



# The YEAR IN REVIEW

AN ANNUAL SURVEY OF INTERNATIONAL LEGAL DEVELOPMENTS AND  
PUBLICATION OF THE ABA INTERNATIONAL LAW SECTION

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	Jonathan Meyer	
	Guy C. Quinlan	
	Minji “MJ” Shin	
	Christopher Vallandingham	
	Bonnie C. Weinstein	

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## **International Legal Developments Year in Review: 2021**

JASON S. PALMER AND KIMBERLY Y.W. HOLST\*

This publication, *International Legal Developments Year in Review: 2021*, presents a survey of important legal and political developments in international law that occurred during 2021 amid a continuing global pandemic. The volume consists of articles from over twenty committees of the American Bar Association Section of International Law, whose members live around the world and whose committees report on a diverse range of issues and topics that have arisen in international law over the past year. Not every development in international law is included in this volume, and the omission of a particular development should not be construed as an indication of insignificance. The Section of International Law committees draft their articles under extremely strict guidelines that limit the number of words that each committee has: roughly 7,000 words, including footnotes. Within these guidelines, committee members contribute submissions that describe the most significant developments in their substantive practice area or geographic region. In some cases, non-section members who have particular knowledge or expertise in an area may also be contributing authors.

Committee chairs and committee editors solicited the contributing authors for each committee article. The committee editors, who are identified in each article, had the daunting task of keeping their authors' collective contributions within the tightly controlled word limit. They made difficult decisions regarding what to include and what to cut. After the committee editors did their work, Professors Jason Palmer and Kimberly Holst, the Co-General Editors, formatted and organized the over twenty committee submissions and then transmitted the articles to an amazing team of Deputy Editors who performed substantive and technical reviews on the articles. Once the Deputy Editors completed their work and returned the articles, the Co-General Editors reviewed each article again before sending them to the diligent student editors at the Dedman School of Law at Southern Methodist University in Dallas, Texas. Ceijenja Cornelius, the Editor-in-Chief of *The International Lawyer*, and Matthew Griffeth, the Managing Editor of *The Year in Review*, and Jessica Lee, the Editor-in-Chief, and Michael Vuong, the Managing Editor, for this current year, performed superlatively in their respective roles. They supervised an outstanding

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\* Professor Jason S. Palmer teaches at Stetson University College of Law in St. Petersburg, Florida, and Professor Kimberly Y.W. Holst teaches at the Sandra Day O'Connor College of Law, Arizona State University.

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editorial team whose individual names you can read in the masthead for this volume. These intrepid students checked the sources cited and reviewed each article line by line and word by word. Professor Beverly Caro Duréus, who was invaluable to the publication of this volume, served again this year as the Faculty Executive Editor, and worked closely with the Co-General Editors and with the student editors. We also appreciate the support received from Caryl Ben Basat, the Publications Officer for the ABA Section of International Law, the Division Chairs, and the other leaders of the ABA Section of International Law. Because of all the work that goes into producing *The Year in Review*, the final product is a useful and reliable overview of international law events during 2021. Readers interested in a particular substantive or geographic area are encouraged to read not only this year's summary but also those from earlier years.

The Co-General Editors work with an incredibly dedicated team of volunteer Deputy Editors from around the world. The Deputy Editors include many law professors who specialize in legal writing, international law, and topics related to foreign and international law. The ABA Section of International Law is extremely fortunate to have such a skilled, dedicated, and generous team of Deputy Editors, many of whom have now served for several years. Here is the list of the Deputy Editors who worked on articles this year, with apologies to anyone omitted from the list. Together with the lists from previous years, we believe that we have the strongest editorial team of any journal in the world. We thank all our committee editors named in the individual articles and our deputy editors named here for the generous contributions of their time and talent.

Amy Bitterman (Rutgers Law School)  
Jenn Brinkley (University of West Florida)  
Jonathan Brown (U.S. District Court for the Western District of Missouri)  
Ron Burdge (Burdge Law Office)  
Sha-Shana Crichton (Howard University School of Law)  
Terry Dwyer (Western Connecticut State University)  
Raul Fernandez-Calienes (St. Thomas University School of Law)  
Mary Harokopus (UNT Dallas College of Law)  
Rosa Kim (Suffolk University Law School)  
Janis Kirkland (Regent University School of Law)  
Niccol Kording  
Paul Koster (Emory University School of Law)  
Elizabeth Kukura (Drexel University Thomas R. Kline School of Law)  
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INTRODUCTION 3

Meredith Stange (Northern Illinois University College of Law)  
Julie St. John (University of Detroit Mercy School of Law)  
John Brendan Thornton (Northwestern Pritzker School of Law)  
Patricia Winograd (Loyola Law School)

On behalf of the readers and researchers who will use this volume in future years, we thank the hundreds of authors, committee editors, deputy editors, and law student editors, whose collective efforts produced this volume and whose work over the years have created a reliable and useful record of international law developments. It has been an honor to work with you.

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## Canada

EDITOR: GANNON BEAULNE; AND  
AUTHORS: JACOB MANTLE, DANNY YEO, PETER JAROSZ, TAYLER  
FARRELL, GANNON BEAULNE, MEGAN STEEVES, ADAM MAUNTAH,  
AND SALMA KEBEICH\*

This article surveys significant legal developments in Canada in 2021.

### I. 2021 Canadian Trade Update

In 2021, the COVID-19 pandemic remained the most dominant and disruptive policy challenge for the Government of Canada and the trade and supply chain community. Continued waves of infection led to further domestic lockdowns in Canada and the closure of the Canada-U.S. border for most of the year for all but essential travel.

Over the last year, the pandemic strained supply chains across Canada, especially at major ports, causing longer delivery times and higher prices for commercial and consumer goods. Other trade headwinds included disputes with China (over canola seed) and the U.S. (over softwood lumber, dairy processor quotas, solar panels, and automotive rules of origin). At the same time, Canada made changes to meet its multilateral export control commitments, responded to geopolitical events through its sanctions regimes, remained an active member of the Ottawa Group on World Trade Organization (WTO) reform, and continued to develop and maintain its network of free trade agreements with its trading partners, including the U.K. and Indo-Pacific nations in particular.

Closer to home, Canada strengthened its anti-money laundering (AML) regime and advanced its customs modernization program. Canadian domestic industries continued to actively file anti-dumping and anti-subsidy complaints, and the Canada Border Services Agency (CBSA) continued a trend of active antidumping and countervailing duties (AD/CVD) enforcement through a record number of normal value and export price reviews.

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\* Editor: Gannon Beaulne, Senior Associate, Bennett Jones LLP (Toronto). Authors in order of appearance: Jacob Mantle, Associate, and Danny Yeo, Associate, Borden Ladner Gervais LLP (Toronto); Peter Jarosz, Counsel, and Tayler Farrell, Articling Student, McMillan LLP (Ottawa); Gannon Beaulne, Senior Associate, and Megan Steeves, Associate, Bennett Jones LLP (Toronto); Adam Mauntah, Counsel, Department of Justice (Ottawa); and Salma Kebeich, Associate, Cambridge LLP (Toronto).

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A. FREE TRADE AGREEMENTS

On April 1, 2021, the Canada-United Kingdom Trade Continuity Agreement came into force, substantially copying provisions of the Canada-European Union Comprehensive Economic and Trade Agreement, but in a bilateral context post-Brexit.<sup>1</sup> This agreement will be a stand-in until negotiations of a comprehensive free trade agreement (expected to start by the end of 2021) are complete.<sup>2</sup> Canada also announced the opening of formal negotiations toward an economic partnership agreement with Indonesia in June 2021 and a free trade agreement with the Association of Southeast Asian Nations in November 2021, both aimed at strengthening Canada's economic relationship with countries in the Indo-Pacific region.<sup>3</sup>

B. WTO DEVELOPMENTS

Canada remained active in 2021 through the Ottawa Group in efforts to advance reforms to the multilateral trading system, including efforts to resolve the Appellate Body impasse.<sup>4</sup> In May, Canada and Australia settled their dispute in *Canada—Measures Governing the Sale of Wine*.<sup>5</sup> Australia initiated that dispute over measures relating to the distribution, licensing, and sales of imported wine in Canada. Under the settlement, among other things, Canada has agreed to phase out the tax difference between Ontario wine and non-Ontario wine sold in offsite wine retail stores and to eliminate “store within a store” measures in the Canadian province of British Columbia that limited the sale of imported wine to liquor stores within grocery stores while allowing domestic wine to be sold on regular store shelves.<sup>6</sup>

In July, after nearly two years of stalled negotiations, the Dispute Settlement Body established a panel in *China—Canola Seed* at Canada's

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1. *Canada-UK Trade Continuity Agreement*, GOV'T OF CANADA (Apr. 1, 2021), [https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cukta-accru/read\\_agreement-consultez\\_accord.aspx?lang-eng](https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cukta-accru/read_agreement-consultez_accord.aspx?lang-eng).

2. DOMINIC WEBB, HOUSE OF COMMONS LIBR., PROGRESS ON UK FREE TRADE AGREEMENT NEGOTIATIONS 1–2 (2021), <https://commonslibrary.parliament.uk/research-briefings/cbp-9314/>.

3. *Canada to Begin Negotiations with Indonesia on a Comprehensive Economic Partnership Agreement*, GLOB. AFF. CANADA (June 20, 2021), <https://www.canada.ca/en/global-affairs/news/2021/06/canada-to-begin-negotiations-with-indonesia-on-a-comprehensive-economic-partnership-agreement.html>; see also *Canada and ASEAN Proceed with Free Trade Agreement Negotiations*, GLOB. AFF. CANADA (Nov. 16, 2021), <https://www.canada.ca/en/global-affairs/news/2021/11/canada-and-asean-proceed-with-free-trade-agreement-negotiations.html>.

4. *Minister Ng Hosts Third Virtual Ottawa Group Meeting of 2021*, GOV'T OF CANADA (July 22, 2021), <https://www.canada.ca/en/global-affairs/news/2021/07/minister-ng-hosts-third-virtual-ottawa-group-meeting-of-2021.html>.

5. WT/DS537/R (April 22, 2021), [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds537\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds537_e.htm).

6. *Canada - Governing the Sale of Wine*, WT/DS537/18, *Notification of a Mutually Agreed Solution* (May 18, 2021), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DS/537-18.pdf&Open=true>.

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request.<sup>7</sup> This dispute arises from the Government of China's 2019 decisions to suspend imports of Canadian canola seeds based on the alleged presence of certain pests. The panel was constituted on November 10, 2021.<sup>8</sup>

**C. USMCA/CUSMA CHAPTER 31 DISPUTES AND SOFTWOOD  
LUMBER DEVELOPMENTS**

In 2021, both Canada and the U.S. made use of the Chapter 31 dispute settlement procedures in the Canada-United States-Mexico Agreement (USMCA/CUSMA) and the long-standing Canada-U.S. softwood lumber dispute continued unabated.

The softwood lumber dispute—the longest Canada-U.S. trade dispute in history—carried into 2021, as the U.S. Department of Commerce released its final determinations in its second administrative review and also started its third administrative review.<sup>9</sup> Final results from the second administrative review, which nearly doubled existing duty rates on Canadian softwood lumber, were met with sharp criticism from Canada.<sup>10</sup>

Canada's USMCA/CUSMA Chapter 10 dispute relating to the first administrative review remains ongoing.<sup>11</sup> In May, the U.S. challenged Canada's administration of dairy tariff-rate quotas—in particular, quota reservations for dairy processors.<sup>12</sup> A panel hearing respecting the administration of Canadian dairy tariff-rate quotas was held in October in Ottawa. In June, Canada asked to establish a dispute settlement panel after failed consultations with the U.S. about its safeguard tariffs (eighteen percent) on imports of certain solar photovoltaic products.<sup>13</sup> The panel

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7. WT/DS589/6, (July 26, 2021), [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds589\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds589_e.htm).

8. *China – Canola Seed (Canada)*, WT/DS589/6, *Constitution of the Panel Established at the Request of Canada*, (Nov. 12, 2021), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:WT/DS/589-6.pdf&Open=true>.

9. *See Certain Softwood Lumber Products from Canada: Final Results of Antidumping Duty Administrative Review; 2019; Correction*, 87 Fed. Reg. 16 (U.S. Dep't of Com. proposed Jan. 25, 2022), <https://www.govinfo.gov/content/pkg/FR-2022-01-25/pdf/2022-01362.pdf>.

10. Press Release, Mary Ng, Minister of International Trade, Export Promotion, Small Business and Economic Development, Statement by Minister Ng on U.S. Final Duty Rates on Canadian Softwood Lumber (Nov. 24, 2021), <https://www.canada.ca/en/global-affairs/news/2021/11/statement-by-minister-ng-on-us-final-duty-rates-on-canadian-softwood-lumber.html>.

11. *CUSMA Dispute*, CANADA UNITED STATES MEXICO AGREEMENT SECRETARIAT (Oct. 26, 2021), <https://can-mex-usa-sec.org/secretariat/disputes-litges-controversias.aspx?lang=eng>.

12. *United States Advances First USMCA Dispute Panel to Enforce Canada's Dairy Commitments*, OFF. OF THE UNITED STATES TRADE REPRESENTATIVE (May 25, 2021), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/may/united-states-advances-first-usmca-dispute-panel-enforce-canadas-dairy-commitments>.

13. *Request for the Establishment of a Panel by Canada – Solar Products*, GOV'T OF CANADA (June 17, 2021), <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/solar-products-produits-energie-solaire.aspx?lang=eng>.

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report is expected in early 2022.<sup>14</sup> Finally, in August, Canada joined ongoing Mexico-U.S. consultations regarding certain rules of origin for automotive parts and vehicles.<sup>15</sup>

**D. CUSTOMS: THE CHARM INITIATIVE AND VALUATION FOR DUTY REGULATIONS**

The Canada Border Services Agency (CBSA) Assessment and Revenue Management (CARM) project is a multi-year initiative to replace certain existing customs accounting and enforcement systems with a modernized online solution for the accounting, payment, and collection of duties and certain taxes.<sup>16</sup> In May, the CBSA launched the first part of the larger CARM project: the CARM Client Portal.<sup>17</sup> The CARM Client Portal is a self-service tool available for importers, brokers, and trade consultants that facilitates accounting and revenue management processes with the CBSA.<sup>18</sup> In the spring of 2022, the CBSA expects to expand the CARM Client Portal by adding new functions, including electronic commercial accounting declarations and electronic management of appeals and compliance actions.<sup>19</sup>

Canada's 2021 federal budget proposed legislative changes to the valuation of imported goods for customs duty and GST purposes.<sup>20</sup> The proposed reforms mainly concern the transaction value method of customs valuation.<sup>21</sup> The proposed reforms are intended to ensure that there is a physical purchaser in Canada, and a price between the foreign vendor and that purchaser, and to tighten the use of permanent establishments as purchasers in Canada when there is a multi-party chain of sales, limiting the use of the "first sale" equivalent rule in Canada. In June, the CBSA conducted consultations<sup>22</sup> with stakeholders about these potential changes. At the time of writing, the government has not yet introduced changes to the *Customs Act* or any of its regulations. The authors, however, expect that any changes will alter the manner of determining the basis for customs duties.

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14. *Id.*

15. Rebecca Cook, *Canada Joins Mexico in Seeking Consultation with U.S. Over USMCA Content Rules*, REUTERS (Aug. 27, 2021), <https://www.reuters.com/business/autos-transportation/canada-joins-mexico-seeking-consultation-with-us-over-usmca-content-rules-2021-08-27/>.

16. *CBSA Assessment and Revenue Management Project*, GOV'T OF CANADA, <https://www.cbsa-asfc.gc.ca/prog/carm-gcra/menu-eng.html> (last visited Feb. 2, 2022).

17. *Id.*

18. *Id.*

19. *CARM: CBSA Assessment and Revenue Management Project*, CANADA BORDER SERV. AGENCY (May 25, 2021), <https://www.cbsa-asfc.gc.ca/prog/carm-gcra/menu-eng.html>.

20. *Consultation Notice: Potential Regulatory Amendments to the Valuation for Duty Regulations*, CANADA BORDER SERV. AGENCY, <https://www.cbsa-asfc.gc.ca/agency-agence/consult/consultations/2021-2-eng.html> (last visited July 5, 2021).

21. *Id.*

22. *Consultation Notice: Potential Regulatory Amendments to the Valuation for Duty Regulations*, CANADA BORDER SERV. AGENCY (July 5, 2021), <https://www.cbsa-asfc.gc.ca/agency-agence/consult/consultations/2021-2-eng.html>.

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E. UPDATE'S TO CANADA'S EXPORT CONTROLS, ECONOMIC  
SANCTIONS AND AML REGIME

In March, Canada issued sanctions relating to China under the *Special Economic Measures Act*, targeting four Chinese officials and a Chinese entity allegedly involved in human rights violations, including the use of forced labor, in the Xinjiang Uyghur Autonomous Region in China.<sup>23</sup> During 2021, Canada also updated and expanded its lists of sanctioned individuals and entities in Belarus, Myanmar, Nicaragua, Russia, and Ukraine.<sup>24</sup>

In June, Canada amended its *Export Control List*, bringing the country up to date with its multilateral export control commitments, including its Wassenaar commitments.<sup>25</sup> The revisions add new export controls for certain goods and technology, including software used by law enforcement agencies to intercept communications, military software for offensive cyber operations, and more.<sup>26</sup> Canada's updated guide to the *Export Control List*, detailing the list of specific items subject to export controls, came into force in July and reflects those amendments.<sup>27</sup>

Also in June, Canada made amendments to its AML regime under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*.<sup>28</sup> The amendments change ongoing monitoring and beneficial ownership requirements,<sup>29</sup> and sector-specific requirements including new obligations applying to accountants and accounting firms, casinos, securities dealers, and

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23. *Canadian Sanctions Related to People's Republic of China*, GOV'T OF CANADA (Apr. 23, 2021), [https://www.international.gc.ca/world-monde/international\\_relations-relations\\_internationales/sanctions/china-chine.aspx?lang=eng](https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/china-chine.aspx?lang=eng).

24. *Canadian Sanctions*, GOV'T OF CANADA (Nov. 9, 2021), [https://www.international.gc.ca/world-monde/international\\_relations-relations\\_internationales/sanctions/current-actuelles.aspx?lang=eng](https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/current-actuelles.aspx?lang=eng); see also Press Release, Mélanie Joly, Minister of Foreign Aff., Minister Joly Announces Additional Sanctions on Belarusian Individuals and Entities in Response to Ongoing and Systematic Human Rights Violations (Dec. 2, 2021), <https://www.canada.ca/en/global-affairs/news/2021/12/minister-joly-announces-additional-sanctions-on-belarusian-individuals-and-entities-in-response-to-ongoing-and-systematic-human-rights-violations.html>. (These changes are made to regulations under the *Special Economic Measures Act*, S.C. 1992, c-17.).

25. *Order Amending the Export Control List (December 2020)*, GOV'T OF CANADA (June 3, 2021), <https://www.international.gc.ca/trade-commerce/guides/summary-resume.aspx?lang=eng>.

26. *Order Amending the Export Controls List: SOR/2021-121*, GOV'T OF CANADA (June 4, 2021), <https://canadagazette.gc.ca/rp-pr/p2/2021/2021-06-23/html/sor-dors121-eng.html>.

27. *A Guide to Canada's Export Control List*, GOV'T OF CANADA (July 23, 2021), [https://www.international.gc.ca/trade-commerce/guides/export\\_control\\_list-liste\\_exportation\\_controlee.aspx?lang=eng](https://www.international.gc.ca/trade-commerce/guides/export_control_list-liste_exportation_controlee.aspx?lang=eng).

28. *Anti-Money Laundering in Canada: A Guide to the June 1, 2021 Changes*, OSLER, <https://www.osler.com/en/resources/in-focus/anti-money-laundering-in-canada-a-guide-to-the-june-1-2021-changes> (last visited Mar. 25, 2021).

29. *Ongoing Monitoring Requirements*, FIN. TRANSACTIONS AND REPORTS ANALYSIS CENTRE OF CANADA (Aug. 4, 2021), <https://www.fintrac-canafe.gc.ca/guidance-directives/client-clientele/omr-eng>; *Beneficial Ownership Requirements*, FIN. TRANSACTIONS AND REPORTS ANALYSIS CENTRE OF CANADA (Aug. 4, 2021), <https://www.fintrac-canafe.gc.ca/guidance-directives/client-clientele/bor-eng>.

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others.<sup>30</sup> The Financial Transactions and Report Analysis Centre of Canada, Canada’s financial intelligence agency, issued new guidance<sup>31</sup> that also came effect in June to assist reporting entities navigate their new compliance obligations.

F. CANADIAN AD/CVD PROCEEDINGS

In 2021, the CBSA initiated four new anti-dumping and subsidy investigations (respecting oil and gas tubular goods, container chassis, and power transformers) and the CBSA and Canadian International Trade Tribunal conducted five expiry reviews.<sup>32</sup> The CBSA also initiated twenty-two normal value and export price reviews this year—the largest number since the introduction of the normal value and export price review mechanism in 2018.<sup>33</sup> Normal value reviews are administered by the CBSA “to update normal values, exports prices, and amounts of subsidy on an exporter-specific basis.”<sup>34</sup> Normal values operate as floor prices or methodologies to establish minimum prices for exporters selling goods to Canada.

In August the Government of Canada, through the Department of Finance, started consultations on potential amendments to Canada’s trade remedy regime, inviting stakeholders to comment on a range of issues, including increasing union participation in trade remedy proceedings; anti-circumvention proceedings; massive importation findings; whether expiry reviews should be automatic; and improving access to the trade remedy process for small and mid-sized enterprises.<sup>35</sup> The proposed changes aim to bring Canada’s trade remedy laws further into alignment with the U.S. and to respond to the domestic steel industry.<sup>36</sup>

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30. *Know Your Client Requirements*, FIN. TRANSACTIONS AND REPORTS ANALYSIS CENTRE OF CANADA (June 1, 2021), <https://www.fintrac-canafe.gc.ca/guidance-directives/client-clientele/1-eng>.

31. *Guidance*, FIN. TRANSACTIONS AND REPORTS ANALYSIS CENTRE OF CANADA (June 1, 2021), <https://www.fintrac-canafe.gc.ca/guidance-directives/1-eng>.

32. *Dumping and Subsidy Investigations*, CANADA BORDER SERV. AGENCY, <https://www.cbsa-asfc.gc.ca/sima-lmsi/i-e/menu-eng.html> (last visited Mar. 25, 2022); *see also Dumping and Subsidy Expiry Reviews*, CANADA BORDER SERV. AGENCY, <https://www.cbsa-asfc.gc.ca/sima-lmsi/er-rre/menu-eng.html> (last visited Mar. 11, 2022).

33. *Normal Value Reviews*, CANADA BORDER SERV. AGENCY (Nov. 15, 2021), <https://www.cbsa-asfc.gc.ca/sima-lmsi/up/menu-eng.html>.

34. *Id.*

35. *Consultation on Measures to Strengthen and Improve Access to Canada’s Trade Remedy System*, GOV’T OF CANADA, <https://www.canada.ca/en/department-finance/programs/consultations/2021/consultation-measures-strengthen-improve-access-canada-trade-remedy-system.html> (last visited Dec. 3, 2021).

36. *Consultation on Measures to Strengthen and Improve Access to Canada’s Trade Remedy System*, DEP’T OF FIN. CANADA (Aug. 6, 2021), <https://www.canada.ca/en/department-finance/programs/consultations/2021/consultation-measures-strengthen-improve-access-canada-trade-remedy-system.html>.

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## **II. Steps Toward a Canadian Border Carbon Adjustment**

Canada has set the goal of reaching net-zero emissions by 2050 to assist in the fight against climate change.<sup>37</sup> As a part of its plan to reach this goal, the Government of Canada announced its intention to explore the possibility of a border carbon adjustment<sup>38</sup> (BCA) in its 2021 budget.<sup>39</sup> It described the role of BCAs as follows:

Border carbon adjustments make sure that regulations on a price on carbon pollution apply fairly between trading partners. If a different price on pollution is levied at source, the difference is accordingly applied on imports and exports between countries. This levels the field, ensures competitiveness, and protects our shared environment.<sup>40</sup>

The concept of leveling the playing field is central to a BCA's purpose.<sup>41</sup> Canada aims to "level" its carbon price with the carbon prices of its trading partners.<sup>42</sup> But this poses a particular challenge in the Canadian context because there are various carbon prices across the country. Which carbon price would be used to level the playing field?

### **A. DOMESTIC CARBON PRICE TO "ADJUST" AGAINST AS A PREREQUISITE TO BCAs**

Canada's division of powers has led to various carbon prices across the country, with certain provinces and territories developing their own carbon pricing regimes. For instance, the province of British Columbia enacted a carbon tax in 2008,<sup>43</sup> and the province of Québec enacted a cap-and-trade system back in 2012.<sup>44</sup> Ontario cancelled its cap-and-trade program in 2018 and has since enacted its own carbon emissions pricing regime.<sup>45</sup> Other provinces and territories, like Manitoba and Nunavut, do not currently have their own carbon price in place.

A major development in 2021, and a development likely critical for the effective implementation of a Canadian BCA, was the Supreme Court of Canada's (SCC) decision that the federal carbon pricing legislation, the

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37. *Canadian Net-Zero Emissions Accountability Act*, S.C. 2021, c. 22, § 6.

38. As will be discussed below, examples of such "adjustments" are import tariffs and export rebates.

39. *Budget 2021: A Recovery Plan for Jobs, Growth, and Resilience*, OTTAWA DEP'T OF FIN., <https://www.budget.gc.ca/2021/report-rapport/toc-tdm-en.html> (last visited May 4, 2022).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Carbon Tax Regulation*, B.C. Reg. 125/2008.

44. *Regulations Respecting AaCap-and-Trade System for Greenhouse Gas Emissions Allowances*, C.Q.L.R. c. Q-2, r. 46.1.

45. The *Greenhouse Gas Emissions Performance Standards*, O. Reg. 241/19, began to apply in Ontario as of January 1, 2022. See *Order in Council*, P.C. 2021-0864, Aug. 11, 2021, SOR/2021-0195, which removed the application of the federal system to Ontario effective January 1, 2022.



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Greenhouse Gas Pollution Pricing Act (GGPPA) was constitutional.<sup>46</sup> Part II of the GGPPA, together with the Output-Based Pricing System Regulations, creates a federal emissions-pricing regime, called the Output-Based Pricing System (OBPS).<sup>47</sup> Under the OBPS, “covered facilities” are allocated a maximum amount of carbon or carbon equivalent that the facility can emit.<sup>48</sup> A facility must pay for any carbon emitted over its allowance.<sup>49</sup> In 2021, the price under the OBPS was \$40 CAD per tonne of CO<sub>2</sub>e.<sup>50</sup> The government announced a progressive increase in this price to \$170 CAD per tonne by 2030.<sup>51</sup>

The OBPS is structured as a backstop. It sets a minimum carbon price across the country and delineates the minimum requirements for any provincial or territorial carbon-pricing system.<sup>52</sup> For any province or territory that does not have a carbon price, the OBPS takes effect.<sup>53</sup> For example, the OBPS is currently in place in both Manitoba, Prince Edward Island, Nunavut, Yukon, and Saskatchewan.<sup>54</sup>

If the GGPPA were found unconstitutional, designing and administering a BCA based on the patchwork of carbon prices across Canada may have proven to be prohibitively challenging. While questions remain, such as what happens when the provincial carbon price is higher than the federal price, a federal minimum was an important step toward a Canadian BCA.

## B. CANADA ANNOUNCES CONSULTATIONS ON BCAs

After the finding of constitutionality, Canada’s Department of Finance announced the beginning of a consultation period and released a background paper outlining considerations surrounding BCAs that delineates four interrelated objectives of BCAs: (1) reducing the risk of carbon leakage; (2) maintaining the competitiveness of domestic industry; (3) supporting greater domestic climate ambition; and (4) driving international climate action.<sup>55</sup> According to the background paper, the BCA may take the form of an import charge imposed on goods from countries with a lower carbon price,

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46. *Reference re: Greenhouse Gas Pollution Pricing System*, 2021 SCC 11.

47. *Output-Based Pricing System Regulations*, SOR/2019-266.

48. *Id.* § 36(1).

49. *Greenhouse Gas Pollution Pricing Act (GGPPA)*, S.C. 2018, c. 12, s. 186, § 174(1).

50. *Id.*, at Sched. 4.

51. *Update to the Pan-Canadian Approach to Carbon Pollution Pricing 2023-2030*, CANADA DEP’T OF ENV’T & NAT. RES., <https://www.canada.ca/en/environment-climate-change/services/climate-change/pricing-pollution-how-it-will-work/carbon-pollution-pricing-federal-benchmark-information/federal-benchmark-2023-2030.html> (last visited Nov. 22, 2021).

52. *Carbon Pollution Pricing Across Canada*, GOV’T OF CANADA, <https://www.canada.ca/en/environment-climate-change/services/climate-change/pricing-pollution-how-it-will-work.html> (last visited Mar. 3, 2022).

53. *Id.*

54. *GGPPA*, *supra* note 49, at Sched. 1.

55. *Exploring Border Carbon Adjustments for Canada*, GOV’T OF CANADA (Aug. 5, 2021), <https://www.canada.ca/en/department-finance/programs/consultations/2021/border-carbon-adjustments/exploring-border-carbon-adjustments-canada.html>.

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or an export rebate that would rebate the cost of the domestic carbon price paid by domestic producers.<sup>56</sup>

The paper suggests that Canada is looking to collaborate on aspects of a BCA, listing areas such as the scope of the BCA, the determination of embedded emissions, and assessing equivalencies between pricing and non-pricing measures as areas conducive to collaboration.<sup>57</sup> It also emphasizes that: “Canada must consider how BCAs would affect trading relationships and the multilateral trading system more broadly.”<sup>58</sup> Because the U.S. is Canada’s largest trading partner, the paper specifically points to the 2021 Canada-U.S. agreement, the Roadmap for a Renewed U.S.-Canada Partnership, as a basis to “work together to address impacts on trade from global disparities in climate policies.”<sup>59</sup> The U.S.-E.U. announcement of a Global Sustainable Steel Arrangement was also touted as a potential basis for a global, sectoral BCA.<sup>60</sup>

### C. CONCLUSION

Discussions remain in the early stages in Canada. But interest in BCAs continues to grow around the globe. Although BCA legislation has not yet been tabled in Canada, the important early steps taken in Canada are bound to influence how this crucial legal framework will develop in the future.

## III. The Evolving Landscape of Transnational Corporate Accountability Litigation

Last year, the SCC recognized that Canadian corporations with foreign operations can now be sued for alleged breaches of customary international law that occur abroad.<sup>61</sup> But the practicalities of bringing this type of novel claim have not yet been clarified by or fully tested before Canadian courts.<sup>62</sup>

At its highest level, claims for breaching customary international law concern breaches of norms.<sup>63</sup> Customary international law embodies the ever-evolving common law of the international legal system.<sup>64</sup> It finds its expression in norms, particularly those that have become so widely accepted

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56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*; see also Press Release Justin Trudeau, Prime Minister, Roadmap for a Renewed U.S.-Canada Partnership (Feb. 23, 2021), <https://pm.gc.ca/en/news/statements/2021/02/23/roadmap-renewed-us-canada-partnership>.

60. *U.S.-E.U. Steel, Aluminum Plan Touted as Basis for Carbon Border Adjustment*, INSIDE U.S. TRADE (Nov. 3, 2021), <https://insidetrade.com/trade/us-cu-steel-aluminum-plan-touted-basis-carbon-border-adjustment>.

61. *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5.

62. *Id.* ¶ 19.

63. *Id.* ¶ 1.

64. *Id.* ¶ 95.

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that they are viewed as obligatory.<sup>65</sup> Today, widely recognized norms of customary international law include, for example, prohibitions on “forced labor; slavery; cruel, inhuman, or degrading treatment; [and] crimes against humanity.”<sup>66</sup>

In *Nevsun Resources Ltd. v. Araya*, a group of former Eritrean workers started a proposed class action in British Columbia against a Canadian mining company based on alleged human rights violations that occurred at an Eritrean mine owned in part by indirect subsidiaries of the Canadian entity, and in part by the Eritrean government.<sup>67</sup>

A majority of the SCC allowed the claims to proceed, dismissing a defense motion seeking to defeat them at a preliminary stage.<sup>68</sup> The majority held that customary international law is part of Canadian law by virtue of the “doctrine of adoption,” under which customary international law is automatically incorporated into domestic law, at least insofar as it is not inconsistent with existing legal rules.<sup>69</sup> Since Canadian companies must follow Canadian law, and Canadian law includes customary international law, the majority found that it could not conclude that it was “plain and obvious” (the test that applies to the defense motion to strike out the plaintiffs’ statement of claim) that the novel claims for breaches of customary international law could not succeed.<sup>70</sup>

The *Nevsun* decision was and is a potentially significant legal development, but it resulted from a preliminary motion on which no evidence on the merits was pleaded, and by which the “plain and obvious” test governed. Thus, the SCC did not determine the merits of the novel claims advanced by the plaintiffs in that case. Those merits will now never be determined because the parties in *Nevsun* reached a private settlement before a merits determination could occur.<sup>71</sup> As a result, trial courts in Canada have been left to interpret *Nevsun*, and to answer the many practical and jurisprudential questions raised by the majority opinion.

At the time of writing, a dearth of judicial guidance exists in Canada about how judges should approach the relatively untried principles relating to alleged liability for breaches of customary international law discussed in *Nevsun*.

In June 2021, the Federal Court of Canada released perhaps the most instructive decision considering *Nevsun* yet. *Big Eagle v. Canada* was a putative class action in which the plaintiff alleged that Canada’s federal police service, the Royal Canadian Mounted Police (RCMP), had failed to investigate and

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65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* ¶ 6.

69. *Id.* ¶ 128.

70. *Id.* ¶ 132.

71. Anne Bucher, *Landmark Settlement Reached in Slavery Lawsuit Against Nevsun*, TOP CLASS ACTIONS (Oct. 26, 2020), <https://ca.topclassactions.com/lawsuit-settlements/lawsuit-news/landmark-settlement-reached-in-slavery-lawsuit-against-nevsun/>.

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prosecute cases involving missing and murdered Indigenous persons.<sup>72</sup> Unlike in *Nevsun*, the alleged conduct at the heart of the case occurred in Canada. Nevertheless, relying on *Nevsun*, the plaintiff alleged potential liability under domestic iterations of international law—in particular, the prohibitions on genocide and crimes against humanity.<sup>73</sup> The Federal Court refused to certify the case as a class action, and struck out the claim without leave to amend.<sup>74</sup> The Federal Court distinguished the *Nevsun* decision for two reasons: first, the plaintiff in *Bigeagle* was relying on genocide, which had not been pleaded in *Nevsun*, and second, nothing in the pleadings in *Bigeagle* supported the claim that the RCMP had acted in a way to further an act constituting a crime against humanity under the Rome Statute of the International Criminal Court,<sup>75</sup> committed as part of “a widespread or systematic attack directed against a civilian population.”<sup>76</sup> Ultimately, the Federal Court held that the plaintiff in *Bigeagle* had not pleaded the elements of genocide or crimes against humanity, and that the deficiencies in the pleadings were not capable of being cured by further amendments.<sup>77</sup>

In *Bigeagle*, the Federal Court brought to bear on the novel claim for breach of customary international law certain of the traditional side-constraints relating to pleadings requirements and preliminary motions to strike out claims that Canadian courts regularly apply in other contexts to root out cases lacking any real prospect of success. But it also appeared to accept that customary international law norms—and the elements that make up those norms, as set out in international instruments or other sources—might be capable of grounding a domestic cause of action. The Federal Court noted, in relation to *Nevsun*, that the law is “unsettled” but breaches of customary international law “could lead to civil remedies.”<sup>78</sup>

Despite this development, much remains unclear. Although claims for breaches of customary international law may be allowed to proceed before Canadian courts (if properly pleaded) under *Nevsun*, there remains little or no meaningful guidance in the Canadian case law about the type of evidentiary record that will be needed to support the merits of that claim, or the type of legal analysis that asserting such a claim will require.<sup>79</sup>

Developments in other jurisdictions offer little more by way of direct guidance. Courts in the U.K. have affirmed the potential liability of parent

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72. *Bigeagle v. Canada*, 2021 FC 504. A Notice of Appeal (Appeal Court File No. A-177-21) has been filed in the Federal Court of Appeal.

73. *Id.* ¶ 228.

74. *Id.* ¶ 250.

75. Rome Statute of the International Criminal Court, art. 7, July 17, 1998, 2187 UNTS 3.

76. *Id.* ¶ 243.

77. *Id.* ¶¶ 228–38.

78. *Id.* ¶ 232.

79. See Gannon Beaulne, *Canadian Companies May Now Be Sued in Canada for Alleged Human Rights Abuses Abroad, Rules Supreme Court of Canada*, BENNET JONES (Apr. 2, 2020), <https://www.bennettjones.com/Blogs-Section/Canadian-Companies-May-Now-Be-Sued-in-Canada—for-Alleged-Human-Rights-Abuses-Abroad>.

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companies relating to foreign harms involving subsidiaries,<sup>80</sup> but have not ventured into *Nevsun* territory. Meanwhile, in 2021, the Supreme Court of the United States rejected the argument that domestic courts should hear claims asserting potential liability of U.S. companies relating to alleged human rights abuses occurring abroad under the Alien Tort Statute.<sup>81</sup>

Accordingly, the legal framework governing transnational corporate accountability litigation in Canada appears to have shifted somewhat over the last two years, but the extent and full nature of the change remains to be seen. For now, no court has expanded on the reasoning of the majority of the SCC in *Nevsun* or explored practical aspects of bringing the breach of customary international law claim discussed in the decision. Different jurisdictions have adopted different approaches and, for now, Canada appears to be an outlier.

#### **IV. Questions of Jurisdiction and Foreign Law in Canada's Federal Courts**

The jurisdiction of the Federal Court of Canada and the Federal Court of Appeal is described in the Federal Courts Act.<sup>82</sup> The Federal Court has concurrent original jurisdiction over maritime and shipping matters, among other subjects.<sup>83</sup> These matters include disputes between private parties.<sup>84</sup> The Federal Court of Appeal has jurisdiction over decisions of the Federal Court.<sup>85</sup> In 2021, two cases relating to shipping were among those before the Federal Court of Appeal. The decisions illustrate principles that the Federal Courts will apply when faced with questions of jurisdiction and the application of foreign law.

The decision in *Great White Fleet v. Arc-En-Ciel Produce Inc.*<sup>86</sup> examined the application of the *Marine Liability Act*<sup>87</sup> and the discretion of the Federal Court to stay a proceeding on the ground that the matter is proceeding in another court or jurisdiction.<sup>88</sup> As explained by the Federal Court,<sup>89</sup> Arc-En-Ciel contracted Great White Fleet to ship perishable goods from Costa

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80. See, e.g., *Okpabi and others v. Royal Dutch Shell Plc and another*, [2021] UKSC 3.

81. *Nestle USA, Inc. v. Doe*, 141 S. Ct. 1931, 1935 (2021).

82. Federal Courts Act, R.S.C. 1985, c. F-7 [hereinafter Federal Courts Act].

83. *Id.* § 22.

84. *Id.* § 22(1) (The provision states that the court has concurrent original jurisdiction “between subject and subject, as well as otherwise”. A party may therefore originate a proceeding in the Federal Court or in the appropriate court in a province or territory. The ability to hear disputes “between subject and subject” means that the Federal Court can hear a matter between private parties.).

85. *Id.* § 27(1).

86. *Great White Fleet v. Arc-En-Ciel Produce Inc.*, 2021 FCA 70 (hereinafter *Great White Fleet*).

87. Marine Liability Act, S.C. 2001, c. (MLA).

88. Federal Courts Act, § 50(1).

89. *Great White Fleet*, ¶ 23.

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Rica to Toronto, Ontario, Canada.<sup>90</sup> The goods were transported by water to the U.S. and then by truck to Canada.<sup>91</sup>

Arc-En-Ciel alleged that the goods were damaged and sued in the Federal Court.<sup>92</sup> Great White Fleet brought a motion to stay that action because the bill of lading provided that any disputes arising from the contract would be commenced in the U.S. District Court for the Southern District of New York and would be decided in accordance with U.S. law.<sup>93</sup> Arc-En-Ciel invoked subsection 46(1) of the Marine Liability Act, which allows an action relating to a contract for carriage of goods by water to be commenced in Canada if certain conditions are met.<sup>94</sup> The Federal Court dismissed the motion,<sup>95</sup> holding that Arc-En-Ciel had met the “strong cause” test to show why the forum selection clause should not be enforced.<sup>96</sup>

The Federal Court of Appeal held that the Federal Court judge had erred in failing to determine whether section 46 of the Marine Liability Act applied, and in refusing to grant a stay.<sup>97</sup> It was an error to leave the applicability of Section 46 to the trial judge, rather than treat it as a threshold question.<sup>98</sup> In addition, if Section 46 applies, a *forum non conveniens* test should be applied. That test is different from the strong cause test, and Arc-En-Ciel should not have to meet both the *forum non conveniens* and strong cause tests.<sup>99</sup> The matter was thus remitted to the Federal Court for redetermination by a different judge.<sup>100</sup>

In contrast, the Federal Court of Appeal in *Hapag-Lloyd AG v. Iamgold Corporation and Niobec Inc.* upheld the decision of a Federal Court judge.<sup>101</sup>

Hapag-Lloyd had contracted with Iamgold to transport four containers by ship from Montreal, Québec, Canada to Antwerp, Belgium.<sup>102</sup> The cargo was then to be loaded onto a truck in Antwerp to be transported to The Netherlands.<sup>103</sup> While the cargo was in Antwerp, three of the containers were inadvertently released to an unauthorized trucker, with only one container arriving at its intended destination.<sup>104</sup>

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90. *Id.* ¶ 2.

91. *Id.* ¶ 8.

92. *Id.* ¶ 3.

93. *Id.*

94. MLA, note 65, § 46(1) (The conditions are that the actual or intended port of loading or discharge is in Canada, the person against whom the claim is made against resides, has a place of business, branch, or agency in Canada, or the contract was made in Canada.).

95. *Great White Fleet*, ¶ 52.

96. *Id.* ¶ 51. (The SCC established the “strong cause” test in *Z.I. Pompey Industrie v. ECU-Line, N.V.*, 2003 SCC 27.).

97. *Id.* ¶ 12.

98. *Id.*

99. *Id.* ¶ 14.

100. *Id.* ¶ 21.

101. *Hapag-Lloyd AG v. Iamgold Corporation and Niobec Inc.*, 2021 FCA 110.

102. *Id.* ¶ 6.

103. *Id.*

104. *Id.* ¶ 8.

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Hapag-Lloyd admitted liability,<sup>105</sup> and the parties agreed that German law would apply,<sup>106</sup> but they disagreed about whether the loss had occurred on the ocean leg or the road leg of the journey.<sup>107</sup> The trial judge heard two opposing experts on the interpretation of applicable German law.<sup>108</sup> The trial judge determined that the loss had occurred during the road leg of the journey.<sup>109</sup> The trial judge was able to make this determination of fact based on the expert evidence.<sup>110</sup> The liability of Hapag-Lloyd for loss occurring on the road leg was significantly higher than if the loss had been found to have occurred on the ocean leg of the journey.<sup>111</sup>

The Federal Court of Appeal upheld this ruling. It determined that the palpable and overriding error standard of review for findings of fact, established by the SCC in *Housen v. Nikolaisen*,<sup>112</sup> should apply to the findings of the trial judge about foreign law. The Court held that the trial judge had not made a palpable and overriding error.<sup>113</sup> The conclusion that the judge had reached was “clearly open to him on the evidence.”<sup>114</sup>

## V. Judicial Deference in Reviewing Commercial Arbitral Awards

Debate over the standard of review that applies when judges are asked to consider commercial arbitration awards was reignited in Canada by the 2019 decision of the SCC in *Canada (Minister of Citizenship and Immigration) v. Vavilov*.<sup>115</sup>

Before *Vavilov*, two SCC decisions, released only a few years earlier, in 2014 and 2017, respectively, directed judges to apply the deferential reasonableness standard of review on appeals of questions of law from commercial arbitral awards.<sup>116</sup> The scope of appellate intervention in commercial arbitration was considered to be narrow, and a deferential standard of review was found to almost always apply, in the interests of efficiency and finality—central objectives of the commercial arbitration regime.<sup>117</sup> The SCC explained preference for the reasonableness standard in

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105. *Id.* ¶ 11.

106. *Id.* ¶ 13.

107. *Id.* ¶ 13.

108. *Id.* ¶ 16.

109. *Id.* ¶ 2.

110. *Id.* ¶ 36.

111. *Id.* ¶ 12.

112. *Housen v. Nikolaisen*, 2002 SCC 33.

113. *Hapag-Lloyd AG*, ¶ 73.

114. *Id.* ¶ 80.

115. *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [hereinafter *Vavilov*].

116. *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 ¶ 75 [hereinafter *Sattva*]; *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 ¶ 80 [hereinafter *Teal Cedar*].

117. *Teal Cedar*, ¶ 1.

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the commercial arbitration context is premised in part on the expertise of the arbitrator, who was selected on the consent of the parties.<sup>118</sup>

In its 2019 decision in *Vavilov*, the SCC revised the framework governing the standard of review that applies to administrative decisions, holding that courts will review any statutory appeal from an administrative tribunal on the less deferential correctness standard.<sup>119</sup> Because, however, domestic arbitration statutes adopted by various Canadian common law provinces and territories provide for appeals from arbitrators' decisions on the merits,<sup>120</sup> it might follow that courts should now review domestic commercial arbitral awards on the correctness standard, which would circumvent deference to arbitrators.

The issue of the standard of review that applies to commercial arbitration awards has been raised in several appellate court decisions since *Vavilov*. In *Northland Utilities (NWT) Limited v. Hay River (Town of)*, the Court of Appeal for the Northwest Territories dealt with an appeal from an arbitrator's decision brought under the *Northwest Territories Arbitration Act*.<sup>121</sup> The Court found that the SCC in *Vavilov* intended that the correctness standard apply to commercial arbitration decisions.<sup>122</sup> The Court questioned whether the commercial attractiveness of Canada as a forum for resolving local and global business disputes would be negatively affected, rather than enhanced, by allowing appeals from arbitrators' decisions based on errors on questions of law.<sup>123</sup> It also suggested that an appellate standard of review would not compromise party autonomy, as parties can contract out of the right of appeal.<sup>124</sup>

Additionally, in *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, the SCC addressed the issue of the standard of review that applies to an arbitrator's decision under British Columbia's *Arbitration Act*.<sup>125</sup> The majority opinion suggested that the pre-*Vavilov* approach of applying the "reasonableness" standard when reviewing an arbitrator's decision may not have been changed by *Vavilov*.<sup>126</sup> But the majority of the SCC left the proper standard of review for another day.<sup>127</sup> Meanwhile, three judges

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118. *Sattva*, ¶ 105.

119. *Vavilov*, ¶ 17.

120. British Columbia's *Arbitration Act*, S.B.C. 2020, c. 2; Alberta's *Arbitration Act*, R.S.A. 2000, c. A-43; Saskatchewan's *Arbitration Act*, 1992, S.S. 1992, c. A 24.1; Manitoba's *Arbitration Act*, C.C.S.M. c. A120; Ontario's *Arbitration Act*, 1991, S.O. 1991, c. 17; Prince Edward Island's *Arbitration Act*, R.S.P.E.I. 1988, c. A-16; New Brunswick's *Arbitration Act*, R.S.N.B. 2014, c. 100; Nova Scotia's *Arbitration Act*, R.S.N.S. 1989, c. 19; Northwest Territories' *Arbitration Act*, R.S.N.W.T. (Nu) 1988, c. A-5.

121. *Northland Utilities (NWT) Limited v. Hay River (Town of)*, 2021 NWTCA 1.

122. *Id.* ¶ 44.

123. *Id.* ¶ 42.

124. *Id.* ¶ 43.

125. *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7.

126. *Id.* ¶ 45.

127. *Id.* ¶ 46.



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suggested in a concurring opinion that they would have applied the correctness standard.<sup>128</sup> In their view, differences between the commercial arbitration and administrative contexts do not affect the standard of review that applies when a statutory right to appeal exists.<sup>129</sup> They reasoned that factors justifying deference to an arbitrator's decision, particularly the parties' choice to arbitrate their dispute, do not affect the interpretive exercise when the word "appeal" is used in legislation.<sup>130</sup>

Most recently, in *Lululemon Athletica Canada Inc. v. Industrial Color Productions Inc.*, the British Columbia Court of Appeal heard an appeal under British Columbia's *International Commercial Arbitration Act*<sup>131</sup> on the grounds that the arbitrator had decided matters beyond the terms of the submission to arbitration.<sup>132</sup> The Court held that the proper standard of review is correctness when there is a true question of jurisdiction.<sup>133</sup> The standard of review applicable to international commercial arbitral awards should promote party autonomy and minimize judicial intervention.<sup>134</sup> The Court suggested that *Vavilov*'s application is limited to the review of administrative decisions, and does not affect arbitration decisions.<sup>135</sup>

The unsettled state of the law surrounding the standard of review that applies to commercial arbitration decisions post-*Vavilov* has led to debate about the efficiency and finality of arbitral awards in Canada.<sup>136</sup> Further clarification by the courts is needed to resolve the state of confusion.

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128. *Id.* ¶ 121.

129. *Id.* ¶¶ 119–20.

130. *Id.*

131. *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233.

132. *Lululemon Athletica Canada inc. v. Industrial Color Productions Inc.*, 2021 BCCA 428 ¶ 4.

133. *Id.* ¶ 34.

134. *Id.* ¶ 39.

135. *Id.* ¶ 46.

136. Martin Valasek, Alison FitzGerald, and Alex Biscaro, *First Appellate-Level Decision on Vavilov and Arbitration Muddies Already Murky Water*, CANADIAN J. OF COM. ARB. BLOG, <https://cjca.queenslaw.ca/news/first-appellate-level-decision-on-vavilov-and-arbitration-muddies-already-murky-waters> (this case comment will appear in Vol. 2, Issue 1 of the Canadian Journal of Commercial Arbitration) (last visited May 1, 2022); Sujit Choudhry, *Protecting Judicial Deference to Commercial Arbitration in Canada After Vavilov: Following the English Approach to Appeals on Questions of Law?*, KLUWER ARB. BLOG (June 7, 2020), <http://arbitrationblog.kluwerarbitration.com/2020/06/07/protecting-judicial-deference-to-commercial-arbitration-in-canada-after-vavilov-following-the-english-approach-to-appeals-on-questions-of-law/>; Alexa Biscaro, *The Emancipation of Arbitration: Recent Developments from the Supreme Court of Canada*, KLUWER ARB. BLOG (June 30, 2021), <http://arbitrationblog.kluwerarbitration.com/2021/06/30/the-emancipation-of-arbitration-recent-developments-from-the-supreme-court-of-canada/>; James Plotkin & Mark Mancini, *Inspired by Vavilov, Made for Arbitration: Why the Appellate Standard of Review Framework Should Apply to Appeals from Arbitral Awards*, 2 CANADIAN J. OF COM. ARB. 1, 1–3 (2021).

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## **Mexico**

KELSEY QUIGLEY, JOSÉ LUIS LIZÁRRAGA, JOHN WALSH, DANIELLE MORRIS, MARIA CAMILA HOYOS, DAVID ROSS, LAUREN MANDELL, NOAH GUINEY, CARLO CANNIZZO, ENRIQUE GARCÍA, AND VANESSA ROMERO\*

### **I. Introduction**

The 2021 year was characterized by dramatic change in Mexico, as the country emerged from the COVID-19 pandemic. But, unlike the Mexico Committee's 2020 *Year in Review* submission, this set of articles does not cover COVID-19 or Mexico's continued emergence from social and economic lockdown. This is, in part, because even without covering the pandemic, the legal and political updates out of Mexico were groundbreaking. And the reverberations of these developments have been felt far and wide—including across the border into the United States.

Perhaps most notably, 2021 saw Mexico's President Andrés Manuel López Obrador (also known as AMLO) initiate energy reforms that would fundamentally change the power dynamics—literal and figurative—in Mexico, and would shape the landscape for foreign investors in Mexico.<sup>1</sup> U.S. and Canadian investors, in particular, faced novel challenges during 2021, with the first full calendar year under the trade agreement between the United States, Mexico, and Canada, which entered into force in mid-2020.<sup>2</sup> Novel legal theories in Mexico were also tested—particularly in the context of cannabis regulation—as the outright prohibition of recreational cannabis use was deemed unconstitutional as an improper infringement on the right to develop a personality.<sup>3</sup> And these were not the only legal challenges brought to bear in Mexican courts, as Mexico's Supreme Court limited the ability of states to outright ban abortion and the ability of medical service providers to, without limitation, refuse to provide medical services to

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\* The Mexico Committee wishes to express special thanks to paralegal Jane Kim of Wilmer Cutler Pickering Hale and Dorr, LLP, for her expert input and work on this submission.

1. See Adriana Barrera, *Mexico Launches Reform to Put State in Charged of Power Market*, REUTERS (Oct. 1, 2021), <https://www.reuters.com/world/americas/mexico-president-says-electricity-reform-has-been-sent-congress-2021-10-01/>.

2. See United States-Mexico-Canada Agreement, OFFICE OF THE U.S. TRADE REPRESENTATIVE, agreed to July 1, 2020, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> [hereinafter USMCA].

3. Declaratoria General de Inconstitucionalidad, Pleno de la Suprema Corte de Justicia, *Semanario Judicial de la Federación y su Gaceta, Décima Época, Tomo I, Febrero de 2019, Tesis 1a/J. 10/2019, página 493 (Mex.)*.

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patients based on personal conscientious objection.<sup>4</sup> This article covers these developments, and more.

## II. Energy Reform in Mexico

Electricity in Mexico is typically derived from petroleum, natural gas, coal, or renewable sources.<sup>5</sup> In 2021, Mexico's electricity industry underwent important changes, which have continued a decades-long trend of radical shifts in the industry.<sup>6</sup> This section will explain these recent developments within the broader context of the history of electricity in Latin America.

### A. BACKGROUND AND HISTORY

Latin American energy production has typically followed three main models: (1) a state-owned monopoly purchases from independent power producers; (2) a single buyer of electricity purchases energy under long-term contracts after competitive bidding procedures; or (3) generators, distributors, marketers, and large consumers trade electricity in spot transactions and long-term contracts as part of a competitive wholesale power market.<sup>7</sup>

In the 1990s, most Latin American countries instituted reforms in the electricity industry, motivated by the poor performance of state-owned energy monopolies.<sup>8</sup> Under the old systems, the public, state-owned company had a vertical monopoly on the electricity value chain: generation, transmission, distribution, and commercialization.<sup>9</sup> This model caused fiscal

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4. Declaratoria General de Inconstitucionalidad. Exigiendo la Nulidad de Varias Disposiciones del Código Penal del Estado de Coahuila de Zaragoza, Pleno de la Suprema Corte de Justicia [SCJN] 10-27-2017 (Mex.), formato PDF, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/viewer.html?pdfurl=https%3A%2F%2Fcongresocoahuila.gob.mx%2Ftransparencia%2F03%2FLeyes\_Coahuila%2Fcoa08\_Nuevo\_Codigo.pdf&clen=1580298&chunk=true (consultada el 13 de abril de 2022) [hereinafter Coahuila]; see also Declaratoria General de Inconstitucionalidad. Demandando la Nulidad del Artículo 4 BIS A, Sección I, de la Constitución Política del Mencionado Estado, Pleno de la Suprema Corte de Justicia [SCJN] 10-xx-2018, formato Octubre de 2018 (Mex.), <https://www.scjn.gob.mx/sites/default/files/versiones-taquigraficas/documento/2021-09-09/9%20de%20septiembre%20de%202021%20-%20Versi%C3%B3n%20definitiva.pdf> (Mex.) [hereinafter Sinaloa].

5. INTERNATIONAL ENERGY AGENCY, ENERGY POLICIES BEYOND IEA COUNTRIES: MEXICO 19 (2017) <https://iea.blob.core.windows.net/assets/d82993b9-6034-4c56-b9f5-5860e82be975/EnergyPoliciesBeyondIEACountriesMexico2017.pdf> [hereinafter 2017 IEA REPORT].

6. Iniciativa de Decreto por el que se Reforman los Artículos 25, 27 y 28 de la Constitución Política de los Estados Unidos Mexicanos, Gaceta Parlamentaria, vol. Anexo I, núm. 5877-I, 1 de octubre de 2021, p. 25, <http://gaceta.diputados.gob.mx/PDF/65/2021/oct/20211001-I.pdf> (Mex.) [hereinafter Iniciativa de Reforma Eléctrica].

7. Luis A. Andrés et al., THE IMPACT OF PRIVATE SECTOR PARTICIPATION IN INFRASTRUCTURE: LIGHTS, SHADOWS, AND THE ROAD AHEAD 80 (2008).

8. *Id.* at 79.

9. *Id.*

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deficits in the state-owned enterprises.<sup>10</sup> Therefore, reforms focused on two main principles to improve electricity service: (1) the separation of roles, such that the state is responsible for policy making and regulation and the private sector is the primary investor and service provider and (2) the introduction of competition wherever possible to improve economic efficiency.<sup>11</sup>

For its part, during this era of reform, Mexico still relied heavily on a state-owned monopoly model, including through the public Federal Electricity Commission (*Comisión Federal de Electricidad* (CFE)), but the country slightly opened the market to private participants.<sup>12</sup> For example, the country amended its Electric Energy Public Service Law (*Ley del Servicio Público de Energía Eléctrica*) to authorize the Ministry of Energy to grant energy production permits to self-sufficient companies, independent producers, and long-term auctions.<sup>13</sup>

A few decades later, on December 20, 2013, the market was opened significantly, when an amendment to the Mexican Constitution was published in the Official Gazette (*Diario Oficial de la Federación* (DOF)).<sup>14</sup> The amendment created a competitive Whole-Sale Power Market (*Mercado Eléctrico Mayorista* (MEM)), in which generators, distributors, marketers, and large consumers could trade electricity in spot transactions and long-term contracts.<sup>15</sup>

Less than a year later, on August 11, 2014, the Energy Industry Law (*Ley de la Industria Eléctrica* (LIE)) was published in the DOF.<sup>16</sup> That law, among other things, provided for the creation of the following:

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10. *Id.*

11. *Id.* at 114.

12. RICHARD H.K. VIETOR & HAVILAND SHELDHAL-THOMASON, HARVARD BUSINESS SCHOOL, MEXICO'S ENERGY REFORM 2 (2017), <https://hepg.hks.harvard.edu/publications/mexicos-energy-reform>.

13. Decreto que Reforma, Adiciona y Deroga Diversas Disposiciones de la Ley del Servicio Público de Energía Eléctrica, Diario Oficial de la Federación [DOF] 23-12-1992Diciembre de 1992, [http://www.diputados.gob.mx/LeyesBiblio/abro/lspree/LSPREE\\_ref04\\_23dic92\\_ima.pdf](http://www.diputados.gob.mx/LeyesBiblio/abro/lspree/LSPREE_ref04_23dic92_ima.pdf) (Mex.); see also DUNCAN WOOD & JEREMY MARTIN, WILSON CENTER MEXICO INSTITUTE, *Of Paradigm Shifts & Political Conflict: The History of Mexico's Second Energy Revolution*, in MEXICO'S NEW ENERGY REFORM 17, 23 (Duncan Wood, ed., 2018), [https://www.wilsoncenter.org/sites/default/files/media/documents/publication/mexicos\\_new\\_energy\\_reform.pdf](https://www.wilsoncenter.org/sites/default/files/media/documents/publication/mexicos_new_energy_reform.pdf).

14. Decreto por el que se reforman y adicionan diversas disposiciones de la Constitución Política de los Estados Unidos Mexicanos, en Materia de Energía, Diario Oficial de la Federación [DOF] (2013), [http://www.diputados.gob.mx/LeyesBiblio/ref/dof/CPEUM\\_ref\\_212\\_20dic13.pdf](http://www.diputados.gob.mx/LeyesBiblio/ref/dof/CPEUM_ref_212_20dic13.pdf) (Mex.).

15. See 2017 IEA REPORT, *supra* note 5, at 12; see also VIETOR & SHELDHAL-THOMASON, *supra* note 12, at 11–12.

16. Decreto por el que se expiden la Ley de la Industria Eléctrica, la Ley de Energía Geotérmica y se adicionan y reforman diversas disposiciones de la Ley de Aguas Nacionales, Diario Oficial de la Federación [DOF] 11-08-2014, [https://www.diputados.gob.mx/LeyesBiblio/ref/lielec/LIElec\\_orig\\_11ago14.pdf](https://www.diputados.gob.mx/LeyesBiblio/ref/lielec/LIElec_orig_11ago14.pdf) (Mex.).

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- (1) The Regulation Energy Commission (*Comisión Reguladora de Energía* (CRE)), which grants permits for generation and commercialization of electric power, regulates transmission and distributions fees, and regulates the MEM;<sup>17</sup>
- (2) The National Center of Electric Control (*Centro Nacional de Control de Energía* (CENACE)), which operates the MEM, guarantees access to the transmission and distribution network, and determines energy market prices;<sup>18</sup> and
- (3) The Clean Energy Certificates (*Certificados de Energía Limpia* (CELs)), which ensure that energy generation comes from a certain amount of “clean energy” (if a generator does not produce enough electric power with clean energy, the operator will need to purchase CELs as an offset).<sup>19</sup>

In the wake of these reforms, private enterprise started to generate electricity with wind, solar, and hydraulic sources, and foreign investment in electricity increased.<sup>20</sup> As a result, CFE became a state-owned provider that was forced to compete with these private enterprises—while still retaining its transmission and distribution monopoly.<sup>21</sup>

**B. 2021 REFORMS**

This background is important for understanding Mexico’s most recent energy reforms. On March 3, 2021, Mexico’s Congress approved the New Energy Bill to amend the Electricity Industry Law,<sup>22</sup> paving the way for CFE to regain the monopoly it enjoyed prior to Mexico’s 2013 energy reforms.<sup>23</sup> The bill requires CFE to prioritize electricity generated at CFE-owned plants, in place of the current system, which gives priority to the least expensive electricity.<sup>24</sup> Specifically, electricity will be dispatched in the following order: (1) hydroelectric facilities (which are owned mainly by

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17. PETER NANCE, WILSON CENTER MEXICO INSTITUTE, INITIAL RESULTS FROM THE MEXICO ELECTRICITY REFORM, 2013-18, *in* MEXICO’S NEW ENERGY REFORM 102, 105 (Duncan Wood, ed., 2018), [https://www.wilsoncenter.org/sites/default/files/media/documents/publication/mexicos\\_new\\_energy\\_reform.pdf](https://www.wilsoncenter.org/sites/default/files/media/documents/publication/mexicos_new_energy_reform.pdf).

18. *Id.* at 106–07.

19. *Id.* at 104–05.

20. *See id.* at 146–68.

21. *See* Guillermo José García Sanchez, WILSON CENTER MEXICO INSTITUTE, THE FINE PRINT OF THE MEXICAN ENERGY REFORM, *in* MEXICO’S NEW ENERGY REFORM 48–49 (Duncan Wood, ed., 2018), [https://www.wilsoncenter.org/sites/default/files/media/documents/publication/mexicos\\_new\\_energy\\_reform.pdf](https://www.wilsoncenter.org/sites/default/files/media/documents/publication/mexicos_new_energy_reform.pdf).

22. *See* Jon Martín Culléll, *El Senado Aprueba la Polémica Reforma Energética de López Obrador*, EL PAÍS (Mar. 3, 2021), <https://elpais.com/mexico/2021-03-03/el-senado-mexicano-aprueba-en-lo-general-la-polemica-reforma-energetica-de-lopez-obrador.html>.

23. *See also* Garrigues, *Propuesta de Contrarreforma Eléctrica en México*, GARRIGUES ALERTAS (Oct. 4, 2021), [https://www.garrigues.com/sites/default/files/documents/propuesta\\_de\\_contrarreforma\\_electrica\\_en\\_mexico\\_-\\_octubre\\_2021.pdf](https://www.garrigues.com/sites/default/files/documents/propuesta_de_contrarreforma_electrica_en_mexico_-_octubre_2021.pdf).

24. *See id.*

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CFE); (2) other CFE-owned facilities; (3) privately owned wind and solar facilities; and (4) other privately owned electricity generation facilities.<sup>25</sup> Concerned about the impact of these reforms on U.S. investors in Mexico, the U.S. Chamber of Commerce responded with a public statement asserting that the measure would contravene Mexico's USMCA commitments.<sup>26</sup> Also, Mexico's Federal Commission of Economic Competition asserted that the measure would "seriously damage" the conditions of competition for generation and commercialization of electricity in Mexico, as well as serious questions regarding the measure's constitutionality.<sup>27</sup>

When the New Energy Bill encountered challenges in Mexican court, President López Obrador turned his attention to the Mexican Constitution. On September 30, 2021, President López Obrador presented to the Congress an initiative to reform the Constitution, specifically to return the Mexican electric industry to a vertically integrated monopoly (the Initiative).<sup>28</sup> Among other things, the Initiative required the following:

- (1) CFE shall generate 54 percent of Mexico's necessary energy, and private companies only 46 percent;<sup>29</sup>
- (2) Private companies must compete to sell electric power to CFE, which is the only institution authorized to market and sell energy to consumers at the price determined by the CFE;<sup>30</sup>
- (3) Subject to certain narrow exceptions, all permits issued pursuant to the 2014 LIE shall be canceled, except for those of self-sufficient companies, independent producers and long-term auctions, whose permits are not to be renewed;<sup>31</sup>
- (4) All 2014 CELs must be canceled;<sup>32</sup>

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25. See Cullell, *supra* note 22.

26. See U.S. CHAMBER OF COMMERCE, *U.S. Chamber Warns Proposed Changes to Mexico's Electrical Industry Law Could Create a Monopoly and Violate USMCA Commitments* (Feb. 5, 2021), <https://www.uschamber.com/international/us-chamber-warns-proposed-changes-mexico-s-electrical-industry-law-could-create>.

27. See *Opinión OPN-001-2021 Sobre la Iniciativa con Proyecto de Decreto por el que se Reforman y Adicionan Diversas Disposiciones de la Ley de la Industria Eléctrica*, COMISIÓN FEDERAL DE COMPETENCIA ECONÓMICA (2021), <https://resoluciones.cofece.mx/CFCResoluciones/docs/Opiniones/V173/9/5363212.pdf>.

28. See *Iniciativa de Reforma Eléctrica*, *supra* note 6.

29. See *id.* at 28; see also Amy Stillman, *Mexico Bill Puts \$22 Billion in Clean Energy Contracts at Risk*, BLOOMBERG (Nov. 17, 2021), <https://www.bloomberg.com/news/articles/2021-11-17/mexico-s-amlo-puts-22-billion-in-energy-contracts-at-risk>.

30. See *Iniciativa de Reforma Eléctrica*, *supra* note 6, at 27–28; see also Garrigues, *supra* note 23.

31. See *Iniciativa de Reforma Eléctrica*, *supra* note 6, at 27–28.

32. Patricia Tapia Cervantes, *Sector Eléctrico en 2021: de un Cambio a la ley a Reforma Constitucional*, FORBES MEXICO (Dec. 23, 2021), <https://www.forbes.com.mx/negocios-sector-electrico-en-2021-de-una-cambio-a-la-ley-a-reforma-constitucional>.

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- (5) The CRE is dissolved;<sup>33</sup> and
- (6) The CENACE is incorporated into CFE.<sup>34</sup>

In sum, these reforms would grant CFE control of the entire electric power industry. Although private companies could generate energy, they would be required by law to sell this electricity to CFE for distribution and transmission, so there is no real competition.<sup>35</sup> Likewise, in part through the elimination of the CELs, generation through fossil fuels would be preferred—even though these energy sources are more expensive and harm the natural environment.<sup>36</sup>

At the end of 2021, the Mexican Congress agreed to continue the discussion of this reform until 2022 due to the technical, financial, and economic complexities of reform.<sup>37</sup> This promised another full of additional significant developments in the Mexican energy industry.<sup>38</sup>

### III. Reforms and Practical Tips for U.S. Investors

As discussed above, 2021 proved crucial in the Mexican government's efforts to restore state control over the energy sector. President López Obrador's key measures—including the New Energy Bill and the constitutional reform—are in tension with Mexico's commitments under international trade and investment agreements, including the United States-Mexico-Canada Agreement (USMCA). U.S. investors should exercise care to ensure that they do not inadvertently forfeit their rights to seek relief under the USMCA—in particular, relief through the investor-state dispute settlement (ISDS).<sup>39</sup>

ISDS is a mechanism in the USMCA and its predecessor agreement (the North American Free Trade Agreement (NAFTA)) that permits U.S. investors to initiate arbitration against the government of Mexico to seek monetary compensation for breach of certain rules in the trade agreement.<sup>40</sup>

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33. See *id.*; see also Jon Martín Cullell, *Reforma Eléctrica: López Obrador Concentra el Poder en la Comisión Federal de Electricidad*, EL PAÍS (Oct. 1, 2021), <https://elpais.com/mexico/2021-10-01/lopez-obrador-presenta-una-reforma-electrica-para-concentrar-el-poder-en-la-cfe.html>.

34. See Cullell, *supra* note 33.

35. Garrigues, *Propuesta de Contrarreforma Eléctrica en México*, *supra* note 23, at 1.

36. See Cullell, *supra* note 33.

37. Víctor Chávez & Héctor Usla, *Reforma eléctrica: Diputados Acuerdan Parlamento Abierto para Discutirla*, EL FINANCIERO (Dec. 15, 2021), <https://www.elfinanciero.com.mx/nacional/2021/12/15/reforma-electrica-diputados-acuerdan-parlamento-abierto-para-discutirla>.

38. As of publication, on April 17, 2022, the Lower House of the Mexican Congress voted against the constitutional amendments that President López Obrador proposed. See Christine Murray, *Mexican President's Radical Energy Reform Defeated in Congress*, FIN. TIMES (Apr. 18, 2022).

39. See USMCA, *supra* note 2, at annex 14-D, art. 14.D.3; see John F. Walsh et al., *Three Tips for Investors in Mexico's Energy Sector Regarding Potential USMCA Claims*, WILMER HALE (Mar. 18, 2021), <https://www.wilmerhale.com/en/insights/client-alerts/20210318-three-tips-for-investors-in-mexicos-energy-sector-regarding-potential-usmca-claims>.

40. See USMCA, *supra* note 2, at art. 14.D.3.

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For the most part, the USMCA significantly narrows U.S. investors' access to ISDS regarding with respect to Mexico.<sup>41</sup> There is one very important exception: U.S. investors with “legacy investments” in Mexico—that is, investments established during the lifetime of the NAFTA's lifetime (January 1, 1994, to July 1, 2020)—have full access to ISDS under NAFTA rules for claims brought by July 1, 2023.<sup>42</sup>

This section offers practical tips for U.S. investors to secure their rights under the USMCA.

**A. TIP #1: LITIGATION IN MEXICAN COURTS**

Under both the USMCA and the NAFTA, U.S. investors do not forfeit their rights to use ISDS merely by going to Mexican court.<sup>43</sup> Rather, “both agreements allow investors to pursue domestic remedies to challenge Mexican government action.”<sup>44</sup> But, both the USMCA and the NAFTA include a “trap door that investors should avoid.”<sup>45</sup> If an investor alleges in Mexican court that a measure breaches an investment-related rule in the USMCA or the NAFTA, that investor will be precluded from alleging breach of that same rule in ISDS.<sup>46</sup> This Mexico-specific provision is intended to prevent investors from getting two bites at the apple through pursuing identical international claims against Mexico; unlike the United States, Mexico is a “monist” state in which treaty commitments automatically create private rights of action under domestic law.<sup>47</sup> For U.S. investors in Mexico's energy sector, this provision makes it critical to frame arguments in domestic litigation carefully to avoid this pitfall.<sup>48</sup> An ISDS tribunal will lack jurisdiction to address a treaty claim that the investor has previously alleged in Mexican court.<sup>49</sup>

**B. TIP #2: THREE-YEAR TRANSITION PERIOD**

The ISDS landscape will change on July 1, 2023, three years after the USMCA's entry into force.<sup>50</sup> On that date, U.S. investors will be able to file new ISDS claims, but with notable limitations.<sup>51</sup> Except for those with

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41. See USMCA, *supra* note 2, at annex 14-D art. 14.D.3; see also Walsh et al., *supra* note 39.

42. *Id.* USMCA, *supra* note 2, at annex 14-C.

43. See North America Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289, art. 1121 (1993) [hereinafter NAFTA]; see also Walsh et al., *supra* note 39.

44. If investors decide to initiate ISDS, there is no “U-turn”: subject to certain exceptions, they may not initiate or continue proceedings relating to the same measure at the domestic level. See NAFTA, at art 1121; see also USMCA, *supra* note 2, at art. 14.D.5(e).

45. See NAFTA, *supra* note 43, at annex. 1120.1; see also USMCA, *supra* note 2, at annex 14-D app. 3.

46. See NAFTA, *supra* note 43, at art. 1120.1 and USMCA, *supra* note 2, app. 3 annex 14-D.

47. See Walsh et al., *supra* note 39.

48. See *id.*

49. See *id.*

50. See *id.*

51. See *id.*



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certain defined government contracts, U.S. investors will lose the ability to lodge some types of claims that might otherwise be viable with respect to Mexican government measures, including indirect expropriation and fair and equitable treatment claims.<sup>52</sup> Most U.S. investors will also be required to initiate and maintain proceedings in Mexican courts for as long as thirty months before they may pursue ISDS.<sup>53</sup> Therefore, U.S. investors in Mexico's energy sector should be mindful of the potential change in circumstances on July 1, 2023.<sup>54</sup> To file a claim before that deadline, an investor will need to submit a notice of intent to Mexico by April 1, 2023.<sup>55</sup>

**C. TIP #3: STATE-TO-STATE DISPUTE SETTLEMENT**

Separate from ISDS, the USMCA permits each Party to initiate state-to-state dispute settlement against another Party.<sup>56</sup> If a dispute settlement panel finds the responding Party to be in breach, and if the responding Party does not come into compliance, the panel can authorize the complaining Party to suspend benefits under the USMCA.<sup>57</sup> This remedy can provide leverage to compel compliance with USMCA rules.<sup>58</sup> Importantly, the United States could initiate state-to-state dispute settlement against Mexico, arguing that a measure breaches any of the USMCA's investment-related rules—or any other relevant rules in the agreement, such as those governing state-owned enterprises—without affecting U.S. investors' rights to initiate ISDS to challenge the same measure.<sup>59</sup> Given this, U.S. investors should consider whether state-to-state dispute settlement has a role to play in resolving investment-related disputes with Mexico.<sup>60</sup>

**IV. USMCA and Trade Between the United States and Mexico**

The USMCA, which entered into force on July 1, 2020, has updated and modernized the rules governing trade relations between the three largest economies in North America.<sup>61</sup> New provisions on digital trade and state-owned enterprises and enforceable labor and environment obligations are a few of the innovations that build on NAFTA, which USMCA replaced.<sup>62</sup> By creating new market access opportunities, the agreement should prove mutually beneficial for businesses and workers in all three countries.

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52. See USMCA, *supra* note 2, at art. 14.

53. *Id.*; see Walsh et al., *supra* note 39.

54. See Walsh et al., *supra* note 39.

55. See *id.*

56. See *id.*

57. See *id.*

58. See *id.*

59. See *id.*

60. See *id.*

61. See USMCA, *supra* note 2.

62. See generally USMCA, *supra* note 2; see generally NAFTA, *supra* note 43.

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At the same time, trade challenges continue, including some spawned by the USMCA itself. A good example of an ongoing trade challenge that predates the USMCA—and that the new agreement has failed as yet to resolve—involves Mexico’s concerns about agricultural biotechnology products. Although the USMCA contains provisions aimed at facilitating cooperation in the regulation of agricultural biotechnology,<sup>63</sup> Mexico’s food and drug regulatory authority, Federal Commission for the Protection against Sanitary Risk (*Comisión Federal para la Protección contra Riesgos Sanitarios* (COFEPRIS)), has issued no decisions on applications for the authorization of new food or feed products created using biotechnology since May 2018.<sup>64</sup> As the Office of the US Trade Representative has observed, this lack of action is contrary to the requirements of Mexican law, which requires COFEPRIS to make decisions on complete applications within six months of receipt.<sup>65</sup> Further, in December 2020, Mexico published a decree providing for the revocation of existing authorizations for the use of genetically modified corn for human consumption, and the prohibition of new authorizations until bioengineered corn is completely phased out by 2024.<sup>66</sup>

This is a significant policy reversal for Mexico. While the country has not embraced the domestic cultivation of bioengineered crops, COFEPRIS historically processed new product applications within the six months required by law.<sup>67</sup> With the election of President López Obrador, this approval process has ground to a virtual halt.<sup>68</sup>

Mexico’s unwillingness to grant approval to new bioengineered agricultural products bodes poorly for American farmers who export their production to Mexico and creates the risk of trade conflict with the United States. In testimony before the U.S. Senate Committee on Finance, for example, Biotechnology Innovation Organization President and CEO Michelle McMurry-Heath noted that ninety percent of U.S. corn is produced with biotechnology crops, and that Mexico represented nearly thirty percent of U.S. corn exports in 2020.<sup>69</sup> Thus, “[i]f Mexico does not approve a new corn biotechnology product, U.S. corn farmers are reluctant to plant the product for fear of disrupting trade to Mexico. This means, in

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63. See USMCA, *supra* note 2, at art. 3.16.

64. See OFFICE OF THE U.S. TRADE REPRESENTATIVE, EXECUTIVE OFFICE OF THE PRESIDENT, 2021 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 359–60 (2021), <https://ustr.gov/sites/default/files/files/reports/2021/2021NTE.pdf>.

65. See *id.* at 360.

66. *Id.*

67. See Implementation and Enforcement of the United States – Mexico – Canada Agreement: One Year After Entry into Force Before the S. Comm. on Finance, 117th Cong. 1–4 (2021) (statement of Michelle McMurry-Heath, President, Biotechnology Innovation Organization), [https://www.finance.senate.gov/hearings/implementation-and-enforcement-of-the-united-states\\_mexico—canada-agreement-one-year-after-entry-into-force](https://www.finance.senate.gov/hearings/implementation-and-enforcement-of-the-united-states_mexico—canada-agreement-one-year-after-entry-into-force).

68. See *id.*

69. See *id.* at 2–4.

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effect, that Mexico determines which technology U.S. farmers can use.”<sup>70</sup> Moreover, if Mexico were to respond to the use of such technologies in the United States by banning U.S. corn exports to Mexico, it would raise significant issues under USMCA rules.<sup>71</sup>

An example of a trade challenge arising out of the USMCA itself is the agreement’s revised provisions on automotive rules of origin (ROOs).<sup>72</sup> One of President Donald Trump’s primary motivations in pushing for an update to NAFTA was to close perceived loopholes in the agreement’s ROOs for automobiles, which were viewed as encouraging the outsourcing of U.S. jobs.<sup>73</sup> The USMCA significantly tightened these rules, increasing the threshold from 62.5 percent to 75 percent North American-made-content for an automobile to enjoy duty free treatment under the agreement; the USMCA also added minimum requirements for steel, aluminum, and labor value content.<sup>74</sup> Since the agreement’s implementation, the United States has diverged from Mexico (and Canada) in its interpretation of the rules in such a way as to raise questions about the eligibility of Mexican-origin autos for duty-free entry into the United States.<sup>75</sup> Mexico responded by seeking consultations under the agreement’s dispute settlement provisions and threatening to request the establishment of a formal dispute settlement panel.<sup>76</sup> And in early 2022, as of the date of publication, Mexico and Canada launched a dispute against the US based on the interpretation.<sup>77</sup> The diverging interpretations and resulting disagreements have created significant uncertainties for manufacturers on both sides of the border.

After a year in effect, the USMCA has helped change the contours of the United States-Mexico trading relationship. But as the experience of the agricultural and automotive sectors shows, disputes between the two countries will continue, as it to be expected given the significant volumes of trade between the two countries.

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70. *Id.*

71. *See id.* at 6.

72. *See* OFFICE OF THE U.S. TRADE REPRESENTATIVE, EXECUTIVE OFFICE OF THE PRESIDENT, ESTIMATED IMPACT OF THE UNITED STATES – MEXICO – CANADA AGREEMENT (USMCA) ON THE U.S. AUTOMOTIVE SECTOR 2 (Apr. 18, 2019), <https://ustr.gov/sites/default/files/files/Press/Releases/USTR%20USMCA%20Autos%20White%20Paper.pdf>.

73. *See id.*

74. *See* USMCA, *supra* note 2, at ch. 4, & app. arts. 3-7.

75. *See, e.g.,* Sharay Angulo & Dave Graham, *Mexico to Seek Expert Panel to Fix Auto Dispute with U.S.-Sources*, REUTERS (Oct. 26, 2021), <https://www.reuters.com/business/autos-transportation/exclusive-mexico-seek-expert-panel-fix-auto-dispute-with-us-sources-say-2021-10-26/>.

76. *Id.*

77. David Ljunggren, *Canada Joins Mexico in Challenging U.S. on Auto Trade Rules, Latest Sign of Strains*, REUTERS (Jan. 13, 2022), <https://www.reuters.com/world/americas/canada-join-mexican-complaint-about-us-auto-industry-move-2022-01-13/>.

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**V. Cannabis Regulation in Mexico**

On July 15, 2021, the General Unconstitutionality Declaration (DGI) of the Mexican Supreme Court of Justice (SCJN) was published in the Official Federal Gazette (DOF).<sup>78</sup> By means of this DGI, the SCJN invalidated two articles of the General Health Law that prohibited the recreational consumption of cannabis in Mexico.<sup>79</sup> This section will summarize a recent history of Mexico's regulation of the cannabis industry and suggest predictions for the future.

The latest round of developments began in 2015, when Mexico's health authority refused authorization to individuals who sought approval for the recreational consumption of marijuana.<sup>80</sup> In response, the affected parties filed an indirect injunction that—after initially being denied by a judge in Mexico City—was examined by the SCJN.<sup>81</sup> The SCJN's ruling resolved that the articles of the General Health Law on which the COFEPRIS had based its refusal violated the human right to the free development of personality.<sup>82</sup> The SCJN ordered COFEPRIS to grant the relevant authorization.<sup>83</sup> Thereafter, the SCJN granted other amparos allowing personal consumption of cannabis—also invoking the right to development of personality.<sup>84</sup>

The right to the free development of personality has been understood as a right with two dimensions: one external and one internal.<sup>85</sup> The external dimension protects individuals' right to perform any act they deem necessary to develop their personality, while the internal aspect protects their sphere of privacy from external invasions that limit the ability to make decisions that serve as a vehicle for exercise of their personal autonomy.<sup>86</sup>

After the SCJN's revolutionary resolution, both the Senate and the Federal Executive presented initiatives that sought to regulate the cannabis

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78. Declaratoria General De Inconstitucionalidad 1/2018, Diario Oficial de la Federación [DOF] 15-07-2021, [https://www.dof.gob.mx/nota\\_detalle\\_popup.php?codigo=5623991](https://www.dof.gob.mx/nota_detalle_popup.php?codigo=5623991) (Mex.) [hereinafter DGI 2021].

79. *See id.*

80. *See id.*

81. *See id.*

82. *See id.*

83. *See id.*

84. Press Release, Suprema Corte of Justicia de la Nación [SCJN], *SCJN Invalida, con Efectos Generales, la Prohibición Absoluta Contenida en la Ley General de Salud para Realizar Actividades Relacionadas con el Autoconsumo de Cannabis y THC* (June 28, 2021), <https://www.internet2.scjn.gob.mx/red2/comunicados/noticia.asp?id=6495> [hereinafter Supreme Court June 2021 Press Release].

85. Derecho al Libre Desarrollo de la Personalidad. Su Dimensión Externa e Interna, Suprema Corte de Justicia [SCJN], Semario Judicial de la Federación y su Gaceta, Décima Época, Tomo II, Febrero de 2019, Tesis 1st CCLXI/2016 (10a.) 898 (Mex.), <https://sjf2.scjn.gob.mx/detalle/tesis/2013140>.

86. *Id.*

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market at a national level.<sup>87</sup> In fact, by April 28, 2017, the Mexican Congress had already approved the medicinal and scientific use of cannabis by approving reforms to the General Health Law and the Federal Criminal Code.<sup>88</sup>

During 2018, the SJCN continued to review challenges to the prohibition of various arms of the cannabis industry—including those relating to the acquisition of seeds. By mid-2018, no Mexican court had upheld a prohibition on activities related to the personal consumption of cannabis. Instead, the SCJN had five times over declared unconstitutional portions of the system prohibiting the personal consumption of marijuana.<sup>89</sup>

After these repeated resolutions, the reasoning became mandatory for courts throughout the country. This triggered the process of a declaration of general unconstitutionality, provided for in the Mexican Constitution.<sup>90</sup> (An unconstitutionality declaration requires the Mexican Congress to modify or repeal provisions declared unconstitutional). The term originally given to comply with this requirement expired on October 31, 2019.<sup>91</sup> Since then, the Mexican Congress has endeavored to pass federal law that would comply with the Supreme Court decision and regulate personal consumption of cannabis.<sup>92</sup>

In the meantime, the Mexican federal government issued a regulation on medical non-recreational cannabis use—suggesting that the government is not opposed to loosening at least some of its grip on the cannabis industry.<sup>93</sup> On January 12, 2021, the Mexican government issued the Regulation of the General Health Law on Health Control for the Production, Research and Medicinal Use of Cannabis and its Pharmacological Derivatives (*Reglamento*

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87. See Peña Nieto Propone Legalizar la Marihuana Con Fines Medicinales en México, CNN ESPAÑOL (Apr. 21, 2016), <https://cnnespanol.cnn.com/2016/04/21/pena-nieto-propone-legalizar-la-marihuana-con-fines-medicinales-en-mexico/>; see also *El Senado de México Aprueba el Uso de la Marihuana Medicinal*, CNN ESPAÑOL (Dec. 14, 2016), <https://cnnespanol.cnn.com/2016/12/14/el-senado-de-mexico-aprueba-el-uso-de-la-marihuana-medicinal>.

88. See *México Aprueba el Uso Medicinal de la Marihuana*, EL PAÍS (Apr. 29, 2017), [https://elpais.com/internacional/2017/04/29/mexico/1493419178\\_321134.html](https://elpais.com/internacional/2017/04/29/mexico/1493419178_321134.html); see also Decree Amending & Adding Various Provisions of the General Health Law and the Federal Penal Code, Diario Oficial de la Federación [DOF] vol. 1, 19 de junio de 2017, 56, [https://www.diputados.gob.mx/LeyesBiblio/ref/lgs/LGS\\_ref107\\_19jun17.pdf](https://www.diputados.gob.mx/LeyesBiblio/ref/lgs/LGS_ref107_19jun17.pdf) [hereinafter DOF 2017].

89. See DGI 2021, *supra* note 78 (citing Inconstitucionalidad de la prohibición absoluta al consumo lúdico o recreativo de marihuana prevista por la ley general de salud, Pleno de la Suprema Corte de Justicia [SCJN], Gaceta del Semanario Judicial de la Federación, Décima Época, Tomo I, Febrero de 2019, Tesis 1a./J. 10/2019 (10a.), página 493 (Mex.)).

90. Supreme Court June 2021 Press Release, *supra* note 84.

91. See DOF 2017, *supra* note 88.

92. Oscar Lopez, *Mexico Set to Legalize Marijuana, Becoming World's Largest Market*, N. Y. TIMES (Mar. 10, 2021), <https://www.nytimes.com/2021/03/10/world/americas/mexico-cannabis-bill.html>.

93. See Reglamento de la Ley General de Salud en Materia de Control Sanitario para la Producción, Investigación y Uso Medicinal de la Cannabis y sus Derivados Farmacológicos, Diario Oficial de la Federación [DOF], 12 de enero de 2021 (Mex.), [https://dof.gob.mx/nota\\_detalle.php?codigo=5609709&fecha=12/01/2021](https://dof.gob.mx/nota_detalle.php?codigo=5609709&fecha=12/01/2021).

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*de la Ley General de Salud en Materia de Control Sanitario para la Producción, Investigación y Uso Medicinal de la Cannabis y sus Derivados Farmacológicos*).<sup>94</sup> This law seeks to regulate, control, promote and monitor the health aspects of the raw material and pharmacological derivatives of cannabis for production, research, manufacturing and medical purposes.<sup>95</sup> Today, the medicinal and scientific market of cannabis in Mexico is open, legal and regulated.

Then, significantly, on July 15, 2021, the SCJN published the DGI in the DOF, effectively eliminating the absolute prohibition on the recreational consumption of cannabis.<sup>96</sup> In practice, the DGI removes COFEPRIS as an obstacle to personal consumption, as well as planting, harvesting, preparing, possessing, and transporting cannabis, even for recreational purposes.<sup>97</sup> These authorizations may only be issued to adults, who may not consume in front of minors or in public places.<sup>98</sup> The DGI does not exempt the Mexican Congress from its obligation to repeal or modify the unconstitutional provisions of the General Health Law.<sup>99</sup> So, the country continues to wait for the required legal provisions to be issued.

One recent proposal approved by the congressional Chamber of Deputies has been widely criticized for continuing to (perhaps unconstitutionally) penalize certain possession.<sup>100</sup> Among other things, the proposed regulation approves the creation of a legal cannabis market for industrial, research and recreational use.<sup>101</sup> The latter may be carried out through cannabis associations, public sale or self-cultivation.<sup>102</sup> The proposed law foresees five

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94. Reglamento de la Ley General de Salud en Materia de Control Sanitario para la Producción, Investigación y Uso Medicinal de la Cannabis y sus Derivados Farmacológicos, Diario Oficial de la Federación [DOF] 12-01-2021 (Mex.), [https://dof.gob.mx/nota\\_detalle.php?codigo=5609709&fecha=12/01/2021](https://dof.gob.mx/nota_detalle.php?codigo=5609709&fecha=12/01/2021).

95. Erick Hernández Gallego, *Mexico's General Health Law Regulations for the Production, Investigation, and Medicinal Use of Cannabis and Derivatives*, NAT'L L. REV. (Jan. 22, 2021), <https://www.natlawreview.com/article/mexico-s-general-health-law-regulations-production-investigation-and-medicinal-use>.

96. See DGI 2021, *supra* note 78.

97. Carmen Morán Breña, *La Suprema Corte da vía libre al uso recreativo de la marihuana en México*, EL PAÍS (June 28, 2021), <https://elpais.com/mexico/2021-06-28/la-suprema-corte-da-via-libre-al-uso-recreativo-de-la-marihuana-en-mexico.html>.

98. Supreme Court June 2021 Press Release, *supra* note 84.

99. See DOF 2017, *supra* note 88.

100. See Boletín Núm. 6072, *La Cámara de Diputados Aprobó, en lo General, el Dictamen que Expide la Ley Federal para la Regulación del Cannabis*, BOLETINES DE LA CÁMARA DE DIPUTADOS (Mar. 10, 2021), <https://comunicacionnoticias.diputados.gob.mx/comunicacion/index.php/boletines/la-camara-de-diputados-aprobo-en-lo-general-el-dictamen-que-expide-la-ley-federal-para-la-regulacion-del-cannabis/>.

101. Boletín N°. 6072, *La Cámara de Diputados aprobó, en lo general, el dictamen que expide la Ley Federal para la Regulación del Cannabis*, Boletines de la Cámara de Diputados 10 de marzo de 2021 (Mex.), <https://comunicacionnoticias.diputados.gob.mx/comunicacion/index.php/boletines/la-camara-de-diputados-aprobo-en-lo-general-el-dictamen-que-expide-la-ley-federal-para-la-regulacion-del-cannabis/>.

102. *Id.*

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types of licenses: cultivation, transformation, commercialization, exportation, importation, and research, which will be regulated by (National Commission against Addictions (*Comisión Nacional contra las Adicciones* (CONADIC)).<sup>103</sup>

All that remains is to wait for the final legislative and regulatory terms that will govern the cannabis market—primary and secondary—in Mexico. The coming year will surely hold more significant developments for those tracking the cannabis industry in the country.

## VI. Notable Supreme Court Decisions

During 2021, the Mexican Supreme Court (*Suprema Corte de Justicia de la Nación*) (SCJN) ruled on five issues that are especially important for the country's public life due to their legal, political, and social significance. Interestingly, all of these most notable cases were issued during the second half of the year. The following is a brief synopsis of these resolutions and their practical effects.

The first resolution was published in the Official Federal Gazette (DOF) on July 15, 2021 and announced a General Unconstitutionality Declaration for certain portions of the General Health Law (*Ley General de Salud*) that prohibited the recreational consumption of cannabis in Mexico.<sup>104</sup> The General Health Law's prohibitions were invalidated because they violated the fundamental right to the free development of personality.<sup>105</sup> As a result, Mexico's federal health authority, COFEPRIS, may issue authorizations allowing the recreational use of cannabis.<sup>106</sup> But, in order for the recreational use of cannabis to be fully permitted in Mexico—including cultivation, possession, exportation, commercialization, transportation, among other activities—the Mexican Congress must approve authorizing legislation. This is expected to happen in the coming months.

Decisions on the following three topics were issued in September 2021: the legal termination of pregnancy, conscientious objection to providing medical treatment, and ex officio control by some jurisdictional bodies.

After several years of feminist action in Mexico, the SCJN finally resolved that it is unconstitutional for the states to criminalize abortion in absolute terms, in connection with cases challenging absolute abortion prohibitions in the Mexican states of Coahuila<sup>107</sup> and Sinaloa.<sup>108</sup> This was the first

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103. *Id.*

104. DGI 2021, *supra* note 78.

105. *See id.*

106. *See id.*

107. Shorthand version of the ordinary public session of the plenary session of the Suprema Corte de Justicia de la Nación, held on Monday, September 6, 2021, *available at* <https://www.scjn.gob.mx/sites/default/files/versiones-taquigraficas/documento/2021-09-06/6%20de%20septiembre%20de%202021%20-%20Versi%C3%B3n%20definitiva.pdf>.

108. Shorthand version of the ordinary public session of the plenary session of the Suprema Corte de Justicia de la Nación, held on Monday, September 6, 2021, *available at* <https://www.scjn.gob.mx/sites/default/files/versiones-taquigraficas/documento/2021-09-06/6%20de%20septiembre%20de%202021%20-%20Versi%C3%B3n%20definitiva.pdf>.

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pronouncement of this right of women and pregnant persons. Although this resolution does not oblige the states to modify their legislation, it does prohibit judges from penalizing pregnant persons who decide to have abortion and medical personnel who assist them in this process.<sup>109</sup>

A few days after this resolution, the SCJN also issued an important decision on conscientious objection by medical personnel to providing medical treatment.<sup>110</sup> The resolution effectively invalidated Article 10 of the federal General Health Law, which did not limit medical and nursing personnel in exercising their right to object to providing medical treatment to others (the right of conscientious objection). The SCJN resolved that such a right cannot be absolute; it must be limited because it may put at risk the human rights of third parties. The SCJN ruled, among other things, that the right to conscientious objection must have guidelines for exercise and must be individualized to guarantee that an institution has both objecting and non-objecting personnel, in order to treat at least some patients seeking care.<sup>111</sup>

Also in 2021, the SCJN—abandoning a 2012 criterion—determined that the jurisdictional bodies of the Judicial Branch of the Federation, in direct and indirect amparo proceedings, may *ex officio* (i.e., without the need for the parties to request it from the authority) review the constitutionality of all laws within their jurisdiction.<sup>112</sup> By virtue of this resolution, all organs of the federal judiciary may invalidate—and must refuse to enforce—any provision of law that they believe violates human rights.<sup>113</sup>

Finally, in October 2021 and following the analysis of an appeal filed by the Legal Counsel of the Presidency, the SCJN suspended the effects of a decree that created the National Registry of Mobile Telephone Users (PANAUT), which was published on April 16, 2021, in the DOF.<sup>114</sup> This resolution addressed a constitutional complaint filed by the Federal Telecommunications Institute, which alleged that the creation of the PANAUT violated the rights of access to information and communication

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[www.scjn.gob.mx/sites/default/files/versiones-taquigraficas/documento/2021-09-09/9%20de%20septiembre%20de%202021%20-%20Versi%C3%B3n%20definitiva.pdf](http://www.scjn.gob.mx/sites/default/files/versiones-taquigraficas/documento/2021-09-09/9%20de%20septiembre%20de%202021%20-%20Versi%C3%B3n%20definitiva.pdf).

109. Coahuila, *supra* note 5, at 23–24; see Sinaloa, *supra* note 5, at 5.

110. SUPREMA CORTE DE JUSTICIA, *La SCJN invalida precepto de la ley general de salud que preveía la objeción de conciencia del personal médico y de enfermería sin establecer las salvaguardas necesarias para garantizar el derecho a la salud*, Pleno de la Suprema Corte de Justicia, Comunicado de Prensa No. 276/2021 (Sep. 20, 2021) (Mex.), <https://www.internet2.scjn.gob.mx/red2/comunicados/noticia.asp?id=6584>.

111. *See id.*

112. SUPREMA CORTE DE JUSTICIA, *Los Órganos Jurisdiccionales del Poder Judicial Federal son competentes para hacer control ex officio de todas las normas sujetas a su conocimiento en el juicio de amparo*, Comunicado de Prensa No. 286/2021 (Sep. 28, 2021) (Mex.), <https://www.internet2.scjn.gob.mx/red2/comunicados/noticia.asp?id=6594>.

113. *See id.*

114. *Decreto por el que se reforman y adicionan diversas disposiciones de la Ley Federal de Telecomunicaciones y Radiodifusión*, Diario Oficial de la Federación [DOF] 16-04-2021 (Mex.), [https://www.dof.gob.mx/nota\\_detalle.php?codigo=5616165&fecha=16/04/2021](https://www.dof.gob.mx/nota_detalle.php?codigo=5616165&fecha=16/04/2021).

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technologies, privacy, and the protection of personal data of mobile telephone users.<sup>115</sup> The ruling has maintained the status quo (with the PANAUT intact), until the SCJN decides on the merits of the controversy.

The above-mentioned resolutions, although they do not constitute all those resolved in the country this year, best reflect the balance of power between the executive, the legislature, and the judiciary branch and the legal, political, and social tensions and challenges currently experienced in Mexico.

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115. *See id.*

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## China

YANLING ZHENG\*

### I. Trademark Law Development in China

As China transitions from a major intellectual property consumer to a major intellectual property producer,<sup>1</sup> the Chinese government has been making continuous and systemic efforts to strengthen trademark protection and enforcement and to curb bad faith filings and malicious litigation. As a result, throughout 2021, the country's intellectual property rights have improved. These efforts all serve “the need to comprehensively strengthen IPR [intellectual property rights] protection from the perspective of national strategy, so as to promote the building of a modernized economy, stimulate the innovation vitality of the whole society, and foster a new development paradigm.”<sup>2</sup>

This article discusses the key judicial and administrative policies related to trademark protection, the constantly improving professionalism of the judiciary and the administrative agencies in handling complex trademark cases, and the major development of trademark prosecution procedures in China throughout 2021.

#### A. IMPORTANT POLICIES, GUIDANCE AND JUDICIARY INTERPRETATIONS

In 2021, Chinese intellectual property administrative agencies and the Supreme People's Court (SPC) have published and implemented several important policies, guidance, and judicial interpretations that will have profound impacts on the protection of intellectual property rights in the future.

The Interpretation of the Supreme People's Court on the Application of Punitive Damages in the Trial of Civil Cases of Infringement of Intellectual Property Rights became effective on March 3, 2021.<sup>3</sup> The 2021 Punitive

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\* This article is authored by Yanling Zheng, partner of ZY Partners.

1. Economic and Trade Agreement Between the Government of the United States of America and the Government of the People's Republic of China, China-U.S. (Jan. 15, 2020), [https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Economic\\_And\\_Trade\\_Agreement\\_Between\\_The\\_United\\_States\\_And\\_China\\_Text.pdf](https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Economic_And_Trade_Agreement_Between_The_United_States_And_China_Text.pdf).

2. See Xi Focus: Xi's article on intellectual property rights protection to be published, XINHUA, English.news.cn xinhuanet.com.

3. Zuigao Renmin Fayuan Guanyu Shenli Qinhai Zhishi Chanquan Minshi Anjian Shiyong Chengfaxing Peichang De Jieshi (法释(2021)4号 最高人民法院关于审理侵害知识产权民事案件适用惩罚性赔偿的解释)

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Damages Interpretation contains specific provisions on the applicability of punitive damages in civil intellectual property cases, the definitions of intentional infringement and serious circumstances, and the bases and multipliers for calculating punitive damages.<sup>4</sup>

On April 22, 2021, the SPC released the People's Court Intellectual Property (IP) Judicial Protection Plan 2021–2025.<sup>5</sup> In this guidance the SPC emphasized the need for strengthening the protection of trademarks. Among other things, the guidance laid out a plan to do so by, among other things, improving the quality of trademark administrative trials, increasing the penalties for malicious trademark registration and hoarding, strengthening the role of trademark use in determining the protection scope of trademark rights, and actively guiding the actual use of trademarks.<sup>6</sup> And on May 31, 2021, the SPC published relevant judicial interpretation explaining that if a plaintiff's IP infringement lawsuit is found to constitute an abuse of rights, the defendant may request the plaintiff to compensate their reasonable expenses incurred in the defense against such malicious litigation.<sup>7</sup>

Finally, on May 10, 2021, the China Intellectual Property Administration (CNIPA) issued the notification on Deepening the Reform of “Delegation, Administration, and Service” in the Field of Intellectual Property, and on Optimizing the Innovation Environment and Business Environment (the “Notification”).<sup>8</sup> Through this influential Notification, CNIPA directs the China Trademark Office (CTMO) and the Trademark Review and Administrative Department (TRAD) to shorten the examination periods for

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[Interpretation of the Supreme People's Court on the Application of Punitive Damages in the Trial of Civil Cases of Infringement of Intellectual Property Rights, Law Interpretation No. 4 (2021) (promulgated by the Judicial Comm. Sup. People's Ct., Feb. 7, 2021, effective as of Mar. 3, 2021) <http://www.court.gov.cn/fabu-xiangqing-288861.html> (China).

4. *Id.*

5. See generally Renmin Fayuan Zhishi Chanquan Sifa Baohu Guihua (2021-2025) (人民法院知识产权司法保护规划(2021-2025)) [People's Court IP Judicial Protection Plan 2021-2025] <http://www.court.gov.cn/fabu-xiangqing-297981.html> (Sup. People's Ct., 2021) (China).

6. *Id.* § 6.

7. Zuigao Renmin Fayuan Guanyu Zhishi Chanquan Qinquan Susong Zhong Beigao Yi Yuangao Lanyong Quanli Weiyou Qingqiu Peichang Heli Kaizhi Wenti De Pifu (法释(2021)11号 最高人民法院关于知识产权侵权诉讼中被告以原告滥用权利为由请求赔偿合理开支问题的批复) [The Supreme People's Court's Reply on the Issue of the Defendant's Request for Compensation for Reasonable Expenses on the Grounds of the Plaintiff's Abuse of Rights in Intellectual Property Infringement Lawsuits, Law Interpretation No. 11 [2021]] (published by the Judicial Comm. Sup. People's Ct., May 31, 2021, effective as of June 3, 2021) <http://www.court.gov.cn/fabu-xiangqing-307061.html> (China)

8. 关于深化知识产权领域“放管服”改革优化创新环境和营商环境的通知 [Notification on Deepening the Reform of Delegation, Administration, and Service” in the Field of Intellectual Property, and on Optimizing the Innovation Environment and Business Environment], CHINA NAT'L INTELL. PROP. ADMIN. (May 10, 2021), 国家知识产权局关于深化知识产权领域“放管服”改革优化创新环境和营商环境的通知, [cnipa.gov.cn](http://cnipa.gov.cn) [hereinafter Notification on Deepening the Reform] (China).

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key trademark administrative proceedings, crack down on malicious trademarks registrations and irregular patent applications, promptly report textbook cases of bad faith filings, and strengthen the supervision and punishment of intellectual property agents who act in bad faith.<sup>9</sup>

**B. IMPROVED PROFESSIONALISM IN ADMINISTRATIVE AND JUDICIAL ENFORCEMENT PROCEEDINGS**

Chinese courts and intellectual property administrative agencies have recently not only displayed a greater intolerance towards bad faith applications and malicious infringement but have also demonstrated their sophistication and professionalism in handling complex trademark infringements and unfair competition lawsuits.

For example, in *BRITA v. DEBRITA*, an infringement action by the renowned drinking water filter brand BRITA, the Shanghai Minhang District Court, in addition to finding serious trademark infringements and false advertisement by the defendant, held that the defendant had engaged in unfair competition by filing twenty-one bad faith trademark applications, one invalidation, and six oppositions against the plaintiff's legitimate trademarks.<sup>10</sup> The court concluded that the defendant's malicious abuse of the trademark invalidation and opposition procedures was part of the defendant's larger-scale infringement.<sup>11</sup> This case is important because it represents the first civil judgment in China where the defendant's filing of bad faith trademark applications and lodging of a malicious invalidation and oppositions against the plaintiff's legitimate trademarks were determined by the court to constitute acts of unfair competition and would support an award of damages. This landmark decision has been critically acclaimed among intellectual property practitioners and the courts alike, and was selected for publication on April 23, 2021, by the Shanghai High People's Court as a representative case.<sup>12</sup>

In *Mascotte Holdings, Inc. v. CNIPA & Xiamen Yezhi Trading Co., Ltd.*, an action seeking to protect an American celebrity's ("Ye," commonly known as Kanye West) legitimate trademark rights to "Yeezy," the Beijing High People's Court found that, due to Kanye West's continuous co-branding with Nike and other business partners, "Yeezy" had become a protectable unregistered trademark for shoes.<sup>13</sup> The court concluded that the bad faith

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9. *Id.*

10. *BRITA GMBH & Bitu Shanghai Water Purification System (Shanghai) Co., Ltd. v. Shanghai Kangdian Industrial Co., Ltd.*, Hu 0112 Civ. Chu No. 26614 Civil Judgment (Shanghai Minhang Dist. People's Ct. Sept. 25, 2020) (China).

11. *Id.*

12. *See generally* Shanghai High People's Court: Attaching Itself to Competitor's Business Reputation with Obvious Malice Violated Good-faith Principle and Constituted Unfair Competition (2021), <http://www1.hshfy.sh.cn/shfy/English/>, Representative Cases, 碧然德 v. 德碧然德.

13. *Jing Xing Zhong No. 3273 Administrative Judgment* (Beijing High People's Ct. Dec. 25, 2020) (China).

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trademark filing for YEEZY by Xiamen Yezhi infringed upon Mr. West's existing trademark rights and violated Mr. West's personal publicity rights to the name Yeezy. On April 22, 2021, this widely commented case was selected as one of the "Top Ten Cases on Judicial Protection of Intellectual Property Rights by Beijing Courts in 2020."<sup>14</sup>

Finally, in 2020, CNIPA promulgated Criteria for Determining Trademark Infringement (the "Criteria")<sup>15</sup> to create uniformed enforcement standards and to improve local intellectual property administrative agencies' handling of administrative enforcement actions. Then, in April 2021, CNIPA published the first three guidance decisions under the Criteria, one of which concerns the protection of the American data and analytics service provider, Dun & Bradstreet's Chinese house mark, 邓白氏 (Deng Bai Shi).<sup>16</sup> In this case, the infringer used "邓白氏" (Deng Bai Shi), identical to Dun & Bradstreet's registered trademark, as the keyword for searching.<sup>17</sup> And on the search results page, the link title and the content of the linked page were highlighted with the term similar to the registered trademark, 邓白氏 (Deng Bai Shi).<sup>18</sup> The local government agency, the Shanghai Chongming Market Supervision Administration, found that such use of 邓白氏 (Deng Bai Shi) by Shanghai Zhangyuan Information Technology Co. Ltd. created a likelihood of confusion to the internet users and therefore constituted an infringement of Dun & Bradstreet's registered trademark.<sup>19</sup> As the CNIPA explained, "the issuance of this guidance case will help to further clarify the definition of trademark use in the Internet environment."<sup>20</sup>

**C. KEY DEVELOPMENTS IN TRADEMARK PROSECUTION  
PROCEEDINGS**

The major developments of trademark prosecution proceedings in 2022 mainly include the acceleration of trademark administrative actions and the Trademark Review and Administrative Department's new rules on Letters of Consent.

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14. See generally Top Ten Cases on Judicial Protection of Intellectual Property Rights by Beijing Courts in 2020 (2020 年度北京法院知识产权司法保护的"十大典型案例"), <https://baijiahao.baidu.com/s?id=1697729380417138535&wfr=spider&for=pc>.

15. 商标侵权判断标准 (Criteria for Determining Trademark Infringement), (effective June 15, 2020).

16. See generally CNIPA's Policy Interpretation on No. 1 Guidance Case Regarding Shanghai Chongmin Market Supervision Administration's Administrative Enforcement against Infringement Upon D&B's Exclusive Rights to Use Its Registered Trademark (国家知识产权局 政策解读 指导案例1号"上海市崇明区市场监管局查处上海章元信息技术有限公司侵犯邓白氏注册商标专用权案"的理解与适用, [https://www.cnipa.gov.cn/art/2021/4/1/art\\_66\\_158172.html](https://www.cnipa.gov.cn/art/2021/4/1/art_66_158172.html)

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

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First, sections 1 and 2 of the CNIPA's May 10, 2021 notification directs that "by the end of 2021, the average examination period for trademark application will be stable within 4 months, and the trademark registration period will be reduced from 8 months to 7 months in general" and that "the average examination period for trademark assignment, opposition, refusal appeal, and invalidation will be reduced to 1.5 months, 12 months, 5.5 months, and 9 months, respectively."<sup>21</sup> Recent proceedings show that the CTMO and the TRAD have followed this guidance in the majority of cases before the CNIPA. According to the statistics released by the CNIPA on July 14, 2021, more than 3.72 million trademarks were registered in the first half of 2021, with the CNIPA ruling on 82,000 oppositions and completing 188,000 trademark reviews.<sup>22</sup> Furthermore, in addition to having any trademark disputes settled before the CNIPA in a timely manner, U.S. companies can currently expect to receive a trademark registration certificate in eight to nine months.<sup>23</sup>

Due to such accelerated processes and the required time frame for the TRAD examiners to conclude pending refusal appeals and reluctance to consider pending actions against the blocking trademarks, however, it has become very difficult for a trademark applicant to obtain a stay pending a refusal appeal. As a result, instances of refileing for the same trademarks and repeated refusal appeals will likely increase, which has become a common concern among U.S. companies.

Another notable practical issue in trademark prosecution are the TRAD's new rules on Letters of Consent (LOCs). One of the common approaches to overcome the refusal of a trademark application because of an existing trademark is to seek an LOC from the existing trademark owner. Based on existing precedents before the TRAD's new rules, where the conflicting trademarks were not identical or substantially similar, the TRAD usually would consider the LOC as persuasive evidence that there is no likelihood of confusion and would allow the registration of the subsequent trademark. Recently, though, refusal appeal decisions published by the TRAD<sup>24</sup> indicate that the department has changed its practice and turned down most of the submitted LOC's. For example, in a recent widely-commented decision concerning the application to register the mark "薇娅严选" (Wei Ya Yuan Xuan) filed by a famous e-commerce anchor, Huang Wei (also known as 薇娅), the TRAD refused to consider the consent provided by an earlier registrant for the mark "薇娅viviya" and ruled that the coexistence of

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21. See Notification on Deepening the Reform, *supra* note 8.

22. See 国家知识产权局在京举办2021年第三季度例行新闻发布会, CHINA NAT'L INTELL. PROP. ADMIN. (July 14, 2021), [https://www.cnipa.gov.cn/art/2021/7/14/art\\_53\\_165901.html](https://www.cnipa.gov.cn/art/2021/7/14/art_53_165901.html) (the statistics released on the Regular press conference of the State Intellectual Property Office in the third quarter of 2021).

23. YIXIAN CHEN & PAUL JONES, TRADEMARK LAWS & REGULATIONS CHINA, ch. 8 (2021).

24. See *generally* TRADEMARK OFF. OF CHINA NAT'L INTELL. PROP. ADMIN., <http://sbj.cnipa.gov.cn/> (CNIPA refusal appeal decisions are regularly published on the official website of the China Trademark Office).

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“薇娅严选” (Wei Ya Yuan Xuan) and “薇娅viya” would cause a likelihood of confusion.<sup>25</sup>

As a result, the TRAD’s new rule on LOC’s would significantly impact those matters that are expected to be resolved by LOC’s. Specifically, in refusal appeal cases, it is now advisable as a practical matter that the subsequent applicant take non-use cancellation action to clear the blocking mark if such prior mark is vulnerable to non-use cancellation attack, because seeking an LOC no longer appears helpful in overcoming a citation in the TRAD review proceeding.

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25. Refusal Appeal Decision on the Applied-for Mark 薇娅严选 (Wei Ya Yuan Xuan) No. 52265196, Administrative Decision (CNIPA, Aug. 30, 2021), <http://sbj.cnipa.gov.cn/> (China).

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## **South Asia/Oceania & India**

EDITORS: KAVITA MOHAN, AMY TOLBERT HARRIS, AND ASEEM CHAWLA; AND

AUTHORS: NAMRATA P. RASTOGI, ASEEM CHAWALA, SONIYA DODEJA, SANJAY NOTANI, NAGHM GHEI, AMIT GUPTA, VIDHI GOEL, HARI SANKAR MAHAPATRA, KATHERINE MADDOX DAVIS, AND ALISA RUKBANKERD\*

This article surveys significant legal developments in South Asia and Oceania during the calendar year 2021.<sup>1</sup>

### **I. Asian Clean Energy and Climate Change Update**

#### **A. INTERNATIONAL INITIATIVES**

Several clean energy and climate change announcements were made at the United Nations Framework Convention on Climate Change's (UNFCCC) 26th Conference of Parties (COP 26) in Glasgow in 2021. At least twenty-three countries, including Indonesia, Vietnam, South Korea, and Singapore from the Asian region, signed on to the new "Global Coal to Clean Power Transition Statement," making commitments to phase out coal.<sup>2</sup> Additionally, the Climate Investment Funds launched the \$2.5 billion Accelerating Coal Transition (ACT) investment program that advances a just transition from coal power to clean energy in South Africa, India, Indonesia,

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\* The committee editors were Kavita Mohan, Of Counsel, GDLSK LLP (Washington D.C.); Amy Tolbert Harris, Paralegal, GDLSK LLP (Washington D.C.); and Aseem Chawla, Founder, Partner, ASC Legal Solicitors & Advocates (New Delhi, India). Section I was authored by Namrata P. Rastogi, Independent Consultant, World Bank (Washington D.C.). Section II was authored by Aseem Chawla, Founder, and Soniya Dodeja, ASC Legal Solicitors & Advocates (New Delhi, India). Section III was authored by Sanjay Notani, Senior Partner, and Naghm Ghei, Senior Associate, Economic Laws Practice (Mumbai, New Delhi, India). Section IV was authored by Amit Gupta, Vidhi Goel, and Hari Sankar Mahapatra, Advocates, Supreme Court of India (New Delhi, India). Section V was authored by Katherine Maddox Davis, Associate Attorney, Gibson, Dunn, & Crutcher (Washington D.C.). Section VI was authored by Alisa Rukbankerd, Candidate for Master of Laws (L.L.M.), May 2022, Cornell Law School (Ithaca, NY).

1. The information provided in the article is intended for informational purposes only and does not constitute legal opinion or advice. Readers are requested to seek formal legal advice prior to acting upon any of the information provided herein.

2. Press Release, United Nations Climate Change, End of Coal in Sight at COP26 (Nov. 11, 2021), <https://unfccc.int/news/end-of-coal-in-sight-at-cop26>.



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and the Philippines.<sup>3</sup> More than 130 countries committed to stop and reverse deforestation and land degradation by 2030, including several Asian countries.<sup>4</sup> Additionally, the Global Methane Pledge to cut methane emissions by thirty percent compared to 2020 levels by 2030 was also announced at COP26 and included more than one hundred countries, including several from the Asian region.<sup>5</sup>

Below are country-specific updates:

1. *India*

At the “High Level Segment for Heads of State and Government” during COP26 in Glasgow, United Kingdom, India laid out a five-point plan to address climate change.<sup>6</sup> Referred to as the “panchamrita,” or the “five ambrosia,”<sup>7</sup> the plan set targets as follows: (1) to achieve a target of net zero greenhouse gas emissions by 2070; (2) to increase non-fossil energy capacity to 500 gigawatts (GW) by 2030; (3) to fulfill fifty percent of energy requirements from renewable sources by 2030; (4) to reduce carbon intensity of economy by forty-five percent by 2030, which is an increase from the previously established target of thirty-three to thirty-five percent; and (5) to reduce total projected carbon emissions by one billion tonnes.<sup>8</sup>

In August 2021, India announced its launch of a National Hydrogen Energy Mission to scale up green hydrogen towards the clean energy transition and make India a global hub for green hydrogen production and export.<sup>9</sup> Indian Railways announced its target to become a net zero emitter by 2030.<sup>10</sup>

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3. *CIF Begins Historic \$2.5B Coal Transition Pilot in Four Developing Countries*, CLIMATE INV. FUNDS (Nov. 4, 2021), <https://www.climateinvestmentfunds.org/news/cif-begins-historic-25b-coal-transition-pilot-four-developing-countries>.

4. *Glasgow Leader’s Declaration on Forests and Land Use*, UN CLIMATE CHANGE CONF. UK 2021 (Feb. 11, 2021), <https://ukcop26.org/glasgow-leaders-declaration-on-forests-and-land-use/>.

5. European Commission Press Release 21/5766, *The Commission, Launch by United States, the European Union, and Partners of the Global Methane Pledge to Keep 1.5C Within Reach* (Nov. 2, 2021).

6. DTE Staff, *CoP26: Modi Offers ‘Panchamrita’ Concoction for Climate Conundrum at Glasgow*, DOWNTOEARTH (Nov. 2, 2021), <https://www.downtoearth.org.in/news/climate-change/cop26-modi-offers-panchamrita-concoction-for-climate-conundrum-at-glasgow-80001>.

7. “Panchamrita is a traditional method of mixing five natural foods — milk, ghee, curd, honey and jaggery. These are used in Hindu and Jain worship rituals. It is also used as a technique in Ayurveda.” *Id.*

8. *Id.*

9. *PM Addressed the Nation From the Ramparts of the Red Fort on the 75th Independence Day*, PMINDIA (Aug. 15, 2021), [https://www.pmindia.gov.in/en/news\\_updates/pm-addressed-the-nation-from-the-ramparts-of-the-red-fort-on-the-75th-independence-day/](https://www.pmindia.gov.in/en/news_updates/pm-addressed-the-nation-from-the-ramparts-of-the-red-fort-on-the-75th-independence-day/).

10. Express News Service, *Indian Railways Sets ‘Net Zero’ Emission Goal for 2030*, NEW INDIAN EXPRESS (Nov. 26, 2021, 8:18 AM), <https://www.newindianexpress.com/nation/2021/nov/26/indian-railways-sets-net-zero-emission-goal-for-2030-2388324.html>.

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2. *South Korea*

South Korea “cemented” into law in September 2021 its target of becoming carbon neutral by 2050, with the South Korean parliament approving a bill that will help in achieving this target.<sup>11</sup> The National Assembly passed a “climate crisis response” act, which mandates over a thirty-five percent cut in greenhouse gas emissions by 2030 compared with 2018 levels.<sup>12</sup> In addition, at COP 26, South Korea announced its target of reducing emissions by at least 40 percent below 2018 levels by 2030.<sup>13</sup>

3. *Australia*

In October 2021, Australia established a target to achieve net zero carbon emissions by 2050 while preserving Australian jobs and generating new opportunities for industries and regional Australia.<sup>14</sup> It also released its Long-Term Emissions Reduction Plan that is technology driven and establishes Australia as a leader in low emissions technologies while preserving existing industries.<sup>15</sup> The plan is based on the following five principles: technology, not taxes; expand choices, not mandates; drive down the cost of a range of new technologies; keep energy prices down with affordable and reliable power; and be accountable for progress.<sup>16</sup>

In November 2021, Australia also announced its intent to establish a new \$1 billion technology fund, the Low Emissions Technology Commercialization Fund, which will drive investment in Australian companies to develop new low emissions technology.<sup>17</sup>

4. *New Zealand*

In October 2021, on the eve of COP26, New Zealand announced that it “will significantly increase its contribution to the global effort to tackle climate change by reducing net greenhouse emissions by 50 percent” from 2005 levels by 2030.<sup>18</sup> As per the announcement, this effort “equates to a 41

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11. Sarah Kim, *Korea Makes Emissions Reduction Pledges at COP26*, KOREA JOONGANG DAILY (Nov. 2, 2021), <https://koreajoongangdaily.joins.com/2021/11/02/national/environment/COP26-Moon-Jaein-climate-change/20211102154524400.html>.

12. *Korea Endorses Bill Mandating Carbon Neutrality by 2050*, KOREA TIMES (Apr. 3, 2022, 10:09 PM), [https://www.koreatimes.co.kr/www/nation/2021/10/371\\_314867.html](https://www.koreatimes.co.kr/www/nation/2021/10/371_314867.html).

13. See Kim, *supra* note 11.

14. Press Release, Scott Morrison, Prime Minister of Australia, Australia’s Plan to Reach Our Net Zero Target by 2050 (Oct. 26, 2021), <https://www.pm.gov.au/media/australias-plan-reach-our-net-zero-target-2050>.

15. *Id.*

16. *Id.*

17. Press Release, Scott Morrison, Prime Minister of Australia, Billion Dollar Fund to Drive Low Emissions Tech. Inv. (Nov. 10, 2021), <https://www.pm.gov.au/media/billion-dollar-fund-drive-low-emissions-technology-investment>.

18. Press Release, Jacinda Arden, Prime Minister of New Zealand, Govt. Increases Contribution to Global Climate Change (Oct. 31, 2021), <https://www.beehive.govt.nz/release/govt-increases-contribution-global-climate-target>.

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[percent] reduction on 2005 levels using what is known as an ‘emissions budget’ approach.”<sup>19</sup> This has been conveyed in the form of an updated Nationally Determined Contribution (NDC) to the UNFCCC.<sup>20</sup>

5. *Singapore*

In early 2021, Singapore announced the Singapore Green Plan 2030, which advances the country’s agenda on sustainable development by setting concrete targets over the next ten years and strengthens Singapore’s commitments under the United Nation’s (UN) 2030 Sustainable Development Agenda and Paris Agreement.<sup>21</sup> The Plan has five key pillars:

- a) City in Nature: to create a green, liveable, and sustainable home for Singaporeans;
- b) Sustainable Living: to reduce carbon emissions, keep the environment clean, and save resources and energy as a way of life in Singapore;
- c) Energy Reset: to use cleaner energy and increase energy efficiency to lower its carbon footprint;
- d) Green Economy: to seek green growth opportunities to create new jobs, transform industries, and harness sustainability as a competitive advantage; and
- e) Resilient Future: to build up Singapore’s climate resilience and enhance food security.<sup>22</sup>

6. *Japan*

In April 2021, Japan increased its emissions reduction pledge to forty-six percent by 2030 from 2013 levels, an increase from the previous target of twenty-six percent.<sup>23</sup> Japan adopted its new energy plan in October 2021 that helps lay the foundation for meeting its pledge for carbon neutrality by 2050.<sup>24</sup> The plan sets an ambitious target of thirty-six to thirty-eight percent of power supplies in 2030 from renewable energy which is “double 2019’s level and well above its previous 2030 target for 22–24 percent.”<sup>25</sup>

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19. *Id.*

20. *Id.*

21. Press Release, Ministry of National Development, Singapore Green Plan 2030 Charts Ambitious Targets for Next 10 Years to Catalyse National Sustainability Movement (Feb. 10, 2021), <https://www.mnd.gov.sg/newsroom/press-releases/view/singapore-green-plan-2030-charts-ambitious-targets-for-next-10-years-to-catalyse-national-sustainability-movement-1>.

22. *Id.*

23. Kyodo News, *Japan Raises 2030 Emissions Reduction Target to 46%*, KYODO NEWS (Apr. 22, 2021, 10:33 PM), <https://english.kyodonews.net/news/2021/04/21d433ecc75c-japan-set-to-decide-more-ambitious-2030-emissions-reduction-target.html>.

24. Yuka Obayashi, *Japan Aims for 36-38% of Energy to Come from Renewables by 2030*, REUTERS (Oct. 22, 2021, 11:21 AM), <https://www.reuters.com/business/energy/japan-aims-36-38-energy-come-renewables-by-2030-2021-10-22/>.

25. *Id.*

## **II. Roll Back by the Indian Government on the Retrospective Amendment Known as the “Vodafone Tax”**

In the backdrop of the Modi government’s renewed, avowed objective of fortifying India’s role as the preferred destination among the emerging economies and of augmenting the flow of inbound capital, in 2021, the Indian government amended the Scheme of Income Tax Act, 1961 (the Act) to do away with the retrospective amendment popularly known as the “Vodafone Tax.”<sup>26</sup> In 2012, the tax department raised a demand of Rs. 11, 218 crores.<sup>27</sup> This demand was quashed by the Supreme Court in 2012 but was brought back through an amendment to Finance Act, 2012.<sup>28</sup> Pursuant to this amendment, Vodafone challenged the tax demand in an international arbitration, which ruled in favor of Vodafone and directed India to reimburse Vodafone.<sup>29</sup> Following this decision, the Indian Tax Administration, on August 28, 2021, requested public comment on a draft notification which constitutes “ways [and] means” by which the government has provided measures to grant relief to the taxpayers, at the same absolving itself of the refund or reimbursement liabilities imposed by international arbitration, and provides entitled applicants with the process by which they can avail the benefit of the roll back and its consequences, including the refund of taxes previously paid.<sup>30</sup>

The draft notification highlighted insertion of Rule 11UE to the Income Tax Rules, 1962, which, *inter alia*, specifies the form and manner of submitting a requisite undertaking by the declarant, as well as the interested party, and, in return, the government promises to refund taxes collected and withdraw all litigation and arbitration.<sup>31</sup>

Recently, Cairn Energy (now renamed as Capricorn Energy) has withdrawn all litigation with regard to the Retrospective tax case, which has enabled the Indian Government to nullify the previous tax demands created

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26. Vasanth Rajasekaran et al., *India: From Vodafone To Cairn And Back: A Taxing Journey Towards Making India A Global Investment Hotspot*, PHOENIX LEGAL (Sept. 2, 2021), <https://www.mondaq.com/india/tax-authorities/1107704/from-vodafone-to-cairn-and-back-a-taxing-journey-towards-making-india-a-global-investment-hotspot>.

27. Sai Manoj, *India Challenges Vodafone Arbitration Award in Singapore: Everything You Need to Know*, PLEADERS INTELLIGENT LEGAL SOLS. (Aug. 4, 2021), <https://blog.ipleaders.in/india-challenges-vodafone-arbitration-award-singapore-everything-need-know/>.

28. *Id.*

29. Shrimi Cloudhary, *Centre Notifies Rules to Settle Vodafone Retrospective Tax Case*, BUS. STANDARD (Oct 15, 2021, 12:53 AM), [https://www.business-standard.com/article/companies/centre-notifies-rules-to-settle-vodafone-retrospective-tax-case-121101500058\\_1.html](https://www.business-standard.com/article/companies/centre-notifies-rules-to-settle-vodafone-retrospective-tax-case-121101500058_1.html).

30. Aseem Chawla, *Rollback of Retrospective Amendment – Is This Finally Beginning of a Graceful End of the Infamous Vodafone & Cairn Saga!!*, TAXMANN (Sep. 20, 2021), <https://www.taxmann.com/research/direct-tax-laws/top-story/10501000000020934/roll-back-of-retrospective-amendment-%E2%80%93-is-this-finally-beginning-of-a-graceful-end-to-the-infamous-vodafone-cairn-saga-experts-opinion>.

31. *India Publishes Draft Notification Providing New Rule for Indirect Transfers*, ORBITAX (Sept. 7, 2021), <https://www.orbitax.com/news/archive.php/India-Publishes-Draft-Notifica-47531>.

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and initiate the process of refunding the tax collected in this regard to the company.<sup>32</sup>

In view of this, “Vodafone Group has filed an application with the government to settle its [Rs. 20,000 Crores (USD \$2.65 billion)] retrospective tax dispute.”<sup>33</sup> “After the application is processed, the company will be issued” a form “setting the stage for the refund of tax already paid.”<sup>34</sup> This application comes after Cairn Energy Plc. submitted its undertaking for the settlement of its long and complicated retrospective tax dispute.<sup>35</sup> In addition to its application to the Indian government, Cairn Energy has registered its arbitration award in many jurisdictions, including the United States, the United Kingdom, Canada, Singapore, Mauritius, France, and the Netherlands and filed cases in multiple jurisdictions to enforce the award.<sup>36</sup>

Both Cairn and Vodafone’s investment protection litigations pertained to explicit tax carve-outs intending to create exclusions for taxation matters.<sup>37</sup> With the adoption of the 2016 Model Bilateral Investment Treaty (BIT), India’s approach moved from being “overly investor-friendly” to protectionist.<sup>38</sup>

Article 4(4) of the India-Netherlands BIT creates an explicit tax carve-out, which appears to cover claims involving other treaty obligations, such as the Fair and Equitable Treatment (FET) obligations and obligations relating to expropriation.<sup>39</sup> Article 4(3) of the India-UK BIT is limited in its scope and provides jurisdiction for international arbitral tribunals only for claims that allege breach of a state’s obligation regarding the National Treatment and Most Favored Nation clause.<sup>40</sup>

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32. *Cairn Energy Withdraws All Litigations in Retrospective Tax Case*, ECON. TIMES, (Jan 5, 2022, 11:32 AM), <https://economictimes.indiatimes.com/news/economy/policy/cairn-energy-withdraws-all-litigations-in-retrospective-tax-case/articleshow/88705064.cms>.

33. Devina Sengupta, *Vodafone Confirms Filing for Retro Tax Dispute Settlement with India*, ECON. TIMES, <https://economictimes.indiatimes.com/news/economy/policy/vodafone-confirms-filing-for-retro-tax-dispute-settlement-with-india/articleshow/88082563.cms> (Dec. 4, 2021, 4:25 PM).

34. *Id.*

35. ENS Economic Bureau, *Retro Tax: Cairn Petition to Indemnify Government Accepted*, INDIAN EXPRESS (Nov. 19, 2021, 3:30 AM), <https://indianexpress.com/article/business/cairn-energy-retrospective-tax-dispute-7630057/>.

36. *Retro Tax and Cairn Energy- India Dispute: All You Need to Know*, TIMES OF INDIA (last updated July 9, 2021, 3:56 PM), <https://timesofindia.indiatimes.com/business/india-business/retro-tax-and-cairn-energy-india-dispute-all-you-need-to-know/articleshow/84263612.cms>.

37. See Chawla, *supra* note 30.

38. *Model Bilateral Investment Treaty*, DRISHTI (July 1, 2020), <https://www.drishtias.com/daily-updates/daily-news-editorials/model-bilateral-investment-treaty>.

39. Agreement Between the Republic of India and Kingdom of Netherlands for the Promotion and Protection of Investments, India-Neth., June 11, 1995, 2242 U.N.T.S. 39911.

40. Agreement Between Republic of India and the Government of the United Kingdom of Great Britain and Northern Ireland for the Promotion and Protection of Investments, India-U.K., Mar. 14, 1994, 27 India Cm 2797.

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Despite the existence of Article 4(4) of the BIT, the arbitral tribunal was successful in affirming its jurisdiction in the Vodafone matter.<sup>41</sup>

**III. Recent Trends in Indian Trade & Customs Practice—An Analysis**

**A. INTRODUCTION**

The COVID-19 pandemic led to significant changes in the conduct of international trade, with disruptions in supply chains, changes in production and consumption patterns, and an increased focus on self-sufficiency, across the globe, including India. As the COVID-19 pandemic recedes and trade begins to increase, the Indian government has recently taken several steps to update its trade procedures and is slowly resuming business as usual. This submission highlights the key developments in Indian trade practice over the past year, as India makes efforts to adjust to the post-pandemic world.

**B. TRADE REMEDIAL MEASURES**

*1. Trends in Trade Remedial Actions*

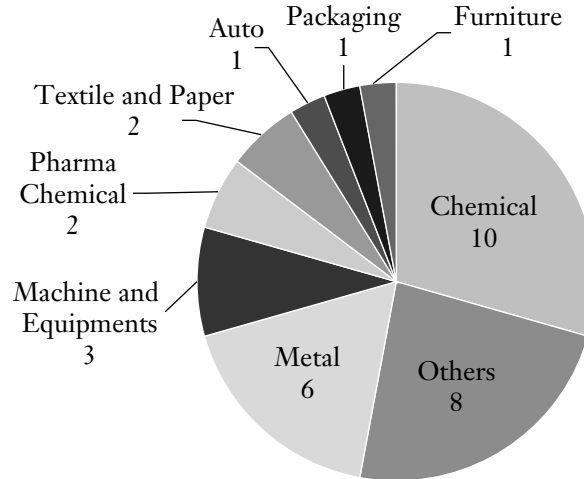
India remains “a prolific user of trade remedial actions, having initiated fifteen new original anti-dumping investigations in 2021, along with twenty sunset and mid-term review investigations.”<sup>42</sup> The largest number of investigations concerned the chemicals sector, including soda ash and monoethylene glycol, followed by metals and other diversified sectors.

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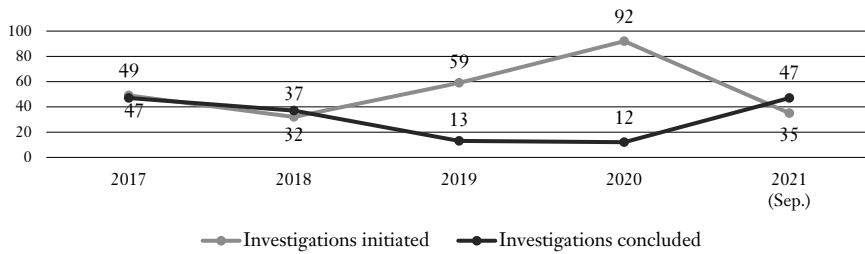
41. Will Thomas et al., *Vodafone Succeeds in US\$2.7bn Tax Arbitration Against India*, FRESHFIELDS BRUCKHAUS DERINGER, (Sept. 29, 2020), <https://technologyquotient.freshfields.com/post/102gh8i/vodafone-succeeds-in-us2-7bn-tax-arbitration-against-india>.

42. Sanjay Notani et al., *International Trade: Year in Review 2021: Implications for India*, MONDAQ (Feb. 15, 2022), <https://www.mondaq.com/india/international-trade-investment/1161576/international-trade-year-in-review-2021-implications-for-india>.

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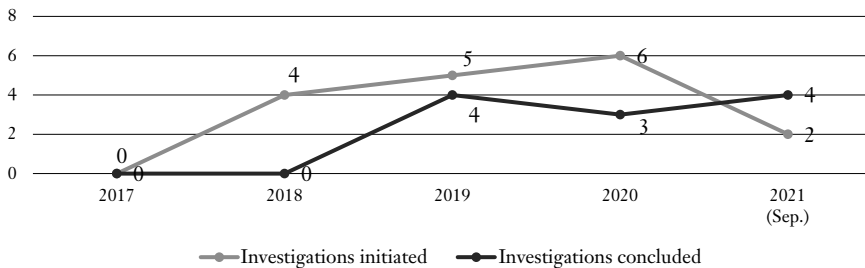


Source: Anti-Dumping Investigations in India, Directorate Gen. of Trade Remedies, <https://www.dgtr.gov.in/anti-dumping-investigation-in-india> (last visited May 10, 2022).



Sources: *Trade and Tariff Data*, WORD TRADE ORG. (Jan.–Sept. 2021), [https://www.wto.org/english/res\\_e/statis\\_e/statis\\_e.htm](https://www.wto.org/english/res_e/statis_e/statis_e.htm); see also Anti-Dumping Investigations in India, Directorate Gen. of Trade Remedies, <https://www.dgtr.gov.in/anti-dumping-investigation-in-india> (last visited May 10, 2022).

As can be seen from the graph above, anti-dumping investigations saw an exponential rise in 2020, which declined in the more recent period of 2021.



Sources: *Trade and Tariff Data*, WORD TRADE ORG. (Jan.–Sept. 2021), [https://www.wto.org/english/res\\_e/statis\\_e/statis\\_e.htm](https://www.wto.org/english/res_e/statis_e/statis_e.htm); see also Anti-Dumping Investigations in India, Directorate Gen. of Trade Remedies, <https://www.dgtr.gov.in/anti-dumping-investigation-in-india> (last visited May 10, 2022).

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Similarly, anti-subsidy investigations saw a rise until 2020, which declined in the more recent period, up to September 2021. The largest number of investigations targeted the metals sector, including hot rolled and cold rolled flat iron and steel products, copper tubes and pipes, and aluminum primary foundry alloy ingots, followed by chemicals, glass, and other products.

In 2021, the Directorate General of Trade Remedies (DGTR) also concluded the first-ever investigation conducted under India's Safeguard Measures (Quantitative Restrictions) Rules 2012 on imports of Isopropyl Alcohol (IPA).<sup>43</sup> The DGTR recommended that import quotas (subject to progressive relaxation) be issued on a country-wise basis for two years.<sup>44</sup> The final decision to give effect to this recommendation has not been taken until now by the Directorate General of Foreign Trade.<sup>45</sup>

### 2. *Trends in Trade Remedial Enforcement*

While trade remedial investigations continue to progress at a steady place, “[t]he Ministry of Finance [(MoF)] has . . . discretion” over whether to levy duties recommended by the DGTR.<sup>46</sup>

Recently, there have been multiple instances where the MoF has chosen not to levy the duties recommended by the DGTR.<sup>47</sup> Though no explicit reasoning was provided by the MoF, it was seemingly on account of public interest concerns.<sup>48</sup> The appellate tribunal, CESTAT, in a recent order, has directed the MoF to issue a reasoned order, in case the recommendations of the DGTR for imposition of duties are not accepted.<sup>49</sup> The Ministry of Finance has filed a writ petition before the High Court of Delhi, and the Court has issued notice, so it is pending a hearing on July 13, 2022.<sup>50</sup>

### 3. *Amendments to Existing Trade Remedial Law and Practice*

Additionally, India has also recently introduced important amendments to align its trade remedial practices with leading WTO signatories.

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43. Govt. of India Ministry of Com. & Indus. Dep't of Com. Directorate General of Trade Remedies, *Final Findings Case No. (SG) 06/2019, 22/6/2019-DGTR* (Sept. 30, 2019).

44. *Id.* at §146(v).

45. *Id.*

46. Ambarish Sathianathan & Harika Bakaraju, *Anti-Absorption Rules: Questions & Answers for Stakeholders*, ELP (Oct. 2021), <https://elplaw.in/wp-content/uploads/2021/10/ELP-Update-Anti-Absorption-1.pdf>.

47. See, e.g., Memorandum from the Govt. of India Ministry of Fin., Dep't of Revenue, Tax Rsch. Unit to Sh. Satish Kumar (July 20, 2021), [https://www.dgtr.gov.in/sites/default/files/OM\\_NBR\\_ADD.pdf](https://www.dgtr.gov.in/sites/default/files/OM_NBR_ADD.pdf) (not imposing duties on Acrylonitrile Butadiene Rubber); Memorandum from the Govt. of India Ministry of Fin., Dep't of Revenue, Tax Rsch. Unit to Sh. Satish Kumar (Apr. 7, 2021), <https://www.dgtr.gov.in/sites/default/files/OM-NonylPhenol-SSR.pdf> (not imposing duties on Plain Medium Density Fibre Board having a thickness less than 6mm Flat-Rolled Products of Stainless Steel Nonyl Phenol).

48. *Id.*

49. (2021) 11 TMI 519.

50. Union of India vs. Jubilant Ingrevia Limited W.P. (C) 5185/2022 and CM APPL. 15389/2022



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The MoF, on October 27, 2021, notified of new provisions on anti-absorption in both anti-dumping and anti-subsidy rules.<sup>51</sup> Similarly, taking a cue from the European Union’s Article 14 Anti-Dumping Regulation, India introduced provisions for the suspension of anti-dumping and anti-subsidy measures by introducing relevant amendments allowing suspension of duties for “one year at a time.”<sup>52</sup> Pursuant to this amendment, the MoF suspended definitive anti-subsidy measures in one case<sup>53</sup> and definitive anti-dumping measures in three cases.<sup>54</sup>

Lastly, new questionnaire formats have also been issued pursuant to stakeholder consultations to simplify filling out the questionnaire formats and application proformas in trade remedial investigations and to reduce the burden of procedural compliance placed on the cooperating parties.<sup>55</sup>

### C. NON-TARIFF BARRIERS

In addition to trade remedial measures, the Government of India has, in the past year, increased its use of non-tariff measures to regulate supply of

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51. Government of India Ministry of Finance (Department of Revenue), Notification No. 84/2021-Customs (N.T.) (Issued on Oct. 27, 2021); Government of India Ministry of Finance (Department of Revenue, Notification No. 83/2021-Customs (N.T.) (Issued on Oct. 27, 2021).

52. ELP, BIENNIAL INDIA TRADE & CUSTOMS UPDATE 3 (2021), <https://elplaw.in/wp-content/uploads/2021/11/ELP-Trade-Customs-Update.pdf>.

53. This is in regard to Certain Hot Rolled and Cold Rolled Stainless Steel Flat Products from China PR. *See* Government of India Ministry of Finance (Department of Revenue), Notification No. 02/2021-CUSTOMS (CVD) (Issued on Feb. 1, 2021); Government of India Ministry of Finance (Department of Revenue), Notification No. 5/2021-CUSTOMS (CVD) (Issued on Sept. 30, 2021).

54. These were straight length bars and rods of alloy steel from China PR; high-speed steel of non-cobalt grade from China PR and Germany; and flat rolled product of steel, plated, or coated with alloy of aluminum and zinc from China PR, Vietnam, and Korea RP. *See* Government of India Ministry of Finance (Department of Revenue), Notification No. 05/2021-CUSTOMS (ADD) (Issued on Feb. 1, 2021); Government of India Ministry of Finance (Department of Revenue), Notification No. 06/2021-CUSTOMS (ADD) (Issued on Feb. 1, 2021); Government of India Ministry of Finance (Department of Revenue), Notification No. 07/2021-CUSTOMS (ADD) (Issued on Feb. 1, 2021).

55. Trade Notice No. 05/2021 revises the questionnaire format/application proforma applicable to domestic producers seeking the initiation of an anti-dumping investigation. Ministry of Commerce & Industry Department of Commerce Directorate General of Trade Remedies, Trade Notice No.: 05/2021 (Issued on July 29, 2021). Trade Notice No’s. 06/2021, 07/2021 and 08/2021 revise the questionnaire formats applicable to foreign producers/exporters, related/unrelated importers, and users. *See* Ministry of Commerce & Industry Department of Commerce Directorate General of Trade Remedies, Trade Notice No.: 06/2021 (Issued on July 29, 2021); Ministry of Commerce & Industry Department of Commerce Directorate General of Trade Remedies, Trade Notice No.: 07/2021 (Issued on July 29, 2021); Ministry of Commerce & Industry Department of Commerce Directorate General of Trade Remedies, Trade Notice No.: 08/2021 (Issued on July 29, 2021). Trade Notice No. 09/2021 has been issued whereby a detailed procedure for filing of application by an Association on behalf of fragmented domestic producers in anti-dumping and anti-subsidy investigations has been provided. Ministry of Commerce & Industry Department of Commerce Directorate General of Trade Remedies, Trade Notice No.: 09/2021 (Issued on July 29, 2021).

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goods in its domestic market, which is believed to be creating non-tariff barriers to promote import substitution.<sup>56</sup> The government has imposed mandatory Bureau of Indian Standards (BIS) certification for a range of new products across sectors, including steel, chemicals, and petrochemicals.<sup>57</sup> “This is imposed” through “Quality Control Orders” specifying the product and relevant “Indian Standard against which certification is to be obtained . . . .”<sup>58</sup> Presently, 446 products have been notified for mandatory certification, with new products being announced routinely.<sup>59</sup> Ordinarily, all producers are granted a period of six months to obtain such certification.<sup>60</sup>

The process of obtaining BIS certification requires a physical inspection of the manufacturing premises.<sup>61</sup> But due to the COVID-19 pandemic and associated travel restrictions, factory audits for international manufacturers were suspended for most of the year. As a result, the Government of India has been issuing periodic extensions to existing quality control orders to enable manufacturers to obtain certifications.<sup>62</sup> It is important to note, however, that with certain strategic products, extensions were not granted to prevent imports (for example, toys).<sup>63</sup> Furthermore, with the easing of travel restrictions, the conduct of inspections is expected to resume shortly for certain countries and, depending on ease of restrictions, the pending applications would be undertaken.<sup>64</sup>

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56. See, e.g., Lola C. Chapman, *BIS Certification Becomes Mandatory for Indian Toy Industry, Stakeholders Want More Time — India Blossoms*, PLAY FAIR (Sept. 1, 2020), <https://play-fair.org/bis-certification-becomes-mandatory-for-indian-toy-industry-stakeholders-want-more-time-india-blossoms/>.

57. *Id.*

58. See BIENNIAL INDIA TRADE & CUSTOMS UPDATE, *supra* note 50, at 18.

59. The Bureau of Indian Standards has a list of products that be notified for mandatory certification. See *Foreign Manufacturers Certification Scheme*, BUREAU OF INDIAN STANDARDS, <https://www.bis.gov.in/index.php/product-certification/products-under-compulsory-certification/scheme-i-mark-scheme/> (last visited May. 13, 2022).

60. See BIENNIAL INDIA TRADE & CUSTOMS UPDATE, *supra* note 50.

61. *Id.* at 19.

62. *Id.*

63. Shilpa Ranipeta, *Government Says No Extension on Toy Quality Control Order Despite Pleas From the Industry*, CNBC (Mar. 3, 2021, 7:16 PM), <https://www.cnbcvt18.com/retail/government-says-no-extension-on-toy-quality-control-order-despite-pleas-from-the-industry-8487011.htm>.

64. *Id.*

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**IV. Survey on Arbitration Law in India and Australia—2021**

**A. INDIA**

**1. *Emergency Arbitration***

The issue of emergency arbitration (EA)<sup>65</sup> was hotly contested in Indian courts in 2021.<sup>66</sup> On October 25, 2020, a Singapore International Arbitration Centre (SIAC) arbitral tribunal had granted interim relief in an EA in favor of Amazon.<sup>67</sup> Amazon filed an application before the Delhi High Court (DHC) to enforce the order.<sup>68</sup> In March 2021, the DHC held that an emergency arbitrator is an arbitrator “for all intents and purposes” under Indian law, and the respondents in the case were directed not to take any further action in violation of the order.<sup>69</sup>

On appeal, the Supreme Court of India (SC) held that the EA order was enforceable because parties had consciously selected SIAC Rules, under which an emergency arbitrator has all the powers of an arbitral tribunal.<sup>70</sup> The SC described the EA order as an important step in decongesting civil courts and affording expeditious interim relief to the parties.<sup>71</sup> But, even after a year, until the end of 2021, proceedings to enforce the EA order were still pending, in view of a stay order from SC.<sup>72</sup>

**2. *Power to Decide Seat***

In *PASL Wind Solutions v. GE Power Conversion India*,<sup>73</sup> the SC held that two Indian parties can agree to arbitrate at a foreign seat. At the same time, they can seek interim relief under Indian law.<sup>74</sup>

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65. Emergency Arbitration is a mechanism which “allows a disputing party to apply for urgent interim relief before an arbitration tribunal has been formally constituted.” *What is Emergency Arbitration?*, INDIAN DISP. RESOL. CTR., <https://theidrc.com/content/adr-faqs/what-is-emergency-arbitration> (Apr. 17, 2022).

66. See *Amazon.com NV Inv. Holdings LLC v. Future Coupons Priv. Ltd.*, 2021 SCC Online Del 1279 (India).

67. *Id.*

68. *Id.*

69. *Id.*

70. *Amazon.com NV Inv. Holdings LLC v. Future Retail Ltd.*, 2021 SCC Online SC 557 (India).

71. *Id.*

72. See *Future Coupons Priv. Ltd. v. Amazon.com NV Inv. Holdings LLC*, Civil Appeal Nos. 859-860 of 2022 (arising out of SLP Nos. 13547-13548 of 2021) decided on 09.09.2021 (SC) (India).

73. *PASL Wind Sols. v. GE Power Conversion India*, 2021 SCC Online SC 331 (India).

74. *Id.*

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3. *Non-Payment of Stamp Duty*

A three-judge bench of the SC opined that non-payment of stamp duty on a contract does not invalidate an agreement regarding arbitration.<sup>75</sup> This issue has now been referred to a larger bench because earlier decisions have held to the contrary.<sup>76</sup>

4. *Period of Limitation to Invoke Arbitration*

The SC held that an application before a court for appointment of an arbitrator should be filed within three years from the date the right to apply accrues.<sup>77</sup> But, where the claims are *ex facie* time-barred, the court may refuse to make a reference to arbitration.<sup>78</sup>

5. *Allegations of Fraud*

In *M/s. N.N. Global Mercantile vs. M/s. Indo Unique Flame Ltd.*,<sup>79</sup> the SC held that the position that allegations of fraud are not arbitrable is an archaic view. Allegations of fraud regarding invocation of a bank guarantee can be arbitrated.<sup>80</sup>

6. *Enforcement of Foreign Arbitral Award Against Foreign State*

The DHC stated that a foreign state cannot claim sovereign immunity against the enforcement of an arbitral award from a commercial transaction.<sup>81</sup> The immunity is available only when it is acting in its sovereign capacity.<sup>82</sup>

7. *Enforcement of Foreign Award Against Non-Signatory*

In *Gemini Bay Transcription vs. Integrated Sales Service*,<sup>83</sup> it was held that Indian law does not allow a non-party to an agreement to allege that it is not bound by a foreign award. The award gave reasons to apply the alter ego doctrine,<sup>84</sup> and the SC refused to re-appreciate the facts.<sup>85</sup>

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75. *M/S. N.N. Glob. Mercantile Pvt. Ltd. v. M/S. Indo Unique Flame Ltd.*, 2021 SCC Online SC 13 (India).

76. *See id.*

77. *Bharat Sanchar Nigam Ltd. v. M/S. Nortel Networks India*, (2021) 5 SCC 738 (India).

78. *Id.*

79. *M/S. N.N. Glob. Mercantile PVT. Ltd.*, *supra* note 73.

80. *Id.*

81. *KLA Const. Techs. v. Embassy of Islamic Republic of Afghanistan*, 2021 SCC OnLine Del 3424 (India).

82. *Id.*

83. *Gemini Bay Transcription Pvt. Ltd. v. Integrated Sales Serv. Ltd. & Anr.*, 2021 SCC Online SC 572 (India).

84. Doctrine of “alter ego” is lifting of the corporate veil between the directors/shareholders and the corporation and treating both as one entity.

85. *Gemini Bay Transcription Pvt. Ltd. v. Integrated Sales Serv. Ltd. & Anr.*, *supra* note 81.

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8. *Power of the Court to Modify an Award*

In *Project Director, National Highways No. 45 E and 220, National Highways Authority of India v. M. Hakeem*,<sup>86</sup> the SC held that a supervisory court does not have the power to modify an award.<sup>87</sup> It can, at best, set aside the award, but the SC refused to interfere with the lower court's order, even though the award had been modified by the lower court.<sup>88</sup> The SC was of the view that the arbitration award was perverse, and the lower court had rightly interfered with it.<sup>89</sup> Further, great injustice would have been caused to the claimant if the awards, which were made seven to ten years ago, were set aside and sent back to a government-appointed arbitrator for de novo adjudication.<sup>90</sup>

9. *Extension of Time Period Due to Pandemic*

In view of declining cases of COVID-19, on March 8, 2021, the SC directed that no time relaxation would be given for completing pleadings and passing an arbitration award with effect from March 14, 2021.<sup>91</sup> But the order was recalled on April 27, 2021.<sup>92</sup>

Later, on September 23, 2021, the SC directed that the entire period from March 15, 2020, until October 2, 2021, shall be excluded for calculating the time for completing pleadings and passing the award.<sup>93</sup>

B. AUSTRALIA

1. *Broadly Defined Arbitration Clause*

The Supreme Court of Queensland interpreted a broadly drafted arbitration clause by observing that even a claim which arose by operation of law, outside the contract, shall be regarded as arising out of or closely connected with the contract.<sup>94</sup>

2. *Enforcement of Foreign Arbitral Award*

In *Neptune Wellness Solutions v. Azpa Pharmaceuticals*,<sup>95</sup> the Federal Court held that a Canadian award was recognizable and enforceable under Australian law, even if the award debtor did not participate in the enforcement proceedings after being served validly.

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86. Nat'l Highways Auth. of India v. M. Hakeem & ANR., 2021 SCC Online SC 473 (India).

87. *Id.* at ¶¶ 29, 47.

88. *Id.* at ¶¶ 39, 57.

89. *Id.* at ¶ 47.

90. *Id.* at ¶¶ 48, 55.

91. *In re Cognizance for Extension of Limitation*, (2021) 5 SCC 452 (India).

92. *In re Cognizance for Extension of Limitation*, (2021) SCC Online SC 492 (India).

93. *Id.*

94. *Cheshire Contractors v. Civ. Mining & Constr.*, (2021) QSC 75 (Austl.).

95. *Neptune Wellness Sols. v. Azpa Pharm.*, (2021) FCA 676 (Austl.).

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3. *Mandatory Domestic Law in Foreign-Seated Arbitration*

The Federal Court was asked to determine the applicability of mandatory domestic law, where the license agreement was governed by Californian laws and disputes were to be decided by a single arbitrator in California.<sup>96</sup> The Court held that claims under the Australian Consumer Law could be heard and determined in the Californian arbitration.<sup>97</sup>

4. *New Rules for Australian Centre for International Commercial Arbitration (ACICA)*

A new set of rules for the ACICA came into force in 2021. These rules permit tribunals to hold conferences and hearings virtually or in a combined/hybrid form.<sup>98</sup> The ACICA has also moved to default electronic filing by requiring both the Notice of Arbitration and Answer to be filed by email or through its dedicated online portal.<sup>99</sup>

**V. Australia Maintaining Its Permanent Seat on the ICJ After the Passing of James Crawford in May and the Election of Hilary Charlesworth**

In 2021, South Asia and Oceania maintained its second International Court of Justice (ICJ) seat. Australian jurist James Crawford passed unexpectedly in May 2021 and, in November 2021, was replaced by Australian jurist Hilary Charlesworth, who made history as the fifth woman on the World Court bench.<sup>100</sup> On November 5, 2021, Hilary Charlesworth was elected by secret ballot.<sup>101</sup> With two nations abstaining, Charlesworth received 119 ballots to Greek Linos-Alexander Sicilians' seventy-one votes.<sup>102</sup> She will complete Judge Crawford's term, scheduled to end February 5, 2024.<sup>103</sup>

ICJ vacancies occurring outside the regular, triennial election cycle are filled through causal elections.<sup>104</sup> There is a general expectation—though no

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96. *Freedom Foods v. Blue Diamond Growers*, (2021) FCA 172 at ¶ 6 (Austl.).

97. *Id.* at ¶ 87.

98. AUSTRALIAN CENTRE FOR INT'L COM. ARB., ACICA RULES: INCORPORATING CLAUSES FOR ARBITRATION & MEDIATION (2021), [https://acica.org.au/wp-content/uploads/2021/04/ACICA\\_Rules\\_2021-WFF3.pdf](https://acica.org.au/wp-content/uploads/2021/04/ACICA_Rules_2021-WFF3.pdf).

99. *Id.*

100. Fionnuala Ní Aoláin, *Gendering the International Court of Justice*, LAWFARE (Nov. 2, 2021), <https://www.justsecurity.org/78839/gendering-the-international-court-of-justice/> [<https://perma.cc/7BR6-DFQJ>].

101. Press Release, General Assembly, General Assembly Elects Judge to International Court of Justice, U.N. Press Release GA/12379 (Nov. 5, 2021).

102. *Id.*

103. *Id.*

104. Antonios Tzanakopoulos, *Casual Vacancies in the ICJ: Is There a Special Practice?*, EJIL: TALK! (Oct. 19, 2021), <https://www.ejiltalk.org/casual-vacancies-in-the-icj-is-there-a-special-practice/> [<https://perma.cc/KPX8-JUE8>].

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formal rule—that a judge who dies or resigns is replaced by someone of the same nationality, or at least from the same region.<sup>105</sup> Traditionally, the ICJ bench reflects relatively consistent representation of seats by region: two for the African Group, two for the Latin American and Caribbean Group, three for the Asia-Pacific Group, two for the Eastern European Group, and five for the Western European and Other Group.<sup>106</sup>

The nomination of Sicilians as Judge Crawford’s replacement was notable, given his home state is outside the geographic bloc Judge Crawford represented.<sup>107</sup> This practice divides the shared experience of the five states holding permanent seats on the United Nations Security Council, known as the P5, from the experience of all other states, including South Asia and Oceania.<sup>108</sup> When an ICJ vacancy is created by the death or resignation of a P5 judge, the election is rarely contested, and, contest aside, the elected judge is always of the same nationality as the outgoing judge.<sup>109</sup> When a vacancy arises through the death or resignation of a non-P5 judge, the replacement election is generally contested.<sup>110</sup>

This development is significant for South Asia and Oceania’s voice on the World Court bench—maintaining two seats. Greece and the Western European group lost a seat to the Asia-Pacific Group in 2017, when Indian Judge Dalveer Bhandari was elected to a seat historically reserved for a member of the Western Europe and Other Groups bloc.<sup>111</sup> That election left the United Kingdom without an ICJ judge for the first time.<sup>112</sup>

Given the ICJ bench’s roster has been 3.7 percent female over time, Judge Charlesworth’s appointment is significant for Oceania representation and gender representation alike.<sup>113</sup>

## **VI. Thailand**

### **A. AMENDMENT OF THE CRIMINAL ACT**

On February 7, 2021, the Act on the Amendment of the Criminal Code (No. 28) B.E. 2564 (2021) came into effect.<sup>114</sup> Under the amended code, abortion within the first twelve weeks of pregnancy is now legal under

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105. *Id.*

106. *Id.*

107. *Id.*; see also Aoláin, *supra* note 98.

108. Tzanakopoulos, *supra* note 102.

109. *Id.*

110. *Id.*

111. Arun M. Sukumar, *The Significance of Dalveer Bhandari’s, and India’s, Recent Election to the ICJ*, LAWFARE (Dec. 13, 2017), <https://www.lawfareblog.com/significance-dalveer-bhandaris-and-indias-recent-election-icj> [<https://perma.cc/9T34-EQFP>].

112. *Id.*

113. Philip Alston, *Vacancies at the ICJ: Yes, There Is a Special Practice, and It Has to Cease*, EJIL: TALK! (Oct. 25, 2021), <https://www.ejiltalk.org/vacancies-at-the-icj-yes-there-is-a-special-practice-and-it-has-to-cease/> [<https://perma.cc/SK2C-7WVA>].

114. 138 Raadchakidja, The Act on the Amendment of the Criminal Code, Royal Thai Gov’t Gazette No. 28, pt.10a p. 1-3 (B.E. 2564, Feb. 6, 2021).

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Section 301, and women seeking abortion and medical practitioners performing an abortion are exempted from the corresponding liabilities under Section 305.<sup>115</sup> The new law also permits abortions beyond the first trimester but no later than the first twenty weeks of pregnancy, if the woman seeking an abortion has consulted with medical practitioners and other professionals in accordance with the rules to be prescribed by the Ministry of Public Health.<sup>116</sup>

This amendment followed the Constitutional Court's landmark decision in 2020 that the criminalization of abortion under the former Section 301 was unconstitutional.<sup>117</sup> Specifically, the Court found that Section 301 violated the principles of equality and liberty enshrined in Sections 27 and 28 of Thailand's Constitution.<sup>118</sup> Prior to the ruling, abortion was a criminal offense in Thailand except in certain circumstances, such as medical necessities concerning the woman's physical health or pregnancy resulting from sexual crimes.<sup>119</sup> Absent such conditions and regardless of the pregnancy period, women seeking abortion faced imprisonment of up to three years or fines up to 60,000 baht, or both.<sup>120</sup> Persons, including medical practitioners, who perform an abortion with the woman's consent were also subject to liabilities of imprisonment and/or fines.<sup>121</sup>

Under the new Section 301, abortion beyond the first trimester is permissible only in exceptional circumstances,<sup>122</sup> and penalties for late-term abortion have now been reduced to imprisonment of up to six months and fines of up to 10,000 baht, or both.

**B. EXTENSION OF THE EFFECTIVE DATE OF THE PERSONAL DATA PROTECTION ACT**

On May 8, 2021, the Government Gazette published the Royal Decree on the Organizations and Businesses of which Personal Data Controllers are Exempted from the Applicability of the Personal Data Protection Act,<sup>123</sup>

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115. *Id.*

116. *Id.*

117. Constitutional Court Decision No. 4/2563, February 19, 2020, [http://aacc-asia.org/content/landmarkdecisions/49\\_20\\_04\\_Constitutional%20Court%20Ruling.pdf](http://aacc-asia.org/content/landmarkdecisions/49_20_04_Constitutional%20Court%20Ruling.pdf) (Thai).

118. RADTHATHAMMANOON [CONSTITUTION] Apr. 6, 2017, B.E. 2560 (Thai).

119. *See* Raadchakidjaa, The Criminal Code, Royal Thai Gov't Gazette, pt. 95 p. 1-4 (B.E. 2499, November 15, 1956).

120. *Id.*

121. *Id.*

122. Section 305 now allows for abortions by medical practitioners when performed within the first trimester, or when the pregnancy endangers the woman's physical or mental health, poses a high risk of fetus disabilities, or results from sexual crime. Abortions beyond the first twelve weeks but not exceeding the twenty weeks is permissible subject to consultation with medical practitioners and in accordance with rules to be prescribed by the Ministry of Public Health. *See id.*

123. 138 Raadchakidjaa, Royal Decree on the Organizations and Businesses of which Personal Data Controllers are Exempted from the Applicability of the Personal Data Protection Act, Royal Thai Gov't Gazette, pt.32a p. 1-3 (B.E. 2562 No. 2, Oct. 27, 2019).



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prescribing an additional postponement of the effective date of the operative provisions under the Personal Data Protection Act (PDPA) for another year.<sup>124</sup> The Royal Decree cites the complexity of the law, the advanced technology required, and the critical impact of the COVID-19 pandemic on the country, which impairs the abilities of entities subject to the PDPA from effective implementation of the statute, among the rationale for the second postponement.<sup>125</sup>

Being the first consolidated data protection statute in Thailand, the PDPA is highly influenced by the European Union’s General Data Protection Act.<sup>126</sup> It stipulates several mandatory obligations upon public and private entities classified as “data controllers” and “data processors.”<sup>127</sup> Under the statute, data controllers and data processors are required to, among other things, inform and obtain consent from the data subject for collection, usage, disclosure, and/or transfer of personal data,<sup>128</sup> report a personal data breach to the authority without delay,<sup>129</sup> and “maintain records of personal data processing activities.”<sup>130</sup> The PDPA has an extraterritorial effect, and non-compliance entails risks of civil, criminal, and administrative liabilities.<sup>131</sup>

With the postponement in effect, entities under the PDPA mandates can now enjoy an additional grace period until May 31, 2022, to build on their capacity to implement the act.<sup>132</sup>

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124. Raadchakidjaa (Royal Thai Gov’t Gazette) pt.69a p. 52-95 (B.E. 2562, May 27, 2019) translated in Personal Data Protection Act (PDPA), Thai Netizen, <https://thainetizen.org/wp-content/uploads/2019/11/thailand-personal-data-protection-act-2019-en.pdf> (unofficial translation) [<https://perma.cc/C3YD-R3HG>].

125. Samata Masagee et al., *Thailand Postpones the Implementation of the Data Protection Act Until 1 June 2022*, DLA PIPER (May 7, 2021), <https://blogs.dlapiper.com/privacymatters/thailand-postpones-the-implementation-of-the-data-protection-act-until-1-june-2022/> [<https://perma.cc/7QSP-BMCJ>].

126. T. Bumpenboon, *Thailand’s Personal Data Protection Act: An Understanding from the Perspectives of the European Privacy Law*, 6 THAMMASAT REV. ECON. & SOC. POL’Y 50, 58-59 (2020), <https://doi.org/10.14456/tresp.v6i1.249265>.

127. “Data controller” is defined as “a person or juristic person having the power and duties to make decisions regarding the collection, use, or disclosure of the personal data”; “Data processor” is defined as “a person or juristic person who operates in relation to the collection, use, or disclosure of the personal data pursuant to the orders given by or on behalf of a Data Controller, whereby such person is not the Data Controller.” See PDPA, *supra* note 122, at § 6.

128. See PDPA, *supra* note 122, at § 19.

129. *Id.*, § 37.

130. *Id.*, § 40.

131. See *id.*

132. Suchit Leesa-Nguansuk, *Grace Period for Businesses to Meet PDPA*, BANGKOK POST (Feb. 13, 2022), <https://www.bangkokpost.com/business/2263643/grace-period-for-businesses-to-meet-pdpa>.

## **International Contracts**

DEANA DAVIS, IZAK ROSENFELD, ALISON STRONGWATER, MARTIN E. AQUILINA, VICKY LI, AND WILLEM DEN HERTOOG\*

The following article summarizes some of the significant international legal developments during 2021 in the areas of international and cross-border contracts and the interpretation and application of related transactional conventions.

### **I. Updated Standard Contractual Clauses (SCCs) Issued by the European Commission**

As technology has evolved and personal data has become increasingly accessible and commercialized, the European Union (EU) has recognized that the law must correspondingly evolve to ensure that persons and their data are legally protected. The most recent protection was adopted on June 4, 2021, when the European Commission issued two new sets of Standard Contractual Clauses (SCCs) for transfers of personal data to countries outside the EU in compliance with the General Data Protection Regulation (GDPR): one for the processing of personal information between data controllers and data processors who are subject to the GDPR and one for the transfer of personal information outside of the EU.<sup>1</sup> The SCCs are intended to ensure that EU data subjects maintain legal protections and rights over their data outside the EU and, thus, have important global ramifications for entities importing or processing any data of EU citizens.<sup>2</sup>

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\* The authors are the following: Deana Davis, Rutgers Law School, J.D. candidate 2022 (Section I); Izak C. Rosenfeld, Esq., Associate General Counsel at Access Now, and Alison Strongwater, Legal Extern at Access Now and second-year J.D. student at New York University (Section II); Martin E. Aquilina and Vicky Li, Aquilina Law P.C., Ottawa, Ontario, Canada (Section III); and Willem den Hertog, denhertog legal, The Hague, The Netherlands (Section IV).

1. *Standard Contractual Clauses (SCC)*, EUROPEAN COMM'N (June 4, 2021), [https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/standard-contractual-clauses-scc\\_en](https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/standard-contractual-clauses-scc_en).

2. Commission Implementing Decision 2021/914 of June 4, 2021, Standard Contractual Clauses for the Transfer of Personal Data to Third Countries Pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council, art. 1, 2021 O.J. (L 199) 31, 35, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32021D0914&from=EN>.

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A. BACKGROUND

In 1995, the EU significantly began protecting its citizens' personal data with the Data Protection Directive (DPD). DPD Article 25 mandates EU countries transferring personal data intended for processing to third countries to find that the third country "ensure an adequate level of protection."<sup>3</sup> Absent such a finding, data controllers can transfer data only after ensuring "adequate safeguards" are in place, and "such safeguards may in particular result from appropriate contractual clauses."<sup>4</sup> The European Commission accordingly published three sets of SCCs under the DPD in 2001, 2004, and 2010.<sup>5</sup>

To satisfy an Article 25 finding of adequacy, the United States issued the Safe Harbor Privacy Principles in 2000, and the European Commission recognized the system of voluntary self-assessment of U.S.-based companies.<sup>6</sup> But, in 2015, the Court of Justice of the European Union (CJEU) invalidated the Commission's decision and the Principles.<sup>7</sup> In response, in 2016, the EU and the United States agreed on the EU-U.S. Privacy Shield as a replacement system, which the Commission approved.<sup>8</sup>

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3. Directive 95/46/EC of the European Parliament and of the Council of Oct. 24, 1995, on the Protection of Individuals With Regard to the Processing of Personal Data and on the Free Movement of Such Data, art. 25(1), 1995 O.J. (L 281) 31, 38, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31995L0046&from=EN>.

4. *Id.* at art. 26(2).

5. See Commission Decision 95/46/EC of June 15, 2001, On Standard Contractual Clauses for the Transfer of Personal Data to Third Countries, Under Directive 95/46/EC, art. 1, 2001 O.J. (L 181) 19, 22, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001D0497&from=EN>; Commission Decision Amending Decision 2001/497/EC as Regards the Introduction of an Alternative Set of Standard Contractual Clause for the Transfer of Personal Data to Third Countries of Dec. 27, 2004, art. 1, 2004 O.J. (L 385) 74, 75, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004D0915&from=EN>; Commission Decision on Standard Contractual Clauses for the Transfer of Personal Data to Processors Established in Third Countries Under Directive 95/46/EC of the European Parliament and of the Council of Feb. 5, 2010, art. 2, 2010 O.J. 5, 8, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010D0087&rid=4>.

6. Maria Tzanou, *European Union Regulation of Transatlantic Data Transfers and Online Surveillance*, 17 HUM. RTS. L. REV. 545, 547 (2017); see also MARTIN A. WEISS & KRISTIN ARCHICK, CONG. RSCH. SERV., R44257, U.S.-EU DATA PRIVACY: FROM SAFE HARBOR TO PRIVACY SHIELD 5 (2016), <https://sgp.fas.org/crs/misc/R44257.pdf>.

7. Case C-362/14, Maximilian Schrems v. Data Prot. Comm'r, ECLI:EU:C:2015:627, ¶ 237 (Sept. 23, 2015), <https://curia.europa.eu/juris/document/document.jsf?text=&docid=168421&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=6084582>.

8. See Commission Implementing Decision (EU) No. 2016/1250 of July 12, 2016, Pursuant to Directive 95/46/EC of the European Parliament and of the Council on the Adequacy of the Protection Provided by the EU-U.S. Privacy Shield, ¶ 137, 2016 O.J. (L207) 1, 32, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016D1250&from=EN>.

The Privacy Shield has also been published in the U.S. Federal Register. See Privacy Shield Framework, 81 Fed. Reg. 51,042, 51,042 (U.S. Dept. of Com. Aug. 2, 2016), <https://www.federalregister.gov/documents/2016/08/02/2016-17961/privacy-shield-framework>.

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The Shield came into effect in 2016, and numerous U.S.-based companies joined it to easily comply with the GDPR.<sup>9</sup>

The GDPR then entered into force in 2018, twenty-three years after the DPD.<sup>10</sup> While the DPD was not binding on all EU member states, the GDPR is a uniform law.<sup>11</sup> The GDPR maintains the transfer of personal data pursuant to an adequacy decision made by the European Commission, per Article 45(3).<sup>12</sup> Alternatively, personal data may be transferred “only if the controller or processor has provided appropriate safeguards, and on condition that enforceable data subject rights and effective legal remedies for data subjects are available.”<sup>13</sup> One of the recognized “appropriate safeguards” is “standard data protection clauses adopted by the Commission . . . .”<sup>14</sup> Thus, parties transferring data must comply with GDPR standards.<sup>15</sup>

In 2020, the CJEU, in *Data Protection Commissioner v. Facebook Ireland Limited, Maximillian Schrems (Schrems II)*, invalidated the EU-U.S. Privacy Shield but upheld the European Commission Decision 2010/87 by holding that SCCs are a valid ground for transferring personal data outside the EU.<sup>16</sup> The court reasoned that the Privacy Shield lacked the force of law in keeping personal data from being viewed by governmental agencies, but SCCs, with requisite assessments, are “effective mechanisms which, in practice, ensure that the transfer to a third country of personal data . . . is suspended or prohibited where the recipient of the transfer does not comply with those clauses or is unable to comply with them.”<sup>17</sup>

## B. THE NEW STANDARD CONTRACTUAL CLAUSES

The update in the SCCs is important to note because “SCCs are the dominant mechanism for cross-border transfers of personal data among

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9. Christopher Kuner, *Reality and Illusion in EU Data Transfer Regulation Post Schrems*, 18 GER. L.J. 881, 883 (2017).

10. See Regulation (EU) 2016/679 of the European Parliament and of the Council of Apr. 27, 2016, on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), art. 99, 2016 O.J. (L 119) 1, 19, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679&from=E>.

11. See UNITY, THE MAIN DIFFERENCES BETWEEN THE DPD AND THE GDPR AND HOW TO ADDRESS THOSE MOVING FORWARD 3 (2017), <https://britishlegalitforum.com/wp-content/uploads/2017/02/GDPR-Whitepaper-British-Legal-Technology-Forum-2017-Sponsor.pdf>.

12. Regulation (EU) 2016/679, *supra* note 10, at art. 45(3); see also Commission Implementing Decision (EU) No. 2021/914, *supra* note 2, cl.16(e).

13. Regulation (EU) 2016/679, *supra* note 10 at art. 45(1)–(3).

14. *Id.* at art. 46(2)(c).

15. *Id.* at art. 44.

16. Case C-311/16, *Data Prot. Comm’r v. Facebook Ireland Ltd. & Maximillian Schrems*, ECLI:EU:C:2020:559, ¶ 149 (July 16, 2020), <https://curia.europa.eu/juris/document/document.jsf?text=&docid=228677&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=6088793>.

17. *Id.*

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commercial entities.”<sup>18</sup> It is likely the SCCs will be increasingly employed now that the EU-U.S. Privacy Shield has been invalidated. The new SCCs comply with data protection updates in the GDPR, the *Schrems II* decision, and introduce increased flexibility for contracting and affected parties.

The SCCs incorporate the developments in data protection the GDPR introduced, while offering a broader definition of personal data; the definition covers such “online identifiers” as IP addresses or mobile device identifiers, geolocation and biometric data, and online behavior.<sup>19</sup> The GDPR provides additional safeguards for this data, such as a right of access, erasure, and objection to processing for direct marketing.<sup>20</sup> Further limitations on how the data may be used are also available. For example, while the DPD did not allow profiling, the GDPR Article 22 mandates suitable safeguards not only for profiling but a broader approach of any automatic processing with legal effects, including decision support systems.<sup>21</sup>

In accordance with the GDPR, the SCCs place heightened responsibilities on data processors and controllers. Responsibilities for the data exporter, whether a controller or a processor, include guaranteeing appropriate data protection safeguards. Further, while the controller is given flexibility in how to structure compliance, the controller assumes the responsibility for making sure that the processing entity compensates for gaps in the law.<sup>22</sup> Additionally, the data exporter must provide data subjects with information regarding intent to transfer their personal data, including the categories of personal data processed, the right to obtain a copy of the standard contractual clauses, and any onward transfer.<sup>23</sup> Meanwhile, the data importer must document its activities and notify the data exporter if it believes it may not comply with the SCCs.<sup>24</sup> The data importer must also inform data subjects of a contact point and deal promptly with any complaints or requests.<sup>25</sup> Finally, each party must ensure that the data is accurate and that only necessary data is transferred.<sup>26</sup>

Before any transfer can occur, however, the parties must undertake a transfer impact assessment, which must be documented and made available to EU data protection regulators upon request.<sup>27</sup> The SCCs follow the risk-oriented obligations of the GDPR in providing several aspects parties must consider when warranting “that they have no reason to believe that the laws

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18. Laura Bradford, Mateo Aboy, & Kathleen Liddell, *Standard Contractual Clauses Cross-Border Transfer of Health Data After Schrems II*, 8 J. LAW BIOSCIENCES 1, 3 (2001)

19. See Directive 95/46/EC of the European Parliament and of the Council, *supra* note 3, at arts. 2, 16; Regulation (EU) 2016/679, *supra* note 10 at art. 3(2)(b).

20. Regulation (EU) 2016/679, *supra* note 10, at arts. 15, 17, 21.

21. Antoni Roig, *Safeguards for the Right to Not Be Subject to a Decision Based Solely on Automated Processing (Article 22 GDPR)*, 8 EUROPEAN J. OF L. AND TECH. 1, 2 (2017)

22. Bradford, Aboy, & Liddell, *supra* note 18, at 9.

23. Commission Implementing Decision (EU) No. 2021/914, *supra* note 2, at Annex I, cl. 8.

24. *Id.* at Annex I, cl. 8.

25. *Id.* at Annex I, cl. 8.

26. *Id.* at Annex I, cl. 8 and 15.

27. *Id.* at Annex I, cl. 14.

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and practices in the third country” would “prevent the data importer from fulfilling its obligations.”<sup>28</sup> The SCCs also obligate the parties to continuously monitor compliance, and failure to comply with the clauses or to suspend transfers upon lack of compliance exposes the parties to liability not only to data subjects, but also between the parties.<sup>29</sup>

Clause 15 of the SCCs also complies with the *Schrems II* decision by obligating the data importer to maintain records of and notify the data exporter when it receives a request for access from public authorities whenever possible.<sup>30</sup> The data importer is also required to challenge any requests from public authorities that it believes to be unlawful and employ available appeals processes.<sup>31</sup> These protocols comply with the *Schrems II* decision that, per Article 46(1) of the GDPR, data subjects need access to “appropriate safeguards, enforceable rights and effective legal remedies.”<sup>32</sup>

Data subjects may invoke and enforce the clauses as third-party beneficiaries, with limitations as to the obligations of data processors and controllers.<sup>33</sup> In the event of a dispute, the data subject can invoke third-party beneficiary status and lodge a complaint with a supervisory authority or refer the dispute to the courts in the EU.<sup>34</sup>

The SCCs offer a greater degree of adaptability to different business relationships; there are four modules that cover data transfers between controller-controller, controller-processor, processor-processor, and processor-controller.<sup>35</sup> Previous SCCs did not contemplate processor-to-processor or processor-to-controller transfers.<sup>36</sup> Significantly, a data exporter and processor can now be a non-EU entity, which broadens the GDPR’s international reach.<sup>37</sup> The SCCs also provide more choices for governing law and venues during disputes, and more than two parties may adhere to the contract terms through the optional docking clause.<sup>38</sup> It is worth noting that the SCCs cannot be modified but can be amended without restricting the “fundamental rights or freedoms of data subjects.”<sup>39</sup>

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28. Nina Diercks and Heiko Markus Roth, *Data Transfer to Unsafe Third Countries*, WOLTERS KLUWER (Aug. 30, 2021), <https://www.wolterskluwer.com/en/expert-insights/data-transfer-to-unsafe-third-countries>; see also Commission Implementing Decision (EU) 2021/914, *supra* note 2, at Annex I, cl. 14.

29. Commission Implementing Decision (EU) 2021/914, *supra* note 2, at Annex I, cls. 12, 14.

30. *Id.* at Annex I, cl. 15.

31. *Id.*

32. Case C-311/16, Data Prot. Comm’r, ECLI:EU:C:2020:559, ¶ 149.

33. Commission Implementing Decision (EU) 2021/914, *supra* note 2, Annex I, cl. 3.

34. *Id.* Annex I, cl. 10.

35. *Id.* at Annex I, cl. 8.

36. Mark H. Francis & Maria C. Serafino, *EU Releases New Standard Contractual Clauses for Cross-Border Data Transfers*, HOLLAND & KNIGHT (June 21, 2021), <https://www.hklaw.com/en/insights/publications/2021/06/eu-releases-new-standard-contractual-clauses-for-crossborder>.

37. *Id.*; see also Commission Decision 95/46/EC, *supra* note 5, at art. 2.

38. Commission Implementing Decision (EU) 2021/914, *supra* note 2, at Annex I, cls. 7, 18; see also Commission Decision 95/46, *supra* note 5, Annex I, cl. 9.

39. Commission Implementing Decision (EU) 2021/914, *supra* note 2, Annex I, cl. 2.

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C. GOING FORWARD

After September 21, 2021, businesses and other entities must use the new SCCs to conduct data transfers.<sup>40</sup> As for businesses transferring data under the previous SCCs, the transfers must comply with the new regulations by December 27, 2022.<sup>41</sup> If entities do not comply with the regulations, they will be subject to legal redress, such as court proceedings, audits, any measures adopted by GDPR-established data supervisory authorities, or administrative penalties up to four percent of the annual gross revenue of an entire corporate group.<sup>42</sup>

It is imperative that companies transferring personal data, as the GDPR broadly defines it, review the policies and contracts under which the data is transferred and understand their new responsibilities. The data transfers may now encompass, among other things, human resource records, performance reviews, employee benefits, and user logs. Parties to the SCCs must assess how to, for example, conduct transfer impact assessments.<sup>43</sup>

While there are certainly benefits in expanding data protection regulations, the *Schrems II* decision introduced further uncertainty into the issue of data transfers by invalidating the EU-U.S. Privacy Shield, and, while the new SCCs seem to comply with the decision and the GDPR, there are still unresolved concerns. The first concern is how broadly EU and GDPR law applies, although it has been suggested that the scope of the commercial purposes determines the application of EU law to third countries during a transfer, with EU law extending to post-transfer processing on the condition that it takes place for commercial purposes, rather than on behalf of national security agencies.<sup>44</sup> The continued transfer of data to the United States also remains under threat, as neither *Schrems II* nor the SCCs eliminate the risk of governmental interference.<sup>45</sup> The updated SCCs represent the EU's latest effort to enforce European law in other jurisdictions for cross-border transfers of data again, a venture whose fate may lie with the courts.

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40. *Id.* at art. 4.

41. *Id.*

42. Commission Implementing Decision (EU) 2021/914, *supra* note 2, at art. 13; Regulation (EU) 2016/679, *supra* note 10, at arts. 83; *see also* Leah Shepherd, *EU Adopts New Standard Contractual Clauses for Data Transfers*, SHRM (July 28, 2021), <https://www.shrm.org/resourcesandtools/hr-topics/global-hr/pages/eu-standard-contractual-data-transfers.aspx>.

43. Shepherd, *supra* note 42.

44. Stefano Fantin, *Data Protection Commissioner v. Facebook Ireland Limited, Maximillian Schrems: AG Discusses the Validity of Standard Contractual Clauses and Raises Concerns over Privacy Shield*, 6 EUR. DATA PROT. L. REV. 325, 328 (2020).

45. Jordan L. Fischer, *The U.S. Perspective on Schrems II: The Challenges of the Extraterritorial Application of the EU Perspective*, 51. SETON HALL L. REV. 1565, 1582 (2021).

## **II. Three Years of GDPR: Enforcement (or Lack Thereof) and Its Impact on Cross-Border Contracts**

### **A. INTRODUCTION**

The GDPR is well-intentioned and, when it was introduced, had high expectations for changing practices in the business world. In 2021, three years after its adoption, although there are strong examples of penalties and fines being imposed on businesses, the question remains: *Has GDPR enforcement (or lack thereof) changed the way cross-border contracting is carried out?*

This article will address the GDPR's initial plans for enforcement, actual instances of enforcement over its three years of existence, and whether anything about the GDPR has changed cross-border contracting practices.

### **B. GDPR PLANS FOR ENFORCEMENT AND EXPECTATIONS**

In 2016, the GDPR was introduced as a regulation to govern all data privacy in the EU, replacing the EU Data Directive. The ultimate goal of the GDPR is to protect the “fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data.”<sup>46</sup> In the second recital of Article 1, the regulators state that the GDPR “is intended to contribute to the accomplishment of an area of freedom, security and justice and of an economic union, to economic and social progress, to the strengthening and the convergence of the economies within the internal market, and to the well-being of natural persons.”<sup>47</sup>

As of 2018, during implementation, the GDPR contained specific provisions to govern fundamental rights and freedoms in data privacy, as well as governance over the use and transmission of data.

Cross-border transfers are primarily governed under Chapter V of the GDPR, which includes Articles 44 through 50.<sup>48</sup> Article 45 allows for transfers of personal data when the recipient country or international organization “ensures an adequate level of protection.”<sup>49</sup> If a country does not provide an adequate level of protection, Article 46 permits transfers when appropriate safeguards are in place.<sup>50</sup> If there is neither an adequacy decision nor appropriate safeguards in place, Article 49 provides for specific derogations under which cross-border transfers of personal data may be permitted.<sup>51</sup>

The text of the GDPR outlines several avenues for enforcement. Contingent upon the type of infringement, Article 83 permits administrative fines up to €20 million or four percent of a company's total worldwide

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46. Regulation (EU) 2016/679, *supra* note 10, at pmb1, ¶ 166.

47. *Id.* at pmb1, cl. 2

48. *Id.* at arts. 44–50.

49. *Id.* at art. 45(1).

50. *Id.* at art. 46.

51. *Id.* at art. 49.



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revenue in the preceding financial year, whichever is larger.<sup>52</sup> Recital 129 affirms that supervisory authorities have the power to ban or limit the ability of violators to process data.<sup>53</sup>

Data protection authorities (DPA) are responsible for monitoring the application of GDPR and handling complaints.<sup>54</sup> Although investigations of complaints are overseen by the supervisory authority where the company in question has its main establishment, the consistency mechanism under Article 63 requires cooperation and coordination between data protection authorities of different member states.<sup>55</sup>

The following sections assess whether enforcement has considered elements of cross-border contracting and whether any considerations have impacted the trends in cross-border contracting, via data transfers or otherwise.

C. ACTUAL ENFORCEMENT

Since inception, supervisory authorities have levied approximately 1,034 fines and €1.6 billion in penalties for violations under the GDPR.<sup>56</sup> While this amount seems impressive, enforcement has been lackluster, and many critics comment on the slow uptake of recommended enforcement mechanisms across EU member states. Limited resources, insufficient funding, and inadequate staffing have impeded enforcement—particularly in Ireland, the main establishment of many major tech companies, including Facebook, Twitter, Google, and Apple.<sup>57</sup>

The consistency mechanism has also hindered the speed of investigations, as cases become backlogged while awaiting input from various DPAs.<sup>58</sup> These frustrations even prompted the head of Hamburg’s data protection commission to claim that the GDPR was “broken.”<sup>59</sup> “At the end of the day,” he stated, “our energies are spent on infighting.”<sup>60</sup> This demonstrates that enforcement of the GDPR leaves much to be desired.

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52. *Id.* at art. 83.

53. *Id.* at pmbl., cl. 129.

54. Ilse Heine, *3 Years Later: An Analysis of GDPR Enforcement*, CTR. FOR STRATEGIC & INT’L STUDS. (Sept. 13, 2021), <https://www.csis.org/blogs/strategic-technologies-blog/3-years-later-analysis-gdpr-enforcement> [<https://perma.cc/5MJQ-CLM5>].

55. Scott Ikeda, *Outgoing Privacy Commissioner Calls GDPR “Broken,” Says That Basic Model “Can’t Work”*, CPO MAG. (July 1, 2021), <https://www.cpomagazine.com/data-protection/outgoing-privacy-commissioner-calls-gdpr-broken-says-that-basic-model-cant-work/>.

56. Regulation (EU) 2016/679, *supra* note 10, at art. 63; *see also* *GDPR Enforcement Tracker*, CMS, <https://www.enforcementtracker.com> [<https://perma.cc/K5SJ-R94S>] (last visited Apr. 09, 2022).

57. Heine, *supra* note 54.

58. Ikeda, *supra* note 55.

59. Stephanie Bodoni, *Europe’s Data Law Is Broken, Departing Privacy Chief Warns*, BLOOMBERG (June 25, 2021, 3:10 AM), <https://www.bloomberg.com/news/articles/2021-06-25/eu-s-broken-gdpr-needs-fixing-departing-privacy-chief-warns>.

60. *Id.*

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Nonetheless, in 2021, authorities appear to have ramped up enforcement. Between January and November 2021, DPAs filed 395 fines against companies, totaling €1,058,690,920 (which represents eighty-one percent of all fines issued from the inception of the GDPR to November 2021).<sup>61</sup>

With respect to cross-border data transfers specifically, few cases have addressed it. Furthermore, looking back on the examples of enforcement in 2021, little attention is paid to contractual language or processes. In fact, in 2021, DPA's analyses of violations have quoted articles from Chapter V of the GDPR in only nine out of 313 fines arising from enforcement.<sup>62</sup>

Looking back at 2021's most notable and significant penalties for breaches of the GDPR, most fines related to issues of consent and transparency (under Articles 5, 7, 12, 13, and 14). High profile instances of enforcement, like the Ireland Data Protection Commission's (DPC) fine against Facebook and the German DPA's fine of *notebooksbilliger.de*, focused on compliance with transparency and consent but did not address Chapter V issues relating to cross-border contracts.<sup>63</sup> This focus is apparent in many other examples of enforcement in 2021.<sup>64</sup> Even when Chapter V articles were mentioned, such as in the DPC's decision on WhatsApp, authorities were more concerned with the availability of information about the transfers rather than the transfers themselves.<sup>65</sup>

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61. *GDPR Enforcement Tracker*, *supra* note 56.

62. Article 44 of the GDPR was quoted in Italy's fine of Bocconi University, Norway's fine of Ferde AS, Spain's fine of Vodafone, and France's fine of Futura Internationale. *See GDPR Enforcement Tracker*, *supra* note 56; *see generally* GDPR Regulation (EU) 2016/679, *supra* note 46. Article 46 of the GDPR was quoted in Italy's fine of Bocconi University and Ireland's fine of WhatsApp. *See GDPR Enforcement Tracker*, *supra* note 56; *see generally* Regulation (EU) 2016/679, *supra* note 10. Article 48 of the GDPR was cited in the Czech Republic's fine of a health provider, and Spain's fines of Vamavi Phone, Vodafone, and Aylon Center. *See GDPR Enforcement Tracker*, *supra* note 56; *see generally* Regulation (EU) 2016/679, *supra* note 10.

63. The decision against Facebook quoted Articles 5, 12–13. *See GDPR Enforcement Tracker*, *supra* note 56; *see generally* Regulation (EU) 2016/679, *supra* note 10. The decision against *notebooksbilliger.de* quoted Articles 5–6 of the GDPR. *See GDPR Enforcement Tracker*, *supra* note 56.

64. The data protection authority of Spain (AEPD) fined CaixaBank S.A. \_6 million for violations under Articles 6, 13, and 14. *See Spain: AEPD Fines CaixaBank \_6M for Consent and Information Failures*, ONE TRUST DATA GUIDANCE (Jan. 14, 2021), <https://www.dataguidance.com/news/spain-aepd-fines-caixabank-%E2%82%AC6m-consent-and-information> [<https://perma.cc/YK56-A2W5>]. The Garante, the data protection authority of Italy, fined Iren Mercato S.p.A. \_3 million under Articles 5–7 for failing to gain consent when using personal data acquired from a third-party source for telemarketing. *See Italy: Garante Fines Iren \_3M for Telemarketing Based on Invalid Third-Party Consent*, ONE TRUST DATA GUIDANCE (June 23, 2021), <https://www.dataguidance.com/news/italy-garante-fines-iren-%E2%82%AC3m-telemarketing-based> [<https://perma.cc/SH5R-6S72>].

65. WhatsApp Ireland Ltd. was fined \_225 million for failing to meet the transparency obligations required under Articles 12–14 of the GDPR. *See* Data Protection Commission, In the Matter of WhatsApp Ireland Limited Decision of the Data Protection Commission Made Pursuant to Section 111 of the Data Protection Act, 2018 and Articles 60 and 65 of the General Data Protection Regulation, IN-18-12-2, at 123, ¶ 435 (Aug. 20, 2021) [https://edpb.europa.eu/system/files/2021-09/dpc\\_final\\_decision\\_redacted\\_for\\_issue\\_to\\_edpb\\_01-09-21\\_en.pdf](https://edpb.europa.eu/system/files/2021-09/dpc_final_decision_redacted_for_issue_to_edpb_01-09-21_en.pdf) (Ir.). In

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Overall, although there has been an increase in the number of instances of GDPR enforcement, very few have addressed cross-border contracting. The question remains: *Have the trends in GDPR enforcement impacted the practical use of cross-border contracts, especially with regards to data privacy and data transfers?*

**D. HOW CROSS-BORDER CONTRACTING HAS CHANGED (OR HASN'T)**

Although some may see the increasing trend in enforcement actions under the GDPR in 2020 and 2021, there is little reference in these most recent (and significant) penalties to contractual processes or considerations. With Ireland as one of the most impactful enforcement agencies in 2021, many companies without a formal connection or link to Ireland will view recent penalties and associated issues as specific to Ireland and without relevance to other cross-border transactions. Any company engaging in cross-border contracting could see this lack of interest from regulatory bodies as a sign that things may carry on as they did before the GDPR came into effect.

There is no doubt that corporations have altered attitudes towards customer engagement and data processing based on the GDPR, but it appears that this scope of concern is limited to the management of consumer and user data (in the context of consent and transparency), rather than the nuances associated with cross-border contracts. Businesses seem far more focused on compliance with data protection language in user agreements and terms of use than on contractual relationships internationally.

**E. WHERE IS ENFORCEMENT GOING?**

The uptick in enforcement decisions in 2021, as well as resolutions and guidance adopted by a variety of European regulatory bodies, suggests that future enforcement of the GDPR may be increasingly vigorous. Although fines have yet to approach anywhere near the four percent limit of Article 83, WhatsApp Ireland's penalty of €225 million and Amazon's €746 million fine likely portend more assertive action on the part of data protection authorities.<sup>66</sup>

In the most significant ruling impacting cross-border contracting at this point in time, referred to as the *Schrems II* decision, the CJEU invalidated the EU-US Privacy Shield, which facilitated data flows between the two countries, on the grounds that U.S. regulations were insufficient to satisfy

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its final decision, the DPC noted that Art. 13 “requires the data controller, ‘where applicable’, to inform the data subject ‘that the controller intends to transfer personal data to a recipient in a third country or international organisation and the existence or absence of an adequacy decision by the [European] Commission.’” *See id.*

66. Heine, *supra* note 54.

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the privacy requirements under the GDPR.<sup>67</sup> In its decision, the court emphasized that supervisory authorities are obligated “to suspend or prohibit a transfer of personal data to a third country” that cannot adequately comply with the standard of data protection required under EU law.<sup>68</sup>

On May 20, 2021, the European Parliament adopted a resolution on *Schrems II*, rebuking the Irish data authority for its failure to adequately enforce the GDPR and emphasizing its concern with the lack of attention paid to cross-border data transfers.<sup>69</sup> On June 18, 2021, the European Data Protection Board (EDPB) published new recommendations for data transfers following *Schrems II*, laying out a six-step process for assessing the need for supplementary measures for data transfers and providing guidance for evaluating transfer mechanisms, such as binding corporate rules (BCR) and contractual clauses. Two weeks earlier, the European Commission had also published new SCCs for cross-border data transfers, which must be fully adopted by both new and existing contracts as of December 27, 2022.<sup>70</sup>

It remains to be seen whether the apparently renewed commitment by the EU will translate into increased enforcement actions for violations of the data transfer requirements under the GDPR, or if the adoption of the standard contractual clauses will be sufficient to satisfy further inquiry from regulatory bodies.

## F. CONCLUSION

The GDPR is widely touted as the greatest shift in data privacy regulation of the century, and rightfully so—with protections of users’ rights in commercial use, as well as cross-border transfers, the GDPR establishes fundamental freedoms within digital spaces and codifies the rights of users across the EU.

But enforcement in the GDPR’s three-year history has only just begun to increase in prevalence, and this shift has been limited to consent and transparency. Enforcement increases in the narrowed context of Chapter V

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67. Natasha Lomas, *Europe’s Top Court Strikes Down Flagship EU-US Data Transfer Mechanism*, TECHCRUNCH (July 16, 2020), <https://techcrunch.com/2020/07/16/europes-top-court-strikes-down-flagship-eu-us-data-transfer-mechanism/> [https://perma.cc/JVD5-5WU8].

68. Court of Justice of the European Union Press Release No 91/20, *The Court of Justice Invalidates Decision 2016/1250 on the Adequacy of the Protection Provided by the EU-US Data Protection Shield* (July 16, 2020), <https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-07/cp200091en.pdf>.

69. European Parliament Resolution of May 20, 2021, on *The Ruling of the CJEU of July 16, 2020 - Data Protection Commissioner v Facebook Ireland Limited and Maximilian Schrems* (“*Schrems II*”), Case C-311/18, Eur. Parl. Doc. P9\_TA(2021)0256 (2021), [https://www.europarl.europa.eu/doceo/document/TA-9-2021-0256\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0256_EN.html); see also Natasha Lomas, *European Parliament Amps Up Pressure on EU-US Data Flows and GDPR Enforcement*, TECHCRUNCH (May 21, 2021), <https://techcrunch.com/2021/05/21/european-parliament-amps-up-pressure-on-eu-us-data-flows-and-gdpr-enforcement/>.

70. Commission Implementing Decision (EU) 2021/914, *supra* note 2, at art. 4.

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protections against improper and unjustifiable cross-border data transfers, specifically with respect to contractual relationships, remain to be seen.

Many critics view the GDPR's enforcement thus far as lackluster, and this is most demonstrable in the cross-border data context. It appears that businesses have not yet been incentivized to effect change in cross-border contractual processes and the question remains: *Will we ever see such a change?*

### III. *H.M.B. Holdings Ltd. v. Antigua and Barbuda*

On November 4, 2021, the Supreme Court of Canada (SCC) dismissed an appeal of a decision of the Ontario Court of Appeal, defining “carrying on business” in a jurisdiction and furthering the debate on so-called “ricochet judgments.”<sup>71</sup>

H.M.B. Holdings Limited (HMB), a private company based in St. Louis, Missouri, and incorporated in Antigua and Barbuda (Antigua), owned the Half Moon Bay Resort in Antigua. In September 1995, Hurricane Luis destroyed the resort. HMB wanted to redevelop the land, but Antigua expropriated the property in 2007. From there arose a dispute about the compensation owed, which culminated in an appeal to the Judicial Committee of the Privy Council in the United Kingdom, the court of final appeal for Antigua.

The Privy Council issued a judgment in February 2014 and a final order in May 2014, fixing the compensation owed by Antigua at over \$26 million, plus interest. In December 2015, Antigua sold the resort to a subsidiary of Replay Resorts Inc., a company incorporated in British Columbia, and paid part of its debt to HMB. In a bid to obtain the unpaid balance, in October 2016, HMB initiated a common law action in the Supreme Court of British Columbia, seeking enforcement of the Privy Council judgment, with the goal of intercepting Replay's outstanding payments to Antigua. Antigua did not respond to the action and a default judgment was entered in April 2017, along with a garnishment order against Replay.

A year later, in May 2018, HMB applied to the Ontario Superior Court of Justice to register the British Columbia judgment pursuant to the Reciprocal Enforcement of Judgments Act (REJA),<sup>72</sup> presumably to enable HMB to seize assets owned by Antigua in Ontario.<sup>73</sup> According to paragraph 4(a) of the REJA, once the foreign judgment is registered under the REJA, it has the same force and effect as a judgment originally obtained from the registering court.<sup>74</sup> Thus, REJA, like other reciprocal enforcement legislation, provides a streamlined path between jurisdictions that allow for

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71. H.M.B. Holdings Ltd. v. Antigua and Barbuda, 2021 SCC 44 (Can.).

72. Reciprocal Enforcement of Judgments Act, R.S.O. 1990, c R.5 (Can.).

73. Kayla Theeuwen, *Enforcing Foreign Judgments in Ontario: Here Comes the Story of the Hurricane*, MONDAQ (Feb. 5, 2020), <https://www.mondaq.com/canada/trials-appeals-compensation/890410/enforcing-foreign-judgments-in-ontario-here-comes-the-story-of-the-hurricane>.

74. *Id.*

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mutual enforcement of judgments. For instance, British Columbia's own REJA accepts the expedient registration of judgments from other Canadian provinces (except Québec), Austria, the United Kingdom, Germany, certain Australian jurisdictions, and the American states of Washington, Alaska, California, Colorado, Idaho, and Montana.<sup>75</sup>

It should be noted that, had HMB attempted, in October 2016, to have the Privy Council judgment recognized by common law action in Ontario instead of British Columbia, it would have been statute-barred, as Ontario's Limitation Act prescribes a general limitation period of two years.<sup>76</sup> On the other hand, British Columbia's Limitation Act sets the limitation period at ten years.<sup>77</sup>

Antigua opposed the registration in Ontario of the British Columbia judgment, pleading paragraphs 3(b) and 3(g) of the REJA. Per paragraph 3(b), a judgment may not be registered if the judgment debtor neither carries on business nor resides within the jurisdiction of the original court nor voluntarily appears at the proceedings in that jurisdiction. The parties agreed that Antigua was not a resident of British Columbia and did not appear during the proceedings in that province but disagreed on whether the Citizenship by Investment Program (CIP) operated by Antigua was considered "carrying on business." At the time of the British Columbia action, Antigua's only activity in British Columbia was its contract with four authorized representatives of the CIP who facilitated investments in Antigua's real estate, businesses, and National Development Fund.

For its part, paragraph 3(g) of the REJA bars registration in Ontario if the judgment debtor would have a good defense if an action were brought on the original judgment. Antigua argued that the original judgment in this case was the Privy Council judgment, and, thus, it would have a good defense had HMB brought an action on that judgment in Ontario, given the two-year limitation period.

The trial judge and the Ontario Court of Appeal both agreed with Antigua, although Justice Nordheimer, JA, dissented on both points. Regarding the test for "carrying on business," he argued, citing the SCC case *Chevron Corp v. Yaiguaje*,<sup>78</sup> that Canadian courts "have adopted a generous and liberal approach to the recognition and enforcement of foreign

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75. Regulation of Court Order Enforcement Act, R.S.B.C. 1996, Ch. 78 (Jurisdictions Declared to Be Reciprocating States for the Purposes of This Act) (Can.).

76. Section 4 Limitations Act, S.O. 2002, c. 24, Sched. B (Can.); see also *H.M.B. Holdings Ltd.*, 2021 SCC 44 ¶ 44 (Can.); see also *Independence Plaza 1 Associates, L.L.C. v. Figliolini*, 2017 ONCA 44 (Can.).

77. Section 7 Limitation Act, S.B.C. 2012, c. 13 (Can.). It is not clear why HMB did not avail itself of the reciprocal enforcement of judgments arrangements between Ontario and the United Kingdom. The Reciprocal Enforcement of Judgments (U.K.) Act, R.S.O. 1990, c. R.6 (Can.) has a six-year limitation period for registering judgments between the two jurisdictions. Through this route, the Privy Council judgment could seemingly have been registered in Ontario at the time of HMB's REJA proceedings. Another unclear point is why Antigua did not raise sovereign immunity as a ground for dismissal over lack of jurisdiction.

78. *Chevron Corp v. Yaiguaje*, 2015 SCC 42.

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judgments,” and, therefore, the bar for proving that a party was “carrying on business” was a “very low” one.<sup>79</sup> He further opined: “in this digital age, it is often unnecessary to have any physical presence in order to carry on a business.”<sup>80</sup> As for the meaning of “original judgment,” Justice Nordheimer reasoned that the phrase “original court” was defined in the REJA as the court by which the judgment was given; therefore, “original judgment” referred to the British Columbia judgment, against which Antigua would have no defense if an action were brought thereon.<sup>81</sup>

The SCC sided with the majority of the Court of Appeal and held that paragraph 3(b) barred HMB from registering the British Columbia judgment. The majority’s reasons centered on the interpretation of “carrying on business,” an expression that is not defined by the REJA. The SCC confirmed that the test for “carrying on business” for the traditional presence-based jurisdiction affirmed in *Chevron* was whether a business had “some direct or indirect presence in the jurisdiction, accompanied by a degree of business activity that is sustained for a period of time.”<sup>82</sup> It found that the “generous and liberal” approach mentioned by Justice Nordheimer did not modify this test and that a “physical presence in the form of maintenance of physical premises will be compelling, and a virtual presence that falls short of an actual presence will not suffice.”<sup>83</sup>

Given its interpretation of paragraph 3(b), the SCC found it unnecessary to adjudicate whether there was a “good defense” pursuant to paragraph 3(g) of the REJA, or whether the British Columbia judgment, as a recognition judgment, even falls within the definition of “judgment” under the REJA.

**A. CONCURRING REASONS**

Justice Côté agreed with the majority’s analysis and disposition of the appeal but wrote separately on the issue of so-called “ricochet judgments”—an issue that the majority of the court decided to leave open for another day. The term “ricochet judgment,” also known as “derivative judgment,” refers to a judgment that enforces a judgment of a non-reciprocating jurisdiction.

The REJA applies to “a judgment or an order of a court in any civil proceedings whereby any sum of money is payable.”<sup>84</sup> A question was raised as to whether a ricochet judgment, such as the British Columbia recognition judgment, falls within this definition and can be registered in Ontario.

In answering that question, Justice Côté drew a distinction between a judgment resulting from a common law action that recognizes a foreign judgment (a “recognition judgment,” such as the British Columbia judgment in the case at bar) and a judgment that has itself been registered under

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79. *H.M.B. Holdings Limited*, 2020 ONCA 12 at ¶¶ 41–42.

80. *Id.* at ¶ 44.

81. *Id.* at ¶¶ 51–54.

82. *H.M.B. Holdings Ltd.*, 2021 SCC 44 at ¶ 41.

83. *Id.* at ¶¶ 40, 42.

84. *Id.* at ¶ 57.

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reciprocal enforcement legislation. According to Justice Côté, the former falls squarely under the REJA's definition of judgment, in its grammatical and ordinary sense, as it is a judgment that makes a sum of money payable. To read an exception for derivative judgments into such a plain language definition would be unwarranted. On the other hand, in Justice Côté's opinion, the REJA would not permit the registration of a judgment that has itself been registered because such a judgment does not make money payable. Rather, it converts a foreign judgment into a local one.

The *H.M.B. Holdings Ltd. v. Antigua and Barbuda* case provides welcomed clarity on the question of what it means to be "carrying on business," at least for the purposes of the REJA, if not for the enforcement of foreign judgments in general. It is now presumably settled that when the argued connecting factor is that of carrying on business, the analysis is the same, whether the court is assessing whether it has jurisdiction to hear an application for recognition or whether it may give effect to a foreign judgment. To be sure, this elucidation is good news for foreign businesses operating in Canada from a distance with minimal physical presence in Canada. On the other hand, the Supreme Court's ruling does not completely resolve the matter of ricochet judgments. Indeed, if a recognition judgment is obtained against a party that *does* carry on business in the recognizing jurisdiction or that has attorned to the jurisdiction, will the court of the *lex fori* register such judgment if the original jurisdiction is not a reciprocating jurisdiction of the *lex fori*? Unless amendments are made to Canada's reciprocal enforcement statutes, we will need to wait for further court decisions.

#### **IV. Martinair/KLM—Creeping Transfer of Undertaking**

The acquisition of a business can take place in two distinct ways. The buyer can purchase the shares in the corporate entity conducting the business, or the buyer can buy the assets necessary to operate the business from that corporate entity. In the first case, the relationship between the business and its employees does not change; because the legal situation between them remains the same, only the ownership of the corporate entity (on a higher level) changes.

An asset deal is different. The employees will find themselves employed by a company that has a diminished business (or none), and the buyer can pick and choose which employees it wants to rehire, and under what conditions. To remedy this, in 1977, the EU adopted the Transfer of Undertaking, Protection of Employees (TUPE) Directive (the Directive).<sup>85</sup>

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85. Council Directive of Feb. 14, 1977, on the Approximation of The Laws of the Member States Relating to the Safeguarding of Employees' Rights in the Event of Transfers of Undertakings, Businesses or Parts of Undertakings or Businesses 77/187/EEC, art. 3, 1977 O.J. (L 61) 26, 27, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31977L0187&from=EN> (changed by Directive 98/50/EC (O.J. 1998, L 201/88) and recodified in Directive 2001/23/E (O.J. 2001, L 82/16)).



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This Directive was implemented into Dutch law as articles 7:662-666 BW (*Burgerlijk Wetboek*, Dutch Civil Code).<sup>86</sup>

Article 3 of the Directive stipulates: “The transferor’s rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee.”<sup>87</sup> This rule applies to any transfer of an undertaking, business, or part of an undertaking or business to another employer after legal transfer or merger.<sup>88</sup> A transfer occurs upon transfer of an economic entity which retains its identity, or an organized grouping of resources which has the objective of pursuing an economic activity, whether that activity is central or ancillary.<sup>89</sup>

Further, the existence of a transfer is, according to the CJEU, dependent on whether the identity of the undertaking is preserved in the transfer.<sup>90</sup> To determine whether the conditions for the transfer of an entity are met, it is necessary to consider all the facts characterizing the transaction in question, including the type of undertaking or business; whether or not its tangible assets, such as buildings and movable property, are transferred; the value of its intangible assets at the time of the transfer; whether the majority of its employees are taken over by the new employer; whether its customers are transferred; the degree of similarity between the activities carried on before and after the transfer; and the period, if any, for which those activities were suspended.<sup>91</sup> But all those circumstances are merely single factors in the overall assessment made and are not considered in isolation.<sup>92</sup>

In assessing the facts characterizing the transaction in question, among other things, the type of undertaking or business concerned must be considered<sup>93</sup>. It follows that the degree of importance to be attached to each criterion for determining whether there has been a transfer within the meaning of the directive will necessarily vary according to the activity carried on or, indeed, the production or operating methods employed in the relevant undertaking, business, or part of a business.<sup>94</sup>

Given these abstract criteria, it is not surprising that, even after almost forty-five years, there still are questions on this matter to be answered. A

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86. Art. 7:662-666 *Burgerlijk Wetboek* [Civil Code], <http://www.dutchcivillaw.com/legislation/dccitle771010.htm> (Neth.).

87. Council Directive of Feb. 14, 1977, *supra* note 85, at art. 3.

88. *Id.*, at art. 1.1(a).

89. *Id.*, at art. 1.1(b).

90. Case 24/85, *Spijkers v. Benedik*, 1986 E.C.R. 01119, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61985CJ0024&from=EN>.

91. Case C-13/95, *Süzen v. Zehnacker Gebäudereinigung*, 1997 E.C.R. I-01259, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61995CJ0013&from=EN>.

92. *Id.*

93. *Id.*

94. *Id.*

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recent decision by the Hague Court of Appeals in the “Martinair/KLM” case<sup>95</sup> is demonstrative. The facts of the case were as follows:<sup>96</sup>

Martinair was originally an airline charter company. Since 1964, KLM owned fifty percent of the shares in Martinair. In 2008, KLM acquired full ownership. Since then, over a period of five years, KLM step by step dismantled Martinair (its former competitor). In 2009, parts of Martinair Cargo (MAC) and KLM Cargo were combined. MAC ground personnel were transferred to KLM Cargo (with preservation of seniority). In 2010, MAC and KLM Cargo were further commercially integrated, and a “bellies and combis first” strategy was implemented.<sup>97</sup>

In 2011, Martinair’s passenger division was terminated. Martinair personnel went to KLM in a starter’s position without seniority. Also in 2011, the commercial organizations of MAC and KLM Cargo were fully integrated, and seventy-one Martinair pilots (passenger and freight divisions) were transferred to KLM in a starter’s function without seniority. In 2013, KLM appointed two KLM senior managers as the full Martinair board. In 2013 and 2014, most Martinair operational departments were transferred to KLM.

The present situation is that MAC is now “Operating Carrier,” solely concluding ACMI (Aircraft, Crew, Maintenance, Insurance) contracts. It is no longer transporting its own freight but only transport service for other airlines. All other previous Martinair activities are now performed by KLM. Martinair personnel is limited to freight pilots. All other personnel for the Martinair activities are seconded by KLM.

In addition, KLM is Martinair’s sole customer. Since January 1, 2014, KLM is committed to purchase a yearly guaranteed number of flying hours from Martinair against a fixed tariff, plus fuel costs (no surcharge) and other flight-related costs (three percent surcharge). Under the arrangement, KLM charges Martinair for commercial and support services. All Martinair freight services to third parties (Etihad, Kenya) ceased in 2014.

In 2015, 181 Martinair freight pilots (in the present proceedings, 116 were left) instituted legal proceedings against KLM, demanding a “Declaration of Right” that, as of January 1, 2014, they are (by the workings of the Directive) employees of KLM with full seniority and demanding an order to offer them appropriate work within ninety days.

As mentioned above, the CJEU had earlier decided that the nature of the assets to be transferred, tangible or intangible, to constitute a “transfer of business,” depends largely on the nature of the business concerned.<sup>98</sup> The CJEU had also earlier decided that, in a situation which concerned the air

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95. Hof’s-Hague 08 juni 2021, ECLI:NL:GHDHA:2021:1023, Koninklijke Luchtvaart Maatschappij NV (Technically Martinair was not a party to the litigation),

96. *Id.* (from the Hague Court of Appeal considerations).

97. Under the “bellies and combis first” strategy, freight is primarily transported in the belly of a KLM passenger plane or a combined passenger/freight plane. *Id.* at ¶ 4.2. A MAC full freighter plane is only used as a last resort. *Id.* at ¶ 1(vii).

98. Case C-13/95, *Süzen v. Zehnacker Gebäudereinigung*, 1997 E.C.R. I-01259.

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transport sector (as in this *Martinair/KLM* case), the fact that tangible assets are transferred must be regarded as a key factor for the purpose of determining whether there is such a “transfer of a business.”<sup>99</sup> Such transfer of assets does not necessarily have to be accomplished by a transfer of property.<sup>100</sup>

Given this earlier decision, it is not surprising that both in the first instance<sup>101</sup> and on appeal, the pilots’ claims were denied.<sup>102</sup> *Martinair* was still operating its own freighters, flown by the *Martinair* pilots. Since there was no transfer of tangible assets (planes), there was no transfer of business.

But, upon appeal to the Dutch Supreme Court (*Hoge Raad*), the latter decision was quashed, and the case referred to the Hague Court of Appeal.<sup>103</sup> That Court came to a radically different conclusion: a transfer of enterprise *had* occurred, and the pilots were engaged as employees of KLM as of January 1, 2014.<sup>104</sup> The Court provided the following reasons:

(1) After KLM’s 100 percent acquisition, a commercial and operational integration occurred.<sup>105</sup> All air-freight activities had been taken over, except the full-freighter transport. Only the freight pilots were in *Martinair*’s employ, and *Martinair* is commercially completely dependent on KLM, its only customer.<sup>106</sup> The ACMI and cost, plus the contracts, resulted in KLM carrying the entire economic risk.<sup>107</sup>

(2) KLM had actual control over MAC’s fleet<sup>108</sup>; KLM owned three of its four planes (painted in KLM colors, the fourth was a spare plane). KLM determined how, where, and when this fleet was engaged (through its “bellies and combis first” strategy, the bellies and combis are both KLM).<sup>109</sup> Therefore, a transfer of (control over) the planes as critical assets occurred.

(3) A number of *Martinair* destinations were taken over by KLM.<sup>110</sup>

(4) There was a significant overlap between the freight transported by MAC and that transported by KLM.

The Court ordered KLM to offer each plaintiff work appropriate to their *Martinair* function and function level within twenty days and provide them with a written description of their work conditions.<sup>111</sup> But placement on the

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99. Case C-160/14, *Brito v. Portugal*, 2015 E.C.R. (Air Atlantis).

100. *Id.*; see also CJEU 15 December 2005, joined cases 232/04 and 233/04, ECLI:EU:C:2005:778 (*Securicor*).

101. Ktr.-Amsterdam 04 juni 2016 ECLI:NL:RBAMS:2016:1860.

102. Ktr. – Amsterdam 01 mei 2018 ECLI:NL:GHAMS:2018:1473.

103. HR 29 November 2019 ECLI:NL:HR:2019:1858.

104. *Id.*

105. *Id.* at ¶ 2.2(xv)

106. *Id.* at ¶ 3.4.1(j),

107. *Id.* at ¶ 3.4.1(f), (i).

108. *Id.* at ¶ 3.2.2.

109. *Id.* at ¶ 2.2(vii)

110. *Id.* at ¶ 3.3.1.

111. Ktr. – Amsterdam 08 juni 2021, ECLI:NL:GHDHA:2021:1023

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KLM seniority list in another position than the one resulting from the January 1, 2014, start of KLM employment (i.e., by taking into account the Martinair years) was refused. The Court of Appeal reasoned that, because the pilots were entitled to their January 1, 2014, salary, placement on the KLM seniority list (which by its nature is vastly different from the Martinair one) in a corresponding position was not a financial right that follows a transfer of enterprise.<sup>112</sup>

This decision shows that a transfer of business need not be a straightforward one-time sale or transfer of activities but can occur in a “creeping” fashion. Suddenly, it transpired that KLM’s workforce was enlarged by 181 (or 116) pilots.<sup>113</sup> It is certainly something that must be considered very carefully in such cases.

The seniority decision was a bitter blow to the pilots, who have again appealed to the *Hoge Raad*. Such an appeal typically takes between eighteen and twenty-four months. So maybe *The Year in Review* for 2022 will have a follow-up. If not, the 2023 one will.

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112. *Id.* at ¶ 4.37

113. *Id.* at p. 7.

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## **International Energy, Natural Resources, and Environmental Law**

JONATHAN MCGOWAN, JOSÉ SAMPAIO, MARIANA ARDIZZONE,  
RICARDO ALVES SILVA, AND SARA FRAZÃO\*

This article reviews some of the most significant international legal developments made in the areas of international energy, natural resources, and environmental law in 2021.

### **I. AFRICA**

#### **A. ANGOLA**

In line with the Executive's goal to boost the country's downstream subsector, the Minister of Mineral Resources, Petroleum and Gas approved the legal framework applicable to the importation and marketing of lubricating oils and greases, setting forth the principles applicable to engagement in the activities of importation and marketing of these products in Angola.<sup>1</sup> Likewise, the Minister approved the Regulations on Specifications of Lubricants Marketed in Angola covering lubricants to be used in four-stroke gasoline/diesel engines, automotive gears, stationary and/or industrial equipment powered by gasoline/diesel, recreational craft, and lubricating greases.<sup>2</sup>

On the upstream subsector, almost one year has elapsed since the approval of the new Legal Framework on Local Content in the Petroleum Industry (Presidential Decree 271/20, of 20 October 2020), which completely changed the paradigm of procurement of goods and services in the petroleum industry. The implementation of the new local content rules was dependent on the issuance of the lists of goods and services falling under the Exclusivity and Preference Regimes by the National Agency for Petroleum,

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\* By Ricardo Silva (Partner at Miranda Alliance's Lisbon Headquarters), Sara Frazão (Senior Associate at Miranda Alliance's Lisbon Headquarters), and José Sampaio (Trainee at Miranda Alliance's Lisbon Headquarters).

1. Executive Decree 30/21; Miranda Alliance, *New Legal Framework Applicable to Importation and Marketing of Lubricants*, LEGAL NEWS: ANGOLA, January - February 2021, <https://mirandalawfirm.com/en/insights-knowledge/publications/legal-news/angola-legal-news-january-and-february-2021> (last visited Sept. 29, 2021).

2. Executive Decree 31/21; Miranda Alliance, *Regulations on Specifications of Lubricants Approved*, LEGAL NEWS: ANGOLA, January - February 2021, <https://mirandalawfirm.com/en/insights-knowledge/publications/legal-news/angola-legal-news-january-and-february-2021> (last visited Sept. 29, 2021).

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Gas and Biofuels (*Agência Nacional do Petróleo, Gás e Biocombustíveis*, ANPG), which the ANPG released in October.<sup>3</sup>

**B. CAPE VERDE**

On the energy front, important statutes have been approved, including: (1) the legal framework for intensive energy consumers, which aims to foster energy efficiency and local energy production at the facilities of final consumers that have significant energy consumption;<sup>4</sup> (2) new Rules Applicable to Energy Services Companies, which was approved in the context of the National Energy Efficiency Action Plan and applies to all private entities wishing to provide energy services to final consumers, in particular energy efficiency services and local energy production services;<sup>5</sup> (3) an amendment to the Legal Framework for Exploitation of Mineral Mass, which resolves some contradictions in the organic powers and overcome practical problems in the application of the statute (e.g. powers for the granting of licenses);<sup>6</sup> (4) the Fossil Fuel Specifications for Road Transportation, which approved the specifications to be observed for gasoline and diesel in the domestic market;<sup>7</sup> and (5) the new Tariff Regulations for Fuel Sector, which defines a “periodic tariff review based on a maximum price system of the last three years, the components of the tariffs of regulated petroleum products, and the applicable regulatory system.”<sup>8</sup>

**C. GABON**

In January 2021, Gabon defined rules governing local development initiatives in the mining sector.<sup>9</sup> This decree details the obligations

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3. Miranda Alliance, *Local Content - Lists of Exclusivity and Preference Regimes released by ANPG*, LEGAL ALERT, <https://www.mirandalawfirm.com/en/insights-knowledge/publications/alerts/local-content-lists-of-exclusivity-and-preference-regimes-released-by-anpg> (last visited Oct. 29, 2021).

4. Decree-Law 35/2021; Miranda Alliance, *Legal Framework for Intensive Energy Consumers*, LEGAL NEWS: CAPE VERDE, April - July 2021, Cape Verde - Legal News - April to July 2021 - Legal News - Publications - Miranda Law Firm - Lawyers, International Legal Advice.

5. Decree-Law 46/2021; Miranda Alliance, *New Rules Applicable to Energy Services Companies*, LEGAL NEWS: CAPE VERDE, April - July 2021, Cape Verde - Legal News - April to July 2021 - Legal News - Publications - Miranda Law Firm - Lawyers, International Legal Advice.

6. Decree-Law 34/2021; Miranda Alliance, *Amendment to Legal Framework for Exploitation of Mineral Mass*, LEGAL NEWS: CAPE VERDE, April - July 2021, Cape Verde - Legal News - April to July 2021 - Legal News - Publications - Miranda Law Firm - Lawyers, International Legal Advice.

7. Order 38/2021; Miranda Alliance, *Fossil Fuel Specifications for Road Transportation*, LEGAL NEWS: CAPE VERDE, April - July 2021, Cape Verde - Legal News - April to July 2021 - Legal News - Publications - Miranda Law Firm - Lawyers, International Legal Advice.

8. Resolution 17/CA/2021; Miranda Alliance, *New Tariff Regulations for Fuel Sector*, LEGAL NEWS: CAPE VERDE, April - July 2021, Cape Verde - Legal News - April to July 2021 - Legal News - Publications - Miranda Law Firm - Lawyers, International Legal Advice.

9. Decree No. 0023/PR/MGPM of 22 January 2021.

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applicable to mining operators implementing Corporate Social Responsibility (CSR) projects, including with respect to the CSR Fund.<sup>10</sup>

In addition, after a series of delays imposed by the COVID-19 pandemic<sup>11</sup>, the 12th Licensing Round that launched in late 2018, in which twelve shallow-water and twenty-three deep-water blocks were put on offer, was recently concluded. Provisional licenses were awarded but remain subject to final agreement on the terms of the Production Sharing Contracts with the Government of Gabon.<sup>12</sup>

**D. DEMOCRATIC REPUBLIC OF THE CONGO**

In order to implement Congo's policy on nuclear safety, the accession to two nuclear conventions was authorized during 2021: (1) the Convention on Early Notification of a Nuclear Accident, which "is intended to ensure the notification of accidents that result or are likely to result in a release of radioactive material, which may lead to a transboundary release";<sup>13</sup> and (2) the Convention on the Physical Protection of Nuclear Material, which "targets the effective protection of nuclear material used for peaceful purposes in international transport or domestic use, storage, and transport."<sup>14</sup>

Moreover, "the ratification of the agreement between the Government of the Republic of Congo and the Government of the Russian Federation on the cooperation in the field of peaceful use of nuclear energy" was authorized.<sup>15</sup> This agreement sets forth that the cooperation between both States shall address, *inter alia*, "the creation, and development of the atomic energy infrastructure of Congo, the development of projects and the construction of nuclear power reactors and nuclear research reactors, the exploration of mineral materials (uranium 4), and the management of radioactive waste."<sup>16</sup>

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10. Miranda Alliance, *Rules on Local Content Projects Issued*, LEGAL NEWS: GABON, May 2021, Gabon - Legal News - May 2021 - Legal News - Publications - Miranda Law Firm - Lawyers, International Legal Advice.

11. Miranda Alliance, *12th Licensing Round has New Deadline*, LEGAL ALERT: GABON, May 2021, 12th Licensing Round has New Deadline - Alerts - Publications - Miranda Law Firm - Lawyers, International Legal Advice.

12. *12th Offshore Licensing Round*, GABON OFFSHORE, (last visited Oct. 30, 2021), <http://gabon12thround.com/>.

13. Law 21-2021; Miranda Alliance, *Ensuring Nuclear Safety*, LEGAL NEWS: REPUBLIC OF THE CONGO, May - July 2021, Republic of the Congo - Legal News - May through July 2021 - Legal News - Publications - Miranda Law Firm - Lawyers, International Legal Advice.

14. Law 22-2021; Miranda Alliance, *Ensuring Nuclear Safety*, LEGAL NEWS: REPUBLIC OF THE CONGO, May - July 2021, Republic of the Congo - Legal News - May through July 2021 - Legal News - Publications - Miranda Law Firm - Lawyers, International Legal Advice.

15. Law 20-2021; Miranda Alliance, *Ensuring Nuclear Safety*, LEGAL NEWS: REPUBLIC OF THE CONGO, May - July 2021, Republic of the Congo - Legal News - May through July 2021 - Legal News - Publications - Miranda Law Firm - Lawyers, International Legal Advice.

16. Miranda Alliance, *Cooperation with Russia for Safe and Peaceful Uses of Nuclear Energy*, LEGAL NEWS: REPUBLIC OF THE CONGO, May - July 2021, Republic of the Congo - Legal



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E. SAO TOME AND PRINCIPE

In order to promote a sustainable management of environmental resources and to respond to the indiscriminate mining and extraction of aggregates, a new statute setting forth the legal framework governing the exploration and extraction of aggregates throughout Sao Tome and Principe has been approved.<sup>17</sup> The main aspects of the new regime include, *inter alia*, the following: (1) as a rule, the extraction of sands and coastal aggregates is prohibited, except as expressly provided for in the law; (2) the extraction of sand and other coastal aggregates for scientific and academic purposes, recovery of beaches, and extraction on private land and in small quantities are subject to special rules; (3) the request and grant of licenses/authorizations for mining and extraction of aggregates is subject to a specific procedure; and (4) applicants for licenses/authorizations must comply with and fulfill a number of requirements (e.g., in respect of hygiene and safety at work and environmental protection).<sup>18</sup>

With respect to the oil and gas sector, the transfer of petroleum products price differential has been approved.<sup>19</sup> The transfer of petroleum products price differential applies to operators engaged in the wholesale sale of petroleum products, who are required to transfer the price differential generated by the sale of those products in favor of the state, to the public treasury's account.<sup>20</sup> Moreover, Production Sharing Agreements were made more flexible due to COVID-19.<sup>21</sup> The new statute approved an exceptional regime allowing production sharing agreement terms and conditions to become more flexible through an extension of up to twelve months of the exploration period. To benefit from this extension, the relevant party should request it from the National Petroleum Agency.<sup>22</sup>

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News - May through July 2021 - Legal News - Publications - Miranda Law Firm - Lawyers, International Legal Advice.

17. Law 9/2020: Miranda Alliance, *Ensuring Nuclear Safety*, LEGAL NEWS: REPUBLIC OF THE CONGO, May - July 2021, Republic of the Congo - Legal News - May through July 2021 - Legal News - Publications - Miranda Law Firm - Lawyers, International Legal Advice.

18. Miranda Alliance, *New Legal Regime for Mining and Extraction of Aggregates Approved*, LEGAL ALERT: SAO TOME AND PRINCIPE (2020), <https://www.mirandalawfirm.com/en/insights-knowledge/publications/alerts/new-legal-regime-for-mining-and-extraction-of-aggregates-approved> (last visited Oct. 12, 2021).

19. *See id.*

20. Miranda Alliance, *Transfer of Petroleum Products Price Differential Regulated*, LEGAL NEWS: SAO TOME AND PRINCIPE, September 2020, São Tomé and Príncipe - Legal News - September 2020 - Legal News - Publications - Miranda Law Firm - Lawyers, International Legal Advice (last visited Oct. 12, 2021).

21. *See* Resolution 25/2020.

22. Miranda Alliance, *Production Sharing Agreements Made More Flexible due to COVID-19*, LEGAL NEWS: SAO TOME AND PRINCIPE, September 2020, São Tomé and Príncipe - Legal News - September 2020 - Legal News - Publications - Miranda Law Firm - Lawyers, International Legal Advice.

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F. SENEGAL

Several important statutes on local content applicable to the petroleum industry in Senegal were finalized, including: (1) Decree 2020-2047 on the organization and operation of the National Local Content Monitoring Committee; (2) Decree 2020-2048 on the funding and operation of the Local Content Development Support Fund; (3) Decree 2020-2065 on the terms of participation of Senegalese investors in companies engaging in oil and gas activities, and which qualifies oil and gas upstream activities in the exclusive, mixed, and non-exclusive regimes;<sup>23</sup> and (4) Decree 2021-248 on the funding and operation of the Local Content Development Support Fund.<sup>24</sup> Moreover, in October 2021, the time period for the submission of bids for the Senegal 2020 Licensing Round, in which twelve offshore blocks are put on offer, has been extended once again to December 15, 2021.<sup>25</sup>

II. ASIA

A. TIMOR-LESTE

After several years of discussion and preparation, the much-awaited Mining Code has been approved by means of Law 12/2021.<sup>26</sup> “It is expected that the approval of this regime will create the conditions to attract the necessary investment for the development of the [Timor-Leste] mining sector.” “The new Code governs all aspects related to the exploration of mineral resources in the country, including, notably, the classification of minerals, the rights and duties of mineral rights’ holders throughout all the phases of the mining activities, and the procedures for the acquisition of such rights. The Code also defines the rules on the right to access and occupy land, relevant compensation for damages and relocation of local communities, as well as the environmental and fiscal frameworks applicable to the mining sector.”<sup>27</sup> “The *Autoridade Nacional de Petróleo e Minerais* (ANPM) shall act as the Regulatory Authority for the Mining Sector, and be

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23. Miranda Alliance, *Oil & Gas Industry: Additional Legislation on Local Content*, LEGAL ALERT: SENEGAL, May 2021, Oil & Gas Industry: Additional Legislation on Local Content - Alerts - Publications - Miranda Law Firm - Lawyers, International Legal Advice.

24. Miranda Alliance, *Funding and Operation of the Local Content Development Support Fund (Decree 2021-248)*, LEGAL ALERT: SENEGAL, May 2021, Oil & Gas Industry: Additional Legislation on Local Content - Alerts - Publications - Miranda Law Firm - Lawyers, International Legal Advice.

25. Miranda Alliance, *Senegal 2020 Licensing Round – Update*, LEGAL ALERT: SENEGAL, October 2021, Senegal 2020 Licensing Round – Update - Alerts - Publications - Miranda Law Firm - Lawyers, International Legal Advice.

26. Miranda Alliance, *New Mining Code Approved*, LEGAL ALERT: TIMOR-LESTE (2021), <https://www.mirandalawfirm.com/en/insights-knowledge/publications/alerts/new-mining-code-approved> (last visited Oct. 30, 2021).

27. Miranda Alliance, *Approval of the Mining Code*, LEGAL ALERT: TIMOR-LESTE (2021), <https://www.mirandalawfirm.com/en/insights-knowledge/publications/legal-news/timor-leste-legal-news-june-to-august-2021> (last visited Oct. 30, 2021).

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in charge of monitoring, supervising and regulating the mining activities carried out in the country.”<sup>28</sup>

### III. EUROPE

#### A. UNITED KINGDOM

Since the 2014 release of the Green Bond Principles (GBP), which is a list of voluntary guidelines developed by the International Capital Market Association (ICMA), the green bond market has continued to develop with a growing demand for a standardization of the principles through regulation.<sup>29</sup> In anticipation of the 26th United Nations Climate Change Conference of the Parties (COP26) in Glasgow, United Kingdom (UK), in November 2021, the government of the United Kingdom pushed through their own development of a green bond, called the Green+ Gilt.<sup>30</sup>

The goals of the Green+ Gilt were not only to generate revenue for environmental projects in the United Kingdom but also to set the global standard on green bond regulation with the intent of introducing mandatory reporting financial information relating to Environmental, Social, and Governance (ESG) investing by 2025.<sup>31</sup>

In June 2021, Her Majesty’s (HM) Treasury released the UK Government Green Financing Framework.<sup>32</sup> The framework outlines the specific uses of Green+ Gilt, dividing them into six categories: Clean Transportation, Renewable Energy, Energy Efficiency, Pollution Prevention and Control, Living and Natural Resources, and Climate Change Adaptation.<sup>33</sup> HM Treasury will provide annual allocation reporting, showing how Green+ Gilt revenues are expended by category and subcategory.<sup>34</sup> More significantly, the framework also provides environmental impact metrics and social co-benefits for each category, adding a tangible way to measure the effectiveness of the investments.<sup>35</sup>

The first issuance of the Green+ Gilt in September 2021 drew 100 billion pounds from investors, while the second issuance a month later by National

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28. Miranda Alliance, *New Mining Code Approved*, LEGAL ALERT: TIMOR-LESTE (2021), <https://www.mirandalawfirm.com/en/insights-knowledge/publications/alerts/new-mining-code-approved> (last visited Oct. 30, 2021).

29. See generally INT’L CAP. MKT. ASS’N, IMCA GREEN BOND PRINCIPLES (2021), <https://www.icmagroup.org/assets/documents/Sustainable-finance/2021-updates/Green-Bond-Principles-June-2021-100621.pdf>.

30. See generally UNITED KINGDOM DEBT MGMT. OFFICE, UK GOVERNMENT GREEN FINANCING FRAMEWORK (2021) <https://www.gov.uk/government/publications/uk-government-green-financing>.

31. *Id.* at 8.

32. *Id.* at 7.

33. *Id.* at 15–17.

34. *Id.* at 24.

35. *Id.* at 24–26.

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Savings & Investments (NS&I) netted 74.1 billion pounds.<sup>36</sup> The Green Financing Framework provides the regulatory framework for the UK green bond market to shift from voluntary standards under the Green Bond Principles to a standardized and regulated reporting standards under the UK government by the 2025 target date.

#### IV. South America

##### A. ARGENTINA

In December 2020, the Argentine Republic submitted its second nationally determined contribution (NDC) under the Paris Agreement, where it pledged to limit greenhouse gas emissions to an absolute and unconditional target, applicable to all sectors of the economy, with a limit of 359 million metric tons of carbon dioxide equivalent by 2030.<sup>37</sup> This calculation equates to a nineteen percent decrease in emissions by 2030 compared to the all-time high in emissions reached in 2007, and a 25.7 percent reduction from the previous NDC submitted in November 2016 in Marrakesh (483 million tons of carbon dioxide equivalent (tCO<sub>2</sub>eq)).<sup>38</sup>

Second, the Republic of Argentina committed to present its long-term development strategy with low-emissions, with the aim of achieving carbon-neutral development by 2050.<sup>39</sup> Subsequently, at the Latin American Summit on Climate Change, the Argentine Republic expanded its commitment to reduce its greenhouse gas (GHG) emissions by 2030 by two percent compared to those presented in the second NDC, so as not to exceed 349.16 MtCO<sub>2</sub>e (27.7% lower than the goals presented in 2016).

On November 1, 2021, the Guidelines for an Energy Transition Plan to 2030 were approved by the National Secretary of Energy.<sup>40</sup> The Guidelines posit that Argentina enters the global energy transition process facing a complex social and macroeconomic situation. Thus, the energy matrix by 2030 is required to be more inclusive, dynamic, stable, federal, sovereign, and sustainable, based on the significant potential of clean sources from wind, solar, hydroelectric, and bioenergy energy, as well as the development of nuclear energy and other energy vectors such as hydrogen, which will play a key role in achieving the energy transition.

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36. David Milliken, *UK's Second 'Green' Gilt Draws Over \$100 Billion in Demand*, REUTERS (Oct. 21, 2021), <https://www.reuters.com/article/britain-bonds/uks-second-green-gilt-draws-over-100-billion-in-demand-idUKKBN2HB0SS>.

37. See *Segunda Contribución Determinada a Nivel Nacional de la República Argentina*, ARGENTINA UNITED (2021), [https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Argentina%20Second/Argentina\\_Segunda%20Contribuci%C3%B3n%20Nacional.pdf](https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Argentina%20Second/Argentina_Segunda%20Contribuci%C3%B3n%20Nacional.pdf).

38. See *Primera Revisión de su Contribución Determinada a Nivel Nacional*, ARGENTINA REPUBLIC (2021), <https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Argentina%20First/17112016%20NDC%20Revisada%202016.pdf> (last visited May 4, 2022).

39. See *Argentina United*, *supra* note 37, at 4.

40. Resol-2021-1036-APN-SE Ministry of Argentina (2021), <https://www.boletin.official.gob.ar/detalleAviso/primera/252092/20211101>.

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To meet the proposed objectives and contribute significantly to the reduction of GHG emissions, the following lines of action were proposed:<sup>41</sup>

1. *Energy efficiency*: More efficient uses of energy consumption will be affected to reduce electricity and gas consumption by up to 8.5% in all sectors of the economy by the year 2030.
2. *Clean energy in GHG emissions*: More than ninety percent of the increase in installed capacity between 2022 and 2030 will come from low-emission energy sources, exceeding a fifty-five percent share in electricity generation and displacing the less efficient and more polluting thermal power plants, reducing about half of the emissions from the subsector. Additionally, one gigawatt (GW) of renewable power will be reached.
3. *Gasification*: Measures will be implemented to gasify energy consumption from onshore and offshore basins, which today is supplied by liquid fuels derived from petroleum. GHG emissions will be reduced through reliable, affordable, continuous, and less polluting supply, while taking advantage of the resources of the country. Moreover, Argentina will seek to transform itself into a regional and global scale natural gas supplier collaborating with the viability of the energy transitions of other countries.
4. *Development of national technological capacities*: Scientific and technological developments will be promoted to generate not only added value through the development of quality local suppliers but also continuous learning processes and accumulation of capabilities for environmental and energy transition goals and objectives for 2050. This path is projected to strengthen conditions for stability by reducing foreign exchange vulnerabilities.
5. *Energy system resilience*: Adjustments will be undertaken in the generation matrix, and in the high and medium voltage transportation and in distribution networks, to ensure optimal conditions of operation, even during extraordinary weather events. Access to affordable energy through the expansion of the electricity grid and the promotion of distributed generation, both in rural and urban environments, will reduce vulnerability of the population to extreme events.
6. *Federalization of energy development*: The energy transition will be conducted federally, with the active participation of the provinces in the planning and development of renewable and clean energy projects. The inclusion of local actors in essential projects for the energy transition will be sought, generating territorial and gender equity in the development of technological capacities.
7. *National strategy for the development of hydrogen*: A roadmap will be implemented to promote the production and export of hydrogen as a

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41. See *id.* at 36–38.

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new energy vector, which uses natural gas and considers other sources for its production.

The underlying policies to achieve those goals include on the demand side: (1) the penetration of electric vehicles, (2) an increase in the compressed natural gas (CNG) driven vehicle fleets, and (3) the diffusion of liquefied natural gas (LNG) for its use in long-distance transport (freight and passengers), resulting in an increase in natural gas consumption for transportation, which would go from 6.7 MMm<sup>3</sup>/d in 2019 to 21 MMm<sup>3</sup>/d in 2030. In the current trend scenario for the 2022-2030 period,<sup>42</sup> (1) an annual growth in electricity consumption of 2.4 percent is estimated, reaching 168 TWh, which could be reduced to 155 TWh (at a rate of 1.7 percent i.a.) if various energy efficiency measures are applied,<sup>43</sup> and (2) and an annual growth in natural gas consumption of 2.7 percent is estimated, reaching 103 million cubic meters per day TWh, which could be reduced to ninety-three million cubic meters per day, respectively, after implementing efficiency policies.<sup>44</sup>

On the supply side, two possible scenarios are proposed. The first scenario involves greater oil and natural gas requirements based on domestic capabilities, with a participation in the generation of renewable energies of twenty percent in the electricity matrix by 2030 (REN 20).<sup>45</sup> In the second scenario, higher natural gas requirements and relatively lower oil requirements are assumed together with a greater share of renewable energies in electricity generation reaching thirty percent (REN 30).<sup>46</sup> This proposal would require the addition of 11,875 MW (3,175 MW) more than in REN 20, at a rate faster than that demanded by the electric market, significantly increasing the required investments and foreign exchange. The first scenario is anticipated to shelter the country from incremental foreign exchange risks which could jeopardize economic growth and, ultimately, the very same energy transition process.

### 1. *New Biofuels Regulatory Framework*

On August 4, 2021, the National Congress enacted the Biofuels Regulatory Framework Law 27,640,<sup>47</sup> abrogating the prior Ethanol National Plan enacted under Law 23,287;<sup>48</sup> the Biofuels Promotional Framework enacted

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42. *See id.* at 38.

43. *See id.* at 40.

44. *See id.* at 41.

45. *See id.* at 49.

46. *See id.* at 50.

47. *See* National Law 27,640, Boletín Oficial de la República Argentina (B.O.) of August 4, 2021, <https://www.boletinoficial.gob.ar/detalleAviso/primera/247667/20210804>.

48. *See* National Law 23,287, Boletín Oficial de la República Argentina (B.O.) of October 25, 1983, <https://www.boletinoficial.gob.ar/detalleAviso/primera/7096767/19851025?busqueda=1>.

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under Law 26,093,<sup>49</sup> which would have otherwise expired on August 27, 2021; and the Bioethanol Promotional Framework enacted under Law 26,334,<sup>50</sup> ending the government incentives aiding the biofuels sector.

The Biofuels Regulatory Framework proved most controversial, receiving support from hydrocarbon-producing states and rejections from corn-, soybean-, and sugar-cane-producing states, where biofuel-producing facilities had been established under the auspices of the abrogated regimes.

The Biofuels Regulatory Framework covers all biofuels production, storage, marketing, and mixing activities and shall be in force until December 31, 2030, subject to a single five-year extension as may be determined by the National Executive Branch.<sup>51</sup> Governmental licensing is required to conduct any such activities, whereas hydrocarbon producers and refiners are restricted from owning or having interests in facilities for the production of biofuels.<sup>52</sup>

Section 8 of the Framework reduced the mandatory cut of biodiesel in diesel that is marketed within the national territory from ten percent to five percent. Moreover, the enforcement authority was empowered both (1) to raise the aforementioned mandatory percentage when deemed appropriate, depending on the supply of demand, the trade balance, the promotion of investments in regional economies and/or environmental or technical reasons and (2) to reduce it to a nominal percentage of three percent, when the increase in the prices of basic inputs for the production of biodiesel could distort the price of fossil fuels at gas stations for altering the proportional composition of the latter on the latter, or in situations of shortage of biodiesel by the processing companies authorized by the enforcement authority for the supply of the market.<sup>53</sup> The biodiesel cut shall be allocated to individual biodiesel producers on a prorated basis, subject to a cap of fifty thousand tonnes per year for companies with a higher scale,<sup>54</sup> except when volumes resulting therefrom are insufficient to meet the aggregate monthly demand.

The mandatory cut of bioethanol in gasoline remained at the previous twelve percent,<sup>55</sup> to be allocated in halves to sugar-cane-based and corn-based producers. But, as in the biodiesel case, the enforcement authority was empowered: (1) to reduce transitorily or to increase the allocation of the six percent cut to sugar-cane-based producers when deemed appropriate in light of the supply of demand, the trade balance, environmental or technical reasons, or the promotion of investments in regional economies; and (2) to

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49. See National Law 26,093, Boletín Oficial de la República Argentina (B.O.) May 15, 2006, <https://www.boletinoficial.gob.ar/detalleAviso/primera/7288104/20060515?busqueda=1>.

50. See National Law 26,093, Boletín Oficial de la República Argentina (B.O.) January 3, 2008, <https://www.boletinoficial.gob.ar/detalleAviso/primera/9209275/20080103?busqueda=1>.

51. See National Law 27,640; see also Miranda Alliance, *supra* note 11, § 1.

52. See *id.* § 5.

53. See *id.* § 8.

54. See *id.* § 11.

55. See *id.* § 9.

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increase or to reduce down to three percent the allocation of the six percent cut to corn-based producers when the increase in the prices of basic inputs for the production of corn-based bioethanol could distort the price of fossil fuels at the gas stations for altering the proportional composition of the latter on the latter, or in situations of shortage of biodiesel by the processing companies authorized by the enforcement authority for the supply of the market.<sup>56</sup>

Biodiesel and bioethanol will not be levied by the Liquid Fuels Tax and the Carbon Dioxide (CO<sub>2</sub>) Tax, established in Title III, Chapters I and II, respectively, of Law 23,966,<sup>57</sup> at any stage of production, distribution, and marketing. In the course of mixing such biofuels with fossil fuels, the tax shall be levied only on the fossil fuel component that integrates the mixture. The tax treatment provided for in this article shall apply until the date of completion of the regime and shall correspond insofar as the main raw materials used in the respective production processes are of national origin.

2. *National Hydrocarbons Promotion Bill*

On September 15, 2021, the National Executive Branch submitted to the National Congress a bill for a new Hydrocarbons Promotional Regime,<sup>58</sup> aimed at increasing hydrocarbons production and exports, increasing natural gas industrialization, adding domestic value along the supply chain, and attracting foreign and domestic investment to both the conventional and conventional hydrocarbons exploration and production, midstream, hydrocarbons industrialization, energy, and logistics infrastructure, to ease the domestic supply and export of hydrocarbons and by-products, including large-scale LNG liquefaction.

The Promotional Regime would last twenty years and be made up of several chapters with different eligibility criteria and benefits: (1) an Oil E&P chapter, (2) a Natural Gas E&P chapter, (3) a Low Productivity Oil Wells Chapter, (4) a General E&P, Industrialization & Transportation Chapter, (5) a Large Investors Chapter, (6) an Offshore Investments Chapter, and (7) a Domestic & Regional Suppliers Program. Moreover, support programs for energy sustainability and gender-based employment in the hydrocarbons industry were proposed. Additionally, a special set-off system to pay up to thirty percent of the fuels tax with accumulated net losses is available to investors who effectively invested in 2019-2020 more than \$1,000 million over one year.<sup>59</sup>

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56. *See id.* § 12.

57. *See* Restated Title III of Law 23,966 (approved by National Decree 518/1998), Boletín Oficial de la República Argentina (B.O.) of May 18, 1998, <https://www.boletinoficial.gob.ar/detalleAviso/primera/7178328/19980518?busqueda=1>.

58. *See id.*

59. *See id.* at Tit. VIII.



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Benefits common to all chapters include fiscal stability and stability in all other benefits under the Promotional Regime. Projects would be scrutinized by a special hydrocarbons investment council to be created.

Lastly, an amendment to the National Hydrocarbons Law<sup>60</sup> would be introduced to allow the granting of (1) natural gas underground storage concessions for a term of twenty-five years subject to evergreen ten-year extensions, (2) transportation concessions to eligible non-exploitation concession holders, and (3) firm capacity rights to new infrastructure or expansions to existing infrastructure.<sup>61</sup>

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60. See National Hydrocarbons Law 17,319 (Boletín Oficial de la República Argentina (B.O.) of June 30, 1967, <https://www.boletinoficial.gob.ar/detalleAviso/primera/7034356/19670630?busqueda=1>), as amended by the National Hydrocarbons Short Law 26,197 (Boletín Oficial de la República Argentina (B.O.) of January 5, 2007, <https://www.boletinoficial.gob.ar/detalleAviso/primera/9105067/20070105?busqueda=1>) and the National Hydrocarbons Law Amendment No. 27,007 197 (Boletín Oficial de la República Argentina (B.O.) of October 31, 2014, <https://www.boletinoficial.gob.ar/detalleAviso/primera/114480/20141031?busqueda=1>).

61. *Id.*

## **International M&A and Joint Ventures**

RENATA ANTIQUERA, JASON SALTZMAN, SYDNEY DENNIS-BIRNBAUM,  
FRANCISCO UGARTE, ALEJANDRA DAROCH, LUIGI PAVANELLO,  
PAWEL SIKORA, ANTON DZHUPLIN, KRISTINA AKALOVICH, NATELLA  
KORTIASHVILI, ALBERT GARROFÉ, IDOYA FERNÁNDEZ, LOLA TEJERO,  
AND MARK HOWARD\*

This article summarizes important developments during 2021 in international mergers and acquisitions (M&A) and joint ventures in Brazil, Canada, Chile, Italy, Poland, Russia, Spain, and the United Kingdom.

### **I. Brazil**

#### **A. STARTUP LEGAL FRAMEWORK**

On June 1, 2021, the Startups Legal Framework was enacted under Supplementary Law no. 182/2021 (SLF),<sup>1</sup> better regulating some critical issues for investors and investees. To be considered a startup, a company, apart from being incorporated as an individual entrepreneur, business company (limited liability company or corporation), cooperative, or non-business company for up to ten years, shall have had a gross revenue up to 16,000,000 Brazilian reais (BRL) in the previous calendar year, or proportional to the months of activity in the previous year; and either fit into the special regime of Inova Simples or have the use of innovative business models stated in its articles of incorporation, pursuant to the provisions of Article II or IV of Law 10,973/2004.<sup>2</sup>

Angel investors shall make capital contributions that are not part of the startup's equity, through contracts, such as convertible loans and stock

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\* Committee Editor — Anton Dzhuplin, a Partner at ALRUD Law Firm. Brazil — Renata Antiquera is a Partner at Pereira Pulici Sociedade de Advogados. Canada — Jason Saltzman is a Partner at Borden Ladner Gervais LLP and Sydney Dennis-Birnbaum is an Associate. Chile — Francisco Ugarte and Alejandra Daroch are Partners at Carey. Italy — Luigi Pavanello is a Partner at PLLC Legal. Poland — Pawel Sikora is a Partner at Kubas Kos Galkowski. Russia — Kristina Akalovich is an Associate at ALRUD Law Firm and Natella Kortiasvili is a Trainee. Spain — Albert Garrofé is a Partner at Cuatrecasas, where Idoya Fernández is an Of Counsel and Lola Tejero is a Senior Associate. United Kingdom — Mark Howard is a Partner at Charles Russell Speechlys.

1. See Lei No. 182, de 1 de Junho de 2021, Diário Oficial da União [D.O.U.] de 2.6.2021 (Braz.), [http://www.planalto.gov.br/ccivil\\_03/leis/lcp/Lcp182.htm](http://www.planalto.gov.br/ccivil_03/leis/lcp/Lcp182.htm) [<https://perma.cc/V4F7-F86V>].

2. See Lei No. 10,973, de 2 Dezembro de 2004, Diário Oficial da União [D.O.U.] de 3.12.2004 (Braz.) [http://www.planalto.gov.br/ccivil\\_03/\\_ato2004-2006/2004/lei/110.973.htm](http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2004/lei/110.973.htm) [<https://perma.cc/TN4B-4MK3>].

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options, among others listed in Article V of the SLF, and, therefore, shall not have the right to manage or to vote but shall be entitled to certain rights, as to examine books and documents and of receiving periodic remuneration.<sup>3</sup> If investors comply with these requirements, investors will neither be considered shareholders nor be liable for debts of the company because, under this regulatory framework, investors will not be subject to piercing of the corporate veil.<sup>4</sup>

The maximum term for an angel investment is seven years, and, once the investment is converted into equity, the investor is considered a shareholder for all purposes.<sup>5</sup> The SLF also allowed governmental bodies or agencies to implement regulatory sandboxes, that is, a set of simplified special conditions so that startups can receive temporary authorizations for the development of innovative businesses;<sup>6</sup> and the SLF expanded startups' access to the public market tenders, although it limits the amount of each such contracts to BRL 1,600,000.00, which is a low amount for projects involving complex technologies.<sup>7</sup>

Finally, the SLF modified some provisions of the Corporations Law,<sup>8</sup> such as allowing closely held companies to have one single officer facilitating access to the stock market to companies with annual gross revenues of less than BRL 500 million and allowing closely held corporations with annual gross revenues of up to BRL 78 million to publish their corporate acts electronically and their corporate books to be in mechanized or electronic format.<sup>9</sup>

#### B. ALTERATIONS TO CORPORATE LAWS

The enactment of Law no. 14.195/21, on August 26, 2021,<sup>10</sup> not only altered provisions of the Brazilian Civil Code<sup>11</sup> and the Brazilian Corporations Law,<sup>12</sup> but also facilitated the process of incorporating a business by allowing automatic issuance of operating licenses for medium

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3. *See id.*

4. *See id.*

5. *See id.*

6. *See id.*

7. *See id.*

8. *See* Lei No. 6,404, de 15 Dezembro de 1976, Diário Oficial da Unia~o [D.O.U.] de 17.12.1976 (Braz.), [http://www.planalto.gov.br/ccivil\\_03/leis/l6404consol.htm](http://www.planalto.gov.br/ccivil_03/leis/l6404consol.htm) [<https://perma.cc/G25U-3AMN>].

9. *See* Lei Complementar No 182, de 1 Junho de 2021, Diário Oficial da Unia~o [D.O.U.] de 2.6.2021 (Braz.), <https://www.in.gov.br/en/web/dou/-/lei-complementar-n-182-de-1-de-junho-de-2021-323558527> [<https://perma.cc/7V9H-7NYR>].

10. *See* Lei No. 14,195, de 26 de Augusto de 2021, Diário Oficial da Unia~o [D.O.U.] de 27.8.2021 (Braz.), [http://www.planalto.gov.br/ccivil\\_03/\\_ato2019-2022/2021/lei/L14195.htm](http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2021/lei/L14195.htm) [<https://perma.cc/HF42-VSZU>].

11. *See* Lei No. 10,406, de 10 de Janeiro de 2002, Diário Oficial da Unia~o [D.O.U.] de 11.1.2002 (Braz.), [http://www.planalto.gov.br/ccivil\\_03/leis/2002/l10406compilada.htm](http://www.planalto.gov.br/ccivil_03/leis/2002/l10406compilada.htm) [<https://perma.cc/WKC9-7MGD>].

12. *See id.*

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risk companies<sup>13</sup> and the registration of entrepreneurs and legal entities without a physical head office,<sup>14</sup> as well as exempting from notarization documents filed before the Boards of Trade, among others.<sup>15</sup> Alterations include the following:

- (1) Starting with the amendment to the Corporations Law,<sup>16</sup> allowing the election of non-resident officers, provided that they appoint a representative in Brazil to receive service of process, which is of particular interest to foreign shareholders;<sup>17</sup>
- (2) Protecting the minority shareholder by modifications to the Corporations Law, including the possibility of creating classes of preferred or common shares for publicly held and closely held corporations and of attributing plural voting to one or more classes of shares, subject to certain conditions and minimum quorums;<sup>18</sup>
- (3) Allowing closely held corporations to replace traditional corporate books by mechanized or electronic records under the terms of regulations still pending;<sup>19</sup> and
- (4) Regulating commercial notes, a security under the terms of Law No. 6385/76<sup>20</sup>, with the possibility of their issuance by limited liability companies and cooperatives.<sup>21</sup> The private offer of a commercial note may contain a clause allowing its conversion into equity interest, except in relation to corporations, which may be a useful instrument for operations in limited liability companies.<sup>22</sup>

## II. Canada

### A. INTRODUCTION

Canadian M&A activity reached new heights in the third quarter of 2021, soaring to its highest level since 2016, riding historically low interest rates and strong equity markets.<sup>23</sup> Returning to pre-pandemic levels, the aggregate deal value in the second quarter of 2021 was 93 billion Canadian

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13. *See id.* Lei No. 14.195, de 26 de Augusto de 2021 (Braz.).

14. *See id.*

15. *See id.*

16. *See* Lei No. 6.404, de 15 de Dezembro de 1976, article 146, para. 2 (Braz.).

17. *See* Lei No. 14.195, de 26 de Agosto de 2021 (Braz.).

18. *See id.*

19. *See id.*

20. *See* Lei No. 6,385, de 7 de Dezembro de 1976, Diário Oficial da União [D.O.U.] de 8.12.1976 (Braz.), [http://www.planalto.gov.br/ccivil\\_03/leis/l6385.htm](http://www.planalto.gov.br/ccivil_03/leis/l6385.htm) [<https://perma.cc/LG84-Q35H>].

21. *See* Lei No. 14.195, de 26 de Agosto de 2021 (Braz.).

22. *See id.*

23. *See* Maiya Keidan & Shariq Khan, *Canadian M&A Jumps 28% in Third Quarter, Market Volatility Could Slow Deals*, REUTERS (Oct. 7, 2021), <https://www.reuters.com/business/canadian-ma-jumps-28-third-quarter-market-volatility-could-slow-deals-2021-10-07/> [<https://perma.cc/5JFP-B2XH>].

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Dollars (CAD).<sup>24</sup> This surge in Canadian M&A activity has been propelled, in part, by continuing growth in the infrastructure and technology sectors. In addition, environmental, social, and governance (ESG) factors continue to grow as serious considerations for many market participants in M&A transactions.<sup>25</sup>

**B. INFRASTRUCTURE**

There have been over fifteen mega deals in fiscal year 2021, with the announced acquisition of Kansas City Southern by Canadian Pacific Railway Ltd. leading the group.<sup>26</sup> In the bidding war between railways, Canadian Pacific beat out Canadian National (CN) Railway in a \$27 billion deal to acquire Kansas City Southern, after U.S. regulators rejected a provision in CN Railway's acquisition proposal to use a voting trust structure.<sup>27</sup> The merger will create the first continental railroad to operate across Canada, the United States, and Mexico, allowing for unparalleled market reach, transportation alternatives, and economic growth.<sup>28</sup>

**C. TECHNOLOGY**

The year kicked off with Rogers Communication's announcement of its \$25 billion takeover of competitor Shaw Communications Inc. on March 15, 2021.<sup>29</sup> Rogers agreed to acquire all of the issued and outstanding Class A

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24. See David Kennealy & Daniel Taranovsky, *Canadian M&A Insights-Summer 2021*, KROLL (Aug. 3, 2021), <https://www.kroll.com/en/insights/publications/m-and-a/canadian-ma-insights-summer-2021> [https://perma.cc/PB24-KNGC]; see also John Emanoilidis, Karrin Powys-Lybbe, & Michael D. Amm, *Canadian M&A Outlook for 2022*, TORYS, <https://www.torys.com/our-latest-thinking/publications/2022/01/canadian-ma-outlook-for-2022> [https://perma.cc/2DQ6-6DET] (last visited Apr. 8, 2022).

25. See *id.*

26. See Stefanie Marotta, *Megadeals Fueling 'Unprecedented' Canadian Merger & Acquisition boom*, FIN. POST (June 17, 2021), <https://financialpost.com/fp-finance/megadeals-fuelling-unprecedented-canadian-merger-and-acquisition-boom> [https://perma.cc/T9XF-D99G].

27. See *Canadian National Not to Proceed with Deal for Kansas City Southern*, REUTERS (Sept. 15, 2021), <https://www.reuters.com/business/autos-transportation/canadian-national-not-proceed-with-deal-kansas-city-southern-2021-09-15/> [https://perma.cc/5ZJY-BZBW]; see also Ari Ashe, *US Regulator Rejects CN Voting Trust to Acquire KCS*, J. OF COM. ONLINE (Aug. 31, 2021), [https://www.joc.com/rail-intermodal/class-i-railroads/canadian-national-railway/us-regulator-rejects-cn-voting-trust-acquire-kcs\\_20210831.html](https://www.joc.com/rail-intermodal/class-i-railroads/canadian-national-railway/us-regulator-rejects-cn-voting-trust-acquire-kcs_20210831.html) [https://perma.cc/H4F3-83YJ].

28. See *Canadian Pacific, Kansas City Southern Will Merge into "The First USMCA Railroad," CPKC (UPDATED)*, RY. AGE (Mar. 21, 2021), <https://www.railwayage.com/freight/class-i/canadian-pacific-kansas-city-southern-will-merge-into-the-first-usmca-railroad-cpkc/> [https://perma.cc/P8LW-2PFK].

29. See Rogers Communications, Inc., *Rogers & Shaw to Come Together in \$26 Billion Transaction, Creating New Jobs & Investment in Western Canada & Accelerating Canada's 5g Rollout*, GLOB. NEWSWIRE (Mar. 15, 2021), <https://www.globenewswire.com/news-release/2021/03/15/2192622/0/en/Rogers-and-Shaw-to-come-together-in-26-billion-transaction-creating-new-jobs-and-investment-in-Western-Canada-and-accelerating-Canada-s-5G-rollout.html> [https://perma.cc/GG8Z-CDNU].

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and B shares of Shaw for a price of \$40.50 per share in case, reflecting a premium of approximately seventy percent to Shaw's Class B share price.<sup>30</sup> The transaction is expected to accelerate the delivery of 5G services across western Canada and will lead to the formation of Canada's largest wholly owned national network.<sup>31</sup> The deal is contingent on regulatory approval and is expected to close in the first half of 2022.<sup>32</sup> In the pendency between signing and closing, Rogers has attracted significant attention in relation to dissension among board members.<sup>33</sup> It is unclear whether the conflict will have a material impact on the transaction moving forward.<sup>34</sup>

**D. ENVIRONMENTAL, SOCIAL, AND GOVERNANCE**

Over the past few years, ESG has attracted significant attention in M&A transactions, and COVID-19 has accelerated market interest in implementing ESG practices in 2021.<sup>35</sup> Atin Prakash, senior manager of Sustainability Services at KPMG Canada, emphasized the recent desire for companies to integrate ESG factors into their corporate governance: "the last 12-18 months have been an almost watershed moment for ESG. It has expanded from what used to be a niche area for a few highly impact industries and social driven companies to something adopted across industries and geographies."<sup>36</sup>

Issuers need to be prepared for potential acquirers or investors to ask due diligence questions relating to the issuer's ESG practices.<sup>37</sup> Some market participants may not be willing to acquire an issuer with poor ESG policies or practices or may discount the price they would otherwise pay.<sup>38</sup>

Deal financing can also be challenging and more costly for issuers with poor ESG track records.<sup>39</sup> Some rating agencies will consider ESG practices

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30. *See id.*

31. *See id.*

32. *See id.*

33. Barbara Schecter & Bianca Bharti, *Edward Rogers Moves to Replace Five Directors After Being Ousted as Telecom's Chair*, FIN. POST (Oct. 22, 2021), <https://financialpost.com/telecom/edward-rogers-voted-out-as-chairman-of-board-at-rogers> [<https://perma.cc/5BZW-TRQZ>].

34. *See id.*

35. *See* Darrell Stonehouse, *2021 Top Operators Report: ESG Factors Becoming Integrated into Financial Risk Management*, JWN (Aug. 24, 2021), <https://www.jwnenergy.com/article/2021/8/24/2021-top-operators-report-esg-factors-becoming-int/> [<https://perma.cc/M4E9-YB9W>].

36. *See id.*

37. *See* PRICEWATERHOUSECOOPERS, *PRIVATE EQUITY'S ESG JOURNEY: FROM COMPLIANCE TO VALUE CREATION* 8–13 (2021), <https://www.pwc.com/gx/en/services/sustainability/publications/private-equity-and-the-responsible-investment-survey.html#cta-1> [<https://perma.cc/65YE-NZEB>].

38. *See* MATT ORSAGH ET AL., *ESG INTEGRATION IN CANADA*, CFA INST. 14–26 (May 12, 2020), <https://www.cfainstitute.org/en/advocacy/policy-positions/esg-integration-in-canada> [<https://perma.cc/ZHT8-2KXF>].

39. *See* *Global M&A Industry Trends: 2022 Outlook*, PRICEWATERHOUSECOOPERS (2022), <https://www.pwc.com/gx/en/services/deals/trends.html#esg> [<https://perma.cc/E6P6-MTBJ>]; *see also* Robert Rapier, *The Cost of Ignoring ESG*, FORBES (Aug. 25, 2021), <https://www.forbes.com/>

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when assigning a rating.<sup>40</sup> If an issuer receives a lower rating, financing is likely to be harder or more expensive to obtain.<sup>41</sup> ESG ratings can also affect an issuer's ability to access capital markets, which can lead to a higher market valuation.<sup>42</sup> By incorporating ESG practices, companies may be able to demonstrate their attentiveness to global issues while shielding against business liabilities, such as climate change.<sup>43</sup> The growing trend towards adopting ESG practices provides insight into the demands companies can expect from potential buyers and investors.<sup>44</sup> Failure by a company to integrate ESG into their corporate governance presents many risks, such as negative publicity or shareholder disapproval, which may affect a proposed or completed transaction.<sup>45</sup>

### E. CONCLUSION

M&A activity continues to progress as companies work beyond the pandemic.<sup>46</sup> Infrastructure and technology focused deals have represented significant transactions in 2021.<sup>47</sup> In addition, we expect to continue seeing that issuer ESG practice will be a factor in the success of potential M&A deals.<sup>48</sup>

## III. Chile

By the end of 2021, the number of disclosed M&A deals in Chile totaled 349, representing a total aggregate value of \$18 billion.<sup>49</sup>

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sites/rpapier/2021/08/25/the-cost-of-ignoring-esg/?sh=CF624ce3d285 [https://perma.cc/V5KB-97NL].

40. See ORSAGH ET AL., *supra* note 38.

41. See Rapier, *supra* note 39.

42. *ESG's Emerging Leading Role in Capital Markets*, MORGAN STANLEY (Mar. 12, 2021), <https://www.morganstanley.com/ideas/corporate-esg-capital-markets> [https://perma.cc/DV9N-4XM5].

43. See *id.*

44. See Jean-François Gagnon, *The Rise of ESG Investing*, EY (Mar. 31, 2021), [https://www.ey.com/en\\_ca/financial-services/the-rise-of-esg-investing](https://www.ey.com/en_ca/financial-services/the-rise-of-esg-investing) [https://perma.cc/FT6Q-3X2S].

45. See EAST & PARTNERS, *CANADA ESG FINANCING A MATURING MARKET 6* (2018), <https://www.riacanada.ca/content/uploads/2019/01/Canada-ESG-Sustainable-Financing-English.pdf> [https://perma.cc/7SNF-NED4] (last visited Apr. 9, 2022).

46. See Curtis Cusinato et al., *Canada's M&A Landscape: Q1 2022 Looking Ahead*, JD SUPRA (Apr. 5, 2022), <https://www.jdsupra.com/legalnews/canada-s-m-a-landscape-q1-2022-and-7632162/> [https://perma.cc/2MAS-3ZDZ].

47. See *generally* Marotta, *supra* note 26; Rogers Communications, *supra* note 29.

48. See Cusinato et al., *supra* note 46.

49. See CHILE: ANNUAL REPORT 2021, TRANSACTIONAL TRACK RECORD 2-9 (2022), <https://www.ttrecord.com/en/publications/market-reports/monthly-report-chile/Chile-Annual-Report-2021/2077/> [https://perma.cc/2VFY-MFN4].

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A. NEW MERGER CONTROL REGULATION

A new regulation regarding the mandatory or voluntary merger control notification, which is required under Title IV of Decree Law No. 211, came into force on November 2, 2021 (New Regulation).<sup>50</sup> The New Regulation streamlines the information requested by the National Economic Prosecutor's Office (FNE, by its Spanish acronym) to analyze transactions that do not raise significant antitrust risks, to focus the agency resources on complex transactions.<sup>51</sup>

Further, new transactions subject to the simplified notification procedure are incorporated: (1) transactions involving the acquisition of individual control over an economic agent in which the acquirer already had joint control and (2) transactions consisting in a joint venture in which the new entity competes in a different market than the one where the joint venture's parties and their related parties are active, among others.<sup>52</sup>

B. REGISTRATION EXEMPTION FOR PUBLIC OFFERINGS OF SECURITIES

On February 22, 2021, the Financial Market Commission (CMF, by its Spanish acronym) issued General Rule No. 452 (NCG 452).<sup>53</sup> The new rule provides that some public offerings of securities are exempted from the requirement of registration of the issuer or the security, as the case may be, regardless of whether such public offerings are carried out on or off-exchange.<sup>54</sup> According to NCG 452, the following public offerings are exempted from the registration requirement: (1) offerings whereby the securities may only be purchased by qualified investors; (2) offerings carried out on national stock exchanges, provided that the total accumulated amount to be raised by the issuer or offeror in the twelve months following the first offer made on a stock exchange does not exceed the equivalent of 100,000 Chilean pesos (approximately \$3,800,000) and that the offeror or the issuer complies with the information requirements that the respective stock exchange has established for the protection of investors in order to make the corresponding offering; (3) offerings whereby each transaction is perfected only if the investor acquires at least two percent of the capital of the issuer of the securities; (4) offerings whose sole purpose is employee compensation; and (5) offerings of securities that grant their acquirors a right of

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50. See Decreto No. 41, Aprueba el Reglamento sobre Notificación de una Operación de Concentración, y Deroga Decreto Supremo que Indicia, Mayo 7, 2021, DIARIO OFICIAL [D.O.] (Chile), <https://www.fne.gob.cl/wp-content/uploads/2021/11/Reglamento-N%C2%B041-D.O.-02.11.2021.pdf> [<https://perma.cc/5E4B-GBDT>].

51. See *id.*

52. *Id.* at art. 4.

53. See Norma de Carácter General No. 452, Comisión para el Mercado Financiero, Febrero 22, 2021, [https://www.cmfchile.cl/normativa/ncg\\_452\\_2021.pdf](https://www.cmfchile.cl/normativa/ncg_452_2021.pdf). [<https://perma.cc/WH2M-6TFS>].

54. See *id.*



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membership, use or enjoyment of facilities or infrastructure of educational, sport or recreational establishments.<sup>55</sup>

C. AMENDMENTS TO THE STOCK CORPORATIONS AND SECURITIES  
MARKET REGULATIONS

On April 13, 2021, a new law promoting transparency and reinforcing the responsibilities of market agents introduced several amendments to Law No. 18,045 on Securities Market and Law No. 18,046 on Corporations (New Law).<sup>56</sup> The New Law covers multiple topics related to market agents and pension advisors. Some of the most relevant amendments are: (1) the integration and interconnection, in real time, of local stock exchanges;<sup>57</sup> (2) the requirement to implement control policies, procedures, and systems intended to timely disclose material events and to avoid any leakages, increasing penalties, creating new sanctions, and expanding the list of people subject to these rules;<sup>58</sup> (3) the reinforcement of the oversight powers of the CMF, authorizing the commission to request information from subsidiaries of a listed corporation;<sup>59</sup> (4) the adoption of a thirty-day blackout period for certain insiders prior to the disclosure of the financial statements;<sup>60</sup> (5) the presumption of liability of directors of a corporation who approve related party transactions in contravention of the law;<sup>61</sup> (6) changes to the regulation of independent directors and the audit committee, including the duty of said committee to provide its opinion on the company's policy of regular operations;<sup>62</sup> and (7) the creation of the "anonymous whistleblower" to facilitate voluntary collaboration with investigations carried out by the CMF, being entitled to receive a percentage of the fines imposed by the CMF in the corresponding investigation.<sup>63</sup>

IV. Italy

A. GOLDEN POWER ENFORCED IN ITALY

The Italian Government has been quite busy enforcing the Golden Power legislation in late 2021.<sup>64</sup> First, it blocked the acquisition of the Italian

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55. *See id.*

56. *See* Law No. 21314, Establece Nuevas Exigencias de Transparencia y Refuerza Las Responsabilidades de los Agentes de los Mercados, Regular la Aseoría Previsional, y otras Materias que Indica, Abril 13, 2021, DIARIO OFICIAL [D.O.] (Chile), <https://www.bcn.cl/leychile/navegar?idNorma=1158144&tipoVersion=0> [<https://perma.cc/2SK5-MLXW>].

57. *See id.* at art. 1.

58. *See id.*

59. *See id.* at art. 2.

60. *See id.* at art. 1.

61. *See id.* at art. 4.

62. *See id.* at art. 1.

63. *See id.*

64. The power to prohibit or impose restrictions/conditions to an investment by foreign persons in certain industries deemed strategic for the Republic of Italy. *See* Legge 21/2012, as

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semiconductor manufacturer, LPE SpA, by the Chinese company Shenzhen Investment Holdings Co.<sup>65</sup> The second case, discussed below, “is far more intriguing and looks like a spy story.”<sup>66</sup>

The Italian company involved is Alpi Aviation Srl (Alpi)—a company based in Northeast Italy operating in the light and ultralight aircrafts business and, more importantly, in the unmanned aerial vehicle (UAV) business, also known as the drones business—is a supplier of military UAVs to the Italian Department of Defense.<sup>67</sup> “In addition, Alpi has executed a joint venture with a state-owned company for the supply to Italian Department of Defense of other military products.”<sup>68</sup> As such, Alpi became subject to not only the Golden Power rules but also other quite stringent rules applicable to suppliers of military products, including mandatory communications as to the company and shareholders structure and any changes to the same, as well as sharp limitations and the need of specific authorizations for any kind of export of military products on a temporary basis.<sup>69</sup>

While investigating an allegedly improper use of a small airfield belonging to the Italian armed forces, the Italian investigators, led by the Pordenone District Attorney Office, discovered that a seventy-five percent controlling participation in Alpi was sold in 2018 to a Hong Kong based company called Mars Information Technology Co. for a substantial price<sup>70</sup> (45 thousand Euros par value shares sold for 3.9 million Euros per share). Moreover, according to the Italian investigators<sup>71</sup>:

- (i) [T]he two ultimate owners of the participation are two Chinese state owned companies, something that was not disclosed and masked by

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amended and supplemented by Presidential Decree 85/2014, Prime Minister Decree 108/2014, Presidential Decree 35/2014, Presidential Decree 86/2014, EU Regulation 452/2019, Law Decree 105/2019 and Law Decree 23/2020. See *Italy's Enforcement Of 'Golden Power' Law Signals Potential Increase of Foreign Direct Investment Scrutiny, Says Globaldata*, GLOBALDATA (Feb. 22, 2022), <https://www.globaldata.com/italys-enforcement-golden-power-law-signals-potential-increase-foreign-direct-investment-scrutiny-says-globaldata/> [<https://perma.cc/ZL28-EJF8>].

65. See Giuseppe Fonte, *REFILE-Italy Vetoes Takeover of Semiconductor Firm By Chinese Company Shenzhen – Sources*, REUTERS (Apr. 9, 2021, 9:35 AM), <https://www.reuters.com/article/china-italy-semiconductors/refile-italy-vetoes-takeover-of-semiconductor-firm-by-chinese-company-shenzhen-sources-idUSL8N2M22LS> [<https://perma.cc/3LA3-XEHX>].

66. See Luigi Pavanello, *The Italian Government Enforces the Golden Power*, INTERNATIONAL M&A AND JOINT VENTURES COMMITTEE NEWSLETTER (AM. BAR ASS'N SECTION OF INT'L L.) Nov. 11, 2021, at 3–4, [https://www.americanbar.org/content/dam/aba/administrative/international\\_law/newsletter/2021/2021-imajv-newsletter-fall.pdf](https://www.americanbar.org/content/dam/aba/administrative/international_law/newsletter/2021/2021-imajv-newsletter-fall.pdf). [<https://perma.cc/2HXB-BMG4>] [hereinafter *M&A Newsletter*].

67. See *id.*

68. See *id.* at 3.

69. Legge 9 luglio 1990, n.185, G.U. July 14, 1990, n.163 (It.).

70. See Pavanello, *supra* note 66.

71. See Gabriele Carrer, *Italian Drone Maker Under Investigation After Chinese Takeover*, DECODE 39 (Sep. 2, 2021), <https://decode39.com/1906/alpi-aviation-gdf-china/> [<https://perma.cc/2DPN-ZPFV>].

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means of an elaborate corporate “smoke screen,” and (ii) it was the intention of the new management of Alpi to transfer the production to Wuxi, the alleged center of the research and development of the Chinese artificial intelligence.<sup>72</sup>

This means that the transaction was not an investment in Italy, but rather an acquisition of know-how and a transfer of technology from Italy to China.<sup>73</sup> Last but not least, in 2019, Alpi had illegally exported a drone to the Shanghai Import Fair by declaring in the customs documentation that it was a radio-controlled plane.<sup>74</sup>

Currently, there are six persons under criminal investigation (three Italians and three Chinese nationals) for (1) failure to request the mandatory prior authorization required by the Golden Power legislation before implementing the share transfer, (2) failure to provide true and accurate information and documentation in respect of the transaction, and (3) violation of the laws and regulation regarding Department of Defense suppliers and experts of military products and equipment.<sup>75</sup>

In addition to the criminal investigation, an administrative file is now before the Italian Government for an alleged violation of the Golden Power rules and regulations because it appears that no prior authorization has been filed or requested and required information and documentation was not filed, has been purposely filed late, or has been filed incomplete or unclear.<sup>76</sup>

The sanction that could be imposed and enforced by the Government, pursuant to Articles I and II of Law Decree 21/2020, could be quite stiff, namely: (1) declaring the whole transaction, including any resolution, agreement, or deed executed in connection therewith, null and void;<sup>77</sup> (2) suspending voting rights;<sup>78</sup> (3) imposing the parties to restore—at their cost and expense—the status *quo ante*, that is, in this case, the shareholding and corporate situation of Alpi before the implementation of the voided transaction;<sup>79</sup> (4) imposing a fine of up to twice the value of the voided transaction (in the Alpi case, up to nearly 8 million Euros) with a minimum of at least one percent of the sales generated by the companies involved as resulting from the latest financial statements;<sup>80</sup> and (5) imposing sanctions upon the company (in this case, Alpi) who had approved the transactions.<sup>81</sup> At the time of the writing of this article, the Italian Government had not

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72. See Pavanello, *supra* note 66 at 3.

73. Carrer, *supra* note 71.

74. *See id.*

75. Pavanello et al., *supra* note 66 at 3.

76. *Id.*

77. See Stefano Crosio et al., *Italy Enacts New Anti-Raider Rules to Protect Strategic Assets*, JD SPURA (Dec. 4, 2017), <https://www.jdsupra.com/legalnews/italy-enacts-new-anti-raider-rules-to-84037/> [<https://perma.cc/BN2X-E5MX>].

78. *See id.*

79. See Pavanello, *supra* note 66, at 3.

80. *See id.*

81. *See id.*

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issued its decision. But, on March 11, 2022, the Italian Government decided to declare the whole transaction null and void,<sup>82</sup> thereby imposing the return to the status *quo ante*, which is the harshest of the sanctions available under the law.<sup>83</sup> It is not clear whether any monetary sanctions have been imposed (from 8 up to 280 million Euros),<sup>84</sup> although it seems quite likely in light of the sanction imposed.<sup>85</sup>

The decision is in line with the Golden Power policy pursued by the Draghi-led Italian Government, which has exercised the Golden Power four out of the six times, enforcing the same since the enactment of the legislation.<sup>86</sup> It is a clear indication of the government's willingness to protect Italian "strategic assets" from foreign acquisitions.<sup>87</sup>

## V. Poland

### A. THE NEW FORM OF CAPITAL COMPANY

The provisions introducing the new form of capital private company—a simple joint-stock company (JSC)—to the Polish Commercial Companies Code entered into force on July 1, 2021.<sup>88</sup> A key goal of the amended act was to fill the gap in the Polish legal system resulting from the lack of adequate, available forms of doing business, which would fully respond to the practical requirements of start-up companies and special purpose

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82. Giuseppe Fonte, Angelo Amante, & Gavin Jones, *EXCLUSIVE Italy Annuls Sale of Military Drones Firm to Chinese Investors, Sources Say*, REUTERS (Mar. 10, 2022), <https://www.reuters.com/world/exclusive-italy-annuls-sale-military-drones-firm-chinese-groups-sources-say-2022-03-10/>.

83. GIOVANNI B. SANDICCHI, LATHAM & WATKINS, *ITALY'S LIQUIDITY DECREE EXTENDS FOREIGN INVESTMENT REGULATION IN RESPONSE TO COVID-19* 1–3 (2020), <https://www.lw.com/thoughtLeadership/Italys-Liquidity-Decree-Extends-Foreign-Investment-Regulation-in-Response-to-COVID-19>.

84. See Ferigo Foscari et al., *COVID-19: Italy Expands Golden Power Review of Foreign Investments*, WHITE & CASE (Apr. 10, 2020), <https://www.whitecase.com/publications/alert/covid-19-italy-expands-golden-power-review-foreign-investments>.

85. See *id.*

86. See *Italy Extends Vetting Powers to Protect Key National Assets*, REUTERS (May 9, 2022), <https://www.reuters.com/business/finance/italy-extends-vetting-powers-protect-key-national-assets-2022-05-09/>.

87. See Giuliana Lampo, *Italy's Exercise of Foreign Investment Screening Power against Chinese Takeover: An Assessment under International Law*, 1 ITALIAN REV. OF INT'L AND COMP. L. 433, 435–37 (2021).

88. See *A Simple Joint-Stock Company: A New Type of a Company*, ECOVIS (June 24, 2021), <https://www.ecovis.com/poland/blog/a-simple-joint-stock-company-a-new-type-of-a-company/> [<https://perma.cc/5T9X-M2GG>]; Ustawa z dnia 19 lipca 2019 r. o zmianie ustawy – Kodeks spółek handlowych oraz niektórych innych ustaw [Act of July 19, 2019 amending the Act – Code of Commercial Companies and certain other acts] (Dz.U. 2019, item 1655).

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vehicles (SPV) and facilitate developing joint venture investments due to an extensive mechanism for raising capital through the issuance of shares.<sup>89</sup>

The fundamental aspect of a simple JSC is the minimal amount of share capital of one Polish zloty, which shall not be determined in a company deed.<sup>90</sup> Remarkably, investors have the convenience of possibly taking up the shares in exchange for non-cash contributions, particularly for the performance of work or services.<sup>91</sup> Shares shall not have a nominal value, will not constitute part of share capital, and will be indivisible.<sup>92</sup> The shareholders of a simple JSC are not statutorily obliged to make their contributions in full prior to the registration of the company.<sup>93</sup> In order to establish the company, the shareholder is only required to make a contribution to cover the share capital in the minimum amount, and the rest of the contributions may be made within three years from the date of entry of the company in the register.<sup>94</sup> This applies to both cash and non-cash contributions, regardless of whether they are allocated to the share capital.<sup>95</sup>

Another significant advantage of a simple JSC, compared to the prior existing forms, is simplified liquidation.<sup>96</sup> According to Article 300, paragraph one, in the event of liquidation, the entire company's assets may be taken over by a designated shareholder, upon whom a duty to satisfy creditors and the remaining shareholders is imposed.<sup>97</sup> The procedure is also significantly shorter, as the liquidators shall give the announcement about the liquidation of the company and the opening of liquidation only once, summoning creditors to present their receivable debts within three months from this date.<sup>98</sup> (In a JSC, two announcements are required,<sup>99</sup> and the period for the creditors to file their claims is six months from the last announcement.)<sup>100</sup>

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89. See Dominik Korybalski, *Simple Joint Stock Company - Only For Startups?*, KONIECZNY WIERBZICKI (Mar. 9, 2021), <https://koniecznywierzbicki.pl/en/simple-joint-stock-company-only-for-startups/> [https://perma.cc/8YC5-GQHM].

90. See Ustawa z dnia 19 lipca 2019 r. o zmianie ustawy – Kodeks spółek handlowych oraz niektórych innych ustaw [Act of July 19, 2019 amending the Act – Code of Commercial Companies and certain other acts], at art. 300<sup>2</sup> § 1.

91. See *id.* art. 300<sup>2</sup> § 2.

92. See *id.* art. 300<sup>2</sup> § 3.

93. See *id.* art. 300<sup>9</sup> § 1.

94. See *id.*

95. See *id.* at art. 300<sup>10</sup> § 1.

96. See *id.* at art. 300<sup>121</sup> §§ 2-3.

97. See *id.*

98. See *id.* art. 300<sup>121</sup> § 1.

99. See *id.* art. 465 § 1.

100. See *id.* art. 465 § 2.

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**B. DEVELOPMENTS IN M&A AND THE TRANSFORMATIONS OF COMPANIES**

The Amendment to the Polish Commercial Code that put forward the field of mergers came into force on January 1, 2021.<sup>101</sup> Importantly, the regulation relates to mergers of companies by acquisition (*per incorporationem*) and simplifies merger proceedings by excluding the mandatory increase of share capital by the acquiring company.<sup>102</sup> The purpose of the regulation was to expand the possibility of a merger by taking into consideration the new type of capital company—a simple JSC—and to improve the performance of reverse mergers, in which the acquiring company is a subsidiary and the acquired company is a parent company.<sup>103</sup> Moreover, the amendment provides the possibility for the acquiring company to grant shares without a nominal value (no-par value stock).<sup>104</sup> Pursuant to Article 515, paragraph two, the acquiring company is allowed to acquire its own shares or stocks for the purpose of issuing them to the shareholders of the acquired company, if the total nominal value of the shares acquired for that purpose does not exceed ten percent of the acquiring company's share capital.<sup>105</sup>

The novelty in the area of transformations of companies is that a shareholder may not complain against a resolution on the transformation of company solely on the grounds of objections concerning the value of shares determined for the purpose of a repurchase<sup>106</sup> but is still entitled to assert his rights pursuant to Article 576.<sup>107</sup> The ratio of such regulation is the maximum prevention from slowing down the process of companies' transformation.<sup>108</sup>

**VI. Russia**

Continuing the trend of bringing the Russian legislation in line with the world's best practices in the M&A and joint ventures sphere and making investments in Russian companies more economically advantageous and statutorily protected, a new unified mechanism of convertible loans has been implemented,<sup>109</sup> and the Russian Supreme Court came up with clarifications

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101. See Ustawa z dnia 30 sierpnia 2019 r. o zmianie ustawy – Kodeks spółek handlowych oraz niektórych innych ustaw [Act of Aug. 30, 2019 amending the Act – Code of Commercial Companies and certain other acts] (Dz.U. 2019, item 1798).

102. See *id.* at art. 1 (42).

103. See *id.*

104. See *id.*

105. See *id.*

106. See Ustawa z dnia 19 lipca 2019 r. o zmianie ustawy – Kodeks spółek handlowych oraz niektórych innych ustaw [Act of July 19, 2019 amending the Act – Code of Commercial Companies and certain other acts], at art. 1 (25).

107. See *id.*

108. See *generally id.*

109. See *generally* Alexey Chertov et al., *In Brief: The Legal Framework for Public M&A in Russia*, LEXOLOGY (2021), <https://www.lexology.com/library/detail.aspx?g=4611893b-f43c-454f-91c4-d697fc192860> [<https://perma.cc/M7DD-8S2D>].

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on the status of ex-spouse following division of marital property, which includes participatory interest in a limited liability company (LLC).<sup>110</sup>

Starting from July 13, 2021, investors may eventually use a convertible loan agreement (CLA) to structure M&A deals, requiring investments to a Russian target company under a debt-to-equity conversion model.<sup>111</sup> CLA is defined as a loan agreement, under which the lender is entitled at its discretion, instead of claiming the repayment of money or part thereof to order the non-public company (debtor) to increase its charter capital or existing lender's equity ratio.<sup>112</sup>

Implementation of a CLA is aimed to replace various mixed constructions that used to be popular in the Russian market and involved a standard loan agreement accompanied by contractual obligations under a corporate agreement to provide the lender with an equity interest or call options with further set-off against the company's debt.<sup>113</sup> Automatic conversion of debt to equity is an essential aspect of the new mechanism, which decreased risks associated with outdated models and is performed by notary filing (for LLCs) or registrar filing (for JSCs) without any input by the debtor or its participants/shareholders.<sup>114</sup> This is reached by the necessity to obtain the preliminary unanimous consent of the debtor's participants or shareholders at the stage of CLA execution.<sup>115</sup> Nevertheless, the notary or registrar filing may not be used in case the debtor objects against the debt-to-equity conversion, which may still eventually lead the parties to litigation.<sup>116</sup> Also,

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110. See Federal'nyi Zakon [Federal Law of the Russian Federation on Amendments to Certain Legislative Acts of the Russian Federation] July 2, 2021, No. 354, <http://publication.pravo.gov.ru/Document/View/0001202107020081> [<https://perma.cc/FU59-7U4G>] [hereinafter Law No. 354-FZ]; Cassation appeal by Dmitry Germanovich Plaksin against the decision of the Moscow Arbitration Court, Supreme Court of the Russian Federation Apr. 6, 2021, No. 305-ES20-22249, [http://vsrf.ru/stor\\_pdf\\_ec.php?id=1984588](http://vsrf.ru/stor_pdf_ec.php?id=1984588) [<https://perma.cc/E4RU-3Z8T>] [hereinafter Case No. 305-ES20-22249].

111. See Evgenia Teterenkova & Olga Matveyeva, *The Convertible Loan: A Familiar Tool with New Rules*, DENTONS (July 16, 2021), <https://www.dentons.com/en/insights/alerts/2021/july/15/the-convertible-loan-russia> [<https://perma.cc/88WG-SKYD>]; Law No. 354-FZ, *supra* note 104.

112. See Federal'nyi zakon Об обществах с ограниченной ответственностью Об акционерных обществах [Federal Law of the Russian Federation About Limited Liability Companies] No. 96, Jan. 28, 1998, <http://pravo.gov.ru/proxy/ips/?docbody=&nd=102051516&intelsearch=08.02.1998+14%20and%20for%20joint-stock%20company> [<https://perma.cc/Q4BE-X5H7>]; Federal'nyi zakon Об акционерных обществах [Federal Law of the Russian Federation About Joint Stock Companies] No. 65, Nov. 24, 1995, <http://pravo.gov.ru/proxy/ips/?docbody=&nd=102038864> [<https://perma.cc/42CN-V8UE>].

113. See EVGENY GLUKHOV ET AL., DLA PIPER, SURVIVAL GUIDELINES FOR TRANSACTION PRACTITIONERS 3 (Mar. 2022), <https://www.dlapiper.com/~media/files/insights/publications/2022/03/legal-update--convertible-loans-key-issues-and-practical-advice-on-structuring-english.pdf> [<https://perma.cc/LC69-CVB9>].

114. See Law No. 354-FZ, *supra* note 104, art. 1(3) & art. 3(3).

115. See *id.*

116. See *id.*

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with respect to LLCs, CLAs are subject to notarization and disclosure in the Russian corporate register.<sup>117</sup>

A CLA is an economically useful tool for venture investments into, for instance, start-ups, where the real value of the company cannot be estimated at the moment the investments are made.<sup>118</sup> And, to a certain extent, the purpose of the Russian CLA may be compared to an analogous foreign instrument, where “[it] is not really a debt instrument so much as it is a means of making deferred equity investments in early-stage technology companies.”<sup>119</sup> Thus, a CLA is a way to structure the cash-in for participants or shareholders, as well as for third parties in spheres, where primarily (but not exclusively) the value of the company depends on future development of their products (for instance, information technology and medicine).<sup>120</sup>

In terms of ex-spouse status, the Supreme Court of the Russian Federation eliminated previously existed uncertainty and clarified that, when, according to a LLC’s charter, third persons may acquire participatory interest only subject to participants’ approval, the ex-spouse does not acquire the corporate rights in that LLC and does not become the participant automatically upon the court’s decision on division of marital property, which includes participatory interest in such LLC.<sup>121</sup> It was further stated that ex-spouses only have property rights to their respective portions of participatory interest (meaning their right to monetary value thereof) and shall comply with corporate formalities prescribed by the LLC’s charter and corporate law in order to become participants of the company.<sup>122</sup>

## VII. Spain

### A. THE NEW REGIME OF LOYALTY SHARES FOR LISTED COMPANIES

Spanish Law 5/2021, of April 12, 2021, introduced a new regime of shares with double voting for loyalty in listed companies, namely “loyalty shares.”<sup>123</sup> Under Article 96.2 of the Spanish Companies Act (*Ley de Sociedades de*

117. See *id.* at art. 4(2).

118. See Roman Yankovsky, *Convertible Loan: Contractual Model & Regulatory Problems*, 11 L. J. 184, 184–92 (2017), <https://www.elibrary.ru/item.asp?id=30693635> [<https://perma.cc/K38N-B4EM>]; Georgy Kovalenko, Angelina Travianko, & Elizaveta Inzartseva, *Federal Law No. 354-FZ: New Rules Governing Convertible Loans*, ERNST & YOUNG, [https://www.ey.com/en\\_ru/tax/tax-alert/2021/07/ey-new-rules-governing-convertible-loans-20-july-2021-law-eng](https://www.ey.com/en_ru/tax/tax-alert/2021/07/ey-new-rules-governing-convertible-loans-20-july-2021-law-eng) [<https://perma.cc/J5DN-89JR>].

119. See John F. Coyle & Joseph M. Green, *Contractual Innovation in Venture Capital*, 66 HASTINGS L. J. 133, 161 (2014).

120. See Ksenia Stepanishcheva & Kristina Seveeva, *Convertible Loan: Review of the New Law*, Kovalev, TUGUSHI & PARTNERS (Aug. 16, 2021, 2:47 PM), <https://ktaplav.ru/tpost/my3jud6dv1-konvertiruemii-zaem-obzor-novogo-zakona> [<https://perma.cc/XM8U-YMGS>].

121. See Case No. 305-ES20-22249, *supra* note 104, at 5.

122. See *id.* at 5–6.

123. See Capital Companies Law art. 527.ter et seq. (R.C.L. B.O.E. 2010, 161) (Spain), <https://www.boe.es/buscar/act.php?id=BOE-A-2010-10544> [<https://perma.cc/7ZNA-TH8R>].



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*Capital*), it is not possible to issue shares that directly or indirectly alter the proportionality of the nominal value and the right to vote.<sup>124</sup> In an exception to the general principle of proportionality, this new regime allows the bylaws of listed companies to provide for double voting shares that have been held by the same shareholder for at least two consecutive years.<sup>125</sup> It is not possible to implement loyalty in non-listed companies. But companies requesting admission to trading may implement this regime from the date of admission to trading, in which case shareholders who can prove uninterrupted ownership of the shares during the loyalty period may register their shares before the date of admission to trading and will enjoy double voting rights from the date of admission to trading.<sup>126</sup>

Loyalty shares seek to (1) create an incentive for shareholders to hold long-term interests and (2) prevent short-term investment strategies and management policies that destroy value and adversely affect the good corporate governance of listed companies.<sup>127</sup> Many authors have questioned the effectiveness of these loyalty shares in preventing short-termism, which is rare in the concentrated shareholding structures that is common to Spanish companies and European Union member states.<sup>128</sup> They also draw attention to the risks to minority shareholders because these shares may result in the control of the company ending up in the hands of a minority close to the administrative body.<sup>129</sup>

Broadly speaking, loyalty shares work as follows:

- (1) Loyalty shares<sup>130</sup> are not linked to share certificates but depend entirely on the same shareholder owning them uninterrupted throughout the loyalty period.<sup>131</sup> Therefore, loyalty shares are not a special class of shares;<sup>132</sup>

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124. *See id.* at art. 96(2).

125. *See id.* at art. 527 ter.

126. *See id.* at art. 527 octies.

127. *See* Aurelio Gurrea Martínez, *The Case Against the Implementation of Loyalty Shares in Spain*, OXFORD L. (July 9, 2019), <https://www.law.ox.ac.uk/business-law-blog/blog/2019/07/case-against-implementation-loyalty-shares-spain> [<https://perma.cc/F9ST-WZZ6>].

128. *See* Miriam Pérez-Schafer & Inigo Rios, *Loyalty Shares in Spain: The Fading of the ‘One Share, One Vote’ Principle*, FRESHFIELDS BRUCKHAUS DERINGER (Apr. 6, 2021), <https://transactions.freshfields.com/post/102guhr/loyalty-shares-in-spain-the-fading-of-the-one-share-one-vote-principle> [<https://perma.cc/8JJQ-GU2N>]; *see* José Carlos González Vázquez, *The So-Called Loyalty Shares: An Unnecessary Mistake (Albeit an Avoidable One)*, THE CORNER (Nov. 24, 2020), <https://thecorner.eu/news-spain/spain-economy/the-so-called-loyalty-shares-an-un-necessary-mistake-albeit-an-avoidable-one/90925/> [<https://perma.cc/6CWE-HPNL>].

129. *See* Vázquez, *supra* note 128.

130. Approving the Revised Text of the Capital Companies Law, art. 527(1) (B.O.E. 2010, 161) (Spain), <https://www.global-regulation.com/translation/spain/1440016/royal-legislative-decree-1-2010-of-2-july%252c-which-approves-the-revised-text-of-the-companies-act-of-capital.html> [<https://perma.cc/4AUH-77PW>].

131. *See id.* at art. 527(4).

132. *See id.* at art. 527. quater.

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- (2) Loyalty double voting rights are subject to the registration of the affected shares in a special registry book;<sup>133</sup>
- (3) They require a resolution of the general meeting of shareholders to amend the bylaws, which must be approved by a qualified majority higher than that required for the approval of any other amendment to the bylaws;<sup>134</sup>
- (4) Five years after its approval, the general meeting of shareholders must renew the bylaw provision for loyalty double voting;<sup>135</sup>
- (5) In listed companies providing for loyalty double voting rights in their bylaws, the quorum for shareholders' meetings under Articles 193 and 194 of the Spanish Companies Act will be calculated based on the total number of votes corresponding to the subscribed voting capital, including double voting rights;<sup>136</sup>
- (6) As a rule, loyalty double voting rights lapse in the event of a direct or indirect assignment or transfer of the relevant shares, even if free of charge, from the date of the assignment or transfer.<sup>137</sup> The Spanish Companies Act establishes exceptions to this general rule in certain cases of transfers between family members, between companies of the same group, and in the event of structural modifications;<sup>138</sup> and
- (7) With the incorporation of the loyalty shares, the thirty-percent threshold for the purposes of mandatory takeover bids will be calculated based on the total number of votes attributed to the company's shares, including loyalty double voting rights.<sup>139</sup>

**B. REFORM OF THE COMPANIES ACT AS IT REGARDS CONFLICTS OF INTEREST IN JOINT VENTURES**

Spanish Act 5/2021<sup>140</sup> transposed the Shareholders Rights Directive (SRD II) into Spanish law.<sup>141</sup> One of the most important issues is the reform of

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133. *See id.* at art. 527.septies.

134. *See id.* at art. 527. quater.

135. *See id.* at art. 527. sexies.

136. *See id.* at art. 527. quinquies.

137. *See id.* at art. 527.decies.1

138. *See id.* at art. 527.decies(2).

139. *See id.* at art. 527.

140. *See* Capital Companies Law art. 231bis. (R.C.L. B.O.E. 2010, 161) (Spain), <https://www.boe.es/buscar/act.php?id=BOE-A-2010-10544> [<https://perma.cc/7ZNA-TH8R>].

141. *See* Paula Graullera Castillejos, *New Regulations in Spain: SRDII, Loyalty Shares, Virtual-only Meetings, Quarterly Reporting & More*, ISS (May 18, 2021), <https://insights.issgovernance.com/posts/new-regulations-in-spain-srdii-loyalty-shares-virtual-only-meetings-quarterly-reporting-more/> [<https://perma.cc/3VLF-6R2M>].

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the legal treatment of directors' duty of loyalty and conflicts of interest,<sup>142</sup> which are particularly relevant in joint venture agreements.<sup>143</sup>

According to this act, so-called "proprietary directors" are affected by conflicts of interest involving the shareholder that appointed them.<sup>144</sup> Thus, they must refrain from participating in any board decisions in which that shareholder has a conflict of interest with the company, unless they have been appointed by the parent company.<sup>145</sup> Therefore, the rules regarding conflicts of interest of proprietary directors must be carefully analyzed when negotiating joint venture agreements involving Spanish companies, with particular regard to whether the parties hold a majority or a minority shareholding in the target company, to ensure that the parties' interests will be correctly covered in the future in case a conflict of interest arises.<sup>146</sup>

### VIII. United Kingdom

The National Security and Investment Act 2021 (NSI Act) received royal assent on April 29, 2021,<sup>147</sup> and certain commencement provisions came into force on July 1, 2021.<sup>148</sup> The new regime will come fully into force on January 4, 2022, but with retrospective application in relation to transactions completed in the period after introduction of the National Security and Investment Bill on November 11, 2020.<sup>149</sup> The NSI Act establishes a new regime for the review of mergers, acquisitions and other types of transactions that could threaten national security.<sup>150</sup> The new NSI Act will:

- (1) Require mandatory notification of certain types of acquisitions of shares or voting rights in companies and other entities operating in sensitive sectors of the economy. In such cases, completion of the

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142. Approving the Revised Text of the Capital Companies Law, *supra* note 130, at art. 225.1.

143. Meghan McGovern et al., *JV Directors Duty of Loyalty*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Nov. 16, 2019), <https://corp.gov.law.harvard.edu/2019/11/16/jv-directors-duty-of-loyalty/> [<https://perma.cc/W4LF-QKZ5>].

144. Approving the Revised Text of the Capital Companies Law, *supra* note 130, at art. 529.

145. *Id.* at art. 228 & art. 231(2).

146. *See id.* at art. 231(2).

147. *See* National Security and Investment Act 2021, c. 25 (UK), <https://www.legislation.gov.uk/ukpga/2021/25/contents/enacted> [<https://perma.cc/RL6Y-AQ9Y>].

148. *See* The National Security and Investment Act 2021 (Commencement No. 1 and Transitional Provision) Regulations 2021, SI 2021/788 (U.K.), <https://www.legislation.gov.uk/uksi/2021/788/introduction/made> [<https://perma.cc/Z9P4-2VDL>].

149. Antonia I. Tzinova, Dariya V. Golubkova, & Mackenzie A. Zales, *UK's National Security and Investment Act Takes Effect*, HOLLAND & KNIGHT (Jan. 19, 2022), <https://www.lexology.com/library/detail.aspx?g=BB09f17e-47ba-4bca-a846-9fdeeceec6d97> [<https://perma.cc/2GPE-A6LV>].

150. *See* Paul Stone, *National Security and Investment Act Granted Royal Assent*, CHARLES RUSSELL SPEECHLYS (May 5, 2021), <https://www.charlesrussellspeechlys.com/en/news-and-insights/insights/corporate/2021/national-security-and-investment-act-granted-royal-assent/> [<https://perma.cc/8L29-4WTU>].

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- acquisition will be prohibited unless and until approval has been given by the Government;<sup>151</sup> and
- (2) Enable the Government to call in and “investigate transactions which involve the acquisition of control or influence over an entity or asset, whether or not the transaction has been notified to the Government.”<sup>152</sup>

**A. MANDATORY NOTIFICATION REGIME**

The NSI Act makes several new changes to the mandatory notification regime.<sup>153</sup> The NSI Act provides the following:

The mandatory notification regime will apply to acquisitions of companies or other entities operating in certain sensitive sectors, where the acquirer will acquire at least 25% of the votes or shares of the target—or sufficient voting rights to enable or prevent the passage of any class of resolution.<sup>154</sup>

The Government had originally proposed that any stake of 15% or more would be caught, but increased this to 25% in view of concerns that the lower level would bring too many transactions within the scope of the mandatory notification regime.<sup>155</sup>

The seventeen areas of the economy designated as sensitive<sup>156</sup> are the following: (1) advanced materials; (2) advanced robotics; (3) artificial intelligence; (4) civil nuclear; (5) communications; (6) computing hardware; (7) critical suppliers to government; (8) cryptographic authentication; (9) data infrastructure; (10) defense; (11) energy; (12) military and dual-use; (13) quantum technologies; (14) satellite and space technologies; (15) suppliers to emergency services; (16) synthetic biology; and (17) transport.<sup>157</sup>

**B. CALL-IN POWER REGIME**

Qualifying acquisitions across the whole economy are in the scope of the NSI Act but the call-in power may only be used for qualifying acquisitions that the government reasonably suspects give rise to or may give rise to a

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151. National Security and Investment Act 2021, *supra* note 141, at c. 25.

152. *Id.*

153. *See id.* Tzinova, Golubkova, & Zales, *supra* note 142.

154. *Id.* National Security and Investment Act 2021, *supra* note 141.

155. *Id.*

156. *See* The National Security and Investment Act 2021 (Notifiable Acquisition) (Specification of Qualifying Entities) Regulations 2021, Draft SI 2021/XXXX (U.K.), <https://www.legislation.gov.uk/ukdsi/2021/9780348226935> [<https://perma.cc/YUP9-J4D9>].

157. *Id.*

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risk to national security.<sup>158</sup> The NSI Act is not a system for screening all acquisitions in the economy.<sup>159</sup>

For example, while not subject to mandatory notification, acquisitions of control through material influence over target entities operating in the seventeen sensitive sectors may be subject to call-in.<sup>160</sup> “In addition, qualifying acquisitions of entities which undertake activities “closely linked” to the activities in the seventeen sensitive areas of the economy are more likely to be called in than those that are not closely linked.”<sup>161</sup> Importantly, the NSI Act provides the following:

Decisions on whether to exercise the call-in power will be made on a case-by-case basis. In order to assess the likelihood of a qualifying acquisition giving rise to a risk to national security (and therefore whether to call in the acquisition), the Government expects to consider primarily the three risk factors, explained below.<sup>162</sup>

C. TARGET RISK

This concerns whether the target of the qualifying acquisition (the entity or asset being acquired) is being used, or could be used, in a way that raises a risk to national security.<sup>163</sup>

D. ACQUIRER RISK

This concerns whether the acquirer has characteristics that suggest there is, or may be, a risk to national security from the acquirer having control of the target.<sup>164</sup>

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158. See National Security and Investment Act 2021: Statement for the Purposes of Section 3, DEP’T FOR BUS., ENERGY & INDUS. STRATEGY (Nov. 2, 2021), <https://www.gov.uk/government/publications/national-security-and-investment-statement-about-exercise-of-the-call-in-power/national-security-and-investment-act-2021-statement-for-the-purposes-of-section-3> [https://perma.cc/W4DT-A53C] [hereinafter NSIA 2021 Statement of Purposes].

159. See *Check If You Need to Tell the Government about an Acquisition That Could Harm the UK’s National Security*, UK GOV’T (Mar. 18, 2022), <https://www.gov.uk/guidance/national-security-and-investment-act-guidance-on-acquisitions> [https://perma.cc/8ZBK-29US].

160. See *id.*

161. See National Security and Investment Act 2021: Statement for the purposes of section 3 published on November 2, 2021, *supra* note 151.

162. *Id.*

163. See *id.*

164. See *id.*

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E. CONTROL RISK

This concerns the amount of control that has been, or will be, acquired through the qualifying acquisition.<sup>165</sup> A higher level of control may increase the level of national security risk.<sup>166</sup>

The U.K. Government has said that, “when calling in an acquisition, all three risk factors will be present, but [that] does not rule out calling in an acquisition on the basis of fewer risk factors.”<sup>167</sup>

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165. *See id.*

166. *See id.*

167. *See id.*

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## International Transportation Law

JAMES HENRY BERGERON, ATTILIO M. COSTABEL, ANDREW M. DANAS, GREGORY C. MADDALeni, AND REBECCA FENNEMAN\*

This article updates selected international legal development in 2021 in international transportation law.

### I. Maritime Law

#### A. MARINE INSURANCE DEVELOPMENTS

##### 1. “Utmost Good Faith”

In January 2021, in *QBE Seguros v. Morales-Vázquez* the U.S. Court of Appeals for the First Circuit reviewed a lower court decision regarding a dispute between an insured boat owner and his insurance company, QBE Seguros.<sup>1</sup> The insurance application required the insured to disclose any accidents or losses. This disclosure led to the discovery that he had been involved in an accident some eleven years earlier he failed to mention that in January 2010 he had grounded a forty-foot yacht in Puerto Rico. On October 24, 2014, the yacht sustained appreciable damage from a fire, and “QBE sought a declaratory judgment voiding the policy on the grounds that [the insured] had failed to honor his duty of utmost good faith (known as ‘uberrimae fidei’ . . .).”<sup>2</sup>

The court held the policy voided under the rule of utmost good faith as originally crafted in England in the eighteenth century.<sup>3</sup> Further, the court held that *uberrimae fidei* is firmly entrenched in the jurisprudence of the First Circuit over strenuous arguments that subsequent British legal reforms in the United Kingdom Insurance Act 2015 made the rule obsolete, rejecting appellant’s claim that the Insurance Act 2015 had to be followed as a model from England, just as the rule of utmost good faith was adopted by the U.S.

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\* James Henry Bergeron, Attilio M. Costabel (Marine Insurance), Andrew M. Danas (Pre-emption of Independent Contractor Laws for Motor Carriers in California), Gregory C. Maddaleni (New Canadian Guidelines for Testing Autonomous Vehicles), and Rebecca Fenneman (Federal Maritime Commission Initiates Shipping Act Enforcement Action).

1. *QBE Seguros v. Morales-Vázquez*, 986 F.3d 1, 2 (1st Cir. 2021).

2. *Id.* at 4.

3. *Id.* (requiring “parties to a marine insurance contract to disclose all known facts or circumstances material to an insurer’s risk. Under such doctrine, an insurer may void a marine insurance policy if the insured fails to disclose “all circumstances known to [the insured] and unknown to the insurer” that materially impact the insurer’s risk calculus”).



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courts in the eighteenth century.<sup>4</sup> The court stated, “[i]t follows, we think, that federal courts tasked with hearing admiralty cases should take heed of developments in English law, but they are not obliged to change course merely because Parliament acts to alter a previously entrenched principle.”<sup>5</sup> The court also noted that the omitted facts must be objectively material in order to allow an insurer to void an insurance policy under the doctrine of *uberrimae fidei*.

2. *Crew Warranty*

Five months later, in *Travelers Property Casualty Company of America v. Ocean Reef Charters*, the U.S. Court of Appeals for the Eleventh Circuit decided a demand by an insurer against an insured yacht owner, seeking declaratory judgment that the owner, Ocean Reef Charters, breached captain and crew warranties, and that therefore the policy did not provide any coverage for total loss caused by a hurricane.<sup>6</sup> The policy contained two express warranties. First, “the captain warranty required Ocean Reef to employ a full-time professional captain approved by Travelers . . . Second, the crew warranty required Ocean Reef to have one full-or part-time professional crew member onboard.”<sup>7</sup>

Ocean Reef did not employ a professional captain for the M/Y My Lady or have crew onboard when, in early September of 2017, Hurricane Irma was heading towards Florida. The manager of the insured did his best to secure the yacht, but during the hurricane a failed piling led to the yacht to drift, hit the sea wall, and sink. The damage resulted in a total constructive loss under the Travelers policy.

Travelers argued that federal maritime law required strict compliance with express warranties in marine insurance contracts, and that a breach barred coverage even if it was unrelated to the loss. Ocean Reef countered that Florida’s so-called “anti-technical statute”<sup>8</sup> should instead apply, and that under that statute the breaches did not preclude coverage because they were unrelated to the loss.<sup>9</sup> At the district court level, Travelers’ motion for summary judgement was granted based on the conclusion “that the Eleventh Circuit has fashioned an entrenched rule of admiralty: express warranties in

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4. See *id.* at 7. The insured’s brief relies heavily on an article by Attilio Costabel. See Attilio Costabel, “*Utmost Good Faith*” in *Marine Insurance: A Message on the State of the Dis-Union*, 48 JOURNAL MARITIME LAW & COMMERCE 1, 1–7 (2017). See Brief for Defendant-Appellant Carlos A. Morales-Vazquez at 25, *QBE Seguros*, 986 F.3d 1 (2021) (No. 19-1503), 2020 WL 1166124, at 25.

5. See *QBE Seguros*, 986 F.3d at 7.

6. See *Travelers Property Casualty Company of America v. Ocean Reef Charters LLC*, 996 F.3d 1161, 1161–64 (11th Cir. 2021).

7. *Id.* at 1163.

8. See FLA. STAT. § 627.409(2).

9. See *Travelers*, 996 F.3d at 1164.

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maritime insurance contracts must be strictly construed in the absence of some limiting provision in the contract.”<sup>10</sup>

The Eleventh Circuit reversed. The court reasoned that, under the rule in *Wilburn Boat v. Fireman’s Fund Insurance Co.*, the question was whether there exist entrenched federal maritime rules governing captain or crew warranties.<sup>11</sup> The Eleventh Circuit answered in the negative. While the court found other warranties, like “navigation” or “seaworthiness,” were federally entrenched, the court found “no American cases or authorities recognizing or announcing an entrenched maritime rule” for the “crew warranty.”<sup>12</sup> Thus, the court applied Florida’s so-called “anti-technical statute,”<sup>13</sup> under which the breaches did not preclude coverage because they were unrelated to the loss.”<sup>14</sup>

Again, there was an interesting discussion about the effects that the United Kingdom Insurance Act 2015 should have over American law of marine insurance.<sup>15</sup> The court raised *in dictum* perplexity on whether *Wilburn Boat* is still to be followed blindly. In the words of the court, “[i]f there are still ‘special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business,’ . . . it will be interesting to see what effect the Act has on American maritime law (and on how *Wilburn Boat* is viewed).”<sup>16</sup> In fact, the court expressed the desire that “this case will prove tempting enough for the U.S. Supreme Court to wade in.”<sup>17</sup> Such a decision seemed possible when a petition for certiorari was filed in the *QBE* case based on this issue. However, the U.S. Supreme Court denied the petition in that case without an opinion.

The *Travelers* case was remanded, and no subsequent history demonstrates any further development in this case, while *QBE* is final with the Supreme Court denial of certiorari. Therefore, the rules appear to be established at least for the foreseeable future. “Utmost Good Faith” is entrenched as it was in its beginning, as set forth in First Circuit, and there are no existing, let alone entrenched, “crew warranties” established by the Eleventh Circuit. Practitioners, however, will be well advised to check the status of these rules circuit by circuit, as no solution from the U.S. Supreme Court may be expected.

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10. *Id.*

11. *Wilburn Boat Co., v. Fireman’s Fund Insurance Co.*, 348 U.S. 310, 312 (1955).

12. *Travelers*, 996 F.3d at 1169.

13. See FLA. STAT. § 627.409(2).

14. *Travelers*, 996 F.3d at 1164.

15. *Id.* at 1169 (citing to Hugh D. Baker, *Sailing to Calmer Seas: The United Kingdom Insurance Act 2015 and Its Potential Effect on United States Marine Insurance Markets and Law*, 41 TUL. MARITIME LAW JOURNAL 159, 180 (2016).

16. *Id.* at 1170 (citing to 2 Schoenbaum, ADMIRALTY & MARITIME LAW, at § 19:15 and Attilio M. Costabel, *The UK Insurance Act 2015: A Restatement of Marine Insurance Law*, 27 ST. THOMAS UNIVERSITY LAW REVIEW 133, 166 (2015)).

17. *Id.* at 1171.

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3. *Maritime Liens - Vessels and “Dead Ships”:*

In *Jones Superyacht Miami, Inc. v. M/Y Waku*, the plaintiff filed an *in rem* action against a yacht to establish a maritime lien on the vessel pursuant to 46 U.S.C. § 31342.<sup>18</sup> The owner argued that the yacht was not technically a vessel under federal maritime law due to an Office of Foreign Assets Control (OFAC) action preventing its use as a means of marine transportation for people or things, and also contended that a maritime lien cannot attach to a “dead ship.”<sup>19</sup>

As a preliminary inquiry, the court had to decide if it had admiralty and maritime jurisdiction. If the yacht was a vessel used as a means of marine transportation for people or things, then the court had subject matter jurisdiction. The yacht went through a “massive overhaul,” remaining idle in dock for a long time, during which an OFAC action and order prevented its use in marine navigation in a technical sense. The owner argued that the yacht had lost its status as a vessel, because, among other things, under the test of *Lozman v. City of Riviera Beach*,<sup>20</sup> the yacht could not even be seen as a vessel.<sup>21</sup> The U.S. District Court for the Southern District of Florida disagreed, treating the *Lozman* argument as “creative” and posting in the opinion two pictures of the yacht, plainly looking like its name and not like the *Lozman*’s houseboat, which was graced by French doors and windows, instead of watertight port holes.<sup>22</sup>

The court then disposed of the OFAC issue, holding that while the OFAC action prevented the yacht’s use in marine navigation in a technical sense, in a practical sense the yacht remained a vessel. Despite its temporary dormant state at drydock, no reasonable observer “would not consider it to be designed to any practical degree for carrying people or things on water.”<sup>23</sup> Finally, the court disposed of the “dead ship” argument holding that the U.S. Court of Appeals for the Eleventh Circuit defined “dead ships” as “[s]hips rendered permanently incapable of marine transportation.”<sup>24</sup>

4. *Cruise Claims – Wrongful Death – Pecuniary Damages – Choice of Law*

In *Goodloe v. Royal Caribbean Cruises Ltd.*, a Wisconsin citizen suffered a heart attack on board a cruise ship in Alaska and died while hospitalized in Anchorage. The estate sued the Cruise Line in the U.S. Florida District Court, and the jury found the cruise line liable and awarded pecuniary and

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18. *Jones Superyacht Miami, Inc. v. M/Y Waku*, No. 19-20735-CIV, 2021 WL 4377260, at \*1 (S.D. Fla. Sept. 24, 2021).

19. *Id.* at \*2.

20. *Lozman v. City of Riviera Beach, Florida*, 568 U.S. 115, 122 (2013).

21. *Jones Superyacht Miami*, 2021 WL 4377260 at \*2-10.

22. *Id.* at \*2.

23. *Id.*

24. *Id.* at \*14-15 (discussing *Crimson Yachts v. Betty Lyn II Motor Yacht*, 603 F.3d 864, 873 n.4 (11th Cir. 2010)).

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substantial non-pecuniary damages. The cruise line appealed the award of non-pecuniary damages.<sup>25</sup>

The U.S. Court of Appeals for the Eleventh Circuit affirmed. Since the death occurred in state waters, the court followed *Yamaha Motor Corporation v. Calhoun*,<sup>26</sup> which held that while general maritime law does not allow non-pecuniary damages for wrongful death, state law may supplement general maritime law for damages in wrongful death suits for deaths that occur within state territorial waters.<sup>27</sup>

The parties did not disagree on the use of *Calhoun*, and also agreed that the *Lauritzen v. Larsen*<sup>28</sup> test should be used to resolve a domestic choice-of-law dispute in a maritime tort case. The court applied the *Lauritzen* test to determine which states' law supplements general federal maritime law to allow for recovery of non-pecuniary damages for wrongful death that occurs on state territorial waters.<sup>29</sup> The choice between the law of the plaintiff (Wisconsin) and that of the forum (Florida) was critical because Wisconsin law did not supply the requested remedy for deaths outside the state, while Florida law did.<sup>30</sup>

Based on the *Lauritzen* factors, the court found that Florida had a slightly stronger connection, being both the forum state and the domicile and base of operations of the defendant corporation, whereas Wisconsin's sole connection was the domicile of the deceased. Turning to compare the two states' relative interests in having their laws applied made clear to the court that Florida did govern, especially because its wrongful death law applies to deaths that happen outside of the state.<sup>31</sup>

### 5. *Jones Act – Seaman Status*

In *Jarvis v. Hines Furlong Line, Inc.*, a seaman employed as a deckhand aboard the vessel, “began suffering from a non-occupational illness in February 2018.”<sup>32</sup> In March 2018, the seaman was permitted to continue his employment in the shipyard where the vessel was undergoing repairs. The reassignment to the shipyard allowed the seaman to be closer to home and urgent medical treatment for that illness. During the time the seaman was working in the shipyard on repairs of the vessel, he suffered a back injury.<sup>33</sup>

The owner argued that because the seaman was reassigned to work in the shipyard, he was “a land-based maritime laborer, not a seaman,”<sup>34</sup> and

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25. *Goodloe v. Royal Caribbean Cruises, LTD*, 1 F.4th 1289, 1291 (11th Cir. 2021).

26. *Id.* (citing *Yamaha Motor Corporation v. Calhoun*, 516 U.S. 199, 216 (1996)).

27. *Yamaha Motor Corporation v. Calhoun*, 516 U.S. 199, 215-16 (1996).

28. *Lauritzen v. Larsen*, 345 U.S. 571, 588-89 (1953).

29. *Goodloe*, 1 F.4th at 1291 (citing *Yamaha Motor Corporation*, 516 U.S. at 216).

30. *Id.* at 1292.

31. *Id.* at 1293.

32. *Jarvis v. Hines Furlong Line, Inc.*, No. 5:20-CV-00014-TBR-LLK, 2021 WL 5564145, at \*2 (W.D. Ky. 2021).

33. *Id.* at \*2.

34. *Id.* at \*3.

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therefore, he could not recover under the Jones Act<sup>35</sup> or general maritime law. The seaman argued that he was a seaman despite his reassignment to work in the shipyard.

The court applied the *Chandris Incorporated v. Latsis*<sup>36</sup> test with respect to seaman status and found that even if the seaman could demonstrate his duties contributed to the function of the vessel, he could not demonstrate that he had a connection to a vessel in navigation that was substantial in terms of duration and nature.<sup>37</sup> The nature of repairs was extensive, and the repairs occurred over an extended period of time. Further, the owners argued that the vessel was “practically incapable of maritime transport” because it could only be moved by harbor tugs.

The seaman argued that he still had a connection to an identifiable fleet of vessels in navigation as he had spent more than half of his total employment with the owner and its predecessor company as a seaman aboard their vessels. Based on an agreement of between the parties, “if a maritime employee receives a new work assignment in which his essential work duties are changed, he is entitled to have the assessment of the substantiality of his vessel-related work made on the basis of his new position.”<sup>38</sup> However, the seaman argued that he did not actually obtain a new position because his assignment to the vessel was only temporary and because his essential work duties did not change. The owners argued that because Jarvis anticipated working in the shipyard until refurbishment was complete, his assignment there was indefinite, and thus, permanent as a matter of law.

The court found that the seaman had received a new work assignment. The court’s evaluation of whether a seaman had a substantial connection to a vessel in navigation related to the vessel, and not to the totality of vessels he worked on during his tenure with the owner and its predecessor company. The court further found that the vessel was not a vessel in navigation because of the extent of repairs it underwent and the duration that such repairs were ongoing.

#### 6. *Carriage Of Goods - Per Package Limitation*

*Hartford Fire Insurance Co. v. Maersk Line* considers a shipment of glass doors and windows that arrived in damaged condition after being transported from Ireland to Connecticut via the Port of Newark.<sup>39</sup> Non-party InterOcean, a Dublin-based freight-forwarding company, booked the

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35. Jones Act, 46 U.S.C. § 55102.

36. *Chandris Incorporated v. Latsis*, 515 U.S. 347, 368 (1995) (requiring (1) that “an employee’s duties must contribute to the function of the vessel or to the accomplishment of its mission”; and (2) that the employee “must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature.”).

37. *Jarvis*, 2021 WL 5564145, at \* 7.

38. *Id.* at \*11 (citing *Chandris*, 515 U.S. at 372).

39. *Hartford Fire Ins. Co. v. Maersk Line*, No. 18-cv-121 (PKC), 2021 WL 949755, at \*3 (S.D.N.Y. 2021).

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shipment's ocean transit. Interocean then retained defendant Maersk to provide ocean carriage, and Maersk issued two bills of lading. One Maersk bill of lading identified "1 Container said to Contain 102 pieces," and the second identified "1 Container Said to Contain 160 PIECES." Pursuant to the two bills of lading, Maersk was to provide two empty containers that measured forty-five feet long, but it had no contractual responsibility for loading and securing the containers' contents.

Maersk sought a ruling from the court that its damages were limited to \$1,000, on the basis that the Maersk bills of lading identified only two "packages," each of which the Carriage of Goods by Sea Act<sup>40</sup> (COGSA) limits to \$500 in damages. In Maersk's view, the parties expressly agreed that the "containers" identified in the bills of lading were packages. In opposition, Hartford urged that the bills of lading identified a total of 262 "pieces" in the shipment, each of which should constitute a "package" under COGSA.

The court held that a container should be treated as a package "when the bill of lading expressly refers to the container as one package, or when the parties fail to specify an alternative measure of the 'packages' shipped . . . " and "[I]f the bill of lading lists the container as a package and fails to describe objects that can reasonably be understood from the description as being packages, the container must be deemed a COGSA package."<sup>41</sup>

In this case, the bill of lading used the disjunctive "or" to distinguish a container from a package, and it expressly identified "1 container," with no mention of packages. The bill of lading separately identified the number of "pieces" contained in each container, under the heading "Kind of Packages; Description of goods; Marks and Numbers; Container No./Seal No." Thus, the bills of lading identified the use of containers, but they did not expressly identify the containers as packages. The number of "pieces" contained in the shipment, by contrast, could "reasonably be understood from the description as being packages."<sup>42</sup> Further, the definition of "container" in the Terms of Carriage did not appear to encompass a preparation for transportation that was made to facilitate handling, as required for a "package." The bills of lading therefore did not reflect an express agreement between the parties to treat a "container" as a "package," and the "pieces" identified in the bills of lading could reasonably be understood from the description as being "packages."

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40. 46 U.S.C. § 30701(4)(5).

41. *Hartford Fire Ins. Co.*, 2021 WL 949755, at \*12-13 (S.D.N.Y. Mar. 11, 2021) (citing *Binladen BSB Landscaping v. M.V. Nedlloyd Rotterdam*, 759 F.2d 1006, 1012 (2d Cir. 1985) (quoting *Allied International American Eagle Trading Corporation v. S.S. Yang Ming*, 672 F.2d 1055, 1061 (2d Cir. 1982)).

42. *Id.* at \*13.

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**B. PRE-EMPTION OF INDEPENDENT CONTRACTOR LAWS FOR  
MOTOR CARRIERS IN CALIFORNIA**

The longstanding legal dispute in the United States, over whether a federal statute that pre-empts states from regulating the routes, prices, or services of U.S. motor carriers invalidates the application of state employee classification statutes when applied to such carriers' drivers and employees, continued without a final resolution in 2021. A split decision by the U.S. Court of Appeals for the Ninth Circuit in *California Trucking Association v. Bonta* created a conflict with other federal circuits over whether state laws applying the "ABC test" for worker classification in the motor carrier industry are pre-empted by federal law.<sup>43</sup>

The Ninth Circuit's majority decision held that application of California Assembly Bill 5 (AB-5)<sup>44</sup> to the motor carrier industry is not pre-empted by the Federal Aviation Administration Act of 1994 (F4A).<sup>45</sup> AB-5 codified a 2018 California Supreme Court decision which changed almost thirty years of California law by adopting the "ABC test" for classifying workers as either employees or independent contractors.<sup>46</sup> Under the prior rule, the California courts had evaluated the classification of a worker by examining a variety of indicia of an employer-employee relationship, as opposed to an independent-contractor relationship. Under the revised criteria of the ABC test in AB-5, a person shall be considered an employee unless (A) the person is free from control and direction of the hiring entity in connection with performance of the work, both under the contract and in fact; (B) the person performs work that is outside the usual course of the hiring entity's business; and (C) the person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.<sup>47</sup>

AB-5 contained a number of exemptions, but it did not exempt motor carriers and their drivers from the law. The California Trucking Association (CTA) thus filed suit to challenge the law, alleging that most motor carriers would no longer be able to use independent contractors because it would be difficult for them to satisfy part B of the AB-5 test. A California federal district court issued a preliminary injunction against enforcement of AB-5 finding that the CTA would succeed in showing that AB-5 violated provisions of F4A pre-empting any state law "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property."<sup>48</sup>

In a two-to-one decision, the Ninth Circuit found that application of AB-5 would not run afoul of the F4A's prohibitions and dissolved the lower

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43. *California Trucking Association v. Bonta*, 996 F.3d 644, 671 (9th Cir. 2021).

44. CAL. LAB. CODE § 2775.

45. *Bonta*, 996 F.3d at 659 (discussing 49 U.S.C. § 14501(c)(1)).

46. *Dynamex Operations W. v. Superior Court*, 416 P.3d 1, 7 (Cal. 2018).

47. *Bonta*, 996 F.3d at 651.

48. *Id.* at 654 (discussing 49 U.S.C. § 14501(c)(1)).

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court's injunction. The majority rejected the arguments of both the dissent and the CTA that the application of AB-5 would have such a significant impact that it indirectly affected the carriers' prices, routes, and services to its customers and thus effectively binds them. Instead, the majority noted that the prior California independent contractor test had not been pre-empted and that precedent indicated that laws of general applicability that affect the relationship between the motor carrier and its customers may have more of an impact on a carrier's prices, route, or service as opposed to laws of general applicability that affect the carrier's relationship with its workers.<sup>49</sup>

Relying on the fact that AB-5 was a law of general applicability to many industries, the majority rejected the argument that AB-5 was related to the prices, routes, and services of a motor carrier because the ABC test requires an employer to hire employees rather than independent contractors. In doing so, the majority rejected decisions from the U.S. Court of Appeals for the First Circuit<sup>50</sup> and for the Third Circuit<sup>51</sup> which found that application of prong B to identical ABC tests were pre-empted under the F4A on this ground.

The majority's decision reached the same conclusion as an earlier California appellate court that as applied to motor carriers AB-5 does not violate the F4A pre-emption provisions.<sup>52</sup> Although on October 4, 2021, the U.S. Supreme Court denied certiorari of an appeal of the California state court case,<sup>53</sup> on November 15, 2021, the U.S. Supreme Court invited the Solicitor General of the United States to file a brief in the CTA appeal expressing the views of the United States on whether the Court should review the issue and circuit split.<sup>54</sup> No deadline was set for the submission of such a brief. As of early December 2021, the petition for certiorari was still pending.

## II. New Canadian Guidelines for Testing Autonomous Vehicles

In August 2021, Transport Canada announced new guidelines for testing automated driving systems in Canada.<sup>55</sup> These new guidelines updated prior

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49. *Id.* at 661-64.

50. *See* Schwann v. FedEx Ground Package Systems, Inc., 813 F.3d 428, 442-46 (1st Cir. 2016).

51. *See* Bedoya v. Am. Eagle Express, Inc., 14 F.3d 812, 817-24 (3d Cir. 2019).

52. *See* People v. Superior Court (Cal Cartage People v. Cal Cartage Transp. Express, LLC), 271 Cal. Rptr. 3d 570, 574-76 (2020), *review denied* (Feb. 24, 2021), *cert. denied sub nom.* Cal Cartage Transp. Express, LLC v. California, 142 S. Ct. 76, 211 (2021).

53. *See* Cal Cartage Transp. Express, LLC v. California, 142 S. Ct. 76, 76 (2021).

54. *See* California Trucking Ass'n, Inc. v. Bonta, 142 S. Ct. 481, 481 (2021).

55. Omar Alghabra, *Guidelines for Testing Automated Driving Systems in Canada*, TRANSPORT CANADA (Aug. 6, 2021), <https://tc.canada.ca/en/road-transportation/innovative-technologies/connected-automated-vehicles/guidelines-testing-automated-driving-systems-canada>.



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guidelines that had been released in 2018.<sup>56</sup> The new guidelines are divided into four logical sections: (1) engagement with government agencies, (2) pre-trial considerations, (3) test considerations and (4) post-test considerations. In the first section, the guidelines address meeting all of the regulatory requirements related to testing new autonomous systems, which includes the requirements for importing these vehicles into Canada. It also includes meeting not only federal but provincial and municipality requirements. The guidelines reference the specific laws and regulations at issue.

In 2019, the Strengthening Motor Vehicle Safety for Canadians Act in 2019 was updated to accommodate types of vehicles that had not been contemplated in existing laws.<sup>57</sup> In that same time frame, Transport Canada released Canada's Safety Framework for Automated and Connected Vehicles.<sup>58</sup> These reforms, along with other Transport Canada guidance, became the reference points from which the new guidelines emerged.<sup>59</sup> Transport Canada also leverages international guidelines, such as various International Standard Organization guidelines, including ISO 22737.<sup>60</sup>

The second part of the guidelines addresses pre-trial considerations. This section is where the thought process is developed in creating the overall test plan. This part includes looking at the results of other tests made on the same type of vehicle in other geographies. Transport Canada has come up with a safety assessment tool which highlights thirteen safety outcomes, a starting point for designing the testing plan. Route selection can evolve as the plan progresses. Testing may start in a closed environment, then a restricted access environment, graduating to segregated lanes and ultimately testing in a mixed traffic environment. All of these tests are governed by a proper safety management, including safety procedures for trial personnel as well as vehicle maintenance. Even as the test is meant to evaluate automation, the safety driver is there to intervene when results are not as anticipated. Local first responders and law enforcement need to be notified and debriefed in advance. One particular pre-trial consideration is the area of cyber security, addressed in Canada's Vehicle Cyber Security Guidance.<sup>61</sup>

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56. DEPARTMENT OF TRANSPORT CANADA, TESTING HIGHLY AUTOMATED VEHICLES IN CANADA: GUIDELINES FOR TRIAL ORGANIZATIONS (2018), [https://publications.gc.ca/collections/collection\\_2018/tc/T86-49-2018-eng.pdf](https://publications.gc.ca/collections/collection_2018/tc/T86-49-2018-eng.pdf).

57. Strengthening Motor Vehicle Safety for Canadians Act, S.C. 2018, c 2 (Can.), [https://laws-lois.justice.gc.ca/eng/annualstatutes/2018\\_2/](https://laws-lois.justice.gc.ca/eng/annualstatutes/2018_2/); Motor Vehicle Safety Act, S.C. 1993, c 16 (Can.), <https://laws-lois.justice.gc.ca/eng/acts/M-10.01/>.

58. DEPARTMENT OF TRANSPORT CANADA, CANADA'S SAFETY FRAMEWORK FOR AUTOMATED AND CONNECTED VEHICLES (2019), [https://tc.canada.ca/sites/default/files/2020-05/tc\\_safety\\_framework\\_for\\_acv-s.pdf](https://tc.canada.ca/sites/default/files/2020-05/tc_safety_framework_for_acv-s.pdf).

59. See *id.*; see also Strengthening Motor Vehicle Safety for Canadians Act, *supra* note 57.

60. *Intelligent Transport Systems — Low-Speed Automated Driving (LSAD) Systems for Predefined Routes — Performance Requirements, System Requirements and Performance Test Procedures*, INTERNATIONAL ORGANIZATION FOR STANDARDIZATION (July 2021), <https://www.iso.org/standard/73767.html>.

61. TRANSPORT CANADA, CANADA'S VEHICLE CYBER SECURITY GUIDANCE (2020), [https://tc.canada.ca/sites/default/files/2020-05/cyber\\_guidance\\_en.pdf](https://tc.canada.ca/sites/default/files/2020-05/cyber_guidance_en.pdf).

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The third section deals with running the test itself. During the actual testing phase, the safety management plan may need to be modified as ongoing results are observed. Also, as part of the test, incident and emergency response plans are evaluated, as well as the functionality of the safety driver. If the test ultimately includes testing with actual passengers, this step will only happen after extensive pre-passenger testing.

The final section deals with post-test considerations, including evaluating and sharing the results. Another post-test consideration is what to do with the vehicle or vehicles once the test is over. Normally these vehicles have been imported solely for testing purposes and need to be exported or destroyed under government supervision. One alternative is to donate the vehicle to a museum in a disabled condition. The Canada Minister of Transport considers these new guidelines as the “2.0” version on how to test autonomous vehicles, and in that way, act as a catalyst towards reaping the benefits of this emerging technology.

Some key differences with U.S. regulation should be noted. In Canada, approval to fly over people requires the advanced operations certificate. In the U.S. a waiver is required, yet only small fraction of these waivers have been administered.<sup>62</sup> There are proposed rule changes to adjust this waiver requirement, but passage of these rules is not foreseen anytime soon. Secondly, there is no distinction between recreational and commercial usage (as is the case in the U.S.), but rather basic versus advanced operations. And finally, commercial usage in the U.S., which in effect is the more advanced usage, requires only aeronautical knowledge, not demonstration of actual flight proficiency as in Canada.

**A. FEDERAL MARITIME COMMISSION INITIATES SHIPPING ACT  
ENFORCEMENT ACTION**

The Federal Maritime Commission (FMC) is an independent U.S. administrative agency, that is empowered to prescribe regulations,<sup>63</sup> as well as make adjudicatory findings of violations of the Shipping Act.<sup>64</sup> Under its procedural rules, the FMC usually assigns adjudications to an administrative law judge for initial decision.<sup>65</sup>

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62. See Matt Clark et al., *Canada's New Drone Regulations Take Effect: How They Compare to the U.S. Regulations*, HOGAN LOVELLS (June 25, 2019), <https://www.hldroneblog.com/2019/06/canadas-new-drone-regulations-take-effect-how-they-compare-to-the-u-s-regulations/>; see also 14 C.F.R. § 107.200; 14 C.F.R. § 107.200; HEATHER KRAUSE, U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-20-97, UNMANNED AIRCRAFT SYSTEMS: FAA COULD BETTER LEVERAGE TEST SITE PROGRAM TO ADVANCE DRONE INTEGRATION 23-28 (2020), <https://www.gao.gov/assets/gao-20-97.pdf>; Kathryn Rattigan, *Part 107 Waivers: Does Your Waiver Stand a Chance?*, JD SUPRA, <https://www.jdsupra.com/legalnews/part-107-waivers-does-your-waiver-stand-51088/>; AUVSI, *Waivers Under Part 107: Interactive Report* (2018), <https://www.auvsi.org/waivers-under-part-107-interactive-report-0>.

63. 46 U.S.C. § 46105(b)(1).

64. 46 U.S.C. §§ 41302-41304.

65. 46 C.F.R. § 502.233.

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1. *Demurrage and Detention: The FMC's 2020 Interpretive Rule*

On May 18, 2020, the FMC adopted an interpretive rule, advising the shipping public and regulated entities on its interpretation of 46 U.S.C. § 41102(C) with respect to the application and collection of demurrage and detention.<sup>66</sup> Although not defined by the interpretive rule, demurrage is generally defined as charges for occupying space (after “free time”); “detention” are charges assessed for retaining equipment (usually ocean-going containers) beyond the allotted “free time.”<sup>67</sup> The FMC had earlier issued an interpretive rule laying out how it would analyze the provisions of 46 U.S.C. § 41102(C) generally.<sup>68</sup> The interpretive rule laid out what the FMC identified as its “north star”—the “incentive principle.”<sup>69</sup> That is, to what extent do the charges serve as incentives to “promote freight fluidity.”<sup>70</sup> Particularly, the FMC considers in its reasonableness analysis “the extent to which demurrage practices and regulations relate demurrage or free time to cargo availability for retrieval[;]”<sup>71</sup> and that it generally finds charging detention when empty containers cannot be returned likely unreasonable (absent “extenuating circumstances”).<sup>72</sup> The FMC also indicated that it may consider “whether and how regulated entities provide notice to cargo interests that cargo is available for retrieval.”<sup>73</sup> Presumably, poor notice practices may make assessing demurrage and detention unreasonable. Finally, the FMC stated “in the context of government inspections, the Commission may consider the extent to which demurrage and detention are serving their intended purposes and may also consider any extenuating circumstances.”<sup>74</sup>

The Interpretive Rule also advises regulated entities that it would consider the “existence, accessibility, content, and clarity” of demurrage and detention policies, including dispute resolution policies; and the extent to which they contain information about points of contact, timeframes, and corroboration requirements.<sup>75</sup> The guidance warns that the FMC may consider the “extent to which regulated entities have clearly defined the terms used in demurrage and detention practices and regulations, the accessibility of definitions, and the extent to which the definitions differ

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66. 46 C.F.R. § 545.5(b).

67. Kellie Lynch, *Clarifying the Difference Between Demurrage, Detention, and Per Diem Fees*, UWL (Apr. 19, 2018), <https://www.shipuwl.com/clarifying-demurrage-detention-per-diem-fees/>.

68. 46 C.F.R. § 545.4(d). Mysteriously, the interpretive rule would only apply to containerized cargo. See 46 C.F.R. § 545.5(b).

69. 46 C.F.R. § 545.5(c)(1).

70. *Id.*

71. 46 C.F.R. § 545.5(c)(2)(i).

72. 46 C.F.R. § 545.5(c)(2)(ii).

73. 46 C.F.R. § 545.5(c)(2)(iii). Presumably, poor notice practices may make assessing demurrage and detention unreasonable.

74. 46 C.F.R. § 545.5(c)(2)(iv).

75. 46 C.F.R. § 545.5(d).

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from how the terms are used in other contexts.”<sup>76</sup> Finally, the Interpretive Rule states that the FMC would not be precluded from “considering factors, arguments, and evidence in addition to those specifically listed in [the interpretive rule].”<sup>77</sup>

## 2. *Presidential Action*

Although U.S. consumers’ demand for goods fell precipitously in March 2020 with closures relating to the outbreak of COVID-19, it rebounded with unmatched fervor in the following months.<sup>78</sup> Coupled with labor supply uncertainties and reductions following the outbreak of the virus until a vaccine was distributed widely in 2021, the results of this “bullwhip” included unprecedented delays in servicing containerships arriving at the ports, and congestion in the transportation of goods generally.

From early in his administration, the President took several actions to address supply chain disruptions, congestion, and bottlenecks.<sup>79</sup> On February 24, 2021, the President issued an Executive Order on America’s Supply Chains and established a task force to make recommendations on action the administration should take.<sup>80</sup> On June 8, 2021, the White House Task Force issued a one-hundred day report.<sup>81</sup> The Task Force recommended that the Administration should establish (1) a Supply Chain Disruptions Task Force led by the Secretaries of the Departments of Commerce, Transportation, and Agriculture to provide an all-of-government response to address near-term supply chain challenges to the economic recovery; (2) a datahub led by the Department of Commerce to bring together data from across the federal government to improve the federal government’s ability to track supply and demand disruptions and improve information sharing between federal agencies and the private sector.<sup>82</sup>

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76. 46 C.F.R. § 545.5(e).

77. 46 C.F.R. § 545.5(f).

78. Jaana Remes et al., *The Consumer Demand Recovery and Lasting Effects of Covid-19*, MCKINSEY & COMPANY (Mar. 17, 2021), <https://www.mckinsey.com/industries/consumer-packaged-goods/our-insights/the-consumer-demand-recovery-and-lasting-effects-of-covid-19>.

79. *Fact Sheet: Biden Administration Efforts to Address Bottlenecks at Ports of Los Angeles and Long Beach, Moving Goods from Ship to Shelf*, WHITE HOUSE (Oct. 13, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/13/fact-sheet-biden-administration-efforts-to-address-bottlenecks-at-ports-of-los-angeles-and-long-beach-moving-goods-from-ship-to-shelf/>.

80. Exec. Order No. 14017, Fed. Reg. 11,849 (Feb. 24, 2021), <https://www.federalregister.gov/documents/2021/03/01/2021-04280/americas-supply-chains>.

81. See generally BUILDING RESILIENT SUPPLY CHAINS, REVITALIZING AMERICAN MANUFACTURING, & FOSTERING BROAD-BASED GROWTH 100 DAYS REVIEW UNDER EXECUTIVE ORDER 14017, THE WHITE HOUSE 4 (June 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/100-day-supply-chain-review-report.pdf>.

82. *Id.* at 17-18.

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On July 9, 2021, the President issued an Executive Order on Promoting Competition in the American Economy.<sup>83</sup> This Executive Order established a White House Competition Council to “coordinate, promote, and advance Federal Government efforts to address overconcentration, monopolization, and unfair competition in or directly affecting the American economy.”<sup>84</sup> Stating its agreement with the FMC’s Interpretive Rule, the Executive Order encouraged the FMC to work to “vigorously enforce the prohibition of unjust and unreasonable practices in the context of detention and demurrage pursuant to the Shipping Act.”<sup>85</sup> On October 13, 2021, the President spoke and issued several statements and briefings, including a readout of a meeting held to focus on the congestion in Southern California ports.<sup>86</sup> On October 25, 2021, the Ports of Los Angeles and Long Beach announced that they would impose an “excessive dwell fee” to begin on November 1, on any inbound container staying on a terminal for more than eight days.<sup>87</sup> Citing velocity improvements, the ports later delayed the imposition of these fees; and as of the date of this writing it had been postponed until November 29, 2021.

3. *Initiation of Docket No. 21-09: The Alleged Violations*

On November 11, 2021, the FMC issued FMC Docket No. 21-09, an Order of Investigation and Hearing entitled Hapag-Lloyd, A.G. and Hapag-Lloyd (America) LLC Possible Violations of 46 U.S.C. § 41102(C) (Order).<sup>88</sup> Although the Order is the initiation, rather than the conclusion, of an administrative investigation, it is notable as the FMC in the Order asserts several novel substantive and procedural positions. It is also the first such order the FMC has issued since 2015, and the first issued since the adoption of a procedural rule requiring pre-enforcement notification by the Bureau of Enforcement.

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83. Exec. Order No. 14036, Fed. Reg. 36,987 (July 9, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

84. *Id.* at § 4(b).

85. *Id.* at § 5(o)(i).

86. *Readout of Virtual Roundtable on Collective Efforts to Address Global Supply Chain Bottlenecks*, WHITE HOUSE (Oct. 13, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/13/readout-of-virtual-roundtable-on-collective-efforts-to-address-global-supply-chain-bottlenecks/>; *see generally* BUILDING RESILIENT SUPPLY CHAINS, REVITALIZING AMERICAN MANUFACTURING, AND FOSTERING BROAD-BASED GROWTH 100 DAYS REVIEW UNDER EXECUTIVE ORDER 14017, WHITE HOUSE 4 (June 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/100-day-supply-chain-review-report.pdf>.

87. *San Pedro Bay Ports Announce New Measure to Clear Cargo: Ocean Carriers to be Charged Daily Fee for Containers that Linger on Terminals*, PORT OF LOS ANGELES (Oct. 25, 2021), [https://www.portoflosangeles.org/references/2021-news-releases/news\\_102521\\_jointclearcargo](https://www.portoflosangeles.org/references/2021-news-releases/news_102521_jointclearcargo).

88. Federal Marine Commission, Hapag-Lloyd, A.G. & Hapag-Lloyd (America) LLC, Docket No. 21-09, Order of Investigation and Hearing (Nov. 10, 2021), <https://public-inspection.federalregister.gov/2021-25098.pdf>.

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In its Order, the Commission alleged that in the Spring and Summer of 2021, on at least eleven occasions, Hapag-Lloyd refused to waive the collection of detention for containers that could not be returned because it had either offered no return locations, or no appointments at the marine terminal were available, during multiple free days or multiple days in detention (i.e., after free time had expired). The FMC alleged<sup>89</sup> that these actions constituted a failure to establish and observe a reasonable practice in violation of 46 U.S.C. 41102(c).<sup>90</sup>

Hapag-Lloyd is an ocean common carrier (vessel-operating common carrier), regulated by the FMC under the provisions of the Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998.<sup>91</sup> As the fifth largest containership operators in the world, it is estimated to control four percent of U.S. transpacific trade, twenty percent of U.S. transatlantic trade, and approximately 7.1 percent of global market share.<sup>92</sup> Hapag-Lloyd's fleet at the end of September 2021 comprised of 257 containerships. It owns or rents 1.79 million containers with a capacity of 2,971.1 TTEU.<sup>93</sup> There is no disputing that 2021 was a record profit-making year for Hapag-Lloyd, as well as all other large containership operators.

The Order named the FMC's Bureau of Enforcement (BOE) as a party to the adjudication, as it typically has done. In prior enforcement activity, BOE will typically prepare a recommendation to the Commission, which then votes and by a majority vote can initiate an investigatory adjudication. In 2018, the FMC adopted a new process whereby prior to making such a recommendation BOE would be required to notify a potential respondent and provide it with an opportunity to respond to the allegations. These arguments would be included in the recommendation to the Commission.<sup>94</sup> The Order, however, includes a waiver of the requirements of 46 C.F.R. § 502.63(d), the Commission asserting it was "necessary to help alleviate the unprecedented stress being placed on the supply chain, including the significant role that unreasonable detention plays in congestion and freight fluidity."<sup>95</sup> The Order sets a relatively accelerated schedule for decision, making it possible that judicial review of the Commission's interpretation and application of the provisions of the Shipping Act, at least with respect to carrier detention practices, may come even as the supply chain disruptions continue.

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89. *See id.* at 3.

90. 46 U.S.C. § 41102(c) (stating "A common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.").

91. Codified at 46 U.S.C. §§ 40101-41301.

92. *See Federal Maritime Commission, Federal Maritime Commission Live Stream*, at 01:45-38:21 (Nov. 16., 2021), <https://www.youtube.com/watch?v=BLDpd0RACzc>.

93. HAPAG-LLOYD AG, QUARTERLY FINANCIAL REPORT 6 (2021), [https://www.hapag-lloyd.com/content/dam/website/downloads/ir/HLAG\\_9M\\_2021\\_EN.pdf](https://www.hapag-lloyd.com/content/dam/website/downloads/ir/HLAG_9M_2021_EN.pdf).

94. 46 C.F.R. § 501.63(d).

95. Federal Marine Commission, *supra* note 88, at 5.

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## **International Tax**

CO-EDITORS: CHRISTIE GALINSKI AND MATIAS MILET; AND  
AUTHORS: GIOVANNA BERNAL, PAUL D. CARMAN, WIEBE DE VRIES,  
SUNITA DOOBAY, JOHAN MYRÉN, MICHAEL ROBINSON, AND DAVE  
SHERWIN\*

This article examines international tax developments relating to cryptocurrency reporting in 2021.

### **I. Introduction**

Digital financial assets, referred to in this article as “cryptocurrency,” have become increasingly relevant for policymakers. Even though there is no uniform definition of cryptocurrency, its inherent and unique characteristics cause challenges for various policymakers. These challenges are often connected to the lack of centralized control and the anonymity typical for cryptocurrencies. Moreover, policymaking around cryptocurrency must address the valuation difficulties, the hybrid characteristics of such assets, as well as the rapid evolution of the underpinning technology.<sup>1</sup>

During the December 2018 Buenos Aires G20 Summit, in the G20 Leaders’ Declaration “Building Consensus for Fair and Sustainable Development,” the need for regulation of cryptocurrency was acknowledged with the following statement, “We will regulate crypto-assets for anti-money laundering and countering the financing of terrorism in line with FATF [Financial Action Task Force] standards and we will consider other responses

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\* Christie Galinski (co-editor) is a senior counsel at Miller Canfield, Paddock and Stone P.L.C., based in Chicago, Illinois. Matias Milet (co-editor) is a partner at Osler, Hoskin & Harcourt LLP, based in Toronto. Giovanna Bernal (author of the Panamanian section) is a founding partner at Prime Solutions Tax & Legal and Premium Strategy, a compliance advisory company based in Panama City, Panama, and President of the International Fiscal Association, Panama branch. Paul D. Carman (author of the U.S. section) is a tax partner at Chapman and Cutler LLP, based in Chicago, Illinois. Wiebe de Vries (author of the Dutch section) is a tax and civil lawyer at BloomTax, based in Amsterdam. Sunita Doobay (author of the Canadian section) is a tax partner with Blaney McMurty LLP and is based in Toronto. Johan Myrén (author of the introduction) is a partner and founder at Cedric, based in Sweden. Michael Robinson (co-author of Cayman section) is a senior associate at Ogier, based in the Cayman Islands. Dave Sherwin (co-author of Cayman section) is a partner at Ogier, based in the Cayman Islands.

1. *ORG. FOR ECON. COOP. DEV., TAXING VIRTUAL CURRENCIES: AN OVERVIEW OF TAX TREATMENTS AND EMERGING TAX POLICY ISSUES 7* (2020), <https://www.oecd.org/tax/tax-policy/taxing-virtual-currencies-an-overview-of-tax-treatments-and-emerging-tax-policy-issues.htm> [<https://perma.cc/J88K-JQ97>].



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as needed.”<sup>2</sup> The use of cryptocurrency (with its lack of the key attributes of sovereign currencies) could increase the risks for tax evasion. This risk was, *inter alia*, explicitly addressed in the communiqués of the G20 Finance Ministers’ meetings held on March 3, 2018,<sup>3</sup> and July 4, 2018.<sup>4</sup> Even though it was acknowledged in the communiqués that cryptocurrency has the potential to improve the efficiency and inclusiveness of the financial system, concerns regarding tax evasion were raised.<sup>5</sup>

The trading of cryptocurrency has, through its widespread use in today’s world, become one of many examples of a truly international business. Virtual assets in the form of cryptocurrency are being held and used in various jurisdictions, while its owners are domiciled and taxed in other jurisdictions.

The fact that cryptocurrency, from an income tax point of view, is not regarded as a legal tender (fiat currency) in many jurisdictions, but rather as intangible personal property, has created some challenges for policymaking, as well as the accounting of capital gains in local tax reporting. Furthermore, cryptocurrency is highly volatile and, therefore, a single taxable person may have a high number of transactions each year to be reported in his or her tax return.<sup>6</sup>

Reportable cryptocurrency transactions vary from jurisdiction to jurisdiction, but, as one example, reportable cryptocurrency transactions in Sweden includes the sale of cryptocurrency, the exchange of cryptocurrency for other types of cryptocurrencies, the exchange of a cryptocurrency for a fiat currency (such as USD), and the use of cryptocurrency as a means of payment for the purchase of goods and/or services. Each reportable transaction increases the risk for errors and/or omissions. Therefore, challenges in complying with tax regulations may result in both intended and unintended tax evasions.

Exchange of information regulations between jurisdictions is frequently used to prevent various forms of tax evasion in relation to financial assets. Exchange of information regulations are often based on various bilateral agreements and executed through local legislation. The Common Reporting Standard (CRS), developed in response to the G20 request and approved by the Organization for Economic Cooperation and Development

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2. *G20 Leaders’ Declaration: Building Consensus for Fair and Sustainable Development*, G20 RSCH. GRP., (Dec. 1, 2018), <http://www.g20.utoronto.ca/2018/2018-leaders-declaration.html> [<https://perma.cc/WC7J-YKRW>].

3. *Communiqué, G20 Finance Ministers and Central Bank Governors Meeting, Buenos Aires* (Mar. 2018), MINISTRY OF FIN., JAPAN (Mar. 19-20, 2018), [https://www.mof.go.jp/english/international\\_policy/convention/g20/180320.htm](https://www.mof.go.jp/english/international_policy/convention/g20/180320.htm) [<https://perma.cc/FB84-3VFL>].

4. *G20 Finance Ministers and Central Bank Governors Meeting: Communiqué, Buenos Aires* (July 2018), [https://www.mof.go.jp/english/international\\_policy/convention/g20/20180722.htm](https://www.mof.go.jp/english/international_policy/convention/g20/20180722.htm).

5. *Id.*

6. Nicole Lapin, *Explaining Crypto’s Volatility*, FORBES (Dec. 23, 2021), <https://www.forbes.com/sites/nicolelapin/2021/12/23/explaining-cryptos-volatility/?sh=58510db97b54> [<https://perma.cc/7MTC-8RQK>].

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(OECD) Council on July 15, 2014,<sup>7</sup> is one example of a standard for the exchange of information cross-border.<sup>8</sup> The CRS calls on jurisdictions to obtain information from their financial institutions and automatically exchanges that information with other jurisdictions on an annual basis.<sup>9</sup> It sets out the financial account information to be exchanged, the financial institutions required to report, the different types of accounts and taxpayers covered, as well as the common due diligence procedures to be followed by financial institutions.<sup>10</sup>

Local CRS or equivalent rules often exclude cryptocurrency from reportable transactions in relation to financial assets. For instance, Canada,<sup>11</sup> the Netherlands,<sup>12</sup> and the European Union<sup>13</sup> do not include cryptocurrency transactions within the scope of their local CRS provisions.

Moreover, in light of the tax compliance risks described above, the OECD has identified a need for greater tax transparency for cryptocurrency.<sup>14</sup> The OECD is, therefore, currently developing technical proposals to ensure an adequate and effective level of reporting and exchange of information with respect to cryptocurrency.<sup>15</sup>

The aim of this article, based upon country-by-country reporting, is to shed light upon some of the current uncertainties concerning the exchange of information of cryptocurrency transactions between jurisdictions.

## II. Canada

Cryptocurrency is not legal tender (fiat currency) in Canada but is deemed to be intangible personal property.<sup>16</sup> Under the Canadian Income Tax Act

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7. ORG. FOR ECON. COOP. DEV., STANDARD FOR AUTOMATIC EXCHANGE OF FINANCIAL ACCOUNT INFORMATION IN TAX MATTERS (2D), at 3 (2017), <https://www.oecd-ilibrary.org/docserver/9789264267992-en.pdf?expires=1652400093&id=id&accname=guest&checksum=3A2D420D730757C12C7474BE96175610>.

8. *Common Reporting Standard (CRS)*, ORG. FOR ECON. COOP. DEV., <https://www.oecd.org/tax/automatic-exchange/common-reporting-standard/> [<https://perma.cc/PLE8-HZKN>].

9. *Id.*

10. *Id.*

11. *Common Reporting Standard*, GOV'T CAN., <https://www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/federal-government-budgets/budget-2016-growing-middle-class/common-reporting-standard.html> [<https://perma.cc/L6XQ-2J3A>] (last visited May 12, 2022).

12. *Tax and Customs Administration to Share Information Automatically to Fight Against International Tax Evasion*, GOV'T NETH. (Oct. 29, 2014), <https://www.government.nl/latest/news/2014/10/29/tax-and-customs-administration-to-share-financial-information-with-other-countries-automatically> [<https://perma.cc/G4PF-TTZL>].

13. EUR. CT. AUDITORS, EXCHANGE OF TAX INFORMATION IN THE EU 6 (2019), [https://www.eca.europa.eu/lists/ecadocuments/ap19\\_14/ap\\_tax\\_information.pdf](https://www.eca.europa.eu/lists/ecadocuments/ap19_14/ap_tax_information.pdf) [<https://perma.cc/SK76-DXNA>].

14. ORG. FOR ECON. COOP. DEV., *supra* note 1, at 9.

15. *Id.*

16. Can. Revenue Agency Ruling 2013-0514701I7 (Dec. 13, 2013), <https://taxinterpretations.com/cra/severed-letters/2013-0514701i7>.

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(ITA),<sup>17</sup> cryptocurrency is a commodity.<sup>18</sup> For tax purposes, the usage of cryptocurrency to purchase goods or services is treated as a barter transaction.<sup>19</sup> A taxpayer who receives virtual currency in exchange for goods and services must compute their gross income based on the fair market value of the cryptocurrency received.<sup>20</sup>

In Canada, the federal goods and services tax and the relevant provincial sales tax will also apply to the fair market value of any goods or services purchased with cryptocurrency. Profits and losses incurred on the trading of a virtual currency must be reported on the taxpayer's income tax return.<sup>21</sup> Such profits and losses may be treated as being on account of capital or on account of income, depending on the relevant facts and circumstances.<sup>22</sup> Effective May 18, 2019, suppliers of cryptocurrencies are exempt from the federal goods and services tax and from provincial sales taxes harmonized with the federal goods and services tax.<sup>23</sup>

On March 19, 2021, the Federal Court issued the Canadian version of a U.S. John/Jane Doe summons, referred to under the ITA as an "Unnamed Persons Requirement" (UPR), on Coinsquare, a virtual currency exchange located in Canada, for purposes of enforcing Canada's income tax and VAT/sales tax.<sup>24</sup> Section 231.2(3) of the ITA and section 289(2) of the Canadian Excise Tax Act authorize a court to issue a UPR, if the Court is satisfied that (1) the group of unnamed persons is ascertainable and (2) requirements are met to verify compliance by persons in the group with their duties and obligations under the ITA and the Canadian Excise Tax Act, respectively. It is unclear whether the amendment to the Canadian Excise Tax Act, effective since May 18, 2019, to exempting suppliers of virtual currency from the collection of GST/HST, will apply to Coinsquare taxation years prior to May 18, 2019.<sup>25</sup>

Specifically, the UPR is seeking information from customers with an address in Canada and whose account had at least \$20,000 on December 31 for any of 2014, through and including 2020, or whose accounts had a cumulative deposit of \$20,000 or more, as well as Coinsquare's 16,500

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17. Income Tax Act, R.S.C. 1985, c 1 (5th Supp.) (Can).

18. Can. Revenue Agency Ruling 2013-0514701I7, *supra* note 16.

19. *Id.*

20. *Id.*

21. See Canada Revenue Agency Ruling 2013-0514701I7 (December 13, 2013), Examples.

22. *Id.*

23. *Excise and GST/HST News - No. 107*, GOV'T CAN. (Feb. 2020), <https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/news107/news107-excise-gst-hst-news-no-107-december-2019.html> [<https://perma.cc/NYD3-4JHZ>].

24. Minister Nat'l Revenue v. Coinsquare Ltd., T-1114-20 (2021), <https://aboutbtax.com/WpL> (Can.).

25. Kathryn Walker, *CRA's Request to Coinsquare Follows the IRS's Success with Coinbase*, LEXOLOGY (June 10, 2021), <https://www.lexology.com/library/detail.aspx?g=43ad91c3-8681-425a-a14d-e01359726e49> [<https://perma.cc/TTA6-2X5G>].

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largest customers between 2014 and 2020.<sup>26</sup> The UPR requires Coinsquare to provide the following information:<sup>27</sup>

1. A list of all customer accounts, both active and inactive, either alone or jointly held with any other person(s) or business(es);
2. A detailed listing of all cryptocurrency and fiat currency transfers identifying the source and destination of all customers' deposits and withdrawals. Details should include the method of funding/withdrawal, the type of fiat currency/cryptocurrency transferred in/out, date, time, cryptocurrency address/bank accounts, transaction ID, amount, fees, and all other information Coinsquare captures regarding funding and withdrawals to/from all customer accounts, either alone or jointly with any other person(s) or business(es);
3. A detailed listing of all trading activity of its customers, including over-the-counter (OTC) or off-exchange trades and information indicating the following: trading pair, buy/sell order, date, time, amount, price per unit, fees, and transaction identifier, which can include a list of all known cryptocurrency addresses that were, or may have been, used during the period of its customers, either alone or jointly with any other person(s) or business(es);
4. A copy of the "know your customer" documentation of its customers;
5. A list of all deposit addresses of its customers, either alone or jointly with any other person(s) or business(es); and
6. All other additional information retained by Coinsquare relating to cryptocurrency or fiat transactions of its customers, either alone or jointly with any other person(s) or business(es).

Section 241(4)(e)(xii) of the ITA authorizes the Canada Revenue Agency (CRA) to exchange a taxpayer's information with another tax authority where there is authority to do so under a tax treaty, a tax information exchange agreement, or pursuant to the Convention on Mutual Administrative Assistance in Tax Matters.<sup>28</sup> A foreign authority may examine the taxpayer's information under the exchange provision of section 241 of the ITA. A taxpayer's information is defined in section 241 as information of any kind and in any form as obtained by the Minister of National Revenue for purposes of administering the ITA and would include all information obtained through a UPR.<sup>29</sup>

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<sup>26</sup> *Id.*

<sup>27</sup> *What the Canada Revenue Agency Is Doing to Fight the Underground Economy*, GOV'T OF CAN. (Oct. 23, 2020), <https://www.canada.ca/en/revenue-agency/corporate/about-canada-revenue-agency-cra/tax-alert/what-canada-revenue-agency-doing-fight-underground-economy.html>.

<sup>28</sup> Convention on Mutual Administrative Assistance in Tax Matters, art. 4, Jan. 25, 1988, E.T.S. No. 127, as amended by the Protocol Amending the Convention on Mutual Administrative Assistance in Tax Matter, May 27, 2010, E.T.S. No. 208.

<sup>29</sup> Income Tax Act, R.S.C. 1985, c 1 (5th Supp.) (Can).

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Currently, a tax authority will not find its taxpayer's cryptocurrency account under the CRS information exchange or under the information exchange under the Intergovernmental Agreement (IGA) signed in 2014 with the Internal Revenue Service (IRS).<sup>30</sup> Both the CRS and the IGA allow for the exchange of information on a taxpayer's financial accounts. Although the United States is not a signatory to the CRS, Canada does share financial accounts belonging to U.S. persons (and certain entities whose controlling persons are U.S. persons) under the IGA. Canadian financial institutions must report to the CRA investment and bank accounts with balances exceeding \$50,000 held by U.S. persons (U.S. citizens, green-card holders, U.S. residents, or U.S. corporations).<sup>31</sup> As of April 1, 2019, the CRA has sent over 700,000 records to the IRS for the 2017 taxation year.<sup>32</sup> Under the IGA, the IRS provides the CRA with information on Canadian financial accounts held by tax residents of Canada. As cryptocurrency is not considered legal tender (fiat currency), a cryptocurrency account will not be considered a financial account.<sup>33</sup>

As a member of the Joint Chiefs of Global Tax Enforcement (J5) and a member of the Joint International Taskforce on Shared Intelligence and Collaboration (JITSIC), Canada will be able to obtain and share information on cryptocurrency holdings with other members of the J5 and JITSIC.<sup>34</sup>

The J5 was formed in 2018 to combat tax evasion and is composed of the Australian Taxation Office (ATO), the Canadian CRA, the Dutch *Fiscale Inlichtingen en Opsporingsdienst* (FIOD), the United Kingdom's Her Majesty's

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30. Canada-United States Enhanced Tax Information Exchange Agreement Implementation Act, S.C. 2014, c. 20, s. 99, <https://laws-lois.justice.gc.ca/eng/acts/C-10.58/FullText.html> (Can.).

31. *Id.* at Annex I, § III(A)(1).

32. Francois Mathieu, *2019-0798711C6 STEP 2019 – Q.17 – Part XVIII of the Act*, VIDEO TAX NEWS, <https://members.videotax.com/technical-interpretations/2019-0798711C6-step-2019-q-17-part-xviii-of-the-act> [<https://perma.cc/JA4T-338M>].

33. Canada implemented the CRS on July 1, 2017. Canada's 2018 federal budget, released on February 27, 2018, allocated \$38.7 million over five years to the CRA for the purpose of implementing Canada's adoption of the CRS. Canada is committed to the CRS, and the Federal government stated that it allows the CRA to expand its offshore compliance activities and advance the Government's commitment to promote compliance and combat tax evasion. Canada requires Canadian banks, credit unions, brokerages, and other financial institutions to report to the CRA on financial accounts held by non-residents of Canada. See *Budget 2018: Equality and Growth for a Strong Middle Class*, GOV'T CAN. (Feb. 27, 2018), <https://www.budget.gc.ca/2018/docs/speech-discours/2018-02-27-en.html> [<https://perma.cc/BU7Y-6WUP>]. The first CRS exchange took place in 2018 with ninety jurisdictions currently activated for incoming data and sixty-four jurisdictions for outgoing data. See *CRS by Jurisdiction 2018*, ORG. FOR ECON. COOP. DEV., <https://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/crs-by-jurisdiction/crs-by-jurisdiction-2018.htm> (last visited May 12, 2022).

34. *Joint Chiefs of Global Tax Enforcement*, INTERNAL REVENUE SERV. (June 4, 2021), <https://www.irs.gov/compliance/joint-chiefs-of-global-tax-enforcement> [<https://perma.cc/CG3B-VNAZ>].

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Revenue & Customs (HMRC), and the U.S. IRS Criminal Investigation.<sup>35</sup> The J5's current focus is on cryptocurrency and on reducing "the growing threat to tax administrations posed by cryptocurrencies and cybercrime and to make the most of data and technology."<sup>36</sup>

JITSIC currently consists of a membership of forty-two countries' national tax administrators with the objective of collaborating information and resources to actively tackle tax evasion and aggressive tax avoidance.<sup>37</sup> JITSIC is currently focusing on combatting tax evasion through cryptocurrency and is working with the OECD Forum on Tax Administration on this matter.<sup>38</sup>

The CRA can also receive information on offshore cryptocurrency accounts through its Offshore Tax Informant Program (OTIP), a whistleblower program, which began in 2014.<sup>39</sup> Under OTIP, the CRA provides financial rewards to informants who provide information relating to major international tax evasion or aggressive tax avoidance.<sup>40</sup> Since the inception of OTIP, the CRA has assessed approximately \$60 million in additional taxes owing.<sup>41</sup>

Although a cryptocurrency account will not be deemed a financial account for CRS and IGA purposes, the information gained from the current UPR on Coinsquare, from audits, and through its whistleblower program will likely certainly be shared with the J5 and members of JITSIC.

### III. Cayman Islands

The Standard for Automatic Exchange of Financial Account Information (Standard) was developed by the OECD and includes two components: (1) the CRS and (2) the Model Competent Authority Agreement (CAA).

On October 29, 2014, the Cayman Islands signed the multilateral CAA, and, on October 13, 2015, the Cayman Islands brought the CRS into its domestic law pursuant to The Tax Information Authority (International Tax Compliance) CRS Regulations, 2015 (now the 2021 Revision) (CRS

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35. *J5 Reflects on Two-Years Pursuing Global Tax Cheats*, INTERNAL REVENUE SERV. (July 13, 2020), <https://www.irs.gov/newsroom/j5-reflects-on-two-years-pursuing-global-tax-cheats> [<https://perma.cc/74D9-VCQG>].

36. *Joint Chiefs of Global Tax Enforcement*, *supra* note 34.

37. *Joint International Taskforce on Shared Intelligence and Collaboration*, ORG. FOR ECON. COOP. DEV., <https://www.oecd.org/tax/forum-on-tax-administration/jitsic/> [<https://perma.cc/AT2A-QTYP>] (last visited May 12, 2022).

38. *Id.*

39. *Report Offshore Tax Cheating – Overview*, GOV'T CAN. (Jan. 25, 2021), <https://www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/compliance/offshore-tax-informant-program.html> [<https://perma.cc/653Q-Y4WA>].

40. *Id.*

41. Rudy Mezzetta, *CRA Assesses Nearly \$60 Million under Offshore Tax Informant Program*, INV. EXEC. (Nov. 27, 2020), <https://www.investmentexecutive.com/news/industry-news/cra-assesses-nearly-60-million-under-offshore-tax-informant-program/> [<https://perma.cc/2UBJ-FHZ4>].

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Regulations).<sup>42</sup> The CRS Regulations are regulations passed under the framework of the Tax Information Authority Act (2021 Revision) that establishes the Cayman Islands' Tax Information Authority (TIA) as the "competent authority."

Every Cayman Islands entity organized under the laws of the Cayman Islands will have a classification under the CRS. Cayman Islands entities that are classified as Financial Institutions may have reporting obligations.<sup>43</sup>

Each Financial Institution must identify whether it maintains financial accounts and whether those accounts are reportable. Reportable Accounts are those held by reportable persons, which are defined by reference to the Reportable Jurisdictions. Only those jurisdictions that have entered into either the multilateral CAA or a bilateral CAA are included on the Reportable Jurisdictions list.<sup>44</sup>

In order to carry out this process, a Reporting Financial Institution is required to establish and maintain written policies and procedures designed to identify reportable Financial Accounts. Each Financial Institution will be obliged to confirm, on an annual basis, that it maintains up to date written policies and procedures.<sup>45</sup>

An account is treated as a Reportable Account from the date on which it is identified as such to the date on which it ceases to be a Reportable Account (e.g., because the account holder ceases to be a Reportable Person or the account is closed or transferred in its entirety).

Subject to certain exceptions, each Reporting Financial Institution must report specific information with respect to each of its Reportable Accounts, including, but not limited to, (1) the name, address, jurisdiction(s) of residence, taxpayer identification number(s), date, and place of birth (in the case of an individual) of each Reportable Person that is an Account Holder; (2) its Controlling Persons, if relevant; (3) its account number and value; and (4) the amounts paid to the account holder during the reporting period.<sup>46</sup>

Any failure to comply with the requirements of the CRS Regulations can constitute a criminal offense on the part of the relevant entity, and, further, any such contravention will result in an imputed offense by the directors, general partner, trustee, or equivalent officers (noting that individuals may have a defense, if they can prove that they exercised reasonable diligence to prevent the contravention).<sup>47</sup>

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42. Tax Information Authority Act (International Tax Compliance) (Common Reporting Standard) Regulations (2021 Revision) [Cayman CRS Regulations] [https://legislation.gov.ky/cms/images/LEGISLATION/SUBORDINATE/2015/2015-0061/TaxInformationAuthorityInternationalTaxComplianceCommonReportingStandardRegulations\\_2021%20Revision.pdf](https://legislation.gov.ky/cms/images/LEGISLATION/SUBORDINATE/2015/2015-0061/TaxInformationAuthorityInternationalTaxComplianceCommonReportingStandardRegulations_2021%20Revision.pdf) (Cayman Is.).

43. *Id.* at pt. 1, § 2(a)(b) (explaining the definitions of the Act).

44. *Id.* at pt. 2, § 7.

45. *Id.* at pt. 2, § 7(1)

46. *Id.* at pt. 2, § 9.

47. *Id.* at pt. 3, § 21.

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The monetary penalties for such offenses are severe, as they reach up to approximately \$61,000 for an offense by a corporate body or individual who forms (or forms part of) an unincorporated Cayman Financial Institution.<sup>48</sup> For other individuals, the penalties can reach up to approximately \$24,400.<sup>49</sup> Custodial sentences are also possible for certain offenses including:

1. Failure to produce information requested by the TIA (up to two years); or
2. Providing the TIA with misleading information (up to five years).<sup>50</sup>

The TIA also has powers to impose administrative penalties (i.e., without a court process and subject to a lower evidentiary threshold) of up to approximately \$61,000, supplemented by daily penalties of approximately \$120 for continuing contraventions.<sup>51</sup>

The vast majority of Financial Institutions situated in the Cayman Islands are investment funds, and the holders of Financial Accounts would, therefore, be holders of equity or debt interests. For traditional investment funds that issue equity, the fund would report on the equity interest holders. As most funds are now regulated in the Cayman Islands, we expect that most, if not all, funds (including funds that invest solely in crypto assets) are complying with their due diligence and reporting requirements under the CRS Regulations.

Entities that are issuers of cryptocurrencies would not typically be required to comply with the CRS Regulations, unless the issuer was acting as a Financial Institution. Even then, the issuer may be unable to identify any Financial Accounts if the rights and attributes of the issued cryptocurrencies were neither equity nor debt interests. For example, it is possible that a crypto asset that entitles the holder to distributions could be regarded as neither a debt interest nor an equity interest. In such cases, the Financial Institution may be limited to reporting solely on its shareholders, as opposed to the holders of its crypto assets.

#### **IV. European Union and the Netherlands**

In the European Union (EU), the CRS, as developed by the OECD, was implemented through amendments to the directive on administrative cooperation in the field of taxation (the Administrative Cooperation Directive).<sup>52</sup> The CRS is incorporated in this directive through two

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48. *Id.* at pt. 3, § 22.

49. *Id.*

50. Tax Information Authority Act §§ 24(1), 24(A)(2) (2021 Revision) (Cayman Is.).

51. *Id.* § 25.

52. Council Directive 2011/16/EU of Feb. 15, 2011, on Administrative Cooperation in the Field of Taxation and Repealing Directive 77/799/EEC, art. 8 O.J. (L 64) 1, 6–7, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0016&from=EN>.



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annexes.<sup>53</sup> Annex I, titled: “Reporting and Due Diligence Rules for Financial Account Information,” includes a nearly literal copy of the OECD CRS text.<sup>54</sup> Annex II, titled: “Complementary Reporting and Due Diligence Rules for Financial Account Information,” includes six instructions from the OECD CRS commentary, which means that the EU CRS provisions largely align with the OECD standards.<sup>55</sup> But, in order to have effect for EU member state residents, the directive must be implemented in the national laws of the various EU member states. Under certain circumstances, EU Directives can be directly relied upon without implementation.

The Netherlands has implemented the Administrative Cooperation Directive through a change in its Law on the International Assistance for the levy of taxes (LIA).<sup>56</sup> The Law now, in many cases, directly refers to the Administrative Cooperation Directive, with the result that the CRS provisions now directly apply in the Netherlands.

The goal of the introduction of the CRS in Dutch legislation is to prevent tax avoidance in relation to financial assets. For this purpose, an OECD Implementation Handbook has been circulated, which explains how reporting financial institutions must gather the information that they need to report to the Dutch tax authorities.<sup>57</sup> The financial institutions must conduct due diligence on accounts that are kept for their customers and must report certain information about these accounts.<sup>58</sup> A practical guide for execution of these duties has also been circulated, which also explains how to deal with Foreign Account Tax Compliance Act (FATCA) reporting obligations under U.S. law.<sup>59</sup> Further, the execution of the CRS obligations is laid down in an executive order on identification and reporting instructions for the CRS.<sup>60</sup>

Currently, cryptocurrency and e-money do not fall within the scope of the EU or Dutch CRS provisions. The current Administrative Cooperation Directive does provide for reporting obligations for financial institutions,

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53. Council Directive 2014/107/EU of Dec. 9, 2014, Amending Directive 2011/16/EU as Regards Mandatory Automatic Exchange of Information in the Field of Taxation, art. 1(2)(b), 2014 O.J. (L 359) 1, 3–4, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0107&from=EN>.

54. *Id.* at Annex I, 2014 O.J. (L 359) 8–27.

55. *Id.* at Annex II, 2014 O.J. (L 359) 28–29.

56. Dutch parliamentary papers, II 2014–2015, 34276, no. 3 (Neth.).

57. ORG. FOR ECON. COOP. DEV., STANDARD FOR AUTOMATIC EXCHANGE OF FINANCIAL INFORMATION IN TAX MATTERS - IMPLEMENTATION HANDBOOK 7 (2d ed. 2018), <https://www.oecd.org/tax/exchange-of-tax-information/implementation-handbook-standard-for-automatic-exchange-of-financial-information-in-tax-matters.pdf> [https://perma.cc/3EQE-H46D].

58. *Id.* at 65.

59. Leidraad FATCA/CRS met technische toelichting bij de NL IGA en de CRS-regelgeving Besluit van 23 juni 2020, no. 2020-115390 [FATCA/CRS guideline with technical explanation of the NL IGA and the CRS regulations, Decision of June 23, 2020, no. 2020-115390] (Neth.).

60. Uitvoeringsbesluit identificatie- en rapportagevoorschriften Common Reporting Standard [Implementing Decree Identification and Reporting Regulations Common Reporting Standard] (2018) (Neth.).

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but cryptocurrencies are not considered assets that fall within the scope of the assets governed by the Administrative Cooperation Directive. Consequently, the Dutch (and probably many other EU) tax authorities lack information on crypto assets. As a result, exchange of information on such assets is currently not possible. Possible taxable transactions executed in cryptocurrency or profits realized with cryptocurrency trading itself currently remain out of sight of the tax authorities. Further, the lack of central overview on cryptocurrency, the high level of anonymity, and the hybrid characteristics constitute challenges for tax authorities.<sup>61</sup>

In order to close this information and reporting gap, on November 23, 2020, the EU Commission proposed to extend the scope of the Administrative Cooperation Directive to include cryptocurrency in financial institutions' reporting obligations.<sup>62</sup> The goal of the EU Commission is to introduce harmonized transparency and publication obligations in relation to crypto assets for crypto-asset service providers and issuers, as well as for e-money institutions.<sup>63</sup> The EU Commission aimed to have the amendment to the Administrative Cooperation Directive published in the third quarter of 2021, but, as of December 2021, it has not been published.

In the Netherlands, the Dutch Central Bank has a certain level of supervision over crypto assets, which is based on the EU's Fifth Anti-Money Laundering Directive, as implemented in the Dutch's so-called Anti Money-Laundering and Anti-Terrorism Financing Act (*Wet ter voorkoming van witwassen en financieren van terrorisme*) (Wwft).<sup>64</sup> On the basis of this statute, private individuals and legal entities must register with the Dutch Central Bank, if they offer conversion services between official currency and cryptocurrency and/or offer crypto wallet services.<sup>65</sup> But the obligations that follow from this law are not comparable to CRS obligations, as applicable for financial assets under the LIA, and the reporting obligations are also not comparable with the reporting obligations for financial institutions, as described above.

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61. *Public Consultation: Exchange of Information Framework in the Field of Taxation*, 196 HIGHLIGHTS AND INSIGHTS ON EUROPEAN TAX'N 1, 2 (2021); see also *European Commission Opens Public Consultation into Collection and Exchange of Taxpayer Information from Digital Platform Providers*, GLOB. TAX NEWS (Feb. 17, 2020), <https://globaltaxnews.eu.com/news/2020-5229-european-commission-opens-public-consultation-into-collection-and-exchange-of-taxpayer-information-from-digital-platform-providers> [<https://perma.cc/9QTF-FR4P>].

62. *Commission Roadmap to Extend Scope of DAC to Crypto-Assets And E-Money (DAC8)*, 69 HIGHLIGHTS AND INSIGHTS ON EUROPEAN TAX'N 1, 3 (2020); see also *Commission Roadmap to Extend Scope of DAC to Crypto-Assets and E-money (DAC8)*, MALTA INST. TAX'N (Nov. 25, 2020), <https://maintax.org/news/commission-roadmap-to-extend-scope-of-dac-to-crypto-assets-and-e-money-dac8/>.

63. *Public Consultation: Exchange of Information Framework in the Field of Taxation*, 196 HIGHLIGHTS AND INSIGHTS ON EUROPEAN TAX'N 1, 3 (2021); see also *European Commission Opens Public Consultation into Collection and Exchange of Taxpayer Information from Digital Platform Providers*, *supra* note 61.

64. *Wet ter voorkoming van witwassen en financieren van terrorisme* ("Wwft") [Anti-Money Laundering and Anti-Terrorism Financing Act] (2022) (Neth.).

65. *Id.* at §1.1, art. 1(1)(a).

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Regarding the applicability of the Dutch tax regime to cryptocurrency, the tax framework has not particularly adjusted to the existence of new asset classes such as cryptocurrency. For Dutch income tax purposes, the two most important elements of the taxation of cryptocurrency—the mining of cryptocurrency and the owning or trading of cryptocurrency—are viewed in accordance with existing Dutch definitions and interpretations.

In the case of owning or trading cryptocurrency, generally, the tax treatment of these items is seen as comparable to any other portfolio investment and taxed as any other asset on the basis of net asset value.<sup>66</sup> The Dutch net asset income taxation (so-called “box 3” taxation) applies to certain types of assets, based on their fair market value on January 1st of each tax year. A deemed yield varying between 1.82 percent and 5.53 percent over this net asset value is subject to the applicable “box 3” tax rate. On December 24, 2021, the Dutch Supreme Court ruled that the method of a deemed yield calculation is discriminatory where it deviates from the actual yield realized on the net assets.<sup>67</sup> For tax years 2017 and onwards, it is currently unclear if the actual yield or a deemed yield will be used to determine the income over the box 3 assets.

Alternatively, active trading in cryptocurrency could be considered an entrepreneurial activity under certain circumstances. If the crypto trading or mining is considered an entrepreneurial activity, then the results of such activity are subject to income tax based on the actual result (in box 1), with a rate of between 37.7 percent and 49.5 percent. According to current court cases, trading in cryptocurrency should generally not be considered an entrepreneurial activity because the efforts involved in such activity do not contribute to the creation of added value.<sup>68</sup> Also, for the activity of currency mining, the current view is that this activity should not be considered an entrepreneurial activity<sup>69</sup> because it has a very low probability of resulting in the realization of a benefit, given the marginal chances of actually mining a coin.<sup>70</sup>

A final remark can be made on a court case in relation to the mining of bitcoins for VAT purposes.<sup>71</sup> In this case, an enterprise claimed deductibility of input VAT in relation to bitcoin mining. The inspector claimed that the activities qualified as financial services or mediation services in relation to financial services, in which case input VAT can only be deducted to the extent the service is provided to recipients outside the EU. The problem is that the taxpayer needed to prove where the recipients of the service were

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66. Wet inkomstenbelasting 2001 [2001 Income Tax Act], art. 5.3(1) (Neth.).

67. HR 24 December 2021, ECLI:NL:HR:2021:1963.

68. P. Kavelaars, NTFR 2021/2377 – Cryptocurrency, NDFR, <https://www.ndfr.nl/content/NTFR2021-2377> [<https://perma.cc/CUJ9-L8QA>].

69. Wet inkomstenbelasting 2001 art. 3.2 (Neth.).

70. In November 2021, this chance was estimated at 1 in 22 trillion. See Kristina Zucchi, *Is Bitcoin Mining Still Profitable?*, INVESTOPEDIA (Mar. 12, 2022), <https://www.investopedia.com/articles/forex/051115/bitcoin-mining-still-profitable.asp> [<https://perma.cc/V243-E7J6>].

71. Court of the Hague 15 Jul. 2020, ECLI:NL:RBDHA:2020:7543 (Neth.).

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residing. The taxpayer used statistical records on the bitcoin market to demonstrate where, in principle, his recipients should reside, claimed on that basis that ninety-eight percent of the recipients reside outside the EU, and reclaimed input VAT on this basis.<sup>72</sup> The lower court referred this matter of proof to the Dutch Supreme Court, which held that proof can be furnished by any means, causing the Hague Court to adjust the reclaim entitlement to seventy-five percent.<sup>73</sup>

## V. Panama

Panama is part of the Global Forum for Transparency and Exchange of Tax Information of the OECD<sup>74</sup> and currently has a rating of partially compliant. In Panama, financial institutions must comply with international standards and with the reporting required by the CRS and FATCA.

In 2020, Panama published the updated list of reportable jurisdictions for the purpose of exchanging financial information under the CRS. The list includes sixty-four jurisdictions,<sup>75</sup> and financial institutions should report information regarding accounts whose holders are tax residents in a reportable jurisdiction to the Tax Authority<sup>76</sup> by July 31st of each year.

Financial institutions must obtain information from their clients that can demonstrate their tax residence, the place or jurisdiction where they generate their income, or where they carry out their economic activities. In addition, if the tax residence is not the Republic of Panama, and the individual is generating passive income, which is credited to their bank accounts, the financial institution must request their income statements or the documents that justify, support, or certify that individual's foreign income.

In 2017, Panama signed the Convention on Mutual Administrative Assistance in Tax Matters (MAC).<sup>77</sup> Panama has been fairly proactive in signing bilateral treaties with seventeen countries to avoid double taxation (Barbados, Czech Republic, France, Ireland, Italy, Korea, Luxembourg, Mexico, Netherlands, Portugal, Qatar, Singapore, Spain, United Arab Emirates, England, and Vietnam).

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72. *Id.* ¶ 8.

73. Court of the Hague 10 Jan. 2021, ECLI:NL:RBDHA:2021:10751 (Neth.).

74. ORG. FOR ECON. COOP. DEV., GLOBAL FORUM ON TRANSPARENCY AND EXCHANGE OF INFORMATION FOR TAX PURPOSES: PANAMA 2019 (SECOND ROUND) 11 (2019), <https://www.oecd.org/countries/panama/global-forum-on-transparency-and-exchange-of-information-for-tax-purposes-panama-2019-second-round-5f2584a0-en.htm> [<https://perma.cc/3HEY-JB3Y>].

75. *See* Exec. Decree 343, Off. Gazette 29063-B (July 7, 2020) (Pan.).

76. Dirección General de Ingresos, DGI (Pan.).

77. *See* Law 5 Convention on Mutual Administrative Assistance in Tax Matters (MAC), (Feb. 21, 2017) (Pan.).

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Panama has a territorial tax system; therefore, local income is subject to income tax and to the execution of yearly annual returns.<sup>78</sup> Corporations and foundations of private interest with foreign income that do not carry out operations that are perfected, consumed, or produce their effects within the Republic of Panama have been required to keep accounting records and maintain supporting documentation of their operations since January 1, 2017.<sup>79</sup>

In this regard, the new legislation outlines accounting records as the data that clearly and precisely indicates the commercial operations of legal persons, their assets, liabilities, and its patrimony, which allow them to determine the financial situation of the legal entity and prepare financial statements, if necessary.<sup>80</sup>

The supporting documentation may include contracts, invoices, receipts, or any other documentation necessary to support the transactions carried out by a legal entity.

The accounting records and supporting documentation may be kept in the offices of its registered agent within the Republic of Panama or in any other place within or outside the Republic of Panama provided by its administrative agencies.<sup>81</sup>

The registered agent must have a copy of the accounting records as of April 30th of each year. Likewise, the registered agent must send each year to the competent authority a list of those entities that have shared their accounting records and those that have not. Thus, legal entities registered in Panama with foreign income crypto activities must prepare accounting records each year, and the registered agent is obliged to monitor the activity with a risk-based approach and report any suspicious activity to the Financial Analysis Unit (UAF).

Failure to comply with these obligations will result in the suspension of corporate rights to the legal entity that can lead to its dissolution and penalties from \$5,000 to \$5,000,000.

Although Panama has implemented FATCA and the CRS, cryptocurrencies are not considered financial assets subject to reporting by a

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78. Gisela Porras, *Global Tax Guide to Doing Business in Panama*, DENTONS, <https://www.dentons.com/en/services-and-solutions/global-tax-guide-to-doing-business-in/panama> (last visited May 12, 2022).

79. See Law 52 Accounting Records and Supporting Documentation for All Operations That Did Not Have Their Effects in the Republic of Panama, *Gaceta Oficial*, Oct. 27, 2016) (Pan.).

80. See Law 254 Adjustments to the Legislation on International Tax Transparency and the Prevention of Money Laundering, (Nov. 11, 2021) (Pan.).

81. In cases where they are kept in a place other than the offices of the resident agent, legal entities must provide to the resident agent, in writing: (1) The physical address of accounting records and supporting documentation. (2) The name and contact details of the person who keeps them in their custody. (3) Legal entities must inform the registered agent, in writing, of any change in the physical address or contact information regarding where the accounting records and supporting documentation are kept, within a period of no more than fifteen business days, counted as of the date the respective change was approved. See Law 254, *supra* note 79.

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financial institution, as crypto trading platforms and crypto exchanges are not considered financial institutions by domestic law.<sup>82</sup> Cryptocurrencies are seen as unregulated virtual assets; therefore, the entities that trade with cryptocurrencies are not subject to reporting obligations yet, unless the cryptocurrencies are under the management of a deposit custodian (crypto asset custodians). In that case, the custodian who is considered, by law, a financial institution must collect and exchange financial information with the respective reportable jurisdictions.

With regards to the regulation of cryptocurrencies, Panama has drafted two preliminary laws under the approval of the Panama National Assembly, which are intended to introduce definitions of crypto assets, e-money, and other virtual currencies<sup>83</sup> and regulate due diligence procedures and licensing.<sup>84</sup>

The OECD is currently developing technical discussions regarding the effectiveness of reporting and the exchange of information on cryptocurrencies in order to improve tax transparency. In addition, the OECD is reviewing the impact of VAT, income, and property tax on transactions related to crypto assets.<sup>85</sup>

As of December 2021, there is no information on Panamanian banks willing to develop their own virtual currencies and, as cryptocurrency is not considered to be legal currency, we expect it will be considered only a virtual asset.

Lastly, with respect to the measures regarding virtual asset service providers, domestic laws in Panama still do not include direct provisions for this type of entity, although Panama follows the Financial Action Task Force and OECD recommendations and is constantly implementing changes in its legislation to comply with their standards.<sup>86</sup>

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82. See Law 51 That Establishes the Regulatory Framework for the Implementation of the Exchange of Information for Tax Purposes Creating Obligations and Appropriate Controls for Supervision and Compliance, by Virtue of the Agreements Signed by the Republic of Panama, *Gaceta Oficial*, (Oct. 27, 2016).

83. Preliminary Draft Law: Crypto Law: Making Panama Compatible with the Digital Economy, Blockchain, Cryptocurrencies, and the Internet, Ch. 3, art. 3(6) (Sep. 6, 2021).

84. Preliminary Draft Law 101: The Use of Virtual Currencies or Cryptocurrencies and Their Management (Aug. 17, 2021) (Pan.).

85. See ORG. FOR ECON. COOP. DEV., *supra* note 1, at 32.

86. See FIN. ACTION TASK FORCE, UPDATED GUIDANCE FOR A RISK-BASED APPROACH TO VIRTUAL ASSETS AND VIRTUAL ASSET SERVICE PROVIDERS 4 (2021), <https://www.fatf-gafi.org/media/fatf/documents/recommendations/Updated-Guidance-VA-VASP.pdf> [<https://perma.cc/A6Z6-PYEZ>].

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## **VI. United States**

Currently, the United States has not adopted the CRS.<sup>87</sup> The U.S. IRS has, at least initially, determined that the country's rough equivalent to CRS, the FATCA provisions, sections 1471 through 1474 of the Internal Revenue Code of 1986, as amended (the IRC or the Code), do not currently apply to virtual currency.<sup>88</sup>

Other U.S. reporting provisions under the Code or under the Bank Secrecy Act may or may not apply to cryptocurrency transactions, depending upon the particular type of cryptocurrency involved and how the cryptocurrency fits into currently used terminology.

IRC section 6045 requires brokers, including barter exchanges, to report transaction information in regard to certain transactions. The reports include the name and address of the customer, as well as the gross proceeds of the transaction. The Treasury Regulations clarify that the reporting applies to each sale by a customer of the broker if, in the ordinary course of a trade or business in which the broker stands ready to effect sales to be made by others, the broker effects the sale or closes the short position opened by the sale.<sup>89</sup>

IRC section 6045(c)(1)(B), as amended by the Infrastructure Investment and Jobs Act, expands the definition of "broker" for returns required to be filed after December 31, 2023, for the purposes of IRC section 6045(c)(1) by adding "any person who (for consideration) is responsible for regularly providing any service effectuating transfers of digital assets on behalf of another person."<sup>90</sup>

In addition, brokers are required to provide statements that include the customer's basis in specified securities.<sup>91</sup> For returns required to be filed after December 31, 2023, IRC section 6045(g)(3)(B)(iv) includes "digital assets" as "specified securities," triggering basis reporting obligations on the part of brokers.<sup>92</sup> "Digital assets" is defined in IRC section 6045(g)(3)(D) as "any digital representation of value which is recorded on a cryptographically secured distributed ledger or any similar technology as specified by the Secretary."<sup>93</sup> This means any broker that effectuates a sale or trade of a digital asset is required to report the name of the customer and the basis of the digital asset.

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87. See ORG. FOR ECON. COOP. DEV., *CRS by Jurisdiction*, <https://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/crs-by-jurisdiction/> [<https://perma.cc/KG8B-YJVR>] (last visited May 12, 2022).

88. INTERNAL REVENUE SERV., INFORMATION REPORTING ADVISORY COMMITTEE PUBLIC REPORT 66 (2018), <https://www.irs.gov/pub/irs-pdf/p5315.pdf> [<https://perma.cc/4RWU-Q8E7>].

89. 26 C.F.R. § 1.6045-1.

90. 26 U.S.C. § 6045(c)(1)(C).

91. 26 U.S.C. § 6045(g)(2)(A).

92. 26 U.S.C. § 6045(g)(3)(B)(iv).

93. 26 U.S.C. § 6045(g)(3)(D).

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In addition, for returns required to be filed after December 31, 2023, IRC section 6045A is amended by adding the requirement that any broker that transfers a digital asset from an accountant maintained by a broker to an account not maintained by a broker is required to report the transfer.<sup>94</sup> This prevents transfers of digital assets to private wallets in order to escape the reporting rules after the amendments by the Infrastructure and Jobs Act take effect.

Separately, for returns required to be filed after December 31, 2023, IRC Section 6050I(d), as amended by the Infrastructure and Jobs Act, adds any digital asset to the list of the types of property treated as cash for the purposes of the obligation of trades or business to report the receipt of cash in connection with the trade or business.<sup>95</sup> In general, IRC section 6050I requires persons in trades or businesses to report receipts of cash more than \$10,000.<sup>96</sup>

The U.S. Financial Crimes Enforcement Network (FinCEN) has previously issued guidance on how FinCEN regulations apply to money transmission dominated in value that substitutes for currency, specifically, convertible virtual currencies (CVCs).<sup>97</sup> In general, money transmitters must comply with certain recordkeeping, reporting, and transaction-monitoring obligations.<sup>98</sup> Under such guidance, a person who creates or sells a CVC software application or platform may be exempt from Bank Secrecy Act reporting obligations as to those actions but may still have Bank Secrecy Act reporting obligations as a money transmitter if the seller or developer also uses the application or platform to accept or transmit currency funds, or value that substitutes for currency, such as a CVC. For these purposes, money transmission services are defined to mean the acceptance of currency, funds, or other value that substitutes for currency from one person and the transmission of currency, funds, or other value that substitutes for currency to another by any means.<sup>99</sup>

Other FinCEN guidance provides that, as long as a broker or dealer in real currency or other commodities accepts and transmits funds solely for the purpose of effecting a bona fide purchase or sale of the real currency or other commodities for or with a customer, such person is not acting as a money transmitter under the regulations. But if the broker or dealer transfers funds between a customer and a third party that is not part of the

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94. 26 U.S.C. § 6045A(a).

95. 26 U.S.C. § 6050I(d).

96. 26 U.S.C. § 6050I(a)(1)–(2).

97. U.S. DEP'T OF TREASURY, FIN. CRIMES ENF'T NETWORK, APPLICATION OF FINCEN'S REGULATIONS TO CERTAIN BUSINESS MODELS INVOLVING CONVERTIBLE VIRTUAL CURRENCIES 1 (2019), <https://www.fincen.gov/sites/default/files/2019-05/FinCEN%20Guidance%20CVC%20FINAL%20508.pdf> [<https://perma.cc/X8EV-DW84>].

98. Examples of such requirements include the filing of Currency Transaction Reports (31 C.F.R. § 1022.310) and Suspicious Activity Reports (31 C.F.R. § 1022.320(a)(1)), whenever applicable, general recordkeeping maintenance (31 C.F.R. § 1010.410), and recordkeeping related to the sale of negotiable instruments (31 C.F.R. § 1010.415).

99. 31 CFR § 1010.100(ff)(5)(i)(A).



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currency or commodity transaction, such transmission of funds is no longer a fundamental element of the actual transaction necessary to execute the contract for the purchase or sale of the currency or the other commodity, and the broker or dealer becomes a money transmitter.<sup>100</sup>

FinCEN has also proposed regulations that would add “convertible virtual currency” to the definition of “money.”<sup>101</sup>

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100. U.S. DEP’T OF TREASURY, FIN. CRIMES ENF’T NETWORK, APPLICATION OF THE DEFINITION OF MONEY TRANSMITTER TO BROKERS AND DEALERS IN CURRENCY AND OTHER COMMODITIES 2 (2008), <https://www.fincen.gov/sites/default/files/guidance/fin-2008-g008.pdf>. *See also* Bank Secrecy Act Regulations; Definitions and Other Regulations Relating to Money Services Businesses, 76 Fed. Reg. 43,594 (U.S. Dep’t of Treasury July 21, 2011), <https://www.federalregister.gov/documents/2011/07/21/2011-18309/bank-secrecy-act-regulations-definitions-and-other-regulations-relating-to-money-services-businesses>.

101. Joint Notice of Proposed Rule Making, 85 Fed. Reg. 68,005 (amending C.F.R. Title 31, Ch. X, Section 1010.100 (eee)(2)(ii)). For these purposes, convertible virtual currency means a medium of exchange (such as cryptocurrency) that either has an equivalent value as currency, or acts as a substitute for currency, but lacks legal tender status. *See also* Notice of Proposed Rule Making, RIN 1506-AB47, Requirements for Certain Transactions Involving Convertible Virtual Currency or Digital Assets, 86 Fed. Reg. 3897 (U.S. Dep’t of Treasury Jan. 15, 2021), <https://www.federalregister.gov/documents/2021/01/15/2021-01016/requirements-for-certain-transactions-involving-convertible-virtual-currency-or-digital-assets>.

## **International Art and Cultural Heritage Law**

BIRGIT KURTZ, MARIA GORETTI TAI, AND LOIS E. WETZEL\*

This article surveys significant legal developments in international art and cultural heritage law during 2021.

### **I. Federal Republic of Germany v. Philipp**

In early 2021, the Supreme Court decided a case involving relics and religious objects taken during the Nazi era from a consortium of Jewish art dealers.<sup>1</sup> The Court held that Germany was immune from suit because the takings exception to sovereign immunity does not apply where the expropriation victims were the state's own nationals. The Court rejected the dealers' heirs' argument that genocide limited the "domestic takings" doctrine.

#### **A. FACTUAL BACKGROUND**

At the center of this case was a collection of medieval relics and devotional objects known as the "Welfenschatz" (Guelph treasure).<sup>2</sup> The treasure was assembled in Germany over the course of centuries. After World War I, three Jewish art dealers collectively bought the treasure and, by 1931, had re-sold about half of the collection's pieces. In 1935, the Nazis allegedly used "a combination of political persecution and physical threats to coerce the consortium into selling" the rest of the items for about a third of their value.<sup>3</sup> At the end of World War II, the United States occupied Germany and took possession of the items, which were eventually turned over to Germany. Since then, the Welfenschatz has been maintained by Stiftung Preussischer Kulturbesitz (SPK) (the Prussian Cultural Heritage Foundation), which is an instrumentality of Germany. Germany and SPK (collectively "Germany") were Petitioners in the case.

Respondents are heirs of the consortium members. When they approached SPK with the claim that the sale of the treasure was unlawful,

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\* Birgit Kurtz is an attorney in New York City, as well as the immediate past Co-Chair of the ABA's International Law Section Art & Cultural Heritage Law Committee (Parts I & II). Maria Goretti Tai holds an LL.M. from UCLA, J.D. from Chinese University of Hong Kong, and M.A. from Domus Academy (Italy), and she works with The Intellectual Property Group, P.L.L.C., New York, NY and Washington, DC (Part III). Lois E. Wetzel is an Associate, Barnes Richardson (Part IV).

1. Federal Republic of Germany v. Philipp, 141 S.Ct. 703 (2021).

2. *Id.* at 708.

3. *Id.*

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SPK investigated the sale and concluded that the transaction occurred at a fair market price without coercion. In 2014, the parties submitted the dispute to the German “Advisory Commission for the Return of Cultural Property Seized as a Result of Nazi Persecution, Especially Jewish Property.”<sup>4</sup> Germany had created the Commission under the Washington Conference Principles on Nazi-Confiscated Art, which promote the establishment of alternative ways of resolving WWII-related disputes. After the Commission considered evidence from expert witnesses and documents, it also decided that the “sale had occurred at a fair price without duress.”<sup>5</sup>

**B. PROCEEDINGS BELOW**

In 2015, the heirs commenced a lawsuit against Germany in the U.S. District Court for the District of Columbia, raising common law property claims and demanding \$250 million in compensation.<sup>6</sup> Germany moved to dismiss the case, arguing it was immune from suit under the Foreign Sovereign Immunities Act (FSIA).<sup>7</sup> The District Court denied Germany’s motion,<sup>8</sup> and the U.S. Court of Appeals for the District of Columbia Circuit affirmed.<sup>9</sup> This decision was appealed, and the Supreme Court granted certiorari.

**C. UNITED STATES SUPREME COURT**

The question before the Supreme Court was “whether a country’s alleged taking of property from its own nationals” negates the general grant of sovereign immunity.<sup>10</sup> In addition to the parties’ briefs, the Court received a number of amicus briefs, including a brief by the United States in support of Germany.<sup>11</sup> The Court held that “the phrase ‘rights in property taken in violation of international law,’ as used in the FSIA’s expropriation exception, refers to violations of the international law of expropriation and thereby incorporates the domestic takings rule.”<sup>12</sup>

**D. HISTORY OF THE FSIA**

Foreign sovereigns were generally immune from suit in United States courts for centuries.<sup>13</sup> As early as 1812, United States courts generally declined to assert jurisdiction over cases involving foreign government

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4. *Id.*

5. *Id.*

6. *Id.* at 708.

7. *Id.* at 708–09.

8. *Philipp v. Federal Republic of Germany*, 248 F.Supp.3d 59, 70–74 (D.D.C. 2017).

9. *Philipp v. Federal Republic of Germany*, 894 F.3d 406 (D.C. Cir. 2018).

10. *Philipp*, 141 S. Ct. at 708.

11. See S.Ct. Docket, Case No. 19-351, <https://www.supremecourt.gov/search.aspx?filename=/Docket/docketfiles/html/public/19-351.html>.

12. *Philipp*, 141 S.Ct. at 715.

13. See *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812).

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defendants, a practice based in a sense of “grace and comity” between the United States and other nations.<sup>14</sup> Judges instead deferred to the views of the Executive Branch as to whether such cases should proceed in American courts, exercising jurisdiction only where the U.S. State Department expressly referred claims for their consideration.<sup>15</sup>

In 1952, U.S. jurisdiction over claims against foreign states and their agents expanded significantly when the State Department issued the so-called “Tate Letter,” which announced the Department’s adoption of a new “restrictive theory” of foreign sovereign immunity to guide courts in invoking jurisdiction over foreign sovereigns.<sup>16</sup> The “Tate Letter” directed that state sovereigns continue to be entitled to immunity from suits involving their sovereign or “public” acts.<sup>17</sup> Acts taken in a commercial or “private” capacity would no longer be protected from United States court review. Even with this new guidance, courts continued to seek the Executive Branch’s views on a case-by-case basis to determine whether to assert jurisdiction over foreign sovereigns, a system that risked inconsistency and susceptibility to “diplomatic pressures rather than to the rule of law.”<sup>18</sup>

In 1976, Congress addressed this problem by enacting the FSIA, essentially codifying the “restrictive theory” of immunity, and empowering the courts to resolve questions of sovereign immunity without resort to the Executive Branch.<sup>19</sup> Today, the FSIA provides the “sole basis” for obtaining jurisdiction over a foreign state in United States courts.<sup>20</sup> The FSIA provides that “foreign states”—including their “political subdivisions” and “agencies or instrumentalities”—are immune from the jurisdiction of United States courts unless one of the statute’s exceptions to immunity applies.<sup>21</sup>

Sections 1605 and 1605A of the FSIA provide the exceptions to sovereign immunity. The “expropriation” or “takings” exception, in section 1605(a)(3), provides:

A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States . . .<sup>22</sup>

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14. *Id.*

15. *Nigerien B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486-87 (1983).

16. *Id.*

17. *Id.*

18. *In re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d 71, 82 (2d Cir. 2008).

19. *See* 28 U.S.C. § 1602.

20. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989).

21. 28 U.S.C. § 1603.

22. 28 U.S.C. § 1605.

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E. APPLICATION OF THE FSIA

Germany asserted that the purchase of the relics at issue was not “in violation of international law.” As a sovereign’s taking of its own nationals’ property, it was a “domestic taking,”<sup>23</sup> and did not violate the international law of expropriation. The heirs countered that Germany’s taking “was an act of genocide and the taking therefore violated the international law of genocide.”<sup>24</sup>

The Court explained that the “domestic takings” rule is based on the premise that “international law” deals with “relations among sovereign states, not relations between states and individuals.”<sup>25</sup> The rule has “deep roots in international law” and in United States “foreign policy,” and has “endured even as international law increasingly came to be seen as constraining how states interacted not just with other states, but also with individuals, including their own citizens.”<sup>26</sup>

The Court pointed to its decision in the *Banco Nacional de Cuba v. Sabbatino* case and to the Second Hickenlooper Amendment, which Congress passed in response.<sup>27</sup> When Congress drafted the FSIA’s expropriation exception, it copied the language of the Second Hickenlooper Amendment almost verbatim.<sup>28</sup> The Court explained that, based on this background, courts generally agreed that the reference in the takings exception to “‘violation of international law’ does not cover expropriations of property belonging to a country’s own nationals.”<sup>29</sup>

The Court explained that the takings exception “places repeated emphasis on property and property-related rights, while injuries and acts we might associate with genocide are notably lacking.”<sup>30</sup> The Court stated that the heirs’ interpretation “would be remarkable” and opined that “[a] statutory phrase concerning property rights most sensibly references the international law governing property rights, rather than the law of genocide.”<sup>31</sup>

The Court reasoned that “[h]istory and context” support Germany’s interpretation of the restrictive view of sovereign immunity:

Given that the FSIA “largely codifies” the restrictive theory, however, we take seriously the Act’s general effort to preserve a dichotomy between private and public acts. It would destroy that distinction were we to subject all manner of sovereign public acts to judicial scrutiny

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23. *Philipp*, 141 S. Ct. at 709.

24. *Id.*

25. *Id.* at 709–10.

26. *Id.* at 710.

27. *Id.* at 711 (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 403 (1964); 22 U.S.C. § 2370(e)(2)).

28. *Id.* at 711.

29. *Philipp*, 141 S. Ct. at 711 (quoting *Republic of Austria v. Altmann*, 541 U.S. 677, 713 (2004) (Breyer, J., concurring)).

30. *Id.* at 712.

31. *Id.* at 712–13.

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under the FSIA by transforming the expropriation exception into an all-purpose jurisdictional hook for adjudicating human rights violations.<sup>32</sup>

Other parts of the FSIA confirm this interpretation, including the FSIA’s approach to human rights violations in the non-commercial tort exception in section 1605(a)(5) and the terrorism exception in sections 1605A(a) and (h).<sup>33</sup> The limitations in those provisions would have no effect if human rights violations were read into the takings exception, and the Court refused “to insert modern human rights law into FSIA exceptions ill-suited to the task.”<sup>34</sup> The Court emphasized that “United States law governs domestically but does not rule the world,” and that “friction” with other nations should be avoided, in order to prevent reciprocal treatment of the United States in foreign courts.<sup>35</sup>

The heirs pointed to a number of statutes as confirmation that their Nazi-era claims should be heard in U.S. courts, including the 2016 Foreign Cultural Exchange Jurisdictional Immunity Clarification Act, the Holocaust Victims Redress Act of 1998, the Holocaust Expropriated Art Recovery Act of 2016 (HEAR Act), and the Justice for Uncompensated Survivors Today (JUST) Act of 2017.<sup>36</sup> But the Court held that none of those statutes “can overcome the text, context, and history of the expropriation exception.”<sup>37</sup> While these laws support restitution to Holocaust victims, “they generally encourage redressing those injuries outside of public court systems.”<sup>38</sup> Because those other statutes do not deal with sovereign immunity, the Court held that it could not allow the heirs “to bypass [the FSIA’s] design.”<sup>39</sup>

## **II. United States Regulatory Developments Relevant to the Art Market**

The U.S. art market is not specifically regulated as such, but that situation may soon change. In recent years, various parts of the U.S. federal government have issued various documents indicating an increased focus on the art market. Below is a brief overview of recent developments, in chronological order.

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32. *Id.* at 713 (internal citations omitted).

33. *Id.* at 713–14.

34. *Id.* at 714.

35. *Philipp*, 141 S. Ct. at 714.

36. *Id.* at 715.

37. *Id.* at 714.

38. *Id.* at 715.

39. *Id.*

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A. SENATE REPORT

In July 2020, a U.S. Subcommittee issued a report entitled “The Art Industry and U.S. Policies that Undermine Sanctions.”<sup>40</sup> The 150-page report contained a detailed case study about two Russian men who circumvented sanctions by buying art in the United States via off-shore shell companies, lawyers, and an art advisor.<sup>41</sup> The report asserted, *inter alia*:

1. “The art industry is largely unregulated.”
2. “Secrecy is pervasive in the art industry.”
3. “Secrecy, anonymity, and a lack of regulation create an environment ripe for laundering money and evading sanctions.”
4. “Tracing the ownership of anonymous shell companies, including those involved in high-value art transactions, is difficult.”<sup>42</sup>

Among other things, the report recommended applying anti-money laundering (AML) regulations to businesses handling high-value art transactions.<sup>43</sup>

B. TREASURY DEPARTMENT ADVISORY & GUIDANCE

In October 2020, the U.S. Treasury Department issued a document titled “Advisory and Guidance on Potential Sanctions Risks Arising from Dealings in High-Value Artwork.”<sup>44</sup> This document proclaimed that certain “vulnerabilities in the high-value artwork market giv[e] rise to sanctions risks” and “blocked persons have exploited vulnerabilities in the high-value artwork market.”<sup>45</sup> The document advised that “transactions involving high-value artwork are not categorically exempt from OFAC [Office of Foreign Assets Control] regulation” but also highlighted the importance of “risk-based compliance programs.”<sup>46</sup>

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40. U.S. SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS, COMM. ON HOMELAND SEC. AND GOVERNMENTAL AFFAIRS, THE ART INDUSTRY AND U.S. POLICIES THAT UNDERMINE SANCTIONS REPORT (2020), <https://www.hsgac.senate.gov/imo/media/doc/2020-07-29%20PSI%20Staff%20Report%20-%20The%20Art%20Industry%20and%20U.S.%20Policies%20that%20Undermine%20Sanctions.pdf>.

41. *See id.*

42. *Id.* at 2–3.

43. *Id.* at 14.

44. U.S. TREASURY DEP’T, ADVISORY AND GUIDANCE ON POTENTIAL SANCTIONS RISKS ARISING FROM DEALINGS IN HIGH-VALUE ARTWORK (2020), [https://home.treasury.gov/system/files/126/ofac\\_art\\_advisory\\_10302020.pdf](https://home.treasury.gov/system/files/126/ofac_art_advisory_10302020.pdf).

45. *Id.* at 1.

46. *Id.* at 3.

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C. NATIONAL DEFENSE AUTHORIZATION ACT

On January 1, 2021, Congress passed the National Defense Authorization Act (NDAA).<sup>47</sup> Among the thousands of provisions in the NDAA, two are of particular relevance to the art market: (1) the addition of the antiquities trade to the Bank Secrecy Act (BSA) and (2) the art market study.

1. *Addition of Antiquities Trade to BSA*

The Bank Secrecy Act (BSA)<sup>48</sup> is designed to help identify the source, volume, and movement of currency to assist U.S. government agencies in detecting and preventing money laundering.<sup>49</sup> The BSA covers banks and certain enumerated non-bank financial institutions including casinos, securities and commodities firms, insurance companies, loan or finance companies, operators of credit card systems, and dealers in precious metals, stones, or jewels.<sup>50</sup> The NDAA added a new type of non-bank financial institution to that list: a person engaged in the *trade of antiquities*, including an advisor, consultant, or any other person who engages as a business in the solicitation or the sale of antiquities.”<sup>51</sup>

Proposed regulations must be issued by December 27, 2021, considering: (1) the scope; (2) the degree of focus on high-value trade; (3) the need to identify dealers, advisors, and consultants; (4) any thresholds; (5) any exemptions; and (6) any other relevant matter.<sup>52</sup>

2. *Art Market Study*

Section 6110(c) of the NDAA, titled “Study of the Facilitation of Money Laundering and Terror Finance Through the Trade in Works of Art,” requires the Treasury Secretary—together with the Federal Bureau of Investigation, the Attorney General, and Homeland Security—to study money laundering and terror financing in the art market.<sup>53</sup> This study should include an analysis of: (1) the extent of the facilitation of money laundering and terror financing; (2) which markets should be subject to regulations; (3) the degree of focus on high-value trade; (4) the need to identify dealers; (5) thresholds and definitions; (6) exemptions; (7) information usefulness to criminal, tax, or regulatory matters; and (8) any

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47. See H.R. 6395 - William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, <https://www.congress.gov/bill/116th-congress/house-bill/6395/text> (hereinafter NDAA).

48. Codified at 12 U.S.C. §§ 1829b, 1951–1959, 31 U.S.C. §§ 5311 et seq.; see also 31 C.F.R. Chapter X.

49. See *FinCEN, History of Anti-Money Laundering Laws*, U.S. TREASURY DEP’T, <https://www.fincen.gov/history-anti-money-laundering-laws>.

50. See 31 U.S.C. § 5312(a)(2).

51. NDAA § 6110(a)(1)(B) (emphasis added)

52. See NDAA § 6110(b) (360 days after Jan. 1, 2021).

53. NDAA § 6110(c).



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other matter the secretary deems appropriate.<sup>54</sup> The NDAA requires a report on the study by December 27, 2021.<sup>55</sup>

**D. CONGRESSIONAL RESEARCH SERVICE (CRS) REPORT**

On March 1, 2021, the CRS issued a report titled “Transnational Crime Issues: Arts and Antiquities Trafficking.”<sup>56</sup> The report noted factors that “may” help criminals use the art trade to profit from their crimes, including “confidentiality, challenges in documenting provenance (ownership history) of certain items, the use of intermediaries, and inconsistent due diligence practices.”<sup>57</sup> The report also listed a number of federal agencies and their roles regarding art and antiquities, and it briefly analyzed a number of relevant laws and legislative activities.<sup>58</sup>

**E. FINCEN NOTICE**

On March 9, 2021, the Treasury Department issued a notice titled “FinCEN Informs Financial Institutions of Efforts Related to Trade in Antiquities and Art.”<sup>59</sup> The notice explained that “crimes relating to antiquities and art may include looting or theft, the illicit excavation of archeological items, smuggling, and the sale of stolen or counterfeit objects,” as well as “money laundering and sanctions violations.”<sup>60</sup> The notice contained specific instructions for filing Suspicious Activity Reports (SARs), requesting that information regarding suspicious art and antiquities transactions include: (1) detailed information on “the actual purchasers or sellers of the property, and their intermediaries or agents”; (2) “the volume and dollar amount of the transactions”; and (3) any beneficial owner information.<sup>61</sup>

In a speech to a group of international bankers, then-FinCEN Director Kenneth Blanco explained the notice’s purpose:

The information you provide will help to inform FinCEN’s rulemaking efforts in extending AML [anti-money laundering] requirements to dealers in antiquities, and will also inform the study of the facilitation of

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54. *Id.*

55. See NDAA § 6110(d) (360 days after Jan. 1, 2021).

56. KATARINA C. O’REGAN, CONG. RSCH. SERV., IF11776, TRANSNATIONAL CRIME ISSUES: ARTS AND ANTIQUITIES TRAFFICKING REPORT (2021), <https://crsreports.congress.gov/product/pdf/IF/IF11776>.

57. *Id.* at 1.

58. *Id.* at 1–2.

59. See U.S. TREASURY DEP’T, FINCEN INFORMS FINANCIAL INSTITUTIONS OF EFFORTS RELATED TO TRADE IN ANTIQUITIES AND ART (2021), [https://www.fincen.gov/sites/default/files/2021-03/FinCEN%20Notice%20on%20Antiquities%20and%20Art\\_508C.pdf](https://www.fincen.gov/sites/default/files/2021-03/FinCEN%20Notice%20on%20Antiquities%20and%20Art_508C.pdf).

60. *Id.* at 1–2.

61. *Id.* at 2.

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money laundering and the financing of terrorism through the trade in works of art that the AML Act requires.<sup>62</sup>

F. ADVANCE NOTICE OF PROPOSED RULEMAKING (ANPRM)

In September 2021, FinCEN issued an ANPRM regarding the addition of the antiquities trade to the BSA (described in Part C.1., above), soliciting comments from members of the antiquities industry, law enforcement, civil society groups, and the broader public by October 25, 2021.<sup>63</sup> In the notice, FinCEN sought comments on all aspects of the ANPRM and on a list of specific questions:<sup>64</sup>

1. Please identify and describe the roles, responsibilities, and activities of persons engaged in the trade in antiquities, including, but not limited to, advisors, consultants, dealers, agents, intermediaries, or any other person who engages as a business in the solicitation or the sale of antiquities. Are there commonly understood definitions of particular roles within the industry? Who would be considered within or outside such definitions?
2. How are transactions related to the trade in antiquities typically financed and facilitated? What are the typical sources and types of funds used to facilitate the purchase of items in the antiquities market? . . .
3. Can the antiquities market be broken down to show the percentage of transactions that fall in a given monetary range (e.g., 50 percent of all transactions fall below \$X-value)? . . .
4. What, if any, information does a buyer typically learn about the seller, cosigner, or intermediary involved in the sale of antiquities? . . .
5. How do foreign-based participants in the antiquities market operate in the United States? . . .
6. What are the money laundering, terrorist financing, sanctions, or other illicit financial activities risks associated with the trade in antiquities? . . .
7. Which participants involved in the trade in antiquities are in positions in which they can effectively identify and guard against money laundering, the financing of terrorism, and other illicit financing risks in connection with the transactions they conduct? . . .

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62. See Kenneth A. Blanco, Director, U.S. Treasury Dep't, Prepared Remarks of FinCEN Director Kenneth A. Blanco, delivered virtually at the Florida International Bankers Association AML Compliance Conference (Mar. 22, 2021), <https://www.fincen.gov/news/speeches/prepared-remarks-fincen-director-kenneth-blanco-delivered-virtually-florida>.

63. Anti-Money Laundering Regulations for Dealers in Antiquities, 86 Fed. Reg. 53,021 (Sept. 24, 2021), <https://www.federalregister.gov/documents/2021/09/24/2021-20731/anti-money-laundering-regulations-for-dealers-in-antiquities#footnote-14-p53023>.

64. *Id.*

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8. What, if any, safeguards does the industry currently have in place to protect against business loss and fraud? . . .
9. How should “antiquities” be defined for the purposes of FinCEN’s regulations? . . .
10. How is an antiquity distinct from a work of art?
11. How should “trade of antiquities” be defined for the purposes of FinCEN’s regulations? . . .
12. Should FinCEN establish a monetary threshold for activities involving trade in antiquities that would subject persons involved in such activities above that threshold to FinCEN’s regulations, but exempt persons whose activities fall below that threshold? . . .
13. Which aspects of the current regulatory framework applicable to financial institutions should apply to persons engaged in the trade in antiquities? . . .

Thirty-seven comments were received by FinCEN in response to the ANPRM.<sup>65</sup> Commenters included auction houses, trade associations, and advocacy groups.<sup>66</sup> Proposed regulations are expected before the end of 2021.<sup>67</sup>

#### G. ENABLERS ACT

On October 8, 2021, a bipartisan group of members of the House of Representatives introduced the Establishing New Authorities for Businesses Laundering and Enabling Risks to Security Act (ENABLERS Act).<sup>68</sup> The Act’s goal is “to expand the scope and authorities of anti-money laundering safeguards” under the BSA.<sup>69</sup> In a separate statement, the sponsors referenced, among other things, the so-called Pandora Papers, which had been publicized just five days earlier.<sup>70</sup>

The Pandora Papers were published on October 3, 2021, resembling the Panama Papers of 2016 and the Paradise Papers of 2017.<sup>71</sup> The Pandora Papers recounted how a number of public figures had used offshore shell companies and trusts.<sup>72</sup> In one case uncovered by the Pandora Papers,

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65. See U.S. Treasury Dep’t Document ID FINCEN-2021-0006-0001, <https://www.regulations.gov/document/FINCEN-2021-0006-0001/comment>.

66. See *id.*

67. See NDAA § 6110(b)(1).

68. See H.R. 5525 – ENABLERS Act, <https://www.congress.gov/bill/117th-congress/house-bill/5525/all-info> (hereinafter ENABLERS Act).

69. *Id.*

70. Press Release, Representatives Malinowski, Salazar, Cohen and Wilson Introduce Bipartisan Legislation to Stop Enablers of International Corruption (Oct. 6, 2021), <https://malinowski.house.gov/media/press-releases/representatives-malinowski-salazar-cohen-and-wilson-introduce-bipartisan>.

71. See, e.g., Greg Miller, Debbie Cenziper & Peter Whoriskey, “Billions hidden beyond reach,” WASH. POST (Oct. 3, 2021), <https://www.washingtonpost.com/business/interactive/2021/pandora-papers-offshore-finance/>.

72. See *id.*

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money related to allegedly looted Cambodian antiquities had passed through offshore accounts.<sup>73</sup>

If enacted, the ENABLERS Act would add the following art market participants to the BSA as new non-bank financial institutions:

a person engaged in the trade in works of *art, antiques, or collectibles*, including a dealer, advisor, consultant, custodian, gallery, auction house, museum, or any other person who engages as a business in the solicitation or the sale of works of art, antiques, or collectibles . . .<sup>74</sup>

The ENABLERS Act would also add other groups<sup>75</sup> to the BSA as new non-bank financial institutions:

1. Investment advisors;
2. Attorneys, law firms, notaries involved in financial activity; and
3. CPAs and public accounting firms.

The bill has been referred to the House Committee on Financial Services.<sup>76</sup>

#### H. CONCLUSION

The rapid succession of the U.S. federal government actions described above leads to two main conclusions. First, there is a perception, deserved or not, that the art market is being used in the commission of various types of financial crimes. And second, the U.S. federal government is taking steps to subject certain art market participants to new regulations that would obligate them to proactively assist in the fight against money laundering and other financial crimes. Readers are advised to monitor closely these fast-moving developments to adequately manage any new obligations as they become effective.

### III. *Andy Warhol Foundation v. Goldsmith*<sup>77</sup>

Copyright protects both original creative work and derivative works. The objective of copyright's fair use exception is to strike a balance between an artist's intellectual property rights and another person's ability to create new works by referencing other works.<sup>78</sup> The 1976 Copyright Act provides a

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73. See Valentina Di Liscia, "Art Dealer Used Offshore Accounts to Trade Looted Antiquities, Pandora Papers Say," *HYPERALLERGIC* (Oct. 4, 2021), <https://hyperallergic.com/681983/pandora-papers-point-to-potentially-looted-artifacts-in-major-museums/>.

74. See ENABLERS Act, *supra* note 68, § 2(a)(2) (emphasis added).

75. See *id.*

76. See *id.*

77. *Andy Warhol Found. For the Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 36 (2d Cir. 2021).

78. *Blanch v. Koons*, 467 F.3d 244, 250 (2d Cir. 2006).

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non-exclusive list of factors,<sup>79</sup> which should be weighed together,<sup>80</sup> to assert the fair use affirmative defense:

1. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. The nature of the copyrighted work;
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. The effect of the use upon the potential market for or value of the copyrighted work.

A. BACKGROUND

In 1981, defendant-appellant Lynn Goldsmith, on assignment from Newsweek magazine,<sup>81</sup> made a series of portrait photographs of musical artist Prince. In 1984, Goldsmith's agency licensed one of the photographs to Vanity Fair magazine for use as an artist reference,<sup>82</sup> permitting the publication of an illustration based on the photography once as a full page and once as a quarter page, with an attribution to Goldsmith.<sup>83</sup> An "artist reference" means an artist "would create a work of art based on [the] image reference."<sup>84</sup> Vanity Fair commissioned Andy Warhol to create an image of Prince to accompany the publication of an article on the musician for its November 1984 issue.<sup>85</sup> Warhol also made a series of silkscreen prints and pencil illustrations collectively known as the "Prince Series."<sup>86</sup> In 1987, after Warhol's death, the Andy Warhol Foundation for the Visual Arts (AWF) was established as a non-profit corporation in New York.<sup>87</sup> AWF retains copyright in the Prince Series.

In April 2016, after Prince's death, Vanity Fair's parent company, Condé Nast, obtained a commercial license for a different Prince Series image to publish as the magazine cover.<sup>88</sup> Goldsmith became aware of Warhol's Prince Series when the magazine was published in May 2016. In July 2016, Goldsmith notified AWF of the perceived infringement of her copyright. In November 2016, Goldsmith registered the photograph as an unpublished work.

In April 2017, AWF sued Goldsmith for a declaratory judgment of non-infringement or fair use. Goldsmith countersued for copyright

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79. 17 U.S.C. § 107 (1967).

80. *Warhol*, 11 F.4th at 37.

81. *Id.* at 33.

82. *Id.* at 50.

83. *Id.* at 34.

84. *Andy Warhol Found. For the Visual Arts, Inc. v. Goldsmith*, 992 F.3d 99, 783 (2d Cir. 2021).

85. *Warhol*, 11 F.4th at 34.

86. *Id.* at 32.

87. *Id.* at 33.

88. *Id.* at 35.

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infringement. In July 2019, the United States District Court for the Southern District of New York granted summary judgment for AWF, concluding the Prince Series was transformative<sup>89</sup> because: (1) it portrayed Prince as “iconic, larger-than-life,” whereas Goldsmith’s portrayal showed Prince as a “vulnerable human being”;<sup>90</sup> (2) Goldsmith’s creative and unpublished photograph was of “limited importance[,]” because the Prince Series was transformative;<sup>91</sup> (3) Warhol “removed nearly all” protectible elements of Goldsmith’s photograph;<sup>92</sup> and (4) “the Prince Series works [were] not market substitutes that have harmed—or have the potential to harm—Goldsmith.”<sup>93</sup>

Contrary to the district court’s decision, the United States Court of Appeals for the Second Circuit reviewed the grant of summary judgment de novo<sup>94</sup> and found each of the four fair use factors favored Goldsmith<sup>95</sup> and AWF’s defense failed as a matter of law. The Second Circuit also found Andy Warhol’s Prince Series was substantially similar to Goldsmith’s photograph, reversed the District Court’s grant of summary judgment, and remanded the case.<sup>96</sup>

Because the defendant did not seek relief as to works produced by Andy Warhol that have been acquired by other art market players, the case did not decide their rights of use.<sup>97</sup>

**B. PURPOSE AND CHARACTER OF THE USE**

To avoid creating a “celebrity-plagiarist privilege,”<sup>98</sup> the Second Circuit emphasized the law does not allow an artist to exploit another artist’s work without permission.<sup>99</sup> The “purpose and character” of the primary and secondary works are used to evaluate the extent to which the secondary work is transformative.<sup>100</sup> A work is not sufficiently transformative, where “a secondary work does not obviously comment on or relate back to the original” work,<sup>101</sup> or does not use the original for a different purpose. The secondary work must convey a separate “new meaning or message,” embodying a “distinct artistic purpose” reasonably perceived.<sup>102</sup> Thus, the

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89. *Andy Warhol Found. For the Visual Arts, Inc. v. Goldsmith*, 382 F.3d 312, 326 (S.D.N.Y. 2019).

90. *Id.*

91. *Id.* at 327.

92. *Id.* at 330.

93. *Id.* at 331.

94. *Warhol*, 11 F.4th at 36.

95. *Id.* at 32.

96. *Id.* at 54.

97. *Id.*

98. *Id.* at 43.

99. *Id.* at 44.

100. *Google LLC v. Oracle Am., Inc.*, 141 U.S. 1183, 1204 (2021).

101. *Warhol*, 11 F.4th at 41.

102. *Id.*

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District Court erred in using the artist's "stated or perceived intent" to recognize an alteration as transformative.<sup>103</sup>

The Prince Series retained the "essential elements<sup>104</sup> of its source material, the Goldsmith photograph," which remained the "recognizable foundation"<sup>105</sup> of the derivative series. Simply removing certain elements like depth and contrast, and embellishing images with loud and unnatural colors<sup>106</sup> did not mean significant changes were made, even if they were meant to display Warhol's signature style of a "distinct aesthetic sensibility."<sup>107</sup> Hence, the Prince Series was not transformative according to the first factor.<sup>108</sup>

C. COMMERCIAL USE

Distinguishing between a commercial use and non-profit use requires determining whether a user stands to profit from exploitation of the copyrighted material without paying the customary price.<sup>109</sup> Where a secondary use is found to be commercial in nature, it "tends to weigh against"<sup>110</sup> fair use. But the commercial nature is less important when the secondary use is transformative enough, where the primary artist has no reasonable expectation of compensation.<sup>111</sup>

Both the Second Circuit and the District Court found the Prince Series was commercial in nature<sup>112</sup> and served the public interest because advancing the visual arts is AWF's mission,<sup>113</sup> which mitigated against its sales and licensing. Where both courts diverged was on AWF's entitlement to monetize Goldsmith's work without paying the "customary price."<sup>114</sup> A commercial, non-transformative work that might serve the public interest did not sway "significantly"<sup>115</sup> in favor of fair use. The extent of serving the public interest was relevant to assess equitable remedies.<sup>116</sup> The Second Circuit thus held the Prince Series was not transformative and AWF had to pay to monetize another artist's work, even if the second work served the public interest.<sup>117</sup>

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103. *Id.* at 42.

104. *Id.* at 43.

105. *Id.*

106. *Warhol*, 382 F. Supp. 3d at 326.

107. *Warhol*, 11 F.4th at 42.

108. *Id.* at 45.

109. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985).

110. *Warhol*, 11 F.4th at 44.

111. *Blanch v. Koons*, 467 F.3d 244, 254 (2d Cir. 2006).

112. *Warhol*, 382 F. Supp. 3d at 325.

113. *Warhol*, 11 F.4th at 44.

114. *Id.*

115. *Id.* at 45.

116. *Id.*

117. *Id.*

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**D. NATURE OF THE COPYRIGHTED WORK**

Where a copyrighted work is “factual or informational” and “published,”<sup>118</sup> the determination swings in favor of finding fair use. Because the Second Circuit held the Prince Series was not transformative, greater weight should be given to the nature of the copyrighted work.<sup>119</sup> The District Court erred in not finding this factor in favor of Goldsmith, where her work was recognized as both creative and unpublished.<sup>120</sup>

**E. AMOUNT AND SUBSTANTIALITY OF THE PORTION USED IN RELATION TO THE COPYRIGHTED WORK AS A WHOLE**

Copyright protects the “cumulative manifestation” of artistic choices of “ideas, concepts, principles, or processes.”<sup>121</sup> For a photograph, these choices include the “particular expression” of the photographer’s idea underlying her photograph,<sup>122</sup> such as the posing of the subjects, lighting, angle, selection of film and camera, and any other variant involved.<sup>123</sup>

Besides considering the “quantity of the material used,” the “quality and importance”<sup>124</sup> of the material used in relation to the original work are also part of the amount and substantiality of the work factor. The test considers the reasonableness of the quantity of the materials used in relation to the purpose of copying.<sup>125</sup>

The Prince Series was found to have borrowed significantly both quantitatively and qualitatively<sup>126</sup> from Goldsmith’s photograph. Despite the cropping and flattening Warhol did to Goldsmith’s photograph, his screen print was “readily” and “instantly” identifiable as deriving from a “specific” photograph taken by Goldsmith,<sup>127</sup> in which Prince’s hair appears shorter on the left side of his face.<sup>128</sup> The Second Circuit found Warhol copied the “essence”<sup>129</sup> of Goldsmith’s photograph and held this factor swung in Goldsmith’s favor.

Thus, the District Court erred in finding Warhol removed nearly all of the copyrightable elements of Goldsmith’s photograph by removing or minimizing Goldsmith’s expressive qualities.<sup>130</sup>

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118. *Id.*

119. *Warhol*, 11 F.4th at 45.

120. *Id.*

121. *Rogers v. Koons*, 960 F.2d 301, 308 (2d Cir. 1992).

122. *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 115 (2d Cir. 1998).

123. *Rogers*, 960 F.2d at 307.

124. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 587 (1994).

125. *Id.* at 586.

126. *Warhol*, 11 F.4th at 47.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 46.



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F. EFFECT OF THE USE UPON THE POTENTIAL MARKET

Fair use is an affirmative defense, and the burden of proving the secondary use does not compete in the relevant market lies with the party asserting the defense.<sup>131</sup> Caselaw shows that “where the infringer’s target audience and the nature of the infringing content is the same as for the original,<sup>132</sup> there is usurpation.

Even though the primary market of both works differed and there might be a public interest in Warhol’s copying, the Prince Series posed “recognizable harm” to Goldsmith’s licensing market for editorial purposes.<sup>133</sup> The Second Circuit held this factor swung in favor of Goldsmith. The District Court erred in placing the burden of proof on the rightsholder<sup>134</sup> and overlooked the potential harm to Goldsmith’s derivative market.<sup>135</sup>

G. EFFECT OF GOOGLE DECISION

The Second Circuit granted plaintiff-appellant’s Petition for Panel Rehearing and Rehearing En Banc after the Supreme Court handed down its decision<sup>136</sup> in *Google*. Both courts reiterated fair use decisions are highly contextual and fact specific. Courts must apply the flexible concept of fair use in light of the “sometimes conflicting” aims of copyright law.<sup>137</sup>

The *Google* decision is limited to the unusual context of copyrights in computer code, and thus rendered no change to the application of established principles to a traditional area of artistic expression.<sup>138</sup> As a result, copyright material serving an artistic function rather than a utilitarian one may enjoy stronger copyright protection.<sup>139</sup>

H. SUBSTANTIAL SIMILARITY

Photographs are “creative aesthetic expressions”<sup>140</sup> of a scene or image. Both photographs in this case were substantially similar as a matter of law.<sup>141</sup> A reasonable viewer can easily recognize Goldsmith’s photograph as the source material for Warhol’s Prince Series.<sup>142</sup> The Second Circuit deemed

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131. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994).

132. *Cariou v. Prince*, 714 F.3d 694, 709 (2d Cir. 2013).

133. *Warhol*, 11 F.4th at 51.

134. *Id.* at 49.

135. *Id.* at 50.

136. *Id.* at 51.

137. *Id.*

138. *Google LLC v. Oracle Am., Inc.*, 141 U.S. 1183, 1208 (2021).

139. *Id.* at 1197.

140. *Warhol*, 11 F.4th at 53.

141. *Id.*

142. *Id.* at 54.

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the “ordinary observer” test appropriate for photographs, which have “long received” thick copyright protection.<sup>143</sup>

I. CONCLUSION

Where artists choose to incorporate other artists’ copyrighted expression into their own works, they must pay for the source material.<sup>144</sup> Even if the secondary user has generated an active market for their own work,<sup>145</sup> the right market must be analyzed. There is no “celebrity-plagiarist privilege” in law. It is not the function of judges to decide the meaning and value of art, which remains in the domain of art historians, critics, collectors, and the museum-going public.

**IV. Republic of Turkey v. Christie’s Inc.**<sup>146</sup>

In April 2021, the United States District Court for the Southern District of New York held an eight-day bench trial on the question of who owned a millennia-old artifact known as the Guennol Stargazer (the Idol). In the resulting Opinion and Order, the court affirmed its earlier holding that the 1906 Ottoman Decree on which the Republic of Turkey based its claims was an ownership law enforceable in United States courts. But the court ultimately concluded that Turkey did not meet its burden of proof in establishing it owned the Idol under that law. Additionally, the court concluded that even if Turkey had established a superior right to the Idol, recovery was barred under the doctrine of laches.

A. FACTUAL BACKGROUND<sup>147</sup>

The Idol is an Anatolian Marble Female Idol of the Kiliya-type, likely manufactured in the middle or late 5th millennium B.C.E. The likely origin of the Idol is Kulaksizlar, in the Anatolia of modern-day Turkey, the only known manufacturing spot for Kiliya-type idols, though no complete Kiliya-type idol has yet been found there.<sup>148</sup> The Idol’s approximate discovery location and date are unknown.<sup>149</sup>

The only extant provenance for the Idol starts in 1961, when art dealer J.J. Klejman sold it to collectors Alastair and Edith Martin. In 1983, the Martins transferred the Idol to a company owned by their son, which later

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143. *Id.* at 53.

144. *Id.* at 52.

145. *Id.* at 48.

146. Republic of Turkey v. Christie’s Inc., 2021 U.S. Dist. LEXIS 169215 (S.D.N.Y. Sep. 7, 2021).

147. Guennol Stargazer, CHRISTIE’S, <https://www.christies.com/features/The-Guennol-Stargazer-8195-3.aspx>.

148. Republic of Turkey v. Christie’s, Inc., No. 17-3086, 2021 U.S. Dist. LEXIS 169215, at \*4–\*5 (S.D.N.Y. Sept. 7, 2021).

149. *Id.* at \*7.

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sold it to the Merrin Gallery.<sup>150</sup> In August 1993, Michael and Judy Steinhardt purchased the Idol from the Merrin Gallery. Between 1968 and 1993, the Idol was on loan to the Metropolitan Museum of Art (the Met) and was exhibited in the museum's permanent galleries.<sup>151</sup> In 1999, the Steinhardts also loaned the Idol to the Met, where it was displayed until 2007.<sup>152</sup> Previously, the Idol had been featured in publications that identified it as Anatolian, discussed its origins, and noted its location. In 2017, Michael Steinhardt consigned the Idol to Christie's for sale, and Christie's listed the Idol in its April 28, 2017,<sup>153</sup> auction catalogue. Before the auction, Turkey sent Christie's a letter asserting ownership of the Idol and demanding its return; Christie's refused.<sup>154</sup> On April 27, 2021, Turkey commenced an action to recover the Idol, asserting that the Idol was an integral and invaluable part of the artistic and cultural patrimony of Turkey and alleging it was illicitly removed from Turkey sometime during the 1960's in violation of its national patrimony law.<sup>155</sup>

**B. LEGAL FRAMEWORK AND PROCEDURAL POSTURE**

National patrimony laws declare state ownership of cultural property found within a nation's borders and regulate the export and private ownership of this cultural property.<sup>156</sup> Accordingly, actions to recover allegedly looted cultural property in U.S. courts are often premised on the theory that the foreign sovereign is the original and priority owner of the items, under the relevant patrimony law.<sup>157</sup> What authority U.S. courts should give foreign patrimony laws remains a contentious issue.<sup>158</sup> Based on the holdings in the seminal *McClain* and *Schultz* cases, an undocumented archaeological artifact is owned by a foreign sovereign when four criteria are met: (1) on its face, the law must clearly and unambiguously be an ownership law, (2) the State's ownership rights must be enforced domestically and not merely for illegal exports, (3) the artifact must have been discovered within the territorial boundaries of the country claiming ownership, and (4) the object must have been in the country at the time the law was enacted.<sup>159</sup>

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150. *Id.* at \*8.

151. *Id.*

152. *Christie's, Inc.*, 2021 U.S. Dist. LEXIS 169215, at \*10; *Guennol Stargazer*, *supra* note 147.

153. *Id.*

154. Complaint for Declaratory Relief, Injunctive Relief, and Damages and Demand for Jury Trial at 3–4, *Republic of Turkey v. Christie's, Inc.*, No. 17-3086 (S.D.N.Y. Apr. 27, 2017).

155. *See*, Complaint for Declaratory Relief, Injunctive Relief, and Damages and Demand for Jury Trial, Doc. 1, Case 1: 17-cv-03086-AJN-SDA.

156. *See* Patty Gerstenblith, *Controlling the International Market in Antiquities: Reducing Harm, Preserving the Past*, 8 CH. J. OF INT'L L. 169, 174 (2007).

157. *Id.* at 177.

158. *Id.* at 174.

159. *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977); *United States v. Schultz*, 333 F.3d 393, 399 (2d Cir. 2003).

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Claimants have the burden of demonstrating the artifact was in the country before the date that the relevant patrimony law went into effect.<sup>160</sup>

Turkey asserted New York state claims of replevin and conversion, which required Turkey to establish an ownership or possessory right to the disputed property.<sup>161</sup> On a double motion for summary judgment, the court held that Turkey had presented sufficient evidence as to the first and second criteria: The 1906 Ottoman Decree was intended as an ownership law, and it is enforced as such.<sup>162</sup> Additionally, the court found that the record contained genuine disputes of material fact as to whether Turkey owned the Idol under the 1906 Ottoman Decree because there was at least some evidence that the Idol may have been discovered in modern-day Turkey after 1906, addressing criteria three and four.<sup>163</sup>

Defendant Christie's and Defendant Steinhardt (collectively Defendants) advanced several arguments to counter Turkey's claim. They argued that (1) the 1906 Ottoman Decree is not, in fact, the ownership law it purported to be,<sup>164</sup> (2) even presuming the patrimony law were enforceable as an ownership law, Turkey could not show that the Idol was discovered in modern-day Turkey before 1906,<sup>165</sup> and (3) even if Turkey could establish a claim to the Idol under the 1906 Ottoman Decree, Turkey had unreasonably and unfairly delayed bringing its claim and thus the equitable defense of Laches barred recovery.<sup>166</sup>

### C. THE COURT'S ANALYSIS

The court held that the 1906 Ottoman Decree is a clear and unequivocal assertion of national ownership of cultural artifacts discovered in modern-day Turkey.<sup>167</sup> The court then considered whether Turkey had established that the Idol was found within and exported from the boundaries of modern-day Turkey while the Decree was in effect.<sup>168</sup> The court explained that Turkey's assertion that the place of manufacture is the place of discovery was weakened by the fact that Kiliya-type idols circulated around the region after they were manufactured and trade networks during the relevant period could have reached the Aegean. Ultimately, the court found that Turkey had not demonstrated by a preponderance of the evidence that the Idol was discovered in Turkey.<sup>169</sup>

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160. See generally Gerstenblith, *supra* note 156.

161. See *Pemrick v. Stracher*, 2007 U.S. Dist. LEXIS 46958 (E.D.N.Y., Jun. 28, 2007)

162. *Republic of Turkey v. Christie's Inc.*, 425 F. Supp. 3d 204, 215 (S.D.N.Y. 2019).

163. *Id.* at 217.

164. *Id.* at 214.

165. *Id.*

166. *Id.* at 213.

167. *Republic of Turkey v. Christie's, Inc.*, No. 17-3086, 2021 U.S. Dist. LEXIS 169215, at \*17 (S.D.N.Y. Sept. 7, 2021).

168. *Id.* at \*19.

169. *Christie's Inc.*, 2021 U.S. Dist. LEXIS 169215 at \*7.

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The court next addressed the Idol's date of discovery, noting that the precise date was unknown, as there is no evidence of excavation or export.<sup>170</sup> The court declined to find that the Idol's introduction to the market in 1961 meant that the Idol must have been found sometime after 1906, because an object might not surface immediately after discovery.<sup>171</sup> The court held that Turkey had not demonstrated that the Idol was discovered, excavated, or exported after 1906, when the decree was in effect.<sup>172</sup>

With respect to the Defendants' laches defense, the court observed that to prove laches, the Defendants must show that (1) Turkey was aware or should have been aware of its claim, (2) Turkey inexcusably delayed in taking action, and (3) Christie's and Steinhardt were prejudiced as a result of the delay.<sup>173</sup> The court found that Turkey should have known of its claim decades before 2017 because the Idol had been featured in various publications, including Turkish publications, since at least the 1960's and it was on public display in the Met for decades.<sup>174</sup> With respect to the second element, the court held that Turkey unreasonably delayed taking action because, at a minimum, Turkey should have inquired once it knew the Idol was of Anatolian origin, was historically significant, and was located in New York, information available well before 2017.<sup>175</sup> As to the issue of prejudice, the court found that had Turkey acted earlier, Defendants would have had a stronger defense, especially for access to potential witnesses and documentary evidence.<sup>176</sup> Further, had Turkey timely inquired as to the Idol, the Steinhardts might not have purchased the Idol. Thus, the court held that the Defendants had shown prejudice by Turkey's delay.<sup>177</sup> The court rejected Turkey's argument that the Steinhardts' had acquired a duty to inquire or investigate before completing the purchase.<sup>178</sup>

#### D. IMPLICATIONS

The significance of the District Court's decision is largely dependent on the outcome upon appeal.<sup>179</sup> The District Court's decision is notable for recognizing the 1906 Ottoman Decree as a true ownership law.<sup>180</sup> Turkey's foreign patrimony law has been at issue in cultural property disputes before

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170. *Id.* at \*19–21.

171. *Id.* at \*24–\*25.

172. *Id.* at \*6.

173. *Id.* at \*8.

174. *Id.*

175. *Christie's Inc.*, 2021 U.S. Dist. LEXIS 169215 at \*9.

176. *Id.* at \*32–\*34.

177. *Id.* at \*10.

178. *Id.* at \*36.

179. Turkey filed a Notice of Appeal in the District Court on Oct. 12, 2021.

180. *See Christie's, Inc.*, 2021 U.S. Dist. LEXIS 169215, at \*18.

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the *Guennol Stargazer* case, but no court has ever explicitly or clearly ruled on its enforceability.<sup>181</sup>

The consistent recognition by United States courts of foreign patrimony laws as true ownership laws influences the market.<sup>182</sup> This recognition disincentivizes the trade in undocumented archaeological material, by demonstrating that finders or subsequent purchasers of such material will be denied title when it can be shown the material was discovered, excavated, or exported from the country claiming ownership while relevant patrimony law is effect.<sup>183</sup> Additionally, the District Court decision gives insight into what standard of clarity is required of the elements a foreign sovereign must demonstrate under the *McClain/Schultz* doctrine in a private replevin action premised on foreign patrimony laws.<sup>184</sup> Despite the growing body of relevant case law, there are open questions as to how the *McClain/Schultz* doctrine, which was conceived from criminal proceedings under the National Stolen Property Act, should be applied in non-criminal litigation.<sup>185</sup>

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181. Republic of Turkey v. OKS Partners, 797 F.Supp. 64 (D. Mass. 1992) (where Turkey's claim of ownership to ancient coins under Turkish law could not be dismissed on the pleadings); Republic of Turkey v. Metropolitan Museum of Art, 762 F.Supp. 44 (S.D.N.Y., 1990) (concerning Turkey's efforts to reclaim the famous Lydian Hoard from the Metropolitan Museum of Art).

182. See Patty Gerstenblith, *The Legal Framework for the Prosecution of Crimes Involving Archaeological Objects*, 64 U.S. ATT'YS BULL. 5, 7 (2016).

183. *Id.*

184. See *Christie's, Inc.*, 2021 U.S. Dist. LEXIS 169215, at \*16–\*38.

185. See Gerstenblith, *supra* note 182, at 8.

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## **International Arbitration**

EDITORS: MARCUS QUINTANILLA AND CARLA GHARIBIAN; AND  
AUTHORS: SERGEY PETRACHKOV, DMITRY KUPTSOV, SAGLAR  
OCHIROVA, OKSANA KAREL, DARYNA HREBENIUK, ROBERT J. C.  
DEANE, JEFFREY ROSENTHAL, KATIE GONZALEZ, KATERINA  
WRIGHT, CAOIMHE CLARKIN, MARCUS WALSH, BELLA CHAN, KEARA  
A. BERGIN, CHRISTOPHER P. DENICOLA, PETER ASHFORD, KATE  
FELMINGHAM, ALINE DIAS, ANTONIO CANALES, GRÉTEL CANNON,  
ASHLEY CHANDLER, MARIANNE CHAO, MERCEDES FERNÁNDEZ,  
GUSTAVO A. GALINDO, MELISSA STEAR GORSLINE, BENJAMIN  
HOLLOWAY, HAIFENG HUANG, ELIE KLEIMAN, VIKTORIIA  
KORYNEVYCH, ANNIE LEEKS, FERNANDO F. PASTORE, MARIA I.  
PRADILLA PICAS, IRIS SAUVAGNAC, JIAHUI SHENG, DARYA  
VAKULENKO, JOSÉ ANTONIO VÁZQUEZ COBO, SHARON YIU, LARS  
MARKERT, CHRISTINA NITSCHKE, ANTHONY LYNCH, HÉCTOR  
SCAIANSCHI MÁRQUEZ, PREETI BHANGNANI, ERIC LENIER IVES, AND  
TOM PEARSON

This article surveys significant legal developments in international arbitration in 2021.

### **I. North America**

#### **A. UNITED STATES**

##### *1. Developments in U.S. Courts*

##### **a. Arbitration Agreements**

##### *1. Delegation of Arbitrability*

In *Henry Schein v. Archer and White Sales, Inc.*, the U.S. Supreme Court granted certiorari on the question of whether a provision in an arbitration agreement exempting certain claims from arbitration negates an otherwise “clear and unmistakable” intent to delegate arbitrability determinations to arbitrators.<sup>1</sup> The U.S. Court of Appeals for the Fifth Circuit had held that

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\* The editorial team for this article included Marcus Quintanilla and Carla Gharibian of Jones Day. The following firms contributed to this article: ALRUD Law Firm: Sergey Petrachkov (Russia), Dmitry Kuptsov (Russia), Saglar Ochirova (Russia); Arzinger Law Firm: Oksana Karel (Ukraine), Daryna Hrebenuk (Ukraine); Borden Ladner Gervais LLP: Robert J. C. Deane (Canada); Cleary Gottlieb Steen & Hamilton LLP: Jeffrey Rosenthal (United States), Katie Gonzalez (United States), Katerina Wright (United States); DLA Piper: Caoimhe Clarkin



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the arbitration agreement, incorporating the American Arbitration Association rules, delegated arbitrability determinations for “some category of cases” but, because there was a partial carve-out, the district court had the authority to determine whether the carve-out applied.<sup>2</sup> Following oral argument, the Supreme Court dismissed the case, concluding that certiorari had been improvidently granted.<sup>3</sup>

The Second Circuit in *Beijing Shougang Mining Inv. Co. v. Mongolia* relied not on the language of the parties’ agreement but on their conduct in the arbitration proceedings to determine the parties’ intent to delegate.<sup>4</sup> Following three Chinese companies’ petition to vacate a bilateral investment treaty (BIT) arbitration award, the Second Circuit found that the arbitration clause in the treaty did “not supply ‘clear and unmistakable’ evidence” to delegate arbitrability concluded that because the parties had “agreed at the outset of the arbitration” to bifurcate the arbitral proceedings into a combined jurisdictional and liability phase followed by a damages phase, the agreement “that the tribunal would hear jurisdictional issues in the first phase” was a question “implicating ‘arbitrability’” that “‘clearly and unmistakably’” evidenced the parties’ intent to delegate the determination to the tribunal.<sup>5</sup>

## II. *Non-Party Signatories*

Whether state law or federal common law determines if a non-signatory may compel arbitration was fiercely contested in two divided circuit court opinions. In *Setty v. Sbriniknvas Sugandhalaya LLP*, a split Ninth Circuit panel held that federal common law determines whether the defendant, a non-signatory to an agreement governed by Indian law, can compel the

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(Ireland), Marcus Walsh (Ireland), Bella Chan (Ireland); Dewey Pegno & Kramarsky LLP: Keara A. Bergin (ICSID), Christopher P. DeNicola (ICSID); Fox Williams LLP: Peter Ashford (England and Wales), Kate Felmingham (England and Wales); Franco Leutewiler Henriques Advogados: Aline Dias (Brazil); Jones Day: Antonio Canales (Spain), Grätel Cannon (Australia), Ashley Chandler (Australia), Marianne Chao (Taiwan), Mercedes Fernández (Spain), Gustavo A. Galindo (Mexico), Melissa Stear Gorsline (NAFTA/USMCA), Benjamin Holloway (Australia), Haifeng Huang (China/Hong Kong), Elie Kleiman (France, Middle East, and Africa), Viktoriia Korynevykh (NAFTA/USMCA), Annie Leeks (Australia), Fernando F. Pastore (Brazil), Maria I. Pradilla Picas (Colombia, Venezuela, Peru, and Ecuador), Iris Sauvagnac (France, Middle East, and Africa), Jiahui Sheng (China/Hong Kong), Darya Vakulenko (Colombia, Venezuela, Peru, and Ecuador), José Antonio Vázquez Cobo (Mexico), Sharon Yiu (China/Hong Kong); Nishimura & Asahi: Lars Markert (Japan); Peters, Schönberger & Partner: Christina Nitsche (Germany, Switzerland, and Sweden); Porzio Ríos García: Anthony Lynch (Chile); Rosa-Scaianschi-Amaya: Héctor Scaianschi Márquez (Argentina, Uruguay, and Paraguay); White & Case LLP: Preeti Bhagnani (United States), Eric Lenier Ives (United States). Tom Pearson (Singapore & ASEAN), Visiting Research Fellow, Future Forum (Cambodia), also contributed to this piece.

2. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 141 S. Ct. 107 (2020) (mem.).

3. *Archer & White Sales, Inc. v. Henry Schein, Inc.*, 935 F.3d 274, 280–82 (5th Cir. 2019).

4. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 141 S. Ct. 656 (2021).

5. *Beijing Shougang Mining Inv. Co. v. Mongolia*, 11 F.4th 144, 154 (2d Cir. 2021).

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plaintiffs to arbitrate.<sup>6</sup> The majority explained that in cases involving the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”) and arising under federal question jurisdiction, federal substantive law applies.<sup>7</sup> While “accept[ing] that a nonsignatory could compel arbitration in a New York Convention case,” the majority nonetheless held that, as a factual matter, the defendant’s equitable estoppel claim failed.<sup>8</sup> The dissent argued that “whether a particular contract is governed by the New York Convention or not, a nonsignatory’s equitable estoppel claim to compel arbitration is brought pursuant to the [Federal Arbitration Act (FAA)], which requires that state contract law (or in the case of a foreign contract, perhaps the foreign state’s contract law, depending on the state’s choice of law rules) govern the issue.”<sup>9</sup>

A similarly split Sixth Circuit panel in *AtriCure, Inc. v. Meng* held that state law, and not federal common law, determines whether non-signatories can compel arbitration in a diversity case.<sup>10</sup> Relying on the Supreme Court decision in *Arthur Andersen v. Carlisle*,<sup>11</sup> the majority held that two non-signatories could not compel arbitration by equitable estoppel under Ohio state law but remanded the case for consideration of an agency theory, which required factfinding.<sup>12</sup>

b. Enforcement of Awards

i. *Subject-Matter Jurisdiction*

A circuit split widened over whether the existence of a written agreement to arbitrate under Article II of the New York Convention is a question that goes to jurisdiction or to the merits. In *Al-Qarqani v. Chevron Corp.*, a California district court dismissed a petition to confirm an award of nearly \$18 billion for lack of subject-matter jurisdiction, finding that there was no agreement to arbitrate and noted that “numerous procedural infirmities would independently preclude confirmation.”<sup>13</sup> On appeal, the U.S. Court of Appeals for the Ninth Circuit affirmed the dismissal on different grounds, holding that the existence of a written agreement to arbitrate goes to the merits, and, therefore, the district court’s disposition should have been a denial of enforcement of the award, not a dismissal for lack of subject-matter jurisdiction.<sup>14</sup> With this holding, the Ninth Circuit took the same position as previously expressed by the Second Circuit,<sup>15</sup> but split from the U.S. Court

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6. *Id.* at 152.

7. *Setty v. Shrinivas Sugandhalaya LLP*, 3 F.4th 1166, 1167 (9th Cir. 2021).

8. *Id.* at 1168.

9. *Id.* at 1169.

10. *Id.* at 1173 (Bea, J., dissenting).

11. *AtriCure, Inc. v. Meng*, 12 F.4th 516, 524 (6th Cir. 2021).

12. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630–31 (2009).

13. *AtriCure, Inc.*, 12 F.4th at 534.

14. *Al-Qarqani v. Chevron Corp.*, No. C 18-03297 JSW, 2019 WL 4729467, at \*5 (N.D. Cal. Sept. 24, 2019), *aff’d*, 8 F.4th 1018 (9th Cir. 2021).

15. *Al-Qarqani v. Chevron Corp.*, 8 F.4th 1018, 1025 (9th Cir. 2021).

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of Appeals for the Eleventh Circuit, which has found that courts may not assume jurisdiction until “the agreement-in-writing requirement has been met.”<sup>16</sup>

ii. *Pre-Judgment Interest*

In *LLC SPC Stileks v. Republic of Moldova*, Moldova challenged the district court’s decision to award pre-judgment interest on a judgment confirming an arbitral award, and argued that the judgment and any interest should have been denominated in Moldovan lei rather than in U.S. dollars.<sup>17</sup> Joining the U.S. Courts of Appeals for the Second, Ninth, and Eleventh Circuits,<sup>18</sup> the U.S. Court of Appeals for the D.C. Circuit held that the “decision to award prejudgment interest ‘must be exercised in a manner consistent with the underlying arbitration award,’” and even though the award itself was silent on pre-judgment interest, such interest would be considered “part of [plaintiff’s] loss . . . to be reimbursed by [Moldova].”<sup>19</sup> The D.C. Circuit affirmed the award of pre-judgment interest but vacated the order that converted “the award to U.S. dollars without considering Moldova’s settled expectation that the award would be payable in Moldovan lei.”<sup>20</sup>

c. Preemption

In *CLMS Mgmt. Servs. Ltd. Partnerships v. Amwins Brokerage of Georgia, LLC*, the Ninth Circuit held that the New York Convention was not reverse preempted by a state law barring the enforcement of arbitration clauses in insurance contracts.<sup>21</sup> The defendant underwriters had argued that the plaintiffs’ claims related to flood damage fell within the policy’s arbitration clause and were governed by the New York Convention, while the plaintiffs argued that Washington state law and the federal McCarran-Ferguson Act operated to reverse preempt the Convention and prohibit arbitration.<sup>22</sup> The Ninth Circuit held that Article II, Section 3 of the Convention—which provides that a court “shall . . . refer the parties to arbitration” where there is an agreement to arbitrate—is self-executing, concluding that “it is the Convention itself that requires enforcements of the parties’ arbitration

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16. *Sarhank Grp. v. Oracle Corp.*, 404 F.3d 657, 660 n.2 (2d Cir. 2005).

17. *Czarina, LLC v. W.F. Poe Syndicate*, 358 F.3d 1286, 1292 (11th Cir. 2004).

18. *LLC SPC Stileks v. Republic of Moldova*, 985 F.3d 871, 876 (D.C. Cir. 2021).

19. *See Waterside Ocean Nav. Co. v. Int’l Nav. Ltd.*, 737 F.2d 150, 153-54 (2d Cir. 1984) (finding pre-judgment interest available in actions under the New York Convention); *see also* *Ministry of Def. of the Islamic Rep. of Iran v. Cubic Def. Sys., Inc.*, 665 F.3d 1091, 1103 (9th Cir. 2011); *Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1446-47 (11th Cir.1998).

20. *LLC SPC Stileks*, 985 F.3d at 881 (citations omitted).

21. *Id.* at 876.

22. *CLMS Mgmt. Servs. Ltd. P’ship v. Amwins Brokerage of Georgia, LLC*, 8 F.4th 1007, 1015 (9th Cir. 2021).

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agreement.”<sup>23</sup> Because reverse preemption under the McCarran-Ferguson Act applies to “Act[s] of Congress”—i.e., domestic legislation—the Convention, as a multilateral treaty, did not fall within its purview.<sup>24</sup> The Ninth Circuit affirmed the district court’s grant of the motion to compel arbitration, but plaintiffs have filed a motion to stay pending their certiorari petition to the Supreme Court.<sup>25</sup>

d. Foreign Sovereign Immunities Act (FSIA)

In *Gater Assets Ltd. v. AO Moldovagaz*, the Second Circuit considered the contours of the FSIA’s “arbitration exception” to sovereign immunity.<sup>26</sup> A New York district court found jurisdiction over Moldova, a non-party to the underlying arbitration agreement, under the arbitration exception, relying on a “direct benefits estoppel theory.”<sup>27</sup> The Second Circuit reversed, finding no jurisdiction. While the Second Circuit stopped short of “conclusively decid[ing] whether direct-benefits estoppel can abrogate a foreign state’s immunity under the FSIA,”<sup>28</sup> it ultimately found that the doctrine was inapplicable because the plaintiff failed to show that the agreement “‘expressly provide[d] [Moldova] with a benefit’” or that Moldova “‘actually invoke[d] the contract to obtain its benefit.’”<sup>29</sup>

In *Ballantine v. Dominican Republic*, the D.C. Circuit reinforced the application of specific FSIA provisions governing service of process in the context of a petition to vacate an arbitral award.<sup>30</sup> The court explained that because service on a non-resident party must be made “in like manner as other process of the court” under the FAA,<sup>31</sup> petitioners were required to serve the Dominican Republic in conformity with Section 1608(a) of the FSIA which “‘sets forth the exclusive procedures for service’” on a foreign state. They had failed to do so.<sup>32</sup>

2. 28 U.S.C. § 1782

As of December 10, 2021, the Supreme Court of the United States was poised to resolve a circuit split regarding the availability of discovery for use

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23. *Id.* at 1010 (the McCarran-Ferguson Act provides a “clear-statement rule” that Congress cannot interfere with a state’s right to regulate the insurance business); *see also* 15 U.S.C. §§ 1011–15.

24. *CLMS Mgmt. Servs. Ltd. P’ship*, 8 F.4th at 1015.

25. *Id.* at 1017–18.

26. Appellants’ Motion to Stay the Mandate, *CLMS Mgmt. Servs. Ltd. P’ship*, No. 20-35428 (9th Cir. Sept. 1, 2021), Dkt. Entry 51.

27. 28 U.S.C. § 1605(a)(6).

28. *Gater Assets Ltd. v. AO Gazsnabtranzit*, 413 F. Supp. 3d 304, 326–28 (S.D.N.Y. 2019), *aff’d in part, vacated in part, remanded sub nom*, *Gater Assets Ltd. v. AO Moldovagaz*, 2 F.4th 42 (2d Cir. 2021).

29. *Gater Assets*, 2 F.4th at 68.

30. *Id.* at 54 (citations omitted).

31. *Ballantine v. Dominican Republic*, No. 20-7086, 2021 WL 5262555 (D.C. Cir. Oct. 22, 2021).

32. 9 U.S.C. § 12.

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in private international commercial arbitration under 28 U.S.C. § 1782, having granted certiorari in two cases that will be heard together in 2022.<sup>33</sup> The Supreme Court took up the question for a second time, after the parties in another case raising the same question abandoned their appeal earlier this year.<sup>34</sup>

*ZF Automotive US, Inc. v. Luxshare, Ltd.* arises from a district court's grant of a § 1782 petition in aid of an international commercial arbitration between a German company and a Hong Kong company under the German Arbitration Institute Rules.<sup>35</sup> The case presents a question of whether 28 U.S.C. § 1782 encompasses private commercial arbitral tribunals.<sup>36</sup>

*In re Fund for Protection of Investor Rights in Foreign States v. AlixPartners, LLP* arises from a Second Circuit decision granting discovery under § 1782 for use in an investor-state arbitration between Russian investors and Lithuania under a BIT.<sup>37</sup> The case presents an opportunity for the Supreme Court to address for the first time the availability of § 1782 discovery in investor-state.<sup>38</sup>

**B. MEXICO**

The 11th Collegiate Tribunal of the First Circuit held that an arbitrator has standing to challenge a court order disqualifying him from an arbitration. The Tribunal rejected arguments that arbitrator-disqualification rulings interest only the parties and that by challenging such a ruling the arbitrator exceeded his duties and created doubts about his impartiality. Reversing the lower court's ruling, the Tribunal held that the arbitrator had standing because, even after the arbitration is concluded, the disqualification ruling may affect the arbitrator's moral and economic position.<sup>39</sup>

**C. CANADA**

The UNCITRAL Model Law on International Commercial Arbitration (the "UNCITRAL Model Law") continued to present issues, which

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33. *Ballantine*, 2021 WL 5262555 at \*1-\*2 (citations omitted).

34. Order Granting Certiorari, *ZF Automotive US, Inc. v. Luxshare, Ltd.* (December 10, 2021) (No. 21-401); Order Granting Certiorari, *AlixPartners, LLP v. Fund for Protection of Investor Rights in Foreign States* (December 10, 2021) (No. 21-518).

35. Letter of Petitioner, *Servotronics, Inc. v. Rolls-Royce PLC and The Boeing Company* (September 8, 2021) (No. 20-794); Joint Stipulation to Dismiss Pursuant to Rule 46.1, *Servotronics, Inc. v. Rolls-Royce PLC and The Boeing Company* (September 24, 2021) (No. 20-794).

36. Brief for Petitioner, *ZF Automotive US, Inc. v. Luxshare, Ltd.* (September 10, 2021) (No. 21-401) at 6.

37. *Id.*

38. Brief for Petitioner, *AlixPartners, LLP v. Fund for Protection of Investor Rights in Foreign States* (October 5, 2021) (No. 21-518); *see also In re Fund for Prot. of Inv'r Rights in Foreign States v. AlixPartners, LLP*, 5 F.4th 216 (2d Cir. 2021) (applying the functionalist approach established in *Hanwei Guo v. Deutsche Bank Sec.*, 965 F.3d 96 (2d Cir. 2020)).

39. Brief for Petitioner, *AlixPartners, LLP*, *supra* note 37, at 1.

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Canadian courts have sought to resolve consistently with international trends.<sup>40</sup> In *lululemon athletica Canada Inc. v. Industrial Color Productions Inc.*,<sup>41</sup> the Court of Appeal for British Columbia confirmed that on an application to set aside an international commercial arbitration award on jurisdictional grounds under Article 34(2)(a)(iii) of the UNCITRAL Model Law, as well as applications to set aside preliminary jurisdictional rulings of a tribunal under Article 16(3), the reviewing court must apply a correctness standard and will not defer to the tribunal. This decision confirmed that the approach of the Court of Appeal for Ontario in *United Mexican States v. Cargill, Inc.*<sup>42</sup> is of broader application in Canada.

In *United Mexican States v. Burr*,<sup>43</sup> the Court of Appeal for Ontario confirmed that when a tribunal's preliminary jurisdictional determination is challenged under Article 16(3) of the UNCITRAL Model Law, the reviewing court's determination is final and not subject to further appeal.

#### D. NAFTA/USMCA

The United States-Mexico-Canada Agreement (USMCA) entered into force on July 1, 2020.<sup>44</sup> To date, only three disputes have been initiated under USMCA,<sup>45</sup> and all are "legacy" claims under USMCA's three-year extension of the North American Free Trade Agreement (NAFTA).<sup>46</sup>

On December 17, 2020, the International Centre for the Settlement of Investment Disputes (ICSID) registered the first USMCA/NAFTA legacy dispute in *Koch Industries v. Canada*.<sup>47</sup> The U.S. conglomerate brought a \$30 million claim over the cancellation of a program designed to reduce carbon emissions.<sup>48</sup>

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40. Thesis [A.]: L11o.C.154 C, T.C.C., Weekly Federal Judicial Bulletin and its Gazette, Eleven Judicial Era. Digital Registry 2023673.

41. See *The Russian Federation v. Luxtona Limited*, 2021 ONSC 4604 ¶¶ 10.

42. 2021 BCCA 428 ¶¶ 34-47.

43. 2011 ONCA 622 ¶¶ 31-51.

44. 2021 ONCA 64 ¶¶ 8-12.

45. Press Release, Michael R. Pompeo, Sec'y of State, Entry into Force of the United States-Mexico-Canada Agreement (July 1, 2020), <https://2017-2021.state.gov/entry-into-force-of-the-united-states-mexico-canada-agreement/index.html>.

46. See *Finley Resources Inc., MWS Management Inc., and Prize Permanent Holdings, LLC v. United Mexican States*, ICSID Case No. ARB/21/25; *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14; *Koch Industries, Inc. and Koch Supply & Trading, LP v. Canada*, ICSID Case No. ARB/20/52.

47. *Id.*

48. *Koch Industries, Inc. and Koch Supply & Trading, LP v. Canada*, ICSID Case No. ARB/20/52, Case Details, <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/20/52>.

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*First Majestic Silver Corp. v. Mexico*<sup>49</sup> was registered by ICSID on March 31, 2021. The Canadian mining investor filed a \$500 million claim over retrospective tax liabilities imposed by Mexico.<sup>50</sup>

On May 12, 2021, ICSID registered *Finley Resources v. Mexico*,<sup>51</sup> in which several U.S. oil and gas investors asserted claims against Mexico for alleged violation of their investment contracts with national petroleum company Pemex.<sup>52</sup>

Two additional USMCA/NAFTA notices of dispute were also served. A Canadian investor, TC Energy, put the United States on notice of its “legacy” claim over the cancellation of the Keystone XL pipeline worth over \$15 billion.<sup>53</sup> Further, a U.S. investor, Talos Energy, threatened Mexico with a “legacy” claim after Pemex was designated as the operator of its offshore oilfield.<sup>54</sup>

## II. ICSID

On September 20, 2021, an ICSID tribunal issued an award in *Lion Mexico Consolidated LP v. United Mexican States*, holding that Mexico had denied procedural justice to Lion Mexico Consolidated LP (“Lion”), a subsidiary of a real estate investment company with investments in Mexico, in violation of NAFTA—the first such finding in NAFTA’s history.<sup>55</sup>

The basis for Lion’s claim was that when it sought to foreclose on a mortgage on a property in Mexico, it learned that a Mexican court had already cancelled the mortgage at the debtor’s request in a proceeding of which Lion had received no notice.<sup>56</sup>

After determining that the debtor had engaged in a “sophisticated fraud,” the tribunal found that Lion was denied procedural justice in three ways: (1)

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49. See *Investment Dispute Settlement Navigator: Koch v. Canada*, INV. POL’Y HUB (2020), <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1074/koch-v-canada>.

50. *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Case Details, <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/21/14>.

51. See Jack Ballantyne, *Canadian Silver Miner Launches NAFTA Claim Against Mexico*, GLOB. ARB. REV. (Mar. 3, 2021), <https://globalarbitrationreview.com/canadian-silver-miner-launches-nafta-claim-against-mexico>.

52. *Finley Resources Inc., MWS Management Inc., and Prize Permanent Holdings, LLC v. United Mexican States*, ICSID Case No. ARB/21/25, Case Details, <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/21/25>.

53. See Cosmo Sanderson, *US Oil and Gas Investors Bring Claim Against Mexico Cosmo Sanderson*, GLOB. ARB. REV. (May 13, 2021), <https://globalarbitrationreview.com/us-oil-and-gas-investors-bring-claim-against-mexico>.

54. See Cosmo Sanderson, *Keystone XL Investor Threatens New Claim Against US*, GLOB. ARB. REV. (July 5, 2021), <https://globalarbitrationreview.com/keystone-xl-investor-threatens-new-claim-against-us>.

55. See Jack Ballantyne, *Mexico Threatened with Treaty Claim Over Oilfield*, GLOB. ARB. REV. (Sept. 6, 2021), <https://globalarbitrationreview.com/mexico-threatened-treaty-claim-over-oilfield>.

56. *Lion Mexico Consolidated LP v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Award, ¶¶ 56–57, 371.

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Lion was denied access to justice because, “without its fault,” it was “never given the opportunity to defend itself” in the cancellation proceeding; (2) Lion was denied the right to appeal the judgement cancelling the mortgage because the trial court subsequently issued a decision giving res judicata effect to the judgment; and (3) Lion was denied the right to allege in a subsequent procedural challenge that a forged settlement agreement had in fact been forged and to present evidence proving that claim.<sup>57</sup> The tribunal ordered Mexico to pay \$47 million to Lion in damages.<sup>58</sup>

### III. Europe

#### A. ENGLAND & WALES

The Supreme Court decision in *Kabab-Ji SAL v Kout Food Group*,<sup>59</sup> concerning whether a parent company had become the operative party, applied and confirmed the principles in *Enka v Chubb*, which held that the law of an arbitration agreement, if not expressly chosen, will be that of the underlying agreement.<sup>60</sup> It also confirmed that (1) the same principles apply before the award and during enforcement, and (2) a contractual provision that all variations to the agreement must be in writing was an insuperable obstacle to succession by the parent.

In *RAV Bahamas v Therapy Beach Club*,<sup>61</sup> the Privy Council concluded that in a provision identical to Arbitration Act § 68 (challenging an award for serious irregularity causing substantial injustice) the focus was on due process, not the correctness of the arbitrator’s decision. There would be substantial injustice if, without the irregularity, the outcome of the arbitration might have been different.

In *Sierra Leone v. SL Mining*<sup>62</sup> and *NWA & Anor v. NVF & Ors*,<sup>63</sup> the Commercial Court confirmed that where a party fails to mediate before referring the dispute to arbitration under a tiered dispute-resolution clause, it is an issue of admissibility, rather than jurisdiction.

#### B. IRELAND

A recent Irish High Court decision reinforces the Irish courts’ support for arbitration and demonstrates the high threshold for a party to resist arbitration by reason of overriding public policy. *Charwin Limited T/A Charlie’s Bar v Zavarovalnica Sava Insurance Company D.D* [2021] IEHC 489 concerned a claim by an Irish pub for business interruption coverage for

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57. *Id.* ¶¶ 300–17.

58. *Id.* ¶¶ 366, 371.

59. *Id.* ¶¶ 850–51.

60. [2021] UKSC 48.

61. *Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38 (UK).

62. [2021] UKPC 8.

63. [2021] EWHC 929 (Comm).



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closure during the pandemic.<sup>64</sup> The claimant initiated court proceedings, but the insurer sought a stay pursuant to Article 8(1) of the UNCITRAL Model Law (incorporated into Irish law under the Arbitration Act 2010) on the ground that the policy was subject to arbitration. The claimant argued that the case was not arbitrable because it implicated fundamental issues of public policy (i.e., the COVID-19 pandemic, the Central Bank of Ireland's framework for COVID-19 and business interruption insurance, and the fact that the decision might affect several hundred other pub owners with similar claims).

The Irish High Court ruled that the pandemic did not trigger sufficient public policy considerations to require a dispute to be determined in court as opposed to arbitration. “[T]he test is a demanding one and the conclusion that public policy considerations render a dispute non-arbitrable should be a conclusion of last resort.”<sup>65</sup>

### C. FRANCE

The revised Rules of Arbitration of the International Chamber of Commerce (ICC) entered into force on January 1, 2021, and will apply to all arbitrations registered at the ICC after that date.<sup>66</sup>

On January 13, 2021, the Court of Cassation upheld the enforcement of an award that was set aside in Cairo a decade ago on the grounds that the agreement to arbitrate breached Egyptian law.<sup>67</sup> This decision accords with the longstanding French view that the setting aside of an award at the place of arbitration does not preclude its enforcement, and it illustrates the commitment of French courts to examine the validity of arbitration agreements through substantive rules as opposed to a choice-of-law approach.<sup>68</sup>

In May 2021, the Court of Cassation ruled for the first time that third parties are entitled to challenge orders granting enforcement of foreign arbitral awards on grounds that such a challenge targets a court decision rather than the arbitral award itself.<sup>69</sup>

In June 2021, two Russian companies filed an UNCITRAL claim against France under the Russia-France BIT after the French government refused

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64. [2021] EWHC 2666 (Comm).

65. *Charwin Limited T/A Charlie's Bar v Zavarovalnica Sava Insurance Company D.D* [2021] IEHC 489, <https://www.bailii.org/ie/cases/IEHC/2021/2021IEHC489.html>.

66. *See Charwin Limited T/A Charlie's Bar v Zavarovalnica Sava Insurance Company D.D* [2021] IEHC 489, ¶ 99, <https://www.bailii.org/ie/cases/IEHC/2021/2021IEHC489.html>.

67. *See* 2021 Arbitration Rules, INT'L CHAMBER OF COM. <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/> (last visited Nov. 18, 2021).

68. French Court of Cassation, First Civil Section (13 January 2021), No. 19-22.938 (Fr.), <https://www.legifrance.gouv.fr/juri/id/JURITEXT000043045890>.

69. *See* Professor Emmanuel Gaillard's comments on this decision: Sebastian Perry, *Annulled Cairo Award Gets All-Clear in France*, GLOB. ARB. REV. (Jan. 26, 2021), <https://globalarbitrationreview.com/annulled-cairo-award-gets-all-clear-in-france>.

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to renew their subsidiary's mining license over a gold deposit located in French Guiana amidst environmental concerns.<sup>70</sup>

**D. SPAIN**

Spain's Constitutional Court rendered two judgments<sup>71</sup> in 2021 confirming a previous pronouncement,<sup>72</sup> which together, with the creation of the Madrid International Arbitration Center, confirmed Spain as a potentially attractive venue for international arbitration. Spanish law regarding annulment proceedings for breach of public order holds that the process of external control does not allow for courts to review the merits of an award. Annulment proceedings must be limited to an analysis of the legality of the arbitration agreement, the arbitrability of the subject matter, and the procedural regularity of the arbitral proceedings.

**E. GERMANY**

The ongoing effects of the COVID-19 pandemic shifted and challenged German arbitration practice into with hybrid and remote hearing formats. The Federal Supreme Court of Justice (BGH) ruled on the principle of procedural equality of arms at a virtual oral hearing, confirming that the arbitral tribunal has a duty to ensure fair proceedings, *inter alia*, when examining witnesses.<sup>73</sup>

With respect to investor-state disputes, an arbitral tribunal dismissed the Vattenfall arbitration<sup>74</sup> on November 1, 2021, after nearly a decade.<sup>75</sup> Vattenfall based its ICSID claim against Germany on the accelerated nuclear phase-out passed by the German legislature in the Thirteenth Act Amending the Atomic Energy Act of July 31, 2011. The parties' settlement in March 2021 required payment of EUR 2.43 billion by the German government—the highest compensation yet paid for the economic consequences of the early nuclear phase-out.

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70. French Court of Cassation, First Civil Section (26 May 2021), No. 19-23.996 (Fr.), [https://www.legifrance.gouv.fr/juri/id/JURITEXT000043617946?init=true&page=1&query=19-23.996+&searchField=ALL&tab\\_selection=all](https://www.legifrance.gouv.fr/juri/id/JURITEXT000043617946?init=true&page=1&query=19-23.996+&searchField=ALL&tab_selection=all).

71. Cosmo Sanderson, *Russian Investors Bring Mining Claim Against France*, GLOB. ARB. REV. (Oct. 18, 2021), <https://globalarbitrationreview.com/russian-investors-bring-mining-claim-against-france>.

72. Judgments no. 17/2021, February 15, and no. 55/2021, March 15, Constitutional Court (Spain).

73. Judgment no. 46/2020, June 15, Constitutional Court (Spain).

74. BGH I ZB 88/19, *SchiedsVZ 2021*, 46 (Ger.).

75. Swedish Vattenfall AB and others as claimant, and the Federal Republic of Germany as defendant.

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F. SWITZERLAND

The Swiss Chambers' Arbitration Institution (SCAI) became the Swiss Arbitration Centre on May 19, 2021,<sup>76</sup> and the Swiss Rules of International Arbitration (Swiss Rules) were revised on June 1, 2021.<sup>77</sup> The revision focuses on efficiency and adaption to technical trends: new rules for cross-claims, joinder, and intervention (Article 6); streamlining of proceedings (Article 19); and the introduction of a new model clause.<sup>78</sup> Triggered by the COVID-19 pandemic, the Swiss Rules also allow for paperless filings (Articles 3.1 and 4.1) and for hearings to be held "remotely by videoconference or other appropriate means" (Article 27.2).

G. SWEDEN

The Stockholm Chamber of Commerce (SCC) implemented the "SCC Express,"<sup>79</sup> a dispute-resolution tool providing parties with legal assessment and resolution of their dispute in twenty-one days with predictable costs and without full-length arbitration. The proceedings are conducted by a neutral legal expert appointed by the SCC. This mechanism appears to focus on cases with limited complexity and scope.

H. RUSSIA

In 2021, the ICC and the Singapore International Arbitration Centre (SIAC) received the status of permanent arbitration institutions in Russia pursuant to its 2016 arbitration reform, which requires that any arbitration institution obtain permission to administer cases in Russia.

On December 2, 2021, the Russian Supreme Court rendered its decision in *Uraltransmash v. PESA Bydgoszcz*.<sup>80</sup> The case concerned Russian legislation from 2020 providing for "barriers to access to justice" for a sanctioned entity as grounds for the unenforceability of a jurisdictional or arbitration agreement in favor of a foreign court or with a seat of arbitration outside of Russia. The central issue addressed by the Supreme Court was the definition of "barriers," namely, whether a party must prove exactly how the sanctions affected its ability to access justice. Reversing the decisions of the lower courts, the Supreme Court dismissed Uraltransmash's claim in order to continue arbitration before the SCC. The Supreme Court's

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76. See *Termination of the Vattenfall Arbitration*, FED. MINISTRY OF ECON. AND CLIMATE PROT. (Feb. 11, 2021), <https://www.bmwi.de/Redaktion/DE/Pressemitteilungen/2021/11/20211102-beendigung-des-vattenfall-schiedsverfahrens.html>.

77. See *Overview*, SWISS ARB. (2021), <https://www.swissarbitration.org/centre/>.

78. See *Swiss Rules 2021*, SWISS ARB. (2021), <https://www.swissarbitration.org/centre/arbitration/arbitration-rules/>.

79. See *Model Clause*, SWISS ARB. (2021), <https://www.swissarbitration.org/centre/arbitration/arbitration-clauses/> (Arbitration clauses referring to the former SCAI remain valid).

80. See ARB. INST. OF THE STOCKHOLM CHAMBER OF COM., GUIDELINES TO THE SCC RULES FOR EXPRESS DISPUTE ASSESSMENT 2 (2021), [https://sccinstitute.com/media/1800128/scc-express-guidelines\\_2021.pdf](https://sccinstitute.com/media/1800128/scc-express-guidelines_2021.pdf).

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rationale has not been published yet, so the reasoning underlying the decision is currently unclear.<sup>81</sup> But the Supreme Court's decision may significantly influence the enforceability of jurisdictional and arbitration clauses with sanctioned Russian entities moving forward.

#### I. UKRAINE

In 2021, Ukraine faced two renewable energy investment claims concerning reform in the energy market.<sup>82</sup>

The Ukrainian Supreme Court denied Russian state-owned Vnesheconombank's application for enforcement of an SCC emergency award in a case brought under the Russia-Ukraine BIT. The court denied enforcement on public policy grounds, stating, *inter alia*, that enforcement would conflict with prior rulings permitting investors in *Everest Estate LLC, et al v. Russia* to enforce against the bank's assets in Ukraine.<sup>83</sup>

In late 2021/early 2022, the Supreme Court will decide whether it is possible to bring a separate claim for invalidation of an arbitration agreement before the Ukrainian courts. Previously, practitioners brought such claims in parallel to arbitration proceedings, as a means to obstruct them.<sup>84</sup>

#### IV. Pacific Rim

##### A. AUSTRALIA

The 2021 Arbitration Rules for the Australian Centre for International Commercial Arbitration (the "2021 ACICA Arbitration Rules") crystallized some of the virtual arbitration practices that have been adopted throughout the pandemic.<sup>85</sup> The 2021 ACICA Arbitration Rules also introduced an obligation on parties to disclose any third-party funding arrangements and extended the scope for consolidation and multi-contract arbitrations.<sup>86</sup>

In March 2021, the Federal Court ruled on the validity of a California-seated arbitration agreement, stating that it was practical, efficient, and just

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81. Uraltransmash JSC v RTS PESA Bydgoszcz JSC, Case: ?60-36897/2020, Ruling, (Sept. 21, 2021), p. 6, [https://kad.arbitr.ru/Document/Pdf/99ce7aa2-7f06-4615-baa5-94473b980771/695de30a-add8-4269-91b7-421b2347e302/A60-36897-2020\\_20210921\\_Opredelenie.pdf?isAddStamp=true](https://kad.arbitr.ru/Document/Pdf/99ce7aa2-7f06-4615-baa5-94473b980771/695de30a-add8-4269-91b7-421b2347e302/A60-36897-2020_20210921_Opredelenie.pdf?isAddStamp=true) (Russ.).

82. *See id.*

83. Modus Energy International B.V. v. Ukraine (SCC Case), <https://www.energycharter-treaty.org/details/article/modus-energy-international-bv-v-ukraine-scc/>; *see also* REW N.V. v. Ukraine (ICSID Case No. ARB/21/52), <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/21/52>.

84. Vnesheconombank v. Ukraine, Resolution of the Supreme Court, Case No. 824/178/19 (14 January 2021), <https://reyestr.court.gov.ua/Review/94328414> (Ukr.).

85. State Enterprise "Administration of seaports of Ukraine" v. China Harbour Engineering Company Ltd., Ruling of the Supreme Court, Case No. 910/9841/20 (29 April 2021), <https://reyestr.court.gov.ua/Review/96668830> (Ukr.).

86. *See* 2021 ACICA Arbitration Rules, rr. 10, 25.3 to 23.5, 27.2, 35.5, 36.5.

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for it to do so.<sup>87</sup> The Federal Court also demonstrated its pro-enforcement stance by upholding a 2020 decision enforcing an ICSID award against Spain, despite the country's claim of state immunity, and rejecting the European Commission's application to intervene in the enforcement proceedings.<sup>88</sup>

Simultaneously, the Federal Court showed a willingness to refuse enforcement of awards on procedural fairness grounds. In arguably the most significant decision of the year, the Full Court of the Federal Court refused enforcement of an award against an Australian company on the basis that the tribunal had been appointed under Qatari law and not in accordance with the parties' arbitration agreement.<sup>89</sup>

## B. JAPAN

In early 2021, an advisory body to Japan's Ministry of Justice published proposed amendments to Japan's 2003 Arbitration Act, which aim to bring it in line with the UNCITRAL Model Law.<sup>90</sup> It remains to be seen whether other features designed to make Japan a more attractive arbitral destination (e.g., relaxing translation requirements in ancillary Japanese court proceedings) will be adopted as well.

In July 2021, amendments to the Japan Commercial Arbitration Association (JCAA) Arbitration Rules came into effect, expanding the scope of application for expedited arbitration procedures (now up to JPY 300 million), lowering administrative fees for smaller disputes, and introducing the JCAA Appointing Authority Rules.<sup>91</sup>

## C. CHINA AND HONG KONG

China issued the "Draft Amendment of Chinese Arbitration Law (Published for Comments)" (the "Draft Amendment") on July 30, 2021.<sup>92</sup> The Draft Amendment represents a potential milestone in the internationalization of Chinese arbitration. It formally approves and provides detailed procedural requirements for ad hoc arbitration in China, and it adopts the principle of competence-competence. The Draft Amendment also eliminates an earlier requirement that parties specify an arbitration institution in their arbitration clause. If the parties fail to specify an arbitral institution, they now can choose an institution by signing a

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87. See 2021 ACICA Arbitration Rules, rr. 16, 18, 54.

88. *Freedom Foods Pty Ltd v Blue Diamond Growers* [2021] FCA 172.

89. *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l. (No 3)* [2021] FCAFC 112 (Spain).

90. *Hub Street v Energy City Qatar Holding* [2021] FCAFC 110 (Spain).

91. See generally Summary of Interim Proposal for Revision of Arbitration Law, MINISTRY OF JUST. (2021), [https://www.moj.go.jp/shingi1/shingi04900001\\_00056.html](https://www.moj.go.jp/shingi1/shingi04900001_00056.html) (Japan).

92. See *Amendment to and Enactment of the JCAA Arbitration Rules (July 1, 2021)*, JAPAN COM. ARB. ASS'N, <https://www.jcaa.or.jp/en/news/index.php?mode=show&seq=202> (last visited May 1, 2022).

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supplemental agreement or by submitting the dispute to an arbitration institution located in the common domicile of both parties.

On November 27, 2020, the Hong Kong government and the Supreme People's Court of China signed the Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region, amending the arrangement entered into in 2000.<sup>93</sup> This amendment was fully implemented when the Arbitration (Amendment) Ordinance 2021 came into effect on May 19, 2021. That ordinance extends the definition of "Mainland award" to cover arbitral awards made in the Mainland in accordance with the Arbitration Law of the People's Republic of China, whether or not made by a recognized Mainland arbitral authority, and allows parallel application to enforce an arbitral award in Hong Kong and in the Mainland to expedite enforcement proceedings in either jurisdiction.

A recent Hong Kong case held that the determination of compliance with a dispute-resolution clause involving a pre-arbitration condition (e.g., a requirement to engage in negotiations before resorting to arbitration) is a matter of admissibility of the claim rather than the jurisdiction of the arbitral tribunal. An arbitral tribunal therefore has the power to decide whether a pre-arbitration condition has been fulfilled.<sup>94</sup>

D. TAIWAN

On October 25, 2021, the Chinese Arbitration Association (CAA) launched the CAA Court of Arbitration to oversee case management; provide parties with impartial, professional, and efficient services; and to assist arbitral tribunals in rendering enforceable awards.<sup>95</sup> An independent agency of the CAA, the Court of Arbitration will decide matters in accordance with Taiwan's arbitration law and the CAA Arbitration Rules, and (with the parties' agreement) the Court may decide specific procedural disputes.<sup>96</sup> The Court's responsibilities include making preliminary decisions on CAA's competence to administer arbitrations, arbitrator appointments and challenges, amounts in dispute, arbitrators' fees and ethics, and the interpretation of the CAA's arbitration rules.

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93. *Draft Amendment of Chinese Arbitration Law (Published for Comments)*, MINISTRY OF JUST. OF THE PEOPLE'S REPUBLIC OF CHINA (July 30, 2021), [http://www.moj.gov.cn/pub/sfbgw/zlk/202107/t20210730\\_432958.html](http://www.moj.gov.cn/pub/sfbgw/zlk/202107/t20210730_432958.html).

94. *Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administrative Region*, DEPT. OF JUST. (Nov. 27, 2020), [https://www.doj.gov.hk/en/mainland\\_and\\_macao/pdf/supplemental\\_arrangementtr\\_e.pdf](https://www.doj.gov.hk/en/mainland_and_macao/pdf/supplemental_arrangementtr_e.pdf) (H.K.).

95. C v D [2021] HKCFI 1474.

96. *Chinese Court of Arbitration*, CHINESE ARB. ASS'N, <http://www.arbitration.org.tw/caa07.php> (last visited May 1, 2022).

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E. SINGAPORE & ASEAN

The Singapore International Commercial Court (SICC), upon a motion to set aside, ruled in an investor-state case<sup>97</sup> that there is a duty for arbitral tribunals to consider evidence of corruption, bribery, or illegality, even if the parties have agreed that no new evidence may be submitted.<sup>98</sup> Singapore also expanded the use of third-party funding<sup>99</sup> to include domestic arbitrations, some SICC cases, and certain mediation proceedings.<sup>100</sup>

Cambodia faces its second investor-state proceeding<sup>101</sup> and the first to be brought under an investment treaty.<sup>102</sup> Though the future of dispute resolution remains uncertain after February's coup, Myanmar's Supreme Court issued Notification No. 42/2021 in January laying out the legal requirements for obtaining authenticated copies of awards issued in Myanmar for purposes of enforcement in other jurisdictions.<sup>103</sup>

Several ASEAN arbitration centers released new rules in 2021, namely the National Commercial Arbitration Centre (NCAC)<sup>104</sup> in Cambodia;<sup>105</sup> Badan Arbitrase Nasional Indonesia (BANI) in Indonesia;<sup>106</sup> and the Asian International Arbitration Centre (AIAC) in Malaysia.<sup>107</sup>

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97. *Id.*

98. Lao Holdings NV v. The Government of the Lao People's Democratic Republic, Case: [2021] SGHC(I) 10, Judgement, (Sept. 9, 2021), [https://www.elitigation.sg/gd/sic/2021\\_SGHCI\\_10](https://www.elitigation.sg/gd/sic/2021_SGHCI_10).

99. Ben Giaretta, *When Arbitrators Can Override the Parties' Agreement*, LEXOLOGY (Oct. 7, 2021), <https://www.lexology.com/library/detail.aspx?g=5414506b-8cae-4bf1-94a1-5c11f25bea82>.

100. See Press Release, Singapore Ministry of Law, Third-Party Funding to be Permitted for More Categories of Legal Proceedings in Singapore (June 21, 2021), <https://www.mlaw.gov.sg/news/press-releases/2021-06-21-third-party-funding-framework-permitted-for-more-categories-of-legal-proceedings-in-singapore>.

101. See Civil Law (Third-Party Funding) (Amendment) Regulations 2021 (Effective June 28, 2021) (Singapore), [LAW 32/006/070; AG/LEGIS/SL/43/2020/1 Vol. 1], <https://sso.agc.gov.sg/SL-Supp/S384-2021/Published/20210621?DocDate=20210621>.

102. Qiong Ye and Jianping Yang v. Kingdom of Cambodia (ICSID Case No. ARB/21/42), <http://icsiddev.prod.acquia-sites.com/cases/case-database/case-detail?CaseNo=ARB/21/42>.

103. Sangeetha Amarthalingam, *Will Policy Reforms, New Laws Expose Cambodia to More Treaty-Based Suits??*, THE PHNOM PENH POST (Nov. 11, 2021), <https://www.phnompenhpost.com/special-reports/will-policy-reforms-new-laws-expose-cambodia-more-treaty-based-suits>.

104. See Min Thein and Lester Chua, *Five Years On: The Development of Arbitration Laws and Institutions in Myanmar*, LEXOLOGY (July 30, 2021), <https://www.lexology.com/library/detail.aspx?g=79a13f0b-909a-45d9-98de-b8ff716115d1>.

105. National Commercial Arbitration Centre Rules (Effective June 28, 2021), <https://ncac.org.kh/wp-content/uploads/2021/10/NCAC-ARBITRATION-RULES-EN-Final.pdf>.

106. See Mealy Khieu, *Commercial Arbitration in Cambodia: The New NCAC Rules 2021 Are Out Now*, SOK SIPHANA & ASSOC. ALERT (June 8, 2021), <https://www.soksiphana.com/resources/alerts/commercial-arbitration-in-cambodia-the-new-ncac-rules-2021-are-out-now/>.

107. See Rizki Karim, *Updates on the New BANI Arbitration Rules 2021*, KARIMSYAH NEWSL. (Oct. 19, 2021), <https://www.karimsyah.com/newsletter/new-bani-rules-2021>.

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**V. Middle East**

**A. UNITED ARAB EMIRATES**

On September 14, 2021, Dubai issued Decree No. 34 abolishing the Dubai International Financial Centre (DIFC) Arbitration Institute, which had an operating agreement with the London Court of International Arbitration (LCIA) to administer arbitrations under an adjusted version of the LCIA rules known as the DIFC-LCIA rules.<sup>108</sup> Cases referred to DIFC-LCIA Arbitration Centre after that date will be administrated by the Dubai International Arbitration Centre (DIAC) in accordance with the DIAC rules, unless the parties agree otherwise.<sup>109</sup>

**B. IRAQ**

In November 2021, Iraq ratified the New York Convention.<sup>110</sup>

**VI. Africa**

**A. ANGOLA**

In September 2021, Angola's National Assembly approved Angola's accession to the ICSID Convention.<sup>111</sup> The same month, the Amsterdam District Court issued a bankruptcy order against Exem Energy, a Dutch company beneficially owned by Isabel dos Santos, the daughter of the former Angolan president.<sup>112</sup> This decision follows an arbitral tribunal's award ordering that Exem return the shares it had acquired in 2006 from Angola's state-owned oil and gas company, Sonangol, after finding the acquisition "tainted by illegality" and that the "nature and size of Exem's

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108. See, e.g., Asian International Arbitration Centre Arbitration Rules (Effective Aug. 1, 2021), [https://admin.aiac.world/uploads/ckupload/ckupload\\_20210801103608\\_18.pdf](https://admin.aiac.world/uploads/ckupload/ckupload_20210801103608_18.pdf); see also Asian International Arbitration Centre I-Arbitration Rules (Effective Nov. 1, 2021) (2021) [https://admin.aiac.world/uploads/ckupload/ckupload\\_20211101035047\\_27.pdf](https://admin.aiac.world/uploads/ckupload/ckupload_20211101035047_27.pdf); Kang Mei Yee, *AIAC Arbitration Rules 2021*, GAN PARTNERSHIP, Aug. 9, 2021, <https://www.ganlaw.my/aiac-arbitration-rules-2021/>; *Malaysia Launches i-Arbitration Rules 2021*; *First Shariah Guided Dispute Resolutions of AIAC*, ISLAMICMARKETS INSIGHTS (Nov. 3, 2021), <https://islamicmarkets.com/articles/malaysia-launches-i-arbitration-rules-2021-first-shariah-guided-dispute-resolutions>.

109. Habib al Mulla & Karen Seif, *Arbitration in Dubai After Decree 34 of 2021: It Has Wings, But Will it Fly?*, KLUWER ARB. BLOG (Nov. 14, 2021), <http://arbitrationblog.kluwerarbitration.com/2021/11/14/arbitration-in-dubai-after-decree-34-of-2021-it-has-wings-but-will-it-fly/>.

110. London Court of International Arbitration, Update: DIFC-LCIA (Oct. 7, 2021), <https://www.lcia.org/News/update-difc-lcia.aspx>.

111. See List of Contracting States, N.Y. ARB. CONVENTION (2021), <https://www.newyorkconvention.org/countries>.

112. *Accession of Angola to the Washington Convention (ICSID Convention)*, THE LEGAL 500 (Oct. 26, 2021), <https://www.legal500.com/developments/thought-leadership/accession-of-angola-to-the-washington-convention-icsid-convention/>. Angola's effective accession to the ICSID Convention remains subject to the Angolan President's ratification of the same. See Article 121(c) of Angola's Constitution dated 2010.



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part” in the transaction “cannot be explained but for grand corruption by the daughter of a head of state and her husband.”<sup>113</sup>

**B. BENIN**

In July 2021, Benin ratified the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration.<sup>114</sup>

**C. MALAWI**

In March 2021, Malawi ratified the New York Convention.<sup>115</sup>

**D. THE REPUBLIC OF THE CONGO**

In 2021, the Republic of the Congo faced multiple claims, including an ICC claim valued at \$27 billion, following its decision to revoke the licenses of three mining companies and to reallocate the licenses to an operator said to have no previous experience in mining in Congo.<sup>116</sup> On November 15, 2021, a UK mining company and its subsidiary filed an additional request for arbitration under the UK-Congo BIT following Congo’s revocation of their iron-ore permit in June 2021.<sup>117</sup>

**VII. South America**

**A. ARGENTINA**

In 2021, Argentina’s government announced its intention to review its BITs in an attempt to restrict investors’ access to international arbitration fora.<sup>118</sup> To date, no further steps have been taken.

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113. Dominic Lawson, *Dos Santos Company Enters Bankruptcy After Dutch Award*, GLOB. ARB. REV. (Sept. 23, 2021), <https://globalarbitrationreview.com/dos-santos-company-enters-bankruptcy-after-dutch-award>.

114. *Exem Energy B.V. v. Sociedade Nacional de Combustíveis de Angola, - Sonangol E.P. (I)*, NAI Case No. 4687, ¶¶ 8.3, 8.18, [https://jusmundi.com/en/document/decision/en-exem-energy-v-sonangol-i-award-tuesday-27th-july-2021#decision\\_17254](https://jusmundi.com/en/document/decision/en-exem-energy-v-sonangol-i-award-tuesday-27th-july-2021#decision_17254).

115. See *Status: United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014)*, UNITED NATIONS COMM’N ON INT’L TRADE L., <https://uncitral.un.org/en/texts/arbitration/conventions/transparency/status> (last visited May 1, 2022).

116. See List of Contracting States, N.Y. ARB. CONVENTION, <https://www.newyorkconvention.org/countries> (last visited May 12, 2022).

117. Cosmo Sanderson, *Mourre Takes Charge of Mammoth Congo Claim*, GLOB. ARB. REV. (Nov. 8, 2021), <https://globalarbitrationreview.com/mourre-takes-charge-of-mammoth-congo-claim>.

118. Jack Ballantine, *Onslaught of Claims Against Congo Continues*, GLOB. ARB. REV. (Nov. 16, 2021), <https://globalarbitrationreview.com/onslaught-of-claims-against-congo-continues>. See also *Midus Holdings and Congo Mining v. The Republic of the Congo*, Documents of the Case, JUS MUNDI, [https://jusmundi.com/en/document/other/en-midus-holdings-and-congo-mining-v-the-republic-of-the-congo-request-for-arbitration-monday-15th-november-2021#other\\_document\\_21650](https://jusmundi.com/en/document/other/en-midus-holdings-and-congo-mining-v-the-republic-of-the-congo-request-for-arbitration-monday-15th-november-2021#other_document_21650).

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**B. URUGUAY**

On May 25, 2021, Uruguay's Supreme Court of Justice<sup>119</sup> upheld a decision rendered by the Civil Court of Appeal of the 2d Term<sup>120</sup> dismissing a demand for disclosure of information regarding an ICSID arbitration. The demand was made under Law 18.381<sup>121</sup> (regarding access to public information) and requested the Uruguayan government to disclose all documents and briefs submitted in the proceeding. The Court of Appeals rejected the request because the matter was subject to arbitration, and the arbitral tribunal had rendered a confidentiality order covering all documents in the record; to ignore the order would unlawfully undermine the powers and jurisdiction of the arbitral tribunal.

Uruguay continues to experience difficulties with its dualist arbitration regime in which a system modeled on the UNCITRAL Model Law exists together with an archaic legal framework for domestic arbitration. But the recent judgment No. 2450/2021 of the Civil Court of First Instance of the 16th Term reaffirmed the courts' flexible approach to the scope of international arbitration to reinforce respect for foreign awards, the terms of the New York Convention, and party autonomy.

**C. PARAGUAY**

On October 25, 2021, the Paraguayan Arbitration and Mediation Center launched its new Arbitration Rules.<sup>122</sup> The new rules include provisions regarding initial hearings to prepare the first procedural order, emergency arbitrators, and the use of technology, with a protocol on digital proceedings.

The Paraguayan Supreme Court of Justice also rendered its judgment in the case "*R. R. D. L. c/ M. L. y otros s/ regulación de honorarios profesionales*" clarifying that fees for lawyers who participate in an arbitration cannot be regarded as a cost of the proceeding unless expressly agreed by the parties.<sup>123</sup>

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119. See *Argentina Quiere Revisar los Acuerdos de Inversión Para Evitar Arbitrajes* [Argentina Wants to Review Investment Agreements to Avoid Arbitrations], CIAR GLOB., <https://ciarglobal.com/argentina-quiere-revisar-los-acuerdos-de-inversion-para-evitar-arbitrajes/> (last visited May 12, 2022).

120. Case: Salle, Gustavo y otro c/ Estado – Poder Ejecutivo - Acción judicial de acceso a la información pública - Ley 18.381 - Casación, File: 2-55051/2018, Judgment of the Supreme Court of Justice, No 112/2021 of May 25, 2021, <http://bjn.poderjudicial.gub.uy/BJNPUBLICA/hojaInsumo2.seam?cid=202501> (Uru.).

121. Case: Salles c. Estado -Acceso a la información pública, File: 2-55051/2018, Judgment of the Civil Court of Appeal of the 2nd Term, No 21/2019 of February 26, 2019, <http://bjn.poderjudicial.gub.uy/BJNPUBLICA/hojaInsumo2.seam?cid=231048> (Uru.).

122. Law No 18,381, Ley sobre el derecho de acceso a la información pública, Oct. 17, 2008 (Uru.).

123. See *El CAMP innova su reglamento con el fin de instalar el arbitraje en Paraguay a la vanguardia* [The CAMP Innovates Its Regulations in Order to Install Arbitration in Paraguay at the Forefront], CENTRO DE ARBITRAJE Y MEDIACION PARAGUAY, <https://www.campparaguay.com>.

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**D. BRAZIL**

In October 2021, Brazil's Superior Court of Justice decided that government-owned Petrobras' statutory arbitration clause could not bind the Federal Government (as the controlling shareholder), on the grounds that: (1) there was no law or statute authorizing the Federal Government to arbitrate shareholder disputes; and (2) the dispute involved extra-contractual civil-liability claims, which were not arbitrable.<sup>124</sup>

The São Paulo Court of Appeal also rendered two important decisions. First, in March 2021, an arbitral award was annulled on the grounds that ruling in equity does not relieve a tribunal of its obligation to properly set out its reasoning for determining damages.<sup>125</sup> And second, in July 2021, an arbitral award was suspended based on an allegation that one of the arbitrators shared office space with the law firm that represented one of the parties.<sup>126</sup>

**E. CHILE**

In 2021, Chile's Supreme Court held, in two decisions, that the purpose of procedures for the recognition of foreign arbitral awards is to verify compliance with minimum legal requirements.<sup>127</sup> In both cases,<sup>128</sup> the Court refrained from revisiting the merits of the awards and held that the only grounds to oppose recognition are those provided in Chile's International Commercial Arbitration Act.<sup>129</sup>

Two ICSID claims were also brought against Chile: one by a Colombian power company concerning the construction of an electricity transmission

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com/es/novedades/noticias/el-camp-innova-su-reglamento-con-el-fin-de-instalar-el-arbitraje-en-paraguay-a-la-vanguardia.

124. Recurso de queja por recurso denegado en los autos Roberto Ruiz Diaz Labrano c/ Maximino Lazzarotto y otros s/ Regulación de honorarios extrajudiciales, Judgment of the Supreme Court of Justice, No 6, Mar. 8, 2021 (Para.).

125. S.T.J.J., C.C. No. 177.436-DF, Relator: Min. Nancy Andrighi, 18.10.2021, Diário do Judiciário Eletrônico [d.j.e.], 20.10.2021, [https://processo.stj.jus.br/processo/dj/documento/mediado/?tipo\\_documento=Documento&componente=MON&sequencial=135176379&num\\_registro=202100353086&data=20211020](https://processo.stj.jus.br/processo/dj/documento/mediado/?tipo_documento=Documento&componente=MON&sequencial=135176379&num_registro=202100353086&data=20211020) (Braz.).

126. T.J.S.P., Ap. Civ. No. 1048961-82.2019.8.26.0100, Relator Azuma Nishi, 10.03.2021, Diário da Justiça [D.J.E.S.P.], <https://esaj.tjsp.jus.br/cjsg/getArquivo.do?cdAcordao=14440160&cdForo=0> (Braz.).

127. T.J.S.P., Ag. Inst. No. 2168253-82.2021.8.26.0000, Relator Araldo Telles, 30.07.2021, Diário da Justiça [D.J.E.S.P.], <https://esaj.tjsp.jus.br/cjsg/getArquivo.do?cdAcordao=14868696&cdForo=0> (Braz.).

128. Corte Suprema de Justicia [C.S.J.] [Supreme Court], 1 de febrero de 2021, "Intergate AG Inversiones y Asesorías Jeremy Richert Limitada," Rol de la causa: 16.745-2019 (Chile), <https://www.diarioconstitucional.cl/wp-content/uploads/2021/02/16.745-2019EXEQUATUR-SUIZA-EMPRESAS.pdf>, and Corte Suprema de Justicia [C.S.J.] [Supreme Court], 19 de julio 2021, "I. Schroeder KG GMBH Co.," Rol de la causa: 104.262-2020 (Chile), <https://www.diarioconstitucional.cl/wp-content/uploads/2021/07/LASTINAJASEXEQUATUR104.262-2020.pdf>.

129. *Id.* ¶ 1 and 8, respectively.

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line<sup>130</sup> and the other by two French companies over the concession for an airport.<sup>131</sup> These are the first ICSID claims filed against Chile since 2017.<sup>132</sup>

F. COLOMBIA

In September 2021, following a 2019 judgment from Colombia's Constitutional Court requiring clarification on international investment treaties,<sup>133</sup> Colombia renegotiated and signed a new BIT with Spain.<sup>134</sup> This more restrictive treaty specifies that substantive obligations from other treaties cannot be imported through the most-favored nation provision, limits the fair and equitable treatment (FET) obligation to five enumerated circumstances, and specifies that a breach of another international provision or national law does not imply a breach of FET.

G. VENEZUELA

In January 2021, the U.S. District Court for the District of Columbia revealed that Juan Guaidó's government agreed to pay \$110 million to satisfy an ICSID award won by British company Vestey.<sup>135</sup> That same month, the Guaidó government announced an agreement with Vestey to delay the first payment until July 2022.<sup>136</sup>

H. PERU

In July 2021, the Arbitration Centre of the American Chamber of Commerce of Peru (AmCham) issued new arbitration rules which permit the AmCham Court to review and make recommendations on the substance of

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130. Law No. 19.971, Sobre Arbitraje Comercial Internacional, 10 de septiembre 2004 (Chile) (closely based on the 1985 UNCITRAL Model Law).

131. *Interconexión Eléctrica S.A. E.S.P. v. Republic of Chile* (ICSID Case No. ARB/21/27).

132. *ADP International S.A. and Vinci Airports S.A.S. v. Republic of Chile* (ICSID Case No. ARB/21/40).

133. See generally INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES (last visited May 1, 2022), <https://icsid.worldbank.org/cases/case-database>.

134. See Eduardo Zuleta & María Camila Rincón, *Colombia's Constitutional Court Conditions Ratification of the Colombia–France BIT to the Interpretation of Several Provisions of the Treaty*, KLUWER ARB. BLOG (July 4, 2019), <http://arbitrationblog.kluwerarbitration.com/2019/07/04/colombias-constitutional-court-conditions-ratification-of-the-colombia-france-bit-to-the-interpretation-of-several-provisions-of-the-treaty/>.

135. See *Spain and Colombia Sign New BIT*, INT'L INST. FOR SUSTAINABLE DEV. (Oct. 7, 2021), <https://www.iisd.org/itn/en/2021/10/07/spain-and-colombia-sign-new-bit/>.

136. Cosmo Sanderson, *Venezuela Settles Beef with Cattle Farmers*, GLOB. ARB. REV. (Jan. 20, 2021).

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all awards,<sup>137</sup> allow multi-contract arbitration, and require a tribunal to issue its final award within ten months.<sup>138</sup>

I. ECUADOR

After denouncing the ICSID Convention in 2009, Ecuador once again ratified it on September 3, 2021.<sup>139</sup>

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137. Procuraduría Especial de la República (Jan. 27, 2021), <https://presidenciave.com/internacional/comunicado-de-la-procuraduria-especial-de-la-republica-sobre-negociacion-judicial-con-la-empresa-vestey1/>.

138. Ricardo Carrillo, Diego Martínez & Christian Wong, *Peru*, GLOBAL REV. (Aug. 12, 2021); La Cámara de Comercio Americana del Perú (AmCham), Centro Internacional de Arbitraje, Reglamento de Arbitraje (July 2021), <https://amcham.org.pe/wp-content/uploads/2021/05/Reglamento-2021.pdf>.

139. Section 40(1) of AmCham 2021 Rules.

## **International Criminal Law, International Courts, and Judicial Affairs**

MANISH N. BHATT, GIOVANNI CHIARINI, KATHERINE MADDOX  
DAVIS, BETH FARMER, TIMOTHY FRANKLIN, CYREKA C. JACOBS,  
STÉPHANE DE NAVACELLE, SARA L. OCHS, ALEXANDER S.  
VESSELINOVITCH, MELISSA GINSBERG, MARC WEITZ, AND  
JULIE ZORRILLA

This article reviews some of the most significant developments in 2021 made by international courts and tribunals, domestic courts, and legislative developments involving issues of international criminal law, international human rights law, and international public law. This article also includes a section on protecting the attorney-client and work product privileges in internal investigations, which offers practical application for lawyers engaged in cross-border civil litigation and investigations.

### **I. International Courts**

#### **A. THE INTERNATIONAL CRIMINAL COURT**

##### *1. Prosecutor v. Ntaganda*

On March 30, 2021, the ICC Appeals Chamber (AppCh) unanimously confirmed the Trial Chamber VI (TC) conviction of Bosco Ntaganda of eighteen counts of war crimes and crimes against humanity committed in Ituri, Democratic Republic of the Congo, during 2002 and 2003.<sup>1</sup> Ntaganda

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\* The Committee Editor of the International Courts & Judicial Affairs Committee is Sara L. Ochs, Assistant Professor of Law at the University of Louisville, Louis D. Brandeis School of Law. The Committee Editors of the International Criminal Law Committee are Beth Farmer, Professor Emerita at Penn State Law School, and Timothy Franklin. Section I(A) was authored by Cyreka C. Jacobs (*Prosecutor v. Ntaganda*); Beth Farmer (*Prosecutor v. Ongwen*); and Giovanni Chiarini, Visiting Researcher at the UCC Centre for Criminal Justice & Human Rights at the CCJHR in Cork, Ireland (*The Philippines Situation*). Timothy Franklin contributed Section I(B) on the IRMCT. Katherine Maddox Davis of Gibson, Dunn & Crutcher, LLP authored Section I(C) on the International Court of Justice, and Marc Weitz of the Law Office of Marc Weitz authored Section I(D) on international human rights courts and tribunals. Section II(A) was authored by Stéphane de Navacelle and Julie Zorrilla of Navacelle Law. Section II(B) includes contributions from Alexander S. Vesselinovitch of Freeborn & Peters, LLP (*United States v. Van Buren*); Manish N. Bhatt (U.S. Supreme Court “State Secrets” Cases); and Melissa Ginsberg of Patterson, Belknap, Webb & Tyler LLP (*Protecting Privilege in Internal Investigations*). The views expressed in this chapter are the authors’ own and do not necessarily represent the views of their law firms, organizations, or universities, or their firms’ or organizations’ clients.

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was convicted as both a direct perpetrator and indirect co-perpetrator.<sup>2</sup> The AppCh also unanimously affirmed the TC's sentence of thirty years.<sup>3</sup> No further appeals are available, so the conviction and sentence are final.

The appeal was based on the TC characterization of Ntaganda's alleged conduct as a high level member of the *Union des Patriotes Congolais* and its military wing, the *Forces Patriotiques pour la Libération du Congo*, and his involvement in the events that took place in Ituri district between approximately August 6, 2002, and December 31, 2003.<sup>4</sup> The specific crimes included crimes against humanity and war crimes including murder, crimes of sexual violence and sexual slavery, persecution, deportation, attacks against civilians and protected objects, and conscripting children under fifteen for armed conflict.<sup>5</sup> Ntaganda and the Prosecutor both appealed the TC's judgment.<sup>6</sup>

Although the AppCh was not persuaded by Ntaganda's arguments, it supplied in-depth discussion before rejecting the thirteenth, fourteenth, and fifteenth grounds of his appeal, raising the theory of indirect co-perpetration. In his thirteenth ground of appeal, Ntaganda argued that the TC erred in its approach to the common plan requirement for indirect co-perpetration and the crimes committed in implementation of this plan. Specifically, Ntaganda argued unsuccessfully that the TC erred in convicting him for the actions of Hema civilians in Mongbwalu.<sup>7</sup>

Under the fourteenth and fifteenth grounds of his appeal, Ntaganda argued that the TC erred in finding that he possessed the required mens rea as an indirect co-perpetrator for the crimes of UPC/FPLC soldiers committed during the First and Second Operations.<sup>8</sup> The AppCh relied on the TC findings with respect to the latter claim, noting that the TC relied on the following specific factors to determine that Mr. Ntaganda did, in fact, possess the requisite *mens rea*: "(i) Mr. Ntaganda's role in the agreement and implementation of the common plan; (ii) his senior status in the UPC/FPLC and his commanding role during the Mongbwalu assault; and (iii) his 'presence, actions and directives' during the First Operation."<sup>9</sup>

In a separate opinion, Judge Luz Del Carmen Ibáñez cited Rome Statute Article 25(3)(a), which recognizes individual criminal responsibility where a person "commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is

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2. Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Public Redacted Version of the Appeals Judgment (Mar. 30, 2021), [https://www.icc-cpi.int/CourtRecords/CR2021\\_03027.PDF](https://www.icc-cpi.int/CourtRecords/CR2021_03027.PDF) [hereinafter Ntaganda Appeals Judgment].

3. *Id.*

4. Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Sentencing Judgment (Nov. 7, 2019), [https://www.icc-cpi.int/CourtRecords/CR2019\\_06674.PDF](https://www.icc-cpi.int/CourtRecords/CR2019_06674.PDF).

5. Ntaganda Appeals Judgment, *supra* note 1, ¶ 27.

6. *Id.* ¶ 28.

7. *Id.* ¶ 30.

8. *Id.* ¶ 878.

9. *Id.* ¶ 26.

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criminally responsible.”<sup>10</sup> As such, Judge Ibáñez clarified that “indirect co-perpetration in this case should not be seen as a stand-alone mode of liability, but as a particular form of co-perpetration . . . and that [t]he requirement of the existence of an organisation used to subjugate the will of the direct perpetrators refers to one of the forms in which commission through another person . . . may take place.”<sup>11</sup>

The Court has made a clear distinction between perpetration and other modes of liability under the statute.<sup>12</sup> Judge Ibáñez noted that the Court previously adopted the following objective criterion of “control over the crime”:

[O]nly those who have control over the commission of the offence – and are aware of having such control – may be principals because:

- (1) They physically carry out the objective elements of the offence (commission of the crime in person, or direct perpetration);
- (2) They control the will of those who carry out the objective elements of the
- (3) Offence (commission of the crime through another person, or indirect perpetration); or
- (4) They have, along with others, control over the offence by reason of the essential tasks assigned to them (commission of the crime jointly with others, or co-perpetration).<sup>13</sup>

Further, “indirect perpetration through an organised power apparatus is a form of commission through another person as provided in article 25(3)(a) of the Statute whereby crimes are committed through an organised power apparatus.”<sup>14</sup> The position within the organized power apparatus, may give that person the power of “functional control over the crimes and retains the power to frustrate their commission.”<sup>15</sup>

The AppCh ultimately determined that contrary to Ntaganda’s challenge, “the Hema civilians functioned as a tool in the hands of the co-perpetrators” and that their “will had become irrelevant”<sup>16</sup> and that the civilian conduct resulted from UPC/FPLC leadership orders.<sup>17</sup>

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10. *Id.* ¶ 962.

11. Rome Statute of the International Criminal Court, at art. 25, ¶ 1, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

12. Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Separate Opinion of Judge Ibáñez, ¶ 213 (Mar 30, 2021), [https://www.icc-cpi.int/RelatedRecords/CR2021\\_03018.PDF](https://www.icc-cpi.int/RelatedRecords/CR2021_03018.PDF) [hereinafter Ibáñez Separate Opinion].

13. *Id.* ¶ 229

14. *Id.* ¶ 229.

15. Ibáñez Separate Opinion, *supra* note 11, ¶ 311.

16. *Id.*

17. Ntaganda Appeals Judgment, *supra* note 1, ¶ 953.



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2. *Prosecutor v. Ongwen*

Dominic Ongwen was a leader in the so-called Lord's Resistance Army (LRA).<sup>18</sup> He had been abducted and used as a child soldier for the majority of his life.<sup>19</sup> This status put Ongwen in the position of being both an alleged vicious perpetrator and also a victim charged with committing some of the same crimes from which he claimed to have suffered.<sup>20</sup> His situation, therefore, required ICC Trial Chamber IX (TC) to decide his criminal responsibility, evaluate his asserted defenses of duress and legal insanity, and determine the appropriate sentence, based on all of the facts.<sup>21</sup> The trial began on December 6, 2016, and was submitted on December 12, 2019, after 234 hearings during which the Prosecutor submitted 116 witnesses, the Defense tendered sixty-three witnesses, and the representatives for the more than 4,000 victims who chose to participate offered seven witnesses.<sup>22</sup> On February 4, 2021, the TC convicted Ongwen of sixty-one of the seventy counts he had been charged of; it also rejected Ongwen's defenses.<sup>23</sup> Just over three months later, on May 6, 2021, Ongwen was sentenced to twenty-five years imprisonment, over a partial dissent recommending thirty years.<sup>24</sup> He filed a Notice of Appeal on May 21, 2021,<sup>25</sup> and the appeal is still pending.

The TC's Judgment recites the long history of the LRA: notably that it was founded by Joseph Kony in the 1980s in Uganda and is active throughout the region as well as in the Central African Republic and the Democratic Republic of the Congo.<sup>26</sup> Uganda referred the situation to the ICC in 2004, and, thereafter, arrest warrants were issued for Kony and four individuals including Ongwen.<sup>27</sup>

The TC specifically found that Ongwen was abducted when he was between nine and ten years old, and that he was between twenty-four and twenty-seven when the crimes charged were committed.<sup>28</sup> These findings

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18. *Id.*

19. See *Case Information Sheet: The Prosecutor v. Dominic Ongwen*, INT'L CRIMINAL CT. (July 2021), <https://www.icc-cpi.int/CaseInformationSheets/ongwenEng.pdf>.

20. *Id.*

21. *Prosecutor v. Ongwen*, ICC-02/04-01/15, Trial Judgment, ¶ 27 (Feb. 4, 2021) [hereinafter *Ongwen Trial Judgment*].

22. *Id.* ¶ 27.

23. Some of the witnesses appeared in person and others by written testimony. See *id.*, ¶¶ 19–20, 22.

24. See Press Release, International Criminal Court, *Dominic Ongwen Declared Guilty of War Crimes & Crimes Against Humanity Committed in Uganda*, ICC-CPI-20210204-PR1564 (Feb. 4, 2021), <https://www.icc-cpi.int/Pages/item.aspx?name=PR1564>.

25. *Id.*

26. *Prosecutor v. Ongwen*, ICC-02/04-01/15, Defence Notification of Its Intent to Appeal the Trial Judgment (May 21, 2021) [https://www.icc-cpi.int/CourtRecords/CR2021\\_04746.PDF](https://www.icc-cpi.int/CourtRecords/CR2021_04746.PDF) [hereinafter *Ongwen Notice of Appeal*].

27. *Id.*, ¶¶ 1–14.

28. Ongwen surrendered in 2015, Kony is not in custody, and the other three are reportedly deceased. *Id.* ¶¶ 15–16.

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begged the obvious question: How, if at all, are these facts relevant to Ongwen's criminal responsibility and proper sentence?

To answer this question, the TC first described the crimes with which Ongwen was charged in detail in the nearly 1,100-page Judgment.<sup>29</sup> The seventy counts of war crimes and crimes against humanity fall into four categories:

- (1) Four attacks on several displaced persons camps including the constitutive acts of murder, torture, enslavement, outrages upon personal dignity, persecution, destruction of property and pillaging;<sup>30</sup>
- (2) Crimes of sexual violence including rape, torture, forced marriage, forced pregnancy, sexual slavery, enslavement, and outrages against personal dignity against seven victims who were kidnapped and forced to serve in his personal household;<sup>31</sup>
- (3) Crimes of sexual violence against women and girls in and by his brigade;<sup>32</sup> and
- (4) Abduction of children under age fifteen for use as soldiers.<sup>33</sup>

Ongwen was charged as a direct and indirect perpetrator and as an indirect co-perpetrator.<sup>34</sup>

The TC found, beyond a reasonable doubt, that Ongwen was an apt pupil: Kony praised him,<sup>35</sup> and Ongwen ultimately attained the position of brigade commander of the Sinia Brigade, one of four LRA brigades comprising several hundred members.<sup>36</sup> Ongwen organized attacks, gave orders, and led members personally.<sup>37</sup> No one was allowed to disobey his orders,<sup>38</sup> or escape.<sup>39</sup> The Court additionally found that Ongwen participated in, co-perpetrated, and knew of gender violence.<sup>40</sup> He also participated in the abduction and use of children under fifteen as soldiers.<sup>41</sup>

The Rome Statute, Article 7(1), defines "crimes against humanity" based on a list constitutive acts when those acts are committed as part of a widespread or systematic attack directed against any civilian population, with

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29. *Id.* ¶¶ 27–31.

30. Ongwen Trial Judgment, *supra* note 20. The decision is extremely difficult reading. While not explicit, it names, recounts, and evaluates the testimony of the many witnesses and many charges.

31. *Id.* ¶ 34

32. *Id.* ¶ 35.

33. *Id.* ¶36.

34. *Id.*

35. *Id.* ¶¶ 32–36.

36. *Id.* ¶ 902

37. Ongwen Trial Judgment, *supra* note 20, ¶¶ 134–38, 885–91, 1013–83.

38. *Id.* ¶¶144, 204.

39. *Id.* ¶¶ 950–70.

40. *Id.* ¶¶ 971–98.

41. *Id.* ¶¶ 205–21.

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knowledge of the attack.<sup>42</sup> Article 8 of the Rome Statute recognizes that war crimes include grave breaches of the Geneva Conventions and “other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law . . . .”<sup>43</sup> Ongwen did not seriously contest that the crimes occurred, but he raised two defenses to his responsibility: legal insanity and duress.<sup>44</sup>

Scholars generally categorize criminal defenses into “excuse” and “justification” types of claims.<sup>45</sup> In the former category, the offender has committed a social harm, which is not offset by a lesser harm or social benefit, is excused because he or she is not a proper target for criminal adjudication and punishment.<sup>46</sup> Classic examples include infancy, legal insanity, and duress or coercion.<sup>47</sup> Colloquially translated, an excuse defense means that treatment may be a more just and efficacious remedy (e.g., for mental disease or infancy) or that the actor cannot control his or her actions (e.g., the coerced actor).<sup>48</sup> A justification defense, in comparison, recognizes that the actor caused prohibited social harm but that the actions were justified because they mitigated or avoided a greater threatened harm.<sup>49</sup> There was no justification claim in this case: Ongwen argued the substantive excuses of mental disease and duress.<sup>50</sup>

Rome Statute Article 31 defines a mental disease or defect excluding criminal responsibility in familiar terms that resemble the American Law Institute’s Model Penal Code.<sup>51</sup>

A person shall not be criminally responsible if, at the time of that person’s conduct: (a) The person suffers from a mental disease or defect that destroys that person’s capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law.<sup>52</sup>

Thus, there are three elements of the defense: (1) a *diagnosed mental disease* or defect, which *destroys* (2) the capacity to *appreciate* either (3a) that the act was prohibited or (3b) the actor’s *ability to control* his or her conduct. In Ongwen’s situation, one would expect the debate to concern the last, alternate, prongs: did he understand what he was doing was legally or morally *wrong* (for example sexual violence, outrages upon personal dignity,

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42. *Id.* ¶¶ 222–25, 892–903, 2310–2447.

43. Rome Statute, *supra* note 10, at art. 7(1).

44. *Id.* at art. 8

45. *Id.* ¶ 2448.

46. Paul Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 213–29 (1982).

47. *Id.* at 221.

48. *Id.*

49. *Id.*

50. *Id.* at 213.

51. Ongwen Trial Judgment, *supra* note 20.

52. MODEL PENAL CODE § 4.01 (AM. L. INST. 1962).

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abduction of children) or, more likely, even if he did, was he able to exercise self-control and not offend?

Instead, the TC focused on the first prong of the defense and found that Ongwen was not suffering from a mental disease when he committed the offenses.<sup>53</sup> Defense experts testified that he suffered from a number of mental diseases including post-traumatic stress disorder (PTSD), depression, obsessive compulsive disorder (OCD), dissociative disorder, and suicidal ideation.<sup>54</sup> The TC was unpersuaded, noting especially that Ongwen had behaved normally and even thrived while in the LRA.<sup>55</sup> The TC found that he was good at his job, “hardworking” and able to function.<sup>56</sup> Lay witnesses, including former fellow soldiers and some of his victims, testified similarly that he was generally a “good person” and skilled at his work.<sup>57</sup> The TC further found that Ongwen’s ability to plan and execute complex attacks indicated the absence of mental disease.<sup>58</sup> The TC found “the possibility that Dominic Ongwen was able to successfully hide from the persons around him the symptoms of his mental disorders, and that he was able to do so for a long period of time, throughout the period of the charges and possibly throughout, or almost throughout, his entire stay in the LRA, impossible in practice and purely theoretical;”<sup>59</sup> the TC concluded that Ongwen did not suffer from a mental disease during the times of the crimes charged.<sup>60</sup> Accordingly, the TC found it unnecessary to address the other elements of the legal insanity defense. This holding is raised on appeal.<sup>61</sup>

The TC also rejected Ongwen’s defense of duress based on Rome Statute Article 31(1)(i), which requires that

The conduct . . . has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be: (i) Made by other persons; or (ii) Constituted by other circumstances beyond that person’s control.<sup>62</sup>

The TC rejected any claim that Ongwen was threatened with imminent death or harm if he refused to obey orders or try to escape, recognizing that abstract dangers or theoretical risks are not sufficient to prevail on the defense.<sup>63</sup> The TC also noted that even though Ongwen disobeyed Kony

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53. Rome Statute, *supra* note 10, at art 31(1)(a).

54. Ongwen Trial Judgment, *supra* note 20, at ¶ 2580.

55. Ongwen Trial Judgment, *supra* note 20, ¶ 2450.

56. *Id.* ¶¶ 2473–75, 2491.

57. *Id.* ¶¶ 2492–93, 2498.

58. *Id.* ¶¶ 2506–16, 2519.

59. *Id.* ¶ 2521.

60. *Id.* ¶ 2556.

61. *Id.* ¶ 2580.

62. Ongwen Notice of Appeal, *supra* note 25, at 12–16.

63. Rome Statute, *supra* note 10, at art. 31(1)(d) (emphasis added).

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from time to time, he was still a favorite, successfully rising in rank and power in the LRA.<sup>64</sup> He was not under threat of imminent death at all times; he could have escaped any time he chose, but did not.<sup>65</sup> The TC's rejection of Ongwen's duress defense is also the subject of appeal.<sup>66</sup>

The TC did not consider Ongwen's status as both an accused and victim as mitigation for the crimes.<sup>67</sup> But notwithstanding its decision to reject both defenses, the following passage shows that the TC recognized the real difficulty in this decision:

[W]hile acknowledging that indeed . . . Ongwen had been abducted at a young age by the LRA, the Chamber notes that . . . Ongwen committed the relevant crimes when he was an adult and, importantly, that, in any case, the fact of having been (or being) a victim of a crime does not constitute, in and of itself, a justification of any sort for the commission of similar or other crimes—beyond the potential relevance of the underlying facts to the grounds excluding criminal responsibility expressly regulated under the Statute.<sup>68</sup>

Although the TC appeared reluctant to take real note of the fact pattern involving victims who are also perpetrators, the Question & Answer page posted on the ICC website about the Ongwen decision (which is not an official court decision), is more expansive, stating the following:

The Judges noted that Dominic Ongwen himself was abducted in 1987 at the age of around nine by the LRA. They are aware that he experienced much suffering in his childhood and youth. The Chamber might have to evaluate this in a later context.<sup>69</sup>

The sentencing decision adopted a balancing test, weighing facts relevant to the offender and "crime specific circumstances and factors."<sup>70</sup> The Prosecutor agreed that Ongwen's experience as a child soldier was relevant and warranted "some" sentence reduction, but argued that these experiences did not lessen Ongwen's responsibility.<sup>71</sup> The defense argued that his experiences effectively constituted a but for cause of his crimes.<sup>72</sup> The class of victims recognized Ongwen's history but countered that his actions were both extremely serious and voluntarily chosen by an adult.<sup>73</sup> Considering all of these arguments, the TC found all of Ongwen's experiences to be relevant

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64. Ongwen Trial Judgment, *supra* note 20, ¶ 2582.

65. *Id.* ¶¶ 2668-69.

66. *Id.* ¶ 2668.

67. Ongwen Notice of Appeal, *supra* note 25, at 16-19.

68. Ongwen Trial Judgment, *supra* note 20, ¶ 1068-77.

69. *Id.* ¶ 2671-72.

70. See *Verdict in the Ongwen Trial at the ICC: Questions and Answers*, INT'L CRIM. CT. (Feb. 4, 2021), <https://www.icc-cpi.int/itemsDocuments/ongwen-verdict/qandq-ongwen-verdict-eng.pdf>.

71. Prosecutor v. Ongwen, ICC-02/04-01/15, Sentence, ¶¶ 62-3 (May 6, 2021), [https://www.icc-cpi.int/CourtRecords/CR2021\\_04230.PDF](https://www.icc-cpi.int/CourtRecords/CR2021_04230.PDF).

72. *Id.* ¶ 66.

73. *Id.* ¶ 67.

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but not a *justification* for the offenses.<sup>74</sup> In applying the above-referenced balancing test and considering the Prosecutor's recommendation of a one-third sentence mitigation,<sup>75</sup> along with all aggravating and mitigating factors, the TC sentenced Ongwen to a total of twenty-five years imprisonment.<sup>76</sup>

3. *The Philippines Situation*

a. A Chronological History

On October 13, 2016, the former ICC Prosecutor Fatou Bensouda highlighted that the extrajudicial killings reported during the Philippines War on Drugs campaign (WoD) "may fall under the jurisdiction of the International Criminal Court if they are committed as part of a widespread or systematic attack against a civilian population pursuant to a State policy to commit such an attack."<sup>77</sup> A preliminary examination was opened on February 8, 2018, when the Office of The Prosecutor (OTP) received several communications pursuant to Rome Statute Article 15.<sup>78</sup> Subsequently, on May 24, 2021, Bensouda requested authorisation for an investigation pursuant to Rome Statute Article 15(3), stating there is a reasonable basis to believe that crimes against humanity were committed as part of the WoD between July 1, 2016 and March 16, 2019.<sup>79</sup> On September 15, 2021, Pre-Trial Chamber I authorized the commencement of the investigation and instructed the Registrar to provide notice of the present decision to the victims who made representations.<sup>80</sup>

This short essay considers the procedural issues, with special attention to jurisdiction *ratione temporis*, which remains, in the author's opinion, an unresolved issue.

b. Jurisdiction Ratione Temporis

The Philippines ratified the Rome Statute on August 30, 2011. Therefore, based on Article 126(1), the Rome Statute became effective the

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74. *Id.* ¶ 68.

75. *Id.* ¶¶ 70–86.

76. *Id.* ¶¶ 87–9.

77. *Id.* ¶¶ 390–97 (dissenting, in part, Judge Raul Pangalangan recommended a 30-year sentence).

78. See Press Release, Office of the Prosecutor of the International Criminal Court, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda Concerning the Situation in the Republic of the Philippines (Oct. 13, 2016), <https://www.icc-cpi.int/pages/item.aspx?name=161013-otp-stat-php>.

79. See Press Release, Office of the Prosecutor of the International Criminal Court, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening Preliminary Examinations into the situations in the Philippines and in Venezuela (Feb. 8, 2018), <https://www.icc-cpi.int/Pages/item.aspx?name=180208-otp-stat>.

80. Public Redacted Version of Request for Authorisation of an Investigation Pursuant to Article 15(3) ¶ 1, (2021) (No. ICC-01/21), [https://www.icc-cpi.int/CourtRecords/CR2021\\_05381.PDF](https://www.icc-cpi.int/CourtRecords/CR2021_05381.PDF) [hereinafter Philippines Request for Authorisation of Investigation].

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Philippines beginning November 1, 2011.<sup>81</sup> On March 17, 2018, the Government of the Philippines deposited a written notification of withdrawal from the Statute.<sup>82</sup> In accordance with Article 127, the withdrawal took effect one year later, on March 17, 2019.<sup>83</sup>

The jurisdictional situation in The Philippines for the WoD events that took place while the Rome Statute was in effect could be resolved in two different ways based on two different interpretations of Article 127: one “broad” and one “strict.”

Following a broad interpretation—as proposed by the OTP as well as the Pre-Trial Chamber I—jurisdiction *ratione temporis* is not an issue at all: jurisdiction is not subject to any time limit, particularly since the preliminary examination here commenced on February 8, 2018, prior to the Philippines’ withdrawal from the Rome Statute. Moreover, the precedent of Burundi Situation, supports this position. In the Burundi Situation, which seems to exclude any objections, as Pre-Trial Chamber III held that a State Party’s withdrawal from the Rome Statute does not affect the Court’s exercise of jurisdiction over crimes committed prior to the effective date of the withdrawal.<sup>84</sup> Furthermore, this interpretation also is supported another decision, which was issued on May 17, 2021, in the Sudan-Darfur Situation. In that decision, Pre-Trial Chamber II stated the following:

[T]he very idea that the effect of an act triggering the jurisdiction of the Court could be simply taken away by a subsequent act—and one not even relating to the same subject matter—runs counter to fundamental and critical features of the system governing the exercise of the Court’s jurisdiction, as enshrined in the Statute as a whole.<sup>85</sup>

Following this approach, the ICC would have jurisdiction from November 1, 2011, to March 16, 2019. The Pre-Trial Chamber dedicated just a few sentences to this issue in the Philippines Decision Request for Authorisation,

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81. Decision on the Prosecutor’s Request for Authorisation of an Investigation Pursuant to Article 15(3) of the Statute at 41, (2011) (No. ICC-01/21), [https://www.icc-cpi.int/CourtRecords/CR2021\\_08044.PDF](https://www.icc-cpi.int/CourtRecords/CR2021_08044.PDF) [hereinafter Philippines Decision on Request for Authorisation].

82. See Press Release, International Criminal Court, The Philippines Becomes the 117th State to Join the Rome Statute System, ICC-CPI-20110830-PR717 (Aug. 30, 2011), [https://asp.icc-cpi.int/en\\_menus/asp/press%20releases/press%20releases%202011/Pages/pr717.aspx](https://asp.icc-cpi.int/en_menus/asp/press%20releases/press%20releases%202011/Pages/pr717.aspx).

83. See Press Release, International Criminal Court, ICC Statement on the Philippines’ Notice of Withdrawal: State Participation in Rome Statute System Essential to International Rule of Law, ICC-CPI-20180320-PR1371 (Mar. 20, 2018), <https://www.icc-cpi.int/Pages/item.aspx?name=PR1371>.

84. See Regine Cabato, *Philippines Leaves International Criminal Court as Duterte Probe Is Underway*, WASH. POST (Mar. 18, 2019), [https://www.washingtonpost.com/world/asia\\_pacific/philippines-leaves-international-criminal-court-as-duterte-probe-underway/2019/03/18/f929d1b6-4952-11e9-93d0-64dbcf38ba41\\_story.html](https://www.washingtonpost.com/world/asia_pacific/philippines-leaves-international-criminal-court-as-duterte-probe-underway/2019/03/18/f929d1b6-4952-11e9-93d0-64dbcf38ba41_story.html).

85. Situation in the Republic of Burundi, Public Redacted Version of “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi” at ¶ 24, (2017) (ICC-01/17-X-9-US-Exp), <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/17-9-Red>.

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highlighting that this broad interpretation “is in line with the law of treaties, which provides that withdrawal from a treaty does not affect any right, obligation or legal situation created through the execution of the treaty prior to its termination.”<sup>86</sup> But is that interpretation sufficient? Or is it just the easiest and more discretionary way to climb over a complicated procedural issue?

Indeed, following a “strict” interpretation of the statutory law, the result is the opposite. Article 127 provides that a country’s withdrawal from the Rome Statute shall take effect one year after the date of receipt of the notification, meaning that in this case the OTP had one year to request the investigation based on the Rome Statute. The Burundi precedent is not helpful because there is a significant difference between these cases: While the Burundi Situation was already in the phase of the authorization of an investigation under Article 15 at the time Burundi withdrew, the Philippines situation was still in the phase of the preliminary examination. More significantly, the Pre-Trial Chamber’s decision on Burundi was issued on October 25, 2017 (only two days *before* the withdrawal took effect), but the decision in the Philippines Situation was issued on September 15, 2021, more than two years *after* the withdrawal took effect. Furthermore, the Sudan-Darfur decision also involves a situation that differs significantly from the Philippines situation: Darfur fell under ICC jurisdiction on March 31, 2005, after the UN Security Council referred the situation to the ICC (Resolution 1593 (2005)), and the investigation was opened in June 2005.<sup>87</sup> This latter issue is not strictly related to Article 127, but Articles 13, 22 and 25, and the latest decision of the Appeals Chamber, issued on June 29, 2021,<sup>88</sup> clarifies any residual doubts.

Although the broader interpretation has been preferred by both ICC Prosecutor and Pre-Trial Chamber I, what is the threshold of judicial interpretation? As the former ICC Vice-President Cuno Jakob Tarfusser said (regarding the Gbagbo-Blè Goude Appeal), “the ICC statutory legal framework is comprehensive enough so as to give ample possibility for solving legal problems through legal interpretation. No need for this continuous flourishing of judicial creations *ultra legem*.”<sup>89</sup>

The solution to every issue may be found in the law, starting with the Rome Statute. If judicial interpretation of the procedural rules should

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86. Prosecutor v. Abd-al-Rahman, ICC-02/05-01/20-302, Decision on the Defence, ¶ 33, (May 17, 2021), [https://www.icc-cpi.int/CourtRecords/CR2021\\_04527.PDF](https://www.icc-cpi.int/CourtRecords/CR2021_04527.PDF).

87. Philippines Decision on Request for Authorisation, *supra* note 80, ¶ 111.

88. Press Release, International Criminal Court, The Prosecutor of the ICC Opens Investigation in Darfur, ICC-OTP-0606-104 (June 6, 2015), <https://www.icc-cpi.int/Pages/item.aspx?name=the%20prosecutor%20of%20the%20icc%20opens%20investigation%20in%20darfur>.

89. Public Prosecution’s Response to the Defence Appeal Against the “Decision on the Defence ‘Exception d’Incompetence’” ¶ 2, 40, Prosecutor v. Abd-al-Rahman, (2021) (ICC-02/05-01/20), [https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021\\_05880.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_05880.PDF).



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strictly conform with statutory law, a strict interpretation should be followed.

c. Admissibility and Complementarity

The jurisdiction *ratione temporis* raises another potential challenge for the ICC judges in the Philippines Situation, because in their latter interpretation of Article 127, the issue remains theoretically unsettled. Possible challenges in terms of complementarity (and regarding Articles 18 and 19) are thus likely.

Reaching admissibility is a delicate and insidious procedural analysis. The main norm is Article 17(1)(a) and (b). Following the Katanga jurisprudence, whether a case is inadmissible is based on the following two initial questions: “(1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned.”<sup>90</sup> The second halves of sub-paragraphs (a) and (b) are used to examine unwillingness and inability *only* if the answers to *both* of these initial questions are affirmative.<sup>91</sup> “To do otherwise would be to put the cart before the horse.”<sup>92</sup>

Considering these questions, in 2018, in the Philippines, three police officers were investigated, prosecuted, and sentenced with the penalty of *reclusion perpetua* by the Caloocan City Regional Trial Court.<sup>93</sup> Further, in June 2020, the Philippines announced the creation of an inter-agency panel, to reinvestigate deaths in drug-related police operations.<sup>94</sup> In addition, there were Senate Committee hearings,<sup>95</sup> a writ of amparo requesting a temporary protection order,<sup>96</sup> and cases brought before the Ombudsman.<sup>97</sup> Although in principle, only national investigations trigger the application of Article 17, an overall evaluation of all these factors could be taken into consideration.

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90. See Cuno Jakob Tarfusser & Giovanni Chiarini, *Can We Return to the Law, Please? Rethinking the Judicial Interpretation of Procedural Rules in the ICC- A Conversation with Judge Tarfusser after Gbagbo Appeal Judgment*, OPINIO JURIS (April 13, 2021), <http://opiniojuris.org/2021/04/13/can-we-return-to-the-law-please-rethinking-the-judicial-interpretation-of-procedural-rules-in-the-icc-a-conversation-with-judge-tarfusser-after-the-gbagbo-ble-goude-appeal-judgment/>.

91. Prosecutor v. Katanga, Judgment on the Appeal of Mr. Germain Katanga Against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ¶ 78 (Sept. 25, 2009), <http://www.icc-cpi.int/court-record/icc-01/04-01/07-1497>.

92. *Id.*

93. *Id.*

94. People of the Philippines v. Oares et al. (*The Kian Delos Santos Case*), No. C-102925, Caloocan City Regional Trial Court Branch 125, (Nov. 29, 2018) (Phil.), [https://issuu.com/inquirerdotnet/docs/calooacan\\_city\\_regional\\_trial\\_court\\_](https://issuu.com/inquirerdotnet/docs/calooacan_city_regional_trial_court_).

95. OFF. OF THE PROSECUTOR OF THE INT’L CRIM. CT., REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2020 ¶ 192 (2020), <https://www.icc-cpi.int/sites/default/files/items/Documents/2020-PE/2020-pe-report-eng.pdf>.

96. *Id.* ¶ 193.

97. See, e.g., Christopher Lloyd Caliwan, *2nd Petition for Writ of Amparo vs PNP Filed in SC*, PHILIPPINE NEWS AGENCY (Oct. 18, 2017), <https://www.pna.gov.ph/articles/1013168>.

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As highlighted in the request under Article 15, the total number of victims appears to be between 12,000 to 30,000.<sup>98</sup> Therefore, these domestic trials are surely not sufficient to trigger complementarity.

Complementarity could represent a harsh challenge in Articles 18 and 19 perspectives, depending on the decisions of the Philippines itself. Procedurally speaking, the situation in the Philippines is far from simple. Indeed, on November 18, 2021, the Prosecutor notified Pre-Trial Chamber I that Philippines had requested deferral of the proceedings.<sup>99</sup> Accordingly, the Prosecutor's Office suspended the investigation pending the receipt of additional information, but clarified that "the Office will continue its analysis of information already in its possession and any new information it may receive from third parties," and will "actively assess the need for applications to the Pre-Trial Chamber for authority to conduct necessary investigative steps for the preservation of evidence under article 18(6) of the Statute."<sup>100</sup>

**B. THE INTERNATIONAL RESIDUAL MECHANISM FOR CRIMINAL TRIBUNALS**

On June 8, 2021, the Appeals Chamber of the International Residual Mechanism for Criminal Tribunals (IRMCT) upheld the 2017 judgment of its predecessor court, the International Criminal Tribunal for the Former Yugoslavia (ICTY),<sup>101</sup> and confirmed its sentence of life imprisonment for Ratko Mladić, the former Commander of the Main Staff of the Bosnian Serb Army.<sup>102</sup>

The ICTY Trial Chamber had convicted Mladić for genocide; crimes against humanity (persecution, extermination, murder, deportation, and inhumane acts); and violations of the laws or customs of war.<sup>103</sup> These acts had been committed by Serb forces during the armed conflict in Bosnia and Herzegovina (BiH) from 1992 until 1995.<sup>104</sup> The Chamber found that "Mladic was instrumental to the commission of these crimes . . . so much so

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98. See, e.g., *Ombudsman Orders Murder Charges Vs. Manila Cop in Drug War Slay*, CNN (Apr. 4, 2019), <https://www.cnnphilippines.com/news/2019/4/4/police-murder-charges-tokhang.html>.

99. Philippines Request for Authorisation of Investigation, *supra* note 80, ¶ 2.

100. See Press Release, International Criminal Court, ICC Prosecutor, Mr. Karim A.A. Khan QC, Notifies Pre-Trial Chamber I of a Request from the Republic of the Philippines to Defer His Investigation Under Article 18(2) of the Rome Statute, ICC-OTP-20211123-PR1628 (Nov. 23, 2021), <https://www.icc-cpi.int/Pages/item.aspx?name=PR1628>.

101. *Id.*

102. See Prosecutor v. Mladić, Case No. MICT-13-56-A, Judgement, at 11841-42 (International Residual Mechanism for Criminal Tribunal June 8, 2021), <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/MICT-13-56-A/JUD285R0000638396.pdf> [hereinafter Mladić Appeals Judgment].

103. See *id.*

104. See Prosecutor v. Mladić, Case No. IT-09-92-T, Trial Chamber Judgement Volume IV, ¶¶ 5168, 5172, 5173 (ICTY Nov. 22, 2017), [https://www.icty.org/x/cases/mladic/tjug/en/171122-5of5\\_1.pdf](https://www.icty.org/x/cases/mladic/tjug/en/171122-5of5_1.pdf).

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that without his acts, they would not have been committed as they were.”<sup>105</sup> Specifically, it determined that Mladić had a “leading and grave role”<sup>106</sup> in four joint criminal enterprises (JCEs):

- (1) The “overarching JCE,” aiming to permanently remove Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territory in Bosnia and Herzegovina between May 1992 and November 1995;<sup>107</sup>
- (2) The “Sarajevo JCE,” aiming to spread terror among the civilian population of Sarajevo through a campaign of sniping and shelling between May 1992 and November 1995;
- (3) The “Srebrenica JCE,” aiming to eliminate the Bosnian Muslims in Srebrenica between July and at least October 1995;<sup>108</sup> and
- (4) The “Hostage-Taking JCE,” aiming to capture UN Protection Force and UN Military Observer(s) personnel deployed in Bosnia and Herzegovina and detain them in strategic military locations to prevent the North Atlantic Treaty Organization from launching further air strikes against Bosnian Serb military targets from May to June 1995.<sup>109</sup>

The ICTY Trial Chamber had, however, found Mladić not guilty of genocide with respect to crimes against Bosnian Muslims and Croats in certain BiH municipalities in 1992, reasoning that while the victims in each municipality had indeed been targeted as part of a protected group, they had constituted “a relatively small part and were not in other ways a substantial part” of that protected group;<sup>110</sup> the Chamber was, therefore, “not satisfied that the only reasonable inference was that the physical perpetrators possessed the required intent to destroy a substantial part of the protected group of Bosnian Muslims.”<sup>111</sup>

Mladić filed a notice of appeal on the following nine grounds:

- (1) The manifest errors made by the Trial Chamber in the application/ interpretation of the indictment resulted in violations of due process;<sup>112</sup>

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105. *See id.*, ¶¶ 3784–85.

106. *See* INT’L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, TRIAL JUDGEMENT SUMMARY FOR RATKO MLADIĆ 7 (2017), <https://www.icty.org/x/cases/mladic/tjug/en/171122-summary-en.pdf> [hereinafter Trial Judgment Summary for Mladić].

107. *See* Mladić Appeals Judgment, *supra* note 101, ¶ 4.

108. *See id.* ¶ 5.

109. *See id.* ¶ 6.

110. *See id.* ¶ 8.

111. *See* Press Release, International Criminal Tribunal for the Former Yugoslavia, ICTY Convicts Ratko Mladic for Genocide, War Crimes & Crimes Against Humanity (Nov. 22, 2017), <https://www.icty.org/en/press/icty-convicts-ratko-mladic-for-genocide-war-crimes-and-crimes-against-humanity>.

112. *Id.*

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- (2) The procedural errors made by the Trial Chamber infected the trial proceedings and the Judgment, thereby prejudicing the Appellant;<sup>113</sup>
- (3) The Trial Chamber erred in law and in fact by finding that an overarching JCE existed and that the Appellant participated in it;<sup>114</sup>
- (4) The Trial Chamber erred in law and in fact by finding that the Appellant participated in the JCE's alleged in Srebrenica in Counts two through eight;<sup>115</sup>
- (5) The Trial Chamber erred in law and in fact by finding that the Appellant intended the objective of the hostage taking JCE and that he committed the actus reus<sup>116</sup> and shared the requisite intent for the crime;<sup>117</sup>
- (6) Errors in law and in fact as to modes of liability;<sup>117</sup>
- (7) The Appellant's right to a fair trial was grossly violated;<sup>118</sup> and
- (8) Appeal against the sentence.<sup>119</sup>

The Prosecution also appealed on two counts, seeking a conviction for the single count of genocide for which Mladić had been acquitted,<sup>120</sup> and requesting that he also be found liable under the command responsibility mode of liability.<sup>121</sup>

In August 2020, the IRMCT conducted an appeals hearing in the Mladić based on jurisdiction pursuant to the UN Security Council's Transitional Arrangements of 2010.<sup>122</sup> But the hearing was fraught with complications arising from the COVID-19 pandemic<sup>123</sup> and Mladić's poor health.<sup>124</sup> The final decision from the court upheld all the ICTY's convictions, dismissing the appeals of both Mladić and the Prosecution.<sup>125</sup>

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113. Mladić Appeals Judgment, *supra* note 101, ¶ 22–38.

114. *Id.* ¶¶ 39–77.

115. *Id.* ¶¶ 130–275.

116. *Id.* ¶¶ 276–346.

116. *Id.*, ¶¶ 240–44.

117. *Id.* ¶¶ 303–332.

118. *Id.* ¶¶ 526–27.

119. *Id.* ¶¶ 531, 533.

120. *Id.* ¶¶ 537.

121. See Notice of Filing of Public Redacted Version of Prosecution Appeal Brief at ¶ 5–18, Prosecutor v. Mladić (2018) (No. MICT-13-56-A) International Residual Mechanism for Criminal Tribunals, <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Brief/NotIndexable/MICT-13-56-A/BRF335R0000519933.pdf>.

122. See *id.* ¶¶ 19–42.

123. S.C. Res. 1966, ¶¶ 2–19 (Dec. 22, 2010).

124. See Anna Holligan, *Bosnian War: Ratko Mladic Appeals Against Genocide Conviction*, BBC NEWS (August 25, 2020), <https://www.bbc.com/news/world-europe-53901737>.

125. See Mike Corder, *Lawyers for Bosnian War Strongman Seek Court Delay in Appeal*, AP (July 24, 2020), <https://apnews.com/article/virus-outbreak-netherlands-united-nations-health-genocides-c754abea00516dc065e563f69c7a31dc>.

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Serge Brammertz, Chief Prosecutor of the International Residual Mechanism for Criminal Tribunals, made the following public statement after the issuance of the judgment:

Mladic ranks among the most notorious war criminals in modern history . . . His name should be consigned to the list of history's most depraved and barbarous figures. This is not a judgment against the Serbian people, who Mladic and his supporters have manipulated for decades. Mladic's guilt is his, and his alone.<sup>126</sup>

C. INTERNATIONAL COURT OF JUSTICE

Despite the ongoing confines of COVID-19 in 2021, the International Court of Justice (ICJ) issued one preliminary judgment and one final judgment; heard oral arguments on provisional measures, merits, and reparations; and announced the docketing of one dispute technically instituted by a 2016 special agreement.

1. *Final Judgment*

On October 12, 2021, the Court announced its judgment in *Somalia v. Kenya*.<sup>127</sup> Somalia and Kenya have disputed their shared maritime boundary extending into the Indian Ocean for nearly half a century: Somalia contends the boundary continues the line of states' land border; while Kenya maintains that the boundary takes a 45-degree turn at the coast to extend due east, parallel to a line of latitude.<sup>128</sup>

Roughly 39,000 square miles rich with fish and oil and gas deposits fall within the disputed boundaries.<sup>129</sup> After years of failed negotiations, in 2012, Kenya licensed foreign oil companies to explore potential resources in the disputed offshore territory.<sup>130</sup> Two years later, Somalia instituted proceedings before the ICJ, requesting that the Court determine the border in accordance with the UN Convention on the Law of the Sea (UNCLOS).<sup>131</sup> Somalia ultimately asked the Court to determine that

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126. Mladić Appeals Judgment, *supra* note 101, ¶ 592.

127. See Press Release, International Residual Mechanism for Criminal Tribunals, Statement by the Prosecutor on the Occasion of Mladic Appeals Judgement (June 8, 2021), <https://www.irmct.org/en/news/21-06-08-statement-prosecutor-occasion-mladic-appeals-judgement>.

128. Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Judgment, ¶ 144-45, (Oct. 12, 2021), <https://www.icj-cij.org/public/files/case-related/161/161-20211012-JUD-01-00-EN.pdf> [hereinafter Maritime Delimitation Judgment].

129. See *ICJ Rejects Kenya Case in Somalia Maritime Border Row*, BBC (Oct. 12, 2021), <https://www.bbc.com/news/world-africa-58885535>.

130. See Rael Ombuor & Rachel Chason, *U.N. Court Rules in Favor of Somalia over Kenya in Long-Running Maritime Dispute*, WASH. POST (Oct. 12, 2021), <https://www.washingtonpost.com/world/2021/10/12/icj-kenya-somalia-dispute/>.

131. See Nicholas A. Ionaides & Constantinos Yiallourides, *A Commentary on the Dispute Concerning the Maritime Delimitation in the Indian Ocean (Somalia v Kenya)*, EJIL: TALK! (Oct. 22, 2021), <https://www.ejiltalk.org/a-commentary-on-the-dispute-concerning-the-maritime->

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Kenya’s exploration licensing violated international law and that Kenya must share its technical data obtained about the disputed area.<sup>132</sup> Kenya raised jurisdictional objections, which the ICJ rejected in 2017.<sup>133</sup>

On the merits, Somalia asserted no maritime boundary existed.<sup>134</sup> Kenya countered that the parties had for years followed an agreed boundary along the parallel of the line of latitude where the states’ land border meets the sea—and even if the Court concluded there was no existing boundary, that latitude line should be the border.<sup>135</sup> Somalia presented oral argument in March 2021, although Kenya declined to participate.<sup>136</sup>

In its 2021 merits ruling, the Court first ruled unanimously “that there is no agreed maritime boundary between the Federal Republic of Somalia and the Republic of Kenya that follows the parallel of latitude” as Kenya described.<sup>137</sup> The Court then established a boundary, parceling rulings as to the territorial sea (the first twelve nautical miles out from the shore’s baseline), the exclusive economic zone (extending from the territorial sea up to 200 nautical miles from the baseline), and across the continental shelf.<sup>138</sup> The Court ruled unanimously that the maritime boundary begins with a straight line extending from the states’ coastal boundary, extending along that line across the states’ territorial seas.<sup>139</sup> Seeking an “equitable solution,” the Court voted ten-to-four that the border takes a slight northern turn at the start of the exclusive economic zone, extending Kenya’s waters.<sup>140</sup> The Court voted nine-to-five that the second line extends to “the outer limits of the continental shelf or the area where the rights of Third States may be affected.”<sup>141</sup>

The Court unanimously rejected Somalia’s allegations that Kenya’s exploration violated international law.<sup>142</sup> The Court declined to find that Kenya violated Somalia’s sovereignty, given there was no evidence of bad faith.<sup>143</sup> The Court further declined to find that Kenya violated UNCLOS, given there was no evidence that Kenya’s activity caused “permanent physical change” to the disputed area.<sup>144</sup>

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delimitation-in-the-indian-ocean-somalia-v-kenya/; see also Maritime Delimitation Judgment, *supra* note 128, ¶¶ 198–200.

132. Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Application Instituting Proceedings, ¶ 18 (Aug. 28, 2014), <https://www.icj-cij.org/public/files/case-related/161/161-20140828-APP-01-00-EN.pdf>.

133. Maritime Delimitation Judgment, *supra* note 128, ¶ 198.

134. *Id.* ¶ 145.

135. *Id.* ¶ 35.

136. *Id.*

137. *Id.* ¶¶ 20, 24.

138. *Id.* ¶ 214(1).

139. *Id.* ¶ 214.

140. *Id.* ¶ 214(2)–(3).

141. *Id.* ¶¶ 172, 214(4).

142. *Id.* ¶¶ 196, 214(5).

143. *Id.* ¶ 214(6).

144. *Id.* ¶ 204.

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2. *Preliminary Judgment*

Following public hearings conducted in September 2020, on February 3, 2021, the Court near-unanimously rejected the United States' five preliminary objections to jurisdiction and admissibility regarding Iran's 2018 application in *Iran v. United States*.<sup>145</sup> The case concerns the United States' 2018 reimposition of sanctions against Iran, which were waived or lifted in 2016, following the Joint Comprehensive Plan of Action on Iran's nuclear program.<sup>146</sup>

3. *Oral Arguments*

In 2021, the ICJ heard oral arguments in two additional ongoing cases.<sup>147</sup> In April, the Court heard argument and court-appointed expert testimony on reparations in *Democratic Republic of the Congo v. Uganda*.<sup>148</sup> In 2005, the ICJ found that Uganda's invasion of the Congo violated a litany of international laws and principles,<sup>149</sup> and that the DRC's attacks on the Ugandan embassy violated the Vienna Convention on Diplomatic Relations.<sup>150</sup> The Court dispatched the states to negotiate reparations.<sup>151</sup> In 2015, the DRC asked the Court to determine reparations, reporting unsuccessful negotiations.<sup>152</sup> In October 2020, the Court appointed four independent experts to monetize the loss of human life and natural resources, and property damage.<sup>153</sup>

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145. *Id.* ¶¶ 203–11.

146. Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. U.S.), Judgment ¶¶ 18, 114 (Feb. 3, 2021), <https://www.icj-cij.org/public/files/case-related/175/175-20210203-JUD-01-00-EN.pdf>.

147. *Id.*, ¶¶ 31–37.

148. See Press Release, International Court of Justice, Armed Activities on the Territory of the Congo (Dem. Republic of the Congo v. Uganda) (Apr. 30, 2021), <https://www.icj-cij.org/public/files/case-related/116/116-20210430-PRE-01-00-EN.pdf>; see also, Press Release, International Court of Justice, Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Oct. 1, 2021), <https://www.icj-cij.org/public/files/case-related/155/155-20211001-PRE-01-00-EN.pdf>.

149. See International Court of Justice, Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), *supra* note 148.

150. Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, ¶ 345(1)–(12), (13)–(14) (Dec. 19, 2005), <https://www.icj-cij.org/public/files/case-related/116/116-20051219-JUD-01-00-EN.pdf>.

151. *Id.* ¶ 345(12).

152. *Id.* ¶ 252(d).

153. See Press Release, International Court of Justice, Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) 2 (July 9, 2015), <https://www.icj-cij.org/public/files/case-related/116/18718.pdf>.

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In September, the ICJ heard two weeks of oral arguments in *Nicaragua v. Colombia*.<sup>154</sup> Nicaragua and Colombia came to the ICJ for resolution of disputes stemming from shared maritime boundaries.<sup>155</sup>

4. *New Cases*

One dispute technically instituted by a 2016 Special Agreement was formally docketed in 2021, in *Gabon/Equatorial Guinea*.<sup>156</sup> On March 5, 2021, Guinea notified the Special Agreement to the ICJ Registrar.<sup>157</sup> Gabon and Guinea now ask the Court to determine whether certain titles, treaties and conventions have the force of law as applied to certain maritime disputes.<sup>158</sup> Briefing is scheduled to finish in 2022.<sup>159</sup>

One new contentious case was filed in 2021.<sup>160</sup> On September 16, Armenia instituted proceedings against Azerbaijan, alleging violations of the International Convention on the Elimination of All Forms of Racial Discrimination, and requesting provisional measures.<sup>161</sup> Azerbaijan instituted cross-proceedings against Armenia, alleging violations of the same Convention and requesting provisional measures.<sup>162</sup> The filings stem from a 2020 war between the states animated by ethnic conflict over a disputed region containing Armenian heritage sites, which was recently returned to Azerbaijan's control after decades in Armenian control.<sup>163</sup>

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154. *Armed Activities on the Territory of the Congo (Dem. Rep. of the Congo v. Uganda)*, Order, 6–7 (Oct. 12, 2020), <https://www.icj-cij.org/public/files/case-related/116/116-20201012-ORD-01-00-EN.pdf>.

155. *See* Press Release, International Court of Justice, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicar. v. Colom.)* (Oct. 1, 2021), <https://www.icj-cij.org/public/files/case-related/155/155-20211001-PRE-01-00-EN.pdf>.

156. *Id.*

157. *Land and Maritime Delimitation and Sovereignty over Islands (Gabon/Equatorial Guinea)*, Special Agreement, at 30 (Nov. 15, 2016), <https://www.icj-cij.org/public/files/case-related/179/179-20210305-SPE-01-00-EN.pdf>; *see also* Press Release, International Court of Justice, *Dispute between Gabon and Equatorial Guinea Brought Before the Court* (Mar. 5, 2021), <https://www.icj-cij.org/public/files/case-related/179/179-20210305-PRE-01-00-EN.pdf> [hereinafter Press Release on Gabon and Eq. Guinea].

158. Press Release on Gabon and Equatorial Guinea, *supra* note 157.

159. *Id.*

160. *Land and Maritime Delimitation and Sovereignty over Islands (Gabon/Equatorial Guinea)*, Order, at 1–2 (Apr. 7, 2021), <https://www.icj-cij.org/public/files/case-related/179/179-20210407-ORD-01-00-EN.pdf>.

161. *Application Instituting Proceedings and Request for Provisional Measures (Armenia v. Azerbaijan)*, Application, ¶¶ 1–2 (Sept. 16, 2021), <https://www.icj-cij.org/public/files/case-related/180/180-20210916-APP-01-00-EN.pdf> [hereinafter *Armenia v. Azerbaijan Application*].

162. *Id.* ¶¶ 2–8.

163. *Interpretation & Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia) Application Instituting Proceedings*, ¶¶ 1–20 (Sept. 23, 2022), <https://www.icj-cij.org/public/files/case-related/181/181-20210923-APP-01-00-EN.pdf>.



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In October 2021, the Court held public hearings on provisional measures.<sup>164</sup> Armenia’s requested provisional measures include protection and release of Armenian prisoners of war who were captured in 2020; preservation and protection of Armenian heritage sites now in Azerbaijani territory; preservation of all evidence related to alleged hate crimes by Azerbaijani against Armenians; and ongoing reports from Azerbaijan to the ICJ for accountability to these matters until the Court rules on the merits.<sup>165</sup> In turn, Azerbaijan called for Armenia to identify remaining landmines in Azerbaijan; cease facilitating any further landmines in Azerbaijan territory; prevent race-based violence and hate speech coming from Armenia toward Azerbaijanis—especially “on Twitter and other social media and traditional media channels;” collect and preserve any known evidence of “ethnically-motivated crimes against Azerbaijanis;” refrain from any further aggravation; and report regularly to the ICJ until a final decision is rendered.<sup>166</sup> Armenia requested that the Court “reject Azerbaijan’s requests for the indication of provisional measures in full.”<sup>167</sup> The Court will deliver its provisional measures decision at a yet-announced public sitting.<sup>168</sup>

**D. INTERNATIONAL HUMAN RIGHTS COURTS & TRIBUNALS**

2021 marked a year of many noteworthy case developments by international human rights courts and tribunals, including the European Court of Human Rights (ECHR), the African Court on Human and People’s Rights (AfCHPR), and the Inter-American Court on Human Rights (IACHR).

**1. *The ECHR***

The ECHR issued many notable decisions in 2021. In January, the ECHR ruled in *Georgia v. Russia (II)* that Russia had violated Articles 2-1 & 2 of Protocol No. 4, Articles 3, 5, Article 2 of Protocol No. 1, Article 38, and Article 41 of the European Convention of Human Rights (“Convention”) during and after its conflict with the Republic of Georgia in which Russia used indiscriminate and disproportionate force, injuring, killing, and detaining hundreds of civilians.<sup>169</sup>

In *Hanan v. Germany*, the applicant complained under Article 2 of the Convention that Germany failed to properly investigate a German airstrike

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164. *Id.*, ¶¶ 14–15.

165. See Press Release, International Court of Justice, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Azerbaijan v. Armenia*) 1 (Oct. 19, 2021), <https://www.icj-cij.org/public/files/case-related/181/181-20211019-PRE-01-00-EN.pdf> [hereinafter Press Release on *Azerbaijan v. Armenia*].

166. *Armenia v. Azerbaijan* Application, *supra* note 161, at 57–58.

167. Press Release on *Azerbaijan v. Armenia*, *supra* note 165, at 1–2.

168. *Id.* at 2.

169. *Id.* at 1.

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in Afghanistan that killed civilians, including the applicant's two sons.<sup>170</sup> The ECHR found Germany did not violate Article 2 of the Convention, saying that the investigation was sufficient and subject to public scrutiny.<sup>171</sup>

In *Vavricka v. the Czech Republic*, the ECHR found that the Czech Republic did not violate Article 8-1 of the Convention, which provides for a right to respect for private life, by fining a parent and excluding their children from preschool for failing to comply with the requirement to vaccinate their children.<sup>172</sup> The ECHR concluded that the vaccine requirement was proportionate and "necessary in a democratic society."<sup>173</sup>

In *Centrum för Rättvisar v. Sweden*, the European Court of Human Rights (ECHR) found that Swedish intelligence services violated Article 8 of the Convention through the bulk interception of private communication in efforts to prevent and intercept crimes before they occur, rather than investigating crimes that had already taken place.<sup>174</sup> The ECHR concluded that interception must be necessary and targeted, and that bulk collection of communication may only be permissible with proper safeguards.<sup>175</sup>

The same issues of bulk interception were addressed in *Big Brother Watch v. United Kingdom*, with the court ruling that electronic selectors could have been used to filter out news organizations and thereby protect the principle of journalistic freedom of expression.<sup>176</sup>

## 2. *The AfCHPR*

The African Court on Human and Peoples' Rights (AfCHPR) also issued notable decisions in 2021. After the AfCHPR reported a loss of members in 2020, the Democratic Republic of Congo took a step toward joining the Court by ratifying the protocol that established the AfCHPR.<sup>177</sup>

In *Makame v. Tanzania*, the applicants argued that because there was only one level of appeal to review the decision of the lower court, their rights were violated under Articles 3 and 7 of the African Charter on Human and Peoples' Rights ("Charter"), which provide the Right to Equality before the Law, Equal Protection of the Law and the Right to Fair Trial, respectively,

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170. *Georgia v. Russia (II)*, App. No. 38263/08, ¶ 334 (Jan. 21, 2021), <http://hudoc.echr.coe.int/eng?i=001-207757>.

171. *Hanan v. Germany*, App. No. 4871/16 (Feb. 16, 2021), <http://hudoc.echr.coe.int/eng?i=001-208279>.

172. *Id.* ¶ 204.

173. *Vavricka and Others v. the Czech*, App. No. 47621/13, ¶¶ 204–243 (Apr. 8, 2021), <http://hudoc.echr.coe.int/eng?i=001-209039>.

174. *Id.* ¶ 310.

175. *Centrum för Rättvisa v. Sweden*, App. No. 35252/08, ¶374 (May 25, 2021), <http://hudoc.echr.coe.int/eng?i=001-210078>.

176. *Id.* ¶ 367.

177. *Big Brother Watch & Others v. the United Kingdom*, App. Nos. 58170/13, ¶ 505 (May 25, 2021), <http://hudoc.echr.coe.int/eng?i=001-210077>.

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were violated.<sup>178</sup> The AfCHPR determined that while those articles provide a right to a review at an appellate level, they do not specify a minimum number of levels; therefore, one level of review was sufficient.<sup>179</sup>

In *Rajabu v. Tanzania*, the AfCHPR determined that the applicant, who was accused of raping a minor, was denied his right to free counsel in violation of Article 7(1)(c) of the Charter because it was a serious crime that, if convicted, carried a long sentence.<sup>180</sup> The AfCHPR found similarly in *Onesmo v. Tanzania* and *Benyoma v. Tanzania*.<sup>181</sup>

In *Juma v. Tanzania*, the AfCHPR found that the mandatory imposition of the death penalty under Tanzanian law violated the right to life for the applicant, who was on death row after being convicted of murdering two people.<sup>182</sup> The AfCHPR declined to overturn the application's conviction but awarded him 4,000,000 Tanzanian shillings for this violation and for the nearly five-year delay from his arrest to trial.<sup>183</sup>

### 3. *The IACHR*

The IACHR issued several decisions in 2021. In *Habbal v. Argentina*, the applicant renounced her original Syrian citizenship to become a naturalized Argentine citizen, but the Argentinian government retroactively invalidated her Argentinian citizenship, which was viewed as discrimination against her Middle Eastern origins.<sup>184</sup> The IACHR ruled that Argentina violated the applicant's right to due process by failing to give proper notice of the proceeding and violated her right to a presumption of innocence by treating her as an immigrant rather than as a citizen during the proceeding.<sup>185</sup>

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178. See Jessica Lusamba, *DR Congo Ratifies Protocol Establishing African Court of Human Rights*, JURIST (Dec. 16, 2020), <https://www.jurist.org/news/2020/12/drc-ratifies-protocol-establishing-african-court-of-human-rights/> (noting that the DRC has not yet filed the necessary declaration for individuals and groups to directly bring cases against the DRC to the court).

179. *Makame v. Tanzania*, No. 023/2016, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶¶ 3–7 (June 25, 2021), <https://www.african-court.org/cpmt/storage/app/uploads/public/60d/afc/883/60dafc883c691062105779.pdf>.

180. *Id.* ¶ 74.

181. *Rajabu v. Tanzania*, 008/2016, Afr. Ct. H.P.R., ¶¶ 3–6, 86–88 (June 25, 2021), <https://www.african-court.org/cpmt/storage/app/uploads/public/60d/af6/de7/60daf6de772e9326977579.pdf>.

182. *Onesmo v. Tanzania*, 047/2016, Afr. Ct. H.P.R., at 25 (Sep. 30, 2021), <https://www.african-court.org/cpmt/storage/app/uploads/public/615/dfa/a88/615dfaa884288476894335.pdf>; *Benyoma v. Tanzania*, 001/2016, Afr. Ct. H.P.R., at 33 (Sep. 30, 2021), <https://www.african-court.org/cpmt/storage/app/uploads/public/615/bf5/320/615bf5320f104852708950.pdf>.

183. *Juma v. Tanzania*, No. 024/2016, Afr. Ct. H.P.R., ¶ 120 (Sept. 30, 2021), <https://www.african-court.org/cpmt/storage/app/uploads/public/615/bf4/f09/615bf4f09e55a745995400.pdf>.

184. *Id.* ¶¶ 158, 164, 166.

185. *Habbal v. Argentina*, Case 11.691, Inter-Am. Comm'n H.R., Report No. 140/19, OEA/Ser.L/V/II.173 doc. 155 rev. ¶¶ 3 – 6 (2019–2021), [http://www.oas.org/es/cidh/decisiones/corte/2021/AR\\_11.691\\_ES.docx](http://www.oas.org/es/cidh/decisiones/corte/2021/AR_11.691_ES.docx).

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Further, Argentina did not take into consideration her rights as a possible stateless person, given that she had renounced her Syrian citizenship.<sup>186</sup>

In *Zaván v. Paraguay*, a journalist was killed in the course of pursuing his professional activities by non-state actors.<sup>187</sup> The IACHR recognized that journalism is an important manifestation of freedom of expression and information and concluded that Paraguay was intentionally responsible for the journalist's death by failing in its duty of prevention and protection and failing to guarantee his right to freedom of expression.<sup>188</sup>

In *Pessolani v. Paraguay*, the IACHR determined that a criminal prosecutor investigating corruption was removed from his position without the proper guarantees under the law as a mean of retribution because the law used to punish him was "vague and ambiguous," that the decision to remove him was not based on clear and specific evidence, and that all of this violated the applicant's right to "the principle of legality and to freedom of expression."<sup>189</sup>

In *Active Memory Civil Association v. Argentina*, the IACHR determined Argentina breached its duty to protect life and personal integrity, pursuant to Articles 4(1) and 5(1) of the American Convention of Human Rights, by not taking adequate measures to protect a vulnerable Jewish group in a 1994 terrorist attack against the Asociación Mutual Israelita Argentina.<sup>190</sup>

In *Baidal v. Ecuador*, the IACHR determined that Ecuador violated its duties of rights of to life, judicial guarantees, and judicial protection, under Articles 4 and 25 of American Convention of Human Rights, by prosecuting a police officer for extrajudicial killings before a police criminal court rather than before an impartial, ordinary jurisdiction.<sup>191</sup>

In *Fuentes v. Peru*, the IACHR determined that Peru failed to protect the applicant's right to privacy and the principles of equality and non-discrimination by not protecting him from being reprimanded by the Dulces y Salados cafeteria of the Santa Isabel Supermarket in San Miguel when he and his homosexual partner were showing public affection and four security agents approached them and asked them to modify their behavior because kids were playing nearby, despite a heterosexual couple doing the same without reprimand.<sup>192</sup>

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186. *Id.* ¶¶ 106, 113.

187. *Id.* ¶¶ 135–36.

188. *Zaván v. Paraguay*, Case 13.030, Inter-Am. Comm'n H.R., Report No. 196/20, OEA/Ser.L/V/II.176, doc. 209 rev. ¶¶ 3–13 (2021), [http://www.oas.org/es/cidh/decisiones/corte/2021/PY\\_13.030\\_ES.docx](http://www.oas.org/es/cidh/decisiones/corte/2021/PY_13.030_ES.docx).

189. *Id.* ¶¶ 96–122.

190. *Pessolani v. Paraguay*, Case 12.963, Inter-Am. Comm'n H.R., Report No. 301/20, OEA/Ser.L/V/II.XX, doc. 318 rev. ¶¶ 3, 96, 115 (2020), [http://www.oas.org/en/iachr/decisions/court/2021/PY\\_12.963\\_EN.docx](http://www.oas.org/en/iachr/decisions/court/2021/PY_12.963_EN.docx).

191. *Active Memory Civil Ass'n v. Argentina*, Case 12.204, Inter-Am. Comm'n H.R., Report No. 187/20, OEA/Ser.L/V/II.176, doc. 200 rev. ¶¶ 54, 55, 85 (2021), [http://www.oas.org/en/iachr/decisions/court/2021/AR\\_12.204\\_EN.pdf](http://www.oas.org/en/iachr/decisions/court/2021/AR_12.204_EN.pdf).

192. *Baidal v. Ecuador*, Case 12.454, Inter-Am. Comm'n H.R., Report No. 149/19, OEA/Ser.L/V/II.173 doc. 164 rev. ¶¶ 3–5, 74, 76 (2021), [http://www.oas.org/en/iachr/decisions/court/2021/EC\\_12.454\\_EN.doc](http://www.oas.org/en/iachr/decisions/court/2021/EC_12.454_EN.doc).

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In *Ungaretti v. Ecuador*, the IACHR found that Ecuador violated the applicant's right to the freedom of expression by failing to protect him from reprisal after he became a whistleblower against the Ecuadorian Armed Forces.<sup>193</sup>

## II. National Courts

### A. DEVELOPMENTS IN FRENCH CRIMINAL LAW

This section discusses important recent developments in the field of white-collar enforcement in France. Three developments stand out. First, the goal of aligning the French anti-corruption framework with the best European and international standards led to an evaluation of the Sapin II law by French Members of Parliament, five years after its enactment.<sup>194</sup> The Report, published on July 7, 2021, proposes several ways to improve the legal framework.<sup>195</sup> Second, a new offense of ecocide has strengthened the protection of the environment.<sup>196</sup> Finally, the French Supreme Court issued a landmark decision on corporate criminal responsibility for crimes against humanity.<sup>197</sup>

#### 1. *Improving France's Anti-Corruption Framework*

On July 7, 2021, French Members of Parliament, Raphaël Gauvain and Olivier Marleix, published a Report evaluating the Sapin II Law.<sup>198</sup> While their overall review was positive, they recommended fifty amendments to improve it.<sup>199</sup> The Report notes that the French Anti-Corruption Agency (AFA) fulfilled its mission of control and sanction, but to the detriment of its coordination mission.<sup>200</sup> The Report thus suggests a special committee for the fight against corruption, and the redirection of the AFA's focus to

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193. *Fuentes v. Peru*, Case 13.505, Inter-Am. Comm'n H.R., Report No. 304/20, OEA/Ser.L/V/II, doc. 321 rev. ¶¶ 3, 53 (2020), [http://www.oas.org/en/iachr/decisions/court/2021/PE\\_13.505\\_EN.doc](http://www.oas.org/en/iachr/decisions/court/2021/PE_13.505_EN.doc).

194. *Ungaretti v. Ecuador*, 12.999, Inter-Am. Comm'n H.R., Report No. 8/20, OEA/Ser.L/V/II.175, doc. 14 rev. ¶¶ 3, 4, 38, 39 (2021), [http://www.oas.org/es/cidh/decisiones/corte/2021/EC\\_12.999\\_ES.docx](http://www.oas.org/es/cidh/decisiones/corte/2021/EC_12.999_ES.docx).

195. See discussion *infra* Section II.A.1.

196. Rapport d'information 4325 du 7 juillet 2021 Évaluation de l'impact de la loi n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, dite « loi Sapin 2 » [National Assembly, ASSESSMENT OF THE IMPACT OF LAW NO. 2016-1691 OF DECEMBER 9, 2016 ON TRANSPARENCY, THE FIGHT AGAINST CORRUPTION & THE MODERNIZATION OF ECONOMIC LIFE, KNOWN AS THE "SAPIN 2 LAW" 173-77 (2021)], [https://www.assemblee-nationale.fr/dyn/15/dossiers/eval\\_sapin2](https://www.assemblee-nationale.fr/dyn/15/dossiers/eval_sapin2) (Fr.) [hereinafter Report on Sapin II].

197. See discussion *infra* Section II.A.2.

198. See discussion *infra* Section II.A.3.

199. See Report on Sapin II, *supra* note 196, at 1.

200. *Id.* at 173-177.

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administrative coordination.<sup>201</sup> The AFA's control and sanctions missions would then be transferred to the already existing High Authority for the Transparency of Public Life (HATVP).<sup>202</sup>

The Report also focuses on ways to encourage the use of the Judicial Public Interest Agreement (CJIP) by granting more safeguards to those involved and improving the status of whistleblowers as difficulties persist both in the quality of their treatment and in their protection against retaliation.<sup>203</sup> The Report will form the basis of a draft bill to be submitted to the National Assembly in November 2021.<sup>204</sup>

## 2. *The New Ecocide Offense*

The Climate and Resilience Act was enacted on August 22, 2021.<sup>205</sup> It strengthens the enforcement of environmental crimes, notably by introducing the ecocide offense,<sup>206</sup> which reinforces the risk for companies that pollute.

The Climate and Resilience Act defines ecocide as aggravating the general offense of environmental pollution when the acts are deliberately committed, i.e., when the offense of air and water pollution<sup>207</sup> or soil

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201. *Id.* at 42 (“However, the voluntarism shown by the agency in its control and advisory activities has been to the detriment of its coordination mission, which is not at all satisfactory. In addition, the resources allocated to the agency were significantly lower than initially estimated, and the constraints associated with the agency’s attachment to the general secretariat of the economic and financial ministries are weighing on its attractiveness”) (translated by author).

202. *Id.* at 86–87 (“Proposal no. 10: Strengthen the governmental steering of the fight against corruption by regularly convening a specialized inter-ministerial committee, chaired by the Prime Minister, with the French Anti-Corruption Agency acting as permanent secretariat. . . This inter-ministerial committee would be responsible for drawing up the multi-year anti-corruption plan, updating it if necessary, and validating the steering committee’s work program for the coming year. It would meet once a year for this purpose”) (translated by author).

203. *Id.* at 87 (“Proposal no. 11: Transfer to the High Authority for Transparency of Public Life the support and control missions of the French Anti-Corruption Agency, in order to create a major authority competent in matters of public ethics and prevention of corruption, the High Authority for Probity”) (translated by author).

204. *Id.* at 112–25.

205. Pierre Januel, *Une proposition de loi pour muscler la lutte anti-corruption [A Bill to Strengthen the Fight Against Corruption]*, DALLOZ ACTUALITÉ (Sept. 6, 2021), <https://www.dalloz-actualite.fr/flash/une-proposition-de-loi-pour-muscler-lutte-anti-corruption> [<https://perma.cc/G25B-T4CV>] (“At the beginning of July, the deputies Raphaël Gauvain (LREM) and Olivier Marleix (LR) drew a positive assessment of the Sapin 2 law, suggesting several improvements. Dalloz actualité has been able to consult the bill that MP Raphaël Gauvain will soon be submitting to follow up on it”) (translated by author).

206. Loi 2021-1104 du 22 août 2021 portant lutte contre le dérèglement climatique et renforcement de la résilience face à ses effets [Law 2021-1104 of August 22, 2021 on Combating Climate Change and Building Resilience to its Effects], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 24, 2021 [hereinafter Law No. 2021-1104].

207. *Id.* at art. 280 (establishing ecocide as an offense punishable by three years’ imprisonment and a fine of \_150,000).

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pollution<sup>208</sup> of the environmental code, was not accidental but intentional.<sup>209</sup> It is punishable by ten years' imprisonment and a fine of 4.5 million euros or of an amount corresponding to ten times the benefit derived from the commission of the offense.<sup>210</sup>

### 3. *The Lafarge Case*

In the *Lafarge*, a French company, was indicted for involvement in alleged offenses committed by its Syrian subsidiary, in connection with payments made to the so-called Islamic State and other armed groups in Syria between 2012 and 2014.<sup>211</sup> The issue before the French Supreme Court (*Cour de Cassation*) was the legal validity of this indictment.<sup>212</sup>

On September 7, 2021, the *Cour de Cassation* held that “one can be an accomplice to crimes against humanity even though there is no intention of associating oneself with the commission of these crimes.”<sup>213</sup> The Court held that it is sufficient to have had knowledge of the preparation or commission of these acts and to have facilitated them through aid or assistance.<sup>214</sup> There is no requirement that the actor be part of the criminal organization or have participated in the conception or execution of the criminal plan.<sup>215</sup> In the *Lafarge* case, the defendant's informed payment of several millions of dollars to an organization whose purpose was to commit crimes against humanity was found sufficient to constitute complicity.<sup>216</sup>

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208. Code de l'environnement [C. ENV'T] [Environmental Code] art. L231-1 (Fr.) (“The act, in a manifestly deliberate violation of a particular obligation of caution or safety provided for by law or regulation, of releasing into the air, throwing, spilling or allowing to flow into surface or underground waters or into the waters of the sea within the limits of territorial waters, directly or indirectly, one or more substances whose action or reactions result in serious and lasting harmful effects on health, flora, fauna, with the exception of the damage mentioned in articles L. 218-73 and L. 432-2, or serious modifications to the normal water supply system, is punishable by five years' imprisonment and a fine of one million euros, which may be increased up to five times the benefit derived from the commission of the offence”) (translated by author).

209. C. ENV'T at art. L231-2 (Fr.) (“The act of abandoning, depositing, or causing to be deposited waste, under conditions contrary to Chapter I of Title IV of Book V, and the act of managing waste, within the meaning of Art. L. 541-1-1, without complying with the requirements relating to the characteristics, quantities, technical conditions for taking charge of the waste and the treatment processes implemented, laid down pursuant to Arts. L. 541-2, L. 541-2-1, L. 541-7-2, L. 541-21-1 and L. 541-22, when they cause a substantial degradation of the fauna and the flora or the quality of the air, the ground or water are punished by three years of imprisonment and a fine of \_150,000”) (translated by author).

210. Law No. 2021-1104, *supra* note 206, at art. 280.

211. *Id.*

212. See Madeline Young, *LaFarge's Case Cemented: Holding Corporations Liable for Crimes against Humanity*, 36 EMORY INT'L L. REV. RECENT DEV. 1, 1–2 (2021).

213. *Id.* at 6–8.

214. Cour de cassation [Cass.] [Supreme Court for Judicial Matters] crim., Sept. 7, 2021, Bull. Crim., No. 19-87.367 (Fr.), ¶ 66.

215. *Id.* ¶¶ 67, 80–81.

216. *Id.* ¶ 66.

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In addition, the Court clarified the rules on the admissibility of NGOs in cases concerning crimes against humanity and terrorism financing.<sup>217</sup> It held that only the European Center for Constitutional and Human Rights (ECCHR) was admissible as a civil party with respect to the offense of complicity in crimes against humanity, because ECCHR was the only association that included such purposes when it was created.<sup>218</sup> By contrast, the Court found that none of the NGOs were admissible as a civil party for the offense of financing of terrorism because the facts alleged were not likely to have caused direct damage to any members of the NGOs.<sup>219</sup> Finally, the Supreme Court confirmed Lafarge’s indictment for the financing of terrorism.<sup>220</sup>

**B. DEVELOPMENTS IN U.S. CRIMINAL LAW**

**1. *United States v. Van Buren***

The Computer Fraud and Abuse Act of 1986 (CFAA) was enacted to give both federal prosecutors and private victims the right to seek relief from outside hackers and inside employees who abuse a victim’s computers for unauthorized or illegal purposes.<sup>221</sup> Like the federal Racketeer Influenced and Corrupt Organizations Act (RICO) statute, the CFAA includes criminal and civil liability for the described offenses.<sup>222</sup> A defendant can be liable under CFAA in two ways: first, when an individual “accesses a computer without authorization,” like an outside hacker, and second, when an individual “exceeds authorization” and then obtains information he is “not entitled to so obtain,” like an inside employee.<sup>223</sup> In its 2021 decision in *Van Buren v. United States*, the U.S. Supreme Court revised the scope of this second means of liability; that is, of an insider who “exceeds” his authorized access to a computer.<sup>224</sup> No particular political agenda can be discerned from the identity of the justices joining the opinions; Justice Barrett wrote the majority opinion for six justices, and Justice Thomas wrote the dissent for the other three.<sup>225</sup>

Nathan Van Buren, a former Georgia police sergeant, had authorized access to a law enforcement database that stored information including

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217. *Id.* ¶¶ 80–81.

218. Cour de cassation [Cass.] [supreme court for judicial matters] crim., Sept. 7, 2021, Bull. Crim., No. 19-87.031 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] crim., Sept. 7, 2021, Bull. Crim., No. 19-87.036 (Fr.).

219. *See e.g.*, Cass., crim., Sept. 7, 2021, Bull. Crim., No. 19-87.031, ¶¶ 47–54.

220. *See e.g.*, Cass., crim., Sept. 7, 2021, Bull. Crim., No. 19-87.036, ¶¶ 22–28; Cass., crim., Sept. 7, 2021, Bull. Crim., No. 19-87.367, ¶ 83.

221. Cass., crim., Sept. 7, 2021, Bull. Crim., No. 19-87.367, ¶¶ 78–83.

222. 18 U.S.C. § 1030 (2020); *see also* Matthew Larson et al., *Computer Crimes*, 58 AM. CRIM. L. REV. 611, 623 (2021).

223. Larson, *supra* note 222, at 623.

224. 18 U.S.C. §§ 1030(a)(2), (a)(4), (e)(6).

225. *Van Buren v. United States*, 141 S. Ct. 1648, 1662 (2021).



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license plate numbers and registered owners of vehicles.<sup>226</sup> Department policy allowed him to retrieve license-plate information only for law enforcement purposes.<sup>227</sup> An FBI informant offered him \$5,000 for information about a woman the informant had met at a strip club.<sup>228</sup> Van Buren agreed to use his patrol car's computer to access the law enforcement database to find the license plate number of the woman.<sup>229</sup> No party suggested that Van Buren had any law enforcement purpose.<sup>230</sup> He was convicted by a jury for violations of the CFAA, which was affirmed by the U.S. Court of Appeals for the Eleventh Circuit.<sup>231</sup> In its six-to-three decision, the Supreme Court reversed Van Buren's conviction under the CFAA.<sup>232</sup>

The majority opinion assessed the interplay between the "without authorization" and "exceeds authorized access" clauses of infraction in section (a)(2) of the CFAA.<sup>233</sup> The Court observed that these clauses specify two distinct ways of unlawfully obtaining information.<sup>234</sup> Whereas the first clause, "without authorization," protects computers from targeting by outside hackers, the second clause, "exceeds authorized access," covers those who access a computer with permission and then exceed the parameters of the authorization by entering an area of the computer to which such authorization does not extend.<sup>235</sup> Both clauses, according to the majority, stem from a "gates-up-or-down inquiry: one either can or cannot access a computer system, and one either can or cannot access certain areas within the system."<sup>236</sup> Because Van Buren had authorized access to the database as well as the registration information on it, he could not be in violation of the CFAA Section (a)(2).<sup>237</sup> The majority disregarded the fact that Van Buren had been offered a loan (or bribe) to retrieve the information for a non-law enforcement purpose.

The three dissenting justices, including Chief Justice Roberts, took a straightforward approach, recognizing that Van Buren only had permission to retrieve license-plate information from the database for law enforcement purposes.<sup>238</sup> The justices concluded that he disregarded this limitation when, in exchange for several thousand dollars, he used the database in an

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226. *See generally, id.*

227. *Id.* at 1653.

228. *Id.*

229. *Id.*

230. *Id.*

231. *Van Buren*, 141 S. Ct. at 1653–55.

232. *United States v. Van Buren*, 940 F.3d 1192, 1197 (11th Cir. 2019), *rev'd* 141 U.S. 1648 (2021).

233. *Van Buren*, 141 S. Ct. at 1662.

234. *Id.* at 1654.

235. *Id.* at 1658.

236. *Id.*

237. *Id.* at 1658–59.

238. *Van Buren*, 141 U.S. at 1662.

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attempt to unmask a potential undercover police officer.<sup>239</sup> In short, Van Buren’s conduct was legal only if he was entitled to obtain that specific license-plate information by using his authorized access, which he was not.<sup>240</sup>

Policy considerations were not irrelevant in this case. If Van Buren’s conviction were affirmed, what, for example, would limit the government from criminalizing *any* use by an employee of a work computer for personal purposes?<sup>241</sup> Would the CFAA proscribe use of a work computer for embellishing an online-dating profile or for use of a pseudonym on Facebook?<sup>242</sup> Indeed, the U.S. Department of Justice’s written policy on prosecutions of this kind is rather vague.<sup>243</sup>

The *Van Buren* decision on the scope of criminal prosecutions and private civil suits raises more questions than it answers. The CFAA remains a robust statute for prosecuting or suing outside hackers who have penetrated and abused the victim’s computer database. But it is now far more difficult to bring a criminal prosecution against those insiders, such as employees, who have used their employer’s database for personal use and purposes that run afoul of the employer’s policies.

Moreover, it is not clear whether any basis remains for a private employer to sue such an employee in a civil action under CFAA. Section 1030(g) gives rise to civil liability where the private plaintiff suffers “loss” or “damage.”<sup>244</sup> According to the majority’s rationale, those terms are “ill fitted” to remediating “misuse” of sensitive information that employees may permissibly access using their computers.<sup>245</sup> If private employers or corporations want specific files or categories of information protected from most of their employees, they likely must take stronger measures to prevent widespread and unfettered access to that computer data by all employees. Employers cannot rely on their corporate or internal policies to enforce violations by employees of those policies under the CFAA. The reach of this decision is relevant to international as well as domestic firms within U.S. jurisdiction.<sup>246</sup>

## 2. *U.S. Supreme Court State Secrets Cases*

The 2021 term of the Supreme Court of the United States features two cases from the U.S. Court of Appeals for the Ninth Circuit that implicate the common law evidentiary state secrets privilege.<sup>247</sup> *United States v. Husayn*

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239. *Id.* at 1663.

240. *Id.*

241. *Id.*

242. *Id.* at 1661.

243. *Id.*

244. *Van Buren*, 141 U.S. at 1661–62.

245. 18 U.S.C. § 1030 (g).

246. *Van Buren*, 141 S. Ct. at 1660.

247. *United States v. Ivanov*, 175 F. Supp. 2d 367 (D. Conn. 2001), was the first case to apply the CFAA internationally. The court specifically held that the CFAA overcame the presumption against extraterritoriality because it used the key terms “interstate or foreign

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*et al.* involves a foreign national who, at the time of writing, remains in custody at the U.S. Naval Station Guantanamo Bay, and questions whether a court, on its own assessment, can reject a Government's otherwise proper invocation of the State Secret privilege.<sup>248</sup> The second case, *Federal Bureau of Investigations v. Fazaga*, tests the Ninth Circuit's holding that the Foreign Intelligence Surveillance Act (FISA) displaces the state secrets privilege dismissal procedure and authorizes a district court to examine, in camera and ex parte, evidence subject to the privilege to determine the merits of a lawsuit.<sup>249</sup>

a. *United States v. Abu Zubaydah*

Abu Zubaydah was captured in March 2002 in Pakistan and suspected of being a high-value terrorist target, a claim later contradicted by a U.S. Senate report.<sup>250</sup> Abu Zubaydah was labeled an "enemy combatant" and underwent "enhanced interrogation techniques" (EITs)<sup>251</sup> while detained at a secret Central Intelligence Agency (CIA) facility in Poland.<sup>252</sup>

In 2010, Abu Zubaydah filed a criminal complaint in Poland "seeking to hold Polish officials accountable for their complicity in his unlawful detention and torture."<sup>253</sup> This investigation closed with no prosecutions, prompting Abu Zubaydah to seek relief from the ECHR. In 2015, the ECHR found, beyond a reasonable doubt, that Abu Zubaydah had been detained and tortured in Poland and that Poland had failed to meet its obligations under the European Convention on Human Rights.<sup>254</sup>

Following the ECHR decision, Polish prosecutors reinitiated their investigation, "focusing on the culpability of Polish citizens and government officials in Abu Zubaydah's detention."<sup>255</sup> In furtherance of this renewed investigation, Poland attempted to obtain information from the United States through the Mutual Legal Assistance Treaty (MLAT) framework, but the United States denied such assistance.<sup>256</sup> Thereafter, Abu Zubaydah's

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commerce or communication" to apply to computers. The enactment of the USA Patriot Act, Pub. L. No. 107-56, § 814, 115 Stat. 272, 384 (2001), later that year further enhanced the CFAA's extraterritorial reach. See William K. Kane & Melissa M. Mikail, *Extraterritorial Application of the Computer Fraud & Abuse Act*, NAT'L L. REV. (2020), <https://www.natlawreview.com/article/extraterritorial-application-computer-fraud-and-abuse-act>.

248. See generally, *Husayn v. Mitchell*, 938 F.3d 1123 (9th Cir. 2019); *Fazaga v. Fed. Bureau of Investigation*, 965 F.3d 1015 (9th Cir. 2020) (collectively citing *United States v. Reynolds*, 345 U.S. 1 (1953); *Intel Corp. v. Advanced Microdevices, Inc.*, 542 U.S. 241 (2004)).

249. *Husayn*, 938 F.3d at 1125–26.

250. *Fazaga*, 965 F.3d at 1025.

251. *Husayn*, 938 F.3d at 1126–27; see also SENATE SELECT COMM. ON INTEL., COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY'S DETENTION AND INTERROGATION PROGRAM 4–5 (2014), [https://irp.fas.org/congress/2014\\_rpt/ssci-rdi.pdf](https://irp.fas.org/congress/2014_rpt/ssci-rdi.pdf).

252. *Husayn*, 938 F.3d at 1127.

253. *Id.*; see also Senate Select Committee Study, *supra* note 251.

254. *Husayn*, 938 F.3d at 1127.

255. *Id.* at 1128; see also *Husayn v. Poland*, App. No. 7511/13, ¶¶ 524–36 (July 24, 2014), [https://hudoc.echr.coe.int/fre#%7B%22itemid%22:\[%22001-146047%22\]%7D](https://hudoc.echr.coe.int/fre#%7B%22itemid%22:[%22001-146047%22]%7D).

256. *Husayn*, 938 F.3d at 1128.

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counsel filed an application under 26 U.S.C. § 1782 to compel the US to turn over testimony related to the EIT program for use in the Polish investigation.<sup>257</sup> The US moved to quash the subpoenas, asserting the state secrets privilege.<sup>258</sup> The District Court granted the Government's motion; however, the Ninth Circuit reversed and remanded, holding that information related to the CIA site in Poland, the interrogation techniques and conditions of the facility, and the treatment of Abu Zubaydah in the facility were not state secrets.<sup>259</sup>

The U.S. Supreme Court heard argument in this matter on October 6, 2021, on the question of whether the Ninth Circuit erred in rejecting the Government's claim of state secrets based on its own assessment.<sup>260</sup> Justices pressed the then-Acting Solicitor General on whether the Government would be willing to produce Abu Zubaydah to testify in the matter, potentially rendering the case before the high court moot; however, the government counsel was unable to confirm whether the government would produce Abu Zubaydah.<sup>261</sup> Abu Zubaydah's testimony could render the matter moot, as he could testify as to his recollection of the events, treatment, and conditions without compelling disclosure from the Government or third party witnesses.

b. *FBI v. Fazaga*

In 2011, three Muslim residents of Southern California brought suit alleging the Federal Bureau of Investigation (FBI) unlawfully gathered information against members of the Muslim community through use of a confidential informant (CI).<sup>262</sup> The FBI made clear to the CI that they were only concerned with information relating to Muslims, and their desire was to "get as many files on [the] community as possible."<sup>263</sup> Information regarding non-Muslims was "set aside."<sup>264</sup>

Procedurally, the respondents first sought to certify a class naming the Government and both official and unofficial-capacity defendants, including individual FBI agents.<sup>265</sup> The initial complaint named eleven causes of action alleging violations of their privacy and freedom rights, including constitutional law claims and claims under FISA.<sup>266</sup> Relevant to the matter before the U.S. Supreme Court, the District Court dismissed several claims against the Government pursuant to qualified immunity, and all other claims

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257. *Id.*

258. *See id.* at 1127.

259. *Id.* at 1129; *see also Reynolds*, 345 U.S. at 7–8.

260. *Husayn*, 938 F.3d at 1134.

261. *See generally* Transcript of Oral Argument, *United States v. Husayn*, 141 S. Ct. 2668 (2021) (No. 20-827), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2021/20-827\\_4e46.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/20-827_4e46.pdf).

262. *Id.* at 71–80.

263. *Fazaga*, 965 F.3d at 1026.

264. *Id.* at 1026.

265. *Id.*

266. *Id.* at 1028.

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against the Government pursuant to the state secrets privilege; the only claims to survive the District Court’s dismissal were those against the individual agents.<sup>267</sup>

The Ninth Circuit reversed and remanded (in part), holding that FISA “displaced the common law dismissal remedy created by the *Reynolds* state secrets privilege as applied to electronic surveillance within FISA’s purview.”<sup>268</sup> Further, the Ninth Circuit found that the District Court was obligated to pursue the FISA dismissal procedure and conduct an in camera and ex parte review of the evidence subject to the Government’s assertion of the state secrets privilege as the claim itself challenges the legitimacy of the electronic surveillance “under FISA, the Constitution, or any other law.”<sup>269</sup> The U.S. Supreme Court heard argument in the case on November 8, 2021.

### 3. *Protecting Privilege in Internal Investigations*

The past year has seen significant developments on the treatment of the attorney-client privilege and attorney work product protection during internal investigations. Firms advising international, as well as domestic, clients should take note. A notable case is *Attorney General v. Facebook, Inc.*, in which the Massachusetts Supreme Judicial Court affirmed and reversed in part a trial court decision that had ordered the production of various materials created in connection with a Facebook, Inc. internal investigation.<sup>270</sup>

In 2018, Facebook hired a law firm to conduct an internal investigation after allegations that various third-party applications had misused Facebook user data, including in connection with the now highly publicized transfer of data to Cambridge Analytica (the “app developer investigation”).<sup>271</sup> Later that year, the Massachusetts Attorney General (the MAG) opened an investigation surrounding the issue and served civil investigative demands. Facebook declined to produce certain materials sought by the demands, arguing that they were covered by the attorney-client privilege and attorney work product doctrines.<sup>272</sup>

In 2020, a trial court judge largely granted the MAG’s petition to compel production of the materials.<sup>273</sup> That court found that the work product doctrine did not protect the investigation materials from disclosure because the app developer investigation was a continuation of Facebook’s ongoing app enforcement program, rather than having been done in anticipation of litigation.<sup>274</sup> It further found that the attorney-client privilege did not apply to most of the information because the information was factual in nature,

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267. *Id.*

268. *Id.* at 1029.

269. *Fazaga*, 965 F.3d at 1044; *see also* 50 U.S.C. § 1806(f).

270. *Fazaga*, 965 F.3d at 1051–52.

271. *See generally*, *Attorney Gen. v. Facebook, Inc.*, 487 Mass. 109 (2021).

272. *Id.* at 110.

273. *Id.*

274. *Id.* at 119.

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and Facebook had “touted” the investigation in public and therefore could not claim privilege.<sup>275</sup>

The Massachusetts Supreme Court affirmed the decision with respect to the attorney-client privilege, but reversed aspects relating to the work product doctrine. With respect to privilege, the court emphasized “distinctions between attorney-client communications and underlying facts,” noting that the “privilege only protects communications between the attorney and the client . . . not the facts themselves.”<sup>276</sup> Accordingly, the court determined that the bulk of the requests did not implicate privileged material, because they “do not require the production of any communications between Facebook and counsel.”<sup>277</sup> Rather, the court determined that factual information such as the identity of the apps at issue, even if that information was learned as a result of an internal investigation, was not protected from disclosure.<sup>278</sup>

With respect to the work product doctrine, the court disagreed with the trial court and found that the app developer investigation was conducted in anticipation of litigation. The court made clear that “simply funneling an organization’s investigation through outside counsel does not bring it within the protection of the work product doctrine if the organization would have conducted these activities irrespective of anticipated litigation.”<sup>279</sup> Nonetheless, the court concluded that the app developer investigation was “not business as usual for Facebook” and was “meaningfully distinct from Facebook’s ongoing enforcement program.”<sup>280</sup> The court then considered whether the materials constituted fact or opinion work product, rejected the trial court’s conclusion that none of the pertinent materials constituted opinion work product, and remanded to the trial court for further consideration after clarifying the standard.<sup>281</sup>

While just one case, the Facebook litigation crystallizes emerging trends in courts’ treatment of privilege and work product. Courts are increasingly skeptical of claims that investigations are conducted “in anticipation of litigation,” rather than for other purposes.<sup>282</sup> If a court determines that an investigation was not in anticipation of litigation, then the protections of the work product doctrine may not attach, even if lawyers conducted key aspects of the investigation. Moreover, while jurisdictions vary with respect to the test for determining whether an investigation was conducted in anticipation of litigation, the parties involved may not have complete certainty concerning where any future litigation will take place at the time an

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275. *Id.*

276. *Id.* at 120.

277. *Facebook*, 487 Mass. at 122–23.

278. *Id.*

279. *Id.*

280. *Id.* at 130–31.

281. *Id.*

282. *Id.* at 134–35.

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investigation is conducted, and so it is worthwhile to be mindful of different jurisdictions' standards.

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## **International Litigation**

EDITOR: AARON MARR PAGE; AND AUTHORS:  
JONATHAN I. BLACKMAN, CARMINE D. BOCCUZZI, THEODORE J.  
FOLKMAN, PHILLIP B. DYE, JR., MATTHEW D. SLATER, MARK  
MCDONALD, ARI MACKINNON, IGOR V. TIMOFEYEV, AND  
JOSEPH R. PROFAIZER\*

This article reviews some of the most significant developments made in international litigation in 2021.

### **I. Foreign Sovereign Immunities Act**

Foreign states are presumptively immune from suit, and their property is presumptively immune from attachment and execution, unless an exception in the Foreign Sovereign Immunities Act (FSIA) applies.<sup>1</sup>

#### **A. EXPROPRIATION EXCEPTION**

In *Republic of Germany v. Philipp*, the U.S. Supreme Court held that the FSIA's expropriation exception, which confers U.S. courts with jurisdiction over some expropriations in violation of international law, does not extend to expropriations by a state from its own citizens—specifically, claims of art confiscated by Germany's Nazi government—even if such takings violate other customary international law norms.<sup>2</sup> Writing for a unanimous Court,

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\* This article summarizes developments in international litigation during 2021. The article was edited by Aaron Marr Page, managing attorney at Forum Nobis PLLC in Washington, D.C. Jonathan I. Blackman, senior counsel at Cleary Gottlieb Steen & Hamilton LLP in New York and London, and Carmine D. Boccuzzi, a Cleary Gottlieb partner in New York, authored Sections I and VII, with assistance from Katie Gonzalez, Leila Mgaloblishvili, Abigail Gotter-Nugent, and Nicholas Maisel, associates at the same firm. Theodore J. Folkman, founder of Folkman LLC in Boston, authored Section II. Phillip B. Dye, Jr., a partner at Vinson & Elkins L.L.P. in Houston, Texas, authored Sections III and VIII, with assistance from Kylie Terry and Austin L. Turman, associates at the same firm. Matthew D. Slater, senior counsel at Cleary Gottlieb in Washington, D.C., and Mark E. McDonald, a partner at Cleary Gottlieb in New York, authored Section IV, with assistance from Ms. Mgaloblishvili and Sata Watson, associates at the same firm. Ari MacKinnon, a partner at Cleary Gottlieb in New York, authored Section V, with assistance from Ms. Gonzalez and Paul Kleist, associates at the same firm. Igor V. Timofeyev and Joseph R. Profaizer, partners at Paul Hastings LLP in Washington, D.C., authored Sections VI and IX, with assistance from Matthew K. Morantz and Robert M. Overing, associates at the same firm.

1. 28 U.S.C. §§ 1602–1605, 1609–1611.

2. *Republic of Ger. v. Philipp*, 141 S. Ct. 703, 711 (2021) (citing *Republic of Austria v. Altman*, 541 U.S. 677, 713 (Breyer, J., concurring)).



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Chief Justice Roberts observed that when the FSIA was enacted in 1976, the international law of expropriations incorporated the domestic takings rule, which generally bars claims arising out of a state’s taking of the property of its citizens, and that “[t]hese restrictions would be of little consequence if human rights abuses could be packaged as violations of property rights and thereby brought within the expropriation exception.”<sup>3</sup> The Court’s decision in *Philipp* narrows the scope of the FSIA’s expropriation exception and is consistent with the approach the U.S. Supreme Court has recently taken in other cases, as under the Alien Tort Statute (ATS),<sup>4</sup> involving human rights claims premised on violations of international law.

Notably, the Supreme Court did not reach a second question presented in *Philipp* regarding whether the FSIA displaces common law international comity defenses—an issue more generally addressed by three Courts of Appeal this year, as discussed below. The Court also declined to reach this question in *Hungary v. Simon*, a related case brought by heirs of Holocaust survivors against Hungary, and instead remanded the U.S. Court of Appeals for the District of Columbia Circuit’s decision in that case for further proceedings consistent with *Philipp*.<sup>5</sup>

In another decision that also narrows the scope of the expropriation exception, the U.S. Court of Appeals for the Second Circuit in *Beierwaltes v. Federal Office of Culture of the Swiss Confederation* held that routine law enforcement seizures do not fall under the expropriation exception unless the seizure has no rational relation to a legitimate public purpose.<sup>6</sup> Accordingly, the Second Circuit affirmed the lower court’s decision dismissing claims based on seizure of art by Swiss authorities.<sup>7</sup>

## B. COMMON LAW DEFENSES

The U.S. Court of Appeals for the Second and Ninth Circuits joined the D.C. Circuit in holding that FSIA displaces common law sovereign immunity defenses.<sup>8</sup> In *United States v. Türkiye Halk Bankası A.S. (Halkbank)*, the Second Circuit held, *inter alia*, that the FSIA categorically precludes common-law sovereign immunity defenses.<sup>9</sup> The Ninth Circuit similarly rejected common-law immunity in *WhatsApp Inc. v. NSO Group Technologies*.

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3. *Id.* at 714.

4. See *Nestle USA, Inc. v. Doe*, 141 S.Ct. 1931, 1937 (2021).

5. *Republic of Hung. v. Simon*, 141 S. Ct. 691, 691 (2021) (per curiam).

6. *Beierwaltes v. Fed. Off. of Culture of the Swiss Confederation*, 999 F.3d 808, 821 (2d Cir. 2021).

7. *Id.* at 828.

8. See *Philipp v. Fed. Republic of Ger.*, 894 F.3d 406, 416 (D.C. Cir. 2018) (finding the FSIA “leaves no room for a common-law exhaustion doctrine based on the very same considerations of comity”), *vacated & remanded on other grounds*, 141 S. Ct. 703, 716 (2021); see also *Usoyan v. Republic of Turk.*, 6 F.4th 31, 49 (D.C. Cir. 2021) (comity did not require dismissing action against Turkey for injuries to protesters outside Turkish embassy in Washington, D.C.).

9. *United States v. Türkiye Halk Bankası A.S. (Halkbank)*, 16 F.4th 336, 350–51 (2d Cir. 2021).

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*Ltd.*, finding that “the FSIA’s text, purpose, and history demonstrate that Congress displaced common-law sovereign immunity doctrine as it relates to entities.”<sup>10</sup>

C. JURISDICTION OVER CRIMINAL CASES

In *Halkbank*, the Second Circuit reviewed FSIA’s application to criminal proceedings<sup>11</sup> and affirmed the denial of a Turkish state-owned bank’s motion to dismiss an indictment charging violations of U.S. sanctions against Iran.<sup>12</sup> The Second Circuit avoided the issue of whether the FSIA, which confers immunity to sovereigns from civil actions (subject to its enumerated exceptions), also confers immunity in criminal cases.<sup>13</sup> The court held that even assuming the FSIA conferred immunity in a criminal action, the complained-of conduct—fraudulent transactions intended to launder approximately \$20 billion in Iranian oil and gas proceeds—would fall within the FSIA’s commercial activity exception since sanctions violations or money laundering were a “*type* of activity” that “literally any” bank could do.<sup>14</sup> It is notable that both the Second Circuit and the D.C. Circuit have now expressly declined to reach the legal question of whether FSIA sovereign immunity (and exceptions thereto) applies to criminal cases at all.<sup>15</sup>

II. International Service of Process

Several U.S. courts addressed vexing applications of Article 10 of the Hague Service Convention,<sup>16</sup> which, among other things, preserves “the freedom to send judicial documents, by postal channels, directly to persons abroad . . . [p]rovided the State of destination does not object.”<sup>17</sup> An important question, on which the appellate courts have not given guidance, is whether this provision allows for service via email, and if so, whether it does so in states that have objected.

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10. *WhatsApp Inc. v. NSO Grp. Technologies Ltd.*, 17 F.4th 930, 933 (9th Cir. 2021).

11. *Halkbank*, 16 F.4th at 346–48.

12. *United States v. Halkbank*, No. 15cr867 (RBM), 2020 WL 5849512, at \*4 (S.D.N.Y. Oct. 1, 2020).

13. *Halkbank*, 16 F.4th at 350–51.

14. *Id.* at 348–50 (emphasis original).

15. *See In re Grand Jury Subpoena*, 912 F.3d 623, 634 (D.C. Cir. 2019) (affirming criminal contempt order against foreign state-owned entity for failure to comply with grand jury subpoena).

16. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, done at The Hague, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 [hereinafter Hague Service Convention].

17. *Id.* at art. 10, § a.

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In *Amazon.com, Inc. v. Robojap Technologies. LLC*, Amazon sought leave of court to serve process by email on two defendants who resided in India.<sup>18</sup> The company had also attempted service via the Hague Service Convention’s central authority mechanism,<sup>19</sup> but it noted that it had taken more than a year for the Indian central authority to serve process on another defendant earlier in the case.<sup>20</sup> Amazon “argue[d] that because the Hague Convention says nothing express about email service and India only objected to service by postal channels, the Convention does not prohibit service by email.”<sup>21</sup>

The court recognized the many recent cases—all at the district court level—that had permitted service by email in similar circumstances.<sup>22</sup> It nonetheless held that Amazon’s argument “gets things backwards,”<sup>23</sup> finding that since the list of methods of service the Hague Service Convention authorizes or permits is exclusive,<sup>24</sup> any form of service “not expressly permitted by the Convention”<sup>25</sup> is “impermissible and prohibited.”<sup>26</sup> The court stated that “[t]o conclude otherwise would mean that the Hague Service Convention’s forms of service are not exclusive, contrary to the U.S. Supreme Court’s clear pronouncement on this subject.”<sup>27</sup> Although many courts have given weight to states’ failure to object expressly to service by email, the *Amazon* court took the view that “[b]ecause the Convention does not expressly permit email service, India had no reason or need to affirmatively reject it for it to be considered prohibited.”<sup>28</sup>

The holding in *Amazon* is contrary to the holding in a line of cases, beginning with *Gurung v. Malhotra*, on similar facts in which the state of destination had objected under Article 10(a) and did not provide an effective central authority mechanism for one reason or another, but in which courts

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18. *Amazon.com Inc. v. Robojap Technologies. LLC*, No. C20-694 MJP, 2021 WL 4893426, at \*3 (W.D. Wash. Oct. 20, 2021); *see also* FED. R. CIV. P. 4(f)(3) (court may authorize service “by other means not prohibited by international agreement”).

19. *See Amazon.com Inc.*, 2021 WL 4893426, at \*3; *see also* Hague Service Convention art. 5.

20. *See Amazon.com Inc.*, 2021 WL 4893426, at \*2.

21. *Id.* at \*6.

22. *See id.* at \*7 (citing *Amazon.com Inc. v. Sirowl Tech.*, No. C20-1217 RSL-JRC, 2020 WL 7122846, at \*3 (W.D. Wash. Dec. 4, 2020); *Will Co. v. Kam Keung Fung*, No. C20-5666 RSL, 2020 WL 6709712, at \*2 (W.D. Wash. Nov. 16, 2020); *In re LDK Solar Sec. Litig.*, No. C07-05182 WHA, 2008 WL 2415186, at \*3 (N.D. Cal. June 12, 2008); *Williams-Sonoma Inc. v. Friendfinder Inc.*, No. C06-06572 JSW, 2007 WL 1140639, at \*2 (N.D. Cal. Apr. 17, 2007); *Shinde v. Nithyananda Found.*, No. EDCV1300363-JGB-SPX, 2014 WL 12597121, at \*6-7 (C.D. Cal. Aug. 25, 2014); *Fed. Trade Comm’n. v. Pecon Software, Ltd.*, No. 12 Civ. 7186, 2013 WL 4016272, at \*5 (S.D.N.Y. Aug. 7, 2013); *DisputeSuite.com, LLC v. Credit Umbrella Inc.*, No. CV146340, 2015 WL 12911757, at \*4 (C.D. Cal. June 2, 2015).)

23. *Id.* at \*6.

24. *Id.* at \*6-7.

25. *Id.* at \*6.

26. *Id.* at \*6.

27. *Id.*

28. *Id.* at \*7.

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nonetheless allowed service by email.<sup>29</sup> Until there is progress on delays—and in some cases overt state intransigence—in the operation of central authorities,<sup>30</sup> U.S. courts will continue to face pressure from plaintiffs anxious to effect service of process to authorize service by email, notwithstanding the clear limitations of the Hague Service Convention.

### III. Personal Jurisdiction

In *Bristol-Myers Squibb Co. v. Superior Court of California*, the U.S. Supreme Court held that, as a matter of constitutional due process, a plaintiff's suit seeking to maintain specific personal jurisdiction against an out-of-state defendant in state court must arise out of or relate to the defendant's contacts with the forum.<sup>31</sup> The Court emphasized the need for a "connection between the forum and the specific claims at issue"<sup>32</sup> and found none where the plaintiffs were not residents of the forum nor claim to have been injured there.<sup>33</sup> Though the Court expressly disapproved of California's former "sliding scale" approach,<sup>34</sup> it declined to clearly describe the nature of the causal connection required to properly assert specific jurisdiction.

In *Ford Motor Co. v. Montana Eighth Judicial District Court*, the Supreme Court again reviewed the relatedness requirement of *Bristol-Myers* but in the context of injuries to forum residents occurring within the forum state.<sup>35</sup> The Court first rejected Ford's argument that the connection required by *Bristol-Myers* to support specific jurisdiction was causal in nature, finding that a "causation only approach" had no support in the Court's relatedness requirement jurisprudence.<sup>36</sup> Instead, the Court held that the exercise of specific jurisdiction over Ford, a non-resident manufacturer, in a product liability action was appropriate where the manufacturer conducted systematic and substantial business in the forums even though it did not

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29. *Gurung v. Malhotra*, 279 F.R.D. 215, 220 (S.D.N.Y. 2011).

30. See, e.g., PERMANENT BUREAU OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, SYNOPSIS OF RESPONSES TO THE QUESTIONNAIRE OF NOV. 2013 RELATING TO THE HAGUE CONVENTION OF 15 NOV. 1965 ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS 19-20 (2014), <https://assets.hcch.net/docs/661b8dec-a0c8-45a1-9b71-0144798e2597.pdf> (statistics on time to execution); *Gurung*, 279 F.R.D. at 219 (noting foreign state refusal to execute letter of request on sovereignty grounds); *Missouri ex rel. Schmitt v. China*, No. 1:20-cv-0099-SNLJ, 2021 WL 89733, at \*7 (E.D. Mo. May 11, 2021) (noting foreign state refusal to execute letter of request on sovereignty grounds).

31. *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1780 (2017).

32. *Id.* at 1781.

33. *Id.* at 1781–82.

34. *Id.* at 1781 ("Under the California approach, the strength of the requisite connection between the forum and the specific claims at issue is relaxed if the defendant has extensive forum contacts that are unrelated to those claims.").

35. *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1026 (2021).

36. *Id.*

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design, manufacture, or sell the specific products to the plaintiffs there.<sup>37</sup> Significantly, the Court held that the “arise out of *or relate to*” language in specific jurisdiction precedent is disjunctive in nature.<sup>38</sup> While the former is principally concerned with causation, the latter “contemplates that some relationships will support jurisdiction without a causal showing.”<sup>39</sup> Therefore, Ford’s numerous related contacts which systematically served a market for its vehicles in the forums,<sup>40</sup> including the same type of vehicles as those at issue, made the relationship between the plaintiff’s claims and Ford’s forum-contacts “close enough to support specific jurisdiction.”<sup>41</sup> The Court emphasized that the plaintiff’s claims were a direct result of injuries received within the forums by forum residents.<sup>42</sup> As a result, the Court was unpersuaded by Ford’s attempted analogy to *Bristol-Myers*, where the plaintiffs were not injured in nor were residents of the forum state.<sup>43</sup>

In the context of collective actions under the Fair Labor Standards Act (FLSA), by contrast, *Bristol-Myers* recently has proven to be a powerful shield for corporate defendants. In *Canaday v. Anthem Cos., Inc.*, the Sixth Circuit upheld the dismissal of non-resident opt-in plaintiffs in a FLSA collective action where the non-resident plaintiff’s claims were not connected to the defendant’s activities in the forum.<sup>44</sup> The claims in *Canaday* were brought in Tennessee by a forum resident-employee against a company both incorporated and headquartered in Indiana.<sup>45</sup> The court analogized *Bristol-Myers* to demonstrate that only opt-in plaintiffs from Tennessee could show the required connection between their FLSA claims and the forum.<sup>46</sup> The fact that the claims of the resident and non-resident plaintiffs were similar was held to be an insufficient basis for exercising specific jurisdiction.<sup>47</sup>

The U.S. Court of Appeals for the Eighth Circuit issued a nearly identical opinion in *Vallone v. CJS Solutions Group, LLC*.<sup>48</sup> As in *Canaday*, the Eighth Circuit upheld the dismissal of FLSA claims brought by non-resident plaintiffs in Minnesota against a Florida-based company for actions taken

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37. *Id.* at 1026–27.

38. *Id.* at 1026 (emphasis original).

39. *Id.*

40. *Id.* at 1028 [B]y making it easier to own a Ford [in the forums], they encourage Montanans and Minnesotans to become lifelong Ford drivers.”)

41. *Id.* at 1032.

42. *Id.* at 1030–31.

43. *Id.*

44. *Canaday v. Anthem Cos., Inc.*, 9 F.4th 392, 397 (6th Cir. 2021).

45. *Id.* at 407–09.

46. *Id.* at 397 (“Anthem did not employ the nonresident plaintiffs in Tennessee. Anthem did not pay the nonresident plaintiffs in Tennessee. Nor did Anthem shortchange them overtime compensation in Tennessee. Taken together, the claims before us look just like the claims in *Bristol-Myers*.”)

47. *Id.* (citing *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1781).

48. *Vallone v. CJS Sol. Group, LLC*, 9 F.4th 861, 865 (8th Cir. 2021).

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exclusively in Florida.<sup>49</sup> The court similarly relied on *Bristol-Myers* to conclude that specific jurisdiction was improper where there was “no in-state injury and no injury to residents of the forum State.”<sup>50</sup>

Taken together, these cases suggest that the presence of forum residents who have been injured within the forum state is a potentially significant factor in how rigorously the court will apply the relatedness standard.

#### **IV. The Act of State Doctrine**

The act of state doctrine is a prudential limitation on the exercise of judicial review, requiring U.S. courts to refrain from judging the validity of acts of a foreign sovereign taken within its own territory.<sup>51</sup>

In *Republic of Germany v. Philipp*, the U.S. Supreme Court examined the expropriation exception of the Second Hickenlooper Amendment to the Foreign Assistance Act of 1964.<sup>52</sup> The Amendment was adopted to allow adjudication of claims of expropriation of American-owned property abroad by prohibiting U.S. courts from applying the act of state doctrine to takings “in violation of . . . international law.”<sup>53</sup> The Court held that the expropriation exception applies only to expropriations that violate international law. At the time of the Amendment’s adoption, a sovereign’s expropriation of its own nationals’ property was not considered internationally wrongful. Thus, the expropriation exception did not apply to claims by the heirs of German Jewish art dealers compelled to sell property during the Nazi regime, which were therefore barred by the act of state doctrine.<sup>54</sup>

In *Celestin v. Martelly*, the U.S. District Court for the Eastern District of New York corrected and superseded a prior ruling (examined in last year’s *Year in Review*) which had held that the act of state doctrine prevented review of Haitian presidential orders that allegedly enabled a price-fixing scheme on money transfers, food remittances, and international calls made to and from Haiti.<sup>55</sup> The court previously had reasoned, in part, that the doctrine applied because the sovereign actions all took place in Haiti.<sup>56</sup> In its updated opinion, the court recognized that even when the sovereign actions are taken within the state’s territory, the act of state doctrine would not apply to expropriations of property located abroad.<sup>57</sup> The court nonetheless granted defendants’ motion to dismiss on act of state grounds after finding that the

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49. *Id.* at 865–66.

50. *Id.* at 866 (quoting *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1782).

51. *See, e.g.*, *WS Kirkpatrick & Co. Inc. v. Envtl. Tectonics Corp. Int’l*, 493 U.S. 400, 406 (1990); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964).

52. *Republic of Ger.*, 141 S. Ct. 703, 711 (2021).

53. *Id.*

54. *Id.*

55. *Celestin v. Martelly*, 450 F. Supp. 3d 264, 271–72 (E.D.N.Y. 2021).

56. *Celestin*, 450 F. Supp. 3d at 269.

57. *Celestin v. Martelly*, 524 F. Supp. 3d 43, 51 (E.D.N.Y. 2021).

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prospective tax on future transfers did not effect a seizure of property held in the United States.<sup>58</sup>

In *Caballero v. Fuerzas Armadas Revolucionarias de Columbia* [sic], the U.S. District Court for the Western District of New York held that the act of state doctrine applied to a motion to substitute counsel for Petroleos de Venezuela (PDVSA), the national oil company of Venezuela.<sup>59</sup> The dispute arose because of competing appointments of counsel by the regime of Nicolás Maduro and the interim government of Juan Guaidó, which was officially recognized by the United States in 2019. The Maduro regime argued that hiring counsel is a private commercial activity rather than a foreign governmental act and therefore is outside the scope of act of state. However, the court took an expansive view of “public” or “official” acts and held that the act of state doctrine broadly applies to “acts regarding the management of Venezuela’s state-owned corporations.”<sup>60</sup> The court further reasoned that the act of state doctrine applies to official acts taken by recognized sovereigns, and since the United States had recognized Guaidó’s Interim Government, only the Ad Hoc Board appointed by Guaidó could retain counsel on behalf of PDVSA.<sup>61</sup> Accordingly, the court approved the motion to substitute counsel with counsel appointed by the Guaidó government.

In *Oppenheimer v. ACL LLC*, the U.S. District Court for the Western District of North Carolina concluded that the act of state doctrine did not apply to the alleged infringement of a photographer’s copyright in a photo of the Cherokee Casino Resort, which the Cherokee Nation allegedly provided to defendants for marketing an event.<sup>62</sup> In reasoning that the doctrine did not apply because the connection to a sovereign action was too attenuated, the court implicitly recognized the applicability of the act of state doctrine to American Indian nations—an approach inconsistent with previous federal court decisions.<sup>63</sup>

## V. International Discovery

### A. OBTAINING U.S. DISCOVERY FOR USE IN FOREIGN PROCEEDINGS

In 2021, the U.S. Supreme Court was expected to answer the question whether 28 U.S.C. § 1782 can be used to obtain discovery for use in private international arbitration proceedings. However, the case before it,

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<sup>58</sup>. *Id.*

<sup>59</sup>. *Caballero v. Fuerzas Armadas Revolucionarias de Columbia*, 2021 WL 1884110, at \*7 (W.D.N.Y. May 11, 2021).

<sup>60</sup>. *Id.*

<sup>61</sup>. *Id.* at \*7–8.

<sup>62</sup>. *Oppenheimer v. ACL LLC*, 504 F. Supp. 3d 503, 508 (W.D.N.C. 2020).

<sup>63</sup>. *See United States v. Funmaker*, 10 F.3d 1327, 1333 (7th Cir. 1993) (“The act of states [sic] doctrine simply does not apply to Indian tribes.”).

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*Servotronics, Inc. v. Rolls-Royce*, settled before oral argument and was dismissed.<sup>64</sup>

The question has divided the U.S. Courts of Appeals and remains relevant.<sup>65</sup> In *Luxshare, Ltd. v. ZF Automotive US, Inc.*, the U.S. District Court for the Eastern District of Michigan upheld a magistrate judge's order authorizing discovery requested under 28 U.S.C. § 1782 for use in a German Arbitration Institute (DIS) proceeding.<sup>66</sup> The discovery target has appealed this decision to the U.S. Court of Appeals for the Sixth Circuit, which is likely to affirm, consistent with its decision in *Abdul Latif Jameel Transportation Co. Ltd. v. FedEx Corp.*,<sup>67</sup> in which it became the first Court of Appeals to hold that Section 1782 applies to private international arbitrations.<sup>68</sup>

In *In re Fund for the Protection of Investor Rights in Foreign States v. AlixPartners*, the Second Circuit addressed a related question: whether 28 U.S.C. § 1782 can be used to obtain discovery in investor-state arbitrations.<sup>69</sup> Applying a “functional approach” based on four factors it identified in *In re Application of Hanwei Guo*, the Second Circuit found that an arbitral panel constituted pursuant to a bilateral investment treaty has sufficient “affiliation with the foreign States” and “closely resemble[s] the sort of arbitral body” that would qualify as a “foreign or international tribunal,” such that 28 U.S.C. § 1782 applies.<sup>70</sup> In so holding, the Second Circuit joined other courts which have concluded that a tribunal constituted pursuant to an investment treaty (as opposed to a commercial contract) is a

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64. *Servotronics, Inc. v. Rolls-Royce PLC*, 142 S. Ct. 54, 54 (2021).

65. The Second, Fifth, and Seventh Circuits have held that Section 1782 is not permitted in private international arbitrations, and the Fourth and Sixth Circuits have ruled that Section 1782 is available in private international arbitrations. *Compare In re Application of Hanwei Guo*, 965 F.3d 96, 106 (2d Cir. 2020); *Servotronics, Inc. v. Rolls-Royce*, 975 F.3d 689, 694-95 (7th Cir. 2020); *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 883 (5th Cir. 1999); *Abdul Latif Jameel Transportation Co. Ltd. v. FedEx Corp.*, 939 F.3d 710, 730-31 (6th Cir. 2019); *Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209, 216 (4th Cir. 2020). Decisions on this issue are pending before the Third and Ninth Circuits. *See In re Application of EWE Gasspeicher GmbH*, No. 20-1830 (3d Cir. 2021); *HRC-Hainan Holding Co., LLC, et al. v. Yihan Hu*, No. 20-15371 (9th Cir. 2021).

66. *Luxshare, LTD. v. ZF Automotive US, Inc.*, 547 F.Supp. 3d 682, 694 (E.D.Mich. July 1, 2021).

67. *Abdul Latif Jameel Transportation Co. Ltd.*, 939 F.3d at 730-31.

68. In a rare procedural move, ZF Automotive filed a petition for *certiorari* before judgment. Petition for a Writ of Certiorari Before Judgment at 1, *ZF Automotive US, Inc. v. Luxshare, Ltd.*, 142 S.Ct. 416 (2021) (No. 21-2736). The U.S. Supreme Court signaled a potential interest in the case by granting a stay of discovery. *See ZF Auto. US, Inc. v. Luxshare, Ltd.*, 142 S. Ct. 416, 416 (2021).

69. *In re Fund for the Protection of Investor Rights in Foreign States v. AlixPartners*, 5 F.4th 216, 220 (2d Cir. 2021), *petition for writ of certiorari granted*, *AlixPartners, LLP v. The Fund for Prot. of Investors' Rts. in Foreign States*, 142 S. Ct. 638, 638 (2021).

70. *Id.* at *In re Fund for the Protection of Investor Rights in Foreign States*, 5 F.4th 216, at 225-27.



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“foreign or international tribunal” under 28 U.S.C. § 1782,<sup>71</sup> although this view is not universal.<sup>72</sup>

**B. OBTAINING DISCOVERY FROM ABROAD FOR USE IN U.S. PROCEEDINGS**

U.S. courts frequently compel the production of documents located abroad for use in U.S. proceedings using the multi-factor comity analysis set forth in *Société Nationale Industrielle Aérospatiale v. U.S. District Court for the Southern District of Iowa*.<sup>73</sup> In the three years since the European Union’s General Data Protection Regulation (GDPR) has taken effect, U.S. courts have continued to apply this test and find that GDPR’s privacy constraints do not outweigh U.S. interests in discovery. In a recent case, *AnywhereCommerce, Inc. v. Ingenico*, the court made particular note of the fact that the parties had agreed to a protective order limiting the dissemination of confidential information, which the court found to be “[c]onsistent with the [privacy] objectives of the GDPR.”<sup>74</sup>

**VI. Extraterritorial Application of United States Law**

**A. ALIEN TORT STATUTE**

In *Nestlé USA, Inc. v. Doe*, the Supreme Court held that allegations of corporate oversight in the United States are insufficient to overcome the extraterritoriality presumption and establish domestic application of the Alien Tort Statute (ATS), 28 U.S.C. § 1350.<sup>75</sup> Plaintiffs were former child slaves in the Ivory Coast who contended that the defendants, U.S. food producers, aided human rights abuses on the cocoa plantations where they worked. The Ninth Circuit allowed the suit to proceed, reasoning that plaintiffs’ aiding and abetting allegations “had pleaded a domestic

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71. “District courts . . . have regularly found that arbitrations conducted pursuant to Bilateral Investment Treaties . . . qualify as international tribunals.” *Islamic Republic of Pakistan v. Arnold & Porter Kaye Scholer LLP*, No. 18-103 (RMC), 2019 WL 1559433, at \*7 (D.D.C. Apr. 10, 2019). *See, e.g., In re Mesa Power Grp., LLC*, No. 2:11-mc-280-ES, 2012 WL 6060941, at \*5, \*7 (D.N.J. Nov. 20, 2012); *Chevron Corp. v. Shefftz*, 754 F. Supp. 2d 254, 260 (D. Mass. 2010).

72. *See* Brief for United States as Amicus Curiae Supporting Respondents, *Servotronics, Inc. v. Rolls-Royce PLC*, 2021 WL 2714670, (2021) (No. 20-794), at 28–33 (2021) (arguing that 28 U.S.C. § 1782 should not extend to investor-state arbitration).

73. *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa*, 482 U.S. 522, 544 n.28 (1987); *see Arcelik A.S. v. E.I. DuPont de Nemours and Co.*, 856 F. App’x 392, 397–400 (3d Cir. 2021) (applying five factors and finding that letters of request to Germany was not overly burdensome).

74. *See AnywhereCommerce, Inc. v. Ingenico*, No. 19-cv-114570IT, 2021 WL 2256273, at \*3 (D. Mass. June 3, 2021).

75. *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931, 1931–32 (2021). The petition for certiorari in *Nestlé* was profiled in last year’s Year in Review. *See* Aaron Marr Page et al., *International Litigation*, 55 YEAR IN REVIEW 311, 320–21 (2021).

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application of the ATS . . . because the ‘financing decisions . . . originated’ in the United States.”<sup>76</sup>

The Supreme Court reversed. The Court held that plaintiff’s complaint “would impermissibly seek extraterritorial application of the ATS because “[n]early all the conduct that they say aided and abetted forced labor—providing training, fertilizer, tools, and cash to overseas farms—occurred in Ivory Coast.”<sup>77</sup> As the Court explained, “allegations of general corporate activity—like decisionmaking—cannot alone establish domestic application of the ATS.”<sup>78</sup>

**B. ENVIRONMENTAL LAW**

In *City of New York v. Chevron Corp.*, New York City sued five multinational oil companies for damages caused by greenhouse gas emissions.<sup>79</sup> Addressing whether the presumption against extraterritoriality applies to federal common law claims, such as nuisance, the U.S. Court of Appeals for the Second Circuit observed that, although the presumption is a tool of statutory interpretation, the principle is also premised on “broad concerns over separation of powers.”<sup>80</sup> The Second Circuit therefore affirmed the dismissal of the city’s claims, because to hold otherwise would “affect the price and production of fossil fuels,” “bypass the various diplomatic channels,” “sow confusion and needlessly complicate the nation’s foreign policy,” and “clearly infring[e] on the prerogatives of the political branches.”<sup>81</sup>

**C. ANTITRUST**

The U.S. Court of Appeals for the Second Circuit in *In re Vitamin C Antitrust Litigation* considered whether U.S. purchasers of vitamin C could sue sellers in the People’s Republic of China (PRC) for price-fixing in violation of U.S. antitrust law.<sup>82</sup> The Second Circuit previously held, deferring to the PRC government’s construction of its law, that the sellers were required by law to fix the price and quantity of exports.<sup>83</sup> The U.S. Supreme Court vacated, instructing that a foreign state’s interpretation of its

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76. *Nestlé USA, Inc.*, 141 S. Ct. at 1936 (quoting *Doe v. Nestlé, S. A.*, 906 F.3d 1120, 1124–26 (9th Cir. 2018)).

77. *Nestlé*, 141 S. Ct. at 1937.

78. *Id.* Justice Thomas, joined by Justices Gorsuch and Kavanaugh, would have also held that the ATS does not create a private right of action for violations of international law beyond certain narrow historical torts previously recognized by the Court. *Id.* at 1937–40 (Thomas, J., concurring); see also *id.* at 1942–43 (Gorsuch, J., concurring).

79. *City of New York v. Chevron Corp.*, 993 F.3d 85, 85–86 (2d Cir. 2021).

80. *Id.* at 102.

81. *Id.* at 103.

82. *In re Vitamin C Antitrust Litigation*, 8 F.4th 136, 140 (2d Cir. 2021).

83. *In re Vitamin C Antitrust Litig.*, 837 F.3d 175, 179 (2d Cir. 2016), vacated and remanded *sub nom.* *Animal Sci. Prod., Inc. v. Hebei Welcome Pharmacy Co.*, 138 S. Ct. 1865, 1868 (2018).

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own law is accorded only “respectful consideration,” not deference.<sup>84</sup> On remand, the Second Circuit again affirmed dismissal of the antitrust claims.<sup>85</sup> The panel majority determined that PRC law required the challenged price-fixing and, therefore, the sellers in the PRC could not have complied with both PRC law and U.S. antitrust law.<sup>86</sup> The majority then held that the principles of international comity prohibited the extraterritorial application of U.S. antitrust law.<sup>87</sup> Although the PRC’s export controls foreseeably harmed American commerce, other comity factors—including that the anticompetitive conduct took place in the PRC, that the United States would expect a PRC court to recognize the same defense, and that the U.S. judiciary is ill-equipped to assess the foreign relations at stake—counseled against extraterritoriality.<sup>88</sup>

**D. COMMUNICATIONS DECENCY ACT**

In *Gonzalez v. Google*, the U.S. Court of Appeals for the Ninth Circuit considered whether family members of victims of terrorist attacks could sue Twitter, Facebook, or Google under the Anti-Terrorism Act, 18 U.S.C. § 2333, for providing material support to ISIS.<sup>89</sup> Gonzalez alleged that ISIS terrorists used YouTube, for example, to recruit members, plan attacks, and issue threats.<sup>90</sup> The U.S. District Court for the Northern District of California ruled that Section 230 of the Communications Decency Act, 47 U.S.C. § 230, largely immunized Google and the other companies from liability arising out of third-party material on their platforms.<sup>91</sup> The Ninth Circuit held, however, that Section 230 need not overcome the presumption against extraterritoriality because “the relevant conduct occurs where immunity is imposed . . . *i.e.*, at the situs of this litigation,” not where the claims arose.<sup>92</sup>

**VII. Recognition and Enforcement of Foreign Judgments**

In U.S. courts, the U.N. Convention on the Recognition and Enforcement of Foreign Arbitration Awards (the Convention) governs the recognition and enforcement of most foreign arbitral awards.<sup>93</sup> State law,

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84. *Animal Sci. Prod., Inc.*, 138 S. Ct. 1865, 1869 (2018).

85. *In Re: Vitamin C Antitrust Litig.*, 8 F.4th 136, 163 (2d Cir. 2021).

86. *Id.* at 148–59.

87. *Id.* at 160–63.

88. *Id.*

89. *Gonzalez v. Google LLC*, 2 F.4th 871, 880–82 (9th Cir. 2021).

90. *Id.* at 881.

91. *Gonzalez v. Google, Inc.*, 335 F. Supp. 3d 1156, 1170 (N.D. Cal. 2018), *aff’d sub nom. Gonzalez*, 2 F.4th at 913 (9th Cir. 2021).

92. *Id.* at 888.

93. U.N. Convention on the Recognition and Enforcement of Foreign Arbitration Awards, 21 U.S.T. 2517, June 10, 1959, 9 U.S.C. §§ 201–08 (The Inter-American Convention on International Commercial Arbitration, implemented in Chapter 2 of the Convention, governs

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however, governs the recognition and enforcement of foreign court judgments.

A. FOREIGN ARBITRAL AWARDS

In *Beijing Shougang Mining Inv. Co. v. Mongolia*, the U.S. Court of Appeals for the Second Circuit considered a challenge to an International Centre for Settlement of Investment Disputes award in which the New York-seated tribunal found it lacked jurisdiction to reach the merits of the claim.<sup>94</sup> Shougang filed a petition to vacate the jurisdictional award in the U.S. District Court for the Southern District of New York, arguing the parties had not consented to submit questions of arbitrability to the tribunal and the tribunal's award on jurisdiction therefore exceeded its powers.<sup>95</sup> The district court denied Shougang's petition and granted Mongolia's cross-motion to confirm the jurisdictional award.<sup>96</sup>

The Second Circuit affirmed the district court's finding that "the question of arbitrability was clearly and unmistakably put before the arbitral tribunal"<sup>97</sup> due to the parties' agreement "that the tribunal will hear jurisdictional issues in the first phase of the arbitration," which was memorialized in a procedural order issued by the tribunal.<sup>98</sup> In reaching this conclusion, the Second Circuit expanded on prior judicial decisions that used evidence other than arbitration agreements narrowly defined, such as separate agreements between parties during arbitration<sup>99</sup> or contractual incorporation of institutional arbitral rules,<sup>100</sup> to identify intent to arbitrate arbitrability and explicitly noted that such evidence need not be limited to "arbitration agreements" alone.<sup>101</sup>

In *CLMS Management Services Ltd. Partnership v. Amwins Brokerage of Georgia, LLC*, the U.S. Court of Appeals for the Ninth Circuit held that state laws subject to the McCarran-Ferguson Act, which provides that state insurance laws preempt conflicting federal laws, could not bar the enforcement of arbitration agreements under the Convention.<sup>102</sup> The Ninth Circuit found that Article II, Section 3 of the Convention is self-executing

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the recognition and enforcement of awards if a majority of the parties to an arbitration agreement are citizens of states that have ratified it).

94. *Beijing Shougang Mining Inv. Co. Ltd. v. Mongolia*, 11 F.4th 144, 154–56 (2d Cir. 2021).

95. *Id.* at 151.

96. *Beijing Shougang Mining Inv. Co. Ltd. v. Mongolia*, 415 F. Supp. 3d 363, 370 (S.D.N.Y. 2019), *aff'd*, *Beijing Shougang Mining Inv. Co.*, 11 F.4th at 163.

97. *Beijing Shougang Mining Inv. Co. Ltd.*, 415 F. Supp. 3d at 370, *aff'd*, *Beijing Shougang Mining Inv. Co.*, 11 F.4th at 163.

98. *Beijing Shougang Mining Inv. Co.*, 11 F.4th at 154–55.

99. *Id.* at 155 (citing *Schneider v. Kingdom of Thailand*, 688 F.3d 68, 71 (2d Cir. 2012)).

100. *Id.* at 155–56 (citing *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 395 (2d Cir. 2011)).

101. *Id.* at 155.

102. *CLMS Mgmt. Servs. Ltd. P'ship v. Amwins Brokerage of Georgia, LLC*, 8 F.4th 1007, 1009 (9th Cir. 2021).

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and therefore not a federal law subject to the Act.<sup>103</sup> As a result, parties can be compelled to arbitrate certain insurance disputes subject to arbitration agreements despite state laws prohibiting such arbitration.<sup>104</sup>

**B. FOREIGN COURT JUDGMENTS**

In *Banca di Credito Cooperativo v. Small*, the U.S. Court of Appeals for the Second Circuit addressed the enforceability of foreign bankruptcy orders under New York law.<sup>105</sup> An Italian bankruptcy court had issued two orders recognizing Banca's claims as a creditor in Italian bankruptcy proceedings, and Banca filed suit in the U.S. District Court for the Southern District of New York to recognize and enforce the two orders.<sup>106</sup> The district court denied recognition and enforcement because the two orders did not meet the requirement under New York law that the foreign judgments were "final, conclusive and enforceable where rendered."<sup>107</sup>

The Second Circuit affirmed.<sup>108</sup> Examining Italian law, which governed whether the orders were "enforceable where rendered," the Second Circuit found that Italian bankruptcy orders are unenforceable outside of the bankruptcy framework, unless an Italian commercial court converts the orders into generally enforceable orders.<sup>109</sup> Since Banca had obtained no such conversion, the orders were enforceable only within the Italian bankruptcy proceedings.<sup>110</sup> While Banca argued that the phrase "enforceable where rendered" merely required that the orders were enforceable by the specific court that issued them, the Second Circuit rejected this argument because it would require U.S. courts to enforce foreign orders that could not be generally enforced in the issuing jurisdiction.<sup>111</sup>

New York has since amended its law on the recognition of foreign judgments,<sup>112</sup> and it remains to be seen whether *Banca di Credito Cooperativo* will persist despite the amendments.

**VIII. Forum Non Conveniens**

A guiding principle of the forum non conveniens doctrine is that a "plaintiff's choice of forum should rarely be disturbed."<sup>113</sup> This year, courts

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103. *Id.* at 1015, 1017.

104. *Id.* at 1017–18.

105. *Banca Di Credito Cooperativo di Civitanova Marche e Montecosaro Soc. Cooperativa v. Small*, 852 F. App'x 15, 17–19 (2d Cir. 2021).

106. *Id.* at 16.

107. *Id.* at 17.

108. *Id.* at 22.

109. *Id.* at 18; *see also* N.Y. C.P.L.R. § 5302.

110. *Banca Di Credito Cooperativo*, 852 F. App'x at 18.

111. *Id.* at 17.

112. *See* N.Y. C.P.L.R. § 5302(a)(2).

113. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

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have discussed how this doctrine might be impacted by the virtual platform, the timeliness of a motion to dismiss for forum non conveniens, and whether the doctrine applies to antitrust actions.

COVID-19 propelled the legal field to utilize technology in extraordinary ways.<sup>114</sup> A Canadian court provided a particularly striking discussion and illustration of what forum non conveniens analyses might come to look like in world of routine virtual proceedings. In *Kore Meals LLC v. Freshii*, the Ontario Superior Court asked broadly whether “[i]n the age of Zoom, is any forum more non conveniens than another? Has a venerable doctrine now gone the way of the VCR player or the action in assumpsit?”<sup>115</sup> The dispute was filed in Ontario, but there was an arbitration agreement requiring arbitration in Chicago under the American Arbitration Association (AAA).<sup>116</sup> The court first noted that in deciding whether to stay an arbitral proceeding, a court must undertake a forum non conveniens analysis to determine if the arbitral tribunal is unfair or impractical.<sup>117</sup> But, in setting aside the parties’ arguments regarding what was required under the arbitration agreement versus what would be most convenient, the court simply asked where the AAA was located.<sup>118</sup> When neither party could identify the location of the AAA, but both were certain that submissions would be made online and the hearings would likely be virtual, the judge began to analyze whether litigation in this virtual setting could truly be “inconvenient.”<sup>119</sup> The court determined there is no location “any more or less convenient than the other” because “a digital-based adjudicative system with a videoconference hearing is as distant and as nearby as the World Wide Web.”<sup>120</sup> In enforcing the arbitration agreement, the judge took a strong stance against forum non conveniens by stating that judges “can now say farewell to what was *until recently* a familiar doctrinal presence in the courthouse.”<sup>121</sup>

This year, the U.S. Court of Appeals for the Eighth Circuit addressed, for the first time, the timeliness requirement of a motion to dismiss for forum non conveniens.<sup>122</sup> The court explained that the forum non conveniens analysis involves looking at both private and public-interest factors, but it is unclear where the issue of timeliness falls.<sup>123</sup> The Fifth Circuit considers

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114. The United States’ first virtual jury trials were tried in 2020. See Nate Raymond, *Texas Tries a Pandemic First: A Jury Trial by Zoom*, REUTERS (May 18, 2020), <https://www.reuters.com/article/us-health-coronavirus-courts-texas/texas-tries-a-pandemic-first-a-jury-trial-by-zoom-idUSKBN22U1FE>.

115. *Kore Meals LLC v. Freshii Dev. LLC* (2021), 2021 ONSC 2896, ¶ 1 (Can. Ont. Super. Ct.).

116. *Id.*

117. *TELUS Communications Inc. v. Wellman*, [2019] S.C.R. 144, ¶ 64 (Can.).

118. *Kore Meals*, 2021 ONSC 2896, ¶ 28.

119. *Id.* ¶¶ 28-29.

120. *Id.* ¶¶ 25, 29.

121. *Id.* ¶ 31 (emphasis added).

122. *Estate of IEH v. CKE Holdings, Inc.*, 995 F.3d 659, 663 (8th Cir. 2021).

123. *Id.* at 663-64.

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timeliness as a private-interest factor,<sup>124</sup> while the Third Circuit categorizes it as a factor for both private- and public-interest,<sup>125</sup> and, uniquely, the Sixth Circuit analyzes timeliness as an independent hurdle.<sup>126</sup> But, declining to categorize timeliness, the Eighth Circuit simply found that timeliness is a relevant inquiry in the forum non conveniens analysis and that filing eighteen months after the complaint “belies the claim that the forum is truly inconvenient.”<sup>127</sup>

The Sixth Circuit this year also clarified its stance on whether the forum non conveniens analysis applies to antitrust actions.<sup>128</sup> The plaintiff, a shell company set up primarily for bringing suit within the United States, claimed that antitrust actions could *never* be dismissed for forum non conveniens.<sup>129</sup> The plaintiff relied on a case from the Fifth Circuit, *Industrial Development Corp. v. Mitsui & Co.*, which held that because of a broad venue provision in the Clayton Act,<sup>130</sup> forum non conveniens would not apply to antitrust actions.<sup>131</sup> The Sixth Circuit criticized the Fifth Circuit precedent and affirmed the dismissal for forum non conveniens.<sup>132</sup> The Sixth Circuit noted the Fifth Circuit’s opinion that the Clayton Act actually “says nothing at all about case transfers” and “simply adds to the number of courts *empowered* to hear a plaintiff’s claim.”<sup>133</sup> Agreeing with the First and Second Circuit,<sup>134</sup> the Sixth Circuit confirmed that an antitrust action can be dismissed for forum non conveniens.<sup>135</sup>

## IX. Parallel Proceedings

### A. ANTI-SUIT INJUNCTIONS

In *Alfandary v. Nikko Asset Management*, the U.S. District Court for the Southern District of New York denied a motion for an anti-suit injunction (ASI), finding that the plaintiffs had not shown that resolution of the case

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124. *Id.* at 663–64 (citing *Trivelloni-Lorenzi v. Pan Am. World Airways*, 821 F.2d 1147, 1165 (5th Cir. 1987), *vacated on other grounds*, 490 U.S. 1032 (1989)).

125. *Id.* at 664 (citing *Lony v. E.I. Du Pont de Nemours & Co.*, 935 F.2d 604, 613 (3d Cir. 1991)).

126. *Id.* at 664 (citing *Rustal Trading US, Inc. v. Makki*, 17 F. App’x 331, 337–38 (6th Cir. 2001)).

127. *Id.* at 665.

128. *Prevent USA Corp. v. Volkswagen AG*, 17 F.4th 653, 660 (6th Cir. 2021).

129. Brief for Plaintiffs-Appellants at 16, *Prevent USA Corp. v. Volkswagen AG*, 17 F.4th 653 (No. 21-1379).

130. 15 U.S.C. § 22.

131. *Indus. Inv. Dev. Corp. v. Mitsui & Co.*, 671 F.2d 876, 890–91 (5th Cir. 1982).

132. *Prevent USA Corp.*, 17 F.4th at 661.

133. *Id.* at 662 (citing *Howe v. Goldcorp Inv., Ltd.*, 946 F.2d 944, 949 (1st Cir. 1991)).

134. *Cap. Currency Exch., N.V. v. Nat’l Westminster Bank PLC*, 155 F.3d 603, 606 (2d Cir. 1998).

135. *Id.* at 612.

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would be “dispositive” of the foreign proceeding.<sup>136</sup> The case was brought by former executives of a Japanese investment advisory company who alleged that the company had intentionally undervalued their stock acquisition rights.<sup>137</sup> The Japanese company subsequently sued one of the executives in the Tokyo District Court, arguing that the former executive had breached a covenant in his separation agreement.<sup>138</sup> In response, the executives sought an ASI in the U.S. district court to enjoin the Japanese company from pursuing its Tokyo action.<sup>139</sup>

Applying the test developed by the Second Circuit in *China Trade & Development Corp. v. M.V. Choong Yong*,<sup>140</sup> the district court observed that “two threshold requirements [must be] met” to grant an ASI: “first, the parties must be the same in both proceedings, and second, resolution of the case before the enjoining court must be dispositive of the action to be enjoined.”<sup>141</sup> Applying the second prong of this test, the district court noted that the Second Circuit “has not articulated precisely what it means for an action to be dispositive,” but that the relevant initial inquiry was “whether the ‘substance’ of the claims is the same in the two actions.”<sup>142</sup> The court noted that, while “related,” the claims in the U.S. and Japanese proceedings did “not share the same ‘substance’ because they concerned different contracts,” and would therefore “turn on different issues, arguments, and evidence.”<sup>143</sup> Finding that the plaintiffs had otherwise failed to satisfy their burden of demonstrating that resolution of the case would be dispositive of the Tokyo action, the U.S. district court denied the motion for an ASI.<sup>144</sup>

## B. INTERNATIONAL ABSTENTION

Under *Colorado River Water Conservation District v. United States*, a federal court may stay or dismiss a lawsuit in light of parallel proceedings only if the court first determines that the actions in question are indeed parallel, and then that there are exceptional circumstances such that abstention would promote “wise judicial administration.”<sup>145</sup> To promote international comity, U.S. courts may abstain in light of parallel foreign proceedings after

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136. *Alfandary v. Nikko Asset Mgmt.*, 2021 U.S. Dist. LEXIS 77701, at \*13 (S.D.N.Y. Apr. 22, 2021).

137. *Id.* at \*2–3.

138. *Id.* at \*3–4.

139. *Id.* at \*6–8.

140. *Id.* at \*7 (citing *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F. 2d 33, 36 (2d Cir. 1987)).

141. *Id.* (quoting *Eastman Kodak Co. v. Asia Optical Co.*, 118 F. Supp. 3d 581, 586 (S.D.N.Y. 2015)).

142. *Id.* at \*10 (citing *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 121 (2d Cir. 2007)).

143. *Id.* at \*10–11.

144. *Id.* at \*10–11, \*13.

145. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 818 (1976).



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considering each government's interests and the adequacy of the foreign forum.<sup>146</sup>

In *HEK, LLC v. Akstrom Imports*, the U.S. District Court for the District of Minnesota refused to apply the doctrine of international abstention where the party invoking that doctrine demonstrated apparent bad faith in filing a parallel foreign proceeding.<sup>147</sup> Akstrom, a Canadian distributor, contracted with HEK, a Minnesota-based company (doing business as Kinneberg Management Group (KMG)), for KMG to serve as Akstrom's sales representative with certain U.S. retailers.<sup>148</sup> Akstrom agreed to pay KMG a portion of its sales as a commission.<sup>149</sup> After KMG performed the contract for several weeks, Akstrom refused to pay the accrued commissions and instead sought to terminate the contract.<sup>150</sup> After KMG issued a demand letter, Akstrom asked KMG to "keep th[e] matter in abeyance," and indicated that it wanted "to discuss settling the dispute."<sup>151</sup> Instead, Akstrom filed an action against HEK/KMG in Canada seeking a declaratory judgment that the contract was null and void.<sup>152</sup> HEK/KMG then sued Akstrom in Minnesota, seeking damages for contractual breaches, statutory violations, and unjust enrichment.<sup>153</sup>

In response, Akstrom moved to dismiss or stay the Minnesota case pending resolution of the Canadian action.<sup>154</sup> The U.S. district court observed that "[d]eferring to a foreign proceeding is a form of abstention," and that "staying or dismissing a case based on international comity is . . . a rule of practice, convenience, and expediency rather than of law, and does not have the force of an imperative or obligation."<sup>155</sup> The relevant test, the court noted, involved consideration of "multiple factors," namely: "the similarity of parties and issues, the adequacy of the alternative forum, the convenience of the parties, the promotion of judicial efficiency, the possibility of prejudice, and the temporal sequence of filing."<sup>156</sup> The court, however, found that consideration of those factors was unnecessary given "Akstrom's apparent bad faith" being the "reason there is a parallel suit in Canada in the first place."<sup>157</sup> Applying the international comity doctrine, the court observed, "would permit Akstrom—who convinced KMG to hold its

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146. See, e.g., *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1237–38 (11th Cir. 2004).

147. *HEK, LLC v. Akstrom Imps., Inc.*, No. 20-CV-1881 (NEB/LIB), 2021 U.S. Dist. LEXIS 32384, at \*7 (D. Minn. Feb. 22, 2021).

148. *Id.* at \*1–2.

149. *Id.* at \*1–2.

150. *Id.* at \*2.

151. *Id.* at \*8–10.

152. *Id.* at \*2–3.

153. *Id.* at \*3.

154. *Id.* at \*3.

155. *Id.* at \*7–8.

156. *Id.* at \*8.

157. *Id.*

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claim in abeyance while it filed suit in Quebec—to benefit from its deception and manipulation.”<sup>158</sup>

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158. *Id.* at 9–10.

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## **Women’s Interest Network**

JULIE KING, ED., CHRISTINE KORPER, ED., ABIOLA AFOLAYAN,  
MARIE ELENA ANGULO, MICHELA COCCHI, ANGELA M.  
GALLERIZZO, DOLLY HERNANDEZ, MARGARET KAMM, DANA KATZ,  
KENDRA MULLER, SIERRA PAOLA, VANESSA ROMERA ROCHA, AINA  
SERRET, SANDHYA TANEJA, AND CATHERINE VAN KAMPEN\*

This article reviews significant legal and political developments impacting women internationally in 2021. Highlighted areas of interest include right to health, gender-based and sexual violence, sexual harassment and assault, human trafficking, and international criminal courts and tribunals.

### **I. Legal Empowerment**

The COVID-19 pandemic has exacerbated existing inequalities between the sexes,<sup>1</sup> “disproportionately jeopardiz[ing] women’s social and economic capabilities.”<sup>2</sup> When women are given equal opportunity, their participation “strengthen[s] economies and enabl[es] development.”<sup>3</sup> On March 4, 2021, the European Commission set forth a “proposal on pay transparency to

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\* Julie King is an Associate at McCabe Kirshner, PC in Lincolnwood, Illinois, and served as co-editor and contributing author. Christine Korper is an Associate at DLA Piper LLP in Chicago and served as co-editor and contributing author. Abiola Afolayan is a Senior International Policy Advisor with Bread for the World. Marie Elena Angulo is Counsel with White & Case in Miami. Michela Cocchi is an Attorney with Studio Legale in Bologna, Italy. Angela M. Gallerizzo is a lawyer licensed to practice law in New York, New Jersey, and Washington, D.C. Dolly Hernandez is Counsel at Boyd Richards Parker & Colonnelli, P.L. in Miami. Margaret Kamm is an Associate at Reed Smith. Dana Katz is an attorney admitted in Connecticut and Texas. Kendra Muller is a 3L at the University of San Diego School of Law and works in civil rights litigation for the Disability Rights California. Sierra Paola is a J.D. Candidate at Gonzaga University School of Law. Vanessa Romero Rocha is a Senior Associate at Cannizzo, Ortiz y Asociados in Mexico. Aina Serret is a Corporate Lawyer and Compliance Officer at Augé Legal & Fiscal in Andorra. Sandhya Taneja is licensed to practice law in Maryland and is a judicial clerk in a Maryland state court. Catherine Van Kampen is an Associate at Bernstein Litowitz Berger & Grossman LLP in New York. The views expressed are attributed to the authors individually and do not represent the views of their respective organizations.

1. See Press Release, International Labour Organization, *Fewer Women Than Men Will Regain Employment During the COVID-19 Recovery Says ILO* (July 19, 2021), [https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS\\_813449/lang--en/index.htm](https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_813449/lang--en/index.htm).

2. WORLD BANK GRP., *WOMEN, BUSINESS AND THE LAW 2021 1* (2021), [https://www.worldbank.org/content/dam/sites/wbl/documents/2021/02/WBL2021\\_ENG\\_v2.pdf](https://www.worldbank.org/content/dam/sites/wbl/documents/2021/02/WBL2021_ENG_v2.pdf).

3. *Id.*

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ensure that women and men in the European Union get equal pay for equal work.”<sup>4</sup>

**A. WOMEN’S REPRESENTATION IN POLITICAL LEADERSHIP**

Regarding women in the public sphere, progression of women’s representation in high-level government positions around the world has slowed.<sup>5</sup> 21.9 percent of ministerial portfolios were held by women compared to 21.3 percent from the year prior,<sup>6</sup> and women’s representation in national parliaments only increased by 0.6 percent.<sup>7</sup> Twenty-two countries had women occupying the role of heads of state or government; however, Europe led the world with respect to women-led countries, having “five out of nine Heads of State and seven out of 13 Heads of Government.”<sup>8</sup> Notably, Belgium’s proportion of women ministers almost doubled from 25 percent to over 57 percent.<sup>9</sup> But despite these overall advances, “the number of countries with no women ministers in 2021 increased to 12, compared to nine in 2020.”<sup>10</sup> While women make up approximately 70 percent of the global health workforce, “women from middle and low-income countries only make up around 5 percent of leaders at global health organizations.”<sup>11</sup>

Denmark, Finland, Iceland, New Zealand, Germany, and Slovakia are led by women heads of state and have been recognized for their proactive responses to the COVID-19 pandemic, “implementing social distancing restrictions early . . . and unifying the country around a comprehensive response with transparent and compassionate communication.”<sup>12</sup> Yvonne Aki-Sawyer, the mayor of Freetown, Sierra Leone, has worked with donors, residents, and the government to provide additional food to people quarantined in informal settlements to “repurpose an under-utilised military training facility space into a care center to support COVID-19 patients who cannot self-isolate.”<sup>13</sup>

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4. Press Release, European Commission, *Pay Transparency: Commission Proposes Measure to Ensure Equal Pay for Equal Work* (Mar. 4, 2021), [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_21\\_881](https://ec.europa.eu/commission/presscorner/detail/en/IP_21_881).

5. See Press Release, *U.N. Entity for Gender Equal. and the Empowerment of Women, Women in Politics: New Data Shows Growth But Also Setbacks* (Mar. 10, 2021), <https://www.unwomen.org/en/news/stories/2021/3/press-release-women-in-politics-new-data-shows-growth-but-also-setbacks>.

6. See *id.*

7. See *id.*

8. See *id.*

9. See *id.*

10. *Id.*

11. Allyson Bear & Roselle Agner, *Why More Countries Need Female Leaders*, U.S. NEWS & WORLD REP. (Mar. 8, 2021), <https://www.usnews.com/news/best-countries/articles/2021-03-08/why-countries-with-female-leaders-have-responded-well-to-the-pandemic>.

12. *Id.*

13. Yvonne Aki-Sawyer, *OPINION: Cities Need Inclusive COVID-19 Responses to Build Back Stronger. But We Can’t Do It Alone*, THOMSON REUTERS (Jan. 7, 2021), <https://news.trust.org/item/20210107132355-uw6lx>.

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**B. LEGAL EQUALITY IN CONSTITUTIONS AND LAWS**

In March 2021, the United Nations Commission on the Status of Women (UNCSW) approved a broad reaffirmation of the Beijing Declaration and Platform for Action in an effort to fulfill the 2030 Agenda for Sustainable Development, “urging governments to implement existing commitments and eliminate laws, policies and regulations that discriminate against women.”<sup>14</sup> The affirmation warns that the “[f]ailure to expedite women’s participation and decision-making in public life and the elimination of violence against women will make it impossible to achieve the Sustainable Development Goals by 2030.”<sup>15</sup> But several delegations voiced concerns during the UNCSW session, with the delegation from Saudi Arabia stating that “[w]e are against anything that goes against our Sharia” and Libya’s representative emphasizing that any action towards the 2030 goals should respect a state’s sovereignty.<sup>16</sup>

*1. Right to Economic and Social Equality*

The gender gap in economic participation and opportunity, which includes, among other things, gaps in participation, pay, and advancement, globally, increased to 32.3 percent in 2021.<sup>17</sup> Of 153 countries studied, only ninety-eight have improved in gender parity, while fifty-five have regressed.<sup>18</sup> Only 52.6 percent of women between the ages of fifteen and sixty-four are in the labor force, compared to 80 percent of their male counterparts.<sup>19</sup> In the United States, approximately 350,000 women left the workforce in August and September, while 321,000 men reentered the workforce.<sup>20</sup>

Unpaid care and domestic duties continue to be a burden primarily shouldered by women and ignored by governmental policy responses as the COVID-19 pandemic persists.<sup>21</sup> Out of 1,700 social protection and labor market measures, “only 11 percent address unpaid care through provisions

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14. Press Release, UN Commission on the Status of Women, *Concluding Annual Session, Women’s Commission Approves Text on Bolstering Regulatory, Legal Framework for Gender Equality, Warning COVID-19 is Rolling Back Progress* (Mar. 26, 2021), <https://www.un.org/press/en/2021/wom2212.doc.htm>.

15. *Id.*

16. *Id.*

17. See WORLD ECON. F., *THE GLOBAL GENDER GAP REPORT 2021* 5, 9 (2021), [https://www3.weforum.org/docs/WEF\\_GGGR\\_2021.pdf](https://www3.weforum.org/docs/WEF_GGGR_2021.pdf).

18. See *id.* at 9.

19. See *id.* at 13.

20. See Jonnelle Marte, *Women Left U.S. Workforce Last Month, But in Fewer Numbers Than a Year Ago*, REUTERS (Oct. 8, 2021), <https://www.reuters.com/business/women-left-us-workforce-last-month-fewer-numbers-than-year-ago-2021-10-08/>.

21. See UN WOMEN, *BEYOND COVID-19: A FEMINIST PLAN FOR SUSTAINABILITY AND SOCIAL JUSTICE* 38 (2021), <https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2021/Feminist-plan-for-sustainability-and-social-justice-en.pdf>.

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such as extended family leaves . . . [and] emergency childcare services for essential workers.”<sup>22</sup> While women in higher wage jobs have had the ability to shift to full-time telework, evidence suggests that working conditions for many women in low-wage jobs have worsened due to an increase in care responsibilities with unchanged expectations from employers.<sup>23</sup>

## 2. *Marriage Rights*

In July, the European Court of Human Rights (ECHR) ruled that Russia was in violation of the European Convention on Human Rights by refusing to grant same-sex couples legal recognition.<sup>24</sup> The ECHR stated that it could identify no important government interest that would outweigh the rights of same-sex couples to have their unions legally recognized.<sup>25</sup> On September 26, 2021, Switzerland voted by public referenda to make same-sex marriage and the right to adopt by same-sex couples legal.<sup>26</sup> In March 2021, the Sapporo District Court of Japan issued the nation’s first-ever ruling on marriage equality, declaring that the government’s ban on same-sex marriage was unconstitutional,<sup>27</sup> noting that sexual orientation cannot be chosen or changed, and concluding that legal benefits denied to same-sex couples was unreasonably discriminatory.<sup>28</sup> On June 16, 2021, Baja California and the Congress of Sinaloa legalized same-sex marriage,<sup>29</sup> and, shortly thereafter, in August, the Congress of Yucatan voted in favor of marriage equality, joining twenty-one other Mexico states who have legalized same-sex marriage.<sup>30</sup>

In January 2021, President Luis Abinader of the Dominican Republic signed into law a bill that bans child marriage for anyone under the age of eighteen.<sup>31</sup> In the United States, Rhode Island and New York became the

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22. *Id.* at 38–39.

23. See INT’L LAB. ORG., BUILDING FORWARD FAIRER: WOMEN’S RIGHT TO WORK AND AT WORK THE CORE OF THE COVID-19 RECOVERY 5 (2021), [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms\\_814499.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_814499.pdf).

24. See *Fedatova v. Russia*, App. No. 40792/10, ¶ 56 (July 13, 2021), <https://hudoc.echr.coe.int/eng#%7B%22tabview%22%3A%5B%22document%22%5D%22itemid%22%3A%22001-211016%22%5D%7D>.

25. *Id.* ¶ 55.

26. See *Volksabstimmung vom 26.09.2021*, BUNDESKANZLEI [Federal Chancellery of Switzerland] (Sept. 26, 2021), <https://www.bk.admin.ch/ch/d/pore/va/20210926/index.html>.

27. See *Japan Court Rules Failure to Recognize Same-Sex Marriage Unconstitutional*, JAPAN TIMES (Mar. 17, 2021) <https://www.japantimes.co.jp/news/2021/03/17/national/crime-legal/same-sex-marriage-landmark-ruling/>.

28. See *id.*

29. See *Baja California Congress Approves Same-Sex Marriage*, MEX. DAILY POST (June 17, 2021), <https://mexicodailypost.com/2021/06/17/baja-california-congress-approves-same-sex-marriage/>.

30. See *Yucatán Congress Says Yes to Same-Sex Marriage*, MEX. DAILY POST (Aug. 26, 2021), <https://mexiconewsdaily.com/news/yucatan-congress-says-yes-to-same-sex-marriage/>.

31. See Escuela Nacional De La Judicatura, *Ley No. 1-21 que modifica y deroga varias disposiciones del Código Civil y de la Ley No.659 del 1944, sobre Actos del Estado Civil. Prohíbe el matrimonio entre personas menores de 18 años. G. O. No. 11004 del 12 de enero de 2021* (2021), <https://>

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fifth and sixth states, respectively, to ban child marriage without exception,<sup>32</sup> raising the age of consent to eighteen years old.<sup>33</sup> Meanwhile, North Carolina passed a bill raising the age of consent to marriage from fourteen to sixteen years old.<sup>34</sup>

### 3. *Right to Health*

On September 1, 2021, Texas passed the most restrictive abortion law in the United States,<sup>35</sup> which limits abortions to the first six weeks of pregnancy and “gives any person the right to sue doctors who perform” abortions past this period.<sup>36</sup>

On January 28, 2021, a ruling by Poland’s Constitutional Tribunal came into effect, which held that abortions in cases of fetal abnormalities are unconstitutional.<sup>37</sup>

In a landmark ruling in September 2021, Mexico’s Supreme Court ruled that the criminalization of abortion was unconstitutional.<sup>38</sup> In October, India’s Parliament amended its Medical Termination of Pregnancy Act of 1971 to increase the upper gestation limits for certain permissible abortions and extend abortion services to unmarried women who experience contraceptive failure.<sup>39</sup> Iran’s President enacted a law in November, which “bars public health-care providers from offering free contraception, prohibits voluntary sterilization, and offers more benefits to childbearing families.”<sup>40</sup> In September, the French Health Minister announced that the government would begin giving out free contraceptives to women up to the age of twenty-five and covering medical visits relating to contraception.<sup>41</sup>

In the United States, the STOP FGM Act of 2020 was signed into law on January 5, 2021, which gives federal authorities the power to prosecute

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[biblioteca.enj.org/bitstream/handle/123456789/122083/LE1-2021.pdf?sequence=1&isAllowed=y](https://biblioteca.enj.org/bitstream/handle/123456789/122083/LE1-2021.pdf?sequence=1&isAllowed=y) (last visited Nov. 10, 2021).

32. See 15 R.I. Gen. Laws § 15-2-14 (2021); N.Y. Dom. Rel. § 7(1) (McKinney 2021).

33. See *id.*

34. See 2021 N.C. Sess. Laws 2021-119 (S.B. 35).

35. See H.B. 1515, 87th Leg., Reg. Sess. (Tex. 2021).

36. *Texas Abortion Law to Stay in Place Until Supreme Court Decision*, BBC NEWS (Oct. 2, 2021), <https://www.bbc.com/news/world-us-canada-59017479>; see also H.B. 1515, 87th Leg., Reg. Sess. (Tex. 2021) at §§ 171.204, 171.208.

37. *Poland Enforces Controversial Near-Total Abortion Ban*, BBC (Jan. 28, 2021), <https://www.bbc.com/news/world-europe-55838210>.

38. See Lizbeth Diaz and Laura Gottesdiener, *Mexico’s Top Court Decriminalizes Abortion in Watershed Moment*, REUTERS (Sept. 8, 2021), <https://www.reuters.com/world/americas/mexico-supreme-court-rules-criminalizing-abortion-is-unconstitutional-2021-09-07/>.

39. See The Medical Termination of Pregnancy (Amendment) Act, 2021, §§ 3, 4 (India).

40. Miriam Berger, *Iran Doubles Down on Abortion and Contraception Restrictions*, WASH. POST (Dec. 1, 2021), <https://www.washingtonpost.com/world/2021/12/01/iran-doubles-down-abortion-contraception-restrictions/>.

41. See *France to Offer Free Birth Control to All Women up to 25*, AP NEWS (Sept. 9, 2021), <https://apnews.com/article/europe-health-france-birth-control-f5a1df14f886dfeff4c3d43dc530129d>.

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individuals engaged in, or conspiring to engage in, female genital mutilation (FGM) and raises the maximum penalty from five years to ten years of imprisonment.<sup>42</sup> On March 15, 2021, Tanzania instituted a national strategy to eliminate FGM, which includes national health campaigns and new legal enforcement mechanisms.<sup>43</sup> In April, Egypt enhanced its criminal penalties for FGM, raising the maximum prison sentence to twenty years.<sup>44</sup> Additionally, the Kenyan High Court upheld the nation's ban on FGM in its ruling on a petition that claimed that the ban was unconstitutional,<sup>45</sup> stating that "FGM cannot be rendered lawful because the person on whom the act was performed consented . . . [n]o person can license another to perform a crime."<sup>46</sup>

## **II. Gender-Based and Sexual Violence, Sexual Harassment, and Assault**

Gender-based violence is one of the most pervasive human rights violations, capturing both physical, sexual, mental, or economic harm as a result of one's biological sex or gender identity.<sup>47</sup> Approximately one in three women are subjected to physical or sexual intimate partner violence, or non-partner sexual violence, at least once in their lifetime.<sup>48</sup> A "shadow pandemic" of violence against women and girls has taken place during the COVID-19 pandemic, with increased violence being reported.<sup>49</sup> Continued lockdowns and support service disruptions have further impacted women's safety from violence.<sup>50</sup>

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42. See Strengthening the Opposition to Female Genital Mutilation Act of 2020, Pub. L. No. 116-309, 134 Stat. 4922 (U.S.), <https://www.congress.gov/116/plaws/publ309/PLAW-116publ309.pdf>.

43. See *Tanzania Presents National Strategy to Eliminate Female Genital Mutilation*, NEWS GHANA (Feb. 7, 2021), <https://newsghana.com.gh/tanzania-presents-national-strategy-to-eliminate-female-genital-mutilation/>

44. See Menna A. Farouk, *Egypt Toughens Penalties for FGM: Activists Remain Skeptical*, REUTERS (Apr. 26, 2021), <https://news.trust.org/item/20210426133011-lktur/>.

45. See Humphrey Malalo & Nazanine Moshiri, *A Lawsuit by a Female Doctor Challenging Kenya's Ban on FGM Was Struck Down by the High Court*, REUTERS (Mar. 17, 2021), <https://news.trust.org/item/20210317134438-oy6j7/>.

46. *Kenya's High Court Rules Anti-FGM Law Is Constitutional: A Jubilant Day For Girls And Women In Kenya*, EQUALITY NOW (Mar. 17, 2021), [https://www.equalitynow.org/press\\_release/kenya\\_fgm\\_case\\_response\\_2021/](https://www.equalitynow.org/press_release/kenya_fgm_case_response_2021/).

47. See Meghan Ott, *Series: What Does That Mean? Gender-based Violence*, WOMEN FOR WOMEN (June 4, 2021), <https://www.womenforwomen.org/blogs/series-what-does-mean-gender-based-violence>.

48. See Press Release, UN Women, *Devastatingly Pervasive: 1 in 3 Women Globally Experience Violence* (Mar. 9, 2021), <https://www.unwomen.org/en/news/stories/2021/3/press-release-1-in-3-women-globally-experience-violence>.

49. *Id.*

50. *See id.*

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A. SEXUAL HARASSMENT

1. *Domestic Sexual Harassment Laws*

Two new laws went into effect in Texas on September 1, 2021, which “lower the statute of limitations for filing sexual harassment charges, expand who can file suits, and broaden liability to individual managers.”<sup>51</sup> Under the new laws, the time period for filing a complaint is almost doubled, permitting employees up to 300 days after the alleged misconduct took place to file a claim for sexual harassment.<sup>52</sup> Further, employees may now bring sexual harassment claims for both the conduct itself and “for an employer’s failure to take immediate corrective action.”<sup>53</sup>

2. *Regional and International Sexual Harassment Laws*

The Violence and Harassment Convention (Convention No. 190), which is the first international treaty recognizing “the right of everyone to a world of work free from violence and harassment,” came into force on June 25, 2021, two years after it was adopted by the International Labour Organization (ILO).<sup>54</sup> It provides “the first international definition of violence and harassment in the world of work, including gender-based violence and harassment,”<sup>55</sup> and has been ratified by nine countries.<sup>56</sup>

B. ELIMINATION OF VIOLENCE AGAINST WOMEN

This year marks the ten-year anniversary of the Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention), a human rights treaty aimed to

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51. Erin Mulvaney, *Texas Sexual Harassment Laws Signal Stronger #MeToo Push*, BLOOMBERG L. (Sept. 2, 2021), <https://news.bloomberglaw.com/daily-labor-report/texas-sexual-harassment-laws-signal-stronger-metoo-push>.

52. See Cristina Rodriguez & Sydney Rupe, *Texas Expands protections for Sexual Harassment Claims*, JD SUPRA (Oct. 7, 2021), <https://www.jdsupra.com/legalnews/texas-expands-protections-for-sexual-6764509/>.

53. *Id.*

54. INT’L LAB. ORG., VIOLENCE & HARASSMENT IN THE WORLD OF WORK: A GUIDE ON CONVENTION NO. 190 AND RECOMMENDATION NO. 206 2 (2021), available at [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms\\_814507.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_814507.pdf)

55. Press Release, Int’l Lab. Org., *First International Treaty to Address Violence and Harassment Comes Into Force* (June 21, 2021), [https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS\\_806022/lang--en/index.htm](https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_806022/lang--en/index.htm).

56. See Press Release, Int’l Lab. Org., *Italy Ratifies the ILO Convention (No. 190) on the Elimination of Violence and Harassment in the World of Work* (Oct. 29, 2021), [https://www.ilo.org/rome/risorse-informative/comunicati-stampa/WCMS\\_825453/lang--en/index.htm](https://www.ilo.org/rome/risorse-informative/comunicati-stampa/WCMS_825453/lang--en/index.htm); see also Violence and Harassment Convention, June 21, 2019, 2133 U.N.T.S. 161, [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300\\_INSTRUMENT\\_ID:3999810](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:3999810).

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promote women's safety.<sup>57</sup> In September, the Members of European Parliament (MEPs) adopted a legislative initiative "demanding targeted legislation and policies to address all forms of violence and discrimination based on gender" and advocated for "gender-based violence" to be listed as a crime under Article 83 of the Treaty on the Functioning of the European Union.<sup>58</sup>

1. *Domestic Violence as a Criminal Offense*

In January 2021, Iran's Council of Ministers approved the Protection, Dignity and Security of Women against Violence bill, which defines violence as "any behavior that is committed against a woman due to her gender or vulnerable position or type of relationship and causes harm or damage to her body or mind or personality, dignity or restriction or deprivation of her legal rights and freedoms."<sup>59</sup> The bill, among other mandates, creates an obligation on the judiciary to allocate resources towards survivors of domestic violence and requires an increase in medical and psychological services for survivors.<sup>60</sup>

On July 28, 2021, Law No. 14, 188 came into effect in Brazil, amending Brazil's Penal Code to include "a penal classification for psychological violence against women,"<sup>61</sup> which is punishable by up to two years in prison, and a punishment of up to four years' imprisonment for bodily harm "committed against women merely because of their gender."<sup>62</sup>

2. *Online Abuse and Violence*

In 2021, online harassment created barriers for women, including women lawyers, politicians, and activists.<sup>63</sup> A study of online violence directed at political candidates in Uganda during the January 2021 election showed that

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57. See Press Release, Council of Eur., *Italy and the Council of Europe Call for an End to Violence Against Women, Including Online* (Nov. 25, 2021), <https://www.coe.int/en/web/portal/-/italy-and-the-council-of-europe-call-for-end-to-violence-against-women-including-online>.

58. Nicolas Delaleu & Kyriakos Klosidis, *Make Gender-Based Violence a Crime Under EU Law, MEPs Say*, EUROPEAN PARLIAMENT (Sept. 9, 2021), <https://www.europarl.europa.eu/news/en/press-room/20210910IPR11927/make-gender-based-violence-a-crime-under-eu-law-meps-say>.

59. Nadia Murray-Ragg & Victoria U Wellington, *Iran Cabinet Approves Bill to Protect Women from Violence*, JURIST (Jan. 5, 2021), <https://www.jurist.org/news/2021/01/iran-cabinet-approves-bill-to-protect-women-from-violence/>.

60. Niyati Verma, *Dignity, & Security of Women Against Violence in Iran*, ORG. FOR WORLD PEACE (Mar 4, 2021), <https://theowp.org/protection-dignity-and-security-of-women-against-violence-in-afghanistan/>.

61. Eduardo Soares, *Brazil: New Program Created to Combat Domestic and Family Violence Against Women*, LIBRARY OF CONGRESS U.S. LIBR. OF CONG. (Aug. 2, 2021), <https://www.loc.gov/item/global-legal-monitor/2021-08-02/brazil-new-program-created-to-combat-domestic-and-family-violence-against-women>.

62. *Id.*

63. See *The Impact of Online Violence Against Women in the 2021 Uganda General Elections*, NAT'L DEMOCRATIC INST. (Sept. 1, 2021), <https://www.ndi.org/our-stories/impact-online-violence-against-women-2021-uganda-general-elections>.

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women candidates experienced online violence, including sexual harassment, trolling, gendered disinformation, and gendered insults.<sup>64</sup> In Libya, Lawyers for Justice released a report detailing that extensive online abuse is endured by Libyan women and goes unchecked by authorities, thus forcing women out of public spheres due to silencing and intimidation.<sup>65</sup>

In May 2021, the United Kingdom presented its Online Safety Bill.<sup>66</sup> The bill imposes a duty of care on online platforms to protect their users from “illegal and otherwise harmful content online”<sup>67</sup> and on social media providers to ensure adequate reporting of abusive material and to conduct regular risk assessments of illegal content; however, the bill is silent on gendered disinformation, running the risk that “it is by no means clear what, and whose speech is considered protected under the Bill.”<sup>68</sup>

### 3. *Regional Instruments and Guidelines*

In Latin America, the 1994 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Belém do Pará Convention) is the principal treaty for tackling harassment and other forms of violence against women.<sup>69</sup> The Belém do Pará Convention has been ratified by all the Member States to the Organization of American States (OAS), with the exception of Canada, Cuba, and the United States.<sup>70</sup> Under the Belém do Pará Convention, the Follow-up Mechanism to the Belém do Pará Convention (MESECVI) monitors the implementation of the treaty by its parties.<sup>71</sup> MESECVI formally began the Fourth Multilateral Evaluation Round in 2021, which emphasized the right to

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64. *See id.*

65. *See Urgent Action Needed to Address Shocking Levels of Online Violence Against Libyan Women*, LAW. FOR JUST. IN LIBER. (Mar. 10, 2021), <https://www.libyanjustice.org/news/urgent-action-needed-to-address-shocking-levels-of-online-violence-against-libyan-women>.

66. *See* Draft Online Safety Bill 2021, 2, §§ 7 & 8 (Gr. Brit.); Draft Online Safety Bill 2021, Impact Assessment, at 17 (UK); *see also* DEP'T FOR DIGITAL, CULTURE, MEDIA & SPORT, DRAFT ONLINE SAFETY BILL 2021, IMPACT ASSESSMENT 17 (UK), <https://www.gov.uk/government/publications/draft-online-safety-bill>.

67. Christoph Schmon, *UK's Draft Online Safety Bill Raises Serious Concerns Around Freedom of Expression*, ELEC. FRONTIER FOUND. (July 14, 2021), <https://www.eff.org/deeplinks/2021/07/uks-draft-online-safety-bill-raises-serious-concerns-around-freedom-expression>.

68. Ellen Judson, *The Online Safety Bill: Will It Protect Women Online?*, HEINRICH-BÖLL-STIFTUNG (June 9, 2021), <https://eu.boell.org/en/2021/06/09/online-safety-bill-will-it-protect-women-online>.

69. Org. of Am. States, Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, June 9, 1994, 33 I.L.M. 1534 [Belém do Pará Convention]; *see also* Org. of Am. State and Council of Europe, *Regional Tools to Fight Violence Against Women: The Belém do Pará and Istanbul Conventions*, (Feb. 2014) [hereinafter *Regional Tools*].

70. *See* ORG. OF AM. STATES, INTER-AMERICAN CONVENTION ON THE PREVENTION, PUNISHMENT & ERADICATION OF VIOLENCE AGAINST WOMEN: STATUS OF SIGNATURES AND RATIFICATIONS I (2011), <https://www.oas.org/en/mesecvi/docs/Signatories-Table-EN.pdf>.

71. *See What is MESECVI?*, ORG. OF AM. STATES, <https://www.oas.org/en/mesecvi/about.asp> (last visited Nov. 21, 2021).

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access to justice for women in the region from a gender and diversity perspective.<sup>72</sup> In 2021, MESECVI continued to monitor the consequences of the COVID-19 pandemic and the measures to mitigate the pandemic on the lives of women and girls in the region and to develop a strategy to deepen MESECVI's work in the English-speaking Caribbean countries and Haiti.<sup>73</sup>

In Europe, the 2011 Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) is the principal instrument for addressing violence against women.<sup>74</sup> May 11, 2021, marked ten years from the date that the Istanbul Convention was opened for signature.<sup>75</sup> As of November 2021, the European Union and twelve member states of the Council of Europe have signed the Istanbul Convention, and thirty-four have ratified it.<sup>76</sup> In March 2021, Turkey, one of the Istanbul Convention's first signatories, notified its withdrawal from the Istanbul Convention, which took effect on July 1, 2021.<sup>77</sup> In June 2021, Liechtenstein ratified the Convention.<sup>78</sup> Under the Istanbul Convention, the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) monitors the implementation of the treaty by its parties.<sup>79</sup>

In Southeast Asia, the Association of Southeast Asian Nations (ASEAN) Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) held its twenty-third meeting virtually in October with representatives from all ten member states.<sup>80</sup> The meeting focused on harnessing the efforts of ASEAN to promote and protect the rights of women and children during the COVID-19 recovery process and the

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72. See ORG. OF AM. STATES, AGREEMENTS OF THE SEVENTEENTH MEETING OF THE COMMITTEE OF EXPERTS OF THE MECHANISM TO FOLLOW-UP ON THE IMPLEMENTATION OF THE INTER-AMERICAN CONVENTION ON THE PREVENTION, PUNISHMENT, & ERADIATION OF VIOLENCE AGAINST WOMEN, "CONVENTION OF BELEM DO PARA" 1-2 (2020), [https://www.oas.org/en/mesecvi/docs/MESECVI\\_XVII\\_CEVIL\\_doc.261.AcuerdosENG.pdf](https://www.oas.org/en/mesecvi/docs/MESECVI_XVII_CEVIL_doc.261.AcuerdosENG.pdf).

73. See *id.*

74. See Convention on Preventing and Combating Violence against Women and Domestic Violence, May 11, 2011, C.E.T.S. No. 210 [Istanbul Convention], <https://rm.coe.int/168008482e>; see also *Regional Tools*, *supra* note 69.

75. See *10 Years of the Istanbul Convention*, COUNCIL OF EUR., <https://www.coe.int/en/web/istanbul-convention/10th-anniversary> (last visited Nov. 21, 2021).

76. See *Key Facts About the Istanbul Convention*, COUNCIL OF EUR., <https://www.coe.int/en/web/istanbul-convention/key-facts> (last visited Nov. 21, 2021).

77. See *id.*

78. See *Country-Monitoring Work*, COUNCIL OF EUR., <https://www.coe.int/en/web/istanbul-convention/country-monitoring-work> (last visited Nov. 21, 2021).

79. See *About GREVIO: Group of Experts on Action Against Violence Against Women & Domestic Violence*, COUNCIL OF EUR., <https://www.coe.int/en/web/istanbul-convention/grevio> (last visited Nov. 21, 2021).

80. See *ACWC Champions the Well-Being of All Women and Children Towards an Inclusive COVID-19 Recovery in ASEAN*, ASS'N OF SE. ASIAN NATIONS, <https://asean.org/acwc-champions-the-well-being-of-all-women-and-children-towards-an-inclusive-covid-19-recovery-in-asean/> (last visited Nov. 21, 2021).

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development of the new ACWC Work Plan 2021-2025 as a living blueprint to drive ASEAN to develop regional policy actions that improve the lives of women and children in ASEAN.<sup>81</sup>

### **III. Human Trafficking**

Despite vaccine rollouts and resumption of normal activities in many regions, the effects of the COVID-19 pandemic increased the number of people vulnerable to human trafficking,<sup>82</sup> especially women and girls, who were often trafficked domestically through local and online recruitment and exploitation in 2021.<sup>83</sup> Migrant status, ethnicity, disability, socio-economic status, and other factors exacerbated circumstances for trafficking victims.<sup>84</sup> Stay-at-home orders and travel restrictions increased rates of gender-based violence and substance abuse, raising risk factors for human trafficking.<sup>85</sup> Governments diverted resources away from anti-trafficking efforts toward the pandemic response; investigations, prosecutions, and adjudications were suspended or postponed.<sup>86</sup> Many relief organizations were unable to respond to reports due to reduced funding and COVID-19 mitigation efforts.<sup>87</sup> Business closures drove trafficking activities even further underground; operations moved out of bars, massage parlors, and brothels and into private dwellings.<sup>88</sup> Public reporting of suspected trafficking crimes decreased in many regions, impeding the ability to rescue victims and bring traffickers to justice.<sup>89</sup>

Child sexual exploitation—especially online—and child marriage also increased in some regions due to school closures, reduced parental supervision, and economic hardship.<sup>90</sup> Rising rates of extreme poverty increased risks for the most vulnerable; it is estimated that half of the trafficked victims in poorer countries were children, and most were forced into labor.<sup>91</sup> Racist stereotyping and discrimination against child victims led

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81. *See id.*

82. *See* U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT JUNE 2021 2 (2021), <https://www.state.gov/wp-content/uploads/2021/09/TIPR-GPA-upload-07222021.pdf> [hereinafter TRAFFICKING IN PERSONS REPORT 2021].

83. *See* U.N. OFFICE ON DRUGS & CRIME, THE EFFECTS OF THE COVID-19 PANDEMIC ON TRAFFICKING IN PERSONS & RESPONSES TO THE CHALLENGES: A GLOBAL STUDY OF EMERGING EVIDENCE 28 (2021) [hereinafter EFFECTS OF THE COVID-19 PANDEMIC ON TRAFFICKING IN PERSONS], [https://www.unodc.org/documents/human-trafficking/2021/The\\_effects\\_of\\_the\\_COVID-19\\_pandemic\\_on\\_trafficking\\_in\\_persons.pdf](https://www.unodc.org/documents/human-trafficking/2021/The_effects_of_the_COVID-19_pandemic_on_trafficking_in_persons.pdf).

84. *See id.*

85. *See* TRAFFICKING IN PERSONS REPORT 2021, *supra* note 82, at 2, 4.

86. *See id.* at 2, 8, 10, 12.

87. *See id.* at 2, 7, 8.

88. EFFECTS OF THE COVID-19 PANDEMIC ON TRAFFICKING IN PERSONS, *supra* note 83, at 8.

89. *See id.* at 26.

90. *See* TRAFFICKING IN PERSONS REPORT 2021, *supra* note 82, at 4, 6, 7.

91. *See Human Trafficking: UN Chief Calls for Action as COVID Leave 'Many Millions' More Vulnerable*, UN NEWS (July 29, 2021), <https://news.un.org/en/story/2021/07/1096682>.

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to failed responses by governmental agencies and private-sector actors.<sup>92</sup> Case studies showed that migrant and displaced women and children were especially at risk for sexual and domestic work trafficking due to debt bonding.<sup>93</sup> Climate change was revealed as a “stress multiplier” to human trafficking.<sup>94</sup> Climate displacement and climate migration increased risks of sex trafficking, labor trafficking, and trafficking-related violence against women and girls during and after extreme weather events.<sup>95</sup>

Out of 40.3 million people estimated to be “living in modern slavery,” roughly 71 percent were women and girls, who were mostly trafficked “for the purpose of sexual exploitation.”<sup>96</sup> But due to the underground nature of human trafficking, actual figures are thought to have far exceeded reported violations.<sup>97</sup> Data from the United Nations Office on Drugs and Crime (UNODC) estimates that 75 percent of detected trafficked victims are women and girls.<sup>98</sup> Throughout the pandemic, a lack of data created challenges to effective assessments and anti-trafficking efforts.<sup>99</sup>

**A. INTERNATIONAL EFFORTS TO COMBAT HUMAN TRAFFICKING**

As traffickers adapted to the “new normal,” anti-trafficking forces attempted to keep pace.<sup>100</sup> International organizations led the efforts to assess the impact of COVID-19 on anti-trafficking efforts and provided recommendations on how to best adapt policy and utilize funds.<sup>101</sup> Civil society organizations cooperated and consolidated resources.<sup>102</sup> Victim service providers shifted to online platforms to provide support, such as legal aid, counseling services, food, and hygiene products.<sup>103</sup> Nevertheless, as a result of the pandemic, anti-trafficking efforts fell short: “victims went unidentified, survivors were underserved, and traffickers were not held accountable.”<sup>104</sup>

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92. *See id.*

93. *See* INT’L INST. FOR ENV’T AND DEV., CLIMATE-INDUCED MIGRATION & MODERN SLAVERY: A TOOLKIT FOR POLICY-MAKERS 6, 26 (2021), <https://pubs.iied.org/sites/default/files/pdfs/2021-09/20441G.pdf> [hereinafter CLIMATE-INDUCED MIGRATION & MODERN SLAVERY].

94. *Id.* at 14.

95. *See id.* at 7, 14, 17.

96. *See id.* at 12.

97. *See* EFFECTS OF THE COVID-19 PANDEMIC ON TRAFFICKING IN PERSONS, *supra* note 83, at 26.

98. *See* *New UNODC Toolkit Puts Human Rights & Gender Equality at the Forefront*, UN NEWS (Feb. 17, 2021), <https://www.unodc.org/unodc/en/frontpage/2021/February/new-unodc-toolkit-puts-human-rights-and-gender-equality-at-the-forefront.html>.

99. *See* TRAFFICKING IN PERSONS REPORT 2021, *supra* note 82, at 12.

100. *See* EFFECTS OF THE COVID-19 PANDEMIC ON TRAFFICKING IN PERSONS, *supra* note 83, at 8-11; *see also* TRAFFICKING IN PERSONS REPORT 2021, *supra* note 82, at 2, 12.

101. *See* TRAFFICKING IN PERSONS REPORT 2021, *supra* note 82, at 12.

102. *See id.* at 13.

103. *See id.*

104. *Id.* at 7.

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In July 2021, the UNDOC released a new study, *The Effects of the Covid-19 Pandemic on Trafficking in Persons and Responses to the Challenges*.<sup>105</sup> The report seeks to examine the impacts on trafficked populations, how victims of trafficking were affected, and the challenges faced by anti-trafficking forces throughout the pandemic to learn from the past and develop strategies to improve future responses that will “leav[e] no one behind.”<sup>106</sup>

In February, the UNODC and the European Union, within the framework of the Global Action against Trafficking in Persons and the Smuggling of Migrants (GLO.ACT) and in partnership with the International Organization for Migration (IOM), jointly published the *Toolkit for Mainstreaming Human Rights and Gender Equality into Criminal Justice Interventions to Address Trafficking in Persons and Smuggling of Migrants* (UNODC Toolkit).<sup>107</sup> The UNODC Toolkit seeks to incorporate human rights and gender equality considerations into all aspects of addressing human trafficking and migrant smuggling for UNODC staff, criminal justice experts, and those working within its GLO.ACT partner countries.<sup>108</sup> The UNODC Toolkit has been made publicly available to assist outside practitioners, entities, and other stakeholders working to prevent and respond to human trafficking.<sup>109</sup>

In October 2021, the UNODC issued a new publication, *The Concept of ‘Harbouring’ in the Trafficking in Persons Protocol*.<sup>110</sup> The paper determines that the concept of harboring has been understood differently from country to country due to its varying interpretations and translations in different language versions in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (UN TIP Protocol), where the term is defined.<sup>111</sup> The paper seeks to clarify legal uncertainties and enhance understanding of the concept of harboring as a criminal act, thereby increasing its effectiveness as a tool for law enforcement, prosecutors, and courts in bringing traffickers to justice and

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105. EFFECTS OF THE COVID-19 PANDEMIC ON TRAFFICKING IN PERSONS, *supra* note 83.

106. *Id.* at 8–9.

107. See *New UNODC Toolkit Puts Human Rights & Gender Equality at the Forefront*, *supra* note 98; see also U.N. OFFICE ON DRUGS & CRIME, UNODC TOOLKIT FOR MAINSTREAMING HUMAN RIGHTS & GENDER EQUALITY INTO CRIMINAL JUSTICE INTERVENTIONS TO ADDRESS TRAFFICKING IN PERSONS & SMUGGLING OF MIGRANTS (2021), [https://www.unodc.org/documents/human-trafficking/GLO-ACTII/UNODC\\_Toolkit\\_for\\_mainstreaming\\_Human\\_Rights\\_and\\_Gender\\_Equality\\_February\\_2021.pdf](https://www.unodc.org/documents/human-trafficking/GLO-ACTII/UNODC_Toolkit_for_mainstreaming_Human_Rights_and_Gender_Equality_February_2021.pdf) [hereinafter UNODC TOOLKIT].

108. See UNODC TOOLKIT, *supra* note 107, at 6.

109. *Id.*

110. See generally U.N. OFFICE ON DRUGS & CRIME, THE CONCEPT OF ‘HARBORING’ IN THE TRAFFICKING IN PERSONS PROTOCOL (2021), [https://www.unodc.org/documents/human-trafficking/The\\_Concept\\_of\\_Harbouring\\_Issue\\_Paper.pdf](https://www.unodc.org/documents/human-trafficking/The_Concept_of_Harbouring_Issue_Paper.pdf).

111. See G.A. Res. 55/25, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, U.N. Doc. A/55/383 (Vol. II), at (Dec. 12, 2000), [https://treaties.un.org/doc/Treaties/2000/11/20001115%2011-38%20AM/Ch\\_XVIII\\_12\\_ap.pdf](https://treaties.un.org/doc/Treaties/2000/11/20001115%2011-38%20AM/Ch_XVIII_12_ap.pdf).



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protecting victims.<sup>112</sup> As of 2021, there are 117 signatories and 178 states party to the UN TIP Protocol.<sup>113</sup>

**B. REGIONAL AND TRANSREGIONAL EFFORTS TO COMBAT HUMAN TRAFFICKING**

**1. North America**

On July 30, 2021, World Day against Trafficking in Persons, the U.S. Department of Homeland Security (DHS) issued a new *Continued Presence Resource Guide* to aid law enforcement agencies at all levels in combating human trafficking through victim and witness support.<sup>114</sup> Continued Presence is a two-year, renewable immigration status afforded to noncitizen victims of human trafficking or witnesses to investigations and allows recipients to apply for certain benefits and seek justice against their traffickers while remaining in the United States.<sup>115</sup> DHS also released a fact sheet to assist victims and witnesses in the business community in reporting forced labor and other crimes occurring in China.<sup>116</sup> The fact sheet provides a warning to those engaging in business in China to comply with U.S. laws or face federal prosecution for forced labor practices in their supply chains.<sup>117</sup>

In November, the UNODC and Canada's Anti-Crime Capacity Building Program (ACCBP) announced the creation of the Strengthening Transregional Action and Responses Against the Smuggling of Immigrants (STARSON), a new two-year initiative created to disrupt transcontinental migrant smuggling to North America by supporting states along the smuggling routes.<sup>118</sup> The project seeks to shift the focus of authorities away from the criminalization of vulnerable migrants escaping extreme poverty, natural disasters, war zones, or persecution to ensure that smuggled migrants are treated fairly and humanely using a gender-responsive approach and to target the organized criminal enterprises that abuse and exploit migrant

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112. See Newsroom, *No Safe Harbour: Lifting the Lid on a Misunderstood Trafficking Crime*, MOD. DIPL. (Oct. 24, 2021), <https://moderndiplomacy.eu/2021/10/24/no-safe-harbour-lifting-the-lid-on-a-misunderstood-trafficking-crime/>.

113. See Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, ch. XVIII, § 12.a, Dec. 12, 2000, 2237 U.N.T.S. 319, <https://treaties.un.org/doc/Publication/MTDGS/Volume%20II/Chapter%20XVIII/XVIII-12-a.en.pdf>.

114. See Press Release, U.S. Dep't of Homeland Security, *DHS Releases New Resources to Combat Human Trafficking on World Day Against Trafficking in Persons* (July 30, 2021), <https://www.dhs.gov/news/2021/07/30/dhs-releases-new-resources-combat-human-trafficking-world-day-against-trafficking>.

115. See *id.*

116. See *id.*

117. See *id.*

118. See *UNODC and Canada Launch New Project to Counter Migrant Smuggling*, U.N. OFFICE ON DRUGS & CRIME (Nov. 2, 2021), <https://www.unodc.org/unodc/en/human-trafficking/Webstories2021/new-project-to-counter-migrant-smuggling.html>.

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people and expose them to human trafficking.<sup>119</sup> While migrant smuggling and human trafficking are distinctly different crimes, smuggled migrants are at heightened risk of human trafficking.<sup>120</sup>

## 2. *Europe*

In January 2021, the Office for Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Co-operation in Europe (OSCE) launched the International Survivors of Trafficking Advisory Council (ISTAC).<sup>121</sup> ISTAC consists of twenty-one of the leading survivors of human trafficking from around the world.<sup>122</sup> The initiative acknowledges the role of survivors in all aspects of combatting human trafficking.<sup>123</sup>

In April, the European Commission adopted the EU Strategy on Combatting Trafficking in Human Beings, to be implemented in the period from 2021 to 2025.<sup>124</sup> It provides for a comprehensive plan to end modern slavery: “from preventing the crime, and protecting and empowering victims to bringing traffickers to justice.”<sup>125</sup> The EU Strategy on Combatting Trafficking in Human Beings was developed in connection with the EU Strategy to Tackle Organised Crime (2021-2025)<sup>126</sup> and builds on the EU Anti-Trafficking Directive of 2011.<sup>127</sup> The Strategy focuses on reducing demand for trafficking in value chains, collecting data on criminal business

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119. *See id.*

120. *See id.*

121. *See OSCE Human Rights Office Launches Survivors' Advisory Council to Strengthen Fight Against Trafficking on Human Beings*, ORG. FOR SEC. AND CO-OPERATION IN EUR. (Jan. 25, 2021), <https://www.osce.org/odhr/475931>.

122. *See id.*

123. *See id.*

124. *See Together Against Trafficking in Human Beings*, EUR. COMM'N (Apr. 14, 2021) [https://ec.europa.eu/anti-trafficking/eu-strategy-combatting-trafficking-human-beings-2021-2025\\_en](https://ec.europa.eu/anti-trafficking/eu-strategy-combatting-trafficking-human-beings-2021-2025_en).

125. *Id.*; *see also* EUR. COMM'N, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS ON THE EU STRATEGY ON COMBATTING TRAFFICKING IN HUMAN BEINGS 2021-2025 at 3 (2021), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0171&from=EN> [hereinafter EU STRATEGY ON COMBATTING TRAFFICKING IN HUMAN BEINGS].

126. *See* EU STRATEGY ON COMBATTING TRAFFICKING IN HUMAN BEINGS, *supra* note 125; *see also* EUR. COMM'N, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC & SOCIAL COMMITTEE & THE COMMITTEE OF THE REGIONS ON THE EU STRATEGY TO TACKLE ORGANIZED CRIME: 2021-2025 (2021), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0170&from=CEN> [hereinafter EU STRATEGY TO TACKLE ORGANIZED CRIME: 2021-2025].

127. *See Together Against Trafficking in Human Beings*, *supra* note 124; *see also* the Council Directive 2011/36/EU of Apr. 5, 2011, On Preventing & Combatting Trafficking in Human Beings & Protecting Its Victims, & Replacing Council Framework Decision 2002/629/JHA, 2011 O.J. (L 101/1), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0036&from=EN>.

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models, and targeting organized crime groups that exploit victims.<sup>128</sup> Additionally, it focuses on tackling the “culture of impunity” by ramping up the criminal justice response to trafficking activities, including acting against online operations; protecting, supporting, and empowering trafficking victims, especially women and children; and increasing international collaboration.<sup>129</sup>

#### **IV. Women, Peace, and Security**

The United Nations Security Council’s landmark Resolution 1325 highlights the important role women play in conflict resolution, peacekeeping, and peacebuilding.<sup>130</sup> In July 2021, more than twenty years after the adoption of Resolution 1325, over one hundred governments, academic institutions, United Nations entities, organizations, and private sector groups signed the Compact on Women, Peace and Security and Humanitarian Action (the Security Compact).<sup>131</sup> The Security Compact was created as part of a “five-year push for gender equality”<sup>132</sup> and plans to reshape security, peace, and humanitarian action processes to “systematically include women and girls in the decisions that impact their lives.”<sup>133</sup> Signatories to the Security Compact have pledged “to take concrete action on existing commitments for women and girls,”<sup>134</sup> including meaningful participation in peace processes, protection of women’s rights in conflict and crisis, and “increased financing for Women, Peace and Security and gender equality in humanitarian programming.”<sup>135</sup>

In August, in response to the Taliban’s seizure of power in Afghanistan, the United Nations Security Council adopted Resolution 2593, which urges all parties “to seek an inclusive, negotiated political settlement, with the full, equal and meaningful participation of women.”<sup>136</sup>

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128. EU STRATEGY ON COMBATting TRAFFICKING IN HUMAN BEINGS, *supra* note 125, at 8–9.

129. EU STRATEGY TO TACKLE ORGANIZED CRIME: 2021–2025, *supra* note 126; *see also* EU STRATEGY ON COMBATting TRAFFICKING IN HUMAN BEINGS, *supra* note 125.

130. *See* S.C. Res. 1325, ¶¶ 1–11 (Oct. 31, 2000), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N00/720/18/PDF/N0072018.pdf?OpenElement>.

131. Press Release, U.N. Women, *More Than 100 Signatories Launch Compact on Women, Peace & Security and Humanitarian Action at the Generation Equality Forum* (July 2, 2021) <https://www.unwomen.org/en/news/stories/2021/7/press-release-launch-of-the-compact-on-women-peace-and-security-and-humanitarian-action>.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *See* S.C. Res. 2593, ¶ 4 (Aug. 30, 2021), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N21/238/85/PDF/N2123885.pdf?OpenElement>.

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**V. International Criminal Courts and Tribunals and Women's Rights Cases**

**A. INTERNATIONAL CRIMINAL COURT**

On February 4, 2021, the International Criminal Court (ICC) found Dominic Ongwen guilty on charges of rape, sexual slavery, forced marriage, and forced pregnancy as crimes against humanity and war crimes, marking the “the first time that forced marriage, charged as ‘another inhumane act’ constituting a crime against humanity, was prosecuted before the ICC”<sup>137</sup> and “the first time that the crime of forced pregnancy was prosecuted before an international court.”<sup>138</sup> The ICC’s interpretation of forced pregnancy “builds international jurisprudence on reproductive violence, in other words, violations of a person’s reproductive health, autonomy, and rights.”<sup>139</sup>

**B. INTER-AMERICAN COURT OF HUMAN RIGHTS**

On November 30, 2021, the Inter-American Court of Human Rights issued a ruling ordering El Salvador to “reform its legal and health care policies that criminalize women for seeking reproductive health care.”<sup>140</sup> This marks the first time an international court has evaluated and ruled on El Salvador’s extreme abortion laws, which criminalize abortion under any circumstance, and “established for the first time in the region that health staff can no longer refer women to law enforcement who come to the hospital seeking reproductive health care, including abortion.”<sup>141</sup>

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137. Nisha Varia, *LRA’s Ongwen: A Critical First ICC Conviction*, HUM. RTS. WATCH (Mar. 13, 2021) <https://www.hrw.org/news/2021/03/13/lras-ongwen-critical-first-icc-conviction>.

138. *Trailblazing ICC Judgment on SGBC: Ongwen Verdict Advances International Accountability for Forced Marriage and Forced Pregnancy*, WOMEN’S INITIATIVES FOR GENDER JUST. (Feb. 4, 2021) <https://4genderjustice.org/trailblazing-icc-judgment-on-sgbc-ongwen-verdict/>.

139. See Varia, *supra* note 137.

140. Press Release, Ctr. for Reproductive Rts., *Inter-American Court of Human Rights Orders El Salvador to Reform Policies that Criminalize Women for Accessing Reproductive Health Care* (Nov. 30, 2021), <https://reproductiverights.org/inter-american-court-of-human-rights-orders-el-salvador-to-reform-policies-abortion>.

141. *Id.*

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## **Africa**

ANNE BODLEY, ZACHARY COMBS, VANESSA SUAREZ GALVÈS, LUCIE GUÉGAN, CHARLOTTE FAVARO, SARA FRAZÃO, LAVERNE LEWIS GASKINS, TYLER HOLMES, LINCOLN MAJOGO, MYRIAM MOSSI, JULIEN NAGINSKI, GALINDO ALIYO RUHIYYAH, RICARDO ALVES SILVA, TANIA TOSSA, CARNEIL WILSON, CHITALU YALOBİ, AND JOSÉ DIOGO SAMPAIO\*

This article discusses the significant international legal developments that occurred in Africa in 2021.

### **I. North Africa**

#### **A. ALGERIA**

##### *1. Trade Zone with Mauritania*

As part of a series of cooperation agreements, Mauritania and Algeria agreed to set up a free trade zone in the countries' shared border region.<sup>1</sup>

##### *2. French Truth Commission*

French President Macron announced a Memories and Truth commission per the recommendation of a review into France's 132-year colonial history

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\* Committee Editors (Holmes); Algeria (Ed.); Angola (Silva; Frazão; Sampaio); Benin (Mossi); Botswana (Wilson; Yalobi); Burkina Faso (Naginski; Ed.); Burundi (Wilson); Cameroon (Ed.); Cape Verde (Silva; Frazão; Sampaio; Ed.); CAR (Wilson); Chad (Ed.); Comoros (Ed.); DRC (Ed.); Congo (Silva; Frazão; Sampaio); Cote d'Ivoire (Ed.); Djibouti (Ed.); Equatorial Guinea (Silva; Frazão; Sampaio); Eritrea (Naginski; Favaro); Ethiopia (Bodley); Gabon (Silva; Frazão; Sampaio); Gambia (Ed.); Ghana (Naginski; Galvès); Guinea (Ed.); Guinea-Bissau (Ed.); Kenya (Ed.); Lesotho (Ed.); Liberia (Ed.); Madagascar (Naginski; Guégan); Malawi (Ed.); Mali (Ed.); Mauritania (Wilson); Mauritius (Naginski; Favaro); Morocco (Ed.); Mozambique (Silva; Frazão; Sampaio); Namibia (Ed.); Niger (Mossi; Tossa); Nigeria (Wilson; Yalobi); Rwanda (Ed.); São Tome and Principe (Ed.); Senegal (Bodley; Silva; Frazão; Sampaio); Seychelles (Ed.); Sierra Leone (Ed.; Wilson); Somalia (Ed.); South Africa (Majogo); South Sudan (Gaskins; Yalobi); Sudan (Ed.); Swaziland (Yalobi); Tanzania (Ed.); Togo (Wilson); Uganda (Combs); Western Sahara (Bodley); Zambia (Yalobi; Naginski; Favaro); Zimbabwe (Majogo); AfCHPR (Yalobi; Ed.); AfComm. (Gaskins; Ruhiyyah); AU (Ruhiyyah; Yalobi); ECOWAS (Mossi; Yalobi); EAC (Ruhiyyah); AfDB (Ruhiyyah); Afreximbank (Ed.); ECA (Ed.); SADC (Naginski); COMESA (Ed.); OHADA (Mossi; Naginski); ECCAS (Ed.); UNMICT (Ed.).

1. Fatma Bendhaou, *Algeria and Mauritania Agree to Create a Free Trade Zone in the Border Region*, ANADOLU AGENCY (Nov. 9, 2021), <https://www.aa.com.tr/fr/afrique/lalg%C3%A9rie-et-la-mauritanie-conviennent-de-cr%C3%A9er-une-zone-de-libre-%C3%A9change-dans-lar%C3%A9gion-frontali%C3%A8re/2416397>.

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in Algeria.<sup>2</sup> The Commission will create French memorials to Algerians and obtain testimony from descendants.<sup>3</sup>

**B. MOROCCO**

*1. Marijuana Legalization*

Morocco legalized marijuana for medicinal and industrial purposes and created a National Agency for the Regulation of Cannabis in 2021.<sup>4</sup> The growth and use of marijuana, often mixed with tobacco and called kif, has a long history in northern Morocco, one of the limited areas where growing will now be legal.<sup>5</sup>

**C. WESTERN SAHARA**

*1. European Union Court Annuls Morocco Trade Deals*

In September 2021, the General Court of the European Union (EU) annulled EU-Morocco agriculture and fishing trade deals because they had been agreed to without the consent of the people of Western Sahara.<sup>6</sup>

*2. United Nations Mission for the Referendum in Western Sahara Mission Further Extended*

The United Nations (UN) Security Council extended the United Nations Mission for the Referendum in Western Sahara (MINURSO) by another year, expressing concern at the breakdown of the 1991 ceasefire between Morocco and the pro-independence Polisario Front and calling for a revival of UN-led negotiations.<sup>7</sup>

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2. Shweta Desai, *France to form Commission for Reconciling with Algeria*, ANADOLU AGENCY (Jan. 21, 2021), <https://www.aa.com.tr/en/africa/france-to-form-commission-for-reconciling-with-algeria/2117868>.

3. *The Agony of Silence France Is Confronting Its History in Algeria*, THE ECONOMIST (May 13, 2021), <https://www.economist.com/international/2021/05/13/france-is-confronting-its-history-in-algeria>.

4. Shaquille Goff, *Morocco's Cabinet Approves Draft Decree Legalizing Cannabis*, MOROCCO WORLD NEWS (Aug. 23, 2021, 8:02 PM), <https://www.morocoworldnews.com/2021/08/344046/moroccos-cabinet-approves-draft-decree-legalizing-cannabis>.

5. *High in the Mountains Morocco Moves to Legalise Some Cannabis Cultivation*, THE ECONOMIST (July 8, 2021), <https://www.economist.com/middle-east-and-africa/2021/07/08/morocco-moves-to-legalise-some-cannabis-cultivation>.

6. Vishwanath Petkar, *EU Court Invalidates Morocco Trade Agreement Over Western Sahara Inhabitant Consent*, JURIST (Sept. 29, 2021), <https://www.jurist.org/news/2021/09/eu-court-invalidates-morocco-trade-agreement-over-western-sahara-inhabitant-consent/>; Case T-279/19, *Front Polisario v. Council*, ECLI:EU:T:2021:639, ¶ 391 (Sept. 29, 2021); see generally *Joined Cases T-344 & 356/19, Front Polisario v. Council*, ECLI:EU:T:2021:640; see also General Court of the European Union Press Release 166/21 (Sept. 29, 2021).

7. *UN Renews Peacekeeping Mission in Western Sahara, Calls for Talks*, AL JAZEERA (Oct. 29, 2021), <https://www.aljazeera.com/news/2021/10/29/un-renews-peacekeeping-mission-in-western-sahara-calls-for-talks>.

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## II. West Africa

### A. BENIN

#### 1. *Abortion Legalized*

On October 21, 2021, parliamentarians voted to legalize abortion, which had previously only been allowed if the unborn child had a “particularly severe affection” or if “the pregnancy threatened the life of the mother [or] was the result of a rape or incest.”<sup>8</sup> Now, women can terminate a pregnancy within the first three months if it is likely to “aggravate or cause material, educational, professional or moral distress, incompatible with the woman or the unborn child’s interest.”<sup>9</sup>

### B. BURKINA FASO

#### 1. *Sankara Assassination Trial*

The trial of fourteen defendants accused of conspiring and carrying out the assassination of President Thomas Sankara began before a military tribunal in October 2021, almost thirty-four years to the day of his assassination.<sup>10</sup> Ex-President Blaise Compaoré, Sankara’s successor and, to many, the primary, if not sole, political force behind the coup, remains in exile in Cote d’Ivoire.<sup>11</sup>

### C. CAPE VERDE

#### 1. *Informal Workers Lottery*

To encourage issuing invoices and paying taxes, Cape Verde will award prizes to individuals, so long as they do not receive business and professional income, per Legislative Decree 3/2021.<sup>12</sup> Individuals whose tax identification number is associated with invoices, receipts, or sales receipts for the purchase of goods and services or receipts for properties rented for accommodation purposes are entered in a prize drawing called the “Happiness Invoice.”<sup>13</sup>

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8. Agence France-Presse, *Benin’s Parliament Votes to Legalise Abortion*, AL JAZEERA (Oct. 21, 2021), <https://www.aljazeera.com/news/2021/10/21/benins-parliament-votes-to-legalise-abortion>.

9. *Id.*

10. Thiam Ndiaga, *After 34 Years, Sankara Murder Trial Begins in Burkina Faso*, REUTERS (Oct. 11, 2021, 2:32 PM), <https://www.reuters.com/world/africa/after-34-years-sankara-murder-trial-begins-burkina-faso-2021-10-11/>.

11. *Id.*

12. *Cape Verde - Legal News - April to July 2021*, MIRANDA ALL. (Sept. 3, 2021), <https://www.mirandalawfirm.com/en/insights-knowledge/publications/legal-news/cape-verde-legal-news-april-to-july-2021>.

13. *Id.*



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2. *Venezuelan Businessman Extradited*

Alleged financier for Venezuelan President Maduro, Alex Saab, was extradited to the United States in October 2021.<sup>14</sup> Saab was arrested in June 2020 as his jet refueled in Cape Verde while he was traveling from Venezuela to Iran.<sup>15</sup> The extradition violates an Economic Community of West African States (ECOWAS) court judgment holding that the arrest (1) occurred before an Interpol red notice was issued for Saab and (2) was in violation of Cape Verde's criminal procedure law.<sup>16</sup> Saab faces money laundering charges in the U.S. District Court for Southern District of Florida.<sup>17</sup>

D. CÔTE D'IVOIRE

1. *TV Presenter Sentenced for "Condoning Rape"*

On an August 2021 program, Presenter Yves de M'Bella had a guest on his show described as a former rapist.<sup>18</sup> The host gave the guest a mannequin, asked the guest to demonstrate his crimes, and later requested that he give tips to women on how to avoid rape.<sup>19</sup> De M'Bella received a suspended prison sentence of twelve months and was ordered to pay a fine of approximately \$3,600.<sup>20</sup>

E. GAMBIA

1. *Truth, Reconciliation and Reparations Commission Report Completed*

Nine days before the presidential election, the Truth, Reconciliation and Reparations Commission (TRRC) presented their 14,000-page report to

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14. Vasco Cotovio, Holly Yan, & Marlon Sorto, *Alex Saab, Alleged Financier for Venezuela's President, Is Extradited to the US And Due in Court Monday*, CNN (Oct. 17, 2021, 2:54 PM), <https://www.cnn.com/2021/10/17/americas/alex-saab-venezuela-cape-verde-extradition/index.html>.

15. *Cape Verde's Top Court Approves Maduro Envoy's Extradition to U.S.*, REUTERS (Sept. 8, 2021), <https://www.reuters.com/world/cape-verde-court-approves-extradition-maduro-envoy-us-2021-09-07/>.

16. *Alex Nain Saab Moran v Republic of Cape Verde*, ECW/CCJ/JUD/07/2021, ¶¶ 123-179, 406-410, [http://www.courtecawas.org/wp-content/uploads/2021/08/JUD-ECW-CCJ-JUD-07-21-Alex-Nain-Saab-Moran-vs.-Rep-of-CAPE-VERDE-15\\_03\\_21.pdf](http://www.courtecawas.org/wp-content/uploads/2021/08/JUD-ECW-CCJ-JUD-07-21-Alex-Nain-Saab-Moran-vs.-Rep-of-CAPE-VERDE-15_03_21.pdf).

17. Cotovio, Yan, & Sorto, *supra* note 14.

18. *Outcry in Ivory Coast Over Televised 'Rape Demonstration'*, AL JAZEERA (Aug. 31, 2021), <https://www.aljazeera.com/news/2021/8/31/outcry-in-ivory-coast-over-televised-rape-demonstration>.

19. *Id.*

20. *Ivory Coast TV Host Gets Suspended Sentence for 'Condoning Rape'*, AL JAZEERA (Sept. 1, 2021), <https://www.aljazeera.com/news/2021/9/1/ivorian-tv-host-gets-suspended-sentence-for-condoning-rape>; see also Georgia Calvin-Smith & Laura Di Blasio, *Ivorian TV Presenter Convicted for Glorifying Rape*, FRANCE24 (Sept. 2, 2021, 10:35 PM), <https://www.france24.com/en/tv-shows/eye-on-africa/20210902-ivorian-tv-presenter-convicted-for-glorifying-rape>.

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President Adama Barrow.<sup>21</sup> In the report, the Commission recommends prosecutions, including for former President Yahya Jammeh, who played a role in 2021's presidential election campaign.<sup>22</sup>

F. GHANA

1. *Big Oil Investments*

Parliament gave consent for Ghana's Finance and Energy Ministers to buy higher stakes in two oil blocks operated by Norwegian operators Aker Energy and AGM on behalf of the national oil company, the Ghana National Petroleum Corporation.<sup>23</sup> Energy Minister Matthew Prempeh argued that the ongoing energy transition has dampened investor sentiment for fossil fuels, forcing national oil companies to become operators themselves.<sup>24</sup>

G. GUINEA

1. *Coup*

On September 5, 2021, just over a year after President Condé won a controversial third term in office, a group of soldiers led by Colonel Mamady Doumbouya seized power.<sup>25</sup> Doumbouya was sworn in as interim president in October 2021<sup>26</sup> and expressed a desire to renew Guinea's democracy,<sup>27</sup> which most Guineans favor,<sup>28</sup> but refused to release Condé.<sup>29</sup>

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21. *Gambian Commission Urges Prosecutions for Yahya Jammeh-Era Abuses*, AL JAZEERA (Nov. 26, 2021, 9:46 AM), <https://www.aljazeera.com/news/2021/11/25/gambian-commission-urges-persecutions-for-jammeh-era-abuses>.

22. *Gambia Elections: Adama Barrow Declared Presidential Election Winner*, BBC NEWS (Dec. 6, 2021), <https://www.bbc.com/news/world-africa-59542813>.

23. *Parliament's Energy and Finance Committees Recommend Purchase of Stakes in Aker Energy, AGM Oil Blocks*, MYJOYONLINE.COM (Aug. 5, 2021, 6:38 PM), <https://www.myjoyonline.com/parliaments-energy-and-finance-committees-recommend-purchase-of-stakes-in-aker-energy-agm-oil-blocks/>; see also *Ghana Plans to Buy Back Oil Licences No One Wants*, THE ECONOMIST (Aug. 12, 2021), <https://www.economist.com/middle-east-and-africa/2021/08/12/ghana-plans-to-buy-back-oil-licences-no-one-wants>.

24. Bright Simons, *Why Is Ghana Giving \$1bn to Big Oil in Norway?*, THE AFRICA REP. (Aug. 13, 2021, 12:40 AM), <https://www.theafricareport.com/115932/why-is-ghana-giving-1bn-to-big-oil-in-norway/>.

25. *Guinea Coup: Who Is Col Mamady Doumbouya?*, BBC NEWS (Oct. 1, 2021), <https://www.bbc.com/news/world-africa-58461971>.

26. *Mamady Doumbouya: Guinea Coup Leader Sworn In As President*, BBC NEWS (Oct. 1, 2021), <https://www.bbc.com/news/world-africa-58761621>.

27. Alain Foka, *Guinean Transitional President Mamady Doumbouya: 'We Want to Give Power Back to Guineans'*, FRANCE24 (Nov. 15, 2021, 7:18 PM), <https://www.france24.com/en/tv-shows/the-interview/20211115-guinean-transitional-president-mamady-doumbouya-we-want-to-give-power-back-to-guineans>.

28. *Guineans Strongly Prefer Democracy to Any Other Regime But Want the President Limited to Two Terms*, AFROBAROMETER (Sept. 6, 2021), <https://afrobarometer.org/press/guineans-strongly-prefer-democracy-any-other-regime-want-president-limited-two-terms>.

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ECOWAS will ban Guinea's coup leaders from travel and freeze their and their families' financial assets until Condé is released and elections are held.<sup>30</sup>

H. GUINEA-BISSAU

1. *Logging Ban Under Consideration*

In October 2020, the Council of Ministers recommended a “special regime” that would lift Guinea-Bissau's complete ban on logging.<sup>31</sup> The regime would allow logging on fourteen species, subject to licensing and quotas, and would include reforestation.<sup>32</sup> Logging activities went nearly unrestricted after a coup in 2012 weakened the authority of the central government, which later implemented a moratorium in 2015.<sup>33</sup> Guinea-Bissau is approximately seventy percent forested.<sup>34</sup>

I. LIBERIA

1. *House and Senate in Dispute*

The Liberian Senate threatened to sue the House of Representatives over the approval of an iron ore concession to a Chinese company.<sup>35</sup> The threat came after the House rejected a Senate version of the Bao Chico Mineral Development Agreement with a written declaration that the agreement's primary aim was to raise revenue, requiring the legislation to originate in the House under Article 34d(i) of the Constitution.<sup>36</sup> When the House passed its own version of the agreement in December 2021, it was unclear if any legal action would be taken.<sup>37</sup>

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29. Agence France-Presse, *Guinea's Junta Rules Out Exile for Ousted President as Opposition Activists Return to Conakry*, FRANCE24 (Sept. 19, 2021, 9:02 AM), <https://www.france24.com/en/africa/20210919-guinea-s-junta-rules-out-exile-for-ousted-president-as-opposition-activists-return-to-conakry>.

30. *ECOWAS Imposes Sanctions on Guinea's Military Leaders, Orders Elections in 6 Months*, J. DU CAMEROUN.COM (Sept. 17, 2021), <https://www.journalducameroun.com/en/ecowas-imposes-sanctions-on-guineas-military-leaders-orders-elections-in-6-months/>.

31. Beatriz Ramalho da Silva, *Guinea-Bissau's Plan to Lift Logging Ban Sparks Fears for Forests*, AL JAZEERA (Mar. 20, 2021), <https://www.aljazeera.com/news/2021/3/20/guinea-bissau-plan-to-lift-logging-ban-sparks-fears-for-forests>.

32. *Id.*

33. *Id.*

34. *Id.*

35. J. Burgess Carter, *Liberia: Senate, House in Tug-of-War Over Bao Chico MDA*, DAILY OBSERVER (Nov. 22, 2021, 1:13 AM), <https://www.liberianobserver.com/liberia-senate-sue-lower-house>.

36. *Id.*

37. Gerald C. Koinyeneh, *Liberia: House Approves BAO CHICO Concession Agreement After Quashing Senate's Version*, FRONT PAGE AFR. (Dec. 2, 2021), <https://frontpageafricaonline.com/politics/liberia-house-approves-bao-chico-concession-agreement-after-quashing-senates-version/>.

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J. MALI

1. *Second Coup*

Colonel Assimi Goita led his second coup d'état in nine months on May 25, 2021.<sup>38</sup> After initially promising elections would still occur in February 2022,<sup>39</sup> now-President Goita later admitted the timeline could not be met.<sup>40</sup> ECOWAS imposed sanctions as a result.<sup>41</sup> The coup was widely criticized,<sup>42</sup> and the impact of the change on Mali's long-standing conflicts remains unclear.<sup>43</sup>

K. MAURITANIA

1. *E-Commerce*

In June 2021, Mauritania's National Assembly approved a draft law related to electronic payment services and means.<sup>44</sup> The legislation creates a regulatory framework for the provision of e-payment services—by banks and non-banks—and the issuance of electronic currencies, with wide customer access in mind.<sup>45</sup> According to the 2018 Global Findex report, only four percent of Mauritanian adults had mobile money accounts.<sup>46</sup>

L. NIGER

1. *First-Ever Democratic Transition*

On February 21, 2021, Mohamed Bazoum won Niger's presidential election, marking the first succession of one elected president from another

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38. *Assimi Goita: Mali's Army Commander Who Seized Power Twice*, AL JAZEERA (June 7, 2021), <https://www.aljazeera.com/news/2021/6/7/coup-leader-assimi-goita-set-to-be-sworn-in-as-malis-president>.

39. *Id.*

40. *West Africa Bloc ECOWAS Imposes Sanctions on Mali Leaders*, AL JAZEERA (Nov. 7, 2021, 8:20PM), <https://www.aljazeera.com/news/2021/11/7/west-africa-bloc-ecowas-imposes-sanctions-on-mali-leaders>.

41. *Id.*

42. Gregory Mann, *Mali's Army Welcomed Previous Coups, But Not This one*, THE CONVERSATION (May 28, 2021, 8:35 AM), [https://theconversation.com/mali-welcomed-previous-coups-but-not-this-one-161723?utm\\_source=Twitter&utm\\_medium=twitterbutton](https://theconversation.com/mali-welcomed-previous-coups-but-not-this-one-161723?utm_source=Twitter&utm_medium=twitterbutton).

43. *Mali Creates Group to Open Dialogue with Islamist Insurgents*, RFI (Feb. 20, 2021, 2:17 PM), <https://www.rfi.fr/en/africa/20210220-mali-creates-a-group-to-open-dialogue-with-islamist-insurgents>.

44. *L'Assemblée Nationale Approuve un Projet de Loi Relatif Aux Services et Moyens de Paiement Électronique* [The National Assembly Approves a Bill Relating to Services and Means of Electronic Payment], AGENCE MAURITANIENNE D'INFORMATION (June 8, 2021, 5:50 PM), <https://fr.ami.mr/Depeche-58768.html>.

45. *Id.*

46. *Congratulations to Mauritania on Adopting a New Regulatory Framework for E-Payment Services*, UN CAP. DEV. FUND, <https://policyaccelerator.uncdf.org/whats-new/mauritania-regulatory-framework> (last visited Dec. 18, 2021).

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since the country's independence in 1960.<sup>47</sup> The proclamation of Bazoum's victory over former President Mahamane Ousmane led to protests, in which two people died and 468 were arrested, and a ten-day government shutdown of the internet while Ousmane alleged fraud.<sup>48</sup>

M. NIGERIA

1. *Petroleum Industry Act*

On August 16, 2021, President Buhari signed the Petroleum Industry Bill, introduced in 2007, into law.<sup>49</sup> Nigeria may have lost as much as \$50 billion in the last decade due to uncertain legal, administrative, and fiscal policies in the oil and gas sector.<sup>50</sup> The Petroleum Industry Act is designed to address policy uncertainty, poor infrastructure, insecurity, and the impact of COVID-19.<sup>51</sup>

N. SÃO TOME AND PRINCIPE

1. *Opposition Wins Presidential Runoff*

Carlos Manuel Vila Nova was sworn in as president of the island country on October 3, 2021.<sup>52</sup> President Vila Nova, a former infrastructure minister, won a delayed runoff vote in September 2021.<sup>53</sup> The runoff had been

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47. *Deadly Protests Rock Niger Over Contested Election Result*, REUTERS (Feb. 25, 2021, 8:14 AM), <https://www.reuters.com/article/us-niger-election-clashes/violent-protests-rock-niger-over-contested-election-result-idUSKBN2APIW3>.

48. *Id.*; see also AFP, *Après Dix Jours de Coupure, à la Suite de Troubles Post-Électoraux, Internet a Été Rétabli au Niger* [After Ten Days of Shutdown Following Post-Election Unrest, the Internet Has Been Restored in Niger], LE MONDE (Mar. 6, 2021, 11:38 AM), [https://www.lemonde.fr/afrique/article/2021/03/06/apres-dix-jours-de-coupure-a-la-suite-de-troubles-post-electoraux-internet-a-ete-retabli-au-niger\\_6072195\\_3212.html](https://www.lemonde.fr/afrique/article/2021/03/06/apres-dix-jours-de-coupure-a-la-suite-de-troubles-post-electoraux-internet-a-ete-retabli-au-niger_6072195_3212.html).

49. *Petroleum Industry Act – A New Era for the Nigerian Oil and Gas Upstream Industry*, VANGUARD (Sept. 22, 2021), <https://www.vanguardngr.com/2021/09/petroleum-industry-act-a-new-era-for-the-nigerian-oil-and-gas-upstream-industry/>.

50. *Id.*; see also *An Overview of the Petroleum Industry Act, 2021*, BRIDGEFORTE ATTORNEYS (Aug. 27, 2021), <https://bridgeforteatorneys.com/wp-content/uploads/2021/08/OVERVIEW-OF-THE-PETROLEUM-INDUSTRY-ACT-2021-1.pdf>.

51. *The Petroleum Industry Act: Redefining the Nigerian Oil and Gas Landscape*, PRICE WATERHOUSE COOPERS NIGERIA (Aug. 2021), <https://www.pwc.com/ng/en/assets/pdf/nigeria-petroleum-industry-act-1.pdf>.

52. Terhemba Daka, *Osinbajo Assures Sao Tome & Principe of Improved Ties*, THE GUARDIAN NIGERIA (Oct. 4, 2021, 3:11 AM), <https://guardian.ng/news/osinbajo-assures-sao-tome-principe-of-improved-ties/>.

53. *Sao Tome Opposition Leader Vila Nova Wins Presidential Runoff*, REUTERS (Sept. 6, 2021, 11:44 AM), <https://www.reuters.com/world/africa/sao-tome-opposition-leader-vila-nova-wins-presidential-runoff-2021-09-06/>.

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postponed for the Constitutional Court's consideration (and rejection) of the third-place candidate's allegations of fraud in the first round of voting.<sup>54</sup>

O. SENEGAL

1. *Counter-Terrorism Laws*

On June 25, 2021, Senegal modified the Penal Code and the Criminal Procedure Code to define "terrorist acts" to include seriously disturbing public order, criminal association, and offenses linked to information and communication technologies, each punishable with life in prison.<sup>55</sup> The laws make it a criminal offence to "incite others" to perpetrate terrorism but do not define incitement and give extra powers to law enforcement officials to carry out surveillance of a suspect without seeking authorization from a judge.<sup>56</sup> Opposition party members appealed to the Constitutional Council to evaluate the laws' constitutionality.<sup>57</sup>

2. *New Public-Private Partnerships Law*

The National Assembly approved the new law on Public-Private Partnerships (PPP),<sup>58</sup> which sets forth a regime for unsolicited bids, introduces specific provisions relating to local content requirements, and foresees the creation of a PPP unit composed of financial and legal experts.<sup>59</sup>

P. SIERRA LEONE

1. *Presidents as Chancellors*

President Bio decided to step down from being chancellor of state universities in Sierra Leone, the first president to do so.<sup>60</sup> A responsibility entrusted to presidents around the African continent,<sup>61</sup> Bio expressed an

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54. John Milo, *Sao Tome and Principe Second Round Presidential Elections*, FOREIGN BRIEF (Sept. 5, 2021), <https://www.foreignbrief.com/daily-news/sao-tome-and-principe-second-round-presidential-elections/>.

55. *Senegal: New Counterterrorism Laws Threaten Rights*, HUM. RTS. WATCH (July 5, 2021, 2:00 AM), <https://www.hrw.org/news/2021/07/05/senegal-new-counterterrorism-laws-threaten-rights>.

56. *Id.*

57. *Id.*

58. Law 2021-23.

59. *New Public-Private Partnerships Law*, MIRANDA L. FIRM (Feb. 25, 2021), <https://www.mirandalawfirm.com/en/insights-knowledge/publications/alerts/new-public-private-partnerships-law-2>.

60. Abdul Rashid Thomas, *President Bio Relinquishes Universities Chancellorship*, THE SIERRA LEONE TEL. (Oct. 25, 2021), <https://www.thesierraleonetelegraph.com/president-bio-relinquishes-universities-chancellorship/>.

61. See, e.g., TRUE: *President Uhuru Kenyatta is the Kibabii University Chancellor*, PESACHECK (Dec. 13, 2019), <https://pesacheck.org/true-president-uhuru-kenyatta-is-the-kibabii-university-chancellor-1b6d8f107c8f>; Lloyd Chitsulo, *Chakwera to be Luanar Chancellor*, THE NATION (Nov. 19, 2020), <https://www.mwnation.com/chakwera-to-be-luanar-chancellor/>.

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interest to hire chancellors with “distinguished and proven records of higher education leadership.”<sup>62</sup>

2. *Death Penalty Abolished*

The Abolition of the Death Penalty Act, 2021, was passed in July 2021 and signed into law in October 2021.<sup>63</sup>

Q. TOGO

1. *Telecommunications*

In an effort to combat fraud, cybercrime, scams, trafficking, and terrorism, the Electronic Communications Regulatory Authority limited users to three sim cards per cellular network or provider as of November 2, 2021.<sup>64</sup> Users who do not comply will have their cell phones deactivated by the regulatory agency.<sup>65</sup> A new law passed in April is meant to complement this effort, putting order in the operators’ database and preparing the country for number interoperability.<sup>66</sup>

**III. Central Africa**

A. CAMEROON

1. *Anglophone Crisis Continues*

Four years after the outset of widespread fighting, the crisis between Cameroon’s Francophone National Government and Anglophone separatists continues.<sup>67</sup> Rape, sexual assault,<sup>68</sup> and attacks against students and teachers are part of the conflict.<sup>69</sup>

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62. Thomas, *supra* note 60.

63. *Sierra Leone Formally Abolishes ‘Inhumane’ Death Penalty*, AL JAZEERA (Oct. 8, 2021), <https://www.aljazeera.com/news/2021/10/8/sierra-leone-president-formally-abolishes-death-penalty>.

64. Issa Sikiti da Silva, *Togo: Telecoms Regulator Deactivates “Illegal” SIM Cards*, BIZTECH AFR. (Nov. 1, 2021, 2:15 PM), <https://www.biztechafrika.com/article/togo-telecoms-regulator-deactivates-illegal-sim-ca/16839/>.

65. *Id.*

66. Law No. 007/MENTD/CAB (April 29, 2021) (Togo).

67. *Cameroon: Witness Testimony and Satellite Images Reveal the Scale of Devastation in Anglophone Regions*, AMNESTY INT’L (July 28, 2021, 12:01 AM), <https://www.amnesty.org/en/latest/news/2021/07/cameroon-satellite-images-reveal-devastation-in-anglophone-regions/>.

68. Annette Young, Fadile Bhayat, Yong Chim & Stéphanie Cheval, *Cameroon’s Anglophone Conflict: Rape Used a Weapon Against Women*, FRANCE24 (Oct. 12, 2021, 5:18 PM), <https://www.france24.com/en/tv-shows/the-51/20211210-cameroon-s-anglophone-conflict-rape-used-a-weapon-against-women>.

69. *Separatists’ Attacks in Cameroon ‘Devastating’ for Education: HRW*, AL JAZEERA (Dec. 16, 2021), <https://www.aljazeera.com/news/2021/12/16/separatists-attacks-in-cameroon-keep-children-out-of-school-hrw>.

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**B. CENTRAL AFRICAN REPUBLIC**

1. *Cease-Fire*

President Touadera declared a cease-fire for the Central African Republic in October 2021.<sup>70</sup> The goal of the unilateral cease-fire is to create an environment for dialogue that will bring peace to the country, finally implementing a February 2019 agreement signed between fourteen rebel groups and the government.<sup>71</sup>

**C. CHAD**

1. *Military Transition*

Days after winning a sixth presidential term in office, President Mahamat Idriss Déby died from injuries he sustained in leading soldiers against Libya-based Chadian rebels, the Front for Change and Concord in Chad.<sup>72</sup> Instead of following procedures set by the constitution, the former president's son, Mahamat Idriss Deby, seized power and created an interim parliament.<sup>73</sup> The National Transition Council has set a timeline for parliamentary and presidential elections between June and September 2022.<sup>74</sup>

**D. CONGO (DEMOCRATIC REPUBLIC)**

1. *Indigenous People's Law*

Legislation to recognize and protect the rights of indigenous peoples in the Democratic Republic of the Congo (DRC) was passed by an overwhelming June 2021 vote in the National Assembly.<sup>75</sup> The legislation is

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70. Elizabeth M. Lederer, *Central African Republic Leader: Cease-Fire Aims for Peace*, U.S. NEWS & WORLD REP. (Oct. 18, 2021, 8:44 PM), <https://www.usnews.com/news/us/articles/2021-10-18/central-african-republic-leader-cess-fire-aims-for-peace>.

71. *Id.*

72. *Chad's Military Ruler Mahamat Deby Names Transitional Parliament*, AL JAZEERA (Sept. 24, 2021), <https://www.aljazeera.com/news/2021/9/24/chads-military-ruler-mahamat-deby-names-transitional-parliament>; *Chad's President Idriss Deby Re-Elected for Sixth Term with 79.3% of Vote*, FRANCE24 (April 19, 2021, 10:48 PM), <https://www.france24.com/en/africa/20210419-chad-s-president-idriss-deby-re-elected-for-sixth-term-with-79-3-of-vote>.

73. *Id.*; *see also Chad Leader Deby, Key Western Ally, Killed in Battle – Army*, REUTERS (Apr. 20, 2021, 8:48 AM), <https://www.reuters.com/world/africa/chad-leader-idriss-deby-western-ally-against-militants-killed-battle-son-takes-2021-04-20/>.

74. Troels Burchall Henningsen, *Chad Has a New Roadmap: Why It May Lead to More of the Same, and Not Democracy*, THE CONVERSATION (Sept. 15, 2021, 10:04 AM), <https://theconversation.com/chad-has-a-new-roadmap-why-it-may-lead-to-more-of-the-same-and-not-democracy-167229>.

75. Auguy Mudiayi, *RDC: l'Assemblée Nationale Adopte à L'unanimité la Proposition de loi sur la Protection des Droits des Autochtones Pygmées* [DRC: The National Assembly Unanimously Adopts the Bill on the Protection of the Rights of Indigenous Pygmies], ACTUALITE.CD (Apr. 7, 2021, 6:23 PM), [https://actualite.cd/2021/04/07/rdc-lassemblee-nationale-adopte-lunanimite-la-proposition-de-loi-sur-la-protection-des?\\_ga=2.114828295.1480733410.1639932080-2019611494.1639932080](https://actualite.cd/2021/04/07/rdc-lassemblee-nationale-adopte-lunanimite-la-proposition-de-loi-sur-la-protection-des?_ga=2.114828295.1480733410.1639932080-2019611494.1639932080;);



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expected to strengthen the indigenous pygmy peoples' contribution to the sustainable management of forests.<sup>76</sup> Congo (Republic) was the first African country to pass a law on the rights on indigenous peoples in 2010.<sup>77</sup>

E. CONGO (REPUBLIC)

1. *Nuclear Energy*

Congo's accessions to the Convention on Early Notification of a Nuclear Accident (Law 21-2021) and the Convention on the Physical Protection of Nuclear Material (Law 22-2021) were authorized to implement the national policy on nuclear safety.<sup>78</sup> Also, Law 20-2021 ratified an agreement with the Russian Federation to create and develop an atomic energy infrastructure in Congo, construct nuclear power reactors and nuclear research reactors, and manage radioactive waste.<sup>79</sup>

2. *Emissions Agreements (and Carbon Credits)*

As of February 2021, Congo is implementing emission reduction programs in the Sangha and Likouala departments in line with the national strategy for the reduction of greenhouse gas emissions from deforestation and forest degradation.<sup>80</sup> The decrees approved the price per ton of carbon dioxide and a plan for splitting program profits; the program is expected to allow Congo to sell carbon credits.<sup>81</sup>

F. EQUATORIAL GUINEA

1. *Tax Changes*

The 2021 State Budget Law included significant changes, such as reducing the previous year's turnover of the Minimum Income Tax from 3

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76. From interviews with Joseph Itwonga & Pastor Matthieu Yela, *Democratic Republic of the Congo: Indigenous Rights Law Inches Forward and CSOs Weigh in Ahead of COP26*, FERN (Feb. 10, 2021), <https://www.fern.org/publications-insight/democratic-republic-of-the-congo-indigenous-rights-law-inches-forward-and-csos-weigh-in-ahead-of-cop26-2295/>; see also *New Law in DRC to Finally Protect Indigenous Peoples Land Rights*, INT'L LAND COAL. (last visited Dec. 19, 2021), <https://africa.landcoalition.org/en/newsroom/new-law-drc-finally-protect-indigenous-peoples-land-rights/>.

77. *Congo: New Law on Rights of Indigenous Peoples*, LIBR. OF CONGRESS (Jan. 11, 2011), <https://www.loc.gov/item/global-legal-monitor/2011-01-11/congo-new-law-on-rights-of-indigenous-peoples/>.

78. *Republic of the Congo - Legal News - May through July 2021*, MIRANDA ALL. (Aug. 27, 2021), <https://www.mirandalawfirm.com/en/insights-knowledge/publications/legal-news/republic-of-the-congo-legal-news-may-through-july-2021>.

79. *Id.*

80. Decree 2021-108 and Decree 2021-91; *LEGAL NEWS: REPUBLIC OF THE CONGO, November 2020 - April 2021*, MIRANDA ALL. (May 28, 2021), <https://www.mirandalawfirm.com/en/insights-knowledge/publications/legal-news/republic-of-the-congo-legal-news-november-2020-through-april-2021>.

81. *Id.*

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percent to 1.5 percent and making the registration of public maintenance contracts awarded in 2021 subject to a registration fee amounting to 0.5 percent of the value of the contract.<sup>82</sup>

G. GABON

1. *Constitutional Amendments*

In response to President Ali Bongo Ondimba's 2018 stroke and long recovery, the Gabonese constitution now includes principles on the continuity of state institutions in the event of the president's temporary unavailability and inability to hold elections.<sup>83</sup> The amended constitution also contains new articles on immunity against prosecution and the presidential appointment of senators.<sup>84</sup>

IV. East Africa

A. BURUNDI

1. *Blockchain*

Cardano, a blockchain platform, and the government of Burundi have signed a memorandum of understanding (MoU) to transform the country digitally.<sup>85</sup> The MoU is not binding, and Cardano has entered into similar agreements with other African countries.<sup>86</sup>

B. DJIBOUTI

1. *Sale of Stake in State Telecom*

As part of public sector reforms, the government of Djibouti announced plans to sell a "significant minority" stake in the country's only telecommunications provider.<sup>87</sup> The announcement came in July 2021.

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82. Law 9/2020; *see also Equatorial Guinea - Legal News - March 2021*, MIRANDA ALL. (Mar. 31, 2021), <https://www.mirandalawfirm.com/en/insights-knowledge/publications/legal-news/equatorial-guinea-legal-news-march-2021>.

83. Law 046/2020 (Eq. Guinea); AFP, *Gabon Approves Constitutional Change If President Incapacitated*, AL JAZEERA (Dec. 29, 2020), <https://www.aljazeera.com/news/2020/12/29/gabon-backs-constitutional-change-if-president-incapacitated>.

84. *Gabon - Legal News - May 2021*, MIRANDA ALL. (May 28, 2021), <https://www.mirandalawfirm.com/en/insights-knowledge/publications/legal-news/gabon-legal-news-may-2021>.

85. *Cardano Signs an MoU with Burundi After Zanzibar*, BITKE (Oct. 31, 2021), <https://bitcoinke.io/2021/10/cardano-signs-mou-with-burundi/>.

86. *Id.*

87. Loni Prinsloo, *Djibouti to Sell Minority Stake in State-Run Telecoms Company*, BLOOMBERG (July 11, 2021), <https://www.bloomberg.com/news/articles/2021-07-11/djibouti-to-sell-minority-stake-in-state-run-telecoms-company>.

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C. ERITREA

1. *Sanctions for Role in Ethiopia*

The Biden Administration imposed sanctions on the Eritrean army and ruling party for its part in the human rights abuses in Tigray,<sup>88</sup> allowed by Ethiopia's government.<sup>89</sup> The United States cited the "continued role" the Eritreans play in the war and the "numerous reports of looting, sexual assault, killing civilians, and blocking humanitarian aid" by Eritrean forces.<sup>90</sup> Similarly, the European Union "de-committed" 100 billion Euros of development aid for Eritrea.<sup>91</sup>

D. ETHIOPIA

1. *Sixty-Year-Old Commercial Code Amended*

In March 2021, Ethiopian lawmakers unanimously amended the country's Commercial Code.<sup>92</sup> The new code allows for legal recognition of holding companies and single-member companies, incorporates new clauses for the protection of minority shareholders on corporate transparency and disclosure, and introduces a number of insolvency procedures, including preventive restructuring proceedings and simplified reorganization proceedings.<sup>93</sup> The amendment took three decades to materialize; the 1960 Code had difficult-to-implement provisions that proved to be susceptible to distinct interpretations.<sup>94</sup>

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88. Jennifer Hansler, *Biden Administration Sanctions Eritrean Military, Ruling Party Over Role in Northern Ethiopia Conflict*, CNN (Nov. 12, 2021), <https://www.cnn.com/2021/11/12/politics/biden-admin-ethiopia-eritrea-sanctions/index.html>.

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90. Hansler, *supra* note 88.

91. Vince Chadwick, *EU Pulls Eritrea Funding, Citing Tigray Conflict, 'Lack of Interest'*, DEVEX (Apr. 23, 2021), <https://www.devex.com/news/eu-pulls-eritrea-funding-citing-tigray-conflict-lack-of-interest-99743>.

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E. KENYA

1. *New Law of Succession*

In November, President Kenyatta assented to the Law of Succession (Amendment) Bill, 2019, which seeks to clarify who can inherit a deceased's estate by law.<sup>95</sup> The law introduces the definition of spouse as a husband, wife, or wives recognized under the Marriage Act and the definition of dependents to include those the deceased had taken in and provided for the last two years of their life.<sup>96</sup> Critics contend that this will leave second families and the girlfriends of married men vulnerable.<sup>97</sup>

F. RWANDA

1. *Medical Marijuana Legalized*

Ministerial Order No 003/MoH/2021 of June 25, 2021, created a license and activity regime for investors interested in using, cultivating, processing, importing, or exporting cannabis for medical or research purposes.<sup>98</sup>

G. SEYCHELLES

1. *Changes to Criminal Law*

In October 2021, the National Assembly revised the Penal Code by removing the offence of criminal defamation and increasing the age of criminal responsibility from seven to ten years old.<sup>99</sup> The legislature in November 2021 replaced the Computer Misuse Act 1998 with the Cybercrimes and Other Related Crimes Act, which creates statutory crimes for fraud, harassment, and leaking private videos, amongst other actions.<sup>100</sup>

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95. *Inheritance Rights in Kenya, Law of Succession (Amendment) Bill 2019*, KELIN KENYA (Nov. 19, 2021), <https://www.kelinkkenya.org/inheritance-rights-in-kenya-law-of-succession-amendment-bill-2019/>.

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H. SOMALIA

1. *Favorable Maritime Ruling*

The International Court of Justice resolved a maritime border dispute between Kenya and Somalia, mostly in the latter's favor.<sup>101</sup> In the October 2021 judgment, the Court drew a border which more closely reflected Somalia's claim that the line between the two countries should adhere to the angle of their land border before it reaches the Indian Ocean.<sup>102</sup> Kenya rejected the ruling.<sup>103</sup>

I. SOUTH SUDAN

1. *Hybrid Court Authorized*

On January 29, 2021, the South Sudan Cabinet formally requested that the Ministry of Justice and Constitutional Affairs establish the African Union (AU) Hybrid Court of South Sudan, the Commission for Truth, Reconciliation and Healing, and the Compensation and Reparation Authority.<sup>104</sup> After two years' delay, the request signifies a first step to initiate transitional justice processes under the Revitalised Agreement on the Resolution of the Conflict in the Republic of South Sudan, the September 2018 deal<sup>105</sup> to resolve violence that began in late 2013.<sup>106</sup>

J. SUDAN

1. *Second Coup*

General Abdel Fattah al-Burhan, the head of Sudan's Sovereign Council, arrested Prime Minister Abdalla Hamdok and other civilian leaders, shut down internet access, and declared a state of emergency on October 25, 2021.<sup>107</sup> Thousands of Sudanese protested the coup, seeking civilian rule,<sup>108</sup>

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101. *Maritime Delimitation in the Indian Ocean (Som. v. Kenya)*, Judgment, 2021 I.C.J. 161, at 75–76 (Oct. 12, 2021). <https://www.icj-cij.org/public/files/case-related/161/161-20211012-JUD-01-00-EN.pdf>.

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and members of the international community suspended foreign aid.<sup>109</sup> After four weeks of house arrest, Prime Minister Hamdook and General al-Burhan reached an agreement for Hamdook's release and sharing power going forward.<sup>110</sup> Elections are to take place in July 2023.<sup>111</sup>

K. TANZANIA

1. *First Female President*

In March 2021, President John Magufuli died,<sup>112</sup> promoting Samia Suluhu Hassan, who became Africa's only female national leader.<sup>113</sup> Suluhu Hassan demonstrated some breaks with her predecessor, getting vaccinated, leading a national vaccine effort,<sup>114</sup> and lifting a ban preventing pregnant girls from attending school.<sup>115</sup> The practice of suspending media outlets remains in use, however.<sup>116</sup>

2. *Mobile Money Tax Introduced, Then Reduced*

In an effort to raise approximately \$500 million in revenues, the Electronic and Postal Communication Act (CAP 306) was amended in June 2021 to impose a levy depending on the size of a mobile money transaction.<sup>117</sup> Tanzanians protested almost immediately as the levy came

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108. AFP, *Thousands Protest Against Arrests of Civilian Leaders in Sudan*, AL JAZEERA (Oct. 25, 2021), <https://www.aljazeera.com/gallery/2021/10/25/thousands-protests-as-pm-officials-detained-in-sudan?sf153378883=1>.

109. Lara Jakes, *The U.S. Cut Off Aid to the Sudanese Government After the Coup.*, N.Y. TIMES (Oct. 25, 2021), <https://www.nytimes.com/2021/10/25/world/africa/us-aid-frozen-sudan.html>.

110. Khalid Abdelaziz & Aidan Lewis, *Sudan's Burhan Says Military Will Exit Politics After 2023 Elections*, REUTERS (Dec. 5, 2021, 2:23 AM), <https://www.reuters.com/world/africa/sudans-burhan-tells-reuters-army-will-exit-politics-after-2023-elections-2021-12-04/>.

111. *Id.*

112. *John Magufuli: Tanzania's President Dies Aged 61 After Covid Rumours*, BBC NEWS (Mar. 18, 2021), <https://www.bbc.com/news/world-africa-56437852>.

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into place on July 15, resulting in a thirty percent reduction of the levies in September 2021.<sup>118</sup>

L. UGANDA

1. *Schools Reopening*

In October 2021, President Museveni announced that schools would reopen in January 2022.<sup>119</sup> Ugandan schools have been closed for over weeks, longer than anywhere else in the world.<sup>120</sup> Many teachers left the profession and do not plan on returning, as most were not paid during the closure.<sup>121</sup>

V. Southern Africa

A. ANGOLA

1. *Colonial Expropriation Law Updated*

In January 2021, the Expropriation by Public Utility Law was passed, repealing rules for expropriation of land which dated to the colonial period.<sup>122</sup> The new procedure will comply with the Angolan Constitution, which recognizes a right to private property and limits expropriation to instances (1) within the public interest, and (2) where fair and prompt compensation is paid.<sup>123</sup>

B. COMOROS

1. *Undersea Cable*

In August 2021, Meta announced that Comoros, the Seychelles, and Angola had been added as branches to an undersea cable project named

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locator=URn:asset:a880bd01-6051-444e-aebe-981a7fca5aef&pinned\_post\_asset\_id=60f00f99424d6a0c8fa9f4bf&pinned\_post\_type=share.

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123. Constitution of Angola, 2010, arts. 15 and 37, [https://www.constituteproject.org/constitution/Angola\\_2010.pdf?lang=EN](https://www.constituteproject.org/constitution/Angola_2010.pdf?lang=EN).

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2Africa.<sup>124</sup> The 45,000-kilometer cable will connect Asia, Europe, and Africa and will be the longest undersea cable in the world when completed in late 2023 or early 2024.<sup>125</sup>

C. BOTSWANA

1. *Rights of Persons with Disabilities*

Botswana acceded to the Convention on Rights of Persons with Disabilities (CRPD) on July 12, 2021.<sup>126</sup> Botswana was the only country in Southern Africa that had not acceded to the Convention.<sup>127</sup> The CRPD entered into force for Botswana on August 11, 2021, in accordance with Article 48(2) of the CRPD.<sup>128</sup>

D. LESOTHO

1. *Communications Regulations Proposed, Withdrawn*

In a repeat of the Internet Broadcasting Rules proposed in 2020, the Lesotho Communications Authority (LCA) proposed the Communications (Subscriber Identity Module and Mobile Device Registration) Regulations, 2021,<sup>129</sup> and then withdrew them under public pressure.<sup>130</sup> The Regulations would have required all people living in Lesotho to register their biometrics, all SIM card-using devices, and the card itself with the LCA, which would have kept the information in a central database and been able to hand over private communications to security agencies without consent or court permission.<sup>131</sup>

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126. Depositary Notification, U.N. Secretary General, Convention on the Rights of Persons with Disabilities - Botswana: Accession, Ref. C.N.216.2021. TREATIES-IV.15 (July 12, 2021), <https://treaties.un.org/doc/Publication/CN/2021/CN.216.2021-Eng.pdf>; *see also* Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3.

127. *Ratification of the Convention on Rights of Persons with Disabilities in Botswana*, S. AFRICA LIT. CENTRE (Aug. 16, 2021), <https://www.southernafricalitigationcentre.org/2021/08/16/ratification-of-the-convention-on-the-rights-of-persons-with-disabilities-in-botswana/>.

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E. MADAGASCAR

1. *Opacity in the Mining Sector*

On New Year's Eve 2020, 73.5 kilograms of Malagasy gold, a record amount, were seized at O.R. Tambo Airport in Johannesburg.<sup>132</sup> In October 2021, activists questioned the Ministry of Mines management under the interim authority of the Prime Minister since August 2021 and requested a complete revision of the Mining Code to provide more transparency in the mining permitting process and additional protection to artisanal miners.<sup>133</sup>

F. MALAWI

1. *Death Penalty Written In, Then Out of Appellate Ruling*

In *Khoviwa v. The Republic*, Malawi's Supreme Court of Appeal ruled that the death penalty was unconstitutional.<sup>134</sup> The judgment built upon *Kafantayeni and Others v. Attorney General*, which had found a mandatory death sentence to be unconstitutional.<sup>135</sup> But, after the opinion's author retired, a "perfected" judgment was issued; the judgment no longer found the death penalty unconstitutional.<sup>136</sup>

G. MAURITIUS

1. *Anti-Money Laundering*

The EU Financial Action Task Force removed Mauritius from its "grey list" and lauded the country's significant progress in improving its anti-money laundering and counterterrorist financing laws and regulations in October 2021.<sup>137</sup> Mauritius also took steps to revise laws governing foreign investment,<sup>138</sup> including foreign foundations' ownership of real estate.<sup>139</sup>

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132. Emre Sari, *Madagascar: l'Administration Rajoelina en Ébullition Après une Saisie d'or de Contrebande* [Madagascar: The Rajoelina Administration in Turmoil After a Seizure of Contraband Gold], JEUNEFRIQUE (Jan. 29, 2021, 12:37 PM), <https://www.jeunefrique.com/1112991/politique/madagascar-ladministration-rajoelina-en-ebullition-apres-une-saisie-dor-de-contrebande/>.

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H. MOZAMBIQUE

1. *Competition Authority Active*

The Competition Regulatory Authority (CRA) approved the Regulation on Notification Forms for Concentrations Between Undertakings.<sup>140</sup> The regular operation of the CRA and the implementation of the procedures to be observed represent a major development for mergers, acquisitions of shareholdings, and joint venture agreements.<sup>141</sup>

I. NAMIBIA

1. *Same-Sex Couple's Son Granted Citizenship*

The High Court granted citizenship to a two-year-old boy, the son of two married men, in November 2021.<sup>142</sup> The ruling overturned an order of the interior ministry, which had denied the boy's citizenship because he had been born via surrogacy in South Africa.<sup>143</sup> The couple, who also have twin daughters born in similar circumstances, have pending cases that seek citizenship for their daughters and the non-Namibian spouse, respectively.<sup>144</sup>

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J. SOUTH AFRICA

1. *Jacob Zuma Sentenced*

In June 2021, the Constitutional Court ordered the imprisonment of former President Zuma for contempt of court after Zuma refused to appear before the Zondo Commission, an investigation of corruption during Zuma's presidency.<sup>145</sup> Zuma was released after two months on a medical parole but was ordered to return to serve the remainder of his fifteen-month sentence in December 2021.<sup>146</sup>

K. SWAZILAND (KINGDOM OF ESWATINI)

1. *Internet Shutdown During Pro-Democracy Protests*

On June 29, 2021, the Eswatini Communications Commission allegedly ordered network providers to turn off internet connectivity during pro-democracy protests.<sup>147</sup> An application challenging the shutdown's constitutionality was referred to a full bench of the High Court of Eswatini in July 2021.<sup>148</sup> Authorities shut down the internet again amidst protests in October 2021,<sup>149</sup> when the government banned protests entirely.<sup>150</sup>

L. ZAMBIA

1. *Internet Shutdown During Election*

On August 12, 2021, the Zambia Information Communication and Technology Authority (ZICTA) ordered mobile service providers to shut down the provision of internet services during the course of national elections.<sup>151</sup> ZICTA's enabling legislation, the Information and Communications Technology Act No.3 of 2010, does not confer ZICTA

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146. Lynsey Chutel, *Jacob Zuma Must Return to Prison, a Judge in South Africa Rules*, N.Y. TIMES (Dec. 15, 2021), <https://www.nytimes.com/2021/12/15/world/africa/jacob-zuma-prison-south-africa.html>.

147. Tawanda Karombo, *Africa's Last Kingdom Is Using Modern Methods to Silence Dissent*, QUARTZ AFR. (July 7, 2021), <https://qz.com/africa/2029884/eswatini-turns-off-internet-to-silence-pro-democracy-protestors/>.

148. *Swaziland: Internet Shutdown in Eswatini Challenged in the High Court*, ALLAFRICA (July 5, 2021), <https://allafrica.com/stories/202107050776.html>.

149. *#KeepItOn: Eswatini Authorities Shut Down Internet to Quell Protests, Ask People to Email Grievances*, ACCESSNOW (Oct. 21, 2021, 6:32 AM), <https://www.accessnow.org/keepiton-eswatini-protests/>.

150. *Eswatini Bans Protests as Tensions Flare Amid Pro-Democracy Calls*, AL JAZEERA (Oct. 22, 2021), <https://www.aljazeera.com/news/2021/10/22/eswatini-bans-protests-as-tensions-flare>.

151. Grace Chaile Lesoetsa, *ZICTA Sued Over Internet Shutdown*, DAILY NATION (Aug. 14, 2021), <https://dailynationzambia.com/2021/08/zicta-sued-over-internet-shutdown/>

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with any authority to deprive citizens' access to internet.<sup>152</sup> The High Court is yet to set down the matter for trial. At the time, opposition leader Hakainde Hichilema won the presidency.<sup>153</sup>

M. ZIMBABWE

1. *Constitution Amended for Chief Justice*

On the eve of Chief Justice Luke Malaba's seventieth birthday, which would have meant his mandatory retirement, parliament amended the Constitution to give the president the power to extend the Chief Justice's tenure of office.<sup>154</sup> Then the Zimbabwean High Court declared President Mnangagwa's extension of the Chief Justice's tenure of office invalid.<sup>155</sup> The Constitutional Court quashed the High Court judgment and Malaba remains Chief Justice.<sup>156</sup>

**VI. African Institutions**

A. AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

1. *Commission of Inquiry in Tigray*

A Commission of Inquiry officially commenced work on June 17, 2021, to investigate allegations of violations of international human rights law and international humanitarian law.<sup>157</sup> Ethiopia called the inquiry "misguided" as international scrutiny intensified over the conflict in Tigray.<sup>158</sup>

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152. *Id.*

153. Chris Mfula, *Zambia Opposition Leader Hichilema Wins Landslide in Presidential Election*, REUTERS (Aug. 16, 2021, 2:32 AM), <https://www.reuters.com/world/africa/zambian-opposition-leader-hichilema-heads-closer-victory-presidential-vote-2021-08-15/>.

154. Constitution of Zimbabwe Amendment (No. 2) Act, 2021, at art. 13.

155. Carmel Rickard, *DRAMA AS ZIM COURT FINDS CHIEF JUSTICE MUST RETIRE, CONFUSION ABOUT AN APPEAL*, AFRICANLII (May 21, 2021), <https://africanlii.org/article/20210520/drama-zim-court-finds-chief-justice-must-retire-confusion-about-appeal-0>.

156. Marx Mupungu v Minister of Justice and 5 Ors, CCZ 07/21, <https://zimlii.org/zw/judgment/constitutional-court-zimbabwe/2021/7> (Zim.).

157. Press Release, African Union, Official Launch of the Commission of Inquiry on the Tigray Region in the Federal Democratic Republic of Ethiopia (June 16, 2021), <https://au.int/en/pressreleases/20210616/press-statement-official-launch-commission-inquiry-tigray-region-federal>.

158. *African Union Launches Probe into Alleged Rights Abuses in Tigray*, AL JAZEERA (June 17, 2021), <https://www.aljazeera.com/news/2021/6/17/african-union-launches-probe-alleged-rights-abuses-tigray>.

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**B. AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS**

1. *Accession to Article 34*

After two withdrawals in 2020,<sup>159</sup> Niger and Guinea Bissau ratified the Protocol Establishing the African Court on Human and Peoples' Rights and simultaneously deposited a Declaration under Article 34(6) of the Protocol in October and November 2021, respectively.<sup>160</sup> The declaration allows citizens of the two countries to access the African Court directly.<sup>161</sup>

**D. AFRICAN UNION**

1. *Somalia Assistance Beyond 2021*

Following a closed-door meeting in Mogadishu on August 19, 2021, the parties signed an agreement on the likely configuration and proposed mandate for AU support to Somalia beyond December 2021.<sup>162</sup> The African Union Mission in Somalia's mandate comes to an end in 2021.<sup>163</sup> The agreement will kick-start the transitional period.

2. *African Medical Agency Established*

On October 5, 2021, Cameroon deposited the fifteenth instrument of ratification of the Treaty for the Establishment of the African Medicines Agency (AMA), bringing it into force.<sup>164</sup> The AMA works to resolve the challenge of weak regulatory systems and the circulation of substandard and falsified medical products<sup>165</sup> by coordinating the services of quality-control laboratories in national and regional regulatory authorities.<sup>166</sup>

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159. *Benin and Côte D'Ivoire to Withdraw Individual Access to African Court*, INT'L JUST. RES. CTR. (May 6, 2020), <https://ijrcenter.org/2020/05/06/benin-and-cote-divoire-to-withdraw-individual-access-to-african-court/>.

160. *The Republic of Guinea Bissau Becomes the Eighth Country to Deposit a Declaration Under Article 24(6) of the Protocol Establishing the Court*, AFR. CT. ON HUM. PEOPLES' RTS. (Nov. 3, 2021), <https://www.african-court.org/wpafc/the-republic-of-guinea-bissau-becomes-the-eighth-country-to-deposit-a-declaration-under-article-346-of-the-protocol-establishing-the-court/>.

161. *Id.*

162. *African Union and Somalia Sign Agreement on Mission Assistance Beyond 2021*, BUS. INSIDER AFR. (Aug. 24, 2021), <https://africa.businessinsider.com/apo/african-union-and-somalia-sign-agreement-on-mission-assistance-beyond-2021/e4et0g8>.

163. *Id.*

164. Press Release, African Union, The African Union Commission Receives the Target Instrument of Ratification for the Establishment of the African Medicines Agency (AMA) (Oct. 5, 2021), <https://au.int/en/pressreleases/20211005/african-union-commission-receives-target-instrument-ratification>.

165. Treaty for the Establishment of the African Medicines Agency, art. 6, Feb. 11, 2019, [https://au.int/sites/default/files/treaties/36892-treaty-0069\\_-\\_ama\\_treaty\\_e.pdf](https://au.int/sites/default/files/treaties/36892-treaty-0069_-_ama_treaty_e.pdf)

166. Press Release, African Union, The African Union Commission receives the target instrument of ratification for the establishment of the African Medicines Agency (AMA) (Oct. 5, 2021), <https://au.int/en/pressreleases/20211005/african-union-commission-receives-target-instrument-ratification>.

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F. ECONOMIC COMMUNITY OF WEST AFRICAN STATES

1. *Nigeria and Twitter*

On June 22, 2021, the ECOWAS Community Court of Justice ordered the Nigerian government to refrain from imposing sanctions on any media house or harassing, intimidating, arresting, or prosecuting concerned Nigerians in their use of Twitter and social media platforms.<sup>167</sup> The application challenged the Nigerian government's indefinite suspension of Twitter and was announced two days after the social media platform deleted President Buhari's tweet and suspended his account.<sup>168</sup>

G. EAST AFRICAN COMMUNITY (EAC)

1. *EAC Verification Mission to the DRC*

In June 2021, a verification mission was expeditiously selected to consider the DRC's February application to join the EAC.<sup>169</sup> In November 2021, the mission report was recommended for consideration by the EAC heads of state.<sup>170</sup> A challenge to the DRC's admission is pending before the East African Court of Justice First Instance Division, which allowed the applicant to serve its case out of time in June 2021.<sup>171</sup>

H. AFRICAN DEVELOPMENT BANK (AfDB)

1. *Bank Adopts Policy to Strengthen Accountability*

In September 2021, the AfDB board of directors approved a new policy framework for the renamed independent recourse mechanism (IRM) aimed at strengthening accountability and providing more effective recourse to

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167. *In re* Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v. Federal Republic of Nigeria, ECW/CCJ/RUL/03/21, Community Court of Justice of the Economic Community of West African States (ECOWAS) (June 22, 2021); Vishwanath Petkar, *ECOWAS Court Orders Nigeria to Stop Prosecuting Twitter Users*, JURIST (June 25, 2021), <https://www.jurist.org/news/2021/06/ecowas-court-orders-nigeria-to-stop-prosecuting-twitter-users/>.

168. *Mubammadu Buhari: Twitter Deletes Nigerian Leader's 'Civil War' Post*, BBC NEWS (June 2, 2021), <https://www.bbc.com/news/world-africa-57336571> (Twitter categorised a Buhari tweet threatening to brutally punish groups for attacks on government buildings as abusive behaviour.).

169. David Ochieng Mbewa, *EAC Begins Verification Mission to DR Congo*, CGTN AFR. (June 26, 2021), <https://africa.cgtn.com/2021/06/26/eac-begins-verification-mission-to-dr-congo/>.

170. *EAC Council of Ministers Green-Light Report on DRC Verification Mission for Consideration by EAC Heads of State*, E. AFRICAN CMTY. (Nov. 23, 2021), <https://www.eac.int/press-releases/2288-eac-council-of-ministers-green-light-report-on-drc-verification-mission-for-consideration-by-eac-heads-of-state>.

171. *Court allows a Party to Serve His Case Out of Time in a Matter Challenging the Summit Over Admission of DRC to EAC*, E. AFRICAN CMTY. (June 17, 2021), <https://www.eac.int/press-releases/2107-court-allows-a-party-to-serve-his-case-out-of-time-in-a-matter-challenging-the-summit-over-admission-of-drc-to-eac> (the applicant challenges DRC's admission on its history and likely future failures to meet the human rights standards of the EAC).

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people affected by bank operations.<sup>172</sup> Several of the policy changes make public awareness and accessibility of the IRM incumbent on the bank.<sup>173</sup>

I. AFRICAN EXPORT-IMPORT BANK (AFREXIMBANK)

1. *Fund for Export-Development in Africa (FEDA)*

Five countries (four in 2021) have signed and Rwanda has ratified the Agreement for the Establishment of the Fund for Export-Development in Africa, a subsidiary of the Bank, which will catalyze foreign direct investment flows into Africa's trade and export sectors.<sup>174</sup> The Bank noted there was an annual equity funding gap of \$110 billion in the areas of intra-African trade and export development.<sup>175</sup> FEDA's permanent headquarters will be in Kigali once a second member country ratifies the agreement.<sup>176</sup>

J. UN ECONOMIC COMMISSION FOR AFRICA (UNECA)

1. *Liquidity and Sustainability Facility (LSF)*

At COP26 of the UN Framework Convention on Climate Change, the UNECA announced a finance mechanism that will allow borrowers with African government bonds to obtain repos, short-term loans using bonds as collateral.<sup>177</sup> Called the LSF, the mechanism is designed to make African bonds less risky and more attractive, with potential savings of \$11 billion to African governments over the next five years.<sup>178</sup>

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172. *African Development Bank Adopts New Policy to Strengthen Accountability and Support People Affected by Its Operations*, AFRICAN DEV. BANK GRP. (Sept. 24, 2021), <https://www.afdb.org/en/news-and-events/press-releases/african-development-bank-adopts-new-policy-strengthen-accountability-and-support-people-affected-its-operations-45786>.

173. *Id.*

174. *Establishment Agreement of Afreximbank's Fund for Export Development in Africa (FEDA): Rwanda Ratifies, Togo and South Sudan Join Three Other Signatories*, AFRIMBANK (Aug. 31, 2021), <https://www.afreximbank.com/establishment-agreement-of-afreximbanks-fund-for-export-development-in-africa-feda-rwanda-ratifies-togo-and-south-sudan-join-three-other-signatories/>.

175. *Mauritania Becomes Second Signatory State of the Establishment Agreement of Fund for Export Development in Africa (FEDA)*, AFRIMBANK (Jan. 25, 2021), <https://www.afreximbank.com/mauritania-becomes-second-signatory-state-of-the-establishment-agreement-of-fund-for-export-development-in-africa-feda/>.

176. *Rwanda Signs Agreements to Establish and Host Fund for Export Development in Africa*, RWANDA DEV. BD. (Nov. 22, 2020), <https://rdb.rw/rwanda-signs-agreements-to-establish-and-host-fund-for-export-development-in-africa/>.

177. *U.N. Launches Fund to Foster Cheaper Loans, Green Development for Africa*, REUTERS (Nov. 3, 2021), <https://www.reuters.com/business/cop/un-launches-fund-foster-cheaper-loans-green-development-africa-2021-11-03/>.

178. *Id.*

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K. COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA  
(COMESA)

1. *Transit Guarantee Scheme*

COMESA was the last regional block with which Afreximbank formalized its African Collaborative Transit Guarantee Scheme, wherein Afreximbank will serve as a continent-wide guarantor of transit bonds to free up business capital and ensure governments their taxes.<sup>179</sup> Of the \$1 billion program, approximately \$200 million is earmarked for COMESA.<sup>180</sup>

L. ORGANIZATION FOR THE HARMONIZATION OF BUSINESS LAW IN  
AFRICA (OHADA)

1. *Register Computerization*

The computerization of the Trade and Personal Property Credit Register is being completed.<sup>181</sup> This will facilitate access to financials and information of incorporated companies established in the seventeen member states.<sup>182</sup>

M. ECONOMIC COMMUNITY OF CENTRAL AFRICAN STATES

1. *Electricity Framework*

With the support of the African Development Bank Group, the Economic Community of Central African States (ECCAS) launched a project aimed at creating an institutional and regulatory framework for electricity in Central Africa.<sup>183</sup> The development project will take place from 2022-2024.<sup>184</sup> As of

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179. *Afreximbank Partners with COMESA to Implement its US\$1billion Continental Transit Guarantee Scheme*, AFREXIMBANK (Mar. 10, 2021), <https://www.afreximbank.com/afreximbank-partners-with-comesa-to-implement-its-us1-billion-continental-transit-guarantee-scheme/>.

180. *Id.*

181. Press Release, Emmanuel Sibidi Darankoum, Permanent Sec'y, Communiqué du Secrétariat Permanent de l'OHADA, Message du secrétaire permanent de l'OHADA à l'occasion de la célébration du 28ème anniversaire de l'Organisation pour l'Harmonisation en Afrique du Droit des Affaires [Press release from the Permanent Secretariat of OHADA, Message from the Permanent Secretary of OHADA on the occasion of the celebration of the 28th anniversary of the Organization for the Harmonization of Business Law in Africa] (Oct. 18, 2021), <https://www.ohada.com/actualite/6056/message-du-secretaire-permanent-de-lohada-a-loccasion-de-la-celebration-du-28eme-anniversaire-de-lorganisation-pour-lharmonisation-en-afrique-du-droit-des-affaires.html>.

182. *Id.*

183. Lancement officiel du Projet d'Appui au Développement du Cadre institutionnel et Réglementaire de l'Electricité de l'Afrique centrale [Official Launch of the Project to Support the Development of the Central African Institutional and Regulatory Framework for Electricity], CEEAC-ECCAS (Nov. 24, 2021), <https://ceeac-eccas.org/programmes/lancement-officiel-du-projet-dappui-au-developpement-du-cadre-institutionnel-et-reglementaire-de-lelectricite-de-lafrique-centrale/>.

184. AFR. DEV. BANK GRP., PROJECT APPRAISAL REPORT ON THE SUPPORT PROJECT FOR THE DEVELOPMENT OF THE INSTITUTIONAL AND REGULATORY FRAMEWORK FOR ELECTRICITY IN



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2018, only 0.2 percent of power generated in the region was traded through bilateral agreements.<sup>185</sup>

N. SOUTHERN AFRICAN DEVELOPMENT COMMUNITY (SADC)

1. *Cabo Delgado*

Over the course of 2021, both Rwanda and SADC deployed troops to Mozambique to combat the long-running insurgency in Cabo Delgado, a northern province rich with natural resources.<sup>186</sup> The conflict, ongoing since 2017, has so far cost over 3,000 lives and displaced 700,000 people.<sup>187</sup> In November, the head of the SADC Mission in Mozambique, Professor Mpho Molomo, said that military intervention had been successful but that ultimate success would come from reconstruction.<sup>188</sup>

O. UN MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS

1. *Witness Tampering Convictions*

In June 2021, Augustin Ngirabatware and three others were convicted of contempt for witness interference, primarily between 2015 and 2018, when Ngirabatware sought to overturn his genocide convictions on the basis of witness recantations.<sup>189</sup> Ngirabatware was sentenced to two more years on top of his earlier year sentence, while the co-accused received time served.

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CENTRAL AFRICA [PADCRE] 4.2.1. (2021), <https://www.afdb.org/en/documents/multinational-support-project-development-institutional-and-regulatory-framework-electricity-central-africa-padcre-project-appraisal-report> .

185. *Id.* at 1.2.3.

186. *Experts Agree that Foreign Intervention Will Help Mozambique's Cabo Delgado to Curb Insurgency*, S. AFR. DEV. CMTY. (SADC) (Nov. 11, 2021), <https://www.sadc.int/news-events/news/experts-agree-foreign-intervention-will-help-mozambiques-cabo-delgado-curb-insurgency/>.

187. *Mozambique Situation Report*, UN OFF. FOR THE COORDINATION OF HUMANITARIAN AFF. (Sept. 1, 2021), <https://reports.unocha.org/en/country/mozambique/>; *see also Cabo Ligado Weekly: 6-12 December*, CABO LIGADO (Dec. 15, 2021), <https://www.caboligado.com/reports/cabo-ligado-weekly-6-12-december-2021>.

188. *Experts Agree that Foreign Intervention Will Help Mozambique's Cabo Delgado to Curb Insurgency*, *supra* note 186.

189. Pronouncement of Judgment in the Nzabonimpa et al. Contempt Case, INT'L RESIDUAL MECHANISM FOR CRIM. TRIBUNALS (IRMCT) (June 25, 2021), <https://www.irmct.org/en/news/21-06-25-pronouncement-judgement-nzabonimpa-et-al-contempt-case>; *see also* Fatuma et al. (MICT-18-116-A), INT'L RESIDUAL MECHANISM FOR CRIM. TRIBUNALS (IRMCT) (Jan. 2022), <https://www.irmct.org/en/cases/mict-18-116>.

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## Europe

DUNCAN GORST, LUIGI PAVANELLO, WILLEM DEN HERTOOG, AND  
JONATHAN A. MCGOWAN

This article reviews some of the most significant international legal developments made in Europe in 2021.

### I. Major Decisions of the Court of Justice of the European Union

In two major and controversial cases, the Court of Justice of the European Union (CJEU) has addressed intra-EU investment arbitration in the context of ad hoc agreements to arbitrate between EU Member States and investors from EU Member States, as well as arbitrations under the Energy Charter Treaty.

In *Republic of Poland v. PL Holdings S.à r.l.*,<sup>1</sup> the CJEU held that ad hoc arbitration agreements that are identical to investor-state arbitration clauses in intra-EU bilateral investment treaties (BIT) are contrary to EU law.<sup>2</sup> In February 2020, the Supreme Court of Sweden had requested a preliminary ruling from the CJEU on whether the CJEU's previous ruling in *Slovak Republic v. Achmea*<sup>3</sup> required it to set aside two arbitral awards rendered under Poland's BIT with the Belgium-Luxembourg Economic Union.<sup>4</sup> The CJEU held that allowing an EU Member State to conclude an ad hoc arbitration agreement with the same content as an invalid arbitration clause in an intra-EU BIT would circumvent the EU Member State's obligations under Article 4(3) of the Treaty on European Union and Articles 267 and 344 of the Treaty on the Functioning of the European Union.<sup>5</sup> This finding is based on the fact that such ad hoc arbitration agreements would have the same effects as an arbitration clause in a BIT.<sup>6</sup> First, ad hoc arbitration agreements would maintain the effects of an invalid provision in a BIT.<sup>7</sup> Second, this was not an isolated case as ad hoc agreements could be adopted in a multitude of cases, which would repeatedly undermine the autonomy of EU law.<sup>8</sup> Third, the legal basis of an arbitral tribunal's jurisdiction cannot

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1. See Case C-109/20, *Republic of Poland v. PL Holdings Sàrl*, ECLI:EU:C:2021:875.

2. *Id.*

3. See Case C-284/16, *Slovak Republic v. Achmea BV*, ECLI:EU:C:2018:158.

4. See Agreement Between BLEU (Belgium-Luxembourg Economic Union) and Poland about the Protection and the Protection of Investments (1987).

5. See *PL Holdings Sàrl*, ECLI:EU:C:2021:875, ¶¶ 46–47.

6. *Id.* ¶ 48.

7. See Case C-109/20, *Republic of Poland v. PL Holdings Sàrl*, ECLI:EU:C:2021:875, ¶ 48.

8. *Id.* ¶ 49.

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depend on the conduct of the parties to the dispute.<sup>9</sup> Finally, ad hoc arbitration agreements would, as was the case in *Achmea*,<sup>10</sup> remove from the EU judicial system disputes which may concern the application and interpretation of EU law.<sup>11</sup> The CJEU also held that EU Member States have a positive obligation to challenge the validity of any arbitration clause in a BIT or ad hoc arbitration agreement.<sup>12</sup>

In *Republic of Moldova v. Komstroy LLC*,<sup>13</sup> the CJEU held that Article 26 of the Energy Charter Treaty (ECT) is not applicable to intra-EU investment arbitration disputes.<sup>14</sup> The Paris Court of Appeal had requested a preliminary ruling from the CJEU relating to setting aside proceedings brought by Moldova with respect to an UNCITRAL arbitral award.<sup>15</sup> The Paris Court of Appeal had requested the preliminary ruling to determine whether a claim arising from a contract for the sale of electricity could constitute an “investment” under the ECT.<sup>16</sup> After the European Commission and several EU Member States intervened in the proceedings, the CJEU took the request for preliminary ruling as an opportunity to also decide on the applicability of the arbitration provisions in the ECT to intra-EU investment arbitration disputes. The CJEU held, drawing parallels to *Achmea*,<sup>17</sup> that Article 26(2)(c) of the ECT, which provides for the resolution of disputes under the ECT by arbitration, is not applicable to intra-EU disputes.<sup>18</sup>

First, the CJEU considered that Article 26(6) of the ECT provides that an arbitral tribunal must decide the issues in dispute in accordance with the ECT and the principles of international law.<sup>19</sup> The CJEU held that as the ECT is an act of EU law,<sup>20</sup> the arbitral tribunal is required to interpret and apply EU law.<sup>21</sup> Second, the CJEU held that an arbitral tribunal is not a court or tribunal of an EU Member State within the meaning of Article 267 of the TFEU and may not, therefore, refer questions to the CJEU for a preliminary ruling.<sup>22</sup> Third, the CJEU examined whether the full effectiveness of EU law could be guaranteed by subjecting the award to review by the courts of the EU Member State. As French law—the law of the forum in this case—foresees only a limited review of arbitral awards,<sup>23</sup> a

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9. *Id.* ¶ 51.

10. See *Achmea*, ECLI:EU:C:2018:158. .

11. See *PL Holdings Sàrl*, ECLI:EU:C:2021:875, ¶ 52.

12. *Id.*

13. See Case C-741/19, *Republic of Moldova v. Komstroy LLC*, ECLI:EU:C:2021:655.

14. *Id.* ¶ 87.

15. *Id.* ¶ 56.

16. *Id.* ¶ 68.

17. See *Achmea*, ECLI:EU:C:2018:158.

18. See *Komstroy LLC*, ECLI:EU:C:2021:655, ¶ 66.

19. *Id.* ¶ 48.

20. *Id.* ¶ 23.

21. *Id.* ¶¶ 48–50.

22. *Id.* ¶¶ 51–53.

23. *Id.* ¶ 57.

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risk exists that the ECT excludes the full effectiveness of EU law in a dispute between an investor of one EU Member State and another EU Member State that is heard by an arbitral tribunal applying EU law.<sup>24</sup>

## II. New Dual Use Regulation issued in the European Union

### A. OVERVIEW

With Regulation (EU) 2021/821 of the European Parliament and of the Council of May 30, 2021 (the “Regulation”) the European Union has revised and set up an EU common regime for the control of exports, brokering, technical assistance, transit, and transfer of dual-use items.<sup>25</sup> The Regulation both substitutes for and updates the existing prior EU legislation.<sup>26</sup>

According to the Regulation, “dual-use items” means items, including software and technology which can be used for both civil and military purposes, and includes items which can be used for the design, development, production or use of nuclear, chemical, or biological weapons or their means of delivery, including all items which can be used for both non-explosive uses and assisting in any way in the manufacture of nuclear weapons or other nuclear explosive devices.<sup>27</sup>

Similar to the previous legislation, the Regulation is centered around the principle that the export outside the EU of a dual use item requires prior authorization. In light of this principle, the Regulation aims to harmonize and control a common dual used items regime through:

1. Common export control rules, including a common set of assessment criteria and common types of authorizations (individual, global, and general authorizations);<sup>28</sup>
2. A common EU list of dual-use items;<sup>29</sup>
3. Authorization for the export of cyber-surveillance items;<sup>30</sup>
4. Controls on brokerage and technical assistance services relating to dual-use items and their transit through the EU;<sup>31</sup>
5. Imposition of specific control measures and compliance to exporters, such as record-keeping and registers;<sup>32</sup> and
6. Set up of a network of authorities supporting the exchange of information and the consistent implementation and enforcement of controls throughout the EU.<sup>33</sup>

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24. *Id.* ¶ 62.

25. Council Regulation 428/2009, 2009 O.J. (L134) 1 (EC).

26. Council Regulation (CE) 428/2009.

27. Art. 2(1) of Reg. (EU) 2021/821.

28. Arts. 4, 5, 9, and 10 of Reg. (EU) 2021/821.

29. Annex I of Reg. (EU) 2021/821.

30. Art. 5 of Reg. (EU) 2021/821.

31. Art. 6 of Reg. (EU) 2021/821.

32. Art. 27 of Reg. (EU) 2021/821.

33. Art. 23–26 of Reg. (EU) 2021/821.

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Dual-use items may be traded freely within the EU, except for some particularly sensitive items, whose transfer within the EU remains subject to prior authorization.<sup>34</sup>

**B. DUAL-USE EXPORT AUTHORIZATIONS**

There are four types of export authorizations in place in the EU export control regime:<sup>35</sup>

*1. EU General Export Authorizations (EUGEAs)*

According to the Regulation, EUGEAs allow exports of dual-use items to certain destinations under certain conditions.<sup>36</sup> The Regulation lists the following EUGEAs:<sup>37</sup>

1. Exports to Australia, Canada, Iceland, Japan, New Zealand, Norway, Switzerland, Liechtenstein, United Kingdom, and the United States of America;
2. Export of certain dual-use items to certain destinations;
3. Export after repair/replacement;
4. Temporary export for exhibition or fair;
5. Telecommunications;
6. Chemicals;
7. Intra-group technology transfers; and
8. Encryption.

*2. National General Export Authorizations (NGEAs)*

NGEAs may be issued by EU Member States if they are consistent with existing EUGEAs and do not refer to items listed in Annex IIg of the Regulation.<sup>38</sup>

*3. Global Licenses*

Global licenses can be granted by competent authorities to one exporter and may cover multiple items to multiple countries of destination or end users.<sup>39</sup>

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34. Annex IV of Reg. (EU) 2021/821.

35. Article 12 of Reg. (EU) 2021/821.

36. Annex II of Reg. (EU) 2021/821.

37. §§ A–H of Annex II of Reg. (EU) 2021/821.

38. Arts. 12.2, 12.3, 12.4, 12.5, and 12.7 of Reg. (EU) 2021/821.

39. Art. 12. and 12.7 of Reg. (EU) 2021/821.

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4. *Individual Licenses*

Individual licenses can be granted by competent authorities to one exporter and cover exports of one or more dual-use items to one end-user or consignee in a third country.<sup>40</sup>

This new Regulation has upgraded and strengthened the EU's export control toolbox to respond effectively to evolving security risks and emerging technologies and, hopefully, will allow the EU to effectively protect its interests and values.

**III. The Hague Court of Appeal Refuses to Suspend Establishment of Dutch Ultimate Beneficial Owner (UBO) Register**

As described last year,<sup>41</sup> the Dutch government has started establishing the UBO-register, required under Article 30 of the 4th EU Anti-Money Laundering Directive (the "Directive").<sup>42</sup> The Act implementing the Directive into Dutch law<sup>43</sup> specifies that the UBO's full name, month and year of birth, country of domicile and nationality as well as the nature and extent of the UBO's economic interest in the legal entity concerned can be accessed by any member of the public.<sup>44</sup>

This public availability is seen as a grave threat to the privacy of the individuals concerned, exposing them to all kinds of unwanted attention and far worse, such as extortion and kidnapping. For that reason, a Dutch Stichting, a foundation and non-profit corporate entity under Dutch law, called *Stichting Privacy First*, took the Dutch government to court in *Kort Geding* (Provisional Proceedings).<sup>45</sup> Stichting Privacy First demanded that the State be ordered to stop the registration of UBOs or suspend it pending the answer by the Court of Justice of the European Union (CJEU) of

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40. Arts. 12.2, 12.3, 12.4, 12.5, and 12.7 of Reg. (EU) 2021/821.

41. James Henry Bergeron et al., *Europe*, 55 *THE YEAR IN REVIEW* 397, 398 (2021).

42. Council Directive (EU) 2015/849 of May 20, 2015, on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, art. 30, 2015 O.J. (L 141), 73, 96–97.

43. Wet van 24 juni 2020 tot wijziging van de Handelsregisterwet 2007, de Wet ter voorkoming van witwassen en financieren van terrorisme en enkele andere wetten in verband met de registratie van uiteindelijk belanghebbenden van vennootschappen en andere juridische entiteiten ter implementatie van de gewijzigde vierde anti-witwasrichtlijn (Implementatiewet registratie uiteindelijk belanghebbenden van vennootschappen en andere juridische entiteiten) 6/24/2020, Stb. (Staatsblad (Dutch Government Gazette) 2020, 231.

44. Laid down in articles 21 and 22 Handelsregisterwet 2007 (Dutch Trade Register Act, Hrw) (Wet van 22 maart 2007, houdende regels omtrent een basisregister van ondernemingen en rechtspersonen, Stb. 2007, 153, last changed on 27-9-2020).

45. Gerechtshof Den Haag 18 maart 2021, KG 2021, 1232 m.nt. Redactie (Stichting Privacy First/De Staat Der Nederlanden (Ministerie van Financiën, Ministerie van Justitie en Veiligheid en Ministerie van Economische Zaken en Klimaat)) (Neth.).

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prejudicial questions, which was to be asked by the *Voorzieningenrechter* (Provisional Measures Judge) on the legality of these matters.<sup>46</sup>

In a March 18, 2021, decision of the Hague *Voorzieningenrechter*,<sup>47</sup> the claims were denied. The Judge found that the Dutch State could not be ordered to breach its duties under the Directive.<sup>48</sup> And although the Judge did see cause, specifically in view of the critical EDPS advice,<sup>49</sup> to ask prejudicial questions, he refrained from doing so, because the *Tribunal d'arrondissement* of Luxembourg had already asked “largely corresponding” prejudicial questions on November 13, 2020.<sup>50</sup>

Privacy First appealed to the Hague Court of Appeal.<sup>51</sup> This Court gave its decision on November 16, 2021.<sup>52</sup> The claims were denied yet again.

Although the Court of Appeal agreed with Privacy First that a national court can suspend a national measure based on a European law if there is serious doubt as to the validity of that law, it refrained from doing so and cited the *Zuckerfabrik*<sup>53</sup> and *Atlanta*<sup>54</sup> decisions. According to the Court of Appeal, there was a simpler way to stave off the “irreparable damage” required under the decisions cited for suspension of the Dutch implementation of the Directive.<sup>55</sup> Article 30, Section 9 of the Directive provides for an exemption to public access of the UBO’s data if such access “would expose the beneficial owner to disproportionate risk, risk of fraud, kidnapping, blackmail, extortion, harassment, violence, or intimidation.”<sup>56</sup> Article 51b, Section 3 *Handelsregisterbesluit* (Trade Register Decree) stipulates that the Trade Register “immediately” blocks access to the public when a request for such an exemption is made, until the request has been

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46. For the doubtfulness of this legality, reference was made to a very critical advice of the European Data Protection Supervisor (EDPS) of 18 March 2017 (Official Journal of the European Union, 2017/ C 85/04) [hereinafter *Official J. of the E.U.*].

47. *Voorzieningenrechter* Den Haag 18 maart 2021, KG 2021, 1232 m.nt. Redactie (Stichting Privacy First/De Staat Der Nederlanden (Ministerie van Financiën, Ministerie van Justitie en Veiligheid en Ministerie van Economische Zaken en Klimaat)) ECLI:NL:RBDHA:2021:2457 (Neth.).

48. *Id.*

49. *See* Reg. (EU) 2021/821, *supra* note 46.

50. *Id.*

51. *Gerechtshof* Den Haag 16 november 2021, Hof 2021, 200.293.732/01 m.nt. Redactie (de stichting Stichting Privacy First/ de publiekrechtelijke rechtspersoon Staat Der Nederlanden (Ministerie van Justitie en Veiligheid en Ministerie van Economische Zaken en Klimaat)) (Neth.).

52. *Id.*

53. CJEU 21 February 1991, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:61988CJ0143>.

54. CJEU 9 November 1995, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61993CJ0465>.

55. *Gerechtshof* Den Haag 16 november 2021, Hof 2021, 200.293.732/01 m.nt. Redactie (de stichting Stichting Privacy First/ de publiekrechtelijke rechtspersoon Staat Der Nederlanden (Ministerie van Justitie en Veiligheid en Ministerie van Economische Zaken en Klimaat)) (ECLI:NL:GHDHA:2021:2176) (Neth.).

56. *Handelsregisterbesluit*, Stert. 2008, 12.

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judged and decided upon in the highest instance.<sup>57</sup> This will presumably be long enough for the CJEU to give its decision, especially because this Hague Court of Appeal decision will probably give rise to a high number of such requests.

All eyes, or at least the Dutch and Luxembourg one, are now on the CJEU, whose decision on the legality of public access of the UBO register is awaited some time in 2022.<sup>58</sup>

#### **IV. ALI-ELI Principles for a Data Economy: Data Transactions and Data Rights**

The American Law Institute (ALI) has drafted model laws since 1923, most notably the Model Penal Code (MPC) which is the standard for criminal laws throughout the United States.<sup>59</sup> Its sister organization, the European Law Institute (ELI), performs a similar service for the European Union in the harmonization of laws.<sup>60</sup> In 2016, these two organizations came together to begin a joint project addressing the emerging legal field of trade in a data economy.<sup>61</sup> In addition to members of ALI and ELI, the project team included representation from the European Parliament, United Nations Commission on International Trade Law (UNCITRAL), and various other organizations and academic institutions.<sup>62</sup>

The result was a 293-page document with forty Principles setting out a detailed framework for future legal development in the field.<sup>63</sup> Similar to the MPC, the *Principles for a Data Economy* (Principles) include language drafted to be used in future legislation and comments on the language to provide clarity of intent.<sup>64</sup> Additionally, the Principles include written illustrations in the comments to offer real world context.<sup>65</sup> The Principles address four main aspects of a data economy: data contracts, data rights, third party aspects of data activities, and multi-state issues.<sup>66</sup>

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57. *Id.*

58. Dutch Court of Appeal rules Ultimate Beneficial Owners can request shielding of data, <https://privacyfirst.eu/court-cases/705-dutch-court-of-appeal-rules-ultimate-beneficial-owners-can-request-shielding-of-data.html> (last visited Mar. 24, 2022).

59. See generally MODEL PENAL CODE (AM. L. INST.) <https://www.ali.org/publications/show/model-penal-code/>.

60. See generally EUROPEAN L. INST., available at [www.europeanlawinstitute.eu](http://www.europeanlawinstitute.eu).

61. ALI-ELI Principles for a Data Economy: Data Transactions and Data Rights, 3, (2021), <https://principlesforadataeconomy.org> [hereinafter *Data Transactions and Data Rights*].

62. *Id.* at 4.

63. *Id.* at 1.

64. *Id.* at 14.

65. *Id.*

66. *Id.* at 22.



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A. DATA CONTRACTS

In addressing contracts relating to the trade of data, the Principles address the complexities of cross border agreements as well as the difficulties of trading a changing commodity.<sup>67</sup> Freedom of contract is a core principle in both the United States and European common law, with limitations imposed by the Uniform Commercial Code (UCC) and Principles of European Contract Law (PECL).<sup>68</sup> The Principles provide both general guidance and sample language for data contracts.<sup>69</sup> The Principles address two categories of data contracts: Contracts for the Supply or Sharing of Data and Contracts for Services with Regard to Data.<sup>70</sup> In regard to Supply or Sharing of Data, five Principles are provided addressing contracts for the transfer of data, contracts for the simple access to data, contracts for the exploitation of a data source, contracts for authorization to access, and contracts for data pooling.<sup>71</sup> For Contracts for Services with regard to Data, four Principles address this: contracts for the processing of data, data trust contracts, data escrow contracts, and data marketplace contracts.<sup>72</sup>

B. DATA RIGHTS

The data rights addressed in the Principles are the legally protected interests as they relate to the data, but do not include the broader issue of intellectual property rights.<sup>73</sup> The Principles propose the recognition of a “new data specific class of rights” known as “data rights.”<sup>74</sup> This is more complex than rights assigned through contract as there may be no contract between the parties or the contract may be silent as to the rights of the data.<sup>75</sup> This is primarily focused on the data collected by equipment through usage and addresses what rights, if any, the final owner or user of the equipment has to the data, referred to as Co-Generated Data.<sup>76</sup> Six Principles outline the Rights with Regard to Co-Generated Data: Co-Generated Data, General Factors Determining Rights in Co-Generated Data, Access or Porting with Regard to Co-Generated Data, Desistance from Data Activities with Regard to Co-Generated Data, Correction of Co-Generated Data, and Economic Share in Profits Derived from Co-Generated Data.<sup>77</sup>

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67. *Data Transactions and Data Rights*, *supra* note 47, at 48.

68. *Id.* at 50–51.

69. *Id.* at 9.

70. *Id.* at 56, 95.

71. *Id.* at 56–94.

72. *Id.* at 95–124.

73. *Data Transactions and Data Rights*, *supra* note 47, at 125.

74. *Id.* at 126.

75. *Id.*

76. *Id.*

77. *Id.* at 134–166.

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An alternative approach to data rights is that of the public interest.<sup>78</sup> For example, if a mechanic needs access to data for a repair, the data on the equipment would arguably be available under the above-mentioned rights; however, the mechanic would not have access to other data for training or comparative purposes.<sup>79</sup> Principles twenty-four through twenty-seven outline the limited scope in which data should be shared in the public interest, as well as protecting the privacy rights and trade secrets of the data.<sup>80</sup>

C. THIRD PARTY ASPECTS OF DATA ACTIVITIES

While the first Part focused on data rights between parties in a contract and the second Part focused on a party with data rights' relationship with a party controlling the data, the third Part focuses on the third parties in relation to data.<sup>81</sup> Data is often passed from one controller to another.<sup>82</sup> These third parties who hold, transmit, or have access to the data need protection in addition to owing a duty to the involved parties.<sup>83</sup> This Part has ten Principles and divides the third party rights into three sections: Protection of Others against Data Activities, Effects of Onward Supply on the Protection of Others, and Effects of Other Data Activities on the Protection of Third Parties.<sup>84</sup>

D. MULTI-STATE ISSUES

The cross-border nature of data transfer and storage leads to a natural complexity on choice-of-law and forum.<sup>85</sup> Principle 38 points to existing choice-of-law rules of the forum State if there is a clear rule.<sup>86</sup> If there is not a clear rule, Principle 39 establishes that the State with the most significant relationship to the legal issue in question shall be the applicable law, laying out a series of factors in determining the significant relationship.<sup>87</sup> Principle forty establishes that the storage location of the data is only a factor if the storage is part of the legal dispute.<sup>88</sup>

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78. *Id.* at 167.

79. *Data Transactions and Data Rights, supra* note 47, at 168.

80. *Id.* at 167–184.

81. *Id.* at 186.

82. *Id.* at 207.

83. *Id.*

84. *Id.* at 185–243

85. *Data Transactions and Data Rights, supra* note 47, at 244.

86. *Id.* at 244–251.

87. *Id.* at 251–255.

88. *Id.* at 255.

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## **Middle East**

KELLY BLOUNT, HARRY BAUMGARTEN, NICOLAS BREMER, GAURAV REDHAL, SEYED MOHSEN ROWHANI, HOWARD L. STOVALL, AND CATHERINE VAN KAMPEN\*

This article surveys significant legal developments in the Middle East in 2021.

### **I. Egypt**

After a lengthy legal reform process that was initiated in 2017 by the Egyptian Competition Authority (ECA), the Egyptian Council of Ministers announced in late November 2020 that they had approved a draft new competition law.<sup>1</sup> The law will, among other things, overhaul the country’s merger control regime—moving it from a post-closing to a pre-closing notification requirement.<sup>2</sup> In February 2021, the Economic Committee

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\* Kelly Blount editor of the Middle East Committee’s contribution to the 2020 Year in Review; Kelly is an American attorney based in Luxembourg writing a PhD in law. Harry Baumgarten (Lebanon) previously served as Legislative Director and Counsel to Members of the House of Representatives. He holds Juris Doctor and Master of Public Policy degrees from Georgetown University and a Bachelor of Arts degree from the George Washington University. Nicolas Bremer (Egypt, Kuwait, Saudi Arabia) is an attorney and partner with BREMER law firm and specializes on advising on M&A transactions as well as merger control matters in Saudi Arabia, Egypt and the wider Middle East. He manages the firms representations in Riyadh and Cairo. Gaurav Redhal (United Arab Emirates) is an Indian Lawyer registered with the All-India Bar Association. He is pursuing LLM in International Law and Legal Studies at Fletcher School of Law and Diplomacy. His thesis analyzes the expanding scope of ‘international peace and security’ mandate of the United Nations Security Council. Seyed Mohsen Rowhani (Iran) holds a JSD from Cardozo Law School and is an NGO representative at the United Nations. He has a Master’s degree in Private Law from Imam Sadiq University and an LLM in International Law from Fordham Law School. Howard Stovall (Yemen) is a Chicago based attorney working exclusively on Arab commercial law matters. Catherine van Kampen’s (Iraq) law practice concentrates on class action settlement administration. Her extensive pro bono service focuses on underserved communities, particularly immigrant and refugee women and children. She is a member of the New York City Bar Association’s United Nations Committee and African Affairs Committee, as well as the American Bar Association.

1. See INTERNATIONAL MONETARY FUND, IMF COUNTRY REPORT NO. 20/266: ARAB REPUBLIC OF EGYPT 14 (2020), <https://www.imf.org/-/media/Files/Publications/CR/2020/English/1EGYEA2020001.ashx> [<https://perma.cc/7SKF-RPQP>]; INTERNATIONAL MONETARY FUND, IMF COUNTRY REPORT NO. 20/163: ARAB REPUBLIC OF EGYPT 69 (2021).

2. See INTERNATIONAL MONETARY FUND, IMF COUNTRY REPORT NO. 20/163, *supra* note 1, at 42.

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approved the draft law.<sup>3</sup> To date, the legislator has, however, neither published the draft law nor communicated a date on which the new law will be published and will enter into force.<sup>4</sup>

## II. Iran

### A. THE FAMILY PROTECTION AND POPULATION REJUVENATION ACT<sup>5</sup>

During the past few years, Iran has taken essential steps towards changing the descending slope of the birth rate by enacting new regulations to encourage larger families.<sup>6</sup> Accordingly, on November 10, 2021, Iran's Parliament enacted the Family Protection and Population Rejuvenation Act (Act), which consists of seventy-three detailed articles.<sup>7</sup> The Act—by outlining a wide-ranging set of financial benefits from loans<sup>8</sup> to purchase houses<sup>9</sup> and cars,<sup>10</sup> to raising the maternity leave to nine months,<sup>11</sup> and reducing the retirement age of mothers to forty-three years<sup>12</sup>—provides a comprehensive package of encouraging assistance. Despite the extensive benefits, there are also valid concerns about the regulation, because the Act restricts abortion unless a pregnancy threatens a woman's health,<sup>13</sup> outlaws sterilization,<sup>14</sup> and outlaws the free distribution of contraceptives in the public health care system.<sup>15</sup>

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3. See *The ECA is Getting Muscled Up, but Do We Even Agree on What "Antitrust" Means?*, ENTERPRISE (Feb. 17, 2021), <https://enterprise.press/stories/2021/02/17/the-eca-is-getting-muscled-up-but-do-we-even-agree-on-what-antitrust-means-32433/> [<https://perma.cc/AQJ9-UUS4>].

4. See *id.*

5. The Family Protection and Population Rejuvenation Act of 10 Nov. 2021 (Iran), <https://www.rrk.ir/Laws/ShowLaw.aspx?Code=25083> [<https://perma.cc/BWT3-RAUS>].

6. *New Bill in Iran Violates Women's Sexual, Reproductive Health Rights: HRW*, RUDAW (Oct. 11, 2021), <https://www.rudaw.net/english/middleeast/iran/10112021> [<https://perma.cc/8NNS-N6QP>].

7. See The Family Protection and Population Rejuvenation Act, *supra* note 5, at art. 10.

8. See *id.* art. 10.

9. *Id.* art. 4.

10. *Id.* art. 12.

11. *Id.* art. 17 ¶ 1.

12. *Id.* art. 17 ¶ 4.

13. According to the Iran's Abortion Law of 15 June 2005 (Iran), abortion could be legally performed during the first four months of pregnancy if three doctors agree that a pregnancy threatens a woman's life, or the fetus has severe physical or mental disabilities that would create extreme hardship for the mother. See the Medical Abortion Law of 15 June 2005 (Iran), <https://rc.majlis.ir/fa/law/show/97756> [<https://perma.cc/42DE-34MN>].

14. See Family Protection and Population Rejuvenation Act, *supra* note 5, at art. 56.

15. See *id.* art. 52.

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**B. THE VALUE ADDED TAX ACT<sup>16</sup>**

On May 23, 2021, the Parliament of Iran, in order to increase the Government's income, enacted an unprecedented tax reform act, which consists of fifty-eight articles.<sup>17</sup> Articles IX and X of the Value Added Tax Act grant tax exemptions for some basic commodities such as food and medicine,<sup>18</sup> agricultural products, meat and fish products, books, immovable properties, one- to three-star hotels, public transportation services,<sup>19</sup> and hand woven Persian rugs.<sup>20</sup> More importantly, the Act grants tax exemptions to the importation of currencies,<sup>21</sup> gold,<sup>22</sup> platinum, and jewelry<sup>23</sup> to the country.

**C. THE PUNISHMENT LAW OF BETTING IN CYBERSPACE<sup>24</sup>**

Since the formation of Islamic Republic of Iran in 1979, Iran, like most countries under Islamic law, has had a ban on all forms of gambling.<sup>25</sup> During the last few years and after the emergence of online gambling, the Government enacted new and specific regulations targeting the practice. Hence, on November 14, 2021, the Parliament passed Articles 705-711 of the Fifth Book of the Islamic Punishment Law, which addresses punishment of gambling in cyberspace.<sup>26</sup> Among other proscriptions, the articles emphasize that if the verboten activities are carried out repeatedly by a group, they will be arrested.<sup>27</sup> Thereafter, their insistence on committing the felony and lack of remorse may be considered by judges as disruption of Iran's economic system and subsequently, corruption on Earth that would levy the death penalty.<sup>28</sup> Notably, Article 705 grants exceptions for gambling on horse racing, camel racing, swordsmanship, and archery.<sup>29</sup>

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16. The Value Added Tax Act of 23 May 2021 (Iran), <https://rrk.ir/Laws/ShowLaw.aspx?Code=23495> [<https://perma.cc/2P23-NR54>].

17. See generally *id.*

18. See *id.* at art. 9 ¶ 15.

19. *Id.* at art. 9 ¶ 13.

20. *Id.* at art. 9.

21. *Id.* at art. 10.

22. *Id.* at art. 9 ¶ 9.

23. *Id.* at art. 26.

24. The Punishment Law of Betting in the Cyberspace of 14 Nov. 2021 (Iran) <https://rc.majlis.ir/fa/law/show/92683> [<https://perma.cc/AA3X-M6S5>].

25. See Kristen Van Ry, *Where Islam Meets the West: A Recommendation for the United Arab Emirates And Dubai In Implementing Casino-Style Gaming*, 4 UNIVERSITY OF NORTHERN LAS VEGAS GAMING LAW JOURNAL 103, 103-08 (2013).

26. See Jerome García, *Online Gambling May be Punishable by Death Sentence in Iran*, GAMBLING NEWS (Dec. 29, 2020), <https://www.gamblingnews.com/news/online-gambling-may-be-punishable-by-death-sentence-in-iran/#:~:text=IN%20Summary%3A,penalty%20in%20the%20Islamic%20Republic> [<https://perma.cc/8ME5-B747>].

27. See *id.*

28. See The Punishment Law of Betting in the Cyberspace, *supra* note 24, at art. 707.

29. See *id.* at art. 705 ¶ 2.

### **III. Iraq: Adverse Developments for Iraqi and Afghan P-2 Program Applicants**

There are three programs that exist for immigration to the United States of Iraqis and Afghans who worked with U.S. forces: (1) Special Immigrant Visas (SIV) for Iraqi and Afghan Translators/Interpreters, or the Translators program, for short (remains active for both countries); (2) the Special Immigrant Visas program for Iraqi and Afghan nationals who were employed by/on behalf of the U.S. government, or the Allies program (which was discontinued for Iraqis, but continues for Afghans); and (3) the Direct Access P-2 Program under the U.S. Refugee Admissions Program (P-2 for short) for U.S.-affiliated Iraqis and Afghans who are not eligible for an SIV.<sup>30</sup>

Earlier this year, the P-2 program for Iraqis was suspended by the Biden Administration because of widespread fraud, raising doubts about the integrity of this program for Afghans who were only recently designated for P-2 admissions weeks before the collapse of the U.S.-backed Kabul government.<sup>31</sup>

The “Special Immigrant Visas (SIV) program for Iraqi nationals who were employed by/on behalf of the U.S. government” stopped accepting applications as of September 30, 2014.<sup>32</sup> While the “Special Immigrant Visas for Afghan nationals who were employed by or on behalf of the U.S. government,” continues to offer protection to Afghan allies.<sup>33</sup> The “Special Immigrant Visas for Iraqi and Afghan Translators/Interpreters” remains active.<sup>34</sup>

With the termination of the SIV Allies program for Iraqi nationals, those (other than translators/interpreters) who face security threats because of their direct or indirect collaboration with the U.S. government could still, until recently, use the Direct Access Program (or P-2 category) available under the U.S. Refugee Admissions Program (USRAP) for an opportunity to resettle in the United States.<sup>35</sup>

“This Direct Access Program was suspended indefinitely at the beginning of 2021.”<sup>36</sup> U.S. officials announced in January [2021] the 90-day suspension of the Direct Access Program for U.S.-Affiliated Iraqis to address fraud vulnerabilities:

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30. See Nayla Rush, *Refugee Resettlement Fraud in the Program for U.S.-Affiliated Iraqis*, CENTER FOR IMMIGRATION STUDIES (Aug. 19, 2021), <https://cis.org/Report/Refugee-Resettlement-Fraud-Program-USAffiliated-Iraqis>.

31. *See id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

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As the result of a joint investigation by the U.S. Department of State's Diplomatic Security Service and the Department of Homeland Security's Office of the Inspector General, the Department of Justice is prosecuting individuals for stealing U.S. government records from the Department of State's Worldwide Refugee Admissions Processing System to take advantage of the Direct Access Program for U.S.-Affiliated Iraqis. This scheme specifically targeted applications for direct access to the U.S. Refugee Admissions Program made possible by the Refugee Crisis in Iraq Act of 2007.<sup>37</sup>

"Eligible applicants include Iraqis inside or outside Iraq in danger because they worked for the U.S. government, as well as certain family members."<sup>38</sup> "More than 47,570 Iraqis have been resettled in the United States through the program, according to one State Department document."<sup>39</sup> According to an American pro bono attorney who works on Iraqi cases and requested her name not be revealed so as not to jeopardize her clients' applications currently pending before the International Office for Migration (IOM), the Resettlement Support Center (RSC) for the Middle East and North Africa (MENA) based in Amman, Jordan, informed her in November 2021 that:

As announced by then Acting Secretary of State, as of January 22, the U.S. Government has suspended processing for all Iraqi P-2 applications pending further review. As of April 22, the Department of State has determined it is necessary to extend the suspension of the Iraqi P-2 program beyond the initial 90-day period as reviews are ongoing. Therefore, these cases have been placed on hold.

One prominent Iraqi human rights organizer who wishes to remain anonymous for safety reasons, stated that this pause "leaves Iraqis who worked for the American Army and their families in grave danger as these families are deemed to be traitors in the eyes of their Iraqi neighbors." The Biden Administration has not set forth any deadline to restart the program and all pending applications have been placed on hold indefinitely.<sup>40</sup>

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37. *Id.*

38. See Jonathan Landay & Ted Hesson, *Exclusive U.S. Suspects 4,000 Cases of Fraud in Iraqi Refugee Program -Documents*, REUTERS (June 18, 2021), <https://www.reuters.com/world/exclusive-us-suspects-4000-cases-fraud-iraqi-refugee-program-documents-2021-06-18/> [<https://perma.cc/WVK8-B9XG>].

39. *Id.*

40. This information as drafted is correct for 2021. On March 1 2022, the Biden Administration announced that it was restarting the Direct Access Program for U.S. Affiliated Iraqis. See Press Release, Ned Price, Spokesperson, U.S. Department of State (Mar. 1, 2022), <https://www.state.gov/restarting-the-direct-access-program-for-u-s-affiliated-iraqis-iraqi-p-2-program>.



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#### IV. Kuwait

Following Saudi Arabia, Kuwait issued a new competition law (Law 27/2020) that shifted the Emirate's merger control regime from market share-based, to a turnover and asset value-based notification threshold.<sup>41</sup> While the thresholds were initially not specified, the Kuwaiti Council of Ministers defined these in late September 2021 by Ministerial Decree 26/202.<sup>42</sup> According to the Decree, any transaction that involves a party which has an annual turnover in Kuwait exceeding 500,000 Kuwaiti dinar (KWD) (approximately \$1.6 million);<sup>43</sup> the parties to which have a combined annual turnover in Kuwait exceeding 750,000 KWD (approximately \$2.5 million);<sup>44</sup> or own assets in Kuwait with a combined value of 2.5 million KWD (approximately \$8.3 million), requires notification under the Kuwaiti merger control regime.<sup>45</sup> Thus, while similar to the Saudi merger control regime, the Kuwaiti regime relies on domestic instead of worldwide turnover thresholds, in contrast to the Saudi regime.<sup>46</sup>

#### V. Lebanon

On August 4, 2020, a large quantity of ammonium nitrate exploded at the Port of Beirut, killing 218 people,<sup>47</sup> displacing 300,000,<sup>48</sup> and damaging approximately \$15 billion worth of property.<sup>49</sup> Less than one week later, Lebanese Prime Minister Hassan Diab resigned due to the blast.<sup>50</sup> He and

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41. See Kuwait Competition Protection Law No. 72 in 2020, <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2021/09/MWGTtemplate2021Kuwait.pdf> [<https://perma.cc/3DVV-4NL6>].

42. See Tamer Nagy, Strati Sakellariou-Witt, J. Mark Gidley, *Key Developments in Kuwait Merger Control: New Turnover Threshold Requirements*, WHITE & CASE, <https://www.whitecase.com/publications/alert/key-developments-kuwait-merger-control-new-turnover-threshold-requirements> [<https://perma.cc/JU87-NRT5>].

43. See *id.*

44. See *id.*

45. See *id.*

46. See ZUBAIR PATEL ET AL., KPMG, TAXATION OF CROSS-BORDER MERGERS & ACQUISITIONS: KUWAIT COUNTRY REPORT 1–8 (2020), <https://assets.kpmg/content/dam/kpmg/kw/pdf/insights/2020/02/mergers-and-acquisitions-country-report-kuwait-web.pdf> [<https://perma.cc/5WUP-9PZQ>].

47. See “*They Killed Us from the Inside*” *An Investigation into the August 4 Beirut Blast*, HUM. RIGHTS. WATCH (Aug. 3, 2021), <https://www.hrw.org/report/2021/08/03/they-killed-us-inside/investigation-august-4-beirut-blast> [<https://perma.cc/H84M-X8ET>].

48. See *id.*

49. See *Beirut Explosion Left 300,000 Homeless, Caused Up to \$15 Billion in Damage*, USA TODAY (Aug. 6, 2020), <https://www.usatoday.com/story/news/world/2020/08/06/aid-lebanon-beirut-explosion-force-corruption-reforms/3307109001/> [<https://perma.cc/Y8F9-MC3Y>].

50. See *Beirut Port Explosion Prosecutor Charges Lebanon's Outgoing Prime Minister Hassan Diab, Three Ex-Ministers with Negligence*, ABC NEWS AUSTL. (Dec. 10, 2020), <https://www.abc.net.au/news/2020-12-11/lebanon-prime-minister-charged-over-beirut-port-blast/12973068> [<https://perma.cc/S5HJ-A3MQ>].

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three former ministers were subsequently charged with negligence.<sup>51</sup> But the probe against Diab was at least temporarily suspended in late October 2021, after he filed a suit questioning investigating Judge Tarek Bitar's authority.<sup>52</sup> As of publication, no party has been found legally culpable in connection with the explosion.

The Port of Beirut blast occurred while Lebanon was already suffering from one of the worst economic crises of the past 150 years.<sup>53</sup> The Lebanese lira lost more than ninety percent of its value in recent years, and the Lebanese economy shrank by forty percent.<sup>54</sup> This economic collapse was reportedly caused by political corruption, poor banking practices, economic isolation due to Lebanon's close relationship with Iran, and overly ambitious government spending.<sup>55</sup> The downward trend was exacerbated by the outbreak of COVID-19, the global economic crisis, and the 2020 explosion.<sup>56</sup>

To make matters worse, Lebanon's electrical network collapsed in October, after the state-owned utility had already reduced its supply to a few hours of power per day over the preceding months.<sup>57</sup> Political actors in Lebanon also dickered over proposed changes to a key law impacting the scheduled legislative elections for March 2022.<sup>58</sup> All of this occurred in a country that ranks second in the world in terms of the ratio of refugees to its native population.<sup>59</sup>

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51. *See id.*

52. *See Beirut Blast Probe Interrupted Again Amid Series of Law Suits – Source*, U.S. NEWS & WORLD REPORT (Oct. 28, 2021), <https://www.usnews.com/news/world/articles/2021-10-28/lebanons-beirut-blast-probe-judge-suspends-hearing-for-former-pm-diab-legal-source> [https://perma.cc/RQE6-YGHE].

53. *See* Bassem Mroue, *World Bank: Lebanon's Crisis Among World's Worst Since 1850*, AP NEWS (June 1, 2021), <https://apnews.com/article/world-bank-beirut-middle-east-lebanon-health-fc5d4c749fb105114729c4281a146895> [https://perma.cc/G9HV-RMR2].

54. *See* Adeel Malik & Jamal Ibrahim Haidar, *Why Can't Lebanon's Leaders Fix its Economic Crisis?*, WASHINGTON POST (Oct. 21 2021), <https://www.washingtonpost.com/politics/2021/10/21/why-cant-lebanons-leaders-fix-its-economic-crisis/> [https://perma.cc/BE6E-4FCK].

55. *See* Edmund Blair, *Explainer: Lebanon's Financial Meltdown and How it Happened*, REUTERS (June 17, 2021), <https://www.reuters.com/world/middle-east/lebanons-financial-meltdown-how-it-happened-2021-06-17/> [https://perma.cc/C86Y-5GQB]; *see also* Rania Abouzeid, *How Corruption Ruined Lebanon*, NEW YORK TIMES (Oct. 30, 2021), <https://www.nytimes.com/2021/10/28/magazine/corruption-lebanon.html> [https://perma.cc/PF76-WNMB].

56. *See id.*

57. *See* Nader Durgham & Liz Sly, *Lebanon's National Electricity Grid Collapses*, WASHINGTON POST (Oct. 9, 2021), [https://www.washingtonpost.com/world/middle\\_east/lebanon-power-beirut-electricity-collapse/2021/10/09/e2588e88-28fb-11ec-8739-5cb6aba30a30\\_story.html](https://www.washingtonpost.com/world/middle_east/lebanon-power-beirut-electricity-collapse/2021/10/09/e2588e88-28fb-11ec-8739-5cb6aba30a30_story.html) [https://perma.cc/DG6F-4PWH].

58. *See* Labanese President Sends Electoral Law Amendments Back to Parliament, REUTERS (Oct. 22, 2021), <https://www.reuters.com/world/middle-east/lebanese-president-sends-electoral-law-amendments-back-parliament-2021-10-22/> [https://perma.cc/8KBC-VFG4].

59. *See* Omer Karasapan & Sajjad Shah, *Why Syrian Refugees in Lebanon are a Crisis Within a Crisis*, BROOKINGS INSTITUTION (Apr. 15, 2021), <https://www.brookings.edu/blog/future-development/2021/04/15/why-syrian-refugees-in-lebanon-are-a-crisis-within-a-crisis/> [https://perma.cc/6KYM-348W].

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## **VI. Saudi Arabia**

In July 2021, the Saudi Merger Control Authority issued comprehensive merger guidelines.<sup>60</sup> Following the overhaul of the Saudi merger control regime in September 2019, the guidelines provide clarification on merger control review procedures and introduce change of control and local effects tests.<sup>61</sup> Both change of control and local effects tests remain comparatively broad, doing little to limit the application of the Saudi merger control regime. For instance, sales (or potential sales) of one party involved in the transaction may trigger a filing obligation.<sup>62</sup> Aside from the changes in the merger control regime, the Saudi legislature took steps to require foreign investors to establish closer ties to the Kingdom.<sup>63</sup> According to the pending headquarters law, businesses seeking to contract with the public sector will be required to domicile their Middle East headquarters in Saudi Arabia as of January 1, 2024.<sup>64</sup> In addition, Saudi Arabia ceased extending preferential customs treatment to goods manufactured in other Gulf Cooperation Council countries unless they comply with strict local content requirements.<sup>65</sup> Finally, with the Saudi data protection law, the Kingdom significantly limited the ability of businesses to store and process data outside of the country.<sup>66</sup>

## **VII. United Arab Emirates**

The United Arab Emirates (UAE) has taken a constructive step forward to enact a first of its kind law<sup>67</sup> that seeks to provide a resilient and efficacious judicial framework to strengthen family laws, particularly for non-Muslims.<sup>68</sup> The desire to maintain its status as a revered commercial focal point has led

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60. See generally GEN. AUTH. FOR COMPETITION, MERGER REVIEW GUIDELINES (2019), <https://www.gac.gov.sa/Search/guidelines#> [https://perma.cc/45J3-PGH4].

61. See *id.* at 2.

62. See *id.*

63. See *id.* at 20.

64. While the law has not yet been published, the move was announced in multiple official press releases. See *Saudi Arabia Won't Work with Foreign Firms Without Regional HQ from 2024*, REUTERS (Feb. 15, 2021), <https://www.reuters.com/article/saudi-company-int-idUSKBN2AF1PX> [https://perma.cc/47LS-2EPC].

65. See THE COOP. COUNCIL FOR THE ARAB STATES OF THE GULF, COMMON CUSTOMS LAW, 5-6 (2008), [https://www.customs.gov.sa/themes/custom/customs/files/agreements/customs\\_law/en.pdf](https://www.customs.gov.sa/themes/custom/customs/files/agreements/customs_law/en.pdf) [https://perma.cc/2UQM-MPCD].

66. See Tarek Khananchet, Julie Teperow & Antonio Michaelides, *Saudi Arabia Issues New Personal Data Protection Law*, COVINGTON (Dec. 9, 2021), <https://www.insideprivacy.com/privacy-and-data-security/saudi-arabia-issues-new-personal-data-protection-law/> [https://perma.cc/8BSC-RB6K].

67. See United Arab Emirates Law No. 14 of 2021 Concerning Personal Status of Non-Muslims Foreigners in the Emirate of Abu Dhabi, <https://u.ae/en/information-and-services/justice-safety-and-the-law/personal-status-for-non-muslims> [https://perma.cc/A5QL-CKVM].

68. See *Abu Dhabi to Allow Non-Muslim Civil Marriage Under Family Law Shakeup*, REUTERS (Nov. 7, 2021), <https://www.reuters.com/world/middle-east/new-abu-dhabi-personal-status-law-non-muslims-includes-civil-marriage-wam-2021-11-07/> [https://perma.cc/396K-EML4].

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the UAE to bring its family laws on par with international best practices.<sup>69</sup> Such practices include allowing an individual to freely practice religion and expression.<sup>70</sup> The present legislation effectively amends its civil law to allow non-Muslims to pursue marriage, divorce, and seek joint custody of children.<sup>71</sup> It further addresses associated issues relating to inheritance, paternity, and alimony, with an aim of bringing parity between men and women.<sup>72</sup>

The enactment coincides with other legal developments in the State, such as the decriminalization of premarital sex.<sup>73</sup> These developments provide the UAE space to modernize and realign its legal justice system with its global economic interests.<sup>74</sup> The law further allows non-Muslims to marry at their will based on the consent of a woman, rather than the previous requirement to seek permission from her guardian.<sup>75</sup> An expedient divorce mechanism has been established that abrogates the compulsory mediation rules and permits parties to pursue proceedings without claiming infliction of harm.<sup>76</sup> It also allows parties to secure divorce at the first hearing with liberty to submit a request for alimony subsequently, which shall be considered on distinct factors such as the financial status of parties, their physical and emotional health, standards of living, and the need for financial support.<sup>77</sup>

The custody provision gives due regard to the psychological health of a child and establishes custody as a joint and equal right.<sup>78</sup> In the event of dispute, the welfare of child shall be the primary concern.<sup>79</sup> Specialized courts shall be established to deal with family law of non-Muslims and for the efficient resolution of disputes.<sup>80</sup> The proceedings shall be conducted in Arabic as well as English, to ensure judicial transparency.<sup>81</sup>

In addition, the law institutes an elaborative framework for inheritance, wherein a non-Muslim spouse is required to register their will during the signing of a marriage certificate.<sup>82</sup> In the absence of a will, the property shall

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<sup>69.</sup> *See id.*

<sup>70.</sup> *See* United Arab Emirates Law No. 14 of 2021, *supra* note 66.

<sup>71.</sup> *See id.*

<sup>72.</sup> *See id.*

<sup>73.</sup> *See* Lisa Barrington, *Status of Pregnancies Outside Marriage Still Unclear in UAE After Law Change*, REUTERS (May 19, 2021), <https://www.reuters.com/world/middle-east/status-pregnancies-outside-marriage-still-unclear-uae-after-law-change-2021-05-20/> [<https://perma.cc/S3V5-KSGY>].

<sup>74.</sup> *See id.*

<sup>75.</sup> *See* United Arab Emirates Law No. 14 of 2021, *supra* note 66, at art. 4 § 2.

<sup>76.</sup> *See id.* at art. 7.

<sup>77.</sup> *See id.* at art. 8.

<sup>78.</sup> *See id.* at art. 9.

<sup>79.</sup> *See id.*

<sup>80.</sup> *See id.* art. 17.

<sup>81.</sup> *See id.* at art. 17 § 3.

<sup>82.</sup> *See id.* art. 11.

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be divided in equal shares between the surviving spouse and the children.<sup>83</sup> In a case in which the deceased is not survived by children or spouse, property will reside with parents or siblings by default.<sup>84</sup>

These legal developments are set forth as a part of the “Projects of the 50,”<sup>85</sup> which aims to establish the UAE as a global hub for investment and talent. In addition to the establishment of individual family rights for non-Muslims, the initiative includes a data law drafted in conjunction with private technology companies that stresses upon individuals’ right to privacy and limits commercial entities’ ability to autonomously commoditize data.<sup>86</sup>

### VIII. Yemen

In February 2021, President Joe Biden announced that the United States was ending its support for the Saudi Arabian war against the Houthi government in Yemen.<sup>87</sup> The Biden administration also reversed one of former President Trump’s last acts in office: the designation of the Houthis as a terrorist organization.<sup>88</sup> The terrorist designation threatened to worsen the humanitarian crisis in Yemen by preventing civilian access to basic commodities like food and fuel—due to the chilling effect on importers who could have faced criminal penalties if products were to fall under Houthi control.<sup>89</sup>

Despite Biden’s promise to step up “diplomacy to end the war in Yemen,” the fighting continued unabated through much of 2021.<sup>90</sup> Saudi Arabia bombed targets in the country and maintained its blockade over both the Houthi-controlled port of Hodeidah and Sanaa’s International Airport.<sup>91</sup> Meanwhile, Houthi troops gained new territory in the energy-rich eastern provinces of Shabwa and Marib,<sup>92</sup> and prepared for a major offensive to

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83. See *id.* at 11 § 2.

84. See *id.*

85. See *First Set of ‘Projects of the 50’*, OFFICIAL PORTAL OF THE UNITED ARAB EMIRATES GOVERNMENT (2021), <https://u.ae/en/about-the-uae/initiatives-of-the-next-50/projects-of-the-50/first-set-of-projects-of-the-50> [<https://perma.cc/YW86-WFQG>].

86. See *id.*

87. See Ben Hubbard & Shuaib Almosawa, *Biden Ends Military Aid for Saudi War in Yemen. Ending the War is Harder.*, NEW YORK TIMES (Feb. 5, 2021), <https://www.nytimes.com/2021/02/05/world/middleeast/yemen-saudi-biden.html> [<https://perma.cc/SU27-PDA7>].

88. See *id.*

89. See Lara Jakes, *U.S. Prepares to Lift Terrorist Designation Against Yemeni Rebels, Despite New Attacks*, NEW YORK TIMES (Feb. 12, 2021), <https://www.nytimes.com/2021/02/12/us/politics/houthi-terrorist-designation-yemen.html> [<https://perma.cc/AH4M-E4HA>].

90. See Annelle R. Sheline & Bruce Riedel, *Biden’s Broken Promise on Yemen*, BROOKINGS INSTITUTION (Sept. 16, 2021), <https://www.brookings.edu/blog/order-from-chaos/2021/09/16/bidens-broken-promise-on-yemen/> [<https://perma.cc/S349-ZZUP>].

91. See *id.*

92. See *Yemen’s Houthis Advance in Shabwa and Marib*, REUTERS (Oct. 17, 2021), <https://www.reuters.com/world/middle-east/yemens-houthis-advance-shabwa-marib-2021-10-17/> [<https://perma.cc/5L2R-895V>].

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restore control of some Red Sea coastal land south of Hodeidah that had been taken by UAE-backed forces in 2018.<sup>93</sup>

In October, the UN Human Rights Council narrowly voted to reject a resolution, supported by a number of European nations, to allow independent investigators another two years to examine potential war crimes in the Yemeni war.<sup>94</sup> Bahrain, Russia, China, and Pakistan were among the countries voting against the measure, the first time in the Council's fifteen-year history that a resolution was rejected.<sup>95</sup>

Tragically, Yemen continues to suffer what has been described by UNICEF as the world's worst humanitarian crisis.<sup>96</sup> Over 10,000 children have been killed or maimed since the war began in 2015, and "more than [eleven] million children (four in five) need humanitarian assistance."<sup>97</sup> Yemen's GDP has dropped forty percent in that time, and one United Nations' official has described the country as "on the brink of total collapse."<sup>98</sup>

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93. See *Crisis Watch: October Alerts & September Trends 2021*, CRISIS GROUP (Sept. 2021), <https://www.crisisgroup.org/crisiswatch/october-alerts-and-september-trends-2021> [https://perma.cc/L6Y9-SJA6].

94. See Stephanie Nebehay, *U.N. Ends Yemen War Crimes Probe in Defeat for Western States*, REUTERS (Oct. 8, 2021), <https://www.reuters.com/world/middle-east/un-ends-yemen-war-crimes-probe-historic-defeat-rights-body-2021-10-07/> [https://perma.cc/9A24-EQ28].

95. See *id.*

96. See *Yemen War Reaches 'Shameful Milestone' – 10,000 Children Now Killed or Maimed*, UN NEWS (Oct. 19, 2021), <https://news.un.org/en/story/2021/10/1103432> [https://perma.cc/Y9MP-8S5P].

97. See *id.*

98. See *id.*

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## **Russia/Eurasia**

KIMBERLY D. REED, TIMUR BONDARYEV, DENIS KARIMOV, ANTON REKUN, AND TETIANA STOROZHUK\*

### **Russian Federation**

#### **I. Recognizing and Enforcing Foreign Judgments in Russian Courts**

##### **A. INTRODUCTION**

The New York Convention of 1958 provides a procedure for courts in member countries to enforce arbitration awards in other member countries.<sup>1</sup> But there is no international treaty or convention regarding the recognition and enforcement of court judgments.<sup>2</sup> A major problem for foreign parties in Russian Federation (RF) courts is the inconsistency of Russian courts in recognizing and enforcing judgments<sup>3</sup> from countries with whom the RF has

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\* Authors: Kimberly D. Reed (Editor and co-author), Reed International Law & Consulting, LLC, Washington, DC; Timur Bondaryev, Arzinger Law Firm, Kyiv, Ukraine; Denis Karimov, Counselor for Administrative Law to Deputy Head of the IP Committee of the Russian Union of Industrialists and Entrepreneurs; Anton Rekun, Arzinger Law Firm, Kyiv, Ukraine; Tetiana Storozhuk, Arzinger Law Firm, Kyiv, Ukraine.

1. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. 1, June 7, 1959, 330 U.N.T.S. 3, 38 <https://www.newyorkconvention.org> [hereinafter New York Convention].

2. See Anna Kopylova, *Enforcement of English Judgments in Russia: Reciprocity*, KOCH BOES (Mar. 8, 2021), <https://kdb.legal/en/enforcement-of-english-judgments-in-russia-reciprocity/>; but see Convention on Choice of Court Agreements, art. 1(1), June 30, 2005 3110 U.N.T.S. 1; see also Hans van Loon, *The 2005 Hague Convention on Choice of Court Agreements – An Introduction*, 18 ANNALS FAC. L., UNIV. ZENICA 11 (2016) (providing an in-depth discussion of the Convention's provisions), [www.prf.unze.ba/Docs/Anali/Analibr18god9/1.pdf](http://www.prf.unze.ba/Docs/Anali/Analibr18god9/1.pdf).

3. Only a final judgment on the merits of a case can be recognized and enforced in Russia, so orders from a foreign court for injunctions or other pre-judgment remedies cannot be recognized or enforced. Parties seeking injunctions in Russia must go directly to a Russian state court. Also, it is not clear whether decisions that approve settlement agreements are subject to recognition and enforcement. See Aram Grigoryan, Nektrov, Saveliev & Partners, *Foreign Judgments in Russia*, GGI FORUM, <https://ggiforum.com/law/international-dispute/1713-foreign-judgments-in-russia.html> (last visited Apr. 12, 2022).



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no formal treaties on that topic.<sup>4</sup> This includes the United States, most of Western Europe, Canada, and Japan.<sup>5</sup>

According to Russian law, disputes involving commercial entities are heard in Commercial (*Arbitrazh*) courts,<sup>6</sup> while civil cases involving individuals (but not an “individual entrepreneur”) are heard in general jurisdiction courts.<sup>7</sup> Commercial courts are required by the Commercial Civil Procedure Code to recognize and enforce foreign court decisions and foreign arbitral awards if so required by: (1) an international treaty between the RF and the country from which the judgment originated, or (2) Russian federal law.<sup>8</sup> By contrast, the Civil Procedure Code requires such reciprocity only if there is a pertinent international treaty between the RF and the originating country.<sup>9</sup> Because of the narrower scope of the Civil Procedure Code’s rule, many civil (general jurisdiction) courts, including the RF Supreme Court,<sup>10</sup> have refused recognition of a foreign judgment unless there is a pertinent reciprocity treaty.<sup>11</sup> In the absence of a reciprocity treaty, commercial courts have generally looked to federal law, specifically the Russian Civil Code’s reciprocity rule,<sup>12</sup> to decide whether to recognize

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4. Russia has approximately thirty treaties on recognition and enforcement of foreign judgments. See Yuri Makhonin, Alexander K. Lazarev, & Maryana R. Batalova, *Litigation: Enforcement of Foreign Judgments in Russia*, LEXOLOGY (Jan. 25, 2019) (listing countries with whom Russia has such treaties), <https://www.lexology.com/library/detail.aspx?g=e1ceb5d8-e8cb-442e-b6a5-2795243f3fa2> (listing countries with whom Russia has such treaties); see also Vassily Rudomino, *Enforcement of Foreign Court Judgments in Russia: A Wind of Change*, WORLD SERV. GRP. (June 6, 2017), <https://www.worldservicesgroup.com/publications.asp?action=Article&artid=8780>.

5. See *Russian Case Law in 2020 on Recognition and Enforcement of Foreign Judgments*, THE LEGAL 500 (Mar. 9, 2021), <https://www.legal500.com/developments/thought-leadership/russian-case-law-in-2020-on-recognition-and-enforcement-of-foreign-judgments-made-by-courts-of-count/> [hereinafter BGP Litigation].

6. Commercial (Arbitrazh) Procedure Code of the Russian Federation, Ch. 31, Art. 241, [www.arbitr.ru/\\_upimg/B722EA8F0FB9196A465ADC315B86B16B\\_Commercial%20Procedure%20Code%20of%20the%20Russian%20Federation.pdf](http://www.arbitr.ru/_upimg/B722EA8F0FB9196A465ADC315B86B16B_Commercial%20Procedure%20Code%20of%20the%20Russian%20Federation.pdf) [hereinafter Commercial Civil Procedure Code].

7. Civil Procedure Code of the Russian Federation, ch. 45, <https://gss.unicreditgroup.eu/sites/default/files/markets/documents/Civil%20Code%20of%20the%20Russian%20Federation.pdf> [hereinafter Civil Procedure Code].

8. Commercial Civil Procedure Code, *supra* note 6, at art. 241 (decisions of foreign courts shall be recognized and enforced in Russia by the commercial courts if the recognition and enforcement of decisions is covered by either an international treaty or federal law of the RF).

9. Civil Procedure Code, *supra* note 7, at art. 409(1).

10. BGP Litigation, *supra* note 5.

11. *Id.*

12. See Civil Code of the Russian Federation, art. 1189, [https://www.wto.org/english/thewto\\_e/acc\\_e/rus\\_e/WTACCRUS58\\_LEG\\_360.pdf](https://www.wto.org/english/thewto_e/acc_e/rus_e/WTACCRUS58_LEG_360.pdf) [hereinafter Russian Civil Code]. “A foreign law shall be applicable in the Russian Federation, irrespective of the applicability of Russian law to relations of the kind in the relevant foreign state, except for cases when the application of a foreign law on reciprocal basis is required by law. . . . Where the application of a foreign law depends on reciprocity such a reciprocity shall be deemed to exist unless the contrary is proven.” *Id.*

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and enforce a foreign judgment. In some cases, judges have examined whether courts in the originating country have recognized and enforced Russian judgments in its own courts.<sup>13</sup> At least one Russian court has based its recognition of a United Kingdom court judgment on an international treaty having nothing to do with reciprocity.<sup>14</sup>

1. *Decisions Denying Recognition of Foreign Judgment*

1. In December 2009, the RF Supreme Court refused to recognize a judgment from Germany because Russia has no relevant reciprocity treaty with Germany to satisfy the requirement of the Civil Procedure Code.<sup>15</sup>

2. In March 2020, the Ninth Cassation Court of General Jurisdiction declined to recognize a judgment from the District Court of North Holland (Netherlands). The Russian court rejected the applicant's argument that in the absence of a specific reciprocity agreement between Russia and the Netherlands, the European Convention on Human Rights 1950 (joined by both The Netherlands and the RF)<sup>16</sup> should be applied.<sup>17</sup>

3. In July 2020, the City Court of Moscow refused to recognize or enforce a judgment from the British Virgin Islands (BVI) because no relevant treaty exists between Russia and BVI to meet the Civil Procedure Code's requirement.<sup>18</sup>

4. In a December 2020, the Fourth Appellate Court of General Jurisdiction Appeals refused to recognize and enforce a United States court's decision because no international treaty exists between the countries that would allow such action under the Civil Procedure Code Article 409(1).<sup>19</sup>

5. In December 2020, the Second Appellate Court of General Jurisdiction ruled that while there was no applicable reciprocity treaty, it could recognize a Finnish court judgment on the basis of reciprocity if there was evidence that Finnish courts recognize Russian court judgments in similar types of lawsuits.<sup>20</sup> Because neither the Court nor

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13. See BGP Litigation, *supra* note 5.

14. See text accompanying notes 26–28.

15. Decision of the RF Supreme Court No. 4-G09-27, Dec. 1, 2009 (Russ.).

16. Convention for the Protection of Human Rights and Fundamental Freedoms, Apr. 11, 1950, 213 UNTS 221, 266, [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf).

17. Decision of the Ninth Cassation Court of General Jurisdiction No. 88-2141/2020, Mar. 31, 2020 (Russ.).

18. Decision of the City Court of Moscow No. 3?-0568/2020, July 3, 2020 (Russ.).

19. Decision of Fourth Appellate Court of General Jurisdiction No. 66-2498/2020, Dec. 22, 2020 (Russ.).

20. Decision of the Second Appellate Court of General Jurisdiction No. 66-1303/2020, Dec. 23, 2020 (Russ.).

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the applicant found such evidence except in alimony cases, the application for recognition of the Finnish decision was rejected.<sup>21</sup>

6. In August 2020, the City Court of Moscow denied a request to recognize a judgment from the Netherlands because there was no reciprocity treaty with the RF and the applicant had not proved that Dutch courts recognized Russian judgments.<sup>22</sup>

2. *Decisions Recognizing Foreign Judgments*

1. In September 2020, the Ninth Appellate Commercial Court recognized the decision of a United States court because the appellant provided evidence that the United States District Court for the Southern District of New York had recognized and enforced judgments from the Khamovnichesky District Court of Moscow and the Commercial Court of Moscow.<sup>23</sup>

2. In December 2020, the Commercial Court of Moscow recognized the judgment of the District Court of Amsterdam, Netherlands on the grounds that: (1) the Commercial Procedure Code's list of grounds for recognition of a foreign judgment is not exclusive; (2) the Commercial Procedure Code's Article 244(1) providing reasons for refusing recognition does not include the absence of an international treaty and/or federal law on reciprocity as grounds for denying recognition; and (3) Dutch courts had recognized Russian court decisions in the past.<sup>24</sup>

3. The Eighth Cassation Court of General Jurisdiction, rather than relying on the Civil Procedure Code's recognition of foreign judgments only if a reciprocity treaty exists, found that the Austrian court judgment should be recognized if Austrian courts have done the same for Russian judgments. Although the applicant had not provided any such evidence, the appellate court ruled that the lower court should have requested such evidence from the applicant or from the Russian or Austrian Ministry of Foreign Affairs.<sup>25</sup>

4. In the absence of a reciprocity treaty between the United Kingdom (UK) and Russia, the Commercial Court of Moscow found that the Partnership and Cooperation Agreement of 1994 between Russia and the European Union<sup>26</sup> (of which the UK was then a member) was a

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21. *Id.*

22. Decision of the City Court of Moscow No. 3?-0036/2020, Aug. 11, 2020 (Russ.).

23. Decision of the Ninth Appellate Commercial Court No. ?40-308642/2018, Sept. 24, 2020 (Russ.).

24. Decision of the Comm. Court of Moscow No. A40-270774/2018, Dec. 18, 2020 (Russ.).

25. Decision of the Eighth Cassation Court of General Jurisdiction No. 88-4957/2020, Apr. 23, 2020 (Russ.).

26. Agreement on Partnership and Cooperation Establishing a Partnership Between the European Communities and their Member States and the Russian Federation, June 24, 1994, <https://op.europa.eu/en/publication-detail/-/publication/70f7046b-4dca-476f-a80a-8438fe467bbb/language-ga> [hereinafter EU-Russia Partnership Agreement].

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sufficient basis for recognizing the UK High Court of Justice judgment. The RF Constitution guarantees judicial protection of rights,<sup>27</sup> and because (1) recognition and enforcement of a judgment is part of these rights; (2) Russia is a party to many international agreements protecting individual rights to a fair hearing by an impartial court; and (3) mutual cooperation of states in recognizing each others' judicial decisions is necessary to protect these rights.<sup>28</sup>

3. *Implications for Parties Seeking Recognition of Foreign Judgment in Russian Court*

The cases above, and others like them, indicate that general jurisdiction civil courts frequently will, with some exceptions, look only at whether there is a reciprocity treaty between Russia and the originating country, while commercial courts tend to look at other Russian laws and the principle of reciprocity.<sup>29</sup> Based on these generalizations, parties attempting to have a foreign judgment recognized and enforced in Russia should present evidence demonstrating that courts in that foreign country have recognized and enforced decisions from Russian courts, preferably in the same area of law (e.g., business contracts, bankruptcy, child custody, etc.). Such cases must be presented to the court with a Russian translation that is certified by a Russian notary and apostilled if appropriate.<sup>30</sup> The applicant can also show evidence of the foreign country's other cooperative agreements with Russia (if any), such as the EU-Russia Partnership Agreement<sup>31</sup> since some courts have given weight to such evidence.<sup>32</sup>

## II. Developments in Anti-Monopoly Law

The basis of Russian antitrust law is Federal Law No.135-FZ (the "Competition Law").<sup>33</sup> In 2020-21, two sets of guidelines were issued that are non-binding but nonetheless important in understanding the analysis the Federal Anti-Monopoly Service (FAS) will undertake when considering whether transactions require pre-clearance. The guidelines are significant on a range of issues pertaining to the enforcement of Russian merger control and anti-monopoly compliance.

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27. Constitution of the Russian Federation, at art. 46(1), [www.constitution.ru/en/10003000-01.htm](http://www.constitution.ru/en/10003000-01.htm) [hereinafter RF Constitution].

28. Decision of the Commercial Court of Moscow No. A40-29989/2020, July 17, 2020 (Russ.).

29. BGP Litigation, *supra* note 5.

30. Makhonin, Lazarev, & Batalova, *supra* note 4.

31. EU-Russia Partnership Agreement, *supra* note 26.

32. *See* text accompanying notes 26–28.

33. Federal Law of the Russian Federation on Protection of Competition, SOBRAINE ZAKONODATEL'STVA ROSSIYSKOI FEDERATSII [SZ RF] 2006, No. 135-FZ, at art. 1 [hereinafter Competition Law], [https://www.wto.org/english/thewto\\_e/acc\\_e/rus\\_e/WTACCRUS58\\_LEG\\_59.pdf](https://www.wto.org/english/thewto_e/acc_e/rus_e/WTACCRUS58_LEG_59.pdf).

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A. MERGER CONTROL GUIDELINES

On June 11, 2021 the FAS issued guidelines (the “Merger Guidelines”)<sup>34</sup> covering several topics, including, inter alia, joint venture (JV) agreements, negative control situations, and non-compete agreements, as detailed below.<sup>35</sup> After more than two years of discussion, these are Russia’s “first complex guidelines on merger control procedures.”<sup>36</sup> For legal practitioners and investors, the Merger Guidelines clarify certain questions regarding merger control rules and make more transparent the FAS’s approach to analyzing transactions.<sup>37</sup>

1. *JV reportability*

The Merger Guidelines better define the Competition Law’s test for whether a joint venture (JV) agreement must receive pre-approval<sup>38</sup> from the FAS by stating that it will be reportable if certain asset or revenue threshold values are exceeded<sup>39</sup> and:

1. The agreement between the parties constitutes a “joint venture agreement” (not simply the creation of a new entity) in which the parties will make joint investments in a joint activity and will jointly bear the risks thereof, and the parties’ activities are directly regulated by an agreement for providing goods or services;<sup>40</sup>
2. The parties to the JV agreement are business entities that are competitors in the Russian market;<sup>41</sup> and
3. The JV agreement explains the parties’ “joint activities” in the RF, such as: (1) creating a JV in Russia or acquiring shares in an existing Russian company; (2) creating a foreign company with a Russian subsidiary that will engage in the JV activities in some way; (3) contributing a Russia-based entity or assets to the JV; (4) the JV’s primary business activity will be in Russia (even if the JV is not a Russian entity); and/or (5) the arrangement does not create a JV but

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34. ANTIMONOPOLY SERVICE OF THE RUSSIAN FEDERATION, GUIDELINES NO. 19 ON THE SPECIFICS OF THE IMPLEMENTATION OF STATE ANTIMONOPOLY CONTROL OVER ECONOMIC CONCENTRATION (2021) <https://fas.gov.ru/documents/687797> [hereinafter Merger Guidelines].

35. ALYONA N. KUCHER ET AL., FAS RUSSIA GUIDELINES ON MERGER CONTROL AND ANTIMONOPOLY COMPLIANCE—PART 1, DEBEVOISE & PLIMPTON (Sept. 27, 2021), <https://www.debevoise.com/insights/publications/2021/09/fas-russia-guidelines-part-1>.

36. *Developments in the Russian Merger Control Rules: Liberalization of Thresholds and Approval of the FAS’ Merger Guidelines*, ALRUD (July 21, 2021), <https://alrud.com/publications/60f83e431aa4545e943d889d/>.

37. *Id.*

38. KUCHER ET AL., *supra* note 35, at 2.

39. Merger Guidelines, *supra* note 34, at 1.2(1)(B).

40. *Id.* at 1.2(2).

41. *Id.*

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involves the parties joining forces to promote goods or services in the Russian market.<sup>42</sup>

## 2. *Negative Control*

Under the Competition Law, FAS approval of mergers is required, *inter alia*, when a party is acquiring rights in a target company that will allow that party to determine the “conditions for the conduct of business” for the target.<sup>43</sup> The key element is the amount of control the buyer will exercise over the target.<sup>44</sup>

The Merger Guidelines set out clearer criteria for determining if sufficient “control” exists in this context to trigger the requirement of FAS pre-approval. The Competition Law defines “control” as whether: (1) the transaction involves an acquisition of more than 50 percent of shares (or ownership stakes) in an entity or (2) the buyer will acquire the right to name the sole executive or majority of the executive body for the target.<sup>45</sup>

The Guidelines list other indicia of control such as acquiring the power to “give binding directives to the merger target at its own discretion,”<sup>46</sup> and in certain circumstances, the right to block particular decisions of the target if such blocking results in a “negative control” situation.<sup>47</sup> Negative control arises when one party possesses 50 percent of the shares or membership interests of a company and has the right to veto strategic decisions, while the remaining 50 percent of ownership is split amongst other owners such that the first party does not have actual sole control but its vote is necessary to approve any decisions, or alternatively, when the first party has a right of veto that no other party has.<sup>48</sup> The Merger Guidelines introduced the concept of “individual negative control,” meaning that the acquisition of veto rights might be pre-reportable only if the acquiring party will be able to exercise decisive influence over the target’s decisions, provided that other shareholders do not have this right.<sup>49</sup>

## 3. *Noncompetition Agreements*

Non-compete clauses or agreements that are part of FAS-reportable transactions are considered ancillary to the transaction and are reviewed as part of the normal FAS process.<sup>50</sup> A non-compete clause or agreement in a

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42. *Id.*; see also KUCHER ET AL., *supra* note 35, at 3–4.

43. Competition Law, *supra* note 33, art. 28, pt. 1, cl. 8.

44. Merger Guidelines, *supra* note 34, at 1.2(5) (“... [T]he scope and content of the acquirable rights must definitively show that an acquirer develops a possibility TO CONTROL DECISIONS made by a merger target in the course of conducting business.”) (emphasis added).

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. KUCHER ET AL., *supra* note 35.

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non-reportable transaction, however, unless the reason for it is manifestly clear, may be voluntarily submitted to the FAS for review.<sup>51</sup> The Merger Guidelines state that a non-compete provision is acceptable if all of the following are true:

1. It serves the “purpose and nature” of the agreement;<sup>52</sup>
2. It applies only to the product market in which the target company operates;<sup>53</sup>
3. The non-compete period lasts only long enough to ensure the purchaser receives a fair return on its investment (usually about five years) and derives profits (usually one to two years after it recovers its costs on the investment);<sup>54</sup> and
4. It does not involve an exchange of information that could facilitate the creation of a cartel or other anti-competitive arrangement.<sup>55</sup>

**B. COMPLIANCE GUIDELINES**

In March 2020, the Competition Law was supplemented with Article 9.1, setting out procedures for companies to implement internal antimonopoly compliance programs.<sup>56</sup> In July 2021, the FAS issued guidelines for companies instituting such programs.<sup>57</sup> The principal provisions urge companies to adopt antimonopoly compliance rules and recommend certain steps and incentives for doing so. The Compliance Guidelines are non-binding and are meant as a guide for entities whose size, organization, industrial sector, nature of business and other factors make such compliance programs desirable.<sup>58</sup>

The Compliance Guidelines explain that a company may voluntarily submit its draft or final antimonopoly compliance policy to the FAS for

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51. *Id.*

52. Merger Guidelines, *supra* note 34, at 3.5(1).

53. *Id.* at 3.5(2).

54. *Id.* at 3.5(3).

55. *Id.* at 3.5(4).

56. Article 9.1 was introduced by Federal Law No. 33-FZ dated Mar. 1, 2020. See Serafima Pankratova & Anastasia Chapurina, *Antimonopoly Compliance in Russia*, HOGAN LOVELLS (Mar. 20, 2020), <https://www.hoganlovells.com/en/publications/antimonopoly-compliance-in-russia>; see also DELOITTE, INTRODUCING AN INSTITUTION OF INTERNAL COMPLIANCE WITH THE REQUIREMENTS OF ANTIMONOPOLY LEGISLATION 4 (2020) <https://www2.deloitte.com/content/dam/Deloitte/ru/Documents/finance/artem-molchanov-fas-competition-compliance-26-january-en.pdf>.

57. See *The Russian Competition Authority Clarifies its Process of Reviewing Economic Entities' Antimonopoly Compliance Programs*, CONCURRENCES (July 21, 2021), <https://www.concurrences.com/en/bulletin/news-issues/july-2021/the-russian-competition-authority-clarifies-its-process-of-reviewing-economic> [hereinafter Compliance Guide].

58. See generally *FAS Clarifies Application of the Legislation on Antimonopoly Compliance*, FED. ANTIMONOPOLY SERV. OF RUSSIAN FEDERATION (July 21, 2021), [en.fas.gov.ru/press-center/news/detail.html?id=55245](https://en.fas.gov.ru/press-center/news/detail.html?id=55245).

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review.<sup>59</sup> If the policy is approved by the FAS, the company cannot be found guilty of antitrust violations if it acted consistently with the policy. Companies that do not submit their policies will not receive this protection (though it will be allowed to show evidence that it took all possible measures to ensure compliance).<sup>60</sup>

A company may include anything it sees fit in its antimonopoly compliance policy, but the policy will only be approved<sup>61</sup> if it includes these required elements:

1. An assessment process regarding the company's risk of anticompetition violations, including a description of risk identification and evaluation methods, relevant operations, persons involved, and the procedures for documenting such assessments and any amendments thereto;
2. Efforts to mitigate those risks, such as employee education about compliance, periodic re-assessments, benchmarks/goals, automation of certain processes, and other preventive measures;
3. Mechanisms to monitor the company's compliance, e.g., an employee hotline, outside audits or reviews, internal investigations, amelioration efforts for breaches, regular reporting;
4. Identity of a person responsible for implementing and overseeing the policy, who must report directly to management but be independent of undue influence and have sufficient authority and resources to perform their duties adequately.<sup>62</sup>

### III. Developments in Privacy/Data Protection Law

Two major amendments to Russia's Personal Data Law took effect in 2021, the first pertaining to disclosure of personal data<sup>63</sup> and the second increasing fines for violating certain data privacy rules.<sup>64</sup> These amendments

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59. See generally Elena Sokolovskaya, *Compliance Guideline*, PEPELIAEV GRP. (Oct. 11, 2021), [https://www.pgplaw.com/analytics-and-brochures/articles-comments-interviews/compliance-guideline/?phrase\\_id](https://www.pgplaw.com/analytics-and-brochures/articles-comments-interviews/compliance-guideline/?phrase_id).

60. *Id.*

61. ALYONA N. KUCHER ET. AL., DEBEVOISE & PLIMPTON, FAS RUSSIA GUIDELINES ON MERGER CONTROL AND ANTIMONOPOLY COMPLIANCE – PART 2 2–3 (Sept. 29, 2021), <https://www.debevoise.com/insights/publications/2021/09/fas-russia-guidelines-part-2>.

62. Competition Law, *supra* note 33, at 9.1.; see also KUCHER ET. AL, *supra* note 61, at 3–5.

63. Federal Law of the Russian Federation on Amendments to the Federal Law on Personal Data of the Russian Federation, Rossiyskaya Gazeta [Ros. Gaz.] Jan. 11, 2021, No. 519-FZ, art. 2.1–2.2 (noting all but Article 1(5)(10) of the Personal Data Amendments took effect on March 1, while Article 1(5)(10) took effect on July 1, 2021), <https://rg.ru/2021/01/11/personalnie-dannie-dok.html>. *Id.* at Art. 2.1–2.2 [hereinafter Personal Data Amendments].

64. Federal Law of the Russian Federation on Amendments to the Code of Administrative Offenses of the Russian Federation, Feb. 24, 2021, No. 19-FZ, <http://ips.pravo.gov.ru:8080/default.aspx?pn=0001202102240010> [hereinafter Administrative Amendments].



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apply to all keepers of personal data.<sup>65</sup> They are particularly relevant for operators of online resources that facilitate the public sharing of information (such as social media site operators) and those who use data obtained from open sources.<sup>66</sup>

A. PERSONAL DATA AMENDMENTS

The Personal Data Amendments set out (1) conditions for disseminating personal data to an unlimited number of people when the personal data was made publicly available by the person who is the subject of the data, and (2) provisions enabling an individual to withdraw his/her consent to such dissemination.<sup>67</sup> The amendments create a default presumption that personal data made public by an individual (the “subject”) cannot be further disseminated by data operators, and gives individuals the option of choosing what, if any, of their personal data may be made publicly available and further disseminated by data operators.<sup>68</sup>

Prior to the Personal Data Amendments, a subject’s personal data could be processed (i.e., collected and disseminated) without her consent if she put the data on a public website (or instructed someone to do so for her).<sup>69</sup> The amendments altered this situation significantly by creating and regulating a new category called “personal data made publicly available,” defined as “personal data to which an unlimited number of persons may have access based on a data subject’s specific consent for dissemination of the data.”<sup>70</sup>

An individual now must directly consent to the disclosure of his personal data to an indefinite number of people separately from any other consents he gives, and he must choose which personal data (if any) he will allow to be disseminated.<sup>71</sup> Details regarding the content of the consent are to be set out by Roskomnadzor (the agency overseeing data privacy).<sup>72</sup> Individuals

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65. E. Agaeva, E. Kvartnikova, & M. Petrova, *Russia: New Rules for Personal Data Processing*, EGOROV, PUGINSKY, AFANASIEV & PARTNERS (Jan. 21, 2021), <https://epam.ru/en/legal-updates/view/novye-pravila-rasprostraneniya-personalnyh-dannyh>.

66. *Id.*

67. *Id.* The term “dissemination” in this section means the processing and distribution of personal data to an unlimited number of people (i.e., publicly) on the internet. *Id.* It does not include internal use of the personal data by the entity to whom the subject gave the data. *Id.* A “data operator” is the entity to whom the information was given by the individual about himself. *Id.*

68. N. Gulyaeva, J. Gurieva, A. Gorbushina, *Russian Personal Data Law Amended to Address Publicly Available Data & Fines*, HOGAN LOVELLS (June 7, 2021), <https://www.engage.hoganlovells.com/knowledgeservices/viewContent.action?key=EC8teaJ9VapcbUiaOYHVf8xgHJMKLFEppVpbVX%2B3OXcP3PYxlq7sZUjdbSm5FletvAtgf1eVU8%3D&nav=FrbANEucS95NMLRN47z%2BeeOgEFCt8EGQ0qFfoEM4UR4%3D&emailtofriendview=true&freeviewlink=true>.

69. *Id.*

70. *Id.*

71. Personal Data Amendments, *supra* note 63, at art. 1(1).

72. *Id.* at art. 1(3). Roskomnadzor released the required elements of a dissemination consent form to be used by data operators beginning Sept. 1, 2021. Gulyaeva, Gurieva, & Gorbushina,

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may set conditions and restrictions regarding the use of their personal data, by which data operators must abide.<sup>73</sup> Any ambiguity or silence regarding the individual's consent, conditions or restrictions requires the data operator not to disseminate her personal data.<sup>74</sup> An individual may terminate her consent at any time.<sup>75</sup>

The Data Privacy Amendments also introduced a concept from the European Union's General Data Protection Regulation,<sup>76</sup> the "right to be forgotten." This allows a person to request that her personal data be deleted and not publicly circulated and compels data operators to stop processing her data within three business days of receiving her request.<sup>77</sup>

**B. ADMINISTRATIVE AMENDMENTS**

The Administrative Amendments increased liability for violations of personal data protection laws and also created new fines.<sup>78</sup> Specifically, fines for using personal data in a manner not provided for by RF law can now be levied for up to RUB 100,000 (~USD \$1350) for companies,<sup>79</sup> and for repeat offenders up to RUB 300,000 (~USD \$4,050).<sup>80</sup> Fines for companies processing personal data without the proper written consent of the individual subject, or against the restrictions or conditions of such a consent, now range from RUB 30,000 to 150,000 (~USD \$400 to \$2,025),<sup>81</sup> and for repeat offenders, RUB 300,000 to 500,000 (~USD 4050 to \$6,750).<sup>82</sup>

If a data operator fails to publish its policy on personal data processing or the requirements for an individual to protect her privacy, it may be fined RUB 30,000 to 60,000 (~USD \$400 to \$800).<sup>83</sup> Failure to block or destroy personal data upon the subject's request or to update incomplete, outdated

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*supra* note 68. Briefly, the consent form must contain: (1) the subject's full name and contact details; (2) the data operator/disseminator's full name and address, registration and identification numbers; (3) details of the website where the subject's personal data will be disseminated or processed; (4) the purpose(s) of the dissemination or processing; (5) categories (general, biometric, sensitive) and list of personal data to be disseminated/processed; (6) categories and list of personal data that is conditioned or restricted from dissemination/processing by the subject; (7) conditions of the transfer of the personal data over the internet or the data operator's internal corporate network; and (8) the time period of the consent. *Id.*

73. Personal Data Amendments, *supra* note 63, at art. 1(5), ¶ 9.

74. *Id.* at art. 1(5), ¶ 5, 8.

75. *Id.* at art. 1(5), ¶ 12, 14.

76. Regulation (EU) 2016/679 of the European Parliament on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), Apr. 27, 2016, art. 17, 2016 O.J. (L 119) 1, 43–44, <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1552662547490&uri=LEX%3A32016R0679>.

77. Personal Data Amendments, *supra* note 63, at art. 1(5), ¶ 14.

78. Administrative Amendments, *supra* note 64.

79. *Id.* at art. 1(3)(a).

80. *Id.* at art. 1(3)(b).

81. *Id.* at art. 1(3)(c).

82. *Id.* at art. 1(3)(d).

83. *Id.* at art. 1(3)(e).

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or inaccurate information, or to use data that is not necessary for the operator's stated purpose, incurs fines of RUB 50,000 to 90,000 (~USD \$675 to \$1200), and for repeat offenders RUB 300,000 to 500,000 (~USD \$4,050 to \$6750).<sup>84</sup> Fines are also increased for corporate officers of operators who commit violations.<sup>85</sup>

## VI. Digital Assets and Cryptocurrency

As the use of cryptocurrencies and cryptotokens has increased in Russia, the government has grappled with defining, controlling, and taxing these assets.<sup>86</sup> Digital rights were first addressed<sup>87</sup> in Russian law in 2019<sup>88</sup> and on January 1, 2021, a new law on digital financial assets (DFAs) and cryptocurrency took effect.<sup>89</sup> The new law begins to regulate the issuance, accounting and circulation of DFAs and the use of digital currency in Russia.<sup>90</sup>

### A. DIGITAL FINANCIAL ASSETS (DFAs)

DFAs are defined as digital rights similar to issued securities but placed through a blockchain.<sup>91</sup> DFAs include monetary claims, the ability to exercise rights to or demand transfer of securities, and the right to participate in the capital of non-public joint stock companies.<sup>92</sup> A DFA can

84. *Id.* at art. 1(3)(h).

85. *Id.* at art. 1(3)(a)–(h).

86. *Russian Federation: New Bill Defines Cryptocurrency, Proposes Tax Regulations*, LIBR. OF CONG. (Jan. 11, 2021), <https://www.loc.gov/item/global-legal-monitor/2021-01-11/russian-federation-new-bill-defines-cryptocurrency-proposes-tax-regulations/>.

87. Mariet Mezokh, *Russia Adopts Law on Digital Financial Assets: A Step Forward or Another Move Towards Further Restrictions?*, UNIV. OF OXFORD: FAC. OF L. (Oct. 2, 2020), <https://www.law.ox.ac.uk/business-law-blog/blog/2020/10/russia-adopts-law-digital-financial-assets-step-forward-or-another>.

88. Russian Civil Code, *supra* note 13, at art. 141.1.

89. Federal Law of the Russian Federation on Digital Financial Assets, Digital Currency and on Amendments to Certain Legislative Acts of the Russian Federation, July 31, 2020, No. 259-FZ, <https://cis-legislation.com/document.fwx?rgn=126432> [hereinafter Digital Financial Assets Law].

90. ANNA V. MAXIMENKO ET. AL., DEBEVOISE & PLIMPTON, RUSSIA ADOPTS LAW ON DIGITAL FINANCIAL ASSETS 1 (Aug. 6, 2020), <https://www.debevoise.com/insights/publications/2020/08/russia-adopts-law-on-digital-financial-assets>.

91. Digital Financial Assets Law, *supra* note 89, at art. 1, § 2; *see also* *What is a Blockchain?*, COINBASE, [https://www.coinbase.com/learn/crypto-basics/plp-what-is-a-blockchain?utm\\_creative=&utm\\_medium=&utm\\_campaign=&utm\\_content=&utm\\_term=&utm\\_source=&utm\\_medium=&utm\\_campaign=&utm\\_content=&utm\\_term=&utm\\_source=bing&utm\\_medium=CPC&utm\\_campaign=RT\\_p\\_us\\_w\\_m\\_acq\\_bin\\_sea\\_non\\_Blockchain&utm\\_term=%2Bblockchain%20%2Bexplained&utm\\_content=blockchain-Explained](https://www.coinbase.com/learn/crypto-basics/plp-what-is-a-blockchain?utm_creative=&utm_medium=&utm_campaign=&utm_content=&utm_term=&utm_source=&utm_medium=&utm_campaign=&utm_content=&utm_term=&utm_source=bing&utm_medium=CPC&utm_campaign=RT_p_us_w_m_acq_bin_sea_non_Blockchain&utm_term=%2Bblockchain%20%2Bexplained&utm_content=blockchain-Explained) (noting that “blockchain” is a list of transactions that anyone can look and verify, and it serves as the technology enabling the transfer of value (i.e., digital currency or assets) online without use of a bank or credit card company (though they may be involved in certain blockchains)).

92. Digital Financial Assets Law, *supra* note 89, at art. 1.2. *See also* Mezokh, *supra* note 88 (“Tokens and stablecoins that do not certify rights to any objects referred to in the definition of

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be sold, bought, pledged, inherited or exchanged for other digital rights.<sup>93</sup> When issued, a DFA is accompanied by documentation much like a securities offering, such as prospectus-like information on the volume of the issue, type and extent of rights attached to the DFA, *et alia*.<sup>94</sup>

The DFA Law calls for the issuance of DFAs to be done via the same information system as normal securities are in Russia.<sup>95</sup> The Central Bank of Russia will regulate DFAs and approve information system operators (predominantly banks, other credit organizations, or exchanges; all must be Russian legal entities), as well as deciding which types of DFAs may be acquired only by “qualified investors.”<sup>96</sup> The DFA Law sets out requirements for the information system operator that issues DFAs, the DFA exchange operator, and the circulation of DFAs.<sup>97</sup>

All DFA transactions are to be made through DFA “Exchange Operators” screened and approved by the Central Bank of Russia to oversee such transactions.<sup>98</sup> The DFA Law sets out special rules for DFAs that carry the power to exercise any rights attached to shares in a private joint stock company (PJSC) or the right to demand a transfer of such shares.<sup>99</sup> There are also specific requirements for advertising DFAs.<sup>100</sup>

It is thought that a separate and more specific federal law is planned in the near future that will govern the issuance and circulation of digital currencies.<sup>101</sup>

## B. DIGITAL CURRENCY/CRYPTOCURRENCY

As Russians invest huge sums in Bitcoin and other digital currencies (sometimes referred to as “cryptocurrency”),<sup>102</sup> several signs have pointed to a general hesitation, if not hostility, on the part of the Government of the

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DFA seem to be beyond the scope of the Law. But this does not exclude that circulation of such objects will be regulated by other laws.”)

93. *A New Russian Digital-Assets Law*, GOWLING WLG (Sept. 1, 2020), <https://gowlingwlg.com/en/insights-resources/articles/2020/a-new-russian-digital-assets-law/>.

94. Digital Financial Assets Law, *supra* note 89, at art. 1.3. *See also A New Russian Digital-Assets Law*, *supra* note 93.

95. Digital Financial Assets Law, *supra* note 89, at art. 1.9.

96. Mezokh, *supra* note 87.

97. BULAT ZHAMBALNIMBUEV, ALLEN & OVERY ADOPTION OF NEW LAW ON DIGITAL FINANCIAL ASSETS AND DIGITAL CURRENCIES 2 (2020), <https://www.allenoverly.com/en-gb/global/news-and-insights/publications/new-law-on-digital-financial-assets-and-digital-currencies-key-innovations-in-russia>.

98. *Id.* at 2.

99. *Id.* (“For example: (i) no DFA offering is allowed if a [PJSC] has previously issued shares in ordinary (book-entry) form; (ii) no state registration is required for an offering of shares in the form of DFAs; and (iii) shares in a [PJSC] cannot be issued in the form of DFAs.”)

100. Digital Financial Assets Law, *supra* note 89.

101. ZHAMBALNIMBUEV, *supra* note 97.

102. *Scale of Russian Investment in Cryptocurrency Revealed*, TADVISER (Dec. 20, 2021), <https://www.rt.com/russia/543799-crypto-market-investment-ban/> (quoting Anatoliy Aksakov, the head of the State Duma’s committee on financial markets, stating “[a]ccording to certain

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RF, and especially the Central Bank of Russia (CBR), toward digital currencies from foreign countries. For example, government officials have said that digital currency bears the risk of “undermining . . . money circulation,”<sup>103</sup> that it is too volatile and is used in criminal acts,<sup>104</sup> and that it lacks transparency.<sup>105</sup> Some have theorized that the Central Bank of Russia opposes digital currencies simply because it wants no competitors for its own eventual digital ruble.<sup>106</sup>

The DFA Law clearly distinguishes between DFA’s and digital currency in establishing a basis for regulating the digital currency industry.<sup>107</sup> It defines “digital currency” as:

A ‘set of electronic data’ (i.e., a digital code) that is contained in an information system and can be accepted as a means of payment that is not a Russian or foreign monetary unit or investment, and that holds no rights except for its value to be recognized by the information system where it exists, which need only ensure compliance with proper procedure for issuing that digital currency and keeping appropriate records.<sup>108</sup>

The DFA Law sets out a number of restrictive steps that, practically, result in the banning of all cryptocurrency except a digital currency to be created and issued by the Central Bank of Russia (the “digital ruble”), which, semantically, is expressly defined as not being “cryptocurrency.”<sup>109</sup> For example, RF residents cannot receive digital currency as payment for goods, work, or services<sup>110</sup> because digital currency is not legal tender for payments in Russia.<sup>111</sup>

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estimates, some 5 trillion rubles [\$67.3 billion] have been invested by Russians” in cryptocurrency.”) [hereinafter Scale of Russian Investment]

103. *Legislation on Digital Financial Assets and Digital Currency in Russia (259-FZ)*, TADVISOR (May 27, 2021) [hereinafter *Legislation on Digital Financial Assets*], <https://tadviser.com/index.php/>

Article:Legislation\_On\_Digital\_Financial\_Assets\_and\_Digital\_Currency\_in\_Russia\_(259-FZ).

104. Chaahat Girdhar, *Bank of Russia Might Restrict Crypto Investments*, COINCODECAP (Dec. 20, 2021), <https://blog.coincodecap.com/bank-of-russia-might-restrict-crypto-investments>.

105. Scale of Russian Investment, *supra* note 102.

106. *See, e.g., Legislation on Digital Financial Assets and Digital Currency in Russia (259-FZ)*, *supra* note 103.

107. *Id.* (quoting Elvira Nabiullina, head of the Central Bank of Russia, in 2017).

108. Digital Financial Assets Law, *supra* note 89, at art. 3.1.

109. Oleg O. Ushakov, *Russian Regulation of Cryptocurrency & Digital Financial Assets*, INT’L BAR ASS’N (June 30, 2021), <https://www.ibanet.org/Russian-regulation-cryptocurrency> (“The main difference between cryptocurrency and the digital ruble lies in the fact that the digital ruble will be issued by the Bank of Russia. Therefore, as with the ‘ordinary’ ruble, the Russian Federation will be liable for its circulation as a national currency, while there is no single person or entity that is liable for the credibility of ‘classical’ cryptocurrency. Another key feature . . . is the application of KYC rules, which are usually used when clients open ordinary bank accounts for digital ruble holders.”).

110. Digital Financial Assets Law, *supra* note 89, at art. 14.5.

111. *Id.* at art. 14.7.

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But Russian residents (apart from some government officials) can purchase foreign cryptocurrency as an investment asset using a foreign operational platform, not a Russian platform.<sup>112</sup> They must declare foreign cryptocurrency assets to the Russian Tax Service,<sup>113</sup> although as of the DFA Law's effective date, there were no guidelines regarding how to value it, report it, or calculate tax on it.<sup>114</sup> Nonetheless, Russian residents are required to declare to tax authorities their digital currency as well as any civil law transactions and/or operations involving such digital currency.<sup>115</sup> Any claims regarding undeclared digital currency, or any undeclared transaction involving digital currency, will not be enforceable in Russian courts.<sup>116</sup>

In early November 2021, the CBR announced that in early 2022, it planned to prepare a prototype for its digital ruble platform and begin a trial run later in the year to decide whether to release it for public use.<sup>117</sup> Simultaneously, reports emerged that in order to implement the digital ruble plan, Russian lawmakers will pursue amendments to the Civil Code, Tax Code, Budget Code, Administrative Code, and other laws on issues such as the CBR's power to make rules for digital currency circulation and the acceptance of digital rubles as a form of payment.<sup>118</sup>

At the end of 2021, reports circulated that the CBR was lobbying to have lawmakers ban cryptocurrencies altogether (except its own, of course); for example, Reuters reported that the CBR's approach to them was a "complete rejection,"<sup>119</sup> with the CBR head confirming she was against the cryptocurrency trade.<sup>120</sup> Media reports circulated that while the Duma

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112. See *A New Russian Digital-Assets Law*, *supra* note 93. The DFA Law does not refer to all tokens, so it is not clear how Russian law will address them. See *Scale of Russian Investment*, *supra* note 102.

113. The Ministry of Finance has stated in its Letter No. 03-03-06/1/73953 that "[t]he logic of the provisions of Chapter 25 of the Tax Code of the Russian Federation implies taxation of all income received by the taxpayer in carrying out activities . . . Given the absence in chapter 25 of the Tax Code . . . of a special procedure for taxing income received during cryptocurrency transactions, these taxpayer revenues are taken into account when determining the tax base for income tax in the general order." *Id.*

114. A bill was introduced in early 2021 (Bill No. 1065710-7) to address taxation issues related to digital currency, but it stalled after its first reading. See Anna Baydakova, *Russia's Chief Tax Man Says Crypto Could Erode State Taxation Profits*, COINDESK (Nov. 22, 2021), <https://www.coindesk.com/policy/2021/11/22/russias-chief-taxman-says-crypto-could-erode-state-taxation-profits/#:~:text=according%20to%20the%20current%20law%20in%20Russia%2C%20cryptocurrencies,since.%20Russian%20civil%20servants%20can%20not%20legally%20crypto>.

115. ZHAMBALNIMBUEV, *supra* note 97.

116. *Id.*

117. *Russia Will Change the Law on the Digital Ruble, While the Central Bank Considers a Prototype for 2022*, JUST. NEWS FLASH REP. (Nov. 9, 2021), [https://www.justiceneWSflash.com/2021/11/09/russia-will-change-the-law-on-the-digital-ruble-while-the-central-bank-considers-a-prototype-for-2022\\_20211109158742.html](https://www.justiceneWSflash.com/2021/11/09/russia-will-change-the-law-on-the-digital-ruble-while-the-central-bank-considers-a-prototype-for-2022_20211109158742.html).

118. *Id.*

119. *Scale of Russian Investment*, *supra* note 102.

120. *Id.*

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(Parliament) was drafting rules for coin mining and exchange, the CBR was trying to prohibit all crypto purchases by Russian residents.<sup>121</sup> In response, experts noted that such a prohibition would serve only to drive crypto investors “underground, making it impossible for the government to collect taxes.”<sup>122</sup>

## V. Public Health and Administration

In the RF, subordinate executive governments exist below the national government, much like in the American federal system.<sup>123</sup> The subordinate executive powers are referred to as “Subjects” of the RF, and comprise Republics, Regions (*Oblasts*), Territories (*Krais*), Autonomous Areas (*Autonomous Okrugs*), Autonomous Regions (*Autonomous Oblasts*), and Cities of Federal Importance.<sup>124</sup>

During the ongoing COVID-19 epidemic, Subjects of the RF have grappled with enacting measures to protect the public from the disease, using their authority under two federal laws empowering them to enact decrees and other regulations.<sup>125</sup> But there are no administrative procedures or unified administrative and procedural legislation governing the exercise of these powers or specifically for making Covid-related policies, and as a result, Subjects’ executive authorities have acted as if there are no limits on their powers and that they have the right to mandate any regulations without regard to consistency or fairness.<sup>126</sup>

The Constitutional Court of the Russian Federation has expressly stated that when introducing new legal regulations, Subjects must comply with other legal norms<sup>127</sup> such as the RF Constitution.<sup>128</sup> Articles 19 and 75.1 of the Constitution require that:

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121. Girdhar, *supra* note 104. While future purchases of cryptocurrency could be banned, it appears that owners of already-purchased crypto will be allowed to keep it after any ban took place. See Arnab Shome, *Russian Central Bank Plans Cryptocurrency Ban*, FIN. MAGNATES (Dec. 17, 2021), <https://www.financemagnates.com/cryptocurrency/regulation/russian-central-bank-plans-cryptocurrency-ban/>.

122. Girdhar, *supra* note 104.

123. RF Constitution, *supra* note 27, at art. 65.

124. *Id.*

125. The first law is (1) Federal Law No. 68-FZ on Protection of Population & Territories from Natural & Man-Made Emergencies, at art. 10, cl. a.1–a.2, art. 11, cl. 1(l), 1(s), & 1(t) and pt. 1.1 (Dec. 21, 1994), <https://rg.ru/2020/04/03/fz98-chs-dok.html> (Russ.). The second law is (2) the Mandatory Rules of Conduct for Citizens & Organizations Upon Introduction of an Emergency Situation Approved by the Russian Federation Government, Res. No. 417, Apr. 2, 2020, <http://publication.pravo.gov.ru/Document/View/0001202004030046> (Russ.).

126. See discussion accompanying note 129, et seq.

127. Constitutional Court of the Russian Federation Decision No. 49-P (Dec. 25, 2020) (finding that the Governor of Moscow Region has the power to restrict the public’s right to walk in the streets due to COVID-19), <http://publication.pravo.gov.ru/Document/View/0001202012290002>.

128. RF Constitution, *supra* note 27.

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1. Legislative restrictions must be consistent with maintaining public confidence in the law and state activities, so legal regulations must be consistent and justified, and if necessary, must provide for compensation to parties damaged by any targeted restrictions;<sup>129</sup>
2. Matters similar in legal nature must be regulated similarly. While the RF has no principle of “*stare decisis*” as in Anglo-American systems, the constitutional principle of equality guarantees citizens protection from discrimination in exercising their rights, and no government may impose limitations on the rights of people in one category that have no objective and reasonable justification to be different from rights of people in the same or similar categories.<sup>130</sup>
3. All restrictions must be proportionate.<sup>131</sup>

But many Subjects’ COVID-19 restrictions fail these standards. For example, Irkutsk Region banned the organizing and staging of theatre,

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129. See, e.g., Decision of the Russian Federation Constitutional Court, Court No. 9-P, Apr. 20, 2010 (Russ.), <https://rg.ru/2010/05/07/ks-dok.html>; see also Decision of the Russian Federation Constitutional Court, No. 34-P, Nov. 28, 2017 (Russ.), <https://rg.ru/2017/12/08/zaloba-dok.html>; Decision of Statutory Court of Sverdlovsk Region Apr. 16, 2013 (Russ.), <http://www.pravo.gov66.ru/5895/>; see also Decision of Statutory Court of Sverdlovsk Region, Apr. 27, 2017, <http://www.pravo.gov66.ru/12523/>. See *Bulves AD vs Bulgaria*, Eur. Ct. Human Rts., Jan. 22, 2009, [www.hrlibrary.umn.edu/research/bulgaria/BULVES%20AD.pdf](http://www.hrlibrary.umn.edu/research/bulgaria/BULVES%20AD.pdf); *Centro Europa 7 S.r.p vs Italy etc.*, Eur. Ct. of Human Rts., June 7, 2012, <https://biblio.ugent.be/publication/3059987>; Decision of the Russian Federation Supreme Court No. 303-ES20-816, June 19, 2020, [https://kad.arbitr.ru/Document/Pdf/098220d3-4169-407a-8de1-028ebb3a600a/0edbbfe0-f6a0-4acd-a44b-5d92029122a7/A51-24425-2018\\_20200619\\_Opredelenie.pdf?isAddStamp=true](https://kad.arbitr.ru/Document/Pdf/098220d3-4169-407a-8de1-028ebb3a600a/0edbbfe0-f6a0-4acd-a44b-5d92029122a7/A51-24425-2018_20200619_Opredelenie.pdf?isAddStamp=true).

130. See Decision of the Russian Federation Constitutional Court, No. 7-P, June 16, 2006 (Russ.), <https://rg.ru/2006/06/21/ks.html>; Decision of the Russian Federation Constitutional Court, No. 5-P, Apr. 5, 2007, <https://rg.ru/2007/04/11/voennye-jilie-dok.html>; see also Decision of the Russian Federation Constitutional Court, No. 6-P, Mar. 25, 2008 (Russ.), <http://doc.ksrf.ru/decision/KSRFDecision19722.pdf>; see also Decision of the Russian Federation Constitutional Court No. 4-P, Feb. 26, 2010, <https://rg.ru/2010/03/12/ks-kodeks-dok.html> (Russ.); see also Decision of the Russian Federation Constitutional Court, No. 16-P, July 14, 2011, <https://rg.ru/2011/07/29/ks-dok.html> (Russ.).

131. RF Constitution, *supra* note 27, at art. 55, pt. 3 (regarding restrictions on rights and freedoms). See also Decision of the Russian Federation Supreme Court, No. AKPI20-489, Oct. 7, 2020 (holding that executive power can restrict human rights if law empowers the Subject to do so but even then is subject to Article 55 of the Russian Federation Constitution), [http://vsrf.ru/stor\\_pdf.php?id=1932608](http://vsrf.ru/stor_pdf.php?id=1932608). This principle is also cited in a 2012 Decision of the Russian Federation Constitutional Court. See Russian Federation Constitutional Court, No. 9-P, March 30, 2012, <https://rg.ru/2012/04/13/ks-dok.html>; see also Decision of the Russian Federation Constitutional Court, No. 448-O, March 10, 2016, <http://doc.ksrf.ru/decision/KSRFDecision228304.pdf>; Decision of the Russian Federation Supreme Court, No. 308-KG17-12587, Apr. 25, 2018, [https://kad.arbitr.ru/Document/Pdf/4a23cef0-b7e2-4689-a38b-0fc5c5a275e9/fa9ac692-a516-4fbc-ba42-23d3fbc8cb9/A53-14724-2016\\_20180425\\_Opredelenie.pdf?isAddStamp=true](https://kad.arbitr.ru/Document/Pdf/4a23cef0-b7e2-4689-a38b-0fc5c5a275e9/fa9ac692-a516-4fbc-ba42-23d3fbc8cb9/A53-14724-2016_20180425_Opredelenie.pdf?isAddStamp=true); see also Decision of the Russian Federation Constitutional Court, No. 4-KG18-66, Oct. 30, 2018, [http://vsrf.ru/stor\\_pdf.php?id=1705852](http://vsrf.ru/stor_pdf.php?id=1705852). See also Review of Judicial Practice by the Constitutional Supreme Court, No. 3, 2018, at cl. 42, <https://vsrf.ru/documents/practice/27317/>; Rev. of Judicial Practice by the RF Supreme Court, No. 4, 2018, cl. 35, <https://vsrf.ru/documents/practice/27547/>.



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opera, ballet, and other stage performances held by touring or visiting performers, while allowing the same activities by non-touring performers.<sup>132</sup> Not only was this ban unfairly restrictive on touring performances, no provision was made to compensate tour organizers for losses they incurred due to the ban.<sup>133</sup> Similarly, in Ivanovo Region, restrictions on activities in state-owned theatres, symphonies, circuses and cinemas were significantly lighter than those in the same type of non-state-owned venues or in other locations (e.g., museums, exhibition centers and outdoor venues). The non-state-owned entities were subject to restrictions on the number of attendees and incurred additional costs for on-site COVID-19 testing not required for state-owned venues.<sup>134</sup> Such disparate treatment of individuals based on whether or not they work for a state-owned entity may well be unconstitutional because it is not supported by objective circumstances.<sup>135</sup>

In Voronezh Region, an October 2021 Decree prohibited all concert activities, starting the very next day, without compensation to the organizers of such events, and with no advance warning or discussion with the concert industry.<sup>136</sup> Similarly, St. Petersburg imposed bans from October 30 to November 7, 2021 on all sports events (except those exempted by government entities); physical, cultural and entertainment activities (except for theatres and museums); and conventions and exhibitions, celebrations, recreational and other categories of events.<sup>137</sup> For no discernable reason, theatre and museum activities were exempted from these bans.<sup>138</sup> Under the RF Constitution, Subjects are not entitled to prioritize activities carried out by certain performing arts organizations over others since both are regulated by the same law.<sup>139</sup>

In the City of Moscow, a unified regulation governed the work of performing arts organizations, including concert halls, theatres and museums, prior to October 21, 2021, when the Mayor's Decree banned certain performing arts organizations (including concert halls and concert venues, but excluding theatres and federal cultural institutions, and

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132. Decree of Governor of Irkutsk Region No. 276-ug, Oct. 11, 2021, cl. 3, sub-cl. 1, <http://publication.pravo.gov.ru/Document/View/3800202110120004> (Russ.).

133. *Id.*

134. Decree of Governor of Ivanovo Region No. 23-ug, Mar. 17, 2020 (ordering that theatres, cinemas, symphonies, and circuses owned by the state could hold events with no COVID testing or other restrictions, but the same kinds of events (plus concerts with less than 500 attendees) in cultural or recreational centers require COVID testing of all participants at the event organizer's expense), <https://docs.cntd.ru/document/570710014> (Russ.).

135. *See* text accompanying note 130.

136. Decree of Governor of Voronezh Region No. 177-u, Oct. 8, 2021, <https://pravo.govrn.ru/?qNde/23345> (Russ.).

137. Resolution No. 795 of the Government of St. Petersburg, Oct. 23, 2021, <http://publication.pravo.gov.ru/Document/View/7800202110250001> (Russ.).

138. *Id.* at art. 2-61, ¶¶. 15, 25.

139. Fundamental legislation of the Russian Federation on Culture approved by the Supreme Soviet of the RF, No. 3612-1, Oct. 9, 1992, <http://pravo.gov.ru/proxy/ips/?docbody=&nd=102018866>.

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museums) from activities, contrary to the RF Constitution provisions discussed above.<sup>140</sup>

There is also controversy about ongoing bans or limits on holding personal meetings or gatherings. While Russian law provides that any person has the right to meet with an authority or official to discuss a relevant problem, many Subjects have restricted this right. For example, in Irkutsk Region, in response to Decree No. 279-ug,<sup>141</sup> an appeal was sent on behalf of the Public Representative of the Presidential Commissioner for the Protection of Entrepreneurs' Rights (the "Entrepreneurs' Presidential Representative"), requesting amendment of Decree No. 279-ug to meet Constitutional requirements. The Ministry of Culture and Archives of Irkutsk Region replied that a May 2020 Presidential Decree<sup>142</sup> had authorized Subjects to issue such regulations, so they would remain in force.<sup>143</sup> But at the same time, the Ministry sent an inquiry regarding personal gatherings to the Regional Policy Department of the Governor of Irkutsk Region, and the response was that personal gatherings could not be held<sup>144</sup> because it would contravene a June 2021 decision of the Irkutsk Commission of Sanitation and Epidemiology.<sup>145</sup>

This decision appears inconsistent with Federal Law No. 59-FZ "On the procedure of consideration of applications of citizens of the Russian Federation," which does not allow the prohibition of personal gatherings.<sup>146</sup> Further, the Commission of Sanitation and Epidemiology is not authorized to issue or change legal regulations so its meeting decision should have had no effect.<sup>147</sup>

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140. Decree of Mayor of Moscow No. 62-UM, Oct. 21, 2021, <https://www.mos.ru/authority/documents/doc/47279220/> (Russ.).

141. See notes 134–135 and accompanying text.

142. Presidential Decree No. 316, On Determining the Procedure for the Extension of Measures to Ensure Sanitary and Epidemiological Welfare of the Population in the Subjects of the Russian Federation in Connection with the Spread of New Coronavirus Infection (COVID-19), May 11, 2020, <http://publication.pravo.gov.ru/Document/View/0001202005110002> (Russ.).

143. Letter No. 03-P56-182/21 of the Ministry of Culture and Archives of the Irkutsk region, Nov. 12, 2021, unpublished, on file with the Public Representative of the Presidential Commissioner for the Protection of Entrepreneurs' Rights (Russ.).

144. Letter No. 03-23-26699/21 of the Regional Policy Department of the Governor of Irkutsk Region, Nov.16, 2021, unpublished, on file with the Public Representative of the Presidential Commissioner for the Protection of Entrepreneurs' Rights (Russ.).

145. Decision No. CSO-148/21of the meeting of Irkutsk Commission of Sanitation-and-Epidemiology, June 15, 2021, unpublished, on file with the Public Representative of the Presidential Commissioner for the Protection of Entrepreneurs' Rights (Russ.).

146. Federal Law of the Russian Federation on Citizenship of the Russian Federation, No. 59-FZ, at art. 13 (authorizing any person or organization to have a meeting with an official or authority to discuss their issues), [http://www.consultant.ru/document/cons\\_doc\\_LAW\\_59999/](http://www.consultant.ru/document/cons_doc_LAW_59999/) [hereinafter No. 59-FZ].

147. *Id.*

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In response, the Entrepreneurs' Presidential Representative<sup>148</sup> argued that complainants should utilize the already-existing Russian legal process that allows individuals and entities to appeal the infringement of their rights by a Subject to a higher administrative body or official. If these procedures are used, a consistent body of decisions would emerge and decrease the arbitrary and inconsistent rulings among RF Subjects (and other levels of government). This process could be used not only with COVID-19 measures, but many other areas of law that are infringements on rights by the Subjects.<sup>149</sup> The Entrepreneurs' Presidential Representative is focused on this extra-judicial remedy because it is faster than a court appeal and the authority to whom the process is addressed has more power to effect wide-ranging change.<sup>150</sup> The Representative is using this process to challenge Subjects' administrative actions that violate the rights of the performing arts industry in particular.<sup>151</sup>

Article 33 of the RF Constitution establishes the "right of petition," i.e., individuals' and entities' rights to appeal to state and local self-government bodies challenging encroachments on their rights and freedoms.<sup>152</sup> Federal Law 59-FZ provides for the right to initiate administrative complaints.<sup>153</sup> Administrative appellate bodies and officials are not judicial officials (as in the U.S.) but are empowered to hear complaints as part of their authority to manage lower bodies pursuant to the RF Constitution.<sup>154</sup> The RF Constitution requires administrative bodies to consider appeals, collect necessary documents and information, and provide direct, complete, clear and logical responses (rather than formal replies requiring additional

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148. Federal Law of the Russian Federation on Citizenship of the Russian Federation, No. 78-FZ, art. 7 (holding that primary purpose of the Entrepreneurs' Presidential Representative is to represent the interests of business owners in the RF under Article 7 of Federal Law No. 78-FZ), [http://www.consultant.ru/document/cons\\_doc\\_LAW\\_145997/](http://www.consultant.ru/document/cons_doc_LAW_145997/).

149. *See, e.g.*, Decision of the Russian Federation Supreme Court, No. 305-KG17-5672, Oct. 31, 2017, [https://kad.arbitr.ru/Document/Pdf/1748a175-4465-470a-a97d-637efb980b58/f86d9dcb-9a0a-4193-8204-5461a03fdb98/A40-101850-2016\\_20171031\\_Opredelenie.pdf?isAddStamp=true](https://kad.arbitr.ru/Document/Pdf/1748a175-4465-470a-a97d-637efb980b58/f86d9dcb-9a0a-4193-8204-5461a03fdb98/A40-101850-2016_20171031_Opredelenie.pdf?isAddStamp=true) (upholding the Federal Tax Service's overruling of a decision by its regional department because the former is a higher official than the latter).

150. Statement of Entrepreneurs' Presidential Representative Denis Karimov, unpublished interview with author, on file, Dec. 9, 2021.

151. *Id.*

152. RF Constitution, *supra* note 27, at art. 33. The right of petition is also set out in Law No. 59-FZ. *See* No. 59-FZ, *supra* note 146, at art. 1. Different legislation may establish other rules of submission and consideration of appeals, while Law No. 59-FZ is always applicable if no special law prescribes otherwise. *Id.* at Art. 1, part 2. *See also* Decision of the Presidium of the Supreme Arbitration Court No. A75-7853/2011, Dec. 25, 2012, [https://kad.arbitr.ru/Document/Pdf/15e46f02-139b-4c69-99d7-f9679a3945b1/08e3d236-0f44-44ed-840f-2f3044fe71b3/A75-7853-2011\\_20121225\\_Reshenija\\_i\\_postanovlenija.pdf?isAddStamp=true](https://kad.arbitr.ru/Document/Pdf/15e46f02-139b-4c69-99d7-f9679a3945b1/08e3d236-0f44-44ed-840f-2f3044fe71b3/A75-7853-2011_20121225_Reshenija_i_postanovlenija.pdf?isAddStamp=true) (Russ.).

153. Law No. 59-FZ, *supra* note 147, at art. 1, pt. 1 & 4. *See also* Decision of the Russian Federation Constitutional Court, No. 34-P, at arts. 5, 9, 10, Nov. 28, 2017 (regarding the constitutionality of certain portions of the Russian Federation Tax Code) (Russ.).

154. *See* RF Constitution, *supra* note 27, at art. 75.1.

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explanation or rule-making from other authorities or bodies).<sup>155</sup> Failure to follow proper appeals procedures constitutes an administrative offense under the RF Code on Administrative Offenses.<sup>156</sup>

This “top-down” review procedure is consistent with the Russian principle of “linear subordination,”<sup>157</sup> meaning that a higher official has the power to manage activities of a lower one if not otherwise prohibited by law. Accordingly, the national federal Government (the highest level of executive administrative power) is empowered to review decisions made by lower authorities (such as Subjects) as part of its general management, coordination and supervision role,<sup>158</sup> and it may pass regulations overruling those of subordinate bodies.<sup>159</sup> The Government’s review power includes the ability to cancel or suspend acts of subordinate executive bodies such as those in the Subjects.<sup>160</sup> Therefore, it is clear that the federal authorities, upon proper appeal by an individual or entity, may strike down inconsistent and unfair regional and local restrictions in order to systematize a national approach to fighting COVID-19.

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155. *Id.*

156. Federal Law of the Russian Federation on Amendments to the Code of Administrative Offenses of the Russian Federation, Feb. 24, 2021, No. 19-FZ, <http://ips.pravo.gov.ru:8080/default.aspx?pn=0001202102240010> [hereinafter Administrative Amendments].

157. *See generally* Bakhrakh and Khazanov, State Administration, Its Bodies & Employees (Anatomy of State Administration), Yekaterinburg, 1998; Bakhrakh and Khazanov, Forms and Methods of State Administration; Yekaterinburg, 1999.

158. RF Constitution, *supra* note 27, at art. 77, pt. 2 (noting that in areas of joint jurisdiction between the Russian Federation and its Regional Authorities form a unified system of executive authority. *See also* Federal Constitutional Law No. 4-FKZ On the Government of the Russian Federation, at art. 12, cl. 3, pt. 1 and 6, & art. 13, pt. 1, Nov. 6, 2020, and section II on the structure of federal executive bodies, approved by Presidential Decree No. 21, Jan. 21, 2020. This is the legal basis for the RF Government to act as a superior body in relation to the executive authorities of the Subjects of the RF in the construction of anti-Covid prohibitions. *See id.*

159. The Regulations on the Government of the RF provide that in order to monitor the implementation of the Constitution, federal laws, international treaties, Presidential acts and Governmental decisions, the national federal Government should review the decisions of federal ministers and Subjects, as well as other subordinate executive bodies. *See* Regulation on the Government of the Russian Federation, approved by Russian Federation Government Decree No. 260, June 1, 2003, cl. 5, [http://www.consultant.ru/document/cons\\_doc\\_LAW\\_47927/ba269782742c5d460477b346c08f821af8de8647/](http://www.consultant.ru/document/cons_doc_LAW_47927/ba269782742c5d460477b346c08f821af8de8647/).

160. *Id.*; *see also* Decision of the Russian Federation Constitutional Court, No. 5-P, Mar. 17, 2009, (holding that the centralized nature of the work of subordinate administrative bodies implies that a higher official body may correct errors made by a lower official body), <https://rg.ru/2009/04/01/ks-nalogproverka-dok.html>; Decision of the Russian Federation Supreme Court, No. 305-KG17-5672, Oct. 31, 2017, (allowing the central apparatus of the Federal Tax Service to cancel a decision of one of its territorial bodies despite the absence of an explicitly stated power to do so in the Russian Federation Tax Code), [https://kad.arbitr.ru/Document/Pdf/1748a175-4465-470a-a97d-637efb980b58/f86d9dcb-9a0a-4193-8204-5461a03fdb98/A40-101850-2016\\_20171031\\_Opredelenie.pdf?isAddStamp=true](https://kad.arbitr.ru/Document/Pdf/1748a175-4465-470a-a97d-637efb980b58/f86d9dcb-9a0a-4193-8204-5461a03fdb98/A40-101850-2016_20171031_Opredelenie.pdf?isAddStamp=true).

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## V. Ukraine

### A. REAL ESTATE PRIVATIZATION

In 2020-2021, despite quarantine-related restrictions, privatization of Ukrainian real estate was very attractive for investors. In 2019, when President Volodymyr Zelenskyi and his team were elected, they promised wide privatization of state property across various sectors of the economy, including energy production and co-generation, infrastructure, hospitality, mining, pharmaceuticals, and alcohol regulation, primarily due to the ineffective management of most state-owned enterprises in the post-Soviet era.

Pursuant to the Privatization Law<sup>161</sup> adopted in 2018 and amended several times since then, both large-scale and small-scale privatization<sup>162</sup> gained momentum in 2020-21. Importantly for foreign investors, the Privatization Law did not introduce any foreign direct investment (FDI) restrictions,<sup>163</sup> leaving merger clearance (applicable to foreign and Ukrainian investors alike) as the only significant permission necessary for foreigners to participate in the privatization process. Despite discussions regarding the possibility of introducing FDI screening requirements, such changes are not on the immediate agenda of the Ukrainian Government and may or may not be considered in the future.

The following discussion is an overview of recent privatizations of property in Ukraine, which, despite some flaws, was developing quickly and reasonably effectively prior to the war with Russia that began in February 2022.

#### 1. *Dnipro Hotel*

In 2020, Ukraine operated its first transparent and open privatization procedure, with twenty-nine participants competing to purchase the 100 percent state-owned stake in the Dnipro Hotel,<sup>164</sup> located in the Maidan Nezalezhnosti (Independence Square), a highly desirable location in the historic and business heart of Kyiv. With a starting bid of 80,923,400 Ukrainian Hryvnia (UAH), the auction proceeded online with the price increasing more than thirteen-fold before ending at UAH 1,111,222,000.22 (~USD \$39,163,000).<sup>165</sup> This process was widely considered to be an excellent beginning of the new era of privatization in Ukraine.<sup>166</sup>

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161. See Law of Ukraine on the Privatization of State and Municipal Property, No. 2269-VIII, Jan. 18, 2018, art. 5 (Ukr.), <https://zakon.rada.gov.ua/laws/show/2269-19#Text>.

162. *Id.* at art. 5.

163. *Id.*

164. See official announcement at *100% State-Owned Stake in PJSC "Hotel "Dnipro," STATE PROP. FUND OF UKRAINE* (2020), <https://privatization.gov.ua/en/product/derzhavnyj-paket-aktsij-rozmirom-100-statutnogo-kapitalu-prat-gotel-dnipro-2/>.

165. *Id.*

166. *Id.*; see also *Hotel Dnipro Sold for Over UAH 1 Billion*, FIN. CLUB (July 17, 2020), <https://finclub.net/ua/news/hotel-dnipro-prodaly-bilsh-nizh-za-1-mlrd-hrn.html>.

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2. *Factories*

The privatization auction of JSC “First Kyiv Machine-Building Plant” (a.k.a. the “Bilshovyk Plant”) was announced in September 2021.<sup>167</sup> The Bilshovyk Plant was founded in 1882<sup>168</sup> and since then had manufactured machines and equipment mainly for the chemical industry. After the break-up of the USSR, the plant became one of many loss-leading state-owned enterprises, as the Soviet state no longer drove demand for the Plant’s products and distribution network. The Bilshovyk Plant’s most valuable assets for privatization were several buildings near the Kyiv city center that sat on a large potential construction site of about 35 hectares.<sup>169</sup>

The privatization sale ended on October 27, 2021, with a purchase price of UAH 1,430,000,000 (~USD \$54 million). Aside from paying the purchase price, the buyer was required to meet other conditions,<sup>170</sup> which include:

1. Paying the plant’s debts of over UAH 600 million (~USD \$22.5 million), including land, tax, and pension fund debt (which had prevented some retirement-age employees from retiring);
2. Keep the plant’s Cherkasy branch open and invest UAH 57 million (~USD \$2 million) into it in the next three years; and
3. Keep the 300 remaining employees for a certain time period while complying with their trade union’s collective agreement.<sup>171</sup>

Another major factory privatization in 2021 was the auction for the sale of the property complex of SE “Elektronmash” in the Kyiv and Chernihiv Regions.<sup>172</sup> Established in 1965, Elektronmash had been the leading computer producing company in the USSR, and, like the Bilshovyk Plant, had sustained serious losses when it could not compete in the post-USSR capitalist system.<sup>173</sup> With twenty-two auction participants, the enterprise was sold under the small-scale privatization procedure<sup>174</sup> for over UAH 970

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167. See KPMG-UKRAINE LTD., INVESTMENT TEASER JSC “FIRST KYIV MACHINE-BUILDING PLANT” (2021), <https://privatization.gov.ua/wp-content/uploads/2021/09/Reklamnyj-buklet-teaser-pro-pidpryemstvo-08-09-2021-ENG.pdf>.

168. See *History of JSC First Kyiv Machine-Building Plant*, FIRST KYIV MACHINE-BUILDING PLANT (2022), <http://eng.pkmz.com.ua/????-?????/>.

169. See *100% State-Owned Stake in PJSC “Hotel “Dnipro,” supra* note 164.

170. See *On Approval of Conditions of Sale of State-Owned Stocks of Joint-Stock Company “First Kyiv Machine-Building Plant” on conditional auction*, Decree of Cabinet of Ministers of Ukraine, No. 1022-p (2021), <https://www.kmu.gov.ua/npas/pro-zatverdzhennya-umov-prodazhu-a1022r>.

171. *Id.*

172. See *Auction on Privatisation of SE “Elektronmash” Has Been Officially Held: The Winner Company Signed Minutes of Bids*, STATE PROP. FUND OF UKR. (2015), <https://www.spfu.gov.ua/ua/news/8342.html>.

173. *Id.*

174. See Law of Ukraine on the Privatization of State and Municipal Property, *supra* note 161, at art. 15.

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million (~USD \$36.5 million), 14 times its initial starting price, with the following conditions at the new owner's expense:<sup>175</sup>

1. Keep the 139 employees for at least six months;
2. Repay the company's debt within six months;
3. Comply with environmental requirements and restrictions necessitated by the building of a recreational center in the Chernihiv Region within six months; and
4. Maintain civil defense structures in readiness for use.<sup>176</sup>

Although these two factory auctions had serious flaws, they were still important steps in the privatization process in Ukraine.<sup>177</sup>

### 3. *Penal Institutions*

The State Property Fund of Ukraine and the Ministry of Justice are in the process of privatizing several non-functioning former prisons. Using the funds raised in the process, the Ministry of Justice plans to construct new correctional facilities according to Western European standards.<sup>178</sup> One of the most successful examples thus far is the sale of the Lviv Correctional Colony No. forty-eight, which was sold to the Ukrainian IT company SoftServe for UAH 377.5 million (~USD \$14.2 million).<sup>179</sup> The company plans to construct a large modern campus at the same location.

### 4. *The Future of Privatization in Ukraine*

The State Property Fund of Ukraine has developed and submitted to the Parliament for consideration Draft Law No. 4572 aimed at further improving the privatization procedure.<sup>180</sup> Among other things, the Draft Law provides for:

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175. See STATE PROP. FUND OF UKR., INVESTMENT PROSPECTUS FOR PROPERTY COMPLEX OF SOE "ELEKTRONMASH," (2021), [https://privatization.gov.ua/wp-content/uploads/2021/10/ENG\\_SOE\\_Electronmash.pdf](https://privatization.gov.ua/wp-content/uploads/2021/10/ENG_SOE_Electronmash.pdf).

176. *Id.*

177. See *Far from Exemplary, But Still an Important Step Towards the Restoration of Large-Scale Privatization: What Ti Ukraine Thinks about the Sale of the "Bilshovyk,"* TRANSPARENCY INT'L UKR. (2021), <https://ti-ukraine.org/en/news/far-from-exemplary-but-optimal-under-the-current-conditions-what-ukraine-thinks-about-selling-the-bilshovyk/>.

178. See Ministry of Justice of Ukraine, *Ministry of Justice Together with State Property Fund of Ukraine Starts a Special Project within the Privatization Framework: Sale of Former Jails Property,* FACEBOOK (Feb. 5, 2021), <https://www.facebook.com/minjust.official/posts/1128055017616174>.

179. See Denis Malyuska, *Auction on Sale of Property of Colony No. 48 Has Been Held,* FACEBOOK (June 3, 2021), [https://www.facebook.com/permalink.php?story\\_fbid=1442259216154796&id=100011121947008](https://www.facebook.com/permalink.php?story_fbid=1442259216154796&id=100011121947008).

180. See *Draft Law on Amendments to The Law of Ukraine "On the State Property Fund Of Ukraine" and Other Legislative Acts of Ukraine on Assistance in Attracting Investments in the Process of Privatization and Lease of State and Municipal Property,* VERKHOVNA RADA OF UKR. (2022), [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=70790](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=70790).

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1. Prohibiting procedural abuse of the court system intended to prevent the privatization of property;
2. Automatic termination of the employment contract of the director of the privatized enterprise at the beginning of the privatization process to allow for replacement of a former (sometimes non-transparent) director with a technical manager who can manage the preparation of the enterprise for privatization;
3. The possibility of transforming a state enterprise into a limited liability company in its pre-privatization stage;
4. Adding 30 days to the deadline for foreigners to pay for their auction winnings; and
5. Allowing privatization contracts to be governed by English law (previously this was allowed as a limited-term experiment, which has ended).

The Draft Law was approved by the Parliament in the first reading and is awaiting further consideration.

In the meantime, at least sixteen more privatizations are being planned as of December 2021,<sup>181</sup> while some others have been postponed due to Covid-19.<sup>182</sup> On December 20, 2021, the auction will be held for JSC “United Mining and Chemical Company,” a large company developing titanium-zircon deposits and producing rutile, ilmenite, and zircon concentrate, as well as providing concentrate enrichment services.<sup>183</sup> The following sales also are planned for the near future:

1. JSC “President Hotel” located in the Kyiv city center;<sup>184</sup>
2. 99.5667% shares in PJSC “Odessa Portside Plant,” a large company that loads ammonia, carbamide and methanol, and produces the latter two;<sup>185</sup> and
3. 78.289% shares in PJSC “Tsentrenergo,” one of the largest energy producers in Ukraine, which owns three energy and heat-generating facilities.<sup>186</sup>

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181. See *Prepared Privatization List*, STATE PROP. FUND OF UKR. (2022), [https://privatization.gov.ua/en/product-category/velyka-pryvatyzatsiya-en/?swoof=1&product\\_tag=gotuyetsya-en&really\\_curr\\_tax=13357-product\\_cat](https://privatization.gov.ua/en/product-category/velyka-pryvatyzatsiya-en/?swoof=1&product_tag=gotuyetsya-en&really_curr_tax=13357-product_cat) [ ].

182. Law of Ukraine “On amending certain legislative acts of Ukraine aimed at procuring additional social and economic guarantees in connection to spreading of coronavirus disease (COVID-19)” No. 540-IX, Mar. 30, 2020, <https://zakon.rada.gov.ua/laws/show/540-20>.

183. See *JSC “United Mining and Chemical Company,”* STATE PROP. FUND OF UKR. (2022), <https://privatization.gov.ua/en/product/at-ob-yednana-girnycho-himichna-kompaniya/>.

184. See *JSC “President-Hotel,”* STATE PROP. FUND OF UKR. (2022), <https://privatization.gov.ua/en/product/prat-prezydent-gotel/>.

185. See *PJSC “Odesa Portside Plant,”* STATE PROP. FUND OF UKR. (2022), <https://privatization.gov.ua/en/product/pat-odeskyj-pryportovij-zavod/>.

186. See *PJSC “Centrenergo,”* STATE PROP. FUND OF UKR. (2022), <https://privatization.gov.ua/en/product/pat-tsentrenergo/>.



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## **International Family Law**

ROBERT G. SPECTOR\* AND MELISSA A. KUCINSKI\*\*

This article examines international developments in the area of family law in 2021.

### **I. International Litigation**

#### **A. THE HAGUE CONVENTION OF OCTOBER 25, 1980, ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION (“ABDUCTION CONVENTION”)**

Most U.S. international litigation in the area of family law in 2021 involved the Abduction Convention<sup>1</sup> and its implementing legislation, the International Child Abduction Remedies Act (ICARA).<sup>2</sup> Federal and state courts have concurrent jurisdiction to resolve a parent’s request for the return of their child under the Abduction Convention.<sup>3</sup>

The Abduction Convention seeks to ensure the prompt return of children to their habitual residence.<sup>4</sup> To obtain an order returning a child, the petitioner must prove that the child was wrongfully removed from, or retained outside of, the child’s “habitual residence” and that the petitioner had “a right of custody,” which they were “actually exercising,” or would have exercised but for the abduction, under the law of the child’s habitual residence.<sup>5</sup>

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\* Robert G. Spector is the Glenn R. Watson Chair and Centennial Professor of Law Emeritus at the University of Oklahoma Law Center.

\*\* Melissa A. Kucinski is an international family law expert and author based in Washington, D.C.

1. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 [hereinafter Abduction Convention].

2. Originally codified at 42 U.S.C. § 11603 et seq., recodified as 22 U.S.C. § 9001 et seq.

3. 22 U.S.C. § 9003(a).

4. See Hague Abduction Convention, *supra* note 1, at art. 8.

5. The law of the Hague Abduction Convention is relatively straightforward, but each case’s facts can be complicated. Some cases are easy to determine. See, e.g., *Quintero v. De Loera Barba*, No. CV 5:19-148, 2019 WL 1386556, at \*3 (W.D. Tex. Mar. 27, 2019); *Lorenz v. Lorenz*, No. 2:20-CV-13128, 2021 WL 2229288, at \*3 (E.D. Mich. May 11, 2021). A petition for return must be filed in the country to which the child was abducted. See *Stone*, 308 So. 3d at 1104.

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1. *Applicability of the Abduction Convention*

The Abduction Convention only applies to countries that have ratified or acceded to it and between countries that have accepted the accession of the other country as a treaty partner.<sup>6</sup> The respondent in the case need not have parental rights.<sup>7</sup> For example, the respondent could be the opposing parent's partner or parent.<sup>8</sup> There are limitations to the applicability of the convention. The Abduction Convention cannot be made applicable to a case by agreement. It ceases to apply when the child in question turns sixteen.<sup>9</sup> A California district court held that the Abduction Convention does not apply to visitation or access issues.<sup>10</sup> It also does not apply when the respondent has been given permission to move to the United States from the other country.<sup>11</sup>

2. *Habitual Residence of the Child*

As in most Hague conventions, the Abduction Convention does not define the term "habitual residence." In 2020, the U.S. Supreme Court gave clarity to the undefined term in *Monasky v. Taglieri*, holding that "a child's habitual residence depends on the totality of the circumstances specific to the case."<sup>12</sup> In her opinion, Justice Ruth Bader Ginsburg included a footnote that provided some facts that courts have considered when resolving the location of a child's habitual residence.<sup>13</sup>

In *J.C.C. v. L.C.*, the court found that the petitioner and respondent intended for El Salvador to be the children's permanent residence.<sup>14</sup> The children's visit to the United States to see the respondent was intended to be temporary.<sup>15</sup> "Respondent's decision to retain the children beyond January 21, 2019, was unilateral, as evidenced by Petitioner's continuous attempts to

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6. See *Alikovna v. Viktorovich*, No. 19-CV-23408, 2019 WL 4038521, at \*2 (S.D. Fla. Aug. 27, 2019) (dismissing a petition to return a child to Russia because the United States has not accepted Russia's accession).

7. *Id.* at \*2-3.

8. *Rishmawy v. Vergara*, 540 F. Supp. 3d 1246, 1251 (S.D. Ga. 2021).

9. See, e.g., Abduction Convention, *supra* note 1, at art. 4. Children who turned sixteen during the proceedings rendered the return moot. See, e.g., *Noergaard v. Noergaard*, 277 Cal.Rptr.3d 905, 913-14, *as modified on denial of reh'g* (Nov. 24, 2020) (finding that the child turned eighteen during the proceeding and rendered the return moot); see also *Bordelais v. Bordelais*, No. 17 C 4697, 2017 WL 6988655, at \*3 (N.D. Ill. Dec. 19, 2017), (7th Cir. 2021), *reh'g denied*, 844 Fed. Appx. 910, 912 (7th Cir. 2021) (holding that the Abduction Convention "cease[s] to apply when the child attains the age of 16 years.>").

10. *Matrai v. Hiramoto*, No. 20-CV-05241-MMC, 2020 WL 7342718, at \*7-8 (N.D. Cal. Dec. 14, 2020).

11. *Dawson v. Dylla*, No. 21-1225, 2021 WL 5232251, at \*4 (10th Cir. Nov. 10, 2021).

12. *Monasky v. Taglieri*, 140 S. Ct. 719, 723 (2020).

13. *Id.* at 727 n.3.

14. *J.C.C. v. L.C.*, No. 19-21889, 2020 WL 6375789 (SDM)(LDW), at \*3 (D.N.J. Oct. 30, 2020).

15. *Id.*

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exercise his parental rights at the time of retention and since then”—leading to this litigation.<sup>16</sup>

In *Stirk v. Lopez*, the court examined a situation where a child was born in Florida but was raised by her parents in Juarez.<sup>17</sup> This established Juarez as the child’s permanent home because “[b]esides living in Florida for less than a year after birth, M.V.C. has lived her entire life in Mexico, M.V.C. attended school in Juarez, enjoyed a close relationship with family in Mexico, and participated in the usual social activity in Juarez.”<sup>18</sup> Because less than a year elapsed before the petitioner’s return request and because the parties admitted that no objective facts pointed “unequivocally” to a permanent change in the child’s social attachment from Mexico, Mexico was determined to be the child’s “habitual residence.”<sup>19</sup>

In *Smith v. Smith*,<sup>20</sup> the court determined that the child’s habitual residence was in the United States by applying the standard set out in *Monasky*. In *Monasky*, the court held that the correct approach to habitual residence was to examine the totality of the circumstances.<sup>21</sup> Because *Monasky* was decided after the trial court decision in *Smith*, the court had to determine whether to remand the case to apply the standard set out in *Monasky*.<sup>22</sup> The Supreme Court determined that there was no need to remand the case because of the extensive fact finding of the district court.<sup>23</sup>

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16. *Id.*

17. *Stirk v. Lopez*, No. 8:20-CV-2894-SDM-AAS, 2021 WL 1139664, at \*1 (M.D. Fla. Mar. 25, 2021).

18. *Id.* at \*4.

19. *Id.*; *see also* *Kenny v. Davis*, No. 3:21-CV-00023-SLG, 2021 WL 2275983, at \*2 (D. Alaska May 10, 2021) (concluding that a child who lived in Alaska for four months, one-third of the child’s life, meant that the child’s habitual residence changed from Ireland to the United States); *Ho v. Ho*, No. 20 C 6681, 2021 WL 2915161, at \*9 (N.D. Ill. July 12, 2021) (finding that the parties considered moving out of New Zealand on and off while living there from 2016 to 2020 but never actually executed any definitive plans to move from New Zealand, despite wishes by respondent to do so); *Pozniak v. Shwartsman*, No. 20-CV-2956, 2021 WL 965238, at \*8–\*9 (E.D.N.Y. Mar. 15, 2021) (finding that a child who lived in Israel for five years with visits to the United States was habitually a resident in Israel).

20. *Smith v. Smith*, 976 F.3d 558, 563 (5th Cir. 2020).

21. *Monasky*, 140 S. Ct. at 723.

22. *Smith*, 976 F.3d at 562.

23. *Id.*; *see also* *Rodriguez v. Lujan Fernandez*, 500 F. Supp. 3d 674, 710 (M.D. Tenn. 2020) (concluding petitioner failed to meet his burden to prove a habitual residence); *Pope on behalf of T.H.L-P v. Lunday*, 835 Fed. Appx. 968, 972 (10th Cir. 2020) (concluding there was not a definite and firm conviction of a mistake at trial level); *De Carvalho v. Carvalho Pereira*, 308 So. 3d 1078, 1085 (Fla. Dist. Ct. App. 2020) (concluding that the court could not find clear error in the trial court’s decision); *Minkiewitz v. Becker*, No. B299073, 2021 WL 566975, at \*3 (Cal. Ct. App. Feb. 11, 2021) (finding the mother cannot overcome the *Monasky* deferential standard of review); *Rishmawy v. Vergara*, 540 F. Supp. 3d 1246, 1278 (S.D. Ga. 2021) (applying the totality of circumstances test of *Monasky*, the trial court determines that the habitual residence of the child was still in Honduras); *Nowlan v. Nowlan*, 543 F. Supp. 3d 324, 361 (W.D. Va. 2021) (concluding that the totality of circumstances indicates that Canada was the habitual residence of the child); *Douglas v. Douglas*, No. 21-1335, 2021 WL 4286555, at \*6 (6th Cir. Sept. 21, 2021) (“No reasonable jury, considering the totality of the circumstances,

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In *Babcock v. Babcock*, the court determined that, although the child had many friends in Iowa and a close relationship with his extended family there, Canada remained his country of habitual residence because there was no clear intent by the parties or the child to abandon Canada as the child's habitual residence.<sup>24</sup> In *Sain ex rel. V.R.S. & L.P.S. v. Sain*, the court determined that the children's stay in the United Kingdom was meant to be temporary and was prolonged because the father and children could not return to China due to the COVID-19 pandemic.<sup>25</sup> These circumstances did not change the child's habitual residence from China to the United Kingdom.<sup>26</sup> While waiting to return to China, the respondent and the minor children traveled to Florida awaiting the reopening of travel to return to China.<sup>27</sup> The petitioner filed the petition in this action, seeking to have the children returned to her in the United Kingdom (where they had previously been staying).<sup>28</sup> Because mainland China is not a party to the Abduction Convention, the return to the United Kingdom was denied.<sup>29</sup>

Finally, in *Dumitrascu v. Dumitrascu*, the parties' intent was to return to the United States after the birth of their child in Romania.<sup>30</sup> But, due to questions about green cards and the ability to obtain permanent residency in the United States, their plans changed, and the petitioner consented to the respondent's return to the United States with the child.<sup>31</sup> The petitioner, on the other hand, stated that the intent was for the respondent to return to the United States only for a limited amount of time and then for the child to return to Romania.<sup>32</sup> The petitioner testified that she believed that it was not possible for her to apply for a U.S. green card while in Romania, based partially on the fact that the respondent had sponsored her first green card while he was living in Colorado, which explains why she consented to the respondent removing the child from Romania on a conditional basis.<sup>33</sup> The court held that the child's habitual residence was Romania because the child was born there and had lived there for ten months prior to the child's removal to the United States.<sup>34</sup>

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could conclude that Heath demonstrated by a preponderance of the evidence that J.D.'s habitual residence was Australia as of the operative wrongful-retention date.”)

24. *Babcock v. Babcock*, 503 F. Supp. 3d 862, 877 (S.D. Iowa 2020).

25. *Sain ex rel. V.R.S. & L.P.S. v. Sain*, 548 F. Supp. 3d 1181, 1191 (M.D. Fla. 2021).

26. *Id.*

27. *Id.*

28. *Id.* at 1185.

29. *Id.* at 1192–93.

30. *Dumitrascu on behalf of A.M.B.D. v. Dumitrascu*, No. 21-CV-01813-PAB, 2021 WL 4197378, at \*5 (D. Colo. Sept. 15, 2021). Mr. Dumitrascu has appealed, but his motion for a stay of the return order was denied. *See Dumitrascu on behalf of A.M.B.D. v. Dumitrascu*, No. 21-CV-01813-PAB, 2021 WL 4861837, at \*7 (D. Colo. Oct. 19, 2021).

31. *Id.* at \*7.

32. *Id.* at \*7–\*8.

33. *Id.* at \*1.

34. *Id.* at \*6–\*7.

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3. *Rights of Custody and Exercise of Those Rights*

a. Rights of Custody

A removal or retention is only wrongful if the left-behind parent had a right of custody under the law of the jurisdiction of the child's habitual residence and the left-behind parent was "actually exercising" that right at the time of removal, or would have exercised that right but for the removal.<sup>35</sup>

In *Lukic v. Elezovic*,<sup>36</sup> the court reaffirmed that *ne exeat* rights (restraints on removal from a jurisdiction) constitute a right of custody and, therefore, justified sending the child back to Montenegro. In *Stirk v. Lopez*,<sup>37</sup> the parties' settlement agreement preserved the father's *patria potestad* rights, which gave him a right of custody.<sup>38</sup>

b. Exercise of the Right to Custody

Normally, the question of exercise of custody rights is not an issue in the case. Most cases follow the determination made in *Friedrich v. Friedrich* that "[t]he only acceptable solution, in the absence of a ruling from a court in the habitual residence, is to liberally find 'exercise' whenever a parent with de jure custody rights keeps, or seeks to keep, any sort of regular contact with his or her child."<sup>39</sup> The Eastern District of Washington order, concluding that a father was not actually exercising his rights of custody, was vacated and remanded by the Ninth Circuit, finding that cutting off financial support is insufficient to establish clear and unequivocal abandonment of the child.<sup>40</sup>

c. Wrongful Retention

In *Babcock v. Babcock*, the court determined that a wrongful retention occurs when "the noncustodial parent no longer consents to the child's continued habitation with the custodial parent, and instead seeks to reassert custody rights, as clearly and unequivocally communicated through words, actions, or some combination thereof."<sup>41</sup>

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35. See Abduction Convention, *supra* note 1, at art. 13(a).

36. The court later refused to stay the return pending appeal. See *Lukic v. Elezovic*, 2021 WL 804384, \*2 (E.D. N.Y. 2021); see also Nowlan, 543 F. Supp. 3d at 362.

37. *Stirk*, 2021 WL 1139664, at \*3-\*4.

38. See also Aluker v. Yan, No. 1:20-CV-1117, 2021 WL 972885, at \*3 (E.D. Va. Mar. 4, 2021) (denying the petition for return on the basis that the parties' settlement agreement granted the wife custody and the husband only visitation), *aff'd*, No. 21-1279, 2021 WL 3417968 (4th Cir. Aug. 5, 2021), *cert. denied*, No. 21-797, 2022 WL 892110 (U.S. Mar. 28, 2022).

39. *Friedrich v. Friedrich*, 78 F.3d 1060, 1065 (6th Cir. 1996). For a recent case, see *Lopez v. Bamaca*, 455 F.Supp.3d 76, 83 (D. Del. 2020).

40. *In re ICJ Jones v. Fairfield*, No. 2:20-CV-00475-SAB, 2021 WL 790904, at \*6 (E.D. Wash. Jan. 28, 2021), *reconsideration denied*, No. 2:20-CV-00475-SAB, 2021 WL 6200509 (E.D. Wash. Mar. 23, 2021), *vacated and remanded*, 13 F.4th 753 (9th Cir. 2021).

41. *Babcock*, 503 F. Supp. 3d at 874 (quoting *Blackledge v. Blackledge*, 866 F.3d 169, 179 (3d Cir. 2017)).

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4. *Exceptions to Return*

There are several exceptions that a respondent may assert when arguing that a child should not be returned to the child's habitual residence. But the exceptions must be timely asserted and filing a general denial and waiting until opening statement to assert the exception may constitute a waiver.<sup>42</sup>

a. *Child Is Settled in His/Her New Environment*

Article 12 provides that the authorities need not return a child if more than one year has elapsed between the child's removal or retention and the petitioner's return request and the child is now settled in the child's new environment.<sup>43</sup> The one-year period runs from the date the retention or removal became "wrongful."<sup>44</sup> A retention occurs not on the date the abducting parent formed the intent to wrongfully retain the child but rather on the date the petitioning parent's actions were so unequivocal that the left-behind parent knew or should have known that the child would not be returned.<sup>45</sup>

In *Luis Alfonso V.H. v. Banessa Christina A.Z.*,<sup>46</sup> the court noted that the father had failed to file his action within one year, and the court would not exercise its discretion to return the child.<sup>47</sup> The factual findings used in determining the "now settled" exception were reviewed under the clear error standard.<sup>48</sup>

The issue of whether the child is settled in its new environment can rarely be decided on a motion to dismiss because it requires detailed fact findings.<sup>49</sup> In *Carvalho v. Carvalho Pereira*, the court "discussed the evidence presented about the children's lives in their various residences in the United States, their relatives in both the United States and Brazil, and lack of ties to the community due to their young ages."<sup>50</sup> The possibility that the appellate

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42. See *Leon v. Ruiz*, No. MO:19-CV-00293-RCG, 2020 WL 1227312, at \*6 (W.D. Tex. Mar. 13, 2020); see also *Orellana Joya v. Munguia Gonzales*, No. CV 20-236, 2020 WL 1181846, at \*7 (E.D. La. Mar. 12, 2020).

43. See Abduction Convention, *supra* note 1, at art. 12.

44. *Id.* It is one year from the time the removal or retention became wrongful and the filing of the petition to have the child returned. See *Monzon v. De La Raca*, 910 F.3d 92, 96 (3d Cir. 2018). Seeking the assistance of the central authority of the country from which the child was taken does not constitute commencement of a proceeding. *Id.*

45. See, e.g., *Palencia v. Perez*, 921 F.3d 1333, 1342 (11th Cir. 2019); see also *Lopez Moreno v. Zank*, 456 F. Supp. 3d 904, 909 (W.D. Mich. 2020).

46. *Alfonso v. Banessa Cristina A.Z.*, 512 F. Supp. 3d 633, 636 (W.D. Va. 2021).

47. See also *Bejarno v. Jimenez*, 837 Fed. Appx. 936, 937 (3d Cir. 2021) (holding that the respondent's immigration status is not determinative of whether a child is well settled).

48. See *id.*

49. See *Annad v. Annad*, No. 20-23549-CIV, 2020 WL 9601516, at \*2 (S.D. Fla. Sept. 18, 2020).

50. *De Carvalho v. Carvalho Pereira*, 308 So. 3d 1078, 1085 (Fla. Dist. Ct. App. 2020), *reh'g denied* (Dec. 30, 2020).

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panel could have “gone the other way had it been our call” does not constitute a clear error of judgment by the trial court.<sup>51</sup>

In *de Jesus Joya Rubio v. Alvarez*, the court found that a child was settled when the father filed his Hague return petition fifteen months after the child was removed to the United States.<sup>52</sup> The fact that the father did not know about the Hague return remedy did not mitigate his failure to file in time.<sup>53</sup>

b. Grave Risk of Harm/Intolerable Situation

i. *Exception Not Sustained*

Under Article 13(b), a court need not return a child if “there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.”<sup>54</sup> Such an exception cannot be decided on a motion to dismiss but requires an evidentiary hearing.<sup>55</sup> In determining whether to sustain the exception when it is founded on domestic violence, the court must consider the nature and frequency of the abuse, the likelihood of its recurrence, and whether there are any enforceable undertakings that would sufficiently ameliorate the risk of harm to the child caused by its return.<sup>56</sup>

In *Rishmawy v. Vergara*, the respondent failed to prove, by clear and convincing evidence, that there was a grave risk in returning the child to Honduras.<sup>57</sup> In *J.C.C. v. L.C.*, the trial court found that the “[r]espondent’s allegations of abuse were undercut by her own testimony that she agreed to the petitioner’s primary physical custody of the children after the parties divorced and sole physical custody after she moved to the United States.”<sup>58</sup> “The allegations were also contradicted by her testimony that she allowed petitioner to spend extended time alone with the children after she retained them . . . .”<sup>59</sup>

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51. *Id.*

52. *de Jesus Joya Rubio v. Alvarez*, 526 F. Supp. 3d 1186, 1204 (S.D. Fla. 2021).

53. *Id.* at 1203

54. *See* Abduction Convention, *supra* note 1, at art. 13(b).

55. *Flores v. Alvarado*, No. 3:17-CV-514-RJC-DSC, 2018 WL 1725615, at \*2 (W.D.N.C. Apr. 6, 2018).

56. *Saada v. Golan*, 833 Fed. Appx. 829, 831 (2d Cir. 2020). A motion to set aside the judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, or, in the alternative, to stay the action pending her petition for writ of certiorari to the United States Supreme Court was denied in *Saada v. Golan*, No. 18-CV-5292, 2021 WL 1176372, at \*8 (E.D.N.Y. Mar. 29, 2021), *aff’d*, No. 21-876-CV, 2021 WL 4824129 (2d Cir. Oct. 18, 2021).

57. *Rishmawy*, 540 F. Supp. 3d at 1289; *see also* *Chung Chui Wan v. Debolt*, No. 20-CV-3233, 2021 WL 1733500, at \*10 (C.D. Ill. May 3, 2021) (finding that “the political climate of Hong Kong does not present a specific grave risk to the children if returned to Hong Kong.”). Subsequently, the court granted Wan’s request for attorney fees, awarded her \$310,933.50 in attorneys’ fees and \$134,355.95 in costs. *See* *Chung Chui Wan v. Debolt*, No. 3:20-CV-3233, 2021 WL 3510232, at \*1 (C.D. Ill. Aug. 10, 2021).

58. *J.C.C.*, 2020 WL 6375789, at \*3.

59. *Id.* at \*3.



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In *Pozniak v. Shwartsman*, the court found that the respondent’s grave risk argument rested on a faulty premise: that ordering the child’s return to Israel requires that he be separated from the respondent.<sup>60</sup> There was no evidence that the respondent could not travel to Israel with the child or that returning the child to Israel would interfere with the respondent’s custody rights.<sup>61</sup>

In *Nobrega v. Luque*, the court noted the following:

[A]t most, the respondent harbors an amorphous and uncorroborated suspicion that [petitioner] exposes [the child] to unwholesome influences and fosters unwanted behavior more characteristic of an older child. Even if true, [respondent’s] conduct falls well short of the evidence needed to “clearly and convincingly” prove that complying with the dissolution agreement would expose [the child] to a “grave risk” of harm.<sup>62</sup>

Although harm to the child is required under 13(b), most courts recognize that sustained spousal abuse can, in some instances, create such a risk.<sup>63</sup> Spousal abuse, one court said, is relevant for Article 13(b) purposes only if it “seriously endangers” the child.<sup>64</sup> There is a difference between evidence of a clear and long history of spousal abuse, which could suffice to show a propensity for child abuse, and evidence of isolated incidents of abuse, which generally demonstrate a risk of harm only to the spouse.<sup>65</sup> At a minimum, the spouse must “draw a connection,” showing that the risk such abuse poses to her “constitute[s] a grave risk to the children.”<sup>66</sup> But in *Velozny v. Velozny*, the respondent never claimed that the petitioner physically abused any of the

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60. *Pozniak*, 2021 WL 965238, at \*12; *see also* *Pawananun v. Pettit*, 508 F. Supp. 3d 207, 220 (N.D. Ohio 2020) (returning the children and calling the allegation of abuse “equivocal”); *Colchester v. Lazaro*, No. C20-1571-JCC, 2021 WL 764136, at \*1 (W.D. Wash. Feb. 26, 2021), *vacated and remanded*, 16 F.4th 712 (9th Cir. 2021); *see also* *Stirk*, 2021 WL 1139664, at \*5 (M.D. Fla. Mar. 25, 2021) (finding that the mother allowing the father increased visitation undermined her grave risk defense); *Vieira v. De Souza*, No. CV 21-10697-WGY, 2021 WL 2980729, at \*3 (D. Mass. July 15, 2021), *aff’d*, 22 F.4th 304 (1st Cir. 2022) (“[G]rave risk would not befall the [m]inor upon his [ ] return to Brazil because none of the allegations of domestic abuse were directed at the [m]inor.”); *Ho v. Ho*, No. 20 C 6681, 2021 WL 2915161, at \*13 (N.D. Ill. July 12, 2021) (“Respondent’s allegations, when taken together, do not rise to a pattern of abuse that warrants in this particular legal context the Court finding by clear and convincing evidence a grave risk to the child from witnessing or being subject to such alleged threats and physical incidents.”).

61. *Pozniak*, 2021 WL 965238, at \*12.

62. *Uribe v. Luque*, No. 8:21-CV-934-SDM-CPT, 2021 WL 3518154, at \*4 (M.D. Fla. May 3, 2021).

63. *Gallegos v. Garcia Soto*, No. 1:20-CV-92-RP, 2020 WL 2086554, at \*4 (W.D. Tex. Apr. 30, 2020).

64. *Id.*

65. *Id.*

66. *Id.*

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children.<sup>67</sup> In fact, it was undisputed that the children did not report ever being abused by their father to the parties' expert witnesses.<sup>68</sup> Nor has respondent "established that an Israeli court could not provide adequate protection for the children during any divorce or custody proceedings."<sup>69</sup>

ii. *Exception Sustained*

In *In re M.V.U.*, the evidence and testimony presented in support of the exception demonstrated a pattern of escalating violence and interference with the respondent's personal liberty, which, in turn, impacted the child's psychological welfare.<sup>70</sup> The respondent demonstrated that the petitioner interfered with her personal liberty when he prohibited her from working as a teacher outside the home.<sup>71</sup> The respondent's evidence "clearly and convincingly established a pattern of escalating domestic abuse beginning with [the petitioner's] demand she obtains an abortion and ending with him choking her while she held the child in her arms and making repeated threats on her life."<sup>72</sup>

In *Sanchez v. Sanchez*, credible evidence before the court regarding past (and possible future) sexual abuse of the child, including unrebutted expert testimony and petitioner's own testimony, proved the existence clearly and convincingly of "a grave risk that the child's return [to Honduras] would expose [her] to . . . psychological harm . . . ."<sup>73</sup>

In *Jacquety v. Baptiste*, the respondent proved by clear and convincing evidence that the child faced a grave risk of harm if she were repatriated to Morocco.<sup>74</sup> An expert determined that there was "clear and compelling evidence" that the child suffered from post-traumatic stress disorder (PTSD) resulting from domestic violence by the petitioner toward the respondent.<sup>75</sup> The expert predicted "with a great deal of certainty" that, if returned to Morocco, the child's PTSD symptoms would increase and her developmental functioning would regress.<sup>76</sup>

A split has developed among courts considering this exception as to whether the court must look for laws and practices in the habitual residence to protect the child from the alleged abuse if the child were returned. In any event, when a father has failed to acknowledge that he has a drinking and abuse problem, no measures from Chile can serve as ameliorative measures

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67. *Velozny ex rel. R.V. v. Velozny*, 550 F. Supp. 3d 4, 21 (S.D.N.Y. 2021), *aff'd*, No. 21-1993-CV, 2021 WL 5567265 (2d Cir. Nov. 29, 2021).

68. *Id.*

69. *Id.* at 22.

70. *In re M.V.U.*, 178 N.E.3d 754, 763 (Ill. Ct. App. 2020).

71. *Id.* at 764.

72. *Id.*

73. *Sanchez v. Sanchez*, No. 1:18CV449, 2021 WL 1227133, at \*4 (M.D.N.C. Mar. 31, 2021) (citing Abduction Convention, *supra* note 1, at art. 13(b)).

74. *Jacquety v. Tena Baptista*, 538 F. Supp. 3d 325, 375 (S.D.N.Y. 2021).

75. *Id.*

76. *Id.*

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that would protect the children from his excessive drinking and abusive behavior.<sup>77</sup> In *Radu v. Shon*, “the district court in no way exceeded its authority to mandate the children’s return to Germany accompanied by Shon.”<sup>78</sup> “But in the context of an Article 13(b) finding, the district court needed a fuller record to have sufficient guarantees that the alternative remedy would be enforced in Germany,”<sup>79</sup> so the circuit court remanded to the district court to develop a fuller record on the availability of a safe harbor order.<sup>80</sup>

The issue of whether the court can order a mental examination of the petitioner was discussed in *Ilves v. Ilves*.<sup>81</sup> The court refused to order the examination because the respondent “alleged no specific history of mental illness, nor explained why a psychological examination would be likely to show the respondent’s purported physical or mental abuse.”<sup>82</sup>

c. Mature Child’s Objection

In applying this exception, the court must consider whether the child objects to being returned to the country of the child’s habitual residence and not whether the child has a preference to live in a specific country.<sup>83</sup> This issue is subject to review under the clear error standard.<sup>84</sup> In *Avendano v. Balza*, an appellate panel affirmed a trial court’s discretion to allow the child’s express preference to stay in the United States.<sup>85</sup> The child was twelve years old and appeared not to be coached and indicated a well-thought-out preference to stay in the United States.<sup>86</sup> On the other hand, the court in *Chung Chui Wan v. DeBolt*, agreed with the guardian *ad litem* and the experts that the children had not reached the age of maturity to express a preference.<sup>87</sup>

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77. *In re Marriage of Emilie D.L.M. & Carlos C.*, 279 Cal.Rptr. 3d 330, 335 (Cal. Ct. App. 2021), *as modified* (May 28, 2021); *see also In re I.C.J. Jones*, 13 F.4th at 764 (“[D]istrict court erred in failing to consider alternative remedies by means of which [ICJ] could be transferred back to [France] without” placing her in an intolerable situation.”).

78. *Radu v. Shon*, 11 F.4th 1080, 1090 (9th Cir. 2021).

79. *Id.*

80. *Id.*

81. *Ilves v. Ilves*, No. 21-CV-387-WMC, 2021 WL 3771708, at \*1 (W.D. Wis. Aug. 25, 2021).

82. *Id.* at \*4.

83. *See* Abduction Convention, *supra* note 1, at art. 13.

84. *Custudio v. Torres*, 842 F.3d 1084, 1089 (8th Cir. 2016).

85. *Avendano v. Balza*, 985 F.3d 8, 16 (1st Cir. 2021).

86. *Id.* at 14. The same was true in *Dubikovskyy v. Goun*, where a sufficiently mature twelve-year-old was entitled to stay in the United States. *See Dubikovskyy v. Goun*, No. 2:20-CV-04207-NKL, 2021 WL 456634, at \*5 (W.D. Mo. Jan. 7, 2021) (finding that a sufficiently mature twelve-year-old was entitled to stay in the United States).

87. *Chung Chui Wan*, 2021 WL 1733500, at \*9; *see also Berengueta-Alvarado v. Castanos*, No. 19-22689-CIV, 2020 WL 10055693, at \*5 (S.D. Fla. Apr. 21, 2020), *aff’d*, 820 Fed. Appx. 870 (11th Cir. 2020) (refusing to follow a six-year-old’s opinion on the issue of his return to Chile).

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d. Human Rights and Fundamental Freedoms

Article 20 provides that the return of a child may be refused “if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.”<sup>88</sup> The only cases where this exception was raised, the trial courts dismissed it out of hand.<sup>89</sup>

e. Consent/Acquiescence to the Removal

To show acquiescence, there must be “an act or statement with the requisite formality, such as testimony in a judicial proceeding; a convincing written renunciation of rights; or a consistent attitude of acquiescence over a significant period.”<sup>90</sup> Some courts have required that the totality of circumstances be examined to determine whether there was consent or acquiescence. In rare instances, cases involving consent or acquiescence can be decided on summary judgment.<sup>91</sup>

In *Pozniak v. Shwartsman*, the court determined that the respondent did not consent to the child’s removal to the United States, nor had he shown that the petitioner subsequently acquiesced to the move.<sup>92</sup> There was no “formal statement” of the petitioner’s agreement, nor was there a “consistent attitude of acquiescence over a significant period of time” following the child’s abduction.<sup>93</sup> On the contrary, the persuasive evidence—the petitioner’s repeated requests that the respondent return the child to Israel—shows that there was neither consent nor acquiescence.<sup>94</sup>

In *Romero v. Bahamonde*, the court determined that the petitioner effectively consented to the children remaining in the United States with the respondent when he went back to Chile, leaving the respondent and the children in the United States and taking the children’s passports.<sup>95</sup>

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88. See Abduction Convention, *supra* note 1, at art. 20.

89. See, e.g., *Gallegos v. Garcia Soto*, No. 1:20-CV-92-RP, 2020 WL 2086554, at \*8 (W.D. Tex. Apr. 30, 2020); see also *Chung Chi Wan*, 2021 WL 1733500, at \*13.

90. See *Diagne v. Demartino*, No. 2:18-CV-11793, 2018 WL 4385659, at \*9 (E.D. Mich. Sept. 14, 2018); see also *Diagne v. Demartino*, No. 18-11793, 2018 WL 6064965, at \*3 (E.D. Mich. Nov. 20, 2018), *appeal dismissed*, 2019 WL 1313827 (6th Cir. 2019); *Djerić v. Djerić*, No. 2:18-CV-1780, 2019 WL 1046893, \*5 (S.D. Ohio Mar. 5, 2019).

91. See, e.g., *Velonzy*, 550 F. Supp. 3d at 18.

92. *Pozniak*, 2021 WL 965238, at \*12.

93. *Id.* at \*10 (quoting *Kosewski v. Michalowska*, No. 15-CV-928, 2015 WL 5999389, at \*15 (E.D.N.Y. Oct. 14, 2015)).

94. *Id.* at \*11.

95. *Romero v. Bahamonde*, No. 1:20-CV-104 (LAG), 2020 WL 8459278, at \*11 (M.D. Ga. Nov. 19, 2020), *aff’d*, 957 F. App’x 576, 577 (11th Cir. 2021) (finding that the children were mature enough to object to the return and were well settled in the United States.).

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5. *Other Issues Under the Hague Abduction Convention and ICARA*

a. Attorney's Fees

The court has the authority to request that an attorney volunteer to represent a petitioner in a Hague return action.<sup>96</sup>

Under ICARA, attorney fees and costs are to be awarded to the prevailing petitioner unless the respondent can show that the award would be clearly inappropriate.<sup>97</sup> Most circuit courts have held that district courts have broad discretion to determine when an award of costs and fees is appropriate.<sup>98</sup> The “clearly inappropriate” inquiry is necessarily dependent on the facts of each case.<sup>99</sup> But the following two considerations are often relied on in determining whether to grant fees and costs under ICARA: (1) whether a fee award would impose such a financial hardship that it would significantly impair the respondent’s ability to care for the child and (2) whether a respondent had a good faith belief that his or her actions in removing or retaining a child were legal or justified.<sup>100</sup>

In *Forcelli v. Smith*, the court reduced the amount requested based on equitable considerations because the determination of habitual residence was questionable, there continued to be reprehensible conduct by both sides, the respondent was unable to pay, and the petitioner’s lawyer incurred much greater fees than the respondent’s lawyer.<sup>101</sup> In *Hart v. Anderson*,<sup>102</sup> the court denied an attorney fee award, noting that the amount requested was four times the respondent’s take-home pay. The court also found that the doctrine of “unclean hands” applied to deny the petitioner’s attorney fee

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96. *Garzon v. Hoffman*, No. 2:21-CV-10340, 2021 WL 1259462, at \*1 (E.D. Mich. Apr. 6, 2021).

97. This may also include expenses and fees incurred when the original order for fees has to be defended on appeal. See *Sundberg v. Bailey*, No. 1:17-CV-00300, 2019 WL 2550541, \*at 1 (W.D. N.C. June 19, 2019).

98. See *West v. Dobrev*, 735 F.3d 921, 932 (9th Cir. 2021); see also *Whallon v. Lynn*, 356 F.3d 138, 140 (5th Cir. 2004). When the abducting parent makes no appearance at the fee hearing and it appears that the petitioner’s law firm already reduced the amount by thirty percent, the trial court found no reason to further reduce the amount of fees. See *Joya v. Gonzalez*, No. 20-236, 2020 WL 1904010, at \*2 (E.D. La. Apr. 17, 2020); *Nissim v. Kirsh*, No. 1:18-CV-11520 (ALC), at \*3 (S.D. N.Y. June 29, 2020); *Beard v. Beard*, No. 4:19-CV-00356-JAJ, at \*1 (S.D. Iowa June 19, 2020) (finding in favor of the petitioner for attorneys’ fees).

99. See *West*, 735 F.3d at 932.

100. In one case, the court determined that the party’s financial situation was not so disparate as to deny fees but was sufficient to slightly reduce the amount the petitioner was seeking. See *Wtulich v. Filipkowska*, No. 16-CV-2941, 2020 WL 1433877, at \*3–\*4 (E.D. N.Y. Mar. 24, 2020).

101. *Forcelli v. Smith*, No. 20-699 (JRT/HB), 2021 WL 638040, at \*4 (D. Minn. Feb. 18, 2021); see also, *Lukic v. Elezovic*, No. 20-CCV-2110 (ARR) (LB), 2021 WL 1904258, at \*2 (E.D. N.Y. May 12, 2021) (finding that respondent had no assets or income to pay an award of costs); *Vieira v. De Souza*, No. 21-10697-WGY, 2021 WL 2980729, at \*4 (D. Mass. July 15, 2021) (finding that it was clearly inappropriate to impose those cost and fees upon the pro se De Souza in the absence of evidence that she had a job or how she paid for her living arrangements).

102. *Hart v. Anderson*, No. GJH-19-2601, 2021 WL 2826774, at \*5 (D. Md. July 7, 2021).

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request because his pattern of alcohol abuse and violent behavior precipitated the respondent's removal of the children.<sup>103</sup> In *Grano v. Martin*,<sup>104</sup> the court reduced the award by eighty-five percent, considering the respondent's demonstrated financial hardships. Respondent had demonstrated that she was under financial strain and was unable to secure employment in Spain because she was not a legal resident there.<sup>105</sup> She also owed her attorneys over \$170,000.<sup>106</sup>

In *Adkins v. Adkins*, the court determined that ICARA provides for an award of necessary expenses incurred in "an action brought under section 9003 [of the Convention]."<sup>107</sup> The statute does not authorize the court to award fees and costs in ancillary matters litigated in other fora, like the habitual residence, and the petitioner did not identify any other basis for the court's authority to do so.<sup>108</sup> But, in *Chambers v. Russell*, the court refused to hold that the respondent's earnings were insufficient to support an attorney fee award, given that the respondent had a house worth over \$200,000.<sup>109</sup>

In *Hulsh v. Hulsh*,<sup>110</sup> the court found that the petitioner had not broken down how the attorneys dedicated their time and had instead stated, in a conclusory manner, that they worked the asserted number of hours. The court found this to be inadequate to support a fee request.<sup>111</sup> "In requesting, challenging, and granting attorneys' fees, specificity is critical. A request for fees must be accompanied by 'fairly definite information as to hours devoted to various general activities, e.g., partial discovery, settlement negotiations, and the hours spent by various classes of attorneys.'"<sup>112</sup>

A court has the authority to order fees and costs, even if the child turns sixteen after the return order.<sup>113</sup> But what can be awarded as costs, as

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103. *Id.* at \*6.

104. *Grano v. Martin*, No. 19-CV-6970, 2021 WL 3500164, at \*1 (S.D.N.Y. Aug. 9, 2021).

105. *Id.* at \*9.

106. *Id.*; *see also* *Berenguela-Alvarado v. Castanos*, No. 19-22689-CIV-COOKE/GOODMAN, 2020 WL 7774730, at \*6 (S.D. Fla. Dec. 8, 2020) (reducing the number of hours worked by the attorney on the grounds that the work could have been delegated to a paralegal).

107. *Adkins v. Adkins*, No. 19-CV-05535HSG, 2020 WL 6508616, at \*1 (N.D. Cal. Nov. 15, 2020) (quoting 22 U.S.C. § 9007(b)(3)).

108. *Id.* at \*2.

109. *Chambers v. Russell*, No. 1:20-CV-498, 2021 WL 1581074, at \*2 (M.D.N.C. Apr. 22, 2021).

110. *Hulsh v. Hulsh*, No. 19 C 7298, 2020 WL 6381362, at \*2 (N.D. Ill. Oct. 30, 2020).

111. *Id.*

112. *Hulsh v. Hulsh*, No. 19 C 7298 (N.D. Ill. Oct. 30, 2022) (reducing the lead attorney's fee from \$625 an hour to \$475 and did not allow recovery for work done in relation to the fee request) (citing *Norinder v. Fuentes*, No. 10-CV-391-WDS, 2010 WL 4781149, \* 8 (N.D. Ill. Nov. 17, 2010) (citing *United Auto Workers Local 259 Soc. Sec. Dep't v. Metro Auto Ctr.*, 501 F.3d 283, 291 (3d Cir. 2007)).

113. *Noergaard v. Noergaard*, 57 Cal.Rptr. 3d 905, 919 Cal. Ct. App. Nov. 24, 2020), *as modified on denial of reh'g* 271 Cal. Rptr. 3d 905, *cert. denied* 141 S. Ct. 2630 (2021).

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opposed to attorney fees, is limited by 28 U.S.C. § 1920 and does not include the costs of holding a trial remotely.<sup>114</sup>

The provisions in ICARA authorize the award of attorney fees to the petitioner.<sup>115</sup> It follows that nothing in ICARA provides that fees can be awarded to a prevailing respondent.<sup>116</sup>

b. Procedural Issues

The voluntary return of a child moots the return proceeding.<sup>117</sup> A recent conviction for domestic violence on the part of a respondent's current husband was insufficient to change the court's mind on the establishment of the now settled or grave risk exceptions to return.<sup>118</sup>

c. Stays

In considering whether to stay a return order in an Abduction Convention case, courts consider the traditional factors: "(1) whether the stay applicant has made a strong showing that [s]he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies."<sup>119</sup>

In *Radu v. Shon*, the court granted a stay pending appeal because of the following:<sup>120</sup>

Case law offers only minimal guidance regarding how to properly craft remedies allowing for a child's return under the [Abduction Convention] while avoiding a grave risk of harm under Article 13(b). Given the scant case law, the court found that the first factor—the likelihood of respondent's success on the merits of her appeal—weighs in favor of a stay.<sup>121</sup>

d. Temporary Restraining Orders

A petitioner seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in

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114. *Jacquety v. Tena Baptista*, 549 F.Supp.3d 293, 299 (S.D.N.Y. 2021); *see also* 28 U.S.C. § 1920(1)–(6).

115. *Stone v. Stone*, No. 19-17962 (MAS) (ZNQ), 2020 WL 491194, at \*1 (D.N.J. Jan. 30, 2020).

116. *Id.*

117. *Garcia v. Segovia*, No. 1:17 CV 239, 2017 WL 6757647, at \*2 (W.D.N.C. Nov. 22, 2017).

118. *See Francis v. Culley*, No. 20-CV-3326 (PKC) (SJB), 2021 WL 3660719, at \*11 (E.D.N.Y. July 20, 2021).

119. *Chafin v. Chafin*, 586 U.S. 165, 179 (2013).

120. *Radu v. Shon*, No. CV-20-00246-TUC-RM, 2020 WL 6741538, \*1 (D. Ariz. Nov. 17, 2020).

121. *Radu*, at \*2. Later, the court denied an award of attorney fees because an award of fees could interfere with respondent's ability to care for the children given her limited financial means. *See id.* Respondent is the primary caregiver of the children, and she avers that she earns only \$14.30 per hour and has been restricted in her capacity to work due to the COVID-19 pandemic. *See Radu v. Shon*, No. CV-20-00246-TUC-RM, 2021 WL 1056393, at \*3 (D. Ariz. Mar. 19, 2021).

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the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.<sup>122</sup> The temporary restraining order can also be extended if the respondent is seeking to avoid service.<sup>123</sup>

e. Other Procedural Issues

It is usually never appropriate for a federal court to abstain from deciding an abduction case merely because a proceeding for custody had been previously filed in state court. Abstention is only proper if the state proceeding will decide all the issues in the abduction case.<sup>124</sup>

A Canadian service member was allowed to testify via video conferencing due to the difficulty of travel during the pandemic.<sup>125</sup> In *Romanov v. Soto*, the court entered temporary orders granting the father's request for a freeze order and an order granting the father temporary visitation via Skype of at least thirty minutes a day.<sup>126</sup>

Normally, post-trial developments will not change the results of a removal proceeding.<sup>127</sup> The abducting mother's contempt proceeding against a respondent was dismissed because the father was to "facilitate" daily communications between the child and the mother, not to ensure that such communications occurred.<sup>128</sup>

B. THE HAGUE SERVICE CONVENTION

Personal service is required in a termination of parental rights case. In *In re Daniel F.*, a juvenile case against the child's father was reversed because the juvenile court's order denied the father's petition to vacate the disposition order.<sup>129</sup> The father, who resided in Mexico, was never served with the dependency petition, notice of the jurisdiction and disposition hearing, or the statutorily required form for asserting paternity.<sup>130</sup>

South Korea objects to service by mail, and, therefore, the respondent was not properly served in a Guam action for divorce.<sup>131</sup> But the application of

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122. *Mendoza v. Salado*, No. 1:21-CV-1795-SCJ, 2021 WL 1508690, at \*3 (N.D. Ga. May 3, 2021); *see also* *Babcock v. Babcock*, No. 3:20-CV-00066, 2020 WL 6293445, at \*2 (S.D. Iowa Aug. 24, 2020).

123. *Sanchez v. Pliego*, No. 21-1849 (MJD/BRt), 2021 WL 4026363, at \*2 (D. Minn. Sept. 3, 2021).

124. *Soulier v. Matsumoto*, No. 20-4720, 2020 WL 8186164, at \*2 (D.N.J. Dec. 4, 2020).

125. *Nowlan v. Nowlan*, No. 5:20cv00102, 2021 WL 217139, at \*1 (W.D. Va. Jan. 21, 2021).

126. *Romanov v. Soto*, No. 3:21-CV-779-MMH-MCR, 2021 WL 4033576, at \*2 (M.D. Fla. Sept. 3, 2021).

127. *Wtulich v. Flipkowska*, No. 16-CV-2941 (JO), 2019 WL 2869056, at \*3 (E.D.N.Y. July 3, 2019).

128. *Colchester v. Lazaro*, No. C20-1571-JCC, 2021 WL 2915411, at \*1 (W.D. Wash. July 12, 2021).

129. *In re Daniel F.*, 279 Cal.Rptr.3d 161, 162 (Cal. Ct. App. 2021).

130. *Id.* at 168.

131. *Kim v. Cha*, No. CVA18-020, 2020 WL 7345992, at \*6 (Guam Dec. 14, 2020).



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the Hague Service Convention can be waived by entering a general appearance.<sup>132</sup>

C. OTHER CASES INVOLVING INTERNATIONAL FAMILY LAW  
LITIGATION

1. *Marriage and Divorce*

A Kentucky court was not obligated to recognize a Jordanian divorce, particularly when the husband allowed the wife to continue to perform wifely duties.<sup>133</sup> An Iowa court applied the doctrine of *forum non conveniens* to dismiss a case in favor of France when most of the evidence needed in the divorce case was in France.<sup>134</sup>

2. *Premarital Agreements*

In *Fraccionadora y Urbanizadora de Juarez, S.A. de C.V. v. Delgado*, under Texas choice of law principles, application of Mexican law was warranted to determine the existence of a premarital agreement, and issues as to whether the premarital agreement existed under Mexican law precluded partial summary judgment.<sup>135</sup> In *L.R.O. v. N.D.O.*, substantial evidence supported a finding that the wife, a Vietnamese national whose first language was not English and who had corresponded with her husband, who lived in Hawaii, electronically before they met and got married, voluntarily executed a premarital agreement where she waived her right to any spousal support.<sup>136</sup>

3. *Children's Issues*

a. Custody

i. *Home State and Significant Connections Jurisdiction*

It is often necessary to hold a hearing to determine the facts that support or deny jurisdiction. Therefore, it was erroneous for a New York court to dismiss a case without holding a hearing to determine whether the children's home state was New York or Yemen.<sup>137</sup>

New York could exercise home state jurisdiction over a child repatriated from Pakistan because the over one year sojourn in Pakistan constituted a temporary absence for the child from New York.<sup>138</sup> Florida could exercise

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132. *J.O. v. Tex. Dep't of Fam. & Protective Servs.*, 604 S.W.3d, 182, 188 (Tex. App.—Austin 2020); *Sweet-Martinez v. Martinez*, 129 N.Y.S.3d 317, 318 (N.Y. 2020); *In re N.B.*, No. E076875, 2021 WL 4205662, at \*1 (Cal. Ct. App. 2021).

133. *Iqtaifan v. Hagerty*, 617 S.W.3d 400, 404 (Ky. 2021) (denying a writ of mandamus was denied following the Kentucky Court of Appeals decision).

134. *In re Marriage of Pitcairn and Renaud*, 2021 WL 2690299, at \*1 (Iowa Ct. App. 2021).

135. *Fraccionadora y Urbanizadora de Juarez, S.A. v. de C.V. v. Delgado*, 632 S.W.3d 80, 80 (Tex. App.—El Paso, 2020).

136. *L.R.O. v. N.D.O.*, 475 P.3d 1167, 1182 (Haw. 2020).

137. *Kassim v. Maliki*, 194 A.D.3d 719, 721 (N.Y. App. Div. 2021).

138. *In re Saida A.*, 143 N.Y.S.3d 501, 511 (N.Y. Fam. Ct. 2021).

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jurisdiction over a child born in Belize who had been in Florida for more than six months.<sup>139</sup>

ii. *Continuing Jurisdiction*

In *Cortez v. Cortez*,<sup>140</sup> the appellate court affirmed a lower court determination that the children's absence from Texas for five years, and the absence of their father from their lives, meant that Texas no longer had exclusive continuing jurisdiction over the case. Alaska determined that it had no authority to modify a Turkish decree and that registering the decree in Alaska did not make it an Alaskan decree.<sup>141</sup>

iii. *Inconvenient Forum*

In *Marriage of Margrain & Ruiz-Bours*,<sup>142</sup> the court concluded that Mexico clearly intended to decline jurisdiction and that declination should be enforced by Arizona courts, even though the Mexican court did not consider all the factors set out in the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA).<sup>143</sup>

In *Stone v. Suzuki*, the appellate court concluded that the trial court had prematurely ended the petitioner's case and that the petitioner should be given an opportunity to present evidence that Japan had declined to exercise jurisdiction and Florida would be a more convenient forum.<sup>144</sup> In *re Marriage of Koivu*,<sup>145</sup> the appellate court concluded that, in applying the UCCJEA, the trial court did not err in concluding that Minnesota was a more appropriate forum for deciding custody, as opposed to Finland.

iv. *Enforcement*

Texas must recognize a Mexican emergency custody order when the father had actual notice of the Mexican order within a few days after it was issued and was aware that he could contest it in that proceeding.<sup>146</sup>

A Pennsylvania trial court erred in holding a German father in contempt for not returning his child to Pennsylvania because of defective service

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139. *Edwards v. Corrington*, 325 So.3d 993, 994–96 (Fla. Dist. Ct. App. 2021).

140. *Cortez v. Cortez*, No. 01-19-00296-CV, 2020 WL 7702187, at \*10–\*11 (Tex. App.–Houston [1st Dist.] Dec. 29, 2020).

141. *Christensen v. Seekin*, 486 P.3d 181, 181 (Alaska 2021).

142. *In re Marriage of Margain and Ruiz-Bours*, 485 P.3d 1079, 1087 (Ariz. Ct. App. 2021).

143. ARIZ. REV. STAT. §25-1001; *see also* UNIF. CHILD CUSTODY JURISDICTION AND ENF'T ACT (NAT'L CONF. OF COMM'R ON UNIF. STATE L. 1997).

144. *Stone*, 308 So.3d at 1106.

145. *In re Marriage of Koivu*, No. A20-0814, 2021 WL 856105, at \*3–\*5 (Minn. Ct. App. May 26, 2021).

146. *See Tucker v. Campos*, No. 03-20-00515-CV, 2021 WL 3572678, at \*4–\*5 (Tex. App.–Austin Aug. 13, 2021).

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against the father.<sup>147</sup> California did not have to enforce a Chinese order that had been stayed pending an appeal.<sup>148</sup>

Arizona must enforce a Canadian order modifying the grandparent visitation provisions of an agreement when Arizona no longer retained continuing jurisdiction because only a grandparent resided in the state.<sup>149</sup>

v. *International Travel*

In *Nabard v. Salgia*, the appellate court reversed the trial court's failure to allow the plaintiff to travel internationally with the child.<sup>150</sup> The court had not considered that international travel was important to this family, which is why they agreed to such travel in their settlement agreement.<sup>151</sup> The court also did not consider that the parties were fully aware of the risk of future litigation in India when they reached the agreement to, nonetheless, allow the plaintiff to travel internationally with the children.<sup>152</sup>

California allowed a mother to move to Hungary with the proviso that she forfeit some child support to assure that she would obey California orders.<sup>153</sup>

vi. *Juvenile*

A Texas court concluded that the trial court did not have factually sufficient evidence on which to exercise its discretion as to its finding of significant impairment to overcome the parental presumption that custody of the children should go to their father in Guatemala.<sup>154</sup> Wisconsin decided that there was sufficient evidence to retain a juvenile in foster care, instead of sending the child to his father in Mexico.<sup>155</sup>

D. CHILD SUPPORT

The Washington Court of Appeals refused to enforce a Polish child support order for adult children because the defendant did not receive notice

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147. *O.B. v. C.W.B.*, No. 1677-WDA-2019, 2020 WL 7233095, at \*1–\*2 (Pa. Super Ct. Dec. 8, 2020).

148. *Wang v. Zhou*, 277 Cal.Rptr.3d 302, 310–11 (Cal. Ct. App. 2021).

149. *Greenbank v. Vanzant*, 483 P.3d 266, 272 (Ariz. Ct. App. 2021).

150. *Nahar v. Salgia*, No. A-5559-18T1, 2020 WL 6375380, at \*6 (N.J. Super. Ct. App. Div. Oct. 30, 2020).

151. *Id.*

152. *Id.*

153. *B.K. v. L.S.*, No. D077408, 2021 WL 1437224, at \*8–\*9 (Cal. Ct. App. Apr. 16, 2021).

154. *M.A.R.G. v. Tex. Dep't of Fam. And Prot. Servs.*, No. 03-20-00413-CV, 2020 WL 7294610, at \*8 (Tex. App.–Austin Dec. 11, 2020).

155. *Ex rel. E.A.U.*, 954 N.W.2d 749 (Wis. Ct. App. 2020).

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prior to entry of the Polish order.<sup>156</sup> A New Jersey court could not modify a Chinese support order because the father continued to reside in China.<sup>157</sup>

1. *Other*

The Second Circuit upheld the International Parental Kidnaping Act against a void for vagueness allegation.<sup>158</sup>

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156. *Hedges v. Hedges*, No. 52877-1-II, 2020 WL 7040987, at \*1 (Wash. Ct. App. Dec. 1, 2020).

157. *F.Y. v. J.L.*, No. A-2096-19, 2021 WL 840748, at \*4 (N.J. Super. Ct. App. Div. Mar. 5, 2021).

158. *United States v. Houtar*, 980 F.2d 268, 277 (2d Cir. 2020); *see also United States v. Helbrans*, 547 F.Supp.3d 409, 428 (S.D.N.Y. 2021).

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## **International Human Rights**

DANIEL L. APPELMAN, JOHN REGIS COOGAN, CYREKA JACOBS,  
CAILEN LABARGE, CORINNE E. LEWIS, KERRY MCLEAN, HIND  
MERABET, LINDA S. MURNANE, THOMAS A. O'KEEFE, SARA  
SANDFORD, WENDY TAUBE, JAMES TAYLOR, AND  
CONSTANCE Z. WAGNER\*

### **I. Introduction**

This article highlights developments in 2021 that the International Human Rights Committee (IHRC) has focused on in its programming and advocacy work.

### **II. Climate Change and Human Rights**

#### **A. RECENT ACTIONS BY THE UNITED NATIONS HUMAN RIGHTS COUNCIL**

On October 8, 2021, the United Nations (UN) Human Rights Council (HRC) took two significant actions to address the degradation of the environment and the challenges posed by climate change. After many years of campaigning,<sup>1</sup> the Council adopted a resolution recognizing the right to a safe, clean, healthy and sustainable environment as a human right within the international system of human rights law.<sup>2</sup> The Council also appointed a special rapporteur to promote the protection of human rights in the context

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\* The Committee Editor is Constance Z. Wagner, Professor, Saint Louis University School of Law. Daniel L. Appelman, Partner, M&H, LLP, wrote Section II.A. Caileen LaBarge, Strategies for Ethical and Environmental Development, Sara Sandford, Of Counsel, Foster Garvey P.C., and Cyreka Jacobs, J.D., UIC John Marshall Law School, wrote Section II.B. Hind Merabet and Dr. Corinne E. Lewis, Partner, Lex Justi, wrote Sections III.A. and III.B. Linda S. Murnane, Colonel, United States Air Force (ret.) and Wendy Taube, Principal, Taube Law, LLC, wrote Section IV. James Taylor, Managing Attorney, Salish and Kootenai Tribal Prosecutors Office, wrote Section V. Thomas A. O'Keefe, President, Mercosur Consulting Group, Ltd., wrote Section VI. John Regis Coogan, John Regis Coogan Law Office, PLLC, wrote Section VII. Kerry McLean, Human Rights Consultant, wrote Section VIII.

1. The first step towards the recognition of the right to a healthy environment occurred almost fifty years ago, when UN member States met in Stockholm, Sweden, during the United Nations Conference on the Environment, and declared that: 'Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being.' Since then, UN member States have adopted a range of resolutions on the interlinkages between the environment and the enjoyment of human rights.

2. The human right to a clean, healthy and sustainable environment, A/HRC/48/L.23/Rev.1 (as orally revised), <https://undocs.org/A/HRC/RES/48/13> [hereinafter HRC Res. 48/13].

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of climate change.<sup>3</sup> The Council's recognition of the right to a healthy environment, itself significant, also paves the way for the adoption of a similar resolution by the UN General Assembly. By the time this article is published, that may well have happened.

The resolution on the right to a healthy environment encourages States to: (1) build capacities to implement protection of the environment and coordinate with other States, the UN, regional agencies and non-State stakeholders, including relevant communities of civil society; (2) adopt policies and practices that will fulfill their obligations to ensure a healthy environment; and (3) design their practices in alignment with the UN's Sustainable Development Goals.<sup>4</sup> It also invites the General Assembly to consider adopting a similar resolution.<sup>5</sup>

The right to a healthy environment may be inherent in other human rights recognized by international law, including the rights to life, the enjoyment of the highest attainable standard of physical and mental health, an adequate standard of living, food, housing, safe drinking water and sanitation, and participation in cultural life.<sup>6</sup> But, until now, the UN has never formally recognized the right to a healthy environment as a human right itself.

International recognition of the right by the UN puts much needed pressure on countries to conform. As of this writing, 156 countries include the right to a healthy environment in their constitutions, legislation, or regional treaties.<sup>7</sup> Many others, including the United States, do not. The embrace by the UN should also result in other needed changes, among them safeguarding environmental defenders.<sup>8</sup> The UN's inclusion of environmental concerns within the human rights framework legitimizes those who are persecuted for their environmental activism.<sup>9</sup> According to David Boyd, the current UN Special Rapporteur on human rights and environment, "[the resolution] will spark constitutional changes and stronger environmental laws, with positive implications for air quality, clean

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3. Mandate of the Special Rapporteur on the promotion and protection of human rights in the context of climate change, A/HRC/48/L.27 (as orally revised), <https://undocs.org/A/HRC/RES/48/14> [hereinafter Mandate of the Special Rapporteur].

4. *Sustainable Development Goals*, UN DEP'T OF ECON. & SOC. AFFAIRS (2021), <https://sdgs.un.org/goals>.

5. H.R.C. Res. 48/13, *supra* note 2.

6. See *Universal Declaration of Human Rights*, UN (1948), <https://www.un.org/en/about-us/universal-declaration-of-human-rights>.

7. UNHRC News, Joint Statement by UN human rights experts for World Environment Day, Geneva (June 4, 2020), <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=27130&LangID=E>.

8. H.R.C. Res. 48/13, *supra* note 2.

9. *Landmark UN Resolution Confirms Healthy Environment Is a Human Right*, UN ENV'T. PROGRAMME (October 14, 2021), <https://www.unep.org/news-and-stories/story/landmark-un-resolution-confirms-healthy-environment-human-right>.

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water, healthy soil, sustainably produced food, green energy, climate change, biodiversity and the use of toxic substances.”<sup>10</sup>

The Committee’s resolution appointing a new rapporteur solely focused on challenges to human rights posed by climate change is, likewise, significant. Under the resolution, the UN expert possesses broad powers to: Promote awareness of the many adverse effects of climate change on the human rights of impacted communities; make recommendations and develop best practices to avoid, mitigate, and adapt to those effects; and coordinate and collaborate with other UN special rapporteurs, including the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes and the Special Rapporteur on the human rights to safe drinking water and sanitation.<sup>11</sup>

Together, these two actions by the UN HRC, and the possible subsequent endorsement by the General Assembly of the right to a healthy environment, reflect a commitment by the international community to pursue a human rights-based approach to climate action.

**B. EFFORTS TO PROTECT ENVIRONMENTAL HUMAN RIGHTS DEFENDERS**

According to Protect Defenders EU, a strikingly increasing trend of attacks on human rights defenders to undermine the rule of law continues, with as many as 520 documented violations recorded in 2021.<sup>12</sup> Those among the most at risk are land and environmental defenders.<sup>13</sup>

The most prevalent violations include judicial harassment, detention, killing, physical attacks, threats or harassment, and ill treatment in detention. In 2021, 248 violations of judicial harassment have been documented.<sup>14</sup> Other atrocities include attempted murder, kidnapping, restrictions to freedom of movement and violations of privacy.<sup>15</sup>

Between January 1, 2020, and June 30, 2021, the Special Rapporteurs overseeing human rights defenders sent twenty-eight complaints to twenty-two Member States regarding the long-term detention of 148 human rights defenders, emphasizing the need for States to abide by their relevant

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10. Press Release, United Nations Human Rights Council, UN Recognition of Human Right to Healthy Environment Gives Hope for Planet’s Future – Human Rights Expert (Oct. 8, 2021), <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=27633>.

11. *Mandate of the Special Rapporteur*, *supra* note 3.

12. *Raising Awareness*, PROTECT DEFENDERS EU, (Oct. 26, 2021) <https://protectdefenders.eu/raising-awareness/#1591727102151-9efdd018-68fe>.

13. *The New UN Climate Report and Environmental Defenders*, UN SPECIAL RAPPORTEUR ON HUM. RTS. DEFENDERS, <https://srdefenders.org/resource/the-new-un-climate-report-and-environmental-defenders/> (last visited Mar. 26, 2022).

14. *Id.*

15. *Id.*



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international commitments.<sup>16</sup> Given the frequency of incidents, more needs to be done to protect human rights defenders and the rule of law globally.

1. *Colombia Environmental Human Rights Defenders*

Colombia continues to witness some of the greatest numbers of human rights violations against environmental activists.<sup>17</sup> In previous years, the Special Rapporteur on the situation of human rights defenders conducted site visits to assess the situation of these defenders in Colombia.<sup>18</sup> “From 2016 to 30 June 2019, Colombia was the country with the highest number of murders of human rights defenders in Latin America, according to the cases compiled and verified by the United Nations.”<sup>19</sup> “On 24 November 2016, the Government of Colombia and the Revolutionary Armed Forces of Colombia – People’s Army (FARC-EP)” executed the Peace Agreement, which ended “more than five decades of armed conflict between the two parties.”<sup>20</sup>

Despite the Agreement, government action to protect these defenders have not been effective.<sup>21</sup> In April 2021, Human Rights Watch filed an amicus brief on killings of human rights defenders in Colombia,<sup>22</sup> noting that governmental authorities’ “failure to exercise effective control over many areas previously controlled by” FARC has contributed to the violence.<sup>23</sup> In other cases, the lack of state presence forces human rights defenders to play a visible role, assuming responsibilities usually performed by public officials, such as protecting at-risk populations. Human rights defenders are also at risk because of their support of initiatives following the Agreement, with some reportedly killed for supporting projects to replace drug-related coca-crops with food crops.<sup>24</sup> A quarterly report confirms these statistics,<sup>25</sup> showing 222 attacks against 209 human rights defenders between

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16. Press Release, Special Rapporteur on the situation of human rights defenders, Come clean about persecution of human rights defenders, UN expert tells governments, U.N. Press Release (Oct. 14, 2021).

17. Human Rights Council, *Rep. of the Special Rapporteur on the situation of human rights defenders, Visit to Colombia*, ¶1, U.N. Doc. A/HRC/43/51/Add.1, December 26, 2019.

18. UN Human Rights Council, *Report of the Special Rapporteur on the situation of human rights defenders, Visit to Colombia*, ¶1, UN Doc. A/HRC/43/51/Add.1, December 26, 2019.

19. *Id.* ¶ 20.

20. *Id.* ¶ 8.

21. See José Fernando Reyes Cuartas, *Amicus Brief on Killings of Human Rights Defenders in Colombia*, HUM. RTS. WATCH (Nov. 9, 2021), <https://www.hrw.org/news/2021/04/20/amicus-brief-killings-human-rights-defenders-colombia>.

22. Human Rights Watch, *Human Rights Watch Amicus Curiae on abuses against human rights defenders*, (Nov. 9, 2021), <https://www.hrw.org/news/2021/04/20/amicus-brief-killings-human-rights-defenders-colombia>.

23. *Id.*

24. *Id.*

25. Somos Defensores, *Agresiones contra personas defensoras de derechos humanos en Colombia, Jul. – Sep. 2021* (Sept. 2021), at 1.

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July and September of 2021 alone—a 21 percent increase from the previous year.<sup>26</sup>

2. *European Union Protection for Environmental Defenders*

In October 2021, parties to the United Nations Economic Commission for Europe (UN/ECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, known as the Aarhus Convention<sup>27</sup>, established an enforcement mechanism to protect environmental human rights defenders: a Special Rapporteur on environmental defenders.<sup>28</sup> The Convention aims to improve access to information, justice, and public participation in environmental policy decisions.<sup>29</sup> It constitutes the only international instrument protecting environmental democracy. Prior to its establishment, the UN HRC recognized the important role of environmental defenders in the protection of nature and sustainability efforts<sup>30</sup> and their need for protection, given increasing attacks on such defenders in recent years.<sup>31</sup> In 2020, Global Witness recorded 227 attacks on environmental and land defenders worldwide.<sup>32</sup>

The Special Rapporteur's role is designed to protect human rights defenders at risk of imminent persecution or harassment as a result of the exercise of their rights under the Convention.<sup>33</sup> The Special Rapporteur has a number of tools for accomplishing this objective, including issuing immediate protection measures, making official public comments, and elevating matters to relevant international and regional human rights authorities.<sup>34</sup> Under the Convention, the Special Rapporteur is set to take an active role in raising awareness of environmental defenders' rights and will potentially coordinate with other international organizations and authorities to this end.<sup>35</sup>

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26. *Id.*

27. Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 2161 U.N.T.S. 447, 38 I.L.M. 517 (1999) [hereinafter *Aarhus Convention*].

28. Economic Commission for Europe, Decision VII/9 on a rapid response mechanism to deal with cases related to article 3 (8) of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, U.N. Doc. ECE/MP.PP/2021/CRP.8.

29. *Aarhus Convention*, *supra* note 1, art. 1.

30. Human Rights Council Res. 40/L.22, U.N. Doc. A/HRC/40/L.22/Rev.1 (March 20, 2019).

31. Economic Commission for Europe, *Information note on the situation regarding environmental defenders in Parties to the Aarhus Convention from 2017 to date*, U.N. Doc. AC/WGP-24/Inf.16.

32. LAST LINE OF DEFENSE: The industries causing the climate crisis and attacks against land and environmental defenders, (2021), <https://www.globalwitness.org/en/campaigns/environmental-activists/last-line-defence/>.

33. *A/HRC/48*, *supra*, note 2 at Annex.

34. *Id.*

35. *Id.* at 17.

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The Convention establishes the first mechanism specifically safeguarding environmental defenders within a legally binding framework under the UN and follows UN HRC recognition of the universal right to a clean, healthy, and sustainable environment this year.<sup>36</sup> Although the Special Rapporteur will undoubtedly draw attention to the risks environmental defenders face, her efficacy, particularly given that the role is generally unfunded, remains to be seen.

### III. Business and Human Rights Developments

#### A. TENTH ANNIVERSARY OF THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

June 16, 2021 marked the ten-year anniversary of the unanimous endorsement by the UN Human Rights Council of the United Nations Guiding Principles on Business and Human Rights (UNGPs).<sup>37</sup> The UNGPs is the global authoritative framework for identifying, preventing, mitigating, and accounting for adverse human rights impacts by businesses.<sup>38</sup> In July 2020, “the UN Working Group on Business and Human Rights (UNWG) launched a global project entitled ‘Business and human rights: towards a decade of global implementation’” (also referred to as “UNGPs10+/NextdecadeBHR”).<sup>39</sup> In the initial “stocktaking” phase of the project, the UNWG solicited input from a wide variety of stakeholders on the progress, gaps, challenges, and successes observed in the first decade of the UNGPs’ implementation.<sup>40</sup>

Based on the input it received, including a submission by the ABA that was coordinated by the IHRC, the UNWG issued a report in June 2021 that serves as the groundwork for the successive future-looking phase of the project, a “roadmap for the next decade.”<sup>41</sup> The aim is to obtain broader implementation of the UNGPs before 2030, the target date for achieving the Sustainable Development Goals adopted by UN Member States in 2015.<sup>42</sup>

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36. Human Rights Council Res. 48/13, U.N. Doc. A/HRC/RES/48/13 (October 18, 2021).

37. U.N. Human Rights Office of the High Comm’r, *Guiding Principles on Business and Human Rights, Implementing the United Nations “Protect, Respect and Remedy” Framework*, UN Doc. HR/PUB/11/04 (2011), [https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf).

38. *OHCHR and Business and Human Rights*, U.N. HUM. RTS. OFF. OF THE HIGH COMM’R, <https://www.ohchr.org/en/business> (last visited Mar. 27, 2022).

39. *Next Decade 10+: Business and Human Rights: U.N. Guiding Principles: Open Call for Input*, U.N. HUM. RTS. SPECIAL PROCEDURES, <https://previous.ohchr.org/Documents/Issues/Business/UNGPsBHRnext10/call-for-input-en.pdf> (last visited Mar. 27, 2022).

40. *Id.*

41. U.N. Working Grp. on Bus. and Human Rights, *Guiding Principles on Business and Human Rights At 10: Taking Stock of the First Decade*, UN Doc. A/HRC/47/39 (2021), <https://www.ohchr.org/Documents/Issues/Business/UNGPs10/Stocktaking-reader-friendly.pdf>.

42. *The SDGs in Action*, UN DEV. PROGRAMME, <https://www.undp.org/sustainable-development-goals> (last visited Nov. 21, 2021).

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B. UN TREATY ON BUSINESS AND HUMAN RIGHTS: MINIMAL  
PROGRESS AND AN ALTERNATIVE PROPOSAL

From October 25-29, 2021, the UN held discussions on a draft treaty on Business and Human Rights. The Geneva discussions revealed both decreased momentum in finalizing the treaty, while, at the same time, increased interest in an alternative framework treaty. The treaty process was set in motion with a 2014 UN Human Rights Council resolution<sup>43</sup> that created a working group (OEIGWG) and mandated the group to draft an international legally binding instrument.<sup>44</sup> The OEIGWG held the seventh discussion session in October 2021 to review the third revised draft treaty, the fourth iteration of the proposed treaty.<sup>45</sup>

Presently, there is a question as to whether the treaty has sufficient support to enter into force and be effectively implemented given that: (1) Only some seventy States, less than one-third of UN Member States, participated in the discussion session; (2) key industrialized States, including Australia, Canada, and Korea, did not attend the session;<sup>46</sup> and (3) most of the proposed changes to the third revised draft came from countries in the global South.<sup>47</sup> The structure of the draft treaty has stabilized, with few new substantive additions between the second and third revised drafts.<sup>48</sup> But certain key provisions—particularly Articles 7 and 8 on legal liability and remedy, respectively, still require further clarification. In an implicit acknowledgement of the remaining challenges, the Chair-Rapporteur proposed convening a group of Ambassadors in Geneva, which would reflect a balanced regional representation, to act as “Friends of the Chair” to further advance the work on the draft.<sup>49</sup>

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43. Human Rights Council Res. 26/9, U.N. Doc. A/HRC/RES/26/9 (July 14, 2014), [https://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/RES/26/9](https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/9).

44. *Id.* ¶ 1.

45. This fourth version of the draft treaty follows the Zero Draft, the Revised Draft, and the Second Revised Draft. For the four drafts of the treaty. See *Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, U.N. HUM. RTS. OFF. OF THE HIGH COMM’R, <https://www.ohchr.org/en/hrbodies/hrc/wgtranscorp/pages/igwgontnc.aspx> (last visited Nov. 22, 2021).

46. Emilio Rafael Izquierdo Miño (Chair-Rapporteur), *Report on the Seventh Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, U.N. Doc. A/HRC/49/XX, Annex I to Draft Report, (forthcoming Jan. 2022), <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session7/igwg-7th-draft-report.pdf> [hereinafter *Report*].

47. *Id.* at Annex II.

48. See U.N. Secretariat, Comparison of Third and Second Revised Drafts of Legally Binding Instrument to Regulate, in *International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises*, <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/igwg-comparing-third-and-second-revised-drafts.pdf> (unofficial document).

49. *Report*, *supra* note 37, ¶ 20(b).

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In a departure from its previous refusal to participate in any discussion of the draft treaty, the United States attended the Geneva session.<sup>50</sup> However, instead of contributing to refinement of the third revised draft treaty, the United States expressed support for an alternative approach, a framework treaty.<sup>51</sup> A framework treaty would define a common objective and principles that would promote implementation similar to the World Health Organization Framework Convention on Tobacco Control and the UN Framework Convention on Climate Change.<sup>52</sup> The International Chamber of Commerce, the International Organization of Employers, and BusinessEurope, one of Brussels's largest and most influential lobby groups, also expressed support for a new framework convention.<sup>53</sup>

Although the idea of an alternative draft treaty had been proposed, the IHRC brought the debate about the form and content of the treaty into the open with a roundtable of experts on July 27, 2021.<sup>54</sup> During the roundtable, the pros and cons of each approach were elaborated upon and debated, thereby contributing to the discussion of the alternative approach during the OEIGWG's October session.<sup>55</sup>

A new version of the treaty should be prepared by the OEIGWG by the end of July 2022,<sup>56</sup> and then discussed during its eighth session later in the year. Significant questions about whether the draft can be finalized and effectively implemented, and whether a framework treaty would be preferable, are becoming increasingly prominent in the discussions.

#### **IV. Reprisals Against Women Judges in Afghanistan**

As is well known, the United States ended its two decades-long engagement in Afghanistan, withdrawing all U.S. forces prior to September

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50. See, e.g., U.S. Mission Geneva, *The United States' Opposition to the Business and Human Rights Treaty Process*, U.S. MISSION TO INT'L ORGS. GENEVA, (Oct. 15, 2018) <https://geneva.usmission.gov/2018/10/15/the-united-states-opposition-to-the-business-and-human-rights-treaty-process/>.

51. See Claire Methven O'Brien, *Draft Text for a Business and Human Rights Treaty*, RESEARCHGATE, (June 2020), [https://www.researchgate.net/publication/342590903\\_Draft\\_text\\_for\\_business\\_and\\_human\\_rights\\_treaty](https://www.researchgate.net/publication/342590903_Draft_text_for_business_and_human_rights_treaty).

52. WHO Framework Convention on Tobacco Control, May 21, 2003, 2302 U.N.T.S. 166, <http://apps.who.int/iris/bitstream/handle/10665/42811/9241591013.pdf;jsessionid=4311BDA6807AAB43A02B2B4A10308CFD?sequence=1>; *What is the United Nations Framework Convention on Climate Change?*, UNFCCC, <https://unfccc.int/process-and-meetings/the-convention/what-is-the-united-nations-framework-convention-on-climate-change> (last visited Nov. 21, 2021).

53. *UN Treaty Negotiations Kick Off with an Appeal to Member States: Engage Constructively*, ECCJ (Oct. 25, 2021), <https://corporatejustice.org/news/un-treaty-negotiations-kick-off-with-an-appeal-to-member-states-engage-constructively/>.

54. *Id.*

55. *Id.*

56. *Report*, *supra* note 37, at para. 20(c).

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11, 2021.<sup>57</sup> When it did so, the United States' disengagement was characterized by some observers as chaotic and disorganized.<sup>58</sup>

During the two decades the United States was engaged in Afghanistan, the U.S. State Department, the U.S. Department of Justice and the U.S. Department of Defense, as well as many non-governmental organizations, embarked upon efforts to strengthen the civilian institutions in Afghanistan.<sup>59</sup> Those efforts included sharing best practices and anti-corruption efforts within the court system.<sup>60</sup> Many Afghan women judges participated in the various programs offered by the U.S.-led group of agencies.<sup>61</sup> Some of those judges even visited the United States on multiple occasions to participate in training programs.<sup>62</sup>

Since U.S. withdrawal, these women judges and their families have been at greater risk for assassination, removal from office, and damage to their homes.<sup>63</sup> When the Taliban took control of the Afghanistan civilian government in the final stages of the U.S. withdrawal, many of the prisoners who had been sentenced by those women judges were released.<sup>64</sup> The women judges, as well as some of their male counterparts, were targeted for reprisal by those they had sentenced.<sup>65</sup> As demonstrated by the assassination of two Afghan women judges in January 2021 as they were on their way to the Court in which they worked, the future of women judges in Afghanistan hangs in the balance.<sup>66</sup> According to a statement issued by the International Association for Women Judges (IAWJ):

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57. Hannah Bloch, *A Look at Afghanistan's 40 Years Of Crisis — From The Soviet War To Taliban Recapture*, NAT'L PUB. RADIO (2021), <https://www.npr.org/2021/08/19/1028472005/afghanistan-conflict-timeline>.

58. *Id.*

59. *Afghanistan Program Overview*, U.S. DEP'T OF STATE (2021), <https://2009-2017.state.gov/j/inl/narc/c27187.htm>; see also LIANA SUN WYLER & KENNETH KATZMAN, CONG. RESEARCH SERV., R41484, *AFGHANISTAN: U.S. RULE OF LAW AND JUSTICE SECTOR ASSISTANCE 33-36* (2010), <https://crsreports.congress.gov/product/pdf/R/R41484/2>.

60. WYLER AND KENNETH KATZMAN, *supra* note 59, at 2-3.

61. See Press Release, Office of the Spokesperson, United States Supports Judicial Education Program for Four Afghan Female Judges through the International Association of Women Judges (Sept. 13, 2012).

62. *Id.*

63. Cynthia L. Cooper, *Women Judges Mobilize to Help Endangered Afghan Counterparts*, AM. BAR ASS'N (Feb. 4, 2022), <https://www.americanbar.org/groups/diversity/women/publications/perspectives/2022/february/women-judges-mobilize-help-endangered-afghan-counterparts/>.

64. *Id.*

65. *Afghan Judges Face Revenge from Taliban Terrorists They Sent to Jail*, THE PORTAL (Aug. 23, 2021), <https://www.theportal-center.com/2021/08/afghan-judges-face-revenge-from-taliban-terrorists-they-sent-to-jail/>.

66. Jaela Bernstein, *Afraid for Their Lives, Afghan Women Judges Desperately Seek Escape from Taliban*, CBC NEWS (Aug. 17, 2021), <https://www.cbc.ca/news/world/afghan-women-judges-fear-execution-1.6143010>; *Two Afghan female judges shot dead in Kabul ambush*, ALJAZEERA (Jan. 17, 2021), <https://www.aljazeera.com/news/2021/1/17/two-afghan-women-judges-shot-dead-in-kabul-ambush>.

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The IAWJ, however, remains very concerned that, due to the nature of their work and the past rulings they have made in criminal, anti-corruption and family courts, many of the women judges and their families will be in particular danger if the Taliban reach Kabul. These dangers are exacerbated by their gender and the likelihood that persons they have sentenced will be released from prison.<sup>67</sup>

The IAWJ has been at the forefront of efforts to assist those women judges and their families seeking safe passage from Afghanistan.<sup>68</sup> With the United States and coalition forces no longer in place to support the justice process they had worked for decades to establish, the judges, now targets of those they had sentenced, were desperate to find safety.<sup>69</sup>

On July 30, 2021, roughly one month before the United States departed Afghanistan, the United States Department of State opened its Special Immigrant Visa Program.<sup>70</sup> As part of the “Emergency Security Supplemental Appropriations Act, 2021,” 8,000 additional Special Immigrant Visas (SIVs) for Afghan principal applicants were made available for individuals who were employed by or on behalf of the United States during its two decades in the country.<sup>71</sup> A total of 34,500 visas for Afghans have been allocated since December 19, 2014.<sup>72</sup>

While the Special Immigrant Visa program was of some limited assistance to those who were employed by the United States, including some who provided extensive and valuable services as interpreters during the U.S. engagement in the country, the judges—especially women judges—who had participated in U.S. training and education programs found little support for their applications for U.S. visas.<sup>73</sup> Non-governmental organizations like the IAWJ have worked tirelessly to obtain safe passage for women judges to countries willing to provide them with visas for legal entry.<sup>74</sup> The assassination of two Afghan women judges in January 2021 is viewed as a

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67. Official IAWJ Statement on the Current Situation in Afghanistan, INT’L ASS’N OF WOMEN JUDGES (Aug. 16, 2021), [https://iawj.clubexpress.com/content.aspx?page\\_id=5&club\\_id=882224&item\\_id=67819](https://iawj.clubexpress.com/content.aspx?page_id=5&club_id=882224&item_id=67819).

68. *See id.*

69. *See* Bernstein, *supra* note 66.

70. *Special Immigrant Visas for Afghans - Who Were Employed by/on Behalf of the U.S. Government*, U.S. DEPT. OF STATE, <https://travel.state.gov/content/travel/en/us-visas/immigrate/special-immg-visa-afghans-employed-us-gov.html> (last visited May 4, 2022).

71. *Id.*

72. *Id.*

73. Rebecca Wright, Anna Coren, Abdul Basir, *Afghanistan’s Women Judges Are in Hiding, Fearing Reprisal Attacks from Men They Jailed*, CNN (Sept. 19, 2021), <https://www.cnn.com/2021/09/19/asia/afghanistan-women-judges-hnk-dst-intl/index.html>; Ali M Latifi and Mutjaba Haris, *Afghanistan’s Female Judges Forced into Hiding Under Taliban Rule*, ALJAZEERA (Oct. 18, 2021), <https://www.aljazeera.com/news/2021/10/18/afghanistan-female-judges-hiding-taliban-takeover>.

74. *Women in Afghanistan Wait for U.S. Protection, As Promised*, N.Y. TIMES (Aug. 18, 2021), <https://www.nytimes.com/2021/08/18/us/politics/afghanistan-women-protection.html>; *Stefanie Van Den Berg, Hunted by the Men They Jailed, Afghanistan’s Women Judges Seek escape*, REUTERS

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precursor to the violence the women judges now fear as reprisal since those they convicted have been set free by the Taliban who are now running the country.<sup>75</sup>

In October 2021, a senior U.S. State Department official, Elizabeth Jones, was appointed to oversee efforts to relocate those to whom the United States has “a special commitment,”<sup>76</sup> as well as the efforts to resettle those who were relocated to the United States in the final days of the U.S. military presence in the country.<sup>77</sup>

Organizations such as the IAWJ and Too Young to Wed are taking donations to help get these women judges out of Afghanistan.<sup>78</sup> As of September 28, 2021, at least 220 women judges were known to be in hiding in various locations fearing assassination, reprisal, and violence to them and to their families.<sup>79</sup> Several law firms, such as DLA Piper, are mobilizing pro bono attorneys to help in facilitating visas for women judges and their immediate families. During an October 2021 webinar sponsored by the ABA International Law Section’s IHRC, Women’s Interest Network Middle East Committee, and the ABA Civil Rights and Social Justice Section, a Call To Action was issued asking individuals to contact their congresspersons to ask what is being done to get the Afghan women judges out, and to urge them to pass the Afghan Adjustment Act, which makes it easier for Afghans arriving in the United States to apply for legal permanent residence.<sup>80</sup>

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(Sep. 3, 2021), <https://www.reuters.com/world/asia-pacific/hunted-by-men-they-jailed-afghanistans-women-judges-seek-escape-2021-09-03/>.

75. Luke Harding and Agencies, *Two Female Judges Shot Dead in Kabul as Wave of Killings Continues*, THE GUARDIAN (Jan. 17, 2021), <https://www.theguardian.com/world/2021/jan/17/two-female-judges-shot-dead-in-kabul-as-wave-of-killings-continues>.

76. Kyle Atwood and Jennifer Hansler, *State Department Taps New Coordinator for Afghanistan Relocation Efforts*, CNN (Oct. 12, 2021), <https://www.cnn.com/2021/10/12/politics/elizabeth-jones-afghanistan-state-department/index.html>.

77. Laura Kelly, *Biden Taps Veteran Diplomat to Lead Afghan Relocation Efforts*, THE HILL (Oct. 12, 2021), <https://thehill.com/policy/international/576365-biden-taps-veteran-diplomat-to-lead-afghan-relocation->.

78. *IAWJ Fundraising Campaign to Support Afghan Judges*, NAT’L ASS’N OF WOMEN JUDGES (Aug. 30, 2021), <https://www.nawj.org/blog/newsroom/news/iawj-fundraising-campaign-to-support-afghan-judges#:~:text=IAWJ%20has%20established%20a%20fundraising,How%20can%20you%20help%3F&text=WE%20are%20creating%20a%20fundraising,ways%20to%20apply%20the%20funds;AfghanistanEmergencyInitiative,TOOYOUNGTOWED,https://tooyoungtowed.org/main/22/Afghanistan%20Emergency%20Initiative> (last visited Mar. 20, 2021).

79. Claire Press, *Female Afghan Judges Hunted by the Murderers They Convicted*, BBC NEWS (Sep. 28, 2021), <https://www.bbc.com/news/world-asia-58709353>.

80. *Afghanistan Response Project*, AM. BAR ASS’N (2021), [https://www.americanbar.org/advocacy/rule\\_of\\_law/afghanistan-response/](https://www.americanbar.org/advocacy/rule_of_law/afghanistan-response/).

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**V. Persecution of the Rohingya People**

The Rohingya, one of the most marginalized populations in the world, continue to face persecution.<sup>81</sup> There are some general statements that can be made about most of the Rohingya, although there is still deep disagreement about them.<sup>82</sup> Many originated from Bengal and were brought to Myanmar by the British in the 1800s and many are Muslim by faith. Some people indigenous to Rakhine State are included.

Under the British, the Rohingya had the same rights as other Burmese citizens.<sup>83</sup> During World War II, the Rohingya fought with the British, while many of their Buddhist counterparts sided with the Japanese.<sup>84</sup> Following the war, when Myanmar became independent from Britain, the Myanmar government enacted the Union Citizenship Act, identifying the ethnicities who could apply for citizenship; Rohingya were not included.<sup>85</sup> In 1962, under General Ne Win, all persons in Myanmar were required to obtain national registration cards; subsequently the Rohingya were issued “foreign” identity cards in 1974. The citizenship law adopted in Myanmar in 1982 excluded the Rohingya as they were not identified as one of the country’s 135 recognized ethnic groups, formalizing their status as stateless.<sup>86</sup>

From 2017-2018, the Myanmar military (Tatmadaw) conducted a genocidal campaign against the Rohingya in Rakhine State, ostensibly in response to attacks by the Arakan Rohingya Salvation Army (ARSA).<sup>87</sup> More than 900,000 Rohingya fled Myanmar to Bangladesh to escape the Tatmadaw.<sup>88</sup> In response, the United Nations launched the Independent

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81. See Helal Udin Ahmed, *A historical overview of the Rohingya crisis*, DHAKA TRIBUNE (July 27, 2019), <https://www.dhakatribune.com/opinion/longform/2019/07/27/a-historical-overview-of-the-rohingya-crisis>.

82. See Steven C. Druce, *Myanmar’s Unwanted Ethnic Minority: A History and Analysis of the Rohingya Crisis, Managing Conflicts in a Globalising ASEAN: Incompatibility Management through Good Governance*, in *MANAGING CONFLICTS IN A GLOBALIZING ASEAN* 17–46 (Mikio Oishi, ed. 2020).

83. See Krishnadev Calamur, *The Misunderstood Roots of Burma’s Rohingya Crisis*, THE ATLANTIC (Sept. 25, 2017), <https://www.theatlantic.com/international/archive/2017/09/rohingyas-burma/540513/>.

84. See Druce, *supra* note 82, at 25.

85. *Id.* at 26–27.

86. *Statelessness Explained*, UN REFUGEES, <https://www.unrefugees.org/news/statelessness-explained/> (last visited May 4, 2022).

87. See Lara Jakes, *Myanmar’s Military Committed Genocide Against Rohingya*, U.S. SAYS, N.Y. TIMES (Mar. 21, 2022), <https://www.nytimes.com/2022/03/21/us/politics/myanmar-genocide-biden.html>; C. Christine Fair, *Arakan Rohingya Salvation Army: Not the Jihadis You Might Expect*, LAWFARE (Dec. 9, 2018), <https://www.lawfareblog.com/arakan-rohingya-salvation-army-not-jihadis-you-might-expect>.

88. U.N. GAOR, 76th Sess., 3d comm. mtg., U.N. Doc. A/C.3/76/L.30/Rev.1 (Nov. 11, 2021).

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International Fact Finding Mission on Myanmar,<sup>89</sup> as well as the Independent Investigative Mechanism for Myanmar (IIMM).<sup>90</sup> According to Nicholas Koumjian, Head of the IIMM, his organization has collected more than 1.5 million separate pieces of evidence against the Tatmadaw establishing crimes against the civilian population, and is sharing the information with the International Criminal Court in its probe of “crimes against the Myanmar’s Rohingya Muslim minority and the case at the International Court of Justice brought by Gambia on behalf of the Organization of Islamic Cooperation accusing Myanmar of genocide against the Rohingya.”<sup>91</sup>

Refugee status for the Rohingya is not a new thing, since they have been forced to flee persecution in Myanmar multiple times.<sup>92</sup> Not all the Rohingya refugees are in Bangladesh; as many as 40,000 Rohingya refugees are in India.<sup>93</sup> The Indian government seeks to deport them, perceiving them as a “threat to national security.”<sup>94</sup> One of the more publicized cases of 2021 included an attempt to deport a 14-year-old Rohingya girl to Myanmar,<sup>95</sup> a decision made following the Indian Supreme Court’s ruling in *Mohammad Salimullah v. Union of India*.<sup>96</sup> The *Salimullah* Court noted that India was not a party to the 1951 United Nations Convention on the Status of Refugees.<sup>97</sup> That Convention includes the principle of non-refoulement, prohibiting the return of an individual at risk of “torture, cruel, inhuman or degrading treatment or punishment and other irreparable harm” in the country to which they are being returned.<sup>98</sup> During the *Salimullah* hearing,

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89. *Independent International Fact-Finding Mission on Myanmar*, UN HUM. RTS. COUNCIL <https://www.ohchr.org/EN/HRBodies/HRC/MyanmarFFM/Pages/Index.aspx> (last accessed May 4, 2022).

90. *Independent Investigative Mechanism for Myanmar*, UN (last accessed May 4, 2022) <https://iimm.un.org/>.

91. Edith M. Lederer, *UN Investigator: Crimes Against Humanity Under Myanmar Junta*, AP NEWS (Nov. 6, 2021), <https://apnews.com/article/crime-myanmar-united-nations-c8d30050193ccc2affc15c508ee4be3d>.

92. Al Jazeera Staff, *Who Are the Rohingya?*, ALJAZEERA (Apr. 18, 2018), <https://www.aljazeera.com/features/2018/4/18/who-are-the-rohingya> (A partial list of the countries to which Rohingya have fled includes Saudi Arabia, the United Arab Emirates, Pakistan, India, Bangladesh, Thailand, Malaysia, and Indonesia. There are also a significant number of Rohingya in Myanmar with the status of internally displaced persons).

93. *See India: Halt All Forced Returns to Myanmar*, HUM. RTS. WATCH (Mar. 10, 2021), <https://www.hrw.org/news/2021/03/10/india-halt-all-forced-returns-myanmar#>.

94. *India: Rohingya Refugees Fear Deportation*, DEUTSCHE WELLE, <https://www.dw.com/en/india-rohingya-refugees-fear-deportation/av-59854937> (last visited May 4, 2022).

95. *Id.* (Her family was neither in India or Myanmar. They were in Bangladesh at the refugee camp at Cox’s Bazaar).

96. *See Salimullah v. Union of India*, Latest Caselaw 2021 SC 187 (India).

97. *See The Refugee Convention, 1951*, UN HUM. RTS. COUNCIL (1951), <https://www.unhcr.org/4ca34be29.pdf>.

98. *The Principle of Non-Refoulement Under International Human Rights Law*, UN HUM. RTS. COUNCIL, <https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf> (last visited May 4, 2022).

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Chief Justice Bobde commented “[p]ossibly that is the fear that if they go back to Myanmar, they will be slaughtered. But we cannot control all that.”<sup>99</sup> The Court’s written decision followed the same logic, “[r]egarding the contention raised on behalf of petitioners about the present state of affairs in Myanmar, we have to state that we cannot comment upon something happening in another country.”<sup>100</sup> Myanmar refused to accept the girl and India was forced to take her back to Assam where she had been living.<sup>101</sup>

In 2021, to reduce the overcrowding in its refugee camps, Bangladesh began relocating Rohingya to the island of Bhasan Char in the Bay of Bengal and plans to move as many as 100,000 refugees there.<sup>102</sup> Bhasan Char might indeed provide better services to the refugees but could not be more isolating. There are also significant environmental considerations in using the island as a refugee camp.<sup>103</sup> As of October 2021, Bangladesh had already relocated over 19,000 Rohingya.<sup>104</sup>

Rohingya in the Bangladesh camps suffer many threats, including from COVID-19. In August 2021, fortunately, some of the refugees in the camps began receiving the COVID-19 vaccine.<sup>105</sup> Because of conditions in the camps, social distancing and masking is not possible; vaccines are their only hope to survive the disease.<sup>106</sup> Another peril in the camps is the rise of militant groups. Assassins are targeting those that speak out against the militant groups.<sup>107</sup> Among the groups targeting civilians is ARSA, the paramilitary group that launched the attacks on military outposts in Myanmar in 2017, sparking genocidal retaliation by the Tatmadaw.<sup>108</sup>

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99. Subhradipta Sarkar, *Deporting Rohingyas to the Slaughter House: Dilution of the “Non-Refoulement” Principle*, INDIA TIMES (Apr. 18, 2021), <https://timesofindia.indiatimes.com/blogs/sarkari-thoughts/deporting-rohingyas-to-the-slaughter-house-dilution-of-the-non-refoulement-principle/?source=App&frmapp=yes>.

100. *Salimullah*, *supra* note 96.

101. *Myanmar Refuses to Accept Rohingya Girl Deported by India: Report*, ALJAZEERA (Apr. 2, 2021), <https://www.aljazeera.com/news/2021/4/2/myanmar-refuses-to-accept-rohingya-girl-deported-by-india-report>.

102. Saif Hasnat & Sameer Yasir, *Rohingya on Bangladesh Island of Bhasan Char Seek to Leave*, N.Y. TIMES (Oct. 10, 2021), <https://perma.cc/R436-MKZ9>.

103. *Rohingya on Bangladesh Island of Bhasan Char Seek to Leave*, N.Y. TIMES (Oct. 10, 2021), <https://www.nytimes.com/2021/10/10/world/asia/bangladesh-rohingya-bhasan-char.html>.

104. *Bangladesh Signs UN Deal to Help Rohingya Refugees on Island*, ONE (Oct. 9, 2021), <https://oneonline.mv/en/53872>.

105. *COVID-19 vaccinations begin in Bangladesh’s Rohingya refugee camps*, UN REFUGEE AGENCY (Aug. 11, 2021), <https://www.unhcr.org/asia/news/press/2021/8/6113a79f4/covid-19-vaccinations-begin-in-bangladeshs-rohingya-refugee-camps.html>.

106. *Myanmar COVID Vaccination Rollout Leaves Rohingya Waiting*, THE STAR (Aug. 11, 2021), <https://www.thestar.com.my/news/world/2021/08/11/myanmar-covid-vaccination-rollout-leaves-rohingya-waiting> (the Rohingya left in camps in Myanmar, the possibility of vaccinations remains distant).

107. *They Warned Their Names Were on a Hit List. They Were Killed.*, N.Y. TIMES (Nov. 14, 2021), <https://www.nytimes.com/2021/11/14/world/asia/rohingya-refugees-bangladesh.html>.

108. *Id.*

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On a more hopeful note, on November 18, 2021, the UN General Assembly Third Committee<sup>109</sup> adopted a draft resolution entitled *The Situation of Human Rights of Rohingya Muslims and Other Minorities in Myanmar*.<sup>110</sup> This resolution calls upon the Tatmadaw to take steps to ameliorate the situation faced by Rohingya, including calls to end all violations of international law; ensure the protection of human rights, investigate the atrocities that have occurred, ensure the safe return of the Rohingya, review and reform the 1982 Citizenship Law as it relates to the Rohingya restoring them to citizenship; dismantle the camps in Rakhine State for internally displaced persons; and allow them to return to their homes.<sup>111</sup> While these goals are laudable, what the Rohingya need most is action by international bodies to obtain accountability for the genocide of the Rohingya, to safely return the Rohingya to Myanmar, and to restore Myanmar's democratically elected government.

## **VI. Access to COVID-19 Medicines and Vaccines as a Human Right**

Article 25(1) of the Universal Declaration of Human Rights, which is binding on all United Nations (UN) Member States, recognizes the right to health and access to medical care as fundamental human rights. Article 12 of the International Covenant on Economic, Social, and Cultural Rights mandates that all persons should enjoy the highest attainable standard of physical and mental health.<sup>112</sup> The UN Human Rights Committee (UN/HRC), which oversees implementation and interpretation of the International Covenant on Civil and Political Rights, has called on States to take necessary action to provide access to life-saving medicines in order to fulfill the inherent "right to life" provisions of Article 6.<sup>113</sup> Meanwhile, Goal 3 of the UN Sustainable Development Goals seeks to ensure healthy lives and promote the wellbeing of individuals at every age through "access to safe, effective, quality and affordable essential medicines and vaccines for all."<sup>114</sup>

The COVID-19 pandemic has underscored how the basic human right to health is honored more in the breach than in practice. Pledges to provide vaccine dosages for free through the multilateral COVAX Facility for at least twenty percent of people in the world's poorest countries in 2021 fell

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109. U.N. GAOR, 76th Sess., *supra* note 88.

110. *Id.* (The resolution was co-sponsored by 107 countries. It was joined by the European Union and the Organization for Islamic Cooperation.)

111. *Id.*

112. G.A. Res. 2200A (XXI), at 4 (Dec. 16, 1966).

113. General Comment No. 36 on Article 6, UN HUM. RTS. COUNCIL, <https://www.ohchr.org/en/hrbodies/ccpr/pages/ge36-article6righttolife.aspx> (last visited May 4, 2022).

114. *See*, Target 3.8 under Goal 3 in Transforming Our World: The 2030 Agenda for Sustainable Development, UN, UA/RES/70/1 (Sep. 25, 2015), <https://sdgs.un.org/2030agenda>.

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short.<sup>115</sup> Instead, many governments shortsightedly prioritized supplying domestic markets, as if the coronavirus respects borders.<sup>116</sup> A similar phenomenon occurred with medications to treat COVID-19 and the provision of personal protective equipment, such as face masks, and health-related equipment and technology.

In May 2021 the Biden administration announced support for an Indian and South African-led effort to waive protections guaranteed by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of the World Trade Organization (WTO) for COVID-19 vaccines, the waiver is presently opposed by, among others, the European Union, Switzerland, and the United Kingdom. A waiver is also impracticable given most developing countries do not have the manufacturing and technical capacity or finances to produce vaccines. Accordingly, a waiver by itself might only exacerbate dependence on India, for example, which forced its vaccine manufacturers to breach obligations to the COVAX Facility in response to the Delta variant amid an explosion in Indian infection rates earlier in 2021.<sup>117</sup> A waiver could also exacerbate the current backlog in accessing limited supplies of the active pharmaceutical ingredients needed to produce vaccines.

A more effective Biden policy would leverage the billions of dollars in taxpayer money the U.S. government directed to companies to successfully develop COVID-19 vaccines. Such a move would force pharmaceutical companies to either license the knowledge to manufacturers in developing nations through technology transfer agreements and/or pledge a portion of their output to poorer nations for free or below cost. Breaking patents at the beginning of their life cycle, however, could seriously erode the incentive for future research and development of new and innovative medical treatments. Licensing agreements are also compatible with the 2001 Doha Declaration on the TRIPS Agreement and Public Health that permits the issuance of compulsory licenses on patents in response to a public health emergency. Governments can use this flexibility to authorize local manufacturing of a medication or vaccine upon adequate remuneration to the non-consenting patent holder. In addition, following amendments that entered into force on January 23, 2017, Article 31bis (and an affiliated Annex and Appendix) to the TRIPS Agreement provides the legal basis for WTO members to grant special compulsory licenses exclusively for the production and export of affordable generic medicines and vaccines to other member states that cannot domestically produce them in sufficient quantities. In May 2021, for example, Bolivia informed the TRIPS Council it intended to import a

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115. *Covax: How Many Covid Vaccines Have The US and the Other G7 Countries Pledged?*, BBC (Sept. 23, 2021), <https://www.bbc.com/news/world-55795297>.

116. *Id.*

117. Chris Kay & Dhvani Pandya, *How Errors, Inaction Sent a Deadly Covid Variant Around the World*, BLOOMBERG (Dec. 28, 2021), <https://www.bloomberg.com/news/features/2021-12-29/how-delta-variant-spread-in-india-deadly-errors-inaction-covid-crisis>; see also *Covax*, *supra* note 115.

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generic version of Johnson & Johnson's COVID-19 vaccine made by a Canadian company under a compulsory license.<sup>118</sup>

Efforts by Latin American countries such as Argentina, Brazil, Mexico, and Cuba to develop new COVID-19 vaccines may have a bigger impact in widening access to vaccines in developing nations than a TRIPS waiver or even compulsory licenses.<sup>119</sup> In August 2021, China's Sinovac announced plans to construct an R&D facility in the northern port city of Antofagasta, Chile, as well as a manufacturing plant in Chile's capital, Santiago, to produce vaccines, including its CoronaVac, for distribution throughout South America.<sup>120</sup> Chinese vaccines helped make Chile currently among the world's top ten countries with the most vaccinated residents.<sup>121</sup> Cuba also enjoys that distinction, but as a result of domestically produced vaccines.<sup>122</sup>

### VII. U.S. Corporate Transparency Act

On January 1, 2021, Congress overrode a Presidential veto to enact the Corporate Transparency Act (CTA) as part of the Anti-Money Laundering Act of 2020 (AMLA).<sup>123</sup> The CTA is landmark legislation, requiring most privately held U.S. for-profit entities with twenty or fewer employees to report—and to update thereafter—certain personal identification information of the ultimate beneficial owners of twenty-five percent or more of the entity.<sup>124</sup> Reports are to be made to the U.S. Financial Crimes Enforcement Network of the Department of the Treasury (FinCEN), which will maintain the information in a secure, nonpublic database available to law enforcement and government regulators under certain conditions.

The CTA was adopted in response to perceived misuse of corporate anonymity by persons engaging in money laundering, financing of terrorism,

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118. *Bolivia Outlines Vaccine Import Needs in Use of WTO Flexibilities to Tackle Pandemic*, WORLD TRADE ORG. (May 12, 2021), [https://www.wto.org/english/news\\_e/news21\\_e/dgno\\_10may21\\_e.htm](https://www.wto.org/english/news_e/news21_e/dgno_10may21_e.htm); Allison Martell, *Bolivia Signs J&J Vaccine Deal with a Twist – It Needs WTO Patent Waiver*, REUTERS (May 11, 2021), <https://www.reuters.com/world/americas/bolivia-signs-jj-vaccine-deal-with-twist-someone-else-would-make-it-2021-05-11/>.

119. See, *The COVID-19 Vaccine Race-Weekly Update*, GAVI, <https://www.gavi.org/vaccineswork/covid-19-vaccine-race> (last visited May 4, 2022); see also, *PAHO Selects Centers in Argentina, Brazil to Develop COVID 19- mRNA Vaccines*, PAN AM. HEALTH ORG. (Sep. 21, 2021), <https://www.paho.org/en/news/21-9-2021-paho-selects-centers-argentina-brazil-develop-covid-19-mrna-vaccines>.

120. Fabian Cambero, *China's Sinovac to Invest \$60 Million in Vaccine Facility in Chile*, REUTERS (Aug. 4, 2021), <https://www.reuters.com/article/us-health-coronavirus-chile-sinovac-biot/chinas-sinovac-to-invest-60-million-in-vaccine-facility-in-chile-idUSKBN2F51YJ>.

121. See, *Coronavirus (COVID-19) Vaccinations*, <https://ourworldindata.org/covid-vaccinations>.

122. *Id.*

123. The CTA and the AMLA were adopted as part of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283 (H.R. 6395, 134 Stat. 338, 116th Cong. 2d Sess. [hereinafter *NDAA*] (The CTA is at §§ 6401–6403 of the *NDAA*)).

124. *Id.*

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human trafficking and human rights abuses, tax fraud, corruption, and acts harming U.S. national security interests, among other things.<sup>125</sup> Some of the salient terms and provisions of the CTA are discussed below.

*Beneficial Owner:* Beneficial owners for purposes of the CTA are individuals who (i) exercise substantial control over an entity, or (ii) own or control twenty-five percent or more of the ownership interests in the entity.<sup>126</sup>

*Reporting Company:* Reporting companies include most small, privately-held, for-profit corporations, limited liability companies, “or other similar” entities formed by filings with a state secretary of state (or similar office of an Indian Tribe).<sup>127</sup> There are twenty-three enumerated exceptions, which exclude, among others, listed companies, regulated financial sector entities, public utilities, trusts, non-profits,<sup>128</sup> and certain larger entities with a physical presence in the United States (entities with (i) more than twenty full-time employees in the United States, (ii) more than five million in gross revenue in the prior year, and (iii) an operating presence at a physical office in the United States).<sup>129</sup> The CTA will apply to non-U.S. entities that register to do business in the United States.<sup>130</sup>

*Information required:* Reports must include<sup>131</sup> for each beneficial owner and “applicant”<sup>132</sup>: (i) full legal name, (ii) date of birth, (iii) business or residential address, and (iv) a unique identifying number from certain identification documents: (A) a U.S. passport, (B) an identification document issued by a state, local, or Tribal government, (C) a state driver’s license, or (D) if the individual does not have one of those documents, a foreign passport.<sup>133</sup> Information must be updated no less than once a year.<sup>134</sup>

*Access to Information:* FinCEN is required to maintain the information in a secure, non-public database, which will be available to: (1) federal agencies engaged in national security, intelligence, or law enforcement activities; (2)

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125. See NDAA § 6401(3)-(5) (a summary of the concerns posed by corporate anonymity which Congress sought to address. In addition to concerns with anonymous companies articulated by human rights and anti-corruption activists, national security concerns were increasingly expressed). In addition, traditional law enforcement concerns with corporate anonymity were outlined by the U.S. Treasury in its National Strategy for Combating Terrorist and Other Illicit Financing 2020. See U.S. DEP’T OF TREASURY, TREASURY IN ITS NATIONAL STRATEGY FOR COMBATING TERRORIST AND OTHER ILLICIT FINANCING 2020 14 (2020), <https://home.treasury.gov/system/files/136/National-Strategy-to-Counter-Illicit-Financev2.pdf>.

126. 31 U.S.C. § 5336(a)(3).

127. 31 U.S.C. § 5336(a)(11).

128. See I.R.C. § 501(c); see also § 527(e)(1).

129. 31 U.S.C. § 5336(a)(11).

130. 31 U.S.C. § 5336(a)(11)(A)(ii).

131. 31 U.S.C. § 5336(b)(2)(A).

132. 31 U.S.C. § 5336(a)(2) (An “applicant” is a person who files an application to form corporation, limited liability company “or similar entity,” or who files an application to register a similar foreign entity to do business in the United States.).

133. 31 U.S.C. § 5336(a)(1) (Individuals will also be able to obtain a unique FinCEN identifier, once the other information has been supplied to FinCEN; 31 U.S.C. § 5336(b)(3).

134. 31 U.S.C. § 5336(b)(1)(D).

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state, local, or Tribal law enforcement agencies, if a court authorizes the agency to seek the information in a criminal or civil investigation; and (3) financial institutions subject to customer due diligence requirements, with the consent of the reporting company (and under certain circumstances, to federal functional regulators of financial institutions).<sup>135</sup> Information may also be provided to foreign law enforcement agencies, prosecutors, or judges pursuant to treaty, agreement, or convention, or in response to an official request from enforcement, judicial, or prosecutorial authorities in “trusted foreign countries.”<sup>136</sup> Requesting agencies will be required to establish systems for information security and training and audit trails to verify that requested information has been used appropriately.<sup>137</sup> Unauthorized use or disclosure of the information is subject to civil penalties of up to \$500 for each day the violation continues or is not remedied, and criminal fines and imprisonment that can range up to \$500,000 and ten years in prison.<sup>138</sup> By contrast, failure to report can result in civil penalties of up to \$500 per day, and fines of up to \$10,000 and two years in prison.<sup>139</sup>

*Effective Dates:* Treasury was under an obligation to promulgate regulations for corporate ownership reporting not later than one year after the CTA comes into effect—i.e., by January 1, 2022.<sup>140</sup> The regulatory project, however, is ongoing, with a first set of regulations proposed by Treasury for comment in December 2021, and at least two further sets of regulations still to be proposed before the CTA disclosure system can become effective.<sup>141</sup> A reporting company formed or registered after the eventual effective date of the regulations should file its report with FinCEN at the time of formation or registration.<sup>142</sup> Reporting companies formed or registered before the effective date of the regulations will be required to file their reports not later than two years after the effective date of the regulations.<sup>143</sup>

*FinCEN Customer Due Diligence Rule:* The FinCEN Customer Due Diligence (CDD) Rule already requires “covered financial institutions to identify and verify the identity of the natural persons (known as beneficial owners) of legal entity customers who own, control, and profit from companies when those companies open accounts.”<sup>144</sup> The CTA extends the

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135. 31 U.S.C. § 5336(c)(2)(B).

136. 31 U.S.C. § 5336(c)(2)(B)(ii).

137. 31 U.S.C. § 5336(c)(3).

138. 31 U.S.C. § 5336(h)(3)(B).

139. 31 U.S.C. § 5336(h)(3)(A).

140. 31 U.S.C. § 5336(b)(5).

141. Beneficial Ownership Information Reporting Requirements, 86 Fed. Reg. 69,920, 69,921 (U.S. Dep’t of Treasury Dec. 8, 2021), <https://www.federalregister.gov/documents/2021/12/08/2021-26548/beneficial-ownership-information-reporting-requirements>.

142. 31 U.S.C. § 5336(b)(1)(C).

143. 31 U.S.C. § 5336(b)(1)(B).

144. *Information on Complying with the Customer Due Diligence (CDD) Final Rule*, FINANCIAL CRIMES ENFORCEMENT NETWORK (last accessed Nov.28, 2021), <https://www.fincen.gov/resources/statutes-and-regulations/cdd-final-rule>; see also, *FinCEN Reissues Real Estate Geographic*



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CDD Rule’s beneficial ownership identification and verification regime from a customer-by-customer collection of information by financial institutions to a new national database, albeit the new national database will only cover the small, privately-held, for-profit entities that are “reporting companies” under the CTA. The CTA requires FinCEN to bring the CDD Rule “into conformance” with the CTA within one year after promulgating the CTA regulations.<sup>145</sup>

### VIII. UN Universal Periodic Review of the United States

The Universal Periodic Review (UPR) is a unique mechanism of the UN Human Rights Council where the human rights record of a country is reviewed by member States. The U.S. government participated in the UPR process in 2011 and 2015, and was reviewed again in November 2020.<sup>146</sup> The Trump administration did not submit a mid-term report detailing implementation of recommendations from the last UPR, as is the norm, and delayed in providing its full-term report, which was not submitted until August 2020.<sup>147</sup>

In addition to the government reports, U.S. civil society organizations submit “stakeholder” reports, which attempt to present the UN member States with an accurate picture of the human rights situation, and share information and evidence about human rights violations in the United States. For the 2020 UPR, there were more than 100 stakeholder reports<sup>148</sup> discussing a range of human rights issues, including the right to health, the right to water, mass incarceration, systemic racism, immigration, and violence against women. After submission of such stakeholder reports, civil society organizations may organize meetings with embassies and missions to lobby governments. This is one method to ensure that specific human rights issues are addressed during the review session or when questions are presented to the State under review in advance of the review session. Advocates also articulate recommendations when meeting with embassies and missions. Some of these embassies and missions utilize these suggestions when proposing recommendations to the member State under review. The recommendations made by member States during the review raise awareness of those issues and put pressure on the State under review to acknowledge the issues and respond to them.

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*Targeting Orders for 12 Metropolitan Areas*, FINANCIAL CRIMES ENFORCEMENT NETWORK (last accessed Nov. 28, 2021), <https://www.fincen.gov/news/news-releases/fincen-reissues-real-estate-geographic-targeting-orders-12-metropolitan-areas-3>.

145. NDAA § 6403(d).

146. *Universal Periodic Review-United States of America*, UN HUM. RTS. COUNCIL, <https://www.ohchr.org/en/hr-bodies/upr/us-index> (last visited May 4, 2022).

147. U.S., Nat’l Rep. Submitted in Accordance with Paragraph 5 of the Annex to Hum. Rts. Council Resol. 16/21, U.N. Doc. A/HRC/WG.6/36/USA/1 (2020).

148. See U.N. GAOR, 76th Sess., *supra* note 88.

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The U.S. government's human rights record was reviewed on November 9, 2020.<sup>149</sup> Over 100 countries made comments and submitted 347 recommendations to the US government regarding human rights violations in the United States.<sup>150</sup> Notably, there were numerous recommendations concerning systemic racism, reproductive rights, immigration, LGBTQ rights, racial profiling and police violence, and ratification of treaties.<sup>151</sup>

On March 17, 2021, the Biden Administration accepted in whole or in part a total of 280 recommendations out of the 347,<sup>152</sup> indicating a commitment to implementing those recommendations. Time will tell if that commitment will be fulfilled, but the acceptance of the recommendations is a step forward for the realization of human rights.

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149. *Id.*

150. *See id.*

151. *Id.* ¶ 26.

152. *U.S. Statement During the Adoption of the Third UPR of the United States*, U.S. MISSION TO INT'L ORGS. IN GENEVA (Mar. 17, 2021), <https://geneva.usmission.gov/2021/03/17/us-upr-1/>

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## **Customs Law**

ADRIENNE BRAUMILLER, DAVID J. GLYNN, GEOFFREY GOODALE,  
JENNIFER HORVATH, HAROLD JACKSON, GEORGE TUTTLE III, AND  
DANA WATTS\*

This article reviews some of the most significant international legal developments made in the area of customs law in 2021.

### **I. Introduction**

Under the dual backdrop of growing pressure on U.S. supply chains and ports due to the COVID-19 pandemic and ongoing trade tensions between the United States and China, major developments to customs law affected U.S. imports and importers. Those developments originated from legislative, judicial, executive, and administrative actions to apply and advance U.S. customs law. In many instances, they also furthered important objectives, including implementing free trade agreements, enhancing import compliance and enforcement, and even supporting foreign policy initiatives. This article summarizes the most important developments to customs law in 2021.

### **II. USMCA Update and Related Customs Regulatory Developments**

The United States-Mexico-Canada Agreement (USMCA) went into effect July 1, 2020.<sup>1</sup> In the last year, some of its provisions have been utilized for the first time, and new customs rules impacting goods from Canada and Mexico have been proposed.

On July 6, 2021, U.S. Customs and Border Protection (CBP) issued a notice of proposed rulemaking and request for comments to change the rules for non-preferential (i.e., non-USMCA or other free trade agreement) country of origin (COO) determinations for goods imported from Mexico or

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\* Adrienne Braumiller, Braumiller Law Group PLLC; David J. Glynn, Holland & Hart LLP; Geoffrey Goodale, Duane Morris LLP; Jennifer Horvath, Braumiller Law Group PLLC; Harold Jackson, Braumiller Law Group PLLC; George Tuttle III, Law Offices of George R. Tuttle, A.P.C.; and Dana Watts, Miller & Chevalier Chartered.

1. Non-Preferential Origin Determinations for Merchandise Imported from Canada or Mexico for Implementation of the Agreement Between the United States of America, the United Mexican States, and Canada (USMCA), 86 Fed. Reg. 35,422 (U.S. Customs & Border Prot. & U.S. Dept's of Treasury July 6, 2021) [hereinafter Non-Preferential Origin Determinations for Merchandise].

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Canada.<sup>2</sup> Under the new rules, such determinations would be based on tariff shift tests found in former North American Free Trade Agreement (NAFTA) “marking rules” promulgated in 19 C.F.R. Part 102.<sup>3</sup> Currently, non-preferential COO determinations for imports into the United States from any country are subject to the “substantial transformation test”—met if an article’s manufacturing or assembly process gives it a new “name, character, or use”—including imports from Canada and Mexico.<sup>4</sup> The test is notoriously subjective and difficult to apply, despite decades of court and administrative rulings interpreting it.<sup>5</sup>

The tariff shift tests in Part 102 are generally more predictable and easier to meet than the substantial transformation test.<sup>6</sup> If implemented, the new rules could give products further manufactured in Canada or Mexico an advantage over products further manufactured in other countries due to the increased certainty in determining the COO—and they could even give Mexican and Canadian products a greater chance of avoiding Section 301 tariffs. This is because Chinese components, used to make a product subject to Section 301 tariffs if the COO is China, must be “substantially transformed” in a third country before importation into the U.S. to avoid the tariffs.<sup>7</sup> But if the new rules are implemented, some Chinese components further manufactured in Canada or Mexico could be considered products of those countries even with less substantial further manufacturing compared to other countries.

Unlike NAFTA, the USMCA does not contain any marking rules. Many speculated that the Part 102 special marking rules for goods from Canada and Mexico would be void when the USMCA replaced NAFTA and that the marking rules applicable to goods from all other countries would apply instead.<sup>8</sup> But pursuant to the proposed new rules, goods from Canada and Mexico—regardless of whether they qualify for duty-free treatment under the USMCA—would continue to be marked according to Part 102.<sup>9</sup> The proposed new rules do not impact the COO for purposes of applying antidumping and countervailing duty orders to such goods.<sup>10</sup>

The USMCA contains a first-of-its-kind labor provisions enforcement mechanism called the Rapid Response Labor Mechanism (RRLM).<sup>11</sup> On May 12, 2021, the Office of the U.S. Trade Representative (USTR) issued

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2. *Id.*

3. *Id.* at 35,425.

4. *Id.* at 35,422.

5. *Id.* at 35,423–24.

6. 19 C.F.R. §§ 102.0 et seq.

7. Non-Preferential Origin Determinations for Merchandise, *supra* note 1 at 35,425.

8. *Id.*

9. *Id.*

10. Non-Preferential Origin Determinations for Merchandise, *supra* note 1, at 35,428.

11. See Agreement Between the United States of America, the United Mexican States, and Canada, Annex 31-A, Nov. 30, 2018, 134 Stat. 11, <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/31%20Dispute%20Settlement.pdf>.

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the first request for review under the RRLM.<sup>12</sup> The request was prompted by events surrounding a vote by workers at General Motors de México's Silao facility regarding their collective bargaining agreement.<sup>13</sup>

On July 8, 2021, the United States and Mexico agreed to a course of remediation, including a new vote.<sup>14</sup> The vote was held on August 17 and 18, 2021.<sup>15</sup> Federal inspectors from Mexico's Secretariat of Labor and Social Welfare oversaw the vote, with the International Labor Organization and Mexico's National Electoral Institute serving as vote observers, and the workers voted to reject the existing collective bargaining agreement.<sup>16</sup>

Less than a month later, the USTR filed its second request under the RRLM, alleging that a Tridonex facility in Matamoros was denying workers free association and collective bargaining rights.<sup>17</sup> USTR announced that an agreement with Mexico had been reached on August 10, 2021, providing severance, backpay, and a commitment to neutrality in future union elections.<sup>18</sup>

USMCA Article 23.6 states that Canada, Mexico, and the United States must "prohibit the importation of goods" that are "produced in whole or in part by forced or compulsory labor."<sup>19</sup> Canada seized its first shipment of goods—women's and children's clothing—suspected of being made using forced labor in 2021.<sup>20</sup> Canada Border Services Agency (CBSA), which works with the Labour Program of Employment and Social Development Canada to identify goods suspected of being made using forced labor, made

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12. Press Release, Office of the U.S. Trade Representative, United States Seeks Mexico's Review of Alleged Worker's Rights Denial at Auto Manufacturing Facility (May 12, 2021), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/may/united-states-seeks-mexicos-review-alleged-workers-rights-denial-auto-manufacturing-facility-0>.

13. *Id.*

14. Press Release, Katherine Tai, U.S. Trade Representative, Ambassador Tai and Secretary Walsh Applaud Successful First Course of Remediation under USMCA's Rapid Response Mechanism (Sept. 22, 2021), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/september/ambassador-tai-secretary-walsh-applaud-successful-first-course-remediation-under-usmcas-rapid>.

15. *Id.*

16. *Id.*

17. Press Release, Katherine Tai, U.S. Trade Representative, United States Seeks Mexico's Review of Alleged Freedom of Association Violations at Mexican Automotive Parts Factory (June 9, 2021), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/june/united-states-seeks-mexicos-review-alleged-freedom-association-violations-mexican-automotive-parts>.

18. Press Release, Katherine Tai, U.S. Trade Representative, United States Reaches Agreement with Mexican Auto Parts Company to Protect Workers' Rights (Aug. 10, 2021), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/august/united-states-reaches-agreement-mexican-auto-parts-company-protect-workers-rights>.

19. See *United States Mexico Canada Agreement, Article 23.6: Forced or Compulsory Labor*, OFF. OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/23%20Labor.pdf>.

20. Stephen Chase, *Canada Seizes Goods Made with Forced Labour from China; MPs Urge More Action for Uyghurs*, THE GLOB. AND MAIL (Nov. 15, 2021), <https://www.theglobeandmail.com/politics/article-canada-seizes-goods-made-with-forced-labour-from-china-mps-urge-more/>.

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the seizure.<sup>21</sup> Later, in November 2021, Supermax Healthcare Canada was asked to stop all imports into Canada, until it could prove that no forced labor was used in making its nitrile gloves.<sup>22</sup> These are some of the most significant USMCA-related developments forin 2021. Next year will no doubt bring further evolutions to this still new—and very important—free trade agreement.

### III. Customs Modernization Act of 2021

In 2021, proposed legislation was introduced in Congress that would significantly enhance the ability of CBP to secure national and economic security, enhance data integrity, confront international adversaries, and better facilitate trade by utilizing emerging technologies.<sup>23</sup> As discussed below, the objectives of the Customs Modernization Act of 2021 (CMA) are to resolve existing data collection constraints, expand the legal use of trade data, increase supply chain visibility and accountability, improve enforcement effectiveness, and direct federal agencies to share trade data.<sup>24</sup>

The CMA would improve CBP's ability to collect and use information.<sup>25</sup> Significantly, CBP would be authorized to collect additional information from additional parties, including information related to the sale, purchase, transportation, importation, or warehousing of a product through a commercial or marketing platform.<sup>26</sup> CBP would be permitted to utilize such information for any lawful purpose, including commercial enforcement, and CBP would have the power to impose penalties of \$5,000 for the first violation and \$10,000 for subsequent violations.<sup>27</sup>

CBP also would be authorized to require electronic filing of all data related to an entry and to require a single entry filing of all data, although CBP would retain the ability to waive the electronic filing requirement and allow for paper- based filing in limited circumstances at CBP's discretion.<sup>28</sup> Only the importer of record (IOR) or its agent (e.g., customs broker) would be permitted to make the electronic filings, and the IOR or its agent would be required to certify electronically-filed entry data or to sign the entry if the

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21. Canada Border Services Agency, Memorandum D9-1-6, Goods Manufactured or Produced by Prison or Forced Labor (May 28, 2021), <https://www.cbsa-asfc.gc.ca/publications/dm-md/d9/d9-1-6-eng.html>.

22. Caitlin Taylor, Katie Pedersen, & Eric Szeto, *Canada Halts Imports of Goods Linked to Forced Labour from China, Malaysia*, CBC (Nov. 17, 2021), <https://www.cbc.ca/news/canada/canada-stop-forced-labour-imports-1.6252283>.

23. See SENATE OFFICE OF LEGISLATIVE COUNSEL, ROS21H27, CUSTOMS MODERNIZATION ACT OF 2021 (Nov. 3, 2021).

24. See Customs Modernization Act of 2021, S. 1159, 117th Cong. (2021) [hereinafter CMA 2021].

25. *Id.*

26. *Id.* § 101.

27. *Id.*

28. *Id.* § 102.

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data is not electronically filed.<sup>29</sup> Importantly, with respect to documentation or information submitted in advance of entry (Advance Data), the IOR or its agent would be permitted to convert such Advance Data into an entry,<sup>30</sup> and CBP would be authorized to use Advance Data for any lawful purpose, including commercial enforcement.<sup>31</sup>

The CMA also would expand recordkeeping requirements to additional parties that facilitate cross-border transactions, including those that submit, transmit, or otherwise make available or visible to CBP documentation or information under U.S. customs and trade laws or that own or operate a commercial or marketing platform or marketplace through which imported goods are offered for sale or purchase.<sup>32</sup> Significantly, the CMA provides that, if a person fails to comply with a demand for records, CBP may use an inference adverse to that person's interests in (1) ascertaining the correctness of any entry; (2) determining the person's liability for fines, penalties, duties, fees, and taxes; and (3) promoting compliance with U.S. laws.<sup>33</sup>

CBP's powers with respect to enforcement of intellectual property rights (IPR) also would be enhanced if the CMA was implemented in its current form.<sup>34</sup> To begin with, CBP would be able to share information on IPR-related import violations provided or shared by online marketplaces, e-commerce platforms, express consignments operators, freight forwarders, and other entities that facilitate imports or the sale of imports to verify the legitimacy of those shipments.<sup>35</sup> The CMA also would require counterfeit imports or exports to be seized and, in the absence of the written consent of the owner of the mark or copyright being infringed, to be summarily forfeited.<sup>36</sup> In addition, the CMA would clarify that persons who are in any way concerned with infringing or counterfeit activities are subject to civil penalties.<sup>37</sup> In a rare instance where CBP's powers would be curtailed, however, the CMA would require that challenges to Section 337 exclusion order enforcement be filed with the U.S. International Trade Commission.<sup>38</sup>

Importantly, the CMA would make some significant changes to how CBP handles penalty matters.<sup>39</sup> For example, the CMA would remove the standard and maximum penalties for gross negligence, and it would require that CBP redefine the standards for negligence and fraud and align the definition of fraud with standards in other civil fraud statutes.<sup>40</sup> The CMA also would establish standards for issuing penalty determinations, which

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29. *Id.*

30. *Id.*

31. CMA 2021 § 103.

32. *Id.* § 105.

33. *Id.* § 106.

34. *See id.* at §§ 107, 202, 205.

35. *Id.* § 107.

36. *Id.* at § 202.

37. *Id.*

38. CMA 2021 § 205.

39. *See id.* §§ 204, 206, 207.

40. *Id.* § 206.



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would include an exception to requiring pre-penalty notices if the claim is \$500,000 or higher per regulation, and it would permit enforcement of fraudulent violations at the U.S. Court of International Trade without CBP having to issue a penalty notice.<sup>41</sup> In addition, the CMA would expand liability to any person in any way concerned with unlawful acts, and it would increase civil penalties for violations of arrival, reporting, entry, or clearance requirements (up to the value of the subject goods in some instances).<sup>42</sup> Moreover, the CMA would allow CBP to summarily forfeit items found to violate the Food, Drug, and Cosmetic Act and other counterfeit goods.<sup>43</sup>

The CMA also would provide additional powers to CBP with respect to entities that have been suspended or debarred by the federal government.<sup>44</sup> To begin with, the CMA would permit CBP to prevent suspended or debarred persons from participating in the IOR program.<sup>45</sup> The CMA also would grant CBP the power to deny administrative exemptions for imports involving suspended or debarred persons.<sup>46</sup> In addition, the CMA would authorize CBP to issue special rules for entry and declaration of goods whose importation is caused or facilitated by suspended or debarred persons.<sup>47</sup>

As the discussion above indicates, if enacted in its current form, the CMA would augment CBP's powers in numerous ways that could have significant implications for importers and exporters. Importantly, the Congressional sponsors of the CMA have expressed a willingness to engage in discussions with interested parties and potentially to make changes to the text of the CMA, and given this fact, it may be beneficial for companies, organizations, and practitioners to seek to enter into such dialogue with the Congressional sponsors.

#### **IV. Section 232 Tariffs on Imported Steel and Aluminum Products**

In March 2018, President Trump issued Proclamations 9704<sup>48</sup> and 9705<sup>49</sup> announcing concurrence with the Secretary of Commerce's determination that aluminum and steel articles were being imported into the United States in quantities and under circumstances that threaten to impair the national security of the United States. Under authority of Section 232 of the Trade Expansion Act of 1962, the President authorized additional tariffs of 25

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41. *Id.*

42. *Id.* § 207.

43. *Id.* § 204.

44. *See id.* at § 201.

45. *Id.*

46. CMA 2021 § 201.

47. *Id.*

48. Proclamation No. 9704, Adjusting Imports of Aluminum into the United States, 83 Fed. Reg. 11,619 (Exec. Off. of the President Mar. 8, 2018).

49. Proclamation No. 9705, Adjusting Imports of Steel into the United States, 83 Fed. Reg. 11,625 (Exec. Off. of the President Mar. 8, 2018).

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percent on steel articles and 10 percent on aluminum articles imported from most countries,<sup>50</sup> effective March 23, 2018. Legal challenges arguing that these tariffs were the result of unconstitutional delegation of authority to the president that allowed too much discretion were unsuccessful.<sup>51</sup> The tariffs remain in place at the time of this article's submission.<sup>52</sup>

Presidential authority was again challenged following issuance of Proclamation 9772<sup>53</sup> on August 10, 2018, when the Section 232 tariffs on steel articles imported from Turkey were raised from 25 percent to 50 percent effective August 13, 2018. Transpacific Steel LLC (Transpacific), an importer of Turkish steel, filed a lawsuit at the Court of International Trade (CIT), claiming that the imposition of the tariff increase was unlawful because Proclamation 9772 was issued outside the mandatory statutory deadlines for the President to take such action.<sup>54</sup> The CIT sided with Transpacific and found that the President's actions were untimely and violated the Equal Protection Clause of the Fifth Amendment as lacking a rational means of addressing the national security concerns underlying imposition of these Section 232 tariffs.<sup>55</sup> This ruling constituted the first successful challenge to the tariffs<sup>56</sup>; however, on July 13, 2021, the U.S. Court of Appeals for the Federal Circuit (CAFC) issued its opinion on appeal reversing the CIT.<sup>57</sup> The CAFC found that the President has broad authority to act under Section 232 based on national security concerns and that there was a rational basis for the increase in tariffs on Turkish imports.<sup>58</sup> The case was remanded to the CIT.<sup>59</sup>

On April 5, 2021, the CIT once again found the President's imposition of Section 232 tariffs was unlawful because the statutory deadline to take such action was exceeded.<sup>60</sup> The ruling applies only to a specific subset of imports—steel and aluminum derivatives such as nails, tacks, staples, wires, and cables.<sup>61</sup> The decision is subject to appeal but signals the unwillingness

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50. Exceptions from Section 232 tariffs are in place for imports from Argentina, Australia, Brazil, Canada, Mexico, and South Korea.

51. See *American Inst. for Int'l Steel, Inc. v. United States*, 376 F. Suppl. 3d 1335, 1339–45 (Ct. Int'l Trade 2019) and *American Inst. for Int'l Steel, Inc. v. United States*, 2019-1727 (Fed. Cir. Feb. 28, 2020).

52. Proclamation No. 10,327, Adjusting Imports of Aluminum into the United States, 87 Fed. Reg. 1 (Exec. Off. of President Jan. 3, 2022); Proclamation No. 9772, Adjusting Imports of Steel into the United States, 83 Fed. Reg. 40,429 (Exec. Off. of President Apr. 1, 2018).

53. Proclamation No. 97,772, Adjusting Imports of Steel into the United States, 83 Fed. Reg. 40,429 (Exec. Off. of President Aug. 15, 2018).

54. *Transpacific Steel LLC, et. al. v. United States*, Slip Op. 20-98 (Ct. Int'l Trade 2020).

55. *Id.* at 1252–53, 1258, 1260.

56. *Id.* at 1260.

57. *Transpacific Steel LLC v. United States*, No. 20-2157 (Fed. Cir. 2020).

58. *Id.* at 1329, 1333–34.

59. *Id.* at 1336.

60. See *Primesource Building Produ PrimeSource*, 505 F. Supp. 3d at 1353; Proclamation No. 9980, 85 Fed. Reg. 5,281 (Jan. 24, 2020). *cts, Inc. v. United States, et. al.*, Slip Op. 21-36 (Ct. Int'l Trade 2021).

61. *PrimeSource*, 505 F. Supp. 3d at 1354.

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of the courts to allow the President unfettered authority to impose import tariffs based on national security concerns.<sup>62</sup>

On October 31, 2021, the United States and the European Union (EU) announced an interim agreement to relax Section 232 tariffs on European steel and aluminum articles and derivatives and EU retaliatory tariffs on various U.S. goods exported to Europe.<sup>63</sup> As part of the deal, the United States agreed to remove tariffs on EU steel and aluminum exports, effective January 1, 2022, and impose a tariff-rate quota (TRQ) system.<sup>64</sup> Under the TRQ, historically based volumes of EU steel and aluminum exports will enter the United States tariff free.<sup>65</sup> Items entered after the quota quantity is exceeded will be subject to Section 232 tariffs. Items granted exclusions from the tariffs will not be subject to the TRQ limits. The EU agreed to end retaliatory tariffs on imports of U.S. whiskey, orange juice, motorcycles, and jeans effective on a yet to be-announced date set by European Commission regulation. The United States is also in discussion with Japan and the United Kingdom on the negotiation of similar agreements.

The Department of Commerce continues to administer a Section 232 tariff exclusion process. Exclusions from the tariffs have been granted for items that are not available from U.S. sources. Exclusions are granted for a twelve-month period and may be renewed. Exclusions granted in the past fiscal year will be automatically extended through the end of 2023 without the need to submit a renewal request.<sup>66</sup> On December 14, 2020, the Department of Commerce published an Interim Final Rule revising the process for requesting exclusions.<sup>67</sup> The new rules create a more efficient approval process for approving exclusions where no objections have been filed, allow for more volume of excluded imports than designated through past usage, and modify the time standard for exclusion objectors to provide the same steel or aluminum article available from a foreign supplier.<sup>68</sup> The goal is to ensure the appropriateness of factors considered and the efficiency and transparency of the process employed in rendering decisions on exclusion requests.<sup>69</sup>

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62. U.S. DEP'T OF COM., ANNOUNCEMENT OF ACTIONS ON EU IMPORTS UNDER SECTION 232 (Oct. 31, 2021), <https://www.commerce.gov/sites/default/files/2021-10/US%20232%20EU%20Statement.pdf>.

63. See Press Release, Off. of U.S. Trade Representative, Steel & Aluminum U.S.-EU Joint Statement (Oct. 31, 2021), <https://ustr.gov/sites/default/files/files/Statements/US-EU%20Joint%20Deal%20Statement.pdf>

64. Press Release, U.S. Dep't of Com., Announcement of Actions on EU Imports Under Section 232 (Oct. 31, 2021), <https://www.commerce.gov/sites/default/files/2021-10/US%20232%20EU%20Statement.pdf>.

65. *Id.*

66. *Id.*

67. Section 232 Steel and Aluminum Tariff Exclusion Process, 85 Fed. Reg. 81,060 (U.S. Dep't of Com. Dec. 14, 2020).

68. *Id.*

69. *Id.*

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**V. 2021 Update on CBP's Force Labor Prevention Efforts**

Section 1307 of the Tariff Act of 1930 prohibits the importation of goods that are mined, produced, or manufactured wholly or in part in any foreign country by convict labor, forced labor, or indentured labor (forced labor).<sup>70</sup> CBP implements § 1307 through the issuance of Withhold Release Orders (WRO).<sup>71</sup> CBP issues a WRO when there is information presented that reasonably indicates that the merchandise being imported, or belonging to a class thereof, was produced in whole or in part using forced labor.<sup>72</sup> CBP detains shipments of goods suspected of being imported in violation of this statute.<sup>73</sup>

For goods that are detained by CBP under a WRO, an importer may choose to export or abandon the goods,<sup>74</sup> or it may submit evidence that the goods in question were not produced “wholly or in part” by forced labor.<sup>75</sup> CBP has three months from the date that the goods were imported to determine whether the proof furnished is sufficient to establish the admissibility of the merchandise. If proof of admissibility has not been timely submitted, or if the proof furnished does not establish the admissibility of the merchandise, the port director will notify the importer that the merchandise is excluded from entry. The importer then has sixty days to export the merchandise or challenge the exclusion by filing a protest.<sup>76</sup> If the protest is denied, the importer may challenge the denial before the Court of International Trade. If the importer takes no action the merchandise will be deemed to have been abandoned and will be destroyed.<sup>77</sup>

In 2020, fifteen WROs were issued by CBP, nine of which involved cotton products originating from China, mostly products from the Xinjiang region.<sup>78</sup> Three WROs involved disposable gloves and palm oil from producers in Malaysia. The remaining three WROs involved seafood from Taiwanese-affiliated fishing vessels. In FY 2021, CBP expanded its efforts to prevent the entry of foreign goods produced by forced labor by issuing eight new WROs, including silica-based products made by Hoshine Silicon Industry Co. (Hoshine) and its subsidiaries.<sup>79</sup> The order covers materials as

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70. 19 U.S.C. § 1307.

71. *Forced Labor*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/trade/forced-labor> (last visited Mar. 28, 2022).

72. 19 C.F.R. § 12.42(e).

73. *CBP Issues Region-Wide Withhold Release Order on Products Made by Slave Labor in Xinjiang*, U.S. CUSTOMS & BORDER PROT. (Jan. 13, 2021), <https://www.cbp.gov/newsroom/national-media-release/cbp-issues-region-wide-withhold-release-order-products-made-slave>.

74. 19 C.F.R. § 12.44(a).

75. 19 C.F.R. § 12.43.

76. *See* 19 USC § 1514(a).

77. 19 C.F.R. § 12.44(b).

78. *Withhold Release Orders and Findings List*, U.S. CUSTOMS AND BORDER PROT., <https://www.cbp.gov/trade/programs-administration/forced-labor/withhold-release-orders-and-findings> (A complete list of all the WROs issued by CBP) (last visited December 7, 2021).

79. *Id.*

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well as final goods, derived from or produced using Hoshine’s silica-based products, regardless of where the materials and final goods were produced.<sup>80</sup> “Silica is a basic raw material [used] in the manufacturing of a wide variety of electronic goods, including semiconductors, printed circuit boards, batteries, solar panels, and virtually all consumer and industrial electronics.”

In 2021, CBP issued additional WROs for disposable gloves produced in Malaysia by several different manufacturers. In January 2021, CBP issued a WRO against cotton and apparel products made with such cotton produced in the Xinjiang Uyghur Autonomous Region of China.<sup>81</sup> In September 2021, CBP lifted its forced labor finding for Top Glove Corporation Bhd.<sup>82</sup> following the submission of evidence that the indicators of forced labor at its Malaysian facilities had been resolved.

In FY 2021, CBP detained 1,469 shipments for possible forced labor concerns.<sup>83</sup> CBP has not released statistics on the number of detained shipments released versus those that were excluded, exported, or destroyed. The ability of importers to submit sufficient supply chain evidence to CBP to support a claim that the goods were not produced with force labor has proven particularly challenging, as CBP has said in a protest decision involving Section 321(b) of the Countering America’s Adversaries Through Sanctions Act (CAATSA)<sup>84</sup> and 22 U.S.C. § 9241(a), that the importer is required to show by clear and convincing evidence that the detained merchandise, in this case, apparel, was not produced with forced labor.<sup>85</sup> “Clear and convincing evidence is a higher standard of proof than a preponderance of evidence, and generally means that a claim or contention is highly probable.”<sup>86</sup> In HQ H317249, CBP concluded that a third-party audit report submitted by a U.S. importer was insufficient to demonstrate that the detained goods were not produced using forced labor.

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80. See *Hoshine Silicon Industry Co. Ltd Withhold Release Order Frequently Asked Questions*, U.S. CUSTOMS AND BORDER PROT., <https://www.cbp.gov/trade/programs-administration/forced-labor/hoshine-silicon-industry-co-ltd-withhold-release-order-frequently-asked-questions> [hereinafter *Hoshine Silicone FAQs*] (last visited Dec. 7, 2021).

81. *CBP Issues Region-Wide Withhold Release Order on Products Made by Slave Labor in Xinjiang*, U.S. CUSTOMS AND BORDER PROT., <https://www.cbp.gov/newsroom/national-media-release/cbp-issues-region-wide-withhold-release-order-products-made-slave> (last visited Dec. 7, 2021).

82. *CBP Modifies Forced Labor Finding on Top Glove Corporation Bhd.*, U.S. CUSTOMS AND BORDER PROT., <https://www.cbp.gov/newsroom/national-media-release/cbp-modifies-forced-labor-finding-top-glove-corporation-bhd> (last visited Dec. 7, 2021).

83. *Forced Labor*, U.S. CUSTOMS AND BORDER PROT., <https://www.cbp.gov/trade/forced-labor> (last visited May 1, 2022) (The detention information provided above covers forced labor related detentions that occurred between October 1, 2020, and September 30, 2021.).

84. Section 321(b) of the CAATSA prohibits goods mined, produced, or manufactured, in whole or in part, by North Korean nationals or North Korean citizens.

85. *Customs Rulings Online Search System (CROSS)*, U.S. CUSTOMS AND BORDER PROT. (last visited May 1, 2021), <https://rulings.cbp.gov/ruling/H317249>.

86. *Id.*

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CBP has issued informal guidance in its section on Frequently-Asked-Questions on the type of business documentation that can be submitted to support the origin of the materials,<sup>87</sup> including, but not limited to:

- (1) Purchase orders, invoices, and proof of payment;
- (2) A list of production steps and records for the imported merchandise;
- (3) Transportation documents;
- (4) Daily manufacturing process reports;
- (5) A list of entities that supplied inputs for the products being imported;
- (6) Any other relevant information that the importer believes may show that the shipments are not subject to the WRO; and
- (7) Evidence regarding the importer's anti-forced labor compliance program.

For cotton products,<sup>88</sup> CBP has indicated that importers need to present information on:

- (1) "The entire supply chain from the origin of the cotton at the bale level through the final production of the finished product."
- (2) Identities of the parties involved in the production process, including names, addresses, and a flow chart of the production process.
- (3) "Maps of the region where the production processes occurred."
- (4) "Number each step along the production processes and number the additional supporting documents associated to each step of the process."

CBP has noted that the above-listed documents are not exhaustive and that other documents might be requested to demonstrate admissibility, and that the agency will evaluate the evidence and supporting materials made available on a case-by-case basis. Given the volume of information to review for admissibility, CBP notes that it is helpful if the documents submitted are organized and include a road map of the supply chain. An English translation of vendor documents is also helpful and may be required, and that only documents relevant to the goods being detained should be included.

CBP's Informed Compliance Publication (ICP) on reasonable care details the standard by which importers are expected to abide for compliance with forced labor prohibitions, including a checklist of 12 questions that importers should be able to answer when importing products into the United States, such as:

- (1) "Have you established reliable procedures to ensure you are not importing goods in violation of 19 U.S.C. § 1307 and 19 C.F.R. §§ 12.42-12.44?"

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<sup>87</sup> *Holsbine Silicon FAQs*, *supra* note 80.

<sup>88</sup> *Id.*

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- (2) “Have you established a reliable procedure of conducting periodic internal audits to check for forced labor in your supply chain?”
- (3) “Do you vet new suppliers/vendors for forced labor risks through questionnaires or some other means?”<sup>89</sup>

CBP has also incorporated forced labor questions related to its Regulatory Audit activities and it is an expected requirement for its upcoming Trusted Trader Program.

## VI. 2021 CIT and CAFC Cases

This portion discusses two pivotal CIT and CAFC cases published over the past year that have significant effects on or implications for customs business.

In *Meyer Corp. v. U.S.*, the CIT denied “first sale” appraisement (which importers use to reduce duties) because the plaintiff failed to prove that the transaction price between the related manufacturer and middleman was not distorted by nonmarket influences from China’s economy.<sup>90</sup>

The value dispute began when Meyer Corp. sought first sale appraisement for entries of cookware from China in 2006, which CBP denied, arguing that the relationship between the related Meyer entities affected the claimed price.<sup>91</sup> When claiming first sale value in a multi-tier transaction, the importer must show that the “first sale” price (the price that the middleman paid to the foreign manufacturer) satisfies several requirements. While the CIT has traditionally focused on only three requirements,<sup>92</sup> the Court in *Meyer Corp.* imposed the additional requirement that the transaction must be conducted “absent any distortive nonmarket influences” for transactions transpiring in a nonmarket economy because the merchandise was from China.<sup>93</sup>

The CIT explained that the importer bears the burden of demonstrating that both inputs from China and the transactions from its manufacturer to its middleman were procured at undistorted prices, which Meyer Corp. failed to demonstrate.<sup>94</sup> In its concluding remarks, the CIT stated that it had doubts if the “first sale” test was even intended to include transactions

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89. See *What Every Member of the Trade Community Should Know: Reasonable Care, An Informed Compliance Publication*, U.S. CUSTOMS AND BORDER PROT., <https://www.cbp.gov/document/publications/reasonable-care> (last visited Sep. 2017).

90. *Meyers Corp. v. U.S.*, Slip Op. 21-26, (Ct Int’l Trade March 1, 2021), *appeal docketed*, No. 21-1932 (Fed. Cir. May 10, 2021).

91. *Id.*

92. See *Nissho Iwai American Corp. v. United States*, 982 F.2d 505 (Fed. Cir. 1992); see also *Synergy Sport International, Ltd. v. United States*, 17 CIT 18 (1993) (The first three elements are: (1) the transaction was conducted at arm’s length, (2) the transaction was a bona fide sale, and (3) the transaction involved merchandise clearly and irrevocably destined for exportation to the United States at the time of the first sale.).

93. *Meyers Corp.*, Slip Op. 21-26 at 4.

94. *Id.* at 16.

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involving non-market economy participants or inputs, such as China, and that “the Court of Appeals for the Federal Circuit could provide clarification.” As one method to prove the absence of nonmarket influences, the CIT posed that the importer could provide the same information that company would provide to obtain a separate duty rate in an antidumping duty investigation involving non-market economy participants.<sup>95</sup> At this time, CBP has not published any guidance or rulings related to this case, thus it is unclear whether CBP will refuse first sale treatment for goods from China. But more guidance should be forthcoming as the case is currently on appeal before the CAFC.<sup>96</sup>

While certain Trump-Era steel and aluminum tariffs were upheld, others were cancelled as illegal duties beyond the President’s delegation of authority, and the dispute regarding China tariffs is progressing through the pre-trial stages in the CIT.

In the *PrimeSource* cases, the CIT determined that the President did not have the authority to impose Section 232 Duties on steel and aluminum derivative products, such as wire, cable, fasteners, and bands.<sup>97</sup> The CIT found that the action taken by Proclamation 9980 to adjust imports of derivatives did not occur within the 105-day time prescribed in the statute conferring Section 232 tariff powers to the President.<sup>98</sup>

Because the President issued Proclamation 9980 after the authority delegated by Congress had expired, the action described in the proclamation was “outside of delegated authority.”<sup>99</sup> The government’s argument that Congress intended for the time limitations in Section 232 to be merely directory was rejected and the CIT determined the untimeliness to be a “significant procedural violation.”<sup>100</sup>

In *Transpacific Steel*, the CAFC upheld the increase in Section 232 Duties on steel imports from Turkey, reversing the CIT’s judgment that held they were unconstitutional.<sup>101</sup> The CAFC found that the President did not violate the conferring statute in issuing Proclamation 9772, which increased

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95. See *Advanced Tech. & Materials Co., v. U.S.*, Slip Op. 12-147, 885 F.Supp.2d 1343, 1348-50 (Ct Int’l Trade 2012) (The de jure factors are: (1) an absence of restrictive stipulations associated with an individual exporter’s business and export licenses, (2) any legislative enactments decentralizing control of companies, and (3) other formal measures by the government decentralizing control of companies. The de facto factors are: (1) the ability to set export prices independently of the government and without the approval of a government authority, (2) the authority to negotiate and sign contracts and other agreements, (3) the possession of autonomy from the government regarding the “selection” of management, and (4) the ability to retain the proceeds from sales and make independent decisions regarding the disposition of profits or financing of losses.)

96. See *Meyer Corporation v. U.S.*, No. 21-1932 (Fed. Cir. filed on May 10, 2021).

97. *PrimeSource Building Products, Inc. v. U.S.*, Slip Op. 21-36, 505 F.Supp.3d 1352, 1357 (Ct. Int’l Trade April 5, 2021), *appeal docketed* (Fed. Cir. June 17, 2021).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Transpacific Steel LLC v. United States*, 4 F.4th 1306, 1334 (Fed. Cir. July 13, 2021).



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steel tariffs on imports from Turkey.<sup>102</sup> On appeal, the plaintiffs-appellees argued, among other things, that Proclamation 9772 was an abuse of discretion and in violation of equal protection of the Fifth Amendment Due Process Clause.<sup>103</sup> The CAFC rejected these arguments, holding that the President timely and specifically adhered to the Secretary's finding of the target capacity-utilization level of domestic steel, applying the rational-basis standard to the national security decision.<sup>104</sup>

While judicial review of the Trump-era steel and aluminum tariffs is concluding, the challenge against Lists 3 and 4A of the Section 301 duties against Chinese goods is presently before the CIT.<sup>105</sup> The challenge comprises over 6,500 importers disputing close to billions of dollars in duties, arguing, among other things, that the Section 301 duties were enacted illegally, violating the timing requirements and other language under The Trade Act of 1974.<sup>106</sup> The legion of lawsuits, which is stayed pending the outcome of the test cases in *In re Section 301 Cases*, was spurred by HMTX Industries LLC's initial lawsuit filed in the CIT in September of last year.<sup>107</sup> An end to the litigation is far on the horizon as the Biden Administration continues to argue in support of the Lists 3 and 4A duties and will likely oppose refunding billions of dollars to importers if the duties are held illegal.<sup>108</sup>

**VII. Updated Requirements for Subheading 9801 Claims and Other Customs Regulatory and Administrative Developments**

This portion summarizes the recent regulatory developments that impact customs enforcement of imports into the United States, including updates to duty-free claims for U.S. goods returned under 9801.00.10 of the Harmonized Tariff Schedule of the United States (HTSUS), Section 232 Duties, and enforcement of Antidumping and Countervailing Duties (AD/CVD) circumvention.

**A. REQUIREMENTS FOR DUTY-FREE CLAIMS UNDER SUBHEADING 9801.00.10, HTSUS**

CBP released updated requirements for claims under 9801.00.10, HTSUS, on August 20, 2021.<sup>109</sup> The tariff provision includes foreign

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102. *Id.* at 1335–36.

103. *Id.*

104. *Id.*

105. *See In re Section 301 Duties*, No. 21-052 (Ct. Int'l Trade filed on Feb. 10, 2021).

106. *Id.*

107. *Id.*; *see HMTX Industries LLC et al v. United States et al*, No. 20-177 (Ct. Int'l Trade filed on September 10, 2020).

108. *Id.*

109. *Updated Requirements for Importers and Brokers Regarding HTS Subheading 9801.00.10- U.S and Foreign Goods Returned*, U.S. CUSTOMS AND BORDER PROT., CSMS #49132200 (Aug. 20,

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merchandise re-imported within three years after having been exported and U.S.-origin goods reimported any time, as long as the goods were not advanced in value or improved in condition by any process while abroad.<sup>110</sup> The provision allows companies to only pay duties and fees, including Merchandise Processing Fees, upon first entry of the foreign origin merchandise, rather than when it is re-imported/reimported later.<sup>111</sup> The claim is particularly useful for companies who export their merchandise from the U.S. often and subsequently reimport the goods when no processing occurs abroad that increases the value of the items.<sup>112</sup>

The updated requirements are focused on “(a) importer and broker responsibilities in filing duty free claims under [sic] HTSUS Subheading 9801.00.10 and (b) documents that CBP may request to support claims under [HTSUS] Subheading 9801.00.10,” especially for aircraft parts and equipment.<sup>113</sup> These are rigid documentary requirements, and, if the correct documents are not provided with the required information, the claim is denied.<sup>114</sup>

The most significant portion of the updated guidance provides that if a U.S.-origin good is returned more than three years after export and is not clearly marked with the name and address of the U.S. manufacturer, the importer may provide a declaration by the owner, importer, consignee, or agent with knowledge of the circumstances regarding the duty-free claim.<sup>115</sup> The declaration can be signed by the president, vice president, secretary, or treasurer of a company, or may be signed by an employee/agent of the company who holds a power of attorney and a certification by the company that the employee/agent has knowledge of the facts of the claim.<sup>116</sup>

Second, CBP can require a manufacturer affidavit in addition to the importer declaration and the foreign shipper declaration.<sup>117</sup> The guidance thus provides that, if the item is clearly marked already with the U.S. name and address of the manufacturer, this will suffice in lieu of the affidavit, which broadens the scope of acceptable documents for HTSUS 9801 claims.<sup>118</sup>

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2021) [hereinafter *Updated Requirements Regarding HTS*]; see *UPDATED GUIDANCE: Requirements for Importers and Brokers Regarding HTS Subheading 9801.00.10 – U.S. and Foreign Goods Returned*, U.S. CUSTOMS AND BORDER PROT., CSMS 49131306 (Aug. 20, 2021); see also *CORRECTION: Updated Requirements for Importers and Brokers Regarding HTS Subheading 9801.00.10- U.S. and Foreign Goods Returned*, U.S. CUSTOMS AND BORDER PROT., CSMS #49163963 (Aug. 24, 2021).

110. *Updated Requirements Regarding HTS*, *supra* note 109.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Updated Requirements Regarding HTS*, *supra* note 109.

117. *Id.*

118. *Id.*

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Third, the guidance confirms that the importer has the burden to substantiate 9801 claims.<sup>119</sup> Because brokers act as agents for the importers, there is a duty of care needed in the filing of entry documents.<sup>120</sup> If it is found that the broker did not provide responsible supervision and control when making the HTSUS 9801 claim, then CBP may address the deficiency through the broker informed compliance process.<sup>121</sup> Essentially CBP is placing a higher burden of responsibility on the broker in filing these claims.

**B. UPDATES TO SECTION 232 EXCLUSIONS FOLLOWING U.S.-E.U. AGREEMENT**

On November 2, 2021, President Biden released a statement following an agreement with the European Union (EU), which allows the United States to impose a tariff-rate quota (TRQ) for a fixed volume of EU imports to enter the United States free from Section 232 duties.<sup>122</sup> Further, Section 232 Exclusions are extended for products imported from the EU for a period of two years without the need to reapply (until December 31, 2023).<sup>123</sup> These changes are expected to take effect January 1, 2022.<sup>124</sup>

The President's announcement follows the Interim Final Rule<sup>125</sup> published by the Bureau of Industry and Security, which modified the Section 232 Exclusion process. Section 232 Duty exclusion requests may now group the products in larger batches on the same single exclusion request if the range of products can be classified in the same ten-digit HTSUS statistical reporting number.<sup>126</sup> Additionally, there are 108 General Approved Exclusions (GAEs) for steel products and fifteen GAEs for aluminum products presently available for use by any importer and do not include quantity limits.<sup>127</sup>

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119. *Id.*

120. *Id.*

121. *Id.*

122. *FACT SHEET: The United States and European Union to Negotiate World's First Carbon-Based Sectoral Arrangement on Steel and Aluminum Trade*, THE WHITE HOUSE (Oct. 31, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/31/fact-sheet-the-united-states-and-european-union-to-negotiate-worlds-first-carbon-based-sectoral-arrangement-on-steel-and-aluminum-trade/>.

123. Press Release, U.S. Department of Commerce, Announcement of Actions on EU Imports Under Section 232 (Oct. 31, 2021), <https://www.commerce.gov/sites/default/files/2021-10/US%20232%20EU%20Statement.pdf>.

124. *Id.*

125. Section 232 Steel and Aluminum Tariff Exclusions Process, 85 Fed. Reg. 81,060 (U.S. Dep't of Com. Dec. 14, 2020) (to be codified at 15 C.F.R. pt. 705).

126. *Id.*

127. *Id.*

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C. REGULATIONS REGARDING CIRCUMVENTION OF ANTIDUMPING  
AND COUNTERVAILING DUTIES

The Department of Commerce's International Trade Administration (ITA) published new rules regarding enforcement of AD/CVD on September 20, 2021, which are designed to target tariff circumvention.<sup>128</sup> First, the regulations bolster CBP's powers under the Enforce and Protect Act (EAPA) by creating the merchandise referral system.<sup>129</sup> When CBP is unable to determine whether merchandise is covered in a circumvention investigation, CBP can now formerly refer the question to the Department of Commerce.<sup>130</sup> Previously, the regulations lacked this formal referral procedure.

Second, the rules define how the agency determines whether a product is substantially transformed in a country-of-origin analysis to assess AD/CVD.<sup>131</sup> Commerce conducts a different analysis from CBP's substantial transformation test, which considers factors such as the downstream production, physical characteristics, essential character, intended end-use, cost, sophistication of processing, and levels of investment in-country.<sup>132</sup> This rule provides Commerce with the authority to make its own country of origin assessments, distinct from CBP, which can result in merchandise having a country of origin for AD/CVD purposes which is distinct than that determined under the Customs regulations at Part 134.<sup>133</sup>

### VIII. Conclusory Remarks

Although 2021 continued to be a tumultuous year for global trade, there were significant developments on the trade front. Despite the disruptive effects of the COVID-19 pandemic and increasing enforcement actions by the U.S. government, many trade practitioners found ways to adapt to such unexpected changes to their business environment. These trends will likely continue in 2022.

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128. 19 C.F.R. Part 351; *see* Regulations to Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws, 86 Fed. Reg. 52,300 (U.S. Int'l Trade Admin. Oct. 20, 2021).

129. 19 C.F.R. § 351.227.

130. *Id.*

131. 19 C.F.R. § 351.225(j).

132. *Id.*

133. *Id.*

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## **Export Controls and Economic Sanctions**

JOHN BOSCARIOL, J. PATRICK BRISCOE, SYLVIA COSTELLOE, JOHN KABEALO, OKSANA MIGITKO, MARY MIKHAEL, TIMOTHY O'TOOLE, MOLLIE SITKOWSKI, CHRISTOPHER STAGG, AND LAWRENCE WARD\*

This article discusses the significant legal developments involving export controls and economic sanctions in 2021.<sup>1</sup>

### **I. Export Control Developments**

#### **A. INTERNATIONAL TRAFFIC IN ARMS REGULATIONS (ITAR)**

##### **1. *Judicial Review Inapplicable Where the Directorate of Defense Trade Controls (DDTC) Removes Item From U.S. Munitions List (USML).***

On April 27, 2021, in *Washington v. United States Department of State*, the U.S. Court of Appeals for the Ninth Circuit held that judicial review is not available when DDTC removes an item from USML.<sup>2</sup>

The case came before the Ninth Circuit after twenty-two states and the District of Columbia sued to stop DDTC from removing certain 3D-printable firearms, their software, and technical data from the USML.<sup>3</sup> The district court issued a preliminary injunction preventing DDTC from removing the 3D-printable firearms and related data from USML, and the U.S. Government appealed that decision to the U.S. Court of Appeals for the Ninth Circuit.<sup>4</sup> Holding that Congress precluded judicial review of such decisions, the Ninth Circuit vacated the district court's injunction and remanded the case with instructions to dismiss.<sup>5</sup>

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\* Contributing authors include John Boscariol, McCarthy Tétrault LLP; J. Patrick Briscoe, University of Minnesota; Sylvia Costelloe, Arent Fox LLP; John Kabealo, Kabealo PLLC; Oksana Migitko, McCarthy Tétrault LLP; Mary Mikhael, Miller & Chevalier Chartered; Timothy O'Toole, Miller & Chevalier Chartered; Mollie Sitkowski, Faegre Drinker Biddle & Reath LLP; Christopher Stagg, Miller & Chevalier Chartered; and Lawrence Ward, Dorsey & Whitney LLP. Mr. Stagg and Mr. Ward served as editors of this article.

1. Given publication deadlines, this article includes developments occurring between December 1, 2020, and November 30, 2021.

2. *Washington v. U.S. Dep't of State*, 996 F.3d 552, 565 (9th Cir. 2021).

3. *Id.* at 564.

4. *Id.* at 556–57.

5. *Id.* at 559.

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2. *DDTC Proposes to Revise the International Traffic in Arms Regulations (ITAR) “Regular Employee” Definition*

On May 27, 2021, DDTC proposed an amendment to ITAR definition of “regular employee.”<sup>6</sup> In doing so, DDTC expanded the definition to cover remote working situations that did not involve proscribed countries.<sup>7</sup> The prior version limited regular employees to those who worked “at a company’s facilities.”<sup>8</sup> The proposed rule would also clarify that the current reference to a “long term contractual relationship” refers to contracts with a term of at least one year, while permitting contractual relationships lasting less than one year in certain situations.<sup>9</sup>

3. *Russia and Ethiopia Added as ITAR’s Proscribed Countries*

On March 18, 2021, DDTC added Russia as a proscribed destination.<sup>10</sup> Consequently, U.S. policy is to deny licenses for Russia, however, a license may be approved on a case-by-case review for certain space activities.<sup>11</sup> Russia was added to the list because the U.S. Government determined it used chemical weapons.<sup>12</sup> On November 1, 2021, DDTC also added Ethiopia as a proscribed destination due to human rights concerns.<sup>13</sup> As a result, U.S. policy is to deny licenses to Ethiopia.<sup>14</sup>

4. *Defense Trade Policy Updates Involving Cyprus and Eritrea*

On September 30, 2021, DDTC extended its modification of the current licensing policy for Cyprus through September 30, 2022, which removes the limitations on non-lethal defense items and services destined for or originating in Cyprus.<sup>15</sup> Additionally, on November 1, 2021, DDTC

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6. See International Traffic in Arms Regulations: Regular Employee, 86 Fed. Reg. 28,503, 28,503 (U.S. Dep’t of State May 27, 2021) (to be codified at 22 C.F.R. pt. 120), <https://www.federalregister.gov/documents/2021/05/27/2021-11053/international-traffic-in-arms-regulations-regular-employee>.

7. *Id.* at 28,503–28,504.

8. 22 C.F.R. § 120.39(a)(2).

9. International Traffic in Arms Regulations: Regular Employee, 86 Fed. Reg. at 28,503–28,504.

10. International Traffic in Arms Regulations: Addition of Russia, 86 Fed. Reg. 14,802, 14,803 (U.S. Dep’t of State Mar. 18, 2021) (to be codified at 22 C.F.R. pt. 126), <https://www.federalregister.gov/documents/2021/03/18/2021-05530/international-traffic-in-arms-regulations-addition-of-russia>.

11. *Id.*

12. *Id.* at 14,802.

13. International Traffic in Arms Regulations: Addition of Ethiopia and Amendment to Eritrea Country Policy, 86 Fed. Reg. 60,165, 60,165 (U.S. Dep’t of State Nov. 1, 2021) (to be codified at 22 C.F.R. pt. 126.5(n)), <https://www.federalregister.gov/documents/2021/11/01/2021-23450/international-traffic-in-arms-regulations-addition-of-ethiopia-and-amendment-to-eritrea-country>.

14. *Id.* at 60,166.

15. International Traffic in Arms Regulations: Temporary Update to Republic of Cyprus (Cyprus) Country Policy; Extension of Effective Period, 86 Fed. Reg. 54,044, 54,044 (U.S.

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strengthened its licensing policy of denial for Eritrea by eliminating the exception for case-by-case reviews of certain non-lethal items.<sup>16</sup> These changes were also due to human rights concerns.<sup>17</sup>

5. *Afghanistan License Review*

In response to the Taliban takeover, on August 18, 2021, the DDTC issued an announcement that it was “reviewing all relevant pending and issued export licenses and other approvals” affecting Afghanistan.<sup>18</sup>

B. EXPORT ADMINISTRATION REGULATIONS (EAR)

1. *Bureau of Industry and Security (BIS) Adds Military End-User List (MEU List) to the EAR*

On December 23, 2020, BIS issued a final rule amending the EAR by adding a MEU List as “supplement no. 7 to part 744.”<sup>19</sup> MEU List identifies the foreign parties prohibited from receiving items subject to the EAR, as described in supplement no. 2 to part 744, unless the exporter obtains a BIS license.<sup>20</sup> Parties on MEU List were found by the U.S. Government to be “military end users” as defined in EAR Section 744.21(g), and to represent an unacceptable risk of use in, or diversion to, a “military end use” or “military end user” in China, Russia, or Venezuela.<sup>21</sup> Because the list is not exhaustive, the license requirements in EAR Section 744.21 still require exporters, re-exporters, or transferors to conduct their own due diligence regarding entities not identified in MEU List.<sup>22</sup>

2. *BIS Removes Hong Kong as a Separate Destination Under the EAR*

On December 23, 2020, BIS amended the EAR, and thus implemented Executive Order 13936, which removed provisions providing differential and preferential treatment for exports, reexports, and transfers (in-country) of

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Dep’t of State Sept. 30, 2021), <https://www.federalregister.gov/documents/2021/09/30/2021-21255/international-traffic-in-arms-regulations-temporary-update-to-republic-of-cyprus-cyprus-country>.

16. International Traffic in Arms Regulations: Addition of Ethiopia and Amendment to Eritrea Country Policy, 86 Fed. Reg. 60,165, 60,165–66 (U.S. Dep’t of State Nov. 1, 2021), <https://www.federalregister.gov/documents/2021/11/01/2021-23450/international-traffic-in-arms-regulations-addition-of-ethiopia-and-amendment-to-eritrea-country>.

17. *Id.* at 60,165.

18. *PM/DDTC Afghanistan Response*, U.S. DEP’T OF STATE (Aug. 18, 2021), [https://www.pmdtc.state.gov/ddtc\\_public?id=DDtc\\_public\\_portal\\_news\\_and\\_events&cat=Notice&p=2](https://www.pmdtc.state.gov/ddtc_public?id=DDtc_public_portal_news_and_events&cat=Notice&p=2).

19. Addition of ‘Military End User’ (MEU) List to the Export Administration Regulations and Addition of Entities to the MEU List, 85 Fed. Reg. 83,793, 83,793 (U.S. Bureau of Indust. and Sec. Dec. 23, 2020) (to be codified at 15 C.F.R. pt. 744).

20. *Id.*

21. *Id.* at 83,795–96.

22. *Id.* at 83,793.



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items to Hong Kong as compared to the People's Republic of China.<sup>23</sup> Consequently, under the EAR, exports, reexports, and transfers (in-country) to Hong Kong are treated the same as transactions destined for China, unless otherwise explicitly specified.<sup>24</sup> This amendment removes Hong Kong as a separate destination on the Commerce Country Chart, and in other places within the EAR.<sup>25</sup> This impacts the availability of license exceptions and the licensing policies and requirements for exports, reexports, and transfers that Hong Kong is subject to.<sup>26</sup>

3. *BIS Amends the EAR to Remove Sudan as a Designated State Sponsor of Terrorism*

On January 19, 2021, BIS issued a final rule amending the EAR by rescinding Sudan's designation as a State Sponsor of Terrorism, which the Secretary of State rescinded effective December 14, 2020.<sup>27</sup> The rule removed Sudan from Country Group E:1 (terrorist supporting countries) in Supplement No. 1 to EAR Part 740, to Country Group B in Supplement No. 1 to EAR Part 740.<sup>28</sup> The rule also removed Anti-Terrorism (AT) and related controls on Sudan, which eased the EAR licensing policies and requirements applicable to Sudan.<sup>29</sup>

4. *Military-Intelligence End Use and End User Rule Goes into Effect*

In an interim rule published on January 15, 2020, BIS introduced expansive changes to the EAR General Prohibition 7 by including new controls on military-intelligence end uses and users.<sup>30</sup> The rule requires a license for any U.S. person who knowingly supports certain items or transactions.<sup>31</sup> Notably, the rule expands the restrictions on military-

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23. Removal of Hong Kong as a Separate Destination Under the Export Administration Regulations, 85 Fed. Reg. 83,765, 83,766 (U.S. Bureau of Indust. and Sec. Dec. 23, 2020) (to be codified at 15 C.F.R. pt. 738), <https://www.federalregister.gov/documents/2020/12/23/2020-28101/removal-of-hong-kong-as-a-separate-destination-under-the-export-administration-regulations>.

24. *Id.* at 83,766–67.

25. *Id.*

26. *Id.*

27. Implementation in the Export Administration Regulations of the United States' Rescission of Sudan's Designation as a State Sponsor of Terrorism, 86 Fed. Reg. 4,929, 4929 (U.S. Bureau of Indust. and Sec. Jan. 19, 2021) (to be codified at 15 C.F.R. pt. 734), <https://www.federalregister.gov/documents/2021/01/19/2020-29037/implementation-in-the-export-administration-regulations-of-the-united-states-rescission-of-sudans>.

28. *Id.* at 4930–31.

29. *Id.* at 4931–32.

30. Expansion of Certain End-Use and End-User Controls and Controls on Specific Activities of U.S. Persons, 86 Fed. Reg. 4,865, 4,866–70 (U.S. Bureau of Indust. and Sec. Jan. 15, 2021), <https://www.federalregister.gov/documents/2021/01/15/2021-00977/expansion-of-certain-end-use-and-end-user-controls-and-controls-on-specific-activities-of-us-persons>.

31. *Id.* at 4865–67, 4872.

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intelligence end uses and users.<sup>32</sup> A license from BIS is required for “the export, re-export, or transfer (in-country) of all items subject to the EAR to military-intelligence end uses and end users in China, Russia, or Venezuela; and countries listed in Country Groups E:1 and E:2” when an entity has “knowledge,” which includes a reason to know, “that the item is intended, either entirely or in part, for a ‘military-intelligence end use’ or a ‘military-intelligence end user’” in the enumerated countries.<sup>33</sup> Consequently, even EAR99 items require a license if the transaction includes an entity falling within the definition of military-intelligence end user when the exporter has some knowledge of the entity’s status.<sup>34</sup>

5. *The BIS Updates Reporting Requirements Relating to Mass-Market Encryption Items and Publicly Available Software*

On March 29, 2021, BIS published a final rule<sup>35</sup> that implemented the changes to the EAR that were agreed to at the December 2019 Wassenaar Arrangement Plenary meeting. Those changes include the elimination of the self-classification reporting requirement for certain mass-market encryption products under EAR Section 740.17(b)(1).<sup>36</sup>

6. *BIS Extends Military-Intelligence End-Use and End-User Controls to Burma*

On April 9, 2021, BIS added Burma to the list of countries subject to military-intelligence-related controls.<sup>37</sup> The military-intelligence end uses and end user controls were first issued in an interim rule on January 15, 2021, and became effective on March 16, 2021.<sup>38</sup>

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32. *Id.* at 4,867.

33. *Id.* at 4,867, 4,873.

34. *Id.* at 4868; *see also Commerce Control List (CCL)*, BUREAU OF INDUSTRY AND SECURITY, <https://www.bis.doc.gov/index.php/regulations/commerce-control-list-ccl> (last visited May 10, 2022).

35. Export Administration Regulations: Implementation of Wassenaar Arrangement 2019 Plenary Decisions; elimination of Reporting Requirements for Certain Encryption Items, 86 Fed. Reg. 16,482, 16,482 (U.S. Bureau of Industry and Security Mar. 29, 2021) (to be codified at 15 C.F.R. pt. 734), <https://www.federalregister.gov/documents/2021/03/29/2021-05481/export-administration-regulations-implementation-of-wassenaar-arrangement-2019-plenary-decisions>.

36. *Id.* at 16,485.

37. Expansion of Certain End-Use and End-User Controls and Controls on Specific Activities of U.S. Persons; Corrections; and Burma Sanctions, 86 Fed. Reg. 18,433, 18,435 (U.S. Bureau of Industry and Security Apr. 19, 2021), <https://www.federalregister.gov/documents/2021/04/09/2021-07357/expansion-of-certain-end-use-and-end-user-controls-and-controls-on-specific-activities-of-us-persons>.

38. *Id.* at 18,433–34.

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7. *BIS Amends the EAR to Reflect United Arab Emirates' Termination of Participation in Israel Boycott*

On June 9, 2021, BIS issued a final rule,<sup>39</sup> effective June 8, 2021, amending the EAR to reflect the formal termination by the United Arab Emirates (UAE) of its participation in the Arab League Boycott of Israel. One consequence of this rule is that certain requests for information, action, or agreement from the UAE, if made after August 16, 2020, will no longer be presumed to be boycott-related and thus, will not be prohibited or reportable under the EAR.<sup>40</sup>

**II. Committee on Foreign Investment in the United States (CFIUS) Developments**

The last year did not see the introduction of any significant new regulations under the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA); rather, CFIUS continued to build out its infrastructure and enforce its expanded authority. Certain public cases have illustrated CFIUS's willingness to aggressively pursue cases even at the edges of its authority.

A. *MAGNACHIP SEMICONDUCTOR CORPORATION (MAGNACHIP)*

The proposed acquisition of Magnachip by an affiliate of Wise Road Capital, an investment fund based in China with a global base of investors, illustrated a dramatic assertion of CFIUS's authority.<sup>41</sup> When the deal was originally announced, Magnachip said it did not believe any regulatory approvals were required in the United States because, although it is a Delaware entity listed on the New York Stock Exchange, Magnachip did not have employees, tangible assets, or IT systems located in the United States.<sup>42</sup> Notwithstanding the parties' public assertions, in May 2021, CFIUS initiated a pre-closing review of the transaction,<sup>43</sup> and on June 15, 2021, CFIUS issued an interim order suspending the acquisition until the formal

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39. Export Administration Regulations: Termination of United Arab Emirates Participation in the Arab League Boycott of Israel, 86 Fed. Reg. 30535, 30536 (U.S. Bureau of Indust. and Sec. June 9, 2021) (to be codified at 15 C.F.R. 760), <https://www.federalregister.gov/documents/2021/06/09/2021-12125/export-administration-regulations-termination-of-united-arab-emirates-participation-in-the-arab>.

40. *Id.* at 30,536

41. Magnachip Semiconductor Corporation, Proxy Statement Pursuant to Section 14(a) of the Securities Exchange Act of 1934 (Schedule 14A), <https://investors.magnachip.com/static-files/85139ccb-9f41-4ea2-89f5-398264b78550> (last visited May 10, 2022).

42. *Id.*

43. Magnachip Semiconductor Corporation, Current Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 (Form 8-K) (May 26, 2021), <https://investors.magnachip.com/node/12366/html>.

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CFIUS review was complete.<sup>44</sup> In September 2021, the parties requested, and CFIUS granted, approval to withdraw and re-file their notice related to the merger to allow them and the U.S. Government additional time to negotiate conditions.<sup>45</sup>

This case illustrates that CFIUS will assert both jurisdictional and national security concerns as a basis for potentially blocking a transaction altogether, even where the target effectively has no U.S. operations.<sup>46</sup> CFIUS's jurisdictional hook may owe to a significantly expanded definition of what constitutes a "U.S. business" under FIRRMA,<sup>47</sup> and U.S. links to Magnachip's corporate existence (i.e., its incorporation in Delaware and its public listing on the New York Stock Exchange). The national security concerns do not appear to be limited to Magnachip's operations in the United States.<sup>48</sup>

**B. MOMENTUS INC. (MOMENTUS)**

Over the course of CFIUS's review of the proposed acquisition of Momentus by a special purpose acquisition company (SPAC), the Department of Defense (DOD) engaged in unprecedented inter-agency coordination.<sup>49</sup> This included DOD's engagement with the Federal Aviation Administration to delay launch licenses for Momentus, the U.S. Securities and Exchange Commission (SEC) to review the accuracy of statements made by the Company, and the SPAC sponsors to address a wide array of U.S. Government concerns.<sup>50</sup> The case prompted a broad set of governmental remedies, including a National Security Agreement whereby Momentus

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44. Magnachip Semiconductor Corporation, Current Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 (Form 8-K) (June 15, 2021), <https://investors.magnachip.com/node/12411/html>.

45. Magnachip Semiconductor Corporation, Current Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 (Form 8-K) (Sept. 13, 2021), <https://investors.magnachip.com/node/12571/html>.

46. *Id.*

47. The definition of a U.S. business in the relevant regulations includes any entity "engaged in interstate commerce in the United States," *see* 50 U.S.C. § 4565, a marked expansion from the prior regulations' formulation, which limited the definition only to the extent of its "activities in interstate commerce." *See* 31 C.F.R. § 800.226. Without this limitation, CFIUS is in theory free to assert jurisdiction over the *entirety* of a company's operations if it is engaged in any U.S. interstate commerce. *See* JAMES K. JACKSON, CONG. RSCH. SERV., RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 1–5 (2020), <https://sgp.fas.org/crs/natsec/RL33388.pdf>; *see also* Brandon L. Van Grack & James Brower, *CFIUS's Expanding Jurisdiction in the Magnachip Acquisition*, LAWFARE (Oct. 11, 2021), <https://www.lawfareblog.com/cfiuss-expanding-jurisdiction-magnachip-acquisition>.

48. Van Grack & Brower, *supra* note 47.

49. *See generally* Stable Road Acquisition Corp., Amendment No. 6 to Form S-4 Registration Statement Under the Securities Act of 1933 (Form S-4) (July 21, 2021), [https://www.sec.gov/Archives/edgar/data/0001781162/000121390021037886/fs42021a6\\_stableroadacq.htm](https://www.sec.gov/Archives/edgar/data/0001781162/000121390021037886/fs42021a6_stableroadacq.htm).

50. *Id.*

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founders agreed to divest their shares in the company.<sup>51</sup> Additionally, the SEC brought formal charges against Momentus, alleging that it, the SPAC, and SPAC sponsors, made materially misleading statements to investors regarding the national security concerns associated with Momentus' founders, as well as the viability of the company's technology.<sup>52</sup> All parties, other than Mikhail Kokorich, the primary founder of Momentus, settled with the SEC.<sup>53</sup>

Ordinarily, CFIUS would not have a reliable basis to pursue an action against a founder of a company because its jurisdiction is generally limited to investment transactions.<sup>54</sup> In the case of a SPAC transaction, the SPAC is effectively a well-funded shell entity whose sole purpose is to make an acquisition with no operations bearing on national security.<sup>55</sup> The assertion of jurisdiction over the SPAC's acquisition of Momentus demonstrates that CFIUS will seek to address "latent" national security concerns against a company whenever an investment transaction may provide it with the jurisdiction to do so.<sup>56</sup> It also indicates that CFIUS will not limit its remedies to concerns arising out of the transaction itself.<sup>57</sup> Put another way, while it is hard to imagine the dilution of Russian founders' interests in a sensitive company by a public shareholder base could increase United States national security concerns, CFIUS may pursue the company for just that.<sup>58</sup>

Notwithstanding the significant regulatory obstacles, the SPAC acquisition of Momentus closed on August 12, 2021, which required the approval of the SPAC's shareholders.<sup>59</sup>

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51. Jeff Foust, *Momentus Founders to Divest Shares After Defense Department Concerns*, SPAC NEWS (Mar. 9, 2021), <https://spacnews.com/momentus-founders-to-divest-shares-after-defense-department-concerns/>.

52. Press Release, U.S. Securities and Exchange Commission, SEC Charges SPAC, Sponsor, Merger Target, and CEOs for Misleading Disclosures Ahead of Proposed Business Combination (July 13, 2021), <https://www.sec.gov/news/press-release/2021-124>.

53. *Id.*

54. *The Committee on Foreign Investment in the United States (CFIUS)*, U.S. DEP'T OF THE TREASURY, <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius> (last visited May 10, 2022).

55. *An Overview of Special Purpose Acquisition Company (SPAC)*, FOTIS LAW FIRM, <https://fotislaw.com/lawtify/an-overview-of-special-purpose-acquisition-company-spac/> (last visited May 10, 2022).

56. Jack Detsch, *Russian-Founded Space Start-Up Faces National Security Pressure*, FOREIGN POL'Y (May 12, 2021), <https://foreignpolicy.com/2021/05/12/russia-space-momentus-biden-spacs/>.

57. *Id.*

58. *Id.*

59. *See generally* Momentus Inc., Amended and Restated Registration Rights Agreement (Aug. 12, 2021), <https://www.sec.gov/Archives/edgar/data/1781162/000121390021043676/0001213900-21-043676-index.htm>.

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### III. Economic Sanctions Developments

As the Trump Administration ended and the Biden Administration began, we saw significant shifts in U.S. sanctions, regulations, and policies.<sup>60</sup> These shifts included noteworthy developments in cyber-related sanctions and the expansion of sanctions programs directed at China and Russia.<sup>61</sup>

#### A. CYBER-RELATED SANCTIONS DEVELOPMENTS

As malicious cyber activities continued, the U.S. Treasury Department's Office of Foreign Assets Control (OFAC) expanded its guidance on cyber-related threats<sup>62</sup> and increased related enforcement activity, including its first designation of a virtual currency exchange.<sup>63</sup>

The expanded guidance was published on September 21, 2021, when OFAC issued a ransomware advisory titled, "Updated Advisory on Potential Sanctions Risks for Facilitating Ransomware Payments" (the "2021 Advisory"), which updated an earlier advisory released in 2020 (the "2020 Advisory").<sup>64</sup> The 2021 Advisory "strongly discourages" entities from engaging in ransomware payments, whereas the 2020 Advisory provided no like guidance.<sup>65</sup> The 2021 Advisory also warns entities of the application of strict liability with respect to ransomware payments (i.e., entities making ransomware payments to a blocked person or a sanctioned jurisdiction risk facing penalties from OFAC, even if they have no knowledge of the nexus to the sanctioned jurisdiction or blocked person).<sup>66</sup> Because of this regulatory structure, OFAC encourages entities to expand their controls to account for the risk of ransomware payments being made to prohibited persons.<sup>67</sup>

Further, the 2021 Advisory encourages, and provides a significant incentive to, companies for reporting ransomware demands to law enforcement.<sup>68</sup> The 2021 Advisory indicates that OFAC will consider cooperation with law enforcement as a mitigating factor when assessing penalties against entities who made ransomware payments to a sanctioned

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60. Jason Bartlett and Megan Ophel, *Sanctions by the Numbers: Spotlight on Cyber Sanctions*, CTR. FOR A NEW AM. SEC. (May 4, 2021), <https://www.cnas.org/publications/reports/sanctions-by-the-numbers-cyber>.

61. *Id.*

62. See generally U.S. DEPT' OF THE TREASURY, OFF. OF FOREIGN ASSETS CONTROL, UPDATED ADVISORY ON POTENTIAL SANCTIONS RISKS FOR FACILITATING RANSOMWARE PAYMENTS (2021), [https://home.treasury.gov/system/files/126/ofac\\_ransomware\\_advisory.pdf](https://home.treasury.gov/system/files/126/ofac_ransomware_advisory.pdf).

63. Press Release, U.S. Department of the Treasury, Treasury Takes Robust Actions to Counter Ransomware (Sept. 21, 2021), <https://home.treasury.gov/news/press-releases/jy0364>.

64. See generally U.S. DEPT' OF THE TREASURY, *supra* note 62, at 1–3.

65. *Id.* at 1; see also U.S. DEPT' OF THE TREASURY, ADVISORY ON POTENTIAL SANCTIONS RISKS FOR FACILITATING RANSOMWARE PAYMENTS 1 (2020), [https://home.treasury.gov/system/files/126/ofac\\_ransomware\\_advisory\\_10012020\\_1.pdf](https://home.treasury.gov/system/files/126/ofac_ransomware_advisory_10012020_1.pdf).

66. *Id.* at 3–4.

67. *Id.* at 4.

68. *Id.* at 5.

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party.<sup>69</sup> Additionally, the 2021 Advisory states that “OFAC would be more likely to resolve apparent violations involving ransomware attacks with a non-public response (i.e., a No Action Letter or a Cautionary Letter) when the affected party took the mitigating steps described above, particularly reporting the ransomware attack to law enforcement as soon as possible.”<sup>70</sup>

Critical to understanding later policy developments, the cyber-related enforcement action involving BitPay, Inc. (BitPay) is a relevant cyber-related sanctions development.<sup>71</sup> On February 18, 2021, BitPay, a payment processing solution that allows merchants to make and receive payments in digital currency,<sup>72</sup> settled over 2,000 apparent violations arising from transactions on its digital currency platform by persons in sanctioned jurisdictions.<sup>73</sup> The root cause of the violations was that BitPay’s compliance process screened its merchants but not customers of those merchants.<sup>74</sup> OFAC found that because BitPay had access to the customers’ IP addresses, and, therefore, had information available to them that the customers were located in sanctioned jurisdictions, BitPay had knowledge it facilitated the transactions to customers in those sanctioned jurisdictions.<sup>75</sup> OFAC emphasized that it regards digital currency services as it does other financial institutions.<sup>76</sup> As such, the digital currency services have sanctions compliance obligations and should implement technical controls, including screening and IP blocking mechanisms, to avoid facilitating transactions with blocked parties or persons in sanctioned jurisdictions.<sup>77</sup>

Consistent with its position in the BitPay action, OFAC published “Sanctions Compliance Guidance for the Virtual Currency Industry,” which provides an overview of best practices.<sup>78</sup> The guidance begins with the proposition that “OFAC sanctions compliance obligations apply equally to transactions involving virtual currencies and those involving traditional fiat currencies.”<sup>79</sup> It also echoes the conclusion in OFAC’s settlement with BitPay, namely that those in the virtual currency industry “are responsible

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69. *Id.*

70. *Id.*

71. *See generally* U.S. DEP’T OF THE TREASURY, OFF. OF FOREIGN ASSETS CONTROL, OFAC ENTERS INTO \$507,375 SETTLEMENT WITH BITPAY, INC. FOR APPARENT VIOLATIONS OF MULTIPLE SANCTIONS PROGRAMS RELATED TO DIGITAL CURRENCY TRANSACTIONS (2021), [https://home.treasury.gov/system/files/126/20210218\\_bp.pdf](https://home.treasury.gov/system/files/126/20210218_bp.pdf).

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. U.S. DEPT’ OF THE TREASURY, OFF. OF FOREIGN ASSETS CONTROL, SANCTIONS COMPLIANCE GUIDANCE FOR THE VIRTUAL CURRENCY INDUSTRY 10–19 (2021), [https://home.treasury.gov/system/files/126/virtual\\_currency\\_guidance\\_brochure.pdf](https://home.treasury.gov/system/files/126/virtual_currency_guidance_brochure.pdf).

79. *See, e.g.*, U.S. DEP’T OF THE TREASURY, *supra* note 62, at 1; *see also* U.S. DEP’T OF THE TREASURY, OFF. OF FOREIGN ASSETS CONTROL, OFAC ENTERS INTO \$98,830 SETTLEMENT WITH BITGO, INC. FOR APPARENT VIOLATIONS OF MULTIPLE SANCTIONS PROGRAMS RELATED TO DIGITAL CURRENCY TRANSACTIONS 1–3 (2020), <https://home.treasury.gov/>

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for ensuring that they do not engage, directly or indirectly, in transactions prohibited by OFAC sanctions.”<sup>80</sup> As a result, companies may violate sanctions indirectly by facilitating a transaction between their user and a blocked party or person in a sanctioned jurisdiction.<sup>81</sup>

OFAC’s guidance on virtual currency was published after it designated the first virtual currency exchange, Suex OTC, S.R.O. (Suex), as a Specially Designated National (SDN) for facilitating payments involving illicit ransomware actors.<sup>82</sup> In its press release, OFAC stated that over 40 percent of payments made by Suex involved illicit actors and “[s]ome virtual currency exchanges are exploited by malicious actors, but others, as in the case with Suex, facilitate illicit activities for their own illicit gains.”<sup>83</sup> This suggests that OFAC’s designation authorities will not be used against those exchanges that fail in good faith to detect violations but rather against those that act in concert with the malicious actors.

**B. CHINESE MILITARY COMPANY SANCTIONS**

On November 12, 2020, former President Trump issued Executive Order 13,959, “Addressing the Threat from Securities Investments That Finance Communist Chinese Military Companies.”<sup>84</sup> Executive Order 13,959 imposed broad restrictions with respect to U.S. persons’ ability to engage in transactions in “publicly traded securities, or any securities that are derivative of, or are designed to provide investment exposure to such securities to any Chinese Communist military company” (CCMC).<sup>85</sup> But the traditional authority given to OFAC to designate individuals, entities, or vessels was missing from Executive Order 13,959.<sup>86</sup> Rather, the Executive Order prohibited transactions with entities listed as a CCMC as determined by the DOD.<sup>87</sup>

After a number of court challenges revealed flaws in the DOD designation process, the Biden Administration revamped this program entirely.<sup>88</sup> Biden

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system/files/126/20201230\_bitgo.pdf; see also U.S. DEP’T OF THE TREASURY, *supra* note 65, at 1.

80. International Traffic in Arms Regulations: Regular Employee, 86 Fed. Reg. at 28,503–5.

81. *Id.*

82. Press Release, U.S. Department of the Treasury, Office of Foreign Assets Control, Treasury Takes Robust Actions to Counter Ransomware (Sept. 21, 2021), <https://home.treasury.gov/news/press-releases/jy0364>.

83. *Id.*

84. Exec. Order No. 13,959, Addressing the Threat from Securities Investments That Finance Communist Chinese Military Companies, 85 Fed. Reg. 73,185 (Exec. Off. of the President Nov. 12, 2020), <https://www.federalregister.gov/documents/2020/11/17/2020-25459/addressing-the-threat-from-securities-investments-that-finance-communist-chinese-military-companies>

85. *Id.*

86. *Id.*

87. *Id.*

88. See e.g., *Xiaomi Corp. v. U.S. Dep’t of Def.*, No. CV 21-280 (RC), 2021 WL 950144, at \*1 (D.D.C. Mar. 12, 2021).



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did so by signing the June 3, 2021, Executive Order 14,032, “Addressing the Threat from Securities Investments that Finance Certain Companies of the People’s Republic of China.”<sup>89</sup> This Executive Order maintains the imposition of restrictions on U.S. persons buying and selling securities of CCMCs but uses a more traditional designation process under OFAC’s authority.<sup>90</sup> It also created the Non-SDN Chinese Military-Industrial Complex Companies List (NS-CMIC List).<sup>91</sup> Notably, Executive Order 14,032 expands the criteria for designation, imposing restrictions on companies involved in the use and development of surveillance technology, which has been a key underpinning of U.S. foreign policy on China over the past year or more, particularly with respect to the Chinese Government’s use of surveillance in Xinjiang.<sup>92</sup>

**C. RUSSIA RELATED SANCTIONS**

The Biden Administration expressed a desire in its 2020 campaign to impose tougher sanctions on Russia, and, in 2021, it promulgated a series of new executive orders directed at Russia.<sup>93</sup> This includes Executive Order 14,024, “Blocking Property with Respect to Specified Harmful Foreign Activities of the Government of the Russian Federation,” which expands the reach of U.S. sanctions to new sectors of the Russian economy (to include the technology sector) and to a host of new types of conduct (to include corruption and certain types of cyber-related activities).<sup>94</sup> It also authorizes new sanctions against the Russian Government, including sanctions impacting Russia’s ability to raise funds.<sup>95</sup> OFAC consequently issued Directive 1 pursuant to Executive Order 14,024, which prohibits U.S. financial institutions from participating in the primary market for ruble or non-ruble denominated bonds issued after June 14, 2021, by the Central Bank of the Russian Federation, the National Wealth Fund of the Russian

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89. Exec. Order No. 14,032, Addressing the Threat from Securities Investments That Finance Certain Companies of the People’s Republic of China, 86 Fed. Reg. 30,145 (Exec. Off. of the President June 3, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-06-07/pdf/2021-12019.pdf>.

90. *Id.* at Addressing the Threat from Securities Investments That Finance Certain Companies of the People’s Republic of China, 86 Fed. Reg. at 73,186–89.

91. *Id.*; see also *Non-SDN Chinese Military-Industrial Complex Companies List (NS-CMIC List)*, U.S. DEP’T OF THE TREASURY, OFF. OF FOREIGN ASSETS CONTROL (Dec. 12, 2021), <https://home.treasury.gov/policy-issues/financial-sanctions/consolidated-sanctions-list/ns-cmic-list>.

92. Addressing the Threat from Securities Investments That Finance Certain Companies of the People’s Republic of China, 86 Fed. Reg. at 30,146–47.

93. See Exec. Order No. 14,024, Blocking Property with Respect to Specified Harmful Foreign Activities of the Government of the Russian Federation, 86 Fed. Reg. 20,249, 20,250 (Exec. Off. of the President Apr. 15, 2021), <https://www.federalregister.gov/documents/2021/04/19/2021-08098/blocking-property-with-respect-to-specified-harmful-foreign-activities-of-the-government-of-the>.

94. *Id.* at 20,249–50.

95. *Id.* at 20,251.

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Federation, and the Ministry of Finance of the Russian Federation.<sup>96</sup> It also prohibits U.S. financial institutions from lending ruble or non-ruble related funds to the Central Bank of the Russian Federation, the National Wealth Fund of the Russian Federation, and the Ministry of Finance of the Russian Federation.<sup>97</sup>

These actions followed OFAC's earlier March 2021 announcement that it had levied sanctions against members of the Russian Government under Executive Order 13,661, "Blocking Property of Additional Persons Contributing to the Situation in Ukraine."<sup>98</sup> Notably, OFAC made these designations the same day the European Union acted against several Russian officials for the Navalny poisoning, indicating OFAC's increasing cooperation with Europe on Russia-related matters.<sup>99</sup>

The Biden Administration also took new actions regarding the Russian Nord Stream 2 pipeline.<sup>100</sup> On August 20, 2021, President Biden signed Executive Order 14,039, "Blocking Property with Respect to Certain Russian Energy Export Pipelines," which targets entities involved in the construction of Nord Stream 2, TurkStream, or any other related successor pipeline projects under the protecting Europe's Energy Security Act of 2019 (PEESA).<sup>101</sup> OFAC subsequently added additional individuals, entities, and vessels to the SDN List under this Executive Order and issued General License 1A, which authorized certain transactions with Marine Rescue Services that are not directly related to the Nord Stream 2 pipeline project.<sup>102</sup>

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96. *Id.* at 20,251–52.

97. *Id.*

98. Press Release, U.S. Department of Treasury, Treasury Sanctions Russian Officials in Response to the Novichok Poisoning of Aleksey Navalny (Mar. 2, 2021), <https://home.treasury.gov/news/press-releases/jy0045>; *see also* Exec. Order No. 13,662, Blocking Property of Additional Persons Contributing to the Situation in Ukraine, 79 Fed. Reg. 15,533 (Exec. Off. of the President Mar. 14, 2014), <https://www.federalregister.gov/documents/2014/03/19/2014-06141/blocking-property-of-additional-persons-contributing-to-the-situation-in-ukraine>.

99. David M. Herszenhorn & Natasha Bertrand, *EU and US Slap Sanctions on Russia Over Navalny*, POLITICO (Mar. 2, 2021), <https://www.politico.eu/article/eu-and-us-slap-sanctions-on-russia-over-navalny/>

100. *See* Exec. Order No. 14,039, Blocking Property with Respect to Certain Russian Energy Export Pipelines, 86 Fed. Reg. 47,205 (Exec. Off. of the President Aug. 20, 2021), <https://www.federalregister.gov/documents/2021/08/24/2021-18306/blocking-property-with-respect-to-certain-russian-energy-export-pipelines>.

101. Blocking Property with Respect to Certain Russian Energy Export Pipelines, 86 Fed. Reg. at 47,206; *see also* U.S. DEP'T OF TREASURY, OFF. OF FOREIGN ASSET CONTROL, AUTHORIZING CERTAIN ACTIVITIES INVOLVING FEDERAL STATE BUDGETARY INSTITUTION MARINE RESCUE SERVICE 1 (2021), [https://home.treasury.gov/system/files/126/peesa\\_gl\\_1a.pdf](https://home.treasury.gov/system/files/126/peesa_gl_1a.pdf).

102. *Issuance of Executive Order Blocking Property with Respect to Certain Russian Energy Export Pipelines; Issuance of Russia-related General License and related Frequently Asked Questions; PEESA Designations; Non-Proliferation Designations*, U.S. DEP'T OF THE TREASURY, (Aug. 20, 2021), <https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20210820>.

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**D. OTHER NOTABLE POLICY AND REGULATORY DEVELOPMENTS**

OFAC designated several individuals over the past year under Hong Kong related sanctions.<sup>103</sup> These designations were made under Executive Order 13,936, “The President’s Executive Order on Hong Kong Normalization.”<sup>104</sup> Dated July 14, 2020, Executive Order 13,936, issued in response to the assertion that Hong Kong “is no longer sufficiently autonomous to justify differential treatment in relation to” China, gave OFAC authority to block any person involved in several enumerated activities relating to undermining Hong Kong’s autonomy.<sup>105</sup> Although OFAC made some designations during the Trump era in December 2020, the majority occurred under the Biden Administration.<sup>106</sup> This reflects overall U.S. policy over the past year opposing China’s treatment of Hong Kong.<sup>107</sup>

On April 1, 2021, President Biden signed Executive Order 14,022, “Termination of Emergency with Respect to International Criminal Court,” which reversed Executive Order 13,928, signed by President Trump on June 11, 2020.<sup>108</sup> OFAC designated two International Criminal Court (ICC) officials under Executive Order 13,928 based on the United States’ disagreement with the ICC’s assertion of jurisdiction under certain circumstances.<sup>109</sup> Although Executive Order 13,928 was reversed, the Biden Administration was clear that the United States continues to disagree with the ICC’s assertion of jurisdiction over the United States and Israel and its investigation into the actions of the United States in Afghanistan and Israel

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103. See *Hong Kong-related Designations Updates*, U.S. DEP’T OF THE TREASURY, OFF. OF FOREIGN ASSET CONTROL (Mar. 17, 2021), <https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20210317>; see also *Hong Kong-Related Designations*, U.S. DEP’T OF THE TREASURY’S OFF. OF FOREIGN ASSET CONTROL (Dec. 7, 2020), <https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20201207>.

104. Exec. Order No. 13,936, The President’s Executive Order on Hong Kong Normalization, 85 Fed. Reg. 43,413, (Exec. Off. of the President July 14, 2020) <https://www.federalregister.gov/documents/2020/07/17/2020-15646/the-presidents-executive-order-on-hong-kong-normalization>.

105. President’s Executive Order on Hong Kong Normalization, 85 Fed. Reg. at 43,414.

106. See *Hong Kong-Related Designations Updates*, U.S. DEP’T OF THE TREASURY’S OFF. OF FOREIGN ASSET CONTROL (Mar. 17, 2021), <https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20210317>; see also *Hong Kong-Related Designations*, U.S. DEP’T OF THE TREASURY’S OFF. OF FOREIGN ASSET CONTROL (Dec. 7, 2020), <https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20201207>.

107. See, e.g., U.S. DEP’T OF THE TREASURY, HONG KONG BUSINESS ADVISORY: RISKS AND CONSIDERATIONS FOR BUSINESSES OPERATING IN HONG KONG 1–4 (July 16, 2021), [https://home.treasury.gov/system/files/126/20210716\\_hong\\_kong\\_advisory.pdf](https://home.treasury.gov/system/files/126/20210716_hong_kong_advisory.pdf)

108. *Termination of Emergency with Respect to the International Criminal Court*, U.S. DEP’T OF THE TREASURY’S OFF. OF FOREIGN ASSET CONTROL (Apr. 5, 2021), [https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20210405\\_33](https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20210405_33).

109. Exec. Order No. 13,928, Blocking Property of Certain Persons Associated with the International Criminal Court, 85 Fed. Reg. 36,139, 36,140 (Exec. Off. of the President June 11, 2020), <https://www.federalregister.gov/documents/2020/06/15/2020-12953/blocking-property-of-certain-persons-associated-with-the-international-criminal-court>.

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in Palestine.<sup>110</sup> Biden's reversal of the Executive Order came days before the United States' filing was due in a case initiated by the Open Society Justice Initiative in the Southern District of New York, which challenged the ICC-related designations.<sup>111</sup> In January 2021, the court granted a narrow preliminary injunction on First Amendment grounds and allowed the Open Society Justice Initiative to continue collaborating with the individuals designated pursuant to Executive Order 13,928.<sup>112</sup>

### III. Notable Enforcement Cases

#### A. ITAR ENFORCEMENT

As part of a civil consent agreement effective April 27, 2021, DDTC fined Honeywell International Inc. (Honeywell) \$13 million and imposed a variety of remedial compliance measures in connection with multiple alleged violations of ITAR.<sup>113</sup> In 2016 and 2017, Honeywell voluntarily disclosed 2011 to 2015 unauthorized exports of seventy-one ITAR-controlled technical drawings of parts and components for military aircraft, vehicles, and missiles to suppliers in Canada, China, Ireland, and Taiwan.<sup>114</sup> During the investigation and resolution of that disclosure case, Honeywell informed DDTC of several corrective actions taken in its procurement system and processes designed to prevent similar violations from occurring again.<sup>115</sup>

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110. Exec. Order No. 14,022, Termination of Emergency with Respect to the International Criminal Court, 86 Fed. Reg. 17,895 (Exec. Off. of the President Apr. 1, 2021); *see also* Press Release, U.S. Department of State, Ending Sanctions and Visa Restrictions Against Personnel of the International Criminal Court (Apr. 2, 2021), <https://www.state.gov/ending-sanctions-and-visa-restrictions-against-personnel-of-the-international-criminal-court/>.

111. Complaint at 2–4, *Open Soc'y Just. Initiative v. Trump*, 510 F.Supp.3d 198 (S.D.N.Y. 2021) (20 Civ. 8121 (KPF)), 2021 WL 22013 (S.D.N.Y. Oct. 1, 2020), [https://www.justiceinitiative.org/uploads/1a2af879-b89c-4c53-8dd2-6c27f403d0ef/osji-et-al.-v.-donald-trump-et-al\\_Redactedv2.pdf](https://www.justiceinitiative.org/uploads/1a2af879-b89c-4c53-8dd2-6c27f403d0ef/osji-et-al.-v.-donald-trump-et-al_Redactedv2.pdf); Order Granting Motion for Extension of Time to File Response/Reply at 1–2, *Open Soc'y Just. Initiative v. Trump*, 510 F.Supp.3d 198 (S.D.N.Y. Dec. 3, 2021) (20 Civ. 8121 (KPF)), 2021 WL 22013.

112. Opinion and Order, *Open Soc'y Just. Initiative v. Trump*, 510 F.Supp.3d 198 (S.D.N.Y. 2021) (20 Civ. 8121 (KPF)), 2021 WL 22013 (S.D.N.Y. Jan. 4, 2020), <https://law.justia.com/cases/federal/district-courts/new-york/nysdce/1:2020cv08121/545370/56/>; *see also* Blocking Property of Certain Persons Associated with the International Criminal Court, 85 Fed. Reg. at 36,141.

113. U.S. DEP'T OF STATE, BUREAU OF POLI-MIL. AFFS., HONEYWELL INTERNATIONAL INC. CONSENT AGREEMENT 2–13 (Apr. 27, 2021), [https://www.pmdtc.state.gov/sys\\_attachment.do?sysparm\\_referring\\_url=tear\\_off&view=true&sys\\_id=E83eab0b1bb764902dc36311f54bcb3b](https://www.pmdtc.state.gov/sys_attachment.do?sysparm_referring_url=tear_off&view=true&sys_id=E83eab0b1bb764902dc36311f54bcb3b).

114. Letter from Michael F. Miller, Deputy Assistant Sec'y, Bureau of Pol.-Mil. Affs., on Alleged Violations of the Arms Export Control Act and the International Traffic in Arms Regulations by Honeywell International Inc. to Victor J. Miller, Vice President, Deputy Gen. Counsel, Corp. Sec'y, and Chief Compliance Officer 3 (2021), [https://www.pmdtc.state.gov/sys\\_attachment.do?sysparm\\_referring\\_url=tear\\_off&view=true&sys\\_id=113eab0b1bb764902dc36311f54bcb42](https://www.pmdtc.state.gov/sys_attachment.do?sysparm_referring_url=tear_off&view=true&sys_id=113eab0b1bb764902dc36311f54bcb42).

115. *Id.* at 4.

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Honeywell voluntarily disclosed that in June and July of 2018, some of its procurement personnel deviated from the adjusted system and corrective processes, causing the unauthorized export of twenty-seven ITAR-controlled drawings of military aircraft parts and components to suppliers in Canada, China, and Mexico.<sup>116</sup> DDTC identified several aggravating factors in its penalty analysis, including that: (1) Certain violations harmed national security; (2) other violations involved technical data designated as Significant Military Equipment; (3) still other violations involved exports to a destination proscribed by ITAR section 126.1; and (4) The 2018 exports were materially similar to the 2011–2015 exports, which were the subject of Honeywell’s corrective actions.<sup>117</sup> These led to the consent agreement, fine, and additional remedial compliance measures.

In an action involving Keysight Technologies Inc. (Keysight), an August 3, 2021, consent agreement was reached, whereby Keysight committed to pay a \$6.6 million civil fine and take several remedial measures to settle allegations that it violated ITAR twenty-four times between 2015 and 2018.<sup>118</sup> DDTC alleged Keysight incorrectly treated its Signal Studio for Multi-Emitter Scenario Generation (MESG) software as EAR99, rather than ITAR-controlled, even after DDTC shared its export jurisdiction/classification concerns with Keysight.<sup>119</sup> According to DDTC, the MESG software is controlled by USML Category XI(d) because of its direct use in modeling and simulating multi-emitter electronic warfare threat scenarios in the testing of radar equipment.<sup>120</sup>

Keysight’s misclassification contributed to the unauthorized export of the MESG software.<sup>121</sup> As aggravating factors, DDTC noted: (1) Certain violations harmed national security; (2) other violations involved exports to a country proscribed by ITAR section 126.1; (3) still other violations involved exports to Russia while it was subject to elevated licensing restrictions; (4) several exports occurred after DDTC notified Keysight of its misclassification concerns; and (5) others occurred while a commodity jurisdiction determination was pending.<sup>122</sup>

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116. *Id.* at 5.

117. *Id.* at 2.

118. U.S. DEP’T OF STATE, BUREAU OF POL.-MIL. AFFS., KEYSIGHT TECHNOLOGIES INC. CONSENT AGREEMENT 3–13 (Aug. 3, 2021), [https://www.pmdtc.state.gov/sys\\_attachment.do?sysparm\\_referring\\_url=tear\\_off&view=true&sys\\_id=98ebc0e51b35b0d0c6c3866ae54bcb80](https://www.pmdtc.state.gov/sys_attachment.do?sysparm_referring_url=tear_off&view=true&sys_id=98ebc0e51b35b0d0c6c3866ae54bcb80)

119. Letter from Michael Miller, Assistant Sec’y of U.S. Dep’t of State, on Alleged Violations of the Arms Export Control Act and the International Traffic in Arms Regulations by Keysight Technologies Inc. to Ron Nersesian, President and CEO of Keysight Technologies Inc. 1–3 (2021), [https://www.pmdtc.state.gov/sys\\_attachment.do?sysparm\\_referring\\_url=tear\\_off&view=true&sys\\_id=84eb00e51b35b0d0c6c3866ae54bcb17](https://www.pmdtc.state.gov/sys_attachment.do?sysparm_referring_url=tear_off&view=true&sys_id=84eb00e51b35b0d0c6c3866ae54bcb17).

120. *Id.*

121. *Id.*

122. *Id.* at 1–2.

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**B. EAR ENFORCEMENT**

On January 29, 2021, BIS assessed a civil penalty of \$3,229,000 against Avnet Asia Pte. Ltd. (Avnet Asia), a Singapore-based electronics distributor, as part of an agreement to settle allegations that the company committed fifty-three violations of EAR.<sup>123</sup> The alleged violations involved multiple unauthorized exports and re-exports of U.S.-origin 3A001 and EAR99 electronic components to end-users in China and Iran, as well as a Hong Kong company on the Entity List.<sup>124</sup> BIS stated that certain Avnet Asia employees took deliberate steps, including creating misleading and fraudulent documentation, to conceal ultimate destinations and end-users from its suppliers.<sup>125</sup>

On October 12, 2021, BIS also fined California-based VTA Telecom Corporation (VTA) \$1,869,372 as part of an agreement to settle civil charges alleging the company committed six violations of EAR.<sup>126</sup> BIS alleged that VTA repeatedly provided false information to BIS licensing officials and other federal personnel to conceal the military end-use of amplifiers, transistors, actuators, and other hardware being shipped to Vietnam.<sup>127</sup> Moreover, VTA unlawfully exported controlled transistors, development tools, and processor chips to Vietnam without BIS' authorization.<sup>128</sup>

**C. OFAC AND DEPARTMENT OF JUSTICE (DOJ) ENFORCEMENT**

German software company SAP SE (SAP) and the Departments of Justice, Commerce, and Treasury reached a global resolution on April 29, 2021, to settle charges against SAP from activities that occurred between 2010 and 2017.<sup>129</sup> DOJ alleged SAP and its subsidiaries directly and indirectly exported or caused the export of U.S.-origin software and cloud services to thousands of users in Iran without the required federal authorization.<sup>130</sup> SAP voluntarily disclosed the apparent violations to all three agencies—the “first-ever” such disclosure to the DOJ.<sup>131</sup> Internal audits, acquisition-related due diligence, and other reviews revealed the company failed to implement and

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123. U.S. DEP'T OF COM., BUREAU OF INDUST. AND SEC., ORDER RELATING TO AVNET ASIA 1, 6, 10 (2021), <https://efoia.bis.doc.gov/index.php/documents/export-violations/export-violations-2021/1285-e2641/file>.

124. *Id.* at 2–5.

125. *Id.*

126. U.S. DEP'T OF COM., BUREAU OF INDUST. AND SEC., ORDER RELATING TO VTA TELECOM CORPORATION 1, 4, 7 (2021), <https://efoia.bis.doc.gov/index.php/documents/export-violations/export-violations-2021/1335-e2687/file>.

127. *Id.* at 2–3.

128. *Id.* at 3–4.

129. Press Release, U.S. Department of Justice, SAP Admits to Thousands of Illegal Exports of its Software Products to Iran and Enters into Non-Prosecution Agreement with DOJ (Apr. 29, 2021), <https://www.justice.gov/opa/pr/sap-admits-thousands-illegal-exports-its-software-products-iran-and-enters-non-prosecution>.

130. *Id.*

131. *Id.*

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enforce recommended controls, such as geo-location IP address-blocking safeguards, to prevent such exports.<sup>132</sup> SAP agreed to disgorge \$5.14 million to DOJ,<sup>133</sup> pay civil penalties of \$3.29 million to BIS,<sup>134</sup> and pay \$2,132,174 in penalties to the OFAC.<sup>135</sup>

In a September 14, 2021, announcement, DOJ stated that it reached a deferred prosecution agreement with three U.S. citizens alleged to have violated ITAR, as well as federal computer fraud and access device fraud laws, while engaged in “hacking” for the benefit of a foreign government.<sup>136</sup> Despite having been advised on several occasions that their computer network exploitation operations constituted an export of ITAR-controlled defense services to the U.A.E., the men provided these services without DDTC’s authorization between 2016 and 2019.<sup>137</sup> The defendants agreed to pay \$1.68 million in fines over three years, lost their security clearances, and were prohibited from obtaining ITAR-related and certain other types of employment.<sup>138</sup>

In addition, OFAC’s enforcement actions this year emphasize that it continues to exercise jurisdiction over transactions that have no other U.S. nexus than U.S. dollar transactions processed through U.S. banks.<sup>139</sup> For example, Mashreqbank, headquartered in the U.A.E., ignored banking protocols to conceal the source of U.S. dollar transfers from Sudanese bank accounts held outside of the United States.<sup>140</sup> Similarly, before the Romanian First Bank SA was acquired by U.S.-based JC Flowers, it processed transactions destined for Iran through U.S. banks.<sup>141</sup> Union de

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132. *Id.*

133. *Id.*

134. U.S. DEP’T OF COM., BUREAU OF INDUST. AND SEC., ORDER RELATING TO SAP SE 4 (2021), <https://efoia.bis.doc.gov/index.php/documents/export-violations/export-violations-2021/1302-e2655/file>.

135. U.S. DEP’T OF TREASURY, OFF. OF FOREIGN ASSETS CONTROL, OFAC SETTLES WITH SAP SE FOR ITS POTENTIAL CIVIL LIABILITY FOR APPARENT VIOLATIONS OF THE IRANIAN TRANSACTIONS AND SANCTIONS REGULATIONS 1 (2021), [https://home.treasury.gov/system/files/126/20210429\\_sap.pdf](https://home.treasury.gov/system/files/126/20210429_sap.pdf).

136. Press Release, U.S. Department of Justice, Three Former U.S. Intelligence Community and Military Personnel Agree to Pay More Than \$1.68 Million to Resolve Criminal Charges Arising from Their Provision of Hacking-Related Services to a Foreign Government (Sept. 14, 2021), <https://www.justice.gov/opa/pr/three-former-us-intelligence-community-and-military-personnel-agree-pay-more-168-million>.

137. *Id.*

138. *Id.*

139. See U.S. DEPT. OF THE TREASURY, OFF. OF FOREIGN ASSETS CONTROL, OFAC ISSUES A FINDING OF VIOLATION TO MASHREQBANK PSC FOR VIOLATIONS OF THE SUDANESE SANCTIONS REGULATIONS 1 (2021), [https://home.treasury.gov/system/files/126/20211109\\_mashreq.pdf](https://home.treasury.gov/system/files/126/20211109_mashreq.pdf)

140. See *id.*

141. See U.S. DEPT. OF THE TREASURY, OFF. OF FOREIGN ASSETS CONTROL, OFAC ENTERS INTO \$862,318 SETTLEMENT WITH FIRST BANK SA AND JC FLOWERS & CO. FOR APPARENT VIOLATIONS OF IRAN AND SYRIA SANCTIONS PROGRAMS 1–3 (Aug. 27, 2021), [https://home.treasury.gov/system/files/126/20210827\\_firstbank\\_flowers.pdf](https://home.treasury.gov/system/files/126/20210827_firstbank_flowers.pdf).

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Banques Arabes et Françaises, a bank based in France, operated U.S. dollar accounts on behalf of sanctioned Syrian financial institutions by processing internal transfers and corresponding funds transfers through a U.S. bank.<sup>142</sup> These settlement agreements highlight OFAC's position that virtually all U.S. dollar transactions wind their way through U.S. banking institutions at some point.<sup>143</sup>

Finally, OFAC's enforcement actions this past year shed light on the sanction risks inherent in both domestic transactions and exports to friendly countries.<sup>144</sup> As an example, OFAC settled with Alliance Steel, Inc., a U.S. manufacturer which did not export from the United States, but did import engineering services from Iran with actual knowledge of the source of the engineering, and without awareness of the requirements of OFAC regulations.<sup>145</sup> Additionally, OFAC published a settlement with MoneyGram Payment Systems, Inc. for processing transactions with blocked persons located at U.S. federal prisons.<sup>146</sup> Lastly, OFAC settled with U.S. company Unicontrol, Inc. (Unicontrol) and its European customers arising out of allegations that Unicontrol ignored red flags concerning its sales of goods to those European customers, which the customers then sold to Iran.<sup>147</sup>

While OFAC reached fewer settlements in previous years, it continues to move away from settlements focused on the financial industry and into settlements that provide lessons to all manner of companies.

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142. See U.S. DEP'T OF THE TREASURY, OFAC ENTERS INTO \$8,572,500 SETTLEMENT WITH UNION DE BANQUES ARABES ET FRANCAISES FOR APPARENT VIOLATIONS OF SYRIA-RELATED SANCTIONS PROGRAM U.S. DEPARTMENT OF THE TREASURY 1 (2021), [https://home.treasury.gov/system/files/126/01042021\\_UBAF.pdf](https://home.treasury.gov/system/files/126/01042021_UBAF.pdf).

143. See, e.g., *id.* at 1; see also U.S. DEP'T OF THE TREASURY, *supra* note 139, at 1; U.S. DEP'T OF THE TREASURY, *supra* note 142, at 1–2.

144. See U.S. DEP'T OF THE TREASURY, OFAC SETTLES WITH ALLIANCE STEEL, INC. FOR \$435,003 WITH RESPECT TO POTENTIAL CIVIL LIABILITY FOR APPARENT VIOLATIONS OF THE IRANIAN TRANSACTIONS AND SANCTIONS REGULATIONS 1 (2021), [https://home.treasury.gov/system/files/126/20210419\\_alliance.pdf](https://home.treasury.gov/system/files/126/20210419_alliance.pdf).

145. See *id.* at 1–2.

146. See U.S. DEP'T OF THE TREASURY, OFAC ENTERS INTO \$34,328.78 SETTLEMENT WITH MONEYGRAM PAYMENT SYSTEMS, INC. FOR APPARENT VIOLATIONS OF MULTIPLE SANCTIONS PROGRAMS 1 (2021), [https://home.treasury.gov/system/files/126/20210429\\_moneygram.pdf](https://home.treasury.gov/system/files/126/20210429_moneygram.pdf).

147. See U.S. DEP'T OF THE TREASURY, UNICONTROL, INC. SETTLES POTENTIAL CIVIL LIABILITY FOR APPARENT VIOLATIONS OF THE IRANIAN TRANSACTIONS AND SANCTIONS REGULATIONS 1 (2021), [https://home.treasury.gov/system/files/126/20210315\\_uc.pdf](https://home.treasury.gov/system/files/126/20210315_uc.pdf).



#### **IV. Canadian Export Control and Economic Sanctions Developments**

##### **A. ECONOMIC SANCTIONS**

###### *1. Afghanistan Under the Taliban*

The Taliban takeover of Afghanistan following the withdrawal of U.S. troops in the summer of 2021 created new challenges for organizations engaged in activities in or with that region. Although Canada has not imposed sanctions against Afghanistan, the Taliban is a listed terrorist group and several individuals in its leadership are listed under Canadian sanctions.<sup>148</sup> Canada's Criminal Code prohibits directly or indirectly providing or making available property and financial or related services that will be used by or benefit such terrorist groups either in whole or in part.<sup>149</sup> The Government of Canada also announced it has no plans to recognize the Taliban as the legitimate government of Afghanistan.<sup>150</sup>

###### *2. Canada Imposes Sanctions and Export Control Measures Against Belarus*

In response to the Belarusian government's crackdown on opposition leaders and civilians protesting the results of Belarus' presidential election, Canada imposed sanctions against various officials of the Belarusian government under the Special Economic Measures Act (SEMA)<sup>151</sup> in the fall of 2020. It also sanctioned President Aleksandr Lukashenko and his son.<sup>152</sup>

Canada expanded these measures following the Belarusian government's diversion and forced landing of Ryanair Flight 4978 as well as the arrest of Belarusian journalist Roman Protasevich and his companion Sofia Sapega in May of 2021.<sup>153</sup> Between June and August, Canada adopted additional measures, which included significant sectoral and trade sanctions targeting important sectors of Belarus' economy.<sup>154</sup> These measures apply to dealings in transferable securities and money market instruments; interactions with debt with more than ninety days' maturity; the provision of insurance and reinsurance to certain individuals and entities; and dealings in petroleum and

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148. See The United Nations Act, R.S.C. 1985, c U-2 §§ 2-3 (Can.); Regulations Implementing the United Nations Resolutions on the Taliban, ISIL (Da'esh) and Al-Qaida, SOR/99-444 §§ 2-8 (Can.); Regulations Implementing the United Nations Resolutions on the Suppression of Terrorism, SOR/2001-360 §§ 1-2(1), sched. (Can.).

149. Criminal Code, R.S.C., 1985, c C-46 §§ 83.02-83.04 (Can.).

150. *Political Situation in Afghanistan*, GOV'T OF CANADA (Aug. 23, 2021), <https://www.canada.ca/en/immigration-refugees-citizenship/services/refugees/afghanistan/political-situation.html>.

151. *Canadian Sanctions Related to Belarus*, GOV'T OF CANADA (2022), [https://www.international.gc.ca/world-monde/international\\_relations-relations\\_internationales/sanctions/belarus.aspx?lang=ENg](https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/belarus.aspx?lang=ENg); see also Special Economic Measures Act, S.C. 1992, c 17 § 4 (Can.).

152. Special Economic Measures (Belarus) Regulations, SOR/2020-214 sched. 1 (Can.).

153. GOV'T OF CANADA, *supra* note 151.

154. See *id.*

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potassium chloride products.<sup>155</sup> This was the first time Canada imposed trade or sectoral measures against a sanctioned country in over seven years. In addition, Canada suspended the issuance of new export and brokering permits to Belarus.<sup>156</sup>

3. *China, the New Sanctions Target*

Canada imposed economic sanctions against China on March 22, 2021, which was the first time since the 1989 crackdown on student protestors in Beijing's Tiananmen Square. The list-based measures under SEMA target four Chinese government officials and one Chinese entity, Xinjiang Production and Construction Corps Public Security Bureau, "for their roles in the mass arbitrary detention, torture . . . mass surveillance and forced labour of Uyghurs and other Muslim ethnic minorities in [the Xinjiang region]."<sup>157</sup>

Canada issued several guidance documents (measures<sup>158</sup> and an advisory<sup>159</sup>) to Canadian businesses designed to address human rights concerns in sourcing from and exporting to China.<sup>160</sup>

4. *Expansion of Existing Sanctions Measures—Myanmar*

Canada introduced two new rounds of sanctions against Myanmar in February and May of 2021.<sup>161</sup> Canada listed several Burmese individuals, their family members, and affiliated commercial entities under SEMA for their involvement in the coup d'état and the subsequent systemic human

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155. Special Economic Measures (Belarus) Regulations, SOR/2020-214 sched. 1 (Can.).

156. This measure was imposed on November 9, 2020, and remains in force today. See *Notice to Exporters and Brokers, Government of Canada, Notice to Exporters and Brokers – Export and Brokering of Items Listed on the Export Control List and the Brokering Control List to Belarus*, GOV'T OF CANADA (Nov. 9, 2021), <https://www.international.gc.ca/trade-commerce/controls-controles/notices-avis/1033.aspx?lang=ENg>.

157. Press Release, Government of Canada, Canada joins international partners in imposing new sanctions in response to human rights violations in Xinjiang (Mar. 22, 2021), <https://www.canada.ca/en/global-affairs/news/2021/03/canada-joins-international-partners-in-imposing-new-sanctions-in-response-to-human-rights-violations-in-xinjiang.html>.

158. *Measures Related to the Human Rights Situation in the Xinjiang Uyghur Autonomous Region*, GLOB. AFF. CANADA (Jan. 18, 2021), <https://www.canada.ca/en/global-affairs/news/2021/01/backgrounder---measures-related-to-the-human-rights-situation-in-the-xinjiang-uyghur-autonomous-region.html>.

159. See *Global Affairs Canada Advisory on Doing Business with Xianjiang-Related Entities*, GLOB. AFF. CANADA (Jan. 12, 2021), <https://www.international.gc.ca/global-affairs-affaires-mondiales/news-nouvelles/2021/2021-01-12-xinjiang-advisory-avis.aspx?lang=ENg>.

160. See *id.*; see also GLOB. AFF. CANADA, *supra* note 158.

161. See Kim Caine et al., *New Sanctions and Export Restrictions Imposed Targeting Burma: Updated Positions of the United States, Canada, United Kingdom and European Union*, NORTON ROSE FULBRIGHT (Apr. 26, 2021), <https://www.nortonrosefulbright.com/en-ca/knowledge/publications/ac28ff93/new-sanctions-and-export-restrictions-imposed-targeting-burma>.

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rights abuses.<sup>162</sup> To date, sanction measures against Myanmar include an arms embargo, asset freezes, and technical assistance prohibitions.<sup>163</sup>

5. *Expansion of Existing Sanctions Measures—Nicaragua*

In November of 2021, Canada imposed additional sanctions on Nicaragua by listing eleven high-ranking officials as part of President Daniel Ortega's inner circle.<sup>164</sup>

6. *Expansion of Existing Sanctions Measures—Russia and Ukraine*

Canada continued strengthening its sanctions regime against Russia in March of 2021 in response to Russia's systemic human rights violations.<sup>165</sup> The new list-based measures were tied to three things: (1) the detention of prominent Russian opposition figure Alexey Navalny; (2) Russia repressing internal dissent; and (3) the seventh anniversary of Russia's invasion of the Crimea region of Ukraine.<sup>166</sup> Canada's sanctions against Russia are imposed under both SEMA and the Sergei Magnitsky Law.<sup>167</sup> They encompass a broad set of measures including asset freezes, prohibitions on dealings with listed persons, and financial and supply prohibitions.<sup>168</sup> In the same month, Canada also added two Ukrainian entities, a federal railway enterprise and an insurance company, to the Ukrainian sanction list under SEMA.<sup>169</sup> The entities are linked to Russia's annexation and ongoing occupation of Crimea.<sup>170</sup>

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162. Regulations Amending the Special Economic Measures (Burma) Regulations, SOR/2021-18, <https://gazette.gc.ca/rp-pr/p2/2021/2021-03-03/html/sor-dors18-eng.html> (Can); *see also* Regulations Amending the Special Economic Measures (Burma) Regulations, SOR/2021-106, <https://canadagazette.gc.ca/rp-pr/p2/2021/2021-05-26/html/sor-dors106-eng.html> (Can.).

163. Special Economic Measures (Burma) Regulations, SOR/2007-285 §§ 3-4, 13, <https://laws-lois.justice.gc.ca/eng/regulations/sor-2007-285/fulltext.html> (Can.).

164. Press Release, Government of Canada, Canada Imposes Third Round of Sanctions in Response to Ongoing Human Rights Violations in Nicaragua (Nov. 15, 2021), <https://www.canada.ca/en/global-affairs/news/2021/11/canada-imposes-third-round-of-sanctions-in-response-to-ongoing-human-rights-violations-in-nicaragua.html>.

165. Regulations Amending the Special Economic Measures (Russia) Regulations: SOR/2021-48, <https://gazette.gc.ca/rp-pr/p2/2021/2021-03-31/html/sor-dors48-eng.html> (Can.).

166. *Id.*; *see also* Regulations Amending the Special Economic Measures (Russia) Regulations, SOR/2021-64 (Can.), <https://laws.justice.gc.ca/eng/regulations/sor-2021-64/fulltext.html>.

167. Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law), S.C. 2017, c 21 § 3 (Can.).

168. *See* Regulations Amending the Special Economic Measures (Russia) Regulations, *supra* note 166, §§ 3, 5; Justice for Victims of Corrupt Foreign Officials Act, *supra* note 167, c 21 § 3.

169. *See* Regulations Amending the Special Economic Measures (Ukraine) Regulations: SOR/2021-65, <https://gazette.gc.ca/rp-pr/p2/2021/2021-04-14/html/sor-dors65-eng.html> (Can.); *see also* Special Economic Measures (Ukraine) Regulations, SOR/2014-60 sched, <https://laws-lois.justice.gc.ca/eng/regulations/sor-2014-60/FullText.html> (Can.).

170. *See id.*

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**B. EXPORT CONTROLS**

1. *Changes to the Export Control List (ECL)*

In June of 2021, Canada announced changes to its ECL.<sup>171</sup> Among the more significant changes are: (1) Additional controls over exports and technology transfers related to software designed for monitoring or analysis by law enforcement; (2) Certain items designed to circumvent information security; and (3) Certain military-related software, including software for offensive cyber operations.<sup>172</sup> The order brings Canada's export controls into compliance with its multilateral export control commitments made as of December of 2020.<sup>173</sup>

2. *Controlled Exports to Turkey*

In October of 2019, Canada suspended the issuance of new permits for exports for military goods and technology to Turkey pending the results of an investigation into allegations that Canadian controlled technology was being used by Azerbaijan in the military conflict in Nagorno-Karabakh.<sup>174</sup> This investigation was completed in the spring of 2021 when Canada issued a final report announcing there is "credible evidence" of Canadian technology being used in Nagorno-Karabakh.<sup>175</sup> Consequently, Canada cancelled export permits for all military goods and technology that had been temporarily suspended in the fall of 2020.<sup>176</sup> But the report stated there was "no reason to take any action in relation to any remaining permits that were currently valid for Group 2 (military) items to Turkey."<sup>177</sup>

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171. See Order Amending the Export Control List: SOR/2021-121, <https://canadagazette.gc.ca/rp-pr/p2/2021/2021-06-23/html/sor-dors121-eng.html> (Can.).

172. John W. Boscarior et al., *Canada Adopts New Export Controls and Amends Process for Introducing Future Controls*, MCCARTHY TETRAULT (June 30, 2021), [https://www.mccarthy.ca/en/insights/blogs/terms-trade/canada-adopts-new-export-controls-and-amends-process-introducing-future-controls#\\_ftn2](https://www.mccarthy.ca/en/insights/blogs/terms-trade/canada-adopts-new-export-controls-and-amends-process-introducing-future-controls#_ftn2).

173. *Id.*

174. *Final Report: Review of Export Permits to Turkey*, GOV'T OF CANADA (Apr. 19, 2021), <https://www.international.gc.ca/trade-commerce/controls-controles/reports-rapports/exp-permits-turkey-licences-turquie.aspx?lang=ENg>.

175. *Id.*

176. *Statement From Minister Garneau to Announce the Cancellation of Export Permits to Turkey*, GLOB. AFF. CANADA (Apr. 12, 2021), <https://www.canada.ca/en/global-affairs/news/2021/04/statement-fromminister-garneauto-announce-the-cancellation-of-export-permits-to-turkey.html>.

177. *Final Report: Review of Export Permits to Turkey*, *supra* note 174, at § c.

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## **International Animal Law**

EDITOR: SUSAN SCHWARTZ; AND  
AUTHORS: TALA DiBENEDETTO, EDIE BOWLES, PAULA CARDOSO,  
DAINA BRAY, RAJESH K. REDDY, AND REGINA PAULOSE\*

### **I. Ecocide: The First International Crime Protecting Animals**

In June 2021, an expert panel of twelve international criminal and environmental lawyers released a definition for ecocide, which they intend to be adopted by the International Criminal Court (ICC) to prosecute egregious harms against the environment.<sup>1</sup> If adopted by the ICC, it would be the first international crime protecting animals as part of the environment and ecosystems decimated by large-scale commercial activity.

The expert panel defined ecocide as “unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts.”<sup>2</sup> “Widespread,” under this definition, means “damage which extends beyond a limited geographic area, crosses state boundaries, or is suffered by an entire ecosystem or *species* or a large number of human beings.”<sup>3</sup> In adopting this definition for “widespread,” the panel borrowed from the ICC’s interpretation of “widespread” within Crimes Against Humanity (namely affecting large numbers of human beings) and expanded it by including entire ecosystems or species.<sup>4</sup>

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\* Tala DiBenedetto, Litigation Counsel at PETA Foundation, authored the Ecocide section; Edie Bowles, Solicitor and co-founder of Advocates for Animals, a UK-based law firm, authored UK 2021; Paula Cardoso, Legal Director of Associação Mercy For Animals Brasil and Daina Bray, Senior Litigation Fellow & Project Manager for the Climate Change & Animal Agriculture Litigation Initiative at Yale Law School’s Law, Ethics & Animals Program, authored the section on Brazil (Ms. Cardoso provided all translations); Rajesh K. Reddy, Director, Global Animal Law Program at the Center for Animal Law Studies at Lewis & Clark Law School, authored the section on Cuba; Regina Paulose, International Criminal Law Attorney, authored the section on wolves. Susan Schwartz is a Deputy Attorney General for California.

1. See *Legal Definition of Ecocide*, STOP ECOCIDE INT’L, <https://www.stopecocide.earth/legal-definition> (last visited Apr. 2, 2022).

2. See STOP ECOCIDE FOUNDATION, INDEPENDENT EXPERT PANEL FOR THE LEGAL DEFINITION OF ECOCIDE: COMMENTARY AND CORE TEXT 5 (2021), <https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d7479cf8e7e5461534dd07/1624721314430/SE+Foundation+Commentary+and+core+text+revised+%281%29.pdf>.

3. *Id.* (emphasis added).

4. *Id.*

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The ICC is tasked with investigating and trying individuals “charged with the gravest crimes of concern to the international community.”<sup>5</sup> It was established and is governed by the Rome Statute.<sup>6</sup> Currently, there are four such crimes laid out in the Rome Statute: war crimes, crimes against humanity, genocide, and the crime of aggression.<sup>7</sup> If adopted by the ICC, ecocide would be the fifth international crime that could be prosecuted by the court and the first protecting animals. It would also be the first new international crime since the 1940s, when Nazi leaders were prosecuted at the Nuremberg trials.<sup>8</sup> Efforts to recognize ecocide as an international crime have earned the support of several high-profile figures such as Pope Francis, Greta Thunberg, and political leaders in Belgium, Finland, France, and Luxembourg.<sup>9</sup>

According to Stop Ecocide International, a “key aim” of adding ecocide to the list of international crimes “is to protect not only humans but nature itself, so that destruction of ecosystems can be outlawed even without direct human victims.”<sup>10</sup> While activities causing extreme ecological destruction overlap with existing international crimes, the organization notes that “most ecosystem destruction happens in peace-time and does not always affect humans directly,” warranting establishment of ecocide as a standalone crime.<sup>11</sup>

International law has long recognized the ecological and cultural significance of animals as part of the natural environment. The United Nations has expressed that animals living in the wild “have an intrinsic value and contribute to the ecological, genetic, social, economic, scientific, educational, cultural, recreational, and aesthetic aspects of human well-being and to sustainable development.”<sup>12</sup> Thus, harm to animals must be addressed in any crime addressing harm to the environment.<sup>13</sup>

We are currently experiencing what scientists call the sixth mass extinction, having already lost countless species, with many more on the

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5. See *About the Court*, INT’L CRIMINAL COURT, <https://www.icc-cpi.int/about> (last visited Apr. 2, 2022).

6. See Rome Statute of the International Criminal Court, art. 1, July 17, 1998, 2187 U.N.T.S. 90, <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

7. *Id.* at art. 5.

8. See Jack Losh, ‘Historic Moment’: Legal Experts Unveil New Definition of Ecocide, ALJAZEERA (June 22, 2021) <https://www.aljazeera.com/news/2021/6/22/legal-experts-unveil-new-definition-ecocide>.

9. *Id.*

10. See *FAQs - Ecocide & the Law*, STOP ECOCIDE INT’L, <https://www.stopecocide.earth/faqs-ecocide-the-law> (last visited Aug. 20, 2021).

11. *Id.*

12. *The Incalculable Value of Wildlife*, UNITED NATIONS, <https://www.un.org/en/observances/world-wildlife-day> (last visited Aug. 24, 2021).

13. *Id.*

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brink.<sup>14</sup> Regarded as one of the most serious environmental issues due to the ecological impacts of species loss,<sup>15</sup> mass extinction poses an existential threat not only to individual species but also to all life on this planet. Extractive industries like mineral mining, oil drilling, and large-scale monocropping (growing a single crop year after year on the same land) of cash crops like soy and palm oil contribute to pollution, and deforestation decimates countless animal populations globally each year.<sup>16</sup>

For example, mining pollution and oil spills have contributed significantly to water pollution and deforestation of the Amazon.<sup>17</sup> Following a series of oil spills, over 10,000 endangered Titicaca water frogs suddenly died in Peru in 2016.<sup>18</sup> The rise of palm oil farming is a major driver of deforestation and degradation of natural habitats in parts of tropical Asia and Central and South America and contribute to the deaths of 750 to 1,250 critically endangered Bornean orangutans annually.<sup>19</sup>

While wild animals are more traditionally thought of as part of the environment, the billions of animals raised and exploited for food are similarly implicated in large-scale environmental issues. Emissions from large-scale animal agriculture form one of the main drivers of climate change.<sup>20</sup> The Food and Agriculture Organization of the United Nations estimates that animal agriculture is responsible for 14.5 to 16.5 percent of global greenhouse gas emissions and causes significant environmental degradation, from biodiversity loss to deforestation.<sup>21</sup> Brazil is the world's largest beef exporter<sup>22</sup> and home to a large portion of the Amazon rainforest, one of the most significant terrestrial carbon sinks.<sup>23</sup> Extensive cattle ranching is the leading cause of deforestation in almost every Amazon

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14. See Gerardo Ceballos et al., *Vertebrates on the Brink as Indicators of Biological Annihilation and the Sixth Mass Extinction*, 117 PROC. OF THE NAT'L ACAD. OF SCIENCES 13596, 13596 (2020), <https://www.pnas.org/doi/10.1073/pnas.1922686117>.

15. *Id.*

16. *Id.*

17. See LAURA SHOLTZ, COUNCIL ON HEMISPHERIC AFF., *DEAD FROGS AND OIL SPILLS: RECONCILING KUCZYNSKI'S PROMISE OF CLEAN WATER WITH PERU'S RECURRING INDUSTRIAL POLLUTION INCIDENTS* 1–3 (2016), [https://secureservercdn.net/104.238.69.231/dbn.flb.myftpupload.com/wp-content/uploads/2016/11/Final\\_Peru-Water.pdf](https://secureservercdn.net/104.238.69.231/dbn.flb.myftpupload.com/wp-content/uploads/2016/11/Final_Peru-Water.pdf).

18. *Id.*

19. INT'L UNION FOR THE CONSERVATION OF NATURE, *PALM OIL AND BIODIVERSITY* 1 (2021), [https://www.iucn.org/sites/dev/files/iucn\\_issues\\_brief\\_palm\\_oil\\_and\\_biodiversity.pdf](https://www.iucn.org/sites/dev/files/iucn_issues_brief_palm_oil_and_biodiversity.pdf).

20. See ENVTL. PROT. AGENCY, *INVENTORY OF US GREENHOUSE GAS EMISSIONS AND SINKS: 1990-2009* 6–2 (2011), [http://www.epa.gov/climatechange/emissions/downloads/11/US-GHG-Inventory-2011-Complete\\_Report.pdf](http://www.epa.gov/climatechange/emissions/downloads/11/US-GHG-Inventory-2011-Complete_Report.pdf).

21. P.J. GERBER ET AL., *FOOD & AGRICULTURE ORG., TACKLING CLIMATE CHANGE THROUGH LIVESTOCK: A GLOBAL ASSESSMENT OF EMISSIONS & MITIGATION OPPORTUNITIES* 17 (2013), <https://www.fao.org/3/i3437e/i3437e.pdf>.

22. See Jessica Brice & Tatiana Freitas, *Why It's So Hard to Stop Amazon Deforestation, Starting With the Beef Industry*, BLOOMBERG (Dec. 17, 2020), <https://www.bloomberg.com/news/features/2020-12-17/saving-the-amazon-starts-with-cleaning-up-the-beef-industry>.

23. R. J. W. Brienen, et al., *Long-Term Decline of the Amazon Carbon Sink*, 519 NATURE 344, 344–348 (2015), <https://www.nature.com/articles/nature14283>.



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country, and it accounts for eighty percent of current deforestation, releasing 340 million tons of carbon into the atmosphere every year.<sup>24</sup> Nevertheless, ranchers in Brazil illegally use bulldozers, machetes, and fire to make room for pastureland.<sup>25</sup>

There are serious animal welfare issues implicated in this massive industry, including those inflicted by husbandry practices. While these practices vary and are regulated differently country by country, there are many commonalities, some dating back thousands of years. Overbreeding and dwindling genetic diversity limit the ability of farm animals to adapt to environmental changes such as climate change.<sup>26</sup> Due to the influence of Western dietary habits and subsidies or loans for animal agriculture, there has been a rise in factory farming in developing nations, mainly India, China, Brazil, and Ethiopia, but also Argentina, Mexico, Pakistan, Taiwan, Thailand, and the Philippines.<sup>27</sup> Further, imported meat from factory farmed animals in countries with less stringent welfare regulations may be sold more cheaply than domestic meat, exacerbating welfare issues by putting pressure on farmers to engage in more harmful practices in order to cut costs.<sup>28</sup>

Industrial fishing also contributes significantly to biodiversity loss and climate change. The ocean absorbs about a quarter of global carbon dioxide emissions each year.<sup>29</sup> Every year, between 0.97 to 2.7 trillion fish are caught from the wild and killed globally, and countless more are farmed for food or caught for recreational purposes.<sup>30</sup> The 2018 State of World Fisheries and Aquaculture report, published by the Food and Agriculture Organization of the United Nations, confirms a global trend toward unsustainable fishing, noting that thirty-three percent of global fish stocks are now overfished, a figure that continues to increase.<sup>31</sup> Overfishing

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24. *Unsustainable Cattle Ranching*, WORLD WILDLIFE FUND, [https://wwf.panda.org/discover/knowledge\\_hub/where\\_we\\_work/amazon/amazon\\_threats/unsustainable\\_cattle\\_ranching/](https://wwf.panda.org/discover/knowledge_hub/where_we_work/amazon/amazon_threats/unsustainable_cattle_ranching/) (last visited Sept. 24, 2021).

25. *Id.*

26. Jan Overney, *Dwindling Genetic Diversity of Farm Animals is a Threat to Livestock Production*, PHYS. ORG. (Oct. 16, 2016), <https://phys.org/news/2015-10-dwindling-genetic-diversity-farm-animals.html>.

27. See *The Globalization of Factory Farming: And What We Can Do at Home*, ANIMAL OUTLOOK, <https://animaloutlook.org/factory-farming-what-we-can-do/> (last visited Jul. 22, 2012).

28. See Juliette Jowit, *Quarter of Meat Sold in UK Imported from Nations Weaker on Animal Welfare*, THE GUARDIAN (Feb. 16, 2010), <https://www.theguardian.com/environment/2010/feb/16/meat-imports-animal-welfare-standards>.

29. See Enric Sala, et al., *Protecting the Global Ocean for Biodiversity, Food & Climate*, 592 NATURE 397, 397–402 (2021), <https://www.nature.com/articles/s41586-021-03371-z.pdf>.

30. *Understanding Fisheries Management in the United States*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., <https://www.fisheries.noaa.gov/insight/understanding-fisheries-management-united-states> (last visited Apr. 4, 2022).

31. See FOOD & AGRICULTURE ORG., THE STATE OF WORLD FISHERIES AND AQUACULTURE 2018: MEETING THE SUSTAINABLE DEVELOPMENT GOALS 90 (2018), <https://www.fao.org/3/I9540EN/I9540en.pdf>.

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reduces the ability of fish to withstand and recover from other threats, including those from climate change—such as ocean warming, acidification, and reduced oxygen levels—affecting the health and survival of fish.<sup>32</sup>

Pollution and deforestation from these practices inhibit the ability of citizens of affected areas to provide for themselves using their own natural resources and particularly impacts cultures that enjoy a close relationship with the natural environment, including many indigenous communities. Criminalizing the most egregious instances of these harmful practices would save countless lives. Not only do they contribute to or exacerbate the effects of climate change, which poses an existential threat to all life on earth, these practices inflict harm on countless individuals, human and animal alike.

A legal definition marks the first step towards making ecocide an international crime. For this to be accomplished, one or more ICC member states must propose an ecocide amendment to the Rome Statute before a meeting of the states parties to the Rome Statute.<sup>33</sup> A majority vote at that meeting enables the amendment to enter into consideration.<sup>34</sup> A Crime Review Conference may then be convened, or negotiation may progress via formal and informal discussion between representatives of states parties.<sup>35</sup> Then, an agreement of two-thirds of the member states would be required to adopt the amendment into the Statute.<sup>36</sup> Finally, countries must work to ratify and enforce the law within their respective domestic legislation.<sup>37</sup> If this were to be accomplished, industries that have inflicted significant harm on humans and animals through environmental destruction and the governments that facilitate these harms may finally be held accountable.

## II. United Kingdom 2021

In the aftermath of Brexit, there was great concern about the future of animal welfare legislation in the United Kingdom. In 2021 however, there has been a wealth of proposals for new animal welfare legislation, not least of which is the Animal Welfare (Sentencing) Act 2021,<sup>38</sup> which increased sentences to five years, and the Animal Welfare (Sentience) Bill, which does the following:<sup>39</sup>

1. Recognizes animals as sentient;<sup>40</sup>

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32. See HOUSES OF PARLIAMENTARY OFFICE OF SCI. & TECH., CLIMATE CHANGE & FISHERIES 2 (2019), <https://researchbriefings.files.parliament.uk/documents/POST-PN-0604/POST-PN-0604.pdf>.

33. See *FAQs - Ecocide & the Law*, *supra* note 10.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. See *generally* Animal Welfare Act 2021 (UK), <https://www.legislation.gov.uk/ukpga/2021/21/contents/enacted>.

39. See Animal Welfare (Sentience) Bill 2022 (UK), <https://bills.parliament.uk/bills/2867>.

40. *Id.*

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2. Introduces an Animal Sentience Committee;<sup>41</sup> and
3. Gives that Committee the power to produce reports regarding government policy that assess whether the government is having due regard to the ways in which animals might be adversely affected. These reports may also contain recommendations for future policy implementation.<sup>42</sup>

This bill is groundbreaking in that a public body will now have the sole purpose of representing animal interests in government policy. But this bill is couched in language of discretion, with no firm commitments from any party involved.

A. IMPORTS AND EXPORTS

Other big developments in the wake of Brexit are the proposals regarding import and export bans. The premise of the European Union is that it creates a single market, which includes the free movement of goods between member states under Article 28 of the Treaty on the Functioning of the European Union (EU).<sup>43</sup> Article 28 means that no import or export bans are possible, except in limited circumstances.<sup>44</sup> Since the United Kingdom's (UK) withdrawal from the EU, some significant import and export bans are being considered; these include the ban on importing fur and foie gras, the ban on importing puppies, and the ban on exporting live farm animals. The farming of animals for fur was banned in England and Wales in 2000<sup>45</sup> and Scotland<sup>46</sup> and Northern Ireland<sup>47</sup> in 2002. In May 2021, the UK government launched a radical consultation to consider what options were available regarding the import and sale of fur in the UK.<sup>48</sup>

The production of foie gras, which involves the painful force feeding of geese, has been banned in the UK since 2000<sup>49</sup> under the Welfare of Farmed

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41. *Id.*

42. *Id.*

43. See Consolidated Version of the Treaty on the Functioning of the European Union, Oct. 10, 2012, 2012 O.J. (C 326) 47, [https://eur-lex.europa.eu/eli/treaty/tfeu\\_2012/oj](https://eur-lex.europa.eu/eli/treaty/tfeu_2012/oj).

44. *Id.*

45. See *generally* Fur Farming (Prohibition) Act 2000 (UK), <https://www.legislation.gov.uk/ukpga/2000/33/contents>.

46. See Fur Farming (Prohibition) (Scotland) Act 2002 (Scot.), <https://www.legislation.gov.uk/asp/2002/10/contents>.

47. See The Fur Farming (Prohibition) (N. Ir.) Order 2002 (UK), <https://www.legislation.gov.uk/nisi/2002/3151/contents/england>.

48. See *The Fur Market Grain in Great Britain*, DEP'T FOR ENV'T FOOD & RURAL AFF., <https://consult.defra.gov.uk/animal-welfare-in-trade/fur-market-in-great-britain/> (last visited Apr. 6, 2022).

49. See *International Outcry*, STOP FORCE FEEDING, <https://web.archive.org/web/20070606205035/http://www.stopforcefeeding.com/page.php?module=international#uk> (last visited May 7, 2022).

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Animals Regulations and now the 2007 regulations, which, under Schedule 1, state the following:<sup>50</sup>

22. Animals must be fed a wholesome diet which is appropriate to their age and species and which is fed to them in sufficient quantity to maintain them in good health, to satisfy their nutritional needs and to promote a positive state of well-being.<sup>51</sup>

23. Animals must not be provided with food or liquid that contains any substance that may cause them unnecessary suffering or injury and must be provided with food and liquid in a manner that does not cause them unnecessary suffering or injury.<sup>52</sup>

The UK government is now considering further restrictions on the import of the product.<sup>53</sup>

Puppy farming has been banned in England since 2020<sup>54</sup> and in Wales<sup>55</sup> and Scotland<sup>56</sup> since 2021. The ban was accomplished by laws that require puppies under eight weeks to be sold with their biological mother.<sup>57</sup> These bans, however, do not extend to puppies being imported into the UK. As a solution, a ban on the import of puppies has been proposed and is close to becoming a reality: the new Animal Welfare (Kept Animals) Bill, introduced to Parliament in June 2021,<sup>58</sup> will give the UK government the power to implement a minimum age on dogs being imported into the UK.

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50. See generally The Welfare of Farmed Animals (England) Regulations 2007 (Eng.), <https://www.legislation.gov.uk/ukxi/2007/2078/schedule/1/made>; see generally The Welfare of Farmed Animals (Wales) Regulations 2007 (UK), <https://www.legislation.gov.uk/wsi/2007/3070/schedule/1/made>.

51. See Welfare of Farmed Animals (England) Regulations 2007 (Eng.), *supra* note 50, at art. 22.

52. *Id.*, at art. 23.

53. See Jane Dalton, *Government Holding Talks in Step Towards UK Ban on Foie Gras*, INDEPENDENT (Aug. 7, 2021), <https://www.independent.co.uk/news/uk/home-news/foie-gras-ban-uk-import-b1898352.html>.

54. See Animal Welfare (Licensing of Activities Involving Animals) (England) Regulations 2018 (Eng.), <https://www.legislation.gov.uk/ukxi/2018/486/schedule/3>.

55. See Animal Welfare (Licensing of Activities Involving Animals) (Wales) Regulations 2021 (Wales), <https://www.legislation.gov.uk/wsi/2021/416/schedule/3/made>.

56. See *Breeding of Animals: Dogs, Cats & Rabbits*, SCOTTISH BORDERS COUNCIL, [https://www.scotborders.gov.uk/info/20025/licensing/1121/the\\_animal\\_welfare\\_licensing\\_of\\_activities\\_involving\\_animals\\_scotland\\_regulations\\_2021\\_conditions/3](https://www.scotborders.gov.uk/info/20025/licensing/1121/the_animal_welfare_licensing_of_activities_involving_animals_scotland_regulations_2021_conditions/3) (last visited Apr. 6, 2022).

57. See Animal Welfare (Licensing of Activities Involving Animals) Regulations 2018, SI 2018/486, sch. 6, ¶ 1(5) (Eng.), <https://www.legislation.gov.uk/ukdsi/2018/9780111165485>; see also Animal Welfare (Licensing of Activities Involving Animals) Regulations 2021, SI 2021/84, sch. 6, ¶ 2(5)(b) (Scot.), <https://www.legislation.gov.uk/ssi/2021/84/contents/made>; see also Animal Welfare (Licensing of Activities Involving Animals) Regulations 2021, SI 2018/416, sch. 3, ¶ 5(1)(d) (Wales) (prohibiting the sale of a puppy that is less than eight weeks old.), <https://www.legislation.gov.uk/sdsi/2021/9780111048474/contents>.

58. Animal Welfare (Kept Animals) Bill 2021-22, HC Bill [195] ch. 3, ¶ 46(2)(a) (UK), <https://bills.parliament.uk/bills/2880>.

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Live exports of farm animals are controversial all over the world, and the EU is no exception.<sup>59</sup> The EU is the biggest live exporter in the world.<sup>60</sup> Live exports are rife with welfare issues.<sup>61</sup> Farm animals being transported throughout the EU benefit from rules on welfare conditions during transit that, among other things, require rest periods, proper handling, and timely feeding.<sup>62</sup> This is true even for the animals that leave the EU, as their treatment and fate do not fall outside of the EU's jurisdiction.<sup>63</sup> In addition, meat imported into the EU must have been slaughtered in accordance with EU standards; however, no such requirement exists for exported animals.<sup>64</sup>

As a result of all these issues, live exports have been controversial in the UK for many years; however, the single market has meant that export restrictions could not be put in place.<sup>65</sup> The Animal Welfare (Kept Animals) Bill bans the export of bulls, cows, heifers, calves, buffalo, bison, horses, ponies, donkeys, asses, hinnies, mules, zebras, sheep, goats, pigs, or wild boar for slaughter or fattening for slaughter.<sup>66</sup>

**B. ACTION PLAN FOR ANIMAL WELFARE**

Many of the proposals that are now possible since the UK's withdrawal from the EU have been published in its 2021 Government Action Plan for Animal Welfare,<sup>67</sup> which outlines UK policy on animal welfare. Along with focusing on sentience, bans on the importation of fur, foie gras, puppies, and bans on live exports, the plan includes the following:

1. A ban on advertising unethical tourist experiences involving animals overseas, such as elephant rides;<sup>68</sup>

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59. See Sophie Kevany, *EU Revealed to be World's Biggest Live Animal Exporter*, THE GUARDIAN (Jan. 27, 2021), <https://www.theguardian.com/environment/2021/jan/27/eu-revealed-to-be-worlds-biggest-live-animal-exporter>.

60. *Id.*

61. *See id.*

62. Council Regulation 1/2005, art. 3, 2004 O.J. (L 3) 1 (EU), <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32005R0001>.

63. But a recent European Court of Justice judgment found that certain provisions of Council Regulation 1/2005 did fall within the scope of EU member states decision-making, even when outside the EU. See Rosalind English, *Export of Live Animals for Slaughter: European Court Rules that Animal Welfare Laws Apply Outside the EU*, UK HUMAN RIGHTS BLOG (Apr. 23, 2015), <https://ukhumanrightsblog.com/2015/04/29/export-of-live-animals-for-slaughter-european-court-rules-that-animal-welfare-laws-apply-outside-the-eu/>.

64. *Live Animal Exports from the EU*, COMPASSION IN WORLD FARMING, <https://www.ciwf.org.uk/our-campaigns/ban-live-exports/live-animal-exports-from-the-eu/> (last visited Apr. 4, 2022).

65. *General Election 2019: Can the UK Ban Live Animal Exports After Brexit?*, BBC (Nov. 29, 2019), <https://www.bbc.com/news/50587148>.

66. See Animal Welfare (Kept Animals) Bill 2021-22, HC Bill [195] ch. 3, ¶ 40(7) (UK), <https://bills.parliament.uk/bills/2880>.

67. See *Plan for Animal Welfare*, DEP'T FOR ENV'T FOOD & RURAL AFF., (May 12, 2021), <https://www.gov.uk/government/publications/action-plan-for-animal-welfare/action-plan-for-animal-welfare>.

68. *Id.*

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2. A ban on the import of shark fins;<sup>69</sup>
3. A ban on the import of hunting trophies;<sup>70</sup>
4. A ban on cages for laying hens;<sup>71</sup>
5. A ban on farrowing crates for pigs;<sup>72</sup>
6. Cracking down on pet theft;<sup>73</sup> and
7. Prohibiting the keeping of primates as pets.<sup>74</sup>

But many of these proposals have not yet been published as legislative bills.<sup>75</sup> It is therefore unknown what form they will take or how effective they will be.

**C. TRADE DEALS**

One of the biggest concerns with leaving the EU was that the UK would be desperate to enter trade agreements with the rest of the world with diminished bargaining power.<sup>76</sup> Specifically, there was a fear that this would come at the cost of animal welfare.<sup>77</sup> These fears of adverse trade agreements for animal welfare seem to be becoming a reality, as evidenced by the June 2021 agreement with Australia, under which Australian beef, sheep, and dairy farmers are able to access the UK market tariff-free, effectively creating a huge incentive for Australian farmers to sell more of their products in the UK.<sup>78</sup> This is a huge blow not only to UK farmers but also to animal welfare.<sup>79</sup> Australia is known for having very poor welfare laws for farm animals, which allows practices that are banned in the UK, “such as sow stalls, battery cages, high usage of hormones and antibiotics during rearing, and slaughter with no prior stunning.”<sup>80</sup>

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<sup>69.</sup> *Id.*

<sup>70.</sup> *Id.*

<sup>71.</sup> *Id.*

<sup>72.</sup> *Id.*

<sup>73.</sup> *Id.*

<sup>74.</sup> *Id.*

<sup>75.</sup> *Id.*

<sup>76.</sup> *Brexit*, CORP. FIN. INST., <https://corporatefinanceinstitute.com/resources/knowledge/economics/brexit/> (last visited Apr. 10, 2022).

<sup>77.</sup> *See Brexit & Animal Welfare*, ROYAL SOC'Y FOR THE PREVENTION OF CRUELTY TO ANIMALS, <https://www.rspca.org.uk/whatwedo/endcruelty/changingthelaw/Brexit> (last visited Apr. 10, 2022).

<sup>78.</sup> Press Release, Dan Tehan, Minister for Trade, Tourism, & Inv., New Free Trade Agreement to Deliver Jobs and Business Opportunities in Australia and The United Kingdom (June 15, 2021), <https://www.trademinister.gov.au/minister/dan-tehan/media-release/new-free-trade-agreement-deliver-jobs-and-business-opportunities-australia-and-united-kingdom>.

<sup>79.</sup> *See id.*

<sup>80.</sup> *See Australia*, ADVOC. FOR ANIMALS (Sept. 23, 2021), <https://www.advocates-for-animals.com/post/Australia>.

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**D. CONCLUSION**

When it comes to animal welfare, Brexit really is a mixed bag. All that can be done is to work to ensure the progress happens without any dilution in current animal welfare standards.

**III. Brazilian Supreme Court Upholds Constitutionality of Rio de Janeiro's Ban on Animal Testing of Cosmetics**

Today, alternatives to animal testing are numerous and accessible.<sup>81</sup> Consumers are more informed, and knowledge is available to government decision-makers.<sup>82</sup> While there are still countries where animal testing of cosmetics is allowed, or even mandatory, more and more governments are enacting bans.<sup>83</sup> A recent judicial decision in Brazil considered the constitutionality of one such ban.<sup>84</sup>

In May 2021, in a lawsuit filed by a cosmetics industry trade group, the Brazilian Supreme Court upheld the State of Rio de Janeiro's ban on animal testing of cosmetics, perfumes, and personal care and cleaning products within its territory.<sup>85</sup> The Court held, however, that the state could not prohibit the sale, within Rio de Janeiro, of cosmetic products that had been tested on animals elsewhere and could not require the labeling of a product's animal testing status. While Brazil's Constitution does expressly require the government to protect animals from cruel practices,<sup>86</sup> the Supreme Court's decision instead was mainly based on the ability of Brazilian states to legislate in the area of environmental protection, with the protection of animals viewed as a part of that activity.<sup>87</sup> Nine other Brazilian states and

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81. See *Cosmetics Testing FAQ*, THE HUMANE SOC'Y, <https://www.humanesociety.org/resources/cosmetics-testing-faq> (last visited Apr. 3, 2022).

82. See *id.*

83. According to Humane Society International, "more than 41 countries have passed laws to limit or ban cosmetics animal testing. . . . In China, by contrast, 'special use' cosmetics (such as hair dye or sunscreens) still require animal testing." *Id.*

84. See S.T.F., Ação Direta de Inconstitucionalidade No. 5.995, Relator: Min. Gilmar Mendes, 27.05.2021, 108 Diário da Justiça [D.J.], 06.08.2021, 1, 1 (Braz.).

85. Associação Brasileira da Indústria de Higiene Pessoal, Perfumaria e Cosméticos - ABIHPEC v. Assembleia Legislativa do Estado do Rio de Janeiro, Case: ADI 5995, Decision (May 27, 2021), [www.stf.jus.br](http://www.stf.jus.br) (discussing Rio de Janeiro State Law 7,814/17) [hereinafter *Associação Brasileira Case*], <http://alerjln1.alerj.rj.gov.br/CONTLEI.NSF/c8aa0900025feef6032564ec0060dfff/004d830341147e03832581fb005bfbf9?OpenDocument>.

86. "All have the right to an ecologically balanced environment, which is an asset of common use and essential to a healthy quality of life, and both the Government and the community shall have the duty to defend and preserve it for present and future generations. In order to ensure the effectiveness of this right, it is incumbent upon the Government to . . . protect the fauna and the flora . . . from all practices that represent a risk to their ecological function, cause the extinction of species or subject animals to cruelty." Constituição Federal [C.F.] [Constitution] art. 225 (Braz.).

87. *Associação Brasileira Case*, *supra* note 85, at 26–27.

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the federal government have enacted similar legislation,<sup>88</sup> and the Brazilian Supreme Court had previously recognized the constitutionality of the State of Amazonas's law prohibiting animal testing of cosmetics.<sup>89</sup>

The participation of Humane Society International (HSI) as an amicus curiae led the Court in its deliberations and written opinions to consider animal welfare and the ethics of cosmetic animal testing.<sup>90</sup> Justice Alexandre de Moraes placed Rio's ban in the larger context of the worldwide movement to end cosmetic testing, directly quoting HSI's amicus brief:

Europe has over a decade of experience in banning animal testing for the development of cosmetics. Scientifically, the advantages outweigh the disadvantages. . . . This list of advantages, associated with intelligent and well-formulated development policies, has produced great scientific advances in the development of alternative methods with applications in cosmetics, pharmaceuticals, cleaning products, and agrochemicals.<sup>91</sup>

Justice Luís Roberto Barroso, who previously decided in favor of animal protection in a number of cases, argued that the intrinsic value of animals should be recognized, regardless of their role in protecting the environment.<sup>92</sup> He observed: "Perhaps it is the fourth narcissistic wound of the human condition. We are no longer the center of the universe since Copernicus."<sup>93</sup>

Justice Nunes Marques, a recent appointment by the Jair Bolsonaro administration, from whom more conservative positions are expected, was the only judge who voted for the entire law to be declared unconstitutional.<sup>94</sup> But his acknowledgment of the government's right to protect animals to prevent the spread of zoonotic disease was notable:

The protection of animals from scientific experiments or abusive industries is extremely relevant, this is not under discussion . . . It is worth remembering that any manipulation of animals in laboratories represents a risk of spreading new diseases among human beings. In the midst of a pandemic, we must keep this very present and clear.<sup>95</sup>

Several judges voted for the constitutionality of all parts of the ban, including Justice Rosa Weber, who mentioned that it was constitutional for a

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88. Pernambuco, Law 16,498/18; São Paulo, Law 15,316/14; Amazonas, Law 289/15; Mato Grosso do Sul, Law 4,538/14; Minas Gerais, Law 23,050/18; Pará, Law 8,361/16; Paraná, Law 18,668/15; Santa Catarina, Law 18,009/20; Distrito Federal, Law 6,721/20.

89. Associação Brasileira da Indústria de Higiene Pessoal, Perfumaria e Cosméticos - ABIHPEC v. Mesa Diretora da Assembleia Legislativa do Estado do Amazonas, Case: ADI 5996, Decision (April 14, 2021) (Braz.), [www.stf.jus.br](http://www.stf.jus.br).

90. *See id.* at 57–58.

91. *Associação Brasileira Case, supra* note 85, at 58.

92. *Id.* at 67.

93. *Id.*

94. *Id.* at 42.

95. *Id.* at 40.



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Brazilian state to require animal testing labeling because a state can issue regulations on “production and consumption, in particular the right to adequate information.”<sup>96</sup> Justice Cármen Lúcia’s opinion explored the ethical importance of animal protection:

What the Constitution establishes, precisely in item VII of art. 225, is exactly the requirement that, for all intents and purposes, fauna and flora must be protected, and practices that lead to extinction or subject animals to cruelty are prohibited . . . which I consider to be a very important civilizing aspect. I always think that when someone hurts another person or animal, there is an aspect of cruelty in hurting oneself and in hurting the other. I think that what the Constitution and human dignity establish, for us and for those who come after us, is an advance of humanity . . . .<sup>97</sup>

In sum, one judge would have struck the law in its entirety, five would have upheld the whole law, and five found only the territorial ban on testing to be constitutional.<sup>98</sup> Thus, ten of the eleven judges upheld the territorial ban and, had there been one more vote in favor, the sales ban and labeling requirements would also have been upheld.<sup>99</sup> The closeness of the decision shows that the Brazilian Supreme Court is narrowly divided and suggests the potential for future activity in this area.<sup>100</sup>

#### **IV. Cuba Passes the Nation’s First Animal Welfare Law**

Formerly one of the few Latin American countries without a national animal protection law, Cuba took historic steps to recognize animals’ moral status with the passage of Decree-Law 31 on Animal Welfare in 2021.<sup>101</sup> Calls to enshrine animal protections into law had reached a fever pitch two years before, when demonstrators called for change in the streets of Havana in 2019.<sup>102</sup> Building on this momentum, animal advocates proposed a welfare bill to the government, which promised to review and approve the law in November 2020.<sup>103</sup> The Cuban Government, however, failed to pass

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96. *Id.* at 79.

97. *Id.* at 81.

98. *Id.* at 121

99. *See id.*

100. *See id.* at 79.

101. *See* Nelson Acosta, *Cuba Approves Animal Welfare Law After Civil Society Pressure*, REUTERS (Feb. 27, 2021), <https://www.reuters.com/article/us-cuba-politics-animalrights/cuba-approves-animal-welfare-law-after-civil-society-pressure-idUSKBN2AR0GM>; *see also* *Decree-Law on Animal Welfare Published in Cuba*, ONCUBA (Apr. 12, 2021), <https://oncubanews.com/en/cuba/decreto-law-on-animal-welfare-published-in-cuba/>.

102. *New Animal-Welfare Law in Cuba Allows Cockfights, Religious Sacrifice*, HAVANA LIVE (Oct. 4, 2021), <https://havana-live.com/new-animal-welfare-law-in-cuba-allows-cockfights-religious-sacrifice/>.

103. Abel Fernández, *Government of Cuba Approves Decree-Law on Animal Welfare*, CIBERCUBA (Feb. 26, 2021), <https://www.cibercuba.com/noticias/2021-02-27-u207959-e207959-s27061-asamblea-nacional-cuba-aprueba-decreto-ley-bienestar>.

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the decree-law as anticipated and postponed its vote until February of 2021.<sup>104</sup> Seizing the chance to witness historic change for animals, advocates demonstrated before the Ministry of Agriculture on February 19, 2021.<sup>105</sup> One week later, Cuba’s Council of State announced the passage of Decree-Law 31, the provisions of which were published in the Official Gazette on April 10, 2021, and went into force ninety days later.<sup>106</sup>

Cuba’s recognition of human-animal interdependence informs the need for the law.<sup>107</sup> Indeed, the decree’s preamble cites Article 90 of Cuba’s Constitution, which imposes a duty on citizens to promote the health of the environment and protect fauna and flora—albeit partly in the context of resource conservation.<sup>108</sup> It also cites the need to acculturate respect for animals and foster harmony between humans and other species to ensure our continued existence.<sup>109</sup> In this vein, it is fitting that the law’s first article regulates “the principles, duties, rules and purposes regarding the care, health and use of animals, to guarantee their well-being, with a focus on One Health[,]” a paradigm that recognizes how human health is inextricably intertwined with animal health and the environment.<sup>110</sup>

Although not all-encompassing, the Decree-Law is considerably wide in scope. Animals contemplated by the law includes: “any mammal, bird, bee, reptile, fish, mollusk, crustacean, and amphibian . . .”<sup>111</sup> It also considers animal welfare in terms of both physical and mental wellbeing,<sup>112</sup> a tacit recognition of animal sentience. The principles that inform the law’s protections are both wide-ranging and robust: animals must be allowed to live and develop in ways that allow for their species-specific subsistence; they must be cared for, protected, and have their basic needs met; they cannot be abused, abandoned, or degraded; companion animals must be respected for the duration of their lives; labor animals are to be afforded adequate food and rest and not overburdened; and, if they are to be killed, their deaths must be carried out instantly and without pain.<sup>113</sup>

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104. *Id.*

105. *Cuban Animal Protectors Talk with Representatives of Ministry of Agriculture After Protest*, ONCUBA (Feb. 19, 2021), <https://oncubanews.com/en/cuba/cuban-animal-protectors-talk-with-representatives-of-ministry-of-agriculture-after-protest/>.

106. *Decree-Law on Animal Welfare Approved in Cuba*, ONCUBA (Apr. 1, 2021), <https://oncubanews.com/en/cuba/decree-law-on-animal-welfare-approved-in-cuba/>; *see also* Decreto-Ley 31, 10 Abril 2021, De Bienestar Animal [Animal Welfare], ch. XIV, Final Provisions, GACETA OFICIAL [GOC] (Cuba) [hereinafter Decree-Law 31].

107. *See id.* at art. 1.1.

108. Decree-Law 31, *supra* note 106, at art. 1.1.

109. *Id.* at art. 1.2.

110. Decree-Law 31, *supra* note 106, at art. 1.1.

111. *Id.* at ch. 1, art. 2.1.

112. *Id.* at art. 2.2.

113. *Id.* at art. 3(a)–(f).

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In terms of general requirements, the Decree-Law requires both humans and corporations to meet animals' species-specific needs.<sup>114</sup> For example, those who own or possess animals are required to do the following: provide adequate food and water and a comfortable environment; ensure the animals do not suffer or feel pain, including fear, stress, and anguish; and see that the animals are allowed to express natural, species-specific behaviors.<sup>115</sup> As a testament to its One Health focus, the law requires breeders to adhere to sanitary and hygienic guidelines to ensure their animals' wellbeing and prevent the spread of zoonoses.<sup>116</sup> Additionally, Decree-Law 31 features an umbrella ban on animal fighting, although exceptions exist.<sup>117</sup> Indeed, the law is viewed as ill-equipped to combat cockfighting, which is seen as having traditional roots in Cuba.<sup>118</sup> On the whole, the law's enforcement falls upon Cuba's Ministry of Agriculture, which works with other national, state, and local agencies.<sup>119</sup>

In addition to these general rules, Decree-Law 31 also features context-specific regulations.<sup>120</sup> For example, Chapter III imposes requirements on veterinarians to attend to sick and injured animals and to ensure that appropriate protocols and tools are used.<sup>121</sup> Chapter IV focuses on duties owed to animals bred for food and other commercial purposes.<sup>122</sup> Those who oversee such animals are prohibited from agitating, overcrowding, exposing animals to extreme temperatures, or depriving the animals of light.<sup>123</sup> Notably, the law also prohibits killing animals based on their sex at birth unless authorized by the animal health authority.<sup>124</sup> Chapter V concerns animals used for labor and, among other things, requires the following: animals are given adequate food, shelter, and veterinary care; animals are protected against heat-related stress, being permanently tied up, and physically or mentally abused; and animals must be moved to safety during natural disasters.<sup>125</sup>

Chapter VI focuses on the care of pets and street animals.<sup>126</sup> Of the former, the law formally recognizes them as *animales de compañía*, or companion animals, and requires that they be given shelter and sufficient space if left outdoors, be vaccinated and sterilized to bring down Cuba's

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114. *See id.* at art. 5 (observing that the law applies to “las personas naturales y jurídicas,” or natural and judicially created persons, such as corporations).

115. *Id.* at art. 5(a)–(e).

116. *Id.* at art. 6.

117. *Id.* at art. 9.

118. *New Animal-Welfare Law in Cuba Allows Cockfights, Religious Sacrifice*, *supra* note 102.

119. *Id.* at art. 11.1.

120. *Id.* chs. III–XII.

121. *Id.* at arts. 24–26.

122. *Id.* at art. 27.

123. *Id.* at art. 29.

124. *Id.* at art. 29(i).

125. *Id.* at arts. 31–32.

126. *Id.* at arts. 33.1, 38.1.

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street animal population, and adopted if unwanted.<sup>127</sup> Regarding street animals, the law authorizes them to be collected and held until they are returned to or claimed by their owners; adopted; transferred for care, rescue, or rehabilitation; or euthanized.<sup>128</sup> Chapter VII concerns animals used for sport, exhibition, and entertainment purposes.<sup>129</sup> This chapter prohibits subjecting animals to stress for extended periods of time and requires handlers to use only positive conditioning for training, protect animals from abuses by the public, and house animals in species-appropriate facilities.<sup>130</sup>

Chapter VIII creates guidelines for animals used in experimentation.<sup>131</sup> Here, the law stipulates that animal-based research can be undertaken only by government-authorized institutions and can only be done in a way that prohibits unnecessary suffering.<sup>132</sup> Notably, the law creates institutional ethics committees to govern animal use and care.<sup>133</sup> Chapter IX concerns the use of animals for instructional purposes and prohibits their use if alternative methods can be employed to meet an educational goal.<sup>134</sup>

Chapter X covers the marketing of live animals,<sup>135</sup> and Chapter XI creates regulations for animals in transport.<sup>136</sup> Here, the law requires animals be transported using species-specific methods and, in the case of commercial or large-scale transport, bans the transport of sick or incapacitated animals, as well as those in late stages of pregnancy, among other restrictions.<sup>137</sup> Notably, the chapter also creates welfare standards for aquatic animals in transport.<sup>138</sup>

Finally, Chapter XII creates regulations for animal slaughter and features a general requirement that it be carried out using compassionate methods, such as stunning, to avoid pain and stress.<sup>139</sup> That said, the law does not ban religious slaughter of animals, such as those practiced by Santerians.<sup>140</sup> It does, however, still require that animal sacrifice be “carried out rapidly and compassionately, to avoid pain and stress.”<sup>141</sup>

Cuba’s historic law is, likewise, noteworthy for distinguishing between violations committed by individual people and those committed by corporations, with the former facing penalties between 500 to 1,500 Cuban

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127. *Id.* at art. 33.1.

128. *Id.* at art. 40.2.

129. *Id.* at art. 42.1.

130. *Id.* at arts. 43–46.

131. *Id.* at art. 47.

132. *Id.* at art. 48.1.

133. *Id.* at art. 48.2.

134. *Id.* at art. 53.

135. *Id.* at art. 59.1.

136. *Id.* at art. 62.

137. *Id.* at art. 63.1.

138. *Id.* at art. 67.

139. *Id.* at arts. 68, 74.1

140. *New Animal-Welfare Law in Cuba Allows Cockfights, Religious Sacrifice*, *supra* note 102.

141. *Id.*

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pesos (CUP) and the latter between CUP 2,000 to 4,000.<sup>142</sup> To be sure, the law constitutes a historic step for animals, especially in a single-party country where dissent is not countenanced.<sup>143</sup> Indeed, the Decree-Law 31 represents a firm foundation for future advocates to build upon.

## **V. Don't Call It a Comeback: Unstable Legal Regimes for Wolf Protection**

### **A. INTRODUCTION**

Wolves are considered a “critical keystone species” because they regulate prey and other species within an ecosystem.<sup>144</sup> Just as climate change impacts human food resources, it also impacts food distribution in the ecosystem. Through a study conducted at Yellowstone National Park, researchers have been able to determine that wolves act as “climate change buffers” because of their relationship with their species in the Yellowstone ecosystem. The researchers found that “scenarios demonstrate that wolves act to retard the effects of a changing climate on scavenger species.”<sup>145</sup> Despite the significance of wolves in ecosystems, the species has continued to be portrayed as a villain that must be vanquished. In June 2021, a female red wolf was shot multiple times and killed by a private landowner in North Carolina, despite the protections extended to her under the Endangered Species Act.<sup>146</sup> The red wolf, alongside the grey wolf in the west, has been deemed a conservation success story, after the species was annihilated down to fifteen or so members.<sup>147</sup> This article examines the unstable legal regime that needs to be strengthened to protect the wolf.

### **B. EUROPE**

In Europe, the gray wolf was rendered virtually extinct by the 1900s, and wolf killing was eventually banned by the 1970s.<sup>148</sup> In 1992, the EU adopted the Habitats Directive, which is considered the “cornerstone” of Europe’s conservation policies.<sup>149</sup> Similar to the Endangered Species Act in the

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142. Ministerio De Justicia, Gaceta Oficial No. 25, Gaceta Oficial De La Republica de Cuba, at art 59(April 10, 2021) (Cu.).

143. Acosta, *supra* note 101.

144. *Wolves: A Critical Keystone Species*, WOLF CONSERVATION CTR. (Aug. 28, 2016), <https://nywolf.org/2016/08/wolves-are-a-critical-keystone-species-in-a-healthy-ecosystem/>.

145. Christopher Wilmers and Wayne Getz, *Gray Wolves as Climate Change Buffers in Yellowstone*, 3 PLoS BIOLOGY 571, 574 (2005), <https://doi.org/10.1371/journal.pbio.0030092>.

146. Jimmy Tobias, *The Collapse of Wild Red Wolves Is a Warning That Should Worry Us All*, THE NATION (Aug. 2, 2021), <https://www.thenation.com/article/environment/red-wolf-extinction/>.

147. *Id.*

148. Cain Burdeau, *Europe's Wolves Are Back, Igniting Old Fears & New Tensions*, COURTHOUSE NEWS SERV. (Feb. 14, 2019), <https://www.courthousenews.com/europes-wolves-are-back-igniting-old-fears-and-new-tensions/>.

149. Council Directive 92/43/EEC, art. 2, 1992 O.J. (L 206/7), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31992L0043&from=EN>.

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United States, it lists species and plants within different annexes, and each of the annexes assigns a different level of protection needed to be enforced by the EU member states.<sup>150</sup>

Throughout Europe, with wolf populations increasing, rural populations, particularly farmers, face the challenge of dealing with the return of the top carnivore.<sup>151</sup> This is often classified as “human-wildlife conflict.” Germany has had success with programs promoting education and encouraging coexistence with wolves through assigned “wolf commissioners.”<sup>152</sup> Spain has taken steps to introduce protections for the Iberian wolf, including a ban on hunting.<sup>153</sup> This measure has not been well accepted by farmers who insist on having the ability to protect livestock from predators.<sup>154</sup>

Norway, which is not part of the EU, introduced culling efforts to keep the wolf populations low, which has pitted the government, farmers, and environmentalists against each other.<sup>155</sup> In 2017, the World Wildlife Fund (WWF) sued Norway, asking the court to place a temporary ban on hunting and culling efforts because the wolf was on Norway’s endangered species list.<sup>156</sup> In 2018, the court ruled against the WWF, stating that the actions of Norway’s government did not violate any laws.<sup>157</sup> Regardless of the outcome of this lawsuit, Norway is a party to the Bern Convention,<sup>158</sup> Europe’s wildlife protection convention, which extends protections to wolves. It has been noted that “Norway’s past and current wolf policy are at odds with the country’s obligations under the Bern Convention.”<sup>159</sup>

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150. *Id.*

151. It is estimated that wolf populations have reached 12,000 and the first sightings in many parts of Europe started in 2000. See Michelle Nijhuis, *The Most Political Animal*, THE ATLANTIC (Apr. 17, 2019), <https://www.theatlantic.com/science/archive/2019/04/norway-divided-over-countrys-wolves/587302/>.

152. Patrick Barkham, *Harmless or Vicious Hunter? The Uneasy Return of Europe’s Wolves*, THE GUARDIAN (Jan. 26, 2018), <https://www.theguardian.com/environment/2018/jan/26/harmless-or-vicious-hunter-the-uneasy-return-of-europes-wolves>.

153. *Spain moves to ban wolf hunting and give species protected status*, THE LOCAL, (Feb. 5, 2021), <https://www.thelocal.es/20210205/spain-moves-to-declare-iberian-wolf-a-protected-species/>.

154. *Id.*

155. See Kyrre Lein, *The Wolf Dividing Norway*, THE GUARDIAN (Dec. 9, 2020), <https://www.theguardian.com/film/ng-interactive/2020/dec/09/the-wolf-dividing-norway-the-hunter-v-the-environmentalist>.

156. *Norway Temporarily Suspends Wolf Hunting After Court Case*, THE LOCAL (Nov. 21, 2017), <https://www.thelocal.no/20171121/norway-temporarily-suspends-wolf-hunting-after-court-case/>.

157. *Disputed Wolf Hunt in Norway Was Legal, Court rules*, THE LOCAL (May 18, 2018), <https://www.thelocal.no/20180518/controversial-wolf-hunt-in-norway-was-legal-court-rules/>.

158. Convention on the Conservation of European Wildlife and Natural Habitats, Sept. 9, 1979, O.J. L. 38.3, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=Celex%3A21979A0919%2801%29>.

159. Arie Trouwborst, *Norway’s Wolf Policy and the Bern Convention on European Wildlife: Avoiding the ‘Manifestly Absurd’*, 20 J. OF INT’L WILDLIFE L. & POL’Y 155, 166 (2017), <https://www.tandfonline.com/doi/pdf/10.1080/13880292.2017.1346357?needAccess=true>.

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In 2020, the EU Court of Justice ruled in *Alian? a Pentru Combaterea Abuzurilor v. TM and Others* that the strict protection afforded to wolves under the Habitats Directive extends not only to their natural habitats and but also to human settlements.<sup>160</sup> The court stated that the Habitats Directive does not “comprise any limits or borders, with the result that a wild specimen of an animal species which strays close to or into human settlements, passing through such areas or feeding on resources produced by humans, cannot be regarded as an animal that has left its natural range.”<sup>161</sup>

C. THE UNITED STATES

In the United States, the largest piece of legislation that protects wolves is the Endangered Species Act.<sup>162</sup> Prior to the 2020 election, the U.S. Fish and Wildlife Service (FWS) removed protection for all gray wolves, except in Arizona and New Mexico.<sup>163</sup> The delisting ends a once-successful species reintroduction for both the red wolf and the gray wolf.<sup>164</sup> This has led to contentious discussions over wildlife management, including the impact that the delisting has on tribal cultures.

In Wisconsin, the success of the reintroduction of the wolf has led to political battles on wolf population management. During the February 2021 hunting season, 220 wolves were killed by hunters in three days.<sup>165</sup> For the upcoming hunting season, farmers and environmentalists are arguing over whether the wolf population of 1,000 could sustain a 300-animal wolf hunt kill limit, despite advice from biologists suggesting that the cap be lowered to 130 because the hunting season, which overlaps for a few days with the wolf breeding season, could have unknown ramifications.<sup>166</sup> Moreover, the Ojibwe tribes have expressed anger at the quotas, as they do not align with proper stewardship and are a violation of the tribes’ treaty rights.<sup>167</sup> The

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160. Case 88/19, *Alian? a Pentru Combaterea Abuzurilor v. TM*, ECLI:EU:C:2020:458, ¶ 38 (June 11, 2020), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62019CJ0088&from=GA>.

161. *Id.* ¶¶ 24, 28, 30.

162. 16 U.S.C. §§ 1531–1544.

163. *Endangered Species Act Protections Stripped From Gray Wolves*, CTR. FOR BIOLOGICAL DIVERSITY (Oct. 29, 2020), <https://biologicaldiversity.org/w/news/press-releases/endangered-species-act-protections-stripped-gray-wolves-2020-10-29/>.

164. Tobias, *supra* note 146.

165. Andrew McKean, *Bounties, Petitions, and Politics: Why the Wolf War is Only Getting More Extreme*, OUTDOOR LIFE (Aug. 21, 2021), <https://www.outdoorlife.com/conservation/wolf-hunts-management-controversy/>.

166. Todd Richmond, *Wolf Hunt Limit Upped to 300; State-Licensed Hunters Likely Will Be Able to Kill up to 150*, WIS. STATE J. (Aug. 12, 2021), [https://madison.com/wsj/news/local/environment/wolf-hunt-limit-upped-to-300-state-licensed-hunters-likely-will-be-able-to-kill/article\\_d5467579-330f-5aea-849b-753a1435add1.html](https://madison.com/wsj/news/local/environment/wolf-hunt-limit-upped-to-300-state-licensed-hunters-likely-will-be-able-to-kill/article_d5467579-330f-5aea-849b-753a1435add1.html).

167. Danielle Kaeding, *Wisconsin Tribes Blast Natural Resources Board Over Fall Wolf Hunt Quota*, WIS. PUB. RADIO (Aug. 16, 2021), <https://www.wpr.org/wisconsin-tribes-blast-natural-resources-board-over-fall-wolf-hunt-quota>.

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Ojibwe have joined the lawsuit against FWS to restore protections for the wolf, discussed below.<sup>168</sup>

In Idaho, lawsuits have been filed against the state for the new statutes that went into effect, which “call for the killing of up to 90 percent of the state’s gray wolf population through year-round hunting, trapping and snaring.”<sup>169</sup> Environmental advocates claim that Idaho is “abrogating” its duties to maintain the health of the species.<sup>170</sup> The same is also said of Montana, where forty percent of the wolf population has been approved to be hunted (450 wolves).<sup>171</sup> Montana has also approved the use of controversial killing methods such as neck-snare trapping, bait hunting, and nighttime wolf hunting.<sup>172</sup>

So far, the U.S. Department of the Interior has declined to comment on a request by tribal leaders to discuss the Wolf Treaty that was signed by several tribal nations because of the sacredness and cultural importance of the wolf to different tribal cultures.<sup>173</sup> In line with both the Obama and Trump administrations, the Biden administration has now taken steps to keep the delisting, as noted in the *Defenders of Wildlife v. U.S. Fish and Wildlife Service* case, which is proceeding in the U.S. District Court of Northern California.<sup>174</sup>

#### D. CONCLUSION

Similar frustrations for the wolf populations are prevalent in areas throughout Asia, which is home to three wolf species. Many of the problems facing the wolf in Asia, like the maned wolf in South America, are due to territorial loss due to development.<sup>175</sup> The biggest international challenge

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168. *Id.*

169. Charlie Schill, *Lawsuit Over New Idaho Wolf-hunting Law*, CACHE VALLEY DAILY (Aug. 9, 2021), <https://www.cachevalleydaily.com/news/archive/2021/08/09/lawsuit-looms-over-new-idaho-wolf-hunting-law/#.YSL4no5KjIU>.

170. McKean, *supra* note 165.

171. John Riley, *New MT Wolf Hunting Season Will Allow Baiting & Night Hunting*, KTVH (Aug. 20, 2021), <https://www.ktvh.com/news/new-mt-wolf-hunting-season-will-allow-baiting-and-night-hunting>.

172. *Id.*

173. Arianna Amehae, *Secretary Haaland Declines Comment as Tribal Film Builds Momentum for Wolf Protections to be Reinstated, Backed by Members of Congress*, NATIVE NEWS ONLINE (July 26, 2021), <https://nativenewsonline.net/currents/secretary-haaland-declines-comment-as-tribal-film-builds-momentum-for-wolf-protections-to-be-reinstated-backed-by-members-of-congress>.

174. Federal Defendants’ Notice of Motion & Cross-Motion for Summary Judgment; Memorandum of Points & Authorities in Support; Opposition to Plaintiffs’ Motion for Summary Judgment, at 15, *Defenders of Wildlife v. U.S. Fish and Wildlife Serv.*, No. 4:21-cv-00344-JSW (N. D. Cal. Aug. 20, 2021), ECF No. 107, [https://earthjustice.org/sites/default/files/files/dkt\\_107\\_feds\\_cross-motion\\_for\\_summary\\_judgment.pdf](https://earthjustice.org/sites/default/files/files/dkt_107_feds_cross-motion_for_summary_judgment.pdf).

175. See Sean Mowbray, *The Manged Wolf: Saving South America’s Largest Canid*, MONGABAY NEWS (Dec. 7, 2015), <https://news.mongabay.com/2015/12/the-maned-wolf-saving-south-americas-unfortunately-named-canid/>.



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facing the wolf is the myths that have been perpetuated about their behavior.<sup>176</sup>

The wolf, like many of the large predators that are critical to ecosystems, including the tiger and the shark, deserves balanced protection and a stable legal regime that does not change depending on its population. In an age where finding solutions to climate change is needed, eliminating a keystone species will not bring humanity closer to protecting the environment.

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176. See Badri Chatterjee, *Wolves Prefer to Stay Away From Human, Shows Telemetry Study in Maharashtra*, THE HINDUSTAN TIMES, (Dec. 15, 2020), <https://www.hindustantimes.com/india-news/wolves-prefer-to-stay-away-from-human-shows-telemetry-study-in-maharashtra/story-W9X9RPJK4ePaWXCVRSk8mJ.html>.

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## **International Trade**

JORDAN C. KAHN, DHARMENDRA N. CHOUDHARY, JOE A. SPRARAGEN, GEOFFREY A. GOODALE, KAVITA MOHAN, THEODORE P. BRACKEMYRE, PAUL DEVAMITHRAN, LAURA EL-SABAAWI, JAKE FRISCHKNECHT, NICOLE HAGER, ELIZABETH LEE, AND CLAIRE WEBSTER\*

This article outlines the most important developments in international trade law during 2021. It summarizes developments in U.S. trade policy, U.S. trade cases at the U.S. Department of Commerce (Commerce or DOC), the International Trade Commission (ITC), and the reviewing courts, as well as Section 337 and enforcement investigations.

### **I. U.S. Trade Policy Developments**

#### **A. REVISED AD/CVD REGULATIONS**

Commerce published a Final Rule on September 20, 2021, modifying its regulations governing antidumping duty (AD) and countervailing duty (CVD) proceedings.<sup>1</sup> These changes constitute the most comprehensive overhaul since 1997, covering scope ruling requests, anti-circumvention inquiries, covered merchandise referrals from Customs and Border Protection (CBP) under the Enforce and Protect Act (EAPA) of 2015, new shipper reviews (NSR), petition sufficiency, and certification requirements.<sup>2</sup> The Final Rule's provisions concerning industry support, NSR, and certifications took effect on October 20, 2021, while those concerning scope, circumvention, and EAPA covered merchandise inquiries applicable to inquiries for which a party filed a request (or DOC self-initiated, in the case of scope and circumvention inquiries) on or after November 4, 2021.<sup>3</sup> These regulations provide an important framework that DOC will develop over time on a case-by-case basis.<sup>4</sup>

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\* This article surveys developments in international trade law during 2021. The committee editor of this article is Dharmendra N. Choudhary of Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP. The views expressed in this section do not necessarily reflect the views of the authors' respective employers.

1. See Regulations to Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws, 86 Fed. Reg. 52,300 (U.S. Dep't of Com. Sept. 20, 2020) (to be codified at 19 C.F.R. pt. 351) [hereinafter Regulations to Improve Administration].

2. Antidumping Duties; Countervailing Duties, 62 Fed. Reg. 27,296 (Int'l Trade Admin. May 19, 1997).

3. Regulations to Improve Administration, 86 Fed. Reg. at 52,300.

4. *Id.*

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**B. SCOPE & CIRCUMVENTION**

DOC Regulations now separate out those governing scope inquiries (19 C.F.R. § 351.225) from other governing statutory circumvention inquiries (19 C.F.R. § 351.226).<sup>5</sup> The Regulations are effective for scope ruling applications or circumvention requests filed or self-initiated by DOC, on or after November 4, 2021.<sup>6</sup> For both scope and circumvention, suspension of entries whose liquidation was already suspended continues after initiation of the proceedings.<sup>7</sup> In companion AD/CVD proceedings, the filings are to be made only in the AD segment.<sup>8</sup>

**C. KEY SCOPE PROVISIONS**

First, Commerce now requires that scope rulings be requested following a detailed and standardized application.<sup>9</sup> Second, Commerce retains its authority to self-initiate scope inquiries.<sup>10</sup> Third, Commerce now has thirty days to accept or reject a scope ruling application or else that application is deemed accepted.<sup>11</sup> Upon scope inquiry initiation, DOC will direct CBP to continue the suspension of liquidation of previously suspended entries and to apply the applicable cash deposit rate. Most significantly, the Regulations codify—and expand upon—DOC’s existing practice to retroactively collect duties upon a determination that imports are within the scope of an existing AD or CVD order.<sup>12</sup> After an affirmative preliminary scope ruling, DOC will instruct CBP to continue suspension of entries that were already suspended and will direct CBP to suspend entries if they were not already suspended, including *unliquidated* entries that are not yet suspended which entered *before* the date of the initiation of the scope inquiry.<sup>13</sup> But DOC may consider an *alternate date* for suspension of liquidation if requested.<sup>14</sup> In case of a negative preliminary scope ruling, while DOC will not direct CBP to suspend liquidation of unsuspended entries, any existing suspension (such as ordered by CBP pursuant to its own authority) will be left undisturbed to preserve the status quo until the conclusion of the inquiry.<sup>15</sup>

In comments, DOC expressly provides that it will not instruct CBP to suspend liquidation for shipments entered prior to November 4, 2021.<sup>16</sup> Significantly, DOC also states that this framework does not affect CBP’s authority to take any additional action with respect to the suspension of

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5. *Id.*

6. *Id.*

7. *Id.* at 52,327.

8. *Id.* at 52,335.

9. *Id.* at 52,313.

10. *Id.* at 52,320.

11. *Id.* at 52,331.

12. *Id.* at 52,328.

13. *Id.* at 52,344.

14. *Id.* at 52,326.

15. *Id.* at 52,333.

16. *Id.* at 52,327.

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liquidation or related measures where CBP on its own finds it appropriate to suspend liquidation.<sup>17</sup>

The Regulations maintain the factors to determine scope as set forth in 19 C.F.R. § 351.225(k), but eliminate the prior distinction between informal inquiries with k-1 factors alone being considered without initiation, which had conferred retroactive liability, and formal inquiries with k-2 factors being considered after initiation, which had conferred prospective liability.<sup>18</sup> Further, the Regulations codify a four-part hierarchy of interpretive sources:

- (1) language of scope (if dispositive);
- (2) primary sources (petition, DOC/ITC initial investigation, prior scope rulings);
- (3) secondary sources (customs rulings, trade usage, dictionaries, etc.);
- and
- (4) k-2 factors, with emphasis on physical characteristics.<sup>19</sup>

DOC also codified its “mixed-media analysis” (i.e., subject merchandise assembled or packaged with non-subject merchandise), in a new § 351.225(k)(3).<sup>20</sup> Yet DOC provides only general guidance.<sup>21</sup> First, whether the component subject merchandise considered separately is within scope.<sup>22</sup> If not, the inquiry ends.<sup>23</sup> Second, if the component is within scope, DOC analyzes the scope language, to determine if mixed-media issue is directly addressed.<sup>24</sup> Third, DOC uses a case-by-case factor analysis looking at practicality of separating, value comparison, and ultimate use comparison.<sup>25</sup>

DOC also codified in § 351.225(j) its country of origin analysis, and in particular provided the factors considered when applying its “substantial transformation” test.<sup>26</sup> These include differences between upstream and processed downstream products in terms of “different class or kind,” physical characteristics, end-use, cost of production/value, sophistication of processing and level of investment in the third country.<sup>27</sup> But DOC has flexibility to choose another test, for example, where the essential component of the product is produced or where the essential characteristics of the product are imparted.<sup>28</sup>

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17. *Id.* at 52,326.

18. *Id.* at 52,323.

19. *Id.*

20. Regulations to Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws, 85 Fed. Reg. 49,481, 49,481 (U.S. Dep’t of Com. Aug. 13, 2020) (to be codified in 19 C.F.R. pt. 351).

21. Regulations to Improve Administration, 86 Fed. Reg. at 52,324–25.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 52,321.

27. *Id.* at 52,376.

28. *Id.*

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The Regulations also provide that DOC can publish scope clarifications which will be incorporated in the scope language.<sup>29</sup> DOC gets discretion to treat scope determinations as producer-specific, exporter-specific, importer-specific, a combination thereof, or cover all products from the same country with the same relevant physical characteristics.<sup>30</sup>

**D. KEY ANTI-CIRCUMVENTION PROVISIONS:**

DOC has codified its practice to self-initiate anticircumvention proceedings when it is reviewing information during a scope inquiry, if the product is not already covered by the scope of the order.<sup>31</sup>

The Regulations codify DOC's current practice that affirmative findings do not apply to shipments entered prior to initiation, but provide an exception based on the same criteria as for the scope exception (through which AD/CVD liability could attach before or after the date that an anticircumvention inquiry is initiated, whereas the scope exception would be to change the liability date prospectively after November 4, 2021).<sup>32</sup> While such case-specific discretion to retroactively suspend pre-initiation entries and require cash deposits has potential to create uncertainty for the importing community, it is still more fair than the retrospective application proposed in the draft Regulations that DOC withdrew following comments from Respondents.<sup>33</sup> The Regulations also codify Commerce's ability to apply circumvention determinations on a country-wide basis to products that are similar or identical to those subject to the inquiry and to also require a certification requirement.<sup>34</sup>

DOC will continue using the value of parts and cost of processing added in United States or another foreign country when determining whether to consider in-scope: (1) parts/components that are imported from a country to which the order applies and then completed into finished products in United States; or (2) where imported merchandise is completed in another foreign country from parts/components produced in the country subject to the order applies.<sup>35</sup> But the Regulation removes specific reference to major input rule in constructed value context under 19 U.S.C. § 1677b(e) for market economies and also references surrogate value methodology under 19 U.S.C. § 1677b(c) for nonmarket economies (NME).<sup>36</sup>

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29. *Id.* at 52,336–37.

30. *Id.* at 52,351.

31. Regulations to Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws, 85 Fed. Reg. at 49,477.

32. Regulations to Improve Administration, 86 Fed. Reg. at 52,338.

33. Regulations to Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws, 85 Fed. Reg. at 49,484–89.

34. Regulations to Improve Administration, 86 Fed. Reg. at 52,351.

35. *Id.* at 52,341–42.

36. *Id.*

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Finally, under its statutory “later developed” analysis, DOC will examine whether the merchandise at issue was “commercially available” at the time of the initiation of the underlying AD/ CVD investigation.<sup>37</sup>

**E. EAPA REFERRALS**

In 2015, Congress amended U.S. law through EAPA, establishing a new framework by which CBP investigates and refers to DOC, potential AD/ CVD duty evasion upon receipt of a complaint from an interested party.<sup>38</sup> The Regulations in § 351.227 create formal procedures including key deadlines.<sup>39</sup>

Upon publishing notice of initiation, DOC will direct CBP to continue the suspension of liquidation of entries comprising the covered merchandise inquiry, and to require AD/CVD cash deposits.<sup>40</sup> DOC also will direct CBP to begin suspending the liquidation and require applicable cash deposits for each unliquidated entry not yet suspended, whether entered after or before initiation (DOC’s Regulations provide that suspension for pre-initiation entries will be the “normal” procedure).<sup>41</sup>

DOC will consider whether the covered merchandise determination should be applied on a producer-specific, exporter-specific, importer-specific basis, or some combination thereof; or to all products from the same country with the same relevant physical characteristics, as the product at issue, on a country-wide basis.<sup>42</sup>

**F. CERTIFICATIONS**

The Regulations in § 351.228 codify and enhance DOC’s existing authority and practice to require that an importer or other interested party maintain and/or provide particular certifications.<sup>43</sup> It also sets out consequences for a party’s failure to so certify. <sup>44</sup> Section 351.228 certifications serve a different purpose from CBP’s existing requirements for importers regarding the “reasonable care” standard by affording an

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37. *Id.* at 52,380.

38. Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114-125, 130 Stat. 122 (2016) (codified at 19 U.S.C. § 4301) (providing procedures for investigating claims of evasion of antidumping and countervailing duty orders).

39. Regulations to Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws, 85 Fed. Reg. at 49,503.

40. Regulations to Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws, 86 Fed. Reg. at 52,325.

41. *Id.* at 52,376.

42. *Id.*

43. Regulations to Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws, 85 Fed. Reg. at 49,491.

44. *Id.*

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additional tool for DOC/ CBP to evaluate whether entries should be filed as either subject to an AD/CVD order (Type 03) or not subject (Type 01).<sup>45</sup>

The longstanding requirement that importers certify they are not being reimbursed for AD/CVD (or else liability can be doubled) under § 351.402(f)(2) is modified to conform to CBP's existing procedure of allowing electronic filing (prior to liquidation) and as an exception, its acceptance through CBP protests (post-liquidation).<sup>46</sup> The certification must contain specific information necessary to link it to the relevant entry or entry line number(s).<sup>47</sup>

#### G. NEW SHIPPER REVIEWS

DOC's modified provisions for new shipper review proceedings under § 351.214 codify DOC's long-standing practice requiring an exporter/producer to establish that the transactions constitute bona fide sales.<sup>48</sup> In turn, the NSR application documentation establishing the circumstances of the sale should include price, sales expenses, whether arm's length sales, whether such merchandise was resold at a profit, additional documentation concerning the producer's or exporter's offer to sell the merchandise to the United States, circumstances surrounding sales to the United States, any home market or third-country sales, relationship with the unaffiliated U.S. customer, and any nonproducing exporter's relationship with the supplier.<sup>49</sup>

Notably, DOC will consider whether an exporter, producer, or customer has lines of business unrelated to the subject merchandise.<sup>50</sup> DOC can also require information about the future selling behavior of the producer or exporter, to examine whether the NSR sales were commercially viable. Absent full or inadequate bona fide sales information, DOC may rescind the NSR.<sup>51</sup>

#### H. PETITION SUFFICIENCY

Section 351.203(g) establishes a deadline for comments on industry support no later than five business days before the scheduled date of initiation, and rebuttal comments no later than two calendar days after.<sup>52</sup>

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45. Regulations to Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws, 86 Fed. Reg. at 52,364.

46. Regulations to Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws, 85 Fed. Reg. at 49,491-92.

47. Regulations to Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws, 86 Fed. Reg. at 52,384, 52,373.

48. *Id.* at 52,301.

49. *Id.* at 52,304-12.

50. *Id.* at 52,309, 52,373.

51. *Id.* at 52,373.

52. *Id.* at 52,303.

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## II. U.S. Trade Remedies

2021 continued to be an active year for AD/CVD proceedings at DOC and ITC.<sup>53</sup> Commerce initiated a plethora AD and CVD investigations, involving several countries and a variety of products.<sup>54</sup> Commerce also issued decisions in several review proceedings.<sup>55</sup> A selection of Commerce and ITC proceedings are discussed below.

### A. SIGNIFICANT COMMERCE CASES

#### 1. *Chassis and Subassemblies from China*

In the final determinations of the AD/CVD investigations of chassis and subassemblies from the People's Republic of China (China or PRC), Commerce calculated a final subsidy rate of 44.32 percent,<sup>56</sup> and a final dumping margin of 188.05 percent.<sup>57</sup>

Notably, in the AD investigation, Commerce applied adverse facts available (AFA) based 188.05 percent dumping margin as alleged in the petition to CIMC, the largest Chinese chassis producer.<sup>58</sup> In a cautionary tale, Commerce based its AFA determination on an untimely filed questionnaire response reasoning that computer/technical issues do not constitute “extraordinary circumstance” within the meaning of agency

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53. See Certain Chassis and Subassemblies Thereof from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value, 86 Fed. Reg. 26,694 (Int'l Trade Admin. May 17, 2021) [hereinafter Final Determination on Certain Chassis and Subassemblies]; see also Certain Mobile Access Equipment and Subassemblies Thereof from the People's Republic of China: Final Affirmative Countervailing Duty Determination, 86 Fed. Reg. 57,809 (Oct. 19, 2021) [hereinafter Final Determination on Countervailing Duty Certain Mobile Access Equipment].

54. *Commerce Initiates New Administrative Reviews on AD/CVD Orders*, HUSCHBLACKWELL (Dec. 28, 2021), <https://www.internationaltradeinsights.com/2021/12/commerce-initiates-new-administrative-reviews-on-ad-cvd-orders-16/>.

55. See, e.g., *Final Determinations in the Antidumping Duty Investigations of Polyester Textured Yarn from Indonesia, Malaysia, Thailand and Vietnam*, INT'L TRADE ADMIN. (Oct. 19, 2021), <https://www.trade.gov/faq/final-determinations-antidumping-duty-investigations-polyester-textured-yarn-indonesia-malaysia>; see also *Final Determinations in the Antidumping and Countervailing Duty Investigations of Aluminum Foil from Armenia, Brazil, Oman, Russia, and Turkey*, INT'L TRADE ADMIN. (Sept. 17, 2021), <https://www.trade.gov/ec-adcvd-case-announcements>; *Final Determinations in the Antidumping Duty Investigations of Thermal Paper from Germany, Japan, South Korea, and Spain*, INT'L TRADE ADMIN. (Sept. 27, 2021), <https://www.trade.gov/faq/final-determinations-antidumping-duty-investigations-thermal-paper-germany-japan-south-korea>.

56. Certain Chassis and Subassemblies Thereof from the People's Republic of China: Countervailing Duty Order and Amended Final Affirmative Countervailing Duty Determination, 86 Fed. Reg. 24,844, 24,844 (May 10, 2021).

57. Final Determination on Certain Chassis and Subassemblies, 86 Fed. Reg. at 26,695.

58. *Id.* (finding that the other mandatory respondent failed to timely file a separate rate application and was assigned the China-wide entity rate of 188.05%).



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regulations, finding instead that CIMC's late submission occurred because of its choice to begin filing close to the deadline.<sup>59</sup>

2. *Certain Mobile Access Equipment and Subassemblies Thereof from China*

In October 2021, Commerce issued an affirmative final determination in the CVD investigation on Mobile Access Equipment and Subassemblies Thereof from China.<sup>60</sup> Notably, in what may be a trend in AD/CVD investigations involving further processed, downstream products, and like the *Chassis* cases described above, the scope covered not just finished units, but also the major subassemblies that comprise mobile access equipment, such as chassis and boom assemblies.<sup>61</sup> The final subsidy margins range from 11.95 percent to 448.70 percent.<sup>62</sup>

3. *Utility Scale Wind Towers from India, Malaysia, and Spain*

Throughout the course of this year, Commerce issued affirmative determinations in the AD/CVD investigations into Utility Scale Wind Towers from India, Malaysia, and Spain.<sup>63</sup> Notably, the mandatory respondent in the Spain AD investigation, Vestas Eolica, declined to participate, warranting the application of AFA and yielding a dumping margin of seventy-three percent.<sup>64</sup> Commerce also applied AFA to mandatory respondent Vestas India in the India AD case, after filing errors by the respondent.<sup>65</sup>

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59. Memorandum from Scot Fullerton, Assoc. Deputy Assistant Sec'y for Antidumping & Countervailing Duty Operations, on Certain Chassis and Subassemblies Thereof from the People's Republic of China: Issues and Decision Memorandum for the Final Affirmative Determination of Sales at Less Than Fair Value to Christian Marsh, Acting Assistant Sec'y of Enft & Compliance 13–16 (U.S. Dep't of Com. May 11, 2021), <https://access.trade.gov/Resources/frn/summary/prc/2021-10346-1.pdf> [hereinafter *Issues and Decision Memorandum*].

60. Final Determination on Countervailing Duty Certain Mobile Access Equipment, 86 Fed. Reg. at 57,809, 57,810.

61. *Id.* at 57,811

62. *Id.* at 57,810.

63. *See, e.g.* Utility Scale Wind Towers from Malaysia: Final Affirmative Countervailing Duty Determination, 86 Fed. Reg. 30,593 (U.S. Dep't of Com. June 9, 2021) [hereinafter *Final Affirmative Countervailing Duty on Utility Scale Wind Towers*].

64. Utility Scale Wind Towers from Spain: Final Determination of Sales at Less Than Fair Value, 86 Fed. Reg. 33,656, 33,657 (U.S. Dep't of Com. June 25, 2021) [hereinafter *Final Determination on Utility Scale Wind Towers from Spain*].

65. Utility Scale Wind Towers from India: Final Affirmative Determination of Sales at Less Than Fair Value, 86 Fed. Reg. 56,890, 56,890–91 (U.S. Dep't of Com. Oct. 13, 2021); *see also* Memorandum from James Maeder, Deputy Assistant Sec'y for Antidumping and Countervailing Duty Operations, on Decision Memorandum for the Preliminary Determination in the Less-Than-Fair-Value Investigation of Utility Scale Wind Towers from Spain to Christian Marsh, Acting Assistant Sec'y of Enft and Compliance 4–9 (U.S. Dep't of Com. Mar. 29, 2021), <https://access.trade.gov/resources/frn/summary/spain/2021-06869-1.pdf>.

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This was the third round of successful petitions on wind towers, with extant AD orders on China, Canada, Indonesia, Korea, and Vietnam and CVD orders on China, Canada, Indonesia, and Vietnam.<sup>66</sup>

4. *Solar Cells and Modules from China*

In a remarkable turnaround from prior reviews, Commerce found no dumping for both mandatory respondents as well as separate rate companies in its October 2021 final results in the 2018-19 administrative review of the AD Order on solar cells and modules from China.<sup>67</sup> This outcome, which has wide ramifications, was propelled by a few key surrogate value choices, especially silver paste, where Commerce applied a relatively more product specific HTS heading (articles of silver) from Turkey instead of a hybrid category HTS heading (articles of silver and gold) from Malaysia, the primary surrogate country.<sup>68</sup>

B. SIGNIFICANT ITC CASES

1. *Vertical Shaft Engines from China*

On April 6, 2021, ITC unanimously determined that small vertical shaft engines from China materially injured the U.S. industry.<sup>69</sup> Significantly, four of the five Commissioners also found “critical circumstances.”<sup>70</sup> This appears to be the first ITC affirmative critical circumstances determination since 2001, and the third ever affirmative critical circumstances determination,<sup>71</sup> and it allows for the retroactive collection of AD/CVD duties to a period prior to Commerce’s preliminary determination.<sup>72</sup>

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66. Utility Scale Wind Towers from Canada, Indonesia, the Republic of Korea, and the Socialist Republic of Vietnam: Antidumping Duty Orders, 85 Fed. Reg. 166 (U.S. Dep’t of Com. Aug. 26, 2020).

67. Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2018–2019, 86 Fed. Reg. 58,871-74 (U.S. Dep’t of Com. Oct. 25, 2021).

68. Memorandum from James Maeder, Deputy Assistant Sec’y for Antidumping and Countervailing Duty Operations, on Issues and Decision Memorandum for the Final Results of the 2018-2019 Antidumping Duty Administrative Review of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, From the People’s Republic of China to Ryan Majerus, Deputy Assistant Sec’y for Policy and Negot. 19–28 (U.S. Dep’t Com. Oct. 19, 2021).

69. Small Vertical Shaft Engines from China, Inv. Nos. 701-TA-643, 731-TA-1493, USITC Pub. 5185 (Apr. 2021) (Final), at 1[hereinafter, Small Vertical Shaft Engines from China].

70. *Id.* at 1 n.2.

71. See Honey from Argentina and China, Inv. Nos. 701-TA-402, 731-TA-892-893, USITC Pub. 3470 (Nov. 2001) (Final) at 22-24; see also Potassium Permanganate from the People’s Republic of China, Inv. Nos. 731-TA-125, USITC Pub. 1480 (Jan. 1984) (Final) at 13–14.

72. Small Vertical Shaft Engines from China, note 70, at 41.

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2. *Chassis and Subassemblies from China*

ITC made affirmative final determinations in its AD/CVD investigations of Chinese chassis and subassemblies.<sup>73</sup> These investigations were instituted in July 2020, following petitions by the Coalition of American Chassis Manufacturers.<sup>74</sup> In May 2021, ITC issued its final CVD determination, finding that imports of chassis and subassemblies subsidized by the Chinese government caused material injury to the U.S. industry, after a significant surge in Chinese imports during the period of investigation apparently related to the imposition of the Section 301 China tariffs.<sup>75</sup> Following an affirmative determination in Commerce's AD investigation,<sup>76</sup> ITC made a similar affirmative finding of material injury with respect to dumped imports in July 2021.<sup>77</sup> AD/CVD orders were published in May and July 2021, and imports of Chinese chassis and subassemblies are now subject to combined duty rates of 221.37 percent.<sup>78</sup>

3. *Mobile Access Equipment and Subassemblies Thereof from China*

In December 2021, ITC made an affirmative final determination in its CVD investigations of imports of Chinese mobile access equipment and subassemblies.<sup>79</sup> These investigations were instituted in February 2021, following petitions by the Coalition of American Manufacturers of Mobile Access Equipment.<sup>80</sup> ITC made affirmative preliminary determinations in April 2021,<sup>81</sup> and, in November, ITC voted unanimously in the affirmative in the final determination.<sup>82</sup> Notably, the determination was based on a

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73. See Chassis and Subassemblies from China, Inv. No. 701-TA-657, USITC Pub. 5187 (May 2021) (Final) at 1[hereinafter Chassis and Subassemblies from China: Inv. No. 701-TA-657]; see also Chassis and Subassemblies from China, Inv. No. 731-TA-1537, USITC Pub. 5211 (July 2021) (Final) at 1[hereinafter Chassis and Subassemblies from China: Investigation No. 731].

74. Chassis and Subassemblies from China: Inv. No. 701-TA-657, note 74, at 2–3.

75. *Id.* at 1 (holding in the final determination that the deadlines for the AD and CVD cases were not aligned at Commerce, the ITC decided the CVD case first, followed by its determination in the AD case months later).

76. Certain Chassis and Subassemblies Thereof from the People's Republic of China: Antidumping Duty Order, 86 Fed. Reg. 36,093, 36,093 (U.S. Dep't Com. Jul. 8, 2021).

77. Chassis and Subassemblies from China: Investigation No. 731, note 74, at 1.

78. Certain Chassis and Subassemblies Thereof from the People's Republic of China: Countervailing Duty Order and Amended Final Affirmative Countervailing Duty Determination, 86 Fed. Reg. 24,844, 24,845 (U.S. Dep't Com. May 10, 2021); Certain Chassis and Subassemblies Thereof from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value, 86 Fed. Reg. 26,694, 26,695 (U.S. Dep't Com. May 17, 2021).

79. Certain Mobile Access Equipment and Subassemblies Thereof from China; Determination, 86 Fed. Reg. 70,147, 70,147 (U.S. Dep't Com. Dec. 9, 2021).

80. *Id.*

81. Certain Mobile Access Equipment and Subassemblies Thereof from China, 86 Fed. Reg. 20,196 (U.S. Dep't Com. Apr. 16, 2021).

82. Certain Mobile Access Equipment and Subassemblies Thereof from China, Inv. No. 701-TA-665, USITC Pub. 5242 (Dec. 2021) (Final) at 67.

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finding that subject imports subsidized by the Chinese government threatened to cause material injury to the domestic industry.<sup>83</sup> The agency also made a finding of a single like product for scissor lifts, boom lifts and telehandlers, coextensive with the scope, consistent with the petitioner's arguments.<sup>84</sup> ITC reached the same threat-only determination in the companion AD investigation in April 2022.<sup>85</sup>

4. *Crystalline Silicon Photovoltaic Cells, Whether or Not Partially or Fully Assembled into Other Products*

Also in November 2021, ITC announced its determination that import relief under safeguard duty provisions beginning in 2018 to the U.S. industry producing crystalline silicon photovoltaic cells, whether or not partially or fully assembled into other products, continued to be necessary to prevent or remedy serious injury to the U.S. industry.<sup>86</sup> ITC also found evidence that the domestic industry is making a positive adjustment to import competition.<sup>87</sup> The President will make the final decision on whether to extend the import relief.<sup>88</sup>

### III. Court Appeals

The U.S. Court of Appeals for the Federal Circuit (CAFC) and the U.S. Court of International Trade (CIT) decided several notable cases in 2021, with important implications for the United States' administration of its trade laws.

#### A. CHINA SECTION 301 LITIGATION

In one of the largest cases ever brought before CIT, over 6,500 plaintiffs filed actions challenging the United States Trade Representative's (USTR) imposition of certain additional duties on goods from China.<sup>89</sup> At stake is over \$100 billion in duties that have been and continue to be assessed upon certain goods imported from China.<sup>90</sup>

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83. *Id.* at 1.

84. *Id.* at 11, 18–19.

85. Certain Mobile Access Equipment and Subassemblies Thereof from China, Inv. No. 731-TA-1557, USITC Pub. 5317 (Apr. 2022) (Final) at 5; *see also* Certain Mobile Access Equipment and Subassemblies Thereof from China, 87 Fed. Reg. 21,923, 21,923 (Int'l Trade Comm'n Apr. 13, 2022).

86. Crystalline Silicon Photovoltaic Cells, Whether or Not Partially or Fully Assembled into Other Products, Inv. No. TA-201-75, USITC Pub. 5266 (Dec. 2021) (Extension) at 1.

87. *Id.* at 3.

88. On February 4, 2022, the President extended it for an additional four years. *See* Proclamation 10339, To Continue Facilitating Positive Adjustment to Competition from Imports of Certain Crystalline Silicon Photovoltaic Cells (Whether or Not Partially or Fully Assembled into Other Products), 87 Fed. Reg. 7,357 (Exec. Off. of the President Feb. 4, 2022).

89. *In Re Section 301 Cases*, No. 21-81, at 1, 27–28 (Ct. Int'l Trade Jul. 6, 2021).

90. *Id.*

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The duties were imposed under the Trump Administration pursuant to Section 301 of the Trade Act of 1974, which grants USTR the authority to investigate foreign trade practices and to take certain actions in response to the findings of such investigations.<sup>91</sup> Prior to the Trump Administration, Section 301 investigations were relatively rare and the imposition of retaliatory tariffs following a Section 301 investigation was even rarer. The last such imposition of duties occurred in 2009<sup>92</sup> (involving Canada's compliance with the 2006 U.S.-Canada Softwood Lumber Agreement).<sup>93</sup>

In August 2017, USTR initiated a Section 301 investigation of China's policies on IPR, subsidies, technology, and innovation.<sup>94</sup> The investigation concluded in March 2018 with findings that China was engaged in discriminatory trade practices in these areas.<sup>95</sup> In response to those findings, USTR imposed additional tariffs on the majority of goods produced in China, rolled out in a series of tranches, commonly referred to as List 1–List 4.<sup>96</sup>

Due to the scope of this litigation, a test case (*In Re Section 301 Cases*) was established.<sup>97</sup> That case is being heard by a three-judge panel at CIT and the Court has appointed a plaintiffs' steering committee to act on behalf of the hundreds of law firms that have filed actions to date.<sup>98</sup>

Plaintiffs allege that USTR exceeded its statutory authority in imposing the Section 301 "List 3" and "List 4A" additional duties and that the process under which the List 3 and List 4A additional duties were promulgated violated the Administrative Procedure Act (APA).<sup>99</sup> The government has moved to dismiss the case, largely on the grounds that the challenge does

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91. *Id.* at 3.

92. Press Release, Office of the United States Trade Representative, United States Imposes Tariffs on Softwood Lumber from Four Canadian Provinces Due to Canada's Failure to Comply with the Softwood Lumber Agreement (Apr. 7, 2009), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2009/april/united-states-imposes-tariffs-softwood-lumber-four-c>.

93. Softwood Lumber Agreement Between the Government of Canada and the Government of the United States of America, Can.-U.S., July 1, 2006, expired Oct. 12, 2015.

94. Initiation of Section 301 Investigation; Hearing; and Request for Public Comments: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 82 Fed. Reg. 40,213, 40,213 (Off. of U.S. Trade Rep. Aug. 24, 2017).

95. OFF. OF U.S. TRADE REPRESENTATIVE, FINDINGS OF THE INVESTIGATION INTO CHINA'S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, & INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974 147 (2018), <https://ustr.gov/sites/default/files/Section%20301%20FINAL.PDF>.

96. *China Section 301-Tariff Actions and Exclusion Process*, OFF. OF U.S. TRADE REPRESENTATIVE, <https://ustr.gov/issue-areas/enforcement/section-301-investigations/tariff-actions> (last visited Apr. 18, 2022).

97. *In Re Section 301 Cases*, No. 21-81 at 7.

98. *Id.* at 1, 7.

99. *Id.* at 7.

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not present justiciable issues.<sup>100</sup> Plaintiffs cross-moved for judgment on the agency record.<sup>101</sup>

Briefing of the case was completed in November 2021. Oral argument was conducted on February 1, 2022.<sup>102</sup> On April 1, 2022, CIT remanded the Final List three and four to U.S. Trade Representative for “reconsideration or further explanation consistent with this opinion.”<sup>103</sup>

Notably, only importers that have filed actions in CIT will be eligible to receive duty refunds in the event that plaintiffs ultimately prevail on the merits. CIT issued a narrow remand on April 1, 2022.<sup>104</sup>

**B. PARTICULAR MARKET SITUATION APPEALS**

CAFC, in *Hyundai Steel Co. v. United States*, Order No. 2021-1748, affirmed CIT’s invalidation of Commerce’s cost of production based PMS adjustments in the below cost sales analysis (19 U.S.C. § 1677b(b)) of home market sales, based on *Chevron* step one, narrowing the ambit of the PMS adjustment solely to constructed value in 19 U.S.C. § 1677b(e).<sup>105</sup>

**C. APPEALS RELATED TO SECTION 232/201 DUTIES**

Challenges to national security tariffs imposed under Section 232 of the Trade Expansion Act of 1962 continued to fail in 2021. In *Transpacific Steel LLC v. United States*, CAFC upheld doubling of duties on Turkish steel, reversing CIT finding that the expansion was unlawful being violative of the law’s statutory deadlines and the equal protection clause of the U.S. Constitution.<sup>106</sup> CAFC concluded that the President had the powers to increase import restrictions<sup>107</sup> and that the action survives rational basis review and satisfies the Fifth Amendment’s due process guarantee.<sup>108</sup> The challengers filed a petition at the Supreme Court asking for review of the decision<sup>109</sup>, which was denied on March 28, 2022.<sup>110</sup>

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100. *Id.* at 2.

101. *Id.*

102. Scott E. Diamond, *United States: CIT Holds Oral Argument in China Section 301 Tariff Refund Litigation*, MONDAQ (Feb. 3, 2022), <https://www.mondaq.com/unitedstates/international-trade-investment/1157672/cit-holds-oral-argument-in-china-section-301-tariff-refund-litigation>; see also *In re Section 301 Cases*, No. 22-32 (Ct. Int’l Trade Apr. 1, 2022), <https://www.cit.uscourts.gov/sites/cit/files/22-32.pdf>.

103. *In re Section 301 Cases*, No. 22-32 (Ct. Int’l Trade Apr. 1, 2022), <https://www.cit.uscourts.gov/sites/cit/files/22-32.pdf>.

104. *In re Section 301 Cases*, 2022 WL 987067, at \*30 (Ct. Int’l Trade 2022).

105. *Hyundai Steel Co. v. United States*, No. 2021-1748, 3 (Fed. Cir. Dec. 10, 2021).

106. See *Transpacific Steel LLC v. United States*, 4 F.4th 1306, 1310 (Fed. Cir. 2021).

107. *Id.* at 1319–1333.

108. *Id.* at 1333–1336.

109. *Transpacific Steel LLC v. United States*, 2021 WL 5364424, at \*1 (Fed. Cir. Nov. 12, 2021).

110. *Transpacific Steel LLC v. United States*, 142 S. Ct. 1414 (2022).

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In *Borusan v. United States*, CIT sustained Commerce’s decision to remove Section 232 duties from U.S. price as U.S. import duties in AD proceedings,<sup>111</sup> distinguishing Section 232 duties from Section 201 duties, which CAFC had previously found should not be reduced from U.S. price.

CIT in November invalidated government actions in the protracted litigation over “bifacial” solar modules.<sup>112</sup> President Trump in January 2018 assessed Section 201 safeguard tariffs on solar products,<sup>113</sup> and in June 2018 authorized exclusions including bifacial modules.<sup>114</sup> But the USTR in October 2019 withdrew that exclusion.<sup>115</sup> This withdrawal was challenged and resulted in CIT issuing a Preliminary Injunction (PI) in December 2019 against the collection of 201 tariffs on bifacial modules, after finding a likelihood that plaintiffs would succeed on their claim that USTR withdrawal violated the APA.<sup>116</sup>

Undeterred, the USTR in April 2020 again withdrew the bifacial exclusion – this time through a notice and comment period.<sup>117</sup> The government requested dissolution of the PI on account of this USTR action, but CIT declined to do so.<sup>118</sup> Consequently, President Trump in October 2020 issued Proclamation 10101 that: (1) assessed Section 201 on bifacial solar cells; and (2) increased the Section 201 tariff rate from 15 percent to 18 percent for the fourth year—from February 7, 2021, to February 6, 2022.<sup>119</sup> CIT in November 2020 ruled that plaintiffs would have to bring a separate appeal challenging Proclamation 10101, declining to extend the PI against Section 201 tariffs on bifacial modules from the appeal of USTR actions to the separate presidential actions.<sup>120</sup>

Challenge to Proclamation 10101 was initiated at CIT in late 2020 and was resolved in favor of plaintiffs in November.<sup>121</sup> CIT found that, although Proclamation 10101 complied with the statutory procedural requirements,<sup>122</sup> it violated the substantive requirements because Section 201 intends to liberalize trade over time; making bifacial tariffs subject and

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111. *Borusan Mannesmann Boru Sanayi v. Ticaret A.S.*, 494 F. Supp. 3d 1365, 1370 (Ct. Int’l Trade 2021).

112. *See* *Solar Energy Industries Association v. United States (SEAH)*, 553 F.Supp.3d 1322, 1322 (Ct. Int’l Trade 2021); *see also* *Invenergy Renewables LLC v. United States*, 552 F. Supp. 3d. 1382, 1404 (Ct. Int’l Trade 2021).

113. Proclamation No. 9693, 83 Fed. Reg. 3,541, 3,541–42 (Jan. 23, 2018).

114. Exclusion of Particular Products from the Solar Products Safeguard Measure, 84 Fed. Reg. 27,684 (Off. of U.S. Trade Representative June 13, 2019).

115. Withdrawal of Bifacial Solar Panels Exclusion to the Solar Products Safeguard Measure, 84 Fed. Reg. 54,244, 54,244 (Off. of U.S. Trade Representative Oct. 9, 2019).

116. *Invenergy Renewables*, 422 F. Supp. 3d at 1280–90.

117. Determination on the Exclusion of Bifacial Solar Panels from the Safeguard Measure on Solar Products, 85 Fed. Reg. 21,497, 21,497 (Off. of U.S. Trade Representative Apr. 17, 2020).

118. *Invenergy Renewables*, 422 F. Supp. 3d at 1360–65.

119. Proclamation No. 10101, 85 Fed. Reg. 65,639, 64,640 (Oct. 16, 2020).

120. *Invenergy Renewables*, 482 F. Supp. 3d at 1355–58.

121. *SEAH*, 553 F. Supp. 3d at 1344

122. *Id.*

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increasing the tariff rate “constituted both a clear misconstruction of the statute and action outside the President’s delegated authority.”<sup>123</sup> The following day, CIT vacated the second USTR action because: USTR lacked statutory authority to withdraw an exclusion once granted;<sup>124</sup> and that subsequent action was arbitrary and capricious in violation of APA requirements.<sup>125</sup>

**D. RETROACTIVITY IN SCOPE AND ANTI-CIRCUMVENTION**

Reviewing courts have recently found that scope and anti-circumvention determinations of the DOC could only apply prospectively, reversing agency decisions that would have retroactively extended AD and CVD liability. CAFC in late 2020 affirmed CIT decision to reverse DOC’s decision to apply AD/CVD retroactively to when the agency published notice initiating an anti-circumvention inquiry in “5050-grade” aluminum extrusions from China on one specific exporter.<sup>126</sup> CIT agreed that DOC properly found these products subject as “later developed merchandise”—but that DOC could only assess AD/CVD on other exporters from the date of the preliminary determination, when the inquiry was expanded to cover all exports from China.<sup>127</sup> CAFC agreed that before such time, DOC had not provided the requisite “fair warning” for AD/CVD liability.<sup>128</sup> Building on this CAFC precedent, CIT in May ruled that DOC could not assess AD/CVD liability on “PVD chrome” steel trailer wheels until DOC’s final determination that clarified the scope exclusion for “chrome” wheels: before that time, “Commerce did not provide adequate notice” that it must afford to “any reasonably informed importer that their product is subject to duty before any retroactive assessment of duties may obtain.”<sup>129</sup>

**E. SEPARATE RATES**

Courts this year reviewed the DOC practice of granting rates separate from that of the government in AD proceedings for exports from NME countries. Most notably, CAFC reversed CIT to reinstate DOC’s 2015 denial of a separate rate for Double Coin Holdings Ltd. in the fifth administrative review of the AD order on diamond sawblades from China.<sup>130</sup> DOC had preliminarily assigned Double Coin a *de minimis* AD rate

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123. *Id.* at 1343.

124. *Invenergy Renewables*, 482 F. Supp. 3d at 1400.

125. *Id.* at 1394.

126. *Tai-Ao Aluminium (Taishan) Co., Ltd. v. United States*, 983 F.3d 487, 489 (Fed. Cir. 2020).

127. *Tai-Ao Aluminium (Taishan) Co., Ltd. v. United States*, 391 F. Supp. 3d 1301, 1305–06 (Ct. Int’l Trade 2019).

128. *Tai-Ao Aluminium*, 983 F.3d at 495.

129. *Trans Texas Tire, LLC v. United States*, 519 F. Supp. 3d 1275, 1288 (Ct. Int’l Trade 2021).

130. *China Mfgs. Alliance, LLC v. United States*, 1 F.4th 1028, 1030 (Fed. Cir. 2021).



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calculated using its own data, but subsequently found that it was part of the “China-wide” entity for failure to demonstrate independence from government control.<sup>131</sup> Whereas CIT found that DOC lacked the statutory authority to assign such an NME-wide rate to Double Coin,<sup>132</sup> CAFC reversal found that the 105.31 percent “PRC-wide rate in this case qualifies as individually investigated.”<sup>133</sup>

CIT in 2021 affirmed DOC’s authority to deny separate rates in other contexts. CIT, in June, affirmed the separate rate denial based on nominal ownership of majority shareholder rights by a labor union in an administrative review of tapered roller bearings from China.<sup>134</sup> This affirmance followed CIT in 2020 remanding for DOC to accept a revised translation it had improperly rejected as untimely factual information,<sup>135</sup> and has been appealed to the CAFC.<sup>136</sup> CIT in July affirmed the DOC’s denial of a separate rate for a respondent, and found part of the NME-wide entity in an administrative review of fish fillets from Vietnam.<sup>137</sup> DOC’s finding, “that the Vietnamese government . . . controls the selection of IDI’s management,” was affirmed due to Communist party members serving on the boards of IDI and its corporate parent.<sup>138</sup>

In 2021, CIT also invalidated DOC’s separate rate denials for respondents who were in prior segments found independent from government control.<sup>139</sup> In April, CIT invalidated the DOC’s separate rate denial in an administrative review of a multi-layered wood flooring company from China for a mandatory respondent having a majority of shares indirectly controlled by the government.<sup>140</sup> DOC was faulted for not addressing “how ‘majority equity ownership’ translates into control of export functions”—the historic focus of DOC’s analysis.<sup>141</sup> Likewise, in May, CIT on this basis invalidated separate rate denials for companies having minority shares indirectly controlled by the government in an administrative review of the AD order on off-the-road tires from China.<sup>142</sup> “The critical flaw” identified by the

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131. *Id.* at 1033.

132. *China Mfgs. Alliance, LLC v. United States*, 205 F. Supp. 3d 1325, 1333-41 (Ct. Int’l Trade 2017).

133. *China Mfgs. Alliance*, 1 F.4th at 1037.

134. *Zhejiang Mach. Imp. & Exp. Corp. v. United States*, 521 F. Supp. 3d 1345, 1346 (Ct. Int’l Trade 2021).

135. *Zhejiang Mach. Imp. & Exp. Corp. v. United States*, 471 F. Supp. 3d 1313, 1331-37 (Ct. Int’l Trade 2020).

136. *Zhejiang Mach. Imp. & Exp. Corp. v. United States*, CAFC No. 21-2257 (docketed Aug. 27, 2021).

137. *I.D.I. Int’l Dev. & Inv. Corp. v. United States*, No. 20-00107, 2021 WL 3082807, at \*12 (Ct. Int’l Trade July 6, 2021).

138. *Id.* at \*7–\*8.

139. *See, e.g., Jilin Forest Indus. Jinqiao Flooring Grp. Co. v. United States*, 519 F. Supp. 3d 1224, 1229–36 (Ct. Int’l Trade 2021).

140. *Id.* at 1234.

141. *Id.* at 1234.

142. *Guizhou Tyre Co. v. United States*, 519 F. Supp. 3d 1248, 1251–52, 1256 (Ct. Int’l Trade 2021).

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CIT “was the Department’s failure to . . . determine whether the Chinese government . . . controlled the prices” of subject merchandise “that was sold for export to the United States.”<sup>143</sup> Remand proceedings are ongoing in both of these CIT appeals.<sup>144</sup>

F. DIFFERENTIAL PRICING ANALYSIS – COHEN’S *d* Test

Reviewing Courts continued to challenge DOC’s presumed mastery expertise of sophisticated statistical tests in the context of their actual application, where the agency has traditionally been accorded an unfettered deference. CAFC endorsed the following elements of DOC’s Cohen’s *d* test applied for differential pricing analysis—(1) “effect-size test” comparing means of test and comparison subgroups to identify divergent sales (i.e., 0.8 Cohen’s *d* cutoff); (2) “ratio test” (i.e., total passing transactions percentage cutoffs, 33 percent and 66 percent); (3) “meaningful difference test” cutoffs (i.e., average-to-transaction (A-T) instead of average-to-average (A-A) is applied to a passing transaction if A-T margin moves across the *de minimis* threshold, or when both A-A and A-T are above *de minimis*, the difference is 25 percent or above); and (4) zeroing A-T results—as embodying interpretive and discretionary rules to implement the statutory directive.<sup>145</sup>

But CAFC then questioned if DOC’s “determination of whether the average-to-transaction method is appropriate in a particular case is not solely within its discretion, because that determination is confined by the statutory language of 19 U.S.C. § 1677f-1(d)(1)(B),”<sup>146</sup> which is premised on a pattern of significantly varying export prices among purchasers, regions, and time periods that cannot be accounted for by A-A results. Even while requiring DOC to establish that the statutory factual preconditions existed prior to invoking Cohen’s *d* test, CAFC nonetheless reiterated that “the relevant standard for reviewing Commerce’s selection of statistical tests and numerical cutoffs is reasonableness, not substantial evidence.”<sup>147</sup>

Applying the reasonableness test, CAFC concluded that “there are significant concerns relating to Commerce’s application of the Cohen’s *d* test . . . in adjudications in which the data groups being compared are small, are not normally distributed, and have disparate variances.”<sup>148</sup> Thus, Cohen’s *d* test results are unreliable in situations where any one of the three criteria are violated.<sup>149</sup>

CIT followed CAFC in a subsequent case, remanding to DOC because it “applied the Cohen’s *d* test to data that showed differences that were not large in absolute terms, because the overall differences for five of the

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143. *Id.* at 1260.

144. *Id.* at 1261.

145. *Stupp Corp. v. United States*, 5 F.4th 1341, 1354–57 (Fed. Cir. 2021).

146. *Id.* at 1352.

147. *Id.* at 1353.

148. *Id.* at 1357.

149. *Id.* at 1360.

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CONNUMs were less than one percent” and also “did not explain whether the data applied to the Cohen’s *d* test were normally distributed or contained roughly equal variances.”<sup>150</sup> Given the three restrictive threshold conditions, DOC will increasingly find it hard to support its Cohen’s *d* test in the current form.

Finally, CAFC is due to adjudicate whether to weight average or simple average the group variances for obtaining the pooled standard deviation, the denominator in Cohen’s *d* formula. In its 2019 remand, CAFC, relying upon academic literature, had expressed concerns about DOC’s current practice of simple averaging.<sup>151</sup> CAFC recently remanded, noting that simple averaging departed from all cited statistical literature.<sup>152</sup> If ultimately CAFC endorses weighted averaging, it will further dilute Cohen’s *d* test by yielding a significantly lesser number of passing transactions and A-T comparisons, which would result in relatively lower dumping margins.

**G. BORUSAN MANNESMANN BORU SANAYI V. AMERICAN CAST IRON PIPE CO.**

In July 2021, CAFC overturned a CIT judgment, holding that Commerce’s final determination concerning its post-sale price adjustment calculation in Large Diameter Welded Pipe from Turkey was supported by substantial evidence.<sup>153</sup> In the underlying proceeding, the plaintiff (Turkish pipe producer Borusan) and joint-venture partners incurred late delivery fees.<sup>154</sup> Each partner initially agreed to pay a third of the penalty, but later agreed that the plaintiff would pay a higher share.<sup>155</sup> In the AD proceeding, Commerce explained its five-factor analysis for determining entitlement to a post-sale price adjustment and found that the plaintiff was entitled to only the one-third amount adjustment, because it was known at the time of the sale.<sup>156</sup> Commerce noted that using the final, higher share amount would give the plaintiff an opportunity to manipulate the adjustment and its dumping margin.<sup>157</sup>

CIT overturned Commerce, finding that the plaintiff was due the entire amount of the post-sale price adjustment.<sup>158</sup> CAFC upheld Commerce’s initial determination to grant the partial adjustment, agreeing that the

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150. *Marmen Inc. v. United States*, 545 F. Supp. 3d 1305, 1319–20 (Ct. Int’l Trade 2021).

151. *Mid Continent Steel & Wire, Inc. v. United States*, 940 F.3d 662, 674 (Fed. Cir. 2019) (“Commerce said that it was simply using a widely accepted statistical test; yet it did not acknowledge that the only cited literature source for the relevant aspect of the test itself calls for the use of weighted averages.”).

152. *Mid Continent Steel & Wire, Inc. v. United States*, 31 F.4th 1367, 1381 (Fed. Cir. 2022).

153. *Borusan Mannesmann Boru Sanayi Ve Ticaret A.S. v. Am. Cast Iron Pipe Co.*, 5 F.4th 1367, 1368 (Fed. Cir. 2021).

154. *Id.*

155. *Id.* at 1371.

156. *Id.* at 1373.

157. *Id.*

158. *Id.* at 1376–77

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circumstances surrounding the timing weighed against valuing the post-sale price adjustment based on the later, higher amount—especially in light of the potential for post hoc manipulation.<sup>159</sup>

## H. COUNTERVAILING DUTY APPEALS

### 1. *EBCP*

Throughout 2021, CIT continued invalidating various DOC actions to countervail the Government of China's Export Buyer's Credit Program (EBCP), without having either conducted verification or provided a sufficient justification for declining to do so.<sup>160</sup> But for the first time in October 2021, DOC conducted EBCP verifications confirming EBCP non-usage by the mandatory respondents and their U.S. customers in the CVD investigation of mobile access equipment and subassemblies thereof from China.<sup>161</sup> This turn of events may signal the end for EBCP litigation that has featured prominently on CIT docket in recent years.

### 2. *Expedited Review*

In August, CIT invalidated the 2019 DOC decision to conduct a CVD review of Softwood Lumber from Canada.<sup>162</sup> Last year, CIT remanded after finding that the DOC had not provided statutory authority to enact the CVD expedited review regulation under 19 C.F.R. § 351.214(k).<sup>163</sup> This regulation had for decades allowed for respondents not individually examined in CVD investigations to have their own rates calculated quickly after CVD order issuance, and become eligible for exclusion if those CVD rates were de minimis. CIT in August sustained DOC's redetermination that it lacked statutory authority to promulgate the CVD regulation and vacated both 19 C.F.R. § 351.214(k) and the softwood lumber expedited CVD review.<sup>164</sup> As a result, Canadian companies excluded through the expedited review were reinstated under the CVD order, and those receiving reduced CVD rates in the expedited review were assigned higher cash

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159. *Borusan*, 5 F.4th at 1376.

160. See *Yama Ribbons & Bows Co. v. United States*, 517 F. Supp. 3d 1325 (Ct. Int'l Trade 2021); *Canadian Solar Inc. v. United States*, 537 F. Supp. 3d 1380 (Ct. Int'l Trade 2021); *Cooper Kunshan Tire Co. v. United States*, 539 F. Supp. 3d 1316 (Ct. Int'l Trade 2021).

161. Final Determination on Countervailing Duty Certain Mobile Access Equipment, 86 Fed. Reg. at 57,810; see also Memorandum from Scot Fullerton, Assoc. Deputy Assistant Sec'y for Antidumping and Countervailing Duty Operations on Issues and Decisions Memorandum of the Final Affirmative Determination of the Countervailing Duty Investigation of Certain Mobile Access Equip. & Subassemblies Thereof from the People's Republic of China to Ryan Majerus, Deputy Assistant Sec'y for Pol'y and Negot. (Oct. 13, 2021).

162. Committee Overseeing Action for Lumber Int'l Trade Investigations or Negotiations v. United States (*Coalition*), 483 F. Supp. 3d 1253, 1257 (Ct. Int'l Trade 2020).

163. Committee Overseeing Action for Lumber Int'l Trade Investigations or Negotiations v. United States (*Coalition*), 535 F. Supp. 3d 1336, 1342 (Ct. Int'l Trade 2021).

164. *Coalition*, 535 F. Supp. 3d at 1340.

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deposit rates.<sup>165</sup> CIT expressly declined to provide retroactive relief, meaning softwood lumber from those companies which had already entered the United States was unaffected.<sup>166</sup> This CIT ruling was appealed to CAFC.<sup>167</sup>

3. *Notable Appeals of ITC Proceedings*

The CIT issued several noteworthy decisions in 2021 relating to ITC proceedings, sustaining ITC's negative injury determinations in a number of cases. For example, in an appeal brought by domestic producers on ITC's negative injury determination in the AD/CVD investigation of polytetrafluorethylene (PTFE) resin from China and India, CIT upheld ITC's reconsideration on remand of the weight it accorded to post-petition price data, and sustained ITC's decision.<sup>168</sup> CIT also sustained ITC's negative injury determinations in appeals relating to polyethylene terephthalate (PET) resin from Brazil, Indonesia, Korea, Pakistan, and Taiwan,<sup>169</sup> and fabricated structural steel from Canada, China, and Mexico.<sup>170</sup> CIT also sustained ITC's final affirmative injury determination of PET sheet from Korea and Oman, rejecting plaintiff's arguments relating to volume, price, and impact.<sup>171</sup>

Also in 2021, LG Electronics USA, Inc. and LG Electronics, Inc. (collectively, LG) appealed a denial by ITC to an application filed by LG's attorneys for access to business proprietary information under the administrative protective order (APO) in ITC's Section 201 safeguard extension proceeding regarding Crystalline Silicon Photovoltaic Cells, Whether or Not Partially or Fully Assembled (Inv. No. TA-201-075 (Extension)).<sup>172</sup> LG's counsel was denied access due to their role in representing China in a dispute settlement case at the World Trade Organization.<sup>173</sup> Plaintiffs argued that ITC's delay in rendering a decision on the APO application filed by LG's attorneys was in violation of the procedural controls governing applications for APO access, which infringed

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165. Certain Softwood Lumber Products from Canada: Notice of Rescission of Final Results of Expedited Review, 86 Fed. Reg. 48,396, 48,397 (U.S. Dep't of Com. Aug. 30, 2021).

166. *Coalition*, 535 F. Supp. 3d at 1357.

167. *Coalition*, 535 F. Supp. 3d 1336 (Ct. Int'l Trade 2021), *appeal docketed*, No. 22-1068 (Fed. Cir. Oct. 18, 2021).

168. *Chemours Co. Fc v. United States*, 492 F. Supp. 3d 1333, 1334, 1337 (Ct. Int'l Trade 2021).

169. *DAK Ams. LLC v. United States*, 517 F. Supp. 3d 1349, 1354, 1374 (Ct. Int'l Trade 2021).

170. *Full Member Subgroup of the Am. Inst. of Steel Const. v. United States*, 547 F. Supp. 3d 1211, 1215, 1233 (Ct. Int'l Trade 2021). Domestic producers have filed a further appeal of this case to the Court of Appeals for the Federal Circuit. See Notice of Appeal at 1, *Full Member Subgroup of the Am. Inst. of Steel Const.*, 547 F.Supp.3d 1211 (No. 20-00090).

171. *Octal Inc. v. United States*, 539 F. Supp. 3d 1291, 1316 (Ct. Int'l Trade 2021).

172. Complaint ¶¶ 1-4, *LG Electronics USA, Inc. v. United States*, No. 21-00520 (Ct. Int'l Trade Sept. 16, 2021).

173. *Id.* ¶¶ 1-2.

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on LG's rights to be represented by their chosen counsel.<sup>174</sup> Plaintiff also said that any denial of the APO application was without authority.<sup>175</sup> Ultimately, the parties stipulated dismissal of the case,<sup>176</sup> but this case is notable as a rare instance in which access to the APO was not granted, and a party appealed that decision to CIT.

#### **IV. EAPA**

In 2021, CBP continued its increased level of activity under EAPA.<sup>177</sup> CBP initiated twelve investigations into evasion of AD and CVD orders on products such as quartz and glycine.<sup>178</sup> CBP rendered eleven determinations as to evasion, with affirmative determinations for AD/CVD orders on aluminum extrusions, cast iron soil pipe, steel grating, and lightweight thermal paper from China.<sup>179</sup> Negative determinations were issued for the AD orders on activated carbon and wooden cabinets from China.<sup>180</sup> The investigations primarily involved alleged transshipment of Chinese products through Southeast Asian countries.<sup>181</sup>

CIT rendered notable EAPA decisions in October 2021. After initially denying the foreign producer/exporter from participating in EAPA appeal of its U.S. importer, CIT reconsidered and authorized such participation because the Plaintiff-Intervenor had an interest in the transaction at issue that had a direct and immediate relationship to the litigation and was not adequately represented by the existing parties.<sup>182</sup> In another case, after remanding last year for CBP to address due process concerns,<sup>183</sup> CIT affirmed CBP's finding of transshipment of Chinese origin pencils through the Philippines based on sufficient public summarization of confidential

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174. *Id.* ¶ 2.

175. *Id.* ¶ 74.

176. *See* Stipulation of Dismissal at 1, LG Electronics USA, Inc. v. United States, No. 21-00520 (Ct. Int'l Trade Oct. 13, 2021).

177. 19 U.S.C. § 1517.

178. *See, e.g.*, Quartz Surface Products from the People's Republic of China: Initiation of Scope and Circumvention Inquiries of the Antidumping Duty and Countervailing Duty Orders, 87 Fed. Reg. 6844, 6845 (U.S. Dep't of Com. Feb. 7, 2022).

179. *See, e.g.*, Common Alloy Aluminum Sheet from the People's Republic of China: Final Results and Partial Rescission of Countervailing Duty Administrative Review; 2018–2019, 86 Fed. Reg. 72,927, 72929 (U.S. Dep't of Com. Dec. 23, 2021).

180. Wooden Cabinets and Vanities and Components Thereof from the People's Republic of China: Notice of Final Results of Antidumping Duty Changed Circumstances Review, 86 Fed. Reg. 56,251, 56,252 (U.S. Dep't of Com. Oct. 8, 2021).

181. 19 U.S.C. § 1517.

182. Glob. Aluminum Distrib. LLC v. United States, No. 21-00198, at 9–10 (Ct. Int'l Trade Oct. 7, 2021).

183. Royal Brush Mfg. v. United States, 483 F. Supp. 3d 1294, 1297 (Ct. Int'l Trade 2020).

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data<sup>184</sup> and a verification report that did not constitute new factual information.<sup>185</sup>

Due process concerns were similarly rejected in CIT appeal challenging EAPA determination on diamond sawblades from China, based on sufficient public summarization.<sup>186</sup> Although CBP had not acted within its statutory timeframe, CIT found no penalty because “the deadline is precatory, not mandatory.”<sup>187</sup> The Thai sawblades using Chinese cores and segments at issue were referred by CBP to DOC, who found them in-scope after conducting an anti-circumvention inquiry.<sup>188</sup> CBP was found to have properly applied that DOC determination retroactively to the sawblades covered by EAPA investigation that entered before the matter was referred to DOC.<sup>189</sup> But CIT remanded because CBP did not explain its “evasion” finding—as the sawblades apparently entered in accordance with prior DOC findings, despite EAPA not having a *mens rea* requirement.<sup>190</sup>

## V. Section 337 Developments

In 2021, several significant Section 337 developments occurred relating to matters concerning the misappropriation of trade secrets. These developments included a seminal determination by ITC and proposed legislation that, if implemented, would affect treatment of Chinese-related theft of trade secrets.

In *Certain Foodservice Equipment and Components Thereof*, ITC affirmed a final initial determination (Final ID) by an administrative law judge (ALJ) in which the ALJ concluded that there had been no violation of Section 337.<sup>191</sup> In the Final ID, although the ALJ found that the China-based respondents had misappropriated certain trade secrets of the complainants and used them in the manufacture of certain allegedly infringing products that were imported and sold in the United States, the ALJ concluded that the complainants had not shown that the importation and sale of the allegedly infringing products threatened or had the effect of destroying or

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184. EAPA did not establish an APO or other mechanism that would allow counsel for parties to access other parties’ confidential information, unlike in AD/CVD proceedings. See Timothy C. Brightbill, *Tim Brightbill Discusses EAPA Process for Pursuing Importers That Evade AD/CVD Duties*, WILEY (July 12, 2021), <https://www.wiley.com/news/Tim-Brightbill-Discusses-EAPA-Process-for-Pursuing-Importers-That-Evade-AD-CVD-Duties>. Accordingly, all parties to a proceeding, including CBP, are required to provide public summaries of confidential information. See 19 C.F.R. § 165.4(a)(2) (2016).

185. *Royal Brush Mfg.*, 545 F. Supp. 1357, 1360, 1371 (Ct. Int’l Trade 2021).

186. *Diamond Tools Tech. LLC v. United States*, 545 F. Supp. 3d 1324, 1343 (Ct. Int’l Trade 2021).

187. *Id.* at 1333.

188. *Id.* at 1329–1330.

189. *Id.* at 1351.

190. *Id.* at 1355.

191. See *Certain Foodservice Equipment and Components Thereof*; Notice of Commission Determination Finding No Violation of Section 337; Termination of the Investigation, 86 Fed. Reg. 58,097, 58,097–98 (U.S. Int’l Trade Comm’n Oct. 20, 2021).

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substantially injuring a domestic industry.<sup>192</sup> In affirming the ALJ's Final ID, ITC held that payments made by complainants to third parties for warranty services provided in the United States were not quantitatively or qualitatively significant enough to demonstrate the existence of a domestic industry, and that, therefore, the complainants did not establish that an industry in the United States exists as required by Section 337(a)(1)(A)(i)—and thus did not establish a substantial injury to a domestic industry.<sup>193</sup>

Shortly after the ALJ's Final ID was issued in early June 2021, Senator John Cornyn (R-TX), along with co-sponsors Senator Christopher Coons (D-Del.), and Senator Todd Young (R-Ind.), introduced the Stopping and Excluding Chinese Rip-offs and Exports with United States Trade Secrets Act of 2021 (the SECRETS Act of 2021) on June 15, 2021.<sup>194</sup> If enacted, the SECRETS Act of 2021 would create an Interagency Committee on Trade Secrets (Committee) that would be chaired by the Attorney General and would include the heads of the Treasury, Commerce and Homeland Security Departments, the U.S. Trade Representative, and the Office of the Intellectual Property Enforcement Coordinator, as well as “[t]he head of such other Federal agency or other executive office as the President determines appropriate, generally or on a case-by-case basis.”<sup>195</sup> The Committee would, upon complaint submitted by the owner of a trade secret or on its own, initiate a review of any allegations that an import meets the criteria for exclusion.<sup>196</sup> If the Committee determines no more than thirty days after notification of an allegation that an import “more likely than not” meets the criteria, the Committee would direct that the article be kept from entry into the United States and would notify the President of the determination, although the President could disapprove of such determination within fifteen days of notification, which would result in the Committee's determination having no force or effect.<sup>197</sup>

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192. *Id.*

193. *Id.* at 58,098.

194. Stopping and Excluding Chinese Rip-offs and Exports with United States Trade Secrets Act of 2021 (SECRETS Act of 2021), S. 2067, 117th Cong. (2021).

195. *Id.* § 2(b)(2)(A).

196. *Id.* § 2(b)(5)(A).

197. *Id.* § 2(d)(1).



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## National Security Law

ORGA CADET, GEOFFREY GOODALE, LAURENCE R. HULL,  
RENEE LATOUR, BARBARA LINNEY, JONATHAN MEYER,  
GUY C. QUINLAN, MINJI “MJ” SHIN,  
CHRISTOPHER VALLANDINGHAM, AND BONNIE H. WEINSTEIN\*

This article highlights significant legal developments relevant to national security law that took place in 2021.

### I. Diligence and Disclosure Obligations for Victims of Ransomware Attacks

Ransomware attacks—cyberattacks demanding that the victim pay a ransom for decryption keys and to avoid the publication of exfiltrated information—have been described as a “scourge” on U.S. companies.<sup>1</sup> These attacks affect a wide range of industries, including but not limited to healthcare, manufacturing, finance, and insurance.<sup>2</sup> In 2020, the largest ransom demand was over \$65 million,<sup>3</sup> and the largest ransom paid was in excess of \$15 million dollars—each more than three times greater than their respective values in 2019.<sup>4</sup>

Companies considering paying such ransomware demands risk violating U.S. economic sanctions. In October 2020, the U.S. Department of the Treasury’s Office of Foreign Assets Control (OFAC) released an advisory directing companies that facilitate ransomware payments on behalf of

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\* Orga Cadet served as the committee editor of this article. Barbara Linney, Partner at Baker & Hostetler LLP, and Orga Cadet, Associate at Baker & Hostetler LLP, co-authored “Diligence and Disclosure Obligations for Victims of Ransomware Attacks.” Geoffrey Goodale, Partner at Duane Morris, LLP, and Jonathan Meyer, Attorney at Law, co-authored “Efforts to Secure the Information and Communications Technology and Services Supply Chain.” Renee Latour, Partner at Clifford Chance US LLP, Laurence R. Hull, Senior Associate at Clifford Chance US LLP, and MJ Shin, Law Clerk at Clifford Chance US LLP, co-authored “CFIUS’s Evolving Concept of National Security in 2021.” Guy C. Quinlan, President of the Lawyers Committee on Nuclear Policy, is the author of “Nuclear Arms Control.” Christopher Vallandingham, Head of Collections and Professor of Legal Research at the University of Florida Levin College of Law and National Security Law Attorney for the U.S. Army, is the author of “Targeted Disinformation Campaigns.” Bonnie H. Weinstein, Attorney at Law, is the author of “Update on the Budapest Convention on Cybercrime.”

1. THEODORE J. KOBUS III & CRAIG A. HOFFMAN, BAKER & HOSTETLER, 2021 DATA SECURITY INCIDENT RESPONSE REPORT 4 (2021), [https://f.datasrvr.com/fr1/021/74237/2021\\_DSIR\\_Report.pdf](https://f.datasrvr.com/fr1/021/74237/2021_DSIR_Report.pdf).

2. *Id.* at 3.

3. *Id.* at 4.

4. *Id.*

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victims—e.g., banks, cyber insurance providers, and digital forensics companies—to “account for the risk that a ransomware payment may involve a SDN [specially designated national] or blocked person, or a comprehensively embargoed jurisdiction.”<sup>5</sup> As noted in the advisory, many ransomware actors have been added to OFAC’s List of Specially Designated Nationals and Blocked Persons.<sup>6</sup> The digital currency wallet utilized by the threat actors may also be designated.<sup>7</sup> In addition, ransomware actors may be located in sanctioned countries.<sup>8</sup>

On September 21, 2021, OFAC released updated advice for companies who suffer ransomware attacks (the Updated Advisory).<sup>9</sup> In the Updated Advisory, OFAC stated, “ransomware payments made to sanctioned persons or to comprehensively sanctioned jurisdictions could be used to fund activities adverse to the national security and foreign policy objectives of the United States. Such payments not only encourage and enrich malicious actors, but also perpetuate and incentivize additional attacks.”<sup>10</sup> As a result, OFAC stated that “[t]he U.S. Government strongly discourages all private companies and citizens from paying ransom or extortion demands and recommends focusing on strengthening defensive and resilience measures to prevent and protect against ransomware attacks.”<sup>11</sup>

OFAC also stated in the Updated Advisory that “license applications involving ransomware payments demanded as a result of malicious cyber-enabled activities will continue to be reviewed by OFAC on a case-by-case basis with a presumption of denial.”<sup>12</sup> OFAC strongly encouraged all victims, and those involved with addressing ransomware attacks, to report incidents to the Cybersecurity and Infrastructure Security Agency (CISA),

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5. U.S. DEPARTMENT OF THE TREASURY, OFFICE OF FOREIGN ASSETS CONTROL, ADVISORY ON POTENTIAL SANCTIONS RISKS FOR FACILITATING RANSOMWARE PAYMENTS 4 (2020), [https://home.treasury.gov/system/files/126/ofac\\_ransomware\\_advisory\\_10012020\\_1.pdf](https://home.treasury.gov/system/files/126/ofac_ransomware_advisory_10012020_1.pdf).

6. See *id.* at 2. See also, e.g., Press Release, U.S. Department of the Treasury, *Treasury Sanctions Two Individuals for Malicious Cyber-Enabled Activities* (Dec. 29, 2016), <https://home.treasury.gov/news/press-releases/jl0693>; Press Release, U.S. Department of the Treasury, *Treasury Sanctions Evil Corp, the Russia-Based Cybercriminal Group Behind Dridex Malware* (Dec. 5, 2019), <https://home.treasury.gov/news/press-releases/sm845>.

7. See, e.g., Press Release, U.S. Department of the Treasury, *Treasury Designates Iran-Based Financial Facilitators of Malicious Cyber Activity and for the First Time Identifies Associated Digital Currency Addresses* (Nov. 28, 2018), <https://home.treasury.gov/news/press-releases/sm556>.

8. See, e.g., Press Release, U.S. Department of Justice, *North Korean Regime-Backed Programmer Charged With Conspiracy to Conduct Multiple Cyber Attacks and Intrusions* (Sept. 6, 2018), <https://www.justice.gov/opa/pr/north-korean-regime-backed-programmer-charged-conspiracy-conduct-multiple-cyber-attacks-and> (charging North Korean hacking team with perpetrating the 2017 WannaCry 2.0 global ransomware attack).

9. U.S. Department of Treasury, *Updated Advisory on Potential Sanctions Risks for Facilitating Ransomware Payments* 1 (Sept. 21, 2021), [https://home.treasury.gov/system/files/126/ofac\\_ransomware\\_advisory.pdf](https://home.treasury.gov/system/files/126/ofac_ransomware_advisory.pdf).

10. *Id.* at 3.

11. *Id.* at 1.

12. *Id.* at 5.

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the Federal Bureau of Investigation (FBI), or the U.S. Secret Service (USSS).<sup>13</sup> If there is any reason to suspect a potential sanctions nexus regarding a ransomware payment, OFAC directs victims to also report ransomware attacks and payments to OFAC and the U.S. Department of the Treasury's Office of Cybersecurity and Critical Infrastructure Protection (CCIP).<sup>14</sup> Doing so could constitute a significant mitigating factor in OFAC's determination of any penalty or other enforcement response.<sup>15</sup>

OFAC continues to sanction ransomware operators and entities that facilitate ransomware payments. For instance, on November 8, 2021, OFAC sanctioned two ransomware operators and a virtual currency exchange that allegedly facilitated ransomware payments.<sup>16</sup> This action indicated OFAC's continuing commitment to applying U.S. economic sanctions laws towards not only ransomware attackers, but also facilitators of ransomware payments to those attackers.<sup>17</sup> Ransomware victims and their supporters should, therefore, strongly consider both the enforcement risk of violating U.S. sanctions laws if paying the perpetrators of cyberattacks and the risk of designation.

In addition to disclosing ransomware attacks to CISA, the FBI, or the USSS, and potentially also to OFAC and the CCIP, victims of ransomware attacks should always consider disclosing the attack to other U.S. government agencies tasked with roles related to export controls or the protection of other sensitive data. For instance, such victims should consider whether to disclose the ransomware incident to the U.S. Departments of Defense, State, and Commerce. The U.S. Department of Defense generally requires U.S. government contractors to disclose within seventy-two hours cyber incidents involving the potential release of unclassified controlled technical information or other information.<sup>18</sup> The U.S. Department of State requires reporting of certain violations under the International Traffic in Arms Regulations (ITAR).<sup>19</sup> Victims should also consider whether reporting other unauthorized exports of technical data listed on the U.S. Munitions List<sup>20</sup> under the voluntary disclosure provisions of the ITAR would be advisable.<sup>21</sup> The U.S. Department of Commerce (DOC) similarly encourages reporting of violations of the Export Administration Regulations (which include similar definitions of "release"

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13. *Id.*

14. *Id.*

15. *Id.*

16. Press Release, U.S. Department of the Treasury, *Treasury Continues to Counter Ransomware as Part of Whole-of-Government Effort; Sanctions Ransomware Operators and Virtual Currency Exchange* (Nov. 8, 2021), <https://home.treasury.gov/news/press-releases/jy0471>.

17. *See id.*

18. *See* 48 C.F.R. §252.204-7012(a).

19. *See* 22 C.F.R. § 126.1(a)-(e)(2).

20. *See id.* at §§ 120.50 (definition of "release"), -120.17 (definition of "export"), -127.1 (definition of "violations").

21. *See id.* at §127.12.

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and “export”),<sup>22</sup> including any unauthorized release of data controlled under the Commerce Control List.<sup>23</sup> Whether to voluntarily disclose ransomware attacks to U.S. government agencies is a decision best made on a case-by-case basis, but given the level of communication and collaboration amongst the various U.S. government agencies with jurisdiction over such matters, entities who are victims of ransomware attacks should consider the value of transparency when weighing the costs and benefits of disclosure.

## **II. Efforts to Secure the Information and Communications Technology and Services Supply Chain (ICTS)**

In 2021, the U.S. government took several actions to help secure the supply chain relating to information and communications technology and services (ICTS). As discussed below, these actions will have profound implications for U.S. and non-U.S. entities that operate throughout the ICTS supply chain.

On January 19, 2021, the DOC published an interim final rule designed to help secure the ICTS supply chain (Interim Rule).<sup>24</sup> Issued pursuant to Executive Order 13,873 of May 15, 2019, (EO 13,873),<sup>25</sup> and noting that the ICTS supply chain “must be secure to protect our national security, including the economic strength that is an essential element of our national security,”<sup>26</sup> the Interim Rule established regulations to provide the DOC with authority to review certain U.S. transactions involving the ICTS supply chain that have a nexus with foreign adversaries that were initiated, pending, or completed on or after January 19, 2021.<sup>27</sup>

Pursuant to the Interim Rule, which went into effect on March 22, 2021, the DOC may prohibit or restrict transactions conducted by any person, or involving any property, subject to U.S. jurisdiction, if they: (1) involve certain categories of ICTS;<sup>28</sup> (2) are designed, developed, manufactured, or supplied by persons owned by, controlled by, or subject to the jurisdiction or

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22. See 15 C.F.R. § 772.1.

23. See 15 C.F.R. § 774.

24. Securing the Information and Communications Technology and Services Supply Chain, 86 Fed. Reg. 4909 (proposed Jan. 19, 2021) (to be codified 15 C.F.R. pt. 7). See also Exec. Order 14,017, 86 Fed. Reg. 11,849 (Mar. 1, 2021). Separate from the Interim Rule, President Biden issued Exec. Order 14,017 of February 24, 2021 (EO 14,017), which required (among other things) that the Secretary of Commerce and the Secretary of Homeland Security prepare and submit a report on supply chains for critical sectors and subsectors of the information and communications technology (ICT) industrial base within one year of the date of EO 14,017. Since that report and many of the other deliverables required by EO 14,017 are not due until 2022, they are beyond the scope of this article.

25. Exec. Order 13,873, 86 Fed. Reg. 96 (May 15, 2019).

26. Securing the Information and Communications Technology and Services Supply Chain, 86 Fed. Reg. 4909, 4909.

27. *Id.* at 4912.

28. *Id.* at 4917.

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direction of a “foreign adversary”;<sup>29</sup> and (3) pose an “undue or unacceptable risk” to the national security of the U.S.<sup>30</sup> Importantly, the DOC can impose significant civil and criminal penalties for violations of DOC determinations or mitigation measures (e.g., civil penalties not to exceed the greater of \$250,000, subject to inflationary adjustment, or an amount that is twice the amount of the transaction that is the basis of the violation; criminal penalties of not more than \$1,000,000, and/or imprisonment for no more than 20 years).<sup>31</sup>

Under the Interim Rule, “ICTS” is defined as any “hardware, software, or other product or service, including cloud-computing services, primarily intended to fulfill or enable the function of information or data processing, storage, retrieval, or communication by electronic means (including electromagnetic, magnetic, and photonic), including through transmission, storage, or display.”<sup>32</sup> “ICTS Transaction” is defined as any “acquisition, importation, transfer, installation, dealing in, or use of any information and communications technology or service, including ongoing activities, such as managed services, data transmission, software updates, repairs, or the platforming or data hosting of applications for consumer download.”<sup>33</sup>

The six categories of ICTS that are reviewable by the DOC under the Interim Rule are:

(1) Critical Infrastructure: ICTS that will be used by a party to a transaction in a sector designated as “critical infrastructure” by Presidential Policy Directive 21–Critical Infrastructure Security and Resilience, including any subsectors or subsequently designated sectors;<sup>34</sup>

(2) Networking: ICTS that is integral to wireless local area networks, mobile networks, satellite payloads, satellite operations and control, cable access points, wireline access points, core networking systems, or long- and short-haul systems;<sup>35</sup>

(3) Sensitive Personal Data: ICTS that is integral to data hosting or storage or computing services that uses, processes, or retains “sensitive personal data” of greater than one million U.S. persons at any point over the twelve months preceding an ICTS Transaction;<sup>36</sup>

(4) Surveillance/Monitoring/Home Networking/Drones: Surveillance or monitoring devices, home networking devices, and drones or any other unmanned aerial system, where one million units of

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29. *Id.* at 4917.

30. *Id.* at 4917.

31. *Id.* at 4928.

32. *Id.* at 4923.

33. *Id.* at 4923.

34. *Id.* at 4924.

35. *Id.* at 4924.

36. *Id.* at 4924.

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the ICTS item at issue have been sold in the twelve months prior to the ICTS Transaction;<sup>37</sup>

(5) Communications Software: Software designed primarily for connecting with and communicating via the Internet that is in use by greater than one million U.S. persons at any point over the twelve months preceding an ICTS Transaction, including desktop, mobile, web-based, and gaming applications;<sup>38</sup> and

(6) Emerging Technology: ICTS that is integral to artificial intelligence and machine learning, quantum key distribution, quantum computing, drones, autonomous systems, or advanced robotics.<sup>39</sup>

As can be discerned from the above description of the six categories, the scope of the Interim Rule is quite broad.

Significantly, only ICTS that is designed, developed, manufactured, or supplied, by persons owned by, controlled by, or subject to the jurisdiction or direction of a “foreign adversary” is subject to review by the DOC.<sup>40</sup> Under the Interim Rule, “foreign adversary” means “any foreign government or foreign non-government person determined by the Secretary to have engaged in a long-term pattern or serious instances of conduct significantly adverse to the national security of the United States or security and safety of United States persons.”<sup>41</sup> As stated in the Interim Rule, “foreign adversaries” specifically include China (including Hong Kong), Cuba, Iran, North Korea, Russia, and Venezuela’s Maduro regime.<sup>42</sup>

In accordance with the Interim Rule, the Secretary of Commerce, in consultation with the heads of other relevant US government agencies, may review any covered ICTS transaction to determine if it involves both (1) ICTS designed, developed, manufactured, or supplied, by persons owned by, controlled by, or subject to the jurisdiction or direction of a “foreign adversary” and (2) any “undue or unacceptable risk” to U.S. national security as set out in EO 13,873, and ultimately to conclude whether the ICTS Transaction should be permitted, permitted with negotiated mitigation measures, or prohibited.<sup>43</sup>

On March 29, 2021, the DOC requested comments on a possible licensing regime that could be used relating to ICTS transactions.<sup>44</sup> Subsequently, on November 26, 2021, the DOC issued a notice of proposed rulemaking that included proposals to amend the ICTS Supply Chain Regulations to include “connected software applications” as covered items

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37. *Id.* at 4295.

38. *Id.* at 4295.

39. *Id.* at 4295.

40. *Id.* at 4293.

41. *Id.* at 4293.

42. *Id.* at 4925.

43. *Id.* at 4926-28.

44. Securing the Information and Communications Technology and Services Supply Chain: Licensing Procedures, 86 Fed. Reg. 16312, 16312 (proposed Mar. 29, 2021) (to be codified at 15 C.F.R. pt 7).

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and to propose potential indicators of risk for the DOC to consider when assessing whether an ICTS Transaction involving connected software applications poses an undue or unacceptable risk.<sup>45</sup> It is expected that the DOC will issue final rules relating to the above matters in 2022.

### III. CFIUS's Evolving Concept of National Security in 2021

Over the past five decades, the evolution of the concept of “national security” has significantly transformed the U.S. government’s foreign investment regime. While reviews of direct or indirect foreign investment into the U.S. remain the domain of the Committee on Foreign Investment in the U.S. (CFIUS or the Committee), the Committee’s role in such reviews has continuously evolved, expanded, and shifted to reflect changes in U.S. national security priorities. In particular, CFIUS’s actions in 2021 reflect national security concerns with novel critical technology areas and possible repositories of sensitive personal data.

The Committee’s basic structure was established in 1975 by Executive Order 11,858 and evolved through a series of amendments and the enactment of the Foreign Investment and National Security Act of 2007 (FINSA), which significantly expanded CFIUS’s authority and presence.<sup>46</sup> Post-FINSA, the focus of national security discourse in the U.S. gradually shifted to China, and the question of “technology transfer.”<sup>47</sup> These trends culminated with the passage of the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA),<sup>48</sup> which further expanded CFIUS’s authority and significantly changed the regulatory process. In 2020, CFIUS introduced the concept of the “TID US Business” – US businesses that (1) produce, design, test, manufacture, fabricate, or develop one or more critical [t]echnologies; (2) own, operate, manufacture, supply, or service critical [i]nfrastructure; or (3) maintain or collect, directly or indirectly, Sensitive Personal [d]ata of US citizens.<sup>49</sup> This past year has seen renewed examples

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45. *Securing the Information and Communications Technology and Services Supply Chain; Connected Software Applications*, 86 Fed. Reg. 67379, 67379 (Nov. 26, 2021) (to be codified at 15 C.F.R. pt. 7).

46. See Exec. Order No. 11,858, 40 Fed. Reg. 20,263 (May 9, 1975); see also Foreign Investment and National Security Act of 2007. 50 U.S.C. App. 2170 (2007).

47. See MICHAEL BROWN & PANVEET SINGH, DEFENSE INNOVATION UNIT EXPERIMENTAL (DIUX), CHINA’S TECHNOLOGY TRANSFER STRATEGY: HOW CHINESE INVESTMENTS IN EMERGING TECHNOLOGY ENABLE A STRATEGIC COMPETITOR TO ACCESS THE CROWN JEWELS OF U.S. INNOVATION 3-4 (2018), [https://admin.govexec.com/media/diux\\_chinatech\\_nologytransferstudy\\_jan\\_2018\\_\(1\).pdf](https://admin.govexec.com/media/diux_chinatech_nologytransferstudy_jan_2018_(1).pdf); see also David R. Hanke, Visiting Fellow, National Security Institute at George Mason University’s Antonin Scalia Law School, Testimony at the U.S.-China Economic and Security Review Commission’s Hearing on U.S.-China Relations in 2021: Emerging Risks Panel III: Assessing Export Controls and Foreign Investment Review 6 (Sept. 8, 2021), [https://www.uscc.gov/sites/default/files/2021-08/David\\_Hanke\\_Testimony.pdf](https://www.uscc.gov/sites/default/files/2021-08/David_Hanke_Testimony.pdf).

48. See John S. McCain National Defense Authorization Act for Fiscal Year 2019, 50 U.S.C. § 4565.

49. 31 C.F.R. § 800.248(a)–(c).



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of the Committee's focus on critical technology and sensitive personal data as national security risks.

For critical technology, the regulatory definition grants CFIUS a degree of flexibility to adapt and expand its inquiries with respect to technological developments, covering both existing export controls and yet-to-be-designated emerging and foundational technologies.<sup>50</sup> CFIUS's recent actions with respect to robotics technology show this expansion in the scope of interest. In June 2021, Hyundai Motor Group (Hyundai), a South Korean conglomerate, acquired an eighty percent stake in Boston Dynamics, an American robotics company, with the deal conditional on Hyundai receiving CFIUS clearance.<sup>51</sup> Boston Dynamics gained widespread public attention through viral videos of its robotic dog and backflipping robot among other products.<sup>52</sup> Robotics is an example of an 'emerging technology' of interest to CFIUS, even where the particular item or technology has not been formally designated as an "emerging technology." The inclusion of CFIUS clearance as a closing condition to the Hyundai/Boston Dynamics transaction indicated the parties' awareness of CFIUS interest in the robotics sector.

Following FIRRMA's codification of sensitive personal data as part of a broader notion of national security, CFIUS has continued its active review of transactions in which personal data is involved. Sensitive personal data is defined to include genetic data about any number of persons, and personally identifiable data about finances, health, geolocation, biometrics, security clearance, government ID, and certain non-public electronic communications.<sup>53</sup> Beyond high profile examples like the Kunlun-Grindr case,<sup>54</sup> this past year showed the Committee's interest in the national security risks of sensitive personal data through transactions involving start-up companies. Through publicly available investor materials, it was revealed that in January 2021, CFIUS made inquiries with Italian-American transportation company HelBiz regarding its relationship with Chinese bike sharing company GonBike.<sup>55</sup> HelBiz stated that its relationship with

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50. 31 C.F.R. § 800.215(a)–(f) (including the U.S. Munition List (USML), certain items on the Commerce Control List, nuclear-related equipment, parts, components, facilities, and material, and select agents and toxins).

51. See Boston Dynamics, *Hyundai Motor Group Completes Acquisition of Boston Dynamics from Softbank*, BOSTON DYNAMICS (Jun. 21, 2021), <https://www.bostondynamics.com/hyundai-motor-group-completes-acquisition>.

52. As of November 2021, Boston Dynamics' YouTube page amassed over 680 million views. See *About Boston Dynamics*, YOUTUBE (Nov. 1, 2021), <https://www.youtube.com/user/BostonDynamics/about>.

53. 31 C.F.R. 800.241(a)–(b).

54. Yuan Yang & James Fontanella-Khan, *Grindr Sold by Chinese Owner After US National Security Concerns*, FINANCIAL TIMES (Mar. 7, 2020), <https://www.ft.com/content/a32a740a-5fb3-11ea-8033-fa40a0d65a98>.

55. See, e.g., GreenVision Acquisition Corporation, Proxy Statement Pursuant to Section 14(a) of the Securities Exchange Act of 1934 (Schedule 14A) (July 26, 2021), <https://investors.helbiz.com/static-files/75a3bed1-267d-485f-a349-e0bdd723800a>.

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GonBike was purely contractual and only extended to the purchase of ebikes – GonBike did not invest in HelBiz.<sup>56</sup> Given HelBiz’s business model which focused on “last-mile” solutions and offered geofencing,<sup>57</sup> CFIUS may have determined that HelBiz’s use of sensitive transportation-related data, such as geolocation, posed a national security risk. CFIUS did not progress beyond these inquiries, but the case shows an active CFIUS when it comes to potential national security risks around sensitive personal data.

This attention to sensitive personal data is also in line with the Biden Administration’s national security agenda. In June 2021, the White House announced the Executive Order 14,034 Protecting Americans’ Sensitive Data from Foreign Adversaries (the Order).<sup>58</sup> The Order outlined criteria for identifying applications that could pose a risk to national security and directed federal agencies to make recommendations on how to protect personal data.<sup>59</sup> While the Order revoked and replaced former executive orders that sought to ban transactions involving TikTok and WeChat, it emphasized the continued focus on personal data as a national security threat.<sup>60</sup>

The evolving and expanding concept of national security is clearly reflected in the role played by CFIUS, as the monitor of foreign investment into the U.S. The Committee’s actions in 2021 in the areas of critical technology and sensitive personal data clearly demonstrate this expanded concept of national security and therefore the range of U.S. businesses that can be implicated. Given the Committee’s history, CFIUS’s role and power will likely only continue to grow as national security concerns continue to evolve.

#### **IV. Nuclear Arms Control**

On February 3, 2021, the U.S. and Russia agreed to a five-year extension of the New START agreement,<sup>61</sup> which limited the deployment of strategic nuclear weapons,<sup>62</sup> as it was about to expire, and the two countries later announced their initiation of a series of discussions on strategic stability.<sup>63</sup>

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56. *See id.* at 106.

57. *See* Press Release, Helbiz, GreenVision Acquisition Corp. Announces Merger Agreement with Helbiz, Inc. to Become the First Micro-Mobility Company Listed on NASDAQ (Feb. 8, 2021), [https://helbiz.com/\\_nuxt/static/pdf/press-release-en.pdf](https://helbiz.com/_nuxt/static/pdf/press-release-en.pdf).

58. Exec. Order No. 14,034, 86 Fed. Reg. 31,423 (June 11, 2021).

59. *See id.* at 31,424.

60. *See id.*

61. *See* Treaty Between the United States of America & the Russian Federation on Measures for the Further Reduction and Limitation of Strategic Offensive Arms, Russ.-U.S., Apr. 8, 2010, T.I.A.S. No. 11,205 [hereinafter New START Treaty].

62. Press Statement, Antony J. Blinken, Secretary of State, U.S. Department of State, On the Extension of the New START Treaty with the Russian Federation (Feb. 3, 2021), <https://www.state.gov/on-the-extension-of-the-new-start-treaty-with-the-russian-federation>.

63. Press Release, The White House, United States-Russia Presidential Joint Statement on Strategic Stability (June 16, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/16/u-s-russia-presidential-joint-statement-on-strategic-stability>.

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On November 16, 2021, U.S. National Security Advisor Jake Sullivan announced that Presidents Biden and President Xi Jinping, during their virtual summit, had agreed to “look to begin to carry forward discussions” between the U.S and China on strategic stability.<sup>64</sup>

The nuclear weapon states continued to modernize their arsenals in 2021.<sup>65</sup> Russia continued to test new types of nuclear weapons,<sup>66</sup> and the Russian defense ministry announced plans for increased nuclear weapons budgets over the next three years.<sup>67</sup> The U.S. continued technical upgrades of its existing nuclear missiles to enhance their “hard-target kill capacity,”<sup>68</sup> and the national defense authorization for the coming year includes plans for a new generation of silo-based missiles as well as a new stealth air-launched cruise missile.<sup>69</sup> China prepared what appears to be new missile silos<sup>70</sup> and tested hypersonic delivery vehicles, one of which was designed for earth orbit.<sup>71</sup> The government of India announced that the Chinese orbital vehicle “will not go unanswered” and tested a new missile with a range sufficient to strike most places in China.<sup>72</sup> The United Kingdom announced

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64. *U.S. Says It Is Not Engaged in Formal Arms Control Talks with China*, REUTERS (Nov. 17, 2021), <https://www.usnews.com/news/world/articles/2021-11-17/us-says-it-is-not-engaged-in-formal-arms-control-talks-with-china>.

65. *Global Nuclear Arsenals Grow as States Continue to Modernize—New SIPRI Yearbook Out Now*, STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE (June 14, 2021), <https://www.sipri.org/media/press-release/2021/global-nuclear-arsenals-grow-states-continue-modernize-new-sipri-yearbook-out-now>.

66. *See, e.g., Russia Test-Fires New Hypersonic Missile from Submarine*, ASSOCIATED PRESS (Oct. 4, 2021), <https://apnews.com/article/business-europe-russia-vladimir-putin-navy-a941853d791d8b57cc1a2bc39e9d4df4>.

67. *See Alexander Bratersky, Russian Nuclear Weapons Stand Out in Defense Budget Request*, DEFENSE NEWS (Nov. 1, 2021), <https://www.defensenews.com/global/europe/2021/11/01/russian-nuclear-weapons-stand-out-in-defense-budget-request>.

68. Jeffrey Smith, *Sensors Add to Accuracy & Power of U.S. Nuclear Weapons But May Create New Security Perils*, WASHINGTON POST (Oct. 29, 2021), [https://www.washingtonpost.com/national-security/us-nuclear-weapons-electronic-sensors-accuracy/2021/10/28/79533ff0-34cc-11ec-9bc4-86107e7b0ab1\\_story.html](https://www.washingtonpost.com/national-security/us-nuclear-weapons-electronic-sensors-accuracy/2021/10/28/79533ff0-34cc-11ec-9bc4-86107e7b0ab1_story.html).

69. CENTER FOR ARMS CONTROL & NONPROLIFERATION, SUMMARY: FISCAL YEAR 2022 NATIONAL DEFENSE AUTHORIZATION ACT (H.R. 4350) AS PASSED 1, 3 (2021), <https://armscontrolcenter.org/summary-fiscal-year-2022-national-defense-authorization-act-h-r-4350-as-passed>.

70. Matt Korda and Hans Kristensen, *A Closer Look at China's Missile Silo Construction*, FEDERATION OF AMERICAN SCIENTISTS (Nov. 2, 2021), <https://fas.org/blogs/security/2021/11/a-closer-look-at-chinas-missile-silo-construction>.

71. U.S. DEPARTMENT OF DEFENSE, OFFICE OF THE SECRETARY OF DEFENSE, ANNUAL REPORT TO CONGRESS ON MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE'S REPUBLIC OF CHINA 60, (Nov. 3, 2021), <https://media.defense.gov/2021/Nov/03/2002885874/-1/-1/0/2021-CMPR-FINAL.PDF>.

72. *India Tests Nuclear-Capable Missile Amid Tensions with China*, ASSOCIATED PRESS (Oct. 28, 2021), <https://apnews.com/article/china-india-beijing-new-delhi-bay-of-bengal-b460bdea8236801954d114d95c004e3b>.

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plans to increase the ceiling on the number of warheads in its arsenal.<sup>73</sup> North Korea intensified its missile testing program and vowed to expand its “growing reliable deterrent.”<sup>74</sup>

The Biden administration is conducting a reexamination of the Nuclear Posture Review, a general formulation of national nuclear strategy, with results currently expected in early 2022.<sup>75</sup> Arms control advocates are pressing for a declaration that the U.S. will never be the first to use nuclear weapons, but these efforts are reportedly opposed by the U.S. military and by allies currently under the U.S. “nuclear umbrella.”<sup>76</sup>

The Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons,<sup>77</sup> postponed in 2020 because of the pandemic, is currently scheduled to convene in January 2022. Meanwhile, a Treaty on the Prohibition of Nuclear Weapons (TPNW), prepared by non-nuclear states frustrated over lack of progress on disarmament under the NPT, entered into force in 2021 with its fiftieth ratification,<sup>78</sup> but is opposed by all states currently possessing nuclear weapons.<sup>79</sup>

In 2021, efforts continued to revive the Joint Comprehensive Plan of Action (JCPOA) restricting nuclear activities of Iran,<sup>80</sup> from which the U.S. withdrew during the Trump administration. No agreement has yet been reached to revive the JCPOA.

The National Defense Authorization Act (NDAA) enacted in 2021 mandates that the National Academies of Science, Engineering, and Medicine must complete a study, within eighteen months, on the effects of various nuclear war scenarios on the climate and environment.<sup>81</sup> The

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73. Kingston Reif & Shannon Burgos, *UK to Increase Cap on Nuclear Warhead Stockpile*, ARMS CONTROL TODAY (April 2021), <https://www.armscontrol.org/act/2021-04/news/uk-increase-cap-nuclear-warhead-stockpile>.

74. Julia Masterson, *North Korea Claims to Test Hypersonic Missile*, ARMS CONTROL TODAY (Nov. 2021), <https://www.armscontrol.org/act/2021-11/news/north-korea-claims-test-hypersonic-missile>.

75. Kingston Reif, *Biden Administration Begins Nuclear Posture Review*, ARMS CONTROL TODAY (Sept. 2021), <https://www.armscontrol.org/act/2021-09/news/biden-administration-begins-nuclear-posture-review> (quoting U.S. Defense Department Spokesman Lt. Col. Uriah Orland).

76. AMY F. WOOLF, CONG. RSCH. SERV., U.S. NUCLEAR WEAPONS POLICY: CONSIDERING “NO FIRST USE” 2 (2021), <https://sgp.fas.org/crs/nuke/IN10553.pdf>.

77. See Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 [hereinafter NPT].

78. *Guterres Hails Entry into Force of Treaty Banning Nuclear Weapons*, UNITED NATIONS (Jan. 22, 2021), <https://news.un.org/en/story/2021/01/1082702>.

79. *The Status of the TPNW*, NUCLEAR WEAPONS BAN MONITOR (last visited Dec. 11, 2021), <https://banmonitor.org/tpnw-status>.

80. See, e.g., Senior State Department Official, *Special Briefing on Ongoing U.S. Engagement Regarding the JCPOA*, U.S. DEPARTMENT OF STATE (June 24, 2021), <https://www.state.gov/senior-state-department-official-on-ongoing-u-s-engagement-regarding-the-jcpoa>.

81. William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 3171, 134 Stat. 3388 (codified as amended in scattered sections of 10 U.S.C.).

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NDAA directs the U.S. Secretary of Defense and Director of National Intelligence to furnish the study groups with relevant information.<sup>82</sup>

A United Nations research report on cybersecurity and nuclear weapons risk concluded that “[t]here remains much ambiguity, some intentional, surrounding the types of cyber operations that could elicit nuclear response; this lack of clarity around these ‘red lines’ feeds into the type of misperception, miscalculation, or misunderstanding that can drive escalation.”<sup>83</sup>

## V. Targeted Disinformation Campaigns

In 2021, the U.S. government continued to pursue legal avenues to combat disinformation campaigns conducted by foreign actors. Legal methods employed by the U.S. government include the imposition of sanctions on individuals and entities responsible for disinformation campaigns, the seizure of websites, and the indictment of individuals. Though measures to counter disinformation campaigns have received bipartisan support, legislation expanding the ability of the U.S. government to punish individuals and nations that engage in disinformation campaigns has languished in both chambers of Congress since the beginning of the 117th Congress in January 2021.

Disinformation campaigns are coordinated efforts to intentionally mislead the target audience.<sup>84</sup> Congress has distinguished legitimate attempts to influence the U.S. audience “through public diplomacy and strategic communication campaigns”<sup>85</sup> from illegitimate ones, whose aim is “to weaken American alliances and partnerships by creating new divisions between them, or by exacerbating existing ones”<sup>86</sup> and “to foment domestic social and political divisions, and to exacerbate existing ones, within democratic countries, by undermining popular confidence in democracy and its essential institutions.”<sup>87</sup>

In a March 10, 2021 unclassified summary of an Intelligence Community Assessment required by Executive Order 13,848,<sup>88</sup> the Intelligence Community concluded that Russia and Iran attempted to influence the 2020

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82. *Id.* at § 3171(c).

83. WILFRED WAN ET AL., UNITED NATIONS INSTITUTE FOR DISARMAMENT RESEARCH, at vi (Nov. 9, 2021), <https://unidir.org/publication/cyber-nuclear-nexus-interactions-and-risks>.

84. See SAM ALEXANDER ET AL., DEPARTMENT OF HOMELAND SECURITY, COMBATTING TARGETED DISINFORMATION CAMPAIGNS: A WHOLE-OF-SOCIETY ISSUE 4 (2019), [https://www.dhs.gov/sites/default/files/publications/ia/ia\\_combatting-targeted-disinformation-campaigns.pdf](https://www.dhs.gov/sites/default/files/publications/ia/ia_combatting-targeted-disinformation-campaigns.pdf).

85. Countering the Chinese Government and Communist Party’s Political Influence Operations Act, S. 2606, 117th Cong. § 3(a)(7) (2021).

86. *Id.* at § 3(a)(8)(E).

87. *Id.* at § 3(a)(8)(F).

88. Exec. Order No. 13,848(1)(a), 83 Fed. Reg. 46,843, 46,843 (Sept. 14, 2018).

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U.S. presidential elections.<sup>89</sup> Russian attempts included the promotion of false claims of wrongdoing by President Biden’s family members related to Ukraine.<sup>90</sup> The U.S. Treasury Department’s OFAC imposed sanctions on sixteen entities and sixteen individuals who assisted the Russian effort<sup>91</sup> and six Iranian individuals and one Iranian entity who assisted the Iranian effort.<sup>92</sup> The sanctions were based on statutory authorities granted to the president.<sup>93</sup>

In June 2021, the Department of Justice seized thirty-three websites run by the Iranian government, claiming that “components of the government of Iran . . . disguised as news organizations or media outlets, targeted the United States with disinformation campaigns and malign influence operations.”<sup>94</sup> The legal basis for the seizure were violations of the Iranian Transactions and Sanctions Regulations, which ban the unauthorized export of services to Iran.<sup>95</sup> However, this tactic has been criticized by groups and individuals within the U.S. as a U.S. government attempt to suppress views critical of U.S. government policies arguing that determining what is a legitimate news organization and what is or is not disinformation should be left to individual readers.<sup>96</sup>

Two Iranian nationals were indicted for, among other things, hacking into an election website to obtain confidential voter information.<sup>97</sup> They used this information to disseminate disinformation about the vulnerabilities of voting websites, including a fake video which allegedly showed an individual

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89. NATIONAL INTELLIGENCE COUNCIL, FOREIGN THREATS TO THE 2020 US FEDERAL ELECTIONS, at i (2021), <https://www.dni.gov/files/ODNI/documents/assessments/ICA-declass-16MAR21.pdf>.

90. *Id.* at 4.

91. Release, U.S. Department of the Treasury, Treasury Escalates Sanctions Against the Russian Government’s Attempts to Influence U.S. Elections (April 15, 2021), <https://home.treasury.gov/news/press-releases/jy0126>.

92. Press Release, U.S. Department of Treasury, Treasury Sanctions Iran Cyber Actors for Attempting to Influence the 2020 U.S. Presidential Election (Nov. 18, 2021), <https://home.treasury.gov/news/press-releases/jy0494>.

93. See International Emergency Powers Act of 1977, 50 U.S.C. § 1701–02; National Emergencies Act of 1976, 50 U.S.C. § 1601–51; Immigration and Nationality Act of 1952, 8 U.S.C. § 1182(f).

94. Press Release, U.S. Department of Justice, United States Seizes Websites Used by the Iranian Islamic Radio and Television Union and Kata’ib Hizballah (June 22, 2021), <https://www.justice.gov/opa/pr/united-states-seizes-websites-used-iranian-islamic-radio-and-television-union-and-kata-ib>.

95. 31 C.F.R. § 560.204(a)–(b).

96. See Ted Galen Carpenter, *Federal Authorities Are Using ‘Disinformation’ as a Pretext to Silence Foreign Policy Dissent*, COMMENTARY, CATO INSTITUTE (June 29, 2021), <https://www.cato.org/commentary/federal-authorities-are-using-disinformation-pretext-silence-foreign-policy-dissent>.

97. Devlin Barrett, *U.S. Indicts Two Iranian Hackers Over 2020 Election Misinformation Campaign*, WASHINGTON POST (Nov. 18, 2021), [https://www.washingtonpost.com/national-security/iran-hackers-election-2020-indicted/2021/11/18/605ae112-4898-11ec-b05d-3cb9d96eb495\\_story.html](https://www.washingtonpost.com/national-security/iran-hackers-election-2020-indicted/2021/11/18/605ae112-4898-11ec-b05d-3cb9d96eb495_story.html).

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casting fraudulent ballots.<sup>98</sup> The U.S. Department of Justice acknowledged that the suspects were presumed to be in Iran but believed that, due to the indictment, the suspects “will forever look over their shoulders as we strive to bring them to justice.”<sup>99</sup>

The difficulty of combating these disinformation campaigns is compounded when foreign actors use witting or unwitting U.S. citizens to disseminate the disinformation.<sup>100</sup> The First Amendment limits the ability of the U.S. government to act against U.S. citizens for spreading disinformation since disinformation, in most cases, is not illegal.<sup>101</sup> Therefore, the U.S. government has relied on social media companies to curb the flow of disinformation on their platforms.<sup>102</sup> As revelations about the baneful impact of social media platforms continue to unfold,<sup>103</sup> pressure on social media companies continues to mount.

## VI. Update on the Budapest Convention on Cybercrime

November 23, 2021, marks the twentieth anniversary of the first international treaty focused on cybercrime, officially known as the Council of Europe’s Convention on Cybercrime, or more informally referred to as the Budapest Convention on Cybercrime (the Budapest Convention).<sup>104</sup> The treaty remains the most relevant and effective international treaty on internet, cyber (computer) crime, and electronic evidence. Among the

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98. *Id.*

99. Press Release, Two Iranian National Charged for Cyber-Enabled Disinformation and Threat Campaign Designed to Influence the 2020 Presidential Election, U.S. Department of Justice (Nov. 18, 2021), <https://www.justice.gov/opa/pr/two-iranian-nationals-charged-cyber-enabled-disinformation-and-threat-campaign-designed>.

100. See, e.g., Alicia Wanless & Laura Walters, *How Journalists Become an Unwitting Cog in the Influence Machine*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (Oct. 13, 2020), <https://carnegieendowment.org/2020/10/13/how-journalists-become-unwitting-cog-in-influence-machine-pub-82923>.

101. See generally Emily Bazelon, *Free Speech Will Save Our Democracy: The First Amendment in the Age of Disinformation*, N.Y. TIMES MAGAZINE (Oct. 13, 2020), <https://www.nytimes.com/2020/10/13/magazine/free-speech.html>.

102. See, e.g., Zolan Kanno-Youngs and Cecilia Kang, *Inside the White House-Facebook Rift Over Vaccine Misinformation*, N.Y. TIMES, (Aug. 10, 2021), <https://www.nytimes.com/2021/08/10/technology/facebook-vaccine-misinformation.html>.

103. See, e.g., *Algorithms and Amplification: How Social Media Platforms’ Design Choices Shape Our Discourse and Our Minds: Hearing Before the Subcomm. on Privacy, Technology, and the Law of the S. Comm. on the Judiciary*, 117th Cong. (April 27, 2021); see also *Protecting Kids Online: Testimony from a Facebook Whistleblower: Hearing Before the Subcomm. on Consumer Protection, Product Safety, and Data Security of the S. Comm. on Commerce, Science & Transportation*, 117th Cong. (October 5, 2021).

104. The Budapest Convention on Cybercrime, Nov. 23, 2001, T.I.A.S. 13174, E.T.S. 185 [hereinafter the Budapest Convention]; Additional Protocol to the Convention on Cybercrime, Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed Through Computer Systems, Jan. 28, 2003, E.T.S. 189 [hereinafter the Additional Protocol] (supplementing the Budapest Convention in 2003, covering the criminalization of acts of a racist and xenophobic nature committed through computer systems).

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topics covered by the treaty are the harmonization of national laws, improved investigative techniques and increased cooperation among signatory nations, violations of network security, computer-related forgery and fraud, offenses in connection with child pornography, and offenses related to the infringement of copyrights.<sup>105</sup> Its main objective, as set forth in its preamble, is to pursue a common criminal policy by the signatory member states aimed at the protection of society against cybercrime, especially by the adoption of relevant legislation by the member states and the fostering of international cooperation.<sup>106</sup>

The Budapest Convention, which opened to signatories in November 2001, went into effect on July 1, 2004.<sup>107</sup> As of April 2022, sixty-six states have ratified the treaty, while a number of additional states had signed but have yet to ratify it.<sup>108</sup> The U.S. Senate ratified the treaty in 2006.<sup>109</sup> Russia, while a member of the Council of Europe, has declined to become a signatory, citing national sovereignty issues.<sup>110</sup> Nonetheless, for the last ten years, Russia has made its own proposals for revisions and expansion of the treaty.<sup>111</sup> Two other significant countries, India<sup>112</sup> and Brazil,<sup>113</sup> also have declined to adopt the treaty.

As the Budapest Convention was formulated in the early 2000s, it covers only cybercrimes recognized at the time. It does not account for the

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105. See generally, The Budapest Convention.

106. *Id.* at Preamble.

107. *Chart of Signatures & Ratifications of Treaty 185*, THE COUNCIL OF EUROPE, <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatyid=185> (last updated April 13, 2022) (The original four states which signed the treaty—Japan, the U.S., Canada, and South Africa—were non-member observer status states to the Council of Europe).

108. *Id.*

109. *Id.*

110. See Davide Giovannelli, *Proposal of United Nations Convention on Countering the Use of Information & Communications Technologies for Criminal Purposes: Comment on the First Draft Text of the Convention*, NATO COOPERATIVE CYBER DEFENSE CENTRE OF EXCELLENCE, <https://ccdcoe.org/library/publications/proposal-of-united-nations-convention-on-countering-the-use-of-information-and-communications-technologies-for-criminal-purposes-comment-on-the-first-draft-text-of-the-convention> (last visited April 13, 2022) (“Russian emphasis on sovereignty in cyberspace, indeed, it is well-noted and it is also the main reason for Russia to not join the 2001 Budapest Convention on fighting cybercrimes, which authorizes cross-border cyber operations.”).

111. See, e.g., Arjun Ramprasad, *Russia Gives the UN Draft Convention to Fight Cybercrime*, PREVIEWTECH SECURITY NEWS (Aug. 5, 2021), <https://previewtech.net/russia-gives-the-undraft-convention-to-fight-cybercrime>.

112. See Alexander Seger, *India & the Budapest Convention: Why Not?*, CYBERCRIME CONVENTION COMMITTEE COUNCIL OF EUROPE (Aug. 10, 2016), <https://rm.coe.int/16806a6698#:~:text=india%20would%20certainly%20not%20expect,which%20it%20is%20a%20Party.&text=that%20it%20is%20a%20criminal,up%20to%20the%20Budapest%20Convention>.

113. Gustavo Rodrigues, *The Budapest Convention on Cybercrime and the controversies over Brazilian membership*, INSTITUTE FOR RESEARCH ON INTERNET AND SOCIETY (Nov. 12, 2021), <https://irisbh.com.br/en/the-budapest-convention-on-cybercrime-and-the-controversies-over-brazilian-membership>.



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exponential expansion of cyber and malicious activity, cloud computing, and digitalization.<sup>114</sup> To address these and other concerns, on May 28, 2021, the Council of Europe adopted the Second Additional Protocol to the Convention on enhanced co-operation and disclosure of electronic evidence (the Second Additional Protocol).<sup>115</sup> As set forth by the Council at the time of the adoption, “Considering the proliferation of cybercrime and the increasing complexity of obtaining electronic evidence that may be stored in foreign, multiple, shifting or unknown jurisdictions, the powers of law enforcement are limited by territorial boundaries. As a result, only a very small share of cybercrime that is reported to criminal justice authorities is leading to court decisions.”<sup>116</sup>

The Second Additional Protocol provides a legal basis for disclosure of domain name registration information and for direct co-operation with service providers for subscriber information, effective means to obtain subscriber information and traffic data, immediate co-operation in emergencies, mutual assistance tools, as well as personal data protection safeguards.<sup>117</sup> The text is scheduled to be opened for signing by Member State participants in May 2022.<sup>118</sup>

Since its formulation, there have been calls by signatory and non-signatory member states for a more comprehensive version of the Budapest Convention. In July 2021, the Russian government submitted a draft convention to the U.N., recommending it to be used as the basis of a future treaty.<sup>119</sup> The U.S. has indicated consideration of the proposal with modification to account for U.S. norms and policy, which is set to be taken-up by the U.N. in 2022.<sup>120</sup>

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114. *E.g., id.*

115. Second Additional Protocol to the Convention on Enhanced Co-Operation and Disclosure of Electronic Evidence, May 12, 2022, COUNCIL OF EUROPE, <https://www.coe.int/en/web/conventions/new-treaties> [hereinafter Second Additional Protocol].

116. Second Additional Protocol to the Cybercrime Convention adopted by the Committee of Ministers of the Council of Europe, COUNCIL OF EUROPE (Nov. 17, 2021), <https://www.coe.int/en/web/cybercrime/-/second-additional-protocol-to-the-cybercrime-convention-adopted-by-the-committee-of-ministers-of-the-council-of-europe> [hereinafter Council Statement].

117. *See generally*, Second Additional Protocol, *supra* note 115.

118. *See* Council Statement, *supra* note 116.

119. *United Nations Convention on Countering the use of Information and Communications Technologies for Criminal Purposes*, KOMMERSANT (June 29, 2021) (unofficial translation draft), [https://www.kommersant.ru/docs/2021/RF\\_28\\_July\\_2021\\_-\\_E.pdf](https://www.kommersant.ru/docs/2021/RF_28_July_2021_-_E.pdf).

120. Human and First Amendment rights and other concerns with respect to the proposal have been raised by various governments, non-governmental organizations and other constituencies. *See, e.g.*, Deborah Brown, *Cybercrime is Dangerous But a New UN Treaty Could Be Worse for Rights*, HUMAN RIGHTS WATCH (Aug. 13, 2021), <https://www.hrw.org/news/2021/08/13/cybercrime-dangerous-new-un-treaty-could-be-worse-rights>; *but see* Joyce Hakmeh & Allison Peters, *A New UN Cyber-Treaty? The Way Forward for Supporters of an Open, Free and Secure Internet*, COUNCIL ON FOREIGN RELATIONS (Jan. 13, 2020), <https://www.cfr.org/blog/new-uncybercrime-treaty-way-forward-supporters-open-free-and-secure-internet>.

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International Law Section

**AMERICAN BAR ASSOCIATION**  
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**CHICAGO, IL 60610**

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