

INTERNATIONAL LAW

QUARTERLY

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Focus on the Caribbean

An aerial topographic map of the Caribbean region. The map shows the Caribbean Sea in the center, surrounded by the northern coast of South America (Venezuela, Colombia, and Ecuador) to the south and Central America (Guatemala, El Salvador, Honduras, Nicaragua, and Costa Rica) to the west. The Caribbean islands are visible in the northern part of the sea. The terrain is color-coded by elevation, with green for lowlands and brown for higher elevations.

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Features

8 • Economic Substance Requirements in the Caribbean: End of an Era?

With some exceptions, new Economic Substance (ES) laws mandate that companies established in Caribbean jurisdictions—such as the British Virgin Islands, the Cayman Islands, Bermuda, The Bahamas, and others—have economic substance within the specific jurisdiction in which they are established to remain operational there in the future. ES laws differ slightly across jurisdictions, and these laws are convoluted and complex. This article attempts to summarize them in a digestible manner.

10 • Nonimmigrant Visa Processing in the Caribbean

Under President Trump's administration, vetting of applicants is up and admissions are down for student visas, tourist visas, and petitions for foreign workers. This article examines nonimmigrant visa processing at the U.S. Embassies in Nassau, The Bahamas; Bridgetown, Barbados; and Port of Spain, Trinidad and Tobago. The author concludes that nonimmigrant visa processing in the Caribbean, especially for third-country nationals, is a viable option as long as law practitioners are aware of possible issues and properly prepare their clients for the consular interview.

12 • Cultural Sensitivity to Foreign-Born Litigants: A Practical Guide

In this article, the author addresses cultural barriers that foreign-born litigants face when seeking justice in Florida's judicial system. Her research included reaching out to judges, lawyers, and others who have worked with immigrants

and others who have limited English proficiency, and their responses help tell the story that access to the courts is being constructively denied to some foreign-born litigants. The author concludes that judges should take cultural barriers into consideration to the extent allowed by the rules of evidence.

14 • A Trade War? What the Heck Is Going On?

Knowing the tariff classification of an item and its country of origin determines how much duty must be paid to U.S. Customs and Border Protection at the time of entry of the product into the United States. The author sheds light on the United States' trade war with China, summarizes what China is doing in response to the Trump administration's additional 25% tariff on goods made in China, and explains how attorneys practicing in the U.S. customs and international law legal specialty can help their clients navigate the process and save money.

16 • New Amendment to the Double Taxation Treaty Between the United States and Spain

On 16 July 2019, the United States Senate ratified the new protocol amending the income tax treaty between Spain and the United States. This protocol was initially signed in 2013, but its ratification had been delayed due to taxpayer privacy concerns. The amendment was a much-needed update that brings the Spain-U.S. income tax treaty in line with other European countries, and reflects a business and financial landscape that is significantly different from when the original treaty was signed in 1990. This article summarizes the most relevant changes in the new protocol.



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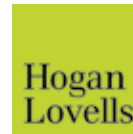
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Message From the Chair

The International Law Section Is a Hub for International Law Practice and International Organizations in Florida

By Clarissa A. Rodriguez

Friends and colleagues, here we go! I am honored and grateful to serve as your chair of the International Law Section for the 2019-2020 year. Along with the other officers—Bob Becerra, Jim Meyer, and Rafael Ribeiro—I am looking forward to a wonderful year.

To returning ILS members, we say, “Welcome back!” The ILS is a volunteer organization, and we are successful because members like you are engaged. To new members and anyone considering joining the International Law Section, I would like to offer you just a few of the many of reasons to get involved:

- With more than twenty committees, dozens of events, webinars, and publishing opportunities, the ILS offers opportunities for every attorney, whether they are new to international law or an experienced practitioner.
- The ILS hosts a premiere Global Forum on International Law called the “iLAW” with three distinct tracts for practitioners of international business transactions, international litigation, and international arbitration.
- Our section monitors the Florida Legislature for bills and proposed changes in law that impact the practice of international law in Florida.
- We draft and propose changes to Florida Statutes and propose bills to improve and streamline international processes in Florida.
- We are the *only* Bar section that evaluates and



CLARISSA A. RODRIGUEZ

certifies foreign lawyers as Florida foreign legal consultants.

- Our section offers two impressive Florida Bar board certifications, and this year will be publishing the first edition of an International Law Desk Reference Book written, edited, and published by ILS members.

Our immediate past chair, Carlos Osorio, often says that while the ILS may be smaller than other Bar sections, it punches well above its weight class.

It is a terrific quote, and it is true! We are having an impact. And because we are small (but mighty), there are many ways to get involved right away. Every type of international law practitioner should be a member of the ILS!

Each year, the ILS chair offers a theme for his or her time in leadership. This year, I’m pleased to announce that the theme and goal for this year will be promoting the International Law Section as the “hub” for information both about the practice of international law in Florida as well as other international organizations in the state. We will invite professionals, firms, trade groups, and international organizations to connect with like-minded folks via the ILS.

It is our responsibility and should be our mandate to serve as a one-stop resource for new lawyers and seasoned veterans that rely on a network of international practitioners to keep up in this fast-paced practice. To that end, we will continue and expand the reach of the *ILS Gazette* and the *International Law Quarterly*. We will also make available an up-to-date

Message from the Chair, continued

calendar of international events (hosted by the ILS and by other organizations), and a directory of international resources and contacts for busy practitioners. We want all of Florida's international attorneys and organizations—from Pensacola to Key West, from Fort Myers to Jacksonville—to know we are here to support them.

How can you be part of the ILS this year?

1. **Sponsor the section.** This year we have a “welcome back” program for law firms looking to rejoin the section. Take advantage of this program as well as the other benefits offered with section sponsorship.
2. **Read the *ILS Gazette*.** The *ILS Gazette* is emailed weekly to our members. The *Gazette* highlights conferences, recognizes members, publishes articles on hot topics, and keeps you connected.
3. **Participate!** Publish an article in the *ILQ*, put together a panel for the iLAW2020, host or attend a CLE program via webcast or a Lunch & Learn. Opportunities are everywhere, so do take advantage.

4. **Invite your friends and colleagues to join the ILS.** Being international, our network extends well beyond the ILS; we all are members of many other groups, organizations, and programs. These special interest groups can join the ILS and help sponsor different events as well as participate in the iLAW2020. We can share member directories, cross-promote events, and highlight each group's activities.

Every member of the ILS is an important spoke in the ILS hub-and-spoke system, and together we can support and propel ourselves and each other forward faster!

I hope that by the time you read this message, you are sitting poolside at our ILS Annual Retreat and ready to take advantage of everything our section has to offer. Join, sponsor, participate, and bring a friend. Let's go!

With gratitude,

Clarissa A. Rodriguez
Chair, International Law Section of The Florida Bar
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From the Editors . . .



ANA M. BARTON



LAURA M. REICH

In this edition of the *International Law Quarterly*, we are pleased to be turning our attention to our neighbors in the Caribbean. While many of the island nations in the Caribbean may be small, they have played a significant role in shaping our world history—and continue to do so today, with Cuba’s influence in Venezuela being a prime example. Since its initial discovery by Christopher Columbus in 1492 and over the course of the centuries-long era of European colonialization, and even through the Cold War, the Caribbean has been important geopolitically and economically. At one point in time, it was a cornerstone of international trade markets, particularly for supplying much of the world with its largest export crop: sugar. In South Florida, the proximity and cultural connection to the Caribbean cannot be missed, with the emergence of vibrant neighborhoods like Little Havana and Little Haiti. Even Disney has been enamored by the mystique of the Caribbean and its crystal-blue waters with its box office successes of the *Pirates of the Caribbean* movies.

Today, in addition to its major attraction as a tropical paradise for year-round tourism, various jurisdictions in the Caribbean are noteworthy players when it comes to offshore financial services and asset structuring and planning for the wealthy, attracting money from all corners of the world for its tax havens and protective privacy laws. But there is a new dawn on the horizon that brings with it a potential shift for the Caribbean. We start this edition of the *International Law Quarterly* with an article by **Jeffrey S. Hagen** entitled “Economic Substance Requirements in the Caribbean: End of an Era?” He walks us through some key legal changes that came into effect this year aimed at requiring companies created in these territories to have a real presence there that makes local contributions in order to reap the financial benefits offered.

Next, immigration attorney **Larry S. Rifkin** describes for us the various visa procedures and hurdles that people face under the current Trump administration for entry into the United States from The Bahamas, Barbados, and Trinidad and Tobago in his article “Nonimmigrant Visa Processing in the Caribbean.” Of course, immigration hurdles are not unique to the Caribbean, and immigration continues to be one of the most pressing issues facing the United States (and the world) today. In “Cultural Sensitivity to Foreign-Born Litigants: A Practical Guide,” **Elizabeth Ricci** gives insight into how best to serve immigrants who are involved in litigation in Florida courts, focusing on particular sensitivities when it comes to adequate translation services.

Turning to international commerce, **Peter A. Quinter** gives an overview of U.S. customs and international trade law and why it matters in his article “A Trade War? What the Heck Is Going On?” Finally, taking us back to the sponsor and benefactor of Christopher Columbus’ voyages to the Caribbean, **Ernesto Lacambra** and **Daniela Pretus** outline new developments to a treaty between the United States and Spain regarding income taxation in “New Amendment to the Double Taxation Treaty Between the United States and Spain.”

As we work on finalizing this edition of the *ILQ*, the unprecedentedly strong Category 5 Hurricane Dorian is making its way across The Bahamas, leaving utter destruction and devastation in its wake, while Florida and the Southeastern coastal states prepare for its impact. Our thoughts are with all of those affected by this tragedy.

It comes all too soon as images of a still hurting Florida Panhandle linger after Hurricane Michael hit last year, and Puerto Rico continues to suffer two years after Hurricane Maria tore across that island in 2017. As a section, in the coming weeks and months we will be working to help with recovery efforts. One place to start is by volunteering with The Florida Bar Young Lawyers Division, which is looking for lawyers to join its Statewide Emergency Legal Services Response Plan (the Florida Plan) to assist Florida citizens with legal issues following a natural disaster. Please be on the lookout for other initiatives or fund-raisers sponsored by the International Law Section.

Sincerely,

Laura M. Reich—co-Editor-in-Chief

Ana M. Barton—co-Editor-in-Chief



Economic Substance Requirements in the Caribbean: End of an Era?

By Jeffrey S. Hagen, Miami

Since the 1980's, former and current British territories in the Caribbean, such as the British Virgin Islands, the Cayman Islands, Bermuda, The Bahamas, and others, have prospered financially from the collection of annual license fees and payments in exchange for corporate services. The corporate services industry, over time, became the bedrock of these economies (along with tourism). Companies from all over the world were incentivized to form in the Caribbean for confidentiality reasons, as well as the benefits of low or no corporate income taxes.

Significant savings have been realized by savvy international entrepreneurs and large corporate entities by establishing companies in these jurisdictions. Using a Cayman Islands corporation, for example, as the international sales agent for a textile business located in South America could mean that the revenue it earns is deemed to be sourced in the Cayman Islands and, therefore, it is taxable at the unbeatable corporate tax rate of 0%. As another example, in our own state of Florida, real estate ultimately owned by a foreign person is often owned directly or indirectly by a foreign corporation (known as a blocker) to insulate the foreign person from U.S. estate tax on his or her U.S. real estate assets.

With some exceptions, new economic substance (ES) laws mandate that companies established in these Caribbean jurisdictions have economic substance within the specific jurisdiction in which they are established to



In addition to beautiful beaches, Bermuda (pictured here) and other Caribbean nations offer advantages to businesses that want to locate there.

remain operational there in the future. The economic substance reporting period began on 30 June 2019. These laws seek to eliminate the advantage gained by the Cayman Islands' textile business and others like it, but as a result, these new laws could also complicate U.S. planning structures.

The ES laws differ slightly across jurisdictions as each jurisdiction has drafted its own version of the law, but the main principles are similar throughout. The ES laws are convoluted and complex, but below is a humble attempt to summarize them in a digestible manner. As such, for purposes of this article, references to "the BVI" are applicable to any Caribbean jurisdiction that has enacted ES.

Economic Substance: When does it apply and what does it require?

The first step for analyzing whether ES requirements apply to a BVI entity is to determine whether the entity

Economic Substance Requirements, continued

is tax resident in the BVI. Most entities that choose to form in the BVI become tax resident to take advantage of the 0% tax rate. While unlikely, it is possible that a BVI entity pays taxes in another jurisdiction instead; in that case, the ES requirements would not apply. A letter or certification from the competent tax authority of the alternate taxing jurisdiction would need to be provided to the BVI tax authority as proof.

If an entity is tax resident in BVI, ES requirements will apply if the entity participates in a relevant activity. Below is the list of relevant activities:

1. Banking business
2. Distribution and service centers business
3. Fund management business
4. Financing and leasing business
5. Headquarters business
6. Insurance business
7. Shipping business
8. Holding business
9. Intellectual property business

Each of the above relevant activities is described in detail in regulations that provide additional clarity to the ES laws themselves. These regulations, however, tend to be verbose. In essence, activities in these categories usually become relevant when they are commercial in nature and meant to produce income. For instance, paying a crew to operate a pleasure yacht owned by a BVI corporation would not rise to the level of shipping business since there is no income being earned by the corporation and therefore no business.

If a BVI entity engages in one of the first seven relevant activities, then:

- The relevant activity must be directed and managed in the BVI (including board meetings);
- The entity must employ an adequate number of qualified employees in the BVI;
- There must be adequate expenditure incurred in the BVI; and
- There must be appropriate physical offices or premises for the activity.

The terms *adequate* and *appropriate* are not defined in ES laws. There is no information in the laws or regulations that a specific number of employees, or a minimum dollar figure, is adequate, or what would cause a physical office to be appropriate.

These vague requirements will give the BVI taxing authority a considerable amount of leeway in how it chooses to interpret the law, and it has owners of entities engaged in relevant activities scrambling to transfer to alternative jurisdictions. The costs and practicality of restructuring a business to be based in the BVI when the jurisdiction was only used for security or tax purposes in the first place are typically not realistic.

ES laws treat the last two relevant activities—holding business and intellectual property business—somewhat differently than the others.

If a BVI entity engages in the intellectual property business, it must abide by the above requirements. Additionally, where an intellectual property business requires specific equipment, that equipment should be in the BVI and a rebuttable presumption of noncompliance with economic substance must be cleared by the entity.

Special Considerations Affecting Holding Companies

While the above may seem like the end is near for the BVI corporate services industry, in reality, a vast percentage of BVI entities are only holding companies and are not engaged in other more active types of relevant activities. Entities engaged in holding business need not be managed or directed in BVI. The definition for a holding business is also interpreted narrowly, which may provide opportunities for planning and, therefore, remaining in the BVI.

Holding business is defined as “the business of being a pure equity holding entity.” A pure equity holding entity means “a legal entity that only holds equity participations in other entities and only earns dividends and capital gains.”

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Nonimmigrant Visa Processing in the Caribbean

By Larry S. Rifkin, Miami



U.S. Embassy in Nassau, The Bahamas

The U.S. Department of State's immigration responsibilities primarily focus on the adjudication of visa applications for foreign nationals seeking entry into the United States. Nonimmigrant visas are for people who wish to go to the United States on a temporary basis for tourism, business, temporary work, study, or medical treatment. Under President Trump's administration, vetting of applicants is up and admissions are down for student visas, tourist visas, and petitions for foreign workers. A policy brief by the National Foundation for American Policy (NFAP) dated March 2019 found that ineligibility findings used by the Department of State to refuse visa applicants increased 5% for nonimmigrants (individuals seeking temporary visas) between FY 2017 and FY 2018, and the number of temporary visas issued declined 7% during the same period.¹ This article will examine nonimmigrant visa processing at the U.S. Embassies in Nassau, The Bahamas; Bridgetown, Barbados; and Port of Spain, Trinidad and Tobago.

U.S. Embassy in Nassau, The Bahamas

Location and Process

The U.S. Embassy in Nassau, The Bahamas, is responsible for the adjudication of immigrant and nonimmigrant visas for nationals of The Bahamas, as well as Turks and Caicos. Per its website, the consular section is located on the ground floor of the embassy building at 42 Queen Street in Nassau, just off Marlborough Street.² The consular section processes the following visa types: B (visitor), C (transiting in United States), D (crewmember), E (treaty trader/investor), F/M (student), H (temporary worker), I (media/journalist), J (exchange visitor), L (intracompany transferee), O (person of extraordinary ability), P (internationally recognized athlete, artist, and/or entertainer), Q (international cultural exchange visitor), R (religious worker), T (victim of human trafficking), U (victim of criminal activity), and TD/TN (NAFTA professional).³

Nonimmigrant Visa Processing, continued

The application process for a nonimmigrant visa in Nassau, The Bahamas, is as follows:

1. Complete the DS-160, Online Nonimmigrant Visa Application, and print the DS-160 Confirmation page;⁴
2. Create a profile on the official U.S. Department of State Visa Appointment (CSRA) website⁵ and follow instructions to pay the visa processing fee at one of the local branches of Scotiabank Bahamas;⁶
3. Schedule the visa interview appointment on the CSRA website. Note that requests for expedited processing are reviewed and adjudicated on a case-by-case basis, depending on the legitimate need;⁷
4. Attend the visa interview; and
5. If approved, wait for U.S. Department of State to complete its administrative processing and return via courier the passport with the stamped visa.

The current wait time for a nonimmigrant visa interview in Nassau, per the Department of State's website, is between one and four calendar days;⁸ however, these wait times are not always accurate.

It is important to note that this is not a simple "complete a form and apply" process. It is helpful if an attorney is significantly involved, as the DS-160 application has numerous questions regarding the applicant's prior residence and employment history, travels, and inadmissibility grounds. The applicant's failure to answer the DS-160 questions properly and in a manner consistent with the documentation submitted for the petition approval could result in a denial of the visa, revocation of the current visa, and/or charges of fraud or inadmissibility, which could bar a client's future entry into the United States. Therefore, under the current U.S. administration's enhanced vetting process, the attorney's role in preparing the DS-160 application and preparing the client for the visa interview should be even greater.

The U.S. Embassy in Nassau has a policy called the Interview Waiver Program, whereby those who are renewing a previous U.S. visa, or who meet certain age-related criteria, may qualify for a waiver of the

visa interview.⁹ The client may be eligible to waive the interview if he/she meets the following criteria:

- Under the age of 14 or older than 79 years of age;
- Has a previous U.S. visa in the same class as the visa he/she seeks to renew;
- His/her fingerprints have been taken previously;
- Has no refusals for a visa in any category since the most recent visa issuance;
- If applying for a B-1/B-2 or C-1/D visa, the prior visa in the same classification is still valid or expired within the last twelve months; and
- The prior visa is not annotated "Clearance Received."¹⁰

In these particular cases, the waiver of the interview at the U.S. Embassy can be beneficial and convenient, and the embassy's procedures should be followed thoroughly.

Third-Country Nationals

The term third-country national (TCN) refers to individuals who wish to apply for visas in countries that are not their country of origin. Often, clients (non-Bahamian nationals) already in the United States in lawful status whose renewal requests have been approved seek to process their visa stamps at U.S. Embassies in the Caribbean—for reasons of convenience and proximity to the United States, or because the U.S. Embassy in their home country is closed, or for purposes of efficiency as it may be faster to schedule a visa appointment in the Caribbean than in their home country. The U.S. Embassies in Canada and Mexico accept visa applications from third-country nationals under set policies and requirements. Similarly, the U.S. Embassy in Nassau specifically addresses on its website its policy regarding visa applications from TCNs.¹¹ The Nassau Embassy will entertain only the following visa applications from TCNs:

- Petition-based F-1, H-1B, J-1, L-1, M-1, O-1, P-1, P-2, P-3, and R-1 renewals, only when initial adjudication was conducted in the applicant's home country;

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Cultural Sensitivity to Foreign-Born Litigants: A Practical Guide

By Elizabeth Ricci, Tallahassee

“A judge’s role in ruling . . . requires more than sensitivity. Judges need specific training so they can be aware of specific cultural mores, traditions and cultures that impact the situation. Without that knowledge, judges are at a disadvantage in making appropriate and protective rulings.”

— Judge Nikki Ann Clark, Florida First District Court of Appeal (retired, May 2015)¹

“**T**he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.” Fla. Const., art. I, § 21. Such access, however, is being constructively denied to some foreign-born litigants.

To overcome these barriers, court staff should review educational information and court-related forms with a litigant, in addition to assuring that appropriate support services—such as crisis intervention, resources, and referrals, as well as information regarding crime

prevention—are in place. Doing so, however, will likely require the assistance of a qualified translator.

“If someone has limited English proficiency, there is nothing more reassuring during the formalities of a civil, criminal or immigration hearing than the presence of a competent interpreter



Providing foreign-born litigants with the information they need for a legal proceeding may require the services of a qualified translator.

Given the more than four million foreign-born residents of Florida,² the judiciary’s careful attention to language skills, cultural nuances, common perceptions, and immigrants’ fears is vital to ensure the administration of justice. New arrivals to the United States, especially women, often are not familiar with our legal system, may not speak English fluently, or may be afraid of being detained by immigration officials. They also can bring from their native countries perceptions of corruption, and many of these people frequently depend on trusted family and friends—or even elements of what they see and hear on television—for guidance.

to assist that person in understanding what is being said to or about her,” says Michael K. Launer, Ph.D., former vice president of RussTech Language Services, Inc.

Plant City attorney and Cuban native Richard Muga cautions that not just any interpreter will do.

“Interpreters have taken it upon themselves to use their own interpretation of programs and pleas available, further confusing non-English speaking defendants,” says Muga. “While some of us have mentioned these occurrences to bailiffs, little has been done to curtail the practice.”

Cultural Sensitivity, continued

What is worse, according to Muga, is that “in some counties, such as Polk County, attorneys have to wait for extended periods as there may only be one interpreter for all courtrooms.”

Furthermore, attorney Robin Hassler Thompson, executive director of the Survive and Thrive Advocacy Center, a North Florida-based counseling service for victims of human trafficking, warns about another cultural peril involved in the selection of appropriate interpreters. “The court must be mindful of the reality that traffickers and abusers have deep links into their own, and sometimes shared, ethnic communities,” she says, “so the court should ensure that the interpreter is not linked or allied with the perpetrator. Failure to do this could result in real danger to the survivor, who will suffer retaliation as well as outright intimidation if the interpreter is connected to or sympathetic to the perpetrator.”

These facts, which directly challenge federal standards, highlight the need for certified interpreters who have been trained in the ethics and cultural sensitivities of court interpreting.

Other factors, such as a litigant’s accent, should also be taken into consideration. Studies show that information is perceived as less credible when relayed by a speaker with a foreign accent, even if the speaker is only repeating a message—a finding that has tremendous implications for foreign-born litigants.³

“My experience has been that while today’s judges are not outright prejudiced against foreign parties and defendants, there are often certain stereotypical responses and subtle differences in how they are treated,” says Nancy Daniels, retired public defender for Florida’s Second Judicial Circuit. “Language barriers add to these difficulties, especially when good interpreters are not available.”

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A Trade War? What the Heck Is Going On?

By Peter A. Quinter, Miami

Read the front page of any newspaper, turn on the news channel of your TV, and quickly check whatever app you use on your mobile phone; you are constantly told there is a “trade war” with China and that President Trump is imposing an additional tariff of 10%, 25%, or more on Chinese merchandise shipped to the United States. Most people, including attorneys, are lost in the maze of trade-war terminology. It’s OK if you ask, “What is a tariff?” or “What is the role of the Office of the U.S. Trade Representative?” or “How is U.S. Customs and Border Protection involved in any of this?”

Below I offer a down-to-earth explanation for all such things based on my almost three decades of experience and expertise in **U.S. customs and international trade law**. Yes, there really is such a legal specialty.

Have you ever gone shopping and wondered where the clothes, electronics, cars, furniture, etc., that you are considering buying were made? Maybe you were comparing a designer, luxury brand of ladies’ high heeled shoes labeled as “Made in Italy” to a pair of everyday sneakers marked as “Made in China.” Every product made overseas and imported into the United States must state the country of origin of manufacture.¹ The country of origin of any imported product must be: (1) in English; (2) conspicuous; (3) legible; and (4) permanent so that the ultimate purchaser in the United States knows where the item was made.²

“So, what’s the big deal?” you may say. “And what’s all this I hear about a trade war with China?” Well, under Section 301 of the Trade Act of 1974, President Trump has used an emergency exception to assess an additional 25% on most products made in China and imported into the United States. That *is* a big deal, and it makes a huge difference for international trade between the largest trading partners in the history of the world: China and



Lawyers who specialize in U.S. customs and international trade law are busier than ever with the United States imposing additional tariffs on goods made in China.

the United States. Since a U.S. importer now must pay an additional 25% on products made in China, there is significant advantage to U.S. importers buying the same product made in another country. Additionally, there is now a tremendous financial incentive for Chinese companies to change the country of origin. What was once a product marked as “Made in China” is now sent to a second country, where it undergoes a “substantial transformation,” so that the product can be designated as having been “made” in that second country before being shipped to the United States.

And that is exactly what is happening. Chinese companies are shifting some production to Vietnam, Thailand, and Mexico, among others. Of course, to be substantially transformed in the second country, the product cannot simply be processed there, such as painting or sanding or canning. There must be a *new* and

A Trade War, continued

different product that is actually created in the second country. Moreover, if there is a free-trade agreement between the second country and the United States, the new product must satisfy the particular rules of origin of that agreement.

As you can imagine, lawyers who specialize in U.S. customs and international trade law are busier than ever under this administration.

- First, U.S. importers are changing their international supply chains to attempt to source products from countries other than China. Trade and customs lawyers are often involved in this process.
- Second, some U.S. importers are either intentionally or inadvertently importing products they knew or should have known were made in China, but were falsely declared to U.S. Customs and Border Protection (CBP) as having been made in another country. When the false declaration, whether intentional or

inadvertent, is discovered, those U.S. importers will need legal representation.

- Third, the U.S. Trade Representative (USTR) has issued guidelines for U.S. importers to file exclusion requests to attempt to exclude their products from being assessed Trump's additional tariff on Chinese-made products. The primary arguments for such requests are that the imported product, which is "Made in China," is not available from a U.S. producer and that assessing the additional tariff will cause severe financial harm to the U.S. importer. To date, *tens of thousands* of such exclusion requests have been filed, and hundreds have been approved by the USTR.³

So far, so good. But what the heck are these tariffs that are paid to CBP on the imported merchandise? Simply defined, a tariff is a tax imposed by the federal government on products from other countries that

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New Amendment to the Double Taxation Treaty Between the United States and Spain

By Ernesto Lacambra, Barcelona, and Daniela Pretus, Miami



Cuatros Torres (Four Towers) Business Area in Madrid, Spain

On 16 July 2019, the United States Senate ratified the new protocol amending the income tax treaty between Spain and the United States (DTT).¹ This protocol was initially signed in 2013, but its ratification had been delayed due to taxpayer privacy concerns. The amendment was a much-needed update that brings the Spain-U.S. income tax treaty in line with other European countries, and reflects a business and financial landscape that is significantly different from when the original treaty was signed in 1990.

The DTT establishes rules that determine how income flowing between Spain and the United States is taxed, and which country has the authority to tax certain items of income, so that taxpayers can avoid or mitigate paying

taxes in both countries on the same income. It was approved by the United States and Spain, together with amendments to three other existing conventions with Switzerland, Japan, and Luxembourg.

The most relevant changes in the new protocol from the 1990 text are as follows:

Permanent Establishments (Article 5)

Companies doing business in a foreign country are generally subject to the domestic tax laws of the country where they are engaged in business. For companies hailing from one of the countries that have ratified an income tax treaty with the United States, their business operations are protected from local taxation for certain

Double Taxation Treaty, continued

activities that do not rise to the level of a permanent establishment (PE).

Under the DTT, a company is generally considered to have a PE if it has a fixed place of business, such as a factory, in the treaty country. Certain activities, such as storage, display, or delivery of goods, are excluded from the definition of PE. The previous DTT provided an exception for “building site or construction or installation project, or an installation or drilling rig or ship used for the exploration or exploitation of natural resources.”² This meant, for example, that a U.S. company engaged in a construction project in Spain would be subject to Spanish taxation if the project lasted more than six months.

The amended DTT raises the threshold for building sites, construction, or installation projects to be considered a PE to twelve months, meaning a company would not be subject to local taxation unless the project exceeded a year. Additionally, the protocol eliminates the branch tax on the repatriation of earnings from a foreign PE. This means that, even if the local business operations of a company are considered a PE, the company would only pay 5% on the repatriation of the profits from its U.S. operations.

Dividends (Article 10)

The new protocol reduces the taxation on the distribution of dividends from a resident company to a resident of the other treaty country, depending on the payee. Under the previous language, dividend payments were taxed at 15%, which would be reduced to 10% if the beneficial owner of the dividends owned at least 25% of the company paying the dividends. As a point of reference, payments of dividends from a U.S. company to a foreign resident of a non-treaty country are generally subject to a 30% flat rate. The modifications introduced by the new protocol maintain the 15% general rate, but lower the tax rate to 5% for dividends paid to related companies (where the beneficial owner owns at least 10% of the voting stock of the company paying the dividend), and eliminates withholding completely on dividends paid by a subsidiary to its foreign parent

(provided the beneficial owner has held shares representing 80% of the voting stock in the company paying the dividends for at least a twelve-month period), provided certain tests of the limitation on benefits clause are met. It is also worth mentioning that the reduced 5% rate will not apply to dividends paid by SOCIMIs (which is the Spanish version of a real estate investment trust (REIT)) or by collective investment vehicles in Spain, nor to those paid by real estate investment companies (RIC) or REITs in the United States.

Interest (Article 11)

Under the amended DTT, interest will only be taxed by the country of residence of the beneficial owner.³ This means that, in most cases, there will be 0% withholding in the source country, compared to the 10% set forth in the previous DTT version for all but very few cases. The 10% withholding will still apply to certain contingent interest arising in the United States (unless it qualifies as portfolio interest under U.S. law) and to excess inclusion income generated by residual interests in real estate mortgage investment conduits subject to tax under U.S. law.

Royalties (Article 12)

Similar to dividends, royalty payments under the amended DTT will only be taxed in the country of residence of the beneficial owner of the royalty. Under the previous DTT version, royalty payments were subject to a 5%, 8%, or 10% withholding tax, depending on the type of rights granted.⁴ Additionally, the definition of the term *royalty* no longer includes payments for technical assistance (specialized services generally provided by a licensor that are related to the intellectual property being licensed), which were previously taxed as royalties. This change will significantly promote the licensing of intellectual property between Spain and the United States.

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Miami Lawyers, ILS Members Well Represented at International Young Lawyers Association's 57th Annual Congress in Rome

By Cristina Vicens Beard, Miami

This year, the chair of the International Law Section of The Florida Bar (ILS) launched an initiative for the ILS to become the hub, or the central organization, that provides links to international events and professional associations that may be of interest to ILS members and, more generally, to Florida lawyers. In line with this initiative, several members of the ILS travelled to Rome, Italy, between 3-7 September 2019 to attend the 57th International Young Lawyers Congress, which was organized by the International Association of Young Lawyers (AIJA).

Founded in 1962, AIJA is the only global association devoted to providing young lawyers (aged 45 and under) with outstanding international opportunities to network, learn, and develop their careers. AIJA has 4,000 members and supporters in 90 different countries, including more than 60 collective members from bar associations. The activities of AIJA are organized by

twenty scientific commissions, in charge of organizing conferences, of different sizes and relating to different practice areas, all around the globe.

This year, inspired by the United Nations' Sustainable Development Goals, the central theme of the 57th Annual Congress was "Sustainability and the Law: Planet. People. Future." More than 800 international legal professionals attended to explore the ways in which today's digitalized and globalized world and the legal practice can become more sustainable. In addition to the scientific program, or academic component, the Annual Congress was rich in opportunities to make meaningful and lasting connections with other international legal professionals.

As a new AIJA member and first-timer at the AIJA's Annual Congress, I found the event unlike any other conference I have attended. The Annual Congress kicked off with a one-hour-long Speed Networking event, where



Participants enjoyed a panoramic view of the Roman Forum during an early morning sightseeing run.

57th Annual Congress in Rome, continued

attendees could meet each other and network in two-minute intervals so that, even before the conference's official commencement, each attendee had met at least thirty new legal professionals. The Speed Networking event was followed by a glamorous welcome cocktail reception at the Annual Congress venue, Parco dei Principi Grand Hotel & Spa. And, of course, in true AIJA spirit, the attendees continued networking and dancing until the wee hours of the morning at an open-air venue near the hotel.

The second day started with a 5k run around the Villa Borghese Park, organized by the Human Rights Committee and which was meant to raise awareness about several human rights issues. Back at the hotel, the attendees gathered for the scientific program and commission meetings in the morning. Notably, our own immediate past chair, Arnaldo B. Lacayo, was inaugurated as president of the Litigation Commission, and ILS member Eduardo de la Peña assumed the role of president of the International Arbitration Commission. Other commissions also met that day, including Antitrust; International Business Law; Sports Law; Real Estate; Transport Law; Banking, Finance, and Capital Markets; Commercial Fraud; Environment and Energy Law; Intellectual Property; International Private Clients and Family Law; Labour Law; and Immigration Law. In the afternoon, another Miami lawyer and ILS member, Giovanni Angles, presented in one of the workshops titled "Making the Environment Great Again: New Frontiers for International Arbitration and State Courts." Other ILS members in attendance included Rodrigo da Silva and Stephanie Reed Traband. The second day of the conference closed with the opening ceremony at the iconic Auditorium Parco della Musica—the biggest multifunctional arts complex in Europe. The keynote speech was given by Michael Green, a renowned global economist, pioneer in measuring social progress, and expert on quantifying and implementing socially responsible business practices and investments.

The third day began with some "sightjogging" around the Eternal City, making quick stops at the Colosseum, the Forum, and other historic sites around the ancient

Roman city. Not only did we start the day by getting to see some of the most famous monuments in Rome, but we did so while getting to meet and exercise with new friends before heading back to the hotel for the academic programming. Each day the academic programming featured between six and eight workshops, each one organized by one or more commissions and focused on a different practice area. Whether you were a litigator, a tax lawyer, or a mergers and acquisitions lawyer, there was a session for you! The remaining commissions also met that afternoon, including In-House Counsel, Insolvency, Litigation, Trade, Tax Law, and Corporate and M&A. At the end of the day, we could not wait to attend AIJA's signature and most anticipated event: the home hospitality dinner. At the home hospitality dinners, the 800 attendees were divided into small groups and assigned to attend a dinner at the house of a member of the local bar. The home hospitality dinner is definitely one of the AIJA members' favorite events because it provides a glimpse into how the local lawyers live, as well as a chance to taste traditional food in an intimate setting with other AIJA members. Welcoming lawyers from around the world is also a rewarding experience for members of the local bar.

The next day, after a few executive committee member meetings and a short academic program, the AIJA Annual Congress attendees geared up for another fan favorite, the AIJA Day Out. The Day Out took place in the mythical cinema sets of Cinecittà—the set of at least 3,000 films in its 80-plus-year history, 51 of which have won Academy Awards! The AIJA members dressed in ancient Roman costumes and shot more than thirty-four short films at the set. After a long day of filming, the Ancient Rome set was transformed into the venue for the dinner and afterparty, complete with a mojito and caipirinha bar and live music.

On the last day, after attending the general assembly, AIJA members had the option to choose to explore the city one more time in diverse ways: a soccer match; yoga in the Villa Borghese Park; and tours of the Ancient

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Special Edition: CARIBBEAN ROUNDUP



For this special edition of the *International Law Quarterly* focusing on the Caribbean, our contributors have highlighted legal issues and developments in the Caribbean region. The definition of *Caribbean* affects how many countries are classified as Caribbean nations, but with at least thirteen sovereign and independent countries and seventeen dependent territories, there is a great deal to report on concerning our neighbors to the south! Special thanks to all contributors who offered their thoughts, opinions, and concerns for this special Caribbean Roundup.

Legal News From the Independent Nations of the Caribbean

ANTIGUA AND BARBUDA

In early 2019, Carnival Cruise Line suddenly and unexpectedly announced that its cruises would no longer travel to Antigua. Carnival's decision came only two weeks after Antigua Prime Minister Gaston Browne accused Carnival and other members of the Florida-Caribbean Cruise Association of "literally exploiting the Caribbean." Carnival's removal of Antigua from its itineraries could cost the island many millions of dollars in losses to its tour operators, vendors, and other local businesses.

THE COMMONWEALTH OF THE BAHAMAS

Following the devastation of Hurricane Dorian, the United States is not demanding visas from anyone evacuating The Bahamas right now; however, disturbing stories have emerged of refugees being forced off ferries to Florida for lack of proper documentation. Only time will tell if the United States will allow Bahamian refugees longer term shelter in the United States. Undoubtedly,

however, U.S. citizens have shown the spirit of generosity, organizing private relief efforts to deliver food, water, necessities, and funds to The Bahamas.

BARBADOS

Barbados is the latest Caribbean country to propose a sweeping medical cannabis law. This spring, the Barbados House of Assembly considered a law establishing a local medical marijuana industry, putting Barbados in the conversation with Jamaica, St. Vincent and the Grenadines, Antigua and Barbuda, and Saint Kitts and Nevis for foreign investment in the cannabis industry.

COMMONWEALTH OF DOMINICA

A gay man filed a legal challenge to Dominica's laws banning same-sex sexual relations. Dominica is among the nine Caribbean nations in which consensual same-sex sexual relations remain criminalized. Such acts are currently punishable in Dominica by incarceration and psychiatric confinement. The challenge by a gay Dominican man, who had been subject to repeated acts of violence and discrimination, alleges that the law violates Dominica's constitutional guarantees to freedom of expression, freedom from inhumane or degrading punishment, and the right to privacy.

DOMINICAN REPUBLIC

The Dominican Republic recently passed Law No. 57-07, which provides significant incentives for the development of renewable energy, leading to a surge of investment in the nation's energy industry. Law No. 57-07 provides significant tax breaks for companies that invest in renewable and sustainable sources of energy.

REPUBLIC OF HAITI

The loss of Temporary Protected Status (TPS) could be devastating for Haitians in the United States and their families in Haiti, who are still struggling almost ten years after an earthquake shook that country. In February 2018, a federal judge blocked the Trump Administration's termination of TPS for more than 300,000 people from El Salvador, Haiti, Nicaragua, and Sudan. The judge ruled in favor of the TPS beneficiaries and ordered the U.S. Department of Homeland Security to automatically extend TPS for the plaintiffs till January 2020. The Trump Administration is appealing.

JAMAICA

The Office of the Parliamentary Counsel (OPC) at the Ministry of Justice in Jamaica is cracking down on and participating in Jamaica's fight against one of the fastest growing crimes in the country: lottery scams. These lottery scams affect the most vulnerable Jamaicans, often older people, and tricks them into transferring money for anything from a luxurious vacation to the chance to buy property or to claim a monetary prize. Jamaica's parliament is actively considering new laws as well as amendments to existing laws to protect against these scams, often the tools of organized crime.

FEDERATION OF SAINT CHRISTOPHER [KITTS] AND NEVIS

Cursing in public is illegal in the nation of Saint Kitts and Nevis, which is proud of its anti-vulgarity laws and has no plans to alter them. Foreign tourists and performing artists are sometimes caught by these laws. American rapper 50 Cent was fined US\$1,100 for his profanity-laced set in St. Kitts, which violated the country's strict law barring explicit language in public.

SAINT LUCIA

In early July 2019, IMPACT Justice, a Canadian government-funded project, hosted a workshop on "Sound Policy for Better Law" in partnership with the attorney general of Saint Lucia in Rodney Bay, Saint Lucia. The workshop focused on training public sector officers to provide drafting assistance to legislative drafters and

to ensure policy directives are transformed into effective law. Gillian Vidal-Jules, director of legislative drafting in the Attorney General's Chambers, urged participants to create "innovative approaches" in their work.

REPUBLIC OF TRINIDAD AND TOBAGO

Trinidad and Tobago were caught by surprise by the flood of more than 40,000 Venezuelan refugees into the country. While the government approved a National Policy to Address Refugee and Asylum Matters in the Republic of Trinidad and Tobago in 2014, it had done little to implement it. Additionally, there is no domestic legislation for refugees and asylum seekers, and the government lacks a comprehensive migration policy. As a result, private and public services are being pushed to their limits.

Territorial Legal News

GUADELOUPE

In the French overseas territory of Guadeloupe, schools and other public institutions have been forced to close temporarily for an unexpected reason: toxic seaweed. The unprecedented invasion of Sargassum seaweed (sometimes known as gulf weed) recurred in 2018, and the mounds of brown decaying seaweed pose potential health risks. Sargassum on the beach can reach as high as two feet and releases hydrogen sulfide and ammonia as it rots. "It's a catastrophe," said Christian Baptiste, the mayor of Saint-Anne in Guadeloupe, where a nursery school was shut down in June over sanitation fears for the young children. A secondary school also closed for four days due to the bloom. During a recent trip to Guadeloupe, French President Emmanuel Macron pledged to keep a promise to clean up toxic Sargassum seaweed within 48 hours of it running aground.

TERRITORIES OF THE NETHERLANDS

The Dutch Caribbean Legal Portal (www.dutchcaribbeanlegalportal.com/) now provides English-language legal news from Aruba, Bonaire, Curaçao, Saba, Sint Eustatius, and Sint Maarten as well as Surinam. This expansion of the Dutch-language legal news will assist English speakers doing business in these territories.

CARIBBEAN ROUNDUP, continued

BRITISH VIRGIN ISLANDS

The BVI are at the forefront of the United Nations' (UN) regional meetings on planning for resilience. At this summer's meetings of the Regional Council of Latin American and Caribbean Institute for Economic and Social Planning in Uruguay, representatives of the BVI

shared the nation's response to the challenges of planning for sustainable development. The BVI's National Physical Development Plan (NPDP), Draft BVI Green Energy Plan, and Virgin Islands Climate Change Trust Fund were highlighted as examples of planning and a mechanism established by the government to build greater resilience in the territory.



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SECTION SCENE

ILS Panama Comparative Law Conference 31 May 2019 Offices of Morgan & Morgan Panama City, Republic of Panama



The ILS held its second offshore conference for 2018-19 at the offices of Morgan & Morgan (Panama).

It was an all-day event featuring panels related to comparative international law: maritime, tax, corporate, and litigation and arbitration. The event was well-attended and featured speakers from Miami, Panama, Central America, and South America. The event was bilingual (English and Spanish) and ideally will be repeated in a similar fashion by the ILS in Panama or neighboring countries. Thank you to Morgan & Morgan and all committee organizers for this great event.

Carlos F. Osorio

ILS Past Chair 2018-19

ILS Panama Comparative Law Conference 2019

Andres Gonzalez Cruz, Supreme Court-Colombia;
Laura Barrios, Morgan & Morgan-Panama; Mauricio
Orellana Caballero, Garcia & Bodan-El Salvador; and
Jeffrey S. Hagen, Harper Myer-United States



Victor Carrion, Apolo Law Firm-Ecuador; Carlos J.
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and Francisco Linares, Morgan & Morgan-Panama



Carlos F. Osorio and James M. Meyer, Harper Meyer-United States



Francisco Linares, Morgan & Morgan-Panama



James M. Meyer and Melvin Estrada Canizales, Garcia & Bodan-Nicaragua

International Law Section Annual Meeting & Awards Presentations 28 June 2019 Boca Raton Resort & Club • Boca Raton, Florida



ILS members gather in Boca Raton for the section's annual meeting and awards presentations.



Laura M. Reich, Jacqueline Villalba, Stephanie A. Vaughan (Stetson law professor, standing), and Penelope B. Perez-Kelly



ILS officers James M. Meyer, Robert J. Becerra, and Clarissa A. Rodriguez recognize 2018-19 ILS Chair Carlos F. Osorio for his outstanding leadership of the section.



Carlos F. Osorio presents a plaque to Rafael R. Ribeiro in recognition of his outstanding work as editor-in-chief of the *International Law Quarterly*, 2018-19.



Carlos F. Osorio recognizes Andres H. Sandoval for his outstanding work as 2018-19 legislative chair.



Carlos F. Osorio and Fabio Giallanza

International Young Lawyers Congress 3-7 September 2019 Parco dei Principi Grand Hotel & Spa • Rome, Italy



The AIJA logo welcomes AIJA members to Rome.



AIJA members enjoy the gala dinner at the Villa Medici: Cristina Vicens Beard (U.S.), Aimee Prieto (Dominican Republic), Arnoldo B. Lacayo (U.S.), and Max Mailliet (Luxembourg).



AIJA honorary members enjoy the gala dinner at the Villa Medici: Martine Hoogendoorn (Netherlands), Stephanie Reed Traband (U.S.), Renata Antiquera (Brazil), and Raphaelle Favre Schnyder (Switzerland).



View of Rome and the dome of St. Peter's Basilica (right) from the Villa Medici



A group of AIJA members at a home hospitality dinner



A group of AIJA members "sightjog" around the ancient Roman city before the start of the academic program.



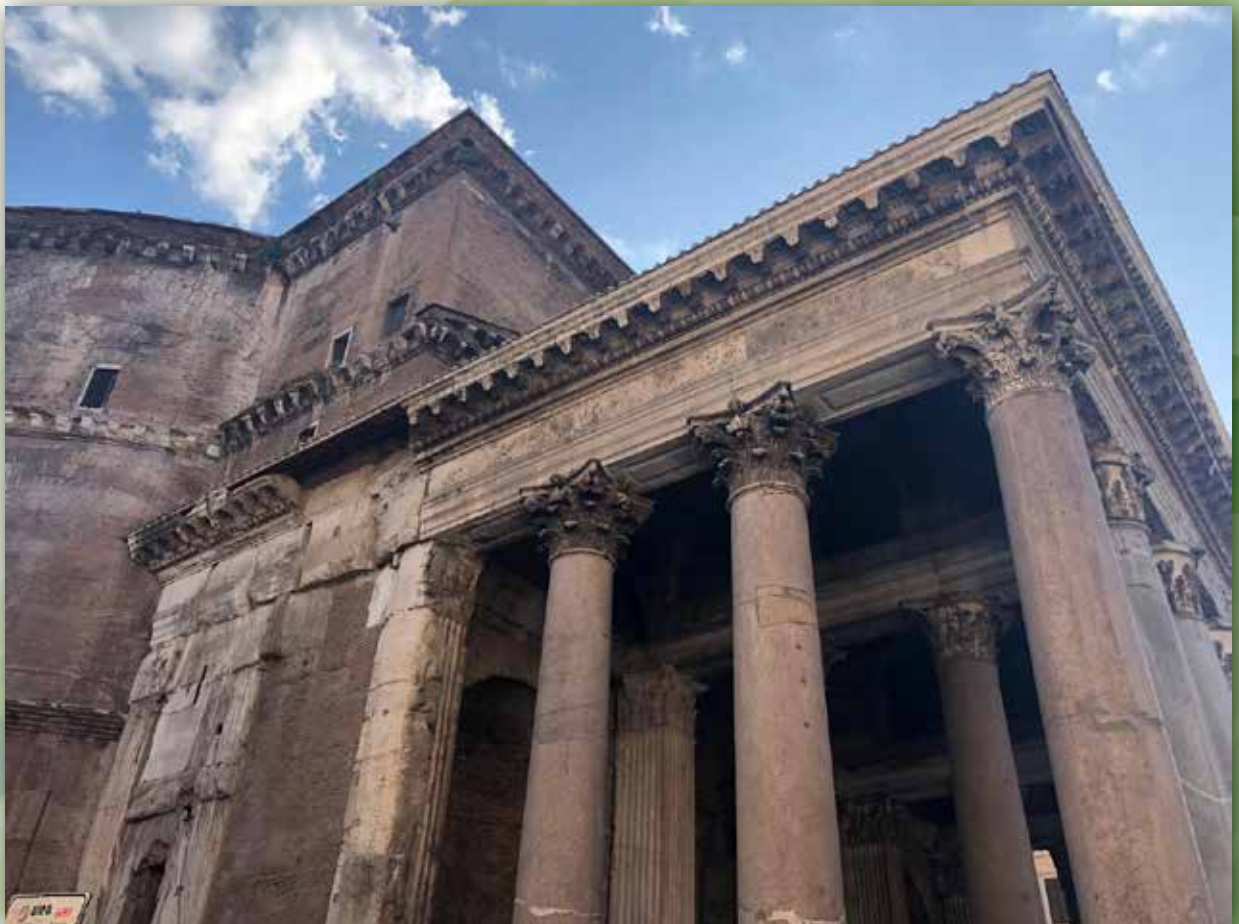
AIJA members enjoy the sunset at the gala dinner from the gardens at the Villa Medici.



The tables are set for dinner, with the attendees mingling in the background at the Villa Medici gardens.



Speakers lead the discussion during one of the workshops, Making the Environment Great Again: New Frontiers for International Arbitration and State Courts. Pictured are Daria Capotorto (Italy), Evelyne Mbula Nzuki (Kenya), Koos Van Den Berg (Netherlands), Hendrik Puschmann (U.K.), and Giovanni Angles (U.S.)



The Pantheon

Economic Substance Requirements, from page 9

The definition of pure equity holding entity should be read literally, and its narrow interpretation has benefits. For instance, if a BVI entity owns shares of a U.S. corporation that produces dividends as its only asset, it would be a pure equity holding entity. On the other hand, if a BVI entity owns shares of a U.S. corporation that does not produce any income at all, it would not fall into the strict definition of a pure equity holding entity, at least for the financial year it earns no dividends. The definition clearly states that an entity must only hold equity participations in other entities *and* earn dividends and capital gains; therefore, an entity that only holds equity participations but yields no income would not be a pure equity holding entity and ES requirements would not apply.

If a BVI entity owns shares of a U.S. corporation plus another investment—such as an interest-bearing bond, a bank account, or a parcel of real estate—then that BVI entity will not qualify as engaging in holding business as it does not exclusively hold an equity participation. It is, of course, possible for a BVI entity to carry on more than one relevant activity. Thus, the fact that an entity is not a pure equity holding entity does not eliminate

the possibility that it engages in finance and leasing business, for example.

One trap we have encountered with a few of our clients arises in the following situation: Florida real estate owned by a single member limited liability company (LLC), with the single member being a BVI entity. For U.S. tax purposes, the single member LLC is a disregarded entity and is ignored. Logically it follows that the asset the BVI entity owns would then be the U.S. real estate, excluding it from ES requirements under the strict definition of holding business. While the LLC may be ignored for U.S. tax purposes in the eyes of the Internal Revenue Service, ES requirements were enacted under BVI law. LLC ownership interest, even single-member LLC ownership interest, is considered an equity participation under the ES requirements. The BVI entity would be wise to open a bank account or acquire some other form of asset directly so that it does not fall into the definition of being a pure equity holding entity.

Compliance, Reporting, and Penalties

The ES law came into force on 1 January 2019. Entities in Caribbean jurisdictions affected by the ES requirements must comply during any financial period that they are active. A financial period is a period of one year used for measuring ES in these jurisdictions. For entities formed prior to 2019, the first financial period begins as late as 30 June 2019. Entities formed in 2019 begin their financial period upon formation. Therefore, at the time of this publishing, all active entities must be in compliance with ES.



Cayman Islands' corporate tax rate is 0%, making it a popular country to locate a business. Pictured here is the flag of Cayman Islands on the Foreign Office building in London, 6 July 2015.
Photo by Foreign & Commonwealth Office, CC BY 2.0, <https://creativecommons.org/licenses/by/2.0/>

Economic Substance Requirements, continued

The first financial period for most entities therefore runs from 30 June 2019 to 29 June 2020. Once this financial period is complete, there is a six-month time period for an entity's director to report to the registered agent on its relevant activities for the financial period. In other words, by the end of 2020, all information pertaining to the first financial period must be reported.

While we have inquired with registered agents as to how this information will be collected, most methods of collection are still in development. Some registered agents have hinted that they hope to develop software for online submission of information; such a system would solve the problems that come along with a massive back and forth of data collection through email correspondence. It is likely that even if an entity is not engaged in a relevant activity, and thus not subject to ES, it will still have to file a form signed by the director stating the same, perhaps also disclosing why the entity takes the position that it has no relevant activity. Those that are engaged in relevant activities will have additional requirements for their filings and will be subject to follow-ups and audits for adequacy in their jurisdictions.

Penalties are structured similarly in each jurisdiction, although the amounts of the penalties differ. Entities are not alone in being subject to penalties—registered agents can also be fined by their competent tax authorities for not collecting information appropriately in accordance with ES laws. The chart below summarizes the penalties for ES violations for each jurisdiction.

Jurisdiction	BVI	Cayman Islands	Bermuda	The Bahamas
1st Offense	\$5K-\$20K	\$12.2K	\$7.5K-\$50K	\$10K
2nd Offense	\$10K-\$200K	\$122K	\$25K-\$100K	\$150K
3rd Offense	Struck off	Struck off	\$50K-\$250K Struck off	Struck off

Note: All dollar amounts are US\$.

Additionally, BVI ES laws have substantially increased penalties for intellectual property business entities that do not comply.

Why Now? Pressure From the European Union

While the connection between the EU and the Caribbean

may not be readily apparent, it is inescapable that the world is shrinking and spheres of influence growing. In 2016, the EU's Code of Conduct Group¹ was tasked with reporting on nations around the world using good governance criteria² to determine which nations belonged on a single EU blacklist.

Bermuda, the BVI, the Cayman Islands, and The Bahamas were identified as nations with the potential to be placed on the EU blacklist. In response, the ES requirements were passed with urgency in these jurisdictions.

The specific sanctions for countries that appear on the EU blacklist are still being finalized. It is anticipated that such sanctions could include monitoring and audits, the implementation of withholding taxes on transactions involving entities in those jurisdictions, and automatic reporting on transactions that include blacklisted jurisdictions. What is evident is that the threat of EU blacklisting has caused considerable reverberations in Caribbean corporate law.

The Caribbean jurisdictions rely heavily on the corporate services industry. It has literally birthed a whole generation of professionals in these jurisdictions that otherwise may never have developed, including accountants, lawyers, and other corporate service providers. ES laws and how they are implemented in the Caribbean may be seen by EU lawmakers as a step toward tax transparency, but the very real and more

immediate impact could be unemployment for thousands³ of honest, hardworking individuals in the Caribbean. If international entrepreneurs and corporate entities begin, in droves, to utilize alternative jurisdictions that do not require economic substance, this law may be a real threat to the

prosperity of the region.

As attorneys, we should consult with each of our clients with entities in these jurisdictions as soon as possible to assess if any changes need be made.

Jeffrey S. Hagen is an associate with Harper Meyer LLP, located in Miami, Florida. He serves as chair of the

Economic Substance Requirements, continued



Tax Committee of The Florida Bar International Law Section. His practice focuses on the viability and effectiveness of international transactions from a tax perspective. He advises local and overseas entrepreneurs in personal estate and trust planning, CRS compliance, FIRPTA transactions, corporate

inversions, and economic substance. He has spoken in Panama City, Mexico City, New York City, and Miami on several international tax topics.

Most of the analysis in this article is uncited as it has been originally interpreted from the laws and regulations themselves by Jeffrey S. Hagen and others at Harper Meyer LLP. Other information and commentary relating

to the laws were obtained through conversations and correspondence with registered agents in these Caribbean jurisdictions. If you have further questions relating to economic substance, please reach out to Jeffrey S. Hagen at jhagen@harpermeyer.com or (305) 577-3443.

Endnotes

1 This article does not take a position as to the appropriateness of using Caribbean jurisdictions to establish entities. There are those who believe that the confidentiality provided by these jurisdictions is critical for security purposes, while others believe these jurisdictions enhance tax avoidance.

2 Johannes Bahrke and Patrick McCullough, *Questions and Answers on the EU list of non-cooperative tax jurisdictions*, European Commission Press Release Database (12 Mar. 2019), http://europa.eu/rapid/press-release_MEMO-19-1629_en.htm

3 Stephanie Baker, *Sun, Sand, and the \$1.5 Trillion Offshore Economy*, Bloomberg Businessweek (10 July 2019), <https://www.bloomberg.com/news/features/2019-07-03/the-bvi-s-struggle-to-protect-its-offshore-economy>



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The online form can be found on the website under "Member Profile."



Nonimmigrant Visa Processing, from page 11

- Petition-based F-2, H-4, L-2, M-2, O-2, O-3, P-4, and R-2 renewals, only when the main applicant is renewing with the family member and the initial adjudication was conducted in the main applicant's home country;
- B-1/B-2 – first time and renewals; and
- E3 – renewals only.¹²

Per similar guidelines, the embassy's website will not accept any TCN applications for petition-based first-time applicants; E-1/E-2 visas; applicants who have been out of status in the United States, having violated the terms of their visas or overstayed; or applicants who entered the United States on one visa and are seeking to reenter the United States on a different visa.¹³

Third-Country National Issues

The U.S. Embassy in Nassau also warns TCNs that applicants without a long-term, established connection to The Bahamas or the Turks

and Caicos Islands will receive extra scrutiny in their visa applications.¹⁴ In addition, the three-to-five business day waiting period for a work-related visa is not guaranteed, and all third-country national applicants should expect delays in the adjudication of their visas.¹⁵ The Foreign Affairs Manual (FAM) also counsels consular officers who are receiving nonimmigrant visa applications from residents outside of the consular district "that an out-of-district applicant may alert you to possible fraud or, at the least, forum shopping."¹⁶ It further states that consular officers should refuse the case under Section 214(b) of the Immigration and Nationality Act "if the applicant is applying for a visa category that requires that he or she demonstrate a residence abroad that he or she does not intend to abandon, and the applicant is unable to do so."¹⁷



U.S. Embassy in Bridgetown, Barbados

These are all concerns that a practitioner should communicate to a non-Bahamian client when deciding where to process a nonimmigrant visa renewal. If the client wishes to proceed, then the attorney must play a significant role in this process. The TCN visa applicant should be prepared to explain why he or she is not applying for the visa in his or her home country. Also, the applicant should document extensively his or her ties to his or her home country, such as family ties, employment, business, property ownership, bank accounts, club memberships, etc. It is important to prepare the client to

present the strongest possible case at the interview, as a consular officer's decision to deny a visa application is not subject to administrative or judicial review.¹⁸

U.S. Embassy in Bridgetown, Barbados

The U.S. Embassy in Bridgetown, Barbados, has jurisdiction over nationals from the consular district comprising Anguilla, Antigua and Barbuda, Barbados, British Virgin Islands, Dominica, Grenada, Guadeloupe, Martinique, Montserrat, St. Kitts and Nevis, St. Lucia, St. Martin (French), and St. Vincent and the Grenadines.¹⁹ The embassy building is located at Wildey Business Park, St. Michael BB 14006, Barbados, W.I. The consular section processes the following visa types: B, C, D, E, F/M, H, I, J, L, O, P, Q, R, T, U, and TD/TN. In contrast

Nonimmigrant Visa Processing, continued

to the U.S. Embassy in Nassau, the U.S. Embassy in Bridgetown does process E-1/E-2 treaty investor visas. The nonimmigrant visa application in Bridgetown is similar to the process in Nassau: complete DS-160 application online; register profile;²⁰ pay visa fee at a branch of Scotiabank in Barbados; schedule appointment; and attend the interview.²¹ The current approximate wait time for a nonimmigrant visa interview in Bridgetown is between four and nineteen calendar days.²² Appointments may be expedited solely in the following circumstances: immediate relative's death; grave illness or life-threatening accident taking place in the United States; urgent medical treatment for the applicant or his/her minor child; or an applicant for a student or exchange visitor (F/M/J) visa whose I-20 or DS-2019 has a start date that is earlier than the first available visa appointment.²³

The U.S. Embassy in Bridgetown has the following Renewal Interview Waiver (RIW) procedures in effect,

whereby an in-person interview may be waived in B-1/B-2, C, F-1, M-1, and J-1 renewal applications if the applicant meets all of the following criteria:

- He/she is a citizen and passport holder of Barbados, Grenada, St. Lucia, or St. Kitts and Nevis;
- The previous visa was issued at the U.S. Embassy in Bridgetown;
- He/she is renewing the same category of visa;
- The prior visa was issued for its full validity;
- The prior visa expired less than twelve months ago;
- He/she has not been arrested or convicted for any criminal offenses; and
- He/she must be able to submit the passport containing the previous visa.²⁴

The U.S. Embassy in Bridgetown does not have specific requirements for TCNs listed on its website, in contrast to the U.S. Embassy in Nassau. Regulations permit the consular officer to accept a nonimmigrant visa application in a consular district in which the alien



U.S. Embassy in Port of Spain, Trinidad and Tobago
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Nonimmigrant Visa Processing, continued

is physically present but not a resident, however.²⁵ Although the Foreign Affairs Manual states that consular officers should seldom, if ever, reject persons who are physically present in but not residents of the consular district,²⁶ the decision to accept or reject such an application is subject to the discretion of the consular officer.²⁷ In practice, the U.S. Embassy in Bridgetown has been amenable to processing TCN visa applications under the enhanced scrutiny standard discussed above. Again, it is the attorney's role to thoroughly prepare the applicant for the interview so that the consular officer does not suspect the alien of "forum shopping."

U.S. Embassy in Port of Spain, Trinidad and Tobago

The U.S. Embassy in Port of Spain, Trinidad and Tobago, is responsible for the adjudication of immigrant and nonimmigrant visas for nationals of Trinidad and Tobago. The embassy building is located at 15 Queen's Park West, Port of Spain, Trinidad and Tobago. The consular section processes the following visa types: B, C, D, E, F/M, H, I, J, L, O, P, Q, R, T, U, and TD/TN. Like the U.S. Embassy in Bridgetown, the U.S. Embassy in Port of Spain also processes E-1/E2 treaty investor visas. The nonimmigrant visa application in Port of Spain is similar to the processes previously described for Nassau and Bridgetown: complete DS-160 application online; register profile;²⁸ pay visa fee at a branch of Scotiabank in Trinidad and Tobago; schedule appointment; and attend the interview.²⁹ The current approximate wait time for a nonimmigrant visa interview in Port of Spain is one or two calendar days for most nonimmigrant visas, except for visitor visas, which are taking approximately fifty-four calendar days to schedule.³⁰ Appointments may be expedited upon request on a case-by-case basis.³¹

In March 2019, the U.S. Embassy in Port of Spain instituted the Renewal Interview Waiver (RIW) initiative, which is "applicable to Trinbagonians whose visas have expired within the last year, or who have valid visas that will be expiring."³² First-time applicants or those whose visas expired more than a year ago are still required to schedule an interview.³³ The embassy has also established an Age Interview Waiver (AIW) program

that allows persons who are under 14 and over 79 years of age to submit their visa applications by courier.³⁴ RIW and AIW are not expedited visa programs, as successful applicants will typically have their passports and U.S. visas returned to them in about three-to-four weeks.³⁵

Similar to the U.S. Embassy in Bridgetown, the U.S. Embassy in Port of Spain's website is silent on the processing of nonimmigrant visa applications for third-country nationals. Third-country nationals seeking to apply for nonimmigrant visas at the U.S. Embassy in Trinidad and Tobago face similar challenges as those applying in Bridgetown, Barbados.

Automatic Visa Revalidation

There is a special rule with regard to automatic visa revalidation that applies to students and exchange visitors in the United States who travel abroad to the Caribbean with an expired visa. Under the automatic visa revalidation provision of immigration law, individuals in F or J status can reenter the United States from Canada, Mexico, or the adjacent islands on an *expired* visa if:

- They are returning to the United States from a visit of less than thirty days; and
- They did not apply for a new visa while outside the United States; and
- They have with them a valid passport, an electronic copy of the I-94, appropriate financial documentation, and a valid I-20 signed for reentry.³⁶

The regulations define *adjacent islands* to include "Anguilla, Antigua, Aruba, Bahamas, Barbados, Barbuda, Bermuda, Bonaire, British Virgin Islands, Cayman Islands, Curacao, Dominica, the Dominican Republic, Grenada, Guadeloupe, Haiti, Jamaica, Marie-Galante, Martinique, Miquelon, Montserrat, Saba, Saint Barthélemy, Saint Christopher, Saint Eustatius, Saint Kitts-Nevis, Saint Lucia, Saint Maarten, Saint Martin, Saint Pierre, Saint Vincent and Grenadines, Trinidad and Tobago, Turks and Caicos Islands, and other British, French and Netherlands territory or possessions bordering on the Caribbean Sea."³⁷

Nonimmigrant Visa Processing, continued

Conclusion

Nonimmigrant visa processing in the Caribbean, especially for third-country nationals, is a viable option as long as practitioners are aware of possible issues and properly prepare their clients for the consular interview.



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Endnotes


1 National Foundation for American Policy (NFAP) Policy Brief: "State Department Visa Refusals in FY 2018 for Immigrants and Nonimmigrants" (2019 March).

- 2 <https://bs.usembassy.gov/visas/nonimmigrant-visas/>
- 3 https://ais.usvisa-info.com/en-bs/niv/information/visa_categories
- 4 <https://ceac.state.gov/GenNIV/Default.aspx>
- 5 <https://ais.usvisa-info.com/en-bs/niv>
- 6 <https://bs.usembassy.gov/change-to-fee-collection-vendor/>
- 7 <https://bs.usembassy.gov/visas/nonimmigrant-visas/>
- 8 <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/wait-times.html>

- 9 <https://bs.usembassy.gov/get-the-facts-about-u-s-visas-and-the-application-process/>
- 10 *Id.*
- 11 <https://bs.usembassy.gov/visas/nonimmigrant-visas/>
- 12 *Id.*
- 13 *Id.*
- 14 *Id.*
- 15 *Id.*
- 16 9 F.A.M. 403.10-2(B)(2)(b)(2)(U).
- 17 *Id.*
- 18 INA §104(a)(1).
- 19 <https://bb.usembassy.gov/u-s-embassy-announces-interview-waiver-process-for-qualifying-visa-renewals-in-saint-kitts-and-nevis/>
- 20 <https://ais.usvisa-info.com/en-bb/niv>
- 21 <https://bb.usembassy.gov/visas/nonimmigrant-visas/>
- 22 <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/wait-times.html>
- 23 <https://bb.usembassy.gov/visas/nonimmigrant-visas/>
- 24 *Id.*
- 25 22 C.F.R. § 41.101(a).
- 26 9 F.A.M. 403.2-4(B).
- 27 *Id.*
- 28 <https://ais.usvisa-info.com/en-tt/niv>
- 29 <https://tt.usembassy.gov/visas/nonimmigrant-visas-2/>
- 30 <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/wait-times.html>
- 31 <https://tt.usembassy.gov/visas/nonimmigrant-visas-2/>
- 32 <https://tt.usembassy.gov/u-s-embassy-introduces-interview-waiver-for-the-renewal-of-tourist-visas/>
- 33 *Id.*
- 34 <https://tt.usembassy.gov/ask-the-consul-june-2019/>
- 35 *Id.*
- 36 https://help.cbp.gov/app/answers/detail/a_id/1218/~/automatic-revalidation-for-certain-temporary-visitors
- 37 8 CFR § 286.1(a).



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Cultural Sensitivity, from page 13



Florida First District Court of Appeal, Tallahassee, Florida

Prejudice is common in the family law context. Take, for example, one practitioner who wishes not to be named. She laments, “It is known among immigration attorneys not to try to process any family court applications for [special immigrant juveniles] due to the judiciary in general being biased towards immigrants. I heard a judge shout ‘we need someone who knows “Mexican”’ for a hearing. Because of that attitude, immigration attorneys purposely circumvent filing in my district because they know that viable petitions will be denied simply because of the anti-immigrant bias.”

There is no rule of evidence that prevents consideration of cultural factors. Imagine a case involving a Caribbean couple in which the wife testifies that she is being abused and the husband swears that she communicates with deceased family members and sacrifices chickens. Casting the religious practices of Santería negatively is the husband’s attorney’s strategy to persuade the court that the wife is an unfit mother. It would be a serious mistake to rely exclusively on the husband as the authority of the importance of the wife’s behavior without taking the cultural context into account.

“Judges should also be cognizant of the immigration ramifications of crimes, as these can be counterintuitive,” says immigration practitioner Gunda J. Brost. “From petty theft to shoplifting, a criminal history

could result in an immigrant being deported or denied an immigration benefit.

“Programs such as pretrial intervention and drug court can unintentionally worsen an immigrant’s prospects of remaining in the U.S. and, ironically, expungements do count for immigration purposes,” Brost continues. “Also important for judges to know is that the sentence imposed may dictate if a crime is considered an ‘aggravated felony’ by an immigration judge, who will not take into consideration time served.”

With reports of Immigration and Customs Enforcement (ICE) agents appearing at courthouses around the country at an all-time high, “there’s a chilling effect. Plaintiffs and defendants alike are not showing up. Whether trying to get assistance in a criminal or civil matter, immigrants’ court accessibility is limited by ICE’s presence, which, in turn, leads to undocumented aliens choosing not to report crimes and, or to an even greater extent, seek civil redress for exploitation in living and working environments,” says Neil St. John Rambana, a deportation defense practitioner in Tallahassee.

In light of these special considerations, judges should be empathetic, respectful, and ready to interact with foreign-born litigants to ensure there is no appearance of personal enmity or bias emitting from the bench. If foreign-born litigants (whether naturalized citizens,

Cultural Sensitivity, continued

permanent residents, or even undocumented immigrants) believe that their cases will not be fairly heard, or that they will be detained for immigration purposes, their confidence in the judiciary may wane and justice may be denied. To the extent allowed by the rules of evidence, judges should consider litigants' understanding of the American judicial system, the cultural context, language barriers, and the immigration consequences of their rulings.



Elizabeth Ricci is an award-winning immigration attorney. Well known for her pro bono work, she was named the “Go-to lawyer for veterans” by the *Philadelphia Enquirer* and is a presidential appointment to the Selective Service System Board. She has appeared on Univision, Fox and Friends, and CNN, and

in *The New York Times*. BBC News and MSNBC have both called her “an immigration law expert.” Ricci has taught immigration and written several scholarly articles including an entry in the *Encyclopedia of the Supreme Court* and for the *Harvard G&L Review*. Ricci studied international business, worked at the U.S. Trade Center, Mexico, and was a small business development volunteer in the Peace Corps in Guatemala.

Endnotes

- 1 All of the quotes in this article are statements provided to the author in response to requests for comment on the subject matter. Other resources consulted in the drafting of this piece include the websites of Florida Access to Justice (<http://www.flaccessjustice.org>) and the Ninth Judicial Circuit of Florida (<http://www.ninthcircuit.org/about/programs/court-interpreters>).
- 2 Migration Policy Institute, <http://www.migrationpolicy.org/programs/data-hub/state-immigration-data-profiles> (last visited 28 Aug. 2019).
- 3 Lev-Ari, S. and Keysar, B., *Why don't we believe non-native speakers? The influence of accent on credibility*, *Journal of Experimental Social Psychology*, Vol. 46(6), Nov. 2016, at 1093-96, <https://www.sciencedirect.com/science/article/pii/S0022103110001459?via%3Dihub> (last visited 28 Aug. 2019).



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A Trade War, from page 15

serves to increase the price and make imported products less desirable, or at least less competitive, than domestically produced products. For those who have never seen the Harmonized Tariff Schedule of the United States (HTSUS), which is a schedule used by CBP personnel, customs brokers, importers, and customs lawyers to evaluate tariff classification and duty rates on imported merchandise, I offer a snip of one below, staying within the footwear category, for kicks:

Harmonized Tariff Schedule of the United States (2019) Revision 11					
Annotated for Statistical Reporting Purposes					
Heading/ Subheading	Stat. Tn- fx	Article Description	Unit of Quantity	Rates of Duty	
				General	Special
6401		Waterproof footwear with outer soles and uppers of rubber or plastics, the uppers of which are neither fixed to the sole nor assembled by stitching, riveting, nailing, screwing, plugging or similar processes:			
6401.10.00	00	Footwear incorporating a protective metal toe-cap	prs	37.5%	Free (AU, BH, CA, CL, D, IL, JO, MA, MX, OM, P, PE, R, SG) 0.9% (PA) 7.5% (OO) 37.5% (KF)(s)

Here is a brief description of what you are looking at above. First note that there is a 10-digit tariff number (*i.e.*, 6401.10.0000) describing in detail a particular product imported into the United States. The General Rates of Duty column indicates what duty rate an importer would generally pay to CBP. So, in this case, for each US\$1 value of imported footwear in this classification, the U.S. importer will pay 37.5 cents to CBP. The Special Rates of Duty column, however, allows this type of footwear to enter the United States without paying any duty whatsoever pursuant to certain agreements. It is *Free* of duty. Those letters after the word *Free* indicate the bilateral or multilateral free-trade agreements that countries have signed with the United States. For example, *AU* refers to Australia and *BH* refers to Bahrain.

I now offer you an advanced lesson in customs law. Sophisticated customs lawyers and their clients (for example,

foreign manufacturers and U.S. importers) engage in what is called *tariff engineering*. They design a product so that its tariff classification will be in a specific tariff number that allows for duty-free entry or a lower duty rate. Really, really cool customs lawyers go one step further and help design a product that will enter the United States in a way to avoid any antidumping or countervailing duties as well as President Trump’s new tariffs. For example, if a product is designed to be classified to a tariff number that is not yet on one of the lists of Chinese products issued by the USTR, then it avoids the 25% extra tariff. It may also avoid falling within the scope of an antidumping or countervailing duty order issued by the U.S. Department of Commerce. As an example, freshwater crawfish tail meat from China is subject to a 223% antidumping duty if classified to tariff number HTSUS 1605.40.1010.⁴ On the other hand, there is no antidumping duty on freshwater

crawfish from China. Careful structuring of imports to achieve or avoid certain classifications can mean big savings for U.S. importers.

Knowing the tariff classification of an item and its country of origin determines how much duty must be paid to CBP at the time of entry of the product into the United States. Long story short, U.S. customs and international trade law



U.S. importers of goods such as athletic shoes must now consider the added cost of additional tariffs on goods made in China.

A Trade War, continued

changes frequently, particularly during the current U.S. administration, and lawyers specializing in these areas save their clients money.



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trade and transportation, including litigation in the federal courts located in Florida and the U.S. Court of International Trade in New York. Board certified in international law, Quinter was appointed by The Florida Bar to the International Law Certification Committee.

Endnotes

- 1 19 U.S.C. § 1304 and the CBP Regulations at 19 CFR Part 134.
- 2 *Id.*
- 3 If you are keen to research the various exclusion requests, go to <<https://exclusions.ustr.gov/s/PublicDocket>>.
- 4 See Freshwater Crawfish Tail Meat From the People's Republic of China, 84 FR 2489 (7 Feb. 2019) (final results of antidumping duty administrative review), Document 2019-01478.



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Double Taxation Treaty, from page 17

Capital Gains (Article 13)

One of the most interesting changes in the amended DTT is the elimination of capital gains taxation, except for real estate holding companies. The previous DTT version provided for the taxation by the source country of capital gains arising from the alienation of stock of a company in which the recipient of the gain directly or indirectly owned, for a twelve-month holding period, at least 25% of the shares. The new protocol deletes this provision, effectively exempting all source withholding on capital gains. This is particularly relevant in relation to the sale of stock in a Spanish company, since the United States does not generally tax Spanish investors on the sale of U.S. stock.

The amended DTT establishes, however, that when capital gains arise from the alienation of shares that directly or indirectly transfers rights to real estate, the income is taxable in the country where the real estate is located.

Pensions (Article 20)

The amended DTT provides that income earned by a pension fund may be taxed as income of the individual only when it is paid to or for the benefit of the individual. The protocol and related memorandum of understanding contain detailed definitions of which plans in each country meet the definition of a pension plan for purposes of the treaty, but generally, qualified U.S. retirement plans such as 401(k)s or IRAs would be included. This means, for example, that a U.S. worker that is transferred to Spain and continues to participate in a U.S. retirement plan would not be taxed on that income, unless the worker is receiving distributions from the plan.

Limitation on Benefits (Article 17)

The limitation on benefits (LOB) clause determines the subjective scope of the DTT. In order to qualify for benefits under the DTT, a foreign person must satisfy the tests contained in the LOB. The LOB is meant to prevent abuse and treaty shopping, and to ensure the benefits

of the treaty are limited to the residents of the treaty countries.

The LOB clause introduced by the new protocol is relatively complex, and must be analyzed on a case-by-case basis bearing in mind the multitude of scenarios covered by this provision. In addition to the qualified persons test, the new LOB clause includes an ownership base erosion test, a derivative benefits test, and a headquarters test. One of the more interesting updates is that the protocol extends treaty benefits to entities that function as the headquarters of a multinational corporate group (based primarily on supervision and authority, not ownership). This update makes Spain, which already offers a tax-efficient ETVE regime, an even more attractive holding company jurisdiction for U.S. investors, and provides an alternative to other holding jurisdictions such as the Netherlands, Luxembourg, or Ireland.

Exchange of Information (Article 27)

The protocol updates the exchange of information provisions to conform to the standards of the Organisation for Economic Cooperation and Development. Where the previous DTT provided that competent authorities in Spain and the United States would exchange information that was “necessary” to carry out the provisions of the DTT, the amended DTT provides for the exchange of “foreseeably relevant” information. This application of this provision exceeds the scope of the treaty, and could potentially be used to exchange information on residents of third-party countries with certain ties—such as a bank account—to either treaty country.

Mutual Agreement Procedure (Article 26)

The previous DTT provided that taxpayers that believed they were being improperly taxed under the treaty by one or both of the treaty countries could present their case to the competent authority of the treaty country in which they resided. The competent authorities were meant to resolve the case by mutual agreement, but were not required to reach a decision within a specified period of time.

Double Taxation Treaty, continued



Construction continues on *Basilica de la Sagrada Família* in Barcelona, Spain.

Under the provisions of the new protocol, when the competent authorities do not reach a mutual agreement within two years (unless the competent authorities agree to a different date), a taxpayer may submit the dispute to an arbitration panel. The decision of the panel must be based on the resolution proposed by one of the contracting states, and is only binding on the contracting states if the taxpayer accepts the decision of the arbitral panel. This amendment creates an incentive for the competent authorities of Spain and the United States to resolve their claims by mutual agreement within two years.

Transparent Entities (Article 1)

The new protocol adds rules for items of income derived through fiscally transparent or flow-through entities. Under these rules, an item of income derived through an entity that is fiscally transparent under the laws of either the United States or Spain, and that is formed or organized either in Spain, the United States, or a third-party country with a tax information exchange agreement in force with the country from which the income is

derived, will be considered derived directly by the resident of the treaty country. Under the new rules, an entity must be considered a fiscally transparent entity by either the United States or Spain, even if the entity is organized under the laws of a third-party country. For purposes of the treaty, the tax treatment by the third-party country is irrelevant to this analysis.

The main purpose of these rules is to ensure that these entities are effectively entitled to treaty benefits and to prevent the claiming of treaty benefits when a resident of one country does not consider

the income as a taxable event because the entity is not considered fiscally transparent in its country of residence. For example, under Section 894(c) of the Internal Revenue Code, income derived through an entity that is treated as a partnership or other fiscally transparent entity is not considered as derived by a treaty resident, unless the entity was also considered a flow-through in the resident country, or a tax treaty specifically allows treaty benefits.

Effective Date

All the main changes detailed above, and other changes considered in the new protocol, will enter into force on 27 November 2019, and shall be effective:

- a. For the new withholding rates, for amounts paid or credited on or after the date the protocol enters into force;
- b. For taxes determined with reference to a taxable period, for taxable periods beginning on or after the date the protocol enters into force; and
- c. For all other purposes, on or after the date the protocol enters into force.

Double Taxation Treaty, continued

The new amendment to the DTT between Spain and the United States is expected to impact how multinational companies and international families structure their businesses and investments, and will certainly facilitate direct investment in Spain and the United States. The treaty now makes Spain an attractive destination for direct investment by U.S. companies compared to other European companies, and will make Spanish companies doing business in the United States more competitive compared to other foreign subsidiaries operating there.

Most of the modifications introduced to the DTT provide an advantage to U.S. and Spanish taxpayers; however, the applicability of these measures as well as any possible limitations that may apply according to each country's interpretation must be analyzed on a case-by-case basis.



Ernesto Lacambra is the co-managing partner of Cases & Lacambra, and he leads the firm's tax practice. Lacambra concentrates his practice on advising multinational groups, private equity firms, and foreign and national investment funds, specializing in the international tax planning of

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Latin American groups, as well as on investments in Spain by European, American, and Asian investors. He has been recognized by the most prestigious international legal directories such as Chambers & Partners, Legal 500, and Best Lawyers.



Daniela Pretus is a partner with the Miami office of Cases & Lacambra, a boutique firm with offices in Madrid, Barcelona, Miami, and Andorra. Pretus focuses her practice on the representation of U.S. and foreign multinational corporations, financial institutions, and

private clients in general corporate matters, inbound and outbound investment, and cross-border transactions. She is admitted to practice in Florida, Washington, D.C., and Spain.

Endnotes

- 1 The full title of the protocol is *The Protocol Amending the Convention between the United States of America and the Kingdom of Spain for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and its Protocol*, signed at Madrid, Spain, on 22 Feb. 1990.
- 2 See Article 5.3 of the 1990 DTT.
- 3 The previous DTT text provided for taxation by the country in which the interest arose, and also allowed taxation by the country of residence of the beneficial owner.
- 4 Under Article 12 of the previous DTT, royalties received for copyrights of literary, dramatic, musical, or artistic works are subject to a 5% tax. An 8% rate is applicable for royalties paid with respect to films; industrial, commercial, or scientific equipment; and the copyright of scientific work. A 10% rate is applicable for all other cases.



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57th Annual Congress in Rome, from page 19

Roman city, the Baths of Diocletian, and famous fountains and city squares. The Annual Congress concluded at a dolce vita themed gala dinner at the Villa Medici—a large palace with breathtaking views of the Eternal City that once belonged to the Medici family. After awards and recognitions were awarded to the best workshop, it was time to introduce the destination of the next annual congress: Rio de Janeiro! The 58th Annual Congress in Rio will deal with diversity in the legal profession.



Meet the individuals in charge of organizing the Half-Year October Conference in Miami, 30 October-2 November 2019: Pablo Vinageras Cobielles (Spain), Paola Fudakowska (U.K., AIJA president), Eduardo de la Peña (U.S.), Arnaldo B. Lacayo (U.S.), Giovanni Angles (U.S.), Colin R. P. Delaney (U.S.), Cristina Vicens Beard (U.S.), Fanny Senez (AIJA events manager), Carlos Federico del Razo Ochoa (Mexico), Viktoria Keri (AIJA association manager), Rodrigo da Silva (U.S.), and Renzo Roberti (Peru).

Not only does AIJA provide first-rate academic programming, but it provides young legal professionals an opportunity to connect deeply with other cultures and to create long-lasting networks. Luckily for ILS members, **AIJA will be coming to Miami between 30 October and 2 November 2019, for its Half-Year October Conference!** AIJA members, as well as non-AIJA members, are welcome to attend. The Half-Year Conference will be held at the East Hotel in Brickell and will feature three distinct tracks: (1) Cross-Border Disputes: What to Expect in 2020, (2) Oil and Gas 2020: Fossil Fuels in a Renewable World, and (3) Doing Business in LatAm 2020: Getting to a Legal State of Bliss. Upwards of 300 attendees are expected at this meeting where the ILS will be featured as a sponsor and cooperating bar association. If you would like to attend, host a home hospitality dinner, become a sponsor, or if you would like more information about AIJA or the Miami Half-Year Conference, visit <https://www.aija.org/en/event-detail/420> or reach out to Arnie

Lacayo (alacayo@sequorlaw.com) or Eduardo de la Peña (edp@reedsmith.com). Don't miss this incredible opportunity in our own backyard. We hope to see you there!



Cristina Vicens Beard, an attorney at Sequor Law, focuses her practice on asset recovery and financial fraud. She represents individuals, governments, and other entities in domestic and international judgment collection matters, cross-border insolvency proceedings under Chapter 15 of the U.S. Bankruptcy Code, actions to collect evidence for use in foreign proceedings under 28 U.S.C. § 1782, and other commercial disputes.





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