of hydrocarbons, petroleum and petrochemicals and other assets, as well as to establish the necessary measures to prevent the commission of such offences.[7] This new legislation was initially directed to combat cartel and organized crime activities related to the theft of hydrocarbons and the environmental damage and harm to individuals that results from the illegal extraction of gasoline, diesel and other chemicals from industrial installations, oil rigs, pipelines and transports. These activities are frequently conducted in association with rogue employees of the companies that are already working in the hydrocarbons sector and oftentimes without executive management knowledge. This is the reason why on June 1, 2018, two years after the Hydrocarbon Crime Act was enacted, a new reform was introduced in order to incorporate the hydrocarbon crimes to the Article 11 BIS list of offences for which a corporation can be criminally prosecuted. Corporations can now be held criminally liable for failing to implement crime controls in relation to their operations and employees. These reforms were linked to the anticorruption system with a strong message. A new crime was designed and an investigation and mandate was directed to the National Anticorruption Prosecutors Office. Any public servant or official who, in the exercise of their functions or because of them, has knowledge of the

probable commission of a hydrocarbon crime and does not report it to the federal police, will be prosecuted and a penalized with up to 7 years in prison.

In the same way that financial institutions are at risk because of unchecked money laundering activities, other corporations face risks in relation to environmental crimes and corporate homicide, especially those that are vulnerable to organized crime, rogue employees, high risk activities and lack of organizational controls.

Under the FCC, a corporation indicted for environmental crimes can face a criminal economic penalty equivalent to 8.2 years of the legal person's net income. Under the México City Criminal Code the penalty for corporate homicide can go up to the equivalent of 50 years of the company's net income. The Mexican Justice System can now potentially produce criminal sentences or plea bargain agreements with fines and penalties similar to those of the 2010 Deepwater Horizon incident in the Gulf of Mexico ($4 billion in criminal fines and penalties).[8] Criminal Courts can also apply other accessory legal consequences to the legal person or entity such as suspension, dissolution, prohibition to carry out certain businesses, operations or activities, intervention and the inability to obtain subsidies and public aid, to contract with the public sector and to enjoy benefits and fiscal or social incentives, for a period of up to 15 years. Court remedial orders under Mexican law are now very similar to remedial orders regulated under the 2007 Corporate Manslaughter and Corporate Homicide Act of the United Kingdom.[9]

Organized Crime Investigation Strategies Applied to Corporations

Since the 1970's, México has developed its legal and investigative capabilities to combat drug cartels. The same strategies that are common in the investigation and prosecutions of members of the organized crime syndicates can be expected to be implemented in corporate crimes investigations.

The NCCP establishes that the public Prosecutor's Office may exercise a criminal action against legal persons, irrespective of the criminal action it may exert against the natural persons involved in the offence committed. Therefore a federal or state prosecutor may offer a plea bargain to an employee or corporate executive in order to obtain useful information needed to prosecute a corporation. This would mean that the relationship between a corporate officer or employee and the company will be compromised by conflicting criminal defenses. Corporations should establish and communicate an internal policy that reflects this reality.

The Federal Environmental Liability Act and the Corporate Criminal Liability Protocol

Following the 2016 legal reforms to the FCC and NCCP, in 2018 the Federal Environmental Protection Agency (the Agency) issued a Corporate Criminal Liability Protocol (CCLP). This document contains important guidelines for criminal referral to the Federal Department of Justice, evidence delivery to the prosecutors and corporate plea bargain requirements. Under the CCLP criminal compliance and corporate crime prevention programs are considered as human rights violations "no repetition guarantees" that are important to obtain plea bargain and remediation and restoration agreements in environmental crimes cases. Victim compensation in high profile environmental and corporate homicide cases have already produced negotiations with large monetary sums. In 2014, a mining accident in the state of Sonora that led to the contamination of a river and more than 180 victims of human contact with copper sulfate resulted in a 2,000,000.00 pesos agreement (one hundred million U.S. dollars, approximately).[10]

Under the Federal Environmental Liability Act (FELA), the Agency is mandated to act as government attorney for the environmental crime's victims defense. In corporate homicide cases associated with industrial accidents the Agency will play an important role during the criminal procedure, as well as in class action judicial proceedings that can be initiated by the government simultaneously. FELA was enacted in 2013, following a constitutional reform that ordered all agencies and courts to investigate environmental liability. Because environmental liability was considered a constitutionally recognized human right, class actions can be filed by the Agency as well as by environmental NGOs and even individuals who live in the community affected by an industrial incident. Under FELA, the affected community can sue before a federal court for environmental remediation actions as well as punitive damages. In 2017, in a federal environmental liability class action proceeding, a federal court issued an order to stop a U.S. $300,000,000.00 project developed by Canadian investors in the state Oaxaca that was conducted without environmental permits. At the same time the federal prosecutor ordered the seizure of the property in a crime investigation.

Legal Risk Prevention Thorough Corporate Criminal Compliance

The FCC, the NCCP, FELA and the National Anticorruption System recognize the value of preventive compliance measures. Article 20 of the Federal Environmental Liability Act, Article 25 of the General Administrative Liability Act and Article 11 BIS of the Federal Criminal Code contain penalty reduction benefits if a criminally investigated corporation opts to develop a Criminal Compliance Program. This is also consistent with the

Corporate Criminal Liability Protocol issued by the Agency in 2018.

Criminal Compliance Programs (CCP) have been standardized by the UNE 19601 norm that was enacted following the reform of the Criminal Code of Spain.[11] UNE 19601 and other international standards such as ISO 31000[12] and ISO 37001[13] are important guidelines for the implementation of Corporate Criminal Compliance Programs in México. These standards along with the provisions contained in Article 11 BIS of the FCC, Article 20 of FELA and Article 25 of the General Administrative Liability Act are the current basis for criminal practitioners that work in crime risk assessments, the design of corporate crimes prevention policies, response protocols and other important elements needed by criminal litigators to demonstrate in a court hearing, compliance with failure to prevent and organizational control obligations mandated by law.

Conclusion

In a country that occupies a worrisome position in the corruption perceptions index (135 out of 180 according to International Transparency), that faces increasing criminal activity affecting national and foreign investments, and that has produced a long list of industrial incidents that resulted in environmental damage and loss of life, corporate criminal liability will represent an important enforcement tool. Surely this will be considered by the new federal administration that will come into power on December 2018. It is a legal tool that will represent a significant operational and economic risk for corporations that have made little or no effort to implement organizational controls.

In the years to come, criminal compliance will represent more than a legal risk management strategy for corporations. Compliance programs will become an essential method of increasing corporations' risk awareness and respect for the rule of law in a country that needs corporate partners to be committed to a permanent process to combat corruption, crime, environmental degradation and human rights violations.

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ANTI-CORRUPTION LAWS IN THE USMCA REGION: IS THE EXCEPTION FOR FACILITATION PAYMENTS OBSOLETE IN MEXICO?

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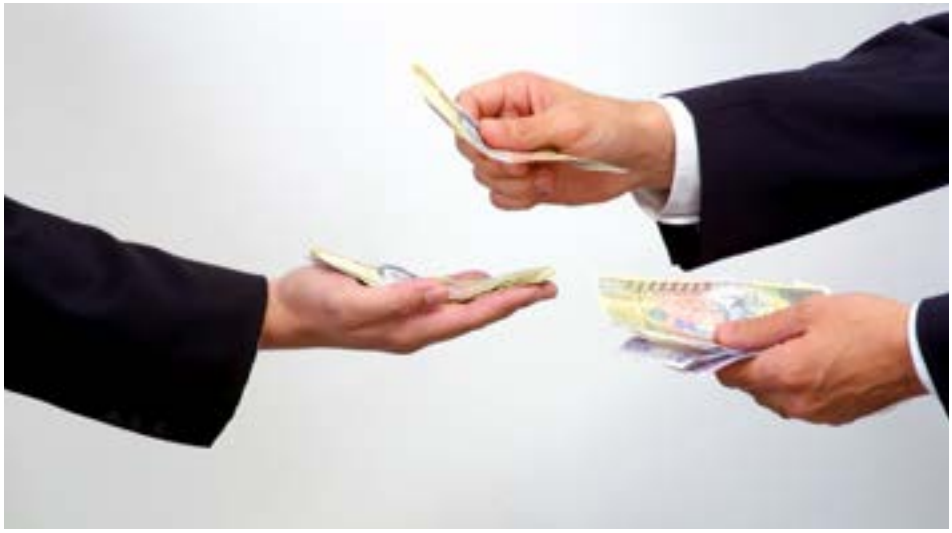
For international companies doing business in Mexico, anti-corruption compliance is a concern. This article compares anti-bribery provisions of the laws of the United States, Mexico and Canada as well as the anti-corruption section of the new USMCA. It also discusses common compliance risks in Mexico, and analyzes whether the Facilitation Payments exception under the FCPA has finally become obsolete in Mexico.



United States – Foreign Corrupt Practices Act (FCPA)

The FCPA is the U.S. anti-corruption law[1] that was enacted in 1977 and prohibits U.S. persons and businesses from paying money or anything of value to foreign governmental officials and public figures in order to obtain or retain business. In addition to this anti-bribery provision, the FCPA contains a separate provision that requires clear accounting of all overseas payments and certain other accounting controls for public companies. The U.S. Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) share enforcement responsibility of the FCPA.

1. FCPA Enforcement Reaches U.S. and Mexico Participants in Bribery Schemes

FCPA violations have substantial consequences that include large fines to companies, as well as fines and criminal charges imposed on responsible officers, directors, owners, and agents. The FCPA covers individuals and entities in three categories: (i) issuers; (ii) domestic concerns; and (iii) foreigners under territorial jurisdiction. Issuers are companies listed on a U.S. stock exchange or that are otherwise required to file periodic reports with the SEC. Domestic concerns are U.S. citizens, residents and companies organized or with a principal place of business in the U.S. The third category extends to foreign individuals and companies that perform some action within the jurisdiction of the U.S. in the course of bribing foreign officials.[2]

This third category of foreigners under territorial jurisdiction is particularly relevant for the U.S. – Mexico region. For example, a March 2017 case involving a Brownsville, Texas aviation company highlights how proximity and international banking can trigger U.S. jurisdiction over Mexican participants in a bribery scheme of Mexican government officials. In this case, a Mexican citizen acting on behalf of the Texas company was sentenced to federal prison and ordered to pay restitution of nearly $90,000 for his part in paying bribes to Mexican aviation officials in exchange for governmental repair and maintenance contracts. Payments were made by wire transfer

and checks to bank accounts in the U.S. controlled by the Mexican officials, which allowed a Texas federal court to prosecute two of the Mexican officials and sentence them to federal prison in the U.S. for money laundering conspiracy.[3] This case on Texas's southern border is an example of territorial jurisdiction and how U.S. anti-corruption laws reach Mexican participants in bribery schemes.

2. Compliance Risks in Mexico

For operations in Mexico, the areas recognized as compliance risks for international companies include: (1) selling to or contracting with government-owned entities, like PEMEX or Mexico's social security institute (IMSS), as both have been named in FCPA enforcement cases; (2) applying for governmental permits, authorizations, and licenses, particularly including building, occupancy, or use permits in the construction area; (3) making payments to third-party consultants called "*gestores*"; (4) dealing with labor, environmental, and safety auditors; (5) requests for donations by municipal authorities; and (6) gifts, meals and entertainment.[4]

On a global scale, Mexico is considered a high-risk country for corruption. One study indicates that the payment of bribes to access basic public services is more common in Mexico than any other country in Latin America.[5] The 2017 Corruption Perception Index by Transparency International[6] ranked Mexico number 135 out of 180 countries for public sector corruption. In a country marked by poverty and lack of education, the culture of bribing government officials, including police officers, still prevails in many areas of Mexico although anti-corruption campaigns by NGO's and the private sector are making headway. U.S. companies can face challenges at the ground level where small off book payments to utility crews, inspectors, labor union representatives, filing clerks, and others may still be expected to guarantee performance of their responsibilities. In some cases, these types of payments were previously thought to fit into the Facilitation Payments exception of the FCPA.

3. The FCPA's Exception for Facilitation Payments Contradicts the Modern Trend or Anti-Corruption Laws

A 1988 amendment to the FCPA for Facilitation Payments was added in response to complaints by U.S. companies doing business overseas that they could not compete locally in some countries without the ability to make "grease payments" to low level administrative officials to get things done. The Facilitation Payments exception is a narrow exception to the FCPA's anti-bribery provision that allows payments to government officials to facilitate or expedite "routine governmental actions" such as processing papers, issuing permits, and other actions.[7]

This exception for facilitating payments is not in line with the broader more recent international trend. For example, the more modern UK Bribery Act that went into force in 2011 is broader in many aspects than the FCPA and makes no exception for Facilitation Payments. Other countries that do not recognize the Facilitation Payments exception are Argentina, Belgium, Brazil, Bulgaria, Chile, Czech Republic, Denmark, Estonia,

COMPARISON OF KEY PROVISIONS OF ANTI-BRIBERY LAWS

	UNITED STATES FCPA	MEXICO GLAR	CANADA CFPOA	USMCA (New NAFTA treaty)
Prohibits Bribing a Public Official	YES	YES	YES	YES
Prohibits Receiving Bribes	*NO	YES	YES	YES
Nationality of Public Official	APPLIES TO FOREIGN OFFICIALS	APPLIES TO FOREIGN AND DOMESTIC PUBLIC OFFICIALS	APPLIES TO FOREIGN AND DOMESTIC PUBLIC OFFICIALS	APPLIES TO FOREIGN OFFICIALS
Facilitation Payments (Payments to expediate routine administrative procedures)	ALLOWED UNDER SOME CIRCUMSTANCES	PROHIBITED	PROHIBITED	APPLIES LAW OF APPLICABLE COUNTRY

**But could be prosecuted under other U.S. criminal laws.*

Finland, France, Germany, Hungary, Iceland, Ireland, Israel, Italy, Japan, Luxembourg, the Netherlands, Norway, Poland, Portugal, Russia, Slovenia, Sweden, and Turkey[8] (and, as discussed below, Mexico and now Canada). The United Nations Convention Against Corruption does not recognize Facilitation Payments as an exception to bribery.

Mexico – General Law of Administrative Responsibilities (GLAR)

As a supplement to anti-corruption provisions in Mexico's federal and state criminal codes, the new General Law of Administrative Responsibilities (GLAR) enacted in 2017 as part of anti-corruption reform prohibits individuals and companies from the private sector from offering or paying bribes as well as the taking of bribes by public officials.[9]

1. Mexico's Anti-Corruption Reform

The GLAR arose from an impressive private sector initiative aimed at public sector corruption that was originally called *Ley 3 de 3* (the "Three of Three Law") and that gave a platform for candidates and public officials to publicly disclose personal assets, possible conflicts of interest and their taxes as a tool to prevent corruption. The "Three of Three" public disclosure obligation became law under the GLAR, but to date the public disclosure forms have not been released and the obligation remains un-enforced. The GLAR was enacted as part of broad anti-corruption reform that established a National Anticorruption System and brought changes to federal and state laws aimed at public servants, administrative procedures, transparency, and others.[10]

In addition to the payment or receipt of bribes, the GLAR defines an expanded group of actions that are offenses under the law, including illegal participation in administrative procedures, influence-peddling, use of false information, blocking investigating authorities, collusion, wrongful use of public resources, and wrongful hiring of ex-public servants, among others.[11]

2. There is No Facilitation Expense Exception under the GLAR

The GLAR prohibits paying bribes to government officials, and there is no exception for Facilitation Payments to expedite routine governmental acts. This is important because the FCPA provides for an affirmative defense to FCPA enforcement actions when a payment to a foreign official is lawful under the laws of that foreign country. The enactment of the GLAR, which does not make an exception for Facilitation Payments, closes the gap on U.S. companies being able to use the Facilitation Payments exception in Mexico.

Canada – Corruption of Foreign Public Officials Act (CFPOA)

1. CFPOA Anti-Bribery provision.

Canada's anti-bribery legislation, called the Corruption of Foreign Public Officials Act,[12] has existed for twenty years and is similar to the FCPA in that it has extraterritorial application. It is a law that has been aggressively enforced in Canada in recent years and applies to Canadian companies operating in Mexico, companies with Canadian personnel, and companies that have a Canadian parent or subsidiaries. The CFPOA originally contained a Facilitation Payments exception for payments "to expedite or secure the performance by a foreign public official of any act of a routine nature that is part of the foreign public official's duties or functions..."[13]This wording is very close to the wording in the FCPA.

2. Repeal of the Facilitation Payments Exception under the CFPOA

Effective October 31, 2017, the Canadian legislation repealed the Facilitation Payments exception to align the CFPOA with the modern approach to anti-corruption requiring a stricter duty of absolute compliance with its non-bribery provisions.

United States-Mexico-Canada Agreement (USMCA) – Chapter 27

The USMCA, which in Spanish will be known by the acronym T-MEC for Tratado Comercial Entre Mexico, Estados Unidos y Canada, has added several new chapters to NAFTA, including the new Chapter 27 on Anti-corruption. Under Chapter 27, the three countries commit to fight corruption by adopting and maintaining measures for: selection and training of public officials; transparency; enforcing codes of conduct; removing public officials; and other systems for preventing corruption. Of note, this chapter closely mirrors chapter 26 of the former Trans-Pacific Partnership, from which President Trump withdrew the U.S. in January 2017, and which was later signed by 11 other member countries under the new name Comprehensive and Progressive Agreement for the Trans-Pacific Partnership.

Chapter 27 of the USMCA further states that the U.S., Mexico and Canada shall not fail to actively enforce the anti-corruption law,[15] thereby putting pressure on Mexico to fully implement and enforce the GLAR. At the time of this writing, it is expected that the USMCA will be signed at the G20 summit, November 30 – December 1, 2018, in Buenos Aires, Argentina. Thereafter, each country would pass legislation to implement the USMCA.

Conclusion

As discussed above, there are two recent developments that challenge the Facilitation Payments exception for USMCA region companies that do business in Mexico. First, both Mexico and Canada now have strict anti-bribery laws that do not recognize the Facilitation Payments exception. Second, the USMCA is bringing additional accountability to Mexico's compliance efforts and the implementation of the GLAR.

Therefore, U.S. companies doing business in Mexico should revisit the applicable anti-bribery provisions and adjust accordingly. As discussed above, the FCPA's exception for Facilitation Payments contradicts the laws of Mexico and Canada, and the enactment of the GLAR in Mexico has effectively blocked the use of the FCPA's affirmative defense to actions involving payments that are lawful under local law. At a minimum, companies should more closely scrutinize the use of the FCPA Facilitation Payments exception to justify small payments to government officials in Mexico. A more prudent position would be to consider that the Facilitation Payments exception to the FCPA is obsolete in Mexico.

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Endnotes

[1] U.S. Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1, et seq. (1977). U.S. laws related to anti-corruption include, without limitation, the Travel Act (1952), Sarbanes-Oxley Act (2002), anti-money laundering laws including the Bank Secrecy Act (1970) and the USA Patriot Act (2001), Dodd-Frank Wall Street Reform and Consumer Protection Act (2010), mail and wire fraud laws, and U.S. tax laws.

[2] 15 U.S.C. §78dd-3. "Since 1998, the FCPA's anti-bribery provisions have applied to foreign persons and foreign non-issuer entities that, either directly or through an agent, engage in any act in furtherance of a corrupt payment (or an offer, promise, or authorization to pay) while in the territory of the United States." U.S. Department of Justice, U.S. Securities and Exchange Commission, A Resource Guide to the U.S. Foreign Corrupt Practices Act, 2012, page 11, available at https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf.

[3] See Business Anti-Corruption Reporter, Six guilty pleas, four for FCPA offenses, in Mexico bribe scheme, December 28, 2016, available at https://www.business-anti-corruption.com/news/six-guilty-pleas-four-for-fcpa-offenses-in-mexico-bribe-scheme/.

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[5] Transparency International, People and Corruption: Latin America, October 9, 2017 available at https://www.transparency.org/whatwedo/publication/global_corruption_barometer_people_and_corruption_latin_america_and_the_car. See Mexico News Daily. Among 20 Countries, MX leads for bribery, October 10, 2017, available at https://mexiconewsdaily.com/news/among-20-countries-mx-leads-for-bribery/

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[9] General Law of Administrative Responsibilities (Ley General de Responsabilidades Administrativas), published in the Federal Official Gazette of Mexico on July 18, 2016, available at http://www.diputados.gob.mx/LeyesBiblio/ref/lgra.htm.

[10] List of anti-corruption legislation includes the Organic Law of Public Administrative Officials (Ley Orgánica de la Administración Publica Federal), Federal Law for Transparency and Access to Public Information (Ley Federal de Transparencia y Acceso a la Informacion Publica), National Security Law (Ley de Seguridad Nacional), Federal Tax Code (Código Fiscal de la Federación). See Secretaría de la Función Pública, Legislación Anticorrupción, available at http://www.programaanticorrupcion.gob.mx/index.php/consulta/legislacion-anticorrupcion.html.

[11] General Law of Administrative Responsibilities (Ley General de Responsabilidades Administrativas), published in the Federal Official Gazette of Mexico on July 18, 2016. See http://www.diputados.gob.mx/LeyesBiblio/ref/lgra.htm.

[12] Corruption of Foreign Public Officials Act, S.C. 1998, c.34, available at https://laws-lois.justice.gc.ca/eng/acts/C-45.2/.

[13] Id. At S.C. 2013, c.26, s.3. The enforcement of the amendment was held in abeyance to allow companies time to adjust their practices. See Sean K. Boyle and Alexandra Luchenko, Facilitation Payments Now a Criminal Offence in Canada, ABA CJS White Collar Crime Committee Newsletter, Winter/Sprint 2018, available at https://www.americanbar.org/content/dam/aba/publications/criminaljustice/2018/Boyle.pdf.

[14] See Office of the United States Trade Representative, United States-Mexico-Canada Agreement, available at https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/united-states-mexico.

[15] Id.

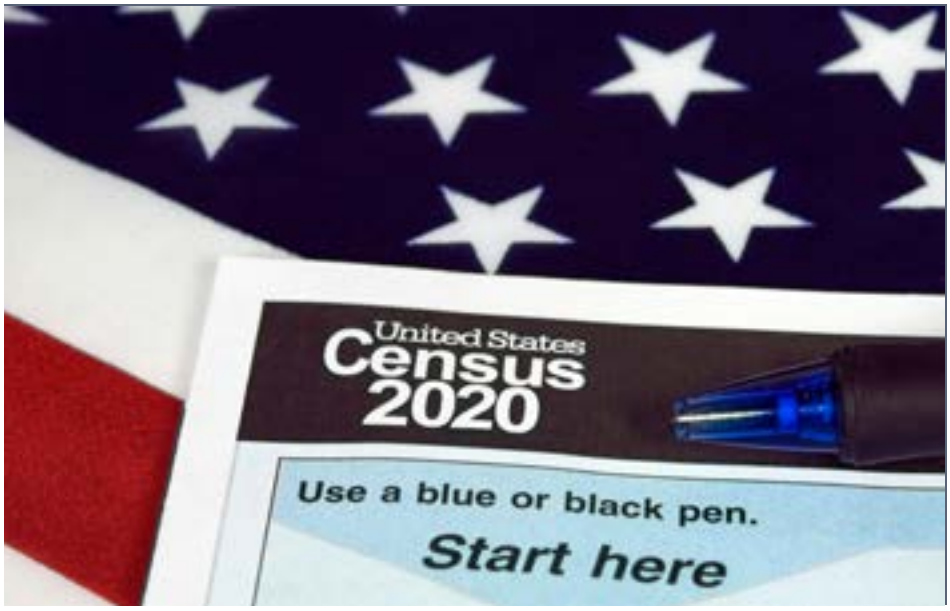
IMMIGRATION CONSEQUENCES OF FALSELY DECLARING U.S. CITIZENSHIP ON 2020 CENSUS

BY JORDAN J. GONZALEZ
Deason Law, P.C., Houston

Every ten years, Americans and non-Americans alike receive a letter in the mail from Uncle Sam. Interestingly, the receipt of this letter often causes entirely different reactions depending on the recipient's legal status. While some Americans and other status-bearing individuals perceive this as a tedious and bureaucratic accounting mechanism, undocumented individuals immediately feel trapped in a Catch-22 type of conundrum. Indeed, the Census Bureau presents a variety of sensitive questions and failure to respond could cause the feds to arrive at the recipient's front door. Conversely, responding honestly has been perceived as placing one "on the radar." This sensation of being trapped between a rock and a hard place, coupled by a lack of awareness with respect to the rights ***everyone*** exercises over their census data, often leads to a regrettable result: misrepresentation of census data.

In a year in which the Trump administration has announced its intention of including a U.S. citizenship question on the 2020 census, the stakes have become even higher than before with respect to undocumented community members. Specifically, falsely claiming U.S. citizenship carries incredibly harsh penalties, which, if discovered by U.S. Citizenship and Immigration Services (USCIS), Immigration and Customs Enforcement (ICE), or the U.S. Secretary of State, can lead to one's permanent inadmissibility and/or deportability.

While undocumented individuals cannot generally abstain from the census, we can cultivate an awareness of the right to confidentiality with respect to census data. This article is intended to provide practitioners and non-practitioners with a basic understanding of the practical consequences of the 2020 citizenship question, our right to census data confidentiality, the circumstances in which census data can be used against us, as well as the broader societal implications this citizenship question may create.



Potential Consequences of Citizenship Question

On March 26, 2018, the U.S. Census Bureau announced its decision to instate a question on citizenship status into the 2020 decennial census.[1] In the time since the announcement, an outpouring of public concern has arisen. Indeed, advocates against the citizenship question argue that the inclusion of this question will result in lower rates of participation amongst the U.S.'s undocumented population.[2] That is, undocumented populations will be more inclined to abstain, or worse, misrepresent their legal status for purposes of evading detection by ICE, the agency charged with enforcing U.S. immigration law through deportation proceedings.

Maintaining the integrity of the census is an important issue to all individuals irrespective of legal status, as the collected data is not only used to conduct a variety of social and

economic studies, but also plays a key role in the allocation of federal funding. Hidden from discussion, however, are the more severe immigration-related consequences linked to misrepresenting census data. Indeed, under current Board of Immigration Appeal (BIA) precedent, a decision as simple as checking the "citizenship" box may cause a non-citizen to be ***permanently*** barred from seeking any future immigrant relief, including residency and U.S. citizenship, if the intent was to obtain a government benefit or evade adverse immigration consequences, such as deportation.[3]

False Claims and Use of Census Data

The law relating to what constitutes a false claim to U.S. citizenship is in and of itself extensive. Generally speaking, however, the ground of inadmissibility is triggered when one makes a false claim to U.S. citizenship for any benefit or purpose under state or federal law.[4] The "benefit or purpose" prong is disjunctive, with each term carrying distinct meanings. According to USCIS, "benefits" includes anything from a U.S. passport, entry into the U.S., and even employment and loans.[5] The term "purpose" is broader, as it includes subjective intent to evade negative legal consequences, such as removal proceedings and inspection by immigration officials.[6] Hence, falsely declaring U.S. citizenship on the census, if done so to avoid removal proceedings, brings one into the purview of the "purpose" prong, resulting in one's inadmissibility or deportability.

As we move closer to the census date, which is set to be administered in a little under a year and a half from now on April 1, 2020, it is imperative to cultivate an awareness that information shared with the U.S. Census Bureau is confidential. Absent the explicit consent of a census respondent (or his or her heirs, successors, or agent), the U.S. Census Bureau is forbidden from disclosing or publishing any identifying census information.[7] There are, of course, a few instances where this rule has been broken – one instance occurring during World War II for the purposes of interning Japanese-Americans and another instance shortly after the September 11 attacks.[8] Nevertheless, even when census information is acquired by federal or state actors, census information cannot be admitted into evidence without the individual's express consent.[9]

Some may ask, "If census data is protected from revelation, then how will ICE or any other government agency discover a false claim to U.S. citizenship?" While it is true that U.S. census information cannot be directly discovered by ICE or other immigration officials, they are not prohibited from asking about false claims to U.S. citizenship throughout the course of visa, residency, citizenship applications, and removal proceedings. If this line of questioning arises and the individual is not wholly convincing in his or her answers, the Department of Homeland Security maintains that it will become the burden of the individual to establish "clearly and beyond a doubt" that he or she did not knowingly make a false statement.[10] This overwhelming burden of proof (akin to the burden for securing a criminal conviction) may, in turn, force the individual accused of the false claim to U.S. citizenship to present one of the limited pieces of evidence available to meet the burden of proof, i.e., the census document itself. If the officer's suspicions relating to the census document turned out to be correct, not only does the permanent bar of inadmissibility for a false claim to U.S. citizenship apply, but additional bars for fraud and/or willful misrepresentation may apply too.

Conclusion

In short, while there may be a risk that the government might improperly use census data, that risk is minute in comparison to the potential adverse consequences of committing a false claim to U.S. citizenship. In this respect, undocumented immigrants should be assured that their census information is generally safeguarded.

Considering the incredibly severe penalties associated with falsely answering the citizenship question, the more interesting question is whether this seeming triviality has been specifically crafted to ensnare more non-U.S. citizens in the deportation system. Indeed, the Trump Administration has made no secret of his intention of ramping up immigration enforcement proceedings. So far, the Administration's primary justification pertaining to including the question has centered on its desire to better enforce the 1965 Voting Rights Act.[11] However, when viewing the impact of the question on an aggregate scale, one cannot help think that the question is but another means to fulfill its hardline stance on immigration.

Whether the impact relating to the inclusion of the question can be calculated or coincidentally gratuitous is yet to be discovered. Yet, the impact on thousands of immigrants' lives is unequivocal. This fact should be at the forefront of the mind when answering the 2020 U.S. Census Bureau's citizenship question, which, if misrepresented, could later cause severe and permanent immigration consequences.

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Jordan J. Gonzalez is an Associate Attorney at the Houston-based immigration law firm, Deason Law, P.C, where he has the pleasure of assisting clients throughout the world with their business, family, and removal-based immigration needs. ●

Endnotes

1 Wilbur Ross, *Reinstatement of a Citizenship Question on the 2020 Decennial Census Questionnaire*, commerce.gov (2018), https://www.commerce.gov/sites/commerce.gov/files/2018-03-26_2.pdf(last visited Oct 23, 2018).

2 Dan M Clark, *NY AG's Lawsuit Over Census Citizenship Question Set for Trial Over White House's Objection*, law.com (2018), https://www.law.com/newyorklawjournal/2018/10/01/ny-ags-lawsuit-over-census-citizenship-question-set-for-trial-over-white-houses-objection/?slreturn=20180923120858 (last visited Oct 23, 2018).

3 Immigration and Nationality Act (INA) § 212(a)(6)(C)(ii)(I); see also INA § 237(a)(3)(D) (False claim to U.S. citizenship is an act considered so severe that it is treated as a deportable offense).

4 8 U.S.C. § 212(a)(6)(C)(ii).

5 USCIS POLICY MANUAL VOL. 8, Ch. 2, Part K, Section E.

6 *Matter of Richmond*, 26 I&N Dec. 779 (BIA 2016).

7 13 U.S.C. §§ 9(a)(1)-(3).

8 Teresa Watanabe, *In 1943, Census released Japanese Americans' data*, latimes.com (2007), http://articles.latimes.com/2007/mar/31/nation/na-census31 (last visited Oct 23, 2018).

9 13 U.S.C. § 9(a)(3).

10 8 USCIS POLICY MANUAL VOL. 8, Ch. 2, Part K, Section D.2. ("As long as there is some evidence in the record that reasonably calls the foreign national's admissibility into question, the foreign national has the burden to prove the foreign national is not inadmissible…The foreign national must establish clearly and beyond a doubt that he or she did not know the claim was false.")

11 Michael Wines, *Inside the Trump Administration's Fight to Add a Citizenship Question to the Census*, The New York Times (Nov. 4, 2018), https://www.nytimes.com/2018/11/04/us/wilbur-ross-commerce-secretary.html.

ENFORCING MEDIATION AGREEMENTS INTERNATIONALLY: THE SINGAPORE CONVENTION

BY DAVID T. LOPEZ, FCIARB
David T. Lopez & Assoc., Houston

Just as international arbitral awards are recognized and enforced under the New York Convention, so also will be international agreements reached at mediation. In July 2018, the United Nations Commission on International Trade Law (UNCITRAL) approved the final draft of the Convention on Enforcement of International Settlement Agreements (the Convention), which will be submitted for subscribing states at a signing ceremony in the spring of 2019. It will be known as the Singapore Convention on Mediation.[1]

The approval was reached on the 60th anniversary of the New York Convention, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which has been adopted by 65 countries and has become a major element in international trade agreements. The adoption culminated three years of, at times, contentious negotiations, perhaps aided by a blizzard that caused the shutdown of the United Nations Headquarters, relegating delegates to a crowded conference room of a New York law firm.[2]

Coverage of the Convention

Under the Convention, international agreements resulting from mediation and confirmed in writing by the parties to a commercial dispute will be enforceable in the judicial tribunals of any of the participating countries. Personal, family, inheritance and employment matters are specifically excluded, and individual countries may impose other exceptions, such as matters involving governmental agencies or persons acting in behalf of governmental agencies. Where exceptions are made, the Convention will not apply absent agreement by the parties.[3] By making it easier for businesses to enforce mediated settlement agreements, the treaty is expected to improve and boost cross-border trade.[4]

Signatory countries must enforce mediated settlement agreements in their courts, subject only to specified grounds for refusal: Lack of capacity of the parties, invalidity of the settlement agreement as void, inoperative or incapable of being performed, the agreement not being final or having been modified, if the obligations in the agreement have been met or are not clear or comprehensible, if relief is requested contrary to the terms of the agreement, of if lack of impartiality or serious breach of applicable mediation standards are demonstrated. The Convention focuses on circumstances not covered by other international agreements, excluding from its coverage matters that can be adjudicated under provisions such as those of the New York Convention or the Hague Convention on the Choice of Court Agreements.[5]

No specific means of enforcement is specified by the Convention, and each participating country is free to determine how the settlement will be enforced, so long as the enforcement is ordered under its procedural rules and the specified conditions in the Convention. The party seeking enforcement must submit to

competent judicial authority the signed mediated agreement and evidence that it resulted from mediation. The judicial authority has discretion to determine the nature of the evidence required, such as written and signed certification by the mediator or an official of an institution administering the mediation.

Model Law

UNCITRAL adopted a corresponding Model Law for consideration of the countries signing the Convention.[6] To protect from enforcement problems arising from the mediation process or the conduct of the mediator, parties, mediators and administering institutions may refer to Articles 18 and 19 of the Model Law. As is the case in the United States, a mediator must make full disclosure to the parties of anything that might suggest lack of a mediator's independence or impartiality.[7] Good guides in this respect are the established standards of the American Arbitration Association and its International Centre for Dispute Resolution.[8]

The Convention will promote the use of international commercial mediation, just as the New York Convention has done for international commercial arbitration. The inclusion of provisions for mediation as a prelude to arbitration might increase significantly.

Given that the Convention specifically excludes application to employment matters, continued careful attention should be given to choice of law provisions in expatriate employment contracts and how recourse to mediation in the agreements is viable. It is common for expatriate agreements to call for the application of the law of the home country, but such provisions can be superseded by local laws of the host country, which can make part or all of the expatriate agreement unenforceable.[9] Within the European Union, such concerns have been addressed through the Rome Regulation on the Applicable Law to Contractual Obligations.[10]

Conclusion

In 2018, The United Nations Commission on International Trade Law approved a model law and a convention that will be signed by adopting countries in Singapore in the spring of 2019 and will be known as the Singapore Convention. Therefore, beginning in 2019, mediation agreements between parties from different countries will be as universally enforceable as arbitral awards now are under the New York Convention.

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David T. Lopez, FCIArb, practices international and domestic arbitration and mediation in Houston.

Endnotes

1. "The Singapore Mediation Convention: An Overview," Global Pound Conference Series, https://www.globalpound.org/2018/07/12.
2. Channel NewsAsia, July 28, 2018.
3. See text of the Convention at www.uncitral.org/pdf/english/commisssionsessions/51st-sesson/Annex_1.pdf.
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7. Article 6 ¶5 of the Model Law.
8. Applicable rules and other guidance is available online at www.adr.org.
9. *INTERNATIONAL LABOR & EMPLOYMENT LAW*, 3d ed., Vol. 1B, pp. 98-5 and 6, American Bar Association 2009.
10. Regulation (EC) No. 593/2008 of The European Parliament and of the Council, replacing the Rome Convention on the Law Applicable to Contractual Obligations (1980).

ENERGY ISSUES UNDER THE UNITED STATES-MEXICO-CANADA AGREEMENT — VEHICLE FOR FURTHER CONSOLIDATION OF THE NORTH AMERICAN ENERGY MARKET?

BY LARRY PASCAL
Haynes and Boone, LLP, Dallas

With the recent announcement of the revamped free trade agreement among the United States, Mexico and Canada, investors can point to some positive developments in the North American energy sector and possibly enhanced efficiencies and integration among the countries. Some highlights of the new agreement are discussed below.

Impact of Energy Issues on USMCA

In discussing the impact on the treatment of energy issues under the United States-Mexico-Canada Agreement ("USMCA"), it is important to acknowledge that the final text of the treaty has not been released. Nevertheless, certain trends, primarily positive from a foreign investor perspective, can be gleaned. For example, the U.S. Trade Advisory Committee on Energy and Energy Services, dated September 27, 2018, provided comments to the United States Trade Representative Office ("USTR") on the energy aspects of the USMCA. The Advisory Committee comments include the following:

a. approval for the investor-state dispute resolution (ISDS) protection for expropriation claims under government contracts being added for investments in the oil and gas, infrastructure, energy generation, and telecommunications sector between the U.S. and Mexico (albeit with Canada and Mexico being governed by the terms of the Trans-Pacific Partnership to which both parties are signatories and hence this aspect was left out of the USMCA);
b. concern for the relatively short period for the sunset clause (16-year term), given the long-

term nature of investments in the energy sector;

c. support for deepening commercial ties in the cross-border fuels and energy sector; and

d. support for harmonization of energy efficiency measures standards through working groups to be established.

As noted, despite the deepening of the North American energy market in the years between the initial ratification of the NAFTA and the announcement of the next generation USMCA, the new agreement lacks a single integrated energy chapter that would typically address commitments of the three countries. However, the USMCA does have a short chapter 8 entitled "Recognition of the Mexican State's Direct, Inalienable, and Imprescriptible Ownership of Hydrocarbons," believed to be inserted at the request of the incoming administration of Mexican President Lopez Obrador, which recites that the Mexican Government remains the owner of all hydrocarbons below the soil. This issue is further heightened by recent declarations of incoming Mexican President Lopez Obrador that suggest a new Mexican energy policy that gives more rights and responsibilities to Pemex at the expense of other actors (private and public) that have emerged under the 2013 Mexican energy reforms.[1]

Moreover, it is important to recall that Canada and Mexico, but not the U.S., have ratified the Trans-Pacific Partnership (along with other countries) and those TPP commitments will continue to exist.

Of course, when the original NAFTA was ratified, Mexico had constitutional restrictions on private sector participation in the upstream oil and gas sector and hence reservations under the NAFTA were made as to treaty commitments by Mexico for this sector. When the Mexican Constitution was later amended under President Pena Nieto so as to allow private and foreign investment, it left open the issue as to whether the Chapter 11 protections against state expropriation applied to the oil and gas sector. This uncertainty will now likely be removed under the USMCA for, among other areas, oil and gas and power generation claims under government contracts, as alluded to above. However, under chapter 8, the USMCA continues to recognize Mexico's "direct, inalienable, and imprescriptible ownership of hydrocarbons" and its sovereign right to amend its Constitution and its domestic legislation.

> "From an energy perspective, the USMCA will permit the continued growth and evolution of a North American energy market that had already begun to evolve, shaped by a variety of market and regulatory forces that have arisen over the years."

The USMCA also maintains tariff-free trade of raw and refined oil and gas products between the U.S. and Mexico and in general grants equal opportunities to U.S. and Canadian investors to participate in Pemex and CFE tenders.[2] However, Canadian and Mexican investors will not enjoy any protection from the effects of U.S. "Buy America" rules in public procurements in the U.S.

Furthermore, under the USMCA, there is also a new chapter on anticorruption (Chapter 27) and a separate stand-alone chapter on the environment (Chapter 24). In particular, the environmental chapter has an express prescription on the lowering of environmental standards as a way to attract trade and investment.[3]

There is also a new concept of granting additional flexibility so as to allow U.S. Customs to accept alternative documentation to certify that natural gas and oil have originated in Canada or Mexico prior to entering the U.S.[4]

Conclusion

From an energy perspective, the USMCA will permit the continued growth and evolution of a North American energy market that had already begun to evolve, shaped by a variety of market and regulatory forces that have arisen over the years — the rapid growth of non-conventional resources in the United States, elimination on U.S. restrictions on the export of crude oil, Mexican energy reform which has liberalized the hydrocarbon and power industry, the growth in the renewable sector, etc.

We see a variety of stakeholders in the energy sector benefitting under the USMCA. U.S. and Canadian energy investors will have more certainty as to their energy investments in Mexico. Mexico will benefit from the possibility of increased investment in the sector afforded by the greater legal certainty. Consumers from the three countries will also benefit from enhanced supply and efficiency in the more integrated North American energy market.

Overall, from an energy perspective, we envision that the region will benefit as a whole by enabling greater inter-regional investment in the regional energy marketplace, enjoying greater investment and legal certainty, and seeing improved

accountability as to environmental and anticorruption measures.

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Larry Pascal is a partner and co-chair of the International Practice Group at Haynes and Boone in Dallas, Texas, where he concentrates his practice on cross-border transactions, including in the energy sector. He previously served as the Chair of the International Law Section of the State Bar of Texas.

Pascal would like to thank his colleagues Edward Lebow and Nicolas Borda at Haynes and Boone for their assistance with this article. ●

Endnotes

1 For example, the incoming administration has announced that future Mexican upstream bid rounds will be halted.

2 See in particular Annex 13-A of the Government Procurement Chapter Notes, which provides an exception to the general rule as follows. "Notwithstanding any provision in Chapter 13 (Government Procurement), Mexico may set aside procurement contracts from the obligations of Chapter 13 (Government Procurement), subject to the following: (a) the total value of the contracts set aside may not exceed the Mexican peso equivalent of US$2,328,000,000 in each calendar year of the date of entry into force of this Agreement for Mexico, which may be allocated by all entities, including PEMEX and CFE; (b) the total value of contracts under any single FSC class (or other classification system agreed by the Parties) that may be set aside under this paragraph in any year shall not exceed 10 per cent of the total value of contracts that may be set aside under this paragraph for that year; (c) no entity subject to subparagraph (a) may set aside contracts in any calendar year of a value of more than 20 per cent of the total value of contracts that may be set aside for that year; and (d) the total value of the contracts set aside by PEMEX and CFE may not exceed the Mexican peso equivalent of US$466,000,000 in each calendar year."

3 See Article 24.4 "Enforcement of Environmental Laws" paragraph 3.

4 See Article 5.2, "Claims for Preferential Treatment" paragraph 2.

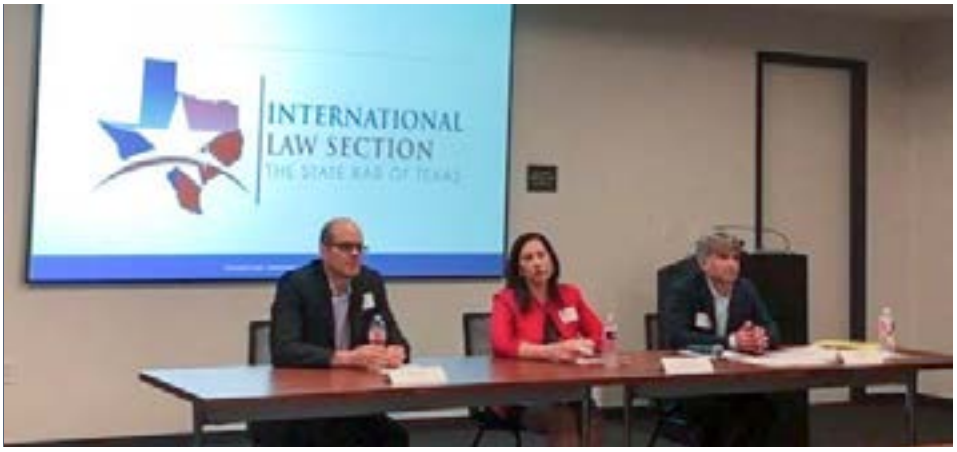
ILS IN AUSTIN TO EXPLORE INTERNATIONAL CYBERSECURITY AND PRIVACY ISSUES

BY MARTIN LUTZ
Partner, McGinnis Lochridge (Austin)

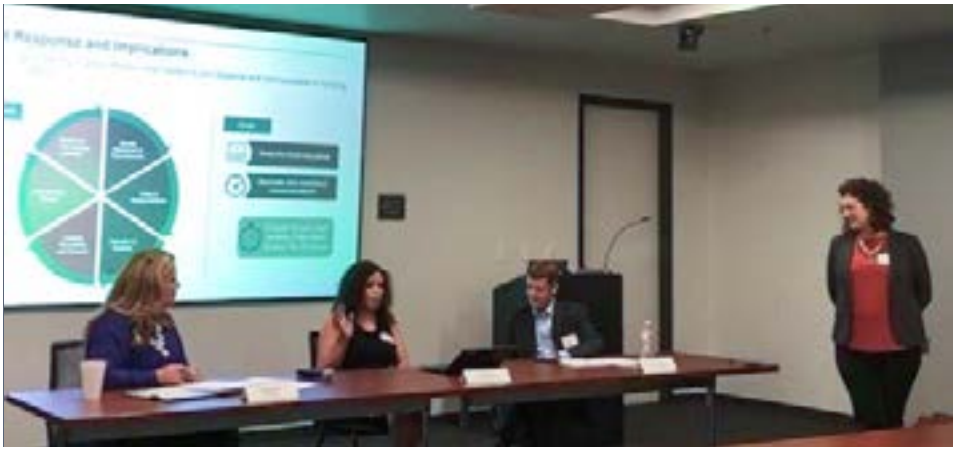
A recent CLE sponsored by ILS was held on September 26 at Holland & Knight Law Offices in Austin, addressing *Cybersecurity and Privacy for International Lawyers and Their Clients*. More than three dozen attorneys, sponsors and ILS members attended a series of afternoon panels on these issues of particular interest to international practitioners, with presentations offered by an excellent group of top practitioners (identified below), to whom the Section is indebted for sharing their insights and their time.

The first panel, *Complying with Cybersecurity and Data Privacy Requirements in the Global Information Age*, addressed the privacy concerns and cybersecurity threats that governments across the globe are addressing with new legislative and regulatory initiatives. Responding to these emerging laws and regulations presents difficult compliance challenges for companies operating across borders. Panelists gave an overview of the emerging legal environment on data protection and cybersecurity, discussed compliance strategies, and offered insights as to where regulatory efforts may be headed in the future.

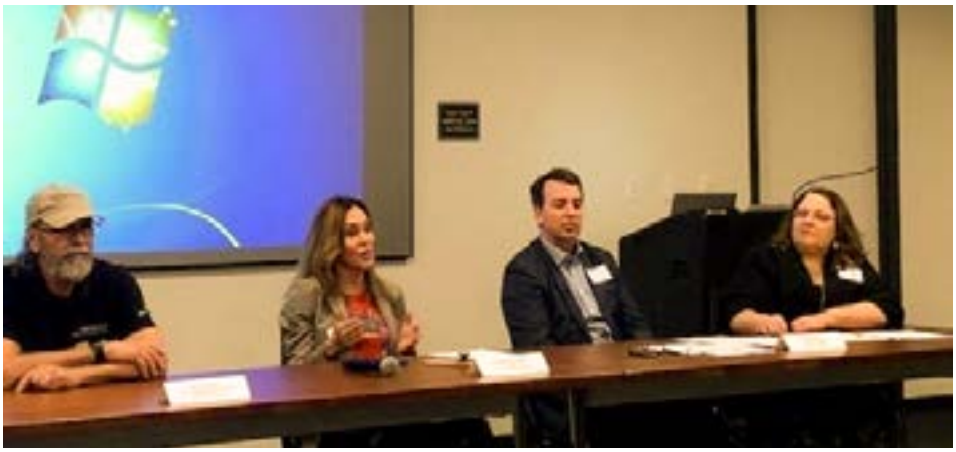
A second panel was entitled, *Responding to Data Breaches and Cybersecurity Attacks*. The frequency and severity of data breaches and cyber-attacks, and the increasing liability resulting therefor, present growing concerns for a wide range of businesses, and particularly those most active



(Left to Right): Complying with Cybersecurity and Data Privacy Requirements in the Global Information Age Panel featured Seth Randle, Chief IP Counsel, Harland Clarke Holdings; Norma Krayem, Senior Policy Advisor, Holland & Knight; and Brian Falbo, Legal Director, Dell.



(Left to Right): Responding to Data Breaches and Cybersecurity Attacks panel featured Jenifer Sarver, Sarver Strategies; Sarah E. Fortt, Senior Associate, Mergers & Acquisitions and Capital Markets, Vinson & Elkins; and Doug Weiner, Cyber Security & IT Counsel, Hewlett Packard Enterprise. Panel Moderator was Natalie R. Lynch, Attorney, Lynch Law Firm (standing, far right).



(Left to Right): A Lawyer's Ethical Obligations in Today's Cyber World featured panelists Roy D. Rector, Senior Digital Forensic Examiner, R3 Digital Forensics; Elizabeth A. Rogers, Partner, Michael Best & Friedrich; Reid Wittliff, Founder and President, R3 Digital Forensics; and Panel Moderator Kristen N. Geyer, Partner, Culhane Meadows.

internationally. Panelists discussed various aspects of effective planning and responses, including public relations, mandatory disclosure requirements, liability mitigation.

An ethics panel titled, A Lawyer's Ethical Obligations in Today's Cyber World, rounded off the day with a presentation addressing key pitfalls for all lawyers in today's world of cloud computing, wireless networks, "cross-network" communications, and remote network access. Attendees heard from leading experts on the applicable ethical obligations to maintain client confidentiality, the latest guidance from the ABA, proposed new cybersecurity ethics requirements for Texas lawyers, and some examples of how mishandling of these challenges can have disastrous consequences.

If you couldn't attend this year, we hope to see you next fall at our annual ILS CLE presentation in Austin. Visit our website for future updates. ●

INTERNATIONAL HEALTH, DRUGS, AND OUTREACH

BY LILLY TENG
Managing Partner, Orchid Law PLLC

Where are the best countries for international investment in healthcare and pharmaceuticals? What are the critical current issues and lessons learned? Which countries and populations need access to better healthcare and medicines? These questions were addressed during the gathering at Dykema Gossett's well-designed offices on the Riverwalk by the legal experts and executives from Christus Health, Baylor College of Medicine, Berkeley Research Group, Norton Rose Fulbright, and Clark Hill Strasburger. The dynamic speakers led a frank discussion of the positives and negatives from development to operations, along with insights from cases in North America and Latin America. The only problem was that there was so much interaction and so many topics to talk about that we ran out of time...officially. Nevertheless, the conversations continued and one speaker even elected to change his flight in order to stay longer.

San Antonio's friendly local culture and attitudes infused everyone; new friends and connections were made in the midst of high-level learning and sharing a healthy (of course!) meal. After the conference, a band of lawyers visited with approximately 25 students from the International Law and Healthcare associations at St. Mary's Law School campus as part of ILS' outreach program, giving advice and sharing insights, while fielding candid questions from the students. It was definitely a good day. Come join us in San Antonio, same time next year (October 2019), for the ILS conference, which promises again to be more than just another CLE program. ●

Conference Photo - Panel of Bob Corrigan (Senior Vice President, General Counsel, and Corporate Secretary of Baylor College of Medicine), William Davis, II (Partner, Norton Rose Fulbright), and Justo Mendez (Senior Counsel, Clark Hill Strasburger) debated on proper due diligence on foreign business partners and other provocative questions encountered in doing business in other countries.

CALENDAR - UPCOMING EVENTS

2019

FEBRUARY 27
Dallas CLE

MARCH 28-29
Annual Institute Houston

APRIL 3-6
International Trip to Mexico City

JUNE 20
State Bar of Texas Annual Meeting
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