



The
YEAR IN REVIEW

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

VOLUME 57 | 2023

International Legal Developments Year in Review: 2022

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International Legal Developments Year in Review: 2022

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

This publication, *International Legal Developments – Year in Review: 2022*, presents a survey of important legal and political developments in international law that occurred during 2022 amid a continuing global pandemic. The volume consists of articles from thirty 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 can be 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: approximately 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 thirty 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. Jessica Lee, the Editor-in-Chief of *The International Lawyer*, and Michael Vuong, the *Year in Review* Managing Editor for this past academic year; and Antonio Partida, the Editor-in-Chief of *The International Lawyer*, and Victoria Stranczek, the *Year in Review* Managing Editor for the current academic year, performed

* 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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superlatively in their respective roles. They supervised an outstanding 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 Robin Kaptzan, 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 2022. 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.

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LEGAL DEVELOPMENTS YEAR IN REVIEW 3

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Delores Mayer (Wayne State University Law School)
Stacie Reardon (Washington University in St. Louis School of Law)
Monte Smith (The Ohio State University Moritz College of Law)
Susan Tanner (Louisiana State University Paul M. Hebert Law Center)
John Brendan Thornton (Northwestern Pritzker School of Law)
Frank Ulmer (Charleston School of Law)
Marcia Narine Weldon (University of Miami School of Law)

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

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AUTHORS: JACOB MANTLE, VICTORIA CLARKE, WILLIAM PELLERIN,
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ADELAIDE EGAN, JULIA WEBSTER, JAQUELINE ROTONDI, AND
JING XU*

This article surveys significant legal developments in Canada in 2022.

I. 2022 Canadian Trade Update Part I

In 2022, the Russian invasion of Ukraine and Canada's response to it through comprehensive economic sanctions and other trade restrictive measures emerged as the most dominant and disruptive policy challenge for the Government of Canada and the trade and supply chain community. The pace of changes to Canada's economic sanctions and the lack of guidance from Canadian authorities left businesses across all industries scrambling to understand their legal risks and obligations.

New trade disputes emerged, others were resolved, and the longest Canada-U.S. trade dispute in history respecting softwood lumber carried into 2022. While Canada remained an active member of the Ottawa Group on the World Trade Organization (WTO), it also moved to deepen its trade relationships with the Indo-Pacific region. Closer to home, Canada continued with its customs modernization program, and while there were fewer new antidumping and countervailing duty (AD/CVD) investigations initiated in 2022, the pace of administrative enforcement of existing measures continued unabated. Lastly, new law respecting corporate human rights reporting is around the corner in 2023, which is likely to put pressure on Canada to step up its enforcement of its existing import ban on goods produced by forced labour.

A. CANADA'S RUSSIA-RELATED SANCTIONS & EXPORT CONTROLS

Canada implemented targeted economic sanctions against Russia, Russian companies, and Russian nationals (Russia Sanctions) in 2014 in response to

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its so-called annexation of the Crimea region of Ukraine.¹ The Russia Sanctions primarily impose a broad-based dealings ban and asset freeze against listed Russian individuals and entities.² But, after Russia's invasion of Ukraine in February, Canada moved rapidly to both sanction more individuals and entities and to expand the scope of the prohibitions contained in the Russia Sanctions.³ While Canada has largely aligned its actions with those taken by its international partners, it is unique in pursuing the seizure and forfeiture of assets owned by sanctioned individuals and entities in Canada.⁴

Unfortunately, Canada has so far failed to provide any clarifying guidance on the interpretation and operationalization of the Russia Sanctions. This stands in stark contrast to Canada's partners, such as the U.S., U.K., and E.U., all of which have provided timely guidance to the legal and business communities. Moreover, a dearth of enforcement action means there is virtually no helpful jurisprudence. An October ruling from the Court of King's Bench in Alberta is, so far, the only relevant judicial consideration of the Russia Sanctions, and even there the court's contribution was limited to providing guidance on how control of entities is assessed.⁵

For a comprehensive review of Canada's Russia-related sanctions, see subsections B.1.a and C section III of this article, titled "Russia," and "Export Controls in 2022," respectively.⁶

B. FREE TRADE AGREEMENTS

On March 24, 2022, Canada and the U.K. launched free trade agreement (FTA) negotiations.⁷ Once it enters into force, this agreement will replace the existing Canada-United Kingdom Trade Continuity Agreement, and largely replicates the obligations in the Canada-European Union Comprehensive Economic and Trade Agreement.⁸ The fourth round of

1. Special Economic Measures (Russia) Regulations, SOR/2014-58 (Can.) [hereinafter SEMR].

2. *Id.* at sched. 2.

3. *See generally id.*; *see also Canadian Sanctions Related to Russia*, GOV'T OF CAN. (Mar. 31, 2023), https://www.international.gc.ca/world-monde/international_relations-reactions_relations_internationales/sanctions/russia-russie.aspx?lang=eng [<https://perma.cc/N3GM-TXMR>] (containing thirty-eight regulations amending and consolidated in SEMR since Russia's invasion of Ukraine).

4. Press Release, Glob. Affs. Can., Canada Starts First Process to Seize and Pursue the Forfeiture of Assets of Sanctioned Russian Oligarch (Dec. 19, 2022), <https://www.canada.ca/en/global-affairs/news/2022/12/canada-starts-first-process-to-seize-and-pursue-the-forfeiture-of-assets-of-sanctioned-russian-oligarch.html> [<https://perma.cc/7XEL-TCQ7>].

5. *Angophora Holdings Limited v Ovsyankin*, 2022 ABKB 711, ¶ 18 (Can. Alta.).

6. *See discussion infra* Sections III.B.1.a, III.C.

7. *Canada-UK Trade Continuity Agreement (Canada-UK TCA)*, GOV'T OF CAN. (Nov. 18, 2022), https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cuktca-accru/read_agreement-consultez_accord.aspx?lang=Eng [<https://perma.cc/9QA5-NEPH>].

8. *See id.*

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negotiations was completed December 2022 and the parties have agreed to conclude the agreement by 2024.⁹

Canada is also negotiating a FTA with the Association of Southeast Asian Nations (ASEAN), and the parties completed the second round of negotiations in November, 2022.¹⁰ Three ASEAN Member States—Brunei, Malaysia, and Vietnam—are also Parties to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), though Brunei has not yet ratified the Agreement.¹¹ Canada also continues negotiating a FTA with Indonesia, and a third round of negotiations was held in October 2022.¹² The negotiation of these two Agreements forms part of Canada’s Indo-Pacific Strategy, announced on November 27, 2022.¹³

C. WTO DEVELOPMENTS

In July, an Article 22.6 arbitration decision provided Canada with the methodology that it may use to retaliate against any future U.S. countervailing duties imposed on Canadian-origin supercalendered paper.¹⁴ This decision comes over two years after Canada successfully challenged the U.S. imposition of countervailing duties.¹⁵ Canada settled its dispute with China over the latter’s 2019 decisions to suspend imports of Canadian canola seeds based on the alleged presence of certain pests.¹⁶ The dispute was resolved after China reinstated market access for the affected companies on May 18, 2022.¹⁷

9. *Summary of Initial GBA Plus for Canada-United Kingdom Free Trade Agreement Negotiations*, GOV’T OF CAN. (Jan. 17, 2023), https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/canada_uk_fta-ale_canada_ru/summary-gba-init-resume-acs.aspx?lang=eng [<https://perma.cc/Y4TK-WEUE>].

10. *About the Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, GOV’T OF CAN. (Mar. 3, 2022), https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptppg/background-document_information.aspx?lang=eng [<https://perma.cc/C2E8-B2P8>].

11. *Id.*

12. *Canada-Indonesia Comprehensive Economic Partnership Agreement – Background Information*, GOV’T OF CAN. (Mar. 14, 2023), <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/indonesia-indonesie/cepa-apeg/background-contexte.aspx?lang=eng> [<https://perma.cc/D6GQ-KQGT>].

13. Press Release, Glob. Affs. Can., Canada launches Indo-Pacific Strategy to support long-term growth, prosperity, and security for Canadians (Nov. 27, 2022), <https://www.canada.ca/en/global-affairs/news/2022/11/canada-launches-indo-pacific-strategy-to-support-long-term-growth-prosperity-and-security-for-canadians.html> [<https://perma.cc/AU2M-3HR8>].

14. Decision by the Arbitrator, *United States – Countervailing Measures on Supercalendered Paper from Canada*, WTO Doc. WT/DS505/ARB (adopted July 13, 2022).

15. Appellate Body Report, *United States – Countervailing Measures on Supercalendered Paper from Canada*, WTO Doc. WT/DS505/AB/R (adopted Mar. 5, 2020).

16. Communication from the Panel, *China – Measures Concerning the Importation of Canola Seed Oil*, WTO Doc. WT/DS589/8 (Sept. 1, 2022).

17. *China Lifts Curbs on Canadian Canola, Demand Seen Muted*, REUTERS (May 19, 2022 1:12 AM), <https://www.reuters.com/markets/commodities/china-lifts-curbs-canadian-canola-demand-seen-muted-2022-05-19/> [<https://perma.cc/88WS-5TWQ>].

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Canada's participation in the Ottawa Group on WTO reform continued in 2022.¹⁸ The focus of the Ottawa Group's advocacy this year was the war in Ukraine, with members issuing several statements condemning Russia's aggression.¹⁹ Two disputes were finalized in 2022 under the new WTO Multi-Party Interim Appeal-Arbitration Arrangement (MPIA) established by Canada and other WTO Members in response to the WTO Appellate Body impasse.²⁰

D. DISPUTES UNDER CANADA'S FREE TRADE AGREEMENTS & SOFTWOOD LUMBER DEVELOPMENTS

In 2022, each of Canada, Mexico, and United States made use of Chapter 31 dispute settlement procedures in the Canada United States Mexico Agreement (USMCA/CUSMA),²¹ the long-standing Canada-U.S. softwood lumber dispute continued,²² and Canada encountered a new dispute under the CPTPP.²³

In February, a panel released its report respecting Canada's complaint against U.S. measures on crystalline silicon photovoltaic cells (used in solar panels), finding that the U.S. measures violated the USMCA/CUSMA.²⁴

18. *Canada and the World Trade Organization*, GOV'T OF CAN. (Dec. 19, 2022), https://www.international.gc.ca/world-monde/international_relations-relations_internationales/wto-omc/index.aspx?lang=eng [<https://perma.cc/U3PV-43JK>].

19. *See, e.g.*, News Release, Can. et al., Joint Statement on Russian aggression against Ukraine (June 17, 2022), https://www.international.gc.ca/world-monde/international_relations-relations_internationales/wto-omc/news-nouvelles/2022-06-17-russian-aggression-agression-russe.aspx?lang=eng [<https://perma.cc/5YTV-6PUB>]; News release, Can. et al., Joint Statement on Government Procurement implications resulting from the aggression by the Russian Federation against Ukraine (June 20, 2022), https://www.international.gc.ca/world-monde/international_relations-relations_internationales/wto-omc/news-nouvelles/2022-06-20-russian-aggression-agression-russe.aspx?lang=eng [<https://perma.cc/6EKS-725Z>].

20. *See Multi-Party Interim Appeal Arbitration Arrangement (MPIA)*, GENEVA TRADE PLATFORM, https://wtoplurilaterals.info/plural_initiative/the-mpia/#:~:text=Known%20as%20the%20Multiparty%20Interim,and%20staffed%20WTO%20Appellate%20Body [<https://perma.cc/T2R3-MCT7>] (last visited Apr. 1, 2023); *see also* Award of the Arbitrators, *Columbia – Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands*, WTO Doc. WT/DS591/ARB25 (Dec. 21, 2022) (MPIA Arbitration under Article 25 of the DSU); *see also* Award of the Arbitrators, *Turkey – Certain Measures concerning the Production, Importation and Marketing of Pharmaceutical Products*, WTO Doc. WT/DS583/ARB25 (July 25, 2022) (MPIA Arbitration under Article 25 of the DSU).

21. Agreement Between Canada, The United States of America, and The United Mexican States, Can.-Mex.-U.S., Nov. 30, 2018, 2020 Can. T.S. 5.

22. *See CUSMA Dispute*, THE SECRETARIAT (Feb. 2, 2023), <https://can-mex-usa-sec.org/secretariat/disputes-litges-controversias.aspx?lang=eng> [<https://perma.cc/EF25-VGYU>].

23. *Canada – Dairy TRQ Allocation Measures, Request for Consultations by New Zealand*, GOV'T OF CAN. (July 7, 2022), <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/nz-consultations.aspx?lang=eng> [<https://perma.cc/CAB4-STXM>].

24. *See Active and Concluded State-to-State Dispute Settlement Cases*, GOV'T OF CAN. (Mar. 28, 2023), <https://www.international.gc.ca/trade-commerce/trade-agreements-accords->

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The U.S. and Canada resolved the dispute through a subsequent bilateral Memorandum of Understanding.²⁵ In July, Canada and the U.S. each requested consultations with Mexico based on various measures that allegedly favour Mexico's state-owned electricity commission.²⁶ In November, a panel circulated an initial report respecting Canada and Mexico's challenge to U.S. interpretations of regional value content for automotive goods.²⁷ While the panel report is not yet public, media reports suggest that Canada and Mexico prevailed.²⁸

In May, Canada published new dairy tariff rate quota allocations, which was done in response to a panel report in 2021 that found Canada had breached its USMCA/CUSMA commitments by reserving certain quotas for Canadian dairy processors.²⁹ The U.S., which brought the original challenge, insists Canada is still not complying with its obligations and launched a second challenge.³⁰ Finally, New Zealand has brought a nearly

commerciaux/agr-acc/cusma-aceum/settlement-cases-reglement-cas.aspx?lang=eng#a2_1
[https://perma.cc/2XGV-GEQ3].

25. Memorandum of Understanding Between the Government of Canada and the Government of the United States of America on Trade in Solar Products, Can.-U.S., July 8, 2022, https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/mou_solar_products-pe_produits_solaires.aspx?lang=eng [https://perma.cc/JX3K-NEMK].

26. See Letter requesting consultations on certain measures in the electricity sector from The Honourable Mary Ng, Member of Parliament, House of Commons Can., to Her Excellency Tatiana Clouthier Carrillo, Secretary of Economy, United Mexican States (July 20, 2022), <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/electricity-sector-secteur-electricite.aspx?lang=eng> [https://perma.cc/PN9G-RVKV]; see also Press Release, Off. of the U.S. Trade Representative, United States Requests Consultations Under the USMCA Over Mexico's Energy Policies (July 20, 2022), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/july/united-states-requests-consultations-under-usmca-over-mexicos-energy-policies> [https://perma.cc/Q836-RJWJ].

27. Eric Martin, et al., *Mexico, Canada Win Trade Panel's Nod Over US on Car-Content Rules*, BLOOMBERG (Dec. 8, 2022), <https://www.bloomberg.com/news/articles/2022-12-08/mexico-canada-win-panel-s-nod-over-us-on-car-content-rules?leadSource=uverify%20wall.#xj4y7vzkg> [https://perma.cc/B7AK-LE4S].

28. See *id.*

29. *Message to Industry – Opening of the Application Period for the 2022-2023 Dairy Year TRQs and CUSMA Calendar Year 2022 Dairy TRQs (August to December 2022)*, GOV'T OF CAN. (May 16, 2022) <https://www.international.gc.ca/trade-commerce/controls-contrôles/messages/2022-05-16-message-industry-industrie.aspx?lang=eng> [https://perma.cc/5UE9-LHXS]; *Statement by Minister Ng on Dairy Tariff Rate Quota Policies Under CUSMA*, GOV'T OF CAN. (May 16, 2022), <https://www.canada.ca/en/global-affairs/news/2022/05/statement-by-minister-ng-on-dairy-tariff-rate-quota-policies-under-cusma.html> [https://perma.cc/E4NB-9ZH6].

30. Press Release, Off. of the U.S. Trade Representative, United States Initiates Second USMCA Dispute on Canadian Dairy Tariff-Rate Quota Policies (May 25, 2022), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/may/united-states-initiates-second-usmca-dispute-canadian-dairy-tariff-rate-quota-policies> [https://perma.cc/F5QD-RMGN].

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identical challenge against Canada's dairy tariff-rate quota allocations under the CPTPP.³¹

The softwood lumber dispute also continued in 2022 as the U.S. Department of Commerce (USDOC) released its final determinations in its third administrative review on August 9, 2022.³² While the new AD/CVD rates were reduced, Canada has challenged the finding under the USMAC/CUSMA.³³ Canada also previously challenged the original AD/CVD investigation under the NAFTA, and the first and second administrative reviews under the USCMA/CUSMA.³⁴ All of these appeals remain outstanding. The USDOC initiated the fourth administrative review on March 9, 2022.³⁵

E. CUSTOMS—THE CARM INITIATIVE AND CHANGES TO IMPORTER LIABILITY

In March 2022, the Canada Border Services Agency (CBSA) again delayed the next implementation phase of its Assessment and Revenue Management (CARM) project (Release 2).³⁶ CARM 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.³⁷ Release 2 was originally expected in January 2023 but has now been postponed until at least October 2023.³⁸ Release 2 is a key milestone because it will permit the submission of electronic commercial accounting declarations, including the ability to make corrections (when

31. *Canada – Dairy TRQ Allocation Measures, Request for Consultations by New Zealand*, *supra* note 23.

32. *Certain Softwood Lumber Products from Canada: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments*, 2020, 87 FR 48465 (proposed August 9, 2022), <https://www.federalregister.gov/documents/2022/08/09/2022-17065/certain-softwood-lumber-products-from-canada-final-results-of-antidumping-duty-administrative-review> [<https://perma.cc/VUL7-XGPG>].

33. CUSMA Secretariat Request for Panel Review, C. Gaz. pt. I, vol. 156, no. 39: Commissions (Sept. 24, 2022), <https://canadagazette.gc.ca/rp-pr/p1/2022/2022-09-24/html/commis-eng.html> [<https://perma.cc/572M-86UX>].

34. *See Softwood Lumber Disputes, Recent Developments*, GLOB. AFFS. CAN. (Mar. 4, 2023), https://www.international.gc.ca/controls-controles/softwood-bois_oeuvre/index.aspx?lang=eng [<https://perma.cc/EZ6X-TVKH>].

35. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 87 Fed. Reg. 13252 (Mar. 9, 2022).

36. *CARM News: Implementation Date for Release 2 – October 2023*, BUCKLAND, <https://www.buckland.com/news/carm-news-implementation-date-for-release-2-october-2023/#:~:text=CBSA%20has%20announced%20that%20the,prepare%20for%20this%20significant%20change> [<https://perma.cc/J72M-8HMY>] (last visited Apr. 8, 2023).

37. *CARM: CBSA Assessment and Revenue Management Project*, CAN. BORDER SERVS. AGENCY (Jan. 1, 2023), <https://www.cbsa-asfc.gc.ca/prog/carm-gcra/menu-eng.html> [<https://perma.cc/M9HT-U4KQ>].

38. *See CARM Release 2 Postponed to 2023*, NEAR N. CUSTOMS BROKERS (Feb. 24, 2022), <https://nearnorthcustoms.com/carm-release-2-postponed-to-2023/> [<https://perma.cc/X4WR-RSYC>]; *see also CARM News: Implementation Date for Release 2 – October 2023*, *supra* note 36.

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duties are owing to the government) and adjustments (when refunds are owed to importers).³⁹

Canada's 2022 federal budget made changes to Canada's customs law respecting liability for duties and taxes.⁴⁰ The changes provide that the entity that declares itself the commercial importer on accounting documents is jointly and severally liable for duties and taxes with the owner and importer of record of the goods.⁴¹ This change is primarily aimed at revenue recapture from importers, third-party-logistics providers, and other intermediaries engaged in the import of e-commerce goods into Canada. While this change was passed in June it has not yet come into force.⁴² But, the authors believe it is likely to come into force before the end of 2023 and perhaps in concert with CARM Release 2. We expect this change will result in an increase in post-importation trade compliance audits by the CBSA.

F. FORCED LABOUR AND SUPPLY CHAIN DUE DILLIGENCE

Despite Canada amending its customs laws to prohibit the importation of goods produced by forced labour in 2020,⁴³ Canada continues to significantly lag the U.S. and other trading partners in enforcement action.⁴⁴ The CBSA does not publish enforcement statistics but the most recent public information suggests that the CSBA has intercepted just one shipment of goods suspected of being produced by forced labour (an October 2021 shipment of women's and children's clothing from China), and even this shipment was subsequently released to the importer.⁴⁵ The lack of enforcement spurred an unsuccessful challenge in Federal Court by human rights activists to force the CSBA to implement a "presumptive determination" that goods imported from the Xinjiang region of China were produced by forced labour.⁴⁶

The government has also pressed forward with its support for a new law that would create human rights due diligence reporting requirements,

39. See *CARM: CBSA Assessment and Revenue Management Project*, *supra* note 37.

40. *Annex 3: Legislative Measures*, GOV'T OF CAN. (Apr. 7, 2022), <https://www.budget.canada.ca/2022/report-rapport/anx3-en.html> [<https://perma.cc/E96W-FQUB>].

41. Budget Implementation Act, S.C. 2022, c 10, pt 5, div 20 (Can.).

42. See generally *id.*

43. *CN 20-23, Import Prohibition on Goods Produced Wholly or In Part by Forced Labour*, CANADIAN SOC. OF CUSTOMS BROKERS (July 2, 2020), <https://escb.ca/article/cn-2023-import-prohibition-goods-produced-wholly-or-part-forced-labour#:~:text=Become%20a%20Member-,CN%2020%2D23%2C%20Import%20prohibition%20on%20goods%20produced%20wholly%20or,in%20part%20by%20forced%20labour> [<https://perma.cc/T5RK-WH2W>].

44. Alexander Panetta, *2,398 for the U.S., 1 for Canada: That's the Lopsided Record on Targeting Forced Labour*, CBC NEWS (Dec. 16, 2022 3:00 AM), <https://www.cbc.ca/news/world/canada-u-s-forced-labour-scorecard-1.6686977> [<https://perma.cc/7FRC-34L2>].

45. Steven Chase, *Only Shipment Canada Has Seized on Suspicion of Forced Labour Was Released After Challenge from Importer*, THE GLOBE AND MAIL (May 27, 2022), <https://www.theglobeandmail.com/politics/article-only-shipment-canada-has-seized-on-suspicion-of-forced-labour-was/> [<https://perma.cc/M6W6-HQU8>].

46. *Kilgour v. Canada*, [2022] F.C. 472, para. 1.

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including reporting on efforts to combat child and forced labour, for companies of a certain size operating in Canada.⁴⁷ The authors expect that the new law will shine a spotlight on the issue of forced labour generally and will increase pressure on the CSBA to step up its enforcement of the existing import ban.

G. CANADIAN AD/CVD PROCEEDINGS

In 2022, the CBSA initiated two new AD/CVD investigations (respecting drill pipes and mattresses);⁴⁸ six country-wide re-investigations (respecting OCTG, line pipe, rebar, seamless casing, grinding media, and corrosion-resistant steel sheet);⁴⁹ and the CBSA and Canadian International Trade Tribunal (CITT) conducted four expiry reviews.⁵⁰ The CBSA also initiated twenty-four (later terminating three) normal value and export price reviews, which continues the trend of increasing AD/CVD enforcement through this administrative mechanism.⁵¹ Normal value and export price reviews are conducted by the CBSA to update normal values, export prices, and amounts of subsidy on an exporter-specific basis.⁵² Normal values are intended, as part of Canada's prospective anti-dumping regime, to operate as floor prices or methodologies to establish minimum prices for exporters selling goods to importers in Canada.⁵³

While the foreign-owned Canadian steel industry continues to be the most prolific users of Canada's AD/CVD regime, Canada continues to see new cases initiated on consumer goods. For example, upholstered domestic seating in 2021 and mattresses in 2022.⁵⁴ These are typically "copy-cat" cases that emerge after similar cases are brought by domestic producers in the U.S. Finally, in the 2022 federal budget, Canada made a number of amendments to its trade remedy laws to, among other things, require the CITT to take into account impacts on workers when assessing injury, consider massive importations, and initiate expiry reviews of certain orders and findings.⁵⁵

47. Corporate Responsibility to Protect Human Rights Act, HC Bill C-262, 44th Parl. (First Reading Mar. 29, 2022) (Can.).

48. See *Dumping and Subsidy Investigations*, CAN. BORDER SERVS. AGENCY (Oct. 21, 2022), <https://www.cbsa-asfc.gc.ca/sima-lmsi/i-e/menu-eng.html> [https://perma.cc/X233-MDSW].

49. See *Dumping and Subsidy Re-Investigations*, CAN. BORDER SERVS. AGENCY (Apr. 6, 2023), <https://www.cbsa-asfc.gc.ca/sima-lmsi/ri-re/menu-eng.html> [https://perma.cc/26D8-KSCX].

50. See *Dumping and Subsidy Expiry Reviews*, CAN. BORDER SERVS. AGENCY (Apr. 6, 2023), <https://www.cbsa-asfc.gc.ca/sima-lmsi/er-rre/menu-eng.html> [https://perma.cc/8WRN-SKAR].

51. See *Normal Value Reviews*, CAN. BORDER SERVS. AGENCY (Mar. 30, 2023), <https://www.cbsa-asfc.gc.ca/sima-lmsi/up/menu-eng.html> [https://perma.cc/53GQ-56GJ].

52. Memorandum from the Canada Border Services Agency on Re-investigation and Normal Value Review Policy – Special Import Measures Act (SIMA) (Oct. 21, 2022), <https://www.cbsa-asfc.gc.ca/publications/dm-md/d14/d14-1-8-eng.html> [https://perma.cc/9LE7-PJX9].

53. See Special Import Measures Act, R.S.C. 1985, c S-15, pt. I.

54. See *Normal Value Reviews*, *supra* note 51.

55. Budget Implementation Act, S.C. 2022, c 10, ss 191-219 (Can.).

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II. 2022 Canadian Trade Update Part II

A. AMENDMENTS TO REGULATIONS ENACTED UNDER THE SPECIAL ECONOMIC MEASURES ACT

The Government of Canada has continued to react to global geopolitical and humanitarian crises by implementing and amending existing economic sanctions regulations pursuant to the Special Economic Measures Act (SEMA).⁵⁶ The SEMA regulations enforced against Ukraine, Russia, Belarus, Myanmar, and Iran have been amended continuously throughout 2022, and new regulations were implemented against Haiti.

Significant amendments were made to the Special Economic Measures (Russia) Regulations to respond to Russia's illegal war in Ukraine.⁵⁷ There are now over 1,100 designated persons subject to the broad dealings prohibition.⁵⁸ The scope of the prohibitions have expanded to include: (1) a prohibition on the docking and passage of ships;⁵⁹ (2) a prohibition on the import, purchase or acquisition of certain petroleum products;⁶⁰ (3) a prohibition on the export, sale, supply, or shipping of certain restricted goods;⁶¹ (4) a prohibition on the provision of insurance or reinsurance with respect to certain aviation and aerospace goods;⁶² (5) a prohibition on the export, sale, supply, shipping, or import of certain luxury goods;⁶³ (6) a prohibition on the export, sale, supply, or shipping of certain goods used for the manufacture of weapons;⁶⁴ (7) a prohibition on the provision of certain services in relation to certain industries;⁶⁵ and (8) a prohibition on the import, purchase or acquisition of certain gold products.⁶⁶

In addition to implementing and amending sanctions regulations, Parliament passed amendments to the SEMA in June 2022 which established a civil forfeiture regime.⁶⁷ Once an order is made to seize or restrain property the Minister of Foreign Affairs can apply to a judge to order that the property be forfeited to the Crown.⁶⁸ The forfeited property can be paid out for the reconstruction of a foreign state adversely affected by a grave breach of international peace and security; the restoration of international peace and security; and the compensation of victims of a grave breach of

56. Special Economic Measures Act, S.C. 1992, c 17, s 4(1.1)(a-d) (Can.) [hereinafter SEMA].

57. See *Canada Sanctions Related to Russia – Selected Documents*, [<https://perma.cc/N3GM-TXMR>] (last visited Apr. 8, 2023) (containing thirty-eight regulations amending and consolidated in SEMR since Russia's invasion of Ukraine).

58. SEMR, SOR/2014-58, at sched. 3.

59. *Id.* at sched. 3.04.

60. *Id.* at sched. 3.05.

61. *Id.* at sched. 3.06.

62. *Id.* at sched. 3.07.

63. *Id.* at sched. 3.08.

64. *Id.* at sched. 3.09.

65. *Id.* at sched. 3.1.

66. *Id.* at sched. 3.11.

67. Budget Implementation Act, 2022 S.C., c 10, s 439.

68. *Id.* s 439(5.4).

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international peace and security, gross and systematic human rights violations or acts of significant corruption.⁶⁹ As of December 2022, the forfeiture regime has yet to be tested in Canadian courts, but the first proceeding is about to be initiated.⁷⁰

B. AMENDMENTS TO CANADIAN EXPORT CONTROLS

In addition to amendments to the Russia Regulations, the Government of Canada has also relied on its export controls program to affect the Russian economy. In February 2022, the Government of Canada stopped issuing permits for the export and brokering of controlled goods to Russia. Existing permits were cancelled, effective February 24, 2022.⁷¹

In November 2022, Global Affairs Canada announced amendments to “A Guide to Canada’s Export Control List” (Guide) to reflect the various multilateral export control regimes up to December 31, 2021.⁷² After a 30-day notice period, the new Guide came into force as of December 21, 2022.⁷³ June 2021 amendments to the Export Control List (ECL) incorporate the Guide “as amended from time to time.”⁷⁴ Any updates to the Guide to reflect change to the underlying multilateral export control regime enter into force thirty days after publication of the Guide.⁷⁵ The addition or amendment of unilateral controls still require regulatory amendments.⁷⁶

C. MODERN SLAVERY ACT

The fourth iteration of Canada’s proposed legislation to combat forced and child labour, Bill S-211, the Fighting Against Forced Labour and Child Labour in Suppl Chains Act, has reached its final stage, its third reading, before the House of Commons.⁷⁷ Upon receiving royal assent in 2023, the bill will come into force January 2024.

The bill establishes annual reporting requirements for: (1) a government institution that is producing, purchasing, or distributing goods in Canada or elsewhere,⁷⁸ and (2) a corporation, or its controlling shareholder, that is

69. *Id.* s 439(5.6).

70. See Glob. Affs. Can., *supra* note 4.

71. *Notice to Exporters and Brokers – Export and Brokering of Items Listed on the Export Control List and the Brokering Control List to Russia*, GOV’T OF CAN. (Feb. 24, 2022), <https://www.international.gc.ca/trade-commerce/controls-controles/notices-avis/1071.aspx?lang=eng> [<https://perma.cc/84CH-8Q7F>].

72. *Notice to Exporters and Brokers, Background: Amendment to A Guide to Canada’s Export Control List*, GOV’T OF CAN. (Dec. 6, 2022), <https://www.international.gc.ca/trade-commerce/guides/backgrounder-document-information.aspx?lang=eng> [<https://perma.cc/QX9J-DF4Q>].

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Fighting Against Forced Labour and Child Labour in Supply Chains Act*, HC Bill C-211, 44th Parl. (Nov. 22, 2021) (Can.).

78. *Id.* s 3(a).

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either producing, purchasing, or distributing goods in Canada or elsewhere, or importing goods produced outside of Canada,⁷⁹ provided that the corporation is listed on the Canadian stock exchange, meets certain financial thresholds, or is prescribed by regulations.⁸⁰

D. ANTI-CORRUPTION ENFORCEMENT

Looking ahead to Canada's Phase 4 Organization of Economic Cooperation and Development's (OECD) Convention on Combatting Bribery of Foreign Public Officials (Convention), the Government of Canada has announced the creation of a national financial crime agency, which would change the course of anti-bribery and financial crime enforcement in Canada, and Canadian agencies have ramped up enforcement of corruption related crimes.⁸¹

In April 2022, the Government of Canada announced funding for a two-million-dollar study into the creation of a national financial crime agency by Public Safety Canada.⁸² Initially, the Government appeared to support an amalgamation of the Canada Revenue Agency, the Financial Transactions and Reports Analysis Center of Canada, and the Royal Canadian Mounted Police (RCMP).⁸³ It now appears that the Government is less focused on amalgamating existing agencies and, is instead, seeking input from stakeholders as to the role that the proposed agency should undertake in the Canadian financial crime enforcement landscape, perhaps either as a coordinating body or as another independent enforcement agency.⁸⁴ The study will continue into 2023 and there is no timeline in place for a final recommendation to Parliament.⁸⁵

With respect to enforcement, the first remediation agreement was entered into with SNC Lavalin and approved by the Quebec Superior Court for fraud and forgery charges⁸⁶ under the Criminal Code⁸⁷ arising from events

79. *Id.* s 9(a)-(c).

80. *Id.* s 2.

81. See News Release, Gov't of Can., Strengthening Canada's response to financial crime (Mar. 3, 2023), <https://www.canada.ca/en/public-safety-canada/news/2023/03/strengthening-canadas-response-to-financial-crime.html> [https://perma.cc/GT23-J4DL].

82. DEP'T OF FIN. CAN., *Chapter 5.3: Standing Up for Democracy, Transparency, and the Rule of Law*, in BUDGET 2022 (2022), <https://www.budget.canada.ca/2022/report-rapport/chap5-en.html#2022-3> [https://perma.cc/NT7E-6BLW].

83. *Canada Financial Crimes Agency (2021)*, LIBERAL PARTY OF CANADA 2021 ELECTION PLATFORM, <https://liberal.ca/our-platform/canada-financial-crimes-agency/> [https://perma.cc/RK9K-TJEE] (last visited May 8, 2023).

84. CANADA: *Cabinet Calls for Consultants to Create Financial Crimes Agency*, IFC (Mar. 8, 2023), <https://www.ifcreview.com/news/2023/march/canada-cabinet-calls-for-consultants-to-create-financial-crimes-agency/> [https://perma.cc/K4KW-85GR].

85. See DEP'T OF FIN. CAN., *supra* note 82.

86. News Release, Royal Canadian Mounted Police, Update: SNC-Lavalin corporations and two former senior executives facing fraud and forgery related charges (Sept. 23, 2021), <https://www.rcmp-grc.gc.ca/en/news/2021/snc-lavalin-corporations-and-two-former-senior-executives-facing-fraud-and-forgery-related> [https://perma.cc/3PRS-7PW2].

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related to the refurbishment of the Jacques Cartier Bridge between 1997 and 2004.⁸⁸ In September 2022, the RCMP announced charges for fraud under the Criminal Code and bribery under the Corruption of Foreign Public Officials Act⁸⁹ (CFPOA) against Ultra Electronic Forensic Technology for events that occurred in the Philippines.⁹⁰ Soon after the RCMP announced the charges, the Crown advised the court that the accused and the Public Prosecution Service of Canada had negotiated the first remediation agreement under the CFPOA, which is still subject to approval by the court.⁹¹

In June 2023, Canada will be reviewed by Austria and New Zealand in the OECD's Phase 4 review of compliance with the Convention.⁹² The Phase 4 review focuses on, amongst other things, weaknesses identified in earlier evaluations and enforcement efforts and results.⁹³

III. Canada's Sanctions & Export Controls Regime

A. OVERVIEW: CANADA'S SANCTIONS REGIME

Canada's sanctions regime is a foreign policy tool used to address concerns relating to international peace and security, gross violations of human rights and significant foreign corruption.⁹⁴ The regime targets individuals, organizations and foreign states through restrictions on property, financial and business dealings, restrictions on the import and export of goods and services, and transportation bans, among other measures.⁹⁵

Canada's sanctions regime is implemented primarily through the Special Economic Measures Act (SEMA).⁹⁶ The regime also includes the Justice for

87. Criminal Code, R.S.C., 1985, c C-46 (Can.).

88. See *R. v. SNC Lavalin, Inc.*, 2022 QCCS 1967 (Can. Que.).

89. Corruption of Foreign Public Officials Act, S.C. 1998, c 34 (Can.).

90. See Joe Lofaro, *RCMP Charges Montreal Company with Bribery, Fraud Charges*, CTV NEWS (Sept. 21, 2022 9:58 PM), <https://montreal.ctvnews.ca/rcmp-charge-montreal-company-with-bribery-fraud-charges-1.6078937> [<https://perma.cc/XAW6-Q7N3>].

91. See Paul Cherry, *Lawyers Seek Closed-Door Hearing in Case Involving Renowned Montreal Tech Firm*, MONTREAL GAZETTE (Oct. 18, 2022), <https://montrealgazette.com/news/local-news/lawyers-seek-closed-door-hearing-in-case-involving-renowned-montreal-tech-firm> [<https://perma.cc/8NLD-ED88>].

92. See *Canada's Fight Against Foreign Bribery*, GLOB. AFFS. CAN. (Oct. 28, 2020), <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/corr-21.aspx?lang=eng> [<https://perma.cc/GJJ2-8LHB>].

93. *Phase 4 Country Monitoring of the Anti-Bribery Convention*, OECD, <https://www.oecd.org/corruption/oecd-anti-bribery-convention-phase-4.htm#:~:text=Phase%20%20focuses%20on%20key,institutional%20framework%20of%20the%20Parties.%3E> [<https://perma.cc/4PF4-P6DJ>] (last visited Apr. 8, 2023).

94. See *Canadian Sanctions Legislation*, GLOB. AFFS. CAN. (Jan. 9, 2023), www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/legislation-lois.aspx?lang=eng [<https://perma.cc/MSQ5-RE8G>].

95. See *id.*

96. See *id.*; see also SEMA, S.C. 1992 c 17 (Can.).

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Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law) (SML), the Freezing Assets of Corrupt Foreign Officials Act (FACFOA), the United Nations Act (UNA), and certain provisions in the Criminal Code.⁹⁷ In addition, the Foreign Extraterritorial Measures Act (FEMA) allows the Canadian government to prevent sanctions imposed by other countries from being applied in Canada.⁹⁸

1. *Sanctions Under the Special Economic Measures Act*

Canada's economic sanctions are implemented under the SEMA against target countries, individuals and entities engaged in activities that threaten the security or stability of Canada and the international community.⁹⁹ The SEMA empowers the federal government (specifically, the Governor in Council (GIC) (i.e., the Cabinet)) to impose economic sanctions in response to breaches of international peace and security; gross and systematic human rights violations; and acts of serious corruption.¹⁰⁰ The SEMA also allows Canada to impose sanctions on the basis of decisions or recommendations of international organizations or associations of states of which Canada is a member.¹⁰¹

The SEMA sanctions have been imposed in response to acts of war (including by Russia in Ukraine),¹⁰² the proliferation of weapons of mass destruction (including nuclear tests and ballistic missile launches by the Democratic People's Republic of Korea),¹⁰³ and serious human rights violations (including the killing of Mahsa Amini by Iran's "morality police" and the repression of protests in Iran).¹⁰⁴

The SEMA sanctions generally prohibit dealing (transacting) by Canadians anywhere in the world, as well as any other persons in Canada, in the property of listed individuals or entities, and require the freezing and reporting of such assets.¹⁰⁵ Specifically, the SEMA authorizes the GIC to

97. Justice for Victims of Corrupt Foreign Officials Act (Sergei Magistrate Law), S.C. 2017, c 21, s 6 (Can.) [hereinafter SML]; Freezing Assets of Corrupt Foreign Officials Act, S.C. 2011, c 10 (Can.) [hereinafter FACFOA]; United Nations Act, R.S.C. 1985, c U-2 (Can.) [hereinafter UNA]; Criminal Code, R.S.C., 1985, c C-46 (Can.).

98. Foreign Extraterritorial Measures Act, R.S.C. 1985, c F-29.

99. See *Canada's Sanction's Legislation*, *supra* note 94.

100. SEMA, S.C. 1992 c 17, s 4(1.1)(b)-(d) (Can.).

101. *Id.* S 3.1

102. SEMR, SOR/2014-58.

103. Special Economic Measures (Democratic People's Republic of Korea) Regulations, SOR/2011-167; see also *Canadian Sanctions Related to North Korea*, GOV'T OF CAN. (Dec. 16, 2022), https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/korea-coree.aspx?lang=eng#a5 [<https://perma.cc/28VP-TKL2>].

104. Special Economic Measures (Iran) Regulations, SOR/2010-165; *Canada Sanctions Related to Iran*, GOV'T OF CAN. (Mar. 27, 2023), https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/iran.aspx?lang=eng [<https://perma.cc/6UES-7ME6>].

105. SEMR, SOR/2014-58, s 3, 7(1) (Can.).

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restrict dealings in property and freeze the assets of foreign nationals or entities.¹⁰⁶ The SEMA also authorizes the GIC to prohibit Canadians and other persons in Canada from providing financial services or other services to foreign nationals or states.¹⁰⁷ Other types of restrictions against nationals and entities of a given foreign state may include prohibitions on importing or exporting goods or services or technical data; limiting the provision of financial or related services; and banning the docking of ships or landing of aircraft to or from the sanctioned state.¹⁰⁸ In addition to these types of prohibitions, the SEMA sanctions also prohibit Canadians and persons in Canada from facilitating or assisting any activity prohibited by the SEMA sanctions.¹⁰⁹

The Special Economic Measures (Russia) Regulations impose a number of requirements on Canadian financial institutions and money service businesses (including banks, insurance companies, credit associations, foreign currency exchanges, and cryptocurrency exchanges, federal and provincial trust and loan companies, and entities dealing in securities).¹¹⁰ Such entities must determine on a continuing basis whether they are in possession or control of property subject to the SEMA.¹¹¹ The sanctions regime further requires Canadian financial institutions, Canadians anywhere in the world, and any person in Canada, to disclose to law enforcement authorities the existence of property in their possession or control that they have reason to believe is owned or controlled by a designated person, directly or indirectly.¹¹² In November 2022, the RCMP reported that \$121 million worth of assets were reported as frozen and \$290 million in financial transactions were reported as blocked as a result of the prohibitions in the Special Economic Measures (Russia) Regulations.¹¹³

Orders made by the GIC are reviewable by the courts. Persons subject to an order may apply for their property to cease being the subject of an order or for a permit to engage in activity that would otherwise be prohibited, which the Minister of Foreign Affairs may only grant if there are reasonable

106. SEMA, S.C. 1992, c 17, s 2.

107. *Id.* s 4(e).

108. *Id.* s 2(b)-(i).

109. SEMR, SOR/2014-58, at sched. 5.

110. *Id.* at sched. 6.

111. *Id.*; see SML, S.C. 2017, c 21, s 6 (Can.); see also FACFOA, S.C. 2011, c 10, s 8.

112. Specifically, every person in Canada and every Canadian anywhere in the world must disclose without delay to the Commissioner of the Royal Canadian Mounted Police the existence of property in their possession or control that they have reason to believe is owned or controlled, directly or indirectly, by a designated person listed in Schedule 1 or by an entity owned or controlled by a designated person listed in that Schedule. See SEMR, SOR/2014-58, s 6, 7; see also Special Economic Measures (Belarus) Regulations, SOR/2020-214, s 6, 7 (Can.) [hereinafter SEM Belarus Regulations]; Special Economic Measures (Iran) Regulations, SOR/2010-165, s 10; Special Economic Measures (Haiti) Regulations, SOR/2022-226, s 7.

113. Statement by the Royal Canadian Mounted Police, Update on the reporting of frozen assets under the Special Economic Measures Act – Russia Regulations (Dec. 23, 2022), <https://www.rcmp-grc.gc.ca/en/news/2022/update-the-reporting-frozen-assets-the-special-economic-measures-act-russia-regulations-0> [https://perma.cc/H84G-MCR3].

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grounds for doing so.¹¹⁴ Persons subject to an order may also apply in writing to the Minister of Foreign Affairs for a permit to be removed from an order.¹¹⁵ The Minister may also issue permits to any person in Canada or any Canadian outside Canada to carry out a specified activity or transaction, or any class of activity or transaction, that is otherwise restricted or prohibited under the SEMA regulations.¹¹⁶

Additional measures can also be imposed. Such measures include travel bans implemented through the Immigration and Refugee Protection Act.¹¹⁷ They also include “lookouts” for individuals sanctioned under the SEMA, of which the Canada Border Services Agency (CBSA) has issued over 900 to date.¹¹⁸

The SEMA offenses are administered and enforced by the Minister of Foreign Affairs, together with investigation and enforcement efforts by the RCMP and CBSA.¹¹⁹

2. *Sanctions Under the Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)*

Canada enacted the SML to help tackle foreign corruption and to bring Canadian sanctions in line with evolving international standards.¹²⁰ The SML allows the Government of Canada to freeze the assets of, and prohibit dealings with, foreign nationals who are involved in, or complicit in, acts of corruption or gross violations of internationally recognized human rights.¹²¹

The SML came into force in October 2017.¹²² The first targets of sanctions were officials related to the custody and death of Sergei Magnitsky in Russia, along with officials complicit with incidents of corruption and

114. SEMA, S.C. 1992, c 17, at sched. 5.1.

115. See, e.g., SEMR, SOR/2014-58, s 8(1); SEM Belarus Regulations, SOR/2020-214, s 8.

116. See Special Economic Measures (Russia) Permit Authorization Order, SOR/2014-59.

117. Immigration and Refugee Protection Act, S.C. 2001, c 27, s 35.

118. *Overview: Standing Committee on Public Safety and National Security: Canada's Security Posture in Relation to Russia*, GOV'T OF CAN. (June 9, 2022), <https://www.cbsa-asfc.gc.ca/transparency-transparence/pd-dp/bbp-rpp/secu/2022-06-09/overview-apercu-eng.html> [https://perma.cc/Q9CN-TG9L].

119. See SEMA, S.C. 1992, c 17, s 6(1). The CBSA will detain assets suspected to have been shipped in contravention of SEMA s 4(2)(b), (d). See Memorandum from the Can. Border Servs. Agency, Memorandum D19-11-1: Canadian Sanctions (Mar. 3, 2022), <https://www.cbsa-asfc.gc.ca/publications/dm-md/d19/d19-11-1-eng.pdf> [https://perma.cc/WUU6-UVTW]. The CBSA will also deny entry to non-Canadian permanent residents sanctioned for having committed human rights violations under SEMA s 4(1.1)(c), (d), as set out in the *Immigration and Refugee Protection Act*. See Immigration and Refugee Protection Act, S.C. 2001, c 27 s 35(1)(d). CSIS is also listed as a point of contact for mandatory disclosures. See, e.g., SEM Belarus Regulations, SOR/2020-214, s 7.

120. See SML, S.C. 2017, c 21, pmbl.

121. See *id.* s 4(3); see also Justice for Victims of Corrupt Foreign Officials Act, GOV'T OF CAN. (Nov. 9, 2021), https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/victims_corrupt-victimes_corrompus.aspx?lang=eng [https://perma.cc/5N4H-2VAJ].

122. SML, S.C. 2017, c 21 (assented to Oct. 18, 2017).

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gross human rights violations in Venezuela and South Sudan.¹²³ While sanctions imposed under the SML continue to apply, use of the SML is typically secondary because amendments to the SEMA now also allow for designation of individuals complicit in gross human right violations and the SEMA has greater flexibility to target certain conduct and to sanction entities.¹²⁴

The SML authorizes the GIC to restrict dealings in property and freeze the assets of foreign nationals in response to a number of defined circumstances. Specifically, the GIC can make orders and regulations to this effect when it is of the opinion that a foreign national (1) is responsible or complicit in gross violations of internationally recognized human rights; (2) acts on behalf of a foreign state in relation to such a violation; or (3) has materially assisted or provided support (including goods and services) to an act of significant corruption by a foreign public official or their associate.¹²⁵ Additionally, the GIC can (4) take action against foreign public officials, or their associates, responsible for or complicit in ordering, controlling, or directing acts of significant corruption.¹²⁶

As with the SEMA, the SML imposes a number of reporting requirements on Canadian financial institutions and money service businesses, which must determine on a continuing basis whether they are in possession or control of property subject to the SML.¹²⁷

B. LEGISLATIVE & REGULATORY DEVELOPMENTS IN 2022

Canada made an unprecedented number of legislative and regulatory changes to its sanctions regime in 2022. Sanctions were imposed both through the United Nations Act and the SEMA.¹²⁸

In addition to expanding the number of countries that are subject to sanctions, Canada also imposed a variety of new sanctions measures in response to international conflicts.

1. *New Sanctions in 2022*

Canada announced multiple waves of new sanctions in 2022 in response to global conflict and regional upheavals. The new sanctions focus on four main countries (1) Russia; (2) Belarus; (3) Iran; (4) Haiti; and (5) Myanmar. Below we discuss the developments related to each of these countries.

123. Justice for Victims of Corrupt Foreign Officials Regulations, SOR/2017-233, s 4.

124. Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law), S Bill S-226, 42nd parl., s 17 (2017) (Can.).

125. SML, S.C. 2017, c 21, s 4(2)(a)–(b), (d).

126. *Id.* s 4(2)(c).

127. *Id.* s 6-7.

128. *See* UNA, R.S.C. 1985, c U-2; *see also* SEMA, S.C. 1992, c 17.

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a. Russia

Following Russia's invasion of Ukraine in February 2022, Canada, along with numerous other countries, announced a series of sanctions against Russian individuals, entities, goods, and services.¹²⁹

Canada implemented Russia-specific sanctions via the SEMR.¹³⁰ These regulations were initially implemented in 2014 following Russia's annexation of Crimea.¹³¹ They were expanded substantially in 2022 and now include a number of sectoral prohibitions as well as lengthy lists of designated persons subject to dealings prohibitions and asset freezes (similar to the Specially Designated Nationals list in the United States).¹³²

The SEMR impose an asset freeze and dealings prohibition on persons listed in Schedule 1, which include both individuals and entities.¹³³ It is prohibited for any person in Canada and any Canadian anywhere in the world to:

- (1) Deal in any property, wherever situated, that is owned, held or controlled by or on behalf of a designated person whose name is listed in Schedule 1;
- (2) Enter into or facilitate, directly or indirectly, any transaction related to such a dealing;
- (3) Provide any financial or other related services in respect of such a dealing;
- (4) Make any goods, wherever situated, available to a designated person listed in Schedule 1 or to a person acting on their behalf; or
- (5) Provide any financial or related service to or for the benefit of a designated person listed in Schedule 1.¹³⁴

Prior to 2022, the SEMR already imposed some restrictions on the financial and energy sectors. With some exceptions, the SEMR prohibit any person in Canada and Canadians anywhere in the world from dealing in new debt of longer than thirty days maturity in relation to persons listed in Schedule 2, or ninety days maturity in relation to persons listed in Schedule

129. For an overview of Canada's sanctions against Russia, see *Canadian Sanctions Related to Russia*, GOV'T OF CAN. (Mar. 31, 2023), https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/russia-russie.aspx?lang=eng [https://perma.cc/N3GM-TXMR] (containing thirty-eight regulations amending and consolidated in SEMR since Russia's invasion of Ukraine).

130. SEMR, SOR/2014-58.

131. *The Government of Canada's Response to the Situation in Ukraine*, GOV'T OF CAN. (Sept. 11, 2014), <https://www.canada.ca/en/news/archive/2014/09/government-canada-response-situation-ukraine-884319.html> [https://perma.cc/8EHX-7VSX].

132. Assets of SDNs are blocked and US persons are generally prohibited from dealing with them. *Specially Designated Nationals and Blocked Persons List (SDN) Human Readable Lists*, U.S. DEP'T OF THE TREASURY (Apr. 5, 2023) <https://home.treasury.gov/policy-issues/financial-sanctions/specially-designated-nationals-and-blocked-persons-list-sdn-human-readable-lists> [https://perma.cc/5MN6-NALL].

133. SEMR, SOR/2014-58, at sched. 3, 1.

134. *Id.*

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3.¹³⁵ Additionally, the SEMR prohibit any person in Canada or Canadians anywhere in the world from dealing in new securities in relation to persons listed in Schedule 2.¹³⁶

The SEMR also prohibit the export, sale, supply or shipping of goods listed in Schedule 4, to Russia or to any person in Russia for their use in offshore oil (depth greater than 500m), shale oil or Arctic oil exploration and production.¹³⁷ This includes a ban on the provision of any financial, technical or other services related to the goods subject to this prohibition.¹³⁸

The SEMR were amended twenty-six times in 2022.¹³⁹ These amendments include the prohibitions listed in section A of the article “2022 Canadian Trade Update” above.

i. Additional Measures Implemented Outside of the SEMR

Beyond traditional sanctions, Canada implemented other measures to deter Russian aggression, such as revoking Russia’s “most favoured nation” (MFN) tariff treatment status. Specifically, on March 2, 2022, Canada revoked Russia’s MFN status under the Customs Tariff, effectively rescinding Canada’s agreement to afford Russian goods the same favoured treatment as other World Trade Organization countries.¹⁴⁰ Russian goods are now subject to the General Tariff rate of thirty-five percent under the Customs Tariff.¹⁴¹

Canada also joined the European Commission, France, Germany, Italy, the United Kingdom, and the United States in committing to remove Russia from the Society for Worldwide Interbank Financial Telecommunications (SWIFT) global banking system.¹⁴² Removing Russia from SWIFT cut Russian banks off from the specialized financial messaging service used by banks to exchange financial data.

ii. Sanctioned Individuals & Entities

As of December 2022, over 1,100 Russian individuals are subject to an asset freeze and dealings prohibition, either for “grave breaches of

135. *Id.* at sched. 3.01(1), (1.1).

136. *Id.* at sched. 3.02.

137. *Id.* at sched. 3.03.

138. Regulations Amending the Special Economic Measures (Russia) Regulations: SOR/2022-125, C. Gaz. pt. II vol. 156 no. 13 (June 22, 2022) (Can.).

139. *See id.*, as amended on Feb. 24 and 28, 2022, Mar. 4, 6, 10, 14, 23, and 24, 2022, Apr. 5, 8, and 19, 2022, May 3, 6, 18, and 27, 2022, June 7 and 27, 2022, July 7, 14 and 29, 2022, Aug. 19, 2022, Sept. 29, 2022, Oct. 14 and 28, 2022, Nov. 10, 2022, and Dec. 7, 2022.

140. *Order Withdrawing the Most-Favoured-Nation Status from Russia and Belarus: Customs Notice 22-02*, CAN. BORDER SERVS. AGENCY (Mar. 11, 2022), <https://www.cbsa-asfc.gc.ca/publications/cn-ad/cn22-02-eng.html> [<https://perma.cc/38LJ-6WTR>].

141. Customs Tariff, S.C. 1997, c 36, s 29.

142. YouTube Video: Announcing Sanctions on Russia (Prime Minister of Can. Justin Trudeau 2022), <https://pm.gc.ca/en/videos/2022/02/25/announcing-sanctions-russia> [<https://perma.cc/7MTP-XY99>].

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international peace and security” or “gross human rights violations.”¹⁴³ Approximately 260 entities are also subject to an asset freeze and dealings prohibition.¹⁴⁴ Prior to 2022, only 129 Russian individuals and seventy-one Russian entities were subject to such sanctions, an increase of 580 percent in sanctioned persons.

Canada’s sanctions on Russia have focused on key economic sectors, including financial, oil and gas, mining, and industrial manufacturing.

Russia’s financial sector was targeted through the designation of large Russian financial institutions as Schedule 1 entities. Sanctioned banks include VTB, Sberbank, Gazprombank, and Alfa-Bank.¹⁴⁵

In addition, Canada designated the Central Bank of the Russian Federation, the National Wealth Fund of the Russian Federation, and the Ministry of Finance of the Russian Federation under the SEM Russia Regulations.¹⁴⁶ While these entities were first subject only to financing restrictions (specifically, persons in Canada and Canadians anywhere in the world could not deal in new debt (either long- or short-term) issued by these entities), these entities were moved to Schedule 1 of the SEMR, meaning they are now subject to the broader prohibition on dealings and to the asset freeze.¹⁴⁷

iii. *Service Prohibitions*

In June 2022, Canada targeted the provision of services to Russia or persons in Russia. These new sanctions prohibit a broad range of services to oil and gas, mining, and chemical manufacturing sectors.¹⁴⁸

The services prohibited within these sectors include bulk storage services for liquids or gases; wholesale trade services for fuels or related products; transportation of petroleum and natural gas; construction; engineering; accounting; auditing and bookkeeping; computer services; market research and public opinion polling; scientific, technical, and management consulting; equipment rental and repair; and water transportation.¹⁴⁹

iv. *Restricted Goods & Technologies List, Goods for Weapons Manufacturing, & Luxury Goods*

Canada has also prohibited the export of goods to certain goods to Russia.¹⁵⁰ First, Canada created a new “Restricted Goods and Technologies

143. SEMR, SOR/2014-58, at sched. 1, pts. 1, 1.1.

144. *Id.* at sched. 1, Parts 2, 3.

145. *Id.* at sched. 1.

146. *Id.*

147. *See* Measures (Russia) Regulations: SOR/2022-27, C. Gaz. Part II Vol. 156 No. 6 (Mar. 16, 2022); *see also* Regulations Amending the Special Economic Measures (Russia) Regulations, SOR/2022-31, C. Gaz. Part II Vol. 156 No. 6 (Mar. 16, 2022).

148. *See Canadian Sanctions Related to Russia, supra* note 129.

149. SEMR, SOR/2014-58, at sched.8.

150. *See generally id.*

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List” which prohibits the export or supply to Russia of listed goods.¹⁵¹ This list is separate and distinct from Canada’s export controls regime.¹⁵²

Separately, Canada has prohibited the export of various goods related to weapons manufacturing.¹⁵³ The list includes military items such as tanks, industrial robots, and unmanned aircraft.¹⁵⁴ It also includes items such as measuring instruments, barber and dentist chairs, cameras, and thermostats.¹⁵⁵

Canada has also imposed restrictions on the import and export of certain “luxury goods” in relation to Russia.¹⁵⁶ Persons in Canada and Canadians anywhere in the world cannot export certain luxury goods to Russia, including cigars, silk, footwear, luxury clothing and accessories, and jewelry.¹⁵⁷ Additionally, they cannot import Russian gold and certain luxury goods such as caviar, spirits and alcoholic beverages, and diamonds.¹⁵⁸

v. *Regional Prohibitions: Donetsk, Luhansk, Kherson, & Zaporizhzhia*

Canada had previously imposed broad regional prohibitions in respect of occupied Crimea in 2014.¹⁵⁹ Crimea remains subject to these prohibitions.¹⁶⁰

Canada announced comprehensive regional sanctions that target the regions of “the Donetsk People’s Republic” and the “Luhansk People’s Republic” following Russia’s decision to recognize the independence of these two regions.¹⁶¹ Canada later announced similar comprehensive sanctions targeting two additional occupied regions: the Kherson oblast and the Zaporizhzhia oblast.¹⁶² These sanctions were all imposed under the Special Economic Measures (Ukraine) Regulations.¹⁶³

The sanctions on these regions are comprehensive. They prohibit: investing or dealing in property in these regions; providing or acquiring financial or related services in these regions; importing, purchasing, or acquiring goods from these regions; exporting goods to these regions; providing technical assistance such as instruction, training, or consulting

151. *Id.* at sched. 5.1, 3.06.

152. *Restricted Goods and Technologies List*, GOV’T OF CAN., https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/goods_technologies-marchandises_technologies.aspx?lang=eng [https://perma.cc/4SMZ-P4UR].

153. SEMR, SOR/2014-58, at sched.7, 3.09.

154. *Id.* at sched. 7.

155. *Id.*

156. *Id.* at sched. 6, 3.08.

157. *Id.*

158. *Id.* at sched. 3.08(3), 3.11.

159. Special Economic Measures (Ukraine) Regulations, SOR/2014-60, s 4.1 (Can.) [hereinafter SEM Ukraine Regulations].

160. *Id.*

161. *Canada Announces Support to Address the Situation in Ukraine*, PRIME MINISTER OF CAN. JUSTIN TRUDEAU (Feb. 22, 2022), <https://pm.gc.ca/en/news/news-releases/2022/02/22/canada-announces-support-address-situation-ukraine> [https://perma.cc/9CKF-CRTG]

162. *See id.*; *see also* SEM Ukraine Regulations, SOR/2014-60.

163. SEM Ukraine Regulations, SOR/2014-60.

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services to a person in these regions; and docking certain cruise ships in these regions.¹⁶⁴

Over 250 individuals have been sanctioned in relation to these regions.¹⁶⁵ The listed individuals are generally senior officials of the so-called “governments” or other so-called leaders of the occupied regions.¹⁶⁶ A single entity – the “Salvation Committee for Peace and Order,” the so-called government authority in the Kherson oblast – has also been listed under these regulations in 2022.¹⁶⁷

vi. *Russian Oil Ban & Price Cap*

On March 3, 2022, Canada prohibited any person in Canada and Canadians anywhere in the world from importing, purchasing or otherwise acquiring Russian petroleum products.¹⁶⁸ The specific products covered under this ban include crude petroleum oil, refined petroleum oil and petroleum gases.¹⁶⁹ Although Canada is a net exporter of crude oil and does not import significant volumes of Russia crude, the ban is a display of support for Ukraine and ensures Canada will not begin importing Russian oil in the future.¹⁷⁰

In September 2022, the G7 countries agreed to impose a price cap on Russian-origin crude oil and petroleum products.¹⁷¹ Products sold above the price cap would be subject to transportation and other prohibitions.¹⁷² The goal of the cap is to apply downward pressure on global energy prices while also limiting the funds available to Russia for its war efforts.¹⁷³

On December 7, 2022, Canada introduced its price cap implementing measures in the form of a new prohibition against the provision of certain services relating to the maritime transport of Russian crude.¹⁷⁴ The same prohibitions will come into force for refined petroleum products on February 5, 2023. The prohibited services include trading and commodities brokering, financing, financial assistance, shipping, insurance and

164. *Id.* s 4.2.

165. *Id.* Part 1.

166. *Id.* s 2.

167. *Id.* Part 2.

168. SEMR, SOR/2014-58, s 3.05(1).

169. *Id.* at sched. 5.

170. *Government of Canada Moves to Prohibit Import of Russian Oil*, GOV'T OF CAN. (Feb. 28, 2022), <https://www.canada.ca/en/natural-resources-canada/news/2022/02/government-of-canada-moves-to-prohibit-import-of-russian-oil.html> [https://perma.cc/T857-WH27].

171. Dep't of Fin. Can., *G7 Finance Ministers' Statement on the united response to Russia's war of aggression against Ukraine*, GOV'T OF CAN. (Sept. 2, 2022), <https://www.canada.ca/en/departement-finance/news/2022/09/g7-finance-ministers-statement-on-the-united-response-to-russias-war-of-aggression-against-ukraine.html> [https://perma.cc/Z9KP-4F75].

172. *Id.*

173. *Id.*

174. Regulations Amending the Special Economic Measures (Russia) Regulations, SOR/2022-261 (Can.).

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reinsurance, protection and indemnity, flagging, and customs brokering.¹⁷⁵ The prohibition applies when the oil is purchased above the price set by the G7+ Coalition Oil Price Cap List, which, at the date of writing is \$60 per barrel.¹⁷⁶

b. Belarus

Canada has also imposed significant sanctions against Belarus as a result of that country's support of Russia's war on Ukraine.¹⁷⁷ As with Russia, Canada revoked Belarus' MFN status.¹⁷⁸ Any goods imported from Belarus are now subject to the thirty-five percent General Tariff.¹⁷⁹

i. *Sanctioned Individuals & Entities*

Over 180 Belarussian individuals and fifty-five Belarussian entities are subject to an asset freeze and dealings prohibition under the Special Economic Measures (Belarus) Regulations.¹⁸⁰ These Regulations were first implemented in 2020 following the presidential election of Alexander Lukashenko.¹⁸¹ In 2022, numerous additional individuals were listed for their role in assisting Russia, including senior military defence officials as well as financial elites, oligarchs, and their associates.¹⁸² The listed entities encompass key Belarussian industries, including potash, tobacco, energy, defence entities and Belarus's national railway company.¹⁸³

ii. *Restricted Goods & Technologies, Goods for Weapons Manufacturing, & Luxury Goods*

Canada has prohibited a wide variety of goods from being exported to Belarus.¹⁸⁴ These prohibitions largely mirror the goods prohibitions made in relation to Russia. The restriction on exporting goods on the "Restricted Goods and Technologies List" applies equally to Belarus.¹⁸⁵ Canada has also prohibited the export of goods to Belarus that can be used in weapons

175. SEMR, SOR/2014-58, sched. 10.

176. *G7+ Coalition Oil Price Cap List*, GOV'T OF CAN., https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/g7-coalition-oil_price-prix_petrole.aspx?lang=eng [<https://perma.cc/EJY5-TSLF>].

177. See generally SEM Belarus Regulations, SOR/2020-214.

178. See *Order Withdrawing the Most-Favoured-Nation Status from Russia and Belarus: Customs Notice 22-02*, *supra* note 140.

179. *Id.*

180. SEM Belarus Regulations, SOR/2020-214, at sched. 1, Part 1-2.

181. *Canadian Sanctions Related to Belarus*, GOV'T OF CAN., https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/belarus.aspx?lang=eng [<https://perma.cc/7RFN-PQWT>].

182. *Id.*

183. *Id.*

184. *Id.*

185. SEM Belarus Regulations, SOR/2020-214, s 3.6(1)-(2).

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manufacturing.¹⁸⁶ Finally, Canada has restricted the import and export of certain “luxury goods” in relation to Belarus.¹⁸⁷

c. Iran

Canada’s newest sanctions against Iran, announced in fall 2022, are the first imposed since 2007.¹⁸⁸ The 2007 sanctions were designed to respond to the proliferation of Iranian nuclear program, but were largely repealed in 2015 after Iran entered into the Joint Comprehensive Plan of Action with the five permanent members of the United Nations Security Council.¹⁸⁹

Canada established new sanctions against Iran following the death of twenty-two-year-old Mahsa Amini, who died in custody of the Iranian “Morality Police,” and following Iran’s violent crackdown against civilian protestors and its use of force against its own citizens.¹⁹⁰

i. *Sanctioned Individuals & Entities*

As of December 2022, Canada has sanctioned an additional eighty-four Iranian individuals and twenty-five Iranian entities for either grave breaches of international peace and security or gross human rights violations.¹⁹¹ Some of the sanctioned entities include the “Morality Police,” the Islamic Revolutionary Guard Corp (a branch of the Iranian armed forces), and the Law Enforcement Forces (Iran’s national police).¹⁹² Sanctioned individuals include leaders and officers of sanctioned entities among others.¹⁹³

ii. *Other Sanctions – Travel Restrictions & Export Controls*

Canada imposes travel restrictions on persons listed by the United Nations’ Security Council via the Immigration and Refugee Protection Act.¹⁹⁴ Also, Canada continues to restrict the export to Iran of a wide range of goods listed on the Export Control List; however, there have been no changes in relation to Iran in 2022.¹⁹⁵

186. *Id.* at sched. 5, s 3.8.

187. *Id.* at sched. 4, s 3.7.

188. See *Canadian Sanctions Related to Iran*, GOV’T OF CAN., https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/iran.aspx?lang=eng [https://perma.cc/NRE3-3TJE].

189. *Id.*

190. *Id.*; *Canada to Implement New Measures Against the Iranian Regime*, PRIME MINISTER OF CAN. JUSTIN TRUDEAU, <https://pm.gc.ca/en/news/news-releases/2022/10/07/canada-implement-new-measures-against-iranian-regime> [https://perma.cc/3J4H-4GZJ].

191. Special Economic Measures (Iran) Regulations, SOR/2010-165, Part 1 (Can.).

192. *Id.*

193. See generally *id.*

194. Immigration and Refugee Protection Act, S.C. 2001, c 27, s 35(1)(c) (Can.).

195. *Canadian Sanctions Related to Iran*, GOV’T OF CAN., https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/iran.aspx?lang=eng [https://perma.cc/3GX9-W4D5].

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d. Haiti

Canada imposed sanctions in relation to Haiti for the first time in December 2022.¹⁹⁶ The sanctions were imposed under both the United Nations Act and the SEMA in response to the ongoing humanitarian crisis occurring in Haiti.¹⁹⁷

On October 21, 2022 the UN passed Resolution 2653 that imposes a travel ban, an asset freeze and a targeted arms embargo for designated individuals in connection with the ongoing situation in Haiti.¹⁹⁸ As a result, Canada implemented the asset freeze and arms embargo via the Regulations Implementing the United Nations Resolution on Haiti, which came into effect on November 10, 2022.¹⁹⁹

Under its autonomous regime, Canada sanctioned several additional Haitian individuals in December 2022 under the Special Economic Measures (Haiti) Regulations.²⁰⁰ The sanctions target the “Haitian political elite who use their position and influence to support criminal armed gangs spreading terror and violence in Haiti.”²⁰¹

e. Myanmar

Canada expanded its list of designated persons from Myanmar three times during 2022.²⁰² The designated individuals and entities were listed for their roles in arms flow, violence against civilians, misinformation efforts, and the weaponization of the judiciary.²⁰³ These sanctions were developed in conjunction with the United States and the United Kingdom.²⁰⁴ As of December 2022, sixty-three entities and eighty-nine individuals are subject to an asset freeze and dealings prohibition.²⁰⁵

196. See *generally* Special Economic Measures (Haiti) Regulations, SOR/2022-226 (Can.).

197. *Id.*; S.C. Res. 2653, ¶ 3–14 (Oct. 21, 2022).

198. S.C. Res. 2653, ¶ 3–14 (Oct. 21, 2022).

199. Special Economic Measures (Haiti) Regulations, SOR/2022-226.

200. Special Economic Measures (Haiti) Regulations, SOR/2022-258.

201. *Canadian Sanctions Related to Haiti, Recent Developments*, GOV'T OF CAN., https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/haiti.aspx?lang=eng [https://perma.cc/2USQ-49J5].

202. Regulations Amending the Special Economic Measures (Burma) Regulations, SOR/2022-008 (Can.); Regulations Amending the Special Economic Measures (Burma) Regulations, SOR/2022-065 (Can.); Regulations Amending the Special Economic Measures (Burma) Regulations, SOR/2022-263 (Can.).

203. See *Canadian Sanctions Related to Myanmar*, GOV'T OF CAN., https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/myanmar.aspx?lang=eng [https://perma.cc/XDX7-L58N].

204. Regulations Amending the Special Economic Measures (Burma) Regulations, SOR/2022-008 (Can.).

205. Regulations Amending the Special Economic Measures (Burma) Regulations: SOR/2022-263, C. Gaz. Part II, Vol. 156, No. 26 (Dec. 7, 2022) (Can.).

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C. EXPORT CONTROLS IN 2022

Canada has acted in concert with key allies and made changes to its export controls regime with the goal of denying Russia access to controlled dual-use and military goods and technologies.²⁰⁶ The Notice to Exporters and Brokers issued by the Government of Canada specifies that Canada will stop issuing permits for the export and brokering of controlled goods and technology to Russia.²⁰⁷ In addition, all existing export permits for the export or brokering of such items are cancelled, effective February 24, 2022.²⁰⁸ These changes are expected to affect up to \$650 million worth of goods.²⁰⁹

As noted above, Canada also prescribed a new Restricted Goods and Technologies List as part of its Russian and Belarusian sanctions regimes.²¹⁰ Despite resemblances, it does not form part of Canada's export controls regime.

1. *Global Affairs Restructures to Better Enforce Sanctions*

With the recent upsurge in Canadian sanctions activity, there has been increased focus on the gaps and inadequacies in Canada's enforcement of the SEMA and other sanctions regulations.²¹¹

a. Seizure and Forfeiture Powers

The amendments enhance the Canadian Government's ability to seize assets.²¹² The changes expand the definition of property to include any type of property that is real or personal property; immovable or moveable; tangible or intangible; corporeal or incorporeal; and include money, funds, currency, digital assets and virtual currency.²¹³ The changes also grant the

206. Aaron D'Andrea, *Canada Targets Russian Elites, Major Banks in New Sanctions Amid Ukraine Invasion*, GLOBAL NEWS (Feb. 24, 2022), <https://globalnews.ca/news/8643325/canada-new-sanctions-russia-ukraine-invasion/> [<https://perma.cc/5AQW-K3ND>].

207. *1071 - Notice to Exporters and Brokers – Exports and Brokering of items listed on the Export Control List and the Brokering Control List to Russia*, GOV'T OF CAN., (Feb. 24, 2022), <https://www.international.gc.ca/trade-commerce/controls-controles/notices-avis/1071.aspx?lang=eng>. [<https://perma.cc/SS5B-6VYA>].

208. *Id.*

209. *The International Trade Explorer, 2021*, STATISTICS CAN. (Dec. 14, 2022) <https://www150.statcan.gc.ca/n1/pub/71-607-x/71-607-x2019005-eng.htm#shr-pg0> [<https://perma.cc/E7A3-78EB>].

210. *1071 - Notice to Exporters and Brokers – Exports and Brokering of items listed on the Export Control List and the Brokering Control List to Russia*, *supra* note 207.

211. See generally Michael Saunders, *Capabilities and gaps in the Canadian special economic measures act regime*, CAN. FOREIGN POL'Y J. (2022).

212. See Budget Implementation Act, 2022, S.C. 2022, c 10 (Can.).

213. *Id.* s 436 (amending s. 2 of the *Special Economic Measures Act*: “property means any type of property, whether real or personal or immovable or movable, or tangible or intangible or corporeal or incorporeal, and includes money, funds, currency, digital assets and virtual currency.”).

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RCMP the power to seize or restrain such property that is owned, held, or controlled (either directly or indirectly) by foreign nationals.²¹⁴

Once property has been seized, the Minister of Foreign Affairs has the ability to apply to a judge of a superior court for forfeiture of the property.²¹⁵ When such an application is made, the judge “must” order the property subject to the application forfeited to the Canadian state, subject to certain notice and due process safeguards to protect third parties that may have interests in the property (e.g., secured creditors).²¹⁶ The goal of these new forfeiture powers is to add a restorative element to Canadian sanctions: “Funds resulting from asset forfeiture may be used to compensate victims of human rights abuses, restore international peace and security or rebuild affected states.”²¹⁷ As of November 22, 2022, no Russian assets had yet been forfeited or liquidated for the benefit of Ukraine.²¹⁸

On December 5, 2022, the Parliamentary Secretary to the Minister of Foreign Affairs, stated that since the passage of the legislative reforms to Canada’s sanctions regime, a “whole-of-government effort has been underway to operationalize the new authorities and move forward with respect to the first potential seizure of assets.”²¹⁹ Canada’s Minister of Foreign Affairs, announced on December 19, 2022 that Canada will pursue the forfeiture of property (dividends held in a financial institution) related to Granite Capital Holdings Ltd., owned by Roman Abramovich.²²⁰ Mr. Abramovich is a Russian oligarch sanctioned under the Special Economic Measures (Russia) Regulations.²²¹

b. Information Sharing

The amendments also established broader information sharing powers between government agencies and law enforcement authorities.²²² The SEMA was amended to allow various government departments, including Foreign Affairs, the Canadian Security Intelligence Service, and the CBSA,

214. *Id.* s 446 (replacing para 4(1)(b) of the SML with “by order, cause to be seized or restrained in the manner set out in the order any property situated in Canada that is owned — or that is held or controlled, directly or indirectly — by the foreign national.”).

215. *Id.* s 447.

216. *Id.*

217. See SEMA, S.C. 1992, c 17, s 5.3, 5.6, 7(1); 151 Parl. Deb. H.C. (Hansard) (Dec. 5, 2022) 141 (Hon. Robert Oliphant) (Can.).

218. Steven Chase, *Canada Has Yet to Sell Off Any Seized Russian Assets for Benefit of Ukraine*, GLOBE & MAIL (Nov. 22, 2022), <https://www.theglobeandmail.com/politics/article-canada-has-yet-to-sell-off-any-seized-russian-assets-for-benefit-of/> [https://perma.cc/6656-LGXS].

219. 151 Parl. Deb. H.C. (Hansard) (Dec. 5, 2022) 141 (Hon. Robert Oliphant) (Can.).

220. *Canada to Seize Assets of Sanctioned Russian Oligarch Abramovich*, REUTERS (Dec. 12, 2022), <https://www.reuters.com/article/ukraine-crisis-canada-idCAKBN2T311N> [https://perma.cc/DUB5-DWVJ].

221. SEMR, SOR/2014-58, Schedule 1, Part 1, item 451.

222. SEMA, S.C. 1992, c 17, s 6.1.

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among others, to share information related to sanctions enforcement.²²³ The amendments also allow the Minister of Foreign Affairs to require any person who has information regarding the enforcement of sanctions to provide that information where there are reasonable grounds to believe it is relevant for the purposes of the making, administration or enforcement of an order or regulation.²²⁴

c. Global Affairs Canada Sanctions Bureau and Increased Funding

The federal government's 2022 budget implementing legislation contained important changes to strengthen the SEMA and the SML, and which came into force on June 23, 2022.²²⁵

On October 7, 2022, Canada announced it would inject \$76 million to strengthen Canada's capacity to implement sanctions.²²⁶ Canada also announced a new dedicated Bureau within Global Affairs to support the RCMP in their investigation and identification of assets and other evidence regarding sanction violations.²²⁷

D. CANADIAN COURT PROVIDES FRAMEWORK FOR ASSESSING ENTITIES CONTROLLED BY BLOCKED PERSONS

A recent decision from an Alberta court has provided, for the first time, some case law on the meaning of "control" under Canada's sanctions regime.²²⁸ Global Affairs Canada has yet to publish such guidance, leaving companies and their advisors to rely on statutory interpretation principles and communications with Global Affairs Canada to assess what level of control by a sanctioned person is required to find that a non-listed entity is itself "blocked."²²⁹

The decision clarified key aspects of the meaning of "control," which in turn impact the companies that are considered to be in control of sanctioned persons.²³⁰ The court applied a fact-specific analysis that relies on "functional factors."²³¹ It found that there was a strong prima facie case that

223. *Id.*; Budget Implementation Act, 2022, S.C. 2022, c 10, s 441 (amending s. 6.1(2) of the *Special Economic Measures Act*).

224. SEMA, S.C. 1992, c 17, s 6.3; Budget Implementation Act, 2022, S.C. 2022, c 10, item 441.

225. See Budget Implementation Act, 2022, S.C., 2022, c 10.

226. *Canada to Implement New Measures Against the Iranian Regime*, PRIME MINISTER OF CAN., JUSTIN TRUDEAU, <https://pm.gc.ca/en/news/news-releases/2022/10/07/canada-implement-new-measures-against-iranian-regime> [<https://perma.cc/3J4H-4GZJ>].

227. *Id.*

228. See *Angophora Holdings Ltd. v. Ovsyankin* (2022), A.R. 711, para. 10.

229. *Advisory to Canadian Businesses on Canada's Sanctions Related to the Russian invasion of Ukraine – Russian invasion of Ukraine*, GOV'T OF CAN., https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/response_conflict-reponse_conflits/crisis-crisis/ukraine-advisory-directive.aspx?lang=eng [<https://perma.cc/BKJ5-9FSK>].

230. *Ovsyankin* (2022), A.R. 711, para. 25.

231. *Id.* paras. 40-42.

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the respondent in the proceeding, Angophora Holdings Limited (“Angophora”), was controlled by Gazprombank JSC (Gazprombank), a bank based in Russia and sanctioned by Canada.²³² Second, the judge found instructive the U.K. and U.S. definitions of control, while likening Canada’s actual approach to that of the E.U. (a *de facto* control approach).²³³

The case involved the Canadian property of a Russian national, Andrey Ovsyankin. Angophora was a judgment debtor against Mr. Ovsyankin.²³⁴ Mr. Ovsyankin brought the application for a stay of the enforcement order on the grounds that Angophora is controlled by a sanctioned entity. Angophora is a wholly-owned subsidiary of Mir Capital SICAR SCA (a Luxembourg investment fund, MIR).²³⁵ MIR is owned equally by two international banks, one of which is Gazprombank.²³⁶

The court considered whether there was a strong *prima facie* case that execution of the award would trigger Canadian sanctions.²³⁷ The court considered that Angophora meets the fifty percent ownership test enunciated under U.S. sanctions law (such that entities owned at fifty percent or more by sanctioned persons are themselves blocked), and that there were numerous fact-specific factors indicating functional control by the sanctioned entity Gazprombank over Angophora.²³⁸ The court also referred to the E.U.’s “Commission Opinion” on the issue of control, and found that Canada’s approach is, as in the E.U., a “factual” approach relating to whether the designated person has “*de facto*” control over the entity.²³⁹ Echoing the E.U. Commission Opinion, the court further stated that despite the lack of Gazprombank’s structural control over Angophora, it had *de facto* control and “sanctions should not allow a designated person to circumvent an asset freeze by continuing to have access through non-designated parties that they control.”²⁴⁰

232. SEMA, S.C. 1992, c 17, Schedule 1, item 94.

233. *Ovsyankin* (2022) A.R. 711, para. 34 (“The approach in the EU is, as in Canada, a factual one relating to whether the designated person in question has *de facto* control over the entity”).

234. *Id.* paras. 4-7.

235. *Id.* paras. 8-10.

236. *Id.*

237. *Id.* para. 14.

238. *Id.* para. 42 (it is unclear whether the finding of “functional control” was in addition to or further to the UK test).

239. *Id.* paras. 33-34.

240. *Id.* para. 43.

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FOOD, AGRICULTURE & CANNABIS

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This Article reviews significant international legal developments made in the areas of food, agriculture, and cannabis law in 2022.

I. Cannabis Legislation

In November 2021, the International Law Section hosted the first international legal conference on cannabis.¹ It was an opportunity for global leaders in the cannabis legal arena to meet and exchange ideas.² Cannabis is an emerging industry that, as with any business, intersects all areas of legal practice.³ According to BDSA, the international cannabis industry is expected to be a \$26 billion dollar market by 2026.⁴ Accordingly, newly enacted laws and regulations materialize with regularity across the globe, and we are just at the beginning of a wave of developing case law as more

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1. *American Bar Association: International Law Section-The Global Business of Cannabis Conference: Interview with Susan Burns*, FRUIT SLABS (Oct. 27, 2021), <https://fruitslabs.com/slabs-blog/2021/10/27/american-bar-association-international-law-section-the-global-business-of-cannabis-conference-interview-with-susan-burns> [<https://perma.cc/NRX2-NULT>].

2. *Id.*

3. *Id.*

4. *BDSA Reports Global Cannabis Sales Will Grow 10% in 2022; Forecasts \$57 Billion Market by 2026*, GLOB. NEWS WIRE (Sept. 13, 2022), <https://www.globenewswire.com/news-release/2022/09/13/2515042/0/en/BDSA-Reports-Global-Cannabis-Sales-Will-Grow-10-in-2022-Forecasts-57-Billion-Market-by-2026.html> [<https://perma.cc/E3L2-83VD>].

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businesses bring their legitimate disputes before judicial tribunals.⁵ The subject matter is intense and replete with intricacies and nuances that are more easily understood with a medical and scientific background. But the purpose of this compendium is to provide a birds-eye view of some global developments.

II. South America

A. URUGUAY

Uruguay was the first country to legalize cannabis in Latin America.⁶ The government controls the program to keep prices low to discourage the illicit cannabis market because the primary policy driving cannabis legislation in Uruguay was the impact of the preceding illegal drug trade.⁷ Forty grams is the maximum possession quantity for personal use.⁸ Individuals must be at least eighteen years old and registered in a national database to track their consumption.⁹ Throughout the market, Uruguay bans all forms of cannabis advertising, promotion, and sponsorship.¹⁰

Uruguay created the Institute for the Regulation and Control of Cannabis (IRCCA) to regulate the planting, cultivation, harvesting, production, processing, storage, distribution, and sale of cannabis.¹¹ The IRCCA ensures the government has a competitive edge over illegal suppliers by ensuring government cannabis rates undercut those of the black market.¹² Further, the IRCCA mandates the National Public Education System to enact policies to educate elementary, secondary, and vocational education levels to prevent harmful cannabis use.¹³

5. X Malena Castaldi & Felipe Llambias, *Uruguay Becomes First Country to Legalize Marijuana Trade*, REUTERS (Dec. 10, 2013), <https://www.reuters.com/article/us-uruguay-marijuana-vote/uruguay-becomes-first-country-to-legalize-marijuana-trade-idUSBRE9BA01520131211> [<https://perma.cc/879D-N6KN>].

6. Will Lees, *How Uruguay Became the First Country to Legalize Marijuana*, CULTURE TRIP (Mar. 26, 2018), <https://theculturetrip.com/south-america/uruguay/articles/how-uruguay-became-the-first-country-to-legalize-marijuana/> [<https://perma.cc/2532-2PL3>].

7. See, e.g., Ley No. 19172, *Marihuana y Sus Derivados Asamblea General [Marihuana y Sus Derivado]* Art. 1 (Uru.), http://archivo.presidencia.gub.uy/sci/leyes/2013/12/cons_min_803.pdf [<https://perma.cc/67HE-Q5GV>]; Guillermo Garat, *Un Siglo de Políticas de Drogas en Uruguay*, FRIEDRICH EBERT STIFTUNG-URUGUAY (Apr. 19, 2013), <https://library.fes.de/pdf-files/bueros/uruguay/10001.pdf> [<https://perma.cc/8S25-GYYJ>] (detailing Uruguay being used as a money-laundering base for Colombian and Mexican drug cartels).

8. Decreto-Ley, 31 de octubre de 1974, 14.294, 11 de noviembre de 1974, No. 19396 art. 31, at 100 (Uru.) [hereinafter D. L. No. 14.294].

9. Ley, 20 de diciembre de 2013, 19/172, 1 de julio de 2014, No. 19172 art. 14, at 86; art. 28, at 91 (Uru.) [hereinafter L. No. 19172].

10. *Id.* art. 11 at 10; art. 13 at 86.

11. *Id.* art. 17-18(A), at 88.

12. See *id.* art. 27(b), at 90.

13. *Id.* art. 10, at 86.

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Under Uruguay's home-consumption provision, individuals may keep, hold, store, or possess up to six cannabis plants in their homes each year, an amount which may not surpass 480 grams.¹⁴ Home growers are required to register with the IRCCA.¹⁵

Uruguay also permits cannabis clubs.¹⁶ Cannabis clubs must have between fifteen and forty-five members.¹⁷ The clubs and their members must register as civil organizations with the Ministry of Education and Culture and are under the control of the IRCCA.¹⁸ As with residential cultivation for self-consumption, members may not cultivate more than 480 grams a year.¹⁹ Excess yields must be reported and turned over to the IRCCA.²⁰

Problems associated with these clubs in Uruguay include regulatory compliance, financial stability, tolerance from society, and collective action dilemmas.²¹ For example, several cannabis clubs in Uruguay have experienced financial hardships because of underestimation of operation costs.²² Typical cost considerations for cannabis clubs include rent, gardening, administrative staff salaries, and security.²³ Additionally, neighbors have filed claims with the Police against some cannabis clubs.²⁴ These claims often result from a lack of publicly available information.²⁵

Uruguay permits some commercial cannabis sales.²⁶ Individuals may purchase up to ten grams of cannabis per week, ensuring retailers are not placed under undue stress by bulk-buyers.²⁷ The planting, growing, harvesting, and marketing of cannabis must be authorized by the IRCCA via license.²⁸ Licenses are obtained through a bidding process.²⁹

14. D. No. 14.294 art. 3(e), at 98.

15. Decreto, 6 de mayo de 2014, 120/014, 19 de mayo de 1974, No. 19172 art. 15, at 106 (Uru.) [hereinafter D. No. 120/014].

16. *Id.* art. 21, at 107; art. 29, at 108 (permitting civil associations of cannabis consumers to cultivate up to ninety-nine cannabis plants).

17. *Id.* art. 24, at 107.

18. *Id.* art. 21, at 107.

19. *Id.* art. 29, at 108.

20. STEVE ROLLES & GEORGE MURKIN, *HOW TO REGULATE CANNABIS A PRACTICAL GUIDE* 242 (3d ed. 2014), https://transformdrugs.org/assets/files/PDFs/How-to-Regulate-Cannabis_3rd_ed.pdf [<https://perma.cc/8XJY-XZU4>].

21. Rosario Queirolo et al., *Cannabis Clubs in Uruguay: The Challenges of Regulation* 34 *INT'L J. DRUG POL'Y* 41, 46 (2016).

22. *Id.*

23. *Id.*

24. *Id.*

25. *See id.*

26. *See* L. No. 19172 art. 17-18(A), at 88.

27. X D. No. 120/014 art. 2(v), at 102.

28. *Id.*

29. Gabriel Pereira, *Casi 5,000 Autocultivadores Registrados y 50 Farmacias Prontas para Iniciar Venta de Marihuana*, *EL OBSERVADOR* (May 31, 2016), <https://www.elobservador.com.uy/nota/casi-5-000-autocultivadores-registrados-y-50-farmacias-prontas-para-iniciar-venta-de-marihuana-2016531500> [<https://perma.cc/H6XP-UJ3D>].

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Uruguay's cannabis law is an example of the government monopoly model with licensed distributors because the government controls all production and governs the price, quality, and maximum production volume of cannabis.³⁰ The government contracts and monitors private companies to produce cannabis on state land.³¹ The private companies then "sell the cannabis to the government, which then distributes the [cannabis] via licensed pharmacies to registered users."³²

B. ARGENTINA

Argentina legalized the use of cannabis for medical purposes in 2017.³³ Unlike in North America, Argentina allows the plant to be home grown and grown by patient collectives rather than limiting national cultivation bids to big companies.³⁴ This non-restrictive standard allows people with medical prescriptions to grow and cultivate Cannabis Sativa L. without being penalized.³⁵

Argentina also took a big step in 2020 when it decriminalized self-cultivation of plants in homes or private spaces for personal use.³⁶ Recreational use, as it is commonly understood, is still illegal in Argentina.³⁷

Argentina's most recent advance occurred on May 5, 2022, when the Chamber of Deputies of the Argentine Congress passed a law regulating the medicinal cannabis and industrial hemp industry,³⁸ which had previously operated legally but without regulation. The new law established a legal framework for the cultivation, production, distribution, and commercialization of cannabis products, derivatives, and seeds and advanced a whole-plant strategy for hemp designed to exploit the crop for its health and environmental benefits in addition to its economic development potential.³⁹

30. L. No. 19172 art. 2, at 83.

31. Rolles & Murkin, *supra* note 20, at 236.

32. *Id.* at 240.

33. Law No. 27350, Apr. 19, 2017, [X] B.O. 1 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/270000-274999/273801/norma.htm> [<https://perma.cc/Y6E6-XDU3>].

34. See *Argentina Creates Regulations for Cannabis-Based Medical Products*, HIGH TIMES (Apr. 13, 2022), <https://hightimes.com/news/argentina-creates-regulations-for-cannabis-based-medical-products/> [<https://perma.cc/A4RC-KK7H>].

35. Manuel Lobato, *The Current Situation in Argentina and Brazil Regarding Cannabis*, MOELLER (last visited Feb. 27, 2023), <https://moellerip.com/the-current-situation-in-argentina-and-brazil-regarding-cannabis/> [<https://perma.cc/3MXS-DFXA>].

36. Decree No. 883/2020, Nov. 12, 2020, [X] B.O. 1, <https://www.boletinoficial.gob.ar/detalleAviso/primera/237208/20201112> [<https://perma.cc/W76D-A5Z8>].

37. See, e.g., *id.*; Luke Sholl, *Legal Status of Marijuana in Argentina*, CANNA CONNECTION (Aug. 13, 2020), <https://www.cannaconnection.com/blog/14858-legal-status-marijuana-argentina> [<https://perma.cc/2J9T-PKXW>].

38. Law No. 27669, May 5, 2022, [X] B.O. 4 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/365000-369999/365303/norma.htm> [<https://perma.cc/Q44P-5QGL>].

39. *New Hemp and Medicinal Cannabis Law in Argentina is 'Triumph Against Hypocrisy'*, HEMP TODAY (June 2, 2022), <https://hemptoday.net/new-hemp-and-medicinal-cannabis-law-in->

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As part of the regulatory process, this law grants licenses to each segment of the production chain and establishes the legal formalities for granting them.⁴⁰ It also establishes the control mechanisms that govern licensees.⁴¹ The law established the Regulatory Agency of the Hemp and Medicinal Cannabis Industry (ARICCAME in Spanish⁴²) as the governing agency and overseer of other regulatory bodies involved in the production chain.

C. COLOMBIA

The Colombian government decriminalized personal use of cannabis and possession of up to twenty grams in in 2012,⁴³ although cannabis use by adults is not legal in Colombia. The 2012 change did not legalize the purchase or sale of cannabis, but it removed a potential prison sentence of sixty-four months.⁴⁴

Three years later, the Constitutional Court in Colombia upheld the decriminalization portion of the 2012 law.⁴⁵ Under that law, people caught with less than twenty-two grams of marijuana for personal use would not be arrested or prosecuted but could be referred to treatment.⁴⁶ The law also decriminalized the possession of other drugs, but the amounts associated with decriminalization remain unclear.⁴⁷

In 2015, Colombia established a medical cannabis program⁴⁸ to allow for research and product development, as well as growing, processing, importing, or exporting cannabis and its derivatives for medical and scientific use.

The most recent development in the cannabis regulatory framework in Colombia happened in November 2022, when the senate approved a cannabis legalization bill⁴⁹ to allow adult use with some restrictions on

argentina-is-triumph-against-hypocrisy/#:~:text=Fern%C3%A1ndez%20of%20Argentina-,New%20hemp%20and%20medicinal%20cannabis,Argentina%20is%20'triumph%20against%20hypocrisy'&text=Share%20this%3A,President%20Alberto%20Fern%C3%A1ndez%20last%20week [https://perma.cc/YKZ8-RK7Q].

40. *See id.*

41. *Id.*

42. *Agencia Regulatoria de la Industria del Cáñamo y del Cannabis Medicinal (ARICCAME)*, ARG. MINISTRY ECON., <https://www.argentina.gob.ar/ariccame> [https://perma.cc/UX94-8QKX] (last visited Feb. 25, 2023).

43. Maurice Veldman, *Cannabis in Colombia – Laws, Use, and History*, SENSE SEEDS (Sept. 9, 2021), <https://senseseeds.com/en/blog/countries/cannabis-in-colombia-laws-use-history/> [https://perma.cc/4NQF-AYD5].

44. Jessica Reilly, *Is Weed Legal in Colombia?*, CANNIGMA (June 19, 2022), <https://cannigma.com/regulation/cannabis-laws-colombia/> [https://perma.cc/S5TH-LSJB].

45. Corte Suprema de Justicia [C.S.J.] [Supreme Court], junio 17, 2015, S.P: P. Salazar Cuéllar, Casación 44891, G.C. t. 1, 10 (Colom.).

46. *See id.*

47. *See id.*

48. L. 17/87, julio 6, 2016, DIARIO OFICIAL [D.O.] (Colom.).

49. *See* D. 029/23, enero 2023, DIARIO OFICIAL [D.O.] (Colom.).

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possession and public consumption in schools and certain public spaces.⁵⁰ The bill also calls for public education campaigns and the promotion of substance misuse treatment services.⁵¹ Legislators have six months to pass the regulations.⁵²

II. Latin America

A. MEXICO

In 2018, Mexico's Supreme Court declared Mexico's prohibition on personal possession and cultivation of cannabis unconstitutional and ordered the Mexican congress to legalize recreational use within ninety days of the Court's action.⁵³ The Supreme Court extended the deadline several times, but lawmakers failed to formally end prohibition by April 30, 2021, the final extension date.⁵⁴ In response, the Supreme Court voted to eliminate the absolute prohibition on the use of recreational cannabis, thereby resolving its previous general declaration of unconstitutionality.⁵⁵

The Supreme Court's decision allows the Ministry of Health to authorize the planting, growing, harvesting, preparing, possessing, and transporting of cannabis by adults for their own cannabis and THC consumption for recreations purposes.⁵⁶ Under the declaration, the Comisión Federal para la Protección contra Riesgos Sanitarios [The Federal Commission for the Protection Against Sanitary Risks] (COFEPRIS) must establish guidelines "for the acquisition of seed" with the understanding that the authorization may not include "the permission to import, trade, supply, or any other act that refers to the sale and/or distribution of [cannabis]."⁵⁷ Last, the Supreme Court held that the COFEPRIS authorizations must specify that the recreational use of cannabis and THC should not occur in the presence of minors, in public places without consent, or while engaging in activities, including driving and operating dangerous machines, that may endanger third parties.⁵⁸

Lawmakers came close to passing the Ley Federal para la Regulación del Cannabis [Federal Law for the Regulation of Cannabis], the bill which

50. *Id.* at 4.

51. *Id.* at 4-5.

52. *Id.* at 5.

53. Declaratoria General de Inconstitucionalidad, Eliminación de la Prohibición Absoluta del Consumo Lúdico o Recreativo de Marihuana, Pleno de la Suprema Corte de Justicia [SCJN] 28-06-2021 (Mex.), at ¶ 6, n. 9., formato PDF, <https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emblematicas/resumen/2022-07/Resumen%20DGI%201-2018%20DGDH.pdf> (consultada el 27 de marzo de 2023) [<https://perma.cc/TX7G-QHC4>].

54. *Id.* at 27 n. 31.

55. *Id.* ¶ 73.

56. *Id.* ¶ 91.

57. *Id.* ¶ 92.

58. *Id.* ¶ 93.

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would have legalized recreational cannabis in Mexico.⁵⁹ The Senate approved a version of the bill, but the Chamber of Deputies revised the bill, sending it back to the Senate for final consideration.⁶⁰ The Senate did not pass the amended bill before the end of the congressional session on April 30, 2021.⁶¹

The most recent version of the bill would have regulated cannabis production for recreational use and research and hemp production for industrial use.⁶² Recreational use is divided into three categories of production: (1) home-cultivation for self-consumption, (2) production by cannabis associations for consumption by associates, (3) and production for commercialization and sale.⁶³ In a previous version, the bill's explicit goal was to preserve public health and empower marginalized and Indigenous communities.⁶⁴ Under the current version, these goals are only implicit.⁶⁵

Under the 2021 version of the bill, possession of more than twenty-eight but fewer than 200 grams would have been considered an infraction punishable by a fine.⁶⁶ Possession of 200 grams or more would have been a crime punishable by jail time.⁶⁷

To date, all Mexican legislative and regulatory bodies have not advanced cannabis legalization on the agenda.⁶⁸ Prior to the beginning of the Fall 2022 legislative session, Senate Majority Leader Ricardo Monreal, an advocate for reform, said that enacting regulations for cannabis would be

59. See Press Release, SCJN, SCJN Approves Extending the Term Extension Granted to the Congress of the Union in the General Declaration of Unconstitutionality 1/2018 Relating to the Decriminalization of the Recreational Use of Marijuana (Dec. 10, 2020).

60. *Id.*

61. See *id.*

62. See, e.g., Bulletin, Chamber of Deputies, The Chamber of Deputies Approved, in General, the Opinion Issued by the Federal Law for the Regulation of Cannabis, (Mar. 10, 2021); Erick Hernández Gallego & Nancy Guillén Espinosa, *Mexican Senate Approves New Provisions and Amendments for the Regulation of Cannabis (Marijuana) in Mexico*, NAT'L L. REV. (Dec. 11, 2020), <https://www.natlawreview.com/article/mexican-senate-approves-new-provisions-and-amendments-regulation-cannabis-marijuana> [<https://perma.cc/K6GY-FML2>].

63. See *id.*

64. Ley Federal para la Regulación del Cannabis, art. 1 § I, art. 5 § X, Diario Oficial De La Federación [DOF] (2020), https://cannabis.senado.gob.mx/images/pdf/anteproyecto_LRC.pdf [<https://perma.cc/7HHM-M7WW>] (stating goals are (1) to empower Indigenous people and communities that were marginalized or “were affected by the prohibitive system or are in a situation of vulnerability or disadvantage in activities related to the sowing, planting, cultivation, and harvest of cannabis and its derivatives” and (2) to regulate “the use of cannabis and its derivatives, under the approach of public health.”).

65. See *id.*

66. *Id.* art. 30, ¶ 3.

67. *Id.*

68. See Kyle Jaeger, *Mexico Is ‘Falling Behind’ Other Countries On Marijuana Legalization, Top Senator Says, But Congress Will Prioritize Reform In New Session*, MARIJUANA MOMENT (Aug. 31, 2022), <https://www.marijuanamoment.net/mexico-is-falling-behind-other-countries-on-marijuana-legalization-top-senator-says-but-congress-will-prioritize-reform-in-new-session/> [<https://perma.cc/ZRG3-G4BT>].

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among the top legislative priorities of the Mexican congress in the new session.⁶⁹ Other leaders have said the same many times before.⁷⁰

B. COSTA RICA

After several months of discussion between the legislative and executive powers, partial vetoes by the president, and expressions of public opinion, on March 2, 2022, the government of Costa Rica approved Law N. 10113,⁷¹ which (1) allows use of cannabis and its derivatives for medical and therapeutic purposes and (2) authorizes the production, industrialization, and commercialization of hemp and its derivatives for industrial and food use. The law sought to promote the economic and social development of Costa Rica, particularly in rural areas, by encouraging companies and individuals to produce, industrialize, and market hemp and medicinal cannabis.⁷² This law was the entry point for hemp-related regulations enacted in September 2022.⁷³

Costa Rica differentiated hemp or “non-psychoactive cannabis,” as the law calls it, from medical marijuana, or “psychoactive cannabis.”⁷⁴ The concept in differentiation is essentially the same as in the United States, in that, while hemp and medical marijuana derive from the same plant, the percentage of tetrahydrocannabinol (THC) content distinguishes the categories from one another.⁷⁵ In Costa Rica, if the cannabis plant and any part of it (including seeds, derivatives and extracts) contains one percent or less of THC (which, by law, explicitly includes Delta nine, Delta eight, and Delta ten) on a dry weight basis, it is hemp; if it contains more than one percent THC, it is what is commonly known as “marijuana.”⁷⁶

This one percent number is higher than in the United States and other jurisdictions, which use 3/10 of a percent delta nine THC as the dividing line.⁷⁷ So, businesses in Costa Rica have more flexibility to produce and use the plant in a broader way, and the inclusion of derivatives in the definition,

69. Kyle Jaeger, *Top Mexican Senator Says There's Agreement to Prioritize Marijuana Legalization Legislation This Session*, MARIJUANA MOMENT (Nov. 9, 2021), <https://www.mmjdaily.com/article/937> Bulletin No. 60722403/mexico-cannabis-legalization-legislation-is-a-priority/[<https://perma.cc/H2SH-ZQUK>].

70. See Jaeger, *supra* note 68.

71. See COD. Civ. L. No. 10113, *Ley Del Cannabis Para Uso Medicinal Y Terapéutico Y Del Cáñamo Para Uso Alimentario E Industrial*, SISTEMA COSTARRICENSE DE INFORMACIÓN JURÍDICA (Mar. 2, 2022) (Costa Rica), http://www.pgrweb.go.cr/scij/Busqueda/Normativa/Normas/nrm_texto_completo.aspx?param1=NRTC&nValor1=1&nValor2=96518&nValor3=129338&strTipM=TC [<https://perma.cc/YFS4-9EDC>].

72. *Id.* art. 1.

73. See *id.*

74. *Id.* art. 2 ¶¶ 2-3.

75. Compare *id.* with Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490, (2018) [hereinafter The 2018 Farm Bill].

76. See *Ley Del Cannabis Para Uso Medicinal Y Terapéutico Y Del Cáñamo Para Uso Alimentario E Industrial*, *supra* note 71, art. 2.

77. See 2018 Farm Bill, *supra* note 75.

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i.e., Delta eight, nine and ten, provides needed clarity on the types of cannabinoids that are included.⁷⁸

On September 7, 2022, Costa Rica passed regulations on hemp production, cultivation, transportation, manufacture, and other related activities,⁷⁹ and on September 30, 2022, the country passed regulations on medical marijuana.⁸⁰ That said, even though the country is open for cannabis business, companies must follow requirements such as having an authorization to produce hemp products or a license for producing medical marijuana to stay in the market.⁸¹

An attractive feature of Costa Rica's approach is its free zone regimes, provided to incentivize businesses to invest in specific areas that meet specified qualifications.⁸² The most important benefit of the free zone regimes is the ability to import containers, raw materials, and other inputs for production without paying taxes.⁸³ A company operating under a free zone regime in Costa Rica is exempt from sales and consumption tax on the purchase of local goods and services and from paying income tax, depending on the category of the business and its geographical location.⁸⁴ The free zone incentive is expected to be used by cannabis businesses to take advantage of the significant cost and tax benefits.⁸⁵

These incentives open a broad world of possibilities for larger cannabis and hemp companies that want to invest in Costa Rica in accordance with the new law and coming regulations, while smaller businesses may benefit

78. See *Ley Del Cannabis Para Uso Medicinal Y Terapéutico Y Del Cáñamo Para Uso Alimentario E Industrial*, *supra* note 71.

79. Decree No. 43724, Regulations to Law No. 10113, Law on Cannabis for Medicinal and Therapeutic Use and Hemp for Food and Industrial Use (Sept. 7, 2022), http://www.pgrweb.go.cr/scij/Busqueda/Normativa/Normas/nrm_texto_completo.aspx?param1=NRTC&nValor1=1&nValor2=97800&nValor3=132554&strTipM=TC [https://perma.cc/U74H-SDCM] (Costa Rica).

80. Decree No. 43724, Regulations to Law No. 10113, Law on Cannabis for Medicinal and Therapeutic Use and Hemp for Food and Industrial Use (Sept. 7, 2022), http://www.pgrweb.go.cr/scij/Busqueda/Normativa/Normas/nrm_texto_completo.aspx?param1=NRTC&nValor1=1&nValor2=97800&nValor3=132554&strTipM=TC [https://perma.cc/U74H-SDCM] (Costa Rica).

81. See *id.*

82. See, e.g., *id.*; see also Steve Colantuoni, *How Does the Free Zone Regime in Costa Rica Work?*, THE CENT. AM. GRP. (Apr. 29, 2020), <https://www.thecentralamericangroup.com/free-zone-regime-in-costa-rica/#:~:text=specifically%2C%20the%20free%20trade%20zone%20regime%20in%20Costa,customs%20and%20tax%20law%20in%20a%20flexible%20manner> [https://perma.cc/83CK-VAGP].

83. See *Costa Rica's Free Zone Regime: An Attractive Market?*, TMF GRP. (May 27, 2022), <https://www.tmf-group.com/en/news-insights/articles/2022/may/costa-rica-free-trade-zone/> [https://perma.cc/Y727-MB56].

84. Steve Colantuoni, *How Does the Free Zone Regime in Costa Rica Work?*, THE CENT. AM. GRP. (Apr. 29, 2020), <https://www.thecentralamericangroup.com/free-zone-regime-in-costa-rica/#:~:text=specifically%2C%20the%20free%20trade%20zone%20regime%20in%20Costa,customs%20and%20tax%20law%20in%20a%20flexible%20manner> [https://perma.cc/83CK-VAGP].

85. See *id.*

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from a regulatory regime that levels the playing field and allows them to compete with larger companies.⁸⁶

III. The United States and Canada

A. THE UNITED STATES

Unlike other countries that define marijuana as “cannabis” and hemp-derived cannabinoids as “hemp,” in the United States the term “cannabis” denotes a plant that is further divided on the basis of its percentage of THC.⁸⁷ In 2014, The Agricultural Act of 2014, a/k/a “The Farm Bill,”⁸⁸ defined industrial hemp as “the plant *Cannabis sativa* L. or any part of such plant, whether growing or not with a delta nine tetrahydrocannabinol concentration of not more than 3/10 of a percent on a dry weight basis.” In the Farm Bill, hemp was excepted from the definition of marijuana under Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970, a/k/a the Controlled Substances Act (CSA), and its definition was amended to include “the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers”⁸⁹

The Farm Bill also carved out requirements that state and tribal governments obtain approval of their own regulatory plans.⁹⁰ The Farm Bill specifically preserved the FDA’s authority over hemp products, including over food, dietary supplements, human and veterinary drugs, and cosmetics, to help ensure consumer access to safe and accurately labeled hemp products.⁹¹

Marijuana, or any cannabis that contains more than 3/10 of a percent THC, is still a Schedule I substance in the Controlled Substances Act,⁹² even though it has multiple accepted medical uses and is widely prescribed in thirty-seven of the fifty states.⁹³ Adult-use marijuana has been legalized in twenty-two states, Washington DC, and Guam.⁹⁴

Because marijuana is not legal at the federal level, however, state-legal marijuana businesses face several disadvantages. National banks will not open accounts for marijuana-related businesses; most tax deductions for

86. *See id.*

87. *See* H.R. 2642, 113th Cong. (2014).

88. *Id.*

89. Agricultural Act of 2014 (The Farm Bill), 7 U.S.C. § 1639(1).

90. *Id.* § 1639(p).

91. *Id.* § 1639(c).

92. Schedule I drugs, substances, or chemicals are defined as drugs with no currently accepted medical use and a high potential for abuse. Some examples of Schedule I drugs are heroin, lysergic acid diethylamide (LSD), marijuana (cannabis), 3,4-methylenedioxymethamphetamine (ecstasy), methaqualone, and peyote. *See* 21 U.S.C.A. § 812.

93. *States with Legalized Smoking and/or Vaping of Marijuana*, AM. NONSMOKER’S RTS. FOUND. (Jan. 1, 2023), <https://no-smoke.org/wp-content/uploads/pdf/marijuana-states-legal-map.pdf> [<https://perma.cc/E2E6-TMQR>].

94. *Id.*

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business expenses are disallowed pursuant to Section 280E of the Internal Revenue Code; and the United States Patent and Trademark Office routinely rejects trademark applications because marijuana is illegal.⁹⁵ Interstate commerce is illegal, even between two states in which marijuana is legal,⁹⁶ and most states have complicated and expensive regulatory regimes.

Much like some Mexican legislators, American legislators campaign on, and hold press conferences about, passing financing and legalization laws, but so far, nothing has come of it—in spite of the fact that bills have been introduced in both chambers.⁹⁷ This failure to act leaves each state to its own devices, complicating matters for multi-state operators. But an economically advantageous niche for hemp businesses has developed.

B. CANADA

In 2018, Canada passed Bill C-45, An Act Respecting Cannabis.⁹⁸ The Act allows adults eighteen years or older—depending on the province—to possess up to thirty grams of legal cannabis in public, to share up to thirty grams with older adults, to purchase cannabis products from a provincial or territorial retailer, and to grow up to four plants per residence for personal use from licensed seeds or seedlings.⁹⁹ The Act prohibits packaging or labeling that, among other things, may be appealing to youths; depicts persons, characters, or animals; or associates cannabis with, or evokes emotion about, “a way of life such as one that includes glamour, recreation, excitement.”¹⁰⁰ Individuals must be licensed by Health Canada to grow cannabis for sale.¹⁰¹ “Fees for application, security, and license vary from

95. Iran Hopkins, *Cannabis Under Federal Law—What’s the Fuss About Section 280E?*, BLOOMBERG TAX: TAX INSIGHTS AND COMMENT. (Apr. 21, 2022), <https://news.bloombergtax.com/tax-insights-and-commentary/cannabis-under-federal-law-whats-the-fuss-about-section-280e> [<https://perma.cc/L7V4-JQMD>].

96. Andrew Smith, *The Dormant Commerce Clause and Marijuana: Does Congress Control Industries they Hold Out to be Illegal?*, COLLINS LACY: NEWS (Nov. 22, 2022), <https://www.collinsandlacy.com/the-dormant-commerce-clause-and-marijuana-does-congress-control-industries-they-hold-out-to-be-illegal/#:~:text=interstate%20transportation%20of%20Marijuana%20is,through%20has%20legalized%20the%20substance> [<https://perma.cc/79U3-DUGZ>].

97. For example, the SAFE Banking Act, introduced by Congressman Perlmutter (H.R. 1996, 117th Cong. (as passed by the House 2021)), and the Marijuana Opportunity Reinvestment and Expungement act introduced by Congressman Nader (H.R. 3617, 117th Cong. (as passed by the House 2022)). See generally H.R. 1996, 117th Cong. (2021); H.R. 3617, 117th Cong. (2022).

98. See Cannabis Act, S.C. 2018, C. 45 (Can.).

99. Cannabis Act, S.C. 2018, C. 16, §§ 8, 9, 12; see also *Cannabis Legalization and Regulation*, CAN. DEP’T OF JUST. (Oct. 17, 2019), <https://www.justice.gc.ca/eng/cj-jp/cannabis/> [<https://perma.cc/F6Q8-LR22>].

100. See, e.g., *id.*

101. See *Types of cannabis and industrial hemp licenses*, GOVT. OF CAN. (last modified Jan. 9, 2023), <https://www.canada.ca/en/health-canada/services/drugs-medication/cannabis/industry-licences-applicants/applying-licence.html> [<https://perma.cc/4355-S9K7>].

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approximately \$5,500 (Canadian) for micro-processing/cultivation to approximately \$28,000 for standard cultivation and sale.”¹⁰²

The Cannabis Act is silent with respect to First Nations and Indigenous communities. The Indigenous Navigator service, however, supports Indigenous individuals through the federal licensing process by providing assistance from professionals who are knowledgeable about Indigenous priorities, communities, and circumstances.¹⁰³

Although the Act applies to all provinces, individual provinces regulate internal distribution and consumption.¹⁰⁴ So, provinces and territories may increase the minimum age requirement, lower the personal possession limit, restrict where adults can consume cannabis, and implement additional rules for cannabis cultivation at home.¹⁰⁵

Variations among provinces are wide. Manitoba, for example, has the highest prices and strictest regulations on cannabis.¹⁰⁶ Public use of cannabis is prohibited there, and home-growing is reserved for medical cannabis users.¹⁰⁷ Quebec permits cannabis sales only to consumers twenty-one years of age or older.¹⁰⁸ Home-growing is forbidden in Quebec.¹⁰⁹ These restrictions likely have made the unregulated market more appealing to consumers in Quebec.¹¹⁰ Ontario took a different approach by implementing a lottery system to award the first two rounds of retail licenses, placing a cap on legal dispensaries,¹¹¹ allowing public consumption, and permitting home-growing.¹¹² British Columbia allows municipalities to

102. *Cannabis Fees Order Guide*, GOV'T OF CAN. (last modified Oct. 29, 2018), <https://www.canada.ca/en/health-canada/services/publications/drugs-health-products/cannabis-fees-order/guide.html#a5.1> [<https://perma.cc/VY4H-3QFB>].

103. See *Cannabis-Related Resources for First Nations, Inuit, and Métis*, GOV'T OF CAN. (last updated July 29, 2021), <https://www.canada.ca/en/health-canada/services/drugs-medication/cannabis/resources/first-nations-inuit-metis.html> [<https://perma.cc/KB3K-CME5>].

104. Cannabis Act, S.C. 2018, C. 16, *supra* note 98; see also *supra* note 99 (explaining how the federal government sets requirements for cannabis producers and industry-wide rules and standards, while the provinces and territories develops and enforce systems “to oversee the distribution and sale of cannabis.”).

105. *Cannabis Fees Order Guide*, *supra* note 102.

106. *Weed's Worst to First*, NAT'L POST (July 11, 2020), <https://www.pressreader.com/canada/national-post-national-edition/20200711/282557315501792> [<https://perma.cc/U29N-TKYR>].

107. *Id.*; *Cannabis in Manitoba*, GOV'T OF MAN., <https://www.gov.mb.ca/cannabis/index.html> [<https://perma.cc/F5ZM-H3P6>] (last visited Mar. 7, 2023).

108. *Weed's Worst to First*, *supra* note 106; *The Legislation on Cannabis*, GOV'T OF QUE. <https://encadrementcannabis.gouv.qc.ca/en/loi/loi-encadrant-le-cannabis/> [<https://perma.cc/LQH3-46XV>] (last visited Feb. 28, 2023).

109. *Weed's Worst to First*, *supra* note 106; *The Legislation on Cannabis*, GOV'T OF QUE. <https://encadrementcannabis.gouv.qc.ca/en/loi/loi-encadrant-le-cannabis/> [<https://perma.cc/LQH3-46XV>] (last visited Feb. 28, 2023).

110. *Weed's Worst to First*, *supra* note 106.

111. Regulators later reversed the cap on legal dispensaries. *Id.*

112. See, e.g., *id.*; *Cannabis Laws*, GOV'T OF ONT. (June 29, 2022), <https://www.ontario.ca/page/cannabis-laws> [<https://perma.cc/YLY3-TQC5>].

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opt out of cannabis retail stores.¹¹³ Alberta restricts cannabis sales to those eighteen years and older, allows private-sector participation in the industry, and allows public consumption.¹¹⁴ Newfoundland and Labrador have the most relaxed regulations.¹¹⁵ The table below shows the regulations implemented by each province.¹¹⁶

Canada's current regulation pardons people convicted for possession of up to thirty grams of cannabis instead of automatically expunging their record.¹¹⁷ In 2019, a proposed amendment to this procedure, which would allow for full expungement of certain cannabis-related convictions, failed.¹¹⁸

While Canada has waived its application fee and expedited its application pardon process, applicants must still pay for the police or court documents and fingerprints required to in the application process.¹¹⁹ So, even though the fee is waived, the "most vulnerable and discriminated against members of communities in Canada continue to be disenfranchised."¹²⁰ "According to the Parole Board of Canada, only 436 applications for cannabis record

113. See, e.g., *Weed's Worst to First*, supra note 106; *Non-Medical Cannabis Licenses*, GOV'T OF B.C., <https://www2.gov.bc.ca/gov/content/employment-business/business/liquor-regulation-licensing/non-medical-cannabis-licenses> [<https://perma.cc/4949-4DJ6>] (last visited Feb. 28, 2023).

114. See, e.g., *Weed's Worst to First*, supra note 106; *Cannabis Legalization in Alberta*, GOV'T OF ALTA., <https://www.alberta.ca/cannabis-legalization.aspx> [<https://perma.cc/NGA6-N72W>] (last visited Mar. 7, 2023).

115. See, e.g., *Weed's Worst to First*, supra note 106; *Your Cannabis Questions ANSWERED*, GOV'T OF NFLD., <https://www.gov.nl.ca/cannabis/> [<https://perma.cc/N4Y9-Z8TL>] (last visited Mar. 7, 2023).

116. *Authorized Cannabis Retailers in the Provinces and Territories*, GOV'T OF CAN. (last modified Oct. 26, 2022), <https://www.canada.ca/en/health-canada/services/drugs-medication/cannabis/laws-regulations/provinces-territories.html> [<https://perma.cc/QRU9-TWTV>].

117. See, e.g., An Act to Provide No-Cost, Expedited Record Suspensions for Simple Possession of Cannabis, S.C., 2019 c. 20 (Can.); Daniel LeBlanc, *Canadians Convicted of Simple Cannabis Possession Will Soon be Able to Apply for a Pardon*, THE GLOBE & MAIL (last updated Oct. 17, 2018), <https://www.theglobeandmail.com/cannabis/article-amnesty-program-for-canadians-convicted-of-simple-cannabis-possession/> [<https://perma.cc/QSY9-AC7G>].

118. Expungement of Certain Cannabis-related Convictions Act (Bill C-415), Can., 42d Parliament, 1st Sess. (2019), available at <https://www.parl.ca/DocumentViewer/en/42-1/bill/C-415/first-reading> [<https://perma.cc/6W3F-JT52>].

119. See, e.g., An Act to Provide No-Cost, Expedited Record Suspensions for Simple Possession of Cannabis, S.C., 2019 c. 20 (Can.); Amanda Connolly, *Canadians with Past Pot Convictions Won't Have to Pay or Wait to Apply for a Pardon*, GLOB. NEWS (last updated Oct. 18, 2018, 9:48 AM), <https://globalnews.ca/news/4563182/cannabis-pardon-marijuana-legalization-ralph-goodale/> [<https://perma.cc/25TZ-27MZ>].

120. Antonia Eliason & Robert Howse, *A Higher Authority: Canada's Cannabis Legalization in the Context of International Law*, 40 MICH. J. INT'L L. 327, 357 (2019).

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suspensions had been received at the federal level as of April 3, 2020.”¹²¹ Of those applications, only 238 suspensions were ordered.¹²²

Providence	Minimum Age	Home Growing	Home Storage Limit	Public Use	Model
Alberta ¹²³	18	Yes, four plants	None	Yes, some public places	Private licensed stores or Government-operated online store
British Columbia ¹²⁴	19	Yes, four plants. But cannot be visible from a public space	1,000 grams (2 lb. 3 ¼ oz)	Yes, some public places	Government-operated stores or government-operated online store
Manitoba ¹²⁵	19	No (only with a medical license)	None	No	Private licensed stores or privately operated online store

121. Jillian Kestler-D’Amours, *Canada’s Cannabis Pardon Program is Failing. Here’s Why*, LEAFLY (last updated July 28, 2020), <https://www.leafly.com/news/politics/canadas-marijuana-sentence-expungement-suspension-program-is-failing-heres-why> [https://perma.cc/D94U-4X6W] (explaining that the reason for the low number of applications is because individuals (1) have passed away, (2) have other convictions on their record, or (3) do not want to draw attention to their past conviction).

122. *Id.*

123. *Cannabis Legalization in Alberta*, *supra* note 114.

124. *Non-Medical Cannabis Licenses*, *supra* note 113.

125. *Cannabis in Manitoba*, *supra* note 107.

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Providence	Minimum Age	Home Growing	Home Storage Limit	Public Use	Model
New Brunswick ¹²⁶	19	Yes, four plants	None	No	Government-operated stores or government-operated online store
Newfoundland and Labrador ¹²⁷	19	Yes, four plants	None	No. Permitted on rented campsites, hotel rooms, or apartment units, subject to restrictions imposed by the owner or operator	Private licensed stores or government-operated online store
Northwest Territories ¹²⁸	19	Yes, four plants	None	Yes, permitted on trails, highways, streets, roads, and parks when they are not used for public events.	Government-operated stores or government-operated online store

126. *Cannabis in New Brunswick*, GOV'T OF N.B., <https://www2.gnb.ca/content/gnb/en/corporate/promo/cannabis.html> [<https://perma.cc/QDU6-HAJC>] (last visited Feb. 28, 2023).

127. *Your Cannabis Questions Answered*, *supra* note 115.

128. *Cannabis in the NWT*, GOV'T OF N.W.T., <https://www.eia.gov.nt.ca/en/cannabis> [<https://perma.cc/QMZZ-RJEB>] (last visited Feb. 28, 2023).

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Providence	Minimum Age	Home Growing	Home Storage Limit	Public Use	Model
Nova Scotia ¹²⁹	19	Yes, four plants	None	Yes, where tobacco may be smoked	Government-operated stores or government-operated online store
Nunavut ¹³⁰	19	Yes, four plants	150 grams (5 ¼ oz)	No, other than a designated cannabis lounge or permitted event	Government-operated stores or government-operated online store
Ontario ¹³¹	19	Yes, four plants	None	Yes, some public places	Private licensed stores or government-operated online store
Prince Edward Island ¹³²	19	Yes, four plants	None	No	Government-operated stores or government-operated online store

129. *Be in the Know About Legal Cannabis in Nova Scotia*, GOV'T OF N.S., <https://novascotia.ca/cannabis/> [<https://perma.cc/HHA4-MFJL>] (last visited Feb. 28, 2023).

130. *Cannabis*, GOV'T OF NU., <https://www.gov.nu.ca/finance/information/cannabis> [<https://perma.cc/58XH-JSWU>] (last visited Feb. 28, 2023).

131. *Cannabis Laws*, GOV'T OF ONT. (June 29, 2022), <https://www.ontario.ca/page/cannabis-laws> [<https://perma.cc/YLY3-TQC5>].

132. *Cannabis Policy, Legislation and Regulation*, GOV'T OF P.E.I., <https://www.princeedwardisland.ca/en/information/cannabis-policy-legislation-and-regulation> [<https://perma.cc/64VK-AQVN>] (last visited Feb. 28, 2023).

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Providence	Minimum Age	Home Growing	Home Storage Limit	Public Use	Model
Quebec ¹³³	21	No	150 grams (5 ¼ oz)	No	Government-operated stores or government-operated online store
Saskatchewan ¹³⁴	19	Yes, four plants	None	No	Private licensed stores or privately operated online store
Yukon ¹³⁵	19	Yes, four plants	None	No, with the potential to allow consumption in other spaces in the future	Government-operated stores or government-operated online store

IV. Europe

A few years ago, legislators of the European Union (“EU”) started to implement changes in EU law to legalize the production, possession, and use of cannabis for nonmedical purposes.¹³⁶ In July 2022, ministers from Germany, Luxembourg, and Malta met for a multilateral consultation on cannabis policy and drafted a joint statement¹³⁷ in which they noted that “the status quo is not a tenable option.” This was the first time that EU members

133. *The Legislation on Cannabis*, *supra* note 108.

134. *Cannabis in Saskatchewan*, GOV’T OF SASK., <https://www.saskatchewan.ca/government/cannabis-in-saskatchewan> [<https://perma.cc/WZG6-PQFL>] (last visited Feb. 28, 2023); *Cannabis Use in Saskatchewan*, GOV’T OF SASK., <https://www.saskatchewan.ca/government/cannabis-in-saskatchewan> [<https://perma.cc/RU5V-CHPE>] (last visited Feb. 28, 2023).

135. *Learn About Cannabis*, GOV’T OF Y., <https://yukon.ca/cannabis#cannabis-legalization> [<https://perma.cc/3P98-75FN>] (last visited Feb. 28, 2023).

136. See *Joint Statement, High level consultation on the regulation of cannabis for non-medical and non-scientific uses between the Federal Republic of Germany, the Grand Duchy of Luxembourg and the Republic of Malta*, GOV’T OF LUX. (July 15, 2022), <https://gouvernement.lu/dam-assets/documents/actualites/2022/07-juillet/15-lenert-tanson-canabis/joint-statement-high-level-consultation-on-cannabis-150722.pdf> [<https://perma.cc/5QTV-2VCQ>].

137. See generally *id.*

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jointly stated their views in the cannabis arena.¹³⁸ The joint statement resulted from previous discussions in countries such as Malta, which became the first EU member state to approve legislation regulating two supply channels for nonmedical cannabis, home cultivation, and cannabis social clubs in 2021.¹³⁹

Still, although most EU member countries have legalized medical marijuana and hemp, the biggest and current debates are regarding “supply architectures” for instance, how cannabis might be supplied, by whom, and under what conditions.¹⁴⁰ Luxembourg, for example, is seeking to regulate home cultivation, while the Netherlands is implementing an experiment that involves further development of the coffeshop model.¹⁴¹

A. THE NETHERLANDS

In the 1970s, the Netherlands issued a tolerance policy¹⁴² that classified cannabis as a soft drug that could be tolerated in specific premises called “coffee shops.”¹⁴³ The policy has become stricter and has been reformed several times, introducing significant changes such as age restrictions, stock amount limits (stores cannot have more than 500 grams total), and locations (not less than 350 meters from schools).¹⁴⁴ In recent years, the Netherlands has also experimented with a ‘weed pass,’¹⁴⁵ with which an individual could obtain weed only as a registered member at a specified coffee shop. The

138. See generally *id.*

139. THE CANNABIS SOCIAL CLUB (Mafalda Pardal ed., Routledge 2022).

140. Mafalda Pardal, *Cannabis Legalization in Europe: Planning Ahead*, RAND (Nov. 9, 2022), <https://www.rand.org/blog/2022/11/cannabis-legalization-in-europe-planning-ahead.html> [<https://perma.cc/WC9C-E6SS>].

141. See, e.g., Joseph Billions, *Luxembourg Legalizes Personal Cannabis Cultivation for Adults, But You Can't Sell It or Ship It to Someone Else*, CANNABIS (Oct. 27, 2021), <https://cannabis.net/blog/news/luxembourg-legalizes-personal-cannabis-cultivation-for-adults-but-you-cant-sell-it-or-ship-it-t> [<https://perma.cc/6MKE-TK78>]; *Netherlands to Experiment With Nonmedical Marijuana Commercial*, MJBIZ (Sept. 10, 2019) production <https://mjbizdaily.com/netherlands-advances-experiment-allowing-nonmedical-marijuana-commercial-production/> [<https://perma.cc/67VQ-NJGF>].

142. EUROPEAN MONITORING CENTRE FOR DRUGS AND DRUG ADDICTION, NETHERLANDS COUNTRY DRUG REPORT 2019 (June 2019), <https://www.emcdda.europa.eu/system/files/publications/11347/netherlands-cdr-2019.pdf> [<https://perma.cc/6RS5-KGW7>].

143. *Toleration Policy Regarding Soft Drugs and Coffee Shops*, GOV'T OF NETH., <https://www.government.nl/topics/drugs/toleration-policy-regarding-soft-drugs-and-coffee-shops> [<https://perma.cc/5YAA-ZHRR>] (last visited Feb. 28, 2023).

144. *Id.*

145. Mike Corder, *Dutch Govt Scraps 'Weed Pass' Designed to Keep Non-residents Out of Pot-selling Coffee Shops*, YAHOO!NEWS (Nov. 20, 2012), https://news.yahoo.com/dutch-govt-scraps-weed-pass-designed-keep-non-150016130.html?guce_referrer=AHR0cHM6Ly9kdWNrZHVja2dvLmNvbS8&guce_referrer_sig=AQAAACPCxxpk_fm6u9BXrGOiBIAE1gW7aQ6RgrL2LgbYwGJt7rPiDAnpqG36RgcDuqiQaMYwSPNF_DO6-JQrvOezAIth8ZRvrDceHPyQy4kfcCo4yvCLjTwhT9eXBDI9fBm9s15pQA-XUog-dBQnrcTIIkza8he0WwgVKutK9ncE2WnZ&guc_consent_skip=1677562311 [<https://perma.cc/7N3T-PRTM>].

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weed pass experiment led to more illegal trade on the street, so it was quickly stopped.¹⁴⁶

Currently, the Netherlands is implementing an “experiment” that introduces a closed chain of cannabis production and distribution to the coffeeshops, in an attempt to contain the unregulated supply of cannabis to these establishments.¹⁴⁷ But no major progress has been made, and the country is still evaluating its viability.

B. GERMANY

Medical cannabis has been legal in Germany since 2017 when the parliament voted to legalize it and require public health insurers to cover treatment.¹⁴⁸ Today, Western Europe’s most populous country is also the continent’s leading medical cannabis market, with more than 128,000 patients receiving medical cannabis in the country each year.¹⁴⁹ Despite Germany’s very expansive medical cannabis program, the country still has not legalized recreational cannabis. Possession, cultivation, import, export, and sale remains illegal in Germany, but people who are arrested with small amounts for personal use (around six to fifteen grams) do not face prosecution.¹⁵⁰

In October 2022, lawmakers actively pursued adult-use cannabis legalization and the launch of a regulated industry.¹⁵¹ The German government unveiled plans for legalization, though many details have yet to be worked out and must be squared with EU law before legislation is put forward. Although lawmakers are currently making their opening arguments to continental leaders, there have been a lot of strikes because

146. *An experiment with a closed cannabis chain -Advisory Committee Experiment Closed Cannabis Chain*, Gov’t of Neth. (June 20, 2018), <https://www.government.nl/documents/reports/2018/06/20/an-experiment-with-a-closed-cannabis-chain> [https://perma.cc/B4BG-48GY].

147. *Controlled cannabis supply chain experiment*, GOV’T OF NETH., <https://www.government.nl/topics/drugs/controlled-cannabis-supply-chain-experiment> [https://perma.cc/9UEQ-VRRX] (last visited Feb. 28, 2023).

148. Gesetz zur Änderung betäubungsmittelrechtlicher und anderer Vorschriften [Law Amending Narcotics Law and Other Provisions], BUNDESGESETZBLATT [FEDERAL LAW GAZETTE] Mar. 6, 2017, BGBl. I at 403, (Ger.), https://www.bgbl.de/xaver/bgbl/start.xav?start=%2F%2F*%5B%40attr_id%3D%27bgbl117s0403.pdf%27%5D#__bgbl_%2F%2F*%5B%40attr_id%3D%27bgbl117s0403.pdf%27%5D__1677604069743 [https://perma.cc/8YHM-MDDA].

149. Bethan Rose, *Recreational Cannabis Legalization in Germany? Medical Cannabis Businesses and Investors Hope So*, VERIHEAL (Apr. 1, 2022, 3:00 PM), <https://www.veriheal.com/blog/recreational-cannabis-legalization-in-germany-medical-cannabis-businesses-and-investors-hope-so/> [https://perma.cc/4L5J-6FF5].

150. Kathleen Schuster, *5 Facts about Cannabis Law in Germany*, DW (Mar. 10, 2018), <https://www.dw.com/en/5-facts-about-cannabis-laws-in-germany/a-42709969> [https://perma.cc/9T6J-P38J].

151. Nadine Schmidt, *German Government Paves Way for Legalization of Recreational Cannabis*, CNN (Oct. 27, 2022, 7:16 AM), <https://www.cnn.com/2022/10/27/europe/germany-cannabis-legalization-recreational-use-intl/index.html> [https://perma.cc/KMQ2-YLZZ].

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opinions are not consistent.¹⁵² Some say that legalization of cannabis will reduce drug crimes and bring safety to the people, while others think it will be the opposite. Conversations are ongoing, and Germany will definitely dictate, with the legalization conversation, the future of the EU if the rest of the countries follow their lead.

C. SWITZERLAND

In Switzerland, cannabis may be classified as a banned drug depending if the THC content exceeds one per cent (one percent). Switzerland sanctions the possession of a banned drug with a possible fine and even prosecution. On the other hand, if THC content is less than one percent, the products, including hemp flowers, scented oils, ointments, and tinctures, are allowed.¹⁵³ Switzerland also has enacted “tolerance” laws, which, among other things, permit the waiver of fines for possessing a small amount of cannabis (no more than ten grams) for personal consumption or supplying (but not selling) up to ten grams to an adult.¹⁵⁴

Since May 2021, Switzerland has permitted trials, subject to federal approval, with recreational cannabis to test the future panorama of cannabis consumption. This pilot recreational-use program will last for years, after which the country expects to have settled on a more permanent regulatory regime.¹⁵⁵

In the medical arena, Switzerland did not permit the use of regulated medical cannabis, prescribed by a doctor, until August 2022.¹⁵⁶ The new medical-use law also permits the export of medical cannabis for commercial purposes through authorization by Swissmedic, the Swiss surveillance authority for medicines and medical devices.¹⁵⁷

Switzerland has yet to address many issues related to marijuana: such as payment and insurance for the products, distribution, production, etc., but Switzerland is starting a trial program for adult use, aiming to provide information to regulate cannabis in the whole country by selling adult-use

152. Riham Alkousaa, *Germany to Legalize Cannabis Use for Recreational Purposes*, REUTERS (Oct. 26, 2022, 12:27 PM), <https://www.reuters.com/world/europe/germany-legalize-cannabis-use-recreational-purposes-2022-10-26/> [https://perma.cc/GPK6-N6V6].

153. *Cannabis*, CH.CH. <https://www.ch.ch/en/health/medicines-and-narcotic-substances/cannabis/#when-is-cannabis-an-illegal-drug> [https://perma.cc/N4DD-YP6F] (last visited Feb. 28, 2023).

154. *Id.*

155. *Pilot Trials With Cannabis*, FED.OFF. OF PUB. HEALTH SWITZ., <https://www.bag.admin.ch/bag/en/home/gesund-leben/sucht-und-gesundheit/cannabis/pilotprojekte.html> [https://perma.cc/E7E4-GTWW] (last visited Feb. 28, 2023).

156. Cédric Heeb, *Access to Medicinal Cannabis for Patients to be Simplified*, CANNABIS THERAPEUTICS (June 22, 2022), https://cannabis-therapeutics.ch/access-to-medicinal-cannabis-for-patients-to-be-simplified/?_gl=1*k5wp0a*_up*MQ.*_ga*MTg4NDA1NTI3OC4xNjc3NjA4NDQ5*_ga_R0WRQ8H9SL*MTY3NzYwODQ0OC4xLjAuMTY3NzYwODQ0OC4wLjAuMA [https://perma.cc/RC9Y-UXVU].

157. *See generally id.*

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cannabis products in Basel to around 400 volunteers and try to complete the new legislation.¹⁵⁸

158. Sarah Sinclair, *Switzerland's 'Weed Care' Trial of Adult-use Cannabis to Launch January 2023*, CANNABIS HEALTH (Dec. 13, 2022), <https://cannabishealthnews.co.uk/2022/12/13/switzerland-weed-care-trial-of-adult-use-cannabis-to-launch-january-2023/> [<https://perma.cc/3MV5-QWNK>].

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Latin America and Caribbean

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This article surveys significant legal developments in Latin America and the Caribbean in 2022.

I. Bolivia

A. REGISTRY OF COMMERCE AND ELECTRONIC GAZETTE OF THE REGISTRY OF COMMERCE

As of April 2022, the Servicio Plurinacional de Registro de Comercio (SEPREC) is the new institution in charge of the Registry of Commerce in Bolivia.¹ Previously, a private foundation² was in charge of this role, unlike the new state entity.

The start of operations of this new entity has brought with it the following amendments to the Commercial Registry:³

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1. See Law No. 1398, Oct. 1, 2021, Gaceta Oficial de Bolivia [G.O.B.] from 10.01.2021, <http://www.gacetaoficialdebolivia.gob.bo/normas/buscarFecha/2021-10-01/2021-10-01> [<https://perma.cc/UDJ7-3D76>] (Bol.); see also Supreme Decree No. 4596, Oct. 6, 2021, G.O.B. from 10.06.2021, <http://www.gacetaoficialdebolivia.gob.bo/normas/buscarFecha/2021-10-01/2021-12-01> [<https://perma.cc/Z3B4-5KSR>] (establishing the creation and operation of the new institution that manages the Bolivian Trade Registry SEPREC) (Bol.).

2. See Supreme Decree No. 2615, June 15, 2001, G.O.B. from 06.21.2001, <http://www.gacetaoficialdebolivia.gob.bo/normas/buscarFecha/2001-06-12/2001-06-15> [<https://perma.cc/LEL2-PER3>] (granting the concession of the Trade Registry to FUNDEMPRESA) (Bol.).

3. See Administrative Resolution SEPREC No. 024/2022, Mar. 28, 2022, SEPREC from 04.01.2022, <https://www.seprec.gob.bo/index.php/download/ra-seprecn024-2022/> [<https://perma.cc/N4TR-ZTBS>] (providing for the new Manual of Procedures of the Registry of Commerce) (Bol.).

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- (1) The implementation of digital citizenship as a requisite for initiating all registration procedures, a tool that is being gradually implemented throughout the structure of the Bolivian state;⁴
- (2) The possibility of carrying out procedures digitally, as well as correcting the observations in the same way;⁵
- (3) The possibility of signing documents and forms with a digital signature, even for notaries;⁶ and
- (4) A change in the identification number of the business registration, which is merged with the tax identification number.⁷

Likewise, the following elements are highlighted in relation to the Electronic Gazette of the Registry of Commerce:⁸

- (1) The procedure for making publications in the Gazette is modified, and company representatives must have a user profile related to the corporate type of their company.⁹
- (2) The types of publications that can be made in the Gazette are diverse, and include annual reports; capital increases and reductions; address changes; summons to corporate meetings; transformations, mergers, and acquisitions; and others.¹⁰

B. REGULATION OF PRE-SALES REAL ESTATE AGREEMENTS

The regulation of pre-sales real estate agreements has been included in the Bolivian legal system,¹¹ for the prevention of abusive provisions in this type of contract. The mechanism established by the norm for the regulation of pre-sales real estate agreements is the issuance of a certificate for the contracts issued by the Ministry of Justice, which certifies that it does not contain abusive clauses.¹² To obtain this certificate, a procedure must be

4. See Law No. 1080, July 11, 2018, G.O.B. from 07.12.2018, <http://www.gacetaoficialdebolivia.gob.bo/normas/buscar/1080> [<https://perma.cc/7VZU-GXGK>] (regulating digital citizenship) (Bol.).

5. *Id.*

6. *Id.* at art. 8.

7. *Id.*

8. See generally Ministerial Resolution MDPYEP No. 057/2022, Mar. 28, 2022, Gaceta Ministerial del MDPYEP from 03.28.2022, <https://dgaj.produccion.gob.bo/docs/MDPyEP-RM-057.2022.pdf> [<https://perma.cc/2V3K-CJWA>] (providing for the modifications to the operation of the Electronic Gazette of the Registry of Commerce) (Bol.).

9. *Id.* at art. 8.

10. *Id.* at art. 13.

11. See Supreme Decree No. 4732, June 1, 2022, G.O.B. from 06.01.2022, <http://www.gacetaoficialdebolivia.gob.bo/normas/buscar/4732> [<https://perma.cc/AWQ2-FKAG>] (Bol.); see generally Ministerial Resolution MJTI No. 32/2022, July 4, 2022, Gaceta Ministerial del MJTI from 7.04.2022, https://www.justicia.gob.bo/cms/files/rm32_2022_ezh5ma68.pdf [<https://perma.cc/GNZ7-H7BH>] (implementing and regulation of the regulation of pre-sales agreement of real estate) (Bol.).

12. Ministerial Resolution MJTI No. 32/2022, at art. 12.

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carried out before the Defense of User and Consumer Rights Division of the Ministry of Justice, and several requirements must be met, such as:¹³

- (1) Identification of the parties and intermediaries;
- (2) Proof that the seller is the owner or has the power to sell the property;
- (3) Demonstration of the existence of the project and its approval before the competent authorities, or that this approval is in process; and
- (4) Other specific provisions that must be included in the contract: a clause that states the obligation to deliver without delay; the prohibition of unilateral amendments to the contract; and a precise description of the payments to be made.

The procedure for obtaining this certification is carried out digitally, for which, those interested must have digital citizenship.¹⁴ In case of non-compliance with this regulation, sanctions may be imposed in accordance with current regulations for the protection of user and consumer rights.¹⁵

C. MODIFICATIONS TO TAX RULES

Through a national law and a regulation,¹⁶ the main tax regulations in Bolivia have been modified¹⁷ with the purpose of granting benefits to taxpayers in relation to the reduction of sanctions, effective repentance, payment facilities, and other modifications on the Value Added Tax. These modifications are summarized in the following aspects:

- (1) The term to opt for the benefit of “Reduction of Sanctions” by eighty percent of the applicable fine has been extended from ten to twenty days.¹⁸
- (2) The term to opt for the “Effective Repentance” benefit has been extended from ten to twenty days.¹⁹

13. *See id.* at art. 6, 8.

14. *See id.* at art. 6.

15. *See* Law No. 453, Dec. 4, 2013, G.O.B. from 12.06.2013, <http://www.gacetaoficialdebolivia.gob.bo/normas/buscar/453> [<https://perma.cc/MEB6-D98Y>] (regarding the rights and guarantees of users and consumers) (Bol.).

16. *See* Law No. 1448, July 25, 2022, G.O.B. from 07.25.2022, <http://www.gacetaoficialdebolivia.gob.bo/normas/buscar/1448> [<https://perma.cc/T9GA-B8DG>] (Bol.); *see also* Supreme Decree No. 4770, July 27, 2022, G.O.B. from 07.27.2022, <http://www.gacetaoficialdebolivia.gob.bo/normas/buscar/4770> [<https://perma.cc/S6KA-NXSL>] (regarding the modifications and regulations to the Tax Code and the Tax Reform Law) (Bol.).

17. *See* Law No. 2492, Aug. 2, 2003, G.O.B. from 08.04.2003, <http://www.gacetaoficialdebolivia.gob.bo/normas/buscar/2492> [<https://perma.cc/93TE-WJAV>] (Bol.); *see also* Law No. 843, May 20, 1986, G.O.B. from 08.28.1986, <http://www.gacetaoficialdebolivia.gob.bo/normas/buscar/843> [<https://perma.cc/H94U-QMKB>] (Bol.).

18. *See* Law No. 1448, at art. 2.

19. *See id.* at art. 2.

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- (3) The penalty for “omission of payment” in tax matters has been reduced from one hundred percent to sixty percent to be calculated on the omitted tax.²⁰
- (4) For independent professionals, the application of the “Earnings Tax—IUE” has been replaced by the “Value Added Complementary Regime—RC IVA,” which implies a possibility of reduction in the amount of tax payment for independent professionals.
- (5) A tax exemption has been established for “the income of delegations or representations of foreign states for cultural events” provided that these events are sponsored by a Bolivian state entity.²¹

It is estimated that these modifications will have an impact on benefits for taxpayers, and they will also generate greater tax collection for the government.

II. Brazil

A. PERSONAL DATA PROTECTION AS A GUARANTEE OF THE STRENGTHENING OF THE NATIONAL PERSONAL DATA PROTECTION AUTHORITY

In 2022, Brazil made significant advances in terms of privacy and data protection.

Although the law regulating personal data protection is recent (having been enacted in 2018 and becoming effective at the end of 2020), the country is taking significant steps to ensure that the rights of data subjects are effectively fulfilled.

Two important measures have been presented during this period: the elevation of personal data protection to the status of a fundamental right and the transformation of the National Data Protection Authority into an independent authority.²²

The publication of a rule by the agency responsible for regulating the electricity sector in the country established minimum levels of cybersecurity to be adopted by all agents operating in the sector.²³

20. *See id.*

21. *See id.* at art. 3.

22. Angelica Mari, *Data Protection Becomes a Fundamental Right in Brazil*, ZDNET (Mar. 27, 2023), <https://www.zdnet.com/article/data-protection-becomes-a-fundamental-right-in-brazil/> [<https://perma.cc/W6HL-CD95>].

23. *Brazil: Resolution on Cybersecurity Policies Required by Electricity Sector Takes Effect*, ONE TRUST DATA GUIDANCE (July 1, 2022), <https://www.dataguidance.com/news/brazil-resolution-cybersecurity-policies-required> [<https://perma.cc/59JL-26Y6>].

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B. THE PROTECTION OF PERSONAL DATA IS A FUNDAMENTAL RIGHT

The objectives of the State in its activities are defined by the Brazilian Federal Constitution.²⁴ Article 5 lists the fundamental guarantees of Brazilian citizens, which are rights to which everyone is entitled, and which must be provided by the State.²⁵ These include health, education, and security.²⁶

Fundamental rights have the status of an inviolable clause.²⁷ This implies that they cannot be altered without amending the Constitution. The elevation of some articles to the status of an inviolable clause is aimed at preventing rights already enshrined in the Federal Constitution from being withdrawn through a simple amendment.

Amendment 115/2022 to the Constitution was enacted in 2022, which includes the protection of personal data, including in digital media, in the list of guarantees and fundamental rights.²⁸ This amendment also determines that the Union has exclusive competence to legislate on the matter, which means that States and Municipalities will not be able to create laws that deal with the subject.²⁹

The measure is important because, in addition to adding data protection to the rights already guaranteed by law in Brazil, it also guarantees greater power for the National Data Protection Authority, given that the body is now responsible for a fundamental right. This will increase the authority's importance and, consequently, guarantee greater investments in its performance.

C. THE TRANSFORMATION OF THE NATIONAL PERSONAL DATAPROTECTION AUTHORITY INTO A SPECIAL AUTHORITY

Another significant advance in Brazil is the conversion of the National Data Protection Authority into a special authority. When it was created, the authority responsible for ensuring the protection of personal data was part of

24. See JOSÉ JOAQUIM GOMES CANOTILHO, *CONSTITUIÇÃO DIRIGENTE E VINCULAÇÃO DO LEGISLADOR: CONTRIBUTO PARA A COMPREENSÃO DAS NORMAS CONSTITUCIONAIS PROGRAMÁTICAS* 154-158 (reprt., Coimbra ed., 1994); see also JOSÉ JOAQUIM GOMES CANOTILHO, *DIREITO CONSTITUCIONAL* 75-76 (6th ed. 1993); see generally, *CONSTITUIÇÃO FEDERAL* (Braz.).

25. See *CONSTITUIÇÃO FEDERAL* at art. 5.

26. See *id.* at art. 6.

27. See *id.* at art. 5.

28. In 2022, Brazil made significant advances in terms of privacy and data protection. See Constitution Amend. No. 115, Feb. 10, 2022, https://www.planalto.gov.br/ccivil_03/constituicao/Emendas/Emc/emc115.htm#:~:text=EMENDA%20CONSTITUCIONAL%20N%C2%BA%20115%2C%20DE,e%20tratamento%20de%20dados%20pessoais [https://perma.cc/SQ8V-S8DN] (Braz.).

29. See *id.*

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the structure of the Presidency of the Republic because there was not, at the time, budget available to create a stand-alone structure.³⁰

Through Provisional Measure Number 1.124/2022, the National Authority was converted into a special autarchy, an autarchy with specific rules and a special regime.³¹ The concept of autarchy is defined by item I of article 5 of Decree-Law No. 200/67, which provides as follows: “Autarchy—the autonomous service, created by law, with legal personality, assets, and its revenue, to carry out activities typical of Public Administration, which require, for their better functioning, decentralized administrative and financial management.”³²

The transformation will link the ANPD to another authority, such as the Office of the Attorney General, guaranteeing greater independence of action. This will raise the country’s classification level in the protection of personal data in the international scenario, in addition to making the Authority more similar to the agency model adopted in Europe.

The amendment also ensures greater freedom for the National Authority to inspect and, if necessary, sanction the government itself for any breaches

30. Although the law regulating personal data protection is recent (having been enacted in 2018 and enforced since the end of 2020), the country is taking significant steps to ensure that the rights of data subjects are effectively fulfilled. *See, e.g., Frequently Asked Questions – ANPD, NAT’L DATA PROT. AUTH.* (Feb. 18, 2021), [https://www.gov.br/anpd/pt-br/acao-a-informacao/perguntas-frequentes-2013-anpd#:~:text=DE%20Dados%20\(ANPD\)-,3.1%20%2D%20O%20que%20%C3%A9%20a%20Autoridade%20Nacional%20de%20Prote%C3%A7%C3%A3o%20de,cumprimento%20da%20LGPD%20no%20Brasil](https://www.gov.br/anpd/pt-br/acao-a-informacao/perguntas-frequentes-2013-anpd#:~:text=DE%20Dados%20(ANPD)-,3.1%20%2D%20O%20que%20%C3%A9%20a%20Autoridade%20Nacional%20de%20Prote%C3%A7%C3%A3o%20de,cumprimento%20da%20LGPD%20no%20Brasil) [https://perma.cc/9SZW-Q2P5].

31. Two important measures have been presented during this period: the elevation of personal data protection to the status of a fundamental right and the transformation of the National Data Protection Authority into an independent authority. The publication of a rule by the agency responsible for regulating the electricity sector in the country established minimum levels of cybersecurity to be adopted by all agents operating in the sector. *See* Provisional Measure No. 1,124, of June 13, 2022, *Diário Oficial da União* [D.O.U.] from 6.14.2022 (Braz.), <https://www.in.gov.br/en/web/dou/-/medida-provisoria-n-1.124-de-13-de-junho-de-2022-407804608> [https://perma.cc/3NWD-E4UC].

32. The protection of personal data is a fundamental right. The objectives of the State in its activities are defined by the Brazilian Federal Constitution. Article 5 lists the fundamental guarantees of Brazilian citizens, which are rights to which everyone is entitled and which must be provided by the State. These include health, education, and security. Fundamental rights have the status of an inviolable clause. This implies that they cannot be altered without amending the Constitution. The elevation of some articles to the status of an intangible clause is aimed at preventing rights already enshrined in the Federal Constitution from being withdrawn through a simple amendment. Amendment 115/2022 to the Constitution was enacted in 2022, which includes the protection of personal data, including in digital media, in the list of guarantees and fundamental rights. This amendment also determines that the Union has exclusive competence to legislate on the matter, which means that States and Municipalities will not be able to create laws that deal with the subject. *See* Decree-Law No. 200, Feb. 25, 1967, D.O.U., https://www.planalto.gov.br/ccivil_03/decreto-lei/del0200.htm [https://perma.cc/KVQ9-JCCC] (Braz.).

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of the General Data Protection Law.³³ This will result in greater protection of the personal data of Brazilian holders.

1. *Normative Resolution Establishes Minimum Levels of Cybersecurity for Agents in the Energy Sector*

Resolution 964/2021³⁴ was issued by the National Electric Energy Agency (ANEEL) on December 14, 2021, and became effective July 1, 2022. The resolution determines standards and requirements for agents in the Brazilian electricity sector and aims to establish guidelines and a minimum content for cybersecurity policies.³⁵

The guidelines established by the authority aim to standardize the security measures to be adopted, thus establishing a stricter cybersecurity protocol that follows international norms and standards.³⁶ In addition, they promote the dissemination of the cybersecurity culture, making agents prepared to identify and remedy risks, in addition to promptly recovering from any incidents that may occur.³⁷ The norm also established minimum requirements for the cybersecurity policies set out by the agents, making mandatory items such as the agent's objectives for cybersecurity and its "ability to prevent, detect, [and] respond" to cybernetic incidents.³⁸

The policy must also be updated periodically and disseminated among workers in the responsible areas, and a responsible officer must be designated.³⁹ It must be approved by a board of directors and "be compatible with the sensitivity of the data and information under its responsibility."⁴⁰

These measures now require agents to apply at least one cybersecurity maturity model annually, ensure the traceability of information, and maintain a record of greater impacts that include information received from companies providing services to third parties.⁴¹ The norm also brought standardization regarding the notification of security incidents and information sharing.⁴²

33. See CONSTITUIÇÃO FEDERAL, at amend. 115.

34. National Electric Energy Agency (ANEEL) Normative Resolution No. 964, Dec. 14, 2021, D.O.U. from 12.22.2021 (Braz.) <https://www.in.gov.br/en/web/dou/-/resolucao-normativa-aneel-n-964-de-14-de-dezembro-de-2021-369359262> [<https://perma.cc/WB5K-FW4H>].

35. The measure is important because, in addition to adding data protection to the rights already guaranteed by law in Brazil, it also guarantees greater power for the National Data Protection Authority, given that the body is now responsible for a fundamental right. This will increase the authorities' status of importance and, consequently, guarantee greater investments in its performance. See *id.* at art. 1.

36. See *id.* at art. 3.

37. See *id.*

38. See *id.* at art. 4.

39. See *id.* at art. 5.

40. See *id.*

41. See *id.* at art. 4.

42. See *id.* at art. 6.

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Resolution No. 964/2021 is an important step forward for Brazil in establishing a stricter standard of cybersecurity in the electricity sector, which is of strategic importance for infrastructure and vital for the country's economic development. Furthermore, the energy sector is endowed with great sensitivity to the country's sovereignty, given that possible cyberattacks directed at the energy sector may cause major problems in all sectors and layers of the population.

Another objective of the country with the introduction of normative resolutions honoring the best international practices is that this is a contributing factor for Brazil to become an effective member of the Organization for Economic Cooperation and Development (OECD), considering that the rise from the country that today figures as a potential member to an effective and permanent member of the organization's staff is an old wish.

III. Chile

A. NEW FINTECH REGULATION

On October 12, 2022, the Chilean Congress approved the bill for promoting competition and financial inclusion of innovation and technology in the provision of financial services (Fintech Law). The new law has not yet been published in the Official Gazette as it is before the Constitutional Court for the established procedure of preventive constitutional control. According to Article 1 of the Fintech Law, the purpose of this regulation is to "establish a general framework to encourage the provision of financial services through technological means by providers governed by [this law.]"⁴³ These providers are those who render the following services: (1) crowdfunding platforms; (2) alternative transaction systems; (3) credit and investment advisory services; (4) custody of financial instruments; and (5) order routing and intermediation of financial instruments.⁴⁴

As the former president of Chile, Sebastián Piñera, said in his message for the presentation of the bill, the Fintech Law represents a significant advance to promote financial innovation and greater competition in the financial system, as well as the development of new financial products and services for consumers.⁴⁵ Furthermore, fintech companies have proven to be a key element in driving the economic boom in Chile, reducing the costs of financial services, extending access to such services, enabling greater

43. Law No. 21521 art. 1, Promueve la Competencia e Inclusión Financiera a Través de la Innovación y Tecnología en la Prestación de Servicios Financieros, Ley Fintec [Fintech Law], 22 diciembre, 2022, DIARIO OFICIAL [D.O.] (Chile).

44. *Id.* at art. 2.

45. See Message No. 172-369 I, 3, Sept. 3, 2021, CHAMBER OF DEPUTIES, <https://www.camara.cl/legislacion/ProyectosDeLey/tramitacion.aspx?prmID=15054&prmBOLETIN=14570-05> [<https://perma.cc/XNG4-8H8T>] (Chile).

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transparency and competition in financial offerings, and using technology to provide more effective solutions.⁴⁶

The Fintech Law provides that entities that carry out intermediation and custody operations, or provide transaction platforms and advice on financial instruments (including crypto assets) will be regulated by the Financial Market Commission (CMF, by its Spanish acronym) and must prove compliance with the requirements set by the authority in order to operate.⁴⁷ The CMF will have broad powers of supervision, regulation, and information requirements.⁴⁸ In addition, it will have the possibility of issuing differentiated regulations for each actor, considering the nature of the service provided, the number or type of participants, and the volume of transactions or instruments traded, among other factors.⁴⁹ The Fintech Law also regulates payment initiation service providers, who will be able to provide services to make electronic transfers from customers' accounts to third party accounts, operating as a means of payment without the need to use cards.⁵⁰

The use of crypto assets as a means of payment is expressly recognized in the new regulation, extending the powers of the Central Bank of Chile to consider as means of payment crypto assets whose value is determinable and backed by money and which meet the requirements established by the issuing institute.⁵¹

On the other hand, Title III of the Fintech Law creates an Open Banking System that will enable financial service providers to exchange customer financial information, thus addressing the information asymmetry faced by incoming players and facilitating the development of new financial product and service offerings.⁵²

Ultimately, with the Fintech Law, different laws governing traditional financial institutions are amended in order to achieve regulatory symmetry in the provision of similar financial services, and certain entry barriers to fintech companies are lowered. Amendments were made to the Corporations Law, the Securities Market Law, the General Banking Law, the Constitutional Law of the Central Bank and the Commercial Code, among others.

46. *See id.* at art. 3, 8.

47. *See* Fintech Law at art. 2.

48. *See id.*

49. *See id.* at art. 4, 5.

50. *See id.* at art. 20.

51. *See id.* at art. 30.

52. *See id.* at tit. III.

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B. NEW CHAPTER OF THE COMPENDIUM OF INTERNATIONAL
EXCHANGE REGULATIONS OF THE CENTRAL BANK OF
CHILE

On August 25, 2022, and after a public consultation carried out within the framework of the modernization process of its foreign exchange regulations, the Central Bank of Chile added a new Chapter III to its Compendium of International Exchange Regulations (New Chapter).⁵³ This amendment seeks to allow a more expeditious access to the Formal Exchange Market for financial institutions supervised by the CMF and to simplify the submission of information for non-banking institutions.⁵⁴

The New Chapter allows the following non-banking institutions to participate in the Formal Exchange Market: (1) stockbrokers and securities agents; (2) foreign banks with a representative office in Chile supervised by the CMF; and (3) legal entities, domiciled and resident in Chile, whose exclusive purpose is to intervene in international exchange transactions as determined by the Central Bank.⁵⁵ These entities shall correspond to open stock corporations and must be registered in the Securities Registry of the CMF.⁵⁶ Further, they must also submit to the Central Bank a request for authorization for such purpose, accompanied by the information indicated in Annex 1 of the New Chapter; and, additionally, they must certify their registration in the Securities Registry of the CMF, as well as that they have, as of the date of the request, a net worth of not less than the equivalent of approximately USD \$442,070, which they must maintain on a permanent basis.⁵⁷ Additionally, the New Chapter simplifies the requirements for non-banking institutions to enter the Formal Exchange Market.⁵⁸

The Central Bank's aim is that the New Chapter will encourage greater participation in the Formal Exchange Market by non-banking entities. The foregoing furthers the Central Bank's mandate to ensure that the Formal Exchange Market is made up of a sufficient number of persons or entities to allow it to operate under conditions of adequate competition, as established in accordance with the provisions of Article 43 the law that regulates the Central Bank.⁵⁹

53. *Agreement Adopted by the Council of the Cent. Bank of Chile in its Ordinary Sess. No. 2497*, CENT. BANK OF CHILE (Aug. 25, 2022), <https://www.bcentral.cl/documents/33528/133259/Acuerto-2497-03-220825.pdf/8a3970e1-aa3-3f62-e7c5-19a260bb470f?t=1661877156480> [https://perma.cc/AL3K-KWRK].

54. *See generally* CHAPTER III OF COMPENDIUM OF INT'L EXCH. REGUL. 1, CENTRAL BANK OF CHILE (Aug. 30, 2022), <https://www.bcentral.cl/documents/33528/115571/CapIII.pdf/85e6d12e-84d1-7cc9-8492-048a6bede81a?t=1661867887647> [https://perma.cc/TA3E-C7B6].

55. *See id.*

56. *See id.*

57. *See id.* at 2.

58. *See id.* at 1–2.

59. Law No. 18840 art. 43, octubre 10, 1989, DIARIO OFICIAL [D.O] (Chile).

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IV. Colombia

A. TRADE AGREEMENTS

On January 26, 2022, the Pacific Alliance, including the Colombian government, signed the Free Trade Agreement (FTA) with Singapore.⁶⁰ The FTA is pending approval from the Colombian Congress.⁶¹ Once this procedure has been completed, the law will be issued, ratifying the FTA from the Colombian side.⁶²

The FTA has been signed to strengthen the operations of the Asian market in the American Field and regulate general issues such as market access, investment, and trade facilitation.⁶³ This will enhance and facilitate the export of those products that were already being sent to Singapore from Colombia, such as fuel oils, coffee, and flowers, and the expansion of the country's export basket to include new products that will be subject to tariff preferences.⁶⁴

B. TAX REFORM

A new Tax Reform was presented by the government to Congress and then passed into law in November.⁶⁵ This reform includes higher taxes for dividends, namely fifteen percent of the dividends if the shareholder is an individual, ten percent of the dividends if the shareholder is a local company, and twenty percent of the dividends if foreign companies are shareholders.⁶⁶ The new reform includes regulation over the national carbon tax, presented as one of the strategies that the government will apply to encourage compliance with greenhouse gas (GHG) mitigation goals at the national level.⁶⁷

The reform also provides new rules for the income tax rate of free trade zone users, namely, income from exporting goods and services, as well as

60. See *Alianza del Pacífico y Singapur Firman Acuerdo de Libre Comercio* [Pacific Alliance and Singapore Sign Free Trade Agreement], ALIANZA DEL PACÍFICO (Jan. 26, 2022), <https://alianzapacifico.net/alianza-del-pacifico-y-singapur-firman-acuerdo-de-libre-comercio/> [https://perma.cc/ZH2A-XSYZ]; see also *Acuerdo Comercial Entre Singapur y la Alianza del Pacífico* [Trade Agreement between Singapore and the Pacific Alliance], MINISTERIO DE COMERCIO, INDUSTRIA Y TURISMO, <https://www.tlc.gov.co/acuerdos/suscrito/singapur> [https://perma.cc/6K5A-D4VF].

61. See *Alianza del Pacífico y Singapur Firman Acuerdo de Libre Comercio*, *supra* note 60.

62. See *Acuerdo Comercial Entre Singapur y la Alianza del Pacífico*, Ministerio de Comercio, Industria y Turismo, *supra* note 60.

63. *Id.*

64. See *Alianza del Pacífico y Singapur Firman Acuerdo de Libre Comercio*, *supra* note 60.

65. See generally, L. 1387, noviembre 2, 2022, GACETAS DEL CONGRESO [G.C.], <http://svrpubindc.imprenta.gov.co/senado/index.xhtml> [https://perma.cc/79WK-NHLF] (Colom.).

66. Project of L. 118-131, noviembre 9, 2022, GACETAS DEL CONGRESO [G.C.] (Colom.).

67. See *Tratamiento Tributario de No Causación* [Tax Treatment of No Causation], MINISTERIO DE AMBIENTE Y DESARROLLO SOSTENIBLE, <https://www.minambiente.gov.co/cambio-climatico-y-gestion-del-riesgo/tratamiento-tributario-de-no-causacion/> [https://perma.cc/V38A-QKWQ] (Colom.).

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from providing health services to patients not residing in Colombia by special permanent free trade zones for health services or industrial users of health services of a permanent free trade zone.⁶⁸ Free trade zones devoted to the development of infrastructure related to ports and airports will maintain the preferential income tax rate of twenty percent.⁶⁹ For operations other than those described above, the general rate will apply.⁷⁰

C. RELATIONS WITH VENEZUELA

With the election of a new president, Colombia restored relations with Venezuela, which relations had been suspended in 2019.⁷¹ On September 9, 2022, the Colombian and Venezuelan governments announced that the borders between the countries would be reopened, and trade relations were reestablished on September 26, 2022.⁷² Trade operations between Colombia and Venezuela constituted seventeen percent of the total trade operations of Colombia in 2022, unlike in 2021, when the trade operations with Venezuela constituted only one percent of the total trade operations of Colombia.⁷³

D. ENERGY

Decree 1476⁷⁴ was issued in August; it includes provisions for the implementation of hydrogen for energy generation. The Decree indicates the mechanisms and conditions for the applications of incentives that the government will apply to the companies that are willing to venture into the hydrogen industry in connection with transport, energy, and vehicles.⁷⁵

This new Decree includes regulation for green hydrogen projects where non-conventional renewable energy is used in the process of production of hydrogen.⁷⁶ It limits the capacity to seek energy suppliers to companies that use self-generated electricity or non-conventional renewable energy

68. L. 1387, at art. 11.

69. *See id.*

70. Project of L. 118-131.

71. *See Ronald Rodríguez, El Fracaso del Cerco Diplomático a Venezuela [The Failure of the Diplomatic Siege of Venezuela]*, RAZÓN PÚBLICA (May 30, 2022), <https://razonpublica.com/fracaso-del-cerco-diplomatico-venezuela/> [<https://perma.cc/J4SW-34E8>].

72. *See Analizamos el Potencial de las Relaciones Comerciales Entre Colombia y Venezuela en el RED Colombia [We Analyze the Potential of Commercial Relations Between Colombia and Venezuela in RED Colombia]*, BANCO DE DESARROLLO DE AMÉRICA LATINA (Oct. 7, 2022), <https://www.caf.com/es/actualidad/noticias/2022/10/el-potencial-de-las-relaciones-comerciales-entre-colombia-y-venezuela/> [<https://perma.cc/QBV7-PRLK>].

73. *See Apertura de la Frontera Para Carga Entre Colombia y Venezuela [Opening of the Border for Cargo Between Colombia and Venezuela]*, MINISTERIO DE COMERCIO, INDUSTRIA Y TURISMO (Sept. 23, 2022), <https://www.mincit.gov.co/mincomercioexterior/apertura-de-la-frontera-entre-colombia-y-venezuela> [<https://perma.cc/67V5-44VK>].

74. *See* Decreto 1476, agosto 3, 2022, 52115 DIARIO OFICIAL [D.O.], <https://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?dt=&i=126602> [<https://perma.cc/4VGA-UY5S>] (Colom.).

75. *See id.* at art. 2.2.7.1.1.

76. *See id.* at art. 2.2.7.1.2.

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sources.⁷⁷ Decree 1476⁷⁸ also regulates blue hydrogen projects which use fossil fuels in the process of production of hydrogen. It indicates that “Blue hydrogen projects must have a Carbon Capture, Use, and Storage (CCUS) system that allows the capture of carbon dioxide generated at large scales in fixed sources.”⁷⁹

E. CANNABIS INDUSTRY

Law 2204, the most recent law in the Colombian hemp industry, became effective in 2022.⁸⁰ Law 2204 allows legal entities and individuals, as well as other associative schemes, to carry out activities of cultivation, trade, import, export, acquisition in any capacity, storage, transport, and final disposal of grain, seeds for sowing, plants in vegetative state or vegetable component, or vegetable component obtained from hemp, whose tetrahydrocannabinol (THC) content, including isomers, salts, and acid forms, is equal to or less than 0.3% for industrial and scientific purposes in Colombia.⁸¹

The new law includes regulation over the companies in which the government is willing to have control over which companies have the authorization for the operation in the hemp industry, establishing requirements such as authorizations, registers, and special regimens for the international operation of hemp products.⁸² In the same manner, Law 2204 provides benefits for agricultural and livestock production.⁸³

F. FINTECH

2022 was an active year in the Financial Technology Industry. In 2021, the government presented a framework that allows for the testing of innovative services in the financial market under the supervision of the Authority for Financial Operations (*Superintendencia Financiera*); however, this project has mostly been executed in 2022.⁸⁴

77. See generally, L. 2099, julio 10, 2021, DIARIO OFICIAL [D.O.], art.2, <https://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?dt&i=114997#23> [<https://perma.cc/BAA3-ZBWU>] (Colom.).

78. See Decree 1476, at art. 2.2.7.1.3.

79. See *id.*

80. See generally L. 2204, mayo 10, 2022, DIARIO OFICIAL [D.O.], <https://www.suin-juriscol.gov.co/viewDocument.asp?ruta=Leyes/30044145> [<https://perma.cc/LM6L-H4WJ>] (Colom.).

81. See *id.* at art. 1–2.

82. See *id.* at art. 5.

83. See *id.* at art. 16.

84. External Regulation 016, Aug. 26, 2021, SUPERINTENDENCIA FINANCIERA DE COLOMBIA [S.F.], <https://www.cerlatam.com/normatividad/superfinanciera-circular-externa-016-de-2021/#:~:text=Habilita%20espacio%20controlado%20de%20prueba,innovadores%20en%20el%20sistema%20financiero> [<https://perma.cc/62MN-SQAT>] (Colom.).

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For the development of the framework, External Regulation 002⁸⁵ was issued to clarify the provision of financial services through banking correspondents. External Regulation 005⁸⁶ was issued to regulate the procurement activity by non-monitored service providers, and External Regulation 014⁸⁷ was issued to regulate collaborative financing through the securities market.

85. External Circular 002, SUPERINTENDENCIA FINANCIERA DE COLOMBIA [S.F.] (Mar. 10, 2021), <https://www.cerlatam.com/normatividad/sfc-circular-externa-002-de-2021/#:~:text=SE%20definen%20los%20requisitos%20y,servicios%20a%20trav%C3%A9s%20de%20corresponsales> [<https://perma.cc/8BZT-MUD8>] (Colom.).

86. External Circular 005, SUPERINTENDENCIA FINANCIERA DE COLOMBIA [S.F.] (Mar. 18, 2021), <https://vlex.com.co/vid/863365149> [<https://perma.cc/J5CR-BQU6>] (Colom.).

87. External Circular 014, SUPERINTENDENCIA FINANCIERA DE COLOMBIA [S.F.] (July 26, 2021), https://alertas.directoriolegislativo.org/wp-content/uploads/2021/07/COL.-ce014_21.pdf?x32394 [<https://perma.cc/FL4J-NQT2>] (Colom.).

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Mexico

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This article surveys significant legal developments in Mexico in 2022.

I. Notable Decisions from the Mexican Supreme Court of Justice

In 2022, the Mexican Supreme Court addressed the constitutionality of three high-profile energy, criminal detention, and immigration policies. The decisions in these cases substantively alter Mexico's legal system, economically and politically impacting the country's public life.

A. ELECTRIC INDUSTRY LAW AMENDMENTS

In April 2022, the Mexican Supreme Court upheld the constitutionality of amendments to the Mexican Electric Industry Law (LIE),¹ which prioritize the dispatch of electricity produced by the Federal Electricity Commission (CFE) to the electrical grid—regardless of cost or fuel source.² The amendments also revise current power purchase agreements with

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1. See Kate Brown de Vejar, et al., *Mexican Supreme Court Dismisses Unconstitutionality Action Against Electricity Industry Law Reform*, DLA PIPER (Apr. 7, 2022), <https://www.dlapiper.com/en/insights/publications/2022/04/mexican-supreme-court-dismisses-unconstitutionality-action-against-electricity-industry-law-reform> [https://perma.cc/5N4Y-5QRG].

2. Adopted in 2014, the LIE codifies the electricity industry's administrative structure, promoting private sector competition and encouraging foreign direct investment in Mexico's

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independent power producers, increasing CFE's overall market participation.³

After receiving Congressional approval, the amendments proposed by President López Obrador were quickly challenged in court by various institutions and political actors for allegedly violating citizens' right to a healthy environment and the energy sector's right to free market competition.⁴ At the same time, various industry participants individually challenged the amendments in lower federal courts, which resulted in a nationwide injunction on antitrust grounds.⁵

The Supreme Court ultimately did not reach the two-thirds supermajority necessary to declare the amendments unconstitutional.⁶ This was, in large part, because, as Supreme Court President Arturo Zaldívar explained, "Economic competition is not the only value to protect."⁷ While the amendments are now "in effect," the ongoing individual lawsuits leave the reform susceptible to new challenges.⁸ In July, for example, a federal judge ruled the amendments unconstitutional and issued a new injunction that enforces the pre-2021 LIE.⁹

B. MANDATORY PRETRIAL DETENTION

Second, the Supreme Court failed to vote on proposals to declare Article 19 of Mexico's Constitution unconstitutional, or rather inconsistent with the

generation and wholesale power markets. *See generally* Kelsey Quigley et. al., *Mexico*, 56 ABA/ILS YIR 21, 22-26 (2022).

3. *See* Decreto por el que se Reforman y Adicionan Diversas Disposiciones de la Ley de la Industria Eléctrica, Diario Oficial de la Federación [DOF] 09-03-2021.

4. *See id.* The CFE's energy production relies primarily on hydroelectric and fossil fuel sources whereas the deprioritized independent producers were relying on renewables such as wind and solar energy. Critics have similarly argued that the shift towards fossil fuels and CFE-control of the electricity sector violates Mexico's obligations under the USMCA. *See* Oscar Lopez, *Mexico Sees Its Energy Future in Fossil Fuels, Not Renewables*, N.Y. TIMES (Aug. 19, 2022), <https://www.nytimes.com/2022/08/17/world/americas/mexico-president-renewable-energy.html?searchResultPosition=6> [<https://perma.cc/G28L-DUTL>]; Rafael Llano et al., *Energy Investors Face Mexico Risks in the Electricity and Lithium Sectors*, WHITE & CASE (July 19, 2022), <https://www.whitecase.com/insight-alert/energy-investors-face-mexico-risks-electricity-and-lithium-sectors> [<https://perma.cc/9QNF-PPT7>].

5. *See* Rafael Llano et al., *Energy Investors Face Mexico Risks in the Electricity and Lithium Sectors*.

6. *See id.*

7. *See* Dave Graham, *Mexico's Top Court Upholds Changes to Power Law in Win for President*, REUTERS (Apr. 7, 2022), <https://www.reuters.com/world/americas/mexico-supreme-court-upholds-key-element-change-power-law-2022-04-07/> [<https://perma.cc/36N2-9GZ9>].

8. *See* Oscar Lopez, *Mexico Sees Its Energy Future in Fossil Fuels, Not Renewables*, N.Y. TIMES (Aug. 19, 2022), <https://www.nytimes.com/2022/08/17/world/americas/mexico-president-renewable-energy.html?searchResultPosition=6> [<https://perma.cc/G28L-DUTL>].

9. *See* César Arellano García, *Juez Gómez Fierro Concede Amparo Contra Ley de la Industria Eléctrica*, LA JORNADA (July 25, 2022), <https://www.jornada.com.mx/notas/2022/07/25/politica/juez-gomez-fierro-concede-amparo-al-cemda-contra-lie/> [<https://perma.cc/54YH-9SMN>].

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rest of a citizen's constitutional rights.¹⁰ Article 19 requires that judges impose “automatic preventive detention” on all persons accused of specific crimes, including some that are nonviolent.¹¹ The challenge against Article 19 argued that such preventative detention violates Mexico's human rights obligations under international law and the Mexican Constitution—especially as Mexico counts nearly 100,000 people in jail without a conviction, many waiting beyond the two-year legal limit for mandatory pretrial detention.¹²

Nonetheless, in September 2022, some of the justices opined that the Court lacks the authority to nullify Article 19.¹³ And although the Court has treated international treaties as equally binding as the Constitution since 2011 (applying whichever protects human rights more stringently), the Court clarified that an exception applies when the Mexican Constitution has expressly restricted the exercise of a certain right.¹⁴ The Court is likely to revisit the matter soon, as a new proposal is set to be introduced.¹⁵

C. IMMIGRATION STOP-AND-SEARCH

Lastly, ruling on a case originally filed by indigenous Mexican citizens, the Supreme Court declared unconstitutional immigration checkpoints in locations without international transit.¹⁶ The resolution explicitly

10. See Beatriz Guillen, *La Suprema Corte Retira sus Proyectos Sobre la Prisión Preventiva Oficiosa*, EL PAÍS (Sept. 8, 2022), <https://elpais.com/mexico/2022-09-08/la-suprema-corte-retira-sus-proyectos-sobre-la-prision-preventiva-oficiosa.html> [<https://perma.cc/EPL9-WVT9>]; Acción de Inconstitucionalidad 130/2019 y su Acumulada 136/2019, https://www.scjn.gob.mx/sites/default/files/proyectos_resolucion_scjn/documento/2022-08/AI%20130-2019%20Proyecto.pdf [<https://perma.cc/NJX4-47HD>].

11. Constitución Política de los Estados Unidos Mexicanos, CP, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10-02-2014 (Mex.).

12. See Cody Copeland, *Mexico Supreme Court Justice Proposes New Reform to Mandatory Pretrial Detention*, COURTHOUSE NEWS SERVICE (Oct. 25, 2022), <https://www.courthousenews.com/mexico-supreme-court-justice-proposes-new-reform-to-mandatory-pretrial-detention/> [<https://perma.cc/PM7H-778K>]; Beatriz Guillén, *La Suprema Corte Aplaza la Decisión Final Sobre la Prisión Preventiva Oficiosa en Pleno Pulso con el Gobierno*, EL PAÍS (Sept. 6, 2022), <https://elpais.com/mexico/2022-09-06/la-decisiva-sesion-sobre-la-prision-preventiva-oficiosa-mantiene-el-pulso-del-gobierno-con-la-suprema-corte.html> [<https://perma.cc/88X2-7LRY>]; Press Release, U.N. Human Rights Office of the High Comm'r, Mexico Should Overturn Mandatory Pre-Trial Detention: UN Experts (Sept. 5, 2022), <https://www.ohchr.org/en/press-releases/2022/09/mexico-should-overturn-mandatory-pre-trial-detention-un-experts> [<https://perma.cc/PD85-3Z4C>].

13. See Cody Copeland, *Mandatory Pretrial Detention Ruling Revives Questions Over Power of Mexico Supreme Court*, COURTHOUSE NEWS SERVICE (Sept. 6, 2022), <https://www.courthousenews.com/mandatory-pretrial-detention-ruling-revives-questions-over-power-of-mexico-supreme-court> [<https://perma.cc/K9LK-Y5NG>].

14. See *id.*

15. See Copeland, *supra* note 12.

16. Press Release, Suprema Corte de Justicia de la Nación, El Procedimiento de Revisión Migratoria Que Se Efectúa en Lugares Distintos al de Tránsito Internacional es Inconstitucional Por Aplicarse a Personas Nacionales y Extranjeras Sin Distinción Alguna:

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condemned checkpoints that allow police to stop and search individuals to ascertain their immigration status as racist and discriminatory, finding that the lack of objective criteria has disproportionately impacted Black and Indigenous Mexicans and allowed agents to wield power based on assumptions of ethnicity, skin color, and language.¹⁷ The Court also held that such checkpoints violate a person's constitutional right to free movement and travel through Mexico—regardless of nationality.¹⁸

II. Energy Policy Under Dispute

A. BACKGROUND

On July 20, 2022, Canada and the United States submitted notices to Mexico, formally requesting a consultation procedure regarding the recent energy policies adopted by the administration of President Andres Manuel López Obrador.¹⁹ The move came in response to Mexico's perceived breach of several obligations under the USMCA, a free trade agreement between the three countries that entered into force in July 2020 (the Treaty).²⁰

B. DISPUTED ENERGY POLICY MEASURES

Although their claims were not identical, both the U.S. and Canada generally argued that, with the president's energy reforms, Mexico provides preferential treatment to its state-owned energy companies, specifically the Federal Electricity Commission (CFE) and Mexican Petroleum (PEMEX).²¹ The U.S. and Canada both claimed that this preferential treatment harms their interests in Mexico.²²

The Mexican energy reforms have included significant modifications to the electricity sector's so-called order of dispatch, that is, the hierarchy by which generation plants inject produced electricity into the system for

Primera Sala, Comunicado de Prensa No. 184/2022 (May 19, 2022), <https://www.internet2.scjn.gob.mx/red2/comunicados/noticia.asp?id=6906> [<https://perma.cc/CE3K-A5SP>] [hereinafter SCJN Immigration Checkpoint Press Release].

17. *See id.*; Tyler Mattiace, *Mexico's Supreme Court Bans 'Random' Immigration Checks*, HUM. RTS. WATCH (May 26, 2022), <https://www.hrw.org/news/2022/05/26/mexicos-supreme-court-bans-random-immigration-checks> [<https://perma.cc/7JAY-29HN>].

18. *See* SCJN Immigration Checkpoint Press Release, *supra* note 16.

19. *See* Press Release, Office of the U.S. Trade Representative, United States Requests Consultations Under the USMCA Over Mexico's Energy Policies (July 20, 2022), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/july/united-states-requests-consultations-under-usmca-over-mexicos-energy-policies-0> [<https://perma.cc/75TP-BTES>]; *see also* Statement by Minister Ng on Canada launching Canada-United States-Mexico Agreement Consultations on Mexico's New Energy Policies (July 21, 2022); <https://www.canada.ca/en/global-affairs/news/2022/07/statement-by-minister-ng-on-canada-launching-canada-united-states-mexico-agreement-consultations-on-mexicos-new-energy-policies.html> [<https://perma.cc/36XZ-44CG>].

20. *See id.*

21. *See generally id.*

22. *Id.*

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distribution and use.²³ Before the disputed reforms and beginning in 2013, when Mexico's energy sector first opened to private participation, the order of dispatch was determined by economic criteria.²⁴ Electricity was purchased via auction from participants who offered the best price, whether from CFE or from the private sector. Notably, the lowest prices almost always came from companies engaged in producing clean and renewable energies.²⁵

Today, under the disputed reforms, the order of dispatch is to proceed as follows: first, all electricity produced by CFE, regardless of whether it comes from fossil fuel sources; then, energy generated by private national and foreign companies.²⁶ It is their last-place ranking in the order of dispatch, behind the state-run electricity monopoly, that the United States and Canada complain violates several protection principles in the USMA.²⁷

In addition, both the U.S. and Canada argue that Mexico has purposely hindered the ability of private Canadian and U.S. companies to operate in the Mexican energy market.²⁸ Specifically, the U.S. and Canada accuse Mexico of delaying, denying, or simply ignoring requests for new permits or permit modifications; revoking or suspending existing permits; and blocking private companies from building and operating their facilities, storing fuel, and importing energy.²⁹

The U.S. also complains that Mexico has enacted policies that limit the use of government infrastructure for natural gas transportation to only those who acquire the energy from the State, affecting the importation of U.S. natural gas.³⁰ Additionally, Mexico granted an extension for complying with

23. See Llano et. al, *supra* note 5.

24. See Ley de la Industria Eléctrica, Diario Oficial de la Federación [DOF] 11-08-2014, últimas reformas DOF 11-05-2022.

25. See Press Release, Secretaría de Energía, En la tercera Subasta Eléctrica Mexicana se Obtuvo uno de los Precios más Bajos Internacionalmente: PJC, Boletín de prensa 111 (Nov. 22, 2017), <https://www.gob.mx/sener/prensa/en-la-tercera-subasta-electrica-mexicana-se-obtuvo-uno-de-los-precios-mas-bajos-> [<https://perma.cc/3ZBD-7GRB>].

26. See Decreto por el que se Reforman y Adicionan Diversas Disposiciones de la Ley de la Industria Eléctrica, Diario Oficial de la Federación [DOF] 09-03-2021; see also Llano et. al, *supra* note 5.

27. See Press Release, Office of the U.S. Trade Representative, United States Requests Consultations Under the USMCA Over Mexico's Energy Policies (July 20, 2022), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/july/united-states-requests-consultations-under-usmca-over-mexicos-energy-policies-0> [<https://perma.cc/75TP-BTES>].

28. See David E. Bond, *United States and Canada Request Consultations Over Mexico's Energy Policies Under USMCA*, WHITE & CASE (July 20, 2022), <https://www.whitecase.com/insight-alert/united-states-and-canada-request-consultations-over-mexicos-energy-policies-under> [<https://perma.cc/9S72-YS26>].

29. See Jon Martín Cullell, *Avisos Ignorados y Trabas Constantes: las Claves tras la Disputa Energética Entre EE UU y México*, EL PAÍS (July 21, 2022), <https://elpais.com/mexico/2022-07-22/avisos-ignorados-y-trabas-constantas-las-claves-tras-la-disputa-energetica-entre-ee-uu-y-mexico.html> [<https://perma.cc/5TR3-L8GF>].

30. See ACUERDO de la Comisión Reguladora de Energía que Modifica la Norma Oficial Mexicana NOM-016-CRE-2016, Especificaciones de Calidad de los Petrolíferos, con

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certain diesel-sulfur-content regulations only to PEMEX, a move disputed by the United States.³¹

C. CONSULTATIONS, THE FIRST STEP

Article 31.4 of the USMCA provides for consultations, which are non-contentious negotiating mechanisms for settling trade disputes under the Treaty.³² Under this provision, in the consultation process, parties must submit all information necessary for a full analysis of the disputed measures, as well as the reasons why said measures—here, energy policies—may or may not violate the USMCA.³³

If, after consultations, the countries cannot reach a mutually agreeable solution, the complaining party may request that an independent panel be constituted to decide whether the measures at stake violate the Treaty.³⁴

D. POSSIBLE IMPLICATIONS

Once an independent dispute resolution panel is formed, the countries have a right to be heard, asserting their respective arguments under the Treaty for the panel to prepare its final report.³⁵ If the panel determines that the disputed measures constitute a violation, the opposing countries have forty-five days to resume dialogue and reach a mutually satisfactory solution.³⁶ The solution can include eliminating the measure and establishing compensation or enacting any other solution that the countries agree will settle the conflict.³⁷

But if no agreement is reached within forty-five days, the complaining party is entitled to suspend benefits and impose tariffs on the exports of the respondent for an amount equivalent to the damage caused by the disputed

Fundamento en el Artículo 51 de la Ley Federal Sobre Metrología y Normalización, Diario Oficial de la Federación [DOF] 26-06-2017, https://dof.gob.mx/nota_detalle.php?codigo=5488031&fecha=26/06/2017#gsc.tab=0; Office of the United States Trade Representative, *supra* note 27.

31. See Comisión Reguladora de Energía, Resolución de la Comisión Reguladora de Energía que Otorga a Pemex Transformación Industrial una Ampliación al Plazo para el Cumplimiento de la Especificación de Contenido de Azufre en el Diésel Automotriz, Previsto en la Norma Oficial Mexicana NOM-016-CRE-2016, Especificaciones de Calidad de los Petrolíferos, Resolución Num. RES/1817/2019 (Dec. 18, 2019), <https://drive.cre.gob.mx/Drive/ObtenerResolucion/?id=YzQ0YmNmYmMtMzEyYS00ZDI5LTE5NjYzLTg5NTZm%20NjFIOTg4YQ==> [<https://perma.cc/U62F-PYPK>]; Office of the U.S. Trade Representative, *supra* note 27.

32. See Agreement between the United States of America, the United Mexican States, and Canada, July 1, 2020, art. 31.4, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> [<https://perma.cc/LW6G-U95C>].

33. *Id.* art. 31.4, ¶ 6(a).

34. *Id.* art. 31.6.

35. *Id.* art. 31.17.

36. *Id.* art. 31.18.

37. *Id.*

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measures, either in the affected sector or in any other sector, and until a solution is found.³⁸ Any trade dispute with the United States and Canada—critical Mexico trading partners—would have serious economic consequences for Mexico.³⁹

III. The United States - Mexico Relationship

A. BACKGROUND

Historically, the relationship between Mexico and the United States has been strong and solid. The North American Leaders' Summit, usually held in November featuring the leaders of Canada, Mexico, and the U.S., will address some of the challenges of maintaining that relationship.

The most recent summit, at the time of this writing, was hosted by U.S. President Joe Biden in November 2021.⁴⁰ The 2022 meeting is to be hosted by Mexican President Andrés Manuel López Obrador in Mexico City—likely in late 2022.⁴¹ President Biden, President López Obrador, and Prime Minister Justin Trudeau have been discussing, and are almost certainly poised to continue discussing, migration and security—two flashpoints in the relationship between the countries.⁴²

B. MIGRATION

The political and economic upheaval across Central and South America continues to drive a new wave of migration across the southern border of the United States and Mexico, representing a critical security threat and a humanitarian catastrophe for the vulnerable people involved.⁴³

The number of individuals who have fled their country attempting to cross the U.S. border increased in an unprecedented way. During 2022 alone, U.S. border authorities encountered and arrested more than two million migrants trying to cross the border.⁴⁴ This is partly attributable to the emergency public health policy issued by then-President Trump in

38. *Id.* art. 31.19.

39. See generally Press Release, The White House, Fact Sheet: Key Deliverables for the 2023 North American Leaders' Summit (Jan. 10, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/01/10/fact-sheet-key-deliverables-for-the-2023-north-american-leaders-summit/> [<https://perma.cc/G47U-FGKZ>].

40. See *id.*

41. Carolina Pulice, Next North American Leaders' Summit Set to Happen in December in Mexico, REUTERS (June 10, 2022), <https://www.reuters.com/world/americas/next-north-american-leaders-summit-set-happen-december-mexico-2022-06-10/> [<https://perma.cc/AV58-6AEZ>].

42. See generally Key Deliverables for the 2023 North American Leaders' Summit, *supra* note 39.

43. See Priscilla Alvarez, *US Border Encounters Top 2 Million in Fiscal Year 2022*, CNN (Oct. 22, 2022), <https://edition.cnn.com/2022/10/22/politics/border-encounters-migrants-2022/index.html> [<https://perma.cc/WU8P-YQP8>].

44. See *id.*

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March 2020, at the start of the COVID-19 pandemic, known as “Title 42.”⁴⁵ The emergency regulation enables federal agents to prohibit the entry of individuals into the U.S. if they note “the existence of a serious danger on the introduction of a disease into the territory,” which means migrants can be rapidly expelled back to Mexico or other countries.⁴⁶

Title 42 has had wide-reaching effects. The number of arrests at the border has increased due to a significant number in repeated crossings at the border.⁴⁷ Families of migrants have been separated indefinitely.⁴⁸ Discriminatory policies have run rampant.⁴⁹ And the chaos at the border has exacerbated cartel violence and insecurity.⁵⁰ In addition, the deficient immigration policies of the Mexican government have left people stranded and vulnerable as the massive backlog of immigration and asylum applications grows.⁵¹

In short, North America is facing a humanitarian crisis, which should be addressed by both the U.S. and Mexican governments in order to implement strategies designed to ensure fair, orderly, and humane systems for managing migration and tackling the complex root causes of forced migration, such as poverty, conflict, and violence.

C. SECURITY

In recent years, Mexico has sought to implement public security policies to combat the illegal trafficking of firearms.⁵² An event that drew attention in recent history occurred during the government of President Felipe Calderon, when the “Fast and Furious” program was implemented. This program consisted of the United States introducing more than 2,000 weapons (with chips incorporated) into Mexican territory, aiming to track and monitor their location in order to identify those responsible for the

45. See Suspension Of Entries and Imports from Designated Places to Prevent Spread of Communicable Diseases, 42 U.S.C. § 265; Uriel J. Garcia, *Here’s What You Need to Know About Title 42, The Pandemic-Era Policy That Quickly Sends Migrants to Mexico*, TEX. TRIB. (Apr. 29, 2022), <https://www.texastribune.org/2022/04/29/immigration-title-42-biden/> [https://perma.cc/7LC9-VVEJ].

46. See Suspension of Entries and Imports from Designated Places to Prevent Spread of Communicable Diseases, 42 U.S.C. § 265.

47. See *A Guide to Title 42 Expulsions at the Border*, AM. IMMIGR. COUNCIL (Oct. 15, 2021), <https://www.americanimmigrationcouncil.org/research/guide-title-42-expulsions-border> [https://perma.cc/B4JC-9F8H].

48. *Id.*

49. See *id.*

50. See *id.*

51. See Taylor Bayly, *In Focus: Migrants Languish in Mexico’s Chaotic Immigration System*, CRONKITE NEWS (Sept. 22, 2022), <https://cronkitenews.azpbs.org/2022/09/22/tapachula-migrants-protest-mexico-immigration-policies/> [https://perma.cc/3NVU-SSZ5].

52. See Nathaniel Parish Flannery, *Why is Mexico’s Security Strategy Failing?*, FORBES (Sept. 27, 2022), <https://www.forbes.com/sites/nathanielparishflannery/2022/09/27/why-is-mexicos-security-strategy-failing/?sh=61a31fc76ecd> [https://perma.cc/X8YX-YYSM].

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trafficking of weapons that would later end up in the hands of drug traffickers; however, the operation was ultimately a failure.⁵³

In addition, the Mexican federal government is currently suing the United States' eleven primary firearm manufacturers, claiming they facilitated the provision of weapons to various criminal groups in Mexico.⁵⁴ As the plaintiff, the Mexican government claims that around half a million weapons have crossed their border with the United States illegally.⁵⁵

The United States also has security topics to raise with Mexico. For example, the U.S. has noted publicly that Mexico is the main supplier of fentanyl in its territory.⁵⁶ Together, these migration and security topics will provide North American leaders with much to talk about in the upcoming international fora.

IV. The USMCA: Fulfilling Objectives?

A. BACKGROUND

Effective July 1, 2020, the United States-Mexico-Canada Agreement (USMCA or the Treaty) represented a major opportunity to renegotiate the terms of the North America Free Trade Agreement (NAFTA).⁵⁷ The resulting Treaty is an instrument that aims to meet the challenges of a contemporary North American economy.⁵⁸ The successful implementation of the Treaty has required close coordination among its three signing members.⁵⁹

Two years after its entry into force, some sectors affected by the Treaty have received special attention, like the energy and automotive sectors. But other considerations have not received special international attention. This

53. See Talk of the Nation, *Why Operation Fast and Furious Failed*, NPR (June 12, 2012), <https://www.npr.org/2012/06/21/155513757/why-operation-fast-and-furious-failed> [https://perma.cc/L5XF-Y923].

54. See Mary Beth Sheridan & Kevin Sieff, *Mexico Sues U.S.-Based Gunmakers Over Flow of Arms Across Border*, WASH. POST (Aug. 4, 2021), https://www.washingtonpost.com/world/the-americas/mexico-guns-us-lawsuit/2021/08/04/181fdbaa-f52d-11eb-a636-18cac59a98dc_story.html [https://perma.cc/UXP6-G3EA].

55. See *id.*

56. Veronica Stracqualursi, *US Report Finds Mexico Is Dominant Source of Fentanyl Trafficked Into US*, CNN (Feb. 8, 2022), <https://edition.cnn.com/2022/02/08/politics/fentanyl-commission-report/index.html> [https://perma.cc/VPN6-TG8W].

57. See Andrew Chatzky et al., *NAFTA and USMCA: Weighing the Impact of North American Trade*, COUNCIL ON FOREIGN RELS. (July 1, 2020), <https://www.cfr.org/backgrounder/naftas-economic-impact> [https://perma.cc/HS97-GW9H].

58. See *USMCA Automotive Sector: Executive Summary*, U.S. DEPT. OF COM., INT'L TRADE ADMIN., <https://www.trade.gov/usmca-auto-report> [https://perma.cc/VTK4-ZYLH] (last visited May 6, 2023).

59. See Claudia Ruiz Massieu, *USMCA in 2023: Opportunities and Challenges*, BROOKINGS (Feb. 28, 2023), <https://www.brookings.edu/blog/up-front/2023/02/27/the-usmca-in-2023-opportunities-and-challenges/> [https://perma.cc/QHZ8-NSU3].

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article analyzes those areas that have enjoyed less media prominence, namely investment and gender parity.

B. INVESTMENT

The Treaty has offered significant opportunities for international companies to expand their operations in Mexico, even in the face of negative factors such as the pandemic and increasing global supply chain costs.⁶⁰

Accordingly, Mexico has been an attractive option for Asian and European companies, offering essential benefits such as a wide network of trade agreements, well-developed infrastructure, and various tax incentives.⁶¹ The Treaty also allows nearshoring, through which foreign companies can operate in Mexico but remain foreign—thereby benefitting from Mexico’s geographic position, while still complying with the Treaty’s strict rules of origin.⁶²

Undoubtedly, the Treaty has encouraged direct investment in Mexico, a major objective of Mexico in signing the Treaty.⁶³ During the first half of 2022, for example, direct investment in Mexico increased twelve percent from the first half of 2021,⁶⁴ compared to a 4.2 percent increase in direct investment in Mexico from 2018 to 2019.⁶⁵

C. GENDER PERSPECTIVE

It is not widely known that the Treaty includes innovative gender parity measures. In Chapter 23, the Parties established the objective of eliminating discrimination in employment and occupation, as well as the goal of promoting equality of women in the workplace.⁶⁶ And in Chapter 25, the Treaty sets out the intention of the Parties to collaborate on different activities to promote small and medium enterprises owned by underrepresented groups.⁶⁷

60. See *México: Es Ahora Más Atractivo en el Comercio Internacional, Dice Experto del TMEC*, INVESTING.COM (Nov. 11, 2022), <https://mx.investing.com/news/economy/mexico-es-ahora-mas-atractivo-en-el-comercio-internacional-dice-experto-del-tmec-2441586> [<https://perma.cc/7R4P-4MZK>].

61. See *id.*

62. See *id.*

63. See *id.*

64. Comunicado No. 052, Secretaría de Economía, México Registra 27,511.6 Millones de Dólares de IED en el Primer Semestre de 2022, (Aug. 22, 2022), <https://www.gob.mx/se/articulos/mexico-registra-27-511-6-millones-de-dolares-de-ied-en-el-primer-semester-de-2022-312017> [<https://perma.cc/BA92-ZCC8>].

65. Comisión Nacional de Inversiones Extranjeras, Informe Estadístico Sobre el Comportamiento de la Inversión Extranjera Directa en México (2019), https://www.gob.mx/cms/uploads/attachment/file/545898/Informe_Congreso-2019-4T.pdf [<https://perma.cc/9AFP-LGTZ>].

66. See Agreement between the United States of America, the United Mexican States, and Canada, *supra* note 32, art. 23.1.

67. *Id.* at art. 25.1.

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Despite these lofty aims, now two years after the Treaty's entry into force, questions remain about what has been achieved.⁶⁸ In Mexico, between September 2020 and September 2022, the economic participation rate of women has increased; women comprise 45.32 percent of the Mexican workforce, up from the 40.18 percent they represented two years ago. But there is still a clear gender gap, as even today, a woman earns eighty-five pesos for every one hundred pesos earned by a man on average.⁶⁹ Indeed, there remain barriers of inequality for the participation and permanence of women in the labor market.

V. Immigration

The U.S. immigration regime is not known for being particularly helpful or inviting for foreign-born entrepreneurs.⁷⁰ But recent changes in U.S. policies have vastly improved options for Mexican nationals seeking visas and green cards to expand their careers and businesses within the U.S., creating immigration options that are much more useful for long-term career growth and stability in the U.S.⁷¹

A. E-VISAS FOR US INVESTMENT & INTERNATIONAL TRADE

In August 2020, the validity of E-visas granted to Mexican people based on international trade (E-1) or investment in a U.S. business (E-2) was extended from one to four years.⁷² Both visa types were created under NAFTA and continue under the Treaty, though the extension from one to four years reflected a change in U.S. policy.⁷³

Although Mexican entrepreneurs have long been able to enjoy both the E-1 International Trade visa and the E-2 Investor visa, both previously only valid for one year, many chose not to apply for these visas because the arduous task of applying for the visa and then moving their life and family to a new country were not worth only a year of guaranteed immigration

68. See *#MujerEnLaEconomía*, MEXICAN INST. FOR COMPETITIVENESS (IMCO), <https://imco.org.mx/monitor/mujeres-en-la-economia/> [<https://perma.cc/D4RR-UBN8>].

69. See *id.*

70. See Amy Feldman, *Why the U.S. is Losing Immigrant Entrepreneurs to Other Nations*, FORBES (June 3, 2022) <https://www.forbes.com/sites/amyfeldman/2021/06/03/why-the-us-is-losing-immigrant-entrepreneurs-to-other-nations/?sh=13d5e59f5f0b> [<https://perma.cc/C74Z-S2L2>].

71. See generally *E2 Visa: Mexicans now Eligible for Longer-Validity E2 & E1 Visas*, DAVIES & ASSOCS., LLC (Aug. 31, 2020), <https://www.usimmigrationadvisor.com/immigration-blog/e2-visa-mexicans-now-eligible-for-longer-validity-e2-e1-visas/> [<https://perma.cc/JA74-DNQT>].

72. *Id.*

73. Each party named the agreement differently, with the U.S. calling it the USMCA and Mexico calling it the Tratado entre México, Estados Unidos y Canadá (T-MEC). See Agreement between U.S., Mexico, and Canada, *supra* note 32.

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status.⁷⁴ But today, Mexican nationals with approved E-visas can now enjoy four years in the U.S. before renewal.⁷⁵

The U.S. Consulate in Ciudad Juarez, Chihuahua was initially the only place in Mexico that would process E-visas.⁷⁶ But in January 2021, the U.S. Embassy in Mexico City began processing E-visas as well.⁷⁷ The ability of Mexican entrepreneurs to process their visas in the nation's capital is a welcome change that aligns more closely with the professional reality of most E-2 applicants, who often come from central Mexico.

B. TN VISA FOR MEXICAN PROFESSIONALS

A TN visa is available to Mexicans whose profession appears on the NAFTA professionals list and who receive a qualifying job offer from a U.S. company.⁷⁸ The TN visa can often be faster and easier to acquire than an E-visa, such that many Mexican entrepreneurs are re-examining their intersecting professional and immigration options.⁷⁹

Much like the E-visa, TN visas⁸⁰ were historically available in one-year increments, making them a tedious and risky option for both U.S. employers, understandably hesitant to hire an employee who may not be able to work more than a year, and for employees, hesitant to quit their jobs, uproot their entire lives, and move under a one-year visa with no guarantee of renewal.

On June 15, 2022, the U.S. Department of State announced that all newly issued TN visas would be valid for up to four years for Mexican professionals.⁸¹ In the two years since the E-visa validity period was increased, my practice has seen a huge increase in interest for E-visas for Mexican entrepreneurs. And a similar trend has emerged for TN visas in the short time that the four-year term has been in effect.

74. See Daniel Waldron & Sanwar Ali, *E1 Visa and E2 Visa Validity Increased For Mexican Nationals*, WORKPERMIT.COM (Aug. 13, 2020), <https://workpermit.com/news/e1-visa-and-e2-visa-validity-increased-mexican-nationals-20200813> [<https://perma.cc/SWE3-U4AX>].

75. See *id.*

76. See U.S. Mission to Mex., *E-2 Visa Instruction*, U.S. EMBASSY & CONSULATES IN MEX. (May 26, 2022), <https://mx.usembassy.gov/e-2-visa-instructions/> [<https://perma.cc/68DN-XC66>].

77. See *id.*

78. See *Visas for Canadian and Mexican NAFTA Professional Workers*, U.S. DEPT. OF STATE – BUREAU OF CONSULAR AFFS., <https://travel.state.gov/content/travel/en/us-visas/employment/visas-canadian-mexican-nafta-professional-workers.html> [<https://perma.cc/PKB3-LBKK>].

79. See *TN Visas for Canadian and Mexican Entrepreneurs*, CURRAN, BERGER, & KLUDT, <https://cbkimmigration.com/employment-based-immigration/tn-visas-for-citizens-of-canada-mexico/tn-visas-for-canadian-and-mexican-entrepreneurs/> [<https://perma.cc/6M7Z-K3QP>].

80. See 8 C.F.R. § 214.2(b)(4).

81. U.S. Embassy in Mexico (@USEmbassyMex), TWITTER (June 15, 2020), <https://twitter.com/USEmbassyMEX/status/1537099451176828928> [<https://perma.cc/MAY2-7NQZ>].

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C. GREEN CARDS FOR MEXICAN ENTREPRENEURS: SPEEDY
OPTIONS

Self-sponsoring a green card is never a simple process, but the experience becomes even more tenuous and frustrating when long processing times are involved.⁸² Mexican entrepreneurs have extremely limited options for self-sponsoring a green card.⁸³ Two popular options many entrepreneurs use include (1) the EB-1C Green Card for multinational managers⁸⁴ and (2) the EB-2 Green Card with a National Interest Waiver.⁸⁵ Until recently, neither of these self-sponsored green card options could be filed with premium processing, meaning that adjudication could take two years or longer.⁸⁶

But in June 2022, USCIS announced that both the EB-1C and EB-2 National Interest Waiver categories would now be eligible for premium processing.⁸⁷ The program is being rolled out in phases, starting with already filed cases which may be upgraded to premium processing. Once premium processing is selected, USCIS must respond within forty-five calendar days.⁸⁸ While this policy change will not resolve the entire case in one to two months, the selection of premium processing at this stage can reduce the processing times by several years for Mexican entrepreneurs seeking to self-sponsor their own green cards in the EB-1C or EB-2 National Interest Waiver categories.⁸⁹

Being able to receive a quick answer instead of waiting in limbo for years is a huge benefit, not just to Mexican entrepreneurs but also to the U.S. economy and U.S. workers, who benefit from their activities in the country.⁹⁰

82. See *generally Self-Sponsored Employment Based Legal Permanent Residency*, YALE UNIV. – OFF. OF INT’L STUDENTS & SCHOLARS, <https://oiss.yale.edu/immigration/us-permanent-residence/self-sponsored-employment-based-legal-permanent-residency> [<https://perma.cc/AM86-R95J>].

83. See *Green Card for Employment Based Immigrants*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/green-card/green-card-eligibility/green-card-for-employment-based-immigrants> [<https://perma.cc/9ZT9-8A2>].

84. *Employment-Based Immigration: First Preference EB-1*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/working-in-the-united-states/permanent-workers/employment-based-immigration-first-preference-eb-1> [<https://perma.cc/W8LW-FT6H>].

85. *Employment-Based Immigration: Second Preference EB-2*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/working-in-the-united-states/permanent-workers/employment-based-immigration-second-preference-eb-2> [<https://perma.cc/K922-KRZT>].

86. See *Historical National Median Processing Time (in Months) for All USCIS Offices for Select Forms by Fiscal Year*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://egov.uscis.gov/processing-times/historic-pt> [<https://perma.cc/H94R-4WWL>].

87. See U.S. CITIZEN AND IMMIGR. SERVS., <https://www.uscis.gov/forms/all-forms/how-do-i-request-premium-processing> (last visited Mar. 25, 2023) [<https://perma.cc/2BKZ-L7TK>].

88. See *id.*

89. See *id.*

90. *White House Fact Sheet: 2022 U.S.-Mexico High-Level Economic Dialogue*, THE WHITE HOUSE (Sept. 12, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/09/12/fact-sheet-2022-u-s-mexico-high-level-economic-dialogue/> [<https://perma.cc/9RYL-3C5W>]; Edward Alden, *U.S. Immigration Has Become and Elaborate Bait and Switch*, FP.COM,

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D. U.S. IMMIGRATION POLICY - AN EVER-CHANGING LANDSCAPE

While U.S. immigration law is not always agile for the foreign-born entrepreneur, Mexican nationals have benefited from a host of recent policy changes that make the U.S. a more inviting and productive environment for business growth. These changes will no doubt serve to further strengthen the important business and cultural ties between the U.S. and Mexico, by empowering Mexican entrepreneurs to grow their careers and their businesses in the U.S.

VI. President Andres Manuel Obrador's Proposed Electoral Reform

A. BACKGROUND

Mexico's democracy stagnated during most of the past century, due to a single-party rule that lasted for seventy-one years until an opposition party finally gained the presidency in 2000.⁹¹ The democratic transition that led to the current electoral system was the result of several far-reaching electoral constitutional amendments.⁹² In this context, Mexican President Andrés Manuel López Obrador (AMLO) recently proposed aggressive electoral modifications to amend the Mexican Constitution (CPEUM).⁹³ This article will analyze some of the most relevant and controversial points of these proposed reforms.

B. NATIONAL ELECTORAL INSTITUTE (INE) AND THE FEDERAL ELECTORAL TRIBUNAL (TEPJF)

Today, the Instituto Nacional Electoral (INE)⁹⁴ is the autonomous institution in charge of organizing elections in Mexico, which it does along with local agencies (Organismos Públicos Locales or OPL) in each state throughout the country.⁹⁵ The general council of the INE is its governing body and is composed of ten members and a president, each of whom is

(Oct. 27, 2022), <https://foreignpolicy.com/2022/10/27/us-immigration-green-cards-biden-congress-reform-midterm-elections-india-china-canada/> [https://perma.cc/TFQ2-YELS].

91. See Valerie Wirtschafter & Arturo Sarukhan, *Mexico Takes Another Step Toward its Authoritarian Past*, BROOKINGS (Mar. 16, 2023), <https://www.brookings.edu/blog/order-from-chaos/2023/03/16/mexico-takes-another-step-toward-its-authoritarian-past/> [https://perma.cc/P5KM-CGK4].

92. This includes the 1977, 1986, 1989, 1993, 1994, 2007 and 2014 electoral amendments. See generally Constitución Política de los Estados Unidos Mexicanos, CP, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10-02-2014.

93. Gutiérrez Luna, Sergio Carlos, "Iniciativa del Ejecutivo Federal," Gaceta Parlamentaria, vol. XXV, num. 6012-XI, 28 de abril 2022.

94. See Constitución Política de los Estados Unidos Mexicanos, CPEUM, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10-02-2014.

95. See *id.*

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nominated, evaluated by an interdisciplinary council, and elected by a two-thirds majority for nine-year term.⁹⁶

AMLO's amendments propose to replace INE with a new Instituto Nacional Electoral y de Consultas (INEC).⁹⁷ INEC would be composed of members according to the following procedure: every six years the President, Congress, and Supreme Court nominate twenty candidates each, among which, only seven shall be elected by popular vote.⁹⁸ The seven members of the Federal Electoral Tribunal's Upper Chamber⁹⁹—an electoral judiciary body—would be selected in the same manner.¹⁰⁰ In addition, the reform would eliminate each of the state OPLs, instead centralizing electoral power in the federal authority.¹⁰¹

**C. HOUSE OF REPRESENTATIVES, SENATE, LOCAL LEGISLATURES,
AND MUNICIPAL AUTHORITIES**

Mexico has a bicameral parliament¹⁰² made up of two chambers:¹⁰³ the Chamber of Deputies, composed of 500 members¹⁰⁴ (300 elected by relative majority¹⁰⁵ and 200 elected by proportional representation¹⁰⁶), and the Senate, composed of 128 members¹⁰⁷ (sixty-four elected by relative majority, thirty-two elected by first minority, and thirty-two by proportional representation).¹⁰⁸

The constitutional amendment proposed by AMLO reduces the number of deputies from 500 to 300, reduces the number of senators from 128 to ninety-six, and removes all members of Congress elected by relative

96. *See id.*

97. *See* Adriana Barrera et al., *Mexico Passes Electoral Overhaul that Critics Warn Weakens Democracy*, REUTERS (Feb. 22, 2023), <https://www.reuters.com/world/americas/mexicos-senate-approves-electoral-reform-bill-2023-02-23/> [<https://perma.cc/E393-RS8X>].

98. *See* Nicolás Mariscal et al., *What Would AMLO's Election Reforms Mean for Mexico?*, THE DIALOGUE: LATIN AMERICA ADVISOR (May 13, 2022), <https://www.thedialogue.org/analysis/what-would-amlos-election-reforms-mean-for-mexico/> [<https://perma.cc/JA4X-M4PZ>].

99. *See* Constitución Política de los Estados Unidos Mexicanos, CPEUM, art. 99, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10-02-2014.

100. *See* Mauro Echeverría, *What AMLO's Electoral Reform Spells for Democracy*, IMPUNITY OBSERVER (Nov. 14, 2022), <https://impunityobserver.com/2022/11/14/what-amlos-electoral-reform-spells-for-democracy/> [<https://perma.cc/T5ZN-MBSM>].

101. *See* Mariscal et al., *supra* note 98.

102. Constitución Política de los Estados Unidos Mexicanos, CPEUM, art. 51–56, 60, 63, 116, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 18-11-2022.

103. *Id.* art. 50.

104. *Id.* art. 52.

105. *See* *Plano Distrital Seccional*, INSTITUTO NACIONAL ELECTORAL, <https://cartografia.ife.org.mx/sige7/?mapoteca=Planos&pds> [<https://perma.cc/7K9X-NFVF>] (last visited Apr. 13, 2023).

106. *See* *Mapa Electoral de la República Mexicana con División de Circunscripciones Plurinominales*, INSTITUTO NACIONAL ELECTORAL, <https://cartografia.ife.org.mx/sige7/?mapoteca=Planos&mrn> [<https://perma.cc/M42L-X9F8>] (last visited Apr. 13, 2023).

107. Constitución Política de los Estados Unidos Mexicanos, CPEUM, art. 56, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 18-11-2022.

108. *Id.*

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majority—instead assigning proportional representation.¹⁰⁹ In addition, AMLO's proposal reduces the number of members allowed in the local legislatures and city councils.¹¹⁰

D. POLITICAL PARTIES

AMLO's proposal maintains public financing for only the campaign expenses of political parties.¹¹¹ But other ordinary expenses would have to be covered by supporters and other funding sources.¹¹²

The proposals also make changes to advertising allocation for political parties. Today, each radio station and television channel airs forty-eight minutes of state content per day.¹¹³ These forty-eight minutes are distributed in the following manner: INE receives seven, eighteen, or twenty-four minutes, depending on whether it is an ordinary period, a pre-campaign period, or inter-campaign or campaign period; the remaining time is given to political parties.¹¹⁴ Under the proposed reforms, the state will grant electoral authorities and political parties only thirty minutes per day in each radio station and television channel, of which only three minutes will be distributed to the electoral authorities, the rest given to the political parties.¹¹⁵

E. CONCLUSIONS

The ruling political party, MORENA or Movimiento de Regeneración Nacional, founded by AMLO, controls the executive power, twenty of thirty-two state governorships, 50.2 percent of the Chamber of Deputies, 47.24 percent of the Senate, and has appointed four of eleven justices on the Supreme Court. It is, therefore, highly likely that AMLO's proposed amendments would allow MORENA to consolidate political control of the country, gaining control of the electoral authorities and processes. Additionally, the elimination of the OPL—and centralization of all electoral power—risks jeopardizing the efficiency and impartiality of local electoral processes.¹¹⁶

109. See Echeverría, *supra* note 100. Initially, the election by proportional representation was incorporated into the Mexican political system through the electoral amendment of 1977 in order to generate counterweights in the legislative system. See *Mexico Has Opened Up Its Political System*, N.Y. TIMES (July 21, 1988), <https://timesmachine.nytimes.com/timesmachine/1988/07/21/261088.html?pageNumber=24> [<https://perma.cc/DT58-E4WJ>].

110. See Constitución Política de los Estados Unidos Mexicanos, CPEUM, art. 115-16, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 18-11-2022.

111. *Id.* art. 41, ¶¶ I-III. See Mariscal et al., *supra* note 98.

112. See *id.*

113. See Constitución Política de los Estados Unidos Mexicanos, CPEUM, art. 41, ¶ III, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 18-11-2022.

114. See *id.*

115. See Echeverría, *supra* note 100.

116. See *Historia Morena*, MORENA: LA ESPERANZA DE MÉXICO, https://morenasonora-org.translate.google/historia-morena/?_x_tr_sl=ES&_x_tr_tl=EN&_x_tr_hl=EN&_x_tr_pto=SC

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As for the amendments related to financing, such reforms would disproportionately affect opposition parties, forcing them to find other non-public sources of financing. And with the changes in radio and television air-time rules, INE would be inhibited in its ability to educate the public about democracy-building initiatives.¹¹⁷

Given Mexico's history of hampered democracy, AMLO's proposed reforms should be viewed with skepticism. Otherwise, we run the risk of returning to the past that our country fought so hard to overcome.

VII. Use of the Mexican Armed Forces and Executive Orders

A. INTRODUCTION

Mexico is known for its “*mañana*” philosophy: “all that can be done tomorrow should wait until tomorrow.” While this philosophy may be appealing to the millions of tourists that visit Mexico every year to relax, it is a heavy burden on productivity and the timely execution of projects. In this context, the Mexican armed forces are unique in their discipline and ability to execute.

This piece discusses some of the tasks that previous federal administrations have conferred upon the Mexican Army (Ejército Mexicano), the Mexican Navy (Marina Armada de México), and the Mexican Air Force (Fuerza Área) (jointly referred to herein as the “Mexican Armed Forces”). This piece also discusses additional functions assigned to the Mexican Armed Forces by the current federal administration through constitutional amendments, legal reform, and executive orders.

B. DEPLOYMENT OF THE MEXICAN ARMED FORCES BY PREVIOUS ADMINISTRATIONS

Under the Mexican Constitution, the President is the Commander in Chief of the Mexican Armed Forces, which can be deployed for preserving internal security and for external defense.¹¹⁸ The Army and Air Force fall under the Ministry of National Defense (Secretaría de la Defensa Nacional), while the Navy exists in its own separate naval agency (Secretaría de Marina).¹¹⁹

[<https://perma.cc/GVS7-97HW>] (last visited Apr. 13, 2023); Vanessa Buschschlüter, *Mexico's Governing Party Captures Four More States*, BBC (June 6, 2022), <https://www.bbc.com/news/world-latin-america-61711398> [<https://perma.cc/X5XG-42UP>]; Kimberly Breier et al., *Mexico's New Congress*, COVINGTON: GLOBAL POLICY WATCH (Sept. 2, 2021), <https://www.globalpolicywatch.com/2021/09/mexicos-new-congress/> [<https://perma.cc/H2PE-VJCW>].

117. See Constitución Política de los Estados Unidos Mexicanos, CPEUM, art. 41, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 18-11-2022.

118. See *id.* art. 89.

119. See *id.* art. 76.

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The administrations of President Felipe Calderon (2006-2012) and of President Enrique Peña Nieto (2012-2018) deployed the Mexican Armed Forces to conduct police functions and fight organized crime in a direct confrontation with drug cartels.¹²⁰ In doing so, these administrations relied on binding 1996 precedent from the Mexican Supreme Court, which upheld the constitutionality of the Mexican Armed Forces supporting the internal security role of police forces.¹²¹

C. DESIGN OF AN INSTITUTIONAL FRAMEWORK FOR CONTINUED DEPLOYMENT

On May 24, 2022, President Andres Manuel López Obrador issued an executive order conferring authority over customhouses to the Mexican Armed Forces: the Mexican Army now enjoys control over inland customhouses and the Navy over those in ports.¹²² This executive order aligns with the legal reform of Mexican Ports Law, which took effect in June 2021 and turned over all customs authority at ports to the Mexican Navy; before this law, this responsibility belonged to the Ministry of Communications and Transportation.¹²³ The rationale behind this increased authority granted to the Mexican Armed Forces was purportedly security, citing the increasing influx of synthetic drugs and chemical precursors for supplying the domestic and U.S. drug markets.¹²⁴

More recently, on October 12, 2022, amendments to the Constitution were passed to provide for the deployment of the Mexican Armed Forces to participate in internal security for the next nine years, i.e., through 2031.¹²⁵ Again, the stated underlying rationale was security: specifically, to allow for the full-fledged development of the structures, capabilities, and territorial outreach of the National Guard (Guardia Nacional)—a nationwide police force created in 2019 by the Mexican Congress and a majority of state

120. See Iñigo Guevara Moyano, *Mexico's National Guard: When Police are Not Enough*, WILSON CENTER (Jan. 2020), <https://www.wilsoncenter.org/sites/default/files/media/uploads/documents/Mexico%27s%20National%20Guard.pdf> [<https://perma.cc/94T5-VWEU>].

121. *Mexico High Court Upholds Keeping Military on Police Duties*, ABC NEWS (Nov. 29, 2022), <https://abcnews.go.com/International/wireStory/mexico-high-court-upholds-keeping-military-police-duties-94175642> [<https://perma.cc/6HPP-B7LE>].

122. See Diego Ore, *Mexico gives Army control of National Guard, sparks clash with U.N.*, REUTERS (Sept. 9, 2022), <https://www.reuters.com/world/americas/mexican-congress-backs-army-taking-control-national-guard-2022-09-09/> [<https://perma.cc/H7XA-SLZ9>].

123. See *What's at Stake in Putting the Navy in Charge of Mexico's Ports?*, BNAMERICAS (Sept. 23, 2020), <https://www.bnamericas.com/en/news/whats-at-stake-in-putting-the-navy-in-charge-of-mexicos-ports> [<https://perma.cc/S5BX-HTX2>].

124. See Julian Resendiz, *Navy Takes Control of Mexican Seaports to Stem Flow of Synthetic Drugs, Precursor Chemicals*, BORDER REPORT (Jan. 11, 2021), <https://www.borderreport.com/regions/mexico/navy-takes-control-of-mexican-seaports-to-stem-flow-of-synthetic-drugs-precursor-chemicals/> [<https://perma.cc/N92X-NEDU>].

125. See *Mexico: Extending Military Policing Threatens Rights*, HUM. RTS. WATCH (Aug. 26, 2022), <https://www.hrw.org/news/2022/08/26/mexico-extending-military-policing-threatens-rights> [<https://perma.cc/Q4VE-EWNY>].

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legislatures; the National Guard is formally directed by non-military civil servants, though its ranks were sourced from the Mexican Armed Forces.¹²⁶

D. BEYOND INTERNAL SECURITY

Although the stated goals of the expanded power of the Mexican Armed Forces center on public security, the current federal administration has expanded far beyond this underlying rationale. President López Obrador's administration has used the Mexican Armed Forces in a host of government-sponsored projects that are far removed from internal security.¹²⁷ He has charged the Mexican Army with the construction and operation of a new airport for serving Mexico City, the construction of the Maya Train project in the Yucatan Peninsula, and the construction of a railroad bypass in Nogales, Sonora.¹²⁸

The intervention of the Mexican Armed Forces in these arenas inhibits transparency.¹²⁹ Federal public works and procurement laws do not require public tenders for projects run by the Mexican Armed Forces, so contracts may be awarded directly to the Mexican Armed Forces.¹³⁰ And the involvement of the Mexican Armed Forces leads to the non-public classification of those projects for the purposes of freedom of information laws.¹³¹ In line with this, in November 2021, President López Obrador issued an executive order allowing for the non-public classification of federal infrastructure projects.¹³²

E. CONCLUSIONS

The debate about “militarization” in Mexico has become very heated in recent months.¹³³ At the heart of the debate is a delicate balancing act of public policy: while blazing drug wars may warrant the intervention of the

126. *See id.*

127. *See id.*

128. *See Mexican President Expropriates Land for Construction of Mayan Train*, REUTERS (Aug. 1, 2022, 5:59 PM), <https://www.reuters.com/world/americas/mexican-president-expropriates-land-construction-mayan-train-2022-08-01/> [<https://perma.cc/8QMF-WXH5>].

129. *See Mexico: Extending Military Policing Threatens Rights*, *supra* note 125.

130. *See Exemptions to Competitive Bidding*, BAKER MCKENZIE, <https://resourcehub.baker-mckenzie.com/en/resources/public-procurement-world/public-procurement/mexico/topics/7-exemptions-to-competitive-bidding> [<https://perma.cc/PM2Q-PNLQ>] (last visited Apr. 13, 2023).

131. *See* Sergio Chagoya D. & Elías Zaga Belzer, *Defence & Security Procurement in Mexico*, LEXOLOGY (Jan. 16, 2019), <https://www.lexology.com/library/detail.aspx?g=21e70e36-51c7-4473-8289-b2dc43cbf5d3> [<https://perma.cc/XZ2W-KY45>].

132. *See* Cassandra Garrison et al., *Mexican President Defends Move to Expedite Public Works*, REUTERS (Nov. 23, 2021), <https://www.reuters.com/markets/deals/mexican-president-defends-move-expedite-public-works-2021-11-23/> [<https://perma.cc/PJP2-LKGC>].

133. *See* Sonja Wolf, *Is Mexico's Security Policy Backfiring?*, AMERICAS Q., (Sept. 8, 2022) <https://www.americaquarterly.org/article/is-mexicos-security-policy-backfiring/> [<https://perma.cc/7V4E-8DH4>].

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Mexican Armed Forces in internal security, the use of the Armed Forces in government-sponsored projects may be more questionable.¹³⁴ In the latter function, the opacity of information and placing the Mexican Armed Forces in the way of corruption may not ultimately counter the reputation of the Mexican Armed Forces for getting the job done.¹³⁵

VIII. Ayotzinapa: Developments in the Search for Truth and Justice

A. BACKGROUND

The disappearance of forty-three students from the Ayotzinapa Rural Teachers' College in Iguala, Guerrero has been one of the most notorious atrocities in Mexico's history.¹³⁶ Eight years after the tragedy, the students' families have been unable to access truth and justice despite wide national and international attention.¹³⁷ This article aims to analyze the progress achieved in the case so far.

In 2015, just four months after the disappearance, the administration of former President Peña Nieto offered a "historical truth" of the case, affirming that the students were killed after being mistaken as cartel members and subsequently incinerated at a trash dump.¹³⁸ Said "truth" was later scientifically disproven by independent analyses¹³⁹ and dismantled by a federal court ruling,¹⁴⁰ which concluded that the investigation had been neither effective nor impartial.¹⁴¹

134. *See id.*

135. *See id.*

136. *See* Oscar Lopez, *Mexico Says Disappearance of 43 Students Was a 'Crime of the State'*, N.Y. TIMES (Aug. 20, 2022) <https://www.nytimes.com/2022/08/18/world/americas/mexico-students-disappearance.html> [<https://perma.cc/7WDJ-HB7W>].

137. *See id.*

138. *See* Olivia Mozdierz, *The Ayotzinapa Case at Seven Years: A Political and Moral Test for Mexican President López Obrador*, YALE J. OF INT'L AFFS. (Jan. 12, 2022), <https://www.yalejournal.org/publications/the-ayotzinapa-case-at-seven-years-a-political-and-moral-test-for-mexican-president-lpez-obrador> [<https://perma.cc/JC9X-DU3T>].

139. *See A la Opinión Pública*, EQUIPO ARGENTINO DE ANTROPOLOGÍA FORENSE (Apr. 2, 2016), [https://ymlp.com/ze\]7Fb](https://ymlp.com/ze]7Fb) [<https://perma.cc/6FBC-5C8D>]; Maureen Meyer, *Mexico's Government Claims the 43 Ayotzinapa Students Were Incinerated in a Trash Dump. Here's How They're Wrong*, WOLA (Apr. 23, 2016), <https://www.wola.org/analysis/mexicos-government-claims-the-43-ayotzinapa-students-were-incinerated-in-a-trash-dump-heres-how-theyre-wrong/> [<https://perma.cc/E3AR-GD2A>].

140. Ximena Suarez-Enriquez, *The New Investigative Commission for the Ayotzinapa Case*, WOLA (June 28, 2018), <https://www.wola.org/analysis/investigative-commission-ayotzinapa-case/> [<https://perma.cc/7C4T-HFCD>].

141. *See id.*

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B. RECENT DEVELOPMENTS

When President Andres Manuel López Obrador took office in 2018, he vowed to resolve the case, creating the Commission for Truth and Access to Justice in the Ayotzinapa Case (COVAJ), promising to finally show results.¹⁴²

With few developments and just two years left in government, the investigation advanced in early 2022 with the discovery of several communications purportedly sent in 2014 by individuals involved in the disappearance, including members of criminal organizations, government officials, and military officials.¹⁴³ In June 2022, President López Obrador announced a soon-to-be published definitive report on what transpired the night of the disappearance.¹⁴⁴ The announcement followed the issuance of dozens of arrest warrants. Among those arrested were military personnel, indicating progress.¹⁴⁵

Later in August 2022, President López Obrador released the findings of the COVAJ investigation, which concluded a “crime of state,” confirming that government authorities from different agencies and levels, including the Mexican Army, conspired with criminal organizations in the disappearance.¹⁴⁶ The report also determined that the Peña Nieto administration, and especially its attorney general Jesús Murillo Karam, were involved in the fabrication of the so-called “historic truth,”¹⁴⁷ pointing to Murillo Karam as the highest-profile individual responsible for the forced disappearance.¹⁴⁸

142. See Secretaría de Gobernación, *Comisión para la Verdad y Acceso a la Justicia en el Caso Ayotzinapa*, GOBIERNO DE MEX. (Jan. 15, 2019), <https://www.gob.mx/segob/es/articulos/comision-para-verdad-y-acceso-a-la-justicia-en-el-caso-ayotzinapa?idiom=ES> [https://perma.cc/MK86-E3BJ].

143. See Gloria Leticia Díaz, *GIEI Desconoce Contenido de 467 Capturas de Pantalla en Informe de Ayotzinapa; Pide Acceso a Pruebas*, PROCESO (Aug. 22, 2022), <https://www.proceso.com.mx/nacional/2022/8/22/giei-desconoce-contenido-de-467-capturas-de-pantalla-en-informe-de-ayotzinapa-pide-acceso-pruebas-291934.html> [https://perma.cc/5E27-L8KW].

144. See Pedro Villa y Caña & Luis Carlos Rodríguez, *AMLO Asegura que este Año Quedará Resuelto Caso Ayotzinapa; “Ya Sabemos lo que Sucedió,” Dice*, EL UNIVERSAL (June 30, 2022), <https://www.eluniversal.com.mx/nacion/amlo-asegura-que-este-ano-queudara-resuelto-caso-ayotzinapa-ya-sabemos-lo-que-sucedio-dice> [https://perma.cc/7E93-ETVD].

145. See Kevin Sieff, *Mexico Arrests Army General in Students’ Disappearance*, WASH. POST (Sept. 15, 2022), https://www.washingtonpost.com/world/2022/09/15/mexico-missing-students-ayotzinapa-general-arrested/?itid=LK_inline_manual_5/ [https://perma.cc/ZET3-FBVW].

146. See *Informe de la Presidencia de la Comisión para la Verdad y el Acceso a la Justicia del Caso Ayotzinapa*, COMISIÓN PARA LA VERDAD Y EL ACCESO A LA JUSTICIA DEL CASO AYOTZINAPA (Aug. 18, 2022), http://www.comisionayotzinapa.segob.gob.mx/work/models/Comision_para_la_Verdad/Documentos/pdf/Informe_de_la_Presidencia_PARA_WEB.pdf [https://perma.cc/3U6R-ALTU].

147. See *id.*

148. See *id.*

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In the weeks that followed, Murillo Karam was arrested and over eighty additional arrest warrants were issued.¹⁴⁹ These actions reflected real progress and showed that the students' families were closer to truth and justice than ever.

But the case against Murillo Karam was eventually dismissed and more than a dozen arrest warrants canceled, citing deficient evidence.¹⁵⁰ A team of international investigators also questioned the authenticity of the communications that laid at the center of the COVAJ report.¹⁵¹ Even then, prosecutors claimed to have enough authentic evidence supporting their conclusions.¹⁵²

In a country where justice is often used as a political tool and after eight years of uncertainty, the students' families need closure and not just propaganda ahead of the general elections in less than two years.¹⁵³

A lack of due diligence on the part of Mexican authorities leaves victims, their families, and the public with the perception that the government tolerates or is complicit in the disappearances, thereby contributing to a climate of pervasive impunity. As such, success can only be achieved through an effective, impartial, and comprehensive investigation that provides access to truth and justice.

IX. Protection of Environmental Defenders in Mexico

According to environmental watchdog Global Witness, Mexico was the deadliest country in the world for environmental activists in 2021.¹⁵⁴ Fifty-

149. See Oscar Lopez, *Mexico Arrests Top Prosecutor in Case of Missing Students and Issues 80 Warrants*, N.Y. TIMES (Aug. 20, 2022), <https://www.nytimes.com/2022/08/20/world/americas/mexico-arrests-jesus-murillo-karam.html> [https://perma.cc/9JJV-XZ5W].

150. See Mary Beth Sheridan & Alejandra Ibarra Chaoul, *Prosecutor Quits Case of 43 Missing Mexican Students Amid New Turmoil*, WASH. POST (Sept. 27, 2022), <https://www.washingtonpost.com/world/2022/09/27/mexico-ayotzinapa-missing-students-prosecutor/> [https://perma.cc/8WWK-7E7R]; Manuel Espino, *Concede a Murillo Karam Suspensión Definitiva contra Vinculación a Proceso; Continuará en Prison*, EL UNIVERSAL (Sept. 29, 2022), <https://www.eluniversal.com.mx/nacion/conceden-murillo-karam-suspension-definitiva-contravinculacion-proceso-continuara-en-prision> [https://perma.cc/3C29-UP9E].

151. See *Conferencia de Prensa del Grupo Interdisciplinario de Expertos Independientes*, FACEBOOK (Oct. 31, 2022), https://www.facebook.com/CDHCMX/videos/872312774150017/?extid=CL-UNK-UNK-UNK-IO5_GK0T-GK1C&ref=Saring [https://perma.cc/68CS-84XW]; John Gibler, *La Investigación del Caso Ayotzinapa se Desmorona desde Adentro*, WASH. POST (Nov. 3, 2022, 7:00 AM), <https://www.washingtonpost.com/es/post-opinion/2022/11/03/filtracion-43-estudiantes-ayotzinapa-giei-investigacion/> [https://perma.cc/Y33J-MTR8]; García, *supra* note 9.

152. García, *supra* note 9.

153. See León Krauze, *Mexico Needs Justice and Fairness, Not Politics, to Heal from Ayotzinapa*, WASH. POST (Aug. 30, 2022, 5:16 PM), <https://www.washingtonpost.com/opinions/2022/08/30/mexico-ayotzinapa-attorney-general-amlo-justice-fairness/> [https://perma.cc/NBW2-TRK].

154. See Ali Hines, *Decade of Defiance: Ten Years of Reporting Land and Environmental Activism Worldwide*, GLOBAL WITNESS (Sept. 29, 2022), <https://www.globalwitness.org/en/campaigns/environmental-activists/decade-defiance/> [https://perma.cc/XE2G-Z92P].

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four environmental or land activists were killed in Mexico during the year—representing twenty-five percent of the 200 activists killed worldwide.¹⁵⁵ Mexico’s ratification of the Escazú Agreement, and its subsequent entry into force in April 2021, provides a mechanism for protecting the rights of environmental defenders in the coming years.¹⁵⁶

A. CASE STUDY: AYOTITLÁN COMMUNITY

This year witnessed continued violence against land defenders in the Ayotitlán Community in Jalisco, Mexico. A decades-old dispute between the Ayotitlán Community and the Benito Juárez Peña Colorada mining operation over indigenous communal lands has led to repeated confrontations, disappearances, and violence, including during this year.¹⁵⁷ In April 2021, for example, José Santos Isaac Chávez, an indigenous leader, lawyer, and vocal opponent of the Peña Colorada mine, was found murdered.¹⁵⁸ Other members of the Ayotitlán Community report that they have experienced forced disappearances, intimidation, death threats, illegal arrests, and deprivations of liberty in retaliation for environmental activism.¹⁵⁹ Community members also report that other defenders have been killed.¹⁶⁰ The ongoing violence creates an atmosphere of fear that chills defenders’ environmental protection efforts.

The local government has not taken action to investigate or bring to justice the perpetrators of violence against the Ayotitlán Community.¹⁶¹ Nor has Mexico’s federal Mechanism for the Protection of Human Rights Defenders and Journalists, which receives requests for protection, been able to protect the defenders.¹⁶² As the United Nations Special Rapporteur on the Situation of Human Rights Defenders recognized in March 2021, impunity for killings is a key driver for additional murders.¹⁶³ Defenders believe that the local government’s failure to act is driven in part by its

155. *See id.*

156. *See id.*

157. *See, e.g.,* Hines, *supra* note 154; Juan Carlos Flores & Juan Carlos G. Partida, *Chocan nabuas, policías y mineros; 11 lesionados*, LA JORNADA (July 24, 2015), <https://www.jornada.com.mx/2015/07/24/estados/026n1est>. [<https://perma.cc/RUQ2-HU75>].

158. Hines, *supra* note 154.

159. *See, e.g.,* *Comunicado de Presna DGC/116/2021*, LA COMISIÓN NACIONAL DE LOS DERECHOS HUMANOS (Apr. 27, 2021), https://www.cndh.org.mx/sites/default/files/documentos/2021-04/COM_2021_116.pdf [<https://perma.cc/K8U6-QE6W>].

160. *See id.*

161. *See* Hines, *supra* note 154; *See, e.g.,* *Comunicado de Presna DGC/116/2021*, *supra* note 159.

162. *Cf. Mecanismo de Protección para Personas Defensoras de Derechos Humanos y Periodistas*, GOBIERNO DE MEX., <https://www.gob.mx/defensorasyperiodistas> [<https://perma.cc/58FW-V4FC>] (last visited Nov. 22, 2022).

163. Press Release, United Nations Human Rights, Office of the High Comm’r, Impunity for Killings of Human Rights Defenders Remains a Key Driver for More Murders, Special Rapporteur on the Situation of Human Rights Defenders Tells Human Rights Council (Mar. 5, 2021), <https://www.ohchr.org/en/press-releases/2021/03/impunity-killings-human-rights-defenders-remains-key-driver-more-murders#:~:text=Impunity%20for%20killings%20>

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connections with organized crime¹⁶⁴—the Jalisco Nueva Generación Cartel has reportedly established an interest in illegal mining in the area, which contributes to the violence against the indigenous community.¹⁶⁵ Corruption is known to be prevalent in Mexico, which Transparency International ranked 124th out of 180 countries on its annual corruption index.¹⁶⁶

Given the reports of violence and the local failures to act, in April 2021, Mexico’s National Human Rights Commission (CNDH) urged the National Guard to safeguard the life, security, and wellbeing of the Ayotitlán land defenders.¹⁶⁷

B. ESCAZÚ AGREEMENT

On January 22, 2021, Mexico acceded to the world’s first legally binding treaty to guarantee the rights of environmental defenders.¹⁶⁸ The Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (known as the Escazú Agreement) subsequently entered into force on April 22, 2021—International Earth Day.¹⁶⁹ Secretary-General of the United Nations António Guterres lauded the agreement, emphasizing it aims “to guarantee the rights of every person to a healthy environment and to sustainable development.”¹⁷⁰

A key component of the Escazú Agreement is its protection for environmental defenders. Article 9 of the agreement obligates Mexico and the other party states to “guarantee a safe and enabling environment . . . so that [environmental defenders] are able to act free from threat, restriction, and insecurity.”¹⁷¹ This article also requires party states to “take adequate and effective measures to recognize, protect and promote all the rights of human rights defenders in environmental matters” and “take appropriate,

remained%20a,prosecute%20perpetrators%20fuelled%20further%20killings [https://perma.cc/6Q9T-BSK2].

164. See *Comunicado de Prensa DGC/116/2021*, *supra* note 159.

165. See Hines, *supra* note 154.

166. *Our Work in Mexico*, TRANSPARENCY INTERNATIONAL, <https://www.transparency.org/en/countries/mexico> (last visited Nov. 14, 2022) [https://perma.cc/V9N8-4Z5P].

167. See *Comunicado de Prensa DGC/116/2021*, *supra* note 159.

168. See Press Release, Foreign Ministry & Environment Ministry, Mexico Makes History: Its Ratification of the Escazú Agreement Ensures Its Entry into Force (Jan. 22, 2021), <https://www.gob.mx/sre/prensa/mexico-makes-history-its-ratification-of-the-escazu-agreement-ensures-its-entry-into-force?idiom=EN> [https://perma.cc/NU54-5PLT]; see also *Escazú Agreement Takes Effect, Enshrining Right to Sustainable Development*, IISD (Apr. 26, 2021), <https://sdg.iisd.org/news/escazu-agreement-takes-effect-enshrining-right-to-sustainable-development/> [https://perma.cc/83PP-UJZE].

169. See *Escazú Agreement Takes Effect*, *supra* note 168.

170. See Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, Foreword, Sept. 27, 2018, 3397 U.N.T.S. 195.

171. *Id.* art. 9.

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effective and timely measures to prevent, investigate and punish attacks, threats or intimidations” against environmental defenders.¹⁷² Civil society groups have called upon the Mexican government to promptly and effectively implement the protections of the Escazú Agreement.¹⁷³

172. *Id.*

173. See, e.g., Hines, *supra* note 154; Citlalli Gonzalez Chacon et al., *Report on the Situation of Environmental Human Rights Defenders, Individuals and Communities, in Mexico, 2021*, CENTRO MEXICANO DE DERECHO AMBIENTAL (Mar. 2022), https://www.cemda.org.mx/wp-content/uploads/2022/04/CEMDA_INFORME2021_INGLES.pdf [<https://perma.cc/Z7E8-S8FH>].

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South Asia/Oceania & India

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This article surveys significant legal developments in South Asia and Oceania during the calendar year 2022.¹

I. The Insolvency and Bankruptcy Code – 2022 Developments

This article surveys developments in 2022 related to the Insolvency and Bankruptcy Code (IBC) in India, which was enacted in 2016.² Not all the provisions have been brought into force yet.³ The IBC has been amended eight times since 2016, and the provisions, currently applicable, have been notified in phases.⁴ Thus, the law is still evolving, as courts have attempted to streamline various issues that have arisen under the IBC.

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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. Harshvardhan Korada & Vasanth Rajasekaran, *Five Years of Insolvency and Bankruptcy Code: A Promising Journey*, HINDU BUS. LINE (Feb. 20, 2022, 10:55 PM), <https://www.thehindubusinessline.com/business-laws/five-years-of-insolvency-and-bankruptcy-code-a-promising-journey/article65058628.ece> [https://perma.cc/N83E-9R7E].

3. See Mani Gupta et al., *Overview of India's Insolvency and Bankruptcy Code*, GLOB. RESTRUCTURING REV. (Sept. 9, 2022), <https://globalrestructuringreview.com/review/asia-pacific-restructuring-review/2023/article/overview-of-indias-insolvency-and-bankruptcy-code> [https://perma.cc/L8ZF-E9JH].

4. See *Unto the Breach: The Eight Amendments Proposed to Bankruptcy Code Will Plug Some Loopholes*, TIMES OF INDIA (July 18, 2019, 8:13 PM), <https://timesofindia.indiatimes.com/blogs/toi-editorials/unto-the-breach-the-eight-amendments-proposed-to-bankruptcy-code-will-plug-some-loopholes/> [https://perma.cc/A69W-4ZSZ].

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A. TIME PERIOD FOR INITIATING INSOLVENCY PROCEEDINGS

The IBC does not provide any time periods within which a creditor must initiate proceedings.⁵ This gap has allowed parties to seek insolvency based on stale claims.⁶ The courts have drawn a distinction on claims that can result in the initiation of insolvency against a debtor.⁷

In *Kotak Mahindra Bank Ltd. v. Kew Precision Parts Private Ltd.*,⁸ the Indian Supreme Court held that proceedings under the IBC have to be initiated within three years from the date of accrual of the right to sue, that is, the date of default of payment of debt.⁹ But, in *Asset Reconstruction Company (India) Ltd. v. Tulip Star Hotels Ltd.*, the court held that, if a debt is acknowledged by a corporate debtor before the expiry of three years from the date of declaration that the loan account is in default, the time period gets extended.¹⁰

Further, the period during which insolvency proceedings take place must be excluded while computing the period of limitation for a suit or proceeding by or against the corporate debtor.¹¹ Thus, in *New Delhi Municipal Council v. Minosha India Ltd.*, the Supreme Court held that a debtor that undergoes insolvency has the benefit of the extended time period to initiate proceedings against a third party for recovery of its claim.¹²

B. CONFLICT BETWEEN IBC AND OTHER STATUTES

The courts have also tried to reconcile the conflict between insolvency proceedings and recovery of statutory dues. In *Sundaresh Bhatt v. Central Board of Indirect Taxes and Customs*, the Supreme Court noted the supremacy of the IBC over other statutes.¹³ Once a moratorium is introduced, the Customs authorities have limited powers of assessment or re-assessment of the duties and cannot initiate recovery proceedings.¹⁴ In *Indian Overseas*

5. See Shishir Mehta et. al., *Restructuring and Insolvency in India: Overview*, THOMSON REUTERS PRAC. L. (Jan. 1, 2022), <https://us.practicallaw.thomsonreuters.com/6-506-0854> [https://perma.cc/E9MV-BE38].

6. See Abhay Chandalia, *Getting Your Dues: Procedure for Creditors to File Under IBC*, ECON. TIMES (Aug. 31, 2019, 11:48 AM), <https://economictimes.indiatimes.com/small-biz/legal/procedure-for-creditors-to-file-under-ibc-insolvency-and-bankruptcy-code/articleshow/70920647.cms?from=mdr> [https://perma.cc/9L6F-BYPN].

7. See Shishir Mehta et. al., *supra* note 5.

8. *Kotak Mahindra Bank Ltd. v. Kew Precision Parts Priv. Ltd.*, 2020 SCC Online SC ¶ 55, at 25 (India).

9. *Id.* ¶ 56, at 25.

10. *Asset Reconstruction Co. (India) Ltd. v. Tulip Star Hotels Ltd.*, 2020 SCC Online SC ¶ 97, at 55.

11. “Moratorium” in terms of Section 14 of the IBC is a period wherein no judicial proceedings for recovery, enforcement of security interest, sale or transfer of assets, or termination of essential contracts can be instituted or continued against the Corporate Debtor. See The Insolvency and Bankr. Code § 14 (India).

12. *New Delhi Mun. Council v. Minosha India Ltd.*, 2022 SCC Online SC 22 (India).

13. *Sundaresh Bhatt v. Cent. Bd. of Indirect Taxes*, 2021 SCC Online SC 55 (India).

14. *Id.* at 31.

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Bank v. RCM Infrastructure Ltd.,¹⁵ the Supreme Court held that, during moratorium, a financial institution cannot continue with proceedings for recovery of any secured asset under another law.¹⁶

But, in *Rajiv Chakraborty Resolution Pro. of EIEL v. Directorate of Enforcement*,¹⁷ the Delhi High Court held that the powers of the Enforcement Directorate under the money laundering law¹⁸ to attach properties are not affected by the moratorium.

In *State Tax Officer v. Rainbow Papers Ltd.*,¹⁹ it was held that the Resolution Plan²⁰ cannot altogether ignore statutory demands. In the absence of a provision to pay either in a phased manner or with uniform proportional reduction, the company would necessarily have to be liquidated and its assets sold and distributed.²¹

C. NOT MANDATORY TO INITIATE INSOLVENCY ON DEFAULT OF A FINANCIAL DEBT

In *Vidarbha Industries Power Ltd. v. Axis Bank Ltd.*, the Supreme Court held that, despite an admission of default towards a financial creditor, insolvency proceedings cannot be initiated automatically if there is a possibility of clearing the financial default.²²

Likewise, in *Invest Asset Securitisation and Reconstruction Private Ltd. v. Girnar Fibres Ltd.*,²³ it was reiterated that the IBC is intended to bring the corporate debtor back to its feet and that its provisions cannot be misused for recovery of money. In *Amit Katyal v. Meera Ahuja*,²⁴ out of a total of 128 home buyers, eighty-two were against the insolvency proceedings of the corporate debtor housing project. Thus, the Supreme Court allowed the withdrawal of proceedings in the larger interest of the home buyers, who had been waiting for possession for more than eight years.²⁵ It was observed that the object of the IBC is “not to kill the company and stop/stall the

15. Indian Overseas Bank v. RCM Infrastructure Ltd., 2021 SCC Online SC 23 (India).

16. *Id.*; see generally The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (India) [hereinafter *Act*]; see also The Prohibition of Benami Property Transactions Act, 1988 (India).

17. Rajiv Chakraborty Resol. Pro. of EIEL v. Directorate of Enft, 2022 SCC Online Del 3703 (India).

18. See generally The Prevention of Money-Laundering Act, 2002 (India).

19. State Tax Officer v. Rainbow Papers Ltd., 2020 SCC Online SC 1162 (India).

20. “Resolution Plan” in terms of Section 5(26) of the IBC means a plan proposed by any person for insolvency resolution of the Corporate Debtor as a going concern in terms of Part II of the IBC. See The Insolvency and Bankr. Code, 2016, § 5(26) (India).

21. Rainbow Papers Ltd., 2020 SCC Online SC 1162, ¶ 53 (India).

22. Vidarbha Indus. Power Ltd. v. Axis Bank Ltd., 2021 SCC Online SC 31 (India).

23. Invest Asset Securitisation & Reconstruction Priv. Ltd. v. Girnar Fibres Ltd., 2021 SCC Online SC 9 (India).

24. Amit Katyal v. Meera Ahuja, 2020 SCC Online SC 14 (India).

25. *Id.* ¶ 9, at 12.

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project, but to ensure that the business of the company runs as a going concern.”²⁶

D. MULTIPLE PROCEEDINGS FOR THE SAME DEBT

In *Maitreya Doshi v. Anand Rathi Global Finance Ltd.*,²⁷ the Supreme Court held that proceedings can be initiated against both the actual borrower and a guarantor at the same time. Further, the culmination of insolvency proceedings with respect to one borrower will not discharge the co-borrower.²⁸ But, if the amount owing is realized in part from one entity, the balance may be realized from the others.²⁹

Likewise, in terms of *Mahendra Kumar Jajodia v. State Bank of India*,³⁰ creditors can initiate insolvency proceedings against personal guarantors even before commencing proceedings against the principal borrower. But the constitutionality of IBC provisions relating to personal guarantors has been challenged before the Supreme Court.³¹ As an interim measure, the Supreme Court has directed that the personal guarantor “shall not transfer, alienate, encumber or dispose of any of his assets or his legal rights or beneficial interest therein” and that the resolution professional shall not proceed with filing of the report.³²

II. The Courts’ Recent Proclivity Towards ADR and Out-of-Court Settlements in Commercial Disputes

A. INTRODUCTION

India’s recent legal discourse has revolved around remedying an overburdened and slow dispute resolution system. For many domestic and multinational entities that transact in India, issues often stem from improper enforcement mechanisms leading to delays and uncertain results.³³ Inevitably, companies start to prefer seating their disputes elsewhere, leading to a negative impact on the growth of India’s financial market.³⁴ Different approaches have been resorted to over the years to stem the tide. The establishment of commercial courts and specialized tribunals designated exclusively to deal with commercial disputes has been one such laudable

26. *Id.* ¶ 12, at 14–15.

27. *Maitreya Doshi v. Anand Rathi Glob. Fin. Ltd.*, 2021 SCC Online SC ¶ 37, at 11 (India).

28. *Id.*

29. *Id.* ¶ 37, at 11–12.

30. *Mahendra Kumar Jajodia v. State Bank of India*, 2022 SCC Online NCLAT 58 (India).

31. *Gurmeet Sodhi v. Union of India*, W.P. (C) No. 308 of 2022, dated Apr. 29, 2022 (SC) (India).

32. *Id.*

33. See Pratik Datta & Suyash Rai, *How to Start Resolving the Indian Judiciary’s Long-Running Case Backlog*, CARNEGIE ENDOWMENT FOR INT’L PEACE (Sept. 9, 2021), <https://carnegieendowment.org/2021/09/09/how-to-start-resolving-indian-judiciary-s-long-running-case-backlog-pub-85296> [<https://perma.cc/B6HE-VWYD>].

34. See *id.*

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effort.³⁵ Furthermore, the recent COVID-19 pandemic forced the judiciary to adopt technology in its daily practice, resorting to virtual hearings and electronic filing mechanisms to make the process more accessible and coherent.³⁶ A top-down approach proved beneficial, and many courts continue the practice, even beyond the lockdown.³⁷

Over the past year, the approach has turned towards reinforcing alternative dispute resolution as a more popular option.³⁸ The effort here again is not only to provide an alternative method of adjudication but also to showcase India's growing commitment to delivering an effective and efficient dispute resolution that benefits robust business.³⁹ This pro-ADR approach can be identified in three crucial spaces: (1) commercial suits; (2) insolvency disputes; and (3) arbitration.⁴⁰

B. COMMERCIAL SUITS

In a case delivered this year, the Supreme Court reinforced the need for all parties to undergo a pre-litigation mediation before instituting a suit under the Commercial Courts Act of 2015.⁴¹ Relying on the statutory amendment of section 12A of the Act, the Supreme Court highlighted the importance of undergoing mediation before approaching the rigors of court.⁴² The Supreme Court's decision underscores the need for parties to first attempt to resolve disputes amicably and within a short duration before it is brought to court. The mandatory nature can further be understood to ensure equal access to justice and a workable solution in commercial matters.

C. Insolvency Disputes

In two separate cases dealing with insolvency and bankruptcy law, the Supreme Court again found mediation and out-of-court settlements to be an effective method of quick and easy resolutions, even at later stages of litigation. In one of the cases, the Supreme Court observed that the law ensures all creditors have the capability and willingness to restructure their liabilities as part of the dispute resolution process.⁴³ In essence, the Supreme

35. Zia Mody et al., *The Dispute Resolution Review: India*, L. REVS. (Feb. 23, 2023), <https://the.lawreviews.co.uk/title/the-dispute-resolution-review/india> [<https://perma.cc/N3QD-KTE9>].

36. See Joanne Harris, *Access to Justice: India Leads Post-Covid Shift in Courts' Use of Technology*, INT'L BAR ASS'N (Oct. 12, 2022), <https://www.ibanet.org/Access-to-justice-India-virtual-courts> [<https://perma.cc/4ZNN-L7M4>].

37. See *id.*

38. See Anupama Hebbar et al., *Litigation and Enforcement in India: Overview*, THOMSON REUTERS PRAC. L. (Dec. 1, 2022), [https://uk.practicallaw.thomsonreuters.com/5-502-0726?transitionType=Default&contextData=\(Sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/5-502-0726?transitionType=Default&contextData=(Sc.Default)&firstPage=true) [<https://perma.cc/V4RN-8979>].

39. See *id.*

40. See *id.*

41. Patil Automation Priv. Ltd. v Rakheja Eng'rs Priv. Ltd., 2022 SCC Online SC 1 (India).

42. *Id.* at 2.

43. Vallal RCK v. M/S Siva Indus. & Holdings Ltd., 2022 SCC Online SC 10-11 (India).

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Court preferred the wisdom of the parties over court intervention. In another case, the Supreme Court held that the parties should not be forced to continue litigating their disputes merely because of a statutory limitation.⁴⁴ It was vital to allow parties to settle their disputes through other methods of dispute resolution, even when the dispute was tightly regulated by statutory guidelines.⁴⁵

D. ARBITRATION

Courts have limited their jurisdiction when it comes to parties agreeing to arbitrate their contractual disputes.⁴⁶ In earlier decisions, courts upheld the procedure adopted by parties in their tribunals, even if it did not entirely prescribe to the due process followed in the courts.⁴⁷ In one such case, the Supreme Court held that even statutory contraventions are not sufficient grounds for setting aside an award.⁴⁸ The Supreme Court observed that the construction of a tribunal under the terms of the agreement must not be replaced by curial intervention, unless there is an egregious violation of law.⁴⁹ Again, in another case, the Supreme Court expanded the enforcement of interim awards to include foreign emergency orders to allow parties the freedom to choose the method in which they attain and enforce urgent relief.⁵⁰ Similarly, over this past year, the role of courts to sit over arbitral proceedings was limited only to either relegate parties back to the tribunal or consider the challenge on a very high threshold of questions of law, emphasising the need to limit curial intervention.⁵¹

E. CONCLUSION

Analyzing each of the cases above demonstrates the courts' efforts to make ADR and out-of-court settlement an easier and more legitimate platform to conduct dispute resolution. The underlying theme is to provide more freedom for parties to choose the method they wish to employ for settling their disputes while alleviating the caseload burden on the courts.

44. Ashok G. Rajani v. Beacon Trusteeship Ltd., 2021 SCC Online SC 9 (India).

45. *Id.* at 2, 10.

46. *See, e.g.*, Seth Thawardas Pherumal v. Union of India, AIR 1955 SC 468.

47. *See, e.g.*, Delhi Airport Metro Express Priv. Ltd. v. Delhi Metro Rail Corp. Ltd., 2021 SCC Online SC ¶ 42, at 51 (India).

48. *Id.* ¶ 42, at 52.

49. *Id.* ¶ 39, at 48–49.

50. Amazon.com NV Inv. Holdings LLC v. Future Retail Ltd., 2021 SCC Online SC ¶ 60, at 87–88 (India).

51. Parthasarathy v. E. Springs Aves. Priv. Ltd., 2022 SCC Online SC 1–2 (India).

III. The Increase of Pre-Suit Mediation in Intellectual Property Disputes

A trend being seen in intellectual property litigation in India is the prevalence of mandatory pre-suit mediation. Section 12A(1) of the Commercial Courts Act⁵² states that “[a] suit, which does not contemplate any urgent interim relief under [the] Act, shall not be instituted unless the plaintiff exhausts the remedy of pre-institution mediation in accordance with such manner and procedure as may be prescribed by rules made by the Central Government.”⁵³

A timeline for the pre-suit mediation is prescribed in section 12A(3). It states that the process of mediation shall be completed within a period of three months from the date of application made by the plaintiff under section 12A(1).⁵⁴ This “period of mediation may be extended for a further period of two months with the consent of the parties.”⁵⁵ “If the parties to the commercial dispute arrive at a settlement, the same shall be reduced into writing and shall be signed by the parties to the dispute and the mediator.”⁵⁶ The Central Government also enacted the Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018, laying down the procedure to be followed under section 12A before the institution of the lawsuit.⁵⁷

The aim is to resolve commercial disputes in the swiftest and most efficient manner possible. Since there is a direct correlation between the effectual resolution of commercial disputes and ease of doing business, this push towards increased pre-suit mediation has been crucial in establishing India’s reputation as a place for effective intellectual property protection.

In 2022, there were several interesting cases concerning whether intellectual property disputes need to be referred to pre-suit mediation or not. In *Patil Automation Private Ltd. v. Rakheja Engineers Private Ltd.*, the Supreme Court held that, when there is no urgent interim relief contemplated in the suit, it is mandatory and necessary to go through pre-suit mediation, as stated in section 12A of the Commercial Courts Act.⁵⁸

In *Bolt Technology OU v. Ujoy Technology Private Ltd.*, the Delhi High Court observed that, in intellectual property cases, the relief of an interim injunction, including at the *ex-parte* stage and *ad-interim* stage, is extremely important.⁵⁹ Such matters do not merely involve the interests of the plaintiff

52. See generally The Commercial Courts Act, 2015 (India).

53. *Id.* § 12(A)(1).

54. *Id.* § 12(A)(3).

55. *Id.*

56. *Id.* § 12(A)(4).

57. See generally Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018 (India).

58. *Patil Automation Priv. Ltd. v. Rakheja Eng’rs Priv. Ltd.*, Unreported Judgments, 1028 of 2022, decided on Aug. 17, 2022 (SC), 38.

59. *Bolt Tech. OU v. Ujoy Tech. Priv. Ltd.*, 2022 582 CS (COMM) ¶ 16, at 1 (India).

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and the defendants but also involve the interest of the customers or consumers of the products and services in question.⁶⁰

Bolt Technology had filed an application seeking exemption from instituting pre-litigation mediation.⁶¹ Bolt Technology filed suit seeking permanent injunction against the defendants. The defendants, however, made a preliminary objection to reject the complaint for non-compliance with section 12A of the Commercial Courts Act.⁶² The defendants relied on the *Patil Automation* case to argue that pre-litigation mediation under section 12A of Commercial Courts Act is a mandatory process and that no suit can be entertained unless parties comply with pre-suit mediation under section 12A of the Commercial Courts Act.⁶³

In response to this preliminary objection by the defendants, Bolt Technology argued that “Paragraph 81 of the judgment of the Supreme Court in [the *Patil Automation* case] clarifie[d] that when an urgent interim relief is being sought, the suit can be filed without resorting to pre-litigation mediation.”⁶⁴

An *ex parte* interim injunction was granted by the Delhi High Court, since the defendant had shown that it was not interested in any mediation, as it did not respond in a proper fashion to the legal notice sent by Bolt Technology.⁶⁵ The Delhi High Court stated that the requirement of section 12A of the Commercial Courts Act was satisfied, since Bolt Technology attempted an amicable resolution that was clearly rejected by the defendants, prayed for urgent interim relief before the Delhi High Court, and was entitled to maintain the present suit.⁶⁶

In another recent case, *Micro Labs Ltd. v. Santhosh*,⁶⁷ the Madras High Court interpreted the word “contemplate” in section 12A(1). The Madras High Court held that:

This Commercial Division should be convinced that interim relief is “urgent” and a product of contemplation in every sense of the terms. In the case on hand, *i.e.*, in the facts and circumstances of the instant case, as there has been a complete lull or in other words, as plaintiff has gone into slumber after issuing cease and desist notice dated 28.04.2022 (served on notice / defendant on 30.04.2022) and thereafter suddenly woke up four months later and presented this plaint on 22.08.2022 (plaint presented on 22.08.2022, suit filed on 29.08.2022). In this view of the matter, this Commercial Division is convinced that though interim order has been sought for vide O.A.Nos.554 to 556 of 2022, it is neither urgent nor a product of contemplation. To be noted, the

60. *Id.* ¶ 17, at 15–16.

61. *Id.* ¶ 3, at 1.

62. *Id.* ¶ 7, at 5.

63. *Id.*

64. *Id.* ¶ 9, at 6.

65. *Id.* ¶ 25, at 21–22.

66. *Id.*

67. *Micro Labs Ltd. v. Santhosh*, 2022 185 CS (COMM) ¶ 16, at 23–24 (India).

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expression used in sub section (1) of section 12A is not merely “interim relief,” it is “urgent interim relief.” This takes this Commercial Division to the term “contemplate” deployed in sub section (1) of section 12A. This term has not been defined in said Act Therefore, a thought process which is not only detailed but profound too is an imperative ingredient of the term “contemplate” deployed by Parliament in sub section (1) of section 12A and in the light of the lull / slumber of four months, this Commercial Division is convinced that applications with interim prayers have been filed absent contemplation and therefore, mere filing of applications for interim prayers do not save the plaintiff from the death knell consequence qua infraction of section 12A. To put it in very simple and short terms, deciding whether the interim relief sought for is urgent and a product of “contemplation” is the prerogative of this Commercial Division when a plaint is tested for rejection qua infraction of section 12A of said Act and in the case on hand, the answer is in the negative.⁶⁸

In intellectual property cases in which an *ex parte* interim relief would be preferred against an infringer whose malafide intention is evident, the insistence on pre-suit mediation would snatch away the element of surprise available to the plaintiff against the defendant.⁶⁹ Further, when a prayer for urgent relief has been filed by the plaintiff and there is a time-lapse of certain months between the issuance of legal notice and the institution of the suit, directing the plaintiff to resort to pre-suit mediation due to such lapse of time is the latest interpretation of the law.⁷⁰

IV. Cybersecurity in Organizations

The cybersecurity framework in India is primarily regulated by the Information Technology Act, 2000, and the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, which govern areas such as collection, transfer, and processing of data while also regulating the social media intermediaries.⁷¹ As the world becomes increasingly data- and digital-reliant, cybersecurity has emerged as a major concern. India has also been subject to numerous cyberattacks, with insurance and finance organizations being the most affected ones.⁷²

It is important to comprehend the advancements that have occurred in India’s cybersecurity sector in 2022. The Ministry of Electronics and Information Technology (MEiTY) proposed the Information Technology

68. *Id.* at ¶¶ 16-17, at 23–26.

69. *Bolt Tech. OU v. Ujoy Tech. Priv. Ltd.*, 2022 582 CS (COMM) ¶ 17, at 15–16.

70. *Id.* ¶ 25, at 21–22.

71. *See generally* The Information Technology Act, 2000; Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (India).

72. Rajeswari Pillai Rajagopalan, *The AIIMS Cyberattack Reflects India’s Critical Vulnerabilities*, OBSERVER RSCH. FOUND. (Dec. 3, 2022), <https://www.orfonline.org/expert-speak/the-aiims-cyberattack-reflects-indias-critical-vulnerabilities/?amp> [<https://perma.cc/U939-EZ97>].

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(Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules, 2022,⁷³ which proposes establishing a Grievance Appellate Committee. This committee was tasked with dealing with the issues pertaining to censorship of information being disseminated on social media and was also empowered to hear appeals to ascertain the removal of certain content from social media.⁷⁴ Under the appellate system, any aggrieved person could appeal to the relevant committee having jurisdiction within thirty days from the receipt of the decision.⁷⁵ Such appeals would need to be disposed of within thirty days from the date of receipt of the appeal.⁷⁶ Further, the Amendment Rules required due diligence to be exercised by the intermediaries and mandated the publishing of the rules, regulations, privacy policy, and user agreements in the public domain.⁷⁷ The Amendment Rules provided that any complaint that pertained to suspending or removing any user account and those complaints in the nature of request for removal of information that was, *inter alia*, defamatory, obscene, or in violation of someone else's IP shall be acknowledged by the intermediary within twenty-four hours and disposed of within fifteen days from the date of receiving the same.⁷⁸

In addition to this amendment, several new cybersecurity directives were released by the Indian Computer Emergency Response Team in April 2022 (CERT-In).⁷⁹ These directives were issued to protect the above-mentioned bodies against threats and breaches while addressing the lacuna in the existing cybersecurity legislation and regime of the country.⁸⁰

The directives provide for the following remedies and rules: All entities shall be required to report any cybersecurity incident within a period of six hours, and the previous ambiguous rule of reporting such incident "as soon as possible" has been removed.⁸¹ Entities that fall under the ambit of the 2022 directives must cater to the Indian Government's clocks, established by the Network Time Protocol and the National Physical Laboratory, by connecting their servers to ensure synchronization of information and enhanced communication.⁸² Further, it mandated all the entities to maintain logs of their ICT systems for a period of 180 days, which can be called for by

73. Ministry of Electronics and Information Technology, G.S.R. 749(E) (Notified on October 28, 2022) (India).

74. *Id.* ¶ 2, at 4.

75. *Id.* ¶ 4(3), at 5.

76. *Id.* ¶ 4(4), at 5.

77. *Id.* ¶ 3(a)(iii), at 4.

78. *Id.* at ¶ 3(b)(i), at 5.

79. See Ministry of Electronics and Information Technology & The Indian Computer Emergency Response Team, Directions Under Sub-Section (6) of Section 70B of the Information Technology Act, 2000 Relating to Information Security Practices, Procedure, Prevention, Response and Reporting of Cyber Incidents for Safe & Trusted Internet, No. 20(3)/2022-CERT-In (Issued on April 28, 2022).

80. *Id.* ¶ 5, at 2.

81. *Id.* ¶ 5(ii), at 2.

82. *Id.* ¶ 5(i), at 2.

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the CERT-In for investigation in case of an incident.⁸³ In addition, the entities shall make provisions for the appointment of a Point of Contact exclusively for communication between the entity and CERT-In.⁸⁴

Furthermore, these directives empower CERT-In to issue orders to entities mandating them to act or provide information that assists CERT-In to prevent, pre-empt, or address cyber incidents and provide the format in which the information is required, the timeframe which could include up to and including near real-time, and the timeframe within which such information must be provided to CERT-In.⁸⁵ Failure in adhering to the same would result in imprisonment for a term of up to one year or a fine of up to 100,000 rupees, or both.⁸⁶

These directives, thus, provide for an updated cybersecurity framework for entities such as service providers (including telecom service providers, network service providers, internet service providers, web-hosting service providers, cloud service providers, and cryptocurrency exchanges and wallets), intermediaries (social media platforms, search engines, and e-commerce platforms), body corporates (any company, firm, or proprietorship), data centers (which store and process large quantities of private and public data), and eventually governmental bodies.⁸⁷

Cybersecurity has become a necessity, and the legislative framework is constantly undergoing changes to adapt per the requirements of the society. However, the implementation of the newly formed data security and cybersecurity regime shall be the key to safeguard the interests of the associated stakeholders.

V. Key Legal Developments Pertaining to Electric Vehicles During 2022 in India

The automotive industry in India is undergoing a paradigm shift in trying to switch towards energy efficient alternatives.⁸⁸ Mobility and electric vehicles (EV) are seen as a possible replacement for fueled automobiles, which would address, among other things, rising pollution, global warming, and depleting natural resources.⁸⁹ India extended its support to the COP26 declaration, which focused on a global-level effort towards zero-emission

83. *Id.* ¶ 5(iv), at 3.

84. *Id.* ¶ 5(iii), at 3.

85. *See generally id.*

86. The Information Technology Act, 2000 § 707(B)(7) (India).

87. *See id.* § 707(B)(6).

88. Shrabona Ghosh, *EV Takes Centre Stage Amid Paradigm Shift in Automotive Industry*, ENTREPRENEUR INDIA (Dec. 7, 2022), <https://www.entrepreneur.com/en-in/technology/ev-takes-centre-stage-amidst-paradigm-shift-in-automotive/440587> [<https://perma.cc/MJ6S-UZZU>].

89. *Id.*

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vehicles.⁹⁰ To materialize it, the Ministry of Power promulgated the revised consolidated guidelines and standards for charging infrastructure of electric vehicles on January 14, 2022.⁹¹ The Guidelines provide that any individual or entity is free to set up public charging stations without a license, provided that such stations meet the technical, safety, and performance standards, along with the protocols, laid down under the Guidelines.⁹² A model revenue-sharing agreement is included under the Guidelines, which would initially be entered into by parties for a period of ten years.⁹³ The tariff for supply of electricity to public EV charging stations would not exceed the average cost of supply until March 31, 2025.⁹⁴ Any public charging station “may obtain electricity from any generation company through open access.”⁹⁵ The Guidelines were further amended on November 7, 2022,⁹⁶ to provide public charging stations with “the feature of prepaid collection of service charges with the time of the day rates and discount for solar hours.”

As another crucial development, the Faster and Adoption and Manufacture of Hybrid and Electric Vehicles (FAME-II)⁹⁷ scheme, a government incentive scheme for the promotion of electric and hybrid vehicles in India, has been extended for a period of two years after March 31, 2022. The main objective of this program is to encourage faster adoption of electric and hybrid motor vehicles by way of offering an upfront incentive on the purchase of electric vehicles and by establishing the necessary charging infrastructure for electric vehicles.⁹⁸

NITI Aayog released a draft battery swapping policy⁹⁹ on April 22, 2022, with the intention of offering incentives to EVs with swappable batteries, subsidies to companies manufacturing swappable batteries, and standards for interoperable batteries, among other measures. The policy will be implemented in two phases—the first phase will cover the metropolitan cities with a population greater than four million, and the second phase will cover all UTs and major cities with a population greater than 500,000.¹⁰⁰

90. Press Release, Government of India, India Celebrates Transport Day at COP26 (Nov. 10, 2021), <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1770721> [<https://perma.cc/9CRW-JEXP>].

91. Ministry of Power, Charging Infrastructure for Electric Vehicles (EV)—The Revised Consolidated Guidelines & Standards, No. 12/2/2018-EV (Issued on January 14, 2022) (India).

92. *Id.* ¶ 2, at 2.

93. *Id.* ¶ 9(2), at 5.

94. *Id.* ¶ 7(1), at 5.

95. *Id.* ¶ 2(2), at 2.

96. Ministry of Power, Amendment in Charging Infrastructure for Electric Vehicles (EV)—The Revised Consolidated Guidelines & Standards, No. 12/2/2020-EV-Part(5) (Issued on November 7, 2022) (India).

97. *See* Ministry of Heavy Industries and Public Enterprises, S.O. 1300(E) (Notified on March 8, 2019) (India).

98. *See id.* ¶¶ 5, 8, at 6–7.

99. *See* National Institution for Transforming India, Battery Swapping Policy Draft (Issued on April 20, 2022) § 7, at 12.

100. *Id.* § 9(1), at 15–16.

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In light of the incentives and notifications by the respective Ministries and the Central Government, as many as five more States/UTs have adopted their EV policy to bring the number to nineteen, and others are in various stages of creation or implementation of policy.¹⁰¹ Under the production-linked incentive schemes for EV, the incentives under the scheme are applicable for products manufactured in India from April 2022.¹⁰²

The future of the car industry is thought to lie with India's electric vehicles. EVs are expected to overtake gasoline-powered vehicles as the industry's mainstay in the coming years due to the current climate change and concerns about such climate change.¹⁰³ Given that the EV industry in India seems to have a promising future, by 2030, India may be able to cut its carbon dioxide emissions by one giga ton thanks to its concerted efforts to encourage shared, electrified, and connected mobility.¹⁰⁴ Although the EV transition presents itself as a massive opportunity, several barriers exist to domestic EV adoption, which should be addressed systematically and expediently, resulting in improved investments in the electric mobility sector in India.

VI. Legal Developments in Sri Lanka in the Year 2022

A. CHECKS AND BALANCES ON THE EXECUTIVE POWERS OF THE PRESIDENT THROUGH THE PASSAGE OF THE 21ST AMENDMENT¹⁰⁵

No report on this topic can begin without mentioning the momentous events shown live to the world from Sri Lanka in the early part of this year. Large civilian crowds on the streets of Colombo protesting and occupying government buildings resulted in the resignation of an executive president elected by the entire country at a presidential election held just three years ago.¹⁰⁶ This political upheaval led to the election of a new president and the

101. See *India: State Level EV Policies*, TRANSP. POL'Y, <https://www.transportpolicy.net/standard/india-state-level-ev-policies/> [<https://perma.cc/97X7-ZD8U>] (last visited Mar. 7, 2023).

102. *Production Linked Incentive (PLI) Schemes*, INVEST INDIA, [https://www.investindia.gov.in/production-linked-incentives-schemes-india#:~:text=production%20Linked%20Incentives%20\(PLI\)&text=incentives%20are%20applicable%20for%20determined,closed%20on%209th%20January%202022](https://www.investindia.gov.in/production-linked-incentives-schemes-india#:~:text=production%20Linked%20Incentives%20(PLI)&text=incentives%20are%20applicable%20for%20determined,closed%20on%209th%20January%202022) [<https://perma.cc/XPL4-BR4K>] (last visited Mar. 7, 2023).

103. Ragini Saxena & Haslinda Amin, *Electric Vehicles to Overtake Gas Guzzlers in India by 2030*, *Mahindra Says*, PRINT (Jan. 25, 2021, 2:34 PM), <https://theprint.in/economy/electric-vehicles-to-overtake-gas-guzzlers-in-india-by-2030-mahindra-says/591529/> [<https://perma.cc/VXD9-UF9W>].

104. See Rajeev R. Shah, *Indian Electric Vehicle Market to Reach More Than \$150 Billion by 2030*, VALUATION RSCH. GRP. (Mar. 22, 2022), <https://www.vrg.net/india-electric-vehicle-market-value-trends/> [<https://perma.cc/CXS8-PXYB>].

105. See Sri Lanka Const. art. 41, amended by The Constitution (Twenty-First Amendment) Act, 2022.

106. See Krutika Pathi & Krishan Francis, *Protesters Retreat as Sri Lankan President Sends Resignation*, AP NEWS (July 14, 2022), <https://apnews.com/article/sri-lanka-maldives->

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passage of a new constitutional amendment that established checks and balances on the executive powers of the president.¹⁰⁷

The executive presidency originally came into operation in Sri Lanka with a new constitution in 1978.¹⁰⁸ Before that time, Sri Lanka and the dominion of Ceylon had a Westminster-style constitution.¹⁰⁹ Sri Lanka's 1978 constitution had a clear separation of powers, as laid out in Article 4, which states, among other things, that the executive power of the people, including the defense of Sri Lanka, shall be exercised by the president of the republic elected by the people.¹¹⁰ After 1978, four subsequent amendments were made to Article 4 by different political parties that sought to alter the separation of powers for their own perceived advantage.¹¹¹

Following the popular revolt of 2021, the twenty-first amendment to the Constitution was proposed and passed.¹¹² The most important aspect of the passing of the twenty-first amendment to the Constitution was that there was a broad consensus reached not only by the political parties in Parliament, but also by professionals, intellectuals, and the broader public, to create a system of checks and balances on the executive powers granted to the president by the Constitution.¹¹³

The twenty-first amendment to the Constitution created a constitutional council, which will approve the names of the persons nominated to hold high positions of power, such as the Chief Justice, the judges of the apex courts, the Attorney General, and the Auditor General, among others.¹¹⁴ It has also created independent commissions to oversee elections, public service, the police, human rights, and finance, among others.¹¹⁵

For example, the establishment of the Audit Service Commission has created a certain amount of transparency to the state system in public finance. The legal framework in combating corruption and mismanagement has also been strengthened by the re-introduction of the constitutional council, the members of which include three persons who are not members

government-and-politics-0b14c0577cdd68a355883302e36048cb [https://perma.cc/BF37-VWZ3].

107. *See id.*; Sri Lanka Const. art. 41, amended by The Constitution (Twenty-First Amendment) Act, 2022.

108. *See* Sri Lanka Const. ch. I, ¶ 4(b).

109. *See* Ashwini Vasanthakumar & Rehan Abeyratne, *Three Key Constitutional Reforms for Sri Lanka*, INT'L J. CONST. L. BLOG (Feb. 7, 2015), <http://www.iconnectblog.com/2015/02/three-key-constitutional-reforms-for-sri-lanka> [https://perma.cc/9K7B-N4KR].

110. *See* Sri Lanka Const. ch. I, ¶ 4.

111. *See* Rathindra Kuruwita, *Sri Lankan Parties Are Amending the Constitution Yet Again*, DIPLOMAT (June 16, 2022), <https://thediplomat.com/2022/06/sri-lankan-parties-are-amending-the-constitution-yet-again/> [https://perma.cc/2P23-6CRX].

112. Sri Lanka Const. art. 41, amended by The Constitution (Twenty-First Amendment) Act, 2022.

113. *See id.*

114. *Id.* art. 41B.

115. *See id.*

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of Parliament.¹¹⁶ According to the twenty-first amendment, these persons are to be appointed to “ensure that the Council reflects the pluralistic character of Sri Lankan society, including professional and social diversity.”¹¹⁷

Notably, the twenty-first amendment was passed with only one member of Parliament voting against it, and even that opposition was on very technical grounds, demonstrating the strength of consensual democratic politics and rule of law in Sri Lanka.¹¹⁸

B. PERSONAL DATA PROTECTION ACT NO. 9 OF 2022

The Sri Lankan Parliament passed the Personal Data Protection Act No. 9 in March 2022.¹¹⁹ The Act states that the government is to provide a legal framework and mechanism for the protection of personal data, ensuring consumer trust and safeguarding privacy.¹²⁰

C. OTHER SIGNIFICANT LEGAL DEVELOPMENTS

The Prohibition of Anti-Personnel Mines Act No. 3 of 2022¹²¹ gives effect to the Ottawa Convention.¹²² The Act applies to Sri Lankan citizens and those aboard aircrafts and ships registered in Sri Lanka.¹²³ The Act prohibits the use of anti-personnel mines by those who come under the Act, other than on a few instances, such as training, which are specified in the Act.¹²⁴ The Act also describes the process if such a device is located.¹²⁵ Offences are also prescribed.¹²⁶

The Intellectual Property Amendment Act No. 8 of 2022¹²⁷ introduced the registration of geographical indications to the Intellectual Property Law of Sri Lanka. The amendment provided for the registration of foreign geographical indications as well.¹²⁸ In 2022, the European Union accepted Ceylon Cinnamon as a geographical indication.¹²⁹

116. *See id.* art. 41A(1)(c)(iii).

117. *See id.*

118. *See* Bharatha Mallawarachi, *Sri Lankan Lawmakers Vote to Trim Presidential Powers*, AP NEWS (Oct. 21, 2022), <https://apnews.com/article/sri-lanka-government-and-politics-business-biden-cabinet-constitutions-61eaebea9453d1ce0b8a81b9c10c32e7> [<https://perma.cc/R6KE-PVD7>].

119. *See* Personal Data Protection Act, 2022 (Sri Lanka).

120. *Id.* pmbl.

121. *See* Prohibition of Anti-Personnel Mines Act, 2022 (Sri Lanka).

122. *See id.* pmbl.

123. *Id.* § 2.

124. *See id.* §§ 3–4.

125. *See id.* § 10.

126. *See id.* § 3.

127. *See* Intellectual Property (Amendment) Act, 2022, § 4 (Sri Lanka).

128. *See id.* § 9, ch. 161K.

129. *See* Commission Regulation 2022/144, 2022 O.J. (L 24) 18 (EU).

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International Contracts

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AND LUIGI PAVANELLO*

This Article reviews significant international legal developments made in the areas of international contracts law and policy in 2022.

I. Introduction

This article describes some of the significant contract issues and legal developments that arose during 2022. The interpretation and enforceability of arbitration provisions in contracts under U.S. federal law is the subject of Section II, covering a number of U.S. Supreme Court and federal appellate court decisions. Once referred to as “midnight clauses” because lawyers typically did not discuss them until closing stages of contract negotiations, dispute resolution and, in particular, arbitration clauses are now firmly within the focus of experienced commercial lawyers. In the “Case of the Cigarette Excise Duty” the Swedish Supreme Court was tasked with determining carrier liability under international law relating to contracts for carriage of goods, as described in Section III.¹ The court discusses national case law and jurisprudence in a variety of states in order to reach its decision.² In Section IV, we are reminded of the far-reaching consequences of the war in Ukraine in a matter relating to legal representation of the Russian Federation in the Netherlands.³ Section V, finally, describes recent case law of the Italian *Corte di Cassazione* in relation to Incoterms.⁴

II. United States: Interpretation and Enforcement of Contractual Arbitration Provisions in U.S. Courts

Continuing the trend of recent years, the interpretation and enforceability of arbitration provisions in contracts under U.S. federal law remained the

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1. Högsta Domstolen [HD] [Supreme Court] 2022-06-14 Ö 3379-21 (Swed.), <https://www.domstol.se/en/supreme-court/precedents-archive/case-t-3379-21/> [<https://perma.cc/R5GW-MT5F>] [hereinafter Högsta domstolen].

2. *Id.*

3. *See infra* Section IV.

4. *See infra* Section V.

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subject of both U.S. Supreme Court and federal appellate court decisions in 2022. The U.S. Supreme Court issued a decision clarifying how and when U.S. courts should interpret and enforce arbitration clauses in contractual disputes and a decision on the availability of U.S. discovery in contractual disputes involving foreign arbitration.⁵ Also of note was a split decision from the U.S. Court of Appeals for the Third Circuit.⁶ That case highlighted the uncertainties that still exist under U.S. law in interpreting whether contracts containing arbitration provisions should be interpreted to apply to third-party non-contract signatories and whether disputes regarding the interpretation of such contracts should be made by a court or an arbitrator.⁷

In *Morgan v. Sundance, Inc.*,⁸ the U.S. Supreme Court addressed the issue of when a contractual right to arbitrate has been waived. In so doing, it held that the interpretation of contractual provisions governing arbitration under the Federal Arbitration Act (FAA) are to be reviewed and enforced in the same manner as other contractual disputes.⁹ It clarified that the FAA “policy favoring arbitration” “is merely an acknowledgement of the FAA’s commitment to overrule the judiciary’s longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts.”¹⁰

Under Section 3 of the FAA,¹¹ a defendant is entitled to file a stay of application in a lawsuit if it is subject to a contractual arbitration procedure. In *Sundance*, the issue decided by the Supreme Court was at what point a party to litigation has waived the right to seek enforcement of a contractual arbitration clause.¹² The case involved a nationwide collective action lawsuit brought by a fast-food franchise worker for alleged nationwide violations of the U.S. Fair Labor Standards Act¹³ by the defendant employer.¹⁴ After litigating the case for eight months in a U.S. district court, the defendant employer filed a motion to stay the litigation and compel arbitration, stating that when applying for her job, the plaintiff employee had contractually agreed to “use confidential binding arbitration instead of going to court” to resolve any employment dispute.¹⁵

Applying U.S. Court of Appeals for the Eighth Circuit precedent, the district court found that the defendant employer had waived its contractual right to arbitration because it knew of the right and “acted inconsistent with

5. ZF Auto. US, Inc. v. Luxshare, Ltd., 142 S. Ct. 2078, 2091 (2022).

6. Zirpoli v. Midland Funding, LLC, 48 F.4th 136, 140 (3d Cir. 2022).

7. *Id.*

8. *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1710–11 (2022).

9. *Id.* at 1714.

10. *Id.* at 1713 (citing *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

11. 9 U.S.C. § 3.

12. *Sundance*, 142 S. Ct. at 1711.

13. 29 U.S.C. § 207(a).

14. *Sundance*, 142 S. Ct. at 1711.

15. *Id.*

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that right” and “prejudiced the other party by its inconsistent actions.”¹⁶ On appeal, the Eighth Circuit, in a split decision, reversed and remanded the finding, holding that the plaintiff had not been prejudiced and the case should go to arbitration.¹⁷ Noting a split between the U.S. federal circuits as to whether a waiver of arbitration required a showing of prejudice, the U.S. Supreme Court granted certiorari and, on appeal, held that the Eighth Circuit was wrong to condition a waiver of a contractual right to arbitrate on a showing of prejudice.¹⁸

Noting that under the federal rules of procedure, waiver “is the intentional relinquishment or abandonment of a known right[,]” the U.S. Supreme Court stated that outside of the arbitration context the federal courts do not generally ask about prejudice and seldom consider the effects of a waiver of a contractual right on the other party.¹⁹ It found that the circuit courts that required a finding of prejudice to the other party in the context of waiving a contractual arbitration clause did so due to what they stated was a “liberal national policy favoring arbitration.”²⁰ But the U.S. Supreme Court disagreed, stating that any “policy favoring arbitration” [did] not authorize federal courts to “invent special, arbitration-preferring procedural rules.”²¹ The Court clarified that the purpose of the FAA was to make “arbitration agreements as enforceable as other contracts, but not more so.”²²

Remanding the case back to the Eighth Circuit, the U.S. Supreme Court held that an appellate court could not make up a new procedural rule based on the FAA’s “policy favoring arbitration” but instead needed to focus on the defendant’s conduct to determine whether the defendant had knowingly relinquished a contractual right to arbitrate by acting inconsistently with that right.²³

In another 2022 ruling, the U.S. Supreme Court also emphasized that private contractual agreements to arbitrate disputes outside of the United States are private in nature and, as such, are not entitled to the benefit of 28 U.S.C. § 1782(a), “a provision authorizing a district court to order the production of evidence “for use in a proceeding in a foreign or international tribunal.”²⁴ In *ZF Auto. US, Inc. v. Luxshare, Ltd.*,²⁵ the U.S. Supreme Court addressed two different cases in which parties to a non-U.S. based contractual arbitration filed applications to seek information from their counterparties in a federal court for use in the non-U.S. arbitration. The

16. *Id.* at 1711–12 (citing *Erdman Co. v. Phoenix Land & Acquisition, LLC*, 650 F.3d 1115, 1117 (8th Cir. 2011)).

17. *Id.* at 1712.

18. *Id.*

19. *Id.* at 1713 (citing *United States v. Olano*, 507 U.S. 725, 733 (1993)).

20. *Id.* at 1712.

21. *Id.* at 1713.

22. *Id.*

23. *Id.* at 1714.

24. *Luxshare*, 142 S. Ct. at 2080–83.

25. *Id.*

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first case, which is discussed in this article, involved allegations of fraud in a sales transaction by Luxshare, Ltd., a Hong Kong-based company, against ZF Automotive US, Inc. (ZF), a Michigan-based automotive manufacturer and subsidiary of a German Company.²⁶ The sales contract signed by the parties provided that all disputes would be resolved by three arbitrators under the Arbitration Rules of the German Institution of Arbitration e.V., a Berlin-based private dispute resolution organization.²⁷

In reversing the lower court decisions holding that Luxshare was entitled to discovery against ZF in U.S. federal court, the U.S. Supreme Court held that discovery under Section 1782 is available only for governmental or intergovernmental dispute resolutions and does not apply to arbitrations before private adjudicatory bodies.²⁸ Applying its ruling to the ZF litigation, the Court noted that disputes resolved pursuant to private arbitration panels pursuant to the terms that private parties agreed to in a private contract are formed by the parties.²⁹ It rejected the argument of Luxshare that a private arbitration panel would qualify as being governmental under Section 1782 simply because the law of the country where the panel would sit governs some aspects of the arbitration and that courts would play a role in enforcing the arbitration agreements.³⁰ It held that a private adjudicative body formed pursuant to the terms of a private contract for purposes of resolving contractual disputes did not qualify as a governmental body so as to allow the application of Section 1782.³¹

Finally, the “‘mind-bending issue’ of arbitration about arbitration” (in the Court’s own words) was the subject of a split decision by the U.S. Court of Appeals for the Third Circuit in the case of *Zirpoli v. Midland Funding, LLC*.³² Noting a previous holding that “questions about the making of the agreement to arbitrate are for the courts to decide unless the parties have clearly and unmistakably referred those issues to arbitration in a written contract whose formation is not in issue[.]”³³ the two judges in the majority in *Zirpoli* reversed a district court decision holding that because an assignment of a contract was illegal and void, a contract assignee could not invoke the contract arbitration provisions to compel arbitration of claims asserted against it.³⁴

The majority found that under Section 4 of the FAA,³⁵ the right to petition for arbitration under a written agreement refers to the party to a litigation, not a party to the contract.³⁶ Over a vigorous dissent, the two

26. *Id.*

27. *Id.* at 2084.

28. *Id.* at 2089.

29. *Id.*

30. *ZF Auto.*, 142 U.S. at 2089.

31. *Id.* at 2091.

32. *Zirpoli v. Midland Funding, LLC*, 48 F.4th 140, 140 (3d Cir. 2022).

33. *Id.*

34. *Id.*

35. 9 U.S.C. § 4.

36. *Zirpoli*, 48 F.4th at 141.

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majority judges held that while the courts have the authority to adjudicate formation challenges to a contract even if the contract delegates the question of arbitrability to an arbitrator, if a contract applies to assignees and delegates the question of arbitrability of claims to an arbitrator, then the question of whether the contract was legally assigned to a third party so as to allow the third party to compel arbitration under the contract is a question to be determined and resolved by arbitration, not the court.³⁷

In reaching their decision, the majority relied, in part, on the language of the contract, which stated that the arbitrability of any claim pursuant to the agreement, including defenses, would be resolved by binding arbitration.³⁸ They also relied on provisions in the contract stating that claims included any alleged violations of state laws.³⁹ Because the question of whether an assignment was valid if it violated state laws was a defense to enforcement of any claims under the contract, the majority held that the case needed to be referred to arbitration.⁴⁰

In stating that he would have upheld the lower court's decision on the grounds that the contract had not been legally assigned to the third-party seeking to enforce the contractual arbitration provision, the dissenting judge wrote the following: "Today's holding confuses how we analyze the formation of arbitration agreements. Courts cannot start by asking, 'Was an agreement formed?' Rather, they must ask, 'Was an agreement formed *between these parties?*' Because the majority does not, I respectfully dissent in part."⁴¹

III. Sweden: Carrier Liability Under International Contract for Carriage of Goods

In a recent ruling⁴² the Swedish Supreme Court was faced with a case of stolen cigarettes, excise duty, and carrier liability under the United Nations Convention on the Contract for the International Carriage of Goods by Road (CMR).⁴³

The facts of the case were as follows:⁴⁴

In October 2018 B & S Paul Global International assigned H.Z. Logistics B.V., a Dutch company, to transport a cargo of cigarettes from the Netherlands to Sweden.⁴⁵ In turn, H.Z. Logistics entered into a carrier agreement with Thomsen & Streutker Logistics B.V., another Dutch

37. *Id.* at 142–45.

38. *Id.* at 145.

39. *Id.*

40. *Id.*

41. *Id.* at 146 (Bibas, J. concurring in part and dissenting in part).

42. HD 2022-06-14 Ö 3379-21 (Swed.).

43. U.N. Convention on the Contract for the International Carriage of Goods by Road (CMR), May 19, 1956, 339 U.N.T.S. 189 [hereinafter CMR].

44. *Id.* ¶¶ 1–3.

45. *Id.* ¶ 1.

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company, to carry out the delivery.⁴⁶ On October, 6, 2018, the cargo had reached the port of Helsingborg in Sweden and was stored there until October 8, 2018, awaiting further transportation to the final destination.⁴⁷ Sometime during this transit storage most of the cargo was stolen by person or persons unknown.⁴⁸

Under European Union (EU) legislation, manufactured tobacco products—including cigarettes—are subject to an excise duty.⁴⁹ Tobacco excise duties are paid at the final point of consumption.⁵⁰ While in transit to their final destination, these goods are in duty-suspension, i.e., no excise duty has yet been paid on them.⁵¹ As a consequence of the theft, the cigarettes were considered to have been released for consumption in Sweden,⁵² triggering an obligation for B & S Paul Global International to pay the applicable excise duty.

B & S Paul Global International claimed compensation from H.Z. Logistics for the loss of the cigarettes and the excise duty and the parties subsequently reached a settlement whereby H.Z. Logistics agreed to pay a total of EUR 154,565 to B & S Paul Global, out of which EUR 19,240 related to the value of the goods and EUR 135,325 to the excise duty⁵³

Based on the provisions in CMR, H.Z. Logistics then initiated legal proceedings against Thomsen & Streutker claiming damages with the same amount that H.Z. Logistics had agreed to pay to B & S Paul Global under the settlement, i.e. EUR 154,565 in total.⁵⁴ Thomsen & Streutker agreed to pay the amount attributable to the value of the goods, EUR 19,240, but refuted the claim as regards the amount relating to the excise duty⁵⁵

Setting aside the matter of applicable law for the purposes of this article, the relevant matter that was finally referred to the Swedish Supreme Court for a ruling was whether the cost for excise duty caused by the theft of duty-suspended goods during transit shall be included in the concept “other charges incurred in respect of the carriage of the goods” pursuant to Article 23.4 of CMR and thus be paid by the carrier.⁵⁶

46. *Id.*

47. *Id.*

48. *Id.*

49. Council Directive 2008/118, art. 32, 2008 O.J. (L 9) 12, 25 (EC).

50. *Id.* § 1, art. 7.

51. *Id.*

52. *Id.* § 1, art. 7.2(a) (“For the purposes of this Directive, ‘release for consumption’ shall mean any of the following: (a) the departure of excise goods, including irregular departure, from a duty suspension arrangement . . .”).

53. See Högsta domstolen, *supra* note 1, ¶ 2.

54. *Id.* ¶ 3.

55. *Id.*

56. *Id.* ¶ 6.

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The relevant provision reads as follows in the official English-language version (the CMR in its English and French official versions was incorporated into Swedish law in 1969):⁵⁷

1. When, under the provisions of this Convention, a carrier is liable for compensation in respect of total or partial loss of goods, such compensation shall be calculated by reference to the value of the goods at the place and time at which they were accepted for carriage.⁵⁸

[. . .]

4. In addition, the carriage charges, Customs duties and other charges incurred in respect of the carriage of the goods shall be refunded in full in case of total loss and in proportion to the loss sustained in case of partial loss, but no further damages shall be payable.⁵⁹

The Swedish Supreme Court first established that CMR was applicable on the carrier contract and its provisions are mandatory for the contractual parties.⁶⁰ As a general principle, the carrier is strictly liable for losses during transportation under CMR, save for events of force majeure.⁶¹ This strict liability is to some degree mitigated by “limitations as regards the compensation to be paid.”⁶² Loss of profit and consequential damage are excluded from the carrier’s liability, by way of example.⁶³

In interpreting Article 23.4, the Swedish Supreme Court first analysed national case law and jurisprudence in a variety of states that are signatories to and have ratified CMR.⁶⁴ Beginning with “carriage charges,” these were determined by the court to be the freight costs agreed between the parties.⁶⁵ In relation to the term “Customs duties,” the court found that neither excise duties nor value added tax are generally considered to constitute customs duties.⁶⁶ Finally, “other charges incurred in respect of the carriage of the goods” were interpreted by the Supreme Court, based on the wording, to mean charges that are not customs duties but of a similar type of costs, being directly related to the actual transportation itself.⁶⁷

57. KUNGÖRELSE MED ANLEDNING AV SVERIGES TILLTRÄDE TILL KONVENTIONEN DEN 19 MAJ 1956 OM FRAKTAVTALET VID INTERNATIONELL GODSBEFORDRAN PÅ VÄG (Svensk författningssamling [SFS] 1969:91) (Swed.).

58. CMR, *supra* note 43, art. 23.

59. *Id.*

60. *See id.*, at art. 41; *see also* Högsta domstolen, *supra* note 1, ¶ 11.

61. Högsta domstolen, *supra* note 1, ¶ 21.

62. *Id.* ¶ 22.

63. *Id.* ¶ 24.

64. *Id.* ¶¶ 33–37.

65. *Id.* ¶ 30.

66. *Id.* at ¶ 22; *see, e.g.*, ANDREW MESSENT & DAVID A. GLASS, CMR: CONTRACTS FOR THE INTERNATIONAL CARRIAGE OF GOODS BY ROAD ¶ 9.23 (Routledge ed., 4th ed. 2018).

67. Högsta domstolen, *supra* note 1, ¶ 32.

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Pursuant to the Swedish Supreme Court,⁶⁸ case law in CMR convention states relating to Article 23.4 can be broadly divided into two categories, one which gives a broad definition of “other charges,” and one which gives a more restrictive one. The former provides that the carrier is liable for all costs attributable to the transportation as it has actually been carried out, which would then include excise duty as a result of the goods having been stolen.⁶⁹ In the latter, more narrow definition, only costs directly attributable to what would have been an ordinary completion of the transportation, i.e., without irregularities in the form of theft, for instance, are compensated.⁷⁰ In other words, only costs that have become unnecessary for the owner due to the loss of the goods are compensated.⁷¹ Excise duties due to theft of the goods are thus not included in the carrier’s payment obligation under Article 24.3.⁷²

In summary, the Swedish Supreme Court found⁷³ that especially the systematics and purpose of the relevant provisions indicate that Article 23.4 in CMR shall be interpreted so that the carrier’s obligation to compensate the owner of the goods shall not include excise duties when the goods have been stolen during transportation. Nor are there any noteworthy reasons against such interpretation.⁷⁴ H.Z. Logistics’ claim for compensation was therefore dismissed.⁷⁵

IV. The Netherlands: The Hague Dean Ordered to Appoint Counsel to Russian Federation

The Ukraine war has disrupted the Dutch legal landscape. The latest “victim” is the Hague Dean (*Deken*) of Advocates (President of the Hague Bar).

As a result of adverse publicity, the major Amsterdam “Zuidas” (similar to London’s Golden Circle) firms have taken leave of their (until now very profitable) Russian clients.⁷⁶ But there is still ongoing litigation before the Dutch Courts, in those echelons where representation of an attorney (*advocaat*) is mandatory.

68. *Id.* ¶ 33.

69. *Id.* ¶ 34.

70. *Id.* ¶ 35.

71. *Id.*

72. *Id.*

73. Högsta domstolen, *supra* note 1, ¶ 42.

74. *Id.*

75. *Id.*

76. Tom Kreling, *Law firm Houtboff breaks ties with Russian government and customers*, DE VOLKSKRANT, (Mar. 3, 2022, 3:20 PM), [https://www.volkskrant.nl/nieuws-achtergrond/advocatenkantoor-houthoff-verbreekt-banden-met-russische-overheid-en-klanten-ba3795d3/\[HTTPS://PERMA.CC/A4\]X-64LK](https://www.volkskrant.nl/nieuws-achtergrond/advocatenkantoor-houthoff-verbreekt-banden-met-russische-overheid-en-klanten-ba3795d3/[HTTPS://PERMA.CC/A4]X-64LK)].

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According to the Dutch *Advocatenwet* (Attorneys Act),⁷⁷ a litigant who cannot find an advocaat willing to assist him, at all or timely, can apply to the Dean in the District where the litigation takes place to have an attorney appointed.⁷⁸ The appointee cannot refuse to provide his services.⁷⁹

The Russian Federation (RF) was involved in five sets of proceedings before the Hague Court of Appeal, leading to one decision on June 28, 2022, and four decisions on July 19, 2022.⁸⁰ Of these decisions an appeal to the *Hoge Raad* (Dutch Supreme Court) is possible (but, as in other jurisdictions, only on points of law, the proceedings being called *cassatie*). In all proceedings the attorneys assisting in the case had withdrawn and because the RF could indeed not find an attorney willing to assist it in the *cassatie*-proceedings, it applied to the local Dean (the *Hoge Raad* is seated in The Hague) to appoint one.⁸¹

The Dean refused (as she can on “serious grounds.”)⁸² These included (1) that Article 13 of *Advocatenwet* does not apply to foreign powers who are without attorney because they are involved in a war, while the disputes only concern its economic interests; (2) the sanctions issued by the European Union forbid assistance of the RF; (3) attorneys have sworn an oath that they will not handle cases that they do not consider just and there are ethical objections within the Hague Bar against handling a case on behalf of the RF, a number of firms have signed the “Stand Firm Declaration;” (4) the Hague Bar does not have both the required specialist knowledge for these highly complex cases and sufficient capacity to handle them properly; (5) an attorney so appointed might face a diminished reputation or loss of clients if it becomes known that he assists the RF; (6) he might face problems with his liability insurer or banks; and (7), if the case goes against the RF, the attorney might face threats and security risks.⁸³

Th RF appealed to the *Hof van Discipline*, the highest disciplinary court for attorneys,⁸⁴ (the Court), and the Court made short shrift of those arguments. As to (1), whether Article 13 applied to foreign powers, the answer is yes. Not only natural persons, but also corporate ones, including warring foreign powers can invoke that article.⁸⁵ As to (2), the EU Sanctions Regulations make clear that assistance necessary for access to a Court is exempted from their prohibitions.⁸⁶

77. Wet van 23 juni 1952, houdende instelling van de Nederlandse orde van advocaten alsmede regelen betreffende orde en discipline voor de advocaten en procureurs, lastly amended 1 July 2020 [hereinafter *Advocatenwet*].

78. *Id.* ¶ 13.1.

79. *Id.* ¶ 13.4.

80. Hof's-Gravenhage 18 augustus 2022, ECLI:NL:TAHVD:2022:132, ¶ 3.3 (Neth.) [hereinafter Hof 's-Gravenhage].

81. *Id.*

82. *Advocatenwet*, *supra* note 77, ¶ 13.2.

83. *Id.* ¶ 13.2.

84. *Id.* ¶ 13.3.

85. *Id.* ¶ 4.13.

86. *Id.* ¶ 4.14.

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As to (3), that a number of firms have expressed objections to assisting Russian institutions and companies, does not mean that all of them have done so and if so, that would not stand in the way of the Dean appointing one, nor does the professional oath.⁸⁷ As to (4) through (7), they are not sufficiently made plausible to count as “serious grounds,” allowing her the denial of the application.⁸⁸

So, the complaint is allowed⁸⁹ and the Dean is ordered (implicitly) to appoint an attorney to assist the RF in the five proceedings before the *Hoge Raad*. Interestingly, the June 28, 2022, June Court of Appeal Decision was one in *Kort Geding* (summary proceedings), in which the appeal deadline is eight weeks, ending on Tuesday, August 23, 2022 (in the other four cases the deadline is the regular one of three months). The decision of the *Hof van Discipline* was given on Thursday, August 18, 2022, August and in proceedings in *cassatie* all complaints against the appealed decision must be brought within the deadline.⁹⁰ So, if another attorney was appointed in time, he had a very busy weekend.

V. Italy: Incoterms and the Italian Corte di Cassazione—A Rollercoaster Relationship

Since the European Court of Justice’s (ECJ) issuance of the seminal Electrosteel case,⁹¹ the Italian *Corte di Cassazione* (the Italian Supreme Court in civil and criminal matters) seemed to have a love-hate relationship with the Incoterms in determining jurisdiction pursuant to EU Regulation 1215/2012 (Bruxelles I bis).⁹²

The point is perfectly illustrated by two orders recently issued by the Italian *Corte di Cassazione* deciding two motions for lack of jurisdiction of the Italian courts on international supply agreements.

While lower courts and scholars thought that the Electrosteel case has placed a nail in the coffin on jurisdictional cases on Brussels I and Brussel I Bis litigation by (1) giving clear instructions and tests to be performed to ascertain which member state has jurisdiction or better which is competent as we Europeans like to say), and (2) granting substantial importance to Incoterms and their delivery terms in the jurisdiction determination process, the Italian *Corte di Cassazione* seems to have backed-off, at least in part, from its original majority opinion that the key element in determining jurisdiction is the place delivery and not the place of final destination.⁹³

87. *Id.* ¶ 4.16.

88. *Id.* ¶ 4.17.

89. *Id.* ¶¶ 4.18–4.19.

90. *Id.*

91. Case C-87/10, Eurosteel Europe SA v. Edil Centro SpA, 2011 E.C.R. I-5003.

92. Commission Regulation 1215/2012, 2012 O.J. (L 351) 1, 7 (EU).

93. Cass., sez. un., 20 giugno 2012, n. 10132 (It.); Cass., sez. un., 14 maggio 2007, n. 10941 (It.); Cass., sez. un., 15 maggio 2022, n. 15891 (It.).

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The first order⁹⁴ concerns a case whereby a *decreto ingiuntivo* (motion for summary judgment in lieu of a complaint) was granted by the Court of Treviso against a British company based upon an Ex Works-delivery inserted in the seller documentation but lacking a formal acceptance by the buyer. The buyer filed a motion for lack of jurisdiction of the Italian court.⁹⁵ In the order the *Corte di Cassazione* held that the case should be dismissed the Treviso court lack jurisdiction on the ground that a party cannot unilaterally insert delivery terms in the contractual documentation without a clear and objective acceptance by the other party.⁹⁶ In its dicta while stating that Electrosteel controls the matter and this case, based upon the aforementioned recent new jurisprudence, the court stated that (1) Incoterms regulate passage of risks and cost of transportation but cannot have an impact on the determination of jurisdiction and, moreover; (2) the criterion of the place of final destination/actual final delivery of the goods is a preferable criterion because it is highly predictable and allows (a) to meet a tight connection between the agreement and the court that will decide on it, because, at least in principle, the goods subject matter of the agreement will normally be located there after the execution of the agreement; and (b) the purpose of a purchase and sale agreement is that the goods will arrive at destination; (3) the place where the seller delivers the goods to an independent freight-forwarder is irrelevant because it cannot equally guarantee the needs of simplification, uniformity, and predictability of the decisions.⁹⁷

Needless to say, the decision has generated a lot of criticism by the scholars mainly because it (1) disapplies Electrosteel, after having proclaimed adherence to it; and (2) shows a subtle mistrust of the Incoterms by some of the judges of the court, maybe generated by the fact that Incoterms are not issued by governmental body, but rather by a “private” organization.

The second case⁹⁸ is more aligned to the Electrosteel case. Again, a lack of jurisdiction motion was raised against a *decreto ingiuntivo* issued by the Italian court of Trani by a Rumanian company claiming that Bucharest should have been the lawful form to hear the case and that the parties did not agree to jurisdiction clause.⁹⁹ The *Corte di Cassazione* dismissed the motion on procedural grounds.¹⁰⁰ But it reported in the order the entire holding of Electrosteel case to explain which are the criteria that a court must take into account whether or not the place of delivery has been determined in the contractual documentation, noting that in light of the aforesaid ECJ jurisprudence the moving party has failed to provide evidence

94. Cass., sez. un., 28 giugno 2022, n. 20633, 1, 5 (It.).

95. *Id.*

96. *Id.*

97. *Id.*

98. Cass., sez. un., 20 luglio 2022, n. 22674 (It.).

99. *Id.* at 3.

100. *Id.* at 9.

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enabling to understand the main agreements reached by the parties and, consequently, also those that may clearly identify the agreed place of delivery.¹⁰¹

Only the future will tell the whether the Italian *Corte di Cassazione* will fully go back to Electrosteel or, on occasion, it will continue to drift away from it.

101. *Id.* at 7.

International Energy and Environmental Law

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This article reviews significant international legal developments made in the areas of international energy, natural resources, and environmental law in 2022.

I. Africa

A. ANGOLA

During 2022, the following environment-related statutes were approved by the President of the Republic: (1) Presidential Order 8/22, which created the National Climate and Environmental Observatory “to coordinate, control and analyze data and information related to environmental, economic and social indicators;”¹ (2) Presidential Decree 83/22, which approved the environmental fees due for issuance and renewal of environmental licenses and registration and environmental consulting firms, among others;² and (3) Presidential Decree 165/22, which approved the Regulations for Management of Naturally Occurring Radioactive Material (NORM) and other Radioactive Waste.³ In addition, following the presidential election last August, the former Ministry of Culture, Tourism,

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1. *National Climate and Environmental Observatory Launched*, MIRANDA ALL., <https://mirandalawfirm.com/en/insights-knowledge/publications/legal-news/angola-legal-news-january-and-february-2022-2-2> [<https://perma.cc/XDN5-2WYL>] (last visited Oct. 24, 2022).

2. *New Table of Fees for Issuance and Renewal of Environmental Licenses for Environmental Impact Assessment*, MIRANDA ALL., <https://mirandalawfirm.com/en/insights-knowledge/publications/legal-news/angola-legal-news-march-through-may-2022-2-2> [<https://perma.cc/LZ4H-B96F>] (last visited Oct. 24, 2022).

3. *Regulation for Radioactive Material Waste Management Approved*, MIRANDA ALL., <https://mirandalawfirm.com/en/insights-knowledge/publications/legal-news/angola-legal-news-june-through-august-2022-2> [<https://perma.cc/9HMT-8ZVY>] (last visited Oct. 24, 2022).

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and the Environment split into the Ministry of the Environment and the Ministry of Culture and Tourism.⁴

Regarding the downstream subsector, the Rules and Procedures for the Exportation of Fuels were approved.⁵ The new rules are aimed at “monitoring and controlling the exportation of petroleum products” and subject their export to a “prior authorization from the Institute for the Regulation of Petroleum Products.”⁶ Also, in line with “the General Strategy for the Award of Petroleum Concessions for the period of 2019–2025 . . . the Licensing Round for Petroleum Concessions for year 2021 was approved together with the respective Terms of Reference.”⁷

B. GABON

The Gabonese Government, by means of Decree 0020/PR/MEFMEPCPAT, approved a “new regime and nomenclature for facilities classified for environmental protection.”⁸ The new statute applies to, *inter alia*, industrial, petroleum, mining, forestry, and agricultural facilities held or exploited by both natural and legal persons.⁹ The statute also sets forth the procedure and the documents required to be filed with the Ministry of Environment according to the potential impact caused by such facilities.¹⁰ The new statute also lists the obligations relating to risk assessment and emergency plans and establishes penalties for breaches of its provisions.¹¹

In addition, in line with the 2019 Hydrocarbons Code, the Government approved Decree 0021/PR/MPGM, governing the State and the Gabon Oil Company’s rights of first refusal in case of transfers of shares in entities holding participating interests in production sharing contracts.¹² The new statute sets forth the procedure for notification, the relevant timelines, and

4. See Press Release, Angola Press Release Agency, Angola: Ministry of Culture and Tourism Committed to Staff Training (Jan. 9, 2023), <https://allafrica.com/stories/202301200078.html> [<https://perma.cc/WS69-HRBS>]; see also Press Release, Angola Press Release Agency, Angola: Minister Wants Sustainable Management of Environment (Jan. 9, 2023), <https://allafrica.com/stories/202207070433.html> [<https://perma.cc/RYU3-Q4Y>].

5. *Rules and Procedures for Fuel Exports Approved*, MIRANDA ALL., <https://mirandalawfirm.com/en/insights-knowledge/publications/legal-news/angola-legal-news-january-and-february-2022-2-2> [<https://perma.cc/YX5L-TQ6P>] (last visited Oct. 24, 2022).

6. *Id.*

7. *Licensing Round for Petroleum Concessions*, MIRANDA ALL., <https://mirandalawfirm.com/en/insights-knowledge/publications/legal-news/angola-legal-news-march-through-may-2022-2-2> [<https://perma.cc/W9UR-F29J>] (last visited Oct. 24, 2022).

8. *Rules for Environmental Protection of Classified Facilities Are Revised*, MIRANDA ALL., <https://mirandalawfirm.com/en/insights-knowledge/publications/legal-news/gabon-legal-news-may-2022-2> [<https://perma.cc/VU9E-YFJK>] (last visited Oct. 28, 2022).

9. *Id.*

10. *Id.*

11. *Rules for Environmental Protection of Classified Facilities Are Revised*, *supra* note 8.

12. *Id.*

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the mechanism to set the transfer price in case such right is exercised.¹³ Also, following “the Country’s readmission to the Extractive Industries Transparency Initiative (EITI) back in October 2021, the by-laws of the EITI were formally adopted by means of Order 0541/PM/MER.¹⁴” “By implementing the EITI, Gabon commits to the transparent management of its extractive sectors, notably as regards granting of permits, collection and use of revenue, and publication of expenditure-related data.”¹⁵

C. MOZAMBIQUE

Last June, by means of a joint Ministerial Statute, the Ministry of Economy and Finance and the Ministry of Mineral Resources and Energy established several measures to mitigate the impact of the rise in the price of the barrel of crude oil internationally.¹⁶ These measures shall remain in force for a six-month period and include, *inter alia*, a five-percent reduction of port handling fees for diesel and petrol and a sixty-percent reduction in the costs of logistics infrastructure for fuel intended for petrol stations.¹⁷ Also, by means of Decree 30/2022, the Council of Ministers “amended the Special Regime for VAT [value-added tax] Regularization by Companies Operating within the Mining and Petroleum Sectors.”¹⁸ Under the new rules, beneficiaries may be excluded from paying VAT assessed by their suppliers upon issuance of Regularization Notes thereto.¹⁹ This procedure, though, is subject to certain requirements, including prior authorization from the Tax Authority.²⁰

D. SÃO TOMÉ AND PRÍNCIPE

In 2022, two important statutes in the oil and gas sector were approved. (1) Decree-Law 22/2022, on the new Legal Regime for the Provision of Services to the National Petroleum Sector, establishes, *inter alia*, (A) the terms and conditions pursuant to which service providers must be registered with the National Petroleum Agency (ANP-STP), (B) the tax regime to

13. *Constraints to Share Transfers of PSC Holders Become Clearer*, MIRANDA ALL., <https://mirandalawfirm.com/en/insights-knowledge/publications/legal-news/gabon-legal-news-may-2022-2> [<https://perma.cc/L69T-LWNY>] (last visited Oct. 28, 2022).

14. *Id.*

15. *EITI Implementation in Progress*, MIRANDA ALL., <https://mirandalawfirm.com/en/insights-knowledge/publications/legal-news/gabon-legal-news-may-2022-2> [<https://perma.cc/VUZ2-A3TL>] (last visited Oct. 28, 2022).

16. *Approval of Measures to Mitigate Impact of Crude Oil Price Rise*, MIRANDA ALL., <https://mirandalawfirm.com/en/insights-knowledge/publications/legal-news/mozambique-legal-news-may-through-august-2022-2> [<https://perma.cc/EV8G-2M4A>] (last visited Oct. 28, 2022).

17. *Id.*

18. *Id.*

19. *Id.*

20. *VAT Refund Rules for Mining and Petroleum Sectors Revised*, MIRANDA ALL., <https://mirandalawfirm.com/en/insights-knowledge/publications/legal-news/mozambique-legal-news-may-through-august-2022-2> [<https://perma.cc/ZHC7-JCWF>] (last visited Oct. 28, 2022).

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which service providers are subject and the obligation of the entities that carry out petroleum operations to submit to the ANP-STP quarterly procurement plans.²¹ Contracts entered into by Authorized Persons or Associates in breach of the new statute are deemed null and void, and the costs incurred therewith are neither recoverable nor deductible.²² (2) Decree Law 47/2022 approved amendments to the Production Sharing Contract (PSC) Model, notably in respect of the fees payable by contractors under the PSC, cost recovery, decommissioning, and employment and training of national citizens.²³

II. Asia

A. TIMOR-LESTE

Decree-Law 41/2022 created the National Authority for Environmental Licensing.²⁴ The new Authority is responsible for, *inter alia*, assessing projects and classifying and issuing environmental licenses, as well as verifying that entities conducting activities with an environmental impact “comply with the provisions of both national and international legislation related to protection of the environment.”²⁵

Moreover, “[i]n compliance with Timor-Leste’s commitments under the Kyoto Protocol, the Government has created the Designated National Authority for the Fight against Climate Change, by means of Decree-Law 42/2022.”²⁶ “This Designated Authority has the mission to approve the participation of public and private national entities in projects related with clean development and emissions trading and will serve as a liaison between Timor-Leste and the Green Climate Fund.”²⁷

21. *New Oil & Gas Legislation: Legal Alert: Sao Tome and Principe*, MIRANDA ALL. (Oct. 10, 2022), <https://mirandalawfirm.com/en/insights-knowledge/publications/legal-news/mozambique-legal-news-may-through-august-2022-2> [<https://perma.cc/BSQ2-5HNC>].

22. *Id.*

23. *Id.*

24. *Creation of the National Authority for Environmental Licensing: Legal News: Timor-Leste*, MIRANDA ALL., <https://www.mirandalawfirm.com/en/insights-knowledge/publications/legal-news/timor-leste-legal-news-junethroughaugust-2022-2> [<https://perma.cc/ZR7D-84JV>] (last visited Nov. 25, 2022).

25. *Id.*

26. *Id.*

27. *Creation of the Designated National Authority for the Fight Against Climate Change*, MIRANDA ALL., <https://www.mirandalawfirm.com/en/insights-knowledge/publications/legal-news/timor-leste-legal-news-junethroughaugust-2022-2> [<https://perma.cc/XK2J-NAW7>] (last visited Nov. 25, 2022).

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Also, Decree-Law 39/2022 amended environmental licensing procedure in Decree-Law 5/2011.²⁸ The new statute establishes new rules, notably in respect of the submission of documents and payment of fees.²⁹

“With a view to developing the mining sector, Decree-Law 43/2022 . . . created the national mining company, called Companhia Mineira de Timor-Leste, S.A. (CMTL, S.A.), and approved its by-laws.”³⁰ “CMTL, S.A. will be responsible for conducting mining activities . . . including reconnaissance activities, prospecting and exploration, evaluation, development, mining, treatment, transportation, and commercialization of minerals as well as mine closure activities.”³¹

III. Europe

A. ITALY

On February 8, 2022, the Italian Chamber of Deputies adopted amendments to Article 9 and Article 41 of the Italian Constitution to introduce environmental protection as a fundamental principle.³² On the original basis to “promote the development of culture as well as scientific and technical research” and to “safeguard the natural landscape and the historical and artistic heritage,” the amendment added that the Republic “shall protect the environment, biodiversity and ecosystems, also in the interest of future generations.”³³ In addition, Article 41 of the Constitution was modified to include “health and environment” as new limitations to private economic initiatives.³⁴ It also encourages Italian law to orient economic activities with “environmental purpose,” stating that “[t]he law shall provide for appropriate programmes and controls so that public and private economic activity may be oriented and co-ordinated for social and environmental purposes.”³⁵

28. *Id.*

29. *First Amendment to Environmental Licensing Procedure Approved*, MIRANDA ALL., <https://www.mirandalawfirm.com/en/insights-knowledge/publications/legal-news/timor-leste-legal-news-junethroughaugust-2022-2> [<https://perma.cc/PSA9-4UN4>] (last visited Nov. 25, 2022).

30. *Id.*

31. *Creation of the Timor-Leste Mining Company*, MIRANDA ALL., <https://www.mirandalawfirm.com/en/insights-knowledge/publications/legal-news/timor-leste-legal-news-junethroughaugust-2022-2> [<https://perma.cc/U8Y8-5U8R>] (last visited Nov. 25, 2022).

32. See Angelo Amante & Gavin Jones, *Italy Makes Constitution Greener, Environmentalists Call for Action*, REUTERS (Feb. 9, 2022), <https://www.reuters.com/world/europe/italy-makes-protecting-environment-part-constitution-2022-02-08/> [<https://perma.cc/A4YD-BG7Y>].

33. Art. 9 COSTITUZIONE [COST.] (It.).

34. *Id.* art. 41.

35. *Id.*

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B. SPAIN

In response to various economic and social consequences of the Ukraine crisis, Royal Decree-Law 6/2022 went into force in March 2022.³⁶ The main aspects related to the energy sector include the following: (1) supportive measures to electro-intensive, gas-intensive, and gas-consuming industries;³⁷ (2) updated parameters of the remuneration regime for the production of electricity from renewable energy, co-generation, and waste sources;³⁸ (3) simplified authorization procedures and conditional waiver of environmental impact assessments for renewable energy projects;³⁹ (4) release of ten percent of the reserved capacity in transmission grid knots for self-consumption facilities;⁴⁰ (5) reduction of greenhouse gas emissions intensity over the life cycle of fuels and the energy supplied in transportation;⁴¹ and (6) extraordinary and temporary rebate on the final price of certain energy products.⁴²

In October 2022, Spain began the process of withdrawing from the Energy Charter Treaty (ECT).⁴³ Earlier in June 2022, an Agreement in Principle to modernize ECT was reached among signatories to conclude fifteen rounds of negotiations, which introduced flexibility for signatories to exclude investment protections in fossil fuel investments, and was pending for further adoption by the Energy Charter Conference in November 2022.⁴⁴

C. THE NETHERLANDS

To deal with soaring energy prices, the Dutch government reduced excise duty on petrol, diesel, liquefied petroleum gas (LPG), and liquefied natural gas (LNG).⁴⁵ Meanwhile, the VAT on natural gas, electricity, and district heating was reduced for all entrepreneurs from twenty-one percent to nine

36. See REAL DECRETO-LEY [Royal Decree-Law] 6/2022, núm. 76 Boletín Oficial del Estado [BOE] Mar. 30, 2022 (Spain), <https://www.boe.es/buscar/act.php?lang=EN&id=BOE-A-2022-4972&tn=1&p=> [<https://perma.cc/2SNZ-HC7F>].

37. See *id.* ch. I.

38. See *id.* art. 5.

39. See *id.* ch. III.

40. See *id.* art. 8.

41. See *id.* ch. V.

42. See *id.* ch. VI.

43. Karl Mathiesen, *Spain Pulls Out of Energy Treaty Over Climate Concerns*, POLITICO (Oct. 12, 2022, 3:56 PM), <https://www.politico.eu/article/spain-pulls-out-of-energy-treaty-over-climate-concerns/> [<https://perma.cc/5ATU-5LGY>].

44. *Modernization of the Treaty*, INT'L ENERGY CHARTER, <https://www.energychartertreaty.org/modernisation-of-the-treaty/> [<https://perma.cc/Z5E9-AHTH>] (in the column of 2022, choose “Public Communication Explaining the Main Changes Contained in the Agreement in Principle (Ad Hoc Meeting of the Energy Charter Conference, 24 June 2022)”) (last visited Oct. 28, 2022).

45. *Lowered Taxes on Fuel Extended*, BUSINESS.GOV.NL, <https://business.gov.nl/amendment/taxes-on-energy-petrol-diesel-lowered/> [<https://perma.cc/JW9B-E3MG>] (last visited Oct. 28, 2022).

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percent.⁴⁶ In October 2022, the Dutch government unveiled a temporary price cap on electricity and gas from January 1, 2023.⁴⁷ For gas, the price would be capped at 1.45 EUR/m³ within the consumption of 1,200 m³.⁴⁸ For electricity, the price would be capped at 0.40 EUR/KWh within the consumption of 2,900 KWh.⁴⁹ Excess consumption needs to be paid pursuant to the market price.⁵⁰ Also, in October, the Dutch government released the Energy Cost Contribution scheme (TEK) to enable energy-intensive SMEs to get allowance for the period from November 2021 to December 2023.⁵¹

But, in October, the effective day of the Environment and Planning Act (Omgevingswet) was postponed to July 1, 2024.⁵² The new Act embodies twenty-six existing acts to test building projects on environment, housing, nature, and water, which is expected to reduce the time to apply for a permit from twenty-six weeks to eight weeks.⁵³

D. GENERAL

To further finance the transition to a sustainable economy, the EU Commission published the Complementary Climate Delegated Act (CCDA) in July 2022,⁵⁴ specifying science-based screening criteria for the EU Taxonomy Regulation (Taxonomy).⁵⁵ In 2020, the EU set forth six environmental objections and four conditions for companies and investors to identify green economic activities in the Taxonomy⁵⁶ and adopted the first delegated act in January 2022.⁵⁷ Compared to the first act, CCDA includes specific gas and nuclear activities into the Taxonomy list, meanwhile providing special disclosure requirements for companies to state to what

46. *VAT on Energy to Go Down*, BUSINESS.GOV.NL, <https://business.gov.nl/amendment/vat-on-energy-lowered/> [https://perma.cc/ZL7M-RX92] (last visited Oct. 28, 2022).

47. *Help with Energy Bills SME (Price Cap)*, BUSINESS.GOV.NL, <https://business.gov.nl/amendment/help-energy-bills-sme/> [https://perma.cc/JG3Z-Y6C4] (last visited Oct. 28, 2022).

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*; see also *Energy Cost Contribution Scheme for Energy-Intensive SMEs (TEK)*, BUSINESS.GOV.NL, <https://business.gov.nl/subsidy/energy-cost-contribution-scheme/> [https://perma.cc/4R5M-9QM6] (last visited Oct. 28, 2022).

52. *Invoering van de Omgevingswet naar 1 juli 2023 [Introduction of the Environment and Planning Act to 1 July 2023]*, DE RIJKSOVERHEID. VOOR NEDERLAND [THE NATIONAL GOVERNMENT. FOR THE NETHERLANDS] (Oct. 14, 2022, 6:22 PM), <https://www.rijksoverheid.nl/onderwerpen/omgevingswet/nieuws/2022/10/14/invoering-van-de-omgevingswet-naar-1-juli-2023>; see also *Introduction of the Environment and Planning Act (Omgevingswet)*, BUSINESS.GOV.NL, <https://business.gov.nl/amendment/introduction-environmental-and-planning-act-omgevingswet/> [https://perma.cc/3982-K9T6] (last visited Oct. 28, 2022).

53. *Introduction of the Environment and Planning Act (Omgevingswet)*, *supra* note 52.

54. Commission Delegated Regulation 2022/1214, 2022 O.J. (L 188) 1, 5 (EU).

55. Regulation 2020/852, 2020 O.J. (L 198) 13, 22 (EU).

56. See *id.* arts. 3, 9.

57. Commission Delegated Regulation 2021/2139, 2021 O.J. (L 442) 1, 11 (EU).

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extent their transactions are linked to natural gas and nuclear energy.⁵⁸ In light of the current applicable Corporate Sustainability Reporting Directive (CSRD)⁵⁹ and Sustainable Finance Disclosure Regulation (SFDR),⁶⁰ CCDA, with the Taxonomy, will fit into the EU's finance framework as policy tools to impose mandatory disclosure requirements on large companies.⁶¹ They also can be voluntarily adopted to achieve positive environmental impacts.⁶²

IV. South America

A. ARGENTINA

After a Hydrocarbons Investments Promotion Bill proposed by the National Executive on September 15, 2021,⁶³ failed to receive expedited treatment by the National Congress, the National Executive, urging to secure domestic hydrocarbon production increases to satisfy the domestic demand substituting costly hydrocarbon imports, issued Decree of Necessity and Urgency (DNU) 277/2022 on May 27, 2022.⁶⁴

The Decree created two substantially similar exchange rate incentive regimes aimed at easing the remittance of currencies required to enable new investments in the critical hydrocarbons industry:⁶⁵ (1) a foreign exchange access regime for incremental oil production (the Petroleum Regime, or RADPIP,⁶⁶ per its official acronym); and (2) a foreign exchange access

58. Commission Delegated Regulation 2022/1214, 2022 O.J. (L 188) 1, 1–2, annex III (EU).

59. COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS: A BLUEPRINT TO SAFEGUARD EUROPE'S WATER RESOURCES, at 1, COM (2021) 188 final (Apr. 21, 2021), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=ELEX:52012DC0673&from=EN> [<https://perma.cc/Y2L3-KCGE>].

60. Commission Delegated Regulation 2021/2139, Supplementing Regulation (EU) 2020/852 of the European Parliament and of the Council by Establishing the Technical Screening Criteria for Determining the Conditions Under Which an Economic Activity Qualifies as Contributing Substantially to Climate Change Mitigation or Climate Change Adaptation and for Determining Whether That Economic Activity Causes No Significant Harm to Any of the Other Environmental Objectives, 2021 O.J. (L 442/1) (EU).

61. Regulation 2020/852, *supra* note 55, arts. 5–8, 2020 O.J. (L 198) 13, 28–29; *see also* FAQ: *What Is the EU Taxonomy and How Will It Work in Practice?* EUR. COMM'N (2021), https://finance.ec.europa.eu/system/files/2021-04/sustainable-finance-taxonomy-faq_en.pdf [<https://perma.cc/573V-XQJN>].

62. Regulation 2020/852, *supra* note 55.

63. *See Mensaje: Régimen de Promoción de Inversiones Hidrocarburíferas [Message: Regime for the Promotion of Hydrocarbon Investment]*, REPÚBLICA ARGENTINA – PODER EJECUTIVO NACIONAL [ARGENTINE REPUBLIC – NATIONAL EXECUTIVE POWER] (Sept. 15, 2021), <https://www.senado.gob.ar/parlamentario/comisiones/verExp/114.21/PE/PL> [<https://perma.cc/L7WK-LEJJP>].

64. *See* Decreto 277/2022, May 27, 2022, [34.929] B.O. 1, <https://www.boletinoficial.gob.ar/detalleAviso/primera/263398/20220528?busqueda=1> [<https://perma.cc/AGT2-5MPM>] (Arg.).

65. *Id.* § 11.

66. *Id.* § 1.

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regime for incremental natural gas production (the Natural Gas Regime, or RADPIGN,⁶⁷ per its official acronym).

The beneficiaries of these regimes will be granted access to the Free Exchange Market without the need for prior approval from the Central Bank for (1) the payment of capital and interest on foreign commercial or financial liabilities, including liabilities with non-resident-related companies and/or profits and dividends that correspond to closed and audited financial statements and/or the repatriation of direct investments of non-residents;⁶⁸ (2) their respective volumes of benefited incremental oil production⁶⁹ (equal to twenty percent of the quarterly incremental production obtained by each beneficiary over its respective production baseline curve); and (3) their respective volumes of benefited incremental natural gas injection (equal to thirty percent of the incremental injection obtained by each beneficiary over the natural gas injection baseline)⁷⁰ valued at external market prices.⁷¹

The given promoted percentages may increase in light of the beneficiary's level of coverage of domestic market needs⁷² or in case it meets other conditions, such as, among others: (1) having reversed the decline curve of the producing reservoirs in the immediate past year;⁷³ (2) having obtained, for the petroleum regime, incremental oil production from low productivity wells or previously inactive or closed wells in partnership with small companies, which, in turn, must meet certain requirements;⁷⁴ (3) having hired, for the natural gas regime, a minimum ten percent of its fracking services from regional or domestic companies, which, in turn, must meet certain domestic content requirements;⁷⁵ or (4) having increased its earnings and profits investments by no less than \$5 million in marginal fields or fields located in regions or basins with declining conventional production only within a period of two years from admission to the incentives program.⁷⁶

To access and maintain the benefits of RADPIP and RADPIGN, beneficiaries shall submit and comply with a National and Regional Supplier Development Plan that satisfies certain "Regional and National Integration Requirements," as well as a system of preferences in favor of said National and Regional Suppliers.⁷⁷

Thereafter, the Decree was further regulated by National Decree 484/2022,⁷⁸ issued on August 12, 2022, whereby the beneficiaries were enabled in

67. *Id.* § 12.

68. *Id.* §§ 8, 17.

69. *Id.* § 6.

70. *Id.* § 15.

71. *Id.* §§ 8, 17.

72. *Id.* §§ 7(a), 16(a).

73. *Id.* §§ 7(b), 16(b).

74. *Id.* § 7(c).

75. *Id.* § 16(d).

76. *Id.* § 16(e).

77. *Id.* ch. 2.

78. *See* Decreto 484/2022, Aug. 16, 2022, B.O., <https://www.boletinoficial.gob.ar/detalleAviso/primera/268563/20220816?busqueda=1> [<https://perma.cc/AH24-6M2R>] (Arg.).

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order to promote the necessary investments to increase the production in their hydrocarbon fields to submit applications jointly with other legal entities, which will be considered as associated third parties, as long as they comply with the applicable requirements, prove a contractual link with the beneficiary of at least twelve months, and have a minimum effective investment of \$50 million,⁷⁹ with the terms to be further regulated by the Enforcement Authority.⁸⁰

Additional regulations from both the National Secretary of Energy and the Argentine Central Bank are also pending for several aspects of these government incentives to become operational.⁸¹

V. Treaties

In early July 2022, Turkey's President Tayyip Erdogan signed and forwarded a bill to the Parliament's Speaker's Office that would make Turkey a party to the Svalbard Treaty.⁸² In October 2022, the Turkish Parliament's Foreign Affairs Committee approved the bill, paving the way for a vote by the full Grand National Assembly of Turkey.⁸³

Signed in 1920, the Svalbard Treaty governs an archipelago located in the Arctic Ocean approximately halfway between Norway and the North Pole.⁸⁴ Under the treaty, Norway is given "full and unrestricted sovereignty over the Svalbard archipelago,"⁸⁵ subject to several key provisions.⁸⁶ First, all treaty signatories are granted non-visa entry and are not subject to tariffs for the import or export of goods.⁸⁷ Second, all parties enjoy "equally the rights of fishing and hunting in the territories . . . and in their territorial waters" and can "carry on there without impediment all maritime, industrial, mining and commercial operations on a footing of absolute equality."⁸⁸ At the time the Treaty was signed, nations had exclusive control of up to around three or four nautical miles of territorial sea.⁸⁹ In 1982, the United Nations

79. *Id.* § 1.

80. *Id.*

81. See Decreto 277/2022, *supra* note 64, §§ 9, 19; see also Decreto 484/2022, *supra* note 78 (noting Judy Boyd is a civilian attorney with the United States Coast Guard, a Reserve Judge Advocate with the United States Army, and a Senior Fellow with the Arctic Institute).

82. See Nuray Babacan, *Türkiye to Become a Party to Svalbard Treaty*, HURRIYET DAILY NEWS (July 3, 2022), <https://www.hurriyetdailynews.com/turkiye-to-become-a-party-to-svalbard-treaty-175058> [<https://perma.cc/V3B8-XBNF>].

83. See *Türkiye Set to Raise North Pole Stake With Key Spitsbergen Treaty*, DAILY SABAH (Oct. 9, 2022), <https://www.dailysabah.com/turkey/turkiye-set-to-raise-north-pole-stake-with-key-spitsbergen-treaty/news> [<https://perma.cc/Y5TW-SLU9>].

84. Treaty Recognising the Sovereignty of Norway Over the Archipelago of Spitsbergen, Feb. 9, 1920, 43 Stat. 1892, 2 L.N.T.S. 7.

85. *Id.* art. 1.

86. *Id.*

87. *Id.*

88. *Id.* arts. 2–3.

89. *About the UNCLOS*, INST. FOR MAR. & OCEAN AFFS., <https://www.imoa.ph/treaties/unclos/unclos-history/> [<https://perma.cc/LWN7-LSX5>] (last visited Mar. 2, 2023).

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Convention on the Law of the Sea (UNCLOS) extended these territorial waters to twelve nautical miles (nm) and established an exclusive economic zone of up to 200 nm beyond a nation's territorial sea.⁹⁰ It is unclear how UNCLOS is to be applied in relation to the Svalbard Treaty.⁹¹

There were originally fourteen party signatories to the Svalbard Treaty.⁹² Turkey is poised to become the forty-seventh party to the treaty.⁹³ Becoming a signatory to the Svalbard Treaty will open the door for Turkey to initiate economic and scientific activities within the Arctic region.⁹⁴ It may also renew legal and political discussions about how to interpret old treaties, considering increased global competition for Arctic resources.⁹⁵

90. See U.N. Convention on the Law of the Sea, art. 57, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force on Nov. 16, 1994).

91. See Jon Grady, *Old Treaties Called Into Question as Arctic Competition Increases*, USNI NEWS (Dec. 20, 2016, 5:41 PM), <https://news.usni.org/2016/12/20/old-treaties-called-question-arctic-competition-increases> [<https://perma.cc/58A7-KFG4>].

92. *Id.*

93. See *What Is Svalbard Treaty on Arctic Region?*, JUST. MIRROR (Mar. 18, 2022), <https://justicemirror.com/what-is-svalbard-treaty/> [<https://perma.cc/HDL3-X89N>]; see also Babacan, *supra* note 82.

94. Babacan, *supra* note 82.

95. See Grady, *supra* note 91.

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This article summarizes important developments during 2022 in international mergers and acquisitions (M&A) and joint ventures in British Virgin Islands, China, Italy, Peru, Russia, Spain, Ukraine, and the United States.

I. British Virgin Islands

A. INTRODUCTION

There were several significant international M&A transactions involving British Virgin Islands (BVI) companies in the first half of 2022. A number of deals focused on the technology sector, with notable deals including the \$200 million acquisition of Six Waves Inc., a game developer, by Stillfront Group and the acquisition by Gopher Investments of Finalto, the financial trading division of Playtech plc, for \$250 million.¹

After a strong start to the year, with the highest number of first quarter incorporations in four years,² the wider corporate market witnessed decline in the second quarter with a 17.85% decline in new incorporations

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1. See *British Virgin Islands Reflects on a Successful H1 2022, with Highest Number of First-Quarter New Incorporations in Four Years*, BVI FIN. (Sept. 23, 2022), <https://bvifinance.vg/Newsroom/All-News/ArticleID/548/British-Virgin-Islands-Reflects-On-A-Successful-H1-2022-With-Highest-Number-Of-First-Quarter-New-Incorporations-In-Four-Years> [https://perma.cc/8HEU-YTKR].

2. *Id.*

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compared to first quarter 2022³ with a number of large transactions being put on hold. The market appears to have picked up in the third quarter with increased M&A and joint venture activity involving BVI companies, particularly within the Asia-Pacific region.⁴

B. ALTERATIONS TO CORPORATE LAWS

New amendments to the Business Companies Act 2004 (BCA) came into force on January 1, 2023, following the enactment of the BVI Business Companies (Amendment) Act, 2022⁵ (Amendment Act).

The Amendment Act introduces a number of significant changes to the BCA including the requirement for an annual financial return, the public filing of registers of directors with the BVI registry, and the introduction of a framework for a register of persons with significant control of BVI companies.⁶ In terms of the proposed beneficial ownership register, the specific details are still unclear, as the new rules are to be outlined in regulations which will be published by the end of 2023.

C. VIRTUAL ASSET LAWS

On September 9, 2022, the BVI Financial Service Commission issued the draft Virtual Assets Service Providers Act, 2022 (VASP Act) for consultation by industry and stakeholders.⁷

The VASP Act is designed to incorporate the principles outlined by the Financial Action Task Force in its Guidance for a Risk-Based Approach to Virtual Assets and Virtual Asset Service Providers, by extending regulatory oversight to service providers in the virtual assets space.⁸ A new licensing regime will be introduced that will require entities conducting virtual assets service provision, virtual asset custody services and/or virtual asset exchanges to apply for registration and comply with certain regulatory requirements and international anti-money laundering standards.⁹ The new legislation is wide in scope and will include activities such as the transfer of virtual assets, safekeeping and administration of virtual assets, and the provision of financial services related to an issuer's offer or sale of a virtual asset.

The VASP Act subsequently came into effect on February 1, 2023, although many details are still to be set out in secondary legislation.

3. *BVI Financial Services Commission Statistical Bulletin Q2 2022*, 67 STATISTICAL BULLETIN 1, 2 (2022) https://www.bvifsc.vg/sites/default/files/q2_2022_statistical_bulletin.pdf [<https://perma.cc/6KW6-BBJH>].

4. *British Virgin Islands Reflects on a Successful H1 2022*, *supra* note 1.

5. Business Companies (Amendment) Act, No. 6 of 2022, gazetted August 12, 2022, effective January 1, 2022 (British Virgin Islands).

6. *Id.* § 230.

7. The Virtual Assets Service Providers Act was circulated for public consultation in 2022. See Virtual Assets Services Providers Act of 2022, No. 17 of 2022 (British Virgin Islands).

8. *Id.* at pt. I.4.

9. *Id.* at pt. II.

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Consequently, the scope of the law is still unclear. There is currently no indication as to what types of virtual assets will be covered by the legislation and whether there will be certain categories of excluded persons. It is likely that there will be exclusions for classes of virtual assets, such as non-fungible tokens and limited purpose payment tokens, and safe harbors for certain classes of persons, such as lawyers and accountants providing incidental services, but the position will remain unclear until subsidiary regulations issued under the VASP Act are circulated.

D. CONCLUSION

The recent legislative changes in 2022, specifically the Amendment Act and the VASP Act, are likely to have an impact on M&A transactions and joint-venture structuring within the British Virgin Islands.

In terms of the Amendment Act, the ability to conduct public searches for directors, and potentially, more limited searches in relation to beneficial owners of BVI companies, is likely to assist in conducting more efficient and certain due diligence at an early stage.

In terms of the VASP Act, the new legislation points to the need to conduct regulatory due diligence on companies operating in the virtual assets space, to verify whether such companies are conducting regulated activities and, if so, whether they are licensed. Given the large number of technology related M&A deals involving BVI companies, regulatory due diligence may become a more important consideration for M&A transactions.

II. China

In 2022, China imposed a series of regulatory trends that pose new challenges for M&A deal-making. Under the new legislation, parties in M&A transactions should closely review the relevant data protection and antitrust requirements and conduct the necessary risk assessments as part of compliance with regulations in China.

A. DATA PRIVACY MEASURE

One of the procedures for companies to get clearance on cross-border data transfer is to undergo a security assessment organized by the Cyberspace Administration of China (CAC).¹⁰ The Measures for Security Assessment of Outbound Data Transfers (the Measures), which came into effect on September 1, 2022, provided details on the requirement and procedures for such security assessment.¹¹

10. Personal Information Protection Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 20, 2021, effective Nov. 1, 2021), art. 38, 2010 P.R.C. Laws 91 (China).

11. Measures for Security Assessment of Outbound Data Transfers (promulgated by the Standing Comm. Nat'l People's Cong., July 7, 2022, effective Sept. 1, 2021), 2022 P.R.C. Laws 11 (China).

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The Measures require CAC security assessment if one of the following thresholds is met: (1) if data processors transfer “important”¹² data abroad; (2) if the data is exported by the critical information infrastructure operators or data processors that handle the personal information of more than 1 million people; (3) if the data processors have exported the personal information of over 100,000 people or the sensitive personal information of over 10,000 people abroad since January 1 of the previous year; or (4) other situations required an assessment as stipulated by the CAC.¹³

Prior to the CAC review application, the data processor must first conduct a self-assessment, evaluating the data transfer risk that may be posed to China’s national security, public interests and the lawful rights of individuals and organizations.¹⁴ Then, the processor has to apply for the CAC review by submitting requisite materials such as the self-assessment report, and legal documents signed between the data handler and the overseas recipient.¹⁵ Upon application acceptance,¹⁶ CAC will organize¹⁷ the relevant departments and agencies to complete the assessment within forty-five working days.¹⁸ Where the data processor objects to the assessment result, it may request reconsideration within fifteen working days of receiving the results, and the re-assessment decision will be final.¹⁹ The positive assessment outcome is valid for two years from the issuance date. But the outcome can be revoked if there is a substantive change to the circumstances under which the approval for outbound data transfer was granted. Also, companies must re-apply for an assessment sixty working days before the expiration date.²⁰

B. ANTITRUST LAW ALTERATION

On August 1, 2022, the Anti-Monopoly Law (AML) amendment took effect.²¹ This amendment establishes a suspensive merger review system and raises the risk of broader antitrust scrutiny of M&A transactions. Some relevant changes include: (1) prohibiting companies from leveraging data and algorithms, technology, or capital advantages and platform rules to involve in monopolistic behavior;²² (2) increasing penalties;²³ (3) enabling the

12. *Id.* at art. 19 (noting that important data refers to data that, once altered, destroyed, leaked, illegally acquired or illegally used, may jeopardize national security, economic operations, social stability, public health or security, etc.).

13. *Id.* at art. 4.

14. *Id.* at art. 5.

15. *Id.* at art. 6.

16. *Id.* at art. 7.

17. *Id.* at art. 10.

18. *Id.* at art. 12.

19. *Id.* at art. 13.

20. *Id.* at art. 14.

21. Anti-Monopoly Law 2022 Amendment (promulgated by the Standing Comm. Nat’l People’s Cong., June 24, 2022, effective Aug. 1, 2022), 2022 P.R.C. (China).

22. *Id.* at art. 9, 22.

23. *Id.* at art. 21.

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anti-monopoly authorities to require reporting obligation and conduct antitrust investigation if there is evidence that the consolidation restricts or could restrict competition, even though the consolidation does not meet the reporting standards;²⁴ (4) introducing a safe harbor rule: vertical monopolistic agreements are not prohibited if the parties' market share in the relevant market is under certain threshold and the conditions established by the enforcement agency are fulfilled;²⁵ and (5) permitting suspension of the calculation of the merger review period if (a) the parties fail to submit the required documents and materials and makes review impossible, or (b) new circumstances or facts that significantly affect the merger review occur and the review cannot proceed without verification, or (c) further evaluation is needed on the additional restrictive conditions for the concentration of business operators, and the company requests a suspension.²⁶

III. Italy

A. RUSSIAN ROULETTE CLAUSES

Under Italian law, notaries are entrusted in making the first evaluation of the lawfulness of the Certificate of Incorporation and By-Laws (*Statuto*) of an Italian company.²⁷ The Notarial District of Milan is one of the most important in Italy and whose decisions are very important and constitute a persuasive precedent in Italian corporate law. It established in its Decision no. 181, as amended,²⁸ of the Corporate Law Commission that it is now lawful to provide anti-deadlock (whether in the Board of Directors or in the shareholders meeting) provisions, including a Russian roulette clause in the By-Laws of an Italian company. These kinds of clauses are typically used in companies with only two shareholders, or in closely held companies.

It has been long debated whether Russian roulette clauses were legal or, if legal, whether they could be included in the By-Laws of a company. But after a recent seminal decision of the Court of Rome²⁹ on its validity, the Notarial District of Milan decided anti-deadlock and Russian Roulette provisions may be included in By-Laws of a company.

24. *Id.* at art. 10(26).

25. *Id.* at art. 18.

26. *Id.* at art. 11(32).

27. *The Deposit at a Notary in Italy of Public and Private Deeds or Agreements Signed Abroad*, NOTARY IN ITALY, <https://www.italy-advisor.it/notary-in-italy> [<https://perma.cc/VK4V-A2J7>] (last visited Mar. 29, 2023).

28. *Anti-deadlock Clause for the Repurchase or Forced Purchase of Shareholdings (so-called Russian Roulette Clause or Cowboy Clause)*, NOTARY COUNCIL OF MILAN, <https://www.consiglionotarilemilano.it/massime-commissione-societa/181/> [<https://perma.cc/32YZ-52ZF>] (last visited Mar. 15, 2023).

29. Daniel Joseph Giuliano & Chiara Sannasardo, *The Court of Rome Confirms that Russian-Roulette Clauses Can Be Included in Shareholders' Agreements in Order to Solve Deadlocks*, CONCURRENCES (Oct. 19, 2017) <https://www.concurrences.com/fr/bulletin/special-issues/mergers-joint-ventures/the-court-of-rome-confirms-that-russian-roulette-clauses-can-be-included-in> [<https://perma.cc/2B32-J73G>].

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Russian roulette clauses are those clauses whereby upon the occurrence of certain triggering events, a shareholder may commence a procedure whereby it has the right to determine the value of the respective equal participations giving to the counterpart the choice between (1) sell its participation to the shareholder that has set the value or (2) purchase the other party participation at the same price.³⁰

The Notarial District of Milan decision points out that this clause has only one mandatory limit, which needs not to be expressly stated. The value of the participation so determined must not be lower than the value determined by the law in case of withdrawal of shareholder from a company,³¹ as prescribed by the current majority jurisprudence and scholars.³²

It should also be noted that the decision of the Notarial District of Milan expressly mentions and allows the use of the Russian roulette clause and similar clauses for different purposes than deadlock solving. For example, as a right granted to a shareholder holding a certain percentage of capital or as special right to the holder of a certain category of shares upon the occurrence of certain triggering events.

In short, in Italian corporate law the Russian roulette clause (and similar clauses) went from a questionable validity to now being acceptable clauses used for several purposes besides the traditional one of anti-deadlock clause.

IV. Peru

A. MERGER CONTROL AND ENFORCEMENT TRENDS

Merger Control was introduced in Peru by means of Law 31112, the Merger Control Law (MCL) enacted in June 2021.³³ Under the law, all business concentration transactions in any sector or industry, including foreign transactions that have effects in Peru and transactions involving agents that have not previously carried out activities in the sector or industry under evaluation and which meet the thresholds set forth in the MCL, require the prior clearance of the National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOPI), the Peruvian antitrust agency.

30. Daniel Joseph Giuliano & Chiara Sannasardo, *Russian Roulette: Take It or Leave it? It's Up to You. . .*, PORTOLANO CAVALLO (Oct. 21, 2019), <https://portolano.it/en/newsletter/portolano-cavallo-inform-corporate/russian-roulette-take-it-or-leave-it-its-up-to-you> [<https://perma.cc/GV3Z-PB7N>].

31. C.c. bk. 5, tit. V, art. 2437-ter, ¶ 2 (It.); C.c. bk. 5, tit. V, art. 2473, ¶ 3 (It.).

32. Court of Milan, order dated March 31, 2008, *Le Società*, 2008 1373 *et seq.*; Sbisà, *Dialogo con la giurisprudenza sulle clausole statutarie di trascinarsi (drag-along)*, *Contratto e Impresa*, 2015, 635 *et seq.* (that although relating to drag-along clauses, deal with the same legal issues).

33. Prior legislation on merger control was only applicable to the electricity industry. See Antimonopoly and Antioligopoly Law of the Electricity Sector, Law 26876 (Nov. 19, 1997) (Peru).

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The clearance proceeding before INDECOPI is structured in two progressive phases. INDECOPI does allow early access to discuss aspects of the filing by way of what is called a “pre-filing” stage. Submitting the application to INDECOPI as a “pre-filing” aims to avoid contingencies in the proceeding and thereby smooth the analysis of the transaction. Ensuring the correct preparation of all the documents is also key for having the transaction approved without a hitch.

The latest experiences show that INDECOPI may take between three and four months for their review and that transactions are normally approved on phase one of the proceeding. Only one of the twelve transactions during the first year of application of the MCL was not approved in phase one and required phase two analysis.³⁴

Phase two analysis applies only if a transaction involves competition concerns. This second stage evaluation may take an additional four to five months to be completed. The final decision may approve the transaction, approve it subject to certain conditions or deny the transaction.

As referred above, during the first year of application of the MCL, twelve notifications were submitted to INDECOPI, of which eight were approved by June 2022. INDECOPI worked efficiently to ensure compliance with the legal terms provided for in the MCL for resolution of the cases.³⁵

In the case of the first phase two transaction, approval was granted subject to conditions in three of the five relevant markets under evaluation. Thus, Pharmaceutica Euroandina S.A.C. was authorized to acquire control of Hersil S.A. Laboratorios Industriales Farmacéuticos, subject to the following conditions:³⁶

- (1) Main commitment: Pharmaceutica Euroandina is to license to a third party the trademarks marketed by Hersil in the antiseptics, anti-infectives, the aminoglycosides, and the systemic nasal preparations markets, for a minimum term of five years. At the end of said term, the relevance of maintaining or modifying the commitments will be evaluated.
- (2) Transitional commitment: From the day after the closing of the transaction until the signing of the trademark license agreement referred to above, Pharmaceutica Euroandina is to implement a

34. *Control de fusiones en Perú: Balance en su primer año de implementación y nuevos lineamiento* [Merger Control in Peru: Balance in its First Year of Implementation & New Guidelines], CENTROCOMPETENCIA (July 13, 2022), <https://centrocompetencia.com/control-de-fusiones-en-peru-balance-en-su-primer-ano-de-implementacion-y-nuevos-lineamientos/> [https://perma.cc/5F3U-HEH6].

35. *Id.*

36. *El Indecopi Autorizó con Condiciones la Adquisición de Hersil S.A. por parte de Pharmaceutica Euroandina S.A.C.*, *gob.pe* [Indecopi authorized with conditions the acquisition of Hersil SA by Pharmaceutica Euroandina SAC], NAT'L INST. FOR THE DEF. OF COMPETITION AND THE PROT. OF INTELL. PROP. (Oct. 25, 2022) <https://www.gob.pe/institucion/indecopi/noticias/663850-el-indecopi-autorizo-con-condiciones-la-adquisicion-de-hersil-s-a-por-parte-de-pharmaceutica-euroandina-s-a-c> [https://perma.cc/R698-2BNM].

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pricing policy in the alluded markets pursuant to which it will not be able to increase the prices of the products marketed under the trademarks to be licensed. This commitment includes maintaining the discount programs in place by Medifarma and Hersil for products distributed in those markets prior to the merger.

It is also relevant to mention that INDECOPI has not denied approval or imposed structural conditions (e.g., a divestiture) since the entering into effect of the MCL.³⁷

Considering the decision-making and enforcement trends of INDECOPI so far, we consider that such authority is acting reasonably in determining if the business concentration transaction involves competition concerns.

It is worth mentioning that with the constant dynamization of the markets, the experience gained, and the guidelines that INDECOPI is adopting for the analysis and approval of transactions, the application of the merger control regime will become more predictable, effectively providing with more tools to evaluate transactions and file complete and efficient notifications in the years to come.

Finally, it's important to note that even when a business transaction does not meet the thresholds for antitrust clearance so no filing is required, INDECOPI is entitled to act *ex officio* when there are reasonable indications to consider that the transaction may generate a dominant position or affect effective competition in the relevant market. Such post completion action may only be triggered up to one year after the transaction not subject to approval is closed.

V. Russia

Despite the fact that 2022 appeared to be challenging for Russian markets and especially for the M&A sphere, creating the new reality for M&A transactions; some steps were taken towards further implementation of the world's best practices in the M&A and joint ventures sphere in Russia. The Russian Supreme Court developed confirmation of the status for the disclosure letter as a tool for limiting the liability of the seller under Russian law. Another positive step for the Russian market was amending the requirements for the Russian Federal Antimonopoly Service (FAS) to approve M&A transactions.

³⁷. Under the prior regime applicable only to the power sector, certain other conditions were imposed. For example, until the year 2030, the electricity distributor, Luz del Sur, is not able to resort directly to the generation of its economic group to supply itself with electricity. If Luz del Sur wishes to get supplied with electricity generated by members of its economic group, it must use the following competitive mechanisms: (1) a bidding process in accordance with Law 28832; or (2) a private contest, which shall allow the participation of competitors. Such condition was imposed by INDECOPI after the acquisition of control over Luz del Sur by the China Three Gorges group. *See* Resolution 007-2020-CLC/INDECOPI (Mar. 27, 2020) (Peru).

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In 2015 the institute of Representations on Circumstances³⁸ was incorporated into Russian legislation.³⁹ But the effective implementation of this tool in the transaction documents is still featured by a lot of blind spots.⁴⁰ One of them is the disclosure of the information against Representations on Circumstances. Due to the wide expansion of the freedom of contract principle, Russian M&A deals are accompanied by the classic practice of the disclosure letter. While at the same time, such practice has not developed in courts. In January 2022, the Russian Supreme Court, literally for the first time, confirmed by keeping in force the decisions of the lower courts that the scope of the Representations on Circumstances shall be limited by the information contained in the disclosure letter.⁴¹ The Court in Case No. A50-29581/2020 applied a disclosure letter signed along with the sale and purchase agreement for the transfer of shares (participation interest) in the limited liability company for interpretation of the provisions of the sale and purchase agreement.⁴² It held that there were no grounds for claiming damages based on the breach of Representations on Circumstances due to the information contained in the disclosure letter.⁴³

Meanwhile, the nature of M&A deals in 2022 changed dramatically as foreign investors were focused on disposing of the Russian assets. The speed for negotiating of the definitive agreements increased as well as the number of “as is” transactions with Russian targets’ management or Russian investors on buyer’s side aimed for the smoothest exit of foreign investors from the Russian market. Such instruments as Representations on Circumstances, indemnities and disclosure letters are not nowadays in demand in the light of distressed deals, however, they shall not be underestimated for the purposes of classic M&A deals.

At the same time, the financial threshold of the M&A transactions subject to preliminary merger clearance was increased. Due to the amendments to the federal law effective since February 28, 2022, the obligatory preliminary consent of FAS for conclusion and performance of the transaction is required in cases where the aggregate value of the assets of a target company and its group exceeds RUB 800,000,000.⁴⁴ This is in comparison with

38. Please note that the concept is close to English Law Warranties and Representations. See, e.g., *Representations and Warranties*, THOMSON REUTERS (last visited Apr. 5, 2023).

39. GRAZHDAŃSKIĬ KODEKS ROSSIĬSKOĬ FEDERATSII [Civil Code] art. 431.2 (Russ.).

40. See, e.g., Artashes Oganov et. al., *Disclosure of the Information in M&A Transactions: Evolving Judicial Practice*, LEXOLOGY (Feb. 16, 2022), <https://www.lexology.com/library/detail.aspx?g=142689d5-9121-4491-98ab-44af75ddcfbd> [<https://perma.cc/U9PJ-M5MR>].

41. See generally *id.*; Кассационная жалоба (представление) в ВС РФ [Cassation appeal by joint-stock company “R-Telecom Holding” against the decision of the decision of the Arbitration (Commercial) Court for Perm Region, Supreme Court of the Russian Federation] (Jan. 10, 2022), No. 309-эС21-25865, <https://kad.arbitr.ru/Card/34158ba6-b5fb-43d2-9b84-a72377794969> [<https://perma.cc/PW9F-F37J>] [hereinafter Case No. А50-29581/2020].

42. Case No. A50-29581/2020.

43. *Id.*

44. *Id.*

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former threshold of RUB 400,000,000, based on the latest balance sheet.⁴⁵ These increases removed small group companies from the control of FAS.⁴⁶ Moreover, in 2022, only transactions involving acquisition of the groups with aggregate value of the assets exceeding RUB 2,000,000,000, based on the latest balance sheet, are subject to the obtaining of the preliminary merger clearance. For other transactions, FAS should be notified within thirty days from their execution. In this regard, the regulatory burden on small businesses decreased.

VI. Spain

To foster entrepreneurship and innovation, the Spanish government passed several important laws to make Spain more attractive for foreign investors. This article highlights two of these laws and how they could impact certain venture capital investments and M&A transactions.

The Creation and Growth Law⁴⁷ modifies the Spanish Corporate Enterprises Act,⁴⁸ the primary Spanish corporate law. This law facilitates the creation and growth of Spanish companies through various measures. The most relevant measures for M&A attorneys are expediting incorporations and easing access to financing.

The law expedites incorporations by eliminating an economic hurdle by reducing the minimum share capital requirements to €1⁴⁹ from €3,000⁵⁰ and reducing the administrative burden by standardizing forms of corporate bylaws and public deeds of incorporation.⁵¹ In addition, the law promotes the Centro de Información y Creación de Empresas (CIRCE), a digital platform designed to streamline bureaucracy⁵² and shorten processing times.⁵³ Under the new law, the Commercial Register must qualify and register the public deed in six working hours, a significant improvement from fifteen business days.⁵⁴ The Notary may also directly remedy any

45. See О внесении изменений в отдельные законодательные акты Российской Федерации [On Amendments to Certain Legislative Acts of the Russian Federation], 2022, No. 46-FZ (Russ.).

46. See, e.g., Maxim Boulba et al., *Changes in the Russian Antimonopoly Legislation Reduce the Degree of Control Over Small Businesses*, LEXOLOGY (Feb. 4, 2022), <https://www.lexology.com/library/detail.aspx?g=915a9e95-1923-4abe-8d6b-4834f509511d> [<https://perma.cc/UJF4-Z7JN>].

47. Creación y Crecimiento de Empresas [On the Creation & Growth of Companies] (B.O.E. 2022, 18/2022) (Spain) [hereinafter On the Creation & Growth of Companies].

48. Por el que se Aprueba el Texto Refundido de la Ley de Sociedades de Capital [Approving the Consolidated Text of the Capital Companies Act] (B.O.E. 2022, 161) (Spain) [hereinafter Approving the Consolidated Text of the Capital Companies Act].

49. On the Creation & Growth of Companies, *supra* note 47, at art. 2.1.

50. Approving the Consolidated Text of the Capital Companies Act, *supra* note 48, at art. 4.

51. On the Creation & Growth of Companies, *supra* note 47, at art. 5.5 & 5.6 (nothing that such framework documents are pending publication through another ministerial order).

52. *Id.* at art. 5.4.

53. *Id.*

54. De apoyo a los emprendedores y su internacionalización [Support for Entrepreneurs & Their Internationalization] art. 15.5.a (B.O.E. 2013, 14) (Spain).

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defects if the registration is denied.⁵⁵ Even if the standardized documents are not used, registration deadlines are reduced to five days.⁵⁶

The Creation and Growth Law also amends the law governing crowdfunding⁵⁷ to implement the applicable European regulation.⁵⁸ Similarly, it modifies certain laws applicable to private equity and investment firms. Of these modifications, noted most importantly are the following: permits management companies to be incorporated as limited liability companies; modifying the offer regime for unaccredited investors; and creating a new category of investment vehicle called debt funds.⁵⁹

Spanish legislators also modified the insolvency law,⁶⁰ unlocking potentially interesting investment opportunities in distressed assets. Law 16/2022⁶¹ contemplates a “pre-pack insolvency” to aid the sale of businesses or assets, also known as “productive units,” from companies in insolvency.⁶² This pre-pack insolvency can speed up a M&A process because the productive unit’s contracts and administrative permits are automatically assigned to the buyer without requiring the consent of third parties.⁶³ Moreover, the only liabilities that the buyer will assume are the debts with employees and the Spanish Social Security.⁶⁴ An important drawback to the modified law is that buyers must ensure business continuity for at least two years, or otherwise potentially be subject to damages claims.⁶⁵

VII. Ukraine

Ukraine’s M&A landscape was transformed by the outbreak of full-scale war in February 2022. Instead of the investment deals expected in 2021, the market is experiencing sporadic deals, mostly in the IT sector.

But this situation has not stopped the ongoing process of Ukrainian law modernizing and adapting it to internationally recognized best practices. Furthermore, considering the country’s E.U. candidacy status, Ukrainian

55. *Id.* at art. 15.7.

56. *Id.* at art. 16.3.

57. De Fomento de la Financiación Empresarial [Promotion of Business Financing] tit. V (B.O.E. 2015, 5) (Spain).

58. Regulation (EU) 2020/1503 of the European Parliament and of the Council of 7 October 2020 on European Crowdfunding Service Providers for Business, & Amending Regulation (EU) 2017.1129 and Directive (EU) 2019/1937, 2020 O.J. (L 347).

59. On the Creation & Growth of Companies, *supra* note 47, at art. 17.1.

60. Real Decreto Legislativo por el que se Aprueba el Texto Refundido de la Ley Concursal [Approving the Consolidated Text of the Bankruptcy Law] (B.O.E. 2020, 1) (Spain).

61. Real Decreto-ley para la Mejora de las Condiciones de Trabajo de Seguridad Social de las Personas Trabajadoras al Servicio de Hogar [Royal Decree for the Improvement of the Working Conditions of Social Security of Workers in the Service of Home] (B.O.E. 2022, 16) (Spain).

62. *Id.* at art. 224(b)–(f).*ter* to 224 *septies*.

63. *Id.* at art. 222.

64. *Id.* at art. 224.

65. *Id.* at art. 224 *septies*.

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lawmakers continue to make additional steps towards the E.U.-based principles of the corporate legislation.

The long-awaited Law of Ukraine on Joint-Stock Companies (Law on JSC), adopted by the Ukrainian Parliament this year, is an example of the chosen path.⁶⁶ This law will enter into force on January 1, 2023 (with some exceptions to be in force from January 1, 2024). It lowers the minimal charter capital to 200 minimal salaries (instead of 1,250) and alongside other changes makes joint-stock companies more attractive and user-friendly organizational form.⁶⁷ For the businesses structured as joint-stock companies the Law on JSC also offers, *inter alia*, the following opportunities:

- (1) The traditional two-level corporate governance model may be replaced by a one-tier structure with both executive and non-executive directors on the board.⁶⁸ The companies will select the model that suits their business or corporate governance needs voluntarily.
- (2) The Law on JSC makes available several options for remote voting at the general shareholders' meeting. This overcomes the problem of the prior legislation that seriously hindered companies' activity within COVID-19 pandemic became even more crucial in wartime. Among suggested options: electronic voting at the standard meeting, fully electronic voting, and voting by ballots.⁶⁹ Such remote voting is to be conducted via a special authorized system.
- (3) The process of reorganization of the joint-stock companies was significantly simplified by shifting several decisions on reorganization matters to the supervisory board (or board of directors – if the one-tier structure is implemented) level.⁷⁰
- (4) The Law on JSC crystallizes the concept of fiduciary duties for companies' officials, which had been used in court practice but not incorporated into legislation before. The new wording imposes the necessity for the officials to analyze their actions more carefully and perform the obligations not only directly specified by the legislation or bylaws but also implied due to the duty to act reasonably and with due care.⁷¹ It was also clarified that any waivers from such liability are void.⁷²
- (5) The Law on JSC provides more detailed provisions regarding the shareholders agreement, especially regarding the parties to such an agreement (the company itself was included as the possible party) and applicable law (the shareholders were given the possibility to conclude

66. *The Law of Ukraine "On Joint-Stock Companies"*, LEGIS. OF UKRAINE (2023) <https://zakon.rada.gov.ua/laws/show/2465-20#Text> [<https://perma.cc/V26U-YKJG>].

67. *Id.* at cl. 1, art. 16.

68. *Id.* at cl. 1, art. 4.

69. *Id.* at art. 38.

70. *Id.* ¶ 25, cl. 2, art. 71 (for supervisory board); *id.* at cl. 1, art. 63 (for board of directors).

71. *Id.* at cl. 1, art. 89.

72. *Id.* at cl. 3, art. 90.

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an agreement governed by the foreign law).⁷³ Previously, the legislation was silent with regard to such provisions, yet the lack of clarity was an obstacle to use this instrument more widely.

- (6) The role of the corporate secretary becomes more visible and, in some cases (*e.g.*, banks, insurance companies and other public joint-stock companies), the company must obligatory appoint such a person.⁷⁴

Moreover, the Law on JSC ensures more efficient protection of the minority shareholders. As an example, minority shareholders holding at least five percent of shares were granted the right to initiate the appraisal process or file the derivative claim.⁷⁵ Elimination of the legislative ambiguities (*e.g.*, regarding violation of the material transactions approval) and updated rules for the squeeze-out procedure are among other changes.

In addition to the changes for joint-stock companies, the law also alters the regulation of limited liability companies. A key change is the possibility to secure the title to shares in limited liability companies by using depositary systems for operations with shares in the limited liability companies instead of registering with the existing trade register.⁷⁶ It is not mandatory to switch to this system—they have the right to opt for this model, *e.g.*, to prevent potential raider attacks.

Additional changes include an analogous choice of a convenient corporate governance model and clarification of certain provisions of the shareholders agreement as well as an increased level of minority shareholders' rights.⁷⁷

With the new legislation, companies will have greater flexibility to choose the most beneficial rules, while at the same time it will be necessary to draw up the bylaws more carefully to avoid any ambiguities. Given this, we expect that these novelties will substantially improve the activity of joint-stock companies.

VIII. United States

Actions taken by, relating to, or involving the Committee on Foreign Investment in the United States (CFIUS) represented the most significant developments in the United States for cross-border M&A transactions in 2022.

By way of background, CFIUS is an inter-agency committee, for which the Secretary of the Treasury serves as Chair, that is authorized to review any transaction that could result in a foreign person obtaining the ability to control a U.S. business that could pose a threat to U.S. national security.⁷⁸ Based on its review of a transaction, CFIUS may conclude that a transaction

73. *Id.* at cl. 1, art. 29 (parties to the SHA); *id.* at cl. 7, art. 29 (applicable law).

74. *Id.* at cl. 1, art. 85.

75. *Id.* at cl. 6, 9 (appraisal) and § 4 of cl. 3 of Final & Transitional Clauses (derivative claim).

76. *Id.*, § 28 of cl. 3 of Final & Transitional Clauses. *Id.* at Final & Transitional Clauses, ch. IV, art. 27.

77. *Id.*

78. 50 U.S.C. § 4565; Exec. Order No. 11858, 40 Fed. Reg. 20, 263 (May 9, 1975).

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threatens to impair U.S. national security and recommend that the President prohibit or unwind a transaction.⁷⁹

The Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) expanded the scope of jurisdiction and powers of CFIUS.⁸⁰ Specifically, FIRRMA provides CFIUS with new powers to review transactions involving certain strategically sensitive real estate in the United States and non-controlling investments in U.S. businesses involving certain critical technology, critical infrastructure, or sensitive personal data (TID US Businesses).⁸¹ In addition, FIRRMA strengthened requirements concerning the use of mitigation agreements.⁸²

In January 2020, the U.S. Department of the Treasury issued two FIRRMA-related final rules that entered into effect on February 13, 2020. One final rule set forth the scope, process, and procedures relating to the national security review by CFIUS of certain transactions involving the purchase, lease, or concession of certain strategically sensitive real estate in the United States (*e.g.*, certain airports, maritime ports, military installations and specific geographic areas in or around those sites) to a foreign person.⁸³ The other final rule expanded CFIUS' jurisdiction to review certain non-controlling investments in TID U.S. Businesses and established criteria that would trigger mandatory filing requirements.⁸⁴ In addition, both final rules created a new voluntary declaration filing option that is shorter and less detailed than the standard voluntary notice option.⁸⁵

On April 29, 2020, the Treasury Department issued an interim final rule on filing fees. Pursuant to this notice, which entered into effect on May 1, 2020, a fee structure was established that ranges from zero fee for transactions valued at under \$500,000 up to \$300,000 for transactions valued at or above \$750,000.⁸⁶

On September 15, 2020, the Treasury Department published a final rule modifying the criteria that triggers mandatory filing requirements.⁸⁷ Pursuant to this final rule, effective October 15, 2020, mandatory declarations must be filed with CFIUS if a U.S. export license or

79. 50 U.S.C. § 4565(d)(2).

80. John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, 132 Stat. 1636, 2177–2207 (2018) (codified at 50 U.S.C. § 4565).

81. *Id.*

82. *Id.*

83. Regulations Pertaining to Certain Transactions by Foreign Persons Involving Real Estate in the United States, 31 C.F.R. § 802 (2020).

84. Provisions Pertaining to Certain Investments in the United States by Foreign Persons, 31 C.F.R. pts. 800, 801; Pilot Program to Review Certain Transactions Involving Foreign Persons & Certain Critical Technologies, 31 C.F.R. § 801 (2020).

85. 31 C.F.R. § 800.402; 31 C.F.R. § 802.401.

86. Filing Fees for Notices of Certain Investments in the United States by Foreign Persons and Certain Transactions by Foreign Persons Involving Real Estate in the United States, 31 C.F.R. §§ 800, 802 (2020).

87. Provisions Pertaining to Certain Investments in the United States by Foreign Persons, 85 Fed. Reg. 57124 (Sept. 15, 2020) (codified at 31 C.F.R. pt. 800).

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authorization would be needed to transfer the relevant critical technology to any of the foreign parties involved in the investment transaction.⁸⁸ This requirement is subject to certain limited exceptions (*e.g.*, the critical technology could be transferred pursuant to certain license exceptions under the Export Administration Regulations—TSU, ENC, and STA).⁸⁹

On September 15, 2022, President Biden signed Executive Order 14083 (EO 14083), which was one of the first CFIUS-related executive order issued in decades.⁹⁰ While not changing the scope of CFIUS jurisdiction, EO 14083 requires that CFIUS focus on fostering supply chain resiliency, preserving U.S. technological leadership, protecting sensitive personal data, assessing cybersecurity risks and examining transactions in the context of broader industry and investment trends.⁹¹

Subsequently, on October 20, 2022, the Treasury Department released the first-ever CFIUS Enforcement and Penalty Guidelines (Guidelines).⁹² Noting that the process for the imposition of penalties is described in 31 C.F.R. §§ 800.901 and 802.90, the Guidelines describe how CFIUS identifies, processes, and assesses violations, including failure to make a mandatory filing, material misstatements or omissions and breaches of CFIUS mitigation requirements.⁹³

88. *Id.*

89. *Id.*

90. Ensuring Robust Consideration of Evolving National Security Risks by the Committee on Foreign Investment in the United States, Exec. Order No. 14083, 87 Fed. Reg. 57369 (Sept. 15, 2022).

91. *Id.*

92. *CFIUS Enforcement and Penalty Guidelines*, U.S. DEP'T OF THE TREASURY (Oct. 20, 2022) <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-enforcement-and-penalty-guidelines> [<https://perma.cc/C7GQ-B3M6>].

93. *Id.*

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International Transportation

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This article highlights significant legal developments relevant to international transportation law that took place in 2022.

I. Warranties–Navigation Limits & Crew

In *Travelers Property Casualty v. Ocean Reef Charters*, a yacht was damaged by Hurricane Irma while moored.¹ Extra mooring lines proved ineffective when the year-old dock piling gave way as the hurricane struck.² The yacht drifted onto other pilings and hit the sea wall, before becoming holed and sinking, resulting in a total constructive loss.³ The boat did not have any crew onboard.⁴ The insurance policy contained two warranties: (1) a full-time professional captain approved by Travelers, and (2) one full-time or part-time professional crew for the yacht.⁵

The insurer filed an action in admiralty against the insured yacht owner, seeking declaratory judgment that the owner breached the captain and crew warranties, and therefore the policy did not provide any coverage for total loss caused by the hurricane.⁶ Ocean Reef argued that Florida’s so-called “anti-technical statute” should apply, and that, under that statute, the breaches did not preclude coverage because they were unrelated to the loss.⁷ Expert testimony was presented that the failure to have a captain and crew did not increase the hazard to the *M/Y My Lady*, and that the yacht sunk due to the unforeseeable failure of the dock piling.⁸ The court addressed this argument drawing from *Wilburn Boat*⁹ with these words:

* James Border, Committee Editor. Authors in order of appearance: Attilio M. Costabel (Warranties, Utmost Good Faith and Telemedicine), Rebecca Fenneman (OSRA 2022), Nicholas L. Webb (OSRA Regulations), Andrew M. Danas (Revisiting what Constitutes a Transportation Worker), David French (FLSA Proposed Rule Change).

1. *Traveler’s Prop. Cas. v. Ocean Reef Charters, LLC*, 996 F.3d 1161, 1163 (11th Cir. 2021).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* at 1163–64.

7. *Id.* at 1164; *See* Fla. Stat. § 627.409(2) (2022).

8. *Ocean Reef Travelers*, 996 F.3d at 1164.

9. *Wilburn Boat Co. v. Firearm’s Fund Ins. Co.*, 348 U.S. 310 (1955).

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Wilburn Boat remains on the books, and we are bound by its treatment of warranties in marine insurance policies despite the ample criticism the decision has received. . . . *Wilburn Boat* instructs us “to look to see if the specific warranty at issue is (or should be) the subject of a uniform or entrenched federal admiralty rule.”¹⁰

From this premise, the court found that there are warranties entrenched such as “navigational limits” but denied that “there is an entrenched federal maritime rule requiring strict compliance with all marine warranties” and went on to say that “The precise questions for us under *Wilburn Boat* are whether there exist entrenched federal maritime rules governing captain or crew warranties.¹¹ The answer to those questions is no.”¹²

Accordingly, the court found that Florida law, specifically Fla. Stat. § 627.409(2), governed the effect of Ocean Reef’s breaches of the captain and crew warranties and remanded to the district court to apply § 627.409(2).¹³

The decision closes with a note of criticism of the current treatment of warranties in American law, and a praise of the novel United Kingdom Insurance Act of 2015 which abandoned the literal compliance rule, so that now “rescission is no longer the [automatic] remedy for breach of warranty.”¹⁴

In its last words, the court expressed a wish: “Maybe, just maybe, this case will prove tempting enough for the Supreme Court to wade in and let us know what it thinks of *Wilburn Boat* today.”¹⁵

The Supreme Court had the opportunity to wade in, but did not change the law, denying a petition to fashion United States law consistent with the new English law, in a case involving the application of the doctrine of “utmost good faith.”¹⁶

II. Utmost Good Faith

In *QBE Seguros v. Morales-Vazquez*,¹⁷ the insurance company sought declaratory judgment that the policy was void *ab initio* under the doctrine of *uberrimae fidei* (utmost good faith) because the insured misrepresented his

10. *Ocean Reef Travelers*, 996 F.3d at 1167 (quoting *Great Lakes Reinsurance (UK) PLC v. Rosin*, 757 F. Supp. 2d 1244, 1257 (S.D. Fla. 2010) (observing previous treatment of *Wilburn Boat*)).

11. *Id.* at 1169.

12. *Id.*

13. *Id.* at 1170–71.

14. *Id.* at 1170 (quoting 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. MAR. L. J. 159, 180 (2016)).

15. *Id.* at 1171.

16. *QBE Seguros v. Morales-Vazquez*, 260 F. Supp. 3d 148, (D.P.R. 2016), *aff’d* 968 F.3d 1 (1st Cir. 2021), *cert. denied*, 142 S. Ct. 242 (2021).

17. *Id.*

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prior boating and loss history.¹⁸ The First Circuit granted declaratory judgment as a matter of law.¹⁹

A petition for certiorari was filed to determine whether the Insurance Act 2015 (U.K.) should have any effect on the American law of marine insurance.²⁰ That is, whether the doctrine of *uberrimae fidei* continues to apply in its strict form or whether it should be modified in conformity with the law of England.²¹ The petition was authored by Professor Sturley, with convincing arguments for the need to bring American law in harmony with business developments, adopting the model crafted by the English Law Commissions after a decade of studies.²²

The Supreme Court denied the petition,²³ so *uberrimae fidei* remains in conflict, given that the doctrine is maintained in the First, Third, Ninth, and Eleventh Circuits, but in a limited form in the Second and the Eighth Circuits and is not recognized at all in the Fifth Circuit.²⁴

As a note to practitioners, we got information that in some policies issued in London for United States Risks, the Warranties and Representation clauses have been changed to make them work under the American rules, in derogation of the Insurance Act 2015 that would have been otherwise applicable.

III. Telemedicine & Cruise Ship Malpractice

There is news that cases are pending for alleged medical malpractice of land-based hospitals having supplied alleged wrong telemedicine advice to cruise ships in connection with injuries to passengers still on board.

These cases present novel issues of telemedicine supplied to ships while on high seas: (1) Does admiralty jurisdiction depend on whether the tort was “committed on board?” (2) Does a telemedicine visit occur on board? (3) Does the *Amclyde* rule²⁵ prohibit set off of the cruise line settlement against the telemedicine defendants? (4) Does vicarious liability apply, concursus of tortfeasors?

Under the *Franza* rule,²⁶ negligence of ship’s medical personnel in treating passengers may be vicariously imputed to shipowner under doctrine

18. *Id.* at 150–51.

19. *QBE Seguros v. Morales-Vázquez*, 986 F.3d 1, 11 (1st Cir. 2021).

20. Brief for Petitioner, at *1–*5, *Morales-Vazquez v. Seguros*, 142 S. Ct. 242 (2021) (No. 20-1779), 2021 WL 2580742.

21. *Id.* at *1.

22. *Id.* at *20.

23. *Morales-Vazquez v. Seguros*, 142 S. Ct. 242 (2021) (*cert. denied*).

24. Brief for Petitioner, *supra* note 20, at *11–*19.

25. *McDermott, Inc. v. Amclyde*, 511 U.S. 202 (1994) (holding that, in case of concurring tortfeasors, when one of the tortfeasors makes a settlement, the non-settling defendants’ liability should be calculated with reference to the jury’s allocation of proportionate responsibility, not by giving them a credit for the dollar amount of the settlement).

26. *Franza v. Royal Caribbean*, 772 F.3d 1225 (11th Cir. 2014) (holding that passenger could sue shipowner for medical negligence under apparent agency theory, abrogating the opposite

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of respondeat superior, and mere fact of physical separation between principals and agents does not inevitably defeat respondeat superior.²⁷ If the *Franza* rule is applicable, the settlement should clear all tortfeasors and leave only indemnity action by the cruise line.²⁸

This may become a novel trend of litigation considering that Cruise Lines might have stand-by contracts of telemedicine with shore hospitals.

IV. Ocean Shipping Reform Act of 2022 (OSRA)–Legislative Summary

The Ocean Shipping Reform Act (P.L. 117-146) (OSRA22) was signed into law by President Biden on June 16, 2022.²⁹ First introduced in the House of Representatives on August 10, 2021 as H.R. 4996, it passed the full House on December 8, 2021.³⁰ The Senate companion bill, S. 3580 was passed on March 31, 2022; it passed the full House on June 13, 2022.³¹

Severe disruptions ignited by the boom in import volumes in mid-2020 which caused congestion at U.S. ports spurred proponents of OSRA22, who hoped it would address *inflation* caused by carrier “price gouging” and *trade imbalances* caused by refusals of foreign-owned carriers to carry U.S. agricultural exports.³²

A. BACKGROUND

In March 2020, Members of Congress urged the then-Chairman of the Federal Maritime Commission (FMC) to take enforcement action to address allegations by agricultural exporters that carriers refused to accept their cargo or unreasonably delayed service.³³ They expressed support for the FMC’s Fact-Finding No. 29 and its expansion to include the concerns of agricultural exporters.³⁴ The Members asserted that “largely unrestricted access to American ports means trade opportunities should be reciprocal” and urged an investigation into whether ocean common carriers’ actions

rule that because in reality, a carrier cannot exercise control over the ship’s doctor as he practices medicine, the carrier or shipowner cannot be held vicariously liable for the doctor’s negligence under the theory of respondeat superior, that was established in *Barbetta v. S/S Bermuda Star*, 848 F.2d 1364 (5th Cir. 1988)).

27. *Id.* at 1241.

28. *See generally id.*

29. Ocean Shipping Reform Act, S. 3580, 117th Cong. (2022) (enacted).

30. *See id.*

31. *See id.*

32. Statement by President Joe Biden on Congressional Shipping Passage of Ocean Shipping Reform Act, WHITE HOUSE (June 13, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/13/statement-by-president-joe-biden-on-congressional-passage-of-ocean-shipping-reform-act/> [https://perma.cc/G2YF-MKQ9].

33. Peter Tirschwell, *US Container Shipping System Tilting Against Exporters*, S&P J. OF COMM. (Dec. 9, 2020, 12:26 PM), https://www.joc.com/article/us-container-shipping-system-tilting-against-exporters_20201209.html [https://perma.cc/9H63-XQ9B].

34. 157 CONG. REC. 145 (daily ed. Aug. 10, 2021) (statement of Hon. John Garamendi).

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were “predatory or unreasonable in refusing to export . . . American agricultural products . . .”³⁵ Reps. Garamendi (D-CA) and Johnson (R-SD) repeated these concerns at a June 15, 2021 hearing on the subject.³⁶

On August 10, 2021, H.R. 4996, The Ocean Shipping Reform Act of 2021, was introduced. Rep. Garamendi stated it would “better support American exporters by ensuring reciprocal trade to help reduce the United States’ longstanding trade imbalance [with] export-driven countries like mainland China” and noted the “considerable consolidation amongst the foreign-based ocean carriers, coinciding with the continued decline of the U.S.-flagged international fleet . . .”³⁷

H.R. 4996 was endorsed by the President on November 17, 2021,³⁸ and moved directly to the Floor on December 8, 2021.³⁹ Sponsors asserted “foreign businesses’ access to the American market and our consumers is a privilege, not a right” and Rep. Garamendi was “thrilled . . . awed . . . and amazed” that it would be adopted in less than four months.⁴⁰ The bill, he said, would address “supply chain bottlenecks . . . promote American competitiveness . . . and hold [] accountable these foreign-flagged ocean carriers, which . . . are increasingly dominated by Chinese state-backed firms.”⁴¹ It passed by a vote of 364-60 and was delivered to the Senate on December 9, 2021.⁴²

S. 3580 was introduced by Sen. Cantwell (D-WA) on February 3, 2022, and passed by voice vote on March 31, 2022.⁴³ The Senate bill passed in the House by an overwhelming margin of 369-42 and was signed into law by the President on June 16, 2022, less than a year from the original introduction of the House bill.⁴⁴

35. *Impacts of Shipping Container Shortages, Delays, and Increased Demand on the North American Supply Chain: Remote Hearing Before the Subcomm. on Coast and Maritime Transp. of the H. Comm. on Transp. and Infrastructure*, 117th Cong. 92, 110 (2021).

36. *Id.* at 28.

37. Ocean Shipping Reform Act, H.R. Doc. No. 4996, 117th Cong. (2021).

38. *Recent Progress at Our Ports: Moving Cargo and Filling Shelves*, WHITE HOUSE (Nov. 17, 2021), <https://www.whitehouse.gov/briefing-room/blog/2021/11/17/recent-progress-at-our-ports-moving-cargo-and-filling-shelves/> [https://perma.cc/CJ9J-2S44].

39. 167 CONG. REC. 212, H7472 (daily ed. Dec. 8, 2021).

40. *Id.* at H7476.

41. *Id.* at H7473–75.

42. *Id.*

43. Ocean Shipping Reform Act, S. 3580, 117th Cong. (2022).

44. *Id.*

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B. OSRA22 AMENDMENTS TO THE SHIPPING ACT—SECTION BY SECTION HIGHLIGHTS⁴⁵

SECTION 3: revises 40502(c) by granting the FMC authority to require by rulemaking additional “essential terms” to be added to privately negotiated confidential service contracts.⁴⁶

SECTION 4: requires any shipping exchange (“platform that connects shippers with common carriers for the purpose of entering into underlying agreements or contracts for the transport of cargo, by vessel or other modes of transportation”) to register with the FMC.⁴⁷

SECTION 5: adds to 41102 a prohibition on refusals or threats to refuse otherwise-available cargo accommodation or take “any other unfair or unjustly discriminatory action” against a shipper, agent of a shipper, ocean transportation intermediary, or motor carrier,” for the reason that it has patronized another carrier, or filed a complaint against it, or for any other reason.⁴⁸

SECTION 7: prohibits unreasonably refusing cargo space accommodations when available, or resorting to any other unfair or unjustly discriminatory methods; revises 41104(5) by adding prohibitions against discrimination against any commodity group or type of shipment; revises 41104(10) to add a prohibition against refusals to deal or negotiate.⁴⁹

SECTION 7: prohibits “for service pursuant to a service contract, give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage against any commodity group or type of shipment.”⁵⁰

SECTION 7: authorizes the FMC to apply penalties or order refunds for demurrage or detention invoices that are inaccurate or false (41104(d)(1)) and requires such invoices to accurately reflect certain terms.⁵¹

45. OSRA22 is codified at 46 U.S.C. § 40101; it became effective immediately upon enactment. *See* 46 U.S.C. § 40101 *et seq.*

46. Ocean Shipping Reform Act, S. 3580, 117th Cong. (2022).

47. *Id.* § 3(9).

48. *Id.* § 4(e).

49. OSRA22 revisions of 46 U.S.C. 41104 §§ 14-15 adopt the FMC’s Interpretive Rule on Demurrage and Detention Under the Shipping Act (May 18, 2020), codified at 46 C.F.R. 545.5. In a floor colloquy with Rep. De Fazio, Rep. Johnson sought agreement that a rule prepared under 7(b)(1) would only clarify the Interpretive rule and be in addition to, not in place of, it; further that the Interpretive Rule would remain in place during the preparation of the additional rule, unless the FMC chooses to undertake any amendment to it. Rep. Johnson observed the Interpretive Rule had been promulgated through notice and comment and had already led to enforcement cases by the FMC; Rep. DeFazio agreed. 168 CONG. REC. 100, H5466 (daily ed. June 13, 2022).

50. Ocean Shipping Reform Act, S. 3580, 117th Cong. § 7(a)(16) (2022).

51. NVOCCs are given safe harbor if not “responsible for the charge;” the charged party is relieved of any obligation to pay a non-compliant invoice. *Id.* § 7(d)(1).

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SECTION 8: authorizes the FMC to award refunds (in addition to assessing civil penalties) for violations of the Act or its rules.⁵²

SECTION 10: requires the FMC to investigate all “information concerning complaints about charges assessed by a common carrier” in light of sections 41104(a) and 41102. 46 U.S.C. 41310 and requires it to provide the common carrier an opportunity to submit additional information but requires it to bear the burden of establishing the reasonableness of any demurrage or detention charge, as set out in the FMC’s Interpretive Rule; and requires the FMC to order a refund of the charges paid and civil penalties for non-compliance.⁵³

SECTION 13: gives the FMC authority to order “refund[s] of money.”⁵⁴

SECTION 18: requires the FMC to make findings as to whether an emergency situation exists and grants the FMC temporary authority (expiring 18 months after the enactment of OSRA22) to determine (by unanimous agreement) whether an emergency order requiring any common carrier or marine terminal operator to share cargo throughput and availability information.⁵⁵

V. OSRA Regulations—Vessel Space Accommodations

On September 13, 2022, the FMC issued a Notice of Proposed Rulemaking (NPRM) applying a requirement of the OSRA22, notifying the shipping public and regulated entities of its intent to define what constitutes an unreasonable refusal to deal or negotiate with respect to vessel space accommodations by an ocean common carrier.⁵⁶ Under the NPRM, a complainant alleging an unreasonable refusal to deal regarding vessel space accommodation must satisfy three elements: (1) the respondent is an ocean common carrier, (2) the respondent refuses to deal or negotiate with respect to vessel space, and (3) the refusal is unreasonable.⁵⁷

Although the Shipping Act defines ocean common carrier as a vessel operating common carrier (VOCC), other key terms such as “unreasonable,” “refusal to deal or negotiate,” and “vessel space accommodations” remain undefined.⁵⁸ However, the Commission proposes to define vessel space accommodations as applying to containers, aboard an ocean common carrier, being imported to or exported from the United States and a “refusal to deal or negotiate” as a presumption that, for there to be a refusal, there

52. *Id.* § 8.

53. *Id.* § 10(a).

54. *Id.* § 13.

55. *Id.* § 18.

56. *FMC Seeking Public Comment on Unreasonable Refusal to Deal Proposed Rule*, FED. MARITIME COMM. (Sept. 13, 2022), <https://www.fmc.gov/fmc-seeking-public-comment-on-unreasonable-refusal-to-deal-proposed-rule/> [<https://perma.cc/QBU6-5T4P>]; see also 46 C.F.R. § 542.1 (2012).

57. 46 C.F.R. § 542.1.

58. *Id.* § 542.1(b)(1)–(3).

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must first have been something to refuse.⁵⁹ Lastly, the Commission will consider three specific factors in considering whether a refusal to deal or negotiate is unreasonable: (1) whether the ocean common carrier is following a “documented export strategy,” (2) whether the carrier engaged in good faith negotiations and “made business decisions that were subsequently applied in a fair and consistent manner,” and (3) whether there were “legitimate transportation factors.”⁶⁰

The NPRM also advises of a burden shifting mechanism for new refusal to deal causes of action.⁶¹ The proposal warns that after the complainant or the FMC’s Bureau of Enforcement, Investigations, and Compliance has established a prima facie case that the three elements have been met, the burden would shift to allow for an ocean common carrier to establish why its actions in refusing vessel space were not unreasonable.⁶² Justification that may be considered by the Commission include whether the ocean common carrier followed a documented export strategy, engaged in good faith negotiations, and articulated legitimate transportation factors.⁶³

VI. OSRA Regulations–Demurrage and Detention Billing

On October 7, 2022, the FMC issued a Notice of Proposed Rulemaking (NPRM) reinforcing the current demurrage and detention billing requirements pursuant to the OSRA22, broadening the scope and establishing new definitions on demurrage and detention invoices.⁶⁴ The Commission broadly defines “demurrage or detention” to include all charges invoiced by VOCCs, non-vessel-operating common carriers (NVOCCs), and Marine Terminal Operators (MTOs).⁶⁵ Additional definitions include “demurrage or detention invoice” to mean “any statement, printed, written, or accessible online, that documents an assessment of demurrage or detention charges,” “billed party” to include the person receiving the demurrage or detention invoice who is responsible for payment, “billing party” to mean the VOCC, NVOCC or MTO issuing the invoice.⁶⁶ A “billing dispute” means any disagreement between the billed party and the billing party regarding the validity of the charges.⁶⁷ Particularly, the

59. *Id.* § 542.1(c)(1)–(3).

60. *Id.* § 542.1(d).

61. *Id.* § 542.1(d).

62. Gerald A. Morrissey III et al., *FMC Issues Proposed Rule on OSRA Refusal to Deal on Vessel Space Accommodations*, HOLLAND & KNIGHT (Sept. 15, 2022), <https://www.hklaw.com/en/insights/publications/2022/09/fmc-issues-proposed-rule-on-osra-refusal-to-deal-on-vessel-space> [https://perma.cc/N36V-FX9W].

63. 46 C.F.R. § 542.1(b)(2)(i)–(iv).

64. *MC Proposing New Demurrage and Detention Billing Requirements*, FED. MARITIME COMM. (Oct. 7, 2022), <https://www.fmc.gov/fmc-proposing-new-demurrage-detention-billing-requirements/> [https://perma.cc/YV5Q-X8AA].

65. 46 C.F.R. § 541.3.

66. *Id.*

67. *Id.*

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Commission, by proposing new definitions, seeks to establish that the only parties responsible for paying demurrage and detention charges are those with a commercial relationship with the VOCC, NVOCC, or MTO.⁶⁸

Furthermore, the Proposed Rule requires new and additional information that billing parties must include on all demurrage and detention invoices.⁶⁹ Such additional information includes the identifying information of “the bill of lading number(s); the container number(s); for imports, the port(s) of discharge, and the basis for determining why the invoiced party is the proper party of interest, and thus liable for the charge;” timing information detailing when the time period for charges apply, the due date for invoiced charges and specific dates when demurrage or detention was charged; rate information detailing the total amount due, and the applicable detention or demurrage rule; and dispute information with a URL linking the billed party to the VOCCs, NVOCCs, or MTO’s website containing detailed information regarding disputing the charges.⁷⁰

Finally, the Commission proposes that VOCCs, NVOCCs, and MTO must issue demurrage and detention invoices “within 30 days from the date charges stop accruing.”⁷¹ If a billed party disputes the validity of the charges, the billed party must “submit any requests for fee mitigation, refund, or waiver to billing parties within 30 days of receiving a demurrage or detention invoice.”⁷² Lastly, after receiving a dispute request, “a billing party must resolve the request within 30 days.”⁷³ The purpose of the billing time frames, according to the Commission, is to provide billing parties with “certainty” in receiving a response from the billing party and to reduce the time it takes to receive a refund.⁷⁴

VII. Revisiting What Constitutes a Transportation Worker

One area of significant U.S. litigation in 2022 was the proper analysis for courts to use in classifying employees as “transportation workers” engaged in interstate or foreign commerce entitled to the exclusion from enforcement of contractual arbitration agreements under the Federal Arbitration Act (FAA).

In *Southwest Airlines Co. v. Saxon*,⁷⁵ the Supreme Court clarified the scope of the transportation worker exemption to the FAA by holding that the exemption does not apply to all employees of a transportation industry

68. Ashley W. Craig et al., *FMC Proposes Expanded Demurrage and Detention Invoice Requirements, Time Frames for Billing, and More in Notice of Proposed Rulemaking*, VENABLE LLP (Oct. 13, 2022), <https://www.venable.com/insights/publications/2022/10/fmc-proposes-expanded-demurrage-and-detention> [<https://perma.cc/J4YX-3MXV>].

69. *Id.*

70. 46 C.F.R. § 541.6.

71. *Id.* § 541.7.

72. *Id.* § 541.8.

73. *Id.*

74. *Id.*

75. *Southwest Airlines v. Saxon*, 142 S. Ct. 1783 (2022).

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company but only to “transportation workers” who play a direct and necessary role in the free flow of goods across borders.⁷⁶ Although the Court’s ruling in *Saxon* provided some guidance on the issue, subsequent 2022 court decisions interpreting *Saxon* indicated that there are still open legal questions as to how the FAA exemption is to be applied, especially as to last or final mile truck delivery services in transportation and non-transportation industries.⁷⁷

In *Saxon*, the Supreme Court held that notwithstanding having signed an arbitration agreement as a condition of employment, a supervisory ramp worker for Southwest Airlines could proceed with a class action lawsuit alleging that Southwest had failed to pay proper overtime wages to her and other ramp supervisors under the Fair Labor Standards Act of 1938.⁷⁸ Although the Federal Arbitration Act recognizes the enforcement of contractual arbitration agreements, Section 1 of the FAA exempts from the statute’s ambit “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”⁷⁹ The district court hearing the employee’s claims ruled that the exemption only applied to those involved in “actual transportation” and not those who merely handled goods.⁸⁰ The Seventh Circuit reversed, and the Supreme Court affirmed, resolving a conflict between the Seventh Circuit’s decision and a prior decision of the Fifth Circuit.⁸¹

The Supreme Court reaffirmed its prior decisions that the FAA exemption is limited to “transportation workers” and, recognizing that those decisions had not provided a complete definition of a “transportation worker,” clarified that such a worker must at least play a direct and “necessary role in the free flow of goods” across borders.⁸² Put another way, the Court held that transportation workers must be actively “engaged in transportation” of those goods across borders via the channels of foreign or interstate commerce.⁸³

In reaching its decision, the Court rejected the employee’s argument that an industrywide approach should be applied, exempting all airline industry employee contracts from the FAA because air transportation as an industry is engaged in interstate commerce and the FAA statutory exemption references seamen and railroad employees.⁸⁴ Such an approach, the Court ruled, was

76. *Id.* at 1790; 9 U.S.C. § 1 (1947).

77. *See, e.g.,* Bissonnette v. LePage Bakeries Park St., LLC, 49 F.4th 655, 656–657 (2d Cir. 2022); Lopez v. Cintas Corp., 47 F.4th 428, 432 (5th Cir. 2022); Archer v. Grubhub, Inc., 190 N.E.3d 1024 (2022).

78. *Saxon*, 142 S. Ct. at 1793; *see* 29 U.S.C. § 201 (1938).

79. 9 U.S.C. § 1 (1947).

80. *Saxon*, 142 S. Ct. at 1787.

81. *Id.* at 1788–89.

82. *Id.* at 1780 (citing *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001)).

83. *Id.* at 1788.

84. *Id.* at 1784.

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not supported by the language of the FAA, which it held speaks of “workers, not “employees” or servants.”⁸⁵

The Court’s ruling glossed over the statutory reference to railroad employees in the FAA.⁸⁶ Instead, it held that the statute did not contemplate an industry-wide FAA exemption because the term seamen, as used in dictionaries from 1906 and 1925, contemplated persons who worked on ships at sea and was thus a subset of workers involved in maritime transactions.⁸⁷ However, the Court also recognized that the statutory reference to railroad employees was ambiguous.⁸⁸ It thus rejected Southwest’s argument that the reference to seamen meant that the statutory exemption only applied to those workers who physically move goods in foreign or interstate commerce.⁸⁹ In finding that the ramp supervisor was a “transportation worker” under the FAA, the Court held that its case law for almost one hundred years was unambiguous that workers who load or unload goods that are traveling in interstate commerce are plainly involved in interstate commerce and are transportation workers subject to the exemption.⁹⁰

Although resolving in the negative the issue of whether all employees of a transportation industry company are “transportation workers” for purposes of the FAA Section 1 exemption, the Supreme Court declined to resolve the question of whether the FAA exemption applies to those classes of employees “further removed from the channels of interstate commerce or the actual crossing of a border.”⁹¹

Subsequent 2022 state court and federal appellate court decisions applying *Saxon* suggest that the Court’s decision did not fully resolve all questions related to the scope of the FAA exemption, especially in the context of whether delivery drivers providing last mile delivery services fall within the scope of the “transportation worker” exemption.

For example, in *Bissonnette v. LePage Bakers Park St., LLC*,⁹² a split panel of the United States Court of Appeals for the Second Circuit disagreed as to whether two independent distributors who delivered baked goods by truck were “transportation workers” within the scope of the FAA exemption so as to allow their class action lawsuit for alleged violations of the FLSA and Connecticut wage laws to proceed against the manufacturer of the goods that were being delivered.

The Second Circuit majority found that while *Saxon* clarified that not everyone who works in the transportation industry is a transportation worker for purposes of the FAA, the *Saxon* decision did not affect or set aside

85. *Id.* at 1788.

86. *Id.* at 1791.

87. *Id.*

88. *Id.* at 1792.

89. *Id.* at 1791.

90. *Id.* at 1789.

91. *Id.* at 1789, n.2.

92. *Bissonnette v. LePage Bakeries Park St., LLC*, 49 F.4th 655, 656–57 (2d Cir. 2022).

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Second Circuit case law which held that the FAA exclusion is limited to workers involved in the transportation industries, not workers who incidentally transport goods interstate as part of their job in another industry.⁹³ Recognizing that other circuits had reached different conclusions about which workers may be “transportation workers,”⁹⁴ the Second Circuit majority held that it did not need to apply a *Saxon* analysis in *Bissonnette* because the plaintiff truck drivers in the case were not involved in the transportation industry but instead worked in the bakery industry.⁹⁵ The court reasoned that since the companies’ customers were paying for the baked goods themselves, and the transportation was a component of the total price, the commerce was not a transportation service.⁹⁶ As such, the workers were not transportation workers.⁹⁷ The majority decision in *Bissonnette* was rendered over a vigorous dissent arguing that it was clear that truck drivers are transportation workers both by the nature of their work and their industry and that multiple courts, including the Seventh Circuit, in the decision affirmed by the Supreme Court in *Saxon*, had stated that transportation worker need not work for a transportation company.⁹⁸

Rather than focus on the industry in which the delivery services were provided, other 2022 post-*Saxon* federal and appellate state court decisions instead examined the question of whether the local last mile delivery of goods was part of interstate commerce for purposes of determining whether the employee was a transportation worker for purposes of the FAA exemption.

The United States Court of Appeals for the Fifth Circuit applied *Saxon* to a local delivery driver who picked up and delivered uniforms from a local warehouse to local customers. *Lopez v. Cintas Corp.*⁹⁹ The Fifth Circuit did not examine the issue of whether the employee or employer was in the transportation industry, but instead focused on whether a local delivery driver delivering to local customers after goods have already been delivered across state lines to an in-state warehouse was engaged in interstate commerce.¹⁰⁰ Recognizing that other federal appellate courts had reached differing conclusions on the issue,¹⁰¹ the Fifth Circuit held that the local delivery drivers were not engaged in interstate commerce because once the goods had arrived in Texas and had been unloaded anyone interacting with the goods was no longer directly or actively engaged in interstate commerce, as required by the FAA exemption.¹⁰²

93. *Id.* at 661.

94. *Id.*

95. *Id.* at 660–61.

96. *Id.* at 661–62.

97. *Id.* at 662.

98. *Id.* at 668–69 (Pooler, J., dissenting).

99. *Lopez v. Cintas Corp.*, 47 F.4th 428, 432 (5th Cir. 2022).

100. *Id.* at 430.

101. *Id.* at 432.

102. *Id.* at 433.

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In *Archer v. Grubhub, Inc.*, the Supreme Judicial Court of Massachusetts reached a similar conclusion.¹⁰³ The court held that in determining whether the FAA exemption applied, “the question is not whether any individual worker was engaged in interstate commerce, but whether the class of workers to which the individual belonged was engaged in interstate commerce.”¹⁰⁴ It then ruled that Grubhub delivery drivers did not qualify for the FAA exemption because while they performed transportation services, they only performed local delivery services and were not part of an ongoing and continuous interstate transit of the good to the customer who had ordered it.¹⁰⁵

VIII. FLSA Proposed Rule Change—Motor Carrier Employee versus Independent Contractor

The Fair Labor Standards Act (FLSA) requires covered employers to pay nonexempt workers (employees) at least the federal minimum wage per hour worked, provide overtime pay at 1.5 times the employee’s regular rate for each hour worked beyond forty hours in a workweek, and maintain certain employee records.¹⁰⁶ Although specific motor carrier employees are exempt from the overtime provisions of the FLSA,¹⁰⁷ other employees are not (e.g., employee drivers operating vehicles weighing 10,000 pounds or less in interstate transit).¹⁰⁸

Fundamentally, the FLSA’s wage and hour provisions only apply to *employees*, not independent contractors.¹⁰⁹ Courts use an “economic reality test” (ERT) to determine if a worker is “dependent” on their employer (and thus an employee), or if they are “in business for themselves” (and thus an independent contractor).¹¹⁰ The ERT is conceptually based in “economic reality,” irrespective of the common law concepts of “employee” and “independent contractor, which emphasize control over the work.”¹¹¹ Additionally, contract terms (such as those in a motor carrier operating or lease agreement) are not dispositive to the ERT.¹¹² The classic ERT factors

103. *Archer v. Grubhub, Inc.*, 190 N.E.3d 1024 (2022).

104. *Id.* at 1030.

105. *Id.* at 1032–33.

106. 29 U.S.C. § 206(a) (minimum wage); 29 U.S.C. § 207(a) (overtime); 29 U.S.C. § 211(c) (record keeping).

107. 29 U.S.C. § 213(b)(1); 49 U.S.C.A. § 13102 (“Motor Carrier” defined); 29 C.F.R. § 782.2. For other transportation industry exemptions, see *Fair Labor Standards Act Advisor*, U.S. DEPT OF LABOR, <https://webapps.dol.gov/elaws/whd/flsa> [<https://perma.cc/VD4H-PRPQ>].

108. SAFETEA-LU Technical Corrections Act (TCA) § 306, Pub. L. No. 110-244, 122 Stat. 1572, 1620 (2008).

109. See *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947).

110. See *Sec’y of Lab., U.S. Dept. of Lab. v. Lauritzen*, 835 F.2d 1529, 1534-35, 1538 (7th Cir. 1987).

111. *Id.* at 1534.

112. See *Brant v. Schneider Nat’l, Inc.*, 43 F.4th 656, 665 (7th Cir. 2022) (holding driver was an employee for FLSA purposes despite owner-operator and truck lease contracts).

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are: (1) the degree of the *employer's control* as to the manner work is done, (2) the worker's opportunity for *profit or loss*, (3) the *worker's investment* in equipment or materials required for their task or their employment of others, (4) whether the service rendered requires a *special skill*; (5) the degree of *permanency and duration* of the working relationship; and (6) the extent to which the worker's services are *integral to the employer's business*.¹¹³ No one factor is controlling.¹¹⁴ Rather courts look "to all the circumstances of the work activity" to determine the economic reality of the working relationship.¹¹⁵

On January 7, 2021, the Department of Labor (DOL) promulgated a final rule (the "2021 Rule") which principally (1) narrowed the FLSA ERT to five factors by combining the "worker's investment" and "profit or loss" factors, and (2) unbalanced the factors, giving more weight to "employer's control" and "profit or loss," stating that those two factors are "more probative [than other factors]."¹¹⁶ After the Biden Administration took office, the DOL instituted rulemaking to delay, and then withdraw, the 2021 Rule (the "Withdrawal Rules").¹¹⁷ A legal challenge resulted in a Federal district court vacating the Withdrawal Rules on the basis that the DOL had not followed the proper rulemaking process.¹¹⁸ The 2021 Rule then went into effect, backdated to its original effective date of March 8, 2021.¹¹⁹ On October 13, 2022, the DOL published a notice of proposed rulemaking entitled "Employee or Independent Contractor Classification Under the Fair Labor Standards Act" (NPRM) in the federal register for public comment.¹²⁰

The stated purpose of the NPRM was to "modify Wage and Hour Division regulations to revise its analysis for determining employee or independent contractor classification under the Fair Labor Standards Act to be more consistent with judicial precedent and the Act's text and purpose."¹²¹ Essentially, the NPRM: (1) eliminated the weight given to certain factors by the 2021 Rule; (2) returned "worker's investment" as a standalone factor; (3) provided an analysis of control factor variables which do not limit "control" to control that is actually exerted; and (4) broadened the "integral to employer's business" factor to include work which is integral to the employer's business, rather than simply part of an integrated unit of

113. See *Lauritzen*, 835 F.2d at 1535.

114. *Id.* at 1534.

115. *Id.*

116. Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. 1168, 1185–86 (Mar. 8, 2021).

117. Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 87 Fed. Reg. 62218, 62225 (Mar. 13, 2022).

118. See *Coalition for Workforce Innovation v. Walsh*, No. 1:21-CV-130, 2022 WL 1073346, at *20 (E.D. Tex. Mar. 14, 2022).

119. *Id.*

120. Employee or Independent Contractor Classification Under the FLSA, 87 Fed. Reg. 62218, 62218 (Mar. 13, 2022).

121. *Id.* at 62218.

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production.¹²² The practical effect of the NPRM was to broaden the class of workers who will be classified as employees and subject to the FLSA.

The NPRM identified the trucking industry as an area of high worker misclassification, citing a report from the Economic Policy Institute (EPI Report) which suggests that up to eighty-two percent of workers in seaport haulers are “misclassified as independent contractors” (under the pre-2021 Rule factor analysis).¹²³ While the NPRM’s reimplementation of worker investment as a standalone ERT factor may broadly weight in favor of classifying trucking owner-operators as independent contractors, the NPRM’s discussion of certain sub-elements of the control factor could weigh strongly against such a finding. Specifically, the NPRM identified “an employer’s compliance with legal obligations, safety or health standards, or requirements to meet contractual or quality control obligations” are an indication that the “employer is exerting control.”¹²⁴ Industry experts have speculated that a motor carrier’s mere compliance with Department of Transportation regulations may now be probative to determining the FLSA status of their drivers.¹²⁵ Additionally, technology such as GPS systems, electronic logging devices, and dashboard cameras may also weigh in favor of a finding of high employer control.¹²⁶

While the NPRM broadens the scope of the FLSA, it does not go as far as California’s AB5 law, which replaces the ERT with a three-prong “ABC test.”¹²⁷ The ABC factors are: (A) the person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work 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.¹²⁸ Motor carriers have argued part B of the ABC test bars their employment of independent contractor drivers and owner operators, leading to increased costs for consumers.¹²⁹ But the NPRM does not limit independent contractors from working for motor carriers quite as completely as AB5 does.

122. *Id.* at 62232-33.

123. *Id.* (citing Françoise Carré, *(In)dependent Contractor Misclassification*, ECON. POL’Y INST. (June 8, 2015), <https://www.epi.org/publication/independent-contractor-misclassification> [<https://perma.cc/Z7AB-UPG7>]).

124. Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 87 Fed. Reg. 62218, 62246 (Mar. 13, 2022).

125. John Kingston, *DOL Independent Contractor Definition Could Pose Problems for Truck Fleets*, FREIGHT WAVES NEWS (Oct. 17, 2022), <https://www.freightwaves.com/news/dol-independent-contractor-definition-could-pose-problems-for-truck-fleets> [<https://perma.cc/PT5R-NG9J>].

126. *See id.*

127. *California Trucking Ass’n v. Bonta*, 996 F.3d 644, 650–51 (9th Cir. 2021).

128. Cal. Lab. Code § 2775.

129. *See California Trucking Ass’n*, 996 F.3d at 650.

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At the time of writing, the public comment period for the NPRM (ending November 28, 2022) has yet to close. The DOL will consider public comments and may modify the NPRM before promulgating a final rule.¹³⁰

¹³⁰ 5 U.S.C. § 533(c).

International Anti-Money Laundering

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This Article reviews significant international legal developments made in the areas of international anti-money laundering law and policy in 2022.

I. Introduction

In 2022, international, regional, and national regulations focused on Anti-Money Laundering (AML) and Counter-Terrorist Financing (CFT) continued to expand in scope and enforceability with a focus on increased international cooperation and adoption and implementation of global standards developed by the Financial Action Task Force (FATF), new sanctions against Russia, and more work on beneficial ownership transparency. There have been a multitude of legal developments that have resulted in a ripple effect, with many changes brought about by the increased use of technology both in the implementation of compliance programs (biometrics, data protection concerns) and in the financial services sector (cryptocurrencies and other virtual assets).

A. INTERNATIONAL DEVELOPMENTS

At the international level, 2022 has been dominated by beneficial ownership reforms, the sanctions against Russia, and bringing digital assets within scope of AML/CFT rules.¹ In March 2022, the FATF adopted amendments to Recommendation 24 which requires countries to prevent the misuse of legal persons for money laundering (ML) or terrorist financing (TF) and to ensure that there is adequate, accurate, and up-to-date information on the beneficial ownership and control of legal persons.² The amendments require collection of accurate beneficial ownership information in a timely manner, and stronger controls to prevent the misuse of bearer shares and nominee arrangements.³ The FATF will begin assessing

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1. See *infra* sections III.A, III.D, III.E.

2. *Outcomes FATF Plenary, 2-4 March 2022*, FATF (Mar. 4, 2022), <https://www.fatf-gafi.org/publications/fatfgeneral/documents/outcomes-fatf-plenary-march-2022.html> [<https://perma.cc/YEU6-W3WC>].

3. See *Public Statement on Revisions to R.24*, FATF (Mar. 4, 2022), <https://www.fatf-gafi.org/publications/fatfrecommendations/documents/r24-statement-march-2022.html> [<https://perma.cc/GU7S-H9ZB>].

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countries for implementation of the revised requirements at the start of the next (fifth) round of mutual evaluations.⁴ Also in March, the FATF Report on Money Laundering and Terrorist Financing Risks Arising from Migrant Smuggling was published, highlighting the need for increased collaboration and rising ML/TF risks.⁵

In June, the Conference on Digital Transformation was held in Berlin, with more than 100 experts in financial crime, data protection, and technology gathered to discuss new technologies used in AML/CFT compliance, followed by the FATF plenary meeting.⁶ The FATF identified Digital Transformation as a strategic priority and published a Digital Strategy for Law Enforcement Agencies ahead of the conference.⁷ The FATF approved a report targeting the real estate sector, highlighting the vulnerabilities and providing risk mitigation measures.⁸ The FATF also provided an update for virtual assets (VAs) and virtual asset service providers (VASPs) focused on the implementation of the Travel Rule, which requires VASPs to provide information on the identities of the originator and beneficiary with virtual asset transfers.⁹ It was noted that the industry is vulnerable from a ML/TF perspective due to the slow introduction of regulations in many countries.¹⁰ The FATF also noted emerging risks in Decentralised Finance (DeFi), Non-Fungible Tokens (NFTs), and un-hosted wallets.¹¹

In September, a joint FATF-INTERPOL Roundtable Engagement (FIRE) was held in Singapore, where participants agreed on the importance

4. See *Outcomes FATF Plenary, 22-24 February 2023*, FATF (Feb. 24, 2023), <https://www.fatf-gafi.org/en/publications/Fatfgeneral/outcomes-fatf-plenary-february-2023.html> [https://perma.cc/92EV-57JC].

5. See *Money Laundering and Terrorist Financing Risks Arising from Migrant Smuggling*, FATF (Mar. 22, 2022), <https://www.fatf-gafi.org/publications/methodsandtrends/documents/migrant-smuggling.html> [https://perma.cc/28RE-4RPN].

6. See *Conference on Digital Transformation*, FATF (June 13, 2022), <https://www.fatf-gafi.org/publications/digitaltransformation/conference-digital-transformation.html>. [https://perma.cc/DB5U-P5SG].

7. See *id.* (This report is confidential, with only a summary available to the public. Additional reports available are the FATF Guidance on Digital ID, Guidance on Virtual Assets, Virtual Assets - Red Flag Indicators of Money Laundering and Terrorist Financing, and Guidance on Private Sector Information Sharing).

8. See *Guidance for A Risk-Based Approach to The Real Estate Sector*, FATF, 9-24, (July 2022), <https://www.fatf-gafi.org/media/fatf/documents/recommendations/RBA-Real-Estate-Sector.pdf> [https://perma.cc/X9WP-9Q9E].

9. See *Targeted Update on Implementation of FATF's Standards on Virtual Assets and Virtual Assets Service Providers*, FATF, 2-3, (June 30, 2022), <https://www.fatf-gafi.org/publications/fatfrecommendations/documents/targeted-update-virtual-assets-vasps.html> [https://perma.cc/LN95-9TQG] (It was noted that of the 98 jurisdictions that responded to FATF's March 2022 survey, only 29 jurisdictions had passed relevant Travel Rule laws, and only a small subset had started enforcement).

10. See *id.*

11. See *id.* at 19-21.

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of a strong legal framework to effectively pursue asset recovery.¹² The event also discussed the impact of cyber-enabled fraud on victims.¹³

Finally in October,¹⁴ the FATF released, for public consultation, draft guidance on Recommendation 24¹⁵ and a consultation of proposed revisions to Recommendation 25 on transparency and beneficial ownership of legal arrangements.¹⁶ FATF members also approved a report on the illicit proceeds generated from the supply chains for fentanyl and related synthetic opioids, and discussed a report on money laundering through arts, antiquities, and other cultural objects, which will be finalized by February 2023.¹⁷

B. REGIONAL DEVELOPMENTS

1. Americas

a. U.S. Anti-Money Laundering Regulatory Updates - 2022

In the United States, by far the most noteworthy development this year in the AML world has been the issuance by the U.S. Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) of the highly anticipated rule implementing the beneficial ownership information reporting requirements of the Corporate Transparency Act of 2021 (CTA).¹⁸ The rule, issued on September 29, 2022, produced the most significant revisions to the U.S. AML compliance framework in more than twenty years, implementing sweeping beneficial ownership disclosure requirements applicable to all U.S. entities, as well as foreign entities registered in the United States.¹⁹ Beginning on January 1, 2024, the rule will require all

12. See *FATF and INTERPOL Intensify Global Asset Recovery*, FATF (Sept. 13, 2022), <https://www.fatf-gafi.org/publications/methodsandtrends/documents/fatf-interpol-2022.html> [https://perma.cc/3GW7-3AJE].

13. See *id.*

14. See *Outcomes FATF Plenary, 20-21 October 2022*, FATF (Oct. 21, 2022), <https://www.fatf-gafi.org/publications/fatfgeneral/documents/outcomes-fatf-plenary-october-2022.html> [https://perma.cc/PK4U-Y2RC].

15. See *FATF Guidance on Beneficial Ownership (Recommendation 24) - Public Consultation*, FATF, <https://www.fatf-gafi.org/publications/fatfrecommendations/documents/r24-public-consultation-oct-2022.html> [https://perma.cc/CS8N-HLZH].

16. See *Revision of R25 And Its Interpretive Note - Public Consultation*, FATF, <https://www.fatf-gafi.org/publications/fatfrecommendations/documents/r25-public-consultation-oct22.html>. <https://perma.cc/UC9M-XYPY> [https://perma.cc/SFT7-7RGW].

17. See *Money Laundering from Fentanyl and Synthetic Opioids*, FATF 39 (Nov. 30, 2022), <https://www.fatf-gafi.org/publications/methodsandtrends/documents/money-laundering-fentanyl-synthetic-opioids.html> [https://perma.cc/JK37-CFUG].

18. See Jamie Schafer, *FinCEN Issues Highly Anticipated Final Rule on Beneficial Ownership Reporting under the Corporate Transparency Act*, WHITE COLLAR BRIEFLY (Oct. 1, 2022), <https://www.whitecollarbriefly.com/2022/10/01/fincen-issues-highly-anticipated-final-rule-on-beneficial-ownership-reporting-under-the-corporate-transparency-act/> [https://perma.cc/T2SE-D5UR].

19. See *generally* Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59498 (Sept. 30, 2022) (to be codified at 31 C.F.R. pt. 1010) [https://perma.cc/GU2U-3VP6].

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covered entities - within thirty days of formation - to provide FinCEN with detailed information regarding natural person beneficial owners as well as individuals who substantially control such entities, unless the entity meets certain defined exemptions set out in the rule.²⁰ Moreover, such information will have to be updated within thirty days of any change.²¹ Companies formed prior to January 1, 2024, will have until January 1, 2025, to make initial filings.²²

Penalties for violations of the rule will apply only to willful violations, including willful failure to file, willful provision of false or fraudulent information, or willfully failing to provide complete or updated information.²³ The rule does not provide for penalties in the case of negligent or reckless failures.²⁴ The September 2022 rule was the first of three rulemakings required to implement the CTA.²⁵ It neither addressed access to the information collected and safeguards to ensure that it is secured, nor did it address required revisions to FinCEN's customer due diligence (CDD) rules to incorporate this new process.²⁶

Finally, on December 15, 2022, FinCEN issued a Notice of Proposed Rulemaking (NPRM) that implement provisions of the CTA on security and confidentiality to protect sensitive personally identifiable information (PII) reported to FinCEN.²⁷ Written comments on the proposed rule cannot be submitted prior to February 14, 2023.²⁸

Another closely watched area of development in the U.S. AML world is the proposed regulation under the Establishing New Authorities for Businesses Laundering and Enabling Risks to Security Act (Enablers Act) of certain previously unregulated categories of service providers regarded as gatekeepers or otherwise potential facilitators of money laundering.²⁹ The proposed legislation would bring under the ambit of the U.S. Bank Secrecy Act providers of (i) corporate structuring and formation services, (ii) trust services, and (iii) third party payment services as well as legal and accounting services to the extent that they facilitate services described in (i) through (iii).³⁰ If passed, the legislation could result in significant new regulatory burdens for corporate formation agents, trustees, and law and accounting firms.³¹ These regulatory burdens could result in implementation of robust

20. *See id.*

21. *See id.*

22. *See id.*

23. *See id.*

24. *See id.*

25. *See id.*

26. *See id.*

27. *See* Beneficial Ownership Information Access and Safeguards, and Use of FinCEN Identifiers for Entities, 87 Fed. Reg. 77404 (Dec. 16, 2022) (to be codified at 31 C.F.R. pt. 1010) [<https://perma.cc/W6HB-QJAC>].

28. *See id.*

29. 115 Cong. Rec. 6368 (daily ed. July 13, 2022).

30. *See id.* at 6369.

31. *See id.*

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customer due diligence programs and potential requirements to monitor and file reports relating to suspicious transactions engaged in by clients (i.e., Suspicious Activity Reports or SARs).³²

Like the Anti-Money Laundering Act of 2020, the Enablers Act appears to have broad bipartisan support in the U.S. Congress.³³ It was initially included in the annual U.S. National Defense Authorization Act (NDAA) to ensure swift passage through expedited procedures but was removed in the final draft.³⁴ The legislation is expected to be reintroduced as a standalone bill to face more lengthy debate over its specific terms in 2023.³⁵

b. Cayman Islands Anti-Money Laundering Regulatory Updates -
2022

For the Cayman Islands, the National Risk Assessment 2021 Report published in March 2022 emphasized the threat of foreign corruption and discussed recent enforcement actions.³⁶ In April, the Cayman Islands Government issued a statement informing the industry that it had established a joint task force to coordinate, identify, and implement policy amendments to employ sanctions on Russia.³⁷ Since the commencement of the Russian invasion of the Ukraine in February 2022, more than 800 asset freezes had been imposed in the Cayman Islands, with over 400 Compliance Reporting Forms submitted, resulting in an estimated value of USD \$7.3 billion of frozen assets.³⁸

In May, the Ministry of Finance received confirmation from the EU's Department for Financial Stability and Capital Markets (DG FISMA), which oversees the EU's AML/CFT listing process, that the EU does not require further measures, beyond those included in the FATF action plan, for removing the Cayman Islands from the EU's AML/CFT list.³⁹ Regulations were then published in June, confirming that beneficial ownership information under the Cayman regime must include details of the

32. See *id.* at 6364.

33. See generally Will Fitzgibbon, *US Senate Blocks Major Anti-Money Laundering Bill, The Enablers Act*, ICIJ (Dec. 12, 2022), <https://www.icij.org/investigations/pandora-papers/us-senate-blocks-major-anti-money-laundering-bill-the-enablers-act/> [<https://perma.cc/PKM9-UEW8>].

34. See *id.*

35. See *id.*

36. See generally National Risk Assessment 2021, CAYMAN IS. GOV. (Mar. 2022), <https://aflu.gov.ky/wp-content/uploads/2022/03/2021-NRA.pdf> [<https://perma.cc/E6JY-HV4R>].

37. See Takiyah Smith, *Task Force on Russia Sanctions Activated*, CAYMAN IS. GOV. (Apr. 7, 2022), <https://www.gov.ky/news/press-release-details/government-joint-task-force-on-russia-sanctions-established> [<https://perma.cc/3MKF-Q5ZV>].

38. See *id.*

39. See *EU Confirms No Additional AML/CFT Measures for Cayman*, MINISTRY OF FIN. SERVS. CAYMAN IS. GOV. (June 1, 2022), <https://www.mfs.ky/news/media-release/eu-confirms-no-additional-aml-cft-measures-for-cayman/> [<https://perma.cc/W8BJ-WMSM>].

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individual's unexpired and valid passport.⁴⁰ Accordingly, this aspect of beneficial owner information must be updated on an ongoing basis.⁴¹

Also in June, the Cayman Islands Monetary Authority (CIMA) published additional guidance on sanctions screening, following up its 2021 inspections.⁴² In particular, it emphasized the need to follow procedures and controls (i.e. effective implementation as opposed to just creating the systems), to properly document screening carried out for onboarding and ongoing monitoring, as well as adequate training.⁴³ CIMA had previously issued additional guidance on third party reliance testing for agents/nominees and Eligible Introducers, which is comprised of written assurance as well as control testing.⁴⁴ Finally, on July 1, 2022, PART XA of the Anti-Money Laundering (Amendment) (No. 2) Regulations, 2020 (AMLRs) came into force, setting out the identification and record-keeping requirements related to transfers of VAs in accordance with the FATF's standards.⁴⁵

c. British Virgin Islands Anti-Money Laundering Regulatory Updates
- 2022

In line with the FATF guidance, the British Virgin Islands (BVI) amended AML/CFT rules in August 2022 to include VAs and VASPs.⁴⁶ BVI has proposed to introduce VASP legislation and in September 2022 the British Virgin Islands Financial Services Commission (FSC) published a draft bill in the form of the Virtual Assets Service Providers Act 2022 (the VASP Act) for industry consultation.⁴⁷ Whilst no clear enactment date has yet been fixed, it is understood that this will likely become effective before the end of 2022 or in early 2023.⁴⁸ The VASP Act will include a transitional grace period of six

40. See Companies Act, SL 19 of 2022 Reg., § 2, (2022) (Cayman Is.), <http://gazettes.gov.ky/portal/pls/portal/docs/1/13172639.PDF> [<https://perma.cc/YFJ3-Y6T3>].

41. See *id.*

42. See *2021 Review of TCSPs Compliance with AMLRs - Sanctions Screening Policies and Procedures*, CIMA (June 2022), <https://www.cima.ky/2021-review-of-tcps-compliance-with-amlrs-sanctions-screening-policies-and-procedures> [<https://perma.cc/FR49-SHMB>].

43. See *id.*

44. See *Third Party Reliance Testing for Agents/Nominees and Eligible Introducers*, CIMA (May 2022), <https://www.cima.ky/third-party-reliance-testing-for-agentsnominees-and-eligible-introducers> [<https://perma.cc/8QH7-EXTH>].

45. See Anti-Money Laundering Act, SL 73 of 2020 Reg., § 8, (2020) (Cayman Is.), https://www.cima.ky/upimages/lawsregulations/1590507134Anti-MoneyLaunderingAmendmentNo.2Regulations2020_1590507134_1599477882.PDF [<https://perma.cc/4XSX-WY8T>].

46. See Proceeds of Criminal Conduct Act, Stat. Ins. 77, § 2(a)(vi), (2022) (Virgin Is.), https://www.bvifsc.vg/sites/default/files/anti-money_laundering_amendment_regulations_2022.pdf [<https://perma.cc/X2LQ-ESU7>].

47. See *Press Release: Consultation on Virtual Assets Service Providers Act, 2022*, VIRGIN IS. FIN. SERVS. COMM'N (Sept. 9, 2022), https://www.bvifsc.vg/sites/default/files/press_release_9_of_2022_-_consultation_on_vasps_0.pdf [<https://perma.cc/8H3N-PYSE>].

48. See *Ten Things Every VASP Should Know About the BVI Virtual Assets Service Providers Act, 2022*, CAREY OLSEN (Feb. 17, 2023), <https://www.careyolsen.com/briefings/ten-things-every-vasp-should-know-about-bvi-virtual-assets-service-providers-act-2022> [<https://perma.cc/BWS2-FJWY>].

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months for an existing VASP to register with the FSC. AML/CFT measures, including the FATF Travel Rules for VA transfers above USD \$1,000, have been in effect since December 1, 2022.⁴⁹

In addition, the BVI introduced changes to the business companies' regime in order to align it with the FATF's standards effective January 1, 2023.⁵⁰ Director names will be available to the public via the BVI Registrar of Corporate Affairs upon request,⁵¹ the register of members will include voting rights,⁵² and the concept of bearer shares will be removed from BVI business companies legislation.⁵³

2. *Asia Pacific*

a. Australia Anti-Money Laundering Regulatory Updates - 2022

The Australian Transaction Reports and Analysis Centre (AUSTRAC) released in April 2022 two new financial crime guides focused on ransomware attacks⁵⁴ and crimes linked to digital currencies.⁵⁵ These guides provide information and key indicators to help businesses identify and report if a payment could be related to ransomware attacks, and any other criminal activity through digital currencies.⁵⁶ Additionally, these guides were designed due to increased attention on cybercrime and digital assets in 2022, including a letter from the Australian Prudential Regulation Authority (APRA) with the risk management expectations for all regulated entities that engage in activities associated with crypto-assets,⁵⁷ and new guidance from the Australian Securities & Investments Commission (ASIC) on cybersecurity.⁵⁸

49. See Proceeds of Criminal Conduct Act § 2(a)(iii)(ee)(n).

50. See BVI Business Companies (Amendment) Act, 2022, § 1(2), (2022) (Virgin Is.), https://www.bvifsc.vg/sites/default/files/act_no_6_of_2022-_bvi_business_companies_amendment_act_2022_1.pdf [<https://perma.cc/2JTR-5QAQ>]; see also BVI Business Companies (Amendment) Reg., § 60A, Stat. Ins. 73 (2022) (Virgin Is.), <https://www.atcw.com/wp-content/uploads/2022/10/SI-No-73-of-2022-BVI-Business-Companies-Amendment-Regulations-2022.pdf> [<https://perma.cc/95HA-AV9X>].

51. See BVI Business Companies Act § 118(B)(4)(b) (2020) (Virgin Is.), https://www.bvifsc.vg/sites/default/files/bvi_business_companies_act.pdf [<https://perma.cc/7P3X-G67P>].

52. See *id.* § 42(2)(a).

53. See *id.* § 38(1)(a).

54. See *Detecting and Stopping Ransomware: Financial Crime Guide*, AUSTRAC 4 (Apr. 2022), https://www.austrac.gov.au/sites/default/files/2022-04/AUSTRAC_FCG_DetectingAndReportingRansomware_FINAL.pdf [<https://perma.cc/F944-Y3KZ>].

55. See *Preventing the Criminal Abuse of Digital Currencies: Financial Crime Guide*, AUSTRAC 5 (Apr. 2022), https://www.austrac.gov.au/sites/default/files/2022-04/AUSTRAC_FCG_PreventingCriminalAbuseOfDigitalCurrencies_FINAL.pdf [<https://perma.cc/T8L2-S6JZ>].

56. See *id.*

57. See *Crypto-assets: Risk Management Expectations and Policy Roadmap*, AUSTRALIAN PRUDENTIAL REGUL. AUTH. (Apr. 21, 2022), <https://www.apra.gov.au/crypto-assets-risk-management-expectations-and-policy-roadmap> [<https://perma.cc/3684-XM8N>].

58. See generally Danielle Press, *Cyber Risk: Be Prepared*, AUSTRALIAN SEC. AND INV.S COMM'N (July 15, 2022), <https://asic.gov.au/about-asic/news-centre/articles/cyber-risk-be-prepared/> [<https://perma.cc/U8X3-X5SG>].

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On the enforcement side, Helio Lending Pty. Ltd., a Melbourne-based business offering cryptocurrency-backed loans to consumers, was charged in April 2022 with falsely claiming that it held an Australian credit license (ACL).⁵⁹ In July 2022, a report on investment scams published by the Australian Competition and Consumer Commission (ACCC) revealed that crypto-scams increased 270% compared to 2021, leading ASIC to issue a media release targeted at consumers in November 2022 to increase awareness with respect to top red flags.⁶⁰

In reference to regulatory policy, AUSTRAC published additional guidance in October 2022 aimed at helping reporting entities identify and verify sources of funds and wealth as part of their know-your-customer (KYC) processes.⁶¹ AUSTRAC also continued to express concern over gatekeeper professions such as designated non-financial businesses and professions (DNFBPs) that were not subject to the anti-money laundering (AML) regime, after a March 2022 Senate Committee Report which examined Australia's failure to expand the scope of AML measures to cover DNFBPs and recommended that the Federal Government take immediate action.⁶² This builds onto a previous AUSTRAC report, where it was estimated that more than USD \$1 billion was laundered through Australian real estate by Chinese entities alone.⁶³

b. Hong Kong Anti-Money Laundering Regulatory Updates - 2022

In April 2022, the Hong Kong Monetary Authority (HKMA) published the sixth issue of its Regtech Adoption Practice Guide, focusing on regtech solutions utilizing artificial intelligence (AI).⁶⁴ In July 2022, HKMA co-organized its second AML Regtech Lab (AMLab) focused on the use of

59. See *22-085MR Cryptocurrency Lender Charged for False Australian Credit License Claims*, AUSTRALIAN SEC. AND INV.S COMM'N (Apr. 8, 2022), <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2022-releases/22-085mr-cryptocurrency-lender-charged-for-false-australian-credit-licence-claims/> [<https://perma.cc/YQ37-U7DY>].

60. See *Targeting Scams: Report of the ACCC on Scam Activity 2021*, AUSTRALIAN COMPETITION & CONSUMER COMM'N 11 (July 2022), <https://www.accc.gov.au/system/files/Targeting%20scams%20-%20report%20of%20the%20ACCC%20on%20scams%20activity%202021.pdf> [<https://perma.cc/J82J-XBDF>].

61. See *New Guidance Available on Conducting Source of Funds and Wealth Checks*, AUSTRAC (Dec. 12, 2022), <https://www.austrac.gov.au/new-guidance-available-conducting-source-funds-and-wealth-checks> [<https://perma.cc/3FL9-QCF4>].

62. See *Section 2: Regulation of Gatekeeper Professions*, Parliament of Austl. (Mar. 30, 2022), https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/AUSTRAC/Report/section?id=Committees%20reportsen%2024754%2079216 [<https://perma.cc/G4KN-PY4M>].

63. See *id.*

64. *Regtech Adoption Practice Guide: Issue #6: Artificial Intelligence-Based Regtech Solutions*, H. K. MONETARY AUTH. 4 (Apr. 2022), <https://www.hkma.gov.hk/media/eng/doc/key-information/guidelines-and-circular/2022/20220428e1a1.pdf> [<https://perma.cc/HSU9-WPCR>].

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enabling technologies such as robotic process automation, low-code/no-code platforms and visualization tools to automate compliance.⁶⁵

In June, amendments to the Anti-Money Laundering and Counter-Terrorist Financing Ordinance (AMLO) were published, including a new licensing regime for VASPs which will be administered by the Securities & Futures Commission (SFC), and is expected to be effective in March 2023.⁶⁶ Also a new registration regime for dealers in precious metals and stones (DPMSs) is now administered by the Commissioner for Customs and Excise.⁶⁷ Additional amendments addressed various technical issues previously identified in the FATF's evaluation report on Hong Kong.⁶⁸ Finally in July 2022, Hong Kong published its Money Laundering and Terrorist Financing Risk Assessment Report, which overall noted a medium-high level of ML/TF risk.⁶⁹

c. Singapore Anti-Money Laundering Regulatory Updates - 2022

In January and June 2022, the Monetary Authority of Singapore (MAS) and the Association of Banks in Singapore (ABS) announced measures to safeguard customers from digital banking scams.⁷⁰ Several additional measures were required to be implemented by banks by October 31, 2022, including additional customer confirmations, emergency kill switch for customers, rapid account freezing, and enhanced fraud surveillance systems.⁷¹

In March, following various inspections and engagements conducted in line with enforcement priorities, a new AML/CFT guidance was issued by MAS for financial institutions (FIs) in the conduct of their operations and business activities in precious stones, precious metals, and precious products (PSM).⁷² This guidance also revised existing AML/CFT notices for FIs and

65. *HKMA and Cyberport Jointly Promote Use of Regulatory Technology (Regtech) in Anti-Money Laundering (AML)*, H. K. MONETARY AUTH. (July 21, 2022), <https://www.hkma.gov.hk/eng/news-and-media/press-releases/2022/07/20220721-3/> [<https://perma.cc/R2QD-9RCC>].

66. See Anti-Money Laundering and Counter-Terrorist Financing (Amendment) Ordinance pt. 3, pt. 5B, div. 3 (2022) (H.K.), <https://www.legco.gov.hk/yr2022/english/ord/2022ord015-e.pdf> [<https://perma.cc/PWP6-N6KB>].

67. See *id.* pt. 2, div. 2, subdiv. 2.

68. See generally *id.*

69. See *Money Laundering and Terrorist Financing Risk Assessment Report*, H.K. EXEC. COUNCIL vi (July 2022), https://www.fstb.gov.hk/fsb/aml/en/doc/Money%20Laudering%20Report_2022_EN.pdf [<https://perma.cc/8W2S-6VKH>].

70. See *Additional Measures to Strengthen the Security of Digital Banking*, MONETARY AUTH. OF SING. (June 2, 2022), <https://www.mas.gov.sg/news/media-releases/2022/additional-measures-to-strengthen-the-security-of-digital-banking> [<https://perma.cc/5QGx-MNGS>].

71. See *id.*

72. See *Notice PSM-N01 Prevention of Money Laundering and Countering the Financing of Terrorism – Financial Institutions Dealing In Precious Stones and Precious Metals*, MONETARY AUTH. OF SING. 8 (Mar. 1, 2022) <https://www.mas.gov.sg/-/media/mas-media-library/regulation/notices/amld/psm-n01/notice-psm-n01-dated-1-march-2022-1.pdf> [<https://perma.cc/QZT9-QGJ9>].

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variable capital companies (VCCs).⁷³ MAS also published an Information Paper in August 2022 for External Asset Managers⁷⁴ and a circular in September 2022 setting out expectations for effective AML/CFT frameworks and compliance for VCCs and eligible financial institutions (EFIs).⁷⁵

3. *Europe*

a. U.K. Anti-Money Laundering Regulatory Updates - 2022

In March 2022, as part of its response to the Russian invasion of Ukraine, the U.K. Government introduced the Economic Crime (Transparency and Enforcement) Bill into the House of Commons, which established a Register of Overseas entities owning U.K. property, with a six-month transitional period for registration. The legislation was fast-tracked and Royal Assent was obtained in the early morning of March 15, 2022, becoming the Economic Crime (Transparency and Enforcement) Act 2022.⁷⁶ In addition to the creation of the Register of Overseas Entities,⁷⁷ the Act brought amendments to the Unexplained Wealth Order (UWO) regime (part II) and existing legislation on U.K. sanctions (part III).

In April, the Financial Conduct Authority (FCA) published the conclusions of a 2021 review of SARs by six challenger retail banks covering over eight million customers and concluded that challenger banks and FinTech companies must improve AML/CFT controls.⁷⁸ While the FCA noted the innovative use of technology, it also flagged weaknesses in customer due diligence (CDD) and enhanced due diligence (EDD) procedures.⁷⁹ In June, the FATF published a follow-up report on the U.K.'s AML/CFT measures acknowledging that the country had strengthened its framework and increased its rating to partially compliant due to the introduction of EDD measures for correspondent banking (for financial institutions outside of the European Economic Area (EEA)).⁸⁰ The FATF

73. *Id.*

74. See *Strengthening AML/CFT Practices for External Asset Managers*, MONETARY AUTH. OF SING. 3 (Aug. 2022), https://www.mas.gov.sg/-/media/mas-media-library/publications/monographs-or-information-paper/cmi1/2022/strengthening-aml_cft-practices-for-external-asset-managers.pdf [<https://perma.cc/KS6W-CZR6>].

75. See Monetary Auth. of Sing., Circular on Enhancing Anti-Money Laundering and Countering the Financing of Terrorism Controls in the VCC Sector, AMLD 06/2022 (issued on Sept. 13, 2022).

76. See generally Economic Crime (Transparency and Enforcement) Act 2022, (UK), <https://www.legislation.gov.uk/ukpga/2022/10/contents/enacted> [<https://perma.cc/3D2C-RSDA>] (last visited Dec. 19, 2022).

77. *Id.* §§ 2-3.

78. See *Financial Crime Controls at Challenger Banks*, FIN. CONDUCT AUTH. (Apr. 4, 2022), <https://www.fca.org.uk/publications/multi-firm-reviews/financial-crime-controls-at-challenger-banks> [<https://perma.cc/SM34-8NE2>].

79. *Id.*

80. See *United Kingdom - Anti-Money Laundering and Counter-Terrorist Financing Measures, Follow-up Report & Technical Compliance Re-Rating*, FATF 3 (May 2022), <https://www.fatf->

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cited the U.K. Financial Intelligence Unit's lack of resources as a major contributing factor to the rating.⁸¹

At the same time, the U.K. government issued a review of its own AML/CFT regulatory and supervisory regime, together with reviews of the existing money laundering regulations (MLRs) and the Office for Professional Body Anti-Money Laundering Supervision (OPBAS) regulations.⁸² The U.K. continued to strengthen its regulatory regime with the Money Laundering and Terrorist Financing (Amendment) (No. 2) Regulations 2022, published in July 2022, which expanded the information sharing standard for wire/bank transfers to transfers involving crypto-assets, i.e., implementing the Travel Rule for crypto-assets and introducing new ongoing compliance requirements for crypto-asset firms (such as the obligation to notify the FCA ahead of any change of control).⁸³ At the same time, the British Art Market Federation (BAMF) issued updated guidance on AML requirements for U.K. art market participants (AMPs) in line with the European Union's Fifth Anti-Money Laundering Directive (5AMLD).⁸⁴

In August, the Office of Financial Sanctions Implementation (OFSI) issued guidance which brought crypto exchanges and wallet providers in line with the reporting obligations faced by banks and other financial institutions with respect to sanctions.⁸⁵ Finally in September, the publication of the Economic Crime and Corporate Transparency Bill 2022, in accordance with the Economic Crime (Transparency and Enforcement) Act passed earlier in the year, marked another reform. The proposed updates will bring crypto assets within the scope of civil forfeiture powers in Part 5 of the Proceeds of Crime Act 2002 (POCA) but will also introduce more general measures such as identity verification requirements for company directors and for persons

gafi.org/content/dam/fatf/documents/reportr/fur/Follow-Up-Report-United-Kingdom-2022.pdf.coredownload.pdf [<https://perma.cc/P5ZR-LPP6>].

81. *Id.* at 2.

82. See *Review of the UK's AML/CFT Regulatory and Supervisory Regime*, HM TREASURY 3 (June 2022), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1085407/MLRs_Review_Report_-_2.5_for_publication.pdf [<https://perma.cc/68HF-PHVD>].

83. See *Money Laundering and Terrorist Financing (Amendment) (No. 2) Regulations 2022*, SI 2022/860 (U.K.), <https://www.legislation.gov.uk/uksi/2022/860/made/data.pdf> [<https://perma.cc/8KLE-QNXT>].

84. See *Guidance on Anti Money Laundering for UK Art Market Participants*, BRITISH ART MARKET FED'N 6 (June 2022), <https://tbamf.org.uk/portfolio/anti-money-laundering-guidelines-2022> [<https://perma.cc/M5SJ-3GD9>].

85. See *UK Financial Sanctions: General Guidance for Financial Sanctions Under the Sanctions and Anti-Money Laundering Act 2018*, HM TREASURY, OFF. OF FIN. SANCTIONS IMPLEMENTATION, (Jan. 31, 2023) <https://www.gov.uk/government/publications/ofsi-guidance-html-documents/uk-financial-sanctions-general-guidance-for-financial-sanctions-under-the-sanctions-and-anti-money-laundering-act-2018> [<https://perma.cc/2EWG-W2ST>].

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with significant control (PSCs) as well as an annual confirmation that a company has a lawful purpose.⁸⁶

b. EU Anti-Money Laundering Regulatory Updates - 2022

Perhaps the most aggressive developments in AML/CFT during 2022 were seen in the European Union (EU), where the long-term goal of a pan-European AML/CFT program is now closer with the creation of a central EU authority projected for 2023 the EU Anti-Money Laundering Authority (AMLA).⁸⁷ AMLA will become fully operational in 2026 and will monitor, support, and coordinate AML/CFT efforts in the EU.⁸⁸ Although the responsibility for AML/CFT currently remains in the hands of member states, AMLA is intended to have direct supervision over the riskiest entities with a focus on large lenders and non-bank financial institutions,⁸⁹ and will have the ability to impose fines.⁹⁰ The AMLA is expected to help harmonize supervisory practices, oversee high-risk and cross-border financial entities, and coordinate financial intelligence units (FIUs).⁹¹ AMLA is intended to be fully independent, with its own executive board, and will be able to act internationally in the FATF and in relationships with third countries.⁹²

Another major development is the new EU Market in Crypto-assets Regulation (MICA), which was agreed on between the EU institutions and is estimated to come into effect in 2023.⁹³ MICA will provide a comprehensive regulatory regime tailored specifically to crypto-assets, including an EU-wide registration (although businesses will be required to register in each

86. See *Policy Paper, Factsheet: Economic Crime and Corporate Transparency Bill Overarching*, HM TREASURY, (Jan. 18, 2023) <https://www.gov.uk/government/publications/economic-crime-and-corporate-transparency-bill-2022-factsheets> [<https://perma.cc/5SQB-SNE9>].

87. See Press Release, Council of the European Union, *New EU Authority for Anti-money laundering: Council Agrees its Partial Position* (June 29, 2022), <https://www.consilium.europa.eu/en/press/press-releases/2022/06/29/new-eu-authority-for-anti-money-laundering-council-agrees-its-partial-position/> [<https://perma.cc/WN4D-SURH>] (This is a European Commission from July 2021. In Parliament, the file was referred to the Committee on Economic and Monetary Affairs (ECON) and the Committee on Civil Liberties, Justice and Home Affairs (LIBE) and the co-rapporteurs issued their joint report in May 2022. Finally, the European Council reached a partial political agreement on the proposal on June 29, 2022. The EU countries have not yet agreed on the location at which AMLA will have its seat).

88. See Council of the Eur. Union, Proposal for a Regulation of the European Parliament and of the Council Establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) 1094/2010, (EU) 1095/2010, at 3 (2022).

89. See *id.* at 8-9 (And following in the draft agreed on by the Council of the European Union).

90. See *id.* at 77-78.

91. See *id.* at 3.

92. See *id.* at 171.

93. See generally Council of the Eur. Union, Proposal for a Regulation of The European Parliament and of The Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937 (2022) (On October 5, 2022, the Council of the European Union adopted the final text of the Markets in Crypto-assets Regulation (MICA)).

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country separately under AML/CFT regulations).⁹⁴ MICA integrates into a wider net of EU regulatory frameworks that are currently in place or being developed, including AMLA, a reform of the AML/CFT rules, and the Transfer of Funds Regulation, which requires that information about the sender and the beneficiary of a transaction travel together with the funds (fiat or crypto).⁹⁵

This coincides with other AML/CFT developments in the EU, such as: (i) the European Commission issuing a trainers' manual for lawyers on AML/CFT rules at EU level,⁹⁶ (ii) the report issued by MONEYVAL, the Council of Europe's financial crime research body, which called for stricter and more coordinated regulations including for digital currencies,⁹⁷ or the (iii) Supranational Risk Assessment Report (SNRA) issued in October 2022 by the European Commission to the European Parliament and Council which flagged crypto-assets and online gambling as a high-risk areas for ML/TF.⁹⁸

The European Commission also issued a new proposal to establish common criminal standards and enable the confiscation of assets for a wider set of crimes for the violation of restrictive measures including sanctions.⁹⁹ The crimes covered in the proposal include the trafficking of humans, drugs, and arms; money laundering; counterfeiting of payment forms; and organized crime.¹⁰⁰

In the banking industry, the European Banking Authority (EBA) published new guidelines on the role and responsibilities of the AML/CFT compliance officer in June 2022 with the same goal of harmonizing

94. See *id.* at 22.

95. See Ann Neville, *An Economic that Works for People - Proposal for a Regulation on Information Accompanying Transfers of Funds and Certain Crypto-Assets (Recast)*, EUR. PARLIAMENT: LEGIS. TRAIN SCHEDULE (Feb. 2, 2023), <https://www.europarl.europa.eu/legislative-train/theme-an-economy-that-works-for-people/file-revision-of-the-regulation-on-transfers-of-funds> [https://perma.cc/DC3P-AAE3].

96. See Directorate-General for Financial Stability, *Financial Services and Capital Markets Union, Training for lawyers on anti-money laundering (AML) and counter terrorist financing (CTF) rules at EU level – Trainers' Manual and Users' Manual*, EUR. COMM'N (2022), https://finance.ec.europa.eu/publications/training-lawyers-anti-money-laundering-aml-and-counter-terrorist-financing-ctf-rules-eu-level_en [https://perma.cc/W47M-VMAT].

97. See Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL), *Annual Report for 2021*, COUNCIL OF EUR. 12-13 (2022), <https://edoc.coe.int/en/terrorism/11044-moneyval-annual-report-for-2021.html> [https://perma.cc/2H9T-LD7K].

98. See Eur. Comm'n, Report from the Commission to the European Parliament and the Council on the Assessment of the Risk of Money Laundering and Terrorist Financing Affecting the Internal Market and Relating to Cross-Border Activities, § 2.1.4, COM (2019) 370 final (July 24, 2019).

99. See Eur. Comm'n, Proposal for a Directive on the Definition of Criminal Offences and Penalties for the Violation of Union Restrictive Measures, § 1(5), COM 2022 (684) final (Feb. 12, 2022).

100. See *id.* § 2.

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applicable AML/CFT standards across the EU,¹⁰¹ and recently issued a call for input on joint guidelines by the European Supervisory Authorities (ESAs)¹⁰² and for experts on crypto asset service providers, AML/CFT, and on restrictive measures regimes.¹⁰³ Finally, a central database for AML/CFT intended as an early warning tool was launched by EBA across the EU. The European reporting system for material CFT/AML weaknesses, EuReCA, will centralize information on weaknesses identified in financial institutions, and measures imposed to rectify them.¹⁰⁴

II. Main Themes

A. DEVELOPMENTS

Considering the additional guidance from the FATF and measures taken by various jurisdictions to enforce a beneficial ownership regime and increased transparency,¹⁰⁵ the focus on beneficial ownership was one of the main themes of the year in AML. In the U.K., in April 2022, the U.K. House of Commons published a research report on beneficial ownership regulations in the U.K. and worldwide,¹⁰⁶ noting that in February 2022 the U.K. Government published a White Paper setting out reforms seeking to increase the accuracy of information provided and that all British Overseas Territories and Crown Dependencies have or will introduce public company beneficial ownership registers by the end of 2023.¹⁰⁷ But in November 2022,

101. See Final Report, *Guidelines on Policies and Procedures in Relation to Compliance Management and the Role and Responsibilities of the AML/CFT Compliance Officer under Article 8 and Chapter VI of Directive (EU) 2015/849*, EUR. BANKING AUTH. 46 (June 14, 2022), https://www.eba.europa.eu/sites/default/documents/files/document_library/Publications/Guidelines/2022/EBA-GL-2022-05%20GLs%20on%20AML%20compliance%20officers/1035126/Guidelines%20on%20AML%20compliance%20officers.pdf [<https://perma.cc/Z6TV-NK34>].

102. See Press Release, *ESAs Publish the Joint Report on the Withdrawal of Authorisation for Serious Breaches of AML/CFT Rules*, EUR. BANKING AUTH. (June 1, 2022), <https://www.eba.europa.eu/esas-publish-joint-report-withdrawal-authorisation-serious-breaches-amlcft-rules> [<https://perma.cc/29V2-689N>] (joint report by European Supervisory Authorities advocating for a more comprehensive framework of powers related to the revocation of licenses for serious breaches of AML/CFT rules).

103. See Press Release, *EBA Launches Call for Interest for Two Expert Groups and a Call for Input to Advise on its Work Under the Recast Funds Transfers Regulation*, EUR. BANKING AUTH. (Oct. 21, 2022), <https://www.eba.europa.eu/eba-launches-call-interest-two-expert-groups-and-call-input-advise-its-work-under-recast-funds> [<https://perma.cc/D6XS-UD9K>].

104. See Press Release, *EBA Launches Today 'EuReCA', the EU's Central Database for Anti-Money Laundering and Counter-Terrorism Financing*, EUR. BANKING AUTH. (Jan. 30, 2022), <https://www.eba.europa.eu/eba-launches-today-eureca-eus-central-database-anti-money-laundering-and-counter-terrorism-financing> [<https://perma.cc/5E3G-QP74>].

105. See *supra* Section B.1.a; *supra* Section A.

106. See generally Ali Shalchi & Federico Mor, *Research Briefings 8259, Registers of Beneficial Ownership*, HOUSE OF COMMONS LIBR. (Apr. 6, 2022), <https://researchbriefings.files.parliament.uk/documents/CBP-8259/CBP-8259.pdf> [<https://perma.cc/F3KE-G2X3>].

107. See also *supra* Section C.1.

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a decision of the European Court of Justice (ECJ), largely publicized, ruled that the legal provision in the EU Directive 2018/843 whereby information on beneficial ownership is accessible in all cases to any member of the general public is invalid.¹⁰⁸ The Court found that the provision excessively infringed upon certain fundamental rights under the Charter of Fundamental Rights of the EU, namely the right to respect for private life and to the protection of personal data, in a way that went further than was strictly necessary and that the measure was not proportionate to the objective of fighting ML/TF.¹⁰⁹

Whereas the decision does not bind the U.K. post-Brexit, and the Charter of Fundamental Rights of the EU was not incorporated into U.K. law as part of the EU (Withdrawal) Act 2018, a U.K. court or tribunal may have regard to anything done on or after Brexit by the ECJ. In the aftermath, it was reported that the Ministries of Justice of the Netherlands and of the Grand Duchy of Luxembourg asked the Chamber of Commerce and the Luxembourg Business Registers, respectively, to temporarily stop providing information from the beneficial ownership register to the general public with immediate effect.¹¹⁰

B. ENFORCEMENT & LITIGATION TRENDS

In the United States, 2022 included several notable AML-related enforcement actions by U.S. federal and state regulatory authorities, including the Office of the Comptroller of the Currency (OCC), FinCEN, the Securities and Exchange Commission (SEC), and the New York State Department of Financial Services (DFS). Prominent themes resulting in the assessment of civil monetary penalties included the failure to remediate previously identified AML program deficiencies, failures regarding SAR, failures regarding customer due diligence obligations, and inadequate staffing.

In March 2022, FinCEN and the OCC levied a combined USD \$140 million penalty against USAA Federal Savings Bank (USAA) for willful violations of the Bank Secrecy Act (BSA) and AML regulations.¹¹¹ For more than five years, USAA had failed to maintain an adequate AML compliance program.¹¹² Prior to the levying of the 2022 penalty, USAA had been made aware of its AML compliance program failures and had committed to their

108. See generally *Joined Cases C-37/20 and C-601/20, Luxembourg Business Registers and Sovim* (Nov. 22, 2022), <https://curia.europa.eu/juris/liste.jsf?lgrec=FR&td=%3BALL&language=EN&num&37/20&jur=C> [<https://perma.cc/4ZMC-MCHD>].

109. See *id.* ¶ 36.

110. See Press Release, *Information Services for the UBO Register Temporarily Stopped*, KVK (Nov. 23, 2022), <https://www.kvk.nl/english/ordering-products-from-the-business-register/kvk-ubo-register-extract/> [<https://perma.cc/PSV4-3R4H>].

111. Department of the Treasury – Financial Crimes Enforcement Network, *USAA Fed. Sav. Bank, Consent Order Imposing Civil Money Penalty*, AA-EC-2022-2, 5 (Mar. 17, 2022).

112. *Id.*

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remediation. But USAA failed to adequately address those issues.¹¹³ It was found that USAA's AML program lacked sufficiently robust and risk-based policies, procedures, and controls tailored to the risks presented by its customers, products and geographies served. It lacked adequate policies, procedures, and controls regarding identifying, reporting, and evaluating suspicious activity.¹¹⁴ USAA's AML program suffered from significant deficiencies in timely identifying and reporting suspicious activity due, in part, to a deficient case alert and investigation system lacking proper tuning and testing.¹¹⁵ USAA's compliance department also suffered from significant understaffing and a lack of training. USAA also failed to adequately collect and update customer due diligence information to allow it to properly understand its customers and the risks they presented. USAA had implemented a flawed customer risk rating model.¹¹⁶

In April 2022, the Office of the OCC in the United States issued a Consent Order against Anchorage Digital Bank for failure to adopt and implement an adequate compliance program for the bank's AML requirements under the BSA as laid out in the Operating Agreement entered into with the OCC in January 2021, when Anchorage received the conditional approval to convert into a National Trust Bank.¹¹⁷ As part of the Consent Order, Anchorage agreed to, among other things, appoint a Compliance Committee of at least three members, of which a majority would be independent directors who are not employees or officers of the bank or any of its subsidiaries or affiliates.¹¹⁸ The Committee was required to: (i) meet at least quarterly, (ii) communicate a detailed remediation plan for AML compliance, including timelines and responsible persons, and (iii) ensure that the appointed BSA officer has sufficient independence, authority, and resources to carry out their duties, including staff with appropriate skills and expertise (and in sufficient numbers) to support the bank's AML compliance program, and that compliance staff is vested with sufficient authority to fulfill their duties and responsibilities.¹¹⁹

In May 2022, the SEC levied a USD \$7 million penalty against Wells Fargo Clearing Services, LLC (Wells Fargo).¹²⁰ Wells Fargo's AML violations centered on failures in its SAR program over a multi-year period.¹²¹ Due to failure in transitioning from one transaction surveillance system to another, Wells Fargo failed to sufficiently capture potentially suspicious transactions involving wire transfers with jurisdictions assessed as

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. Department of the Treasury - Office of the Comptroller of the Currency, Anchorage Digit. Bank, Nat'l Ass'n Sioux Falls, South Dakota, AA-ENF-2022-7, 2 (Apr. 21, 2022).

118. *Id.* at 9-10.

119. *Id.* at 3.

120. Wells Fargo Clearing Servs., Exchange Act Release No. 94955, File No. 3-20866 (May 20, 2022).

121. *Id.*

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being of moderate or high money laundering risk. That resulted in a failure to alert for over 1,700 transactions and to file at least twenty-five SARs.¹²²

In August 2022, DFS levied a USD \$30 million penalty against Robinhood Crypto, LLC (Robinhood), partly for its failure to maintain an adequately robust BSA/AML program.¹²³ Despite tremendous business growth, Robinhood failed to effectively develop its AML program, particularly its SAR program in relation to the risks associated with operating a cryptocurrency platform.¹²⁴ Despite the growth, Robinhood's transaction monitoring system remained manual, rather than automated, which was ill-suited to keeping pace with the daily volume of transactions. That resulted in a significant backlog of alerts needing further investigation.¹²⁵ Once Robinhood implemented an automated monitoring system, its transaction monitoring rules were deficient. Furthermore, Robinhood's compliance program relied significantly on the compliance program of its parent company and an affiliate which were not geared to New York's requirements.¹²⁶ This resulted in Robinhood not having significant influence in the management of larger entity-wide compliance program and the resulting implications for Robinhood regarding staffing, resources, and adopting measures. As a result, Robinhood lacked the necessary skilled compliance staff.¹²⁷

In October 2022, FinCEN in conjunction with the Office of Foreign Asset Control (OFAC) levied a nearly USD \$300 million penalty against Bittrex, Inc. (Bittrex).¹²⁸ Bittrex failed to sustain an effective AML program over a multi-year period regarding its convertible currency trading platform.¹²⁹ Particularly, it failed to maintain adequate controls designed to ensure compliance with SAR obligations. Its SAR program relied on a few minimally trained and inexperienced employees manually reviewing all transactions, an impossible task given its overwhelming daily trading volume.¹³⁰ Furthermore, in designing its AML controls, Bittrex failed to adequately account for the risks presented by different virtual currencies traded across its platform.¹³¹ As a result, Bittrex failed to timely identify and report a wide variety of suspicious activity, including transactions with entities in violation of OFAC regulations.¹³²

122. *Id.*

123. N.Y.S. Department of Financial Services, Robinhood Crypto, Consent Order, ¶ 1-2 (Aug. 2, 2022).

124. *See id.* ¶¶ 40-41.

125. *See id.* ¶ 54.

126. *See id.* ¶¶ 40-41.

127. *See id.*

128. Department of the Treasury, Financial Crimes Enforcement Network, Bittrex, Consent Order Imposing Civil Money Penalty, No. 2022-03, 1 (Oct. 11, 2022).

129. *Id.* at 3.

130. *Id.*

131. *Id.* at 4.

132. *Id.* at 6.

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C. TECHNOLOGY, AML, AND RANSOMWARE

Enforcement actions in the United States, discussed above, should be read in conjunction with a greater trend related to the expectation of the regulators that businesses implement effective compliance programs, commensurate with the risks they are exposed to and the volume and frequency of transactions, in what is called the Risk Based Approach (RBA). Increasingly, the FATF and national regulators have referred to technology and automation, biometric, and artificial intelligence (AI) as tools which would increase the effectiveness of AML compliance programs.¹³³ But at the same time, this results in increased attention on cybersecurity and data protection, with increased regulatory attention on resilience, cybersecurity and ransomware.

For example, in October 2022, the G7 Finance Ministers and Central Bank Governors approved the publication of a set of principles on third-party cyber risk management¹³⁴ and on countering ransomware risks, including recommendations for public and private financial entities on how to address the growing threat of ransomware attacks, identifying the minimum measures to be adopted both to prevent and to mitigate the impact of possible attacks.¹³⁵ In the United States in November, FinCEN announced that reported ransomware-related incidents had substantially increased from 2020, with ransomware-related BSA filings in 2021 approaching USD \$1.2 billion, and that roughly seventy-five percent of the ransomware-related incidents reported to FinCEN during the second half of 2021 were linked to Russia-related ransomware variants.¹³⁶

D. SANCTIONS

Russia's invasion of Ukraine rocked the economic sanctions world in 2022, leading to a cascade of multilateral sanctions against Russia and Belarus.¹³⁷ These are the most significant sanctions ever imposed on a major global economic power and have had broad implications for nearly every

133. See also *supra* Section A.

134. See *G7 Fundamental Elements for Third Party Cyber Risk Management in the Financial Sector*, EUR. CENT. BANK 1 (Oct. 2022), https://www.ecb.europa.eu/paym/pol/shared/pdf/October_2022-G7-fundamental-elements-for-third-party-cyber-risk-management-in-the-financial-sector.en.pdf [<https://perma.cc/JD8T-REB3>].

135. See *id.* at 5.

136. See *Financial Trend Analysis: Ransomware Trends in Bank Secrecy Act Data between July 2021 and December 2021*, FINANCIAL CRIMES ENFORCEMENT NETWORK 1, 2 (Nov. 2022), https://www.fincen.gov/sites/default/files/2022-11/Financial%20Trend%20Analysis_Ransomware%20FTA%20_508%20FINAL.pdf [<https://perma.cc/3AEA-APVU>].

137. See Noah Berman & Anshu Siripurapu, *One Year of War in Ukraine: Are Sanctions Against Russia Making a Difference?*, COUNCIL ON FOREIGN RELS. (Feb. 21, 2023), <https://www.cfr.org/in-brief/one-year-war-ukraine-are-sanctions-against-russia-making-difference> [<https://perma.cc/EBA2-T5BR>].

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sector of the global economy.¹³⁸ Most notably, the United States imposed the following restrictions on U.S. person and entity interaction with Russia:

- Expanded comprehensive sanctions on the Crimea region of Ukraine, which was annexed by Russia in 2014, to two newly annexed Ukrainian regions (Luhansk and Donetsk);¹³⁹
- Targeted the Russian Central Bank and Russian banking sector with punishing sanctions, freezing global assets within U.S. jurisdiction and effectively cutting them off from U.S. markets except in limited, defined circumstance;¹⁴⁰
- Included numerous Russian entities and individuals associated with the Russian government and defense industry to the Specially Designated Nationals (SDN) list, including President Vladimir Putin, many of his family members and close associates, as well as individuals and business leaders generally regarded as oligarchs and many Russian legislators and government officials;
- Prohibited all new investment in Russia by U.S. persons and entities;¹⁴¹ and
- Prohibited U.S. persons and entities from, directly or indirectly, providing accounting, trust and corporate formation, management consulting, or quantum computing services to any person or entity in Russia.¹⁴²

The United States has also taken an aggressive stance on imposing secondary sanctions on foreign persons continuing to engage with Russian sanction targets supporting the invasion of Ukraine or Russian sanction-evasion efforts, including malicious cyber actors and foreign companies assisting the Russian government in obtaining critical defense-related technology and supplies. FinCEN in coordination with OFAC has also issued numerous alerts and other guidance advising of Russian and Belarussian sanction evasion efforts.¹⁴³

138. *See id.*

139. *See* Exec. Order No. 14065, 87 Fed. Reg. 149 (Feb. 21, 2022).

140. *See, e.g.*, Exec. Order No. 14024, 86 Fed. Reg. 73 (Apr. 15, 2021) (“Blocking Property With Respect to Specified Harmful Foreign Activities of the Government of the Russian Federation”); Treas. Dir. 4, under Exec. Order No. 14024 (Feb. 28, 2022) (“Prohibitions Related to Transactions Involving the Central Bank of the Russian Federation, the National Wealth Fund of the Russian Federation, and the Ministry of Finance of the Russian Federation”).

141. *See* Exec. Order No. 14071, 87 Fed. Reg. 68 (Apr. 6, 2022) (“Prohibiting New Investment in and Certain Services to The Russian Federation in Response to Continued Russian Federation Aggression”).

142. *See* Department of the Treasury, Office of Foreign Assets Control, Determinations Pursuant to Section 1(a)(ii) of Exec. Order No. 14071, Prohibitions Related to Certain Accounting, Trust and Corporate Formation, and Management Consulting Services (May 8, 2022); *see also* Exec. Order No. 14071, 87 Fed. Reg. 68 (Apr. 6, 2022).

143. *See, e.g.*, Department of the Treasury, Financial Crimes Enforcement Network, *Advisory on Kleptocracy and Foreign Public Corruption*, FIN-2022-A001, 2 (Apr. 14, 2022).

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E. CRYPTOCURRENCIES & DIGITAL ASSETS

In 2022, OFAC also demonstrated a notable focus on sanction risks posed by the cryptocurrency industry, designating multiple cryptocurrency exchanges and mixers as SDNs on the basis of their role in facilitating sanction evasion and terrorist financing activity. Previously, OFAC had also issued sanctions and designated cryptocurrency mining company BitRiver and subsidiaries as entities involved in attempts to evade sanctions imposed on Russia.¹⁴⁴

More recently, an OFAC action against a so-called decentralized virtual currency mixer, Tornado Cash, garnered significant attention for its novelty in challenging a common industry belief that DeFi could not be subject to regulation or enforcement.¹⁴⁵ OFAC also brought several high-profile enforcement actions against cryptocurrency exchanges for failures to prevent sanctioned parties and countries from accessing their services.¹⁴⁶ In the press release, the U.S. OFAC mentioned more than USD \$7 billion laundered via Tornado Cash since its creation in 2019.¹⁴⁷ Additionally, Blender.io, another mixer operated as a centralized business but without AML/CFT controls, had been previously sanctioned in May 2022, and the operator of Bitcoin Fog was arrested in 2021.¹⁴⁸ Previously, Bestmixer.io and Helix were also targeted by law enforcement.

Since Tornado Cash was run in a decentralized manner, its being added to the sanctions listings as an entity, followed by the arrest of a Tornado Cash developer in Europe, led to concerns in the industry that blockchain developers may generally be exposed to criminal liability for simply developing privacy-enhancing software,¹⁴⁹ despite previous clarifications approved at the FATF level that software and blockchain developers and node validators would not be imposed AML/CFT requirements.¹⁵⁰ Typically, developers are not maintaining control over networks after

144. See, e.g., Press Release, U.S. Department of Treasury, Office of Foreign Assets Control, U.S. Treasury Designates Facilitators of Russian Sanctions Evasion (Apr. 20, 2022), <https://home.treasury.gov/news/press-releases/jy0731> [<https://perma.cc/5V2R-JURR>].

145. See, e.g., Press Release, U.S. Department of Treasury, Office of Foreign Assets Control, U.S. Treasury Sanctions Notorious Virtual Currency Mixer Tornado Cash (Aug. 8, 2022), <https://home.treasury.gov/news/press-releases/jy0916> [<https://perma.cc/SNL2-LW5X>].

146. See *id.*

147. See *id.*

148. See, e.g., Press Release, U.S. Department of Treasury, Office of Foreign Assets Control, U.S. Treasury Issues First-Ever Sanctions on a Virtual Currency Mixer, Targets DPRK Cyber Threats (May 6, 2022), <https://home.treasury.gov/news/press-releases/jy0768> [<https://perma.cc/8R5Y-J89T>].

149. See Jack Schickler, *Tornado Cash Developer's Arrest in the Netherlands Draws Community Protest*, COINDESK (Aug. 21, 2022), <https://www.coindesk.com/policy/2022/08/21/arrest-of-tornado-cash-developer-draws-dutch-crypto-community-protest/> [<https://perma.cc/D8VC-66MM>].

150. See *Updated Guidance for a Risk-Based Approach to Virtual Assets and Virtual Asset Service Providers*, FATF 35 (Oct. 2021), <https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Guidance-rba-virtual-assets-2021.html> [<https://perma.cc/5A8V-X6WD>].

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launch, which means that there is no operator to be held accountable for AML compliance.

In 2021, the FATF had widened the scope of its AML/CFT regulations standards to capture some of the DeFi projects, such as networks which are not fully decentralized and where operators, promoters, developers, and/or beneficial owners maintain some control or significant influence.¹⁵¹ Overall, the FATF left the specific rules to be implemented with respect to DeFi networks, subject to several principles, to national regulators. First, the recommendation from the FATF was that a case-by-case determination with a facts and circumstances test¹⁵² be carried out to identify individuals and/or legal entities which could potentially be considered VASPs in connection with a decentralized blockchain project, without taking account of any marketing terms and/or other labels, but rather the services provided by and/or the transactions carried out via the protocol or project. Regulators, in the absence of a legal entity connected to a project, may choose to require that a legal entity be designated for compliance purposes, and/or apply existing rules for non-hosted wallets and peer-to-peer (P2P) transactions. Finally, the FATF highlighted that while self-regulatory bodies would be generally insufficient in themselves, regulators should liaise and discuss potential solutions with the industry. This was consistent with the conclusions of the working group from the Financial Stability Institute (FSI) of the Bank for International Settlements (BIS) stating that collaboration and outreach are the recommended approaches for compliance in the VAs industry.¹⁵³

Finally, in addition to Sanctions and developments with respect to Travel Rule obligations and AML on transactions involving virtual currencies,¹⁵⁴ another aspect of AML compliance for crypto and digital assets for 2022 (and expected 2023 trend) is linked to the work of the Organization for Economic Cooperation and Development (OECD) on a global tax transparency framework to provide for the reporting and exchange of information with respect to crypto-assets. An example is the Crypto-Asset Reporting Framework (CARF),¹⁵⁵ which contains CRS modifications for the automatic transfer of financial account information between jurisdictions. The objective of CARF is to establish a framework that enables tax administrations to gather and share tax-relevant data on specific crypto-asset transactions.¹⁵⁶ CARF is meant to ensure that all assets covered under the

151. *See id.*; *see also supra* Section A, Section III.A.

152. *See Updated Guidance, supra* note 150, at 27-28.

153. *See* Financial Stability Institute, FSI Insights on Policy Implementation No. 31, Supervising Cryptoassets for Anti-Money Laundering, BANK FOR INT'L SETTLEMENTS 17 (Apr. 2021).

154. *See supra* Section B.1.a; *supra* section C.1.

155. *See* OECD, *Crypto-Asset Reporting Framework and Amendments to the Common Reporting Standard*, EY (Oct. 17, 2022), https://www.ey.com/en_gl/tax-alerts/oecd-publishes-final-crypto-assets-reporting-framework-and-amend [<https://perma.cc/B5UN-YLJH>].

156. *See id.*

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new tax reporting framework also fall within scope of AML/KYC obligations.¹⁵⁷ Due diligence procedures will be based on the CRS self-certification process and existing AML/KYC standards.¹⁵⁸

157. *See id.*

158. *See id.*

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International Tax

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I. Developments On the Taxation of Remote Work in 2022: Guidelines for Employers

A. INTRODUCTION

Since the start of the pandemic, many employers have become more flexible about permitting remote work. As a result, governments worldwide are reviewing, and sometimes updating, tax rules that apply to remote workers.

Before the pandemic, the number of employees working remotely in the United States was already on the rise, and that trend does not seem likely to reverse itself.¹ Employees are now deliberately pursuing remote work opportunities and increasing the talent pool for many employers, particularly individuals who might want to work for employers in different countries.² Many employers wish to allow remote work arrangements and

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1. Ryan Golden, *Most U.S. Employers with Flexible Work Plans Choose Hybrid Work*, *Mercer Says*, HR DRIVE (July 14, 2021), <https://www.hrdrive.com/news/most-us-employers-with-flexible-work-plans-choose-hybrid-work-mercero-says/603304/> [https://perma.cc/YW2N-8B3U]; see also *Statistics on Remote Workers That Will Surprise You*, APOLLO TECH. (Dec. 2, 2022), <https://www.apollotechnical.com/statistics-on-remote-workers/> [https://perma.cc/5HUE-4RHL].

2. *Statistics on Remote Workers That Will Surprise You*, APOLLO TECH. (Dec. 2, 2022), <https://www.apollotechnical.com/statistics-on-remote-workers/> [https://perma.cc/5HUE-4RHL].

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therefore attract remote workers from other countries who come to the physical office infrequently.³

Employers must investigate the tax consequences of hiring a remote employee located in a different country than any of an employer's other employees.⁴ Hiring such a person could make an employer liable for complying with requirements such as (1) income tax withholding, (2) unemployment tax withholding, and (3) potential nexus issues.⁵

Each country treats the three types of taxes listed above differently. Many countries have additional taxes or variations on the three listed taxes, and many countries have tax treaties with other countries; employers will need to determine which taxes are owed for each country, how to comply with these taxes, and then comply with these taxes annually.⁶

B. CANADA

A number of issues can arise if an employee of a non-Canadian employer works remotely from Canada. Unless the employee is seconded to a Canadian affiliate of the employer on a cost-recovery basis, the employer will be required to register with the Canada Revenue Agency (CRA).⁷ Among other things, depending on the circumstances, the employer may also have an obligation to file Canadian tax returns, pay Canadian income tax, and comply with payroll tax and/or value-added tax obligations.⁸

The discussion herein assumes that the remote working arrangement in Canada is intentional. Where the remote working arrangement arose or

3. Lynn Kier, *Remote Work: The Ultimate Equalizer for Talent Acquisition and Employee Experience*, FORBES (Aug. 10, 2020), <https://www.forbes.com/sites/forbescommunicationscouncil/2020/08/10/remote-work-the-ultimate-equalizer-for-talent-acquisition-and-employee-experience/?sh=377612507986> [https://perma.cc/9TVB-R2BS].

4. See, e.g., Roy Deaver, *5 Tax Considerations for International Remote Working*, (Feb. 2, 2021), <https://www.mossadams.com/articles/2021/02/international-tax-impacts-and-remote-work> [https://perma.cc/77GS-598C].

5. *Id.*

6. See Mo Bell-Jacobs et al., *Remote Workforces Are Complicating State Tax Nexus and Withholding*, RSM, <https://rsmus.com/insights/services/business-tax/remote-workforces-are-complicating-state-tax-nexus-and-withholdi.html> [https://perma.cc/2GPY-YSJ9] (last visited June 12, 2022); see also Paul Jones, *Remote Work Complicates Employer Tax Compliance, Pressures States to Revise Rules*, TAXNOTES (Apr. 5, 2022), <https://www.taxnotes.com/tax-notes-today-global/corporate-taxation/remote-work-complicates-employer-tax-compliance-pressures-states-revise-rules/2022/04/05/7db5p?highlight=remote%20Work%20Complicates%20Employer%20Tax%20Compliance%20C%20Pressures%20States%20to%20Revise%20Rules> [https://perma.cc/9ULN-RS78].

7. *Doing Business in Canada – GST/HST Information for Non-Residents*, CAN. REVENUE AGENCY (Jan. 24, 2023), <https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/rc4027/doing-business-canada-gst-hst-information-non-residents.html> [https://perma.cc/EY2D-87QY].

8. *Employer's Guide – Payroll Deductions and Remittances*, CAN. REVENUE AGENCY (Nov. 2, 2022), https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/t4001/employers-guide-payroll-deductions-remittances.html#P263_15329 [https://perma.cc/28K8-FBYC].

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continued due to Covid-19 travel restrictions, the CRA has provided for significant administrative concessions that limit a non-resident employer's exposure.⁹

1. *Canadian Payroll Tax Obligations*

Employers with employees living in Canada will have to register with the CRA for a payroll account because there will be payroll tax obligations (or the account will be required to obtain an exemption from some, or all, of its payroll tax obligations).¹⁰

In general, resident and non-resident employers have the same payroll tax obligations with respect to work performed in Canada by their employees, including deductions for income tax, Canada Pension Plan (CPP) contributions, employment insurance (EI) premiums, and any applicable provincial payroll taxes.¹¹

A non-resident employer without an establishment in Canada is generally not required to withhold CPP contributions.¹² Further, EI premiums are not required to be withheld if premiums are payable in respect of the Canadian employment services under the employment insurance laws of the employee's home country.¹³ Where CPP contributions and/or EI premiums must be deducted from an employee's pay, the employer is liable for CPP contributions and EI premiums on its own account.¹⁴

2. *Canadian Non-Resident Employer Certification*

Under a non-resident employer certificate regime, employers that are a resident of a treaty country and become certified by the CRA, are not required to deduct and remit Canadian income tax on remuneration paid to qualified non-resident employees.¹⁵ Qualifying employees must be:

- (1) A resident in a country with which Canada has a tax treaty;
- (2) Exempt from Canadian income tax on the remuneration because of that treaty; and

9. See *International Income Tax Issues: CRA and COVID-19*, GOV'T OF CAN. (Dec. 12, 2021), <https://www.canada.ca/en/revenue-agency/services/tax/international-non-residents/guidance-international-income-tax-issues-covid.html> [<https://perma.cc/Y8T9-4NAZ>].

10. *Determine If You Need to Register*, GOV'T OF CAN. (Jan. 25, 2017), <https://www.canada.ca/en/revenue-agency/services/tax/businesses/topics/payroll/determine-need-register.html> [<https://perma.cc/WZ43-T6YU>].

11. *Non-Resident Employer Certification*, GOV'T OF CAN. June 25, 2020), <https://www.canada.ca/en/revenue-agency/services/tax/international-non-residents/information-been-moved/rendering-services-canada/non-resident-employer-certification.html#> [<https://perma.cc/D2RW-TX4R>].

12. Canada Pension Plan Regulations, C.R.C., c.385 s.22(1).

13. Employment Insurance Regulations, SOR/96-332, s.7(d) (Can.).

14. Canada Pension Plan, R.S.C. 1985, c.C.8 s.21; Employment Insurance Act, S.C. 1996, c.23 s.82(4).

15. Income Tax Act R.S.C 1985, c.1 (5th Supp.) s.153(1)(a)(ii) (Can.).

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(3) Either (A) not in Canada for ninety or more days in any twelve-month period that includes the payment time, or (B) not in Canada for forty-five or more days in the calendar year that includes the payment time.¹⁶

The employer will generally have continuing reporting obligations on amounts paid to its qualifying non-resident employees.¹⁷ Further, the employer may be liable for withholdings to the extent that the non-resident employees were not in fact qualifying non-resident employees.¹⁸

If the employer is not certified as described above, or the employee is not a qualified non-resident employee, the employee can apply for an exemption via a Regulation 102 waiver if the remuneration is exempt from Canadian income tax because of a tax treaty.¹⁹

3. *Income Tax Obligations*

Having an employee in Canada will raise an employer's risk of being classified as carrying on business in Canada.²⁰ Subject to a treaty exemption, a non-resident "carrying on business" in Canada is generally liable for tax with respect to profits from such business activities.²¹

Under one test commonly used by Canadian tax courts, a non-resident would generally be found to be carrying on business in the jurisdiction where the business contract is concluded, or where the center of profit-making activities is located.²² Further, certain activities of the employee may cause the employer to be deemed as carrying on business in Canada, such as where the employee "solicits orders or offers anything for sale in Canada . . . whether the contract or transaction is to be completed inside or outside Canada."²³

An employer that is entitled to treaty benefits is not generally liable for Canadian income tax with respect to its business profits, provided it does not carry on the subject business through a permanent establishment (PE) in

16. *Id.* s.153(6).

17. *Non-Resident Employees Who Carry Out Services in Canada*, GOV'T OF CAN. (Jan. 31, 2020), <https://www.canada.ca/en/revenue-agency/services/tax/businesses/topics/payroll/payroll-deductions-contributions/income-tax/non-resident-employees-who-perform-services-canada.html> [<https://perma.cc/7M6K-K7V6>].

18. Income Tax Act, s.153(3.1) (Can.).

19. *See Regulation 102 Waiver Application*, CAN. REVENUE AGENCY (Aug. 3, 2021), <https://www.canada.ca/content/dam/cra-arc/formspubs/pbg/r102-r/r102-r-21e.pdf>. [<https://perma.cc/QH97-U7PB>].

20. Income Tax Act, s.253 (Can.).

21. *Id.*

22. Peter Aprile & James Roberts, *Corporate Tax Residency in Canada: The Legal Tests Explained*, COUNTER TAX (Nov. 11, 2021), <https://www.countertax.ca/blog/corporate-tax-residency-in-canada-legal-tests> [<https://perma.cc/JG77-QQJW>].

23. Income Tax Act, s.253 (Can.).

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Canada.²⁴ If the employee has the authority to conclude contracts in Canada, the tax treaty may deem that the employer has a PE in Canada.²⁵ Under certain treaties such as the Canada-U.S. tax treaty, there is additional risk of a deemed PE if the employee is providing services on behalf of the employer.²⁶

A non-resident carrying on, or deemed to be carrying on, business in Canada in a year is required to file a Canadian tax return with respect to that year, even if they are exempt from tax by reason of a tax treaty.²⁷

If the employee is providing services in Canada, the employer's customer may be required to deduct and remit fifteen percent of the payment for such services to the CRA unless a waiver is obtained.²⁸ In many situations though, the customer may not be aware that any part of the service is being provided from inside Canada. These withholdings are applied against the non-resident service provider's potential Canadian income tax liabilities for the year.²⁹

Employers may be eligible to apply for a waiver to eliminate or reduce the withholding. Treaty-based waivers are available to treaty residents that do not have a PE in Canada.³⁰ Income and expense waivers are available to allow a payer to withhold tax at a reduced rate based on the employer's anticipated net income on the services rendered.³¹

C. CHINA

1. *Individual Income Tax Law of the People's Republic of China*

Foreign nationals have enjoyed certain tax benefits in China for a long time.³² Examples include a reasonable allowance for housing, food, and laundry expenses, a relocation allowance, a business travel allowance, a home leave allowance; language trainings for executives and school fees for

24. Convention between Canada and the United States of America with respect to Taxes on Income and on Capital, Can.-U.S., Sept. 26, 1980, 1984 Can. T.S. No. 15, art. V(7).

25. *Id.* art. V(5).

26. *Id.* art. V.

27. Income Tax Act, s.250(1) (Can.).

28. Income Tax Regulations, C.R.C., c.945 s.105 (Can.).

29. *Required Withholdings from Amounts Paid to Non-Residents Providing Services in Canada*, CAN. REVENUE AGENCY (Feb. 24, 2020), <https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/ic75-6/required-withholding-amounts-paid-non-residents-providing-services-canada.html> [<https://perma.cc/PV9C-H6XL>].

30. *See Regulation 105 Waiver Application*, CAN. REVENUE AGENCY (Aug. 3, 2021), <https://www.canada.ca/content/dam/cra-arc/formspubs/pbg/r105/r105-21e.pdf> [<https://perma.cc/2ZNS-3NG8>].

31. *Id.*

32. *China Rolling Back Tax Exempt Benefits for Expats in 2022*, INTEGRA GRP. (Dec. 24, 2021), <https://www.integra-group.cn/tax-exempt-benefits-for-expats-ending-2022/> [<https://perma.cc/H6GT-3KMQ>].

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children are tax exempted.³³ In 2018, China amended its Individual Income Tax Law to provide that these benefits would sunset by December 31, 2021.³⁴ But, on December 31, 2021, China issued a notice declaring that these tax benefits were extended for foreign nationals until December 31, 2023.³⁵ This policy does not appear to be a direct response to Covid-19; instead, it seems to be a policy to attract foreign investment in China.

Starting from January 1, 2022, China encourages individuals to set up individual personal pension account. Each individual can contribute up to RMB 12,000 per year to his/her personal pension account, and such contribution amount will be deducted from his/her taxable income for that contribution year. The earnings made by the personal pension account prior to retirement age are tax deferred, and when the individual withdraws the pension after reaching retirement age, the withdrawn amount will be subject to only three percent income tax.³⁶ Though this policy is issued during the pandemic period, it intends to address the issue of inadequacy of the pension fund administered by the government to pay higher amount of the pension resulting from increasingly bigger aging populations.

2. *Corporate Income Tax Law*

During the period from January 1, 2019, to December 31, 2021, certain small companies with a small profit margin enjoyed a reduced corporate income tax rate.³⁷ Qualifying companies were companies that (1) engaged in

33. Notice of the Ministry of Finance and the State Administration of Taxation on Several Policy Issues Concerning Individual Income Tax [财政部 国家税务总局关于个人所得税若干政策问题的通知], STATE TAX ADMIN. [国家税务总局] (May 12, 1994), <http://www.chinatax.gov.cn/chinatax/n363/c1186/content.html> [https://perma.cc/8KUG-CYZ7]; Notice of the State Administration of Taxation on Issues Concerning the Implementation of an Individual Income Tax Levy or Exemption on Allowance of Foreign Individuals [国家税务总局关于外籍个人取得有关补贴征免个人所得税执行问题的通知], STATE TAX ADMIN. [国家税务总局] (Apr. 9, 1997), <http://www.chinatax.gov.cn/chinatax/c101249/c101638/index.html>.

34. Press Release, The Min. of Fin. & The State Admin. of Taxation [国家税务总局], Notice of the Min. of Fin. and the State Admin. of Taxation on issues related to the convergence of preferential policies after the revision of the Individual Income Tax Law [财政部 税务总局关于个人所得税法修改后有关优惠政策衔接问题的通知] (Dec. 26, 2018), <http://www.chinatax.gov.cn/n810341/n810755/c3978994/content.html> [https://perma.cc/R57X-UBCY].

35. Press Release, The Min. of Fin. & The State Admin. of Taxation [国家税务总局], Notice of the Min. of Fin. and the State Admin. of Taxation on Continuing Implementing Certain Allowances Relating to Individual Income Tax Beneficial Policy In Favor of Foreign Nationals [财政部、税务总局关于延续实施外籍个人津补贴等有关个人所得税优惠政策的公告], (Dec. 31, 2021), <http://fgcx.bjcourt.gov.cn:4601/law?fn=CH1610s105.txt&truetag=2923&titles=&contents=&dbt=CH1> [https://perma.cc/37A2-D8PW].

36. Press Release, The Min. of Fin. & The State Admin. of Taxation [国家税务总局], Notice of the Min. of Fin. and the State Admin. of Taxation on Individual Income Tax Policy relating to Personal Pension Fund [财政部、税务总局关于个人养老金有关个人所得税政策的公告], (Nov. 3, 2022), <http://www.chinatax.gov.cn/chinatax/n363/c5182621/content.html>.

37. Press Release, The Min. of Fin. & The State Admin. of Taxation [国家税务总局], Notice of the Min. of Fin. and the State Admin. of Taxation on Further Implementing Corporate

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industries that were not prohibited or restricted; (2) had a taxable income less than RMB three million and the number of the employees was no more than 300 people; and (3) with total assets not exceeding RMB 50 million.³⁸

If a company's taxable income was less than RMB 1 million, only 12.5 percent of the taxable income was subject to corporate income tax, and the applicable tax rate was decreased from the standard corporate income tax rate of twenty-five percent to twenty percent, meaning the qualifying companies only needed to pay 2.5 percent corporate income tax rate.³⁹ This preferential rate expired on December 31, 2022;⁴⁰ however, during the period from January 1, 2023 to December 31, 2024, if a company's taxable income was less than RMB 1 million, only twenty-five percent of the taxable income was subject to corporate income tax, and the applicable tax rate is twenty percent, meaning the qualifying companies only need to pay five percent corporate income tax rate.⁴¹

For companies whose taxable income was more than RMB one million but less than RMB 3 million, only twenty-five percent of its taxable income was subject to corporate income tax, and the applicable tax rate was decreased from the standard corporate income tax rate of twenty-five percent to twenty percent.⁴² This reduction meant the qualified companies only needed to pay five percent corporate income tax rate.⁴³ This preferential corporate income tax rate was applicable from January 1, 2022, to December 31, 2024.⁴⁴

For qualified manufacturing companies whose annual sales are more than RMB 20 million but less than RMB 400 million, the payment date for fifty percent of corporate income tax payable after October 1, 2021, can be deferred to January 15, 2023.⁴⁵ Companies that paid the enterprise income

Income Tax Preferential Policy to Small Companies [财政部 税务总局关于进一步实施小微企业所得税优惠政策的公告], (Mar. 14, 2022), <http://www.chinatax.gov.cn/chinatax/n362/c5173677/content.html> [https://perma.cc/TRC8-FQDB].

38. *Id.*

39. Press Release, The State Admin. of Taxation [国家税务总局], Notice of the State Admin. of Taxation on Issues relating to Implementing Income Tax Preferential Policy to Small Companies with Small Profit Margin and Individual Industry and Commerce Households [国家税务总局关于落实支持小型微利企业和个体工商户发展所得税优惠政策有关事项的公告] (Apr. 7, 2021), <http://www.chinatax.gov.cn/chinatax/n362/c5163255/content.html> [https://perma.cc/2SZF-YCL8].

40. *Id.*

41. Press Release, The Min. of Fin. & The State Admin. of Taxation [国家税务总局], Notice of the Min. of Fin and State Admin. of Taxation on Issues relating to Income Tax Preferential Policy to Small Companies with Small Profit Margin and Individual Industry and Commerce Households [财政部 税务总局关于小微企业和个体工商户发展所得税优惠政策的公告] (Mar. 26, 2023), <http://www.chinatax.gov.cn/chinatax/n362/c5185878/content.html>.

42. The Min. of Fin. & The State Admin. of Taxation [国家税务总局], *supra* note 36.

43. *Id.*

44. *Id.*

45. Press Release, The Min. of Fin. & The State Admin. of Taxation [国家税务总局], Notice on Issues Concerning Midsized and Small Manufacturing Enterprises Defer Payment of the Partial Taxes for Fourth Quarter of 2021 [国家税务总局 财政部关于制造业中小微企业延缓缴

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taxes during the period from November 2011 to February 2, 2022, can voluntarily apply for a refund.⁴⁶

Small manufacturing companies whose sales revenues are less than RMB 20 million can defer 100 percent of the corporate income tax payable for the fourth quarter of 2021 and the first and second quarter of 2022 until January 2023 and May 15, 2023, respectively.⁴⁷

D. COSTA RICA

Costa Rica is widely known for its natural wonders: majestic rainforests, active volcanoes, and dreamy beaches. In 2019, Costa Rica had its best tourism year ever, surpassing three million arrivals of international tourists.⁴⁸ According to the Costa Rican Central Bank, the tourism industry represents approximately 6.3 percent of the country's GDP, which jumps to 8.2 percent when the indirect contributions are included.⁴⁹ The tourism industry employs 8.8 percent of the country's workforce.⁵⁰ 2020 was expected to greatly exceed the numbers from the prior year, but that expectation

纳2021年第四季度部分税费有关事项的公告], (Oct. 29, 2021), <http://www.chinatax.gov.cn/chinatax/n362/c5170139/content.html> [https://perma.cc/G7SP-YNQ3].

46. Tax payments for the 4th quarter of 2021 are deferred by three months. *See id*; *see also* Press Release, The Min. of Fin. & The State Admin. of Taxation [国家税务总局], Notice Concerning the Continuation of the Implementation of the Deferral of Partial Tax Payment by Small, Medium and Micro Enterprises in the Manufacturing Industry [国家税务总局 财政部关于延续实施制造业中小微企业延缓缴纳部分税费有关事项的公告] (Feb. 28, 2022), <http://www.chinatax.gov.cn/chinatax/n810341/n810825/c101434/c5173058/content.html> [https://perma.cc/VFF5-HPYR]. Further, mid-sized manufacturing companies can defer the 50% of the enterprise income tax due and payable for first and second quarter of 2022 for six months and the small manufacturing company can defer 6 months. *Id.* The Ministry of Finance & The State Administration of Taxation further permitted that the payment date can be differed by another four months. *See* Press Release, The Min. of Fin. & The State Admin. of Taxation [国家税务总局], Notice on Matters Concerning the Continued Delay of Payment of Some Taxes and Fees by Small, Medium and Micro Enterprises in the Manufacturing Industry [国家税务总局 财政部关于制造业中小微企业继续延缓缴纳部分税费有关事项的公告], (Sept. 14, 2022), <http://www.chinatax.gov.cn/chinatax/n810341/n810825/c101434/c5181400/content.html> [https://perma.cc/6E7Q-VTED].

47. Press Release, The Min. of Fin. & The State Admin. of Taxation [国家税务总局], Notice on Matters Concerning the Continued Delay Of Payment Of Some Taxes And Fees By Small, Medium And Micro Enterprises In The Manufacturing Industry [国家税务总局 财政部关于制造业中小微企业继续延缓缴纳部分税费有关事项的公告], (Sept. 14, 2022), <http://www.chinatax.gov.cn/chinatax/n810341/n810825/c101434/c5181400/content.html> [https://perma.cc/6E7Q-VTED].

48. *Costa Rica Registers Increase in Tourist Visits in 2019*, TICO TIMES (Feb. 6, 2020), <https://ticotimes.net/2020/02/06/costa-rica-registers-increase-in-tourist-visits-in-2019> [https://perma.cc/45QE-36HW].

49. *Costa Rica Seeks to Position Itself as The Perfect Destination To Connect With Life's Essential Values*, INSTITUTO COSTARRICENSE DE TURISMO, <https://www.ict.go.cr/en/featured-news/1558-costa-rica-seeks-to-position-itself-as-the-perfect-destination-to-connect-with-life%E2%80%99s-essential-values.html> [https://perma.cc/8PRN-WCY8] (last visited Mar. 27, 2023).

50. *Id.*

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dimmed when COVID-19 caused borders to be closed to travel for approximately seven months.⁵¹ COVID-19's impact on the Costa Rican economy was significant and many people suffered economic hardships as a result of the country closing its borders.⁵²

The "Digital Nomads Law"⁵³ (Law) was one of Costa Rica's efforts to attract international workers to revive the deeply injured tourism industry. The Law sought to regulate the activity of those foreigners who were authorized to enter and remain in the country under the migratory category of Non-Resident, Subcategory of Stay, "Worker or Remote Service Provider."⁵⁴ The Law also regulates the tax benefits on profits and the importation of equipment necessary for the digital nomad to provide its services.⁵⁵ But, the Law's main purpose is to make it easier for people from different parts of the world to work from Costa Rica, to potentially attract consequential investments and contributions that originate from this type of activity, and to promote long-term visits to Costa Rica that will hopefully result in an increase in foreign spending in Costa Rica.⁵⁶ While the Digital Nomads Law was approved in July 2021, the applicable regulations⁵⁷ were not approved until mid-2022, so the Immigration Office did not begin to apply the provisions until the regulations were approved.

The requirements to apply for a digital nomad permit are minimal, as the Law only requires a minimum income of USD \$3,000 for individuals travelling alone, or an income of USD \$4,000 for individuals travelling with their families.⁵⁸ Medical insurance is also necessary to cover any health issues while in the country. But, digital nomads cannot work for Costa Rican employers, which means that they must be hired by a non-domiciled entity, and they cannot provide their services locally.⁵⁹

The application process is very simple and can be done online. Once approved, an individual may remain in Costa Rica for a twelve-month period, which may be extended for another twelve months.⁶⁰

51. Alvaro Murillo, *Costa Rica Sees Ailing Tourist Trade Stagnant In 2021 After COVID-19 Blow*, REUTERS (Jan. 30, 2021), <https://www.reuters.com/article/us-costarica-tourism/costa-rica-sees-ailing-tourist-trade-stagnant-in-2021-after-covid-19-blow-idUSKBN29Z0SV> [https://perma.cc/89PB-QWZ5].

52. *Id.*

53. Ley No. 10008, 1 Sept. 2021, Ley Para Atraer Trabajadores Y Prestadores Remotos De Servicios De Carácter Internacional [Law to Attract International Remote Workers and Service Providers] LA GACETA, DIARIO OFICIAL [L.G.] (Costa Rica).

54. *Id.* art. 2.

55. *Id.* art. 17.

56. *Id.* art. 1.

57. Decreto No. 43619 H-MGP-TUR, 8 July 2022, Reglamento A La Ley No. 10008 "Ley Para Trabajadores Y Prestadores Remotos De Servicios De Carácter Internacional" [Regulations for Law No. 10008 "Law to Attract International Remote Workers and Service Providers] LA GACETA, DIARIO OFICIAL [L.G.] (Costa Rica).

58. Ley No. 10008, art. 10 (Costa Rica).

59. *Id.* art. 14.

60. *Id.* art. 15.

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The most attractive benefit from a tax perspective is that any income generated from digital nomad activities is not considered Costa Rica-source income, and therefore is not subject to taxation under Costa Rican Law.⁶¹ The Costa Rican tax system is based on the “territoriality principle,” whereby only income derived from Costa Rican sources is subject to Costa Rican income tax.⁶² Costa Rica-source income is defined as any income derived from services rendered, goods located, or investments used within the Costa Rican territory.⁶³ This definition means a tax is also imposed on occasional or continual revenues derived by legal entities or individuals within the national territory, regardless of the citizenship or residence of the recipient of such income.⁶⁴

Thus, it is likely that both legal entities and individuals in Costa Rica will be taxed based on territoriality, meaning that only income derived from local sources should be subject to taxation, regardless of the citizenship or residence of the recipient of such income.⁶⁵ Tax rates for individuals range from zero percent up to twenty-five percent,⁶⁶ so being able to remain in the country and work for up to two years without being taxed is a very attractive incentive for remote workers and their employers.

The Digital Nomad permit is vital for people wishing to work remotely from Costa Rica.⁶⁷ Anyone attempting to skirt the permit requirements will meet a hard and harsh time limit of three months, as opposed to the twenty-four months available with the permit. Most individuals are only allowed to stay for ninety days on a tourism visa.⁶⁸ More importantly, the Costa Rican Income Tax Law establishes that an individual becomes a tax resident after spending 183 days,⁶⁹ consecutive or not, in Costa Rica, during the same fiscal year. Thus, even if a worker’s income is derived from foreign sources, they may accidentally become a tax resident and run the risk that the Costa Rican Tax Authorities would consider all of their income as Costa Rican-sourced and attempt to tax it as such.⁷⁰

All foreign employers who are aware that they have employees or contractors working from Costa Rica are advised to require those workers to

61. *Id.* art. 16.

62. Daniel Araya, *Global Tax Guide to Doing Business in Costa Rica*, DENTONS, <https://www.dentons.com/en/services-and-solutions/global-tax-guide-to-doing-business-in/costa-rica> [<https://perma.cc/U6QM-XZGN>] (last visited Mar. 28, 2023).

63. Ley No. 7092, 19 May 1988, Ley Del Impuesto Sobre La Renta [Income Tax Law] LA GACETA, DIARIO OFICIAL [L.G.], art. 1 (Costa Rica).

64. *Id.*

65. *Id.*

66. *Id.* art. 15.

67. Ley No. 10008, art. 15 (Costa Rica).

68. *Visas, Residences, Permits*, EMBAJADA DE COSTA RICA EN WASHINGTON DC, <http://www.costarica-embassy.org/index.php?qNde/72#1> [<https://perma.cc/UX93-66MF>] (last visited Mar. 28, 2023).

69. Ley No. 7029, art. 2 (Costa Rica).

70. *Id.*

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provide them with a copy of their Digital Nomad permit to avoid incurring mirroring liabilities.

The Law is an important instrument to attract individuals to Costa Rica. It is designed to tempt people to live and work in the country for up to two years to help reactivate the Costa Rican economy. Unfortunately, it is unclear if the government's investment strategy will be successful yet because of the delay in the implementation of related immigration regulations. But the country remains optimistic, and as of the publication of this article, Costa Rica's international travel numbers are reaching – and possibly on track to exceeding – the record-high number of visitors seen in 2019.⁷¹

E. NEW ZEALAND

New Zealand's geographic remoteness from its trading neighbors caused the country to be an early adopter of international remote working, for both inbound and outbound work. This article considers New Zealand's key domestic tax changes in the 2022 calendar year affecting remote workers under two specific scenarios:

- (1) *Scenario One*: New Zealand tax residents travelling abroad while continuing to work for their New Zealand employer; and
- (2) *Scenario Two*: Tax residents of foreign countries coming to work in New Zealand while continuing to work for their foreign employer.

All section references are to the Income Tax Act 2007 (ITA)⁷² and all clause references are to the Taxation Annual Rates for 2022–23, Platform Economy, and Remedial Matters Bill (No 2-2022).⁷³ New Zealand's domestic tax provisions generally require its employers to withhold tax on remuneration, non-cash benefits, and certain superannuation contributions to employees under the Pay as You Earn (PAYE) system, pay fringe benefit tax (FBT) and employer's superannuation contribution tax (ESCT) (together referred to as tax deduction obligations).⁷⁴ Employees must pay New Zealand income taxes if the income is earned in New Zealand.⁷⁵ Further, an employee is liable for income tax in New Zealand, regardless of

71. Ana M. López, *Inbound Tourism Volume in Costa Rica 2010-2022*, STATISTA (Feb. 28, 2023), <https://www.statista.com/statistics/816547/costa-rica-number-of-tourist-arrivals/> [https://perma.cc/G2W6-7JFY].

72. See generally Income Tax Act 2007 (N.Z.).

73. See generally Taxation Annual Rates for 2022–23, Platform Economy, and Remedial Matters Bill 2022 (161-1) (N.Z.).

74. Commentary on the Taxation (Annual Rates For 2022-23, Platform Economy, and Remedial Matters) Bill (No 2) [hereinafter Commentary], Inland Revenue 43 (2022).

75. Income Tax Act, s YD 4(4) (N.Z.).

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where the income is earned, if the employee is a New Zealand tax resident.⁷⁶ These requirements may be modified by a Double Tax Agreement (DTA).⁷⁷

Legal changes have affected New Zealand tax residents travelling abroad while continuing to work for their New Zealand employer. Typically, a New Zealand employer's tax deduction obligation only ceases if the employee becomes a non-resident for tax purposes.⁷⁸ But, a special rule applies to trailing payments, for example, a bonus relating to the employee's work in New Zealand that is paid after the employee leaves the country.⁷⁹ Such trailing payments are still subject to New Zealand tax deduction obligations even if the employee is no longer a tax resident.⁸⁰

Receipt of a trailing payment can have an unintended follow-on New Zealand tax effect.⁸¹ Specifically, if the employee receives a current period non-cash benefit with respect to their employment abroad, that non-cash benefit is also subject to New Zealand FBT.⁸² The 2022 Taxation Bill proposes to correct this unintended FBT effect. Under the new law, the employer will not be subject to FBT on non-cash benefits provided whilst working abroad, assuming the non-cash benefit does not relate to the employee's time spent in New Zealand.⁸³

The legal changes also affect residents of foreign countries working for their foreign employer while living in New Zealand. Foreign employers and employees temporarily working in New Zealand will not have a tax deduction obligation or income tax liability, respectively, if the employee's presence in the country is below the domestic tax exempt threshold of ninety-two days, or the relevant DTA threshold which is typically 183 days.⁸⁴ When the employee's presence in New Zealand exceeds these time thresholds, then the respective tax deduction obligations and employee income tax liabilities commence on the first day (commencement) of the employee's presence in New Zealand.⁸⁵ For example, an employer may choose not to deduct PAYE from payments made to an employee scheduled to work on a project in New Zealand for ninety days. If, due to unforeseen project delays, the employee is in the country for ninety-three days (assuming no DTA concessions apply), then the employer will be in breach of its tax deduction obligations and will be required to pay the core tax plus

76. *Id.* ss BD 4, CE 1; *see also* Inland Revenue, Operational Statement: Non-Resident Employers' Obligations To Deduct PAYE, FBT And ESCT In Cross-Border Employment Situations, ¶ 3 (Dec. 1, 2021).

77. Income Tax Act, s BH 1(2) (N.Z.).

78. Commentary, *supra* note 74, ¶ 4, at 2.

79. *Id.* at 59.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*; Taxation (Annual Rates for 2022–23, Platform Economy, and Remedial Matters) Bill (No 2) [hereinafter Taxation Bill] 2022 (164-3), cl 28 (N.Z.).

84. Income Tax Act, s CW 19(1) (N.Z.).

85. COMMENTARY, *supra* note 72, at 45.

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penalties and interest calculated from the first day in the ninety-two-day period.⁸⁶

The 2022 Taxation Bill proposes a number of amendments, including the introduction of a sixty-day grace period.⁸⁷ The grace period applies where an employer has taken reasonable measures to comply with their tax deduction obligations, but nonetheless, the employee has breached the relevant day's threshold.⁸⁸ In this case, no penalties and interest will apply if the employer corrects and pays the required amount of tax within a defined sixty-day grace period.⁸⁹

V. Puerto Rico

The lockdowns implemented around the world due to the COVID-19 pandemic caused Puerto Ricans who had left the island for work to return and perform their work remotely from Puerto Rico. It also caused individuals who had never lived in Puerto Rico to become interested in moving to Puerto Rico to work remotely. This trend caused the foreign employers of these individuals to worry about (1) whether the activities of such employees would render them engaged in a trade or business in Puerto Rico (ETB-PR) and (2) whether they had any local tax compliance requirements with respect to the salaries paid to such employees for services rendered from Puerto Rico.

Regulations issued under Section 1062.01 of the Puerto Rico Internal Revenue Code of 2011, as amended (PR Code), provide that salaries subject to Puerto Rican income tax withholding include the remuneration for services rendered in Puerto Rico by an employee of a foreign entity (i.e., an entity organized outside of Puerto Rico) regardless of whether or not such foreign entity is ETB-PR.⁹⁰ Non-ETB-PR foreign entities with this determination must register as employers for Puerto Rico income tax purposes and comply with the related income tax withholding, remittance, and withholding obligations.⁹¹ Salaries paid to employees working in Puerto Rico are subject to Puerto Rican income tax withholding,⁹² as well as U.S. Social Security and Medicare tax withholding.⁹³

Thus, when employers have an employee who is working remotely from Puerto Rico, that employee may cause a foreign employer to be deemed ETB-PR due to their working activities—although this is highly dependent on the duties and position of the employee in question.⁹⁴ Pursuant to local

86. *Id.* at 45-47.

87. *Id.* at 46.

88. *Id.*

89. *Id.*; Taxation Bill, cls 16–18, 91 (N.Z.).

90. P.R. Internal Revenue Reg. 1062.01(a)(1)-1(g).

91. *Id.* §§ 1062.01(a)(1)-1(g)(1).

92. P.R. LAWS ANN. tit. 13, § 30271(b).

93. 26 U.S.C. § 3121(a), (e) (2022).

94. P.R. LAWS ANN. tit. 13, §§ 1062.01(a)(1)-1(g).

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regulations, certain *de minimis* services rendered in Puerto Rico through employees that are residents of Puerto Rico will not render a foreign corporation ETB-PR.⁹⁵ *De minimis* services are those services that are not substantial compared to all the activities conducted by the foreign entity, and that require the utilization of a minimum of the entity's resources.⁹⁶ The determination of whether services are *de minimis* is based on the facts and circumstances of each case.⁹⁷

Act 52-2022, approved on June 30, 2022 (Act 52), amended the Puerto Rico Code definition of the term "trade or business" to include, for taxable years beginning after December 31, 2021, the concept of "remote worker" for purposes of determining whether such individual's employer is ETB-PR.⁹⁸ The term "remote worker" is defined as an individual who performs services as an employee for the benefit of a nonresident person (Remote Worker).⁹⁹ For these purposes, the term nonresident person includes: (1) an individual who is not a resident of Puerto Rico; (2) a trust whose beneficiary(es), grantor(s), and trustee(s) are not resident of Puerto Rico; (3) an estate whose decedent, heir(s), legatee(s), or executor(s) are not, or, in the case of the decedent, have not been residents of Puerto Rico; or (4) a foreign entity.¹⁰⁰ In this context, the term services includes only services that do not have a nexus with Puerto Rico rendered to an employer that complies with the provisions of section 1010.01(a)(40)(D) of the PR Code.¹⁰¹

Pursuant to Section 1010.01(a)(40)(D) of the PR Code,¹⁰² for taxable years beginning after December 31, 2021, foreign employers that maintain Remote Workers in Puerto Rico will not be considered ETB-PR, only if:

- (1) At no time during the taxable year does the foreign employer have an office or other fixed place of business in Puerto Rico;
- (2) At no time does the foreign employer have an economic nexus with Puerto Rico;
- (3) The foreign employer is not considered a merchant for sales and use tax purposes;
- not an officer, director or majority shareholder of the foreign employer;
- (5) The services provided by the Remote Worker are provided for the benefit of customers or businesses of the foreign employer that do not have a nexus with Puerto Rico; and

95. P.R. Internal Revenue Reg. § 1231-1(d)(1)(ii)(A)–(G).

96. *Id.* § 1231-1(d)(1)(ii).

97. *Id.* § 1231-1(d)(1)(ii)(G).

98. See generally Act No. 52-2022 of June 30, 2022, H.B. 1367 (amending P.R. Internal Revenue Code § 1010.01(a)(40)(D)).

99. See generally *id.* (amending P.R. Internal Revenue Code § 1010.01(1)(42)); P.R. LAWS ANN. tit. 13, § 30041(a)(42).

100. P.R. LAWS ANN. tit. 13, § 30041(a).

101. P.R. Internal Revenue Code § 1010.01(a)(40)(D).

102. Act No. 52-2022 of June 30, 2022, H.B. 1367 (amending P.R. Internal Revenue Code § 1010.01(a)(40)(D)).

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(6) The foreign employer reports the income paid to the Remote Worker on a Federal W-2 Form or on a Form 499R-2/W-2PR (“W-2 Form”).¹⁰³

Foreign employers that allow employees to carry out their work remotely from Puerto Rico will not have an economic nexus with Puerto under the law even when:

- (1) The Remote Worker’s home office is necessary for employment or is a condition for employment;
- (2) There is a business purpose to allow the Remote Worker’s home to be used as his or her office;
- (3) The Remote Worker is required to perform some basic duties of his or her work from a location of the employer; and
- (4) Some of the expenses of the remote worker to have the office to work from home may be reimbursable by the employer.¹⁰⁴

Instead of being subject to Puerto Rico income tax withholding by the employer,¹⁰⁵ salaries paid to remote workers are subject to the payment of estimated taxes by such workers.¹⁰⁶ Remote workers are eligible for a foreign tax credit for the amount of any income and excess profits tax paid or accrued during the tax year to any possession of the United States or any state of the United States on salaries earned for services rendered in Puerto Rico.¹⁰⁷ The Secretary of the Treasury shall establish the necessary regulations to limit this credit only to states and territories of the United States whose source of income rule in the case of wages is based on the employer’s residence or place where the employer conducts business.¹⁰⁸

The amendments introduced to the PR Code by Act 52 create a special regime for remote workers whereby they are essentially treated as independent contractors with salaries reported in a W-2 Form.¹⁰⁹ By shifting the tax compliance burden to the remote worker and creating a safe harbor where foreign employers are not considered ETB-PR because of worker activities in Puerto Rico, current laws make it easier for foreign employers to allow their employees to work remotely from Puerto Rico.¹¹⁰

103. *Id.* (amending P.R. Internal Revenue Code § 1010.01(a)(40)(D)(VI)).

104. *Id.* (amending P.R. Internal Revenue Code § 1010.01(a)(40)(D)(ii)(IV)).

105. P.R. LAWS ANN. tit. 13, § 30271(b).

106. Act No. 52-2022 of June 30, 2022, H.B. 1367 (amending P.R. Internal Revenue Code § 1061.20(g); P.R. LAWS ANN. tit. 13, § 30260(g)).

107. Act No. 52-2022 of June 30, 2022, H.B. 1367 (amending P.R. Internal Revenue Code § 1051.01(a)(5)); P.R. LAWS ANN. tit. 13, § 30201(a)(5).

108. P.R. LAWS ANN. tit. 13, § 30201(a)(5).

109. Act No. 52-2022 of June 30, 2022, H.B. 1367 (amending P.R. Internal Revenue Code § 1010.01(a)(40)(D)(IV)).

110. *Id.*

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VI. Spain

A. SPANISH NON-RESIDENT INCOME TAX RULES¹¹¹

The Spanish Tax Administration has referred to teleworking in several binding tax rulings.¹¹² Although the administration concluded that the non-resident company was not acting through a permanent establishment in Spain (under domestic provisions and article five of the OECD Model Tax Convention),¹¹³ the lack of background functions carried out by the employee in Spain means that those precedents do not constitute a clear guidance on how future rulings may be applied related to remote workers.

In previous cases, the Spanish Tax Administration made a distinction based on whether the employees developed internal or external tasks linked to a business activity of their employer that were related to the core business of the company.¹¹⁴ In some cases, a reference to the business operative in the Spanish market has been considered as a relevant factor.¹¹⁵

The most recent precedent is the binding ruling, V0066-22, dated January 18, 2022, where the Spanish Tax Administration addressed the issue of an individual from the United Kingdom that was stuck in Spain during the COVID-19 pandemic, and after the first period of lock-down unilaterally decided to stay in Spain even though the employer required his return (thus triggering the employee's termination).¹¹⁶ It was concluded that the United Kingdom employer did not act through a permanent establishment in Spain.¹¹⁷ Factors that contributed to this conclusion included; the circumstances surrounding the pandemic; the availability of premises for the worker in the United Kingdom; and that the company did not reimburse any expenses connected with remote work.¹¹⁸ The Spanish General Directorate for Taxes made an express reference to the Commentaries in article 5 of the

111. Revised Nonresident Income Tax Law (R.D.L. 2004, 5) (Spain).

112. *V1305-15*, DIRECCIÓN GENERAL DE TRIBUTOS [THE SPANISH DIRECTORATE GENERAL FOR TAXATION] (Apr. 28, 2015), https://petete.tributos.hacienda.gob.es/consultas/?num_consulta=V1305-15 [<https://perma.cc/W9UM-Q4B7>]; *V3794-16*, DIRECCIÓN GENERAL DE TRIBUTOS [THE SPANISH DIRECTORATE GENERAL FOR TAXATION] (Sept. 9, 2016), https://petete.tributos.hacienda.gob.es/consultas/?num_consulta=V3794-16 [<https://perma.cc/PK9P-E4L2>]; *V3286-17*, DIRECCIÓN GENERAL DE TRIBUTOS [THE SPANISH DIRECTORATE GENERAL FOR TAXATION] (Dec. 27, 2017), https://petete.tributos.hacienda.gob.es/consultas/?num_consulta=V3286-17 [<https://perma.cc/W72K-MXNZ>].

113. *Articles of the Model Convention with Respect to Taxes on Income and on Capital*, 8–10, OCED (Nov. 21, 2017), <https://www.oecd.org/ctp/treaties/articles-model-tax-convention-2017.pdf> [<https://perma.cc/ZZS4-BLSS>].

114. *V1983-20*, DIRECCIÓN GENERAL DE TRIBUTOS [THE SPANISH DIRECTORATE GENERAL FOR TAXATION] (June 17, 2020), https://petete.tributos.hacienda.gob.es/consultas/?num_consulta=V1983-20 [<https://perma.cc/7C8M-EP5G>].

115. *Id.*

116. *V0066-22*, DIRECCIÓN GENERAL DE TRIBUTOS [THE SPANISH DIRECTORATE GENERAL FOR TAXATION] (Jan. 18, 2022), https://petete.tributos.hacienda.gob.es/consultas/?num_consulta=V0066-22 [<https://perma.cc/8S7F-4LKX>].

117. *Id.*

118. *Id.*

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OECD Model Tax Convention (and, in particular, to the OECD Secretariat Analysis of Tax Treaties and the Impact of the COVID-19 Crisis, and paragraphs 18 and 19 to Commentaries to article 5 of the OECD Model Tax Convention).¹¹⁹

**B. SPANISH PERSONAL INCOME TAX PROVISIONS: SPECIAL
INPATRIATES REGIME¹²⁰**

Another relevant issue would be whether remote workers could be deemed to acquire Spanish tax residence status. Because there are no specific rules applicable in these situations, the general tax residence criteria under Spanish Personal Income Tax rules apply.¹²¹ Remote workers generally meet the permanence and economic test criteria, unless the tie-breaker rules under the relevant Tax Treaties tip the balance to the origin country.¹²² They would then be considered ordinary residents subject to worldwide taxation in Spain.¹²³ Thus, the regime entails that only Spanish-sourced income and capital gains will be subject to taxation at domestic tax rates.¹²⁴ Conversely, employment income is taxed worldwide (fixed rate of twenty-four percent up to €600,000 and forty-seven percent onwards).¹²⁵

To make moving to Spain a more attractive option for key employees residing abroad, the current Spanish tax inpatriates regime will likely be modified¹²⁶ to broaden the terms to include friendlier regulations under a special regime applied to “digital nomads.”¹²⁷

In particular, the residency requirement would be deemed to be fulfilled if the employee is granted an International Teleworking Visa,¹²⁸ which will allow eligible applicants to reside and work in Spain for up to one year. International Teleworking Residence Permits will grant work and residence rights for up to two years.¹²⁹ The regime could also be extended to inpatriates’ spouses and children under specific requirements.¹³⁰

119. *Id.*

120. Personal Income Tax Law art. 93 (R.C.L. 2014, 26) (Spain).

121. Personal Income Tax Law art. 9 (R.C.L. 2006, 35) (Spain).

122. *Id.*

123. *Id.*

124. *Id.*

125. *New ‘Start-up Law’ Aims to Encourage Entrepreneurial Activity in Spain*, OSBORNE CLARKE (Jan. 31, 2023), <https://www.osborneclarke.com/insights/spain-new-start-law-aims-encourage-entrepreneurial-activity-spain>, [<https://perma.cc/4MP5-EMSG>].

126. Bill to Promote the Ecosystem of Emerging Companies (B.O.E. 2021, 81) (Spain.).

127. Digital nomads are employees that work for a foreign company providing their services remotely through the exclusive use of computer and telecommunication systems and resources, provided that they have not lived in Spain during the five tax periods before moving to Spain (currently ten years). *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

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Inpatriate individuals would also be subject to the new state Solidarity Tax on High Fortunes¹³¹ that is likely to enter into force for tax year 2022 on the assets located in Spain exceeding €3 million, with tax rates ranging from one point seven percent to three point five percent (above €10.7 million).¹³² This tax is likely to have a greater impact for inpatriates that are resident in regions with friendly wealth tax regulations (e.g., Madrid and Andalusia).

VII. United States Remote Workers

A. BACKGROUND

The United States has made minimal changes at the federal and state level regarding the taxation of employees working remotely since the COVID-19 pandemic.¹³³ Non-U.S. resident remote workers living in the United States are potentially subject to U.S. federal and state income taxes as well as taxes on their payroll such as social security and unemployment taxes.¹³⁴ Furthermore, because of the U.S. worldwide taxing system, U.S. citizens and tax residents living outside the United States are generally still subject to U.S. federal income taxes albeit with multiple income exemptions and tax credits.¹³⁵

B. RESIDENCY

Non-U.S. workers in the United States fall into two categories depending on time spent working in the United States: resident aliens and non-resident aliens.¹³⁶ Residency in the United States is determined by the number of days in the United States.¹³⁷ A good rule of thumb is that spending over half of a year in the United States can result in U.S. residency.¹³⁸ A U.S. resident, regardless of whether they are a United States citizen or resident alien, is taxed on their worldwide income.¹³⁹ A non-resident alien is taxed only on their U.S.-source income.¹⁴⁰

131. The new Tax will be included in article 3 of the Draft Law for the establishment of temporary taxes to energy and credit institutions and approving the Solidarity Tax on High Fortunes. See Law proposal for the establishment of liens temporary energy and credit institutions (B.O.E. 2022, 271) (Spain).

132. *Id.*

133. See generally Jeanne Sahadi, *Working Remotely in a Different State than your Employer? Here's What that Means for Your Taxes*, CNN (Mar. 1, 2022), <https://www.cnn.com/2022/03/01/success/state-income-tax-ramifications-remote-work/index.html> [https://perma.cc/NB75-SWCA].

134. See generally I.R.C. §§ 861, 862(a)(3), 863, 864(b), 865(g).

135. See generally I.R.C. §§ 1, 61.

136. *Id.* § 7701(b)(1).

137. *Id.* § 7701(b)(2).

138. *Id.* § 7701(b)(3)(B).

139. *Id.* § 1, 61.

140. *Id.* §§ 861(a)(3), 862(b), 863(a), 864(b), 865(a)(1).

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Because non-U.S. persons residing in the United States are taxed on their worldwide income, a remote worker who works outside the United States for an extended period of time (but not such a significant amount of time as to lose residency status) may owe taxes to two countries.¹⁴¹

The United States provides a tax credit for foreign taxes paid on income that has been taxed in both countries, but higher rates in the United States can still result in U.S. taxes.¹⁴²

C. REMOTE WORKERS FOR NON-U.S. COMPANIES

Because both non-U.S. residents and U.S. residents are taxed on income earned while in the United States, employers should withhold employment tax on their wages.¹⁴³ The employer should report the income to the United States and a portion of the income paid will need to be withheld and remitted to the United States.¹⁴⁴ If not paid, the employer is liable for that amount.¹⁴⁵ The individual employee is responsible for apportioning their income due to time spent elsewhere, if a non-resident, and obtaining foreign tax credits, if a resident.¹⁴⁶

D. STATE LEVEL TAXES

In the United States, employees are also typically subject to taxes at the state level, including state income and state unemployment taxes.¹⁴⁷ States generally only tax income actually earned in such state, so, unlike federal taxes, income earned outside the U.S. usually does not result in state taxes.¹⁴⁸ Employers need to register and withhold for these state taxes, which are typically administered across multiple branches of government.¹⁴⁹

141. *Id.* § 7701(b)(1).

142. *Id.* §§ 901, 903-09.

143. *Aliens Employed in the U.S.*, INTERNAL REVENUE SERV. (Aug. 3, 2022), <https://www.irs.gov/individuals/international-taxpayers/aliens-employed-in-the-us>, [<https://perma.cc/P3QU-3YAC>].

144. I.R.C. § 3402(a)(1)(A)–(B).

145. *Id.* § 3509.

146. *Foreign Tax Credit Compliance Tips*, INTERNAL REVENUE SERV. (Jan. 13, 2023), <https://www.irs.gov/individuals/international-taxpayers/foreign-tax-credit-compliance-tips> [<https://perma.cc/H9DD-45YQ>].

147. *Taxes and Working Remotely in a Different State*, JUSTIA (Mar. 2023), <https://www.justia.com/covid-19/taxes-and-covid-19/taxes-and-working-remotely-in-a-different-state/#:~:text=CA%20worker%20may%20have%20tax,a%201099%20DNEC%20independent%20contractor> [<https://perma.cc/M5AG-C7XK>].

148. *Id.*

149. *State Government Websites*, INTERNAL REVENUE SERV. (Nov. 10, 2022), https://www.irs-ein-tax-id.com/?utm_source=google&utm_medium=cpc&utm_campaign=main-irs-general&utm_term=irs%20small%20businesses&utm_content=&gclid=EAIaIQobChMIInPjEk4yW_gIVYhTUAR2HrQ5IEAAYASAAEgKhtvD_BwE [<https://perma.cc/KDC5-CT5R>].

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E. U.S. VISA TYPE MATTERS

Non-U.S. citizen remote workers in the United States could have a variety of visas, and the remote worker's type of visa can also impact U.S. taxation of the worker with some visas allowing for reductions and exemptions of income.¹⁵⁰

F. EMPLOYER TAXES

Remote workers in the United States may also cause their non-U.S. employers U.S. tax issues.¹⁵¹ For example, a non-U.S. employer can be subject to U.S. corporate taxes, among other taxes, when the employer is considered to have a U.S. presence.¹⁵² A remote worker in the United States performing work can create a U.S. presence for their foreign employer depending on a variety of circumstances including what type of work is being done.¹⁵³ A U.S. presence can be a compliance difficulty for foreign employers.¹⁵⁴

The United States has entered many tax treaties with different countries which may affect some of the above generalities such as residency and taxes being assessed on non-U.S. employers for remote workers in the United States.¹⁵⁵

G. SOCIAL SECURITY

In addition to the above discussed income taxes, non-U.S. citizen employees working in the United States will also require withholding income for Social Security taxes, regardless of whether they are considered a resident or not.¹⁵⁶ There may also be treaties affecting Social Security taxes as well.¹⁵⁷

H. CHANGES IN 2022

When the pandemic began, several states passed laws aimed at simplifying income taxes and providing relief for U.S. employees traveling between states; no such rules were passed for federal income and Social Security

150. I.R.C. § 1441(b)(2).

151. *See, e.g., Lewenhaupt v. Comm'r*, 20 T.C. 151, 153 (1953).

152. *See id.* (holding that a U.S. agent had broad general powers to manage taxpayer's affairs and property in United States, including to buy and sell real estate and securities in name of taxpayer).

153. *See generally* I.R.C. § 882.

154. *United States Income Tax Treaties*, INTERNAL REVENUE SERV. (Feb. 7, 2023), <https://www.irs.gov/businesses/international-businesses/united-states-income-tax-treaties-a-to-z> [<https://perma.cc/VR8N-RH6Z>].

155. *See generally* I.R.C. § 3102.

156. *See* INTERNAL REVENUE SERV., *supra* note 143.

157. *U.S. International Social Security Agreements*, SOC. SEC. ADMIN., https://www.ssa.gov/international/agreements_overview.html [<https://perma.cc/8ZZJ-7PBF>] (last visited Apr. 14, 2023).

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taxes.¹⁵⁸ Moreover, the United States federal government proposed legislation related to state level income tax issues (remote workers moving from one to state to another in the United States) but has not addressed international remote employees. One example of proposed federal legislation is the Remote and Mobile Worker Relief Act of 2021, which would include a thirty-day non-resident de minimis withholding threshold.¹⁵⁹ But, as of the publication of this article, this legislation was proposed over a year ago without implementation; also, the provisions related exclusively to state income taxes with no provisions related to federal income taxes.¹⁶⁰

VIII. Conclusion

As remote work becomes increasingly possible and popular, savvy employers will need to closely monitor worker locations to avoid incurring additional tax liabilities. This article provides a sample of changing tax issues in many popular “digital nomad” countries and demonstrates how tax issues related to remote work are evolving rapidly around the globe. Going forward, employers must proactively investigate the tax consequences of sustaining employees who wish to work from other countries because each country has different tax rules, and incurring unintended tax liabilities can be expensive and time-consuming.

158. See generally JUSTIA, *supra* note 147.

159. Remote and Mobile Worker Relief Act of 2021, S. 1274, 117th Cong. (2021).

160. *Id.*

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International Art and Cultural Heritage Law

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This article surveys some significant legal developments in international art and cultural heritage law during the calendar year 2022.

I. Cassirer v. Thyssen-Bornemisza Collection Foundation

In April 2022, the Supreme Court of the United States addressed a crucial conflict of laws question in the long-running Holocaust restitution case concerning renowned impressionist painting *Rue Saint-Honoré, après-midi, effet de pluie* (*Rue St. Honoré, Afternoon, Rain Effect*) (*Rue St. Honoré* or the Painting) by Camille Pissarro. The Court resolved a circuit split as to what choice-of-law rule a federal court should apply in a suit raising non-federal claims brought under the Foreign Sovereign Immunities Act (FSIA).¹

The object of the case, Pissarro's *Rue St. Honoré*, was purchased directly from Pissarro's exclusive agent in 1900 by Paul Cassirer, a German Jew and devoted art collector.² Paul's nephew, Fritz Cassirer, inherited the painting, and, upon Fritz's untimely death in 1926, it devolved to his wife, Lilly Karolina Cassirer, who resided in Berlin.³ In 1939, Lilly sought an exit visa to flee from Nazi-occupied Germany.⁴ As a condition for granting the visa, the Nazis made Lilly relinquish the Painting to an Aryan art dealer at a fraction of its true value.⁵ Lilly eventually ended up in the United States with her grandson, Claude Cassirer, who also fled from Nazi Germany after the war broke out.⁶ Lilly and Claude searched for the Painting after the war to no avail.⁷ In 1958, believing the Painting had been destroyed and having been legally declared its rightful owner, Lilly settled with the German government, expressly preserving her right to future recovery.⁸ Lilly died in 1962, naming Claude Cassirer as her successor in interest.⁹

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1. Cassirer et. al. v. Thyssen-Bornemisza Collection Foundation, 142 S. Ct. 1502 (2022).

2. *Id.* at 1506.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

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Contrary to Lilly and Claude's beliefs, the Painting was not destroyed; it made its way to the United States after the war.¹⁰ After changing hands several times in the United States, the Painting ended up in the collection of industrialist tycoon, Baron Hans Heinrich Thyssen-Bornemisza (the Baron).¹¹ In the 1990s, the Baron struck a lucrative deal with the Kingdom of Spain; the Baron agreed to sell to Spain the bulk of his collection (including *Rue St. Honoré*) and in turn, Spain agreed to create and sponsor a state-run entity that would house and maintain the collection, called the Thyssen-Bornemisza Collection Foundation (the Foundation).¹² By 1992, the Foundation's Madrid-based museum, Museo Thyssen-Bornemisza, was up and running and exhibiting the Painting publicly.¹³ It was not until 1999 that Claude Cassirer, then a resident of California, learned of the Painting's whereabouts.¹⁴ In 2005, after several unsuccessful attempts to recover the Painting outside of court, Claude Cassirer sued Spain and the Foundation in the Federal District Court for the Central District of California, asserting jurisdiction under FSIA, and alleging that under California property law, the Cassirers owned the Painting and were entitled to its return.¹⁵

Spain and the Foundation were unsuccessful in dismissing the claims on various procedural grounds related to jurisdiction, sovereign immunity, and the statute of limitations.¹⁶ Eventually, in 2015, the Foundation moved for summary judgment on the merits, claiming that under Spanish law, the Foundation owned the Painting.¹⁷ The Cassirers counter motioned for summary adjudication, seeking an order that California law, not Spanish law, governed the underlying claim.¹⁸ The lower courts held that Spanish law governed the ownership dispute and ultimately awarded title of the Painting to the Foundation thereunder.¹⁹

The question of whether California law or Spanish law applied to the Cassirers' claim for the return of the Painting was of critical consequence. The Cassirers brought their claim under California law.²⁰ Like all common

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. Cassirer v. Kingdom of Spain, No. CV 05-3459 GAF, 2006 WL 8423211, at *1 (C.D. Cal. Apr. 27, 2006). Claude passed away in 2010. His daughter, Ava, a successor to his claims, also died sometime prior to the Ninth Circuit's 2020 ruling. The claims are being maintained by Claude's son, David Cassirer, Ava's estate, and the Jewish Federation of San Diego County. This article uses the inclusive "Cassirers" or "the Cassirer family" to refer to the collective plaintiffs.

16. See Cassirer v. Kingdom of Spain, 461 F. Supp. 2d 1157 (C.D. Cal. 2006), *aff'd in part, rev'd in part*, 580 F.3d 1048 (9th Cir. 2009), *on reh'g en banc*, 616 F.3d 1019 (9th Cir. 2010), and *aff'd in part, appeal dismissed in part*, 616 F.3d 1019 (9th Cir. 2010).

17. Cassirer v. Thyssen-Bornemisza Collection Found., 153 F. Supp. 3d 1148, 1153 (C.D. Cal. 2015).

18. *Id.*

19. *Id.*

20. *Id.*

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law states, California adheres to the general rule that a thief cannot pass good title to anyone, including a good faith purchaser.²¹ In other words, a stolen painting remains stolen no matter how many changes of clean hands it undergoes. The Foundation did not dispute the stolen nature of the Painting, but rather argued that, under Spanish law, the Foundation acquired ownership of the Painting, despite its checkered history.²² The doctrine of acquisitive prescription under Spanish law, which is essentially adverse possession applied to personal property, allows for a subsequent possessor of stolen goods to acquire good title if certain conditions are met.²³ Accordingly, the two competing laws of liability were in direct conflict.

To determine whether California law or Spanish law applied, the district court first determined what choice-of-law rule to consult.²⁴ The Ninth Circuit has consistently held, with minimal to no reasoning, that in cases predicated on FSIA jurisdiction, a court must consult federal common law to determine which choice-of-law rules to apply.²⁵

The Ninth Circuit's resort to federal common law choice-of-law rules in FSIA cases directly contrasts Second, Fifth, Sixth, and D.C. Circuit precedent, all of which have uniformly held that the law of the forum state governs the choice-of-law analysis for state law claims brought under FSIA.²⁶ In *Oveissi v. Islamic Republic of Iran*, the D.C. Circuit framed its decision to apply the forum state's choice-of-law rules as a sort of statutory requirement.²⁷ Some of the case law analogous to the *Oveissi* ruling follows a similar reasoning, generally concluding that the application of a forum state's choice-of-law rules is prescribed by FSIA itself.²⁸ Specifically, the Second, Fifth, Sixth, and D.C. Circuits cite section 1606 of FSIA, set out in more detail below, as the prescribing choice-of-law provision, and consistently find that, in similar cases, it calls for application of a forum state's choice-of-law rules.²⁹

In puzzling contrast, the Ninth Circuit somewhat informally leaned toward the position that specific statutory guidance regarding choice-of-law questions in cases brought under FSIA was lacking: In the relevant *Cassirer* decision on choice-of-law issues, the lower courts did not discuss section 1606 of FSIA or explain its lack of applicability.³⁰ In the absence of a statutory requirement and convinced that FSIA jurisdiction is expressly

21. *Id.* at 1157.

22. *Id.* at 1160.

23. *Id.*

24. *Id.* at 1154.

25. *Id.*

26. *See, e.g.*, *Barkanic v. Gen. Admin. of Civ. Aviation of China*, 923 F.2d 957, 959-61 (2d Cir. 1991); *Northrop Grumman Ship Sys., Inc. v. Ministry of Def. of the Republic of Venez.*, 575 F.3d 491, 498 (5th Cir. 2009); *O'Bryan v. Holy See*, 556 F.3d 361, 381 n. 8 (6th Cir. 2009).

27. *Oveissi v. Islamic Republic of Iran*, 573 F.3d 835, 841 (D.C. Cir. 2009).

28. *Id.*

29. *Id.*

30. *Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d 951, 961 (9th Cir. 2017).

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distinct from diversity jurisdiction, the lower courts followed their precedent that federal common law choice-of-law rules applied.³¹

According to the Ninth Circuit (and only the Ninth Circuit) “federal common law [choice-of-law] follows the approach of the Restatement (Second) of Conflict of Laws.”³² Section 6 of the Restatement (Second) of Conflict of Laws (the Restatement), flushed out by section 222 of the Restatement, uses a most significant relationship test, setting out several factors to consider and instructions to consult in order to determine which state has “the most significant relationship to the thing and the parties.”³³

Applying section 6 of the Restatement to the facts of *Cassirer*, the lower courts concluded that Spain had the most significant relationship to the Painting and the parties, and thus Spanish law governed the claims.³⁴ The next several years of litigation consisted of dynamic disputes concerning the correct interpretation of Spanish law and whether the Painting’s acquisition by the Baron and the Foundation satisfied the necessary conditions provided by the doctrine of acquisitive prescription. In August 2020, the Ninth Circuit Court of Appeals denied the Cassirers’ request to revisit its 2017 holding on the choice-of-law issue and affirmed the district court’s award of title to the Foundation under Spanish law.³⁵ The Supreme Court granted the Cassirers’ petition for writ of certiorari on the issue of what choice-of-law rule applied.³⁶ Essentially, the Court needed to understand the meaning of section 1606 of FSIA, what the provision is intended to accomplish, and what it requires.

The Court grounded its determination in the plain language and discernable intent of FSIA. As the Court described, FSIA spells out “the suits against foreign sovereigns that American courts do, and do not, have power to decide.”³⁷ If, under the terms of FSIA, an American court has the power to decide or, for example, is entitled to exercise jurisdiction over foreign sovereigns in a particular suit, the question then becomes to what extent the foreign sovereign or foreign instrumentality is liable for the alleged wrongdoing.³⁸ Anticipating that very question, Congress crafted section 1606 of FSIA: “As to any claim for relief with respect to which a

31. *Id.*

32. *Id.* (citing *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777, 782 (9th Cir. 1991)).

33. *Id.* at 962 (The 2d Restatement factors are as follows: “(a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.”).

34. *Id.* at 964.

35. *Cassirer v. Thyssen-Bornemisza Collection Found.*, 824 F. App’x 452, 455 (9th Cir. 2020) *vacated and remanded*, 142 S. Ct. 1502 (2022).

36. *See Cassirer v. Thyssen-Bornemisza Collection Found.*, 142 S. Ct. 1502 (2022).

37. *Id.* at 1508.

38. *Id.*

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foreign state is not entitled to immunity . . . , the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances.”³⁹

As a general matter, a party’s liability is determined by the substantive law that governs the dispute. If a foreign sovereign or instrumentality is supposed to be held liable to the same extent as a private individual under like circumstances, then the substantive law that governs a similar suit against private parties is the law to apply.⁴⁰ In some cases, knowing what substantive law governs a dispute is straightforward. The analysis as to what substantive law governs is more involved when there are conflicting substantive laws at issue. In a conflicts case, courts must look to a jurisdiction’s choice-of-law rule to determine what substantive law of liability governs.

In that way, the *Cassirer* plaintiffs and amici argued that section 1606 of FSIA dictates the selection of a choice-of-law rule in cases brought under FSIA; the Court agreed, explaining that the choice-of-law rule to apply “must mirror the rule that would apply in a similar suit between private parties.”⁴¹ If section 1606 of FSIA demands that non-immune foreign sovereigns be subject to the same level of liability as a private party, which the Court made clear it does, then the only way to accomplish that is to ensure the applicable substantive law is determined the same way in both scenarios.⁴²

Accordingly, the Court then considered the hypothetical situation of a suit brought in California, against a private museum for return of art, where the claims asserted turn only on state or foreign property law.⁴³ If the private suit were brought in federal court under diversity jurisdiction, the Court explained that “according to long-settled precedent,” the federal court would borrow the forum state’s, California’s, choice-of-law rule to determine the substantive law of liability.⁴⁴

In more pointed words, the Court explained that the Ninth Circuit went rogue when it decided to apply a federal choice-of-law rule to determine whether California or Spanish law governed the *Cassirers*’ suit.⁴⁵ The Court walked through the ways in which the resort to federal common lawmaking likely created a mismatch between the Foundation’s liability and a private museum’s liability, frustrating the intent of section 1606 of FSIA.⁴⁶

The Court described the intent of section 1606 of FSIA as “clear” but noted that even if it were not, there is “scant justification for federal

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 1508–09.

44. *Id.* at 1509.

45. *Id.*

46. *Id.*

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common lawmaking in this context.⁴⁷ Indeed, federal courts are not permitted to engage in federal common lawmaking as a matter of preference—if a federal court is going to displace a state-created rule with a judicially created federal rule, it must be “necessary to protect uniquely federal interests.”⁴⁸ No such interests were threatened by applying California’s choice-of-law rule, the Court explained, dismissing defendant Foundation’s argument that the government’s interest in foreign relations was compromised.⁴⁹ The long-standing practice of courts outside the Ninth Circuit in applying state choice-of-law rules in FSIA suits has never given rise to foreign relations concerns.⁵⁰

As the only mechanism by which to obtain jurisdiction over foreign sovereigns in U.S. courts, FSIA features prominently in suits to recover stolen art from foreign sovereigns or their instrumentalities. The Court’s decision elucidates how a court sitting in FSIA jurisdiction should resolve a conflict-of-law dispute, which is not uncommon in suits concerning moveable property given the variances in civil and common law. Section 1606 of FSIA demands that the law of liability be determined in the same manner it would be in a comparable private suit.⁵¹ In *Cassirer*, that meant the application of the forum state’s, California’s, choice-of-law rules to resolve the conflict-of-law dispute.⁵²

The impact of the Court’s decision on the Cassirer family’s ability to recover the painting is uncertain. The Court vacated the Ninth Circuit’s judgment and remanded the case for a renewed determination of what substantive law governs the claim, using California’s choice-of-law rule.⁵³ The Cassirer plaintiffs have maintained that under California’s choice-of-law rule, California property law governs the suit; whether the lower courts agree remains to be seen.⁵⁴

II. *Philipp v. Stiftung Preussischer Kulturbesitz (SPK)*

In August 2022, the U.S. District Court for the District of Columbia determined that it lacked subject-matter jurisdiction over claims brought by a consortium of Jewish art dealers against a Prussian Cultural Heritage Foundation, *Stiftung Preussischer Kulturbesitz (SPK)*, for the return of

47. *Id.* at 1504.

48. *Id.*

49. *Id.*

50. *Id.* at 1510.

51. *Id.* at 1508.

52. *Id.* at 1510.

53. *Id.*

54. In an earlier decision, in dicta, the district court took a contrary position, and hypothesized that even under California choice-of-law rules, Spanish law would govern the dispute. *See Cassirer v. Thyssen-Bornemisza Collection Found.*, 153 F. Supp. 3d 1148, 1155 (C.D. Cal. 2015).

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relics and religious objects (collectively known as the Welfenschatz) sold under coercion to the Nazis in 1935.⁵⁵

The Welfenschatz is a collection of medieval religious relics that was originally housed in Brunswick Cathedral, and dates primarily from the eleventh century to the fifteenth century.⁵⁶ In 1929, the Welfenschatz was purchased by three Jewish-owned art dealer firms (together in their corporate capacity known as the Consortium),⁵⁷ based in Frankfurt, Germany. Shortly after the Nazi party assumed control of Germany, it became interested in acquiring the Welfenschatz on behalf of Germany.⁵⁸ Conversations regarding a sale commenced between the Consortium, the Prussian state (a political subdivision of Germany), and Dresdner Bank (acting as an intermediary).⁵⁹ On June 14, 1935, the parties entered into a purchasing agreement that facilitated the sale of the Welfenschatz by the Consortium to the Prussian state.⁶⁰ After acquiring the Welfenschatz, the Prussian state gifted the collection to Adolf Hitler.⁶¹ Eventually, the Welfenschatz ended up in the possession of the Prussian Cultural Heritage Foundation, or SPK, an entity created “for the purpose of succeeding all of Prussia’s rights in cultural property.”⁶² The Welfenschatz remains under SPK’s control, and the collection is currently housed at the Museum of Decorative Arts in Berlin.⁶³

After unsuccessfully seeking restitution in Germany, the heirs to the Consortium members (Plaintiffs) filed suit against SPK (Defendant) and the Federal Republic of Germany,⁶⁴ alleging that the sale of the Welfenschatz was made under duress and for less than market value due to the Nazi persecution of Jews, and that the Plaintiffs were entitled to its return.⁶⁵

SPK moved to dismiss Plaintiffs’ claim on grounds of foreign sovereign immunity.⁶⁶ To establish the court’s subject-matter jurisdiction, Plaintiffs invoked the expropriation exception to sovereign immunity, which strips a foreign state and a foreign instrumentality of jurisdictional immunity for

55. See *Philipp v. Stiftung Preussischer Kulturbesitz (Philipp IV)*, No. 15-00266 (CKK), 2022 U.S. Dist. LEXIS 153297 (D.D.C. Aug. 25, 2022).

56. *Id.* at *3.

57. The art dealer firms that made up the Consortium were: Z.M. Hackenbroch, I. Rosenbaum, and J. & S. Goldschmidt. *Id.* at *1.

58. *Id.* at *4.

59. *Id.*

60. *Id.* at *5.

61. Sullivan & Worcester, *At U.S. Supreme Court, Jewish Heirs Lay Claim to Treasure Taken by Nazi Agents in 1935*, SULLIVAN LAW (Dec. 3, 2020), <https://www.sullivanlaw.com/news-At-US-Supreme-Court-Jewish-Heirs-Lay-Claim-to-Treasure-Taken-by-Nazi-Agents-in-1935.html> [<https://perma.cc/6XNV-PDZK>].

62. *Philipp IV*, 2022 U.S. Dist. LEXIS 153297 at *5.

63. *Id.*

64. Germany was dismissed as a Defendant by the Circuit Court in later proceedings. See *Philipp v. Fed. Rep. of Germany*, 925 F.3d 1349 (Mem.) (D.C. Cir. 2019).

65. *Philipp v. Fed. Republic of Germany*, 248 F. Supp. 3d 59, 67 (D.D.C. 2017).

66. *Philipp IV*, 2022 U.S. Dist. LEXIS 153297, at *6.

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claims alleging that property was “taken in violation of international law.”⁶⁷ SPK argued that the expropriation exception was not available to Plaintiffs by application of the domestic takings rule, which stands for the proposition that a foreign sovereign’s expropriation of its own citizens’ property is not a violation of international law.⁶⁸ SPK contended that the domestic takings rule applied to the Plaintiffs’ claims because the Consortium and individual art dealer firms were German corporate entities, the individual owners of the Consortium were German nationals, and the taking was done by a political subdivision of Germany.⁶⁹

Plaintiffs argued that the domestic takings rule was inapplicable because the sale of the Welfenschatz was part of the Nazi Germany genocide against the Jewish people.⁷⁰ In light of the then-recent Court of Appeals for the D.C. Circuit’s ruling in *Simon v. Republic of Hungary*,⁷¹ Plaintiffs contended that the underlying genocide was the relevant international law violation and thus, the domestic takings rule was not pertinent and the Consortium member’s nationality was irrelevant.⁷² The lower courts agreed with Plaintiffs and the case ultimately went to the United States Supreme Court on the issue of whether the domestic takings rule applied given the Plaintiffs’ invocation of the expropriation exception to establish jurisdiction.⁷³

In early 2021, the Supreme Court reasoned that the domestic takings rule was relevant to the Plaintiffs’ claims.⁷⁴ The Court rejected a broader reading of FSIA’s expropriation exception, explaining that the “international law” to which it refers is limited to the narrow doctrine of international law governing property rights, and does not incorporate general human rights norms like the law of genocide.⁷⁵ The Court then went on to clarify that the international law governing property rights recognizes the domestic takings rule, meaning that such a limitation is read into the expropriation exception.⁷⁶ Therefore, the nationality of the Consortium members was of the utmost importance—the expropriation exception would only permit jurisdiction if the sale of the Welfenschatz could be characterized as the confiscation of property of foreigners.⁷⁷ Accordingly, the Court vacated the D.C. Circuit’s judgment, and the case was remanded for further

67. *Id.* (quoting 28 U.S.C. § 1605(a)(3)).

68. *Id.* at *6.

69. *Id.*

70. *Id.*

71. *Simon v. Republic of Hungary (Simon I)*, 812 F.3d 127 (D.C. Cir. 2016) (holding that the domestic takings rule had “no application to the unique circumstances of [that] case, in which, unlike most cases involving expropriations in violation of international law, genocide constitutes the pertinent international law violation”).

72. *Id.*; *Phillip IV*, 2022 U.S. Dist. LEXIS 153297, at *8.

73. See *Phillip v. Fed. Republic of Germany*, 248 F. Supp. 3d 59, 67 (D.D.C. 2017), *aff’d and remanded*, 894 F.3d 406 (D.C. Cir. 2018), *vacated and remanded*, 141 S. Ct. 703 (2021).

74. *Fed. Republic of Germany v. Philipp (Phillip III)*, 141 S. Ct. 703, 715 (2021).

75. *Id.* at 711–12.

76. *Id.* at 710.

77. *Id.*

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proceedings.⁷⁸ Specifically, the Court instructed the District Court via the Court of Appeals to determine: (1) whether the “sale of the Welfenschatz is not subject to the domestic takings rule because the Consortium members were not German nationals at the time of the transaction” and (2) whether that argument was adequately preserved by Plaintiffs in the District Court.⁷⁹

The District Court began with an explanation of FSIA, noting that jurisdiction over a foreign state or instrumentality can only be obtained if one of the statutory exceptions to immunity applies.⁸⁰ Because the Supreme Court ruled that the expropriation exception was limited by the domestic takings rule, the only way Plaintiffs would be able to meet the jurisdictional requirements was if they preserved the argument challenging the basis for the domestic takings rule.⁸¹ The District Court surveyed the Plaintiffs’ pleadings and found that the Plaintiffs failed to preserve any argument regarding an exception to the domestic takings rule based on the nationality of the Consortium members.⁸² The District Court explained that Plaintiffs had, to their detriment, focused their contentions on the claim of genocide and scant attention was given to opposing Defendant’s claims that the art dealer firms were German corporate entities.⁸³ Further, Plaintiffs did not assert any fleshed out argument that the individual owners were foreign nationals or were stateless.⁸⁴

Despite finding that the argument had not been preserved and because the remand order instructed the District Court to consider whether the Consortium members were not German nationals at the time of the transaction, the District Court assumed *in arguendo* that Plaintiffs did preserve their argument and assessed whether Plaintiffs established an exception to the domestic takings rule on those grounds.⁸⁵ The District Court explained that to establish an exception, the Plaintiffs needed to allege facts establishing that the sale was not a domestic taking, and also demonstrate that the exception claimed is clearly established customary international law.⁸⁶

Plaintiffs argued that the Consortium members lost their German nationality, with the exception of two Consortium members who Plaintiffs contended were Dutch, and became stateless.⁸⁷ This contention presented its own dilemma of whether customary international law of takings is violated when a state takes property from a stateless person.⁸⁸ The D.C. Circuit noted the existence of unfavorable precedent from the Court of

78. *Id.* at 716.

79. *Id.* at 715-16.

80. *Phillip IV*, 2022 U.S. Dist. LEXIS 153297, at *10-11.

81. *Id.* at *16-17.

82. *Id.* at *17-23.

83. *Id.* at *18.

84. *Id.* at *18-20.

85. *Id.* at *23.

86. *Id.* at *23-24.

87. *Id.* at *28.

88. *Id.* at *29.

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Appeals for the Eleventh Circuit on that issue⁸⁹ while acknowledging that it had not yet taken a position. Even still, the District Court analyzed whether Plaintiffs had demonstrated that the Consortium members lost their German nationality such that they had become stateless at the time of sale.⁹⁰

Because possession of nationality is determined by the laws of the state to which an individual is a member,⁹¹ Plaintiffs needed to demonstrate that the Consortium members had lost their German nationality under German law. Plaintiffs argued that to be a German national in Nazi Germany, individuals could not be Jewish (by the time of sale).⁹² They cited three paragraphs from their Complaint to support their argument: (1) stating *Mein Kampf* indicated that Hitler believed there was no place in the world for Jewish people; (2) noting an amendment to the Weimar Constitution giving Hitler the power to enact laws without the legislature; and (3) asserting that “[t]hrough the collective humiliation, deprivation of rights, robbery, and murder of Jews as a population, they were officially no longer considered German.”⁹³ While the District Court acknowledged the horror of genocidal programs, it sided with Defendant in that genocidal programs do not de facto, strip individuals of nationality.⁹⁴ This holding is echoed in similar cases that were decided in the wake of the Supreme Court’s 2021 decision in *Philipp III*.⁹⁵ For example, in *Toren v. Federal Republic of Germany*, the Court disagreed with plaintiff’s contention that the “Nazi regime’s broader campaign of persecution against German Jews” rendered plaintiff’s ancestor, amongst other German Jews, stateless.⁹⁶ There, the Court held the expropriation exception does not encompass the question of whether a person is rendered stateless by virtue of that state’s conduct.⁹⁷ Similarly, in *Heller v. Republic of Hungary*, the descendants of a family of Hungarian Jews who all fled the country in 1939, leaving behind homes, places of business, and possessions, asserted that their ancestors had become de facto stateless when Hungary deported or sent its Jewish residents to concentration camps and expropriated their property as a part of its de-Jewification program.⁹⁸

89. *Id.* (citing *Mezerhane v. República Bolivariana De Venezuela*, 785 F.3d 545, 551 (11th Cir. 2015) (after limited analysis, the court dismissed a claim by a plaintiff who was alleged to be “de facto stateless” because the claim did not “implicate multiple states” as required by the law of takings)).

90. *Id.* at *31-32.

91. *Id.* at *32 (citing Convention on Certain Questions Relating to the Conflict of Nationality Law arts. I & II, Apr. 12, 1930, 179 L.N.T.S. 89; Oliver Dorr, *Nationality*, MAX PLANCK ENCYCLOPEDIAS OF INT’L LAW at ¶ 4 (2019); *Comparelli v. Republica Bolivariana de Venezuela*, 891 F.3d 1311, 1321-22 (11th Cir. 2018)).

92. *Id.* at *35.

93. *Id.* at *35-36.

94. *Id.* at *43.

95. See *Toren v. Fed. Rep. of Germany*, No. 16-1885-RJL, 2022 U.S. Dist. LEXIS 152674, at *2 (D.D.C. Aug. 23, 2022).

96. *Id.* at *8.

97. *Id.* at *8-9.

98. *Heller v. Rep. of Hungary*, No. 21-CV-1739-BAH, 2022 U.S. Dist. LEXIS 126221, *15-16 (D.D.C. July 18, 2022).

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The Court declined to consider that assertion relevant though, holding that “the FSIA’s expropriation exception cannot reach expropriations carried out against even badly treated citizens *regardless* of what labels might be applied to aspects of a defendant’s genocidal conduct.”⁹⁹

The Court also considered Plaintiffs’ other assertion that two Consortium members, Rosenberg and Rosenbaum, lost their German nationality and acquired Dutch nationality by the sale of Welfenschatz.¹⁰⁰ Plaintiffs argued that Rosenberg and Rosenbaum had emigrated from Germany to the Netherlands, and emigration implies a renunciation of a former nationality.¹⁰¹ The Court found that Plaintiffs’ mere assertion that emigration could be equated with a renunciation of nationality was insufficient.¹⁰² The Court also pointed out that the Plaintiffs were inconsistent in their pleadings as to when exactly the Consortium members lost German nationality.¹⁰³

The Court found that Plaintiffs had not pleaded actual facts showing a loss of German nationality by operation of German law.¹⁰⁴ The Court explained that Plaintiffs were required to base their arguments in “judgments and opinions of national and international judicial bodies, scholarly writings, and unchallenged governmental pronouncements that undertake to state a rule of international law” to meet their burden of proof.¹⁰⁵ In this case, Plaintiffs’ assertions fell short of that burden because they failed to point to any German laws indicating that the Consortium members were denationalized before any expropriation via the sale occurred.¹⁰⁶

Other recent case law demonstrates that this is not an impossible burden to satisfy. In *Ambar v. Federal Republic of Germany*, Germany contended that the expropriation exception was not a valid jurisdictional basis because the person from whom Germany confiscated a building was a German national, and thus the domestic takings rule applied.¹⁰⁷ In *Ambar*, the plaintiffs met the burden of proof to overcome the domestic takings challenge by pleading facts related to specific German laws denationalizing Jewish nationals that were in effect at the time of the taking.¹⁰⁸

Ultimately, the district court found that “the majority of Plaintiffs’ assertions” in *Phillip IV* were “general in nature” and “tangential at best in providing information about the Consortium members’ alleged loss of

99. *Id.* at *22.

100. *Phillip IV*, 2022 U.S. Dist. LEXIS 153297, at *42–45.

101. *Id.* at *43.

102. *Id.*

103. *Id.* at *43–44.

104. *Id.* at *37.

105. *Id.* at *37–38 (internal citations omitted).

106. *Id.*

107. *Ambar v. Fed. Rep. of Germany*, 596 F. Supp. 3d 76, 79 (D.D.C. 2022).

108. *Id.* at 84–88.

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German nationality by the time of the sale.”¹⁰⁹ Thus, the district court resolved both issues in favor of Defendant SPK and dismissed the case, as the sale of the Welfenschatz fell within the domestic takings rule, and thus was not within the scope of the expropriation exception.¹¹⁰ Although the Plaintiffs have appealed,¹¹¹ the district court’s most recent ruling should not be taken lightly as it fleshes out the consequences of the Supreme Court’s 2021 ruling as to the limited nature of the expropriation exception and the application of the domestic takings rule to claims seeking jurisdiction thereunder.¹¹²

III. AAMD Deaccessioning Policy Changes and a Broader Discussion about Museum Financials

Soup thrown on paintings. Union strikes. Cuts to public funding. There can be little doubt that internationally, museums are in a crisis, all stemming from financial issues, post-pandemic challenges, and the broader question about museum operability in the twenty-first century.

At the end of September 2022, the Association of Art Museum Directors (AAMD) announced that its members had voted to narrowly change the approved use of funds from deaccessioned art.¹¹³ The new rule, section 25 of the Professional Practices, allows for these funds to be used not only for the acquisition of works of art, but also for “direct care of objects in a museum’s collection.”¹¹⁴ Direct care is now defined as “the direct costs associated with the storage or preservation of works of art,” including conservation, restoration, and materials required for storage.¹¹⁵ The section further clarifies that funds from art disposal may (still) not be used for museum operations or capital expenses, and direct care does not include staff salaries or costs for temporary exhibitions.¹¹⁶ This change brings the AAMD in line with the policies of the American Alliance of Museums (AAM) and the Financial Accounting Standards Board (FASB), but provides a clear definition of “direct care” where the other organizations do not.¹¹⁷ In the United Kingdom, the next largest country for art institutions, a similar rule exists regarding the disposal of items in a museum collection, which Arts

109. *Phillip IV*, 2022 U.S. Dist. LEXIS 153297, at *37.

110. *Id.* at *46.

111. See *Phillip v. Stiftung Preussischer Kulturbesitz*, No. 15-00266-CKK, 2022 WL 3681348 (D.C. Cir., Sept. 19, 2022).

112. *Id.* at *10.

113. Press Release, Membership of AAMD Approves Change to Deaccessioning Rule, Bringing Policy in Line with American Alliance of Museums (AAM) and Financial Accounting Standards Board (FASB), ASS’N OF ART MUSEUM DIRS. (Sept. 30, 2022), <https://aamd.org/for-the-media/press-release/membership-of-aamd-approves-change-to-deaccessioning-rule-bringing> [https://perma.cc/U3NN-249J].

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

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Council England classifies as “unethical sales.”¹¹⁸ But the situation outside of the United States is slightly different as many museums hold their collections in the public domain.¹¹⁹ Nevertheless, the principle of a collection as a cultural, not financial, asset remains the same.

The amended deaccessioning rule follows the AAMD’s temporary pandemic guidelines, which were introduced in April 2020 and have since been repealed.¹²⁰ While the temporary guidelines allowed for funds to be used for “direct care,” the AAMD did not provide a definition of the term, so museums approached the change with greater latitude in a time of upheaval.¹²¹ The public and museum staff were notably distressed when many museum workers were furloughed or made redundant during the pandemic,¹²² especially museums like the Metropolitan Museum of Art (The Met), which holds an endowment of three billion dollars. These endowments are perceived by the public, like many museum holdings, to be a large sum of money stashed away gathering dust, especially because a majority of the funds are earmarked for certain projects or restricted in how they are spent.¹²³ The Met alleged a loss of \$150 million in revenue when it was forced to close for five months. According to a survey from the AAM, sixteen percent of museums believed they faced a significant risk of permanent closure without additional financial relief.¹²⁴

The pandemic and subsequent inflation may have been the catalyst for employee strikes at major museums this past year. In September 2022, workers at the Philadelphia Museum of Art went on an indefinite strike after two years of failed negotiations, during which they demanded higher wages

118. *Id.*

119. DISPOSAL TOOLKIT: GUIDELINES FOR MUSEUMS, MUSEUMS ASS’N 4 (2014).

120. Joint Statement, Arts Council England & Others, *Unethical Sales from Museum Collections* (Mar. 27, 2015), <https://cdn.nationalarchives.gov.uk/documents/archives/museums-association-statement-march-2015.pdf> [<https://perma.cc/SJ3B-E259>].

121. *Id.*; Justin Kamp, *Following Controversial Sales, U.S. Museum Association Revises Its Deaccessioning Policy*, ART NEWSPAPER (Sept. 30, 2022), <https://usaartnews.com/news/following-controversial-sales-us-museums-association-revises-its-deaccessioning-policy> [<https://perma.cc/P2EJ-8UBS>] (In October 2020, the Baltimore Museum of Art planned to sell three works from its collection to fund a \$65 million endowment to fund staff pay raises, diversity admission, and free admission to special exhibitions, but widespread outrage and board resignations resulted in a cancellation of the sale).

122. The Met reduced its headcount by 400 employees, or about twenty percent of its staff. Julia Jacobs, *Met Shrinks Staff Again, Totaling 20 Percent Cut*, N.Y. TIMES (Aug. 5, 2020) <https://www.nytimes.com/2020/08/05/arts/design/met-museum-layoffs-pandemic.html> [<https://perma.cc/7CMD-3BVM>].

123. Taylor Dafoe, *Just a Third of Museums are Investing Their Endowments in Socially Responsible Ways, a Study Found. Here’s How They Can Do Better*, ARTNET (July 7, 2022), <https://news.artnet.com/art-world/museums-social-impact-investing-study-2143589> [<https://perma.cc/7VZT-V9A6>].

124. *A Snapshot of U.S. Museums’ Response to the COVID-19 Pandemic (June 2020)*, AMERICAN ALLIANCE OF MUSEUMS (July 22, 2020), <https://www.aam-us.org/2020/07/22/a-snapshot-of-us-museums-response-to-the-covid-19-pandemic/> [<https://perma.cc/LG4H-GDSL>].

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and health care benefits.¹²⁵ The union president explained that many museum employees work two jobs, which he felt “is pretty unbelievable for an institution with a \$60 million a year budget and a \$600 million endowment.”¹²⁶ In the spring, members of the Whitney Museum of American Art’s union staged demonstrations at the museum’s annual gala and Studio Party and at the opening of the Whitney Biennial.¹²⁷ The union once again pushed for improved compensation and higher standards for job security and health and safety.¹²⁸ A member of the union and exhibition coordinator stated that “[t]he museum needs to invest in Whitney staff as much as it invests in its exhibitions and collections.”¹²⁹ Unfortunately, this is not a strictly American issue, as evidenced by the sharp increase in U.K. museum workers who joined PCS Culture Group¹³⁰—its membership increased by twenty percent between 2020 and 2022.¹³¹ The heritage sector trade union found that one in ten museum jobs paid £9.50 an hour or less and that the median salary for an assistant curator is £11,000 below the national median salary for 2021.¹³²

The issue of “contested heritage,” initially sparked by the American Black Lives Matter movement, and that calls for statues of Confederate generals to be torn down, became a tipping point for U.K. museum professionals, as well.¹³³ The U.K. Government threatened to withhold funding if museums removed objects that “arguably, glorified slavery and imperialism,” which concerned museum professionals “who see their desire to properly present and curate collections linked to transparent threats to job security, funding and livelihoods.”¹³⁴ Such threats resulted in multiple demonstrations, including outside a Victoria and Albert Museum fundraiser in June 2022.¹³⁵

Outside of the United States, where museums are usually provided with funding from public sources, funding has fallen. Between 2010 and 2014, funding from the U.K. Department for Culture, Media and Sport was cut by

125. Haley Son, *Philadelphia Museum of Art Workers Go on Strike, Protest for Increased Wages*, DAILY PENNSYLVANIAN (Sept. 28, 2022), <https://www.thedp.com/article/2022/09/philadelphia-art-museum-strike-union-wages> [<https://perma.cc/WQT2-KHKM>].

126. *Id.*

127. Annie Armstrong, *The Whitney’s Union & Supporters Protests Outside the Museum’s Annual Gala Following a ‘Lowballed’ Wage Offer*, ARTNET (May 18, 2022), <https://news.artnet.com/art-world/whitney-union-demonstration-at-the-museums-annual-gala-2117313> [<https://perma.cc/WG5W-VD6T>].

128. *Id.*

129. *Id.*

130. PCS Culture Group represents 4,000 museums workers across England, Wales & Scotland.

131. Rachel Spence, *With the Threat of Cuts, Unions Get Militant in U.K. Museums—and Their Membership Is Growing Rapidly*, ART NEWSPAPER (Nov. 17, 2020), <https://www.theartnewspaper.com/2022/11/17/with-the-threat-of-cuts-unions-get-militant-in-uk-museums> [<https://perma.cc/6ZZX-AQV5>].

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

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fifteen percent and continues to move in a downward trajectory.¹³⁶ Arts Council England announced this year that it is cutting funding for London-based arts institutions in favor of a policy to reallocate funding outside of the capital.¹³⁷

Museums around the world, despite some public funding, nevertheless accept corporate donations and may incur in reputational damage.¹³⁸ Indeed, philanthropy is the main method of funding American cultural institutions and the protests outside of galas and fundraising events are no coincidence.¹³⁹ Museums take advantage of these donors not solely by accepting their cheques, but by flipping their donated art.¹⁴⁰ Indeed, when artworks are donated but not accessioned, museums can sell them after three years without jeopardizing the donor's charitable deduction, one of the main reasons for the donation, and without triggering sanctions from the AAMD.¹⁴¹ Museums also accept funding and support from large corporations, including oil companies and those that harm the environment.¹⁴² These well-known partnerships were heavily protested over the summer and fall by activists from groups including Just Stop Oil and Extinction Rebellion, who targeted museums by throwing soup on art, gluing themselves to paintings, and other acts of destruction, in the name of climate awareness.¹⁴³ Unfortunately, a more effective means of impacting the climate would be advocating for fossil-fuel divestment of an institution's invested endowment.¹⁴⁴ Like individuals, museums invest in public equities and index funds, which directly connects museums with companies dealing in fossil fuels, tobacco, weapons, and private prisons.¹⁴⁵ In June 2022, Upstart Co-Lab released a report after surveying sixty-one independent museums in the United States with a combined \$10 billion in endowment assets.¹⁴⁶ Upstart Co-Lab reported that only thirty-one percent of those museums currently have impact investment strategies, and only thirty-five

136. *Id.*

137. Simon Stephens, 'Challenging' Cuts in London as ACE Levels Up Regional Investment, MUSEUMS ASS'N (Mar. 8, 2022), <https://www.museumsassociation.org/museums-journal/news/2022/03/challenging-cuts-in-london-as-ace-levels-up-regional-investment/#> [<https://perma.cc/M3RY-ZHDT>].

138. Maxwell L. Anderson, *Museum Beware: Permanent Collections are not Piggy Banks*, APOLLO MAGAZINE (Oct. 5, 2022), <https://www.apollo-magazine.com/deaccessioning-american-museum-directors-new-guidelines/> [<https://perma.cc/R7HB-5WUT>].

139. *Id.*

140. *Id.*

141. *Id.*

142. Sian Cain, *Climate Activists Attacking Art 'Severely Underestimate' Fragility of Works, Gallery Directors Warn*, THE GUARDIAN (Nov. 11, 2022), <https://www.theguardian.com/artanddesign/2022/nov/11/climate-activists-attacking-art-severely-underestimate-fragility-of-works-gallery-directors-warn> [<https://perma.cc/7A8C-DEAE>].

143. *Id.*

144. Dafoe, *supra* note 123.

145. *Id.*

146. See CULTURAL CAPITAL: THE STATE OF MUSEUMS AND THEIR INVESTING, UPSTART CO-LAB (June 2022).

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percent have women or BIPOC fund managers in charge of the endowments.¹⁴⁷ While most museums are attempting to showcase more equitable artists and attract diverse audiences, their endowments and investments are not yet contributing to the same mission.¹⁴⁸

As the joint statement from a group of key museum sector groups in the U.K. states, museum collections are “founded on civic conviction, public investment, and the goodwill and support of donors,” and are “primarily held in trust as cultural, not financial, assets.”¹⁴⁹ While this laudable statement may be true, those who work in the museum sector are demonstrating that museums cannot continue to divorce their collection from the people whose job is to care for that collection, nor can the museum continue to advocate for itself as a progressive place of learning and engagement for the general public,¹⁵⁰ often with programming and exhibitions on current issues, while avoiding the issues within its own institution.¹⁵¹ Finances and the sustainability of the museum as an institution are intertwined, and 2022 has shown the cracks in the system. Larger questions remain about society’s commitment to preserve its culture, the responsibility that comes with that, and how we value and look after the people who take on such responsibility.

147. These numbers are significantly lower than those of similarly sized universities and foundations. Dafoe, *supra* note 123.

148. *Id.*

149. Joint Statement, *supra* note 120.

150. This summer ICOM approved a new definition of a museum: “A museum is a not-for-profit, permanent institution in the service of society . . . Open to the public, accessible and inclusive, museums foster diversity and sustainability.” Press Release, International Council of Museums, *ICOM Approves a New Museum Definition*, INT’L COUNCIL OF MUSEUMS (Aug. 24, 2022) <https://icom.museum/en/news/icom-approves-a-new-museum-definition> [<https://perma.cc/86FJ-L3FP>].

151. For example, see the British Museum’s exhibition “Arctic Culture and Climate” in 2020 and 2021. See Arctic: Culture and Climate, The British Museum, <https://www.britishmuseum.org/exhibitions/arctic-culture-and-climate> [<https://perma.cc/2GDC-TRLR>] (last visited Mar. 30, 2023). The American Museum of Natural History has permanent exhibitions with sections on climate change, and extensive climate change resources on its website, Climate Change Resources, Am. Museum of Nat. Hist., <https://www.amnh.org/explore/science-topics/climate-change/resources> [<https://perma.cc/N3E5-TZ2M>] (last visited Mar. 30, 2023).

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This article highlights significant legal developments relevant to international arbitration law that took place in 2022.

I. North America

A. UNITED STATES

1. U.S. Supreme Court Developments

The U.S. Supreme Court decided five arbitration-related cases in 2022, three of which potentially implicate issues in international arbitration.¹

a. Federal Jurisdiction

In *Badgerow v. Walters*, the Court held that actions to confirm or vacate an arbitral award under Sections 9 and 10 of the Federal Arbitration Act (FAA) require an independent basis for federal subject matter jurisdiction.² Circuit courts have been split over whether the “look-through” approach – which allows a district court to consider the underlying petition to compel arbitration under Section 4 of the FAA to determine whether there is a basis for subject matter jurisdiction – could be applied to actions to confirm, vacate, or modify an arbitral award under other FAA sections.³ In *Badgerow*, the petitioner had moved to remand an action to vacate or confirm an arbitral award to state court, arguing the federal court lacked jurisdiction because there was no diversity.⁴ The U.S. Court of Appeals for the Fifth Circuit, applying the “look-through” approach, found jurisdiction in the federal law claims of the underlying action.⁵ Distinguishing the text of Section 4 with Sections 9 and 10 of the FAA, the Supreme Court reversed, holding that the “look-through” approach did not apply to Sections 9 and 10.⁶

1. The Court’s decision in *ZF Auto. US, Inc. v. Luxshare, Ltd.*, 142 S. Ct. 2078 (2022), addressing whether courts may authorize discovery pursuant to 28 U.S.C. § 1782 in international arbitration, is discussed in a subsequent section. The two remaining cases involved labor matters and are not covered herein. See *Sw. Airlines Co. v. Saxon*, 142 S. Ct. 1783 (2022); *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022).

2. *Badgerow v. Walters*, 142 S. Ct. 1310 (2022).

3. Compare *Quezada v. Bechtel OG&C Constr. Servs., Inc.*, 946 F.3d 837, 843 (5th Cir. 2020) (holding the look-through approach applies to applications to confirm, vacate, or modify an arbitral award); *Ortiz-Espinosa v. BBVA Sec. of P. R., Inc.*, 852 F.3d 36, 47 (1st Cir. 2017) (same); *Doscher v. Sea Port Group Sec., LLC*, 832 F.3d 372, 381-88 (2d Cir. 2016) (same); *McCormick v. Am. Online, Inc.*, 909 F.3d 677, 680-84 (4th Cir. 2018) (same), *with* *Goldman v. Citigroup Glob. Mkts. Inc.*, 834 F.3d 242, 252-55 (3d Cir. 2016) (look-through approach does not apply to those applications); *Magruder v. Fidelity Brokerage Servs.*, 818 F.3d 285, 287-89 (7th Cir. 2016) (same).

4. *Badgerow*, 142 S. Ct. at 1314-15.

5. *Badgerow v. Walters*, 975 F.3d 469, 472-73 (5th Cir. 2020).

6. *Badgerow*, 142 S. Ct. at 1317-18.

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b. Waiver of Arbitration

In *Morgan v. Sundance, Inc.*, the Court unanimously held that courts can conclude that a party waived its right to stay litigation or compel arbitration under Sections 3 and 4 of the FAA, respectively, without a finding of prejudice from delay.⁷ The decision abrogates well-settled precedent in the U.S. Courts of Appeal for the Second,⁸ Third,⁹ Fourth,¹⁰ Eighth,¹¹ and Ninth Circuits.¹² Relying on the text of Section 6 of the FAA, which requires that applications be “heard in the manner provided by law for the making and hearing of motions,” the Court explained that district courts must “apply the usual federal procedural rules.”¹³ Therefore, because a federal court does not require prejudice as an element of waiver “[o]utside the arbitration context,” the Eighth Circuit “was wrong to condition a waiver of the right to arbitrate on a showing of prejudice.”¹⁴

2. *Enforcement Of Arbitral Awards*

a. Challenges to Enforcement

In 2022, the Second and D.C. Circuits weighed in on the grounds for resisting enforcement of arbitral awards under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). In *Esso Exploration & Production Nigeria Ltd. v. Nigerian National Petroleum Corp.*, the Second Circuit affirmed in part and vacated in part a district court’s ruling denying enforcement of an arbitral award that was annulled in part by a Nigerian court.¹⁵ Looking to Article V(1)(e) of the New York Convention, which allows courts to decline to enforce an award that has been set aside by a court in the jurisdiction where the award was issued, the Second Circuit found that the district court had correctly refused to enforce an award issued by an arbitral tribunal seated in Nigeria that was later annulled in a Nigerian court because tax matters cannot be arbitrated under Nigeria law, but it had erred in refusing to enforce portions of the award unrelated to tax issues.¹⁶ The Second Circuit instructed that courts should enforce an annulled award “only if the judgment setting aside the award can be properly characterized as ‘repugnant to fundamental notions of what is decent and just’ in the United

7. *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1714 (2022).

8. *Carcich v. Rederi A/B Nordie*, 389 F.2d 692, 696 (2d Cir. 1968).

9. *PaineWebber Inc. v. Faragalli*, 61 F.3d 1063, 1068–69 (3d Cir. 1995).

10. *Carolina Throwing Co. v. S & E Novelty Corp.*, 442 F.2d 329, 331 (4th Cir. 1971) (per curiam).

11. *Erdman Co. v. Phoenix Land & Acquisition, LLC*, 650 F.3d 1115, 1117 (8th Cir. 2011).

12. *Shinto Shipping Co. v. Fibrex & Shipping Co., Inc.*, 572 F.2d 1328, 1330 (9th Cir. 1978).

13. *Morgan*, 142 S. Ct. at 1714.

14. *Id.* at 1713.

15. *Esso Expl. & Prod. Nigeria Ltd. v. Nigerian Nat’l Petroleum Corp.*, 40 F.4th 56, 79 (2d Cir. 2022).

16. *Id.* at 61–62.

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States,¹⁷ thereby reaffirming the Second Circuit’s commitment to deferring to set-aside proceedings in the court of primary jurisdiction and placing substantial weight on considerations of comity and determinations of foreign courts.¹⁸ The Second Circuit found that the partial set-aside proceedings in Nigeria were not “repugnant” to U.S. policy and therefore the set-aside portion should not be enforced in the United States.¹⁹ But the Second Circuit remanded to the district court for additional fact-finding to define the portion of the award that had not been set aside in Nigeria so that it could be enforced.²⁰

In *Pao Tatneft v. Ukraine*, the D.C. Circuit considered whether the common law doctrine of forum non conveniens could be a defense against the enforcement of an international arbitration award in the United States, even though it is not one of the enumerated grounds for resisting enforcement in the New York Convention.²¹ Rejecting Ukraine’s arguments that the enforcement action should be litigated in Ukraine, the D.C. Circuit “squarely held” that forum non conveniens could not bar a party from seeking enforcement of an arbitral award in the United States because “only U.S. courts can attach foreign commercial assets found within the United States.”²² Arguing a split with the Second Circuit, Ukraine sought review by the U.S. Supreme Court, but the Supreme Court denied Ukraine’s petition for certiorari.²³

b. Service Requirements

This year a number of cases dealt with issues of service in the context of award enforcement and the Foreign Sovereign Immunities Act (FSIA).²⁴

In *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*, the D.C. Circuit adopted a strict, textualist reading of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the Hague Convention) in holding that Saint-Gobain had failed to properly serve the Republic of Venezuela in connection with its efforts to enforce a USD \$42 million ICSID award.²⁵ Pursuant to Section 1608(2) of the FSIA, which provides for service “by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents,” Saint-Gobain attempted service pursuant to the Hague Convention, which

17. *Id.* at 73.

18. *See id.* at 73–76.

19. *Id.* at 67.

20. *Id.*

21. *Pao Tatneft v. Ukr.*, 21 F.4th 829, 834–35 (D.C. Cir. 2021), *cert. denied sub nom. Ukr. v. Pao Tatneft*, 143 S. Ct. 290 (mem.).

22. *Id.* at 840.

23. *See Pao Tatneft*, 143 S. Ct. at 290.

24. *See Republic of Guat. v. IC Power Asia Dev. Ltd.*, No. 1:22-CV-00394 (CM), 2022 WL 3139949 (S.D.N.Y. Aug. 5, 2022).

25. *Saint-Gobain Performance Plastics Eur. v. Bolivarian Republic of Venez.*, 23 F.4th 1036, 1040–41 (D.C. Cir. 2022).

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requires that once the Central Authority receives a request for service, it effects service consistent with the state's internal law and then provides a certificate attesting that service was completed.²⁶ Saint-Gobain delivered the documents to the Venezuelan Foreign Ministry, but the Foreign Ministry did not deliver those documents to the Attorney General (as required under Venezuelan law) or return a certificate of service to Saint-Gobain.²⁷ Breaking with other courts which have found that service is proper notwithstanding the failure of the Central Authority to adhere to its requirements,²⁸ the D.C. Circuit reversed and remanded, explaining that “[e]ven when ‘the equities of a particular case may seem to point in the opposite direction,’ the Supreme Court has required courts to adhere to the plain text of the FSIA and the Hague Convention in view of the ‘sensitive diplomatic implications.’”²⁹ Saint-Gobain filed a petition for certiorari to the Supreme Court,³⁰ but it was denied.³¹

In *Commodities & Minerals Enterprise Ltd. v. CVG Ferrominera Orinoco, C.A.*, the Second Circuit held that service of a summons is not required to confirm an arbitral award under the New York Convention, resolving an open question on the intersection between the FAA, the New York Convention, and the FSIA.³² There, CVG Ferrominera Orinoco argued that because it was an instrumentality of a foreign state, proper service required the delivery of a summons pursuant to the FSIA, even though the FAA requires only service of “the notice of the application” to confirm the award.³³ The Second Circuit disagreed, explaining that “[a]lthough the FAA partially incorporates the FSIA . . . to fill gaps in *how* service must be made on a foreign instrumentality, those cross-references do not alter *what* must be served under the FAA.”³⁴ According to the Second Circuit, “it would make no sense to import the FSIA’s requirement of service of a ‘summons and complaint’ into the FAA because motions to confirm arbitral awards are not commenced by the filing of a complaint.”³⁵

26. Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, arts. 5–6, Nov. 15, 1965, 20 U.N.T.S. 31.

27. *Crystallex Int’l Corp. v. PDV Holding Inc.*, No. 15-CV-1082-LPS, 2019 WL 6785504, at *11 (D. Del. Dec. 12, 2019).

28. *See, e.g.,* *Box v. Dall. Mex. Consulate Gen.*, 487 Fed. App’x 880, 886 (5th Cir. 2012); *Devengoechea v. Bolivarian Republic of Venez.*, No. 12-cv-23743, 2014 WL 12489848, at *1 (S.D. Fla. Apr. 25, 2014); *Scheck v. Republic of Arg.*, No. 10-cv-5167, 2011 WL 2118795, at *3 (S.D.N.Y. May 23, 2011).

29. *Saint-Gobain Performance Plastics Eur.*, 23 F.4th at 1042 (citation omitted).

30. Brief for Petitioner, *Saint-Gobain Performance Plastic v. Venez.*, No. 21-1574, 2022 WL 4652081, at *22 (U.S. Oct. 3, 2022).

31. *Saint-Gobain Performance Plastic*, No. 21-1574, 2022 WL 4652081, at *22 (U.S. Oct. 3, 2022).

32. *Commodities & Mins. Enter. Ltd. v. CVG Ferrominera Orinoco, C.A.*, 49 F.4th 802 (2d Cir. 2022).

33. 9 U.S.C. § 9.

34. *Commodities*, 49 F.4th at 811 (emphasis in original).

35. *Id.*

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3. *Arbitral Subpoenas*

Providing clarity on district courts' ability to enforce arbitral subpoenas, the Ninth Circuit in *Day v. Orrick, Herrington & Sutcliffe, LLP* held that a California court had subject matter jurisdiction under the FAA to enforce a third-party subpoena issued by an arbitrator against Orrick, Herrington & Sutcliffe, LLP (Orrick) in California, in connection with an arbitration seated in Washington, D.C.³⁶

Section 7 of the FAA provides that the district court “for the district in which such arbitrators, or a majority of them, are sitting may compel” compliance with an arbitral subpoena.³⁷ The Northern District of California ruled that it had no subject matter jurisdiction to enforce the subpoena against Orrick, construing Section 7 to provide jurisdiction *only* in the district where the arbitration is seated.³⁸ As a matter of first impression, the Ninth Circuit reversed and remanded, finding subject matter jurisdiction under Section 203 of the FAA, which provides federal district courts with original jurisdiction over “action[s] or proceeding[s] falling under the Convention.”³⁹ The Ninth Circuit reasoned that venue in the Northern District of California—Orrick’s principal place of business—was proper under the general venue statute applicable to district courts, 28 U.S.C. § 1391, which establishes a proper venue is “a judicial district in which any defendant resides.”⁴⁰ A potential obstacle to that conclusion was Section 204 of the FAA, which provides that an action or proceeding may be brought in the district “embrac[ing]” the place of arbitration if the arbitration agreement designates a place of arbitration in the United States.⁴¹ But the Ninth Circuit explained that Section 204 is a non-exclusive, “permissive” venue provision that “supplements, rather than supplants” the general venue statute.⁴²

4. *28 U.S.C. § 1782*

In a long-awaited decision, on June 13, 2022, the Supreme Court unanimously ruled in *ZF Auto. US, Inc. v. Luxshare, Ltd.* that 28 U.S.C. § 1782 does not permit U.S. district courts to order discovery for use in proceedings before private international arbitral tribunals or ad hoc investor-State arbitral tribunals under the United Nations Commission on International Trade Law (UNCITRAL) Rules.⁴³

36. *Day v. Orrick, Herrington & Sutcliffe, LLP*, 42 F.4th 1131, 1135 (9th Cir. 2022).

37. 9 U.S.C. § 7.

38. *Day v. Orrick, Herrington & Sutcliffe LLP*, No. 21-MC-80181-JST, 2021 WL 4069753, at *1 (N.D. Cal. Sept. 7, 2021).

39. *Day*, 42 F.4th at 1139.

40. *Id.* at 1141–42.

41. *Id.*

42. *Id.* at 1140–41.

43. *ZF Automotive US, Inc. v. Luxshare, Ltd.*, 142 S. Ct. 2078, 2083 (2022).

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Section 1782 allows federal district courts to order discovery for use in a proceeding before a “foreign or international tribunal.”⁴⁴ The Supreme Court’s decision clarified that neither private international commercial tribunals nor ad hoc UNCITRAL investor-State tribunals qualify as “foreign or international tribunals,” resolving a 3-2 Circuit split on that issue.⁴⁵

The Court found that private international commercial tribunals do not qualify as a “foreign or international tribunal” under Section 1782 because “[n]o government is involved in creating [the arbitral] panel or prescribing its procedures.”⁴⁶ The Court’s ruling also is clear that Section 1782 discovery is not available for use in ad hoc UNCITRAL investor-State arbitrations.⁴⁷ The Court suggested, however, that an arbitral tribunal could qualify as a “foreign or international tribunal” if the States intended to “imbue” the panel with governmental authority, as determined by “indicia of a governmental nature,” such as state funding, public disclosure, and a formal relationship with the State.⁴⁸

In the wake of the decision, questions lingered about whether Section 1782 discovery remained available for arbitrations administered by State-sanctioned institutions like the International Centre for Settlement of Investment Disputes (ICSID).⁴⁹ One district court magistrate judge has now rejected a petition in aid of ICSID arbitration.⁵⁰ The decision is being challenged before the presiding district court judge.⁵¹

B. MEXICO

The Third Collegiate Court of the First Circuit ruled that the annulment of an arbitral award is improper where a party claims that the arbitrator did not apply foreign law (here, the Constitution of the State of California) but does not provide proof of the existence of the foreign law and its applicability to the case in question.⁵²

44. *Id.*

45. *Compare* *Servotronics, Inc. v. Boeing Co.*, 954 F. 3d 209 (4th Cir. 2020), *and* *Abdul Latif Jameel Transp. Co. v. FedEx Corp.*, 939 F. 3d 710 (6th Cir. 2019) *with* *National Broadcasting Co. v. Bear Stearns & Co.*, 165 F. 3d 184 (2d Cir. 1999); *Republic of Kazakhstan v. Biedermann Int’l*, 168 F. 3d 880 (5th Cir. 1999), *and* *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F. 3d 689 (7th Cir. 2020).

46. *ZF Automotive US, Inc. v. Luxshare, Ltd.*, 142 S. Ct. 2078, 2082, 2089 (2022).

47. *Id.* at 2091–92.

48. *Id.* at 2090–91.

49. *In re Alpeng, Ltd.*, No. 21 MC 2547 (MKB)(RML), 2022 U.S. Dist. LEXIS 196061.

50. *Id.* at *11 (emphasizing *inter alia* that ICSID arbitral tribunals have no authority to provide reciprocal discovery assistance for U.S. proceedings).

51. Applicant’s Rule 72(b) Objection to Magistrate Judge’s October 27, 2022 Discovery Rulings at 6–12, *In re Alpeng*, (E.D.N.Y. Nov. 10, 2022) (No. 21 MC 2547), 2022 WL 15497008.

52. *Acción de Nulidad de Laudo Arbitral, Tribunales Colegiados de Circuito, SJF, Undécima Época, Tomo IV, 9 enero de 2022, Tesis I.3o.C.121 K (10a.), página 2948, Registro No. 2024059 (Mex.)*.

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Under the Mexican Commercial Code, foreign legal regimes are subject to proof.⁵³ Because the arbitration proceeding was conducted in Mexico, the party claiming that the arbitrator did not apply California law—not the arbitrator—had the burden to prove its existence and applicability to the case.⁵⁴

C. CANADA

Canadian courts continued their trend of actively facilitating arbitration. In *Cash Cloud v. BitAccess*, the Ontario Superior Court of Justice confirmed that it had jurisdiction to grant urgent interim relief in aid of an international arbitration, granting a prohibitive injunction to maintain the status quo between the parties pending the completion of the arbitration.⁵⁵

Similarly, in *Eurobank Ergasias v. Bombardier Inc.*, the Quebec Court of Appeal refused to issue a payment order to a losing party at arbitration that would render an international arbitration award effectively meaningless.⁵⁶ The Court found that judicial policy and public order required courts to maintain the integrity of the arbitration process whenever possible to do so.⁵⁷

In *Enrox Energy and Mining Group v. Saddam*, the Supreme Court of British Columbia affirmed that an international award will be enforced unless the party resisting enforcement could exceptionally establish the limited circumstances set out in the UNCITRAL Model Law or the New York Convention.⁵⁸

D. NAFTA/USMCA

The United States-Mexico-Canada Agreement (USMCA) entered into force on July 1, 2020.⁵⁹ To date, six “legacy” disputes under USMCA’s three-year extension of the North American Free Trade Agreement (NAFTA) have been initiated.⁶⁰ All six cases remain pending.⁶¹ More than two years after entering into force, USMCA’s terms (as opposed to its extension of NAFTA’s terms) have yet to be implicated in a dispute.⁶²

53. *Id.*

54. *Id.*

55. *Cash Cloud v. BitAccess*, 2022 O.N.S.C. 5622, ¶¶ 33, 44, 60 (Can.).

56. *Eurobank Ergasias S.A. v. Bombardier Inc.*, 2022 Q.C.C.A. 802, ¶ 76 (Can.).

57. *Id.* ¶ 73.

58. *Enrox Energy and Mining Grp. v Saddam*, 2022 B.C.S.C. 285, ¶ 42 (Can.).

59. *See* United States-Mexico-Canada Agreement, Nov. 13, 2021, 134 Stat. 11.

60. Ivan W. Bilaniuk & Francisco Victoria-Andreu, *Time is Running Out to File an International Investment Arbitration Claim Under NAFTA*, DINSMORE (Feb. 1, 2023), <https://www.dinsmore.com/publications/time-is-running-out-to-file-an-international-investment-arbitration-claim-under-nafta/> [<https://perma.cc/9RU5-JAA3>].

61. *Id.*

62. *Id.*

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On December 17, 2020, ICSID registered the first legacy dispute in *Koch Industries v. Canada*.⁶³ The U.S. conglomerate brought a USD \$30 million claim over the cancellation of a program designed to reduce carbon emissions.⁶⁴ In April 2022, the tribunal invited non-disputing parties to file amicus curiae submissions.⁶⁵

On December 22, 2020, the PCA registered *Windstream Energy v. Canada (II)*,⁶⁶ in which the U.S. wind energy developer claims U.S. \$333 million over Ontario's failure to lift the moratorium on its offshore wind project.⁶⁷

*First Majestic Silver v. Mexico*⁶⁸ was registered by ICSID on March 31, 2021. The Canadian mining investor filed a U.S. \$500 million claim over retrospective tax liabilities imposed by Mexico.⁶⁹

On May 12, 2021, ICSID registered *Finley Resources v. Mexico*,⁷⁰ in which several U.S. oil and gas investors claimed that Mexico violated provisions of NAFTA and USMCA regarding their investment contracts with national petroleum company Pemex.⁷¹ On January 26, 2022, the tribunal issued a confidential provisional measures decision.⁷²

On December 22, 2021, ICSID registered *TC Energy & TransCanada v. U.S. (II)*,⁷³ in which Canadian investors brought a \$15 billion Canadian

63. Koch Industries, Inc. and Koch Supply & Trading, LP v. Canada, ICSID Case No. ARB/20/52, <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/20/52> [<https://perma.cc/QK64-7XXP>].

64. See *Investment Dispute Settlement Navigator: Koch v. Canada*, INV. POL'Y HUB, <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1074/koch-v-canada> [<https://perma.cc/YXG6-VF6X>].

65. See Gordon E. Kaiser, *NAFTA and USMCA Energy Arbitrations*, GLOB. ARB. REV. (Aug. 5, 2022), <https://globalarbitrationreview.com/guide/the-guide-energy-arbitrations/fifth-edition/article/nafta-and-usmca-energy-arbitrations> [<https://perma.cc/LT6P-FZ9F>].

66. Windstream Energy LLC (USA) v. Government of Canada, Case No. 2021-26 (Perm. Ct. Arb. 2021), <https://pca-cpa.org/en/cases/280/> [<https://perma.cc/MDC9-QKKD>].

67. See Cosmo Sanderson, *Wind Investor Pursues Second Claim Against Canada*, GLOB. ARB. REV. (Sept. 13, 2022), <https://globalarbitrationreview.com/article/wind-investor-pursues-second-claim-against-canada> [<https://perma.cc/5W64-LRUB>].

68. First Majestic Silver Corp. v. United Mexican States, ICSID Case No. ARB/21/14, <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/21/14> [<https://perma.cc/63WP-9MUZ>].

69. See Jack Ballantyne, *Canadian Silver Miner Launches NAFTA Claim Against Mexico*, GLOB. ARB. REV. (Mar. 3, 2021), <https://globalarbitrationreview.com/article/canadian-silver-miner-launches-nafta-claim-against-mexico> [<https://perma.cc/MVT4-KZBH>].

70. Finley Res. Inc., MWS Management Inc., and Prize Permanent Holdings, LLC v. United Mexican States, <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/21/25> [<https://perma.cc/299X-685Z>].

71. See Cosmo Sanderson, *US Oil & Gas Investors Bring Claim Against Mexico*, GLOB. ARB. REV. (May 13, 2021), <https://globalarbitrationreview.com/article/us-oil-and-gas-investors-bring-claim-against-mexico> [<https://perma.cc/E2CX-B5LZ>].

72. Finley Res. Inc., ICSID Case No. ARB/21/25.

73. TC Energy Corp. and TransCanada Pipelines Ltd. v. United States of America, ICSID Case No. ARB/21/63, Case Details, <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/21/63> [<https://perma.cc/2QNR-D7GH>]. The same claim was filed in 2016 under NAFTA with respect to President Obama's refusal to grant the necessary permit to

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Dollar claim over the cancellation of the Keystone XL pipeline.⁷⁴ On September 21, 2022, the tribunal was constituted.⁷⁵

In September 2022, the U.S. precious metals producer Coeur Mining filed a request for arbitration against Mexico over its refusal to grant VAT refunds on royalty payments.⁷⁶

II. ICSID

On July 1, 2022, ICSID’s amended rules came into force. ICSID has described its amended rules as intended to “streamline[]” and “modernize[]” ICSID arbitration, including by increasing “efficien[cy]” and “transparency.”⁷⁷ These include several new rules.

Under Rule 14, a party must disclose the “name and address” of any direct or indirect third-party funder from whom the party has received funding to pursue or defend the proceeding through a “donation or grant” or in return for outcome-dependent “remuneration.”⁷⁸ If the third-party funder is a “juridical person,” the party must disclose the “names of the persons and entities that own and control” that person.⁷⁹ Rule 14 also provides that a tribunal may order disclosure of “further information regarding the funding agreement.”⁸⁰

Rule 58 provides that a tribunal “shall” render the award “no later than” “240 days after the last submission,” although Rule 12 provides that a tribunal shall use “best efforts” to meet the time limits in ICSID’s rules.⁸¹

Under Rule 62(3), parties are deemed to have consented to the publication of awards and decisions on annulment “if no party objects in writing to such publication within 60 days” after dispatch of the document.⁸² Rules 63 and 64 provide that ICSID “shall” publish orders, decisions, and parties’ written

construct the Keystone XL. On March 24, 2017, the U.S. State Department signed President Trump’s permit to proceed with the Keystone XL construction and the parties discontinued arbitration proceedings.

74. See Kaiser, *supra* note 65.

75. See *TC Energy Corp. and TransCanada Pipelines Ltd.*, ICSID Case No. ARB/21/63.

76. See Sebastian Perry, *Miner Hits Mexico with NAFTA Claim Over VAT Rebates*, GLOB. ARB. REV. (Nov. 11, 2022), <https://globalarbitrationreview.com/article/miner-hits-mexico-nafta-claim-over-vat-rebates> [<https://perma.cc/9RNN-APZ8>].

77. INT’L CTR. FOR SETTLEMENT OF INV. DISP., ANNUAL REPORT 2022 4 (2022), https://icsid.worldbank.org/sites/default/files/publications/ICSID_AR.EN.pdf [<https://perma.cc/N2GH-SGR9>]; Press Release, ICSID Releases 2022 Versions of its Rules and Regulations, WORLD BANK (June 22, 2022), <https://icsid.worldbank.org/news-and-events/news-releases/icsid-releases-2022-versions-its-rules-and-regulations> [<https://perma.cc/VB39-5WWF>].

78. INT’L CTR. FOR SETTLEMENT OF INV. DISP., ICSID CONVENTIONS, REGULATIONS, & RULES 98 (2022), https://icsid.worldbank.org/sites/default/files/documents/ICSID_Convention.pdf [<https://perma.cc/S7ZH-H868>].

79. *Id.*

80. *Id.*

81. *Id.* at 97, 120.

82. *Id.* at 123.

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submissions, although that rule is subject to Rule 66, which protects various types of confidential information from public disclosure.⁸³

Under Rule 75(1), parties may agree to expedited arbitration.⁸⁴ Rules 75–86 provide that shorter timelines and page limits apply in expedited arbitration.⁸⁵

III. Europe

A. ENGLAND

The Law Commission has reported on proposed changes to the Arbitration Act 1996.⁸⁶ These changes are essentially a “light touch” but propose a statutory duty of disclosure, codifying the law.⁸⁷

In *NDK Ltd v HUO Holding Ltd*⁸⁸ the court found that claims between shareholders under a company’s articles “related to” or were “in connection with” matters in a shareholders’ agreement that mandated arbitration.

In *Gol Linhas Aereas S.A v Matlin Patterson*,⁸⁹ the Privy Council ruled that the standard of due process to resist enforcement under the New York Convention is not dictated by local standards, but is a general standard “capable of application to any international arbitration” and comprising “the basic minimum requirements that would generally . . . be regarded by the international legal order as essential to a fair hearing.”⁹⁰

In *Ducat Maritime v Lavender Shipmanagement*,⁹¹ the court set aside part of an award on the grounds that an “obvious accounting mistake” by an arbitrator had breached the duty of fairness. The decision is seen as blurring the focus of the serious irregularity provision, where the relevant inquiry is whether there has been a failure of due process, not whether the tribunal has reached the correct answer.⁹²

B. IRELAND

In a landmark judgment on investor-state arbitration, the Irish Supreme Court held in *Costello v. Government of Ireland*⁹³ that an arbitration tribunal

83. *Id.* at 124–25.

84. *Id.* at 132.

85. *Id.* at 132–37.

86. *Review of the Arbitration Act 1996*, L. COMM’N, <https://www.lawcom.gov.uk/project/review-of-the-arbitration-act-1996/> [<https://perma.cc/95AZ-YPT5>] (last visited Mar. 24, 2023).

87. L. COMM’N, *REVIEW OF THE ARBITRATION ACT 1996: A CONSULTATION PAPER 26* (Sept. 2022), <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2022/09/Arbitration-Consultation-Paper.pdf> [<https://perma.cc/VAR5-R232>].

88. *NDK Ltd. v. Huo Holding Ltd.* [2022] EWHC 2580 (Comm) [17].

89. *Gol Linhas Aereas S.A v. Matlin Patterson* [2022] UKPC 21.

90. *Id.* ¶ 6.

91. *Ducat Mar. v Lavender Shipmanagement Inc.* [2022] EWHC 766 (Comm) 10–11.

92. *Id.* at 8.

93. *See Patrick Costello v. The Gov’t of Ir.* [2022] IESC 44 (Ir.); *SUMMARY OF PATRICK COSTELLO v. THE GOV’T OF IR.* [2022] IESC 44, SUPREME CT. OF IR. 4 (Nov. 11, 2022),

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system to be established under the EU-Canadian Comprehensive Economic Trade Agreement (CETA) would infringe the principle of judicial sovereignty under the Irish Constitution.

In particular, CETA establishes an arbitral tribunal that would handle investor-state disputes and make monetary awards against the Irish State.⁹⁴ The Supreme Court found that this would contravene Irish constitutional law because Irish courts would not have the power to refuse enforcement of awards made by the tribunal.⁹⁵

But the Supreme Court noted that if the Irish legislature passed certain amendments to Ireland's Arbitration Act 2010 then CETA could be ratified.⁹⁶ Indeed, one of the judgments suggests specific amendments⁹⁷ which would expressly allow the Irish High Court to refuse enforcement of a CETA tribunal award on specific grounds, namely if the award materially compromised the constitutional identity of the State, or it materially compromised the State's obligation to give effect to EU law.

C. FRANCE

In the landmark *Belokon* decision,⁹⁸ the *Cour de cassation* upheld the Paris Court of Appeal's annulment of an arbitral award due to corruption allegations regarding the underlying agreement.⁹⁹ The decision confirmed French courts' move towards a "maximalist" standard of review of awards' conformity with international public policy,¹⁰⁰ namely in assessing corruption allegations "in law and in fact" without engaging in a review on the merits.

In *Sorelec*, which also dealt with corruption allegations, the Supreme Court similarly concluded that there was no limitation on reviewing courts' "power to investigate in law and in fact all the elements concerning the relevant ground for review."¹⁰¹

<https://www.bailii.org/ie/cases/IESC/2022/2022IESC44Summary.pdf> [https://perma.cc/DVH9-GPCE].

94. *Summary of Patrick Costello v. The Gov't of Ir.* [2022] IESC 44, *supra* note 93, at 2–3.

95. *Id.* at 4.

96. *Id.* at 1.

97. Costello [2022] IESC at 96.

98. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Mar. 23, 2022, Bull. civ. I, No. 17-17.981 (Fr.).

99. Cour d'appel de Paris [court of appeals of paris] Paris, Feb. 21, 2017, No. 15-01650 (Fr.).

100. Code de procédure civile [C.P.C.] [Civil Procedure Code] art. 1520 (Fr.).

101. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Sept. 7, 2022, Bull. Civ. I, No. 20-22.118 (Fr.).

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D. SPAIN

On October 12, 2022, Spain announced its intention to withdraw from the Energy Charter Treaty (ECT).¹⁰² The decision will take effect one year after Spain's withdrawal notice, but the ECT will continue to apply for another twenty years to investments made before the effective date.¹⁰³ As such, investors who make their investments before the effective date may still initiate proceedings under the ECT.¹⁰⁴

E. GERMANY

Following the landmark *Achmea* decision by the Court of Justice of the European Union (CJEU) on March 6, 2018,¹⁰⁵ on April 28, 2022, the *Kammergericht Berlin* (Berlin Higher Regional Court) ruled that the admissibility of the arbitral proceedings was subject to neither national courts' nor the CJEU's supervisory authority because the arbitration was administered by ICSID.¹⁰⁶ The Berlin Court thus rejected Germany's request to declare that respondents'¹⁰⁷ claim against Germany under Article 26 of the ECT was inadmissible as one concerning an intra-EU dispute. The decision has been appealed to the German Federal Court of Justice; a decision is expected in 2023.¹⁰⁸

The *Bundesverfassungsgericht* (German Federal Constitutional Court) found that the mandatory arbitration clause of the Court of Arbitration for Sport (CAS) violated an athlete's constitutional right of access to justice under the *Grundgesetz* (German Federal Constitution).¹⁰⁹

102. Toby Fisher, *Spain Announces Withdrawal from ECT*, GLOB. ARB. REV. (Oct. 13, 2022), <https://globalarbitrationreview.com/article/spain-announces-withdrawal-ect> [https://perma.cc/5CRV-SCUJ].

103. See EUR. PARLIAMENT, SUNSET CLAUSES IN INTERNATIONAL LAW AND THEIR CONSEQUENCES FOR EU LAW 25 (2022), [https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703592/IPOL_STU\(2022\)703592_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703592/IPOL_STU(2022)703592_EN.pdf) [https://perma.cc/59ML-DULC].

104. See *id.*

105. Case C-284/16, *Slowakische Republik (Slovak Republic) v. Achmea BV*, ECLI:EU:C:2018:158, ¶ 2 (Mar. 6, 2018).

106. KG Berlin decision 12 SchH 6/21 of 28 April 2022 (Ger.).

107. *Mainstream Renewable Power Ltd. v. Fed Republic of Ger.*, ICSID Case No. ARB/21/26, Decision on Respondent's Application Under ICSID Arbitration Rule 41(5), ¶¶ 111–12 (Jan. 18, 2022), <https://www.italaw.com/sites/default/files/case-documents/italaw170120.pdf> [https://perma.cc/XG4Z-3TA6].

108. Laura Halonen & Sophie Eichhorn, *Berlin Court Finds Intra-EU ICSID Arbitration is Immune from Achmea*, WAGNER ARB. (July 21, 2022), <https://wagner-arbitration.com/en/journal/berlin-court-decision-on-icsid-arbitration-could-impact-the-future-of-intra-eu-bit-claims/> [https://perma.cc/43Q5-8KTP].

109. See *Bundesverfassungsgericht 1 BvR 2103/16*, *SchiedsVZ* 2022, 296 (Ger.).

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F. SWITZERLAND

The Swiss Arbitration Centre has issued “Supplemental Swiss Rules for Corporate Law Disputes” (the Supplemental Swiss Rules) which will enter into force on January 1, 2023.¹¹⁰

The Supplemental Swiss Rules were drafted in parallel to a new Article 697n of the Swiss Code of Obligations, which will enter into force the same day.¹¹¹ The new Article 697n expressly allows Swiss companies to include arbitration clauses for corporate law disputes in their articles of association.¹¹² Arbitrations based on such statutory arbitration clauses are domestic arbitrations as a matter of law and governed by Part 3 of the Swiss Civil Procedure Code.¹¹³ Companies may, however, regulate the specifics of the arbitration proceedings, including by reference to institutional arbitration rules.¹¹⁴

The Supplemental Swiss Rules are designed to account for the specific characteristics of corporate law disputes.¹¹⁵ Specifically, they (1) implement the statutory requirement that “persons who may be directly affected by the legal effects of the arbitral award” are notified timely about the commencement and termination of the arbitration and are given an adequate opportunity to participate in the proceedings; (2) adapt the rules on interim and emergency relief under the Swiss Rules; and (3) provide a Model Arbitration Clause which companies may incorporate into their articles of association.¹¹⁶

G. RUSSIA

*Uraltransmash*¹¹⁷ and its broad interpretation of Articles 248.1 and 248.2 of the Code of Arbitrazh Procedure (CAP)¹¹⁸ continues to have ramifications for Russian court practice. Courts have reviewed both foreign arbitral and court decisions as the relevant CAP provisions do not differentiate between the two.

Courts mostly followed the reasoning in *Uraltransmash*. In *Sovfrakbt*,¹¹⁹ the court prohibited an English company from continuing an English court

110. See SWISS ARB. CTR., SUPPLEMENTAL SWISS RULES FOR CORPORATE LAW DISPUTES 6 (2023), https://www.swissarbitration.org/wp-content/uploads/2022/11/Supplemental-Swiss_Rules_for_Corporate_Law_Disputes_EN.pdf [<https://perma.cc/DTF6-99AE>].

111. See *id.* at 4.

112. See *id.*

113. See *id.*

114. See *id.*

115. See *id.*

116. See *id.* at 4–5, 7, 110.

117. See Determination of the Supreme Court of the Russian Federation, No. 309-ES21-6955 (1-3) (Dec. 9, 2021) (Russ.).

118. See Code of Arbitrazh Procedure of the Russian Federation (Dec. 30, 2001) (as amended) (Russ.).

119. See Determination of the Arbitrazh Court of City of Moscow, case No. A40-156736/20-68-1037 (May 23, 2022) (Russ.).

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proceeding against a Russian sanctioned entity and awarded compensation in the amount of the English claim. In *Dell*,¹²⁰ the court opined, albeit in *dicta*, that the imposition of sanctions was sufficient *per se* for Russian courts to assume jurisdiction over the otherwise foreign arbitration. In *Siemens*,¹²¹ the court prohibited Siemens from pursuing arbitration before the Vienna International Arbitral Centre (VIAC) in favor of Russian courts.

However, in somewhat of an outlier decision, in *Rizzani*,¹²² the court held that the barriers to access to justice that a Russian sanctioned party would encounter in a foreign state were only a rebuttable presumption (overturned in the event).

As regards non-sanctioned Russian entities, in *Cabinplant*,¹²³ *Credit Suisse*,¹²⁴ and *Mastercard*,¹²⁵ the courts rejected attempts to invoke paragraph 4 of Article 248.1. For example, in *Cabinplant*, the court dismissed a Russian state-owned company's claim on the partiality of arbitrators due to Sweden, an "unfriendly" country, being the arbitration seat.

H. UKRAINE

Despite the war, the International Commercial Arbitration Court (ICAC) at the Ukrainian Chamber of Commerce and Industry (UCCI) in Kyiv only suspended¹²⁶ the administration and consideration of commercial disputes from February to March 2022 before resuming operations.¹²⁷ On July 1, 2022, amendments to the ICAC Rules were adopted to ensure the effective administration of cases during the martial law period by increasing the use of electronic communications.¹²⁸

Investment arbitrations against Ukraine have been suspended to enable the Ministry of Justice to focus on lawfare against Russia (e.g., European

120. See Decision of the Arbitrazh Court of City of Moscow, case No. A40-72905/22-116-1253 (June 17, 2022) (Russ.).

121. See Determination of the Arbitrazh Court of City of Moscow, case No. A40-98870/22-68-644 (Nov. 8, 2022) (Russ.).

122. See Determination of the Arbitrazh Court of City of Moscow, case No. A40-50169/22-10-306 (Aug. 18, 2022) (Russ.).

123. See Determination of the Arbitrazh Court of Samara Oblast, case No. A55-24707/2022 (Aug. 24, 2022) (Russ.).

124. See Determination of the Arbitrazh Court of City of Moscow, case No. A40-191489/2022-25-1449 (Oct. 24, 2022) (Russ.).

125. See Determination of the Arbitrazh Court of City of Moscow, case No. A40-141959/22-22-1067 (Nov. 17, 2022) (Russ.).

126. See *About the ICAC*, INT'L COM. ARB. CT., <https://icac.org.ua/en/novyny-ta-publikatsiyi/vazhlyvo-osoblyvi-umovy-roboty/> [<https://perma.cc/H98P-7WTK>] (last visited May 9, 2023).

127. See *Open Letter of the President of the ICAC and the UMAC to Arbitrators (on Operations During Martial Law)*, INT'L COM. ARB. CT., <https://icac.org.ua/en/novyny-ta-publikatsiyi/zvernennya-golovy-icac-ta-umac-do-arbitriv-instytutsij/> [<https://perma.cc/FNB9-VNLL>] (last visited May 9, 2023).

128. See *The ICAC Rules Amended as of 01 July 2022 Are Available at Website*, INT'L COM. ARB. CT., <https://icac.org.ua/en/novyny-ta-publikatsiyi/reglament-icac-zi-zminamy-vid-01-lypnya-2022-roku-vzhe-na-sajti/> [<https://perma.cc/48W3-N8EM>] (last visited May 9, 2023).

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Court of Human Rights claims, creation of the international claims commission following the adoption of the U.N. General Assembly Resolution dated November 14, 2022, on reparations to Ukraine).¹²⁹

Russia failed to set aside the jurisdictional awards in the *Aeroporto Belbek*, *Everest Estate* and *Privatbank* cases, which may serve as guidance for potential claimants who lost their investments in territories annexed by Russia in 2022.¹³⁰

Facing threats of investment disputes because of its freezes and seizures of Russian energy infrastructure assets, Ukraine invoked the denial of benefits provision under the ECT to refuse protection to Russian-owned investments.¹³¹

The Supreme Court of Ukraine unified court practice to ensure the prompt and effective recognition and enforcement of ICSID awards.¹³²

IV. Pacific Rim

A. AUSTRALIA

In March 2022, the High Court of Australia granted special leave to appeal a decision of the Full Federal Court enforcing an award against Spain under the ICSID Convention.¹³³ This appeal continues a line of decisions considering the doctrine of sovereign immunity in the enforcement of ICSID awards in Australia and is one of the few arbitration decisions to reach Australia's highest court.¹³⁴

In 2021, the Full Court held that there was a distinction between "recognition" and "enforcement" proceedings, ultimately ordering that the award be enforced.¹³⁵ Notably, the Full Court did not address the primary judge's finding that Spain had submitted to the jurisdiction of the Federal Court, waiving its right to sovereign immunity by virtue of the ICSID

129. Mariana Antonovych, *2022 in Review: Investment Arbitration Amidst War in Ukraine*, KLUWER ARB. BLOG (Feb. 17, 2023), <https://arbitrationblog.kluwerarbitration.com/2023/02/17/2022-in-review-investment-arbitration-amidst-war-in-ukraine/> [https://perma.cc/MK2C-ZTGY].

130. See Cosmo Sanderson, *Russia Fails to Quash Jurisdictional Awards in Crimea Cases*, GLOB. ARB. REV. (July 19, 2022), <https://globalarbitrationreview.com/article/russia-fails-quash-jurisdictional-awards-in-crimea-cases> [https://perma.cc/LX49-K95Q].

131. See Letter from Dmytro Kuleba, Minister of Foreign Affairs of Ukraine, to His Excellency, Mr. Guy Lentz, Secretary-General of the Energy Charter Secretariat (Aug. 2022), https://files.lbr.cloud/public/2022-08/0297-IN-19082022-Ukraine__Mission_to_the_EU.pdf?VersionId=KJmWKH8NEcOXoueZYz5eJgZacLiAch1I [https://perma.cc/8SKV-8DWG].

132. First Judicial Chamber of the Civil Court of Cassation S. O. Pogribny [Supreme Court] Sept. 2, 2022, 824/182/21, <https://reyestr.court.gov.ua/Review/106141305> [https://perma.cc/9SLF-YS8B] (Ukr.).

133. Kingdom of Spain v. Infrastructure Services Luxembourg S.À.R.L & Anor, [2022] HCA 39 (Austl.).

134. *Id.*

135. Appellant's Notice of Filing, Kingdom of Spain v. Infrastructure Services Luxembourg S.À.R.L & Anor, (May 6, 2022), S43/2022 (Austl.).

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Convention.¹³⁶ Spain has raised this issue for consideration by the High Court.¹³⁷

The appeal was heard in November 2022 and irrespective of the outcome, the decision will provide clarity around the role of sovereign immunity in enforcing arbitral awards in Australia.¹³⁸

B. JAPAN

The Legislative Council of Japan's Ministry of Justice has largely completed its amendments to Japan's Arbitration Law of 2003.¹³⁹ The amendments, which focus on interim measures, are expected to pass into law in 2023 and aim to bring the Arbitration Law in line with the 2006 amendments to the UNCITRAL Model Law.¹⁴⁰ Other amendments include giving courts discretion to waive the requirement for Japanese translations of all or some evidence in arbitration-related proceedings and extending the jurisdictions of the Tokyo and Osaka District Courts to hear cases relating to arbitration.¹⁴¹

C. CHINA & HONG KONG

China has expanded entry permits for overseas arbitration institutions to establish offices and operations in China.¹⁴² Some large cities such as Beijing, Shanghai, and Chongqing have issued guidance on the conditions and procedures for the establishment of these offices.¹⁴³ Beijing will allow overseas arbitration institutions to establish offices in the China (Beijing) Pilot Free Trade Zone upon registration with the Beijing Judicial Bureau and will allow parties to select foreign arbitration institutions for arbitration agreements involving foreign matters.¹⁴⁴

136. *Id.*

137. *Id.*

138. *Kingdom of Spain*, at 192.

139. Yoshimi Ohara et al., *Japan*, GLOB. ARB. REV. (May 27, 2022), <https://globalarbitrationreview.com/review/the-asia-pacific-arbitration-review/2023/article/japan> [<https://perma.cc/8PT2-4RTB>].

140. *Id.*

141. *Id.*

142. Jingsi Guanlan, *Administrative Measures for the Registration of Business Organizations Established by Overseas Arbitration Institutions in the China (Beijing) Pilot Free Trade Zone*, BEIJING ARB. COMM'N (Dec. 31, 2020), <https://www.bjac.org.cn/news/view?id=3878> [<https://perma.cc/XYA4-3B4H>].

143. See *Administrative Measures for Overseas Arbitration Institutions Establishing Business Organizations in the Lingang New Area of China (Shanghai) Pilot Free Trade Zone*, LIN-GANG SPECIAL AREA ECON. DEV. (Jan. 26, 2021), https://xpqj.shlingang.com/xinwenzixun/policy/express/202101/t20210126_21970.shtml [<https://perma.cc/N4FW-AK98>]; *General Office of Chongqing Municipal People's Government About Issuing the China (Chongqing) Pilot Free Trade Zone Notice of the "14th Five-Year Plan" (2021-2025)*, CHONGQUING MUN. PEOPLE'S GOV'T (May 20, 2022), http://www.cq.gov.cn/zwgk/zfxxgkml/szfwj/qtgw/202205/t20220520_10738390.html [<https://perma.cc/6WQL-3VED>].

144. Guanlan, *supra* note 142.

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Effective January 1, 2022, China cancelled the requirement that the Supreme People's Court (SPC) review all non-enforcements or revocations of arbitral awards rendered by Chinese arbitration institutions where the parties are domiciled in different provinces.¹⁴⁵ Now, for cases not involving foreign (including Hong Kong, Macau, or Taiwan) matters, only non-enforcement or revocation of an arbitral award rendered by a Chinese arbitration institution "on the grounds of violation of public interests" shall be reviewed by the SPC.¹⁴⁶

The United Nations Convention on Contracts for the International Sale of Goods came into force in Hong Kong on December 1, 2022, making Hong Kong a more competitive international commercial dispute settlement center.¹⁴⁷ Further, Hong Kong issued the Arbitration and Legal Practitioners Legislation (Outcome Related Fee Structures for Arbitration) (Amendment) Bill 2022 in March,¹⁴⁸ which is expected to save parties significantly on arbitration costs and encourage arbitration in Hong Kong.

D. SINGAPORE

Singapore continues to liberalize the funding of dispute resolution as laws permitting conditional fee agreements came into effect on May 4, 2022.¹⁴⁹

In one of several important decisions in 2022 regarding arbitration, on October 7, 2022, the Singapore High Court held that an emergency interim award issued by an emergency arbitrator in Pennsylvania was enforceable as a binding foreign award under the International Arbitration Act.¹⁵⁰

The newest version of the Singapore International Commercial Court procedural rules went into effect on April 1, 2022.¹⁵¹

145. See *Relevant Provisions of the Supreme People's Court on the Issue of Reporting and Verification of Arbitration Judicial Review Cases*, SUP. PEOPLE'S CT. OF PEOPLE'S REPUBLIC OF CHINA (Dec. 25, 2021), <https://www.court.gov.cn/xinshidai-xiangqing-338601.html> [<https://perma.cc/K4VS-UHUG>].

146. *Id.*

147. Lianjun Li et al., *CISG Applies to Hong Kong: Implications for International Trade Agreements*, REED SMITH (Nov. 30, 2022), <https://www.reedsmith.com/en/perspectives/2022/11/cisg-applies-to-hong-kong-implications-for-international-trade-agreements> [<https://perma.cc/2TJ2-J3QX>].

148. See 2022 年仲裁及法律執業者法例 (與仲裁結果有關的收費架構) (修訂) 條例草案 [Arbitration and Legal Practitioners Legislation (Fee Structure in Relation to Arbitration Outcome) (Amendment) Bill 2022], <https://www.legco.gov.hk/yr2022/chinese/bills/b202203251.pdf> [<https://perma.cc/7EPD-F52F>].

149. Legal Profession (Amendment) Act, 2022, § 115, (No. 8 of 2022), <https://sso.agc.gov.sg/Acts-Supp/8-2022/Published/20220222?DocDate=20220222> [<https://perma.cc/D6MR-24DG>] (Sing.); Legal Profession Act, 1966, § 3, (No. S 333), <https://sso.agc.gov.sg/SL/LPA1966-S333-2022?DocDate=20220428> [<https://perma.cc/R7BU-SGRW>] (Sing.).

150. CVG v. CVH [2022] SGHC 249 (Sing.).

151. See Supreme Court of Judicature Act (Chapter 322), 2022 (No. S 924), <https://sso.agc.gov.sg/SL/SCJA1969-S924-2021?DocDate=20211202> [<https://perma.cc/TH5Q-9ZGC>] (Sing.).

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E. CAMBODIA

Cambodia's National Commercial Arbitration Centre administered its first emergency arbitration in 2022.¹⁵²

F. PHILIPPINES

The Philippines Securities and Exchange Commission issued guidelines on September 18, 2022 for the arbitration of commercial disputes governed by arbitral clauses within incorporation documents.¹⁵³

V. Middle East

A. UNITED ARAB EMIRATES

On March 21, 2022, the Dubai International Arbitration Centre (DIAC) launched the DIAC Arbitration Rules 2022.¹⁵⁴ The purpose of the new rules is to increase the efficiency and transparency of arbitration proceedings, including by making electronic communications the default between the parties, the tribunal, and DIAC.¹⁵⁵ Other procedural changes in the 2022 Rules include the introduction of expedited proceedings and provisions for the joinder of additional parties and consolidation of claims.¹⁵⁶

B. QATAR

On September 23, 2022, the International Council of Arbitration for Sport adopted the Arbitration Rules for the 2022 FIFA World Cup Qatar Final Round.¹⁵⁷ These provide that certain disputes shall be resolved through arbitration where they arise “during – and in connection with – the final round of the 2022 FIFA World Cup Qatar” held between November 20 and December 18, 2022.¹⁵⁸

152. See Anirudh Singh Bhati, *NCAC's Emergency Arbitrator Issues the First-ever Interim Award*, CAMBODIA INV. REV. (Feb. 6, 2022), <https://cambodiainvestmentreview.com/2022/02/06/ncacs-emergency-arbitrator-issues-the-first-ever-interim-award/> [<https://perma.cc/QNP3-959R>].

153. See Felix Sy, *Philippine SEC Promulgates Guidelines on the Arbitration of Intra-Corporate Disputes*, ZICO L. (Nov. 14, 2022), <https://www.zicolaw.com/resources/alerts/philippine-sec-promulgates-guidelines-on-the-arbitration-of-intra-corporate-disputes/> [<https://perma.cc/WU8Z-UM87>].

154. See Jasmin Fichte, *DIAC Arbitration Rules 2022 – a Paradigm Shift for Dubai Becoming a Global Arbitration Hub*, INT'L BAR ASS'N (June 14, 2022), <https://www.ibanet.org/diac-arbitration-rules-2022-dubai> [<https://perma.cc/C6JY-DVPS>].

155. See *id.*

156. See *id.*

157. Arbitration Rules for the 2022 FIFA World Cup Qatar Final Round, Ct. Arb. for Sport, art. 24, <https://digitalhub.fifa.com/m/47ef3004972d4b3a/original/Arbitration-Rules-for-FIFA-World-Cup-Qatar-2022-CAS.pdf> [<https://perma.cc/26SW-JYR8>].

158. *Id.* art. 1.

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VI. Africa

A. NIGERIA

On May 10, 2022, the Nigerian Senate passed the Arbitration and Mediation Bill 2022.¹⁵⁹ The bill repeals the Arbitration and Conciliation Act 1988 and introduces new provisions, including for the creation of an appellate level arbitral process and terms regarding consolidation and joinder, third-party funding, emergency arbitrators, and the recognition and enforcement of interim measures.¹⁶⁰

B. SOUTH AFRICA

In the *Tee Que* case,¹⁶¹ the International Arbitration Act No. 15 of 2017 was interpreted by the South African courts for the first time. The Court upheld the relevant arbitration agreements and ordered a stay of local proceedings pending referral of the dispute to arbitration.¹⁶²

VII. South America

A. ARGENTINA

The General Arbitral Tribunal of the Buenos Aires Stock Exchange, one of the country's leading institutions, migrated all operations to an online platform.¹⁶³ The decision was implemented on May 16, 2022, and encompasses both new and ongoing proceedings, with only a few exceptions.¹⁶⁴

A trend toward fixing clear limits on the role of national courts in arbitration also continues. Following last year's Supreme Court decision regarding this approach in the recognition and enforcement of arbitral awards,¹⁶⁵ on March 9, 2022, the Commercial Court of Appeals, Chamber B,¹⁶⁶ reinforced that national courts are limited to analyzing the annulment grounds listed in the procedural code. The court dealt specifically with

159. Abimbola Akeredolu et al., *Arbitration Procedures and Practice in Nigeria: Overview*, THOMPSON REUTERS PRACTICAL L., [https://uk.practicallaw.thomsonreuters.com/1-542-4705?transitionType=Default&contextData=\(Sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/1-542-4705?transitionType=Default&contextData=(Sc.Default)&firstPage=true) [https://perma.cc/9A5G-9WFC].

160. *See id.*

161. *Tee Que Trading Services (Pty) Ltd. v. Oracle Corporation South Africa (Pty) Ltd.* [2022] ZASCA 68 (S. Afr.).

162. *Id.*

163. *See Protocolo de actuación (SOE) [Protocol of action (SOE)]*, BOLSA DE COM. DE BUENO AIRES, <https://www.labolsa.com.ar/institucional/tribunal/protocolo-de-actuacion-soe/> [https://perma.cc/6AAH-UE24] (Arg.).

164. *See id.*

165. *Milantic Trans SA v. Ministry of Production*, (2021) SAJ: FA21000173 (Buenos Aires) (Arg.).

166. *Pérez Iturraspe, Teresa Manuela and another v. Aufiero Jorge Félix on external organisms*, (2022) SAJ: FA22130322, 10, (Buenos Aires) (Arg.).

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procedural flaws in the arbitral proceeding, noting that due process requires that parties receive equal treatment, namely equal opportunities to present their arguments, support them with evidence, and counter their opponent's procedural actions.¹⁶⁷

B. URUGUAY

The Chamber of Commerce and Services of Uruguay, which hosts the country's main arbitral center, introduced a new set of rules applicable to arbitrations filed after January 1, 2022.¹⁶⁸ The new rules bring the institution in line with the standard practices of international arbitral institutions, including with respect to submissions, technology, joinder of additional parties, and consolidation of proceedings.¹⁶⁹

C. PARAGUAY

The Paraguayan Arbitration and Mediation Center continued its modernization. On August 1, 2022, the institution issued Announcement No. 29 (Circular 29/2022) amending its Rules for Arbitrators and establishing a mechanism for arbitrator selection.

Further, the Civil and Commercial Court of Appeal, Fifth Chamber, affirmed the importance of national courts avoiding undue intervention in arbitral proceedings, highlighting the leading role of arbitrators as directors of the dispute resolution process.¹⁷⁰

D. BRAZIL

In June 2022, the Superior Court of Justice (SCJ) ruled on two cases regarding jurisdictional conflicts.

The first concerned conflicting decisions from an arbitral tribunal and an employment court where both claimed jurisdiction over a dispute between an insurance company and a former franchisee.¹⁷¹ The SCJ held, contrary to the principle of *kompetenz-kompetenz*, that the employment court should first determine whether the franchisee was an "employee."¹⁷² If it was not, the arbitral tribunal could assume jurisdiction.¹⁷³ The decision remains subject to appeal.¹⁷⁴

167. *Id.* at 12.

168. *See Regulation*, CTR. DE CONCILIACIÓN Y ARB., <https://www.arbitraje.com.uy/rules/get-all-rules?rulesType=1> [<https://perma.cc/KK9Z-ZE2C>].

169. *Id.*

170. Grupo Villalba Piñeiro S.A. v. Estado Paraguay - Secretaría Nacional del Deporte (Ac. y Sent.) No. 01 del 15/01/2021, PY/JUR/321/2021).

171. Superior Court of Justice, Second Section, Conflict of Jurisdiction No. 184.495/SP, (June 22, 2022) (Braz.).

172. *See id.*

173. *See id.*

174. *See id.*

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In the second case, the SCJ ruled on a jurisdictional conflict between two arbitral tribunals.¹⁷⁵ One arbitration had been initiated by minority shareholders and the second by the company.¹⁷⁶ Both arbitrations involved damages claims against the majority shareholders of the listed company allegedly caused by (admitted) illegal conduct.¹⁷⁷ The SCJ held that the tribunal overseeing the arbitration initiated by the company should determine the claims pertaining to the liability of the company's officers, directors and controlling shareholders, and thus that any arbitrations initiated by the minority shareholders should be dismissed.¹⁷⁸ The SCJ further held that derivative lawsuits against the controlling shareholders, brought under Brazil's Corporations Act, first require inaction by the company—with which the right of action ultimately resides.¹⁷⁹

E. CHILE

The President of the Court of Appeals of Santiago deployed his powers of arbitration assistance and supervision in two instances in 2022.¹⁸⁰ In one case,¹⁸¹ the President of the Court denied a request to invalidate the appointment of an arbitrator, stating that the applicable arbitration rules provided for adequate mechanisms to guarantee the independence and impartiality of the tribunal and that the decisions of the appointing authority are final.

In another case,¹⁸² the President of the Court held that the arbitral tribunal did not have jurisdiction over a dispute because the defendant was not a party to the arbitration agreement.

F. VENEZUELA

Venezuela faced several enforcement orders in 2022. In August, a U.S. court ordered Venezuela to pay USD \$8.5 billion, enforcing a 2019 award in

175. Superior Court of Justice, Second Section, Conflict of Jurisdiction No. 185.702/DF, (June 30, 2022) (Braz.).

176. *See id.*

177. *See id.*

178. *See id.*

179. *See id.*

180. ENERG Power Ltda with Arbitration Institute of the Stockholm Chamber of Commerce, (2022) 1238-2022 (Chile); CIPATEX Impregnadora de Papeis E Tecidos Ltda con Baraona, (2022) 922-2022 (Chile).

181. Presidente de la Corte de Apelaciones de Santiago, 2 de mayo de 2022, "ENERG Power Ltda con Instituto de Arbitraje de la Cámara de Comercio de Estocolmo," Rol de la causa 1238-2022, <https://juris.pjud.cl/busqueda/u?d7q3> [<https://perma.cc/P529-PFBN>] (Chile).

182. Presidente de la Corte de Apelaciones de Santiago, 24 de junio de 2022, "CIPATEX Impregnadora de Papeis E Tecidos Ltda con Baraona," Rol de la causa 922-2022, <https://juris.pjud.cl/busqueda/u?dktt> [<https://perma.cc/F2GD-RG38>] (Chile).

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favor of ConocoPhillips.¹⁸³ In June, the Paris Court of Appeal upheld a USD \$1.2 billion award in favor of Rusoro.¹⁸⁴

Venezuela also saw the resolution of several disputes. An ICSID tribunal ordered Venezuela to pay USD \$1.6 billion to Agroinsumos Ibero-Americanos for expropriation.¹⁸⁵ Another tribunal dismissed outright a dual national's treaty claim.¹⁸⁶

G. PERU

Peru saw positive results in several arbitrations in 2022. Petroperu reportedly won an ICC arbitration against Grupo Cobra, with the tribunal ordering Grupo Cobra to finalize the Talabra refinery project and splitting arbitration costs.¹⁸⁷ Another tribunal dismissed on jurisdictional grounds claims for USD \$96 million¹⁸⁸ relating to Peru's alleged violation of the Peru-U.S. Trade Promotion Agreement.¹⁸⁹ In June, the *Autopista del Norte v. Peru* tribunal awarded a fraction of the damages sought.¹⁹⁰ An ICC tribunal, however, ordered Peru's Pronatel to pay USD \$177 million to Quanta Services over a telecom networks project.¹⁹¹

183. ConocoPhillips Petrozuata B.V. v. Bolivarian Republic of Venezuela, No. 1:19-CV-0683 (CJN), 2022 WL 3576193 (D.D.C. Aug. 19, 2022); ConocoPhillips Petrozuata B.V. et al. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30, Award (Mar. 8, 2019).

184. Cour d'Appel de Paris [Court of Appeals of Paris], *Rusoro Mining Limited v. République Bolivarienne du Venezuela*, June 7, 2022, no. 61/2022, 12 (Fr.).

185. See Lisa Bohmer, *ICSID Tribunal Awards 1.6 Billion USD in Compensation for Expropriation of Investment in Venezuela's Agriculture Sector; Dissenter Would Have Declined Jurisdiction Due to Manifest Inexistence of Foreign Investment*, INV. ARB. REP. (Mar. 24, 2022), <https://www.iareporter.com/articles/icsid-tribunal-awards-1-6-billion-usd-in-compensation-for-expropriation-of-investment-in-venezuelas-agriculture-sector-dissenter-would-have-declined-jurisdiction-due-to-manifest-inexistence/>. [<https://perma.cc/BH5B-TYQE>].

186. The tribunal found that claimant had "dominant and effective" Venezuelan nationality at the time the investments were made. *Fernando Fraiz Trapote v. República Bolivariana de Venezuela*, CPA núm. 2019-11, Award, ¶ 415 (Jan. 31, 2022).

187. *Cobra pierde arbitraje en Perú por obras de Refinería de Talara* [Cobra Loses Arbitration in Peru for Talara Refinery Works], EL GAS NOTICIAS (Feb. 23, 2022), <https://elgasnoticias.com/cobra-pierde-arbitraje-en-peru-por-obras-de-refineria-de-talara/> [<https://perma.cc/7BNX-YXX8>].

188. *Bacilio Amorrortu v. Republic of Peru*, Permanent Court of Arbitration, Case No. 2020-11, Claimant's Memorial, ¶ 410 (Sept. 11, 2020).

189. *Bacilio Amorrortu v. Republic of Peru*, Permanent Court of Arbitration, Case No. 2020-11, Partial Award on Jurisdiction, ¶ 289 (Aug. 5, 2022).

190. The tribunal reportedly awarded only USD \$8.6 million out of USD \$150 million damages sought. Claimant has since filed for annulment of the award. See Vladislav Djanic, *Investor Moves to Annul Award Issued in Peruvian Highway Arbitration*, INV. ARB. REP. (Nov. 07, 2022), <https://www.iareporter.com/articles/investor-moves-to-annul-award-issued-in-peru-highway-arbitration/>. [<https://perma.cc/Q3TX-ZZ3N>].

191. See Jack Ballantyne, *A Loss and a Win for Peru*, GLOB. ARB. REV. (Aug. 11, 2022), <https://globalarbitrationreview.com/article/loss-and-win-peru> [<https://perma.cc/HF46-9KTC>].

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I. Developments in International Tribunals Related to Russia's Invasion of Ukraine

A. INTRODUCTION

Since the commencement of Russia's war in Ukraine on February 24, 2022, international courts and tribunals have been involved as means to invoke international responsibility for violations of international law caused by the invasion.

In the absence of a single integrated judicial system with compulsory jurisdiction, the proceedings initiated before these tribunals reflect a narrow legal framing of broader issues related to the invasion and conduct of hostilities. Below is a review of some noteworthy developments.

B. INTERNATIONAL COURT OF JUSTICE (ICJ)

On February 26, 2022, two days after Russia's invasion, Ukraine instituted proceedings¹ before the ICJ regarding Allegations of Genocide under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (*Ukraine v. Russian Federation*) and requested the Court to order provisional measures,² including an immediate halt to all military actions in Ukraine.³

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1. Application Instituting Proceedings (Ukr. v. Russ. Fed'n), Application Instituting Proceedings, 2022 I.C.J. 182, ¶ 1 (Feb. 26), <https://www.icj-cij.org/public/files/case-related/182/182-20220227-APP-01-00-EN.pdf> [<https://perma.cc/BY9A-HEUD>] [hereinafter Application Instituting Proceedings].

2. See Rules of Court, art. 74 (1978), International Court of Justice, <https://www.icj-cij.org/rules> [<https://perma.cc/R2YK-6QQZ>].

3. Request for the Indication of Provisional Measures Submitted by Ukraine, Request, I.C.J., ¶ 3, <https://www.icj-cij.org/public/files/case-related/182/182-20220227-WRI-01-00-EN.pdf> [<https://perma.cc/H7JJ-2TQY>].

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Seeking to justify its military intervention, Russia accused Ukraine of committing genocide in the Luhansk and Donetsk oblasts of Ukraine,⁴ predominantly populated by Russian speakers.

The crime of genocide is generally characterized by the specific intent to destroy, in whole or in part, a national, ethnic, racial, or religious group by killing its members or, by other means, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group—conditions of life calculated to bring about its physical destruction, imposing measures intended to prevent births within the group, or forcibly transferring children of the group to another group.⁵

In its application, Ukraine made a two-fold claim: it “emphatically denied” allegations of genocide⁶ as a matter of fact and maintained that “Russia has no lawful basis to take action in and against Ukraine for the purpose of preventing and punishing any purported genocide” as a matter of law.⁷ Ukraine further submitted that “Russia’s misuse of the concept of genocide to justify its lawless and aggressive behavior” gives rise to “a dispute regarding the interpretation, application or fulfilment of the Convention,”⁸ which, in its Article IX,⁹ confers jurisdiction upon the Court to resolve this dispute. Because neither party has accepted the ICJ’s compulsory jurisdiction,¹⁰ the Court’s competence in this case derives solely from the Convention, which both parties have ratified,¹¹ and which principles are considered *jus cogens* that no state can derogate.¹²

Russia chose not to participate in the first public hearing¹³ held on March 7, 2022, raising jurisdictional objections. In its submission preceding the

4. See Vladimir Putin, President, Russ. Fed’n, Address by the President of Russia (Feb. 24, 2022), <http://en.kremlin.ru/events/president/transcripts/statements/67843> [<https://perma.cc/J3SM-YJSZ>].

5. Rome Statute of the International Criminal Court, art. 6, July 17, 1998, 2183 U.N.T.S. 3 [hereinafter Rome Statute].

6. Application Instituting Proceedings, *supra* note 1, ¶ 3.

7. *Id.*

8. *Id.* ¶ 7.

9. *Id.* art. IX.

10. Statute of the International Court of Justice, art. 36, ¶ 2, June 26, 1945, 59 Stat. 1031, T.S. 993.

11. *Convention on the Prevention and Punishment of the Crime of Genocide*, U.N. TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtldsg_no=IV-1&chapter=4&clang=_en [<https://perma.cc/DB8Q-GESH>] (last visited Mar. 26, 2023); *see also* United Nations Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 16, 1949, 78 U.N.T.S. 277.

12. Reservations to Convention on Prevention and Punishment of Crime and Genocide, Advisory Opinion, 1951 I.C.J. 15 (May 28), <https://www.icj-cij.org/public/files/case-related/12/012-19510528-ADV-01-00-EN.pdf> [<https://perma.cc/THV9-894G>].

13. Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ. Fed’n), Verbatim Record, 8 (Mar. 7, 2022, 10:00 AM), <https://www.icj-cij.org/public/files/case-related/182/182-20220307-ORA-01-00-BI.pdf> [<https://perma.cc/8AMN-PFRM>].

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hearing,¹⁴ Russia changed its justification of the use of force in Ukraine by removing the reference to genocide. Instead, it claimed that it has been acting in self-defense, in accordance with Article 51 of the UN Charter, and that the issue of concern is one of state recognition and use of force in international law,¹⁵ which “fall beyond the scope of the Convention and thus the jurisdiction of the Court.”¹⁶

Although Ukraine’s argumentation to obtain the Court’s prima facie jurisdiction for the purposes of the provisional measures has been described as a creative approach,¹⁷ the Court found it plausible. Conversely, the Court rejected Russia’s jurisdictional argument and made it clear that Russia’s claim on the use of force in self-defense does not invalidate its prima facie finding on the existence of a dispute between the parties within the meaning of the Genocide Convention.¹⁸

On March 16, 2022, the ICJ granted Ukraine’s request for provisional measures¹⁹ while reserving final judgment on jurisdiction and the merits. By thirteen votes to two, the Court ordered²⁰ that Russia must immediately suspend its military operations and ensure that any military or irregular armed units under its control cease actions to further the military operations.²¹ Additionally, the Court unanimously ordered that both states “refrain from any action which might aggravate or extend the dispute.”²² Judges who opposed the first two measures directed at Russia were Judge Gevorgian from Russia and Judge Xue from China.²³

Apart from causing some reputational harm to Russia, the effect of the decision remained largely symbolic. Russia did not take the ruling into account and refused to halt its military actions in Ukraine. Although the decision is binding on Russia,²⁴ the Court lacks the mechanisms to enforce it.

14. Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ. Fed’n), Submission Preceding Hearing (Mar. 7, 2022), <https://www.icj-cij.org/public/files/case-related/182/182-20220307-OTH-01-00-EN.pdf> [<https://perma.cc/A5ZN-SE5K>] (setting out Russia’s position regarding the alleged “lack of jurisdiction” of the Court in the case).

15. *Id.* ¶¶ 15–20.

16. *Id.* ¶ 23.

17. Marko Milanovic, *ICJ Indicates Provisional Measures Against Russia, in a Near Total Win for Ukraine; Russia Expelled From the Council of Europe*, EJIL: TALK! (Mar. 16, 2022), <https://www.ejiltalk.org/icj-indicates-provisional-measures-against-russia-in-a-near-total-win-for-ukraine-russia-expelled-from-the-council-of-europe/> [<https://perma.cc/AY45-ZEHJ>].

18. Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ. Fed’n), Provisional Measures Order, ¶¶ 37–47 (Mar. 6, 2022), <https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-00-EN.pdf> [<https://perma.cc/AL3R-9BAU>] [hereinafter Provisional Measures Order].

19. *Id.* ¶ 46.

20. *Id.* ¶ 86.

21. *Id.*

22. *Id.*

23. *Id.*

24. U.N. Charter art. 94.

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Even if the case is taken to the UN Security Council,²⁵ it would be impossible to overcome Russia's veto power.²⁶

Nonetheless, the decision marks an important step towards proving the illegality of the invasion under international law. In this first "false genocide claim" case in its history, the Court exposes the perils of the abusive interpretation of the duty to prevent and punish genocide under Article I of the Genocide Convention.

Noteworthy are the Court's arguments that: (1) it is not in possession of evidence substantiating the genocide allegations by Russia;²⁷ (2) in fulfilling its duty to prevent genocide, every State may only act within the limits permitted by international law;²⁸ (3) it is doubtful that the Convention automatically authorizes a State's unilateral use of force in the territory of another State for the purpose of preventing or punishing an alleged genocide;²⁹ and (4) Ukraine has a plausible right not to be subject to military operations for the purpose of preventing and punishing an alleged genocide on its territory.³⁰

The legal issues arising out of this dispute received wide international resonance. As many as twenty-four States,³¹ including the United States,³² have filed interventions under Article 63 of the ICJ Statute³³ denying Russia's claims of genocide as a pretext for the unilateral use of force. Many other States signaled their intention to intervene in the proceedings in the future. Such united support for an ICJ disputing party is rare and remarkable, given that the Court's final judgment interpreting the Convention will be legally binding on all intervening countries.

In October 2022, Russia filed preliminary objections³⁴ to the Court's jurisdiction, which have not been made public. The Court issued an order³⁵ directing Ukraine to respond to those objections by February 3, 2023.

25. *Id.* art. 94, ¶ 2.

26. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 15 (June 27).

27. Provisional Measures Order, *supra* note 18, ¶ 59.

28. *Id.* ¶ 57.

29. *Id.* ¶ 59.

30. *Id.* ¶ 60.

31. Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ. Fed'n), Intervention Written Proceedings, <https://www.icj-cij.org/case/182/intervention> [<https://perma.cc/37ST-27XG>] (last visited Mar. 26, 2023).

32. Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ. Fed'n), Declaration of Intervention Under Article 63 of the Statute Submitted by the United States of America (Sept. 7, 2022), <https://www.icj-cij.org/sites/default/files/case-related/182/182-20220907-WRI-01-00-EN.pdf> [<https://perma.cc/3M6R-KSCL>].

33. *See* Statute of the International Court of Justice, *supra* note 10, art. 63, ¶ 2.

34. The International Court of Justice (@CIJ_ICJ), TWITTER (Oct. 6, 2022, 5:41 AM), https://twitter.com/CIJ_ICJ/status/157797219813177536 [<https://perma.cc/T4NW-R92L>].

35. Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ. Fed'n), Order (Oct. 7, 2022), <https://www.icj-cij.org/public/files/case-related/182/182-20221007-ORD-01-00-EN.pdf> [<https://perma.cc/BQQ5-QMWX>].

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This is the second case filed with the Court against Russia arising out of its military actions in Ukraine. In 2017, Ukraine filed an application related to Russia's annexation of Crimea,³⁶ whereby the Court found that it has jurisdiction, and the merits stage is ongoing.³⁷

C. INTERNATIONAL CRIMINAL COURT (ICC)

Russia's full-scale invasion of Ukraine on February 24, 2022, has elevated the ongoing fighting in Donbas to the level of a territory-wide international armed conflict. Therefore, on February 28, 2022, the ICC Prosecutor announced his decision to "proceed with opening an investigation into the Situation in Ukraine."³⁸ He indicated that there is a "reasonable basis to believe that both alleged war crimes and crimes against humanity have been committed"³⁹ since the onset of the conflict in 2014. Hence, "given the expansion of the conflict . . . [the] investigation will also encompass any new alleged crimes . . . committed by any party to the conflict on any part of the territory of Ukraine"⁴⁰ on an ongoing basis.

Although Ukraine is not a State Party to the Rome Statute establishing the ICC, it accepted the ICC's jurisdiction by filing an Article 12(3) declaration,⁴¹ which was later extended for an indefinite term. An unprecedented joint referral of the situation to the ICC by forty-three State Parties to the Rome Statute allowed Ukraine to expedite the matter, overcoming jurisdictional hurdles.⁴² Thus, by March 2, 2022, the ICC

36. Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukr. v. Russ. Fed'n), Application Instituting Proceedings (Jan. 16, 2017), <https://www.icj-cij.org/public/files/case-related/166/166-20170116-APP-01-00-EN.pdf> [<https://perma.cc/R2GS-BWF3>].

37. See Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukr. v. Russ. Fed'n), Press Release (Nov. 8, 2019), <https://www.icj-cij.org/public/files/case-related/166/166-20191108-PRE-01-00-EN.pdf> [<https://perma.cc/8YAS-BGWP>].

38. See Press Release, Office of the Prosecutor of the International Criminal Court, Statement of the Prosecutor of the International Criminal Court, Karim A.A. Khan QC on the Situation in Ukraine (Feb. 28, 2022), <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening> [<https://perma.cc/Y8CM-BR2D>].

39. *Id.*

40. *Id.*

41. See Rome Statute, *supra* note 5, art. 12, ¶ 3; see also Press Release, Office of the Prosecutor of the International Criminal Court (Sept. 29, 2015), <https://www.icc-cpi.int/news/icc-prosecutor-extends-preliminary-examination-situation-ukraine-following-second-article-123> [<https://perma.cc/DY2A-KT9E>].

42. See Press Release, Office of the Prosecutor of the International Criminal Court, Statement of the Prosecutor of the International Criminal Court Karim A.A. Khan QC on the Situation in Ukraine: Receipt of Referrals From 39 States Parties and the Opening of an Investigation (Mar. 2, 2022), <https://www.icc-cpi.int/Pages/item.aspx?name=2022-prosecutor-statement-referrals-ukraine> [<https://perma.cc/9EVD-A2LY>].

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Prosecutor launched an investigation into the situation based on the referrals received.

In April 2022, the ICC became part of a joint investigation team,⁴³ which was earlier established by Ukraine and other States under the auspices of Eurojust.⁴⁴ This marked a new chapter in the Court's history when it started to engage more transparently with investigations on the ground alongside other actors.⁴⁵ In May 2022, the ICC Prosecutor deployed the largest-ever team of forty-two investigators, including seconded national experts, to collect evidence in Ukraine.⁴⁶ In September 2022, the ICC, together with Eurojust, published practical guidelines for civil society organizations on documenting core international crimes.⁴⁷

Various credible sources indicate the widespread commission of alleged war crimes and crimes against humanity on the territory of Ukraine by Russian forces that potentially fall within the Court's jurisdiction.⁴⁸ Reported incidents include attacks against civilians and civilian infrastructure, as well as the use of prohibited weapons such as cluster munitions and phosphorous bombs.⁴⁹ The ICC Prosecutor is mandated to investigate crimes committed by all parties to the conflict, but the alleged crimes appear to have been predominantly committed by Russian forces and pro-Russian separatist groups, with some isolated instances of Ukrainian combatants mistreating Russian prisoners of war.⁵⁰

Although the ICC has been collecting evidence of potential crimes in Ukraine, it has not formally announced charges or issued arrest warrants

43. See Press Release, European Union Agency for Criminal Justice Cooperation, Eurojust Supports Joint Investigation Team Into Alleged Core International Crimes in Ukraine (Mar. 28, 2022), <https://www.eurojust.europa.eu/news/eurojust-supports-joint-investigation-team-alleged-core-international-crimes-ukraine> [https://perma.cc/3RMY-UNS7].

44. *Who We Are*, EUROJUST, <https://www.eurojust.europa.eu/about-us/who-we-are> [https://perma.cc/KGQ4-N2KN] (last visited Feb. 22, 2023).

45. Iryna Marchuk & Aloka Wanigasuriya, *The ICC and the Russia-Ukraine War*, 26 AM. SOC'Y INT'L L. INSIGHTS 1, 1 (2022), https://www.asil.org/insights/volume/26/issue/4#_edn7 [https://perma.cc/488P-RBU6].

46. See Press Release, International Criminal Court, ICC Prosecutor Karim A.A. Khan QC Announces Deployment of Forensics and Investigative Team to Ukraine (May 17, 2022), <https://www.icc-cpi.int/news/icc-prosecutor-karim-aa-khan-qc-announces-deployment-forensics-and-investigative-team-ukraine> [https://perma.cc/2XJH-WVEB] [hereinafter ICC Press Release on Forensics Team].

47. See Press Release, International Criminal Court, ICC Prosecutor and Eurojust Launch Practical Guidelines for Documenting and Preserving Information on International Crimes (Sept. 21, 2022), <https://www.icc-cpi.int/news/icc-prosecutor-and-eurojust-launch-practical-guidelines-documenting-and-preserving-information> [https://perma.cc/V6MW-6XXV].

48. U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, SITUATION OF HUMAN RIGHTS IN UKRAINE IN THE CONTEXT OF THE ARMED ATTACK BY THE RUSSIAN FEDERATION, 24 FEBRUARY TO 15 MAY 2022 10–36 (June 29, 2022), <https://www.ohchr.org/sites/default/files/documents/countries/ua/2022-06-29/2022-06-UkraineArmedAttack-EN.pdf> [https://perma.cc/NR64-LXWN].

49. *Id.* at 11–16.

50. See ICC Press Release on Forensics Team, *supra* note 46.

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related to the invasion. This is because the ICC’s jurisdiction is “complimentary” to domestic criminal jurisdiction and is designed to intervene only in cases that Ukraine is not equipped to prosecute. So far, Ukraine has documented nearly 40,000 cases of war crimes⁵¹ and conducted invasion-related prosecutions in its domestic courts under domestic law. But given serious concerns about the capacity of Ukraine’s judicial system to address the large scale of atrocities committed on its territory, the ICC may potentially have a bigger role to play.

The reach of the ICC remains limited to war crimes, crimes against humanity, and genocide committed by individuals.⁵² Its jurisdiction does not extend to the crime of aggression, which is a particularly grave violation of the prohibition on the use of force between states.⁵³ According to the ICC Statute, the crime of aggression is “the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.”⁵⁴ The UN General Assembly, in its resolution of March 2, 2022,⁵⁵ took the position that the Russian invasion of Ukraine constitutes an act of aggression. To ensure accountability for this crime, Ukraine has called for the creation of an ad hoc international tribunal that would focus on the crime of aggression committed by Russian leaders and military commanders and supplement the efforts of the ICC and Ukraine’s domestic courts.⁵⁶

D. EUROPEAN COURT OF HUMAN RIGHTS (ECHR)

The ECHR, on March 1, 2022, was the first judicial institution to order “interim measures”⁵⁷ in response to “massive human rights violations being

51. *Crimes Committed During the Period Full-Scale Invasion of the Russian Federation*, OFF. OF THE PROSECUTOR GEN. OF UKR., <https://warcrimes.gov.ua/en/all-crimes.html> [<https://perma.cc/3D8Q-3XY3>].

52. *How the Court Works*, INT’L CRIM. CT., <https://www.icc-cpi.int/about/how-the-court-works> [<https://perma.cc/42M8-BGE6>] (last visited Mar. 26, 2023).

53. ICC-ASP/16/Res.5, Resolution on the Activation of the Jurisdiction of the Court Over the Crime of Aggression (Dec. 14, 2017).

54. Rome Statute, *supra* note 5, art. 8 bis, ¶ 1.

55. See G.A. Res. A/RES/ES-11/1 (Mar. 2, 2022). See also Press Release, General Assembly, General Assembly Overwhelmingly Adopts Resolution Demanding Russian Federation Immediately End Illegal Use of Force in Ukraine, Withdraw All Troops, U.N. Press Release GA/12407 (Mar. 2, 2022), <https://press.un.org/en/2022/ga12407.doc.htm> [<https://perma.cc/4TT5-WDHW>].

56. Olivier Corten & Vaios Koutroulis, Tribunal for the Crime of Aggression Against Ukraine: A Legal Assessment, EUR. PARL. DOC. P.E. 702.574 (2022).

57. See Press Release, European Court of Human Rights, The European Court Grants Urgent Interim Measures in Application Concerning Russian Military Operations on Ukrainian Territory (Mar. 1, 2022), <https://hudoc.echr.coe.int/eng-press#%7B%22itemid%22:%5B%22003-7272764-9905947%22%5D%7D> [<https://perma.cc/KXR7-89BQ>] [hereinafter The European Court Grants Urgent Interim Measures in Application].

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committed by the Russian troops in the course of the military aggression against the sovereign territory of Ukraine.”⁵⁸ Interim measures⁵⁹ are legally binding “urgent measures which . . . apply only where there is an imminent risk of irreparable harm.”

At the request of Ukraine,⁶⁰ the Court called on the Russian government to “refrain from military attacks against civilians and civilian objects”⁶¹ and to “ensure immediately the safety of the medical establishments, personnel and emergency vehicles.”⁶² The Court indicated that Russia’s actions present “a real and continuing risk of serious violations of the Convention rights of the civilian population, in particular . . . right to life . . . prohibition of torture and inhuman or degrading treatment or punishment . . . and . . . right to respect for private and family life.”⁶³

Unsurprisingly, Russia did not comply with the interim measures. Furthermore, on March 15, 2022, Russia communicated its intent to denounce the European Convention on Human Rights.⁶⁴ Its withdrawal from the Convention became effective on September 16, 2022.⁶⁵ Nonetheless, the Court may still consider cases filed against Russia involving the alleged human rights violations that occurred before the withdrawal took effect.⁶⁶

Currently, there are five inter-state claims⁶⁷ lodged against Russia by Ukraine, including the one filed on June 23, 2022, which concerns allegations of mass and gross human rights violations committed by Russia

58. *Id.* at 1.

59. See EUR. CT. OF HUM. RTS., RULES OF COURT, RULE 39 19–20 (2023), https://www.echr.coe.int/documents/rules_court_eng.pdf [<https://perma.cc/A68R-3YEF>]; see also *Factsheet—Interim Measures*, EUR. CT. OF HUM. RTS. (2022), https://www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf [<https://perma.cc/QY4W-6V4D>].

60. Press Release, Inter-State Case Ukraine v. Russia (X): Receipt of Completed Application Form: Application Number 11055/22, Eur. Ct. of Hum. Rts. (June 28, 2022), <https://hudoc.echr.coe.int/eng-press#%7B%22fulltext%22:%5B%2211055/22%22%5D%2C%22itemid%22:%5B%22003-7372751-10076076%22%5D%7D> [<https://perma.cc/N98K-QRYH>] [hereinafter Press Release on Inter-State Case Ukraine v. Russia].

61. See The European Court Grants Urgent Interim Measures in Application, *supra* note 57.

62. *Id.*

63. *Id.*

64. Julia Emtseva, *The Withdrawal Mystery Solved: How the European Court of Human Rights Decided to Move Forward With the Cases Against Russia*, EJIL: TALK! (Feb. 8, 2023), <https://www.ejiltalk.org/the-withdrawal-mystery-solved-how-the-european-court-of-human-rights-decided-to-move-forward-with-the-cases-against-russia/> [[HTTPS://PERMA.CC/CD5B-F8DK](https://perma.cc/CD5B-F8DK)].

65. *Work of the Council of Europe and the Expulsion of Russia*, U.K. PARLIAMENT HOUSE OF COMMONS LIBR. (June 14, 2022), <https://commonslibrary.parliament.uk/research-briefings/cbp-9570/#:~:text=Russia%20will%20cease%20to%20be,Russian%20occupation%20of%20the%20Crimea.> [<https://perma.cc/FB3E-PLG5>].

66. EUR. CT. OF HUM. RTS., RESOLUTION OF THE EUROPEAN COURT OF HUMAN RIGHTS ON THE CONSEQUENCES OF THE CESSATION OF MEMBERSHIP (2022), https://echr.coe.int/Documents/Resolution_ECHR_cessation_membership_Russia_CoE_ENG.pdf [<https://perma.cc/QU4H-JD5Z>].

67. See *List of Cases*, EUR. CT. OF HUM. RTS., <https://www.echr.coe.int/Pages/home.aspx?p=caselaw/interstate&c> [<https://perma.cc/HZE8-CS89>] (last visited Mar. 27, 2023).

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in Ukraine since February 24, 2022.⁶⁸ There are also more than 8,500 individual claims filed before the ECHR against Russia.⁶⁹

II. Developments in International Investment Arbitration

A. INTRODUCTION

The field of international investment law has experienced significant developments in 2022. From surprising case outcomes to changes in institutional rules, this area of law, not long ago regarded as nascent and obscure, continues to evolve into more well-defined contours. Below, we report on a few noteworthy developments in International Investment Arbitration.

B. A NEW SET OF AMENDMENTS: THE 2022 INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID) RULES AND REGULATIONS

After a five-year-long rule amendment process, ICSID, an international arbitration institution that operates under the auspices of the World Bank, released a new version of its rules for resolving disputes between foreign investors and their host States.⁷⁰ The new amendments are the first since 2006 and represent the most extensive modernization of ICSID procedures, which are the most widely used set of arbitration rules in the field of International Investment Arbitration. The 2022 Rules came into effect on July 1, 2022, and aim to improve access, speed, transparency, and overall cost efficiency in investor-state dispute settlements. Most notably, the amendments include new rules establishing a new expedited arbitration procedure; a revised rule on the procedure available to dispose of meritless claims; rules that enhance the transparency of ICSID orders, decisions, and awards; rules creating and tightening deadlines at various stages of arbitration; rules requiring disclosure of third-party funding; and rules concerning cost allocation and provision of security for costs, among others.⁷¹ Additionally, the amendments provided a brand new set of mediation and fact-finding rules that offer procedures to resolve disputes through negotiation and to conduct targeted and impartial factfinding.⁷²

68. See Press Release on Inter-State Case Ukraine v. Russia, *supra* note 60.

69. *Id.*

70. INT'L CTR. FOR SETTLEMENT OF INV. DISPS., ICSID CONVENTION, REGULATIONS & RULES (2022), https://icsid.worldbank.org/sites/default/files/documents/ICSID_Convention.pdf [<https://perma.cc/6KLG-D6TK>].

71. See, e.g., INT'L CTR. FOR SETTLEMENT OF INV. DISPS., ICSID ARBITRATION RULES 75–86, 27(2), 58, 41, 14, 53 (2022), https://icsid.worldbank.org/sites/default/files/Arbitration_Rules.pdf [<https://perma.cc/WPH3-RYRD>].

72. INT'L CTR. FOR SETTLEMENT OF INV. DISPS., ICSID MEDIATION RULES AND REGULATIONS (2022), https://icsid.worldbank.org/sites/default/files/ICSID_Mediation_Rules.pdf [<https://perma.cc/ZXW7-PWKU>]; see also INT'L CTR. FOR SETTLEMENT OF INV. DISPS.,

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The changes to the ICSID rules are a comprehensive effort to make investor-state cases less delayed, opaque, and financially burdensome and to, thereby, make foreign investment a more attractive option for investors and host States alike.

C. ACCESS TO DISCOVERY ASSISTANCE UNDER 28 U.S.C. § 1782
NARROWED

In June 2022, a unanimous U.S. Supreme Court significantly narrowed access to U.S. discovery procedures in the context of international arbitration.⁷³ Previously, under 28 U.S.C. § 1782(a), the U.S. Congress permitted federal district courts to order testimony or the production of documents “for use in a proceeding in a foreign or international tribunal.”⁷⁴ But there had long been a circuit split over whether 28 U.S.C. § 1782 applied to private international commercial arbitrations.⁷⁵ In order to settle the split, the U.S. Supreme Court granted certiorari to and consolidated a case concerning a private commercial arbitral panel and a case concerning an ad hoc investor-state panel, *ZF Automotive US, Inc. v. Luxshare, Ltd.* and *AlixPartners, LLP v. Fund for Protection of Investors’ Rights in Foreign States*, respectively.⁷⁶ In the Court’s view, the modern version of § 1782 arose out of Congress’s express interest in improving assistance to a broader scope of foreign judicial and quasi-judicial bodies for the “animating purpose” of international comity.⁷⁷ The Court, thus, concluded that, in order to benefit from the purposes of the statute, an arbitral panel must be imbued with governmental authority.⁷⁸ The Court held that neither the private commercial arbitral panel at issue in *ZF Automotive* nor the ad hoc investor-state tribunal in *AlixPartners* fit the definition of a governmental adjudicative body.⁷⁹ The decision summarily excluded private arbitral panels in international commercial arbitrations from the scope of § 1782(a), but it left open the possibility that investor-state disputes resolved through courts of arbitration with governmental authority, rather than ad hoc private rules, could still benefit from discovery assistance through § 1782(a).

ICSID FACT-FINDING RULES AND REGULATIONS (2022), https://icsid.worldbank.org/sites/default/files/ICSID_Fact-Finding_Rules.pdf [<https://perma.cc/WFD5-7MJZ>].

73. Minyao Wang, *Justices Curtail Ability to Get Discovery in U.S. Court for Use in International Arbitrations*, SCOTUSBLOG (June 17, 2022, 11:20 AM), <https://www.scotusblog.com/2022/06/justices-curtail-ability-to-get-discovery-in-u-s-court-for-use-in-international-arbitrations/> [<https://perma.cc/U7D8-NQ4R>].

74. 28 U.S.C. § 1782(a).

75. Rachel B. Goldman et al., *Supreme Court Resolves Circuit Split Over 28 U.S.C. § 1782*, BRACEWELL (June 14, 2022), <https://bracewell.com/insights/supreme-court-resolves-circuit-split-over-28-usc-%C2%A7-1782#:~:text=%C2%A7%201782,-June%2014%2C%202022&text=ON%20Monday%2C%20the%20Supreme%20Court,available%20in%20private%20foreign%20arbitrations> [<https://perma.cc/5YRG-JDJD>].

76. See *ZF Auto. US, Inc. v. Luxshare, Ltd.*, 142 S. Ct. 2078 (2022).

77. *Id.* at 3.

78. *Id.*

79. *Id.* at 3–4.

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In September 2022, the question of what type of investor-state proceedings would continue to have access to § 1782 found one answer in the case of *P&ID v. Nigeria*.⁸⁰ The case concerns Nigeria’s efforts to set aside a \$10 billion award rendered in 2017 in an arbitration over a gas production contract between Process and Industrial Developments Ltd. (P&ID) and Nigeria.⁸¹ After the award was rendered, Nigeria contended the award arose out of a contract that was fraudulently procured and commenced a proceeding in England to set aside the arbitral award based on new evidence establishing that the contract was procured by bribes.⁸² For use in the English proceedings, Nigeria requested permission to conduct discovery under § 1782 in the U.S. District Court for the Southern District of New York and sought leave to serve subpoenas on the ultimate owners of P&ID.⁸³ The court granted Nigeria’s application, finding that Nigeria had satisfied all the statutory requirements under § 1782: the respondents were not party to the English proceedings; the application was not an attempt to circumvent foreign proof-gathering restrictions and policies; the discovery request was not unduly burdensome; and the English set aside proceeding qualified as a proceeding under a “foreign or international tribunal,” particularly a tribunal that would be receptive to § 1782 assistance.⁸⁴ This decision on Nigeria’s § 1782 request provides a helpful rearticulation of the factors U.S. courts consider in determining whether proceedings related to investment arbitration can benefit from U.S. discovery assistance.

Contrastingly, in October 2022, a federal magistrate judge in the Eastern District of New York ruled that an arbitration panel constituted under ICSID in the case of *Alpene Ltd v. Republic of Malta* did not qualify as a “foreign tribunal” for the purposes of using § 1782 for discovery assistance.⁸⁵ The judge did not find sufficient evidence to support that Malta and China, the Claimant’s country of origin, had “inten[ded] to imbue the body in question [here, the ICSID arbitration panel] with governmental authority.”⁸⁶ The judge explained that, because ICSID tribunals cannot reciprocate discovery assistance, they cannot further the statute’s aim of promoting cooperation between the United States and other countries.⁸⁷ This ruling

80. See *Fed. Republic of Nigeria v. VR Advisory Servs., Ltd.*, 27 F.4th 136, 136 (2d Cir. 2022).

81. See *Process & Indus. Dev. Ltd v. Nigeria Ministry of Petrol. Res.*, Final Award (Jan. 31, 2017), https://jsumundi.com/en/document/decision/en-process-and-industrial-developments-ltd-v-the-ministry-of-petroleum-resources-of-the-federal-republic-of-nigeria-final-award-tuesday-31st-january-2017#decision_5289 [<https://perma.cc/5QZQ-SW55>].

82. See Jonathan Bonnitchea, *Corruption and Confidentiality in Contract-Based ISDS: The Case of P&ID v Nigeria*, INV. INST. FOR SUSTAINABLE DEV. (Mar. 23, 2021), <https://www.iisd.org/itm/en/2021/03/23/corruption-and-confidentiality-in-contract-based-isds-the-case-of-pid-v-nigeria-jonathan-bonnitchea/> [<https://perma.cc/3CUJ-EY6X>].

83. See *Fed. Republic of Nigeria v. VR Advisory Servs., Ltd.*, 27 F.4th 136 (2d Cir. 2022).

84. *Id.*

85. *In re Alpene, Ltd.* for an Order Directing Discovery from Elizabeth McCaul Pursuant to 28 U.S.C. § 1782, Mem. & Order, No. 1:21-mc-2547-MKB-RML (E.D.N.Y. Oct. 27, 2022).

86. *Id.* at 7.

87. *Id.* at 6.

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has further greatly narrowed the types of international arbitral proceedings that can look to U.S. district courts for discovery assistance.

D. *Green Power v. Spain*: The First Intra-European Union (EU) Objection to the Energy Charter Treaty (ECT) Ever Upheld

The ECT is an international agreement that provides a multilateral framework for cross-border energy sector cooperation.⁸⁸ Though it has been in force for around thirty years, a growing number of European countries have contested the framework and announced plans to withdraw from it because the treaty has become an obstacle to certain efforts related to renewable energy.⁸⁹ One particular area of consternation for ECT signatories is the scope of jurisdiction in the dispute resolution mechanism found in Article 26, which many European host States have argued does not extend to intra-EU claims.⁹⁰

The dispute in *Green Power v. Spain* arose out of changes Spain made to its regulatory framework that negatively impacted the investments of two Danish companies in Spain's solar sector.⁹¹ The investors brought claims under the ECT, and Spain objected to the jurisdiction of the tribunal on the basis that Article 26 did not contain a valid offer to arbitrate intra-EU disputes.⁹² In three prior landmark cases, *Slovakia v. Achmea* (2018),⁹³ *Moldova v. Komstroy* (2021),⁹⁴ and *Poland v. PL Holding* (2021),⁹⁵ the Court of Justice of the European Union (CJEU) found that Article 26 of the ECT was inoperative between EU investors and EU Member States. But, as ECT tribunals are not bound to follow EU law, ECT investor-state tribunals had,

88. The International Energy Charter Consolidated Energy Charter Treaty, Dec. 17, 1994, 2080 U.N.T.S. 100 [hereinafter The Energy Charter Treaty].

89. *More Countries Signal Intention to Withdraw From the Energy Charter Treaty – Why Now?*, NAT'L L. REV. (Dec. 7, 2022), <https://www.natlawreview.com/article/more-countries-signal-intention-to-withdraw-energy-charter-treaty-why-now> [<https://perma.cc/E3JY-7YZ8>].

90. See, e.g., Guillermo Garcia-Perrote & Ella Wisniewski, *European Exodus From the ECT: Politics and Unintended Consequences*, GLOB. ARB. REV. (Nov. 15, 2022), <https://globalarbitrationreview.com/article/european-exodus-the-ect-politics-and-unintended-consequences> [<https://perma.cc/D5EV-DFVR>]; Susannah Moody, *Germany Latest to Quit ECT*, GLOB. ARB. REV. (Nov. 11, 2022), <https://globalarbitrationreview.com/article/germany-latest-quit-ect> [<https://perma.cc/4HAC-6DV3>]; Jack Ballantyne, *Poland Moves to Exit ECT*, GLOB. ARB. REV. (Sept. 2, 2022), <https://globalarbitrationreview.com/article/poland-moves-exit-ect> [<https://perma.cc/A4XS-C5VH>].

91. *Green Power Partners K/S v. Kingdom of Spain*, Arb. Inst. of the Stockholm Chamber of Com. Case No. V 2016/135, Award ¶ 5 (2022).

92. *Id.* ¶ 196.

93. Case C-284/16, *Slowakische Republik (Slovak Republic) v. Achmea BV*, ECLI:EU:C:2018:158 (Mar. 6, 2018).

94. Case C-741/19, *Republic of Moldova v. Komstroy LLC*, ECLI:EU:C:2021:655 (Sept. 2, 2021).

95. Case C-109/20, *Republiken Polen (Republic of Poland) v. PL Holdings Sari*, ECLI:EU:C:2021:875 (Oct. 26, 2021).

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prior to the *Green Power v. Spain* decision, consistently dismissed EU Member States' objections to their jurisdiction to arbitrate disputes between EU investors and EU Member States.⁹⁶ But, in *Green Power v. Spain*, given that the seat of arbitration was Stockholm and that there was no prior agreement on the applicable law between the parties, the tribunal looked to the Swedish Arbitration Act to determine the applicable law in the case.⁹⁷ The Swedish Arbitration Act demanded the application of the law of the seat, in this case Swedish law, and, in turn, EU law, which is incorporated into Swedish law.⁹⁸ Upon review of the ordinary meaning, context, text, related instruments, and practice under the ECT, the tribunal found that EU law was relevant to issues concerning its jurisdiction.⁹⁹ Thus, the tribunal applied the CJEU's reasoning in the *Achmea* line of cases and concluded in a June 2022 ruling that it was precluded from exerting jurisdiction.¹⁰⁰

While groundbreaking, the *Green Power v. Spain* decision has limited application, given that ECT arbitrations seated outside of the EU or brought under ICSID, rather than domestic EU laws, would continue to evade intra-EU jurisdictional objections. On the heels of this decision, however, European states have concluded a five-year negotiation process and reached an agreement to revise the ECT to explicitly preclude Article 26 from applying intra-EU.¹⁰¹ In the meantime, intra-EU ECT arbitration remains contentious. The future of the ECT altogether remains uncertain in the face of continued country withdrawals.

E. *Yukos Capital v. Russia*: Five-Billion-Dollar Award Against Russia Upheld

In August 2022, a Swiss Federal Tribunal upheld the findings of a Permanent Court of Arbitration tribunal, which held Russia liable for expropriating the investments of the Luxembourg finance company, Yukos Capital Ltd, under the ECT.¹⁰² The dispute arose out of loans Yukos

96. Tony Dymond et al., *ECT Arbitration Update: Warning, Restrictions Ahead*, DEBEVOISE & PLIMPTON (July 16, 2022), <https://www.debevoise.com/insights/publications/2022/07/ect-arbitration-update-warning-restrictions-ahead> [<https://perma.cc/4449-UJU5>].

97. *Green Power Partners K/S v. Kingdom of Spain*, Arb. Inst. of the Stockholm Chamber of Com. Case No. V 2016/135, Award ¶ 163 (2022).

98. *Id.* ¶ 153.

99. *Id.* ¶ 412.

100. *Id.* ¶ 477.

101. See Simon Maynard & Mikhail Kalinin, *ECT Modernisation Perspectives: Unpacking the Impact of the Revised ECT Text on Dispute Resolution*, KLUWER ARB. BLOG (Nov. 6, 2022), <http://arbitrationblog.kluwerarbitration.com/2022/11/06/ect-modernisation-perspectives-unpacking-the-impact-of-the-revised-ect-text-on-dispute-resolution/> [<https://perma.cc/K82R-3GCV>].

102. See, e.g., *Yukos Capital Ltd. v. Russian Federation*, Permanent Court of Arbitration Case No. 2013-31, Final Award ¶ 868 (2021); see also Christopher Boog & Anne-Carole Cremades, *Multibillion-Dollar Yukos Award Upheld*, SHELLENBERG WITTMER (Jan. 1, 2022), <https://www.swlegal.com/en/insights/blog-detail/multibillion-dollar-yukos-award-upheld/> [<https://perma.cc/6ZBS-L7NB>].

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Capital made to its Russian parent company, Yukos Oil, a company that was forced into bankruptcy and liquidated by Russia without any payment being made to Yukos Capital Ltd.¹⁰³ Russia had sought to set aside the award on the basis of several jurisdictional objections, including that the loans were not qualifying protected investments within the meaning of the ECT, that the proceedings were an abuse of rights, that the investments were illegal tax-evasive transactions, and that the award violated public policy against unjust enrichment.¹⁰⁴ The Swiss Federal Tribunal dismissed all of Russia's jurisdictional objections and rejected Russia's application to set aside the award.¹⁰⁵ This \$5 billion award is one of several arbitral awards that have arisen out of Russia's dismantling of Yukos Oil, including three awards (*Hulley Enterprises v. Russia*, *Yukos Universal v. Russia*, and *Veteran Petroleum v. Russia*)¹⁰⁶ won by Yukos Oil shareholders against Russia, totaling over \$50 billion. Russia continues to defend enforcement of these awards.¹⁰⁷

F. *RWE v. Netherlands*: A Provisional Measures Balancing Act

In August 2022, the tribunal in *RWE v. Netherlands* re-affirmed the four-pronged test for recommending provisional measures pursuant to Article 47 of the ICSID Convention.¹⁰⁸ The tribunal said that it must consider (1) whether it had prima facie jurisdiction; (2) whether the claimant had established a prima facie case on the merits; (3) the urgency and necessity of the measures requested; and (4) the proportionality of those measures.¹⁰⁹ While it was readily satisfied that the first two criteria had been met,¹¹⁰ the tribunal focused on the urgency and necessity and proportionality prongs of RWE's request that it direct the Netherlands to withdraw or suspend proceedings against one of the Claimants, RWE AG, before the Higher Regional Court of Cologne.¹¹¹ In May 2021, pursuant to the German Code of Civil Procedure, the Netherlands had requested that the Cologne court find the *RWE v. Netherlands* arbitration inadmissible as a matter of EU and German law, relying on the CJEU's 2018 *Achmea* ruling.¹¹²

103. Tribunal fédéral [TF] Aug. 24, 2022, 4A_492/2021 (Switz.).

104. *Id.* ¶¶ 7–10.

105. *Id.* ¶ 11.

106. *See, e.g.*, *Hulley Enter. Ltd. (Cyprus) v. Russian Federation*, Perm. Ct. Arb., Case No. AA 226, Final Award (2014); *Yukos Universal Ltd. (Isle of Man) v. Russian Federation*, Perm. Ct. Arb., Case No. AA 227, Final Award (2014); *Veteran Petroleum Ltd. (Cyprus) v. Russian Federation*, Perm. Ct. Arb., Case No. AA 228, Final Award (2014).

107. *See* Jack Ballantyne, *Swiss Court Upholds Multibillion-Dollar Yukos Award*, GLOB. ARB. REV. (Oct. 7, 2022), <https://globalarbitrationreview.com/article/swiss-court-upholds-multibillion-dollar-yukos-award> [<https://perma.cc/N7N8-LQZE>].

108. *RWE AG & RWE Eemshaven Holding II BV v. Kingdom of the Netherlands*, ICSID Case No. ARB/21/4, Decision on the Claimants' Request for Provisional Measures, ¶¶ 31–32 (2022).

109. *Id.* ¶ 76.

110. *Id.* ¶¶ 77–78.

111. *Id.* ¶ 1.

112. *Id.* ¶¶ 4–5.

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At the time of the tribunal's decision-making, the case before the Cologne court was still pending,¹¹³ which most likely played a key role in the tribunal's finding that—even if RWE could make a case for proportionality—the measures requested were neither urgent nor necessary.¹¹⁴ While noting “some hesitation” in not granting the request,¹¹⁵ the tribunal left its door widely open to RWE. In case the German court found the ICSID arbitration inadmissible, the tribunal committed to entertain “on an expedited basis” a potential renewed request for provisional measures.¹¹⁶ At the same time, while acknowledging the Netherlands' stated intentions not to do so, the tribunal recommended that the Netherlands not restrain RWE from participating fully in the arbitration without first providing sufficient notice to RWE of its intentions to allow the Claimants to apply for provisional measures again.¹¹⁷

In the analysis preceding its decision, the tribunal recognized the conundrum. On the one hand, it sympathized with RWE that the German case was part of “a strategy to end th[e] arbitration” and more than a theoretical danger, as it could lead to an anti-arbitration injunction forcing RWE AG to withdraw from the arbitration and/or to blocking enforcement.¹¹⁸ Even if the decision on inadmissibility was merely declaratory, it would pose some level of threat to the tribunal's *kompetenz-kompetenz*, RWE's right of access to ICSID, and the integrity of ICSID proceedings.¹¹⁹ On the other hand, the tribunal recognized the position of the Netherlands that EU law mandated this course of action and that it was seeking nothing more than a declaratory decision.¹²⁰ The tribunal also acknowledged the representations of the Netherlands that it would continue to comply with all of its international law obligations and continue to participate in the arbitration, regardless of the outcome of the German case, and especially its stated view that the *RWE v. Netherlands* tribunal is the only competent body to determine its own jurisdiction.¹²¹

Just two weeks later, on September 1, 2022, the Higher Regional Court of Cologne declared the *RWE v. Netherlands* arbitration inadmissible.¹²² The

113. *Id.* ¶ 87.

114. *Id.* ¶ 89.

115. *Id.* ¶ 90.

116. *Id.* ¶ 91.

117. *Id.*

118. *Id.* ¶ 80–81.

119. *Id.* ¶ 82.

120. *Id.* ¶ 80.

121. *Id.* ¶¶ 83–86.

122. Lars Market & Anne-Marie Doernenburg, *RWE and Uniper: (German) Courts Rule on the Admissibility of ECT-Based ICSID Arbitrations in Intra-EU Investor-State Disputes*, KLUWER ARB. BLOG (Nov. 3, 2022), <https://arbitrationblog.kluwerarbitration.com/2022/11/03/rwe-and-uniper-german-courts-rule-on-the-admissibility-of-ect-based-icsid-arbitrations-in-intra-eu-investor-state-disputes/> [<https://perma.cc/96H5-2J29>].

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decision is yet to become final as a matter of German law.¹²³ No further applications for provisional measures were made, and the arbitration proceeding is suspended as of October 18, 2022, pursuant to the parties' agreement.¹²⁴

G. *Kruck v. Spain*: Contrasting Approaches to the Legitimate Expectations Standard

Kruck v. Spain concerns a dispute submitted to ICSID under the ECT by a group of over seventy German entities and individuals against Spain.¹²⁵ The claims arise out of a series of renewable energy reforms enacted by Spain that adversely affected Claimants' investments in photovoltaic (PV) power plant facilities.¹²⁶ In the Claimants' view, Spain had induced foreign investment through an attractive renewable energy incentives regime that then fundamentally altered after their investments were made.¹²⁷ The primary legal claim in the case concerned the content of the Fair and Equitable Treatment (FET) standard and whether the doctrine of legitimate expectations under the standard had been breached.¹²⁸ Spain maintained that interpretation of the legitimate expectations doctrine must factor in Spain's right to regulate in the public interest and disputed that it had made "specific commitments" giving rise to legitimate expectations that would prevent it from altering its own laws.¹²⁹

In its September 2022 decision, the tribunal majority, Vaughan Lowe and Michael C. Pryles, concluded that "in circumstances where the explicitly declared purpose of legislation is to invite investors to commit capital to projects in reliance upon guarantees of stability in a regulatory regime, specific commitments can be made by provisions in general legislation."¹³⁰ It found that Spanish Royal Decree 661/2007 (RD 661) had promised attractive and stable regulated tariffs and premiums to qualifying registered PV facilities for a fixed period and, thus, gave rise to legitimate expectations upon which potential investors could rely.¹³¹ Spain subsequently breached those legitimate expectations when it adopted a new regulatory regime.¹³²

123. Jack Ballantyne, *German Court Declares ICSID Claims Inadmissible*, GLOB. ARB. REV. (Sept. 7, 2022), <https://globalarbitrationreview.com/article/german-court-declares-icsid-claims-inadmissible> [<https://perma.cc/46GB-K36M>].

124. RWE AG & RWE Eemshaven Holding II BV v. Kingdom of the Netherlands, ICSID Case No. ARB/21/4, Proceedings Suspended Pursuant to the Parties' Agreement (Oct. 18, 2022).

125. Mathias Kruck v. Kingdom of Spain, ICSID Case No. ARB/15/23, Decision on Jurisdiction, Liability and Principles of Quantum, ¶ 5 (2022) [hereinafter Mathias Kruck v. Kingdom of Spain].

126. *Id.* ¶ 132.

127. *Id.* ¶¶ 24, 108.

128. *Id.* ¶ 97.

129. *Id.* ¶ 119.

130. *Id.* ¶ 189.

131. Mathias Kruck v. Kingdom of Spain, *supra* note 125, ¶ 189.

132. *Id.* ¶¶ 221–25.

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In a dissenting opinion, Zachary Douglas disagreed with the majority’s formulation of the test for legitimate expectations, arguing that the majority had used a flawed approach inspired by contract law that attributed liability based on a notion of strict liability—an approach that rendered the State’s public policy reasons for breaching its regulatory “promise” irrelevant.¹³³ Douglas argued that under Article 10 of the ECT and international investment law broadly, a State can only be found liable for a breach of legitimate expectations on the basis of fault.¹³⁴ Where there is a change in regulation at issue, a determination of fault should weigh the proportionality of the burden on the investor against the public interest pursued.¹³⁵ Douglas broadly criticized tribunals that have essentially created a no-fault compensation scheme for disgruntled foreign investors at the expense of State Parties.¹³⁶

133. *Id.* ¶ 2.

134. *Id.* ¶ 3.

135. *Id.* ¶ 47.

136. *Id.* ¶ 6.

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International Litigation

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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.¹

A. CHOICE OF LAW RULES

In *Cassirer v. Thyssen-Bornemisza Collection Foundation*, the Supreme Court held that a federal court considering non-federal claims under the FSIA should use the same choice-of-law rules to determine the governing substantive law as it would in a case between private parties.² A family had brought suit against a foundation owned by the Kingdom of Spain, seeking to regain possession of a Picasso painting taken from the family by the Nazi regime.³ Though a federal court normally applies forum state choice-of-law rules,⁴ the Court of Appeals for the Ninth Circuit held that when jurisdiction is based on the FSIA, federal common law choice-of-law rules

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1. 28 U.S.C. §§ 1602 *et seq.* (1976).

2. *Cassirer v. Thyssen-Bornemisza Collection Found*, 142 S. Ct. 1502, 1504 (2022).

3. *Id.*

4. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 497 (1941).

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apply, creating a split on the question with the Second, Sixth, and D.C. Circuits.⁵ The Supreme Court reversed, observing that “the FSIA was never intended to affect the substantive law determining the liability of a foreign state or instrumentality deemed amenable to suit.”⁶ The Court reasoned that because Section 1606 of the FSIA requires that “the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances,”⁷ “only the same choice-of law rule can guarantee use of the same substantive law—and thus . . . guarantee the same liability.”⁸

B. COMMON LAW DEFENSES

Last year’s Year in Review noted that the Second and Ninth Circuits had joined the D.C. Circuit in holding that the FSIA displaces common law sovereign immunity defenses for foreign sovereigns and instrumentalities.⁹ The defendant in the Ninth Circuit case has sought certiorari on this issue.¹⁰ The U.S. Solicitor General submitted an amicus curiae brief stating that although the United States is not prepared to endorse a categorical holding on common law immunity for FSIA claims, certiorari should be denied.¹¹

C. JURISDICTION OVER CRIMINAL CASES

The Supreme Court is poised to weigh in on whether the FSIA applies to criminal prosecutions. The Court has granted certiorari to review of the Second Circuit’s decision in *United States v. Türkiye Halk Bankası A.S.*, which—assuming *arguendo* that the FSIA applied—affirmed the denial of a Turkish state-owned bank’s motion to dismiss claims of U.S. sanctions violations, finding that the complained-of conduct fell within the commercial activity exception.¹² The Court’s decision on this issue will decide a circuit split between the Sixth Circuit, which has held that the FSIA’s grant of jurisdiction is limited to civil actions, and the D.C. and Second Circuits, which have applied the FSIA in criminal cases.¹³

5. *Cassier*, 142 S. Ct. at 1508 n.2.

6. *Id.* at 1508 (internal quotation marks omitted).

7. 28 U.S.C. § 1606 (1976).

8. *Id.*

9. See *WhatsApp Inc. v. NSO Grp. Techs. Ltd.*, 17 F.4th 930, 933 (9th Cir. 2021) (finding that the FSIA’s displaced common-law sovereign immunity for entities); *United States v. Türkiye Halk Bankası A.S. (Halkbank)*, 16 F.4th 336, 350 (2d Cir. 2021) (FSIA categorically precluded common-law sovereign immunity defenses).

10. *NSO Grp. Techs. Ltd. v. WhatsApp Inc. and Meta Platforms, Inc.*, 143 S. Ct. 562 (2023).

11. Brief of Solicitor General as Amicus Curiae at 7, *NSO Grp. Techs. Ltd. v. WhatsApp Inc.*, 143 S. Ct. 562 (2023) (No. 21-1338).

12. *Halkbank*, 16 F.4th at 346-48, *cert. granted*, *Türkiye Halk Bankası A.S. v. United States*, 143 S. Ct. 82 (2022). *Halkbank* was described in further detail in last year’s edition.

13. Compare *Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 819 (6th Cir. 2002), *with Halkbank*, 16 F.4th at 347, and *In re Grand Jury Subpoena*, 912 F.3d 623, 628 (D.C. Cir. 2019).

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D. COMMERCIAL ACTIVITY EXCEPTION

Courts have continued to refine the parameters of the FSIA's commercial activity exception. In *Wye Oak Technologies, Inc. v. Republic of Iraq*,¹⁴ the D.C. Circuit analyzed the exception's infrequently invoked second clause: claims "based upon" an "act performed in the United States in connection with a commercial activity of the foreign state elsewhere."¹⁵ The D.C. Circuit rejected a ruling previously issued in the same case by the Fourth Circuit that this exception could be satisfied by the administrative acts of the plaintiff, an American contractor, performed in the United States in connection with its contract with Iraq, finding instead that "the act at issue [must] be one that the foreign state has performed in the United States."¹⁶ The D.C. Circuit also reasoned that the contractor's claim was not "based upon" its own activities, but upon Iraq's nonperformance of its contractual obligations, which occurred in Iraq.¹⁷

In *Blenheim Capital Holdings Ltd. v. Lockheed Martin Corp.*, the Fourth Circuit analyzed whether South Korea's purchase of military satellite equipment was "commercial" activity under the FSIA.¹⁸ The Fourth Circuit reasoned that although the purchase of goods is generally "commercial," the military purchase transaction was of an exclusively sovereign nature, and undertaken based on regulations for sales "in furtherance of U.S. public policy and mutual military cooperation between countries."¹⁹ Accordingly, the purchase was not "commercial" for purposes of the FSIA's commercial activity exception.²⁰

II. International Service of Process

The Foreign Sovereign Immunities Act prescribes the methods that a plaintiff must attempt to serve process on a foreign state or its subdivision, as well as the order in which the plaintiff must attempt them.²¹ Because the first method, a special arrangement for service,²² is uncommon, plaintiffs typically must begin by seeking to serve foreign states under the Hague Service Convention, if the foreign state in question is a party to it.²³ Convention states have opportunities not available to other litigants to delay

14. *Wye Oak Tech., Inc. v. Republic of Iraq*, 24 F.4th 686, 689 (D.C. Cir. 2022) (Cleary Gottlieb represented the Republic of Iraq in the matter).

15. 28 U.S.C. § 1605 (1976).

16. *Wye Oak*, 24 F.4th at 700.

17. *Id.* at 703.

18. *Blenheim Cap. Holdings Ltd. v. Lockheed Martin Corp.*, No. 21-2104, 2022 WL 16936267, at *2 (4th Cir. Nov. 15, 2022).

19. *Id.* at *7.

20. *Id.* at *8.

21. *See* 28 U.S.C. § 1608(a) (1976).

22. *See id.* § 1608(a)(1).

23. *See* Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 art. 2 [hereinafter *Convention*].

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or frustrate service, because the Convention’s main channel of transmission gives the foreign state the obligation of serving process on itself.²⁴ The Convention state designates a central authority to receive requests for service,²⁵ which is typically a government ministry or a court official. A competent authority in the requesting state forwards the request for service to the foreign central authority.²⁶ The central authority then arranges for service of the summons on the defendant, using a method of service prescribed by the foreign law, unless the plaintiff has requested another method.²⁷ That is, one department of the foreign government arranges for delivery of the paper to another department. If all goes well, the central authority returns a certificate that serves as proof of service.²⁸

In *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*,²⁹ Saint-Gobain, a French company, owned a majority stake in NorPro Venezuela, C.A., which produced components for hydraulic fracturing. In 2011, President Chavez ordered the expropriation of Saint-Gobain’s interest.³⁰ Saint-Gobain brought an International Centre for the Settlement of Investment Disputes (“ICSID”) arbitration, prevailed, and in 2018 sought enforcement of the award in the U.S. District Court for the District of Delaware.³¹ It sent a request for service to the Venezuelan central authority, which did not respond in any way.³² Venezuela moved to dismiss for improper service of process and improper venue.³³ The court agreed that venue was improper and that the case should be transferred to the District of Columbia.³⁴ But it rejected Venezuela’s service argument, reasoning that the Convention “does not permit a foreign sovereign to feign non-service by its own failure to complete and return the required certificate,” and that service was complete when the documents were received by the Venezuelan central authority.³⁵ After the transfer to the District of Columbia, Saint-Gobain moved for summary judgment while Venezuela moved to dismiss for lack of jurisdiction, which the D.C. federal district court treated as a motion for reconsideration of the Delaware

24. *Id.*

25. *Id.*

26. *Id.* art. 3.

27. *Id.* art. 5.

28. *Id.* art. 6.

29. *Saint-Gobain Performance Plastics Eur. v. Bolivarian Republic*, 23 F.4th 1036, 1038 (D.C. Cir. 2019); *Saint-Gobain Performance Plastics Eur. v. Bolivarian Republic of Venezuela*, 143 S. Ct. 113 (2022).

30. *Saint-Gobain Performance Plastics Eur. v. Bolivarian Republic*, 23 F.4th 1036, 1038 (D.C. Cir. 2019).

31. *Id.*

32. *Id.*

33. *Id.* at 1040.

34. *Id.*

35. *Id.*

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decision on service.³⁶ The court then granted summary judgment and denied Venezuela's motion.³⁷ Venezuela appealed.³⁸

The D.C. Court of Appeals reversed.³⁹ It held that because Saint-Gobain had not requested the use of an alternative method, the Convention required that service be effected under Venezuelan law, which required service of the documents on the Attorney General, and it was undisputed that this had not happened.⁴⁰ As to Saint-Gobain's argument that service on the central authority was meaningful because the central authority *is* the foreign state, the D.C. Circuit held that the Convention is clear that service is not complete on transmission to the central authority.⁴¹ The central authority merely receives a *request* for service,⁴² and has authority to refuse to execute requests for any number of legitimate reasons, for example, if the foreign state concludes that executing the request would infringe its sovereignty or security, or if the request does not comply with the Convention for other reasons.⁴³ The court disregarded Saint-Gobain's claims that Venezuela had acted in bad faith: "Even when the equities of a particular case may seem to point in the opposite direction, the Supreme Court has required courts to adhere to the plain text of the FSIA and the Hague Convention in view of the sensitive diplomatic implications."⁴⁴

Saint-Gobain had also argued that under Article 15 of the Convention, a default judgment was proper because no response had been received from the Venezuelan central authority and more than six months had passed.⁴⁵ But the Court of Appeals held that Article 15 applies only when the defendant has not appeared.⁴⁶ Venezuela did appear, to challenge service.⁴⁷ Thus, even though Venezuela's central authority had not responded to the request for service, Article 15 did not apply.⁴⁸

Venezuela threaded the needle expertly by neither executing the service request nor affirmatively asserting that it would not execute it, and then making a limited appearance in court sufficient to avoid a default judgment under Article 15.⁴⁹ That said, it may only have bought some time. Service via the diplomatic channel, while slow, is always available as a last resort when service under easier methods proves impossible.⁵⁰

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 1040.

40. *Id.* at 1040-41.

41. *Id.*

42. *Id.* at 1041 (citing *Convention* art. 2).

43. *See id.* (citing *Convention* arts. 4, 13).

44. *Id.* at 1042 (citation and internal quotation marks omitted).

45. *Id.*

46. *Id.* at 1041.

47. *Id.*

48. *Id.*

49. *Id.*

50. *See Convention, supra* note 23, art. 9.

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III. Personal Jurisdiction

In *Douglass v. Nippon Yusen Kabushiki Kaisha*, the U.S. Court of Appeals for the Fifth Circuit considered the limits of a federal court's exercise of personal jurisdiction.⁵¹ The suit arose from a 2017 collision between a Japanese container ship owned by Nippon Yusen Kabushiki Kaisha (NYK) and a U.S. Navy destroyer in Japan's territorial waters.⁵² Personal representatives of sailors killed and injured in the collision brought claims in federal court under the Death on the High Seas Act against NYK which is incorporated and headquartered in Japan.⁵³ The plaintiffs sought to proceed under a general personal jurisdiction theory without satisfying the traditional Fourteenth Amendment minimum contacts analysis, which requires showing that a defendant's contacts are "so continuous and systematic as to render it essentially at home" in the relevant forum.⁵⁴ Rather, plaintiffs argued that, especially in an admiralty case, general jurisdiction could be found based on Federal Rule of Civil Procedure 4(k)(2), where the defendant maintained "substantial, systematic and continuous contacts with the United States as a whole" and had "fair notice" that it could be subject to a suit.⁵⁵

On appeal, an en banc panel rejected plaintiffs' argument that Rule 4(k)(2) was substantive source of personal jurisdiction.⁵⁶ The court explained that Rule 4(k) is inherently a procedural rule about issuing summons, incapable of expanding the scope of a court's exercise of personal jurisdiction.⁵⁷ Additionally, Rule 4(k)(2) was "expressly subservient to the constitutional limits of due process."⁵⁸ The appeals court then reasoned that the Fifth and Fourteenth Amendment due process clauses "use the same language and serve the same purpose" such that the standards governing due process limits on the exercise of personal jurisdiction under the clauses must also "mirror each other."⁵⁹

Within days of the *Douglass* decision, the U.S. Court of Appeals for the Eleventh Circuit came to the same conclusion in *Herederos De Roberto Gomez Cabrera, LLC v. Teck Res. Ltd.*⁶⁰ In *Herederos*, the Eleventh Circuit considered a federal claim under the Helms-Burton Act that a Canadian-headquartered and incorporated company had illegally trafficked in property confiscated by the Cuban government.⁶¹ Similar to *Douglass*, the plaintiff

51. *Douglass v. Nippon Yusen Kabushiki Kaisha*, 46 F.4th 226, 230-31 (5th Cir. 2022).

52. *Id.*

53. The survivors and their family members sued NYK separately for negligence and loss-of-consortium. *Id.* The Fifth Circuit consolidated the separate actions on appeal. *Id.*

54. *Daimler AG v. Bauman*, 571 U.S. 117, 139 (2014).

55. *Douglass*, 46 F.4th at 235.

56. *Id.*

57. *Id.* at 234.

58. *Id.* at 233.

59. *Id.* at 235.

60. *Herederos De Roberto Gomez Cabrera, LLC v. Teck Res. Ltd.*, 43 F.4th 1303, 1308 (11th Cir. 2022).

61. *Id.* at 1307.

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contended that the exercise of personal jurisdiction over the foreign defendant was “consistent with the . . . Constitution” under Rule (4)(k)(2).⁶² The plaintiff argued that the Fifth Amendment’s due process test for personal jurisdiction was an even more lenient “arbitrary or fundamentally unfair” standard than the “fair notice” standard rejected in *Dougllass*.⁶³ In affirming the district court’s dismissal for lack of personal jurisdiction, the Eleventh Circuit explained, as the *Dougllass* court had, that the language of the Fifth and Fourteenth Amendment due process clauses were materially identical and that it would make little sense to treat a jurisdictional analysis under each differently.⁶⁴

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.⁶⁵

In *Caballero v. Fuerzas Armadas Revolucionarias de Colombia*, discussed in last year’s Year in Review, the U.S. District Court for the Western District of New York applied the act of state doctrine to a dispute between two competing sets of counsel who sought to represent the Venezuelan national oil company, Petroleos de Venezuela (PDVSA), one appointed by the regime of Nicolás Maduro and the other appointed by the interim government of Juan Guaidó.⁶⁶ In the decision discussed last year, the court reasoned that the appointment of counsel was an “official” “act[] regarding the management of Venezuela’s state-owned corporations” by the Guaidó government—the government recognized by the United States.⁶⁷

In early 2022, the district court denied a motion for reconsideration by the Maduro regime.⁶⁸ The regime argued that *Kirkpatrick* established that federal courts should not invoke the act of state doctrine unless “the outcome of the case turns upon—the effect of official action by a foreign sovereign,”⁶⁹ but the court had applied the doctrine to a non-dispositive motion. The court rejected the argument, holding that the focus *Kirkpatrick* was on whether the issue “require[d] deciding the effect of an official act by a foreign sovereign” or could have been decided without such a finding.⁷⁰

62. *Id.*

63. *Id.* at 1307–08; *cf. Dougllass*, 46 F.4th at 235.

64. *Herederos*, 43 F.4th at 1308.

65. *See, e.g., WS Kirkpatrick & Co. Inc. v. Env’t. Tectonics Corp. Int’l*, 493 U.S. 400, 406 (1990); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964).

66. *Caballero v. Fuerzas Armadas Revolucionarias de Columbia*, No. 20-MC-40-LJV, 2021 WL 1884110, at *7 (W.D.N.Y. May 11, 2021).

67. *Id.*

68. *Caballero v. Fuerzas Armadas Revolucionarias de Columbia*, No. 20-MC-40-LJV, 2022 WL 71662, at *3 (W.D.N.Y. Jan. 7, 2022).

69. *Id.* (quoting *Kirkpatrick*, 493 U.S. at 406).

70. *Id.*

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Because the court could not avoid making such a finding in resolving the counsel dispute, the doctrine was properly applied.

But in a related proceeding, the District Court for the District of Connecticut declined to apply the act of state doctrine and denied the Guaidó government's motion to substitute its own counsel to represent an El Salvadoran subsidiary of PDVSA, in place of counsel retained by the subsidiary's authorized representative.⁷¹ The court reasoned that, even assuming the Guaidó government had validly decreed it would make decisions for all of PDVSA's subsidiaries, because this subsidiary was incorporated in El Salvador, the law of El Salvador applied and the act of state doctrine "[did] not apply extraterritorially to allow Venezuela to override the basic corporate law principles of El Salvador."⁷²

In *United States v. Trabelsi*, the U.S. Court of Appeals for the D.C. Circuit applied the act of state doctrine to defer to an extradition decision of Belgium's executive branch, notwithstanding conflicting decisions by Belgium's judiciary.⁷³ The defendant, a Tunisian national extradited from Belgium to the United States, sought dismissal of his case based on intervening decisions by Belgian courts finding he could not be prosecuted for certain acts in the United States.⁷⁴ The D.C. Circuit held that these judicial decisions did not affect the extradition because under the applicable extradition treaty, the Belgian executive's decision controlled (not the Belgian judiciary's), and the act of state doctrine required deference to that decision.⁷⁵

The U.S. Court of Appeals for the Second Circuit issued two decisions addressing the types of claims covered by the act of state doctrine. In *Celestin v. Caribbean Air Mail*, the court held that the act of state doctrine did not bar U.S. antitrust claims based in part on acts of Haitian government officials, reversing a district court decision which had held that the doctrine prevented review of a price-fixing scheme involving money transfers, food remittances, and international calls to and from Haiti that had alleged been enabled by Haitian presidential orders.⁷⁶ The appeals court reasoned that because the antitrust claims did not hinge on the *validity* of the Haitian government's orders but on whether the elements of an antitrust cause of action were met, the act of state doctrine did not apply.⁷⁷ Similarly, in *Petroleos de Venezuela S.A. v. MUFJ Union Bank, N.A.*, the Second Circuit applied *Celestin* to claims challenging the validity of a bond swap by PDVSA allegedly executed in violation of an official act of the Venezuelan

71. *Caballero v. Fuerzas Armadas Revolucionarias de Colombia*, 579 F. Supp. 3d 315, 325 (D. Conn. 2022).

72. *Id.* at 317, 324.

73. *United States v. Trabelsi*, 28 F.4th 1291, 1299 (D.C. Cir. 2022), *cert. denied* 214 L. Ed. 2d 162, 143 S. Ct. 345 (2022).

74. *Trabelsi*, 28 F.4th at 1296.

75. *Id.* at 1306.

76. *Celestin v. Caribbean Air Mail*, 30 F.4th 133, 137 (2d Cir. 2022).

77. *Id.* at 142-43.

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government.⁷⁸ The court observed that whether the doctrine applied depended on the “antecedent” question of whether the validity of the bond swap was governed by Venezuelan or U.S. law—if the latter, the act of state doctrine would not apply.⁷⁹ The court reserved judgment on the act of state argument pending its certification of the choice of law question to the New York Court of Appeals.⁸⁰

V. International Discovery

A. OBTAINING U.S. DISCOVERY FOR USE IN FOREIGN PROCEEDINGS

In the consolidated cases of *ZF Automotive US, Inc. v. Luxshare, Ltd.* and *AlixPartners, LLC v. Fund for Protection of Investors' Rights in Foreign States*,⁸¹ the U.S. Supreme Court issued a much-anticipated decision on whether 28 U.S.C. § 1782 (Section 1782), which allows U.S. federal courts to compel discovery for use before “foreign or international tribunal[s],”⁸² can be invoked in aid of international arbitration proceedings. Resolving an entrenched split among multiple courts of appeal, the Supreme Court held that private international arbitrations do not qualify under Section 1782 because the term “foreign or international tribunal”⁸³ is limited to adjudicatory bodies that exercise governmental authority.

Under this interpretation, the Court found it “straightforward” that private international arbitration tribunals, like the German Arbitration Institute (DIS) panel at issue in *ZF Automotive*, do not qualify under the statute.⁸⁴ The Court acknowledged that whether public international arbitration tribunals, like the ad hoc panel constituted under the UNCITRAL Rules pursuant to a Russia-Lithuania Bilateral Investment Treaty in *AlixPartners*, present a “harder question.”⁸⁵ Although the Court ultimately concluded that the ad hoc panel in that case did not qualify as a “foreign or international tribunal,”⁸⁶ noting that the panels in both cases “derive[d] their authority from the parties’ consent to arbitrate,” rather than the exercise of “official authority.”⁸⁷

78. *Petroleos de Venezuela S.A. v. MUFG Union Bank, N.A.*, 51 F.4th 456, 466 (2d Cir. 2022).

79. *Id.*

80. *Id.* at 476.

81. *ZF Automotive US, Inc. v. Luxshare*, 142 S. Ct. 2078, 2089 (2022).

82. 28 U.S.C. § 1782.

83. *ZE Auto*, 142 S. Ct. at 2079.

84. *Id.* at 2089.

85. *Id.* at 2089-90.

86. *Id.* at 2091.

87. *Id.*

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The Court did not mention arbitrations conducted by the ICSID, which many courts had previously found could rely on Section 1782.⁸⁸ At least one district court has already grappled with whether an ICSID tribunal is still within the ambit of Section 1782 following the Supreme Court’s decision.⁸⁹ In *In re Application of Alpeine*, a magistrate judge in the District Court for the Eastern District of New York noted that “[t]he Supreme Court did not set out any test or provide any guidelines for lower courts to follow in making this determination,” but considered five factors that it dubbed as “persuasive elements” in indicating whether the states at issue intended to “imbue” the ICSID facility with the kind of governmental authority that the Supreme Court was looking for.⁹⁰ While noting both the “number of similarities” and “significant differences” between the ICSID tribunal and the ad hoc panel in *AlixPartners*, the court found “insufficient support for the argument” that the ICSID tribunal was imbued with governmental authority.⁹¹ The court found unpersuasive the argument that comity considerations underlying Section 1782 weighed in favor of permitting discovery, noting that “ICSID arbitral tribunals have no authority to provide reciprocal discovery assistance for United States proceedings.”⁹²

B. OBTAINING DISCOVERY FROM ABROAD FOR USE IN U.S. PROCEEDINGS

U.S. courts may compel the production of documents located abroad for use in U.S. proceedings using the multi-factor comity analysis established by *Société Nationale Industrielle Aérospatiale v. U.S. District Court for the Southern District of Iowa*.⁹³ They may do so even in the face of foreign “blocking” statutes or other foreign legislation purporting to limit disclosure, such as the European Union’s General Data Protection Regulation (GDPR).⁹⁴ In *Kashef v. BNP Paribas S.A.*, however, the District Court for the Southern District of New York found that the presence of French bank secrecy laws

88. See, e.g., *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) (“District courts . . . have regularly found that arbitrations conducted pursuant to Bilateral Investment Treaties, and specifically by the ICSID, qualify as international tribunals.”).

89. See *In re Alpeine, Ltd.*, No. 21 MC 2547 (MKB)(RML), 2022 WL 15497008 (E.D.N.Y. Oct. 27, 2022).

90. *Id.* at *2.

91. *Id.* at *4.

92. *Id.* at *3.

93. *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa*, 482 U.S. 522, 544 n.28 (1987).

94. See *Philips Medical Sys. (Cleveland), Inc. v. Buan*, No. 19 CV 2648, 2022 WL 602485, at *2 (N.D. Ill. Mar. 1, 2022) (noting that “[f]oreign laws that block the production of discoverable material do not automatically excuse a party from its Rule 26 obligations” and permitting document production where defendants “failed to meet their burden of establishing that” Chinese law barred discovery); see also *In re Procom America LLC*, 638 B.R. 634, 647 (M.D. Fla. 2022) (permitting discovery despite Hungarian blocking statute because the “Hungarian interest . . . is outweighed by the interests of the United States”).

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and blocking statutes which “demonstrated a strong interest in data privacy” weighed against a wholesale de-pseudonymization sought by the plaintiffs in that case.⁹⁵

VI. Extraterritorial Application of United States Law

A. WIRE FRAUD ACT

In *United States v. Elbaz*, the Fourth Circuit construed the Wire Fraud Act, 18 U.S.C. § 1343, to apply to a foreign defendant whose fraudulent messages were received in the United States.⁹⁶ The defendant and her co-conspirators had been convicted of federal wire fraud for a multimillion-dollar scheme involving binary options that targeted unsophisticated victims worldwide.⁹⁷ Defendant challenged her conviction on the ground that the statute has no extraterritorial application and thus did not apply to her conduct, which originated outside the United States.⁹⁸ Applying the familiar two-step test for extraterritorial application, the Fourth Circuit first agreed that the statute does not apply extraterritorially.⁹⁹ At step two, however, the court determined that the charged conduct was not extraterritorial, looking specifically at “the conduct relevant to the statute’s focus.”¹⁰⁰ Aligning itself with the First and Ninth Circuits, the Fourth Circuit emphasized that the focus of the wire-fraud statute was the defendant’s “use of wire communication to execute the scheme,” rather than the defendant’s devising of the scheme, which occurred abroad.¹⁰¹ Because the defendant used internet and phone wires in Maryland to execute the scheme, the conviction was a permissible domestic application of the statute.¹⁰²

B. COMMODITY EXCHANGE ACT

In *Laydon v. Cooperatieve Rabobank U.A.*, the Second Circuit affirmed the dismissal of Commodity Exchange Act (CEA) claims on extraterritoriality grounds because the alleged conduct was predominantly foreign.¹⁰³ The court explained that under Section 22 of the CEA, a claim must involve both a “domestic transaction” and “sufficiently domestic conduct by the defendant.”¹⁰⁴ In *Laydon*, the plaintiff had traded a derivative, not listed on a

95. *Kashef v. BNP Paribas S.A.*, No. 16-CV-3228 (AKH) (JW), 2022 WL 1617489, at *4 (S.D.N.Y. May 23, 2022). Cleary Gottlieb represented BNP Paribas S.A. in the matter.

96. *United States v. Elbaz*, 52 F.4th 593 (4th Cir. 2022).

97. *Id.* at 599.

98. *Id.*

99. *Id.* at 602-03 (applying *Morrison v. Nat’l Austrl. Bank Ltd.*, 561 U.S. 247, 255, 130 S. Ct. 1869, 177 L. Ed. 2d 535 (2010)).

100. *Id.*

101. *Id.* (citing *United States v. Hussain*, 972 F.3d 1138, 1143-45 (9th Cir. 2020); *United States v. McLellan*, 959 F.3d 442, 469 (1st Cir. 2020)).

102. *Elbaz*, 52 F.4th at 604.

103. *Laydon v. Cooperatieve Rabobank U.A.*, 55 F.4th 86, 90 (2d Cir. 2022).

104. *Id.* at 96.

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domestic exchange, that was tied to the value of a foreign asset.¹⁰⁵ The derivative contract's value was determined, at least in part, by interest rates set by foreign entities in foreign countries.¹⁰⁶ The defendant's alleged manipulative conduct and communications occurred almost entirely abroad on foreign trade desks.¹⁰⁷ Aside from some communications by employees merely traveling inside the United States, the complaint focused on foreign individuals working in foreign offices.¹⁰⁸ The court concluded that these particular "CEA claims are impermissibly extraterritorial because the conduct [alleged] is 'predominantly foreign.'"¹⁰⁹

C. MONEY LAUNDERING CONTROL ACT

In reviewing the conviction of a Bulgarian man who operated a cryptocurrency exchange in Bulgaria, the Sixth Circuit considered whether the lower court's application of the federal money laundering and RICO statutes was impermissibly extraterritorial.¹¹⁰ The Money Laundering Control Act (MLCA) expressly provides that:

[t]here is extraterritorial jurisdiction . . . if: (1) the conduct is by a United States citizen or, in the case of a non-United States citizen, the conduct occurs in part in the United States; and (2) the transaction or series of related transactions involves funds or monetary instruments of a value exceeding \$10,000.¹¹¹

Although the defendant never set foot in the United States, the court of appeals concluded his money-laundering conspiracy satisfied the first prong—occurring in part in the United States—because it targeted victims in the United States, accepted and converted payments in the United States, and laundered funds in the United States.¹¹² Consequently, the Sixth Circuit held that the prosecution did not run afoul of the *RJR Nabisco* framework.¹¹³

The defendant also raised an extraterritoriality argument under the Fifth Amendment's Due Process Clause, arguing that if the MLCA and RICO statutes reached his conduct, they were unconstitutional as applied.¹¹⁴ Despite the absence of on-point circuit law, the Sixth Circuit rejected the defendant's constitutional claim on the ground that even if the Fifth Amendment limited the federal power to criminalize extraterritorial conduct, there was no arbitrariness or fundamental unfairness because the

105. *Id.*

106. *Id.* at 96-97.

107. *Id.* at 97.

108. *Id.*

109. *Id.* (citing *Prime Int'l Trading, Ltd. v. BP P.L.C.*, 937 F.3d 94, at 106 (2d Cir. 2019)).

110. *United States v. Iossifov*, 45 F.4th 899, 910 (6th Cir. 2022), *cert. denied*, No. 22-6343, 2023 WL 2123960 (U.S. Feb. 21, 2023).

111. 18 U.S.C. § 1956(f); *see also Iossifov*, 45 F.4th at 912.

112. *Iossifov*, 45 F.4th at 914.

113. *Id.* at 913.

114. *Id.* at 914.

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ties between the defendant’s offense and the United States were “numerous and compelling.”¹¹⁵

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.¹¹⁶ State law, however, governs the recognition and enforcement of foreign court judgments.¹¹⁷

A. FOREIGN ARBITRAL AWARDS

In *Tatneft v. Ukraine*,¹¹⁸ the D.C. Circuit enforced an arbitration award won by a Russian company against Ukraine in proceedings under the Russia-Ukraine Bilateral Investment Treaty, rejecting arguments that the action should be dismissed as forum non conveniens and that enforcement of the award violated public policy. The D.C. Circuit held that “forum non conveniens is not available” in enforcement proceedings because there is no adequate alternative forum to attach assets in the United States.¹¹⁹ It also rejected the argument that the Convention’s public policy exception was triggered by the claim that the award was in violation of Ukrainian law, noting that “the U.S. does not have a policy against enforcing arbitral awards predicated on underlying violations of foreign law.”¹²⁰

In *Reddy v. Buttar*,¹²¹ the Fourth Circuit rejected arguments that the district court lacked jurisdiction to enforce a Singaporean award because the petitioner had failed to produce a written arbitration agreement. In accord with precedent from the Second and Ninth Circuits,¹²² the Fourth Circuit concluded that the Convention’s “written-and-signed” requirement “speak[s] to the merits of a plaintiff’s enforcement action,” not to the subject-matter jurisdiction of U.S. courts.¹²³

115. *Id.*

116. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *proclaimed* Dec. 11, 1970, 21 U.S.T. 2517 (entered into force Dec. 29, 1970). The Convention is implemented in U.S. law through Chapter 2 of the Federal Arbitration Act (“FAA”). 9 U.S.C. §§ 201-08 (2013). The Inter-American Convention on International Commercial Arbitration, implemented in Chapter 3 of the FAA, governs the recognition and enforcement of awards if a majority of the parties to an arbitration agreement are citizens of states that have ratified it.

117. *See* 21 U.S.T. 2517.

118. *Tatneft v. Ukraine*, 21 F.4th 829 (D.C. Cir. 2021), *cert. denied sub. nom.* *Ukraine v. POE Tatneft*, 214 L. Ed. 2d 123, 143 S. Ct. 290 (2022). The author represented *Tatneft* in the case.

119. *Id.* at 840 (citing *LLC SPC Stileks v. Republic of Mold.*, 985 F.3d 871, 876 (D.C. Cir. 2021)).

120. *Id.* at 838.

121. *Reddy v. Buttar*, 38 F.4th 393 (4th Cir. 2022).

122. *Al-Qarqani v. Chevron Corp.*, 8 F.4th 1018, 1024 (9th Cir. 2021); *Sarhank Grp. v. Oracle Corp.*, 404 F.3d 657, 660 (2d Cir. 2005).

123. *Reddy*, 38 F.4th at 399.

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In *Esso Expl. & Prod. Nigeria Ltd. v. Nigerian Nat. Petroleum Corp.*,¹²⁴ the Second Circuit considered an action to enforce an arbitral award set aside in the primary jurisdiction. It clarified that “district courts are not limited to the four considerations” the court had earlier laid out in *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. PEMEX-Exploración y Producción*.¹²⁵ Rather, district courts should consider all relevant factors bearing on whether “the foreign judgment setting aside the award is . . . repugnant to the fundamental notions of what is decent and just in the United States.”¹²⁶

B. FOREIGN COURT JUDGMENTS

In *De Fontbrune v. Wofsy*, the Ninth Circuit clarified that California’s public policy exception to the recognition of foreign judgments depends in part on the merits of the defense sought to be asserted.¹²⁷ A French court had entered judgment on de Fontbrune’s claims against Wofsy for copyright infringement of photographs, granting de Fontbrune an *astreinte*, pursuant to which Wofsy would be liable for damages for further use of the photographs. In subsequent proceedings to collect on the *astreinte*, Wofsy did not appear, and the French court entered a default judgment.¹²⁸

In de Fontbrune’s recognition suit in California, the Northern District of California granted Wofsy’s motion for summary judgment because French law did not allow for a fair use defense to copyright infringement, making the *astreinte* judgment “repugnant to U.S. public policy favoring free expression”¹²⁹ and subject to non-recognition under the California Recognition Act.¹³⁰ The Ninth Circuit reversed.¹³¹ The fair use defense under U.S. copyright law consists of four factors, and the Ninth Circuit substantively examined each of these factors with respect to the Wofsy’s use of the photographs.¹³² Because in the Ninth’s Circuit view, none of the factors weighed in favor of the fair use defense, the court concluded that the inability to assert the defense in the French proceedings “does not place the French judgment in ‘direct and definite conflict with fundamental American constitutional principles.’”¹³³ The Ninth Circuit expressly left open the question of whether the inability to assert a meritorious fair use defense in

124. *Esso Expl. & Prod. Nigeria Ltd. v. Nigerian Nat. Petroleum Corp.*, 40 F.4th 56 (2d Cir. 2022).

125. *Corporacion Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploracion Y Produccion*, 832 F.3d 92 (2d Cir. 2016).

126. *Esso*, 40 F.4th at 71 (internal quotations omitted).

127. *De Fontbrune v. Wofsy*, 39 F.4th 1214, 1222, 1229 (9th Cir. 2022).

128. *Id.* at 1219-20.

129. *Id.* at 1221.

130. Cal. Civ. Proc. Code § 1716(c)(3).

131. *De Fontbrune*, 39 F.4th at 1236.

132. *Id.* at 1224-26.

133. *Id.* at 1227 (quoting *Naoko Ohno v. Yuko Yasuma*, 723 F.3d 984, 1004 (9th Cir. 2013)).

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foreign proceedings would result in a judgment triggering the public policy exception to recognition.¹³⁴

VIII. Forum Non Conveniens

In the traditional forum non conveniens analysis, the court first considers the degree of deference awarded to the plaintiff's choice of forum, then considers whether the alternative forum is adequate to adjudicate the dispute and balance the private and public interests factors relating to convenience.¹³⁵ This year, the appellate courts looked at the interplay between this analysis and application of both the FSIA and the United Nations Convention Against Corruption (UNCAC).

In *Aenergy, S.A. v. Republic of Angola*, the Second Circuit addressed whether the standard principles of forum non conveniens apply when a suit is brought against a foreign state under an exception to the FSIA.¹³⁶ The plaintiff in *Aenergy* sued Angola under two FSIA exceptions: the exception for commercial activity carried on in the United States, and the exception for property taken in violation of international law where that property, or property exchanged for such property, is present in the United States.¹³⁷ Citing the Supreme Court's decision in *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*,¹³⁸ the district court conditionally dismissed the complaint after finding that Angola would be a more convenient forum, without addressing whether there was jurisdiction under the FSIA.¹³⁹ On appeal, the plaintiff argued that dismissal under forum non conveniens was improper where a claim was brought against a foreign state under an exception to the FSIA or, alternatively, that the standard for dismissal must be higher.¹⁴⁰ The plaintiff argued that because Congress already expressly considered the convenience—or lack thereof—to foreign states in crafting the FSIA, applying forum non conveniens inquiry in a FSIA context would “upset the careful balance struck by Congress.”¹⁴¹

In stark contrast to the plaintiff's argument, the Second Circuit held that not only did forum non conveniens still apply to suits brought under an exception to the FSIA, but it might apply “in some cases perhaps with greater weight.”¹⁴² The court opined that “the forum non conveniens doctrine remains useful in the FSIA context as a ‘tool that helps prevent this

134. *Id.* at 1227 n.11.

135. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22, 255–56 (1981).

136. *Aenergy, S.A. v. Republic of Angl.*, 31 F.4th 119 (2022). See Section I, *supra*.

137. *Id.* at 126 n.8.

138. *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 432 (2007).

139. *Aenergy, S.A.*, 31 F.4th at 126.

140. *Id.*

141. *Id.*

142. *Id.*

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country's judicial system from becoming the courthouse to the world, or an international court of claims.”¹⁴³

Similarly, in *Instituto Mexicano del Seguro Social v. Zimmer Biomet Holdings, Inc.* and in *Instituto Mexicano del Seguro Social v. Stryker Corporation*, plaintiffs argued that the UNCAC precluded dismissal for forum non conveniens.¹⁴⁴ The UNCAC is a multilateral treaty intended to prevent international corruption, requiring that State Parties “[t]ake such measures as may be necessary to” make its courts available for parties to initiate an action under the UNCAC.¹⁴⁵ The Sixth and Seventh Circuits did not answer whether the UNCAC would have any relevance to the forum non conveniens analysis, but both circuits found that because the treaty was not self-executing the UNCAC is not binding federal law and cannot foreclose the forum non conveniens analysis.¹⁴⁶

IX. Parallel Proceedings

A. ANTI-SUIT INJUNCTIONS

In *In re Zetta Jet USA Inc.*, the U.S. Bankruptcy Court for the Central District of California granted a motion to enjoin a U.S. company's Chapter 7 Trustee from pursuing claims in Singapore against parties to the original proceeding initiated in Singapore.¹⁴⁷ The Trustee argued that, after the court had dismissed the case and the Trustee had filed a notice of appeal, the court lacked jurisdiction to issue the injunction.¹⁴⁸ The court found that it had power to enforce its own orders while appeals are pending,¹⁴⁹ as necessary to “‘to protect the federal judgment from being undermined or vitiated in foreign proceedings by a party before’ the Court.”¹⁵⁰ The Trustee also argued that an anti-suit injunction would offend international comity and would unfairly deny the trust's beneficiaries the protections of Singapore insolvency law, in particular due to certain exclusivity provisions in Singapore law that required the Trustee to bring suit in Singapore.¹⁵¹ The court rejected these arguments as well, concluding that Singapore law had no bearing on the U.S. court's jurisdiction, which was a matter of U.S. law

143. *Id.* at 127 (quoting *Monegasque de Reassurances S.A.M. v. Nak Naftogaz of Ukr.*, 158 F. Supp. 2d 377, 382 (S.D.N.Y. 2001), *aff'd sub nom.*, 311 F.3d 488 (2d Cir. 2002)).

144. *Instituto Mexicano Del Seguro Soc. v. Zimmer Biomet Holdings, Inc.*, 29 F.4th 351, 356 (7th Cir. 2022); *Instituto Mexicano Del Seguro Soc. v. Stryker Corp.*, 28 F.4th 732, 735 (6th Cir. 2022).

145. *Instituto Mexicano Del Seguro Soc. v. Stryker Corp.*, 28 F.4th 732, 735-36 (6th Cir. 2022).

146. *Id.* at 737; *Instituto Mexicano del Seguro Soc. v. Zimmer Biomet Holdings, Inc.*, 29 F.4th 351, 362 (7th Cir. 2022).

147. *In re Zetta jet USA, Inc.*, 644 B.R. 12, 64 (Bankr. C.D. Cal. 2022).

148. *Id.* at 28.

149. *Id.* at 33.

150. *Id.* at 32 (quoting *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 129 n.19 (2d Cir. 2007)).

151. *Id.* at 37-38.

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and (in this case) the Bankruptcy Code.¹⁵² Dispatching these threshold matters, the bankruptcy court determined that *res judicata* principles barred the Trustee's Singapore action.¹⁵³

In *Ganpat v. Eastern Pacific Shipping, PTE. LTD.*,¹⁵⁴ the U.S. District Court for the Eastern District of Louisiana gave careful attention to “the extent to which the foreign suit is duplicative of the litigation in the United States,” one of the anti-suit injunction factors.¹⁵⁵ In the Fifth Circuit, the “duplicative factor is about legal not factual, similarity.”¹⁵⁶ The court found that even though the allegedly vexatious and duplicative suit in India was filed by the defendant in the U.S. action, and primarily sought an injunction against the plaintiff's pursuit of the U.S. action, the two suits share the same legal bases and satisfied the factor favoring an anti-suit injunction.¹⁵⁷

B. INTERNATIONAL ABSTENTION

The *Colorado River* doctrine gives federal courts a “virtually unflagging obligation” to exercise jurisdiction in the face of parallel state proceedings, absent “exceptional” circumstances.¹⁵⁸ But different federal circuits apply *Colorado River*'s analysis of parallel state proceedings to parallel foreign proceedings in a variety of different ways. In *HSBC Bank (Uru.) S.A. v. Seaboard Corp.*, the U.S. District Court for the District of Kansas looked at what it called “a civil procedure battle royale” of different approaches, none of which the Tenth Circuit had adopted.¹⁵⁹ The majority of the circuits—the Fourth, Sixth, Seventh, and Ninth—simply apply *Colorado River* without any special consideration for international concerns.¹⁶⁰ The Eleventh Circuit follows a modified *Colorado River* test that accounts for international comity,¹⁶¹ whereas the Second Circuit has articulated the doctrine of “‘international comity abstention,’” which involves six or more factors.¹⁶² The district court agreed with the minority approaches that international abstention presents “different concerns than the issues of federalism addressed in *Colorado River*.”¹⁶³ The court predicted that the Tenth Circuit

152. *Id.* at 40-45; *see also* 28 U.S.C. §§ 157(a), 1334(b).

153. *Zetta Jet*, 644 B.R. at 45-62.

154. *Ganpat v. E. Pac. Shipping, PTE. LTD.*, No. CV 18-13556, 2022 WL 1015027, at *9 (E.D. La. Apr. 5, 2022) (citing *MWK Recruiting Inc. v. Jowers*, 833 F. App'x 560 (5th Cir. 2020)).

155. *Id.*

156. *Id.* at *10 (quoting *Jowers*, 833 F. App'x at 564).

157. *Id.* at *10-11.

158. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813, 817-18 (1976).

159. *HSBC Bank (Uru.) S.A. v. Seaboard Corp.*, No. 21-CV-2435-DDC-TJJ, 2022 WL 4447416, at *1, *20-21 (D. Kan. Sept. 23, 2022).

160. *Id.* at *17; *see also Colo. River Water Conservation Dist.*, 424 U.S. at 814.

161. *HSBC Bank*, 2022 WL 4447416 at *17.

162. *Id.* at *17-18 (quoting *Royal & Sun All. Ins. Co. of Can. v. Century Int'l Arms, Inc.*, 466 F.3d 88, 92 (2d Cir. 2006)).

163. *Id.* at *19.

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would most likely adopt the Second Circuit’s “robust framework for considering abstention issues” in the context of parallel foreign bankruptcy.¹⁶⁴ After applying the six-factor test to the case, however, the court found that two factors weighed against abstention, two were neutral, and two favored abstention, such that, “[a]dded together it’s a wash.”¹⁶⁵ The court concluded that given the close balance of the factors, no “exceptional circumstances” justified abstention.¹⁶⁶

In another case, the U.S. District Court for the Southern District of New York applied the Second Circuit standard for “adjudicative comity” abstention based on parallel foreign bankruptcy proceedings.¹⁶⁷ The court determined it could exercise jurisdiction over objections based on international comity because the parallel case was sufficiently distinct and there were no “extraordinary circumstances.”¹⁶⁸ Further, the court reiterated that in the Second Circuit, only foreign bankruptcy proceedings have been “singled out” as “often requir[ing] dismissal of parallel district court actions.”¹⁶⁹

164. *Id.*

165. *Id.* at *24.

166. *Id.*

167. *ArcelorMittal N. Am. Holdings LLC v. Essar Glob. Fund Ltd.*, No. 21 Civ. 6975 (KPF), 2022 WL 4334665, at *22-25 (S.D.N.Y. Sept. 19, 2022).

168. *Id.* at *25.

169. *Id.* at *23.

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Women’s Interest Network

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This article reviews the significant legal and political developments that impacted women internationally in 2022. Highlighted areas of interest include the right to health, gender-based and sexual violence, sexual harassment and assault, human trafficking, and international criminal courts and tribunals.

I. Legal Empowerment

In 2022, world events have “shown the positive difference women’s leadership and decision-making can make”¹ with regard to public

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1. *New Platform Highlights Women’s Leadership in Tackling Global Challenges*, U.N. (Sept. 20, 2022), <https://news.un.org/en/story/2022/09/1127081> [<https://perma.cc/HCU2-W8X5>] (last visited Apr. 14, 2023).

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administration, law, legislation and regulation, and the political realm.² When women hold high-level positions in governmental bodies, governments are more effective in “tailor[ing] and target[ing] solutions to those most in need.”³

A. WOMEN’S REPRESENTATION IN POLITICAL LEADERSHIP

In 2022, only five countries reached gender parity in their legislatures where women make up at least fifty percent of representatives.⁴ Rwanda continues to have the highest percentage of female legislators with 61.3 percent of seats filled by women in its lower house of parliament.⁵ More than 120 countries, including the United States, have legislatures where women comprise less than thirty percent of elected representatives.⁶ The current average percentage of women in legislatures is 22.9 percent, up from 14.9 percent in 2006, showing that progress has occurred in the last decade and a half.⁷ But women’s representation in government ministries lags behind that of legislatures, as just 16.1 percent of ministerial positions are filled by women.⁸

Only twenty-three percent of legislatures are presided over by women, showing inequity at the highest levels of government.⁹ Newly elected Justice Ayesha Malik, Pakistan’s first female Supreme Court judge, advocates for women to hold high positions of judicial leadership.¹⁰ In 2022, women made up just over twenty percent of global heads of state, with the largest shares coming from Europe, East Asia, and Sub-Saharan Africa.¹¹ No woman has held the position of head of state in North America in the last twenty-five years.¹²

Women’s representation in local governmental bodies worldwide is slightly better than national bodies but it still remains well below gender

2. *Women’s Leadership and Political Participation*, U.N. WOMEN, <https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2013/12/UN%20WomenLGTThemBriefUSwebrev2%20pdf.pdf> [<https://perma.cc/3SRD-S3MV>] (last visited Apr. 14, 2023).

3. *New Platform Highlights Women’s Leadership in Tackling Global Challenges*, *supra* note 1.

4. *Monthly Ranking of Women in National Parliaments*, IPU PARLINE, <https://data.ipu.org/women-ranking?month=11&year=2022> [<https://perma.cc/26H7-Z3FS>] (last visited Apr. 14, 2023).

5. *Id.*

6. *Id.*

7. See WORLD ECON. F., GLOBAL GENDER GAP REPORT 1, 7 (JULY 2022).

8. *Id.*

9. *Women Speakers of National Parliaments*, IPU PARLINE, <https://data.ipu.org/women-speakers> [<https://perma.cc/6G2J-MUXJ>] (last visited Apr. 14, 2023).

10. *International Women’s Day 2022: In Conversation with Mrs. Justice Ayesha A. Malik*, COURTS AND TRIBUNALS JUDICIARY (Mar. 8, 2022), <https://www.judiciary.uk/guidance-and-resources/international-womens-day-2022-in-conversation-with-mrs-justice-ayesha-a-malik> [<https://perma.cc/KM3X-54RH>] (last visited Apr. 14, 2023).

11. GLOBAL GENDER GAP REPORT, *supra* note 7 at 39.

12. *Id.* at 22.

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parity.¹³ Only twenty countries have local legislative bodies with at least forty percent women.¹⁴ Additionally, political violence remains a threat to women serving in political roles.¹⁵ Women in political leadership positions have faced violence, including sexual violence and death.¹⁶ In the United States, female elected officials are targeted with political violence an estimated 3.4 times more than their male counterparts.¹⁷

B. LEGAL EQUALITY IN CONSTITUTIONS & LAWS

The World Bank's *Women, Business, and the Law* report indicates that women have three-quarters of the legal rights of men in areas such as mobility, the workplace, pay, marriage and its legal constraints, parenthood, entrepreneurship, pensions, and assets like property and inheritance.¹⁸

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-fifth meeting in September 2022.¹⁹ The meeting focused on ASEAN's efforts to end all forms of violence against women and children under the theme, "Advancing the Implementation of International and Regional Frameworks on the Elimination of Violence Against Women."²⁰ In September 2022, ASEAN and the United States issued a joint statement in furtherance of the ASEAN-US dialogue on gender equality and women's empowerment.²¹

1. Right to Economic and Social Equality

Progress in closing the gender gap has stalled in most countries because of the multi-layered crises the world is facing, such as increases in the cost of

13. Ionica Berevoescu & Julie Ballington, *Women's Representation in Local Government: A Global Analysis* 12 (Dec. 2021) (working paper), <https://www.unwomen.org/sites/default/files/2022-01/Womens-representation-in-local-government-en.pdf> [<https://perma.cc/HL9H-7PDA>].

14. *Id.*

15. *Id.* at 19.

16. Roudabeh Kishi, *Violence Targeting Women in Politics: 10 Countries to Watch in 2022*, GEO. INST. FOR WOMEN, PEACE, & SEC. (Jan. 28, 2022), <https://giwps.georgetown.edu/violence-targeting-women-in-politics-10-countries-to-watch-in-2022/> [<https://perma.cc/J8W3-4XCN>].

17. PRINCETON UNIV., BRIDGING DIVIDES INITIATIVE, THREATS AND HARASSMENT AGAINST LOCAL OFFICIALS DATASET 1, 22 (Oct. 20, 2022).

18. Press Release, World Bank, Nearly 2.4 Billion Women Globally Don't Have Same Economic Rights as Men (Mar. 1, 2022), <https://www.worldbank.org/en/news/press-release/2022/03/01/nearly-2-4-billion-women-globally-don-t-have-same-economic-rights-as-men> [<https://perma.cc/62LB-8Y2J>].

19. *See ASEAN Commits to Promote and Protect Rights of Children*, ASS'N OF SE. ASIAN NATIONS (Sept. 22, 2022), <https://asean.org/asean-commits-to-promote-and-protect-rights-of-women-and-children> [<https://perma.cc/LN4T-8KZW>].

20. *See id.*

21. *Joint Statement of the ASEAN - U.S. Ministerial Dialogue on Gender Equality and Women's Empowerment*, ASS'N OF SE. ASIAN NATIONS (Sept. 30, 2022), <https://asean.org/joint-statement-of-the-asean-u-s-ministerial-dialogue-on-gender-equality-and-womens-empowerment> [<https://perma.cc/26X7-R84T>].

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living, COVID-19 and other health emergencies, and the climate crisis.²² “Gender gap” refers to the difference between men and women as reflected in cultural, intellectual, social, political, and economic²³ attitudes, as well as gendered disparities in achievement.²⁴ The 2022 global gender gap closed by 68.1 percent, which is a 0.2 percent increase from 2021.²⁵ While eighty-seven countries have worked to close their gender gap, fifty-eight countries have reversed their gender gap since 2021.²⁶ With the current rate of progression, the World Economic Forum and the United Nations concluded it will take 132 to 300 years to close the gender gap entirely.²⁷

2. *Marriage Rights*

In March 2022, the first same-sex marriages in Chile took place after the Marriage Equality Law came into effect.²⁸ The measure, introduced in 2017 by center-left President Michelle Bachelet, and later signed into law by right-wing President, Sebastian Piñera, in 2021,²⁹ vests same-sex parents with full parental rights, expands spousal benefits, and confers adoption rights on married couples.³⁰

In June 2022, the Constitutional Court of Slovenia struck down a statutory ban on same-sex marriage, holding that the ban was discriminatory and in violation of the Constitution.³¹ The decision immediately took effect and the Court gave Parliament six months to amend the law to conform with its decision.³² Four months later, the National Assembly of Slovenia granted the right to equal treatment under the law for marriage and adoption, regardless of sexual orientation, making the nation the first formerly

22. GLOBAL GENDER GAP REPORT, *supra* note 7, at 17.

23. See Briony Harris, *What Is The Gender Gap (And Why Is It Getting Wider)?*, WORLD ECON. F. (Nov. 1, 2017), <https://www.weforum.org/agenda/2017/11/the-gender-gap-actually-got-worse-in-2017/> [<https://perma.cc/FD9Z-L7HM>].

24. *Id.*

25. GLOBAL GENDER GAP REPORT, *supra* note 7, at 9.

26. *Id.*

27. See U.N. WOMEN & DEPT. OF ECON. AND SOC. AFFS., PROGRESS ON THE SUSTAINABLE DEVELOPMENT GOALS: THE GENDER SNAPSHOT 2022 1, 10 (2022).

28. Jane Chambers, *Chile Couples' Joy as First Same-Sex Marriages Held*, BBC (Mar. 10, 2022), <https://www.bbc.com/news/world-latin-america-60690266> [<https://perma.cc/WXK7-TSKA>].

29. See Law No. 21400, diciembre 9, 2021, DIARIO OFICIAL [D.O.] (Chile); see also *President Piñera Enacts Marriage Equality Law: “Freedom Is Built on Recognizing Each Other as Equal in Dignity and Rights”*, GOBIERNO DE CHILE (Dec. 9, 2021), <https://www.gob.cl/en/news/president-pinera-enacts-marriage-equality-law-freedom-is-built-on-recognizing-each-other-as-equal-in-dignity-and-rights> [<https://perma.cc/68EC-T2QG>].

30. See Law No. 21400, *supra* note 29; see also *President Piñera Enacts Marriage Equality Law: “Freedom Is Built on Recognizing Each Other as Equal in Dignity and Rights”*, *supra* note 29.

31. See Press Release, Constitutional Court of Slovenia, *The Review Regulation of Marriage and Joint Adoption Entails Prohibited Discrimination Against Same-Sex Couples* (June 23, 2022), <https://www.us-rs.si/decision/?lang=en&q=U-I-486%2F20&caseId=&df&dt=&af=&at=&pri=1&vd&vv=&vs=&ui=&va=&page=1&sort=&order=&id=117933> [<https://perma.cc/H358-VKK2>].

32. *Id.*

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Communist country to enact same-sex marriage reform.³³ Also in October 2022, same-sex marriage became legal in all thirty-two Mexican states when Tamaulipas voted to amend its Civil Code, marking a monumental achievement for LGBTQ rights.³⁴

In July 2022, Switzerland's "Marriage for All" amendment took effect³⁵ following a public referendum in 2021 in which 64.1 percent voted in favor of marriage equality.³⁶ In July 2022, Andorra's General Council unanimously voted to legalize civil marriage for same-sex couples³⁷ and granted full marriage rights to former "civil unions."³⁸ The new statute was promulgated in August by Co-Prince Emmanuel Macron and will go into effect in February 2023.³⁹

In November 2022, Tokyo joined hundreds of other Japanese municipalities when it began offering domestic partnership certificates to recognize same-sex couples.⁴⁰ Despite last year's ruling from the Sapporo District Court of Japan deeming its ban on same-sex marriage unconstitutional,⁴¹ the Osaka District Court disagreed in June.⁴² Japan is the only G7 country unwilling to recognize same-sex marriage.⁴³ In the same month, Cuba passed a historic referendum, which among other things,

33. Brody Levesque, *Slovenia Legalizes Marriage, Adoption for Same-Sex Couples*, WASH. BLADE (Oct. 5, 2022), <https://www.washingtonblade.com/2022/10/05/slovenia-legalizes-marriage-adoption-for-same-sex-couples/> [<https://perma.cc/A2Q7-ZFX4>].

34. *Same-Sex Marriage Is Now Legal in All of Mexico's States*, AP NEWS (Oct. 27, 2022), <https://apnews.com/article/mexico-caribbean-gay-rights-marriage-e214fe19d33a4bd67cb04a1fb556178a> [<https://perma.cc/YC8U-2AGF>].

35. Brenna H. Neghaiwi & Arnd Wiegmann, *In Switzerland, First Same-Sex Couples Say "I Do"*, REUTERS (July 1, 2022), <https://www.reuters.com/world/europe/switzerland-first-same-sex-couples-say-i-do-2022-07-01/> [<https://perma.cc/543K-BRJL>].

36. *Volksabstimmung Vom 26.09.2021 [Referendum of 09.26.2021]*, FED. CHANCELLERY BK (Sept. 26, 2021), <https://www.bk.admin.ch/ch/d/pore/va/20210926/index.html> [<https://perma.cc/382G-SQ8R>].

37. Michael K. Lavers, *Andorra Lawmakers Extend Civil Marriage Rights to Same-Sex Couples*, L.A. BLADE (July 21, 2022), <https://www.losangelesblade.com/2022/07/21/andorra-lawmakers-extend-civil-marriage-rights-to-same-sex-couples> [<https://perma.cc/R9XK-3D7T>].

38. Llei No. 30/2022, Títol II, arts. 74–84, BUTLLETÍ OFICIAL DEL PRINCIPAT D'ANDORRA, 30-31 (Juliol 21, 2022).

39. *Id.*; see also *LGBT Marriage News (@LGBTMarriage)*, TWITTER (Aug. 27, 2022), <https://twitter.com/LGBTMarriage/status/1563574175058771971> [<https://perma.cc/KT5H-JJKU>].

40. Alex Bollinger, *Same-Sex Couples in Tokyo Can Now Get Domestic Partnerships*, LGBTQ NATION (Nov. 4, 2022), <https://www.lgbtqnation.com/2022/11/sex-couples-tokyo-can-now-get-domestic-partnerships> [<https://perma.cc/4X4X-LEUU>].

41. *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> [<https://perma.cc/8N5N-JF9D>].

42. *Japan Court Says Ban on Same-Sex Marriage Is Constitutional*, NAT'L PUBLIC RADIO (June 20, 2022), <https://www.npr.org/2022/06/20/1106313824/japan-court-ban-on-same-sex-marriage-constitutional> [<https://perma.cc/2DDH-4786>].

43. *Id.*

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granted marriage and adoption rights to same-sex couples, thus increasing legal protections for diverse families.⁴⁴

In the United States, the Respect for Marriage Act (RFMA) was signed into law on December 13, 2022, by President Joe Biden.⁴⁵ It repeals and replaces the 1996 Defense of Marriage Act and recognizes same-sex and interracial marriage under federal law.⁴⁶ The bipartisan bill passed with a 267-157 vote in the House and with a 61-36 vote in the Senate after adding an amendment.⁴⁷ The House will vote on the amendments, and if approved, they will be sent to President Joe Biden to become law.⁴⁸ The new law codified, in part, *Obergefell v. Hodges*, the Supreme Court decision guaranteeing marriage rights to same-sex couples under the Fourteenth Amendment to the U.S. Constitution.⁴⁹ This guarantee was called into question⁵⁰ after Justice Clarence Thomas implored the Court to “reconsider” and overrule *Obergefell* in the *Dobbs v. Jackson Women’s Health Organization*⁵¹ decision issued in June 2022.

3. *Right to Health*

In the United States, the *Dobbs*⁵² decision overturned almost fifty years of precedent under *Roe v. Wade*.⁵³ The 6-3 conservative majority revoked the constitutional right to an abortion, allowing states to pass abortion bans and

44. See Eduardo Medina, *Cuba Approves Same-Sex Marriage in Historic Vote*, N.Y. TIMES (Sept. 26, 2022), <https://www.nytimes.com/2022/09/26/world/americas/cuba-same-sex-marriage-adoption.html> [<https://perma.cc/XHK5-8XFP>]; see also *Cuba Approves Same-Sex Marriage in A Referendum*, NAT’L PUBLIC RADIO (June 20, 2022), <https://www.npr.org/2022/09/27/1125344835/cuba-approves-same-sex-marriage> [<https://perma.cc/P4GG-ASUE>] (last visited Apr. 14, 2023).

45. See Respect for Marriage Act, H.R. 8404, 117th Cong. (2022).

46. *Id.* (citing *United States v. Windsor*, 570 U.S. 744 (2013); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)).

47. President Biden signed the Respect for Marriage Act on December 13, 2022. See Respect for Marriage Act; see also Kathryn Watson, *Biden Signs Respect for Marriage Act, Recognizing Marriage Equality in Federal Law*, CBS NEWS (Dec. 13, 2022), <https://www.cbsnews.com/live-updates/biden-signs-respect-for-marriage-act-equality-federal-law/> [<https://perma.cc/2NKA-WEC2>].

48. Watson, *supra* note 47.

49. *Obergefell*, 135 S. Ct. at 2604.

50. Sheryl Gay Stolberg, *Thomas’s Concurring Opinion Raises Questions About What Rights Might Be Next*, N.Y. TIMES (June 24, 2022), <https://www.nytimes.com/2022/06/24/us/clarence-thomas-roe-griswold-lawrence-obergefell.html> [<https://perma.cc/T7KK-656E>].

51. *Dobbs v. Jackson’s Women’s Health Org.*, 142 S. Ct. 2228, 2301 (2022) (Thomas, J., concurring).

52. *Id.*

53. *Id.*; *Roe v. Wade*, 410 U.S. 113 (1973).

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highly restrictive laws,⁵⁴ raising concerns for women's health care, human rights, and gender equality worldwide.⁵⁵

The public—especially women—largely disapproved of the opinion,⁵⁶ and partook in protests nationwide.⁵⁷ As of December 12, 2022, abortion was banned in twelve states, including: Alabama, Arkansas, Idaho, Kentucky, Louisiana, Mississippi, Missouri, Oklahoma, South Dakota, Tennessee, Texas, and West Virginia.⁵⁸ In North Dakota and Wisconsin, abortion was effectively prohibited due to continuing litigation.⁵⁹

Citizens are expressing their views at the polls. In Kansas and Kentucky, voters rejected an anti-abortion referendum that would eliminate protections from the states' constitutions.⁶⁰ Meanwhile, the *Dobbs* decision has led to an absence of abortion care in some states, placing lives in jeopardy around the country.⁶¹ The United States is one of only four

54. *Tracking the States Where Abortion Is Now Banned*, N.Y. TIMES (Apr. 14, 2023), <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html> [https://perma.cc/AC72-GMMD].

55. See Off. of the High Comm'r for Hum. Rts., *Joint Web Statement by UN Human Rights Experts on Supreme Court Decision to Strike Down Roe v. Wade*, U.N. (June 24, 2022), <https://www.ohchr.org/en/statements/2022/06/joint-web-statement-un-human-rights-experts-supreme-court-decision-strike-down> [https://perma.cc/XSC5-GRFZ] (“The Supreme Court has completely disregarded the United States’ binding legal obligations under international human rights law . . .”).

56. *Majority of Public Disapproves of Supreme Court’s Decision To Overturn Roe v. Wade*, PEW RSCH. CTR. (July 6, 2022), <https://www.pewresearch.org/politics/2022/07/06/majority-of-public-disapproves-of-supreme-courts-decision-to-overturn-roe-v-wade/> [https://perma.cc/QZV9-JEW7].

57. Shawn Hubler, *Abortion Rights Protesters Voice Their Anger in Cities Across The Country*, N.Y. TIMES (June 24, 2022), <https://www.nytimes.com/live/2022/06/24/us/roe-wade-abortion-supreme-court> [https://perma.cc/4CMH-RRN7].

58. *Compare Tracking the States Where Abortion Is Now Banned*, *supra* note 54 with *After Roe Fell: Abortion Laws by State*, CTR. FOR REPROD. RTS., <https://reproductiverights.org/maps/abortion-laws-by-state/> [https://perma.cc/TSE3-2T5D] (last visited Apr. 14, 2023) (explaining that Wisconsin “will try to prohibit” abortion with its pre-Roe ban while the law remains in question).

59. Elizabeth Nash and Peter Ephross, *State Policy Trends 2022: In a Devastating Year, US Supreme Court’s Decision to Overturn Roe Leads to Bans, Confusion and Chaos*, GUTTMACHER INST., <https://www.guttmacher.org/2022/12/state-policy-trends-2022-devastating-year-us-supreme-courts-decision-overturn-roe-leads> [https://perma.cc/F9LL-AQYY] (last visited April 26, 2023).

60. See Holly Honderich, *Abortion Election Results: Kentucky Rejects Constitutional Amendment on Abortion*, BBC NEWS (Nov. 9, 2022), <https://www.bbc.com/news/world-us-canada-63564062> [https://perma.cc/VQY3-NZWC].

61. See Elizabeth Cohen & John Bonifield, *Texas Woman Almost Dies Because She Couldn’t Get an Abortion*, CNN (Nov. 16, 2022), <https://www.cnn.com/2022/11/16/health/abortion-texas-sepsis/index.html> [https://perma.cc/6QKM-UMLX]; see also Chavi Eve Karkowsky, *Without Abortion, Doctors in Texas Are Forced to Witness Horrible Outcomes*, SLATE (Nov. 28, 2022), <https://slate.com/technology/2022/11/abortion-texas-roe-v-wade-data-maternal-morbidity.html> [https://perma.cc/9X7Z-SPSW].

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countries, along with El Salvador, Nicaragua, and Poland, to backslide on abortion rights in almost three decades.⁶²

The UN Committee on the Elimination of Racial Discrimination (CERD) issued a report in August 2022 focused on racial and ethnic discrimination in maternal health care in the United States.⁶³ The Committee stated it is “deeply concerned” by the *Dobbs* ruling, recommending that the United States actively work to eliminate barriers to inequalities in reproductive care.⁶⁴

Following decisions by Argentina’s Senate and Mexico’s Supreme Court, the Constitutional Court of Colombia issued a landmark ruling in February decriminalizing abortion up to twenty-four weeks of gestation,⁶⁵ making it the eighth country in Latin America and the Caribbean that decriminalized abortion in the initial stages of pregnancy.⁶⁶ The court requested that Colombia’s Congress create and implement regulations to effectively apply the court’s ruling.⁶⁷ In September 2022, one year after its referendum to overturn a 150-year-old abortion ban, San Marino legalized abortion during the first twelve weeks of pregnancy, requiring the public health system to cover the cost.⁶⁸

Also in September 2022, India’s Supreme Court ruled that the amended Medical Termination of Pregnancy Act of 1971 (MTP) applies to all women equally, including single women,⁶⁹ and that its definition of “woman” applies to abortion seekers of all genders.⁷⁰ This decision reversed the lower court,

62. *With Its Regression on Abortion Rights, The U.S. Is A Global Outlier*, CTR. FOR REPROD. RTS. (Sept. 8, 2022), <https://reproductiverights.org/us-a-global-outlier-on-abortion-rights> [https://perma.cc/4T53-SX6Q].

63. Int’l Convention on the Elimination of All Forms of Racial Discrimination, *Concluding Observations on the Combined Tenth to Twelfth Reports of the United States of America*, U.N. Doc. CERD/C/USA/CO/10-12 (Sept. 21, 2022).

64. *Id.* ¶ 35, at 9.

65. Stefano Pozzebon et al., *Colombia Becomes Latest Latin American Country to Partially Decriminalize Abortion*, CNN (Feb. 22, 2022), <https://www.cnn.com/2022/02/21/americas/colombia-decriminalize-abortion-intl/index.html> [https://perma.cc/Y4YZ-VV7N].

66. *Colombia’s Highest Court Rules to Decriminalize Abortion*, CTR. FOR REPROD. RTS. (Feb. 22, 2022), <https://reproductiverights.org/colombia-court-decriminalize-abortion/> [https://perma.cc/4ABE-N5E8].

67. *Id.*

68. *San Marino Legalises Abortion, One Year After Landmark Referendum*, EURONEWS (Jan. 9, 2022), <https://www.euronews.com/2022/09/01/san-marino-legalises-abortion-one-year-after-landmark-referendum> [https://perma.cc/MJW6-464U].

69. *See X v. Principal Sec’y*, (2022) SC (India); Tanvi Mehta & Suchitra Mohanty, *India’s Top Court Legalises Abortion Regardless of Marital Status*, REUTERS (Sept. 29, 2022), <https://www.reuters.com/world/india/indias-top-court-gives-all-women-right-abortion-2022-09-29/> [https://perma.cc/9BFJ-XPPV]; Medical Termination of Pregnancy (Amendment) Act, 2021, §3; *see also Factsheet: The Medical Termination of Pregnancy (Amendment) Act, 2021*, CTR. FOR REPROD. RTS. (2021), <https://reproductiverights.org/wp-content/uploads/2022/09/India-FACTSHEET-MTP-Amendment-Act-9-22.pdf> [https://perma.cc/8MXS-9FQ2] [hereinafter *Factsheet*].

70. *Principal Sec’y*, (2022) SC at 9 (India).

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which ruled that last year's amendment increasing the gestational limit to twenty or twenty-four weeks, depending on the circumstances of the pregnancy, was limited to certain categories of women.⁷¹ The Supreme Court ruled that marital status was an "artificial distinction," and that women should have equal access to abortion under the "intent" of the MTP and India's Constitution.⁷² The Court emphasized that all women have the right to seek safe abortions with dignity, autonomy, privacy, equality, and justice.⁷³ The opinion substantially rests on international law, citing numerous obligations.⁷⁴

With the Taliban takeover, women and girls in Afghanistan face increased barriers to health care because of gender-based policies restricting women's human rights.⁷⁵ A decree restricting women from traveling more than forty-five miles without a male guardian, or *mahram*, prevents access to education, jobs, and medical care, endangering the health and safety of women and children.⁷⁶ Taliban policy of allowing women to be treated only by women healthcare providers absent emergencies, further strained the healthcare system and limited women's access to necessary medical care.⁷⁷ The Taliban is training women doctors for the sole purpose of treating women.⁷⁸

Scotland became the first country to provide free hygiene products for menstruating people.⁷⁹ The Scottish Parliament unanimously approved the measure, which went into effect in November 2020.⁸⁰ The government launched an app-driven system to distribute menstrual products and requires educational facilities to provide free products in restrooms.⁸¹

The Liberian government and its National Council of Chiefs and Elders issued a three-year moratorium on Female Genital Mutilation (FGM) in February 2022.⁸² Opposition to reforms remain, but membership in

71. *Id.* at 12; Factsheet, *supra* note 69.

72. *Principal Sec'y*, (2022) SC at 54 (India).

73. See *India Dispatch: Top Court Ruling To Extend Abortion Rights Relies on Both Domestic and International Law*, JURIST (Sept. 30, 2022), <https://www.jurist.org/news/2022/09/india-dispatch-top-court-ruling-to-extend-abortion-rights-relies-on-both-domestic-and-international-law/> [https://perma.cc/3SD9-F66S].

74. *Id.*

75. Chantelle Lee, *What's the Status of Healthcare for Women in Afghanistan Under the Taliban?*, PBS (Aug. 9, 2022), <https://www.pbs.org/wgbh/frontline/article/healthcare-women-afghanistan-under-taliban/> [https://perma.cc/3QUM-JNPP].

76. *Id.*

77. *Id.*

78. Claire Parker, *The Taliban Wants to Segregate Women. So It's Training Female Doctors*, WASH. POST (Nov. 5, 2022), <https://www.washingtonpost.com/world/2022/11/05/afghanistan-women-doctors-taliban-medical/> [https://perma.cc/3Q3Y-6NS9].

79. Li Cohen, *Scotland Begins Providing Free Period Products, Becoming the First Country in the World to Do So*, CBS NEWS (Aug. 15, 2022), <https://www.cbsnews.com/news/scotland-free-period-products-first-country-in-world/> [https://perma.cc/RS4K-F7P7].

80. *Id.*

81. *Id.*

82. Press Release, Equality Now, Traditional Leaders in Liberia Make Historic Announcement Declaring Ban on Female Genital Mutilation (Feb. 9, 2023), <https://www.equalitynow.org/press-releases/traditional-leaders-in-liberia-make-historic-announcement-declaring-ban-on-female-genital-mutilation>

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societies that practice FGM waned amid widespread awareness campaigns and traditional leaders are losing influence among women.⁸³

II. Gender-Based and Sexual Violence, Sexual Harassment, and Assault

Gender-based violence is one of the most pervasive human rights violations, encompassing physical, sexual, mental, or economic harm as a result of one's biological sex or gender identity.⁸⁴ The UN initiative called UNiTE to End Violence Against Women⁸⁵ raises awareness about violence against women and femicide.⁸⁶ 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,⁸⁷ and less than forty percent of women who are victims of violence seek help.⁸⁸

A. SEXUAL HARASSMENT

1. Domestic Sexual Harassment Laws

In March 2022, the United States enacted the Violence Against Women Reauthorization Act of 2022, which expands the special criminal jurisdiction of Tribal courts.⁸⁹ Tribal courts can now prosecute non-Native perpetrators for sexual assault and sex trafficking offenses that occur on tribal land.⁹⁰

www.equalitynow.org/press_release/traditional-leaders-in-liberia-make-historic-announcement-declaring-ban-on-female-genital-mutilation/ [<https://perma.cc/LZ3N-32KY>].

83. *See id.*

84. *See* Meghan Ott, *Series: What Does That Mean? Gender-Based Violence*, WOMEN FOR WOMEN INT'L (June 4, 2021), <https://www.womenforwomen.org/blogs/series-what-does-mean-gender-based-violence> [<https://perma.cc/3T66-7VNV>].

85. *See UNITE to End Violence Against Women Campaign*, U.N. WOMEN, <https://www.unwomen.org/en/what-we-do/ending-violence-against-women/unite> [<https://perma.cc/KZ88-F6JC>] (last visited Apr. 14, 2023).

86. *See* Audrey Mugeni, *An End to Violence Against Women Means Zero Femicides*, WOMEN FOR WOMEN INT'L (Apr. 19, 2022), <https://www.womenforwomen.org/blogs/end-violence-against-women-means-zero-femicides> [<https://perma.cc/PWQ9-F5QT>].

87. 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> [<https://perma.cc/P3UC-YGZJ>].

88. *Id.*

89. *Fact Sheet: Reauthorization of the Violence Against Women Act (VAWA)*, WHITE HOUSE (Mar. 16, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/16/fact-sheet-reauthorization-of-the-violence-against-women-act-vawa/> [<https://perma.cc/54YZ-AYVR>].

90. *Id.*; *see also* Violence Against Women Act Reauthorization Act of 2022, S. 3623, 117th Cong. (2022).

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2. *Regional and International Sexual Harassment Laws*

Convention No. 190 is the world's first international treaty that recognizes the right to have a workplace free of violence and harassment.⁹¹ To date, there are twenty signatories: Albania, Antigua and Barbuda, Argentina, Barbados, Central African Republic, Ecuador, El Salvador, Fiji, Greece, Italy, Mauritius, Mexico, Namibia, Peru, San Marino, Somalia, South Africa, Spain, the United Kingdom, and Uruguay.⁹²

The International Labour Organization (ILO) embarked on a new campaign to build support for Convention No. 190, aiming to raise awareness about violence and harassment at work and encourage governments to ratify and implement Convention No. 190.⁹³ The ILO also developed a campaign toolkit with visual and audio materials.⁹⁴ The desired outcome is for governments and legislatures around the world to ratify and implement Convention No. 190.⁹⁵

B. ELIMINATION OF VIOLENCE AGAINST WOMEN

1. *Domestic Violence as a Criminal Offense*

In January 2022, South Africa amended its Domestic Violence Act of 1998.⁹⁶ The definition of "domestic violence" expanded to include spiritual abuse, elder abuse, and controlling behavior.⁹⁷ The amendment also expands the Act's reach to include cyberstalking and abuse as forms of domestic violence.⁹⁸

For the first time, the Supreme Court of India recognized marital rape as a criminal sexual assault while interpreting the Medical Termination of Pregnancy Act.⁹⁹ In their September decision, the Court held that the "ordinary meaning of the word 'rape' is sexual intercourse with a person, without their consent or against their will, regardless of whether such forced intercourse occurs in the context of matrimony."¹⁰⁰

91. *Eliminating Violence and Harassment in the World of Work*, INT'L LAB. ORG., <https://www.ilo.org/global/topics/violence-harassment/lang--en/index.htm#:~:text=ILO%20Convention%20No.,gender%2Dbased%20violence%20and%20harassment> [https://perma.cc/HRC2-B3UB] (last visited Apr. 14, 2023).

92. *Ratifications of C190 – Violence and Harassment Convention, 2019 (No.190)*, INT'L LAB. ORG., https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:3999810 [https://perma.cc/KB8P-XUGF] (last visited Apr. 14, 2023).

93. *C190 Campaign Toolkit*, INT'L LAB. ORG., <https://brand.ilo.org/d/XdDMx745iKTL/events-and-campaigns#/campaigns/c190-campaign-toolkit> [https://perma.cc/58E5-2FJA?type=Image] (last visited Apr. 14, 2023).

94. *Id.*

95. *Id.*

96. Domestic Violence Amendment Act 14 of 2021 (S. Afr.).

97. *Id.* § 1.

98. *Id.* § 5(B).

99. X v. Principal Sec'y Health and Fam. Welfare Dep't, Unreported Judgments, Civ. App. No 5802, (Sept. 29, 2022), SC, 32-33, 47 (India).

100. *Id.* at 45.

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2. *Online Abuse and Violence*

Australia, Denmark, the Republic of Korea, Sweden, the United Kingdom, and the United States launched the Global Partnership for Action on Gender-Based Online Harassment and Abuse in March 2022, recognizing that “online violence against women is a threat to democracy.”¹⁰¹ The Global Partnership’s goals are to “develop and advance shared principles, increase targeted programming and resources, and expand reliable, comparable data and access” to data on gender-based online harassment and abuse.¹⁰² The countries committed to devoting time and resources to combat gender-based online harassment and to refrain from and oppose the spread of gender misinformation and online harassment.¹⁰³

In the United States, the Violence Against Women Act (VAWA) Reauthorization Act of 2022 established a federal civil cause of action, allowing for the recovery of legal fees and damages for those victimized via non-consensual distribution of their personal, intimate images otherwise known as “revenge porn.”¹⁰⁴

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) became the principal treaty for tackling harassment and other forms of violence against women.¹⁰⁵ 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.¹⁰⁶ Under the Belém do Pará Convention, the follow-up Mechanism to the Belém do Pará Convention (MESECVI)

101. *Global Partnership to End Online Violence Against Women Presents Opportunities for Tech and Government to Step Up*, NAT’L DEMOCRATIC INST. (NDI), <https://www.ndi.org/our-stories/global-partnership-end-online-violence-against-women-presents-opportunities-tech-and> [https://perma.cc/VU5M-CPHY] (last visited Apr. 14, 2023).

102. *2022 Roadmap for the Global Partnership for Action on Gender-Based Online Harassment and Abuse*, U.S. DEP’T OF STATE (Mar. 16, 2022), <https://www.state.gov/2022-roadmap-for-the-global-partnership-for-action-on-gender-based-online-harassment-and-abuse/> [https://perma.cc/7358-F5MB].

103. *See id.*

104. *Fact Sheet: Reauthorization of the Violence Against Women Act (VAWA)*, *supra* note 89.

105. Org. of Am. States, *Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women*, 33 I.L.M. 1534 (June 4, 1994); *see also* ORG. OF AM. STATES & COUNCIL OF EUR., REGIONAL TOOLS TO FIGHT VIOLENCE AGAINST WOMEN: THE BELÉM DO PARÁ AND ISTANBUL CONVENTIONS (2014), <https://www.oas.org/en/mesecvi/docs/MESECVI-CoE-CSWPub-EN.pdf> [https://perma.cc/U77K-66ZS] [hereinafter REGIONAL TOOLS].

106. *See Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women: Status of Signatures and Ratifications*, Org. of Am. States (2011), <https://www.oas.org/en/mesecvi/docs/Signatories-Table-EN.pdf> [https://perma.cc/ZLY7-9BRH].

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monitors the implementation of the treaty by its parties.¹⁰⁷ During 2022, MESCEVI issued several *communiqués* expressing its concern about (1) the illegitimate use of parental alienation syndrome against women, (2) the new education bill in Peru, (3) disappearances taking place in Nuevo Leon, Mexico, and (4) the femicides of two adolescents from the Wichi Community in Argentina.¹⁰⁸

In Europe, the 2011 Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) became the principal instrument for addressing violence against women.¹⁰⁹ As of November 2022, the European Union and all member states of the Council of Europe (except for Azerbaijan and Turkey, which withdrew in 2021) had signed the Istanbul Convention and thirty-seven had ratified it.¹¹⁰ In January 2022, the Republic of Moldova ratified the Istanbul Convention,¹¹¹ followed by the United Kingdom and Ukraine in July 2022.¹¹² But the United Kingdom reserved the right not to be bound by Article 59 of the convention, which compels states to protect migrant women whose residency depends on an abusive spouse.¹¹³ 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.¹¹⁴

107. *What is MESECVI?*, ORG. OF AM. STATES, <https://www.oas.org/en/mesecvi/about.asp> [<https://perma.cc/D6BG-TEHW>] (last visited Apr 14, 2023).

108. *MESECVI: News*, ORG. OF AM. STATES, <https://www.oas.org/en/mesecvi/news.asp#2022> [<https://perma.cc/E5YY-63S5>] (last visited Apr. 14, 2023).

109. *See* Convention on Preventing and Combating Violence against Women and Domestic Violence, Council of Eur., May 11, 2011, C.E.T.S. No. 210, <https://rm.coe.int/168008482e> [<https://perma.cc/6279-6V55>] (last visited Apr. 14, 2023) [hereinafter *Istanbul Convention*]; *see also* REGIONAL TOOLS, *supra* note 105 at 34–35.

110. *Key Facts About the Istanbul Convention*, COUNCIL OF EUR., <https://www.coe.int/en/web/istanbul-convention/key-facts> [<https://perma.cc/FJ2F-6SMJ>] (last visited Apr. 14, 2023); *see also* *Chart of Signatures and Ratifications of Treaty 210*, COUNCIL OF EUR., <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=210> [<https://perma.cc/FCD2-86SW>] (last visited Apr. 14, 2023).

111. *Chart of Signatures and Ratifications of Treaty 210*, *supra* note 110.

112. *Id.*

113. *Reservations and Declarations on Treaty 210*, COUNCIL OF EUR., <https://www.coe.int/en/web/conventions/full-list?module=declarations-by-treaty&numSte=210&codeNature=2&codePays=UK> [<https://perma.cc/NTG3-MHVW>] (last visited Apr. 14, 2023); Istanbul Convention, *supra* note 109, art. 59.

114. *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> [<https://perma.cc/K4VV-3TKS>] (last visited Apr. 14, 2023).

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III. Human Trafficking

Human trafficking is considered the world's fastest-growing and most profitable criminal enterprise.¹¹⁵ The ILO and nonprofit group Walk Free released a report estimating that as of 2021, the number of people working under forced labor conditions had grown to 27.6 million.¹¹⁶

Amidst the global COVID-19 pandemic, the United Nations reported that human traffickers adjusted their business models to the “new normal” created by the virus, especially through “modern communications technologies.”¹¹⁷ The UN noted that the pandemic has “exacerbated and brought to the forefront the systemic and deeply entrenched economic and societal inequalities that are among the root causes of human trafficking.”¹¹⁸ The UN estimates that each day “nearly twenty-eight million adults and children around the world are trapped in jobs that are so oppressive that they amount to modern slavery or human trafficking.”¹¹⁹

A. INTERNATIONAL EFFORTS TO COMBAT HUMAN TRAFFICKING

In February 2022, Russia's intensified war in Ukraine created a new host of challenges, including the largest refugee crisis in Europe since World War II.¹²⁰ As millions of refugees fled Ukraine, aid agencies raised the alarm about the risks of sexual exploitation, abuse, and human trafficking.¹²¹ The La Strada International/Freedom Fund report, *Preventing Human Trafficking of Refugees from Ukraine*¹²² documented evidence of human trafficking activity in Ukraine.¹²³ Risks will likely continue to increase as the war enters 2023 and more people are internally displaced, with access to services and livelihoods becoming more precarious and millions of refugees facing the need for longer periods of refuge and support.¹²⁴

The International Survivors of Trafficking Advisory Council (ISTAC) was established in 2021 to combat human trafficking at the Organization for

115. See Michael Hudson, *About the Trafficking Inc. Investigation*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Mar. 28, 2023), <https://www.icij.org/investigations/trafficking-inc/about-trafficking-inc> [<https://perma.cc/XM5L-Q2AG>].

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. OECD, INTERGOVERNMENTAL FISCAL OUTLOOK AND THE IMPLICATIONS OF RUSSIA'S WAR AGAINST UKRAINE, HIGH ENERGY PRICES AND INFLATION 1–2 (OECD No. 42, 2023).

121. Kristy Siegfried, *Ukraine Crisis Creates New Trafficking Risks*, UNHCR, (Mar. 28, 2023), www.unhcr.org/en-us/news/stories/2022/4/62569be24/ukraine-crisis-creates-new-trafficking-risks.html [<https://perma.cc/RM9C-X4HA>].

122. See Suzanne Hoff & Eefje de Volder, *Preventing Human Trafficking of Refugees from Ukraine: A Rapid Assessment of Risks and Gaps in the Anti-Trafficking Response*, LA STRADA INT'L & THE FREEDOM FUND (2022), https://freedomfund.org/wp-content/uploads/UkraineAntiTraffickingReport_2022_05_10.pdf [<https://perma.cc/9XML-MFXM>] (last visited Apr. 14, 2023).

123. *Id.*

124. *Id.*

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Security and Co-operation in Europe (OSCE).¹²⁵ The ISTAC currently consists of twenty-one survivor leaders from across OSCE's fifty-seven member states.¹²⁶ In July 2022, the OSCE issued the *Survey Report 2021 of Efforts to Implement OSCE Commitments and Recommend Actions to Combat Trafficking in Human Beings* to track progress made toward the implementation of anti-trafficking commitments, finding that there are already some promising examples of governments that increasingly target goods produced by trafficked labor in their own and private sector supply chains.¹²⁷

**B. REGIONAL AND TRANSREGIONAL EFFORTS TO COMBAT
TRAFFICKING**

1. North America

a. Trafficking in Persons Report

In July 2022, the U.S. Department of State released the *2022 Trafficking in Persons Report*,¹²⁸ which reviews governmental responses to combatting human trafficking and forced labor worldwide.¹²⁹ It revealed significant increases in funding and identified that support by politicians and those in power is needed for meaningful global progress on ending forced labor and sex trafficking.¹³⁰

b. Trafficking in Persons Report Findings

The State Department places countries into one of four tiers.¹³¹ The first tier is the highest ranking and indicates that a government has made the appropriate efforts to meet the standards of The Trafficking Victims Protection Act of 2000 (TVPA).¹³² These standards include steps to effectively prevent trafficking, prosecute traffickers, and protect survivors.¹³³

125. U.S. DEP'T OF STATE, *TRAFFICKING IN PERSONS REPORT JULY 2022* 1, 11 (2022) [hereinafter *TRAFFICKING IN PERSONS REPORT 2022*], <https://www.state.gov/wp-content/uploads/2022/10/20221020-2022-TIP-Report.pdf> [<https://perma.cc/UE4S-39CC>] (last visited Apr. 14, 2023).

126. *Id.*

127. *Survey Report 2021 of Efforts to Implement OSCE Commitments and Recommend Actions to Combat Trafficking in Human Beings*, ORG. FOR SEC. AND CO-OPERATION IN EUR. (OSCE) 1, 16 (2021), https://www.osce.org/files/f/documents/6/1/522934_1.pdf [<https://perma.cc/6GD5-VZKG>] (last visited Apr. 14, 2023).

128. See *TRAFFICKING IN PERSONS REPORT 2022*, *supra* note 125.

129. Terry FitzPatrick, *2022 TIP Report Underscores that Extensive Work is Needed to Improve Global Efforts to Protect People from Human Traffickers*, ATEST (July 19, 2022), <https://endslaveryandtrafficking.org/2022-tip-report-underscores-that-extensive-work-is-needed-to-improve-global-efforts-to-protect-people-from-human-trafficker> [<https://perma.cc/T9VV-CVP8>].

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

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In 2022, thirty countries received Tier I rankings.¹³⁴ Tier 2 countries are those that do not meet the TVPA standards but are making “significant efforts” to comply with the standards.¹³⁵ Ninety-nine countries received Tier 2 rankings.¹³⁶ A sub-tier is the Tier 2 Watch List, whereby the country is making significant efforts to comply with the standards but there are either 1) problems the country is not addressing related to human trafficking, or a significant increase in human trafficking victims, or 2) the country fails to provide evidence of increasing its efforts to combat human trafficking.¹³⁷ Thirty-five countries received Tier 2 Watch List ratings.¹³⁸ The lowest tier is Tier 3, which are countries that do not meet the TVPA standard and are not making significant efforts to comply.¹³⁹ Twenty-two countries received a Tier 3 ranking.¹⁴⁰

The report notes that several factors affecting human trafficking require special attention, including international conflicts; the lasting COVID-19 impact and disruption of people’s livelihoods and ability to travel; economic and food uncertainty; and extreme weather conditions, climate variability, and the rise of temperatures.¹⁴¹

The report indicates the continuing trend of impunity and lack of prosecutions for human trafficking crimes,¹⁴² as only 10,572 human traffickers are prosecuted globally.¹⁴³ Cases that do proceed to court are disproportionately focused on sex trafficking, leaving forced labor victims unprotected and labor traffickers unaccountable.¹⁴⁴ Only 1,379 (thirteen percent) of these 10,572 prosecutions were forced labor cases.¹⁴⁵ The U.S. numbers reflect only 228 federal human trafficking prosecutions and seven forced labor prosecutions.¹⁴⁶

2. *Europe*

In May 2022, the UN Office on Drugs and Crime (UNODC) launched *Exploitation and Abuse: The Scale and Scope of Human Trafficking in South Eastern Europe*,¹⁴⁷ which examines issues including Asian migrants

134. *Id.*

135. See *TRAFFICKING IN PERSONS REPORT 2022*, *supra* note 125, at 55.

136. FitzPatrick, *supra* note 129.

137. See *TRAFFICKING IN PERSONS REPORT 2022*, *supra* note 125, at 55.

138. FitzPatrick, *supra* note 129.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. FitzPatrick, *supra* note 129.

145. See *id.*

146. See *id.*

147. U.N. OFFICE ON DRUGS & CRIME, *EXPLOITATION AND ABUSE: THE SCALE AND SCOPE OF HUMAN TRAFFICKING IN SOUTH EASTERN EUROPE* 1, 3 (2022), https://www.unodc.org/documents/human-trafficking/Exploitation_and_Abuse.pdf [https://perma.cc/K6G4-VGJU] (last visited Apr. 14, 2023).

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being forced to work in construction, agriculture, and hospitality sectors by human traffickers; sexual exploitation of children; and crimes committed by trafficked children.¹⁴⁸ The most prevalent type of human trafficking is the sexual exploitation of women who are trafficked to countries in western and southern Europe.¹⁴⁹ In the summer seasons, many women and girls who migrate for work to warmer climates are forced to provide sexual services.¹⁵⁰

IV. Women, Peace, & Security

In 2022, global security—and the role of women in shaping global security—decreased.¹⁵¹ Military spending is at an all-time high and gender equality has suffered in the wake of COVID-19, climate change, and increasing conflict.¹⁵²

Since 2000, the United Nations Security Council has adopted a total of ten resolutions on women, peace, and security (WPS).¹⁵³ These measures serve as the international policy framework for WPS by articulating the obligations of international and national stakeholders and are binding in enforcing global peace and stability.¹⁵⁴ The resolutions are important in facilitating the council's ability to address the impacts and prevalence of war, violent conflict, terrorism, and violent extremism, which all continue to ravage the lives of women and girls.¹⁵⁵

As of August 2022, 103 countries and territories have adopted dedicated National Action Plans (NAPs) on women, peace and security.¹⁵⁶ Additionally, in July 2022, the U.S. government launched its second Women Peace and Security Congressional Report 2022, articulating authority for four key U.S. agencies: the State Department, U.S. Agency for International Development (USAID), Department of Homeland Security, and the Department of Defense.¹⁵⁷

The UN Security Council convened in October 2022 at its yearly event—the Open Debate on Women, Peace and Security — which is a forum to

148. *Id.* at 10–11, 22.

149. *Id.* at 3.

150. *Id.* at 53.

151. UN Women, *In Focus: Women, Peace, and Security*, U.N. (Oct. 18, 2022), <https://www.unwomen.org/en/news-stories/in-focus/2022/10/in-focus-women-peace-and-security> [<https://perma.cc/XN42-55ZV>].

152. *Id.*

153. UN Women, *Global Norms and Standards: Peace and Security*, U.N., <https://www.unwomen.org/en/what-we-do/peace-and-security/global-norms-and-standards> [<https://perma.cc/CAK4-CS3Y>] (last visited Apr. 14, 2023).

154. *Id.*

155. *Id.*

156. U.N. Secretary-General, *Women and Peace and Security*, ¶ 70, U.N. Doc. S/2022/740 (Oct. 5, 2022).

157. *FACT SHEET: U.S. Government Women Peace and Security Report to Congress*, WHITE HOUSE (July 18, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/07/18/fact-sheet-us-government-women-peace-and-security-report-to-congress/> [<https://perma.cc/VM99-SXSN>].

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review the women, peace, and security agenda.¹⁵⁸ The focus of 2022’s debate was strengthening women’s resilience and leadership as a path to peace in regions plagued by armed groups¹⁵⁹ and to allow participants to share specific examples of how they are supporting women’s resilience in conflict-affected countries and their capacity to contribute to peace and security.”¹⁶⁰ The UN Secretary General, civil society representatives, and the Executive Director of UN Women gave briefings.¹⁶¹

The trafficking of women and girls due to the Russia-Ukraine war, the arrests of women by the morality police in Iran, the shaming of women under the three-child policy in China, and the weaponization of rape in the ongoing war in Burkina Faso are examples of bodily, community, and policy injuries¹⁶² that women and girls face. These injuries underscore the importance of gendered women, peace, and security global and domestic agendas — with women and girls at the forefront of implementation.¹⁶³

V. International Criminal Courts & Tribunals and Women’s Rights Cases

A. INTERNATIONAL CRIMINAL

The Office of the Prosecutor (OFP) of the International Criminal Court is undertaking new initiatives to highlight ongoing vulnerabilities of women in war.¹⁶⁴ Working with Eurojust, the OFP published a set of guidelines in March 2022 that civil society can use to properly document and preserve evidence of international war crimes.¹⁶⁵ Prosecutor Karim Khan emphasizes the importance of these guidelines in “situations involving crimes against children or victims of sexual abuse.”¹⁶⁶ Khan opened an investigation into the “situation in Ukraine” in February upon receipt of thirty-nine referrals from member states.¹⁶⁷

158. *Women and Peace and Security*, *supra* note 157, at ¶ 102.

159. *Id.* at III(C).

160. *Letter dated 4 October 2022 from the Permanent Representative of Gabon to the United Nations Addressed to the Secretary-General*, (Oct. 4, 2022), <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/S-2022-743.pdf> [<https://perma.cc/YSC9-6YDP>].

161. *Id.* ¶ 12.

162. VALERIA M. HUDSON, ET AL., *SEX AND WORLD PEACE* Ch. 2, 3 (Colum. Univ. Press 2012).

163. *See generally id.*

164. *ICC Prosecutor and Eurojust Launch Practical Guidelines for Documenting and Preserving Information on International Crimes*, ICC (Sept. 21, 2022), <https://www.icc-cpi.int/news-icc-prosecutor-and-eurojust-launch-practical-guidelines-documenting-and-preserving-information> [<https://perma.cc/36J6-MQ98>].

165. *Id.*

166. *Id.*

167. *Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from Thirty-Nine States Parties and Opening of an Investigation*, INT’L CRIM. CT. (Mar. 2,

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Further, in November 2022, the OFP published its draft policy on the prosecution of the crime of gender persecution.¹⁶⁸ Gender persecution is a crime against humanity under Article 7 of the Rome statute.¹⁶⁹ The OFP successfully charged the crime of gender persecution for the first time against Al Hassan in 2019.¹⁷⁰ The case is ongoing.¹⁷¹

B. INTER-AMERICAN COURT OF HUMAN RIGHTS

In April 2022, the Inter-American Commission on Human Rights (IACHR) filed a case for custody of a thirteen-year-old rape victim's son who was removed by the state for adoption.¹⁷² The case "*Maria*" and her son "*Mariano*" v. *Argentina* is pending.¹⁷³

C. EUROPEAN COURT OF HUMAN RIGHTS

In February 2022, the European Court of Human Rights determined that the State's failure to properly investigate and protect C from domestic violence and death by D, her partner and a police officer, was a violation of Article 2 (right to life) of the Convention for the Protection of Human Rights and Fundamental Freedoms in both its procedural and substantive prongs, and Article 14, which prohibits discrimination.¹⁷⁴ The Court noted the case as a warning of relaxed law enforcement practices in the domestic violence arena.¹⁷⁵

In August of 2022, the ECHR examined the issue of sexual harassment in the workplace under Article 8 (the right to private life) for the first time.¹⁷⁶ The case turned on the failure of the state to properly execute its positive obligations to fully and fairly investigate the allegations.

2022), <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states> [https://perma.cc/BQE4-7BZJ].

168. Office of the Prosecutor, *Policy on the Crime of Gender Persecution*, INT'L CRIM. CT. (Dec. 7, 2022), <https://www.icc-cpi.int/sites/default/files/2022-12/2022-12-07-Policy-on-the-Crime-of-Gender-Persecution.pdf> [https://perma.cc/3UHW-B2UC].

169. *Id.* ¶ 22, at 10.

170. Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, ICC-01/12-01/18, Decision on the Conduct of Proceedings, ¶¶ 173, 178, 179, 189. (May, 6, 2020), <https://www.icc-cpi.int/court-record/icc-01/12-01/18-789> [https://perma.cc/Q6DG-L58U].

171. See *Case Information Sheet: The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, INT'L CRIM. CT. (Mar. 2023), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020_01806.PDF [https://perma.cc/54PX-ZQUQ].

172. "María" and Her Son "Mariano" v. Argentina, Case 14.059, Inter-Am. Comm'n H.R. Report No. 393/21, OEA/Ser.L/V/II.20, doc. 404 ¶ 160 (2021).

173. *Cases in the Court*, IACHR, <https://www.oas.org/en/iachr/decisions/pc/cases.asp?Year=2022&Country=ARG> [https://perma.cc/4GKX-CDP3] (last visited Apr. 14, 2023).

174. A and B v. Georgia, App. 73975/16, ¶ 49 (May 10, 2022), <https://hudoc.echr.coe.int/fre?i=001-215716> [https://perma.cc/BAR3-67GX].

175. *Id.*

176. C. v. Romania, App. No. 47358/20, Eur. Comm'n H.R. HUDOC (Aug. 30, 2022), <https://hudoc.echr.coe.int/fre?i=001-218933> [https://perma.cc/58Y6-5MSZ].

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In September of 2022, the ECHR rendered judgment in a case involving repeated victimization of a rape victim by her abuser.¹⁷⁷ The case addresses a situation in which the victim is being threatened indirectly while her abuser, her father, is out on prison leave.

D. HIGH COURT OF KENYA

The High Court of Kenya issued a milestone ruling in March 2022 affirming that “abortion care is a fundamental right under the Constitution of Kenya”¹⁷⁸ and that it is illegal to prosecute and arbitrarily arrest patients for seeking care or health care providers for offering and providing abortion services.¹⁷⁹ In its ruling, the court also directed the Kenyan parliament to create a public policy framework and implement abortion laws that align with the Constitution.¹⁸⁰ The court further emphasized that protection of access to abortion care “impacts vital Constitutional values, including dignity, autonomy, equality, and bodily integrity,”¹⁸¹ and criminalizing abortion without any constitutional statutory framework adversely impacts women’s reproductive rights.¹⁸²

In July 2022, the Initiative for Strategic Litigation in Africa (ISLA) submitted an amicus brief to the African Court of Human and Peoples’ Rights (ACtHPR) in the *Tike Mwambipile & Equality Now v. The United Republic of Tanzania* case.¹⁸³ The litigation challenges the Tanzanian government’s denial of education to married and pregnant girls and adolescent mothers.¹⁸⁴ The brief was filed in order to “assist the court in determining the state’s obligation in guaranteeing equality for school-going

177. *J.I. v. Croatia*, App. No. 35898/16, Eur. Comm’n H.R. HUDOC (Jan. 30, 2023), <https://hudoc.echr.coe.int/eng?i=001-219067> [<https://perma.cc/6498-KMLA>].

178. *Kenyan High Court Affirms the Right to Abortion Under the Constitution and Directs Parliament to Enact Reforms*, CTR. REPRODUCTIVE RTS. (Mar. 25, 2022), <https://reproductiverights.org/malindi-kenya-court-affirms-abortion-right-pak/> [<https://perma.cc/H547-R7GB>].

179. *Id.*

180. *Id.*

181. *Kenyan High Court Makes Landmark Ruling on Safe Abortion Care*, INT’L PLANNED PARENTHOOD FED’N (Mar. 26, 2022), <https://www.ippf.org/media-center/kenyan-high-court-makes-landmark-ruling-safe-abortion-care> [<https://perma.cc/96YV-Y46R>].

182. *Id.*

183. Brief for The Initiative for Strategic Litigation in Africa, Human Rights Watch, and Women’s Link Worldwide at 1, *Mwambipile & Equality Now v. Tanz.*, No. 042/2020, Case Summary, African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.], (Nov. 19, 2020), https://www.hrw.org/sites/default/files/media_2022/06/Amicus%20brief%20ISLA%20HRW%20WLW%20submitted%20170722_0.pdf [<https://perma.cc/BW9A-UWMD>].

184. *Id.* ¶ 6.

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girls and women in accessing the right to education.”¹⁸⁵ The court dismissed the case due to a procedural issue, admissibility.¹⁸⁶

185. *Id.* ¶ 8.

186. *Mwambipile & Equality Now v. Tanz.*, No. 042/2020, Decision, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], at 1 (Dec. 1, 2022), <https://www.african-court.org/cpmt/storage/app/uploads/public/638/8cf/981/6388cf9812d0c043104364.pdf> [<https://perma.cc/WZW8-PDYW>].

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Africa

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I. North Africa

A. ALGERIA

1. Human Rights Campaign

In May, Amnesty International promoted a campaign led by Algerian and other organizations against increasing government repression of human rights in the country.¹ The groups claimed that since authorities shut down ‘Hirak’ pro-democracy protests, unfounded terrorism prosecutions had soared, legal actions were launched against civil society organizations and opposition political parties, and governmental authorities continued to obstruct independent unions.² The campaign calls on Algerian authorities

* Committee Co-editors (Holmes, Bodley); Algeria (Ed., Tossa); Angola (Silva; Frazão, Martins); Benin (Ed.); Botswana (Ed.); Burkina Faso (Ed.); Burundi (Ed.); Cameroon (Ed.); Cape Verde (Silva, Frazão, Martins, Ed.); CAR (Ed.); Chad (Ed.); Comoros (Ed.); DRC (Cocchi); Congo (Ed.); Côte d’Ivoire (Ed.); Djibouti (Ed.); Equatorial Guinea (Silva, Frazão, Martins); Eritrea (Ed.); Ethiopia (Jones-Nelson); Gabon (Silva, Frazão, Martins, Ed.); Gambia (Bah); Ghana (Ed.); Guinea (Ed.); Guinea-Bissau (Ed.); Kenya (Mumbo); Lesotho (Matakala); Liberia (Ed.); Madagascar (Ed.); Malawi (Umali; Mulwafu); Mali (Ed.); Mauritania (Ed.); Mauritius (Matakala); Mozambique (Silva; Frazão, Martins, Ed.); Namibia (Gaskins); Niger (Tossa); Nigeria (Arop); Rwanda (Gallerizzo); São Tomé and Príncipe (Silva; Frazão, Martins, Ed.); Senegal (Ed.); Seychelles (Ed.); Sierra Leone (Ed.); Somalia (Ed.); South Africa (Ed.); South Sudan (Ed.); Sudan (Ed.); Swaziland (Eswatini) (Ed.); Tanzania (Mumbo); Togo (Nutakor); Uganda (Cocchi); Western Sahara (Ed.); Zambia (Ed.); Zimbabwe (Ed.); AfCHPR (Ed.); AfComm. (Gaskins; Bah); AU (Gaskins; Jones-Nelson); ECOWAS (Jones-Nelson, Ed.); EAC (Ed.); AfDB (Bah); Afreximbank (Ed.); ECA (Ed.); SADC (Ed.); COMESA (Umali); IGAD (Matakala; Gallerizzo); ECCAS (Ed.); UMA (Ed.); OHADA (Cocchi); AFCFTA (Umali, Cocchi); biographies: <http://www.abanet.org/dch/committee.cfm?com=IC805000>.

1. *Algeria: Campaign Against Increasing Government Repression of Human Rights*, AMNESTY INT’L (May 19, 2022), <https://www.amnesty.org/en/latest/news/2022/05/algeria-campaign-against-increasing-government-repression-of-human-rights/> [<https://perma.cc/M547-P6XX>].

2. *Id.*

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to release those detained for peaceful exercise of their human rights and asks for fair trials with effective remedies for victims.³

2. *Foreign Investment Law*

In July, the Algerian government published law no. 22-18 to boost the economy and attract foreign investment.⁴ The new law, *inter alia*, permits foreign entities to own shares in their Algerian subsidiaries in certain sectors.⁵

B. WESTERN SAHARA

1. *Morocco, Spain Near Western Sahara Resolution*

In March, Spain recognized the importance of the Sahara issue for Morocco in a letter to Moroccan King Mohammed VI, holding that an autonomous region under Rabat control is the “most serious, realistic and credible” solution, having previously viewed Morocco’s hold as an occupation.⁶ Morocco, which controls nearly eighty percent of the territory, has battled the Sahrawi Polisario Front since Spain left the territory in 1975.⁷ The Algeria-backed independence movement has long called for a referendum on becoming sovereign. In October, the UN Security Council repeated its call for the parties to “resume negotiations,” again renewing the UN mission for another year.⁸

II. West Africa

A. BENIN

1. *World Bank Provides \$200 Million for Flooding*

In September, the World Bank approved \$200 million in International Development Association (IDA) financing to support Benin with climate-

3. *Id.*

4. Sarra Boussen, *Algérie: Nouvelle loi sur L’investissement, Qu’en est-il pour Les Investisseurs Étrangers?*, MANAGER (Aug. 2, 2022), <https://managers.tn/2022/08/02/algérie-nouvelle-loi-sur-linvestissement-quen-est-il-pour-les-investisseurs-etranagers/> [<https://perma.cc/C56H-4KQD>].

5. INVESTMENT LAW No. 22-18 (2022) (Alg.).

6. *Western Sahara: Spain and Morocco Near End to Diplomatic Row Over Disputed Territory*, EURONEWS (Mar. 18, 2022), <https://www.euronews.com/2022/03/18/western-sahara-spain-and-morocco-near-end-to-diplomatic-row-over-disputed-territory> [<https://perma.cc/S3DV-HNQM>].

7. See Carlos Santamaria, *Morocco Makes a Play for Western Sahara*, GZERO (June 2, 2021), <https://www.gzeromedia.com/morocco-makes-a-play-for-western-sahara#toggle-gdpr> [<https://perma.cc/92QQ-DUNN>].

8. *Western Sahara: Security Council Urges Resumption of Talks*, AFR. NEWS (Oct. 27, 2022), <https://www.africanews.com/2022/10/27/western-sahara-security-council-urges-resumption-of-talks/> [<https://perma.cc/N43L-GVGF>].

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resilient infrastructure and urban services to reduce flooding risks.⁹ The program will improve drainage infrastructure and develop contingency plans for natural disasters.¹⁰ Experts predict that climate-induced floods in Nigeria, Chad, Benin, Cameroon, and elsewhere, will displace half of Africa's 1.4 billion population by 2030.¹¹

B. BURKINA FASO

1. Second Coup This Year

On September 30, newly-installed military leader President Paul-Henri Damiba was deposed in the country's second coup this year as army Captain Ibrahim Traore took charge, dissolving the transitional government and suspending the country's constitution.¹² The new leader said a group of officers had decided to remove Damiba for his inability to deal with a worsening uprising in the country.¹³ Damiba, who had led the army to depose six-year President Roch Kabore in January, following unrest in the capital city of Ouagadougou and citing the Kabore administration's failure to control the deteriorating security situation, resigned his post and fled to Togo.¹⁴

C. CAPE VERDE

1. Investment and Labor Treaties

In July, Cape Verde and Angola signed a bilateral investment treaty to strengthen economic relations between them by creating favorable conditions for private investment between the countries.¹⁵ Cape Verde and Portugal agreed upon an MOU in October to protect Cape Verdean workers

9. Press Release, The World Bank, *Benin: Reducing Flood Risks in Secondary Cities through Infrastructure Resilience and Capacity Building*, (Sept. 29, 2022), <https://www.worldbank.org/en/news/press-release/2022/09/29/benin-reducing-flood-risks-in-secondary-cities-through-infrastructure-resilience-and-capacity-building> [https://perma.cc/6XY5-F4U6].

10. *Id.*

11. Sunday Ehigiator, *Flood to Displace 700m in Nigeria, Benin, Chad by 2030, Experts Reveal*, THIS DAY, <https://www.thisdaylive.com/index.php/2022/11/06/flood-to-displace-700m-in-nigeria-benin-chad-by-2030-experts-reveal/> (last visited Mar. 22, 2023) [https://perma.cc/UT5C-CM7A].

12. *Burkina Faso's Coup and Political Situation: All You Need to Know*, AL JAZEERA (Oct. 5, 2022), <https://www.aljazeera.com/news/2022/10/5/coup-in-burkina-faso-what-you-need-to-know> [https://perma.cc/QBR9-Q9RR].

13. *Id.*

14. *Id.*

15. Miranda Alliance, *Bilateral Investment Treaty Between Angola and Cape Verde*, LEGAL NEWS: ANGOLA (July 23, 2022), <https://mirandalawfirm.com/en/insights-knowledge/publications/legal-news/angola-legal-news-june-through-august-2022-2> [https://perma.cc/448W-66PH].

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in Portugal.¹⁶ Unions welcomed the move in reducing illegal immigration, unemployment, and poverty.

D. CÔTE D'IVOIRE

1. *Measures Fighting Inflation*

In October, Côte d'Ivoire increased its 2023 budget by 18.1 percent to XOF 11,494 billion (\$16.9 billion).¹⁷ With a projected increase in spending along with a tightened budget deficit, the country aims to boost economic resilience and purchasing power amid rising inflation that has affected the region.¹⁸

E. GAMBIA

1. *Former Intelligence Director Death Sentence*

In July, the High Court sentenced former director general of the National Intelligence Agency, Yankuba Badjie, and four others to death for killing United Democratic Party opposition leader Ebrima Solo Sandeng during Yahya Jammeh's regime.¹⁹ While usually commuted to life imprisonment, Gambian law nonetheless retains the death penalty.²⁰ Since his fall from power in January 2017, a state inquiry under Jammeh's successor Adama Barrow found the former ruler responsible for the killings; at least five members of Jammeh's hit-squad, the Junglers, have confessed to executions with an undisclosed state deal for their freedom; and a former minister is serving life for killing finance minister Ousman Koro Ceesay.²¹

F. GHANA

1. *IMF Talks Following Protests*

In July, Ghana announced it would begin talks with the International Monetary Fund (IMF) following protests against the country's deteriorating

16. *Cape Verde and Portugal to Sign Workers Agreement*, THE PORTUGAL NEWS (Oct. 18, 2022), <https://www.theportugalnews.com/news/2022-10-18/cape-verde-and-portugal-to-sign-workers-agreement/71294> [<https://perma.cc/6XXF-MZZ9>].

17. *Côte d'Ivoire Announces 2023 Budget, Up 18.1% Compared to the 2022 Initial Bill*, ECONFIN AGENCY (Oct. 13, 2022), <https://www.ecofinagency.com/public-management/1310-43949-cote-divoire-announces-2023-budget-up-18-1-compared-to-the-2022-initial-bill> [<https://perma.cc/4SLJ-Z4GH>].

18. *Id.*

19. Mustapha K. Darboe, *Gambia: Death Penalty for former Leaders of the National Intelligence Agency*, JUSTICEINFO.NET (July 18, 2022), <https://www.justiceinfo.net/en/103778-gambia-death-penalty-former-leaders-national-intelligence-agency.html> [<https://perma.cc/62JK-P7GV>].

20. *Id.*

21. *Id.*

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economy despite earlier pledges not to seek IMF assistance.²² Blaming its woes on recent events including Covid-19, the Ukraine crisis, and U.S. and Chinese economic slumps, inflation hit an eighteen-year high of 27.6 percent in May 2022 after growth slowed to 3.3 percent and the value of the cedi declined 23.5 percent against the dollar.²³ Authorities hope an IMF program will relieve Ghana's nearly \$1 billion balance-of-payments deficit.²⁴

G. GUINEA

1. *Ex-President Prosecuted for Corruption*

In November, Guinea's ruling junta ordered the prosecution for alleged corruption of overthrown ex-President Alpha Condé and others from a list of 188 senior executives or ex-ministers.²⁵ Implicated in May for assassinations, kidnappings, and rape in repressing political demonstrations, Condé has had previous actions brought against him.²⁶ Colonel Doumbouya was sworn in as president in September 2021, pledging to hand over power to elected civilians within two years.²⁷

H. GUINEA-BISSAU

1. *President Survives Attempted Coup*

In February, President Umaro Sissoco Embaló, winner of a contested December 2019 run-off vote, reportedly survived an attempted coup.²⁸ Regional bloc ECOWAS sent troops to stabilize the country after the five-hour attack in which eleven people died.²⁹ Guinea-Bissau has seen four military coups and sixteen attempted military takeovers since independence from Portugal in 1974.³⁰

22. Cooper Inveen & Rachel Savage, *Explainer: Why Ghana has Returned to the IMF*, REUTERS (July 8, 2022), <https://www.reuters.com/world/africa/why-ghana-has-returned-imf-2022-07-07/> [https://perma.cc/C9ED-K77D].

23. *Id.*

24. *Id.*

25. *Guinea: Junta Orders the Prosecution of ex-President Condé and ex-Ministers*, TELLER REPORT (Mar. 11, 2022), <https://www.tellerreport.com/news/2022-11-03-guinea%E2%80%94the-junta-orders-the-prosecution-of-ex-president-cond%C3%A9-and-ex-ministers.r1kXGTZBi.html> [https://perma.cc/3JHP-WDRY].

26. *Id.*

27. *Id.*

28. *Guinea-Bissau's 'Attempted Coup': What You Need to Know*, AL JAZEERA (Feb. 2, 2022), <https://www.aljazeera.com/news/2022/2/2/explainer-guinea-bissau-attempted-coup> [https://perma.cc/SH79-BE7F].

29. *Id.*

30. *Ecows Troops to Go to Guinea-Bissau after Coup Bid*, BBC (Feb. 4, 2022), <https://www.bbc.co.uk/news/topics/cvenzmgd5t/guinea-bissau> [https://perma.cc/XJG2-D783].

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I. LIBERIA

1. *Third Female Chief Justice Appointed*

In September, the Liberian senate confirmed Justice Sie-A-Nyene Gyapay Yuoh as the new chief justice, the third female chief justice in the country's 175 years.³¹ Justice Yuoh replaced retiring Chief Justice Francis Saye Korkpor.³²

2. *French Court Sentences Rebel Commander*

In November, a Paris court sentenced former Liberian rebel commander Kunti Kamara to life imprisonment for complicity in crimes against humanity during Liberia's 1990s civil war.³³ Kamara was arrested in France in 2018 under a French law that permitted prosecution for serious crimes, even if committed abroad.³⁴ Kamara was a senior officer in the Ulimo armed militia which oversaw a reign of terror in north-west Liberia over a ten-year period.³⁵ Witnesses testified, *inter alia*, that he had publicly murdered a school teacher and eaten her heart, and allowed soldiers under his command to repeatedly rape two teenage girls.³⁶ Liberia's courts have yet to try any accused national for war crimes, despite a truth commission calling for the establishment of a special tribunal.³⁷

J. MAURITANIA

1. *Former President Faces Corruption Charges*

Former Mauritanian President Mohamed Ould Abdel Aziz was referred to court in June on corruption charges, along with eleven others from his former regime.³⁸ The ex-President was first charged with "corruption, money laundering, illicit enrichment and abuse of influence."³⁹ Abdel Aziz came to power in a coup in 2008, stepping down in 2019 after two presidential terms and succeeded by former General Mohamed Ould Ghazouani.⁴⁰

31. *Liberia Gets Third Female Chief Justice*, BBC (Sept. 12, 2022), <https://www.bbc.co.uk/news/topics/c77jz3md70rt/liberia> [<https://perma.cc/T96E-53R3>].

32. *Id.*

33. Kim Willsher, *French Court Convicts Former Liberian Rebel Commander over Atrocities*, THE GUARDIAN, <https://www.theguardian.com/world/2022/nov/02/french-court-convicts-former-liberian-rebel-commander-over-atrocities> [<https://perma.cc/DQA4-DG9E>] (last visited Mar. 22, 2023).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Ex-Mauritanian President Faces Corruption Charges*, MIDDLE EAST MONITOR (June 2, 2022 2:59 PM), <https://www.middleeastmonitor.com/20220602-ex-mauritanian-president-faces-corruption-charges/> [<https://perma.cc/ZP6W-JX4Z>].

39. *Id.*

40. *Id.*

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K. MALI

1. *Raid by Mali Army and Russian Mercenaries*

On October 30, at least thirteen people, including a woman and child, were killed following a raid by the Malian army and mercenaries, who were identified by locals as members of Russia's Wagner group.⁴¹ Long accused of abuses, including by the country's UN mission (MINUSMA), the Malian army is reported to have hired Wagner, which is denied by Bamako and was previously denied by Russia. Mali has faced security, political, and humanitarian crisis since 2012, following the outbreak of independence and jihadist insurgencies.⁴²

L. NIGER

1. *Prison Abolished for Cybercrime Insults*

In June, the Niger government amended law no. 2019-33 on the repression of cybercrime, removing prison sentences for defamation and insults, replacing them with lesser penalties.⁴³ The government explained that the decision was to align the law with Ordinance No 2010-35 of June 4, 2010, on freedom of the press.⁴⁴ The move was widely welcomed as media, political, and civil activists had previously been jailed for expressing their opinions on social networks.⁴⁵

M. NIGERIA

1. *Start-up Act, Data Protection Bill*

In October, then-President Buhari signed the Start-up Bill into law, giving investors employee income tax relief and tax credits to encourage Nigerian start-ups.⁴⁶ The Nigeria Data Protection Bureau also issued the Data Protection Bill 2022 to establish an independent regulatory

41. *Russia's Wagner, Malian Army Kill 13 Civilians: Local Sources*, THE DEFENSE POST (Nov. 2, 2022), <https://www.thedefensepost.com/2022/11/02/wagner-mali-army-kill-civilians/#:~:text=Malian%20troops%20and%20%E2%80%9Cwhite%20soldiers,by%20the%20African%20nation's%20army> [https://perma.cc/P7LW-L6XW].

42. *Id.*

43. *Cybercriminalité: Le Niger Supprime la Peine d'Emprisonnement pour Délit de Diffamation et D'injure*, ACTUNIGER (June 23, 2022), <https://www.actuniger.com/societe/18291-cybercriminalite-le-niger-supprime-la-peine-d-emprisonnement-pour-delit-de-diffamation-et-d-injure.html> [https://perma.cc/4BYB-KBZF].

44. *Id.*

45. Ekip, *Niger: Le Gouvernement Décide de Réviser la Loi sur la Cybercriminalité*, ANADOLU AGENCY (Apr. 28, 2022), <https://www.aa.com.tr/fr/afrique/niger-le-gouvernement-d%C3%A9cide-de-r%C3%A9viser-la-loi-sur-la-cybercriminalit%C3%A9/2575493> [https://perma.cc/AAR2-TUKF].

46. Emmanuel Paul, *Nigeria's President Signs Start-up Bill into Law: Here's What it Means for Tech Companies, Investors, and Employees*, TECHPOINT AFRICA (Oct. 19, 2022), <https://techpoint.africa/2022/10/19/nigerias-startup-act-2022/> [https://perma.cc/JQ34-4ABF].

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commission to govern data protection and privacy issues and monitor data controllers and processors in Nigeria.⁴⁷

2. *Shell Judgment Implies Ministerial Powers over Contracts*

In August 2022, the National Industrial Court of Nigeria handed down a decision with far-reaching effects implying that the Minister of Petroleum Resources had regulatory powers over the employment contracts of petroleum industry operators.⁴⁸ Prior to the decision, employers were not required to obtain ministerial approval before dismissing an employee in the petroleum industry.⁴⁹

N. SÃO TOMÉ AND PRÍNCIPE

1. *Registry on Movable Asset Guarantees*

In August, the São Tomé and Príncipe parliament approved Law 08/2022 on Movable Asset Guarantees to improve access to credit.⁵⁰ The statute comprises a new legal framework for movable asset guarantees and creates an electronic central registry of movable assets and credit assignments.⁵¹

2. *New Laws Regulate Oil and Gas Providers*

Two important statutes on oil and gas passed In 2022: (i) Decree-Law 22/2022 that adopted a new legal regime for petroleum sector services, *inter alia*, requiring service providers to be registered with the National Petroleum Agency (ANP-STP) and petroleum operations entities to submit to ANP-STP quarterly procurement plans;⁵² and (ii) Decree 47/2022 amending the production-sharing contract (PSC) model, notably in respect of fees payable by contractors under a PSC.⁵³ Contracts in breach of Decree-Law 22/2022 are considered invalid and costs incurred are neither recoverable nor deductible.⁵⁴

47. Ifeoluwa Ebiseni et al., *An Appraisal of The Nigeria Data Protection Bill 2022*, AELEX (Oct. 6, 2022), <https://www.aelix.com/an-appraisal-of-the-nigeria-data-protection-bill-2022/> [https://perma.cc/2BSF-ZVNJ].

48. Inam Wilson, *Shell Petroleum Development Co. Ltd. v. Minister of Petroleum: A New Legal Regime on the Release of Nigerian Employees in the Petroleum Industry Beckons*, TEMPLARS (Aug. 16, 2022), <https://www.templars-law.com/app/uploads/2022/08/PDC-v.-Minister-of-Petroleum-Resources-A-New-Labour-Jurisprudence-Beckons.pdf> [https://perma.cc/TAE7-4K3X].

49. *Id.*

50. Miranda Alliance, *Law on Movable Asset Guarantees Approved*, LEGAL ALERT: SÃO TOMÉ AND PRÍNCIPE (Aug. 5, 2022), <https://mirandalawfirm.com/en/insights-knowledge/publications/alerts/law-on-movable-asset-guarantees-approved-2> [https://perma.cc/7U9T-SVJ6].

51. *Id.*

52. Miranda Alliance, *New Oil & Gas Legislation*, LEGAL ALERT: SÃO TOMÉ AND PRÍNCIPE (Oct. 14, 2022), <https://mirandalawfirm.com/en/insights-knowledge/publications/alerts/new-oil-gas-legislation-2> [https://perma.cc/8433-VF6S].

53. *Id.*

54. *Id.*

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O. SENEGAL

1. *Casamance Military Operation*

In March, Senegal launched a military offensive against fighters allied with the Movement of Democratic Forces of Casamance (MFDC), a separatist group in the south of the country.⁵⁵ The mission came after the death of four Senegalese soldiers and the capture of seven others by MFDC fighters, following skirmishes near the Gambia border that caused more than 6,000 people to flee their homes.⁵⁶ The MFDC rebellion dates back to 1982.⁵⁷

2. *Highest Proportion of Female MPs in West Africa Elected*

Senegal's July elections saw seventy-three out of 165 parliamentary seats go to women, the highest proportion of female MPs in West Africa.⁵⁸ A 2010 law requiring "absolute gender parity" in elective institutions is behind the country's high share of women in office.⁵⁹

P. SIERRA LEONE

1. *Protests Over Cost-of-Living Crisis*

At least twenty-one protesters and six officers were killed in August when police and security officials cracked down on protests erupting out of inflation and cost-of-living increases caused, in part, by the Ukraine war.⁶⁰ Anger also rose over authorities' refusal to permit protests. Under the terms of a 1965 public order act, organizers usually have to ask police for permission to protest, which is rarely granted.⁶¹

55. *Senegal Begins Military Operation Against Casamance Separatists*, AL JAZEERA (Mar. 15, 2022), <https://www.aljazeera.com/news/2022/3/15/senegal-begins-military-operation-against-casamance-secessionists> [https://perma.cc/3TKX-623F].

56. *Over 6,000 Displaced in Gambia, Senegal, after Casamance Mission*, AL JAZEERA (Mar. 23, 2022), <https://www.aljazeera.com/news/2022/3/23/over-6000-displaced-in-gambia-and-senegal-after-casamance-missio> [https://perma.cc/QK89-8YRJ].

57. *Id.*

58. *Senegal Leads Way on Women Legislator but Challenges Ahead*, AFR. NEWS (Sept. 11, 2022), <https://www.africanews.com/2022/09/11/senegal-leads-way-on-women-legislators-but-challenges-ahead/> [https://perma.cc/H3VW-DKKD].

59. *Senegal Women Fill Parliament*, VOA AFRICA (Sept. 10, 2022), <https://www.voaafrica.com/a/senegal-women-fill-parliament/6737902.html> [https://perma.cc/4WH3-XYEG].

60. *'Explosion of Violence': Sierra Leone Picks up the Pieces after Protests*, THE GUARDIAN, <https://www.theguardian.com/global-development/2022/aug/21/sierra-leone-protests-inflation-cost-of-living> [https://perma.cc/2EXH-C76Y] (last visited Mar. 22, 2023).

61. *Id.*

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Q. TOGO

1. *Togo Increases Budget*

In October, the Togo parliament increased the 2022 budget by 5.4 percent since adopting the 2021 budget to CFA 1,779.2 billion (\$2.68 billion) for increased security issues, terrorist threats, and global inflation.⁶² Togo planned to dedicate CFA 518 billion (\$780 million) to public investment projects in 2022, about forty percent of total budget expenditures, in support of its five-year “Togo 2025” government-initiated roadmap, focusing on growth, employment, and social inclusion.⁶³

III. Central Africa

A. CAMEROON

1. *President Reaches Forty Years in Power*

In power since 1982, President Paul Biya reached forty years of rule in November, the second longest-ruling head of state still in office behind the forty-three-year rule of Equatorial Guinea president Teodoro Obiang Nguema Mbasogo.⁶⁴ The threshold came at a time when inflation and a cost-of-living crisis were impacting many countries.⁶⁵

B. CENTRAL AFRICAN REPUBLIC

1. *War Crimes Judgements Delivered*

In October, the UN-supported Special Criminal Court issued its first judgments, convicting Issa Sallet Adoum, Ousman Yaouba, and Tahir Mahamat of the 3R rebel group for war crimes and crimes against humanity committed in 2019.⁶⁶ About forty-six civilians were killed, and the communities pillaged in attacks three months after 3R and thirteen other armed groups signed a peace accord.⁶⁷ The hybrid national and

62. Esaïe Edoh, *Togo Parliament Adopts Amended Budget*, TOGOFIRST (Oct. 24, 2022), <https://www.togofirst.com/en/public-finance/2410-10828-togo-parliament-adopts-amended-budget> [<https://perma.cc/3PD6-DAHV>].

63. *Togo Plans to Dedicate CFA518 billion to Public Investment Projects in 2022*, TOGOFIRST (Jan. 25, 2022), <https://www.togofirst.com/en/economic-governance/2501-9294-togo-plans-to-dedicate-cfa518-billion-to-public-investment-projects-in-2022> [<https://perma.cc/AEW8-FDRB>].

64. *Cameroon: Paul Biya Celebrates His 40 Years of Reign at the Head of the Country*, TELLER REPORT (Nov. 6, 2022), <https://www.tellerreport.com/news/2022-11-06-cameroon%E2%80%9494paul-biya-celebrates-his-40-years-of-reign-at-the-head-of-the-country.Byx2yOMHBs.html> [<https://perma.cc/B5VY-BLSA>].

65. *Id.*

66. *Central African Republic: First War Crimes Verdict Due*, HUMAN RIGHTS WATCH, <https://www.hrw.org/news/2022/10/28/central-african-republic-first-war-crimes-verdict-due> [<https://perma.cc/8V2R-577Z>] (last visited Mar. 22, 2023).

67. *Id.*

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international court, relying on the UN and international donors, became operational in 2018 to try grave crimes committed during armed conflicts in the country since 2003.⁶⁸

C. CHAD

1. *Democratic Rule Protests Repressed*

In October, security forces in the N'Djamena capital left at least fifty dead and dozens injured as they dispersed banned protests calling for a quicker transition to democratic rule.⁶⁹ Chad has been on edge since the death of President Idriss Déby while visiting troops in April 2021.⁷⁰ A transitional military council headed by Mahamat Idriss Déby, who took power after his father's death, has been resisted, with elections pushed back to October 2024.⁷¹

D. CONGO (DEMOCRATIC REPUBLIC)

1. *Land Rights Policy Adopted*

In April 2022, the country's Council of Ministers approved a UN-supported National Land Policy.⁷² The policy will improve tenure security of customary lands; recognize land rights of marginalized people, particularly women and the indigenous; decentralize land administration; and resolve land conflicts.⁷³ In 2022, the DRC recognized the customary rights of the indigenous Pygmy people, which law could become the cornerstone of a new approach.⁷⁴

2. *UN says Torture "Widespread"*

Torture is "widespread" and under-reported, according to UN investigators in a 2019-2022 report on torture and other cruel, inhuman, or degrading forms of treatment or punishment in the country, and the abuse "involves armed groups and State forces."⁷⁵

68. *Id.*

69. Zeinab Mohammed Salih & Jason Burke, *Dozens Dead in Chad Capital as Security Forces Fire on Protesters*, THE GUARDIAN (Oct. 20, 2022), <https://www.theguardian.com/world/2022/oct/20/chaos-chad-police-protests-journalist-prime-minister-democracy> [https://perma.cc/K257-TEQM].

70. *Id.*

71. *Id.*

72. *DR Congo Validates Draft Land Law*, GLOBAL LAND TOOL NETWORK, <https://gltn.net/2022/05/31/dr-congo-validates-draft-land-law/> [https://perma.cc/JT3M-USLN] (last visited Mar. 22, 2023).

73. *Id.*

74. *Id.*

75. Mission de l'Organisation des Nations Unies pour la Stabilisation en République démocratique du Congo, *Rapport sur la torture et autres peines ou traitements cruels, inhumains ou dégradants en République démocratique du Congo du 1er Avril 2019 au 30 Avril 2022* (Oct. 2022), <https://www.ohchr.org/sites/default/files/documents/issues/torture/2022-10->

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E. CONGO (REPUBLIC)

1. *Rwanda Agreements*

In April, Congolese President Sassou Nguesso and Rwandan President Paul Kagame presided over signing eight agreements to develop bilateral cooperation between their countries.⁷⁶ The agreements related to agriculture, mining, skills, culture, sport, the protection of investments, and the management of economic entities.⁷⁷ Agreements in 2021 removed double taxation and visa requirements to facilitate trade, and agreements were passed relating to military, education, and land management.⁷⁸

F. EQUATORIAL GUINEA

1. *Equatorial Guinea to Privatize State Assets*

In a year electing the republic's president for the next seven years, the government agreed with the IMF to open an international bid to privatize certain State assets including GETESA (telecommunications), SEGESA (electricity) and GECOTEL (post and telecommunications), as well as other state assets (including hotels, schools, and airport infrastructures).⁷⁹

G. GABON

1. *Environmental Protection Rules Revised*

In February, Gabon published a wide-reaching decree to regulate industrial, petroleum, mining, forestry, agricultural, and other facilities for environmental protection purposes.⁸⁰ The statute mandates Ministry of Environment impact study filings along with risk-assessments and emergency plans and penalties for breach of its provisions.⁸¹ In 2019 Gabon appointed British conservationist Professor Lee White CBE as its new Forestry Minister in a move hailed for the commitment to protecting ecosystems and wildlife.⁸²

04/041022_Joint-report-on-torture-in-the-DRC-01042019-to-30042022.pdf [https://perma.cc/BXK3-A7BA].

76. *Rwanda, Congo-Brazzaville Sign Eight Pacts*, AFRO NEWS (Apr. 13, 2022), https://afro.news/2022/04/13/rwanda-congo-brazzaville-sign-eight-pacts/ [https://perma.cc/T9PE-73TM].

77. *Id.*

78. *Id.*

79. Miranda Alliance, *Equatorial Guinea to open an international bid for privatization of State assets*, LEGAL ALERT: EQUATORIAL GUINEA, April 4, 2022, at https://mirandalawfirm.com/en/insights-knowledge/publications/alerts/equatorial-guinea-to-open-an-international-bid-for-privatization-of-state-assets-2 (visited Oct. 28, 2022).

80. Miranda Alliance, *Rules for Environmental Protection of Classified Facilities are Revised*, LEGAL NEWS: GABON, https://mirandalawfirm.com/en/insights-knowledge/publications/legal-news/gabon-legal-news-may-2022-2 [https://perma.cc/TAR2-CLFX] (last visited Mar. 22, 2023).

81. *Id.*

82. Oliver Poole, *Leading Conservationist Appointed to Gabon's Government*, INDEPENDENT (June 12, 2019), https://www.independent.co.uk/voices/campaigns/elephant-campaign/leading-

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2. *Special Economic Zone Established*

Passed in 2022, Decree 0122/PR/MPIPPPAEA established the 2,000-hectare Mpassa-Lezombi Special Economic Zone in the southeastern province of Haut-Ogooué to promote industrial, commercial, and service activities related to wood and agricultural industries, as well as the processing of natural resources and the production of electricity.⁸³

IV. East Africa

A. BURUNDI

1. *U.S./EU Sanctions Lifted*

In February, the European Union and United States lifted sanctions and resumed aid to Burundi, citing political progress under President Évariste Ndayishimiye.⁸⁴ Both had imposed sanctions over the 2015 violence that claimed 1,200 lives and sent 400,000 fleeing during then-president Pierre Nkurunziza's bid for a third term in office.⁸⁵ The United States reportedly has agreed to a \$400 million five-year aid deal for "sustainable development" in the country.⁸⁶

B. DJIBOUTI

1. *Grain Shipments from Ukraine Resume*

In August, the first shipment of grain from Ukraine to Africa since the war began docked in Djibouti.⁸⁷ The war in neighboring Ethiopia, for which the wheat aid was bound, has impacted the country's economy, reducing trade to about twenty percent of what it was with losses at \$1.7 billion.⁸⁸ The United States has expressed concerns that the conflict could spill over and impact neighbors, including Djibouti.⁸⁹

conservationist-appointed-to-gabon-s-government-a8956311.html [https://perma.cc/CC74-5LCD].

83. Miranda Alliance, *New Special Economic Zone Created*, LEGAL NEWS: GABON, <https://mirandalawfirm.com/en/insights-knowledge/publications/legal-news/gabon-legal-news-august-2022-2> [https://perma.cc/5VWC-7PSA] (last visited Mar. 22, 2023).

84. AFP, *Thousands Rally in Burundi after Sanctions Lifted*, CGTN AFR. (Feb. 12, 2022), <https://africa.cgtn.com/2022/02/12/thousands-rally-in-burundi-after-sanctions-lifted/> [https://perma.cc/S37F-DA8V].

85. *Id.*

86. *Id.*

87. *Ukraine Grain Ship with Aid for Ethiopia Docks in Djibouti*, BBC (Aug. 30, 2022), <https://www.bbc.com/news/world-africa-62721228> [https://perma.cc/C4VM-BUSC].

88. Charles Gitonga, *Djibouti's Economy Hit Hard by War in Ethiopia*, BBC (Nov. 18, 2021), <https://www.bbc.co.uk/news/topics/cq23pdgvrnr/Djibouti> [https://perma.cc/HBW6-DSK3].

89. *Id.*

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C. ERITREA

1. *Eritrea Reportedly Mobilizes to Send Troops to Tigray*

Eritrean authorities reportedly intensified military mobilization and were hunting down draft dodgers, sending troops to help the Ethiopian government against forces from the Tigray region.⁹⁰ Information Minister Yemane Gebremeskel said in July that a “tiny number” of reservists had been called up, denying the entire population had been mobilized.⁹¹ Contrary reports, however, indicated that women had not been spared with the elderly detained to force their children to surrender, or cattle confiscated and relatives harassed.⁹² The call-ups followed the collapse of a five-month truce in August.⁹³

D. ETHIOPIA

1. *Peace Agreement Ends Two-Year War*

In November, following AU-led peace talks, the Ethiopian government and Tigray regional forces agreed to cease hostilities after two years of war that has killed thousands, displaced millions, and left hundreds of thousands facing famine.⁹⁴ The war stemmed from a breakdown in relations between the Tigray People’s Liberation Front (TPLF), a guerilla movement turned political party that dominated Ethiopia for twenty-seven years, and Prime Minister Abiy Ahmed, once part of their ruling coalition, but whose appointment in 2018 ended TPLF dominance.⁹⁵

E. KENYA

1. *High Court Affirms Abortion Rights*

In March, the High Court affirmed the right to abortion as a constitutional right following a case brought on behalf of a young girl and a doctor charged respectively under Penal Code Sections 159 (for procuring an abortion) and 158 (for administering an abortion).⁹⁶ In upholding the complaint, the High Court held that criminalizing abortion under the penal

90. Teklemariam Bekit & Farouk Chothia, *Eritreans Hunted Down as Military Call-Up Intensifies over Ethiopia’s Tigray War*, BBC (Oct. 12, 2022), <https://www.bbc.co.uk/news/world-africa-63208353> [<https://perma.cc/CB9N-FMUQ>].

91. *Id.*

92. *Id.*

93. *Id.*

94. Reuters, *Parties to War in Ethiopia’s Tigray Region Agree to Stop Fighting*, N.Y. POST (Nov. 2, 2022 4:07 PM), <https://nypost.com/2022/11/02/parties-to-war-in-ethiopia-tigray-region-agree-to-stop-fighting/> [<https://perma.cc/DP63-GTPN>].

95. *Id.*

96. PAK v. Attorney General (2022) K.L.R. 262 (H.C.K.) (Kenya), <http://kenyalaw.org/caselaw/caselawreport/?id=231489> [<https://perma.cc/G926-GHFT>].

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code was an impairment to women’s enjoyment of their reproductive rights.⁹⁷

F. RWANDA

1. *EAC Commodities Tax*

A new thirty-five percent tax rate came into effect in Rwanda in July 2022 as an East African Community (EAC) Directive came into force.⁹⁸ Applicable to commodities, the new rate is the fourth band of the EAC’s Common External Tariff, a uniform external tariff adopted by the region’s customs union and common market and applied on goods coming from outside the EAC, thus supporting local manufacturers.⁹⁹

G. SEYCHELLES

1. *Seychelles Calls for Revamp in Climate Change Financing*

In May, President Wavel Ramkalawan decried climate-aid pledges as “worthless” with promises unmet from UN climate change conference COP26.¹⁰⁰ COP27 (2022) was expected to focus on Africa’s needs, although an old pledge to give \$100 billion in funding annually was not met.¹⁰¹ Ramkalawan, whose Indian Ocean archipelago is threatened by rising sea levels, called for a revamp of the way the need for grants and concessional finance—currently focused on wealth—is assessed.¹⁰²

H. SOMALIA

1. *Attacks Increase Since New President Installed*

In November, a suicide bomber killed at least five people and wounded eleven others near a military training camp, a week after explosions in the capital of Mogadishu left at least 116 dead.¹⁰³ The AU drove al Qaeda-allied al Shabab fighters out of Mogadishu in 2011, but it still controls parts of the countryside and has increased attacks since President Hassan Sheikh Mohamud came back to power in May 2022, pledging “all-out war” against

97. *Id.* ¶ 32, at 9.

98. Edwin Musoni, *Importers of Wine, Shoes, and Tiles to Pay More as New EAC Directive Comes into Force*, THE NEW TIMES (June 15, 2022) <https://www.newtimes.co.rw/article/200350/News/importers-of-wine-shoes-and-tiles-to-pay-more-as-new-eac-directive-comes-into-force> [<https://perma.cc/E7SZ-BGVK>].

99. *Id.*

100. Antony Sguazzin & Kamlesh Bhuckory, *Seychelles Says the Rich World is Failing on Climate*, PHYS ORG (May 30, 2022), <https://phys.org/news/2022-05-seychelles-rich-world-climate.html> [<https://perma.cc/A7JL-4NXC>].

101. *Id.*

102. *Id.*

103. *Five Killed in Suicide Bombing at Somalia Military Camp*, AL JAZEERA (Nov. 6, 2022) <https://www.aljazeera.com/news/2022/11/6/several-killed-in-suicide-bombing-at-somalia-military-camp> [<https://perma.cc/MS47-Y66Y>].

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the group which has been fighting for over ten years to install its own Islamic rule.¹⁰⁴

I. SOUTH SUDAN

1. *South Sudan Most Dangerous for Aid Workers*

Care International said at least eleven aid workers were killed in South Sudan in 2022, one-quarter of the forty-four killed worldwide, making it the world's deadliest place to be a humanitarian worker.¹⁰⁵ South Sudan is facing its worst hunger crisis since independence with steep increases in food and fuel costs, exacerbated by the Ukraine war that has left humanitarian appeals under-funded.¹⁰⁶ In October, the UN Office of the High Commissioner for Human Rights called for urgent action on the 2018 peace agreement that has seen slow progress.¹⁰⁷ A hybrid court, a Commission for Truth, Reconciliation and Healing, and a reparations process should have been established over two years ago.¹⁰⁸

J. SUDAN (REPUBLIC)

1. *New Political Framework Talks*

Sudan leader General Abdel Fattah al-Burhan confirmed in November that talks on a new political framework were underway.¹⁰⁹ Al-Burhan led a coup last year that stopped the transition to elections following the ouster of President Omar al-Bashir after thirty years of rule.¹¹⁰ A draft constitution paves the way for agreement among the country's political parties and members of Bashir's banned National Congress Party, which has seen a resurgence in public life.¹¹¹

104. *Id.*

105. Chany Ninrew, *11 Aid Workers Killed in South Sudan in 2022—Report*, EYE RADIO (Nov. 7, 2022), <https://www.eyeradio.org/11-aid-workers-killed-in-south-sudan-in-2022-report/> [<https://perma.cc/2DND-7MSW>].

106. *Id.*

107. Press Release, Commission on Human Rights in South Sudan, Urgent Action Needed on Peace Agreement for South Sudan, U.N. Press Release (Oct. 9, 2022), <https://www.ohchr.org/en/press-releases/2022/10/urgent-action-needed-peace-agreement-south-sudan> [<https://perma.cc/FKT9-VDZE>].

108. *Id.*

109. Khalid Abdelaziz & Nafisa Eltahir, *Sudan's Burhan Says Political Talks Ongoing but Bashir Loyalists Not Welcome*, US NEWS (Nov. 6, 2022), <https://www.usnews.com/news/world/articles/2022-11-06/sudans-burhan-says-political-talks-ongoing-but-bashir-loyalists-not-welcome> [<https://perma.cc/T3ZM-EA5W>].

110. *Id.*

111. *Id.*

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K. TANZANIA

1. *Decision Finds Violation of Young Mothers' Rights*

In September, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) upheld a complaint brought on behalf of Tanzanian girls that the country's policies of mandatory pregnancy testing, expulsion of pregnant and married girls from school, denial of education post-childbirth, and a lack of access to information and reproductive health services in schools violated the girls' rights under the African Charter on the Rights and Welfare of the Child.¹¹² The Committee called for Tanzania to review its education regulations and ensure that girls are supported in continuing their educations.¹¹³ The Committee asked Tanzania for a report on implementation within 180 days.¹¹⁴

L. UGANDA

1. *Computer Law Threatens Freedom of Expression*

In October, President Museveni signed the Computer Misuse (Amendment) Act into law, which barred those convicted from holding public office for ten years and reinforced state control over online freedom of expression.¹¹⁵ Violations can result in fines of up to 15 million Ugandan shillings (about \$3,940) with imprisonment terms up to seven years, with public leaders forced to leave office if convicted.¹¹⁶ The law defines "hate speech" broadly and prohibits sharing "unsolicited information" via computer.¹¹⁷

112. Press Release, African Comm. of Experts on the Rights and Welfare of the Child, Decision on the Merits of Communication No: 0012/Com/001/2019 Legal and Human Rights Centre and Centre for Reproductive Rights (on behalf of Tanzanian girls) against the United Republic of Tanzania (Sept. 15, 2022), <https://reporting.acerwc.africa/en/article/press-release/decision-merits-communication-no-0012com0012019-legal-and-human-rights-centre> [https://perma.cc/E2X8-28C5].

113. *Id.*

114. *Id.*

115. *Uganda: New Law Imposes Restrictions on Use of Internet*, AFR. NEWS (Oct. 14, 2022 2:42 PM), <https://www.africanews.com/2022/10/14/uganda-new-law-imposes-restrictions-on-use-of-internet/> [https://perma.cc/MP26-LW8E].

116. *Id.*

117. *Uganda: Scrap Draconian Law Aimed at Suppressing Freedom of Expression Online*, AMNESTY INT'L (Oct. 14, 2022), <https://www.amnesty.org/en/latest/news/2022/10/uganda-scrap-draconian-law/> [https://perma.cc/4Q9P-YXJD].

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V. Southern Africa

A. ANGOLA

1. *Statutes on State Responsibility*

Three important statutes passed in 2022: (i) a legal regime establishing extra-contractual civil liability for administrative, legislative, or jurisdictional functions;¹¹⁸ (ii) a new Code of Administrative Procedure;¹¹⁹ and (iii) the new Code of Administrative Litigation Procedure to protect the fundamental rights of interested persons with administrative procedural law.¹²⁰

B. COMOROS

1. *Ex-President to be Tried for High Treason*

After more than four years of detention, counsel for former President Ahmed Abdallah Sambi announced in 2022 that he would be tried for high treason in a case originally prosecuted for embezzlement of public funds, corruption, and forgery in the sale of Comorian passports.¹²¹ Comorian law has not defined high treason or fixed the penalties or procedure.¹²²

C. BOTSWANA

1. *Ruling Decriminalizes Homosexuality*

In January, President Mokgweetsi Masisi promised to implement a ruling decriminalizing homosexuality after losing an appeal to overturn the decision.¹²³ Lesbians, Gays and Bisexuals of Botswana (Legabibo) had challenged a government ban on its existence which led to a 2019 court order that laws punishing same-sex relationships be amended.¹²⁴ While homosexuality remains illegal in over half of the sub-Saharan countries, it

118. Miranda Alliance, *Legal Regime on Tort Liability of the State Approved*, LEGAL NEWS: ANGOLA (Sept. 30, 2022), <https://mirandalawfirm.com/en/insights-knowledge/publications/legal-news/angola-legal-news-june-through-august-2022-2> [<https://perma.cc/5V3R-RKQU>].

119. *Id.*

120. Miranda Alliance, *The Legal Regime on Extracontractual Civil Liability of the State, the Code of Administrative Procedure and the Code of Administrative Litigation Procedure Have Been Approved*, LEGAL NEWS: ANGOLA (Sept. 9, 2022), <https://mirandalawfirm.com/en/insights-knowledge/publications/alerts/the-legal-regime-on-extracontractual-civil-liability-of-the-state-the-code-of-administrative-procedure-and-the-code-of-administrative-litigation-procedure-have-been-approved-2> [<https://perma.cc/8RJY-VL2Z>].

121. *Comoros: ex-President Sambi, Detained for Four Years, will be Tried for 'High Treason'*, THE LTD. TIMES (Nov. 7, 2022), <https://newsrnd.com/news/2022-11-07-comoros-ex-president-sambi-detained-for-four-years-will-be-tried-for-%22high-treason%22.Hkf8uta8Bj.html> [<https://perma.cc/5XFP-C42X>].

122. *Id.*

123. *Botswana President Vows to Honour Gay Rights Judgement*, AFR. NEWS (Jan. 25, 2022), <https://www.africanews.com/2022/01/25/botswana-president-vows-to-honour-gay-rights-judgment/> [<https://perma.cc/3KT2-5P65>].

124. *Id.*

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has been decriminalized in Botswana, Lesotho, Mozambique, Angola and the Seychelles.¹²⁵

D. LESOTHO

1. *High Court Overrules King*

In September, the High Court found in favor of applicants Boloetse and Tuke who challenged the constitutionality of the Prime Minister's declaration of a state of emergency following parliament's failure to pass two August bills before its dissolution and its recall by the king to pass the bills.¹²⁶ The High Court ruled that parliament's failure to pass the two bills was not a state of emergency and that as such the king's recalling of parliament was unconstitutional.¹²⁷

E. MADAGASCAR

1. *Nineteen Killed Following Reported Albino Kidnapping*

At least nineteen people were killed, and twenty-one injured in August 2022 when police opened fire on a group angered by the kidnapping of an albino child.¹²⁸ Some 500 people armed with machetes allegedly tried to force their way into a police station where four kidnapping suspects were held.¹²⁹ Albinos are targeted in some African countries due to the belief that their body parts can bring luck and wealth.¹³⁰

F. MALAWI

1. *Land Transfers Limited to Citizens or Investors*

Effective July, amendments to laws enacted in the last five years now limit land sales and grants to Malawi citizens or investors.¹³¹

125. *Id.*

126. *Boloetse v. The King 2022 (L.S.H.C.)* at 57, ¶ 88 (Lesotho), https://jud.gov.ls/wp-content/uploads/2022/09/BOLOETSE-TUKE-V-HIS-MAJESTY-THE-KING-13-15-2022_202209150836.pdf [<https://perma.cc/C8CV-YHPL>].

127. *Id.* ¶¶ 80, 85, at 53, 56.

128. *Madagascar Police Shoot Dead 19 Protesters*, CHANNEL AFR. (Aug. 30, 2022), <http://www.channelafrica.co.za/sabc/home/channelafrica/news/details?id=aea516c3-9639-4d02-ad0a-18438e8cf79e&title=madagascar%20police%20shoot%20dead%2019%20protesters> [<https://perma.cc/Q73T-HWA3>].

129. *Id.*

130. *Id.*

131. Watipaso Mzungu, *Chakwera Signs 15 Bills into Law*, NYASA TIMES (May 13, 2022), <https://www.nyasatimes.com/chakwera-signs-15-bills-into-law/#:~:text=Chakwera%20signs%2015%20bills%20into%20law%20May%2013%20C,fifth%20meeting%20of%20the%2049th%20Session%20of%20Parliament> [<https://perma.cc/KQ7Y-K4WV>].

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2. *Malawi Decriminalizes Sex between Children*

In July, the Malawi parliament passed the Penal Code (Amendment) Bill 2022 that will decriminalize sex acts between children under eighteen years whose age difference is two years or less.¹³² The current Act criminalizes intercourse with girls under sixteen which will be expanded to include sex with a male child (under age eighteen), with the defense if the perpetrator is within two years of the age of the other and the victim consented.¹³³

G. MAURITIUS

1. *Finance Act*

In August, the President assented to the Finance (Miscellaneous Provisions) Act 2022, which amended the Workers' Rights Act 2019 to protect workers from being terminated for failing to carry out their duties where they have been injured in the course of their employment, and they provide the employer with a medical certificate showing they had not recovered from the injuries sustained.¹³⁴

H. MOZAMBIQUE

1. *Anti-Terrorism Framework Updated*

In line with UN Security Council resolutions, in July, Mozambique's parliament approved Law 13/2022 which set out the Specific Legal Regime Applicable to the Prevention, Repression and Fights against Terrorism and Related Actions and Law 11/2022 which revised the Law on the Prevention and Fight against Money Laundering and Financing of Terrorism from 2013.¹³⁵ NGOs and opposition parties criticized the laws as violating freedom of the press and expression principles.¹³⁶

132. Penal Code (Amendment) Act, 2023 (Act 8/2023) (Malawi).

133. Malawi Penal Code, 1930 (L.R.O. 1/2015) ch. 7:01 (Malawi).

134. Alicia Kwan Pang, Rajiv Gujadhur & Javed Niamut, *Mauritius: Finance Act 2022 – Guide*, BOWMANS (Aug. 29, 2022), <https://bowmanslaw.com/insights/corporate-services/mauritius-finance-act-2022-guide/#:~:text=the%20Finance%20Act%20gives%20effect,international%20tax%20measures%2C%20among%20others> [<https://perma.cc/M2T3-7TLE>].

135. Miranda Alliance, *Revision of Legal Framework Applicable to Prevention, Repression and Fight against Terrorism and Proliferation of Weapons of Mass Destruction*, MOZAMBIQUE – LEGAL NEWS (Sept. 21, 2022), <https://mirandalawfirm.com/en/insights-knowledge/publications/legal-news/mozambique-legal-news-may-through-august-2022-2> [<https://perma.cc/Y5YF-G4TQ>].

136. *Mozambique: Lawmakers Should Reject Restrictive NGO Law*, INT'L PRESS INST. (Feb. 27, 2023), <https://ipi.media/mozambique-lawmakers-should-reject-restrictive-ngo-law/> [<https://perma.cc/K8NX-44HC>].

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I. NAMIBIA

1. *Ruling Protects the Press*

In July, the Supreme Court reversed a High Court decision that a newspaper had defamed the game farmer plaintiffs and applied the deference test of reasonable or responsible publication in *Trustco*, finding the “reporting on allegations of ill-treatment of . . . protected game [was] a matter of compelling public interest.”¹³⁷ The ruling strengthened press protection, finding that the journalist had acted reasonably in reporting allegations made by the political and executive heads of the ministry.¹³⁸

J. SOUTH AFRICA

1. *Visa-free Deal with Kenya*

In November, South Africa and Kenya agreed to a reciprocal visa-free deal to give up to ninety days’ stay in the other, following years in which visa issues had been a thorny issue between the countries.¹³⁹ Kenyans currently pay up to \$40 for a ninety-day South African visa and have to show proof of “sufficient” funds along with waiting three weeks for processing.¹⁴⁰ South Africans, by contrast, do not require pre-departure visas to Kenya.¹⁴¹ South African President Cyril Ramaphosa and Kenyan President William Ruto announced the deal agreeing on a return policy when immigration laws are breached.¹⁴²

K. SWAZILAND (ESWATINI)

1. *King Reportedly Receiving Taiwan Bribes*

In October, it was reported that King Mswati had been receiving about R 40 million (\$2.25 million) each year from Taiwan as a bribe to urge UN recognition of its independence from China (PRC).¹⁴³ Taiwan has sought UN review of the 1971 resolution that endorsed the One-China principle and recognized the PRC as a UN member.¹⁴⁴ Mswati and Taiwan had been

137. Namib. Media Holdings (PTY) Ltd. v. Lombaard 2022 No. 23/2020 (S.C. Namib.) at 53, ¶ 146(b), https://legalbrief.co.za/media/filestore/2022/07/Namibia_Media_Holdings_Pty_Ltd_Another_v_Lombard_Another_SA23-2020_2022_NASC_8_July_2022_1.pdf [<https://perma.cc/TWW3-ADVC>].

138. *Id.*

139. Victor Komen, *Kenya and South Africa Agree on Visa-free Entry*, HIIRAN ONLINE (Nov. 10, 2022), https://www.hiiraan.com/news4/2022/Nov/188640/kenya_and_south_africa_agree_on_visa_free_entry.aspx [<https://perma.cc/JU3B-9TEP>].

140. *Id.*

141. *Id.*

142. *Id.*

143. Zweli Martin Dlamini, *Exposed: Mwati’s R40 Million Bribe for United Nations (UN) Taiwan Recognition Advocacy, Money Disguised as Security Upgrade*, SWAZILAND NEWS (Oct. 17, 2022), <http://www.swazilandnews.co.za/fundza.php?nguyiphi=3238> [<https://perma.cc/3HWD-63SV>].

144. *Id.*

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using the Ministry of Economic Planning and Development to “launder” the payments, with some of the payments disguised as donations for social projects.¹⁴⁵ Eswatini is the only country in Africa with diplomatic relations with Taiwan.¹⁴⁶

L. ZAMBIA

1. *World Bank Loan post-Default*

In October, the World Bank approved a \$270 million loan to Zambia to help it recover from the Coronavirus pandemic, the economic impact of the Ukraine war and to manage its debt crisis after 2020 when it became the first African country since the onset of the pandemic to default on its debt.¹⁴⁷ In August, the IMF approved a \$1.3 billion loan to help the country restructure its debts.¹⁴⁸

M. ZIMBABWE

1. *Reserve Bank Charging up to 200 Percent on Loans*

In June, the Government’s Reserve Bank of Zimbabwe (RBZ) started charging up to 200 percent interest on loans, a move decried as “suicidal” by economists as it is likely to result in bank failures and bankruptcies.¹⁴⁹ RBZ’s interest rates are the highest of any central bank in the world.¹⁵⁰ The IMF had projected that Zimbabwe’s GDP growth would decline in 2022 by about half of its 2021 levels to around 3.5 percent.¹⁵¹ The decline was attributed to a slowdown in agriculture and energy outputs owing to erratic rains and rising macroeconomic instability amidst a recover in mining and tourism.¹⁵²

145. *Id.*

146. *Id.*

147. *World Bank Approves \$275 Million in Development Support for Zambia*, AFR. NEWS (Oct. 27, 2022), <https://www.africanews.com/2022/10/27/world-bank-approves-275-million-in-development-support-for-zambia/> [https://perma.cc/T4JC-FCBZ].

148. *Id.*

149. Reason Razao, *200 Percent Interest Rates Likely to Impact 2022-2023 Agric Season*, NEW ZIM. (Nov. 8, 2022), <https://www.newzimbabwe.com/200-percent-interest-rates-likely-to-impact-2022-2023-agric-season/> [https://perma.cc/D4LL-DC45].

150. *Id.*

151. *Zimbabwe’s GDP to Decline by Half in 2022: IMF*, NEW ZIM. (Sept. 20, 2022), <https://www.newzimbabwe.com/zimbabwes-gdp-to-decline-by-half-in-2022-imf/> [https://perma.cc/3YRC-XUU5].

152. *Id.*

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VI. African Institutions

A. AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

1. AU Members Should Resolve Western Sahara

In September, the Court delivered judgment on an action by Ghanaian national Bernard Mornah against States party to the African Charter on Human and Peoples' Rights Protocol arguing that eight states had abrogated their international obligations by admitting Morocco to the AU without requiring an end to its occupation of the Sahrawi Arab Democratic Republic (SADR) (Western Sahara).¹⁵³ The Court held that the states had not violated SADR's right to self-determination under the Charter as how the individual states had voted on admitting Morocco was not shown.¹⁵⁴ Its decision notwithstanding, the Court pronounced that all AU States Parties had responsibilities under international law to resolve Morocco's occupation of the region, ensuring Western Sahara's enjoyment of its right to self-determination.¹⁵⁵

B. AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

1. Ethiopia Human Rights Case

In October, the Commission announced its decision to seize itself of a case against Ethiopia alleging human rights violations against Tigrayan civilians in the two-year civil war and issued provisional measures to cease violations and ensure humanitarian access ahead of the peace agreement concluded in November.¹⁵⁶ The Commission was the first regional human rights body to consider claims arising out of the conflict in Ethiopia, the decision marking the first time in over a decade that the Commission has seized itself of widespread violations in a large-scale armed conflict.¹⁵⁷

153. *African Court on Human & Peoples' Rights Delivers Judgement on Case Against Morocco's Occupation of SADR*, PAN-AFRICAN LAWS. UNION (Oct. 3, 2022), <https://www.lawyersofafrica.org/african-court-on-human-peoples-rights-delivers-judgement-on-case-against-moroccos-occupation-of-sadr/#:~:text=ON%202022%20September%202022%3A%20The%20African%20Court%20on,to%20be%20an%20amicus%20curiae%20in%20this%20case> [<https://perma.cc/W6SK-TNW4>].

154. *Id.*

155. *Id.*

156. *Debevoise, Legal Action Worldwide, and the Pan-African Lawyers Union Secure Provisional Measures Relief in Landmark Case against Ethiopia for Human Rights Violations in Tigray*, DEBEVOISE & PLIMPTON (Oct. 19, 2022), <https://www.debevoise.com/news/2022/10/debevoise-legal-action-worldwide> [<https://perma.cc/PG9J-DR8U>].

157. *Id.*

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C. AFRICAN UNION

1. *Second Continental Progress Report, Migration Forum*

In February, the AU Commission issued the Second Continental Report on the Implementation of Agenda 2063, “Africa’s development blueprint to achieve inclusive and sustainable socio-economic development over a fifty-year period.”¹⁵⁸ In October 2022, the seventh Pan-African Forum on Migration (PAFoM-7) was held in Kigali, bringing together AU Member States and other parties to consider the effects of climate change on migration and displacement on the continent.¹⁵⁹

D. ECONOMIC COMMUNITY OF WEST AFRICAN STATES

1. *ECOWAS Visa Moves Forward*

Supporting the free movement of peoples in the West African region, the ECOWAS Commission held meetings October 11-13 in Abuja, agreeing to the launch of the ECOVISA across the region.¹⁶⁰ ECOWAS’ Directorate of Trade also organized the second virtual meeting for ECOWAS Institutions and Specialized Agencies on the African Continental Free Trade Area (AfCFTA) to update ECOWAS institutions about the agreement and to encourage Member States to ratify it.¹⁶¹

E. EAST AFRICAN COMMUNITY

1. *DRC Joins EAC*

In April, the DRC became the East African Community’s seventh member which includes Burundi, Kenya, Rwanda, South Sudan, Tanzania, and Uganda.¹⁶² The DRC’s admission means the bloc counts for about 300 million people and a GDP of around \$250 billion.¹⁶³

158. *Second Continental Report on the Implementation of Agenda 2063*, AFRICAN UNION (Feb. 2022), https://au.int/sites/default/files/documents/41480-doc-2nd_Continental_Progress_Report_on_Agenda_2063_English.pdf [<https://perma.cc/UF9S-FJ7S>].

159. *The 7th Pan-African Forum on Migration (PAFoM-7)*, AFRICAN UNION (Oct. 18, 2022), <https://au.int/en/newsevents/20221018/7th-pan-african-forum-migration-pafom-7> [<https://perma.cc/LSS5-M3HJ>].

160. Press Release, ECOWAS, *Experts Agreed to the Harmonised Ecowas Visa Regime Ecovisa to Take-Off* (Oct. 21, 2022), <https://ecowas.int/experts-agreed-to-the-harmonised-ecowas-visa-regime-ecovisa-to-take-off/> [<https://perma.cc/NNM8-TFT7>].

161. Press Release, ECOWAS, *ECOWAS Commission Holds 2nd Meeting for ECOWAS Institutions and Specialized Agencies on the African Continental Free Trade Area (AfCFTA)* (Oct. 25, 2022), <https://ecowas.int/ecowas-commission-holds-2nd-meeting-for-ecowas-institutions-and-specialized-agencies-on-the-african-continental-free-trade-area-afcfta/> [<https://perma.cc/PT3X-SYHB>].

162. Camille Pauravel, *DR Congo Signs the East African Community Treaty, Officially Joining the Bloc*, AFR. NEWS (Apr. 18, 2022), <https://www.africanews.com/2022/04/08/dr-congo-joins-the-east-african-community-eac/> [<https://perma.cc/K3TG-SM9L>].

163. *Id.*

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F. AFRICAN DEVELOPMENT BANK

1. *Bank Approves Landmark Pharmaceutical Institution*

In June, the Bank approved establishment of the African Pharmaceutical Technology Foundation, boosting the Bank's commitment to spend at least \$3 billion over the next ten years to support the pharmaceutical and vaccine-manufacturing sector under its Vision 2030 Pharmaceutical Action Plan.¹⁶⁴ The Rwanda-based Foundation will work with the AU, EU, WHO, and philanthropic organizations to foster public-private sector collaboration in developed and developing countries.¹⁶⁵

G. AFRICAN EXPORT-IMPORT BANK

1. *\$1.5 Billion Financing to Botswana*

In November, the Bank announced a net \$1.5 billion three-year lending arrangement to Botswana with funding for up to seven years for eligible transactions.¹⁶⁶ The financing supports key projects in Botswana's Economic Transformation and Diversification Plan, with funding for multiple sectors, which will support the country's goal to become an export-led high-income economy by 2036.¹⁶⁷

H. UN ECONOMIC COMMISSION FOR AFRICA

1. *UNECA Cancels Flagship Energy Initiative*

In November, the UNECA cancelled its Team Energy Africa initiative to mobilize \$500 billion of private sector investment into "clean" energy after discovering that coalition partner African Energy Chamber was led by convicted fraudster NJ Ayuk.¹⁶⁸ Ayuk pleaded guilty in 2007 to fraud in the United States after impersonating a congressman to obtain visas for fellow Cameroonians.¹⁶⁹ In 2015, he was investigated by Ghana's central bank on suspicion of laundering \$2.5 million.¹⁷⁰

164. *African Development Bank's Board Approves Landmark Institution: Establishment of African Pharmaceutical Technology Foundation to Transform Africa's Pharmaceutical Industry*, AFRICAN DEV. BANK (June 27, 2022), <https://www.afdb.org/en/news-and-events/press-releases/african-development-banks-board-approves-landmark-institution-establishment-african-pharmaceutical-technology-foundation-transform-africas-pharmaceutical-industry-52727> [<https://perma.cc/P9DT-9CL2>].

165. *Id.*

166. Press Release, Afreximbank, *Afreximbank Announces US\$1.5 Billion Financing Programme to Botswana* (Nov. 4, 2022), <https://www.afreximbank.com/afreximbank-announces-us1-5-billion-financing-programme-to-botswana/> [<https://perma.cc/CXL3-N7B6>].

167. *Id.*

168. Chloé Farand, *UN Cancels African Energy Finance Initiative over Fraudster's Role*, CLIMATE HOME NEWS (Nov. 11, 2022), <https://www.climatechangenews.com/2022/11/11/un-cancels-african-energy-finance-initiative-over-fraudsters-role/> [<https://perma.cc/K7E5-PZ6M>].

169. *Id.*

170. *Id.*

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I. SOUTHERN AFRICAN DEVELOPMENT COMMUNITY

1. *Election Observers Bless Lesotho Elections*

In October 2022, the SADC Electoral Observation Mission (SEOM) issued a statement confirming the orderly conduct of the October Lesotho National Assembly elections.¹⁷¹ SEOM had deployed observers to 171 voting stations in the Kingdom's ten districts and will issue its Final Report within thirty days of the electoral cycle concluding.¹⁷²

J. COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA

1. *Moves Toward a Single Air Transport Market*

On March 8-10, African Civil Aviation Commission (AFCAC) experts and COMESA met in Rwanda to work toward an AU Agenda 2063 project, a Single African Air Transport Market (SAATM).¹⁷³ The workshop agreed to strategies on the Yamoussoukro Decision, a treaty adopted by most AU members to liberalize air transport services between African countries.¹⁷⁴ The parties also signed grant project agreements with the African Development Bank and AFCAC on support for SAATM, with EU support for air transport sector development in the region.¹⁷⁵

K. INTERGOVERNMENTAL AUTHORITY ON DEVELOPMENT

1. *Regional Trade Policy Launch*

In September, IGAD issued its 2022-2026 regional trade policy¹⁷⁶ as an initiative to promote greater regional integration in the East African countries of its operation.¹⁷⁷ Identical to African Continental Free Trade Area (AfCTA) measures, the policy aims to facilitate regional trade integration and the removal of tariff and non-tariff barriers.¹⁷⁸

171. *SADC Releases the Preliminary Observation Mission Statement on the National Assembly Elections to the Kingdom of Lesotho Held on 7th October 2022*, SADC (Oct. 9, 2022), <https://www.sadc.int/latest-news/sadc-releases-preliminary-observation-mission-statement-national-assembly-elections> [<https://perma.cc/KW6G-LV8W>].

172. *Id.*

173. Mwangi Gakunga, *Fresh Impetus Towards a Single African Air Transport Market*, COMESA (Mar. 9, 2022), <https://www.comesa.int/fresh-impetus-towards-a-single-african-air-transport-market/> [<https://perma.cc/CTK9-SREG>].

174. *Id.*

175. *Id.*

176. *IGAD Launches its Regional Trade Policy 2022-2026*, IGAD (Sept. 15, 2022), <https://igad.int/igad-launches-its-regional-trade-policy-2022-2026/?g=2485378cb89790a39d71ac96e5ed5024#:~:text=The%20IGAD%20Regional%20Trade%20Policy's,living%20standards%20in%20the%20region> [<https://perma.cc/7644-X63B>].

177. *Id.*

178. *Id.*

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L. ECONOMIC COMMUNITY OF CENTRAL AFRICAN STATES

1. *DRC Meeting to Resolve Conflict*

In July, heads of state and government met with ECCAS in Kinshasa to discuss the conflict between the DRC and the March 23 Movement (M23), of which the DRC accuses Rwanda of being part.¹⁷⁹ The meeting in its final communiqué agreed to “adhere to the Luanda (Angola) roadmap pertaining to the cessation of hostilities by the M23 rebel group and its immediate withdrawal from occupied positions” on Congolese territory.¹⁸⁰

M. UNION DU MAGHREB ARABE

1. *UMA Excluded from Summit*

Algeria excluded recent UMA Secretary-General Taieb Baccouche from November’s Arab League Summit with suggestions that the decision was due to his “hostile positions against the Tunisian regime.”¹⁸¹ Baccouche had planned to revive talks to reconcile UMA countries over tensions notably concerning Western Sahara.¹⁸²

N. ORGANIZATION FOR THE HARMONIZATION OF BUSINESS LAW IN AFRICA

1. *Accounting System Aims at Regional Harmonization*

In July, Cameroon hosted an OHADA National Commissions plenary with member states’ professional accounting bodies to examine a draft accounting system for non-profit entities such as cooperative societies, associations, and foundations.¹⁸³ The draft will be submitted to the Common Court of Justice and Arbitration (CCJA) before it is put for the OHADA Council of Ministers’ approval and adopted within the framework of the Project for the Improvement of the Business Climate within the OHADA region.¹⁸⁴

179. Afolake Oyinloye, *Kinshasa Hosts Central African Bloc Leaders*, AFRICANEWS (July 27, 2022), <https://www.africanews.com/2022/07/26/kinshasa-hosts-central-african-economic-bloc-leaders/> [https://perma.cc/AP2K-LLT5].

180. *Id.*

181. *Arab Summit: Algeria Fails to Invite Secretary-General of Arab Maghreb Union*, GNA (Nov. 2, 2022), <https://gna.org.gh/2022/11/arab-summit-algeria-fails-to-invite-secretary-general-of-arab-maghreb-union/> [https://perma.cc/BDF9-6WZW].

182. *Id.*

183. Emmanuel Sibidi Darankoum, *Accounting System for Non-profit Entities Under Elaboration*, OHADA <https://www.ohada.org/en/plenary-assembly-of-the-ohada-national-commissions-douala-27th-to-29th-july-2022-the-accounting-system-for-non-profit-entities-under-elaboration/> (last visited Mar. 31, 2023) [https://perma.cc/5DGC-ZT3S].

184. *Id.*

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O. AFRICAN CONTINENTAL FREE TRADE AREA

1. *Afreximbank Agreement on the Base Fund*

In February, the AfCFTA Secretariat and Afreximbank signed an agreement governing the AfCFTA Adjustment Fund.¹⁸⁵ The Base Fund (the subject of the agreement) comprises contributions from States Parties, grants, and technical assistance funds.¹⁸⁶ The Base Fund will support African countries to participate in the AfCFTA-established trading area implementing the AfCFTA Agreement.¹⁸⁷

185. *AfCFTA Secretariat and Afreximbank Sign an Agreement for the Management of the AfCFTA Adjustment Fund*, AFREXIMBANK (Feb. 9, 2022), <https://www.afreximbank.com/afcfta-secretariat-and-afreximbank-sign-an-agreement-for-the-management-of-the-afcfta-adjustment-fund/> [https://perma.cc/PQE2-9GXL].

186. *Id.*

187. *Id.*

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Europe

LUIGI PAVANELLO AND WILLEM DEN HERTOG*

This Article discusses significant legal developments in European Law from 2022.

I. Italy

A. THE EUROPEAN COURT OF JUSTICE EXPLAINS THE MEANING OF THE WORD “DECISION” UNDER EU REGULATION 2201/2003

Case C-646/20, which was published on November 15, 2022,¹ addressed the interpretation of Council Regulation (EC) no. 2201/2003 (Regulation 2201/2003). Regulation 2201/2003, dated November 27, 2003,² concerns jurisdiction and the recognition and enforcement of judgments in matrimonial and parental responsibility matters and matters of parental responsibility. In its decision, the European Court of Justice set an important and fundamental precedent with respect to when an out-of-court divorce decree—specifically, that an out-of-court divorce decree constitutes a judgment under Regulation (EC) no. 1347/2000 (Regulation Brussels II-bis).³

The case involved a controversy between the *Senatsverwaltung für Inneres und Sport, Landesamtsaufsicht* (the Berlin Interior and Sport Department, which is in charge of overseeing and keeping the marital status register) and a German-Italian citizen.⁴ The Berlin Interior and Sport Department refused to acknowledge and file the German citizen’s marital status and would not register the divorce between the German-Italian citizen and his Italian wife obtained in Italy through the City of Parma’s *Ufficiale di Stato*

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1. At the time of drafting of this Article, only the German version (which was the language used in the proceeding) and the French version of the decision are available. See Case C-646/20, *Senatsverwaltung für Inneres und Sport, Landesamtsaufsicht v TB*, ECLI:EU:C:2022:879 (Nov. 15, 2022).

2. Council Regulation 2201/2003, 2003 O.J. (L 338) 1–29 (EC).

3. No longer in force, as of July 31, 2022; Latest consolidated version: March 1, 2005; Repealed by Council Regulation (EU) 2019/1111 dated June 25, 2019, on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), a/k/a “Regulation Brussels-III.” See Council Regulation 1347/2000, 2000 O.J. (L 160) 19 (EC).

4. Case C-646/20, *Senatsverwaltung für Inneres und Sport, Landesamtsaufsicht v TB*, ECLI:EU:C:2022:879, ¶ 25 (Nov. 15, 2022).

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Civile (Marital Status Registrar) without the previous exequatur and recognition of the divorce by the competent German Court.⁵

The facts of the case are simple: a German-Italian citizen married an Italian citizen in Berlin in 2013.⁶ In 2017, the couple appeared before the City of Parma’s Marital Status Registrar to have their marriage dissolved pursuant to Italian law.⁷ Under Italian law, a couple may dissolve their marriage without the need for court proceedings before the local Marital Status Registrar if the following conditions are met: (1) There are no minor children, no disabled or seriously handicapped children, or no children that are not financially self-supporting; and (2) their will is freely expressed.⁸ After having obtained the divorce, one of the spouses sought to have the divorce registered in Berlin.⁹ But local German authorities refused to register the divorce on the grounds that it had not yet been recognized by a German court.¹⁰ After an appeal, the matter was brought before the locally-competent German Federal Court, which raised the following question to the European Court of Justice: Does the term “decision” as used in the Regulation Brussels II-bis regarding the recognition of a divorce include the divorce granted by a Marital Status Registrar of a Member State deriving from an agreement between the spouses and executed in accordance with the laws of such Member State?¹¹

The European Court of Justice, sitting in the Grand Chamber composition,¹² decided that the divorce decision issued by the Italian Marital Status Registrar, in accordance with the laws of Italy, was a “decision” in accordance with the Regulation Brussels II-bis, and it only concerned the dissolution of the marriage without any legal consequences on spousal maintenance, child support, or division of assets, and without the involvement of any minor or financially dependent offspring.¹³

Thus, according to the European Court of Justice, any divorce decision, whether issued by a court or out of court by an authority so empowered by

5. *See id.* ¶ 2.

6. *See id.* ¶ 25.

7. Decree Law no. 132 of September 12, 2014 – Urgent measures for de-jurisdictionalization and other measures to reduce the civil cases backlog (Gazzetta Ufficiale no. 212 of September 12, 2014) converted into law, with amendments, by Law no. 162 dated November 10, 2014, (Gazzetta Ufficiale no. 261 of November 10, 2014) (“Decree Law 132/2014”). *See* Legge 12 settembre 2014, n.132, G.U. Sept. 12, 2014, n.212 (It.).

8. *Id.* at art. 12.

9. Case C-646/20, *Senatsverwaltung für Inneres und Sport, Standesamtsaufsicht v TB*, ECLI:EU:C:2022:879, ¶ 27 (Nov. 15, 2022).

10. *See id.* ¶ 29.

11. *See id.* ¶¶ 14, 30.

12. In this decision, fifteen judges out of twenty-seven agreed with the ruling. *See The Court of Justice of the European Union*, EUROPEAN PARLIAMENT, <https://www.europarl.europa.eu/factsheets/en/sheet/26/the-court-of-justice-of-the-european-union> [https://perma.cc/U44H-8BCU] (last visited Mar. 21, 2023); *see* Case C-646/20, *Senatsverwaltung für Inneres und Sport, Standesamtsaufsicht v TB*, ECLI:EU:C:2022:879 (Nov. 15, 2022) (referencing Grand Chamber).

13. *Id.* ¶ 14.

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the laws of an EU Member State, is a “decision” in accordance with Regulation Brussels II-bis and must be automatically recognized in the other EU Member States, except for the limitations set forth in the Regulation.¹⁴

II. Netherlands

A. ULTIMATE BENEFICIAL OWNER REGISTER

As described last year,¹⁵ and the year before that,¹⁶ the Dutch government has started establishing the Ultimate Beneficial Owner of companies (UBO) Register, which is required under Article 30 of the 4th EU Anti-Money Laundering Directive (the Directive).¹⁷ The Dutch Act¹⁸ that implements the EU Directive “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.”¹⁹

The public availability of the UBO Register is seen by some people “as a serious threat to the privacy of the individuals concerned, exposing them to all kinds of unwanted attention and far worse, such as and far worse, such as potential extortion and kidnapping.”²⁰ In prior litigation on this issue, the Dutch Courts refused to ask the Court of Justice of the European Union (CJEU) for a prejudicial decision because the Tribunal d’Arrondissement of Luxembourg had already done so.²¹ Since then, all eyes, or at least the Dutch and Luxembourg ones, were on the CJEU.²² The CJEU has now

14. *Id.*

15. Duncan Gorst et al., *Europe*, 56 ABA/ILS YIR 293, 297 (2022).

16. James Henry Bergeron et al., *Europe*, 55 ABA/ILS YIR 395, 398 (2021).

17. 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.

18. Gorst et al., *supra* note 15, at 297 (citing 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.).

19. 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 Sept. 27, 2020).

20. Gorst et al., *supra* note 15, at 297.

21. *Id.* at 298; *see also* Directive (EU) 2015/849 of the European Parliament and of the Council, *supra* note 17.

22. *See Dutch Court of Appeal Rules Ultimate Beneficial Owners Can Request Shielding of Data*, PRIVACY FIRST (Nov. 16, 2021), <https://privacyfirst.eu/court-cases/705-dutch-court-of-appeal-rules-ultimate-beneficial-owners-can-request-shielding-of-data.html> [https://perma.cc/8GS2-7RN8].

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issued its decision,²³ finding that the Directive’s provision that Member States must ensure that information on the beneficial ownership of companies and of other legal entities incorporated within their territory is accessible to any member of the general public is invalid.²⁴

The CJEU began its decision with the customary recital of the applicable E.U. and Luxembourg law,²⁵ the facts of both cases, and the prejudicial questions asked.²⁶ Then, the Court addressed the issue of interference with the fundamental rights guaranteed in Article 7 (protection of private and family life, home, and communications) and Article 8 (protection of personal data) of the Charter of Fundamental Rights of the European Union (the Charter)²⁷ resulting from the general public’s access to information on UBOs.²⁸ Given its recital of the its previous decisions,²⁹ it is unsurprising that the Court found that interference exists and that, given that the free dissemination of this information can lead to serious abuse, this “constitutes a serious interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter.”³⁰

The Court then analyzed whether such interference was justified. In so doing, the Court made lengthy observations on the principles involved in such justification, including: (1) legality, (2) respect for the essence of the fundamental rights involved, (3) the objective of general interest recognized by the European Union, and (4) whether the interference at issue is appropriate, necessary, and proportionate.³¹

As to the first two principles, the Court found that the principle of legality must be considered to have been fulfilled³² and that the interference does not undermine the essence of the fundamental rights enshrined in Articles 7 and 8 of the Charter.³³ As to the third principle, the Court found, on the one hand, that the stated aim of the legislation—to prevent money laundering and terrorist financing—constitutes an objective of general interest that is capable of justifying even serious interferences with the fundamental rights mentioned.³⁴ On the other hand, the principle of transparency—also underlying the legislation—is not so capable because, as in this case, it does not concern transparency linked to a public institution.³⁵

23. See Case C-37/20, *WM v. Luxembourg Bus. Regs.* ECLI:EU:C:2022:912 (Nov. 22, 2022) (joined cases C-37/20 and C-601/20).

24. *Id.* ¶ 88 (explaining the Court’s reasoning in dictum).

25. *Id.* ¶¶ 3–19.

26. *Id.* ¶¶ 20–33.

27. Charter of Fundamental Rights of the European Union, 2012 O.J. (C 326) 391, 397.

28. Case C-37/20, *WM v. Luxembourg Bus. Regs.*, ECLI:EU:C:2022:912, ¶¶ 35–44.

29. *Id.* ¶¶ 38, 39, 42.

30. *Id.* ¶ 44.

31. *Id.* ¶¶ 45–88.

32. *Id.* ¶ 49.

33. *Id.* ¶ 54.

34. *Id.* ¶ 59.

35. *Id.* ¶¶ 61, 62.

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It was in its treatment of the fourth principle that the Court really took a bite.³⁶ Although it considered the general public's right of access to the UBO Register information appropriate,³⁷ it found that it is not strictly necessary³⁸ and not at all proportional.³⁹ With respect to the former, the Court pointed out that the previous Money-Laundering Directive⁴⁰ required a "legitimate interest" for a member of the public to obtain the UBO information.⁴¹ The fact that the Commission had trouble defining "legitimate interest" is not a sufficient reason for the EU legislature to simply provide for unrestricted general public access to that information. The Court also found that the interference is not proportional, in part because combating money-laundering and financing of terrorism is a priority for public authorities and for entities such as banks,⁴² but that providing UBO data to individuals, given the serious risks, does not outweigh the serious drawbacks.⁴³

In sum, the CJEU declared the provisions of the Directive mandating the provision of UBO information to the general public to be invalid.⁴⁴ Thus, all eyes are again on the European and national legislatures to see whether they will try again. This will be an area to watch in the coming year.

36. *Id.* ¶¶ 63–87.

37. *Id.* ¶ 67.

38. *Id.* ¶ 76.

39. *Id.* ¶ 86.

40. 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, 97.

41. Case C-37/20, *WM v. Luxembourg Bus. Regs.*, ¶ 83.

42. *See id.* ¶ 85.

43. *See id.* ¶¶ 85–88.

44. *See id.* ¶ 88.

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Middle East

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This article surveys significant legal developments in the Middle East in 2022.

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I. Afghanistan

On May 7, 2022, *de facto* authorities issued an order forbidding women from leaving their homes without covering their faces, except for their eyes.¹ The directive, issued by the Taliban, stated that staying at home except for emergencies was the best form of Islamic *hijab*.² Female employees in government will be relieved of their positions immediately if they do not wear the veil.³ The decree further expresses the penalties faced by the heads of families who do not impose the obligation to wear the veil on their subordinate members.⁴ For the first two offenses, a warning is issued; the third offense carries a three-day punishment, and the fourth offense results in a referral to the judiciary.⁵ Additionally, women are not permitted to travel domestically and internationally without a male chaperone.⁶ Access to necessary travel assistance is frequently refused to unchaperoned women.⁷ The Ministry for the Propagation of Virtue and the Prevention of Vice also enacted regulations banning women from traveling long distances without a *mabram* and designating specific days for men and women to visit parks.⁸ The Taliban's top focus appears to be strengthening social restrictions, notwithstanding the current economic crisis in Afghanistan.⁹ The mandatory veil laws violate the human rights of women in Afghanistan, including the right to equality, privacy, self-determination, and freedom of expression. Ultimately, these laws degrade women and girls, effectively stripping them of their dignity and their sense of value.

1. *Taliban Order Afghan Women to Cover Faces Again*, REUTERS (May 7, 2022), <https://www.reuters.com/world/asia-pacific/taliban-announce-women-must-cover-faces-public-say-burqa-is-best-2022-05-07/> [<https://perma.cc/2K3H-TCLY>].

2. Belquis Ahmadi & Mohammad Osman Tariq, *How the Taliban's Hijab Decree Defies Islam*, U.S. INST. OF PEACE (May 12, 2022), <https://www.usip.org/publications/2022/05/how-talibans-hijab-decree-defies-islam> [<https://perma.cc/PK5S-KL86>].

3. *See Taliban Orders Female Staff Members of UN in Afghanistan to Wear Hijab*, BUS. STANDARD (May 18, 2022), https://www.business-standard.com/article/international/taliban-orders-female-staff-members-of-un-in-afghanistan-to-wear-hijab-122051800578_1.html [<https://perma.cc/3N78-P3LY>].

4. Emma Graham-Harrison, *Taliban Order All Afghan Women to Cover Their Faces in Public*, THE GUARDIAN (May 7, 2022), <https://www.theguardian.com/world/2022/may/07/taliban-order-all-afghan-women-to-wear-burqa> [<https://perma.cc/T2AH-GJXD>].

5. Ahmadi & Osman, *supra* note 2.

6. *Taliban Ban Women in Afghanistan from Flying Without Male Chaperone*, REUTERS (Mar. 27, 2022), <https://www.reuters.com/world/asia-pacific/afghanistans-taliban-ban-women-flying-without-male-chaperone-sources-2022-03-27/> [<https://perma.cc/G8VB-CY6J>].

7. *See* Ahmadi & Osman, *supra* note 2.

8. Belquis Ahmadi & Scott Worden, *The Taliban Continue to Tighten Their Grip on Afghan Women and Girls*, U.S. INST. OF PEACE (Dec. 8, 2022), <https://www.usip.org/publications/2022/12/taliban-continue-tighten-their-grip-afghan-women-and-girls> [<https://perma.cc/F42Z-G8GT>].

9. *See* Lindsay Maizland, *The Taliban in Afghanistan*, COUNCIL ON FOREIGN RELS. (Jan. 19, 2023), <https://www.cfr.org/backgrounder/taliban-afghanistan> [<https://perma.cc/SQ45-97EN>].

II. Algeria

On July 24, 2022, Algeria promulgated new corporate business regulations in an effort to attract foreign investment.¹⁰ Previously, Algerian law required a fifty-one percent majority to be held by Algerian national shareholders, leaving forty-nine percent for foreign nationals.¹¹ The new law repealed this requirement but it is still retained for certain strategic sectors and circumstances.¹² Key legal reforms include tax incentives and other benefits, new transparency requirements, and guarantee of transfer of the investment and its revenues.¹³

III. Bahrain

A. CORPORATE GOVERNANCE

On September 20, 2022, amendments to Bahrain's Corporate Governance Code (the Code) came into effect.¹⁴ Some of the amendments introduced new document retention requirements.¹⁵ Additional changes to the Code related to board and committee appointment standards, including efforts to improve diversity on boards of public companies.¹⁶ There are also new standards for managing director conflicts of interest.¹⁷

Other noteworthy amendments to the Code related to shareholder rights, external auditors, and compensation transparency.¹⁸ The Code now allows shareholders to vote electronically.¹⁹ Certain sections of the Bahrain Commercial Companies Law²⁰ related to the rights of shareholders have been incorporated into the Code.²¹ There are now stricter parameters for the appointment of external auditors and engagement partners, and a new obligation for auditors to report on compliance with their internal controls.²² In addition, the Code has new guidelines for a company's annual corporate

10. Céline van Zeebroeck, *Algeria: A New Set of Laws in Algeria to Attract Foreign Investors*, BAKER MCKENZIE (Oct. 2022), https://insightplus.bakermckenzie.com/bm/attachment_dw.action?attkey=FRbANEucS95NMLRN47z%2BeeOgEFc8EGQjsWJiCH2WAUuQVQjpl3o%2BaXUHex7yKau&nav=FRbANEucS95NMLRN47z%2BeeOgEFc8EGQbuwypnpZjc4%3D&attdocparam=PB7HEsg%2FZ312Bk8OIuOIH1c%2BY4beLEAe52vV7ExjsUE%3D&fromContentView=1 [https://perma.cc/86U4-P23A].

11. *Id.*

12. *Id.*

13. *Id.*

14. RESOLUTION NO. 91/2022 (Bahr.).

15. CORP. GOVERNANCE CODE [THE CODE] ch. 1, § 2(9) (Bahr.).

16. *Id.* ch. 2, § 1, ¶ 1(a).

17. *Id.* ch. 2, § 2, ¶¶ 3-4.

18. *Id.* ch. 2, § 2, ¶¶ 2-5; *id.* § 3, ¶ 1; *id.* § 7, ¶¶ 1-4; *id.* § 10, ¶¶ 1-2.

19. *Id.* ch. 2, § 7, ¶ 2(l).

20. THE COMMERCIAL COMPANIES LAW, DECREE LAW NO. 21/2021 (Bahr.).

21. *See* THE CODE, ch. 2, § 7, ¶ 2.

22. *Id.* ch. 2, § 10, ¶ 1.

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governance report that are designed to increase transparency with respect to compensation received by board members and senior management.²³

The final noteworthy amendment to the Code was the addition of penalties for violations by reference to the Bahrain Commercial Companies Law.²⁴ These penalties include: (a) ordering the company to cease the activity that is in violation of the Code; (b) suspending the commercial registration of the company for a period of time; (c) imposing an administrative fine; and (d) striking the company off the commercial registry of the Ministry of Industry & Commerce.²⁵ In keeping with the principle of “comply or explain,” there is an argument to be made that penalties should not be imposed for sections of the Code which appear as guidance for best practices.

B. DATA PROTECTION

The Ministry of Justice, Islamic Affairs and Waqf issued a number of decisions in 2022, which supplemented and gave effect to several provisions of Bahrain’s Personal Data Protection Law (PDPL).²⁶ These decisions became effective on March 18, 2022, and covered a range of related matters including, *inter alia*, (1) the transfer of personal data outside the Kingdom of Bahrain;²⁷ (2) specifics related to the technical and organizational measures that guarantee protection of personal data;²⁸ (3) procedures for processing sensitive personal data;²⁹ (4) specifics surrounding the Data Protection Guardians;³⁰ (5) rights of data subjects;³¹ (6) procedures for lodging complaints;³² (7) processing of personal data in the context of criminal proceedings;³³ and (8) public registers of personal data.³⁴ The PDPL now includes the principles of “privacy by design,” data protection impact assessments (DPIAs), a mechanism for data breach notifications, and binding corporate rules for transferring data across borders.³⁵

23. *Id.* appx. 5, ¶ 2.

24. *See id.* ch. 1, § 2, ¶ 9.

25. CONCERNING THE AMENDMENT TO CERTAIN PROVISIONS OF THE COMMERCIAL COMPANIES LAW PROMULGATED BY LEGIS. DECREE NO. 21/2001, LEGIS. DECREE 53/2018, art. 362 bis (Bahr.).

26. *See* Orders cited *infra* notes 27-34.

27. MINISTRY OF JUSTICE, ISLAMIC AFFAIRS AND WAQF, ORDER NO. 42/2022 (2022) (Bahr.).

28. MINISTRY OF JUSTICE, ISLAMIC AFFAIRS AND WAQF, ORDER NO. 43/2022 (2022) (Bahr.).

29. MINISTRY OF JUSTICE, ISLAMIC AFFAIRS AND WAQF, ORDER NO. 45/2022 (2022) (Bahr.).

30. MINISTRY OF JUSTICE, ISLAMIC AFFAIRS AND WAQF, ORDER NO. 46/2022 (2022) (Bahr.).

31. MINISTRY OF JUSTICE, ISLAMIC AFFAIRS AND WAQF, ORDER NO. 48/2022 (2022) (Bahr.).

32. MINISTRY OF JUSTICE, ISLAMIC AFFAIRS AND WAQF, ORDER NO. 49/2022 (2022) (Bahr.).

33. MINISTRY OF JUSTICE, ISLAMIC AFFAIRS AND WAQF, ORDER NO. 50/2022 (2022) (Bahr.).

34. MINISTRY OF JUSTICE, ISLAMIC AFFAIRS AND WAQF, ORDER NO. 51/2022 (2022) (Bahr.).

35. PERSONAL DATA PROTECTION LAW, DECREE LAW NO. 30/2018, §§ 3, 5, arts. 12, 26 (Bahr.).

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IV. Egypt

The human rights situation in Egypt continued to deteriorate throughout 2022, with charges of “spreading false news” deployed against a former Presidential candidate,³⁶ creators of satirical TikTok videos,³⁷ whistleblowers,³⁸ and independent journalists.³⁹ Early 2022 also saw President al-Sisi issue a decree to expropriate private properties across thirty-six Nile islands,⁴⁰ leading to clashes between houseboat residents and security forces.⁴¹

Economically, Egypt struggled with rising inflation and food supply issues.⁴² Attempting to address these financial and monetary crises, the government increased tolls on the Suez Canal⁴³ and announced a three-month ban on the export of wheat.⁴⁴ In addition, the government also began issuing bonds in yuan,⁴⁵ while the Central Bank initiated a flexible exchange rate regime.⁴⁶ In addition, the Prime Minister granted several golden

36. See *Egypt Court Jails Former Presidential Candidate for 15 years*, AL JAZEERA (May 29, 2022), <https://www.aljazeera.com/news/2022/5/29/egypt-court-jails-former-presidential-candidate-for-15-years> [<https://perma.cc/DX2D-LTK8>].

37. See *Egypt Arrests TikTokers Over Satirical Videos on High Food Prices*, AL-MONITOR (May 7, 2022), <https://www.al-monitor.com/originals/2022/05/egypt-arrests-tiktokers-over-satirical-videos-high-food-prices> [<https://perma.cc/3K8J-GWWJ>].

38. See Amr Magdi, *Egypt's Response to Torture: Punish the Victims*, HUM. RTS. WATCH (June 10, 2022), <https://www.hrw.org/news/2022/06/10/egypts-response-torture-punish-victims> [<https://perma.cc/VCC4-2ELB>].

39. See *Egypt's Journalism Crackdown Continues Despite 'National Dialogue'*, AL-MONITOR (Sept. 14, 2022), <https://www.al-monitor.com/originals/2022/09/egypts-journalism-crackdown-continues-despite-national-dialogue> [<https://perma.cc/8TCT-L86M>].

40. See *Sisi Hands Over Nile Islands to Egyptian Military, Raising Controversy*, AL-MONITOR (Feb. 8, 2022), <https://www.al-monitor.com/originals/2022/02/sisi-hands-over-nile-islands-egyptian-military-raising-controversy> [<https://perma.cc/9GLF-SAN4>].

41. See *Cairo Evicts Nile Island Residents for Development Project*, AL-MONITOR (Aug. 27, 2022), <https://www.al-monitor.com/originals/2022/08/cairo-evicts-nile-island-residents-development-project> [<https://perma.cc/57ZK-X4VL>].

42. See Samy Magdy, *Egypt Struggles With Troubled Economy Due to Ukraine War*, PBS NEWS HOUR (Mar. 1, 2023), <https://www.pbs.org/newshour/world/egypt-struggles-with-troubled-economy-due-to-ukraine-war> [<https://perma.cc/PP8E-9F6M>].

43. See Marc Español, *Egypt Turns to Suez Canal to Boost Revenues*, AL-MONITOR (Apr. 3, 2022), <https://www.al-monitor.com/originals/2022/03/egypt-turns-suez-canal-boost-revenues> [<https://perma.cc/9ZB7-3VCG>].

44. See Baher al-Kady, *Egypt Bans Export of Key Staples to Cushion Blow of Ukraine War*, AL-MONITOR (Apr. 14, 2022), <https://www.al-monitor.com/originals/2022/03/egypt-bans-export-key-staples-cushion-blow-ukraine-war> [<https://perma.cc/BBA3-22XF>].

45. See Adam Lucente, *Egypt to Issue Bonds in China's Currency Yuan*, AL-MONITOR (Aug. 29, 2022), <https://www.al-monitor.com/originals/2022/08/egypt-issue-bonds-chinas-currency-yuan> [<https://perma.cc/NY6B-XNDY>].

46. See Adam Lucente, *Egyptian Pound Plummets After Interest Rate Hike, Exchange Rate Change*, AL-MONITOR (Oct. 27, 2022), <https://www.al-monitor.com/originals/2022/10/egyptian-pound-plummets-after-interest-rate-hike-exchange-rate-change> [<https://perma.cc/THS3-P98H>].

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licenses to foreign investors for the first time since the license was established in 2017.⁴⁷

Finally, within the legal structure, there was progress on issues of gender and religious representation. In February, the Egyptian State Council opened applications for assistant delegate positions to women⁴⁸ and the first Christian was appointed to head the Constitutional Court.⁴⁹ In May, the Ministry of Awqaf created the first fatwa councils comprised solely of women.⁵⁰ In October, Dar al-Ifta drafted the first fatwa charter addressing climate change,⁵¹ and President al-Sisi announced the beginning of a national dialogue with opposition groups,⁵² the outcome of which has yet to be seen.

V. Iran

On November 1, 2022, the two-year trial before the People's Tribunal⁵³ on the investigation and assessment of the events in Iran in November 2019 (Aban Tribunal) ended with a final judgment.⁵⁴

On November 15, 2019, peaceful protests against the government erupted, sparked by announced increases in the price of petrol.⁵⁵ Iranian

47. See Ahmed Gomaa, *Egypt Grants New Incentives to Foreign Investors*, AL-MONITOR (May 26, 2022), <https://www.al-monitor.com/originals/2022/05/egypt-grants-new-incentives-foreign-investors> [<https://perma.cc/C6RU-4A9P>].

48. See Hagar Hosny, *Egypt's Top Judiciary Body Opens Door to Women for the First Time*, AL-MONITOR (Feb. 11, 2022), <https://www.al-monitor.com/originals/2022/02/egypts-top-judiciary-body-opens-door-women-first-time> [<https://perma.cc/4JME-ANPH>].

49. See Ibrahim Ayyad, *Historic Decision to Appoint Christian Judge as Head of Egypt's Supreme Constitutional Court*, AL-MONITOR (Feb. 15, 2022), <https://www.al-monitor.com/originals/2022/02/historic-decision-appoint-christian-judge-head-egypts-supreme-constitutional> [<https://perma.cc/2FCT-HG4E>].

50. See Hagar Saeed Mohamed, *Egypt Launches First Women's Fatwa Councils*, AL-MONITOR (June 5, 2022), <https://www.al-monitor.com/originals/2022/05/egypt-launches-first-womens-fatwa-councils> [<https://perma.cc/93QB-J4BT>].

51. See Ayah Aman, *First Climate-Related Fatwa Prohibiting Environmentally Harmful Practices Issued in Egypt*, AL-MONITOR (Oct. 26, 2022), <https://www.al-monitor.com/originals/2022/10/first-climate-related-fatwa-prohibiting-environmentally-harmful-practices-issued> [<https://perma.cc/W8HW-LR44>].

52. See Muhammed Magdy, *Egypt's 'National Dialogue' Set to Finally Start Next Month*, AL-MONITOR (Sept. 14, 2022), <https://www.al-monitor.com/originals/2022/09/egypts-national-dialogue-set-finally-start-next-month> [<https://perma.cc/X9VS-9AV2>].

53. Int'l People's Trib. On Iran's Atrocities (*Aban Tribunal*), Judgment, (Nov. 1, 2022), <https://abantribunal.com/wp-content/uploads/2022/11/Aban-Judgment-Final.pdf> [<https://perma.cc/SF7P-HDYF>].

54. On the judgment in light of the protests in Iran since September 2022, see Narin Nosrati, *The Return of Iran's "Bloody November"? The Aban Tribunal's Judgment on Iran's Violations of International Law in 2019 in View of the Current Situation in Iran*, VÖLKERRECHTSBLOG (Nov. 21, 2022), <https://voelkerrechtsblog.org/the-return-of-irans-bloody-november/> [<https://perma.cc/3XFD-5FFJ>].

55. *Aban Tribunal*, *supra* note 53, ¶ 1, at 7; see also Farnaz Fassihi & Rick Gladstone, *Iran Abruptly Raises Fuel Prices, and Protests Erupt*, N.Y. TIMES (Nov. 15, 2019), <https://>

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security forces intervened, resulting in the deaths of about 1,500 people and the arrest of about 7,000.⁵⁶ The Islamic Republic of Iran and 160 officials are accused of having committed the unlawful acts of murder, enforced disappearances, arbitrary imprisonment, torture, sexual assault, and rape.⁵⁷

Given the absence of legal reconditioning, human rights organizations⁵⁸ and advocates initiated the People's Tribunal. Its main objective is to "uncover the truth and determine who is responsible according to the principles of law, human conscience and justice."⁵⁹

The judgment has no binding effect and Iran did not participate in the proceedings.⁶⁰ Still, the verdict and the more than 600 witness statements provide important documentation and legal assessment of the atrocities.⁶¹

The Panel found that Iran violated a wide range of international obligations, in particular human rights under the International Covenant on Civil and Political Rights (ICCPR),⁶² which Iran has ratified,⁶³ and crimes against humanity, according to the standards of Article 7 of the Rome Statute of the International Criminal Court (ICC).⁶⁴

Iran was found to have violated the right to peaceful protest and expression under Article 21 of the ICCPR and the right to life under Article 6 of the same covenant.⁶⁵ Through arbitrary arrests, the inhumane conditions of detention, and the use of torture, Iran violated the right to liberty and security of the person under Article 9 and the freedom from torture and other inhuman treatment under Article 7 of the ICCPR.⁶⁶ In addition, Iran committed enforced disappearances in violation of Articles

www.nytimes.com/2019/11/15/world/middleeast/iran-gasoline-prices-rations.html?searchResultPosition=1 [<https://perma.cc/T966-6GQS>].

56. *Aban Tribunal*, *supra* note 53, ¶¶ 238, 420, at 69, 116 (citing research by Reuters and Amnesty International); *see also* Reuters Staff, *Special Report: Iran's Leader Ordered Crackdown on Unrest – 'Do whatever it takes to end it'*, REUTERS (Dec. 23, 2019), <https://www.reuters.com/article/us-iran-protests-specialreport-idUSKBN1YR0QR> [<https://perma.cc/NY7H-HZ9R>].

57. *Aban Tribunal*, *supra* note 53, ¶ 467, at 130.

58. Namely, Justice for Iran, Iran Human Rights Centre and Ensemble Contre la Peine de Mort (Together Against Death Penalty). *See* Nosrati, *supra* note 54; *see also* *Statute for Aban Tribunal*, ABAN TRIBUNAL 1 <https://abantribunal.com/wp-content/uploads/2022/02/Aban-Tribunal.-Statute.-Final.12thOctober2021.pdf> [<https://perma.cc/HE9C-MKF5>] (last visited Mar. 13, 2023).

59. *Statute for Aban Tribunal*, ABAN TRIBUNAL 2, <https://abantribunal.com/wp-content/uploads/2022/02/Aban-Tribunal.-Statute.-Final.12thOctober2021.pdf> [<https://perma.cc/HE9C-MKF5>] (last visited Mar. 13, 2023).

60. *See* Nosrati, *supra* note 54.

61. *Id.*

62. *Aban Tribunal*, *supra* note 53, ¶¶ 452-62, at 126-28.

63. *See Ratification Status for Iran (Islamic Republic of)*, U.N. TREATY BODY DATABASE, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=81&Lang=EN [<https://perma.cc/H3AK-JB7J>] (last visited Mar. 14, 2023).

64. *Aban Tribunal*, *supra* note 53, ¶¶ 463-64, at 128-29.

65. *Id.* ¶¶ 452-453, 652, at 126, 172.

66. *Id.* ¶ 455, 457, at 127.

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2(3), 7, and 9 of the ICCPR and violated the right of access to justice under Article 2 of the same covenant.⁶⁷

The Tribunal ultimately found that Iran committed crimes against humanity, as the acts were widespread and systematic to eliminate peaceful protests.⁶⁸ The judgment ends with recommendations⁶⁹ to Iran and the international community. These include intervention by the United Nations Security Council and a reference to the ICC through a resolution under Chapter VII of the U.N. Charter, which is possible under Article 13(b) of the Rome Statute for crimes against humanity, allowing for investigation and assessment by the ICC.⁷⁰

VI. Jordan

Parliament approved thirty changes to the Constitution in January,⁷¹ including one creating a National Security Council and another adding the noun “women” to the definition of Jordanian citizens.⁷² The most controversial amendments were those that gave the king exclusive power to appoint and dismiss the Chief Justice, head of the Sharia Judicial Council, Grand Mufti, Chief of the Royal Court, Minister of the Court, and the king’s advisors.⁷³ Supporters of the amendments stated they would increase the political neutrality of these positions, while detractors saw the amendments as either unimportant or a way of consolidating the king’s power.⁷⁴ Later in January, a parliamentarian was sentenced to twelve years of hard labor for insulting the king.⁷⁵ In February, ten more Jordanians were arrested for criticizing the government, the king, and the new amendments.⁷⁶

In March, Parliament passed a draft law regulating political parties in Jordan, giving courts the right to dissolve parties that affiliated with foreign

67. *Id.* ¶ 456, 127.

68. *Id.* ¶ 552, at 151.

69. *Id.* ¶ 192, at 59.

70. *Id.* at 194, No. 13; *see also* United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9 6, 14-15 (July 17, 1998).

71. *See* Hanna Davis, *Jordan: Critics Denounce Reforms ‘Enlarging King’s Authority’*, AL JAZEERA (Jan. 31, 2022), <https://www.aljazeera.com/news/2022/1/31/jordan-critics-denounce-reforms-enlarging-kings-authority> [<https://perma.cc/F9UG-BY6B>].

72. *Id.*

73. *See* Tareq Al Naimat, *Constitutional Amendments in Jordan*, CARNEGIE ENDOWMENT FOR INT’L PEACE (Mar. 1, 2022), <https://carnegieendowment.org/sada/86538> [<https://perma.cc/TH7Z-FGJ7>].

74. *Id.*

75. *See* *Jordan: Protests After Osama al-Ajarmeh Jailed for Insulting King*, MIDDLE E. EYE (Jan. 27, 2022), <https://www.middleeasteye.net/news/jordan-protests-after-politician-jailed-insulting-king> [<https://perma.cc/8Y72-6QRJ>].

76. *See* Mohammad Ersan, *Arrests in Jordan Spark Fury and Rare Public Rebukes of the King*, MIDDLE E. EYE (Feb. 18, 2022), <https://www.middleeasteye.net/news/jordan-arrests-king-spark-fury-rare-public-rebukes> [<https://perma.cc/8CK4-9NVV>].

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entities and to charge party members who incited armed protests against the government.⁷⁷ Later that month, the Lower House endorsed a new elections law that re-drew electoral districts, created rules for the inclusion of women and youth in party lists, and reduced the minimum age for running for office.⁷⁸

Other laws passed in the spring included one criminalizing suicide attempts⁷⁹ and another increasing the punishment for journalists violating gag orders by covering secret trials.⁸⁰ In June, a law came into effect to lower and cap the imprisonment penalties for debt crimes,⁸¹ while the government unveiled a ten-year strategy for rejuvenating the economy.⁸² In September, the Lower House endorsed a new children's rights law, affirming the right of children to decent living conditions free of poverty.⁸³

VII. Kuwait

On April 17, 2022, the Kuwait Court of Cassation issued a new standardized principle regarding all nationality-related matters.⁸⁴ This new principle stipulates that all nationality-related matters, whether concerning original or acquired nationality-related cases, are completely outside of the Court's judicial jurisdiction⁸⁵ because they are acts of sovereignty and are thus excluded from its purview. Abiding by Article 2 of Law No. 23 of 1990, which emphasizes the Court's lack of jurisdiction over acts of sovereignty,

77. See *Jordan: House of Representatives Approves Draft Law Regulating Operation of Political Parties*, LIBR. CONG. (2022), <https://www.loc.gov/item/global-legal-monitor/2022-03-31/jordan-house-of-representatives-approves-draft-law-regulating-operation-of-political-parties/#:~:text=Article%20Jordan%3A%20House%20of%20Representatives,Regulating%20Operation%20of%20Political%20Parties&text=ON%20March%208%2C%202022%2C%20the,of%20political%20parties%20in%20Jordan> [<https://perma.cc/CN7M-3KQX>].

78. See *Lower House Passes Draft 2022 Elections Law*, JORDAN TIMES (Mar. 29, 2022), <https://www.jordantimes.com/news/local/lower-house-passes-draft-2022-elections-law> [<https://perma.cc/WB8S-FUCD>].

79. See Lara Bellone d'Altavilla, *Biting the Dust: Jordan's Suicide Law Only Adds Insult to Injury*, NEW ARAB (July 12, 2022), <https://www.newarab.com/features/biting-dust-jordans-suicide-law-adds-insult-injury> [<https://perma.cc/HV5E-H6VT>].

80. See Mohammad Ersan, *Jordan: Press Freedom at Stake as Parliament Seeks Jail Terms for Violating Gag Orders*, MIDDLE E. EYE (Apr. 30, 2022), <https://www.middleeasteye.net/news/jordan-press-freedom-stake-amendments-jail-time> [<https://perma.cc/2KMK-FMGT>].

81. See *Amendments to Execution Law Lower Jail Term of Debtors*, JORDAN TIMES (July 2, 2022), <https://www.jordantimes.com/news/local/amendments-execution-law-lower-jail-term-debtors#:~:text=Walid%20Kanakrieh%2C%20secretary%20general%20of,News%20Agency%2C%20Petra%2C%20reported> [<https://perma.cc/Z95F-VMHN>].

82. See *Jordan Lays Out 10 year Plan to Revive Economy*, MIDDLE E. MONITOR (June 7, 2022), <https://www.middleeastmonitor.com/20220607-jordan-lays-out-10-year-plan-to-revive-economy/> [<https://perma.cc/B52G-SCC9>].

83. See *Lower House Endorses 2022 Children's Rights Draft Law*, JORDAN TIMES (Sept. 19, 2022), <https://jordantimes.com/news/local/lower-house-endorses-2022-childrens-rights-draft-law> [<https://perma.cc/VE8P-GSRB>].

84. Public Body Judgment, No. 2/2022, Court of Cassation (Apr. 17, 2022) (Kuwait).

85. *Id.*

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the Cassation Court based its decision on the fact that the nationality issue is related to the state's supreme sovereignty, the safety of its population, and the establishment of security.⁸⁶

The appeal was forwarded by a circuit in the court to the Public Body for standardization of principles in order to avoid divergent principles on the same issue. One of the previous contradicting principles was that in matters of original and acquired nationality, only the latter was considered to be an act of sovereignty.⁸⁷ Now, all nationality-related matters are under the purview of acts of sovereignty and the judiciary is therefore unable to adjudicate on such matters.

VIII. Lebanon

On October 27, 2022, Lebanon and Israel signed an agreement to demarcate their maritime borders after months of negotiations.⁸⁸ The signing ceremony formally settles a years-long maritime boundary dispute involving major oil and gas fields in the Mediterranean.⁸⁹ Before a settlement was reached, Hezbollah pledged to obstruct any Israeli attempts to drill in the Karish underwater gas field close to the long-disputed border.⁹⁰ The deal confirms Israeli sovereignty over the Karish field and grants drilling rights to Lebanon at one disputed gas field, Qanaa, which lies between the two economic zones.⁹¹ Israel has accepted the Lebanese stance on a more profound nine-nautical-mile stretch into the sea while maintaining control over its current security line that extends three nautical miles off the coast.⁹²

IX. Libya

On October 3, 2022, the Government of National Unity of Libya signed a Memorandum of Understanding (MoU) with Turkey that envisages the development of bilateral scientific, technical, technological, legal, administrative, and commercial cooperation in the field of hydrocarbons,

86. *Id.*

87. See Administrative Circuit Judgments, Nos. 687/2007, 702/2007, 71/2010, 647/2016, 659/2016, 694/2016, 1449/2020, 1748/2020, Court of Cassation (Kuwait).

88. See *Israel and Lebanon Sign Maritime Border Deal*, DEUTSCHE WELLE (Oct. 27, 2022), <https://www.dw.com/en/israel-and-lebanon-sign-maritime-border-deal/a-63570640> [<https://perma.cc/2G8A-2AZR>].

89. See Raffi Berg, *Israel-Lebanon Gas Field Deal Staves Off War Threat*, BBC (Oct. 27, 2022), <https://www.bbc.com/news/world-middle-east-63414872> [<https://perma.cc/Y2QM-32UZ>].

90. See *Lebanon's Hezbollah Warns Israel Against Drilling in Disputed Maritime Border Area*, REUTERS (Oct. 22, 2021), <https://www.reuters.com/world/middle-east/lebanons-hezbollah-says-israel-mistaken-act-it-wants-disputed-maritime-border-2021-10-22/> [<https://perma.cc/UFX9-GQ33>].

91. See Berg, *supra* note 89.

92. Isabel Kershner, *Israeli-Lebanese Maritime Deal Marks a Milestone, With Limitations*, N.Y. TIMES (Oct. 27, 2022), <https://www.nytimes.com/2022/10/27/world/middleeast/israeli-lebanon-gas-deal.html> [<https://perma.cc/W977-3C8H>].

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both on land and at sea.⁹³ Egypt and Greece rejected this MoU as illegal and invalid for two reasons.⁹⁴ First, the MoU complements an agreement signed in 2019 between the Government of National Unity and Turkey regarding the maritime borders between both countries which encroaches upon Greece's maritime sovereign rights in the area.⁹⁵ Second, the Government of National Unity does not have any legal authority to sign the MoU.⁹⁶ Those concerns were also raised by the European Union spokesperson who stated that the European Union takes note of the MoU but recalls its position regarding the 2019 agreement as "infring[ing] upon the sovereign rights of third States."⁹⁷ It has been also reported that the Speaker of the Libyan House of Representatives rejected the MoU for not being signed by an authority vested with the power to do so.⁹⁸ Turkey, on the other hand, rejected those allegations as it did in 2019.⁹⁹ It alleged that statements made regarding the MoU violated the sovereignty of Turkey and Libya and disrespected the principle of the equality of States; a cardinal principle of international law.¹⁰⁰ In defense of the MoU, the Turkish Minister of

93. See *Statement of the Spokesperson of the Ministry of Foreign Affairs, Ambassador Tanju Bilgiç, in Response to a Question Regarding the Statements Made by the EU and Greece on the Memorandum of Understanding Between Türkiye and Libya on Cooperation in the Field of Hydrocarbons*, TURK. MINISTRY OF FOREIGN AFF. (Oct. 4, 2022), https://www.mfa.gov.tr/sc_-28_-turkiye-ile-libya-arasinda-hidrokarbonlar-alaninda-isbirligine-iliskin-mutabakat-zapti-konusunda-ab-ve-yunanistan-tarafindan-yayimlanan-aciklamalar-hk-sc.en.mfa [https://perma.cc/N692-UTST].

94. See *Statement by the Ministry of Foreign Affairs Regarding the Signing of a "Memorandum of Understanding" on Hydrocarbons Between the Government of National Unity (GNU) of Libya and Turkey*, HELLENIC REPUBLIC MINISTRY OF FOREIGN AFF. (Oct. 3, 2022), <https://www.mfa.gr/en/current-affairs/statements-speeches/statement-by-the-ministry-of-foreign-affairs-regarding-the-signing-of-memorandum-of-understanding-on-hydrocarbons-between-the-government-of-national-unity-gnu-of-libya-and-turkey.html> [https://perma.cc/WLY6-28HP].

95. *Id.*

96. See Gobran Mohamed, *Egypt, Greece Reject Turkish-Libyan MoU for Oil-gas Exploration*, ARAB NEWS (Oct. 4, 2022), <https://www.arabnews.com/node/2175071/middle-east> [https://perma.cc/F25A-7URS].

97. See *Libya/Turkey: Statement by the Spokesperson on a Reported Agreement on Hydrocarbons*, EUROPEAN UNION EXTERNAL ACTION (Oct. 3, 2022), https://www.eeas.europa.eu/eeas/libyaturkey-statement-spokesperson-reported-agreement-hydrocarbons_en [https://perma.cc/RT8K-G67B].

98. See *Libyan Parliament Rejects Energy Agreement Signed between Turkey and Dabaiba Outgoing Government*, LIBYA UPDATE (Oct. 3, 2022), <https://libyaupdate.com/libyan-parliament-rejects-energy-agreement-signed-between-turkey-and-dabaiba-outgoing-government/> [https://perma.cc/V76H-QGMS].

99. See *Statement of the Spokesperson of the Ministry of the Foreign Affairs, Mr. Hami Aksoy, in Response to a Question Regarding the Statements Made by Greece and Egypt on the Agreement Signed With Libya on the Maritime Jurisdiction Areas*, TURK. MINISTRY OF FOREIGN AFF. (Dec. 1, 2019), https://www.mfa.gov.tr/sc_-73_-yunanistan-ve-misir-aciklamalari-hk-sc.en.mfa [https://perma.cc/FN2A-PLBF].

100. See *Statement of the Spokesperson of the Ministry of Foreign Affairs, Ambassador Tanju Bilgiç, in Response to a Question Regarding the Statements Made by the EU and Greece on the Memorandum of Understanding Between Türkiye and Libya on Cooperation in the Field of Hydrocarbons*, *supra* note 93.

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Foreign Affairs stressed that an MoU is not an agreement and thus does not require the acceptance of Libya's House of Representative.¹⁰¹

X. Morocco and Western Sahara

On February 3, 2022, Morocco was elected for a three-year term to the Peace and Security Council of the African Union at the 40th ordinary session of the African Union Executive Council.¹⁰²

On September 22, 2022, the African Court on Human and Peoples' Rights issued a judgment in the complaint against Benin, Burkina Faso, Côte d'Ivoire, Ghana, Mali, Malawi, and Tunisia for voting in favor of the unconditional re-admission of Morocco to the African Union in 2017.¹⁰³ While this complaint was not directly lodged against Morocco, it certainly has several implications for the Morocco/Western Sahara dispute.

The Court has highlighted that the United Nations and African Union recognize that Western Sahara is a territory whose "decolonisation process is not yet fully complete,"¹⁰⁴ and recalled that the ICJ in its 1975 Advisory Opinion has denied the existence of evidence for "any historical tie of territorial sovereignty between the territory of Western Sahara and Morocco."¹⁰⁵ Therefore, the Court stressed that the continued occupation of Western Sahara by Morocco is incompatible with the right to self-determination of the Sahrawi people as enshrined in Article 20 of the African Charter on Human and Peoples' Rights.¹⁰⁶

The Court has also stated that the African Charter mandates an "international obligation on all State Parties to take positive measures to ensure the realization of the right [to self-determination], including by giving assistance to oppressed peoples in their struggle for freedom and refraining from engaging in actions that are incompatible with the nature or full enjoyment of the right."¹⁰⁷ Nevertheless, the Court did not find that voting in favor of the unconditional admission of Morocco to the African

101. See Levent Kenez, *Turkish FM Admits Maritime Memorandum with Libya not an International Agreement Since UN-backed Government Not Authorized to Sign*, NORDIC MONITOR (Nov. 11, 2022), <https://nordicmonitor.com/2022/11/turkish-fm-admits-maritime-memorandum-with-libya-not-an-international-agreement-un-backed-libyan-government-has-no-such-authority/> [<https://perma.cc/MC2B-LVX2>].

102. See *Morocco Elected to AU Peace and Security Council*, MOROCCO MINISTRY OF FOREIGN AFFAIRS (Feb. 3, 2022), <https://www.diplomatie.ma/en/morocco-elected-au-peace-and-security-council#:~:text=The%20Kingdom%20of%20Morocco%20was,the%20votes%20in%20this%20election> [<https://perma.cc/ZUV2-5HNQ>].

103. Bernard Anbataayela Mornah v. Benin, Burk., Côte d'Ivoire, Ghana, Mali, Malawi, Tanz., Tunis., No. 028/2018, Decision, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 312 (Sept. 22, 2022), <https://www.african-court.org/cpmt/storage/app/uploads/public/632/e0f/3ad/632e0f3ad580e748464681.pdf> [<https://perma.cc/495C-JTXZ>].

104. *Id.* ¶ 301.

105. *Id.* ¶ 302.

106. *Id.* ¶ 303.

107. *Id.* ¶ 305.

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Union constitutes a violation of this obligation.¹⁰⁸ Accordingly, it dismissed the Applicant request for reparations in the form of an order compelling the concerned States to individually and/or collectively call for an emergency session of the Assembly of the African Union.¹⁰⁹

On October 11, Morocco was elected – with an overwhelming majority of 178 votes—a member of the U.N. Human Rights Council for a period of three years (2023-2025).¹¹⁰

On October 27, the U.N. Security Council adopted Resolution 2654 that extends the mandate of the U.N. Mission for the Referendum in Western Sahara (MINURSO) until the October 31, 2023.¹¹¹ This resolution was adopted by 13 States in favor and Russia and Kenya abstaining for concerns with its wording.¹¹² Morocco welcomed the resolution and considered it “a confirmation resolution that reaffirms the framework of the political process, its actors and its purpose.”¹¹³ Algeria, on the other hand, saluted the position of Russia and Kenya and regarded the resolution as “devoid of the will to direct and stimulate efforts intended to preserve the nature of the question of Western Sahara and to scrupulously apply to it the doctrine and the good practices of the United Nations in matters of decolonization.”¹¹⁴

XI. Oman

On February 9, 2022, the Sultanate of Oman issued Royal Decree 6/2022, promulgating the Personal Data Protection Law (PDPL).¹¹⁵ Upon coming into force, the Omani PDPL repealed and replaced Chapter Seven of the Omani Electronic Transactions Law that previously imposed certain duties in connection with the protection of private data in the field of electronic transactions.¹¹⁶ The executive regulation is expected to be issued soon by the Minister of Transport, Communications, and Information Technology to

108. *Id.* ¶ 304-23.

109. *Id.* ¶ 324-38.

110. See *Statement: Morocco Elected to UN Human Rights Council for a Third Term*, MOROCCO MINISTRY OF FOREIGN AFF. (Oct. 11, 2022), <https://www.diplomatie.ma/en/statement-morocco-elected-un-human-rights-council-third-term> [<https://perma.cc/G38V-BTH2>].

111. See Press Release, Security Council, Security Council Extends Mandate of United Nations Mission in Western Sahara, Adopting Resolution 2654 (2022) by 13 Votes in Favour, 2 Abstentions, U.N. Press Release SC/15081 (Oct. 27, 2022).

112. S.C. Res. S/PV.9168 (Oct. 27, 2022).

113. See *Statement: Adoption of the UN Security Council Resolution 2654 on the Moroccan Sahara Issue*, MOROCCO MINISTRY OF FOREIGN AFF. (Oct. 27, 2022), <https://www.diplomatie.ma/en/statement-adoption-un-security-council-resolution-2654-moroccan-sahara-issue> [<https://perma.cc/8Q8S-84CM>].

114. *Western Sahara: Ministry of Foreign Affairs' Statement on Security Council Vote*, EMBASSY ALGERIA (Oct. 30, 2022), <https://www.algerie.uz/PRESSE%20RU.html> [<https://perma.cc/73AD-5NSG>].

115. Royal Decree 6/2022 of 9 February 2022 (Promulgating the Personal Data Protection Law) Official Gazette 1429 (Oman).

116. *Id.* art. 3.

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put in place necessary mechanisms, tools, and procedures in the context of effective execution of the law.

The Omani PDPL gives a one-year grace period for the persons targeted by the provisions of this law to comply.¹¹⁷

Different from most national personal data protection laws, the Sultanate of Oman does not have a specified body for the sake of regulation and implementation of its PDPL; instead, Oman entrusted such powers and missions to the Ministry of Transport, Communications, and Information Technology under Royal Decree 6/2022 in its capacity as the Data Privacy Supervisory Authority pursuant to Article 7 thereof.¹¹⁸

The Omani PDPL adopts a new and uncommon approach in widening the events where controllers are obliged to obtain the explicit and documented consent of data subjects before any processing of their data.¹¹⁹ Such an approach differs from the European Countries' approach under the General Data Protection Regulation, which determines, exhaustively, six events where the consent of data subjects is bedrock.¹²⁰

XII. Palestine

On May 11, 2022, Palestinian-American journalist Shireen Abu Akleh was shot while covering an Israeli military raid in Jenin, West Bank.¹²¹ The death of the world-renowned Al-Jazeera journalist sparked international uproar.¹²²

After multiple independent investigations indicated that she was shot by Israeli forces,¹²³ the Israeli military publicly stated that Abu Akleh was most

117. *Id.* art. 4.

118. *Id.* art. 2.

119. See *New Oman Personal Data Protection Law*, DENTONS (July 6, 2022), <https://www.dentons.com/en/insights/articles/2022/july/6/new-oman-personal-data-protection-law> [<https://perma.cc/825G-S6FR>].

120. Council Regulation 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), 2016 O.J. (L 119) art. 6, at 36 [hereinafter GDPR].

121. Zena Al Tahhan, *Shireen Abu Akleh: Al Jazeera Reporter Killed by Israeli Forces*, AL JAZEERA (May 12, 2022), <https://www.aljazeera.com/news/2022/5/11/shireen-abu-akleh-israeli-forces-kill-al-jazeera-journalist> [<https://perma.cc/JXN9-U9QB>].

122. *Israel/Palestine: Statement by the Spokesperson on the Killing of Al Jazeera Journalist*, EUROPEAN UNION EXTERNAL ACTION (EEAS) (May 11, 2022), https://www.eeas.europa.eu/eeas/israelpalestine-statement-spokesperson-killing-al-jazeera-journalist_en [<https://perma.cc/XB3P-SEAS>]; *UN Officials Call for Probe into Killing of Al Jazeera Journalist Shireen Abu Akleh*, U.N. NEWS (May 11, 2022), <https://news.un.org/en/story/2022/05/1118032> [<https://perma.cc/TNX6-FFGE>].

123. Sarah Cahlan et al., *How Shireen Abu Akleh was Killed*, WASH. POST (June 12, 2022), <https://www.washingtonpost.com/investigations/interactive/2022/shireen-abu-akleh-death/> [<https://perma.cc/5CML-RV57>]; Ravina Shamdasani, *Killing of Journalist in the Occupied Palestinian Territory*, OHCHR (June 24, 2022), <https://www.ohchr.org/en/press-briefing-notes/2022/06/killing-journalist-occupied-palestinian-territory> [<https://perma.cc/252M-QSYD>]; Zeena Saifi et

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likely killed by an Israeli soldier, but said the killing was accidental in that the soldier misidentified her.¹²⁴ Thus, the Israeli military forces decided not to press any charges against the soldier.¹²⁵ The U.S. State Department's investigation came to a similar conclusion.¹²⁶

Weeks after the military's statement, Abu Akleh's family, together with the International Centre of Justice for Palestinians, submitted an official complaint to the International Criminal Court.¹²⁷ The family submitted reports indicating that Abu Akleh was deliberately targeted.¹²⁸ The U.S. Department of Justice opened an investigation into the death of Abu Akleh as well.¹²⁹ The previously unknown investigation was announced by Israeli Minister of Defense Benny Gantz in a tweet, stating that Israel will not cooperate with the American probe and will not enable interventions to internal investigations.¹³⁰

Considering the Treaty on Mutual Legal Assistance signed between Israel and the United States in 1998,¹³¹ Israel's refusal to cooperate could be in violation of the bilateral agreement. Article 1 of the treaty defines the scope of the assistance between the two states to include investigations, persecution, and proceedings in criminal matters.¹³² Article 2 vests the authorized authority to implement provisions of the treaty with the Attorney General.¹³³ Israel may still deny the assistance according to Article 3 of the

al., *'They were Shooting Directly at the Journalists': New Evidence Suggests Shireen Abu Akleh was Killed in Targeted Attack by Israeli Forces*, CNN (May 26, 2022), <https://edition.cnn.com/2022/05/24/middleeast/shireen-abu-akleh-jenin-killing-investigation-cmd-intl/index.html> [https://perma.cc/JW3H-S98N]; Raja Abdulrahim et al., *The Killing of Shireen Abu Akleh: Tracing a Bullet to an Israeli Convoy*, N.Y. TIMES (June 20, 2022), <https://www.nytimes.com/2022/06/20/world/middleeast/palestian-journalist-killing-shireen.html> [https://perma.cc/6Y8G-UP6U].

124. *Final Conclusions of Shireen Abu Akleh Investigation*, IDF (Sept. 5, 2022), <https://www.idf.il/en/articles/2022/final-conclusions-of-shireen-abu-akleh-investigation/> [https://perma.cc/X29K-8TLJ].

125. Hadas Gold & Abeer Salman, *Israeli Military Admits Shireen Abu Akleh Likely Killed by Israeli Fire, but Won't Charge Soldiers*, CNN (Sept. 6, 2022), <https://edition.cnn.com/2022/09/05/middleeast/idf-shireen-abu-akleh-investigation-intl/index.html> [https://perma.cc/BK6Z-W6VZ].

126. Ned Price, *On the Killing of Shireen Abu Akleh*, U.S. DEP'T STATE (July 4, 2022), <https://www.state.gov/on-the-killing-of-shireen-abu-akleh/> [https://perma.cc/XBK2-LPDE].

127. Bethan McKernan, *Shireen Abu Akleh's Family Submits Complaint to ICC*, THE GUARDIAN (Sept. 21, 2022), <https://www.theguardian.com/world/2022/sep/21/shireen-abu-akleh-family-submits-complaint-to-icc> [https://perma.cc/VUV8-7P3D].

128. *Id.*

129. The Associated Press, *Israel Says that DOJ is Investigating Journalist Shireen Abu Akleh's Killing*, NPR (Nov. 14, 2022), <https://www.npr.org/2022/11/14/1136648287/israel-doj-fbi-shireen-abu-akleh> [https://perma.cc/EAB3-QMT6].

130. Sahar Akbarzai et al., *Israel Reveals US Probe into Shireen Abu Akleh's Death but Says it 'Will Not Cooperate'*, CNN (Nov. 15, 2022), <https://edition.cnn.com/2022/11/15/middleeast/shireen-abu-akleh-israel-us-investigation-intl/index.html> [https://perma.cc/C6B8-WSEM].

131. Treaty on Mutual Legal Assistance in Criminal Matters, Isr.-U.S., Jan. 26, 1998, S. TREATY DOC. NO. 105-40 (1998).

132. *Id.* art. 1.

133. *Id.* art. 2.

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treaty if the requests pursuant to the treaty may harm its sovereignty, security, or other essential interests.¹³⁴ Israel may also deny its assistance if the request relates to a political offense or an offense under military law.¹³⁵

XIII. Qatar

The Qatar Financial Centre (QFC) recently issued its amended Data Protection Regulations and Data Privacy Rules (New DPR) on December 21, 2021, which entered into force on June 19, 2022.¹³⁶

QFC regulators were careful to create a regulation that has striking similarities with the standards of the General Data Protection Regulations 2016/679 (GDPR),¹³⁷ the “gold standard” in the data privacy world, which will ultimately ensure more diligence by the QFC’s companies in their data compliance practices.

The New DPR focuses on ensuring that companies, as data controllers, manage personal data ethically, lawfully, and transparently, while also empowering the data subjects with sufficient enforceable rights over their data.

Some of the most important amendments introduced by the New DPR include the establishment of eight main principles on the processing of personal data, which are strikingly similar to those of the GDPR, and the establishment of a Data Protection Office as the QFC’s supervisory authority along with appointing a Data Protection Commissioner at the QFC.¹³⁸ Additionally, the amendments adopted wider definitions and conditions on data processing and data subjects’ consent, like the right to access, the right to object, and the right to restrict.¹³⁹ Moreover, should there be a high risk due to processing data, the new amendments require controllers to apply a data processing impact assessment before such processing.¹⁴⁰ On a different note, the new DPR penalties contain financial penalties of up to \$1.5 million.¹⁴¹ There is also a risk of reputational damage to businesses that fail to comply, so companies are encouraged to review their privacy policies in light of the new DPR.

134. *Id.* art. 3.

135. *Id.*

136. QFC Data Protection Regulations of 21 Dec. 2021 (Qatar), https://qfcra-en.thomsonreuters.com/sites/default/files/net_file_store/QFCRA_13240_VER1.pdf [https://perma.cc/7RSD-YDAD] [hereinafter QFC DPRs].

137. See generally GDPR, *supra* note 120.

138. QFC DPRs, *supra* note 136, art. 32, at 27.

139. *Id.* arts. 16-22, at 16-19.

140. *Id.* art. 27(1), at 23.

141. *Id.* art. 36(3), at 32.

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XIV. Saudi Arabia

A. HUMAN RIGHTS

Saudi Arabia continues to punish citizens who dissent on social media. In August, a Saudi doctoral student was sentenced to thirty-four years in prison because of tweets she shared while in her Ph.D. program in the UK.¹⁴² In September, another woman was charged with “spreading lies through tweets” and was sentenced to forty-five years in prison.¹⁴³ In October, an elderly U.S.-Saudi citizen was sentenced to sixteen years for tweets that he had posted while living in Florida.¹⁴⁴

Saudi Arabia also continues to apply the death penalty. In March, eighty-one men were executed on a variety of charges.¹⁴⁵ In the spring, despite a February statement by the Saudi Human Rights Commission that the country had halted executions of individuals who committed crimes when they were minors, criminal courts sentenced three men to death for crimes they committed as children.¹⁴⁶ Similarly, despite the 2021 announcement of a moratorium on the death penalty for drug offenses, two Pakistani nationals were executed in November for smuggling heroin.¹⁴⁷

Economically, Saudi Arabia has expanded its global reach, entering deals with Chinese oil companies¹⁴⁸ and becoming the largest investor in Jordan.¹⁴⁹ Saudi Arabia has also published new laws opening up the financial

142. See *Saudi Arabia: Woman Sentenced to 34 Years for Tweets*, HUM. RTS. WATCH (Aug. 19, 2022), <https://www.hrw.org/news/2022/08/19/saudi-arabia-woman-sentenced-34-years-tweets> [https://perma.cc/7STV-EDJL].

143. See Stephanie Kirchgaessner, *Revealed: Jailed Saudi Woman was Convicted of ‘Spreading Lies Through Tweets’*, THE GUARDIAN (Sept. 6, 2022), <https://www.theguardian.com/world/2022/sep/06/revealed-jailed-saudi-woman-was-convicted-of-spreading-lies-through-tweets> [https://perma.cc/K38Y-HWD6].

144. See Stephanie Kirchgaessner, *Saudi Arabia Sentences US Citizen to 16 Years Over Tweets Critical of Regime*, THE GUARDIAN (Oct. 22, 2022), <https://www.theguardian.com/world/2022/oct/18/saudi-arabia-us-citizen-prison-critical-tweets-regime> [https://perma.cc/GQB5-LV6C].

145. See *Saudi Arabia: Mass Execution of 81 Men*, HUM. RTS. WATCH (Mar. 15, 2022), <https://www.hrw.org/news/2022/03/15/saudi-arabia-mass-execution-81-men> [https://perma.cc/VZ68-VWNH].

146. See *Saudi Arabia: Young Men Face Imminent Execution Despite Assurances on Re-Sentencing Juveniles to Prison Terms*, AMNESTY INT’L (Oct. 10, 2022), <https://www.amnesty.org/en/latest/news/2022/10/saudi-arabia-young-men-face-imminent-execution-despite-assurances-on-re-sentencing-juveniles-to-prison-terms/> [https://perma.cc/G6T9-NBTV].

147. See *Saudi Announces First Executions for Drug Crimes Since 2020*, NEW ARAB (Nov. 11, 2022), <https://english.alaraby.co.uk/news/saudi-announces-first-executions-drug-crimes-2020> [https://perma.cc/8VW4-JCH6].

148. See *Saudi Arabia-China Relations Strengthen with Aramco-Sinopec Deal*, AL-MONITOR (Aug. 4, 2022), <https://www.al-monitor.com/originals/2022/08/saudi-arabia-china-relations-strengthen-aramco-sinopec-deal> [https://perma.cc/3XC2-FESJ].

149. See Adam Lucente, *Saudi Arabia, Jordan Strengthen Ties with Energy, Mining Deals*, AL-MONITOR (June 22, 2022), <https://www.al-monitor.com/originals/2022/06/saudi-arabia-jordan-strengthen-ties-energy-mining-deals> [https://perma.cc/8G6U-9MFF].

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technology and banking sectors.¹⁵⁰ In June, Saudi authorities announced the launch of the FinTech Strategy Implementation Plan, and in August, the Saudi Central Bank updated the legal framework for its Regulatory Sandbox.¹⁵¹ In November, the Saudi Central Bank announced a new open banking framework and open banking lab.¹⁵²

Finally, in March, the king codified family law, creating a minimum age requirement for marriage, allowing women more choice over their husbands, formalizing women's property rights in marriage, and expanding women's child custody rights.¹⁵³ In October, the government lifted the requirement that women making a pilgrimage to Mecca need a male guardian.¹⁵⁴

B. DATA PROTECTION

As of March 23, 2022, the Saudi Personal Data Protection Law (PDPL), which was issued earlier under Royal Decree (M/19) on September 16, 2021, entered into effect.¹⁵⁵ For the first two years, the law will be enforced under the Saudi Data and Artificial Intelligence Authority; afterwards, a transition to the National Data Management Office will be considered.¹⁵⁶ With the PDPL, Saudi aimed at enacting a standalone law for the regulation and protection of data privacy, especially since the business environment in the country has been largely and rapidly growing.

In the course of the comprehensive inclusion of the persons targeted by the PDPL, Saudi promulgated a draft Executive Regulation for public consultation.¹⁵⁷ Following discussions with firms and businesses operating in Saudi Arabia, the country granted a one-year grace period for firms and businesses to comply, meaning that the Saudi Executive Regulation will apply as of March 17, 2023. On November 20, 2022, Saudi Arabia

150. *Id.*

151. See Hassan Jivraj, *Saudi Arabia Opens up to New Fintech Players*, AL-MONITOR (Oct. 7, 2022), <https://www.al-monitor.com/originals/2022/10/saudi-arabia-opens-new-fintech-players> [<https://perma.cc/P98D-G6KS>].

152. See *Saudi Arabia Establishes Open Banking Framework*, AL-MONITOR (Nov. 3, 2022), <https://www.al-monitor.com/originals/2022/11/saudi-arabia-establishes-open-banking-framework> [<https://perma.cc/3VWE-D89S>].

153. See *Saudi Arabia: New Law Regulating Family Matters Promulgated*, LIBR. CONG. (July 17, 2022), <https://www.loc.gov/item/global-legal-monitor/2022-07-17/saudi-arabia-new-law-regulating-family-matters-promulgated/> [<https://perma.cc/8PLK-DEZK>].

154. See Areeb Ullah, *Saudi Arabia: Women No Longer Required to Bring Male Guardian to Hajj and Umrah*, MIDDLE EAST EYE (Oct. 11, 2022), <https://www.middleeasteye.net/news/saudi-arabia-hajj-umrah-women-no-male-guardian-required> [<https://perma.cc/7ZFR-PL4M>].

155. See *Saudi Arabia's PDPL*, DATAGUIDANCE, <https://www.dataguidance.com/jurisdiction/saudi-arabia> [<https://perma.cc/64KS-ZRDV>].

156. *See id.*

157. *Id.*

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promulgated an amended version of the draft Executive Regulation for public consultation.¹⁵⁸

The new law is similar to the General Data Protection Regulation in relation to defining personal data and regulating how personal data can be used, processed, and retained, but it differs in notable ways. The limitations on transferring data across borders are a key difference. The PDPL provides for restrictive limitations on cross-border data transfer outside of the country with only specific exceptions from this rule.¹⁵⁹

As to penalties for violations of the PDPL, breaches can be punished by imprisonment for up to two years along with fines that may reach 5 million riyals (approximately USD \$1.3 million).¹⁶⁰

XV. Syria

On January 13, 2022, the world's first torture trial for the Assad regime ended.¹⁶¹ A German court sentenced a Syrian national to life imprisonment for, *inter alia*, crimes against humanity, torture, and twenty-seven counts of first-degree murder.¹⁶² A Syrian doctor who allegedly tortured people for Military Intelligence was also charged. His trial began on January 19, 2022, at the Frankfurt Higher Regional Court.¹⁶³

The basis for the proceedings is the international law principle of universal jurisdiction. Certain crimes, namely genocide, crimes against humanity, and war crimes, can be prosecuted without domestic connection.¹⁶⁴ The proceedings officially documented crimes in Syria and can have a precedential effect in other states.¹⁶⁵

158. *Id.*; see also *Personal Data Protection Law-Suggested Amendments*, KINGDOM OF SAUDI ARABIA PUBLIC CONSULTATION PLATFORM, <https://istitlaa.ncc.gov.sa/ar/Transportation/NDMO/PDPL22/Pages/default.aspx> [<https://perma.cc/V58N-TZM3>].

159. See *Saudi Arabia's New Personal Data Protection Law – Key Action Points*, SQUIRE PATTON BOGGS (Dec. 2021), <https://www.squirepattonboggs.com/en/insights/publications/2021/12/saudi-arabias-new-personal-data-protection-law-key-action-points> [<https://perma.cc/A5CK-CEXS>].

160. *Id.*

161. *The Trial of Anwar Raslan and Eyad Al-Gharib*, SYRIA JUST. AND ACCOUNTABILITY CTR. (SJAC), <https://syriaaccountability.org/the-trial-of-anwar-raslan-and-eyad-al-gharib/> [<https://perma.cc/4ZAE-LJAQ>].

162. *Id.*

163. An English-language documentation of the proceedings from the Syria Justice and Accountability Center is available at: *The Trial of Alaa M.*, SYRIA JUST. AND ACCOUNTABILITY CTR. (SJAC), <https://syriaaccountability.org/alaa-m-trial-monitoring/> [<https://perma.cc/DM7F-2TED>] (last visited Nov. 24, 2022).

164. Ilias Bantekas, *Criminal Jurisdiction of States under International Law*, in MAX PLANCK ENCYC. OF PUB. INT'L L. (2011), ¶¶ 22-25.

165. See Susann Aboueldahab & Fin-Jasper Langmack, *The End of the Al-Khatib Trial: A Historic Verdict and a Trial of Missed Opportunities*, VÖLKERRECHTSBLOG (Feb. 7, 2022), <https://voelkerrechtsblog.org/the-end-of-the-al-khatib-trial/> [<https://perma.cc/2RNC-4Q53>].

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XVI. Tunisia

The presidential decree relating to combating illegal speculation was published on March 20, 2022, in the Official Journal of the Tunisian Republic.¹⁶⁶ The decree aims to regulate the conduct of inspection of shops and food depots against speculators and monopolists.

In the decree, speculation is defined as being “any operation of storage or concealment of goods and merchandise with the aim of creating a shortage or disruption of the market, any increase or reduction in prices carried out deliberately directly or indirectly or through an intermediary, by the use of fraudulent and/or electronic means.”¹⁶⁷

According to the provisions of this decree, an individual is guilty of speculation where he or she, by any means whatsoever, commits acts of speculation or disseminates false information with the intention of inducing the consumer to boycott products, disrupt the supply cycle, or to cause an unjustified price increase.¹⁶⁸

Under the terms of the decree, persons guilty of speculation may incur prison sentences of ten years and a fine of 100,000 Tunisian dinars (about USD \$31,000).¹⁶⁹ If the object of speculation is a subsidized or pharmaceutical product, the penalty increases to twenty years in prison with a fine of 200,000 Tunisian dinars (about USD \$60,000).¹⁷⁰ Moreover, speculation is punishable by thirty years in prison and a fine of 500,000 Tunisian dinars (about USD \$155,000), if committed in times of disaster, pandemic, urgent health crisis, or state of exception.¹⁷¹ Life imprisonment may be pronounced if the crime is committed by a criminal association or a criminal group.¹⁷²

The new law criminalizes the deliberate dissemination of false or inaccurate news or information which causes consumers not to buy products or disrupts the supply of the market, thus causing a rise in prices. This decree enables unfair and abusive prosecutions against acts aimed at influencing the markets by fraudulent means.

XVII. Turkey

On October 13, 2022, Turkey adopted a new censorship law imposing criminal sentences for those who spread fake news or disinformation online.¹⁷³ This new law tightens government control over news sites and

166. Decree-Law No. 2022-14 of 20 March 2022 (on the fight against illegal speculation) (Tunis).

167. *Id.* art. 4.

168. *Id.* art. 3.

169. *Id.* art. 17.

170. *Id.*

171. *Id.*

172. *Id.*

173. Turkey: *Dangerous, Dystopian New Legal Amendments*, HUM. RTS. WATCH (Oct. 14, 2022), <https://www.hrw.org/news/2022/10/14/turkey-dangerous-dystopian-new-legal-amendments#:~>

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gives the government broad authority to compel social media companies to remove online content and turn over private user data, or face having their bandwidth reduced if they refuse.¹⁷⁴

One month later, following a deadly bombing in Istanbul on November 13,¹⁷⁵ this new law came into execution when the Turkish government exercised its newly expanded authority by shutting down all social media platforms until the next day.¹⁷⁶

:text=(Istanbul)%20%E2%80%93%20Turkey's%20parliament%20passed,Human%20Rights%20Watch%20said%20today [https://perma.cc/T449-F6ZT].

174. *Id.*

175. See Dorian Jones, *Political Repercussions Grow Over Turkey Bombing*, VOA NEWS (Nov. 16, 2022), <https://www.voanews.com/a/political-repercussions-grow-over-turkey-bombing/6836887.html> [https://perma.cc/W2M6-E8YX].

176. Beril Akman et al., *Turkey Tested New Censorship Powers After Istanbul Blast*, BLOOMBERG (Nov. 18, 2022), <https://www.bloomberg.com/news/articles/2022-11-18/turkey-tested-new-censorship-powers-after-istanbul-blast?leadSource=Uverify%20wall> [https://perma.cc/RME6-TU4S].

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Russia

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This article discusses significant legal developments in Russian Law from 2022.

I. Developments in Merger Control, Foreign Direct Investment, and Counter-Sanctions Reviews

A. MERGER CONTROL REVIEW

Merger control in the Russian Federation (RF) is governed by Federal Law No. 135-FZ.¹ The Federal Antimonopoly Service (FAS) is the executive agency responsible for merger control review and enforcement of the Competition Law.² The Merger Guidelines,³ approved by the FAS in June 2021, were designed to provide a roadmap for merger control review. They have operated well since they took effect and have provided both the FAS and market players with comprehensive regulation of merger cases.

The Competition Law has extraterritorial effect and is applicable to domestic and foreign M&A transactions that have a Russian nexus, for example, those that result in the acquisition of shares, membership interests, assets, or controlling rights of Russian entities.⁴ In practice, one of the most common trigger events for review of foreign-to-foreign entity transactions is the acquisition of “control,” which is defined by the Competition Law as the right to determine business activity or direct the functions of an entity’s

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1. See generally Federal Law of the Russian Federation on Protection of Competition. SOBRAINE ZAKONODATEL'STVA ROSSIYSKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2006, No. 135-FZ, https://www.wto.org/english/thewto_e/acc_e/rus_e/WTACCRUS58_LEG_59.pdf [hereinafter Competition Law].

2. *Id.* art. 2(2).

3. Antimonopoly Service of the Russian Federation, Guidelines No. 19 on the Specifics of the Implementation of State Antimonopoly Control Over Economic Concentration (2021), <http://en.fas.gov.ru/documents/documentdetails.html?id=15367> [<https://perma.cc/HLP8-KRKM>] (detailing the specifics of the implementation of state antimonopoly control over economic concentration) [hereinafter Merger Guidelines]; see also *FAS Russia Guidelines on Merger Control and Anti-Monopoly Compliance – Part 1*, DEBEVOISE & PLIMPTON 1 (Sept. 27, 2021), <https://www.debevoise.com/-/media/files/insights/publications/2021/09/20210927-fas-russia-guidelines-part-1-eng.pdf?rev=Beef418974ae4334bb0c6fe5c1e5227b> [<https://perma.cc/ZD99-LTUP>] [hereinafter DEBEVOISE & PLIMPTON].

4. Competition Law, *supra* note 1, arts. 3(2), 26(1), 28.

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executive body, usually associated with the acquisition of more than fifty percent of voting shares.⁵ The issue of control usually arises when a foreign acquisition or merger target has a Russian subsidiary or a foreign subsidiary with a high Russian turnover.⁶

According to the Merger Guidelines, the following may be deemed “controlling rights” for merger review purposes:

- (1) The right or means to determine an entity’s decisions;
- (2) The right to give binding instructions or otherwise exercise significant influence over the entity’s (and/or its group’s) business decisions through, *inter alia*, blocking management decisions; and
- (3) Veto rights (also known as negative control).⁷

The FAS makes the final decision on whether the rights acquired as a result of an M&A deal are “controlling rights.”⁸

1. *Recent Amendments to Monetary Threshold for Review*

In February 2022, the Federal Assembly of the RF, that is, the Parliament, raised the minimum threshold for merger review from 400 million rubles to 800 million rubles.⁹ Thus, companies are generally exempted from antimonopoly review if their total assets are less than 800 million rubles (approximately \$10.34 million). Conversely, Article 28 of the Competition Law regarding acquisition of shares, assets, and controlling rights over business entities provides that such transactions are subject to merger control review if *two* criteria are met:

- (1) The combined worldwide value of assets of the acquirer (and its group) and the target (and its group), according to its latest balance sheet (or the consolidated balance sheet of its group), exceeds seven billion rubles (approximately \$90.5 million), or their combined worldwide revenue for the previous calendar year exceeds ten billion rubles (approximately \$129.3 million); *and*
- (2) The worldwide value of assets of the target group, according to the latest account, exceeds 800 million rubles (approximately \$10.34 million).¹⁰

According to 2022 amendments to the Competition Law, mergers and acquisitions may be executed without prior approval:

5. *Id.* arts. 28(1) cl. 8–9, 29(1) cl. 8.

6. See generally Igor Artemyev, *Federal Anti-Monopoly Service*, RUSSIAN GOV’T, <http://government.ru/en/department/89/events/> [<https://perma.cc/KWX9-NGTU>].

7. Merger Guidelines, *supra* note 3, at 1.2(5); see also DEBEVOISE & PLIMPTON, *supra* note 3.

8. See generally Ksenia Tyunik, *Merger Control in the Russian Federation Overview*, THOMSON REUTERS (Feb. 1, 2022), [https://uk.practicallaw.thomsonreuters.com/w-0231815?transitionType=Default&contextData=\(Sc.Default\)&firstpage=true#co_anchor_a902556](https://uk.practicallaw.thomsonreuters.com/w-0231815?transitionType=Default&contextData=(Sc.Default)&firstpage=true#co_anchor_a902556) [<https://perma.cc/2MHK-TY7M>].

9. *Developments in the Russian Merger Control Rules: Liberalization of Thresholds and Approval of the FAS’ Merger Guidelines*, ALRUD (July 21, 2021), <https://www.alrud.com/publications/60f83e431aa4545e943d889d/> [<https://perma.cc/R82R-KMYZ>].

10. Competition Law, *supra* note 1, art. 28.

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- (1) For transactions involving financial institutions, which fall under Article 29 of the Competition Law,¹¹ regardless of the entity's asset value; and/or
- (2) For transactions involving any other type of entity, which fall under Article 28 of the Competition Law, only if the worldwide value of the target group's assets is more than 800 million rubles but less than two billion rubles.¹²

If an acquirer chooses not to seek prior FAS approval under the above circumstances, it must submit a post-closing notification to the FAS within thirty days.¹³ While this amendment applied only to the year 2022, further proposed amendments would extend the rule's applicability until the end of 2023.¹⁴

2. *Latest Trends in Merger Control Review*

The original waiting period of thirty calendar days for FAS review of M&A transactions is, in reality, now more frequently around ninety days, although smaller or less complex deals in non-strategic industries may take only thirty days.¹⁵

The Fifth Antimonopoly Package bill¹⁶ was passed by the State Duma in late 2022 and, if enacted, will provide several grounds for lengthening the waiting period, such as seeking an expert opinion either at the FAS's discretion or at the request of the acquiring party.¹⁷ In addition, the Russian

11. Financial institutions include credit, insurance, microfinance, and other institutions rendering financial services. The thresholds for these institutions are established by the Russian Government on its own or in cooperation with the Central Bank of Russia. *See id.*, arts. 3, 4 cl. 6.

12. *See* Federal Law of the Russian Federation on Amendments to Certain Legislative Acts of the Russian Federation, SOBRANIE ZAKONODATEL'STVA ROSSISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2022, No. 46-FZ, art. 15.1 (amended by Federal Law No. 286-FZ of 14 July 2022).

13. *See generally* Competition Law, *supra* note 1.

14. On Amendments to Certain Legislative Acts of the Russian Federation, Bill No. 222860-8, art. 1, <https://sozd.duma.gov.ru/bill/222860-8>.

15. According to Article 33, part 1 of the Competition Law, the FAS must issue a decision within thirty calendar days, but, if a transaction requires additional analysis due to its complexity or the necessity to obtain additional information, or if a transaction could lead to the restriction of competition, the FAS may extend the waiting period for an additional two months. *See* Competition Law, *supra* note 1, arts. 33(1), 33(2) cl. 1–2.

16. On Amendments to the Federal Law on Protection of Competition, Bill No. 160280-8, <https://sozd.duma.gov.ru/bill/160280-8> (improving antimonopoly regulation of digital markets). The bill was approved by the Duma on November 10, 2022.

17. *See id.* art. 1 (proposing to implement Article 9.2 of the Competition Law and supplement Article 33 with a new part 3.2.). The new law is expected to take effect on March 1, 2023, but, at the time of this writing, had not yet been fully adopted. *Russian State Duma Passed in the First Reading the Fifth Antimonopoly Package*, BRICS COMPETITION L. & POL'Y CTR. (Nov. 11, 2022), <http://bricscompetition.org/news/russian-state-duma-passed-in-the-first-reading-the-fifth-antimonopoly-package>. *See also* Elena Sokolovskaya, *The Fifth Antimonopoly Package of Amendments Has Been Adopted in the First Reading*, PEPELIAEV GRP. (Nov. 21, 2022), <https://>

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Government may extend the waiting period at its own discretion if the subject transaction involves and/or has an impact on a foreign market.¹⁸

A current trend is the FAS's increasing attention to e-commerce and online content, including online platforms, high-tech businesses, heavy industry, and socially important industries. In 2021 and 2022, the FAS cleared a number of such international transactions, including Groupe BRIAND/Lindab Group,¹⁹ ABG Reebok LLC/Adidas,²⁰ Bouygues/ENGIE,²¹ and Sibur/TAIF,²² as well as several sales by global companies of their Russian businesses,²³ including the sale by Shell Oil of 99.99% of the shares in LLC "Shell Neft" to the Russian oil giant Lukoil,²⁴ PepsiCo's sale of Wimm-Bill-Dann Drinks to Multipro,²⁵ the sale of the McDonald's

www.pgplaw.com/analytics-and-brochures/alerts/v-pervom-chtenii-prinyat-pyatyy-antimonopolnyy-paket/.

18. *Id.* (proposing amendments to art. 33, pt. 2, cl. 3).

19. See Press Release, Lindab Group, Lindab's Divestment of Astron Building Systems Has Received Anti-Trust Approval (Dec. 3, 2021), <https://www.lindabgroup.com/media/news-media/press-releases/press-release/70F7C53E096867D9> [<https://perma.cc/AR3J-NA8F>].

20. In November 2021, the FAS cleared the acquisition by ABG Reebok LLC of one hundred percent of the shares in Reebok International Limited owned by Adidas. See *Authentic Brands Group Inc. Completed the Acquisition of Reebok International Ltd. From Adidas A.G.*, MKT. SCREENER (Mar. 1, 2022), <https://www.marketscreener.com/quote/stock/ADIDAS-AG-6714534/news/Authentic-Brands-Group-Inc-completed-the-acquisition-of-Reebok-International-Ltd-from-adidas-AG-39653575/> [<https://perma.cc/Z2MC-XDUX>].

21. Decision of the FAS No. N HI/12638/22 (Feb. 18, 2022); see also Press Release, ENGIE, Completion of the Sale of EQUANS: A Major Milestone in the Execution of ENGIE'S Strategic Plan (Oct. 4, 2022), <https://www.engie.com/en/journalists/press-releases/engie-enters-into-exclusive-negotiations-with-bouygues-for-the-sale-of-equans-for-a-valuation-of-7-1-billion> [<https://perma.cc/RPG3-N4CF>].

22. The FAS cleared the acquisition by Sibur of one hundred percent of the shares in TAIF. *Management of Regulation of Fuel Energy Complex and Chemical Industry*, FED. ANTIMONOPOLY SERV., <https://br.fas.gov.ru/to/upravlenie-regulirovaniya-toplivno-energeticheskogo-kompleksa-i-himicheskoy-promyshlennosti/f1e81108-e102-418c-9335-b0357924fa5c/> (last visited Mar. 25, 2023); see also *Antitrust Advisory Advised PJSC SIBUR Holding and JSC TAIF on Clearance of Their Merger by the FAS of Russia*, ANTITRUST ADVISORY (July 21, 2021), <https://at-advisory.com/en/antitrust-advisory-advised-pjsc-sibur-holding-and-jsc-taif-on-clearance-of-their-merger-by-the-fas-of-russia/> [<https://perma.cc/AR9H-X4VW>].

23. According to FAS statistics, in 2021, a total of 1,255 notifications (1,172 pre-closing notifications and eighty-three post-closing notifications) were considered by the FAS, ten percent more than in 2020 (1,019 and 133, respectively). See FED. ANTIMONOPOLY SERV., REPORT ON THE STATE OF COMPETITION FOR 2021 186 (2022), <https://fas.gov.ru/documents/68843> [hereinafter 2021 Competition Report]; see also Elena Kazak et al., *The Merger Control Review: Russia*, L. REVS. (Aug. 5, 2022), <https://thelawreviews.co.uk/title/the-merger-control-review/russia> [<https://perma.cc/QAW4-XQAA>].

24. See FED. ANTIMONOPOLY SERV., <https://fas.gov.ru/news/31950> (last visited Mar. 25, 2023); see also Press Release, Shell Global, Shell Signs Agreement to Sell Retail and Lubricants Businesses in Russia (May 12, 2022), <https://www.shell.com/media/news-and-media-releases/2022/shell-signs-agreement-to-sell-retail-and-lubricants-businesses-in-russia.html> [<https://perma.cc/7TD5-6F2G>].

25. See *Control of Agro Industrial Complex*, FED. ANTIMONOPOLY SERV., <https://br.fas.gov.ru/ca/upravlenie-kontrolya-agropromyshlennogo-kompleksa/fb3907fb-8c0c-44d8-8b5e->

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restaurant business in Russia to Club Hotel,²⁶ and the sale of OBI to GISK MAX.²⁷

B. FOREIGN DIRECT INVESTMENT REVIEW

The FAS is also the authorized agency for foreign direct investment (FDI) control, handling the associated documentation and providing a preliminary analysis of M&A deals involving FDI.²⁸ If a transaction is subject to both a merger control filing and an FDI filing, then the FDI clearance must be obtained first.²⁹ Thus, M&A parties must assess preliminarily whether FDI review is necessary for their transaction.

As described below, direct or indirect acquisition by a foreign investor of a Russian entity may require approval of the Government Commission on Monitoring Foreign Investment,³⁰ which consists of top government officials and is chaired by the Russian Prime Minister.³¹

85f225685ba1/ (last visited Mar. 25, 2023); see also *Russia's FAS Permits Multipro TC to Acquire Wimm-Bill-Dann Beverages From PepsiCo*, INTERFAX (May 4, 2022), <https://interfax.com/newsroom/top-stories/78874/> [<https://perma.cc/4VWJ-RWYM>].

26. See FED. ANTIMONOPOLY SERV., <https://fas.gov.ru/news/31972> (last visited Mar. 25, 2023); see also *FAS Approves MAX Group's Petition to Purchase McDonald's Business in Russia*, AK&M INFO. AGENCY (June 3, 2022), <https://www.akm.ru/eng/news/fas-approved-the-club-hotel-company-s-petition-to-purchase-mcdonald-s-business-in-russia/> [<https://perma.cc/XR43-L2VG>].

27. In July 2022, the FAS cleared the acquisition by LLC “GISK MAX” of several of OBI’s companies incorporated in Russia. The announcement was made on the telegram channel of the FAS. See *FAS Approves MAX Group's Petitions to Buy Russian Business OBI*, AK&M INFO. AGENCY (July 15, 2022), <https://www.akm.ru/eng/news/fas-approves-max-group-s-petitions-to-buy-russian-business-obi/> [<https://perma.cc/JSY2-QG6M>].

28. The FAS is authorized to control foreign investments in Russia in strategic sectors by Federal Law No. 57-FZ of 29 April 2008 on Procedures for Foreign Investments in Companies Having Strategic Importance for National Defense and State Security, which empowers the FAS to revise a party’s filing before transferring it to the Government Commission. See Federal Law of the Russian Federation on Foreign Investment in the Russian Federation, SOBRAINE ZAKONODATEL’STVA ROSSIJSKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 1999, No. 160-FZ, www.wto.org/english/thewto_e/acc_e/rus_e/WTACCRUS58_LEG_18.pdf [<https://perma.cc/F5PF-7KSK>] [hereinafter Strategic Investments Law]; *Foreign Investments in the Russian Federation: Federal Law of 09.07.1999 N 160-FZ*, VETROV & PARTNERS L. FIRM, https://vitvet.com/en/laws/investments/federal_law_on_foreign_investments_in_the_russian_federation/ [<https://perma.cc/33T9-58KH>].

29. The FAS is required to extend the merger control filing until a decision is granted in accordance with the Strategic Investments Law. See Competition Law, *supra* note 1, art. 33(2), cl. 3.1.

30. See *Government Commission on Monitoring Foreign Investment*, RUSSIAN GOV’T, <http://government.ru/en/department/8/about/> [<https://perma.cc/QH26-6BBG>] [hereinafter the Government Commission].

31. See Order of the Government of the Russian Federation No. 640-p (Mar. 16, 2022); see also *Government Approves Rules for Transactions With Foreign Companies From Unfriendly Countries and Territories*, RUSSIAN GOV’T, <http://government.ru/en/docs/44746/> [<https://perma.cc/CPM3-JQLY>].

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In 2022, the FAS continued tightening FDI deal review and enforcement, as summarized below.

1. *Strategic Investments Law*

Russia's Strategic Investments Law requires³² a pre-closing clearance by the Government Commission in order for a foreign investor³³ to acquire control over a "strategic" Russian company.³⁴ There are fifty-one non-exhaustive categories of strategic activities listed in the Strategic Investments Law (as amended), including, *inter alia*, manufacturing of aerospace technology, production of weapons and military equipment, nuclear activity, use of infectious agents, natural resources, and coding and producing cryptographic equipment.³⁵

The Russian Government is continuously adding more "strategic" activities to the list. For example, in the *Schlumberger/EDC* transaction,³⁶ the FAS ruled that a Government Commission review was necessary because the FAS and the Russian Ministry of Natural Resources and Environment had concluded that drilling services are an integral part of minerals exploration

32. Strategic Investments Law, *supra* note 28, arts. 3, 19.

33. *Id.* art. 6. The concept of a "foreign investor" is defined in Article 2 of Federal Law No. 160-FZ of 9 July 1999 on Foreign Investments in the Russian Federation [hereinafter Foreign Investment Law]:

"[F]oreign investor" means a foreign legal entity the civil legal capacity of which is determined under the legislation of the state where it has been instituted and which is entitled under the legislation of the said state to invest on the territory of the Russian Federation; a foreign organization not being a legal entity the civil legal capacity of which is determined under the legislation of the state where it has been instituted and which is entitled under the legislation of the said state to invest on the territory of the Russian Federation; a foreign citizen whose civil legal capacity and competence is determined under the legislation of the state of his/her citizenship and who is entitled under the legislation of the said state to invest on the territory of the Russian Federation; a person without citizenship who permanently resides outside the territory of the Russian Federation and whose civil legal capacity and competence are determined under the legislation of the state where he/she permanently resides and who is entitled under the legislation of the said state [to make an] investment on the territory of the Russian Federation; an international organization which is entitled under an international treaty of the Russian Federation to invest on the territory of the Russian Federation; [or] foreign states in compliance with a procedure provided by federal laws.

34. Strategic Investments Law, *supra* note 28, art. 4. According to Article 3 of the Strategic Investments Law, a "strategic" company is one that is engaged in activities in Russia of a kind that are important for ensuring Russia's national defense and state security. Examples of these activities are set out in Article 6 of the Strategic Investments Law.

35. *Id.* art. 6.

36. *Eurasia Drilling and Schlumberger Extend Deal Closing by One Month*, VEDOMOSTI (May 29, 2015), <https://www.vedomosti.ru/business/news/2015/05/29/594325-eurasia-drilling-i-schlumberger-prodlevayut-na-mesyats-zakritie-sdelki> [<https://perma.cc/F72E-7HYP>].

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and may be significant to ensuring state security, even though the services are not subject to licensing.³⁷

2. *Foreign Investments Regime*

Under the Foreign Investment Law,³⁸ foreign governments and international organizations, or companies under the control of either, must file for review of all direct or indirect acquisitions of more than twenty-five percent ownership in any Russian company or acquisitions resulting in the right to block the decisions of a Russian company's managing body, according to procedures set forth in the Strategic Investments Law.³⁹

Further, the Foreign Investment Law allows the Prime Minister to submit a transaction to the Government Commission for consideration if he believes it could pose a threat to national defense and/or state security.⁴⁰ Usually, however, the procedure is commenced by the FAS, which seeks input from other state agencies, such as the Federal Security Service (FSB), the Ministry of Defense, and industrial agencies, while reviewing a merger control deal with a foreign element.⁴¹ Despite the statutory waiting period of three months, with the possibility of an additional three-month extension,⁴² a foreign buyer in this situation should, in practice, anticipate a one-year period for regulatory clearance in Russia.

The FAS is increasingly commencing high-profile cases challenging M&A transactions as violations of the Strategic Investments Law:

- (1) In *FAS Russia v. Otkritie Holding*,⁴³ the 2017 sale by LUKOIL oil company of AGD Diamonds (a “strategic” company) to the foreign company Otkritie Holding was challenged by the FAS on the grounds that beneficiaries of Otkritie Holding did not provide information about the foreign citizenship of investors gaining control of AGD Diamonds.⁴⁴

37. See Petr Ntreda et al., *Government Delays Schlumberger Sale to Eurasia Drilling*, ROSBIZNESCONSULTING GRP. (Mar. 26, 2015), <https://www.rbc.ru/ins/business/26/03/2015/5513d73e9a79477a19e9fe24> [<https://perma.cc/8GYX-PSJN>].

38. Foreign Investment Law, *supra* note 33.

39. *Id.* art. 6, pt. 4.

40. *Id.* art. 6, pt. 5.

41. Resolution of the Government of the Russian Federation, 2008, No. 510, cl. 4(1).

42. Strategic Investments Law, *supra* note 28, art. 11(4).

43. See Decision of Moscow City Arbitrazh Court No. A40-170004/2020, July 28, 2022, <https://kad.arbitr.ru/Card/93b8da74-10cd-40b7-912c-6f0e3505fc70> [<https://perma.cc/5B3M-KRUM>] (ruling on termination of proceedings in the case).

44. The head of the FAS announced that, in summer 2022, FAS, LUKOIL, and VTB Bank (the pledgee of the AGD Diamonds shares) concluded a confidential settlement agreement to allow the transaction to proceed. See Maria Fedotova, *FAS and LUKOIL Signed the World Agreement on the Diamond Miner AGD, VTB Is Not Yet*, KOMMERS, <https://www.kommersant.ru/doc/5421689> [<https://perma.cc/VFX9-NVUZ>].

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- (2) In *FAS Russia v. Arconic Corporation*⁴⁵ (formerly ALCOA, a leading American aluminium company), the arbitrazh (business) court imposed unprecedented interim measures preventing shareholders of Arconic’s Russian subsidiary, which was deemed a Russian strategic company, from making management and business decisions, including the possible sale of the company and the receipt of dividends. The court agreed with the FAS’s argument that, in 2019, Elliott Management had obtained control over Arconic without approval from the Government Commission.⁴⁶
- (3) In *FAS Russia v. Slontecco Investments* and other cases,⁴⁷ the arbitrazh court ordered the government seizure of shares in the Russian company that were acquired by foreign investors in violation of the Strategic Investments Law, despite the absence of such a remedy in the Strategic Investments Law for a breach.⁴⁸

Despite this extra scrutiny of FDI, the Government Commission approved foreign investment of approximately \$11.1 billion in the development of Russian strategic entities in 2021.⁴⁹

C. COUNTER-SANCTIONS REVIEW

Since March 2022, President Vladimir Putin has mandated additional restrictions within the rapidly developing field of countersanctions, which apply to transactions involving foreign persons or entities (so-called “unfriendly persons”) that are connected to foreign states perceived as being unfriendly or adverse to Russian companies. Mergers and acquisitions involving “unfriendly persons” usually are reviewed by the Sub-Commission of the Government Commission⁵⁰ using the simpler and quicker procedure of applying regulations made by presidential decree, rather than undertaking the full statutory reviews usually performed under the Strategic Investments Law and Foreign Investment Law. Briefly, the main counter-sanctions regulations are:

45. Decision of Samarskay Oblast Arbitrazh Court No. A55-6479/2020, Apr. 1, 2020, <https://kad.arbitr.ru/Card/346fee5a-f555-4986-8e84-ca5529ea1d00> [<https://perma.cc/ZUB6-5PCC>] (imposing interim measures).

46. *Id.*

47. Decision of Arbitrazh Court of the North-Western District No. A42-10735/2019, Oct. 10, 2022, <https://kad.arbitr.ru/Card/1e031633-eee6-4302-872c-1046e74c1961> [<https://perma.cc/A4V2-F4A3>].

48. *Id.*

49. 2021 Competition Report, *supra* note 23, at 210.

50. The Sub-Commission consists of representatives of the Presidential Administration, the Ministry of Economic Development, the Central Bank of Russia, and the Ministry of Finance, and it meets several times weekly. Rules adopted by the Resolution of the Government of the Russian Federation, 2022, No. 295, cl. 13 [hereinafter Resolution 295].

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- (1) Presidential Decree No. 81 dated March 1, 2022,⁵¹ which provides a special procedure for transactions between Russian residents and unfriendly persons that result in the transfer of ownership of Russian securities and/or real estate.⁵² Subsequent decisions of the Sub-Commission confirm that Decree No. 81 also applies to securities and real estate of non-Russian entities.
- (2) Presidential Decree No. 520,⁵³ which, until December 31, 2023, restricts the disposal of shares (or membership interests) in companies operating in specific areas, including the strategic energy/mining and banking sectors (identified by name in later presidential orders).⁵⁴ According to Decree No. 520, if such a company's ownership shares or interests are to be owned by unfriendly persons, then the transaction requires a special decision of the President of Russia.⁵⁵
- (3) Presidential Decree No. 618,⁵⁶ which restricts transactions made by unfriendly persons that directly or indirectly involve membership interests in Russian limited liability companies.⁵⁷
- (4) Presidential Decree No. 737,⁵⁸ which, *inter alia*, requires transactions made by unfriendly persons that directly or indirectly involve shares of a Russian joint-stock company to obtain the Sub-Commission's approval.⁵⁹

A filing to review a transaction involving an unfriendly person should be submitted to the Ministry of Finance pursuant to Resolution No. 295⁶⁰ with

51. Decree of the President of Russia No. 81, On Additional Temporary Economic Measures to Ensure the Financial Stability of the Russian Federation (Mar. 1, 2022), *amended by* Decree of the President of Russia No. 876 (Dec. 5, 2022), <http://en.kremlin.ru/acts/news/67886> [<https://perma.cc/FE5U-MKLD>].

52. *Id.* cl. 1(a).

53. Decree of the President of Russia No. 520, On Applying Special Economic Measures in the Financial, and Fuel and Energy Sectors in Connection With the Unfriendly Actions by Certain Foreign States and International Organizations (Aug. 5, 2022), <http://en.kremlin.ru/acts/news/69117> [<https://perma.cc/BUT5-TV8W>] [hereinafter Decree No. 520].

54. Order of the President of Russia No. 357-PI, On Endorsement of List of Russian Lending Institutions Prohibited From Transactions With Equities and Shares That Are Part of Their Charter Capitals (Oct. 26, 2022), <http://actual.pravo.gov.ru/text.html#pnun=0001202210260006> [<https://perma.cc/V83N-GH36>]; *see also* Order of the President of Russia No. 372-PI, On Endorsement of List of Economic Entities Manufacturing and Servicing Equipment for Fuel and Energy Sector, Economic Entities Generating and Supplying Heat and Electricity and Those Refining Oil and Petroleum and Manufacturing Their Derivatives (Nov. 9, 2022), <http://actual.pravo.gov.ru/text.html#pnun=0001202211090018> [<https://perma.cc/JM54-7AWQ>].

55. *See generally* Decree No. 520, *supra* note 53.

56. Decree of the President of Russia No. 618, On a Special Procedure for the Execution (Implementation) of Specific Kinds of Transactions Between Certain Individuals (Sept. 8, 2022), <http://en.kremlin.ru/acts/news/69313> [<https://perma.cc/39WC-LC2H>].

57. *Id.* cl. 1.

58. Decree of the President of Russia No. 737, On the Application of Certain Executive Orders of the President of the Russian Federation (Oct. 15, 2022), <http://en.kremlin.ru/acts/news/69620> [<https://perma.cc/H5R6-D58U>].

59. *Id.* cl. 5.

60. Resolution 295, *supra* note 50.

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the required documents, including the applicant's incorporation documents⁶¹ and information on its assets and beneficiaries.⁶² Timelines for consideration are not mandated, but, in practice, the decisions usually take several months.

If a transaction requires both merger and counter-sanction approvals, the FAS, at its discretion, may indicate in its decision that the transaction is also subject to review by the Sub-Commission, but this is not mandatory.⁶³ In 2022, the Sub-Commission issued many broadly applicable decisions providing exceptions to the presidential decrees that are usually applied.⁶⁴

61. *Id.* cl. 4 (providing that an application may be submitted by a resident or a foreign entity but constituent documents must be submitted by the applicant).

62. *Id.* cl. 5.

63. *See, e.g.*, FAS Decision No. TH/94208/22 (Oct. 12, 2022); *see also* FAS Decision No. TH/94207/22 (Oct. 12, 2022).

64. *See, e.g.*, Sub-Commission Meeting Extract No. 85 (Sept. 7, 2022); *see also* Sub-Commission Meeting Extract No. 62/1 (June 14, 2022).

International Investment and Development

KIRA XIAOHAN LIN*

This article highlights significant legal developments relevant to international investment and development that took place in 2022.

I. ICSID Cases in ESG-Related Disputes

In 2022, environmental, social, and governance (ESG) disputes continued to receive high attention. In particular, two Energy Charter Treaty (ECT) cases are notable within the energy sector for their impact on the environment and society.

In May 2022, a divided International Centre for Settlement of Investment Disputes (ICSID) tribunal rendered a final award against Spain for its breach of the ECT in *REENERGY S.à r.l. v. Kingdom of Spain* and granted the Luxembourg-based claimant nearly thirty-three million EUR.¹ This dispute concerned Claimant's investment in Spanish wind farms and concentrated solar power plants.² A majority of the tribunal held that Spain's modifications of its renewable energy incentive framework breached the Claimant's legitimate expectation of relative stability and violated the fair and equitable treatment standard set in Article 10(1) of the ECT.³ In September 2022, Spain filed an application for annulment of the award.⁴ The case is still pending.⁵

In August 2022, in another energy dispute, *Rockhopper Italia S.p.A. et al. v. Italian Republic*, an ICSID tribunal held that Italy breached the ECT and awarded the British claimants more than 190 million EUR.⁶ This dispute concerned the concession and exploitation of the Ombrina Mare oil field.

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1. *REENERGY S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/14/18, Award (May 6, 2022), <https://www.italaw.com/sites/default/files/case-documents/italaw170256.pdf> [https://perma.cc/5KWN-5YWH].

2. *Id.* ¶ 118.

3. *See id.* ¶ 1011.

4. *REENERGY S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/14/18, Case Details (Aug. 23, 2022), <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/14/18> [https://perma.cc/9TVM-H94H].

5. *See id.*

6. *Rockhopper Italia S.p.A. et al. v. Italian Republic*, ICSID Case No. ARB/17/14, Final Award, ¶¶ 319–20 (Aug. 23, 2022), <https://jusmundi.com/en/document/decision/pdf/en-rock-hopper-exploration-plc-rockhopper-italia-s-p-a-and-rockhopper-mediterranean-ltd-v-italian-re-public-final-award-wednesday-24th-august-2022>; *see also* *Arbitration Award*, ROCKHOPPER

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The tribunal found that the Claimants were entitled to a concession, and as a consequence Italy's adoption of a stricter drilling ban which prohibited claimants' exercise of that concession violated the ECT.⁷ The tribunal clarified that this award "was not passing judgment on the legitimacy of the contested measures, or contesting Italy's sovereign right to adopt the drilling ban," but only to address "whether the fact demonstrated an ECT breach by Italy, and whether damages (and what amount of) should be awarded."⁸

The tribunal had previously denied Italy's intra-EU jurisdictional objection to the Investor-State Dispute Settlement mechanism provided by the ECT.⁹ The tribunal had also dismissed Italy's request to reconsider its previous objection, concluding that the Court of Justice of the European Union's (CJEU) decision in *Republic of Moldova v. Komstroy* was not applicable as *Komstroy* referred to "investment" rather than "anticipatory or advisory discussion" of the investment.¹⁰

In addition to the cases that have been decided, a number of ESG-related cases are ongoing. Among these is the *Chevron Corp. v. The Republic of Ecuador (II)* case that has been pending since 2009.¹¹ Within the energy sector, there are continued efforts to adopt international arbitration to reconcile public ESG interest with private investment interest. Further modernization of the ECT should lead to more developments in ESG-related dispute resolution.¹²

EXPLORATION PLC (Aug. 24, 2022), <https://rockhopperexploration.co.uk/2022/08/successful-arbitration-outcome/> [<https://perma.cc/Y9NB-XTML>].

7. See Lisa Bohmer, *Analysis: Unpacking the Rockhopper v. Italy Award, Including Tribunal's Reasons for Finding that Denial of Hydrocarbons Concession Amounted to an Unlawful Expropriation, and for Awarding 190 Million EUR to Claimant*, INV. ARB. REP. (Sept. 1, 2022), <https://www.iareporter.com/articles/analysis-unpacking-the-rockhopper-v-italy-award-revealing-tribunals-reasons-for-finding-that-denial-of-hydrocarbons-concession-amounted-to-an-unlawful-expropriation-and-for-awarding-190-m/> [<https://perma.cc/X9NV-UWZM>].

8. See *id.* at 3.

9. *Rockhopper Italia S.p.A. et al. v. Italian Republic*, ICSID Case No. ARB/17/14, Decision on the Intra-EU Jurisdictional Objection, ¶ 211 (June 26, 2019), https://www.italaw.com/sites/default/files/case-documents/italaw10646_0.pdf [<https://perma.cc/A59A-2B58>].

10. See C-741/19, *Republic of Moldova v. Komstroy LLC*, ECLI:EU:C:2021:655, ¶ 84 (Sept. 2, 2021), <https://curia.europa.eu/juris/document/document.jsf?text=&docid=245528&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=4530121> [<https://perma.cc/N9F7-Y4EC>]; see also Bohmer, *supra* note 7, at 2–3.

11. In June 2022, Ecuador's request of annulment was rejected by the Hague Court of Appeal. See *Gerechshof Den Haag* [Court of Appeal in Hague] 18 juni 2022, Hof 2022, 200.288.128/01 m.nt. Redactie (Ecuador/Chevron) (Neth.); see also *Chevron Corp. v. The Republic of Ecuador (II)*, PCA Case No. 2009-23, ITALAW, <https://www.italaw.com/cases/257> [perma.cc/ME9S-5PMY].

12. After fifteen rounds of negotiations, the conference hosted by Mongolia to finalize the amendments to the ECT is expected to meet ad hoc in April 2023. See *Modernization of the Treaty*, INT'L ENERGY CHARTER, <https://www.energychartertreaty.org/modernisation-of-the-treaty/> [<https://perma.cc/74Y8-QJWJ>] (choose the column of "2023") (last visited Nov. 28, 2022).

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Immigration and Naturalization

ESHIGO P. OKASILI*

I. A Panoramic View of U.S. Immigration Landscape in 2022

In the 2021-2022 term, the U.S. Supreme Court rendered some decisions that will likely reshape the American immigration landscape.

On May 16, 2022, in *Patel v. Garland*, the U.S. Supreme Court held that federal courts have no jurisdiction to review facts found as an integral part of discretionary-relief proceedings pursuant to Immigration and Nationality Act (INA) Section 1255 and the other provisions enumerated in INA Section 1252(a)(2)(B)(i).¹ The Court resolved the three distinct and conflicting views of the parties and amici regarding discretionary proceedings and clarified that judicial review is limited to legal and constitutional questions, pursuant to INA Section 1252(a)(2)(D)—a subparagraph which Congress added after the Court's suggestion in *Immigration and Naturalization Service v. St. Cyr*² that foreclosing judicial review of all legal questions in removal cases could raise constitutional issues.³

The likelihood that the government, on one hand, and immigrants and their counsel or advocates, on the other hand, will always identify and correct all factual errors is extremely low.⁴ Therefore, this decision will likely have significant adverse implications for innumerable law-abiding immigrants, non-immigrants, and U. S. citizen-petitioners since there will likely be unintended factual errors in both the statutory eligibility phase and the phase pertaining to grants or denial of relief.

On June 8, 2022, in *Egbert v. Boule*,⁵ the U.S. Supreme Court held that *Bivens v. Six Unknown Named Agents*⁶ did not extend to create causes of action for Boule's First Amendment and Fourth Amendment claims.⁷ In the post-*Bivens* years, the Court has been more focused on the separation of powers and therefore, more inclined to exercise judicial restraint where the legislative and/or the executive branches have created alternative means of addressing and redressing claims against government officials (in this case,

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1. *Patel v. Garland*, 142 S. Ct. 1614, 1627 (2022).

2. *INS v. St. Cyr*, 533 U.S. 289, 315–26 (2001).

3. *Patel*, 142 S. Ct. at 1626–27.

4. *See id.*

5. *Egbert v. Boule*, 142 S. Ct. 1793 (2022).

6. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 391–92 (1971).

7. *Egbert*, 142 S. Ct. at 1804, 1807.

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border enforcement agents).⁸ Without reversing *Bivens*, the Court reviewed its two-tiered analysis for pursuing a *Bivens* claim.⁹ First, is the claim substantially different from the three cases in which the Court has recognized a damages action?¹⁰ Second, if so, are there special factors which indicate that Congress is better placed than the judiciary to conduct a costs-benefits analysis to determine whether a claim for damages ought to proceed or not?¹¹ Applying this analysis, the Court considered the risk of impacting border policy and national security adversely.¹² Furthermore, the Court clarified that the threshold question is not whether *Bivens* relief might be “harmful” or “inappropriate,” but whether judicial intervention in a certain field might be harmful or inappropriate.¹³

On one hand, this decision is likely to advance the ability of border patrol officers to carry out their duties without fear of facing *Bivens* claims.¹⁴ On the other hand, many citizens and immigrants are likely to experience an increase in the violation of their constitutional and/or fundamental human rights by obtaining inadequate or no relief.¹⁵

On June 13, 2022, in *Garland v. Aleman Gonzalez*, the U.S. Supreme Court held that INA Section 1252(f)(1) strips district courts of jurisdiction to consider the respondents’ requests for class-wide injunctive relief.¹⁶ The Court clarified that district courts have jurisdiction to entertain, on a case-by-case basis, individual immigrant’s requests for bond hearing after having spent 180 days or more in immigration detention facilities and that the Government’s need to maintain national security trumps immigrants’ need to seek class-wide injunctive relief.¹⁷ This decision will likely have the unintended effect of increasing the number of immigrants who will remain in immigration detention facilities beyond 180 days without bond hearings.¹⁸

On June 15, 2022, in *Arizona v. City and County of San Francisco*, the U.S. Supreme Court dismissed the previously granted writ of certiorari on the grounds that it was granted “improvidently.”¹⁹ In other words, by its own admission, the Court lacked jurisdiction to entertain the question based on which the writ of certiorari was granted, not for its merits, but to answer the

8. *See id.* at 1797.

9. *See id.*

10. *Id.* at 1797.

11. *Id.* at 1797–98.

12. *See id.*

13. *Id.* at 1805.

14. Tierney Sneed & Ariane de Vogue, *Supreme Court Limits Excessive Force Claims Against Border Patrol Agents*, CNN (June 8, 2022), <https://www.cnn.com/2022/06/08/politics/supreme-court-border-patrol-agents/index.html> [<https://perma.cc/JS7W-NQNG>].

15. *Egbert*, 142 S. Ct. at 1823 (Sotomayor, J., concurring).

16. *Garland v. Aleman Gonzalez*, 142 S. Ct. 2057, 2063 (2022).

17. *Id.* at 2065.

18. *Review of the Supreme Court’s 2021–2022 Immigration Cases*, NAT’L IMMIGR. F. (Aug. 12, 2022), <https://immigrationforum.org/article/review-of-the-supreme-courts-2021-2022-immigration-cases/> [<https://perma.cc/ZZX5-T8YQ>] (last visited Mar. 22, 2023).

19. *Patel*, 142 S. Ct. at 1627.

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question whether the petitioners—thirteen states which support the 2019 Public Charge Rule²⁰ — should have been allowed to participate in the litigation to defend the legality of the Rule in the Court of Appeals.²¹ The dismissal, though not based on the merits, leaves untouched the Public Charge Rule as it existed in the years before the Trump administration, thereby preserving the status quo ante and ensuring that immigrant recipients of certain public benefits no longer face the risk of being deemed ineligible to adjust their immigration status solely based on having received those public benefits.²²

On June 30, 2022, in *Biden v. Texas*, the U.S. Supreme Court held that the U.S. Government’s rescission of the Migrant Protection Protocol (MPP), also known as “Remain in Mexico Policy” did not violate INA Section 1225, and that the October 29 Memoranda constituted final agency action.²³ The Court based its decision on the plain language of the law and stated that the district court’s injunction against the U.S. Government violated 8 U.S.C. § 1252(f)(1) because it lacked jurisdiction to entertain the question, in the first place.²⁴ Furthermore, the Court clarified that both the district court and the court of appeals misinterpreted Section 1225 of the INA when both courts interpreted paragraphs INA Section 1225(b)(B) and INA Section 1225(b)(2)(C), both of which contain the word, “may” as being mandatory and governed by the word, “shall” in Section 1225(b)(2)(A).²⁵ In other words, the Court further clarified that only INA Section 1225(b)(2)(A) is mandatory while INA Section 1225(b)(2)(B) and INA Section 1225(b)(2)(C) are discretionary.²⁶ This determination allowed each administration to decide whether to implement INA Section 1225(b)(2)(B) or INA Section 1225(b)(2)(C) in the face of Congress’ perennial inability or unwillingness to adequately fund the implementation of INA Section 1225(b)(2)(A)—the mandatory detention of immigrants who enter the United States illegally through contiguous territories such as Canada and Mexico).²⁷ This decision will likely enable the Government to prioritize and direct its limited resources towards achieving “other regional and domestic goals, foreign policy objectives, and domestic policy objectives that better align with the Administration’s objectives” such as engaging in diplomatic relations with Mexico, fighting transnational criminal and smuggling networks and

20. Inadmissibility on Public Charge Grounds, 80 Fed. Reg. 41292 (U.S. Dep’t Homeland Sec. Aug. 14, 2019).

21. *Patel*, 142 S. Ct. at 1627 (holding that “[f]ederal courts lack jurisdiction to review facts found as part of discretionary-relief proceedings under § 1255 and the other provisions enumerated in § 1252(a)(2)(B)(i)”).

22. Jaelyn Belczyk, *US Supreme Court Dismisses Case Over ‘Public Charge’ Immigration Rule*, JURIST (June 15, 2022, 2:37 PM), <https://www.jurist.org/news/2022/06/us-supreme-court-dismisses-case-over-public-charge-immigration-rule/> [<https://perma.cc/ZFL9-UYEN>].

23. *Biden v. Texas*, 142 S. Ct. 2528, 2544 (2022).

24. *Id.* at 2538–39 (citing *Aleman Gonzalez*, 142 S. Ct. at 2065).

25. *Id.* at 2544.

26. *Id.*

27. *Review of the Supreme Court’s 2021–2022 Immigration Cases*, *supra* note 18.

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addressing the root causes of migration.²⁸ But it will likely increase the influx of foreign nationals entering the United States by land through contiguous territories such as Canada and Mexico.

On July 31, 2022, in *United States v. Texas*, the U.S. Supreme Court denied the application for stay presented to Justice Alito and referred to the Court by him and granted the Solicitor General's request for certiorari (as an application for certiorari before judgment).²⁹ Notably, Justice Sotomayor, Justice Kagan, Justice Barrett, and Justice Jackson indicated that they would grant the application for stay.³⁰

The Court directed the parties to brief and argue three questions:

- (1) Whether the State plaintiffs have Article III standing to challenge the Department of Homeland Security's Guidelines for the Enforcement of Civil Immigration Law;³¹
- (2) Whether the Guidelines are contrary to 8 U.S.C. § 1226(c) or 8 U.S.C. § 1231(a), or otherwise violate the Administrative Procedure Act; and,³²
- (3) Whether 8 U.S.C. § 1252(f)(1) prevents the entry of an order to "hold unlawful and set aside" the Guidelines under 5 U.S.C. § 706(2).³³

The case was scheduled for argument in the first week of the December 2022 session and was argued on Tuesday, November 29, 2022.³⁴

Overall, the Court's decisions in the 2021-2022 term have restored the United States immigration landscape to its status quo ante—the way things were before the Trump administration took the reins of power or almost.³⁵ In other words, there have not been seismic changes in the United States immigration landscape, despite the Biden administration having pledged to make significant changes and having been in office for the past two years.³⁶ It is questionable or unlikely that the new Congress will prioritize or support the implementation of the Biden administration's immigration agenda.³⁷

28. *Biden*, 142 S. Ct. at 2537.

29. *United States v. Texas*, 143 S. Ct. 51, 51 (2022) (mem.).

30. *Id.*

31. Press Release, Alejandro N. Mayorkas, Sec'y, Secretary Mayorkas Announces New Immigration Enforcement Priorities (Sept. 30, 2021), <https://www.dhs.gov/news/2021/09/30/secretary-mayorkas-announces-new-immigration-enforcement-priorities> [<https://perma.cc/SM9Q-BB2X>]; see also *Texas*, 143 S. Ct. at 51.

32. *Texas*, 143 S. Ct. at 51.

33. *Id.*

34. *Review of the Supreme Court's 2021–2022 Immigration Cases*, *supra* note 18.

35. Jens Manuel Krogstad & Ana Gonzalez-Barrera, *Key Facts about U.S. Immigration Policies and Biden's Proposed Changes*, PEW RSCH. CTR. (Jan. 11, 2022), <https://www.pewresearch.org/fact-tank/2022/01/11/key-facts-about-u-s-immigration-policies-and-bidens-proposed-changes/> [<https://perma.cc/5TAK-AF68>].

36. See *id.*

37. See *id.*

International Family Law

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This article highlights significant legal developments relevant to international family law that took place in 2022.

I. The Convention on the Civil Aspects of International Child Abduction, Done at the Hague October 25, 1980 (Abduction Convention)

In the United States, the Abduction Convention is implemented by the International Child Abduction Remedies Act (ICARA).¹ Federal and state courts have concurrent jurisdiction to resolve a parent's request for the return of their child pursuant to the Abduction Convention.² To obtain an order returning a child pursuant to the Abduction Convention, 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 at the time of the removal/retention.³ Countries may become party to the Abduction Convention as a result of ratification, acceptance, approval of, or accession to, the Convention.⁴ An accession will have effect between the acceding country and another party to the Convention if the latter country has declared its acceptance of the accession.⁵ The Abduction Convention ceases to apply when the child in question turns sixteen.⁶

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1. International Child Abduction Remedies Act (ICARA), 22 U.S.C. §§ 9001–11; Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 102 Stat. 437, 1343 U.N.T.S. 89.

2. 22 U.S.C. § 9003.

3. Convention on the Civil Aspects of International Child Abduction, *supra* note 1, ch. III.

4. *Id.*

5. See *Alikovna v. Viktorovich*, No. 19-CV-23408, 2019 WL 4038521, at *2 (S.D. Fla. Aug. 27, 2019) (unpublished; text in Westlaw) (where the court dismissed a petition to return a child to Russia because the United States has not accepted Russia's accession); see also *Safdar v. Aziz*, No. 358877, 2022 WL 2276914, at *2 (Mich. Ct. App. June 23, 2022) (holding that since Pakistan has acceded and the United States has accepted the accession, courts in relocation cases should not further analyze Pakistan's ability to apply the Convention).

6. Convention on the Civil Aspects of International Child Abduction, *supra* note 1, art. 4; *Noergaard v. Noergaard*, 57 Cal. App. 5th 841, 852–53 (2020) (child turned sixteen during the

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A. PETITIONER'S CASE

1. *Habitual Residence*

The Abduction Convention does not define the term “habitual residence.”⁷ In 2020, the U.S. Supreme Court gave clarity to the undefined term in *Monasky v. Taglieri*,⁸ holding that “a child’s habitual residence depends on the totality of the circumstances specific to the case.”⁹ Justice Ginsburg, in her opinion, included a footnote that provided some considerations that courts have applied when considering whether a child has acclimatized to a habitual residence.¹⁰

The Supreme Court, in *Monasky*, also established a clear-error standard of review on appeal, which has had the effect of rarely overturning a trial judge’s finding of habitual residence.¹¹ For example, the U.S. Court of Appeals for the Fifth Circuit affirmed a district court’s denial of a petitioner’s request to return his child to Ireland.¹² The district court concluded that the United States was the child’s habitual residence, despite a variety of facts that showed the parents’ intention to establish Ireland as the child’s home base, involve him in toddler groups, apply for his residency status, and obtain his Irish medical card.¹³ On the other hand, the child lived a transitory lifestyle with his musician mother, and therefore, his habitual residence never shifted to Ireland, where he spent relatively little time.¹⁴ Likewise, a transitory family who moved between Los Angeles, New York, Mexico, and then to Iceland could establish the child’s habitual residence in Iceland, even though their move did not foreclose future additional moves.¹⁵ The court concluded that while habitual residence anticipates some amount of settlement, “it need not mean that’s where you plan to leave your bones.”¹⁶

proceeding and rendered the return moot); *Bourdelaïs v Bourdelaïs*, 844 Fed. App’x 910, 910 (7th Cir. 2021).

7. See generally Convention on the Civil Aspects of International Child Abduction, *supra* note 1.

8. *Monasky v. Taglieri*, 140 S. Ct. 719, 723 (2020).

9. *Id.*

10. *Id.* at 735 n.3.

11. *Id.* at 730.

12. *Harm v. Lake-Harm*, 16 F.4th 450, 450 (5th Cir. 2021).

13. *Id.* at 456.

14. See *Garcia v. Ramsis*, No. 4:21-CV-650-SDJ, 2022 WL 1036770, at *2 (E.D. Tex. Apr. 6, 2022) (holding that Ms. Ramsis could not establish habitual residence by unilaterally removing her to the United States); *Guzzo v. Hansen*, No. 4:22-CV-15 PLC, 2022 WL 3081159, at *6 (E.D. Mo. Aug. 3, 2022) (holding that a child’s visits to the United States from Spain did not change the child’s habitual residence).

15. *Matter of E.Z.*, No. 1:21-CV-06524-MKV, 2021 WL 5106637, at *20, *22 (S.D.N.Y. Nov. 2, 2021).

16. *Id.* at *22.

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On the contrary, however, two state appellate courts reversed the trial judge's finding of habitual residence.¹⁷ The Court of Appeals of Texas overturned a trial judge's finding of habitual residence, when the children were born in Israel, but, the father had all but considered himself an unmarried man, questioned the children's paternity, refused to let his wife and the children's mother live with him, and left her pregnant and alone.¹⁸ The fact that the mother signed a custody agreement in Israel, which she did not have translated and claimed to not understand, did not, in isolation, establish Israel as the habitual residence.¹⁹ Likewise, the Court of Appeals of Indiana overturned a trial judge's finding of habitual residence on the basis that while the parents' move to Indiana left open the circumstances under which the family might return to Germany, it was clear that the parents saw the family's move to the United States as indefinite and potentially permanent.²⁰

2. *Rights of Custody & Their Exercise*

A removal or retention is only wrongful for purposes of the Abduction Convention if the petitioner had a right of custody under the law of the child's habitual residence and was "actually exercising" that right at the time of removal or retention, or would have exercised that right, but for the removal or retention.²¹ Normally, the question of exercise of custody rights is not an issue in the case. Most courts follow the determination made in *Friedrich v. Friedrich*²² that the 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.²³

When a father relied heavily on a document purporting to absolve a Honduran mother's custody rights, and the court found (based on testimony of a handwriting expert) that it was forged, it concluded that petitioner had not, as respondent claimed, relinquished her rights of custody under an existing Honduran settlement agreement.²⁴ When a father in Australia was prohibited from being within 100 meters of his children for five years, and presented no evidence that contradicted the terms of this protective/restraining order, the district court in Colorado concluded that he did not

17. See *In the Interest of A.Y.S.*, No. 12-21-00074-CV, 2022 WL 868046, at *12 (Tex. App.—Tyler Mar. 23, 2022, no pet.) (mem. op.); *Cole v. Cole*, 187 N.E.3d 957 (Ind. Ct. App. 2022).

18. *In the Interest of A.Y.S.*, 2022 WL868046, at *9.

19. *Id.* at *9–11.

20. *Cole*, 187 N.E.3d at 962–63.

21. Convention on the Civil Aspects of International Child Abduction, *supra* note 1, art. 13.

22. *Friedrich v. Friedrich*, 78 F.3d 1060, 1065 (6th Cir. 1996).

23. For a recent case see *Lopez v. Bamaca*, 455 F. Supp.3d 76, 84–85 (D. Del. 2020).

24. *Ariza v. Ash*, No. CV 22-1053, 2022 WL 3328888, at *4 (W.D. La. Aug. 11, 2022).

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have a right of custody at the time that respondent unilaterally moved the children to Colorado.²⁵

B. RESPONDENT’S CASE

There are several exceptions that a respondent may assert in arguing that a child should not be returned to the child’s habitual residence.

1. Child Is Settled

Article 12 of the Abduction Convention provides that the authorities need not return a child if more than one year has elapsed between the wrongful removal or retention of the child and the commencement of proceedings for the return of the child, and the child is now settled in the child’s new environment.²⁶ A retention occurs not on the date the abducting parent formed the intent to wrongfully retain the child, but rather on the date the responding parent’s actions were so unequivocal that the petitioner knew or should have known that the child would not be returned.²⁷ The issue of whether the child is settled in their new environment can rarely be decided on a motion to dismiss because it requires detailed fact finding.²⁸

Even if a court determines a child is settled in their new environment, the court may still use its discretion to order the child be returned to their habitual residence.²⁹ Furthermore, even if a parent neglects, for whatever reason, to commence the lawsuit in the United States within one year of the removal or retention becoming wrongful, a child is not automatically considered settled.³⁰ Such was the case when a petitioner took diligent steps to locate the child in the United States but was thwarted by the respondent’s movements and relocation within the United States.³¹ In another case, the respondent could not demonstrate the child was settled in Massachusetts because she resided with her boyfriend, who paid all her expenses, she was

25. *Livingstone v. Livingstone*, No. 22-CV-00472-RM, 2022 WL 3699832, at *4 (D. Colo. Aug. 26, 2022).

26. In the United States, this period is measured between the date of the wrongful removal or retention and the date on which the petition is filed in a federal or state court. Seeking the assistance of the U.S. central authority of the country from which the child was taken does not constitute commencement of a proceeding. *See Monzon v. De La Roca*, 910 F.3d 92, 96 (3d Cir. 2018).

27. *Palencia v. Perez*, 921 F.3d 1333, 1342–43 (citing *Blackledge v. Blackledge*, 866 F.3d 169, 179 (3d Cir. 2017)); *Lopez Moreno v. Zank*, 456 F. Supp. 3d 904, 911 (W.D. Mich. 2020).

28. *See Annad v. Annad*, No. 20-23549-CIV, 2020 WL 9601516, at *2 (S.D. Fla. Sept. 18, 2020).

29. *Matter of Akin*, 274 A.3d 569, 576–77, 581 (2022).

30. *See Philantrope v. Jean*, No. 21-81398-CIV, 2021 WL 4896266, at *1 (S.D. Fla. Oct. 19, 2021).

31. *Id.*

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unemployed, relied on public assistance, and her and the child's immigration status was uncertain.³²

2. *Grave Risk or Intolerable Situation*

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.”³³ Such an exception should not be decided on a motion to dismiss but requires an evidentiary hearing.³⁴ 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 and the likelihood of its recurrence.³⁵ In addition, a court may consider measures to reduce the likelihood of harm upon return.³⁶ The U.S. Supreme Court observed that “[w]hile a district court has no obligation under the Convention to consider ameliorative measures that have not been raised by the parties, it ordinarily should address ameliorative measures raised by the parties or obviously suggested by the circumstances of the case”³⁷ In the U.S. Supreme Court's fifth case under the Abduction Convention, *Golan v. Saada*,³⁸ it examined the Second Circuit's mandatory consideration of ameliorative measures and reached the conclusion that there are three things a court must consider when it chooses to examine ameliorative measures: (1) it must prioritize the child's physical and psychological safety, (2) it cannot usurp the role of the court that will ultimately adjudicate the child's custody, and (3) any consideration must accord with the Abduction Convention's requirement to act expeditiously.³⁹ The Supreme Court remanded the case, and the district court, on remand, again ordered the child returned, concluding that even if not mandated to consider ameliorative measures, it would have considered them in this case, because it was “obviously suggested by the circumstances”⁴⁰

Post-*Golan*, a New York district court agreed to explore ameliorative measures when a petitioner parent put forth eight separate proposed

32. *Karim v. Nakato*, No. CV 21-11458-WGY, 2022 WL 1597955, at *16 (D. Mass. May 20, 2022).

33. Convention on the Civil Aspects of International Child Abduction, *supra* note 1, art. 13(b).

34. *Flores v. Alvarado*, No. 3:17-CV-514-RJC-DSC, 2018 WL 1725615, at *2 (W.D.N.C. Apr. 6, 2018).

35. *Golan v. Saada*, 142 S. Ct. 1880, 1889 (2022).

36. *Id.* at 1893.

37. *Id.*

38. *Id.*

39. *Id.* at 1893–94.

40. *Saada v. Golan*, 2022 WL 4115032, *5 (S.D.N.Y. Aug. 31, 2022); *see also Radu v. Shon*, 11 F.4th 1080, 1090 (9th Cir. 2021), *cert. granted, judgment vacated*, 142 S. Ct. 2861 (2022) (where the district court implemented “alternative remedies” to return the children to Germany, and on remand from the U.S. Supreme Court, based on *Golan v. Saada*, affirmed its return order without a further evidentiary hearing).

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measures, but in doing so, concluded that none of the measures presented would actually protect the child upon return to Canada.⁴¹

Although harm to the child is required under Article 13(b), most courts recognize that sustained spousal abuse can, in some instances, create such a risk.⁴² Spousal abuse is usually relevant for Article 13(b) purposes only if it seriously endangers the child.⁴³ 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.⁴⁴ At a minimum, the respondent must “draw a connection” showing that the risk of such abuse “constitute[s] a grave risk to the children.”⁴⁵ Therefore, when a respondent parent presented evidence of two incidents of kicking and slapping, it did not meet the clear and convincing threshold to demonstrate an Article 13(b) exception.⁴⁶ A family brawl, in which the respondent parent was also a participant, and a report of uncorroborated threats timed just after service of the summons in the Abduction Convention lawsuit, also did not meet the clear and convincing threshold.⁴⁷

The Second Circuit also granted a non-precedential summary order, concluding that the district court did not commit error when it rejected a Mother’s argument that returning the children to Israel would expose them to a grave risk, because only one month prior to her removal of the children from Israel, she had expressed willingness to let the children travel unaccompanied to Israel twice each year to see their father.⁴⁸

A child’s return may be refused if the habitual residence is in a state of domestic terrorism, however, when a respondent failed to introduce sufficient evidence that Venezuela was in a zone of war, famine, or disease, she did not meet her burden to establish an Article 13(b) exception.⁴⁹

Separate from physical harm (or the threat of physical harm) is the psychological harm that might befall a child if returned to their habitual residence. Therefore, when a respondent was able to demonstrate that the child suffered, and continued to suffer, psychological harm because of the

41. *Braude v. Zierler*, No. 22 CV 03586 (NSR), 2022 WL 3018175, at *10 (S.D.N.Y. July 29, 2022) (appeal filed).

42. *See, e.g., Gallegos v. Garcia Soto*, 1:20-CV-92-RP, 2020 WL 2086554, at *3.

43. *Id.*

44. *Id.* at *4.

45. *Id.*

46. *Soto v. Garcia*, No. 3:22-CV-0118-B, 2022 WL 780701, at *9 (N.D. Tex. Mar. 15, 2022); *see also Salame v. Tescari*, 29 F.4th 763, 768 (6th Cir. 2022) (where a single instance of the father’s abuse towards mother was insufficient to establish an Article 13(b) argument); *Vieira v. DeSousa*, 22 F.4th 304, 310 (1st Cir. 2022); *Arguenta v. Lemus*, No. 3:21cv209-NBB-JMV, 2022 WL 880039, at *8 (N.D. Miss. Mar. 9, 2022) (testimony does not meet the level of an “intolerable situation” as contemplated by the Abduction Convention).

47. *Munoz v. Diaz*, No. 4:22-CV-9, 2022 WL 1093270, at *11 (S.D. Ga. Apr. 12, 2022).

48. *Velozny on behalf of R.V. v. Velozny*, No. 21-1993-CV, 2021 WL 5567265, at *2 (2d Cir. Nov. 29, 2021).

49. *Salame*, 29 F.4th at 770.

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petitioner's behavior, including threatening texts, inappropriate reprimands of the child, and threats to punish the mother, who petitioner qualified as a criminal, the respondent succeeded in successfully arguing Article 13(b).⁵⁰ Evidence of psychological harm is often demonstrated through expert evaluations and testimony.⁵¹ When a respondent alleges no specific history of mental illness, or explains why a psychological examination is necessary, a court will likely refuse to order such an examination.⁵² The Ninth Circuit, however, concluded that the district court erred when it refused to honor the respondent mother's request for appointment of a forensic psychologist to examine the child and provide an expert opinion regarding her allegations of abuse and the resulting harm to the child.⁵³

A court has the discretion to appoint a Guardian Ad Litem in a case that involves Article 13(b).⁵⁴

3. *Mature Child's Objection*

In applying the "mature child" exception, the court must consider whether the child objects to being returned to the child's habitual residence and not whether the child has a preference to live in a specific country or with a specific parent.⁵⁵ The federal courts in Missouri had opportunity to address this exception on several occasions recently. One court found that a thirteen-year-old was not sufficiently mature to express an objection because his responses to even minor adversities were exaggerated and disproportionate, reminding the parties that when the only potential reason for not returning a child to their habitual residence is that child's objection, the court must apply a stricter standard in considering the child's wishes.⁵⁶ The court also noted that it is an extraordinary case when a child under the age of sixteen is deemed mature enough for his objection to defeat a meritorious petition for his return under the Abduction Convention.⁵⁷ In another Missouri federal court case, a ten-year-old child did not develop particular objections to returning to Spain.⁵⁸ Contrary to his mother's assertions that the child "disliked" living in Spain, he did not communicate dislike for Spain so much as a preference for the United States, saying that, in Spain, there was "nothing to do there" whereas, in Missouri, there were "a

50. Cruvinel v. Cruvinel, No. 19-CV-4237, 2022 WL 757955, at *6 (E.D.N.Y. Jan. 1, 2022).

51. See, e.g., Colchester v. Lazaro, 16 F.4th 712, 725 (9th Cir. 2021).

52. See Ilves v. Ilves, No. 21-CV-387-WMC, 2021 WL 3771708, at *3 (W.D. Wis. Aug. 25, 2021).

53. Colchester, 16 F.4th at 723; compare Lorenz v. Lorenz, No. 2:20-cv-13128, 2021 WL 5549062, at *3-4 (E.D. Mich. 2021) (where the court refused to appoint a psychologist as neither necessary or required to supplement the court's interview of the children).

54. Djiele v. Kengne, No. 2:20-cv-3140, 2020 WL 12634487, at *1 (S.D. Ohio Dec. 1, 2020).

55. Convention on the Civil Aspects of International Child Abduction, *supra* note 1, art. 13(b).

56. Bhattacharjee v. Craig, No. 4:21-CV-00826-SEP, 2021 WL 4504376, at *4, *7 (E.D. Mo. Oct. 1, 2021).

57. *Id.* at *3.

58. Guzzo v. Hansen, No. 4:22-CV-15 PLC, 2022 WL 3081159, at *9-10 (E.D. Mo. Aug. 3, 2022).

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lot of things to do there.”⁵⁹ The court found the child’s statements to be that of a typical ten-year-old, but not especially mature.⁶⁰

4. *Human Rights*

Article 20 provides that the return of the 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.”⁶¹ Practically speaking, this exception is typically unsuccessful, and therefore not often raised. In the past year, however, it has featured more prominently in the caselaw. A federal district court in Texas agreed with a father’s argument under Article 20 that returning his five-year-old and four-year-old to Ciudad Juarez, Mexico, would violate their human rights, as they were not afforded the fundamental right to a special education free of charge to meet their specific needs, thereby impacting their fundamental freedoms in the future.⁶² Referring to the Universal Declaration of Human Rights,⁶³ the Individuals with Disabilities Education Act,⁶⁴ the Texas Constitution, and *Brown v. Board of Education*,⁶⁵ the court concluded that while Mexican law provides for special education, it required the children’s mother to be present so the children could attend school, which created a conflict with her work schedule, and this acted to deny them a fundamental right to education.⁶⁶

In a second case, while the district court ordered the return of the minor child to Venezuela, despite the child having been granted asylum in the United States, a dissenting opinion from the United States Court of Appeals for the Sixth Circuit urged the majority to consider whether asylum claims may invoke an Article 20 exception, arguing that when dealing with a refugee child, there should be a rebuttable presumption that if the child is returned, there is a risk of persecution.⁶⁷ The dissent also cited to the 1951 Convention Relating to the Status of Refugees⁶⁸ and Article 14 of the Universal Declaration of Human Rights to argue that returning an asylee is a matter under Article 20.⁶⁹ But the primary issue, argued at trial, was not Article 20; the respondent relied primarily on Article 13(b), which the

59. *Id.*

60. *Id.* at *8–9.

61. Convention on the Civil Aspects of International Child Abduction, *supra* note 1, art. 20.

62. Galaviz v. Reyes, No. EP-21-CV-00286-FM, 2022 WL 620702, at *5–6 (W.D. Tex. Feb. 22, 2022) (appeal filed; the court also found a grave risk of harm to returning the children to Mexico, separate from the Article 20 exception).

63. See G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 26 (Dec. 10, 1948).

64. 20 U.S.C. § 1400.

65. See generally *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

66. See *Galaviz*, 2022 WL 620702 at *2, *6.

67. *Salame v. Tescari*, 29 F.4th 763, 773–75 (6th Cir. 2022) (Nelson Moore, J., dissenting).

68. Convention Relating to the Status of Refugees, art. 33, July 28, 1951, 189 U.N.T.S. 137.

69. *Salame*, 29 F.4th 763 at 778 (Nelson Moore, J., dissenting).

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majority determined was relevant but required a very different burden of proof than a request for asylum.⁷⁰

5. *Consent/Acquiescence*

To show acquiescence there must be either 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 of time.”⁷¹ Courts have required that the totality of circumstances be examined to determine whether there was consent or acquiescence.⁷²

C. OTHER ISSUES

1. *Attorney’s Fees*

A court has the authority to request an attorney volunteer to represent the petitioner in a Hague return action.⁷³

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.⁷⁴ Most circuit courts hold that district courts have broad discretion to determine when an award of costs and fees is appropriate.⁷⁵ While the “clearly inappropriate” inquiry is necessarily dependent on the facts of each case, 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 their actions in removing or retaining the child were legal or justified.⁷⁶ A court found that an attorney fee award would not be inappropriate when a respondent’s financial condition still permitted him to visit the children, particularly since he had free flights to Thailand.⁷⁷ Further, he had no good faith belief that his actions were legally

70. *Id.* at 771–72.

71. *Djeric v. Djeric*, No. 2:18-cv-1780, 2019 WL 1046893, at *5 (S.D. Ohio Mar. 5, 2019).

72. *See, e.g., Pflucker v. Warms*, No. 8:21-cv-1869-WFJ-JSS, 2021 WL 4593824, at *8–*10 (M.D. Fla. Oct. 6, 2021).

73. *See Garzon v. De Hoffman*, No. 2:21-cv-10340, 2021 WL 125946, at *2 (E.D. Mich Apr. 6, 2021).

74. This may also include expenses and fees incurred when the original order for fees must be defended on appeal. *Sundberg v. Bailey*, No. 1:17-cv-00300-MR-DLH, 2019 WL 2550541, at *1 (W.D.N.C. June 19, 2019).

75. *See, e.g., West v. Dobrev*, 735 F.3d 921, 932 (10th Cir. 2013); *Whallon v. Lynn*, 356 F.3d 138, 140 (1st Cir. 2004); *Ascanio v. Crespo*, No. 21-cv-23396, 2022 WL 1812251, at *3 (S.D. Fla. May 11, 2022).

76. *See Bhattacharjee*, 2022 WL 2915545, at *2, *6; *Webster-Colquhoun v. Colquhoun*, No. 21-CV-7101, 2022 WL 2866470, at *3 (S.D.N.Y. July 21, 2022).

77. *Pawanun v. Petit*, No. 1:20CV1081, 2022 WL 99721, at *2 (N.D. Ohio Jan. 11, 2022).

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justified.⁷⁸ If a respondent argues financial hardship, they need to provide sufficient evidence to be successful in their argument.⁷⁹

A court has the authority to order fees and costs even if the child turns sixteen after the return order, but before the fee award.⁸⁰ The award may be for fees and costs, but the costs might not include the cost of holding a trial remotely.⁸¹ Petitioner must also ensure that they follow local procedural rules governing the timing of the attorney fee request.⁸² A request filed forty-two days after the child was ordered returned violated a local court rule requiring requests to be filed within fourteen days and was therefore denied.⁸³

The provisions in ICARA authorize an award of attorney fees to the prevailing petitioner.⁸⁴ It follows, therefore, that there is nothing in ICARA permitting the award of fees to a prevailing respondent.⁸⁵ A court can, however, award sanctions to a respondent for the bad faith activities of petitioner's counsel under provisions other than ICARA, such as the Federal Rules of Civil Procedure 11(b).⁸⁶

D. PROCEDURAL ISSUES

1. *Interpreters*

U.S. federal courts do not typically provide interpreters for the parties at no cost. But there are occasions when a court has found that an Abduction Convention proceeding is an exception to the general rule, and the parties can revisit the issue of costs later in the proceeding.⁸⁷

a. Remote Testimony

The Federal Rules of Civil Procedure requires testimony in open court, but permits, in compelling circumstances, and with appropriate safeguards, for testimony by contemporaneous transmission from a different location.⁸⁸ A petitioner father argued that this should be permitted in his situation, where he was serving in the U.S. military in Germany, it would cost between \$800 to \$1,600 and more than fourteen hours for him to travel to California,

78. *Id.*

79. *Romanov v. Soto*, 2022 WL 3646325, *4–*5 (M.D. Fla. 2022).

80. *See Noergaard v. Noergaard*, 271 Cal. Rptr. 3d 905, 915–17 (Cal. Ct. App. 2020).

81. *See Jacquety v. Baptista*, 549 F. Supp. 3d 293, 299–300 (S.D.N.Y. 2021).

82. *Sanchez v. Iduarte*, No. 4:21-cv-0984-P, 2022 WL 1540581, at *1–2 (N.D. Tex. May 16, 2022).

83. *Id.*

84. 22 U.S.C. § 9007(b)(2).

85. *See Stone v. Stone*, No. 19-17962, 2020 WL 491194, at *1 (D.N.J. Jan. 30, 2020).

86. *See Soberano v. Guillen*, No. C21-1084, 2022 WL 1092675, at *5 (W.D. Wash. Apr. 12, 2022).

87. *See generally id.* at *3.

88. FED. R. CIV. P. 43(a).

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and his military duties were to support the ongoing Ukraine war.⁸⁹ He also had a condition (ulcerative colitis) that would make travel difficult.⁹⁰ The court, however, rejected the petitioner's request, having found that two days earlier, the petitioner had requested a summer trip with his children to Disneyworld.⁹¹ The court concluded that the trial could be scheduled for when the father was already in the United States.⁹²

2. *Mootness*

An Abduction Convention matter that had been dragging due to procedural posturing, was dismissed as moot after the petitioner mother secured a foreign child custody order and registered and enforced it under the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA) in Michigan, securing the return of her children using that process.⁹³ The respondent father argued that the children could only be returned to Germany using the Abduction Convention and in federal court, and so he requested the federal court order the children re-returned to Michigan for further proceedings under the Abduction Convention.⁹⁴ The court rejected this argument.⁹⁵

3. *Stays*

In considering whether to stay a return order in an Abduction Convention case, courts consider the traditional stay 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."⁹⁶ Stays pending appeal are generally frowned upon in a proceeding under the Hague Convention.⁹⁷

89. See *Krause v. Krause*, No. 1:21-cv-01706-JLT-SAB, 2022 WL 1292261, at *5 (E.D. Cal. Apr. 29, 2022).

90. See *id.*

91. See *id.* at *7–*8.

92. See *id.* at *12.

93. See *Lorenz v. Lorenz*, No. 20-cv-13128, 2022 WL 1178501, at *2 (E.D. Mich. Apr. 20, 2022); *Lorenz v. Lorenz*, No. 2:20-cv-13128, 2022 WL 1400850, at *5 (E.D. Mich. Mar. 16, 2022).

94. See *Lorenz*, 2022 WL 1400850, at *1, *3.

95. See *id.* at *6.

96. *Chafin v. Chafin*, 586 U.S. 165, 179 (2013); *Dumitrascu v. Dumitrascu*, No. 21-cv-01813-PAB, 2021 WL 4861837, at *1 (D. Colo. Oct. 19, 2021) (petitioner unlikely to succeed on appeal due to the new definition of habitual residence), *aff'd*, 2022 WL 1529624 (10th Cir. May 16, 2022).

97. See *Garcia v. Ramsis*, No. 4:21-CV-650-SDJ, 2022 WL 1271129, at *1 (E.D. Tex. Apr. 28, 2022).

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4. *Temporary Restraining Orders*

A petitioner seeking a preliminary injunction must establish that “[s]he is likely to succeed on the merits, that [s]he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his/her favor, and that an injunction is in the public interest.”⁹⁸

The court may also remove the child from the abductor during the pendency of the case if it is allowed to do so under state law.⁹⁹ An Ohio court removed the children because the appointed Guardian Ad Litem observed that the respondent was “prone to impulsive behavior, and she may not comply with a court order directing her to facilitate the children’s return to France.”¹⁰⁰

A Michigan court refused to issue an *ex parte* order based solely on a petitioner’s version of the events.¹⁰¹ Similarly, a California court refused a petitioner’s *ex parte* request for a *ne exeat*, to prevent the respondent from leaving Alameda County, because nothing in the record before the court indicated that the respondent was poised to leave Alameda, where he had lived for some time.¹⁰²

5. *Enforcement of Foreign Orders*

A Kansas court determined that it should give comity to a Dutch decision not to return a child under the Abduction Convention.¹⁰³ The court then determined that the child’s home state was the Netherlands and therefore the Netherlands had jurisdiction to decide the custody issue.¹⁰⁴ But, it does not automatically follow that Kansas courts do not have jurisdiction simply because the Dutch courts refused to return the child under the Abduction Convention.

6. *Abstention*

It is rare for a federal court to abstain from deciding an abduction case because a proceeding for custody had been previously filed in state court. Abstention is proper if the state proceeding will decide all the issues in the

98. See *Rodriguez v. Molina*, 608 F. Supp. 3d 791, 796 (S.D. Iowa 2022); *McIntyre v. Smith*, No. 21-cv-2182, 2021 WL 5167280, at *1 (D. Minn. Oct. 7, 2021); *Martinez v. Palmer*, No. 4:21-cv-00520-DCN, 2022 WL 671212, at *4 (D. Id. Mar. 7, 2022); *Lopez v. Ashe*, No. 22-1053, 2022 WL 1207146, at *2 (W.D. La. Apr. 22, 2022); *Vonnahme v. Lugo*, No. 2:22-cv-00707-JAD-NJK, 2022 WL 1444645, at *1 (D. Nev. May 5, 2022); *Aredes v. Aredes*, No. 22-cv-10666-IT, 2022 WL 2442631, *2 (D. Mass. June 8, 2022) (preliminary injunction).

99. *Djiele v. Kengne*, No. 2:20-CV-3140, 2021 WL 5376642, at *5 (S.D. Ohio Mar. 18, 2021).

100. *Id.* at *4–5.

101. See generally *Garzon v. De Hoffman*, No. 1:21-CV-59, 2021 WL 5537505, *2 (W.D. Mich. Jan. 20, 2021).

102. *Kitam v. Titti Moussi*, No. 21-CV-09235-JD, 2021 WL 6617457, at *1–2 (N.D. Cal. Dec. 21, 2021).

103. *Interest of S.L.*, 503 P.3d 244, 265 (Kan. Ct. App. 2021).

104. *Id.* at 257.

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abduction case.¹⁰⁵ When a father, who was seeking access through the Abduction Convention, sought the same in a federal court in the United States, despite pending litigation on the issue of custody and access in both a U.S. and English family court, the Tenth Circuit Court of Appeals concluded that his request was precluded from resolution by the abstention doctrine because of the ongoing litigation in the family courts on the precise same issue.¹⁰⁶

7. *Discovery*

When a respondent failed to cooperate in the discovery process, the petitioner filed a request for discovery sanctions.¹⁰⁷ The court, pursuant to the Federal Rules of Civil Procedure, sanctioned respondent by precluding her from arguing a grave risk of harm exception for interfering with the psychological expert's report, and made a finding that England was the child's habitual residence because the lack of discovery responses to questions related to habitual residence meant the respondent could not prove it was not England.¹⁰⁸

8. *Shielding an Address*

A petitioner parent argued that his due process rights were violated when the respondent was permitted to shield/protect her address.¹⁰⁹ She also refused to provide her boyfriend's name and the county in which she lived with her boyfriend because of her protected address.¹¹⁰ The court agreed with petitioner that he was entitled to know what was happening in the house where the child lived for the purpose of defending against the respondent's assertion that the child was now settled but concluded that protecting the information did not inhibit his ability to present his case.¹¹¹

9. *International Organizations and Tribunals*

The United States is not a treaty party to the U.N. Convention on the Rights of the Child, but Chile is.¹¹² After two consecutive orders refusing to return an autistic child to Spain, the Supreme Court of Chile ordered the return of the child pursuant to the Abduction Convention.¹¹³ The mother,

105. *Soulier v. Matsumoto*, No. CV 20-4720, 2020 WL 8186164, at *2-3 (D.N.J. Dec. 4, 2020).

106. *Dawson v. Dylla*, No. 21-1225, 2021 WL 5232251, at *5 (10th Cir. Nov. 10, 2021).

107. *Tchenguz v. Bird*, No. CV 21-128-M-DWM, 2022 WL 43660, at *1 (D. Mont. Jan. 5, 2022).

108. *Id.*

109. *Baez v. Paraskevas*, No. 2 CA-CV 2022-0022-FC, 2022 WL 3368498, at *3 (Ariz. Ct. App. Aug. 16, 2022).

110. *Id.*

111. *Id.* at *3-4.

112. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

113. See generally U.N. Committee on the Rights of the Child, Views Adopted by the Committee Under the Optional Protocol to the Convention on The Rights of the Child on a

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having exhausted her appeals, lodged a letter with the U.N. Committee on the Rights of the Child, alleging that the court in Chile violated several articles of the U.N. Convention on the Rights of the Child.¹¹⁴ The committee ultimately agreed that the Chilean Supreme Court order did not provide sufficient reasoning in its decision for the committee to assess that the court considered the child's best interests in reaching its decision.¹¹⁵

II. International Judicial Assistance

A. SERVICE OF PROCESS

A New York trial court erred in allowing a husband to serve his wife by email when he failed to make out a case that service would not otherwise be completed under Italian law.¹¹⁶

B. EVIDENCE REQUESTS

A Michigan court enforced letters rogatory from an Egyptian court seeking documents from a respondent in Michigan concerning his salary at the University of Michigan to facilitate the petitioner's suit for support in Egypt.¹¹⁷ The respondent's claim of lack of notice prior to the subpoena was rejected since he had actual notice and failed to show any prejudice for the fact that the notice came a couple of days after the subpoena.¹¹⁸

III. Divorce

A. ALIMONY

A Connecticut court concluded that spousal maintenance orders, entered in a divorce matter in England, could be modified in Connecticut.¹¹⁹ The Connecticut court's reading of the U.K.'s Reciprocal Enforcement of Maintenance Orders Order 2007 (REMO) conferred modification jurisdiction of U.K. spousal support orders in the U.K. courts, but that jurisdiction was not exclusive, meaning a Connecticut court could concurrently modify the orders, particularly in that both parties had left England.¹²⁰

Communications Procedure, Concerning Communication No. 121/2020, U.N. Doc. CRC/C/90/D/121/2020 (June 20, 2022).

114. *Id.* ¶¶ 7.2, 7.7.

115. *Id.* ¶ 8.8.

116. *Joseph II. v. Luisa JJ.*, 49, 160 N.Y.S.3d 119, 123–24 (N.Y. App. Div. 2021).

117. *In re Request for Judicial Assistance from Embassy of Arab Republic of Egypt*, No. 2:21-MC-51058, 2021 WL 6112131, at *3–4 (E.D. Mich. Dec. 27, 2021).

118. *Id.* at *2.

119. *Olson v. Olson*, 279 A.3d 230, 239 (Conn. Ct. App. 2022), *cert. denied* 284 A.3d 299 (2022).

120. *Id.* at 238.

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B. MARRIAGE CONTRACTS

A couple who executed an Islamic marriage contract in Iraq, and where the husband did not suggest the contract was unenforceable in Iraq under Iraqi law, or that he was coerced into signing it, were bound by the contract at the time of their divorce in New York.¹²¹ As a matter of comity, the generally accepted rule is that matters bearing on a contract's execution, interpretation, and validity are determined by the law of the place where the contract was made.¹²² A Florida couple disputed the interpretation (but not validity) of a Bangladeshi Islamic marriage contract, questioning whether the contract set a minimum amount due to the wife or a maximum amount due to the wife.¹²³ The court applied Florida law to the secular terms in the contract, and looking at Florida's presumption in favor of equitable distribution, the court reversed and remanded indicating that there was no language in the contract waiving such equitable distribution.¹²⁴ A couple who executed a marriage contract in Quebec, Canada, which selected a "separate property regime" pursuant to the Civil Code of Quebec, but were divorcing in Florida, were required to have their property divided according to the civil code of Quebec.¹²⁵ Florida courts will enforce contractual choice-of-law provisions unless in violation of Florida public policy.¹²⁶

C. VOID MARRIAGES

Parties who were married legally in Lebanon had their marriage invalidated in California by a California judge as being bigamous.¹²⁷ Even though the parties waived in their assertions as to whether they were married, or not, and the originally assigned judge found the marriage valid because it was valid under Lebanese law, the bigamous marriage was void in California as against public policy.¹²⁸

D. DIVORCE

A Polish national could form the requisite intent to make Washington State her domicile so that she could pursue a divorce there.¹²⁹ Her immigration status post-divorce, where she would no longer be a dependent

121. *Olewi v. Shlahi*, 156 N.Y.S.3d 825, 825–26 (N.Y. Sup. Ct. 2021).

122. *Id.* at 826.

123. *Parbeen v. Bari*, 337 So. 3d 343, 344 (Fla. Dist. Ct. App. 2022).

124. *Id.* at 346.

125. *Moquin v. Bergeron*, 338 So. 3d 918, 925 (Fla. Dist. Ct. App. 2022).

126. *Id.*

127. *In re Marriage of Elali & Marchoud*, 294 Cal. Rptr. 3d 804, 815 (Cal. Ct. App. 2022).

128. *Id.*

129. *Matter of Marriage of Rietschin*, 22 Wash. App. 2d 1045 (Wash. Ct. App. 2022), *withdrawn on denial of reconsideration sub nom.* *Rietschin v. Rietschin*, 2022 WL 4078521 (Wash. Ct. App. 2022), *review denied*, 525 P.3d 147 (2023).

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on her Swiss spouse's employment visa in the United States, was irrelevant to the domicile argument.¹³⁰

IV. Children

A. CUSTODY DETERMINATIONS

A Tennessee mother was allowed to take her children to Germany for the summer conditioned upon her posting a \$50,000 bond.¹³¹

A New York court reversed an order allowing a father to travel with his children to Ghana, which has not ratified the Abduction Convention, as there was no sound and substantial basis in the record to support a finding that such unrestricted international travel was in the best interests of the young children.¹³²

B. JURISDICTION OVER CUSTODY

1. Home State & Significant Connections Jurisdiction

It is often necessary to hold a hearing to determine the facts that support or reject jurisdiction. For example, a New York trial court erred in examining a totality of circumstances to hold that New York had jurisdiction when in fact the child had lived in Italy for the last ten months.¹³³ Ohio also could not exercise jurisdiction over a child who had lived in India for over six months, thereby giving India home state jurisdiction.¹³⁴

A child who had lived in Canada with his mother for a year prior to filing for custody in California was only temporarily absent from California.¹³⁵ California remained the child's home state because the plan for the mother and child to live in Canada was merely a temporary plan for the mother to secure acting jobs, but then return to California where she would find permanent work.¹³⁶

2. Continuing Jurisdiction

An Illinois court properly modified its own order and allowed the children to visit their mother in Japan.¹³⁷ A Texas court had exclusive continuing jurisdiction over children who had lived in Mexico for the last four years

130. *Id.* at 1045.

131. *Liebetreu v. Liebetreu*, No. M2021-00623-COA-R3-CV, 2022 WL 818109, at *3 (Tenn. Ct. App. Mar. 18, 2022).

132. *Naamye v. Goodwin*, 152 N.Y.S.3d 575, 575 (N.Y. App. Div. 2021).

133. *Joseph II*, 160 N.Y.S.3d at 121–22.

134. *V.K. v. K.K.*, 2022-Ohio-1661, ¶¶ 38, 41, 190 N.E.3d 96, 107–08 (Ohio Ct. App. 2022).

135. *In re Marriage of Randoy*, No. B308216, 2022 WL 2338955, at *1 (Cal. Ct. App. June 29, 2022), reh'g denied (July 22, 2022), review denied (Oct. 12, 2022) (unpublished).

136. *Id.* at *4.

137. *In re Marriage of Jeffrey F. & Yuko Y.-F.*, 2021 WL 5276627, *13 (Ill. App. Ct. 2021).

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because the mother prevented the children from seeing their father.¹³⁸ A Michigan court modified a custody determination and changed custody to the father when the mother moved to Mexico, obtained a restraining order against the father, refused to allow him to exercise his parenting time, and did not consult him on those aspects of parenting required by the decree.¹³⁹

3. *Registration and Enforcement*

A New Hampshire trial court properly enforced a custody determination from Turkey because the father had been given an opportunity to be heard in the Turkish proceeding.¹⁴⁰ A Georgia court enforced a custody order from the United Kingdom as the mother in Georgia did not meet her burden for contesting registration under the narrow provisions of the UCCJEA.¹⁴¹

V. Criminal Kidnapping & Ancillary Issues

A New Jersey custody order, granting sole custody of a child to the child's father, resulted in the child's mother filing criminal charges against the father after he moved the child to India.¹⁴² Arguing that the order that the federal prosecutor was attempting to use as the basis for the criminal charges (a subsequent order requiring the father to return the child) gave no rights to the mother, and her visitation was vague at best, the father succeeded in having the charges dismissed.¹⁴³ The court concluded that "visiting rights" under the International Parental Kidnapping Crime Act (IPKCA)¹⁴⁴ must be concrete and specifically defined in the court order or legally binding agreement prior to the unlawful removal or retention.

The U.S. Department of State also issued its annual "compliance" report¹⁴⁵ under the International Child Abduction Prevention and Return Act of 2014 (ICAPRA)¹⁴⁶ on June 17, 2022. This report examines every country where a child was taken during the prior calendar year (here, 2021).¹⁴⁷ It then provides guidance as to whether each country exhibited a pattern of noncompliance (i.e., it did not return the child, regardless of

138. Cortez v. Cortez, 639 S.W.3d 298, 311–12 (Tex. App. 2021).

139. Telehowski v. Telehowski, No. 357521, 2022 WL 1194626, at *7 (Mich. Ct. App. Apr. 21, 2022), *appeal denied*, 980 N.W.2d 501 (Mich. 2022).

140. *Matter of Akin*, 274 A.3d at 581.

141. Makin v. Davis, 873 S.E.2d 477, 481 (Ga. Ct. App. 2022).

142. United States v. Patel, No. CR 20-613 (RMB), 2022 WL 17324428, at *2–3 (D.N.J. Nov. 29, 2022).

143. *Id.*

144. 18 U.S.C. § 1204.

145. See generally U.S. DEP'T OF STATE, ANNUAL REPORT ON INTERNATIONAL CHILD ABDUCTION 2022 (2022), <https://travel.state.gov/content/dam/NEWIPCAAssets/pdfs/2022%20ICAPRA%20Annual%20Report.pdf> [<https://perma.cc/HX5N-34V9>].

146. Sean & David Goldman International Child Abduction Prevention and Return Act of 2014, Pub. L. No. 113-150, 128 Stat. 1807 (2014).

147. U.S. DEP'T OF STATE, *supra* note 145.

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whether there was a legal mechanism in place to provide for the return of the child or not).¹⁴⁸ While certain countries have long been listed as not compliant by the Department of State, the report included a few new countries this year, including Austria (noting delays in communication about the resolution of cases and judicial decisions that are not consistent with the Abduction Convention),¹⁴⁹ Belize (noting delays in the judiciary),¹⁵⁰ Honduras (noting Central Authority delays and delays in the judiciary),¹⁵¹ South Korea (noting delays in the judiciary and delays in enforcement of return orders),¹⁵² and Trinidad and Tobago (noting delays in the judiciary).¹⁵³

148. *Id.* at 14–45.

149. *Id.* at 17–18.

150. *Id.* at 19–20.

151. *Id.* at 29–30.

152. *Id.* at 35–36.

153. *Id.* at 41–41.

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International Human Rights

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I. Introduction

This article highlights developments in 2022 that the International Human Rights Committee (IHRC) has focused on in its programming and advocacy work.

II. Climate Change and the Environment

A. RIGHT TO A CLEAN, HEALTHY, & SUSTAINABLE ENVIRONMENT

The triple threats of climate change, loss of biodiversity, and pervasive environmental pollution have prompted many civil society organizations to urge governments and the private sector to recognize their obligations to assure the right to a clean, healthy, and sustainable environment. Over 150 countries have adopted that right in their constitutions, laws, regulations, and judicial decisions.¹ Regionally, the African Charter on Human and Peoples' Rights, the American Convention on Human Rights, the Escazu

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1. See *Advancing the Right to a Healthy Environment*, UNITED NATIONS ENV'T PROGRAMME, <https://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/advancing-right-healthy-environment> [https://perma.cc/6JN3-2WSB]. (last visited Mar. 10, 2023); see also *A Universal Right to a Healthy Environment*, EUROPEAN PARLIAMENT (Dec. 2021), [https://www.europarl.europa.eu/RegData/etudes/ATAG/2021/698846/EPRS_ATA\(2021\)698846_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2021/698846/EPRS_ATA(2021)698846_EN.pdf) [https://perma.cc/9BJ3-A5WN].

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Agreement, the Arab Charter on Human Rights, and the ASEAN Declaration on Human Rights all include a right to a healthy environment.²

In the United States, New York, Pennsylvania, Montana, Illinois, Hawaii, and Massachusetts have adopted a right to a healthy environment in their state constitutions.³ Other states, including Kentucky, Maine, New Mexico, Oregon, Washington, and West Virginia, are in various stages of creating such a right.⁴

In 2021, the United Nations Human Rights Council (UNHRC) acknowledged the right to a healthy environment as a human right and as part of the system of international human rights in a resolution submitted to the UNHRC by a core group of countries, including Costa Rica, Morocco, Slovenia, Switzerland, and the Maldives.⁵ In a major development this year, the U.N. General Assembly adopted a similar resolution.⁶

U.N. recognition of the right to a clean, healthy, and sustainable environment brings environmental protection into the system of international human rights law and urges governments, and the private sector, to take action to protect and safeguard the environment.⁷ It also focuses attention on those communities that are most adversely affected by environmental degradation.⁸

The two U.N. resolutions cited above are not enforceable in and of themselves; yet the international recognition of rights establishes universal norms and expectations, acts as a catalyst for the implementation of stronger measures, and provides incentives for more governments to incorporate those norms and expectations into their own constitutions and legislation where they can be enforced nationally.⁹ The recognition of the right to a healthy environment will also lend credibility to groups within civil society that advocate for increased attention to that right and to those who push for

2. See, e.g., *Good Practices on the Right to a Healthy Environment*, UNITED NATIONS HUM. RTS. OFF. OF HIGH COMM'N, <https://www.ohchr.org/en/special-procedures/sr-environment/good-practices-right-healthy-environment> [<https://perma.cc/YQ4G-TM89>] (last visited Apr. 10, 2023); see also Special Rapporteur David R. Boyd, *Right to a Healthy Environment: Good Practices*, U.N. Doc. A/HRC/43/53 (Mar. 20, 2020) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/355/14/PDF/G1935514.pdf?OpenElement> [<https://perma.cc/U8DE-CXP6>].

3. *The Right to a Healthy Environment, Part 3: Subnational Consideration of the Right to a Healthy Environment in the U.S.*, ENV'T LAW INST. (July 20, 2022), <https://www.eli.org/events/right-healthy-environment-part-3-subnational-consideration-right-healthy-environment-us> [<https://perma.cc/J6W4-5WAJ>].

4. Corinne Bell, *Every State Should Have a Right to a Healthy Environment*, NAT'L RES. DEF. COUNCIL (Mar. 29, 2021), <https://www.nrdc.org/experts/corinne-bell/every-state-should-have-right-healthy-environment> [<https://perma.cc/HUV4-8LGW>].

5. Human Rights Council Res. 48/13, U.N. Doc. A/HRC/RES/48/13, at 3 (Oct. 18, 2021).

6. G.A. Res. 76/300 (July 28, 2022).

7. *Id.*

8. *Id.*

9. See G.A. Res. 48/13 (Oct. 8, 2021); G.A. Res. 76/300 (July 28, 2022).

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remedies to assist the most vulnerable communities to adapt and receive compensation for the harms they have suffered.¹⁰

B. HUMAN RIGHTS IN CLIMATE LITIGATION

Human rights continued to feature in many instances of climate litigation in 2022,¹¹ building on a general trend to focus on the human rights implications of various climate-related actions. These included the long-awaited report of the Philippines Commission on Human Rights (“PCHR”) on the impact of climate change and the role of certain high emissions companies known as “carbon majors,” which contains a series of recommendations for political bodies on responding to climate change from a human rights perspective.¹² In other jurisdictions, courts were asked to address the human rights component of climate change vis-à-vis governments’ compliance with their obligations. These have seen mixed results, with jurisdictions often taking very different approaches.

For example, in July 2022, the United Kingdom High Court of Justice (U.K. High Court) issued a decision concerning, among other things, the Net Zero Strategy (NZS) issued by the Secretary of State for Business Energy and Industrial Strategy (Secretary) in 2021.¹³ Plaintiffs in the case had argued that the NZS was inadequate, and thus unlawful, under Sections 13 and 14 of the Climate Change Act of 2008 (CCA).¹⁴ The plaintiffs argued the CCA should be interpreted to better protect human rights covered under the European Convention on Human Rights (ECHR).¹⁵ Ultimately, the U.K. High Court found the NZS insufficient under CCA Sections 13 and 14 but not on the human rights ground.¹⁶

CCA Sections 13 and 14 impose a “duty to prepare proposals and policies for meeting carbon budgets” and a “duty to report on proposals and policies for meeting carbon budgets,” respectively.¹⁷ The U.K. High Court

10. See Michelle Bachelet, U.N. High Comm’r for Hum. Rts., Statement at Glion Hum. Rts. Dialogue (May 16, 2022), <https://www.ohchr.org/en/statements/2022/05/right-clean-healthy-and-sustainable-environment-what-does-it-mean-states-rights> [https://perma.cc/WH2T-ASUD].

11. See, e.g., JOANA SETZER & CATHERINE HIGHAM, GLOBAL TRENDS IN CLIMATE CHANGE LITIGATION: 2022 SNAPSHOT 1, 4 (2022), <https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2022/08/Global-trends-in-climate-change-litigation-2022-snapshot.pdf> [https://perma.cc/2BEL-U4JK].

12. COMM’N ON HUM. RTS. OF THE PHILIPPINES, NATIONAL INQUIRY ON CLIMATE CHANGE REPORT (2022), https://chr.gov.ph/wp-content/uploads/2022/12/CHRP_National-Inquiry-on-Climate-Change-Report.pdf [https://perma.cc/G2LY-FV37].

13. Friends Earth Ltd. v. Sec’y State for Bus., Energy and Indus. Strategy [2022] EWHC (Admin) 1841 (Eng.). See also DAVID HOLGATE, J., FRIENDS EARTH LTD. v. SEC’Y STATE FOR BUS., ENERGY AND INDUS. STRATEGY SUMMARY (July 18, 2022), <https://www.judiciary.uk/wp-content/uploads/2022/07/FoE-v-BEIS-summary-180722.pdf> [https://perma.cc/86BK-4TEZ].

14. See Friends Earth [2022] EWHC (Admin) 1841 [16] (Eng.).

15. *Id.*

16. *Id.* at ¶ 279.

17. Climate Change Act 2008, c. 27, § 13–14 (U.K.).

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determined that Section 13 had been violated by not providing quantitative analysis for the individual policies comprising the NZS.¹⁸ Similarly, the U.K. High Court determined that Section 14 had been violated by not providing detail on the policies, including clarifying that the quantitative assessments still left five percent of emissions reductions to be achieved by additional policy work that had only been qualitatively reviewed as of the publication of the NZS.¹⁹

But the U.K. High Court did not find that the CCA should be interpreted to integrate human rights obligations from the ECHR.²⁰ It noted that the Human Rights Act of 1998 did not give the judiciary license to amend legislation, just to merely interpret it to be compatible with the ECHR and related jurisprudence from the European Court of Human Rights (ECtHR).²¹ Plaintiffs referenced *The State of the Netherlands v. Urgenda*, but the U.K. High Court did not find that decision to necessarily conform to the principles established by the ECtHR.²² As such, the U.K. High Court determined that imbuing the provisions of the CCA with a human rights interpretation would go beyond permissible incremental development in the application of the ECHR.²³

In contrast, the Supreme Court of Brazil (SCB) issued a decision in June 2022 recognizing an inviolable human rights element of climate change that supersedes domestic law.²⁴ In *PSB v. Brazil*, the SCB held that treaties on environmental law are effectively human rights obligations and thus enjoy supranational status.²⁵ While the case in question focused on Brazil's climate fund, the decision theoretically suffuses human rights considerations into any suit in Brazil where international environmental law may be applicable.²⁶

The supranational status of human rights obligations is also featured in an earlier case from Brazil regarding the rights of Indigenous peoples. On February 8, 2022, the Federal Court of Rio Grande do Sul in Brazil issued its decision on the request of two associations, the Associação Indígena Poty Guarani and the Associação Arayara de Educação e Cultura, nullifying the licensing process for a coal, sand, and gravel mining project of Copelmi Mineração Ltda.²⁷ The case considered the principle of free, prior, and informed consent (FPIC), which Brazil ratified in International Labour Organization Convention 169 (C169).²⁸ Plaintiffs argued that there had not

18. See Friends of the Earth, *supra* note 13.

19. *Id.*

20. See *id.* at ¶ 261–75.

21. *Id.*

22. *Id.* at ¶ 268.

23. *Id.* at ¶ 275.

24. S.T.F.J., Arguição De Descumprimento De Preceito Fundamental No. 0024408-68.2020.1.00.0000, Relator: Min. Roberto Barroso, 04.07.2022, 708 ADPF (Braz.).

25. See *id.* at ¶ 17.

26. *Id.*

27. J.F.-9 Porto Alegre, Ação Civil Pública No. 5069057-47.2019.4.04.7100/RS, Relator: Clarides Rahmeier, 08.02.2022 (Braz.).

28. *Id.*

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been sufficient consultation to fulfill the FPIC requirement, despite the involvement of the National Indian Foundation (Fundação Nacional do Índio or FUNAI), because the specifically impacted Indigenous peoples had not been consulted.²⁹ The court agreed, nullifying the licensing process for failure to comply with the supranational norm.³⁰ The court also acknowledged C169's requirement of special protection of Indigenous peoples' interests in the use, administration, and conservation of natural resources (including subsoil resources) found in their lands and underscored the right of Indigenous communities to actively participate in decision-making that has the potential to affect their way of life.³¹

In both these cases, the supranational status of human rights norms resulted in the invalidation of contrary actions by the Brazilian government in actions with environmental impact. While not explicitly referenced by the courts, it is worth noting that both FPIC and the right to a healthy environment were underscored by the Inter-American Court of Human Rights (IACtHR) in the 2020 decision *Lhaka Honhat Association v. Argentina*.³² In contrast, the U.K. High Court noted that the ECtHR has not yet ruled on the ECHR's relationship to climate change.³³

While this may explain some of the differences in rulings of the courts in these countries, the variation in outcomes between countries indicates that the topic of human rights cannot presently be considered dispositive of the legal architecture for climate change, despite the willingness to consider the topics together.

C. THE RIGHTS OF NATURE

The legal movement for the rights of nature saw several new successes in 2022; by the end of October, the number of countries and Indigenous nations that have codified the right in some form rose to thirty-nine.³⁴

The movement's first European achievement is included in the numbers for 2022. The Mar Menor, an endangered lagoon off the southeast coast of Spain, was the first European recipient of the right.³⁵ The Spanish legislation, passed in September 2022, provides the Mar Menor with legal

29. *Id.*

30. *Id.*

31. *Id.*

32. Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 400 (Feb. 6, 2020).

33. See Friends of the Earth [2022] EWHC (Admin) 1841 [267] (Eng.).

34. Katie Surma, *Celebrating Victories in Europe and South America, the Rights of Nature Movement Plots Strategy in a Time of 'Crises'*, INSIDE CLIMATE NEWS (Oct. 31, 2022), <https://insideclimatenews.org/news/31102022/celebrating-victories-in-europe-and-south-america-the-rights-of-nature-movement-plots-strategy-in-a-time-of-crises/> [https://perma.cc/8RG6-RK4V].

35. Sam Jones, *Endangered Mar Menor Lagoon in Spain Granted Legal Status as a Person*, THE GUARDIAN (Sept. 21, 2022), <https://www.theguardian.com/world/2022/sep/21/endangered-mar-menor-lagoon-in-spain-granted-legal-status-as-a-person> [https://perma.cc/YAU2-SX39].

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representation, made up of a team of local caretakers, including public officials, who can take action to defend the lagoon from further pollution.³⁶

In February 2022, Panama became the second country to codify the rights of nature into national law;³⁷ Bolivia was the first in 2011.³⁸ The new Panamanian legislation defines nature as “a unique, indivisible and self-regulating community of living beings, elements and ecosystems interrelated to each other that sustains, contains and reproduces all beings,” and extends to it various rights, including the “right to be restored after being affected directly or indirectly by any human activity.”³⁹

The first meeting of the International Rights of Nature Tribunal was also held in 2022.⁴⁰ The Tribunal began on July 18, 2022, with judges spending over ten days traveling across the Amazon rainforest, listening to claims of ecological destruction from Indigenous leaders and migrants.⁴¹ At the end of their journey, the Tribunal judges delivered portions of their verdicts, which called, in part, for corporate executives to meet with Indigenous communities affected by the ecological destruction caused by their operations, for nature to be given a voice in policy-making, and for “companies and people destroying the Amazon . . . to repair the forest.”⁴²

India also had a rights of nature milestone this year. In April 2022, an Indian court ruled that nature should be granted “all corresponding rights, duties and liabilities of a living person.”⁴³

In addition, the Constitutional Court of Ecuador, in late 2021, upheld its past rulings on the rights of nature to protect the Los Cedros Forest from

36. *Id.*

37. Katie Surma, *Panama Enacts a Rights of Nature Law, Guaranteeing the Natural World's 'Right to Exist, Persist, and Regenerate'*, INSIDE CLIMATE NEWS (Feb. 25, 2022), <https://insideclimatenews.org/news/25022022/panama-rights-of-nature/> [https://perma.cc/2VYG-D8PH].

38. *Bolivia – National Rights of Nature Legislation*, AUSTRALIAN EARTH LAWS ALL., <https://www.earthlaws.org.au/aclc/rights-of-nature/bolivia/#:~:text=The%20laws%20recognised%20that%20nature,have%20cellular%20structure%20modified%20or> [https://perma.cc/WH9W-NUWY] (last visited Mar. 29, 2023).

39. See Surma, *supra* note 37.

40. Katie Surma, *A Thousand Miles in the Amazon, to Change the Way the World Works*, INSIDE CLIMATE NEWS (Oct. 9, 2022), https://insideclimatenews.org/news/09102022/a-thousand-miles-in-the-amazon-to-change-the-way-the-world-works/?utm_source=InsideClimate+News&utm_campaign=B00e095376-&utm_medium=Email&utm_term=0_29c928ffb5-b00e095376-329093333 [https://perma.cc/46YW-AURS].

41. *In Situ Visit of the International Tribunal for the Rights of Nature*, INT'L RTS. OF NATURE TRIBUNAL, <https://www.rightsofnaturetribunal.org/tribunals/brazil-delegation-2022/> [https://perma.cc/CD45-S36H] (last visited Mar. 29, 2023).

42. Surma, *supra* note 40.

43. Catherine Garcia, *The Global Movement to Give Nature 'Rights'*, THE WEEK (May 20, 2022), <https://theweek.com/environmental-news/1013565/the-global-movement-to-give-nature-rights> [https://perma.cc/8SGU-ERS8].

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mining and other extractive industries.⁴⁴ The ruling is critical in that it directs the court to develop binding jurisprudence to protect the rights of nature.⁴⁵ The court went even further in January 2022, when it became the first country to grant legal rights to individual wild animals in the landmark *Estralita* case.⁴⁶

National legislation successes were not the only such developments in 2022. This year has also seen increasing calls to add the definition of “ecocide” as a fifth international crime to the Rome Statute of the International Criminal Court, in addition to genocide, crimes against humanity, crimes of aggression, and war crimes.⁴⁷

The year 2022 also saw the publication of the report, *Law in the Emerging Bio Age*, from The Law Society.⁴⁸ The report draws on scientific developments, Indigenous understanding, and legal developments to call for rights to be granted to nonhumans, which “communicates our dependence on and a greater role for nature in decision-making.”⁴⁹

Finally, on March 7, 2022, the United Nations Environmental Assembly adopted a resolution connecting animal welfare to environmental protection and sustainability.⁵⁰ Though not explicitly connected to the global rights of nature movement, the Resolution emphasized the importance of improving global animal welfare to the U.N.’s goals concerning One Health⁵¹ and Harmony with Nature⁵² and stated that animal welfare is connected to human well-being and environmental sustainability.⁵³

44. Corte Constitucional Del Ecuador [Constitutional Court of Ecuador] (Nov. 10, 2021), “Action of Injunctive Relief,” Ruling No 1149-19-JP/21, <http://celdf.org/wp-content/uploads/2015/08/Los-Cedros-Decision-ENGLISH-Final.pdf> [<https://perma.cc/N9HY-57JR>].

45. *Id.*

46. Corte Constitucional Del Ecuador [Constitutional Court of Ecuador], 1/27/2022, “Rights of Nature and animals as subjects of rights,” Ruling No. 253-20-JH/22, <https://animal.law.harvard.edu/wp-content/uploads/Final-Judgment-Estellita-w-Translation-Certification.pdf> [<https://perma.cc/AMU9-EF4V>].

47. Charlotte Elton, *Ecocide Campaigners Call for Environmental Damage to be Treated Like War Crimes*, EURONEWS.GREEN (July 11, 2022), <https://www.euronews.com/green/2022/11/07/ecocide-campaigners-call-for-environmental-damage-to-be-treated-like-war-crimes> [<https://perma.cc/CPZ7-BBLG>].

48. WENDY SCHULTZ & TRISH O’FLYNN, THE L. SOC’Y, *LAW IN THE EMERGING BIO AGE* (Aug. 2022), <https://www.lawsociety.org.uk/topics/research/law-in-the-emerging-bio-age> [<https://perma.cc/9DNT-QAV9>].

49. *Id.* at 15.

50. United Nations Environment Assembly Res. 5/1, U.N. Doc. UNEP/EA.5/Res.1 (Mar. 7, 2022).

51. *One Health*, FOOD & AGRIC. ORG. UNITED NATIONS, <https://www.fao.org/one-health/en> [<https://perma.cc/AD5V-J3WR>] (last visited Mar. 29, 2023).

52. *Programme*, HARMONY WITH NATURE UNITED NATIONS, <http://www.harmonywithnatureun.org/> [<https://perma.cc/49ZZ-6SSG>] (last visited Mar. 29, 2023).

53. Climate Change Act 2008, c. 27 (U.K.).

III. Business and Human Rights Developments: The U.N. Accountability and Remedy Project Update

The 2022 report from the Accountability and Remedy Project of the Office of the U.N. High Commissioner for Human Rights (OHCHR) began with the important reminder, “The lack of accountability and remedy in business and human rights cases demands urgent attention from both State and business actors, not least because the right to remedy is a core tenet of the international human rights system.”⁵⁴ The Accountability and Remedy Project (ARP) aims to strengthen the implementation of the remedy pillar of the U.N. Guiding Principles on Business and Human Rights (UNGPs),⁵⁵ the global framework for addressing human rights abuses connected to corporate activity.⁵⁶ Under the UNGPs’ three-pillar “protect, respect, remedy” approach, states are recognized as the principal duty-bearers in protecting human rights, corporations have a responsibility to respect human rights, and both states and corporations bear responsibilities for ensuring access to remedy when human rights abuses occur.⁵⁷

The ARP, now in its fourth phase, has engaged in more than eight years of research and consultations across the globe.⁵⁸ Earlier phases focused on the different remedial systems referred to in the UNGPs: phase one (ARP I) on state-based judicial mechanisms, such as courts; phase two (ARP II) on state-based, non-judicial grievance mechanisms, such as regulators and national human rights institutions; and phase three (ARP III) on non-state-based grievance mechanisms, such as those created by companies.⁵⁹ The current phase (ARP IV) is devoted to the dissemination and implementation of the guidance identified in the earlier phases.⁶⁰

As detailed in the ARP IV report, that process is well underway.⁶¹ In 2022, it included the publication of an OHCHR report on remedy in development finance that drew heavily on ARP guidance.⁶² For years, civil

54. U.N. High Comm’r of Hum. Rts., *Enhancing the Accessibility, Dissemination and Implementation of the Accountability and Remedy Project*, ¶ 5, U.N. Doc. A/HRC/50/45 (Apr. 15, 2022) [hereinafter ARP IV Report].

55. *Id.* at ¶ 7; *see also* U.N. HIGH COMMISSIONER OF HUMAN RIGHTS, *GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: IMPLEMENTING THE UNITED NATIONS “PROTECT, RESPECT AND REMEDY” FRAMEWORK* (2011), https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf [<https://perma.cc/WR45-KVAA>] [hereinafter UNGPs].

56. U.N. WORKING GRP. ON BUS. & HUM. RTS., *UNGPs 10+ A ROADMAP FOR THE NEXT DECADE OF BUSINESS AND HUMAN RIGHTS 2–3* (2021), <https://www.ohchr.org/sites/default/files/2021-12/ungps10plusroadmap.pdf> [<https://perma.cc/VBZ6-CSK4>].

57. *See* UNGPs, *supra* note 55.

58. ARP IV Report, *supra* note 54, at ¶ 12.

59. *See* U.N. HIGH COMMISSIONER OF HUMAN RIGHTS, *ACCOUNTABILITY AND REMEDY PROJECT INFORMATION NOTE 1* (2022), <https://www.ohchr.org/sites/default/files/2022-05/arp-information-note.pdf> [<https://perma.cc/X73U-XN2C>].

60. ARP IV Report, *supra* note 54, at ¶ 12.

61. *See id.*

62. ARP IV Report, *supra* note 54, at ¶ 18.

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society organizations (CSOs) have documented human rights violations linked to investments by development finance institutions (DFIs) and sought accountability for affected communities.⁶³ The OHCHR report argues for “a stronger commitment and more proactive, robust approaches to remedy” within DFIs.⁶⁴ It underscores the importance of access to remedy, addresses the responsibilities of different parties in DFI-funded projects to remediate human rights harms, and offers recommendations to improve access to remedy in practice.⁶⁵ The report, with its emphasis on remedy as “the core of human rights,” along with its practical guidance, is an important contribution to ensure that DFIs “address harms, advance sustainable development and make more people whole.”⁶⁶

The ARP also focused this year on the connections between human rights due diligence regimes and access to remedy,⁶⁷ and hosted a consultation on that issue, which is summarized in an addendum to the ARP IV report.⁶⁸ The UNGPs advise that companies should carry out human rights due diligence “to identify, prevent, mitigate and account for how they address their adverse human rights impacts.”⁶⁹ In recent years, an increasing number of jurisdictions have adopted mandatory human rights due diligence legislation, and this year, the European Commission adopted a proposal for an EU-wide law.⁷⁰ In May 2022, OHCHR submitted feedback on the Commission’s proposed Directive, informed by the ARP’s work, which highlights areas where the proposed Directive should be revised to better align with the UNGPs and to improve its ability to advance human rights through due diligence.⁷¹

63. See Ioana Tuta & Signe Andreassen, *Development Finance Institutions and Human Rights: The Urgent Need to Connect the Dots*, BUS. & HUM. RTS. RES. CTR. (Dec. 10, 2021), <https://www.business-humanrights.org/en/blog/development-finance-institutions-and-human-rights-the-urgent-need-to-connect-the-dots/> [<https://perma.cc/8ZX5-4QRL>].

64. ARP IV Report, *supra* note 54, at ¶ 25.

65. See UNITED NATIONS HUM. RTS. OFF. OF HIGH COMM’N, REMEDY IN DEVELOPMENT FINANCE: GUIDANCE AND PRACTICE 1-8 (2022), <https://www.ohchr.org/sites/default/files/2022-03/Remedy-in-Development.pdf> [<https://perma.cc/KX6T-PGPX>].

66. *Id.* at viii, 8.

67. See *Mandatory Human Rights Due Diligence (mHRDD)*, UNITED NATIONS HUM. RTS. OFF. OF HIGH COMM’N, <https://www.ohchr.org/en/business-and-human-rights/mandatory-human-rights-due-diligence-mhrdd> [<https://perma.cc/D3HS-7AAL>] (last visited Mar. 30, 2023) (listing all of the ARP’s work on human rights due diligence from 2018 to 2022).

68. U.N. High Comm’r of Hum. Rts., Summary of Consultations on Enhancing Access to Remedy in the Technology Sector and on the Enforcement of Human Rights Due Diligence, ¶¶ 54–93, U.N. Doc. A/HRC/50/45/Add.1 (June 1, 2022) [hereinafter ARP IV Report Addendum].

69. See UNGPs, *supra* note 55, at 17.

70. See *Mandatory Due Diligence*, BUS. & HUM. RTS. RES. CTR., <https://www.business-humanrights.org/en/big-issues/mandatory-due-diligence/> [<https://perma.cc/E3CP-82U8>] (last visited Mar. 30, 2023).

71. See generally U.N. HIGH COMMISSIONER OF HUM. RTS., FEEDBACK ON THE PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON CORPORATE SUSTAINABILITY DUE DILIGENCE (2022), <https://www.ohchr.org/sites/default/files/2022-05/eu-csddd-feedback-ohchr.pdf> [<https://perma.cc/CDC5-T3BK>].

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Beyond the developments highlighted above, the full ARP IV report demonstrates the breadth of the Project’s work and its relevance to the rapid developments in the field of corporate accountability and access to remedy.⁷² For example, the report describes the ARP’s support for various national action plans on business and human rights, and the ARP IV report addendum includes key takeaways from a consultation on access to remedy in the technology sector.⁷³ The ARP is also developing a series of practical guidance documents to be released soon.⁷⁴

Despite this progress on numerous fronts, the ARP IV report warns, “[T]he fact that accountability and remedy for business-related human rights harms remains so elusive in practice shows the scale of the challenges ahead.”⁷⁵ It concludes with recommendations that business entities and others who operate non-state-based grievance mechanisms should: implement existing guidance; share experiences and lessons learned; and “meaningfully and proactively engage” with external stakeholders, including unions, affected communities, and CSOs “to ensure that such grievance mechanisms are properly responsive to the needs” of those intended to use them.⁷⁶

IV. Accountability and Remedy for Atrocity Crimes in Ukraine

Credible reports of violations of international humanitarian law and international human rights law by Russian forces, since its invasion of Ukraine on February 24, 2022, have been documented by U.N. fact-finding bodies, nongovernmental organizations, and others.⁷⁷ The widespread occurrence of summary executions, unlawful confinement, torture, rape, and other sexual violence⁷⁸ strongly supports the view that war crimes, crimes against humanity, and genocide have been committed against Ukrainians.

Consequently, a November 14, 2022, U.N. General Assembly resolution recognizes that the Russian Federation should be held accountable for violations of international law.⁷⁹ It also states that the Russian Federation

72. ARP IV Report, *supra* note 54.

73. *See generally* ARP IV Report Addendum, *supra* note 68, at ¶¶ 7–53.

74. *Id.* at ¶ 17; *see also* U.N. HIGH COMMISSIONER OF HUM. RTS., MEETING THE UNGPs’ EFFECTIVENESS CRITERIA: SUMMARY OF ARP III GUIDANCE (2021), <https://www.ohchr.org/sites/default/files/2022-01/arp-note-meeting-effectiveness-criteria.pdf> [<https://perma.cc/YNZ3-JLQT>] (providing practical guidance from ARP III).

75. ARP IV Report, *supra* note 54, at ¶ 69.

76. *Id.* at ¶ 73.

77. *See, e.g., UN Commission Has Found an Array of War Crimes, Violations of Human Rights & International Humanitarian Law Have Been Committed in Ukraine*, U.N. HIGH COMM’R OF HUM. RTS., (Oct. 18, 2022), <https://www.ohchr.org/en/press-releases/2022/10/un-commission-has-found-array-war-crimes-violations-human-rights-and> [<https://perma.cc/EUU2-6JU4>].

78. Report of the Independent International Commission of Inquiry on Ukraine, U.N. Doc. A/77/533 (Oct. 18, 2022).

79. G.A. Res. ES-11/5, ¶ 2 (Nov. 14, 2022) (providing that the Resolution, co-sponsored by fifty-six U.N. member States, was adopted with ninety-four votes in favor, thirteen against and seventy-four abstentions).

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“must bear the legal consequences of all of its internationally wrongful acts, including making reparation for the injury, including any damage, caused by such acts.”⁸⁰ The American Bar Association (ABA) has also expressed condemnation of the invasion and called for accountability for atrocity crimes committed in Ukraine.⁸¹

In addition to actions by the International Criminal Court, the International Court of Justice, and the European Court of Human Rights, Ukrainian courts are pursuing prosecutions of the perpetrators of these atrocity crimes. Other countries have also opened investigations for potential domestic prosecution, based on their national laws, for crimes committed on Ukrainian territory, including Germany,⁸² Lithuania,⁸³ Poland,⁸⁴ Spain,⁸⁵ and Sweden.⁸⁶

80. *Id.*

81. See American Bar Association House of Delegates Resolution 506 (Feb. 6, 2023); see also American Bar Association House of Delegates Resolution 405 (Aug. 8–9, 2022) (calling upon the U.N. General Assembly to authorize the Secretary-General of the United Nations to expeditiously report to the General Assembly on what further measures are needed to ensure that those who committed atrocity crimes are held to account). In addition, the ABA President issued two Presidential statements. See *Statement of ABA President Reginald Turner Re: Russian Federation actions in Ukraine*, AM. BAR ASS’N (Feb. 23, 2022), <https://www.americanbar.org/news/abanews/aba-news-archives/2022/02/statement-of-aba-president-re-ukraine/> [<https://perma.cc/XZZ6-7NUR>]; see also *Statement of ABA President Reginald Turner Re: Russian Federation actions in Ukraine*, AM. BAR ASS’N (Mar. 2, 2022), <https://www.americanbar.org/news/abanews/aba-news-archives/2022/02/statement-of-aba-president-reginald-turner-re-invasion-of-ukraine/> [<https://perma.cc/RG2N-6UZA>].

82. See, e.g., Bojan Pancevski, *Germany Opens Investigation into Suspected Russian War Crimes in Ukraine*, WALL ST. J. (Mar. 8, 2022), <https://www.wsj.com/livecoverage/russia-ukraine-latest-news-2022-03-08/card/germany-opens-investigation-into-suspected-russian-war-crimes-in-ukraine-bNCphaIWE30f2REH8BCi> [<https://perma.cc/LM5W-WAPB>]; see also *Germany Launches Probe into Suspected War Crimes in Ukraine*, AL JAZEERA (Mar. 8, 2022), <https://www.aljazeera.com/news/2022/3/8/germany-launches-probe-into-suspected-war-crimes-in-ukraine> [<https://perma.cc/Y4ET-CN6R>].

83. See *Lithuania Opens Probe into Crimes Against Humanity in Ukraine Attacked by Russia*, LRT (Mar. 3, 2022), <https://www.lrt.lt/en/news-in-english/19/1633685/lithuania-opens-probe-into-crimes-against-humanity-in-ukraine-attacked-by-russia#:~:text=Lithuania%20opens%20probe%20into%20crimes%20against%20humanity%20in%20Ukraine%20attacked%20by%20Russia,-updated%20113&text=the%20Lithuanian%20Prosecutor%20General's%20Office,invaded%20by%20Russia%20last%20Thursday> [<https://perma.cc/H8BZ-UPKF>].

84. See, e.g., *Lithuania Prosecutors Launch Ukraine War Crimes Investigation*, REUTERS (Mar. 3, 2022), <https://www.reuters.com/world/europe/lithuania-prosecutors-launch-ukraine-war-crimes-investigation-2022-03-03/> [<https://perma.cc/B4K4-RN68>]; see also Paweł Supernak, *Polish Prosecutors Launch Investigation into Russia’s Attack on Ukraine*, THE FIRST NEWS (Mar. 1, 2022), <https://www.thefirstnews.com/article/polish-prosecutors-launch-investigation-into-russias-attack-on-ukraine-28331> [<https://perma.cc/LB6V-TUXW>]; see also *Lithuanian, Polish, Ukrainian Prosecutors to Probe War Crimes*, LRT (Mar. 29, 2022), <https://www.lrt.lt/en/news-in-english/19/1656900/lithuanian-polish-ukrainian-prosecutors-to-probe-war-crimes> [<https://perma.cc/XZ7F-WMRC>].

85. See *Spain Opens Probe into ‘Serious Violations’ by Russia in Ukraine*, THE LOCAL (Mar. 8, 2022), <https://www.thelocal.es/20220308/spain-opens-probe-into-serious-violations-by-russia-in-ukraine> [<https://perma.cc/BB7B-N94L>].

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In the United States, the violations and abuses have sparked bipartisan efforts in Congress to strengthen justice and accountability measures.⁸⁷ These measures include repairing critical gaps in existing legislation that authorize criminal and civil actions in United States courts against perpetrators of atrocities and serious human rights abuses committed abroad.⁸⁸ The ABA has addressed these gaps in a resolution (No. 502), passed in August of 2021.⁸⁹ On the criminal side, the resolution recommends broadening the reach of the War Crimes Act, eliminating or lengthening time limitations for prosecutions, expressly adding command responsibility as a basis for liability, and enacting a crimes against humanity statute.⁹⁰ On the civil side, it recommends broadening the class of defendants covered by the Torture Victims Protection Act and making the Alien Tort Statute expressly extraterritorial.⁹¹

Although many of the recommended measures have been of interest to members of Congress for some time, the reports of Russian crimes in Ukraine spurred legislative action. On May 18, 2022, senators from both parties introduced the Justice for Victims of War Crimes Act, S. 4240.⁹² An identical version of the bill was introduced in the House of Representatives. The bill extends the War Crimes Act to reach any defendant who is present in the United States, regardless of whether, as currently required, the victim or perpetrator is a U.S. national.⁹³ The bill also eliminates the statute of limitations, which under current law is an unrealistically short five years in cases not resulting in death.⁹⁴ The bill does contain a potential political limitation on its use, requiring the Attorney General to certify that prosecution “is in the public interest and necessary to secure substantial justice.”⁹⁵ Both the House of Representatives and the Senate passed the bill in December 2022, and it was signed by the President and became law on January 5, 2023 (Pub. L. No. 117-351).

On May 5, 2022, two Democratic senators introduced the Alien Tort Statute Clarification Act, S. 4155.⁹⁶ The Alien Tort Statute provides civil

86. See *Swedish Prosecutors Open Preliminary Investigation into War Crimes in Ukraine*, REUTERS (Apr. 4, 2022), <https://www.reuters.com/world/europe/swedish-prosecutors-open-preliminary-investigation-into-war-crimes-ukraine-2022-04-05/> [https://perma.cc/8A82-MBD2].

87. See Press Release, House Committee on the Judiciary, House Passes Bipartisan Legislation to Strengthen, Protect Our Democracy (Dec. 9, 2021), <https://web.archive.org/web/20221209134722/https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=4816> [https://perma.cc/V4ZD-42V8].

88. *Id.*

89. See AM. BAR ASS'N CRIM. JUST. SECTION, ANNUAL REPORT 2021-2022 7 (2022), <https://www.americanbar.org/content/dam/aba/publications/criminaljustice/2022/annual-report-2022.pdf> [https://perma.cc/EDF9-HJFN].

90. *Id.*

91. *Id.*

92. Justice for Victims of War Crimes Act, S. 4240, 117th Cong. (2022).

93. *Id.*

94. *Id.*

95. *Id.*

96. Alien Tort Statute Clarification Act, S. 4155, 117th Cong. § 2 (2022).

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redress in United States courts to aggrieved aliens for torts committed in violation of the law of nations or a U.S. treaty.⁹⁷ The bill clarifies that the statute applies extraterritorially. The clarification is necessary in light of Supreme Court precedent, holding that the statute generally applies only to conduct occurring within the United States.⁹⁸ The bill has been referred to the Senate Committee on the Judiciary. Efforts are also being made to close legislative gaps in immigration laws, with the introduction in April of this year of the Human Rights Violators Act of 2022, S.B. 4021.⁹⁹

On September 28, 2022, the United States Senate Committee on the Judiciary held a hearing, “From Nuremberg to Ukraine: Accountability for War Crimes and Crimes Against Humanity.”¹⁰⁰ The hearing reviewed legislative and executive efforts on accountability in Ukraine.¹⁰¹ The executive efforts include the creation of a War Crimes Accountability Team in the U.S. Department of Justice to help Ukraine identify, capture, and prosecute persons responsible for war crimes and atrocities committed there.¹⁰² ABA President Deborah Enix-Ross submitted a statement to the Committee for that hearing.¹⁰³ In it, she urged Congress to expand jurisdiction under the War Crimes Act to include “present-in” jurisdiction, eliminate the statute of limitations for war crimes, and adopt a crimes-against-humanity statute.¹⁰⁴

The bills described above do not cover all needed legislative changes. Nevertheless, they are important steps toward the improvement of justice and accountability for victims, both in Ukraine and throughout the world.

V. Women Judges in Afghanistan

The situation of the women who were judges in Afghanistan in August 2021 remains one of the gravest crises.¹⁰⁵ As the stories of the brave women judges fade from the front pages, the situation of some eighty women judges who remain trapped in Afghanistan is compounded by those who wait in temporary holding environments.¹⁰⁶ In its September 2022 report, “Afghanistan Crisis Update, Women and Girls in Displacement,” Relief Web reported that Afghan girls in Afghanistan are denied access to

97. *Id.*

98. *Kiobel v. Royal Dutch Petroleum, Co.*, 569 U.S. 108, 124 (2013) (holding that the ATS does not rebut presumption that the statute applies only to conduct occurring domestically).

99. *See* Human Rights Violators Act of 2022, S. 4021, 117th Cong. § 2 (2022).

100. *From Nuremberg to Ukraine: Accountability for War Crimes and Crimes Against Humanity*, S. Comm. on the Judiciary, 116th Cong. (2022).

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. Pamela Say, *Female Judge Remains Trapped in Afghanistan, Pleads for International Support*, ORATO (Aug. 15, 2022), <https://orato.world/2022/08/15/female-judge-remains-trapped-in-afghanistan-pleads-for-international-support/> [<https://perma.cc/LCE7-JP8K>].

106. *See id.*

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education.¹⁰⁷ On October 3, 2022, Sima Bahous, the United Nations Undersecretary-General and Executive Director for U.N. Women, noted in her statement: “Confined to their homes, excluded from work, murdered in classrooms—this is what faces Afghan women and girls. With inequality imposed everywhere, nowhere is safe. Friday’s suicide attack in Kabul killed or wounded many students who were simply taking an exam. The majority were young women.”¹⁰⁸

Speaking specifically to the return of the restriction on women and girls obtaining education, the Undersecretary General and Executive Director for U.N. Women explained the criticality of education in advancing the cause of women.¹⁰⁹ The reversion to removing educational opportunities corresponds to the suspension of all women judges in their roles in Afghanistan.¹¹⁰ Regarding the rights of all Afghans, regardless of gender, Ms. Bahous said:

Education is a fundamental human right and a driving force for the advancement of social, economic, political, and cultural development, a vision¹¹¹ agreed at the U.N. General Assembly’s recently concluded “Transforming Education Summit.” I join the U.N. Secretary-General in his call¹¹² for the de facto authorities to protect the rights of all Afghans—regardless of ethnicity or gender—to access education safely and securely. I urge the de facto authorities to take immediate action to protect the full rights of Afghan women and girls and to hold perpetrators to account in line with international standards.¹¹³

For those few Afghan women and others who have been successful in obtaining entry to the United States through the U.S. Special Immigrant Visa Program,¹¹⁴ the job opportunities for them in the United States fall far below the skills and talents they used to support their families in Afghanistan

107. U.N. HIGH COMMISSIONER FOR REFUGEES, AFGHANISTAN CRISIS UPDATE: WOMEN & GIRLS IN DISPLACEMENT 7 (2022), <https://reliefweb.int/report/afghanistan/afghanistan-crisis-update-women-and-girls-displacement-factsheet-ii-september-2022> [https://perma.cc/NN9J-D5HR].

108. *Statement: Protect the Rights of all Afghans Statement on Afghanistan* by Ms. Sima Babous, U.N. Under-Secretary-General and U.N. Women Executive Director, U.N. WOMEN (Oct. 3, 2022), <https://www.unwomen.org/en/news-stories/statement/2022/10/statement-protect-the-rights-of-all-afghans> [https://perma.cc/VS4Z-ZHBP].

109. *Id.*

110. *Id.*

111. António Guterres, Sec’y-Gen., United Nations, Transforming Education: An Urgent Political Imperative for Our Collective Future (Sept. 19, 2022), https://www.un.org/sites/un2.un.org/files/2022/09/sg_vision_statement_on_transforming_education.pdf [https://perma.cc/REA7-RRGM].

112. António Guterres (@antonioguterres), TWITTER (Sept. 30, 2022, 4:04 PM), <https://twitter.com/antonioguterres/status/1575954670035824641> [https://perma.cc/92TE-U64X].

113. *Id.*

114. *Special Immigrant Visas (SIVs) for Iraqi and Afghan Translators/Interpreters*, U.S. DEP’T OF STATE, <https://travel.state.gov/content/travel/en/us-visas/immigrate/siv-iraqi-afghan-translators-interpreters.html> [https://perma.cc/7ECV-4LS5] (last visited Apr. 11, 2023).

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before the withdrawal in August 2021.¹¹⁵ For Afghan women judges, the situation is even worse. As Judge Patricia (Patti) Whalen of the International Association of Women Judges (IAWJ) noted:

Because of the harsh conditions of winter, we are trying to get the remaining 67 judges out of Afghanistan by the end of the year and into Pakistan or other countries. We are working with Argentina, Canada, Germany, and Spain to help place our judges. One of the biggest issues we ran into is immigration. We cannot get a timeline on the U.S. P1 process, and depending on who you talk to the timeline may be anywhere from six months or more. While US immigration awaits government authorization, the refugee process hasn't begun in Pakistan. The U.S. immigration process for us feels like standing on shifting sand. On top of this, there is also a fair amount of unrest in Pakistan.¹¹⁶

The IAWJ reports that to date, they have been able to get approximately 185 judges and their families out of Afghanistan, which in total is more than 1,000 people.¹¹⁷ Currently, there are several judges in the United Arab Emirates still awaiting processing.¹¹⁸ Of the women judges who have been relocated, approximately twenty-four judges have gained entry into the United States.¹¹⁹ A concern is the lack of English language skills, even though the judges have made efforts to learn English.¹²⁰

According to Judge Whalen, time is running out for the judges still in Afghanistan.¹²¹ The harsh winter is coming, and now the Taliban is prohibiting male doctors from treating women, but there are no women doctors, so there is no healthcare for women.¹²² Judge Whalen has promised “all of our women judges” in Afghanistan “that we would forget nobody and leave no one behind. We were determined to do what we could.”¹²³

115. Andrea Hsu, *The Jobs That Await Afghans in The U.S. Are Often Far Below Their Skill Level*, NAT'L PUB. RADIO (Sept. 16, 2021), <https://www.npr.org/2021/09/16/1038032116/the-jobs-that-await-afghans-in-the-u-s-are-often-far-below-their-skill-level> [<https://perma.cc/D58U-3NLY>].

116. Wendy Taube, Interview with Judge Patricia Whalen, October 2022 (on file with author).

117. Cynthia 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/> [<https://perma.cc/NJY7-P737>].

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. Isha Sharma, *Taliban Terror: Afghan Women Banned from Seeing Male Doctors, Athletes Barred from Playing*, INDIA TIMES (Jan. 12, 2023), <https://www.indiatimes.com/trending/social-relevance/afghan-women-banned-from-seeing-male-doctors-beauty-salons-to-shut-down-590044.html> [<https://perma.cc/ZY3X-GTSK>].

123. *Id.*

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Through a variety of projects and programs, efforts are underway to provide full scholarships for those successful in exiting Afghanistan to obtain LL.M. degrees. The view is that those graduating from the LL.M. program successfully will be able to eventually use their extensive legal training, provided in part through U.S. State Department or U.S. Department of Justice-funded opportunities, to advance legal careers in their adopted countries.¹²⁴

The effort to relocate Afghan women judges as the withdrawal occurred in August 2021 was almost exclusively funded through private organizations, like the International Association of Women Judges.¹²⁵ Few of the women judges made their way into the United States initially, but slowly, the system is beginning to allow more of the displaced Afghan women judges to enter the United States.¹²⁶

Programs have been established to advance English language skills designed to improve their Test of English as a Foreign Language (TOEFL) scores, which is key to moving on to further education and career transition.¹²⁷ Of particular challenge, however, is the age of some of the judges who were able to relocate.¹²⁸ Starting over this late in their career journey, in a new land and in a new language, is more than a little challenging.¹²⁹ As one example, Judge Kamila Noori served on the trial, appellate, and Supreme Court of Afghanistan before she was relocated.¹³⁰ In an interview with *Judicature*, published in the Fall/Winter 2021–2022 edition by the Bolch Judicial Institute at Duke Law School,¹³¹ Judge Noori and another colleague, Judge Parsa, described their background, training, and positions before August 2021, contrasting those with where they find themselves now.

In the meantime, Senate Bill 4787, the Afghan Adjustment Act, is stalled in Congress.¹³² The Act is intended to (1) provide a permanent status for Afghan evacuees, (2) establish rigorous vetting requirements and criminal

124. One example is the Afghan Professional Resettlement Project being conducted by the American Bar Association. See *The ABA is Working to Help Afghan Refugees, and so Can You*. AM, BAR ASS'N (Feb. 9, 2022), https://www.americanbar.org/advocacy/rule_of_law/afghanistan-response/blog/aba-helping-refugees-afghanistan/ [https://perma.cc/48S6-RV22].

125. Cooper, *supra* note 117.

126. See *id.*

127. See *id.*

128. See, e.g., Olivia Cuthbert, *Studying to Escape: English Lessons in Afghanistan*, IDEAS BEYOND BORDERS (Mar. 8, 2023), <https://ideasbeyondborders.org/english-lesson-in-afghanistan/> [https://perma.cc/Y7QE-XU2M].

129. See David F. Levi et al., *Leaving Afghanistan*, 105 JUDICATURE INT'L 30, 36 (2021).

130. See *id.*

131. See *id.*

132. Camilo Montoya-Galvez, *36,000 Afghan Evacuees Lack Pathway to Permanent Legal Status in The U.S.*, CBS NEWS (Jan. 29, 2022, 4:33 PM), <https://www.cbsnews.com/news/afghan-evacuees-lack-pathway-to-permanent-legal-status-in-the-u-s/#text=But%20efforts%20to%20introduce%20and%20pass%20an%20Afghan%20advocates%20and%20public%20support%20from%20the%20Biden%20administration> [https://perma.cc/BN8L-RDGV].

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inadmissibility grounds for applicants to the pathway to permanence, and (3) expand and improve upon efforts to protect Afghans left behind.¹³³ Despite bipartisan support and energized efforts to ensure that this pathway for citizenship is moved forward, the bill remains without action in the 117th Congress.¹³⁴

VI. Women-Led Revolution in Iran

Mahsa Amini (aka Jina Amini), a twenty-two-year-old Kurdish-Iranian woman, died in the custody of Iran's Morality Police in September 2022.¹³⁵ She was arrested for violating the hijab rules.¹³⁶ According to the U.N. Human Rights Office, Amini was "beaten on the head with a baton" and had her head "banged against" the police vehicle so hard that she fell into a coma.¹³⁷ She died three days later.¹³⁸

Amini's death sparked women-led demonstrations that have continued for over several months and spread to many regions and segments of society.¹³⁹ Thousands of women have taken to the streets, burning their hijabs, cutting their hair, and chanting "woman, life, freedom," not just in Tehran but in over fifty other cities.¹⁴⁰

After the Islamic revolution of 1979, the Iranian clerks imposed a strict dress code, and head-covering via hijab became mandatory.¹⁴¹ Until the 16th century, the hijab was not obligatory; it became standard during the Safavid dynasty.¹⁴² In 1936, Reza Shah banned the hijab, and his successor

133. *Bill Summary: The Afghan Adjustment Act*, NAT'L IMMIGR. F. (Aug. 11, 2022), <https://immigrationforum.org/article/bill-summary-the-afghan-adjustment-act/#:~:text=The%20Afghan%20Adjustment%20Act%2C%20or%20S.4787%2C%20is%20a,following%20the%20fall%20of%20Kabul%20in%20August%202021> [<https://perma.cc/8F93-M45L>].

134. *Afghan Adjustment Act*, S. 4787, 117th Cong. (2022).

135. David S. Cloud, *Who Is Mahsa Amini and Why Did Her Death Spark Protests in Iran?*, WALL ST. J. (Sept. 23, 2022), <https://www.wsj.com/story/who-is-mahsa-amini-and-why-did-her-death-spark-protests-in-iran-d4236eb3?page=1> [<https://perma.cc/36DZ-6GPW>].

136. *Id.*

137. Press Release, U.N. Human Rights Office of the High Commissioner, *Mahsa Amini: Acting U.N. Human Rights Chief Urges Impartial Probe Death Iran* (Sept. 20, 2022), <https://www.ohchr.org/en/press-releases/2022/09/mahsa-amini-acting-un-human-rights-chief-urges-impartial-probe-death-iran> [<https://perma.cc/829D-JLPA>].

138. *Iran: Urgent International Action Needed to Ensure Accountability for Mahsa Amini's Death in Custody*, AMNESTY INT'L (Sept. 27, 2022), <https://www.amnesty.org/en/documents/mde13/6060/2022/en/> [<https://perma.cc/EQ9Y-7DGQ>] [hereinafter *Urgent International Action Needed*].

139. Jessie Yeung et al., *Iranian Women Burn Their Hijabs as Hundreds of Protest Death of Mahsa Amini*, CNN (Sept. 21, 2022), <https://www.cnn.com/2022/09/21/middleeast/iran-mahsa-amini-death-widespread-protests-intl-hnk/index.html> [<https://perma.cc/FRS7-KTY8>].

140. *Id.*

141. JACQUELINE SAPER, *FROM MINISKIRT TO HIJAB: A GIRL IN REVOLUTIONARY IRAN* 84, 148 (2019).

142. JENNIFER HEATH, *THE VEIL: WOMEN WRITERS ON ITS HISTORY, LORE, AND POLITICS* 253 (2008); COLIN P. MITCHELL, *NEW PERSPECTIVES ON SAFAVID IRAN: EMPIRE AND SOCIETY* 104 (2011).

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Mohammad Reza Shah liberalized that law by allowing women who wished to do so to wear hijab.¹⁴³ Reza Shah raised the age of marriage of girls from nine to thirteen and allowed women to attend university.¹⁴⁴ These changes were unacceptable to the Islamists, to whom control of women was one of the critical tenants of the revolution.¹⁴⁵

Khomeini ordered a mandatory hijab right at the very beginning of the revolution.¹⁴⁶ Immediately, Iranian women began to protest that law staging a strike that began on March 8, 1979, International Women’s Day.¹⁴⁷ To many Iranian women who fought for the revolution, laws mandating hijab seemed like a betrayal: “We didn’t have a revolution to go backward” was the rallying cry of women protesting on the streets of Tehran on March 8, 1979.¹⁴⁸ The cries of the Islamists were different, and two of their slogans during the 1979 revolution were: “wear a veil, or we will punch your head” and “death to the unveiled.”¹⁴⁹

By 1981, it became mandatory for any nine-year-old girl to wear a hijab.¹⁵⁰ Substantial punishment was enacted for any woman who failed to wear one “properly,” ranging from imprisonment to fines, not to mention beatings and other extrajudicial yet state-sanctioned violence such as having acid thrown at women’s faces.¹⁵¹ In 1983, the Islamic Consultative Assembly ordered that women who do not cover their hair in public can be punished with seventy-four lashes.¹⁵² Since 1995, unveiled women could be imprisoned for sixty days.¹⁵³ The Morality Police was formally set up in 1990.¹⁵⁴

In addition to compulsory hijab, other legal changes discriminating against women soon followed, introducing forced gender segregation at

143. Nick Baker & Annabelle Quince, *Iranian Women Are Fighting for Their Rights. They’ve Had to Fight for Them for Generations*, ABC NEWS (Nov. 15, 2022), <https://www.abc.net.au/news/2022-11-16/why-are-iranian-women-protesting-history/101623592> [<https://perma.cc/B3WX-2D9Z>].

144. *Id.*

145. *Id.*

146. Leila Mouri, *Compulsory Hijab in Iran: There is No Room for Appeasement*, HUFFINGTON POST (Sept. 23, 2012), https://www.huffpost.com/entry/compulsory-hijab-in-iran_b_1698338 [<https://perma.cc/5KYD-CGR8>].

147. *The Stolen Revolution: Iranian Women of 1979*, CBC RADIO (Dec. 9, 2019), <https://www.cbc.ca/radio/ideas/the-stolen-revolution-iranian-women-of-1979-1.5048382> [<https://perma.cc/K4UL-G7WM>].

148. *Id.*

149. Kerten Knipp, *Why Iranian Authorities Enforce Veil Wearing*, DEUTSCHE WELLE (Dec. 21, 2020), <https://www.dw.com/en/why-iranian-authorities-force-women-to-wear-a-veil/a-56014027> [<https://perma.cc/GRX9-XU8P>].

150. Mouri, *supra* note 146.

151. Juana Summers, *The History of Iran’s So-called Morality Police*, NAT’L PUB. RADIO (Sept. 30, 2022), <https://www.npr.org/2022/09/30/1126281355/the-history-of-irans-so-called-morality-police> [<https://perma.cc/78D6-V4FZ>].

152. *Id.*

153. *Id.*

154. *Id.*

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work, in schools, and in public places.¹⁵⁵ In addition, laws governing divorce, child custody, inheritance, citizenship, and retribution were rewritten with provisions aimed against women.¹⁵⁶ Under the Sharia-influenced Civil Code of the Islamic Republic, husbands have control over their wife's fundamental life decisions: they can prevent their wives from obtaining a job, can determine where and how they can live, whether they can travel, or even if they can get a passport.¹⁵⁷ Moreover, the Civil Code creates a duty that a woman must satisfy the sexual needs of her husband at any time and on-demand according to the orthodox interpretation of *tamkin*, or submission, under Sharia law.¹⁵⁸ Under the Criminal Code, women often suffer higher penalties at a younger age.¹⁵⁹ For example, nine-year-old girls can be held criminally liable but boys only at the age of fifteen.¹⁶⁰

Many women's protests followed during the last forty years, but none succeeded.¹⁶¹ The brutal killing of Amini seemed like a final straw for Iranian women who now have endured forty years of unequal, unjust, inhumane, and infantilizing laws.¹⁶² According to some accounts, there is hardly a woman in Iran who has not been harassed at one point or another by the Morality Police.¹⁶³ But the current women-led revolution is about far more than just hijab; it is about the fundamental human rights of women and broader demands for social and political change.¹⁶⁴

The Islamic Republic has been attempting for the last forty years to institute a legal and political system based on religious norms dating to seventh-century Islam.¹⁶⁵ In their view, an ideal Iranian woman is an antithesis of the corrupt sexualized Western woman.¹⁶⁶ There are many versions of Islam, but the rulers of the Islamic Republic seem to believe that the subjugation of women is needed under the "true" interpretation of Islam.¹⁶⁷ The international legal regime, which grants women human rights,

155. *Hijab Law in Iran Over the Decades the Continuing Battle for Reform*, THE CONVERSATION (Oct. 7, 2022), <https://theconversation.com/hijab-law-in-iran-over-the-decades-the-continuing-battle-for-reform-192037> [<https://perma.cc/T4UA-GTHG>].

156. Blessing Iyamadiken, *Laws Discriminating Against Women in Iran*, URB. WOMEN MAG. (July 18, 2021), <https://urbanwomanmag.com/laws-discriminating-against-women-iran/> [<https://perma.cc/3UP5-WBHD>].

157. QANUNI MADANI [CIVIL CODE] 1314 [1935], arts. 1105-1117 (Iran).

158. *Id.* at art. 1108.

159. MAJMU'AH QAVANINI JAZAI [CODE OF CRIMINAL LAWS] [1991], art. 147 (Iran).

160. *Id.*

161. Baker & Quince, *supra* note 143.

162. Nadeen Ebrahim, *Iran's Morality Police Have Terrorized Women for Decades. Who Are They?*, CNN (Sept. 21, 2022), <https://www.cnn.com/2022/09/21/middleeast/iran-morality-police-mime-intl/index.html> [<https://perma.cc/68J9-9X3U>].

163. *Id.*

164. *Urgent International Action Needed*, *supra* note 138.

165. *Sharia, Fiqh, and the New Religious Thinkers*, in *HIJAB: THREE MODERN IRANIAN SEMINARIAN PERSPECTIVES* (2021).

166. HAMIDEH SEDGHI, *WOMEN AND POLITICS IN IRAN: VEILING, UNVEILING, AND REVEILING 2*, 151 (2007).

167. *Id.*

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is seen as a cultural artifact of that immoral and corrupt West rather than as a universal human standard.¹⁶⁸ Hijab is thus a symbol of a proper Islamic attitude. In practice, the hijab is a political tool to suppress women; it has long lost its primarily religious significance.

The brutal crackdown on peaceful protests is continuing and escalating. Human rights groups claim that over 300 protesters have already been killed, including forty children.¹⁶⁹ Over eighteen thousand were arrested.¹⁷⁰ The Iranian court just issued the first death sentence for a peaceful protester for “enmity against God” and “spreading corruption on Earth.”¹⁷¹ Other protesters are receiving long prison sentences.¹⁷² This women-led revolution is the biggest show of dissent in Iran since the 1979 revolution and a huge challenge to the Iranian theocracy.¹⁷³

Many Western countries have condemned Iran’s brutal response and imposed sanctions on officials involved in the crackdown.¹⁷⁴ The United States, which was seeking Iran’s removal from the U.N. Commission on the Status of Women, finally succeeded in late 2022, while the U.N. Human Rights Council condemned the violent crackdown and launched an investigation into abuses committed by the Iranian state.¹⁷⁵ But these international actions have been insufficient and the brutal crackdown has continued and is maybe even escalating. As of this writing, the government of Iran has instituted stronger enforcement of hijab rules and new criminal penalties for anyone encouraging women to unveil. Meanwhile, Iranian women continue their fight against the gender-based persecution and gender-based segregation and exclusion risking their lives.¹⁷⁶

168. Elizabeth M. Zechenter, *In the Name of Culture: Cultural Relativism and the Abuse of the Individual*, 53 J. OF ANTHROPOLOGICAL RSCH. 319, 322–23 (1997).

169. Duarte Mendonca et al., *At Least 326 Killed in Iran Protests, Human Rights Group Claims*, CNN (Nov. 12, 2022), <https://www.cnn.com/2022/11/12/middleeast/iran-protests-death-toll-intl-hnk/index.html> [<https://perma.cc/2NZ6-FTL9>].

170. *Id.*

171. *Id.*

172. Press Release, U.N. Office of High Commissioner for Human Rights, Iran: Stop Sentencing Peaceful Protesters to Death, Say U.N. Experts (Nov. 11, 2022), <https://www.ohchr.org/en/press-releases/2022/11/iran-stop-sentencing-peaceful-protesters-death-say-un-experts> [<https://perma.cc/D6XC-KB3F>].

173. Shabnam von Hein, *Iran’s Protest Supporters Face Arrests, Working Bans*, DEUTSCHE WELLE (Jan. 8, 2023), <https://www.dw.com/en/irans-protest-supporters-face-arrests-working-bans/a-64315224> [<https://perma.cc/U8F2-MMQR>].

174. *U.K. Sanctions 24 Iranian Officials Over Violent Crackdown on Protests*, REUTERS (Nov. 14, 2022), <https://www.reuters.com/world/britain-sanctions-iranian-officials-over-crackdown-protesters-2022-11-14/> [<https://perma.cc/RMB6-5DBW>].

175. Farnaz Fassihi, *U.S. Seeks Removal of Iran from U.N. Women’s Rights Agency*, N.Y. TIMES (Nov. 2, 2022), <https://www.nytimes.com/2022/11/02/world/middleeast/iran-protests-united-nations.html> [<https://perma.cc/R5M-3XJX>]; *Iran Removed from U.N. Commission on the Status of Women*, UNITED NATIONS NEWS, <https://news.un.org/en/story/2022/12/1131722> [<https://perma.cc/S9J4-HE46>] (last visited Apr. 24, 2023).

176. *Iran Vows Crack Down on People Who Promote Removing the Veil*, REUTERS (Apr. 15, 2023), <https://www.reuters.com/world/middle-east/iran-vows-crack-down-people-who-promote->

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removing-veil-2023-04-15 [<https://perma.cc/S9J4-HE46>]; *Iran Installs Cameras in Public Places to Identify, Penalise Unveiled Women*, REUTERS (Apr. 10, 2023), <https://www.reuters.com/world/middle-east/iran-installs-cameras-public-places-identify-penalise-unveiled-women-police-2023-04-08/> [<https://perma.cc/SDA7-5EUH>]; *U.N. Condemns Repressive Enforcement of Iranian Hijab Laws as Gender-Based Persecution*, WOMEN'S COMM. OF THE NAT'L COUNCIL OF RESISTANCE OF IRAN (Apr. 14, 2023), <https://women.ncr-iran.org/2023/04/14/hijab-plan-enforcement/> [<https://perma.cc/7AN7-S3ND>].

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International Refugee Law

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I. 2022 Crises Migration: Global Refugee and Asylum Developments

A. INTRODUCTION

Refugees, asylum seekers, internally displaced persons (IDPs), and in fact, all persons on the move are fully entitled to human rights. The United Nations Declaration of Human Rights¹ came into effect in 1948 and seeks to protect every human being regardless of their race, color, gender, language, or religion. Also, the 1951 Refugee Convention² and its 1967 Protocol³ seek to protect the rights of refugees by clearly specifying their rights and spelling out the duties of States to uphold and protect these well-defined rights. About 149 States are parties to either or both conventions mentioned above.⁴ But despite the existence of the Convention and Protocol and the public commitment to the principles in these documents, the global challenge of displacement continues to soar both because of the actions or inactions of these same States as well as actions or inactions of States which are not parties to these instruments.

As there have been so many significant developments in Refugee Law and asylum seekers, this article will selectively highlight some of the most significant issues in 2022.

In 2022, seventy-one years after the 1951 Refugee Convention came into effect of the and seventy-four years after the United Nations Declaration of Human Rights came into effect of, the United Nations High Commission for Refugees (UNHCR) reports that about 103 million people are forcibly displaced worldwide.⁵ Out of the 103 million people, about 32.5 million people are refugees as at mid-2022; 53.2 million were IDPs as of 2021; about

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1. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, Art. 2 (Dec. 10, 1948).

2. G.A. Res. 2198 (XXI), Convention Relating to the Status of Refugees (July 28, 1951).

3. G.A. Res. 2198 (XXI), Protocol Relating to the Status of Refugees (Oct. 4, 1967).

4. Convention Relating to the Status of Refugees, *supra* note 2.

5. *Refugee Data Finder*, UNCHR, <https://www.unhcr.org/refugee-statistics/download/?url=05qiXT>, [<https://perma.cc/6B2Y-UWRS>] (last visited Apr. 30, 2023); *see also Refugee Data Finder*, UNCHR, <https://www.unhcr.org/refugee-statistics/>, [<https://perma.cc/ZQZ6-LDF8>] (last visited Apr. 30, 2023).

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4.9 million are asylum seekers as of mid-2022; and the remaining are people in need of other forms of international protection as of mid-2022.⁶ The UNHCR reports that seventy-two percent of these migrants originate from just five countries;⁷ thirty-six percent are hosted in five countries;⁸ seventy-four percent are hosted by low- or middle-income countries.⁹ Sadly, the number keeps increasing daily, monthly and yearly.¹⁰ Each year persons on the move die while trying to seek better homes and way of life while a substantial number of those who are alive are subjected to torture, discrimination, and all forms of inhumane treatments.¹¹

II. Fleeing Conflict

Daily news continues to document millions of persons displaced through global conflicts.¹² But it is an incomplete picture of the considerable refugee crisis that the world faces and the impact that this crisis has on the nearly 103 million forcibly displaced people.¹³ Little progress has been made in 2022 to address the issues that have led millions of people to leave their lives behind.¹⁴ By mid-2022, the number of displaced people surpassed 2021 numbers.¹⁵ Not enough progress has been made to address the increasing number of crises or the people affected by them.¹⁶ Also, there is notable apathy towards aiding refugees fleeing armed conflicts and violence.¹⁷ The global response to the refugee crisis lacks sufficient progress in the following areas: (1) refugees are being admitted inconsistently with a growing emphasis given to their ethno-religious background;¹⁸ and (2) there are

6. *Refugee Data Finder*, UNCHR, <https://www.unhcr.org/refugee-statistics/download/?url=05qiXT>, [<https://perma.cc/6B2Y-UWRS>] (last visited Apr. 30, 2023).

7. *Id.* (listing Syrian Arab Republic, Venezuela, Ukraine, Afghanistan, and South Sudan).

8. *Id.* (listing Turkey, Colombia, Germany, Uganda, and Pakistan).

9. *Id.*

10. *Id.* (line chart illustrating refugee trends over time by population type).

11. See, e.g., *Migrant's Deaths and Disappearances*, MIGRATION DATA PORTAL (June 14, 2022), <https://www.migrationdataportal.org/themes/migrant-deaths-and-disappearances#:~:text=since%202014%2C%20more%20than%204%2C000,deaths%20have%20been%20recorded%20globally> [<https://perma.cc/S8PB-X2HC>]; *Desperate Journeys*, UNCHR, <https://www.unhcr.org/desperatejourneys/> [<https://perma.cc/94G2-BBFB>] (last visited Apr. 9, 2023).

12. See *2022 Year in Review: 100 Million Displaced, 'A Record That Should Never Have Been Set'*, UN NEWS (Dec. 26, 2022), <https://news.un.org/en/story/2022/12/1131957> [<https://perma.cc/7VLE-7K5N>] (an example of just one of the many daily news stories).

13. *Id.*

14. *Refugee Data Finder*, *supra* note 6.

15. *Id.*

16. *Id.*; *2023: A Moment of Truth for Global Displacement*, UNCHR, <https://www.unhcr.org/spotlight/2023/01/2023-a-moment-of-truth-for-global-displacement/> [<https://perma.cc/W6Y7-3WHJ>] (last visited Apr. 9, 2023).

17. Burcu Pinar Alakoc, *Explaining Public Attitudes Towards Refugees*, POL. VIOLENCE AT A GLANCE (Dec. 9, 2022), <https://politicalviolenceataglance.org/2022/12/09/explaining-public-attitudes-toward-refugees/> [<https://perma.cc/CB26-395F>].

18. Helen Benedict, *If You're a Refugee, Best to be White and Christian*, FAIR OBSERVER (Dec. 6, 2022), <https://www.fairobserver.com/politics/if-youre-a-refugee-best-to-be-white-and-christ>

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increasingly restrictive asylum policy measures being imposed by governments.¹⁹

A. ARMED CONFLICT

Armed conflict “arises whenever there is fighting between States or protracted armed violence between government authorities and organized armed groups.”²⁰ In 2022, most refugees fleeing armed conflict originated from the Syrian Arab Republic, Ukraine, Afghanistan, Myanmar, and South Sudan.²¹

The Syrian civil war has entered its twelfth year and has created approximately 6.8 million refugees and 6.7 million IDPs.²² The fighting continues and may intensify if the war endures.²³ According to Paulo Sérgio Pinheiro, chair of the U.N.’s Syria commission, “Syrians face increasing and intolerable hardships, living among the ruins of this lengthy conflict. Millions are suffering and dying in displacement camps, while resources are becoming scarcer, and donor fatigue is rising.”²⁴ This forewarns of a larger and more protracted crisis which will compound the struggles faced by refugees.

Similarly, the Russo-Ukrainian conflict intensified in 2022 with Russia invading Eastern Ukraine, resulting in one of the worst refugee crises today.²⁵ The UNHCR reports that by July of 2022 more than 5.4 million people had become refugees from this conflict alone.²⁶ Another 6.7 million

ian/ [https://perma.cc/4CGP-8NBQ]; Niki Kitsantonis et al., *Countries previously hostile to refugees embrace Ukrainians*, N.Y. TIMES (Mar. 17, 2022), <https://www.nytimes.com/2022/03/17/world/europe/europe-countries-refugees-embrace-ukrainians.html> [https://perma.cc/ASG9-ZF26].

19. Benedict, *supra* note 18.

20. *The Law of Armed Conflict*, INT’L COMM. OF THE RED CROSS, https://www.icrc.org/en/doc/assets/files/other/law1_final.pdf, [https://perma.cc/XS3A-NJPN] (last visited Mar. 28, 2023).

21. Refugee Data Finder, *supra* note 6.

22. *Refugee Data Finder*, *supra* note 6; *Syria Refugee Crisis Explained*, UNCHR <https://www.unrefugees.org/news/syria-refugee-crisis-explained/>, [https://perma.cc/QS72-GGY8] (last visited Apr. 30, 2023).

23. See, e.g., *Don’t Look Away: Syrian Civilians Face the Prospect of a New Escalation*, OHCHR (Sept. 14, 2022), <https://www.ohchr.org/en/press-releases/2022/09/dont-look-away-syrian-civilians-face-prospect-new-escalation> [https://perma.cc/D8NU-SHH4]; Rep. of the Indep. Int’l Comm’n of Inquiry on the Syrian Arab Rep., at ¶ 5, U.N. Doc. A/HRC/51/45 (2022), <https://perma.cc/2VU2-UX5P> (hereinafter A/HRC/51/45).

24. See, e.g., *Syria Could Return ‘To Larger-Scale Fighting’, UN Warns*, AL JAZEERA (Sept. 14, 2022), <https://www.aljazeera.com/news/2022/9/14/syria-headed-to-to-larger-scale-fighting-un-warns-in-report> [https://perma.cc/LVM9-GQSC]; A/HRC/51/45, ¶ 39.

25. OHCHR, *Rep. on the Hum. Rts. Situation in Ukraine, 1 February to 31 July 2022*, at 10–12 (Sept. 27, 2022), <https://www.ohchr.org/sites/default/files/documents/countries/ua/2022-09-23/ReportUkraine-1Feb-31Jul2022-en.pdf> [https://perma.cc/LPY6-SP7S].

26. *Refugee Data Finder*, *supra* note 6; *Syria Refugee Crisis Explained*, *supra* note 22; *UNHCR Data Finder Ukraine*, UNHCR, <https://www.unhcr.org/refugee-statistics/download?url=2qIW4H> [https://perma.cc/6FAL-AHCA] (last visited Mar. 30, 2023); *Operational Data Portal*,

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persons are internally displaced.²⁷ This conflict led to nearly one-third of Ukrainians fleeing their homes.²⁸

Meanwhile, more than six million people remain in refugee status following the U.S. withdrawal from Afghanistan in 2021.²⁹ When the U.S. withdrew, the Taliban swiftly moved in to fill the power gap and drove Afghans fearing retribution to flee the country en-masse.³⁰

In 2022, the global community's reluctance to aid Syrians fleeing the civil war³¹ and Afghans fleeing the return of the Taliban have been its most impactful failure.³² Rather, States condition aid and admittance on ethno-religious lines.³³ Most notably, European nations have created conditions to prevent refugees from entering their countries.³⁴ The worst conditions are occurring at the borders between Poland and Belarus,³⁵ Hungary and its

UNHCR (Mar. 28, 2023), <https://data.unhcr.org/en/situations/ukraine> [<https://perma.cc/KXV7-5JHZ>] (indicating current refugee number is 8.1 million); *infra* note 28; G.A. Res. 217, *supra* note 1.

27. UNHCR Data Finder Ukraine, *supra* note 26.

28. *Ukraine Situation Flash Update #24*, UNHCR (Aug. 5, 2022), <https://data.unhcr.org/en/documents/details/94640> [<https://perma.cc/DT63-B69S>].

29. *Refugee Data Finder*, *supra* note 6 (including 2.8 million refugees under UNCHR mandate and 3.4 million IDPs in Afghanistan).

30. Joseph Krauss, *Taliban take over Afghanistan: What We Know and What's Next*, AP NEWS (Aug. 17, 2021), <https://apnews.com/article/taliban-takeover-afghanistan-what-to-know-1a74c9cd866866f196c478aba21b60b6> [<https://perma.cc/WQG2-C5GU>].

31. Ibrahim, *Why Did We Have to Freeze in the Forest?*, THE NEW HUMANITARIAN (Mar. 15, 2022), <https://www.thenewhumanitarian.org/first-person/2022/03/15/ukraine-poland-syria-refugee-welcome-forest> [<https://perma.cc/8KUK-ALZG>]; Karolina Jeznach, *Reporter's Diary: Death, Survival, and Volunteer Aid on the EU's Eastern Frontier*, THE NEW HUMANITARIAN (Dec. 13, 2021), <https://www.thenewhumanitarian.org/opinion/2021/12/13/reporters-diary-death-survival-volunteer-aid-EU-eastern-frontier> [<https://perma.cc/2XR8-KSZ8>]; Alexis Okeowo, *Europe's Other Migration Crisis*, THE NEW YORKER (Mar. 2, 2022), <https://www.newyorker.com/news/daily-comment/europes-other-migration-crisis> [<https://perma.cc/ME5Q-4SA6>]; Emily Venturi & Anna Iasmi Vallianatou, *Ukraine exposes Europe's double standards for refugees*, CHATHAM HOUSE (Mar. 30, 2022), <https://www.chathamhouse.org/2022/03/ukraine-exposes-europes-double-standards-refugees> [<https://perma.cc/B5H7-AFK3>]; Laurel Wamsley, *Race, Culture and Politics Underpin How — or if — Refugees are Welcomed in Europe*, NAT'L PUBLIC RADIO (Mar. 3, 2022), <https://www.npr.org/2022/03/03/1084201542/ukraine-refugees-racism> [<https://perma.cc/9AWB-AA35>].

32. *What's Next for Afghans Fleeing the Taliban?*, HUM. RTS. WATCH ("HRW") (Sept. 9, 2021), <https://www.hrw.org/news/2021/09/09/whats-next-afghans-fleeing-taliban> [<https://perma.cc/8LJA-EBCM>].

33. Wamsley, *supra* note 31.

34. See, e.g., Benedict, *supra* note 18; Górczynska et. al, *infra* note 35; Child, *infra* note 36; Stevis-Gridneff, *infra* note 37; Schultheis, *infra* note 38.

35. Marta Górczynska et al., *Access to Asylum Denied at Polish-Belarusian Border*, HELSINKI FOUND. FOR HUM. RTS (Sept. 24, 2021), https://www.hfhr.pl/wp-content/uploads/2021/09/HFHR-Access-to-asylum-denied-in-Poland_Sep-2021.pdf [<https://perma.cc/U7ST-ZCNC>]; Andrew Higgins & Marc Santora, *Cold and Marooned in a Police State as Desperation Takes Hold*, N.Y. TIMES (Nov. 16, 2021), <https://www.nytimes.com/2021/11/16/world/europe/poland-belarus-border-crisis.html> [<https://perma.cc/6GGP-8DEX>]; Scott Neuman, *How a Political Standoff Trapped Hundreds of Migrants at the Belarus-Poland Border*, NPR (Nov. 17, 2021), <https://www.npr.org/2021/11/17/1051111111/belarus-poland-border-crisis>.

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neighbors,³⁶ Greece and Turkey,³⁷ and Italy and the Mediterranean.³⁸ These countries are violently forcing refugees back across borders, beating them, and stranding them in inhospitable areas.³⁹ These nations are in conflict over who will accept refugees and fail to consider the consequences faced by refugees.⁴⁰ States justify their actions and ignore their obligations under EU and international law, and put migrants at risk of harm, including death.⁴¹ Refugees, who are being pushed back from borders, are denied the opportunity to seek asylum status, or have the validity of their claims investigated.⁴² Refugees are confronted by this treatment, often after enduring harsh conditions on the road to safety, such as crossing countries on foot or crossing the Mediterranean on unsafe vessels.⁴³ These roadblocks

www.npr.org/2021/11/17/1056129127/poland-belarus-eu-migrant-border-crisis [https://perma.cc/97Q6-E4QD]; *Poland: Digital investigation proves Poland violated refugees' rights*, AMNESTY INT'L (Sept. 30, 2021), <https://www.amnesty.org/en/latest/news/2021/09/poland-digital-investigation-proves-poland-violated-refugees-rights/> [https://perma.cc/3JWV-L9GJ]; Anton Troianovski et al., *West Accuses Belarus of Orchestrating Migrant Crisis at Polish Border*, N.Y. TIMES (Nov. 9, 2021), <https://www.nytimes.com/2021/11/09/world/europe/poland-belarus-border-crisis.html> [https://perma.cc/YTV9-2NKW].

36. David Child, *Croatia, Greece, Romania Illegally Pushing Refugees Back: Report*, AL JAZEERA (Oct. 7, 2021), <https://www.aljazeera.com/news/2021/10/7/croatia-greece-romania-illegal-pushbacks-borders> [https://perma.cc/7K7P-PG2U].

37. Karolína Augustová, *Who is Responsible for the Deaths of Children at EU Borders?*, AL JAZEERA (Sept. 27, 2022), <https://www.aljazeera.com/opinions/2022/9/27/children-die-at-eu-borders-and-the-eu-is-to-blame> [https://perma.cc/CPH4-8N7G]; Carlotta Gall, *'They Just Left Us': Greece Is Accused of Setting Migrants Adrift at Sea*, N.Y. TIMES (July 18, 2021), <https://www.nytimes.com/2021/07/18/world/europe/greece-migrants.html?action=Click&module=RelatedLinks&pgtype=Article> [https://perma.cc/4AUZ-N87F]; Carlotta Gall, *Survivors of Deadly Night at Greek Border Say They Were Left to Die*, N.Y. TIMES (Feb. 24, 2022), <https://www.nytimes.com/2022/02/24/world/europe/greece-turkey-migrants-deaths.html> [https://perma.cc/3ZFX-87RT]; Matina Stevis-Gridneff, *E.U. Interpreter Says Greece Expelled Him to Turkey in Migrant Roundup*, N.Y. TIMES (Dec. 1, 2021), <https://www.nytimes.com/2021/12/01/world/europe/greece-migrants-interpreter-expelled.html> [https://perma.cc/P4VT-G37W].

38. Raul Gallego Abellan, *Crossing the Mediterranean Sea: To Survive or To Die*, AL JAZEERA (Sept. 21, 2022), <https://www.aljazeera.com/program/al-jazeera-close-up/2022/9/21/crossing-the-mediterranean-sea-to-survive-or-to-die> [https://perma.cc/RA8P-5NAD]; Colleen Barry & Emily Schultheis, *Italy Closes its Ports to Rescue Ships, Leaving 1,100 Migrants in Limbo*, PBS NEWS HOUR (Nov. 5, 2022), <https://www.pbs.org/newshour/world/italy-closes-its-ports-to-rescue-ships-leaving-1100-migrants-in-limbo> [https://perma.cc/68ZF-UALK].

39. Gall, *supra* note 37; *At Europe's Borders, Migrants and Refugees are Denied their Basic Human Rights*, OXFAM INT'L, <https://www.oxfam.org/en/europes-borders-migrants-and-refugees-are-denied-their-basic-human-rights> [https://perma.cc/MVQ2-LZC9] (last visited Apr. 30, 2023).

40. Gall, *supra* note 37.

41. Lorenzo Tondo, *Revealed: 2,000 Refugee Deaths Linked to Illegal EU Pushbacks*, THE GUARDIAN (May 5, 2021), <https://www.theguardian.com/global-development/2021/may/05/revealed-2000-refugee-deaths-linked-to-eu-pushbacks#:~:text=EU%20member%20states%20have%20used,people%2C%20the%20Guardian%20can%20reveal> [https://perma.cc/9XZS-CWNU].

42. Gall, *supra* note 37.

43. See, e.g., Abellan, *supra* note 38; Meghan Keneally & Molly Hunter, *Inside the Refugee Crisis That Has Migrants Walking to Safety in Europe*, ABC NEWS (Sept. 4, 2015), <https://>

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are violations of refugee rights and contrary to established international laws.⁴⁴

Also, Syrian and Afghan refugees face a “two-tier refugee response” largely based on their ethno-religious background.⁴⁵ When given sanctuary, reports indicate that Syrian and Afghan refugees are forcibly relocated to make room for Ukrainian refugees.⁴⁶ Another hierarchy exists between Syrians and Afghans because of the protracted Afghan refugee crisis; Afghans are often pushed to the end of asylum queues and their level of need is deemed less immediate.⁴⁷ Furthermore, the Syrian refugee crisis is compounded by calls for repatriation to Syria based on the rationale that it is safe to return due to de-escalation while, in fact, the civil war continues to rage.⁴⁸ Claims for repatriation are rooted in anti-refugee sentiments and will fail with long term effects on refugees.⁴⁹ Repatriated refugees face torture, sexual violence, enforced disappearance, and arbitrary detention upon returning home.⁵⁰

The above crises stand in stark contrast to the treatment and acceptance of Ukrainian refugees.⁵¹ Europe and the U.S.’s treatment of Ukrainian

abcnews.go.com/International/inside-refugee-crisis-migrants-walking-safety-europe/story?id=33539447 [https://perma.cc/HR7Y-YMTQ].

44. Convention Relating to the Status of Refugees, *supra* note 2, art. 33.

45. Alkistis Agrafioti Chatzigianni et al., *Greece: A Two-Tier Refugee System*, GREEK COUNCIL FOR REFUGEES (May 2022), https://oi-files-d8-prod.s3.eu-west-2.amazonaws.com/s3fs-public/2022_05/GCR_Oxfam_STC_Advocacy_Update_April_2022_final.pdf [https://perma.cc/5UGX-XVSE].

46. *Id.* at 12.

47. Matina Stevis-Gridneff, *Afghan Refugees Face Two-Tier System in Europe*, N.Y. TIMES (Feb. 5, 2022), <https://www.nytimes.com/2022/02/05/world/europe/afghan-refugees-two-tier-system-in-europe.html> [https://perma.cc/5RN8-QJDA].

48. HUM. RTS. WATCH, WORLD REPORT 2022: EVENTS OF 2022 639 (2022), https://www.hrw.org/sites/default/files/media_2022/01/World%20Report%202022%20web%20pdf_0.pdf [https://perma.cc/Z5XM-4DQS]; see also Hannah Jacobs, *Not Ready to Repatriate Displaced Syrians*, ARAB CTR. WASHINGTON D.C. (Sept. 20, 2022), <https://arabcenterdc.org/resource/syria-is-not-ready-to-repatriate-displaced-syrians> [https://perma.cc/AZM4-WUTM]; *Lebanon: Stop the So-Called Voluntary Returns of Syrian Refugees*, AMNESTY INT’L (Oct. 14, 2022), <https://www.amnesty.org/en/latest/news/2022/10/lebanon-stop-the-so-called-voluntary-returns-of-syrian-refugees> [https://perma.cc/4FH2-K2MP]; Kareem Fahim, *Turkey Departs Hundreds of Syrian Refugees, Human Rights Watch Says*, WASH. POST (Oct. 24, 2022), <https://www.washingtonpost.com/world/2022/10/24/syria-turkey-refugees-deportation/> [https://perma.cc/FZP5-CVP7].

49. See, e.g., Jacobs, *supra* note 48; AMNESTY INT’L, *supra* note 48; Fahim, *supra* note 48.

50. See A/HRC/51/45, *supra* note 23, ¶¶ 15, 16; see Syria: *Former Refugees Tortured, Raped, Disappeared After Returning Home*, AMNESTY INT’L (Sept. 7, 2021), <https://www.amnesty.org/en/latest/news/2021/09/syria-former-refugees-tortured-raped-disappeared-after-returning-home> [https://perma.cc/9EKS-WGYK]; Syria: *“You’re Going to Your Death” Violations Against Syrian Refugees Returning to Syria*, AMNESTY INT’L (Sept. 7, 2021), <https://www.amnesty.org/en/documents/mde24/4583/2021/en/> [https://perma.cc/F5B7-K844].

51. Giovanna Coi et al., *The EU’s Real Refugee Policy: Division and Delay*, POLITICO (May 12, 2022), <https://www.politico.eu/article/ukraine-war-refugees-europe-real-policy-brussels->

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refugees is an exception rather than the rule.⁵² Ukrainians are warmly welcomed by the armed military on the Polish border,⁵³ given warm food to eat,⁵⁴ and generally treated as people worthy of aid.⁵⁵ The “white-European, Christian” status of Ukrainian refugees affords them fast-tracked access to safety in the EU—including healthcare, jobs, education, and accommodations.⁵⁶ Even the U.S. has committed to a “streamlined process to provide Ukrainian citizens . . . opportunities to come to the United States.”⁵⁷ The positive treatment of Ukrainian refugees demonstrates a prevailing issue: refugees are being admitted inconsistently, and States are considering ethno-religious background as grounds for aid and admittance.

Furthermore, restrictive asylum policies continue to undermine efforts to assist refugees fleeing conflict. Many countries, including Poland,⁵⁸ the Netherlands,⁵⁹ Italy,⁶⁰ Greece,⁶¹ Hungary,⁶² Denmark,⁶³ and Sweden⁶⁴ have

migration-division-delay/ [https://perma.cc/A32W-CC8U]; Kitsantonis et al., *supra* note 18; Wamsley, *supra* note 31.

52. Giovanna Coi et al., *The EU's Real Refugee Policy: Division and Delay*, POLITICO (May 12, 2022), <https://www.politico.eu/article/ukraine-war-refugees-europe-real-policy-brussels-migration-division-delay/> [https://perma.cc/A32W-CC8U].

53. *Id.*

54. See Chris Melzer, *People Across Poland Show Solidarity with Refugees from Ukraine*, UNHCR (Mar. 1, 2022), <https://www.unhcr.org/news/stories/2022/3/621dd8214/people-across-poland-show-solidarity-refugees-ukraine.html> [https://perma.cc/5SCF-ZU6G].

55. *Id.*

56. *EC Communication: Welcoming Those Fleeing War in Ukraine - Readyng Europe to Meet the Needs*, EUR. COMM'N (Mar. 23, 2022), https://ec.europa.eu/migrant-integration/news/ec-communication-welcoming-those-fleeing-war-ukraine-readyng-europe-meet-needs_en [https://perma.cc/NG7P-K84F]; see Andrew Higgins, *At the Polish Border, Tens of Thousands of Ukrainian Refugees*, N.Y. TIMES (Feb. 25, 2022), <https://www.nytimes.com/2022/02/25/world/europe/ukrainian-refugees-poland.html> [https://perma.cc/Q9RC-MNB5]; Niki Kitsantonis et al., *Countries Previously Hostile to Refugees Embrace Ukrainians*, N.Y. TIMES (Mar. 17, 2022), <https://www.nytimes.com/2022/03/17/world/europe/europe-countries-refugees-embrace-ukrainians.html> [https://perma.cc/ASG9-ZF26]; Eric Schmitt & Monika Pronczuk, *U.S. Troops in Poland Prepare for the Arrival of Refugees From Ukraine*, N.Y. TIMES (Feb. 24, 2022), <https://www.nytimes.com/2022/02/24/world/europe/us-troops-poland-ukraine-russia.html> [https://perma.cc/Z2AD-5UZT]; Wamsley, *supra* note 31.

57. *President Biden to Announce Uniting for Ukraine, a New Streamlined Process to Welcome Ukrainians Fleeing Russia's Invasion of Ukraine*, U.S. DEP'T OF HOMELAND SEC. (Apr. 21, 2022), <https://www.dhs.gov/news/2022/04/21/president-biden-announce-uniting-ukraine-new-streamlined-process-welcome-ukrainians> [https://perma.cc/9UH3-8EH6].

58. DZIENNIK USTAW [CIVIL CODE] Poz. 1918 (Pol.); *Poland Violates European Law. We React and File a Complaint to the European Commission*, STOWARZYSZENIE INTERWENCJI PRAWNEJ [ASS'N FOR LEGAL INTERVENTION (S.I.P.)] (Dec. 20, 2021), <https://interwencjaprawna.pl/en/poland-violates-european-law-we-react-and-file-a-complaint-to-the-european-commission> [https://perma.cc/HP23-3NH4].

59. *Netherlands Reveals Plan to Resolve Asylum Crisis, Incl. Family Reunification Limits, Military Aid*, NL TIMES (Aug. 26, 2022), <https://nltimes.nl/2022/08/26/netherlands-reveals-plan-resolve-asylum-crisis-incl-family-reunification-limits-military> [https://perma.cc/889X-4H9P]; *Reception Crises: Dutch State Sued Over Inhumane Conditions and Criticised over Proposed Crisis Measure to Limit Family Reunification*, EUR. COUNCIL ON REFUGEES AND EXILES (Sept. 2, 2022), <https://ecre.org/reception-crises-dutch-state-sued-over-inhumane-conditions-and->

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anti-refugee/migrant laws to prevent refugees from entering these States. Such laws send a clear message to refugees that people who arrive through irregular means are not welcome.⁶⁵ This restrictive view on refugees leads States to “only accept those who really need protection—those who cross borders illegally will be sent back.”⁶⁶ Nations often rationalize overly restrictive policies as legitimate concerns over illegal immigration; but policies which restrict or combat illegal immigration often violate individual rights to international protection—especially considering the crucial difference between illegal immigration for better economic conditions and immigration to escape armed conflict.⁶⁷ Sometimes illegal means are the only options left to refugees. Ultimately, restrictive measures by governments to deter or discourage refugees are contrary to international law and the rights of refugees.⁶⁸

Afghan refugees face a unique policy issue, particularly in the U.S., in the form of bureaucratic delays.⁶⁹ Many refugees, including people who aided the U.S. army, who apply for special immigration visas (SIV) or humanitarian parole for the U.S. face backlogs that extend for years.⁷⁰ These refugees’ lives are constantly at risk,⁷¹ yet the U.S. government fails to

criticised-over-proposed-crisis-measure-to-limit-family-reunification-fedasil-staff-protests-as-reception-crisis-in-belgium-reaches-boi/ [https://perma.cc/V75H-Q575].

60. Nikolaj Nielsen, *EU Commission Cannot Stop Italy Banning Rescue Boats*, EUOBSERVER (Nov. 4, 2022), <https://euobserver.com/migration/156377> [https://perma.cc/LVX4-GZQ2].

61. Astikos Kodikas [A.K.] [Civil Code] 4686:2020 (Greece); see Eleni Karageorgiou, *EU Pact on Migration and Asylum in light of the United Nations Global Compact on Refugees*, MIGRATION POL’Y CTR., 49 (2021), <https://cadmus.eui.eu/bitstream/handle/1814/70600/QM-02-21-358-EN-N.pdf?sequence=1&isAllowed=y#page=57> [https://perma.cc/P5TV-68XB].

62. Case C-821/19, Comm’n v. Hungary, ECLI:EU:C:2021:143, ¶ 57 (Feb. 25, 2021); Maia dela Baume, *Hungarian Law Criminalizing Asylum Seeker Help Breaches EU law*, POLITICO (Nov. 16, 2021), <https://www.politico.eu/article/eu-top-court-rules-hungary-breached-eu-law-over-treatment-of-asylum-seekers/> [https://perma.cc/J24R-LXCE].

63. Act amending the Aliens Act, Act No. 102 of 03/02/2016 (Den.) (allows the search and seizure of refugee assets upon entering Denmark) (note Denmark is exempting Ukrainians seeking asylum from this law); see Kitsantonis, *supra* note 18.

64. Dale Gavlak, *New Swedish Government to Tighten Migration Policy*, VOICE OF AMERICA (Oct. 27, 2022), <https://www.voanews.com/a/new-swedish-government-to-tighten-migration-policy-/6808370.html> [https://perma.cc/4ED9-ZFWX].

65. *See id.*

66. Monica Perosino, *Margaritis Schinas: “L’Europa Non Può Più Aspettare, Serve il Nuovo Patto Sui Migranti”*, LA STAMPA (Aug. 15, 2021), <https://www.lastampa.it/topnews/primo-piano/2021/08/15/news/margaritis-schinas-l-europa-non-puo-piu-aspettare-serve-il-nuovo-patto-sui-migranti-1.40601288/> [https://perma.cc/B84S-LZ24].

67. *Id.*

68. Convention Relating to the Status of Refugees, *supra* note 2, art. 33(1).

69. Miriam Jordan, *‘We Can’t Claim Mission Accomplished’: A Long Road for Afghan Refugees*, N.Y. TIMES (Aug. 12, 2022), <https://www.nytimes.com/2022/08/12/us/afghanistan-refugees.html> [https://perma.cc/7RE9-CQDV].

70. *Id.*

71. *Afghanistan: Humanitarian Crisis Threatens Basic Human Rights*, UNHCR (Dec. 14, 2021), <https://news.un.org/en/story/2021/12/1107902> [https://perma.cc/NUW8-WKJT]; Michal

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fast-track their visas or parole.⁷² While the U.S. provides fast-track aid to Ukrainian refugees under its Uniting for Ukraine Parole Program (UUPP), Afghan refugees who have waited for years are ineligible for fast-tracked visas or parole options.⁷³ According to U.S. Department of Homeland Security's statements on Ukrainians admitted, the U.S. has admitted 9,000 as immigrants with permanent residency; 20,000 as temporary visa holders; 20,000 as parolees; and an additional 9,000 under the UUPP.⁷⁴ This bureaucratic maneuvering demonstrates that refugees are being admitted inconsistently.

While more change is necessary for consistency, the U.S. refugee policy is getting a much-needed update.⁷⁵ First, the 2023 admission caps are less restrictive and transferrable,⁷⁶ and the SIV application process has been streamlined.⁷⁷ New SIV applications will only require a single application to the U.S. State Department.⁷⁸

Furthermore, Germany started a new admissions program for Afghan refugees.⁷⁹ The program aids vulnerable Afghans – those active in women's rights, human rights, justice, politics, the media, education, culture, sports, academia, and Afghans who have or are experiencing violence or persecution

Kranz, *Afghans in US Immigration Limbo Watch Ukrainians Breeze Through*, AL JAZEERA (July 20, 2022), <https://www.aljazeera.com/news/2022/7/20/afghans-in-us-immigration-limbo-watch-ukrainians-breeze-through> [<https://perma.cc/Q489-YTVT>].

72. Jordan, *supra* note 69; Kranz, *supra* note 71; Camilo Montoya-Galvez, *U.S. is Rejecting Over 90% of Afghans Seeking to Enter the Country on Humanitarian Grounds*, CBS (June 20, 2022), <https://www.cbsnews.com/news/afghan-refugees-rejected-us-entry-humanitarian-grounds> [<https://perma.cc/VU4W-F9D8>]; D. Parvaz, *Since the Taliban Takeover, Afghans Hoping to Leave Afghanistan Have Few Ways Out*, NAT'L PUBLIC RADIO (Oct. 3, 2022), <https://www.npr.org/2022/10/03/1121053865/afghanistan-refugees-visas> [<https://perma.cc/3TCC-USRK>].

73. European Policy Centre, *Transatlantic Solidarity in Action: Addressing the Needs of Refugees from Ukraine*, YOUTUBE at (1:23:31) (June 9, 2022), https://www.youtube.com/watch?v=1vEwAB-z4zQ&ab_channel=EuropeanPolicyCentre [<https://perma.cc/XD7Z-8LDK>].

74. *Id.*

75. *Memorandum on Presidential Determination on Refugee Admissions for Fiscal Year 2023*, WHITE HOUSE (Sept. 27, 2022) <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/09/27/memorandum-on-presidential-determination-on-refugee-admissions-for-fiscal-year-2023/> [<https://perma.cc/A8BU-YX3F>].

76. *Id.*

77. *Ongoing Efforts to Support Afghan Special Immigrant Visa Applicants*, U.S. DEP'T OF STATE (July 18, 2022), <https://www.state.gov/ongoing-efforts-to-support-afghan-special-immigrant-visa-applicants/> [<https://perma.cc/LYQ9-QAVG>].

78. Jordan, *supra* note 69.

79. Joint Press Release, Fed. Foreign Office and the Fed. Ministry of the Interior and Cmty., *The Federal Admission Programme for People from Afghanistan Who are at Particular Risk*, (Oct. 17, 2022) (Ger.), <https://www.auswaertiges-amt.de/en/newsroom/news/federal-admission-programme-afghanistan/2558756> [<https://perma.cc/UPV2-6APN>]; see Riham Alkousaa, *Germany Starts New Admission Programme for Afghan Refugees*, REUTERS (Oct. 17, 2022), <https://www.reuters.com/world/germany-starts-new-admission-programme-afghan-refugees-2022-10-17> [<https://perma.cc/L3BG-37RS>].

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based on their gender, sexual orientation, or religion.⁸⁰ Germany also agreed to work with civil society organizations to support this program.⁸¹

B. VIOLENCE-BASED CONFLICT

The limited focus on high-profile matters above overlooks the millions who remain in refugee status from lower-level conflicts including those who are escaping other forms of violence such as gang violence, domestic violence, and drug cartels.⁸² This level of conflict occurs when there are “internal disturbances and tensions involving violent demonstrations and riots” to name a few, in a country.⁸³ Violence-based displacement occurs when lower-level conflicts force people to be internally displaced or to flee their home country.⁸⁴ These refugees often come from Venezuela, Nicaragua, Honduras, and Guatemala and seek asylum in the U.S.⁸⁵ U.S. Customs and Border Protection (CBP) reports more than 2.76 million migrant encounters from Central and South America with twenty percent from the Northern Triangle, six point nine percent Venezuelan, and five point nine six percent Nicaraguan during the 2022 fiscal year.⁸⁶ All 2.76 million refugees, at the Southern U.S. border, made the arduous journey by foot to flee violence unrelated to recognized conflicts.⁸⁷

Globally, there are nearly 7.1 million Venezuelan refugees.⁸⁸ These refugees have fled Venezuela because of the “rampant violence, inflation,

80. *Memorandum on Presidential Determination on Refugee Admissions for Fiscal Year 2023*, *supra* note 75.

81. *Id.*

82. *Refugee Data Finder*, *supra* note 6.

83. *Id.*

84. *Stories of Afghanistan Refugees*, SAVE THE CHILD. (Apr. 11, 2023), <https://www.savethechildren.org/us/what-we-do/emergency-response/refugee-children-crisis/afghanistan-refugee-stories> [<https://perma.cc/ZDA2-PYR9>].

85. *Id.*

86. Note: CBP reports 2.4 million encounters at Southern border. *Southwest Land Border Encounters*, U.S. CUSTOMS & BORDER PROT. (Oct. 21, 2022), <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters> [<https://perma.cc/S47J-6XGQ>]; *Nationwide Encounters*, U.S. CUSTOMS & BORDER PROT. (Oct. 21, 2022), <https://www.cbp.gov/newsroom/stats/nationwide-encounters> [<https://perma.cc/NZR5-G2P7>]; *CBP Releases September 2022 Monthly Operational Update*, U.S. CUSTOMS & BORDER PROT. (Oct. 21, 2022), <https://www.cbp.gov/newsroom/national-media-release/cbp-releases-september-2022-monthly-operational-update> [<https://perma.cc/JJU2-TSPF>].

87. *Venezuelan Refugees & Migrants in the Region – Sept 2022*, R4V (Sept. 2022), <https://www.r4v.info/en/document/r4v-latin-america-and-caribbean-venezuelan-refugees-and-migrants-region-sept-2022> [<https://perma.cc/HJ7J-4U8A>].

88. *Venezuela Humanitarian Crisis*, UNHCR, <https://www.unrefugees.org/emergencies/venezuela/> [<https://perma.cc/AM83-YC8Y>] (last visited Apr. 30, 2023); see *Explainer: So, Why Are So Many Venezuelans Leaving Their Country?*, CBS (Sept. 21, 2022), <https://www.cbsnews.com/miami/news/explainer-so-why-are-so-many-venezuelans-leaving-their-country/> [<https://perma.cc/5JE2-6E72>]; Oriana Van Praag, *Understanding the Venezuelan Refugee Crisis*, WILSON CTR. (Sept. 13, 2019), <https://www.wilsoncenter.org/article/understanding-the-venezuelan-refugee-crisis> [<https://perma.cc/Z2YN-TVSF>].

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gang-warfare, soaring crime rates as well as shortages of food, medicine and essential services.”⁸⁹ Those leaving Venezuela are vulnerable, with few resources, and face poverty.⁹⁰ The COVID-19 pandemic exacerbated this situation by forcing Venezuelans deeper into poverty.⁹¹ Similarly, in 2022, roughly 230,000 Nicaraguans were seeking asylum because of the rise of an authoritarian dictator who is systematically eradicating democratic safeguards in Nicaragua.⁹² According to the UNHCR Global Appeal for 2022 the Northern Triangle (Guatemala, Honduras, and El Salvador) experiences widespread violence including: attacks on women and the LGBTQIA+ community; widespread gang recruitment; gang violence; fragile institutions; the impacts of climate change; and deep-rooted inequalities; compounded by the pandemic-related socioeconomic downturn; which contributes to refugees leaving.⁹³ There are approximately 636,283 refugees and asylum seekers from the Northern Triangle worldwide.⁹⁴

Inconsistencies in refugee admissions also impact Central and South American refugees, especially under Title 42.⁹⁵ Under 42 U.S.C. § 265, the U.S. government can “prohibit . . . the introduction of persons and property from such countries or places as [the Surgeon General] shall designate in order to avert [the spread of COVID-19].”⁹⁶ It asserts such a “suspension of the right to introduce such persons and property is required in the interest of the public health.”⁹⁷ Under this policy, refugees are denied entry into the U.S.⁹⁸ In 2022, the Biden Administration expanded Title 42 to target

89. *Venezuela Situation*, UNHCR (2022), <https://www.unhcr.org/en-us/venezuela-emergency.html> [<https://perma.cc/RW7M-FJH2>]. *Crisis*, WILSON CTR (Sept. 13, 2019), <https://www.wilsoncenter.org/article/understanding-the-venezuelan-refugee-crisis>.

90. U.S. CUSTOMS & BORDER PROT., *supra* note 60.

91. HUM. RTS. WATCH, *supra* note 48 at 489–497.

92. *El Salvador, Guatemala and Honduras Situation*, UNHCR (2021), <https://reporting.unhcr.org/ncasituation> [<https://perma.cc/8UCM-2BAK>]; *Displacement in Central America*, UNHCR, <https://www.unhcr.org/en-us/displacement-in-central-america.html> [<https://perma.cc/K9NZ-U9PK>] (last visited Apr. 30, 2023); *Central American Migration: Root Causes and U.S. Policy*, CONG. RES. SERV. (Mar. 31, 2022), <https://sgp.fas.org/crs/row/IF11151.pdf> [<https://perma.cc/KXC8-YBLD>].

93. *Venezuela Situation*, *supra* note 89; A Universal Declaration of Human Rights, *supra* note 13.

94. 42 U.S.C. § 265.

95. *Id.*

96. *Id.*

97. David Shortell & Julie Turkewitz, *Venezuelans Who Left Everything Behind Are Stuck South of U.S. Border*, N.Y. TIMES (Oct. 24, 2022), <https://www.nytimes.com/2022/10/24/world/americas/venezuela-migrants-biden-mexico.html> [<https://perma.cc/4XTT-97Y3>].

98. DHS Announces New Migration Enforcement Process for Venezuelans, U.S. DEP’T OF HOMELAND SEC. (Oct. 12, 2022), <https://www.dhs.gov/news/2022/10/12/dhs-announces-new-migration-enforcement-process-venezuelans> [<https://perma.cc/CQ7R-UB7L>]; see Jordan Fabian & Ellen M Gilmer, *US Border Chief Sees New Success in Deterring Venezuela Migrants*, BLOOMBERG (Oct. 20, 2022), <https://www.bloomberg.com/news/articles/2022-10-20/us-border-chief-sees-new-success-in-deterring-venezuela-migrants?leadSource=Uverify%20wall> [<https://perma.cc/Q4D2-V64E>].

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Venezuelans and discourage them from making the journey to the U.S.⁹⁹ This new expansion, along with the Administration increasing the Venezuelan lawful entry cap to 24,000, limits the number of refugees admitted.¹⁰⁰ Refugees exceeding the cap are being expelled from the U.S. and Mexico.¹⁰¹ Title 42 is meant to deter and discourage refugees from seeking safety in the U.S., without examining their asylum claim; as applied, it violates international law, rights of refugees, and endangers vulnerable people.¹⁰²

But progress in addressing refugees fleeing violence has been made: The Biden Administration explicitly categorizes people escaping violence in the Northern Triangle as refugees for the purpose of admission into the U.S.¹⁰³ But the regional refugee admission cap still limits Latin America and the Caribbean to 15,000.¹⁰⁴ On November 15, 2022, the D.C. district court found Title 42's "policy [is an] arbitrary and [a] capricious . . . violation."¹⁰⁵ It further enjoined DHS from applying Title 42 to refugees.¹⁰⁶

III. Economically Forced Migration

Recently, economic driven migration has been a major reason why persons have been on the move in search of better life.¹⁰⁷ Economic driven migration has been described as the movement of people from one place to another in order to find work or improve their standard of living.¹⁰⁸ It has also been defined as a choice to move to improve the standard of living by gaining a better paid job.¹⁰⁹ Economic migration occurs as a result of poverty in a migrant's homeland, lack of employment/job opportunities, hunger,

99. 42 U.S.C. § 265.

100. Dave Graham & Ted Hesson, *U.S. to expel Venezuelan migrants to Mexico under joint plan*, Reuters (Oct. 13, 2022), <https://www.reuters.com/world/americas/us-mexico-agree-border-plan-venezuelan-migrants-2022-10-12/> [<https://perma.cc/3TCX-GA98>]; see Dave Graham, *First plane Repatriating Venezuelan Migrants in Mexico Departs for Caracas*, Reuters (Oct. 26, 2022), <https://www.reuters.com/world/americas/first-plane-repatriating-venezuelan-migrants-mexico-departs-caracas-sources-say-2022-10-26/> [<https://perma.cc/AM9D-MA65>].

101. *Ukraine Situation Flash Update #24*, *supra* note 28; see also *US/Mexico: Expelling Venezuelans Threatens Rights, Lives*, HUM. RTS. WATCH (Oct. 21, 2022), <https://www.hrw.org/news/2022/10/21/us/mexico-expelling-venezuelans-threatens-rights-lives> [<https://perma.cc/96E8-XUQK>].

102. See generally 42 U.S.C. § 265.

103. Presidential Determination No. 2022-225, Presidential Determination on Refugee Admissions for Fiscal Year 2023, 87 Fed. Reg. 60547 (Sept. 27, 2022).

104. See *id.*

105. *Huisha-Huisha v. Mayorkas*, 2022 U.S. Dist. LEXIS 207282, at *42 (D.D.C. Nov. 15, 2022).

106. *Id.* at *51.

107. Michael Dimock, *Global Migration's Rapid Rise*, PEW RSCH. CTR. TREND MAG., <https://www.pewtrusts.org/en/trend/archive/summer-2016/global-migrations-rapid-rise> [<https://perma.cc/GL3U-RMJA>] (last visited Apr. 30, 2023).

108. Chris Drew, *12 Types of Migration (Human Geography Notes)* (Mar. 23, 2022), <https://helpfulprofessor.com/types-of-migration/> [<https://perma.cc/2UF7-JV6Z>].

109. *Migration*, BBC, <https://www.bbc.co.uk/bitesize/guides/z3p4b82/revision/3> [<https://perma.cc/L8AA-VNSY>] (last visited Apr. 18, 2023).

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corruption and poor governance, lack of clean water, and poor health services among other things.¹¹⁰

Economic migrants often face difficulty in being employed in their host countries and sometimes face discrimination and exploitation in their host countries.¹¹¹ Economic migrants are often viewed as a threat to local employment seekers and face harsh treatment as “foreigners.” Meanwhile, economic migration keeps increasing globally and rose between 2020 and 2022 in particular, as a result of the COVID-19 pandemic.¹¹² In many countries, there were signs of increased skills shortages and demand for foreign workers while in some other countries, the pandemic dealt massive blow on their economies.¹¹³ Consequently, people moved (especially skilled workers) from some Asian and African countries to Europe, Canada, America, and some Gulf Cooperating Council countries.¹¹⁴

Instances of economic driven migration manifested in the movement of people from the economically depressed country of Venezuela to neighboring Colombia in search of work during the 2020 economic crash.¹¹⁵ Conversely, a 2021 report issued by Africa Center for Strategic Studies shows that about twenty-one million Africans have migrated to other African countries for better opportunities,¹¹⁶ while about eleven million migrated to

110. Cünyet Telsaç & Ölzem Telsaç, *Causes of Migration and Its Effects*, in PROCEEDINGS BOOK 427, 428-29 (2d Int'l Symposium “Global Migration Phenomenon” 2022), https://www.researchgate.net/publication/359438780_CAUSES_OF_MIGRATION_AND_ITS_EFFECTS [<https://perma.cc/FAH2-RPM8>].

111. Melanie Lombard, *The Experience of Precarity: Low-paid Economic Migrants' Housing in Manchester*, 38 HOUSING STUDIES (No. 2) 307, 311-12, 313 (2023), <https://www.tandfonline.com/doi/full/10.1080/02673037.2021.1882663> [<https://perma.cc/N87R-YQ86>]. More than seventy-nine percent of African migrants who reached Italy from Libya in the first half of 2017 reported experiencing at least one form of abuse—from extortion and not getting expected payment for work to physical violence, torture, and outright bondage. Law enforcement officials were regularly reported to be among the perpetrators. See *Dynamics of African Economic Migration*, AFR. CTR. FOR STRATEGIC STUDIES (Dec. 15, 2017), <https://africacenter.org/spotlight/dynamics-african-economic-migration/#:~:text=AN%20estimated%2015%2C000-17%2C000%20economic%20migrants%20each%20year%20travel,third%20route%2C%20from%20the%20Horn%20to%20Southern%20Africa> [<https://perma.cc/8ANC-56QA>].

112. See U.N. Dep't of Econ. and Soc. Affairs, *Policy Brief No. 133: Migration Trends and Families*, U.N. (May 2022), https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/PB_133.pdf [<https://perma.cc/7T4G-ZMFC>]; see also Stephen A. Altman & Caroline R. Bastian, *The State of Globalization in 2022*, HARV. BUS. REV. (Apr. 12, 2022), <https://hbr.org/2022/04/the-state-of-globalization-in-2022> [<https://perma.cc/WS9G-6ATT>].

113. U.N. OFF. OF THE HIGH COMM'R FOR HUMAN RIGHTS (OHCHR), *THE ECONOMIC, SOCIAL AND CULTURAL RIGHTS OF MIGRANTS IN AN IRREGULAR SITUATION*, at 11-12, U.N. Doc. HR/PUB/14/1, U.N. Sales No. E.14.XIV.4 (2014).

114. ASIAN DEV. BANK. INST. ET AL., *LABOR MIGRATION IN ASIA: COVID-10 IMPACTS, CHALLENGES, AND POLICY RESPONSES 1* (2022).

115. *Id.* at 15, ann. 1, at 114-137.

116. Leonardo Penalzoza-Pancheco, *Living with Neighbors: the Effect of Venezuelan Forced Migration on the Labor Market in Colombia*, 56 J. LAB. MKT. RSCH., no. 14, 2022, at 1.

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Europe; almost five million migrated to the Middle East and about three million migrated to North America.¹¹⁷

Global depression of wages, income gaps and the pursuit of better opportunities as major factors that drive people to risk their lives in the bid to migrate.¹¹⁸ Migrants fleeing economic hardships have historically been at risk of loss of life.¹¹⁹ In one particularly disturbing case from 2013, it was reported that a boat conveying migrants from Libya to Italy sank off the Italian Island of Lampedusa.¹²⁰ A number of migrants on the boat (reportedly originating from Misrata) reportedly originated from Eritrea, Somalia, and Ghana.¹²¹ Reports indicate that about 155 survivors were rescued while more than 300 people died.¹²²

Between 2013 and 2022, reports indicate that more migrants have died in the same sea while more are still attempting to cross the sea to Europe.¹²³ The UNHCR, in one of its 2022 reports, lamented the loss of more than 50,000 migrants (worldwide) in 2014 while searching for greater economic stability.¹²⁴ But little or nothing is being done by governments globally to curb or mitigate the root causes of economic driven migration.¹²⁵ Despite the high risk and historically high loss of life resulting from migration tied to economic hardship, the number of persons seeking a better circumstance for them and for their families continues to drive migration for economic hardship at high numbers.¹²⁶

117. Urban areas in Egypt, Nigeria, and South Africa have been reported to be the main destinations for this inter-African migration, reflecting the relative economic dynamism of the Countries. See *African Migration Trends to Watch in 2022*, AFR. CTR. FOR STRATEGIC STUD. (Dec. 17, 2021), <https://africacenter.org/spotlight/african-migration-trends-to-watch-in-2022/> [https://perma.cc/37PF-H945].

118. See *id.*

119. Branko Milanovic, *The Economic Causes of Migration*, THE GLOBALIST (Oct. 22, 2013), <https://www.theglobalist.com/economic-causes-migration/> [https://perma.cc/VC8C-PUMK].

120. See *Refugees, Asylum Seekers and Migrants*, AMNESTY INT'L, <https://www.amnesty.org/en/what-we-do/refugees-asylum-seekers-and-migrants/> [https://perma.cc/QT2J-WXGH] (last visited Apr. 19, 2023).

121. Jim Yardley & Elisabetta Povoledo, *Migrants Die as Burning Boat Capsizes Off Italy*, N.Y. TIMES (Oct. 3, 2013), https://www.nytimes.com/2013/10/04/world/europe/scores-die-in-shipwreck-off-sicily.html?_r=0 [https://perma.cc/B4D5-CAJW].

122. See *id.*

123. Lara Olivieri, et al., *Challenges in the Identification of Dead Migrants in the Mediterranean: The Case Study of the Lampedusa Shipwreck of October 3rd, 2013*, 285 J. FORENSIC SCI. INT'L 121, 122 (2018).

124. *More Than 50,000 Migrants "Die in Search of a Better Life"*, U.N. NEWS, <https://news.un.org/en/story/2022/11/1130997> [https://perma.cc/6W9X-QD3L] (last visited Apr. 19, 2023).

125. See *id.*

126. See *id.*

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IV. Conclusion

Actions taken by States in 2022 demonstrate a significant and pervasive issue in addressing fundamental rights of refugees in times of crises and that the global community must address the rights and safety of refugees. Most actions by States fail to account for the abrupt circumstances under which people are forced to flee their homes and their lives. Barriers and discouragements to prevent refugees from entering a country or taking the perilous track to safety are contrary to the spirit and purpose of the Refugee Convention and violate international human rights law.¹²⁷ This is, therefore, a reminder and call to action for all. Notwithstanding the reasons that generally compel or drive people to move, no one deserves to die or suffer in search of a better life.

127. *See id.*

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Customs Law

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Against the backdrop of continuing pressure on supply chains and ports due to the effects of the COVID-19 pandemic, the Russia-Ukraine conflict, and ongoing trade tensions between the United States and China, the year 2022 brought several significant developments to U.S. customs laws affecting imports and importers. Those developments originated from the legislative, judicial, executive, and administrative actions.

This article summarizes the most important developments in U.S. customs laws in 2022.

I. Uyghur Forced Labor Prevention Act Implementation

At the end of 2021, President Biden signed into law the Uyghur Forced Labor Prevention Act (UFLPA).¹ The implementation of UFLPA set the stage for wide-reaching enforcement in 2022, targeting goods made with forced labor in the Xinjiang Uyghur Autonomous Region (the XUAR).² Under the Uyghur Forced Labor Prevention Act, a rebuttable presumption is established that goods, wares, articles, or merchandise (1) mined, produced, or manufactured wholly or in part in the XUAR, or (2) produced by certain entities on the Forced Labor Enforcement Task Force (FLETTF) Entity List are made with forced labor and thus prohibited from importation by section 307 of the Tariff Act of 1930.³ The presumption applies unless the importer complies with certain conditions and shows through clear and convincing evidence that the imported items were not produced using forced labor.⁴

On June 13, 2022, U.S. Customs and Border Protection (CBP) issued its Operational Guidance for Importers, to assist the trade community in

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1. Uyghur Forced Labor Prevention Act, Pub. L. 117-78, 135 Stat. 1525 (to be codified at 22 U.S.C. § 6901).

2. *See id.*

3. *See id.*

4. *See id.*

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preparing for the UFLPA rebuttable presumption.⁵ The operational guidance includes resources for supply chain diligence and tracing and information regarding the nature and type of information that may be required when an importer requests a UFLPA exception, such as:

- (1) Documentation showing a due diligence system for suppliers, employees, and stakeholders.⁶
- (2) Supply chain tracing information detailing the overall supply chain and records specific to the imported merchandise and its components.⁷
- (3) Information on supply chain management measures, such as internal controls to prevent forced labor.⁸
- (4) Documentation that traces the supply chain to show that the goods were not mined, produced, or manufactured wholly or in part in the XUAR.⁹

On June 17, 2022, the FLETF, chaired by the Department of Homeland Security (DHS), introduced its *Strategy to Prevent the Importation of Goods Mined, Produced, or Manufactured with Forced Labor in the People's Republic of China*, providing greater detail on the risk of forced labor and plans to support forced labor prevention.¹⁰ Importantly, the guidance further expounded upon the level of due diligence expected of importers in managing supply chain risks and in mapping the entirety of their supply chains.¹¹

On June 21, 2022, the UFLPA went into effect with the trade community anticipating how implementation would look in a practical sense. Since enforcement began, CBP's monthly operational guidance shows active targeting of shipments made with forced labor.¹² In October alone, CBP targeted nearly 400 entries for suspected use of forced labor in the production of imported goods valued at more than USD \$129.8 million.¹³ To date, other than monthly operational updates, CBP has published limited

5. U.S. CUSTOMS & BORDER PROT., U.S. CUSTOMS & BORDER PROTECTION OPERATIONAL GUIDANCE FOR IMPORTERS (2022), https://www.cbp.gov/sites/default/files/assets/documents/2022-Jun/CBP_Guidance_for_Importers_for_UFLPA_13_June_2022.pdf [<https://perma.cc/5E24-TSBE>].

6. *See id.* at 13.

7. *See id.* at 16.

8. *See id.* at 17.

9. *See id.* at 14–15.

10. U.S. DEP'T. OF HOMELAND SEC., STRATEGY TO PREVENT THE IMPORTATION OF GOODS MINED, PRODUCED, OR MANUFACTURED WITH FORCED LABOR IN THE PEOPLE'S REPUBLIC OF CHINA (2022), https://www.dhs.gov/sites/default/files/2022-06/22_0617_fletf_uflpa-strategy.pdf [<https://perma.cc/5L6W-FJDS>].

11. *See id.* at 45.

12. Richard Vanderford, *U.S. Forced Labor Crackdown Is Tough, But Opaque*, WALL ST. J. (Feb. 23, 2023), <https://www.wsj.com/articles/u-s-forced-labor-crackdown-is-tough-but-opaque-a463d6e7> [<https://perma.cc/K3PZ-ATL8>].

13. *See CBP Releases of October 2022 Monthly Operational Update*, U.S. CUSTOMS & BORDER PROT. (Nov. 14, 2022), <https://www.cbp.gov/newsroom/national-media-release/cbp-releases->

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UFLPA enforcement data, although sources state that UFLPA seizures neared 1,600 by November 2022.¹⁴

Since the UFLPA went into effect, importers and suppliers have identified practical implementation as the leading challenge due to the vast amount of supply chain formations that could arise and the overall complexity of supply chain tracing.¹⁵ Obtaining information from upstream suppliers, tracing commingled merchandise, and obtaining credible insight into overseas operations are among the barriers importers face in achieving compliance.¹⁶ As CBP has put technology at the forefront of UFLPA enforcement, platforms for DNA testing and trace element identification are among the many emerging ideas for meeting new forced labor requirements.¹⁷

CBP is considering numerous proposals to streamline enforcement measures and provide greater visibility for importers. On November 2, 2022, CBP published the UFLPA Region Alert enhancement to the Automated Commercial Environment (ACE), which will use postal codes to provide early notification to importers of goods that may have been produced in the XUAR.¹⁸ The implementation date is yet to be determined; however, this enhancement is one of several expected to come as forced labor enforcement continues to rise.¹⁹

For importers seeking to gain more insight into the UFLPA, CBP and DHS have published several resources to aid in forced labor compliance, including FAQs, fact sheets, and government resources available on the CBP and DHS webpages.²⁰

october-2022-monthly-operational-update#:~:text=IN%20October%202022%20alone%2C%20CBP,collected%20by%20the%20U.S.%20government [https://perma.cc/2GN9-H2T7].

14. Nicholas Green, *Exclusive: U.S. Blocks more than 1,000 Solar Shipments over Chinese Slave Labor Concerns*, REUTERS (Nov. 11, 2022), <https://www.reuters.com/world/china/exclusive-us-blocks-more-than-1000-solar-shipments-over-chinese-slave-labor-2022-11-11/> [https://perma.cc/J8Z5-G9JQ].

15. David E. Bond et al., *Uyghur Forced Labor Prevention Act: Commercial Implications, Compliance Challenges and Responses*, WHITE & CASE (Oct. 3, 2022), <https://www.whitecase.com/insight-alert/uyghur-forced-labor-prevention-act-commercial-implications-compliance-challenges-and> [https://perma.cc/UBL3-FBQM].

16. *See id.*

17. *FAQs: Uyghur Forced Labor Prevention Act (UFLPA) Enforcement*, U.S. CUSTOMS & BORDER PROT. (Feb. 23, 2023), <https://www.cbp.gov/trade/programs-administration/forced-labor/faqs-ufpla-enforcement> [https://perma.cc/M3AU-ZX8E].

18. *See CBP Releases of October 2022 Monthly Operational Update*, *supra* note 13.

19. U.S. CUSTOMS & BORDER PROT., NOTIONAL DEVELOPMENT & DEPLOYMENT SCHEDULE FOR AUTOMATE COMMERCIAL ENVIRONMENT (ACE) (2023), https://www.cbp.gov/sites/default/files/assets/documents/2023-Apr/ACE%20Development%20-%20Deployment%20Schedule-April%202023_v2_508c.pdf [https://perma.cc/QV3U-AGSA].

20. *See generally FAQs: Uyghur Forced Labor Prevention Act (UFLPA) Enforcement*, *supra* note 17; *see also Uyghur Forced Labor Prevention Act*, U.S. DEP'T HOMELAND SEC. (Oct. 27, 2022), <https://www.dhs.gov/ufpla> [https://perma.cc/CS7L-DN4X].

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II. CTPAT Introduces New Anti-Forced Labor Requirements

In 2022, CBP announced the rollout of new forced labor-related requirements to the Customs Trade Partnership Against Terrorism (CTPAT) program. CTPAT is a voluntary program under which U.S. importers agree to implement certain anti-forced labor measures in exchange for specific benefits.²¹ The CTPAT program has two “sides:” the Security side, to which all 11,000-plus CTPAT partners belong, and the Trade Compliance side, to which a subset of CTPAT partners belong.²² CBP maintains oversight over both sides of the program.²³ CBP announced forced labor-related enhancements on the CTPAT Security side and six new forced labor requirements on the CTPAT Trade Compliance side.²⁴

A. CTPAT SECURITY & FORCED LABOR

As of January 2023, all CTPAT Security partners must have a documented social compliance program in place.²⁵ Before January 2023, having a social compliance program was listed as a “should” and not a “must” for CTPAT partners.²⁶ At a minimum, the social compliance program must address how the company ensures the goods it imports into the United States are not “mined, produced or manufactured, wholly or in part, with prohibited forms of labor (i.e., forced, prisoner, indentured, or indentured child labor).”²⁷ It should also include policies and practices to implement the Code of Conduct’s social and labor-related elements and address the partner’s responsibilities to certain stakeholders.²⁸

B. CTPAT TRADE COMPLIANCE & FORCED LABOR

In 2022, CBP outlined additional anti-forced labor requirements for CTPAT Trade Compliance partners which are more comprehensive than the social compliance program detailed in the Minimum-Security Criteria.²⁹

21. See *CTPAT: Customs Trade Partnership Against Terrorism*, U.S. CUSTOMS AND BORDER PROT. (Jan. 10, 2023), <https://www.cbp.gov/border-security/ports-entry/cargo-security/CTPAT> [https://perma.cc/9TAR-WPJD].

22. See *id.*

23. See *id.*

24. *CTPAT Forced Labor Requirements Frequently Asked Questions*, U.S. CUSTOMS AND BORDER PROT. (2022), <https://www.shapiro.com/wp-content/uploads/CTPAT-Forced-Labor-Requirements-FAQs-FINAL-Article-1.pdf> [https://perma.cc/9MKT-9ZQ9].

25. See *id.*

26. U.S. CUSTOMS & BORDER PROT., MINIMUM SECURITY CRITERIA – U.S. IMPORTERS NOVEMBER 2019 10 (Nov. 2019), <https://www.cbp.gov/sites/default/files/assets/documents/2019-Dec/CTPAT%20U.S.%20Importers%20MSC%202019.pdf> [https://perma.cc/335C-WDEB] [hereinafter MINIMUM SECURITY CRITERIA].

27. See *id.*

28. See *id.*

29. U.S. CUSTOMS & BORDER PROT., CUSTOMS TRADE PARTNERSHIP AGAINST TERRORISM TRADE COMPLIANCE HANDBOOK 2 (2022), https://www.cbp.gov/sites/default/files/assets/documents/2022-Nov/CTPAT%20Trade%20Compliance%20Handbook%202.0%20_508.pdf

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As described by CBP, the new forced labor requirements are divided into six sections:³⁰

- (1) *Risk-Based Mapping*: Partners must conduct risk-based mapping of their entire supply chains, including “the regions, suppliers, etc. that the importer feels” pose the most forced labor risk.³¹
- (2) *Code of Conduct*: “Partners must create a Code of Conduct statement that represents their position against the use of Forced Labor within any part of their supply chain” and must have policies and procedures to operationalize the Code of Conduct.³² Partners must publicly publish their Code of Conduct, upload it to the CTPAT portal, and integrate the Code of Conduct into their social compliance program.³³
- (3) *Evidence of Implementation*: Partners must provide CBP with evidence of implementation of their social compliance program (including their Code of Conduct).³⁴ Additionally, partners must identify high-risk parts of their supply chain and be ready to provide CBP with related requested information.³⁵
- (4) *Due Diligence and Training*: “Partners must provide training about the social compliance program requirements to their suppliers that identifies the specific risks and helps identify and prevent forced labor in the supply chain” and be ready to provide CBP with proof of training, if requested.³⁶
- (5) *Remediation Plan*: If forced labor is identified in their supply chain, partners must maintain a remediation plan and provide it to CBP if requested.³⁷ Remediation plans must include a process to disclose identified forced labor to CBP and outline steps for corrective actions.³⁸
- (6) *Shared Best Practices*: Partners must share best practices for mitigating forced labor with CBP, as appropriate, to help mitigate the risk of forced labor.³⁹

Existing CTPAT Trade Compliance partners must implement these six elements by August 1, 2023.⁴⁰ Since August 1, 2022, prospective CTPAT

[<https://perma.cc/XHV6-MJHX>] [hereinafter TRADE COMPLIANCE HANDBOOK]; see also MINIMUM SECURITY CRITERIA, *supra* note 26.

30. See CTPAT Forced Labor Requirements Frequently Asked Questions, *supra* note 24.

31. See *id.*

32. TRADE COMPLIANCE HANDBOOK, *supra* note 29, at 16.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 17.

37. *Id.*

38. *Id.*

39. *Id.*

40. CTPATFAQs, U.S. CUSTOMS AND BORDER PROT. (July 28, 2022), <https://www.cbp.gov/accordion-page/ctpat-2021-faqs> [<https://perma.cc/YHR5-DTS4>].

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Trade Compliance partners must have had these elements in place when they applied for the program.⁴¹

In addition, Trade Compliance partners have been provided with new forced labor-related benefits:

- (1) *Prioritized Reviews*: Partners whose products have been detained due to forced labor concerns will have their admissibility packages sent to the “front of the line” and prioritized for review upon request.⁴²
- (2) *Avoiding Redelivery*: Partners whose products have arrived at their facilities, but are later held due to forced labor ties, may hold shipments at their warehouses, rather than redelivering the goods to CBP as would normally be required.⁴³ Goods may stay at the partners’ facilities until an admissibility decision is made or until the physical inspection is required.⁴⁴
- (3) *Holds in Bonded Facilities*: Partners who have had goods detained subject to a Withhold Release Order may move their goods to a bonded facility until an admissibility decision is made.⁴⁵

III. Import Restrictions and Duty Implications of Russian-Origin Products

On February 24, 2022, the Russian Federation (Russia) invaded Ukraine. The response to that invasion has included significant economic sanctions on Russia and Belarus and several Western companies pulling out from or halting their business operations in Russia, disrupting global trade flows.⁴⁶ While the most significant impact of the invasion and ongoing war in Ukraine remains unquestionably the humanitarian crisis it has created, the tranche of economic sanctions imposed in response has included notable changes to the rules for importing Russian-origin goods. This short commentary focuses on U.S. import measures imposed on Russia.

41. *Id.*

42. Manuel A. Garza, Jr., *A Message from CTPAT Director Manuel A. Graza, Jr.*, U.S. CUSTOMS AND BORDER PROT. (Nov. 2022), https://www.cbp.gov/sites/default/files/assets/documents/2022-Nov/Trade%20Compliance%20Benefits%20Letter_Nov%202022_Pub%20%232072-1122.pdf [<https://perma.cc/D3WW-CEN7>].

43. *Id.*

44. *Id.*

45. *Id.*

46. *FinCEN Advises Increased Vigilance for Potential Russian Sanctions Evasion Attempts*, U.S. DEP’T TREASURY, FIN. CRIMES ENF’T AGENCY (2022), <https://www.fincen.gov/sites/default/files/2022-03/FinCEN%20Alert%20Russian%20Sanctions%20Evasion%20FINAL%20508.pdf> [<https://perma.cc/Y3KU-F439>].

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A. RESTRICTIONS ON IMPORTS FROM THE DONETSK PEOPLE'S
REPUBLIC (DNR) AND LUHANSK PEOPLE'S REPUBLIC
(LNR) REGIONS OF UKRAINE

The first U.S. import restrictions imposed on Russia immediately followed the Russian government's decision to recognize the DNR and LNR as independent from Ukraine.⁴⁷ On February 21, 2022, the Biden Administration responded by issuing Executive Order 14065.⁴⁸ That Executive Order imposed comprehensive trade sanctions on the DNR and LNR, including a ban on all imports into the United States of any goods, services, or technology from these regions.⁴⁹

B. RESTRICTIONS ON IMPORTS FROM RUSSIA

Like the import ban from DNR and LNR, the United States has imposed various import restrictions on goods from Russia or goods that are of Russian origin.⁵⁰ These include restrictions on imports of crude oil, petroleum, energy products,⁵¹ and gold,⁵² as well as a ban on certain items from key Russian sectors, such as seafood, alcohol, and non-industrial diamonds.⁵³

C. SUSPENDING NORMAL TRADE RELATIONS WITH RUSSIA AND
BELARUS

As the conflict in Ukraine escalated in April of 2022, President Biden signed a bill that revoked Russia's Normal Trade Relations (NTR) status (the Suspending NTR Act), thereby giving the President the authority to raise tariffs on Russian goods beyond most-favored-nation (MFN) levels at the World Trade Organization (WTO).⁵⁴

For some imported products from Russia, simply revoking NTR status caused a significant increase in import duty.⁵⁵ For many other products, the effect was more modest, given that, under then-existing U.S. tariff codes,

47. Exec. Order No. 14065, 87 Fed. Reg. 36 (Feb. 21, 2022).

48. *Id.*

49. *Id.*

50. Exec. Order No. 14066, 87 Fed. Reg. 47 (Mar. 10, 2022).

51. *Office of Foreign Assets Control*, U.S. DEP'T OF TREASURY, https://home.treasury.gov/system/files/126/eo_14066.pdf [<https://perma.cc/W3XF-25FB>].

52. Press Release, U.S. Treasury Sanctions Nearly 100 Targets in Putin's War Machine, Prohibits Russian Gold Imports, U.S. Treasury (June 28, 2022), <https://home.treasury.gov/news/press-releases/jy0838#:~:text=Concurrent%20with%20today's%20sanctions%20actions,vigilance%20against%20Russian%20and%20Belarusian> [<https://perma.cc/D2QC-F36M>].

53. *Office of Foreign Assets Control*, *supra* note 51.

54. Increasing Duties on Certain Articles from the Russian Federation, 87 Fed. Reg. 38875 (June 30, 2022).

55. *Id.*

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there was little difference between the MFN import duty rate and the import duty rate for countries that do not have MFN privileges.⁵⁶

Under the authority of the Suspending NTR Act, on June 27, 2022, President Biden signed a proclamation increasing the duty rate applicable to a range of Russia-origin products to thirty-five percent ad valorem.⁵⁷ The duty increase applies to more than 570 tariff subheadings, which were listed in Annex A to the proclamation.⁵⁸ These subheadings covered raw materials and other production inputs (e.g., certain chemicals, minerals, textiles, and articles made from steel, aluminum, or copper) in addition to finished goods (e.g., certain machinery, lighting equipment, electrical devices, and optical equipment).⁵⁹ The additional duty took effect on July 27, 2022.⁶⁰

**D. U.S. COMMERCE DEPARTMENT DOWNGRADES RUSSIA TO
NONMARKET ECONOMY STATUS**

The most recent U.S. custom import trade restriction on the Russian economy occurred on November 10, 2022, when the U.S. Department of Commerce (DOC) announced that it had reclassified Russia as a nonmarket economy.⁶¹ This designation means that the U.S. government will no longer treat Russia as a market economy in antidumping proceedings.⁶² Specifically, the application of DOC's "non-market methodology" in antidumping proceedings is essentially a summary finding that the Department cannot rely on the costs reported by Russian manufacturers in the dumping calculation.⁶³ This generally results in significantly higher duty rates through the use of surrogate costs from comparable market economy producers.⁶⁴

IV. Notable CIT and CAFC Cases in 2022

This section covers 2022 cases from the Court of Appeals for the Federal Circuit (CAFC) and the Court of International Trade (CIT) that have significant ramifications for U.S. customs law.

^{56.} *Id.*

^{57.} *Id.*

^{58.} *Id.*

^{59.} *Id.*

^{60.} *Id.*

^{61.} Press Release, U.S. Department of Commerce Revokes Russia's Market Economy Status in Antidumping Process, Int'l Trade Admin. (Nov. 10, 2022), <https://www.trade.gov/press-release/us-department-commerce-revokes-russias-market-economy-status-antidumping-proceedings> [<https://perma.cc/JYK6-2E6R>].

^{62.} *Id.*

^{63.} *Id.*

^{64.} *Id.*

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A. CAFC CLARIFIES THE “FIRST SALE PRICE” VALUATION RULE
FOR NONMARKET ECONOMIES IN MEYER CORP. V. UNITED
STATES

In *Meyer Corp. vs. United States*,⁶⁵ the CAFC vacated and remanded the CIT’s decision on the issue of first sale valuation regarding merchandise from a nonmarket economy.⁶⁶ In its decision, the CAFC clarified its prior holding in *Nissho Iwai American Corp. v. United States* and held that importers are not required to prove the “absence of any market-distortive influences” in order to declare the “first sale” transaction value in multi-tiered transactions involving merchandise from nonmarket economies.⁶⁷

The value of imported merchandise is calculated using the transaction value (price actually paid or payable), when viable, in accordance with 19 U.S.C. § 1401a(a)(1).⁶⁸ In a multi-tiered transaction, the “first sale” transaction value is the price paid by the middleman to the foreign seller for the merchandise in question, rather than the price paid by the importer to the middleman.⁶⁹ In *Nissho*, the CAFC held that importers may declare the first sale price “when the goods are clearly destined for export to the United States and when the manufacturer and the middleman deal with each other at arm’s length, in the absence of any nonmarket influences that affect the legitimacy of the sales price.”⁷⁰

Interpreting *Nissho Iwai* in 2021, the CIT in *Meyer Corp.* required the plaintiff to prove the “absence of any market-distortive influences” from a nonmarket economy, such as China, in order to declare the value of the first sale transaction.⁷¹ Disagreeing with the CIT, the CAFC held that this requirement is extraneous because the “absence of nonmarket influences” is determined based on the effects of the relationship between the buyer and the seller on the price, not whether the transaction was affected by a foreign government’s market-distortive influences.⁷² Further, the CAFC held that Congress did not expressly distinguish market economies from nonmarket economies in § 1401a, nor did it authorize differing treatment in any other related provision.⁷³ The CAFC’s holding in *Meyer Corp.* eliminates the CIT’s extraneous burden on importers to prove the absence of market-distortive influences from foreign governments when declaring the first sale transaction value.⁷⁴

65. *Meyer Corp. v. United States*, 43 F.4th 1325, 1329 (Fed. Cir. 2022).

66. *Id.* (citing *Meyer Corp. v. United States*, No. 13-00154, 2021 WL 777788 (Ct. Int’l Trade 2021)).

67. *Id.* at 1332.

68. *Id.*

69. *Id.*

70. *Nissho Iwai American Corp. v. United States*, 982 F.2d 505, 509 (Fed. Cir. 1992).

71. *Meyer Corp.*, 43 F.4th at 1332.

72. *Id.*

73. *Id.*

74. *Id.*

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B. THE CIT REMANDS LISTS 3 AND 4 TO THE USTR

In a slip opinion published on April 1, 2022,⁷⁵ the CIT held that the Office of the United States Trade Representative (USTR) had the authority to modify the section 301 action in response to Chinese retaliatory tariffs.⁷⁶ The CIT explained that “modifications are based on activity increasing (or decreasing) the burden on U.S. commerce after the initial determination,” and therefore, what matters is not the timing but whether the USTR found that China’s retaliation increased the burden from the “acts, policies, and practices” that were “subject of the action.”⁷⁷ The CIT determined that the USTR Report⁷⁸ provided a basis for considering China’s retaliation “within the scope of the acts, policies, and practices” constituting the original action because China’s conduct was intended to uphold those same unfair trade policies.⁷⁹ Thus, the CIT held that the USTR did not exceed its authority by promulgating Lists 3 and 4A.⁸⁰

On the other hand, the CIT conceded that the USTR failed to provide sufficient rationale for the tariffs in the notice and comment process as required by the Administrative Procedure Act (APA).⁸¹ The CIT held that “the USTR was required to address comments regarding any duties to be imposed, the aggregate level of trade subject to the proposed duties, and the products covered by the modifications,” and that such action must be taken “in light of section 301’s statutory purpose to eliminate the burden on U.S. commerce . . . and subject to the specific direction of the President, if any.”⁸² But the USTR’s responses failed to adequately explain how it came to its decision to act and why it chose to act the way it did.⁸³ Although the USTR cited the direction of the President and the harm of Chinese policies as reasons for taking action, the CIT explained that the agency solicited comments and had an obligation to respond to significant issues they raised under the APA.⁸⁴ The CIT remanded the USTR’s actions for further explanation while List 3 and 4A tariffs remain in effect.⁸⁵

75. *In re* Section 301 Cases, 570 F. Supp. 3d 1306, *1338–49 (Ct. Int’l Trade 2022).

76. *Id.* at 1330–34.

77. *Id.* at 1332.

78. OFF. OF THE UNITED STATES TRADE REPRESENTATIVE, FINDINGS OF THE INVESTIGATION INTO CHINA’S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974 (Mar. 22, 2018), <https://ustr.gov/sites/default/files/enforcement/301Investigations/301%20Draft%20Exec%20Summary%203.22.ustrfinal.pdf> [<https://perma.cc/5V82-FVRT>].

79. *In re* Section 301 Cases, 570 F. Supp. 3d at 1334.

80. *Id.*

81. *Id.* at 1338–43.

82. *Id.* at 1340.

83. *Id.* at 1340–41.

84. *Id.*

85. *Id.*

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C. THE CIT DENIES SUMMARY JUDGMENT FOR IMPORTERS WHO
CLAIMED GOVERNMENT'S CUSTOMS FRAUD ACTION WAS
TIME BARRED IN UNITED STATES V. GREENLIGHT
ORGANIC, INC.

On August 4, 2022, the CIT denied the defendants' motion for summary judgment in *United States v. Greenlight Organic, Inc.*⁸⁶ upon finding that the undisputed facts were insufficient to establish the date of discovery of fraud.⁸⁷

The government brought a civil enforcement action on February 8, 2017, to recover unpaid duties and affix penalties against the defendants under 19 U.S.C. § 1592 for allegedly undervaluing and misclassifying imported wearing apparel.⁸⁸ In a motion for summary judgment, the defendants claimed that the statute of limitations had run under 19 U.S.C. § 1621(1), contending that the fraud was discovered on May 31, 2011, when a competitor reported the defendants' double invoicing to Immigration and Customer Enforcement (ICE).⁸⁹ Alternatively, the defendants argued that the date of discovery of fraud was on October 31, 2011, when ICE allegedly opened a criminal investigation into the defendants' double invoicing.⁹⁰ Alternatively, the defendants argued that the date of discovery of fraud was on December 19, 2011, when Customs personnel interviewed officials at the defendants' offices and subpoenaed the defendants for information.⁹¹ On the other hand, the government argued that the statute of limitations did not begin to run until at least February 9, 2012, when it first received physical records that evidenced the defendants' double invoicing.⁹²

In denying the defendants' motion for summary judgment, the CIT explained that the date of the discovery of fraud was defined in *United States v. Spanish Foods, Inc. (Spanish Foods I)* as "the date when the plaintiff first learns of the fraud or is sufficiently on notice as to the possibility of fraud to discover its existence with the exercise of due diligence," specifically the date when Customs comes into possession of information or knowledge that "(1) amount[s] to more than a mere suspicion; and (2) could have led a man of ordinary prudence to learn of the fraud or the possibility of fraud under the particular circumstances."⁹³ But the CIT further explained that the inquiry of the date of discovery of fraud is fact-intensive, and not often resolved by

86. *United States v. Greenlight Organic, Inc.*, 586 F. Supp. 3d 1342, 1344 (Ct. Int'l Trade 2022).

87. *Id.* at 1347–48.

88. *Id.* at 1343–45.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 1344–46.

93. *Id.* at 1347; *see also* *United States v. Spanish Foods, Inc. (Spanish Foods I)*, 118 F. Supp. 2d 1293, 1297 (Ct. Int'l Trade 2000).

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summary judgment.⁹⁴ As many facts were in dispute when the motion was filed, the CIT denied summary judgment.⁹⁵

V. Section 201 Tariffs on Imported Crystalline Silicon Photovoltaic Cells

On January 23, 2018, pursuant to section 203 of the Trade Act of 1974,⁹⁶ as amended, President Trump issued Proclamation 9693⁹⁷ imposing a four-year safeguard measure that included both a tariff-rate quota (TRQ) limiting the amount of crystalline silicon photovoltaic cells (CSPV cells) allowed for import into the United States as well as an increase in duties on imports of these products (hereinafter Section 201 tariffs).⁹⁸ The scope of the safeguard measures includes CSPV cells partially and fully assembled into other products, such as solar panels.⁹⁹ These Section 201 tariffs, which are in addition to any preexisting duties, were initially set at thirty percent but gradually reduced to fifteen percent in the fourth year of the order.¹⁰⁰ Imports of CSPV cells from designated WTO member developing countries were excluded from the Section 201 tariffs and not counted toward the TRQ limits.¹⁰¹

On February 1, 2022, a U.S.-Mexico-Canada Agreement (USMCA) panel ruled that the imposition of safeguard measures on imported CSPV cells violated U.S. obligations under USMCA, requiring the exclusion of Canada from such safeguard measures.¹⁰²

On February 4, 2022, President Biden issued Proclamation 10339¹⁰³ announcing that safeguard measures on imports of CSPV cells continue to be necessary to prevent or remedy serious injury to the domestic industry.¹⁰⁴ This action extended the safeguard measures invoked in 2018 for an additional four years with certain modifications effective February 7, 2022.¹⁰⁵ The TRQ within-quota quantity of 5.0 GW per year and exclusion of

94. *Greenlight Organic*, 586 F. Supp. 3d at 1348.

95. *Id.*

96. 19 U.S.C. § 2253.

97. To Facilitate Positive Adjustment to Competition from Imports of Certain Crystalline Silicon Photovoltaic Cells (Whether or Not Partially or Fully Assembled into Other Products) and for Other Purposes, 85 Fed. Reg. 65639 (Jan. 23, 2018).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. See OFF. OF U.S. TRADE REPRESENTATIVE, CRYSTALLINE SILICON PHOTOVOLTAIC CELLS SAFEGUARD MEASURE FINAL REPORT (USA-CDA-2021-31-01) 42 (2022), <https://ustr.gov/sites/default/files/enforcement/USMCA/Chapter%2031%20Disputes/Final%20Report%20USMCA%20solar.pdf> [<https://perma.cc/2P8S-X7SZ>].

103. 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. 7357 (Feb. 4, 2022).

104. *Id.* ¶ 8.

105. *Id.* ¶ 9(a).

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bifacial panels from safeguard measures remained unchanged.¹⁰⁶ But the duty rates of the Section 201 tariffs applicable to imported CSPV cells were reduced to 14.75 percent in the first year and gradually stepped down to fourteen percent in the fourth year of the action.¹⁰⁷ Imports of CSPV cells from designated WTO member developing countries remain excluded from the Section 201 tariffs.¹⁰⁸

On July 8, 2022, the United States and Canada signed a Memorandum of Understanding¹⁰⁹ resolving a USMCA dispute and suspending Section 201 tariffs on unliquidated entries of CSPV cells eligible for USMCA treatment effective February 1, 2022.¹¹⁰ The agreement and its terms also apply to Mexican CSPV cell imports.¹¹¹

VI. SECTION 232 TARIFFS ON IMPORTED STEEL AND ALUMINUM PRODUCTS

In March 2018, President Trump issued Proclamations 9704¹¹² and 9705,¹¹³ 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 threatened to impair the national security of the United States.¹¹⁴ Under the authority of section 232 of the Trade Expansion Act of 1962, the President authorized additional tariffs of twenty-five percent on steel articles and ten percent on aluminum articles imported from most countries¹¹⁵ effective March 23, 2018 (Section 232 tariffs). Legal challenges arguing that these tariffs resulted from an unconstitutional delegation of authority to the president that allowed too much discretion were unsuccessful.¹¹⁶ The tariffs remain in place.¹¹⁷

106. *Id.*

107. *Id.* at Annex I.

108. *Id.*

109. Memorandum of Understanding Between the Government of the United States and the Government of Canada on Trade in Solar Products (July 8, 2022), https://ustr.gov/sites/default/files/US-CA%20Solar%20Agreement_Signed_English_070822.pdf [<https://perma.cc/847Y-2ZED>].

110. *Id.*

111. *Id.*

112. Proclamation 9704, Adjusting Imports of Aluminum into the United States, 83 Fed. Reg. 11619 (Mar. 8, 2018).

113. Proclamation 9705, Adjusting Imports of Steel into the United States, 83 Fed. Reg. 11625 (Mar. 8, 2018).

114. 83 Fed. Reg. 11619 (Mar. 8, 2018).

115. Exceptions from Section 232 tariffs are in place for imports from Argentina, Australia, Brazil, Canada, Mexico, and South Korea.

116. *See* American Inst. for Int'l Steel, Inc. v. United States, 376 F. Supp. 3d 1335, 1339-45 (Ct. Int'l Trade 2019); *see also* American Institute for International Steel Inc. v. United States, 806 Fed. Appx. 982 (Fed. Cir. 2020).

117. *American Inst. for Int'l Steel, Inc.*, 806 Fed. Appx. at 984.

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On December 27, 2021, President Biden issued Proclamation 10328, announcing the United States had successfully concluded discussions with the European Union regarding imports of steel articles from EU member countries.¹¹⁸ The United States agreed to implement a TRQ system for steel articles that are melted and poured in the European Union.¹¹⁹ Only items entered after the quota quantity is exceeded will be subject to Section 232 tariffs.¹²⁰ Items granted exclusions from the tariffs will not be subject to the TRQ limits.¹²¹ All exclusions granted and utilized to import steel products tariff-free from the European Union in fiscal year 2021 were renewed for two calendar years.¹²²

The United States reached an agreement with the United Kingdom in March 2022 to allow historically based volumes of U.K. steel and aluminum products to enter the United States free from Section 232 tariffs.¹²³ In May 2022, The United States announced a one-year suspension of Section 232 tariffs on Ukrainian steel products.¹²⁴

The DOC continues to administer a Section 232 tariff exclusion process.¹²⁵ Exclusions from the tariffs have been granted for items not available from U.S. sources. Exclusions are granted for twelve months and may be renewed.¹²⁶ Exclusions granted in the past fiscal year will be automatically extended through the end of 2023 without the need to submit a renewal request.¹²⁷ On December 14, 2020, the DOC published an Interim Final Rule revising the process for requesting exclusions and adding 123 General Approved Exclusions (GAEs).¹²⁸ Any importer may use these GAEs, and they do not include quantity limits.¹²⁹ On December 9, 2021, the DOC published an Interim Final Rule removing twenty-seven GAEs for steel and five GAEs for aluminum imports.¹³⁰

118. Proclamation 10328, Adjusting Imports of Steel into the United States, 87 Fed. Reg. 11 (January 3, 2022).

119. *Id.* ¶ 5.

120. *Id.*

121. *Id.*

122. *Id.* ¶ 7.

123. U.S. DEP'T OF COM., ANNOUNCEMENTS OF ACTIONS ON UK IMPORTS UNDER SECTION 232 (2022), <https://www.commerce.gov/sites/default/files/2022-03/UK232-US-Statement.pdf> [<https://perma.cc/66K8-TFTE>].

124. U.S. DEP'T OF COM., RAIMONDO ANNOUNCES TEMPORARY SUSPENSION OF 232 TARIFFS ON UKRAINE STEEL (May 9, 2022), <https://www.commerce.gov/sites/default/files/2022-03/UK232-US-Statement.pdf> [<https://perma.cc/24L7-68H8>].

125. *Id.*

126. *Id.*

127. *Id.*

128. Section 232 Steel and Aluminum Tariff Exclusion Process, 85 Fed. Reg. 81060 (Dec. 14, 2020) (to be codified at 15 C.F.R. pt. 705).

129. *Id.*

130. Removal of Certain General Approved Exclusions (GAEs) Under the Section 232 Steel and Aluminum Tariff Exclusion Process, 86 Fed. Reg. 70003 (Dec. 9, 2021) (to be codified at 15 C.F.R. pt. 705).

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VII. Section 301 Tariffs on Imports from China

In 2022, certain product exclusions from the section 301 of the Trade Act of 1974 (Section 301)¹³¹ tariffs on China-origin goods were reinstated, while the majority of previously granted exclusions have expired.¹³² As of the end of 2022, the Section 301 tariffs themselves are under review.¹³³

As background, the USTR has imposed four rounds of tariffs on China-origin goods based on its Section 301 investigation initiated in August 2017 of China's acts, policies, and practices related to technology transfer, intellectual property, and innovation.¹³⁴ The USTR initially imposed Section 301 tariffs on approximately USD \$50 billion of annual imports from China, divided into "List 1" goods¹³⁵ (worth USD \$34 billion), which became effective on July 6, 2018, and "List 2" goods¹³⁶ (worth USD \$16 billion), which became effective on August 23, 2018. The USTR subsequently imposed two additional rounds of tariffs, known as "List 3" (on goods worth USD \$200 billion)¹³⁷ and "List 4A" (on goods worth USD \$126 billion).¹³⁸ Collectively, the four lists are known as the Section 301 tariff actions, as modified.¹³⁹

On March 23, 2022, the USTR announced the reinstatement of previously expired tariff exclusions for 352 categories of products covered by the Section 301 tariff previously granted in goods.¹⁴⁰ The USTR applied the reinstated tariff exclusions retroactively to October 12, 2021, and extended

131. 19 U.S.C. § 2411.

132. *USTR Announces Next Steps in Statutory Four-Year Review of China 301 Tariffs*, OFFICE OF U.S. TRADE REP., (Oct. 12, 2022), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/october/ustr-announces-next-steps-statutory-four-year-review-china-301-tariffs> [<https://perma.cc/CQL6-BPPH>].

133. *Id.*

134. *Section 301 Investigation Fact Sheet*, OFFICE OF U.S. TRADE REP., <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2018/june/section-301-investigation-fact-sheet> [<https://perma.cc/2PZB-5JTF>] (last visited Mar. 10, 2023).

135. *See* Notice of Action and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 28710 (June 20, 2018).

136. *See* Notice of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 40823 (Aug. 16, 2018).

137. *See* Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 47974 (Sept. 21, 2018).

138. *See* Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 84 Fed. Reg. 43304 (Aug. 20, 2019).

139. *Id.*

140. *See* Notice of Reinstatement of Certain Exclusions: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 87 Fed. Reg. 17380 (Mar. 28, 2022).

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the exclusions through December 31, 2022.¹⁴¹ Separately, on May 27, 2022, the USTR published another Federal Register notice extending Section 301 tariff exclusions for eighty-one medical-care products needed to address the COVID pandemic for six months, through November 30, 2022.¹⁴² Beyond these select reinstated exclusions, all other previously-granted Section 301 product exclusions have expired.¹⁴³

On May 5, 2022, the USTR announced that under section 307(c)(2) of the Trade Act,¹⁴⁴ the Section 301 tariff actions, as modified, were subject to possible termination on their respective four-year anniversary dates (i.e., July 6, 2022 and August 23, 2022), and notified representatives of domestic industries which benefit from the Section 301 tariffs of the opportunity to request continuation of the actions.¹⁴⁵ On September 8, 2022, the USTR issued a notice that the Section 301 tariff actions, as modified, would remain in effect because at least one representative of a domestic industry, which benefits from each action, submitted to the USTR a request for continuation of the action.¹⁴⁶ This notice also announced that, in accordance with section 307(c)(3) of the Trade Act,¹⁴⁷ the USTR would review the Section 301 tariff actions.

The Trade Act requires the USTR to conduct a review of “(A) the effectiveness in achieving the objectives of Section 301 of (i) such tariff actions, and (ii) other actions that could be taken (including actions against other products or services), and (B) the effects of such actions on the United States economy, including consumers.”¹⁴⁸ On October 17, 2022, the USTR published a notice in the Federal Register requesting comments in its four-year review of the Section 301 tariffs.¹⁴⁹ The comment portal opened on November 15, 2022, and closed on January 17, 2023.¹⁵⁰

Interested persons were able to submit comments concerning any aspect of the above considerations, including comments on:

141. *See id.*

142. *See* Notice of Product Exclusion Extensions: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 87 Fed. Reg. 33871 (June 3, 2022).

143. *Id.*

144. 19 U.S.C. § 2417(c)(2).

145. *See* Initiation of Four-Year Review Process: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 87 Fed. Reg. 26797 (May 5, 2022).

146. *See* Continuation of Actions: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 87 Fed. Reg. 55073 (Sept. 8, 2022).

147. 19 U.S.C. § 2417(c)(3).

148. Request for Comments in Four-Year Review of Actions Taken in the Section 301 Investigation: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 87 Fed. Reg. 62914 (Oct. 17, 2022).

149. *Id.*

150. *Id.*

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- (1) The effectiveness of Section 301 tariff actions in eliminating China's acts, policies, and practices related to technology transfer, intellectual property, and innovation.¹⁵¹
- (2) The effectiveness of Section 301 tariff actions in counteracting China's acts, policies, and practices related to technology transfer, intellectual property, and innovation.¹⁵²
- (3) Other actions or modifications that would be more effective in obtaining the elimination of or in counteracting China's acts, policies, and practices related to technology transfer, intellectual property, and innovation.¹⁵³
- (4) The effects of the actions on the U.S. economy, including U.S. consumers.¹⁵⁴
- (5) The effects of the actions on domestic manufacturing, including capital investments, domestic capacity and production levels, industry concentrations, and profits.¹⁵⁵
- (6) The effects of the actions on U.S. technology, including in terms of U.S. technological leadership and U.S. technological development.¹⁵⁶
- (7) The effects of the actions on U.S. workers, including with respect to employment and wages.¹⁵⁷
- (8) The effects of the actions on U.S. small businesses.¹⁵⁸
- (9) The effects of the actions on U.S. supply chain resilience.¹⁵⁹
- (10) The effects of the actions on the goals of U.S. critical supply chains outlined in Executive Order 14017 and subsequent reports and findings.¹⁶⁰
- (11) Whether the actions have resulted in higher additional duties on inputs used for manufacturing in the United States than the additional duties on particular downstream product(s) or finished good(s) incorporating those inputs.¹⁶¹

On November 1, the USTR published a comment form prescribing the submission format for public comments.¹⁶² The comment form separates the questions into three sections (A, B, and C) and invites views concerning

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. OFF. U.S. TRADE REPRESENTATIVE, REQUEST FOR COMMENTS: FOUR-YEAR REVIEW OF ACTIONS IN SEC. 301 INV. OF CHINA (DOCKET ID: USTR-2022-0014), <https://ustr.gov/sites/default/files/2022-10/Four-Year%20Review%20Docket%20For%20Posting%20103122.pdf> [https://perma.cc/63HZ-9LNH] (last visited May 5, 2023).

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the Section 301 actions at increasing levels of specificity.¹⁶³ Section A invites comments on the effectiveness of the tariffs at an economy-wide level.¹⁶⁴ Section B invites comments on the effectiveness of the tariffs at a sector/industry level, including comments on the effects of the actions on domestic manufacturing, supply chain resilience, U.S. workers, and consumers of goods within the industry or sector.¹⁶⁵ Section C invites comments at the level of individual Harmonized Tariff Schedule of the United States (HTSUS) tariff subheadings, including comments on whether those tariffs should be maintained, eliminated, or modified and whether additional subheadings should be added to the actions.¹⁶⁶ The comment process thus presents an opportunity for interested parties to submit new exclusion requests as the USTR considers the future of the Section 301 tariffs.¹⁶⁷

VIII. Conclusory Remarks

Although 2022 has been a tumultuous year for global trade, there continued to be significant developments on the trade front. And despite the disruptive effects of the Russian-Ukrainian conflict and increasing enforcement actions by the US government, many trade practitioners continually found ways to adapt to unexpected changes to their business environment. These trends will likely continue in 2023.

163. *Id.*

164. *Id.*

165. *Id.*

166. *See id.*

167. *Id.*

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Customs and Trade Law

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2022 was another eventful year for customs and trade law. This article describes key legal developments at the U.S. Customs and Border Protection (CBP or Customs), U.S. Department of Commerce (DOC or Commerce), U.S. International Trade Commission (ITC), and significant rulings issued by the U.S. Court of International Trade (CIT) and the U.S. Court of Appeals for the Federal Circuit (CAFC).

I. Customs

A. UYGHUR FORCED LABOR PREVENTION ACT

On December 23, 2021, President Biden signed the Uyghur Forced Labor Prevention Act (UFLPA) into law.¹ Since the issuance of additional guidance on June 21, 2022, the UFLPA required the CBP Commissioner, absent an exception being made by an importer successfully rebutting the presumption of forced labor (discussed *infra*), to “apply a presumption that, with respect to any goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in the Xinjiang Uyghur Autonomous Region [XUAR] of the People’s Republic of China [China] or produced by an entity on a list . . . the importation . . . is prohibited under 19 U.S.C. 1307.”²

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1. Press Release, The White House, Bill Signed: H.R. 6256 (Dec. 23, 2021), <https://www.whitehouse.gov/briefing-room/legislation/2021/12/23/bill-signed-h-r-6256/> [<https://perma.cc/AP7H-57CA>].

2. Uyghur Forced Labor Prevention Act, Pub. L. No 117-78, § 3(a), 135 Stat. 1525, 1529 (2021).

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The UFLPA supports enforcement of 19 U.S.C. § 1307, which prohibits importation of all “goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor under penal sanctions.”³ While UFLPA’s prohibition against entry of goods wholly or partially produced with forced labor is not new,⁴ its *presumption* of forced labor imputed on goods with nexus to a region or list of entities is a new feature. The UFLPA does not require CBP to issue Withhold Release Orders and Findings pursuant to the regulations promulgated under 19 U.S.C. § 1307.⁵

For specific enforcement actions such as detention, exclusion, or seizure of shipments, CBP will identify shipments through a variety of sources, including the UFLPA Entity List.⁶ CBP will provide importers with notice when enforcement actions are taken.⁷ If an importer believes its importation is outside of the scope of the UFLPA, the importer may provide information that the imported goods and their inputs are not sourced, to any extent, from XUAR and have no nexus to entities on the UFLPA Entity List, thus obviating an exception.⁸ If there is a geographic sourcing nexus to XUAR or nexus to any entity on the UFLPA Entity List, importers must request an exception to the UFLPA’s presumption, which then necessitates *clear and convincing evidence* that no forced labor was used—thus rebutting the presumption, leading to an exception.⁹ Importers may also identify additional shipments with identical supply chains to broaden the scope of their rebuttal.¹⁰

If an importer of record successfully rebuts the presumption, the CBP Commissioner will grant an exception to the presumption.¹¹ The CBP Commissioner is subsequently required to submit, within thirty days of the determination granting the exception, a report to Congress and make available to the public a report outlining the evidence warranting the exception.¹² To rebut the UFLPA’s presumption, importers must do the following:

- Fully and adequately respond to all CBP requests for information about merchandise under CBP review;¹³

3. 19 U.S.C. § 1307 (2016).

4. *See id.*

5. U.S. Dep’t of Homeland Sec. Bureau of Customs & Border Protection, *Operational Guidance for Importers*, 5 (June 13, 2022), https://www.cbp.gov/sites/default/files/assets/documents/2022-Jun/CBP_Guidance_for_Importers_for_UFLPA_13_June_2022.pdf [<https://perma.cc/HE6K-GRRR>].

6. *Id.*

7. *Id.* at 7.

8. *Id.*

9. *Id.* at 4.

10. *Id.* at 7.

11. Uyghur Forced Labor Prevention Act, Pub. L. No 117-78, § 3(b), 135 Stat. 1525, 1529 (2021).

12. *Id.* § 3(c).

13. U.S. Dep’t of Homeland Sec., *supra* note 5, at 9.

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- Provide documentation showing a due diligence system or process;¹⁴
- Provide documentation evidencing effective supply chain management, including tracing from raw materials (even seeds in the case of tomatoes) to the imported goods. This requirement extends throughout the entire supply chain. It is not limited to goods shipped from XUAR; goods shipped from elsewhere in China and other countries are in scope;¹⁵ and
- Demonstrate by clear and convincing evidence that the goods, wares, articles, or merchandise was not mined, produced, or manufactured wholly or in part by forced labor.¹⁶

CBP provided specific guidance for supply chain documentation for cotton, polysilicon, and tomatoes—all of which CBP considers to have a “high-risk of forced labor.”¹⁷ For all three sensitive commodities, CBP emphasized documentation (e.g., transaction records), flow charts of the production processes, production maps, and lists of entities involved at each step of the production processes.¹⁸ Recently, the impact of the UFLPA has widened with the discovery that certain materials used in producing batteries for electric vehicles were produced in the XUAR.¹⁹ As the reach of UFLPA widens, companies have responded with new supply chain tracing initiatives since the UFLPA encompasses all products of which the raw materials were initially sourced from the XUAR.²⁰ These efforts—even if unsuccessful in tracing the product and obtaining a formal exception to the presumption—are likely to constitute a mitigating factor demonstrating due diligence in any CBP enforcement or penalty investigation.²¹

B. ENFORCE AND PROTECT ACT

In 2022, CBP continued its increased level of activity under the Enforce and Protect Act (EAPA).²² CBP initiated four more investigations into evasion of antidumping duty (ADD) and countervailing duty (CVD) orders

14. *Id.* at 13.

15. *Id.* at 14.

16. *Id.* at 16.

17. *Id.* at 16-17.

18. *Id.*

19. See Matt Solomon & David E. Bond, *The Uyghur Forced Labor Prevention Act – Potential Impact on Critical Minerals Supply for Clean Energy Technologies*, WHITE & CASE (Dec. 5, 2022), <https://www.whitecase.com/insight-alert/uygher-forced-labor-prevention-act-potential-impact-critical-minerals-supply-clean> [https://perma.cc/MEJ9-7TRW].

20. See Chris Marquis, *How Companies are Dealing with the Uyghur Forced Labor Prevention Act*, THE CHINA PROJECT (Aug 17, 2022), <https://thechinaproject.com/2022/08/17/how-companies-are-dealing-with-the-uyghur-forced-labor-prevention-act/> [https://perma.cc/PP5M-7WJ3].

21. U.S. Dep’t of Homeland Sec., *supra* note 5, at 14.

22. 19 U.S.C. § 1517.

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than in 2021, for a total of sixteen investigations.²³ CBP rendered fourteen affirmative determinations as to evasion, including those for ADD/CVD orders on wooden cabinets and vanities, hardwood plywood, quartz surface products, aluminum extrusions, and aluminum sheet from China.²⁴ Negative determinations were issued for the ADD orders on malleable cast iron pipe fittings from China and glycine from Thailand.²⁵ The investigations primarily involved alleged transshipment of Chinese products through Southeast Asian countries.²⁶

The CIT rendered notable EAPA decisions in 2022. In *Norca Industrial Co. v. United States*, the CIT in March 2022 remanded for CBP to reconsider its determination of evasion because of an incomplete administrative record.²⁷ Due process concerns were raised in another case, *Ad Hoc Shrimp Trade Enforcement Committee v. United States*.²⁸ There, the CIT in May 2022 remanded for CBP to reconsider its findings as to non-evasion, which had been reversed on administrative appeal because CBP's Office of Regulations and Rulings had not reviewed the entire administrative record and CBP's Trade Remedy & Law Enforcement Directorate did not adequately explain how it determined public summaries of confidential documents complied with CBP's regulations.²⁹

In its November 2022 EAPA ruling, *Aspects Furniture International, Inc. v. United States*, the CIT addressed for the first time whether CBP may retroactively apply the EAPA statute (19 U.S.C. § 1517) and regulation (19 C.F.R. § 165.2) to entries made prior to the EAPA statute coming into force.³⁰ The CIT held that an EAPA investigation may not include merchandise entered prior to the EAPA statute's date of entry into force on August 22, 2016, because the language is clear that the EAPA statute entered into force on that day—i.e., 180 days after the Trade Facilitation and Enforcement Act of 2015 was enacted.³¹

C. FIRST SALE

The CAFC, in its August 2022 ruling, *Meyer Corp. v. United States*, reversed the CIT in a case involving the importation of pots and pans manufactured in Thailand from steel discs manufactured in China.³² The

23. See U.S. Customs & Border Protection, *Enforce & Protect Act (EAPA) Notices of Action*, <https://www.cbp.gov/trade/trade-enforcement/tftea/eapa/notices-action> [<https://perma.cc/U355-UWZQ>] (Feb. 28, 2023).

24. See *id.*

25. See *id.*

26. See *id.*

27. *Norca Indus. Co. v. United States*, 561 F. Supp. 3d 1379, 1384 (Ct. Int'l Trade 2022).

28. *Ad Hoc Shrimp Trade Enforcement Comm. v. United States*, 578 F. Supp. 3d 1310 (Ct. Int'l Trade 2022).

29. *Id.* at 1321.

30. *Aspects Furniture Int'l v. U.S.*, 607 F. Supp. 3d 1246, 1254 (Ct. Int'l Trade 2022).

31. *Id.* at 1257.

32. *Meyer Corp., U.S. v. United States*, 43 F.4th 1325, 1331 (Fed. Cir. 2022).

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importer, Meyer, sought to establish the dutiable value of its imported cookware using the “first sale” price from the manufacturer to the distributor.³³ The CIT in March 2021 required Meyer to prove not only that the sales were conducted at arms-length, but also that the sales were unaffected by China’s status as a non-market economy.³⁴ Finding that the importer did not prove the absence of “non-market influences,” the CIT did not allow the importer to rely on the first sale prices.³⁵

The CAFC overruled the CIT and held that there is no basis in the value statute for CBP or the CIT to consider the effects of a non-market economy (NME) on transaction value.³⁶ The CAFC found that the statute requires only that the goods are clearly destined for export to the United States and “the relationship between [the] buyer and seller did not influence the price actually paid or payable.”³⁷ The CAFC further held that the CIT misinterpreted its *Nissho Iwai American Corp. v. United States*³⁸ decision by requiring an importer to prove an exporting country’s nonmarket economy does not prohibitively influence the price actually paid or payable—particularly as “[t]here is no basis in the statute for Customs or the court to consider the effects of a nonmarket economy on the transaction value. The statute requires only that ‘the relationship between [the] buyer and seller did not influence the price actually paid or payable.’”³⁹ The CAFC remanded for the CIT to reconsider Meyer’s qualifications for first sale duty savings treatment.⁴⁰ This CAFC decision is significant as it resolves an open question regarding the valuation of goods imported from China (and other nonmarket economies) and the viability of the first sale duty savings program in connection with those purchases.

Two subsequent CBP rulings highlight the need for importers to review their first sale transactions for compliance with CBP requirements. In HQ H316892, issued in July 2022, a U.S. importer attempted to use the first sale between its related Hong Kong middleman/vendor and an unrelated factory in China.⁴¹ The importer intended for title and risk of loss to pass from the factory to the middleman at the port of export and then from the middleman to the importer at the international date line.⁴² The middleman’s purchase order to the manufacturer indicated “[Free on Board (FOB)]-ocean freight” Incoterms and the manufacturer’s invoice stated “FOB Taiwan.”⁴³ A supply agreement between the importer and middleman provided that title and risk

33. *Id.* at 1329.

34. *Id.*

35. *Id.*

36. *Id.* at 1332.

37. *Id.*

38. 982 F.2d 505 (Fed. Cir. 2007).

39. Meyer Corp. at 1332 (quoting 19 U.S.C. § 1401a(b)(2)(B)).

40. *Id.* at 1333.

41. U.S. Customs & Border Protection, HQ H316892, 1 (July 20, 2022), <https://rulings.cbp.gov/ruling/H316892> [<https://perma.cc/9CMA-MAPB>].

42. *Id.* at 11.

43. *Id.* at 3-5.

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of loss were to pass from the middleman to the importer at the international date line.⁴⁴ However, the importer's purchase order to the middleman indicated "FOB-ocean freight," and the importer paid the applicable international freight and insurance charges.⁴⁵ CBP found that even though the supply agreement provided that risk of loss passed from the middleman to the importer at the international date line because the importer was responsible for the international freight and insurance costs, the middleman bore no risk of loss, and risk of loss transferred from the manufacturers directly to the U.S. importer at the foreign port of shipment.⁴⁶

Regarding the passage of title, CBP again disregarded the supply agreement and pointed out that the commercial documents did not provide information regarding the passage of title since Incoterms do not themselves establish when title passes.⁴⁷ CBP looked for guidance from the [Uniform Commercial Code (U.C.C.)], which states that "[u]nless otherwise explicitly agreed, title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods."⁴⁸ Since the manufacturers delivered the goods when the merchandise was placed on board the vessel at the foreign port of export for delivery to the U.S. importer, CBP found that title transferred from the manufacturers to the U.S. importer at that point.⁴⁹ Accordingly, CBP ruled that title and risk of loss transferred directly from the foreign manufacturers to the U.S. importer.⁵⁰ Accordingly, CBP did not find a *bona fide* "first sale" and the merchandise could not be appraised based on the price paid by the middleman.⁵¹ As the only sale that occurred was the sale between the U.S. importer and the unrelated foreign manufacturer, the merchandise was appraised based on the price paid by the U.S. importer.⁵²

The second CBP ruling, HQ H323585, issued in August 2022,⁵³ implicated similar facts with the CBP rejecting the first sale, reasoning that the middleman never took proper title or risk of loss.⁵⁴

These rulings in the wake of *Meyer* reveal that CBP's interpretation of the first sale rule of appraisement is not static and is subject to change as new fact patterns are presented for analysis.⁵⁵ These rulings demonstrate that importers utilizing the first sale rule should periodically review their import

44. *Id.* at 11.

45. *Id.*

46. *Id.* at 12.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. U.S. Customs & Border Protection, HQ H323585, 1 (Aug. 31, 2022), <https://rulings.cbp.gov/ruling/H323585> [<https://perma.cc/56CW-E54D>].

54. *Id.* at 5.

55. See generally U.S. Customs & Border Protection, HQ H316892, 1; U.S. Customs & Border Protection, HQ H323585, 1.

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transactions to ensure the company is maximizing its benefits.⁵⁶ Periodic compliance reviews can help companies to ensure that legal requirements are being met and that the company is not at risk of non-compliance due to changing aspects of the transactions or of changes in CBP's interpretation of the requirements of the program.

II. Section 301 Litigation

A. CIT UPDATE

On April 1, 2022, the CIT three-judge panel hearing the challenge to the United States Trade Representative's (USTR) imposition of List 3 and List 4A Section 301 additional duties on certain goods from China (*In re Section 301 Cases*) issued an initial decision on the merits of the case.⁵⁷ The CIT rejected Government arguments that judicial review was precluded as the imposition of Section 301 duties was either a presidential action or, alternatively, a political question doctrine, and held that the decision to impose List 3 and List 4A were agency actions subject to the Court's review and that Plaintiffs' claims regarding statutory interpretation and compliance with procedural requirements are well-within the Court's authority to review.⁵⁸

On the issue of statutory interpretation, Plaintiffs' position is that USTR exceeded its statutory authority by imposing List 3 and List 4A in response to retaliatory actions taken by China following the imposition of the List 1 and List 2 tariffs.⁵⁹ Plaintiffs' view is that the statute only permits USTR to impose Section 301 duties in response to the practices that were the subject of the Section 301 investigation, which centered on China's theft of U.S. intellectual property.⁶⁰ On this question, the CIT found that China's retaliatory actions were linked to the investigated practices.⁶¹ Having found such a link, the CIT ruled that USTR's modification of the original Section 301 duties was within the scope of its statutory authority.⁶²

Plaintiffs also argued that USTR failed to follow the procedural requirements of the Administrative Procedure Act (APA) when it promulgated List 3 and List 4A.⁶³ On this issue, the CIT agreed with Plaintiffs.⁶⁴ Prior to imposing List 3 and List 4A, USTR received thousands of comments, many of which opposed the additional tariffs.⁶⁵ The CIT held that USTR failed to provide an adequate explanation of its decision to

56. *Id.*

57. *In re Section 301 Cases*, 570 F. Supp. 3d 1306 (Ct. Int'l Trade 2022).

58. *Id.* at 1325, 1328.

59. *Id.* at 1321.

60. *Id.* at 1330.

61. *Id.* at 1334.

62. *Id.*

63. *Id.* at 1335.

64. *Id.* at 1335-37.

65. *Id.* at 1319, 1336-37.

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impose the additional tariffs or how it considered the comments that it received, and did not explain its decision to remove certain tariff subheadings from the initial versions of List 3 and List 4.⁶⁶ Having found that USTR violated the APA, the CIT remanded List 3 and List 4A, ordering that USTR further explain its decision to impose the additional tariffs, how it considered the comments that it received and provide an explanation of why certain provisions were included on these lists and why others were removed.⁶⁷ The CIT also noted that it was declining to vacate List 3 and List 4A (for the time being), pending USTR's filing of further explanations.⁶⁸

The Government filed USTR's remand report on August 1, 2022.⁶⁹ The report purports to explain the process that USTR employed in its decision to impose the final versions of List 3 and List 4.⁷⁰ Plaintiffs filed comments on September 14, 2022, arguing that the remand report failed to address significant comments opposing the tariffs and that the report largely consisted of *post hoc* explanations for the agency's actions.⁷¹ The Government filed a response to Plaintiffs' brief on November 4, 2022.⁷² Finally, Plaintiffs filed a reply brief on December 5, 2022.⁷³ The CIT affirmed the USTR's remand report in its entirety on March 17, 2023.⁷⁴ An appeal of this final CIT decision to the CAFC is nearly certain.

**B. CAFC REQUIRES PROTESTS FOR SECTION 301 EXCLUSION
REFUNDS**

On November 6, 2022, the CAFC issued *ARP Materials, Inc. v. United States*, a decision impacting importers' ability to obtain refunds of additional duties assessed under Section 301 of the Trade Act of 1974 (19 U.S.C. § 2411) on excluded products.⁷⁵ Two importers, ARP Materials, Inc. and The Harrison Steel Castings Company, filed nearly identical Complaints in the CIT seeking refunds of Section 301 duties.⁷⁶ Each Complaint asserted

66. *Id.* at 1340-43.

67. *Id.* at 1343-45.

68. *Id.* at 1344.

69. Further Explanation of the Final List 3 & Final List 4 Modifications in the Section 301 Action, *In re* Section 301 Cases, 570 F. Supp. 3d 1306 (Ct. Int'l Trade 2022) (No. 1:21-cv-00052), ECF No. 467.

70. *Id.* at 3.

71. Pls.' Comments on the U.S. Trade Representative's Remand Determination at 1, *In re* Section 301 Cases, 570 F. Supp. 3d 1306 (Ct. Int'l Trade 2022) (No. 1:21-cv-00052), ECF No. 474.

72. Defs' Reply to Comments on Remand Results, *In re* Section 301 Cases, 570 F. Supp. 3d 1306 (Ct. Int'l Trade 2022) (No. 1:21-cv-00052), ECF No. 479.

73. Pls.' Reply, *In re* Section 301 Cases, 570 F. Supp. 3d 1306 (Ct. Int'l Trade 2022) (No. 1:21-cv-00052), ECF No. 482.

74. Slip Op. 22-35 2023 WL 2553926.

75. *See* *ARP Materials, Inc. v. United States*, 47 F.4th 1370 (Fed. Cir. 2022).

76. *ARP Materials, Inc. v. United States*, 520 F. Supp. 3d 1341, 1345-46 (Ct. Int'l Trade 2021).

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claims for refunds on the basis that the USTR had retroactively rescinded the duties on the subject merchandise by granting exclusions⁷⁷ covering the subject merchandise.⁷⁸ Both Plaintiffs imported merchandise that was subject to Section 301 tariffs at the time of entry.⁷⁹ Subsequently, USTR granted exclusion requests that covered Plaintiffs' imported merchandise.⁸⁰ Those exclusions were retroactive, meaning that Plaintiffs' previously imported merchandise was also excluded from the Section 301 tariffs, forming the basis for the importers' refund claims.⁸¹ However, in certain instances, Plaintiffs failed to file an administrative protest with CBP.⁸²

The CAFC considered the issue of whether an importer must file a protest in order to recoup duties paid prior to the issuance of a retroactive Section 301 exclusion.⁸³ The CAFC found that Plaintiffs had "simply and regrettably dropped the ball" when they failed to timely file protests.⁸⁴ The CAFC affirmed the CIT's decision that the failure to file a timely protest precluded jurisdiction and was a bar to judicial relief.⁸⁵ In reaching its decision, the CAFC stated that Plaintiffs had an adequate opportunity to file protests that would have preserved their claim for refunds.⁸⁶ The CAFC also noted that CBP had published clear instructions regarding how and when importers could obtain refunds of previously paid Section 301 duties.⁸⁷ Finally, the CAFC determined that Plaintiffs' failure to file timely protests did not trigger the CIT's residual subject matter jurisdiction under 28 U.S.C. § 1581(i).⁸⁸

This decision highlights the importance for importers to monitor the status of their customs entries to ensure that any needed protest is filed within the statutory time limit. In the context of Section 301 duties, it is also important for importers to monitor USTR decisions regarding the dutiable status of specific merchandise.

77. See Notice of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 40823, 40824 (Aug. 16, 2018); Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 84 Fed. Reg. 20459, 20460 (May 9, 2019) (USTR procedures for applying for exclusions).

78. See *ARP Materials, Inc.*, 520 F. Supp. 3d at 1346.

79. *Id.* at 1350.

80. *Id.*

81. *Id.*

82. See 19 C.F.R. § 174.12(e)(1) (2017) (requiring that protests be made within 180 days of the notice of liquidation).

83. *ARP Materials*, 47 F.4th at 1376.

84. *Id.*

85. *Id.* at 1380.

86. *Id.* at 1379.

87. *Id.* at 1374, 1380.

88. *Id.* at 1379.

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III. DOC / ITC Significant Rulings

A. RUSSIA HENCEFORTH A NME COUNTRY

On November 9, 2022, as part of the agency's antidumping duty investigation of *Emulsion Styrene-Butadiene Rubber from the Russian Federation*, Commerce determined to treat Russia as a NME in forthcoming proceedings.⁸⁹ Following Russia's invasion of Ukraine, Commerce reassessed Russia's market economy status pursuant to six statutory conditions and determined that Russia is an NME because: the Russian ruble is no longer freely convertible;⁹⁰ Russia's Labor Code was amended to increase the Government of Russia's (GOR) control over the labor market;⁹¹ market conditions for joint ventures and foreign investments deteriorated in Russia;⁹² the GOR exercises a high degree of control over the Russian economy;⁹³ the GOR has growing control over price setting;⁹⁴ and corruption, rule of law, and freedom of information have all worsened.⁹⁵ Because Commerce's NME decision applies only to forthcoming proceedings, Commerce relied on its market economy methodology to calculate ADD margins ranging from 8.15 to 17.47 percent in its final determination in this investigation.⁹⁶

B. ORDERS ON STEEL PRODUCTS FROM BRAZIL REVOKED BASED ON DECUMULATION

In August 2022, the ITC issued its final determination in the five-year reviews of cold-rolled steel (CRS) from six countries.⁹⁷ The ITC unanimously voted to consider all countries, except Brazil, on a cumulated basis.⁹⁸ With a 3-2 vote, the ITC decumulated Brazil when considering the

89. See Memorandum from Leah Wils-Owens, Economist in the Economic Analysis Unit, for Lisa Wang, Ass't Sec. for Enforcement and Compliance, re: Reconsideration of Russia's Status as a Market Economy Country (Nov. 9, 2022) ("Russia NME Memorandum"); see also *Emulsion Styrene-Butadiene Rubber from the Russian Federation: Final Affirmative Determination of Sales at Less Than Fair Value and Classification of the Russian Federation as a Non-Market Economy*, 87 Fed. Reg. 69002 (Nov. 17, 2022).

90. Memorandum from Leah Wils-Owens, Economist in the Economic Analysis Unit, for Lisa Wang, Ass't Sec. for Enforcement and Compliance, re: Reconsideration of Russia's Status as a Market Economy Country 14-23 (Nov. 9, 2022).

91. *Id.* at 24-28.

92. *Id.* at 29-36.

93. *Id.* at 37-41.

94. *Id.* at 42-48.

95. *Id.* at 49-68.

96. *Emulsion Styrene-Butadiene Rubber from the Russian Federation: Final Affirmative Determination of Sales at Less Than Fair Value and Classification of the Russian Federation as a Non-Market Economy*, 87 Fed. Reg. at 69002-69003 (Nov. 17, 2022).

97. *Certain Cold-Rolled Steel Flat Products from Brazil, China, India, Japan, South Korea, and the United Kingdom*, Inv. Nos. 701-TA-540-543, 731-TA-1283-1287, 1290, USITC Pub. 5339 (Aug. 2022) (Review).

98. See *id.* at 1 n.2.

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likely effect of the orders in the event of revocation.⁹⁹ While all Commissioners found that imports from Brazil were likely to have a discernible adverse impact and reasonable overlap in competition,¹⁰⁰ three Commissioners reasoned that imports from Brazil competed under different conditions of competition “given the distinguishing circumstances of the Section 232 measures with respect to CRS from Brazil.”¹⁰¹ Two dissenting Commissioners observed that differing Section 232 measures would not result in imports from the subject countries “competing differently in the marketplace.”¹⁰² As a result, the ITC continued the orders on all countries except Brazil.¹⁰³

In October 2022, the ITC issued its final determination in the five-year review of hot-rolled steel from eight countries.¹⁰⁴ Again, the ITC voted 3-2 not to continue the order on imports from Brazil but voted unanimously to continue the orders on imports from all other countries.¹⁰⁵

IV. DOC ADD/CVD Litigation

A. CAFC INVALIDATES DOC’S SELECTION OF A SINGLE MANDATORY RESPONDENT

The CAFC reversed the CIT in its 2022 ruling, *YC Rubber (North America) LLC v. United States*, in a case with potentially far-reaching consequences for DOC.¹⁰⁶ In the second administrative review (AR2) of the ADD order on passenger vehicle and light truck tires from China, DOC initially selected two mandatory respondents.¹⁰⁷ With one Chinese exporter declining to participate, DOC individually examined only the other exporter—whose ADD margin was assigned to all exporters being reviewed.¹⁰⁸ Appeals to the CIT followed, claiming that DOC was required by statute to review more than one respondent.¹⁰⁹ Although the CIT in late 2020 affirmed DOC’s decision to select a single respondent, the CAFC in August 2022 reversed that ruling and found that DOC had violated its statutory obligation to review multiple respondents: “The statute generally requires that the ‘reasonable number’ is greater than one.”¹¹⁰ This ruling

99. *See id.* at 3 n.1.

100. *See id.* at 20-36, 41.

101. *See id.* at 42-43.

102. *Id.* at 78 (Commissioners Schmidlein & Stayin, dissenting).

103. *See id.* at 74.

104. Hot-Rolled Steel from Austl., Braz., Japan, Neth., Russ., S. Kor., Turk., and the U.K., Invs. Nos. 701-TA-545-546, 731-TA-1291-1297 (Review), and 713-TA-808 (Fourth Review), USITC Pub. 5380 (Nov. 1, 2022).

105. *Id.* at 100-07, 108-14 (Commissioners Schmidlein & Stayin, dissenting).

106. *YC Rubber Co. v. United States*, No. 2021-1489, 2022 WL 3711377, at *1 (Fed. Cir. Aug. 29, 2022).

107. *Id.*

108. *Id.* at *2.

109. *Id.*

110. *Id.* at *3 (emphasis added).

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could have a far-reaching impact on DOC's workload and resource allocation. Indeed, DOC has received two extensions of time into 2023 to file a motion for CAFC reconsideration,¹¹¹ but ultimately declined to do so.

B. CAFC RULINGS ON DOC APPLICATION OF ADVERSE FACTS AVAILABLE

The CAFC, in several 2022 rulings, affirmed DOC's application of statutory adverse facts available (AFA)¹¹², and the CIT's affirmation thereof, including two reviews of the ADD order on steel nails from China in which DOC had changed its practice.¹¹³ The CAFC, in its July 2022 ruling, *Shanxi Hairui Trade Co. v. United States*, affirmed the CIT finding that DOC properly applied AFA in the ninth administrative review.¹¹⁴ There, one mandatory respondent was found to have properly been assigned the 118.04% AFA rate because of a fraudulent transshipment scheme by its supplier.¹¹⁵ The non-selected respondents were found to have properly been assigned a 43.26% ADD rate, which was the weighted average of that AFA rate and the 3.94% rate assigned to the cooperating mandatory respondent.¹¹⁶ Although DOC had changed its practice that previously excluded AFA rates when assigning non-selected rates, the CAFC found DOC acted reasonably and consistently with the ADD statute.¹¹⁷ The CAFC, in its September 2022 ruling, *Xi'an Metals & Minerals Import & Export Co. v. United States*, affirmed the CIT finding that DOC properly applied AFA in the subsequent, tenth administrative review to a mandatory respondent who was unable to report its factor of production data on a control-number (CONNUM)-specific basis.¹¹⁸ Although DOC had previously accepted data that was not CONNUM-specific, the CAFC found that the policy refinement did not constitute formal rulemaking; DOC properly explained "that CONNUM-specific data is essential for the accurate calculation of costs;" and DOC's decision was otherwise supported by substantial evidence.¹¹⁹

111. Ord. Granting US's Motion to Extend the Time to File a Pet. for Rehearing, *YC Rubber Co. v. United States*, 2022 WL 3711377, at *1 (Fed. Cir. Aug. 29, 2022) (No. 21-01489), ECF No. 79; Ord. Granting Motion to Extend Time to File Pet. for Rehearing filed by Appellee US, *YC Rubber Co. v. United States*, 2022 WL 3711377, at *1 (Fed. Cir. Aug. 29, 2022) (No. 21-01489), ECF No. 82.

112. 19 U.S.C. § 1677e(b).

113. See generally *Shanxi Hairui Trade Co. v. United States*, 39 F.4th 1357 (2022); *Xi'an Metals & Minerals Import & Export Co. v. United States*, 50 F.4th 98 (2022).

114. *Shanxi Hairui Trade Co.*, 39 F.4th 1360.

115. *Id.* at 1360-63.

116. *Id.*

117. *Id.*

118. *Xi'an Metals & Minerals Import & Export Co. v. United States*, 50 F.4th 98 (Fed. Cir. 2022).

119. *Id.* at 106-110.

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The CAFC likewise affirmed DOC's application of AFA in the CVD investigation of corrosion-resistant steel products from India because the respondent failed to disclose an affiliated company.¹²⁰ The CAFC, in its May 2022 ruling affirming the CIT, *Uttam Galva Steels Ltd. v. United States*, found DOC acted properly and rejected arguments that the affiliation could not have resulted in additional subsidies.¹²¹ However, the CAFC reversed the CIT and invalidated DOC's AFA application in its May 2022 ruling, *Hitachi Energy USA Inc. v. United States*.¹²² In that case, on remand in AR2 of the ADD order on large power transformers from Korea, DOC revised its methodology for determining service-related revenue.¹²³ Since DOC found mandatory respondent Hyundai's original submissions inadequate to determine service-related revenue in the revised manner, Hyundai asked DOC for permission to provide additional information.¹²⁴ Commerce denied that request and applied partial AFA in calculating Hyundai's ADD rate, which was affirmed by the CIT.¹²⁵ Yet the CAFC found that DOC violated 19 U.S.C. § 1677m(d) by disallowing Hyundai the opportunity to cure a deficiency with its submitted data.¹²⁶ The CAFC further found that DOC had misapplied the AFA statute and acted without the requisite substantial evidence.¹²⁷

C. PARTICULAR MARKET SITUATION

The past year saw several significant developments in particular market situation (PMS) jurisprudence and administration, especially cost-based PMS in the context of constructed value (CV). This PMS authority was bestowed upon DOC by the Trade Preferences Extension Act (TPEA) of 2015, codifying that a "particular market situation exists [when] the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade."¹²⁸ Consequently, when computing CV, DOC may replace the producer's actual costs using "any other calculation methodology."¹²⁹

Pursuant to TPEA, DOC in steel pipe cases routinely affirmed cost-based PMS, allegedly arising from a global phenomenon: Chinese oversupply of steel manifesting uniquely in the foreign exporting countries in terms of its

120. *Uttam Galva Steels Ltd. v. United States*, No. 2021-2119, 2022 WL 1419596, *4 (Fed. Cir. May 5, 2022).

121. *Id.*

122. *Hitachi Energy USA Inc. v. United States*, 34 F.4th 1375 (Fed. Cir. 2022).

123. *Id.* at 1378.

124. *Id.* at 1380.

125. *Id.* at 1380-81.

126. *Id.* at 1384-85.

127. *Id.* at 1385-86.

128. 19 U.S.C. § 1677b(e).

129. *Id.*

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collective and cumulative consequences.¹³⁰ These include trade remedy measures undertaken against Chinese hot-rolled coil (HRC) imports, government subsidies to HRC producers, government involvement in the electricity market, government-led restructuring of the steel industry, and strategic alliances between HRC and pipe producers.¹³¹ To compute PMS adjustments in steel pipe cases, DOC employed a complex statistical ordinary least square regression methodology, which was premised on a set of assumptions.¹³²

In recent years, the CIT aggressively pushed back against DOC's cost-based PMS overreach on several fronts. First, as a matter of law, the CIT ruled against PMS adjustment in building up the "cost of production" for a below-cost sales analysis.¹³³ Second, as a matter of substantial evidence, the CIT probed DOC as to how a global phenomenon of Chinese oversupply of cheap HRC could be uniquely particular to one exporting country or how subsidies absent a pass through analysis could be presumed to distort the cost of production of the subject merchandise.¹³⁴ Consequently, DOC, in remand proceedings, began dropping its PMS findings.¹³⁵ In 2022, this trend firmly crystallized with all eight CIT PMS decisions on steel pipe cases (of ten PMS decisions) either remanding DOC's affirmative PMS findings or affirming its negative PMS findings.¹³⁶ The CIT underscored that the alternative methodology in 19 U.S.C. § 1677b(e)(1) conceives both a comparative and a causal requirement.¹³⁷ Specifically, besides finding PMS, DOC must demonstrate that those unique market phenomena prevented the cost of materials and fabrication from accurately reflecting the cost of production.¹³⁸ Likewise, pursuant to CIT questioning the assumptions behind the regression methodology and data used for PMS adjustment, DOC entirely dropped the PMS adjustments.¹³⁹

In all nine new determinations on steel pipe cases (of thirteen PMS determinations) issued in 2022, DOC issued negative PMS findings because

130. *See, e.g.*, Certain Oil Country Tubular Goods from the Republic of Korea, 84 Fed. Reg. 24085 (May 24, 2019); Welded Pipes From India, 85 Fed. Reg. 2715, Issues and Decision Memorandum (IDM) Cmt. 1.

131. *Id.*

132. Welded Carbon Steel Standard Pipes and Tubes From India, 85 Fed. Reg. 2715 (Jan. 16, 2020) ("Welded Pipes From India"), IDM Cmt. 7.

133. *See, e.g.*, Borusan Mannesmann Boru Sanayi Ve Ticaret A.S., v. United States, 426 F. Supp. 3d 1395, 1410 (Ct. Int'l Trade 2020), *aff'd*, No. 2022-1502, 2022 WL 3695310, *1 (Fed. Cir. Aug. 26, 2022).

134. *See, e.g.*, Nexteel Co. v. United States, 475 F. Supp. 3d 1378, 1380 (Ct. Int'l Trade 2020).
135. *Id.*

136. *See, e.g.*, Nexteel Co. v. United States, 578 F. Supp. 3d 1354 (Ct. Int'l Trade 2022); Hyundai Steel Co. v. United States, 581 F. Supp. 3d 1284 (Ct. Int'l Trade 2022).

137. Garg Tube Export LLP v. United States, 569 F. Supp. 3d 1202 (Ct. Int'l Trade 2022).

138. *Id.*

139. *Id.*; Garg Tube Export LLP v. United States, 600 F. Supp. 3d 1276, 1278 (Ct. Int'l Trade 2022).

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they could not be supported by substantial evidence.¹⁴⁰ Even in the other four non-steel cases, DOC predominantly issued negative PMS findings.¹⁴¹ As such, despite its initial hawkish post-TPEA years, DOC in 2022 recognized the judicial scrutiny and demonstrated extreme restraint in its PMS analysis.

A tipping point was reached in 2022 with the first decision regarding the substantive merits of PMS issued by the CAFC, which found DOC's findings unsupported by substantial evidence.¹⁴² Specifically, the CAFC reached four important conclusions.¹⁴³ First, a PMS which distorts costs must cause costs to deviate from what they would have otherwise been in the ordinary course of trade.¹⁴⁴ Second, a PMS must be particular to certain producers or exporters, inputs, or the market where the inputs are manufactured.¹⁴⁵ Third, if there is a claim of a subsidy or government interference, there should be evidence of receipt of benefit and the resulting impact on the price of the input.¹⁴⁶ Finally, while quantification of a distortion in costs by the PMS is not required to prove the existence of a PMS, such a quantification may help support an affirmative PMS finding.¹⁴⁷ In the ensuing remand proceeding, DOC reversed itself and found the record evidence insufficient to support a PMS finding.¹⁴⁸

Ultimately, DOC wisely saw the writing on the wall. Pursuant to an unremitting judicial onslaught compounded by the inherent uncertainty surrounding the scope of PMS, which is not defined either in the statute or the regulation, DOC decided to revisit the PMS issue.¹⁴⁹ In an advanced notice of proposed rulemaking published on November 18, 2022, Commerce invited comments on three issues: (1) information which DOC should consider in determining if a PMS exists which distorts the costs of production; (2) information DOC should not be required to consider when determining if a PMS exists, regardless of the PMS allegation; and (3) comments on PMS adjustment calculations, where the record does not allow for the quantification of cost distortions.¹⁵⁰ DOC's forthcoming PMS regulations, expected in 2023, should help streamline the criteria and factors

140. *See, e.g.*, Circular Welded Non-Alloy Steel Pipe From the Republic of Korea, 87 Fed. Reg. 26343 (May 4, 2022), IDM Cmt. 1.

141. *See, e.g.*, Raw Honey From India, 87 Fed. Reg. 22188 (Apr. 14, 2022), IDM Cmt. 1.

142. *See* Nexteel Co. v. United States, 28 F.4th 1226 (Fed. Cir. 2022).

143. *Id.*

144. *Id.* at 1236.

145. *Id.* at 1235-36.

146. *Id.* at 1234.

147. *Id.*

148. U.S. Dept. of Commerce Final Results of Redetermination Pursuant to Court Remand, Nexteel Co. v. United States, CAFC Case No. 21-1334 (Fed. Cir. Mar. 11, 2022).

149. Determining the Existence of a Particular Market Situation That Distorts Costs of Production, 87 Fed. Reg. 69234 (Nov. 18, 2022).

150. *Id.*

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applied for PMS finding and providing transparent methodology(ies) for computing PMS adjustments.¹⁵¹

D. CIT RULINGS ON THE EXPORT BUYER'S CREDIT PROGRAM

The CIT began 2022 by continuing its 2021 trend of invalidating DOC actions in CVD proceedings to countervail the Government of China's (GOC) Export Buyer's Credit Program (EBCP).¹⁵² The CIT had, in several cases before and during 2021, invalidated DOC's decision to apply AFA to countervail the EBCP, based on the GOC providing all requested EBCP information without at least trying to verify the respondents' claims not to have used the EBCP.¹⁵³ The CIT in May 2022 affirmed DOC's redetermination, under protest, to recalculate subsidy rates without including a CVD rate for the EBCP in the fifth administrative review (AR5) of the CVD order on crystalline silicon photovoltaic (solar) cells from China.¹⁵⁴ In that review, DOC had not elected to attempt verification on remand.¹⁵⁵ The CIT in May 2022 further granted DOC's request for a voluntary remand to reconsider its decision to countervail the EBCP in the sixth administrative review (AR6) of the CVD order on solar cells from China.¹⁵⁶ Finally, in May 2022, the CIT also ordered DOC to reconsider its application of AFA to respondents who claimed EBCP non-usage in the CVD investigations of wooden cabinets and vanities (WCV) from China rather than attempt verification.¹⁵⁷

Unlike solar cells CVD AR5, DOC on remand in solar cells CVD AR6 and in the WCV CVD investigation re-opened the record to verify EBCP non-usage.¹⁵⁸ In the final WCV remand filed in August 2022, DOC found that neither mandatory respondent provided complete information requested concerning potential EBCP usage by their customers and accordingly continued to countervail EBCP.¹⁵⁹ The WCV respondents have challenged that redetermination, and a CIT ruling is expected next year. In the final remand in solar cells CVD AR6, issued in October 2022, DOC verified non-usage by one mandatory respondent based on complete information provided by its sole customer, eliminating its EBCP CVD

151. *Id.*

152. 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).

153. *Id.*

154. *Canadian Solar v. United States*, 2022 WL 1583428 (Ct. Int'l Trade May 19, 2022).

155. *Id.*

156. *Risen Energy Co. v. United States*, 570 F. Supp. 3d 1369, 1372-73 (Ct. Int'l Trade 2022).

157. *Dalian Meisen Woodworking Co. v. United States*, No. 20-00110, 2022 WL 1598896 (Ct. Int'l Trade May 12, 2022).

158. U.S. Dept. of Commerce Final Results of Redetermination Pursuant to Court Remand, *Dalian Meisen Woodworking Co. v. United States*, (Ct. Int'l Trade May 12, 2022) (No. 20-00110), 2022 WL 1598896.

159. *Id.*

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rate—but was unable to do so for the other mandatory respondent, whose EBCP CVD rate was maintained.¹⁶⁰ Briefing on this redetermination continues into next year.¹⁶¹

Just as the CIT and DOC were coalescing on an approach towards EBCP whereby mandatory respondents would be verified as to whether they or their customers used EBCP, the CIT in September 2022 affirmed DOC's decision to countervail the EBCP by applying AFA based on GOC non-cooperation.¹⁶² The CIT, in that appeal of the CVD investigation of wood mouldings and millwork products from China, affirmed the DOC rationale that had largely been rejected in prior cases—that verification was reasonably not pursued on account of the information deficit caused by the GOC's unwillingness to provide all requested EBCP details.¹⁶³ Now that there is a split on this issue within the CIT, it is likely that DOC's ability to countervail the EBCP will eventually be resolved by the CAFC.

E. CIT RULINGS ON DOC REJECTION OF UNTIMELY SUBMISSIONS

The CIT in 2022 adjudicated several challenges to instances where DOC applied AFA based on untimely submissions. In *Ajmal Steel Tubes & Pipes Industries v. United States*, the CIT in October found it unreasonable for DOC to refuse to accept a Section A Questionnaire Response (AQR), which was untimely due to COVID-19 related issues, even though DOC had tolled all deadlines in response to the same issue.¹⁶⁴ Ajmal, a mandatory respondent in an administrative review of the ADD order on circular welded carbon-quality steel pipes from the United Arab Emirates, submitted extension requests for its AQR, citing delays “due to the COVID-19 global pandemic.”¹⁶⁵ DOC granted both of these requests.¹⁶⁶ However, on the due date, Ajmal failed to submit their documents before the 5:00 p.m. deadline and submitted a third extension request at 6:10 p.m. and its AQR at 6:42 p.m.¹⁶⁷ DOC denied both the extension request and the AQR, as well as requests to reconsider.¹⁶⁸ Yet during the review, “Commerce tolled all deadlines in AD and [CVD] investigations by 50 days . . . [but this decision] . . . did not apply to deadlines that had already passed.”¹⁶⁹ Two weeks later,

160. U.S. Dept. of Commerce Final Results of Redetermination Pursuant to Court Remand, *Risen Energy Co. v. United States* (Ct. Int'l Trade Oct. 7, 2022) (No. 20-03912).

161. *Id.*

162. *Fujian Yinfeng Imp & Exp Trading Co. v. United States*, No. 21-00088, 2022 WL 4180886, *4-6 (Ct. Int'l Trade Sept. 13, 2022).

163. *See id.* at *5-6.

164. *Ajmal Steel Tubes & Pipes Indus. LLC v. United States*, No. 21-00587, 2022 WL 15943670, at *6-8 (Ct. Int'l Trade Oct. 28, 2022).

165. *Id.* at *1.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at *2.

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DOC further tolled all administrative review deadlines by another 60 days.¹⁷⁰ DOC nonetheless considered Ajmal's AQR untimely and instead applied AFA to assign a 54.27% ADD rate.¹⁷¹

The CIT first found the issues Ajmal experienced on the day of filing alone should not have prevented the filing of a timely extension request.¹⁷² However, because "Commerce unilaterally tolled the deadlines for all AD and CVD administrative reviews by 50 days . . . in response to the operational adjustments due to COVID-19," the CIT found that DOC recognized "operational adjustments due to COVID-19" during the spring of 2020 as extraordinary circumstances.¹⁷³ The CIT highlighted the fact that "[t]he total delay to the investigation by Ajmal, caused by its operational issues due to COVID-19, consisted of less than two hours . . . [while] [t]he total delay to the review by Commerce, [also] in response to operational adjustments due to COVID-19 consisted of 50 days or 1,200 hours, plus a subsequent additional 60 days."¹⁷⁴ Thus, the CIT concluded that "[i]t was an abuse of discretion for Commerce, with both delays before it, to reason that filing issues due to COVID-19 are so different from operational adjustments due to COVID-19 that they do not constitute sufficient extraordinary circumstances to permit a slightly late filing here to avoid serious consequences."¹⁷⁵ The CIT remanded for DOC "to accept and consider" Ajmal's AQR.¹⁷⁶

The CIT reached the same outcome in a pair of February 2022 rulings, *Celik Halat Ve Tel Sanayi A.S. v. United States*, involving late filings submitted by the same mandatory respondent in the ADD/CVD investigations of prestressed concrete steel wire stand from Turkey.¹⁷⁷ On the ADD side, DOC assigned a margin of over fifty percent because Celik Halat's Sections B and C Questionnaire Response (BCQR) included a single exhibit filed twenty-one minutes after the 5:00 p.m. deadline on account of formatting errors.¹⁷⁸ DOC denied requests for reconsideration, finding that Celik Halat had notice of formatting requirements and failed to show that an extraordinary circumstance prohibited it from timely filing an extension request before the deadline.¹⁷⁹ On appeal, the CIT determined that "Commerce abused its discretion to impose a draconian penalty upon plaintiff for a minor and inadvertent technical error by its counsel that had no appreciable effect on the antidumping duty investigation."¹⁸⁰ First, the

170. *Id.*

171. *Id.*

172. *Id.* at *4.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at *5.

177. *Celik Halat Ve Tel Sanayi A.S. v. United States*, 557 F. Supp. 3d 1348, 1356 (Ct. Int'l Trade 2022).

178. *Id.*

179. *Id.*

180. *Id.* at 1362.

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CIT found that DOC's use of AFA was predicated "on what was no more than a minor incident of non-compliance . . . that had no appreciable effect on the antidumping duty investigation."¹⁸¹ The CIT recognized that "Commerce has broad discretion in establishing its own rules governing the administrative procedure," but found that "in applying those rules to an individual circumstance, Commerce lacked the discretion to impose a draconian and punitive sanction in the circumstance represented."¹⁸² As a result, the CIT ordered DOC to calculate a new ADD margin for Celik Halat using the BCQR instead of AFA.¹⁸³

On the CVD side, the CIT likewise invalidated DOC's application of an AFA rate to Celik Halat as a result of an untimely filed Section III response to the initial questionnaire.¹⁸⁴ Through DOC's "lag rule," Celik Halat had to file the "not Final" business proprietary information (BPI) version of the response by 5:00 p.m. on the due date and the final BPI version by 5:00 p.m. the following business day.¹⁸⁵ Celik Halat submitted the BPI Not Final version on time.¹⁸⁶ However, its counsel, who was recovering from surgery in a different time zone, submitted the final BPI version at 6:27 p.m. DOC rejected the submission and applied AFA by assigning Celik Halat a 158.44% CVD rate, finding that Celik Halat withheld requested information and impeded the investigation.¹⁸⁷ Yet the CIT rejected this position, emphasizing that because Celik Halat was only able to edit bracketing between the BPI versions and not the substantive material, DOC had all the information it needed in the timely filed BPI Not Final version.¹⁸⁸ Thus, the CIT determined that DOC exceeded its statutory authority in applying AFA and remanded for a new DOC CVD determination that does not rely on AFA.¹⁸⁹

The CIT reached a different outcome in its late 2021 ruling, affirmed in early 2023 by the CAFC, *Trinity Manufacturing, Inc. v. United States*.¹⁹⁰ There, the CIT affirmed DOC's unwillingness to accept an untimely Substantive Response from petitioner that led to revocation of the ADD order on chloropicrin from China.¹⁹¹ One week after the deadline passed, DOC revoked the ADD order, and the petitioner subsequently asked DOC to grant a retroactive extension for the Substantive Response deadline based on the medical condition of petitioner's counsel that allegedly caused the

181. *Id.*

182. *Id.*

183. *Id.*

184. *Celik Halat Ve Tel Sanayi v. United States*, 557 F. Supp. 3d. 1363, 1366 (Ct. Int'l Trade 2022).

185. *Id.* at 1371.

186. *Id.*

187. *Id.* at 1368, 1371.

188. *Id.* at 1372-74.

189. *Id.* at 1375, 1381.

190. *Trinity Mfg., Inc. v. United States*, 549 F. Supp. 3d. 1370, 1372 (Ct. Int'l Trade 2021), *aff'd*, No. 2022-1329, 2023 WL 234228 (Fed. Cir. Jan. 18, 2023).

191. *Id.*

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deadline to be missed.¹⁹² After DOC denied this request and reconsideration, the petitioner appealed to the CIT.¹⁹³

The CIT highlighted that in the retroactive extension request, petitioner’s counsel explained that he realized for the first time that he may not have filed the Substantive Response upon receiving notice of the untimely filing.¹⁹⁴ The CIT agreed that DOC properly found the absence of the requisite extraordinary circumstance, finding that “an extraordinary circumstance is not demonstrated when the person attempting to make a filing did not know, and could not say, why the attempt at filing did not succeed.”¹⁹⁵ The CIT further reasoned that “the extension request did not demonstrate that the filing could not have been accomplished through ‘reasonable measures’ and ‘reasonable means,’ including ordinary measures to confirm that the document had . . . been filed.”¹⁹⁶ The CIT agreed with DOC’s conclusion that these medical issues did not constitute an extraordinary circumstance because petitioner’s counsel had not established a medical emergency or otherwise being unable to file an extension request on time.¹⁹⁷

F. CIT RULING ON VERIFICATION

The COVID-19 pandemic caused disruptions to Commerce’s ability to conduct on-site verifications, triggering the choices of alternative procedures to verify the information.¹⁹⁸ In February 2022, the CIT asked Commerce to explain why a petitioner’s request for virtual verification was not possible in an antidumping investigation into forged steel fittings from India in light of COVID travel restrictions.¹⁹⁹ The Court found that the agency’s failure to consider the possibility of virtual verification was unsupported by substantial evidence, noting that although Commerce had not resumed on-site verification due to the pandemic, senior administration officials had made recent trips to India.²⁰⁰ Commerce’s remand redetermination arguing that questionnaires constituted verification is currently pending before the CIT.²⁰¹

192. *Id.* at 1373.

193. *Id.*

194. *Id.* at 1375.

195. *Id.* at 1376.

196. *Id.*

197. *Id.* at 1379-81.

198. 19 U.S.C § 1677m(i).

199. *Bonney Forge Corp. v. United States*, 560 F. Supp. 3d 1303, 1313-1316 (Ct. Int’l Trade 2022).

200. *Id.*

201. *Id.*

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G. CAFC RULING ON DOC’S SCOPE MODIFICATIONS

In *M S Int’l, Inc. v. United States*, the CAFC upheld Commerce’s authority to modify the scope during ADD/CVD investigations.²⁰² The underlying investigations involved quartz surface products from China.²⁰³ The scope in the petitions described quartz surface products as “slabs and other surfaces created from a mixture of materials that includes predominantly silica (e.g., quartz, quartz powder, cristobalite) as well as a resin binder”²⁰⁴ In response to Commerce’s request for clarification, the petitioner explained that while covered products may contain a certain quantity of crushed glass, the scope was not intended to cover products in which the crushed glass content is greater than any other single material.²⁰⁵ Commerce adopted the petitioner’s revision of the scope to exclude crushed glass products—“surface products in which the crushed glass content is greater than any other single material, by actual weight.”²⁰⁶

Later in the investigations, the petitioner requested that Commerce further clarify the scope to limit the exclusion to crushed glass products with visible large pieces of glass.²⁰⁷ The petitioner explained that it had intended for the exclusion to cover crushed glass products that display visible pieces of crushed glass, giving them a distinct appearance.²⁰⁸ The petitioner explained that Chinese producers were offering quartz glass products visibly similar to quartz products but containing higher amounts of glass, suggesting that they had begun offering the products in response to tariffs.²⁰⁹ Commerce modified the exclusion as requested for the final determination.²¹⁰

The CAFC emphasized that Commerce was not bound to the preliminary scope, noting that the agency found it to be problematic because Chinese producers/exporters could evade the orders by selling “quartz glass.”²¹¹ The CAFC rejected arguments that Commerce should have treated the clarification request as a request to amend the petition and that the modification was unlawful for being contrary to the petitioner’s intent.²¹² Notably, the CAFC found that the evidence of potential evasion justified Commerce’s departure from its decision in a separate investigation, where the agency denied the petitioners’ request to expand the scope without filing an amended petition.²¹³

202. *M S Int’l, Inc. v. United States*, 32 F.4th 1145 (Fed. Cir. 2022).

203. *Id.*

204. *Id.* at 1148.

205. *Id.* at 1148-49.

206. *Id.* at 1149.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* at 1150.

211. *Id.* at 1151.

212. *Id.* at 1150-52.

213. *Id.* at 1152.

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Export Controls and Economic Sanctions

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This article discusses the significant legal developments involving export controls and economic sanctions that occurred in 2022.¹

I. Export Control Developments

A. INTERNATIONAL TRAFFIC IN ARMS REGULATIONS (ITAR)

1. Part 120 Consolidation

After four years in the works, ITAR was significantly revised in September 2022 by consolidating the regulatory definitions, processes, and policies within Part 120.² That Part now has three parts: *first*, providing background information on the statutory and regulatory scheme and related laws; *second*, providing information on ITAR's policies and procedures; *third*, providing a listing of defined regulatory terms that globally apply throughout ITAR.³ The intent of these revisions is that ITAR will have a more logical flow,⁴ such as related definitions being next to one another.⁵ Additionally, ITAR was amended to make the so-called “see-through” rule explicit within the regulations, which generally maintains controls over an ITAR-controlled item, even when incorporated into a non-ITAR-controlled item.⁶ Elsewhere, two key terms that were previously defined locally, “development” and “production,” are now defined globally.⁷

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1. Given the publication deadlines, this article includes developments occurring between December 1, 2021, and November 30, 2022.

2. International Traffic in Arms Regulations: Consolidation and Restructuring of Purposes and Definitions, 87 Fed. Reg. 16396 (Mar. 23, 2022).

3. *Id.*

4. *Id.*

5. *Id.*

6. 22 C.F.R. § 120.11(c) (2023).

7. 22 C.F.R. § 120.43(a)–(b) (2023).

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2. *Trial of New Pilot Program for Open General License*

The Directorate of Defense Trade Controls (DDTC) in 2022 launched a new pilot program to test a new concept involving open general licenses.⁸ The current pilot program has two open general licenses (one for re-exports and one for re-transfers) that are valid through July 31, 2023.⁹ These programs have a number of limitations and restrictions, and they are available only to the Australian, Canadian, and United Kingdom governments and to certain persons within those countries.¹⁰

3. *Defense Trade Policy Updates Involving Cyprus*

On November 22, 2022, DDTC extended its current licensing policy towards Cyprus through September 30, 2023, which suspends its status as a proscribed country and the resulting policy of denial.¹¹

B. EXPORT ADMINISTRATION REGULATIONS (EAR)

The U.S. Department of Commerce's Bureau of Industry (BIS) has been extremely busy responding to Russia's invasion of Ukraine, which began in February 2022.¹² With almost every escalation of the war, BIS has escalated export controls on exports to Russia (and Belarus).¹³

On February 24, 2022, BIS released a draft Federal Register Notice of a final rule effective on that same date increasing export controls on exports to Russia, which was ultimately published on March 3, 2022.¹⁴ This first round of export controls introduced a license requirement for all exports, re-exports, transfers, or releases of any commodities, software, or technology (Items) classified on the Commerce Control List (CCL) under Categories 3 through 9.¹⁵ Additionally, BIS expanded its Military End User (MEU) and Military End Use rule found at 15 C.F.R. § 744.21 to impose a license requirement of exporting *any* Item subject to EAR (that is, even EAR99 items) to military end users or for military end uses, except for EAR99 food and medicine or certain mass market encryption commodities and software,

8. International Traffic in Arms Regulations: Issuance of Open General Licenses 1 and 2, 87 Fed. Reg. 43366 (July 20, 2022).

9. *Id.*

10. *Id.*

11. 22 C.F.R. § 126.1(r) (2022); International Traffic in Arms Regulations: Prohibited Exports, Imports, and Sales to or From Certain Countries—Cyprus, 87 Fed. Reg. 71250 (Nov. 22, 2022).

12. See *Current State of BIS Export Controls in Response to the Russian Federation's Invasion of Ukraine*, BAKERHOSTETTLER (Jan. 19, 2023), <https://www.bakerlaw.com/Current-State-of-BIS-Export-Controls-in-Response-to-the-Russian-Federations-Invasion-of-Ukraine> [<https://perma.cc/58MT-GMRG>].

13. See *generally id.*

14. Implementation of Sanctions Against Russia Under the Export Administration Regulations (EAR), 87 Fed. Reg. 12226 (Mar. 3, 2022) (to be codified at 15 C.F.R. pts. 734, 738, 740, 742, 744, 746, 772).

15. *Id.*

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when destined for Russian government end users or State-Owned Enterprises (SOEs).¹⁶ BIS narrowed the applicability of License Exception ENC in accordance with its expanded MEU rule.¹⁷

Importantly, this first round of increased export controls introduced two new Foreign Direct Product Rules (FDP Rules) specific to Russia—one for end users in Russia and one specific to military end users or for military end uses.¹⁸ BIS first expanded the FDP Rule for specific end users in 2020 when it created a new FDP rule specifically directed at Huawei and many of its affiliates and subsidiaries included on the Entity List.¹⁹ Many export practitioners opined at the time that this end-user-specific FDP Rule heralded a new era in export controls and was proven right with this first round of Russian export controls.²⁰

In March 2022, BIS imposed the Russian licensing requirements of February 24, 2022, onto exports, re-exports, transfers, and releases to Belarus.²¹ BIS also expanded the list of EAR99 items that require a license for export, re-export, release, or transfer to Russia or Belarus based on use in the oil industry and use as luxury items.²² BIS introduced a list of countries to which the new FDP Rules did not apply, assuming that the excluded countries were implementing export restrictions similar to those of the United States.²³

In April 2022, BIS expanded the list of countries excluded from the application of the new FDP Rules.²⁴ BIS also expanded the license requirements for exports, re-exports, transfers, or releases to Russia or

16. *Id.* at 12227.

17. *Id.* at 12229.

18. *Id.* at 12226–27.

19. See Addition of Huawei Non-U.S. Affiliates to the Entity List, the Removal of Temporary General License, and Amendments to General Prohibition Three (Foreign-Produced Direct Product Rule), 85 Fed. Reg. 51596 (Aug. 17, 2020) (to be codified at 15 C.F.R. pts. 736, 744, 762).

20. *Explainer: The U.S. Export Rule That Hammered Huawei Teed Up to Hit Russia*, REUTERS (Jan. 24, 2022, 4:16 PM), <https://www.reuters.com/business/us-export-rule-that-hammered-huawei-teed-up-hit-russia-2022-01-24/> [https://perma.cc/5E35-9ZLF].

21. Imposition of Sanctions Against Belarus Under the Export Administration Regulations (EAR), 87 Fed. Reg. 13048 (Mar. 8, 2022) (to be codified at 15 C.F.R. pts. 734, 736, 738, 740, 742, 744, 746).

22. Expansion of Sanctions Against the Russian Industry Sector Under the Export Administration Regulations (EAR), 87 Fed. Reg. 12856 (Mar. 8, 2022) (to be codified at 15 C.F.R. pts. 738, 746); Imposition of Sanctions on ‘Luxury Goods’ Destined for Russia and Belarus and for Russian and Belarusian Oligarchs and Malign Actors Under the Export Administration Regulations (EAR), 87 Fed. Reg. 14785 (Mar. 16, 2022) (to be codified at 15 C.F.R. pts. 738, 746).

23. Addition to the List of Countries Excluded From Certain License Requirements Under the Export Administration Regulations (EAR), 87 Fed. Reg. 13627 (Mar. 10, 2022) (to be codified at 15 C.F.R. pt. 746).

24. Additions to the List of Countries Excluded From Certain License Requirements Under the Export Administration Regulations (EAR), 87 Fed. Reg. 21554 (Apr. 12, 2022) (to be codified 15 C.F.R. pt. 746).

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Belarus.²⁵ Specifically, all items with an ECCN require a license for export, re-export, transfer, or release to Russia or Belarus.²⁶ This extension of license requirements also extended the new FDP Rules to Belarus.²⁷ BIS narrowed the applicability of License Exception Aircraft, Vessels, and Spacecraft (AVS) for exports, re-exports, transfers, or releases to Russia or Belarus or Russian or Belarusian nationals.²⁸

On May 11, 2022, BIS further expanded the list of EAR99 items, identified by a Schedule B or Harmonized Tariff Schedule of the United States (HTSUS) number.²⁹ In June, BIS also revoked the license exception for EAR99 food and medicine when destined for MEUs or military end uses.³⁰ Finally, BIS clarified its license review policy.³¹

In September 2022, BIS added additional EAR99 items, identified by a Schedule B or HTSUS number, to its list of items requiring a license for export, re-export, transfer, or release to Russia and amended monetary thresholds for luxury items on the list.³² BIS expanded these EAR99 controls to Belarus.³³ BIS further expanded the MEU and military intelligence end user rules to additional countries.³⁴

During all these expansions and revisions to the EAR, BIS continued to add Russian, Belarusian, and other entities to its Entity List.³⁵ It also issued expansive orders denying export privileges to several Russian airlines and aircraft.³⁶

25. Expansion of Sanctions Against Russia and Belarus Under the Export Administration Regulations (EAR), 87 Fed. Reg. 22130 (Apr. 14, 2022) (to be codified at 15 C.F.R. pts. 734, 738, 746).

26. *Id.*

27. *Id.*

28. *Id.*

29. Expansion of Sanctions Against Russian Industry Sectors Under the Export Administration Regulations (EAR), 87 Fed. Reg. 28758 (May 11, 2022) (to be codified at 15 C.F.R. pt. 746).

30. Export Administration Regulations: Revisions to Russia and Belarus Sanctions and Related Provisions; Other Revisions, Corrections, and Clarifications, 87 Fed. Reg. 34131, 34133 (June 6, 2022) (to be codified at 17 C.F.R. pts. 734, 740, 744, 746, 766).

31. *Id.* at 34134.

32. Implementation of Additional Sanctions Against Russia and Belarus Under the Export Administration Regulations (EAR) and Refinements to Existing Controls, 87 Fed. Reg. 57068, 57070 (Sept. 16, 2022) (to be codified at 15 C.F.R. pts. 732, 734, 736, 740, 744, 746, 762).

33. *Id.* at 57068.

34. *Id.* at 57070–71.

35. *Id.* at 57072.

36. Press Release, U.S. Dept. of Com., BIS Takes Enforcement Actions Against Three Russian Airlines Operating Aircraft in Violation of U.S. Export Controls (Apr. 7, 2022), <https://www.commerce.gov/news/press-releases/2022/04/bis-takes-enforcement-actions-against-three-russian-airlines-operating> [<https://perma.cc/2H6V-32CE>].

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II. Committee on Foreign Investment in the United States (CFIUS) Developments

A. CFIUS

1. Executive Order 14083

On September 15, 2022, President Biden issued a first-of-its-kind CFIUS-related order captioned *Ensuring Robust Consideration of Evolving National Security Risks by the Committee on Foreign Investment in the United States*.³⁷ The order requires CFIUS, “as appropriate,” to weigh the effect of covered transactions on the United States: (1) commercial and defense supply chain resilience; (2) technological leadership in areas affecting national security; (3) cybersecurity; and (4) sensitive personal data.³⁸ The order specifically named the following supply chains as “fundamental to national security:” advanced clean energy, agriculture (for food security), artificial intelligence, biomanufacturing and biotechnology, climate adaptation technologies, critical materials, microelectronics, and quantum computing.³⁹

2. Enforcement and Penalty Guidelines

On October 20, 2022, CFIUS released its first-ever public Enforcement and Penalty Guidelines.⁴⁰ The Guidelines focus on failures to timely file mandatory declarations, material misstatements, omissions, false certifications, and non-compliance with a CFIUS mitigation agreement, condition, or order.⁴¹ The Guidelines provided a non-exhaustive list of aggravating and mitigating factors and the Committee’s first-ever public description of a voluntary self-disclosure (VSD) process.⁴²

3. Magnachip Semiconductor Corporation (Magnachip)

CFIUS’s review and suspension of the proposed acquisition of Magnachip by Chinese investors in 2021 surprised many, given the company’s sparse involvement in the U.S. economy, limited to incorporation in Delaware and being listed on the New York Stock Exchange.⁴³ In December 2021, after CFIUS allowed the parties to withdraw and re-file, the parties terminated

37. Exec. Order No. 14,083, *Ensuring Robust Consideration of Evolving National Security Risks by the Committee on Foreign Investment in the United States*, 87 Fed. Reg. 57369 (Sept. 20, 2022) (signed Sept. 15, 2022).

38. *Id.* at 57370–72.

39. *Id.* at 57070.

40. Memorandum from Paul M. Rosen for CFIUS Regarding CFIUS Enforcement and Penalty Guidelines, U.S. Dept. of Treasury (Oct. 20, 2022), <https://home.treasury.gov/system/files/206/CFIUS-Enforcement-and-Penalty-Guidelines.pdf> [<https://perma.cc/AN6W-S4D2>].

41. *Id.*

42. *Id.*

43. John Boscarriol et al., *Export Controls and Economic Sanctions*, 56 ABA/ILS YIR 406 (2022).

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the deal.⁴⁴ The Magnachip transaction demonstrates that CFIUS will zealously assert jurisdiction when it believes there is a national security risk.

B. OUTBOUND INVESTMENT REVIEW UNDER THE CHIPS ACT

In 2022, Congress passed the CHIPS Act,⁴⁵ which, among other initiatives, commits approximately \$52,000,000,000 in awards to semiconductor-related companies for manufacturing and research.⁴⁶ To protect these funds from aiding a recipient's ability to expand manufacturing operations in China or other "foreign countries of concern," Congress will lead a first-of-its-kind outbound investment review process.⁴⁷ No implementing regulations have been published through the end of November 2022.⁴⁸

III. Economic Sanctions Developments

As the Biden Administration matured, there were significant shifts in U.S. sanctions regulations and policy.⁴⁹ These shifts included noteworthy developments in Russia-related sanctions.⁵⁰

A. U.S.-IMPOSED UKRAINE-/RUSSIA-RELATED SANCTIONS

Before the Russian Federation's 2022 invasion of Ukraine, formally recognized to have started on February 24, 2022, most U.S. sanctions on Russia were prompted by Russia's 2014 invasion and annexation of Ukraine's Crimea region and Russia's support for the conflict in eastern Ukraine. Executive Orders (EOs) 13660, 13661, 13662, and 13685, which were codified by the Countering America's Adversaries Through Sanctions Act,⁵¹ were the basis for these 2014 sanctions.⁵²

Since March 6, 2014, when President Obama signed EO 13660, the United States has had an ongoing national emergency formally declared to

44. *Magnachip and Wise Road Capital Announce Withdrawal of CFIUS Filing and Mutual Termination of Merger Agreement*, PR NEWSWIRE (Dec. 13, 2021), <https://www.prnewswire.com/news-releases/magnachip-and-wise-road-capital-announce-withdrawal-of-cfius-filing-and-mutual-termination-of-merger-agreement-301443561.html> [<https://perma.cc/8N7K-7VJ6>].

45. CHIPS and Science Act of 2022, Pub. L. No. 117-167.

46. *Id.*

47. Semiconductor Incentives, 15 U.S.C. § 4652 (2023).

48. See *2022 Year End Sanctions and Export Controls Update*, GIBSON DUNN (Feb. 7, 2023), <https://www.gibsondunn.com/2022-year-end-sanctions-and-export-controls-update/> [<https://perma.cc/AL5S-XQQ6>].

49. *Id.*

50. Congressional Research Service, *Russia's War Against Ukraine: Overview of U.S. Sanctions and Other Response*, CONG. RSCH. SERV. (Dec. 20, 2022), <https://crsreports.congress.gov/product/pdf/IN/IN11869> [<https://perma.cc/VY3Q-LB6W>].

51. 22 U.S.C. §§ 9501 *et seq.* (2017).

52. Countering America's Adversaries Through Sanctions Act, Pub. L. No. 115-44, 131 Stat. 886 (2017).

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deal with Ukraine-related threats,⁵³ and President Biden continued the national emergency under Section 202(d) of the National Emergencies Act (50 U.S.C. § 1622(d)), on February 21, 2022, with EO 14065.⁵⁴

Throughout 2022, President Biden issued four Ukraine-related EOs expanding on the aforementioned EOs targeting Russia, among others, starting with EO 14065 to address Russia's characterization of purported independence and sovereignty of the so-called Donetsk People's Republic (DNR) and the Luhansk People's Republic (LNR) regions of Ukraine on February 21, 2022.⁵⁵ Starting March 8, 2022, three additional EOs were issued to address Russia's February 24, 2022 invasion of Ukraine.⁵⁶

The EOs cite the International Emergency Economic Powers Act (50 U.S.C. § 1701 *et seq.*), the National Emergencies Act (50 U.S.C. § 1601 *et seq.*), Section 212(f) of the Immigration and Nationality Act of 1952 (8 U.S.C. § 1182(f)), Section 301 of Title 3, the United States Code, and the Constitution for authority.⁵⁷

Through the Ukraine-/Russia-Related Sanctions Regulations (URSR), codified at 31 C.F.R. Part 589, the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) and U.S. Department of State's Office of Economic Sanctions Policy and Implementation (TFS/SPI) issued regulations to implement the EOs and to exercise the President-delegated authority of the Departments of the Treasury and State to augment the sanctions.⁵⁸ The individuals and entities determined by the Departments of the Treasury and State to be subject to sanctions are included on OFAC's List of Specially Designated Nationals and Blocked Persons (SDN List) and other sanctions lists (such as OFAC's Non-SDN Menu-Based List) administered by the two Departments.⁵⁹

53. Exec. Order No. 13,660, Blocking Property of Certain Persons Contributing to the Situation in Ukraine, 3 C.F.R. 226 (2014).

54. Exec. Order No. 14,065, Blocking Property of Certain Persons and Prohibiting Certain Transactions With Respect to Continued Russian Efforts to Undermine the Sovereignty and Territorial Integrity of Ukraine, 87 Fed. Reg. 10293 (Feb. 23, 2022).

55. Press Release, U.S. Sec'y of State Antony J. Blinken, Kremlin Decision on Eastern Ukraine (Feb. 21, 2022), <https://www.state.gov/kremlin-decision-on-eastern-ukraine/> [<https://perma.cc/6X3C-XY3Q>].

56. *See* Exec. Order No. 14,065, Blocking Property of Certain Persons and Prohibiting Certain Transactions With Respect to Continued Russian Efforts to Undermine the Sovereignty and Territorial Integrity of Ukraine, 87 Fed. Reg. 10293 (Feb. 23, 2022); Exec. Order No. 14,066, Prohibiting Certain Imports and New Investments With Respect to Continued Russian Federation Efforts to Undermine the Sovereignty and Territorial Integrity of Ukraine, 87 Fed. Reg. 13625 (Mar. 10, 2022); Exec. Order No. 14,068, Prohibiting Certain Imports, Exports, and New Investment With Respect to Continued Russian Federation Aggression, 87 Fed. Reg. 14381 (Mar. 15, 2022); Exec. Order No. 14,071, Prohibiting New Investment in and Certain Services to the Russian Federation in Response to Continued Russian Federation Aggression, 87 Fed. Reg. 20999 (Apr. 8, 2022).

57. *Id.*

58. 31 C.F.R. § 589 (2022).

59. *Id.*

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EO 14065, signed February 21, 2022, expanded the scope of the national emergency declared in the aforementioned 2014 EOs⁶⁰ and EO 13849 from 2018⁶¹ and prohibited new investments by U.S. persons in the DNR, the LNR, and other regions of Ukraine (collectively, the Covered Regions). It also prohibited U.S.-destined imports from, as well as exports, re-exports, sales, and supplies to, the Covered Regions, with U.S. persons or others located in the U.S. further prohibited from supporting such transactions with the Covered Region, as may be determined by the Departments of the Treasury and State.⁶² EO 14065 also blocked all property and interests of property with a certain nexus to the United States that the Departments of the Treasury and State determine to have a prohibited nexus to the Covered Regions.⁶³

On February 22, 2022, two days before the invasion, OFAC started imposing new Russia-targeted sanctions.⁶⁴ By February 25, 2022, Russia became the world's most sanctioned nation, overtaking the Islamic Republic of Iran.⁶⁵

On February 26, 2022, President Biden, along with the leaders of Canada, the United Kingdom, the European Commission, Germany, Italy, and France, committed to removing select Russian banks from the SWIFT messaging system to “ensure that these banks are disconnected from the international financial system and harm their ability to operate globally.”⁶⁶

EO 14066, signed March 8, 2022, principally prohibited certain Russian-origin fossil fuels and related products from being imported into the United States and U.S. persons from making new investments in Russia's energy

60. See *supra* note 56.

61. See Exec. Order No. 13,849, Authorizing the Implementation of Certain Sanctions Set Forth in the Countering America's Adversaries Through Sanctions Act, 83 Fed. Reg. 48195 (Sept. 21, 2018).

62. See Exec. Order No. 14,065, Blocking Property of Certain Persons and Prohibiting Certain Transactions With Respect to Continued Russian Efforts to Undermine the Sovereignty and Territorial Integrity of Ukraine, 87 Fed. Reg. 10293 (Feb. 23, 2022).

63. *Id.*

64. Publication of Financial Services Sectoral Determination and Directives 1A, 2, 3, and 4 Under Executive Order 14024 of April 15, 2021, 87 Fed. Reg. 32303 (May 31, 2022) (to be codified at 31 C.F.R. pt. 587).

65. Spencer Vuksic, *Russia Is Now the World's Most Sanctioned Country*, CASTELLUM.AI (Mar. 8, 2022), <https://www.castellum.ai/insights/russia-is-now-the-worlds-most-sanctioned-country> [<https://perma.cc/8Q2U-TUJ9>]; see also *Russia Sanctions Dashboard*, CASTELLUM.AI, <https://www.castellum.ai/russia-sanctions-dashboard> [<https://perma.cc/KC89-7CRA>] (current as of Feb. 24, 2023) (chart exhibiting that the total globally imposed sanctions targeting Russia exceeds those targeting Iran starting February 25, 2022).

66. Press Release, The White House, Joint Statement on Further Restrictive Economic Measures (Feb. 26, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/02/26/joint-statement-on-further-restrictive-economic-measures/> [<https://perma.cc/8RLD-3F6D>].

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sector, and the EO prohibited U.S. persons from supporting such imports or investments.⁶⁷

EO 14068, signed March 11, 2022, principally prohibited the import from, and export, re-export, and supply to, Russia of additional goods (such as the import of seafood, alcoholic beverages, and non-industrial diamonds; the export of luxury goods; and U.S. dollar-denominated banknotes).⁶⁸ The EO granted the Departments of the Treasury, State, and Commerce the authority to augment the list of in-scope goods.⁶⁹

EO 14071, signed April 6, 2022, principally prohibited U.S. persons from making new investments in Russia.⁷⁰ It also prohibited the provision of certain services determined by the Departments of the Treasury and State to any person located in Russia.⁷¹

On April 8, 2022, President Biden signed into law the bipartisan Suspending Normal Trade Relations with Russia and Belarus Act (SNTRRBA), which subjected Russian and Belarusian products to column two of the HTSUS starting April 9, 2022, after the SNTRRBA unanimously passed the Senate and nearly unanimously passed the House of Representatives.⁷² The SNTRRBA also modified and reauthorized sanctions under the Global Magnitsky Human Rights Accountability Act.⁷³

As a consequence of Russia's invasion of Ukraine and Belarus's material support thereof, the Departments of the Treasury and State, in lockstep with a coalition of thirty-seven countries,⁷⁴ added hundreds of now-sanctioned parties to the SDN list and other sanctions lists.⁷⁵

67. Exec. Order No. 14,066, Prohibiting Certain Imports and New Investments With Respect to Continued Russian Federation Efforts to Undermine the Sovereignty and Territorial Integrity of Ukraine, 87 Fed. Reg. 13625 (Mar. 8, 2022).

68. Exec. Order No. 14,068, Prohibiting Certain Imports, Exports, and New Investment With Respect to Continued Russian Federation Aggression, 87 Fed. Reg. 14381 (Mar. 11, 2022).

69. *Id.*

70. Exec. Order No. 14,071, Prohibiting New Investment in and Certain Services to the Russian Federation in Response to Continued Russian Federation Aggression, 87 Fed. Reg. 20999 (Apr. 6, 2022).

71. *Id.*

72. Press Release, The White House, A Proclamation on Increasing Duties on Certain Articles From the Russian Federation (Feb. 24, 2023), <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/02/24/a-proclamation-on-increasing-duties-on-certain-articles-from-the-russian-federation/> [<https://perma.cc/UK6X-3AXF>].

73. H.R. 7108, 117th Cong. § 6 (2021) (enacted).

74. Press Release, U.S. Dep't of State, The Impact of Sanctions and Export Controls on the Russian Federation (Oct. 20, 2022), <https://www.state.gov/the-impact-of-sanctions-and-export-controls-on-the-russian-federation/> [<https://perma.cc/SMK7-8RA4>].

75. Press Release, U.S. Dep't of State, How the United States Is Holding Russia and Belarus to Account (Feb. 24, 2023), <https://www.state.gov/holding-russia-and-belarus-to-account/> [<https://perma.cc/8R25-N7F3>].

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B. OTHER OFAC DEVELOPMENTS

1. *Afghanistan*

In February 2022, OFAC issued new Frequently Asked Questions (FAQs) and Afghanistan-related General License (GL) 20, which expanded authorizations for commercial and financial transactions in Afghanistan.⁷⁶

2. *Ethiopia*

On February 8, 2022, OFAC issued the Ethiopia Sanctions Regulations to implement EO 14046 of September 17, 2021, captioned *Imposing Sanctions on Certain Persons with Respect to the Humanitarian and Human Rights Crisis in Ethiopia*.⁷⁷

3. *Syria*

On May 12, 2022, OFAC issued Syria GL 22, authorizing specified economic activities in certain regions of Syria not controlled by the Assad regime.⁷⁸ GL 22 supports the Biden Administration's strategy to defeat ISIS by promoting economic stabilization in areas liberated from the terrorist group's control.⁷⁹

4. *Cuba*

On June 9, 2022, OFAC issued a final rule to increase support for the Cuban people.⁸⁰ Specifically, the rule authorized group people-to-people educational travel to Cuba and removed certain restrictions on authorized academic educational activities, permitted travel to attend or organize professional meetings or conferences in Cuba, removed the \$1,000 quarterly limit on family remittances, and authorized donative remittances to Cuba.⁸¹

76. See *Issuance of Afghanistan-Related General License and New and Amended Frequently Asked Questions*, U.S. DEP'T OF THE TREASURY (Feb. 25, 2022), <https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20220225> [<https://perma.cc/ER9N-HG5Q>]; see also *Frequently Asked Questions*, U.S. DEP'T OF THE TREASURY, <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/added/2022-02-02> [<https://perma.cc/2C8L-ZHQW>] (last visited Feb. 24, 2023).

77. *Issuance of Ethiopia Sanctions Regulations; Implementation of the Federal Civil Penalties Inflation Adjustment Act*, U.S. DEP'T OF THE TREASURY (Feb. 8, 2022), <https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20220208> [<https://perma.cc/AR67-AK5R>].

78. Ned Price, *Authorizing Specified Economic Activities in Non-Regime Held Areas of Northeast and Northwest Syria in Support of D-ISIS Efforts*, U.S. DEPT. OF STATE (May 12, 2022), <https://www.state.gov/authorizing-specified-economic-activities-in-non-regime-held-areas-of-northeast-and-northwest-syria-in-support-of-d-isis-efforts/> [<https://perma.cc/8UJLY-SPBW>].

79. *Id.*

80. Cuban Assets Control Regulations, 87 Fed. Reg. 35088 (June 9, 2022) (to be codified at 31 C.F.R. pt. 515).

81. *Id.*

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5. *Iran*

On September 23, 2022, OFAC issued Iran GL D-2.⁸² GL D-2 authorized a more expansive set of activities related to internet communication, including cloud-based software and services, to increase support for internet freedom in Iran by bringing U.S. sanctions guidance in line with the changes in modern technology since the issuance of Iran GL D-1.⁸³

6. *Venezuela*

On November 26, 2022, OFAC issued Venezuela GL 41, authorizing Chevron Corporation to resume limited natural resource extraction operations in Venezuela.⁸⁴ OFAC also issued Venezuela GL 40A, authorizing certain transactions involving the exportation or re-exportation of liquefied petroleum gas to Venezuela;⁸⁵ GL 8K, and transactions involving *Petróleos de Venezuela, S.A.* necessary for the limited maintenance of essential operations in Venezuela or the wind-down of operations in Venezuela for certain entities.⁸⁶

7. *Cyber-Related Sanctions*

On September 6, 2022, OFAC amended and reissued in their entirety the Cyber-Related Sanctions Regulations, which had initially been published in abbreviated form on December 31, 2015.⁸⁷

8. *Instant Payment Compliance Guidance*

On September 30, 2022, OFAC published its Sanctions Compliance Guidance for Instant Payment Systems.⁸⁸

82. *See Issuance of Iran General License D-2 and Related Frequently Asked Questions*, U.S. DEP'T OF THE TREASURY (Sept. 23, 2022), <https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20220923> [<https://perma.cc/E8UR-SFSK>].

83. Press Release, U.S. Dep't of the Treasury, U.S. Treasury Issues Iran General License D-2 to Increase Support for Internet Freedom (Sept. 23, 2022), <https://home.treasury.gov/news/press-releases/jy0974> [<https://perma.cc/XHB4-C4XK>].

84. *Treasury Issues Venezuela General License 41 Upon Resumption of Mexico City Talks*, U.S. DEP'T OF THE TREASURY (Nov. 26, 2022), <https://home.treasury.gov/news/press-releases/jy1127> [<https://perma.cc/LQ8W-7VT6>].

85. *Issuance of Venezuela-Related General License 40A*, U.S. DEP'T OF THE TREASURY (July 7, 2022), <https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20220707> [<https://perma.cc/EM6T-EU9Y>].

86. *Issuance of Venezuela-Related General Licenses and Frequently Asked Questions*, U.S. DEP'T OF THE TREASURY (Nov. 26, 2022), <https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20221126> [<https://perma.cc/9DT5-MVHT>].

87. Cyber-Related Sanctions Regulations, 31 C.F.R. § 578 (2022).

88. *Sanctions Compliance Guidance for Instant Payment System*, OFF. OF FOREIGN ASSETS CONTROL (Sept. 2022), https://home.treasury.gov/system/files/126/instant_payment_systems_compliance_guidance_brochure.pdf [<https://perma.cc/9WVF-TWT3>].

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IV. Notable Enforcement Cases

A. ITAR ENFORCEMENT

On January 21, 2022, DDTC concluded an administrative settlement with Torrey Pines Logic, Inc. (TPL) and Dr. Leonid B. Volfson.⁸⁹ In the proposed charging letter, DDTC alleged that TPL and Dr. Volfson attempted to export ITAR-controlled thermal imaging systems without authorization to various countries, including China and Lebanon, and to restricted-destination Russia.⁹⁰ DDTC further alleged that they engaged repeatedly in ITAR-controlled activities while ineligible and not registered, including some transactions involving Significant Military Equipment, and that they exported defense articles without authorization while a Commodity Jurisdiction request was pending.⁹¹ Under a consent agreement, TPL and Dr. Volfson agreed to a civil penalty of \$840,000, half of which was suspended on the condition that TPL and Dr. Volfson apply this amount to remedial compliance costs and refrain from participating in export-related activities for three years.⁹²

On August 5, 2022, DDTC concluded administrative proceedings against Ryan Adams, Marc Baier, and Dan Gericke.⁹³ DDTC alleged that they had violated ITAR § 127.1(a)(1) by providing ITAR-controlled electronic defense services and software to the United Arab Emirates (UAE) without proper authorization.⁹⁴ Each individual, under his separate consent

89. See *Consent Agreement in the Matter of Leonid Boris Volfson and Torrey Pines Logic, Inc.*, U.S. DEP'T OF STATE BUREAU OF POL.-MIL. AFFS. 1 (Jan. 21, 2022), https://www.pmdtc.state.gov/sys_attachment.do?sysparm_referring_url=Tear_off&view=true&sys_id=9a8529c31b5dcd90c6c3866ae54bcb32 [<https://perma.cc/BD83-AXR8>].

90. See *Proposed Charging Letter in the Matter of Leonid Boris Volfson and Torrey Pines Logic, Inc.*, U.S. DEP'T OF STATE BUREAU OF POL.-MIL. AFFS. 1, https://www.pmdtc.state.gov/sys_attachment.do?sysparm_referring_url=tear_off&view=true&sys_id=5285a9c31b5dcd90c6c3866ae54bcb1c [<https://perma.cc/C6A3-L2YA>] (last visited Feb. 24, 2023).

91. See *id.* at 1–2.

92. See *Consent Agreement in the Matter of Leonid Boris Volfson and Torrey Pines Logic, Inc.*, *supra* note 89, at 11–12.

93. *Order in the Matter of Ryan Adams*, U.S. DEP'T OF STATE BUREAU OF POL.-MIL. AFFS. (July 2022), https://www.pmdtc.state.gov/sys_attachment.do?sysparm_referring_url=tear_off&view=true&sys_id=42158c3e1b651d502dc36311f54bcbec [<https://perma.cc/AH4V-YQVT>]; *Order in the Matter of Marc Baier*, U.S. DEP'T OF STATE BUREAU OF POL.-MIL. AFFS. (July 7, 2022), https://www.pmdtc.state.gov/sys_attachment.do?sysparm_referring_url=tear_off&view=true&sys_id=52158c3e1b651d502dc36311f54bcbf2 [<https://perma.cc/C5D3-PRBD>]; *Order in the Matter of Daniel Gericke*, U.S. DEP'T OF STATE BUREAU OF POL.-MIL. AFFS. (Aug. 5, 2022), https://www.pmdtc.state.gov/sys_attachment.do?sysparm_referring_url=tear_off&view=true&sys_id=1615cc3e1b651d502dc36311f54bcb36 [<https://perma.cc/NH3C-ALQ2>].

94. See *Proposed Charging Letter in the Matter of Daniel Gericke*, U.S. DEP'T OF STATE BUREAU OF POL.-MIL. AFFS. 5, https://www.pmdtc.state.gov/sys_attachment.do?sysparm_referring_url=Tear_off&view=True&sys_id=BB9808c71be59d502dc36311f54bcb56 [<https://perma.cc/2TZZ-FJDA>] (last visited Feb. 25, 2023).

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agreement, was debarred for a period of three years.⁹⁵ The U.S. Department of Justice (DOJ) also agreed with each individual to a deferred prosecution agreement (DPA) in a related enforcement action.⁹⁶ In the DPA, Ryan Adams, Marc Baier, and Dan Gericke acknowledged criminal violations of the AECA and ITAR and agreed to cut all ties with the UAE, cooperate with the DOJ, and pay fines of \$600,000, \$750,000, and \$335,000, respectively.⁹⁷

B. EAR ENFORCEMENT

Since Russia's invasion of Ukraine in February 2022, the United States has increasingly used export controls on aircraft to apply pressure on Russian companies and individuals by prohibiting the export of aircraft to Russia or Belarus without U.S. export authorization.⁹⁸ BIS has used General Prohibition 10 in 15 C.F.R. § 736.2(b)(10) to sanction aircraft and their owners or operators who violate these U.S. export controls by prohibiting them from receiving any form of service both in the United States and abroad, which effectively grounds the aircraft.⁹⁹ The U.S. Department of the Treasury Financial Crimes Enforcement Network (FinCEN) has also issued a joint alert with BIS to financial institutions urging them to be vigilant against efforts to evade export controls implemented in connection with Russia's invasion of Ukraine.¹⁰⁰

^{95.} See *Consent Agreement in the Matter of Ryan Adams*, U.S. DEP'T OF STATE BUREAU OF POL.-MIL. AFFS. 2 (July 7, 2022), https://www.pmdtc.state.gov/sys_attachment.do?sysparm_referring_url=Tear_off&view=true&sys_id=39158c3e1b651d502dc36311f54bcbe9 [<https://perma.cc/HYE6-45QH>]; *Consent Agreement in the Matter of Marc Baier*, U.S. DEP'T OF STATE BUREAU OF POL.-MIL. AFFS. 2 (July 7, 2022), https://www.pmdtc.state.gov/sys_attachment.do?sysparm_referring_url=Tear_off&view=true&sys_id=42158c3e1b651d502dc36311f54bcbf0 [<https://perma.cc/M8LL-DGB4>]; *Consent Agreement in the Matter of Daniel Gericke*, U.S. DEP'T OF STATE BUREAU OF POL.-MIL. AFFS. 2 (Aug. 5, 2022), https://www.pmdtc.state.gov/sys_attachment.do?sysparm_referring_url=tear_off&view=true&sys_id=1615cc3e1b651d502dc36311f54bc34 [<https://perma.cc/4Q4P-PMAE>].

^{96.} See *Deferred Prosecution Agreement at 1, United States v. Baier*, 21-cr-577 (2021), <https://www.justice.gov/opa/press-release/file/1432606/download> [<https://perma.cc/HS88-TCUN>].

^{97.} See *id.* at 23.

^{98.} See *Resources on Export Controls Implemented in Response to Russia's Invasion of Ukraine*, U.S. DEP'T OF COM. BUREAU OF INDUS. & SEC., <https://www.bis.doc.gov/index.php/policy-guidance/country-guidance/russia-belarus> [<https://perma.cc/2YTE-ATYA>] (last updated Feb. 24, 2023); *Commerce Department Identifies Commercial and Private Aircraft Exported to Russia in Apparent Violation of U.S. Export Controls*, U.S. DEP'T OF COM. (Mar. 18, 2022), <https://www.commerce.gov/news/press-releases/2022/03/commerce-department-identifies-commercial-and-private-aircraft-exported> [<https://perma.cc/AZT4-SYFS>].

^{99.} See *BIS Issues Temporary Denial Order Against Fifth Russian Airline and Names Second Abramovich Aircraft Violating U.S. Export Controls*, U.S. DEP'T OF COM. BUREAU OF INDUS. & SEC. (May 20, 2022), <https://www.bis.doc.gov/index.php/documents/about-bis/newsroom/press-releases/2994-2022-05-20-press-release-bis-rossiya-tdo-and-list-update-final/file> [<https://perma.cc/JM9M-EPJT>].

^{100.} See *FinCEN and BIS Issue Joint Alert on Potential Russian and Belarusian Export Control Evasion Attempts*, U.S. DEP'T OF THE TREASURY FIN. CRIMES ENF'T NETWORK (June 28,

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By May 20, 2022, BIS had identified two aircraft owned by the Russian oligarch Roman Abramovich as likely in violation of U.S. export controls.¹⁰¹ On June 6, 2022, in the first action of its kind, BIS issued a Charging Letter against Abramovich for allegedly violating U.S. export controls involving flights of two of his private jets, which are of U.S. origin, to Russia without export licensing.¹⁰² Under the Charging Letter, Abramovich “reexported” the aircraft to Russia without the required BIS export license on three flights from the UAE and Turkey.¹⁰³ Abramovich faces potential penalties, including jail time, fines, and loss of export privileges.¹⁰⁴ The DOJ has also obtained warrants to seize the aircrafts at issue, which have a combined value of over \$400,000,000 and are subject to forfeiture.¹⁰⁵ BIS has taken similar action against PJSC LUKOIL (Lukoil), charging Lukoil with the unlicensed re-export of an aircraft from the UAE to Russia.¹⁰⁶ Lukoil also faces fines, loss of export privileges, and exclusion from practice before BIS.¹⁰⁷

On June 7, 2022, BIS imposed a Temporary Denial Order (TDO) on three apparently related U.S. companies—Quicksilver Manufacturing, Inc., Rapid Cut LLC, and U.S. Prototype, Inc.—while it investigates potential export control violations.¹⁰⁸ According to the TDO, Quicksilver and Rapid Cut, both 3D printing manufacturers, exported drawings from their

2022), <https://www.fincen.gov/sites/default/files/2022-06/FinCEN%20and%20BIS%20Joint%20Press%20Release%20508%20FINAL.pdf> [<https://perma.cc/YM5T-P2FJ>].

101. See *BIS Issues Temporary Denial Order Against Fifth Russian Airline and Names Second Abramovich Aircraft Violating U.S. Export Controls*, *supra* note 99.

102. See *Mr. Roman Abramovich Charging Letter*, U.S. DEP’T OF COM. BUREAU OF INDUS. & SEC. (June 6, 2022), <https://efoia.bis.doc.gov/index.php/documents/export-violations/export-violations-2022/1371-2022-06-06-charging-letter-roman-abramovich-aircraft-violations/file> [<https://perma.cc/2MX2-Z5KQ>].

103. See *id.*

104. See *BIS Issues Temporary Denial Order Against Fifth Russian Airline and Names Second Abramovich Aircraft Violating U.S. Export Controls*, *supra* note 99.

105. See Press Release, U.S. Dep’t of Justice, United States Obtains Warrant for Seizure of Two Airplanes of Russian Oligarch Roman Abramovich Worth Over \$400 Million (June 6, 2022), <https://www.justice.gov/usao-sdny/pr/united-states-obtains-warrant-seizure-two-airplanes-russian-oligarch-roman-abramovich> [<https://perma.cc/CV5N-25HU>].

106. Affidavit in Support of Seizure Warrant In Rem Pursuant to 50 U.S.C. § 4820 and 18 U.S.C § 981 at 14, *U.S. v. A Boeing 7878 Dreamliner Aircraft, Bearing Tail No. P4-BDL and Mfr. Serial No. 6417, 22 MAG 4860* (June 6, 2022), <https://www.justice.gov/usao-sdny/press-release/file/1510781/download> [<https://perma.cc/6RCY-N8W4>].

107. See *BIS Takes Enforcement Actions Against Three Additional Russian Airlines Operating Aircraft in Violation of U.S. Export Controls and Updating Lists of Aircraft Operating in Apparent Violation of U.S. Law*, U.S. DEP’T OF COM. BUREAU OF INDUS. & SEC. (June 24, 2022), <https://www.bis.doc.gov/index.php/documents/about-bis/newsroom/press-releases/3038-2022-06-24-bis-press-release-nordwind-pobeda-s7-temporary-denial-orders/file> [<https://perma.cc/5HAY-A6GQ>].

108. See *Order Temporarily Denying Export Privileges in the Matter of Quicksilver Manufacturing, Inc., Rapid Cut LLC, and US Prototype, Inc.*, U.S. DEP’T OF COM. BUREAU OF INDUS. & SEC. 1–2 (June 7, 2022), <https://efoia.bis.doc.gov/index.php/documents/export-violations/export-violations-2022/1372-quicksilver-tdo-final-6-7-2022/file> [<https://perma.cc/AVX4-543E>].

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customers to China for printing without an export license.¹⁰⁹ The drawings related to controlled satellite and rocket technology, which were subject to a presumption of denial for export authorization for China, and technical data for military submersible vessels.¹¹⁰ The TDO suspended the companies' ability to participate in any export transactions—including receiving exports or benefiting from export transactions—for a renewable period of 180 days, currently set to expire on December 4, 2022.¹¹¹ BIS urges customers of the companies to review whether they had provided any controlled technology or technical data to the companies.¹¹²

C. OFAC AND DOJ ENFORCEMENT

On January 11, 2022, Sojitz (Hong Kong) Limited (Sojitz HK), a trading and financing company based in Hong Kong, entered into a settlement agreement with OFAC, agreeing to a civil penalty of \$5,228,298 for apparent Iran sanctions violations.¹¹³ OFAC alleges that, from August 2016 through May 2018, despite repeated and explicit instructions prohibiting U.S. dollar payments in connection with Iran-related business transactions, certain Sojitz HK employees violated company policy by purchasing approximately 64,000 tons of high density polyethylene resin (HDPE) of Iranian origin from a supplier in Thailand for resale to buyers in China and took steps to conceal the HDPE's Iranian origin.¹¹⁴ As a result, Sojitz HK made sixty U.S. dollar payments, totaling \$75,603,411, through multiple U.S. financial institutions in connection with the HDPE of Iranian origin.¹¹⁵ OFAC provided mitigating credit for voluntary disclosure of the apparent violations, a thorough investigation by the company, termination of the rogue employees, and enhanced sanctions compliance procedures.¹¹⁶

On April 25, 2022, OFAC announced a \$6,131,855 settlement with Toll Holdings Limited (Toll), an Australian international freight company, for nearly three thousand apparent violations of multiple OFAC sanctions programs.¹¹⁷ OFAC alleged that, between approximately January 2013 and

109. *See id.* at 3.

110. *See id.* at 4–7.

111. *See Temporary Denial Order Issued for Illegal Export of Satellite, Rocket and Defense Technology to China*, U.S. DEP'T OF COM. BUREAU OF INDUS. & SEC (June 8, 2022), <https://www.bis.doc.gov/index.php/documents/about-bis/newsroom/press-releases/3023-2022-06-08-bis-press-release-quick-silver-rapid-cut-and-us-prototype-tdo/file> [<https://perma.cc/SD52-N2FQ>].

112. *See id.*

113. Press Release, U.S. Dep't of the Treasury, OFAC Settles with Sojitz (Hong Kong) Limited for \$5,228,298 Related to Apparent Violations of the Iranian Transactions and Sanctions Regulations (Jan. 11, 2022), https://home.treasury.gov/system/files/126/20220111_sojitz.pdf [<https://perma.cc/Y2U4-MGXP>].

114. *See id.* at 1.

115. *Id.*

116. *See id.* at 2.

117. Press Release, U.S. Dep't of the Treasury, OFAC Settles with Toll Holdings Limited for \$6,131,855 Related to Apparent Violations of Multiple Sanctions Programs (Apr. 25, 2022),

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February 2019, Toll paid or received 2,958 payments in connection with shipments involving North Korea, Iran, and Syria, as well as property of entities on the SDN list.¹¹⁸ The payments were processed through U.S. banks, one of which repeatedly raised concerns about payments involving sanctioned parties and required Toll to provide documentation and confirm that its payments did not violate sanctions regulations.¹¹⁹ Eventually, in February 2017, Toll introduced “hard controls” that disabled the location codes for sanctioned countries, preventing shipments to or from sanctioned countries, but not before 2,853 illicit payments were made.¹²⁰ OFAC alleged that these violations were, in part, due to Toll’s rapid growth without corresponding growth in its compliance resources.¹²¹

On May 27, 2022, OFAC announced a settlement with Banco Popular de Puerto Rico (BPPR) for \$255,937.86 for apparent Venezuela sanctions violations.¹²² Despite the issuance of EO 13884 on August 5, 2019, blocking interests in the property of the Government of Venezuela, BPPR failed to identify and block the accounts of Venezuelan government officials until over a year later.¹²³ BPPR’s delay in identifying these customers for fourteen months following the issuance of EO 13884 resulted in 337 apparent sanctions violations; however, due to BPPR’s self-disclosure, internal review, and improvements to its compliance program, the apparent violations were non-egregious.¹²⁴

On September 30, 2022, Tango Card, Inc. (Tango Card), a digital “reward” supplier based in Seattle, Washington, entered into a settlement agreement with OFAC for apparent violations of multiple sanctions programs.¹²⁵ After being alerted by a client in February 2021 that several reward recipient email addresses were associated with sanctioned jurisdictions, Tango Card conducted an investigation and discovered that, between September 2016 and September 2021, it had transmitted 27,720 gift and debit cards, totaling \$386,828.65, to individuals with domains associated with Cuba, Iran, Syria, North Korea, and the Crimea region of

https://home.treasury.gov/system/files/126/20220425_toll.pdf [<https://perma.cc/WQ2P-M3Q6>].

118. *See id.* at 1.

119. *See id.* at 2.

120. *See id.* at 3.

121. *See id.* at 2.

122. *See* Press Release, U.S. Dep’t of the Treasury, OFAC Settles With Banco Popular de Puerto Rico for \$255,937.86 Related to Apparent Violations of the Venezuela Sanctions Regulations (May 27, 2022), https://home.treasury.gov/system/files/126/20220527_bppr.pdf [<https://perma.cc/8NZW-C6M3>].

123. *See id.* at 1.

124. *See id.* at 2.

125. *See* Press Release, U.S. Dep’t of the Treasury, OFAC Settles with Tango Card, Inc. for \$116,048.60 Related to Apparent Violations of Multiple Sanctions Programs (Sept. 30, 2022), https://home.treasury.gov/system/files/126/20220930_tango_card.pdf [<https://perma.cc/6U9S-YPGX>].

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Ukraine.¹²⁶ While Tango Card used geolocation and screening mechanisms for senders of rewards, that is, its direct customers, it did not use those controls for recipients of rewards.¹²⁷ Following the discovery of the apparent violations, Tango Card implemented a number of remedial measures, including blocking domains associated with sanctioned jurisdictions, hiring additional compliance staff and conducting additional training, acquiring additional screening tools, and implementing regular “lookback” reports to identify recipients located in sanctioned jurisdictions.¹²⁸ The statutory maximum civil monetary penalty for these apparent violations was over \$9,000,000,000, but OFAC determined that, due to Tango Card’s additional compliance steps and Tango Card’s voluntary self-disclosure, the apparent violations were non-egregious, and they settled on a \$116,048.60 penalty.¹²⁹

On October 11, 2022, OFAC announced a settlement with Bittrex, an online virtual currency exchange company based in Washington.¹³⁰ Gaps in Bittrex’s sanctions compliance procedures allowed persons located in the Crimea region of Ukraine, Cuba, Iran, Sudan, and Syria to use Bittrex’s platform to perform \$263,451,600.13 worth of virtual currency transactions.¹³¹ Bittrex had no internal controls in place to screen customer IP addresses for terms associated with sanctioned jurisdictions; in February 2016, Bittrex retained a third-party vendor for sanctions screening purposes, but the screening was incomplete and did not scrutinize whether customers were in a sanctioned jurisdiction.¹³² The statutory maximum civil monetary penalty was over \$35,000,000,000, but, because Bittrex was a small and new company at the time and took steps to remedy its compliance program promptly after learning about the incomplete screening, OFAC accepted a \$24,280,829.20 settlement.¹³³

V. Canadian Export Control and Economic Sanctions Developments

In 2022, Canadian economic sanctions efforts were centered primarily around Russia’s illegal invasion of Ukraine. Canada implemented more than thirty amendments to the Special Economic Measures (Russia) Regulations

126. *See id.* at 1.

127. *See id.*

128. *See id.* at 2.

129. *See id.*

130. *See* Press Release, U.S. Dep’t of the Treasury, OFAC Settles with Bittrex, Inc. for \$24,280,829.20 Related to Apparent Violations of Multiple Sanctions Programs (Oct. 11, 2022), https://home.treasury.gov/system/files/126/20221011_bittrex.pdf [<https://perma.cc/G2B5-G35A>].

131. *See id.* at 1.

132. *See id.* at 2.

133. *See id.*

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(SEMA Russia Regulations),¹³⁴ which have become the most impactful sanctions program in modern Canadian history.

A. CANADIAN COURT RULES ON THE ISSUE OF CONTROL

For many years, companies have struggled with the issue of whether Canadian economic sanctions prohibit them from engaging in dealings involving entities that are owned or controlled by persons designated or listed by the Canadian government. On October 25, 2022, the Court of King’s Bench of Alberta issued a decision in *Angophora Holdings Limited v. Ovsyankin*,¹³⁵ which attempts to tackle this “control question.” The Court adopted a facts-based analysis to determine functional control, but it considered formal control structures, including the extent to which the entity is held (in terms of percentage ownership interest) by the listed person, as a factor to be considered in that assessment.¹³⁶ The Court concluded that a listed person’s fifty percent indirect ownership and involvement in management and operations of the controlled entity disclosed a “strong prima facie case” that the entity was controlled by or acting on behalf of the listed person, and, therefore, dealings with such an entity would risk violating sanctions.¹³⁷

B. RUSSIA, THE MAIN SANCTIONS TARGET OF 2022

Canada imposed its initial round of 2022 sanctions against Russia on February 24, 2022, immediately after Russia signed a decree recognizing the independence and sovereignty of the Donetsk and Luhansk regions.¹³⁸ The initial sanctions package imposed a broad dealings prohibition on 351 members of the Russian Duma, major Russian banks, state-owned companies, political and financial elites and their families, and President Vladimir Putin.¹³⁹ Multiple rounds of additional measures were implemented in the weeks and months that followed, creating one of Canada’s most aggressive sanctions programs.

The SEMA Russia Regulations encompass a very broad set of measures. There is a broad asset freeze and dealings prohibition with respect to more than 1,100 individuals and 260 entities listed under Schedule 1.¹⁴⁰ The list encompasses members of Putin’s family, key government officials, including

134. Special Economic Measures (Russia) Regulations, SOR/2014-58 (Can.).

135. *Angophora Holdings Ltd. v. Ovsyankin*, 2022 ABKB 711, 714 (Can.).

136. *See id.* at 715–16.

137. *See id.* at 716.

138. Special Economic Measures (Russia) Regulations, SOR/2014-58 (Can.); Helen Regan et al., *The Latest on the Ukraine-Russia Crisis*, CNN (Feb. 22, 2022), https://www.cnn.com/europe/live-news/ukraine-russia-news-02-21-22/h_fcf8c95f9e69b343087651747ab9acd1 [https://perma.cc/F8BZ-4ZF3].

139. Andy Blatchford, *Canada G-7 to Launch More Sanctions Against Russia’s ‘Failing Kleptocracy’*, POLITICO (Mar. 1, 2022), <https://www.politico.com/news/2022/03/01/canada-g-7-russia-ukraine-sanctions-00012938> [https://perma.cc/S3E2-XWSS].

140. Special Economic Measures (Russia) Regulations, SOR/2014-58 (Can.).

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ministers and members of the Russian Federal Assembly, oligarchs, and their close associates and family members, energy sector executives, misinformation agents, and various state bodies. In a number of cases, Canada has listed entities and individuals that have not been listed, including those under the sanctions regimes of the United States, the United Kingdom, or the European Union. Further, the Canadian measures do not yet include any general licenses or permits or broad exemptions that are often available in these other jurisdictions.

Canada has imposed bans on supplying a broad range of goods to Russia or persons in Russia (some of these bans include prohibitions on any related financial, technical, or other services), including certain luxury items, certain goods and technologies (including software) that could be used in the manufacturing of weapons, and goods and technologies as set out in the Restricted Goods and Technologies List prepared by Global Affairs Canada.¹⁴¹ This List includes a broad range of items in the areas of electronics, computers, telecommunications, sensors and lasers, navigation and avionics, marine, aerospace, and transportation.¹⁴²

In addition, persons in Canada and Canadians outside Canada are prohibited from providing to Russia or any person in Russia a wide range of services in relation to certain listed industries.¹⁴³ The affected industries include oil, gas, mining, the manufacturing of chemicals and chemical products, transport and transport via pipelines, the manufacturing of basic metals, fabricated metal products, machinery and equipment, computers, electronic and optical products, electrical equipment, motor vehicles, and transport equipment.¹⁴⁴ Prohibited services include, among others, accounting, management consulting, engineering, scientific and technical consulting, services incidental to the manufacturing of metal products and machinery and equipment, and advertising.¹⁴⁵ Notably, the scope of prohibited services is much broader than that of the U.S., UK, and EU sanctions regimes.

There are restrictions in place relating to the provision of insurance and reinsurance to or for the benefit of Russia or any person in Russia in relation to aircraft, aviation, and aerospace products and related technology.¹⁴⁶ Transport Canada implemented a no-fly zone for Russian aircraft in

141. *Restricted Goods and Technologies List*, GOV'T OF CAN. (May 10, 2022), https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/goods_technologies-marchandises_technologies.aspx?lang=Eng [https://perma.cc/M8C3-U5ZC].

142. *See id.*

143. There are thirty categories of services and fifteen categories of industries set out in Parts 1 and 2, respectively, of Schedule 8 to the SEMA Russia Regulations. *Supra* note 140.

144. *Supra* note 134.

145. *Id.*

146. *Government of Canada Prohibits Russian Aircraft to Enter Canadian Airspace*, GOV'T OF CAN. (Feb. 27, 2022), <https://www.canada.ca/en/transport-canada/news/2022/02/government-of-canada-prohibits-russian-aircraft-to-enter-canadian-airspace.html> [https://perma.cc/7ZS9-2LCK].

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Canadian airspace. Russian ships or ships related to listed persons are prohibited from docking in Canada or passing through Canada.¹⁴⁷

C. UKRAINE, IN CONNECTION WITH THE RUSSIAN INVASION

To respond to the Russian invasion of Ukraine and the violations of Ukraine's sovereignty and territorial integrity, Canada expanded the list of Ukrainian territories that are subject to broad sourcing and supply prohibitions in 2022.¹⁴⁸ The initial prohibitions imposed on the Crimea region of Ukraine in 2014 were supplemented in 2022 with prohibitions on dealings with four other regions: the DNR and LNR and the areas of the Kherson and Zaporizhzhia oblasts of Ukraine that are illegally occupied by Russia.¹⁴⁹

D. BELARUS, FOR AIDING AND ABETTING THE RUSSIAN INVASION OF UKRAINE

During 2022, Canada targeted Belarus with sanctions, mainly in connection with its involvement in the Russian invasion of Ukraine, targeting Belarusian government and financial elites, their family members and associates, defense officials, and entities involved in Belarus' financial, potash, energy, tobacco, and defense sectors.¹⁵⁰ Canada has also prohibited the provision of all insurance, reinsurance, and underwriting services for aircraft, aviation, and aerospace products owned, controlled, or operated by Belarusians; the export to Belarus of all items on the Restricted Goods and Technologies List;¹⁵¹ the export of certain advanced technologies that could be used in the manufacturing of weapons; and the export and import of certain luxury goods to or from Belarus or any person in Belarus.¹⁵²

E. EXPANSION OF EXISTING SANCTIONS MEASURES AGAINST IRAN AND MYANMAR

1. *Iran*

Canada implemented five rounds of sanctions on Iran throughout October and November 2022, specifically listing the Morality Police, senior Iranian officials, and prominent entities that directly implement repressive

147. *Id.*; *Government of Canada Prohibits Russian Ships and Fishing Vessels from Entering Canadian Ports and Internal Waters*, GOV'T OF CAN. (Mar. 1, 2022), <https://www.canada.ca/en/transport-canada/news/2022/03/government-of-canada-prohibits-russian-ships-and-fishing-vessels-from-entering-canadian-ports-and-internal-waters.html> [https://perma.cc/HFQ6-ZHSP].

148. Special Economic Measures (Ukraine) Regulations, SOR/2014-60 (Can.).

149. *See id.*

150. *Canadian Sanctions Related to Belarus*, GOV'T OF CANADA (Jan. 18, 2023), https://www.international.gc.ca/world-monde/international_relations-reactions_internationales/sanctions/belarus.aspx?lang=eng [https://perma.cc/HB97-4ASQ].

151. *Restricted Goods and Technologies List*, *supra* note 141.

152. Special Economic Measures (Belarus) Regulations, SOR/2020-214 (Can.).

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measures, violate human rights, and spread the Iranian regime's propaganda and misinformation.¹⁵³ These latest rounds are the first significant changes to Canada's controls over trade and investment with Iran since sanctions had been significantly relaxed in 2016.¹⁵⁴

On November 14, 2022, Canada announced that it designated Iran as a regime that has engaged in terrorism and systematic and gross human rights violations.¹⁵⁵ This means that tens of thousands of senior members of the Iranian regime, including many members of the Islamic Revolutionary Guard Corps, are now inadmissible to Canada under the Immigration and Refugee Protection Act.¹⁵⁶

2. *Myanmar*

In February and May 2021, Canada had listed several Myanmar individuals and entities under the Special Economic Measures Act¹⁵⁷ (SEMA).¹⁵⁸ These sanctions were expanded in 2022 by adding further key senior military and military-appointed officials and their family members, as well as military, defense, and affiliated commercial entities to the sanctions list.¹⁵⁹

F. NEW SANCTIONS AGAINST HAITI

In November 2022, Canada imposed sanctions on Haiti under SEMA and the United Nations Act.¹⁶⁰ The sanctions measures impose dealings prohibitions, asset freezes, travel bans on listed persons, and an arms embargo.¹⁶¹

153. Special Economic Measures (Iran) Regulations, SOR/2010-165 (Can.).

154. *Canadian Sanctions Related to Iran*, GOV'T OF CAN. (Feb. 27, 2022), https://www.international.gc.ca/world-monde/international_relations-reactions_internationales/sanctions/iran.aspx?lang=eng [https://perma.cc/39SY-JBSN].

155. *Senior Officials of the Iranian Government Officially Banned From Canada*, GOV'T OF CAN. (Nov. 14, 2022), <https://www.canada.ca/en/border-services-agency/news/2022/11/senior-officials-of-the-iranian-government-officially-banned-from-canada.html> [https://perma.cc/2VQU-SECD].

156. Immigration and Refugee Protection Act, S.C. 2001, c 27 (Can.).

157. *Canadian Sanctions Related to Myanmar*, GOV'T OF CAN. (Jan. 31, 2023), https://www.international.gc.ca/world-monde/international_relations-reactions_internationales/sanctions/myanmar.aspx?lang=eng [https://perma.cc/2KQF-HVBS]; Special Economic Measures Act, S.C. 1992, c 17 (Can.).

158. Special Economic Measures (Burma) Regulations, SOR/2021-18 (Can.); Regulations Amending the Special Economic Measures (Burma) Regulations, SOR/2021-106 (Can.).

159. Special Economic Measures (Burma) Regulations, SOR/2007-285 (Can.).

160. Regulations Amending the Special Economic Measures (Haiti) Regulations, SOR/2022-231 (Can.); United Nations Act, R.S.C. 1985, c. U-2.

161. Regulations Amending the Special Economic Measures (Haiti) Regulations, SOR/2022-231 (Can.).

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International Animal Law

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This Article reviews significant international legal developments made in the area of animal law and policy in 2022.

I. Introduction

In October 2022, the Union Internationale des Avocats (UIA), an international association of lawyers, approved the formation of an Animal Law Commission Working Group.¹ The addition of a working group to the UIA was an important step in advancing animal law's recognition and relevance on the global stage. In 2022, international animal law continued to be a dynamic and growing field.

Many noteworthy legal events in animal law occurred over the past year. The following survey provides a snapshot of several such events that reflect global trends. First, we explain how a Brazilian judge held a city accountable for failing to enforce animal cruelty laws. Then, we discuss how the U.S. government dealt with the abuse of beagles bred for scientific research. Additionally, we provide an update on the litigation to recognize nonhuman animals as rightsholders, an analysis of a groundbreaking United Nations resolution, and details on New Zealand's ban on live exports by sea.

II. Brazilian High Court Holds Municipality Responsible for Failing to Address Animal Neglect & Environmental Damage

The Brazilian Constitution provides that citizens have the right to an ecologically balanced environment and prohibits animal cruelty as a part of

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1. *UIA Approves Animal Law Commission Working Group*, INT'L ASS'N OF LAWS. (Dec. 14, 2022), <https://www.uianet.org/en/news/uia-approves-animal-law-commission-working-group> [<https://perma.cc/N2ZQ-R4WG>].

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ensuring the effectiveness of that right.² What happens when a municipality plays a role in animal mistreatment? The Brazilian Superior Court of Justice recently answered this question.³

In 2012, after receiving a complaint from a veterinarian, the Public Attorney's Office of the State of São Paulo launched an investigation into allegations of neglected animals⁴ on land within the city of Guarulhos.⁵ The authorities discovered an alarming situation: a local resident who had been illegally occupying the land for six years was housing 107 dogs in poor conditions in an unlicensed kennel.⁶ Although most of the dogs did not have serious injuries or diseases, the authorities found that they had not been receiving adequate veterinary care and were not fully vaccinated.⁷ The resident and the São Paulo Public Attorney's Office reached an agreement requiring the resident to leave the property and provide proof that she had transferred the dogs to private homes or for placement in adoption programs.⁸

During a 2016 inspection to confirm that the resident had complied with the prior agreement, the Guarulhos authorities found that the resident had

2. CONSTITUIÇÃO FEDERAL [C.F.] [Constitution] art. 225 (Braz.).

3. The Brazilian Superior Court of Justice is the highest appellate court in Brazil for non-constitutional questions of federal law. S.T.J.-T2, Agravo em Recurso Especial No. 2.024.982-SP, Relator: Ministro Og Fernandes, 14.06.2022, Diário da Justiça Eletrônico [D.J.e.] 24.06.2022 (Braz.), https://storage.googleapis.com/jus-jurisprudencia/STJ/attachments/STJ_ARESP_2024982_1e7fa.pdf?X-Goog-Algorithm=GOOG4-RSA-SHA256&X-Goog-Credential=Calendar-api%40jusbrasil-155317.iam.gserviceaccount.com%2F20230407%2Fauto%2Fstorage%2Fgoog4_request&X-Goog-Date=20230407T233448Z&X-Goog-Expires=600&X-Goog-SignedHeaders=Host&X-Goog-Signature=8c73d67c940c15d3b666319e0cabbb796c6b81d4c57f78451cbe1d2741a6319ed4a8f5afc4ab36c6aaffbc4c1c2f767d92fba926c0c75094d68a6717c89dd1dd44e2b567cd8c94ae39dab38baa5feb0d36cc3acb09ebb195c0f58c6dd113cc2408f5d9cb6ee3423e530937cb9ea26678b27a3f12ecb33a5ff113b7256ba34ddabd3554dd715bb45357c44c00d8289c313184398eb0eb89333f8d6cff2007afc81f695e53b40c045dbfdd77ef7ebb52c8b9c5cd039ecf3d58964b686092ca11548f3c7fea764b1b39723063a99d153bd8c8bc3886cc7879cdce5f1630afc607ff884845742ac6a6bfb89977cad4cf6b5592149f317d5602f48b3be17362f9f4 [https://perma.cc/XQ9R-2S3C].

4. *Id.* at 4.

5. Guarulhos is a city with almost 1.5 million inhabitants located in the metropolitan area of São Paulo, the largest city in Latin America. See Amy Tikkanen, *Guarulhos, Brazil*, ENCYCLOPEDIA BRITANNICA (Aug. 13, 2012), <https://www.britannica.com/place/Guarulhos> [https://perma.cc/N3UU-9KGY].

6. The court decisions refer to the establishment using the Portuguese word “canil,” which translates to “kennel” in English. It is not clear from the decisions whether the resident was running a commercial operation (for example, breeding and selling dogs or receiving payment to house owned dogs). The court decisions do note the resident's statement that she often provided shelter to abandoned animals. To the extent that was true, in English we could also refer to the site as a failed shelter or rescue. See S.T.J.-T2, Agravo em Recurso Especial No. 2.024.982-SP, Relator: Ministro Og Fernandes, 14.06.2022, 4, Diário da Justiça Eletrônico [D.J.e.] 24.06.2022 (Braz.).

7. T.J.S.P.-1, Ação Civil Pública No. 1022048-16.2018.8.26.0224, Juiz de Direito: Rodrigo Tellini de Aguirre Camargo, 27.07.2020 (Braz.).

8. See *id.*

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vacated the property but had reestablished the unlicensed kennel on another area of public land within the city of Guarulhos.⁹ Upon further investigation, the São Paulo Public Attorney's Office found that animal waste from the kennel had contaminated the soil of this new area.¹⁰ Moreover, the Office found that the city of Guarulhos had failed to take adequate action in the intervening years, even though city representatives had been aware that the kennel was operating without a license.¹¹ On this basis, the Public Attorney's Office filed a public civil action against the city of Guarulhos, the Urban Housing Development Company of the State of São Paulo, and the resident.¹² A public civil action is a civil legal proceeding used to address moral or material damages to collective goods and rights such as damages to the environment, consumers, goods and rights of artistic value, or honor and dignity of racial groups.¹³

The lower court banned the resident from sheltering new animals in the unlicensed kennel and ordered her to relinquish the dogs in her possession.¹⁴ It also ordered the city of Guarulhos to house the animals in an appropriate place, providing them with necessary veterinary care with the aim of making them available for adoption, or to transfer them to private adoption programs.¹⁵ The court ordered the São Paulo Urban Housing Development Company, which had been named as a defendant because it owned the land at issue, to restore the area to its prior state and to inspect it regularly to prevent a recurrence.¹⁶ The city appealed the decision, arguing that the resident had committed the underlying acts and that the city had no responsibility.¹⁷ The Court of Appeals gave the city more time to comply with the order but otherwise upheld the lower court's decision.¹⁸

The city again appealed, and the Superior Court of Justice agreed to hear the case.¹⁹ In its decision, the Superior Court disagreed with the city's position that it bore no responsibility:

According to the jurisprudence of this Court, environmental protection is the duty of all spheres of government, in light of the principle of

9. *See id.*

10. *See id.*

11. *See id.*

12. *See id.*

13. Decreto No. 7.347, de 24 de Julho de 1985, Diário Oficial da União [D.O.U.] de 25.07.1985 (Braz.).

14. *See Page 3753 of Notebook 4 – Judicial – 1st Instance – Interior – Part I of the Court of Justice of São Paulo of July 29, 2020*, JUSTICA ONLINE, <https://tjsp.justica.online/tribunal-de-justica-de-sao-paulo/caderno-4---judicial---1a-instancia---interior---parte-i/2020/Julho/29/3753> [https://perma.cc/2C6Z-7M54] (last visited Apr. 7, 2023).

15. *See id.*

16. *See id.*

17. T.J.S.P.-1, Apelação Cível No. 1022048-16.2018.8.26.0224, Relator: Marcelo Martins Berthe, 15.07.2021 (Braz.).

18. *See id.*

19. *See S.T.J.-T2, Agravo em Recurso Especial No. 2.024.982-SP, Relator: Ministro Og Fernandes, 14.06.2022, [D.J.e.] 24.06.2022 (Braz.).*

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cooperative environmental federalism consolidated in Complementary Law n. 140/2001. Failure to inspect and mitigate damages leads to the judicial imposition of positive obligations on the administration in order to solve the problem whose temporal and quantitative extension reveals an affront to the ecological dimension of human dignity. . . .

Therefore, there is no need to talk about the ineligibility of the municipality to be a defendant when, aware of the facts for 13 years, it failed to take effective measures in response, penalizing animals submitted to the “shelter,” which cannot even be tolerated, especially in the face of the ecological dimension of human dignity, already recognized by this court.²⁰

Thus, the Superior Court affirmed that government agencies can be accountable if they are aware of and fail to address significant and prolonged acts of animal cruelty and environmental damage.²¹ As recognized by the Superior Court of Justice, all levels of government in Brazil are jointly and severally responsible for environmental law enforcement, and animal cruelty—which is understood to be a harm to the environment—harms human dignity.²²

III. Envigo Beagles: Rescued from the Dual Horrors of Confined Breeding and Use in Laboratories

Docile, obedient, and human-trusting, beagles are the dog breed of choice for use in research and testing because of their size and personality.²³ Annually, nearly 60,000 beagles are used in research in the United States alone,²⁴ and some 200,000 dogs are used globally.²⁵ To meet this demand, thousands of beagles are bred in facilities that resemble factory farms.²⁶ Notably, no international standards regulate the use of animals in research

20. *Id.* ¶ 4, at 1-2.

21. *Id.* at 7-8.

22. *Id.*

23. *Which Animals are Used*, AMERICAN ANTI-VIVISECTION SOCIETY, <https://aavs.org/animals-science/animals-used/dogs/#:~:text=the%20most%20common%20breed%20of,using%20less%20space%20and%20money> [https://perma.cc/3CUR-N9HH] (last visited Oct. 29, 2022).

24. Maya Trabulsi, *Used, Reused or Euthanized: A Dog's Life in Animal Research*, KPBS (Aug. 12, 2022), <https://www.kpbs.org/news/local/2022/08/12/used-reused-euthanized-dogs-life-animal-research> [https://perma.cc/T6TP-DSKZ].

25. Jarrod Bailey, *Advances in Neuroscience Strengthen Ethical Opposition to Harmful Experiments on Dogs*, J. OF MED. ETHICS: BLOG (Aug. 2, 2017), <https://blogs.bmj.com/medical-ethics/2017/08/02/advances-in-neuroscience-strengthen-ethical-opposition-to-harmful-experiments-on-dogs/> [https://perma.cc/D3SN-J8HL].

26. See Jane Dalton & Claire Colley, *Footage of Beagles Bred for Lab Tests Show Puppies 'Stressed and Confined in Cages'*, INDEP. (June 5, 2022), <https://www.independent.co.uk/news/uk/home-news/beagles-cages-lab-test-breeding-stress-b2088402.html?r=27475> [https://perma.cc/C9MD-F3QK].

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or breeding; only domestic laws govern. In the United States, for example, the Department of Agriculture Animal and Plant Health Inspection Service (APHIS) enforces the Animal Welfare Act (AWA).²⁷ The AWA regulates breeders and research facilities but sets only minimal standards that arguably do not meet the most basic needs of the animals.²⁸ Breeders may keep dogs confined in stacked, all-wire cages that leave only six inches of space above the dog's head and in front of their nose.²⁹ Moreover, the dogs receive little to no exercise, socialization, or enrichment.³⁰ They may be left in extreme temperatures for up to four hours,³¹ and there are no limits on how frequently a dog may be bred.³² The breeders then sell the dogs to laboratories for research and testing.³³ The AWA provides that research protocols should minimize pain and distress where possible, but no research protocol may be altered, even if it causes severe pain and suffering to the animal.³⁴ Generally, the research facilities kill the dogs when they are no longer needed.³⁵

Beginning in July 2022, approximately 4,000 beagles were rescued from horrendous conditions at the Envigo breeding facility in Cumberland, Virginia.³⁶ From this facility, Envigo bred and sold beagles for research.³⁷ This rescue, the largest in the sixty-seven-year history of the Humane Society of the United States, raised awareness of the inhumane use of animals in research and testing.³⁸

Envigo RMS, a Class A licensee under the AWA, was cited for over sixty AWA violations between July 2021 and March 2022 but received no

27. *Animal Welfare Act*, U.S. DEP'T OF AGRIC. APHIS (Jan. 12, 2022), https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/sa_awa [<https://perma.cc/EVP8-8NGP>]; See also *Animal Welfare Act*, 7 U.S.C. §§ 2131–2160. Regulations implementing the AWA are codified in Title 9 of the Code of Federal Regulations. See 9 C.F.R.

28. *Federal Licensing and USDA Standards*, AM. SOC'Y FOR THE PREVENTION OF CRUELTY TO ANIMALS, <https://www.aspc.org/barred-from-love/laws-rules/federal-licensing-usda-standards> [<https://perma.cc/8TBD-2P5Q>].

29. U.S. DEP'T OF AGRIC. APHIS, ANIMAL CARE TECH NOTE: MINIMUM SPACE REQUIREMENTS FOR DOGS 1 (June 2022), https://www.aphis.usda.gov/animal_welfare/downloads/canine-care/minimum-space-requirements-for-dogs.pdf [<https://perma.cc/F2SN-X5N7>].

30. *Federal Licensing and USDA Standards*, *supra* note 28.

31. See 9 C.F.R. § 3.3(a).

32. *Id.*; see also *Federal Licensing and USDA Standards*, *supra* note 28.

33. Glenn Greenwald & Leighton Akio Woodhouse, *Bred to Suffer: Inside the Barbaric U.S. Industry of Dog Experimentation*, THE INTERCEPT (May 17, 2018), <https://theintercept.com/2018/05/17/inside-the-barbaric-u-s-industry-of-dog-experimentation/> [<https://perma.cc/63ED-JCJX>].

34. 7 U.S.C. § 2143(a)(3)(A)-(C).

35. Greenwald & Woodhouse, *supra* note 33.

36. Lizzie Johnson, *Profit, Pain, and Puppies: Inside the Rescue of Nearly 4,000 Beagles*, WASH. POST (Oct. 17, 2022), <https://www.washingtonpost.com/dc-md-va/2022/10/17/beagles-envigo-rescue-humane-society/> [<https://perma.cc/CHD9-LSLE>].

37. *Id.*

38. *Id.*

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sanctions and faced no consequences.³⁹ In March 2022 two Virginia Senators wrote to APHIS requesting information about the “repeated AWA violations [at Envigo and charging] . . . that APHIS did not use available enforcement tools, including fines, license suspension, and animal confiscation, to correct the ‘continued, horrific mistreatment’ of animals.”⁴⁰ Only after this, and nearly two months later, did the U.S. government file a lawsuit against Envigo.⁴¹ Among other things, the complaint alleged that dogs were kept in overcrowded conditions; incompatible dogs were housed together which resulted in dog fights; nursing mothers were deprived of food for forty-eight-hour periods and when food was offered it contained live insects; dogs with serious illnesses received no attention, resulting in over 300 puppies dying over seven months of “unknown causes” with many not receiving anesthesia before being euthanized; and gaps in the flooring of cages were large enough for puppies’ feet to fall through up to their shoulders.⁴² On May 21, Judge Moon issued a temporary restraining order, concluding “that Envigo is engaged in serious and ongoing violations of the Animal Welfare Act, and that an immediate temporary restraining order must issue to put a halt to such violations.”⁴³ In June, the court issued a preliminary injunction,⁴⁴ and the facility announced it would close.⁴⁵ On July 15, the parties entered into a Consent Decree that provided for the transfer of almost 4,000 beagles to rescue organizations, barred Envigo from any activity requiring an AWA license at the Cumberland facility, and resolved all civil claims against Envigo without barring any criminal prosecuting authority from filing charges.⁴⁶ On July 21, rescue groups began removing the beagles from these horrific conditions.⁴⁷

The conditions at Envigo are not uncommon. In June 2022, as Envigo announced it would close, animal advocates released footage of beagles bred for laboratories in the United Kingdom at MBR Acres, a facility in Cambridgeshire that breeds approximately 2,000 beagles annually for sale.⁴⁸

39. *U.S. v Envigo RMS, LLC*, No. 6:22-cv-00028, 2022 WL 1607840 (W.D. Va. May 21, 2022) (issuing a Temporary Restraining Order to Envigo) [hereinafter *TRO*].

40. Press Release, Mark R. Warner, Warner & Kaine Demand Immediate Action in Light of “Continued, Horrific Mistreatment” of Dogs and Puppies at Va. Facility (Mar. 31, 2022), <https://www.warner.senate.gov/public/index.cfm/2022/3/warner-kaine-demand-immediate-action-in-light-of-continued-horrific-mistreatment-of-dogs-and-puppies-at-va-facility> [<https://perma.cc/PCP5-Q4J6>].

41. *TRO*, 2022 WL 1607840.

42. *Id.* at *1, *6.

43. *Id.* at *1.

44. *U.S. v. Envigo RMS, LLC*, No. 6:22-cv-00028, 2022 WL 2195030, at *1 (W.D. Va. June 17, 2022).

45. GENEVIEVE K. CROFT, CONG. RSCH. SERV., R47179, *THE ANIMAL WELFARE ACT: BACKGROUND AND SELECTED ISSUES* 11 (2022).

46. Consent Decree at 2-5, *U.S. v. Envigo RMS, LLC*, 2022 WL 2195030 (W.D. Va. July 15, 2022) (No. 6:22-cv-00028).

47. *4,000 Beagles*, THE HUMANE SOC’Y, <https://www.humanesociety.org/4000beagles> [<https://perma.cc/99FJ-4MRU>] (last visited Apr. 3, 2023).

48. Dalton & Colley, *supra* note 26.

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The dogs are confined in wire cages, are extremely stressed, and engage in pathological repetitive behaviors.⁴⁹ These conditions are similar to those in pig factory farms.⁵⁰

The Envigo beagles, including Uno and Fin—the first and last dogs rescued⁵¹—were fortunate. However, thousands of beagles in other facilities world-wide continue to be bred for use in research.⁵² Many argue that most uses of animals in laboratories should cease given the availability of non-animal alternatives that are more humane and arguably more effective and efficient.⁵³ In the United Kingdom, sixty-seven percent of experiments on beagles involve the forced-feeding of chemicals for up to ninety days, with no pain relief or anesthetic; remarkably, these experiments are classified as only “mild suffering.”⁵⁴ The dogs are killed at the conclusion of the experiments.⁵⁵ This inhumane toxicity testing procedure fails to predict human responses seventy percent of the time.⁵⁶ Although in 2022 voters in Switzerland rejected a total ban on animal testing,⁵⁷ forty-two countries ban the sale of cosmetic products tested on animals.⁵⁸ In 2022, laws banning the sale of new animal-tested cosmetics took effect in Hawaii, Maryland, New Jersey, and Virginia.⁵⁹

A serious hurdle to moving to non-animal alternatives is that the law often requires animal tests on new drugs before approval.⁶⁰ In the U.K., all new drugs must be tested on two animals—a rodent and a non-rodent—before progressing to human trials.⁶¹ But the Food and Drug Administration (FDA) Modernization Act, unanimously approved by the U.S. Senate in September 2022, would end animal testing mandates and allow the use of

49. *Id.*

50. *Id.*

51. Johnson, *supra* note 36.

52. See *The Facts, HOUNDED: BAN THE USE OF DOGS IN ANIMAL TESTING*, <https://houndedcampaign.co.uk/the-facts> [<https://perma.cc/5AKC-U778>] (last visited Oct. 29, 2022).

53. See *id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Swiss Overwhelmingly Reject Ban on Animal Testing*, DW (Feb. 13, 2022), <https://www.dw.com/en/swiss-overwhelmingly-reject-ban-on-animal-testing/a-60759944> [<https://perma.cc/W5P5-M8LF>].

58. *Cosmetics Animal Testing FAQ*, THE HUMANE SOC’Y OF THE U.S., [https://www.humane.society.org/resources/cosmetics-animal-testing-faq#:~:text=AS%20of%20February%202022%2C%20eight,laws%20banning%20cosmetics%20animal%20testing%20\(last%20visited%20Oct.%202029,%202022\)](https://www.humane.society.org/resources/cosmetics-animal-testing-faq#:~:text=AS%20of%20February%202022%2C%20eight,laws%20banning%20cosmetics%20animal%20testing%20(last%20visited%20Oct.%202029,%202022)) [<https://perma.cc/78TM-SVT2>].

59. *It’s a Very Happy New Year for Animals in Hawaii, Maryland and Virginia!*, CRUELTY FREE INT’L (Jan. 1, 2022), <https://crueltyfreeinternational.org/latest-news-and-updates/its-very-happy-new-year-animals-hawaii-maryland-and-virginia> [<https://perma.cc/VNF9-E9S9>].

60. See Helen Prior, *Review of the Use of Two Species in Regulatory Toxicology Studies*, NAT’L CTR. FOR THE REPLACEMENT REFINEMENT & REDUCTION OF ANIMALS IN RSCH., (Sept. 2018), <https://www.nc3rs.org.uk/our-portfolio/review-use-two-species-regulatory-toxicology-studies> [<https://perma.cc/E9CW-XP44>].

61. *Id.*

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alternative methods to meet FDA requirements.⁶² Further, the Humane Research and Testing Act aims to accelerate the use of alternatives in science by providing additional funding for the research and development of animal replacements.⁶³ And the Humane and Existing Alternatives in Research and Testing Sciences Act expands the responsibilities of the National Institutes of Health to promote research methods that do not use animals.⁶⁴ These laws and others are needed globally to incentivize the development and use of non-animal alternatives to research and testing to put an end to the inhumane breeding and use of beagles—and all other animals—in laboratories.

IV. International Animal Rights Developments and Favorable Dissents

“Now is not the end. It is not even the beginning of the end. But it is, perhaps, the end of the beginning,”⁶⁵ so 2022 should be remembered in the fight for nonhuman animal rights. For the Nonhuman Rights Project (NhRP),⁶⁶ the year began in South America.⁶⁷

On January 27, 2022, the Constitutional Court of Ecuador issued a landmark ruling.⁶⁸ The underlying case was a habeas corpus action brought by Ana Beatriz Burbano Proaño on behalf of Estrellita, a chorongo monkey illegally kept by Ms. Proaño for eighteen years before being seized by Ecuadorian authorities.⁶⁹ During the lawsuit’s pendency, the NhRP and the Brooks McCormick Jr. Animal Law & Policy Program at Harvard Law

62. FDA Modernization Act of 2021, S. 2952, 117th Cong. (2021); *see also* *Passage of Senate Bill S. 5002, “FDA Modernization Act 2.0,” Relating to Animal Testing*, COVINGTON (Oct. 4, 2022), <https://www.cov.com/en/news-and-insights/insights/2022/10/passage-of-senate-bill-s-5002-fda-modernization-act-2-0-relating-to-animal-testing> [<https://perma.cc/T7N3-X8DG>].

63. Humane Research and Testing Act of 2021, H.R. 1744, 117th Cong. (2021).

64. Humane and Existing Alternatives in Research and Testing Sciences Act of 2021, H.R. 4104, 117th Cong. (2021).

65. Steven M. Wise, Founder & President, Nonhuman Rights Project, Inc., Remarks at a Rally Held Prior to a Hearing in the New York State Court of Appeals: The Struggle to Gain an Elephant’s Right to Bodily Liberty (May 18, 2022) (quoting Winston Churchill, Prime Minister of the U.K., Address at the Lord Mayor’s Luncheon at the Mansion House (Nov. 10, 1942)) (transcript *available at* <https://www.nonhumanrights.org/blog/struggle-to-gain-an-elephants-right-to-liberty/> [<https://perma.cc/DG6A-396S>]).

66. “The [NhRP] is the only civil rights organization in the United States dedicated solely to securing rights for nonhuman animals.” *A Unique and Vital Mission*, NONHUMAN RTS. PROJECT, <https://www.nonhumanrights.org/> [<https://perma.cc/FKY8-KHAF>] (last visited Oct. 7, 2022).

67. *See Constitutional Court of Ecuador Urged to Recognize Animals as Rightsholders*, NONHUMAN RTS. BLOG (Dec. 14, 2021), <https://www.nonhumanrights.org/blog/ecuador-animals-rightsholders/> [<https://perma.cc/BBZ2-A7Y8>].

68. *See generally* Final Judgment No. 253-20-JH/22, Corte Constitucional Del Ecuador [CC] [Constitutional Court of Ecuador] Jan. 27, 2022 [hereinafter *Estrellita Monkey Case*], translated in <https://animal.law.harvard.edu/wp-content/uploads/Final-Judgment-Estrellita-w-Translation-Certification.pdf> [<https://perma.cc/S9BT-RPEA>].

69. *Id.* 24-26, at 8-9.

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School (ALPP) filed a joint amicus curiae brief urging the Court to recognize nonhuman animals as rightsholders.⁷⁰ Specifically, the NhRP and ALPP urged the Court to decide that (1) nonhuman animals can be subjects of rights, (2) writs of habeas corpus can be appropriate for nonhuman animals, and (3) the rights of nature provision in Ecuador's Constitution⁷¹ protects nonhuman animals as subjects of rights.⁷² The Court was convinced: in a 7-2 decision relying heavily on the joint amicus brief, the Court found that the rights of nature include nonhuman animals.⁷³ The court added that habeas corpus could be an appropriate action for wild nonhuman animals,⁷⁴ although the writ did not apply to Estrellita because she had passed away prior to the resolution of the case.⁷⁵ With this ruling, the precedent has been set for extending constitutional protections to nonhuman animals under the rights of nature theory, which recognizes individual nonhuman animals as having protectable inherent value.⁷⁶

Six months later on June 14, the New York Court of Appeals issued its decision in a habeas corpus action brought by the NhRP, which sought to free an Asian elephant named Happy from her solitary confinement at the Bronx Zoo.⁷⁷ The case marked the first time in history that the highest court of any English speaking jurisdiction heard arguments for a habeas corpus petition brought on behalf of a nonhuman animal.⁷⁸ The Court ruled against Happy in a 5-2 decision, holding that the writ of habeas corpus, which safeguards the fundamental right to bodily liberty, does not apply to nonhuman animals.⁷⁹ However, Judges Rowan D. Wilson and Jenny Rivera issued powerful dissenting opinions.⁸⁰ Remarking on the availability of habeas corpus throughout history to challenge the unjust confinements of

70. See Brief for Stilt et al. as Amici Curiae Supporting Claimant ¶ 1.12, *Estrellita Monkey Case*, No.253-20-JH (CC Dec. 13, 2021) (Ecuador) [hereinafter Joint Amicus Brief], <https://animal.law.harvard.edu/wp-content/uploads/ENGLISH.-HLS-NhRP-amicus-curiae-Ecuador.pdf> [https://perma.cc/MU6R-P437].

71. "In September 2008, Ecuador became the first country in the world to recognize Rights of Nature in its constitution." *Rights of Nature FAQ*, INT'L JOINT COMM'N, <https://www.ijc.org/system/files/commentfiles/2019-10-Nicolette%20Slagle/FAQ.pdf> [https://perma.cc/NTK4-S7MG] (last visited Oct. 7, 2022).

72. Joint Amicus Brief, *supra* note 70, ¶ 2.1.

73. *Estrellita Monkey Case*, No. 253-20-JH/22, ¶ 181(I)-(II), at 55 (Ecuador).

74. *Id.* ¶ 173, at 53.

75. *Id.* ¶ 177, at 54. Had Estrellita been alive, the court would not have granted Ms. Proaño's petition because her home was "not a place with the necessary conditions for the integral maintenance of a wild animal," and would have evaluated whether it was in Estrellita's "best interest to stay at the eco zoo or to be transferred to another place." *Id.* ¶ 176, at 54.

76. See *id.* ¶ 77, at 26.

77. See *In re Nonhuman Rights Project, Inc. v. Breheny*, 197 N.E.3d 921, 923 (N.Y. June 14, 2022).

78. *New York Court of Appeals Agrees to Hear Landmark Elephant Rights Case*, NONHUMAN RIGHTS BLOG (May 4, 2021), <https://www.nonhumanrights.org/blog/appeal-granted-in-landmark-elephant-rights-case/> [https://perma.cc/763E-XAJZ].

79. *Brebeny*, 197 N.E.3d at 932.

80. *Id.* at 932-66 (Wilson, J., dissenting), 966-77 (Rivera, J., dissenting).

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humans with few or no rights, the dissenting judges reasoned that our knowledge about the extraordinary cognitive abilities and needs of elephants justifies extending the writ's protections to them.⁸¹ Like famous dissents that paved the way for recognizing fundamental rights for humans, Judge Wilson's and Judge Rivera's dissents may pave the way for recognizing fundamental rights in at least some nonhuman animals.⁸²

Notably, the dissents relied on international caselaw concerning animal rights.⁸³ In attacking the majority's finding that nonhuman animals cannot have rights, Judge Wilson noted that "many other countries have given animals rights."⁸⁴ He cited a decision by the Indian Supreme Court holding that the Indian Constitution's due process clause applies to all species, a decision by an Argentinian court granting a habeas corpus petition brought on behalf of a chimpanzee named Cecilia, and a decision by Pakistan's Islamabad High Court granting a writ of mandate petition brought on behalf of an elephant named Kaavan.⁸⁵

Judge Rivera began her dissent by quoting at length from Kaavan's case:

An animal undoubtedly is a sentient being. It has emotions and can feel pain or joy. By nature each species has its own natural habitat. They require distinct facilities and environments for their behavioural, social and physiological needs. This is how they have been created To separate an elephant from the herd and keep it in isolation is not what has been contemplated by nature. Like humans, animals also have natural rights which ought to be recognized. It is a right of each animal, a living being, to live in an environment that meets the latter's behavioral, social and physiological needs.⁸⁶

Judge Rivera went on to state that Happy's unnatural environment at the Bronx Zoo "does not allow her to live her life as she was meant to: as a self-determinative, autonomous elephant in the wild."⁸⁷ Judge Rivera further explained that Happy's captivity is not only "inherently unjust and inhumane," it is "an affront to a civilized society."⁸⁸ As an autonomous being, Happy should have the "right to live free of an involuntary captivity

81. *Id.* at 933 (Wilson, J., dissenting) (remarking that the majority recognizes "undisputed existence as 'an autonomous and extraordinarily cognitively complex being' and legal entitlement to 'dignity and respect.')." 968 (Rivera, J., dissenting) (concluding that if "humans without full rights and responsibilities under the law may invoke the writ to challenge an unjust denial of freedom, so too may any other autonomous being, regardless of species.").

82. See Jake Davis, *The Legal Fight to #FreeHappy and The Importance of Dissent*, NONHUMAN RTS. BLOG (July 7, 2022), <https://www.nonhumanrights.org/blog/freehappy-dissents/> [<https://perma.cc/8X7L-TLCS>].

83. See *Brebeny*, 197 N.E.3d at 946, n.10 (Wilson, J., dissenting).

84. *Id.* at 939, n.8 (Wilson, J., dissenting).

85. *Id.*

86. *Id.* at 966-67 (Rivera, J., dissenting) (alterations in original) (citation omitted).

87. *Id.* at 977 (Rivera, J., dissenting).

88. *Id.*

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imposed by humans, that serves no purpose other than to degrade life.”⁸⁹ Although Happy was not freed, the dissents affirm the possibility of recognizing nonhuman animal rights in the United States.⁹⁰ Both Happy’s case and Estrellita’s case demonstrate judges’ increased willingness to consider animals’ interests independent of human interests.⁹¹

The NhRP intends to use the momentum from this year to achieve even more moving forward. On July 26, 2022, the NhRP introduced its first federal legislative initiative alongside Representatives Adam Schiff (D-Calif.), Jared Huffman (D-Calif.), Suzan DelBene (D-Wash.), and Senator Dianne Feinstein (D-Calif.).⁹² In 2023, the NhRP has already filed an appellate habeas corpus petition in California’s Fifth District Court of Appeals on behalf of three elephants at the Fresno Zoo.⁹³ Upcoming internal plans also include filing an action in Colorado demanding freedom for elephants, and in a to-be-named jurisdiction, demanding freedom for a cetacean, among other cases. It also hopes to file suit in India on behalf of Shankar, a solitary African elephant held at the Delhi Zoo.⁹⁴

The Founder and President of the NhRP once wrote, “it should now be obvious that the ancient Great Wall that has for so long divided humans from every other animal is biased, irrational, unfair, and unjust. It is time to knock it down.”⁹⁵ The year of 2022 marks the end of the beginning of the knocking down of that wall.

V. Historic United Nations Resolution Highlights Nexus Between Animal Welfare and Environmental Sustainability

In early March 2022, the United Nations Environment Assembly (UNEA) took an extraordinary step. For the first time in its history and by unanimous vote, the UNEA adopted a resolution (the Resolution) connecting animal welfare to environmental protection and sustainability.⁹⁶ The Resolution is titled the “Animal Welfare - Environment - Sustainable

89. *Id.* at 968 (Rivera, J., dissenting).

90. See Davis, *supra* note 82.

91. See generally *Brebeny*, 197 N.E.3d 921; see also *Estrellita Monkey Case*, No. 253-20-JH/22 (Ecuador).

92. Courtney Fern, *NhRP Supports New Bill to End the Capture and Breeding of Whales for Public Display*, NONHUMAN RTS. BLOG (July 26, 2022), <https://bit.ly/3RV7XEC> [<https://perma.cc/FW5C-MCCV>].

93. Media Release, Nonhuman Rights Project, New Petition Filed to Free Fresno Zoo Elephants, (Feb. 16, 2023), <https://www.nonhumanrights.org/media-center/new-petition-fresno-elephants/> [<https://perma.cc/F6DD-SMKZ>].

94. Simrun Sirur, *For Love & Freedom: Teen Wages Battle for Lonely African Elephant at Delhi Zoo*, THE PRINT (July 12, 2022), <https://bit.ly/3WcyGjr> [<https://perma.cc/QM94-9DYC>].

95. STEVEN M. WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS 270 (MERLOYD LAWRENCE ED., 2000).

96. See Env’t Assembly of the U.N. Env’t Programme Res. 5/1, Resolution adopted by the United Nations Assembly on Environment on 2 March 2022 (Mar. 2, 2022) [hereinafter The Resolution].

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Development Nexus,”⁹⁷ and was officially adopted at the UNEA meeting in Nairobi, Kenya on March 2, 2022.⁹⁸ This is the first time a United Nations (UN) body has adopted any measure referencing or relating to animal welfare.⁹⁹

The UNEA, the governing body of the United Nations Environment Programme, is the international authority on environmental and sustainability policy.¹⁰⁰ In addition to adopting important resolutions on international environmental policy, the UNEA assists the international community via its vast expertise, including helping to implement the UN 2030 Agenda for Sustainable Development.¹⁰¹

The Resolution not only emphasizes the importance of improving global animal welfare to the UN’s goals concerning One Health¹⁰² and Harmony with Nature,¹⁰³ but for the first time explicitly notes that animal health and welfare is connected to human health and well-being.¹⁰⁴ Sponsored by member states Ghana, Ethiopia, Burkina Faso, Senegal, Democratic Republic of Congo, South Sudan, and Pakistan,¹⁰⁵ the Resolution instructs the Executive Director of the UN Environment Programme (UNEP) to draft a report on the nexus between animal welfare, the environment, and sustainable development¹⁰⁶ to be presented at the UNEA’s sixth annual meeting to be held between February and March of 2024 in Nairobi, Kenya.¹⁰⁷ The report will be a collaboration between the UNEP, the Food and Agriculture Organization of the United Nations, The World Health Organization, the World Organization for Animal Health, and the One Health High-Level Expert Panel.¹⁰⁸ Finally, the Resolution requires the UNEP to take a One Health approach to all matters involving animal welfare.¹⁰⁹

The Resolution is a watershed moment for animal protection in international policy. In addition to being the first of any UN policy

97. *Id.*

98. *See id.*

99. *See An Animal Welfare Nexus Resolution for Sustainable Development Adopted in March at UNEA 5.2*, ANAW, <https://www.anaw.org/index.php/details/item/114-an-animal-welfare-nexus-resolution-for-sustainable-development-adopted-in-march-at-unea-5-Apr2> [<https://perma.cc/MYZ4-CPGY>] (last visited Apr. 3, 2023).

100. *See The United Nations Environment Assembly*, UNEA, <https://www.unep.org/environmentassembly> [<https://perma.cc/U8WG-PKDS>] (last visited Apr. 3, 2023).

101. *Id.*

102. *See One Health*, FAO, <https://www.fao.org/one-health/en> [<https://perma.cc/4DZN-QBGG>] (last visited Apr. 3, 2023).

103. *See Programme*, U.N. HARMONY WITH NATURE, <http://www.harmonywithnatureun.org/> [<https://perma.cc/4YVW-LWRZ>] (last visited Apr. 3, 2023).

104. *See* The Resolution, *supra* note 96, at 1.

105. *See An Animal Welfare Nexus Resolution for Sustainable Development*, *supra* note 99.

106. *See* The Resolution, *supra* note 96, at 1.

107. *See Sixth Session of the United Nations Environment Assembly*, UNEA, <https://www.unep.org/environmentassembly/unea-6> [<https://perma.cc/2Z8Z-27LN>] (last visited Apr. 8, 2023).

108. *See* The Resolution, *supra* note 96, at 1.

109. *Id.* at 2.

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incorporating animal welfare into explicit policy, the Resolution also signals to the world that the scientific connections between animal health and welfare, human health and welfare, and environmental health and sustainability can no longer be ignored, but must be the foundations for collective change.¹¹⁰ Despite historically being treated as entirely separate areas of law and policy, animal welfare, human rights, and environmental protection issues are broadly interconnected.¹¹¹ Humans are animals, and the foundations of both animal welfare and human rights theory and practice surround issues of vulnerability, ability, dignity, agency, justice, and the basic physical, mental, and emotional needs of life. In fact, the most foundational principles of international human rights jurisprudence—those concerning rights to life, liberty, bodily integrity, freedom from torture and inhumane treatment—are the cornerstones by which we define basic animal welfare.¹¹²

Commercial industries that exploit animals for profit often violate important human rights and environmental protections in addition to causing animal suffering, with industrial animal agriculture being a top contributor to these negative externalities.¹¹³ The scale of factory farming is vast; over 73 billion land animals were slaughtered for food in 2020 alone.¹¹⁴ Each of these animals is a sentient individual with the ability to feel pain, fear, stress, and grief, and the methods by which they are raised (or caught) and slaughtered have significant and often irreversible consequences on our own health and that of our ecosystems and the global climate.

These consequences are becoming more and more obvious and dire. They include systemic human rights violations such as the abuse of farm¹¹⁵ and meat industry workers;¹¹⁶ human slavery within the commercial fishing

110. See *An Animal Welfare Nexus Resolution for Sustainable Development*, *supra* note 99.

111. See *id.*

112. See Tom Sparks et al., *Editorial: Animal Rights: Interconnections with Human Rights and the Environment*, 11 J. HUM. RTS. AND THE ENV'T 149, 149 (Sept. 2020), <https://www.elgaronline.com/view/journals/jhre/11-2/jhre.2020.02.00.xml> [<https://perma.cc/BPV2-CUW4>].

113. See *Industrial Animal Agriculture: Exploiting Workers and Animals*, ANIMAL LEGAL DEF. FUND (July 28, 2020), <https://aldf.org/article/industrial-animal-agriculture-exploiting-workers-and-animals/> [<https://perma.cc/UVG5-VSW6>].

114. See *Yearly Number of Animals Slaughtered for Meat, World, 1961 to 2020*, OUR WORLD IN DATA (May 17, 2022), <https://ourworldindata.org/grapher/animals-slaughtered-for-meat> [<https://perma.cc/9JBD-7YR7>].

115. See, e.g., Dave Biscobing, *Inmates Catch COVID-19 at Hickman's Egg Farm*, ABC15 (June 20, 2020), <https://www.abc15.com/news/local-news/investigations/inmates-catch-covid-19-at-hickmans-egg-farm> [<https://perma.cc/XXJ5-U9J5>].

116. See *BLOOD, SWEAT, AND FEAR: Workers' Rights in U.S. Meat and Poultry Plants*, HUMAN RTS. WATCH (Jan. 24, 2005), <https://www.hrw.org/report/2005/01/24/blood-sweat-and-fear/workers-rights-us-meat-and-poultry-plants> [<https://perma.cc/YM9N-AN9U>]; see also Brian Stauffer, *"When We're Dead and Buried, Our Bones Will Keep Hurting": Workers' Rights Under Threat in U.S. Meat and Poultry Plants*, HUMAN RTS. WATCH (Sept. 4, 2019), <https://www.hrw.org/report/2019/09/04/when-were-dead-and-buried-our-bones-will-keep-hurting/workers-rights-under-threat> [<https://perma.cc/PX5Y-T6DQ>].

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industry;¹¹⁷ excessive pollution and emissions that harm public health and local ecosystems,¹¹⁸ further contributing to environmental injustice; unsustainable water use;¹¹⁹ and mass tropical deforestation to create land for animal agriculture, including growing animal feed crops.¹²⁰

Unfortunately, attempts to further regulate industrial animal agriculture are often hindered by the capitalistic interests of profitability and market consolidation. Under a different regulatory framework, where animal welfare was ensured via enforceable legal standards, human well-being and environmental stability would improve globally as well. This is why the Resolution's approach, which recognizes the importance of animal welfare in environmental preservation and human rights jurisprudence and that of a unified One Health approach,¹²¹ is critical to our shared future.

Animal welfare is inextricably linked to the UN's sustainable development goals (SDGs), with improved animal welfare standards in agriculture serving to improve compliance with many of the SDGs, including SDG 1 on ending poverty, SDG 2 on ending hunger, SDG 12 on sustainable consumption and production patterns, and SDG 14 on conservation and sustainable use of the oceans.¹²² Measures aimed at improving animal welfare within factory farming systems will also positively impact additional SDGs, such as SDG 6 on fresh water quality and SDG 15 on protecting terrestrial ecosystems and combating deforestation.¹²³ In addition, because intensive confinement systems are breeding grounds for the development of zoonotic disease, improving animal welfare in this way will also reduce the risk of future pandemics and food borne illnesses and also lessen our global dependence on antibiotics, impacting SDG 3 on ensuring human health and well-being.¹²⁴ Improving animal health and welfare in global food production will also positively impact the stability of our food systems overall, as animals

117. See Steve Dow, *'Such Brutality': Tricked into Slavery in the Thai Fishing Industry*, THE GUARDIAN (Sept. 21, 2019), <https://www.theguardian.com/world/2019/sep/21/susu-brutality-tricked-into-slavery-in-the-thai-fishing-industry> [<https://perma.cc/W6PT-GDYN>].

118. See Michael B. Eisen & Patrick O. Brown, *Rapid Global Phaseout of Animal Agriculture has the Potential to Stabilize Greenhouse Gas Levels for 30 Years and Offset 68 Percent of CO₂ Emissions this Century*, PLOS CLIMATE (Feb. 1, 2022), <https://journals.plos.org/climate/article?id=10.1371/journal.pclm.0000010> [<https://perma.cc/K2BF-425J>].

119. See Rebecca Libauskas, *Commentary: Animal Agriculture's 'Water Footprint' is Putting the Planet in Peril*, PHYS.ORG (Mar. 16, 2022), <https://phys.org/news/2022-03-commentary-animal-agriculture-footprint-planet.html> [<https://perma.cc/Z9LT-BGB6>].

120. See Pendrill et al., *Disentangling the Numbers Behind Agriculture-Driven Tropical Deforestation*, SCIENCE (Sept. 9, 2022), <https://www.science.org/doi/10.1126/science.abm9267> [<https://perma.cc/76WF-AU4R>].

121. See *Joint Tripartite and UNEP Statement on Definition of "One Health"*, UN ENV'T PROGRAMME, <https://www.unep.org/news-and-stories/statements/joint-tripartite-and-unesp-statement-definition-one-health> [<https://perma.cc/C75S-LYRV>] (last visited Apr. 3, 2023).

122. See G.A. Res. 70/1, at 14 (Oct. 21, 2015).

123. *Id.*

124. *Id.*

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suffering from inhumane treatment are more susceptible to injury and disease.¹²⁵

The consequences of ignoring animal welfare's importance to human and environmental health have never been clearer, especially as the climate crisis continues to evolve and expand in impact. The passage of the Resolution signals a critical development in international policy, one that recognizes that human rights and environmental protection cannot be separated from the welfare of all other living beings on planet earth, as humans are entirely dependent on a healthy planet, healthy and thriving ecosystems, and abundant biodiversity.

VI. New Zealand Bans Live Exports by Sea

On September 28, 2022, the New Zealand government announced a ban on live animal exports by sea for the purpose of breeding.¹²⁶ The ban was introduced through the Animal Welfare Amendment Bill, which states, "A person must not apply for, and the Director-General must not issue, an animal welfare export certificate for the export of cattle, deer, goats, or sheep by ship."¹²⁷

The ban applies only to live export by *sea*, not by air, where the travel times are much shorter, or by land, which like by sea, can involve long travel times in treacherous conditions.¹²⁸ The law, effective as of April 2023, makes all live exports of animals by sea prohibited, as New Zealand currently bans live exports for fattening and slaughter.¹²⁹

Live export from New Zealand is particularly cruel given that the country's remoteness requires long and arduous journeys.¹³⁰ Tragedies often occur.¹³¹ For example, in September 2020, the Gulf Livestock 1, an export ship that left New Zealand destined for China, sank, killing 6,000 cattle and

125. See Jordan O. Hampton et al., *Animal Harms and Food Production: Informing Ethical Choices*, NIH (May 6, 2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8181469/> [<https://perma.cc/KVU7-GMSD>].

126. See *Government Announces Ban for Live Cattle Exports by Sea*, RNZ (Apr. 14, 2021), <https://www.rnz.co.nz/news/political/440434/govergover-announces-ban-for-live-cattle-exports-by-sea> [<https://perma.cc/DGV9-9UFX>].

127. See *Animal Welfare Act 2022 (N.Z.)*; see also *New Zealand Places a Complete Ban Against Live Animal Exports!*, NAT'L COUNCIL OF SPCAs (Sept. 29, 2022), <https://nspca.co.za/new-zealand-places-a-complete-ban-against-live-animal-exports/> [<https://perma.cc/Q8YE-5BFD>].

128. See *New Zealand Livestock Exports by Sea to Cease*, THE COUNTRY (Sept. 28, 2022), <https://www.nzherald.co.nz/the-country/news/new-zealand-livestock-exports-by-sea-to-cease/UIM5PNKRMWBSNONWWISYIC5KAY> [<https://perma.cc/XQ9G-CQVZ>].

129. *Id.*

130. See *New Law will Halt All Live Seaborne Livestock Exports from New Zealand*, THE MAR. EXEC. (Sept. 30, 2022), <https://maritime-executive.com/article/new-law-will-halt-all-live-seaborne-livestock-exports-from-new-zealand> [<https://perma.cc/88GU-VYLP>].

131. *Id.*

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41 crew members.¹³² Further, twenty-three routine animal fatalities occurred during live export from New Zealand in the first half of 2022; in 2021, eighty-six such fatalities occurred.¹³³ A review of the live export industry, which began in 2019 and included the events of the Gulf Livestock 1 tragedy, showed considerable public support for the Bill.¹³⁴ Hence, in 2021, a two-year transition period began to provide farmers and companies time to adjust to a possible future ban on live exports.¹³⁵

The Bill's passage reflects a decision by the New Zealand government to protect the country's reputation in a world where people are becoming more concerned with animal welfare. Speaking on behalf of the ban, New Zealand's Minister for Agriculture, Damien O'Connor, said, "It protects the reputation of not just our farmers now, but the farmers of the future."¹³⁶ Furthermore, the ban will not significantly impact New Zealand's economy; in 2021, live exports by sea represented only 0.6 percent of primary sector exports.¹³⁷ O'Connor added that the Bill "future-proofs our economic security amid increasing consumer scrutiny across the board on production practices."¹³⁸

The decision to ban live exports has been met with support from New Zealanders and throughout the world. In New Zealand, a Green Party spokesperson, Chlöe Swarbrick, said, "This could not have come soon enough. Animals have been suffering in live export for years."¹³⁹ Debra Ashton, Chief Executive of New Zealand's Save Animals From Exploitation (SAFE), said, "We've been working tirelessly with activists across the country for decades to end live export, and we're grateful the Government has listened."¹⁴⁰ Abroad, Mandy Carter from Compassion In World Farming said, "We're delighted to hear that New Zealand has announced it

132. See *Government Passes Bill to Ban Livestock Exports by Sea*, RNZ (Sept. 28, 2022), <https://www.rnz.co.nz/news/political/475676/govgover-passes-bill-to-ban-livestock-exports-by-sea> [https://perma.cc/YG7L-UJYR].

133. See *New Law will Halt All Live Seaborne Livestock Exports*, *supra* note 130.

134. *New Zealand Livestock Exports by Sea to Cease*, NZ HERALD (Sept. 28, 2022), <https://www.nzherald.co.nz/the-country/news/new-zealand-livestock-exports-by-sea-to-cease/UIM5PNKRMWBSNONWWISYIC5KAY> [https://perma.cc/VS6S-2QVM].

135. See Gerhard Uys, *Livestock Exports by Sea Banned from April*, STUFF (Sept. 29, 2022), <https://www.stuff.co.nz/business/farming/130019938/livestock-exports-by-sea-banned-from-april> [https://perma.cc/D5QE-W8RB].

136. See *New Zealand Livestock Exports by Sea to Cease*, *supra* note 128.

137. *Id.*

138. *Id.*

139. See *New Zealand Bans Live Animal Exports from April 2023*, THE GUARDIAN (Sept. 29, 2022), <https://www.theguardian.com/world/2022/sep/29/new-zealand-bans-live-animal-exports-from-april-2023> [https://perma.cc/G7H4-RAXJ].

140. See *Passing of Live Export Bill a Historic Moment*, SAFE FOR ANIMALS (Sept. 29, 2022), <https://safe.org.nz/media-releases/passing-of-live-export-bill-a-historic-moment> [https://perma.cc/P9CZ-FNEY].

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will ban live exports next year.”¹⁴¹ FOUR PAWS said the new law was a “milestone for animal welfare,”¹⁴² while the National Council of the Society for the Prevention of Cruelty to Animals (NSPCA) in South Africa, said, “This is a MASSIVE victory in the world of animal welfare.”¹⁴³

There was opposition to the Bill and some of the arguments put forward had merit. Because other countries still permit live export and the demand still exists, the gap in the market left by the New Zealand ban will be met elsewhere.¹⁴⁴ Adrian Ladaniwskyj, Senior Market Analyst at Mecardo in Australia, said, “Australia is expected to become the most prominent player in cattle exports to China, as the New Zealand ban on exports by sea are brought to a final halt on the 30th April, 2023.”¹⁴⁵

In live export, animals have precarious journeys, spending days, weeks, and even months on overcrowded ships.¹⁴⁶ They suffer from disease, severe heat, stress, exhaustion and dehydration, and are forced to live in their own excrement.¹⁴⁷ These journeys often go horribly wrong, resulting in thousands of animals drowning, as well as humans, as in the case of Gulf Livestock 1.¹⁴⁸ Earlier this year, a live export ship sank in Sudan, resulting in 15,000 sheep drowning; in 2020, 14,000 sheep drowned in Romania when a ship capsized.¹⁴⁹ In 2021, 3,000 cattle were stranded in the Mediterranean Sea for three months, leading to many dying, starving, or severely dehydrated animals.¹⁵⁰ Often, the situation is worse for those animals who survive because they endure more suffering and inhumane slaughter when they arrive in countries with little to no animal welfare laws.

After New Zealand took the lead with this landmark decision, Germany also announced a ban on all live export by sea to countries outside the

141. Polly Foreman, *New Zealand Is Officially Banning Live Animal Exports*, PLANT BASED NEWS (Sept. 29, 2022), <https://plantbasednews.org/culture/law-and-politics/new-zealand-banning-live-animal-exports> [<https://perma.cc/CE5H-D58K>].

142. Lauren Lewis, *Victory! New Zealand Bans Live Animal Export; New Law Goes Into Effect In April Of 2023*, WORLD ANIMAL NEWS (Sept. 30, 2022), <https://worldanimalnews.com/victory-new-zealand-bans-export-of-live-animals-new-law-goes-into-effect-in-april-of-2023> [<https://perma.cc/L9D8-K5ZT>].

143. *New Zealand Places a Complete Ban Against Live Animal Exports!*, *supra* note 127.

144. See Adrian Ladaniwskyj, *Chinese Beef Imports Forecast to Fall in 2023*, MECARDO (Sept. 27, 2022), <https://mecardo.com.au/chinese-beef-imports-forecast-to-fall-in-2023> [<https://perma.cc/CJ3B-YYRX>].

145. *Id.*

146. Foreman, *supra* note 141.

147. See *Live Export: Feces, Falls and Flooding*, THE MAR. EXEC. (June 13, 2016), <https://maritime-executive.com/editorials/live-export-feces-falls-and-flooding> [<https://perma.cc/E7AB-4YW6>].

148. See *New Zealand Bans Live Animal Exports from April 2023*, *supra* note 139.

149. Foreman, *supra* note 141.

150. See *How Nearly 3,000 Cattle Came to be Stranded at Sea for Three Months*, THE GUARDIAN (Mar. 31, 2021), <https://www.theguardian.com/environment/2021/mma/31/how-nearly-3000-cattle-came-to-be-stranded-at-sea-for-three-months> [<https://perma.cc/2FB6-K4M6>].

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European Union.¹⁵¹ Other jurisdictions must now follow their lead. As New Zealand's Minister for Agriculture Damien O'Connor correctly said, countries' reputations are at stake.¹⁵² Australian Prime Minister, Anthony Albanese, is committed to ending live export.¹⁵³ But the earliest the trade would be phased out is 2025.¹⁵⁴ The U.K. committed in 2020 to ban the export of live animals by sea for slaughter and fattening but not for breeding.¹⁵⁵ The U.K. ban would be done through the Animal Welfare (Kept Animals) Bill.¹⁵⁶ Elisa Allen, Vice President of Programmes at PETA U.K. said, "Now that New Zealand has passed legislation banning the sordid live-export trade, all eyes are on the U.K. government to follow suit."¹⁵⁷ The push for the EU to ban live exports is important, as the union includes twenty-seven countries.¹⁵⁸ Further, as Germany's ban does not include live export within the EU, animals from Germany can be exported in an onward trade to countries outside the EU by other EU countries.¹⁵⁹

New Zealand's ban has also been used to reinforce calls for prohibitions on live exports in the U.S. and South Africa.¹⁶⁰ Victoria Paige, an author on the Animal Petitions website, has called for the U.S. government to ban live exports: "The passing of [New Zealand's] law is a milestone for animal welfare, and will save the lives of tens of thousands of livestock."¹⁶¹ The NSPCA in South Africa said, "It is time for South Africa to follow suit [and]

151. See *Germany to Tighten Up Export Rules in 2023, Sparing Countless Animals from Suffering*, EUROGROUP FOR ANIMALS (Nov. 5, 2022), <https://www.eurogroupforanimals.org/news/germany-tighten-export-rules-2023-sparing-countless-animals-suffering> [<https://perma.cc/AC7C-ZBTC>].

152. *Government Passes Bill to Ban Livestock Exports by Sea*, *supra* note 132.

153. Calla Wahlquist, *Anthony Albanese Says Live Sheep Exports Won't Be Phased Out Before 2025*, THE GUARDIAN (June 3, 2022), <https://www.theguardian.com/australia-news/2022/jun/03/anthony-albanese-says-live-sheep-exports-wont-be-phased-out-before-2025> [<https://perma.cc/4NGF-E4ZX>].

154. *Id.*

155. Sophie Kevany, *England and Wales to Ban Live Animal Exports in European First*, THE GUARDIAN (Dec. 3, 2020), <https://www.theguardian.com/environment/2020/dec/03/uk-to-become-first-country-in-europe-to-ban-live-animal-exports> [<https://perma.cc/D3YK-QUFT>].

156. See Animal Welfare (Kept Animals) Bill (as introduced) HC Bill [2] cl. 40 (Gr. Brit.); see also THOMAS ET AL., ANIMALS MATTER 3 (2022), <https://www.politicshome.com/ugc-1/1/21/0/Briefing%20Doc%20final%20-%20digital.pdf> [<https://perma.cc/V3AF-2BSD>].

157. Foreman, *supra* note 141.

158. See *Countries in the EU and EEA*, GOV.UK, <https://www.gov.uk/eu-eea> [<https://perma.cc/CS4U-8HJS>] (last visited Apr. 3, 2023).

159. *Germany to Tighten Up Export Rules in 2023*, *supra* note 151.

160. See Sheena Swemmer, *Live Animal Export is a Violation of Animal Welfare and Human Rights and Could Lead to Our Next Pandemic*, DAILY MAVERICK (Apr. 29, 2021), <https://www.dailymaverick.co.za/opinionista/2021-04-29-live-animal-export-is-a-violation-of-animal-welfare-and-human-rights-and-could-lead-to-our-next-pandemic/> [<https://perma.cc/X7Z4-M97L>]; see also Victoria Paige, *Stop Drowning, Suffocating, and Burning Animals to Death*, ANIMAL PETITIONS, <https://animalpetitions.org/1171000/stop-letting-thousands-of-farm-animals-drown-to-death> [<https://perma.cc/2HU5-ARQN>] (last visited Apr. 3, 2023).

161. Paige, *supra* note 160.

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acknowledge the suffering our sheep are subjected to on board live export vessels.”¹⁶²

Viable alternatives that make live export unnecessary may further support efforts to ban the practice. For example, the export of live animals for slaughter can be replaced by the export of animal carcasses, and the export of live animals for breeding can be replaced by semen and embryos.¹⁶³ Farmers can transition to these alternatives and substitute live export by meeting domestic demand for meat and dairy. Even better, farmers could transition away from animal agriculture for the benefit of animals, humans, and the environment. Praising an example of such a shift, Debra Ashton of SAFE said, “The Netherlands has already put a plan in place to help transition farmers out of animal agriculture—including a buy-out scheme to smooth the transition.”¹⁶⁴

Although New Zealand’s prohibition represents a significant achievement and a critical line in the sand, animal rights advocates have a long way to go to stop the live export trade. Hopefully, more nations will follow their lead and do the same, thereby preventing demand from being met by supply elsewhere. Additionally, countries must consider the suffering of animals in live export by land and air, as well as by sea. There must be viable alternatives for consumers and farmers, as well as greater public awareness of the benefits for animals, humans, and the environment of having a more plant-based diet. Further, education—including legal education—must expand peoples’ comprehension that animals, like humans, are sentient beings capable of feeling pain and distress.

162. *New Zealand Places a Complete Ban Against Live Animal Exports!*, *supra* note 127.

163. See European Parliament Press Release 20220114IPR21025, *Animals Must be Better Protected During Transport* (Jan. 20, 2022).

164. *Passing of Live Export Bill a Historic Moment*, *supra* note 140.

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National Security Law

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This article highlights significant legal developments relevant to national security law that took place in 2022.

I. CFIUS Issues New Exemption and Increases Transparency in 2022

In 2022, the public learned new information regarding the present and future trajectory of the Committee on Foreign Investment in the United States (CFIUS). President Biden issued an Executive Order (EO) directing CFIUS on where and how to focus its broad national security powers,¹ and, separately, CFIUS exempted a new class of investors from its national security reviews.² Further, CFIUS—which normally is viewed as a “black box” that is reticent to publicly share information concerning its national security reviews—organized an inaugural CFIUS Conference open to the public,³ issued new Enforcement and Penalty Guidelines,⁴ and published a de-classified annual report to Congress.⁵ These developments provided a glimpse into CFIUS’s approach to national security reviews, offering key

* Orga Cadet served as the committee editor of this article. Barbara Linney, Partner at Baker & Hostetler LLP, Scott C. Jansen, Counsel at Baker & Hostetler LLP, and Orga Cadet, Associate at Baker & Hostetler LLP, co-authored “CFIUS Issues New Exemption and Increases Transparency in 2022.” Geoffrey Goodale, Partner at Duane Morris, LLP, Lauren Wyszomierski, Associate at Duane Morris, LLP, and Jonathan Meyer, Attorney at Law, co-authored “Semiconductor-Related Supply Chain Developments in 2022.” Adam C. Pearlman, Senior Attorney & Managing Director of Lexpat Global Services, LLC authored “Cabo Verde and the Extradition of Alex Saab.” Guy C. Quinlan, President of the Lawyers Committee on Nuclear Policy, authored “Nuclear Arms Control.”

1. Exec. Order No. 14,083, 87 Fed. Reg. 57369 (Sept. 20, 2022).

2. Determination Regarding Excepted Foreign States, 87 Fed. Reg. 731 (Jan. 6, 2022).

3. Press Release, U.S. Dep’t of the Treasury, Save the Date: Inaugural CFIUS Conference (Apr. 14, 2022), <https://home.treasury.gov/news/featured-stories/save-the-date-inaugural-cfius-conference> [<https://perma.cc/T2UJ-5AS9>].

4. Press Release, U.S. Dep’t of the Treasury, Treasury Releases CFIUS Enforcement and Penalty Guidelines (Oct. 20, 2022), <https://home.treasury.gov/news/press-releases/jy1037> [<https://perma.cc/J89Q-CN76>].

5. Press Release, U.S. Dep’t of the Treasury, Treasury Releases CFIUS Annual Report for 2021 (Aug. 2, 2022), <https://home.treasury.gov/news/press-releases/jy0904> [<https://perma.cc/94E7-8C5M>].

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insights for businesses and investors involved in mergers, acquisitions, and/or investments that could be subject to CFIUS jurisdiction.

**A. NEW EXECUTIVE ORDER ON FOCUS OF NATIONAL SECURITY
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On September 15, 2022, President Biden issued EO 14083 (the CFIUS EO) to provide direction to CFIUS on evolving national security risks.⁶ This was the first CFIUS-related EO issued by a U.S. president since President Gerald Ford issued an EO in 1975 establishing CFIUS to monitor and mitigate risks related to foreign investment in the United States.⁷ The CFIUS EO, which is in many ways an elaboration of current CFIUS focus areas, ensures that CFIUS's national security reviews will be increasingly broad and in-depth, extending to supply chain risks, U.S. technological leadership, and other concerns.⁸ Further, in assessing national security risks associated with any foreign person that is acquiring or investing in a U.S. business, CFIUS's analysis will extend to that foreign person's third-party ties and the cumulative investments from that foreign person into certain U.S. sectors or technologies.⁹

The CFIUS EO directs CFIUS to take the following factors into account when conducting national security reviews of any transaction:¹⁰

- (1) “[*S*upply chain resilience and security,” including
 - (A) the effect of foreign investment on domestic capacity to meet national security requirements, “both within and outside of the defense industrial base;”
 - (B) “the degree of diversification through alternative suppliers across the supply chain, including suppliers located in allied or partner economies;”
 - (C) “whether the United States business that is party to the covered transaction supplies, directly or indirectly, the United States Government, the energy sector industrial base, or the defense industrial base;” and
 - (D) the degree of involvement and the “concentration of ownership or control by the foreign person in a given supply chain;”

6. 87 Fed. Reg. 57369.

7. Exec. Order No. 11858, 40 Fed. Reg. 20263 (May 7, 1975), as amended.

8. 87 Fed. Reg. 57369.

9. *Id.* at 57370.

10. *Id.* at 57370–57373. The CFIUS EO specifically directed consideration of supply chain resilience and security when assessing the impact of the covered transaction on “manufacturing capabilities, services, critical mineral resources, or technologies that are fundamental to national security, including: microelectronics, artificial intelligence, biotechnology and biomanufacturing, quantum computing, advanced clean energy (such as battery storage and hydrogen), climate adaptation technologies, critical materials (such as lithium and rare earth elements), elements of the agriculture industrial base that have implications for food security, and [certain] other sectors.” *Id.* at 57370.

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- (2) *U.S. technological leadership*, including in the context of “manufacturing capabilities, services, critical mineral resources, or [fundamental] technologies”¹¹ and any transaction that may “result in future advancements and applications in technology that could undermine national security;”
- (3) *Cybersecurity risks*, including “activity designed to undermine the protection or integrity of data in storage or databases;” “interference with United States elections, United States critical infrastructure, the defense industrial base, or other cybersecurity national security priorities;” or “the sabotage of critical energy infrastructure;” and
- (4) *Sensitive data*, particularly
 - (A) “United States persons’ health, digital identity, or other biological data;”
 - (B) Technology that, when combined with large data sets, can enable the re-identification or de-anonymization of what once was unidentifiable data; and
 - (C) “Data on sub-populations in the United States that could be used by a foreign person to target individuals or groups of individuals in the United States in a manner that threatens national security.”

To help CFIUS fully assess the risk factors above, the CFIUS EO directs CFIUS to analyze whether foreign persons who are party to a covered transaction have any relevant third-party ties that might cause the transaction to pose a national security threat.¹² The CFIUS EO also requests that CFIUS analyze whether any foreign persons and governments (not just parties to the specific transaction before CFIUS) have made “[i]ncremental investments over time in a sector or technology” (or in related manufacturing capabilities, services, critical mineral resources, or technologies) that could cede, little-by-little, “domestic development or control in that sector or technology” to foreign persons.¹³ Prior to this directive, CFIUS was only focused on incremental investments by the same foreign person/entity in a specific U.S. company.¹⁴

The CFIUS EO directs the White House Office of Science and Technology Policy (OSTP), which is a CFIUS member agency, to periodically publish a list of technology sectors that are fundamental to U.S. technological leadership in areas relevant to national security.¹⁵ CFIUS will, as appropriate, consider this list during its national security reviews.¹⁶ The

11. The CFIUS EO states that such fundamental technologies include, but may not necessarily be limited to, “microelectronics, artificial intelligence, biotechnology and biomanufacturing, quantum computing, advanced clean energy, and climate adaptation technologies.” *Id.* at 57371.

12. *Id.* at 57370–57373.

13. *Id.* at 57371.

14. *See generally* JAMES K. JACKSON, CONG. RSCH. SERV., RL33388, THE COMMITTEE ON FOREIGN INVESTMENTS IN THE UNITED STATES (CFIUS) (2018).

15. *Id.* at 57371.

16. *Id.* at 57371.

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CFIUS EO also empowers CFIUS to request analysis from the U.S. Department of Commerce International Trade Administration on the industry in which any U.S. business involved in a covered transaction operates, as well as “the cumulative control of, or pattern of recent transactions by, the foreign person . . . in that sector or industry.”¹⁷ Further, the CFIUS EO requires CFIUS to regularly review its processes, practices, and regulations, and to periodically report the results of these reviews to the Assistant to the President for National Security Affairs.¹⁸

B. NEW EXEMPTION FOR INVESTMENTS FROM NEW ZEALAND

Notwithstanding the areas that CFIUS likely will prioritize pursuant to the CFIUS EO, CFIUS also de-prioritized investments from New Zealand.¹⁹ Specifically, on January 5, 2022, CFIUS added New Zealand to its “whitelist” of excepted foreign states, thereby granting certain investors from New Zealand who meet the “excepted investor” requirements in the CFIUS regulations an opportunity to bypass CFIUS jurisdiction over their investments in or acquisition of a U.S. business.²⁰ With the addition of New Zealand, the group of excepted foreign states has increased to four—the others are Australia, Canada, and the United Kingdom.²¹

C. NEW ENFORCEMENT AND PENALTY GUIDELINES, INAUGURAL CONFERENCE, AND ANNUAL REPORT

While the CFIUS EO brought additional insight to CFIUS national security reviews, the year 2022 also saw CFIUS increase transparency in several additional ways.²² For instance, on October 20, 2022, CFIUS, for the first time ever, published Enforcement and Penalty Guidelines (the Guidelines).²³ The Guidelines lay out how CFIUS assesses whether and in what amount to impose a penalty or take some other enforcement action for a violation of a party’s obligation with respect to CFIUS, including aggravating and mitigating factors that CFIUS considers in making such a determination.²⁴ The Guidelines address the failure to timely submit a mandatory filing, as well as other acts or omissions that may constitute a

17. *Id.* at 57372.

18. *Id.* at 57373.

19. 87 Fed. Reg. 731.

20. *Id.*

21. *Id.*

22. *See, e.g.*, Press Release, U.S. Dep’t of the Treasury, Treasury Releases CFIUS Enforcement and Penalty Guidelines (Oct. 20, 2022), <https://home.treasury.gov/news/press-releases/jy1037> [<https://perma.cc/J89Q-CN76>].

23. *CFIUS Enforcement and Penalty Guidelines*, U.S. DEP’T OF THE TREASURY, <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-enforcement-and-penalty-guidelines> [<https://perma.cc/PBM6-WTZU>] (last visited Apr. 29, 2023).

24. U.S. Dep’t of the Treasury, *supra* note 22; U.S. DEP’T OF THE TREASURY, *supra* note 23.

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violation of CFIUS's laws and regulations.²⁵ They also lay out the process by which parties could petition CFIUS for reconsideration of a penalty.²⁶

In addition to issuing the Guidelines, CFIUS hosted its first-ever CFIUS Conference on June 16, 2022.²⁷ The Conference featured the Deputy Secretary of the U.S. Department of the Treasury, the Acting CFIUS Staff Chair and Director, and more than a dozen other leaders from CFIUS member agencies.²⁸ The 2022 CFIUS Conference provided insights on CFIUS authorities, processes, and practice.²⁹ Key takeaways from the conference included: the intention of CFIUS to continue its focus on data-related transactions; the importance of a collaborative rather than adversarial approach to the CFIUS review process; and the CFIUS plan to increase its compliance monitoring efforts as well as its efforts to identify and review transactions that were not voluntarily notified to CFIUS.³⁰ As a result, it is widely anticipated that in 2023 CFIUS will issue penalties for violations of existing CFIUS mitigation agreements and for failure to notify CFIUS of transactions subject to mandatory filing requirements (i.e., non-notified transactions).³¹

Lastly, CFIUS published the declassified version of its annual report to Congress on August 2, 2022.³² This year's annual report, which concentrated on CFIUS's activities in calendar year 2021, demonstrated, among other things, that CFIUS reviewed a record number of covered transactions, including thirty percent more declarations³³ and forty-five percent more notices³⁴ than were reviewed in 2020. Only eleven percent of the cases CFIUS cleared in 2021 required mitigation and the U.S. president did not block any transaction in 2021.³⁵ It is unclear if CFIUS filings will increase in 2023 given the slowing global economy, but based upon an increased engagement posture by CFIUS and an outward-focused Biden administration, many believe CFIUS will continue to be a significant player in foreign direct investment matters in 2023, particularly in connection with

25. U.S. Dep't of the Treasury, *supra* note 22; U.S. DEP'T OF THE TREASURY, *supra* note 23.

26. U.S. Dep't of the Treasury, *supra* note 22; U.S. DEP'T OF THE TREASURY, *supra* note 23.

27. *Inaugural CFIUS Conference*, U.S. DEP'T OF THE TREASURY (June 16, 2022), <https://events.treasury.gov/s/event-template/a2mt0000001UNMmAAO/inaugural-cfius-conference> [<https://perma.cc/96Q7-WHEN>].

28. Antonia I. Tzinova et al., *5 Key Takeaways from the 2022 Inaugural CFIUS Conference*, HOLLAND & KNIGHT (July 5, 2022), <https://www.hklaw.com/en/insights/publications/2022/07/5-key-takeaways-from-the-2022-inaugural-cfius-conference> [<https://perma.cc/UND5-EPY9>].

29. *Id.*

30. *Id.*

31. *Id.*

32. U.S. DEP'T OF THE TREASURY, ANNUAL REPORT TO CONGRESS FOR CY 2021 11–12 (2021), <https://home.treasury.gov/system/files/206/CFIUS-Public-AnnualReporttoCongressCY2021.pdf> [<https://perma.cc/C27H-HBC9>].

33. *Id.* at 5.

34. *Id.* at 17.

35. *Id.* at 17, 38.

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transactions involving Chinese investment or critical technology investments and acquisitions.³⁶

II. Semiconductor-Related Supply Chain Developments in 2022

Two key national security-related actions that were taken to improve semiconductor-related supply chain security were: (1) the passage of the Creating Helpful Incentives to Produce Semiconductors and Science Act of 2022 (CHIPS Act)³⁷ and (2) the enactment of stringent export controls that have made it very difficult, if not impossible, for U.S. companies to export semiconductors and related manufacturing equipment and technology to China.³⁸ These developments are discussed below.

The United States was an early pioneer in semiconductors, but today produces only about ten percent of the world's supply.³⁹ Instead, the United States has relied on Asia (mainly Taiwan and China) to satisfy domestic semiconductor demand.⁴⁰ U.S. companies across multiple industries are dependent on chips made abroad for production, and the fragility of those supply chains has been exposed during the pandemic.⁴¹ A good example is the U.S. auto industry, which suffered major supply-side disruptions arising from chip shortages.⁴² Moreover, estimates point to an increased demand for semiconductors.⁴³

36. See Press Release, White House, Fact Sheet: President Biden Signs Executive Order to Ensure Robust Reviews of Evolving National Security Risks by the Committee on Foreign Investment in the United States (Sept. 15, 2022) (directing CFIUS to “continue to regularly review its processes, practices, and regulations to ensure that they remain responsive to evolving national security threats”), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/09/15/fact-sheet-president-biden-signs-executive-order-to-ensure-robust-reviews-of-evolving-national-security-risks-by-the-committee-on-foreign-investment-in-the-united-states> [https://perma.cc/Y4AK-5CU6].

37. CHIPS and Science Act of 2022, Pub. L. No. 117-167, 136 Stat. 1366 (codified at 15 U.S.C. §§ 4651–4652) [hereinafter CHIPS Act].

38. Press Release, U.S. Dep’t of Com., Bureau of Indus. & Sec., Commerce Implements New Export Controls on Advanced Computing and Semiconductor Manufacturing Items to the People’s Republic of China (PRC) (Oct. 7, 2022), <https://www.bis.doc.gov/index.php/documents/about-bis/newsroom/press-releases/3158-2022-10-07-bis-press-release-advanced-computing-and-semiconductor-manufacturing-controls-final/file> [https://perma.cc/J6R7-CZ8B].

39. Press Release, White House, Fact Sheet: CHIPS and Science Act Will Lower Costs, Create Jobs, Strengthen Supply Chains, and Counter China (Aug. 9, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/09/fact-sheet-chips-and-science-act-will-lower-costs-create-jobs-strengthen-supply-chains-and-counter-china/> [https://perma.cc/4K9M-SB9T] [hereinafter White House Fact Sheet].

40. *Id.*

41. Ondrej Burkacky et al., *Strategies to Lead in the Semiconductor World*, MCKINSEY & CO. (Apr. 15, 2022), <https://www.mckinsey.com/industries/semiconductors/our-insights/strategies-to-lead-in-the-semiconductor-world> [https://perma.cc/TUE5-C4HY].

42. *Id.*

43. *Id.*

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A. OVERVIEW OF THE CHIPS ACT

The CHIPS Act provisions were mostly extracted from the U.S. Innovation and Competition Act (USICA) and its House alternative, the America COMPETES Act, which Congress failed to pass.⁴⁴ Unlike its predecessors, the CHIPS Act received bipartisan support, passing in the Senate by a 64-33 vote.⁴⁵ But important aspects of other sought-after trade remedies in the USICA and Competes Act (e.g., 301 tariffs exclusion, AD/CV duties, and trade preference programs (GSP) were left out of the CHIPS Act.⁴⁶

The CHIPS Act provides USD \$52.7 billion for American semiconductor research, development, manufacturing, and workforce development.⁴⁷ “This [funding] includes USD \$39 billion in manufacturing incentives, including \$2 billion for the legacy chips used in automobiles and defense systems, USD \$13.2 billion in R&D and workforce development, and USD \$500 million to provide for international information communications technology security and semiconductor supply chain activities.”⁴⁸

The CHIPS Act also provides a twenty-five percent investment tax credit related to manufacturing of semiconductors and associated equipment.⁴⁹ These incentives (are intended to) secure domestic supply, create high-skilled manufacturing jobs, and catalyze hundreds of billions more in private investment.⁵⁰

The CHIPS Act requires recipients to demonstrate significant worker and community investments, including opportunities for small businesses and disadvantaged communities.⁵¹ Other guardrails in the CHIPS Act help ensure that entities that receive the semiconductor incentive funding or tax incentives do not use the funding to buy back their own stock, provide shareholders with dividend payments, or expand advanced semiconductor manufacturing capabilities in foreign countries of concern like China.⁵² Recipients’ failure to abide by the restrictions will result in clawback of granted funds and/or forfeiture of tax credits.⁵³

44. Mark Muro, *Can the CHIPS Act Heal the Nation’s Economic Divides?*, BROOKINGS INST. (Aug. 2, 2022), <https://www.brookings.edu/blog/the-avenue/2022/08/02/can-the-chips-act-heal-the-nations-economic-divides/> [https://perma.cc/WB9A-LLFB].

45. Chips and Science Act, H.R. 4346, 117th Cong. (2021).

46. See Rick Helfenbein, *Retail Agonizes About Trade Provisions – As Congress Leans Towards A ‘CHIPS Only’ Bill*, FORBES (July 18, 2022), <https://www.forbes.com/sites/rickhelfenbein/2022/07/18/retail-agonizes-about-trade-provisions-as-congress-leans-towards-a-chips-only-bill/?sh=E91df8932e1b> [https://perma.cc/3MRH-GFE8].

47. See White House Fact Sheet, *supra* note 39.

48. See *id.*

49. See *id.*

50. See *id.*

51. See *id.*

52. See *id.*

53. See CHIPS Act § 103(a)(6).

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In total, the CHIPS Act directs USD \$280 billion in funding over the next ten years “to bolster U.S. semiconductor manufacturing capacity,” including authorizing about USD \$174 billion to certain government agencies for research and development.⁵⁴ The agencies include the Department of Commerce, the Department of Energy, the National Science Foundation, and the National Institute of Standards and Technology.⁵⁵

B. EXECUTIVE BRANCH ACTIONS TO IMPLEMENT THE CHIPS ACT

On August 25, 2022, President Biden signed an executive order to implement the semiconductor funding in the bipartisan CHIPS Act.⁵⁶ The order created the CHIPS Implementation Steering Council, which will coordinate the implementation of the CHIPS Act across the administration.⁵⁷ The council will be co-chaired by National Economic Director Brian Deese, National Security Advisor Jake Sullivan, and Acting Director of the Office of Science and Technology Policy Alondra Nelson.⁵⁸ Other members will include:

- (1) Department of State Secretary Antony Blinken;
 - (2) Department of Treasury Secretary Janet Yellen;
 - (3) Department of Defense Secretary Lloyd Austin;
 - (4) Department of Commerce Secretary Gina Raimondo;
 - (5) Department of Labor Secretary Marty Walsh;
 - (6) Department of Energy Secretary Jennifer Granholm;
 - (7) White House Office of Management and Budget Director Shalanda Young;
 - (8) Small Business Administration Administrator Isabel Guzman;
 - (9) Office of the Director of National Intelligence Director Avril Haines;
 - (10) White House Domestic Policy Council Director Susan Rice;
 - (11) White House Council of Economic Advisers Chair Cecilia Rouse;
 - (12) White House Office of the National Cyber Director Chris Inglis;
- and
- (13) National Science Foundation Director Sethuraman Panchanathan.⁵⁹
- The Six Implementation Priorities of the Steering Council Created by the Executive Order are:⁶⁰

- (1) *Protect taxpayer dollars.* The CHIPS program will include rigorous review of applications along with robust compliance and

54. Justin Badlam et al., *The CHIPS and Science Act: Here's What's in It*, MCKINSEY & CO. (Oct. 4, 2022), <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/the-chips-and-science-act-heres-whats-in-it> [https://perma.cc/3SEJ-WUG2].

55. See generally CHIPS Act.

56. Exec. Order No. 14,080, 87 Fed. Reg. 52847 (Aug. 25, 2022) [hereinafter CHIPS Act EO].

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

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accountability requirements to ensure taxpayer funds are protected and spent wisely.

- (2) *Meet economic and national security needs.* The CHIPS program must address economic and national security risks “by building domestic capacity that reduces [U.S.] reliance on vulnerable or overly concentrated foreign production for both leading-edge and mature microelectronics,” and increasing United States economic productivity and competitiveness. U.S. long-term economic and national security require a sustainable, competitive domestic industry.
- (3) *Ensure long-term leadership in the sector.* The CHIPS program will establish a dynamic, collaborative network for semiconductor research and innovation to enable long-term U.S. leadership in the industries of the future. The program intends to support a diversity of technologies and applications along many stages of product and process development.
- (4) *Strengthen and expand regional manufacturing and innovation clusters.* Long-term competitiveness requires large economies of scale and investments across the supply chain. Regional clusters containing manufacturing facilities, suppliers, “basic and translational research,” and workforce programs, along with supporting infrastructure, will be the foundation for a competitive industry. The CHIPS program intends to facilitate the expansion, creation and coordination of semiconductor manufacturing and innovation clusters that benefit many companies.
- (5) *Catalyze private sector investment.* A successful CHIPS program will respond to market signals, fill market gaps and reduce investment risk to attract significant private capital. The role of government in the CHIPS program is to shift financial incentives to maximize large-scale private investment in production, breakthrough technologies and workers. The CHIPS program intends to encourage new ecosystem partnerships that reduce risk, build on U.S. strengths and facilitate such investments.
- (6) *Generate benefits for a broad range of stakeholders and communities.* A successful CHIPS program will create benefits for startups, workers, socially and economically disadvantaged (SEDI) businesses, including minority-owned, veteran-owned and women-owned businesses, and rural businesses universities and colleges, and state and local economies, in addition to supporting semiconductor companies. The CHIPS program intends to encourage linkages to underserved regions and populations to draw in new participants to the semiconductor ecosystem.

C. NEW SEMICONDUCTOR-RELATED EXPORT CONTROLS

The U.S. Department of Commerce’s Bureau of Industry and Security (BIS) is implementing a series of targeted updates to its export controls as

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part of its efforts to protect U.S. national security and foreign policy interests.⁶¹ These amendments to the Export Administration Regulations (EAR) administered by BIS will restrict the ability of the People's Republic of China's (PRC's) ability to purchase and manufacture certain high-end chips used in military applications and build on prior policies, company-specific actions, and less public regulatory, legal, and enforcement actions taken by BIS.⁶² The bureau published an interim final rule to implement these semiconductor-related amendments to the EAR in the Federal Register on October 13, 2022.⁶³

The interim final rule addresses U.S. national security and foreign policy concerns in two key areas.⁶⁴ First, the rule imposes restrictive export controls on certain advanced computing semiconductor chips, transactions for supercomputer end-uses, and transactions involving certain entities listed under supplement No. 4 to part 744 of the EAR (also known as the Entity List).⁶⁵ Second, the interim final rule imposes new controls on certain semiconductor manufacturing items and on transactions for certain integrated circuit (IC) end uses.⁶⁶ Specifically, the interim final rule:

- (1) Adds certain advanced and high-performance computing chips and computer commodities that contain such chips to the Commerce Control List (CCL);
- (2) Adds new license requirements for items destined for a supercomputer or semiconductor development or production end use in the PRC;
- (3) Expands the scope of the EAR over certain foreign-produced advanced computing items and foreign-produced items for supercomputer end uses;
- (4) Expands the scope of foreign-produced items subject to license requirements for twenty-eight existing entities on the Entity List that are located in the PRC;
- (5) Adds certain semiconductor manufacturing equipment and related items to the CCL;
- (6) Adds new license requirements for items destined for a semiconductor fabrication "facility" in the PRC that fabricates ICs meeting specified standards. Licenses for facilities owned by PRC entities will face a "presumption of denial," and facilities owned by multinationals will be decided on a case-by-case basis;
- (7) Restricts the ability of U.S. persons to support the development or production of ICs at certain PRC-located semiconductor fabrication "facilities" without a license;

61. U.S. Dep't of Com., *supra* note 38.

62. *Id.*

63. Implementation of Additional Export Controls: Certain Advanced Computing and Semiconductor Manufacturing Items; Supercomputer and Semiconductor End Use; Entity List Modification, 87 Fed. Reg. 62186 (Oct. 13, 2022) [hereinafter EAR Rule].

64. *See id.*

65. *See id.*

66. *See id.*

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- (8) Adds new license requirements to export items to develop or produce semiconductor manufacturing equipment and related items; and
- (9) Establishes a temporary general license to minimize the short-term impact on the semiconductor supply chain by allowing specific, limited manufacturing activities related to items destined for use outside the PRC.⁶⁷

In response to many industry-posed questions, BIS has recently issued guidance relating to the interim final rule.⁶⁸ The guidance provides important clarifications relating to such things as the definition of a covered “facility,” the scope of the “activities of U.S. persons” restrictions, and the impact of the rule on deemed exports and encryption-related items.⁶⁹

The PRC’s response to the new export controls was framed as an abuse by the United States to block and suppress Chinese companies.⁷⁰ The export controls are expected to be just the first in a series of actions from the United States before the end of 2022, including possible executive branch actions to strengthen federal oversight of U.S. investment in China⁷¹ and to limit data collection from Chinese firms.⁷²

III. Cabo Verde and the Extradition of Alex Saab

On June 12, 2020, Cabo Verdean authorities detained Colombian businessman Alex Saab during a refueling stop while traveling from Caracas to Tehran.⁷³ Saab is alleged to have run an elaborate global money laundering operation on behalf of the Maduro regime in Venezuela, in part to evade U.S. sanctions, with the help of countries like Russia, Turkey, and

67. See generally *id.*

68. U.S. DEP’T OF COM., BUREAU OF INDUST. AND SEC., FAQs FOR INTERIM FINAL RULE - IMPLEMENTATION OF ADDITIONAL EXPORT CONTROLS: CERTAIN ADVANCED COMPUTING AND SEMICONDUCTOR MANUFACTURING ITEMS; SUPERCOMPUTER AND SEMICONDUCTOR END USE; ENTITY LIST MODIFICATION (Oct. 28, 2022), <https://www.bis.doc.gov/index.php/documents/product-guidance/3181-2022-10-28-bis-faqs-advanced-computing-and-semiconductor-manufacturing-items-rule-2/file> [<https://perma.cc/8YGJ-4AVF>].

69. See *id.*

70. See Rishi Iyengar, *Biden Short-Circuits China*, FOREIGN POL’Y (Oct. 28, 2022), <https://foreignpolicy.com/2022/10/28/biden-china-semiconductors-chips/> [<https://perma.cc/AUD6-CH6A>].

71. See Gavin Bade, *White House Scales Back Plans to Regulate U.S. Investments in China*, POLITICO (Feb. 28, 2023), <https://www.politico.com/news/2023/02/27/white-house-investments-china-00084473> [<https://perma.cc/KKP4-APH4>].

72. See Ralph Jennings, *What the US Might Learn from China’s Data Privacy Rules*, VOICE OF AMERICA (Mar. 28, 2022), <https://www.voanews.com/a/what-the-us-might-learn-from-china-s-data-privacy-rules-/6505203.html> [<https://perma.cc/TJ2M-WCCT>].

73. See Vasco Cotovio & Holly Yan, *Alex Saab, Alleged Financier for Venezuela’s President, Is Extradited to the US and Due in Court Monday*, CNN (Oct. 17, 2021), <https://www.cnn.com/2021/10/17/americas/alex-saab-venezuela-cape-verde-extradition/index.html> [<https://perma.cc/W5RD-6K8L>].

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Iran.⁷⁴ Saab himself was sanctioned by OFAC for laundering billions for the regime off of corrupt food contracts and sanctions evasion and is under federal indictment in the United States for allegedly laundering USD \$350 million of that money through U.S. financial institutions.⁷⁵ Pursuant to an International Criminal Police Organization (INTERPOL) Red Notice requesting his seizure, Cabo Verdean authorities took responsible action in detaining him.⁷⁶

Although Cabo Verde has neither a Mutual Legal Assistance Treaty nor an extradition treaty with the United States,⁷⁷ the Cabo Verdean government proceeded with the extradition under Article 16 of the U.N. Convention on Transnational Organized Crime,⁷⁸ which it ratified in 2004.⁷⁹

The Maduro regime reacted swiftly and strongly, claiming Saab was a Special Envoy traveling on a diplomatic passport who was unlawfully intercepted on his humanitarian mission to help feed the Venezuelan people.⁸⁰ He was entitled to diplomatic inviolability and immunity while in transit, they argued, and his arrest was simply politically-driven and amounted to a kidnapping.⁸¹ Sixteen months of lawfare and political attacks followed, aimed at Cabo Verdean government officials and judges, while the small nation worked diligently to uphold its international obligations.⁸² For instance, an aggressive social media campaign included deploying Twitter bots to smear and threaten Cabo Verde's government and specific officials and judges and paying influencers to sew domestic discord.⁸³ Saab also

74. Henry Peyronnin & Mike Saidi, *The Saab Story: A Colombian Dealmaker's Role in Venezuela's Evolving Response to U.S. Sanctions*, C4ADS (June 10, 2020), <https://c4ads.org/blogposts/2020/6/10/the-saab-story> [<https://perma.cc/PR2B-HJUF>].

75. Press Release, U.S. Dep't of the Treasury, Treasury Targets Sanctions Evasion Network Supporting Corrupt Venezuelan Actors (June 18, 2022), <https://home.treasury.gov/news/press-releases/sm1038> [<https://perma.cc/M9RW-DQ8C>].

76. See *Venezuela Warned Detained Envoy Not to Cooperate with U.S., Court Filing Shows*, REUTERS (Jan. 22, 2021), <https://www.reuters.com/article/us-venezuela-politics-saab/venezuela-warned-detained-envoy-not-to-cooperate-with-u-s-court-filing-shows-idUSKBN29R22Z> [<https://perma.cc/T9QB-D8WM>].

77. *2016 International Narcotics Control Strategy Report (INCSR)*, U.S. DEP'T OF STATE, BUREAU OF INT'L NARCOTICS & L. ENF'T AFF., <https://2009-2017.state.gov/j/inl/rls/nrcrpt/2016/vol1/253247.htm> [<https://perma.cc/2RF3-GDMC>].

78. See G.A. Res. 55/25, United Nations Convention against Transnational Organized Crime, U.N. Doc. A/55/383 (Vol. II), at (Nov. 15, 2000).

79. United Nations Convention against Transnational Organized Crime, Nov. 15, 2000, 2225 U.N.T.S. 209.

80. See Joshua Goodman, *Maduro Ally Seeks Recognition as Venezuelan Diplomat in Court*, AP NEWS (Dec. 12, 2022), <https://apnews.com/article/iran-venezuela-miami-government-united-states-fcde83d3ff73b120e514e37e7d834c6> [<https://perma.cc/3KKA-E7FD>].

81. *Id.*

82. See 'Brutal aggression:' Venezuela halts talks with opposition after envoy extradited to US, THE GUARDIAN (Oct. 16, 2021), <https://www.theguardian.com/world/2021/oct/17/brutal-aggression-venezuela-halts-talks-with-opposition-after-envoy-extradited-to-us> [<https://perma.cc/H7GB-FNVV>].

83. See Craig Silverman, *Why Do a Bunch of Nigerian Twitter Influencers Want This Alleged Money Launderer to Go Free? They're Being Paid*, BUZZFEED NEWS (Apr. 9, 2021), <https://www.buzzfeednews.com/article/craig-silverman/why-do-a-bunch-of-nigerian-twitter-influencers-want-this-alleged-money-launderer-to-go-free-theyre-being-paid>.

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brought actions through regional bodies without jurisdiction as a public relations pressure tactic, including a habeas action in the ECOWAS Court of Justice, despite the fact that Cabo Verde has never assented to that body's jurisdiction.⁸⁴ After Saab's arrest, Maduro also designated him as Venezuela's deputy representative to the African Union (AU) to try to bolster the immunity claims, though Cabo Verde is not a signatory to the AU's privileges and immunities protocol.⁸⁵

Saab was finally extradited to the U.S. in October 2021 after he exhausted all of his appeals in Cabo Verde's judicial and constitutional courts.⁸⁶ In the year and a half since his arraignment in Miami, he has continued to use U.S.-based lawyers to push his diplomatic immunity narrative.⁸⁷ But discovery produced in November undermined the credibility and reliability of the evidence and arguments Saab's team had relied upon,⁸⁸ and in December the district court formally rejected Saab's immunity claim.⁸⁹ He has appealed that ruling,⁹⁰ but the Eleventh Circuit has since held in different case that a district court could not grant a motion brought by a Maduro-appointed body without addressing a nonjusticiable political question concerning the State Department's conclusion that Maduro is not

www.buzzfeednews.com/article/craigsilverman/nigerian-twitter-campaign-alex-saab [https://perma.cc/Y5KZ-JV6Y].

84. See *Cape Verde Court Delivers 'Counter' Judgement to ECOWAS Court on Extradition of Alex Saab*, B&FT ONLINE (Mar. 18, 2021), <https://thebftonline.com/2021/03/18/cape-verde-court-delivers-counter-judgement-to-ecowas-court-on-extradition-of-alex-saab/> [https://perma.cc/2VKY-W4RN].

85. See Samson Adenekan, *Venezuela Appoints Businessman Detained in Cabo Verde as Ambassador to African Union*, PREMIUM TIMES OF NIGERIA (Dec. 29, 2020), <https://www.premiumtimesng.com/news/headlines/433703-venezuela-appoints-businessman-detained-in-cabo-verde-as-ambassador-to-african-union.html> [https://perma.cc/W4HL-TMZ9].

86. Press Release, U.S. Att'y Off. Southern District of Florida, Colombian Businessman Charged with Money Laundering Extradited to the United States from Cabo Verde (Oct. 18, 2021), <https://www.justice.gov/usao-sdfl/pr/colombian-businessman-charged-money-laundering-extradited-united-states-cabo-verde> [https://perma.cc/PLU9-PYUL].

87. Joshua Goodman, *Appeals Court Thwarts Maduro Ally's Claim of Diplomat Status*, ASSOCIATED PRESS (May 2, 2022), <https://apnews.com/article/middle-east-iran-venezuela-miami-nicolas-maduro-b09cb0160e18c057cdc8156160e8ae31> [https://perma.cc/P2J8-EESE].

88. See *United States v. Saab Moran*, 19-20450-CR-Scola, 2022 WL 4291417 (S.D. Fla., Sept. 15, 2022); Joshua Goodman, *Venezuela's Bid to Save 'Diplomat' from US Charges Takes Hit*, ABC NEWS (Nov. 8, 2022), <https://abcnews.go.com/International/wireStory/venezuelas-bid-save-diplomat-us-charges-takes-hit-92844870> [https://perma.cc/A9UC-HJXP].

89. *US Judge Denies Diplomatic Immunity for Maduro Ally Alex Saab*, AL JAZEERA (Dec. 24, 2022), <https://www.aljazeera.com/news/2022/12/24/us-judge-denies-diplomatic-immunity-for-maduro-ally-alex-saab> [https://perma.cc/U6LE-XMSP]; Sarah Morland, *U.S. Court Rejects Bid by Maduro Ally to Dismiss Money Laundering Charges*, REUTERS (Dec. 24, 2022), <https://www.reuters.com/world/americas/us-court-denies-motion-dismiss-saab-case-diplomatic-status-2022-12-23/> [https://perma.cc/4FQY-DXJK].

90. Brian Ellsworth, *Maduro Ally Saab Appeals U.S. Court Ruling on Diplomatic Immunity*, REUTERS (Dec. 28, 2022), <https://www.reuters.com/world/americas/maduro-ally-saab-appeals-us-court-ruling-diplomatic-immunity-2022-12-28/> [https://perma.cc/Q2C5-2A9Y].

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Venezuela's legitimate political leader.⁹¹ It follows, then, that Saab's argument that he is entitled to diplomatic immunity based upon his alleged appointment by someone not recognized as a legitimate head of state, is likely to fail on appeal, as well.

IV. Nuclear Arms Control

On February 24, 2022, Russia invaded Ukraine in violation of both the United Nations Charter⁹² and Russian security assurances when Ukraine agreed to relinquish its nuclear weapons.⁹³ Russia ignored the UN General Assembly⁹⁴ and the International Court of Justice's⁹⁵ calls for halting the invasion. President Putin referred to Russia's nuclear arsenal and threatened historic consequences if other nations "interfered," but the United States and other NATO countries furnished extensive military aid to Ukraine.⁹⁶ Ukraine repelled an initial Russian drive on the capital, Kyiv, but at the time this article went to press, fighting continued in the Southern and Eastern parts of Ukraine.⁹⁷ Meanwhile, Russia was conducting a campaign of missile strikes on civilian water, heat, and electricity infrastructure, prompting United Nations human rights officials to express "shock" at the suffering caused.⁹⁸

Despite tensions over Ukraine, the United States and Russia agreed to resume nuclear arms control talks, including talks of renewal or replacement of the New START treaty.⁹⁹ A State Department spokesperson said that talks would resume "in the near future,"¹⁰⁰ but they had not resumed at the

91. PDVSA US Litigation Trust v. LukOil Pan Americas LLC, 65 F.4th 556 (11th Cir. 2023).

92. U.N. Charter art. 2, ¶¶ 1–5.

93. Memorandum on Security Assurances in Connection with Ukraine's Accession to the Treaty on the Non-Proliferation of Nuclear Weapons, Dec. 5, 1994, 3007 U.N.T.S. 169.

94. *General Assembly: Eleventh Emergency Special Session of the General Assembly (Resumed: 12th Plenary meeting): Territorial Integrity of Ukraine: Defending Principles of the Charter of the United Nations*, UNITED NATIONS (Oct. 20, 2022), <https://media.un.org/en/asset/k1z/k1zt3lnr03> [<https://perma.cc/PA2C-UNQX>].

95. Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), Summary, 2022 I.C.J. (Mar. 16, 2022).

96. Steve Rosenberg, *Ukraine Invasion: Would Putin Press the Nuclear Button?*, BBC (Feb. 28, 2022), <https://www.bbc.com/news/world-europe-60551140> [<https://perma.cc/P6CG-CXSS>].

97. See Robert Burns, *Russia's Failure to Take Down Kyiv Was a Defeat for the Ages*, ASSOCIATED PRESS (Apr. 7, 2022), <https://apnews.com/article/russia-ukraine-war-battle-for-kyiv-dc559574ce9f6683668fa221af2d5340> [<https://perma.cc/B59Z-CRXD>].

98. *UN High Commissioner for Human Rights Volker Turk Concludes His Official Visit to Sudan*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'N (Nov. 16, 2022), <https://www.ohchr.org/en/statements/2022/11/un-high-commissioner-human-rights-volker-turk-concludes-his-official-visit-sudan> [<https://perma.cc/FTZ4-S9DF>].

99. *FactBox: What Is the New START Nuclear Arms Treaty?*, REUTERS (Feb. 21, 2023), <https://www.reuters.com/world/what-is-new-start-nuclear-arms-treaty-2023-02-21/> [<https://perma.cc/7B7B-8R6K>].

100. Press Conference, Ned Price, Spokesperson, U.S. Dep't of State, Dep. Press Briefing (Nov. 8, 2022), <https://www.state.gov/briefings/department-press-briefing-november-8-2022/> [<https://perma.cc/VP9Q-S5TE>]; see also Simon Lewis, *Russia, U.S. to Hold First Talks Under*

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time of this writing. Numerous arms control experts and scientists have published warnings that rapid advances in military technology are shortening the window of time available for negotiation of an effective arms control treaty.¹⁰¹

In 2022, all states possessing nuclear weapons continued to upgrade, and in some instances, to enlarge, their nuclear arsenals.¹⁰² Russia had completed eighty-nine percent of its comprehensive modernization program,¹⁰³ but Putin professed to be “extremely concerned”¹⁰⁴ about U.S. missile defense near Russia and the Russian Defense Ministry announced that in 2023 there would be a major upgrade of nuclear infrastructure to enhance the combat capabilities of Russia’s missile forces.¹⁰⁵ The United States rolled out the first of its new B-21 stealth bombers¹⁰⁶ and continued with plans for an enhanced long-range air to surface nuclear missile, enhanced nuclear missile submarines, and a new generation of fixed silo nuclear ICBMs.¹⁰⁷ The Defense Department assesses that China is seeking to enhance its “strategic nuclear capability,” which currently has about four-hundred nuclear warheads, and could have as many as 1,500 by 2035.¹⁰⁸

Nuclear Treaty Since Ukraine War-State Dept, REUTERS (Nov. 9, 2022), <https://www.reuters.com/world/russia-us-discuss-first-nuclear-talks-since-ukraine-conflict-kommersant-2022-11-08/> [<https://perma.cc/G5C9-AN5E>].

101. See, e.g., Rose Gottemoeller, *The Case Against a New Arms Race*, FOREIGN AFF. (Aug. 9, 2022), https://www.foreignaffairs.com/world/case-against-new-arms-race?utm_medium=Promo_email&utm_source=Lo_flows&utm_campaign=registered_user_welcome&utm_term=email_1&utm_content=20230329 [<https://perma.cc/J43K-NNKG>]; MARINA FAVARO ET AL., NEGATIVE MULTIPLICITY: FORECASTING THE FUTURE IMPACT OF EMERGING TECHNOLOGIES ON INTERNATIONAL STABILITY AND HUMAN SECURITY 5 (Univ. of Hamburg Inst. for Peace Rsch. & Sec. Pol’y, Rsch. Report No. 010, 2022), <https://ifsh.de/en/news-detail/new-research-report-forecasting-the-future-impact-of-emerging-technologies-on-international-stability-and-human-security> [<https://perma.cc/KU6Y-PTK4>].

102. *Global Nuclear Arsenals Are Expected to Grow as States Continue to Modernize-NEW SIPRI Yearbook Out Now*, STOCKHOLM INT’L PEACE RSCH. INST. (June 13, 2022), <https://sipri.org/media/press-release/2022/global-nuclear-arsenals-are-expected-grow-states-continue-modernize-new-sipri-yearbook-out-now> [<https://perma.cc/QC2Q-B6UP>].

103. Hans M. Kristensen & Matt Korda, *Nuclear Handbook: How Many Nuclear Weapons Does Russia Have in 2022?*, BULL. OF THE ATOMIC SCIENTISTS (Feb. 23, 2022), <https://thebulletin.org/premium/2022-02/nuclear-notebook-how-many-nuclear-weapons-does-russia-have-in-2022/> [<https://perma.cc/KEE4-G52>].

104. *Id.*

105. See *Russia Should Use Advanced Weapons in Ukraine, Shoigu Says*, REUTERS (Nov. 30, 2022), <https://www.reuters.com/world/europe/russia-should-use-advanced-weapons-ukraine-shoigu-says-2022-11-30/> [<https://perma.cc/7JDS-4W9A>].

106. *Nuclear Policy News*, CTR. FOR STRATEGIC & INT’L STUD. (Dec. 5, 2022), <https://pardot.csis.org/webmail/906722/1271032689/3e5d726abaa3d3b3693dc0ac0131c7d4323626ba194718e7257900eed8be29b0> [<https://perma.cc/YU7W-XHUV>].

107. U.S. DEP’T OF DEFENSE, 2022 NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 33–61 (2022), <https://media.defense.gov/2022/Oct/27/2003103845/-1/-1/1/2022-NATIONAL-DEFENSE-STRATEGY-NPR-MDR.PDF> [<https://perma.cc/6UQW-9VFF>].

108. See U.S. DEP’T OF DEFENSE, MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE’S REPUBLIC OF CHINA (2022), <https://media.defense.gov/2022/Nov/29/2003122279/>

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North Korea continued extensive testing of nuclear-capable missiles. It reportedly made apparent preparations for a possible nuclear weapons test, but no such test had been conducted when this article went to press.¹⁰⁹

Two scientific studies published in 2022 estimated that a full-scale nuclear war between the United States and Russia, and the inevitable “nuclear winter” and subsequent famine caused by soot and smoke lingering in the atmosphere, would cause up to five billion deaths worldwide, and that a limited nuclear war between India and Pakistan would cause up to two billion deaths from a global famine.¹¹⁰

The first Meeting of State Parties under the Treaty on the Prohibition of Nuclear Weapons (TPNW) issued renewed calls for the complete elimination of nuclear weapons.¹¹¹ But none of the states actually possessing nuclear arms are among the sixty-eight states parties that have ratified the TPNW.¹¹²

The Review Conference of the Nuclear Non-Proliferation Treaty, scheduled for 2020 but postponed because of the COVID pandemic, met in 2022 and adjourned without agreeing on a final document.¹¹³ Russia’s invasion of Ukraine led to widespread predictions that additional states might seek their own nuclear weapons programs,¹¹⁴ but none have yet announced plans to do so.

On October 27, 2022, the U.S. Department of Defense released the Administration’s Nuclear Posture Review (NPR), similar in numerous respects to those released by previous administrations.¹¹⁵ The NPR did not contain the statement, advocated by President Biden during the 2020 Presidential campaign, that the “sole purpose” of the U.S. nuclear arsenal is

1/-1/1/2022-MILITARY-AND-SECURITY-DEVELOPMENTS-INVOLVING-THE-PEOPLES-REPUBLIC-OF-CHINA.PDF [https://perma.cc/XMJ6-52HY].

109. Kristensen & Korda, *supra* note 103.

110. Lili Xia, et al., *Global Food Insecurity & Famine from Reduced Crop, Marine Fishery & Livestock Production Due to Climate Disruption from Nuclear War Soot Injection*, NATURE FOOD (Aug. 15, 2022), <https://www.nature.com/articles/s43016-022-00573-0> [https://perma.cc/53W3-7LBD]; Cheryl S. Harrison et al., *A New Ocean State After Nuclear War*, 3 AGU ADVANCES 1, 12 (2022).

111. Rep. of the first Meeting of State Parties to the Treaty on the Prohibition of Nuclear Weapons, at 7, U.N. Doc TPNW/MSP/2022/6 (July 21, 2022).

112. U.N. Off. of Disarmament Aff., Treaty on the Prohibition of Nuclear Weapons (Jan. 22, 2021), <https://treaties.unoda.org/t/tpnw> [https://perma.cc/K3XV-2C3J]; *Nuclear Weapons: Who Has What at a Glance*, ARMS CONTROL ASS’N (Jan. 2022), [https://www.armscontrol.org/factsheets/Nuclearweaponswhohaswhat#:~:text=the%20nuclear%2Dweapon%20states%20\(NWS,nuclear%20weapons%20by%20the%20NPT](https://www.armscontrol.org/factsheets/Nuclearweaponswhohaswhat#:~:text=the%20nuclear%2Dweapon%20states%20(NWS,nuclear%20weapons%20by%20the%20NPT) [https://perma.cc/9E8A-L4HK].

113. See *Joint Statement from Civil Society to the States Parties of the Nuclear Non-Proliferation Treaty*, REACHING CRITICAL WILL (Jan. 10, 2022), https://reachingcriticalwill.org/images/documents/Disarmament-fora/npt/revcon2022/ngo-materials/joint-ngo-npt-statement_Jan2022.pdf [https://perma.cc/WW5K-HH22].

114. See Paul Mcleary & Alexander Ward, *Russia’s Invasion of Ukraine Could Start a Race for Nukes*, AUSTIN SAYS, POLITICO (Nov. 19, 2022), <https://www.politico.com/news/2022/11/19/russias-invasion-ukraine-race-nukes-00069593> [https://perma.cc/UFJ2-FDZY].

115. U.S. DEP’T OF DEFENSE, *supra* note 107, at 33–61.

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to deter nuclear attacks against the United States and its allies.¹¹⁶ The 2022 NPR repeats statements that the United States remains committed to arms control and shares the ultimate goal of a world without nuclear weapons but did not propose any specific steps to implement the statements.¹¹⁷

Efforts continued in 2022 to reestablish the Iran nuclear agreement that President Trump withdrew the United States from in May 2018,¹¹⁸ but talks ended in an impasse, and Iran announced that it was increasing the amount of uranium that it was enriching to near weapons-grade.¹¹⁹ Meanwhile Saudi Arabia, which has reserved the right to enrich uranium, has issued a request for proposals for construction of a major new nuclear reactor.¹²⁰

The Conference on Establishment of a Middle East Zone Free of Nuclear Weapons and Other Weapons of Mass Destruction met in November 2022 and issued a report stating that no agreement had been reached but that work would continue in hopes of arriving at a treaty.¹²¹

116. *What is the Sole Purpose of US Nuclear Weapons?*, FED’N OF AM. SCIENTISTS, <https://fas.org/what-is-the-sole-purpose-of-us-nuclear-weapons/> [<https://perma.cc/5QDY-KFAH>] (last visited Mar. 29, 2023).

117. U.S. DEP’T OF DEFENSE, *supra* note 107; *see also* Hans Kristensen & Matt Korda, *The 2022 Nuclear Posture Review: Arms Control Subdued by Military Rivalry*, FED’N OF AM. SCIENTISTS (Oct. 27, 2022), <https://fas.org/blogs/security/2022/10/2022-nuclear-posture-review/> [<https://perma.cc/B8UZ-AKDC>].

118. *Timeline of Nuclear Diplomacy with Iran*, ARMS CONTROL ASS’N (Jan. 2023), <https://www.armscontrol.org/factsheets/Timeline-of-Nuclear-Diplomacy-With-Iran> [<https://perma.cc/UX32-SP32>].

119. Gabriela Rosa Hernandez, *Iran Supplies Arms to Russia*, ARMS CONTROL ASS’N (2022), <https://www.armscontrol.org/act/2022-11/news/iran-supplies-arms-russia> [<https://perma.cc/S6HZ-LWJE>].

120. Henry Sokolski, *Will Seoul and Washington Make Riyadh Nuclear-Weapons Ready?*, BULL. OF THE ATOMIC SCIENTISTS (July 26, 2022), <https://thebulletin.org/2022/07/will-seoul-and-washington-make-riyadh-nuclear-weapons-ready/> [<https://perma.cc/6W7C-WEV5>].

121. U.N. Conference on the Establishment of a Middle East Zone Free of Nuclear Weapons and Other Weapons of Mass Destruction, Report of the Third Session of the Conference on Establishment of a Middle East Zone Free of Nuclear Weapons and Other Weapons of Mass Destruction 14 (2022), U.N. Doc A/CONF.236/2022/3 (Nov. 14, 2022).

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