

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA INTERNATIONAL LAW SECTION



The YEAR IN REVIEW

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

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International Legal Developments Year in Review: 2023

KIMBERLY Y. W. HOLST, ROSA KIM, AND JASON S. PALMER*

This publication, *International Legal Developments – Year in Review: 2023*, presents a survey of important legal and political developments in international law that occurred during 2023. The volume consists of articles from thirty-three committees of the American Bar Association International Law Section, 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 International Law Section 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 specialized 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 Kimberly Holst, Rosa Kim, and Jason Palmer, the Co-General Editors, formatted and organized the thirty-three 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. Antonio Partida and A.B. Steinberg, the past and current Editors-in-Chief of *The International Lawyer* ("The International Lawyer"), and Victoria Stranczek and Taylor Rosenbleeth, the past and current Managing Editors of *The Year in Review*

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(“*The Year in Review*”), all performed 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 and Joan Schaffner, the prior and current Publications Officers for the ABA International Law Section 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 2023. 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 International Law Section 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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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.

THE YEAR IN REVIEW
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**PUBLISHED IN COOPERATION WITH
THE SMU DEDMAN SCHOOL OF LAW**

Canada

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AUTHORS: JACOB MANTLE, CHELSEA RUBIN, PETER JAROSZ,
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This article surveys significant legal developments in Canada in 2023. All information in this article is current to November 2023.

I. 2023 Canadian Trade Update

While the war in Ukraine and Canada's response to it remained a significant driver of trade policy in 2023, new issues and challenges emerged.

The Canada Border Services Agency (CBSA) proposed to radically overhaul its approach to customs valuation and, once again, delayed its marquee customs modernization program. While the pace of new anti-dumping/countervailing-duty (AD/CVD) proceedings slowed somewhat in 2023, enforcement of existing measures increased with the CBSA making its first-ever "particular market situation" finding and, in what appears to be a policy shift, routinely imposing retroactive antidumping reassessments despite Canada's self-professed "prospective" normal value system.¹

On sanctions, while Canada has tried to align its actions with those of its international partners, it has also increasingly signaled a willingness to implement unilateral sanctions measures both with respect to Russia and other jurisdictions.² However, Canada continues to be conspicuous in its failure to provide sanctions-related guidance, unnecessarily complicating compliance efforts.

Also this year, Canada joined other jurisdictions in passing modern slavery legislation imposing public self-reporting requirements with respect to

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1. *Notice of Conclusion of Re-investigation: Certain Concrete Reinforcing Bar*, GOV'T CAN. (May 10, 2023), <https://www.cbsa-asfc.gc.ca/sima-lmsi/ri-re/rb12022/rb12022-nc-eng.html> [<https://perma.cc/DVD7-AUL4>].

2. *See* Special Economic Measures (Russia) Regulations, SOR/2014-58 (Can.); *see also Current Sanctions Imposed by Canada*, GOV'T CAN. (Feb. 20, 2024), https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/current-actuelles.aspx?lang=eng [<https://perma.cc/65T3-2KF4>].

risks of forced or child labour in supply chains.³ Businesses with reporting obligations will be required to file their first reports in May 2024.⁴

Finally, several trade disputes involving Canada came to a head, including ones respecting dairy and vehicles.⁵ The longest Canada-U.S. trade dispute in history—that with respect to softwood lumber—also continued largely unabated in 2023.⁶ Despite such rifts, Canada continued, albeit slowly, to expand connections in the Indo-Pacific⁷ and to conclude a new free trade agreement (FTA) with the United Kingdom (UK).⁸ Canada also continued the process of modernizing the existing FTA with Ukraine⁹ and concluded negotiations on a foreign investment promotion and protection agreement with Taiwan.¹⁰

A. CUSTOMS – CARM DELAYS AND NEW VALUE FOR DUTY CHANGES

In August 2023, the CBSA again delayed the next implementation phase of its Assessment and Revenue Management (CARM) project (known as “Release 2”). CARM is a multi-year initiative to replace certain existing customs and enforcement systems with a modernized online solution for the accounting, payment, and collection of duties for certain taxes. Release 2 was originally expected in January 2023, then in October 2023, but has now been postponed until at least May 2024.¹¹ Release 2 will be an important milestone because it will open the online system to all trade community participants, i.e., not just brokers and consultants, and it will permit the

3. See *Fighting Against Forced Labour and Child Labour in Supply Chains Act*, S.C. 2023, c 9 (Can.) [hereinafter “Modern Slavery Act”].

4. *Id.* c 9, § 11(1).

5. See *Canada Welcomes CUSMA Dispute Settlement Panel Findings on Dairy Tariff Rate Quotas*, GLOB. AFFS. CAN. (Nov. 24, 2023), <https://www.canada.ca/en/global-affairs/news/2023/11/canada-welcomes-cusma-dispute-settlement-panel-findings-on-dairy-tariff-rate-quotas.html> [<https://perma.cc/MD9N-BLXV>]; see also Steve Scherer, *Canada, Mexico Win Auto Rules Trade Dispute with U.S.*, REUTERS (Jan. 11, 2023), <https://www.reuters.com/world/americas/canada-mexico-win-auto-rules-trade-dispute-with-us-2023-01-11/> [<https://perma.cc/UC64-G4EW>].

6. See *Softwood Lumber*, GLOB. AFFS. CAN. (last modified Mar. 4, 2024), https://www.international.gc.ca/controls-controles/softwood-bois_oeuvre/index.aspx?lang=eng [<https://perma.cc/H83K-PNAU>].

7. See *Canada’s Indo-Pacific Strategy*, GOV’T CAN. (Feb. 29, 2024), <https://www.international.gc.ca/transparency-transparence/indo-pacific-indo-pacifique/index.aspx?lang=eng> [<https://perma.cc/U2U4-SGQZ>].

8. See *Canada-UK Trade Continuity Agreement*, GOV’T CAN. (Nov. 18, 2022), https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cuktca-accru/read_agreement-consulrez_accord.aspx?lang=eng [<https://perma.cc/3GQN-XFRC>].

9. See *Canada-Ukraine Free Trade Agreement Implementation Act*, S.C. 2017, c. 8 (Can.).

10. See *Canada and Taiwan Complete Foreign Investment Promotion and Protection Arrangement Negotiations*, GLOB. AFFS. CAN. (Oct. 24, 2023), <https://www.canada.ca/en/global-affairs/news/2023/10/canada-and-taiwan-complete-foreign-investment-promotion-and-protection-arrangement-negotiations.html> [<https://perma.cc/5K8C-2PHQ>].

11. *CARM: Release schedule, features, and benefits*, CAN. BORDER SERVS. AGENCY (Mar. 19, 2024), <https://www.cbsa-asfc.gc.ca/services/carm-gcra/schedule-calendrier-eng.html> [<https://perma.cc/88CP-WW6E>].

submission of electronic commercial accounting declarations, including the ability to make corrections when duties are owing and adjustments when refunds are owed.

In May 2023, the CBSA proposed to amend the *Value for Duty Regulations* to alter which sale in a series of sales transactions results in the importation of goods into Canada and would therefore be the basis upon which to determine value for duty.¹² The changes would create a type of “last sale” rule for valuing goods.¹³ However, the amendments propose to consider any type of agreement, understanding, or arrangement as the last “sale” and not necessarily only a sale or an agreement to sell.¹⁴ The changes will undoubtedly result in an increase in the value for duty of imported goods and therefore the amount of customs duty and tax. While these changes are described by the CBSA as simply seeking to “level the playing field” between Canadian and Non-Resident Importers—the latter of whom, the CBSA asserts, can unfairly declare their lower acquisition costs¹⁵—the changes would, in fact, affect any importer that resells goods in Canada. The proposal would radically depart from existing law and practice in Canada and is arguably offside Canada’s obligations under the World Trade Organization’s (WTO) Customs Valuation Agreement.¹⁶ The CBSA received near-universal opposition to these changes during its conspicuously short consultation process and will likely face continued pushback in 2024.¹⁷

B. CANADIAN AD/CVD PROCEEDINGS

The CBSA initiated only one new AD/CVD investigation (with respect to wind towers from China);¹⁸ five country-wide re-investigations (respecting corrosion-resistant steel sheet, copper pipe fittings, line pipe, heavy plate, and fasteners);¹⁹ and nine expiry reviews.²⁰ The CBSA also initiated eleven normal value and export price reviews.²¹

The CBSA made its first-ever “particular market situation” finding in a re-investigation of rebar from Turkey.²² In that case, the CBSA determined

12. *Canada Gazette, Part 1, Volume 157, Number 21: Regulations Amending the Valuation for Duty Regulations, Regulatory Impact Analysis Statement*, CAN. GAZETTE (May 27, 2023), <https://gazette.gc.ca/rp-pr/p1/2023/2023-05-27/html/reg1-eng.html> [<https://perma.cc/3DMD-8YMG>].

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *See generally id.*

18. *Dumping and Subsidy Investigations*, GOV’T CAN. (Mar. 11, 2024), <https://www.cbsa-asfc.gc.ca/sima-lmsi/i-e/menu-eng.html> [<https://perma.cc/TCK7-4KM8>].

19. *Dumping and Subsidy Re-investigations*, GOV’T CAN. (Mar. 11, 2024), <https://www.cbsa-asfc.gc.ca/sima-lmsi/tr-re/menu-eng.html> [<https://perma.cc/9CA8-27LK>].

20. *Dumping and Subsidy Expiry Reviews*, GOV’T CAN. (Mar. 11, 2024), <https://www.cbsa-asfc.gc.ca/sima-lmsi/er-rre/menu-eng.html> [<https://perma.cc/2CTS-UTZA>].

21. *Normal Value Reviews*, GOV’T CAN. (Mar. 11, 2024), <https://www.cbsa-asfc.gc.ca/sima-lmsi/up/menu-eng.html> [<https://perma.cc/2CTS-UTZA>].

22. *Notice of Conclusion of Re-investigation: Certain Concrete Reinforcing Bar*, *supra* note 1.

that the Turkish rebar market did not permit a proper comparison with sales of rebar to importers in Canada because of alleged distortions in the Turkish market caused by large volumes of low-priced Russian steel billet (available in part because of economic sanctions against Russia following its invasion of Ukraine) and the effects of Turkey's hyperinflation.²³ The practical result of this finding was significantly higher normal values for Turkish rebar exporters.²⁴

While the pace of AD/CVD new investigations and reviews slowed somewhat in 2023, the CBSA's enforcement of existing orders increased.²⁵ Notably, the CBSA has begun making routine retroactive reassessments of anti-dumping duties against Canadian importers. This is a marked departure from Canada's "prospective" normal value system, and nearly all of these decisions are under appeal, either before the CBSA or the Canadian Federal Courts.

Finally, several judicial reviews of both CBSA and Canadian International Trade Tribunal (CITT) decisions, including some lingering from pandemic-induced court slowdowns, were finally concluded. Notably, in *Canadian Hardwood Plywood and Veneer Association v. Canada (Attorney General)*, the Federal Court of Appeal (FCA) upheld the CITT's no injury and no threat of injury determinations.²⁶ In doing so, the FCA somewhat narrowed the scope for an injury or threat of injury determination.²⁷ Respecting the former, the court upheld the CITT's decision that injury must crystallize during the period of inquiry.²⁸ That is, allegations of injury arising from a period before the one under review by the CITT could not justify an injury finding.²⁹ Respecting threat of injury, the FCA upheld the CITT's decision that to make a threat finding there must be a "change in circumstances" from those that existed during the CITT's period of review where it found no injury.³⁰ Lastly, the FCA confirmed the CITT's findings that even if there is only one single class of goods, not all the goods in that class necessarily compete, and the lack of competition may break the alleged causal link between the dumped goods and injury to domestic producers.³¹

C. CANADA'S RUSSIA-RELATED SANCTIONS

In 2023, Canada continued its response to the Russian invasion of Ukraine, sanctioning dozens of additional Russian individuals, companies, and other entities, such as the Wagner private military company, under

23. *Id.*

24. *Id.*

25. *Notice of Retroactive Special Imports Measures Act Assessments: Line pipe 2*, Gov't CAN. (Apr. 28, 2023), <https://www.cbsa-asfc.gc.ca/sima-lmsi/ri-re/lp22022/lp22022-ret-eng.html> [<https://perma.cc/MF3C-B38U>].

26. *Canadian Hardwood Plywood & Veneer Assoc. v. Canada*, [2023] FCA 154 (Can.).

27. *See id.*

28. *Id.* ¶ 54.

29. *Id.*

30. *Id.* ¶ 83–84.

31. *Id.* ¶ 95.

the *Special Economic Measures (Russia) Regulations*.³² These regulations impose a broad-based dealings ban, asset freeze, and financial prohibitions against listed individuals and entities.³³ Canada also expanded other trade restrictive measures to, for example, prohibit the import of aluminum and steel products originating in Russia.³⁴

Canada continues to be unique in pursuing the seizure and forfeiture of assets owned by sanctioned individuals and entities in Canada.³⁵ However, despite government rhetoric, Canada's seizure and forfeiture regime continues to be relatively unused and untested. The only physical asset seized by the government, an Antonov cargo plane seized in June, remains the subject of ongoing disputes and, at the time of this writing, continues to sit on a tarmac in Toronto.³⁶

While Canada has moved quickly to sanction additional individuals and entities, it has so far failed to provide any guidance on the interpretation and operationalization of its sanctions. This continues to be in stark contrast to partners, such as the United States, UK, and European Union (EU), all of which have provided ongoing timely guidance. Moreover, a dearth of enforcement action means there is virtually no jurisprudence on the interpretation of Canada's Russia-related sanctions. An October 2022 ruling from the Court of King's Bench in Alberta remains the only significant judicial consideration of the Russia-related sanctions.³⁷ The Court's dictum was largely obiter, limiting its interpretive value.

Canada also made significant changes to the Special Economic Measures Act, under which the Russia regulations are promulgated, and its Magnitsky Act.³⁸ These amended acts establish threshold criteria that would "deem" a sanctioned person to be the owner of an entity's property when that sanctioned person is considered to "control" that entity.³⁹ Control will be deemed to exist when at least one of three enumerated criteria is satisfied.⁴⁰

32. See *Special Economic Measures (Russia) Regulations*, SOR/2014-58 (Can.).

33. *Id.*

34. *Id.* § 3.14; see also *Canada Bans Russian Aluminum and Steel Imports*, DEPT. FIN. CAN. (Mar. 10, 2023), <https://www.canada.ca/en/department-finance/news/2023/03/canada-bans-russian-aluminum-and-steel-imports.html> [https://perma.cc/RN5A-3P34].

35. *Canada Starts First Process to Seize and Pursue the Forfeiture of Assets of Sanctioned Russian Oligarch*, GLOB. AFFS. CAN. (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/5W8S-F5NN].

36. *Government of Canada Orders Seizure of Russian-registered Cargo Aircraft at Toronto Pearson Airport*, GLOB. AFFS. CAN. (June 10, 2023), <https://www.canada.ca/en/global-affairs/news/2023/06/government-of-canada-orders-seizure-of-russian-registered-cargo-aircraft-at-toronto-pearson-airport.html> [https://perma.cc/LLD7-C8LZ].

37. *Angophora Holdings Limited v. Ovsyankin*, 2022 ABKB 711 (Can.).

38. *Special Economic Measures Act*, S.C. 1992, c 17 (Can.).

39. *Id.* § 2.1; *Justice for Victims of Corrupt Foreign Officials Act*, S.C. 2017, c 21, § 2.01; see also *Budget Implementation Act*, S.C. 2023, c 26, ss 253, 261 (Can.).

40. *Special Economic Measures Act*, S.C. 1992, c 17, § 2.1(2) (Can.); *Justice for Victims of Corrupt Foreign Officials Act*, S.C. 2017, c 21, § 2.01(2) (Can.); see also *Budget Implementation Act*, S.C. 2023, c 26, § 2.1(2).

While these changes appear, at least superficially, to align with other similar approaches taken by the United States, UK, and EU, in reality, these changes may result in a far stricter but potentially more ambiguous application of Canadian sanctions. Indeed, it was the view of the Canadian Bar Association, expressed in a rare submission to Canada's Parliament, that the amendments "do not increase the predictability and certainty of Canada's sanctions regime. Rather, they cause further confusion and compliance challenges."⁴¹

Canada has also shown an increasing willingness to turn to economic sanctions, whether multilateral or unilateral, to respond to other foreign policy issues, especially when there are significant affected diaspora populations located in Canada.⁴² In 2023, Canada implemented a new sanctions regime in respect of Sri Lanka and sanctioned many new individuals related to the deteriorating situation in Haiti.⁴³ While sanctions in Haiti were initially implemented at the end of 2022, they were substantially expanded in 2023.⁴⁴ In both cases, Canada imposed many of the sanctions unilaterally in the absence of similar action by its allies.

D. FORCED LABOUR AND SUPPLY CHAIN DUE DILIGENCE

Despite a longstanding lack of enforcement of its existing efforts to combat modern slavery, Canada pressed forward in 2023 with a new law, the Fighting Against Forced Labour and Child Labour in Supply Chains Act (the Modern Slavery Act).⁴⁵ The law creates reporting requirements, including reporting on efforts to combat child and forced labour, for companies of a certain size with a business nexus to Canada.⁴⁶ The Modern Slavery Act

41. Letter from Ewa Katarzyna Gosal, Chair, CBA International Law Section to Peter Fonseca, M.P. & Chair of the Standing Committee on Finance, The Canadian Bar Ass'n (May 12, 2023) (on file with the Canadian Bar Association) (letter regarding Budget Implementation Act).

42. *Current Sanctions Imposed by Canada*, GOV'T CAN. (Feb. 20, 2024), https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/current-actuelles.aspx?lang=eng [<https://perma.cc/65T3-2KF4>].

43. See Special Economic Measures (Haiti) Regulations, SOR/2022-26 (Can.); Special Economic Measures (Sri Lanka) Regulations, SOR/2022-226 (Can.); see also *Canada Imposes Sanctions on Sri Lankan State Officials for Human Rights Violations*, GLOB. AFFS. CAN. (Jan. 10, 2023), <https://www.canada.ca/en/global-affairs/news/2023/01/canada-imposes-sanctions-on-sri-lankan-state-officials-for-human-rights-violations.html> [<https://perma.cc/U9EY-M9TB>].

44. See *Canada Imposes Sanctions Against Haitian Economic Elites*, GLOB. AFFS. CAN. (Dec. 5, 2022), <https://www.canada.ca/en/global-affairs/news/2022/12/canada-imposes-sanctions-against-haitian-economic-elites.html> [<https://perma.cc/ZH7Z-48V5>]; *Canada Imposes Additional Sanctions Against Haitian Elites*, GLOB. AFFS. CAN. (Dec. 20, 2022), <https://www.canada.ca/en/global-affairs/news/2022/12/canada-imposes-additional-sanctions-against-haitian-elites.html> [<https://perma.cc/2NS6-PNM9>]; *Canada Imposes Additional Sanctions Against Members of Haitians Economic Elite*, GLOB. AFFS. CAN. (Sept. 21, 2023), <https://www.canada.ca/en/global-affairs/news/2023/09/canada-imposes-additional-sanctions-against-members-of-haitian-economic-elite.html> [<https://perma.cc/9QUV-K2CR>].

45. See generally Modern Slavery Act (Can.).

46. *Id.* § 3(b).

comes into force on January 1, 2024, and reports must be made public and filed with the Ministry of Public Safety and Emergency Preparedness by May 2024.⁴⁷ These public reports may serve as an information-gathering tool for CBSA to help inform its eventual enforcement activities.

The Modern Slavery Act also amended Canada's existing customs import ban on goods produced in whole or in part by forced labour to update the definition of "forced labour" and to specifically cover and define "child labour" regardless of coercion.⁴⁸ The changes adopted and expanded upon the definitions found in several International Labour Organization conventions and arguably expand the scope of activity that is subject to the import ban.

E. FREE TRADE AGREEMENTS

Canada is in the process of introducing or modernizing FTAs with the UK, Ukraine, Indonesia, and the Association of Southeast Asian Nations (ASEAN). Canada also concluded negotiations on a foreign investment promotion and protection agreement with Taiwan, the first based on Canada's new model agreement.⁴⁹

Canada's negotiations with the UK toward a new FTA continued in 2023.⁵⁰ The existing Canada-United Kingdom Trade Continuity Agreement will expire at the end of 2023.⁵¹ Despite the parties completing a sixth round of negotiations in June 2023 and a commitment to conclude negotiations, the prospect of a conclusion by the end of 2023 is increasingly unlikely.⁵²

Canada is also in the process of negotiating an FTA with the ASEAN bloc; the parties completed their fifth round of negotiations in October 2023 and aim to conclude negotiations by 2025. Canada continues negotiating an FTA with Indonesia and held a sixth round of negotiations in October 2023;⁵³ a seventh round is anticipated to take place in early 2024.⁵⁴ The negotiation of these two agreements forms part of Canada's 2022 Indo-Pacific Strategy.⁵⁵

47. See generally *id.*

48. *Id.* § 2.

49. *Canada and Taiwan Complete Foreign Investment Promotion and Protection Arrangement Negotiations*, *supra* note 10; *Canada's 2021 Foreign Investment Promotion and Protection Agreement (FIPA) Model*, Gov'T CAN. (May 11, 2021), <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx?lang=eng> [<https://perma.cc/3CMS-4ELR>].

50. See generally *Canada-UK Trade Continuity Agreement*, *supra* note 8.

51. *Id.*

52. As all information in this article is current to November 2023, it should be noted that the year ended without a conclusion to these negotiations.

53. *Canada-Indonesia Comprehensive Economy Partnership Agreement – Background Information*, Gov'T CAN. (Nov. 2, 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/A8VW-H9UW>].

54. *Id.*

55. *Canada's Indo-Pacific Strategy*, *supra* note 7.

Finally, Canada and Ukraine agreed to modernize their existing FTA.⁵⁶

**F. DISPUTES UNDER CANADA'S FREE TRADE AGREEMENTS AND
SOFTWOOD LUMBER DEVELOPMENTS**

Two dairy-related disputes came to a head in 2023. First, in November 2023, the second United States-Mexico-Canada Agreement (USMCA/CUSMA) panel to consider a dairy-related dispute between Canada and the United States released its report rejecting, in majority, the United States complaint that Canada continued violating its market access commitments despite revising its dairy quota system for processors.⁵⁷ Canada made these updates in response to a 2021 panel decision that sided with the United States.⁵⁸ Second, a panel established in response to a similar dairy-related challenge by New Zealand brought under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) released its report in September concluding that Canada's practice regarding its allocation of dairy quota to processors violated its commitments under the CPTPP.⁵⁹

Additionally, the softwood lumber dispute—the longest-running Canada-U.S. trade dispute—continued in 2023.⁶⁰ In July, the U.S. Department of Commerce (USDOC) released its final determinations in its fourth administrative review; the fifth administrative review is ongoing.⁶¹ In October, a legacy North American Free Trade Agreement (NAFTA) panel released its report on Canada's challenge to the USDOC's original dumping determination, nearly six years after Canada first requested the panel.⁶² The NAFTA panel agreed with Canada that certain elements of the dumping determination were inconsistent with U.S. law and directed the USDOC to review its determination.⁶³ Nevertheless, seven other active NAFTA and USMCA/CUSMA reviews remain outstanding.⁶⁴ The operation of these panels has been stalled by U.S. actions to prevent the selection and appointment of panel members.

Finally, early in 2023, a USMCA/CUSMA panel released its report on one of the first disputes arising under the agreement respecting Canada's and Mexico's challenge to U.S. interpretations of regional value content for

56. See Canada-Ukraine Free Trade Agreement Implementation Act, S.C. 2017, c. 8 (Can.).

57. *Canada Welcomes CUSMA Dispute Settlement Panel Findings on Dairy Tariff Rate Quotas*, GLOB. AFFS. CAN. (Nov. 24, 2023), <https://www.canada.ca/en/global-affairs/news/2023/11/canada-welcomes-cusma-dispute-settlement-panel-findings-on-dairy-tariff-rate-quotas.html> [<https://perma.cc/MD9N-BLXV>].

58. *Id.*

59. *CPTPP Reaffirms Canada's Dairy Supply Management System*, GLOB. AFFS. CAN. (Sept. 5, 2023), <https://www.canada.ca/en/global-affairs/news/2023/09/cptpp-reaffirms-canadas-dairy-supply-management-system.html> [<https://perma.cc/KEB8-J3K3>].

60. *Softwood Lumber*, *supra* note 6.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

automotive goods.⁶⁵ The crux of that dispute was whether non-originating inputs used to make certain core automotive parts could be “rolled up” and counted as originating in the final vehicle.⁶⁶ The United States argued such a roll-up was not permitted, thus making it more difficult for certain vehicles to benefit from the agreement.⁶⁷ The panel rejected the United States’ interpretation.⁶⁸

II. Procurement and the Ontario Government: Implications for U.S. Suppliers

Ontario is Canada’s largest province by population and had a provincial budget of almost \$205 billion in 2023.⁶⁹ This budget included public procurement, which refers to buying goods and services from domestic and U.S. (and other international) suppliers.⁷⁰ According to government publications, “[e]very year, Ontario spends about \$29 billion on goods and services ranging from pacemakers and bandages, to computer and IT hardware.”⁷¹

A. U.S. SUPPLIERS’ ACCESS TO ONTARIO PROCUREMENTS THROUGH TRADE AGREEMENTS

Many of Canada’s trade agreements have opened procurement opportunities to foreign suppliers by containing government procurement obligations.⁷² These obligations dictate that government bodies must abide by certain rules when procuring goods or services.⁷³ Notably, however, the USMCA/CUSMA does not contain government procurement obligations that apply to Canada.⁷⁴ Instead, Canada and the United States have agreed

65. Steve Scherer, *Canada, Mexico Win Auto Rules Trade Dispute with U.S.*, REUTERS (Jan. 11, 2023), <https://www.reuters.com/world/americas/canada-mexico-win-auto-rules-trade-dispute-with-us-2023-01-11/> [https://perma.cc/UC64-G4EW].

66. *See id.*

67. *Id.*

68. *Id.*

69. *See* Katherine DeClerq, *Ontario Aims to Balance Budget in 2025 Despite Largest Spending Plan in Province’s History*, CTV NEWS (Mar. 23, 2023), <https://toronto.ctvnews.ca/ontario-aims-to-balance-budget-in-2025-despite-largest-spending-plan-in-province-s-history-1.6324486#> [https://perma.cc/6CYA-GXBJ].

70. *Id.*

71. *See* *Doing Business with the Government of Ontario*, GOV’T ONTARIO (Feb. 12, 2024), <https://www.ontario.ca/page/doing-business-government-ontario> [https://perma.cc/8HUW-JXGK].

72. *Government Procurement*, GLOB. AFFS. CAN. (Dec. 28, 2023), <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/gp-mp/index.aspx?lang=eng> [https://perma.cc/5U6G-E7BV].

73. *Id.*

74. *See* Agreement Between the United States of America, the United Mexican States, and Canada 2020 Can. T.S.; *see also* *Government Procurement Summary*, GOV’T CAN. (June 17, 2019), https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/government-procurement-marches_publics.aspx?lang=eng [https://perma.cc/6G2W-KP25].

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to abide by the procurement rules set out in the WTO's Agreement on Government Procurement (GPA).⁷⁵

The GPA allows U.S. businesses to bid for contracts tendered by certain Canadian government entities, including procurements by the Ontario government.⁷⁶ The GPA also imposes obligations on procuring entities when running a procurement.⁷⁷ The key obligation is that of non-discrimination: the Ontario government must treat U.S. suppliers "no less favourable" than any supplier from Canada.⁷⁸ Ontario must also not discriminate against domestic suppliers based on the degree of foreign affiliation or ownership by Canada's trading partners.⁷⁹ Further, the GPA sets forth obligations with respect to transparency and procedural fairness.⁸⁰

The GPA obligations apply only to procurements valued over defined thresholds, and the threshold values are subject to two-year periodic updates.⁸¹ Through 2023, the thresholds applicable to the Ontario government were \$651,000 for contracts for goods or services and \$9,100,000 for contracts for construction services.⁸² The thresholds in effect from January 1, 2022, through December 31, 2023, are scheduled to increase for 2024.⁸³

Ontario is one of the largest public buyers in Canada. Many of its purchases are governed by the rules set out in the GPA. According to Canada's most recent notification to the WTO, in 2019 Ontario had 274 contracts with a combined value of over \$4 billion that were subject to the GPA.⁸⁴ These contracts represent a significant opportunity for U.S. suppliers. However, two notable issues should be concerning for U.S. suppliers doing business in

75. See *Government Procurement Summary*, GOV'T CAN. (June 17, 2019), https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/government_procurement-marches_publics.aspx?lang=eng [<https://perma.cc/6G2W-KP25>]; see also *Agreement on Government Procurement 2012 (as amended on 30 March 2012)*, WTO, https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm [<https://perma.cc/C4YC-CZLF>] (last visited Apr. 3, 2024).

76. See *Canada-Central Government Entities-Annex 1*, WTO, <https://e-gpa.wto.org/en/Annex/Details?Agreement=GPA113&Party=Canada&AnnexNo=1&ContentCulture=en> [<https://perma.cc/4FTC-AQBR>] (last visited Mar. 28, 2024).

77. *Id.*

78. WTO, *AGREEMENT ON GOVERNMENT PROCUREMENT 2012 AND RELATED WTO LEGAL TEXTS*, art. IV(1), at 17 (2012) [hereinafter GPA].

79. *Id.* at art. IV(2), at 17.

80. See *id.* at arts. IV(4), at 18, XVI, at 40–41 (setting out transparency provisions); see also *id.* at arts. VII, at 22–25, XX, at 49–50 (setting out procedural fairness provisions).

81. *Id.* at art. II, at 12–16.

82. *Thresholds in National Currencies*, WTO, <https://e-gpa.wto.org/en/ThresholdNotification/NationalCurrencies> [<https://perma.cc/MSQ3-LAGJ>] (last visited Apr. 3, 2024).

83. See *Contracting Policy Notice 2021-6 Trade Agreements: Thresholds Update*, TREASURY Bd. CAN. SECRETARIAT (Dec. 20, 2021), <https://www.canada.ca/en/treasury-board-secretariat/services/policy-notice/contracting-policy-notice-2021-6.html> [<https://perma.cc/FC64-4GJ8>]; see also GPA, *supra* note 78.

84. See Committee on Government Procurement, *Notification of Statistics Under Article XVI:4 of the Agreement on Government Procurement 2012*, WTO Doc. GPA/STAT(19)/CAN/1 (July 31, 2023), [https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/PLURI/GPASTAT\(19\)/CAN1.pdf&Open=True](https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/PLURI/GPASTAT(19)/CAN1.pdf&Open=True) [<https://perma.cc/PD2D-Z9LS>].

the province: the recent “Buy Ontario” initiative and the fact that Ontario still lacks an independent bid challenge authority.

B. “BUY ONTARIO” PROCUREMENT LEGISLATION

The province’s “Buy Ontario” initiative is outlined in the Building Ontario Businesses Initiative Act, 2022 (BOBI).⁸⁵ Once in force, BOBI and its proposed accompanying regulations will require public sector entities to give preference to Ontario businesses when conducting procurements for goods and services.⁸⁶ While BOBI was tabled in 2022, Ontario released its proposed approach for regulations in 2023.⁸⁷ Based on these proposals, the preferences would be afforded only in procurements of prescribed values falling below minimum thresholds under the Canadian Free Trade Agreement (CFTA),⁸⁸ an intergovernmental agreement between Canada’s provincial, territorial, and federal governments to reduce barriers to trade within Canada.⁸⁹ The values are set out in the table below.

**Proposed Thresholds Under Which Procurements Will be
Required to Give Preference to Ontario Businesses⁹⁰**

Potential Entity Type	Entity Group Under CFTA	Sector	Proposed Threshold
Government Entities under Ontario’s <i>Supply Chain Management Act</i>	Departments, ministries, agencies, boards, councils, committees, commissions, and similar agencies of a Party	Goods	Below \$30,300
		Services	Below \$121,200
		Construction	Below \$121,200
	Crown corporations, government enterprises, and other entities that are owned or controlled by a Party through ownership interests	Goods	Below \$605,600
		Services	Below \$605,600
		Construction	Below \$6,056,100
Designated Broader Public Sector Organizations	School boards, and publicly-funded academic, health, and social service entities as well as any corporation or entity owned or controlled by one or more of the preceding entities	Goods	Below \$121,200
		Services	Below \$121,200
		Construction	Below \$302,900

85. See Building Ontario Businesses Initiative Act, S.O. 2022, c 2, Sch 2 (Can.) [hereinafter “BOBI”].

86. *Id.*

87. See Building Ontario Businesses Initiative Act, O. Reg. 422/23 (Can.) [hereinafter “Ontario BOBI”], <https://www.ontariocanada.com/registry/view.do?postingId=45027&language=en> [<https://perma.cc/F72Z-E3TU>].

88. See Canadian Free Trade Agreement, C.R.C. 2023 (Can.), <https://www.cfta-alec.ca/wp-content/uploads/2023/08/CFTA-Consolidated-Version-August-17-2023.pdf>.

89. See BOBI, s 3; see also Ontario BOBI.

90. See Ontario BOBI.

These thresholds are also below the thresholds of the GPA, therefore, the proposed “Buy Ontario” requirement is not in direct breach of the GPA. However, advantages provided to Ontario businesses could have a significant impact. By Ontario’s estimate, it could result in \$3 billion in contracts awarded to Ontario businesses annually by 2026.⁹¹ By natural extension, because Ontario businesses will be given preference in these procurements, U.S. suppliers will not be considered or will be disadvantaged in bidding for these contracts. Because the relevant regulations have not yet been finalized, key questions remain such as which businesses will qualify as “Ontario businesses” and what mechanism will be used to give “preference.”

Not only will the stated preference for Ontario suppliers disadvantage U.S. suppliers, it may also lead to procurements that are inconsistent with Canada’s trade agreements, including the GPA. For instance, where an Ontario procuring entity wishes to award a contract to an Ontario business, it may split what is technically one contract into smaller parts in order to circumvent the value thresholds that trigger the application of trade agreements and their corresponding procurement-related obligations.⁹² Additionally, the mechanism that is defined to give “preference” to Ontario businesses may result in procuring entities using undisclosed evaluation criteria to favour Ontario suppliers over other qualified suppliers, which would also breach the GPA.⁹³

C. ONTARIO STILL LACKS AN INDEPENDENT BID CHALLENGE AUTHORITY

An Ontario initiative that is conspicuously absent is the development of an independent bid challenge authority. Currently, when bidders have a complaint concerning an Ontario government procurement, they can file the complaint with the Ministry of Public and Business Service Delivery, which will then launch a formal review.⁹⁴ In contrast, suppliers looking to challenge a federal procurement can file a complaint with the CITT,

91. *Id.*

92. See GPA, *supra* note 78, art. II(6)(a), at 15 (“a procuring entity shall: (a) [not] divide a procurement into separate procurement with the intention of excluding it from the application of a trade agreement”); see also *Text of the Comprehensive Economic and Trade Agreement – Chapter Nineteen: Government Procurement, Art. 19.1-Definitions*, GOV’T CAN. (Oct. 3, 2017), <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/19.aspx?lang=eng> [<https://perma.cc/36NK-9UMP>] [hereinafter *CETA*]; see also Canadian Free Trade Agreement, *supra* note 88, art. 503.

93. See GPA, *supra* note 78, art. X(7)(c) (“a procuring entity shall make available to suppliers tender documentation that includes all information necessary to permit suppliers to prepare and submit responsive tenders. Unless already provided in the notice of intended procurement, such documentation shall include a complete description of: (c) all evaluation criteria the entity will apply in the awarding of the contract, and, except where price is the sole criterion, the relative importance of such criteria”); see also CETA, *supra* note 92, art. 19.9(7); Canadian Free Trade Agreement, *supra* note 88, art. 509(7).

94. See *Complaint Regarding an Ontario Government Procurement*, ONTARIO (Mar. 11, 2024), <https://forms.mgcs.gov.on.ca/en/dataset/002-5205> [<https://perma.cc/WB7R-L7VL>].

an independent quasi-judicial body.⁹⁵ The New West Partnership Trade Agreement, an agreement between the Governments of British Columbia, Alberta, Saskatchewan, and Manitoba, arguably contains an independent bid protest mechanism.⁹⁶ Finally, the Québec Autorité des marchés publics is an independent public body that oversees public procurements in Quebec.⁹⁷

While not all other provinces currently have a separate review body, the absence of an independent bid challenge authority for Ontario leaves suppliers, including subsidiaries and joint venture partners of U.S.-based businesses, without a dedicated forum to bring procurement challenges against one of Canada's largest public purchasers. Moreover, the Canada-European Union Comprehensive and Economic Trade Agreement (CETA),⁹⁸ Canada's trade agreement with the EU, and the CFTA⁹⁹ require Ontario to have an independent bid challenge authority for covered procurements. For example, the CFTA's specific language provides for an "appeal [of] the initial decision to an impartial administrative or judicial authority that is independent of the procuring entity."¹⁰⁰

Ontario's process of filing a procurement complaint with the Ministry of Public and Business Service Delivery was recently challenged as a breach of the CETA and CFTA in *Thales DIS Canada Inc. v. Ontario*.¹⁰¹ The concurring judgment of Justice Corbett of the Ontario Divisional Court made pointed comments on this deficiency:

Ontario is in breach of [the CETA] in two ways. First, in failing "to designate at least one impartial administrative or judicial authority that is independent of its procuring entities" and second, by failing "to ensure the supplier may appeal" a decision of the decision-maker.¹⁰²

In other words, Justice Corbett objected to the absence of an independent tribunal to review internal bid dispute decisions via an appeal route (which, in his view, the various trade agreements require), as opposed to an

95. See *Procurement Services*, GOV'T CAN. (Feb. 22, 2024), <https://www.canada.ca/en/public-services-procurement/services/acquisitions.html> [<https://perma.cc/MW3Q-PKMQ>].

96. See New West Partnership Trade Agreement, art. 14(4), Jul. 1, 2010, (Can.), http://www.newwestpartnershiptrade.ca/the_agreement.asp [<https://perma.cc/N7A2-SL79>]; see also *Bid Protest Mechanism FAQs*, NEW WEST P'SHIP, http://www.newwestpartnershiptrade.ca/bid_protest_mechanism_FAQs.asp [<https://perma.cc/LEK8-YXU5>] (last visited Apr. 3, 2024).

97. See *About Us*, AUTORITE DES MARCHES PUBLICS [PUBLIC PROCUREMENT AUTHORITY], <https://amp.quebec/en/about-us/> [<https://perma.cc/UEW2-NQVY>] (last visited Mar. 17, 2024); See also *File a Complaint Concerning a Public Contract*, AUTORITE DES MARCHES PUBLICS [PUBLIC PROCUREMENT AUTHORITY], <https://amp.quebec/en/file-complaint/> [<https://perma.cc/V9TA-V2CV>] (last visited Mar. 17, 2024).

98. See generally CETA, *supra* note 92.

99. See Canadian Free Trade Agreement, *supra* note 88, art. 518.

100. *Id.*

101. *Thales DIS Canada Inc. v. Ontario*, 2022 ONSC 3166, ¶¶ 26–34, 37, 168–78 (Can.) (the decision was appealed to the Ontario Court of Appeal and the decision (after a hearing in June 2023) is pending).

102. *Id.* ¶ 172.

application for judicial review to the Ontario courts.¹⁰³ Thus, as a result of trade obligations and court decisions, Ontario may be required to establish a bid challenge review body that is more independent than a review by a governmental department.

Notably, unlike the GPA, the procurement chapters of both the CFTA¹⁰⁴ and CETA¹⁰⁵ apply to Ontario's MASH entities (Municipalities, Academic Institutions, Schools, and Hospitals). Therefore, suppliers of these entities, including U.S. suppliers, may be similarly affected by not having an independent provincial-level authority to which complaints may be filed.

D. CONCLUSION

Significant gaps exist in Ontario's public procurement rules, and significant changes are foreseeable for the province's procurement landscape. Some of these initiatives have already been announced and are in development, while others await the outcome of litigation and government policy planning and decision-making. U.S. suppliers wishing to do business with the Ontario government and related entities should closely monitor these developments.

III. Canada's Evolving Position in Carbon Pricing Amidst Global Developments

Canada continues to navigate the complex regulatory landscape of carbon pricing alongside its global counterparts. While the EU implemented the world's first border adjustment mechanism¹⁰⁶—an import tariff that will implicate importers and exporters of carbon-intensive goods globally—Canada's domestic carbon pricing regime is also taking shape. As the European Commission acknowledged, its environmental ambitions “will not be achieved by Europe acting alone.”¹⁰⁷ Canada has indeed taken steps to contribute. This section provides an update on Canada's carbon pricing initiatives, examining the proposed border carbon adjustment (BCA) and how it compares with other frameworks, particularly the EU's Carbon Border Adjustment Mechanism (CBAM).

103. *Id.* ¶¶ 168–72.

104. See Canadian Free Trade Agreement, *supra* note 88, at art. 504(3)(b), at 59 (Sch of Ont.).

105. See CETA, *supra* note 92, Annex 19-A, Annex 19-2-9 Ontario.

106. See *Exploring Border Carbon Adjustments for Canada*, DEPT. FIN. CAN. (June 6, 2023), <https://www.canada.ca/en/departement-finance/programs/consultations/2021/border-carbon-adjustments/exploring-border-carbon-adjustments-canada.html> [<https://perma.cc/S97H-UJAD>].

107. *Communication from the Commission to The European Parliament The European Council, The European Economic and Social Committee and the Committee of the Regions, The European Green Deal*, at 2, COM (2019) 640 final (Dec. 11, 2019).

A. CANADA'S DOMESTIC CARBON PRICING REGIME DEVELOPMENTS

Since 2019, every Canadian province and territory has had a price on carbon.¹⁰⁸ Canadian jurisdictions have a choice: adopt the federal pricing system, or establish a local carbon pricing regime that meets or exceeds the stringency requirements under the federal system (the “federal backstop”).¹⁰⁹

In 2021, Canada proposed a BCA as part of its Climate Plan to reduce greenhouse gas (GHG) emissions and reach net-zero emissions by 2050.¹¹⁰ BCAs impose a tariff on goods based on their carbon content.¹¹¹ The goal of a BCA in Canada would be to ensure fair competition in the market while protecting the environment.¹¹²

But the Canadian BCA has yet to be implemented. Carbon emissions in Canada are currently priced using the two-part federal pricing system established under the Greenhouse Gas Pollution Pricing Act.¹¹³ This system includes a regulatory “fuel charge” on fossil fuels and an “output-based pricing system” (OBPS), setting a federal GHG emissions benchmark on certain industries.¹¹⁴ When emitters exceed their OBPS limit, they are required to pay the relevant carbon price.¹¹⁵

As indicated, the provinces and territories of Canada can choose to implement the federal system, a local system, or a mix of both.¹¹⁶ Manitoba, Nunavut, Prince Edward Island, and Yukon have implemented both the fuel charge and the OBPS under the federal system.¹¹⁷ As of July 1, 2023, Ontario,

108. *Carbon Pollution Pricing Systems Across Canada*, GOV'T CAN. (July 5, 2023), <https://www.canada.ca/en/environment-climate-change/services/climate-change/pricing-pollution-how-it-will-work.html> [https://perma.cc/6JCU-9S8V].

109. *Id.*

110. *Budget 2021*, DEPT. FIN. CAN. (Apr. 19, 2021), <https://www.budget.canada.ca/2021/home-accueil-en.html> [https://perma.cc/N7XW-EP3Q].

111. *Id.* at 176.

112. *Id.*

113. *Output-Based Pricing System*, GOV'T CAN. (Feb. 7, 2024), <https://www.canada.ca/en/environment-climate-change/services/climate-change/pricing-pollution-how-it-will-work/output-based-pricing-system.html> [https://perma.cc/5E5Y-CG7D].

114. *Output-Based Pricing Systems Regulations*, SOR/2019-266 (Can.); see also *Carbon Pollution Pricing Systems Across Canada*, *supra* note 108.

115. The current carbon price under the OBPS is \$65 per tonne, which is scheduled to increase \$15 per tonne annually from 2023 to 2030. See *The Federal Carbon Pollution Pricing Benchmark*, GOV'T CAN. (June 5, 2023), <https://www.canada.ca/en/environment-climate-change/services/climate-change/pricing-pollution-how-it-will-work/carbon-pollution-pricing-federal-benchmark-information.html> [https://perma.cc/7ZKX-TYAY] (discussing that the current carbon price is scheduled to increase \$15 per tonne annually from 2023 to 2030); see also *Update to the Pan-Canadian Approach to Carbon Pollution Pricing 2023–2030*, GOV'T CAN. (Aug. 5, 2021), <https://www.canada.ca/en/environment-climate-change/services/climate-change/pricing-pollution-how-it-will-work/carbon-pollution-pricing-federal-benchmark-information/federal-benchmark-2023-2030.html#toc2> [https://perma.cc/R3ZX-USZ3].

116. *Exploring Border Carbon Adjustments for Canada*, DEPT. FIN. CAN. (June 6, 2023), <https://www.canada.ca/en/departement-finance/programmes/consultations/2021/border-carbon-adjustments/exploring-border-carbon-adjustments-canada.html> [https://perma.cc/9T8Z-9GAC].

117. *Carbon Pollution Pricing Systems Across Canada*, *supra* note 108.

Alberta, New Brunswick, Newfoundland and Labrador, Nova Scotia, and Saskatchewan have adopted the federal fuel charge with local carbon pricing systems;¹¹⁸ however, Saskatchewan is transitioning to a local OBPS for covered industries.¹¹⁹ British Columbia, Quebec, and the Northwest Territories are the only jurisdictions with local carbon pricing systems.¹²⁰ British Columbia has announced plans to transition to a provincial carbon tax and provincial OBPS in April 2024.¹²¹

On November 21, 2023, the Canadian Government announced in the 2023 Fall Economic Statement (FES)¹²² that it is designating up to \$7 billion of the \$15 billion Canada Growth Fund¹²³ to carbon contracts for difference (CFDs).¹²⁴ Carbon CFDs will provide some guarantee that companies who invest in green projects and investments will not be disadvantaged should the government abolish the carbon price in the future—effectively creating a contract on the future price of carbon. To entirely abolish the carbon price in the wake of such contracts would be to expose the federal government to monetary liability. According to the FES, some of these contracts are already being negotiated.¹²⁵ The proposed carbon CFDs are important in the current political context of the Canadian Conservative Party's longstanding promise to abolish the carbon pricing regime should it form a government.¹²⁶

B. RECENT CARBON PRICING DEVELOPMENTS IN OTHER JURISDICTIONS

While Canada is still in the proposal stage of carbon adjustments, several other countries have implemented carbon pricing regimes to meet carbon emission reduction goals under the Paris Agreement. Most notably, the EU's CBAM aims to reduce carbon emissions and carbon leakage by pricing carbon emitted by certain sectors: iron and steel, aluminum, cement,

118. *Id.*

119. *The Government of Canada Strengthens Pollution Pricing Across the Country*, GOV'T CAN. (Nov. 22, 2022), <https://www.canada.ca/en/environment-climate-change/news/2022/11/the-government-of-canada-strengthens-pollution-pricing-across-the-country.html> [<https://perma.cc/Z7W9-WLS7>].

120. *Id.*

121. *B.C. Output-Based Pricing System*, B.C. (Mar. 6, 2024), <https://www2.gov.bc.ca/gov/content/environment/climate-change/industry/bc-output-based-pricing-system> [<https://perma.cc/7CM9-JBRH>].

122. *See generally 2023 Fall Economic Statement*, DEPT. FIN. CAN. (Nov. 21, 2023), <https://www.budget.canada.ca/fes-eea/2023/report-rapport/toc-tdm-en.html> [<https://perma.cc/6L85-A488>].

123. *See Canada Growth Fund, Inc. Innovative funding to help accelerate Canada's decarbonization strategy*, CDEV, <https://cdev.gc.ca/canada-growth-fund-inc/> [<https://perma.cc/UF7T-4FVZ>] (last visited Mar. 27, 2024).

124. *2023 Fall Economic Statement*, *supra* note 122, at 58.

125. *Id.*

126. *See* Christopher Bonasia, *Canada Commits \$7B to Carbon Contracts For Difference*, ENERGY MIX (Nov. 28, 2023), <https://www.theenergymix.com/canada-commits-7b-to-carbon-contracts-for-difference/> [<https://perma.cc/9T7B-N6NM>].

fertilizer, electricity, and hydrogen.¹²⁷ In the decade leading up to the CBAM's proposal, the EU maintained a cap-and-trade Emissions Trading System (ETS) on the EU carbon market¹²⁸ that granted free allowances to certain "at-risk" sectors, including aviation, maritime transport, and industry to discourage carbon leakage.¹²⁹ The free allowances will be phased out by 2030.¹³⁰ Thus, the European Commission proposed that the CBAM's obligations enter into force incrementally as part of the "European Green Deal" to cover the sectors that received allowances under the ETS and reduce the risk of carbon leakage.¹³¹

Meanwhile, the EU has prescribed new reporting obligations on importers of carbon-intensive goods under the CBAM's Implementing Regulation.¹³² These reporting obligations began on October 1, 2023, when the CBAM entered its "transitional period," and will continue quarterly until December 31, 2025.¹³³ The carbon price will not be charged to emitters until January 1, 2026, which will mark the start of the CBAM's definitive period.¹³⁴

The Implementing Regulation does not directly subject exporters outside the EU to reporting compliance. But practically, EU importers will be relying on their foreign exporting counterparts, including Canadian exporters, to implement monitoring and reporting schemes to ensure importers accurately report embedded emissions and maintain trading relationships.¹³⁵ The Implementing Regulation prescribes penalties on EU importers for non-compliance and incorrect or incomplete reports during the transitional period.¹³⁶ This is significant, as it is likely that importers will seek ways to transfer such responsibilities, and risks to their exporting

127. *Proposal of the European Parliament and of the Council Establishing a Carbon Border Adjustment Mechanism*, at 20, COM (2021) 564 final (Feb. 14, 2021).

128. A cap-and-trade system sets a limit on permitted emissions from certain emitters and industries through "emissions allowances." Allowances are then bought and traded on the EU carbon market, where companies sell unused allowances or purchase more. The overall cap is reduced every year to bring the economy closer in line with carbon neutrality. See Directive 2003/87/EC, of the European Parliament and of the Council of 13 October 2003 Establishing a Scheme for Greenhouse Gas Emission Allowance Trading Within the Community and Amending Council Directive 96/61/EC, 2003 O.J. (L 275/32), arts. 11, 12.

129. *Id.* Annex I.

130. *Id.* at art. 10b(1).

131. *Id.* s 2.1.1.

132. Regulation (EU) 2023/956 of the European Parliament and of the Council of May 10, 2023, Establishing a Carbon Border Adjustment Mechanism, arts. 5, 6, 2023 OJ (L 130), 52, 68–70 (hereinafter "Implementing Regulation 2023/956").

133. *Id.* at art. 32.

134. See *Carbon Border Adjustment Mechanism starts this weekend in its transitional phase*, EUR. COMM'N (Sept. 29, 2023), https://taxation-customs.ec.europa.eu/news/carbon-border-adjustment-mechanism-starts-weekend-its-transitional-phase-2023-09-29_en [<https://perma.cc/8V4X-YK4Z>].

135. *Carbon Border Adjustment Mechanism*, EUR. COMM'N, https://taxation-customs.ec.europa.eu/carbon-border-adjustment-mechanism_en [<https://perma.cc/9DB3-B5RK>] (last visited Mar. 31, 2024).

136. Implementing Regulation 2023/956, *supra* note 132, art. 26.

counterparts, who will ultimately possess embedded emissions data and production information.

Beyond the EU, other countries have also taken steps to implement carbon pricing regimes. China operates the world's largest ETS for covered emissions, a national ETS that prices emissions from its power sector.¹³⁷ South Korea also operates a nationwide ETS that covers 74 percent of GHG emissions from its power, industry, domestic aviation, building, waste, and transport sectors.¹³⁸ Rather than implement a federal carbon "tax," the United States subsidizes decarbonization and green technology efforts under its Inflation Reduction Act.¹³⁹ Certain U.S. states have also opted to implement carbon pricing systems at the state level.¹⁴⁰

C. CARBON PRICING INITIATIVES' COMPLIANCE WITH WTO REQUIREMENTS

Certain carbon pricing regimes have begun to raise red flags concerning WTO compliance, and similar concerns will likely apply to Canada's proposed BCA. For example, experts have questioned whether U.S. tax credits and subsidies with local content requirements conflict with WTO rules against discriminatory treatment of imports by triggering a "subsidy race to the bottom."¹⁴¹ Similar concerns¹⁴² are being raised surrounding the CBAM and whether it will violate WTO national treatment (ensuring imported products are not discriminated against compared to domestic products) and most-favoured nation rules (prohibiting treating certain countries' products more favourable than the same products of other countries) that require Member States to treat trading partners equally.¹⁴³

Similar concerns surrounding WTO compliance and discriminatory measures may be raised regarding Canada's proposed BCA once it enters

137. *China National ETS*, INT'L CARBON ACTION P'SHIP (2021), <https://icapcarbonaction.com/en/ets/china-national-ets> [<https://perma.cc/Q86M-D4LS>].

138. *Korea Emissions Trading Scheme*, INT'L CARBON ACTION P'SHIP (2015), <https://icapcarbonaction.com/en/ets/korea-emissions-trading-scheme> [<https://perma.cc/4RCN-4B27>].

139. See Inflation Reduction Act of 2022, Pub. L. No. 117-169, § 13201, 136 Stat. 1818, 1931-41 (2022); see also Joachim Monkelbaan & Tim Figures, *CBAM: What You Need to Know About the New EU Decarbonization Incentive*, WORLD ECON. F. (Dec. 19, 2022), <https://www.weforum.org/agenda/2022/12/cbam-the-new-eu-decarbonization-incentive-and-what-you-need-to-know/> [<https://perma.cc/PG9R-3544>].

140. Thirteen states, including California and the eleven Northeast states, have carbon pricing mechanisms in place under the Regional Greenhouse Gas Initiative. See David T. Stevenson, *A Review of the Regional Greenhouse Gas Initiative*, 38 CATO J. 203-04, 207, 210 (2018).

141. See Andy Bounds, *EU Accuses US of Breaking WTO Rules With Green Energy Incentives*, FIN. TIMES (Nov. 6, 2022), <https://www.ft.com/content/de1ec769-a76c-474a-927c-b7e5aeff7d9e> [<https://perma.cc/PG5T-CN5H>].

142. James Bacchus, *Legal Issues with the European Carbon Border Adjustment Mechanism*, CATO INST. (Aug. 9, 2021), <https://www.cato.org/briefing-paper/legal-issues-european-carbon-border-adjustment-mechanism> [<https://perma.cc/M4SG-WCYW>].

143. General Agreement on Tariffs and Trade, arts. I, III, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

into force. A Canadian BCA would have to satisfy the WTO's national treatment and most-favoured nation treatment obligations.¹⁴⁴ Presently, most concerns surrounding Canada's carbon pricing regime appear to be coming from within Canada. The Angus Reid Institute recently published a study that suggests nearly half of Canadians want to completely abolish the carbon tax.¹⁴⁵ In addition, as noted above, the Conservative Party has been against the carbon pricing regime for years.¹⁴⁶ Thus, there are domestic hurdles to first clear before Canada's carbon pricing regime comes into fruition and reaches a stage at which WTO compliance can be challenged.

It is yet to be seen whether countries will bring these and similar measures in front of the WTO once they enter into force or whether countries will potentially modify their existing legislation to bring it into conformity with WTO law. As the United States continues to block appointments to the WTO Appellate Body,¹⁴⁷ the WTO may not present a viable option for countries seeking to address unfair trade concerns within a reasonable time frame.

D. CONCLUDING THOUGHTS

The global carbon pricing landscape has evolved quickly, including in Canada. Many Canadian producers and exporters will be impacted by these regimes as well as those applicable in Canada, whether it be a provincial or federal scheme. Canadian exporters will want to ensure they understand the carbon pricing mechanism applicable to them and the impact it has on compliance with requirements in the jurisdictions in which they do business, such as the carbon cost that the EU will begin to collect in 2026. Additionally, industry and governments alike will want to remain updated on WTO compliance issues surrounding jurisdictional carbon pricing regimes.

144. Michael A. Mehling et al., *Designing Border Carbon Adjustments for Enhanced Climate Action*, 113 AM. J. INT'L L. 433, 459–64 (2019).

145. *Carbon Tax: Perceptions of Insufficient Rebates, Cost of Living Concern & Questions over Efficacy Send Support Plummeting*, ANGUS REID INST. (Nov. 16, 2023), <https://angusreid.org/carbon-tax-perceptions-rebates/> [https://perma.cc/57DH-NG3F].

146. See Catherine Levesque, *Pierre Poilievre Plans to Scrap the Carbon Tax, But will he Unveil a Climate Plan?*, NAT'L POST (Sept. 27, 2022), <https://nationalpost.com/news/pierre-poilievre-plans-to-scrap-the-carbon-tax-but-will-he-unveil-a-climate-plan/> [https://perma.cc/YM3E-G3NZ].

147. See Simon Lester, *Ending the WTO Dispute Settlement Crisis: Where to from here?*, IISD (Mar. 2, 2022), <https://www.iisd.org/articles/united-states-must-propose-solutions-end-wto-dispute-settlement-crisis> [https://perma.cc/UL36-E3TR].

THE YEAR IN REVIEW
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Food, Agriculture, & Cannabis

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This article reviews 2023 developments in hemp, agriculture, and food and provides updates in each of these sectors internationally, notably: (1) hemp and cannabis law changes in the U.S.; (2) significant U.S. decision(s) for the pork industry; (3) food and agriculture environmental issues in the European Union; (4) new U.S. traceability regulation for food companies; and (5) new labeling and advertising requirements for the Chilean alcohol industry.

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I. Hemp

Authors: Susan Burns, Monica Sanchez Garita

During 2023, lobbying within the medical and recreational industries intensified as they moved to continue efforts to dominate the market and squeeze out hemp derivatives.¹ With more states legalizing recreational and medical marijuana, the hemp industry is currently experiencing several challenges.² As discussed below, statutory developments in four states that restrict the hemp derivative market have been challenged in court by hemp business owners on the basis that the statutes are unconstitutional.³ Those four states are Arkansas, Maryland, Georgia, and Virginia.⁴

The 2018 Farm Bill basically legalized hemp and its derivatives⁵ by redefining it and decoupling it from marijuana. Most states followed this federal lead with enactment of state-specific statutes.⁶ The result was that the hemp market opened up, and products like tinctures, oils, and gummies with hemp-derived CBD, Delta-8, Delta-9, and Delta-10 entered the market.⁷ Due to consumer demand, this market expanded significantly.⁸

Arkansas was among the states with a developing hemp market.⁹ In 2019, Arkansas passed Act 504¹⁰ to decouple hemp from marijuana and include a broad definition that encompassed hemp and its derivatives. But on April 11, 2023, Act 629 (“the Act”) was enacted, which narrowed the definition of hemp, recriminalized its possession, and restricted manufacturing,

1. See Grace Yarrow, *How the 2023 Farm Bill Could Change the Game for THC Products*, THE HILL (Mar. 21, 2023, 5:00 AM), <https://thehill.com/policy/future-of-farming/3903815-how-the-farm-bill-could-curb-the-chaos-around-hemp-products/> [https://perma.cc/55WA-Z3VW].

2. See generally Samantha Capaldo, *Legal Challenges to State Hemp Laws and Regulations*, NAT’L AGRIC. L. CTR. (Nov. 16, 2023), <https://nationalaglawcenter.org/legal-challenges-to-state-hemp-laws-and-regulations/> [https://perma.cc/T34A-FJGN].

3. See Robert Hoban, *The Law Come to Get You If You Don’t Walk Right—Hemp Law, Policy And The Courts*, FORBES (Dec. 9, 2023, 6:26 PM), <https://www.forbes.com/sites/roberthoban/2023/12/09/the-law-come-to-get-you-if-you-dont-walk-right--hemp-law-policy-and-the-courts-part-45/?sh=32dc71476ebc> [https://perma.cc/QW4H-MM3N].

4. *Id.*

5. Hemp is defined as “the plant *Cannabis Sativa* L. and any part of such plant, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis” according to the 2018 Farm Bill Agriculture Improvement Act of 2018, § 1639o(1), 7 U.S.C. § 9001, <https://www.govinfo.gov/content/pkg/USCODE-2022-title7/pdf/USCODE-2022-title7-chap38-subchapVII-sec1639o.pdf> [https://perma.cc/C24W-8NBH].

6. *Regulating Hemp and Cannabis-Based Products*, NAT’L CONF. STATE LEGISLATURES (NCSL) 1, 1–2 (Apr. 30, 2022), https://documents.ncsl.org/wwwncsl/Agriculture/lb_2537.pdf [https://perma.cc/TKC2-5HSP].

7. See Sian Ferguson, *Delta 8 vs. Delta 9 vs. Delta 10—What’s the Difference?*, HEALTHLINE, (Sept. 28, 2022), <https://www.healthline.com/health/delta-8-vs-delta-9-vs-delta-10#takeaway> [https://perma.cc/4SQZ-SY3L].

8. *Id.*

9. See generally *Arkansas Hemp Overview*, ARK. STATE INFO. SYS., <https://arkansascannabis.org/hemp> [https://perma.cc/2BSM-NUR4] (last visited Apr. 4, 2024).

10. H.R. 1518, 92nd Gen. Assemb., Reg. Sess. (Ark. 2019) § 1.

transportation, and sale of popular hemp-derived cannabinoid products.¹¹ On July 31, 2023, plaintiffs sued the state of Arkansas and several government officials to enjoin enforcement of the Act.¹²

Plaintiffs alleged that the Act excluded hemp derived-cannabinoid products from the state's definition of marijuana but narrowed the definition of hemp by recriminalizing all hemp products "produced as a result of a synthetic chemical process,"¹³ including Delta-8 and Delta-9 THC.¹⁴ But there is no synthetic distinction permitted under the Farm Bill of 2018.¹⁵ In this sense, the Act is in direct conflict with the DEA's determinations that Delta-8 and other cannabinoid products with no more than 0.3 percent Delta-9 THC are considered hemp and not a controlled substance under federal law.¹⁶

Plaintiffs' primary argument is that the Act's provisions are preempted by federal law because they (1) attempt to revise federal law to reclassify certain hemp-derived cannabinoids as illegal controlled substances; (2) interfere with the free flow of interstate transportation and shipment of hemp products; and (3) impose a narrower definition of hemp than mandated by federal law in violation of the Supremacy Clause of the Constitution and in conflict with legal principles.¹⁷

Further, the Act is a substantial burden on interstate commerce in violation of the Commerce Clause and infringes on plaintiffs' constitutional rights, amounting to a regulatory taking under the Constitution because it entirely bans hemp products that contain any amount of THC.¹⁸ Plaintiffs argued that substantial investments in their businesses are based on the established regulatory scheme prior to the Act, along with the inventory.¹⁹ Accordingly, the Act infringes upon the investment expectations upon which Plaintiffs have built their livelihoods, in addition to taking their property without just compensation.²⁰

The trial court granted plaintiff's motion for a preliminary injunction and rejected the state's motion to dismiss on September 8, 2023.²¹ The court reasoned that the Act was preempted by federal law.²² Under the 2018 Farm Bill, "Arkansas can regulate hemp production and even ban it outright if it

11. S.B. 358, 94th Gen. Assemb., Reg. Sess. (Ark. 2023).

12. Complaint at 2, ¶ 1, *Bio Gen., LLC et al. v. Sanders*, No. 4:23-CV-718-BRW (E.D. Ark. July 31, 2023), <https://arktimes.com/wp-content/uploads/2023/07/bio-gen-complaint.pdf> [<https://perma.cc/8E9A-VRNF>].

13. S.B. 358, 94th Gen. Assemb., Reg. Sess. (Ark. 2023) § 6(h)(i).

14. Terrence Ng et al., *Tetrahydrocannabinol (THC)*, NAT'L CTR. FOR BIOTECHNOLOGY INFO. (Nov. 12, 2023), <https://www.ncbi.nlm.nih.gov/books/NBK563174/> [<https://perma.cc/F7XB-YGDC>].

15. See Complaint for Declaratory Relief, *supra* note 12, at 16, ¶ 73.

16. *Id.* at 20, ¶ 88.

17. See *id.* at 16, ¶¶ 73–74.

18. *Id.* at 23, ¶ 102.

19. *Id.*

20. *Id.* at 24, ¶¶ 105–06.

21. *Bio Gen., LLC v. Sanders*, No. 4:23-CV-00718-BRW 1, 10 (E.D. Ark. Sept. 7, 2023).

22. *Id.* at 9.

is so inclined.”²³ But “changing definitions from a federal program, which it had already fully joined,” was not constitutionally valid.²⁴ Also, the 2018 Farm Bill explicitly provides that “no State or Indian Tribe shall prohibit the transportation or shipping of hemp or hemp products.”²⁵ Considering that Arkansas is criminalizing “hemp-derived products without an effective exemption for interstate commerce,” Act 629 is preempted by federal law.²⁶ The court also stated that the Act contains terms that are vague and would confuse “even an exceptionally intelligent reader,” and the plaintiffs demonstrated irreparable harm in the form of a credible threat of criminal sanctions.²⁷

This decision marked an important precedent for the hemp market in the U.S. because, thanks to lobbying efforts by the recreational and medical marijuana industry, states are unconstitutionally regulating a hemp market that has been legalized and regulated under federal law.²⁸ The court’s decision provides hemp business owners a reprieve to continue operations.²⁹

Maryland was the next state to experience litigation over cannabis, namely hemp and marijuana regulation enacted in 2023.³⁰ On July 1, 2023, Maryland passed the Recreational Cannabis Act (“the RCA”), which legalized recreational marijuana only if purchased at a dispensary licensed by the state.³¹ But the RCA lumped marijuana and hemp together, even though the definition of hemp as established in the Farm Bill remained unchanged in the state.³² Further, the license system allowed only a few businesses to obtain a license and sell marijuana products, hemp products, or both.³³

Prior to enactment of the RCA, and similar to many other states, Maryland had no laws regulating the sale or distribution of hemp-derived Delta-9 THC products and relied solely on the definition under the 2018 Farm Bill.³⁴ Under federal law, thousands of Maryland hemp businesses were selling hemp products that met the definition of “industrial hemp,” including the

23. *Id.* at 8.

24. *Id.*

25. 7 U.S.C. § 1639o(1).

26. *Bio Gen., LLC*, No. 4:23-CV-00718-BRW, at 9.

27. *Id.* at 9–10.

28. See generally Kristin McCall et al., *Litigation Trends Impacting the Hemp Intoxicating Product Market*, CANNABIS BUS. EXEC. (Mar. 7, 2024), <https://www.cannabisbusinessexecutive.com/2024/03/litigation-trends-impacting-the-hemp-intoxicating-product-market/> [<https://perma.cc/VQ73-QRSS>].

29. *Id.*

30. See generally Associated Press, *Maryland Court Order Enables Shops to Sell Hemp-Derived Products*, MD. DAILY REC. (Oct. 13, 2023), <https://thedailyrecord.com/2023/10/13/maryland-court-order-enables-shops-to-sell-hemp-derived-products/> [<https://perma.cc/U5XH-5J4W>].

31. S.B. 516, 2023 Leg., Reg. Sess. (Md. 2023).

32. *Id.*

33. *Id.*

34. LEVI SELLERS, HEMP INDUSTRY STAKEHOLDERS: NON-DELTA 9 THC REGULATION REPORT 8 (2023), https://mgaleg.maryland.gov/cmte_testimony/2023/ecm/12OA0KzvIgd5_k1I-Pl0BWNy-Ucplc3sjk.pdf [<https://perma.cc/FX2Y-FJCE>].

hemp plant and all its derivatives with a Delta-9 THC concentration of not more than 0.3 percent on a dry weight basis.³⁵

But the RCA prohibited the sale or distribution of previously lawful hemp derived products other than certain tinctures without first obtaining a license, a highly unlikely occurrence under the RCA.³⁶ It also limited the amount of THC that may be contained in a product to no more than 0.5 mg of THC per serving unless the seller was licensed and complied with manufacturing standards, laboratory testing, packaging, and labeling requirements.³⁷ Sales to individuals under twenty-one years of age were prohibited, and the product was required to be derived from naturally occurring, biologically active chemicals.³⁸ The RCA allowed hemp-derived tinctures containing a ratio of CBD to THC of at least fifteen to one, and 2.5 mg or less of THC per serving or 100 mg per package.³⁹ The RCA regulated consumable and inhalable intoxicating hemp products with other cannabis products, while exempting non-intoxicating products, such as CBD edibles, lotions, and tinctures.⁴⁰

Plaintiffs stated that the majority of their products that were previously lawful to distribute without a license could not meet the new standards for maximum mg of THC and were, therefore, subject to violations.⁴¹ To comply, plaintiffs would have to obtain a license, which they alleged was almost impossible due to the limited number of licenses and other restrictions such as social equity provisions and lottery requirements.⁴²

The plaintiffs' primary argument was that the licensing factors were not related to public safety or health concerns, and that the social equity concerns were no reason for a state to grant monopolies.⁴³ Even if they were, there was no relation between the factors in the Act defining social equity and the redress of past grievances.⁴⁴ In addition, plaintiffs alleged that they were being deprived of income, particularly given the likelihood they would not be able to obtain a license under the statute.⁴⁵ They further argued that consumers were deprived of buying hemp products from a store that does not sell marijuana; instead the RCA forced them to buy products in a store where the main focus is on "getting high."⁴⁶

35. *See id.* at 6.

36. S.B. 516, 2023 Leg., Reg. Sess. (Md. 2023).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. Complaint for Declaratory Relief, Temporary Restraining Order, and Preliminary Injury and Demand for Jury Trial at 16, ¶ 22, Md. Hemp Coal., Inc. et al. v. Moore, No. C-21-CV-23-348 (Cir. Ct. Md. Oct. 12, 2023), <https://wtop.com/wp-content/uploads/2023/07/Hemp-Final-Complaint.pdf> [<https://perma.cc/2QZS-FTRD>].

42. *Id.* at 18, ¶ 27.

43. *Id.* at 27, ¶ 49; *id.* at 20, ¶ 33.

44. *Id.* at 20, ¶ 33.

45. *Id.* at 24, ¶ 41.

46. *See* Complaint for Declaratory Relief, Temporary Restraining Order, and Preliminary Injury and Demand for Jury Trial, *supra* note 41, at 24–25, ¶ 43.

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On October 12, 2023, the Maryland court granted plaintiffs' preliminary injunction, finding that (1) the licensing scheme, as applied to hemp producers, is preempted by the 2018 Farm Bill; (2) the law creates a monopoly that "unfairly excludes many from their right to continue or enter the profession of their choosing;" (3) the law "does not survive an equal protection review under Article 24 of the Maryland Declaration of Rights;" and (4) prohibiting the sale of hemp products that were previously legally sold does not affect Defendants and, due to the balance of conveniences, the market may continue.⁴⁷ As with Arkansas, this decision was a significant win for the hemp industry seeking to survive in a rapidly growing and changing market.⁴⁸

Similarly, in February 2022, Gwinnett County, Georgia law enforcement officers executed a search warrant at a warehouse owned by plaintiff and seized edible and nonedible products containing Delta-8 and Delta-10 THC for possession of a controlled substance with the intent to distribute.⁴⁹ The state returned the nonedible products stating that those products were not controlled substances⁵⁰ but maintained that edible products were controlled substances.⁵¹

The Gwinnett County district attorney had taken the position that it was illegal to possess or sell products containing Delta-8 and Delta-10 THC, which in its opinion, were controlled substances because these products did not fall within an exclusion for "hemp products" within Schedule I of the Georgia Controlled Substances Act.⁵²

On June 23, 2022, plaintiff filed a lawsuit against the state arguing that the warrant authorizing the seizure of the items was not supported by probable cause⁵³ because Georgia's Schedule I expressly excluded THC when found in hemp or hemp products when containing less than 0.3 percent concentration of Delta-9 THC.⁵⁴ The Court of Appeals' November 2, 2023, decision held that Delta-8 and Delta-10 THC are not controlled substances because Schedule I expressly excluded hemp products and hemp from the Controlled Substances Act.⁵⁵ The court gave emphasis to the statutory language, interpreting it to mean that there was no probable cause to issue the warrant and seize the products.⁵⁶

47. *Md. Hemp Coal., Inc. v. Moore*, No. C-21-CV-23-348 (Cir. Ct. Md. Oct. 12, 2023), 1, 4–10.

48. Rod Knight, *Maryland Hemp Industry Scores Big Victory Over Monopolistic Cannabis Law*, KIGHT ON CANNABIS (Oct. 12, 2023), <https://cannabusiness.law/maryland-hemp-industry-scores-big-victory-over-monopolistic-cannabis-law/> [<https://perma.cc/Q6H5-ANBM>].

49. *Elements Distrib., LLC v. State*, 369 Ga. App. 844, 844, 894 S.E.2d 641, 642 (2023).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Elements Distrib., LLC*, 369 Ga. App. at 844, 894 S.E.2d at 642 (2023).

56. *Id.*

Finally, in Virginia, the law defined hemp and its products in accordance with the 2018 Farm Bill.⁵⁷ Under the 2018 Farm Bill, hemp is determined solely by its concentration of Delta-9 THC; concentrations of any natural isomers like Delta-8 or Delta-10, or synthetic isomers like Delta-3, Delta-4 THC were not relevant to whether a product of the cannabis plant qualifies as hemp because the definition technically only includes Delta-9 THC.⁵⁸

This interpretation changed in Virginia with the passage of Act SB 903, which was signed into law on April 12, 2023.⁵⁹ Act SB 903 used the Farm Bill definition of “industrial hemp,” but implemented a new standard for hemp products, industrial hemp extracts, and other derivatives.⁶⁰ These products cannot have more than 0.3 percent of total THC to be legal.⁶¹ “Total THC” includes quantities of Delta-9 and all other isomers, including Delta-8.⁶² In other words, hemp products with 0.4 percent of Delta-8 THC but 0 percent Delta-9 THC would be illegal under the new law, although legal under the Farm Bill.⁶³

Moreover, Act SB 903 also made it illegal to sell industrial hemp to a manufacturer anywhere in the world that creates hemp products that do not comply with Virginia’s “total THC” standard.⁶⁴ To understand more of the “total THC” standard, Act SB 903 stated that products must contain only Delta-9 THC, excluding all other isomers that were allowed before its passage, or contained no more than two milligrams of total THC per package or an amount of CBD that is no less than twenty-five times greater than the amount of total THC per package.⁶⁵

These changes created a drastic shift in the market. Plaintiffs filed a lawsuit against the state of Virginia under the argument that Act SB 903 contradicts the Supremacy Clause, because federal law is the supreme law of the land and the 2018 Farm Bill preempts state law.⁶⁶ They argued that the Commonwealth does not have authority to redefine any part of the federal definition of hemp as it has done in SB 903, and that the law harms manufacturers, buyers, retailers, possessors and transporters in Virginia because the act is restricting free interstate commerce under the Commerce Clause.⁶⁷

Contrary to Arkansas, Maryland, and Georgia, on October 30, 2023, the Court for the Eastern District of Virginia rejected the plaintiff’s injunctive relief petition, holding that the 2018 Farm Bill relaxes the federal regulations

57. 7 U.S.C. § 1639o(1).

58. *Id.*

59. S.B. 903, 2023 Reg. Sess. (Va. 2023).

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. S.B. 903, 2023 Reg. Sess. (Va. 2023).

66. Plaintiffs’ Motion for Preliminary Injunction at 9, *N. Va. Hemp & Agric., LLC v. Commonwealth*, No. 1:23-cv-01177-LMB-IDD (E.D. Va. 2023).

67. *Id.*

concerning hemp, but it permits states to enact more stringent regulations of hemp production.⁶⁸ The court stated that federal law preempts state laws that attempt to regulate the transportation or shipment through the state but does not preempt state regulations of other aspects of industrial hemp, such as the growth, production, sale, and use of industrial hemp and hemp products.⁶⁹ According to the court, high doses of Delta-8 and adulterated products made children sick in Virginia and therefore there was a legitimate interest for the state to enforce Act SB 903.⁷⁰

With regards to the Commerce Clause, the court opined that there was no evidence on record that Act SB 903 seeks to advantage in-state firms or disadvantage out-of-state rivals.⁷¹ The court also held that plaintiffs could not show irreparable harm to grant injunctive relief because of the delay in filing the lawsuit.⁷² According to the court, because the act passed on February 7 of 2023 and plaintiffs waited until September 1 to file, there was evidence of the absence of irreparable harm.⁷³

In conclusion, the hemp industry has been fighting statutory developments in several states that have implemented statutory changes that are unconstitutional. The courts' decisions are consistent in granting injunctive relief petitions on the basis that the new regulations tend to be unenforceable and are attempting to contradict constitutional rights and principles such as the Supremacy Clause and the Commerce Clause. We expect that, with these precedents, states will consider the hemp industry as a federal legal business that needs to be properly regulated, rather than arbitrarily regulated to favor only a few.

II. Agriculture

A. NATIONAL PORK PRODUCERS COUNCIL v. ROSS

Author: Nicole Cook

In May of 2023, the U.S. Supreme Court issued its much-anticipated decision in *National Pork Producers Council v. Ross*.⁷⁴ The decision focused on challenges to California's Proposition 12 ("Prop 12"), the Farm Animal Confinement Initiative, which was passed by California voters in 2018.⁷⁵

68. *N. Va. Hemp & Agric., LLC v. Commonwealth*, No. 1:23-cv-01177-LMB-IDD, 2023 WL 7130853, at *1 (E.D. Va. 2023).

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. See generally *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 143 S. Ct. 1142 (2023).

75. Prop 12, also known as the "Prevention of Cruelty to Farm Animals Act," amended requirements in Chapter 13.8, sections 25990 through 25994, of California's Health and Safety Code to prohibit the sale of egg and meat products in California from certain animals confined in areas below the minimum square feet requirements established by the state. The law requires that covered animals be housed in confinement systems that comply with specific minimum standards for freedom of movement, cage-free design, and minimum floor space, and identifies

As relevant here, Prop 12 forbids the in-state sale of whole pork meat that comes from breeding pigs (or their immediate offspring) that are “confined in a cruel manner.”⁷⁶ Confinement is “cruel” if it prevents a pig from “lying down, standing up, fully extending [its] limbs, or turning around freely.”⁷⁷ Before Prop 12’s adoption, proponents suggested the law would benefit animal welfare and consumer health while opponents claimed that existing farming practices protected animals better by, for example, preventing pig-on-pig aggression, and ensured consumer health by avoiding contamination.⁷⁸ After Prop 12’s adoption, two organizations—the National Pork Producers Council and the American Farm Bureau Federation—filed a lawsuit on behalf of their members who raise and process pigs.⁷⁹ They asserted that, because most of California’s eggs, veal, and pork products are imported from outside California, most of Prop 12’s compliance costs will be borne by out-of-state businesses, which violates the dormant Commerce Clause by impermissibly burdening interstate commerce.⁸⁰

The federal district court dismissed the case for failure to state a claim.⁸¹ The Ninth Circuit affirmed that decision⁸² and the two agricultural groups petitioned the U.S. Supreme Court for review, which the court granted.⁸³

The Supreme Court affirmed the Ninth Circuit’s decision and held that, if state statutes do not purposefully discriminate against out-of-state economic interests, the dormant commerce clause does not prohibit their implementation, regardless of whether those laws have the practical effect of regulating commerce outside the State.⁸⁴ As a result of the decision, all breeding swine farms will need Prop 12 certifications by January 1, 2024, in order for buyers and pork distributors to sell pork to the California market.⁸⁵ Outside states selling eggs and veal to California must also be in compliance by January 1, 2024.⁸⁶

covered animals to include veal calves, breeding pigs and egg-laying hens, as specified. The law also prohibits a farm owner or operator from knowingly causing any covered animal to be confined in a cruel manner and prohibits a business owner or operator from knowingly engaging in the sale within the state of shell eggs, liquid eggs, whole pork meat or whole veal meat, as defined, from covered animals that are “confined in a cruel manner.” See generally Cal. Health & Safety Code Ann. § 25990(b)(2).

76. *Id.* § 25991(b)(2).

77. *Id.* § 25991(e)(1).

78. *Nat’l Pork Producers Council*, 598 U.S. at 366, 143 S. Ct. at 1151 (2023).

79. *Id.*

80. *Id.* at 365.

81. *Id.* at 354.

82. *Id.* at 368.

83. *Id.*

84. *Nat’l Pork Producers Council*, 598 U.S. at 356, 143 S. Ct. at 1141 (2023).

85. *Id.* at 366.

86. *California’s Prop 12 Fully in Effect*, MCGUIREWoods (Mar. 6, 2024), <https://www.mcguire-woods.com/client-resources/alerts/2024/3/californias-prop-12-fully-in-effect/> [<https://perma.cc/UJS9-DCZF>].

III. Environmental, Social, and Governance (“ESG”) in the Food & Agriculture Industry in the European Union

Author: Austin Pierce

Although environmental regulations in the EU have existed for some time, there have historically been various exceptions or other special treatment afforded to the production of food and related cultivation endeavors.⁸⁷ There has been an increasing recognition of the prominent role that food and agriculture play in shaping the sustainability of society, both through environmental and social impacts. As such, several new regimes—both regulatory and extra regulatory—have been established in 2023 that incorporate or explicitly focus on the food and agriculture sector’s environmental and social profile.⁸⁸ These include two significant regulatory developments in the European Union.

First, the European Sustainability Reporting Standards (the “ESRS”)—a principal component of the ESG disclosure regime under the EU’s Corporate Sustainability Reporting Directive (“CSRD”)—were adopted by the European Commission.⁸⁹ CSRD requires businesses across industries that meet certain financial and/or employment thresholds to provide disclosures on a range of environmental, social, and governance (“ESG”) related topics.⁹⁰ The ESRS provide detailed disclosure requirements for various topics, including climate change, biodiversity and ecosystems, and labor practices.⁹¹ The applicability of these requirements ultimately turns on whether they are material, based on a “double materiality” standard, looking not only at the degree to which the environmental/social matter in question impacts the company, but also at how the company impacts that environmental/social matter.⁹²

But the EU has also moved beyond disclosure requirements to impose substantive expectations on the environmental and social provenance of certain products. In particular, the EU Deforestation Regulation (“EUDR”) targets the production profile of several key agricultural commodities—cattle, cocoa, coffee, palm-oil, rubber, soya, and wood, as well as relevant products that contain or have been made (or fed) with such commodities.⁹³

The marketing or sale of such products in the EU is prohibited unless they are: (1) deforestation-free; (2) produced in accordance with relevant

87. See *European Farmers Exempted from Rules on Land Lying Fallow*, EUR. COMM’N (Feb. 13, 2024), https://ec.europa.eu/commission/presscorner/detail/en/ip_24_781#:~:text=The%20European%20Commission%20officially%20adopted,Member%20States%20in%20committee%20meetings [https://perma.cc/A789-XWZG].

88. See *The Common Agricultural Policy at a Glance*, EUR. COMM’N, https://agriculture.ec.europa.eu/common-agricultural-policy/cap-overview/cap-glance_en [https://perma.cc/MK4Y-Z97C] (last visited Apr. 7, 2024).

89. Commission Delegated Regulation 2023/5303, 2023 O.J. 1, 1 (EU).

90. *Id.* at 13, 169.

91. *Id.* at 36–37.

92. *Id.* at 19.

93. Council Regulation 2023/1115, 2023 O.J. (L 150) 2 (EU).

legislation of the country of production; and (3) covered by a due diligence statement to that effect.⁹⁴ This ultimately implicates a variety of laws, including land use; environmental protection; forestry management; third-party rights; labor rights; human rights; indigenous rights (particularly the concept of free, prior, and informed consent); and various commercial laws on tax, anti-corruption, trade, and customs.⁹⁵ The degree of due diligence required under the EUDR will depend on the relative risk profile of the country of production.⁹⁶ Such risk profiles are to be established by the European Commission within eighteen months of the EUDR entering into force (therefore, by the end of 2024).⁹⁷ Nevertheless, the degree of due diligence required in most cases is expected to be extensive, which may be quite complex for companies with far-reaching supply chains that may draw from a variety of different locales.

In the United States, efforts to address environmental and social matters in the food and agriculture sectors have relied more on incentive-based approaches, often folded into the approximately five-year “Farm Bill(s)” that significantly influence agricultural practice in the country.⁹⁸ The current iteration of the Farm Bill, the Agriculture Improvement Act of 2018,⁹⁹ expired in September 2023; but various programs are proposed for the new bill, including expanded technical and financial assistance for certain sustainability-related practices, such as precision agriculture technologies that can help to reduce fertilizer and water usage.¹⁰⁰ But the ultimate contents of the new farm bill are uncertain, as it has continued to undergo intense scrutiny and negotiation in Congress despite the expiration of the prior version.

Meanwhile, there have been multiple developments from civil society as well. In September 2023, the Taskforce on Nature-related Financial Disclosures (“TNFD”) published final recommendations for organizations’ assessment, management, and disclosure on nature’s intersection with their businesses.¹⁰¹ TNFD seeks to provide similar structure for companies’ approach to natural capital as the Task Force on Climate-related Financial Disclosures (“TCFD”)

94. *Id.* at 1. The statement must note that the party placing relevant goods/products on the EU market or exporting them exercised due diligence and that no, or only a negligible, risk of non-compliance with the requirements of Article 3 exists. *Id.* at 9.

95. *Id.* at 1.

96. *Id.* at 11.

97. *Id.* at 24, art. 16(v).

98. *What is the Farm Bill?*, NAT’L SUSTAINABLE AGRIC. COAL., <https://sustainableagriculture.net/our-work/campaigns/fbcampaign/what-is-the-farm-bill/> [<https://perma.cc/LEG2-8ZW6>] (last visited Apr. 7, 2024).

99. Farm Bill of 2018, Pub. L. No. 115-334, 132 Stat. 4490 (2018).

100. *See, e.g.*, Producing Responsible Energy and Conservation Incentives and Solutions for the Environment Act, H.R. 1459, 118th Cong. (2023).

101. *Recommendations of the Taskforce on Nature-Related Financial Disclosures*, TNFD 1, 8 (Sept. 2023), https://tnfd.global/wp-content/uploads/2023/08/Recommendations_of_the_Taskforce_on_Nature-related_Financial_Disclosures_September_2023.pdf?v=1695118661 [<https://perma.cc/6MKN-YBHM>].

has provided for climate.¹⁰² There are significant parallels between the two frameworks, though the TNFD is modified to fit the larger scope and variability associated with nature.¹⁰³ TNFD has also produced a range of guidances, including draft guidance for several priority sectors that include food and agriculture, aquaculture, and forestry management.¹⁰⁴

Food and agriculture are a priority industry for Nature Action 100 (“NA100”), an investor group representing approximately \$24 trillion in assets under management that is focused on engaging with public companies on the management of nature-related matters.¹⁰⁵ NA100 announced eight key sectors for engagement earlier this year, including food, chemicals (particularly noting agricultural chemicals), food and beverage retail, and forestry and paper.¹⁰⁶ A survey of investors also noted that, of these key sectors, the most common engagement targets were based in the food sector, with forestry and paper being the third most popular target sector.¹⁰⁷

Engagement may include requests for additional disclosures and information but may also translate into shareholder proposals or other strategies to elicit the desired information.¹⁰⁸

All together, these developments indicate a substantial increase in attention to the environmental and social performance of the food and agriculture sector from a variety of stakeholders, leveraging multiple areas of law and civil society to promote such stakeholders’ expectations.

IV. The U.S. Food and Drug Administration’s Final Food Traceability Rule

Author: Nicole Cook

The U.S. Food and Drug Administration (FDA) released its final rule on the traceability of high-risk foods (“the Rule”) on November 21, 2022.¹⁰⁹

102. *Id.* at 31.

103. See *TNFD Publishes Finalized Recommendations for Nature-Related Disclosures*, LATHAM & WATKINS (Sept. 20, 2023), <https://www.lw.com/admin/upload/SiteAttachments/TNFD-Publishes-Finalized-Recommendations-for-Nature-Related-Disclosures.pdf> [https://perma.cc/PTD4-USL7].

104. *Discussion Paper on Draft Sector Metrics*, TNFD 1, 5 (Dec. 2023), https://tnfd.global/wp-content/uploads/2023/09/Discussion_paper_on_proposed_sector_disclosure_metrics_v1.pdf [https://perma.cc/F8K7-KKM3].

105. See *Investor Expectations for Companies on Nature-Related Risks*, NATURE ACTION 100 (2023), <https://www.natureaction100.org/media/2023/09/Nature-Action-100-Letter-Sept-2023-1.pdf> [https://perma.cc/VWP7-4UY4].

106. Austin Pierce, *Nature Action 100 Gives First Insight Into Engagement Priorities With Companies*, JDSUPRA (July 13, 2023), <https://www.jdsupra.com/legalnews/nature-action-100-gives-first-insight-9755829/> [https://perma.cc/8FX5-TB3W].

107. Gina Gambetta, *RI Survey: Investors Reveal Nature Action 100 Engagement Plans*, RESPONSIBLE INV. (Oct. 16, 2023), <https://www.responsible-investor.com/ri-survey-nature-action-100-investor-engagement-plans/> [https://perma.cc/JEE9-FVKY].

108. *Id.*

109. See *generally* Requirements for Additional Traceability Records for Certain Foods, 87 Fed. Reg. 70,910 (Nov. 21, 2022).

The Rule is one of the last remaining regulations to implement the Food Safety Modernization Act (FSMA). The Rule became effective January 20, 2023, and has a compliance date of January 20, 2026.¹¹⁰ The goal of the Rule is to improve the efficient recall of high-risk foods (e.g., leafy greens, fresh-cut produce, soft cheeses, fish) in the event of a foodborne illness outbreak by requiring certain data points to travel with foods from the farm level (or manufacturer or fishing vessel, depending on the food) to the retail level.¹¹¹ The FDA anticipates that these data points will facilitate the tracking of listed foods from the marketplace back to the point of harvest (e.g., for fresh produce and aquaculture products), point of manufacturing (e.g., for soft cheeses and deli salads), or fishing vessel.¹¹² Under the Rule, every entity along the supply chain is required to maintain records that will allow the FDA to follow the supply chain and ensure that other foods that may be similarly contaminated can be removed from the market in the event of a recall.¹¹³

The Rule imposes record keeping requirements on certain foods that FDA considers high risk for foodborne illness outbreaks.¹¹⁴ Foods on that “traceability list” (listed foods) include leafy greens, fresh-cut produce, sprouts, soft cheeses, fish, shellfish, and deli salads.¹¹⁵ The FDA concluded that these and the other listed foods met criteria established by Congress to rate them as high-risk, including the history and severity of past foodborne illness outbreaks associated with the food, the health and economic impacts of such outbreaks, and the risk of the food being subject to microbiological or chemical contamination.¹¹⁶

Under the Rule, parties handling listed foods at certain points along the supply chain (known as Critical Tracking Events)¹¹⁷ must record specific types of information (known as Key Data Elements).¹¹⁸ The Critical Tracking Events are limited to: (1) harvesting; (2) cooling (before initial packing); (3) initial packing; (4) shipping (only after initial packing; includes intra-company shipment); (5) receiving (only after initial packing phase; includes intracompany shipment); and (6) transformation (e.g., manufacturing/processing, commingling, repacking or relabeling, changing packaging or packing).¹¹⁹ The Key Data Elements vary depending on the type of Critical Tracking Event, but they include information such as geographic coordinates for the growing location.¹²⁰

110. *Id.* at 70,910.

111. *Id.* at 71,070.

112. *Id.* at 71,082.

113. *Id.* at 71,070.

114. *Id.* at 70,912.

115. See *Food Traceability List*, U.S. FOOD & DRUG ADMIN. (Mar. 5, 2024), <https://www.fda.gov/food/food-safety-modernization-act-fsma/food-traceability-list> [<https://perma.cc/H5WJ-B3X4>].

116. Requirements for Additional Traceability Records for Certain Foods, 87 Fed. Reg. 70,910, 70,913 (Nov. 21, 2022).

117. 21 C.F.R. § 1.1310 (2023).

118. *Id.*

119. *Id.*

120. *Id.*

A Traceability Lot Code¹²¹ must be assigned at the initial packing stage for fresh produce *and* with any transformation activity (e.g., repacking).¹²² Accordingly, a given listed food may have different Traceability Lot Codes as it moves through the supply chain.¹²³ The Traceability Lot Code travels with the food and must be recorded at each subsequent Critical Tracking Event, along with any relevant Key Data Elements.¹²⁴ Covered parties must also maintain and make available for FDA inspection a written traceability plan and records of compliance.¹²⁵ The Rule does not apply to ingredient suppliers producing ingredients for manufacturers of listed processed foods.¹²⁶ For example, the Rule does not apply to milk and rennet suppliers selling ingredients to a soft cheese manufacturer. The requirements under the Rule start with the soft cheese manufacturer.¹²⁷

Also, FDA has:

clarified in its comments that, if the listed food is described as being ‘fresh,’ the rule applies only to the fresh form.¹²⁸ Listed foods include fresh herbs, for example. Dried herbs are not subject to the rule.¹²⁹ The entity that processes fresh herbs into dried herbs must maintain receiving records for the fresh herbs but is not required to maintain records for its subsequent transformation and shipping activities.¹³⁰ In addition, subsequent recipients of that food do not have to maintain traceability records under the rule.¹³¹

In addition to accelerating FDA’s recall process for foods, it is hoped that the Rule will also benefit industry by limiting the scope of recalls (e.g., limiting the recall of a certain product produced by a single farm, rather than recalling all such product from the same growing region).

V. Consumer Consumables and Food

A. CHILE: NEW REGULATION FOR LABELING AND ADVERTISEMENT OF ALCOHOLIC BEVERAGES – A PARADIGM CHANGE

Authors: Cristina Busquets and Ignacio Gillmore

Following the regulatory trends in the country during the past few years, in 2023, Chile enacted a regulation setting forth new labelling requirements

121. *Id.*

122. *Id.*

123. *See* 21 C.F.R. § 1.1310 (2023).

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *See* 21 C.F.R. § 1.1310 (2023).

130. *Id.*

131. *Id.*

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and advertisement restrictions on alcoholic beverages.¹³² This new regulation could represent a major challenge for the alcoholic beverages industry, especially for foreign manufacturers because it entails relevant changes to the labelling requirements currently in force for these type of products in Chile.

In July 2023, Decree No. 98 of 2023¹³³ of the Ministry of Interior and Public Health (the “Regulation”) was published in the Chilean Official Gazette, as a regulation of Law No. 21,363¹³⁴ (the “Law”), which was published on August 6, 2021. The Regulation establishes new requirements and imposes new restrictions for the commercialization and advertising of alcoholic beverages in Chile, among other matters.¹³⁵ Although enacted over two years ago, the Law has not yet entered into force in practice with regards to many of its provisions because, as expressly stated therein, it required the issuance of specific regulations to determine the characteristics and scope of its new obligations.¹³⁶ After several months of discussion within the Government, finally, in July 2023, the Regulation was enacted.

In general terms, the Law requires any beverage with an alcoholic graduation equal to or higher than 0.5 degrees to include, in its container, box, or packaging, a visible warning regarding harmful consequences of consumption.¹³⁷ The warning is required to include phrases regarding the risks of excessive alcohol consumption, along with graphic signs especially intended for those segments of greater risk, such as pregnant women, minors, and drivers.¹³⁸ Additionally, the Law establishes that containers of these products must also include a graphic warning sign, either adhered or printed, showing a car, a pregnant woman, or the number eighteen, each one fully circled, or otherwise dictated by the correspondent regulations.¹³⁹

The Law also requires inclusion of warnings in any advertising communicated through written media, posters, or advertisement signs of any kind, be they physical or virtual, audiovisual advertising, and radio announcements.¹⁴⁰ Additionally, manufacturers, producers, distributors, and importers of alcoholic beverages must provide on its containers or labels its energy content.¹⁴¹

At the same time, the Law introduces several limitations to the advertising of alcoholic beverages:

- Advertising of alcoholic beverages on television is restricted to between 10:00 PM and 6:00 AM;

132. Igancio Gillmore & Christina Busquets, *Publication of Regulation that Amends Law No.19,925 on the Sale and Consumption of Alcoholic Beverages*, CAREY (July 10, 2023), <https://www.carey.cl/en/publication-of-regulation-of-articles-40-bis-and-40-ter-of-law-no-19925-on-the-expenditure-and-consumption-of-alcoholic-beverages> [https://perma.cc/DL5L-TA5Z].

133. Law No. 19925 art. 40, Marzo 15, 2023, DIARIO OFICIAL [D.O.] (Chile).

134. See generally Law No. 21363, Julio 27, 2021, DIARIO OFICIAL [D.O.] (Chile).

135. See generally *id.*

136. *Id.*

137. *Id.* at art. 14.

138. *Id.*

139. *Id.*

140. Law No. 21363, art. 14 ter, Julio 27, 2021, Diario Oficial [D.O.] (Chile).

141. *Id.* at art. 15.

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- Radio advertising, whether direct or indirect, is restricted to between 4:00 PM and 6:00 PM;
- Prohibition of any form of advertising of alcoholic beverages—whether commercial or non-commercial, direct or indirect—at sporting events, except for mega sporting events held in Chile;¹⁴²
- Prohibition to include, in any sports item massively distributed, as well as in promotional items linked to any kind of sports activity, the name, logo or images related to alcoholic beverages, including any sign or reference to their brands or products;¹⁴³
- Prohibition of any form of advertising of alcoholic beverages—whether commercial or non-commercial, direct, or indirect—in any product, publication or activity exclusively intended for minors.¹⁴⁴ The Law also establishes a prohibition of selling these products by means of “commercial hooks” such as gifts, contests, games, or other child attracting elements;¹⁴⁵ and
- Prohibition of developing propaganda that encourages the consumption of alcohol in public places, such as streets, squares, or beaches.¹⁴⁶ But signs found on roads or highways that allow arriving at places of production of alcoholic beverages, such as vineyards, are excepted.¹⁴⁷

Importantly, the Regulation establishes the graphic characteristics of the warnings on harmful consumption that must be included in the packaging of alcoholic beverages, as well as the manner in which such warnings must be incorporated in the advertising of these products.¹⁴⁸ It also regulates the manner in which the declaration of the calorie content of the products must be made.¹⁴⁹ The Law sets forth that the entry into force of all the aforementioned obligations and restrictions shall be subject to the issuance of the corresponding regulation.¹⁵⁰

142. According to Article 15 of the Regulation, a “mega sporting event held in Chile” shall be understood to be that sporting competition within the national territory, in which Chile has been previously designated by competent international sporting organizations, as the official venue of events integrated into the program of the Olympic or Paralympic Cycle in force, at South American, Pan American or World level, as well as those world level, as well as those official international competitions programmed by continental or international continental federations or international sports federations, integrated to the Olympic Movement, in which the Movement, in which the country is officially designated as the venue for such events. The Chilean Ministry of Sports shall be in charge of qualifying events as “mega sporting events held in Chile.” *Id.*

143. Law No. 21363, art. 40 ter, Julio 27, 2021, DIARIO OFICIAL [D.O.] (Chile).

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at art. 40.

148. Law No. 19925 art. 3, Marzo 15, 2023, DIARIO OFICIAL [D.O.] (Chile).

149. *Id.* at art. 12.

150. *Id.* at art. 1.

The Regulation requires warnings to be incorporated on a back face or label of the container or package, with a black or white background.¹⁵¹ The size of the warning may not cover less than fifteen percent of the surface of the back face or label of the respective container, box, or package.¹⁵² In the event that the container, carton, or package, as the case may be, does not have a back label, the value indicated above shall be considered with respect to the front label.¹⁵³ But the complete warning shall not be less than 6.2 cm wide and 3.5 cm high, and each of the octagonal symbols shall not be less than 1.7 cm high and 1.7 cm wide.¹⁵⁴ The complete warning shall not occupy more than thirty percent of the packaging.¹⁵⁵ The producer or manufacturer in the case of national products, and the importer in the case of imported beverages, shall be responsible for affixing the warning.¹⁵⁶ The Regulation includes the following graphic examples:



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With regard to the energy content, the label of all beverages with an alcohol content equal to or greater than 0.5 percent shall include the energy value or energy of the product expressed in calories, whose unit of measurement shall be expressed in kilocalories.¹⁵⁸ The energy value shall be expressed per 100 milliliters of the product.¹⁵⁹ This information on the energy value shall be included on the back of the respective container, box or packaging, by means of a rectangle with black borders and a white background, which shall include the information indicated in the Regulation.¹⁶⁰

With regard to advertisement, in any graphic or advertising action that is communicated through written media, posters, or advertisements of any kind, whether physical or virtual, including those placed at points of sale, a box containing the word "WARNING" must be incorporated, and one of the phrases established in the Regulation must be included.¹⁶¹ This box must cover at least fifteen percent of the total surface of the graphic or advertising

151. *Id.* at art. 3.

152. *Id.* at art. 4.

153. Law No. 19925 art. 4, Marzo 15, 2023, DIARIO OFICIAL [D.O.] (Chile).

154. *Id.*

155. *Id.*

156. *Id.* at art. 6.

157. *Id.* at art. 3.

158. *Id.* at art. 11.

159. Law No. 19925 art. 11, Marzo 15, 2023, DIARIO OFICIAL [D.O.] (Chile).

160. *Id.* at art. 3.

161. *Id.* at art. 7.

action, have a black background and white letters, in capital letters, and include the logo of the Ministry of Health.¹⁶² “The box should be displayed in the upper right corner of the graphic or advertising action.”¹⁶³ Lastly, “the warning must also be incorporated in audiovisual and radio advertising, as established in the Regulations.”¹⁶⁴

Further, any form of advertising, commercial or non-commercial, direct or indirect, of alcoholic beverages by any means, such as product packaging, computer, and non-computer media, or any activity or publication, aimed exclusively at minors, is prohibited.¹⁶⁵ Likewise, the Regulation establishes a prohibition to induce minors to consume alcoholic beverages and to take advantage of their credulity.¹⁶⁶ For these purposes, the Regulation establishes that it will be understood that minors are induced, or their credulity is taken advantage of when, among other elements, children’s or young people’s characters and figures, animations, cartoons, toys, or children’s music are used.¹⁶⁷ Also, it shall be especially understood that minors are induced or their credulity is exploited when the presence of real or fictitious persons or characters that attract the interest of this group is used, such as national or international athletes recognized in their discipline or characters from movies or series aimed at children, or persons who influence minors by having a presence in written or digital media aimed at this group.¹⁶⁸ In addition, the prohibition to induce minors also applies if the advertisement contains fantastical statements or plots, childish voices, language, or expressions typical of minors in general, or if it presents situations that represent the daily life of minors, such as school, recreation, games, children’s or teenagers’ hobbies, parties, or social gatherings, family or children’s, teenagers’ or minors’ peers in general.¹⁶⁹ Any form of direct or indirect commercial or non-commercial advertising of alcoholic beverages in sporting activities is prohibited, except for “mega sporting events.”¹⁷⁰

“Sporting goods intended for mass distribution, such as t-shirts and uniforms or posters and promotional items related to all kinds of sporting activities, may not contain names, logos or images of brands of alcoholic beverages, including any sign or allusion to their brands or products.”¹⁷¹ Finally, in order to implement the Regulation, a time period has been established for the entry into force of its provisions, as follows:

- one year from its publication (July 7, 2024) for the entry into force of the provisions related to warning messages and graphics (including their incorporation in advertising) and energy value; and

162. *Id.*

163. *Id.*

164. *Id.* at art. 8.

165. Law No. 19925 art. 7(iii), Marzo 15, 2023, DIARIO OFICIAL [D.O.] (Chile).

166. *Id.* at art. 14.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at art. 15.

171. Law No. 19925 art. 15, Marzo 15, 2023, DIARIO OFICIAL [D.O.] (Chile).

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- thirty-six months from its publication (July 7, 2026) to the entry into force of the rules regulating advertising restrictions (Title III of the Regulation).¹⁷²

The enactment of the Law and the Regulation marks a significant landmark in Chilean regulation related to alcoholic beverages. Such regulation has been particularly weak or scarce to date, as far as advertisement restrictions and warning messages, in comparison to the heavily restrictive regulation in place for other products, such as foodstuff or cigarettes.

Conclusion

There have been several developments in the hemp, agriculture, and food industry in the U.S., European Union, and Chile during 2023. As the examples above indicate, we are seeing lawmakers, regulators, industry, consumers, and courts across countries grapple with various equity, social, environmental, and public health issues in numerous aspects of the complex food, agriculture, and cannabis sectors. This development is key to improving the laws and regulations within those countries.

172. *Id.*

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Latin America & Caribbean

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MARÍA ALICIA CORBO SERANI; JOSÉ FRANCISCO MAFLA;
DIEGO RAMÍREZ MESEC & JAMES E. KEEBLE*

This article surveys significant legal developments in Latin America and the Caribbean in 2023—particularly in Brazil, Chile, Colombia, and Ecuador.

I. Brazil

A. DRAFT BILL 2,338/2023¹ – LEGAL FRAMEWORK OF ARTIFICIAL INTELLIGENCE IN BRAZIL

In 2023, Brazil has made relevant developments in establishing a legal framework for Artificial Intelligence nationwide. The Internal Temporary Committee on Artificial Intelligence in Brazil will analyze Draft Bill No. 2,338/2023 (Draft Bill), which aims to establish a general regulation regarding the use of artificial intelligence in the country.² To that end, the Committee intends not only to respond to relevant actors in the sector, but also to engage in an international comparative analysis of such regulations.³

A critical component of the debate is striking a legal balance between fundamental rights and guarantees provided for in Article 5 of the Brazilian Federal Constitution⁴—notably the right to protection of personal data, including in digital media—and fostering the advancement of technology in the country, especially in strategic sectors, such as industry, health, and security.⁵

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1. See Senador Rodrigo Pacheco, Projeto de Lei N° 2338, 5 de Maio de 2023, Plenário do Senado Federal 2023 (Braz.).

2. See *id.* at 2.

3. See *id.* at 29.

4. See CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 5 (Braz.).

5. Agência Senado, *Comissão da Inteligência Artificial aprova plano de trabalho* [Committee Approves Work Plan and Intends to Analyze Draft Bill in 120 Days], SENADO NOTÍCIAS (Sept. 12, 2023),

Although the use of artificial intelligence is of concern to every public agency, the National Data Protection Authority (ANPD) exercises jurisdiction over the use of artificial intelligence in Brazil.⁶ The ANPD has issued two analyses regarding the contents of the Draft Bill itself.⁷ The analyses highlighted the intersections between the existing Brazilian General Law of Data Protection⁸ and the main subjects the Draft Bill intends to regulate, such as protection of rights, governance mechanisms, artificial intelligence risk classification, and competent authority.⁹

Another important step towards the accomplishment of the legislation's goals was ANPD's Call for Contributions to the regulatory sandbox for artificial intelligence and data protection¹⁰ that remained open until early November 2023. This project, designed in collaboration with the Development Bank of Latin America and the Caribbean (CAF), aimed to foster the exchange and experiences of all relevant actors and the development of regulatory sandboxes in the region.¹¹ This project not only contributes to the standardization of the regulation in Latin America, but also joins countries with similar socioeconomic backgrounds facing similar challenges in developing their technological and artificial intelligence sectors.¹²

B. CONSTITUTIONAL AMENDMENT PROPOSAL NO. 45/2019¹³ - TAX REFORM IN BRAZIL: SO CLOSE YET SO FAR

Recently, the long-awaited reform of the national tax system in Brazil gained ground with the approval of the original text of the Constitutional

<https://www12.senado.leg.br/noticias/materias/2023/09/12/comissao-da-inteligencia-artificial-aprova-plano-de-trabalho> [<https://perma.cc/DKV2-7RGT>].

6. See Autoridade Nacional de Proteção de Dados, *ANPD Publica Análise Preliminar do Projeto de Lei no 2338/2023 que Dispõe sobre o Uso da Inteligência Artificial* [ANPD publishes preliminary analysis of Bill No. 2338/2023, which provides for the use of Artificial Intelligence], MINISTÉRIO DA JUSTIÇA E SEGURANÇA PÚBLICA (Sept. 7, 2023) [hereinafter *ANPD Preliminary Analysis*], <https://www.gov.br/anpd/pt-br/assuntos/noticias/anpd-publica-analise-preliminar-do-projeto-de-lei-no-2338-2023-que-dispoe-sobre-o-uso-da-inteligencia-artificial> [<https://perma.cc/BFX6-LZZ2>].

7. See *id.*; Autoridade Nacional de Proteção de Dados, *ANPD publica segunda análise do Projeto de Lei sobre inteligência artificial* [ANPD publishes second analysis of the Bill on artificial intelligence], MINISTÉRIO DA JUSTIÇA E SEGURANÇA PÚBLICA (Oct. 10, 2023) [hereinafter *ANPD Second Analysis*], <https://www.gov.br/anpd/pt-br/assuntos/noticias/anpd-publica-segunda-analise-do-projeto-de-lei-sobre-inteligencia-artificial> [<https://perma.cc/2646-43ET>].

8. Lei Geral de Proteção de Dados Pessoais (LGPD), Lei Nº 13.709, Diário Oficial da União [D.O.U.], 14 de Agosto de 2018 (Braz.).

9. See *ANPD Second Analysis*, *supra* note 7.

10. National Data Protection Authority (ANPD), *ANPD's Call for Contributions to the Regulatory Sandbox for Artificial Intelligence and Data Protection in Brazil Is Now Open*, MINISTÉRIO DA JUSTIÇA E SEGURANÇA PÚBLICA (Oct. 3, 2023), <https://www.gov.br/anpd/pt-br/assuntos/noticias/anpds-call-for-contributions-to-the-regulatory-sandbox-for-artificial-intelligence-and-data-protection-in-brazil-is-now-open>. [<https://perma.cc/SK2R-F6B6>].

11. *Id.*

12. See *id.*

13. Câmara dos Deputados, Projeto de Lei Nº 2338, de 2019, Plenário do Senado Federal 2023 (Braz.).

Amendment Proposal No. 45/2019 by the Federal Senate (Proposal).¹⁴ In accordance with the Brazilian Federal Constitution,¹⁵ the Proposal will return to the House of Representatives for a new vote. If the number of necessary votes is reached, the Proposal can finally be enacted.

The Brazilian tax system is one of the most complex systems in the world.¹⁶ Its tax burden is also one of the highest, despite public services being notoriously deficient in several aspects—especially in the health and public safety sectors.¹⁷ While the need for tax reform has been expressed widely, lawmakers have disagreed about the focus of reform, given the competing interests of different sectors of society represented in the National Congress.¹⁸

The Brazilian reform is expected to have two components: the Contribution on Goods and Services (CBS), which will replace three federal taxes (IPI, PIS and COFINS), and the Tax on Goods and Services (IBS), which will unify ICMS (state tax) and ISS (municipal tax).¹⁹ The debate will revolve around the appropriate tax rate, since, if the predictions come true, the Brazilian VAT not only will increase the tax burden but may also raise the rate to as high as twenty-eight percent—the highest in the world.²⁰

In addition to the unification of taxes, the tax reform also aims to simplify taxation itself.²¹ Currently, upon a single triggering event, several taxes may apply along with ancillary obligations that are often contradictory.²² This is because current tax laws at the three levels of power (federal, state, and municipal) multiply and overlap with each other, leaving a trail of legal uncertainty behind.²³

II. Chile

A. NEW CONSTITUTIONAL REFERENDUM

As a result of the protests of October 2019, Chile has faced two processes to amend its Constitution.²⁴ The first process ended with a referendum on

14. See PWC, TAX INTELLIGENCE: BRAZIL'S VAT REFORM (24th ed. 2023), https://www.pwc.com.br/pt/tax/tax-intelligence/2023/PwC-Tax-Intelligence_Brazils-VAT-Reform-Senate-24th-Ed.pdf [https://perma.cc/Z4U3-FY6H].

15. CONSTITUIÇÃO FEDERAL [C.F.] art. 60.

16. See generally OECD ECON. POLICY REPORT: REDESIGNING BRAZIL'S CONSUMPTION TAXES TO STRENGTHEN GROWTH AND EQUITY (2023), <https://www.gov.br/fazenda/pt-br/acesso-a-informacao/acoes-e-programas/reforma-tributaria/estudos/brazil-tax-policy-brief-2023-final.pdf> [https://perma.cc/AS7G-2WTH].

17. See *id.* at 2.

18. *Id.*

19. See *id.* at 4.

20. See *id.* at 5.

21. *Id.*

22. See OECD ECON., *supra* note 16, at 4.

23. See *id.*

24. Rafael Romo et. al, *Chilean Voters Overwhelmingly Reject Proposed Leftist Constitution*, CNN WORLD (Sept. 5, 2022), <https://www.cnn.com/2022/09/04/americas/chile-constitution-vote-intl/index.html> [https://perma.cc/A727-HGKS].

September 4, 2022, in which the vast majority (i.e., 61.89 percent of the population) voted against the proposed draft.²⁵ Then, a new constitutional process followed. A popularly elected Constitutional Counsel drafted the current proposal, which is based on a draft prepared by a congressionally appointed expert commission.²⁶ The Constitutional Council presented its final draft on November 7, 2023.²⁷ Chileans will vote on December 17, 2023, to approve or reject the new proposal.²⁸

B. NEW LAW ON ECONOMIC CRIMES

On August 17, 2023, Law No. 21,595 on Economic Crimes (the Economic Crimes Law) was published in the Official Gazette.²⁹ This bill systematizes economic crimes and attacks against the environment, modifies various legal bodies concerning crimes against the socioeconomic order, and adapts the penalties applicable to all of them.³⁰ The Economic Crimes Law includes the following innovations:

- (i) The systematization of crimes related to business activities under four major categories of crimes;³¹
- (ii) The codification of new crimes, such as so-called environmental crimes,³² and the creation of the concept of labor exploitation of workers, among others;
- (iii) The establishment of new penalties and sanctions, and the strengthening of existing ones, seeking to ensure that those who commit an economic crime actually serve a prison sentence;³³ and
- (iv) The exponential increase of base crimes for which legal entities may be criminally liable.³⁴

25. *See id.*

26. EL CONSEJO CONSTITUCIONAL, PROPUESTA CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [POLITICAL CONSTITUTION PROPOSAL FROM THE REPUBLIC OF CHILE] (2023), <https://www.procesoconstitucional.cl/wp-content/uploads/2023/10/PROPUESTA-DE-NUEVA-CONSTITUCION-POLITICA-DE-LA-REPUBLICA.pdf> [https://perma.cc/K6ZF-AUWQ].

27. *Id.* at 2.

28. Alexander Villegas & Natalia A. Ramos Miranda, *Chileans Reject Conservative Constitution to Replace Dictatorship-era Text*, REUTERS (Dec. 18, 2023), <https://www.reuters.com/world/americas/chileans-head-polls-again-replace-dictatorship-era-constitution-2023-12-17/> [https://perma.cc/WSC2-WFM5].

29. Law No. 21969, Lei de Delitos Economicos [Law on Economic Crimes], Agosto 7, 2023, Diario Oficial [D.O.] (Chile).

30. *See id.* tit. I, § 1, art. 1.

31. *See id.* tit. II, § 4, art. 39.

32. *Id.* tit. IV, § 13, art. 305.

33. *Id.* tit. II, § 1, art. 8.

34. *See* Law No. 21969, tit. IV, § 2, art. 50.

C. NEW BILL FOR PERSONAL DATA PROTECTION

On May 8, 2023, the Chilean Congress approved a bill that updates the current regulation on the protection of personal data and creates the Personal Data Protection Agency (the Personal Data Protection Law).³⁵ This new law has not yet been published in the Official Gazette as its preventive constitutional control is pending before the Constitutional Court. The current law on data protection was passed in 1999.³⁶ Although the current law has been amended several times, it was necessary to create a new legal framework that responds to the current needs of information exchange and use of new technologies to achieve the delicate balance between the individual's privacy protection and data transfer.³⁷

The Personal Data Protection Law modernizes the legal regulations that govern the processing of personal data, an issue the current law does not address.³⁸ Article 3 of the bill establishes the principles of lawfulness, fairness, purpose, proportionality, quality, accountability, security, transparency, information, and confidentiality.³⁹

Another fundamental novelty of this new law is the creation of a control authority, the Personal Data Protection Agency, which will have regulatory, supervisory, sanctioning, and certifying powers.⁴⁰ This Agency will oversee and supervise the compliance with the provisions of the new law and will oversee sanctioning its infractions.⁴¹

Lastly, the penalties under the new law are considerably more onerous. It establishes fines of up to 20,000 UTM (approximately equivalent to \$14,500,000), and in the most serious cases, the suspension of the processing of personal data for up to thirty days, in addition to a catalog of infractions.⁴² In contrast, the current law establishes a maximum fine of fifty UTM (approximately equivalent to \$3,600), and does not contain a catalog of infractions.⁴³

35. See Centro de Prensa, *Tratamiento de datos personales tendrá nuevo marco legal* [Processing of personal data will have a new legal framework], CAMARA DE DISPUTADAS Y DISPUTADOS (May 8, 2023), <https://www.camara.cl/cms/noticias/2023/05/08/tratamiento-de-datos-personales-tendra-nuevo-marco-legal/> [https://perma.cc/M6P3-SJQC].

36. Law No. 19628, *Sobre Protección de la Vida Privada* [On Protection of Private Life], Agosto 28, 1999, Diario Oficial [D.O.] (Chile).

37. See, e.g., *Legal Alert: Chile's Bill on Personal Data Protection: What comes Ahead?*, DLA PIPER (May 17, 2023), <https://www.dlapiper.cl/en/2023/05/17/legal-alert-chiles-bill-on-personal-data-protection-what-comes-ahead/> [https://perma.cc/7ZF2-2Z7K].

38. Law No. 2246446, *Promueve La Competencia E Inclusión Financiera A Través De La Innovación Y Tecnología En La Prestación De Servicios Financieros*, Ley Fintec [Promotes Competition and Financial Inclusion Through Innovation and Technology in the Provision of Financial Services, Fintec Law], Enero 4, 2023, Diario Oficial [D.O.] (Chile).

39. See *id.* art. 3.

40. See *id.* art. 30.

41. *Id.* art. 7.

42. *Id.* art. 16.

43. See Law No. 19628 [D.O.] (Chile).

D. NATIONAL LITHIUM STRATEGY

In April 2023, Chile's President announced the creation of the National Lithium Strategy.⁴⁴ As defined by the current government, this strategy "is a set of measures that seek to incorporate capital, technology, sustainability, and value addition to the productive sector in harmony with the communities."⁴⁵ Through the National Lithium Strategy, the government seeks to encourage the Chilean State's mining of lithium, the generation of value-added lithium products and investment in technology and research.⁴⁶

One of the most important features of this plan is the creation of the National Lithium Company (NLC), whose organization depends on the approval of Congress.⁴⁷ The NLC will seek partnerships with private companies for the sustainable development of lithium exploration, mining, and value-adding projects.⁴⁸ According to the President, this public-private action, as articulated by the NLC, will increase the national production of lithium and attract new players and expand the industry through joint initiatives.⁴⁹ This initiative will allow greater sustainable production in the Salar de Atacama and new projects in other salt flats in the country.⁵⁰

As of this date, the Chilean government has not presented Congress with the drafts for the bills necessary to implement the National Lithium Strategy nor for the creation of the NLC.

E. FINANCIAL CONGLOMERATES LAW PROPOSAL

The Chilean Financial Market Commission (CMF, by its Spanish acronym) is analyzing the inclusion of financial conglomerates as part of the institutions under its supervision and is proposing a legal framework to regulate them (the Financial Conglomerates Law).⁵¹

The CMF defines financial conglomerates as the group of companies belonging to the same economic group (as defined in the Securities Market Law) which has at least one regulated financial entity and any other entity

44. See *Estrategia Nacional del Litio* [National Lithium Strategy], GOBIERNO DE CHILE, <https://www.gob.cl/litioporchile/#:~:text=La%20Estrategia%20Nacional%20del%20Litio%20es%20un%20conjunto%20de%20medidas,en%20armon%C3%ADa%20con%20las%20comunidades> [https://perma.cc/R3LV-X79X] (last visited Apr. 28, 2024).

45. See *id.*

46. See *id.*

47. See *id.*

48. See *id.*

49. See *Empresa Nacional del Litio: Presidente Boric da a conocer estrategia para el aprovechamiento del mineral* [National Lithium Company: President Boric announces strategy for the use of the mineral], GOBIERNO DE CHILE (Apr. 20, 2023), <https://www.gob.cl/noticias/presidente-boric-da-conocer-creacion-de-empresa-nacional-del-litio/> [https://perma.cc/R8AX-NGN7].

50. See *id.*

51. See COMISIÓN PARA EL MERCADO FINANCIERO, LINEAMIENTOS PARA UNA LEY DE CONGLOMERADOS FINANCIEROS EN CHILE [GUIDELINES FOR A LAW ON FINANCIAL CONGLOMERATES IN CHILE] 24 (2023), https://www.cmfchile.cl/portal/estadisticas/617/articles-72010_doc_pdf.pdf [https://perma.cc/A9GC-BA3Z].

engaged in financial activities.⁵² Regulated financial entities includes but is not limited to insurance companies, banks, credit card issuers, and securities intermediaries.⁵³ Financial activities of other entities (to be defined in the Financial Conglomerates Law), whether regulated or not by the CMF, include actions carried out abroad by companies belonging to local conglomerates.⁵⁴

Under this proposal, all financial conglomerates operating in Chile would become entities subject to regulation and supervision by the CMF, except for those that the CMF excludes under certain criteria.⁵⁵ Entities classified as financial conglomerates would have to meet specific conditions and requirements, including:

- (i) Separating its financial activities from other activities of the group;
- (ii) Incorporating a financial parent company domiciled in Chile, subject to a licensing and registration process. Both the initial structure of the conglomerate and any material changes would be subject to the approval of the CMF;
- (iii) Possessing sufficient consolidated equity to face the risks derived from its activities; and
- (iv) Publishing financial statements with particular emphasis on the disclosure of information of interest to the market associated with the organization as a financial conglomerate.⁵⁶

In addition, the controlling shareholders of the financial parent company would have to comply with strict character requirements.⁵⁷ The CMF may also impose mandatory policies on transactions and exposures between the companies of the conglomerate and those related to them within the economic group.⁵⁸

The CMF would have broad powers of supervision to include the authority to suspend the registration of bonds and other debt instruments, require capital regularization plans, restrict the payment of dividends, and revoke the authorization to operate as a conglomerate, among others.⁵⁹

F. NEW REGULATION FOR LABELING AND ADVERTISING ALCOHOLIC BEVERAGES

On July 7, 2023, the new regulation for labeling and advertising of alcoholic beverages was published in the Official Gazette.⁶⁰ Alcoholic

52. *See id.*

53. *Id.*

54. *See id.*

55. *See id.*

56. *Id.* at 26–27, 32.

57. COMISIÓN PARA EL MERCADO FINANCIERO, *supra* note 51, at 28.

58. *See id.*

59. *See id.* at 30.

60. Law No. 19925, Decreto 98: Aprueba Reglamento De Los Artículos 40 Bis Y 40 Ter De Ley No. 19,925 [Decree 98: Approves Regulations of Articles 40 Bis and 40 Ter of Law No. 19,925], Julio 7, 2023, Diario Oficial [D.O.] (Chile).

beverage labels now must contain the calories and health warnings regarding alcohol consumption and its relationship with pregnancy, driving, and minors.⁶¹ Likewise, the new regulation prohibits advertising directed to minors, advertising of alcoholic beverages on TV between 6:00 am to 10:00 pm, and advertising of alcoholic beverages on the radio between 4:00 to 6:00 pm.⁶² Further, all forms of advertising (e.g., written media, posters, audiovisual and radio spots) must contain health warnings.⁶³

III. Colombia

A. TRADE AGREEMENTS

On January 10, 2023, Colombia issued Law No. 2284 of 2023, ratifying the inclusion of Singapore as an associated state of the Pacific Alliance.⁶⁴ The Pacific Alliance signed a Free Trade Agreement (FTA) with Singapore on January 26, 2022.⁶⁵ This FTA aims to bolster the operations of the Asian market in the American field and address general issues such as market access.⁶⁶

The FTA outlines the following objectives to promote trade:

- (i) Establish parameters for trade and investment between Singapore and the member countries of the Pacific Alliance;
- (ii) Stimulate trade in goods and services and attract investment; and
- (iii) Facilitate trade in goods with Singapore.⁶⁷

It is worth noting that in 2019 (pre-pandemic), trade with Singapore amounted to \$6.1 billion, representing 33.2 percent of the total trade in goods with Latin America.⁶⁸

The inclusion of Singapore as an Associated State to the Pacific Alliance aims not only to benefit Singapore, but also to provide a new approach to benefits for Latin America.⁶⁹ Colombia has highlighted that one of the significant opportunities arising from this FTA is in the digital market. This is due to the ease of structuring technological projects in Singapore and the abundance of talent in operations related to electronic media.⁷⁰

61. *Id.*

62. *Id.*

63. *Id.*

64. L. 2284, enero 5, 2023 Diario Oficial [D.O.] (Colom).

65. *See Singapore, Pacific Alliance countries sign trade agreement*, REUTERS (Jan. 26, 2022), <https://www.reuters.com/business/singapore-pacific-alliance-countries-sign-trade-agreement-2022-01-26/> [<https://perma.cc/PCX3-FP2L>].

66. L. 2284, [D.O.] (Colom).

67. *See id.*

68. *See id.*

69. *See Singapore, Pacific Alliance countries sign trade agreement*, *supra* note 65.

70. *See* L. 2284, [D.O.] (Colom).

B. RELATIONS WITH VENEZUELA

September 26, 2023, marks one year since the re-opening of the border and commercial flows between Colombia and Venezuela, advancing a process of commercial reconnection and allowing regional economic growth.⁷¹ On July 10, 2023, Colombia issued Law No. 2301 of 2023, whereby it ratified the Agreement between the Republic of Colombia and the Bolivarian Republic of Venezuela regarding international ground transport of cargo and passengers.⁷² Colombia is willing to promote the two countries' relationship through the implementation of different agreements, such as the Agreement Between the Bolivarian Republic of Venezuela and the Republic of Colombia Regarding the Reciprocal Promotion and Protection of Investments.⁷³

C. SUPPLY CHAIN SAFETY

On April 17, 2023, the Mutual Recognition Agreement (MRA) was signed between the Colombian Authorized Economic Operator (AEO) (in Spanish (Operador Económico Autorizado) (OEA)) and the U.S. Customs-Trade Partnership Against Terrorism (CTPAT) Programs.⁷⁴ The World Customs Organization (WCO) promoted the AEO authorization to implement security measures in the logistics chains of member countries based on each organization's risk management of global risks that affect them.⁷⁵ In the review procedure, it came to light that the AEO is one of the most rigorous and comprehensive programs in Latin America.

D. REDUCTION OF THE LEGAL LABOR SCHEDULE

On July 16, 2023, the implementation of Law No. 2101 of 2021 began.⁷⁶ This law approved the gradual reduction of the workday, as well as the workweek by one hour (to forty-seven hours per week) starting two years after the law's implementation.⁷⁷ In the third year, an additional reduction of one hour will bring the workweek to forty-six hours.⁷⁸ Starting in the

71. See, e.g., Morning Edition, *After 7 years, the Colombia-Venezuela border is reopening to trade*, NPR (Sept. 26, 2022), <https://www.npr.org/2022/09/26/1125054614/after-7-years-the-colombia-venezuela-border-is-reopening> [<https://perma.cc/Q5N4-5QUY>].

72. L. 2301, julio 10, 2023, Diario Oficial [D.O.] (Colom).

73. See, e.g., Diego P. Fernández Arroyo, *The Venezuela-Colombia BIT: An Original Development of Uncertain Impact*, KLUWER ARB. BLOG (April 19, 2023), <https://arbitrationblog.kluwerarbitration.com/2023/04/19/the-venezuela-colombia-bit-an-original-development-of-uncertain-impact/> [<https://perma.cc/2CS2-NTL4>].

74. See *Mutual Recognition Agreement between Colombia and the United States: A significant step for international supply chain security*, WORLD BASC ALL. (May 5, 2023), <https://www.wbasco.org/en/news/mutual-recognition-agreement-between-colombia-and-united-states-significant-step-international> [<https://perma.cc/ZTJ4-RQGU>].

75. See *id.*

76. L. 2101, julio 15, 2022, Diario Oficial [D.O.] (Colom).

77. *Id.*

78. *Id.*

fourth year, the workweek will reduce by two hours annually until reaching a total of forty-two hours per week.⁷⁹

E. REGULATION OF ENVIRONMENTAL LIABILITIES

On September 13, 2023, the Colombian Government issued Law No. 2327 of 2023, establishing the definition of environmental liabilities and providing guidelines for their management, along with other relevant provisions.⁸⁰ Under the law, the National Government must define guidelines for the management of environmental liabilities and formulate an action plan as well as a follow-up mechanism.⁸¹ Additionally, the law established the Environmental Liabilities Information System, which will serve as the sole instrument for managing information related to the strategy for handling environmental liabilities.⁸² Its purpose is to identify, monitor, intervene, follow up on liabilities, and other situations that the Ministry of Environment and Sustainable Development designates.⁸³

F. REGIONAL HOLDING

On August 31, 2023, the Colombian Stock Exchange shareholders meeting decided to begin the process of integrating the stock exchanges of Chile, Peru, and Colombia.⁸⁴ This integration process will last between approximately eighteen and twenty-four years.⁸⁵ The integration presents an opportunity for investors in the region by facilitating the exchange of securities between these three countries, and by promoting the eventual possibility of integration with markets that are in growth or that do not have significant economic activity.⁸⁶

G. TAX ON SUGAR AND ULTRA-PROCESSED FOOD

On December 13, 2022, Colombia issued Law No. 2277 of 2022 (tax reform) that was pending in 2022.⁸⁷ This tax reform introduced taxes on ultra-processed products that contain high levels of sodium, fat, or sugar.⁸⁸

79. *Id.*

80. L. 2327, septiembre 13, 2023, Diario Oficial [D.O.] (Colom).

81. *Id.*

82. *Id.*

83. *Id.*

84. See Carlos Arturo García Mahecha, *Juan Pablo Córdoba explica la integración de las bolsas de Colombia, Chile y Perú* [Juan Pablo Córdoba explains the integration of the stock exchanges of Colombia, Chile and Peru] EL TIEMPO (Sept. 4, 2023), <https://www.eltiempo.com/economia/sectores/juan-pablo-cordoba-explica-la-integracion-de-las-bolsas-de-colombia-chile-y-peru-802303> [<https://perma.cc/9WD6-7G8C>].

85. *Id.*

86. See *id.*

87. L. 2277, diciembre 13, 2023, Diario Oficial [D.O.] (Colom).

88. *Id.*

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The implementation of this tax began on November 1, 2023, applying to drinks or products classified as ultra-processed sugar drinks or ultra-processed food products high in sugar, sodium, and saturated fats.⁸⁹ The law will increase the tax base and the tax rate annually until the year 2025, reaching twenty percent of the value of the product.⁹⁰ The burden of the tax falls on producers, importers, and those who benefit from the commercialization of the products.⁹¹

**H. PROMOTION AND PROTECTION OF TECHNOLOGY AGREEMENT
WITH CHINA**

On October 25, 2023, the Colombian Government signed three memorandums of understanding establishing a bilateral agreement with China in the technological field.⁹² The main purpose of these documents is to strengthen the digital economy, allow Colombian students to participate in internships in Chinese technology companies, and establish collaboration between the Colombian public media systems and the China Media Group, represented by Shen Haixiong.⁹³

These agreements support the digital transformation in Colombia.⁹⁴ In addition, they promote Colombian public television and facilitate opportunities of Colombian citizens to participate in internships in Chinese technology companies.⁹⁵ The agreement related to the digital economy promotes digital development in diverse areas, from traditional industries to technological innovation, including the implementation of smart city pilots.⁹⁶ It also seeks to foster policy cooperation and regulatory information exchange in the information and communications technologies sector.⁹⁷ This collaboration is planned for three years and is touted as an opportunity to take advantage of the Chinese experience in 5G technology in various areas to improve the quality of life of Colombians.⁹⁸

89. *Id.*

90. *Id.*

91. *See id.*

92. *See Gobiernos de Colombia y China Firman Acuerdos para Fortalecer la Economía Digital y los Medios Públicos* [Governments of Colombia and China Sign Agreements to Strengthen the Digital Economy and Public Media], MINISTERIO DE TECNOLOGÍAS DE LA INFORMACIÓN Y LAS COMUNICACIONES (Oct. 25, 2023), <https://mintic.gov.co/portal/inicio/Sala-de-prensa/Noticias/281150:Gobiernos-de-Colombia-y-China-firman-acuerdos-para-fortalecer-la-economia-digital-y-los-medios-publicos>. [https://perma.cc/YH8N-VA7A].

93. *See id.*

94. *See id.*

95. *See id.*

96. *See id.*

97. *See id.*

98. *See Governments of Colombia and China Sign Agreements to Strengthen the Digital Economy and Public Media*, *supra* note 92.

IV. Ecuador

A. IMPEACHMENT TRIAL AGAINST PRESIDENT LASSO

Since President Guillermo Lasso was sworn in, his working relationship with the National Assembly (controlled by the opposition party) has been confrontational, and his attempts to negotiate a majority have proved unsuccessful.⁹⁹ As a result, President Lasso was unable to pass major legislative initiatives. The year 2023 proved to be particularly troublesome. Amid allegations of corruption in the press that sparked protests, on March 16, 2023, fifty-nine members of the National Assembly submitted a letter requesting the initiation of an impeachment trial against President Lasso.¹⁰⁰ The trial moved forward, but before the motion to remove the President from office could be decided, on May 17, 2023, the President used his power to dissolve the National Assembly and called for early elections for the Presidency and the National Assembly (to complete the term).¹⁰¹

The dissolution of the National Assembly resulted in several significant effects, including:

- (i) The immediate termination of the members of the National Assembly, but with the possibility of running for re-election;
- (ii) The President's continuation in office, governing by means of economic emergency executive decrees, which will become effective with the approval of the Constitutional Court and their publication in the Official Gazette;¹⁰² and
- (iii) The swearing-in of the new National Assembly on November 17th and the President on November 23rd. Both the new National Assembly and the President will be in office for about eighteen months.¹⁰³

99. See, e.g., Alexandra Valencia, *Ecuador President Lasso Dissolves National Assembly, Triggers Early Elections*, REUTERS (May 17, 2023), <https://www.reuters.com/world/americas/ecuador-president-dissolves-legislature-bringing-elections-forward-2023-05-17/> [https://perma.cc/5NGA-MY9N].

100. See, e.g., Vanessa Buschschlüter, *Guillermo Lasso: Ecuadorean President's Impeachment Trial Starts*, BBC (May 16, 2023), <https://www.bbc.com/news/world-latin-america-65610183> [https://perma.cc/T9KB-CKNL].

101. See, e.g., Vanessa Buschschlüter, *Guillermo Lasso: Ecuador's President Dissolves Parliament*, BBC (May 17, 2023), <https://www.bbc.com/news/world-latin-america-65610183> [https://perma.cc/T9KB-CKNL].

102. The following emergency executive decrees were sent to the Constitutional Court: (i) Free Trade Zone Law; (ii) Student Loan Relief; (iii) Decree Law on Corporate Restructuring; (iv) Organization, and Transparency of Public Finances; and (v) Risks and Disasters (partially approved). They were authorized by the Constitutional Court because they were not urgent. See Gustavo Prieto, *Ecuador's Mutual Death Clause*, VERFASSUNGSBLOG (May 29, 2023), <https://verfassungsblog.de/ecuadors-mutual-death-clause/> [https://perma.cc/5V62-EPVX].

103. See, e.g., Alexandra Valencia, *New Ecuador President Noboa Pledges Reforms to Reduce Violence, Create Jobs*, REUTERS (Nov. 23, 2023), <https://www.reuters.com/world/americas/ecuador-swear-millennial-businessman-noboa-president-2023-11-23/> [https://perma.cc/9P3D-XP4Q].

B. ORGANIC LAW FOR DIGITAL AND AUDIOVISUAL TRANSFORMATION

On February 7, 2023, the Organic Law for Digital and Audiovisual Transformation (Ley Orgánica para la Transformación Digital y Audiovisual, in Spanish) was enacted.¹⁰⁴ This law made significant advances by implementing a digital transformation in the justice administration system. Its features include changing the subpoena regime, mandatory digital filing (along with hardcopies), and telematic hearings.¹⁰⁵

C. LAW FOR BUSINESS OPTIMIZATION AND PROMOTION OF CORPORATE GOVERNANCE

On March 2, 2023, the Ley Orgánica Reformatoria a la Ley de Compañías para la Optimización Empresarial y el Fomento del Gobierno Corporativo¹⁰⁶ was enacted, amending the Ley de Compañías (Companies Law) to simplify procedures for the establishment of companies, reduce costs, allow the resignation of managers when the shareholders do not accept it as per a special procedure, allow assignment of equity among equity-holders of a limited liability corporation without universal consent, and expressly allow for private shareholder agreements, among others.¹⁰⁷ The changes introduced with this new law help modernize the business sector and promote corporate governance.¹⁰⁸

D. LAW FOR THE PREVENTION, DETECTION AND ERADICATION OF MONEY LAUNDERING

On April 3, 2023, the law that amends the Organic Law for the Prevention, Detection and Eradication of the Crime of Asset Laundering and of Financing of Crime, expanding the reporting obligations of certain financial transactions, was enacted.¹⁰⁹ Since the dollarization of Ecuador's economy, the country has faced complications regarding money and asset

104. Ley Orgánica para la Transformación Digital y Audiovisual [Organic Law for Digital and Audiovisual Transformation], Febrero 7, 2023, 3 Registro Oficial [R.O.] 245 (Ecuador), <https://www.gobiernoelectronico.gob.ec/wp-content/uploads/2023/02/7e52b3d7-0ba5-4c58-a474-00e19fcbe127.pdf> [<https://perma.cc/WHM3-2K2K>].

105. *See id.*

106. Ley Orgánica Reformatoria a la Ley de Compañías para la Optimización Empresarial y el Fomento del Gobierno Corporativo [Organic Law Reforming the Companies Law for Business Optimization and the Promotion of Corporate Governance], Marzo 15, 2023, 1 Registro Oficial [R.O.] 269 (Ecuador), <https://www.asambleanacional.gob.ec/sites/default/files/private/asambleanacional/filesasambleanacionalnameuid-29/Leyes%202013-2017/1336-ayaguana/ro-269-supl-15-03-2023.pdf> [<https://perma.cc/7XH8-89EW>].

107. *See id.*

108. *See id.*

109. *See generally*, U.S. DEP'T OF ST., 2023 INVESTMENT CLIMATE STATEMENTS: ECUADOR (2023), <https://www.state.gov/reports/2023-investment-climate-statements/ecuador/> [<https://perma.cc/B3U5-X4SY>].

laundering, and organized crime has grown considerably.¹¹⁰ This law introduces important changes to combat these problems and represents one of many attempts and legislative changes to address the problems.¹¹¹

E. TAX REFORM TO STRENGTHEN THE FAMILY ECONOMY

By means of Decree No. 742 of May 17, 2023, President Guillermo Lasso signed the tax reform Law for the Strengthening of the Family Economy.¹¹² The law went into effect upon authorization from the Constitutional Court.¹¹³ This law was introduced to remedy the issues in the unpopular tax reform that President Lasso himself had passed a few months earlier, which considerably affected his popularity.¹¹⁴ Specifically, the law reversed the Lasso Administration's tax reform (which reduced deductible expenses for income tax purposes, thus increasing the tax burden on middle class families) and further reduced certain taxes.¹¹⁵ While the new law has resulted in a considerable reduction in the state collection of taxes, it has benefited taxpayers.

F. PERSONAL DATA PROTECTION LAW

In 2021, Ecuador made significant advances in terms of privacy and data protection with the Personal Data Protection Law.¹¹⁶ The law provided companies with two years to adapt their activities to ensure compliance.¹¹⁷ During this period, the law requires the creation of the National Data Protection authority and the appointment of a Superintendent of Data Protection.¹¹⁸ On May 26, 2023, the law's sanctioning regime came into force.¹¹⁹

110. *See, id.*

111. *See id.*

112. *See, e.g., Ecuador's Lasso Issues Decree to Boost Investment*, REUTERS (May 23, 2023), <https://www.reuters.com/world/americas/ecuadors-lasso-issues-decree-boost-investment-2023-05-23/> [<https://perma.cc/A3QS-EHfy>].

113. *Id.*

114. *See id.*

115. *See id.*

116. Ley Orgánica de Protección de Datos Personales [Organic Law on Protection of Personal Data], mayo 26, 2021, 5 Registro Oficial [R.O.] 459 (Ecuador), <https://www.telecomunicaciones.gob.ec/wp-content/uploads/2021/06/Ley-Organica-de-Datos-Personales.pdf> [<https://perma.cc/2E92-25HZ>].

117. Cristina Antequera, *Data Protection in Latin American Countries*, CLARKE MODET (June 19, 2023), <https://www.clarkemodet.com/en/articles/data-protection-in-latin-american-countries/#:~:text=The%20Organic%20Law%20on%20Personal,in%20case%20of%20non%2Dcompliance> [<https://perma.cc/QYR9-9YL2>].

118. Mario Alejandro Flor, *Ecuador—Data Protection Overview*, DATA GUIDANCE (Jan. 2024), <https://www.dataguidance.com/notes/ecuador-data-protection-overview> [<https://perma.cc/6PGS-D5AM>].

119. *Id.*

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On November 6, 2023, the Regulation to the Organic Law on Personal Data Protection was enacted.¹²⁰ Among other issues, this law establishes the content and procedure to request enforcement of the rights protected by the law; access, rectification, updating, suppression, opposition and portability of personal data, regulation of the data protection authority, and the establishment and organization of the Public Registry to administer it.¹²¹

G. REFERENDUM ON THE FUTURE OF OIL EXPLORATION WITHIN THE YASUNÍ NATIONAL PARK

On August 20, 2023, Ecuadorian voters rejected continued oil drilling in the Yasuní National Park within the rainforest area of Ecuador.¹²² While the issue arose before oil drilling began, voting had been delayed for years.¹²³ As a result, production entered into full swing in the main oil field, known as “Block 43.”¹²⁴ The majority of local voters would have approved continued drilling.¹²⁵ The referendum took place on the same day as the snap elections to elect the 137 members of the National Assembly as well as the President and Vice-president of Ecuador.¹²⁶ The government has confirmed that it will end operations in the field in February 2024.¹²⁷

H. REGULATION TO THE ORGANIC LAW OF COMMUNICATION

On August 28, 2023, the Reglamento General a la Ley Orgánica de Comunicación was published.¹²⁸ It incorporates rules for the self-regulation of the media, including addressing the issuance of codes of conduct as

120. See, e.g., Rafael Serrano, *Regulation of the Law on Personal Data Protection*, CORRAL ROSALES (Nov. 13, 2023), [https://corralrosales.com/en/regulation-of-the-law-on-personal-data-protection/#:~:text=Regulation%20of%20the%20Law%20on%20Personal%20Data%20Protection,-CorralRosales%20%3E%20Bulletin%20%3E%20Regulation&text=On%20November%20%2C%202023%2C%20the,hereinafter%20the%20%E2%80%9CRegulation%E2%80%9C\).](https://corralrosales.com/en/regulation-of-the-law-on-personal-data-protection/#:~:text=Regulation%20of%20the%20Law%20on%20Personal%20Data%20Protection,-CorralRosales%20%3E%20Bulletin%20%3E%20Regulation&text=On%20November%20%2C%202023%2C%20the,hereinafter%20the%20%E2%80%9CRegulation%E2%80%9C).) [https://perma.cc/DKN9-3TXU].

121. See *id.*

122. See, e.g., *Ecuadorians Reject Oil Drilling in the Amazon, Ending Operations in a Protected Area*, AP (Aug. 21, 2023), <https://apnews.com/article/amazon-ecuador-oil-drilling-referendum-yasuni-5c72a325755976c47a3ec138bdab8537> [https://perma.cc/HT5X-F6AZ].

123. See *id.*

124. See *id.*

125. See *id.*

126. *Republic of Ecuador Election for Ecuadorian Presidency*, IFES ELECTION GUIDE (Oct. 24, 2023), <https://www.electionguide.org/elections/id/4202/> [https://perma.cc/M6Z3-696R].

127. Esperanza Martínez, *Yasuní: The Significance of a Victory*, WORLD RAINFOREST MOVEMENT (Feb. 26, 2024), <https://www.wrm.org.uy/bulletin-articles/yasuni-the-significance-of-a-victory> [https://perma.cc/S3CG-V5ZL].

128. Ana Samudio, *Reglamento General a la Ley Orgánica de la Comunicación* [General Regulations to the Organic Law of Communication], CORRAL ROSALES (Aug. 30, 2023), <https://corralrosales.com/reglamento-general-a-la-ley-organica-de-comunicacion/> [https://perma.cc/D9SY-XS5M].

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well as editorial and information policies that generate a balance between responsibility and freedom of information, among other issues.¹²⁹

I. REGULATION TO THE FINTECH LAW

The Regulation to the Fintech Law was enacted on November 6, 2023.¹³⁰ The purpose of this law is to regulate the activities carried out by technological initiatives in financial matters, including the financial, securities, and insurance markets.¹³¹

129. *See id.*

130. *See, e.g., Government Issues Personal Data Law Regulations*, ECUADOR TIMES (Nov. 9, 2023), <https://www.ecuadortimes.net/government-issues-personal-data-law-regulations/> [<https://perma.cc/2V6C-3S8Z>].

131. *See id.*

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Mexico

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This article surveys significant legal developments in Mexico in 2023.

I. Notable Supreme Court Decisions

In 2023, the Mexican Supreme Court addressed several high-profile decisions asserting the limits between public branches and entities to preserve the constitutional order and to protect human rights. This piece addresses five fundamental decisions on access to public information, electoral system, and landmark human rights cases.

A. ACCESS TO PUBLIC INFORMATION

In November 2021, the Mexican Government issued a decree declaring certain high-profile governmental projects to be of public interest and national security.² The Mexican Institute in charge of safeguarding the right

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2. See Press Release, Suprema Corte de Justicia de la Nación [SCJN], Press Release No. 174/2023, SCJN determina efectos de law resolución que invalid el acuerdo por el que el ejecutivo federal emitió una declaratoria de interés público y seguridad nacional respecto de diversos proyectos y obras [SCJN Determines Effects of the Resolution that Invalidated the

of access to public information, the National Institute for Transparency (INAI), challenged such decree arguing that, according to the legal framework on the matter, all information related to such projects would be classified as reserved without any analysis.³ Therefore, the Court declared that such a decree infringed on the competence of the Institute and limited citizens' access to public information.⁴

Furthermore, in a separate ruling, the Court analyzed the Mexican Senate's failure to comply with its constitutional obligation to appoint commissioners to the aforementioned Institute.⁵ The INAI requires a quorum of five commissioners to legally operate, but, since April 2023, it was unable to do so because the Senate kept three of the seven seats vacant.⁶ Accordingly, the Court determined that the Senate transgressed its constitutional responsibilities, and thereby restricted the right of access to public information by making it impossible for the guarantor institute to make any decisions on the matter.⁷

B. MEXICAN ELECTORAL SYSTEM

In March 2023, a modification to the electoral legal framework was enacted.⁸ Several political parties and the National Electoral Institute challenged such reform, arguing procedural deficiencies, the decrease in the

Agreement by Which the Federal Executive Issued a Declaratory of Public Interest and National Security Regarding Various Projects and Works] (May 22, 2023), <https://www.internet2.scjn.gob.mx/red2/comunicados/noticia.asp?id=7360#:~:text=Controversia%20constitucional%20217%2F2021%2C%20promovida,la%20Administraci%C3%B3n%20P%C3%BAblica%20Federal%20a> [https://perma.cc/H4WA-PNGM].

3. See *Transparency Agency Still Out of Action After Failed Legal Challenge*, MEX. NEWS DAILY (Apr. 25, 2023), <https://mexiconewsdaily.com/news/transparency-agency-remains-out-of-action-after-failed-legal-challenge/> [https://perma.cc/9HKK-33LJ].

4. *Controversia Constitucional 217/2021*, Suprema Corte de Justicia de la Nación [SCJN], Diario Oficial de la Federación, Noviembre de 2023, §§ 119–121 (Mex.), https://www.dof.gob.mx/nota_detalle.php?codigo=5709186&fecha=22/11/2023&print=true [https://perma.cc/VE4Y-6TK6].

5. See Isabela González, *El Organismo Para la Transparencia en México Queda Paralizado por Tiempo Indefinido*, El País (April 1, 2023), <https://elpais.com/mexico/2023-04-01/el-organismo-para-la-transparencia-en-mexico-queda-paralizado-por-tiempo-indefinido.html> [https://perma.cc/G2S6-MTD3].

6. See *id.*

7. See Press Release, Suprema Corte de Justicia de la Nación, Press Release No. 341/2023, The Court Authorizes the Plenary of the INAI to Provisionally Meet with Fewer Than Five Commissioners (Oct. 2, 2023), <https://www.internet2.scjn.gob.mx/red2/comunicados/comunicado.asp?id=7531> [https://perma.cc/VU3U-LBSZ].

8. Decreto por el que se reforman, adicionan y derogan diversas disposiciones de la Ley General de Instituciones y Procedimientos Electorales, de la Ley General de Partidos Políticos, de la Ley Orgánica del Poder Judicial de la Federación y se expide la Ley General de los Medios de Impugnación en Materia Electoral, Diario Oficial de la Federación [DOF] 02-03-2023 (Mex.), https://www.dof.gob.mx/nota_detalle.php?codigo=5681325&fecha=02/03/2023#gsc.tab=0, [https://perma.cc/A8JB-2VQ8].

independence of the electoral institute, violations to the labor rights of the institute's personnel, and the setback in measures of equality and inclusion within the elections.⁹ In this regard, the Court stated that amendment procedures are not a mere formality, but a guarantee of the democratic system, and thus, declared the reforms to be null.¹⁰

C. LANDMARK HUMAN RIGHTS CASES

The Court recognized the human right to care, to be cared for, and to self-care, especially regarding people with disability, elderly, or terminally ill individuals, establishing that such care should be accessible, that the government should assume responsibility for its provision, and that the stereotype of women as the main caregivers should not be maintained.¹¹

The Court also determined that a double burden is detrimental to the personal and professional growth of the person who is primarily responsible for household chores and caregiving duties, so that person is entitled to request proportional remuneration when a divorce petition is filed.¹² Furthermore, the Court recognized a rebuttable presumption in favor of the plaintiff, releasing them from the burden of proving that they did household chores and caregiving duties.¹³

On the basis of these and other rulings, the Mexican Supreme Court continues to solidify its position as a constitutional court capable of both settling conflicts between the public authorities and safeguarding the human rights of individuals.

9. See Press Release, Instituto Nacional Electoral, Press Release No. 072/2023, Presenta INE segunda Controversia Constitucional en contra de la reforma electora [INE Presents Second Constitutional Controversy Against Electoral Reform] (March 9, 2023), <https://centralectoral.ine.mx/2023/03/09/presenta-ine-segunda-controversia-constitucional-en-contra-de-la-reforma-electoral/>, [https://perma.cc/SM22-5XPT].

10. Acción de Inconstitucionalidad 71/2023 y sus acumuladas 75/2023, 89/2023, 90/2023, 91/2023, 92/2023 y 93/2023, Suprema Corte de Justicia de la Nación [SCJN] (June 22, 2023), § 187–198. (Mex.), https://bj.scjn.gob.mx/doc/sentencias_pub/o_hWTosBB6QLvK5FX1g1/%22Refugio%22 [https://perma.cc/6WFB-LHEY].

11. See Press Release, Suprema Corte de Justicia de la Nación [SCJN], Press Release No. 378/2023, La Primera Sala Reconoce por Primera Vez el Derecho Humano al Cuidado, Especialmente de las Personas Con Discapacidad, Mayores y Con Enfermedades Crónicas [The First Chamber Recognizes for the First Time the Human Right to Care, Especially for People with Disabilities, the Elderly, and Persons with Chronic Illnesses] (Oct. 18, 2023), <https://www.internet2.scjn.gob.mx/red2/comunicados/noticia.asp?id=7568> [https://perma.cc/ZN6W-XJW3].

12. *Id.*

13. Press Release, Suprema Corte de Justicia de la Nación, Press Release No. 379/2023, El Desempeño de la Llamada “Doble Jornada” Afecta el Crecimiento Personal, Académico, Profesional y/o Emocional de Quien la Lleva a Cabo: Primera Sala [The Performance of the So-Called “Double Shift” Affects the Personal, Academic, Professional and/or Emotional Growth of the Person Who Carries It Out: First Room] (Oct. 18, 2023), <https://www.internet2.scjn.gob.mx/red2/comunicados/noticia.asp?id=7569> [https://perma.cc/DCL7-AS8E].

II. Mexico's Sustainable Taxonomy

In March 2023, Mexico published a finalized version of the country's Sustainable Taxonomy (Taxonomy),¹⁴ joining the increasing number of jurisdictions that have developed such a framework.¹⁵ At their core, these frameworks aim to provide parameters for what is considered “sustainable,” thereby combating misleading statements about the environmental or social profile of economic activities (sometimes known as “greenwashing”) and providing clarity to markets for discussing sustainability in terms of investment products and economic activities.¹⁶ However, these taxonomies adapt to the distinct considerations and priorities of their respective jurisdictions. The Taxonomy established by Mexico does this both through certain environmental considerations and in the incorporation of core social aims.¹⁷

The fundamental structure of the Taxonomy mirrors the EU's taxonomy.¹⁸ However, Mexico builds on this model with the identification of several social objectives, including the following: (1) gender equality; (2) access to basic services related to sustainable cities (e.g., shelter, public transport, waste/water management); (3) health; (4) education; and (5) financial inclusion.¹⁹

Similar to the EU taxonomy, which references NACE (European Community Nomenclature of Economic Activities) codes, the Taxonomy's requirements for “substantial contribution” to such objectives vary by economic sector.²⁰ However, the Taxonomy instead uses the NAICS (North American Industry Classification System) codes for classifying business activities to determine eligibility for inclusion for each sector.²¹ For example, the Taxonomy excludes natural gas and nuclear energy from eligibility under the energy sector.²²

Eligible economic activities then must meet technical criteria. In some cases, these are quantitative, such as a threshold of 100 kgCO₂e/MWh for climate change mitigation for many energy activities.²³ But other sectors and objectives use qualitative or scoring measures. For example, substantial

14. GOBIERNO DE MÉXICO, *TAXONOMÍA SOSTENIBLE DE MÉXICO* (2023) [hereinafter *TAXONOMY*], https://www.gob.mx/cms/uploads/attachment/file/809773/Taxonom_a_Sostenible_de_M_xico_.pdf [<https://perma.cc/MW8A-KU8F>].

15. See Adriana Bazán Fuster et. al, *Shaping the Future of Finance: Exploring the Global Rise of Sustainable Finance Taxonomies*, CCAP (July 31, 2023), <https://www.ccap.org/post/shaping-the-future-of-finance-exploring-the-global-rise-of-sustainable-finance-taxonomies>, [<https://perma.cc/LU9F-C553>].

16. See *TAXONOMY*, *supra* note 14, at 26.

17. See *id.* at 7.

18. Compare *id.*, with Regulation 2020/852, 2020 O.J. (L 198) (EU).

19. *TAXONOMY*, *supra* note 14, at 7.

20. *Id.* at 29.

21. *Id.* at 27.

22. *Id.* At 98.

23. See *id.* at 99.

contribution to gender equality is measured via a survey, requiring a minimum score both on particular survey sections and also overall.²⁴

Activities also must meet “do no significant harm” (“DNSH”) requirements in order to be considered “sustainable.”²⁵ As with the substantial contribution criteria, these requirements are sector-specific. But at present, these DNSH requirements apply only to the Taxonomy’s environmental objectives.²⁶

The Taxonomy addresses negative social impacts (such as human rights and anti-corruption concerns) within the “minimum safeguards” section, which requires activities to align with certain social and governance considerations.²⁷ This section references both Mexican law and key international frameworks, including the OECD Guidelines for Multinational Enterprises, the UN Guiding Principles on Business and Human Rights, and the ILO Declaration on Fundamental Principles and Rights at Work.²⁸

Use of the Taxonomy is currently voluntary, but it is nonetheless expected to provide an influential framework to guide capital flows in the jurisdictions that are focused on sustainability. Additionally, Mexico’s financial authorities have indicated they plan to evaluate potential regulatory efforts in conjunction with the Taxonomy following its rollout, which may include disclosures on information related to the Taxonomy, parameters for sustainable finance instruments, or both.²⁹

Companies and financial institutions considering issuing, lending to, or underwriting sustainable finance instruments, or otherwise promoting the sustainability of their activities in Mexico, may wish to assess the Taxonomy to understand how, and whether, their operations or lending practices align. While practical implementation likely will evolve as entities become more familiar with the Taxonomy, assessing compliance will inherently require more than an assessment of a select handful of key performance indicators or performance targets. Both the safeguards and various DNSH requirements depend on company policies and ESG governance.

III. Regional Accountability Mechanisms and Migrant Disappearances

In 2015, the Mexican government established the Mecanismo de Apoyo Exterior [External Support Mechanism] (MAE),³⁰ enabling families of missing migrants to contact Mexican institutions to aid in the search of

24. *Id.* at 201.

25. TAXONOMY, *supra* note 14, at 31.

26. *See id.*

27. *See id.*

28. *See id.*

29. *Id.* at 43–44.

30. *¿Qué es el Mecanismo de Apoyo Exterior? [What is the External Support Mechanism?]*, FUNDACIÓN PARA LA JUSTICIA (Feb. 9, 2022), <https://www.fundacionjusticia.org/que-es-mecanismo-de-apoyo-exterior/> [<https://perma.cc/VU8L-TTM6>].

their disappeared loved ones.³¹ Through the MAE, families can report crimes, request investigations, file evidence, repatriate a victim's body, and potentially receive reparations.³² The families need only to contact a Mexican consulate to file a claim.³³

The Camargo Massacre is instructive on the potential of transnational mechanisms such as the MAE. On January 22, 2021, nineteen charred bodies were found in a pickup truck near Camargo, Tamaulipas,³⁴ belonging to seventeen migrants and two “coyotes” en route to the United States.³⁵ A majority of the migrants were from Comitancillo, Guatemala.³⁶ The Camargo Massacre brought memories of the 2010 San Fernando Massacre, in which seventy-two migrants were murdered by cartel members in nearby San Fernando, Tamaulipas.³⁷ The gravity of the Camargo Massacre prompted an internal investigation by the Tamaulipas Attorney General,³⁸ resulting in the breakthrough conviction of twelve state agents.³⁹ But Mexico has not awarded damages or repatriated the migrant bodies back to the families in direct violation of their domestic and international obligations.⁴⁰ As Fundación para la Justicia, a Mexican Non-Governmental Organization, stated, “If it is difficult for a Mexican family to understand and contribute to the criminal justice system, it is much more difficult for families that

31. XIMENA SUÁREZ ET AL., ACCESS TO JUSTICE FOR MIGRANTS IN MEXICO: A RIGHT THAT EXISTS ONLY ON THE BOOKS (2017), https://www.wola.org/wp-content/uploads/2017/07/Access-to-Justice-for-Migrants_July-2017.pdf [<https://perma.cc/WFF4-FB85>].

32. *Reporting Crimes Committed against Migrants in Mexico from Abroad*, WASHINGTON OFFICE ON LATIN AMERICA (Apr. 12, 2017), <https://www.wola.org/analysis/reporting-crimes-committed-migrants-mexico-abroad/>. [<https://perma.cc/2XXX-EFFD>].

33. *Id.*

34. Pablo Ferri, *The remorseful policeman of the Camargo massacre: “They finished them off and poured gasoline on them. Then they set them on fire,”* EL PAÍS (May 23, 2023), <https://english.el-pais.com/international/2023-05-23/the-remorseful-policeman-of-the-camargo-massacre-they-finished-them-off-and-poured-gasoline-on-them-then-they-set-them-on-fire.html>. [<https://perma.cc/ZKB5-J84Y>].

35. Associated Press, *Twelve Mexican police arrested over mass killing of migrants near US border*, THE GUARDIAN (Feb. 3, 2021), <https://www.theguardian.com/world/2021/feb/03/twelve-mexican-police-arrested-over-mass-killing-of-migrants-near-us-border>. [<https://perma.cc/T3L6-ZKNJ>].

36. Ferri, *supra* note 34.

37. See Jo Tuckman, *Survivor tells of escape from Mexican massacre in which 72 were left dead*, THE GUARDIAN (Aug. 25, 2010), <https://www.theguardian.com/world/2010/aug/25/mexico-massacre-central-american-migrants>. [<https://perma.cc/4FVJ-HF9R>].

38. Ferri, *supra* note 34.

39. See Kimberly Rocío López, *Camargo es un parteaguas: familias de migrantes asesinados logran condena histórica* [Camargo is a Watershed: Families of Murdered Migrants Win Historic Conviction], PLAZA PÚBLICA (Oct. 31, 2023), <https://www.plazapublica.com.gt/migracion/reportaje/camargo-es-un-parteaguas-familias-de-migrantes-asesinados-logran-condena>. [<https://perma.cc/Q494-XLSD>].

40. See United Nations International Convention for the Protection of All Persons from Enforced Disappearance art. 26, Dec. 23, 2010, 2716 U.N.T.S. 1353 (adopted by G.A. Res 37/133 (Dec. 23, 2010)).

are in another country.”⁴¹ While the MAE was not used with the Camargo Massacre, it can be used to obligate Mexico to repatriate migrants’ remains, and give further relief in other atrocities.⁴²

With most migrants aiming to reach the United States, the dangers do not end in Mexico.⁴³ Upon reaching the southern border, countless migrants are injured or killed because of aggressive domestic policies such as Texas’s Operation Lone Star.⁴⁴ When migrants go missing near the border, there is a lack of meaningful investigation, search, and rescue.⁴⁵ These disappearances occur in desolate border regions that make deciphering what happened, and in what jurisdiction, difficult. This issue calls for a process of transnational habeas corpus that allows individuals to file a claim, regardless of their nationality. Through United States—Mexico cooperation, the MAE can be a forum for transnational habeas corpus, allowing more families to bring claims and receive relief.

IV. Sweeping Mining Reform in Mexico

In May 2023, Mexico—the world’s largest producer of silver and a significant supplier of other metals—substantially overhauled several laws governing the mining sector.⁴⁶ The legal reform increases state control over mining activity, holds companies to higher environmental standards, and requires consultation with indigenous and Afro-Mexican stakeholders, among other changes.⁴⁷ These changes will affect any future mining concession and may affect obligations under existing concessions.

41. *Dictan sentencia condenatoria contra policías en la Masacre de Camargo, una sentencia histórica en crímenes atroces* [Police Officers Involved in Camargo Massacre Sentenced, a Historic Sentence in Heinous Crimes], FUNDACIÓN PARA LA JUSTICIA (Sept. 14, 2023), <https://www.fundacionjusticia.org/dictan-sentencia-condenatoria-contra-policias-en-la-masacre-de-camargouna-sentencia-historica-en-crimes-atroces/> [https://perma.cc/792S-M6HT].

42. See SUÁREZ ET AL., *supra* note 31, at 33.

43. See Salil Shetty, *Most Dangerous Journey: What Central American Migrants Face When They Try to Cross the Border*, AMNESTY INT’L, <https://www.amnestyusa.org/updates/most-dangerous-journey-what-central-american-migrants-face-when-they-try-to-cross-the-border/> [https://perma.cc/S5HQ-FFM3] (last visited Nov. 13, 2023).

44. See *Operation Lone Star: All You Need to Know About the Latest US Border Flashpoint*, AL JAZEERA (Aug. 9, 2023), <https://www.aljazeera.com/news/2023/8/9/operation-lone-star-all-you-need-to-know-about-latest-us-border-flashpoint> [https://perma.cc/3KRB-G5RN].

45. See Mary Cantrell, *In Rural Far West Texas, Justices of the Peace Confront a Death-Investigation System That’s Failing Unknown Migrants*, TEX. MONTHLY (Dec. 14, 2022), <https://www.texas-monthly.com/news-politics/far-west-texas-death-id-system-failing-migrants/> [https://perma.cc/DV82-F36R].

46. Diego Martinez et. al, *Mexico is Amending its Mining Law and Related Laws*, DLA PIPER (June 25, 2023), <https://www.dlapiper.com/en-jp/insights/publications/2023/04/mexico-is-amending-its-mining-law-and-related-laws>. [https://perma.cc/2CPJ-VBCE]; Tomás Lujambio, *Is Mexico Still an Attractive Mining Investment Destination?*, MEX. BUS. NEWS (July 5, 2023), <https://mexicobusiness.news/mining/news/mexico-still-attractive-mining-investment-destination>. [https://perma.cc/W2PN-EGT9].

47. Martinez et. al, *supra* note 46; Lujambio, *supra* note 46.

A. KEY AMENDMENTS

On May 8, 2023, Mexico published amendments to the Mining Law, National Waters Law, General Law of Ecological Equilibrium and Environmental Protection, and General Law for the Prevention and Integral Management of Waste.⁴⁸ Key amendments include the following:

- **Mining concessions:** Mining concessions will now be awarded through a public bidding process.⁴⁹ Previously, the first qualified applicant seeking to develop an area was awarded the rights. The length of mining concessions also has been shortened from fifty to thirty years, with the possibility of one twenty-five year extension.⁵⁰
- **State involvement:** The Mexican Geological Service—a state-run agency—obtained exclusive rights to conduct all mining exploration activities.⁵¹ Mining concessions assigned to Mexican state-owned companies will have an indefinite term.⁵²
- **Water use management:** Mining concessions will now be conditioned on the availability of water. The volume of water in a concession may be reduced to ensure the availability of water for human and domestic consumption.⁵³
- **Environmental protection:** The mining reforms prohibit granting authorizations for mining activities in protected natural areas.⁵⁴ Concessions may be cancelled based on an imminent risk of ecological imbalance or irreversible damage to natural resources. At the end of a mining concession, concessionaires have environmental obligations, including permanent and nontransferable responsibility for mining and metallurgical waste.⁵⁵
- **Indigenous community consultations:** The mining reform requires free and informed consultation with indigenous and Afro-Mexican communities prior to granting any mining concessions.⁵⁶ In addition,

48. Martinez et. al, *supra* note 46.

49. Adam Williams et. al, *Mexican Mining Industry under Threat from Sweeping New Regulations*, FIN. TIMES (June 5, 2023), <https://www.ft.com/content/5424e057-e0bf-42eb-907e-af63683452a9> [https://perma.cc/DXS3-W4TZ].

50. Dante Trevedan & Hernán González, *Major Overhaul to Mexico's Mining Regulation*, NORTON ROSE FULBRIGHT (May 2023), <https://www.nortonrosefulbright.com/en/knowledge/publications/04715af1/major-overhaul-to-mexicos-mining-regulation> [https://perma.cc/YXE2-X49K].

51. Williams et al., *supra* note 49.

52. Alberto de la Parra et. Al, *Mining Reform in Mexico: Principal Amendments, Effect, and Implications for Foreign Investors*, JONES DAY (June 2023), <https://www.jonesday.com/en/insights/2023/06/mining-reform-in-mexico-amendments-and-impact> [https://perma.cc/M3QU-S7DC].

53. *See id.*

54. Martinez et al., *supra* note 46.

55. de la Parra et al., *supra* note 52.

56. *Id.*

concessionaires must pay five percent of net profits to adjacent or affected indigenous communities.⁵⁷

- **Worker safety:** The legal reform establishes stricter worker safety measures, including requiring the appointment of an engineer responsible for compliance with safety regulations; shortening the deadline for reporting safety accidents; and classifying failure to adhere to safety standards as a criminal offense.⁵⁸

B. STAKEHOLDER REACTION

The mining reform has been controversial. Mining companies have warned that they are rethinking investments in Mexico;⁵⁹ Mexico's mining business chamber reportedly estimates that the reform could cost Mexico approximately \$9 billion in investments and up to 420,000 jobs.⁶⁰ In addition, there has been a multitude of legal challenges against provisions of the law. The first preliminary injunction against portions of the reform was issued in June 2023.⁶¹ Within five months of the reform's enactment, over 500 injunction requests have been filed by national and foreign companies.⁶² Opposition lawmakers also have challenged the law as unconstitutional before Mexico's Supreme Court.⁶³ These legal challenges are expected to continue.⁶⁴

V. Nearshoring: Mexico's Horizon

Several armed conflicts, and the COVID-19 pandemic, have led to increased freight prices, shortages of goods, and supply chain disruptions, transforming the landscape of global business and pushing companies to adopt nearshoring as a strategic approach to manufacturing and service activities.⁶⁵

57. Trevedan & Hernán, *supra* note 50.

58. Sofía Garduño, *Mining Policy: The Why and How of the Mining Law Reform*, MEXICO BUSINESS NEWS (July 5, 2023), <https://mexicobusiness.news/mining/news/mining-policy-why-and-how-mining-law-reform> [https://perma.cc/AS4C-ZEKP].

59. Williams et al., *supra* note 49.

60. Riyaz Dattu & Maya S. Cohen, *Mexico's New Mining Laws: Additional Complexity, Government Control, and Increased Country Risk Requires Investment Protection Planning*, ARENT FOX SCHIFF: PERSPECTIVES (May 16, 2023), <https://www.afslaw.com/perspectives/international-arbitration-dispute-resolution-blog/mexicos-new-mining-laws-additional> [https://perma.cc/TV5H-7XLP].

61. Fernando Mares, *First Majestic Secures Provision Amparo Against Mining Reform*, MEX. BUS. NEWS (June 5, 2023), <https://mexicobusiness.news/mining/news/first-majestic-secures-provisional-amparo-against-mining-reform> [https://perma.cc/425D-UCLD].

62. Fernando Mares, *Mining Companies Have Filed 500 Amparos Against Mining Law*, MEX. BUS. NEWS (Oct. 18, 2023), <https://mexicobusiness.news/mining/news/mining-companies-have-filed-500-amparos-against-mining-law> [https://perma.cc/6FNN-EAY7].

63. *Id.*

64. *See id.*

65. Israel Zamarrón, *Nearshoring en México: Estos son Los Beneficios Que Podría obtener el País a 2030* [nearshoring in Mexico: These Are the Benefits the Country Could Obtain by 2030], FORBES MÉX.

Mexico has emerged as the top destination for nearshoring due to its strategic location in North America, the USMCA trade agreement, and a skilled work force with low labor costs.⁶⁶ Indeed, the rise of nearshoring is considered by many as the main engine of the Mexican economy, as it has led to increased employment and export rates.⁶⁷

As such, to further promote nearshoring, the Mexican government enacted the “DECREE by which tax incentives are granted to key sectors of the export industry consisting of the immediate deduction of the investment in new fixed assets and the additional deduction of training expenses” (the Decree) on October 11, 2023.⁶⁸

The Decree grants two tax incentives to exporting companies seeking to optimize their operations through nearshoring: (i) an immediate tax deduction on investments made in new fixed assets, for the specific percentages established in the Decree depending on the type of asset, which are superior to the regular tax deductions for fixed assets contained in Articles 34, 35, and 209 of the Mexican Income Tax Law; and (ii) an additional tax deduction equivalent to twenty-five percent of any increase in training expenses received for each of their employees.⁶⁹

As for the first incentive, it may be applied only to certain taxpayers⁷⁰ engaged in the production, processing, or industrial manufacture of certain goods for export, belonging in key sectors identified as semiconductors, automotive (especially electromobility), electrical and electronics, medical devices and pharmaceuticals, agribusiness, and food and animal feed, among others.⁷¹

The deduction percentages established in the Decree may be applied only to investments in new fixed assets acquired from the effective date of the Decree until December 31, 2024, and only when taxpayers estimate that the amount of income from the export of applicable goods will represent at least fifty percent of their total revenue each fiscal year.⁷²

(Oct. 31, 2023, 11:30 AM), <https://www.forbes.com.mx/nearshoring-en-mexico-estos-son-los-beneficios-que-podria-obtener-el-pais-a-2030/> [<https://perma.cc/GR7G-EU4E>].

66. Bop-Admin, *Exploring the Top Benefits of Nearshoring to Mexico*, IVEMSA (Oct. 31, 2023), <https://www.ivemsa.com/exploring-benefits-nearshoring-of-to-mexico/> [<https://perma.cc/GZS2-UYK2>].

67. See Zamarrón, *supra* note 65.

68. Decreto por el que se otorgan estímulos fiscales a sectores clave de la industria exportadora consistentes en la deducción inmediata de la inversión en bienes nuevos de activo fijo y la deducción adicional de Gastos de Capacitación [Decree granting tax incentives to key sectors of the export industry consisting of the immediate deduction of investment in new fixed assets and the additional deduction of Training Expenses], Diario Oficial de la Federación [DOF] 31-10-2023, https://www.dof.gob.mx/nota_detalle.php?codigo=5704676 [<https://perma.cc/JA74-NU22>].

69. *Id.* arts. 3–4.

70. *Id.* art. 1 (Corporations taxed under Title II of the Mexican Income Tax Law and the Simplified Trust Regime, and individuals with business activities and professional services).

71. *Id.* art. 1, cap. I–X.

72. *Id.* arts. 1–2.

Regarding the second incentive, taxpayers may apply in the annual tax return for fiscal years 2023, 2024, and 2025, a tax incentive consisting of an additional deduction equivalent to twenty-five percent of the increase in the training expenses received by each of their employees in the fiscal year in question.⁷³

Overall, the tax incentives contained in the Decree may lead to promoting competitiveness, innovation, and investment in technology between exporting companies, generating employment and attracting foreign direct investment as export activity increases foreign exchange income to the country and improves the trade balance. This is expected to increase the confidence of investors and business partners in the country, boosting economic growth by taking advantage of Mexico's potential in key sectors of the export industry.

VI. Corporate Disclosure Obligations for Beneficial Shareholders in Mexico and the United States

To combat money laundering, tax evasion, and other illicit activities, an international effort has been made to adopt control and cooperation measures among countries.⁷⁴ Such efforts aim to enhance the transparency of transactions involving income and asset flows, as well as to facilitate the identification of “beneficial owners.”⁷⁵ Under the international standards on transparency, beneficial owners are always natural persons who ultimately own or control a legal person or a legal arrangement.⁷⁶

The Financial Action Task Force (FATF) and the Global Forum of the Organization for Economic Cooperation and Development (OECD) have promoted standardizing the definition of the figure of “beneficial owner” and its information exchange;⁷⁷ however, each country is ultimately responsible for establishing its own internal regulations toward this concept, including the applicable definitions, the required reporting information, the control and information storage mechanisms, and the deadlines for compliance with this obligation.⁷⁸

73. *Id.* art. 4.

74. See, e.g., *Public Consultation on Recommendation 16 on Payment Transparency*, FAFT, <https://www.fatf-gafi.org/en/home.html> [<https://perma.cc/H2CJ-N4KE>].

75. See *Asset Recovery*, FATF: TOPICS, <https://www.fatf-gafi.org/en/topics/asset-recovery.html> [<https://perma.cc/W5RR-KULY>].

76. THE SECRETARIAT OF THE GLOB. F. ON TRANSPARENCY AND EXCH. OF INFO. FOR TAX PURPOSES, INTER-AM. DEV. BANK, A BENEFICIAL OWNERSHIP IMPLEMENTATION TOOLKIT 1 (2019). While the concept of beneficial ownership is a core component of several international initiatives on transparency, its internationally and predominantly accepted definition was set up by the FATF; SCJN Press Release, *supra* note 2.

77. See FATEF, GUIDANCE ON BENEFICIAL OWNERSHIP OF LEGAL PERSONS (2023), <https://www.fatf-gafi.org/content/dam/fatf-gafi/guidance/Guidance-Beneficial-Ownership-Legal-Persons.pdf.coredownload.pdf> [<https://perma.cc/T22E-G7L6>].

78. See *id.* ¶ 173, at 60.

In the United States, new beneficial ownership reporting requirements will take effect beginning January 1, 2024, as set forth in the Corporate Transparency Act (CTA),⁷⁹ which is part of the Anti-Money Laundering Act of 2020, and the related regulations adopted by the U.S. Treasury's Financial Crimes Enforcement Network (FinCEN).⁸⁰

All domestic non-exempt⁸¹ corporations, limited liability companies, limited partnerships, entities created by registering with a secretary of state or similar office, and foreign entities registered to do business in the United States, will be considered "reporting companies" obligated to report company information, beneficial ownership information,⁸² and company applicant information⁸³ to the FinCEN, through its online interface.

In Mexico, pursuant to the modifications to the Federal Tax Code that went into effect in January 2022, the Tax Administration Service (SAT) has been provided with new verification powers that allows it to request detailed information regarding the controlling beneficiaries⁸⁴ of legal entities,

79. Press Release, U.S. Dep't of the Treasury, Fact Sheet: U.S. Department of the Treasury Actions to Prevent and Disrupt Corruption (Sept. 11, 2023), <https://home.treasury.gov/news/press-releases/jy1974> [<https://perma.cc/QA6V-UXPA>].

80. See *Beneficial Ownership Information*, FIN. CRIMES ENF'T NETWORK, <https://www.fincen.gov/boi> [<https://perma.cc/9BJ6-Y56J>].

81. *Corporate Transparency Act Takes Effect with Beneficial Ownership Reporting Requirements*, GREENBERG TRAURIG: GT ALERT (Jan. 11, 2024), <https://www.gtlaw.com/en/insights/2024/01/corporate-transparency-act-takes-effect-with--beneficial-ownership-reporting-requirements> [<https://perma.cc/8ZSR-UFGY>]: Certain entities are explicitly exempt from the reporting company definition, such as banks, governmental authorities, money services businesses, and accounting firms. Large operating companies consisting of (i) 20 or more full-time employees; (ii) a U.S. income tax return for the previous year of \$5 million in gross receipts from U.S. income; and (iii) an operating presence at a physical office in the U.S., are also exempt. See also Corporate Transparency Act, 31 U.S.C. § 5336 (2024).

82. 31 U.S.C. § 5336(a)(11): A "beneficial owner" includes any individual who directly or indirectly: (i) owns or controls at least 25% of the ownership interests of the company; (ii) serves as a senior officer of a reporting company; (iii) has authority over the appointment or removal of any senior officer or dominant majority of the governing body of a reporting company; (iv) has direction, determination, or substantial influence over important matters of a reporting company; or (v) holds any other form of substantial control over the reporting company. *Id.* § 5336(a)(3).

83. A "company applicant" is (i) the person who directly files the entity's formation documents as well as (ii) the person primarily responsible for directing or controlling the filing (*i.e.*, the reporting company's organizer or incorporator, or the legal professional who prepared the underlying formation documents). A reporting company is only required to report up to two company. *Id.* § 5336(a)(2).

84. A controlling beneficiary is an individual that: (i) Directly or indirectly obtains a benefit from its participation in a Company or in last instance, the person that exercises the rights of usage or exploits the goods or services of the Company; or (ii) Has direct or indirect control of the Company through shares, membership interests, or any other type of equity holding, and is able to: (a) Make direct or indirect decisions at the shareholder or members meetings; (b) Hold and maintain the ownership of rights that allow, directly or indirectly, the exercise of voting rights of more than 15% of the capital stock; and (c) Lead, directly or indirectly, the management, strategies, or main policies of the Company. *Mexico: New obligations for information about "controlling beneficiaries," part of 2022 tax reforms*, KPMG: INSIGHTS (June 22, 2022), <https://kpmg.com/us/>

fiduciaries, settlors or trustees, and contracting parties in any legal entity, at any moment.⁸⁵

Mexican obligated subjects are required to obtain, maintain updated, and provide to the SAT the information about their controlling beneficial shareholders as requested.⁸⁶ These reporting obligations also apply to third parties involved in the company's formation, such as the Public Notary, which also may be subject to fines for non-compliance under these provisions.⁸⁷

Entities operating in both countries should be aware of their reporting obligations and ensure that they are in strict compliance under both sets of regulations. For many businesses, compliance will require significant efforts to evaluate how the regulations apply to their organization and to establish a process for ongoing compliance reporting. Such efforts are crucial, as Mexican and U.S. tax authorities can share such information with foreign authorities under an international reciprocal information exchange treaty.

VII. Reform to the General Law of Commercial Companies

A. BACKGROUND

On March 30, 2020, Mexico declared a “public health emergency” in response to the rapid spread of SARS-CoV-2 (COVID-19) and mandated a lockdown to mitigate its transmission.⁸⁸ The resulting series of restrictions on social interactions required companies to devise alternative methods for conducting shareholder meetings and maintaining business operations. But the absence of regulatory provisions and company bylaws addressing these alternative methods presented a significant challenge to their validity.⁸⁹

Mexican commercial law at the time did not explicitly recognize the validity of partner or shareholder assemblies conducted through digital platforms, despite acknowledging certain electronic tools for commercial transactions.⁹⁰

en/home/insights/2022/06/tnf-mexico-new-obligations-information-controlling-beneficiaries-2022-tax-reforms.html [https://perma.cc/PJJ6-C9M3].

85. See PWC, TRUST SERVICES, DOING BUSINESS IN MEXICO 2023.

86. See WBG, G-20 ANTI-CORRUPTION WORKING GROUP, GUIDE TO BENEFICIAL OWNERSHIP INFORMATION: LEGAL ENTITIES AND LEGAL ARRANGEMENTS (2023), https://star.worldbank.org/sites/star/files/g20_bo_country_guide_mexico.pdf. [https://perma.cc/UDL4-YJHK].

87. See *id.* at 2.

88. Acuerdo por el que se declara como emergencia sanitaria por causa de fuerza mayor, a la epidemia de enfermedad generada por el virus SARS-CoV2 (COVID-19) [Agreement declaring the epidemic of disease generated by the SARS-CoV2 virus as a health emergency due to force majeure], Diario Oficial de la Federación [DOF] 30-03-2020.

89. Roberto Arena Reyes Retana et al., *Reform to Mexican Law Allows for virtual Board and Shareholders' Meetings Needing By-laws Amendments and Specific Requirements for Implementation*, FOLEY & LARDNER LLP (Dec. 13, 2023), <https://www.foley.com/insights/publications/2023/12/reform-mexican-law-virtual-board-meetings/> [https://perma.cc/6H37-FKXH].

90. See Dictamen de las Comisiones unidas de Economía y de Estudios Legislativos a la Minuta con Proyecto de Decreto por el que se reforman diversas disposiciones de la Ley General de Sociedades Mercantiles [Opinion of the Joint Committees on Economy and Legislative Studies on the Minutes with Draft Decree amending various provisions of the General Law on

Consequently, it became both necessary and timely to incorporate a legal framework within the General Law of Commercial Companies (GLCC), allowing Mexican commercial companies (including corporations and limited liability companies [LLCs]) to harness technological tools to facilitate and ensure the legal validity of their partner, shareholder, and general board meetings. As a result, the GLCC was amended by Congress, and the President promulgated and enforced the reform through a decree published on October 20, 2023.⁹¹ The amendments went into effect shortly after, except for the modification to Article 81, which will go into effect on April 21, 2024.⁹²

This reform was modeled after efforts in other countries, such as the United States, the United Kingdom, France, Spain, and Colombia.

B. AMENDMENTS

The reforms broadly encompass the following key elements:⁹³

1. **Virtual presence:** Virtual attendance is recognized as an equivalent to physical attendance in corporate assemblies and meetings.
2. **Hybrid meetings:** Shareholder and board meetings may now occur entirely or partially in a virtual manner.
3. **Preservation of principles:** In accordance with the technological neutrality principles outlined in the Commercial Code and the Federal Civil Code, the GLCC treats in-person and virtual meetings equally, and does not impose the superiority of one method over the other. Companies may select their preferred approach for recording minutes in accordance with their specific interests.
4. **Flexibility in meeting locations:** Companies are no longer required to hold meetings exclusively at their corporate headquarters. Shareholders and partners may determine, on a case-by-case basis, alternative venues, provided specific conditions are met. For example, shareholders or partners must approve unanimously the location and the availability of electronic means for conducting such meetings.
5. **Partner access and identity validation:** Partners are guaranteed access to the means through which the assembly, meeting, or session is conducted, thus safeguarding their voting rights. Companies are

Commercial Companies], Senado de la República, LXV Legislatura, 22 febrero 2023 (Mex.), https://comisiones.senado.gob.mx/economia/dictamenes_pendientes.php [<https://perma.cc/GCR7-353V>].

91. See Decreto por el que se reforman diversas disposiciones de la Ley General de Sociedades Mercantiles, Diario Oficial de la Federación [DOF] 20 Octubre 2023.

92. *Id.*

93. The following GLCC articles were modified: Article 81 (¶2), Article 186, and Article 194 (¶1). *Id.* Additionally, the following new provisions were added: Article 6 (new section XIV), Article 75 (¶ 2), Article 80 (¶¶ 2-3), Article 82 (¶ 3), Article 143 (¶ 5), Article 178 (¶ 3), and Article 179 (¶¶ 2-4). *Id.*

required to confirm the identity of attendees, validate the significance of their vote, and generate the corresponding evidence.

Furthermore, the Ministry of Economy has a six-month period to implement an electronic system. LLCs are obligated to adhere to their notification requirements by publishing notices through the electronic system established. This compliance is to be observed in accordance with the stipulated reform requirements, regardless of any provisions in their bylaws specifying the use of alternative methods.

C. CONCLUSION

This reform aims to streamline the procedures for convening and conducting meetings of shareholders and management within Mexican commercial companies, as well as to expedite and enhance the signature collection process.⁹⁴ The feasibility of these improvements depends on the provisions outlined in the bylaws of both corporations and LLCs. Consequently, it is strongly advisable for new companies seeking incorporation in Mexico to integrate these amendments into their bylaws, and for existing companies to review their bylaws and incorporate these provisions for enhanced efficiency and compliance.

VIII. What Does it Mean to Abolish the State of Interdiction?

The state of interdiction is a legal figure imposed on individuals with physical disabilities, or intellectual disabilities, or both, whereby they are declared incapable of reaching their own decisions, enforcing their rights, or fulfilling their legal obligations by themselves.⁹⁵ As these individuals lose their capacity, they consequently need a third party known as a guardian, who intervenes in each of their decisions,⁹⁶ ranging from mundane tasks like hiring a telephone company, to critical decisions related to medical care; the guardian is present in all aspects of the person's integral development.⁹⁷

Although interdiction and guardianship seek to protect the person with a disability, the acts performed by those in such state have no legal effects on their own sphere, nor on that of third parties.⁹⁸ "The direct consequence of this is the substitution of the will of the interdicted person by means of

94. See Dattu & Cohen, *supra* note 60.

95. Hilda Pérez Carbajal & Campuzano, *Análisis crítico y constructivo de la declaración del estado de interdicción*, BIBLIOTECA JURÍDICA VIRTUAL DE INVESTIGACIONES JURÍDICAS DE LA UNAM, <https://archivos.juridicas.unam.mx/www/bjv/libros/8/3835/15.pdf> [<https://perma.cc/T4Z4-LVTZ>].

96. *Id.*

97. *Id.*

98. *Id.*

a forced representation[.]”⁹⁹ which affects the enjoyment of other human rights and impacts on the human dignity itself.¹⁰⁰

Even when Mexico ratified the Convention on the Rights of People with Disabilities in 2008, the country maintained said figure in its legislation, violating the provisions of Article 12 regarding the recognition of legal capacity and means that support its exercise. “Interdiction is not in accordance with the right to an independent life or to be included in the community, since it is a model which replaces the will of people.”¹⁰¹

This had been the case in the country until April 24, 2023, when the Mexican Senate unanimously approved a new National Code of Civil and Family Procedures,¹⁰² “which repeals interdiction and grants all people eighteen years of age or older full legal capacity and the right to make decisions with support in accordance with the regulations in the civil codes of the states.”¹⁰³

The repeal of interdiction means that people with disabilities will be on equal legal footing with others in every aspect of their lives. They would have full decision-making power, and their decisions will now have legal effect. Henceforth, decisions such as which medical treatments to undergo, whether to sign a lease, or whether to get married, now will be in their hands.

The new Code establishes a new legal institution called Designation of Extraordinary Supports. This “new procedure will operate only for those cases in which someone is unable to communicate his or her will and preferences. In those cases, the designated person will have to reconstruct the history of the affected person in order to make the best possible interpretation of their wishes and thus operate their will.”¹⁰⁴

This reform finally recognizes the legal existence of people with disabilities by respecting their will in the legal context. It seems like a gigantic step, which undoubtedly will have to be complemented by different amendments

99. *Id.*

100. *Id.*

101. Press Release, Suprema Corte de Justicia de la Nación, Press Release No. 026/2019, La Primera Sala de la Suprema Corte declara inconstitucional el estado de interdicción decretado a una persona con discapacidad intelectual [The First Chamber of the Supreme Court declares unconstitutional the state of interdiction decreed on a person with intellectual disability] (Mar. 13, 2019), <https://www.internet2.scjn.gob.mx/red2/comunicados/noticia.asp?id=5838> [<https://perma.cc/2XS4-ALWA>].

102. *Aprueban en el Senado, por unanimidad, nuevo Código Nacional de Procedimientos Civiles y Familiares*, Senado de la República (Apr. 12, 2023), <https://comunicacionsocial.senado.gob.mx/informacion/comunicados/5620-aprueban-en-el-senado-por-unanimidad-nuevo-codigo-nacional-de-procedimientos-civiles-y-familiares> [<https://perma.cc/2CGF-SBPW>].

103. Mexico: *States’ Inaction on Legal Capacity*, HUM. RTS. WATCH (May 18, 2023, 7:00 AM), <https://www.hrw.org/node/384896/printable/print> [<https://perma.cc/VVQ3-6736>].

104. Alejandro Santos Cid, *El Congreso aprueba una norma que garantiza la independencia de las personas con discapacidad* [Congress approves a law that guarantees the independence of people with disabilities], EL PAÍS (Apr. 24, 2023, 10:12PM), <https://elpais.com/mexico/2023-04-25/el-congreso-aprueba-una-norma-que-garantiza-la-independencia-de-las-personas-con-discapacidad.html> [<https://perma.cc/LLT4-HBA6>].

within the state civil codes, so the legal capacity of people with disabilities is fully recognized.

The code will not be fully in force for four years, since 2021 a Supreme Court ruling prohibits all types of interdiction systems. By continuing to fail to update laws to comply with the ruling, state legislatures are putting people with disabilities and seniors at risk.”¹⁰⁵

The fight may not be over, but this reform is a positive step.

IX. Mexico Supreme Court Decision on Abortion

In September 2023, Mexico’s Supreme Court of Justice (SCJN, for its Spanish initials, or the Court) issued a landmark decision decriminalizing abortion under federal law, both for those who seek the procedure and for the medical professionals who perform it. According to the Information Group on Reproductive Choice (GIRE, for its Spanish initials), this “historic milestone” will expand access to abortion for “more than 70 percent of women in Mexico[.]”¹⁰⁶

A divided five-judge panel ruled that the federal ban on abortion is unconstitutional and a human rights violation. The majority noted that “[t]he criminal provisions” imposed for receiving abortion care “are contrary to human dignity, reproductive autonomy and free development of personality, the right to health and the right to equality[.]”¹⁰⁷ The Court referred to the criminalization of receiving an abortion as “an act of violence” stating that such restrictions reinforce the stereotype that, for women and individuals with the ability to become pregnant, “motherhood [is] a mandatory destiny[.]”¹⁰⁸

The Court also ruled that prohibiting federal health care professionals from performing abortions is unconstitutional.¹⁰⁹ The Court reasoned that the criminalization of *performing* an abortion procedure “generates a discriminatory effect” because it leads to fewer health care professionals being trained to perform the procedure, or being willing to perform the procedure, or both, “and this directly impacts the healthcare system and the exercise of the reproductive rights of women and pregnant people.”¹¹⁰

105. *Id.*

106. Mary Beth Sheridan, *Mexican Court Expands Access to Abortion, Even as U.S. Restricts It*, WASH. POST (Sept. 6, 2023), <https://www.washingtonpost.com/world/2023/09/06/mexico-abortion-decriminalize-supreme-court/>.

107. Press Release, Suprema Corte de Justicia de la Nación, Press Release No. 314/2023, El sistema jurídico que regula el delito de aborto en el código penal federal es inconstitucional por ser contrario al derecho a decidir de las mujeres y de las personas con capacidad de gestar [The legal system that regulates the crime of abortion in the federal penal code is unconstitutional because it is contrary to the right to decide of women and people with the capacity to bear children] (Sept. 6, 2023), <https://www.internet2.scjn.gob.mx/red2/comunicados/comunicado.asp?id=7504> [<https://perma.cc/BT35-7L2L>].

108. *Id.*

109. *Id.*

110. *Id.*

This is especially true for those with limited resources or limited access to healthcare.¹¹¹

The practical effects of the decision will not be felt immediately, as abortion remains illegal in twenty of Mexico's thirty-two states, and further legal work will be required to remove all penalties for providing and receiving abortions.¹¹² However, the ruling will require that the Mexican federal public health service and all federal health institutions offer abortions to anyone requesting the care.¹¹³ Therefore, practically, access to abortion care will depend on how quickly the federal health care system can begin offering abortion services. Maria Antonieta Alcaldá, director of Ipas, an organization seeking to increase abortion access in Latin America and the Caribbean, opined that Mexico's health ministry, "which provides a full spectrum of healthcare services for the majority of the population," should be able to quickly begin offering abortion services.¹¹⁴

This ruling comes nearly sixteen years after Mexico City passed legislation decriminalizing abortion through the twelfth week of pregnancy.¹¹⁵ In the years since, twelve other Mexican states have decriminalized abortion.¹¹⁶ This trend is referred to as *La Marea Verde* or "the Green Tide," a reference to the green bandanas worn by protesters who joined "a social movement in favor of legal, safe, and free abortion . . . aimed at improving laws and facilitating access to information for those who decide to have an abortion[.]" in Latin America.¹¹⁷ While several Mexican states took steps towards decriminalizing abortion in the years leading up to the decision, "abortion[] remained a federal crime except in the cases of rape and life-threatening conditions to the pregnant woman or person."¹¹⁸ As noted by Human Rights Watch, "[t]his unprecedented ruling marks enormous progress towards guaranteeing human rights in Mexico."¹¹⁹

111. *Mexico: Landmark Reproductive Rights Rulings*, HUM. RTS. WATCH (Sept. 14, 2021), <https://www.hrw.org/news/2021/09/14/mexico-landmark-reproductive-rights-rulings> [<https://perma.cc/DMG6-HG75>].

112. Maria Teresa Hernandez, *As Mexico expands abortion access, activists support reproductive rights at U.S. border*, AP NEWS (Oct. 13, 2023), <https://apnews.com/article/mexico-legal-abortion-access-activists-470863cf5a9101b7ffb12bd323e3466b> [<https://perma.cc/UY55-3GX5>].

113. *Id.*

114. Gabriella Borter, *Mexico has Decriminalized Abortion, but Politics Could Decide Access*, REUTERS (Sept. 8, 2023), <https://www.reuters.com/world/americas/mexico-has-decriminalized-abortion-nationwide-access-remains-elusive-2023-09-08/> [<https://perma.cc/DWQ4-LXMS>].

115. GIRE, *STEP BY STEP: MEXICO'S SUPREME COURT RULINGS ON ABORTION* 8 (2022), <https://gire.org.mx/wp-content/uploads/2022/11/Step-by-step-.pdf> [<https://perma.cc/DLB4-D6BE>].

116. Regina Tamés & Cristina Quijano Carrasco, *Mexico's Supreme Court Orders Federal Decriminalization of Abortion*, HRW (Sept. 8, 2023), <https://www.hrw.org/news/2023/09/08/mexicos-supreme-court-orders-federal-decriminalization-abortion#:~:text=Mexico%E2%80%99s%20Supreme%20Court%20ruled%20this,massive%20victory%20for%20human%20rights> [<https://perma.cc/VA5Z-T68C>].

117. GIRE, *supra* note 115, at 33–34.

118. Tamés & Carrasco, *supra* note 116.

119. *Id.*

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The Supreme Court's decision is a surprise for many, as Mexico is a predominantly Catholic country. Indeed, organizations such as the Civil Association for the Rights of the Conceived and Red Familia, condemned the decision.¹²⁰ Irma Barrientos, director of the Civil Association for the Rights of the Conceived, pointed to the United States Supreme Court's recent decision in *Dobbs v. Jackson* and said pro-life groups "[are] not going to stop until Mexico guarantees the right to life from the moment of conception."¹²¹ Many expect pro-life groups to challenge the Court's decision.

120. See *About Us*, RED FAMILIA, <https://redfamilia.org/nosotros/> [https://perma.cc/UC55-5HJ8] (Red Familia is an organization that seeks to promote and strengthen institutions and projects that give life and protection to the family).

121. *Mexico Decriminalizes Abortion, Extending Latin American Trend of Widening Access*, AP (Sept. 6, 2023), <https://www.npr.org/2023/09/06/1198039758/mexico-abortion-decriminalization-supreme-court#:~:text=Mexico%20City%20was%20the%20first,conservative%20country%2C%20did%20the%20same> [https://perma.cc/7UCK-92RP].

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This Article discusses significant legal developments in Central/East Asia and China Law from 2023.

On March 5, 2023, the 14th National People's Congress (NPC), the legislative body of the People's Republic of China (China), convened in Beijing and will conclude in March 2028.¹ A skim of the NPC, and its Standing Committee, "the NPC Standing Committee," shows they adopted fifteen new laws, including amendments to existing laws, from national security, legislation, and environmental protection, to civil procedure to corporate governance.² This article summarizes certain key aspects of China's changes in legislation and practice and provides insights to American lawyers and anyone who has a general interest in the market.

I. Four Anti-Monopoly Regulations Implemented

In a significant step to reinforce fair competition and provide guidance on the enforcement of Anti-Monopoly Law (AML),³ the China State

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1. See Changhao Wei, NPC OBSERVER, *Understanding Chinese Legislature's New Five-Year Legislative Plan: Part 1* (Sept. 27, 2023), <https://npcobserver.com/2023/09/china-npc-legislative-plan-analysis-part-1/> [<https://perma.cc/TP7N-D7EC>].

2. *See id.*

3. See Zhonghua Renmin Gongheguo Fan Longduan Fa (中华人民共和国反垄断法) [Anti-Monopoly Law of the People's Republic of China ("PRC")] (promulgated by the NPC, Aug. 30, 2007, effective Aug. 1, 2008), https://www.gov.cn/flfg/2007-08/30/content_732591.htm, [<https://perma.cc/CX2C-8EJ8>], amended by NPC Standing Committee, Quánguó rénmin dàibǎo dàhuì chángwù wěiyuánhùi guānyú xiūgǎi "zhōnghuá rénmin gònghéguó fǎn lǒngduàn fǎ" de juéding (全国人民代表大会常务委员会关于修改《中华人民共和国反垄断法》的决定) [The Decision to Amend Anti-Monopoly Law by the Standing Committee of the NPC] (Jun. 24, 2022, effective Aug. 1, 2022), https://www.gov.cn/xinwen/2022-06/25/content_5697697.htm [<https://perma.cc/4KWP-JHYG>].

Administration for Market Regulation (SAMR) promulgated four regulations (Regulations) on March 24, 2023.⁴ These Regulations, with an effective date of April 15, 2023, include the Regulation on Merger Control Review (Merger Control Regulation),⁵ Regulation Prohibiting Monopoly Agreements (Monopoly Agreement Regulation),⁶ Regulation Prohibiting Abuse of Market Dominance (Abuse of Dominance Regulation),⁷ and Regulation Prohibiting Abuse of Administrative Power to Eliminate and Restrict Competition (Administrative Prohibition Regulation).⁸ The Regulations, built on the AML and its 2022 amendment,⁹ introduce substantial improvements and have noteworthy implications for international companies operating in, or engaging with, the Chinese market.

A. MERGER CONTROL

The Merger Control Regulation includes three primary aspects:

1. *Clarification of “Control”*

The Merger Control Regulation specifies the factors to be considered when determining whether a subject company has “control” or “power to control” under the AML, which is key to determining the merger review threshold and assessment of a proposed merger’s market impact.¹⁰ The factors

4. See Press Release, SAMR, Shichang Jian’guan Zongju Fabu Si Bu Fanlongduan Fa Peitao Guizhang (市场监管总局发布四部反垄断法配套规章) [SAMR Releases Four Supporting Regulations for the Anti-Monopoly Law] (Mar. 25, 2023), https://www.gov.cn/xinwen/2023-03/25/content_5748266.htm [https://perma.cc/8TKD-3RFV].

5. See Jingyingzhe Jizong Shencha Guiding (经营者集中审查规定) [Regulation on Merger Control Review] (promulgated by the SAMR, Mar. 10, 2023, effective Apr. 15, 2023) [hereinafter “Merger Control Regulation”], https://www.gov.cn/gongbao/content/2023/content_5754540.htm [https://perma.cc/TM5H-DMHB].

6. See Jinzhi Longduan Xieyi Guiding (禁止垄断协议规定) [Regulation Prohibiting Monopoly Agreements] (promulgated by the SAMR, Mar. 10, 2023, effective Apr. 15, 2023) [hereinafter “Monopoly Agreement Regulation”], https://www.gov.cn/gongbao/content/2023/content_5754538.htm [https://perma.cc/GDK3-4ZVH].

7. See Jinzhi Lanyong Shichang Zhiwei Diwei Xingwei Guiding (禁止滥用市场支配地位行为规定) [Regulation Prohibiting Abuse of Market Dominance] (promulgated by the SAMR, Mar. 10, 2023, effective Apr. 15, 2023) [hereinafter “Abuse of Dominance Regulation”], https://www.gov.cn/gongbao/content/2023/content_5754539.htm [https://perma.cc/4ZPM-TQM5].

8. See Zhizhi Lanyong Xingzheng Quanli Paichu, Xianzhi Jingzheng Xingwei Guiding (制止滥用行政权力排除、限制竞争行为规定) [Regulation Prohibiting Abuse of Administrative Power to Eliminate and Restrict Competition] (promulgated by the SAMR, Mar. 10, 2023, effective Apr. 15, 2023), https://www.gov.cn/gongbao/content/2023/content_5752223.htm [https://perma.cc/7BDB-LULG].

9. In response to its economic development and to enhance its competition enforcement, China amended the AML in 2022 with an effective date of Aug. 1, 2022 (2022 amendment). See 我国反垄断法完成修改保护公平竞争 [China’s Anti-Monopoly Law Completed Revision to Protect Fair Competition], XINHUA NEWS AGENCY (June 6, 2022), https://www.gov.cn/xinwen/2022-06/24/content_5697527.htm, [https://perma.cc/5WS8-5GDM].

10. Merger Control Regulation, art. 5.

for consideration include, the goal and future plans of the merger transaction under review (transaction); changes in the shareholding structure before and after the transaction; other shareholders' voting mechanisms and voting subject matters (including the history of other shareholders' attendance and voting patterns); the decision, management, and voting mechanisms of other shareholders through the company board; the appointment and removal of senior management; the relationships between other shareholders; and the relationship between the applying shareholder and other shareholders.¹¹ This clarification provides guidance to companies and enforcement agencies on the application of this important concept. It also preserves room for SAMR's discretion by including a catch-all in the clause.¹²

2. Clarification of "Implemented Concentration"

The Merger Control Regulation prohibits companies from implementing a concentration without applying for and receiving a merger control approval (Implemented Concentration), without which such companies will be subject to heavy fines.¹³ Implemented Concentration can occur through changing the business registration or the registration of their rights, appointment of senior management personnel, participation in business decisions and operational management, exchange of sensitive information with other merger parties, and substantive integration of business.¹⁴ This clarification helps companies determine their action plan and avoid penalties.

3. Enhanced Penalties

The Merger Control Regulation imposes heightened penalties for procedural violations, including refusing to provide information or providing false information, concealing, destroying, or transferring evidence, or other acts impeding an investigation, with penalties of up to one percent of the sales amount of the previous year or RMB five million.¹⁵ Individuals engaging in such violations are subject to penalties of up to RMB 500,000.¹⁶

B. MONOPOLY AGREEMENT

The Monopoly Agreement Regulation represents a more refined approach to tackling monopoly agreements, with particular attention paid to the internet platform economies. Notable amendments include the following four provisions:

11. *See id.*

12. *See id.*

13. *See id.* art. 8.

14. *See id.*

15. *See id.* art. 67.

16. *See* Merger Control Regulation, art. 67.

1. *Clarity in Defining Relevant Markets*

The Monopoly Agreement Regulation offers a more precise framework for identifying market dominance, referring to the scope of competition for specific goods or services (products) over a certain period, encompassing both the relevant product market and the relevant geographical market.¹⁷ The regulation, in alignment with other international regimes, mandates that the determination of relevant markets be based on a demand substitution analysis.¹⁸ This involves evaluating factors including consumer reactions to changes in product prices, product characteristics and usage, and distribution channels.¹⁹ The regulation also directs that supply substitution be considered in defining markets, including assessing the other suppliers' ease of switching to producing the product at issue and competitiveness of the product market after the switch.²⁰

In essence, the regulation provides a comprehensive framework for defining relevant markets by incorporating the demand and supply substitution analyses, thereby ensuring a comprehensive examination of the various factors in the context of traditional and platform-based economies.

2. *Prohibited Conduct in E-Commerce*

The regulation expressly prohibits competitors from entering into anti-competitive agreements by utilizing data, algorithms, technology, and platform rules to achieve signaling, coordination, and the exchange of sensitive information.²¹ The regulation also expressly prohibits businesses from utilizing data, algorithms, technology, and platform rules to achieve illegal resale maintenance agreements.²²

3. *Specifying Aiding and Abetting*

The regulation sets out the circumstances constituting aiding and abetting in Article 19 of the AML, where a business organizes other businesses to reach monopoly agreements.²³ Abettors include those who are not parties to an illegal agreement, but do have a decisive or dominant role in determining the scope, content, and performance conditions of the agreement.²⁴ Significantly, the regulation expressly provides that businesses can be liable for antitrust violations on a "hub-and-spoke" theory by entering into multiple bilateral

17. See Monopoly Agreement Regulation art. 7.

18. See *id.*

19. See *id.*

20. See *id.*

21. See *id.* art. 13.

22. See *id.* art. 15.

23. See Monopoly Agreement Regulation art 19.

24. See *id.*

agreements between competitors, facilitating communications, exchanging sensitive information, or coordinating actions.²⁵

4. Conditions for Satisfying Exemptions

The regulation outlines the factors to be considered in determining whether an exemption applies, including the specific form and effects of the agreement, the causal relationship between the agreement and the result in fact, whether the agreement is a necessary condition for the result in fact, and whether consumers can benefit from the agreement in product price, quality, or available variety.²⁶ This new general guideline will continue to pose challenges to enforcement agencies and businesses as they grapple with weighing the complexity of these multiple factors.

The Monopoly Agreement Regulation provides considerable discretion to the antitrust enforcement agencies when imposing a penalty. They are instructed to consider the specific circumstances of each case, including the nature, circumstances, degree, duration, and consequences of the illegal conduct.²⁷ In cases where the violation is notably severe, the consequences are “exceptionally harmful,” and the impact is “particularly egregious,” as the SAMR has the authority to levy fines exceeding the established ranges, up to five times the statutory limits.²⁸ This approach acknowledges that antitrust violations can vary widely in their nature and impact, granting SAMR more authority to issue penalties that commensurate with the gravity of the offense.

Overall, this regulation underscores SAMR’s commitment to enforcing antitrust laws and fostering fair competition in the marketplace. The regulation aims to curb anti-competitive behavior and protect the interests of consumers and competitors.

C. ABUSE OF DOMINANCE

The Abuse of Dominance Regulation, like the other three regulations, refines key concepts in the AML, attends to the needs of E-commerce, and enhances enforcement authorities. The primary enhancements are as follows:

1. Relevant Market Definition

The regulation, like the Monopoly Agreement Regulation, contains a new section to guide the relevant market definition.²⁹

25. *See id.*

26. *See id.* art. 20.

27. *See id.* art. 45.

28. *Id.*

29. *See* Abuse of Dominance Regulation art. 14

2. *Application in E-Commerce*

The regulation, with special attention to the online platform economy, requires the enforcement agencies, in determining market dominance, to consider transaction amount, volume, and the ability to control volume.³⁰ In determining “unfair prices,” enforcement agencies must consider the cost interdependence among various relevant markets within the platform’s involvement in multiple related markets and its rationality.³¹ An illegal tie-in can also occur when an E-commerce operator uses pop-ups, mandatory transaction steps, or other methods, making it difficult for users to choose, modify, refuse bundling, or combine the sale of different products.³² Furthermore, the regulation expressly prohibits platform operators from utilizing data, algorithms, technology, and platform rules to abuse their market-dominant positions.³³

3. *Enhanced Enforcement Procedures*

Pursuant to the regulation, antitrust enforcement agencies may conduct interviews with the legal representatives or responsible individuals of operators suspected of abuse of dominance violations.³⁴ The regulation also requires antitrust enforcement agencies to initiate an investigation based on written complaints submitted with real names.³⁵

D. ADMINISTRATIVE PROHIBITION

The Administrative Prohibition Regulation specifies certain prohibited acts that administrative agencies must avoid, as they constitute an abuse of their administrative power.³⁶ Notably, this includes making cooperation agreements or memoranda to prevent or hinder market entry or prescribe unfair treatment to business operators to eliminate or restrain competition.³⁷ To elaborate, the regulation also identifies other types of abusive acts, such as requesting, implying, refusing, stalling, keeping records to directly or indirectly limit the operation, purchasing, using merchandise, or services of certain designated entities.³⁸

Importantly, the antitrust enforcement agencies³⁹ are authorized to interview legal representatives or responsible persons of administrative

30. *See id.*

31. *See id.*

32. *See id.* art. 18.

33. *See id.* art. 21.

34. *See id.* art. 26.

35. *See* Abuse of Dominance Regulation art. 26.

36. *See id.*

37. *See* Administrative Prohibition Regulation art. 5.

38. *See id.* art. 4.

39. *See id.* art. 2. Anti-trust enforcement agencies include the SAMR and the Administration for Market Regulation at the provincial level.

agencies that allegedly violate the AML and its related regulations, and request abatement measures.⁴⁰ The regulation does not authorize antitrust enforcement agencies to prescribe penalties or order abatement; rather, the antitrust enforcement agencies are required to report their interview meetings to the investigated agency's supervisory government agencies.⁴¹

Overall, these four new regulations present both challenges and opportunities to international businesses and their lawyers. The emphasis on strict enforcement with increased fines and corrective measures for violators underscores China's commitment to maintaining fair and open markets through a focus on deterrence.⁴² International companies operating in China or engaging with Chinese entities must reassess their business practices to ensure compliance with the new regulations.

II. Amendment To Company Law

China's Company Law was initially adopted in 1993, and has been amended five times since then.⁴³ Over the years, there were calls to further amend the law, which were not acted upon until the last few days of 2023.⁴⁴ On December 29, 2023, the NPC Standing Committee made the final step to update the Company Law of the PRC ("2023 Company Law"), effective July 1, 2024.⁴⁵ Undoubtedly, the new amendment will have a significant effect on the establishment and management of corporations in China.⁴⁶

The 2023 Company Law, among other things, responds to the call for protection of minority shareholder(s), sets a limit on capital contributions while granting flexibility in corporate governance.⁴⁷ The following are descriptions of some major changes in these areas.

A. CAPITAL CONTRIBUTION MUST BE MADE WITHIN FIVE YEARS

China is one of the few countries that require registered capital, an amount the shareholder(s) must contribute to keep the company operating, which provides immunity to its shareholder(s) once they pay in.⁴⁸ Since the Company Law was adopted in 1993, and for a long period afterwards,

40. See *id.* arts. 24–25.

41. See *id.* art. 24.

42. See *id.* arts. 24–25.

43. See generally Robert C. Art & Minkang Gu, *China Incorporated: The First Corporation Law of the People's Republic of China*, 20 YALE J. INT'L L. 273, 274 (1995).

44. See generally, Stanley Lubman, *Looking for Law in China*, 20 COLUM. J. ASIAN L. 1, 9 (2006); see also *Zhonghua Renmin Gongheguo Gongsì Fa* (2023 Xiuding) (中华人民共和国公司法(2023修订)) [Company Law of the PRC (2023 revision)] (promulgated by the Standing Committee of the NPC, Dec. 29, 2023) [hereinafter "2023 Company Law"], https://www.gov.cn/yaowen/liebiao/202312/content_6923395.htm [https://perma.cc/6SKC-VHHE].

45. See generally 2023 Company Law.

46. See *id.*

47. See *id.*

48. See Ge Pushen et al., *Corporate Capital Formation System of China: The Evolutions, Deficiencies and Improvements*, 11 RUSSIAN L. J. 487, 489 (2023).

shareholders were required to pay registered capital in advance and have an certified audit in order to trigger the establishment of a company.⁴⁹ This hurdle had been called unreasonable during the course of economic research, which was abandoned in 2014, and shortly after China declared the direction of a market economy.⁵⁰ With that, shareholders may determine the term of payment at-will, to a maximum of fifty years or even longer.⁵¹ This freedom in capital contribution has been proven to allow businesses to flourish. Like a double-edged sword, it has also demonstrated problems, creating tremendous zombie enterprises with no paid-in capital to run, eventually leading to deadlocks in seeking remedies where shareholder(s) tend to be less serious in commitment.

The 2023 Company Law requires that capital contributions subscribed by shareholders of a limited liability company be fully paid within five years from the date of establishment of the company, in accordance with the provisions of the articles of association.⁵² In certain key industries, the term to contribute capital may be shorter if required by law, regulation, or per decision of the State Council.⁵³

The law also provides more details regarding equities forfeited. In one scenario, if a shareholder fails to contribute the registered capital within a specified period, including the grace period, it would forfeit unpaid equities, and its equity may be transferred or written off as a follow-up.⁵⁴ The law, however, does not address how a company duly registered prior to the end of June 2024, with a commitment of capital contribution longer than five years shall comply, and defers to the State Council to set a grace period.⁵⁵

B. PROTECTION OF MINORITY SHAREHOLDER(S)

Due protection to minority shareholders is a headache to administrative and judicial bodies everywhere, and the same applies to China. Many urged specific provisions be enacted if a majority shareholder or management goes against the interest of minority shareholders.

To reflect this concern, the 2023 Company Law adds certain provisions, such as: (1) in the event that a controlling shareholder abuses the dominant right and seriously damages the interests of the company or other shareholders, the other shareholders shall have the right to request the

49. See *Zhonghua Renmin Gongheguo Gongsì Fa* (中华人民共和国公司法) [Company Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 1993, effective July 1, 1994) 16 *STANDING COMM. NAT'L PEOPLE'S CONG. GAZ.* [hereinafter "1994 Company Law"].

50. See HAWES ET AL., *SOC. SCI. RSCH. NETWORK, INTRODUCING THE 1-YUAN CHINESE COMPANY: IMPACTS OF THE 2014 PRC COMPANY LAW AMENDMENTS ON SHAREHOLDER LIABILITY AND CREDITOR PROTECTION* 3–4 (2015).

51. Lubman, *supra* note 44.

52. See 2023 Company Law art. 47.

53. See *id.*

54. See *id.* art. 52.

55. See *id.* art. 266.

company purchase his/her/its equity at a reasonable price;⁵⁶ (2) shareholders (typically minority shareholders) have the right to review, and copy the register of shareholders and accounting vouchers in addition to articles of association, minutes of shareholders' meetings, resolutions of the Board of Directors, resolutions of the Board of Supervisors, financial accounting reports, and other relevant materials of the company;⁵⁷ (3) any shareholder who owns more than one percent equity of a company shall be entitled to submit temporary proposals for the shareholders' meeting in due process and this equity threshold is not subject to change;⁵⁸ and (4) where a company reduces its registered capital, it shall do so in proportion to the capital contribution or shares held by shareholders, unless otherwise provided by law or agreed unanimously by all the shareholders.⁵⁹

Moreover, the 2023 Company Law limits the power of controlling shareholders and actual controllers who enjoy decision-making power without legal position in the company, as such actual controllers might infringe on the interests of the company through invisible actions such as related party transactions.⁶⁰ In this regard, the 2023 Company Law clearly provides that where a controlling shareholder and the actual controller who does not serve as directors of the company but manages or controls the company de facto, a duty of loyalty and diligence assumed by directors, supervisors and senior executives to the company shall also apply.⁶¹

C. MORE FLEXIBILITY IN CORPORATE GOVERNANCE

There has been inconsistency in Chinese laws in terms of corporate governance. In general, the law sets three tiers: the meeting of shareholder(s), board of directors/executive director, and top-down management.⁶² In addition, the previous law mandated any company to appoint a board of supervisors or a single supervisor, separate from key management to maintain sound governance of a company.⁶³

56. See *id.* art. 89.

57. See *id.* arts. 57 (for limited liability companies), 110 (for joint stock limited companies).

58. See 2023 Company Law art. 115.

59. See *id.* art. 224.

60. See Xia Hongzhen, Jin Yi Bu Qianghua Dui Konggu Gudong He Shiji Kongzhiren De Guifan (进一步强化对控股股东和实际控制人的规范) [Reinforcement of Management of Controlling Shareholders and Actual Controller] (promulgated by the Standing Comm. Of the NPC, Aug. 28, 2023), http://www.npc.gov.cn/npc/c2/c30834/202308/t20230828_431188.html [<https://perma.cc/6EVL-X5YA>].

61. See Reinforcement of Management of Controlling Shareholders and Actual Controller; 2023 Company Law art. 180.

62. See 2023 Company Law, arts. 102–08 (describing the functions of the shareholders' meetings, Board of Directors, and Supervisory Committee).

63. See 1994 Company Law; see also Chien-Chung Lin, *The Chinese Independent Director Mechanism Under Changing Macro Political-Economic Settings: A Review of Its First Decade and Two Possible Models for the Future*, 1 AM. U. BUS. L. REV. 263, 277–78 (2012).

There were calls for changes to allow a small or medium company with a simple shareholding structure to be allowed more free choice.⁶⁴ To address that, the 2023 Company Law allows a company to dispense with a board of supervisors as long as it sets an audit committee consisting of directors in the board of directors to exercise such power, subject to the articles of association.⁶⁵ In other words, appointment of a supervisor is not a mandate as long as the company creates a similar function within the board of directors.

It is worth noting that the 2023 Company Law also sets out more details, including events and procedures that impose liability on controlling shareholders, de facto shareholders, and management who conduct activities against minority shareholders and/or damage the interest of the company.⁶⁶ It will be interesting to see how this change evolves in practice.

III. Trademark Law Development

This section discusses the proposed amendments to the Trademark Law, including the Chinese court's move to curb abuse of litigation rights and discourage trademark infringement by allowing high damage awards, and some positive developments related to trademark prosecution matters in 2023.

A. PROPOSED AMENDMENT TO THE TRADEMARK LAW

On January 13, 2023, the China National Intellectual Property Administration (CNIPA) published the Draft Amendment to the PRC Trademark Law (Trademark Law Draft Amendment) for public comment.⁶⁷ The introduction of rules regarding “trademark use or commitment to use a trademark at the stage of application stage,”⁶⁸ the mechanism for removing registered trademarks that are not in use after five years of registration,⁶⁹ and the prohibition on repeated trademark applications for the same trademark for the same goods or services by the same applicant⁷⁰ are of major concern to foreign brand owners and these proposed amendments, if enacted, will significantly affect their trademark filing and portfolio management strategy in China. The Trademark Law Draft Amendment was not adopted by

64. *See id.*

65. *See* 2023 Company Law, arts. 69 (for limited liability companies), 121 (for joint stock limited companies).

66. *See id.*

67. *See* Guojia Zhishi Chanquan Ju Guanyu Zhonghua Renmin Gongheguo Shangbiao Fa Xiuding Caoan Zhengqiu Yijian Gao Gongkai Zhengqiu Yijian De Tongzhi (国家知识产权局关于《中华人民共和国商标法修订草案（征求意见稿）》公开征求意见的通知) [CNIPA Notification Regarding Seeking Public Comments on the Draft Amendment to the PRC Trademark Law (Draft for Comments)] (published by the CNIPA, Jan. 13, 2023), https://www.cnipa.gov.cn/art/2023/1/13/art_75_181410.html [<https://perma.cc/9Q4B-MWXD>].

68. *Id.* art. 5.

69. *See id.* art. 61.

70. *See id.* art. 14.

lawmakers in 2023, and is expected to undergo several rounds of revisions. But, it sends a strong signal to the legal community and is already having an effect in practice.

**B. SPC GUIDING OPINIONS ON IP PROTECTION AND CERTAIN
CITED CASES**

In terms of judicial protection, the Supreme People's Court (SPC) issued Guiding Opinions,⁷¹ providing the following guidance: (1) to continue to crack down on malicious hoarding and squatting of trademarks; (2) where the concerned party violates the principle of good faith by acquiring and exercising the relevant intellectual property rights in bad faith, the court shall, in accordance with the law, dismiss its claim for infringement of intellectual property rights; (3) if a defendant proves that the plaintiff has abused its right to bring the lawsuit, thereby damaging the defendant's legitimate rights and interests, and requests the plaintiff to reimburse the reasonable litigation costs, the court shall support the defendant's request in accordance with the law; and (4) to strictly implement the system of punitive damages for intellectual property infringement.⁷²

China does not follow case law, but certain remarkable and cited cases provide reference to local courts and demonstrate the attitude of the judiciary, which align with the Guiding Opinions.

1. Siemens Case

In *Siemensaktieng-Sellschaft and Siemens (China) Ltd. v. Ningbo Qishuai Electric Appliance Co., Kunshan New Venture Electric Co. and Wu Qianzhi* involving trademark infringement and unfair competition,⁷³ the SPC upheld the first-instance judgment of the Jiangsu Provincial Higher People's Court,⁷⁴ which found that Ningbo Qishuai Electric Appliance Co. had infringed Siemens'

71. See Zuigao Renmin Fayuan Guanyu Youhua Fazhi Huanjing Cujin Mingying Jingji Fazhan Zhuangda De Zhidao Yijian (最高人民法院关于优化法治环境 促进民营经济发展壮大的指导意见) [The Guiding Opinions on Optimizing the Legal Environment and Promoting the Development and Growth of the Private Economy] (promulgated by the SPC, Sept. 25, 2023), <https://www.court.gov.cn/zixun/xiangqing/413942.html>.

72. See *id.* art. 9.

73. Ximenzi Gufen Gongsi, Ximenzi (Zhongguo) Youxian Gongsi Su Ningbo Qishuai Dianqi Youxian Gongsi Deng Qin Hai Shangbiao Quan Ji Bu Zhengdang Jingzheng Jiufen An (西门子股份公司、西门子(中国)有限公司诉宁波奇帅电器有限公司等侵害商标权及不正当竞争纠纷案) [*Siemensaktieng-Sellschaft and Siemens (China) Ltd. v. Ningbo Qishuai Electric Appliance Co., Kunshan New Venture Electric Co. and Wu Qianzhi*], 2022 Sup. People's Ct. (Sup. People's Ct. 2023 (China)).

74. Ximenzi Gufen Gongsi, Ximenzi (Zhongguo) Youxian Gongsi Su Ningbo Qishuai Dianqi Youxian Gongsi Deng Qin Hai Shangbiao Quan Ji Bu Zhengdang Jingzheng Jiufen An (西门子股份公司、西门子(中国)有限公司诉宁波奇帅电器有限公司等侵害商标权及不正当竞争纠纷案) [*Siemensaktieng-Sellschaft and Siemens (China) Ltd. v. Ningbo Qishuai Electric Appliance Co., Kunshan New Venture Electric Co. and Wu Qianzhi*] 2019 Su Min Chu No. 2 Civil Judgment, (Jiangsu Higher Ct.) (China).

trademark rights and awarded damages in the amount of RMB 100 million yuan. The courts took into consideration the high reputation and economic value of Siemen's intellectual property rights, the scale of the infringement, the sales data on record, the sales regions of the infringing products, the categories of the infringing products, determined that the damages should be higher than the statutory maximum, which is RMB five million yuan under the PRC Anti-Unfair Competition Law.⁷⁵

2. *Nature Republic Case*

In the trademark infringement case of *Nature Republic Co., Ltd. v. Jianglin Cosmetics Department of Wangdu County*,⁷⁶ the SPC reversed the trial and appellate judgments and answered the thorny question of whether to support a plaintiff's claim for damages against a bona fide seller in bulk litigation. The SPC found that the legitimate source defense was established because the seller had exercised reasonable care and met its burden of proving the legitimate source of the infringing product.⁷⁷ The SPC also found that the plaintiff filed lawsuits against many small and medium-sized sellers in more than ten provinces in mainland China for the same infringing goods as in the present case, resulting in bulk litigation.⁷⁸ Therefore, the SPC concluded that, while the seller should cease the infringement, the seller should not be held liable for the damages claimed by the plaintiff, and issued the following directions in its retrial judgment: the trademark right holder has the legitimate right to legally and reasonably protect its interests.⁷⁹ However, the court held that allowing a trademark right holder to use "enforcement" and "litigation" as tools to make profits is not in line with the purpose of intellectual property protection, is not conducive to maintaining the stability of trade order, and is a waste of judicial resources to a certain extent.⁸⁰ Such conduct should not be encouraged.⁸¹

C. KEY DEVELOPMENTS IN TRADEMARK PROSECUTION PROCEEDINGS

The year 2023 also witnessed the following positive developments in procedural rules, which are welcomed among U.S. business entities because

75. Zhonghua Renmin Gongheguo Fan Buzhengdang Jingzheng Fa (中华人民共和国反不正当竞争法) [Anti-Unfair Competition Law of the PRC] (promulgated by the Standing Comm. Nat'l People's Cong., Nov. 4, 2017, effective Aug. 1, 2018) STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. art. 17.

76. Zhu Shi Hui She Nayiqier yu Wangdouxian Jianglin Huazhuangpin Menshibu Qinhai Shangbiaoquan Jiufen An (株式会社纳益其尔与望都县江林化妆品门市部侵害商标权纠纷案) [Nature Republic Co., Ltd. v. Jianglin Cosmetics Department of Wangdu County] Sup. People's Ct. (Sup. People's. Ct 2023 (China).

77. See *id.*

78. See *id.* at 2.

79. See *id.* at 2–3.

80. See *id.* at 3.

81. See *id.*

the implementation of these new rules will significantly reduce time and costs for securing and enforcing their trademark rights in China.

1. *CNIPA's New Rule on Suspension of Cases*

In June 2023, CNIPA issued its internal Regulations for Suspension of Trademark Review Cases.⁸² According to the new rules, CNIPA may, ex officio or at the request of a concerned party, suspend the trial of refusal appeal, opposition review, and invalidation actions under certain situations where the status of the cited marks is uncertain or are supposed to be invalid.⁸³ Recent practice has shown that such new suspension rules can effectively solve the problem of the lack of coordination between administrative authorization procedures, as well as between administrative procedures and judicial procedures, and also reduce the burden of repeated filings by the applicant.⁸⁴

2. *Pre-docketing Practice before the Beijing IP Court*

In June 2023, the Beijing IP Court, which conducted the first-instance judicial review over CNIPA trademark decisions, issued new rules on the pre-docketing of refusal appeal litigation.⁸⁵ According to the new rules, if the outcome of the case depends on the status of the cited pending trademark, the plaintiff may request a suspension and formally register court appeal within twelve months from the date of initial court appeal filing.⁸⁶ This is equivalent to granting a twelve-month extension to the plaintiff, who will have sufficient time to decide whether to continue with the administrative litigation based on the final status of the cited mark made by the relevant CNIPA.⁸⁷

IV. Legal Enforcement For Environment Protection & Carbon Neutrality

At the General Debate of the 75th Session of the United Nations General Assembly on September 22, 2020, China's President Xi Jinping proposed

82. See Duan Xiaomei, Pingshen Anjian Zhongzhi Qingxing Guifan Jiedu (《评审案件中中止情形规范》解读) [Interpretation of Standards for Suspension of Review Cases], CHINA NAT'L INTELL. PROP. ADMIN. (Jun. 13, 2023), https://sbj.cnipa.gov.cn/sbj/ssbj_gzdt/202306/t20230613_27700.html [<https://perma.cc/7KG9-JJUX>].

83. See *id.*

84. See *id.*

85. See Beijing Zhishi Chanquan Fayuan Yu Dengji Shenqing Shu Yu Dengji Yong (北京知识产权法院预登记申请书(预登记用)) [Beijing IP Court Pre-filing Application Form (for Pre-filing Purpose)], (published by Beijing IP Court, June 21, 2023) (China), <https://bjzcfy.bjcourt.gov.cn/article/detail/2023/06/id/7353498.shtml> (last visited April 23, 2024); see also "New" Pre-Registration Mechanism of Beijing IP Court, AFD CHINA, <https://www.afdip.com/index.php?ac=article&at=read&did=4556> [<https://perma.cc/NNT9-CCZP>] (last visited Mar. 30, 2024).

86. See *id.*

87. See *id.*

that China aimed to have carbon dioxide emissions peak before 2030 and achieve carbon neutrality before 2060.⁸⁸

With the release of Working Guidance⁸⁹ and Action Plan for Carbon Dioxide Peaking Before 2030,⁹⁰ as well as the issuance of “12 implementation programs for key areas and industries” and “11 support and service programs” by relevant ministries, China has built up a “1+N” policy framework for Carbon Dioxide Peaking and Carbon Neutrality (Dual Carbon).⁹¹

In 2023, China continued to advance environmental and ecological protection legislation.⁹² For instance, the newly revised Marine Environmental Protection Law provides that the State advocates green, low-carbon, and intelligent shipping to reduce emissions of greenhouse gases (GHGs) and air pollutants.⁹³ In addition, the newly adopted Law on Ecological Conservation on the Qinghai-Tibet Plateau also requires that the State strengthens the protection and restoration of wetlands on the Qinghai-Tibet Plateau to improve their carbon sequestration capacity.⁹⁴ It can be seen that China has comprehensively integrated green and low-carbon development philosophy into its newly enacted and revised laws to promote the reduction of carbon

88. See Xi Jinping, Statement at the General Debate of the 75th Session of the United Nations General Assembly, The State Council Information Office, Sept. 23, 2020, http://english.scio.gov.cn/topnews/2020-09/23/content_76731466.htm.

89. See Zhonggong Zhongyang, Guowuyuan Guanyu Wanzheng Zhunque Quanmian Guanche Xin Fazhan Linian Zuohao Tandafeng Tanzhonghe Gongzuo De Yijian (中共中央 国务院关于完整准确全面贯彻新发展理念做好碳达峰碳中和工作的意见) [Working Guidance for Completely, Accurately, and Comprehensively Implementing the New Development Concept and Promoting Carbon Dioxide Peaking and Carbon Neutrality] (promulgated by the Communist Party of China Cent. Comm. & St. Council, Oct. 24, 2021), St. Council, Oct. 25, 2021, https://english.www.gov.cn/policies/latestreleases/202110/25/content_WS61760047c6d0df-57f98e3c21.html [<https://perma.cc/V8EN-BLW2>].

90. See 2030年前碳达峰行动方案 [Action Plan for Carbon Dioxide Peaking Before 2030], (promulgated by the St. Council, Oct. 27, 2021), Dep’t Res. Conservation Env’t Prot., Oct. 27, 2021 [hereinafter “Action Plan”].

91. 持续推进绿色低碳转型——“双碳”目标提出三年来取得积极成效 [Continue to promote green and low-carbon transformation - the “double carbon” goal has achieved positive results three years since it was proposed], Nat’l Dev. Reform Comm’n, Sept. 25, 2023, https://www.ndrc.gov.cn/fggz/hjzy/tdftzh/202309/t20230925_1360861.html [<https://perma.cc/VG6A-9849>] [hereinafter Continue to Promote Green].

92. See Feng Li, Zhonghua Renmin Gongheguo Haiyang Huanjing Baohu Fa (中华人民共和国海洋环境保护法) [Marine Environmental Protection Law of the PRC] (promulgated by Standing Comm. Nat’l People’s Cong., Oct. 24, 2023, effective Jan. 1 2024), XINHUA NEWS AGENCY art. 88 (Oct. 24, 2023), http://www.news.cn/politics/2023-10/24/c_1129936229.htm [<https://perma.cc/26LV-QWZK>] [hereinafter “Marine Environmental Protection Law”]; see also Feng Li, Zhonghua Renmin Gongheguo Qingzang Gaoyuan Shengtai Baohu Fa (中华人民共和国青藏高原生态保护法) [Law on Ecological Conservation on the Qinghai-Tibet Plateau of the PRC] (promulgated by Standing Comm. Nat’l People’s Cong., Apr. 26, 2023, effective Sept. 1 2023), XINHUA NEWS AGENCY, art. 26 (Apr. 26, 2023), http://www.news.cn/politics/2023-04/26/c_1129569154.htm [<https://perma.cc/8CT9-YK7F>] [hereinafter “Ecological Conservation Law”].

93. See Marine Environmental Protection Law, art. 88.

94. See Ecological Conservation Law, art. 26.

emissions in the industrial sector while enhancing the functioning of the ecosystem.⁹⁵

To implement these initiatives, Chinese government agencies introduced several industry policies to support the Dual Carbon goal.⁹⁶ Not coincidentally, the SPC issued guidances toward the same direction.⁹⁷

A. INDUSTRY POLICIES

In February 2023, China's most powerful government agency, the National Development and Reform Commission (NDRC), took the lead in implementing policies on promoting energy conservation, carbon reduction, and recycling of products and equipment.⁹⁸ These policies require enterprises to carry out energy-saving and carbon-reducing upgrading of products and equipment such as boilers, motors, power transformers, refrigeration, lighting, and household appliances.⁹⁹

On March 28, 2023, the NDRC issued Decree No. 2,¹⁰⁰ which serves as an amendment to the energy conservation review system effective since 2010.¹⁰¹ The decree is set to align the system with the "1+N" policy framework of Dual Carbon and focuses on consumption of fossil and renewable energy, raw material energy use, and carbon dioxide emissions of the projects concerned.¹⁰²

On November 13, 2023, the NDRC, along with other ministries, issued the Opinions on Accelerating the Establishment of Product Carbon Footprint

^{95.} *See id.*

^{96.} Continue to Promote Green, *supra* note 91.

^{97.} See Gai Huan Zi, Guojia Fazhan Gaige Wei Deng Bumen Guanyu Tongchou Jieneng Jiangtan He Huishou Liyong, Jiakuai Zhongdian Lingyu Chanpin Shebei Gengxin Gaizao De Zhidao Yijian (国家发展改革委等部门关于统筹节能降碳和回收利用 加快重点领域产品设备更新改造的指导意见) [Guiding Opinions on Coordinating Energy Conservation, Carbon Reduction and Recycling to Accelerate the Upgrading and Transformation of Products and Equipment in Key Areas] (promulgated by the Nat'l Dev. Reform Comm'n and other 8 ministries, Feb. 20, 2023), GEN. OFF. ST. COUNCIL OPERATION, https://www.gov.cn/zhengce/zhengceku/2023-02/25/content_5743274.htm [<https://perma.cc/JH33-5VTH>] [hereinafter Coordinating Energy Conservation].

^{98.} *See id.*

^{99.} *See id.*

^{100.} See Guding Zichan Touzi Xiangmu Jieneng Shenchu Banfa (固定资产投资项目节能审查办法) [Measures for Energy Conservation Review of Fixed Asset Investment Projects] (promulgated by the Nat'l Dev. Reform Comm'n, Mar. 28, 2023, effective Jun. 1, 2023), GEN. OFF. ST. COUNCIL OPERATION, https://www.gov.cn/zhengce/2023-04/06/content_5750368.htm [<https://perma.cc/FQ3L-QP4X>] [hereinafter "Measures for Energy Conservation"].

^{101.} See Guding Zichan Touzi Xiangmu Jieneng Pinggu He Shenchu Zanxing Banfa (固定资产投资项目节能评估和审查暂行办法) [Interim Measures for Energy Conservation Evaluation and Review of Fixed Assets Investment Projects] (promulgated by the Nat'l Dev. Reform Comm'n, Sept. 17, 2010, effective Nov. 1, 2010, expired Dec. 31, 2016), GEN. OFF. ST. COUNCIL OPERATION, https://www.gov.cn/gongbao/content/2011/content_1792048.htm [<https://perma.cc/H43M-SH7T>].

^{102.} *See* Measures for Energy Conservation, *supra* note 100.

Management System,¹⁰³ which proposes to set carbon footprint accounting rules and standards by 2025, then again in 2030.¹⁰⁴ It also proposes to establish a carbon footprint background database in relevant industries, as well as carbon label certification for products, and to facilitate convergence and mutual recognition with major trading partners.¹⁰⁵

B. INDUSTRY STANDARD ADVOCATE

On April 1, 2023, the Standardization Administration of China, together with other ministries, issued the Guidelines for the Construction of Carbon Dioxide Peaking and Carbon Neutrality Standard System,¹⁰⁶ setting out the main target that at least 1,000 national and industry standards would be developed or revised by 2025.¹⁰⁷ The Dual Carbon standard system includes four primary subsystems: basic universal standard subsystem, carbon emission reduction standard subsystem, carbon removal standard subsystem, and market-oriented mechanism standard subsystem.¹⁰⁸ These subsystems are further divided into fifteen secondary subsystems and sixty-three tertiary subsystems.¹⁰⁹ These systems cover key industries and fields, such as energy, industry, transportation, urban and rural construction, water conservancy, and meet the application of various scenarios such as regions, industries, parks and organizations.¹¹⁰

On October 19, 2023, China's Ministry of Ecology and Environment (MEE) issued Decree No. 31,¹¹¹ which supports development of renewable energy, forestry carbon sinks, methane emission reduction and other

103. See Guojia Fazhan Gaige Wei Deng Bumen Guanyu Jiakuai Jianli Chanpin Tan-zuji Guanli Tixi De Yijian (国家发展改革委等部门关于加快建立产品碳足迹管理体系的意见) [Opinions on Accelerating the Establishment of Product Carbon Footprint Management System] (promulgated by the Nat'l Dev. Reform Comm'n and other 4 ministries, Nov. 13, 2023), NAT'L DEV. REFORM COMM'N (Mar. 30, 2024), https://www.ndrc.gov.cn/xxgk/zcfb/tz/202311/t20231124_1362231.html [https://perma.cc/66D6-BYDL].

104. See *id.* art. 1(3).

105. See *id.* art. 2.

106. See Tandafeng Tanzhonghe Biaozhun Tixi Jianshe Zhinan (碳达峰碳中和标准体系建设指南) [Guidelines for the Construction of Carbon Dioxide Peaking and Carbon Neutrality Standard System], NAT'L STANDARDS COMM. LIAN (Apr. 1, 2023), https://www.gov.cn/zhengce/zhengceku/2023-04/22/content_5752658.htm [https://perma.cc/X6ZP-Y4EA].

107. See *id.*

108. See *id.*

109. See *id.*

110. See (碳达峰碳中和标准体系建设指南) [Guidelines for the Establishment of a Standard System for Carbon Peak and Carbon Neutrality] FOOD AGRIC. ORG. U.N. (Jun. 16, 2023), <https://www.fao.org/faolex/results/details/en/c/LEX-FAOC217481/> [https://perma.cc/SG2D-WSQ6].

111. See Wenshi Qiti Ziyuan Jianpai Jiaoyi Guanli Banfa (Shixing) (温室气体自愿减排交易管理办法 (试行)) [Measures for the Administration of Voluntary Greenhouse Gas Emission Reduction Trading (for Trial Implementation)] (promulgated by the Ministry of Ecology and Env't of China, Oct. 19, 2023, effective Oct. 19, 2023), https://www.mee.gov.cn/xxgk2018/xxgk/xxgk02/202310/t20231020_1043694.html [https://perma.cc/E4QX-364W].

projects that contribute significantly to carbon reduction and sinks through the voluntary GHGs emission reduction trading mechanism.¹¹²

C. SPC INTERPRETATIONS

The judicial system, led by the SPC, is not far behind these developments. On February 16, 2023, the SPC issued the Opinions on Completely, Accurately and Comprehensively Implementing the New Development Concept and Providing Judicial Services for Actively and Steadily Promoting Carbon Dioxide Peaking and Carbon Neutrality (Opinions).¹¹³

According to the Opinions, Chinese courts will focus on cases related to (i) energy conservation and emission reduction, low-carbon technology, carbon trading, and sustainable finance; (ii) ecological and environmental infringement disputes over GHGs emissions; (iii) carbon emission quotas, and (iv) China Certified Emission Reduction (CCER) trading disputes and support conclusion of trade contracts of carbon emissions, carbon emission quota, CCER, etc.¹¹⁴ Judges should balance development and emission reduction when they hear and rule on cases.¹¹⁵

On August 15, 2023, the first National Ecological Day,¹¹⁶ the SPC issued the interpretation in the same week to strengthen the protection of forest resources in a judicial way.¹¹⁷ According to the interpretation, the courts will impose heavier penalties in cases where the destruction of forest resources results in the loss of, or permanent damage to, the basic functions of forest land or other farmland, the unlawful occupation of forest

112. *See id.*

113. *See* Zuigao Renmin Fayuan Guanyu Wanzheng Zhunque Quanmian Guanche Xin Fazhan Linian, Wei Jiji Wentuo Tuijin Tandafeng Tanzhonghe Tigong Sifa Fuwu De Yijian (最高人民法院关于完整准确全面贯彻新发展理念 为积极稳妥推进碳达峰碳中和提供司法服务的意见) [Opinions on Completely, Accurately and Comprehensively Implementing the New Development Concept and Providing Judicial Services for Actively and Steadily Promoting Carbon Dioxide Peaking and Carbon Neutrality] (promulgated by the Sup. People's Ct., Feb. 16, 2023), CHINA COURT INTERNATIONAL INTERNET WEBSITE (Feb. 17, 2023), <https://www.chinacourt.org/article/detail/2023/02/id/7149453.shtml> [<https://perma.cc/J8AA-7SKL>].

114. *See* Yurou Yin, SPC Issues Judicial Policy on Carbon Peak and Neutrality, CHINA JUST. OBSERVER (Apr. 10, 2023), <https://www.chinajusticeobserver.com/a/spc-issues-judicial-policy-on-carbon-peak-and-neutrality> [<https://perma.cc/G3YT-DQ5L>].

115. *See* Isabella Kaminski, *China Strengthens Role of Courts in Meeting Carbon Targets*, CLIMATE HOME NEWS (Mar. 7, 2023), <https://www.climatechangenews.com/2023/03/07/china-strengthens-role-of-courts-in-meeting-carbon-targets/> [<https://perma.cc/ULS8-BWQU>].

116. *See* Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Sheli Quanguo Shengtairi De Jueding (全国人民代表大会常务委员会关于设立全国生态日的决定) [Decision of the Standing Committee of the NPC on the Establishment of a National Ecology Day] (promulgated by the Standing Comm. Nat'l People's Cong., Jun. 28, 2023), XINHUA NEWS AGENCY (Jun. 28, 2023), http://www.news.cn/politics/2023-06/28/c_1129722734.htm [<https://perma.cc/G97P-DF59>].

117. *See* Wei Yue, *The Supreme People's Court issued the "Interpretation on Several Issues Concerning the Application of Law in the Trial of Criminal Cases Destroying Forest Resources,"* CHINA COURT INT'L INTERNET WEBSITE (Aug. 14, 2023), <https://www.chinacourt.org/article/detail/2023/08/id/7470513.shtml> [<https://perma.cc/4BTJ-NPLZ>].

land or other farmland within the core protection zone of a nature reserve, or the unlawful harvesting in national parks or nature reserves.¹¹⁸ This judicial policy demonstrates China's determination to protect the ecological environment.¹¹⁹

It is too soon to say that China's ambitious goal will be realized on time.¹²⁰ However, the economic slowdown did not prevent the Chinese government from marching toward carbon neutrality with a comprehensive approach in legal, administrative and judicial actions.¹²¹

* * *

The year 2023 was unique because it was a time of normalization after COVID-19, and it marks the halfway point of the 14th Five-Year Plan. The Chinese government is dedicated to trade and economic growth to create a fair and friendly competitive market. For instance, the General Office of the State Council issued Opinions of the General Office of the State Council on Promoting the Stabilization of Scale and Optimization of Structure of Foreign Trade (Opinions)¹²² to strengthen trade promotion and expand markets by stabilizing and scaling up the imports and exports of key products. The Opinions identify several measures to increase fiscal and financial support, accelerate innovative development of foreign trade, and optimize the environment for the development of foreign trade.¹²³ In addition, the Opinions include measures¹²⁴ to regulate utilization of foreign investment and guarantee the national treatment for foreign-invested enterprises, indicating that foreign investment will be continuously advocated and strengthened in the foreseeable future.

It is notable that China acceded to the 1961 Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents (Convention) on March 8, 2023, effective as of November 7, 2023.¹²⁵ Accordingly, a concerned party from member countries of the Convention

118. *See id.* art. 12.

119. *See id.*

120. *See* Action Plan, *supra* note 90.

121. *See id.*

122. *See* Guowuyuan Bangongting Guanyu Tuidong Waimao Wenguimo Youjieyou De Yijian (国务院办公厅关于推动外贸稳规模优结构的意见) [Opinions of the General Office of the State Council on Promoting the Stabilization of Scale and Optimization of Structure of Foreign Trade] (promulgated by the Gen. Off. Of St. Council, Apr. 11, 2023, effective Apr. 25, 2023), GEN. OFF. OF ST. COUNCIL (Apr. 11, 2023), https://www.gov.cn/zhengce/zhengceku/2023-04/25/content_5753130.htm [https://perma.cc/G2BQ-X734].

123. *See id.*

124. *See* Guowuyuan Guanyu Jinyibu Youhua Waishang Touzi Huanjing Jiada Xiyin Waishang Touzi Lidu De Yijian (国务院关于进一步优化外商投资环境加大吸引外商投资力度的意见) [Opinions of the State Council on Further Optimizing the Environment for Foreign Investment and Emphasizing on Attracting Foreign Investment] (promulgated by the St. Council, Jul. 25, 2023, effective Aug. 13, 2023), GEN. OFF. OF ST. COUNCIL OPERATION, Aug. 13, 2023, https://www.gov.cn/zhengce/zhengceku/202308/content_6898049.htm [https://perma.cc/XQ3U-UEED].

125. *See Notice on the Abolition of Consular Authentication Services by The Chinese Embassy and Consulates-General in the U.S. After China's Accession to the 1961 Hague Convention*, EMBASSY

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no longer need to obtain legalization from the Chinese embassy or consulate to legalize its document in certain circumstances, such as to file cases in any court in China.¹²⁶ Without a doubt, this will save time and money for the industry over the long run.

Fairly speaking, 2023 was not special in terms of legislation and enforcement in China. We do not see much development of guidance in data security or personal data protection, and some of the key legislations as projected by the NPC Standing Committee¹²⁷ have yet to be realized. We expect more to come in 2024.

OF CHINA IN THE U.S. (Oct. 24, 2023), http://us.china-embassy.gov.cn/eng/lswf/zj/gz/202310/t20231025_11167576.htm [<https://perma.cc/X8B4-2596>].

126. *See id.*

127. In September 2023 the 14th NPC Standing Committee announced that it anticipates adoption of 130 pieces of legislation, of which seventy-nine are mature and ready for adoption and fifty-one expected to be mature enough for introduction and introduction during the course, without counting additional research and discussion for preparation of new laws. *See* Legislative Plan of the 14th National People's Congress Standing Committee (《十四届全国人大常委会立法规划》), STANDING COMM. NAT'L PEOPLE'S CONG., (Sept. 8, 2023) http://www.npc.gov.cn/npc/c2/c30834/202309/t20230908_431613.html [<https://perma.cc/R4LT-B3L3>].

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International Contracts Committee

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This Article reviews significant international legal developments made in the areas of international contracts law and policy in 2023.

I. Introduction

This Article reviews significant international legal developments made in the areas of international contracts law and policy in 2023. In Section II, the article discusses a case where a Canadian court not only confirmed the existence of a contract for the sale of goods concluded through an exchange of text messages, it also found that a “thumbs-up” emoji (👍) constituted a valid signature. Section III describes the new Swedish Direct Investment Act. Contrary to most other EU Member States, Sweden previously lacked a screening system that prevents investments in domestic companies if they involve risks from a security policy perspective. Section IV discusses the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgements and the implications of its adoption. Finally, Section V describes the judicial reform in Israel. Although not strictly pertaining to contractual law matters, this judicial reform has the potential to significantly impact the legal environment in Israel and the due process of law in determining the legality of applicable legislation.

II. Canada: Contract Formation through Text Messages

A. BACKGROUND

In a recently issued decision, the King’s Bench Court of Saskatchewan not only confirmed the formation of a contract for the sale of goods through an exchange of text messages, it also found that a “thumbs-up” emoji (👍) constituted a valid signature.¹

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1. South West Terminal Ltd. v. Achter Land & Cattle Ltd. (2023), 116 Sask. R. 63, ¶ 37 (Can.) [hereinafter South West Terminal], <https://images.assettype.com/barandbench/>

The plaintiff, South West Terminal Ltd. (SWT), brought a summary judgment application against the defendant, Achter Land & Cattle Ltd. (Achter), for breach of contract and damages of C\$83,200.21.² According to SWT, the parties entered into an agreement for the purchase and delivery of a flax shipment, with delivery to take place sometime during the month of November 2021 (Flax Contract).³ SWT drafted the Flax Contract, to which its representative applied his signature in wet ink before texting a photograph of the signature page to a representative of Achter, requesting that he “please confirm flax contract.”⁴ In response, Mr. Achter texted back a “thumbs-up” emoji.⁵ Ultimately, the price of flax rose quite significantly and Achter failed to deliver the shipment within the specified period, presumably opting to sell its flax at a higher price to another buyer.⁶ In its defence, Achter argued that the “thumbs-up” emoji meant that its representative “confirmed that [he] received the Flax contract” and that it was not a “confirmation that [he] agreed with the terms of the Flax Contract.”⁷

While the court dealt with other issues, this article focuses on the contract formation issue argued by the parties, namely whether a valid contract was formed between SWT and Achter to deliver the flax.⁸ In its analysis, the court sought to determine whether there was consensus ad idem, commonly referred to as a “meeting of the minds,” and whether there was sufficient certainty around contractual terms for a binding agreement to exist.⁹ In reaching an affirmative answer on both points, the court relied heavily on the past dealings between the two parties since the beginning of their business relationship in 2015.¹⁰

B. ANALYSIS

First, the court considered the principles of contract formation at common law, and in particular, the concept that “a contract is only formed where there is an offer by one party that is accepted by the other party with the intention of creating a legal relationship, supported by consideration.”¹¹ In determining whether the parties were ad idem on the Flax Contract, the court applied an objective test that asks “how each party’s conduct would appear to a reasonable person in the position of the other party,”¹² rather

2023-07/17ed50ce-4edd-472a-be49-91d1c5e6b402/South_West_Terminal_Ltd_v_Achter_Land___Cattle_Ltd.pdf.

2. *Id.* ¶ 1.

3. *Id.*

4. *Id.* ¶ 15.

5. *Id.*

6. *Id.*

7. *South West Terminal*, 116 Sask. R., ¶ 27.

8. *Id.* ¶ 16.

9. *Id.* ¶ 18.

10. *Id.* ¶ 21.

11. *Id.* ¶ 18.

12. *Id.* (citing *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, 2021 SCC 22, ¶ 35 (Can.)).

than a subjective test that asks what each party had in mind at the time. Quoting a leading decision of the Supreme Court of Canada, the court stated that in arriving at a conclusion on the existence of an enforceable contract, courts are not restricted to the principles of contract formation; they may also consider the surrounding circumstances of the case or what is referred to in Canadian jurisprudence as the “factual matrix.”¹³

As the plaintiff was seeking summary judgement, the court had to limit its factual enquiry to the various documents on the record, namely affidavits and cross-examinations of the plaintiff, defendants and its agents, which evidenced the parties’ pattern of entering into what they both knew and accepted to be valid and binding delivery contracts.¹⁴ Specifically, four contracts had been previously executed by Achter via text messages, and in three of these, Achter signalled its acceptance of the terms by simply stating “looks good,” “ok,” and “yup.”¹⁵ The court reasoned that the use of a thumbs-up emoji was akin to how contracts had previously been entered into (and fulfilled) by Achter, therefore a contract had been effectively formed.¹⁶ In its view, a reasonable bystander with knowledge of the parties’ previous conduct would come to the objective understanding that the parties had reached a consensus ad idem.¹⁷

The court then turned to the provincial statute governing electronic documents and found that a “thumbs up” emoji is an “action in electronic form”¹⁸ that can be used to express acceptance as contemplated by section 18(1) of the Electronic Information and Documents Act (EIDA),¹⁹ which states:

18 (1) Unless the parties agree otherwise, an offer or the acceptance of an offer, or any other matter that is material to the formation or operation of a contract, may be expressed:

- (a) by means of information or a document in an electronic form; or
- (b) by an action in an electronic form, including touching or clicking on an appropriately designated icon or place on a computer screen or otherwise communicating electronically in a manner that is intended to express the offer, acceptance or other matter.

(2) A contract shall not be denied legal effect or enforceability solely by reason that information or a document in an electronic form was used in its formation.²⁰

13. *South West Terminal*, 116 Sask. R., ¶ 46 (citing *Sattva Capital Corp v. Creston Moly Corp.*, (2014) S.C.C. 53, ¶ 46 (Can.))

14. *Id.* ¶ 19.

15. *Id.* ¶ 21. The court does not mention how acceptance of the fourth contract was conveyed.

16. *Id.* ¶ 36.

17. *Id.*

18. *Id.* ¶ 37.

19. The Electronic Information and Documents Act, 2000, S.S. 2000, c E-7.22, art. 18(1) (Can.).

20. *Id.*

In *Quilichini v. Wilson's Greenhouse & Garden Centre Ltd.*, Justice Scherman (also of the King's Bench Court of Saskatchewan) referred to the above provision and opined that it is irrelevant that a contract could have been executed by hard copy but was not, and that using only one of many options available to execute a contract does not lead to the conclusion that no agreement exists.²¹ While Achter argued against this interpretation by asserting that an actual signature in its classic presentation is essential to confirm the signatory's identity, and thus acceptance of the terms being offered, the court had no trouble finding that EIDA clearly provides otherwise and does not prevent the use of a modern day emoji to express acceptance.²² Moreover, the court dismissed Achter's argument that allowing a "thumbs-up" emoji would inundate the court system with cases involving all kinds of emojis; in its view, courts should be prepared to meet the new realities of Canadian society that arise from technology and common usage.²³

Additionally, Achter's defence included the proposition that the Flax Contract was void for uncertainty for two reasons, namely that the photograph provided by SWT did not include the general terms and conditions of the contract, and secondly, the photograph of the Flax Contract stated the delivery period as "Nov.," which Achter argued was impermissibly vague.²⁴ The court rejected both arguments.²⁵ As previously stated, Canadian courts consider the factual matrix of a contract at the time of its formation, including the facts that were known or reasonably capable of being known by the parties when they enter into an agreement.²⁶ Through its assessment of the factual matrix, the court ascertained that Achter would have already known the contract's terms and conditions from past agreements because they were "boiler plate" and had never changed.²⁷ Without expressly saying so, the court seem prepared to accept that the general terms and conditions were therefore implicitly agreed to. Moreover, the court held that the agreement conveyed sufficient clarity on the essential terms, as none of these were missing or unascertainable, with the parties, property, and price all being "crystal clear."²⁸ Consequently, the contract could not be invalidated for uncertainty.²⁹ Finally, based on previous dealings and in the context of the discussions surrounding the Flax Contract, the only logical interpretation of the abbreviation "Nov." was that it referred to the month of November 2021.³⁰

21. *South West Terminal*, 116 Sask. R., ¶ 38 (citing *Quilichini v. Wilson's Greenhouse & Garden Centre Ltd.*, 2017 S.K.Q.B. 10, [2017] 8 WWR 375, at 10 (Can.)).

22. *Id.* ¶¶ 39–42.

23. *Id.* ¶ 40.

24. *Id.* ¶ 45.

25. *Id.*

26. *Id.* ¶ 47.

27. *South West Terminal*, 116 Sask. R., ¶ 48.

28. *Id.* ¶ 49 (citing 101034761 *Saskatchewan Ltd. v. Mossing*, 2022 SKQB 193, ¶¶ 112–13 (Can.)).

29. *Id.*

30. *Id.* ¶ 50.

C. COMMENTARY

A decision rendered by the Superior Court of Ontario this year has similarly addressed the extent to which individuals can circumvent legal traditions of formality through technology yet also how courts continue to enforce the long-standing principle of certainty of terms.³¹ In *Lithium Royalty Corporation v. Orion Resource Partners*,³² two parties had entered negotiations to sell a royalty interest in a Nevada lithium mine. The plaintiff sent a contractual offer to the defendant by email, to which the defendant responded with “OK, sounds good.”³³ The court in that case found that the defendant’s omission to sign the term sheet that had been circulated was inconsequential because the essential terms were set out in the email correspondence, inclusive of the email in which the defendant had confirmed its acceptance.³⁴

The two Canadian judgements briefly examined in this article demonstrate that parties engaged in contractual dealings, and notably foreign parties with Canadian representatives that engage in contractual negotiations with Canadian entities via informal messaging applications (such as WhatsApp or WeChat), should ensure that their representatives are aware of how their messages may be interpreted should a contractual dispute arise in Canadian courts. Fortunately, while the court in the *South West Terminal* case found that a “thumbs-up” emoji constituted a valid acceptance of a contractual offer,³⁵ the court’s approach highlights the relevance of the parties’ pattern of contracting over the course of several years.³⁶ In doing so, the Saskatchewan court has left the door open for a different outcome in future cases where acceptance is not communicated in a formal manner. Nevertheless, Canadian courts remain reluctant to interfere with commercial relations between contractual parties, and for this reason they are likely to continue to analyze the factual matrix of a contract’s formation on a case-by-case basis.³⁷

III. Sweden: Foreign Direct Investment Act

On December 1, 2023, a new law on foreign investments entitled the “Foreign Direct Investment Act”³⁸ (FDI Act) became effective in Sweden. Foreign investments are an important part of the Swedish business sector’s

31. *Lithium Royalty Corporation v. Orion Resource Partners*, (2023) O.N.C.A. 697, ¶ 1 (Can.).

32. *Id.* ¶ 2.

33. *Id.* ¶ 17.

34. *Id.* ¶ 33.

35. *South West Terminal*, 116 Sask. R., ¶ 37.

36. *Id.* ¶ 21.

37. *Id.* ¶¶ 47–48.

38. LAG (2023:560) OM GRANSKNING AV UTLÄNDSKA DIREKTINVESTERINGAR (Svensk författningssamling [SFS] 2023:560) (Swed.) [Act (2023:560) on the Screening of Foreign Investments].

development.³⁹ At the same time, strategic acquisitions are one of the methods used by foreign powers to obtain advantages over other states.⁴⁰ The FDI Act introduces a screening regime for direct investments in Swedish companies that conduct sensitive operations, such as vital public services or activities that are of importance to national security interests.⁴¹

The FDI Act applies to investments in undertakings domiciled in Sweden, including indirect transfers of shares and transfers of shares in listed companies.⁴² Certain thresholds relating to ownership or influence determine whether the obligation to report is triggered.⁴³ The FDI Act thus applies to investments resulting in the investor acquiring (directly or indirectly) voting rights equal to or exceeding ten, twenty, thirty, fifty, sixty-five or ninety percent in a target company performing activities eligible for protection, influence over the management of such target company through other means, or assets or business eligible for protection.⁴⁴ No turnover or deal value thresholds apply.

Specific thresholds apply to investments in other legal entities (e.g., limited partnerships or trusts).⁴⁵ In addition, certain types of issuances of new shares are exempted.⁴⁶

Investments by investors from all countries are covered by the screening regime (including investors from Sweden and other EU Member States).⁴⁷ However, only investments made by an investor from a country outside the EU may be subject to a substantive examination by the screening authority and a decision to prohibit the investment or to impose conditions.⁴⁸ It is the investor who is responsible for notifying the screening authority.⁴⁹ There is no filing fee. A target company that is subject to an investment that falls within the screening regime must, subject to certain exemptions for listed companies, inform the investor that the investment falls within the scope of the FDI Act.⁵⁰

The designated screening authority is a governmental agency, the Inspectorate for Strategic Products,⁵¹ (Sw. *Inspektionen för strategiska produkter*).

39. Press Release, Ministry of Defense & Ministry of Justice, New act will stop investments in companies by foreign actors that could harm Sweden (Mar. 22, 2023), <https://www.government.se/press-releases/2023/03/new-act-will-stop-investments-in-companies-by-foreign-actors-that-could-harm-sweden/> [<https://perma.cc/G3CR-7FX2>].

40. *Id.*

41. *Id.*

42. § 2 LAG (SFS 2023:560) (Swed.).

43. *Id.* § 7.

44. *Id.*

45. *Id.* § 7(3).

46. *Id.* § 7(5).

47. *Id.* § 4.

48. §§ 19–20 LAG (SFS 2023:560) (Swed.).

49. *Id.* §§ 7, 9–10.

50. *Id.* § 11.

51. *Foreign Direct Investment*, INSPECTORATE STRATEGIC PRODS. (Nov. 10, 2023), <https://isp.se/eng/foreign-direct-investment/> [<https://perma.cc/W5P6-3QEH>].

In addition to reviewing reported investments, the agency may initiate its own examination of an investment that is not covered by a notification obligation if there is reason to believe that the investment may harm national security, public order, or public safety.⁵² Once a complete notification of an investment has been made to the screening authority, it shall within twenty-five days decide either to take no further action or to initiate an examination.⁵³ In the event that an examination is initiated the screening authority shall make a final decision within three months.⁵⁴ This deadline may be extended to six months under special circumstances.⁵⁵

In making a substantive assessment, the screening authority will make a case-by-case assessment of the risks associated with the investment, taking into account the nature and extent of the activities of the target company and various circumstances related to the investor.⁵⁶ The screening authority also considers whether the investor is controlled by the government of a country outside the EU.⁵⁷ Another relevant factor is if the investor has previously been involved in activities that have or could have adversely affected Sweden's security or public order or security in another EU Member State.⁵⁸ Whether there are other circumstances pertaining to the investor that could pose a risk to Sweden's national security or public order or security in Sweden will also be relevant.⁵⁹

An investment that falls within the scope of the FDI Act may only be implemented if it has been approved or a decision has been made by the screening authority not to take further action.⁶⁰ Hence, a transaction that falls within the scope of the FDI Act cannot be closed prior to such decision being made.⁶¹

The screening authority may prohibit a foreign investment if necessary to protect Sweden's national security, public order, or public safety.⁶² Such prohibition will render the investment null and void.⁶³ Where the investment is made in a listed company or in real estate, a prohibition will be combined with an injunction to divest the relevant undertaking or real estate.⁶⁴ The screening authority may also approve an investment subject to conditions.⁶⁵ Such conditions could relate to, *inter alia*, the activities of the

52. § 13 LAG (SFS 2023:560) (Swed.).

53. *Id.* § 14.

54. *Id.* § 15.

55. *Id.*

56. *Id.* § 17.

57. *Id.* § 18.

58. § 18 LAG (SFS 2023:560) (Swed.).

59. *Id.*

60. *Id.* § 16.

61. *Id.*

62. *Id.* § 13.

63. *Id.* §§ 20, 23.

64. §§ 20, 23 LAG (SFS 2023:560) (Swed.).

65. *Id.* § 21.

target company, the management and control of the target company and circumstances relating to the investor and can be combined with a penalty.⁶⁶

The screening authority may impose administrative fines for infringements of the FDI Act amounting up to SEK 100 million.⁶⁷ Fines can be imposed for a variety of breaches of the provisions of the FDI Act, such as failure to report an investment, providing false or misleading information, closing a transaction prior to, or contrary to, a final decision, or violating the conditions decided by the screening authority.⁶⁸ Decisions by the screening authority to prohibit an investment or to impose conditions may be appealed to the Swedish Government.⁶⁹ Injunctions and administrative fines may be appealed to the Stockholm Administrative Court.⁷⁰

The FDI Act also applies to the screening system under the Protective Security Act⁷¹ (the latter has a narrow scope of application). The same transaction may thus trigger filing obligations under both the FDI Act and the Protective Security Act.⁷²

IV. Italy: 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgements

The 2019 Hague Convention on the recognition and enforcement of foreign judgments in civil and commercial matters (the Convention) dated July 2, 2019,⁷³ has finally become effective. Although it has been signed by various countries, including Israel, Montenegro, Russia, the United States and Uruguay, it only applies to the European Union and Ukraine for the time being.⁷⁴ It became effective on September 1, 2023. Pursuant to Article 28, the Convention “shall enter into force on the first day of the month following the expiration of the period during which a notification may be made in accordance with Article 29(2) with respect to the second State that has deposited its instrument of ratification, acceptance, approval or accession referred to in Article 24.”⁷⁵

The European Union has exclusive external competence in this area and expressed its consent to be bound by the Convention in August 2022 pursuant to art. 216, par. 2 of the Treaty on the Functioning of the European

66. *Id.*

67. *Id.* §§ 31–32.

68. *Id.* § 31.

69. *Id.* § 39.

70. § 39 LAG (SFS 2023:560) (Swed.).

71. SÄKERHETSSKYDDSLAG (Svensk författningssamling [SFS] 2018:585) (Swed.).

72. *See id.*

73. *Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*, Hague Conf. on Priv. Int’l L. (HCCH) (July 2, 2019), <https://www.hcch.net/en/instruments/conventions/full-text/?cid=137> [<https://perma.cc/8FRC-KMSK>] [hereinafter *The Convention*].

74. 41: *Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*, HCCH (Jan. 12, 2024), <https://www.hcch.net/en/instruments/conventions/status-table/?cid=137> [<https://perma.cc/A5WR-HBEN>] [hereinafter *Convention Recognition*].

75. *The Convention*, *supra* note 73, at arts. 24, 28–29.

Union.⁷⁶ With the entry into force for the European Union, the Convention binds the individual Member States and with Italy due its ratification of the Treaty on the Functioning of the European Union with Law no. 130 dated August 2008.⁷⁷

The Convention generally applies to the recognition and enforcement of judgments in civil or commercial matters, including consumer and individual employment contracts.⁷⁸ However, certain matters are expressly excluded from its application, including those on the status and legal capacity of natural persons, family law matters, insolvency, privacy, intellectual property,⁷⁹ arbitration and related proceedings,⁸⁰ and provisional remedies.⁸¹ Finally, pursuant to Article 18(1) of the Convention, contracting states may also decide and declare in their ratification documents that the Convention does not apply to other specific matters.⁸²

The conditions upon which a judgment may be recognized pursuant to the Convention are set forth in Article 5.1. and namely:

- (a) the person against whom recognition or enforcement is sought was habitually resident in the State of origin at the time that person became a party to the proceedings in the court of origin;
- (b) the natural person against whom recognition or enforcement is sought had their principal place of business in the State of origin at the time that person became a party to the proceedings in the court of origin and the claim on which the judgment is based arose out of the activities of that business;
- (c) the person against whom recognition or enforcement is sought is the person that brought the claim, other than a counterclaim, on which the judgment is based;
- (d) the defendant maintained a branch, agency, or other establishment without separate legal personality in the State of origin at the time that person became a party to the proceedings in the court of origin, and the claim on which the judgment is based arose out of the activities of that branch, agency, or establishment;
- (e) the defendant expressly consented to the jurisdiction of the court of origin in the course of the proceedings in which the judgment was given;
- (f) the defendant argued on the merits before the court of origin without contesting jurisdiction within the timeframe provided in the law of the State of origin, unless it is evident that an objection to jurisdiction or to the exercise of jurisdiction would not have succeeded under that law;

76. Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, 2012 (O.J. 326) art 216.

77. Legge 2 agosto 2008, G.U. Aug. 8, 2008, n.185 (It.).

78. *The Convention*, *supra* note 73, at art. 1.

79. *Id.* art. 2(1).

80. *Id.* art. 2(2).

81. *Id.* art. 3(1)(b).

82. *Id.* art. 18(1).

(g) the judgment ruled on a contractual obligation and it was given by a court of the State in which performance of that obligation took place, or should have taken place, in accordance with (i) the agreement of the parties, or (ii) the law applicable to the contract, in the absence of an agreed place of performance, unless the activities of the defendant in relation to the transaction clearly did not constitute a purposeful and substantial connection to that State;

(h) the judgment ruled on a lease of immovable property (tenancy) and it was given by a court of the State in which the property is situated;

(i) the judgment ruled against the defendant on a contractual obligation secured by a right in rem in immovable property located in the State of origin, if the contractual claim was brought together with a claim against the same defendant relating to that right in rem;

(j) the judgment ruled on a non-contractual obligation arising from death, physical injury, damage to or loss of tangible property, and the act or omission directly causing such harm occurred in the State of origin, irrespective of where that harm occurred;

(k) the judgment concerns the validity, construction, effects, administration or variation of a trust created voluntarily and evidenced in writing, and – (i) at the time the proceedings were instituted, the State of origin was designated in the trust instrument as a State in the courts of which disputes about such matters are to be determined; or (ii) at the time the proceedings were instituted, the State of origin was expressly or impliedly designated in the trust instrument as the State in which the principal place of administration of the trust is situated. This sub-paragraph only applies to judgments regarding internal aspects of a trust between persons who are or were within the trust relationship;

(l) the judgment ruled on a counterclaim – (i) to the extent that it was in favour of the counterclaimant, provided that the counterclaim arose out of the same transaction or occurrence as the claim; or (ii) to the extent that it was against the counterclaimant, unless the law of the State of origin required the counterclaim to be filed in order to avoid preclusion;

(m) the judgment was given by a court designated in an agreement concluded or documented in writing or by any other means of communication which renders information accessible so as to be usable for subsequent reference, other than an exclusive choice of court agreement.⁸³

It is clear the conditions for the recognition and enforcement of the judgments are quite numerous and detailed.⁸⁴ However, it should be noted that notwithstanding the provisions of Article 5.1 mentioned above, a judgment ruling “on rights in rem in immovable property (real property) shall be recognised and enforced if and only if the property is

83. *Id.* art. 5(1)(a)–(l).

84. *See The Convention*, *supra* note 73, at art. 5(1).

situated in the State of origin.”⁸⁵ In short, it applies the worldwide rule that cases on real property can only be decided by the courts located where the property is situated.⁸⁶

The grounds upon which the recognition and enforcement of the judgment are limited are commonplace since they basically align with the grounds upon which most states now refuse recognition and enforcement (e.g., public policy, fraud, lack, or improper of service of documents) and specifically:

- (a) the document which instituted the proceedings or an equivalent document, including a statement of the essential elements of the claim—(i) was not notified to the defendant in sufficient time and in such a way as to enable them to arrange for their defence, unless the defendant entered an appearance and presented their case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested; or (ii) was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents;
- (b) the judgment was obtained by fraud;
- (c) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State and situations involving infringements of security or sovereignty of that State;
- (d) the proceedings in the court of origin were contrary to an agreement, or a designation in a trust instrument, under which the dispute in question was to be determined in a court of a State other than the State of origin;
- (e) the judgment is inconsistent with a judgment given by a court of the requested State in a dispute between the same parties; or
- (f) the judgment is inconsistent with an earlier judgment given by a court of another State between the same parties on the same subject matter, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State.⁸⁷

It should be further noted that the above grounds for refusal are not mandatory, allowing courts to exercise discretion in their judgments.⁸⁸

In short, a judgment may be recognized and enforced under the Convention if any of the criteria set forth in Article 5.1. are met, with the sole exception, in certain cases, of real property.⁸⁹ Judgments in this matter,

85. *Id.* art. 6.

86. *Id.*

87. *Id.* art. 7(a)–(f).

88. *See id.*

89. *Id.* art. 5(1)(i).

are recognized if, and only if, the real property is situated in the state from which the judgment was issued.⁹⁰

Another important feature of the Convention is that it provides minimum requirements for recognition and enforcement and does not prevent or limit the recognition and enforcement of judgments under national law, bilateral, regional or other international treaties,⁹¹ with the exception of real property as regulated by Article 6 of the Convention.⁹² As it has been noted, the Convention provides a “floor” rather than a “ceiling” in the recognition and enforcement of foreign judgments.

With regard to relations with the Brussels Ibis Regulation,⁹³ it should be pointed out that the current rules are preserved and fully effective and enforceable, while any subsequent ones, in their field of application, are intended to prevail over the Convention with the sole exception of the provisions of Article 6. Summarily, Brussels Ibis in its current formulation will be applicable and operational to the decisions regulated by it, while any subsequent rule adopted must still guarantee compliance with the provisions of Art. 6 of the Convention concerning actions on real property.⁹⁴

Although the 2019 Hague Convention on the recognition and enforcement of foreign judgments only applies to the EU and Ukraine, it is definitively a useful tool to have judgments circulating abroad.⁹⁵ Hopefully more countries will ratify it in the future and be fully part of the same.

V. Israel: The Judicial Reform

The proposed judicial reform in Israel, promoted by the governing coalition, ignited a fierce debate in Israeli society for much of 2023.⁹⁶ The reform proposals laid bare strongly divergent views of the role of the executive and judicial branches of the Israeli legal system.⁹⁷ While advocates of the reform contend that it will enhance democracy in Israel, opponents express deep concerns that the reform will grant excessive power to the executive branch, compromise principles of checks and balances, and threaten minority rights.⁹⁸

The proposed reform encompasses several key changes, including:

90. *The Convention*, *supra* note 73, at art. 5(1)(i).

91. *Id.* arts. 15, 23.

92. *Id.* art. 6.

93. Regulation (EU) 1215/2012, of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the recognition and enforcement of judgments in Civil and Commercial Matters, 2012 O.J. (L 351) 1, 7.

94. *The Convention*, *supra* note 73, at art. 6.

95. *See Convention Recognition*, *supra* note 74.

96. *The Reform to Correct the Judicial System*, MY ISR., <https://legal-reform.org.il/the-reform/> [<https://perma.cc/U9ZR-Q658>] (last visited Nov. 28, 2023).

97. *Id.*

98. JERUSALEM INST. JUST., INTRODUCTION TO THE 2023 ISRAELI JUDICIAL REFORM 3 (2023), <https://jij.org/wp-content/uploads/2023/03/Booklet-Judicial-Reform.pdf>.

A. THE OVERRIDE CLAUSE

In Israel's current legal framework, if the Supreme Court invalidates a law enacted by the Knesset (the Israeli parliament), on the grounds that it violates a right established in a Basic Law,⁹⁹ the annulment is considered final. However, the proposed reform would grant the Knesset the ability to re-legislate laws that were previously invalidated by the Supreme Court. The reform would make it harder for the Court to invalidate laws in the future, by requiring eighty percent of a full panel of fifteen Supreme Court justices to invalidate a law. Moreover, the reform would prohibit the Supreme Court from reviewing Basic Laws.¹⁰⁰

B. RESTRUCTURING OF THE JUDICIAL APPOINTMENTS COMMITTEE

The proposed reform would increase the representation of political appointees on the Judicial Appointment Committee,¹⁰¹ thereby affording the governing coalition's representatives sufficient voting power on the Committee to appoint judges.

C. GOVERNMENT LEGAL ADVISORS

Under the proposed reform, ministers would be empowered to select and replace government legal advisors, even though such advisors are supposed to be independent parties.¹⁰²

D. NARROWING THE REASONABLENESS PRINCIPLE

Perhaps the most significant and controversial part of the reform is a proposed amendment to the Basic Law: Judiciary restricting the Supreme Court's ability to invalidate executive branch decisions solely on the grounds of "unreasonableness."¹⁰³ In general, the Court's presumption is that government officials act correctly, lawfully, and with reasonable discretion.¹⁰⁴ Therefore, the Court usually refrains from interfering with decisions of government officials, unless the decision was unreasonable.¹⁰⁵ In the vast majority of cases, the Court adopts the government's position, or at most returns the decision to the governmental authority for reconsideration.¹⁰⁶ In order to examine such decisions, the Court evaluates whether the

99. *Id.* at 12 (outlining that Basic Laws are a series of statutes on core subjects and serve as stand-ins for a written constitution, which Israel does not have).

100. *Id.*; see also *The Reform to Correct the Judicial System*, *supra* note 96.

101. JERUSALEM INST. JUST., *supra* note 98, at 6.

102. See *id.* at 14.

103. *The Reform to Correct the Judicial System*, *supra* note 96.

104. See *id.*

105. JERUSALEM INST. JUST., *supra* note 98, at 18.

106. Amichai Cohen, *Ma'bi Ilat Hasvirut? Kol Ve'Hatsbuvot [What is the Reasonableness Test? All The Questions and Answers]*, ISRAELI DEMOCRACY INST. (June 20, 2023), <https://www.idi.org.il/tags/47683> [<https://perma.cc/NL3X-UVXT>].

interests and considerations that should have been taken into account were adequately considered and given appropriate weight during the decision-making process.¹⁰⁷ The Court has applied this principle to overturn government decisions relatively rarely.¹⁰⁸ For example, in the past the Court ruled that the decision of the Minister of Defense not to build sheltered school classrooms in the city of Sderot in the south of Israel, despite the threat of an attack from the nearby Gaza Strip, was unreasonable.¹⁰⁹

While the other aspects of the proposed reform law have yet to be considered by the Knesset, on July 23, 2023, the Knesset passed an amendment of the Basic Law regarding the reasonableness principle.¹¹⁰ The amendment states:

Notwithstanding the provisions of this Basic Law, whoever has jurisdiction by law, including the Supreme Court serving as the High Court of Justice, shall not discuss the reasonableness of the decision of the government, the prime minister or any other minister, and shall not issue an order regarding such matter; In this section, a “decision” – any decision, including regarding matters of appointments or a decision to refrain from exercising any authority.¹¹¹

Several petitions were submitted to the Supreme Court against this amendment after its enactment, contending that the amendment would cause serious damage to fundamental democratic values such as rule of law, incorruptibility, and public trust.¹¹²

On September 12, 2023, the Supreme Court held a 13-hour discussion on the matter, before all 15 justices.¹¹³ In the hearing, many justices expressed concern about the amendment’s impact on the Supreme Court’s ability to review government decisions.¹¹⁴ They suggested that under the amendment the government’s obligation to act reasonably cannot be enforced if the Court lacks oversight authority based on the reasonableness principle.¹¹⁵ Several justices expressed their belief that they lack the authority to strike down the amendment, while others indicated that while they have the authority to do so, they do not consider the amendment sufficiently extreme to warrant nullification.¹¹⁶ Some justices also explored the possibility of

107. JERUSALEM INST. JUST., *supra* note 98, at 18.

108. *See* Cohen, *supra* note 106.

109. HCJ 06/8397 Vesser v. the Minister of Defense 62(2) PD 198 (2007) (Isr.).

110. Basic Law: the Judiciary, 5748-1984, SH No. 3066, as amended (Isr.).

111. *Id.* § 15.

112. *The Reform to Correct the Judicial System*, *supra* note 96.

113. Suzie Navot, *The Supreme Court Hearing on Reasonableness: Law without Enforcement*, ISRAELI DEMOCRACY INST. (Sept. 20, 2023), <https://en.idi.org.il/articles/50943> [<https://perma.cc/7XPH-PGFV>].

114. *Id.*

115. *Id.*

116. *Id.*

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interpreting the amendment in a way that limits its scope, rather than nullifying it entirely.¹¹⁷

The Court's ruling on this matter, which will have significant implications for Israel's governing principles, is greatly anticipated.¹¹⁸ The Court's ruling is expected to be delivered in early 2024 and may well determine the future direction of judicial reform in Israel.¹¹⁹

117. *Id.*

118. *Id.*

119. Navot, *supra* note 113.

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International Energy and Environmental Law Committee: Year In Review

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This Article discusses significant legal developments in the areas of international energy and environmental law from 2023.

I. Angola

Executive Decree 78/23 approved the General Guidelines for the Preparation of the Rural Electrification Plan with a goal of providing universal access to electricity by 2030 with an emphasis on the use of renewable energy.¹ The Plan aims to provide power to areas of the country still lacking access to the electricity grid and which are not expected to be connected to it in the next ten years through the installation of small generating units (minigrids) or solar kits.²

The oil and gas sector also saw important legal developments during 2023. By means of Joint Executive Decree 81/23, the rules and procedures concerning the definition and modification of the prices of crude and natural gas products have been amended, and a flexible price adjustment mechanism (taking into account the variations in the main factors conditioning the cost

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1. DECRETO PRESIDENCIAL No. 125/23, 30 de Maio de 2023, 97 Diário da República 2956 (Angl.), <https://faolex.fao.org/docs/pdf/ang221956.pdf> [<https://perma.cc/ZTA8-BCQY>].

2. MIRANDA ALL., ANGOLA—LEGAL NEWS—APRIL AND MAY 2023 3 (2023), <https://mirandalawfirm.com/en/insights-knowledge/publications/legal-news/angola-legal-news-april-and-may-2023-2> [<https://perma.cc/2G4R-75YJ>].

structure) was approved.³ Also, specific tax rules on transfer pricing for the New Gas Consortium project have been established by the means of Presidential Decree 158/23, to meet the project's unique economic and commercial conditions,⁴ and in line with the implementation of measures aimed at improving the business environment and streamlining bureaucracy, the Regulations on the Licensing of Gas Stations were approved by Presidential Decree 173/23.⁵

II. Gabon

In 2023, several environmental-related statutes were published including: (i) Ministerial Order 0017/MEFMEPCPAT/SG/DGEPPF, which created the National Committee for the Global Environment Fund, entrusted with evaluating and improving the mobilization of resources from the Global Environment Facility for Gabon, and acting as advisory body to provide non-binding opinions on potential projects and funding requests;⁶ (ii) Decree 0020/PR/MEFMEPCPAT, on the facilities classified for environmental protection;⁷ and (iii) Decree 00291/PR/MEFMEPCPAT/MER, which created the Gabonese Fund for Strategic Investments, the agency in charge of commercializing the carbon credits generated in the country and belonging to the State.⁸

In addition, the new articles of association of the Société Nationale des Hydrocarbures du Gabon, the “Gabon Oil Company” (GOC), have become available.⁹ In the capacity of the National Oil Company, GOC holds interests in different blocks and has a preferential right in direct and indirect transfers of interests in production sharing contracts.¹⁰ According to the new articles of association, GOC's share capital has been increased to XAF eleven billion.¹¹

On the mining front, by means of Decree 0362/PR/MM, the General Directorate of Mines and Geology, which oversees conceiving and implementing the Government's policy with respect to the exploration of mineral resources and the exploitation of mines and quarries, has been reorganized.¹²

3. MIRANDA ALL., *New Rules for the Definition of Crude and Natural Gas Products Prices*, ANGOLA—LEGAL NEWS—JUNE TO AUGUST 2023 2 (2023), <https://www.mirandalawfirm.com/en/insights-knowledge/publications/legal-news/angola-legal-news-june-to-august-2023-2> [<https://perma.cc/SZQ7-MDAK>].

4. *See id.* at 3.

5. *See id.*

6. MIRANDA ALL., *LEGAL NEWS—GABON—FEBRUARY 2023* 2 (2023), <https://www.mirandalawfirm.com/en/insights-knowledge/publications/legal-news/gabon-legal-news-february-2023-2> [<https://perma.cc/E2JD-EJPS>].

7. *See id.*

8. *See id.*

9. *Id.* at 1.

10. *Id.*

11. *Id.*

12. MIRANDA ALL., *LEGAL NEWS—GABON—FEBRUARY 2023* 4.

III. Portugal

In line with the international trends, by means of Decree-Law 11/2023 (Environment made Simpler), a “broad reform and simplification of the licensing on environmental matters” has been published.¹³ The aim of the reform is to “significantly reduce the administrative and regulatory burden faced by companies, with particular focus on the energy sector, in order to accelerate the energy transition (e.g., elimination of unnecessary or redundant acts, licenses, permits and processes).”¹⁴ The new statute includes measures pertaining to the environmental impact assessment, environmental license, permit for usage of water resources, and waste management.¹⁵

IV. Republic of Congo

Law 3/2023 created the Oyo’s Center of Excellence for Renewable Energies and Energy Efficiency.¹⁶ The Center is responsible for conducting research, training and development relating to renewables and therefore is expected to contribute for the implementation of the energy transition in the country.¹⁷ In addition, with the enactment of Order 385, Congo sought to limit the effects of the increase of domestic premium fuel and diesel by approving several measures according to which the State would bear the costs with taxes and fees due to the connection of public transportation to people and goods.¹⁸

V. Timor-Leste

Late 2022, through Resolution 35/2022, the Government approved the areas to be dedicated to mining activities, as well as the Terms of Reference (TOR) for the opening of a tender to award mining rights for exploration and production of construction materials in the three concession areas proposed by the Minister.¹⁹ Also, by means of Resolution 7/2023, the Government approved the opening of areas for the carrying out of mining activities in the country and the TOR of the tender for the award of mineral rights for the

13. *Environment made Simpler*, MIRANDA ALL. (Feb. 14, 2023), <https://www.mirandalawfirm.com/en/insights-knowledge/publications/alerts/environment-made-simpler-2> [<https://perma.cc/KL8V-K3GZ>].

14. *Id.*

15. *Id.*

16. MIRANDA ALL., CONGO—LEGAL NEWS—FEBRUARY THROUGH APRIL 2 (2023), <https://www.mirandalawfirm.com/en/insights-knowledge/publications/legal-news/congo-legal-news-february-through-april-2023-2> [<https://perma.cc/CX6L-AF4Y>].

17. *See id.*

18. *Id.*

19. MIRANDA ALL., TIMOR-LESTE—LEGAL NEWS—BETWEEN MARCH AND MAY 2023 1 (2023), <https://www.mirandalawfirm.com/en/insights-knowledge/publications/legal-news/timor-leste-legal-news-between-march-and-may-2023-2> [<https://perma.cc/79HH-EK8H>].

exploration and mining of metallic minerals, gemstones, industrial minerals, radioactive minerals, rare earth minerals, and coal in said areas.²⁰

In addition, the National Parliament ratified the Doha Amendment to the Kyoto Protocol to the United Nations Framework Convention on Climate Change, adopted in Doha on December 8, 2012, through Resolution 1/2023.²¹

Major changes in the organization of the Timor-Leste Energy and Natural Resources sector have been approved in 2023, including: (i) Decree-Law 59/2023,²² which approved a new Framework Law for the Ministry of Petroleum and Mineral Resources; thus adopting a more dynamic and efficient structure capable of meeting emerging technical requirements, particularly in terms of prospecting, exploration and marketing of petroleum and mineral resources, and other areas of growing interest in the energy sector, such as carbon capture and storage (CCS) and hydrogen have also been addressed for the first time; (ii) Decree-Law 60/2023,²³ which amended the framework governing the Institute of Petroleum and Geology, to ensure a better knowledge of geological resources, including a vast number of research disciplines in the field of geosciences (geological mapping, oil prospecting, geotechnics, hydrogeology, etc.); and (iii) Decree-Law 61/2023,²⁴ which amended the rules governing the National Oil Company, TIMOR GAP, E.P. focused on greater transparency and an increased focus on its core areas of activity, thus improving its efficiency. Moreover, the Government has decided to separate the mining and oil and gas regulatory roles and approved Decree-Law 62/2023,²⁵ on the National Petroleum Authority and Decree-Law 63/2023,²⁶ on the National Mining Authority.²⁷

VI. Norway's High Court Decides Who Controls Svalbard Continental Shelf

On March 20, 2023, Norway's Supreme Court ruled that a Latvian company cannot fish for snow crab on the continental shelf outside Svalbard and Norway has no obligation to share access rights to this area

20. *Public Tender for the award of mineral rights in Timor-Leste*, MIRANDA ALL. (Apr. 12, 2023), <https://www.mirandalawfirm.com/en/insights-knowledge/publications/alerts/public-tender-for-the-award-of-mineral-rights-in-timor-leste-2> [<https://perma.cc/C2TW-FMZQ>].

21. TIMOR-LESTE—LEGAL NEWS—BETWEEN MARCH AND MAY 2023, *supra* note 19, at 2.

22. 59/2023, 33 JORNAL DA REPÚBLICA, I SÉRIE 1849 (2023) https://www.mj.gov.tl/jornal/public/docs/2023/serie_1/SERIE_I_NO_33.pdf.

23. *See id.* at 1858.

24. *See id.* at 1868.

25. *See id.* at 1881.

26. *See id.* at 1896.

27. *New changes in the organization of the Timor-Leste Energy and Natural Resources Sector*, MIRANDA ALL. (Sept. 11, 2023), <https://www.mirandalawfirm.com/en/insights-knowledge/publications/alerts/new-changes-in-the-organization-of-the-timor-leste-energy-and-natural-resources-sector-3> [<https://perma.cc/K9KZ-7FQB>].

with contracting parties to the 1920 Svalbard Treaty.²⁸ The ruling has implications for fishing, oil, and mineral rights at a time of increased global competition for Arctic resources. If Latvia had prevailed, all forty-seven signatory nations to the Svalbard Treaty would have equal access to the natural resources beyond territorial waters and on the continental shelf.²⁹ Latvia or other High Parties to the Svalbard Treaty can still bring the dispute before an international court or tribunal.³⁰

Under the Svalbard Treaty, Norway is given “full and unrestricted sovereignty over the Svalbard archipelago” subject to the provisions that all parties enjoy “equally the rights of fishing and hunting in the territories [...] and in their territorial waters”³¹ and can “carry on there without impediment all maritime, industrial, mining and commercial operations on a footing of absolute equality.”³²

Latvia argued that the text of the treaty provided a basis for a dynamic interpretation of “territorial waters” to comprise areas beyond the internal waters and territorial sea, thereby extending the Article 2 right of equality to those areas.³³ Furthermore, Norway had set precedent when it expanded the territorial sea outside Svalbard from four to twelve nautical miles based on application of the 1982 United Nations Convention on the Law of the Sea (UNCLOS).³⁴ The court disagreed and held Norway has full and exclusive sovereign rights on the continental shelf outside Svalbard that are not limited by the equality provision of Article 2.³⁵

VII. Guyana

To try to ensure a more equitable distribution of Guyana’s offshore oil and gas bonanza, a local content law has been in force after 2021.³⁶ The law requires that all contractors, sub-contractors, and licensees operating in Guyana’s petroleum sector submit a Local Content Annual Plan that outlines detailed annual targets for procuring some forty different types of goods and services from Guyanese firms as well as in employment and capacity

28. Supreme Court of Norway Mar. 20, 2023, Judgment HR-2023-491-P (Case No. 22-134375 SIV-HRET), <https://www.domstol.no/globalassets/upload/hret/decisions-in-english-translation/2023/hr-2023-491-p.pdf> [<https://perma.cc/CJ64-FQKS>]; Treaty Recognizing the Sovereignty of Norway over the Archipelago of Spitsbergen [hereinafter “the Svalbard Treaty”], Feb. 9, 1920, T.I.A.S. No. 686, <https://www.jus.uio.no/english/services/library/treaties/01/1-11/svalbard-treaty.xml> [<https://perma.cc/YNC2-GEQC>].

29. See Judgment HR-2023-491-P ¶ 75, at 11.

30. See The Svalbard Treaty, annex 2–3.

31. *Id.* art. 2.

32. *Id.* art 3.

33. See Judgment HR-2023-491-P ¶ 48, at 8.

34. See *id.* ¶ 14, at 3 (citing Act of 27 June 2003 no. 57 (Nor.)).

35. *Id.* ¶¶ 227–229, at 33.

36. *In three short years, Guyana transformed legislative, regulative framework for oil industry – VP Jagdeo*, OILNOW (Aug. 4, 2023), <https://oilnow.gy/news/in-three-short-years-guyana-transformed-legislative-regulative-framework-for-oil-industry-vp-jagdeo/> [<https://perma.cc/23PS-VM96>].

development.³⁷ These targets range from requiring that at least five percent of higher complexity services must be provided by Guyanese businesses while the goal is one hundred percent for general support services.³⁸ In 2023, Guyana's Attorney General announced plans to increase the list of goods and services as well as raising percentage targets.³⁹ To qualify as Guyanese, at least fifty-one percent or more of a company's share capital must be owned by Guyanese citizens, the business should be registered with the Guyana Revenue Authority, and a firm's offices, plant or facilities need to be located in Guyana.⁴⁰ The government claims that the Local Content Law has, to date, directed some \$400 million to Guyanese businesses.⁴¹

In 2023, the Centre for Local Business Development—the domestic capacity-building entity funded by the first consortium made up of ExxonMobil, Hess, and the China National Offshore Oil Corporation (CNOOC) to drill in Guyana—introduced an enhanced and upgraded digital platform for petroleum companies to connect with local suppliers of goods and services.⁴² The Centre works closely with the Local Content Secretariat to verify businesses on the platform are indeed “local.”⁴³

The National Assembly approved a Petroleum Activities Law in August 2023 that replaced Guyana's former one-on-one negotiated Production Sharing Agreement (PSA) model to a standardized PSA framework for companies or consortiums wishing to bid on offshore blocks.⁴⁴ The first auction utilizing the revised regime took place in September 2023.⁴⁵ These agreements now include a ten percent royalty rate, a reduced cost recovery ceiling from seventy-five to sixty-five percent, and a 50/50 sharing of after cost recovery profits between the Guyanese government and the operators.⁴⁶ The new law also facilitates approval of ExxonMobil's

37. *Guyana certifies major oil companies local content compliant after successful 2022*, OILNOW (May 22, 2023), <https://oilnow.gy/featured/major-guyana-oil-sector-contractors-get-approvals-for-2023-local-content-plans/> [<https://perma.cc/VBZ3-2LGY>].

38. *See id.*

39. Local Content Act 2021 (Act No. 18/2021) (Guy.); *see also* Svetlana Marshall, *Back to Front: Exploitative International JVs, limited access to financing and gaps in a well-intentioned local content law hinder Guyana's SME growth potential* CARIBBEAN INVESTIGATIVE JOURNALISM NETWORK (Nov. 9, 2023), <https://www.cijn.org/back-to-front/> [<https://perma.cc/L7LR-RTPQ>].

40. Local Content Act 2021 (Act No. 18/2021); *see also* Marshall, *Back to Front: Exploitative International JVs, limited access to financing and gaps in a well-intentioned local content law hinder Guyana's SME growth potential* CARIBBEAN INVESTIGATIVE JOURNALISM NETWORK.

41. *In three short years, Guyana transformed legislative, regulative framework for oil industry – VP Jagdeo*, *supra* note 36.

42. Press Release, ExxonMobil, ExxonMobil Guyana advances fifth offshore Guyana development (Apr. 26, 2023), https://corporate.exxonmobil.com/news/news-releases/2023/0426_exxonmobil-guyana-advances-fifth-offshore-guyana-development [<https://perma.cc/U6JK-AGZW>].

43. *See id.*

44. *See S&P Sees Guyana Holding Strong Despite in Oil and Gas Sector Despite Revised PSA*, OILNOW (Aug. 16, 2023), <https://oilnow.gy/featured/even-with-new-contract-terms-guyana-remains-attractive-investment-destination-sp-global/> [<https://perma.cc/S3UU-EDDV>].

45. *See id.*

46. *See id.*

proposal to build a pipeline to transport offshore natural gas to a mainland thermal plant for generating electricity.⁴⁷ This development is expected to significantly reduce domestic electricity prices currently generated from imported fuel oil.⁴⁸

VIII. Suriname

Unlike Guyana, Suriname has had an active but limited onshore petroleum sector as well as refining capacity for decades that primarily meets domestic transportation needs. Most of Suriname's electricity is generated from renewable hydropower.⁴⁹ Suriname's first deep-water oil and natural gas project was announced by TotalEnergies and its partner Apache Corporation or APA in September 2023.⁵⁰ Both companies have already spent \$1.3 billion on exploration and TotalEnergies expects to invest another \$9 billion to bring production online.⁵¹ A field development plan has yet to be filed, however, and environmental authorizations have still not been approved. Accordingly, TotalEnergies does not expect to begin producing offshore oil until at least 2028.⁵² Under Suriname's production sharing contract rules, the Surinamese state is entitled to a majority of net income derived from offshore activities including royalties, profit oil, and taxes.⁵³ This arrangement is designed to facilitate participation by the Surinamese state oil company, Staatsolie, in this inaugural deepwater oil and gas project.⁵⁴

IX. Conclusion

These developments are promising for multiple industries. The legal frameworks and judgments are robust.

47. See *Guyana project overview*, EXXONMOBIL, <https://corporate.exxonmobil.com/locations/guyana/guyana-project-overview>.

48. See *id.*

49. 50% of Suriname's electricity coming from hydropower, KAIETEUR NEWS (Feb. 15, 2023), <https://www.kaieteurnewsonline.com/2023/02/15/50-of-surinames-electricity-coming-from-hydropower/> [<https://perma.cc/4S42-Q5Z6>].

50. Scott B. McDonald, *Suriname, Energy Transition, and Climate Change*, GLOBAL AMERICANS (Oct. 27, 2023), <https://globalamericans.org/suriname-energy-transition-and-climate-change/> [<https://perma.cc/FT2T-NBPB>].

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

THE YEAR IN REVIEW
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International M&A & Joint Ventures

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This article summarizes important developments during 2023 in international mergers and acquisitions (M&A) and joint ventures in France, Japan, Russia, Singapore, Spain, Britain, and the United States.

I. FRANCE

A. INTRODUCTION

For the fourth consecutive year, France has been ranked as the most attractive country in Europe for foreign direct investments (FDI).¹ As of the publication of this article, the numbers for 2023 were not yet available, but the latest data show that more than 1,259 FDI projects were announced in France in 2022.²

With regard to the private equity sector, although there has been a net decrease in comparison with previous record years, the size and number of funds raising capital during the first semester of 2023 are close to those in 2016 and 2020.³ As in many other jurisdictions, the timeline of the deals has been overly expanded.

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1. ERNST & YOUNG, FRANCE ATTRACTIVENESS SURVEY 2023 2 (2023), https://assets.ey.com/content/dam/ey-sites/ey-com/fr_fr/topics/attractiveness/barometre-de-l-attractivite-de-la-france-2023/ey-attractivite-france2023-episode1-executive-summary-uk.pdf [<https://perma.cc/T8BY-W25A>].

2. *Id.*

3. FR. INV. & GRANT THORNTON, ACTIVITÉS DES ACTEURS DU CAPITAL-INVESTISSEMENT FRANÇAIS [ACTIVITIES OF FRENCH PRIVATE EQUITY PLAYERS] 3 (2023), https://www.granthornton.fr/globalassets/1.-member-firms/france/images/insights/2023/2023-10-18_etude-dactivite-s1-2023_france-invest.pdf [<https://perma.cc/6KD9-P4EP>].

The legal and regulatory reforms of the past few years have thus impacted capital markets and made France a leading country for foreign investment.⁴ The year 2023 has also been quite generous in producing reforms and new legislative bouquets from both a national and European point of view. Below are some of the many adopted in 2023:

B. LAW 2023-171 OF MARCH 9, 2023⁵ — “DDADUE 3”

DDADUE 3, whose provisions came into force on March 11, 2023, contains various provisions to adapt French law to European Law by either directly amending the French Monetary and Financial Code, the Commercial Code, or empowering the French Government to do so.⁶

This law is quite enriching as it contains the following:

1. Adaptation to Regulation (EU) 2022/858 of the European Parliament and of the May 30, 2022 Council on a pilot regime for market infrastructures based on distributed ledger technology and amending Regulation (EU) No 600/2014 and (EU) No 909/2014 and Directive 2014/65/EU.⁷ Article 7 of DDADUE 3 introduces various amendments to the French Monetary and Financial Code to enable application of the pilot regime for market infrastructures based on distributed ledger technology.⁸ A decree should also be issued to complete the system.

2. Government empowerment to transpose Directive 2022/2464 (CSRD Directive) of the European Parliament and of the Council of December 14, 2022, and harmonize corporate sustainability reporting measures.⁹ Parliament has empowered the Government to transpose this directive before December 9, 2023, specifically to:

- (i) transpose the CSRD Directive and its requirement of publication of a sustainability report which will replace the current extra-financial performance declaration;
- (ii) adapt the provisions relating to the engagement of statutory auditors including the services to be provided as well as those relating to the

4. See *France Most Attractive Destination for FDI Projects for the Fourth Consecutive Year*, Bus. FR. N. AM. (May 12, 2023), [https://www.prnewswire.com/news-releases/france-most-attractive-destination-for-fdi-projects-for-the-fourth-consecutive-year-301823407.html#:~:text=For%20the%20fourth%20consecutive%20year%2C%20France%20confirmed%20its%20top%20position,followed%20by%20Germany%20with%20832](https://www.prnewswire.com/news-releases/france-most-attractive-destination-for-fdi-projects-for-the-fourth-consecutive-year-301823407.html#:~:text=For%20the%20fourth%20consecutive%20year%2C%20France%20confirmed%20its%20top%20position,followed%20by%20Germany%20with%20832.). [<https://perma.cc/YEW3-M9G8>].

5. Loi 2023-171 du 9 mars 2023 portant diverses dispositions d'adaptation au droit de l'Union européenne dans les domaines de l'économie, de la santé, du travail, des transports et de l'agriculture [Law 2023-171 of March 9, 2023 Relating to Various Provisions for Adaptation to European Union Law in the Fields of Economy, Health, Work, Transport and Agriculture], Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 10, 2023 [hereinafter “DDADUE”], <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000047281777> [<https://perma.cc/PX7B-35EB>].

6. See *id.*

7. *Id.* art. 7(1).

8. See generally *id.* art. 7.

9. *Id.* art. 12.

- organization and powers of the competent authorities in terms of accreditation and supervision of persons authorized to assess the compliance of published sustainability information; and
- (iii) draw consequences from the changes made on the various systems of obligations relating to the social, environmental, and corporate governance issues of commercial companies.¹⁰

In application of this new text, the French Government will need to adapt the French Commercial Code by (i) taking into account different sizes of companies and groups by reference to thresholds, drawing inspiration from those in EU law; (ii) harmonizing the methods of calculating these thresholds; (iii) applying these definitions to the different systems with similar thresholds; (iv) extending these systems to certain types of companies; and (v) unifying the injunction procedures.¹¹

3. French Government empowerment to transpose Directive (EU) 2019/2121 of the European Parliament and of the Council of November 27, 2019, amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions, was finally adopted by Ordinance No. 2023-393 of May 24, 2023, reforming the rules governing mergers, demergers, partial contributions of assets and cross-border transactions by commercial companies.¹² The Ordinance has introduced a major reform that will apply to transactions for which the draft is filed with the Clerk of the Commercial Court on or after July 1, 2023.¹³ The decree was published on June 3, 2023.¹⁴ This widely expected decree specifies in particular:

- (i) the elements required for commercial companies to implement mergers, demergers, partial contributions of assets, partial demergers and the same operations carried out in a cross-border context between member states of the European Union;
- (ii) the content of the draft terms of these transactions, the notice sent to stakeholders and its management report, as well as the deadlines and procedures for publication of these documents.¹⁵

10. *Id.* art. 12(1)–(3).

11. *See* DDADUE, art. 12(3)(a)–(d).

12. *See* Ordonnance 2023-393 du 24 mai 2023 portant réforme du régime des fusions, scissions, apports partiels d'actifs et opérations transfrontalières des sociétés commerciales [Ordonnance 2023-393 of May 24, 2023 Reforming the Regime for Mergers, Divisions, Partial Contributions of Assets and Cross-Border Operations of Commercial Companies] Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 25, 2023, <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000047584074> [<https://perma.cc/ZGE7-CXNN>].

13. *Id.*

14. Décret 2023-430 du 2 juin 2023 portant réforme, du régime des fusions, scissions, apports partiels d'actifs et opérations transfrontalières des sociétés commerciales [Decree 2023-430 of June 2, 2023 Reforming the Regime of Mergers, Divisions, Partial Contributions of Assets and Cross-Border Transaction of Commercial Companies] Journal Officiel de la République Française [J.O.] [Official Gazette of France] June 3, 2023, <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000047623842> [<https://perma.cc/39KJ-5K75>].

15. *See id.*

- C. BILL NO. 2023-1107 OF NOVEMBER 29, 2023, FOR EMPLOYEE FOR PROFIT SHARING OR EMPLOYEE EQUITY PROGRAM - LOI N° 2023-1107 DU 29 NOVEMBRE 2023 PORTANT TRANSPOSITION DE L'ACCORD NATIONAL INTERPROFESSIONNEL RELATIF AU PARTAGE DE LA VALEUR AU SEIN DE L'ENTREPRISE¹⁶

On November 16, 2023, the French Senate adopted a Proposed Bill for the Profit Sharing or Employee Equity Program and the law was published on November 29, 2023.¹⁷ The measures are various and adaptable.

With regards to free share allocations for instance, the law has modified the dispositions of Article L. 225-197-1 of the French Commercial Code regarding the ceiling for free share allocations to employees and certain corporate officers, and raises to:

1. Fifteen percent of the share capital (instead of ten percent) in the case of large and medium-sized companies;
2. Twenty percent of the share capital in the case of small and medium-sized companies (instead of fifteen percent); and
3. Forty percent of the share capital in the case of allocations to all employees.¹⁸

This law has also modified Article L. 225-197-1, Titles I and II, of the French Commercial Code by creating a new intermediate ceiling of thirty percent of share capital, on the twofold condition that employee beneficiaries represent more than twenty-five percent of total payroll and more than fifty percent of the workforce.¹⁹

In conclusion, like other countries, France will probably be impacted by the evolving socioeconomic environment. However, the dynamism it has shown in past years, together with the various legislative reforms put in place, will enhance its attractiveness. The Strategic Plan of the French Government within a 2030 horizon is to invest more than fifty-four billion Euros in innovation and ecological transition.²⁰ This has been working out

16. Loi 2023-1107 du 29 novembre 2023 portant transposition de l'accord national interprofessionnel relatif au partage de la valeur au sein de l'entreprise [Law 2023-1107 Transposing the National Interprofessional Agreement on Value Sharing Within the Company] Journal Officiel de la République Française [J.O.] [Official Gazette of France] Nov. 30, 2023, <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000048480565> [<https://perma.cc/V4BQ-G7EV>].

17. See *Value Sharing: Developments Since 1 December 2023*, RÉPUBLIQUE FRANÇAISE (Dec. 6, 2023), <https://entreprendre.service-public.fr/actualites/A16971?lang=en> [<https://perma.cc/T3GT-L2WD>].

18. Value Sharing Law, art. 17(1)(a).

19. *Id.*

20. See, e.g., *Presentation of the "France 2030" Plan*, BUSINESSFRANCE (Oct. 15, 2021), <https://www.businessfrance.fr/discover-france-news-presentation-of-the-france-2030-plan> [<https://perma.cc/4MFX-GMEY>].

quite well since France accounts for twenty-nine unicorn²¹ companies and intends to champion decarbonization.²²

II. JAPAN

A. TAKEOVER GUIDELINES

On August 31, 2023, the Ministry of Economy, Trade, and Industry of Japan (METI) published the “Guidelines for Corporate Takeovers” (the Takeover Guidelines), which concern the conduct of listed companies’ directors in Japan, as well as their acquirers, in the context of takeovers of such listed companies.²³ The Takeover Guidelines are “soft” law and are not legally binding. However, they will have a material impact on unsolicited takeover practices in Japan.

Traditionally, in Japan, cross-shareholdings and loyal shareholders, coupled with a lack of qualified outside directors in listed companies, resulted in less stock market discipline and ineffective dialogue with minority shareholders.²⁴ In addition, cross-shareholdings have been criticized as having lower capital efficiency.²⁵ In Japan, there are more listed companies with a Price Book-Value Ratio (PBR) of less than 1x as compared to other countries, and it is expected that M&A transactions will be used as a corporate strategy to address increasingly complex management issues.²⁶ In light of these trends, METI formulated the Takeover Guidelines.²⁷ The aim of the Takeover Guidelines is to stimulate acquisitions that increase corporate value and secure shareholders’ interests, with a focus on how the parties involved should behave in cases where the evaluation of an acquisition proposal is divided between an acquirer and a target company.²⁸

The Takeover Guidelines list three principles, which are set out below:

1.) “Whether or not an acquisition is desirable should be determined on the basis of whether it will secure or enhance corporate value and the

21. See Ivana Pino, *What is a Unicorn Company and What it Takes to be in the Club*, FORTUNE RECOMMENDS (Dec. 20, 2022), <https://fortune.com/recommends/investing/what-is-a-unicorn-company/> [https://perma.cc/98P5-DHUT] (defining “unicorn” company).

22. See, e.g., *The Secrets of the 29 French Unicorn Startups*, WAALAXY (July 3, 2024), <https://blog.waalaxy.com/en/french-unicorn-startups/> [https://perma.cc/G5UV-Y6GJ].

23. See *METI Formulates Guidelines for Corporate Takeovers*, METI (Aug. 31, 2023), https://www.meti.go.jp/english/press/2023/0831_001.html [https://perma.cc/D7LU-C2W7].

24. Toichi, et al., *Recent Trends and Changes in M&A in Japan*, LEXOLOGY (May 16, 2023), <https://www.lexology.com/library/detail.aspx?g=4b328058-7979-40d0-b062-c07f1e300456#:~:text=Cross%2Dshareholdings%20and%20loyal%20shareholders,as%20having%20lower%20capital%20efficiency.> [https://perma.cc/94WZ-VKSZ].

25. *Id.*

26. MIZUHO BANK, MIZUHO CUSTODY NEWSLETTER 2–3 (2023), <https://www.mizuhogroup.com/binaries/content/assets/pdf/mizuho-bank/what-we-do/custody/mizuho-custody-newsletter/october2023.newsletter.pdf> [https://perma.cc/U6VX-FH8B].

27. See *id.* at 2.

28. See Toichi et al., *supra* note 24.

shareholders' common interests."²⁹ According to this principle, if a listed company's management, while receiving an acquisition proposal with a higher acquisition price, intends to accept another acquisition proposal with a lower acquisition price that its board of directors determines will improve value, management is required to use its reasonable efforts to ensure shareholders' common interests or the best available transaction terms for shareholders is achieved, and the board of directors has sufficient accountability.³⁰

2.) "The rational intent of shareholders should be relied upon in matters involving the corporate control of the company."³¹

3.) "Information useful for shareholders' decision making should be provided appropriately and proactively by the acquiring party and the target company.³² To this end, the acquiring party and the target company should ensure transparency regarding the acquisition through compliance of acquisition-related laws and regulations."³³ According to these principles, regarding matters related to the management control rights of a company, the company should rely on the rational intention of the shareholders, to whom the company's interests are attributed.³⁴ Normally, shareholders' wishes are respected in acquisitions by obtaining shareholders' decisions through tendering their shares in tender offers. However, in exceptional and limited cases where normal procedures do not provide the necessary information (including opinions expressed by the target company) or sufficient time for shareholders to decide, some listed companies have introduced policies that implement countermeasures against acquisitions that utilize the free allotment of share acquisition rights with discriminatory content (countermeasures) and implement such countermeasures based on that policy.³⁵ In these cases, generally, the rational intention of the shareholders regarding whether to introduce and implement countermeasures should be confirmed at the shareholders' meeting.³⁶ In addition, countermeasures should be taken only in necessary and reasonable manners, considering the principle of shareholder equality, the protection of property rights, and the prevention of abuse for the sake of management's own protection.³⁷ In short, the Takeover Guidelines expect that countermeasures should be taken in these sorts of "exceptional and limited" cases, only in a necessary and reasonable manner.³⁸

29. MINISTRY OF ECON., TRADE AND INDUS. (METI), GUIDELINES FOR CORPORATE TAKEOVERS § 2.1, at 10 (2023), <https://www.meti.go.jp/press/2023/08/20230831003/20230831003-b.pdf> [<https://perma.cc/DU9M-ADTY>].

30. *See id.* § 3.2.3, at 25–27.

31. *Id.* § 2.1, at 10.

32. *Id.*

33. *Id.*

34. *See id.* § 5.2, at 41–43.

35. METI, *supra* note 29, at 39–43.

36. *See id.* § 5.2, at 41–43.

37. *See id.* § 5.3, at 42–43.

38. *See id.* § 2.2.3, at 15–16; *see also id.* at 39–43.

In fact, by referring to the Takeover Guidelines, Nidec Corporation (Nidec), a company listed on the prime market of the Tokyo Stock Exchange (TSE), made an unsolicited takeover proposal to Takisawa Machine Tool Co., Ltd. (Takisawa), a company listed on the standard market of TSE.³⁹ After two months of discussion of this proposal, Takisawa's management agreed.⁴⁰ This tender offer was successfully completed in November 2023.⁴¹ As this example shows, there is a possibility that the number of similar successful unsolicited takeover proposals will increase in the future by referring to the Takeover Guidelines, resulting in more frequent sound takeovers in the Japanese market.

B. AMENDMENT TO FDI REGULATIONS

Additionally, under the Foreign Exchange and Foreign Trade Act (FEFTA), which regulates inward foreign direct investments, a foreign investor must make a prior notification to the Ministry of Finance and other relevant Ministries before acquiring shares of a Japanese company engaged in a certain designated industry (Designated Industry) and is prohibited from acquiring such shares until it obtains clearance from the relevant Ministries.⁴² The 2023 amendment to the public notice related to the FEFTA (which applies to inward foreign direct investments made on or after May 24, 2023) expanded the definition of Designated Industry to include the following: permanent magnets, semiconductors, machine tools, industrial robots, storage batteries, natural gas, metal products, mineral products, and metal 3D printers, etc.⁴³

III. RUSSIA

It has been eight years since the institution of representations of circumstances⁴⁴ (hereinafter “representations”) was incorporated into Russian

39. *Tender Offer Statement*, NIDEC CORP. (Sept. 14, 2024), <https://disclosure2dl.edinet-fsa.go.jp/searchdocument/pdf/S100RV0A.pdf?sv=2020-08-04&st=2023-12-09T05%3A18%3A39Z&se=2028-11-13T15%3A00%3A00Z&sr=b&sp=rl&sig=vTlyABGQHZUblTYRKYRh4I3pxb59yFTXkYSkfc0hC%2Fw%3D> [https://perma.cc/JS6H-YZSS].

40. *Id.*

41. *Id.*

42. See *Cabinet Order for Implementation of the FEFTA on Inward Foreign Direct Investment*, MINISTRY OF FIN. JAPAN (Apr. 24, 2020), https://www.mof.go.jp/english/policy/international_policy/fdi/20200424.htm [https://perma.cc/LK6M-RYPT].

43. *Public Notice Specifying Business Types to Be Specified by the Minister of Finance and the Competent Minister for the Business Pursuant to the Provisions of Article 3-2, Paragraph (3) of the Order on Inward Direct Investment*, JAPANESE L. TRANSLATION, <https://www.japaneselaw-translation.go.jp/en/notices/view/147> [https://perma.cc/9TE2-94MG] (last visited Apr. 1, 2024).

44. GRAZHDANSKIĖ KODEKS ROSSIĖSKOĖ FEDERATSII [CIVIL CODE] art. 431.2 (Russ.) (note that the concept is close to English Law Warranties and Representations. See, e.g., *Representations and Warranties*, THOMSON REUTERS (last visited April 1, 2024)).

legislation. But even now, it is not always clear or predictable how representations given under transaction documents, when structuring M&A and joint ventures under Russian law, will be interpreted and how liability limitations will work and be enforceable in case of a dispute, as well as to what extent the court may recreate the initial parties' intentions to consider representation claims as lawful. In 2023, two important clarifications were made by Russian courts.

In March, the Russian Supreme Court ruled in favor of the existence of implied representations by interpreting the actual buyer's intention during negotiation of the list of representations.⁴⁵ The higher court in this instance held that representations may cover by default not only the existence or absence of certain circumstances or facts expressly referred to in a contract, but also the absence of grounds (causes) that could make such circumstances or facts untrue.⁴⁶ It transpires from the judgement that such grounds themselves may be included in the scope of representations impliedly (i.e., even if not set forth in the contract).⁴⁷ The court emphasized that in order for the representation to be deemed breached, these grounds must exist at the time of providing the representation, even if they are not known to the sellers and emerge in the future.⁴⁸

In the case, a share sale and purchase agreement, the sellers gave a representation that the target company (holding the license of a forex dealer) would not receive any claims from governmental authorities and would comply with the license requirements of a forex dealer until the moment shares transferred to the buyer.⁴⁹ Upon transfer, governmental authorities revoked the license of the forex dealer, and the grounds for it were violations on the part of the target company before the date when the representations were given.⁵⁰ The lower courts held that the representations were not breached by the sellers, given the fact that as of the date of the representations, the company retained the license and no claims had been received by it.⁵¹ At the same time, there was no express representation (set forth in the agreement or otherwise) that the target company was free from any violations of law as of the date of representations.⁵² Nonetheless, the Russian Supreme Court deemed such representations related to the absence of violations were

45. Kassatsionnaya zhaloba Aleksandrova A.V. na resheniye Arbitrazhnogo (Arbitrazhnogo) suda g. Moskvy, Verkhovnogo Suda Rossiyskoy Federatsii [Cassation appeal by Aleksandrov A.V. against the decision of the Arbitration (Commercial) Court of Moscow, Supreme Court of the Russian Federation] (Mar. 21, 2023), No. 305-ЭC22-17862, p. 10–11, <https://kad.arbitr.ru/Card/887fe555-8a6c-4a7c-9c54-46535345b5e9> [hereinafter "Case No. A40-167835/2021"].

46. *Id.* at 8.

47. *See id.*

48. *Id.* at 8, 9. It should be noted that the legal enforceability of representations in respect of future circumstances has not been confirmed in Case No. A40-167835/2021 and is yet declined by Russian courts of the lower instances.

49. *Id.* at 3–4.

50. *Id.* at 4.

51. Case No. A40-167835/2021, at 5.

52. *Id.* at 10.

included by implication, and thus breached by the sellers.⁵³ Therefore, it is important to be cautious regarding the existence of implied representations deriving from the contractually designated ones and to put limitations in the list of representations under Russian law by making it exhaustive if necessary.

Another significant clarification made by the Russian Supreme Court in that decision was that there is no obligation on the part of the buyer (being a recipient of the representations) to contest the revocation of the license to enjoy the benefit from the representation being breached.⁵⁴ In practical terms, this means that despite the general bona fide principle established in Russian law,⁵⁵ one should nonetheless expressly oblige the recipient of representations to take the necessary actions if one wants to ensure all such actions aimed at mitigating or excluding losses are taken.

The concept of representation is closely connected with the buyer's knowledge that limits the seller's liability and prevents the claims from being brought. In that respect, the judgement of 10th Arbitration (Commercial) Appeal Court related to due diligence to be exercised by a party receiving representations before concluding a deal is worth mentioning.⁵⁶ Russian courts have repeatedly required such a party to be cautious by at least searching the public registers and not to blithely rely on the representations it receives.⁵⁷ But in the present case,⁵⁸ the court found that a party receiving representations, which turned out to be untrue, was not obliged to be cautious (to make a representations claim to be enforceable), because such a requirement would have disavowed and diminished the very essence of the concept of representations under Russian law.⁵⁹ Although it is too early to declare the new approach in that respect developed, the decision is nonetheless remarkable.

53. *Id.*

54. *See id.*

55. GRAZHDANSKIY KODEKS ROSSIYSKOY FEDERATSII [CIVIL CODE] art. 10 (Russ.)

56. Obrashcheniye Dubrovskogo D.V. na resheniye Arbitrazhnogo (torgovogo) suda Moskovskoy oblasti, 10-go Arbitrazhnogo (torgovogo) apellyatsionnogo suda Rossiyskoy Federatsii [Appeal by Dubrovskiy D.V. against the decision of the Arbitration (Commercial) Court of Moscow Region, The 10th Arbitration (Commercial) Appeal Court of the Russian Federation] (Sep. 25, 2023), No. 10AI-14989/2023, at 6, <https://kad.arbitr.ru/Card/8660e9bc-5b94-43d5-b715-c5aac4994715> [<https://perma.cc/3P59-NFP8>] [hereinafter "Case No. A41-32499/23"].

57. *See, e.g.*, Kassacionnaya zhaloba obshchestva s ogranichennoj otvetstvennost'yu "Universal" na reshenie Arbitrazhnogo (Arbitrazhnogo) suda Habarovskogo kraja, Arbitrazhnogo (Arbitrazhnogo) suda Dal'nevostochnogo okruga [Cassation appeal by limited liability company "Universal" against the decision of the Arbitration (Commercial) Court of Khabarovsk Region, The Arbitration (Commercial) Court of Far Eastern District] (Apr. 22, 2019), No. Φ03-1112/2019, at 9-10, <https://kad.arbitr.ru/Card/73e38bb0-27b2-40cb-9325-2b8a584b1331> [<https://perma.cc/76A7-8XHA>].

58. It should be noted that the case concerned the representations provided in the context of a lease contract but the court's findings are applicable to representations in general, including those provided in the context of M&A and joint ventures. *Id.*

59. *See* Case No. A41-32499/23, at 6.

IV. SINGAPORE

A. FAMILY OFFICES IN SINGAPORE: UPDATE IN 2023

In recent years, Singapore has emerged as a prominent hub for wealth management and family offices (FOs).⁶⁰ FOs, serving as private wealth management entities, oversee high-net-worth individuals or families' financial and investment needs, and engage in non-investment activities such as philanthropy and legal matters.⁶¹ As of the end of 2022, Singapore boasted approximately 1,100 single-family offices.⁶²

The attractiveness of Singapore as a destination for establishing FOs is attributed to its stable political environment, rigorous regulatory framework, favorable taxation rates, and convenient access to Asian opportunities within a globally diversified investment portfolio.⁶³ The presence of well-developed capital markets, along with a vibrant private equity and venture capital ecosystem, add to its allure.⁶⁴

FOs are renowned for diversifying their investments across various asset classes, including real estate, private equity, venture capital, hedge funds, and more. On average, FOs allocate approximately eighteen percent and six percent of their total wealth to private equity and venture capital investments, respectively.⁶⁵ These asset classes are pivotal for FOs, offering access to a spectrum of opportunities, ranging from emerging tech start-ups to substantial corporate transactions backed by private equity funds.⁶⁶ Notably, companies are increasingly turning to FOs as a source of funding,⁶⁷ with FOs contributing fifteen percent of the capital

60. MONETARY AUTH. OF SING., CONSULTATION PAPER ON PROPOSED FRAMEWORK FOR SINGLE FAMILY OFFICES ¶ 2.3, at 4. (2023), <https://www.mas.gov.sg/-/media/mas/news-and-publications/consultation-papers/2023-consultation-paper-on-proposed-framework-for-single-family-offices/consultation-paper-on-proposed-framework-for-single-family-offices.pdf> [<https://perma.cc/2B8F-NFHB>].

61. *Id.* ¶ 2.2.

62. Ow Kim Kit et al., *Family Offices In Singapore: An Update & Recent Trends*, IFC (July 7, 2023), <https://www.ifcreview.com/articles/2023/july/family-offices-in-singapore-an-update-recent-trends/> [<https://perma.cc/P3Q7-ZZC6>].

63. See Ayman Medina, *Why Establish a Family Office in Singapore*, ASEAN BRIEFING (Oct. 16, 2023), <https://www.aseanbriefing.com/news/why-establish-a-family-office-in-singapore/> [<https://perma.cc/GS88-4QM5>].

64. See *Wealth Management*, MONETARY AUTH. OF SING., <https://www.mas.gov.sg/development/wealth-management> [<https://perma.cc/H94L-CAB6>] (last visited Apr. 1, 2024).

65. David Struthers, *Family Office Venture Capital Review 2023*, SIMPLE (2023), <https://and-simple.co/reviews/family-office-venture-capital/#3> [<https://perma.cc/8PJG-9HSY>].

66. See STEPHANIE PERRYFROST & GABRIELE SCHMIDT, GLOBAL FAMILY OFFICE REPORT, UBS (Rupert Bruce ed., 2023), <https://www.ubs.com/content/dam/assets/wm/static/noindex/gfo/docs/ubs-gfo-report-2023.pdf> [<https://perma.cc/48NB-Z96U>].

67. See Faye Ong, *Singapore family office scene set to soar in sophistication*, THE BUS. TIMES (Aug. 24, 2023), <https://www.businesstimes.com.sg/companies-markets/banking-finance/singapore-family-office-scene> [<https://perma.cc/K6VX-EPLB>].

for investment managers, according to the latest research by the Global Impact Investing Network.⁶⁸

B. STRUCTURE OF FOs IN SINGAPORE

In Singapore, FOs can take the form of either multi-family offices (MFOs), overseeing third-party assets from two or more families, or single-family offices (SFOs), dedicated to managing assets exclusive to a single family, while being entirely owned or controlled by members of that family.⁶⁹ The structures of SFOs are typically crafted to obtain exemptions from licensing requirements for offering fund management and financial advisory services.⁷⁰ This exemption can be pursued through two distinct pathways:

1. Exemption for “Related corporations” under the Singapore Financial Advisers Regulations:⁷¹ This exemption is granted to a corporation managing funds or providing financial advisory services to its related corporations.⁷² To achieve this, some families establish a common holding company that wholly owns both the SFO and the investment fund vehicle holding the family’s assets.⁷³ In this arrangement, the SFO manages or advises the investment fund as its related corporation.⁷⁴
2. Case-by-case Exemption for SFOs: In cases where an SFO does not neatly fit within the parameters of existing class licensing exemptions, it may seek a licensing exemption from the Monetary Authority of Singapore (MAS) under section 99(1)(h) of the Securities and Futures Act 2001.⁷⁵

C. MODIFICATION OF THE FUND TAX INCENTIVE SCHEMES FOR FAMILY OFFICES

To foster the growth of Singapore’s wealth management sector and create a favorable tax setting for SFOs to augment their assets, Fund Tax Incentive Schemes have been established in sections 13O and 13U of the Income Tax Act 1947 (ITA), and are overseen by the MAS.⁷⁶

68. See DEAN HAND, ET. AL, 2023 GIINSIGHT: IMPACT INVESTING ALLOCATIONS, ACTIVITY & PERFORMANCE, GLOBAL IMPACT INVESTING NETWORK (2023), <https://thegiin.org/assets/documents/pub/2023-GIINSight/2023%20GIINSight%20-%20Impact%20Investing%20Allocations,%20Activity%20&%20Performance.pdf> [<https://perma.cc/C8YX-8PLZ>]. Impact investing is an investment strategy that aims to generate specific beneficial social or environmental effects in addition to financial gains.

69. *Wealth Management*, MONETARY AUTH. OF SING., <https://www.mas.gov.sg/development/wealth-management> [<https://perma.cc/Y525-3UB9>].

70. See *id.*

71. Financial Advisers Act (Cap. 110), reg. 27(1)(b) (Sing.).

72. Securities and Futures Act (Cap. 289), ¶ 5(1)(b), (Sing.).

73. See *id.*

74. See *id.*

75. Securities and Futures Act 2001, § 99(1)(h) (Sing.).

76. *Fund Tax Incentive Schemes for Family Offices*, MONETARY AUTH. OF SING. (July 5, 2023), <https://www.mas.gov.sg/schemes-and-initiatives/fund-tax-incentive-scheme-for-family-offices> [<https://perma.cc/8SM3-C4Y4>].

On July 5, 2023, the MAS announced modifications to the eligibility requirements for SFO fund vehicles seeking tax exemptions under sections 13O and 13U of the ITA.⁷⁷ These revisions apply to all new applications under sections 13O and 13U that submit preliminary documents to MAS as of July 5, 2023.⁷⁸ The adjustments specifically address criteria related to minimum Assets Under Management, the investment professionals, minimum spending in local enterprises, and the capital deployment requirement.⁷⁹

Regarding the capital deployment requirement, funds under the 13O and 13U Schemes were obligated to invest a minimum of ten percent of their Assets Under Management or \$10 million (around \$7,457,122), whichever was lower, into certain local investments.⁸⁰ In the recent modification, the MAS has expanded the range of eligible local investments. In addition to (1) Equities listed on Singapore-licensed exchanges; (2) Qualifying debt securities; (3) Non-listed funds distributed by Singapore-licensed or registered financial institutions; and (4) Investments into non-listed Singapore-incorporated companies with operating business(es) and substantive presence in Singapore, MAS has now acknowledged (5) Climate-related investments; and (6) Blended finance⁸¹ structures with significant involvement of Singapore-licensed or registered financial institutions.⁸²

Furthermore, MAS has implemented multipliers for specific investments. Certain categories of eligible investments will receive a multiplier, whereby the invested amount in those categories will be scaled up by a multiplier when computing the capital deployment requirement.⁸³ As an illustration, a 2x multiplier will be employed for the investment in deeply concessional capital within blended finance structures that involve substantial involvement from financial institutions in Singapore.⁸⁴

The latest changes are designed to encourage SFOs to invest in blended finance structures and deploy funds towards climate-related projects, not only in Singapore but also globally.

V. SPAIN

The year 2023 in Spain opened the door to important regulatory developments that have significantly affected Mergers and Acquisitions and Joint Ventures.

77. *See id.*

78. *See id.*

79. *See id.*

80. *See id.*

81. Blended Finance refers to the utilization of catalytic capital from public or philanthropic sources to augment private sector investment in sustainable development. *See* USAID, USAID INVEST BLENDED FINANCE STARTER KIT: 10 QUESTIONS ABOUT MOBILIZING PRIVATE CAPITAL FOR BETTER DEVELOPMENT RESULTS 2 (2020), <https://www.usaid.gov/INVEST/blended-finance-starter-kit> [<https://perma.cc/5JE6-5LXM>].

82. *See id.*

83. *Fund Tax Incentive Schemes for Family Offices*, *supra* note 76.

84. *See id.*

The so-called “Mobility Directive”⁸⁵ has been incorporated into the Spanish legal system through the New Law on Structural Changes in Corporations.⁸⁶ For the first-time, it has regulated changes in registered offices abroad (called “cross-border transformations”), cross-border spin-offs (when they imply the incorporation of new companies), and has modified the rules for cross-border mergers.⁸⁷ The New Law on Structural Changes in Corporations has replaced former Law 3/2009⁸⁸ with a new regulation that integrates both internal and cross-border structural amendments (transformations, mergers, spin-offs, and global transfers of assets and liabilities), both intra- and extra-European ones (within and outside the European Economic Area).⁸⁹ This means that it includes extra-European mergers and cross-border spin-offs that were not previously regulated in Law 3/2009.

Regarding financial markets, Law 6/2023⁹⁰ has replaced the former Securities Market Law.⁹¹ In particular, Law 6/2023 regulates for the first time in Spain a specific regime for Special Purpose Acquisition Companies (SPAC), not only by including a new chapter on this subject in the Spanish Corporate Enterprises Act,⁹² but also through other provisions which, for instance, exempt the obligation of launching a mandatory takeover bid if, as a result of the acquisition or the application of the chosen redemption mechanism, a shareholder obtains, directly or indirectly, a controlling interest in the resulting company (thirty percent or more of the voting rights). Likewise, Law 6/2023 provides that, once the European regulations are approved, the Spanish Securities Market Commission (CNMV) will already have the necessary supervisory duties to protect investors and guarantee financial stability around crypto assets and distributed ledger technologies, and also amends the Spanish Corporate Enterprises Act to include, for the first time in Spanish corporations regulations, the possibility of representing shares through systems based on distributed ledger technologies.⁹³ Moreover, Law 6/2023 takes advantage of the opportunity to introduce new developments in the area of takeover bids, extending,

85. Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions, 2019 O.J. (L 321).

86. Para la transposición de Directivas de la Unión Europea en materia de modificaciones estructurales de sociedades mercantiles [For the transposition of European Union Directives on structural amendments of trading companies] (B.O.E. 2023, 154) (Spain) [hereinafter “Law 154/2023”].

87. *See id.*

88. Sobre modificaciones estructurales de las sociedades mercantiles [on structural changes in corporations] (B.O.E. 2009, 82) (Spain).

89. *See* Structural Amendments of Trading Companies.

90. *See generally* De los Mercados de Valores y de los Servicios de Inversión [On Securities Market and Investment Services] (B.O.E. 2023, 6) (Spain) [hereinafter “Law 6/2023”].

91. *See generally* Por el que se aprueba el texto refundido de la Ley del Mercado de Valores [Approving the Consolidated Text of the Securities Market Act] (B.O.E. 2015, 255) (Spain).

92. 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).

93. *See* Law 6/2023, ch. 6, at 12.

for example, the scope of application to companies listed in a multilateral trading system (MTF) and domiciled in Spain, whose provisions will only be applicable when the corresponding regulatory development comes into force, or introducing the new case of waiver of the delisting takeover bid when the securities continue to be listed in another trading center, which could facilitate transnational merger operations.⁹⁴ In line with European regulations, the law permits that a trading security that has been admitted to trading on a regulated market in another Member State may subsequently be admitted to trading on a Spanish regulated market, even without the consent of the issuer, and the regulated market must inform the issuer of this circumstance.⁹⁵ In the area of investment services companies, Law 6/2023 tries to improve the competitiveness of the collective investment entities such as private equity funds and investment funds.

Finally, Royal Decree 571/2023,⁹⁶ which implements Law 19/2003⁹⁷ and has replaced Royal Decree 664/1999,⁹⁸ aims to regulate the declaration of investments to reduce the administrative burdens and to develop the suspension of the liberalization regime of certain foreign investments, including those implying tax havens, to guarantee a legal framework that protects the attraction of foreign investments to Spain. By virtue of this new regulation, investments from Spanish residents into foreign entities or vice versa must, as a general rule, be subsequently declared (when they represent a participation equal to or greater than ten percent of the capital stock of the target or of its voting rights) to the Investment Registry of the Ministry of Industry, Commerce, and Tourism of Spain.⁹⁹ An exception applies when the investment has its origin or destination in a non-cooperative jurisdiction and when its target concerns critical infrastructure, companies with sensitive information, media and specific technologies and some foreign investors, which are subject to a prior authorization from the Spanish Directorate General for International Trade and Investment.¹⁰⁰ In addition, Royal Decree 571/2023 permits a voluntary consultation to be filed to determine whether a specific investment requires prior authorization, except in the defense sector where a prior authorization will always be compulsory.¹⁰¹ In addition, above certain thresholds, the submission of an annual report on the evolution of the investment will be required.¹⁰²

94. *Id.* tit. IV, ch. 1, § 1, art. 42(1), at 31.

95. *See id.*

96. Sobre inversiones exteriores [On Foreign Investments]] (B.O.E. 2023, 159) (Spain) [hereinafter “Royal Decree 571/2023”].

97. Sobre régimen jurídico de los movimientos de capitales y de las transacciones económicas con el exterior y sobre determinadas medidas de prevención del blanqueo de capitales [On Legal Regime Of Movements Of Capital And Economic Transactions Abroad And On Certain Measures For Prevention Of Money Laundering] (B.O.E. 2003, 160) (Spain).

98. Sobre inversiones exteriores [On Foreign Investments] (B.O.E. 1999, 106) (Spain).

99. Royal Decree 571/2023, art. 4(a).

100. *Id.* art. 15.

101. *Id.* arts. 9–12.

102. *Id.* art. 5(4).

VI. UNITED KINGDOM

In *Decision Inc. Holdings Proprietary Ltd. & Anor v. Garbett & Anor*, the High Court found that the Defendant sellers breached the first warranty in the sale and purchase agreement and awarded damages of £1.31m to the Claimants buyers.¹⁰³ The buyers of a company brought a claim against the sellers about the poor performance of that company since the acquisition.¹⁰⁴ The dispute also concerned the sale and purchase of shares in a company owned by the Defendants.¹⁰⁵

First, the share purchase agreement contained the following warranties: Warranty 19.1.2: “Since the Accounts Date . . . there has been no material adverse change in the turnover, financial position or prospects of the Company;”¹⁰⁶ Warranty 20: “All financial and other records of the company [(“Records”)] . . . do not contain any material inaccuracies or discrepancies.”¹⁰⁷

The claims were based on alleged breaches of two contractual warranties: (1) “as to material adverse change since the accounts date” at the time the contract became effective,¹⁰⁸ and (2) “material inaccuracies or discrepancies in the company’s records.”¹⁰⁹ The Defendants argued for a countervailing claim in damages for breach of that warranty which should be set off against any award¹¹⁰ based on “deficiencies in the notice of claim which the Claimants were required to give under clause 11.4.”¹¹¹

The Court has opined on the meaning of “material,” holding that “material is an ordinary English word, and its application to a set of primary facts is itself a question of fact.”¹¹² The High Court considered the following:

“[O]ne way of testing whether a change is material is to ask whether it is so significant that the other party, had they known of the change, would not have entered into the transaction at all, or would have entered into it on significantly different terms The test is an objective test—evidence of the actual states of mind of the parties is not—and should not be—admissible in this regard. The question is as to whether a reasonable person who had entered the transaction with the aims and objectives of the buyer would have sought to withdraw from or renegotiate the transaction had he known of the change. That is the true test of materiality.”¹¹³

103. See *Decision Inc. Holdings Proprietary Ltd. & Anor v. Garbett & Anor* [2023] EWHC 588 (Ch), 12 (UK).

104. *Id.* ¶¶ 2–10.

105. *Id.* ¶ 2.

106. *Id.* ¶ 12.

107. *Id.*

108. *Id.* ¶ 13.

109. *Garbett & Anor* [2023] EWHC 588, ¶ 13.

110. *Id.*

111. *Id.* ¶ 84.

112. *Id.* ¶ 104; see also *Fitzroy House, Epworth Street (No.1) Limited v. Financial Times Limited* (2006) 1 WLR 2007, ¶ 36 (UK).

113. *Garbett & Anor* [2023] EWHC 588, ¶ 105.

The judge pointed out that “there is a dearth of English authority on material adverse change”¹¹⁴ and noted his:

“approval [of] the decision of the Delaware Court of Chancery in *IPB Inc v Tyson Foods Inc* (2001)¹¹⁵ as to the construction of a “material adverse effect” event in a corporate sale and purchase agreement to the effect that such clauses “are best read as a backstop protecting the acquiror from the occurrence of unknown events that substantially threaten the overall earnings potential of the target in a durationally significant manner.”¹¹⁶

On the evidence, the Deputy Judge of the High Court found that when it entered the SPA, the Claimants did not have actual knowledge of any change in the prospects of the company at the Effective Date. The Court therefore found that the notice given satisfied the requirements of the Agreement.

In reaching his decision, the Court ruled in the Claimants’ favor in respect of their claim for breach of the No MAC Warranty on the basis there had been a material adverse change in the Company’s prospects (though not its turnover) but found no breach of the Records Warranty.¹¹⁷ The Court also held that the Defendants had failed to establish any of the contractual defenses on which they sought to rely to avoid liability for breach of warranty, and therefore awarded damages in the sum of £1.31 million.¹¹⁸

VII. UNITED STATES

Several important developments relating to U.S. regulation of international mergers and acquisitions occurred in 2023.

A. CFIUS’ INCREASED SCRUTINY OF FOREIGN DIRECT INVESTMENT IN THE UNITED STATES

In accordance with the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), in July 2023, the Committee on Foreign Investment in the United States (CFIUS)¹¹⁹ published its annual report to Congress covering calendar year 2022 (Report).¹²⁰ The Report revealed that

114. *Id.* ¶ 106.

115. *Id.* ¶ 108 (citing *IPB Inc v. Tyson Foods Inc* 789 A.2d 14 (Del. Ch. 2001)).

116. *See id.*

117. *See id.* ¶ 232.

118. *Garbett & Anor* [2023] EWHC 588, ¶ 227.

119. For additional information on CFIUS and its operations, please refer to the Committee’s article in the 2022 ABA ILS Year in Review. *See generally* Renata Antiquera et. al, *International M&A and Joint Ventures* 57 ABA/ILS YIR X (2022).

120. COMM. ON FOREIGN INV. IN THE U.S., ANNUAL REPORT TO CONGRESS (2022), https://home.treasury.gov/system/files/206/CFIUS%20-%20Annual%20Report%20to%20Congress%20CY%202022_0.pdf [<https://perma.cc/84BR-JYV8>] (hereinafter 2022 Annual Report).

CFIUS' caseload remains high, with a record number of filings in 2022.¹²¹ Importantly, the number of national security agreements also increased in 2022, as CFIUS imposed more mitigation requirements than ever before.¹²²

In 2022, 154 declarations relating to covered transactions were submitted to CFIUS.¹²³ Following a thirty-day assessment of these declarations, CFIUS concluded all action for only ninety declarations, or about fifty-eight percent of all declarations filed.¹²⁴ This marks a significant decrease from 2021, when CFIUS cleared more than seventy percent of declarations.¹²⁵ There were 286 full written notices of transactions filed with CFIUS in 2022.¹²⁶ CFIUS conducted a subsequent "investigation" for 162 of those 286 notices, meaning that approximately fifty-seven percent of notices proceeded to the investigation phase.¹²⁷ Finally, in 2022, CFIUS adopted mitigation measures and conditions in fifty-two instances, accounting for approximately eighteen percent of the total number of 2022 notices. More specifically, CFIUS imposed a national security agreement in forty-one instances,¹²⁸ which represents a significant increase from 2021, when CFIUS imposed national security agreements for only twenty-six notices.¹²⁹

The Report also noted that CFIUS has turned its increased resources toward the monitoring of recent foreign investments as CFIUS works to detect non-notified transactions and to assess national security risks posed by recent foreign investment.

B. OUTBOUND INVESTMENT EXECUTIVE ORDER

On August 9, 2023, President Biden issued Executive Order (EO) 14,105 titled, "Executive Order on Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern."¹³⁰ The EO declares a national emergency to deal with the threat of advancement in military, intelligence, surveillance and cyber-enabled technologies and products of China and other countries of concern and aims to curb investments from the United States in those sectors and in those countries.¹³¹ The EO directs the U.S. Department of the Treasury

For additional information on CFIUS and its operations, please refer to the Committee's article in the 2022 ABA ILS Year in Review, https://www.americanbar.org/groups/international_law/publications/the_year_in_review/2023/ [<https://perma.cc/K4HW-3VKM>].

121. *Id.* at vii.

122. *See id.* at 45.

123. *Id.* at 5.

124. *Id.* at 9.

125. *Id.*

126. ANNUAL REPORT TO CONGRESS, *supra* note 120 at 19.

127. *Id.* at 45.

128. *Id.* at 19.

129. COMM. ON FOREIGN INV. IN THE U.S., ANNUAL REPORT TO CONGRESS 15, 38 (2022), <https://home.treasury.gov/system/files/206/CFIUS-Public-AnnualReporttoCongressCY2021.pdf> [<https://perma.cc/83A2-S93B>].

130. Exec. Order No. 14,105, 88 Fed. Reg. 54,867, 54,867 (Aug. 9, 2023).

131. *See id.*

(Treasury) to begin a rulemaking process that will designate specific types of investments by U.S. persons in China or in certain Chinese-affiliated entities as either prohibited or notifiable transactions.¹³²

The forthcoming regulations must cover transactions with “covered foreign persons” of “countries of concern” who engage in activities involving national security technologies or products.¹³³ This also includes entities owned fifty percent or more by the above parties (which could include, e.g., U.S. subsidiaries of a Chinese parent company).¹³⁴ China, along with the Special Administrative Regions of Hong Kong and Macau, is currently the only nation listed as a “country of concern,” but that list is subject to change.¹³⁵ Covered national security technologies and products are those technologies and products that are critical for the military, intelligence, surveillance, or cyber-enabled capabilities of a country of concern, limited to three sectors:

1. Semiconductors and microelectronics;
2. Quantum information technologies; and
3. Artificial intelligence.¹³⁶

In accordance with the EO, Treasury on the same day published an advance notice of proposed rulemaking regarding the forthcoming regulations.¹³⁷ The advance notice proposed several key definitions and invited public comment on over eighty specific issues relating to the implementation of the EO.¹³⁸ The advance notice did not itself implement the EO and is not a draft regulatory text. It will be followed by draft regulations at a later stage in the process.

It is not proposed that the program provide for retroactive application of the provisions related to the prohibition of certain transactions and the notification of others. Thus, no transactions will be prohibited or notifiable until the final regulations are issued and in effect.

C. NEW DOJ SAFE HARBOR POLICY

On October 4, 2023, Deputy Attorney General Lisa Monaco announced a new U.S. Department of Justice (DOJ) Safe Harbor Policy for voluntary self-disclosures made in connection with mergers and acquisitions (M&A).¹³⁹ Under the new Safe Harbor Policy, acquiring companies that

132. *Id.* at 54,871.

133. *Id.* at 54,867.

134. Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern, 88 Fed. Reg. 54,961, 54,964 (Aug. 14, 2023).

135. *Id.* at 54,962.

136. *Id.*

137. *See id.* at 54,961

138. *See generally id.*

139. Lisa O. Monaco, Deputy Attorney General, Speech: *Deputy Attorney General Lisa O. Monaco Announces New Safe Harbor Policy for Voluntary Self-Disclosures Made in Connection with*

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voluntarily disclose criminal misconduct discovered at the acquired entity within the Safe Harbor period will receive a presumption of a declination of prosecution.¹⁴⁰ Self-disclosing entities must also cooperate with the ensuing investigation, and engage in requisite, timely and appropriate remediation, restitution, and disgorgement to receive the presumption of a declination.¹⁴¹ To qualify for this safe harbor, companies must disclose the discovered misconduct within six months from the date of closing.¹⁴² After disclosure, companies will have one year from the date of closing to fully remediate the misconduct.¹⁴³

This new Safe Harbor Policy only applies to criminal conduct discovered in bona fide, arms-length M&A transactions.¹⁴⁴ This policy does not impact civil merger enforcement.¹⁴⁵

Mergers and Acquisitions (Oct. 4, 2023), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-announces-new-safe-harbor-policy-voluntary-self> [<https://perma.cc/JX9H-LSYY>].

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. See Lisa O. Monaco, Deputy Attorney General, *Deputy Attorney General Lisa O. Monaco Announces New Safe Harbor Policy for Voluntary Self-Disclosures Made in Connection with Mergers and Acquisitions*.

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International Transportation Committee

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This article reviews some of the most significant developments in 2023 involving issues of international transportation law.

I. Federal Preemption of State Law Negligence Claims Against U.S. Motor Carrier Brokers

In 2023, two different U.S. federal appellate courts issued decisions holding that state law claims against motor carrier property brokers for an alleged negligent hiring of a motor carrier causing injuries were preempted by federal law under provisions of the Federal Aviation Administration Authorization Act (“FAAAA”).¹ The two decisions, one by the Eleventh Circuit in *Aspen American Insurance Co. v. Landstar Ranger, Inc.*,² and the other by the Seventh Circuit in *Ye v. GlobalTranz Enterprises, Inc.*,³ conflict with an earlier 2020 Ninth Circuit decision in *Miller v. C.H. Robinson Worldwide, Inc.*⁴ The Ninth Circuit held that such state law negligent hiring claims against brokers were not subject to federal preemption due to a safety exception to preemption contained in the FAAAA.⁵ In 2022, the U.S. Supreme Court denied certiorari to review the Ninth Circuit *Miller* decision.⁶ At the end of 2023, the issue was again back before the Supreme Court, with the filing of a petition for certiorari in the *Ye* case seeking a review of the Seventh Circuit’s decision and the scope of broker preemption under the FAAAA.⁷

* James Border, Committee Editor. Authors in order of appearance: Andrew M. Damas (Federal Preemption of State Law Negligence Claims Against U.S. Motor Carrier Brokers), Attilio M. Costabel (New Florida Tort Law and Conventions), Nicholas L. Webb (Rulemaking on Unreasonable Refusal to Deal or Negotiate), James Border (Taxation of International Transportation).

1. See *Aspen American Ins. Co. v. Landstar Ranger, Inc.*, 65 F.4th 1261, 1272 (11th Cir. 2023); see also *Ye v. GlobalTranz Enters.*, 74 F.4th 453, 466 (7th Cir. 2023); see also 49 U.S.C. § 14501(c)(1).

2. See *Aspen American Ins. Co.*, 65 F.4th at 1272.

3. See *Ye*, 74 F.4th at 466.

4. See *Miller v. C.H. Robinson Worldwide, Inc.*, 976 F.3d 1016, 1031 (9th Cir. 2020), *cert. denied*, 142 S. Ct. 2866 (2022).

5. *Id.*

6. *Id.*

7. See generally Petition for Writ of Certiorari, *Ye*, 74 F.4th at 453 (No. 22-1805).

Domestic trucking in the United States consists of several players.⁸ These include the shipper, the motor carrier property broker, and the motor carrier.⁹ The owner of the goods, the shipper, can directly select and engage the motor carrier, the truck that transports the goods.¹⁰ Alternatively, the shipper may engage the services of a broker, which is a regulated intermediary that acts as a middleman in connecting the motor carrier and the shipper.¹¹ Under federal law, a motor carrier broker is “a person . . . that . . . sell[s], provid[es], or arrang[es] for, transportation by motor carrier for compensation.”¹² A recent litigation trend in the United States has involved plaintiffs in motor carrier personal injury and cargo loss and damage claims suing both the motor carrier and, if one is involved, the broker who selected the motor carrier.¹³ One reason for including the broker in the lawsuit is the fact that many motor carriers have either limited insurance coverage or insufficient assets to satisfy a judgment, whereas a broker may have such assets or insurance.¹⁴ Brokers have thus been included in litigation against motor carriers for an injury or loss caused by the motor carrier on a legal theory of negligent hiring of the motor carrier by the broker.¹⁵

The U.S. motor carrier industry is subject to exclusive federal economic regulation under Title 49 of the U.S. Code.¹⁶ Pursuant to this regulatory scheme, certain state laws relating to motor carriers and brokers are preempted by federal law.¹⁷ The FAAAA provides that “States may not enact or enforce a law . . . related to a price, route, or service of any motor carrier . . . broker, or freight forwarder with respect to the transportation of property.”¹⁸ But the FAAAA also sets forth a “safety exception” that states that the federal preemption provision “shall not restrict the safety regulatory authority of a State with respect to motor vehicles.”¹⁹

District courts in the United States have reached contrary conclusions as to when the FAAAA preemption applies to negligent hiring claims against brokers, especially as to whether the safety exception allows an otherwise preempted claim.²⁰ Until 2023, the Ninth Circuit decision in *Miller* was the only appellate court case addressing the issue, finding against preemption of such claims.²¹ Both 2023 appellate court cases reached the opposite conclusion, finding that the safety exception does not apply to motor

8. *Aspen American Ins. Co.*, 65 F.4th at 1264.

9. *Id.*

10. *Id.*

11. *Id.* at 1264–65.

12. *Id.* at 1272 (quoting 49 U.S.C. § 13102(2)).

13. *Id.* at 1265.

14. *Aspen American Ins. Co.*, 65 F.4th at 1265.

15. *Id.*

16. See generally Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793.

17. *Id.*

18. 49 U.S.C. § 14501(c)(1).

19. 49 U.S.C. § 14501(c)(2)(A).

20. See *Aspen American Ins. Co.*, 65 F.4th at 1268 (citing *Nyswaner v. C.H. Robinson Worldwide Inc.*, 353 F. Supp. 3d 892, 896 (D. Ariz. 2019)).

21. See *Miller*, 976 F.3d at 1031.

carrier property brokers and that negligent hiring claims against brokers are preempted under the FAAAA.²² The Eleventh Circuit found that such claims are preempted in the case of cargo theft (*Aspen*), while the Seventh Circuit found that such claims are preempted in a wrongful death case (*Ye*).²³

In *Aspen*, the legal issue was whether a broker could be sued under Florida state law for the negligent hiring of a motor carrier that turned out to be an imposter that stole the shipment.²⁴ The plaintiff sued the broker, alleging that the broker did not follow its normal carrier-verification protocols when engaging the motor carrier.²⁵ Affirming the lower court's decision dismissing the claims, the Eleventh Circuit found that the preemption provisions of the FAAAA are an express preemption of state laws and that the state law claims against the broker alleging the negligent hiring of a carrier clearly involved the "services" of the broker with respect to the transportation of property within the scope of the preemption statute.²⁶

The Eleventh Circuit rejected the holdings of some district courts that negligent hiring claims are outside the scope of the FAAAA preemption because they are generally applicable state common law causes of action that are not targeted or directed to the trucking industry.²⁷ The Eleventh Circuit found that these lower court rulings were contrary to Supreme Court decisions regarding the FAAAA preemption.²⁸ In addition, the court found that these decisions failed to recognize that the claims being asserted against the broker were not general state law claims asserted against a member of the general public but instead were specific allegations regarding the selection of a motor carrier, and are thus related to the performance of the broker's core transportation related services.²⁹

With respect to the safety exception to preemption, the Eleventh Circuit in *Aspen* found that Florida's general state law negligence standards address public safety standards and that Florida law regarding negligent hiring clearly related to safety concerns.³⁰ But it held that with respect to negligent hiring claims against brokers, the state law authority was not being exercised "with respect to motor vehicles."³¹ The Eleventh Circuit found that this was a requirement for the safety exception to apply.³² It also found that a general negligent hiring tort claim only had an indirect connection to a motor vehicle, because under federal law the broker's services are limited to

22. See *Aspen American Ins. Co.*, 65 F.4th at 1270; see also *Ye*, 74 F.4th at 466.

23. See *Aspen American Ins. Co.*, 65 F.4th at 1270; see also *Ye*, 74 F.4th at 466.

24. *Aspen American Ins. Co.*, 65 F.4th at 1264.

25. *Id.* at 1265.

26. *Id.* at 1272.

27. *Id.* at 1268.

28. *Id.*

29. *Id.*

30. *Aspen American Ins. Co.*, 65 F.4th at 1270.

31. *Id.* at 1270–72.

32. *Id.* at 1272.

the hiring of motor carriers that provide services related to motor vehicles.³³ The Eleventh Circuit also rejected legal arguments that a distinction should be made with respect to the preemption of negligent hiring claims involving bodily injury claims as opposed to property damage claims, because both types of incidents involve safety concerns.³⁴

The Seventh Circuit subsequently made similar rulings in *Ye* that involved negligent hiring claims against a broker for the wrongful death caused by a motor carrier the broker engaged with.³⁵ The Seventh Circuit found that allowing a claim against a motor carrier property broker recognizing common law negligence claims for the selection of a motor carrier would impose in the name of state law a new and clear duty of care on brokers that would have a significant economic effect on broker services.³⁶ Such claims were thus expressly preempted by the FAAAA.³⁷

In reaching its decision, the Seventh Circuit acknowledged that “many courts” have agreed that a state’s tort law is part of its “safety regulatory authority,” so as to support an application of the safety exception to FAAAA pre-emption.³⁸ But it concluded that it did not need to reach the issue because it agreed with the Eleventh Circuit that a negligent hiring claim against a broker does not satisfy the second half of the safety exception’s text that the claim is “with respect to motor vehicles.”³⁹ The Seventh Circuit further noted that the safety exception contains no mention of brokers—only motor carriers and motor vehicles.⁴⁰ The Court thus concluded that Congress viewed motor vehicle safety regulations separately and apart from the regulatory obligations imposed on brokers.⁴¹ Put differently, the Court found that “Congress required motor carriers—not brokers—to bear responsibility for motor vehicle accidents.”⁴²

The Seventh Circuit’s decision also directly addressed the Ninth Circuit’s 2020 ruling in *Miller* holding that the safety exception does apply to negligent hiring claims against brokers in motor vehicle highway accident injury claims.⁴³ The Seventh Circuit criticized the Ninth Circuit’s decision

33. Circuit Judge Jordan issued a concurrence in the judgment and most of the majority decision, stating that it was unnecessary for the court to address whether the negligence standard that the plaintiff was seeking to enforce was within Florida’s safety regulatory authority because the court’s determination that the negligent hiring claims against the broker are “not with respect to motor vehicles and doomed any claims that the preemption safety exemption applied.” *Id.* at 1272–73.

34. *Id.* at 1269.

35. *Ye*, 74 F.4th at 455, 466.

36. *Id.* at 459.

37. *Id.*

38. *Ye*, 74 F.4th at 460 (citing *Miller v. C.H. Robinson Worldwide, Inc.*, 976 F.3d 1016, 1026–29 (9th Cir. 2020); *Aspen American Ins. Co.*, 65 F.4th at 1267).

39. *Id.* at 460.

40. *Id.*

41. *Id.* at 462.

42. *Id.* at 463.

43. *Id.* at 464–65 (citing *Miller*, 976 F.3d at 1031).

as relying on a presumption against preemption and unduly emphasizing Congress' stated deregulatory purpose in enacting the FAAAA, while not focusing on the plain meaning and import of both Section 140501(c) and Title 49 of the U.S. Code as a whole.⁴⁴ The Seventh Circuit also disagreed with the Ninth Circuit's holding in *Miller* that by selecting a motor carrier, a broker was indirectly involved with the vehicles of the motor carrier and thus the broker's services could fall within the scope of the safety exception.⁴⁵ Instead, the Seventh Circuit stated that based on the plain text and the statutory scheme, the safety exception did not save a state court negligent hiring claim from being preempted under the FAAAA.⁴⁶

On November 6, 2023, a petition for certiorari by the Plaintiff in *Ye* was docketed with the Supreme Court.⁴⁷ In seeking Supreme Court review of the Seventh Circuit's decision, the Plaintiff noted the conflict between the Ninth Circuit's decision in *Miller* and the Seventh Circuit's decision in *Ye*.⁴⁸ In addition to arguing that the Seventh Circuit was wrong in its analysis of the FAAAA safety exception, the Plaintiff argued that the Seventh Circuit's decision incorrectly placed an emphasis on the nature of the entity being regulated, and not the nature of the state authority being invoked.⁴⁹ The plaintiff argued that, if allowed to stand, the Seventh Circuit decision would not allow plaintiffs to "hold a broker liable for its negligent hiring of an unsafe motor carrier even if the broker *knew* that the motor carrier would place dangerous motor vehicles on the road."⁵⁰ On January 8, 2024, the Supreme Court denied the petition for certiorari in *Ye*, similar to its 2022 denial of certiorari in *Miller*.⁵¹ It thus appears that the Supreme Court will wait for additional circuit courts to issue rulings on the interpretation and scope of the FAAAA preemption.

II. New Florida Tort Law

On March 24, 2023, Florida Gov. DeSantis signed into law the tort reform bill, numbered CS/CS/HB, 837 (HB 837).⁵² Because Florida is the venue for most cruise ship claims, any change to its tort laws have wide reaching impact.⁵³ The Bill introduced major changes in the area of Comparative

44. *Ye*, 74 F.4th at 465.

45. *Id.* at 465–66.

46. *Id.*

47. See generally Petition for Writ of Certiorari, *Ye*, 74 F.4th 453 (No. 22-1805).

48. *Id.* at 9.

49. *Id.* at 14.

50. *Id.* at 18.

51. See generally *Ye v. Globaltranz Eners., Inc.*, 2024 U.S. LEXIS 372 (U.S. Jan. 8, 2024); *Miller* 976 F.3d at 1016.

52. See generally Press Release, Ron DeSantis, Governor, Fla., Governor Ron DeSantis Signs Comprehensive Legal Reforms into Law (Mar. 24, 2023), <https://www.flgov.com/2023/03/24/governor-ron-desantis-signs-comprehensive-legal-reforms-into-law/> [<https://perma.cc/H8WC-9ETU>].

53. Gerald A. McGill, *Handling Cruise Line Passenger Claims*, 78 ALA. LAW. 30, 32 (2017).

Negligence, Bad Faith Insurance Claims, Fee Awards, Medical Bills and Proof of Medical Damages, Contingency Fee Multipliers, Premises Liability, and, most importantly, the Statute of Limitations.⁵⁴ In only ten months from coming into force, HB 837 spurred two developments in the Florida courts.⁵⁵

A. STATUTE OF LIMITATIONS

HB 837 reduced the time to file provided by § 95.11(4), Fla. Stat., Limitations other than for the recovery of real property, from five and four years respectively, to two years.⁵⁶ In particular, the amendments make the two-year limit applicable to actions founded on negligence, actions founded on professional malpractice, and actions for wrongful death.⁵⁷ On May 31, 2023, the United States District Court for the Middle District of Florida decided a question concerning the statute of limitations in a civil rights complaint under 42 U.S.C. § 1983.⁵⁸ Because Section 1983 does not contain a statute of limitations, the claims are governed by the forum state's residual personal injury statute of limitations, which, in Florida, was four years when the action accrued.⁵⁹ The Court declined to apply the new two-year statute of limitations, holding that the Amendment applies only to causes of action accruing after the Act's effective date.⁶⁰ This holding extends to all applications of the amending act and, therefore, applies also to shipping and international transportation actions in Florida.⁶¹ Unless specific limitations apply by international conventions or mandatory federal or state laws, all actions in Florida accruing after March 24, 2003, on negligence, wrongful death and premises, in the context of international shipping and transportation cases, will be subject to the new limit of two years.⁶²

54. See Governor Ron DeSantis Signs Comprehensive Legal Reforms into Law, *supra* note 52.

55. See Juliette Fairley, *Judge: Major Tort Reform Bill HB 837 Applies Retroactively to Lawsuits Filed before Effective Date*, FLA. REC. (June 5, 2023), <https://flarecord.com/stories/643504341-judge-major-tort-reform-bill-hb837-applies-retroactively-to-lawsuits-filed-before-effective-date> [<https://perma.cc/M5LK-QYUP>]; see also *Sapp v. Brooks*, No. 17-CA-5664, 2023 Fla. Cir. LEXIS 619, at *1 (Fla. Cir. Ct. 13th Dist. May 19, 2023).

56. HB § 837(2), (4)(a)–(h), 2023 Sess. (Fla. 2009), <https://www.flsenate.gov/Session/Bill/2023/837/BillText/er/PDF> [<https://perma.cc/3NQ4-DK9H>].

57. *Id.* at § 837(a)–(b), (e).

58. See Fairley, *supra* note 55.

59. *City of Hialeah, Fla. v. Rojas*, 311 F.3d 1096, 1103 (11th Cir. 1990).

60. *Williams v. Home Advantage Humana*, No. 8:23-cv-980-CEH-AAS, 2023 U.S. Dist. LEXIS 109269, at *4 n. 3 (M.D. Fla. May 31, 2023) (“Effective March 24, 2023”); Fla. Stat. § 95.11, was amended to reduce the statute of limitations for negligence claims from four years down to only two years. Fla. Stat. § 95.11(4)(a)(2023). However, the amendment is inapplicable to this action because Plaintiff's claims accrued in 2018, well before the effective date of the amendment. H.B. 837 (“The amendments made by this act to § 95.11, Florida Statutes, apply to cases of action accruing after the effective date of this act.”).

61. See *id.*

62. See *id.*

**B. INTERACTION OF HB 837 WITH ADMISSIBILITY OF
MEDICAL EVIDENCE**

Well known for its advertising, the law firm Morgan and Morgan filed a negligence lawsuit on behalf of Sharon Sapp and Stacy Chaney.⁶³ Within that action, the issue of proof of medical expenses became an issue as HB 837 stiffened the standards of proof for such cases.⁶⁴ The issue in that case was the manner of proving medical expenses: whether under the sharp limits of the new law or the prior statute 768.0427.⁶⁵

On May 19th, Circuit Court Judge Anne-Leigh Gaylord Moe of Hillsborough County entered an order granting the defendant's motion in limine, on the grounds that the new statute applies retroactively to lawsuits filed before HB 837's effective date because the changes it made were procedural.⁶⁶ Morgan & Morgan alone had filed 25,000 complaints prior to HB 837 coming into force as a protective measure, and the same has been done by other plaintiff firms.⁶⁷ An appeal to the Florida Second District Court of Appeals appears likely. For cases filed in Florida (as is often required by the venue selection clauses of cruise passenger contracts), this change in the law, if upheld, will impact proof of damages in all cases.⁶⁸ Attempts by plaintiffs' trial attorneys to avoid the consequences of the tort reform in Florida may be in vain if the appeal by the plaintiffs is unsuccessful.

C. COMPARATIVE NEGLIGENCE

This is arguably one of the major changes of the HB 837. Florida law had been a pure comparative negligence jurisdiction, meaning that the indemnity due by the tortfeasor would fall onto either party in the percentage proportional to their respective fault.⁶⁹ With section (6) of HB 837, the revised **percentage of fault** section now reads: "In a negligence action to which this section applies, any party found to be greater than fifty percent at fault for his or her own harm may not recover any damages."⁷⁰ The consequence of the statutory revision in Florida is that now the victim of the tort would recover nothing if he or she contributed to the tort with more than fifty percent of their negligence.⁷¹ This change will have serious

63. *Sapp v. Brooks*, No. 17-CA-5664, 2023 Fla. Cir. LEXIS 619, at *1 (Fla. Cir. Ct. 13th Dist. May 19, 2023).

64. *See id.* at *1, *5.

65. *See id.* at *2.

66. *Id.* at *58.

67. *See Fairley*, *supra* note 55.

68. *See Sapp*, 2023 Fla. Cir. LEXIS 619, at *8–9.

69. *See Hoffman v. Jones*, 280 So. 2d 431, 439 (Fla. 1973); Fla. Stat. § 768.81(3) (2023) ("In a negligence action, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability.").

70. Fla. Stat. § 768.81(6) (2023).

71. *See id.*

repercussions on the handling and planning of insurance liability for tort claims arising from cruise ships that are venued in Florida.⁷²

III. International Conventions

A. BEIJING CONVENTION ON THE JUDICIAL SALE OF SHIPS⁷³

On September 5, 2023, the United Nations opened for signature the Convention on the International Effects of Judicial Sales of Ships (“Beijing Convention on the Judicial Sale of Ships”).⁷⁴ The ceremony was held in Beijing, attended by thirty plus Nations, and signed by fifteen.⁷⁵

Prepared by UNCITRAL and adopted by the United Nations General Assembly on December 7, 2022, the Convention establishes harmonized rules for the international effect of ships’ judicial sales, but carefully preserving domestic laws.⁷⁶ This new regime may have good effects on the ship market, improving creditors’ expectations.⁷⁷

On June 26, 2023, Bangladesh deposited the instrument of accession to the International Convention for the Safe and Environmentally Sound Recycling of Ships, with the International Maritime Organization (IMO) Secretary-General, at the IMO Headquarters in London, thus setting the Convention entering into force on June 26, 2025.⁷⁸ The aim of the Convention is to ensure that ships recycled at the end of their lives do not pose risks to human health and the environment.⁷⁹

IV. Rulemaking on Unreasonable Refusal to Deal or Negotiate with Respect to Vessel Space Accommodations

On June 16, 2022, President Biden signed the Ocean Shipping Reform Act of 2022 (OSRA22) into law.⁸⁰ OSRA22 required the Federal Maritime Commission (FMC) to initiate a rulemaking defining unreasonable refusal

72. *See id.*

73. *See generally* Press Release, U.N. Info. Serv. Vienna, The United Nations “Beijing Convention on the Judicial Sale of Ships” Opens for Signature in Beijing (Sept. 5, 2023), <https://unis.unvienna.org/unis/en/pressrels/2023/unisl348.html> [<https://perma.cc/25NQ-5EY8>].

74. *Id.*

75. *Id.*

76. *Id.*

77. *See generally* Jacqueline Tan, *The Hong Kong Convention enters into force on 26 June 2025*, UK P&I (July 18, 2023), <https://www.ukpandi.com/news-and-resources/articles/2023/the-hong-kong-convention-enters-into-force-on-26-june-2025/#:~:text=On%2026%20June%202023%2C%20Bangladesh,Ships%20> [<https://perma.cc/A5QL-MDME>].

78. *Hong Kong Ship Recycling Convention Set to Enter into Force*, IMO (June 26, 2023), <https://www.imo.org/en/MediaCentre/PressBriefings/pages/Hong-Kong-Convention-set-to-enter-into-force-.aspx> [<https://perma.cc/Y4PX-DL8R>].

79. *Id.*

80. Ocean Shipping Reform Act of 2022, Pub. L. No. 117-146, 136 Stat. 1272 (2022).

to deal or negotiate with respect to vessel space under section 41104(a)(10).⁸¹ On September 13, 2022, the FMC issued a Notice of Proposed Rulemaking (NPRM) applying a requirement of OSRA22 to define “unreasonableness” under 46 U.S.C. 41104(a)(10)⁸² which restricts a common carrier, either alone or working in conjunction with any other person directly or indirectly, from unreasonably refusing to deal or negotiate with respect to vessel space accommodations provided by an ocean common carrier.⁸³

To establish a violation for an unreasonable refusal to deal or negotiate, the FMC proposed in the NPRM that complaints must meet each of the following 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.⁸⁴ Moreover, the Commission proposed to define “vessel space accommodation” as “space provided aboard a vessel of an ocean common carrier for laden containers being imported to, or exported from, the United States,” and “unreasonable” as “an ocean common carrier’s refusal to deal or negotiate as prohibited under 46 U.S.C. 41104(a)(10).”⁸⁵ The NPRM proposed to define “reasonable” based on three factors: (1) whether the ocean common carrier follows a documented export strategy that enables the efficient movement of export cargo; (2) whether the ocean common carrier engaged in good faith negotiations, and made business decisions that were subsequently applied in a fair and consistent manner; and (3) the existence of legitimate transportation factors such as factors that incorporate the genuine operational considerations underlying an ocean common carrier’s practical ability to accommodate laden cargo for import or export, and any other factors the Commission deems relevant.⁸⁶ Once the three elements have been established, the burden of production shifts to allow for an ocean common carrier to establish why its actions in refusing vessel space were not unreasonable.⁸⁷

81. *Id.* at 1276 (“Not later than thirty days after the date of enactment of this Act, the Federal Maritime Commission, in consultation with the Commandant of the United States Coast Guard, shall initiate a rulemaking defining unreasonable refusal to deal or negotiate with respect to vessel space under § 41104(a)(10) of Title 46, as amended by this section. The Federal Maritime Commission shall issue a final rule not later than six months after the date of enactment of this Act.”).

82. Definition of Unreasonable Refusal To Deal or Negotiate With Respect to Vessel Space Accommodations Provided by an Ocean Common Carrier, 87 Fed. Reg. 57674, 57674 (proposed Sept. 21, 2022) (to be codified at 46 C.F.R. pt. 542).

83. *Id.*

84. *Id.* at 57676.

85. *Id.*; 46 U.S.C. § 41104(a)(10) (“Unreasonably refuse to deal or negotiate, including with respect to vessel space accommodations provided by an ocean common carrier . . .”).

86. Definition of Unreasonable Refusal To Deal or Negotiate With Respect to Vessel Space Accommodations Provided by an Ocean Common Carrier, 87 Fed. Reg. at 57678–79.

87. *Id.* at 57679 (explaining that such justification for a refusal to deal or negotiate may be in the form of a certification from the ocean carrier declaring that “the decision and supporting evidence is correct and complete.”).

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On January 25, 2023, the Commission announced the issuance of a Supplemental NPRM (SNPRM)⁸⁸ in which it proposed to: (1) define “unreasonable” by stating a general principle and a non-exhaustive list of examples of unreasonable conduct; (2) establish the elements of a refusal of cargo space accommodations; (3) revise the definition of “transportation factors” to focus on vessel operation considerations; (4) clarify that vessel space services were already included in the definition of vessel space accommodations; (5) define “documented export policy” and add mandatory document export policy requirements; and (6) remove the voluntary certification provision proposed by the NPRM.⁸⁹ In addition to the above, the SNPRM examines the correlation between 46 U.S.C. 41104(a)(3) and 41104(a)(10) and the elements required to establish a violation under each of these provisions.⁹⁰

While the SNPRM proposes elements that the FMC may consider when evaluating the reasonableness of an ocean common carrier’s refusal to provide cargo space accommodations, the elements vary contingent on whether a violation falls under 46 U.S.C. 41104(a)(3) or 46 U.S.C. 41104(a)(10).⁹¹ Section 41104(a)(3) applies when a refusal occurs at the execution stage such as after the parties reached a deal on service terms and conditions.⁹² Conversely, section 41104(a)(10) applies during the negotiation stage when the parties are initiating negotiations over terms and conditions of service.⁹³ If a violation constitutes a 46 U.S.C. 41104(a)(10) claim, the Commission proposes that it may consider: (1) whether the ocean common carrier followed a documented export policy that enables the efficient movement of export cargo; (2) whether the ocean common carrier made a good faith effort to mitigate the impact of a refusal; (3) whether the refusal was based on legitimate transportation factors; and (4) any other factors relevant in determining whether there was a refusal in that particular case.⁹⁴ If a violation falls under 46 U.S.C. 41104(a)(3), the Commission proposes that it may consider: (1) blank sailings or schedule changes with no advance notice or with insufficient advance notice; (2) vessel capacity limitations not justified by legitimate transportation factors; (3) failing to alert or notify shippers with confirmed bookings; (4) scheduling insufficient time for vessel loading so that cargo is constructively refused; (5) providing inaccurate or unreliable vessel information; (6) categorically or systematically excluding

88. *FMC to Seek Additional Comments on Unreasonable Refusal to Deal Rulemaking*, FED. MAR. COMM’N (Jan. 25, 2023), <https://www.fmc.gov/fmc-to-seek-additional-comments-on-unreasonable-refusal-to-deal-rulemaking/> [https://perma.cc/F6VT-X35M].

89. Definition of Unreasonable Refusal To Deal or Negotiate With Respect to Vessel Space Accommodations Provided by an Ocean Common Carrier, 88 Fed. Reg. 38789, 38789–90 (proposed June 14, 2023) (to be codified at 46 C.F.R. pt. 542).

90. *Id.* at 38791.

91. *Id.* at 38791.

92. *Id.*

93. *Id.*

94. *Id.* at 38794.

exports in providing cargo space accommodations; or (7) any other conduct the Commission finds unreasonable.⁹⁵

The SNPRM defines “unreasonable” for both 46 U.S.C. 41104(a)(3) and 41104(a)(10) claims as “ocean common carrier conduct that unduly restricts the ability of shippers to access ocean freight carriage services.”⁹⁶ To demonstrate the type of conduct the Commission would deem to be unreasonable, the Commission proposed the following non-exhaustive list: (1) quoting rates that are so far above market as to render the quote not a serious negotiation; (2) categorically or systematically excluding exports in providing vessel space accommodations; and (3) any other interactions or communications with the shipper or other conduct the Commission finds unreasonable.⁹⁷ The FMC proposes to define “transportation factors” to include only “weather related scheduling considerations” to guarantee that scheduling within the control of the ocean common carrier is not used as a factor.⁹⁸ Therefore, legitimate transportation factors must exist, be outside the vessel operators’ control, and relate to the facts of a specific transaction or vessel.⁹⁹

The Commission sought to broaden the definition of “vessel space accommodations” to acknowledge that vessel space services are included in the proposed definition.¹⁰⁰ As such, “vessel space accommodations” means “space available aboard a vessel of an ocean common carrier for laden containers being imported to or exported from the United States.”¹⁰¹ In addition, “vessel space accommodations also includes the services necessary to access or book vessel space accommodations.”¹⁰² The SNPRM modifies the proposal made in the NPRM and proposes the mandate that ocean common carriers submit a documented export policy once per calendar year that includes pricing strategies, services offered, strategies for equipment provision, and descriptions of markets served.¹⁰³ The SNPRM also removed the voluntary self-certification provision proposed previously in the NPRM.¹⁰⁴ Currently, the FMC is considering the comments received from the SNPRM. It remains unclear when a Final Rule will be issued by the Commission.

V. Taxation of International Transportation

With respect to the taxation of international transportation, there are two model income tax conventions on which bilateral income taxation

95. Definition of Unreasonable Refusal To Deal or Negotiate With Respect to Vessel Space Accommodations Provided by an Ocean Common Carrier, 88 Fed. Reg. at 38807.

96. *Id.* at 38804.

97. *Id.*

98. *Id.* at 38803.

99. *Id.*

100. *Id.* at 38790.

101. Definition of Unreasonable Refusal To Deal or Negotiate With Respect to Vessel Space Accommodations Provided by an Ocean Common Carrier, 88 Fed. Reg. at 38807.

102. *Id.*

103. *Id.*

104. *Id.* at 38803.

conventions are based: those published by the United Nations Organisation for Economic Cooperation and Development (OECD)¹⁰⁵ and by the United Nations (UN).¹⁰⁶ Article 8 of each of these provides, generally, that the international operation of ships and aircraft are subject to tax only in the jurisdiction where the entity providing the transportation is resident.¹⁰⁷ This concept of full reciprocity for shipping and air transport is contained in approximately 3,500 bilateral income tax treaties.¹⁰⁸ The UN Model Convention also contains an alternative provision, applicable only to shipping, that permits source-based taxation based on an appropriate allocation of profits.¹⁰⁹ Some variation of this provision is contained in less than ten percent of bilateral income tax treaties.¹¹⁰

A. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT

Although the OECD has not announced plans for modification of its model convention, it has, since before 2013, been engaged in the “Base Erosion and Profit Shifting” (BEPS) project at the behest of the G20 countries.¹¹¹ This project has resulted in fifteen separate actions, but one in particular, “Tax Challenges Arising from Digitalisation,” currently has, or will have, the greatest impact on international transportation. The OECD expanded participation in the BEPS project to all (currently) 145¹¹² members of the OECD/G20 Inclusive Framework (IF). The IF has agreed on what is known as the Two-Pillar Solution. Pillar One establishes taxing rights in market jurisdictions for a defined portion of residual profits.¹¹³ When Pillar One

105. See generally Organisation for Econ. Co-operation and Dev., Model Tax Convention on Income and on Capital, Nov. 21, 2017 [hereinafter OECD MC].

106. See generally U.N., Model Double Taxation Convention Between Developed and Developing Countries, 2021 [hereinafter UN MC].

107. OECD MC, *supra* note 105, art. 8; UN MC, *supra* note 106, at art. 8.

108. Bob Michel & Tâtiana Falcão, *Taxing Profits from International Maritime Shipping in Africa: Past, Present and Future of UN Model Article 8 (Alternative B)* art. 8 (Int’l Ctr. for Tax & Dev., Working Paper No. 133, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4193094 [<https://perma.cc/6PDQ-L85P>].

109. UN MC, *supra* note 106, at art. 8. (Alternative B).

110. Comm. of Experts on Int’l Coop. in Tax Matters, Co-Coordination Report: Proposal for a Revision to Article 8 (Alternative B) of the United Nations Model Double Taxation Convention between Developed and Developing Countries ¶ 9, U.N. Doc. E/C.18/2023/CRP.44 4 (Sept. 27, 2023) [hereinafter CRP.44].

111. See *Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy*, OECD 17 (Oct. 2021), <https://www.oecd.org/tax/beps/brochure-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf> [<https://perma.cc/7JMY-NWDL>] (tracing the project from its genesis in 1996).

112. *Members of the OECD/G20 Inclusive Framework on BEPS*, OECD (Nov. 15, 2023), <https://www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf> [<https://perma.cc/D8SN-MVYX>].

113. *Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint: Inclusive Framework on BEPS*, OECD 11 (2020), <https://www.oecd-ilibrary.org/docserver/beba0634-en.pdf?expires=1712033982&id=id&accname=guest&checksum=4680AED852468D33F33D052F7C452429> [<https://perma.cc/9SZP-EK5Q>].

is adopted, multinational enterprises with revenue greater than €20 billion and profitability above ten percent will be required to allocate twenty-five percent of profit in excess of the ten percent threshold to jurisdictions in which it derives at least €1 billion in revenues.¹¹⁴ Under the current draft pronouncements, this allocated revenue (“Amount A”) will, in the case of international transportation, be allocated among countries based on i) place of discharge for passengers; and ii) fifty/fifty between place of loading and place of discharge for freight.¹¹⁵

Pillar One also identifies an additional amount subject to local taxation (“Amount B”) which provides for the local taxation of “baseline” marketing and distribution activities under a simplified transfer pricing structure.¹¹⁶ Amount B is currently applicable only to the wholesale distribution of goods and, with this limitation, will be inapplicable to most aspects of international transport.¹¹⁷ Pillar One will be implemented through the adoption of a multilateral income tax convention, a draft of which has been developed and released by the OECD.¹¹⁸

The second leg of the Two-Pillar Solution is the fifteen percent minimum tax of Pillar Two, also known as the Global Anti-Base Erosion (GloBE) Model Rules.¹¹⁹ Pillar Two contains an exclusion for international shipping subject to several preconditions. First, and likely most important, is that the “constituent entity” have its “strategic or commercial management of all ships . . . effectively carried on from within the jurisdiction where the Constituent Entity is located.”¹²⁰ Thus, an entity formed in Country A,

114. A lower threshold of €250,000 of revenue applies to jurisdictions with GDP lower than €40 billion. *The Multilateral Convention to Implement Amount A of Pillar One*, OECD 6 (Dec. 2023), <https://www.oecd.org/tax/beps/multilateral-convention-amount-a-pillar-one-factsheets.pdf> [https://perma.cc/65DU-4CAP].

115. *Pillar One – Amount A: Draft Model Rules for Nexus and Revenue Sourcing*, OECD 29, 30 (2022), <https://web-archiver.oecd.org/2022-02-04/623615-public-consultation-document-pillar-one-amount-a-nexus-revenue-sourcing.pdf> [https://perma.cc/2X94-EGTB].

116. *Pillar One – Amount B*, OECD 7 (2023), <https://www.oecd.org/tax/beps/public-consultation-document-pillar-one-amount-b-2023.pdf> [https://perma.cc/P7D9-BYW9].

117. *Id.*

118. *The Multilateral Convention to Implement Amount A of Pillar One*, OECD (Oct. 11, 2023), <https://www.oecd.org/tax/beps/multilateral-convention-to-implement-amount-a-of-pillar-one.pdf> [https://perma.cc/2F88-MQK8]; *Explanatory Statement to the Multilateral Convention to Implement Amount A of Pillar One*, OECD (Oct. 11, 2023), <https://www.oecd.org/tax/beps/explanatory-statement-multilateral-convention-to-implement-amount-a-of-pillar-one.pdf> [https://perma.cc/5WL6-TL4B].

119. Taxpayers with no foreign presence or less than €750 million in consolidated revenue are outside its scope. *Tax Challenges Arising from Digitalisation – Report on Pillar Two Blueprint: Inclusive Framework on BEPS, OECD/G20 Base Erosion and Profit Shifting Project*, OECD 15 (2020), <https://www.oecd-ilibrary.org/docserver/abb4c3d1-en.pdf?expires=1712097365&id=id&accname=guest&checksum=BFEE094B6BFF8614DC9767808BCCB786> [https://perma.cc/P9ZV-EGDU].

120. *Tax Challenges Arising from the Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two): Inclusive Framework on BEPS*, OECD art. 3.3.6. (2021), https://www.oecd-ilibrary.org/taxation/tax-challenges-arising-from-digitalisation-of-the-economy-global-anti-base-erosion-model-rules-pillar-two_782bac33-en [https://perma.cc/N8T8-4X76].

with crewing operations in Country B and technical maritime operations in Country C may not qualify for the exemption. Second, the exclusion divides income into two classes—International Shipping Income (ISI) and Qualified Ancillary International Shipping Income (QAISI).¹²¹ To be included within the shipping exclusion, the QAISI of all constituent entities can not exceed fifty percent of those entities ISI.¹²² QAISI includes income from short term bareboat charters, leasing and storage of containers, detention charges, provision of engineering, maintenance, cargo handling, and other services to other shipping enterprises, among other activities.¹²³

If an entity fails to qualify for the shipping exclusion under either the “management or control” test or the QAISI limitation, Pillar Two contains a Substance Based Income Exclusion (SBIE) which is designed to exclude from the minimum tax base a return on assets and labor. Initially, the exclusion will be the sum of five percent of eligible payroll costs and five percent of the carrying value of eligible tangible assets.¹²⁴ But eligible payroll costs and eligible tangible assets are only those located in a jurisdiction to which the income subject to tax is related.¹²⁵ This will exclude any benefit for payroll and assets in transit outside the territorial limits of any jurisdiction.

How Pillar One will develop and if it will be adopted over the current objections of the United States are unresolved questions.¹²⁶ Currently, 140 countries have committed to adopt Pillar Two but, due to their complexity, some countries have adopted only a portion of the OECD rules and staged implementation is expected.¹²⁷ The multilateral treaty to coordinate the rules is not yet in force.¹²⁸

B. UNITED NATIONS

Unlike the OECD’s work on a project separate from its model convention, the United Nations has made and proposed changes to its

121. *Id.*

122. *Id.* art. 3.3.4.

123. *Id.* art. 3.3.3.

124. *Id.* art. 5.3.3, 5.3.4.

125. *Id.*

126. See, e.g., Paola Tamma & Bjarke Smith-Meyer, *Yellen Says US Is Not Ready to Sign Global Tax Treaty Just Yet*, POLITICO (Oct. 16, 2023), <https://www.politico.eu/article/janet-yellen-us-not-ready-to-sign-global-tax-treaty/> [<https://perma.cc/VD2B-TJDJ>].

127. See *Minimum Tax Implementation Handbook (Pillar Two)*, OECD/G20 Base Erosion and Profit Shifting Project, OECD 27 (2023), <https://www.oecd.org/tax/beps/minimum-tax-implementation-handbook-pillar-two.pdf> [<https://perma.cc/G73P-HVQD>]. For the current status of Pillar Two implementation, PricewaterhouseCoopers has an OECD Pillar Two Country Tracker Online. *PwC’s Pillar Two Country Tracker Provides the Status of Pillar Two Implementation in Different Countries and Regions*, PWC, <https://www.pwc.com/gx/en/services/tax/pillar-two-readiness/country-tracker.html> [<https://perma.cc/J2CC-QAG7>] (last visited Apr. 16, 2024).

128. *Multilateral Convention to Facilitate the Implementation of the Pillar Two Subject to Tax Rule*, OECD (Sept. 15, 2023), <https://www.oecd.org/tax/beps/multilateral-convention-to-facilitate-the-implementation-of-the-pillar-two-subject-to-tax-rule.htm> [<https://perma.cc/LMV7-99WP>].

model which, when adopted in bilateral conventions will impact the taxation of international transportation. The United Nations Committee of Experts on International Cooperation in Tax Matters (“the Committee”)¹²⁹ has undertaken or is undertaking projects that impact the international transportation taxation norm. First, the Committee has adopted a change to the UN MC that created a “subject-to-tax” rule.¹³⁰ Under this rule, Article 1 of the UN MC is amended to provide that it (and any bilateral convention including the provision) will not apply if the income is not subject to a minimum agreed statutory tax rate.¹³¹ Consequently, if the countries agree a minimum statutory tax rate of fifteen percent, a shipping country resident in the European Union and electing under its country’s tonnage tax system, would be considered to be taxed below the agreement minimum rate and ineligible for exemption of its earnings from source country taxation under Article 8.¹³²

Second, the Committee is considering a revision to Article 8, Alternative B. The local taxes to which Alternative B generally applies are often referred to as “freight taxes” although they generally apply to both freight and passenger transportation. In operation, they apply a country’s statutory tax rate to a defined amount of income.¹³³ Most significantly, the proposed changes would expand Alternative B to air transportation.¹³⁴ This proposed expansion of Alternative B and the potential application of source-based taxation was immediately noted by the airline industry.¹³⁵ Finally, substantive changes to Article 8, Alternative B are suggested which, at this stage, do not integrate smoothly with freight taxes imposed globally.

Further than the changes to the UN MC initiated by the Committee, the General Assembly adopted a resolution which would initiate

129. The UN MC is not subject to approval by the General Assembly and is instead drafted and maintained by a twenty-five-member committee of experts appointed by Governments to act in their expert capacity, subsidiary to the UN Economic and Social Council (ECOSOC). See U.N. Tax Comm., About the Committee of Experts on International Cooperation in Tax Matters, <https://financing.desa.un.org/what-we-do/ECOSOC/tax-committee/about> [<https://perma.cc/78H6-WGGE>] (last visited Apr. 16, 2024). This unique relationship has its origins in the League of Nations. See SUNITA JOGARAJAN, DOUBLE TAXATION AND THE LEAGUE OF NATIONS 14–21 (2018).

130. Comm. of Experts on Int’l Coop. in Tax Matters, Report on the Twenty-Sixth Session ¶ 19, U.N. Doc. E/2023/45/Add.1-E/C.18.2023/2 (Mar. 2023). This change to the UN MC loosely parallels the OECD BEPS Pillar 2.

131. Comm. of Experts on Int’l Coop. in Tax Matters, Co-Coordination Report: Proposal for the Inclusion of a General “Subject to Tax” Rule in the United Nations Model Double Taxation Convention between Developed and Developing Countries ¶ 5, U.N. Doc. E/C.18/2023/CRP.12 (Mar. 10, 2023).

132. *Id.*

133. See, e.g., *Income Tax Assessment Act 1936* (Cth) § 129 (Austl.). Deems five percent of outbound freight to be the combination of profit and source subject to Australian income tax.

134. CRP.44, *supra* note 110, at ¶ 16.

135. Ligia Fonseca, *Proposed Changes to the UN Tax Model Convention – 10 Reasons Why Article 8 Must Be Kept Unchanged for Airlines*, KLUWER INT’L TAX BLOG (Oct. 12, 2023), <https://kluwertaxblog.com/2023/10/12/proposed-changes-to-the-un-tax-model-convention-10-reasons-why-article-8-must-be-kept-unchanged-for-airlines/> [<https://perma.cc/M36L-4PGQ>].

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intergovernmental discussion on ways to strengthen the “inclusiveness and effectiveness” of international tax cooperation, including the possibility of developing an international tax cooperation framework or agreement.¹³⁶ The UN initiative is due, in part, to the perceived limited effectiveness of the rules produced by the OECD to respond to the needs of the developing countries and the OECD procedural rules that prevent full participation by developing countries in the process.¹³⁷

How the UN action will interface with, or conflict with, the work performed by the OECD can not be predicted. But the transportation provisions currently included in the UN Model Convention can reasonably be expected to persist.

136. G.A. Res. A/C.2/78/L.18/Rev.1, at 2 (Nov. 15, 2023).

137. U.N. Secretary-General, *Promotion of Inclusive and Effective International Tax Cooperation at the United Nations* ¶¶ 41–42, U.N. Doc. A/78/235 (July 26, 2023).

International Anti-Money Laundering

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This Article reviews significant international legal developments in the areas of International Anti-Money Laundering (AML) law and policy in 2023.

I. Introduction, International Developments, and Major Themes

On February 24, 2023, the Financial Action Task Force (FATF) decided for the first time in its history to suspend the membership of the Russian Federation in connection with Russia's invasion of Ukraine.¹ At the same time, the FATF emphasized that the Russian Federation "must continue to meet its financial obligations" and that the Russian Federation "will remain a member of the Global Network as an active member of the Eurasian Group on Combating Money Laundering."² Sanctions against Russia were extensively covered in the 2022 YIR and are not included in this update.

Additionally, the FATF updated its list of "jurisdictions under increased monitoring" and its list of "high-risk jurisdictions subject to a call for action" at its plenary meetings in February 2023,³ June 2023,⁴ and October 2023.⁵ New jurisdictions subject to increased monitoring include Nigeria,⁶ South Africa,⁷ Bulgaria,⁸ Cameroon,⁹ Croatia,¹⁰ Vietnam,¹¹ Morocco,¹² and Cambodia.¹³ Further, Albania,¹⁴ the Cayman Islands,¹⁵ and Panama¹⁶ were removed from the list of jurisdictions under increased monitoring, as they have addressed their technical deficiencies to meet their commitments to FATF.

On virtual assets, the FATF released a report in June 2023 revealing that based on aggregated data from ninety-eight mutual evaluation reports and

1. See generally *FATF Statement on the Russian Federation*, FATF (Feb. 24, 2023), <https://www.fatf-gafi.org/en/publications/Fatfgeneral/fatf-statement-russian-federation.html> [https://perma.cc/L2D4-WDED].

2. *Id.*

3. *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/GZ9F-L6SL].

4. *Jurisdictions Under Increased Monitoring – 23 June 2023*, FATF (June 23, 2023), <https://www.fatf-gafi.org/en/publications/High-risk-and-other-monitored-jurisdictions/Increased-monitoring-june-2023.html> [https://perma.cc/D8LQ-NTG4].

5. *Outcomes FATF Plenary, 25–27 October 2023*, FATF (Oct. 27, 2023), <https://www.fatf-gafi.org/en/publications/Fatfgeneral/outcomes-fatf-plenary-october-2023.html> [https://perma.cc/S3BU-SVB3].

6. *Outcomes FATF Plenary, 22–24 February 2023*, *supra* note 3.

7. *Id.*

8. *Outcomes FATF Plenary, 25–27 October 2023*, *supra* note 5.

9. *Jurisdictions Under Increased Monitoring – 23 June 2023*, *supra* note 4.

10. *Id.*

11. *Id.*

12. *Outcomes FATF Plenary, 22–24 February 2023*, *supra* note 3.

13. *Id.*

14. *Outcomes FATF Plenary, 25–27 October 2023*, *supra* note 5.

15. *Id.*

16. *Id.*

follow-ups over four years, regulatory standards for virtual assets and virtual asset service providers (VASPs) were not yet implemented by three-quarters of jurisdictions, with deficiencies in several key areas, including a lack of adequate risk assessments, failure to implement travel rule compliance, and emerging risks from decentralized finance applications and unhosted wallets.¹⁷ The report should be tied to another major trend for 2023: 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, the Crypto-Asset Reporting Framework (CARF).¹⁸ 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.¹⁹ CARF is meant to ensure that all assets covered under the new tax reporting framework also fall within the scope of Anti-Money Laundering/Know Your Customer (AML/KYC) obligations.²⁰ Due diligence procedures will be based on the Common Reporting Standard (CRS) self-certification process and existing AML/KYC standards.²¹

Finally, the FATF Recommendations were updated in November 2023, and additional guidance published in 2023 covered Guidance on Beneficial Ownership of Legal Persons,²² Best Practices on Combating the Abuse of Non-Profit Organizations,²³ and Illicit Financial Flows from Cyber-enabled Fraud.²⁴ FATF's big themes of 2022 were therefore continued in 2023, including the increased focus on beneficial ownership, virtual assets, and cryptocurrencies, as well as cybersecurity issues.²⁵ Concerning cybersecurity issues, we remember that in October 2022, the G7 Finance Ministers and Central Bank Governors approved the publication of a set of principles

17. *Virtual Assets: Targeted Update on Implementation on the FATF Standards on Virtual Assets and Virtual Asset Service Providers*, FATF (June 27, 2023), <https://www.fatf-gafi.org/content/fatf-gafi/en/publications/Fatfrecommendations/targeted-update-virtual-assets-vasps-2023.html> [<https://perma.cc/AM9M-PSR4>].

18. See OECD, CRYPTO-ASSET REPORTING FRAMEWORK AND AMENDMENTS TO THE COMMON REPORTING STANDARD (OECD Publishing, Paris 2022), <https://www.oecd.org/tax/exchange-of-tax-information/crypto-asset-reporting-framework-and-amendments-to-the-common-reporting-standard.pdf> [<https://perma.cc/7PAX-BH2X>].

19. *Id.*

20. *Id.* at 11.

21. *Id.*

22. See generally *Guidance on Beneficial Ownership of Legal Persons*, FATF (Mar. 10, 2023), <https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Guidance-Beneficial-Ownership-Legal-Persons.html> [<https://perma.cc/3828-V9QK>].

23. See generally *Best Practices on Combating the Abuse of Non-Profit Organisations*, FATF (Nov. 16, 2023), <https://www.fatf-gafi.org/en/publications/Financialinclusionandnpoissues/Bpp-combating-abuse-npo.html> [<https://perma.cc/VCI8-T5SK>].

24. See generally *Illicit Financial Flows from Cyber-enabled Fraud*, FATF (Nov. 9, 2023), <https://www.fatf-gafi.org/en/publications/Methodsandrends/illicit-financial-flows-cyber-enabled-fraud.html> [<https://perma.cc/VC6V-YV64>].

25. See generally *Guidance on Beneficial Ownership of Legal Persons*, *supra* note 22; *Best Practices on Combating the Abuse of Non-Profit Organisations*, *supra* note 23; *Illicit Financial Flows from Cyber-enabled Fraud*, *supra* note 24.

on third-party cyber risk management²⁶ and countering ransomware risks, including recommendations for public and private financial entities on addressing the growing threat of ransomware attacks and providing the minimum measures to be adopted both to prevent and to mitigate the impact of possible attacks.²⁷

In October 2023, the Wolfsberg Group, an association of twelve global banks that aims to develop frameworks and guidance for the management of financial crime risks, issued revised payment transparency standards,²⁸ addressing the growing complexity of global payments. The Wolfsberg Group had previously issued updated guidelines on effective anti-bribery and corruption compliance programs in April 2023.²⁹

II. Regional Developments

A. AMERICAS

1. U.S. Anti-Money Laundering Regulatory Updates

In the United States, the most critical development in 2023 has been the continued conversation around the U.S. Department of the Treasury's Financial Crimes Enforcement Network's (FinCEN) regulatory activity regarding the Corporate Transparency Act of 2021 (CTA).³⁰ FinCEN issued its highly anticipated rule implementing the beneficial ownership reporting requirements on September 30, 2022.³¹ The rule 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.³² Beginning on January 1, 2024, the rule requires all covered entities (reporting companies) 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.³³ As issued, the rule requires reporting

26. See EUR. CENT. BANK, G7 FUNDAMENTAL ELEMENTS FOR THIRD PARTY CYBER RISK MANAGEMENT IN THE FINANCIAL SECTOR 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].

27. See *id.* at 5.

28. THE WOLFSBERG GROUP, WOLFSBERG GROUP PAYMENT TRANSPARENCY STANDARDS 2 (Oct. 19, 2023), <https://wolfsberg-group.org/news/50> [https://perma.cc/P7RK-VP3D].

29. See generally THE WOLFSBERG GROUP, WOLFSBERG ANTI-BRIBERY AND CORRUPTION COMPLIANCE PROGRAMME GUIDANCE 1 (Apr. 17, 2023), <https://wolfsberg-group.org/news/39> [https://perma.cc/32DH-A6U6].

30. 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://www.federalregister.gov/documents/2022/09/30/2022-21020/beneficial-ownership-information-reporting-requirements> [https://perma.cc/X8EV-DW84].

31. *Id.*

32. *Id.*

33. *Id.* at 59591–92.

companies to make such filing within thirty days of formation.³⁴ Reporting information will also have to be updated within thirty days of any change.³⁵ Companies formed prior to January 1, 2024, will have until January 1, 2025, to make initial filings.³⁶

On November 30, 2023, FinCEN issued a rule extending the deadline for certain reporting companies to file their beneficial ownership information (BOI) reports with FinCEN.³⁷ Reporting companies created or registered in 2024 will have ninety calendar days from the date of receiving actual or public notice of their creation or registration becoming effective to file their initial reports.³⁸ FinCEN will not accept BOI reports from reporting companies until January 1, 2024.³⁹

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.⁴⁰ The rule does not provide for penalties in the case of negligent or reckless failures.⁴¹

The September 2022 rule was the first of three rulemakings required to implement the CTA.⁴² It addressed neither access to the information collected and safeguards to ensure that it is secured, nor required revisions to FinCEN's customer due diligence rules to incorporate this new process.⁴³ On December 15, 2022, FinCEN issued a Notice of Proposed Rulemaking implementing provisions of the CTA on security and confidentiality to protect sensitive personally identifiable information reported to FinCEN.⁴⁴ On November 8, 2023, FinCEN issued a final rule on the use of FinCEN identifiers for reporting beneficial ownership information of entities.⁴⁵ The rule specifies when and how entities required to report beneficial ownership

34. *Id.* at 59591.

35. *Id.* at 59592.

36. *See generally* Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. at 59498.

37. *See* Beneficial Ownership Information Reporting Deadline Extension for Reporting Companies Created or Registered in 2024, 88 Fed. Reg. 83499 (Nov. 30, 2023) (to be codified at 31 C.F.R. pt. 1010), <https://www.govinfo.gov/content/pkg/FR-2023-11-30/pdf/2023-26399.pdf> [<https://perma.cc/S6T3-2BHD>].

38. *Id.* at 83502.

39. *Id.*

40. Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. at 59596.

41. *See id.*

42. *See* Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. at 59498; *see also* 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); *see also* Use of FinCEN Identifiers for Reporting Beneficial Ownership Information of Entities, 88 Fed. Reg. 76995 (Nov. 8, 2023) (to be codified at 31 C.F.R. 1010).

43. *See* Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. at 59596.

44. *See* Beneficial Ownership Information Access and Safeguards, and Use of FinCEN Identifiers for Entities, 87 Fed. Reg. at 77404.

45. *See* Use of FinCEN Identifiers for Reporting Beneficial Ownership Information of Entities, 88 Fed. Reg. at 76995.

information to FinCEN may use a FinCEN identifier to report beneficial ownership information.⁴⁶ FinCEN has not yet issued a final rule regarding beneficial information access and safeguards.

Another closely watched area of development in the U.S. AML world remains the proposed regulation under the Establishing New Authorities for Business 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.⁴⁷ 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).⁴⁸ If passed, the legislation could result in significant new regulatory burdens for corporate formation agents, trustees, and law or accounting firms.⁴⁹ These regulatory burdens could result in implementation of robust 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).⁵⁰

The Enablers Act has received broad bipartisan support in the U.S. Congress.⁵¹ But, the U.S. Senate nevertheless blocked passage of the Enablers Act in December 2022.⁵² The legislation is expected to be reintroduced as a standalone bill to face more lengthy debate over its specific terms in the near future.⁵³ Another developing area is digital assets regulation. In December 2022, FinCEN announced digital asset regulation as a “key priority area.”⁵⁴

Additionally, on April 10, 2023, the U.S. Department of the Treasury published the 2023 De-risking Strategy pursuant to the Anti-Money Laundering Act of 2020 (AMLA).⁵⁵ The Strategy “summarizes key findings and recommendations to address the issue of de-risking, which refers to financial institutions terminating or restricting business relationships

46. *Id.*

47. 115 CONG. REC. 168, H6368 (daily ed. July 13, 2022).

48. *Id.* at H6369.

49. *Id.*

50. *Id.* at H6368.

51. See generally Will Fitzgibbon, *US Senate Blocks Major Anti-Money Laundering Bill, the Enablers Act*, INT’L CONSORTIUM INVESTIGATIVE JOURNALISTS (Dec. 12, 2022), <https://www.icij.org/investigations/pandora-papers/us-senate-blocks-major-anti-money-laundering-bill-the-enablers-act/> [<https://perma.cc/GSA4-UZXA>].

52. *Id.*

53. *Id.*

54. See generally Prepared Remarks of FinCEN Acting Director Himamuali Das During the ABA/ABA Financial Crimes Enforcement Conference, FIN. CRIMES ENF’T NETWORK (Dec. 6, 2022), <https://www.fincen.gov/news/speeches/prepared-remarks-fincen-acting-director-himamuali-das-during-abaaba-financial-crimes> [<https://perma.cc/2ATM-A8H5>].

55. See generally Press Release, U.S. Dept. of the Treasury, Fact Sheet: Treasury Department Announces 2023 De-Risking Strategy (Apr. 25, 2023) (on file with author).

indiscriminately with broad categories of customers rather than analyzing and managing specific risks associated with those customers.”⁵⁶ Among other recommendations, the report recommends “clarifying and revising anti-money laundering (AML/CFT) Bank Secrecy Act (BSA) regulations and guidance for Money Service Businesses, and proposing regulations that require financial institutions to have reasonably designed and risk-based AML/CFT programs supervised on a risk basis, possibly taking into consideration the effects of financial inclusion.”⁵⁷

2. *Cayman Islands Anti-Money Laundering Regulatory Updates*

For the Cayman Islands, 2023 marks the removal from the FATF list of “jurisdictions under increased monitoring,” as well as the continuation of a long series of reforms of the AML/CFT frameworks.⁵⁸ A revised version of the Anti-Money Laundering Regulations (AMLR) was published in January 2023, consolidating prior amendments.⁵⁹ In August 2023, revised Guidance Notes on the Prevention and Detection of Money Laundering (ML), Terrorist Financing (TF), and Proliferation Financing (PF) were issued, incorporating changes to facilitate the use of e-KYC and Remote Customer Due Diligence, in line with existing FATF-issued guidance on digital identification.⁶⁰ The new rules now permit remote onboarding of clients and the use of e-KYC and digital identification technologies on an ongoing basis, where appropriate based on the risk assessment of clients.⁶¹

At the same time, the Cayman Island government published the Beneficial Ownership Transparency Bill, 2023,⁶² aimed at fulfilling the commitment made in 2019 concerning the introduction of public registers of beneficial ownership information.⁶³

56. *Id.*

57. *Id.*

58. *Cayman Islands Removed from FATF “Grey List,”* CAMPBELLS LEGAL (Oct. 31, 2023), <https://www.campbellslegal.com/client-advisory/cayman-islands-removed-from-fatf-grey-list-8389/> [<https://perma.cc/5LJK-8TY9>].

59. See *AML/CFT Legislative Framework*, CAYMAN IS. MONETARY AUTH., <https://www.cima.ky/amlcft-legislative-framework> [<https://perma.cc/2ADE-7HEJ>] (last visited Apr. 7, 2024).

60. *Guidance Notes on the Prevention and Detection of Money Laundering, Terrorist Financing and Proliferation Financing in the Cayman Islands*, CAYMAN IS. MONETARY AUTH., https://www.cima.ky/upimages/commonfiles/GuidanceNotesonPreventionandDetectionofML-TF-PF-February2024_1708455450.pdf.

61. *Id.* at 31.

62. See *Beneficial Ownership Transparency Bill, 2023*, Legislation Gazette No. 26 (Aug. 30, 2023), <https://legislation.gov.ky/cms/images/LEGISLATION/BILLS/2023-0014/BeneficialOwnershipTransparencyBill2023.pdf> [<https://perma.cc/K8LU-GPM9>].

63. *Cayman Government to Bring in Ownership Transparency Bill*, CAPTIVE INT’L (Sept. 1, 2023), <https://www.captiveinternational.com/news/cayman-government-to-bring-in-ownership-transparency-bill> [<https://perma.cc/W9GV-R5JD>].

3. *British Virgin Islands Anti-Money Laundering Regulatory Updates*

The British Virgin Islands (BVI) are currently being evaluated by the FATF.⁶⁴ Following an onsite visit in March 2023, the mutual evaluation report is expected to be finalized and published by the end of 2023 or early 2024.⁶⁵

One of the major areas of focus for BVI in 2023 has been the Virtual Assets Service Providers Act (VASP Act) that took effect in February 2023, requiring persons providing virtual asset services to be registered with the Financial Services Commission (FSC) to perform such activities.⁶⁶ Persons that conducted these activities prior to February 1, 2023, were allowed until July 31, 2023, to submit applications for registration.⁶⁷

In addition, the FSC and partnering agency BVI Financial Investigation Agency (FIA) published the 2022 Virgin Islands ML Risk Assessment Report in June 2023 and hosted a live webinar to elaborate on the findings in July 2023.⁶⁸

B. ASIA PACIFIC

1. *Singapore Anti-Money Laundering Regulatory Updates*

In Singapore, the Monetary Authority of Singapore (MAS) recorded more than \$20 million in penalties in its Fourth Enforcement Report,⁶⁹ as well as high-profile enforcement actions against four financial institutions for insufficient AML/CFT measures. This comes following a background of increased enforcement actions and additional scrutiny in 2023. In April 2023, Singapore's Ministry of Home Affairs proposed⁷⁰ stricter laws against money mules, via amendments to the Corruption, Drug Trafficking, and

64. See statement by Lorna Smith, Deputy Premier And Minister For Financial Services, Labour And Trade, Statement By Honourable Smith - Update on Financial Services Supervision and Compliance (Nov. 2, 2023), <https://bvi.gov.vg/media-centre/statement-honourable-smith-update-financial-services-supervision-and-compliance> [https://perma.cc/C4DW-NWT6].

65. *Id.*

66. See *BVI FSC Newsletter: October 2023*, BRITISH VIRGIN ISLANDS FIN. SERVS. COMM'N (Oct. 6, 2023), <https://www.bvifsc.vg/news/industry-updates/bvi-fsc-newsletter-october-2023> [https://perma.cc/9RLC-7PRC].

67. *Legal Alert: Persons carrying on Business as Virtual Assets Service Providers Act in the BVI*, LOEB SMITH (July 14, 2023), <https://www.loebsmith.com/legal/legal-alert-persons-carrying-on-business-as-virtual-assets-service-providers-act/371/#:~:text=For%20those%20persons%20who%20have,to%20be%20registered%20as%20VASPs> [https://perma.cc/FX7K-857X].

68. *BVI FSC Newsletter*, *supra* note 66.

69. MONETARY AUTH. OF SINGAPORE, ENFORCEMENT REPORT JANUARY 2022 TO JUNE 2023 3 (2023), <https://www.mas.gov.sg/-/media/mas/news-and-publications/monographs-and-information-papers/4th-enforcement-report.pdf> [https://perma.cc/XA9P-TTCY].

70. Press Release, Ministry of Home Affairs, Amendments to the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act and the Computer Misuse Act (Apr. 18, 2023), <https://www.mha.gov.sg/mediaroom/press-releases/amendments-to-the-corruption-drug-trafficking-and-other-serious-crimes-confiscation-of-benefits-act-and-the-computer-misuse-act/> [https://perma.cc/FPB8-NGS7].

Other Serious Crimes (Confiscation of Benefits) Act and the Computer Misuse Act, which would hold money mules criminally liable for their actions.

In May 2023, new guidance for financial institutions was published on CFT controls, following an industry-wide survey which considered CFT-related controls and assessed understanding of terrorist financing.⁷¹

Also in May 2023, parliament passed the Financial Services and Markets (Amended) Bill creating a regulatory framework for MAS secure information-sharing platform, Collaborative Sharing of Money Laundering/Terrorist Financing Information and Cases (COSMIC), which is due to launch in the second half of 2024.⁷² Financial institutions will be required to use the network to share information about customers and transactions when “material risk thresholds” are breached.⁷³ Singapore is also proposing to close loopholes for single-family offices (SFOs) and adding new investor protection measures for Digital Payment Token service providers.⁷⁴

C. EUROPE AND THE MIDDLE EAST

1. U.K. Anti-Money Laundering Regulatory Updates

In February 2023, the U.K. Office of Financial Sanctions Implementation (OFSI) issued new public guidance on ransomware and financial sanctions, reminding the industry that making ransomware payments to designated entities is prohibited and that breaching financial sanctions is “a serious criminal offense.”⁷⁵ This correlates with industry reports indicating that the U.K. has the highest number of cybercrime victims per million internet users.⁷⁶

71. *Strengthening Financial Institutions’ (FIs) Countering the Financing of Terrorism (CFT) Controls*, MONETARY AUTH. SING. (May 26, 2023), <https://www.mas.gov.sg/regulation/guidance/strengthening-fi-cft-controls> [<https://perma.cc/QMM3-S92Y>].

72. Speech by Alvin Tan, Minister of State, Ministry of Culture, Cmty. and Youth & Ministry of Trade and Indus., and Bd. Member of MAS, on behalf of Mr. Tharman Shanmugaratnam, Senior Minister and Minister-in-charge of the Monetary Auth. of Sing. (May 9, 2023), <https://www.mas.gov.sg/news/speeches/2023/financial-services-and-markets-amendment-bill-2023> [<https://perma.cc/PJT8-9VCH>].

73. Mahima Gupta, *Responsible Tech Ecosystems: Pragmatic Precursors to Responsible Regulation*, THOUGHTWORKS (July 5, 2023), <https://www.thoughtworks.com/en-us/insights/blog/responsible-tech/responsible-tech-ecosystems#:~:text=With%20COSMIC%2C%20financial%20institutions%20can,and%20trust%20in%20the%20system> [<https://perma.cc/8QVU-QGZU>].

74. Media Release, Monetary Auth. Of Sing., MAS Publishes Investor Protection Measures for Digital Payment Token Services (July 3, 2023), <https://www.mas.gov.sg/news/media-releases/2023/mas-publishes-investor-protection-measures-for-digital-payment-token-services> [<https://perma.cc/Z83Y-8MPS>].

75. HM TREASURY OFFICE OF FIN. SANCTIONS & IMPLEMENTATION, RANSOMWARE AND SANCTIONS: GUIDANCE ON RANSOMWARE AND FINANCIAL SANCTIONS 1 (2023), https://assets.publishing.service.gov.uk/media/65ca0d7c14b83c000ea716bd/Financial_sanctions_guidance_for_ransomware.pdf [<https://perma.cc/J8CQ-CBAY>] (last visited Apr. 7, 2024).

76. Charles Griffiths, *The Latest 2024 Cyber Crime Statistics*, AAG (Jan. 3, 2024), <https://aag-it.com/the-latest-cyber-crime-statistics/> [<https://perma.cc/7LLZ-LV2X>].

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Also, in February 2023, the U.K. government announced that fraud would be reclassified as a national security threat.⁷⁷ According to the 2022 cross-government fraud landscape report, public sector fraud and error loss are estimated at £33 billion annually.⁷⁸ As a result, a new fraud strategy was published by the U.K. government in May 2023, setting out over fifty measures to reduce fraud and cybercrime by ten percent by 2025.⁷⁹ The 2022 Annual Fraud Report published by U.K. Finance revealed that more than £1.2 billion was stolen by criminals through authorized and unauthorized fraud in 2022.⁸⁰

On March 30, 2023, the U.K. government published its new three-year Economic Crime Plan (2023–2026), proposing a “more comprehensive” approach to improving the effectiveness of U.K. money laundering regulations after a disappointing 2022.⁸¹ The plan is centered around several initiatives, including reforming the role of Companies House for more transparency and limiting the abuse of corporate structures (the Economic Crime and Corporate Transparency Bill), supervisory reform, increasing enforcement for the use of crypto/virtual assets to launder illicit funds, improving suspicious activity reports (SARs), and recovering more criminal assets.⁸² The plan also highlights increased cooperation with the United States, the European Union, and other jurisdictions, and support of the NCA’s Combatting Kleptocracy Cell.⁸³

In April 2023, the Financial Conduct Authority (FCA) introduced new measures for financial institutions after a report estimated that hundreds of millions of British pound sterling are laundered each year in the U.K. through the cash deposit channel at the Post Office.⁸⁴ In July 2023, the U.K. government called on the FCA to review its guidance on risk management

77. *Fraud to be Reclassified as a UK National Security Threat*, COMPLY ADVANTAGE (Feb. 9, 2023), <https://complyadvantage.com/insights/fraud-to-be-reclassified-as-a-uk-national-security-threat/> [https://perma.cc/RE78-2H2E].

78. PUB. SECTOR FRAUD AUTH., CROSS-GOVERNMENT FRAUD LANDSCAPE: ANNUAL REPORT 2022 23 (2022), https://assets.publishing.service.gov.uk/media/641c158b32a8e0000cfa9251/2974_Fraud_Landscape_Annual_Report_2022_.pdf [https://perma.cc/P6NH-9RH3].

79. HM GOV’T, FRAUD STRATEGY: STOPPING SCAMS AND PROTECTING THE GOVERNMENT 3 (2023), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1154660/Fraud_Strategy_2023.pdf [https://perma.cc/EUP4-LX9Q].

80. UK FINANCE, ANNUAL FRAUD REPORT 2 (2022), https://www.ukfinance.org.uk/system/files/2023-05/Annual%20Fraud%20Report%202023_0.pdf [https://perma.cc/C39R-9ZP2].

81. HM GOV’T, ECONOMIC CRIME PLAN 2, 4 (2023), https://assets.publishing.service.gov.uk/media/642561b02fa8480013ec0f97/6.8300_HO_Economic_Crime_Plan_2_v6_Web.pdf [https://perma.cc/K6PJ-UWEW].

82. *Id.* at 17–18.

83. *Id.* at 4, 51.

84. Press Release, Fin. Conduct Auth., Financial Watchdog Puts Banks on Alert in Fight Against Money Laundering via the Post Office (Apr. 24, 2024), <https://www.fca.org.uk/news/press-releases/financial-watchdog-puts-banks-alert-fight-against-money-laundering-post-office> [https://perma.cc/4EZE-2FLM].

for politically exposed persons (PEPs)⁸⁵ among reports that some financial institutions are restricting the access of PEPs and their associates to financial services.⁸⁶ It is possible that bank de-risking and financial inclusion will be among the big trends for 2024.

Finally, in June 2023, HM Treasury released another consultation paper on the Reform of the Anti-Money Laundering and CounterTerrorism Financing Supervisory Regime,⁸⁷ part of the reform plan under the Economic Crime Plan, after a 2022 report had noted that supervisory standards for the accountancy and legal sectors did not reflect the sectors' high risk.⁸⁸

2. *EU Anti-Money Laundering Regulatory Updates*

In the European Union (EU), the long-term goal of a pan-European AML/CFT program is now closer with the creation of the EU Anti-Money Laundering Authority (AMLA).⁸⁹ The proposed AML/CFT framework continues to progress through legislative processes. AMLA is expected to become fully operational in 2026 and will monitor, support, and coordinate AML/CFT efforts in the EU.⁹⁰ 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 institutions⁹¹ and will also have the ability to impose

85. Anna Wise, *Watchdog Should Prioritise Probe Into How Banks Treat Politicians – Minister*, INDEP. (July 5, 2023), <https://www.independent.co.uk/business/watchdog-should-prioritise-probe-into-how-banks-treat-politicians-minister-b2369828.html> [<https://perma.cc/4UC6-H93L>].

86. Ivp Dawnay, *How My Brother-in-Law Boris Got Me Cancelled*, SPECTATOR (July 8, 2023), <https://www.spectator.co.uk/article/how-my-brother-in-law-boris-got-me-cancelled/> [<https://perma.cc/34C5-9N43>].

87. HM TREASURY, REFORM OF THE ANTI-MONEY LAUNDERING AND COUNTER-TERRORISM FINANCING SUPERVISORY REGIME 6 (2023), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1166665/AML_Reform_Consultation_Document_-_FINAL.pdf [<https://perma.cc/A3M6-ABN8>].

88. HM Gov'T, ECONOMIC CRIME PLAN 2 4 (2023), https://assets.publishing.service.gov.uk/media/642561b02fa8480013ec0f97/6.8300_HO_Economic_Crime_Plan_2_v6_Web.pdf [<https://perma.cc/K6PJ-UWEW>].

89. Press Release, Council of the EU, 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).

90. See 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) 1093/2010, (EU) 1094/2010, (EU) 1095/2010, at 9, COM (2021) 421 final (July 20, 2021) [hereinafter Establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and Amending Regulations].

91. See *id.* at 8–9.

finances.⁹² During 2023 negotiations, the Parliament requested that AMLA be given additional powers.⁹³ The AMLA is expected to help harmonize supervisory practices, oversee high-risk and cross-border financial entities, and coordinate financial intelligence units (FIUs).⁹⁴ AMLA is intended to be fully independent with its own executive board and will be able to act internationally through the FATF and through its relationships with third countries.⁹⁵

Another major development which dominated both 2022 and 2023 is the new EU Market in Crypto-assets (MiCA) regulation, providing a comprehensive regulatory regime tailored specifically to crypto-assets.⁹⁶ This regime includes an EU-wide registration, although businesses will be required to register in each country separately under AML/CFT regulations.⁹⁷ 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 (TFR), which requires that information about the sender and the beneficiary of a transaction travel together with the funds (fiat or crypto).⁹⁸ The TFR was endorsed by the Parliament and Council in April and May 2023⁹⁹ and will come into effect in January 2025, roughly in parallel with the MiCA regulation, bringing a broad spectrum of digital service providers into EU financial regulation.¹⁰⁰

92. See *id.* at 54.

93. See *The EU's AML Reform Plan: An Update on Progress*, COMPLY ADVANTAGE (July 28, 2023), <https://complyadvantage.com/insights/the-eus-aml-reform-plan-an-update-on-progress/> [<https://perma.cc/QRS9-LDYZ>]. Following the expansion of EU sanctions against Russia in 2022, the Parliament asked that AMLA contribute to implementing financial sanctions, including asset freezes, seizures, and confiscations. The Parliament wants to ensure that BO information for companies incorporated outside of the EU is included in registries and that bank account, crypto-asset wallets, and safety deposit box registers are accessible to AMLA and financial intelligence units through a centralized platform. The Parliament has also asked for the development of registers for real estate and high-value assets such as yachts and motor vehicles. The Parliament has proposed that the beneficial ownership threshold be lowered to fifteen percent, plus either one share or voting rights, or a lower threshold of five percent plus one share, for high-risk industries. Negotiations continued but a final vote on the package by both the Parliament and Council might not occur until early 2024.

94. See *Establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and Amending Regulations*, *supra* note 90 at 3.

95. See *id.* at 2, 13.

96. Stephan Mitsios, *The New EU Markets in Crypto-Assets Regulation ("MiCAR")*, EY (June 21, 2023), https://www.ey.com/en_gr/tax/tax-alerts/the-new-eu-market-in-crypto-assets-regulation [<https://perma.cc/CW7M-KTG2>].

97. See *id.*

98. See *Proposal for a Regulation On Information Accompanying Transfers of Funds and Certain Crypto-Assets (Recast)*, EUR. PARLIAMENT: LEGIS. TRAIN SCHEDULE 1 (2021), <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>].

99. *Id.*

100. See *The EU's AML Reform Plan: An Update on Progress*, *supra* note 93.

Reinforcing this collaboration trend, EU countries are increasing their efforts to combat terrorism via Eurojust,¹⁰¹ with more flexibility to provide information related to terrorism cases via the European Judicial Counter-Terrorism Register (CTR) after an amendment to the Eurojust Regulation on October 31, 2023.¹⁰² In September 2023, Europol issued its first pan-European financial and economic crime threat assessment.¹⁰³ This assessment discussed threats of money laundering, corruption, and organized crime, and highlighted several EU sanctions evasion methods (e.g., concealing beneficial ownership, fraudulent documents and intermediaries, and using third countries to send transactions from Russia).¹⁰⁴

In the banking industry, the European Banking Authority (EBA) published a report in June 2023 on the money laundering and terrorist financing (ML/TF) risks associated with EU payment institutions.¹⁰⁵ This report found that ML/TF risks in the sector may not be assessed and managed effectively by institutions and their supervisors.¹⁰⁶ In addition, the report highlighted emerging risks due to “white labeling” (i.e., a bank providing its license to an independent third party for business purposes), virtual international bank account numbers (IBANs), which cannot hold a balance, and third-party merchant acquiring (i.e., when a payment processor outsources part of the process to a third party and depends on outside AML/CFT controls).¹⁰⁷

In August 2023, the EBA published its third report on the functioning of AML/CFT colleges,¹⁰⁸ which are the permanent structures that serve to enhance cooperation between different supervisors involved in the supervision of cross-border institutions in the EU. The report noted that these new institutions had not reached maturity as approximately

101. *Fight Against Terrorism Across EU Strengthened by More Information Sharing with Eurojust*, EUROJUST (Oct. 31, 2023), <https://www.eurojust.europa.eu/news/fight-against-terrorism-across-eu-strengthened-more-information-sharing-eurojust> [<https://perma.cc/X43A-TD9S>].

102. *Eurojust Legal Framework*, EUROJUST, <https://www.eurojust.europa.eu/about-us/organisation/eurojust-legal-framework#tab-2> [<https://perma.cc/9TSW-Y3YK>] (last visited Mar. 12, 2024).

103. EUROPOL, *THE OTHER SIDE OF THE COIN: AN ANALYSIS OF FINANCIAL AND ECONOMIC CRIME 3* (2023), <https://www.europol.europa.eu/cms/sites/default/files/documents/The%20Other%20Side%20of%20the%20Coin%20-%20Analysis%20of%20Financial%20and%20Economic%20Crime%2028EN%29.pdf> [<https://perma.cc/96M2-PUXV>].

104. *Id.* at 4.

105. Press Release, Euro. Banking Auth., EBA Finds That Money Laundering and Terrorist Financing Risks in Payment Institutions are Not Managed Effectively (June 16, 2022), <https://www.eba.europa.eu/eba-finds-money-laundering-and-terrorist-financing-risks-payments-institutions-are-not-managed> [<https://perma.cc/W2K2-4P4N>].

106. *Id.*

107. EURO. BANKING AUTH., *EBA REPORT ON ML/TF RISKS ASSOCIATED WITH PAYMENT INSTITUTIONS 12* (June 16, 2023), https://www.eba.europa.eu/sites/default/files/document_library/Publications/Reports/2023/1056453/Report%20on%20ML%20TF%20risks%20associated%20with%20payment%20institutions.pdf [<https://perma.cc/BXF4-4LSG>].

108. Press Release, Euro. Banking Auth., Supervisory Cooperation in the Fight Against Financial Crime is Improving, the EBA Finds (Aug. 10, 2023), <https://www.eba.europa.eu/supervisory-cooperation-fight-against-financial-crime-improving-eba-finds> [<https://perma.cc/9CF6-E9D3>].

fifty colleges had not held their first meeting, and the sharing of relevant information remained insufficient.¹⁰⁹

3. *United Arab Emirates Virtual Assets Updates*

The United Arab Emirates' (UAE) Cabinet Resolution No. (111) of 2022 Concerning the Regulation of Virtual Assets and their Service Providers (the Resolution) is a landmark piece of legislation that established a comprehensive regulatory framework for the UAE's virtual asset sector.¹¹⁰ The Resolution, which came into effect on January 13, 2023, is designed to protect investors and promote the responsible development of the virtual asset industry.¹¹¹ Under the resolution, a virtual asset is defined as "[a] digital representation of value that can be digitally traded or transferred, and can be used for investment purposes. It does not include digital representations of paper currencies, securities, or other funds."¹¹² The Central Bank of the UAE (CBUAE) does not recognize virtual assets as legal tender in the UAE, as the only legal tender in the UAE is the UAE dirham.¹¹³ Businesses that accept virtual assets as payment assume any risk associated with the future acceptance or recognition of virtual assets.¹¹⁴

Under Articles 9 and 15 of the AML-CFT Law, virtual asset service providers (VASPs) must report suspicious transactions and related information to the UAE Financial Intelligence Unit (FIU).¹¹⁵ VASPs are defined as businesses that provide services related to virtual assets, such as trading, custody, and exchange, but exclude internal transfers of virtual assets by a single legal person and the acceptance of virtual assets as payment for goods and services.¹¹⁶ VASPs are overseen by the Virtual Asset Regulatory Authority.¹¹⁷ Under Articles 13 and 14, supervisory authorities are authorized to assess the risks of VASPs, conduct inspections, and impose administrative penalties on VASPs for violations of applicable laws and regulations.¹¹⁸

^{109.} *Id.*

^{110.} Cabinet Resolution No. 111 of 2022, Concerning the Regulation of Virtual Assets and Their Service Providers (U.A.E.) [hereinafter Cabinet Decision No. 111 of 2022].

^{111.} *Id.*

^{112.} *Id.*

^{113.} CENTR. BANK U.A.E., CBUAE RE-ITERATES THE OBJECTIVE OF THE NEW STORED VALUE FACILITIES (SVF) REGULATION 1 (Dec. 6, 2020).

^{114.} *Id.*

^{115.} Federal Decree-Law No. 20 of 2018, On Anti-Money Laundering, Combating the Financing of Terrorism and Financing of Illegal Organizations (Sept. 13, 2021) (U.A.E.).

^{116.} *Id.*

^{117.} CENTR. BANK U.A.E., GUIDANCE FOR LICENSED FINANCIAL INSTITUTIONS ON RISKS RELATED TO VIRTUAL ASSETS AND VIRTUAL ASSET SERVICE PROVIDERS 5 (Feb. 20, 2023), https://www.centralbank.ae/media/avwlktgy/cbuac-guidance-for-lfis-on-risks-related-to-virtual-assets-and-virtual-assets-providers_final-clean-version1.pdf [<https://perma.cc/PM3U-X8MT>].

^{118.} Federal Decree-Law No. 20 of 2018, On Anti-Money Laundering, Combating the Financing of Terrorism and Financing of Illegal Organizations (Sept. 13, 2021) (U.A.E.).

The Resolution mandates the licensing of all VASPs operating in the UAE, with the exception of those operating in financial free zones.¹¹⁹

The CBUAE licenses payment token service providers (PTSPs) under the Retail Payment Services and Card Schemes Regulation.¹²⁰ PTSPs are businesses that issue, buy, sell, exchange, or facilitate payments to merchants, enable peer-to-peer payments, or provide custodian services for payment tokens.¹²¹ Payment tokens are a type of cryptocurrency backed by fiat currencies that may be digitally traded and used as a medium of exchange, unit of account, or store of value, supported only by agreement within the community of users.¹²²

The Resolution notes that under the Stored Values Facilities (SVF) Regulation of 2020, the CBUAE licenses and supervises providers of SVFs.¹²³ SVFs are facilities that allow customers to store money or “money’s worth” and transfer it as a means of payment.¹²⁴ Under the SVF Regulation, “money’s worth” includes other forms of monetary consideration or assets, such as values, reward points, cryptocurrencies, and virtual assets.¹²⁵ If SVF providers engage in virtual asset exchange or transfer activities, or other VASP activities, they must be licensed by UAE authorities.¹²⁶

The Resolution reiterates the Abu Dhabi Global Market 2018 regulatory framework for virtual assets¹²⁷ and the Financial Services Regulatory Authority’s Financial Services and Markets Regulations of 2015.¹²⁸ The Dubai Financial Services Authority regulates crypto in the Dubai International Financial Centre and updated its regulatory framework for crypto assets in 2022 to include crypto tokens.¹²⁹

119. Cabinet Resolution No. 111 of 2022, Concerning the Regulation of Virtual Assets and Their Service Providers (U.A.E.) [hereinafter Cabinet Decision No. 111 of 2022].

120. CENTR. BANK U.A.E., RETAIL PAYMENT SERVICES AND CARD SCHEMES REGULATION 4 (June 6, 2021), https://www.centralbank.ae/media/4came3rh/2021-c-15-2021-retail-payment-services-and-card-schemes-reg_0.pdf [<https://perma.cc/JTK8-24VM>].

121. *Id.* at 18, ¶ 71.

122. *Id.* at 18, ¶ 73.

123. CENTR. BANK U.A.E., STORED VALUE FACILITIES REGULATION 4 (Sept. 30, 2020), <https://www.centralbank.ae/media/pxzjtgd/stored-value-facilities-svf-regulation-ar-en.pdf> [<https://perma.cc/7BHJ-AGJ7>].

124. *Id.* at 10–11, ¶ 27.

125. *Id.* at 9, ¶ 21.

126. FATF, VIRTUAL ASSETS AND VIRTUAL ASSET SERVICE PROVIDERS 32 (Oct. 2021), <https://www.fatf-gafi.org/media/fatf/documents/recommendations/Updated-Guidance-VA-VASP.pdf> [<https://perma.cc/N8LA-QCJ5>].

127. Cabinet Decision No. 111 of 2022, *supra* note 110.

128. ABU DHABI GLOB. MKT., THE WORLD’S LEADING AND MOST COMPREHENSIVE VIRTUAL ASSETS FRAMEWORK BY ABU DHABI GLOBAL MARKET 8 (2023), <https://www.adgm.com/documents/publications/en/adgm-virtual-asset-brochure-2023.pdf> [<https://perma.cc/9GC3-58MW>].

129. DUBAI FIN. SERVICES AUTH., CONSULTATION PAPER NO. 143: REGULATION OF CRYPTO TOKENS 2 (Mar. 8, 2022), https://dfs.aen.thomsonreuters.com/sites/default/files/net_file_store/CP143_Regulation_of_Crypto_Tokens.pdf (accessed on 10/20/2023) [<https://perma.cc/TU3M-DPG9>].

D. AFRICA

1. South Africa Anti-Money Laundering Regulatory Updates

On February 24, 2023, South Africa found itself on the FATF “grey list,” signifying an increased level of scrutiny and prompting the jurisdiction to take significant steps in adapting its regulatory framework.¹³⁰ Despite being added to the grey list, South Africa has vowed to persist in enhancing its AML/CFT system, not only to meet FATF requirements in targeted areas but also to bolster its overall ability to combat money laundering, terrorist financing, corruption, and financial crimes, thereby benefiting the nation, its economy, financial system, and the safety of its citizens.¹³¹ The evolving landscape reflects the nation’s commitment to fostering innovation and protecting consumers in the digital age.

As a showcase to South Africa’s commitment to and the implementation of the FATF Recommendations, the Intergovernmental Fintech Working Group, together with the Financial Intelligence Centre (FIC), paved the way by publishing a position paper outlining the definition of crypto assets and regulatory measures for Crypto Asset Service Providers (CASPs), which aligns with international best practices and FATF Recommendations.¹³² Following thereon, the South African Reserve Bank (SARB) classified cryptocurrency as a financial asset, requiring crypto exchanges to adhere to exchange control laws and AML/CFT rules.¹³³ The SARB also issued guidelines allowing financial institutions to handle funds related to digital assets and encouraged banks not to indiscriminately block all crypto clients, enabling them to act as intermediaries for crypto transactions and facilitate fiat currency conversions.¹³⁴ Towards the end of 2022, the Financial Sector Conduct Authority (FSCA) declared crypto assets as “digital representations of value” subject to regulation in South Africa, including foreign exchange controls and licensing requirements.¹³⁵

Several key pieces of legislation underpin South Africa’s digital asset regulatory framework, including the Financial Advisory and Intermediary

130. See NAT’L TREASURY REPUBLIC OF SOUTH AFRICA, FACT SHEET: WHAT DOES FATF GREYLISTING MEAN FOR A COUNTRY? 3 (2023), https://www.treasury.gov.za/comm_media/press/2023/2023022501%20FATF%20Grey%20Listing%20Fact%20Sheet.pdf [https://perma.cc/HK59-NJNQ].

131. *Id.* at 5.

132. See FIN. INTEL. CTR., 2022/23 ANNUAL REPORT 26 (2022), <https://www.fic.gov.za/wp-content/uploads/2023/10/2023.9-%E2%80%93FIC-Annual-Report-2022-2023.pdf> [https://perma.cc/6TSE-X6VZ].

133. See Declaration of a Crypto Asset as a Financial Product Under the Financial Advisory Intermediary Services Act, GN 1350 of GG 47334 (19 October 2022) (S. Afr.).

134. Supervisory Guidelines for Matters Related to the Prevention of Banks or Controlling Companies Being Used for Any Money Laundering, Terrorist Financing or Other Unlawful Activity, GN 9 of G10/22 (15 August 2022) (S. Afr.).

135. See Press Release, Fin. Sector Conduct Auth., Declaration of Crypto Assets as a Financial Product (Oct. 20, 2022), https://www.fsca.co.za/News%20Documents/FSCA%20Press%20Release_Declaration%20of%20Crypto%20Assets%20As%20A%20Financial%20Product_20%20October%202022.pdf [https://perma.cc/L6GU-JVVT].

Services (FAIS) Act, FIC Act, and guidance from the SARB and South African Revenue Service (SARS) on taxation of cryptocurrencies.¹³⁶ The latest regulatory developments, which include the implementation of a license framework for CASPs, represent a significant stride in enhancing consumer protection through the imposition of accountability measures on CASPs.¹³⁷

As of June 2023, CASPs can apply for licenses from the FSCA under the FAIS Act, and they are granted a leniency period that extends until December 2023 for this purpose.¹³⁸ To streamline the transition for CASPs, applicants can continue offering financial services related to crypto assets without a license if they apply for a license during the designated exemption period.¹³⁹ This exemption remains in effect until the approval or rejection of the license application.¹⁴⁰ CASPs must adhere to specific legal, operational, and compliance standards.¹⁴¹ This includes appointing a compliance officer who must be actively involved in the day-to-day operations and designating a Key Individual with a recognized qualification as well as relevant knowledge and experience.¹⁴² The FIC Act also imposes AML/CFT requirements on CASPs.¹⁴³ The upcoming year will be pivotal to observing South Africa's response to its greylisting and the progress of CASP applications and registrations.

III. Enforcement & Litigation Trends - United States

In the United States, 2023 included several high-profile AML enforcement actions by U.S. federal and state regulatory authorities, including FinCEN, the Office of Foreign Assets Control (OFAC), the Securities and Exchange Commission (SEC), New York State Department of Financial Services (NYDFS), Internal Revenue Service (IRS) Criminal Investigation, among others. Key themes include AML program deficiencies, failures regarding suspicious activity reports (SARs), sanctions violations, and fraud in the digital assets market.

On January 4, 2023, the NYDFS and Coinbase, Inc. entered into a consent order under which Coinbase, a major cryptocurrency exchange,

136. See Finance Intelligence Center Act 2001, GN 1262 of GG 22886 (3 Dec. 2001) (S. Afr.); see also Financial Advisory Services Act 2002, GN 1453 of GG 24079 (15 Nov. 2022) (S. Afr.).

137. See Press Release, *supra* note 135.

138. *Id.*

139. *Id.*

140. *Id.*

141. See Declaration of a Crypto Asset as a Financial Product Under the Financial Advisory Intermediary Services Act, GN 1350 of GG 47334 (19 October 2022) (S. Afr.).

142. *Id.*

143. FIN. INTEL. CTR., PUBLIC COMPLIANCE COMMUNICATION NO. 57: GUIDANCE ON THE INTERPRETATION OF CRYPTO ASSET SERVICE PROVIDERS, ITEM 22 OF SCHEDULE 1 TO THE FINANCIAL INTELLIGENCE CENTRE ACT, 2011 (ACT 38 OF 2001) AND POTENTIAL RISK INDICATORS 4 (2023), <https://www.fic.gov.za/wp-content/uploads/2023/09/2023.07-PCC-PCC-57-CASPs.pdf> [<https://perma.cc/G6ED-5URV>].

agreed to pay a \$50 million penalty and commit to investing an additional \$50 million to remediate and enhance its compliance program over the next two years.¹⁴⁴ Coinbase also agreed to extend a previously appointed Independent Compliance Monitor for an additional year.¹⁴⁵

On January 18, 2023, FinCEN issued an order identifying virtual currency exchange Bitzlato as a “primary money laundering concern” in connection with Russian illicit finance.¹⁴⁶ FinCEN determined that Bitzlato is a financial institution operating outside of the United States.¹⁴⁷ Bitzlato “plays a critical role in laundering Convertible Virtual Currency by facilitating illicit transactions for ransomware actors operating in Russia, including Conti, a Ransomware-as-a-Service group with links to the Russian government.”¹⁴⁸ As a result of FinCen’s determination, certain fund transfers by covered financial institutions involving Bitzlato are prohibited.¹⁴⁹

On February 9, 2023, the SEC charged Payward Ventures, Inc. and Payward Trading, Ltd., both commonly known as Kraken, with “failing to register the offer and sale of their crypto asset staking-as-a-service program, whereby investors transfer crypto assets to Kraken for staking in exchange for advertised annual investment returns as much as twenty-one percent.”¹⁵⁰ To avoid litigation, “the two Kraken entities agreed to immediately cease offering and selling securities through crypto asset staking services or staking programs and to pay \$30 million in disgorgement, prejudgment interest, and civil penalties.”¹⁵¹

On March 30, 2023, Wells Fargo Bank, N.A. settled with OFAC for \$30 million in relation to apparent violations of three sanctions programs.¹⁵² From 2008–2015, “Wells Fargo, and its predecessor, Wachovia Bank, provided a foreign bank located in Europe with software that the foreign bank then used to process trade finance transactions with U.S.-sanctioned jurisdictions and persons.”¹⁵³ Wells Fargo did not identify or stop the European

144. See N.Y.S. Dep’t of Fin. Serv., Coinbase, Inc., Consent Order, ¶ 86 (Jan. 4, 2023), https://www.dfs.ny.gov/system/files/documents/2023/01/ea20230104_coinbase.pdf [<https://perma.cc/MQP6-EGR7>].

145. See *id.* at ¶ 78.

146. See *FinCEN Identifies Virtual Currency Exchange Bitzlato as a “Primary Money Laundering Concern” in Connection with Russian Illicit Finance*, FIN. CRIMES ENFT NETWORK (Jan. 18, 2023), <https://www.fincen.gov/news/news-releases/fincen-identifies-virtual-currency-exchange-bitzlato-primary-money-laundering> [<https://perma.cc/ZPS6-LHV5>].

147. *Id.*

148. *Id.*

149. *Id.*

150. See Press Release, U.S. Sec. Exch. Comm’n, Kraken to Discontinue Unregistered Offer and Sale of Crypto Asset Staking-As-A-Service Program and Pay \$30 Million to Settle SEC Charges (Feb. 9, 2023), <https://www.sec.gov/news/press-release/2023-25> [<https://perma.cc/FY2L-BF3B>].

151. *Id.*

152. See Enforcement Release, Dep’t of the Treas., OFAC Settles with Wells Fargo Bank, N.A. for \$30,000,000 Related to Apparent Violations of Three Sanctions Programs (Mar. 30, 2023), <https://ofac.treasury.gov/media/931541/download?inline> [<https://perma.cc/B7R8-EQFK>].

153. *Id.*

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bank's use of the software platform for trade-finance transactions involving sanctioned jurisdictions and persons for seven years, despite potential concerns raised internally within Wells Fargo on multiple occasions.¹⁵⁴ The settlement amount reflects OFAC's determination that Wells Fargo's 124 apparent violations, which occurred between approximately December 27, 2010 and December 7, 2015, were voluntarily self-disclosed.¹⁵⁵

On November 28, 2023, FinCEN and OFAC announced a settlement with Binance Holdings Ltd. and its affiliates, the world's leading virtual currency exchange.¹⁵⁶ Binance settled with FinCEN for \$3.4 billion and with OFAC for \$968 million for violations of the Bank Secrecy Act (BSA) and apparent violations of multiple sanctions programs.¹⁵⁷ Binance maintained a significant U.S. user base without registering with FinCEN.¹⁵⁸ Binance also failed to maintain an effective AML program; it has never filed a SAR with FinCEN as required by the BSA, and it did not begin to collect KYC information until May 2022.¹⁵⁹ FinCEN entered a consent order with Binance and its founder, CZ, which, in addition to assessing a civil monetary penalty of \$3.4 billion, imposed a five-year monitorship and required significant compliance undertakings, including ensuring Binance's complete exit from the United States.¹⁶⁰ OFAC also entered a consent order with Binance for violations of multiple sanctions programs.¹⁶¹

154. *Id.*

155. *Id.*

156. See Press Release, U.S. Dep't of the Treas., U.S. Treasury Announces Largest Settlements in History with World's Largest Virtual Currency Exchange Binance for Violations of U.S. Anti-Money Laundering and Sanctions Laws (Nov. 21, 2023), <https://home.treasury.gov/news/press-releases/jy1925> [<https://perma.cc/VM6N-T384>].

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. See Enforcement Release, Dep't of the Treas., OFAC Settles with Binance Holdings, Ltd. for \$968,618,825 Related to Apparent Violations of Multiple Sanctions Programs (Nov. 21, 2023), https://ofac.treasury.gov/system/files/2023-11/20231121_binance.pdf [<https://perma.cc/FN7B-77PS>].

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This Article outlines the most significant development in international antitrust in 2023 in eleven jurisdictions.

I. Argentina

A. LEGISLATIVE DEVELOPMENTS

In May 2023, the Secretary of Trade approved the new Merger Control Review Regulation,¹ which aims to regulate the procedure for notifying economic concentration transactions before the Antitrust Commission the (“CNDC”).²

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1. Merger Control Review Regulation (Resolución 905/2023), May 18, 2023 (Arg.), <https://servicios.infoleg.gob.ar/infolegInternet/anexos/380000-384999/383980/norma.htm> [<https://perma.cc/C2TF-Z44X>].

2. *Id.*

One of the main novelties of the new Regulation is the introduction of a summary procedure (“PROSUM”) as an alternative for those economic concentrations with a lower probability of significant effects to competition.³ The Regulation also introduces new F0, F1, and F2 forms for notification.⁴

Furthermore, the CNDC issued Provision 62/2023, establishing the technical criteria to determine which cases may qualify for PROSUM given the economic concentrations notified under the terms in Section 9 of Law No. 27,442 (“Antitrust Law”).⁵

This year marks the 100th anniversary of the enactment of Law No. 11,210, the first antitrust legislation in Argentina and Latin America.⁶

B. MERGER

As of October 2023, the CNDC unconditionally approved twenty-seven economic concentrations.⁷ A key merger case was the unconditional approval of Fiat-Peugeot.⁸

In recent years, the CNDC has shown a tendency to issue Statements of Objection.⁹ Since 2020, the CNDC has issued nine Statements of Objection; four of these already have a final decision conditioning the transaction and in one case, the transaction was withdrawn by the parties.¹⁰

C. CARTELS AND ANTI-COMPETITIVE PRACTICES

The *Notebooks* case¹¹ is about a corruption scandal that was unveiled in 2018 concerning an alleged organized corruption scheme that involved

3. See *id.*

4. *Id.*

5. Technical Criteria for the Notification of Economic Concentrations in the Summary Procedure (Disposición 62/2023), Aug. 18, 2023 (Arg.), <https://www.argentina.gob.ar/normativa/nacional/disposición-62-2023-388895/texto> [<https://perma.cc/7LKJ-892D>].

6. Beccar Varela, *In Review: Anti-Cartel Enforcement Policies in Argentina*, LEXOLOGY (Feb. 14, 2023), <https://www.lexology.com/library/detail.aspx?g=7f0cce8e-652b-4d02-9a0f-cd6104b57a22> [<https://perma.cc/23AX-NDTC>].

7. Abeledo Gottheil Abogados, *Antitrust: New Rules to Notify Economic Concentrations*, THE LEGAL 500 (Oct. 20, 2023), <https://www.legal500.com/developments/press-releases/antitrust-new-rules-to-notify-economic-concentrations/> [<https://perma.cc/RfV4-RXQB>].

8. In the Matter of Fiat Chrysler Automobiles N.V. & Peugeot S.A. (Resolución 2023/1190), July 28, 2023 (Arg.), <http://cndc.produccion.gob.ar/sites/default/files/cndcfiles/CONC1753.pdf> [<https://perma.cc/MBH4-2RQL>].

9. Pablo Lepere, *Argentina: Objection Reports Detail Threats to CNDC's Merger Regulation*, GCR (Aug. 25, 2023), <https://globalcompetitionreview.com/review/the-antitrust-review-of-the-americas/2024/article/argentina-objection-reports-detail-threats-cndcs-merger-regulation> [<https://perma.cc/35WH-KNLQ>].

10. *Id.*

11. Law No. 27442, June 29, 2023, [VIII] B.O. 288–289 (Arg.), https://www.argentina.gob.ar/sites/default/files/2023/09/cond_1698_-_dictamen_cndc_y_resolucion_sc.pdf [<https://perma.cc/Q4DP-77A5>].

the paying of bribes to benefit from large public contracts between 2005–2015.¹² In light of testimony given in the criminal investigation, the CNDC opened a parallel investigation into allegations of bid-rigging that involved fifty-two companies.¹³

In September 2023, the CNDC closed this investigation, finding that there was insufficient evidence to prove the existence of an agreement between the companies to fix prices and allocate public work bids, although it issued “pro-competitive” recommendations to be implemented by the Argentine Chamber of Road Companies.¹⁴

D. DOMINANCE

In August 2021, the Secretary of Trade fined Cervecería y Maltería Quilmes (“CMQ”) 150 million pesos and subjected it to a set of corrective measures for abusing its dominant position.¹⁵ CMQ appealed, but the Antitrust Law states that measures may be appealed with non-suspensive effect.¹⁶ Accordingly, CMQ must comply with the corrective measures until a competent court can resolve the appeal.¹⁷

In February 2023, the CNDC concluded that CMQ was not implementing the mandatory corrective measures and fined CMQ 2,396,603 mobile units,¹⁸ approximately 389.5 million pesos. This is the first fine applied pursuant to the new provisions of the Antitrust Law, which increased potential penalties from the previous Law No. 25,156.¹⁹

II. Brazil

A. LEGISLATIVE DEVELOPMENTS

The Brazilian Congress is currently discussing two draft bills aimed at regulating the activities of digital platforms:

12. *Id.*

13. *Id.* at 70.

14. *Id.*

15. *Sanction of Brewery and Maltery Films for 150 Million Pesos*, ARGENTINA.GOB.AR (Aug. 25, 2021), <https://www.argentina.gob.ar/noticias/sancion-cerveceria-y-malteria-quilmes-por-150-mil-lones-de-pesos#:~:text=Como%20consecuencia%20de%20una%20investigaci3n,posici3n%20dominante%20de%20tipo%20exclusorio> [<https://perma.cc/XGD9-KXDBJ>].

16. *Cervecería y Maltería Quilmes: Federal Court Confirms Fine and Ratifies CNDC’s Recommendation*, ARGENTINA.GOB.AR, <https://www.argentina.gob.ar/defensadelacompetencia/cerveceria-y-malteria-quilmes-federal-court-confirms-fine-and-ratifies-cndcs> [<https://perma.cc/9V9S-E4NQJ>] (last visited Apr. 20, 2024).

17. *Id.*

18. In the Matter of Cervecería y Maltería Quilmes S.A.I.C.A. and G. EX-2021-125852512- - APN-DGD#MDP s/ (2023) (Arg.), https://www.argentina.gob.ar/sites/default/files/2023/03/resolucion_1589_inc_cese_1.pdf [<https://perma.cc/Q72K-B53P>].

19. In the Matter of Cervecería y Maltería Quilmes S.A.I.C.A. and G. EX-2021-125852512- - APN-DGD#MDP s/ (2023).

- Draft Bill No. 2768/2022²⁰ gives equivalent regulatory powers of the European Commission to Brazil's National Telecommunications Agency, ANATEL.²¹ But the CADE would maintain the authority to analyze transactions involving digital platforms; and
- Draft Bill No. 2630/2020²² aims to combat the dissemination of false content on social networks and on private messaging services.²³ Additionally, it forbids the discrimination of platform users' services, which includes discrimination involving access to updated data and restrictions on technical functionalities.²⁴

B. MERGERS

As of November 13, 2023, CADE reviewed 497 transactions, far more than their 2022 stats.²⁵ The average review time has decreased significantly in 2023, reaching 18.7 days²⁶ compared to 34.5 in 2022.²⁷ As of this writing, two merger cases²⁸ have been pulled by Tribunal members for reassessment.²⁹ CADE has also blocked one merger case³⁰ and assessed seven gun jumping infractions—five of them settled with the Parties.³¹

CADE approved a joint venture³² involving agricultural commodities players aiming to develop and operate a B2B software platform for tracking and standardizing sustainability metrics across food and agricultural supply

20. Congresso Nacional, Projeto de Lei No. 2768/2022 (Braz.), <https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2337417> [https://perma.cc/6AUU-PRQN].

21. *Id.*

22. Congresso Nacional, Projecto de Lei No. 2630/2020 (Braz.), <https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2256735> [https://perma.cc/YUJ5-UAJ5].

23. *Id.*

24. *Id.*

25. *Conselho Administrativo de Defesa Econômica* ("CADE"), EM NÚMEROS, <https://cade-numeros.cade.gov.br/QvAJAXZfc/opendoc.htm?document=Painel%2FCADE%20em%20N%C3%BAmeros.qvw&host=QVS%40srv004q6774&anonymous=true> [https://perma.cc/872C-75CF] (last visited Mar. 29, 2024).

26. Ana Paula Candil & Paula Mariane, *Brazil's Average Deal-review Time Decreased by Over 40 Percent in 2023*, *CADE Superintendent Barreto says*, MLEX (Nov. 10, 2023), <https://mlexmarketinsight.com/news/insight/brazil-s-average-deal-review-time-decreased-by-over-40-percent-in-2023-cade-superintendent-barreto-says> [https://perma.cc/2578-V96E].

27. *Anuário Cade 2022*, CADE, https://indd.adobe.com/view/publication/7ae16908-dc6c-4610-9ec4-4868c3f02f62/443k/publication-web-resources/pdf/Completo_08.03.pdf [https://perma.cc/Y4VX-QNH8] (last visited Mar. 29, 2024).

28. Conselho Administrativo de Defesa Econômica, 08700.004304/2022-84; 08700.009905/2022-83 (Braz.).

29. *Id.*

30. Conselho Administrativo de Defesa Econômica, 08700.004046/2022-36 (Braz.).

31. Conselho Administrativo de Defesa Econômica, 08700.005795/2021-08; 08700.007096/2021-94; 08700.000974/2020-60; 08700.000977/2020-01; 08700.002598/2020-48; 08700.003972/2019-99; and 08700.005463/2019-09 (Braz.).

32. Conselho Administrativo de Defesa Econômica, 08700.009905/2022-83 (Braz.).

chains.³³ This is an indication from Brazilian authorities of the growing intersection between competition and sustainability.³⁴

CADE has also published draft Vertical Merger Review Guidelines³⁵ inspired by the European Commission, which are currently under public consultation.³⁶

C. CARTELS AND ANTICOMPETITIVE PRACTICES

In the last twenty years, CADE has signed 109 leniency agreements, an average of five deals each year.³⁷ Recently, CADE's Superintendent, Alexandre Barreto, said that CADE is negotiating ten leniency agreements, some of which involve international cases.³⁸

Since 2022, the formation of consortia to participate in public bids has been in the spotlight. Initially considered a common practice, it has been investigated by CADE as a potential illegal agreement between competitors in at least two cases.³⁹ One case resulted in the conviction of telecom companies⁴⁰ and the other in the dismissal of fuel distributors.⁴¹

In 2023, CADE ruled on fourteen anticompetitive conduct proceedings, imposing 113,748,813.85 BRL (USD\$ 23,166,764.53⁴²) in fines,⁴³ which is ten percent of the 2022 total.

D. DOMINANCE

In recent years, exclusivity has been the second most investigated practice in Brazil and has motivated some of the recent interim measures imposed by

33. *Id.*

34. *Id.*

35. Eduardo Frade, et al., *Cade Publishes Draft of Non-Horizontal Merger Guidelines*, MATTOS FILHO (Nov. 17, 2023), <https://www.mattosfilho.com.br/en/unico/cade-draft-non-horizontal/> [https://perma.cc/53PW-TS3P].

36. *Id.*

37. *CADE Hosts a Debate on the 20 Years Since the First Leniency Agreement Signed in Brazil*, MINISTÉRIO DA JUSTIÇA E SEGURANÇA PÚBLICA (Dec. 5, 2023, 8:51 AM), <https://www.gov.br/cade/en/matters/news/cade-hosts-a-debate-on-the-20-years-since-the-first-leniency-agreement-signed-in-brazil> [https://perma.cc/3VXC-AJUL].

38. *Id.*

39. Camila Pavanelli de Lorenzi, *CADE's Unprecedented Conviction of Telcos Creates Burden for Consortia in Public Procurement Process—Lawyers* (Oct. 19, 2023), <https://community.ionanalytics.com/cades-unprecedented-conviction-of-telcos-creates-burden-for-consortia-in-public-procurement-processes-lawyers> [https://perma.cc/24C8-MV9X].

40. Conselho Administrativo de Defesa Econômica, 08700.011835/2015-02; 08700.003471/2019-11 (Braz.).

41. Conselho Administrativo de Defesa Econômica 08700.003471/2019-11 (Braz.).

42. *1 US Dollar to Brazilian Reais*, WISE, <https://wise.com/us/currency-converter/usd-to-brl-rate?amount=1> [https://perma.cc/4FKR-SGWS] (last visited Mar. 29, 2024).

43. Eduardo Frade, et al., *Cade's Enforcement Against Anticompetitive Conduct*, MATTOS FILHO (Nov. 17, 2023), <https://www.mattosfilho.com.br/en/unico/cades-anticompetitive-conducts/> [https://perma.cc/3FZL-H7PG].

CADE.⁴⁴ In 2023, CADE entered into settlement agreements with Ifood⁴⁵ and Ambev⁴⁶ establishing restrictions on the companies signing exclusivity agreements.⁴⁷

Professional councils have also caught CADE's attention through investigations concerning the allegedly abusive exercising of its regulatory power.⁴⁸ In October 2023, GS suggested the conviction of the Pharmacy,⁴⁹ Dentistry,⁵⁰ and Architecture⁵¹ councils.

III. Canada

A. LEGISLATIVE DEVELOPMENTS

The 2022 amendments to the Competition Act, which came into force in June 2023, criminally prohibit two or more unaffiliated employers from engaging in wage-fixing or no-poach agreements.⁵² The prior C\$25 million limit on fines under section 45 has also been removed.⁵³

A new set of proposed amendments to the Competition Act would expand the Competition Bureau's ("Bureau") power to conduct market studies in the "public interest" and seek prohibition orders to civilly address anti-competitive agreements between parties that do not necessarily compete.⁵⁴ The amendments also propose to repeal the "efficiencies defence," which allows merging parties to resist a Bureau challenge based on efficiencies offsetting a merger's alleged anti-competitive effects.⁵⁵

B. MERGERS

Shell Canada Limited agreed to divest retail gas station assets in three markets in Western Canada to address competition concerns arising from its acquisition of a competitor's assets in those markets.⁵⁶

44. Calo Neto, et al., *Brazil: A Close-Up of Key Cases Highlights Growing Concern over Structural Movements*, GCR (Feb. 14, 2024), <https://globalcompetitionreview.com/guide/digital-markets-guide/third-edition/article/brazil-close-of-key-cases-highlights-growing-concern-over-structural-movements> [<https://perma.cc/Z2C4-EH7S>].

45. Conselho Administrativo de Defesa Econômica, 08700.004588/2020-47 (Braz.).

46. Conselho Administrativo de Defesa Econômica, 08700.001992/2022-21 (Braz.).

47. *Id.*

48. *Id.*

49. Conselho Administrativo de Defesa Econômica, 08700.002502/2022-11 (Braz.).

50. Conselho Administrativo de Defesa Econômica, 08700.002420/2022-69 (Braz.).

51. Conselho Administrativo de Defesa Econômica, 08700.002501/2022-69 (Braz.).

52. Competition Act, R.S.C. 1985, c C-34, art 45(1.1) (Can.).

53. *Id.*

54. Adam S. Goodman, et al., *Bill C-56 Proposes New Amendments to the Competition Act*, DENTONS CAN. REGUL. REV. (Oct. 2, 2023), <https://www.canadaregulatoryreview.com/bill-c-56-proposes-new-amendments-to-the-competition-act/> [<https://perma.cc/J28B-GRAR>].

55. *Id.*

56. Competition Bureau Canada, *Competition Bureau Preserves Competition in Supply of Retail Fuel in Western Canada*, GOV'T OF CAN. (July 31, 2023), <https://www.canada.ca/en/>

A proposed merger between RBC, Canada's largest bank, and HSBC, Canada's seventh-largest bank, was approved by the Bureau, although approval by the Minister of Finance is also required for closing.⁵⁷

The Federal Court of Appeal ("FCA") dismissed an appeal of the Competition Tribunal's ("Tribunal") decision allowing Rogers Communications Inc.'s C\$26 billion acquisition of telecommunications rival, Shaw Communications Inc.⁵⁸ The FCA's ruling confirmed the Tribunal's finding that Shaw's sale of its wireless business, Freedom Mobile, to Videotron Ltd. was an appropriate "fix-it-first" remedy.⁵⁹

The FCA dismissed an appeal by Secure Energy Services Inc. ("Secure") of a Tribunal decision ordering Secure to divest certain Western Canadian oilfield waste facilities in connection with Secure's acquisition of competitor, Tervita Corporation.⁶⁰ Secure's reliance on the efficiencies defence was unsuccessful as the evidence was not "clear and convincing."⁶¹

C. CARTELS AND ANTI-COMPETITIVE PRACTICES

Canada Bread Co. pled guilty and was sentenced to pay a fine of C\$50 million for its role in a price-fixing scheme for bread—the largest price—fixing fine imposed in Canada to date.⁶²

D. DOMINANCE

Pharmaceutical company, Isologic, agreed with the Bureau's request to cease using exclusivity clauses in some of its contracts with customers.⁶³

Apotex Inc. brought the first private party application for leave to the Tribunal to initiate an abuse of dominance proceeding since the provision was

competition-bureau/news/2023/07/competition-bureau-preserves-competition-in-supply-of-retail-fuel-in-western-canada.html# [https://perma.cc/E4ZP-4GDC].

57. Competition Bureau Canada, *Competition Bureau Issues Report Summarizing its Competition Assessment of RBC's Proposed Acquisition of HSBC Canada*, GOV'T OF CAN. (Sept. 1, 2023), <https://www.canada.ca/en/competition-bureau/news/2023/09/competition-bureau-issues-report-summarizing-its-competition-assessment-of-rbcs-proposed-acquisition-of-hsbc-canada.html#> [https://perma.cc/7LU3-3RXN].

58. Comm'r of Competition v. Rogers Commc'm Inc., [2023] F.C.A 16 (Can.), <https://www.canlii.org/en/ca/fca/doc/2023/2023fca16/2023fca16.html> [https://perma.cc/QCP4-WVHD].

59. Adam S. Goodman, et al., *Competition Tribunal Decides in Favour of Rogers-Shaw Deal; Competition Bureau Appeals*, DENTONS (Jan. 17, 2023), <https://www.dentons.com/en/insights/articles/2023/january/17/competition-tribunal-decides-in-favour-of-rogers-shaw-deal> [https://perma.cc/D2V3-E7P2].

60. Secure Energy Services, Inc. v. Comm'r of Competition, [2023] F.C.A 172 (Can.).

61. *Id.*

62. *Canada Bread Company Limited Sentenced to \$50 Million in Fines for Price-Fixing*, PUB. PROSECUTION SERV. OF CAN. (June 21, 2023), https://www.ppsc-sppc.gc.ca/eng/nws-nvs/2023/21_06_23.html [https://perma.cc/EH3J-CZT4].

63. Competition Bureau Canada., *Competition Bureau Reaches Agreement with Isologic to Protect Competition in Healthcare*, GOV'T OF CAN. (Mar. 24, 2023), <https://www.canada.ca/en/competition-bureau/news/2023/03/competition-bureau-reaches-agreement-with-isologic-to-protect-competition-in-healthcare.html#> [https://perma.cc/N825-5C4Y].

added in the 2022 amendments to the Competition Act.⁶⁴ The application, which sought access to a rival's drug samples to develop its generic version, was later discontinued.⁶⁵

IV. China

A. LEGISLATIVE DEVELOPMENTS

In 2023, the State Administration for Market Regulation of China ("SAMR") released five sets of regulations to the amended PRC Anti-Monopoly Law ("AML"), including Provisions on Prohibition of Monopoly Agreements,⁶⁶ Provisions on Prohibition of Abuse of Dominant Market Positions,⁶⁷ Provisions on Review of Concentrations of Undertakings,⁶⁸ Provisions on Prohibition of Acts of Eliminating or Restricting Competition by Abuse of Administrative Power,⁶⁹ and Provisions on Prohibition of Abuse of IPR to Exclude or Restrict Competition.⁷⁰ The AML amendments and the regulations are devised to address new issues arising in the digital economy.⁷¹

B. MERGERS

In 2023, SAMR unconditionally approved approximately 593 deals and imposed conditions in four transactions.⁷²

In *Simcere Pharma/Tobishi*, SAMR required the combined entity to terminate the exclusive supply agreement of batroxobin, an active pharmaceutical ingredient ("API"), in China, to divest its batroxobin

64. Apotex, Inc., v. Paladin Labs Inc., Competition Tribunal, File. No. CT-2023-007, <https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/521216/index.do> [<https://perma.cc/79XK-UG3E>].

65. See *id.*

66. *Prohibition of Monopoly Agreements*, STATE ADMIN. FOR MKT. REGUL., https://www.samr.gov.cn/zw/zfxgk/fdzdgknr/fgs/art/2023/art_e96bccd087754167bcac253683435f23.html [<https://perma.cc/XGU3-KMDB>] (last visited Mar. 29, 2024).

67. *Prohibition of Abuse of Dominant Market Positions*, STATE ADMIN. FOR MKT. REGUL., https://www.samr.gov.cn/zw/zfxgk/fdzdgknr/fgs/art/2023/art_fd238d3ec1284cb58a-2e640255711ff6.html [<https://perma.cc/75AU-WKJM>] (last visited Mar. 29, 2024).

68. *Provisions on the Review of Concentration of Undertakings*, STATE ADMIN. FOR MKT. REGUL., https://www.samr.gov.cn/zw/zfxgk/fdzdgknr/fgs/art/2023/art_4c34a8aa4e62449ab38233bdbba172a7.html [<https://perma.cc/BL5W-9QNN>] (last visited Mar. 29, 2024).

69. *Prohibition of Abuse of Administrative Power*, STATE ADMIN. FOR MKT. REGUL., https://www.samr.gov.cn/zw/zfxgk/fdzdgknr/fgs/art/2023/art_b96953818d5a4737a60527c675c1d1cb.html [<https://perma.cc/H9ME-NGZJ>] (last visited Mar. 29, 2024).

70. *Prohibition of Abuse of Intellectual Property Rights*, STATE ADMIN. FOR MKT. REGUL., https://www.samr.gov.cn/zw/zfxgk/fdzdgknr/fgs/art/2023/art_e155397fbc5c4c05ad3c1838c1322ad2.html [<https://perma.cc/E8BZ-J9LB>] (last visited Mar. 29, 2024).

71. See *id.*

72. *Antitrust in China – 2023 Year in Review*, GIBSON DUNN (Mar. 19, 2024), <https://www.gibsondunn.com/antitrust-in-china-2023-year-in-review/> [<https://perma.cc/SD2G-WYWM>].

injection business and to decrease the end user price.⁷³ This is the first transaction below the filing thresholds to receive conditional approval.⁷⁴

In *MaxLinear/Silicon Motion*, SAMR required that the combined entity continue to supply NAND flash memory chips to Chinese customers on a FRAND basis and retain Silicon Motion's field application engineers in China to provide support to its Chinese customers.⁷⁵ However, the transaction was abandoned by MaxLinear shortly after SAMR's approval.⁷⁶

In *Wanhua Chemical/Yantai Juli*, SAMR required that the annual average price of TDI supplied by the combined entity to customers in China shall not be higher than the average price during the twenty-four months preceding the decision.⁷⁷

In *Broadcom/VMware*, SAMR required the combined entity to avoid tie-in sales, to maintain interoperability, to continue with existing product certification practices, and to protect the confidential information of third-party hardware manufacturers.⁷⁸

C. ENFORCEMENT

In 2023, SAMR took enforcement action in eleven cartel cases, eight abuse of dominance cases, and one resale price maintenance case.⁷⁹ Among the cartel cases, two involved APIs, five involved public utilities and services, and three involved in the construction industry.⁸⁰ In the Huangshan Cruise Cartel case, SAMR granted leniency in the form of a reduced fine to the first company who reported the cartel.⁸¹ The abuse of dominance cases involved

73. *Announcement of the State Administration for Market Regulation (Simcere Pharmaceutical Co.)*, STATE ADMIN. FOR MKT. REGUL., https://www.samr.gov.cn/fldes/tzgg/ftj/art/2023/art_90a71deadd224689b026920807c0389c.html [<https://perma.cc/UJ8T-GQCV>] (last visited Mar. 29, 2024).

74. *Id.*

75. *Announcement of the State Administration for Market Regulation (Beijing Tobixi Pharmaceutical Co.)*, STATE ADMIN. FOR MKT. REGUL., https://www.samr.gov.cn/fldes/tzgg/ftj/art/2023/art_90a71deadd224689b026920807c0389c.html [<https://perma.cc/S2Y5-VQED>] (last visited Mar. 29, 2024).

76. *Id.*

77. *Announcement of the State Administration for Market Regulation (Yantai Juli Fine Chemicals Co.)*, STATE ADMIN. FOR MKT. REGUL., https://www.samr.gov.cn/fldes/tzgg/ftj/art/2023/art_c2b34c8db90d4415a4025b84a4cf837f.html [<https://perma.cc/7MPZ-J34R>] (last visited Mar. 29, 2024).

78. *Announcement of the State Administration for Market Regulation (Broadcom)*, STATE ADMIN. FOR MKT. REGUL., https://www.samr.gov.cn/fldes/tzgg/ftj/art/2023/art_cae805a5e37d489ea929af8a4a369f6b.html [<https://perma.cc/2SW5-3TL6>] (last visited Mar. 29, 2024).

79. *Antitrust in China and Across the Region*, CLIFFORD CHANCE (Jan. 2023), <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2023/04/asia-pacific-quarterly-anti-trust-briefing-q1-2023.pdf> [<https://perma.cc/42HE-Y594>].

80. *Id.*

81. *Id.*

exclusive dealing and unfairly high price by API manufacturers and public utilities companies.⁸²

D. JUDICIAL JUDGMENTS

Miao Chong v. SAIC-GM is the first case resulting in a victory for a plaintiff in an antitrust lawsuit against a defendant fined by SAMR for resale price maintenance.⁸³ The Supreme People's Court ("SPC") of China held that unchallenged administrative penalty decisions by SAMR are precedential for purposes of follow-up antitrust litigation.⁸⁴

In *Yangtze River Pharmaceutical Group v. Hefei Industrial Pharmaceutical Institute*, the SPC reversed the lower court's decision and held that (1) competitive constraints from the downstream market should be considered when evaluating the market power of API producers; and (2) exclusive dealing arrangements will not violate the AML if it is necessary for the exercise of patent rights.⁸⁵

V. European Union

A. LEGISLATIVE DEVELOPMENTS

Flagship legislation to regulate "gatekeeper" providers of digital platform services started to apply, and gave rise to its first challenges before the EU courts.⁸⁶ Legislation destined to screen financial contributions given by non-EU countries to companies engaging in M&A and public procurement in the EU also entered into force.⁸⁷ In a different area, the European Commission ("EC") proposed legislation to regulate the licensing of Standard Essential Patents.⁸⁸

82. *Id.*

83. Peter Wang et al., *China's Supreme Court Ruling Likely to Prompt More Follow-on Anti-trust Litigation*, JD SUPRA (Feb. 7, 2023), <https://www.jdsupra.com/legalnews/china-s-supreme-court-ruling-likely-to-9597796/> [<https://perma.cc/XWC7-4RRF>].

84. *Second-instance Civil Judgment on Disputes Over Vertical Monopoly Agreements between Miao Chong and SAIC General Motors Sales Co., Ltd.*, BEIJING INTELL. PROP., <https://county.beijingip.cn/cy/websiteArticle/detailArticle.do?id=b607048958594e96499e6bb930850c13> [<https://perma.cc/YNK6-UBU7>] (last visited Mar. 29, 2024).

85. Janet Hui, Wei Huang & Vanessa Yanhua Zhang, *Antitrust and Economic Analysis of Key Sectors under the New Anti-Monopoly Law*, 38 ANTITRUST L.J. 1 (2023).

86. *About the Digital Markets Act*, EUR. COMM'N, https://digital-markets-act.ec.europa.eu/about-dma_en [<https://perma.cc/W9SF-CLNJ>] (last visited 2024).

87. *Foreign Subsidies Regulation*, EUR. COMM'N (July 12, 2023), https://competition-policy.ec.europa.eu/foreign-subsidies-regulation_en [<https://perma.cc/C2KN-ADGS>].

88. *Intellectual Property: Harmonised EU Patent Rules Boost Innovation, Investment and Competitiveness in the Single Market*, EUR. COMM'N (April 27, 2023), https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2454 [<https://perma.cc/9D9K-UH6K>].

B. MERGERS⁸⁹

Further to its 2022 high-profile prohibition of Illumina's acquisition of Grail, the EC imposed fines on the companies for gun-jumping and ordered Illumina to unwind the transaction.⁹⁰ In a different sector, the EC blocked hotel online travel agency Booking's proposed acquisition of flight online travel agency eTraveli, following an in-depth review that lasted close to one year.⁹¹ Other high profile transactions under review include Amazon's proposed acquisition of iRobot and Adobe's plans to acquire Figma.⁹²

C. ANTI-COMPETITIVE PRACTICES

In 2023 as of this article's submission, the EC imposed fines totaling about €14.6 million (~USD \$16 million) in respect of hand grenades and antispasmodic ingredient cartels, the latter marking the EC's first cartel decision in the pharmaceuticals sector.⁹³

D. DOMINANCE⁹⁴

The EC continued a number of investigations into the tech and digital sector.⁹⁵ It progressed its investigations into Apple's App Store Rules and Apple Pay, as well as into Meta's use of data in connection with its Facebook Marketplace service.⁹⁶ The EC also opened an investigation into Microsoft's possible tying of its Teams communication system with its Office/Microsoft 365 suites.⁹⁷ It adopted formal charges against Google for allegedly abusive

89. *Mergers*, EUR. COMM'N, https://competition-policy.ec.europa.eu/mergers_en [<https://perma.cc/CX4E-NVBU>] (last visited Mar. 29, 2024).

90. *Mergers: Commission Prohibits Acquisition of GRAIL by Illumina*, EUR. COMM'N (Sep. 6, 2023), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5364 [<https://perma.cc/L3V8-RAHT>].

91. *Mergers: Commission Prohibits Proposed Acquisition of eTraveli by Booking*, EUR. COMM'N (Sept. 25, 2023), https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4573 [<https://perma.cc/ZH4R-T3J2>].

92. Michelle Chapman, *Adobe Calls Off \$20 Billion for Figma after Pushback from Europe Over Possible Antitrust Issues*, ASSOCIATED PRESS (Dec. 18, 2023), <https://apnews.com/article/adobe-figma-acquisition-regulatory-6997e3a40ef309a147f13e3ed3e773fe> [<https://perma.cc/8H4Q-7GBZ>].

93. *Cartels Cases and Statistics*, EUR. COMM'N (Dec. 7, 2023), https://competition-policy.ec.europa.eu/antitrust-and-cartels/cartels-cases-and-statistics_en [<https://perma.cc/HZH2-E9HT>].

94. *Antitrust and Cartels*, EUR. COMM'N, https://competition-policy.ec.europa.eu/antitrust-and-cartels_en [<https://perma.cc/767R-JZ8B>] (last visited 2024).

95. Edith Hancock, *EU Cracks Down on 6 Big Tech Giants*, POLITICO (Sept. 6, 2023), <https://www.politico.eu/article/eu-cracks-down-on-six-big-tech-giants/> [<https://perma.cc/3KG7-3Z58>].

96. *Id.*

97. *Antitrust: Commission Opens Investigation into Possible Anticompetitive Practices by Microsoft Regarding Teams*, EUR. COMM'N (July 23, 2023), https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3991 [<https://perma.cc/AS8Q-YNJL>].

practices in the ad technology stack.⁹⁸ Meanwhile, Google continued its legal challenges against three EC decisions imposing multi-billion fines in connection with its Shopping, AdSense, and Android search services.⁹⁹ Finally, following a long court battle that resulted in the partial annulment of its findings against Intel's rebate policy, the EC re-imposed a fine of €376 million (~USD \$410 million) on the company, limited to the so-called naked restrictions not called into question by the EU Courts.¹⁰⁰

E. JUDICIAL JUDGMENTS

In two rulings, the EU Courts further clarified the scope of the essential facilities doctrine, including the evidentiary standard to characterize a refusal to deal.¹⁰¹ The EU Court of Justice also confirmed that transactions that do not trigger merger control review may be scrutinized under Article 102 TFEU (i.e. the rules on abuse of dominance).¹⁰² In its first ruling on the topic, the EU's top court considered the scope of the EU's Foreign Direct Investment Screening Regulation and its interplay with the EU's fundamental freedom of establishment and free circulation of capital.¹⁰³

VI. India

A. LEGISLATIVE DEVELOPMENTS

The Government of India passed the Competition (Amendment) Act, 2023 bringing the most significant overhaul of the Indian competition law regime since its inception.¹⁰⁴

On the merger control front, key changes include: (a) a new deal value threshold; (b) derogation of standstill obligations for certain on-market

98. *Antitrust: Commission Sends Statement of Objections to Google Over Abusive Practices in Online Advertising Technology*, EUR. COMM'N (June 14, 2023), https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3207 [<https://perma.cc/3SBL-PADR>].

99. *Antitrust: Commission Fines Google €2.42 billion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison Shopping Service-factsheet*, EUR. COMM'N (June 27, 2017), https://ec.europa.eu/commission/presscorner/detail/es/MEMO_17_1785 [<https://perma.cc/G4ZL-EQP8>].

100. *Antitrust: Commission Re-imposes € 376.36 Million Fine on Intel for Anticompetitive Practices in the Market for Computer Chips*, EUR. COMM'N (Sept. 22, 2023), https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4570 [<https://perma.cc/Z39X-JRPD>].

101. Case C-42/21, *Lietuvos Geležinkeliai AB v. Eur. Comm'n*, 2022 E.C.R. 2022:537; see also Case T-136/19, *Bulgarian Energy Holding EAD v. Eur. Comm'n*, 2022 E.C.R. 2022:149.

102. Case C-449/21, *Towercast v. Autorité de la Concurrence*, 2022 E.C.R. 2022:777.

103. Case C-106/22, *Xella Magyarország Építőanyagipar Kft. v. Innovációs és Technológiai Miniszter*, 2023 E.C.R. 2023:267.

104. The Competition (Amendment) Act, 2023 (India), [https://prsindia.org/files/bills_acts/acts_parliament/2023/The%20Competition%20\(Amendment\)%20Act,%202023.pdf](https://prsindia.org/files/bills_acts/acts_parliament/2023/The%20Competition%20(Amendment)%20Act,%202023.pdf) [<https://perma.cc/H95J-7EJJ>].

purchases; (c) codifying the “material influence” standard for the “control” definition; and (d) expedited review timelines.¹⁰⁵

On the enforcement front, changes include: (a) a new framework for commitments and settlements in vertical agreements and abuse of dominance cases; (b) a new “leniency plus” mechanism; and (c) higher penalties based on “global turnover” rather than the current “relevant turnover” standard.¹⁰⁶

B. MERGERS

The CCI cleared several notifications subject to structural and behavioral modifications, including India-specific remedies in global deals.¹⁰⁷

The CCI sought undertakings from acquirers to not participate in board meetings, or in the management and affairs of the acquired entities.¹⁰⁸

The National Company Law Appellate Tribunal (“NCLAT”) set aside penalties imposed on *ITC Limited* for its failure to notify the acquisition of certain trademarks.¹⁰⁹

The CCI clarified that the notification exemption for buyback of shares would not apply where it led to the acquisition of control.¹¹⁰

C. CARTELS AND ANTI-COMPETITIVE PRACTICES

The NCLAT allowed appeals by Indian tire manufacturers, finding that the correct data showed no price parallelism among manufacturers.¹¹¹ The CCI was directed to re-examine the case.¹¹² The NCLAT upheld the CCI’s rejection of a challenge to a merger between film exhibitors.¹¹³ The NCLAT set aside the CCI’s sugar-mills decision given its inordinate delay in issuing the decision and the fact that an insufficient number of CCI members signed the order.¹¹⁴

105. *Id.* §5.

106. *Id.* §27.

107. See generally Competition Comm’n of India, Order Combination Registration No. C-2022/04/923 (Oct. 4, 2022); Order Combination Registration No. C-2023/04/1022 (Sept. 1, 2023).

108. Competition Comm’n of India, Order Combination Registration No. C-2022/07/952 (Aug. 30, 2022); Order Combination No. C-2023/04/1017 (June 6, 2023).

109. *ITC Ltd. v. Competition Comm’n of India*, Competition Appeal (AT) No. 11 of 2018 (NCLAT Apr. 27, 2023).

110. Competition Comm’n of India, Order Combination Registration No. C-2002/06/936 (July 15, 2022).

111. *Ceat Ltd. v. Competition Comm’n of India*, Competition Appeal (AT) No. 05 of 2022 (NCLAT Dec. 1, 2022).

112. *Id.*

113. *CUTS v. Competition Comm’n of India*, Competition Appeal (AT) No. 61 of 2022 (NCLAT Aug. 10, 2023).

114. *Balrampur Chini Mills Limited v. Competition Comm’n of India*, Competition Appeal (AT) No. 86 of 2018 (NCLAT Oct. 10, 2023).

D. DOMINANCE

The NCLAT upheld penalties against Google for its anti-competitive conduct in the Android ecosystem.¹¹⁵

The CCI separately penalized Google for its Play Store payments policies and for self-preferencing its own payments application.¹¹⁶

MakeMyTrip was penalized for abuse of dominance and for entering into an agreement with hotel franchisor, Oyo, to delist certain competing hotel chains on MakeMyTrip's portal.¹¹⁷

The Delhi High Court ruled that disputes relating to alleged anti-competitive conduct in patent rights licensing must be examined under the Patents Act, rather than the Competition Act.¹¹⁸

VII. Japan

A. LEGISLATIVE DEVELOPMENTS

There were no significant legislative developments in the fiscal year ending on March 31, 2023 ("FY2022").¹¹⁹ That said, the Japan Fair Trade Commission ("JFTC") has strengthened its response to rapid market changes such as digitalization by engaging in advocacy activities in addition to pure enforcement.¹²⁰ In its market survey report on mobile OS/app distribution issued in February 2023, the JFTC pointed out that there are insufficient competitive pressures on the mobile OS and app stores provided by Google and Apple, raising potential concerns for exclusionary or abusive conduct by those companies.¹²¹ Presumably, by proactively releasing such fact-finding reports, the JFTC is trying to informally warn said companies as well as possibly suggest new legislation to regulate digital markets.¹²²

115. Competition Comm'n of India, *Umar Javeed v. Google LLC*, Case No. 39 of 2018 (Oct. 20, 2022); *Google LLC v. Competition Comm'n of India*, Competition Appeal (AT) No. 1 of 2023 (Mar. 29, 2023).

116. Competition Comm'n of India, *XYZ v. Alphabet Inc. et al.*, Case No. 7 of 2020 (Oct. 25, 2022).

117. Competition Comm'n of India, *FHRAI v. MakeMyTrip*, Case No. 14 of 2019 (Oct. 19, 2022).

118. *Telefonaktiebolaget LM Ericsson (Publ.) v. Competition Comm'n of India*, W.P.(C) No. 8379 of 2015 (Delhi High Court July 13, 2023).

119. *Market Study Report on Mobile OS and Mobile App Distribution*, JAPAN FAIR TRADE COMM'N (Feb. 9, 2023), <https://www.jftc.go.jp/en/pressreleases/yearly-2023/February/230209.html> [<https://perma.cc/42MM-7G34>].

120. *Id.*

121. *Id.*

122. *The Status of Notifications Regarding Business Combinations and the Results of Reviews of Major Business Combinations in Fiscal Year 2022*, JAPAN FAIR TRADE COMM'N (June 28, 2023), <https://www.jftc.go.jp/en/pressreleases/yearly-2023/June/230628.html> [<https://perma.cc/VTH2-AXLC>].

B. MERGERS AND ACQUISITIONS

In FY2022, the JFTC received a total of 306 merger notifications, none of which were brought into a Phase II review and only one of which required remedies.¹²³ Notably, fifteen cases were non-reportable transactions that were voluntarily submitted by the parties or investigated by the JFTC ex officio, indicating the JFTC's increasing willingness to review non-reportable transactions that may impact competition in Japan.¹²⁴ Other prominent features of the JFTC's merger review include a continuous acute interest in the digital markets and more frequent use of economic analysis.¹²⁵ A good demonstration of these features is the case of Microsoft's acquisition of Activision Blizzard, in which the JFTC conducted a vertical analysis to evaluate any potential incentive for input foreclosure and reviewed internal documents submitted by the parties.¹²⁶ Both methods of evaluation are in line with the JFTC's newly released policy on "Active Promotion of Competition Policy in Response to Socioeconomic Changes caused by Digitalization."¹²⁷

C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

In FY2022, the JFTC opened investigations against 116 cases of suspected Antimonopoly Act ("AMA") violations and reached decisions in ninety-nine cases.¹²⁸ The JFTC took eleven legal measures, including eight cease-and-desist orders and three commitment plan approvals.¹²⁹

On March 30, 2023, the JFTC issued cease-and-desist orders and surcharge payment orders against five major electricity companies for forming a cartel that led them to refrain from acquiring new customers outside their traditional supply areas.¹³⁰ Three electricity companies were ordered to pay a total of approximately USD \$670 million, thereby pushing the annual total surcharges in FY2022 to a new record high.¹³¹ Kansai Electric Power enjoyed full immunity from surcharge payment as the first leniency applicant in that case.¹³²

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Annual Report of the Japan Fair Trade Commission (April 2022–March 2023)*, JAPAN FAIR TRADE COMM'N (June 16, 2023), <https://www.jftc.go.jp/en/pressreleases/yearly-2023/June/230616.html> [<https://perma.cc/G5AS-JQ6G>].

128. *Id.*

129. *The JFTC Issued Cease and Desist Orders and Surcharge Payment Orders against the Former General Electricity Utilities, etc.*, JAPAN FAIR TRADE COMM'N (Mar. 30, 2023), <https://www.jftc.go.jp/en/pressreleases/yearly-2023/March/230330.html> [<https://perma.cc/X9S9-6JV7>].

130. *Id.*

131. *Id.*

132. *The JFTC's Criminal Accusation on Bid-rigging Concerning the Outsourcing Contracts of Planning Test Events, etc. Regarding the Olympic and Paralympic Games Tokyo 2020 Ordered by the Tokyo Organizing Committee of the Olympic and Paralympic Games*, JAPAN FAIR TRADE COMM'N

At the conclusion of its investigation into a bid-rigging case concerning the outsourcing contracts for test events during the 2020 Olympics and Paralympic Games, the JFTC filed an accusation with the Prosecutor General against six major advertisement agencies and seven individuals for criminal violations of the AMA and the Penal Code.¹³³ These agencies and individuals were indicted by the Tokyo District Prosecutors' Office on the same day and the case is currently under review by the Tokyo District Court.¹³⁴

VIII. Korea

A. LEGISLATIVE DEVELOPMENTS

On January 12, 2023, the Korea Fair Trade Commission ("KFTC") adopted the Guidelines for Review of Abuse of Market Dominance by Online Platform Operators, supplementing the KFTC's existing review guidelines.¹³⁵ The new guidelines provide criteria for defining a relevant market and for assessing market dominance and anti-competitiveness involving online platforms.¹³⁶ The guidelines also provide criteria for determining illegality of specific types of dominance-abusive conduct—i.e., restriction of multi-homing, demanding MFN treatment, self-preferencing and tying.

In November 2023, the KFTC issued a proposed amendment to its Merger Review Guidelines to reflect the unique attributes of online platforms affecting competitive analysis, such as zero-price services, multi-sided platforms, and network effects.¹³⁷

B. MERGERS

In May 2023, the KFTC unconditionally cleared Microsoft's acquisition of Activision Blizzard based on the parties' low combined market share in the gaming market.¹³⁸ The KFTC took into account the Korean market's

(Feb. 28, 2023), <https://www.jftc.go.jp/en/pressreleases/yearly-2023/February/230228.html> [<https://perma.cc/3ARH-8YJK>].

133. *Id.*

134. *Guidelines on Review of Abuse of Market Dominance by Online Platform Operators*, KIM & CHANG: NEWSL. (Jan. 12, 2023), https://www.kimchang.com/en/insights/detail.kc?sch_section=4&idx=26661 [<https://perma.cc/9P4D-MEFK>].

135. *KFTC Issues Advance Notice of Proposed Amendment to Merger Review Guidelines for the Digital Economy*, KIM & CHANG: NEWSL. (Nov. 22, 2023), https://www.kimchang.com/en/insights/detail.kc?sch_section=4&idx=28331 [<https://perma.cc/W58W-84QQ>].

136. *See id.*

137. *See South Korea is the Latest Country to Approve Microsoft's Activision Blizzard Acquisition*, VIDEO GAMES CHRON.: VIDEO GAMES NEWS (May 30, 2023, 9:55 AM), <https://www.videogameschronicle.com/news/south-korea-is-the-latest-country-to-approve-microsofts-activision-blizzard-acquisition/#:~:text=Microsoft's%20proposed%20acquisition%20of,Blizzar%20games%20are%20made%20exclusive> [<https://perma.cc/WV2J-AZKA>].

138. *Id.*

preference for Sony's PlayStation over Microsoft's Xbox and PC games over cloud games.¹³⁹

In October 2023, the KFTC conditionally approved Broadcom's acquisition of VMware, a leading company in the server virtualization software market.¹⁴⁰ The KFTC found that post-transaction, Broadcom could foreclose its FC HBA rivals by degrading interoperability between their FC HBAs and VMware's server virtualization software.¹⁴¹ The KFTC required Broadcom to ensure interoperability over the next ten years.¹⁴²

C. CARTELS AND ANTI-COMPETITIVE PRACTICES

In September 2023, the KFTC announced sanctions of approximately KRW 19.1 billion on Broadcom for abusing its superior bargaining position against Samsung Electronics.¹⁴³ The KFTC found that Broadcom coerced Samsung to enter into unfavourable long-term agreements that prevented Samsung from using other suppliers through sanctions like suspending shipments.¹⁴⁴ This left Samsung particularly vulnerable given the competition with Apple in the premium smart device market.¹⁴⁵ Earlier in June, the KFTC rejected Broadcom's proposed consent decree due to insufficient compensatory measures.¹⁴⁶

D. ABUSE OF DOMINANCE

In June 2023, the KFTC fined Kakao Mobility approximately KRW 25.7 billion for abusing its dominant position in the ride-hailing market to monopolize the adjacent taxi franchise market.¹⁴⁷ The KFTC alleged that since its launch of taxi franchise Kakao T Blue in March 2019, Kakao Mobility engaged in unlawful self-preferencing by manipulating algorithms in its ride-hailing app to favour its cab drivers from Kakao T Blue.¹⁴⁸

139. Yoon & Yang LLC, *Korea: KFTC grants conditional approval for Broadcom-VMware merger*, WESTLAW: PRAC. L. UK (Nov. 17, 2023), [https://uk.practicallaw.thomsonreuters.com/w-041-4310?transitionType=Default&contextData=\(sc.Default\)#::~text=On%2023%20October%202023%2C%20the,Regulation%20and%20Fair%20Trade%20Act](https://uk.practicallaw.thomsonreuters.com/w-041-4310?transitionType=Default&contextData=(sc.Default)#::~text=On%2023%20October%202023%2C%20the,Regulation%20and%20Fair%20Trade%20Act) [https://perma.cc/7NMG-GFLQ].

140. *Id.*

141. *Id.*

142. Michael Herh, *KFTC Slaps Fine on Broadcom for Abusing Its Power over Samsung Electronics*, BUS. KOREA: ICT (Sept. 21, 2023), <https://businesskorea.co.kr/news/articleView.html?idxno=202319> [https://perma.cc/ET3E-7SBV].

143. *Id.*

144. *Id.*

145. *Id.*

146. So-Hyeon Kim & Sang-eun Lucia Lee, *Kakao Mobility Fined \$20 Million over Unfair Taxi-Handling Service*, THE KOREA ECON. DAILY GLOB. ED.: BUS. & POL. (Feb. 14, 2023), <https://www.kedglobal.com/business-politics/newsView/ked202302140024> [https://perma.cc/P2F8-7CE2].

147. *Id.*

148. *Id.*

This significantly increased the number of Kakao T Blue drivers, which appreciably increased Kakao T Blue's share in the taxi franchise market, from 14.2% in 2019 to 73.7% in 2021.¹⁴⁹

In July 2023, the KFTC fined Google approximately KRW 42.1 billion for abusing its dominant position to exclude its local rival Android-based app store, ONE Store.¹⁵⁰ The KFTC alleged that from June 2016 to April 2018, Google pushed gaming developers to release their games exclusively on Google Play in exchange for support for global expansion and in-app featuring, which resulted in a significant drop in ONE Store's market share.¹⁵¹

In April 2023, the Supreme Court ruled in favour of the KFTC against Qualcomm.¹⁵² In 2017, the KFTC fined Qualcomm approximately KRW 1.03 trillion for abusing its position as a dominant manufacturer of modem chipsets and holder of standard essential patents (SEPs).¹⁵³ The KFTC alleged that Qualcomm, in violation of its FRAND obligations, refused to license its SEPs and forced mobile phone manufacturers to exclusively use Qualcomm's chipsets.¹⁵⁴ The Seoul High Court and the Supreme Court both dismissed Qualcomm's appeals in large part and upheld the fine.¹⁵⁵

IX. South Africa

A. LEGISLATIVE DEVELOPMENTS

The Competition Commission ("Commission") released two sets of guidelines; on the Exchange of Competitively Sensitive Information,¹⁵⁶

149. Gadjó Sevilla, *Google Dinged with \$32M Fine in South Korea for Blocking Mobile Games on Rival App Store*, EMARKETER (Apr. 12, 2023), <https://www.emarketer.com/content/google-dinged-with-32m-fine-south-korea-blocking-mobile-games-on-rival-app-store> [https://perma.cc/SHS8-R66E].

150. Invitation for Public Comment on the Draft Amended Public Interest Guidelines Relating to Merger Control GN 3945 of GG 49407 (Oct. 6, 2023), https://www.gov.za/sites/default/files/gcis_document/202310/49407gon3945.pdf [https://perma.cc/L9F4-CWA8].

151. Kim Yoon-kyong & Kim Tae-gyu, *Qualcomm's \$800M Fine Upheld by Korea's Highest Court*, UPI: WORLD NEWS (Apr. 14, 2023, 3:28 PM), https://www.upi.com/Top_News/World-News/2023/04/14/Qualcomm-South-Korea-fine-business-practices/4921681500105/ [https://perma.cc/34FW-3T7M].

152. KOREA FAIR TRADE COMM'N, KOREA FAIR TRADE COMMISSION ANNUAL REPORT 2017, at 8, 42 (2017), https://www.ftc.go.kr/solution/skin/doc.html?fn=bd60e97df64ecfb0bf2578c58ef3a70fc41f48786446f5f5aed59088afd80fd&rs=/fileupload/data/result/BBSM-STR_000000002404/ [https://perma.cc/3RC4-ERF6].

153. *Id.* at 14.

154. Yook-kyung & Tae-gyu, *supra* note 151.

155. Final Guidelines on the Exchange of Competitively Sensitive Information between Competitors under the Competition Act No.89 of 1998 (as amended), GN 3084 of GG 48104 (Feb. 24, 2023), https://www.gov.za/sites/default/files/gcis_document/202302/48104gon3084.pdf [https://perma.cc/8UEN-3T8K].

156. Draft Amended Public Interest Guidelines Relating to Merger Control, GN 3945 of GG 49407 (Oct.6,2023), https://www.gov.za/sites/default/files/gcis_document/202310/49407gon3945.pdf [https://perma.cc/CH8Q-VYU4].

and a draft update to the Public Interest Guidelines Relating to Merger Control.¹⁵⁷ The latter is controversial for the emphasis placed on promoting black and worker ownership in merging entities.¹⁵⁸

B. MERGERS

The most notable trend is the Commission's negotiation for public interest conditions that expand ownership of black persons or workers in the merging parties.¹⁵⁹ Such conditions do not necessarily address identifiable harms to the public interest arising out of the mergers.¹⁶⁰

Regarding the proposed merger between Epiroc and Polkadots,¹⁶¹ the Tribunal held that a public interest analysis is a holistic one. The factors listed must be assessed separately and if necessary, weighed against each other to conclude on the effects.¹⁶²

C. ABUSE OF DOMINANCE

The Commission is doubling down on excessive pricing investigations and prosecutions. It initiated a complaint¹⁶³ against Johnson & Johnson alleging exclusionary practices and excessive pricing in the supply of tuberculosis treatment. This follows an ongoing referral against Roche for alleged excessive pricing of breast cancer treatment.¹⁶⁴

157. Chris Charter & Gavriel Bender, *Final Revised Public Interest Guidelines: Commission Doubles Down on Ownership Requirements for Mergers*, CLIFFE DEKKER HOFMEYR INC.: COMPETITION LAW ALERT (Mar. 26, 2024), <https://www.cliffedekkerhofmeyr.com/en/news/publications/2024/Practice/Competition/competition-law-alert-26-march-Final-revised-Public-Interest-Guidelines> [<https://perma.cc/A7NM-4R6B>].

158. *See id.*

159. Mark Garden et al., *Unpacking the Revised Public Interest Guidelines*, BIZCOMMUNITY: NEWS (Mar. 27, 2024), <https://www.bizcommunity.com/article/the-competition-commission-publishes-revised-public-interest-guidelines-675641a> [<https://perma.cc/BWQ4-7S8K>].

160. Epiroc Holdings South Africa (Pty) Ltd. and K2022596519 (South Africa) (Pty.) Ltd. and Polkadots Properties 117 (Pty.), Case No. LM14, Reasons for Decision ¶ 66 (Competition Tribunal of South Africa Nov. 8, 2022).

161. *Id.* ¶ 75.

162. Media Statement, Competition Comm'n S. Afr., Commission Initiates Investigation Against Johnson & Johnson (Pty.) Ltd. and Janssen Pharmaceutica (Pty.) Ltd. (Sept. 15, 2023), <https://www.compcom.co.za/wp-content/uploads/2023/09/Media-Statement-Commission-investigates-Johnson-Johnson-15-September-2023.pdf> [<https://perma.cc/XK5B-869L>].

163. Media Statement, Competition Comm'n S. Afr., Commission Prosecutes a Multinational Healthcare Company, Roche, for Excessive Pricing of a Breast Cancer Treatment Drug (Feb. 8, 2022), <https://www.compcom.co.za/wp-content/uploads/2022/02/COMPETITION-COMMISSION-PROSECUTES-A-MULTINATIONAL-HEALTHCARE-COMPANY-ROCHE-FOR-EXCESSIVE-PRICING-OF-A-BREAST-CANCER-TREATMENT-DRUG.pdf> [<https://perma.cc/784N-W64X>].

164. Competition Commission of South Africa v. Waco Africa (Pty.) Ltd. et al., Case No. CR277 Feb. 18, Reasons for Decision and Order [Competition Tribunal of S. Afr.] ¶125, at 36, ¶ 1, at 37 (May 30, 2023).

D. CARTELS AND OTHER ANTI-COMPETITIVE PRACTICES

Adding to the growing dismissals of bid rigging referrals, the Tribunal dismissed another case as the parties could not be considered competitors unless they were competitors before the relevant bids.¹⁶⁵

The Commission published its report on the Online Intermediation Platforms Market Inquiry¹⁶⁶ (“OIPMI”). The report recommends remedial actions by local and international digital platforms, including divestiture.¹⁶⁷ The Commission also launched Market Inquiries into Fresh Produce¹⁶⁸ and Media and Digital Platforms.¹⁶⁹

X. United Kingdom

A. LEGISLATIVE DEVELOPMENTS

In April 2023, the UK Government introduced the Digital Markets, Competition, and Consumers Bill (“Bill”),¹⁷⁰ which proposes wide-ranging reforms to UK competition law, including revised jurisdictional thresholds for merger control and strengthening investigative and enforcement powers under the Competition Act 1998 (“CA98”). The Bill will also implement the UK Government’s digital markets strategy, which includes tailored codes of conduct and a bespoke merger control regime for designated companies.¹⁷¹

2023 has also seen the introduction of new horizontal block exemptions (covering Research & Development agreements¹⁷² and Specialisation

165. Media Statement, Competition Comm’n S. Afr., Commission Releases Final Report for Online Intermediation Platforms Market Inquiry (July 31, 2023), <https://www.compcom.co.za/wp-content/uploads/2023/07/Media-Statement-Final-digital-markets-report-released-31-July-2023.pdf> [<https://perma.cc/HYZ6-KEPV>].

166. *Id.*

167. Stakeholder Notice, Competition Comm’n S. Afr., The Fresh Produce Market Inquiry Embarks on First Round of Public Hearings (Oct. 16, 2023), <https://www.compcom.co.za/wp-content/uploads/2023/10/Stakeholder-Notice-FPMI-holds-first-round-of-public-hearings.pdf> [<https://perma.cc/T24X-MJRV>].

168. Media Statement, Competition Comm’n S. Afr., Commission Releases Final Terms of Reference for Media and Digital Platforms Market Inquiry (Sept. 15, 2023), <https://www.compcom.co.za/wp-content/uploads/2023/09/Media-Statement-Commission-gazettes-final-terms-of-reference-for-Media-and-Digital-Platforms-Market-Inquiry-15-September-2023.pdf> [<https://perma.cc/4TM8-4Y7T>].

169. Digital Markets, Competition and Consumers Bill, HC Bill [294] 1, 3, 96 (UK).

170. *Id.* at 162, 240.

171. The Competition Act 1998 (Research and Development Agreements Block Exemption) Order 2022, SI 2022/1271 (UK), <https://www.legislation.gov.uk/uksi/2022/1271/contents/made> [<https://perma.cc/583S-937Z>] (last visited Mar. 30, 2024).

172. Competition and Markets Authority, *Retained Horizontal Block Exemption Regulations (R&D and specialisation agreements) Consultation*, Gov.UK (June 28, 2022), <https://www.gov.uk/government/consultations/retained-horizontal-block-exemption-regulations-rd-and-specialisation-agreements-consultation> [<https://perma.cc/8PV5-9LVD>].

agreements¹⁷³) and guidelines,¹⁷⁴ as well as specific guidance on how competition law applies to environmental sustainability agreements.¹⁷⁵

B. MERGERS

The Competition and Markets Authority (“CMA”) continues to take an interventionist approach.¹⁷⁶ It referred fifteen cases for a Phase 2 investigation between April 1, 2022, and October 31, 2023, including two fast-track references in *Carpenter/Recticel*¹⁷⁷ and *Sika/MBCC Group*.¹⁷⁸ Of the nineteenth Phase 2 investigations completed in the same period, only six were unconditionally cleared: four were prohibited, six required remedies, and three were abandoned.¹⁷⁹

Some CMA prohibitions have been controversial. For example, the CMA’s original prohibition of the Microsoft/Activision Blizzard deal, which had received clearances in other jurisdictions, attracted negative comments from leading politicians.¹⁸⁰ In a rare move, Microsoft submitted a request to the CMA to reconsider its prohibition decision in light of “significant” new

173. COMPETITION & MARKETS AUTHORITY, CMA 184, GUIDANCE ON THE APPLICATION OF THE CHAPTER 1 PROHIBITION IN THE COMPETITION ACT 1998 TO HORIZONTAL AGREEMENTS (2023), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1178791/Horizontal_Guidance_FINAL.pdf [<https://perma.cc/G9UR-TG6R>].

174. COMPETITION & MARKETS AUTHORITY, CMA 185, GREEN AGREEMENTS GUIDANCE: GUIDANCE ON THE APPLICATION OF THE CHAPTER I PROHIBITION IN THE COMPETITION ACT 1998 TO ENVIRONMENTAL SUSTAINABILITY AGREEMENTS (2023), https://assets.publishing.service.gov.uk/media/6526b81b244f8e00d8e742c/Green_agreements_guidance_.pdf [<https://perma.cc/CZ9X-HNXJ>].

175. Competition and Markets Authority, *Strategic Steer to the Competition and Markets Authority 2023*, GOV.UK: POL’Y PAPER (Nov. 23, 2023), <https://www.gov.uk/government/publications/strategic-steer-to-the-competition-and-markets-authority-2023/strategic-steer-to-the-competition-and-markets-authority-2023> [<https://perma.cc/BZ3W-ACYU>] (last visited Mar. 30, 2024).

176. See Competition and Markets Authority, *Carpenter Co. / Recticel NV/SA Merger Inquiry*, GOV.UK (June 19, 2023), <https://www.gov.uk/cma-cases/carpenter-co-slash-recticel-nv-slash-sa-merger-inquiry> [<https://perma.cc/G7TH-RL7U>].

177. Competition and Markets Authority, *Skia AG/ MBCC Group Merger Inquiry*, GOV.UK (May 11, 2023), <https://www.gov.uk/cma-cases/sika-ag-slash-mbcc-group-merger-inquiry> [<https://perma.cc/2N45-26RA>].

178. *Merger Control Laws and Regulations United Kingdom 2024*, ICLG.COM (Apr. 12, 2023), <https://iclg.com/practice-areas/merger-control-laws-and-regulations/united-kingdom> [<https://perma.cc/Q3CW-3W9G>].

179. Rich Stanton, *UK MPs Question why the CMA Blocked Microsoft’s \$68.7B Activision Blizzard Deal, CMA says it won’t be ‘Turning a Blind Eye to Anti-competitive Mergers,’* PCGAMER: NEWS (May 16, 2023), <https://www.pcgamer.com/uk-mps-question-why-the-cma-blocked-microsofts-dollar687b-activision-blizzard-deal-cma-says-it-wont-be-turning-a-blind-eye-to-anti-competitive-mergers/> [<https://perma.cc/DD6A-F9HF>].

180. See *Microsoft/Activision: Microsoft’s Submissions on Material Changes of Circumstances and/or Special Reasons for the Purpose of Section 41(3) Enterprise Act 2002*, WEIL (July 25, 2023), https://assets.publishing.service.gov.uk/media/64c76983331a650014934e7c/A_Microsoft_submission.pdf [<https://perma.cc/ZDV4-SV75>].

material.¹⁸¹ This request was rejected and Microsoft subsequently filed a restructured deal with the CMA, providing for the sale of Activision's cloud streaming rights to Ubisoft, which was cleared by the CMA on October 13, 2023.¹⁸²

C. ANTI-TRUST

The CMA continues to pursue anti-competitive behaviour, imposing fines in two cases in 2023: £880,000 in relation to branded football merchandise¹⁸³ and over £59 million for bid-rigging in the construction services market. In 2023, the CMA opened three investigations in relation to: chemicals used in the construction industry,¹⁸⁴ labour in production, creation and broadcasting of TV content (excluding sports),¹⁸⁵ and the fragrance sector.¹⁸⁶

D. DOMINANCE

The UK Competition Appeal Tribunal ("CAT") upheld fines imposed by the CMA for excessive pricing in breach of the CA98 in two cases in 2023.¹⁸⁷ In *Hydrocortisone*, the CAT upheld the CMA's findings on liability but reduced the fine to almost £130 million for the period where one of the parent companies was subject to "hold separate" commitments.¹⁸⁸ These are the highest penalties upheld by the CAT.¹⁸⁹

181. Arjun Kharpal, *Microsoft's \$69 billion Activision Blizzard Takeover Approved by UK, Clearing Way for Deal to Close*, CNBC: TECH (Oct. 13, 2023, 8:49 AM), <https://www.cnbc.com/2023/10/13/microsoft-activision-blizzard-takeover-approved-by-uk-regulator-cma.html> [<https://perma.cc/DS4T-C24D>].

182. Competition and Markets Authority, *Suspected Anti-competitive Behaviour in Relation to the Sale of Leicester City FC-Branded Products and Merchandise*, Gov.UK (Jan. 9, 2024), <https://www.gov.uk/cma-cases/suspected-anti-competitive-behaviour-in-relation-to-the-sale-of-leicester-city-fc-branded-products-and-merchandise> [<https://perma.cc/J27E-CMNU>].

183. Competition and Markets Authority, *CMA Launches Investigation into the Supply of Chemicals for use in Construction Industry*, Gov.UK: NEWS (Oct. 17, 2023), <https://www.gov.uk/government/news/cma-launches-investigation-into-the-supply-of-chemicals-for-use-in-construction-industry> [<https://perma.cc/9FB3-M6JG>].

184. Competition and Markets Authority, *Suspected Anti-competitive Behaviour Relating to Freelance and Employed Labour in the Production, Creation and/or Broadcasting of Television Content, Excluding Sport*, Gov.UK (Mar. 26, 2024), <https://www.gov.uk/cma-cases/suspected-anti-competitive-behaviour-relating-to-freelance-and-employed-labour-in-the-production-creation-and-slash-or-broadcasting-of-television-content-excluding-sport> [<https://perma.cc/BB4A-JC78>].

185. Competition and Markets Authority, *Suspected Anti-competitive Conduct in Relation to Fragrances and Fragrance Ingredients (51257)*, Gov.UK (Jan. 17, 2024), <https://www.gov.uk/cma-cases/suspected-anti-competitive-conduct-in-relation-to-fragrances-and-fragrance-ingredients-51257> [<https://perma.cc/5D2D-2VKK>].

186. *HG Capital LLP v. Competition and Markets Authority* [2023] CAT 52; *Allergan PLC v. Competition and Markets Authority* [2023] CAT 56.

187. *Allergan PLC*, [2023] CAT 56 ¶ 377.

188. Scott Campbell & Nanret Senok, *2023 Year in Review: Competition Disputes*, HAUSFELD: BLOGS (Dec. 14, 2023), <https://www.hausfeld.com/en-us/what-we-think/perspectives-blogs/2023-year-in-review-competition-disputes/> [<https://perma.cc/GJK6-WK3B>].

189. *Id.*

XI. United States

The U.S. Department of Justice Antitrust Division (“DOJ”) and the Federal Trade Commission (“FTC”) have been incredibly active in 2023,¹⁹⁰ promoting new policies and procedures, bringing cases against big tech, adopting an increasingly hard line in merger enforcement, and prosecuting cartel activity.¹⁹¹ Civil plaintiffs and state attorneys general have joined in these efforts.¹⁹²

A. POLICY DEVELOPMENTS

The FTC and DOJ released a draft for new Merger Guidelines in July 2023.¹⁹³ The draft Guidelines are much broader than prior Guidelines, covering both horizontal and non-horizontal transactions and setting out a wide range of theories of potential anticompetitive harm.¹⁹⁴

The FTC also proposed changes to the Hart-Scott-Rodino (“HSR”) premerger notification process, which would require HSR filers to provide significantly more information and documentation.¹⁹⁵

B. MERGERS

In June 2023, the FTC sued to enjoin Microsoft from acquiring Activision, alleging that the acquisition would enable Microsoft to exclude competitors by making Activision’s content exclusive.¹⁹⁶ The district court denied the preliminary injunction, and the FTC has appealed despite the deal being closed in October.¹⁹⁷

190. See Satya Marar & Alden Abbott, *Antitrust Enforcement in 2023: Year in Review for the Federal Trade Commission and the Department of Justice*, GEO. MASON UNIVERSITY: MERCATUS CTR. at 1 (Jan. 17, 2024), <https://www.mercatus.org/research/policy-briefs/antitrust-enforcement-2023-year-review-federal-trade-commission-and> [<https://perma.cc/47CD-JRHL>].

191. *Id.*

192. See U.S. DEP’T OF JUSTICE & F.T.C., Draft Merger Guidelines (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf [<https://perma.cc/GXN7-Q576>] (last visited Mar. 30, 2024).

193. *Id.*

194. Press Release, F.T.C., FTC and DOJ Propose Changes to HSR Form for More Effective, Efficient Merger Review (June 27, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-doj-propose-changes-hsr-form-more-effective-efficient-merger-review> [<https://perma.cc/DN84-2BQT>].

195. F.T.C. v. Microsoft Corp., No. 23-CV-02880-JSC 1, 2 (N.D. Cal. 2023).

196. Diana Bartz & Chris Sanders, *US Appeals Court Refuses FTC Request to Pause Microsoft Deal for Activision*, REUTERS: LEGAL (July 15, 2023, 9:30 AM), <https://www.reuters.com/legal/us-appeals-court-refuses-ftc-request-pause-microsoft-deal-activision-2023-07-14/> [<https://perma.cc/B77Q-3UHW>].

197. Press Release, F.T.C., FTC Sues to Block Biopharmaceutical Giant Amgen from Acquisition That Would Entrench Monopoly Drugs Used to Treat Two Serious Illnesses (May 16, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/05/ftc-sues-block-biopharmaceutical-giant-amgen-acquisition-would-entrench-monopoly-drugs-used-treat> [<https://perma.cc/QHX8-RGSC>].

In June 2023, the FTC challenged pharmaceutical company Amgen's acquisition of Horizon, alleging that Amgen would leverage its large drug portfolio to pressure insurance companies and pharmacy benefit managers into favoring Horizon's drugs.¹⁹⁸ The case settled with a rare behavioral remedy, prohibiting Amgen from bundling Amgen and Horizon products or using any product rebate or contract terms.¹⁹⁹

C. CARTELS AND ANTICOMPETITIVE PRACTICES

The DOJ continued to prosecute cases alleging collusion relating to labor markets, notably "no-poach" arrangements.²⁰⁰ Those prosecutions have been largely unsuccessful. In March 2023, a jury acquitted defendants in the DOJ's action against managers of home healthcare staffing agencies for allegedly fixing wages and restricting job mobility of caretakers.²⁰¹ In April 2023, a district court dismissed the DOJ's no-poach case involving aerospace industry executives for allegedly agreeing to refrain from hiring or recruiting engineers from one another.²⁰²

There are several civil litigations brought by private plaintiffs and federal and state regulators against entities that act as information exchanges and help their customers set prices using common algorithms.²⁰³ Notable cases involve property management software (RealPage) and healthcare cost and pricing management programs (MultiPlan).²⁰⁴

D. DOMINANCE

In September 2023, the FTC and seventeen state attorneys general brought a landmark lawsuit against Amazon, alleging that Amazon uses

198. Press Release, F.T.C., Biopharmaceutical Giant Amgen to Settle FTC and State Challenges to its Horizon Therapeutics Acquisition (Sept. 1, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/09/biopharmaceutical-giant-amgen-settle-ftc-state-challenges-its-horizon-therapeutics-acquisition> [<https://perma.cc/U949-TTSP>].

199. Andrew Geverola et al., *Developments in U.S. Antitrust Criminal Enforcement – 2023 Year in Review*, ARNOLD & PORTER: ADVISORY (Feb. 15, 2024), <https://www.arnoldporter.com/en/perspectives/advisories/2024/02/us-antitrust-criminal-enforcement-2023-yir> [<https://perma.cc/T9CG-EC5Q>].

200. *Id.*

201. *Id.*

202. Daniel B. Asimow et al., *Developments in U.S. Antitrust Litigation – 2023 Year in Review*, ARNOLD & PORTER: ADVISORY (Feb. 1, 2024), <https://www.arnoldporter.com/en/perspectives/advisories/2024/02/developments-in-us-antitrust-litigation-2023> [<https://perma.cc/8P4N-79UA>].

203. Katie Arcieri, *MultiPlan Accused of Price-Fixing Plot with Health Insurers*, BLOOMBERG LAW (Aug. 10, 2023, 2:28 PM), <https://news.bloomberglaw.com/antitrust/multiplan-accused-of-price-fixing-plot-with-health-insurers> [<https://perma.cc/YB4X-ES2F>].

204. Press Release, F.T.C., FTC Sues Amazon for Illegally Maintaining Monopoly Power (Sept. 26, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-sues-amazon-illegally-maintaining-monopoly-power> [<https://perma.cc/F9WX-H9ZS>].

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anti-discounting measures to prevent competitors from growing by offering lower prices and coercive tactics involving order-fulfillment services.²⁰⁵

The DOJ and several attorneys general have two ongoing cases against Google.²⁰⁶ The first, alleging that Google monopolized search and search advertising markets, went to trial in late 2023.²⁰⁷ The second case filed in January 2023, alleges that Google has monopolized multiple digital advertising technology products (the “ad tech stack”) crucial for website publishers to sell and advertisers to purchase digital ads.²⁰⁸

205. See Dara Kerr, *United States Takes on Google in Biggest Tech Monopoly Trial of 21st Century*, NPR: Bus. (Sept. 12, 2023), <https://www.npr.org/2023/09/12/1198558372/doj-google-monopoly-antitrust-trial-search-engine> [<https://perma.cc/GT4D-PP37>]; Press Release, U.S. Dep’t of Justice, Justice Department Sues Google for Monopolizing Digital Advertising Technologies (Jan. 24, 2023), <https://www.justice.gov/opa/pr/justice-department-sues-google-monopolizing-digital-advertising-technologies> [<https://perma.cc/AN22-2XPK>].

206. *Id.*

207. Kerr, *supra* note 205.

208. Justice Department Sues Google for Monopolizing Digital Advertising Technologies Press Release, *supra* note 205.

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International Tax

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This article highlights significant legal developments in International Tax Law in 2023. It underscores changes and additions to corporate transparency and reporting regimes that are relevant to attorneys practicing in Austria, Brazil, China, the European Union, the United Kingdom, and the United States.

I. Austria

A. COVERED INTERMEDIARIES

Austria has implemented mandatory reporting rules in line with the EU Notification Obligation Act,¹ which provide that intermediaries must file information with the Austrian Minister of Finance on reportable cross-border arrangements that are within their knowledge, possession, or control within thirty days.²

An intermediary is any person who designs, markets, organizes, or implements a reportable cross-border arrangement.³ An intermediary also includes any person who, with the relevant facts and circumstances, based on available information, and possessing relevant expertise and understanding required to provide such services, knows or could be reasonably expected to know that they have undertaken to provide, directly or by means of other

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1. EU-MELDEPFLICHTGESETZ [EU MANDATORY REPORTING ACT] BUNDESGETZBLATT [BGBl] No. 91/2019, <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20010781> [<https://perma.cc/26G3-3HGW>] (Austria) [hereinafter EU MANDATORY REPORTING ACT].

2. *Id.* §§ 7–8.

3. *Id.* § 3(3)(a).

persons, aid, assistance, or advice with respect to designing, marketing, organizing, or implementing a reportable cross-border arrangement.⁴

The reporting rules apply if an intermediary:

- Has their domicile, habitual abode, legal seat, and/or place of management in Austria;
- Is not a tax resident in another EU Member State and provides his services with respect to the arrangements via a permanent establishment in Austria;
- Is not a tax resident in another EU Member State and is subject to Austrian professional or trade law provisions; or
- Is not a tax resident in another EU Member State and is registered with an Austrian professional association related to legal, tax, or consultancy services.⁵

B. UNCONDITIONALLY NOTIFIABLE TRANSACTIONS

Intermediaries are unconditionally required to provide notification of the following arrangements:

- Arrangements that involve deductible cross-border payments made between two or more associated enterprises where: (i) the recipient of the payment is not resident for tax purposes in any tax jurisdiction; or (ii) although the recipient of the payment is resident for tax purposes in a jurisdiction, that jurisdiction is included in a list of third-country jurisdictions which have been assessed by EU Member States collectively or within the framework of the OECD as being non-cooperative;
- Arrangements in which deductions for the same depreciation on the asset are claimed in more than one jurisdiction;
- Arrangements where relief from double taxation in respect of the same item of income or capital is claimed in more than one jurisdiction;
- Arrangements that include transfers of assets and where there is a material difference in the amount being treated as payable in consideration for the assets in the jurisdictions involved;
- Certain arrangements that may have the effect of undermining the reporting obligations under legislation on the automatic exchange of financial account information or which take advantage of the absence of such legislation;
- Arrangements involving a non-transparent legal or beneficial ownership chain with the use of persons, legal arrangements, or structures: (i) that do not carry on a substantive economic activity supported by adequate staff, equipment, assets, and premises; (ii) that are incorporated, managed, resident, controlled, or established in any jurisdiction other

4. *Id.* § 3(3)(b).

5. *Id.*

than the jurisdiction of residence of one or more of the beneficial owners of the assets held by such persons, legal arrangements, or structures; and (iii) where the beneficial owners of such persons, legal arrangements, or structures are not made identifiable in line with the fourth Anti-Money Laundering Directive; and

- Arrangements concerning transfer pricing involving (i) the use of unilateral safe harbor rules; (ii) the transfer of hard-to-value intangibles; or (iii) an intragroup cross-border transfer of functions, risks or assets, if the projected annual EBIT during the three-year period after the transfer of the transferor is less than 50 percent of the projected annual EBIT of such transfer had the transfer not been made.⁶

C. CONDITIONALLY NOTIFIABLE TRANSACTIONS

Intermediaries are required to provide notification of the following transactions only if it can be established that the main benefit or one of the main benefits, after considering all relevant facts and circumstances, is that a person may reasonably expect to derive a tax advantage from the following types of arrangements:

- Arrangements in which the relevant taxpayer or a participant in the arrangement attempts to comply with a condition of confidentiality, which may require them not to disclose how the arrangement could secure a tax advantage vis-à-vis other intermediaries or tax authorities;
- Arrangements in which the intermediary is entitled to receive a fee (or interest, remuneration for finance costs, and other charges) for the arrangement, and that fee is fixed by reference to (i) the amount of the tax advantage derived from the arrangement; or (ii) whether or not a tax advantage is actually derived from the arrangement (including an obligation on the intermediary to partially or fully refund the fees where the intended tax advantage derived from the arrangement was not partially or fully achieved);
- Arrangements that have substantially standardized documentation or structures and are available to more than one relevant taxpayer without a need to be substantially customized for implementation;
- Arrangements whereby a participant in the arrangement takes contrived steps that consist of acquiring a loss-making company, discontinuing the main activity of such company and using its losses in order to reduce its tax liability, including through a transfer of those losses to another jurisdiction or by the acceleration of the use of those losses;
- Arrangements that have the effect of converting income into capital, gifts, or other categories of revenue that are taxed at a lower level or exempt from tax;

6. *Id.* § 5.

- Arrangements that include circular transactions resulting in the round-tripping of funds, namely through involving interposed entities without other primary commercial functions or transactions that offset or cancel each other or that have other similar features; and
- Arrangements that involve deductible cross-border payments made between two or more associated enterprises, where: (i) the recipient is resident for tax purposes in a jurisdiction that does not impose any corporate tax or imposes corporate tax at the rate of zero or almost zero; (ii) the payment is non-taxable or has a full exemption from tax in the jurisdiction where the recipient is resident for tax purposes; or (iii) the payment is subject to a preferential tax regime in the jurisdiction where the recipient is resident for tax purposes.⁷

Intermediaries are granted a waiver from filing information on a reportable cross-border arrangement where the reporting obligation would breach the legal professional privilege under Austrian law unless the intermediary is released from the obligation to secrecy.⁸

II. Brazil

A. BACKGROUND OF BRAZIL REPORTING RULES

Brazil seeks to adhere to the G20 High-Level Principles on Beneficial Ownership Transparency to promote greater transparency of the beneficial ownership of legal entities.⁹ Pre-existing regulations from the Brazilian Central Bank¹⁰ mandated financial institutions to collect beneficial owner information as part of Know Your Customer (KYC) procedures related to anti-money laundering laws.¹¹ However, regulations put into place in 2018 require active companies in Brazil to disclose their ultimate beneficial ownership to the Brazilian Federal Tax Authorities (RFB).¹² This regulation and company information are most relevant to M&A transactions involving entities in Brazil.¹³

7. *Id.* § 6.

8. *Id.* § 11.

9. See CONTROLADORIA-GERAL DA UNIÃO, BRAZIL ACTIONS AND NEXT STEPS ON BENEFICIAL OWNERSHIP (2022), <https://www.gov.br/cgu/pt-br/assuntos/articulacao-internacional/arquivos/g20/transparencia-do-beneficiario-final/plano-nacional-beneficiario-final-brasil.pdf> [https://perma.cc/H327-THJ7].

10. See Circular No. 3.978, de 23 de janeiro de 2020, Diário Oficial da União [D.O.U.] de 24.01.2020 (Braz.).

11. See Lei No. 9.613, de 3 de Março de 1998, Diário Oficial da União [D.O.U.] de 04.03.1998 (Braz.). Penalties include: a warning, monetary fine, disqualification from holding a managing position, and revocation or suspension of authorization to carry out activities.

12. See Instrução Normativa No. 1863, de 27 de Dezembro de 2018, Diário Oficial da União [D.O.U.] de 28.12.2018 (Braz.).

13. See *id.*

All legal entities domiciled in Brazil are required to enroll with the National Register of Legal Entities (CNPJ).¹⁴ Certain non-domiciled entities must also be registered with CNPJ, including those with an ownership interest in a Brazilian entity or assets in Brazil, such as real estate, bank accounts, investments, or vehicles.¹⁵ Foreign entities engaged in specific activities in Brazil, like leasing and securities consulting, must also enroll with CNPJ.¹⁶

Entities registered with CNPJ, both domestic and foreign, must report ultimate beneficial ownership to the RFB.¹⁷ Amendments to these reporting rules became effective on January 1, 2023.¹⁸

Certain entities for which information is already publicly disclosed, such as Brazilian and foreign publicly listed companies, are exempt from reporting ultimate beneficial ownership, provided that such company is domiciled in a jurisdiction requiring public disclosure of relevant shareholders and is not a tax haven jurisdiction.¹⁹ Exemptions also apply to public companies, international organizations, central banks, and government entities.²⁰

Foreign collective investment vehicles with ownership interest in a Brazilian company must declare ultimate beneficial ownership unless exempted by these specific criteria:

- (1) it is a collective investment whose number of investors, directly or indirectly, through other collective investment vehicles, is equal to or greater than 100 (one hundred), provided that none of them have significant influence, except for investment made in Brazil in a private equity fund;
 - (2) its portfolio management is carried out by a professional administrator registered with a regulatory entity recognized by the Securities and Exchange Commission of Brazil (CVM);
 - (3) it is subject to investor protection regulation of a regulatory entity recognized by the CVM; and
 - (4) it has a diversified asset portfolio, understood as one whose concentration of assets from a single issuer does not characterize the significant influence, except for investment made in Brazil in a private equity fund.²¹
- Shareholders of funds domiciled abroad are also subject to reporting obligations.²²

14. See Instrução Normativa No. 2119, de 6 de Dezembro de 2022, Diário Oficial da União [D.O.U] Art. 1, de 08.12.2022 (Braz.).

15. *Id.* annex I.

16. *Id.* § 7 I–V.

17. See *id.* arts. 54–55.

18. See *id.* at 1.

19. See *id.* art. 55, at § 1.

20. Instrução Normativa No. 2119 art. 55, at § 1.

21. See *id.*

22. *Id.*

B. BENEFICIAL OWNER DEFINITION

The ultimate beneficial owner is defined as the “natural person who, directly or indirectly, owns, controls, or significantly influences the entity,” or a natural person “on whose behalf a transaction is conducted.”²³

A person is presumed to have significant influence over an entity if he owns more than twenty-five percent directly or indirectly of the entity’s capital stock or voting rights, or if he can, individually or collectively, prevail in corporate deliberations and in the election of the entity’s management.²⁴ The characterization also extends to every natural person within the chain of ownership who meets the ultimate beneficial owner definition requirements.²⁵

For trusts, all relevant parties, including settlers, trustees, protectors, beneficiaries, and anyone exercising final effective control, must be identified as beneficial owners.²⁶

C. REPORTING REQUIREMENTS

The following information for each beneficial owner must be provided to the RFB:

- Full legal name;
- Date of birth;
- Nationality; and
- Country of residence.²⁷

Non-domiciled entities must provide corporate documents related to the incorporation of the company and its legal representation, as well as a copy of the passports of its legal representatives and ultimate beneficial owners.²⁸

Furthermore, they are required to present to the Brazilian tax authorities an organizational chart showing the corporate chain of the entity up to the ultimate beneficial owner level (or an exemption case).²⁹ Such a chart needs to identify the name of each shareholder, its equity participation, tax identification number, and country of origin.³⁰

All foreign documents must be apostilled or legalized by a Brazilian consular representation if the document is from a country that is not a party to The Hague Apostille Convention.³¹

23. *Id.* art. 50.

24. *Id.*

25. *Id.*

26. Instrução Normativa No. 2119, art. 53, § 5.

27. *Id.* annex XII, §§ 2–3.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

D. WHEN MUST BENEFICIAL OWNERSHIP BE REPORTED?

As of January 1, 2023, entities must declare ultimate beneficial ownership to the RFB within 30 days of CNPJ registration,³² with a provision to extend the deadline by another thirty days.³³ However, meeting this timeframe, particularly when presenting complex organizational charts, can pose challenges.

Normative Instruction 2119/2022 stipulates that failure to timely report ultimate beneficial ownership information or provide necessary documents results in the suspension of the CNPJ registration.³⁴ This suspension blocks entities, whether domiciled in Brazil or abroad, from engaging in transactions with Brazilian banks, including using bank accounts, making investments, or taking loans.³⁵

Exceptions exist for operations necessary for returning investments to the country of origin and fulfilling obligations assumed before CNPJ suspension.³⁶

E. CONCLUSION

The rules for reporting beneficial ownership must be considered in M&A transactions that involve an acquisition target in Brazil, including when the acquisition of a Brazilian subsidiary of an international group is made indirectly through the acquisition of a parent company abroad. Adequate preparation for compliance with Brazilian regulations is needed to avoid possible disruptions in the business of the Brazilian entity.

III. China

A. CHINA'S MANDATORY SHAREHOLDER IDENTITY REPORTING RULES

China requires that any establishment of, change to, or cancellation of a company in China shall be registered with the State Administration for Market Regulation (SAMR) in accordance with the Regulation on the Administration of the Market Entity Registration (Entity Registration Regulation)³⁷ and its implementing rules (Entity Registration Implementing Rules).³⁸ The information that must be registered includes:

32. Instrução Normativa No. 2119, at 1.

33. *Id.* art. 55, § 11.

34. *Id.* art. 56.

35. *Id.*

36. *Id.* art. 50, § 1.

37. Zhōng huá rén mín gòng hé guó shì chǎng zhǔ tǐ dēng jì guǎn lǐ tiáo lì (中华人民共和国市场主体登记管理条例) [Regulations of the People's Republic of China on the Registration and Management of Market Entities] (promulgated by the State Council of the People's Republic of China, July 27, 2021, effective Mar. 1, 2022).

38. Zhōng huá rén mín gòng hé guó shì chǎng zhǔ tǐ dēng jì guǎn lǐ tiáo lì shí shī xì zé _ guó wù yuàn bù mén wén jiàn _ zhōng guó zhèng fǔ wǎng (中华人民共和国市场主体登记管理条例实施细则_国务院部门文件_中国政府网) [Detailed Implementation Rules of the Regulations

- Entity name;
- Entity type;
- Entity's scope of business;
- Entity's domicile or main place of business;
- The entity's registered capital or amount of capital contribution;
- The name of the entity's legal representative;
- The names of shareholders of a limited liability company; and
- The names of promoters of a joint stock limited company.³⁹

Furthermore, directors, supervisors, and senior managers of the company, as well as any “relevant information” regarding “beneficial ownership” of the company, must also be reported to the SAMR.⁴⁰ Despite this requirement, the concept of a “beneficial owner” is not defined and guidance as to what “relevant information” should be disclosed for the “beneficial owner” is not specified. Relevant rules will be issued jointly by the People's Bank of China (PBC) and SAMR.⁴¹

B. DEFINITION OF “BENEFICIAL OWNER”

After issuance of the Entity Registration Regulation and the Entity Registration Implementing Rules, neither SAMR nor PBC issued any additional guidance governing a “beneficial owner.” Therefore, certain best practices have emerged to identify “beneficial owners” in the absence of formal rules.

The concept of “beneficial owners” first appeared in Anti-Money Laundering Law in 2006,⁴² though no definition was provided therein. In 2017, the PBC published guidance on how to identify “beneficial owners” in the Notice of the People's Bank of China on Strengthening the Identification of Anti-Money Laundering Customers (PBC 2017 Notice).⁴³ In this PBC 2017 Notice, a beneficial owner of a company may be identified in the following order: (i) a natural person who directly or indirectly owns more than twenty-five percent of such company's equity or voting

of the People's Republic of China on the Registration and Management of Market Entities] (promulgated by the State Administration for Market Regulation, Mar. 1, 2022, effective Mar. 1, 2022).

39. *Id.* art. 6(1).

40. *Id.* art. 7.

41. *Id.*

42. See Article 16 of the Anti-Money Laundering Law of the People's Republic of China, adopted at the 24th Meeting of the Standing Committee of the 10th National People's Congress, issued on October 31, 2006, came into force on January 1, 2007. See 《中华人民共和国反洗钱法》[全文] (www.gov.cn).

43. Zhōng guó rén mín yín háng guān yú jiā qiáng fǎn xǐ qián kè hù shēn fèn shí bié yǒu guān gōng zuò de tōng zhī (中国人民银行关于加强反洗钱客户身份识别有关工作的通知) [Notice of the People's Bank of China on Strengthening the Identification of Anti Money Laundering Customers] (promulgated by the Anti-Money Laundering Bureau, issued 2017).

rights; (ii) a natural person who controls the company through controlling company's decision making, including without limitation, selecting board members, hiring and firing personnel, providing financing to the company; and (iii) any senior management personnel of such company which include "manager, vice manager, person responsible for financial matters, the board secretary of public companies and other personnel defined in the articles of association of the company."⁴⁴

If the senior management personnel of a company proves not to be the "beneficial owners" or there is doubt that such senior management is a beneficial owner, the bank should consider third parties in determining whether any natural person who actually "controls" or influences the decision making of the company.⁴⁵

If a beneficial owner is identified, the information of each beneficial owner of a company including name, nationality, place of residence, type of valid identity certificate, certificate number, and expiration date should be disclosed.⁴⁶ In 2018, the China Banking Regulatory Commission further clarified the channels for obtaining information relating to the "beneficial owner" or "actual controller" of a company, which includes, among other things, asking the company to disclose such information or the bank entrusting a third party to collect beneficial owner's information.⁴⁷ Since the information collection relates to the bank's compliance with anti-money laundering laws and regulations, failure to cooperate with the bank may result in that bank's refusal to establish a customer relationship with such entity or terminating the bank-customer relationship for existing customers.⁴⁸

C. APPLYING FOR COMPANY REGISTRATION

In applying for a company registration, applicants are responsible for the authenticity, legality, and validity of the materials submitted.⁴⁹ Applicants who submit false materials or conceal important facts will be ordered by SAMR to make corrections or will be subject to a fine of not less than RMB 50,000 but not more than RMB one million, depending on the seriousness

44. *Id.*

45. *See id.*

46. Fēi yín háng zhī fù jī gòu fǎn xǐ qián xiàn cháng jiǎn chá shù jù jiē kǒu guī fàn (shì xíng) (非银行支付机构反洗钱现场检查数据接口规范(试行)) [Notice of the People's Bank of China on Issuing the Data Interface Specifications for the On-site Anti-Money Laundering Inspections of Non-Banking Payment Institutions (for Trial Implementation)] (promulgated by the People's Bank of China, issued Dec. 29, 2017, effective Dec. 29, 2017).

47. Zhōng guó rén mín yín háng guān yú jìn yī bù zuò hǎo shòu yì suǒ yǒu rén shēn fèn shí bié gōng zuò yǒu guān wèn tí de tōng zhī (中国人民银行关于进一步做好受益所有人身份识别工作有关问题的通知) [Notice of the People's Bank of China on issues related to further improving the identification of beneficial owners] (promulgated by the People's Bank of China, Issued July 26, 2018, effective July 26, 2018).

48. *See* Notice of the People's Bank of China on Strengthening the Identification of Anti Money Laundering Customers.

49. *See* Regulations of the People's Republic of China on the Registration and Management of Market Entities, art. 17.

of the situation.⁵⁰ In addition to or in lieu of a fine, the company's business license may be revoked.⁵¹ Any changes with respect to such registered items on file, including a change of the beneficial owner, require that an applicant apply for the change of registration and record it within thirty days from the date of making the resolution or decision on the change.⁵² Despite these requirements, there have not been any reported instances where registering a nominee shareholder as holding shares for the true shareholder has been deemed to be providing false material or concealing important facts.

We expect that SAMR and the PBC will issue further regulations governing the disclosure of beneficial owners of the company.

IV. European Union

Across Europe, financial disclosure regimes tend to originate with multinational organizations rather than with national governments.⁵³ The leading groups for such projects are the Organization for Economic Cooperation and Development (OECD) and the Council of the European Union (EU), which often work collaboratively, as their memberships, and their mandates overlap.⁵⁴ In the past year, we have seen the fruits of this collaboration in two cross-border information disclosure and exchange regimes, both of which build on the OECD's Common Reporting Standard (CRS).⁵⁵

A. THE DAC6 REGIME

The EU's Mandatory Disclosure Rules on certain cross-border arrangements (referred to as DAC6), derive in pertinent part from the OECD's Mandatory Disclosure Rules (the MDRs).⁵⁶ The MDRs were developed to close off loopholes in CRS that had been routinely exploited since the disclosure regime's inception.⁵⁷ The novel facet of the MDRs was its focus on intermediaries: to wit, the advisors and other facilitators that

50. *Id.* art. 44.

51. *Id.*

52. *Id.* arts. 26, 29.

53. See *Financial Reporting*, EUR. COMM'N (Apr. 8, 2024), https://finance.ec.europa.eu/capital-markets-union-and-financial-markets/company-reporting-and-auditing/company-reporting/financial-reporting_en [https://perma.cc/R3BY-Q2F2].

54. See *id.*

55. OECD, STANDARD FOR AUTOMATIC EXCHANGE OF FINANCIAL ACCOUNT INFORMATION IN TAX MATTERS (2d ed. 2017), https://read.oecd-ilibrary.org/taxation/standard-for-automatic-exchange-of-financial-account-information-in-tax-matters-second-edition_9789264267992-en#page4 [https://perma.cc/F3NU-GT4L].

56. OECD, MODEL MANDATORY DISCLOSURE RULES FOR CRS AVOIDANCE ARRANGEMENTS AND OPAQUE OFFSHORE STRUCTURES (2018), <https://www.oecd.org/tax/exchange-of-tax-information/model-mandatory-disclosure-rules-for-crs-avoidance-arrangements-and-opaque-offshore-structures.pdf> [https://perma.cc/T376-57ZT].

57. *Id.* at 9.

recommended or in some way aided CRS avoidance.⁵⁸ The direct targets for disclosure were, therefore, not the taxpayers themselves, but rather their lawyers, tax advisors, accountants, and fiduciaries.⁵⁹ Accordingly, any transaction or arrangement that met one or more of the listed indicators of aggressive tax planning (referred to as “Hallmarks”) was subject to disclosure, and any parties who designed, promoted, or implemented the transaction or arrangement were potentially subject to disclosure as well.⁶⁰

The EU adopted the MDRs and expanded them significantly by amending Council Directive 2011/16/EU, its general legal framework for information exchange amongst EU Member States.⁶¹ Beyond CRS avoidance, the EU’s expansive DAC6 encompassed multiple areas of taxation where the domestic tax authorities of Member States saw a benefit from the disclosure of the advisors and facilitators of dubious transactions.⁶² Accordingly, the EU built a heterogeneous intermediary reporting regime on top of the MDRs, adding new Hallmarks for tax shelter promotions (e.g., contingency pricing and confidentiality clauses), conventional cross-border income tax maneuvers (e.g., income character conversion, hybrid mismatches, and related-party transactions) and transfer pricing.⁶³

The DAC6 regime entered into force in all EU countries as of January 1, 2021.⁶⁴ Despite the broad sweep of DAC6, the reporting requirements implicated fewer transactions and arrangements than perhaps was expected. The reason may be that many Hallmarks are also subject to the Main Benefit Test, which queries whether a reasonable person would think that the tax benefit gained was a main motivation for the particular transaction or arrangement.⁶⁵ The resultant wiggle room may have limited the number of parties needing to file reports. Unsurprisingly, perhaps, the perception of limited success for DAC6 in the EU has tempered the interests of other countries—especially financial centers in and outside of Europe—to adopt the OECD MDRs.

58. *DAC6: EU’s New Mandatory Disclosure Regime*, BLOOMBERG TAX (Mar. 22, 2022), <https://pro.bloombergtax.com/brief/complying-with-dac6/> [https://perma.cc/HHB8-GHZZ].

59. See generally Patricia A. Brown et al., *Combating Aggressive Tax Planning Through Disclosure: A Comparison of U.S. and EU Rules Applicable to Tax Advisors*, ABA (June 13, 2019), https://www.americanbar.org/groups/taxation/publications/abataxtimes_home/19jun/19jun-pp-brown-et-al-combating-aggressive-tax-planning-through-disclosure/ [https://perma.cc/NEC8-JPLN].

60. *Id.*

61. Directive 2018/822, 2018 O.J. (L 139) (EU).

62. See *id.*

63. See *id.*

64. Raluca Enache, *Extension of DAC6 Reporting Deadlines Announced by some Member States*, KPMG (Jan. 29, 2021), <https://kpmg.com/xx/en/home/insights/2021/01/etf-441-extension-of-dac6-reporting-deadlines-announced-by-some-member-states.html#:~:text=This%20applies%20both%20for%20initial,instead%20of%20Sunday%2C%20February%2028.> [https://perma.cc/2WDS-RR8U].

65. Oliver R. Hoor & Fanny Bueb, *INSIGHT: The Main Benefit Test Under the Mandatory Disclosure Regime—Considering Anti-Abuse Legislation*, BLOOMBERG TAX (Feb. 14, 2020), <https://news.bloombergtax.com/daily-tax-report-international/insight-the-main-benefit-test-under-the-mandatory-disclosure-regime-considering-anti-abuse-legislation> [https://perma.cc/WR5H-2CAQ].

The challenges associated with one new-fangled disclosure regime—for intermediaries—did not deter OECD and EU efforts to collaborate simultaneously on another new-fangled disclosure regime, this one for crypto assets. Based in primary part and closely linked to CRS, the OECD’s Crypto-Asset Reporting Framework (CARF) seeks to compel the disclosure, reporting, and exchange of information on the beneficial owners of digital assets.⁶⁶ Because digital assets may be stored outside of traditional custodial institutions, the methods deployed for CRS are inapposite to a crypto asset disclosure regime.⁶⁷ To that end, CARF targets crypto exchanges as the backbone of the digital financial system. Crypto exchanges qualify as the core reporting parties under CARF, like banks and other Financial Institutions under CRS.⁶⁸ Crypto exchange clients are the parties to be reported under CARF, like account holders under CRS.⁶⁹ Crypto exchange transactions generate the financial information to be reported under CARF, like payments and account balances or values under CRS.⁷⁰

B. THE DAC8 AMENDMENTS

In tandem with the OECD’s development of the CARF regime, the EU proposed further amendments to 2011/16/EU, its general legal framework for information exchange amongst EU Member States. These amendments, referred to as “DAC8,” are designed to regulate the taxation of digital assets through similar mechanisms adopted by the OECD for CARF.⁷¹ The definition of reportable holdings is broad enough to include familiar cryptocurrencies, as well as stablecoins and e-money tokens and certain non-fungible tokens (NFTs).⁷² The aim of this sweeping definition is to identify any assets that can be used for payments and/or investments.⁷³ In furtherance of this aim, the EU expressly encourages national governments of its Member States and any parties potentially subject to DAC8 reporting requirements to refer to CARF and the accompanying OECD commentaries for guidance.⁷⁴

66. OECD, CRYPTO-ASSET REPORTING FRAMEWORK AND AMENDMENTS TO THE COMMON REPORTING STANDARD (2022) [hereinafter THE OECD CARF STANDARD], <https://www.oecd.org/tax/exchange-of-tax-information/crypto-asset-reporting-framework-and-amendments-to-the-common-reporting-standard.pdf> [<https://perma.cc/CRA9-7VEM>].

67. *Id.* at 9.

68. *Id.* at 28, 50.

69. *Id.* at 45, 53.

70. Reportable transactions may consist of: “a) exchange between Relevant Crypto-Assets and Fiat Currencies; and b) exchange between one or more forms of Relevant Crypto-Assets,” but other transactions, such as transfers between wallets (i.e., accounts) held by the same Person and retail purchases, may also qualify. *Id.* at 51.

71. European Parliament legislative resolution of 13 September 2023 on the proposal for a Council directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation, COM (2022) 0707 final (Sept. 13, 2023).

72. *Id.* at 6–7.

73. *Id.*

74. *Id.* at 6.

The EU Parliament formally adopted DAC8 on September 18, 2023, and, accordingly, EU Member States must codify DAC8 into their national laws by December 31, 2025.⁷⁵ As of 2026, qualifying crypto asset service providers in the EU will begin the process of information collection for reportable transactions of EU-resident customers to exchange with the competent authorities of the other Member States.⁷⁶

C. THE MiCA REGIME

Parallel to its efforts to regulate crypto assets via a cross-border information exchange regime like CARE, the EU also formally adopted a framework on markets in crypto assets (referred to as “MiCA”).⁷⁷ MiCA aims to regulate the issuance of digital assets, including—notably—stablecoins.⁷⁸ For purposes of MiCA, stablecoins encompass a range of tokens, from those referencing a single underlying fiat currency to those referencing a basket of fiat currencies and other asset classes.⁷⁹ The EU-authorized issuers of qualifying digital assets must publish a “white paper” (i.e., a prospectus), disclosing key information on the asset and its issuer to any prospective buyers.⁸⁰ MiCA will come into effect EU-wide on December 30, 2024.⁸¹

V. United Kingdom

A. HISTORY OF ULTIMATE BENEFICIAL OWNERS REGISTERS

A register of the ultimate beneficial owners (UBO), or rather the persons with significant control (PSC) over UK corporate entities (PSC register), was introduced in the United Kingdom (UK) under the Small Business, Enterprise, and Employment Act 2015 (SBEEA), which came into force in 2016⁸²

75. *EU adopts Directive introducing tax transparency rules for crypto assets (DAC8)*, TAX NEWS UPDATE (Oct. 24, 2023), <https://globaltaxnews.ey.com/news/2023-1765-eu-adopts-directive-introducing-tax-transparency-rules-for-crypto-assets-dac8> [<https://perma.cc/K98A-QQDZ>].

76. *Id.*

77. Directive 2021/514, 2021 O.J. (L 104) (EU).

78. *Id.* at 2.

79. Jon Egilsson, *The Big Misunderstanding: What MiCA Really Means for Stablecoins in Europe*, COIN DESK (Feb. 6, 2024, 12:32 PM), <https://www.coindesk.com/consensus-magazine/2024/02/06/the-big-misunderstanding-what-mica-really-means-for-stablecoins-in-europe/> [<https://perma.cc/XL75-WMJJ>].

80. *What are the EU's white paper requirements in MiCAR and do they apply to Bitcoin?*, OSBORNE CLARKE (Oct. 4, 2023), [https://www.osborneclarke.com/insights/what-are-eus-white-paper-requirements-micar-and-do-they-apply-bitcoin#:~:text=The%20white%20paper%20should%20also,on%20the%20risks%20\(including%20a](https://www.osborneclarke.com/insights/what-are-eus-white-paper-requirements-micar-and-do-they-apply-bitcoin#:~:text=The%20white%20paper%20should%20also,on%20the%20risks%20(including%20a) [<https://perma.cc/T3KQ-MQ4E>].

81. Filip Windak, *Markets in Crypto-assets (MiCA)—New EU law on crypto-assets*, BIRD & BIRD (Jan. 25, 2024), <https://www.twobirds.com/en/insights/2024/global/markets-in-crypto-assets-new-eu-law-on-crypto-assets#:~:text=With%20this%20in%20mind%2C%202024,MiCAR%20on%2030%20December%202024.> [<https://perma.cc/N6X6-KDYK>].

82. Small Business, Enterprise and Employment Act 2015, c.26, § 7 (Eng.). The sections concerning the PSC Register came into force as of April 6, 2016.

The European Union (EU) followed suit under Directive (EU) 2015/849 (the 4th AML Directive),⁸³ which introduced the obligation for all the EU member states to create a register of the ultimate beneficial owners of their corporate entities (UBO registers). Originally, such registers were not publicly accessible until a new Directive (EU) 2018/843 (the 5th AML Directive)⁸⁴ opened them up to any member of the general public.

B. CHALLENGE TO PUBLIC UBO REGISTERS IN THE EU

The European Court of Justice (ECJ), in its decision of November 22, 2022, on the joined cases C37/20 and C601/20, declared that unrestricted public access to the UBO registers of companies is unlawful insofar as it breaches the fundamental right to privacy under Articles 7 and 8 of the EU Charter of Fundamental Rights.⁸⁵

As a result, and regardless of a few exceptions such as France and some Nordic countries, such UBO registers have gone off-line in most EU member states.⁸⁶ New legislation is expected at the EU level to determine a harmonized approach to their access by people who can demonstrate a legitimate interest.⁸⁷

C. STATUS OF UBO REGISTERS IN THE UK

The situation is different in the UK. Since the institution of “Brexit” on January 30, 2020, the UK has officially left the EU and as a consequence, the ECJ decisions are no longer binding on its courts.⁸⁸ As a preliminary note, it must be mentioned that there are other publicly accessible UBO registers in the UK in addition to the PSC register.⁸⁹

In particular, a Register of Overseas Entities was established under the Economic Crime (Transparency and Enforcement) Act 2022 as of September 5, 2022.⁹⁰ It contains the beneficial ownership information of

83. Council Directive 2015/849, 2015 O.J. (L 141) 73 (EU).

84. Council Directive 2018/849, 2018 J.O. (L 156) 43 (EU).

85. See Case C-24/03, *Sovim SA v. Luxembourg Bus. Registers*, 2022 E.C.R..

86. See Paolo Panico, *Beneficial Ownership Registers 2.0: What can be Expected after the European Court of Justice Decision of 22 November 2022?*, IFC MEDIA (Jan. 22, 2022), <https://www.ifcreview.com/articles/2024/january/beneficial-ownership-registers-20-what-can-be-expected-after-the-european-court-of-justice-decision-of-22-november-2022/> [<https://perma.cc/R2SL-32XS>].

87. Claus Christensen, *UBO Identification in Europe: What Happens Now?*, FINEXTRA (Dec. 14, 2022), <https://www.finextra.com/blogposting/23406/ubo-identification-in-europe-what-happens-now> [<https://perma.cc/7C6M-PMWJ>].

88. *The Supreme Court and Europe*, SUPREME COURT UK, <https://www.supremecourt.uk/about/the-supreme-court-and-europe.html> [<https://perma.cc/LMP8-C76G>].

89. See *infra* text and accompanying notes 90–92.

90. Economic Crime (Transparency and Enforcement) Act 2022, c.10 (UK).

all overseas entities holding an interest in UK real estate.⁹¹ Its access is free and unrestricted in the same way as to the PSC Register.⁹²

A Register of Persons Holding a Controlling Interest in Land was also established in Scotland under the Land Reform (Scotland) Act 2016 (Register of Persons Holding a Controlling Interest in Land) (Scotland) Regulations 2021.⁹³ This register, which will come into being in 2024, will also be accessible to the general public.⁹⁴

The UK government updated a policy paper in 2023 stating that public access to these UBO registers is compatible with the European Convention on Human Rights.⁹⁵ More precisely, the EU Charter of Fundamental Rights⁹⁶—which was the basis of the ECJ decision—is no longer part of UK law under section 5(4) of the European Union (Withdrawal) Act 2018.⁹⁷ Nonetheless, the European Convention on Human Rights (ECHR)⁹⁸ is part of UK law under the Human Rights Act 1998⁹⁹

Article 8 of Schedule 1 of the Human Rights Act reads as follows: “Everyone has the right to respect for his private and family life, his home, and his correspondence.”¹⁰⁰ This is almost identical to Article 7 of the EU Charter of Fundamental Rights: “Everyone has the right to respect for his or her private and family life, home and communications.”¹⁰¹

Article 8 of Schedule 1 to the Human Rights Act continues with a subsequent paragraph 8(2), which introduces a public interest exemption to the right to respect for private and family life insofar as:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.¹⁰²

The argument for the validity of public access to the UBO registers in the UK is that their interference with the right to privacy is supported by the legislation that created them, as is expressly contemplated by paragraph

91. *Id.*

92. *See id.*

93. The Land Reform (Scotland) Act 2016 (Register for Persons Holding a Controlling Interest in Land) Regulations 2021, (UK).

94. *See id.*

95. Economic Crime and Corporate Transparency Act 2023, Supplementary Memorandum ¶¶ 17–29 (UK).

96. Charter of Fundamental Rights of the European Union, 2012 O.J. (C 326) 391.

97. European Union (Withdrawal) Act 2018, c. 16 (UK).

98. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. No. 5 (1950).

99. Human Rights Act 1998, c. 42 (UK).

100. *Id.*

101. *See* European Union (Withdrawal) Act 2018, c. 16.

102. *See* Human Rights Act 1998, c. 42.

8(2) above. A difference is earmarked between Article 7 of the EU Charter of Fundamental Rights, which consists of a single paragraph, and Article 8 of Schedule 1 to the Human Rights Act 1998, which includes a qualification to the right to privacy under paragraph 8(2).¹⁰³

In actuality, a provision substantially equivalent to paragraph 8(2) above exists also under the EU Charter of Fundamental Rights. It is Article 52(1) which introduces the principle of proportionality:

Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.¹⁰⁴

The ECJ, in its decision of November 22, 2022, analyzed in some detail the compatibility of unrestricted public access to the UBO registers with this principle of proportionality and concluded that it is not compatible.¹⁰⁵ As a result, the provision granting access to any member of the general public under the 5th AML Directive was struck out as invalid.¹⁰⁶

The UK government did not provide any robust justification to its contention that such an invasion of privacy as public access to the UBO registers is indeed “necessary in a democratic society” as prescribed under paragraph 8(2) of Schedule 1 to the Human Rights Act 1998.¹⁰⁷ A court decision may have to expressly clarify this aspect, and it is not impossible that a UK court might engage in reasoning similar to that of the ECJ in its November 2022 decision and yield the same result.

Incidentally, a case about the breach of the right to privacy under the ECHR might, in fact, be brought before the European Court of Human Rights in Strasbourg, which is the ultimate arbiter of any issues relating to the ECHR. The ECJ decisions are not binding on the Strasbourg court, but they may be regarded as even more persuasive than a decision by a UK court.¹⁰⁸ A breach of the fundamental right to privacy should, therefore, be sanctioned under this data protection legislation as well.

Finally, the ECJ decision of November 22, 2022, was also based on Regulation (EU) 2016/679 (the General Data Protection Regulation or GDPR).¹⁰⁹ A modified and more restrictive version of the GDPR was implemented in the UK after Brexit pursuant to the Data Protection,

103. Compare *id.* c. 42, sch. 1, art. 8, with Charter of Fundamental Rights of the European Union, 2012 O.J. (C 326) 391.

104. Charter of Fundamental Rights of the European Union, 2012 O.J. (C 326) art. 52(1).

105. See Case C-24/03, *Sovim SA v. Luxembourg Bus. Registers*, 2022 E.C.R.

106. See *id.*

107. See Human Rights Act 1998, c. 42.

108. See ECHR, *QUESTIONS & ANSWERS* (2023), https://www.echr.coe.int/documents/d/echr/Questions_Answers_ENG [<https://perma.cc/A5GD-38JX>].

109. Commission Regulation 2016/679, 2016 J.O. (C 119) 1.

Privacy and Electronic Communications (Amendments, etc.) (EU Exit) Regulations 2019/419.¹¹⁰ Nonetheless, absent a court order to the contrary, such registers are here to stay, and anybody can easily learn the UBOs of any UK corporation with no legal protections against abuse.

VI. United States Of America

A. OVERVIEW OF THE CORPORATE TRANSPARENCY ACT

In the United States, the Corporate Transparency Act (the CTA)¹¹¹ became effective on January 1, 2024. The CTA requires certain entities, referred to as “reporting companies,” to disclose the identity of their beneficial owners to the U.S. Financial Crimes Enforcement Network (FinCEN).¹¹² The beneficial ownership information (BOI) will be compiled into a database available to certain federal, state, and non-U.S. law enforcement agencies, the Treasury Department (including the Internal Revenue Service), and certain financial institutions subject to customer due diligence requirements.¹¹³ According to FinCEN, the CTA will require 32.6 million entities to submit BOI reports in 2024, the CTA’s first year of applicability.¹¹⁴

According to the U.S. Congress, the CTA is needed to combat “money laundering, the financing of terrorism, proliferation financing, serious tax fraud, human and drug trafficking, counterfeiting, piracy, securities fraud, financial fraud, and acts of foreign corruption, harming the national security interests of the United States and allies of the United States.”¹¹⁵ BOI reporting under the CTA will join Foreign Bank and Financial Accounts (FBAR) reporting and Foreign Account Tax Compliance Act (FATCA) as tools to unmask persons who use sophisticated legal structures to conceal their activities from U.S. tax authorities and law enforcement.¹¹⁶

The CTA requires each reporting company to report its BOI to FinCEN.¹¹⁷ Under the CTA, a reporting company is any corporation, LLC, or similar entity that is created in a U.S. State, American Indian tribal land, or that is formed under the law of a non-U.S. country and is registered to do business in the United States.¹¹⁸ The regulations provide twenty-four exceptions to

110. The Data Protection, Privacy and Electronic Communications (Amendments etc.) (EU Exit) Regulations 2019, SI 2019/419, ¶ 5.

111. 31 U.S.C. § 5336 [hereinafter CTA].

112. *Id.*

113. *Id.* § 3556(c)(2).

114. Beneficial Ownership Information Reporting Requirements, 31 C.F.R. § 1010 (2022).

115. Pub. L. No. 116-283 § 6402(3).

116. The foreign bank account reporting (or FBAR) provisions generally require a U.S. taxpayer to report interests in non-U.S. bank accounts above certain dollar-amount thresholds to FinCEN. 31 U.S.C. §§ 5311–5330. The Foreign Account Tax Compliance Act (FATCA) generally imposes due diligence obligations on non-U.S. financial institutions and requires them to notify the Internal Revenue Service (or, if an intergovernmental agreement is in place, the home country tax authority) of any U.S. taxpayer accountholders. I.R.C. §§ 1471–1474.

117. CTA § 5336(b)(1)(B).

118. *Id.* § 5336(a)(11)(A).

this definition, including for public companies, governmental entities, banks and certain other financial entities, and certain large operating entities.¹¹⁹

The BOI that must be reported includes identifying details about the entity¹²⁰ and information about each “beneficial owner.”¹²¹ For this purpose, a beneficial owner is an individual who directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise (i) exercises substantial control over the entity; or (ii) owns or controls twenty-five percent or more of the entity’s ownership interests.¹²² The statute includes exceptions for minors, nominees and other types of agents, employees, individuals who expect to inherit an interest in the entity, and creditors.¹²³

Any person who willfully fails to provide BOI or who willfully provides or attempts to provide false or fraudulent BOI may be subject to a civil penalty of \$500 per day while the violation continues and a criminal penalty of up to \$10,000 or up to two years of imprisonment.¹²⁴ The CTA provides penalty relief for a person who corrects an incorrect BOI report within ninety days of submitting the incorrect BOI report.¹²⁵

B. BOI REPORT DUE DATES

As noted above, the CTA became effective on January 1, 2024. On the effective date, reporting companies will have to file BOI reports on the following timetable:

- A U.S. reporting company created on or after January 1, 2024, and before January 1, 2025, must file a BOI report within ninety calendar days of the effective date of its creation;
- A U.S. reporting company created on or after January 1, 2025, must file a BOI report within thirty calendar days of the effective date of its creation;
- An entity that becomes a non-U.S. reporting company on or after January 1, 2024, and before January 1, 2025, must file a BOI report within ninety calendar days of the effective date of its registration to do business in the United States;
- An entity that becomes a non-U.S. reporting company on or after January 1, 2025, must file a BOI report within thirty calendar days of the effective date of its registration to do business in the United States;
- A U.S. reporting company created before January 1, 2024, and an entity that became a non-U.S. reporting company before January 1, 2024, must file a BOI report by January 1, 2025; or

119. *Id.* § 5336(a)(11)(B)(i)–(xxiv).

120. *See* 31 C.F.R. § 1010.380(b)(1)(i).

121. CTA § 5336(b)(2)(A).

122. *Id.* § 5336(a)(3)(A).

123. *Id.* § 5336(a)(3)(B).

124. *Id.* § 5336(h)(3)(A).

125. *Id.* § 5336(h)(3)(C)(i).

- An entity that loses an exemption from BOI reporting must file a BOI report within thirty calendar days after the date of the loss.¹²⁶

For the purpose of these rules, the effective date of a reporting company's creation or registration to do business is the earlier of (i) the date on which the reporting company receives actual notice that its creation or registration has become effective; or (ii) the date on which a secretary of state or similar office first provides public notice that the reporting company has been created or been registered to do business.¹²⁷

C. MERGERS AND ACQUISITIONS CONSIDERATIONS

In the context of M&A transactions, the CTA creates two new clusters of issues.¹²⁸ First, the structures used to acquire target companies often involve multiple tiers of entities and are specifically structured to provide anonymity for the ultimate owners of the contracting parties.¹²⁹ Moreover, because of these structures, it may be difficult for the contracting parties to obtain the information needed to provide BOI reports. In the absence of more guidance from FinCEN, the CTA will increase the inherent compliance risks of using entities in acquisitions.

Second, the target companies will have compliance obligations under the CTA and will be subject to penalties in the case of non-compliance.¹³⁰ In particular, the \$500-a-day civil penalty is not subject to a maximum, and there is no guidance on situations where compliance is impossible.¹³¹ Will this penalty accrue indefinitely where compliance is impossible? Buyers will be well-advised to seek representations and indemnities to protect against a target's potential CTA liability.

126. 31 C.F.R. § 1010.380(a) (amended 2023).

127. *See id.*

128. *See generally* CTA, § 5336(c)(2).

129. *See id.*

130. *See id.*

131. *See id.*

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International Art & Cultural Heritage

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This article surveys 2023 developments in International Art & Cultural Heritage cases in the U.S.

I. Republic of Turkey v. Christie's Inc.

In March 2023, the Second Circuit Court of Appeals (“Second Circuit”) determined that the District Court for the Southern District of New York (“District Court”) applied the wrong standard of proof when it entered a declaratory judgment of ownership to Michael Steinhardt (“Steinhardt”) of a Kiliya-type Anatolian Marble Female Idol (the “Stargazer” or “Idol”).¹ But the Second Circuit agreed with the District Court that Steinhardt and Christie’s (a nominal defendant) were entitled to judgment based on the equitable defense of laches.² The use of laches to defeat a claim of ownership to artwork is not novel.³ The Second Circuit’s decision did, however, clarify both the reasonable due diligence requirements of parties to an ownership

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1. Republic of Turkey v. Christie’s Inc., 62 F.4th 64, 70–71 (2d Cir. 2023).

2. *Id.* at 67.

3. See Zuckerman v. Metro. Museum of Art, 928 F.3d 186, 194 (2d Cir. 2019) (delay was unreasonable where stolen item was on display at the Metropolitan Museum of Art and had been published in the museum’s published catalogue of French paintings for decades); *In re Peters*, 821 N.Y.S.2d 61, 68–69 (1st Dep’t 2006) (finding suit barred by doctrine of laches where missing art was exhibited “at prominent museums, galleries, and universities during the second half of the twentieth century”); *Howard Univ. v. Borders*, 588 F. Supp. 3d 457, 481 (S.D.N.Y. 2022) (court denied summary judgment on the laches issue).

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dispute⁴ and a plaintiff's burden of proof in a declaratory judgment motion concerning ownership of property.⁵

The following is a summary of the facts of the Stargazer litigation. In 1961, Alastair and Edith Martin (the "Martins") purchased the Stargazer from J.J. Klejman Gallery ("Klejman") in New York City.⁶ The Martins kept the Idol in their collection for twenty-two years before they transferred it to the Buttercup Beta Corporation ("Beta")—an entity owned by members of the Martin family.⁷ In 1993, Beta sold the Stargazer to the Merrin Gallery, which, in turn, sold the Idol to Steinhardt in the same year.⁸

The Martins and Beta had loaned the Idol to the Metropolitan Museum of Art (the "Met") from 1966 through 1993, where it was displayed publicly in the Met's permanent galleries.⁹ Steinhardt loaned the Stargazer to the Met from 1999 through 2007.¹⁰ In addition to its history of public display, the Idol was referenced in eleven publications between 1964 and 2017.¹¹ Notably, some of these publications were written by Turkish journalists who had ties to the Turkish Ministry of Culture.¹² At least one of these reports noted the Anatolian origin of the Idol; thus, Turkey was aware the statue was made in what is modern day Turkey, as well as the fact that it had been on

4. *Christie's, Inc.*, 62 F.4th at 68.

5. *Id.* at 70.

6. *Id.* at 68.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Christie's, Inc.*, 62 F.4th at 68.

11. *Id.*

12. See *Republic of Turk. v. Christie's, Inc.*, 2021 U.S. Dist. LEXIS 169215, at *10–13 (S.D.N.Y. Sept. 7, 2021). In 1964, Herbert Hoffman mentioned the Idol in *The Beauty of Ancient Art: Exhibition of the Norman Schimmel Collection*. In 1974, Hoffman again mentioned the Idol in O.W. Muscarella's *Ancient Art: The Norbert Schimmel Collection*. In 1975, Elizabeth Rohde published an article that references the Idol. In 1982, Prudence Harper, former curator in charge of the Met's Department of Ancient Near Eastern Art, published a two-volume work entitled, *The Guennol Collection* that discusses the Idol and includes a photograph of Idol. In 1985, Patricia Getz-Preziosi, a leading scholar of Neolithic and Chalcolithic statuettes, wrote an introduction for a publication that references the Idol and includes an image. In 1986, Getz-Preziosi wrote a section of Martha Sharp Joukowsky's *Prehistoric Aphrodisias*, which references the Idol and includes images of it. In 1990, Getz-Preziosi again referenced the Idol in a different publication. In 1992, Jürgen Seeher, a resident at the German Archaeological Institute in Istanbul, published *Anatolian Marble Statues of the Kiliya-Type*. In 2014, Önder Bilgi, an archaeology professor at Istanbul University, published a book, *Anthropomorphic Representations in Anatolia* that names the Idol and features an image of it; in 1989, Özgen Acar published an article, *History for Sale Again*, in *Cumhuriyet*, a well-known newspaper (Acar had ties to Turkey's Ministry of Culture, having served at one point as consultant to former Minister of Culture Durmuş Fikri Sağlar, who served in the position in the 1990s). In 2017, Acar again wrote about the Idol after he learned that it was being auctioned at Christie's.

display in New York at the Met.¹³ For the years that the Idol was displayed at the Met, Turkey was also aware of its location.¹⁴

In 2017, Steinhardt sold the Idol at Christie's for \$12,700,000.¹⁵ But the buyer never took possession of the artifact because Turkey claimed ownership of the Idol prior to the auction.¹⁶ The basis of Turkey's complaint was that it had been unlawfully excavated and smuggled out of Turkey in violation of the country's patrimony law.¹⁷ That law dates back to a 1906 Ottoman decree that vests all ownership of unexcavated antiquities in the state (the "1906 Decree").¹⁸ Christie's and Steinhardt counterclaimed, citing New York's laws prohibiting tortious interference with contracts, or, in the alternative, tortious interference with prospective economic advantage; they also sought a declaratory judgment that all right, title, and interest in and to the Idol vested in Steinhardt.¹⁹

On September 30, 2019, the District Court granted Turkey's motion for summary judgment on the Defendants' tortious interference with contract and tortious interference with prospective economic advantage claims.²⁰ The court did not determine either Turkey's claims of conversion and replevin, or the parties' respective claims for a declaratory judgment on ownership.²¹

In April 2021, the District Court conducted an eight-day bench trial in which it ruled against Turkey's replevin and conversion claims.²² The court entered a declaratory judgment that all rights, title, and interest to the Idol vested in Steinhardt.²³ Specifically, the District Court concluded that Turkey

13. *Id.* at *14–16. In the early 1990s, Rafet Dinç, a prominent specialist on Turkish antiquities who was working at the state-owned Manisa Museum, reported to the Turkish Ministry of Culture that "Kiliya-type marble idols are of Anatolian origin and are spread in museums and private collections across the world." In May 1996, Dinç gave a presentation at a symposium in Ankara sponsored by the Ministry of Culture, with Ministry employees present, that included specific mention of the Idol. In 1997, the Ministry published Dinç's 1996 "Research Results" essay that identified a Kiliya-type idol in the Guennol Collection in New York. The Ministry also published Dinç's 1997 essay, which identified the Idol as having been part of the Guennol Collection in New York, on its website. In 2013, one scholar reported to the Office of the Director General that a Kiliya-type idol had been sold at Christie's in 2010; in doing so, he identified the Stargazer as having been part of the Guennol Collection and again reiterated that Kiliya-type idols abroad originated in Anatolia.

14. *See Christie's, Inc.*, 2021 U.S. Dist. LEXIS 169215, at *10–13.

15. *Christie's, Inc.*, 62 F.4th at 68.

16. *Id.*

17. *Republic of Turkey v. Christie's Inc.*, 425 F. Supp. 3d 204, 218 (S.D.N.Y. 2019).

18. *Id.* at 214–215. Article 4 of the 1906 Decree provides that "[a]ll monuments and immovable and movable antiquities situated in or on land and real estate belonging to the Government and to individuals and various communities, the existence of which is known or will hereafter become known, are the property of the Government of the Ottoman Empire. Consequently, the right to discover, preserve, collect, and donate to museums the aforementioned belongs to the Government." Order on Summ. J. (Dec. 2, 2019) (ECF No. 285).

19. *Christie's Inc.*, 425 F. Supp. 3d at 210.

20. *Id.* at 208.

21. *Id.*

22. *Christie's, Inc.*, 62 F.4th at 67.

23. *Id.* at 69.

did not meet its burden of proof in establishing ownership of the Idol.²⁴ The court reasoned that, although the Idol was undoubtedly manufactured in what is now modern-day Turkey, the trial record did not establish that it was excavated from Turkey after 1906, a prerequisite to a finding of ownership under the 1906 Decree.²⁵ First, the District Court noted that the Idol could have been traded in ancient times, and, therefore, was not necessarily found in Turkey.²⁶ Second, while Kiliya-type idols originated in Turkey, they have circulated outside of Turkey for at least 120 years.²⁷ In sum, the exact circumstances surrounding the trajectory of the Idol prior to its arrival in New York in 1961 were unclear.²⁸ For instance, the Idol's exact find spot was unknown and there was no other direct evidence establishing even an approximate find spot and date or linking the Idol's excavation to any place or person.²⁹ It was also unclear how Klejman came across the Idol, as there was no evidence in the record to establish where Klejman first encountered the statue, how it came to be in his possession, or when and how he brought the Idol to the United States.³⁰ All that the court could reasonably find is that Klejman sold the Idol to the Martins in 1961.³¹

In addition, the District Court found that even if Turkey had established ownership, the trial record showed that Turkey slept on its rights and, thus, was barred from recovery under the doctrine of laches.³² The District Court determined that Turkey should have known of its interest in the Stargazer “decades before 2017,” when it initiated its recovery attempt, and its delay was inexcusable.³³ The District Court found that, to prevail on a laches defense, a defendant must establish “(1) the plaintiff knew of the defendant’s misconduct; (2) the plaintiff inexcusably delayed in taking action; and (3) the defendant was prejudiced by the delay.”³⁴ The first of these elements may be established where a plaintiff “should have known” of the injury.³⁵ The District Court found that academics with connections to the Turkish Ministry of Culture were discussing the Stargazer in the early 1990s, and this awareness “should have put Turkey on notice as to its potential claim—at least enough to inquire further.”³⁶ By failing to investigate, the District Court concluded, Turkey’s delay became unreasonable.³⁷ The District Court noted that it, “need not determine the precise date on which Turkey knew

24. *Id.*

25. *Id.*

26. *Christie’s, Inc.*, 2021 U.S. Dist. LEXIS 169215, at *20–21.

27. *Id.* at *21–22.

28. *Id.* at *24–25.

29. *Id.* at *19–23.

30. *Id.* at *22–23.

31. *Id.*

32. *Christie’s, Inc.*, 2021 U.S. Dist. LEXIS 169215, at *26.

33. *Id.* at *27 (citing *Ikelionwu v. U.S.*, 150 F.3d 233, 237 (2d Cir. 1998)).

34. *Id.* at *26.

35. *Id.* at *31–32.

36. *Id.* at *29.

37. *Id.* at *31–32.

of its claim because it concludes that Turkey should have known of its claim decades before 2017, when it finally initiated its attempt to recover the Idol.”³⁸ Evidence at trial had established that the Idol was widely discussed in the available literature starting in the 1960s, and it was in near-constant display at the Metropolitan Museum of Art for decades.³⁹ The Court found it especially relevant to the Defendants’ laches defense that as early as the 1980s and early 1990s—before Steinhardt even bought the Idol—the Idol was discussed in Turkish publications by academics with connections to the Ministry of Culture.⁴⁰

Also, the Court noted that “[a]wareness of the existence of the Idol, should have put Turkey on notice as to its potential claim—at least enough to inquire further.”⁴¹ Notwithstanding the prominence of the Idol, however, Turkey took no steps to ascertain whether it was entitled to ownership over the object despite being aware of its existence for decades.”⁴²

The District Court also concluded that Turkey’s delay was inexcusable, thus determining that Defendants satisfied the second requirement for a laches defense.⁴³ The Court noted that, *inter alia*, Turkey failed to take any steps to discover the origins of the Idol, how it made its way to New York, and whether it had any potential claim.⁴⁴ Moreover, the Court reasoned that this failure to inquire or investigate was probative of inexcusable delay, even when the precise elements of a potential claim—including the unlawful possessor of the object—were unknown.⁴⁵ The District Court found it especially relevant that Turkey was, or should have been, aware that the Idol was on display at the Met,⁴⁶ but nevertheless failed to contact the Museum to obtain information about the origins of the Idol—a relatively low bar, all things considered.⁴⁷

The District Court also found that the delay prejudiced the Defendants, as the Martins and Klejman had all died before the time of trial.⁴⁸ The Court reasoned that the deaths of the Martins and Klejman deprived Defendants of key witnesses, which was prejudicial to their defense.⁴⁹ As a result of the death of these witnesses—which occurred after Turkey should have been aware of its claim but before it initiated this action—Turkey deprived the Defendants of the ability to seek out relevant information or testimony that

38. *Christie’s, Inc.*, 2021 U.S. Dist. LEXIS 169215, at *27.

39. *Id.* at *28.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at *32.

44. *Christie’s, Inc.*, 2021 U.S. Dist. LEXIS 169215, at *31.

45. *Id.*

46. *Id.* at *32.

47. *Id.*

48. *Id.* at *35.

49. *Id.* at *33–34.

would support their defenses;⁵⁰ prior courts had deemed such prejudice relevant for laches.⁵¹

In addition, the District Court weighed the reasonableness of the parties' actions, finding that Steinhardt acted with reasonable diligence before purchasing the Stargazer, whereas Turkey was dilatory in asserting its claim.⁵² Turkey rebutted the Defendants' laches defense by insisting that, even though Steinhardt was a good-faith purchaser, the District Court should conclude he did not conduct due diligence prior to buying the statue.⁵³ Turkey argued that Steinhardt knew of sufficient red flags as to the Idol's provenance and, therefore, he had a duty to inquire or investigate prior to completing the purchase.⁵⁴ The District Court was unpersuaded by this argument and concluded that the evidence showed that Steinhardt was, in fact, diligent in the lead-up to the 1993 purchase of the Idol.⁵⁵

On appeal, the Second Circuit started its analysis by reiterating that, under New York law, claimants asserting ownership of property are required to make a "threshold showing that they have an arguable claim" before the burden of proof shifts to the possessor.⁵⁶ Turkey argued that it exceeded this initial burden by presenting evidence that 1) the Stargazer was crafted in Turkey; 2) the original seller of the Stargazer was a notable antiquities trafficker; 3) looted antiquities typically appear on the market shortly after their theft; and 4) there was no record of the Stargazer's provenance before its sale to the Martins in New York.⁵⁷ Turkey claimed that these facts constituted, at the very least, a "threshold showing" that the Stargazer was found in Turkey after 1906.⁵⁸ As such, Turkey argued the burden shifted to Defendants to prove by a preponderance of the evidence that the Stargazer was not stolen.⁵⁹

The Second Circuit noted that it had not, to date, defined a "threshold showing" of an "arguable claim" of ownership.⁶⁰ The Court went on to reason that it could not determine whether Turkey's limited evidence at trial met this standard because the District Court applied the wrong standard of proof, namely, that instead of analyzing whether Turkey made a "threshold showing," the District Court held Turkey to a preponderance of the evidence standard.⁶¹ Thus, the Second Circuit could not address whether Turkey met its threshold burden.⁶² The Court further reasoned that, under New York

50. *Christie's, Inc.*, 2021 U.S. Dist. LEXIS 169215, at *33–34.

51. *Id.* at *34.

52. *Id.* at *38.

53. *Id.* at *35–36.

54. *Id.* at *36.

55. *Id.* at *37–38.

56. *Christie's, Inc.*, 62 F.4th at 70 (citing *Bakalar v. Vavra*, 619 F.3d 136, 147 (2d Cir. 2010)).

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 70–71.

62. *Christie's Inc.*, 62 F.4th at 72.

law, the ultimate burden of proof does not rest on the shoulders of the claimant,⁶³ “[r]ather, the claimant must only make a ‘threshold showing’ of an ‘arguable claim’ to the pilfered artwork before the possessor must carry the rest.”⁶⁴

The Second Circuit ultimately decided, however, that Steinhardt’s laches defense barred Turkey’s claims.⁶⁵ The Court noted that, although the doctrine of laches contains a knowledge requirement, plaintiffs need not be aware of the specific circumstances giving rise to their claim.⁶⁶ Here, Turkey was privy to enough information that it should have known of its claim to the Stargazer.⁶⁷ The Court noted that, throughout the 1990s, the Ministry of Culture itself published essays and presentations discussing the Stargazer and its Anatolian roots, evidencing that Turkey should have been aware of its potential claim in the 1990s.⁶⁸

The Second Circuit also determined that the District Court did not add an investigation element to the doctrine of laches, but rather simply concluded that, considering the information available to Turkey, its failure to assert or even investigate its claim to the Stargazer for over twenty-five years was unreasonable.⁶⁹ This ruling, according to the Second Circuit, was not an abuse of discretion, and Turkey’s failure to bring a claim or start an investigation until 2017 was unreasonable in light of the signals from its own Ministry of Culture that the Stargazer was in New York City.⁷⁰

Turkey contended that Mr. Steinhardt would have purchased the Stargazer even if he had known it was stolen, and the District Court’s dismissal of this argument was an abuse of discretion.⁷¹ The Second Circuit disagreed, reasoning that Rule 404(b) directly prohibits the admission of prior-acts evidence to prove that “on a particular occasion the person acted in accordance” with a character trait—such as buying unprovenanced antiquities.⁷²

Regarding the prejudice element of laches, the Second Circuit agreed with the District Court that, because of the passage of time, Defendants could not have produced a witness testifying as to where, when, and how

63. *Id.*

64. *Id.* (citing *Solomon R. Guggenheim Found. v. Lubell*, 550 N.Y.S.2d 618, 624 (1st Dep’t 1990), *aff’d*, 567 N.Y.S.2d 623 (1991)) (“We recognize this burden to be an onerous one, but it well serves to give effect to the principle that persons deal with the property in chattels or exercise acts of ownership over them at their peril.” (internal quotation marks and alterations omitted)).

65. *Id.* at 71–74.

66. *Id.*

67. *Id.*

68. *Christie’s Inc.*, 62 F.4th at 72.

69. *Id.*

70. *Id.*

71. *Id.* at 73.

72. *Id.*

Klejman came into possession of the Stargazer, and that such testimony could have potentially absolved Defendants from liability.⁷³

Turkey also objected to the District Court's findings regarding Steinhardt's reasonable diligence when he acquired the Idol.⁷⁴ Turkey argued that the District Court should have held Steinhardt to the level of diligence typically reserved for art dealers, museums, and other commercial actors under New York's Uniform Commercial Code, and argued that, by failing to contact the Republic of Turkey, the Martins, or Klejman, Steinhardt exhibited "indifference as to the provenance" of the Stargazer.⁷⁵ The Second Circuit responded that Turkey misconstrued the District Court's reasoning on this issue,⁷⁶ and noted that, after concluding that Steinhardt, as an ordinary purchaser of art, was under no duty to investigate the provenance of the Stargazer, the District Court determined that he nevertheless did investigate the Idol's provenance.⁷⁷ The Second Circuit pointed to evidence that Steinhardt had questioned the Merrin Gallery about the Stargazer when he bought it, reviewed a report on the Idol promulgated by a "noted" art expert, met with other experts, and relied upon the "Met's good reputation."⁷⁸ The Second Circuit noted the District Court's determination that these efforts were "reasonably diligent."⁷⁹ The Second Circuit further reasoned that, "after contrasting Steinhardt's investigation into the Stargazer's provenance with Turkey's failure to act for over twenty-five years, we do not find that the district court abused its discretion in balancing the parties' respective diligence."⁸⁰

The Second Circuit concluded its opinion by noting that "[e]quity favors the vigilant. But in this case, because Turkey has slept on its rights, we affirm the judgment of the district court."⁸¹

II. Cassirer v. Thyssen-Bornemisza Collection Foundation

For nearly two decades, the fate of Camille Pissarro's *Rue St. Honoré, après-midi, effet de pluie* (*Rue Saint-Honoré in the Afternoon. Effect of Rain*) (1897) (the "Painting") has hung in the balance while courts have considered an action brought by heirs of the original owner, who sued on the grounds that the Painting was Nazi-looted art.⁸² The initial decisions in the case addressed whether the court had jurisdiction to hear a claim for the return of a work

73. *Id.*

74. *Christie's Inc.*, 62 F.4th at 74.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Christie's Inc.*, 62 F.4th at 74.

81. *Id.*

82. Isaac Kaplan, *Appeals Court Revives 16-Year Lawsuit Over \$40 Million Nazi-Looted Pissarro*, ART MKT. (July 10, 2017), <https://www.artsy.net/article/artsy-editorial-lawsuit-40-million-nazi-looted-pissarro-painting-revived> [<https://perma.cc/NC3R-NG5B>].

that was located in Spain,⁸³ and whether too much time had passed before the case was brought.⁸⁴ Since 2015, the Cassirer litigation has chiefly focused on choice of law, namely whether the law of California or the law of Spain should apply.⁸⁵ The answer to this question is crucial as, under California law, stolen property remains stolen, even in the hands of possessors who had nothing to do with the theft.⁸⁶ Conversely, under Spanish law, title to stolen property may vest in a later owner after the passage of time.⁸⁷

A. BACKGROUND

As with much Nazi-looted artwork, the history of the Painting is long and complex. Lilly Cassirer Neubauer inherited the Painting in 1926.⁸⁸ As German Jews, Lilly and her husband were subject to the discriminatory racial laws of the Third Reich, including the “Aryanization” of the property of German Jews.⁸⁹ Pursuant to these laws, Berlin art dealer Jakob Scheidwimmer (“Scheidwimmer”) was appointed by the Nazi government to appraise the Painting.⁹⁰ Scheidwimmer refused to permit Lilly to take the Painting out of Germany and demanded that she “sell” it to him.⁹¹ The payment—about \$350 in Reichsmarks—was deposited in a blocked bank account to which Lilly had no access. Lilly and her husband fled Germany in 1939.⁹²

83. See *Cassirer v. Kingdom of Spain*, 461 F. Supp. 2d 1157, 1164 (C.D. Cal. 2006) (denying Spain’s motion to dismiss for lack of jurisdiction), *aff’d in part*, 616 F.3d 1019 (9th Cir. 2010).

84. The Foundation moved to dismiss the case, challenging California Civil Procedure Code Section 338(c)(3)(A), which extended the statute of limitations and permits claims to be brought within six years of actual discovery for “the specific recovery of a work of fine art brought against a museum, gallery, auctioneer, or dealer, in the case of an unlawful taking or theft . . . of a work of fine art, including a taking or theft by means of fraud or duress.” The District Court held that 338(c)(3)(A) was an unconstitutional intrusion upon the federal government’s foreign affairs power. See *Cassirer v. Thyssen-Bornemisza Collection Found.*, Case No. CV-05-3459-GAF (CTX), 2012 WL 12875771, at *4 (C.D. Cal. May 24, 2012). The Ninth Circuit disagreed, holding that “§ 338(c)(3) does not intrude on the federal government’s foreign affairs power.” See *Cassirer v. Thyssen-Bornemisza Collection Found.*, 737 F.3d 613, 617 (9th Cir. 2013).

85. Kaplan, *supra* note 82.

86. Edvard Pettersson, *Spain Prevails Against in Fight Over Picasso Painting Stolen by Nazis*, COURTHOUSE NEWS SERVICE (Jan. 9, 2024), <https://www.courthousenews.com/spain-prevails-again-in-fight-over-pissarro-painting-stolen-by-nazis/#:~:text=That%27s%20because%20the%20state%27s%20rules%20stipulate%20that%20when%20there%27s%20a%20conflict%20between%20the%20laws%20of%20two%20jurisdictions%2C%20the%20laws%20of%20the%20jurisdiction%20that%20has%20most%20at%20stake%20in%20the%20outcome%20should%20be%20applied%2C%20the%20panel%20ruled> [<https://perma.cc/ST3H-K8BW>].

87. *Id.*

88. Kaplan, *supra* note 82.

89. *Id.*

90. Nicholas O’Donnell, *Thyssen-Bornemisza Wins Picasso Painting Sold under Nazi Duress by Lilly Cassirer*, JDSUPRA (Jan. 15, 2024), <https://www.jdsupra.com/legalnews/thyssen-borne-misza-wins-pissarro-6613932/> [<https://perma.cc/Q2WQ-R7BW>].

91. *Id.*

92. *Id.*

Scheidwimmer subsequently exchanged the Painting for three German paintings from the collection of Julius Sulzbacher (“Sulzbacher”), a Jewish art collector.⁹³ This “exchange” was no more consensual than the forced “sale” of the Painting. After the Sulzbacher family fled Germany, the Gestapo seized the Painting.⁹⁴

After the war, both Lilly and Sulzbacher filed claims against Scheidwimmer, for restitution or compensation.⁹⁵ In 1954, the U.S. Court of Restitution Appeals confirmed that Lilly was the owner of the Painting.⁹⁶ In 1957, Germany established a process for claims related to Nazi-looted property.⁹⁷ Lilly dropped her claim against Scheidwimmer and filed a claim with Germany for compensation.⁹⁸ At this time, everyone, Lilly included, believed the Painting had been lost or destroyed in the war.⁹⁹ Thus, in 1958, Lilly, Sulzbacher, and Germany entered into a settlement agreement with respect to the Painting and two of the three paintings Sulzbacher had “exchanged” for it.¹⁰⁰ In that settlement, Lilly was paid the agreed value of the Painting as of April 1, 1956 (120,000 Deutschmarks).¹⁰¹

The Painting, however, had not been destroyed.¹⁰² Instead, it appears to have been sold in a Nazi government auction, and then sold again in 1943 at the Lange Auction in Berlin.¹⁰³ The Frank Perls Gallery of Beverly Hills moved the Painting from Germany to California in 1951 and sold it to collector Sidney Brody.¹⁰⁴ The Painting was sold in 1952 to St. Louis art collector Sydney Schoenberg.¹⁰⁵ It was then sold in 1976 to Baron Hans-Heinrich Thyssen-Bornemisza of Lugano, Switzerland (the “Baron”).¹⁰⁶

In 1988, the Baron and the Kingdom of Spain entered into an agreement for the Baron to loan his collection (the “Collection”) to Spain.¹⁰⁷ Spain subsequently established a non-profit foundation, the Thyssen-Bornemisza Collection Foundation (the “Foundation”) to “maintain, conserve, publicly exhibit, and promote artwork from the Collection.”¹⁰⁸ In 1993, Spain purchased the Collection, and the Foundation continued to manage it.¹⁰⁹ The Painting has been owned by Spain since 1993 and publicly displayed

93. *Id.*

94. *Id.*

95. *Id.*

96. O'Donnell, *supra* note 90.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d 951, 956 (9th Cir. 2017).

101. O'Donnell, *supra* note 90.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. O'Donnell, *supra* note 90.

108. *Cassirer v. Thyssen-Bornemisza Collection Found.*, 89 F.4th 1226, 1231 (9th Cir. 2024).

109. O'Donnell, *supra* note 90.

at the Foundation managed Thyssen-Bornemisza National Museum in Madrid since 1992.¹¹⁰

Lilly's heirs discovered the painting at the Foundation in 2000, and petitioned Spain and the Foundation for its return.¹¹¹ Spain's Minister of Education, Culture, and Sports denied that request.¹¹² Subsequently, five members of the U.S. Congress wrote to the Minister, asking Spain and the Foundation to return the painting to Lilly's heirs; this request was also refused.¹¹³

On May 10, 2005, Lilly's heir, Claude Cassirer, a resident of Los Angeles, filed suit against the Foundation and Spain in the U.S. District Court for the Central District of California.¹¹⁴

B. PROCEDURAL HISTORY: A LONG ROAD

In 2015, the District Court held that Spanish law concerning stolen property applied to the case and granted summary judgment in favor of the Foundation.¹¹⁵ On appeal, the U.S. Court of Appeals for the Ninth Circuit reversed the District Court, holding that, if the Foundation had "had actual knowledge the Painting was stolen . . . [it] could not have acquired title to the Painting through acquisitive prescription."¹¹⁶ Following a bench trial, the District Court found that the Foundation did not have actual knowledge that the Painting had been stolen, and, therefore, it had acquired title to the Painting under Spanish law.¹¹⁷ The Cassirers appealed again to the Ninth Circuit, which affirmed the District Court's decision, holding that "[b]ecause the district court's finding that [the Foundation] lacked actual knowledge that the Painting was stolen is supported by inferences that may be drawn from facts in the record, it is not clearly erroneous."¹¹⁸

The U.S. Supreme Court granted certiorari, and on April 21, 2022, issued its decision, which rejected the Ninth Circuit's choice of law analysis.¹¹⁹ The issue was not which substantive law, California's or Spain's, should apply, but whether the courts below had employed the correct choice of law rule for making the determination.¹²⁰ The Court determined that both the Ninth Circuit and the District Court had employed a choice of law rule derived

110. *Id.*; *Cassirer*, 89 F.4th at 1231.

111. *Cassirer*, 89 F.4th at 1231.

112. *Cassirer v. Kingdom of Spain*, 580 F.3d 1048, 1052 (9th Cir. 2009).

113. *Id.*

114. *Id.*

115. *Cassirer v. Thyssen-Bornemisza Collection Found.*, 153 F. Supp. 3d 1148, 1167 (C.D. Cal. 2015).

116. *Cassirer v. Thyssen-Bornemisza Collection Found.*, 824 F. App'x 452, 454 (9th Cir. 2020) *vacated and remanded*, 142 S. Ct. 1502 (2022) (citing *Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d 951, 972-73 (9th Cir. 2017)).

117. *Cassirer v. Thyssen-Bornemisza Collection Found.*, No. CV 05-3459-JFW (Ex), 2019 U.S. Dist. LEXIS 247143, at *49 (C.D. Cal. 2019).

118. *Cassirer*, 824 F. App'x at 456.

119. *Cassirer*, 142 S. Ct. at 1507.

120. *Id.* at 1502-04.

from federal common law.¹²¹ The Court framed the issue as “whether a court in an FSIA case raising non-federal claims (relating to property, torts, contracts, and so forth) should apply the forum State’s choice-of-law rule, or instead use a federal one.”¹²² The following section briefly considers the Supreme Court’s decision and reasoning before analyzing the Ninth Circuit’s May 22, 2023, decision.

C. THE SCOTUS DECISION

To understand the Court’s analysis and holding, it is necessary first to consider how a U.S. court came to have jurisdiction to hear a case against a museum such as the Foundation, which is an instrumentality (or agency) of a foreign government. As the Court explained:

Under the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1602 et seq., a foreign state or instrumentality is amenable in specified circumstances to suit in an American court [The FSIA] provides the sovereign actor with immunity unless the claim against it falls within a specified exception The complaint here asserted that the statute’s expropriation exception applied. That exception removes immunity for cases involving ‘rights in property taken in violation of international law’ At a prior stage of this litigation, the courts below held that the Nazi confiscation of Rue Saint-Honoré brought [Cassirer’s] suit against the Foundation within the expropriation exception.¹²³

Since, under the FSIA, any claim for relief not entitled to immunity is liable in the same manner and to the same extent as a “private individual under the circumstance,”¹²⁴ the Court reasoned there could be no deviation from the choice of law rule that would apply in a case against a private individual.¹²⁵ The rationale, the Court noted, is simple: “[c]onsider two suits seeking recovery of a painting – one suit against a foreign-state-controlled museum (as here), the other against a private museum. If the choice-of-law rules in the two suits differed, so might the substantive law in fact chosen. And if the substantive law differed, so might the suits’ outcomes.”¹²⁶

The Court remanded the case back to the Ninth Circuit for further consideration.¹²⁷

121. *Id.* at 1506.

122. *Id.* at 1506–07.

123. *Id.* at 1504–06 (quoting 28 U.S.C. § 1605).

124. *Id.* at 1507 (quoting 28 U.S.C. § 1606).

125. *Cassirer*, 142 S. Ct. at 1507.

126. *Id.*

127. *Id.* at 1509.

D. THE NINTH CIRCUIT DECISION: CALIFORNIA'S CHOICE-OF-LAW RULE AND A QUESTION

The Ninth Circuit issued its decision on May 22, 2023, applying the “governmental interest test,” which is California’s choice-of-law rule.¹²⁸ This test involves three steps: (1) “a court must determine ‘whether the relevant law of each of the potentially affected jurisdictions with regard to the particular issue in question is the same or different,’” (2) “if the law is different, ‘the court examines each jurisdiction’s interest in the application of its own law under the circumstances of the particular case to determine whether a true conflict exists,’” and (3) “if there is a true conflict, the court ‘carefully evaluates and compares the nature and strength of the interest of each jurisdiction in the application of its own law to determine which state’s interest would be more impaired if its policy were subordinated to the policy of the other state.’”¹²⁹

The Ninth Circuit analyzed each of the test’s three steps. With respect to the first step, it concluded that

[b]ecause Spanish law expressly recognizes ‘that title to chattels may pass through qualified, extended possession,’ . . . while no California judicial decision or statute has ever authorized such a practice, and California law has made clear that ‘[s]tolen property remains stolen property, no matter how many years have transpired from the date of the theft,’ . . . the relevant laws of these jurisdictions are different ‘with regard to the particular issue in question.’¹³⁰

In considering the test’s second step, the court concluded that a true conflict existed, since both jurisdictions had a legitimate interest in the application of its own laws.¹³¹ The court noted that:

Spain has an interest in regulating conduct that occurs within its borders, including applying its long-standing rule governing acquisitive prescription of personal property, which assures Spanish residents that their title to personal property is protected after they have possessed the property in good faith for a set period of time.¹³²

128. *Cassirer v. Thyssen-Bornemisza Collection Found.*, 69 F.4th 554, 559 (9th Cir. 2023).

129. *Id.* at 560 (citing *Kearney v. Salomon Smith Barney, Inc.*, 39 Cal. 4th 95, 107–08 (2006)).

130. *Cassirer*, 69 F.4th at 562 (citing *Cassirer*, 862 F.3d at 961; *Naftzger v. Am. Numismatic Soc’y*, 42 Cal. App. 4th 421, 432, 49 Cal. Rptr. 784 (1996); *Kearney*, 39 Cal. 4th at 107).

131. The dissent objects to the majority’s conclusion, arguing instead that it is not at all clear that California law does not recognize acquisition of title to personal property by adverse possession. The dissent distinguishes between a thief not being able to pass good title and an innocent third party being able to acquire title by virtue of adverse possession. There is, then, the dissent argues, only a “false conflict,” and “Spain is the only interested jurisdiction and therefore its law applies.” *Cassirer*, 69 F.4th at 573–76 (Bea, J., dissenting).

132. *Cassirer*, 69 F.4th at 573–76.

Likewise, the court observed that California “has shown it has an interest in enabling residents to recover stolen personal property, even when it is in the hands of good faith purchasers, and a particular interest when that stolen property is Holocaust-era art.”¹³³

The application of the third element of the test—comparing the degree of impairment of the two jurisdictions if their law were subordinated to the law of the other jurisdiction—created a problem for the court.¹³⁴ The court noted a distinction between the ways that courts analyze choice of law questions in cases arising in torts and in cases addressing questions of property, reasoning that “[w]hile federal common law provided guidance on how its choice-of-law rules should be applied to property cases . . . California’s choice-of-law rules do not.”¹³⁵ Without overt guidance, the court looked to those decisions that applied California’s choice-of-law rules, which were limited to “tort actions where a California resident, who has suffered a physical injury due to the negligent conduct of a defendant in a different jurisdiction, being an action to impose liability on that defendant.”¹³⁶ While the courts applying California’s choice-of-law rules in tort actions had considered a number of factors, the most important factor by far was the “situs where the tortious conduct and physical injury occurred.”¹³⁷ This factor was, the court found, unhelpful in the context of a stolen property action.¹³⁸

Seeking guidance on how this prong of the test should be applied to stolen property, the Ninth Circuit certified the question to the California Supreme Court.¹³⁹ On August 9, 2023, the California Supreme Court declined the Ninth Circuit’s request for clarification, leaving the court to its own analysis.¹⁴⁰ The court has accepted supplemental briefing from the parties on the question of choice of law as it relates to stolen property.¹⁴¹

E. THE ROAD AHEAD

For the Painting, the long and tortuous road continues. The Ninth Circuit must complete its choice-of-law analysis. The outcome of that analysis is far from clear. Observers of the case should consider the following advice, which Pissarro himself once gave to a young art student: “[t]he eye should not be fixed on a particular point but should take in everything, while simultaneously observing the reflections that the colors produce on their surroundings.”¹⁴²

133. *Id.*

134. *Id.*

135. *Id.* at 566.

136. *Id.*

137. *Id.*

138. *Cassirer*, 69 F.4th at 567.

139. *Cassirer*; *The Est. of Ava Cassirer v. Thyssen-Bornemisza Collection Found.*, No. S280128, 2023 Cal. LEXIS 4363, at *4363 (2023).

140. *Id.*

141. *Id.*

142. CAMILLE PISSARRO, NEW WORLD ENCYCLOPEDIA, https://www.newworldencyclopedia.org/p/index.php?title=Camille_Pissarro&oldid=1128749 [<https://perma.cc/K7JH-MTG4>].

International Arbitration

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This article discusses significant legal developments in International Arbitration Law from 2023.

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I. North America

A. UNITED STATES

1. U.S. Supreme Court Developments

a. Enforcement of Arbitral Awards

In *Yegiazaryan v. Smagin*, the U.S. Supreme Court confirmed that foreign parties who seek to enforce an arbitral award in the United States may use the Racketeer Influenced and Corrupt Organizations Act (RICO)—which imposes criminal liability on persons who engage in a “pattern of racketeering” comprised of a series of predicate acts, including wire fraud and obstruction of justice¹—to collect on an arbitral award.² In the 6-3 opinion, the Supreme Court held that courts must apply a context-specific, rather than a “residency-based” bright-line rule when determining whether a foreign plaintiff has pleaded a “domestic injury” sufficient to sustain a RICO claim.³ Smagin had obtained an arbitration award against Yegiazaryan in London, which was confirmed as a judgment in California pursuant to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).⁴ Thereafter, Yegiazaryan allegedly engaged in various methods to hide assets.⁵ Smagin initiated an action alleging that Yegiazaryan’s actions “injured” his property (the California judgment enforcing the foreign arbitration award) under RICO, which only applies to domestic injuries.⁶

The Ninth Circuit found that Smagin had successfully pleaded a domestic injury under RICO, and the Supreme Court affirmed, holding that a plaintiff alleges a domestic injury when the circumstances surrounding the injury indicate that it arose in the United States.⁷ In doing so, the Court adopted a “case-specific analysis” to determine whether the injury is “sufficiently ground[ed]” in the United States.⁸ Although the Court declined to provide a set list of factors, the Court’s analysis focused on two elements pointing to the existence of a domestic injury—(1) where the alleged racketeering activity occurred; and (2) the situs of the “injurious aims and effects of the activity”—in California.⁹

The Supreme Court’s decision adds a potentially powerful tool for the enforcement of arbitral awards and may make the United States a more attractive forum for judgment creditors, particularly in light of the ability to

1. See 18 U.S.C. §§ 1961–1968.

2. See generally *Yegiazaryan v. Smagin*, 599 U.S. 533 (2023).

3. *Id.* at 545.

4. *Id.* at 537.

5. *Id.* at 538.

6. *Id.* at 539.

7. *Id.* at 540–41.

8. *Smagin*, 599 U.S. at 544–48.

9. See *id.* at 544–48.

recover treble damages and attorneys' fees under RICO,¹⁰ and potentially impose liability on third parties under the theory that they have aided and abetted unlawful efforts to avoid enforcement of a judgment.¹¹

b. **Mandatory Stay of Proceedings**

In *Coinbase, Inc. v. Bielski*, the Court held that a district court must stay proceedings when a party appeals the denial of a motion to compel arbitration under the Federal Arbitration Act (FAA), thereby resolving a longstanding Circuit split.¹² In its 5-4 decision, the Court found that an appeal under Section 16(a) of the FAA—which permits an immediate appeal from the denial of a motion to compel arbitration, among other orders—requires a stay.¹³ The Court acknowledged that the FAA “does not say whether the district court proceedings must be stayed,” but found support for its conclusion based on the “longstanding tenet of American procedure” that an appeal “divests the district court of control over those aspects of the case involved in the appeal.”¹⁴ Consistent with a pro-arbitration approach, the majority noted that its decision was also grounded in “common sense,” as certain benefits of arbitration—including “efficiency, less expense, less intrusive discovery, and the like”—would be “irretrievably lost” absent a stay of proceedings pending appeal.¹⁵

2. *Vacatur of Arbitral Awards*

a. **Grounds For Vacatur**

In *Corporación AIC, S.A. v. Hidroeléctrica Santa Rita S.A.*, the Eleventh Circuit ruled *en banc* that where an international arbitration is seated in the United States, and is otherwise governed by the New York Convention, Section 10 of the FAA provides the exclusive grounds for vacatur of an arbitral award.¹⁶ The Eleventh Circuit had previously held that awards issued under the New York Convention could be vacated only under Article V, which enumerates grounds for a court to refuse to recognize and enforce a foreign arbitral award governed by the Convention.¹⁷ With the *Corporación AIC, SA* decision, the Eleventh Circuit overruled its precedent, finding that Article V, by its terms, only set out the grounds for a court exercising *secondary* jurisdiction to refuse to enforce an award issued under the New York Convention, and that instead, “the primary jurisdiction’s domestic law” (the

10. See 18 U.S.C. § 1964(c).

11. See 18 U.S.C. § 1962(a).

12. See *generally* *Coinbase, Inc. v. Bielski*, 599 U.S. 736 (2023).

13. *Id.* at 747.

14. *Id.* at 740.

15. *Id.* at 743.

16. *Corporación AIC, S.A. v. Hidroeléctrica Santa Rita S.A.*, 66 F.4th 876, 880 (11th Cir. 2023).

17. *Inversiones y Procesadora Tropical INPROTSA, S.A. v. Del Monte International GmbH*, 921 F.3d 1291, 1301–02 (11th Cir. 2019).

FAA) “provides the vacatur grounds for an arbitral award,”¹⁸ bringing the Eleventh Circuit in line with all other Circuit courts that have considered the issue.

b. Arbitrator Bias

Courts grappled with an application of the “evident partiality” standard to determine whether arbitrator bias warrants vacatur of an award.¹⁹ In *Andes Petroleum Ecuador Ltd. v. Occidental Exploration & Production Company*, the Second Circuit held that awards should be vacated based on failure to disclose a relationship only where a “reasonable person, considering all the circumstances, would *have* to conclude that an arbitrator was partial to one side.”²⁰ It also declined to vacate an award based on an arbitrator’s failure to disclose appointment to a separate tribunal alongside one party’s counsel.²¹ In *Grupo Unidos por el Canal, S.A. v. Autoridad del Canal de Panama*, the Eleventh Circuit applied slightly different reasoning to similar facts to reach the same result, holding that arbitrators’ failures to disclose that they had served on panels with one party’s counsel were not “reasonably indicative of possible bias.”²²

c. Annulment

Emblematic of courts’ discretion to confirm or vacate arbitral awards, the Tenth Circuit in *Compañía de Inversiones Mercantiles S.A. v. Grupo Cementos de Chihuahua S.A.B. de C.V.* refused to vacate an order confirming a Bolivian arbitral award, after the underlying award was subsequently annulled by a Bolivian court.²³ Rejecting a “presumption” of international comity,²⁴ the Tenth Circuit held that the district court did not abuse its discretion because recognizing the Bolivian annulment would offend U.S. public policies protecting the finality of judgments and favoring “parties’ contractual expectations in the arbitration context, including the finality of awards,” as well as the “corollary interest” of “enforcing the resulting award.”²⁵

3. *Foreign Sovereign Immunities Act (FSIA)*

In *Devas Multimedia Priv. Ltd. v. Antrix Corp.*, the Ninth Circuit held that a constitutional “minimum contacts” analysis is required to exercise

18. Corporación AIC, SA, 66 F.4th at 886.

19. 9 U.S.C. § 10(a)(2).

20. *Andes Petroleum Ecuador Ltd. v. Occidental Expl. & Prod. Co.*, No. 21-3039-CV, 2023 WL 4004686, at *2 (2d Cir. June 15, 2023), *pet. for cert. filed*, No. 23-506.

21. *See id.*

22. *Grupo Unidos por el Canal, S.A. v. Autoridad del Canal de Pan.*, 78 F.4th 1252, 1262 (11th Cir. 2023).

23. *See Compañía de Inversiones Mercantiles S.A. v. Grupo Cementos de Chihuahua S.A.B. de C.V.*, 58 F.4th 429, 437 (10th Cir. 2023).

24. *Id.* at 463.

25. *Id.* at 458–61.

personal jurisdiction over a foreign state under the FSIA,²⁶ splitting from other federal circuits which have held that the FSIA does not incorporate such a requirement.²⁷ Plaintiffs filed suit in federal court to confirm an International Chamber of Commerce (ICC) award against India's space agency, Antrix.²⁸ The court held that Antrix, a "foreign state" under the FSIA, was subject to jurisdiction,²⁹ but the Ninth Circuit reversed, holding that the agency did not have the requisite "minimum contacts" with the United States.³⁰ While the Ninth Circuit may now be seen as less favorable for parties seeking to enforce arbitral awards against foreign sovereigns, because the "direct effects" test establishing jurisdiction under the FSIA is considered similar to the "minimum contacts" analysis, the impact of this decision could be minimal.

4. *Preemption*

As a matter of first impression, the First Circuit held in *Green Enterprises, LLC v. Hiscox Syndicates Ltd. at Lloyd's of London* that domestic law rendering an arbitration clause unenforceable was preempted by Article II of the New York Convention, which provides that courts should enforce arbitration agreements between U.S. citizens and non-citizens.³¹ Focusing on the text of the New York Convention, including Article II's commandment that courts "refer the parties to arbitration" when there is a written arbitration agreement, the First Circuit concluded that the New York Convention was self-executing,³² i.e., directly enforceable as domestic law.³³

5. *28 U.S.C. § 1782*

Following the U.S. Supreme Court's 2022 decision that 28 U.S.C. § 1782 does not permit discovery for use in private commercial arbitral proceedings in foreign countries because such tribunals are not "imbued with governmental authority,"³⁴ two recent New York federal district courts have concluded that Section 1782 discovery is also not available for use in International Centre for the Settlement of Investment Disputes (ICSID) proceedings. In *re Alpine Ltd.*, the magistrate judge concluded that ICSID does not "exercise[] governmental authority such that granting discovery

26. *Devas Multimedia Priv. Ltd. v. Antrix Corp.*, No. 20-36024, 2023 WL 4884882, at *3 (9th Cir. Aug. 1, 2023).

27. See, e.g., *TMR Energy Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296, 303 (D.C. Cir. 2005); *Rote v. Zel Custom Mfg. LLC*, 816 F.3d 383, 392 (6th Cir. 2016).

28. See *Devas Multimedia Priv. Ltd. v. Antrix Corp.*, No. C18-1360 TSZ, 2020 WL 6286813, at *1 (W.D. Wash. Oct. 27, 2020).

29. *Id.* at *4.

30. *Devas Multimedia*, 2023 WL 4884882, at *2-3.

31. See generally *Green Enter., LLC v. Hiscox Syndicates Ltd. at Lloyd's of London*, 68 F.4th 662 (1st Cir. 2023).

32. *Id.* at 667 (citing *Medellin v. Texas*, 552 U.S. 491 (2008)).

33. See *id.* at 666.

34. *ZF Automotive US, Inc. v. Luxshare, Ltd.*, 596 U.S. 619, 623, 631 (2022).

requests by parties in arbitrations before the ICSID would ‘promote[] respect for foreign governments and encourage[] reciprocal assistance.’”³⁵ *In re Webuild S.P.A.*, the court observed that various factors, including the ICSID tribunal’s functional independence and lack of affiliation with either state party to the bilateral investment treaty (BIT), the lack of “government funding,” and “the confidentiality of the ICSID Panel” weighed against concluding that the tribunal acted with governmental authority.³⁶ Both decisions are currently pending appeal.

Courts have continued to permit Section 1782 discovery for use in proceedings before foreign courts, including where the petitioner sought the discovery for use in both the foreign court proceeding and commercial arbitral proceedings seated abroad.³⁷ Other courts have expressly prohibited the use of any evidence obtained through Section 1782 discovery in non-qualifying proceedings (such as private commercial arbitrations) or have required that the applicant obtain the court’s authorization before doing so.³⁸

B. MEXICO

In Mexico, the Third Collegiate Court of the First Judicial Circuit held that interim measures may be adopted prior to or during arbitral proceedings under articles 1425 and 1470, fraction III of the Commercial Code in order to preserve an existing factual situation during the arbitration, but that such interim measures shall not constitute or modify the rights and obligations of the parties if they lack “*fumus boni iuris*” (prima facie appearance of a legitimate right), or if they imply the breach of a contractual obligation that may only be modified or revoked through a final arbitral award on the merits.³⁹

C. CANADA

Canadian courts continued their trend of actively facilitating international arbitration. In *Hypertec Real Estate Inc. v. Equinix Canada Ltd.*, the Superior Court of Quebec appointed a French law firm as *amicus curiae* to provide independent and impartial legal submissions in a de novo competence

35. *In re Alpeine, Inc.*, 21 MC 2547, 2022 WL 15497008, at *3 (E.D.N.Y. Oct. 27, 2022), *aff’d*, 2023 WL 5237336.

36. *In re Webuild S.P.A.*, 22-mc-140, 2022 WL 17807321, at *1–2 (S.D.N.Y. Dec. 19, 2022), appeal filed, No. 23–73.

37. *See, e.g., In re Pub. Joint-Stock Co. Bank Otkritie Fin. Corp.*, 22-MC-50, 2023 WL 4928227, at *3–4, *3 n.1 (S.D.N.Y. Aug. 2, 2023).

38. *See, e.g., In re Caterpillar Crédito*, No. 22-mc-412, 2023 WL 6317913, at *2 (D. Del. Sept. 28, 2023); *In re Sailed Tech. (Beijing) Co.*, Case No. 2:22-cv-01396, 2023 WL 3568151, at *9 (W.D. Wash. May 18, 2023).

39. *Medidas Cautelares Provisionales en el Juicio Especial sobre Transacciones Comerciales y Arbitraje*, Tribunales Colegiados de Circuito, SJF *Medidas Cautelares Provisionales en el Juicio Especial sobre Transacciones Comerciales y Arbitraje*, Tribunales Colegiados de Circuito [SJF], Undécima Época, Tomo III, Enero de 2023, Tesis I.3o.C.21 C (11a.), página 2587 (Mex.).

hearing.⁴⁰ The Court found the Model Law origins of arbitration provisions in Quebec's Code of Civil Procedure and reasoned that Canada's and Quebec's commitment to maintaining uniform arbitral practice and procedures with the rest of the world militated in favor of the appointment.⁴¹

In *Fotmer Corp. v. Tilray Brands, Inc.*, the Supreme Court of British Columbia held that, in accordance with the national neutrality principle, an American company's place of business in Canada prevented the court from appointing a Canadian arbitrator over the objections of the opposing party from Uruguay.⁴² The Court added that a party's desire for the arbitrator to be qualified in British Columbia law was not a compelling reason to override the principles of independence and impartiality.⁴³

In *Johnston v. Octaform Inc.*, the Supreme Court of British Columbia held that it did not have the power to stay arbitrations under the province's international commercial arbitration legislation, finding that a clear purpose of the legislation was to limit the role of the courts in arbitral proceedings.⁴⁴

D. NAFTA/USMCA

On July 1, 2023, the deadline for filing "legacy" disputes under the United States-Mexico-Canada Agreement (USMCA)'s three-year extension of the North American Free Trade Agreement (NAFTA) expired.⁴⁵ In total, seventeen "legacy" disputes have been initiated.⁴⁶

1. *Claims against Mexico*

Four cases were filed by U.S. and Canadian mining companies due to imposition of retrospective tax liabilities,⁴⁷ refusal to grant VAT refunds on royalty payments,⁴⁸ illegal blockades of mines,⁴⁹ and dilution of ownership interests.⁵⁰ Two cases were filed by U.S. and Canadian oil & gas investors over violations of investment contracts with Mexico's national petroleum company,

40. See *Hypertec Real Estate Inc. v. Equinix Can. Ltd.*, 2023 QCCS 3061, ¶¶ 23–26 (Can. Que.).

41. See *id.*

42. See *Fotmer Corp. v. Tilray Brands, Inc.*, 2023 BCSC 1323, ¶¶ 20–48 (Can. B.C.).

43. See *id.* ¶¶ 50–57.

44. See *Johnston v. Octaform Inc.*, 2023 BCSC 311, ¶¶ 25–26 (Can. B.C.).

45. A "legacy investment" is "an investment of an investor of another Party in the territory of the Party established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry of force of this agreement." See U.S.—Mexico—Canada Agreement, Annex 14–C, 6(a), Dec. 10, 2019, 134 Stat. 11 [hereinafter "USMCA"].

46. See *infra* notes 47–61.

47. *First Majestic Silver Corp. v. Mexico*, ICSID Case No. ARB/21/14 (Sept. 21, 2023).

48. *Coeur Mining, Inc., v. Mexico*, ICSID Case No. UNCT/22/1 (Aug. 17, 2023).

49. *Silver Bull Resources, Inc. v. Mexico*, ICSID Case No. ARB/23/24 (Feb. 26, 2024).

50. *Goldgroup Resources, Inc. v. Mexico*, ICSID Case No. ARB/23/4 (Nov. 9, 2023).

Pemex,⁵¹ and an order by the Mexican employment tribunal to pay US\$120 million to a company's former employee.⁵² Two cases were brought by U.S. transportation investors due to Mexico's revocation of parking collection⁵³ and railroad concessions.⁵⁴ In two cases, U.S. agricultural investors brought claims with respect to the sugar mill business⁵⁵ and alleged expropriation of agricultural land,⁵⁶ while another U.S. company initiated a case regarding the site of its sweets factory.⁵⁷ The final case involves claims by U.S. investment funds with respect to their debt instruments and financial services.⁵⁸

2. *Claims against Canada*

All four cases against Canada were initiated by U.S. investors and relate to environmental measures that allegedly impacted their investments in the energy⁵⁹ and mining⁶⁰ sectors.

3. *Claims against the United States*

In the only case initiated against the United States, Canadian investors brought a C\$15 billion claim over cancellation of the Keystone XL pipeline.⁶¹

To date, no investor has brought a claim under USMCA's terms (as opposed to its extension of NAFTA's terms).⁶²

II. ICSID

On July 14, 2023, an ICSID tribunal issued an award in *Nachingwea and others v. Tanzania*, holding that Tanzania unlawfully expropriated claimants' investment in a nickel sulphide exploration and development project by passing legislation in 2017 that repealed the legal basis for their

51. Finley Resources Inc., MWS Management Inc., and Prize Permanent Holdings, LLC v. Mexico, ICSID Case No. ARB/21/25 (Nov. 15, 2023).

52. Enerflex and Exterran v. Mexico, ICSID Case No. ARB/23/22 (Feb. 1, 2024).

53. Doups Holdings LLC v. Mexico, ICSID Case No. ARB/22/24.

54. Mario Noriega Willars v. Mexico, ICSID Case No. ARB/23/29.

55. Amerra Cap. Mgmt. LLC v. Mex., ICSID Case No. UNCT/23/1, Notice of Arbitration, ¶¶ 24–25 (Aug. 3, 2022).

56. Access Bus. Grp. LLC v. Mex., ICSID Case No. ARB/23/15, Request for Arbitration, ¶ 42 (Apr. 13, 2023).

57. Arbor Confections Inc. v. Mex., ICSID Case No. ARB/23/25.

58. Cyrus and Contrarian v. Mexico, ICSID Case No. ARB/23/33.

59. Koch Indus. Inc. v. Can., ICSID Case No. ARB/20/52, Request for Arbitration, ¶¶ 15–17 (Dec. 7, 2020); Windstream Energy LLC v. Can., PCA Case No. 2021-26, Procedural Order No. 2 Decision on Bifurcation, ¶¶ 8, 23 (Sept. 13, 2022); Ruby River Capt. LLC v. Can., ICSID Case No. ARB 23/5, Request for Arbitration, ¶ 5 (Feb. 17, 2023).

60. Westmoreland Coal Co. v. Can., ICSID Case No. UNCT/23/2, Notice of Arbitration, ¶ 13 (Oct. 11, 2022).

61. TC Energy Corp. v., U.S., ICSID Case No. ARB/21/63, Respondent's Request for Bifurcation, ¶ 2 (Jan. 11, 2023).

62. See USMCA Cases, U.S. DEPT. OF LABOR, <https://www.dol.gov/agencies/ilab/our-work/trade/labor-rights-usmca-cases> [https://perma.cc/7TT6-X4YQ] (last visited Mar. 27, 2024).

license—thereby “creat[ing] uncertainty”—and then passing regulations in 2018 that made clear that claimants’ license “no longer existed” and that the “license areas had been reverted to the State.”⁶³ The tribunal rejected Tanzania’s argument that its actions were justified under the police powers doctrine because Tanzania’s assertions that the cancellation of the license was “in the public interest” and “intended to improve the modality of managing the mining industry operations” were not supported by any evidence.⁶⁴

The tribunal also held that Tanzania’s expropriation of claimants’ investment was unlawful because Tanzania’s failure to provide “reasonable advance notice” to stakeholders like claimants—for example, “the critical provision” concerning the repeal of the legislative basis of the licenses was “only introduced a few hours before the Parliamentary vote”—was not “in accordance with due process of law.”⁶⁵ The tribunal ordered Tanzania to pay more than \$100 million in damages.⁶⁶

III. Europe

A. ENGLAND AND WALES

The Law Commission has submitted its final report and with it a draft bill amending the Arbitration Act 1996.⁶⁷ The key changes provide for: (1) a default rule that the law of the arbitration agreement will be the law of the seat;⁶⁸ (2) tribunals to have express power to issue an award on a summary basis to dispose of any issue, claim or defense which demonstrably lacks merit;⁶⁹ (3) the framework for challenging awards for lack of substantive jurisdiction under Section 67 of the Act to be revised to prevent a full re-hearing of jurisdictional issues by courts where a Tribunal has already undertaken a full hearing on these issues;⁷⁰ (4) tribunals to have an express power to award costs even if they find that they do not have jurisdiction;⁷¹ (5) courts’ supportive powers to be extended to cover preemptory orders issued

63. *Nachingwea U.K. Ltd. v. United Republic of Tanz.*, ICSID Case No. ARB/20/38, Award, ¶ 199 (July 14, 2023).

64. *Id.* ¶¶ 242, 246.

65. *Id.* ¶¶ 269–70.

66. *See id.* ¶¶ 387, 413(3). On July 28, 2023, the Secretary-General registered Tanzania’s application for annulment and provisionally stayed enforcement of the award. *See ICSID Case No. ARB/20/38*, ICSID, <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/20/38> [<https://perma.cc/5QPD-GYPT>] (last visited Apr. 10, 2024).

67. *See* LAW COMMISSION, REVIEW OF THE ARBITRATION ACT 1996: FINAL REPORT AND BILL, 2023, HC 1787 (UK) [hereinafter LAW COMMISSION FINAL REPORT], <https://lawcom.gov.uk/project/review-of-the-arbitration-act-1996/> [<https://perma.cc/HLK5-A2ZW>].

68. *See id.* ¶ 12.2, at 134.

69. *See id.* ¶ 6.3, at 54.

70. *See id.* § 11(1)(3B)(b)–(c), at 181.

71. *See id.* § 6, at 178.

by emergency arbitrators and third parties;⁷² (6) arbitrators' general duty of disclosure to be codified;⁷³ and (7) strengthening of arbitrators' immunity.⁷⁴

*FamilyMart Holding v. Ting Chuan*⁷⁵ and *Republic of Mozambique v. Credit Suisse International*⁷⁶ defined a "matter" which gives rise to a stay of legal proceedings in favor of arbitration.

In *Radisson Hotels v. Hayat*, the Commercial Court held that a party to arbitral proceedings who fails to make a prompt objection to a partial award and continues to participate in the subsequent phase of the proceedings may be barred from subsequently challenging that award.⁷⁷

While the rule in *Browne v. Dunn* requires that challenged evidence must be put to a witness in order that it can be addressed, *BPY v. MXV* clarified that this might not be necessary if it was obvious what the response would be or if the witness had the opportunity to deal with it in written submissions.⁷⁸

B. IRELAND

While third-party funding is generally prohibited in Ireland, it is now permitted for "dispute resolution proceedings," including international commercial arbitration, court proceedings arising out of an international commercial arbitration, and mediation and conciliation proceedings arising out of those court proceedings or an international commercial arbitration.⁷⁹

The Minister for Justice may set down certain criteria for third-party funding contracts (including with respect to transparency of funders and recipients), but it remains to be seen exactly what criteria will be prescribed, if any, given the delicate balance between transparency and the principle of confidentiality that is central to commercial arbitration.⁸⁰ Provided the third-party funding contracts meet any such criteria, they shall not be treated as contrary to public policy or otherwise illegal or void.⁸¹

C. FRANCE

In *Halyvourgiki*, the Paris Court of Appeal refused to set aside an ICC award based on the arbitrator's alleged lack of independence and impartiality

72. See *id.* ¶ 8.4, at 76.

73. See *id.* ¶ 5.8, at 185.

74. See LAW COMMISSION FINAL REPORT ¶¶ 5.1–5.4, at 43.

75. See *FamilyMart China Holding Co. Ltd. v. Ting Chuan Holding Corp.*, [2020] UKPC 33, [48] (appeal taken from Cayman Is.) (UK).

76. See *Republic of Mozam. v. Prinvest Shipbuilding SAL Holding*, [2023] UKSC 32, [35] (appeal taken from Eng.) (UK).

77. See *Radisson Hotels APS Den. v. Hayat Otel Isletmeciligi Turzim Yatirim Ve Ticaret Anonim Sirketi*, [2023] EWHC (Comm) 892 [38] (Eng.).

78. See *BPY v. MXV*, [2023] EWHC (Comm) 82, [32]–[33] (Eng.).

79. The Courts and Civil Law (Miscellaneous Provisions) Act (Ireland) 2023 c. 124, § 5A.

80. See *id.*

81. See *id.*

due to undisclosed links with respondent (i.e., prior appointments; the preparation of multiple legal opinions; family ties).⁸² The non-disclosure of these links dated back to between three and 30 years and was not sufficient to establish “reasonable doubt” in the minds of the parties as to the arbitrator’s lack of independence and impartiality.⁸³

Conversely, in *PAD*, the Paris Court of Appeal overturned an ICC award due to an arbitrator’s failure to disclose close personal ties with the counsel of the party that had nominated him.⁸⁴ While the arbitrator’s disclosure of such ties in a eulogy published online following the death of the counsel was not sufficient to show “reasonable doubt” in the minds of the parties, such doubt was established given the fact that the eulogy set out a link between those personal ties and ongoing arbitral proceedings.⁸⁵

D. SPAIN

Spain, in particular Madrid, consolidated its position as one of the most attractive venues for international and commercial arbitration following the Constitutional Court’s now-consolidated doctrine,⁸⁶ limiting the scope of control by courts of justice over the merits of awards. This trend has continued with the creation of the Madrid International Arbitration Center (CIAM) and the approval of the new CIAM Regulation, which will enter into force on January 1, 2024.⁸⁷ The aim of the new Regulation is to streamline arbitration procedures, adapt to the current needs of international arbitration, and promote transparency.⁸⁸ To this end, new measures are envisaged, including the creation of a hyper-abbreviated procedure, modification of the rules for the appointment and confirmation of arbitrators, and a more detailed regulation on the intervention of third parties and joinder of proceedings.⁸⁹

82. See Cour d’ appel [Ca] [regional court of appeal] Paris, ICC, Sept. 16, 2023, 21/16159 (Fr.).

83. *Id.* ¶¶ 62, 68.

84. See Cour d’ appel [Ca.] [regional court of appeal] Paris, ICC, Jan. 10, 2023, 20/18330 (Fr.).

85. *Id.* ¶¶ 69–70.

86. See T.C., June 27, 2022 (No. 79) (Spain); S.T.C., Apr. 4, 2022 (No. 50) (Spain); S.T.C., Mar. 15, 2021 (No. 51) (Spain); S.T.C., Feb. 15, 2020 (No. 46) (Spain).

87. See Amaia Rivas & Sofia Parra Martinez, *Energy Related Investor State Disputes Continue to Dominate Arbitration Market in Spain*, PINSENT MASON (Mar. 14, 2024, 2:47 PM), <https://www.pinsentmasons.com/out-law/analysis/energy-related-investor-state-disputes-dominate-arbitration-market> [<https://perma.cc/UTB5-N3WA>].

88. See *id.*

89. See Rivas et al., *Energy Related Investor State Disputes Continue to Dominate Arbitration Market in Spain*, PINSENT MASON; Pamela McDonald & Sylvia Tordova, *International Arbitration: Global Developments and Current Trends*, PINSENT MASON (March 14, 2023, 3:00 PM), <https://www.pinsentmasons.com/out-law/analysis/international-arbitration-global-developments-current-trends> [<https://perma.cc/PVQ8-ADHY>].

E. GERMANY

On April 18, 2023, the German Federal Ministry of Justice published a white paper on the modernization of German arbitration law,⁹⁰ which is aimed at strengthening Germany as a seat for international arbitration. If implemented, it would be the biggest reform in German arbitration law since 1997.⁹¹ The white paper sets out twelve key points including, *inter alia*, the conclusion of arbitration agreements without form requirements,⁹² the expanded use of English,⁹³ the introduction of an extraordinary remedy against final domestic arbitral awards,⁹⁴ and the establishment of commercial courts integrating judicial support.⁹⁵

The German Federal Court of Justice has ruled in three appealed cases⁹⁶ that EU law prevails and EU Member States are allowed to use upstream national judicial protection against ICSID arbitrations initiated by investors from other EU Member States under the Energy Charter Treaty.⁹⁷

F. SWITZERLAND

On March 1, 2023, the Swiss Arbitration Centre released a Practice Note on the Swiss Rules of International Arbitration,⁹⁸ which contains comprehensive clarifications on the Swiss Rules' application. The Swiss Supreme Court held that an award confined to its operative part, lacking findings of fact or legal rationale, qualifies as an arbitral award and, in

90. See *Eckpunkte des Bundesministeriums der Justiz zur Modernisierung des deutschen Schiedsverfahrensrechts* [White Paper of the Federal Ministry of Justice on the Modernization of German Arbitration Law], at 1 (Apr. 18, 2023) (unofficial translation provided by the German Arbitration Institute).

91. See Neues Schiedsverfahrensgesetz Schiedsverfahrensgesetz von 1997 [Arbitration Procedure New Regulation Act-Arbitration Procedure Act of 1997], Dec. 22, 1997, BGBl I at 3224 (Ger.).

92. *White Paper on German Arbitration*, *supra* note 90, at 2.

93. See *id.* at 3.

94. See *id.* at 4.

95. See *id.* at 3-4.

96. See BGH July 27, 2023, I ZB 43/22, <https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2023-7-27&nr=134423&pos=10&anz=22> [<https://perma.cc/URE4-47SZ>]; BGH July 27, 2023, I ZB 74/22, <https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2023-7-27&nr=134424&pos=11&anz=22> [<https://perma.cc/B2CP-HDNH>]; BGH July 27, 2023, I ZB 75/22, <https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2023-7-27&nr=134425&pos=12&anz=22> [<https://perma.cc/RM5Q-H3YV>].

97. See *The German Courts Offer Protection from Intra-EU Arbitrations*, INT'L INST. FOR SUSTAINABLE DEV. (Sept. 30, 2023), <https://www.iisd.org/itn/en/2023/09/30/the-german-courts-offer-protection-from-intra-eu-arbitrations/> [<https://perma.cc/BTF8-NDN6>].

98. See SWISS ARBITRATION CTR., SWISS RULES OF INTERNATIONAL ARBITRATION PRACTICE NOTE (2023), <https://www.swissarbitration.org/swiss-rules-of-international-arbitration-practice-note/> [<https://perma.cc/7F2D-974M>].

principle, may be subject to challenge before the Swiss Supreme Court.⁹⁹ However, if the parties agree that the award need not contain any reasoning, such an award is not open to judicial review.¹⁰⁰

In the same year, the European Court of Human Rights (ECHR) issued a judgment holding that Switzerland failed to afford adequate procedural safeguards to former Olympic champion Caster Semenya during her unsuccessful challenge of an arbitral award before the Swiss Supreme Court,¹⁰¹ namely by failing to effectively examine her substantiated and credible claims of discrimination resulting from her elevated testosterone levels.¹⁰²

G. RUSSIA

Russian courts crystallized their restrictive approach under article 248.1 of the Code of Arbitrazh Procedure¹⁰³ to companies from “unfriendly” states trying to adjudicate disputes with sanctioned Russian entities in foreign jurisdictions, finding sanctions are per se sufficient to invoke the rebuttable jurisdiction of Russian courts without the need to prove the effect on access to justice in a foreign forum.¹⁰⁴

In light of Western sanctions, Russian parties have also started to consider alternative seats like sanctions-free Hong Kong.¹⁰⁵ Sweden—while neither new nor sanctions-free—is also still considered relatively neutral and welcoming.¹⁰⁶ However, Russian courts have still shown a readiness to issue anti-arbitration injunctions with respect to Hong Kong International Arbitration Centre (HKIAC) and Stockholm Chamber of Commerce (SCC) proceedings.¹⁰⁷

After the initial shock caused by Russia’s invasion of Ukraine and subsequent sanctions and countersanctions, investor-state claims have

99. See Bundesgericht [BGer] [Federal Supreme Court] May 12, 2023, 4A_41/2023 (Switz.).

100. See *id.*

101. See *Seymana v. Swiss*, App. No. 10934/21 (2023), <https://hudoc.echr.coe.int/eng?i=001-225768> [<https://perma.cc/X6CM-WWVZ>]

102. See *id.*

103. See *Arbitrazhno-Protssessual’nyĭ Kodeks Rossiĭskoĭ Federatsii* [GRAK RF] (Code of Arbitration Procedure) art. 248.1 (Russ.).

104. See *Арбитражный суд Москвы* [Ruling of the Arbitration Court of Moscow, Apr. 4, 2023, No. A40-262826/2022-52-2056] (Russ.).

105. See *Pak Yiu & Echo Wong, Russian Companies Move Legal Battles to Hong Kong Courts*, *FIN. TIMES*, (Aug. 8, 2023), <https://www.ft.com/content/012a4e84-ea79-458c-9d94-3c368facd8f9> [<https://perma.cc/P8XZ-TT9C>].

106. See *Арбитражный суд Иркутской области* [Ruling of the Arbitration Court of Irkutsk Oblast, Jan. 17, 2023, No. A19-10204/2022] (Russ.).

107. See *Арбитражный суд ул. Санкт-Петербург и Ленинградская область* [Ruling of the Arbitration Court of St Petersburg and Leningrad Oblast, June 6, 2023, No. A56-129797/2022] (Russ.); *Арбитражный суд ул. Санкт-Петербург и Ленинградская область* [Ruling of the Arbitration Court St Petersburg and Leningrad Oblast, Oct. 31, 2023 No. A56-96787/2023] (Russ.).

started to emerge.¹⁰⁸ Following the transfer of their in-country assets under Russia's external management, Fortum¹⁰⁹ and Carlsberg¹¹⁰ sent their BIT notices of dispute to Russia. Russia's Volga-Dnepr Airlines also sent a BIT notice of dispute to Canada in response to the latter's seizure of the company's plane,¹¹¹ and Russian fertilizer maker Akron announced it would challenge the seizure of its shares in Polish Grupa Azoty.¹¹²

H. UKRAINE

In August, Ukraine terminated its BIT with Russia.¹¹³ The termination becomes effective on January 27, 2025, but Ukrainian investors will still be able to bring claims against Russia until 2035.¹¹⁴

The International Register of Damages was established on May 12, 2023 to serve as a comprehensive compensation mechanism for Ukraine.¹¹⁵

There was also noteworthy progress in cases involving expropriation of assets after the Russian occupation of Crimea in 2014.¹¹⁶ Naftogaz

108. See Eric Leikin et al., *Arbitration Arising out of Russia's Invasion of Ukraine*, FRESHFIELDS, <https://www.freshfields.us/insights/campaigns/international-arbitration-in-2023/arbitration-arising-out-of-russias-invasion-of-ukraine/> [<https://perma.cc/T362-U8BA>] (last visited Mar. 30, 2024).

109. See *Fortum has Sent Notices of Dispute to the Russian Federation Due to the Violations of International Investment Treaty Protection*, FORTUM (July 13, 2023, 4:45 PM), <https://www.fortum.com/media/2023/07/fortum-has-sent-notices-dispute-russian-federation-due-violations-international-investment-treaty-protection> [<https://perma.cc/2JLG-NK2E>].

110. See *Carlsberg Threatens Russia with an International Court Due to the Situation Around the Baltic*, INTERFAX (Nov. 8, 2023, 9:53 AM), <https://www.interfax.ru/russia/929541> [<https://perma.cc/ZYC5-2DUL>].

111. See *Volga-Dnepr Airlines Sent A Pre-Arbitration Notice To Canada Regarding The Seized An-124-100 Aircraft*, VOLGA-DNEPR (Aug. 14, 2023), <https://www.volga-dnepr.com/press-center/news/4280/> [<https://perma.cc/H2V6-ABR2>].

112. See *Acron Will Challenge the Decision of the Polish Authorities Regarding Grupa Azoty Shares*, INTERFAX (July 13, 2023, 2:36 PM), <https://www.interfax.ru/business/911479> [<https://perma.cc/F75Y-ZNNF>].

113. See The Verkhovna Rada of Ukraine [Legislation of Ukraine], Aug. 10, 2023, No. 3329-IX.

114. See Agreement between the Cabinet of Ministers of Ukraine and the Government of the Russian Federation on the Promotion and Mutual Protection of Investments, Ukr.-Rus., Dec. 15, 1999, https://zakon.rada.gov.ua/laws/show/643_101#top [<https://perma.cc/4CUD-QFT5>]; see also Eric Leikin et al., *Ukraine's Termination of its Bilateral Investment Treaty with Russia: What Happened and What it Means for Potential Future Claims*, FRESHFIELDS BRUCKHAUS DERINGER, (Oct. 3, 2023) <https://riskandcompliance.freshfields.com/post/102ip3m/ukraines-termination-of-its-bilateral-investment-treaty-with-russia-what-happen> [<https://perma.cc/6S3N-JJ4F>].

115. See Susannah Moody, *Asters Co-Head to Run Ukrainian Damage Register*, GLOB. ARB. REV. (July 4, 2023), <https://globalarbitrationreview.com/article/asters-co-head-run-ukrainian-damage-register> [<https://perma.cc/6MXF-EPWZ>].

116. See *Oleksiy Chernyshov: Court in The Hague ordered Russia to Pay \$5bn in Compensation for Losses and Lost Property of Naftogaz in Crimea*, NAFTOGAZ (Apr. 13, 2023 10:55 AM), <https://www.naftogaz.com/en/news/russia-pay-5bn-compensation-naftogaz-crimea> [<https://perma.cc/TN54-254Q>].

secured a \$5 billion award¹¹⁷ and initiated enforcement proceedings in the United States.¹¹⁸ Oschadbank also commenced enforcement proceedings in the United States.¹¹⁹ The Permanent Court of Arbitration (PCA) upheld the claims of Ukrainian companies in *Lugzor v. Russia*¹²⁰ and *DTEK v. Russia*.¹²¹

The ECHR declared admissible *Ukraine and the Netherlands v. Russia*, a case recognizing Russia's effective control over the occupied parts of the Donetsk and Luhansk regions since 2014.¹²² This may be an important development in proving the jurisdiction of investment tribunals over such claimants as Ukrainian businessman Rinat Akhmetov, who initiated an investment dispute against Russia for losses in the territory in 2014–2022.¹²³

Ukraine's Supreme Court confirmed its pro-arbitration approach, ruling that (1) arbitration clauses apply to non-signatories who assumed contractual rights and obligations; and (2) two Ukrainian counterparties can choose foreign commercial arbitration in contracts involving a foreign element.¹²⁴

IV. Pacific Rim

A. AUSTRALIA

In a landmark decision, in April 2023 the High Court of Australia delivered its first judgment concerning the enforceability of an investor-state arbitration award in Australia.¹²⁵ The Court found that Spain had waived its

117. See Sebastian Perry, *Naftogaz Wins US \$5 billion Award Against Russia*, GLOB. ARB. REV. (Apr. 13, 2023), <https://globalarbitrationreview.com/article/naftogaz-wins-us5-billion-award-against-russia> [<https://perma.cc/F2TQ-BZT5>].

118. See Jack Ballantyne, *Russia Faces Enforcement of US \$5 billion Award in DC*, GLOB. ARB. REV. (June 23, 2023), <https://globalarbitrationreview.com/article/russia-faces-enforcement-of-us5-billion-award-in-dc> [<https://perma.cc/D4T6-KEMZ>].

119. See Susannah Moody, *Ukrainian Bank's Billion-Dollar Award Against Russia Surfaces*, GLOB. ARB. REV. (Mar. 22, 2023), <https://globalarbitrationreview.com/article/ukrainian-banks-billion-dollar-award-against-russia-surfaces> [<https://perma.cc/Q43Y-B2MG>].

120. See Sebastian Perry, *Russia Liable Over Crimean Real Estate*, GLOB. ARB. REV. (Apr. 6, 2023), <https://globalarbitrationreview.com/article/russia-liable-over-crimean-real-estate> [<https://perma.cc/5SKU-3VSG>].

121. See Jack Ballantyne, *Ukrainian Energy Company Reports Win Against Russia*, GLOB. ARB. REV. (Nov. 2, 2023), <https://globalarbitrationreview.com/article/ukrainian-energy-company-reports-win-against-russia> [<https://perma.cc/B74L-LLNJ>].

122. See *Case of Ukraine & The Netherlands v. Russia*, App. No. 8019/16, 43800/14 & 28525/20, 225–26 (Nov. 30, 2022), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%22001-222889%22%7D> [<https://perma.cc/AK2G-HKQ4>].

123. See Tom Jones, *Ukraine's Richest Man Brings Treaty Claim Against Russia*, GLOB. ARB. REV. (Apr. 11, 2023), <https://globalarbitrationreview.com/article/ukraines-richest-man-brings-treaty-claim-against-russia> [<https://perma.cc/T8ZQ-KJJU>].

124. See Велика Палата Верховного [Grand Chamber of the Supreme Court] Nov. 1, 2023, No. 910/3208/22, ¶¶ 2.2–2.3 (Ukr.), <https://reyestr.court.gov.ua/Review/114685588> [<https://perma.cc/T745-WLSY>].

125. See *Kingdom of Spain v. Infrastructure Services Luxembourg S.à.r.l.* (2023) 408 ALR 658, ¶ 36 (Austl.).

foreign state immunity from the *recognition* and *enforcement* of investor-state arbitral awards by Australian courts by signing the ICSID Convention.¹²⁶

In October 2023, the Federal Court of Australia rejected India's attempt to set aside an application to enforce an award in Australia on similar grounds that India could not rely on foreign state immunity as a defense to the enforcement of an award as it had signed the New York Convention.¹²⁷

There has been an uptick in investor-state claims against Australia in 2023, albeit all linked to Clive Palmer, an Australian mining magnate.¹²⁸ Mr. Palmer, through a Singaporean subsidiary, has commenced two arbitrations, and has given notice of his intention to commence a third, against Australia, claiming record-breaking damages of over AUD 410 billion.¹²⁹ The first of these arbitrations involves a claim for AUD 300 billion (approximately US\$200 billion), making it the largest known investor-state arbitration claim on record.¹³⁰ The claims all involve Mr. Palmer's interests in mining projects in Australia and have been brought under either the Association of Southeast Asian Nations (ASEAN)-Australia-New Zealand Free Trade Agreement or the Singapore-Australia Free Trade Agreement.¹³¹

B. JAPAN

On April 21, 2023, the Japanese Diet passed amendments to the Arbitration Act of Japan, which will come into effect on April 21, 2024.¹³² The changes focus on the enforcement of interim measures, provide for the Tokyo and Osaka District Courts to have concurrent jurisdiction over arbitration-related cases if the arbitration is seated in Japan, and waive certain Japanese translation requirements.¹³³

On October 1, 2023, Japan acceded to the Singapore Convention on Mediation.¹³⁴ The Convention will enter into force for Japan on April 1, 2024, when the national legislation implementing the Convention becomes effective.¹³⁵

126. *See id.* ¶ 36.

127. *See* CCDM Holdings, LLC v. Republic of India (No. 3) [2023] FCA 1266, ¶¶ 1–22 (Austl.).

128. *See* Toby Fisher, *Mining Magnate Threatens Another Mega-claim Against Australia*, GLOB. ARB. REV. (Nov. 6, 2023), <https://globalarbitrationreview.com/article/mining-magnate-threatens-another-mega-claim-against-australia> [<https://perma.cc/M54B-MR2>].

129. *See id.*

130. *See id.*

131. *See id.*

132. *See Amendment to The Arbitration Act*, THE LEGAL 500 (June 23, 2023), <https://www.legal500.com/developments/thought-leadership/amendment-to-the-arbitration-act/> [<https://perma.cc/ADZ9-KJ2L>].

133. *See id.*

134. *See* Press Release, Information Service Vienna, Japan Accedes to the United Nations Convention on International Settlement Agreements Resulting from Mediation, U.N. Press Release UNIS/L/350 (Oct. 3, 2023), <https://unis.unvienna.org/unis/en/pressrels/2023/unis350.html> [<https://perma.cc/PM9K-GJG>].

135. *See id.*

In May 2023, the Japan International Dispute Resolution Center closed its hearing facility in Tokyo, which had opened just three years earlier.¹³⁶ The search for alternatives continues.

C. CHINA AND HONG KONG

In 2023, China marked the tenth anniversary of the Belt and Road Initiative (BRI).¹³⁷ The China International Economic and Trade Arbitration Commission (CIETAC) established the first international arbitration cooperation mechanism for the BRI in 2019 and has expanded to 55 member arbitration institutions in 2023.¹³⁸ As parties in disputes among BRI countries might not be familiar with foreign laws, on September 11, 2023, CIETAC released the Memorandum of Cooperation on Foreign Law Ascertainment for the BRI Arbitration Institutions, which provides detailed rules on foreign law ascertainment issues among BRI countries.¹³⁹

Hong Kong and Mainland China entered into the Arrangement Concerning Mutual Assistance in Court-Ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and the Hong Kong Special Administrative Region on October 1, 2019, which enables parties to certain Hong Kong arbitration proceedings to apply to Mainland courts for interim measures.¹⁴⁰ In recent years, the HKIAC has received increased numbers of preservation order applications under the Arrangement.¹⁴¹ As of October 27, 2023, the HKIAC has accepted 100 applications, most of which were for preservation of assets.¹⁴² Under the Arrangement, Mainland courts have granted 66 preservation of assets orders with a total value of approximately US \$2.3 billion.¹⁴³

136. See *Closure of JIDRC-Tokyo Facility*, JAPAN INT'L DISP. RESOL. CTR. (June 1, 2023), <https://idrc.jp/en/2023/06/closure-of-jidrc-tokyo-facility/> [<https://perma.cc/PW9T-FZW4>].

137. See *Fifty-five International Arbitration Institutions Joined the "Belt & Road" Arbitration Institution Cooperation Mechanism*, MINISTRY OF JUST. OF CHINA (Sept. 28, 2023), http://www.moj.gov.cn/pub/sfbgw/fzgz/fzgzggflfw/fzgzggflfw/202309/t20230928_487130.html [<https://perma.cc/DF9M-LT9Z>].

138. See *id.*

139. See *CIETAC Released the Memorandum of Cooperation on Foreign Law Ascertainment for the Belt & Road Initiative Arbitration Institutions*, CHINA INT'L ECON. & TRADE ARB. COMM'N (Sept. 11, 2023), <http://www.cietac.org/index.php?m=Article&a=show&id=19419> [<https://perma.cc/5C9M-GTVR>].

140. See *Interim Measures Arrangement – FAQs*, HONG KONG INT'L ARB. CTR., <https://www.hkiac.org/arbitration/IMA-FAQs> [<https://perma.cc/WZ27-JFUH>] (last visited Apr. 10, 2024).

141. See *id.*

142. See *HKIAC Receives 100th application under PRC-HK Interim Measures Arrangement*, HONG KONG INT'L ARB. CTR. (Oct. 13, 2023), <https://www.hkiac.org/news/hkiac-receives-100th-application-under-prc-hk-interim-measures-arrangement> [<https://perma.cc/B5C8-XPSX>].

143. See *id.*

D. SINGAPORE

In a case involving a shareholder agreement for an India-registered company, the Court of Appeal held that in determining arbitrability in the pre-award stage, courts must apply a multistep test when the law governing the arbitration agreement is that of another state.¹⁴⁴ First, the court must determine whether the foreign law permits arbitration.¹⁴⁵ If not, the matter cannot be arbitrated.¹⁴⁶ If so, the court must look to the law of the seat, Singapore in this case, to decide.¹⁴⁷ If that law permits arbitration, the arbitration may proceed.¹⁴⁸ If neither permits arbitration, the arbitration cannot move forward as it violates the public policy of both the foreign state and Singapore.¹⁴⁹

E. MALAYSIA

The Court of Appeal held that where the validity of the arbitration agreement is at issue, in this case in a Hong Kong-seated arbitration, both the tribunal and Malaysian courts have the power to determine validity.¹⁵⁰

F. VIETNAM

The Justice Council of the Supreme People's Court confirmed as precedent a ruling of the Ho Chi Minh City People's Court that a dispute that arose out of a non-compete agreement clause in an employment contract was arbitrable because one of the parties was engaged in commercial activities.¹⁵¹

V. Middle East

A. SAUDI ARABIA

The Saudi Center for Commercial Arbitration (SCCA) released the SCCA Arbitration Rules 2023, in force from May 1, 2023.¹⁵² Significant

144. See *Anupam Mittal v. Westbridge Ventures II Investment Holdings*, [2023] SGCA 1 [28], ¶ 62 (Sing.), https://www.elitigation.sg/gd/s/2023_SGCA_1 [<https://perma.cc/Q45H-EPV2>].

145. See *id.*

146. See *id.*

147. See *id.*

148. See *id.*

149. See *id.*

150. See *Who Decides The Validity Of An Arbitration Agreement?*, RDS ADVOC. & SOLIC. (Sept. 6, 2023), <https://www.rdslawpartners.com/post/who-decides-the-validity-of-an-arbitration-agreement> [<https://perma.cc/2F47-ABEB>] (discussing *Macsteel International Far East Ltd v. Lysaght Corrugated Pipe Sdn Bhd* and other appeals [2023] 4 MLJ 551).

151. See *The Arbitrability of Non-compete and Non-disclosure Agreements*, LEXOLOGY (Dec. 19, 2023), <https://www.lexology.com/library/detail.aspx?g=b483e1a3-7003-4437-bb28-639467892c8e> (discussing Draft Case Precedent No. 12/2023 (August 18, 2023) and Decision No. 755/2018/QD-PQTT) [<https://perma.cc/X77G-VJK9>].

152. See SAUDI CTR. FOR COMMERCIAL ARBITRATION, SCCA ARBITRATION RULES 2023, art. 2(2), at 11 (2023), <https://sadr.org/ADRServices-arbitration-arbitration-rules?lang=en> [<https://perma.cc/HYQ5-SB36>].

amendments to the initial 2016 rules include the creation of the SCCA Court, tasked with key decisions (e.g., deciding on arbitrator challenges and reviewing draft awards);¹⁵³ new powers granted to arbitrators (e.g., encouraging amicable dispute resolution);¹⁵⁴ and new provisions governing emergency arbitrations (e.g., implementing a two-week timeframe for issuing interim awards).¹⁵⁵

B. UNITED ARAB EMIRATES (UAE)

In September 2023, the UAE revised Federal Law No. 6/2018 on Arbitration, which governs arbitrations seated in the country (except in Financial Free Zones such as the Dubai International Financial Centre).¹⁵⁶ Key amendments pertain to hearings (e.g., recognizing the possibility of virtual hearings)¹⁵⁷ and arbitrator qualifications (e.g., permitting the appointment of arbitrators in cases administered by institutions where they hold supervisory roles, subject to certain safeguards).¹⁵⁸

VI. Africa

On February 19, 2023, the African Union adopted the final Draft Protocol to the Agreement Establishing the African Continental Free Trade Area on Investment.¹⁵⁹ The Draft Protocol aims to promote growth and development across the continent through investment policy reform and cooperation, with an express focus on sustainability.¹⁶⁰ Under the Draft Protocol, state parties will need to terminate all existing intra-African BITs within five years and not enter into any new such BITs.¹⁶¹

Within a year of adopting the Draft Protocol, member states will have to adopt rules and procedures for preventing, managing, and resolving investor-state disputes, which will be appended in an annex.¹⁶² An earlier

153. *See id.* arts. 18(6), 36(4), at 25, 35–36.

154. *See id.* art. 25(7), at 28.

155. *See id.* appendix III, at 53–58.

156. Federal Decree Law No. 15 of 2023 (Amending Certain Provisions of Federal Law No. 6 of 2018 on Arbitration), art. 1 (U.A.E.), <https://wolterskluwerblogs.com/arbitration/wp-content/uploads/sites/48/2023/10/Translation-of-Federal-Decree-Law-No.-15-of-2023-Amending-Certain-Provisions-of-Federal-Law-No.-6-of-2018-on-Arbitration-2.pdf> [<https://perma.cc/5RPX-V38A>].

157. *See id.* art. 1 (amending art. 28(1), (3)).

158. *See id.* art. 2 (amending art. 10(bis)).

159. *See* The Protocol has not been made publicly available at the time of writing. *See* African Union, *Draft Protocol to the Agreement Establishing the African Continental Free Trade Area on Investment* (Jan. 2023), https://www.bilaterals.org/IMG/pdf/en_-_draft_protocol_of_the_af-cfta_on_investment.pdf [<https://perma.cc/7JVF-DAXX>].

160. *See id.* art. 2(a).

161. *See id.* art. 49.

162. *See id.* art. 46.

draft of the annex contained state-state dispute settlement provisions,¹⁶³ as well as investor-state dispute settlement provisions under the UNCITRAL Rules or the rules of any arbitral institution,¹⁶⁴ although it is yet to be determined whether such mechanisms will be maintained or replaced by a permanent investment court.

VII. South America

A. ARGENTINA

In an April 5, 2023 judgment, the Commercial Court of Appeal rejected a nullity appeal that raised issues such as essential procedural flaws and the inclusion of incompatible decisions.¹⁶⁵ The Court highlighted that the substance of the arbitral tribunal's decision could not be reviewed by national courts if the parties had expressly excluded the possibility of appeals on the merits.¹⁶⁶ Further, because the tribunal was a court of justice, it was authorized to make the legal decision it deemed appropriate considering the facts of the case.¹⁶⁷

In a March 2, 2023 decision, the Commercial Court of Appeal established that arbitral jurisdiction cannot be extended to issues not covered by an arbitration clause.¹⁶⁸

B. URUGUAY

A project proposing reform of the legal framework for national arbitration was approved by the lower house of the Uruguayan parliament, signaling its imminent transformation into law.¹⁶⁹ The reform aims to harmonize the national arbitration system with the international regime based on the UNCITRAL model.¹⁷⁰

163. See African Union, *Protocol to the Agreement Establishing the African Continental Free Trade Area on Investment, Zero Draft*, annex 1, at 33–34 (Nov. 2021), https://www.isds.bilaterals.org/IMG/pdf/afcfra_protocol_on_investment_first_draft.pdf [<https://perma.cc/PGG6-PXCB>].

164. See *id.* at 34–42.

165. See Cámara Nacional de Apelaciones en lo Comercial de la Capital Federal [CNCom.] [National Court of Commercial Appeals of the Federal Capital], 5/4/2023, “Persist SA c. Fideera Chililcoy SA / Organismos Externos” (Arg.), <http://www.saij.gob.ar/home> (choose “All” from “Type of Content” dropdown; then in “Contextual Search” type “Persist SA v. Fideera Chililcoy AS”; click search; click first result) [<https://perma.cc/DBS3-ZMK7>].

166. See *id.*

167. See *id.*

168. Cámara Nacional de Apelaciones en lo Civil de la Capital Federal [CNCiv.] [National Court of Civil Appeals of the Federal Capital], 2/3/2023, “Gerosa, Francisco P. c. Pravpat SA / Daños y Perjuicios” (Arg.), <https://ar.ijeditores.com/pop.php?option=articulo&Hash=aae8a13d7bc6fcc9fb8e80ee48ce4386> [<https://perma.cc/Z3YQ-UP8J>].

169. See Régimen de Arbitraje Internacional [Nat'l Arbitration Regime] Law No. 313, Feb. 2021 (Uru.), <http://www.diputados.gub.uy/data/docs/LegActual/Repartid/R0313.pdf> [<https://perma.cc/977G-PD2E>].

170. See *id.*

In a March 23, 2023 judgment regarding recognition of a foreign award, the Supreme Court held that a contract entered into by two Uruguayan entities to be performed in Uruguay could not be subject to foreign law as that would contradict Uruguayan public policy and that the nullity of the choice of law provision entailed the nullity of the arbitration agreement, thus rendering the award unenforceable.¹⁷¹ The decision is difficult to reconcile with the New York Convention and was a sharp departure from the Supreme Court's trend of consistently refusing to analyze whether the law applied by a tribunal to the merits of a dispute is correct.¹⁷²

C. BRAZIL

The Superior Court of Justice (STJ), Brazil's highest court for federal, non-constitutional matters, has been instrumental in strengthening Brazil's status as a pro-arbitration jurisdiction and its alignment with international best practices.

First, the STJ held that parties to an arbitration agreement cannot seek judicial assistance for the production of documents prior to initiating arbitration proceedings.¹⁷³ Per the STJ, such requests can only be made directly to the tribunal in the arbitration, unless a party, for some good reason, cannot wait until the tribunal is constituted.¹⁷⁴

Second, the STJ held that an insurance company cannot sue in court under a transportation contract containing an arbitration clause.¹⁷⁵ Specifically, the STJ held that an insurance company cannot take into account the arbitration clause in the underlying contract when pricing its insurance and, subsequently, refuse to comply with the obligation to arbitrate contained in that same contract.¹⁷⁶

D. CHILE

Chilean Courts continue to hold a supportive stance towards international commercial arbitration. In July, the Supreme Court recognized a foreign arbitral award and ratified that a defense based on public policy is only admissible

171. See Suprema Corte de Justicia [Supreme Court of Justice], 23/3/2023, "Corporación de Navíos Granos S.A. c. Kilafen S.A. - Ejecución de sentencia extranjera" (Uru.), <https://bjn.poderjudicial.gub.uy> (search "255/2023 FINAL - Supreme Court of Justice - RECOGNITION AND EXECUTION OF FOREIGN JUDGMENTS (EXECUATUR);" [<https://perma.cc/E7A4-GLVN>]).

172. See *id.*

173. See S.T.J., REsp No. 2,023,615/SP, j., Relator: Ministro Marco Aurélio Bellizze, 14.3.2023, art. 4.1 (Braz.), https://disciplinas.usp.br/pluginfile.php/7753942/mod_resource/content/1/RESP-2023615-2023-03-20.pdf [<https://perma.cc/K7ZE-SML4>].

174. See *id.*

175. See S.T.J. Fourth Panel, REsp No. 1,988,894/SP, j., Relator: Maria Isabel Gallotti, 9.5.2023, 775 STJ, 23.5.2023 (Braz.), <https://informativos.trilhante.com.br/julgados/stj-resp-1988894-sp> [<https://perma.cc/SR22-NFH3>].

176. See *id.*

if based on a breach of fundamental rules and principles of Chilean law.¹⁷⁷ The Court of Appeals of Santiago confirmed that grounds for annulment of arbitral awards under Chile's International Commercial Arbitration Act¹⁷⁸ are limited and narrowly defined. It held that violations of public policy for these purposes must be extreme and affect principles such as due process, equal and fair treatment, or the impartiality of the arbitral tribunal.¹⁷⁹

E. COLOMBIA

Colombia was awarded the largest arbitration award in its history when an ICC tribunal directed an American construction company to pay Colombia-owned energy company Ecopetrol more than US\$1 billion in damages.¹⁸⁰

F. VENEZUELA

In July 2023, an ICSID tribunal ordered Venezuela to pay ExxonMobil more than US\$1.4 billion,¹⁸¹ largely reinstating the US \$1.6 billion award that had been annulled by an ICSID *ad hoc* Committee in 2017.¹⁸²

G. ECUADOR

In March 2023, a U.S. court enforced a US \$412 million ICSID award for Perenco, a Bahamian oil company, in its claim against Ecuador,¹⁸³ stemming from the country's seizure of two Amazonian oil properties.¹⁸⁴

177. See Corte Suprema de Justicia [C.S.J.] [Supreme Court], 27 de julio de 2023, "Ashlock Company Division of Vistan Corporation (Procesadora Rengo SpA)," Rol de la causa: 133.313-2022 (Chile), www.diarioconstitucional.cl/wp-content/uploads/2023/08/ASHLOCKEXEQUATUR.pdf [133.313-2022.pdf] [<https://perma.cc/QC7S-UN8B>].

178. See Law No. 19.971, 29 de septiembre de 2004 (Chile), <https://www.bcn.cl/leychile/navegar?idNorma=230697> [<https://perma.cc/2JTK-VRT8>] (closely based on the 1985 UNCITRAL Model Law).

179. See Corte de Apelaciones de Santiago (C. Apel.) (Court of Appeals), 12 de mayo de 2023, "Empresa Pública de Hidrocarburos del Ecuador, EP Petroecuador/Servicios Integrados Pañaturí S.A.," Rol de la causa: 10.750-2022 (Chile), <https://jusmundi.com/en/document/decision/es-servicios-integrados-panaturi-s-a-v-empresa-publica-de-hidrocarburos-del-ecuador-ep-sentencia-de-la-corte-de-apelaciones-de-santiago-10750-2022-friday-12th-may-2023> [<https://perma.cc/27RN-9G74>].

180. See Camilo Sánchez, *Ecopetrol gana 1.000 millones de dólares en un fallo internacional por los retrasos en las obras de Reficar*, EL PAÍS (June 8, 2023) [<https://perma.cc/CMB4-2DKG>].

181. See Venezuela Holdings, B.V., Mobil Cerro Negro Holding, LLC, & Mobil Cerro Negro, Ltd. v. Bolivarian Republic Of Venezuela, ICSID Case No. ARB/07/27, Resubmission Proceeding, ¶ 291 (July 10, 2023).

182. See *id.*

183. See Toby Fisher, *US Court Enforces Perenco Award Against Ecuador*, GLOB. ARB. REV. (Mar. 17, 2023), <https://globalarbitrationreview.com/article/us-court-enforces-perenco-award-against-ecuador> [<https://perma.cc/4GYM-5XVY>].

184. See Perenco Ecuador Limited v. Republic of Ecuador, ICSID Case No. ARB/08/6, ¶ 733 (May 28, 2021).

H. PERU

Political instability in Peru has contributed to an increase in arbitrations, particularly claims against the government.¹⁸⁵ As of July 2023, Peru is “the South American country with the most open proceedings.”¹⁸⁶ For example, an ICSID tribunal recently awarded two Singaporean power companies US \$110.7 million after finding that Peru violated the Peru-Singapore Free Trade Agreement.¹⁸⁷

185. See Ricardo Carrillo & Chiara Crestani, *Arbitration Review of the Americas 2024: Peru*, GLOB. ARB. REV. (July 2023), <https://globalarbitrationreview.com/review/the-arbitration-review-of-the-americas/2024/article/peru> [<https://perma.cc/BT88-ZE6N>].

186. See *id.*

187. See *Ciadi notifica a Perú resultado de arbitraje con IC Power y Kenon Holdings* [ICSID Notifies Peru of Arbitration Results with IC Power and Kenon Holdings], AMÉRICA ECONOMÍA (Oct. 6, 2023), <https://www.americaeconomia.com/economia-y-mercados-politica/ciadi-notifica-peru-resultado-de-arbitraje-con-ic-power-y-kenon> [<https://perma.cc/NW5V-DNTD>]; *IC Power Ltd and Kenon Holdings Ltd v. Republic of Peru*, ICSID Case No. ARB/19/19, Award, 186 (Oct. 3, 2023).

THE YEAR IN REVIEW
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**PUBLISHED IN COOPERATION WITH
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International Courts and Judicial Affairs

Joy MOMIN*

This article discusses the significant legal developments involving International Courts and Judicial Affairs that occurred in 2023.

I. International Criminal Court to Prosecute Cybercrimes

The lead prosecutor of the International Criminal Court (ICC), Karim Khan, in a brief publication dated August 20, 2023, announced that the ICC will investigate and prosecute cyber hacking crimes that violate international law.¹

A. KHAN ON CYBERCRIME²

Cyber warfare is not theoretical—“it can have a profound impact on people’s lives.”³ Hybrid or gray zone strategies, which exploit ambiguity and operate “between war and peace, legal and illegal,” are a growing challenge.⁴ The ICC’s jurisdiction, which is “clearly defined and complementary to that of states,” can play an important role in the “collective response” to cybercrime.⁵ The ICC can make several contributions to the fight against cybercrime, including deterring offenders, “mitigate[ing] the ambiguity of hybrid strategies,” and “supporting states and other bodies to proceed under their applicable laws.”⁶ Cooperation is essential for the success of combating cybercrime.⁷ The ICC is currently investing in its own operational practices to ensure that it is adequately defended against cyberoperations.⁸

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1. Karim A.A. Kahn, *Technology Will Not Exceed Our Humanity*, DIGIT. FRONT LINES (Aug. 20, 2023), <https://digitalfrontlines.io/2023/08/20/technology-will-not-exceed-our-humanity/> [https://perma.cc/JB6B-S8K5].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. Kahn, *supra* note 1.

8. *Id.*

B. JURISDICTIONAL LANDSCAPE

Cybercrime can constitute a war crime if it is committed in the context of an armed conflict, it is intentional, and it causes serious harm.⁹ For example, a cyberattack that disables critical infrastructure, such as a power grid or a hospital, could be considered a war crime if it is carried out during an armed conflict and causes significant death or injury.¹⁰ Cybercrime can also constitute a crime against humanity if it is part of a widespread or systematic attack against a civilian population.¹¹ For example, a cyberattack that targets a specific ethnic group or religious minority and causes widespread death or suffering could be considered a crime against humanity.¹² In addition to its jurisdiction based on the core crimes, the ICC also has jurisdiction over the crime of aggression, which was activated in 2017.¹³ Aggression is defined as the use of force by a state against the sovereignty, territorial integrity, or political independence of another state.¹⁴

C. POTENTIAL CHALLENGES

Article 22(2) of the Rome Statute prohibits the ICC from construing crimes by analogy.¹⁵ There are a few exceptions to the prohibition on analogy—specifically, for example, the ICC can interpret the Rome Statute in the light of international law, including customary international law and the general principles of law.¹⁶ The Court can also interpret the Statute in a way that is consistent with the objectives of the Statute and the principles of justice.¹⁷

Cyber operations may be outsourced or involve deception, which poses attributional challenges as the ICC can only exercise jurisdiction over individuals and in situations where the underlying crime is committed on the territory of a State Party or by a national of a State Party.¹⁸ Moreover, the ICC's rulings on intent suggest that it may not hold perpetrators responsible for the unforeseen or unintended consequences of cyber operations,¹⁹

9. See Rome Statute of the International Criminal Court, art. 8(2)(b), at 5, July 17, 1998, 2187 U.N.T.S. 38544 [hereinafter Rome ICC]; see also INT'L GRP. OF EXPERTS, NATO COOP. CYBER DEF. GRP. OF EXCELLENCE, TALLINN MANUAL 2.0 ON THE INT'L LAW APPLICABLE TO CYBER OPERATIONS 392–96 (Michael N. Schmitt ed., 2nd ed. 2017).

10. See Rome ICC, art. 8(2)(b)(ix), at 5, July 17, 1998, 2187 U.N.T.S. 38544.

11. See *id.* art. 7(1), at 3.

12. *Id.* art. 7(1)(h), at 3.

13. *Id.*

14. *Id.* art. 8 bis (2)(a), at 7.

15. *Id.* art. 22(2), at 14.

16. See Rome ICC, art. 21(1)(c), at 13, July 17, 1998, 2187 U.N.T.S. 38544.

17. See *id.*

18. *Id.* art. 12(1), at 8.

19. Milena Sterio & Jennifer Trahan, *Cyber Operations as Crimes at the International Criminal Court*, LIEBER INST. WEST POINT (Oct. 4, 2023), <https://lieber.westpoint.edu/cyber-operations-crimes-icc/> [https://perma.cc/6U4C-DXBE].

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posing additional challenges with non-cooperation of States when looking to prosecute non-State actors.

D. POTENTIAL CASE EXAMPLE

The Human Rights Center at UC Berkeley's School of Law formally requested the ICC to investigate Russian hackers for their cyberattacks in Ukraine, focusing on cyberattacks carried out by a Russian group known as Sandworm.²⁰ Sandworm, believed to be a part of the Russian Main Intelligence Directorate (GRU) and responsible for a series of high-profile cyberattacks,²¹ including the NotPetya ransomware attack in 2017²² and the attack on the Viasat satellite modem network in 2022,²³ carried out a series of cyberwar attacks against critical civilian infrastructure in Ukraine, including targeting Ukrainian electric utilities, triggering blackouts, releasing malware that caused billions of dollars in damages, and sabotaging Ukraine's power grid and satellite modem network.²⁴ Future cases are yet to come.

20. Lindsay Freeman, *Russian Cyberattacks Need an International Criminal Court Response*, CTR FOR EUR. POL'Y ANALYSIS (July 19, 2022), <https://cepa.org/article/russian-cyberattacks-need-an-international-criminal-court-response/> [https://perma.cc/CTM2-ZXM3].

21. See Press Release, U.S. Dep't of Just., Six Russian GRU Officers Charged in Connection with Worldwide Deployment of Destructive Malware and Other Disruptive Actions in Cyberspace (Oct. 19, 2020), <https://www.justice.gov/opa/pr/six-russian-gru-officers-charged-connection-worldwide-deployment-destructive-malware-and> [https://perma.cc/C24A-2YCQ].

22. See Mike McQuade, *The Untold Story of NotPetya, the Most Devastating Cyberattack in History*, WIRED (Aug. 22, 2018, 5:00 AM), <https://www.wired.com/story/notpetya-cyberattack-ukraine-russia-code-crashed-the-world/> [https://perma.cc/N8M5-48AR].

23. See *Case Study: Viasat*, CYBERPEACE INST. (June 2022), <https://cyberconflicts.cyberpeaceinstitute.org/law-and-policy/cases/viasat> [https://perma.cc/8B9U-NLKE].

24. See Press Release, U.S. Dep't of Just., *supra* note 21.

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International Criminal Law Committee

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CHRISTEL Y. THAM, FEDERICO J. WYNTER*

This article reviews some of the most significant developments in 2023 involving issues of international criminal law.

I. The Tigray Conflict: Digital Authoritarianism Vs. Human Rights Advocacy

A. INTRODUCTION

Since November 2020, the Ethiopian Government has waged a brutal war in the northern region of Tigray leading to massive and widespread human rights violations and causing the deaths of roughly 600,000 people.¹ In that war, Ethiopia and its allies—including the Eritrean Defense Forces (“EDF”), Amhara regional forces, and various ethnic militias—systematically violated the rights of millions of Tigrayan civilians by carrying out airstrikes on civilian targets, brutal massacres, and extrajudicial killings, systematically committing sexual and gender-based violence, and imposing a crushing humanitarian blockade.² An agreement signed in November 2022

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1. David Pilling & Andres Schipani, *War in Tigray may have killed 600,000 people, peace mediator says*, FIN. TIMES (Jan. 15, 2023), <https://www.ft.com/content/2f385e95-0899-403a-9e3b-ed8c24adf4e7> [https://perma.cc/6KEB-4DMQ].

2. See Press Release, *Pan African Lawyers Union, Legal Action Worldwide, Debevoise & Plimpton, Allegations of Massive Human Rights Violations in Tigray Submitted in Landmark Case Against Ethiopia* (Dec. 13, 2022), https://www.legalactionworldwide.org/wp-content/uploads/Merits-Submission-Press-Release_13.12-_Website.pdf [https://perma.cc/JAQ7-AYRT].

by the Ethiopian Government and the Tigrayan People's Liberation Front ("TPLF") to cease hostilities, unfortunately, did not bring an end to the suffering of the Tigray people.³

To date, the violations the Ethiopian Government has been perpetrating against Tigrayans have been left largely unchecked by the global community.⁴ One particular aspect of Ethiopia's campaign has been its deliberate shutdown of internet access and mobile phone services as an instrument of warfare.⁵ By exploiting internet and communications infrastructure, the Ethiopian Government has been quashing documentary and testimonial evidence of its human rights violations, while simultaneously cultivating a climate of fear and perpetuating a narrative of the conflict that conveniently underplays and obfuscates its own violations.⁶ On the global stage, meanwhile, Ethiopian leaders have been obstructing any and all international efforts at accountability, including by refusing UN and other human rights investigators physical access to Tigray.⁷

Ethiopia's conduct with respect to the deliberate targeting of communication infrastructure can be understood as part of a growing "digital authoritarianism" trend, which is defined by the "use of information technology by authoritarian regimes to surveil, repress, and manipulate domestic and foreign populations."⁸ This trend, which this article will examine through the lens of the Tigray conflict, threatens to undermine accountability for human rights violations the world over.⁹ In particular, the following sections will address the challenges that digital authoritarianism poses for human rights advocacy in Ethiopia, the ways in which human rights advocates are overcoming those challenges, and the role that human rights legal proceedings can play in advancing transitional justice initiatives,

3. *Quarterly Situation Report*, OMNA TIGRAY (Mar. 2024), <https://omnatigray.org/omna-tigray-march-2024-quarterly-situation-report/> [<https://perma.cc/TD46-5YX5>].

4. See *Ethiopia: Ethnic Cleansing Persists Under Tigray Truce*, HUM. RTS. WATCH (June 1, 2023), <https://www.hrw.org/news/2023/06/01/ethiopia-ethnic-cleansing-persists-under-tigray-truce#:~:text=Local%20authorities%20and%20Amhara%20forces,2%2C%202022%2C%20truce%20agreement.> [<https://perma.cc/MJX7-NBMJ>].

5. See *Freedom on the Net 2023: Ethiopia*, FREEDOM HOUSE (2023), <https://freedomhouse.org/country/ethiopia/freedom-net/2023> [<https://perma.cc/QP2W-YRQJ>].

6. See *id.*

7. See REP. OF THE ETH. HUN. RTS. COMM'N & OFFICE U.N. HIGH COMM'R HUM. RTS. JOINT INVESTIGATION ALLEGED VIOLATIONS INT'L HUM. RTS., HUMANITARIAN REFUGEE L. COMMITTED BY ALL PARTIES TO CONFLICT TIGRAY REGION FED. DEMOCRATIC REPUBLIC ETH. 92 (2021) [hereinafter "JTI Report"].

8. Alina Polyakova & Chris Meserole, *Democracy & Disorder: Exporting Digital Authoritarianism*, BROOKINGS 1, 2 (2019), https://www.brookings.edu/wp-content/uploads/2019/08/FP_20190827_digital_authoritarianism_polyakova_meserole.pdf [<https://perma.cc/5VFK-MFPJ>].

9. See Press Release, UN Hum. Rts. Off. of the High Comm'r, Myanmar: UN Experts Condemn Military's "Digital Dictatorship" (June 7, 2022), <https://www.ohchr.org/en/press-releases/2022/06/myanmar-un-experts-condemn-militarys-digital-dictatorship> [<https://perma.cc/M6JM-QYSU>] (For instance, since 2021, Myanmar's military junta also imposed internet shutdowns to suppress opposition and cover up its campaign of violence against civilians).

including before the African Commission on Human and Peoples' Rights ("African Commission").

**B. THE CHALLENGES POSED BY DIGITAL AUTHORITARIANISM FOR
HUMAN RIGHTS ADVOCACY**

Since 2020, the Ethiopian Government has been exploiting the tools of digital authoritarianism to conceal its violations.¹⁰ In the very first days of its invasion in November 2020, Ethiopia severed all communications between Tigray and the outside world.¹¹ Internet and mobile phone services were completely unavailable for most of the two-year war.¹² Even after the parties reached an ostensible agreement to cease hostilities in 2022, the Ethiopian Government has continued to shut down internet access and mobile phone services for months at a time.¹³ This communications blackout has cut off victims from their families and communities, silenced victims and their advocates, and is helping to shield Ethiopia from the consequences of its own actions.¹⁴ Meanwhile, the Ethiopian Government has been capitalizing on this deliberate silencing by broadcasting anti-Tigrayan sentiment across State television and digital media, ensuring that only its narrative of the conflict would be heard.¹⁵ The Ethiopian Government has silenced even those Tigrayans living elsewhere in Ethiopia by cultivating a climate of fear through the media, rounding up and arbitrarily detaining Tigrayans en masse, and subjecting them to torture, inhumane conditions, and even death.¹⁶

Ethiopia's systematic efforts in this regard have created many challenges for accountability. Above all, the communications blackout has made it nearly

10. See *Freedom on the Net 2023: Ethiopia*, *supra* note 5.

11. Lucy Kassa & Nabih Bulos, *In an Out-of-Sight War, A Massacre Comes to Light*, L.A. TIMES (Mar. 23, 2021), <https://www.latimes.com/world-nation/story/2021-03-19/ethiopia-tigray-war-massacre-bora#:~:text=A%20rape%20survivor's%20story%20emerges%20from%20a%20remote%20African%20war&text=The%20massacre%20in%20Bora%20is,attacked%20a%20government%20military%20base> [https://perma.cc/RVA2-4VQS].

12. 'No Timeline' for Restoring Internet to Tigray: Ethiopia Minister, AL JAZEERA (Nov. 30, 2022), <https://aljazeera.com/news/2022/11/30/no-timeline-for-restoring-internet-to-tigray-ethiopia-minister#:~:text=Tigray's%20internet%20service%20will%20be,Governance%20Forum%20in%20Addis%20Ababa> [https://perma.cc/NF9A-SM42].

13. *Ethiopia Lifts Internet Restrictions on Social Media Platforms*, APA NEWS (July 18, 2023), <https://apanews.net/ethiopia-lifts-internet-restrictions-on-social-media-platforms/> [https://perma.cc/R9MZ-XGQ2].

14. See Carolyn Tackett & Felicia Anthonio, *After Years in the Dark, Tigray Is Slowly Coming Back Online*, ACCESS NOW (Feb. 1, 2023), <https://www.accessnow.org/tigray-shutdown-slowly-coming-back-online/> [https://perma.cc/Q6GY-99VH].

15. James Jeffrey, *Ethiopia's Tigray Conflict and the Battle to Control Information*, AL JAZEERA (Feb. 16, 2021), <https://www.aljazeera.com/news/2021/2/16/ethiopia-tigray-conflict-and-the-battle-to-control-information> [https://perma.cc/Q9G9-YVGH].

16. "We Will Erase You from This Land" Crimes Against Humanity and Ethnic Cleansing, HUM. RTS. WATCH & AMNESTY INT'L 1, 164 (2022), <https://www.hrw.org/report/2022/04/06/we-will-erase-you-land/crimes-against-humanity-and-ethnic-cleansing-ethiopia> [https://perma.cc/56GP-Y476].

impossible to transmit concrete evidence of human rights violations out of the region.¹⁷ Human rights NGOs have lamented how little access they have to videos, photographs, and other forms of visual evidence that could corroborate reports of human rights violations occurring across Tigray.¹⁸ The communications blackout has also made it difficult for investigators and advocates to identify Tigrayan victims and witnesses who could provide first-hand accounts of human rights abuses.¹⁹ Even where communication is technically possible, the climate of fear Ethiopia has fostered has prevented survivors from coming forward to share their experiences.²⁰

As a result of Ethiopia's tactics, the magnitude of Ethiopia's violations is likely understated. For instance, the prevalence of rape and sexual violence against Tigrayans is likely far higher than what has been officially reported due in large part to the Ethiopian Government's refusal to allow human rights observers into Tigray.²¹ This has contributed to human rights advocates facing significant difficulties in drawing public attention to, and obtaining accountability for, the Ethiopian Government's widespread human rights abuses against Tigrayans.²²

C. THE ROLE FOR TRADITIONAL HUMAN RIGHTS ADVOCACY TOOLS IN
RAISING AWARENESS AND HOLDING THE ETHIOPIAN GOVERNMENT
ACCOUNTABLE

Despite these challenges, Tigrayan and international human rights advocates have found several, mutually reinforcing means to help overcome accountability challenges posed by digital authoritarianism.²³ First and foremost, they have drawn from Tigray's resilient diaspora community. Many of the victims who feel safe enough to speak out against the Ethiopian Government are Tigrayan refugees displaced by the conflict, or family members who moved abroad long before war broke out.²⁴ In addition, human rights advocates have been creative in gathering a variety of evidentiary

17. See 'No Timeline' for Restoring Internet to Tigray: Ethiopia Minister, *supra* note 12.

18. See, e.g., "We Will Erase You from This Land" *Crimes Against Humanity and Ethnic Cleansing*, *supra* note 16, at 10.

19. See JTI Report, *supra* note 7, at 49–50.

20. Abdi Latif Dahir, *Mass Detention of Civilians Fan 'Climate of Fear' in Ethiopia*, N.Y. TIMES (Nov. 17, 2021), <https://www.nytimes.com/2021/11/17/world/africa/ethiopia-tigrayan-detention.html> [<https://perma.cc/7TGW-EQZZ>].

21. Press Release, UN Hum. Rts. Off. High Comm'r, *Tigray Conflict: UN Experts Call for Urgent Action to Stop Violence Against Women* (Dec. 3, 2021), <https://www.ohchr.org/en/2021/12/tigray-conflict-un-experts-call-urgent-action-stop-violence-against-women> [<https://perma.cc/3VYA-DJHL>].

22. Malaka Gharib, *Not Every War Gets the Same Coverage as Russia's Invasion – and That Has Consequences*, NPR (Mar. 4, 2022), <https://www.npr.org/sections/goatsandsoda/2022/03/04/1084230259/not-every-war-gets-the-same-coverage-as-russias-invasion-and-that-has-consequenc> [<https://perma.cc/32FL-QNHA>].

23. See "We Will Erase You from This Land" *Crimes Against Humanity and Ethnic Cleansing*, *supra* note 16, at 184.

24. See *id.* at 109–17.

sources to document violations of human rights.²⁵ These include, for instance, medical reports, forensic analyses, satellite imagery, and a variety of other sources.²⁶ Such evidence has been critical in documenting abuses in proceedings before international bodies, as well as in contributing to fact-finding missions, human rights reports, and media campaigns.²⁷ Such initiatives also have the ancillary effect of drawing much-needed global attention to the conflict.²⁸

In order to obtain accountability on behalf of the Tigray people, a team from Legal Action Worldwide, the Pan-African Lawyers Union, and Debevoise & Plimpton LLP²⁹ brought a communication, including a request for provisional measures, on behalf of Tigrayan victims of the war to the African Commission alleging systematic violations of the African Charter on Human and Peoples' Rights (the "Charter") by Ethiopia and its allies.³⁰ The African Commission is responsible for promoting the rights enshrined in the Charter and ensuring their protection across Africa by, for example, receiving and considering individual communications against States such as the one submitted by Tigrayan victims.³¹

The landmark communication was filed in February 2022, making the African Commission the first regional human rights body to consider claims arising out of the armed conflict and humanitarian crisis in Ethiopia.³² A report from the Ethiopian Human Rights Commission was published on December 28, 2023 (after the submission of this article).³³

Despite the real and credible threats of violence against Tigrayans who speak out, many came forward to testify in the case.³⁴ Through in-depth interviews with these brave witnesses, coupled with rigorous analysis of

25. *See id.* at 9.

26. *See id.* at 10.

27. *See id.* at 9.

28. *Cf. id.* at 1.

29. The authors of this article are attorneys at Debevoise & Plimpton LLP, which acts as counsel to the complainants in these proceedings before the African Commission.

30. *See also* Press Release, Pan African Lawyers Union, Legal Action Worldwide, Debevoise & Plimpton, Landmark Case Filed Against Ethiopia for Human Rights Violations in Tigray (Feb. 8, 2022), https://www.legalactionworldwide.org/wp-content/uploads/Tigray_Complaint-Press-Release_8.2.22.pdf [<https://perma.cc/NZ88-JNRH>].

31. *See id.*

32. Lizzy Davies, Ethiopia Accused of 'Serious' Human Rights Abuses in Tigray Landmark Case, *THE GUARDIAN* (Feb. 8, 2022), <https://www.theguardian.com/global-development/2022/feb/08/ethiopia-human-rights-abuses-possible-war-crimes-tigray#:~:text=Ethiopia%20has%20committed%20a%20wide,Africa's%20top%20human%20rights%20body.> [<https://perma.cc/R22D-MMYP>].

33. REP. OF THE ETH. HUM. RTS. COMM'N & OFFICE U.N. HIGH COMM'R HUM. RTS. FINDINGS CMTY. CONSULTATIONS TRANSNAT'L JUST. VICTIMS AFFECTED POPULATIONS FED. DEMOCRATIC REPUBLIC ETH. 1 (2023).

34. *See* Press Release, Pan African Lawyers Union, Legal Action Worldwide, Debevoise & Plimpton, Tigrayan Victims Secure Provisional Measures Relief in Landmark Human Rights Case Against Ethiopia (Oct. 18, 2022), <https://www.legalactionworldwide.org/accountability-rule-of-law/tigrayan-victims-secure-provisional-measures-relief-in-landmark-human-rights-case-against-ethiopia/> [<https://perma.cc/L97W-ECYH>].

information from UN bodies, international human rights organizations, and credible news outlets, the Tigrayan victims' *communications* meticulously document Ethiopia's violations of the twenty-three articles of the African Charter and its supporting Maputo Protocol through its two-year campaign against Tigrayans.³⁵ This includes: massacres and extrajudicial killings; widespread and brutal sexual and gender-based violence; systematic arbitrary detention and torture; massive forced displacement; the devastating humanitarian blockade of the region; and Ethiopia's failure to investigate and prosecute these violations.³⁶ Tigrayan victims have also brought a distinct claim that Ethiopia's power and communications blackout in Tigray violated the rights to freedom of expression and access to information guaranteed under Article 9 of the African Charter.³⁷

On October 14, 2022, the African Commission granted urgent provisional measures, requesting that Ethiopia cease all violations that would result in loss of life or violations of the dignity and physical integrity of Tigrayan civilians, and ensure humanitarian access in Tigray.³⁸ As of publication, the parties await the African Commission's decision on the admissibility of the communication.³⁹

D. CONCLUSION

Raising these issues before human rights mechanisms, such as the African Commission, serves to highlight the violations that persist. For example, when Ethiopia entered into the November 2022 agreement, it committed to "[m]obilize and expedite humanitarian assistance" in Tigray.⁴⁰ Yet, many months after the agreement, Ethiopia and its officials continued to deprive starving Tigrayans of much needed food and other forms of humanitarian aid.⁴¹ Ethiopia also committed to the "return and reintegration of internally

35. African Union [AU], Assembly Dec. 813, at 1 (Feb. 5–6, 2022); AU, Assembly Dec 831, at 3 (Feb. 5–6, 2022).

36. Landmark Case Filed Against Ethiopia for Human Rights Violations in Tigray Press Release, *supra* note 30.

37. See *Legal Action Worldwide, FAQ: Complaint to the African Commission on Human and Peoples' Rights*, LEGAL ACTION WORLDWIDE 3 (2022), https://www.legalactionworldwide.org/wp-content/uploads/Tigray-Communication-FAQ_7.2.22-CLEAN.pdf [<https://perma.cc/3YP5-HYL8>].

38. See Tigrayan Victims Secure Provisional Measures Relief in Landmark Human Rights Case Against Ethiopia, *supra* note 34.

39. *Id.*

40. *Agreement for Lasting Peace Through a Permanent Cessation of Hostilities Between the Government of the Federal Democratic Republic of Ethiopia and the Tigray People's Liberation Front (TPLF)*, Eth.-TPLF, arts. 7.2.d, 7.2.b, Nov. 2, 2022.

41. Ellen Knickmeyer & Cara Anna, *Once Starved by War, Millions of Ethiopians Go Hungry Again as US, UN Pause Aid After Massive Theft*, AP NEWS (June 21, 2023), <https://apnews.com/article/ethiopia-humanitarian-food-aid-theft-us-un-c129b6942663cbfc44c6605fed97928b> [<https://perma.cc/FKL5-PC4L>].

displaced persons and refugees.”⁴² And yet, in Western Tigray, where over 2.6 million ethnic Tigrayans have been forcefully expelled from their homes as part of a campaign that Human Rights Watch, Amnesty International, and U.S. officials described as “ethnic cleansing,” there is little indication that displaced residents have been able to return home.⁴³

Under the November 2022 agreement, Ethiopia also committed to “implement a comprehensive national transitional justice policy” to ensure accountability for violations committed on all sides.⁴⁴ The Tigrayan victims’ submissions before the African Commission help put sustained pressure on Ethiopia to make good on this promise. By introducing first-hand witness accounts and documentation, human rights organizations’ reporting, news articles from outlets across the world, and more, this case can help build a credible record of events to ensure that these gross human rights violations are never forgotten and will not go unpunished. A decision by the African Commission, drawing on this robust body of evidence, would go a long way in building the factual and legal foundation for comprehensive and equitable accountability in Ethiopia and around the world.

II. Hybrid Censorship System In Iran: A Brief Background

This article provides a brief history of censorship in Iran that helps to understand the current state of censorship impacting the country. After a short-lived but flourishing two years of relative freedom of expression during the Shah of Iran’s attempts to calm the nationwide protests, censorship returned almost immediately after the fall of the last Pahlavi government and the victory of the 1979 Revolution.⁴⁵ It was also widely institutionalized with the establishment of the Islamic Republic of Iran (“IRI”).⁴⁶ The first and most defining policy of the new regime, implemented even before

42. *Agreement for Lasting Peace Through a Permanent Cessation of Hostilities Between the Government of the Federal Democratic Republic of Ethiopia and the Tigray People’s Liberation Front (TPLF)*, *supra* note 40, at arts. 5.3, 10.3.

43. *Ethiopia - Situation Report*, 25 Aug 2023, U.N. OCHA (Aug. 25, 2023), <https://www.unocha.org/publications/report/ethiopia-situation-report-22-aug-2023> [<https://perma.cc/ZW7B-WZSX>]; see also *Ethiopia: Ethnic Cleansing Persists Under Tigray Truce*, HUM. RTS. WATCH (June 1, 2023, 12:00 AM), <https://www.hrw.org/news/2023/06/01/ethiopia-ethnic-cleansing-persists-under-tigray-truce#:~:text=Local%20authorities%20and%20Amhara%20forces,2%2C%202022%2C%20truce%20agreement> [<https://perma.cc/6BZL-RH9M>]; UN, Others Cite New Displacement from Ethiopia’s Tigray, ASSOC. PRESS (Apr. 13, 2023, 2:47 PM), <https://apnews.com/article/ethiopia-forcible-displacement-tigray-un-amhara-7b9cde1fdb-976csdfd3398059a7261fb> [<https://perma.cc/R7ZE-QKUG>].

44. *African Union, Agreement for Lasting Peace Through a Permanent Cessation of Hostilities between the Government of the Federal Democratic Republic of Ethiopia and the Tigray People’s Liberation Front (TPLF)* at art. 5.4 & 10.3, (Nov. 2, 2022), <https://igad.int/wp-content/uploads/2022/11/Download-the-signed-agreement-here.pdf> [<https://perma.cc/P8DK-4NJD>].

45. Janet Afary, *Iranian Revolution*, BRITANNICA (May 11, 2024), <https://www.britannica.com/event/Iranian-Revolution> [<https://perma.cc/QKC3-8MH2>].

46. *Id.*

it was officially established and before the adoption of its new Constitution by a referendum, was censorship.⁴⁷ The fact that censorship held such a position of urgency within the IRI's system of governance indicates not only its importance as the essential feature of IRI's totalitarianism but also its purpose as a means of maintaining a theocratic dictatorship that had appropriated a popular revolution.⁴⁸ A statement by a member of the Book Supervisory Board called the censorship (i.e., Momayezi) "the essence of all the revolution's ideals."⁴⁹

The history of censorship in post-revolutionary Iran can be identified as two distinct stages: 1980–1997 and 1998–present, based on the evolution of the IRI's complex censorship apparatus and the expansion of its tools and mechanisms from direct to indirect application.⁵⁰ The first stage established the basic structure of the IRI's censorship apparatus, predating the Islamic Republic and the adoption of its constitution.⁵¹ The earliest attempts to restrict and suppress Freedom Of Expression ("FOE") shaped the sociopolitical environment that promoted and empowered Iran's new political and legal systems, which in turn institutionalized censorship through a variety of legal and extralegal tools in gross violation of Iran's obligations under international human rights law.⁵² The first stage utilized the most extreme methods of direct censorship, including prior restraint, licensing, monopolization of mass media, criminalizing dissenting speech, and institutionalizing intolerance in all aspects of everyday life.⁵³ The series of events known as the Cultural Revolution was the most characteristic policy of this era when the whole education system, along with the totality of the cultural industry and the Iranian intellectual sphere, was reconstructed to block any possibility of generating and disseminating ideas that could differ from the ruling ideology and its system of values within the education system and the mass culture.⁵⁴ Therefore, The Cultural Revolution process

47. *Id.*

48. Sheida Soleimani, *A History of Censorship: Iran's Religious Dictatorship and the Ruline Thought Police*, INFINITE MILE (Sept. 2016), https://infinitemiledetroit.com/A_History_of_Censorship_Irans_Religious_Dictatorship_and_the_Ruling_Thought_Police.html [<https://perma.cc/T5PT-BZVB>].

49. *Member of the Book Supervisory Board: "Audit" Is an Extract of the Ideals of the Revolution*, BBC PERSIA (June 8, 2011), https://www.bbc.com/persian/arts/2011/06/110608_141_book_ahmad_shakeri_int [<https://perma.cc/9VP5-BWAL>].

50. Nanquette Laetitia, *Text Censorship in Iran After the 1979 Revolution: History and Operation*, 154 *REVUE DE MONDES MUSULMANS ET DE LA MEDITERRANEE* 2023 ¶ 14.

51. Blake Atwood, *Sense and Censorship in the Islamic Republic of Iran*, 39 *WORLD LITERATURE TODAY* (May 1, 2012).

52. See, e.g., *The Iranian Legal Framework and International Law*, HUMAN RIGHTS WATCH, <https://www.hrw.org/reports/1999/iran/Iran99o-03.htm> [<https://perma.cc/YAH4-48M7>] (last visited May 13, 2024).

53. *Censorship*, ENCYCLOPAEDIA IRANICA, <https://www.iranicaonline.org/articles/censorship-sansur-in-persia> [<https://perma.cc/H6GB-MHQR>] (last visited May 13, 2024).

54. *The 1980 Cultural Revolution and Restrictions on Academic Freedom in Iran*, IRAN PRESS WATCH (Mar. 4, 2020), <https://iranpresswatch.org/post/20819/1980-cultural-revolution-restrictions-academic-freedom-iran/> [<https://perma.cc/D9J9-VERH>].

shall be seen as establishing the infrastructures necessary for implementing one of the most suppressive systems of direct censorship in history.⁵⁵

The second stage attempted to expand the tools of censorship from direct to indirect methods to reduce global condemnation of the IRI's suppression of FOE and to tackle the emerging tools of communication and sources of information primarily based abroad and beyond the reach of the IRI's means of direct censorship.⁵⁶ The IRI's shift from direct censorship towards indirect censorship was mainly aimed at concealing the state's role in suppressing FOE and replacing the overt censorship methods with those less known and condemned by the international community.⁵⁷ It was in this stage when the IRI actively participated in establishing and spreading discourses and arguments, such as cultural relativism, that could frame restrictions on FOE in Iran within the scope of the state's margin of appreciation based on cultural difference rather than a gross violation of international human rights standards.⁵⁸ But another reason for adopting the indirect means of censorship at this stage was the potentiality of these methods to silence voices beyond the reach of the state's methods of direct censorship.⁵⁹ The mass immigration of dissident voices, the rise of the Persian media abroad, and the emergence of new mass communication technologies—such as satellite TV and, most importantly, the internet—disarmed the IRI's censorship apparatus, which was mainly focused on direct censorship.⁶⁰ Silencing the dissenting diaspora and foreign media through direct censorship was either technically impossible or politically too costly.⁶¹ The IRI's attempt to assassinate Iranian dissidents abroad was usually backlashed with tremendous political and diplomatic crises.⁶² It was at this point when the IRI decided to adopt indirect methods as far-reaching, more effective, and less costly means of censorship.⁶³ The Cultural Engineering Map is the principal policy that characterizes this era as it shifts towards

55. *See id.*

56. Omid Shams, *Indirect Censorship: The Iranian Government's Methods for Suppressing Dissent Abroad*, IRAN WIRE (July 4, 2023), <https://iranwire.com/en/politics/118157-indirect-censorship-the-iranian-governments-methods-for-suppressing-dissent-abroad/> [<https://perma.cc/U8B6-EXEB>].

57. *Id.*

58. *See, e.g., Unveiled: Art and Censorship in Iran*, 9 ARTICLE 19 (Sept. 2006), <https://www.article19.org/data/files/pdfs/publications/iran-art-censorship.pdf> [<https://perma.cc/95Z4-46U2>].

59. *See* Justin Hendrix, *Internet Shutdowns and Censorship, in Iran and Beyond*, TECH POLICY (Nov. 16, 2022), <https://www.techpolicy.press/internet-shutdowns-and-censorship-in-iran-and-beyond/> [<https://perma.cc/9QWP-7PV5>].

60. *See* Maryam Sinaiee, *Censorship Major Tool of Suppression, Iranian Writers Say*, IRAN INT'L (Dec. 7, 2023), <https://www.iranintl.com/en/202312077744> [<https://perma.cc/WQ5M-ZPXX>].

61. *See* Babak Rahimi, *Censorship and the Islamic Republic: Two Modes of Regulatory Measures for Media in Iran*, 69 MIDDLE E. J. 358, 374 (2015).

62. Presidency Conclusions, Brussels European Council (Apr. 10, 1997), https://ec.europa.eu/commission/presscorner/detail/en/PESC_97_32 [<https://perma.cc/JBM3-FAW5>].

63. Shams, *supra* note 56.

adopting indirect censorship methods disguised as engaging with the “soft war” and “soft threats.”⁶⁴

As a result of the Cultural Revolution and the Islamization of the education system, the state monopoly over the Radio and Television broadcast, and its vast system of licensing and pre-publishing reviews, the IRI had almost total control over the flow of information and ideas up until the mid-90s.⁶⁵ While the limited existing literature on indirect censorship focuses on the potentiality of avoiding transparency and misdirecting accountability as the main reasons behind adopting the indirect mechanisms, this section argues that their effectiveness, especially in the face of emerging means of social communication, and their far-reaching impact are as equally essential motives for utilizing these mechanisms by the States.

A. NEW CHALLENGES AND FAILURE OF DIRECT MECHANISMS OF CENSORSHIP

The emergence of new communication technologies effectively challenged the IRI’s absolute power over the mass media and flow of information.⁶⁶ Additionally, certain political upheavals, including the growing domestic and international critique of the IRI’s censorship system and its own urgent need to reconstruct its relationship with the international community, pushed the state to reconstruct its censorship system and adopt more covert mechanisms of indirect censorship.⁶⁷

The first threat came from satellite television broadcasts from outside Iran.⁶⁸ Although the IRI swiftly tackled the problem with legislation banning the use of satellite receiving equipment in 1995, satellite TV channels became severe rivals to the state-owned Islamic Republic of Iran Broadcasting (“IRIB”) and a key source of information.⁶⁹ Although the police have fiercely enforced the banning, the number of viewers has grown.⁷⁰ Criminalizing access to equipment and even satellite jamming was not enough and, at some point, ineffective.⁷¹ There was a new threat, a powerful and far-reaching media that was out of the IRI’s jurisdictional reach with no

64. Eliot Assoudeh, *Iran’s Quest for a New Islamic Civilization*, FAIR OBSERVER (May 3, 2017), https://www.fairobserver.com/region/middle_east_north_africa/iran-islamic-civilization-middle-east-politics-culture-news-63411/# [<https://perma.cc/6TVS-CRK4>].

65. Rahimi, *supra* note 61, at 372.

66. *Id.* at 360.

67. *Id.* at 361.

68. *Id.*

69. *Iran: Penalty for Running a Business Selling Satellite Disbs; Whether There Have Been Recent Prosecutions*, IMMIGR. REFUGEE BD. CAN. (Apr. 1, 1999), <https://webarchive.archive.unhcr.org/20230530080031/https://www.refworld.org/docid/3aeaaa944.html> [<https://perma.cc/4VCU-LRYG>].

70. Steven Barraclough, *Satellite Television in Iran: Prohibition, Imitation and Reform*, 37 MIDDLE E. STUD. 25, 33–34 (2010).

71. *Id.*; Rebecca Joubin, *The Politics of Iran’s Satellite Era: Turkish Serials, Safety Valves and Youth Culture*, 274 MIDDLE E. REP. 38, 39 (2015).

obligation to follow its system of licensing and prior restraint.⁷² The need to silence beyond borders and in a vast scale to compete with the diversity and multiplicity of the threat makes the direct mechanisms of censorship too costly, impossible, or obsolete. Moreover, making an impact on the FOE in another state's jurisdiction doubles the importance of misdirection and concealment of responsibility.

The second and main threat that forced the IRI to reconstruct its system of censorship accordingly was the internet.⁷³ The internet as a limitless source of information was widely embraced and used to verify the information released and fact-check claims made by the state, but it also enabled Iranian citizens to freely communicate their opinions and ideas not only to each other but to the rest of the world.⁷⁴ After two decades of having public opinion censored and misrepresented by the state-controlled media, and after two decades of having all sources of information or means of communication (other than that of the state) withheld, Iranians had access to points of view that strongly contradicted the monotonous and forged voice of their people as transmitted by media controlled by the state.⁷⁵ The Internet facilitated whistleblowing and documentation of evidence of human rights abuses.⁷⁶ It also reinstated the pressure of public opinion through the voice of the victims that could now be heard globally.⁷⁷ The IRI once again used the same legislative pattern to block access to countless and ever-growing numbers of websites and blogs directly.⁷⁸ Iran's Internet-blocking system is one of the broadest and most sophisticated in the world.⁷⁹ But the availability of means of circumventing internet blocking and the crucial role of the internet in Iran's political upheavals up until today proves that direct internet censorship was, at best, insufficient and financially, legally, and politically costly.⁸⁰ When the internet became an inseparable part of

72. See Rahimi, *supra* note 61, at 368.

73. See *How the Islamic Republic Has Enslaved Iran's Internet*, REPORTERS WITHOUT BORDERS (May 10, 2022), <https://rsf.org/en/how-islamic-republic-has-enslaved-iran-s-internet> [<https://perma.cc/PKS5-XHTH>].

74. See *id.*

75. Allan Hassaniyan, *How Longstanding Iranian Disinformation Tactics Target Protects*, FIKRA FORUM (Nov. 1, 2022), <https://www.washingtoninstitute.org/policy-analysis/how-longstanding-iranian-disinformation-tactics-target-protects> [<https://perma.cc/29KV-3D2E>].

76. See *Iran: Personal Data Protection and Safeguarding Draft Act*, 6 ARTICLE 19 (Jun 2019), <https://www.article19.org/wp-content/uploads/2019/06/Legal-Analysis-of-Draft-Data-Protection-Act.pdf> [<https://perma.cc/NFD3-ZZMS>].

77. See Jon B. Alterman, *Protest, Social Media, and Censorship in Iran*, CTR. FOR STRATEGIC INT'L STUDIES (Oct. 18 2022), <https://www.csis.org/analysis/protest-social-media-and-censorship-iran> [<https://perma.cc/3Z3K-8KUH>].

78. *Iran's Intranet: A Master Plan for Internet Censorship*, THE MILLI CHRONICLE (Nov. 1, 2020), <https://millichronicle.com/2020/11/irans-intranet-a-master-plan-for-internet-censorship.html> [<https://perma.cc/GCB9-22D8>]. All

79. See *Iranian Internet Censorship System Profiled for First Time*, University of Michigan: Computer Science and Engineering (Aug. 29, 2013), <https://cse.engin.umich.edu/stories/iranian-internet-censorship-system-profiled-for-first-time> [<https://perma.cc/CD5L-GE45>].

80. See *Internet Ban Costs Iranians \$400 Million Annually*, IRAN INT'L (Nov. 20, 2023), <https://www.iranintl.com/en/202311202439> [<https://perma.cc/LPW8-5M7Z>].

businesses through social media, the direct blocking of such platforms became even more expensive for the state.⁸¹ All these reasons contribute to IRI's policy to reconstruct and renovate its system of censorship and misdirect or conceal its responsibility.

B. REFORMISTS' CENSORSHIP POLICY

In May 1997, Mohmmad Khatami won the presidential election with the promise of reform and re-establishment of the basic freedoms.⁸² Before the reformist government, censorship was almost completely arbitrary and based on laws and bylaws vaguely formulated and broadly interpreted to stifle freedom of expression.⁸³ The rogue nature of revolutionary institutions and power groups, and the vague concept of existing laws, had created a vast and heavy but random and chaotic system of censorship.⁸⁴ For instance, pre-publishing reviews and licensing processes for all forms of cultural product are assigned to the Ministry of Culture and Islamic Guidance ("MCIG") based on the SCCR's directive that delegates the authority regarding the publishing permissions to the MCIG without any clarification on the scope and nature of the pre-publishing review.⁸⁵ In turn, the MCIG itself refused to provide clear guidance on the scope and nature of permissible and impermissible contents.⁸⁶ Iranian playwright, Mahmoud Karimi Hakkak's account of his attempts to obtain permission to stage plays in Iran clearly illustrates the arbitrary nature of censorship in this period: "From 1993 to 1998 I petitioned the authorities to stage 124 various plays. None were accepted. None were rejected. I faced a wall. It was as if I had never petitioned."⁸⁷

When a reformist government took office, the IRI was determined to shift from an extreme isolationism towards reconstructing its foreign relations especially with liberal democracies.⁸⁸ Therefore, it was crucial for

81. See *Iran: Freedom on the Net 2023*, FREEDOM HOUSE, <https://freedomhouse.org/country/iran/freedom-net/2023> [<https://perma.cc/CDR6-NBJK>] (last visited May 13, 2024).

82. Gareth Smyth, *Iran's Khatami Strikes Back*, TEHRAN BUREAU, (Sept. 19, 2013) <https://www.theguardian.com/world/iran-blog/2013/sep/20/iran-khatami-revenge-rouhani-victory> [<https://perma.cc/D4MN-N6BA>].

83. *Restrictions on Freedom of Expression in the Islamic Republic of Iran*, IRAN HUM. RTS. DOCUMENTATION CTR. (Mar. 25, 2016), https://iranhrdc.org/restrictions-on-freedom-of-expression-in-the-islamic-republic-of-iran/#4_restrictions_imposed_on_freedom_of_expression_through_irans_domestic_law [<https://perma.cc/3PU5-QEPA>].

84. Karimi-Hakkak, *Of Hail and Hounds: The Image of the Iranian Revolution in Recent Persian Literature*, 3 STATE, CULTURE, SOC'Y 148, 176 (1985).

85. See, e.g., Unveiled: Art and Censorship in Iran, *supra* note 58, at 32.

86. See, e.g., Maryam Dehkordi, *Post-Protest Censorship: Iranian Authors Excluded Without Book Review*, IRAN WIRE (Feb. 16, 2024), <https://iranwire.com/en/features/125428-post-protest-censorship-iranian-authors-excluded-without-book-review/> [<https://perma.cc/AG3C-DQMU>].

87. Mahmood Karimi-Hakkak, *Exiled to Freedom: A Memoir of Censorship in Iran*, 47 THE DRAMA REV. 17, 23 (2003).

88. See R.K. Ramazani, *The Shifting Premise of Iran's Foreign Policy: Towards a Democratic Peace?*, 52 MIDDLE E. J. 177, 180 (2003).

the IRI to improve its image among the international community especially regarding its widely condemned human rights record. The first step was to reframe the state's suppressive measure including its methods of censorship to better fit into a quasi-legal framework in order to present them as less discriminatory and arbitrary and, therefore, more defensible against the criticisms of the international watchdogs.

The new regulations aimed at transforming and systematizing an arbitrary regime of suppression into a highly restrictive system of censorship presented as cultural policy. Some of them made the pre-publication review and licensing processes easier, faster, and partly transparent. But most of these processes remained intentionally vague and at the total discretion of the censors.⁸⁹ The MCIG issued two major directives to clarify the qualifications for press freedom enshrined in Article 24 of the Constitution.⁹⁰ The first directive calls for a clarification on the scope and meaning of the clause "harmful to the principles of Islam" and the second one responds with an interpretation of "the principles and limitations of FOE in the press from legal and Sharia perspectives."⁹¹ For the first time, the right to FOE is addressed extensively in a legal document that acknowledges that the "restrictions on FOE should be exceptions to the principle of freedom."⁹² The document claims that it clarifies the scope and instances of the impermissible exception, i.e., "[the] contents deemed harmful to the principles of Islam"—and yet the interpretation is still too broad and open to discretionary interpretations.⁹³ More importantly, the MCIG attempted to provide an interpretation of Article 24 while the Guardian Council (which was primarily established as the Constitution's sole interpreter) had not provided any substantial clarification in the form of opinion or interpretation up until 2015.⁹⁴ Nevertheless, even these minor and insufficient efforts towards reinstating the rule of law and regulating mechanisms of direct censorship were deemed to be a major improvement compared to the chaotic and arbitrary mechanisms of censorship during the first stage, and led to a drastic increase in the number of the press and cultural products.

At this point, the IRI's system of censorship, mostly overseen by the conservatives, tended towards indirect and covert mechanisms of censorship.⁹⁵ In April 2000, the parliament passed a new Press Law in which the amended Article 34 placed press offences under jurisdiction of General

89. *Restrictions on Freedom of Expression in the Islamic Republic of Iran*, *supra* note 83.

90. *The Iranian Legal Framework and International Law*, *supra* note 52.

91. *Fulfilling Promises, A Human Rights Roadmap for Iran's New President*, INT'L CAMPAIGN FOR HUM. RTS. IN IRAN 11 (2013), <https://iranhumanrights.org/wp-content/uploads/Fulfilling-Promises-English-web.pdf> [<https://perma.cc/GMQ5-5VYS>].

92. *Restrictions on Freedom of Expression in the Islamic Republic of Iran*, *supra* note 83.

93. *Fulfilling Promises, A Human Rights Roadmap for Iran's New President*, *supra* note 91.

94. Council of Guardians, Iranian Government, BRITANNICA (Mar. 4, 2024), <https://www.britannica.com/topic/Council-of-Guardians> [<https://perma.cc/3AMA-D6KP>].

95. Shams, *supra* note 56.

Criminal Courts (“GCC”) and the Revolutionary Courts (“RC”).⁹⁶ These special criminal courts, primarily tasked with national security and political cases, were notorious for their total disregard for principles of fair trial and constitutional safeguards under Article 168.⁹⁷ Prior to this amendment, the press was under jurisdiction of the special press court.⁹⁸ The RC and GCC used the Pre-Revolution era “Safety Measure Law,” which was meant for preventing dangerous criminals from recommitting the crime by allowing the confiscation of the tools that could be used to commit the crime, as a pretext for temporary and indefinite seizure of the press without a trial or even a conviction for the crime.⁹⁹

C. POLITICAL PROTESTS AND RECONSTRUCTING THE CENSORSHIP SYSTEM

After a few years of fearful silence, in the early 1990’s a new wave of anti-government protests swept the country. In less than four years, six uprisings took place in Iran’s largest cities.¹⁰⁰ Since 1979, with each wave of anti-government protest, the IRI has tried to reinforce its system of censorship.¹⁰¹ If the Cultural Revolution in the 1980’s was a response to the protests led by the students and threats posed by free academia, the response to the new wave of protests in the early 1990’s was the enactment of New Penal Code (“NPC”) in 1996.¹⁰² Article 500 of the NPC introduces a new criminal offense: “propaganda against the system.”¹⁰³ The provision is so broad and ambiguous that it could cover any act of criticism, activism, and protest in any form of speech as long as it was covered by the press or echoed by the opposition media outlets.¹⁰⁴ Similarly, after the large student protests over the seizure of Salam Newspaper in 1999, the new Press Law was passed, which gave the Revolutionary Courts jurisdiction over the press

96. Press Law of 19 March 1986, amended 2000 (Iran).

97. *The Iranian Judiciary: A Complex and Dysfunctional System*, IRAN HUM. RTS. DOCUMENTATION CTR. (Oct. 12, 2016), https://iranhrdc.org/the-iranian-judiciary-a-complex-and-dysfunctional-system/#_Toc462333469 [https://perma.cc/S4SB-7RCS].

98. See Hossein Shahidi, *Iranian Journalism and the Law in the Twentieth Century*, 41 IRAN STUD. 739, 746 (2008).

99. *Restrictions on Freedom of Expression in the Islamic Republic of Iran*, *supra* note 83.

100. Asef Bayat, *Squatters and the State: Back Street Politics in the Islamic Republic*, 191 MIDDLE E. REP. 10, 10–11 (1994).

101. *Country of Origin Information Report*, Iran, UK BORDER AGENCY (Jan. 26, 2010), <https://www.justice.gov/sites/default/files/eoir/legacy/2013/06/12/Iran012610.pdf> [https://perma.cc/MZL9-Z9FN].

102. *Islamic Penal Code of the Islamic Republic of Iran – Book Five*, IRAN HUM. RTS. DOCUMENTATION CTR. (July 15, 2013), <https://iranhrdc.org/islamic-penal-code-of-the-islamic-republic-of-iran-book-five/> [https://perma.cc/7454-84X9].

103. *Id.* at 2.

104. *Indefensible: Iran’s Systematic Criminalisation of Human Rights Defenders*, 7 FIDH (Aug. 20, 2019), <https://reliefweb.int/report/iran-islamic-republic/indefensible-iran-s-systematic-criminalisation-human-rights-defenders> [https://perma.cc/B5SJ-UKSS].

cases and excluded the authors of the articles from being tried in public courts and in front of a jury.¹⁰⁵

But, the most important changes in the IRI's system of censorship were implemented after the 2009 protests over the disputed results of the presidential election, known as "Green Revolution," which marked as the largest anti-government demonstrations in Iran's history.¹⁰⁶ The protests immediately made their way to the headlines and numerous videos of the atrocities by security forces were captured by citizen journalists were aired on mainstream media around the world.¹⁰⁷ As a result, the protests received worldwide public solidarity and the IRI's human rights record was once again unequivocally condemned by the international community.¹⁰⁸

The anti-government uprisings since 2009 revealed the internet's potential as a powerful tool for organizing protests. The most recent uprising and the current Woman Life Freedom Revolution have also foregrounded the social media's importance in the live coverage of such protests and in the mobilization of a vast and global network of public support.¹⁰⁹ But most importantly, it demonstrated the deficiency of the direct system of censorship in the age of satellites and cross-border massively multiplayer online platforms of expression.¹¹⁰ At this point the IRI expanded its censorship, focusing on indirect methods due to emerging communication technologies, the emigration of dissidents, and the shift from print to satellite TV and online media.¹¹¹ Direct censorship had become ineffective as most information sources were now overseas, and the state therefore adopted what Babak Rahimi described as "proactive censorship."¹¹² These methods do not directly intervene with the flow of information but actively create loud noises and false narratives that, in effect, silence, marginalize or

105. *World: Middle East Iran Closes Down Newspaper*, BBC NEWS (July 7, 1999), http://news.bbc.co.uk/2/hi/middle_east/388635.stm [<https://perma.cc/8BA9-V5KB>].

106. See Fact Sheet: Protests in Iran (1979–2020), IRAN PRIMER (May 30, 2023), <https://iranprimer.usip.org/blog/2019/dec/05/fact-sheet-protests-iran-1999-2019-0> [<https://perma.cc/4QTD-LWRT>].

107. *Iranian Green Movement and Citizen Journalism: A Revolution on the Internet*, CENTR. EUROPEAN UNIV. (Oct. 8, 2010), <https://www.ceu.edu/article/2010-10-08/iranian-green-movement-and-citizen-journalism-revolution-internet> [<https://perma.cc/GU6P-WPHU>].

108. See *EU Finalizes Sanctions for 32 Individuals in Iranian Government Who Violated Human Rights*, UNITED FOR IRAN (Apr. 18, 2011), <https://united4iran.org/blog/eu-finalizes-sanctions-for-32-individuals-in-iranian-government-who-violated-human-rights/> [<https://perma.cc/KPJ5-G3M2>].

109. See Shabnam Holliday, *Iran's 'Woman, Life, Freedom' Movement Highlights Global Issues*, LSE (Feb. 10, 2023), <https://blogs.lse.ac.uk/mec/2023/02/10/irans-woman-life-freedom-movement-highlights-global-issues/> [<https://perma.cc/8BLX-2XFR>].

110. See Jared Keller, *Evaluating Iran's Twitter Revolution*, THE ATLANTIC (June 18, 2010), <https://www.theatlantic.com/technology/archive/2010/06/evaluating-irans-twitter-revolution/58337/> [<https://perma.cc/2EJL-C5ZY>].

111. Rahimi, *supra* note 61 at 360.

112. See *id.* at 371

dehumanize unwanted voices or distort and discredit undesirable information through propaganda.¹¹³

This new approach became part of the IRI's overall strategy for "soft war."¹¹⁴ A term initially used by security and intelligence think tanks, "soft war" became the code for a vast project of updating the state's system of censorship.¹¹⁵ Three years after the Green Revolution, the Deputy Joint Chief of Staff for Iran's armed forces announced the establishment of the "soft war headquarters,"¹¹⁶ while the Cultural and Propaganda Deputy of the IRGC announced the operation of 20,000 IRGC agents organized into cultural associations to fight the soft war against dissidents.¹¹⁷

The IRI's new strategy of censorship embedded in the term soft war was eventually incorporated into a larger "map of cultural engineering" as the principal cultural policy and the most essential element of the IRI's controlling system after the Cultural Revolution that determined the new dimensions of the IRI censorship system.¹¹⁸

Cultural engineering introduces a vast range of indirect mechanisms of censorship.¹¹⁹ These mechanisms include massive expansion of the state media's overseas network as a means of spinning the speech, promoting social censorship and "cancel culture" through proxy agents, systematic spread of propaganda and directing nationalistic anger and religious hatred towards the journalists, activists, and dissidents inside Iran and abroad, organizing user-generated censorship, establishing an oligopoly of companies connected to or indirectly controlled by intelligence and military organizations, over the media market and cultural industries, budget cutting, and manipulating the education system.¹²⁰ The last method is specifically used in the humanities and social sciences to marginalize or silence secular ideas in favor of the ideologically altered contents.¹²¹

113. *Id.*

114. See Dr. Payam Mohseni, *The Islamic Awakening: Iran's Grand Narrative of the Arab Uprisings*, 71 MIDDLE EAST BRIEF 1, 4 (Apr. 2013), <https://www.brandeis.edu/crown/publications/middle-east-briefs/pdfs/1-100/meb71.pdf> [<https://perma.cc/U5EQ-WFD5>].

115. *Id.*

116. *Jazayeri: Soft War Headquarters Established by Iranian Armed Forces*, ISLAMIC REPUBLIC NEWS AGENCY (Dec. 1, 2012), <https://en.irna.ir/news/80437009/Jazayeri-Soft-war-headquarters-established-by-Iranian-Armed> [<https://perma.cc/3XSL-M8RM>].

117. Kitaneh Fitzpatrick, *The Soft War: Understanding Iran's Domestic Ideological Crisis*, AM. ENTER. INST. (Oct. 10, 2023), <https://www.aei.org/research-products/report/the-soft-war-understanding-irans-domestic-ideological-crisis/> [<https://perma.cc/2RPY-KQ2Q>].

118. *Iran's Cultural Engineering Map Open to Int'l Cooperation: Scholar*, ISLAMIC REPUBLIC NEWS AGENCY (Apr. 8, 2019), <https://en.irna.ir/news/83430196/Iran-s-cultural-engineering-map-open-to-int-l-cooperation-Scholar> [<https://perma.cc/9XGK-EG2S>].

119. ALI AKBAR TAJMAZINANI, *THE ROUTLEDGE HANDBOOK OF GLOBAL CULTURAL POLICY* 53 (Victoria Durrer, et al. eds., 1st ed. 2017).

120. *Id.* at 515.

121. *Id.* at 507.

III. Justice For Burma: Addressing Long-Standing Impunity

A. INTRODUCTION

Since the February 2021 coup orchestrated by the Myanmar military junta, the situation in the country continues to deteriorate. It is estimated that over 4,000 civilians have been killed, and approximately 25,000 people have been arrested post-coup.¹²² Compounding these issues has been the lack of humanitarian aid to reach ethnic groups who continue to be the victims of the junta's targeted killings and the occurrences of natural disasters such as Cyclone Mocha.¹²³ Despite tragedy on the ground, cases are being pursued outside of the country, which could finally have an impact on the long-reigning impunity the military junta has enjoyed for decades.¹²⁴ This article reviews litigation pending as of 2023 that was filed against the junta for mass atrocities crimes. A separate article focusing on corporate accountability for the Rohingya genocide will be published by New Lines Institute by 2024.¹²⁵

B. UNIVERSAL JURISDICTION CASES

1. *Philippines*

On October 24, 2023, five Myanmar nationals from the Chin community filed a complaint with the Philippines Department of Justice against ten officers of the Myanmar military¹²⁶ for “violations of Republic Act 9851 or the Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity.”¹²⁷ The advocacy group Myanmar Accountability Project (MAP) has alleged that in September 2021, soldiers attacked the town of Thantlang in Chin State.¹²⁸ Approximately 2,000 homes were reportedly destroyed, approximately 250 people were

122. *Daily Briefing in Relation to the Military Coup*, ASSISTANCE ASS'N FOR POL. PRISONERS (Sept. 12, 2023), <https://aappb.org/?p=26225#> [<https://perma.cc/397B-73MH>].

123. *Myanmar: Junta Blocks Lifesaving Cyclone Aid*, HUM. RTS. WATCH (June 20, 2023, 7:00 AM), <https://www.hrw.org/news/2023/06/20/myanmar-junta-blocks-lifesaving-cyclone-aid> [<https://perma.cc/EP5K-FN7Z>].

124. *See, e.g.*, OLIVER SLOW, *RETURN OF THE JUNTA: WHY MYANMAR'S MILITARY MUST GO BACK TO THE BARRACKS* 209–210 (Bloomsbury ed., 1st ed. 2023).

125. Rohingya Legal Forum, NEW LINES INST., <https://newlinesinstitute.org/initiative/rohingya-legal-forum/> [<https://perma.cc/G5YJ-NAYB>] (last visited May 13, 2024).

126. Joahna Lei Casilao, *Myanmar Natives File War Crimes Complaint vs. Myanmar Military*, GMA INTEGRATED NEWS SERVICE (Oct. 25, 2023, 1:12 PM), <https://www.gmanetwork.com/news/topstories/nation/886245/myanmar-natives-file-war-crimes-complaint-vs-myanmar-military/story/> [<https://perma.cc/YR87-3KW3>].

127. *Id.*; An Act Defining and Penalizing Crimes Against International Humanitarian Law, Genocide and Other Crimes Against Humanity, Organizing Jurisdiction, Designating Special Courts, and for Related Purposes, Rep. Act No. 9851 (Dec. 11, 2009) (Phil.).

128. Sebastian Strangio, *Victims of Myanmar Junta File War Crimes Charges in Philippine Court*, THE DIPLOMAT (Oct. 26, 2023), <https://thediplomat.com/2023/10/victims-of-myanmar-junta-file-war-crimes-charges-in-philippine-court/> [<https://perma.cc/583D-SW89>].

killed, and over 50,000 people fled from the violence.¹²⁹ During this attack, complainants alleged that “soldiers murdered civilians, mutilated bodies, burned down hundreds of houses, destroyed churches, and used aid as a weapon of war.”¹³⁰ From the date of filing, the Prosecutors in the Philippines have ninety days to approve or dismiss the case.¹³¹

2. *Germany*

On January 20, 2023, the non-governmental organization Fortify Rights, along with sixteen individual complainants, filed a criminal complaint with the Office of the Federal Prosecutor in Germany.¹³² Using universal jurisdiction, the parties seek justice for genocide, crimes against humanity, and war crimes perpetrated by the military junta. In addition to seeking charges against specific individuals in the Myanmar military, the complaint requests German Prosecutors to “open a ‘structural investigation’ into the situation in Myanmar, which would uncover numerous other crimes in various locations and affecting other ethnic groups not otherwise covered by the complaint.”¹³³ Although Germany has been proactive in utilizing universal jurisdiction to prosecute individuals for torture in Syria and by the Islamic State group, the Prosecutors office notified Fortify Rights that it would not initiate an investigation.¹³⁴

3. *Turkey*

On March 29, 2022, MAP filed a case with the Public Prosecutor’s Office in Turkey under universal jurisdiction for torture.¹³⁵ The case focuses on one victim’s time at the interrogation center called “Ye Kyi Ain” and accuses twenty-four people, including junta leader Min Aung Hlaing and others who run the interrogation center.¹³⁶ According to MAP’s reporting, the filing was accepted and the Justice Ministry in Ankara has initiated an investigation.¹³⁷

129. *Id.*

130. *Id.*

131. *Id.*

132. Criminal Complaint Filed in Germany for Atrocity Crimes, FORTIFY RTS. (Jan. 24, 2023), <https://www.fortifyrights.org/mya-inv-2023-01-24/> [<https://perma.cc/CL32-7YPU>].

133. *Id.*

134. Grant Peck, *Rights group Files Suit in Germany Against Myanmar Military*, AP (Jan. 24, 2023), <https://apnews.com/article/germany-myanmar-crime-e32c784f0f7fc03cdfce1969556ebb84> [<https://perma.cc/A7C3-LAPC>]; News Release, Fortify Rights, German Federal Prosecutor Declines to Investigate Myanmar Atrocities, Fortify Rights Committed to Ending Impunity (Nov. 30, 2023), <https://www.fortifyrights.org/mya-inv-2023-11-30/> [<https://perma.cc/L9XE-TA9X>].

135. Zsombor Peter, *Rights Group Files Torture Case Against Myanmar Junta in Turkey*, VOA (Apr. 6, 2022), <https://www.voanews.com/a/rights-group-files-torture-case-against-myanmar-junta-in-turkey/6517695.html> [<https://perma.cc/ZU5T-49DB>].

136. *Id.*

137. Turkish Authorities Open Unprecedented Investigation into Myanmar Junta, MYANMAR ACCOUNTABILITY PROJECT (June 2, 2022), <https://the-world-is-watching.org/2022/06/02/>

4. *Argentina*

In June of 2023, the universal jurisdiction case filed by a London-based non-governmental organization proceeded with a week-long hearing in front of the Federal Prosecutor in Argentina.¹³⁸ Due to security issues, victims testified behind closed doors. The Federal Prosecutor is “technically” still in the discovery phase of the matter.¹³⁹

C. INTERNATIONAL ORGANIZATIONS/INSTITUTIONS

1. *IIMM*

The United Nations Independent Investigative Mechanism for Myanmar (“IIMM”), established in 2018, focuses on collecting evidence relating to genocide, crimes against humanity, and war crimes.¹⁴⁰ In its Fifth Annual Report, the IIMM stated that authorities in Myanmar have “disregarded” requests for information and access to the territory of Myanmar,¹⁴¹ which has caused the IIMM to operate in a “challenging environment with no physical access to crime sites or witnesses inside Myanmar and has serious witness protection concerns.”¹⁴² However, the IIMM reported that it “collected an unprecedented and unanticipated amount of information and evidence.”¹⁴³ The IIMM continues to extend support and provide evidence to cases relating to Myanmar as they are filed.

2. *ASEAN/AICHR*

Another novel legal pathway was created by a member of the Chin community in northern Burma. The Chin community continues to face aerial bombardments of churches, schools, and villages.¹⁴⁴ In August of 2023, Applicant Salai Za Uk Ling filed an Application against Myanmar, asking the Association of South East Asian Nations (“ASEAN”) and The ASEAN Intergovernmental Commission on Human Rights (“AICHR”) to

turkish-authorities-open-unprecedented-investigation-into-myanmar-junta/ [https://perma.cc/KB55-3GL9].

138. Carlos G. Hamann, *Argentine Court Hears Allegations of Genocide Against Myanmar Leaders*, RADIO FREE ASIA (June 7, 2023), <https://www.rfa.org/english/news/myanmar/rohingya-argentina-06072023162250.html> [https://perma.cc/3WG5-AGPU].

139. *Id.*

140. Independent Investigative Mechanism for Myanmar, UNITED NATIONS, <https://iimm.un.org> [https://perma.cc/E5FX-VR73] (last visited May 13, 2024).

141. Rep. of the Independent Investigative Mechanism for Myanmar ¶ 24, U.N. Doc. A/HRC/54/19 (2023).

142. *Id.* ¶ 4.

143. *Id.* ¶ 6.

144. See, e.g., Jonathan Head, *Myanmar: Eight Children Killed in Military Strike on School in Chin State*, BBC (Nov. 17, 2023), <https://www.bbc.com/news/world-asia-67448410> [https://perma.cc/9FT4-4YJ8]; Grant Peck, *Churches, Temples and Monasteries Regularly Hit by Airstrikes in Myanmar, Activists Say*, AP NEWS (Jan. 23, 2024), <https://apnews.com/article/myanmar-churches-airstrikes-human-rights-chin-state-ddd8e076d127c7e78f668ef589d3950d> [https://perma.cc/CHN3-2WR2].

(1) declare Myanmar to be in violation of its international obligations; (2) ask the military junta to cease and desist violations of human rights; (3) call upon the junta to provide reparations to victims; (4) establish a fact finding mission to Myanmar; (5) establish a regional tribunal for prosecution of international crimes since February 1, 2021; and (6) implement an individual complaints mechanism in ASEAN system.¹⁴⁵ The Applicant noted that in 2009, Myanmar had indicated its support for the creation of the AICHR by signing the Cha-am Hua Hin Declaration.¹⁴⁶

D. INTERNATIONAL COURTS

1. *International Criminal Court*

International Criminal Court (“ICC”) Prosecutor Karim Khan visited the Rohingya camps in Bangladesh in July.¹⁴⁷ He met with representatives from the camps for a question-and-answer session regarding the ICC matter.¹⁴⁸ Khan promised to “accelerate” the investigation and report on progress in 2024.¹⁴⁹

2. *International Court of Justice*

The government of France decided to intervene in *The Gambia v. Myanmar* case pending before the International Court of Justice (“ICJ”).¹⁵⁰ In March of 2023, Myanmar requested an extension of its counter-memorial due to a litany of issues.¹⁵¹ The Gambia opposed the request.¹⁵² On April 6, 2023, the ICJ granted Myanmar a brief reprieve, ordering an extension of the deadline to file the counter-memorial to May of 2023.¹⁵³ On October 16,

145. Application Against Myanmar, MYANMAR ACCOUNTABILITY PROJECT 3 (Aug. 11, 2003), <https://the-world-is-watching.org/wp-content/uploads/2023/08/Myanmar-Communication-ASEAN-AND-AICHR-2023.10.08v5.pdf> [https://perma.cc/25GP-5C63].

146. *Id.* at 7.

147. Andrea Marshall & Elizabeth Zach, ICC Prosecutor Visits DW Akademie Project Serving Rohingya Refugees, DEUTSCHE WELLE (July 7, 2023), <https://akademie.dw.com/en/icc-prosecutor-visits-dw-akademie-project-serving-rohingya-refugees/a-66152056> [https://perma.cc/PY4J-5WHU].

148. *Id.*

149. Shehab Sumon, ICC Chief Prosecutor Vows to Speed Up Efforts to Bring Justice to Rohingya, ARAB NEWS (July 7, 2023), <https://www.arabnews.com/node/2333981/world> [https://perma.cc/R3N8-7L4D].

150. Sm Najmus Sakib, France to ‘Intervene in’ Rohingya Genocide Case at UN court, AN-ADOLU AGENCY (Sept. 11, 2023), <https://www.aa.com.tr/en/asia-pacific/france-to-intervene-in-rohingya-genocide-case-at-un-court/2989341#> [https://perma.cc/FNU8-3WMA].

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152. *Id.*

153. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Order, 2023 I.C.J. 178 (April 6, 2023).

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2023, the ICJ set new “time-limits” for the written pleadings that will now take the case late into 2024.¹⁵⁴

E. CONCLUSION

Two other matters which are worth mentioning are the pending public interest litigation focusing on the treatment of Rohingya refugees in India, in violation of the Indian Constitution.¹⁵⁵ Activists petitioned the Constitutional Court of the Republic of Indonesia to allow for a case to be filed against the junta for crimes against humanity and genocide.¹⁵⁶ While more activists and lawyers continue to pursue pathways to justice, the people of Burma continue to plead with the international community to take action to stop the unnecessary violence perpetrated against them by the military junta, who continue to be supported by corporate actors and governments through economic pathways and weapons sales.

154. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Gam. v. Myan.*), Order, 2023 I.C.J. 178 (Oct. 16, 2023).

155. V. Venkatesan, *SC Seeks Centre’s Response to Petition Seeking Release of Illegally Detained Rohingya Refugees*, *THE WIRE* (Oct. 11, 2023), <https://thewire.in/government/sc-seeks-centres-response-to-petition-seeking-release-of-illegally-detained-rohingya-refugees> [<https://perma.cc/XA7A-9PER>].

156. Samara Baboolal, *Indonesia Activists Ask Court to Allow Human Rights Case Against Myanmar Junta*, *JURIST* (Sept. 8, 2022), <https://www.jurist.org/news/2022/09/indonesia-activists-ask-court-to-allow-human-rights-case-against-myanmar-junta/> [<https://perma.cc/3NX5-P94U>].

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International Litigation

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This Article discusses significant legal developments in international litigation from 2023.

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. INAPPLICABILITY TO CRIMINAL CASES

In *United States v. Turkiye Halk Bankasi A.S.*, the U.S. Supreme Court held that the FSIA does not immunize foreign sovereigns or their instrumentalities from criminal prosecution in U.S. courts² or indeed cover criminal cases at all. The decision affirmed the Second Circuit's holding that there was federal subject matter jurisdiction over a criminal indictment against Halkbank, one of Turkey's largest state-owned banks, for evading U.S. sanctions against Iran under the general federal criminal jurisdiction

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1. See 28 U.S.C. § 1604 (1976).

2. See *Turkiye Halk Bankasi A.S. v. United States*, 598 U.S. 264, 272–73 (2023) [hereinafter *Halkbank*].

statute, 18 U.S.C. § 3231.³ Citing the plain text of the FSIA—including Section 1330, which grants jurisdiction over a “nonjury *civil* action against a foreign state”—the Court reasoned that the statute exclusively addresses civil suits against foreign states and their instrumentalities, and that it was unlikely that Congress, in “enact[ing] a comprehensive scheme governing claims of immunity,” also silently intended to codify sovereign immunity from criminal proceedings.⁴ Notably, the decision did not address whether Halkbank is immune from federal prosecution under general common law.⁵ The Court remanded the case to the Second Circuit to consider Halkbank’s common law immunity arguments, and that court’s decision remains pending.⁶

B. LATER-ACQUIRED SOVEREIGN STATUS

In *Bartlett, et al. v. Baasiri, et al.*, the Second Circuit held, in a case of first impression, that a defendant who gains sovereign status after a lawsuit is filed can assert sovereign immunity as a defense under the FSIA.⁷ The U.S. District Court for the Eastern District of New York had found that American military service members (or their relatives) who were killed or injured in Iraq by alleged proxies of Hezbollah could sue Jammal Trust Bank (JTB), a Lebanese bank, rejecting the argument that JTB was immune as an “organ of a foreign state” because it had been liquidated and its assets acquired by Lebanon’s central bank after the lawsuit was filed.⁸ In reversing, the Second Circuit accepted arguments of the U.S. State Department in an amicus curiae brief, holding that the “most natural reading” of the FSIA “gives foreign sovereigns immunity even when they gain their sovereign status mid-suit.”⁹

C. COMMERCIAL ACTIVITY EXCEPTION – DIRECT EFFECT

In *Jones v. PGA Tour, Inc.*, a California district court held that Saudi Arabia’s Public Investment Fund (PIF) was not immune from responding to a subpoena for documents and deposition testimony.¹⁰ Affirming a Magistrate Judge’s order, the court found that PIF’s conduct—which involved “substantial commercial activity outside the United States,” including the founding of a disruptor golf league—caused a “direct effect”

3. *See id.* at 272.

4. *Id.* at 272–73 (citing 28 U.S.C. § 1330 (emphasis added)).

5. *See id.* at 268–69.

6. *See id.* at 280–81.

7. *See Bartlett v. Baasiri*, 81 F.4th 28, 37 (2d Cir. 2023).

8. *See Bartlett v. Societe Generale de Banque au Liban SAL*, No. 19CV00007CBATAM, 2021 WL 3706909, at *1, *6, *8 (E.D.N.Y. Aug. 6, 2021), *vacated and remanded sub nom. Bartlett*, 81 F.4th 28 (2d Cir. 2023).

9. *Bartlett*, 81 F.4th 28 at 33.

10. *See Jones v. PGA Tour, Inc.*, No. 22-cv-04486-BLF, 2023 WL 2843489, at *8, *13 (N.D. Cal. Apr. 3, 2023).

in the United States under the third clause of the commercial activity exception.¹¹ Relying on Ninth Circuit precedent, the court rejected PIF's argument that the commercial activity did not form the gravamen of the suit under the first clause of the exception, as "the gravamen requirement need not be met here" where "the basis of the lawsuit caused a direct effect in the United States."¹²

The Supreme Court might consider in its 2024 term whether military purchases are considered a "commercial activity" under the FSIA.¹³ The Fourth Circuit's decision in *Blenheim Capital Holdings Ltd. v. Lockheed Martin Corp.*, holding that South Korea's purchase of military equipment was not "commercial" activity because it was of an exclusively sovereign nature, is subject to a certiorari petition before the Court, which requested the views of the Solicitor General on October 2, 2023.¹⁴

II. International Service of Process

The FSIA provision governing service of process on foreign states and their political subdivisions provides four methods for service: service per a special arrangement, service under an applicable treaty, service by post, and service through the diplomatic channel.¹⁵ The statute lists the four methods in hierarchical order.¹⁶ That is, a plaintiff can try a method of service only if the preceding methods of service are unavailable.

The correct method of service is usually clear. But problems can arise when it is not clear which methods are available, or when the plaintiff makes a mistake in its choice.¹⁷ In *LS Energia Inc. v. Corp. Electrica Nacional S.A.*,¹⁸ the plaintiffs first moved for leave to serve process through the diplomatic channel on Venezuela and two of its subdivisions or instrumentalities.¹⁹ Their motion argued that service through the diplomatic channel was "the only method of service available to them."²⁰ The plaintiffs represented that there was no special arrangement for service and that service under the

11. *Id.* at *6.

12. *See id.* at *7 (citing *Terenkian v. Republic of Iraq*, 694 F.3d 1122, 1132 (9th Cir. 2012); *Packsys, S.A. de C.V. v. Exportadora de Sal, S.A. de C.V.*, 899 F.3d 1081, 1092 (9th Cir. 2018)).

13. *See generally* Brief for Petitioner, *Blenheim Capital Holdings Ltd. v. Lockheed Martin Corp.*, 133 S.Ct. 63, at i. (2003) (No. 22-886).

14. *See id.* at i; *see* *Blenheim Capital Holdings Ltd. v. Lockheed Martin Corp.*, 53 F.4th 286, 297 (4th Cir. 2022).

15. *See* 28 U.S.C. § 1608(a)(1)–(4) (1976).

16. *See id.*

17. *See, e.g.,* *Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1054 (2019).

18. *See generally* *LS Energia Inc. v. Corporacion Electrica Nacional S.A.*, No. 21-21642-CIV, 2023 WL 122196 (S.D. Fla. Jan. 6, 2023).

19. Service through the diplomatic channel is available only on a foreign state or its political subdivision, not its instrumentality. *See id.* at *4; *compare* 28 U.S.C. § 1608(a), *with* 28 U.S.C. § 1608(b). This summary does not consider further the characterization of Venezuela's two co-defendants, *Corporacion Electrica Nacional, S.A.* and *Petroleos de Venezuela, S.A.*, though the decision addresses the issue.

20. *LS Energia*, 2023 WL 122196, at *3.

Hague Service Convention was unavailable because “Venezuela has failed to comply with its obligations to receive and transmit service papers under [the framework of the Hague Convention].”²¹ After the court granted the motion, the plaintiffs transmitted the papers to the State Department, but “[a]fter many months the Department of State [had] not yet indicated that it [had] transmitted those documents to Defendants, and Plaintiffs [had] lost hope that they [could] serve Defendants in this manner.”²²

The plaintiffs then brought a second motion, this time seeking leave to serve by mail.²³ In the first motion, they had claimed that service by mail was unavailable, because Venezuela had objected to service by postal channels under Article 10(a) the Hague Service Convention.²⁴ In their second motion, the plaintiffs asserted that Venezuela’s declaration under Article 10(a) was no bar to service by mail.²⁵

The district court disagreed.²⁶ In *Water Splash, Inc. v. Menon*,²⁷ the Supreme Court held that the Convention permits service by post “[i]f two conditions are met: first, the receiving state has not objected to service by mail; and second, service by mail is authorized under otherwise-applicable law.”²⁸ The district court decisions after *Water Splash* took the same view in dicta.²⁹ The *LS Energia* court agreed, noting the importance of comity, the sensitivity involved in foreign sovereign litigation, and the risk that Venezuela would not receive actual notice of the lawsuit if served by mail.³⁰

Although the court did not dismiss the plaintiffs’ arguments on procedural grounds in light of its change in position, the court expressed concern about the change in position.³¹ In light of the long time it can take to serve

21. *Id.* At least two cases have reached similar results. *See, e.g.,* Tidewater Inv. SRL v. Bolivarian Republic of Venez., No. 17-1457-TJK, 2018 WL 6605633, at *6 (D.D.C. Dec. 17, 2018) (mem. op.); Casa Express Corp. v. Bolivarian Republic of Venez., No. 21-mc-23103, 2021 WL 5359721, at *2 (S.D. Fla. Nov. 17, 2021).

22. *LS Energia*, 2023 WL 122196, at *3. The plaintiffs should perhaps have been more patient: it can take many months for papers to be served via the diplomatic channel and to receive proof of service from the State Department.

23. *See id.* Service by mail requires that the papers be “addressed and dispatched” by the clerk and sent using a form of mail requiring a signed receipt as in 28 U.S.C. § 1608(a)(3).

24. *See id.* at *4; *Declaration/Reservation/Notification*, HCHH, <https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=429&disp=resdn> [<https://perma.cc/LX8J-A683>] (last visited Apr. 14, 2024). The State Department takes the view that “Service by registered mail should . . . not be used in the countries party to the Hague Service Convention that objected to the method described in Article 10(a) (postal channels).” *Service of Process*, U.S. DEP’T OF STATE BUREAU CONSULAR AFFAIRS, <https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/internl-judicial-asst/Service-of-Process.html> (last updated Nov. 27, 2023) [<https://perma.cc/N4Z2-7BWH>].

25. *See LS Energia, Inc.*, 2023 WL 122196, at *4.

26. *See id.* at *6.

27. *Water Splash, Inc. v. Menon*, 581 U.S. 271 (2017).

28. *LS Energia Inc.*, 2023 WL 122196, at *4 (quoting *Water Splash, Inc.* 581 U.S. at 284).

29. *Id.* at *4–5 (citing *Azadeh v. Gov’t of Islamic Republic of Iran*, 318 F. Supp. 3d 90, 99 (D.D.C. 2018)).

30. *Id.* at *6.

31. *Id.* at *4.

process through the diplomatic channel, one practical implication of the case is that, if there is any question about the availability of a method of service under the FSIA, a plaintiff should attempt all possible methods before seeking to serve another party via diplomatic channels.³²

III. Personal Jurisdiction

In *Mallory v. Norfolk Southern Railway Co.*, the U.S. Supreme Court clarified the contours of consent as a means to establishing personal jurisdiction.³³ There, the Court was faced with a suit brought in Pennsylvania state court by a Virginia-based man against his former employer, a Virginia-based corporation, for events that took place in Ohio and Virginia.³⁴ When challenged, the plaintiff contended that the defendant had consented to suit in Pennsylvania.³⁵ He relied on a Pennsylvania statute, which states that in order to do business in Pennsylvania, an out-of-state corporation must register with the Department of State, identify an “office” in the state and “continuously maintain” it.³⁶ After registration, the corporation is subject to the same rights and liabilities as domestic entities.³⁷ Pennsylvania law provides elsewhere that “qualification as a foreign corporation” shall permit state courts to “exercise general personal jurisdiction” over a registered foreign corporation, just as they can over domestic corporations.”³⁸

The Supreme Court accepted plaintiff’s argument, holding that the defendant corporation had consented to personal jurisdiction.³⁹ The plurality reasoned that the facts in *Mallory* fell “squarely within [the] rule” from a 1917 case, *Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co.*⁴⁰ There, the Supreme Court held that where Missouri law “required any out-of-state insurance company . . . to file paperwork agreeing to (1) appoint a state official to serve as the company’s agent for service of process, and (2) accept service on that official as valid in any suit,” a compliant corporation consented to personal jurisdiction.⁴¹

The *Mallory* case was decided on June 27, 2023.⁴² In the months following, a handful of lower courts have applied the decision. These opinions reflect an effort by plaintiffs’ counsel to expand the holding in *Mallory*, and hesitance by the judiciary to step outside *Mallory*’s bounds. In *Fuld v.*

32. *Id.* at *2.

33. See *Mallory v. Norfolk Railway Co.*, 600 U.S. 122, 127 (2023).

34. *Id.* at 126.

35. *Id.* at 126–27.

36. See *id.* (arguing the significance of 15 Pa. Const. Stat. § 411(a), (f) (2014)); see also 15 Pa. Const. Stat. § 411(a), (f) (2014).

37. See 15 Pa. Const. Stat. § 402(d) (2014).

38. *Mallory*, 600 U.S. at 134 (quoting 42 Pa. Const. Stat. § 5301(a)(2)(i) (1988)).

39. *Id.* at 146.

40. See *id.* at 135–36 (referencing *Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917)).

41. *Id.* at 132.

42. *Id.* at 122.

Palestine Liberation Organization, the Second Circuit was faced with determining the constitutionality of the “Promoting Security and Justice for Victims of Terrorism Act of 2019” (PSJVTa), which would have conferred personal jurisdiction over the defendants by virtue of “deemed consent.”⁴³ The PSJVTa predicated “deemed consent” on a defendant making payments to an individual who had committed an act of terrorism injuring or killing a U.S. national, due to that individual’s imprisonment or death.⁴⁴ The Second Circuit rejected Congress’ attempt to “by legislative fiat, simply “deem” activities to be “consent”” to personal jurisdiction.⁴⁵ It distinguished the PSJVTa from *Mallory*, noting that the statute in *Mallory* had required that the defendant “accept[] a government benefit conditioned on submitting to suit in the forum.”⁴⁶ “Because the PSJVTa’s predicate activities cannot reasonably be understood as signifying the defendants’ consent, the statute does not effect a valid waiver of the defendants’ due process protection against the ‘coercive power’ of a foreign forum’s courts.”⁴⁷

In *Simon v. First Savings Bank of Indiana et al.*, the plaintiff asserted the defendant corporation had consented to personal jurisdiction, using the statute at issue in *Mallory* as a hook.⁴⁸ Unlike *Mallory*, the defendant in *Simon* “had not registered to do business or appointed an agent to accept process” in Pennsylvania.⁴⁹ The Eastern District of Pennsylvania rejected this attempt to “considerably expand the reach of *Mallory*.”⁵⁰ In *Lumen Techs. Serv. Grp., LLC v. CEC Grp., LLC*,⁵¹ the Colorado District Court rejected the argument that because the defendant corporation had registered to do business in Colorado and had designated a registered agent for service of process there, it had consented to personal jurisdiction.⁵² The court concluded that because Colorado law is not “explicit that qualification as a foreign corporation shall permit state courts to exercise general personal jurisdiction over a registered foreign corporation, just as they can over domestic corporations,” the corporation had not consented to personal jurisdiction.⁵³

These and other cases applying *Mallory* illustrate how critical the language of a registration statute, and underlying state law, will be to evaluating consent by registration going forward.⁵⁴

43. *Fuld v. Palestine Liberation Org.*, 82 F.4th 74, 79-80 (2d Cir. 2023).

44. *Id.* at 83.

45. *Id.* at 97.

46. *Id.* at 90.

47. *Id.* at 98.

48. *See Simon v. First Savings Bank of Indiana*, No. CV 23-721, 2023 WL 5985282, at *3 (E.D. Pa. Sept. 14, 2023).

49. *Id.* at *2.

50. *Id.* at *3.

51. *See Lumen Techs. Serv. Grp., LLC v. CEC Grp., LLC*, No. 23-CV-00253-NYW-KAS, 2023 WL 5822503, at *11 (D. Colo. Sept. 8, 2023).

52. *Id.* at *11.

53. *Id.* at *6 (distinguishing *Mallory*, 600 U.S. at 134 (quotations omitted)).

54. *See, e.g., In re Abbott Lab’s, Preterm Infant Nutrition Prod. Liab. Litig.*, No. 22 C 02011, 2023 WL 4976182, at *3 (N.D. Ill. Aug. 3, 2023).

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.⁵⁵

American courts continue to clarify the territorial limitations of a sovereign's actions under the doctrine, the appropriate prudential concerns, and the limitations of the doctrine as applied to non-sovereign parties.

In *Rusesabagina v. Republic of Rwanda*, the District Court for the District of Columbia addressed claims of illegal surveillance, kidnapping, imprisonment, and torture by a sovereign entity, brought under both common law and the Torture Victim Protection Act (TVPA).⁵⁶ The Court dismissed the common law claims stemming from actions within the sovereign's own borders but allowed common law claims stemming from actions taking place *elsewhere* to proceed.⁵⁷ The court reasoned that the Act of State Doctrine applies to official acts taken within the sovereign's borders, but allegations of torts committed outside the sovereign's territory are not barred.⁵⁸ Although the U.S. State Department had already taken a position on the legality of the underlying actions,⁵⁹ the Court highlighted that diplomatic efforts were ongoing, and it was "reluctant to insert itself into those negotiations" by adjudicating the claims.⁶⁰

The court also allowed claims brought under the TVPA to proceed, regardless of where the underlying acts occurred.⁶¹ The court agreed with plaintiffs that the enactment of the TVPA reflected a decision by Congress that such claims should be heard by the U.S. judiciary, even if they would otherwise have been barred under the Act of State Doctrine.⁶² The court reasoned that Congress was aware of the prudential concerns of the Act of State Doctrine when it created a cause of action under the TVPA, which therefore represented a "clear statement by Congress that federal courts should not cite the Act of State Doctrine as grounds to refuse to hear a case to which the [TVPA] statute applies."⁶³

In *D'Augusta v. American Petroleum Institute*, the Northern District of California dismissed claims against non-sovereign oil companies accused of colluding with the governments of Russia and Saudi Arabia to reduce

55. See, e.g., *WS Kirkpatrick & Co. Inc. v. Env't Tectonics Corp. Int'l*, 493 U.S. 400, 403–04 (1990); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964).

56. See *Rusesabagina v. Republic of Rwanda*, No. CV 22-469 (RJL), 2023 WL 2562692, at *1–2 (D.D.C. Mar. 16, 2023), *appeal dismissed*, No. 23-7039, 2023 WL 3029734 (D.C. Cir. Apr. 14, 2023).

57. *Id.* at *11.

58. *Id.* at *10–11.

59. *Id.* at *10.

60. *Id.*

61. *Id.* at *12.

62. *Rusesabagina*, 2023 WL 2562692, at *12.

63. *Id.*

oil production and increase oil prices.⁶⁴ The court concluded that Russia and Saudi Arabia were “indispensable co-conspirators in the alleged [price-fixing] scheme.”⁶⁵ Thus, adjudicating plaintiffs’ claims would require the court to evaluate the legality of Russia’s and Saudi Arabia’s decisions to reduce oil production, which would violate the Act of State Doctrine.⁶⁶ Similarly, in *Li v. Li*, the District Court for the District of Columbia dismissed a case against a private party similarly alleged to have acted in concert with a sovereign entity to injure plaintiffs.⁶⁷ Plaintiffs alleged that the Chinese government illegally seized and auctioned their property, and the defendant bank had facilitated the transaction.⁶⁸ The court reasoned that under the Act of State Doctrine, it was required to assume that the Chinese government’s actions within its own territory were valid.⁶⁹ Consequently, plaintiffs could not maintain a claim against the Chinese bank for facilitating the transaction.⁷⁰

In contrast, in *A.O.A. v. Rennert*, the District Court for the Eastern District of Missouri held that claims against a private company that had purchased a Peruvian government refinery were not barred by the Act of State Doctrine, despite many of the alleged toxic emissions having occurred while the Peruvian government operated the plant.⁷¹ Defendants argued that such claims were barred under the Act of State Doctrine because they would require the court to parse liability between the Peruvian government and the defendant company.⁷² However, the court reasoned that even if it found that the Peruvian government partially caused plaintiffs’ injuries, that would not require a determination of the *validity* of a foreign sovereign’s actions, and the case could therefore proceed.⁷³

V. International Discovery

A. OBTAINING U.S. DISCOVERY FOR USE IN FOREIGN PROCEEDINGS

Following last year’s landmark decision in which the U.S. Supreme Court held that a private international arbitration tribunal does not qualify as a “foreign or international tribunal” under 28 U.S.C. § 1782 (Section 1782), but left open the possibility that arbitral panels constituted in investor-state cases involving international investment agreements might meet the

64. *D’Augusta v. Am. Petrol. Inst.*, No. 22-cv-01979-JSW, 2023 WL 137474, at *1 (N.D. Cal. Jan. 9, 2023), *appeal docketed*, No. 23-15878 (9th Cir. June 13, 2023).

65. *Id.* at *4.

66. *Id.*

67. *Heping Li v. Kegiang Li*, No. 20-2008 (JMC), 2023 WL 2784872 (D.D.C. Apr. 5, 2023), *appeal docketed*, No. 23-7052 (D.C. Cir. May 3, 2023).

68. *Id.* at *2.

69. *Id.* at *9.

70. *Id.*

71. *A.O.A. v. Rennert*, No. 4:11 CV 44 CDP, 2023 WL 346001, at *1 (E.D. Mo. Jan. 20, 2023), *appeal docketed*, No. 23-8001 (8th Cir. Apr. 3, 2023).

72. *Id.* at *27.

73. *Id.*

statutory definition,⁷⁴ two U.S. district courts in New York have grappled with the question of whether arbitral tribunals constituted under the International Centre for Settlement of Investment Disputes (ICSID) are within the ambit of Section 1782.

In re Webuild, the District Court for the Southern District of New York held that Section 1782 does not apply to permit U.S. discovery in ICSID arbitrations.⁷⁵ In a decision that has since been appealed to the U.S. Court of Appeals for the Second Circuit, the district court reasoned that the ICSID panel formed as part of an investor-state arbitration under the bilateral investment treaty (BIT) between Panama and Italy was not a “foreign or international tribunal” within the meaning of Section 1782 because the two States did not “intend to imbue the ICSID Panel with governmental authority”—a hallmark of Section 1782 eligibility, as per the Supreme Court.⁷⁶

Similarly, *In re Alpeine*, the District Court for the Eastern District of New York affirmed a Magistrate Judge’s order from 2022 and denied an application for discovery under Section 1782, reasoning that the ICSID tribunal was created by treaty among sovereign nations and derives its power from the consent of the parties.⁷⁷ The court noted that the ICSID tribunal was one of several options for the parties to litigate their dispute under the BIT, including the parties’ home jurisdictions, China and Malta, and concluded that this evidenced the states’ intention not to imbue the panel with governmental authority required for discovery under Section 1782.⁷⁸

These two cases point towards New York district courts’ continued exclusion of ICSID tribunals from the definition of a “foreign or international tribunal” under Section 1782, in line with the Second Circuit’s position prior to the Supreme Court’s decision.

Outside of the arbitration context, U.S. courts have continued to consider applications for Section 1782 discovery in aid of foreign court proceedings. *In re Application of Venequip, S.A. v. Caterpillar Inc.*, the Seventh Circuit affirmed the denial of a Section 1782 application for discovery for use in court proceedings in Switzerland.⁷⁹ Applying the four discretionary factors established by the Supreme Court in *Intel Corp. v. Advanced Micro Devices, Inc.*⁸⁰ in deciding whether to exercise the authority conferred in Section 1782, the Seventh Circuit reasoned that “freely and intelligently selected” forum-selection clauses may be relevant to the exercise of discretion under Section 1782, as they “might indicate parties’” preference for a court system that

74. *ZF Auto. US, Inc. v. Luxshare, Ltd.*, 594 U.S. 619 (2022).

75. See *In re Webuild S.P.A.*, No. 22-MC-140 (LAK), 2022 WL 17807321, at *1 (S.D.N.Y. Dec. 19, 2022).

76. *Id.* at *3.

77. See *In re Alpeine, Ltd.*, 2022 WL 15497008, at *2 (E.D.N.Y. Oct. 27, 2022) (citing *ZF Auto. US, Inc.* 594 U.S. at 636–37).

78. See *id.*

79. *In re Venequip*, 83 F.4th 1048, 1051 (7th Cir. 2023).

80. See *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 244–245 (2004).

doesn't contemplate the level of compulsory process available in America."⁸¹ In balancing these "permissible contextual factors," the appellate court held that the district court's exercise of its discretion in declining Section 1782 discovery was proper.⁸²

**B. OBTAINING DISCOVERY FROM ABROAD FOR
USE IN U.S. PROCEEDINGS**

In a notable decision, the Southern District of New York held in *Owen v. Elastos Foundation* that China's Personal Information Protection Law (PIPL) did not bar a U.S. discovery request.⁸³ Cryptocurrency purchasers moved to compel the production of documents, which defendants had withheld in reliance on the PIPL, claiming that the law prohibits the transfer of data stored within mainland China to the judicial or law enforcement authorities of foreign countries without the approval of competent authorities.⁸⁴ The court granted the motion, finding that, under the PIPL's Article 13 exception, handling personal information was permitted where necessary "for the performance of statutory duties or obligations," including obligations under foreign law.⁸⁵ In the alternative, the court held, applying a seven-factor analysis, that comity would not prevent the court from ordering defendants to produce discoverable documents within and outside of China.⁸⁶

VI. Extraterritorial Application of United States Law

A. MARITIME DRUG LAW ENFORCEMENT ACT

In *United States v. Antonius*,⁸⁷ the Second Circuit affirmed the convictions of three non-U.S. citizens for conspiring to transport drugs on the high seas, using a stateless vessel in violation of the Maritime Drug Law Enforcement Act (MDLEA). The drug traffickers had a scheme to transfer cocaine from Guyana to the Netherlands but had not planned for the drugs to be delivered to the United States or to travel in U.S. waters.⁸⁸ Further, the vessel that was eventually used to transport the drugs did not originate in the United States, was not bound for the United States, and was not intercepted in U.S. waters.⁸⁹

The traffickers argued that their MDLEA convictions violated their Fifth Amendment right to due process, because there was no nexus between

81. *Venequip*, 83 F.4th at 1057 (citing *Heraeus Kulzer, GmbH v. Biomet, Inc.*, 633 F.3d 591, 595 (7th Cir. 2011)).

82. *Id.*

83. *Owen v. Elastos Found.*, 343 F.R.D. 268, 289 (S.D.N.Y. 2023).

84. *Id.* at 274, 277.

85. *Id.* at 285–86.

86. *Id.* at 286–89.

87. *United States v. Antonius*, 73 F.4th 82, 84–86 (2d Cir. 2023).

88. *Id.* at 84.

89. *Id.* at 85.

their alleged criminal conduct and the United States.⁹⁰ The Second Circuit previously had not required a showing of nexus for MDLEA prosecution of accused draft traffickers “who are *actually on board of a stateless vessel* . . . because such prosecutions are not arbitrary, because any nation may exercise jurisdiction over stateless vessels,” nor unfair, because “such activity is illegal and may be prosecuted somewhere.”⁹¹ Noting that it had left open the question of “whether proof of nexus with the United States must be established in cases involving *land-based conspirators* using stateless vessels on the high seas to traffic drugs,” the Second Circuit declined to answer that question in this case.⁹² The court explained that, even if such a nexus were required, it would be met where “the aim of [the] activity is to cause harm inside the United States or to U.S. citizens or interests,” and that drug trafficking on the high seas inherently involves such an aim because it threatens the societal well-being of the United States.⁹³

B. LANHAM ACT

In *Abitron v. Hetronic*,⁹⁴ the Supreme Court held that provisions of the Lanham Act prohibiting trademark infringement—15 U.S.C. §§ 1114(1) (a) & 1125(a)(1)—are not extraterritorial and apply only when the claimed infringing use in commerce is domestic.

The Court first concluded that the Lanham Act’s definition of “commerce” as “all commerce which may lawfully be regulated by Congress” was insufficient to rebut the general presumption against extraterritoriality because that definition did not provide the requisite clear, affirmative indication of extraterritorial application.⁹⁵

The Supreme Court then examined “when claims [under the Lanham Act] involve “domestic” applications of these provisions.”⁹⁶ Reaffirming its rule that this inquiry “turns on the location of the conduct relevant to the focus of the statutory provisions,” the Court explained that the relevant conduct was “the unauthorized “use in commerce” of a protected trademark when that use “is likely to cause confusion.””⁹⁷ The Supreme Court then vacated the decision below because it was “not in accord with this understanding of extraterritoriality.”⁹⁸ Four of the Justices concurred in the judgment only, and would have held that the Lanham Act “extends to activities

90. *Id.*

91. *Id.* at 87–88 (internal quotation marks and citation omitted; emphasis added).

92. *Antonius*, 73 F.4th at 88 (emphasis added).

93. *Id.* (internal quotation marks and citation omitted).

94. *Abitron Austria GmbH v. Hetronic Int’l Inc.*, 600 U.S. 412, 446 (2023).

95. *Id.* at 420.

96. *Id.* at 421.

97. *Id.* at 422–23 (referencing *RJR Nabisco, Inc. v. European Cmty.*, 579 U.S. 325, 337 (2016)).

98. *Id.* at 2428.

carried out abroad when there is a likelihood of consumer confusion in the United States.”⁹⁹

C. RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT

The Racketeer Influenced and Corrupt Organizations Act (RICO) provides a private right of action to “[a]ny person injured in his business or property by reason of a violation of” RICO’s substantive provisions.¹⁰⁰ The Supreme Court had previously held, in *RJR Nabisco*, that this statute may apply extraterritorially where the plaintiff alleges and proves a “domestic injury to its business or property.”¹⁰¹

In *Yegiazaryan v. Smagin*,¹⁰² the Supreme Court held that this extraterritoriality analysis requires a fact-based, totality-of-the-circumstances approach (as opposed to an analysis of only the plaintiff’s place of residence) to ascertain whether an injury is “domestic” in nature.¹⁰³ In this case, the Court concluded that Smagin had alleged a sufficient “domestic” injury to justify RICO’s application where “his ability to enforce a California judgment in California against a California resident was impaired by racketeering activity that largely occurred or was directed from and targeted at California.”¹⁰⁴ Three Justices criticized the Court’s rule as “offer[ing] virtually no guidance,” and would have dismissed the writ of certiorari.¹⁰⁵

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.¹⁰⁶ State law, however, governs the recognition and enforcement of foreign court judgments.¹⁰⁷

A. FOREIGN ARBITRAL AWARDS

In *Yegiazaryan v. Smagin*, the U.S. Supreme Court held (as described above) that courts must apply a context-specific inquiry, rather than a “residency-based” bright-line rule, in determining whether a foreign

99. *Id.* at 432–33 (Sotomayor, J., concurring in the judgment).

100. 18 U.S.C. § 1964(c).

101. *RJR Nabisco*, 579 U.S. at 346.

102. *See Yegiazaryan v. Smagin*, 599 U.S. 533, 544–45, 549 (2023).

103. *Id.* at 543–44, 549.

104. *Id.* at 543, 549.

105. *Id.* at 549, 554 (Alito, J., dissenting).

106. Recognition and Enforcement of Foreign Arbitral Awards art. 1(1), June 10, 1959, T.I.A.S. No. 6997, 21 U.S.T. 2517. The Inter-American Convention on International Commercial Arbitration, implemented in Chapter 3 of the Federal Arbitration Act (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.

107. *Id.*

plaintiff has pleaded a “domestic injury” to sustain a RICO claim.¹⁰⁸ The Court accordingly upheld a Ninth Circuit decision permitting a Russia-based plaintiff to use RICO to claim damages resulting from a California resident defendant’s obstruction of the plaintiff’s efforts to enforce a non-U.S. arbitral award.¹⁰⁹ The Court declined to provide an exhaustive list of factors for analyzing the situs of the injury, instead focusing on the location where the racketeering activity and the “injurious aims and effects of that activity” occurred, which in this case was California, where the defendant—against whom a London-seated tribunal had issued an award—coordinated a scheme to evade payment.¹¹⁰

In *Baker Hughes Servs. Int’l LLC v. Joshi Techs. Int’l, Inc.*, the Tenth Circuit considered whether it was deprived of jurisdiction to enforce an arbitral award where it had been provided a translation of the award, but not a “duly authenticated original award or a duly certified copy,” as required by Article IV of the Convention.¹¹¹ The court held that the failure to satisfy the Article IV requirements does not deprive the court of jurisdiction, distinguishing between the procedural requirements set out in Article IV, and the jurisdictional requirements set out in the FAA.¹¹²

In *Corporación AIC, SA v. Hidroeléctrica Santa Rita S.A.*, the Eleventh Circuit considered whether the FAA or the Convention provides the grounds for vacatur of awards in arbitrations seated in the United States or governed by U.S. arbitration law (i.e., where the United States is, in arbitration terminology, the “primary jurisdiction”).¹¹³ Hearing the case en banc, the Eleventh Circuit reversed its own precedent and, following the Second, Third, Fifth, and Seventh Circuits, held that the FAA provides the grounds for vacatur if the United States is the primary jurisdiction.¹¹⁴

B. FOREIGN COURT JUDGMENTS

28 U.S.C. § 2467 provides the mechanism for the United States to recognize and enforce foreign forfeiture judgments, subject to certain statutory requirements, including that the foreign judgment was rendered under processes compatible with due process and the foreign court had personal and subject matter jurisdiction.¹¹⁵ On the request of the Republic of the Philippines, the United States filed an action in the Southern District of

108. *Yegiazaryan*, 599 U.S. at 545.

109. *Id.* at 539–41.

110. *Id.* at 544.

111. *Baker Hughes Servs. Int’l, LLC v. Joshi Techs. Int’l, Inc.*, 73 F.4th 1139, 1144 (10th Cir. 2023).

112. *Id.* at 1144–46.

113. *Corporación AIC, SA v. Hidroeléctrica Santa Rita S.A.*, 66 F.4th 876, 881–82 (11th Cir. 2023).

114. *Id.* at 886–88 (citing *Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434 (11th Cir. 1998); *Inversiones y Procesadora Tropical INPROTSA, S.A. v. Del Monte Int’l GmbH*, 921 F.3d 1291 (11th Cir. 2019)).

115. See generally 28 U.S.C. § 2467.

New York to enforce a 2012 Philippine Supreme Court judgment ordering the estate of former President Ferdinand Marcos to forfeit allegedly stolen assets.¹¹⁶ In recognizing the judgment, the district court applied U.S. (as opposed to foreign law) standards to the due process inquiry and the law of the Philippines to the questions of the existence of personal and subject matter jurisdiction.¹¹⁷ The court rejected as irrelevant other defenses to enforcement, e.g., comity, given that 28 U.S.C. § 2467 makes no mention of such defenses.¹¹⁸

In *Gibson v. Wikeley*, a Kentucky district court denied a temporary restraining order that would have prevented defendants from taking actions barred by an interim judgment from New Zealand's High Court enjoining a corporation from enforcing a default judgment obtained in Kentucky state court.¹¹⁹ The decision highlighted that (1.) the New Zealand orders were interim, not final; (2.) it was unclear that New Zealand courts would defer to an American interim order; and (3.) plaintiffs failed to join a necessary party to the action.¹²⁰

VIII. Forum Non Conveniens

The doctrine of forum non conveniens permits a court to dismiss a case, which was properly brought before it, when the suit would be more convenient in a foreign forum.¹²¹ Before considering whether a foreign forum would be *more* convenient, the court must address the threshold issue of whether there is an adequate alternative forum to adjudicate the dispute.¹²² This year, an appellate court in the Tenth Circuit considered whether a district court may dismiss part of an action pursuant to the forum non conveniens doctrine while allowing the other part to proceed before it.¹²³

In *DIRTT Environmental Solutions, Inc. v. Falkbuilt Ltd.*, the plaintiffs were a Colorado corporation and its Canadian parent corporation, who brought an action against multiple defendants.¹²⁴ The defendants consisted of the Canadian competitor to the Colorado corporation (established by the corporation's former chief executive officer), the former chief executive officer, and other individuals based in Utah.¹²⁵ The plaintiffs originally filed

116. *In re Arelma, S.A.*, No. 19 Misc. 412 (LAK) (GWG), 2023 WL 6449240, at *16 (S.D.N.Y. Oct. 3, 2023).

117. *Id.* at *16–17.

118. *Id.* at *20.

119. *See Gibson v. Wikeley*, 670 F.Supp.3d 423, 429 (E.D. Ky. 2023).

120. *Id.* at 428.

121. *Cooper v. Tokyo Elec. Power Co.*, 860 F.3d 1193, 1210 (9th Cir. 2017).

122. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254, n.22 (1981).

123. *DIRTT Environment Solutions, Inc. v. Falkbuilt*, 65 F.4th 547, 555 (10th Cir. Apr. 11, 2023).

124. *Id.* at 550.

125. *Id.* at 550–51.

suit in Canada, but subsequently filed a second suit in Utah based on an theft of trade secret claims under federal and state law.¹²⁶

Two of the defendants moved to dismiss the plaintiffs' complaint, based on forum non conveniens, claiming that Canada would be a more appropriate forum.¹²⁷ The remaining defendants refused to join the motion or to consent to Canadian jurisdiction.¹²⁸ The Utah district court granted the defendants' motion to dismiss the case on the grounds of forum non conveniens, effectively dismissing the case against only those defendants who filed the motion and were subject to jurisdiction in Canada.¹²⁹

On appeal, the Tenth Circuit found that the district court's dismissal was an abuse of discretion because forum non conveniens is not available as a tool to split or bifurcate cases.¹³⁰ Specifically, the district court erred in finding the Canadian forum was available when only some of the defendants could be brought before that court.¹³¹ Instead, courts should consider convenience as it applies to the entire case and all the parties as well as the court's inherent interest in the efficient administration of justice.¹³² The court stated that forum non conveniens is a "multi-dimensional concept" that is concerned with convenience for the entire case.¹³³

Similarly, in *Riot Games, Inc. v. Suga PTE*,¹³⁴ a federal district court in California denied the defendants' motion to dismiss for forum non conveniens because the defendants were not able to demonstrate that their co-defendants would accept service in the foreign forums.¹³⁵ In *Riot Games*, the plaintiff, a producer of the well-known video game League of Legends, sued the defendants for copyright infringement for creating a "knock-off" game similar to the plaintiff's game.¹³⁶

The court denied the defendants' motion to dismiss for forum non conveniens because the defendants were not able to show that an adequate alternative forum existed.¹³⁷ The defendants focused on their own amenability to jurisdiction in the alternative forums but failed to address whether the other defendants would accept service in those forums.¹³⁸ The California court stated that dismissing only some of the defendants, while allowing the case against the other defendants to continue "would result in the great inconvenience to [the] Plaintiff, which would override the premise of forum

126. *Id.* at 551.

127. *Id.*

128. *Id.*

129. *DIRTT Envtl. Sols.*, 65 F.4th at 551–52.

130. *Id.* at 553–54, 555–56.

131. *Id.* at 555.

132. *See id.*

133. *Id.*

134. *Riot Games, Inc. v. Suga PTE, Ltd.*, No. 2:22-cv-00429-SPG-KS, 2023 WL 6881904, at *1 (C.D. Cal. Sept. 14, 2023).

135. *Id.* at *14.

136. *Id.* at *1.

137. *Id.* at *14.

138. *Id.*

non conveniens.”¹³⁹ The court referred to *DIRTT v. Falkbuilt*, and quoted its language that “forum non conveniens is not available as a tool to split or bifurcate cases.”¹⁴⁰

IX. Parallel Proceedings

A. ANTI-SUIT INJUNCTIONS

In *Ganpat v. Eastern Pacific Shipping PTE, Ltd.*,¹⁴¹ the Fifth Circuit affirmed the issuance of an anti-suit injunction mentioned in the 2022 edition of this *Year in Review*, holding that the district court was “well within its discretion to conclude that the vexatiousness of the Indian litigation outweighed any comity concerns,” and that the issuance of an anti-suit injunction was “unsurprising[],” in part because the plaintiff was “placed in a prison for violent criminals.”¹⁴² The court also held that a showing of “irreparable injury,” as would be required for a preliminary injunction, was not required for an anti-suit injunction.¹⁴³ The defendant-appellant—against whom the anti-suit injunction was issued—has petitioned the U.S. Supreme Court for a writ of certiorari.¹⁴⁴

Three recent decisions by the U.S. District Court for the District of Columbia have left an uneven landscape for litigants in that court. Two judges gave opposing rulings on three similar cases, all of which pertained to efforts to enforce arbitration awards against Spain.¹⁴⁵ In each case, Spain argued that the arbitration agreement under which the awards had been rendered (contained in the Energy Charter Treaty) was invalid as a matter of EU law.¹⁴⁶ In *Nextera Energy Global Holdings* and *9REN Holding*, Judge Tanya S. Chutkan dismissed that argument, granting the plaintiff’s requests for anti-suit injunctions and ruling that the invalidity alleged by Spain may not be used “to rebut a plaintiff’s evidence that an agreement to arbitrate exists.”¹⁴⁷ By contrast, in *Blasket Renewable Investments*,¹⁴⁸ Judge Richard J.

139. *Id.*

140. *Riot Games*, 2023 WL 6881904, at *14 (citing *DIRTT Envtl. Sols.*, 65 F.4th at 555).

141. *Ganpat v. E. Pac. Shipping PTE, Ltd.*, 66 F.4th 578 (5th Cir. 2023), *cert. denied*, 144 S. Ct. 487, 217 L. Ed. 2d 255 (2023).

142. *Id.* at 580–81, 586.

143. *Id.* at 584.

144. See generally Brief for Petitioner, *Ganpat v. E. Pac. Shipping PTE, Ltd.*, 66 F.4th 578 (5th Cir. 2023) (No. 22-30168).

145. Cf. *Nextera Energy Glob. Holdings B.V. v. Kingdom of Spain*, No. 19-cv-03561 (TJK), 2023 WL 2016932, at *3 (D.D.C. Feb. 15, 2023) (mem. op.), with *9REN Holding S.À.R.L. v. Kingdom of Spain*, No. 19-cv-01871 (TJK), 2023 WL 2016933, at *13 (D.D.C. Feb. 15, 2023) (mem. op.), and *Blasket Renewable Invs., LLC v. Kingdom of Spain*, No. 19-cv-03372 (TJK), 2023 WL 2682013, at *13 (D.D.C. Mar. 29, 2023).

146. See *Nextera Energy Glob. Holdings B.V.*, 2023 WL 2016932, at *1; see also *9REN Holding S.À.R.L.*, 2023 WL 2016933, at *4.; see also *Blasket Renewable Invs.*, 2023 WL 2682013, at *8.

147. *Nextera Energy Glob.*, 2023 WL 2016932, at *7; *9REN*, 2023 WL 2016933, at *6 (both discussing *Chevron Corp. v. Ecuador*, 795 F.3d 200 (D.C. Cir. 2015), and *LLC SPS Stileks v. Republic of Moldova*, 985 F.3d 871 (D.C. Cir. 2021)).

148. See *Blasket Renewable Invs.*, 2023 WL 2682013, at *5, *13.

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Leon “respectfully disagree[d]” with Judge Chutkan and ruled for Spain, finding that Spain “lacked the legal capacity to extend an offer to arbitrate *any* dispute with the Companies under the law that applied to the parties.”¹⁴⁹ As “no agreement to arbitrate ever existed,” the court granted a motion to dismiss.¹⁵⁰

B. INTERNATIONAL ABSTENTION

Under *Colorado River Water Conservation District v. United States*, federal courts have a “virtually unflagging obligation” to exercise jurisdiction in cases in which there is a parallel state proceeding, absent “exceptional” circumstances.¹⁵¹ But there is no such uniform rule for exercising jurisdiction in cases of parallel *foreign* proceedings.¹⁵²

An interlocutory appeal of the U.S. District Court for the Eastern District of Missouri’s decision to deny a motion for international abstention in *A.O.A. v. Rennert*¹⁵³ is currently pending before the Eighth Circuit. In *Rennert*, the district court applied a modified version of the *Colorado River* test,¹⁵⁴ finding that where no actual parallel foreign proceeding is yet pending, a motion for international abstention should be granted only if there is “a serious problem that would be created by federal court proceedings but that would not be present if the matter were adjudicated abroad.”¹⁵⁵ In dismissing the motion requesting the abstention, the court noted a lack of controlling Eighth Circuit precedent.¹⁵⁶

In *Marti v. Iberostar Hoteles y Apartamentos S.L.*, the Eleventh Circuit reversed a decision of the District Court for the Southern District of Florida to maintain a years-long stay, pending a decision by the European Commission.¹⁵⁷ The Eleventh Circuit recognized that “[its] cases considering international comity have generally occurred in the context of whether to abstain out of deference to a *foreign court*, not an administrative body,”¹⁵⁸ whereas the European Commission’s “foreign administrative decision” is not a “judicial act” and “will have no effect on the claims here.”¹⁵⁹ For these reasons, considerations of “international comity” were less significant.¹⁶⁰

149. *Id.* at *9, 14.

150. *Id.* at *14.

151. *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 817–18 (1976).

152. *How Do Federal Courts Treat Foreign Parallel Litigation?*, TRANSNAT’L LITIG. BOG (June 7, 2022), <https://tlblog.org/how-do-federal-courts-treat-foreign-parallel-litigation/> [<https://perma.cc/92NW-QEVG>].

153. *Rennert*, 2023 WL 346001, at *30.

154. *Id.* at *19.

155. *Id.* (quoting *GDG Acquisitions, LLC v. Gov’t of Belize*, 749 F.3d 1024, 1032–33 (11th Cir. 2014)).

156. *Id.* at *18.

157. *Marti v. Iberostar Hoteles y Apartamentos S.L.*, 54 F.4th 641, 643 (11th Cir. 2022).

158. *Id.* at 650 n.6 (emphasis added).

159. *Id.* at 650.

160. *Id.*

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Women's Interest Network

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This article reviews significant legal and political developments impacting women internationally in 2023. 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 2023, multiple international studies were released regarding women's representation in the legal sphere and the subsequent impacts on economic, social, and cultural disruption of global events.¹ Gendered stereotypes

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1. See Soledad Artiz Prillaman, *Strength In Numbers: How Women's Groups Close India's Political Gender Gap*, 67 AM. J. POL. SCI. 390, 410 (2023); see also Kerry Baker & Sonia Palmieri, *Can Women Dynasty Politicians Disrupt Social Norms Of Political Leadership? A Proposed Typology Of Normative Change*, 44 INT'L POL. SCI. REV. 122, 136 (2023).

continue to dominate, shaping perceptions of women's competency in leadership roles in legislative, judicial, governmental, and national affairs.²

A. WOMEN'S REPRESENTATION IN POLITICAL LEADERSHIP

During 2023, Albania, Finland, Spain, Nicaragua, and Liechtenstein had the highest percentage of women cabinet members, hovering between sixty to sixty-seven percent.³ Among women serving in legislatures in 2023, the majority held committee positions related to "human rights, gender equality, and social affairs" including committees overseeing indigenous rights, youth and children affairs, and social inclusion and development.⁴ From 2022 to 2023, no change occurred to the percentage of legislatures presided over by women (22.8 percent).⁵

In 2023, six states reached gender parity in their legislatures, where women make up at least fifty percent of representatives, up from five percent in 2022.⁶ As of October 2023, 129 countries have legislatures where women comprise less than thirty percent of elected representatives.⁷ Accounting for all legislative bodies, including both lower and upper political houses, the most recent data reflect an average of 26.7 percent of women filling seats in political representation globally.⁸ Rwanda still leads on the percentage of female legislators with 61.3 percent of seats filled by women in its lower house of parliament from the last election in 2018.⁹ This is partly because Rwanda's electoral framework under the 2003 Constitution requires that at least thirty percent of seats be filled by women.¹⁰ During 2023, elections produced more gender parity, like Cuba's 53.4 percent to 55.7 percent increase of representation by women in parliament after its

2. Diana Z. O'Brien & Jennifer M. Piscopo, *Gender and Political Representation in Times of Crises*, 19 POL. GENDER 891, 899 (2023).

3. Inter-Parliamentary Union & U.N. Women, *Women in Politics: 2023* (Feb. 2023), <https://www.unwomen.org/sites/default/files/2023-03/Women-in-politics-2023-en.pdf> [<https://perma.cc/ME4Q-4K5U>].

4. *Id.*

5. *Women Speakers of National Parliaments*, IPU PARLINE, <https://data.ipu.org/women-speakers> [<https://perma.cc/9T7Q-NHMU>] (last visited Nov. 27, 2023).

6. *Monthly Ranking of Women in National Parliaments*, IPU PARLINE (2023), <https://data.ipu.org/women-ranking?month=10&year=2023> [<https://perma.cc/M5AW-QPY5>] (last visited Nov. 27, 2023).

7. *Id.*

8. *Global and Regional Averages of Women in National Parliaments*, IPU PARLINE, <https://data.ipu.org/women-averages?month=10&year=2023> [<https://perma.cc/3GU8-ZK8B>] (last visited Nov. 27, 2023).

9. *Id.*

10. ITEGEKO NSHINGA RYA REPUBLIKA Y'U RWANDA [CONSTITUTION] May 26, 2003, art. 10(d) (Rwanda) ("The State of Rwanda commits itself to upholding the following fundamental principles and ensuring their respect: . . . building a State governed by the rule of law, a pluralistic democratic Government, equality of all Rwandans and between men and women which is affirmed by women occupying at least thirty percent (30%) of positions in decision-making organs.").

March 2023 election.¹¹ Legislative action such as Spain's draft Equal Representation Law, which requires no less than forty percent of women fill political seats,¹² and India's passage of a thirty-three percent gender quota for parliamentary seats likewise reflected tangible progress towards equality.¹³

In May 2023, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) met for its 85th session, reviewing eight state reports.¹⁴ CEDAW identified concerns with China's report, such as the fact that women, "including women from ethnic minorities and women with disabilities, remain seriously underrepresented in legislative bodies."¹⁵ This analysis also holds true for the majority of other states' representation globally.¹⁶

Women's representation in local governmental bodies for 2023 is 35.47 percent, growing one percent from 2022.¹⁷ The forty states reporting figures in 2023 averaged 28.8 percent representation in local elected deliberative bodies.¹⁸

For judicial leadership, little to no statistical data has been collected in recent years, reflecting a need for further research and updated data.¹⁹ There have been some notable developments in women's representation, such as

11. *Compare Monthly Ranking of Women in National Parliaments*, *supra* note 6; with *Monthly Ranking of Women in National Parliaments*, IPU PARLINE (2022), <https://data.ipu.org/women-ranking?month=10&year=2022> [<https://perma.cc/EM4M-9BM3>] (last visited Nov. 27, 2023).

12. Ley Orgánica 5/1985 [Organic Law 5/1985], art. 44 (B.O.E. 1985, 147) (Spain).

13. INDIA CONST. art. 332, *amended by* The Constitution (One Hundred and Twenty-Eighth Amendment) Bill, 2023, [https://prsindia.org/files/bills_acts/bills_parliament/2023/Constitution_\(128th_Amendment\)_Bill_2023.pdf](https://prsindia.org/files/bills_acts/bills_parliament/2023/Constitution_(128th_Amendment)_Bill_2023.pdf) [<https://perma.cc/WL48-ESV4>].

14. Comm. on the Elim. of Discr. against Women, Rep. of the Eighty-Fifth Session, at 5, U.N. Doc. CEDAW/C/2023/II/CRP (2023).

15. Comm. on the Elim. Of Discrim. against Women, List of Issues and Questions in Relation to the Ninth Periodic Report of China, at 4, U.N. Doc. CEDAW/C/CHN/Q/9 (2021).

16. *Women Elected Officials by Race/Ethnicity*, CTR. FOR AM. WOMEN AND POLITICS, <https://cawpdata.rutgers.edu/women-elected-officials/race-ethnicity> [<https://perma.cc/3UMB-QSMV>] (last visited Nov. 27, 2023); Gertrude Oforiwa Fefoame, *We Cannot Keep Leaving Women with Disabilities Behind in Leadership*, AFRICAN ARGUMENTS (May 4, 2022), <https://africanarguments.org/2022/05/we-cannot-keep-leaving-women-with-disabilities-behind-in-leadership/> [<https://perma.cc/Y98Z-CTJT>]; *Facts and Figures: Women and Girls with Disabilities*, UN WOMEN, <https://www.unwomen.org/en/what-we-do/women-and-girls-with-disabilities/facts-and-figures> [<https://perma.cc/7Y9E-R3J2>].

17. U.N. Women, Global Data on Women's Political Participation, <https://localgov.unwomen.org/data/> [<https://perma.cc/VZ27-USZX>] (last visited Nov. 27, 2023) (*Compare* results from (1) Select Indicator: Number of Elected Women in Local Deliberative Bodies, Select Year: 2023, Select Region: World (Global), *with* results from (2) Select Indicator: Number of Elected Women in Local Deliberative Bodies, Select Year: 2022, Select Region: World (Global)).

18. *Id.*

19. See U.N. Office on Drugs and Crime, Gender-related Judicial Integrity Issues, at 4 (2019), https://www.unodc.org/ji/resdb/data/2019/gender-related_judicial_integrity_issues.html?lng=en&match=gender%20related [<https://perma.cc/M3CW-8WP8>]; *Judicial Power: Percentage of Women Judges in the Highest Court or Supreme Court*, GENDER EQUAL. OBSERVATORY FOR LATIN AMERICA AND THE CARIBBEAN, <https://oig.cepal.org/en/indicators/judicial-power-percentage-women-judges-highest-court-or-supreme-court> [<https://perma.cc/PH82-C9RT>] (last visited Nov. 27, 2023).

in June 2023, when Kao Meng-hsun became the first woman Chief Justice appointed by the Supreme Court of the Republic of China in Taiwan.²⁰

B. LEGAL EQUALITY IN CONSTITUTIONS AND LAWS

The World Bank's Women, Business, and the Law reports that "women still have only three-quarters of the legal rights of men, and nearly 2.4 billion women of working age still do not have the same legal rights as men."²¹ Further:

The global average Women, Business and the Law score is 77.1 out of 100 in 2022, only half a point higher than in 2021. Today, only 14 economies (Belgium, Canada, Denmark, France, Germany, Greece, Iceland, Ireland, Latvia, Luxembourg, the Netherlands, Portugal, Spain, and Sweden) score 100 on the index, meaning that women are on an equal legal standing with men in all of the areas measured (table ES.1). Nearly 90 million women of working age gained legal equality in the last decade. Yet, 2.4 billion women of working age do not have the same legal rights as men.²²

Alarming, the World Bank states that "progress toward equal treatment for women has fallen to its weakest pace in twenty years."²³

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 2022.²⁴ The meeting focused on ASEAN's efforts in its goal 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."²⁵ In September, ASEAN and the U.S. issued a joint statement in furtherance of the ASEAN-US dialogue on gender equality and women's empowerment.²⁶

20. Jono Thomson, *Taiwan's First Female Supreme Court Chief Justice Takes Office*, TAIWAN NEWS (Jun. 1, 2023), <https://www.taiwannews.com.tw/en/news/4907217> [<https://perma.cc/5VAW-LRUX>].

21. WBG, WOMEN, BUSINESS AND THE LAW 2023 2 (2023), <https://wbl.worldbank.org/content/dam/sites/wbl/documents/2023/Executive%20Summary.pdf> [<https://perma.cc/LS2L-WLXE>].

22. *Id.*

23. *Id.*

24. See *ASEAN Commits to Promote and Protect Rights of Women and Children*, ASS'N OF SOUTHEAST ASIAN NATIONS (Sep. 22, 2022), <https://asean.org/asean-commits-to-promote-and-protect-rights-of-women-and-children/> [<https://perma.cc/9JM4-V5GK>].

25. See *id.*

26. ASEAN, Joint Statement of the ASEAN – US Ministerial Dialogue on Gender Equality and Women's Empowerment (Sept. 30, 2022), <https://asean.org/joint-statement-of-the-asean-u-s-ministerial-dialogue-on-gender-equality-and-womens-empowerment> [<https://perma.cc/VY9Y-ZRDS>].

1. *Right to Economic and Social Equality*

Multilayered crises face the world today, like cost of living increases, pandemic and other health emergencies, the climate crisis, and stalled progress in closing the gender gap in most countries.²⁷ The term “gender gap” refers to the difference between men and women as reflected in cultural, intellectual, social, political, and economic²⁸ attitudes towards each respective gender and each gender’s attainment and achievement reflective of existing attitudes.²⁹ The 2022 global gender gap closed by 68.1 percent, which is a 0.2 percent increase from 2021.³⁰ While eighty-seven countries have worked to close their gender gap, fifty-eight countries have reversed their gender gap since 2021.³¹ With the current rate of progression, the World Economic Forum and the United Nations concluded it will take 132–300 years to close the gender gap entirely.³²

2. *Marriage Rights*

According to a report published by Human Rights Campaign Foundation, thirty-four nations recognize and legalize same-sex marriages, including, most recently, Estonia, where the Parliament enacted legislation legalizing same-sex marriage on June 23, 2023 (effective January 1, 2024).³³ Of the thirty-four nations recognizing marriage equality, including same-sex marriage, twenty-three countries legalized same-sex marriage nationally through legislation.³⁴ Ten countries legalized same-sex marriage through court decisions, and two countries enacted legislation legalizing same-sex marriage after court decisions, mandating that legislation was required.³⁵

On June 28, 2023, Nepal’s Supreme Court ordered that same-sex marriages be registered, despite legislation remaining in the nation’s Civil Code that limits marriage registration to unions between a man and a woman.³⁶ Nepal is not included in the Human Rights Campaign Foundation’s report.

27. WORLD ECON. F., GLOBAL GENDER GAP REPORT 2022 4 (2022), https://www3.weforum.org/docs/WEF_GGGR_2022.pdf [https://perma.cc/3PTM-BRD4].

28. 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/Y473-VWA6].

29. *Id.*

30. GLOBAL GENDER GAP REPORT 2022, *supra* note 27, at 5.

31. *See id.* at 9.

32. *See id.*; *see also* U.N. Women, Progress on the Sustainable Development Goals, at 10 (2022), https://www.unwomen.org/sites/default/files/2022-09/Progress-on-the-sustainable-development-goals-the-gender-snapshot-2022-en_0.pdf [https://perma.cc/TMX9-5ARH].

33. *Marriage Equality Around the World*, HUMAN RIGHTS CAMPAIGN, <https://www.hrc.org/resources/marriage-equality-around-the-world> [https://perma.cc/2M6P-QAK5].

34. *Id.*

35. *Id.*

36. Meenakshi Ganguly, *Nepal’s Historic Achievement on Marriage Equality*, HUM. RTS. WATCH (Jul. 5, 2023), <https://www.hrw.org/news/2023/07/05/nepals-historic-achievement-marriage-equality> [https://perma.cc/LSJ4-MMGH].

On October 17, 2023, India's Supreme Court declined to recognize same-sex marriage, concluding that the legislature, and not the courts, are the appropriate branch of government to make such a decision.³⁷

In Uganda, Human Rights Watch (HRW) reported that President Yoweri Museveni signed into law legislation titled "The Anti-Homosexuality Act of 2023."³⁸ HRW reports that the legislation includes the death penalty for actions characterized in the statute as "aggravated homosexuality."³⁹

The U.S. Supreme Court issued its decision in *303 Creative LLC v. Elenis* on June 30, 2023, holding that the First Amendment of the United States Constitution prohibits the state of Colorado "from forcing a website designer to create expressive designs speaking messages with which the designer disagrees."⁴⁰ This holding builds on the U.S. Supreme Court case law set out in *Masterpiece Cakeshop, Ltd., v. Colorado Civil Rights Commission*, decided in 2018, which held similarly that a cakeshop could not be required to provide its baking and decorating services to a same-sex couple, relying upon the "free exercise" clause of the U.S. Constitution.⁴¹

3. *Right to Health*

The United Nations High Commissioner for Refugees estimates that over 108 million people were forcibly displaced worldwide⁴² until 2022, and that number is likely to increase in 2023 due to several humanitarian emergencies and ongoing conflicts.⁴³ Women are reported to be more than half of displaced people,⁴⁴ and when found in such situations, they have their access to health care—especially sexual and reproductive health (SRH) care—hindered.

Women refugees and internally displaced women suffer from gender-based discrimination, marginalisation, and sexual and gender-based violence;

37. "India's Top Court Declines to Legalise Same-Sex Marriage," REUTERS, <https://www.reuters.com/world/india/india-top-court-declines-allow-same-sex-marriages-2023-10-17/>.

38. Ashwanee Budoo-Scholtz, *Uganda's President Signs Repressive Anti-LGBT Law*, HUM. RTS. WATCH (May 30, 2023), <https://www.hrw.org/news/2023/05/30/ugandas-president-signs-repressive-anti-lgbt-law> [https://perma.cc/2F7K-8R6T].

39. *Id.*

40. *303 Creative LLC v. Elenis*, 600 U.S. 570, 572 (2023).

41. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 585 U.S. 617, 639 (2018).

42. U.N. High Commissioner for Refugees, *Figures at a Glance*, <https://www.unhcr.org/us/about-unhcr/who-we-are/figures-glance> [https://perma.cc/8WR5-9KPQ] (last visited Nov. 28, 2023).

43. See Sigal Samuel, *Palestinians Fear They're Being Displaced Permanently. Here's Why That's Logical*, VOX (Oct. 27, 2023), <https://www.vox.com/world-politics/23933707/israel-palestine-hamas-gaza-nakba-displacement-refugees-history> [https://perma.cc/5AKK-3ENY].

44. *Five Facts About What Refugee Women Face*, WOMEN FOR WOMEN INT'L (Jun. 5, 2023), https://womenforwomen.org.uk/blog/5-facts-about-what-refugee-women-face?gclid=Cj0KCCQiA35urBhDCARIsAOu7QwnJV0R57NgklEhmgEn_Qf5Dxvk3DcGSNiuHov4WTUaOBajgcOsRJYaAhChEALw_wcB [https://perma.cc/ZA7F-M67K].

statistics indicate that one in five women refugees experiences some sort of sexual violence.⁴⁵ In Sudan, there are reports of refugee women and girls being internally displaced and suffering gender-based violence and conflict-related sexual violence (CRSV),⁴⁶ In September 2023, the United Nations Fact-Finding Mission in Venezuela received information of sexual violence against women and girls perpetrated by the Bolivarian National Armed Forces agents at checkpoints.⁴⁷

Such acts result in women and girls experiencing unwanted pregnancies and sexually transmitted diseases.⁴⁸ The lack of access to SRH might increase the risk of pregnancy due to the scarcity of contraception, overall medical complications, disabilities, and death.⁴⁹ When displaced women and girls reach their countries of destination, they encounter issues regarding their documentation while trying to access healthcare facilities in their everyday circumstances.⁵⁰ Such barriers raise concerns specifically for victims of CRSV, given that host countries impose legal barriers on access to SRH.⁵¹

After the eruption of conflict, Ukrainian women who fled to Hungary, Poland, Romania, and Slovakia in search of refuge from the hostilities are having a hard time obtaining health care, and their only alternative is of returning to Ukraine temporarily to seek SRH, which can be costly, risky, and against time sensitive matters, such as SRH for CRSV victims.⁵²

In July 2023, Senior United Nations officials, regarding the increasing reports of gender-based violence in Sudan, called for an immediate end to gender-based violence, urged all parties to respect their obligations under international humanitarian law and human rights law, and to allow safe passage for survivors of conflict to access health care, including women and girls.⁵³

45. *Id.*

46. *Sudan: Top UN Officials Sound Alarm at Spike in Violence against Women and Girls*, WHO (Jul. 5, 2023), <https://www.who.int/news/item/05-07-2023-sudan-top-un-officials-sound-alarm-at-spike-in-violence-against-women-and-girls> [https://perma.cc/46DP-6Y5U].

47. *Venezuela: Events of 2022*, HUM. RTS. WATCH, <https://www.hrw.org/world-report/2023/country-chapters/venezuela> [https://perma.cc/G45F-UNTU].

48. Allison Ruby Reid-Cunningham, *Rape as a Weapon of Genocide*, 3 GENOCIDE STUD. AND PREVENTION 279, 283 (2008).

49. *See Sexual and Reproductive Health and Rights*, WOMEN'S REFUGEE COMM., <https://www.womensrefugeecommission.org/focus-areas/sexual-reproductive-health-rights/> [https://perma.cc/NYG8-BDM7].

50. *See NATALIA CINTRA ET AL.*, DISPLACEMENT, HUM. RTS. AND SEXUAL AND REPROD. HEALTH 89 (2023).

51. *See CTR. FOR REPROD. RIGHTS, CARE IN CRISIS: FAILURES TO GUARANTEE THE SEXUAL AND REPRODUCTIVE HEALTH AND RIGHTS OF REFUGEES FROM UKRAINE IN HUNGARY, POLAND, ROMANIA AND SLOVAKIA* 9 (2023).

52. *Id.*

53. WHO, *supra* note 46.

Maternal mortality is an important metric for the quality of healthcare systems and gender discrimination.⁵⁴ According to a 2023 report on maternal mortality released by several United Nations agencies, including the World Health Organization, a woman dies during pregnancy or childbirth every two minutes.⁵⁵ In Venezuela, due to the humanitarian emergency, SRH services for women have been debilitated, and by March 2023, there were contraceptive shortages as well as lack of appropriate obstetric health care for pregnant women.⁵⁶ Venezuelan women are fleeing their country to find health care elsewhere, driven by the fear of dying in childbirth, among other reasons.⁵⁷

In Venezuela, maternal mortality at the national level has a rate of 124 deaths per 100,000 live births,⁵⁸ and South Sudan has a rate of 1,223 deaths per 100,000 live births.⁵⁹ Since the Taliban's takeover in 2021, maternal deaths have increased in Afghanistan at a ratio of 620.40 deaths per 100,000 live births due to the incapacitation of the healthcare system, which used to be funded in part by international aid.⁶⁰ Therefore, even though there are several treaties, such as CEDAW, that aim to protect maternal rights and women's access to health care, the numbers of maternal deaths are still high.⁶¹

In Ethiopia, for instance, sixty-five percent of women suffer from female genital mutilation (FGM), which can lead to complications during birth.⁶² The United Nations Populations Fund estimates that in 2023 nearly 4.3 million girls were at risk of FGM. July 2023 marked the twentieth anniversary of the Maputo Protocol, which explicitly prohibits FGM under Article 5 on the Elimination of Harmful Practices.⁶³ Nevertheless, member

54. GEO. INST. FOR WOMEN, PEACE & SEC., WOMEN PEACE AND SECURITY INDEX 2023/24: TRACKING SUSTAINABLE PEACE THROUGHOUT INCLUSION, JUSTICE, AND SECURITY FOR WOMEN 26 (2023).

55. *A Woman Dies Every Two Minutes Due to Pregnancy or Childbirth: UN Agencies*, WHO (Feb. 23, 2023), <https://www.who.int/news/item/23-02-2023-a-woman-dies-every-two-minutes-due-to-pregnancy-or-childbirth--un-agencies#:~:text=Every%20two%20minutes%2C%20a%20woman,by%20United%20Nations%20agencies%20today>. [https://perma.cc/N4AG-P7CT]

56. *World Report 2023, Venezuela: Events 2022*, HUM. RTS. WATCH, <https://www.hrw.org/world-report/2023/country-chapters/venezuela> [https://perma.cc/7MEL-LJXC] (last visited Nov. 27, 2023).

57. *Id.*

58. HUM VENEZUELA, FOLLOW-UP REPORT ON THE IMPACTS OF THE COMPLEX HUMANITARIAN EMERGENCY IN VENEZUELA FOLLOWING THE CONFINEMENT DUE TO THE COVID PANDEMIC 32 (2022).

59. GEO. INST. FOR WOMEN, PEACE & SEC., *supra* note 54, at 26.

60. See Esther Sharma et. al, *To Sustain Maternal and Newborn Health in Afghanistan Under the Taliban Regime, Midwifery Must be Prioritised*, THE BMJ (Mar. 11, 2022), <https://www.bmj.com/content/376/bmj.o653> [https://perma.cc/Q8PU-48JK].

61. See *id.*

62. UNICEF, A PROFILE ON FEMALE GENITAL MUTILATION IN ETHIOPIA 3 (2020), <https://www.unicef.org/ethiopia/media/2261/file/A%20Profile%20of%20Female%20Genital%20Mutilation%20.pdf> [https://perma.cc/M3JR-N8R5].

63. African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, art. 5, at 7–8 (July 11, 2003), <https://www.ohchr.org/sites/default/>

States have a long way to go to protect women and girls. Statistics from 2023 reflect high prevalence of FGM against women and girls aged fifteen to forty-nine years among the following member States: Somalia (ninety-nine percent), Guinea (ninety-five percent), Djibouti (ninety-four percent), Mali (eighty-nine percent), Egypt & Sudan (eighty-seven percent), Eritrea & Sierra Leone (eighty-three percent), Burkina Faso (seventy-six percent), The Gambia (seventy-three percent), Mauritania (sixty-seven percent), and Ethiopia (sixty-five percent).⁶⁴

Also, the Brazilian Supreme Court opened a session in September 2023 to decide whether abortion up to the twelfth week of pregnancy will be decriminalized nationwide, as abortion is only permitted in cases of rape, evident risk to the mother's life, or if the fetus has a brain malformation.⁶⁵ Other types of abortion are criminalized under the Brazilian Criminal Code.⁶⁶ The Supreme Court's Chief at the time, Justice Rosa Weber, put the issue forward and voted in favor before she retired in October.⁶⁷ Ten more justices have yet to vote, however, and there is not a set date for the hearing to proceed.⁶⁸

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.⁶⁹ The UN initiative, UNITE to End Violence Against Women,⁷⁰ raises awareness about violence against women and femicide.⁷¹ Approximately one in three women is subjected to physical or sexual intimate partner violence, or non-partner sexual violence,

files/Documents/Issues/Women/WG/ProtocolontheRightsofWomen.pdf [https://perma.cc/JC8W-MUE6].

64. MAKE EVERY WOMAN COUNT, ET. AL, TWENTY YEARS OF THE MAPUTO PROTOCOL: WHERE ARE WE NOW? 63 (2023), <https://equalitynow.storage.googleapis.com/wp-content/uploads/2023/07/07093522/Maputo-Protocol-Report.pdf> [https://perma.cc/4584-7VU3].

65. Mauricio Savarese, *Brazil's Top Court Opens Vote to Decriminalizing Abortion Up to 12th Week of Pregnancy*, AP NEWS (Sept. 22 2023), <https://apnews.com/article/brazil-abortion-supreme-court-decriminalization-90c4b92d4ea46d804c7b165871155329> [https://perma.cc/J8MG-2PQE].

66. See *Women's Rights, Abortion: Brazil*, HUM. RTS. WATCH, <https://www.hrw.org/legacy/women/abortion/brazil.html> [https://perma.cc/B7FV-FVHY] (last visited Apr. 17, 2024).

67. Savarese, *supra* note 65.

68. *Id.*

69. See Meghan Ott, *Gender-Based Violence (GBV) Includes Physical, Sexual, Verbal, Emotional, and Psychological Abuse, Threats, Coercion, and Economic or Educational Deprivation*, WOMEN FOR WOMEN INT'L (June 4, 2021), <https://www.womenforwomen.org/blogs/series-what-does-mean-gender-based-violence> [https://perma.cc/6MXG-JBEK].

70. U.N. Women, UNITE to End Violence Against Women Campaign (2022), <https://www.unwomen.org/en/what-we-do/ending-violence-against-women/unite> [https://perma.cc/MPY3-M8GD].

71. *Id.*

at least once in their lifetime,⁷² and less than forty percent of women who are victims of violence seek help.⁷³

A. SEXUAL HARASSMENT

1. *Domestic Sexual Harassment Laws*

The most significant development in the laws concerning sexual harassment at the workplace in the United States may be the continuing reconceptualization of “sexual harassment.” A broadly defined concept of “sex-based harassment” has gradually replaced the narrowly construed “sexual harassment” in state and federal laws. Most recently, “sex-based harassment” is incorporated in the U.S. Equal Employment Opportunity Commission’s (EEOC) proposed Enforcement Guidance on Harassment in the Workplace.⁷⁴ “Sex-based harassment” adopts an expanded definition of “sex,” which extends the meaning of “sex” in Title VII of the Civil Rights Act of 1964 to sexual orientation and gender identity, as the U.S. Supreme Court held in its 2020 decision in *Bostock v. Clayton County*.⁷⁵ “Sex-based harassment” broadens the types of prohibited discriminatory, hostile, or offensive actions based on sex.⁷⁶ Sex-based harassment does not have to be of a sexual nature. Harassment based on sex includes non-sexual discriminatory or offensive conducts based on gender identity, sexual orientation, and other sex-related conditions.⁷⁷ For example, repeated offensive comments on pregnancy, childbirth, or an employee’s decision on abortion or contraception create a hostile and offensive work environment and consequently constitute sex-based harassment.⁷⁸

2. *Regional and International Sexual Harassment Laws*

The International Labour Organization (ILO) has continued its global campaign to promote the ratification of Convention No. 190 (C190), the world’s first international treaty to address violence and harassment in the world of work, including gender-based violence and harassment.⁷⁹ C190

72. See Press Release, U.N. 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/J5NC-4VST>].

73. *Id.*

74. *Proposed Enforcement Guidance on Harassment in the Workplace*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (Sept. 29, 2023), <https://www.eeoc.gov/proposed-enforcement-guidance-harassment-workplace#> [<https://perma.cc/5CFL-TLJZ>].

75. See *Bostock v. Clayton Cnty., Ga.*, 590 U.S. 644, 655 (2020).

76. *Proposed Enforcement Guidance on Harassment in the Workplace*, *supra* note 74.

77. *Id.*

78. *Id.*

79. INT’L LABOUR ORG., ELIMINATING VIOLENCE AND HARASSMENT IN THE WORLD OF WORK CONVENTION NO. 190, RECOMMENDATION NO. 206, AND THE ACCOMPANYING RESOLUTION 1 (2019), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_721160.pdf [<https://perma.cc/FBE9-SZA8>].

requires ratifying governments to enact laws and policies to prevent and address violence and harassment in the world of work.⁸⁰

As of November 2023, there are now thirty-six ratifications of C190: Albania, Antigua and Barbuda, Argentina, Australia (will enter into force in June 2024), Bahamas, Barbados, Belgium (will enter into force in June 2024), Canada (entered into force in January 2024), Central African Republic, Chile (will enter into force in June 2024), Ecuador, El Salvador, Fiji, France (will enter into force in April 2024), Germany (will enter into force in June 2024), Greece, Ireland (entered into force in January 2024), Italy, Lesotho (will enter into force in March 2024), Mauritius, Mexico, Namibia, Nigeria, North Macedonia (will enter into force in October 2024), Norway (will enter into force in October 2024), Panama, Papua New Guinea (will enter into force in September 2024), Peru, Rwanda (will enter into force in November 2024), San Marino, Somalia, South Africa, Spain, Uganda (will enter into force in August 2024), the United Kingdom of Great Britain and Northern Ireland, and Uruguay.⁸¹

Regionally, the European Union (E.U.) has recently adopted a draft decision calling on all E.U. member states to ratify C190 without delay.⁸² Moreover, the United States also recently announced in May 2023 a new partnership between the U.S. Department of Labor and the International Labour Organization to curb gender-based violence and harassment in the world of work.⁸³ The partnership aims to end violence and harassment in the world of work in the U.S. by “uplifting the principles and promising practices featured in [C190].”⁸⁴

B. ELIMINATION OF VIOLENCE AGAINST WOMEN

As noted previously, 2023 marked the twentieth anniversary of the Maputo Protocol. This Protocol guarantees “extensive rights to women,” including “the right to take part in the political processes, to social and political equality with men, improved autonomy in their reproductive health decisions, and an end to harmful traditional practices such as female genital mutilation,” along with other rights.⁸⁵

80. *Id.* at 7.

81. See *Ratifications of C190 – Violence and Harassment Convention, 2019 (No. 190)*, Int’l Labor Org. (Jun 25, 2021), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:3999810 [<https://perma.cc/MYB8-H9FQ>].

82. Rothna Begum & Negar Mohtashami Khojasteh, *EU Advances Treaty to End Violence and Harassment at Work*, HUM. RTS. WATCH (Sept. 19, 2023), <https://www.hrw.org/news/2023/09/19/eu-advances-treaty-end-violence-and-harassment-work> [<https://perma.cc/LA73-4N7M>].

83. Press Release, U.S. Dep’t of Labor, US Department of Labor, International Labour Organization, Announce Partnership to Curb Gender-Based Violence and Harassment in World of Work (May 25, 2023), <https://www.dol.gov/newsroom/releases/wb/wb20230525> [<https://perma.cc/R3CD-69YQ>].

84. *Id.*

85. African Union, Women, Gender and Youth, Maputo Protocol on the Rights of Women in Africa: Commemorating 20 Years (July 5, 2023), <https://au.int/en/newsevents/20230705/maputo-protocol-20-years> [<https://perma.cc/2FTY-U5NX>].

1. *Domestic Violence as a Criminal Offense*

In November the Irish Minister for Justice introduced a new stand-alone offense for non-fatal strangulation and non-fatal suffocation.⁸⁶ Minister of Justice Helen McEntee stated the new offense is intended to target “non-fatal strangulation, which can be a precursor to murder in domestic abuse situations.”⁸⁷ Also introduced was a stand-alone offense for stalking, which the Minister determined is a common behavior in domestic abuse situations.⁸⁸

In the United States, Michigan passed a law banning any person convicted of a misdemeanor involving domestic violence from possessing, carrying, or distributing firearms.⁸⁹ The law also expands the meaning of a “misdemeanor involving domestic violence” to include vulnerable adult abuse, willful and malicious destruction of another’s property or home, online stalking or harassment, and more.⁹⁰

2. *Online Abuse and Violence*

Because of its scale, speed, and impact, online abuse and violence can quickly spread, making it difficult to stop.⁹¹ The United Nations marked November 25 as the International Day for the Elimination of Violence against Women to more actively combat the issue.⁹²

Political violence remains one of many barriers to women pursuing or serving in political roles. For example, although Brazil recognized women’s political voting rights in 1932 and despite ongoing efforts to increase representation in political spheres, including the introduction of regulatory and advocacy measures, closing the political gender parity gap remains an uphill battle with politically gendered violence.⁹³

86. Criminal Justice (Miscellaneous Provisions) Act 2023 (Act No. 24/2023) (Ir.), <https://www.irishstatutebook.ie/eli/2023/act/24/section/23/enacted/en/html#sec23> [<https://perma.cc/8JWV-NL3E>].

87. Press Release, Dep’t of Justice, Ministers McEntee and Browne Pass Legis. to Deliver Range of New Offences to Tackle Crime and Protect Victims (July 12, 2023) (Ir.), <https://www.gov.ie/en/press-release/cb588-wide-ranging-criminal-justice-miscellaneous-provisions-bill-enacted/#> [<https://perma.cc/V89Z-JT5G>].

88. *See id.*

89. *See* 2023 Mich. Pub. Acts 201, § 224(f).

90. *Id.*; 2023 Mich. Pub. Acts 199, §§ 145(n), 377(a), 540(e).

91. U.N. Women, Creating Safe Digital Spaces Free of Trolls, Doxing, and Hate Speech (Nov. 13, 2023), <https://www.unwomen.org/en/news-stories/explainer/2023/11/creating-safe-digital-spaces-free-of-trolls-doxing-and-hate-speech> [<https://perma.cc/U477-KA5W>].

92. Ewelina U. Ochab, *Violence Against Women and Girls Today: One Killed Every 11 Minutes*, FORBES (Nov. 25, 2023), <https://www.forbes.com/sites/ewelinaochab/2023/11/25/violence-against-women-and-girls-today-one-killed-every-11-minutes/?sh=3f12d5c91e5d> [<https://perma.cc/V7KK-W8MT>].

93. Paul Tavares & Gustavo Borges, *Disinformation and Online Political Violence Against Women in Brazil*, WILSON CTR. (Sept. 19, 2023), <https://www.wilsoncenter.org/article/disinformation-and-online-political-violence-against-women-brazil> [<https://perma.cc/9MXE-YAL2>].

3. *Regional Instruments and Guidelines*

In Latin America, the 1994 Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Belém do Pará Convention) is the principal treaty for tackling harassment and other forms of violence against women.⁹⁴ 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 U.S.⁹⁵ Under the Belém do Pará Convention, the Follow-up Mechanism to the Belém do Pará Convention (MESECVI) monitors the implementation of the treaty by its parties.⁹⁶

In Europe, the 2011 Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) is the principal instrument for addressing violence against women.⁹⁷ 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.⁹⁸

III. Human Trafficking

According to the Harvard International Law Journal, human trafficking is one of the gravest human rights violations and affects every country of the world.⁹⁹ With annual profit as high as \$150 billion, it represents the world's third largest and most profitable crime industry after illicit drug and arms trafficking.¹⁰⁰ According to the International Labor Organization (ILO) and the United Nations Migration Agency, in 2016 alone, over forty million people were victims of "modern slavery."¹⁰¹ To break it down, more than

94. Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women "Convention of Belem Do Para," June 9, 1994, 33 I.L.M. 1534; *see also* ORG. OF AM. STATES & COUNCIL OF EUROPE, REGIONAL TOOLS TO FIGHT VIOLENCE AGAINST WOMEN 10 (2014) [hereinafter REGIONAL TOOLS], <https://www.oas.org/en/mesecvi/docs/mesecvi-coe-cswpub-en.pdf> [https://perma.cc/F25D-F4KF].

95. *Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women: Status of Signatures and Ratifications*, ORG. OF AM. STATES, <https://www.oas.org/juridico/english/sigs/a-61.html> [https://perma.cc/54QG-D6J9] (last visited Apr. 17, 2024).

96. *See OAS/CIM MESECVI, What is MECVI?*, ORG. OF AM. STATES, <https://www.oas.org/en/mesecvi/about.asp> [https://perma.cc/8QSV-VU6P].

97. Convention on Preventing and Combating Violence Against Women and Domestic Violence, May 11, 2011, C.E.T.S. 210; *see also* REGIONAL TOOLS, *supra* note 94, at 96.

98. *See About GREVIO – Group of Experts on Action Against Violence Against Women and Domestic Violence, Istanbul Convention*, COUNCIL OF EUROPE, <https://www.coe.int/en/web/istanbul-convention/grevio> [https://perma.cc/V7Q8-TW64].

99. Romina Morello & Frederika Schweighoferova, *Taking Down One of the World's Largest and More Profitable Criminal Industries: Trafficking in Persons (Part I)*, HARV. INT'L L. J. (May 13, 2021), <https://journals.law.harvard.edu/ilj/2021/05/taking-down-one-of-the-worlds-largest-and-more-profitable-criminal-industries-trafficking-in-persons-part-i/>. [https://perma.cc/8RUT-ZUX6].

100. *Id.*

101. *Id.*

twenty-five million have been victims of forced labor, including forced labor exploitation, forced sexual exploitation of adults, commercial sexual exploitation of children, and state-imposed forced labor; in addition, over fifteen million people were victims of forced marriage.¹⁰² Of this forty million, the report estimates that seventy-one percent of victims of “modern slavery” are women and girls, and one in four victims is a child.¹⁰³

The most widely accepted definition of human trafficking is included in the 2003 UN Trafficking Protocol (Trafficking Protocol),¹⁰⁴ adopted by 178 states.¹⁰⁵ According to Article 3(a) of the Protocol, to constitute trafficking in persons, three basic elements need to be established: an *action* (“recruitment, transportation, transfer, harboring or receipt of persons”) by certain *means* (“threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person”) for the *purpose of exploitation* (which “includes at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs”).¹⁰⁶

Women (forty-nine percent) and girls (twenty-three percent) make up the majority of all reported human trafficking cases, including ninety-nine percent of victims of sex trafficking and fifty-eight percent of victims in all other commercial industries.¹⁰⁷ The risk of human trafficking is heightened for women and girls in areas of extreme gender discrimination, gender-based violence, and conflict.¹⁰⁸ Discriminatory labor laws limit professional options for many women and girls, making them more susceptible to traffickers who promise opportunities for a better life.¹⁰⁹ High societal rates of gender-based violence can make it difficult for authorities to identify and stop traffickers who employ similar violence.¹¹⁰ Societies without rule of law and armed or extremist groups can easily target women and girls for forced marriage, sexual exploitation, and domestic servitude.¹¹¹ Various actors capitalize on conflict to exploit adults and children regardless of gender, such as the self-proclaimed Islamic State, Nigeria’s Boko Haram, Central Africa’s Lord’s Resistance Army, and several governments involved

102. *Id.*

103. *Id.*

104. G.A. Res. 55/25, Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Nov. 15, 2000) [hereinafter “Trafficking Protocol”].

105. *Human Trafficking in the Global Era*, WORLD 101 (Dec. 21, 2020), <https://world101.cfr.org/global-era-issues/globalization/human-trafficking-global-era> [https://perma.cc/44N8-R2RT].

106. Trafficking Protocol, art. 3(a).

107. *Human Trafficking in the Global Era*, *supra* note 105.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

in state-sponsored human trafficking.¹¹² “Men (twenty-one percent) and boys (seven percent) also constitute a significant share of human trafficking victims, including the majority of those trafficked in male-dominated industries such as agriculture, construction, and manufacturing.¹¹³ Men and boys also make up the majority of victims of organ removal.”¹¹⁴

According to the International Organization for Migration:

Climate change increases the risk of natural disasters and places a strain on livelihoods; it exacerbates poverty and can potentially cause situations of conflict and instability. These conditions, when combined with a mismatch between demand for labor and supply and the proliferation of unscrupulous recruitment agencies, increase high-risk behaviors and other negative coping strategies among affected populations. This may include resorting to migrant smugglers, which in turn makes migrants vulnerable to trafficking in persons (TiP) and associated forms of exploitation and abuse. The impact of climate change, however, is rarely considered as a potential contributor to human trafficking in global discussions or national level policy frameworks.¹¹⁵

A. INTERNATIONAL EFFORTS TO COMBAT HUMAN TRAFFICKING

Trafficking in persons is modern-day slavery, involving victims who are forced, defrauded, or coerced into labor or sexual exploitation.¹¹⁶ The ILO, the UN agency charged with addressing labor standards, employment, and social protection issues, estimated in 2022 that 27.6 million people worldwide were victims of forced labor, bonded labor, forced child labor, sexual servitude, and involuntary servitude.¹¹⁷ In 2000, the US Congress passed the Trafficking Victims Protection Act (TVPA), most recently reauthorized in 2022 and took effect in January 2023, “which provides tools for the U.S. to combat trafficking in persons, both domestically and abroad.”¹¹⁸ One of the law’s key components is the creation of the U.S. Department of State’s annual Trafficking in Persons Report, which assesses the government response in some 185 countries with a significant number of victims trafficked across their borders who are recruited, harbored, transported, provided, or obtained for forced labor or sexual exploitation.¹¹⁹

112. *Id.*

113. *Human Trafficking in the Global Era*, *supra* note 105.

114. *Id.*

115. INT’L ORG. FOR MIGRATION, THE CLIMATE CHANGE-HUMAN TRAFFICKING NEXUS 1, 3 (2016), https://publications.iom.int/system/files/pdf/mecc_infosheet_climate_change_nexus.pdf [<https://perma.cc/PFQ8-AWX6>].

116. *Trafficking in Persons*, THE WORLD FACTBOOK, <https://www.cia.gov/the-world-factbook/field/trafficking-in-persons/> [<https://perma.cc/ABK6-FFDJ>] (last visited Apr. 17, 2024).

117. *Id.*

118. *Id.*

119. See U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT JUNE 2023 (2023), https://www.state.gov/wp-content/uploads/2023/05/Trafficking-in-Persons-Report-2023_Introduction-Additional-Pagesv4_FINAL.pdf [<https://perma.cc/FNA9-3G78>].

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Fewer victims of trafficking in persons are being identified even as the COVID-19 pandemic and other crises are increasing vulnerabilities to exploitation, according to the latest Global Report on Trafficking in Persons published by the United Nations Office on Drugs and Crime (UNODC).¹²⁰ The number of victims detected globally fell by eleven percent in 2020 from the previous year, driven by fewer detections in low- and medium-income countries.¹²¹ The pandemic, in addition to reducing opportunities for traffickers to operate, may have weakened law enforcement capacities to detect victims.¹²² The seventh UNODC Global Report on Trafficking in Persons covers 141 countries and provides an overview of patterns and flows of trafficking in persons at global, regional and national levels, based on trafficking cases detected between 2017 and 2021.¹²³ The findings are further informed by analysis of 800 court case summaries and accompanied by detailed suggestions to policymakers to help formulate effective responses.¹²⁴ Fewer cases of trafficking for sexual exploitation were detected during the pandemic as public spaces were closed and related restrictions may have pushed this form of trafficking into more concealed and less safe locations, making it harder to identify victims.¹²⁵ Globally, the number of convictions for trafficking offenses also fell by twenty-seven percent in 2020 from the previous year—with sharper decreases registered in South Asia (fifty-six percent), Central America and the Caribbean (fifty-four percent) and South America (forty-six percent)—accelerating a longer-term trend registered by UNODC since 2017.¹²⁶ Court case analysis featured in the report further shows that trafficking victims, when they are identified, escape from traffickers on their own and are in effect “self-rescued”; there are more cases of victims escaping and reporting to authorities on their own initiative (forty-one percent) than cases where victims were located by law enforcement (twenty-eight percent) or by members of the community and civil society (eleven percent).¹²⁷

The report also details how war and conflict offer opportunities for traffickers to exploit. It shows that the war in Ukraine is elevating trafficking risks for the displaced population.¹²⁸ Most victims resulting from conflicts originate in and are trafficked to countries in Africa and the Middle East.¹²⁹ Breaking down trafficking in persons statistics by region, the report shows higher levels of impunity in Sub-Saharan Africa and South Asia.¹³⁰ Countries

120. U.N. OFFICE ON DRUGS AND CRIMES (UNODC), GLOBAL REPORT ON TRAFFICKING IN PERSONS 2022, U.N. Sales No. E.23.IV.1 (2022).

121. *Id.* at III.

122. *Id.*

123. *Id.* at 10.

124. *Id.*

125. *Id.* at IV.

126. GLOBAL REPORT ON TRAFFICKING IN PERSONS 2022, *supra* note 120, at VII

127. *Id.* at VI.

128. *Id.* at IX.

129. *Id.*

130. *Id.* at VIII.

in these regions convict fewer traffickers and detect fewer victims than the rest of the world.¹³¹ At the same time, victims from these regions are identified in a wider range of destination countries than victims from other regions.¹³² The 2022 Global Report on Trafficking in Persons also examines court cases showing that female victims are subject to physical or extreme violence at hands of traffickers at a rate three times higher than males, and children are subjected almost twice as often as adults.¹³³ At the same time, women investigated for trafficking in persons are also significantly more likely to be convicted than men.¹³⁴ This suggests that the justice system may discriminate against women, and that the role of women in trafficking networks may increase the likelihood that they are convicted for the crime.¹³⁵

B. REGIONAL AND TRANSREGIONAL EFFORTS TO COMBAT TRAFFICKING

1. *North America*

In June, the U.S. Department of State released the “2023 Trafficking in Persons Report.”¹³⁶ Both governmental and non-governmental organizations have been engaged in combatting human trafficking in North America.¹³⁷ Challenges persist in identifying victims, prosecuting traffickers, and providing comprehensive support services to survivors.¹³⁸ It underscores the need for increased regional cooperation and resources to effectively address human trafficking in North America.¹³⁹

2. *Europe*

The Group of Experts on Action Against Human Trafficking in Human Beings (GRETA) launched in 2023 its 12th General Report¹⁴⁰ covering 2022. In this report, GRETA raised alarm on human trafficking risks amid Russia's aggression in Ukraine, offering guidance and practical steps.¹⁴¹ It highlighted gaps in anti-trafficking measures, including low convictions and insufficient victim compensation access.¹⁴² In January, the UNODC released its 2022 Global Report on Trafficking in Persons.¹⁴³ Globally, a decrease

131. *Id.*

132. See GLOBAL REPORT ON TRAFFICKING IN PERSONS 2022, *supra* note 120, at VIII.

133. *Id.* at 18.

134. *Id.*

135. See *id.*

136. See TRAFFICKING IN PERSONS REPORT JUNE 2023, *supra* note 119.

137. See *id.*

138. *Id.* at 16, 23.

139. *Id.* at 14–20.

140. GRP. OF EXPERTS ON ACTION AGAINST HUMAN TRAFFICKING IN HUMAN BEINGS (GRETA), 12TH GENERAL REPORT (2023), <https://rm.coe.int/12th-general-report-on-greta-activities-covering-the-period-from-1-jan/1680ab9868> [<https://perma.cc/7P4Y-UWX5>].

141. *Id.* at 50–52.

142. *Id.* at 52.

143. GLOBAL REPORT ON TRAFFICKING IN PERSONS 2022, *supra* note 120.

in detected victims and prosecution figures occurred for the first time in twenty years.¹⁴⁴ Yet, Europe saw increased victim detections, especially in labor exploitation.¹⁴⁵ Interestingly, in parts of Europe, sexual exploitation no longer ranks as the primary form of trafficking.¹⁴⁶

3. *The Middle East*

In May 2023, in an effort to combat migrant smuggling from the Middle East to Europe, UNODC held a three-day liaison visit of Iraqi criminal justice experts to the European Union Agency for Law Enforcement Cooperation (Europol).¹⁴⁷ UNODC held a further workshop in July of 2023 to address the issue of trafficking relating to organ removal.¹⁴⁸

4. *Africa*

As noted by the United States Agency for International Development (USAID) trafficking in human beings remains a significant issue on the African continent.¹⁴⁹ In July 2023, the International Centre for Migration Policy Development (ICMPD) held its World Day against Trafficking Persons 2023 in Ghana.¹⁵⁰ This event was attended by the ECOWAS Commission (Economic Community of West African States) and its member states.¹⁵¹ The Regional Referral Mechanism for Victims of Trafficking was validated at the conference.¹⁵²

144. *Id.* at III.

145. *Id.* at 136.

146. *See id.*

147. U.N. Office on Drugs and Crime, UNODC Strengthens International Cooperation in Countering Transactional Organized Crime: Iraqi Criminal Justice Experts Visit Europol and Eurojust (June 9, 2023), https://www.unodc.org/unodc/en/human-trafficking/glo-act2/Countries/unodc-strengthens-international-cooperation-in-countering-transnational-organized-crime_-iraqi-criminal-justice-experts-visit-europol-and-eurojus.html [https://perma.cc/2JH5-N4GV].

148. U.N. Office on Drugs and Crime, Addressing a Blindspot in the Human Trafficking Movement: Milestone Workshop on the Investigation and Prosecution of Trafficking in Persons for Organ Removal Held in Kurdish Region of Iraq (July 30, 2023), https://www.unodc.org/romena/en/Stories/2023/July/addressing-a-blindspot-in-the-human-trafficking-movement_-milestone-workshop-on-the-investigation-and-prosecution-of-trafficking-in-persons-for-organ-removal-held-in-kurdish-region-of-iraq.html [https://perma.cc/4AFD-RSUD].

149. *See* U.S. AGENCY FOR INT'L DEV. (USAID), USAID ANTI-TRAFFICKING IN PERSONS PROGRAMS IN AFRICA: A REVIEW iii (2007), https://pdf.usaid.gov/pdf_docs/PDACJ521.pdf [https://perma.cc/KLZ2-YLLH].

150. *World Day Against Trafficking in Persons 2023*, INT'L CTR. FOR MIGRATION POL'Y DEV. (July 28, 2023), <https://www.icmpd.org/news/world-day-against-trafficking-in-persons-2023> [https://perma.cc/8J4G-VD53].

151. *Id.*

152. *Id.*

5. *Asia*

ASEAN (Association of Southeast Asian Nations), China, and UNODC met in September 2023 to address trafficking persons associated with casinos and scams.¹⁵³ The policy document and commitments by regional actors focused on the trafficking of human beings by transnational criminal organizations.¹⁵⁴ Currently, UNODC believes the trafficking in human beings for this type of forced criminal endeavor constitutes 10.2 percent of the total trafficking in human beings globally.¹⁵⁵

IV. Women, Peace, and Security

According to the Georgetown Institute for Women, Peace and Security's 2023 Women, Peace and Security Index, the year 2022 remains "the deadliest in terms of battle-related deaths from armed conflict since 1994, the year of the Rwandan genocide, and approximately 600 million women lived near armed conflict."¹⁵⁶ Additionally, "2022 marked the eighth consecutive year that global military expenditure rose, hitting a record-breaking \$2.2 trillion."¹⁵⁷

In 2023, the UN Security Council convened "Women's participation in international peace and security: from theory to practice" at its annual open debate on women peace and security.¹⁵⁸ Underpinning the urgency for turning theory to practice is the staggering data on the impact of conflict on women and girls.¹⁵⁹

The UN Secretary General noted in his 2023 Women, Peace, and Security report that climate change, the need for gender sensitive climate finance, addressing misogyny in the context of authoritarianism, and violent conflict remain issues to monitor as they disproportionately impact women and girls.¹⁶⁰

Since 2000, the United Nations Security Council has adopted a total of ten resolutions on women, peace, and security (WPS).¹⁶¹ These measures

153. U.N. Off. on Drugs and Crimes (UNODC), Policy Report: Casinos, Cyber Fraud, and Trafficking in Persons for Forced Criminality in S.E. Asia (2023), https://www.unodc.org/roseap/uploads/documents/Publications/2023/TiP_for_FC_Policy_Report.pdf [https://perma.cc/EN66-CL7P].

154. *See id.*

155. *Id.* at 1.

156. *See 2023 Women, Peace, and Security Index*, GIWPS (November 2023), <https://giwps.georgetown.edu/the-index/>.

157. U.N. Women, In Focus: The Women, Peace, and Security Debate (Oct. 24, 2023), <https://www.unwomen.org/en/news-stories/in-focus/2023/10/in-focus-the-women-peace-and-security-debate> [https://perma.cc/83E6-VZUD].

158. *Id.*

159. *Id.*

160. U.N. Secretary General, *Women and Peace and Security*, U.N. Doc. S/2023/725 (Sept. 28, 2023).

161. U.N. Women, Global Norms and Standards: Peace and Security, <https://www.unwomen.org/en/what-we-do/peace-and-security/global-norms-and-standards> [https://perma.cc/V6N2-NSU9] (last visited Apr. 17, 2024).

serve as the international policy framework for WPS and articulate the obligations of international and national stakeholders and are binding for the enforcement of global peace and stability.¹⁶² The resolutions are important for 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.¹⁶³

As of July 2023, 107 countries and territories have adopted dedicated National Action Plans (NAPs) on women, peace, and security.¹⁶⁴ Chad, Morocco, Somalia, Sri Lanka and Uruguay launched their first action plans and several countries renewed expired plans.¹⁶⁵

V. International Criminal Courts and Tribunals and Women's Rights Cases

A. INTERNATIONAL CRIMINAL COURT

The Office of the Prosecutor (OFP) of the International Criminal Court launched a new Policy on Gender-based Crimes (GBC) with the aim to strengthen and guide investigations and prosecutions of same, articulating OFP's position that "essentially all crimes under the Rome Statute can involve forms of sexual, reproductive, or other gender-based violence regardless of whether they have traditionally been seen as such."¹⁶⁶ This new policy identifies OFP's underlying principles of overcoming misconceptions and stereotypes, adopting an intersectional perspective, and taking a trauma-informed and survivor-centered approach in OFP's work on GBC.¹⁶⁷

B. INTER-AMERICAN COURT OF HUMAN RIGHTS

In the *Case of Rodriguez Pacheco et al. v. Venezuela*, the Inter-American Court of Human Rights declared Venezuela to be "internationally responsible" for violating the rights to a fair trial and judicial protection with regard to the rights of health and personal integrity and violating subsections (b), (f), and (g) of Article 7 of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women.¹⁶⁸ The violations

162. *See id.*

163. *See generally, Women and Peace and Sec., supra* note 160.

164. *Id.* ¶ 45.

165. *See id.*

166. Press Release, Int'l Crim. Ct., Office of the Prosecutor of the International Criminal Court Publishes New Policy on Gender-based Crimes (Dec. 5, 2023), <https://www.icc-cpi.int/news/office-prosecutor-international-criminal-court-publishes-new-policy-gender-based-crimes> [<https://perma.cc/Y2XA-LTHY>].

167. *Id.*

168. Press Release, Inter-Am. Ct. of Human Rights, Venezuela is Responsible for Deficiencies in the Judicial Proceedings on a Complaint of Acts of Obstetric Violence and Medical Malpractice That Took Place in a Private Hospital (Nov. 27, 2023), https://www.corteidh.or.cr/comunicados_prensa.cfm?lang=en&n=1984 [<https://perma.cc/8E8P-XX3D>].

stemmed from deficient judicial proceedings related to a complaint of medical malpractice and obstetric violence which occurred in a private hospital.¹⁶⁹

C. EUROPEAN COURT OF HUMAN RIGHTS

In April 2023, the European Court of Human Rights issued a Chamber Judgment, finding no violation of Article 8 of the European Convention on Human Rights in *A.H. and Others v. Germany*, a case in which German officials refused to record a transgender parent, whose child was conceived through the use of her sperm, as the child's mother on the birth certificate as she had not given birth to her child.¹⁷⁰ According to the court, and in line with the German legislature's intent, the former gender and forename of a transgender parent must be indicated on a child's birth certificate regardless of whether that parent's gender reclassification became final before or after the child's conception or birth.¹⁷¹

D. THE CONSTITUTIONAL COURT OF KYRGYZSTAN

In 2023, the Constitutional Court of Kyrgyzstan ruled that any Kyrgyz citizen over the age of sixteen can now choose a matronymic rather than a patronymic.¹⁷² The Kyrgyz Law "On Acts of Civil Status" was found unconstitutional and discriminatory for only allowing patronymic naming practices.¹⁷³

169. *Id.*

170. See generally 106 Eur. Ct. H.R. (2023) (refusal of German authorities to record a transgender parent as mother on the birth certificate of a child to whom she had not given birth did not violate Convention).

171. *Id.*

172. *Kyrgyz Court Allows 'Matronymics' in a Surprise Nod to Women's Rights*, REUTERS (July 4, 2023), <https://www.reuters.com/world/asia-pacific/kyrgyz-court-allows-matronymics-surprise-nod-womens-rights-2023-07-04/> [<https://perma.cc/VVZ8-ZAQM>]; Syinat Sultanalieva, *Kyrgyz Woman Wins Strategic Gender Equality Case*, HUM. RTS. WATCH (July 3, 2023), <https://www.hrw.org/news/2023/07/03/kyrgyz-woman-wins-strategic-gender-equality-case> [<https://perma.cc/7HMY-8DS2>].

173. Sultanalieva, *supra* note 172.

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This Article discusses significant legal developments in African Law from 2023.

I. North Africa

A. WESTERN SAHARA

1. *MINURSO Re-extended; Israel Recognizes Moroccan Claims*

In October, with tensions rising following Israel's support of Morocco's claim of sovereignty over the Western Sahara, the U.N. Security Council extended the Mission for the Referendum in Western Sahara (MINURSO) by another year.¹ The U.N. supports holding a referendum on self-determination,

* Committee Editor (Bodley); Angola (Silva, Frazão, Osório); Benin (Ed.); Botswana (Ed., Cocchi); Burkina Faso (Barad, Ed.); Burundi (Ed.); Cameroon (Ed.); Cape Verde (Silva, Frazão, Osório, Ed.); CAR (Ed.); Chad (Ed.); Comoros (Ed.); DRC (Ed.); Congo (Silva, Frazão, Osório); Côte d'Ivoire (Ed.); Djibouti (Ed.); Equatorial Guinea (Ed.); Eritrea (Ed., Cocchi); Ethiopia (Ed.); Gabon (Ed., [Silva, Frazão, Osório]); Gambia (Bah, Anyanwu); Ghana (Jones-Nelson); Guinea (Ed.); Guinea-Bissau (Ed.); Kenya (Mweseli); Lesotho (Ed.); Liberia (Williams); Madagascar (Ed.); Malawi (Mulwafu; Zawanda; Chitha); Mali (Barad); Mauritania (Ed.); Mauritius (Ed.); Mozambique (Silva, Frazão, Osório); Namibia (Ed.); Niger (Barad; Tossa); Nigeria (Anyanwu); Rwanda (Ed., Williams); São Tomé and Príncipe (Silva, Frazão, Osório, Ed.); Senegal (Ed.); Seychelles (Ed.); Sierra Leone (Ed.); Somalia (Ed.); South Africa (Gaskins); South Sudan (Chitha; Ed.); Sudan (Ed.); Swaziland (Eswatini) (Ed.); Tanzania (Ed.); Togo (Ed.); Uganda (Gitonga, Cocchi); Western Sahara (Cocchi, Ed.); Zambia (Ed.); Zimbabwe (Jones-Nelson; Anyanwu); AfCHPR (Ed.); AfComm. (Ed.); AU (Gaskins; Jones-Nelson); ECOWAS (Gassikia); EAC (Ed.); AfDB (Ed., Cocchi); Afreximbank (Williams); ECA (Ed.); SADC (Ed.); COMESA (Mweseli); IGAD (Ed., Cocchi); ECCAS (Ed.); OHADA (Ed.); UNMICT (Bah); biographies: <http://www.abanet.org/dch/committee.cfm?com=IC805000>.

1. Press Release, Security Council, Security Council Extends UN Mission for Referendum in Western Sahara by One Year, with Two Members Abstaining on Resolution, U.N. Press Release SC/15471 (Oct. 30, 2023), <https://press.un.org/en/2023/sc15471.doc.htm> [<https://perma.cc/WW4P-UZ7N>].

particularly after the International Court of Justice and other courts have ruled that Morocco's efforts to annex the territory are illegal.²

II. West Africa

A. BENIN

1. \$230 Million World Bank Package

In September, the World Bank approved \$230 million in financing from the International Development Association to help Benin strengthen private sector-led growth, boost revenue collection, and build social and climate resilience.³ Benin ranks 152 out of 181 countries on the extreme climate vulnerability index; flooding is exacting a heavy toll on the population and coastal erosion is among the area's highest.⁴

B. BURKINA FASO

1. Coups Drop Rating to "Not Free"

Burkina Faso saw the steepest drop in Freedom House's 2023 report, losing twenty-three points on its 100-point scale and falling from "partly free" to "not free" after two coups.⁵ In January 2022, Lieutenant Colonel Paul-Henri Sandaogo Damiba, leading the Patriotic Movement for Safe-guard and Restoration, ousted the elected president, suspended the constitution, dissolved the legislature, and instituted a curfew.⁶ Eight months later, he was replaced by another officer, Captain Ibrahim Traoré, who dismissed the transitional government, again suspended the constitution, closed the borders, and froze civil society organizations.⁷

C. CAPE VERDE

1. IMF/World Bank Call for New Tax Authority

Prepared under agreement with the International Monetary Fund (IMF),⁸ Law 16/X/2022 approved the 2023 State Budget which includes

2. Monir Ghaedi, *Morocco and Western Sahara: A New Conflict Brewing?*, DW (July 19, 2023), <https://www.dw.com/en/moroccos-territorial-claims-on-western-sahara-a-new-conflict-brewing/a-66288761> [<https://perma.cc/A9SB-L7YZ>].

3. Press Release: Benin: \$230 Million to Support Growth and Social and Climate Resilience, World Bank (Sept. 18, 2023), <https://www.worldbank.org/en/news/press-release/2023/09/18/benin-230-million-to-support-growth-and-social-and-climate-resilience> [<https://perma.cc/VY82-8KAQ>].

4. *Id.*

5. FREEDOM HOUSE, *FREEDOM IN THE WORLD 2023* 3-4 (2023), https://freedomhouse.org/sites/default/files/2023-03/FIW_World_2023_DigitalPDF.pdf [<https://perma.cc/5UZ6-M7NH>].

6. *Id.* at 4.

7. *Id.*

8. *State Budget 2023: DNRE on the Verge of Extinction*, AFR. PRESS (Aug. 29, 2022), <https://www.africa-press.net/cape-verde/all-news/state-budget-2023-dnre-on-the-verge-of-extinction> [<https://perma.cc/QMA5-4NPS>].

the following: research and development tax incentives for companies; reinvestment of profits; renewable energy production; and exemptions for excise duties on 4x4 vehicle imports.⁹ The country has been urged to reduce expenditures with the IMF and World Bank looking to create a new tax authority to aid in revenue collection, which is predicted to see the demise of the National Directorate of State Revenue.¹⁰

D. CÔTE D'IVOIRE

1. *IMF \$3.5 Billion Loan*

In May, the IMF approved a \$3.5 billion loan agreement with Côte d'Ivoire to tackle financial challenges, including the shocks of the pandemic, global monetary tightening, and the war in Ukraine.¹¹ Nearly \$500 million was made immediately available with further funds dependent on structural economic changes.¹²

E. GAMBIA

1. *Mutual Assistance Act*

In March, Gambia passed the Mutual Assistance in Criminal Matters Act, which enables the country to cooperate with foreign law enforcement agencies in investigating and prosecuting cross-border crime, which is important in pursuing accountability for human rights violations committed under former president Yahya Jammeh.¹³

2. *FGM Convictions*

In August, a court found three women guilty of practicing female genital mutilation (FGM), the first convictions since FGM was banned in the country in 2015.¹⁴ FGM convictions carry up to three years imprisonment,

9. See *2023 State Budget Law Published*, PWC (Mar. 1, 2024), <https://taxsummaries.pwc.com/Cabo-Verde/Corporate/Significant-developments> [<https://perma.cc/52DC-AFCP>]; see also *State Budget for 2023 Enacted*, MIRANDA ALL. (Jan. 2023), <https://www.mirandalawfirm.com/en/insights-knowledge/publications/alerts/state-budget-for-2023-enacted-3> [<https://perma.cc/D45Q-Y57G>].

10. See *State Budget 2023: DNRE on the Verge of Extinction*, *supra* note 8.

11. *IMF Approves \$3.5bn Loan Deal with Ivory Coast, US\$500 Million Released as Tranche 1*, GHANAWEB (May 25, 2023), <https://www.ghanaweb.com/GhanaHomePage/africa/IMF-approves-US-3-5bn-loan-for-Ivory-Coast-US-500-million-released-as-tranche-1-1773392> [<https://perma.cc/WFD6-SZSH>].

12. *Id.*

13. Musa Saho, *Mutual Assistance in Criminal Matters Act 2023 Passed by Parliament*, ATT'Y GEN.'S CHAMBERS & MINISTRY JUST. (Mar. 30, 2023), <https://www.moj.gm/news/be7b1924-cf07-11ed-8b02-025103a708b7> [<https://perma.cc/AXY2-8ZB9>].

14. See *Landmark Convictions Signal Progress in the Fight Against FGM in the Gambia*, UNFPA (Sept. 6, 2023), <https://gambia.unfpa.org/en/news/landmark-convictions-signal-progress-fight-against-fgm-gambia> [<https://perma.cc/A9DW-PY78>].

a fine of 50,000 dalasi (\$735), or both; up to life imprisonment where FGM leads to death.¹⁵

F. GHANA

1. *Death Penalty Abolished*

In August, President Nana Addo Dankwa Akufo-Addo assented to the Criminal Offences (Amendment) Bill 2022 and the Armed Forces (Amendment) Bill 2022, both of which abolish the death penalty for most crimes in Ghana.¹⁶ Although Ghana has not carried out an execution since 1993, its laws have provided for capital punishment for murder, genocide, treason, and smuggling, and its constitution still provides for it for high treason.¹⁷ Ghana had ratified the International Covenant on Civil and Political Rights (ICCPR) in 2000 but had yet to sign its Second Optional Protocol aimed at abolishing the death penalty.¹⁸

G. GUINEA

1. *Jailbreak Frees Former Leader*

In November, gunmen stormed Conakry's main prison and freed former dictator Moussa "Dadis" Camara, resulting in the justice minister announcing closure of the country's borders.¹⁹ Camara, who came to power in a 2008 coup, had been held in connection with a stadium massacre during his time in power.²⁰ Opposition parties initially welcomed a September 2021 coup that removed long-serving President Alpha Condé, who sparked anger for changing the constitution to run for a third term, but frustrations with the military government have been rising over the slow return to constitutional rule.²¹

H. GUINEA-BISSAU

1. *Opposition Groups Win Majority in Restored Parliament*

In June 2023, a coalition of opposition groups won a majority in parliament in the first legislative elections since President Umaro Sissoco

15. Women's Act § 74 (2010) (amended 2015) (Gam.), <https://www.lawhubgambia.com/womens-act-2010> [<https://perma.cc/X495-FYQX>].

16. *Ghana and the Death Penalty*, PARLIAMENTARIANS FOR GLOB. ACTION, <https://www.pgaction.org/ilhr/adp/gha.html> [<https://perma.cc/7Z3Q-F7J7>].

17. *Id.*

18. *Id.*

19. Rédaction Africanews & AP Staff, *Former Guinean Leader Dadis Camara Escapes from Prison in a Jailbreak*, AFRICANEWS (Nov. 4, 2023), <https://www.africanews.com/2023/11/04/former-guinean-leader-dadis-camara-escapes-from-prison-in-a-jailbreak/> [<https://perma.cc/VFW6-JVLM>].

20. *Id.*

21. *Guinea's Suppression of Protests Stokes Anger Against Military*, AL JAZEERA (May 25, 2023), <https://www.aljazeera.com/news/2023/5/25/guineas-suppression-of-protests-stokes-anger-against-military> [<https://perma.cc/4LLK-SKJQ>].

Embalo dissolved the assembly.²² Under the current system, the majority party or coalition appoints the government, but the president retains powers to dismiss it.²³ More than twenty political parties and coalitions vied for seats in the elections, the five-party Terra Ranka—a coalition led by the African Party for the Independence of Guinea and Cape Verde—winning fifty-four of 102 seats, ahead of Embalo's Madem G15 party, which gained twenty-nine.²⁴

I. LIBERIA

1. *Presidential Election Run-off*

Despite record turnout in the October presidential election, neither incumbent President Joseph Weah, running for reelection, nor opposition candidate Joseph Boakai received enough votes to win outright, leading to a run-off.²⁵ The eventual winner faces challenges to help Liberia recover from two civil wars and its 2013–2016 Ebola epidemic.²⁶

J. MAURITANIA

1. *Former President Tried*

Former President Mohamed Ould Abdel Aziz and nine other defendants went on trial in January; Aziz faces charges of unlawfully amassing more than \$72 million from his years in power.²⁷ Aziz was succeeded by Mohamed Ould Ghazouani in 2019 in the country's first transfer of power between elected leaders but was soon accused of financial misdealing.²⁸ In October 2023, a prosecutor sought a twenty-year sentence in the trial, which awaits judgment.²⁹

22. *Guinea-Bissau Opposition Wins Majority in Parliamentary Polls*, AL JAZEERA (June 8, 2023), <https://www.aljazeera.com/news/2023/6/8/guinea-bissau-opposition-wins-overall-majority-in-parliament-vote> [<https://perma.cc/AJC6-WWK3>].

23. *Id.*

24. *Id.*

25. *Liberia Presidential Election Heads for November Run-off Vote*, REUTERS (Oct. 24, 2023), <https://www.reuters.com/world/africa/liberia-presidential-election-goes-run-off-electoral-commission-2023-10-24/> [<https://perma.cc/3683-37P3>].

26. *Id.*

27. *Mauritanian ex-President in Court for Landmark Corruption Trial*, AL JAZEERA (Jan. 25, 2023), <https://www.aljazeera.com/news/2023/1/25/mauritanian-ex-president-in-landmark-corruption-trial> [<https://perma.cc/BC3W-BJ23>].

28. *Id.*

29. *Mauritania: Prosecutor Seeks 20 Years for Former President Aziz*, AFRICANEWS (Oct. 24, 2023), <https://www.africanews.com/2023/10/24/mauritania-prosecutor-seeks-20-years-for-former-president-aziz/> [<https://perma.cc/YA7C-RTCA>].

K. MALI

1. *Referendum Increases Executive Powers*

In June 2023, Malians approved constitutional changes in a referendum to pave the way to elections and a return to civilian rule, with opponents countering that the changes will give too much power to the president, currently Colonel Assimi Goita.³⁰ With the changes, the president will “determine the policies of the nation,” a role intended for the government under the 1992 constitution; the head of state will hire and fire the prime minister and cabinet members; and the government will answer to him, not to parliament.³¹ Mali has been under military rule since August 2020, when army officers forced out the country’s elected president, Ibrahim Boubacar Keita.³²

L. NIGER

1. *Coup Leader Dissolves Constitution*

In July 2023, Niger’s Presidential Guard overthrew President Mohamed Bazoum, dissolving the country’s constitution and suspending state institutions.³³ Responding to the coup, the Economic Community of West African States (ECOWAS) closed Niger’s borders, suspended trade and financial transactions, and threatened military intervention.³⁴

M. NIGERIA

1. *Contested Elections Confirmed*

In October 2023, the Supreme Court of Nigeria upheld the election of All Progressives Congress candidate Bola Tinubu to the presidency, ruling against the opposition’s challenges of fraud and electoral law violations from his two main contenders, the People’s Democratic Republic’s Atiku Abubakar and the Labour Party’s Peter Obi.³⁵

30. *Malians Approve Amendments to Constitution in Referendum*, AL JAZEERA (June 23, 2023), <https://www.aljazeera.com/news/2023/6/23/mali-approves-constitutional-amendments-in-a-referendum> [<https://perma.cc/WGV8-QARL>].

31. *Id.*

32. *Id.*

33. *Niger in the Grip of Attempted Coup Against President Mohamed Bazoum*, EURONEWS (July 27, 2023), <https://www.euronews.com/2023/07/27/niger-in-the-grips-of-attempted-coup-against-president-mohamed-bazoum> [<https://perma.cc/HH7C-9P6K>]; Elian Peltier et. al, *Niger’s Ousted President: Celebrated Abroad, Criticized at Home*, N.Y. TIMES (Aug. 18, 2023), <https://www.nytimes.com/2023/08/18/world/africa/niger-president-bazoum-coup.html> [<https://perma.cc/B8L7-CQFR>].

34. Nnamdi Obasi, *ECOWAS, Nigeria and the Niger Coup Sanctions: Time to Recalibrate*, INT’L CRISIS GRP. (Dec. 5, 2023), <https://www.crisisgroup.org/africa/sahel/niger/ecowas-nigeria-and-niger-coup-sanctions-time-recalibrate> [<https://perma.cc/EH7X-GR3A>].

35. *Nigeria’s Supreme Court Affirms Tinubu’s Presidential Victory*, AL JAZEERA (Oct. 26, 2023), <https://www.aljazeera.com/news/2023/10/26/nigerias-supreme-court-affirms-tinubus-presidential-victory> [<https://perma.cc/4NWR-HP9P>].

2. *Data Protection Act*

In June 2023, the Nigeria Data Protection Act 2023 was signed into law.³⁶ The Act provides a legal framework for the regulation of personal data in Nigeria in line with data principles within international data protection frameworks.³⁷ The predecessor National Data Protection Regulation 2019 and its Implementation Framework will continue to apply to the extent that it is not inconsistent with the Act.³⁸

N. SÃO TOMÉ AND PRÍNCIPE

1. *VAT Introduced; World Bank Package*

Expanding domestic tax collection, the country's new VAT regime came into effect in June, replacing prior taxes, including a general consumption tax, and introducing a new Stamp Duty Code.³⁹ In August 2023, the World Bank announced a \$15 million Development Policy Operation, the third of three to support macroeconomic stability and growth post-Covid, aimed at strengthening domestic revenue mobilization, financial and power sector stability, and social protection systems.⁴⁰

O. SENEGAL

1. *Opposition Leader Sentenced*

In June 2023, at least sixteen people died and hundreds were arrested after protests broke out following the sentencing of opposition leader Ousmane Sonko who was cleared of a rape charge but found guilty of "immoral behavior" toward young people under the age of twenty-one.⁴¹ Senegal's interior ministry dissolved Sonko's political party after his arrest for plotting

36. Wale Ajayi, *Regulatory Alert: President Signs the Nigerian Data Protection Bill, 2023 into Law*, KPMG (June 2023), <https://kpmg.com/ng/en/home/insights/2023/06/president-signs-the-nigerian-data-protection-bill—2023-into-law.html> [<https://perma.cc/BGT6-G6H3>].

37. Mercy King'ori, *Nigeria's New Data Protection Act, Explained*, FUTURE PRIVACY F. BLOG (June 28, 2023), <https://fpf.org/blog/nigerias-new-data-protection-act-explained/> [<https://perma.cc/4DGS-5M7T>].

38. *Id.*

39. *VAT Code Enters into Force in STP*, MIRANDA ALL. (June 1, 2023), <https://www.mirandalawfirm.com/en/insights-knowledge/publications/alerts/vat-code-enters-into-force-in-stp-2> [<https://perma.cc/RR3L-DMXX>]; *Sao Tome and Principe VAT Regime in Force from June 2023 – Orbitax News & Alerts*, ORBITAX (May 31, 2023), <https://orbitax.com/news/archive.php/Sao-Tome-and-Principe-VAT-Regi-52845> [<https://perma.cc/B8SG-7DE2>].

40. Press Release, World Bank, *Sao Tomé and Príncipe Gets a \$15 Million Boost to Restore Macroeconomic Stability and Achieve a Stronger Recovery* (Aug. 29, 2023), <https://www.worldbank.org/en/news/press-release/2023/08/29/sao-tome-and-principe-afe-gets-a-15-million-boost-to-restore-macroeconomic-stability-and-achieve-a-stronger-recovery> [<https://perma.cc/24XJ-3WNP>].

41. Nimi Princewill, *At Least 16 Dead in Senegal Protests after Opposition Leader Sentencing*, CNN (June 5, 2023), <https://edition.cnn.com/2023/06/05/africa/sixteen-killed-senegal-protests-intl/index.html> [<https://perma.cc/WWF7-GAB7>].

insurrection.⁴² Supporters say the charges are part of a government effort to derail his candidacy in the 2024 presidential election, although incumbent President Macky Sall has said he will not seek a controversial third mandate.⁴³

P. SIERRA LEONE

1. *Gender Equality Act Passed*

Hailed as “ground-breaking,” in January 2023, Sierra Leone passed the Gender Equality and Women’s Empowerment Act (GEWE) that reserves thirty percent of jobs for women, ringfences senior positions, and provides at least fourteen weeks of maternity leave.⁴⁴ In addition, in October 2023, Sierra Leone fell six places in the World Justice Project’s 2023 report to 110 out of 142 countries.⁴⁵

Q. TOGO

1. *State of Emergency Extended*

Originally extended for six months in September 2022, in March Togo’s National Assembly extended a state of emergency for another year in its northern Savanes border region hit by jihadist attacks.⁴⁶ Togolese troops are deployed in the north to contain a jihadist threat from Mali, Niger, and Burkina Faso, where militants linked to al-Qaeda and the Islamic State operate.⁴⁷

III. Central Africa

A. CAMEROON

1. *Conflict Continues in Anglophone Regions*

In July 2023, Amnesty International called on authorities to end the violence that has seen the deaths of more than 6,000 people in Anglophone

42. *Senegal Dissolves Party of Opposition Leader Sonko*, AL JAZEERA (July 31, 2023), <https://www.aljazeera.com/news/2023/7/31/senegal-dissolves-party-of-opposition-leader-sonko> [https://perma.cc/TVV8-528].

43. *Senegal’s Ousmane Sonko Charged with Fomenting Insurrection*, AL JAZEERA (July 30, 2023), <https://www.aljazeera.com/news/2023/7/30/senegals-ousmane-sonko-charged-with-fomenting-insurrection> [https://perma.cc/A5VL-G772].

44. Cecilia Macaulay, *Sierra Leone Passes Landmark Law on Women’s Rights*, BBC NEWS (Jan. 20, 2023), <https://www.bbc.com/news/world-africa-64348892> [https://perma.cc/QZ7J-33PS].

45. Sorie Abubakar, *Sierra Leone Declines in 2023 Rule of Law Index, Ranks 110th out of 142*, SIERRALOADED (Oct. 26, 2023), <https://sierraloadead.sl/news/sierra-leone-declines-rule-of-law-index-2023/> [https://perma.cc/4RYV-Q4T3].

46. Aimee Woodmass, *Togo Parliament Extends Regional State of Emergency by 12 Months*, JURIST (Apr. 9, 2023), <https://www.jurist.org/news/2023/04/togo-parliament-extends-regional-state-of-emergency-by-12-months/> [https://perma.cc/3GNC-58MG].

47. *Togo Extends State of Emergency in the North*, BBC NEWS (Sept. 7, 2022), <https://www.bbc.com/news/topics/cx1m7zg0gj4t/togo> [https://perma.cc/K8G3-GT33].

Cameroon.⁴⁸ Discrepancies between the French and English academic, legal, and administrative systems, along with political and economic marginalization, turned into riots in 2016; the suppression of these riots has led to conflict that continues in Anglophone regions.⁴⁹

B. CENTRAL AFRICAN REPUBLIC

1. *Referendum Enables Third Term*

In August 2023, CAR's Constitutional Court approved referendum results showing ninety-five percent of voters backing constitutional changes that enable President Faustin Archange Touadera to seek a third term.⁵⁰ The changes scrap the two-term limit and extend the presidential mandate from five to seven years.⁵¹ Touadera was elected president in 2016 after French military intervention, and the deployment of UN peacekeepers ended civil war.⁵² In September 2022, the Court dealt a blow to the proposed constitutional change, scrapping a committee tasked with drafting the new charter.⁵³ Its then-president, Daniele Darlan, forcibly retired in January.⁵⁴

2. *ICC Case Withdrawn*

In October, anti-balaka militia leader Maxim Mokom was released by the International Criminal Court (ICC) after it withdrew charges, citing a lack of evidence and witnesses.⁵⁵ Mokom, who became a government minister in 2019 after a peace deal ceded top posts to rebels, is the third anti-balaka leader sent to The Hague over the 2013–2014 violence.⁵⁶ Mokom was convicted in absentia in September with twenty-three others, including former President François Bozizé, by the country's appeals court on charges including undermining the internal state security and rebellion and was sentenced to life in prison.⁵⁷

48. *Cameroon: Rampant Atrocities Amid Anglophone Regions Must be Stopped and Investigated*, AMNESTY INT'L (July 4, 2023), <https://www.amnesty.org/en/latest/news/2023/07/cameroon-rampant-atrocities-amid-anglophone-regions-must-be-stopped/> [https://perma.cc/7LCW-4V5V].

49. *Gunmen Kill 10 in Northwest Cameroon in Ongoing Anglophone Crisis*, AL JAZEERA (July 17, 2023), <https://www.aljazeera.com/news/2023/7/17/gunmen-kill-10-in-northwest-cameroon-in-ongoing-anglophone-crisis> [https://perma.cc/D36T-5DGK].

50. *CAR Top Court Approves Referendum Result, Allowing President to Seek Third Term*, FRANCE24 (Aug. 21, 2023), <https://www.france24.com/en/africa/20230821-car-top-court-approves-referendum-result-allowing-president-to-seek-third-term> [https://perma.cc/D67Q-TKC6].

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. Lewis Mudge, *Mokom Case Falls Flat in Central African Republic*, HUM. RTS. WATCH (Oct. 26, 2023), <https://www.hrw.org/news/2023/10/26/mokom-case-falls-flat-central-african-republic> [https://perma.cc/LWQ7-FF3C].

56. *Id.*

57. *Id.*

C. CHAD

1. *CAR Crisis Spillover*

Southern Chad remains “deeply affected by the impact of the [CAR] crisis, intra- and inter-communal conflicts, kidnappings for ransom, flooding, food insecurity, and health emergencies.”⁵⁸ In August 2023, the International Organisation for Migration (IOM) estimated that 38,700 people were displaced.⁵⁹ In October 2022, police and soldiers opened fire on demonstrators protesting the two-year extension of General Mahamat Idriss Déby Into, who was proclaimed head of state by the army in April 2021 following the death of his father who had ruled the country for thirty years.⁶⁰

D. CONGO (DEMOCRATIC REPUBLIC)

1. *Record 6.9M Displaced; MONUSCO Asked to Leave*

In October, the IOM estimated a record high of 6.9 million displaced persons in the DRC, the latest increase following renewed conflict between Tutsi-led M23 rebels and militias loyal to the government in the North Kivu province.⁶¹ Plagued by violence from armed groups for nearly thirty years, the DRC has one of the largest internal displacement and humanitarian crises in the world.⁶² The DRC government has called on the UN peacekeeping mission, MONUSCO, to leave by December, saying it has failed to put an end to the violence.⁶³

2. *Growth Above Six Percent*

Reviewing its \$1.5 billion loan program, the IMF said DRC’s economy is expanding more than six percent despite both a slump in the prices of the metal used in electric vehicles and continued conflict.⁶⁴

58. U.N. OCHA, Chad – Humanitarian Situation in the South (Oct. 27, 2023), <https://www.unocha.org/publications/report/chad/chad-humanitarian-situation-south-october-2023> [<https://perma.cc/S2HM-77WC>].

59. *Id.*

60. *Chad: Amnesty Calls for ‘Justice’ One Year after Bloody Demonstration*, AFRICANEWS (Oct. 20, 2023), <https://www.africanews.com/2023/10/20/chad-amnesty-calls-for-justice-one-year-after-bloody-demonstration/> [<https://perma.cc/Y9HQ-YE4U>].

61. *UN Says Record 6.9 Million People Internally Displaced in DR Congo*, AFRICANEWS (Oct. 30, 2023), <https://www.africanews.com/2023/10/30/un-says-record-69-million-people-internally-displaced-in-the-dr-congo/> [<https://perma.cc/5P56-UUXB>].

62. *Id.*

63. *Id.*

64. *Congo’s Growth to Surpass 6% in 2023 – IMF*, FURTHER AFRICA (Nov. 2, 2023), <https://further-africa.com/2023/11/02/congos-growth-to-surpass-6-in-2023-imf/> [<https://perma.cc/DU8G-VCUD>].

E. CONGO (REPUBLIC)

1. *Centre for Renewable Energy*

In May, the Congo inaugurated the Oyo Centre of Excellence for Renewable Energies and Energy Efficiency to work towards energy transition in the country.⁶⁵ In addition, it has ratified eleven International Labor Organization conventions, including ones related to social security, minimum wage, migrant workers, occupational health, and others.⁶⁶

F. EQUATORIAL GUINEA

1. *Cooperation with Russian Companies*

In November 2023, President Teodoro Obiang Nguema Mbasogo welcomed Russian mining companies during talks in Moscow with Russian President Vladimir Putin, highlighting mutual interests and investment opportunities.⁶⁷ In power since 1979, Nguema Mbasogo currently heads the Economic Community of Central African States (ECCAS).⁶⁸

G. GABON

1. *Transition Charter after Coup*

In August 2023, Gabon's military ousted President Ali Bongo Ondimba minutes after election results were announced, resulting in the country's transitional president, Brigade General Brice Oligui Nguema, ushering in a transition charter supplanting the 1991 Constitution.⁶⁹ Gabon has been partially suspended from the Commonwealth following the coup under calls for credible elections within two years.⁷⁰ In November 2023, US President Joe Biden announced that he would expel Gabon, Niger, Uganda, and CAR from the African Growth and Opportunity Act (AGOA) trade program, in

65. *Legal News: Republic of Congo*, MIRANDA ALL. (May 29, 2023), <https://www.mirandalaw-firm.com/en/insights-knowledge/publications/legal-news/congo-legal-news-february-through-april-2023-2> [<https://perma.cc/QZ5R-AV4U>].

66. *Id.*

67. *Equatorial Guinea Open to Cooperation with Russian Companies*, AFRICANEWS (Nov. 3, 2023), <https://www.africanews.com/2023/11/03/equatorial-guinea-open-to-cooperation-with-russian-companies/> [<https://perma.cc/WV33-DRMP>].

68. *Id.*

69. Christophe Châtelot, *After the Coup in Gabon, the Transition of Power is in Search of Balance*, LE MONDE (Sept. 17, 2023), https://www.lemonde.fr/en/le-monde-africa/article/2023/09/17/after-the-coup-in-gabon-the-transition-of-power-is-in-search-of-balance_6136789_124.html# [<https://perma.cc/2LJ8-HTG6>].

70. James Landale & Antoinette Radford, *Gabon Partially Suspended from Commonwealth After Coup*, BBC NEWS (Sept. 19, 2023), <https://www.bbc.co.uk/news/world-africa-66861734> [<https://perma.cc/EH66-CH9J>].

Gabon's case as it had not made "continual progress toward establishing the protection of political pluralism and the rule of law."⁷¹

IV. East Africa

A. BURUNDI

1. Former PM Arrested

In April 2023, Burundi arrested former Prime Minister Alain Guillaume Bunyoni seven months after he was sacked, President Evariste Ndayishimiye making accusations of a coup plot against him.⁷² Former president Nkurunziza's "chaotic and bloody rule" saw Burundi isolated and Bunyoni under US sanctions since 2015 over his alleged role in a crackdown sparked by Nkurunziza's run for a third term.⁷³ Having previously overseen public security, Amnesty International hailed Bunyoni's arrest as an opportunity for Burundi to ensure accountability for human rights violations.⁷⁴

B. DJIBOUTI

1. Crackdown on 'Illegal' Migration

In March 2023, Djibouti announced a crackdown on irregular migration, with state-run television reporting that about 3,000 people had been rounded up by police to be deported.⁷⁵ Interior Minister Said Nouh Hassan said the Horn of Africa nation had become "saturated" by an influx of people from neighboring countries, with 220,000 arriving "illegally" in 2022 alone.⁷⁶

C. ERITREA

1. Human Rights Dire; AfDB Funding

In March 2023, UN Deputy Human Rights Chief Nada Al-Nashif told the Human Rights Council that the human rights situation in Eritrea remained

71. Alexis Boddy, *US to Expel Gabon, Niger, Uganda and the Central African Republic from Trade Program over Rights Concerns*, JURIST (Nov. 1, 2023), <https://www.jurist.org/news/2023/11/us-to-expel-gabon-niger-uganda-and-the-central-african-republic-from-trade-program-over-rights-concerns/> [<https://perma.cc/XW9B-8J2A>].

72. *Former Burundi Prime Minister Alain Guillaume Bunyoni Arrested*, AL JAZEERA (Apr. 23, 2023), <https://www.aljazeera.com/news/2023/4/23/former-burundi-prime-minister-alain-guillaume-bunyoni-arrested> [<https://perma.cc/2H9C-GQSP>].

73. *Id.*

74. *Burundi: Arrest of Former Prime Minister an Opportunity for Accountability*, AMNESTY INT'L (Apr. 26, 2023), <https://www.amnesty.org/en/latest/news/2023/04/arrest-of-former-burundi-pm-an-opportunity-for-accountability/> [<https://perma.cc/MF6L-B9D8>].

75. *Government of Djibouti Launches Crackdown on 'Irregular' Migrants*, FRANCE24 (May 1, 2023), <https://www.france24.com/en/africa/20230430-government-of-djibouti-launches-crackdown-on-irregular-migrants> [<https://perma.cc/D2ML-7HSZ>].

76. *Id.*

“dire” due to the fact State security forces act with impunity and violations of basic freedoms in Eritrea “show[ing] no sign of improvement.”⁷⁷ The UN Special Rapporteur was extended by another year as indefinite military service, military conscription round-ups, evictions, arbitrary detentions, and disappearances continued.⁷⁸

In April, the African Development Bank (AfDB) approved a \$49.92 million grant to construct a solar photovoltaic power plant in the country which is expected to improve access to energy in Eritrea.⁷⁹

D. ETHIOPIA

1. *Crimes Against Humanity Despite Truce*

In September 2023, a UN report said that war crimes and crimes against humanity were still being committed in Ethiopia a year after the government and regional forces from Tigray agreed to end the fighting.⁸⁰ The two-year conflict ended in November 2022.⁸¹ Both sides accused each other of massacres, rape, and arbitrary detentions.⁸² In a statement accompanying the report, the International Commission of Human Rights Experts on Ethiopia Chair said that signing the agreement had silenced the guns but had not resolved the conflict.⁸³ The report said the Ethiopian National Defense Force, Eritrean Defense Forces, and regional forces had carried out a “widespread and systematic attack” against civilian populations.⁸⁴

E. KENYA

1. *High Court Halts Collection of Biometric Data*

In August, a high court in Nairobi ordered cryptocurrency project Worldcoin and its partners to stop processing new biometric data in Kenya, pending adjudication of a petition from the Office of the Data

77. U.N., News: Eritrea: Human Rights Situation Remains Dire Amid Complete Impunity (Mar. 6, 2023), <https://news.un.org/en/story/2023/03/1134202> [<https://perma.cc/U7H8-MM4Y>].

78. *Id.*

79. *The African Development Bank Board Approves US\$49.92 Million to Build a 30 MW Solar Photovoltaic Power Plant in Dekembare*, AFRICA NEWS (Apr. 6, 2023), <https://www.africanews.it/english/eritrea-the-african-development-bank-board-approves-us49-92-million-to-build-a-30-mw-solar-photovoltaic-plant-in-dekembare/> [<https://perma.cc/LD6Y-KSRJ>].

80. *Crimes Against Humanity Continue in Ethiopia Despite Truce, Say UN Experts*, AL JAZEERA (Sept. 19, 2023), <https://www.aljazeera.com/news/2023/9/19/cimes-against-humanity-continue-in-ethiopia-despite-truce-say-un-experts> [<https://perma.cc/FDZ4-VQCG>].

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

Protection Commissioner.⁸⁵ The injunction is in response to a grievance that Worldcoin had gathered personal information in contravention of Kenya's data protection laws, including unlawfully obtaining consent from data subjects.⁸⁶

F. RWANDA

1. *UK's Rwanda Asylum Policy Challenged*

Rwanda is an "authoritarian, one-party state" that "imprisons, tortures and murders" opponents, including those who have fled the country, argued counsel in October before the UK Supreme Court in a challenge to the country's policy to send UK asylum-seekers to Rwanda.⁸⁷ In November 2023, the Supreme Court quashed the UK government's program after its Court of Appeal overturned a High Court ruling that the plan was lawful.⁸⁸

G. SEYCHELLES

1. *Seychelles Meeting IMF Targets*

In October 2023, the IMF completed a first review under the Extended Fund Facility (EFF) and the Resilience and Sustainability Facility (RSF), finding the Seychelles to be meeting performance targets in the EFF-supported program strengthening macro-economic balances.⁸⁹ As a "small island state vulnerable to external shocks and climate change," the IMF said the Seychelles needed to stay the course in reducing public debt and increasing foreign exchange buffers while increasing the efficiency of public investment and support for vulnerable segments of the population.⁹⁰

85. Natasha Kahungi, *Kenya High Court Halts Worldcoin Data Processing Amid Privacy Concerns*, JURIST (Aug. 28, 2023), <https://www.jurist.org/news/2023/08/kenya-high-court-halts-worldcoin-data-processing-amid-privacy-concerns/> [https://perma.cc/5Y9M-D6FN].

86. Sam Kiplagat, *Keep off Kenyans' Eyes, Court Orders Worldcoin as Probe on*, BUS. DAILY AFRICA (Aug. 14, 2023), <https://www.businessdailyafrica.com/bd/economy/keep-off-kenyans-eyes-court-orders-worldcoin-as-probe-on--4335544> [https://perma.cc/4CP5-SJFR].

87. Diane Taylor, *Rwanda 'Tortures and Murders,' Supreme Court Asylum Plan Hearing Told*, GUARDIAN (Oct. 9, 2023), <https://www.theguardian.com/uk-news/2023/oct/09/rwanda-deportation-plan-uk-supreme-court> [https://perma.cc/WZ7U-5FSE].

88. Emilie McDonnell, *UK Supreme Court Finds UK-Rwanda Asylum Scheme Unlawful*, HUM. RTS. WATCH (Nov. 15, 2023), <https://www.hrw.org/news/2023/11/15/uk-supreme-court-finds-uk-rwanda-asylum-scheme-unlawful> [https://perma.cc/ZG49-RN4F].

89. *IMF Staff and the Seychellois Authorities Reach Staff-Level Agreement on the First Review Under the Extended Fund Facility (EFF) Arrangement and the Resilience and Sustainability Facility (RSF)*, IMF (Oct. 3, 2023), <https://www.imf.org/en/News/Articles/2023/10/02/pr23323-seychelles-imf-staff-and-seychelles-reach-staff-level-agreement-eff-and-rsf> [https://perma.cc/J4KZ-TVFQ].

90. *Id.*

H. SOMALIA

1. *Drawdown of International Forces*

In October 2023, the UN Special Representative of the Secretary General and Head of the United Nations Assistance Mission in Somalia (UNSOM) highlighted Somalia's progress on state-building and security through the military offensive against Al-Shabab, which remains a threat, as the country prepares for the drawdown of international forces.⁹¹ The May 27 National Consultative Council communiqué sets out proposals for a future electoral system although the presidential system and proposed synchronization of federal member states' election schedules remain contentious.⁹²

I. SOUTH SUDAN

1. *New Human Rights Report*

In October 2023, the UN Commission on Human Rights in South Sudan reported the country's National Security Service was threatening media and civil society and undermining prospects for a democratic transition.⁹³ The report details attacks on journalists and civil society, both within and outside the country, with journalists subjected to surveillance, intimidation, and human rights violations including arbitrary detention ahead of the elections scheduled for December 2024.⁹⁴

Following a 2014 investigation mission, a delegation from the African Committee of Experts on the Rights of Welfare of the Child (ACERWC) repeated its call for South Sudan to ratify the African Charter on the Rights and Welfare of the Child and to implement its recommendations following an April advocacy mission to the country.⁹⁵

91. Press Release, Security Council, As African Union Mission in Somalia Draws Down, Al-Shabab Remains Threat to Country, Region, Special Representative Tells Security Council, U.N. Press Release SC/15457 (Oct. 19, 2023), <https://press.un.org/en/2023/sc15457.doc.htm> [<https://perma.cc/N9WT-D3JN>].

92. *Id.*

93. Deng Machol, *A UN Rights Commission Accuses South Sudan of Violations More than a Year before the Next Election*, AP (Oct. 6, 2023), <https://apnews.com/article/south-sudan-elections-human-rights-un-commission-a4360d72bbbb9ea572d587094323a51e> [<https://perma.cc/F54X-6YYC>].

94. *Id.*

95. AFR. COMM. OF EXPERTS ON THE RIGHTS AND WELFARE OF THE CHILD (ACERWC), ACERWC'S REPORT ON THE ADVOCACY MISSION FOR THE RATIFICATION OF THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD 2 (2023), https://www.acerwc.africa/sites/default/files/2023-06/Report%20on%20Advocacy%20Mission%20to%20South%20Sudan_0.pdf [<https://perma.cc/7T78-XYLP>].

J. SUDAN (REPUBLIC)

1. *5.6 Million Displaced*

“Half a year of war has plunged Sudan into one of the worst humanitarian nightmares in recent history,” said UN Undersecretary-General Martin Griffiths in a statement after fighting broke out in April between Sudanese armed forces and paramilitary group the Rapid Support Forces (RSF).⁹⁶ The UN estimates that 9,000 people were killed and another 5.6 million were forced to flee their homes.⁹⁷ In the Darfur region, the fighting has taken on its own ethnic dimension, pitting Arab against non-Arab communities, recalling the violence that made it synonymous with conflict for twenty years.⁹⁸

K. TANZANIA

1. *Maasai Arrested, Detained, Following Meeting*

In August, members of the Maasai community gathered to address the government’s use of media to achieve its goal of persuading them to leave the Ngorongoro Conservation Area.⁹⁹ Thirty-nine people were arrested following the meeting and are being held in unknown places.¹⁰⁰ Amnesty International called on Tanzanian authorities to end the arrests and detentions “which constitute renewed repression against the Maasai Indigenous Community that is standing up for their rights to their ancestral lands.”¹⁰¹ Threats to evict the Maasai from their ancestral lands have lasted over a decade.¹⁰²

L. UGANDA

1. *Tough New Anti-Homosexuality Laws Passed*

Passed in March, Uganda’s Anti-Homosexuality Act (2023) “foresees the application of the death penalty and long prison sentences for consensual acts between adults,” said the UN Secretary-General, calling on Uganda to respect its international human rights obligations, notably the principle of non-discrimination and the respect for personal privacy.¹⁰³ The statement

96. Kate Bartlett & Emmanuel Akinwotu, *Sudan’s War Passed 6 Months, with Much of the World Consumed by Other Conflicts*, NPR (Oct. 21, 2023), <https://www.npr.org/2023/10/21/1206104009/sudan-war> [https://perma.cc/3ABL-RHAB].

97. *Id.*

98. *Sudan’s War after Two Months: What You Need to Know*, AL JAZEERA (June 15, 2023), <https://www.aljazeera.com/news/2023/6/15/sudans-war-after-two-months-what-you-need-to-know> [https://perma.cc/WS57-VSB6].

99. *Tanzania: End the Crackdown on the Maasai Standing Up against Forced Evictions in Ngorongoro*, AMNESTY INT’L (Aug. 25, 2023), <https://www.amnesty.org/en/latest/news/2023/08/tanzania-must-end-crackdown-on-masaai-fighting-forced-evictions/> [https://perma.cc/NJM3-36BL].

100. *Id.*

101. *Id.*

102. *Id.*

103. Press Release, U.N. Secretary-General, Deeply Concerned by Uganda’s Anti-Homosexuality Act, Secretary-General Calls on Government to Respect its International Human

condemned the law as risking worsened violence and persecution already faced by lesbian, gay, and bisexual people in Uganda;¹⁰⁴ the law's legality was challenged by two applications filed with the East African Court of Justice.¹⁰⁵

V. Southern Africa

A. ANGOLA

1. *Human Rights Record “Appalling”*¹⁰⁶

In June, Amnesty International called on Angola to exercise restraint during nationwide protests against high fuel costs and restrictive laws aimed at limiting the work of NGOs in the country, after authorities confirmed that five people were killed and eight injured and thirty-four others arrested during a June protest.¹⁰⁷

General elections took place in August 2022, resulting in the People's Movement for the Liberation of Angola winning with fifty-one percent of the vote against allegations of electoral irregularities.¹⁰⁸

2. *AML Plan Approved*

In January, Presidential Decree 73/23 approved a National Strategy and General Guidelines for the Plan to Prevent and Combat Money Laundering, Terrorist Financing, and the Proliferation of Weapons of Mass Destruction.¹⁰⁹ The Plan, to be implemented 2023-2027, aims at safeguarding the stability and integrity of the Angolan financial system.

B. COMOROS

1. *World Bank Outlines Economic Reforms*

In its October Public Expenditure Review (PER), the World Bank said Comoros “must improve public financial management, enhance domestic

Rights Obligations, U.N. Press Release SC/SM/21816 (May 23, 2023), <https://press.un.org/en/2023/sgsm21816.doc.htm> [<https://perma.cc/CT38-QL5R>].

104. *Id.*

105. Carmel Rickard, *Uganda's Anti-gay Laws: What Will East African Court of Justice Say?*, AFR. LII (Aug. 29, 2023), <https://africanlii.org/articles/2023-08-29/carmel-rickard/ugandas-anti-gay-laws-what-will-east-african-court-of-justice-say> [<https://perma.cc/9G34-3KRG>].

106. See *Angola: Police Must Exercise Restraint During Nationwide Protests*, AMNESTY INT'L (June 9, 2023), <https://www.amnesty.org/en/latest/news/2023/06/angolan-police-must-exercise-restraint-during-nationwide-protests/> [<https://perma.cc/A8T4-TRA2>].

107. *Id.*

108. *Angola 2022*, AMNESTY INT'L, <https://www.amnesty.org/en/location/africa/southern-africa/angola/report-angola/> [<https://perma.cc/TGR4-N4H9>].

109. *Legal News: Angola, February to March 2023*, MIRANDA ALL. (Apr. 28, 2023), <https://mirandalawfirm.com/en/insights-knowledge/publications/legal-news/angola-legal-news-february-and-march-2023-2> [<https://perma.cc/8MU2-3ZAX>].

resource mobilization, improve the efficiency of public health spending, and take steps to incorporate climate change and disaster risk management.”¹¹⁰ Improved public financial management could generate fiscal space up to 1.8 percent of GDP which could be used to finance expenditures such as improved healthcare.

C. BOTSWANA

1. *High Court Criticized*

In September 2023, the High Court of Botswana dismissed an application to review the Water Utility Company (WUC)’s refusal to release a report on waterflow into the Gaborone Dam, the applicant arguing that the right to freedom of expression under the Botswana Constitution includes the right to access information.¹¹¹ The Court held for the WUC, finding that the report was intended for its operations and not for public consumption, Botswana not having a freedom of information act.¹¹² The Southern Africa Litigation Centre criticized the decision, writing that the WUC, as a publicly-owned institution, should be transparent in disclosing information, referencing the African Commission on Human and Peoples’ Rights Guidelines on the Right to Water in Africa (2019) that require States to “ensure that individuals and communities, especially vulnerable and marginalized groups, are given full and equal access . . . to information on their right to water”¹¹³

D. LESOTHO

1. *“No Confidence” Vote*

In October 2023, Lesotho’s main opposition party, the Democratic Congress, initiated a vote of no confidence against Prime Minister Sam Matekane, based in a 2020 constitutional amendment that curtailed executive powers, weakening Matekane’s ability to withstand the parliamentary challenge.¹¹⁴ Proceedings were scheduled for October 30,

110. *Comoros: New World Bank Report Identifies Reforms to Address Fiscal Challenges to Achieving Fiscal Growth*, WORLD BANK (Oct. 6, 2023), <https://www.worldbank.org/en/news/press-release/2023/10/06/comoros-afe-new-world-bank-report-identifies-reforms-to-address-fiscal-challenges-to-achieving-inclusive-growth> [https://perma.cc/LBP4-V5FC].

111. Melusi Simelane, *Botswana High Court Ignores Constitution and Rules*, S. AFR. LITIG. CTR. (Sept. 26, 2023), <https://www.southernafricalitigationcentre.org/2023/09/26/botswana-high-court-ignores-constitution-and-rules-there-is-no-right-to-access-information-without-legislation/> [https://perma.cc/K2LH-ZGSX].

112. *Id.*

113. *Id.*

114. *Lesotho’s Prime Minister Faces Uncertainty Amid Constitutional Challenge*, AFRICANEWS (Oct. 17, 2023), <https://www.africanews.com/2023/10/17/lesothos-prime-minister-faces-uncertainty-amid-constitutional-challenge/> [https://perma.cc/WPH4-YFD6].

causing a parliamentary stand-still and delaying critical matters including the budget.¹¹⁵

E. MADAGASCAR

1. *\$100 Million World Bank Credit*

In June, the World Bank approved a \$100 million credit for a Development Policy Operation (DPO) aimed at reforms to drive inclusive and resilient growth including improving transparency and macro-fiscal stability, market competition, and corporate governance in the energy, telecommunications, and mining sectors.¹¹⁶ The credit is the first of three DPOs.¹¹⁷

F. MALAWI

1. *Malawi Repeals Sedition Laws*

In November 2023, Malawi repealed provisions of its penal code providing for sedition.¹¹⁸ The move comes after a 2010 Malawi High Court ruling that the sedition laws were invalid under the constitution¹¹⁹ with NGOs saying that successive governments have used sedition charges to restrict freedoms of expression and opinion and to silence critical voices.¹²⁰

2. *Refugees Detained*

In May 2023, Malawi detained over 400 refugees and asylum-seekers, including children, about two months after issuing an ultimatum for people to return to an overcrowded camp north of the city.¹²¹ The Malawi Ministry of Homeland Security responded that the operation was “trying to flush out illegal immigrants” such that those with valid documentation should not

115. *Id.*

116. *Madagascar Receives \$100 Million for Reforms to Help Unleash Drivers of Equitable and Resilient Growth*, WORLD BANK (June 9, 2023), <https://www.worldbank.org/en/news/press-release/2023/06/09/madagascar-afe-receives-100-million-for-reforms-to-help-unleash-drivers-of-equitable-and-resilient-growth> [https://perma.cc/LGP8-HKU5].

117. *Id.*

118. *Members of Parliament in Malawi Remove Sedition as Criminal Offence*, MEDIA INST. S. AFR. (Nov. 22, 2022), <https://malawi.misa.org/2022/11/22/members-of-parliament-in-malawi-remove-sedition-as-criminal-offence/> [https://perma.cc/UVC6-KSUU].

119. *Republic v Mkandawire*, [2010] MWHC 5, 13 (Malawi), <https://malawilii.org/akn/mw/judgment/mwhc/2010/5/eng@2010-10-07> [https://perma.cc/LQ9W-WAUN].

120. *See Members of Parliament in Malawi Remove Sedition as Criminal Offence*, *supra* note 118.

121. *Malawi Authorities Arrest More than 400 Refugees*, AFRICANEWS (May 19, 2023), <https://www.africanews.com/2023/05/19/malawi-authorities-arrest-more-than-400-refugees/> [https://perma.cc/ZHZ9-46WM].

be concerned.¹²² Malawi is home to almost 70,000 refugees and asylum-seekers, according to UNHCR, most living in a refugee camp set up to accommodate about 12,000 but hosting more than 56,000 refugees.¹²³

G. MAURITIUS

1. *Sodomy Laws “Unconstitutional”*

In October 2023, the Supreme Court of Mauritius ruled a law criminalizing sodomy “unconstitutional,” finding the country’s criminal code discriminated against gay men.¹²⁴ The court ruled on claims brought by “Collectif-Arc-en-Ciel” (CAEC) on behalf of Abdool Ridwan Firaas Ah Seek, who argued that the provision violated his right to freedom from degrading treatment as the law allowed law enforcement to enter and search his home merely on suspicion of an offence.¹²⁵

H. MOZAMBIQUE

1. *Private Investment Law*

Encouraging investment, in May 2023, the Parliament of Mozambique passed a new Private Investment Law incorporating tax benefits, accessible land, simplified procedures for licenses and permits, and protection against expropriation, eliminating visa requirements for twenty-nine countries.¹²⁶ The law also introduced provisions to promote responsible investment, emphasizing the social responsibility of investors.¹²⁷

I. NAMIBIA

1. *Same-Sex Marriages Recognized*

In May 2023, setting aside a 2022 High Court decision, Namibia’s Supreme Court ruled that immigration laws must recognize same-sex marriages validly concluded outside Namibia, finding for two couples

122. *Id.*

123. *Id.*

124. Celeste Hall, *Mauritius Supreme Court Decriminalizes Sodomy in Landmark Decision*, JURIST (Oct. 4, 2023), <https://www.jurist.org/news/2023/10/mauritius-supreme-court-decriminalizes-sodomy-in-landmark-decision/> [<https://perma.cc/7YLM-LBJ5>].

125. *Id.*

126. See *Investment Policy Monitor; Mozambique Approves a New Law to Foster Private Investment*, UNCTAD (May 4, 2023), <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/4325/approves-a-new-law-to-foster-private-investment> [<https://perma.cc/YXE4-Q6SM>]; see also *New Investment Law*, MIRANDA ALL. (June 20, 2023), <https://www.mirandalawfirm.com/en/insights-knowledge/publications/alerts/new-investment-law-2> [<https://perma.cc/C39M-QMMS>].

127. See *Investment Policy Monitor; Mozambique Approves a New Law to Foster Private Investment*, *supra* note 126.

denied rights due them from their marital status.¹²⁸ The High Court had dismissed the applications, noting that the Constitution of Namibia prohibited discrimination based on sexual orientation but the High Court was bound by the 2001 Supreme Court judgment *Immigration Selection Board v Frank* which denied rights of same-sex partners under the Immigration Act.¹²⁹ Namibia continues to criminalize same-sex sexual relations, although prosecutions are rare.¹³⁰

J. SOUTH AFRICA

1. *Employment Act Increases Sectoral Representation*

Designed to address the discriminatory impact of apartheid in labor and employment through affirmative action, in April 2023, President Cyril Ramaphosa amended the Employment Equity Act of 1998 (EEA)¹³¹ to permit numerical targets for national economic sectors to support equitable representation. The Department of Employment and Labour said the amendments were necessary to address employment inequality, with white South Africans comprising eight percent of the population but occupying 62.9 percent of top management and black South Africans comprising eighty percent of the population but only 16.9 percent of top management.¹³²

K. SWAZILAND (ESWATINI)

1. *Legal Aid Introduced*

In August 2023, an Eswatini Legal Aid Office was established, the first to offer legal aid services to those facing the justice system, particularly the poor and marginalized.¹³³ Legal information about awareness, advice, referrals, and mediation services were to be offered first, with legal representation in court pending further Legal Aid legislation.¹³⁴

128. Bradley Fortuin, *Analysing the Case of Digashu and Others v Government of the Republic of Namibia, Seiler-Lilles v Government of the Republic of Namibia*, S. AFR. L. CENTRE (Oct. 5, 2023), <https://www.southernafricalitigationcentre.org/2023/10/05/analysing-the-case-of-digashu-and-others-v-government-of-the-republic-of-namibia-seiler-lilles-v-government-of-the-republic-of-namibia/> [https://perma.cc/WZE9-GXLQ].

129. *Id.*

130. *Id.*

131. Employment Equity Amendment Act 2022, GN 3280 of GG 48418 (14 April 2023) (S. Afr.).

132. See *Department of Employment and Labour on Inclusivity of their Laws*, S. AFR. GOV'T (July 19, 2023), <https://www.gov.za/news/media-statements/department-employment-and-labour-inclusivity-their-laws-19-jul-2023> [https://perma.cc/Q86F-TWUD].

133. Mantoe Phakathi, *Legal Aid Opens Doors for the First Time in Eswatini*, UNDP (Aug. 30, 2023), <https://www.undp.org/eswatini/news/legal-aid-opens-doors-first-time-eswatini> [https://perma.cc/6VLZ-J95D].

134. *Id.*

L. ZAMBIA

1. *Death Penalty Abolished*

In January 2023, Zambia abolished the death penalty followed by repeal of defamation of the President as a criminal offence.¹³⁵ The development “followed years of advocacy efforts by concerned stakeholders, such as the National Human Rights Commission, civil society groups, development partners, the UN team, and other partners.”¹³⁶

M. ZIMBABWE

1. *Government Criticism Outlawed*

Known as the “Patriotic Bill,” in July 2023, Zimbabwe President Emmerson Mnangagwa signed the Criminal Law Codification and Reform Amendment Bill 2022, making it an offence punishable up to twenty years imprisonment for those calling for military intervention or sanctions against the country and outlawing criticism of the government.¹³⁷ The bill was passed hours after the government announced parliamentary and presidential elections in August 2023, which saw Mnangagwa securing a second term, the law’s passage sparking fears of a crackdown on dissent.¹³⁸

VI. African Institutions

A. AFRICAN COURT ON HUMAN AND PEOPLES’ RIGHTS

1. *Vagrancy Laws Violate Human Rights*

Published in June 2023, in December 2020 the African Court issued an advisory opinion holding that many vagrancy laws, which consider the poor, homeless, or unemployed to be criminals, in a majority of countries in Africa violate many rights of those punished under them.¹³⁹ The Court concluded that signatories to the African Charter on Human and Peoples’ Rights have an obligation to amend or repeal their vagrancy laws.¹⁴⁰

135. U.N., *News: Zambia: Abolition of the Death Penalty ‘A Historic Milestone’* (Jan. 6, 2023), <https://news.un.org/en/story/2023/01/1132212> [https://perma.cc/YQ7W-2JRJ].

136. *Id.*

137. *Zimbabwe’s ‘Patriotic Bill’ Outlaws Criticism of Government before Election*, REUTERS (June 1, 2023), <https://www.reuters.com/world/africa/zimbabwes-patriotic-bill-outlaws-criticism-government-before-election-2023-06-01/> [https://perma.cc/MX7T-UHHY].

138. *Id.*

139. *Advisory Opinion of the Court Requesting the Abrogation of Vagrancy Laws*, AMNESTY INT’L (June 25, 2023), <https://www.amnesty.org/en/latest/campaigns/2023/06/advisory-opinion-of-the-court-requesting-the-abrogation-of-vagrancy-laws/> [https://perma.cc/WWS2-GJXF].

140. *Id.*

B. AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

1. *Arbitrary Detention Violated Charter*

In September 2023, the African Commission held that the 2014–2015 arbitrary arrest, detention, and denial of access to medical services to Sudanese activist Dr. Amin Mekki Medani and opposition leader Farouq Abu Eissa violated their rights under the African Charter on Human and People's Rights.¹⁴¹

C. AFRICAN UNION

1. *Inaugural Climate Change Summit*

In September 2023, African Heads of State met in Nairobi for the AU's inaugural Africa Climate Summit, recognizing that climate change is the “single biggest threat to life” and expressing concern that African countries face disproportionate risks from climate change-related events.¹⁴² The call to action included accelerating all efforts to reduce emissions to align with the goals of the Paris Agreement.¹⁴³

D. ECONOMIC COMMUNITY OF WEST AFRICAN STATES

1. *ECOWAS at a Crossroads*

Four coups in the fifteen-member bloc in the past three years have undermined ECOWAS' ability to meet its goals.¹⁴⁴ Established in 1975 with the mission of achieving regional economic integration, the bloc revised its treaty in July 1993 to include the facilitation of peace, security, and stability in West Africa.¹⁴⁵ In December 2001, it also adopted the Supplementary Protocol on Democracy and Good Governance, which holds that “every accession to power must be made through free, fair and transparent elections,” and that member states must demonstrate a “zero tolerance for power obtained or maintained by unconstitutional means.”¹⁴⁶ Presiding Nigerian President Bola Ahmed Tinubu's vows to stop recurrent takeovers

141. Press Release, Int'l Fed'n for Hum. Rts., African Commission: Sudan Violated the African Charter in the Medani & Eissa Case (Sept. 14, 2023), <https://www.fidh.org/en/region/Africa/sudan/african-commission-sudan-violated-the-african-charter-in-the-medani> [<https://perma.cc/DJQ9-NVMM>].

142. African Union, *The African Leaders Nairobi Declaration on Climate Change and Call to Action* ¶ 5, at 2 (Sept. 2023), https://au.int/sites/default/files/decisions/43124-Nairobi_Declaration_06092023.pdf [<https://perma.cc/5CPT-P5NW>].

143. *Id.*

144. Tafi Mhaka, *ECOWAS is Undoubtedly in Trouble, But it Still has Potential*, AL JAZEERA (Sept. 27, 2023), <https://www.aljazeera.com/opinions/2023/9/27/ecowas-is-undoubtedly-in-trouble-but-it-still-has-potential> [<https://perma.cc/L6TU-VRQU>].

145. *Id.*

146. *Id.*

following consecutive coups in Mali, Guinea, Burkina Faso, and Niger, however, were met with backlash from bloc members forcing it to consider whether military intervention or the reverse, its failure to reinstall Bazoum in Niger, would irreversibly weaken it.¹⁴⁷

E. EAST AFRICAN COMMUNITY

1. *Troop Mandate in DRC Extended*

First sending troops into the strife-torn eastern DRC last November after a resurgence of the M23 rebel group, in September the seven-nation EAC extended the force's mandate to December pending an evaluation report.¹⁴⁸ The deployment had been in doubt after DRC President Felix Tshisekedi criticized the force but the EAC decided in June to keep the troops on the ground for another three months.¹⁴⁹

F. AFRICAN DEVELOPMENT BANK

1. *Legal Support Facility Extended*

Established in 2008 and extended in 2021, in January the African Legal Support Facility launched a new Medium-Term Strategy 2023–2027.¹⁵⁰ The AfDB established the Facility to support African governments with legal and technical assistance in commercial transactions for sustainable development, and the new strategy undercases intensifies activities for greater, more sustainable impact across sovereign finance, natural resources, energy, infrastructure, and public-private partnerships.¹⁵¹

G. AFRICAN EXPORT-IMPORT BANK

1. *Deals Include \$1 Billion Morocco-Africa Trade Promotion*

Among Afreximbank's 2023 deals, in October the bank announced the issue of the first-ever multi-border transit bond, the \$10 million bond issued in favor of Innovate General Insurance (IGI) of Zambia, which is expected to provide counter guarantees and boost IGI's capacity to issue bonds to Clearing and Forwarding Agents in Zambia.¹⁵² Earlier in October, the Bank

147. *Id.*

148. *East Africa Leaders Extend Regional Troop Mandate in DR Congo*, AL JAZEERA (Sept. 6, 2023), <https://www.aljazeera.com/news/2023/9/6/east-africa-leaders-extend-regional-troop-mandate-in-dr-congo> [<https://perma.cc/4JUM-ZLEQ>].

149. *Id.*

150. *African Legal Support Facility Gears Up for 2023–2027 Plan Under a New Phase*, AFR. DEV. BANK (Jan. 31, 2023), <https://www.afdb.org/en/news-and-events/events/african-legal-support-facility-gears-2023-2027-plan-under-new-phase-57682> [<https://perma.cc/3EH8-7VC9>].

151. *Id.*

152. Press Release, Afreximbank, Afreximbank Announces Historic Issuance of the First-Ever Multi-Border Transit Bond in Zambia Under the Afreximbank African Collaborative

entered into an MOU with Morocco to develop a \$1 billion Morocco-Africa Trade and Investment Promotion program.¹⁵³

H. UN ECONOMIC COMMISSION FOR AFRICA

1. *African Economic Conference*

Jointly organized by the ECA, AfDB, and UNDP, the 2023 African Economic Conference (AEC) was held in hybrid format in Addis Ababa in November.¹⁵⁴ With the theme, “Imperatives for Sustainable Industrial Development in Africa,” the Conference reviewed industrialization on the continent, looking to achieve the Sustainable Development Goals and the aspirations of Agenda 2063.¹⁵⁵

I. SOUTHERN AFRICAN DEVELOPMENT COMMUNITY

1. *SADC Censures Zimbabwe Election*

Following SADC’s Electoral Observer Mission (SEOM)’s conclusion that the Zimbabwe elections were fraudulent, in September, the “SADC Organ Troika” (the SADC Parliamentary Forum, SADC Secretariat, and SADC Electoral Advisory Council) criticized Zimbabwe authorities’ conduct over the elections, instructing the SADC Secretariat to communicate its censure to Harare.¹⁵⁶ The SADC Protocol on Politics, Defence and Security Cooperation authorizes the SADC Organ on Politics, Defence, and Security Cooperation, managed by the Troika, to use conflict resolution measures to resolve political crises, including “enforcement as a last resort.”¹⁵⁷

J. COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA

1. *FTA Progress*

In January 2023, trade experts from seventeen countries met in Nairobi under the COMESA-EAC-SADC Tripartite Agreement for the Tripartite

Transit Guarantee Scheme (AATGS) (Oct. 24, 2023), [https://www.afreximbank.com/afreximbank-announces-historic-issuance-of-the-first-ever-multi-border-transit-bond-in-zambia-under-the-afreximbank-african-collaborative-transit-guarantee-scheme-aatgs-%EF%BF%BC/\[https://perma.cc/U85H-NAXK\]](https://www.afreximbank.com/afreximbank-announces-historic-issuance-of-the-first-ever-multi-border-transit-bond-in-zambia-under-the-afreximbank-african-collaborative-transit-guarantee-scheme-aatgs-%EF%BF%BC/[https://perma.cc/U85H-NAXK]).

153. Press Release, Afreximbank, Morocco Sign MOU for \$1 billion Trade and Investment Programme (Oct. 15, 2023), [https://www.afreximbank.com/afreximbank-morocco-sign-mou-for-1billion-trade-and-investment-programme/\[https://perma.cc/ZP4N-AJNG\]](https://www.afreximbank.com/afreximbank-morocco-sign-mou-for-1billion-trade-and-investment-programme/[https://perma.cc/ZP4N-AJNG]).

154. See *2023 African Economic Conference*, UNDP (Nov. 5, 2023), [https://www.undp.org/africa/events/2023-african-economic-conference/\[https://perma.cc/PT9B-XBDS\]](https://www.undp.org/africa/events/2023-african-economic-conference/[https://perma.cc/PT9B-XBDS]).

155. *Id.*

156. Paul Nantulya, *SADC Attempts to Navigate Zimbabwe’s Disputed Election*, AFR. CTR. FOR STRATEGIC STUDIES (Oct. 11, 2023), [https://africacenter.org/spotlight/sadc-navigate-zimbabwe-election/\[https://perma.cc/BS53-XFKK\]](https://africacenter.org/spotlight/sadc-navigate-zimbabwe-election/[https://perma.cc/BS53-XFKK]).

157. *Id.*

Trade Negotiation Forum (TTNF) where they reviewed progress to make the Tripartite Free Trade Area operational and unlock trade and investment opportunities for the twenty-nine Member States, eleven countries ratifying to date.¹⁵⁸ Established in 2008 with a combined GDP of approximately \$1.6 trillion and a population of about 800 million, the Tripartite bloc is a formidable market, second only to the African Continental Free Trade Area (AfCFTA) market.¹⁵⁹

K. INTERGOVERNMENTAL AUTHORITY ON DEVELOPMENT

1. *Eritrea rejoins IGAD*

In June 2023, Eritrea rejoined IGAD after sixteen years in a move to rebuild ties with its neighbors.¹⁶⁰ The country had quit the regional bloc in 2007 to protest the deployment of Ethiopian troops to Somalia to force out al-Shabab fighters who controlled most of southern Somalia at the time.¹⁶¹

L. ECONOMIC COMMUNITY OF CENTRAL AFRICAN STATES

1. *Gabon Suspended*

In June 2023, Gabon's then-President and Chairman of ECCAS, Ali Bongo Ondimba, convened the bloc's twenty-third Ordinary Session of the Conference of Heads of State and Government of ECCAS Member States on the theme of community financing to accelerate integration in the Central African region and support its institutional reform.¹⁶² In September 2023, following the coup that ousted its president, the bloc suspended Gabon's membership, condemning the use of force to resolve political conflicts.¹⁶³

158. Muzinge Chibomba, *Tripartite Free Trade Area – Taking Stock of Progress*, COMESA (Jan.24,2023), <https://www.comesa.int/tripartite-free-trade-area-taking-stock-of-progress/> [<https://perma.cc/3GMR-UVCU>].

159. *Id.*

160. *Eritrea Rejoins East Africa Bloc After Exit 16 Years Ago*, AL JAZEERA (June 13, 2023), <https://www.aljazeera.com/news/2023/6/13/eritrea-rejoins-east-africa-bloc-after-exit-16-years-ago> [<https://perma.cc/RW23-65NZ>].

161. *Id.*

162. Press Release, CCEAC-EECAS, XXIIIe Session Ordinaire de la Conférence des Chefs d'Etat et de Gouvernement de la Communauté Economique des Etats de l'Afrique Centrale (CEEAC) [Chairman of the Economic Community of Central African States (ECCAS) Announces the XXIII Ordinary Session of the Conference of Heads of State and Government of ECCAS Member States] (June 18, 2023), <https://ceeac-eccas.org/en/2023/06/18/press-release/> [<https://perma.cc/2UU3-PJY9>].

163. Moki Edwin Kindzeka, *Central African States Suspend Gabon's Membership, Call for Return to Constitutional Order*, VOA (Sept. 5, 2023), <https://www.voanews.com/a/central-african-states-suspend-gabon-s-membership-call-for-return-to-constitutional-order-/7255105.html> [<https://perma.cc/A4PB-F7CB>].

**M. ORGANIZATION FOR THE HARMONIZATION OF BUSINESS LAW
IN AFRICA**

1. OHADA Marks 30 Years

Established in 1993, OHADA marked thirty years with a colloquium on the successes and future of the legal integration tool.¹⁶⁴ OHADA seeks to create a common legal framework for its seventeen member states to promote economic integration and growth.¹⁶⁵

N. UN MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS

1. Last Major Accused Unfit to Stand Trial

In August 2023, UNMICT, the successor to the UN International Criminal Tribunal for Rwanda (UNICTR), ruled that alleged financier Félicien Kabuga, the last major suspect of the 1994 genocide, was unfit to stand trial for reasons of senile dementia.¹⁶⁶ Marking the end of an era, the Appeals Chamber sent the case back to the trial court, formally suspending proceedings that had taken nearly thirty years.¹⁶⁷

164. *30 Years and Counting: Celebrating OHADA Treaty, Africa's Legal Integration Tool*, INVESTOR'S MAG. (Apr. 17, 2023), <https://investorsmag.media/2023/04/17/30-years-and-counting-celebrating-ohada-treaty-africas-legal-integration-tool/> [<https://perma.cc/H7HM-8CLC>].

165. *Id.*

166. Balthazar Nduwayezu, *Final Curtain Falls on Kabuga Trial*, JUSTICEINFO.NET (Aug. 22, 2023), <https://www.justiceinfo.net/en/120523-final-curtain-falls-on-kabuga-trial.html> [<https://perma.cc/7ZRN-N5VF>].

167. *Id.*

THE YEAR IN REVIEW
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This Article discusses significant legal developments in European Law from 2023.

I. The Foreign Subsidies Regulation

In July 2023, the European Union (EU) implemented its inaugural antitrust measure aimed at addressing foreign subsidies, the Foreign Subsidies Regulation (FSR).¹ This landmark regulation mandates that companies operating within the EU and receiving foreign subsidies must formally inform the European Commission (EC or “the Commission”) of such subsidiaries, especially before quantitatively determined merger and acquisition (M&A) transactions, joint-ventures and public procurement bids.²

In October 2023, pre-transaction notification requirements of the FSR went into effect, including an implementing regulation with new notification obligations for transactions above specific thresholds.³ The implementation of these additional components coincided with the launch of an investigation

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1. See Commission Regulation 2023/1441 O.J. (L 177) 1 (EU); see also Communication from the Commission 2023/C 246/02 O.J. (C 246) 2 (EC). The European Commission adopted the FSR’s Implementing Regulation on July 10, 2023. See Commission Regulation 2023/1441 2023/144, at 1. The Implementing Regulation introduced filing requirements and provided helpful instructions and clarifications to the FSR. See *id.* annex I at 20–44. In addition, a detailed communication from the European Commission clarifies procedural rules, notably regarding transmission of documents to the European Commission. See EC FSR Communication, 2023/C 246/02.

2. See Commission Regulation 2023/1441, annex I, at 28–33, 38.

3. See Sarah Blazek, *The EU Foreign Subsidiaries Regulation*, ABA (Nov. 10, 2023), [https://www.americanbar.org/groups/business_law/resources/business-law-today/2023-november/the-eu-foreign-subsidies-regulation/#:~:text=The%20European%20Union%20\(EU\)%20Foreign,public%20procurement%20procedures%E2%80%9494became%20applicable.\[https://perma.cc/7PYQ-ZMYW\]](https://www.americanbar.org/groups/business_law/resources/business-law-today/2023-november/the-eu-foreign-subsidies-regulation/#:~:text=The%20European%20Union%20(EU)%20Foreign,public%20procurement%20procedures%E2%80%9494became%20applicable.[https://perma.cc/7PYQ-ZMYW]).

into potentially illegally subsidized Chinese battery electric vehicles.⁴ The timing is no coincidence. Indeed, in the years preceding the FSR, international trade laws and existing EU measures against subsidized goods, such as battery electric vehicles, were decried as ineffective to prevent the harmful effects of financial subsidies on the internal market.⁵

The EC recognized the disruptive impact of non-goods related subsidies, particularly financial subsidies, on competition within the EU's internal market.⁶ To address this issue, the Commission enacted a regulation specifically tailored for this problem.⁷ While the EU's Council and Parliament initially adopted the FSR to safeguard the EU's internal market, this regulation may have a wider impact.⁸

The FSR fills the gap left by the absence of legislation dedicated to tackling the distortions caused by foreign non-EU states' subsidies on the single market, especially active or passive subsidizing (e.g., injecting funds or foregoing due tax revenue) as opposed to subsidizing goods.⁹ While some industries may be disproportionately impacted by the FSR, it retains a general antitrust purpose to shield the EU's internal market from adverse competitive conditions provoked by state subsidies, which may come from a non-EU state.¹⁰ Although the FSR's scope is broad, EU institutions have long rung the alarm bell about particularly distortive practices by Chinese, among other, state-owned or state-subsidized companies that unduly allow these companies to escape adverse market conditions or impose drastically lowered prices on the EU's internal market.¹¹ A recent example of this is the Pelješac bridge contract in Croatia, eighty-five percent financed by EU funds, which was awarded to a Chinese firm that bid at much lower prices than its competition.¹²

The FSR gives the Commission several tools to deal with distortions to the internal market caused by foreign subsidies:

- Two specific ex-ante provisions impose new pre-transaction filing requirements on determined economic operators in the EU, based on turnover and foreign subsidy amounts as well as on operation types.

4. See European Commission Press Release IP/23/4752, Commission Launches Investigation on Subsidized Electric Cars from China (Oct. 4, 2023).

5. See Jakub Kociubinski, *The Proposed Regulation on Foreign Subsidies Distorting the Internal Market: The Way Forward or Dead End?*, 6 EUR. COMPETITION & REG. L. REV. 56, 58 (2022).

6. See *id.* at 59.

7. See *id.* at 68.

8. See Council and Parliament Regulation 2022/2560 O.J. (L 330) 1 (EU) [hereinafter "FSR"].

9. See *id.* ¶ 73, at 12; see also Commission Regulation 2023/1441 ¶ 1, at 2.

10. See FSR 2022/2560, ¶ 19, at 3.

11. See Nerina Boschiero & Stefano Silingardi, *The EU Trade Agenda - Rules on State Intervention in the Market*, 24 GERMAN L. J. 151, 175 (2023).

12. See Simon Van Dorpe, *5 Industries that Need to Watch Foreign Subsidies Rules*, POLITICO (July 14, 2023), <https://www.politico.eu/article/five-industrie-need-watch-foreign-subsidies-rules/> [<https://perma.cc/P7RU-LXBV>].

- One ex-ante requirement is the reporting of foreign subsidies received by parties to M&A operations and joint ventures (also designated as concentrations in EU law), where the EU turnover of a merging party, acquisition target, or the joint venture itself amounts to 500 million euros or above, if a party has received more than fifty million euros in foreign subsidies from a non-EU state within the three years immediately preceding the signing of the deal.¹³
- The second ex-ante requirement is the reporting of foreign subsidies received by economic operators bidding to deliver products or services or complete works for state or state-controlled entities in the single market (designated as public procurements), where the value of the public procurement is at least 250 million euros and the economic operator, including affiliates (e.g., de facto controlled subcontractors and subsidiaries), received at least four million euros in foreign subsidies.¹⁴
- Lastly, a broader ex-officio tool applies to all situations where companies active in the EU received foreign subsidies from a third state.¹⁵ Those M&A or joint-venture agreements and public procurements that fall below the thresholds applicable in ex-ante proceedings can still be analyzed under the ex-officio powers of the Commission, which allow the Commission to intervene in a wide variety of situations where foreign subsidies distort competition in the internal market.¹⁶

The FSR applies *ratione temporis* to operations, M&A, and joint venture agreements signed and public procurement contracts awarded after July 12, 2023.¹⁷ That is to say, the Commission uses both its ex-ante and ex-officio powers beginning on this date.

Subsidies covered by the FSR include those attributed to parties involved in a concentration or recipients of a public procurement contract in the three years leading up to July 12, 2023, if they meet the criteria specified in the ex-ante filing requirements.¹⁸ Foreign subsidies that are attributed in the five years prior to July 12, 2023, and are identified by the Commission's ex-officio powers as distorting the market after this date, also fall within the scope of the FSR.¹⁹ Thus, the Commission both guarantees itself jurisdiction over a long-term state subsidization strategy that would otherwise escape the FSR, and prevents adverse effects from quantitatively smaller transactions that would nevertheless have negative effects on competition in the single

13. See FSR 2022/2650, art. 20(3), at 23.

14. See *id.* art. 28, at 29–30.

15. See *id.* art. 9, at 17.

16. See *id.* art. 9(1).

17. See *id.* art. 54(2), at 44.

18. See *id.* art. 53(2), at 43.

19. See FSR 2022/2650, art. 53(1), at 43.

market.²⁰ The notification requirements in both ex-ante procedures (detailed under Articles 21 and 29) apply beginning on October 12, 2023.²¹

Ratione materiae the FSR applies to foreign financial contributions received by undertakings or economic operators in the EU from third party non-EU States that distort competition in the internal market.²² Thus, the FSR does not target subsidies generally, but rather applies only to those subsidies that unduly benefit an undertaking in a manner unlikely to occur under normal competition conditions.²³ In Article 3, the FSR gives an explicitly non-exhaustive list of foreign financial contributions that constitute a foreign subsidy that confers a benefit on an economic undertaking in the EU.²⁴ The FSR differentiates foreign financial contributions from foreign subsidies, using the latter formulation specifically to designate foreign financial contributions that upend competition in the internal market.²⁵ Under Article 3, foreign financial contributions that can be qualitatively considered direct or indirect foreign subsidies include, but are not limited to, the transfer of funds or liabilities (such as capital injections or loan guarantees), the foregoing of revenue (such as tax exemptions), or the provision or purchase of goods or services.²⁶

A foreign subsidy need not be disbursed to fall under the jurisdiction of the Commission and the scope of the FSR (Article 15).²⁷ Thus, economic operators engaged in the EU must keep track of both previously disbursed foreign financial contributions and undisbursed foreign financial contributions that they became entitled to receive during the previous five years before July 12, 2023.²⁸

While the FSR may itself have implied that disclosure requirements are relatively limited, the subsequent Implementation Regulation significantly widened disclosure requirements through the two ex-ante notification requirements. Indeed, this category of subsidies also requires disclosure, in forms FS-CO or FS-PP, of individual subsidies amounting to at least one million euros and coming from countries that granted at least forty-five million euros (in concentrations) or four million euros (in public procurement procedures) total in the three preceding years.²⁹ Disclosure is not required for deferrals of tax payments, tax reliefs of general application, or provision or purchase of goods or services at standard market rates.³⁰

20. See Raymond Luja, *The Foreign Subsidies Regulation: Countering State Aid beyond the European Union*, 20 EUR. ST. AND L. Q. 187, 192 (2021).

21. See FSR 2022/2650, art. 54(3), at 44.

22. See *id.* art. 3(1), at 14.

23. See *id.* art. 27, at 29.

24. See *id.* art. 3(2), at 14.

25. See *id.*

26. See *id.* art. 3(2)(a).

27. See FSR 2022/2650, art. 15, at 20.

28. See *id.* art. 53(2), at 43.

29. See Commission Regulation 2023/1441, annex 1, § 5(1), at 33-34, § 9(A)(3), at 41.

30. See *id.* annex I, § 9(B)(6), at 41-42.

Article 5 of the FSR also points at foreign financial contributions that are most likely to distort the market.³¹ Among the latter are particularly distortive subsidies such as guarantees that are unlimited in amount or duration, attributed by a third state to an undertaking, and foreign subsidies that directly facilitate an M&A or joint-venture operation.³² For a subsidy within this category (i.e., subsidies particularly likely to distort competition in the internal market), detailed disclosures must be made if the subsidy amounts to one million euros or more and the subsidy is received by a party to a concentration or public procurement within the three years immediately preceding the signing or attribution.³³

On the opposite end, in Articles 4.3. and 4.4 the FSR provides that a subsidy granted over a consecutive period of three years and valued below four million euros is deemed unlikely to distort the market, while a subsidy under the de minimis threshold of 200,000 euros is deemed non-distortive in the single market.³⁴

Ratione personae, the FSR applies to entities with economic activities in the EU. Article 1 makes the FSR applicable to all economic actors in the EU, including those directly or indirectly controlled by a state.³⁵ Previous Commission investigations into subsidized goods, and the ensuing World Trade Organization Dispute Resolution Organ cases provide some insight into the entities the Commission may assimilate to foreign states in its application of the FSR.³⁶ The FSR does not directly define the entities, but they are assumed to be any party liable to partake in concentrations in the EU. In Article 2.3, the FSR does refer to definitions of economic operators, bidders in public procurement procedures, held in various directives.³⁷ Article 20, in turn, focuses on detailing the situations where a concentration arises, which largely follow the notions of M&A, joint ventures and control acquisitions.³⁸

In applying the FSR, the Commission has broad investigative powers and has a wide array of remedial tools at its disposal. The Commission follows its antitrust *modus operandi* as visible in previous decisions and in dedicated antitrust regulations.³⁹ Through either its *ex-officio* powers or *ex-ante* notifications, once the Commission finds that a financial contribution constitutes a subsidy,⁴⁰ it determines whether the subsidy distorts the market by improving the competitive position of its recipient while harming

31. See FSR 2022/2560, art. 5, at 15.

32. See *id.* art. 5(b), (d).

33. See Commission Regulation 2023/1441, annex 1, § 5(1), at 33–34.

34. See FSR 2023/1441, art. 4(3)–(4), at 14–15.

35. See FSR 2022/2560, art. 1(2), at 13.

36. See Zhang Liying, *The European Union's New Anti-Subsidy Policy as per the Regulation on Foreign Subsidies* (2022), 13 J. WTO & CHINA 28, 31 (2023).

37. See FSR 2022/2650, art. 2(3), at 13.

38. See *id.* art. 20, at 22–23.

39. See, e.g., Council Regulation (EC) 1/2003, 2002 O.J. (L 001) 1.

40. See FSR 2022/2560, art. 3(2), at 14.

competition on the internal market.⁴¹ If the Commission finds that a subsidy distorts competition in the internal market, the Commission then conducts a balancing test.⁴² It weighs the EU's antitrust, industrial and other policies, the potential positive effects of the subsidy on a specific economic sector (e.g., lower prices benefiting consumers or technological advancement) against the negative effects the subsidy may have on competition in the internal market.⁴³

Using its ex-officio power,⁴⁴ the Commission implements a two-stage review of a subsidy that distorts the market. To gather evidence, the Commission may use preliminary reviews, in-depth reviews, and inspections.⁴⁵ Among the host of other remedial tools at its disposal, the Commission may make requests for information, impose or accept interim measures, and impose redressive measures.⁴⁶ Article 21 and 29 of the Regulation explicitly make several of these tools applicable in ex-ante procedures targeting notifiable subsidies in concentrations and public procurements.⁴⁷

Parties that do not cooperate or violate notification requirements, intentionally or not, are exposed to fines.⁴⁸ A party investigated through the Commission's ex-officio powers that supplies incorrect, incomplete, or directly misleading information is exposed to a fine of up to one percent of its aggregate turnover, which is calculated based on the revenues of the preceding financial year.⁴⁹ Shorter term, periodic penalties may amount to up to five percent of the daily aggregate turnover.⁵⁰

A party to a concentration under investigation through the ex-ante procedure faces a fine of up to one percent of its aggregate turnover for an erroneous notification.⁵¹ Circumvention of the notification requirement, or implementation of a suspended or prohibited concentration, exposes a party to a fine of up to ten percent of its aggregate turnover.⁵²

For public procurements, the penalties applicable to ex-officio procedures under Article 17 apply.⁵³ On top of those fines, the Commission may, similar to the situation with concentrations, impose a fine of up to one percent of an economic operator's aggregate turnover for misleading or incorrect information in notifications.⁵⁴ That fine is correspondingly increased to ten

41. *See id.* art. 4, at 14–15.

42. *See id.* art. 6, at 15.

43. *See id.* art. 6(1).

44. *See id.* art. 10, at 17.

45. *See id.* art. 10(1).

46. FSR 2022/2560, arts. 11–13, at 18–19.

47. *See id.* arts. 21, 29, at 24, 30.

48. *See id.* art. 17(1), at 21.

49. *Id.* art. 17(2).

50. *Id.* art. 17(3).

51. *See id.* art. 26(2), at 28.

52. FSR 2022/2560, art. 26(3), at 28.

53. *See id.* art. 17, at 21.

54. *Id.* art. 17(2).

percent of the aggregate turnover if the economic operator failed to notify or tried to circumvent the notification of notifiable subsidies⁵⁵ (i.e., subsidies triggering the ex-ante procedure).

In light of the broad applicability and reach of the FSR, companies operating within the EU will need to gather comprehensive data regarding any foreign financial contributions they receive from third-party states.⁵⁶ Moreover, the more demanding provisions of the FSR necessitate collection of information on foreign financial contributions dating back five years prior to October 12, 2023, particularly if they continue to exert anti-competitive effects.⁵⁷ The threshold for the value of these subsidies, which may be as low as one million euros,⁵⁸ becomes pertinent, especially when a subsidy is designated as likely to induce distortions to the internal market.⁵⁹ Thus, the FSR's broad applicability is likely to lengthen the time necessary for award of public procurements, as well as the signing of M&A and joint-venture deals, and increase due diligence requirements.

A parallel may be drawn between the FSR and U.S. President Joe Biden's administration's Merger Filing Fee Modernization Act of 2022, which includes two sections dedicated to curbing subsidies from foreign countries.⁶⁰ But, the subsidies targeted by this legislation primarily originate from countries the United States identifies as entities of concern, and thus, as strategic threats.⁶¹ Consequently, the Act is much more limited in scope than the FSR. The absence of a close comparison only underscores the specificity of this regulation, prompting inquiries into how it interacts with international trade law texts and bodies, as well as the possibility that it may trigger retaliatory legislation. Given the broad applicability of the FSR and, in turn, the broad powers it grants the Commission, the application of the FSR will have to be closely watched in years to come.

II. Export Controls

“We must keep it firm in our minds that technology is the core combat capability”

– Xi Jinping – October 2017⁶²

55. *Id.* art. 17(5)(a).

56. *See id.* arts. 20–21, at 22–23; *see also id.* art. 29, at 30.

57. *See id.* art. 54(4), at 44.

58. *See generally* Commission Regulation 2023/1441, annex I, at 20–44.

59. *See* FSR 2022/2506, ¶ 19, at 3.

60. Merger Filing Fee Modernization Act of 2022, H.R. 3843, 110th Cong. §§ 201–202 (2022).

61. *See id.* § 201(a)(1).

62. Xi Jinping, President of China, Report at 19th CPC National Congress (Oct 18, 2017), https://www.chinadaily.com.cn/china/19thcpcnationalcongress/2017-11/04/content_34115212.htm [<https://perma.cc/9WMJ-YPH4>].

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“On export controls, we have to revisit the longstanding premise of maintaining ‘relative’ advantages over competitors That is not the strategic environment we are in today We must maintain as large of a lead as possible. Earlier this year, the United States and our allies and partners levied on Russia the most stringent technology restrictions ever imposed on a major economy . . . , forcing Russia to use chips for dishwashers in its military equipment Export controls can be a new strategic asset in the U.S. and allied toolkit to impose cost on adversaries, and even over time degrade their battlefield capabilities.”

– Jake Sullivan – September 2022⁶³

“We are now living in a totally new era”

– Henry Kissinger – May 2022⁶⁴

This section discusses the aftermath of the U.S. export controls on Advanced Computing and Semiconductor Manufacturing Items to the People’s Republic of China (China) imposed by the U.S. Department of Commerce’s Bureau of Industry and Security (BIS) on October 7, 2022.⁶⁵ As recently as October 17, 2023, BIS updated last year’s measures in an attempt to close several loopholes that weakened the efficiency of those measures.⁶⁶ The U.S. government’s implementation of semiconductor-related export controls targeting China is a landmark decision in the relationship between the two countries. The unilateral imposition of these controls has not only led to increased tensions between the two superpowers, but also had a far-reaching geopolitical impact when Japan and the Netherlands, global leaders in the semiconductor industry, presented similar national export measures following the U.S. export controls.⁶⁷ Although these national controls do not mention China specifically, they have the same de facto result, controlling the export of semiconductor

63. Jake Sullivan, Nat’l Sec. Advisor, Remarks at the Special Competitive Studies Project Global Emerging Technologies Summit (Sept 16, 2022), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/09/16/remarks-by-national-security-advisor-jake-sullivan-at-the-special-competitive-studies-project-global-emerging-technologies-summit/> [https://perma.cc/6NRY-D2PH].

64. Interview by Edward Luce with Henry Kissinger, Former U.S. Sec’y of State and Nat’l Sec. Adviser, in Wash. (May 9, 2022), <https://www.ft.com/content/cd88912d-506a-41d4-b38f-0c37cb7f0e2f> [https://perma.cc/8BBP-RY79].

65. Given the publication deadlines, this section is limited to developments between October 7, 2022, and November 30, 2023.

66. Press Release, U.S. Dep’t of Com., Bureau of Indus. & Sec., Commerce Strengthens Restrictions on Advanced Computing Semiconductors, Semiconductor Manufacturing Equipment, and Supercomputing Items to Countries of Concern (Oct. 17, 2023), <https://www.bis.gov/press-release/commerce-strengthens-restrictions-advanced-computing-semiconductors-semiconductor> [https://perma.cc/B243-KY6G].

67. See Ana Swanson, *Netherlands and Japan Said to Join U.S. in Curbing Chip Technology Sent to China*, N.Y. TIMES (Jan. 23, 2023), <https://www.nytimes.com/2023/01/28/business/economy/netherlands-japan-china-chips.html> [https://perma.cc/EC96-A6SZ].

goods and technologies to China.⁶⁸ These controls mark a new era in the use of export controls in global technology trade as an instrument to protect national security and foreign policy interests against the background of ever-growing geopolitical tensions in the continuing race for technological superiority over competing countries, such as China.

A. THE 2022 U.S. SEMICONDUCTOR-RELATED EXPORT CONTROLS

On October 7, 2022, the United States shook the world of export controls and unilaterally issued sweeping new export controls on advanced semiconductors and semiconductor manufacturing equipment and tools to China.⁶⁹ The amendments made to the Export Administration Regulations (EAR) by BIS aimed to limit China's ability to procure advanced computing chips, develop and maintain supercomputers, and manufacture advanced semiconductors used for military purposes.⁷⁰ BIS published an interim final rule to implement these semiconductor-related amendments to the EAR in the Federal Register on October 13, 2022.⁷¹ Although the Year in Review 2022 edition briefly discussed the new U.S. export controls,⁷² it is essential to outline the contents of these controls in order to understand the 2023 amendments and reflect on their global impact in the past year.

The 2022 U.S. export controls rule, briefly put, addresses U.S. national security and foreign policy concerns in two key areas.⁷³ First, it enforces stringent export controls on specific advanced computing semiconductor chips, transactions related to supercomputer end uses, and dealings with certain entities identified in supplement No. 4 to part 744 of the EAR, also referred to as the Entity List.⁷⁴ Second, the rule introduces new controls on particular semiconductor manufacturing items and transactions involving specific integrated circuit (IC) end uses.⁷⁵

The new U.S. export controls signify the next step in the technology war between the United States and China, with technology at the heart

68. *See id.*

69. *See* Press Release, U.S. Dep't of Commerce, Bureau of Indus. & Sec., Commerce Implements New Export Controls on Advanced Computing and Semiconductor Manufacturing Items to the People's Republic of China (PRC) (October 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/648Q-SJ57>].

70. *See id.*

71. *See* Implementation of Additional Export Controls: Certain Advanced Computing and Semiconductor Manufacturing Items; Supercomputer and Semiconductor End Use; Entity List Modification, 87 Fed. Reg. 62,186 (Oct. 13, 2022) (to be codified at 15 C.F.R. pts. 734, 736, 740, 742, 744, 762, 772, 774).

72. *See* Geoffrey Goodale et al., *Semiconductor-Related Supply Chain Developments in 2022*, 57 ABA/ILS YIR 524 (2023).

73. *See* U.S. Dep't of Commerce, *supra* note 69.

74. *See id.*

75. *See id.*

of rearranging the global export control landscape.⁷⁶ In that context, these unilateral U.S. export controls were considered a major diplomatic gamble.⁷⁷ Although the United States maintains a dominant position in many categories of the semiconductor manufacturing industry, the long-term success of these measures was contingent on aligning with U.S. allies to prevent backfilling the Chinese semiconductor industry by (mainly) Dutch and Japanese competitors of U.S. companies.⁷⁸ The Netherlands holds a significant role in the potential success of the Chinese semiconductor industry as they are the world's only manufacturer of the most advanced lithography equipment available, which is crucial for developing and producing semiconductors.⁷⁹ Access to this advanced machinery is necessary for the Chinese semiconductor industry in its technological progress and to avoid being overshadowed technologically by "the West."⁸⁰ Transforming these unilateral U.S. export controls into multilateral controls was therefore deemed a substantial challenge and a central diplomatic priority for the Biden administration.⁸¹ Because Dutch and Japanese semiconductor companies dominate categories of semiconductor manufacturing equipment that U.S. companies do not, diplomatic discussions between the Netherlands and Japan were highly anticipated.⁸²

In response to the October 7, 2022, measures, China filed a complaint with the World Trade Organization (WTO) on December 12, 2022.⁸³ In its complaint, China requested consultations with the United States with respect to the measures related to trade in certain advanced computing semiconductor chips, supercomputer items, semiconductor manufacturing items and other items, as well as their related services and technologies destined for or in relation to China.⁸⁴ On December 21, 2022, the Russian Federation (Russia) requested to join the consultations based on the

76. See H. Andrew Schwartz & Gregory C. Allen, *Choking Off China's Access to the Future of AI*, CTR. FOR STRATEGIC & INT'L STUD. (Oct. 11, 2022), <https://www.csis.org/podcasts/truth-matter/choking-chinas-access-future-ai> [<https://perma.cc/H9BK-VYEZ>].

77. See GREGORY C. ALLEN & EMILY BENSON, CTR. FOR STRATEGIC & INT'L STUD., *CLUES TO THE U.S.-DUTCH-JAPANESE SEMICONDUCTOR EXPORT CONTROLS DEAL ARE HIDING IN PLAIN SIGHT* 1 (2023), <https://www.csis.org/analysis/clues-us-dutch-japanese-semiconductor-export-controls-deal-are-hiding-plain-sight> [<https://perma.cc/3HHQ-FBF4>].

78. Schwartz & Allen, *supra* note 76.

79. ALLEN & BENSON, *supra* note 77.

80. See *id.* at 7.

81. See *id.* at 5.

82. See *id.* at 4.

83. Request for Consultations by China, *United States – Measures on Certain Semiconductor and Other Products, and Related Services and Technologies*, WTO Doc. G/L/147#G/TRIMS/D/46#IP/D/44#S/L/438#WT/DS615/1 (Dec. 12, 2022), https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=298390,292386,291954,291955,291863,291170,290979,290829,290464&CurrentCatalogueIdIndex=8&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True [<https://perma.cc/6KR9-HC3Z>].

84. *Id.* ¶ 1.

argument that it has a substantial trade interest in these consultations.⁸⁵ According to Russia, the U.S. export controls have an impact on the export of non-US made products to Russia.⁸⁶ Further, Russia requested to join the consultations because “the United States has adopted and maintained measures related to trade with Russia.”⁸⁷ The United States responded on March 3, 2023,⁸⁸ that in its view, issues of national security are political matters not susceptible to review or capable of resolution by WTO dispute settlement since every Member of the WTO retains the authority to determine for itself those measures that it considers necessary to the protection of its essential security interests.⁸⁹ While the United States accepted China’s request to enter into consultations, the status of the consultations are currently unknown.⁹⁰

B. THE U.S.—DUTCH—JAPANESE SEMICONDUCTOR EXPORT CONTROLS DEAL

On January 28, 2023, the United States secured a deal with the Netherlands and Japan to join the new semiconductor export controls.⁹¹ The exact details of how the Netherlands and Japan would join the U.S. export control measures were not published at that time. The legal frameworks of export control regimes in the Netherlands and Japan differ significantly from the U.S. system. As a member of the EU, the Netherlands maintains an export control policy implemented at an EU level through the EU Dual-Use Regulation.⁹² The Netherlands took a leap of faith by deciding to implement

85. Communication from the Russian Federation, Request to Join Consultations, *United States – Measures on Certain Semiconductor and Other Products, and Related Services and Technologies*, WTO Doc. WT/DS615/2 (Dec. 21, 2022), https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=298390,292386,291954,291955,291863,291170,290979,290829,290464&CurrentCatalogueIdIndex=7&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True [https://perma.cc/WFP4-FXSU].

86. *Id.*

87. *Id.*

88. See Communication from the United States, *United States – Measures on Certain Semiconductor and Other Products, and Related Services and Technologies*, WTO Doc. WT/DS615/7 (Mar. 3, 2023), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/615-7.pdf&Open=True> [https://perma.cc/P3RG-8K3X].

89. See generally General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter “GATT 1994”], Art. XXI; see also General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) [hereinafter “GATS”], Article XIV bis; see also Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994), art. 7.

90. See *Dispute Settlement DS615: United States – Measures on Certain Semiconductor and Other Products, and Related Services and Technologies*, WTO, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds615_e.htm [https://perma.cc/B8N5-UCVJ] (last visited Apr. 9, 2024).

91. Swanson, *supra* note 67.

92. See Regulation 2021/821 of the European Parliament and of the Council of 20 May 2021 Setting Up a Union Regime for the Control of Exports, Brokering, Technical Assistance,

unilateral national export control measures without the usual support and backing of the EU. To understand the challenges for the Dutch legislator following the U.S.—Dutch—Japanese Semiconductor Export Controls Deal, we briefly compare the differences between the different export control regimes below.

Both the Netherlands and the United States are participating states in the Wassenaar Arrangement, an export control regime with forty-two member states controlling the export of arms, dual-use goods and technologies.⁹³ The U.S. alignment with the Wassenaar Arrangement is mainly regulated through the U.S. Commerce Control List.⁹⁴ But, the 2018 Export Control Reform Act (ECRA) also allows the United States to impose export controls on items not covered by the Wassenaar Arrangement.⁹⁵ This is relevant because amendments and updates to the Wassenaar Arrangement's control lists can only be accomplished when the participating states reach consensus.⁹⁶ As such, any member of the Wassenaar Arrangement, such as Russia, can block proposed amendments to its control list. The current geopolitical circumstances and the fact that plenary decision-making meetings only take place once per year,⁹⁷ however, have resulted in a deadlock situation, making it difficult, if not impossible, to add new items to the list and try to keep abreast with technological developments, especially in the field of semiconductor technology. The ECRA, however, enables the United States to move ahead on the implementation of export controls of this semiconductor technology unilaterally, thereby allowing the United States to act swiftly in case of new technological developments that 'threaten' national security and foreign policy interests.⁹⁸

The Netherlands' participation in the Wassenaar Arrangement is further aligned through the rules and regulations of the EU and, more specifically, the EU Dual-Use Regulation. Although the EU export control system reflects the commitments under the Wassenaar Arrangement, it lacks the unilateral powers, at least at an EU level, to act in a similar way compared to how the United States is able to act under ECRA.⁹⁹ The recast of the Dual-Use Regulation in 2021, however, provided the possibility for individual Member States to impose further controls on non-listed items

Transit and Transfer of Dual-Use Items (recast), 2021 O.J. (L 206) 1 [hereinafter "Dual-Use Regulation"] (EU).

93. See Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, Dec. 19, 1995 [hereinafter "Wassenaar Arrangement"], <https://www.wassenaar.org/app/uploads/2021/12/Public-Docs-Vol-I-Founding-Documents.pdf> [<https://perma.cc/N4DJ-4THB>].

94. See The Commerce Control List, 15 C.F.R. § 774.

95. See 50 U.S.C. § 4817(c).

96. See Wassenaar Arrangement art. VII(5).

97. *Id.* art. VII(2).

98. See 50 U.S.C. § 4817(c)(2).

99. See *Exporting Dual-Use Items*, EUROPEAN COMM'N, https://policy.trade.ec.europa.eu/help-exporters-and-importers/exporting-dual-use-items_en [<https://perma.cc/J975-N5WG>] (last visited Apr. 9, 2024).

and technology under specific circumstances, by amending and broadening the catch-all provisions. Articles 4 and 9 of the Dual-Use Regulation¹⁰⁰ allow individual Member States to unilaterally control the export of items and technology not listed in the Wassenaar Arrangement.¹⁰¹ These two catch-all provisions allow Member States to impose additional controls (i) if they are deemed critical in the prevention of the proliferation of weapons of mass destruction,¹⁰² or (ii) for reasons of public security, including the prevention of acts of terrorism, or for human rights considerations.¹⁰³ Furthermore, Article 9 of the Dual-Use Regulation also allows Member States to coordinate their export controls on items for which export controls have not been agreed multilaterally.¹⁰⁴

Moreover, it is important to note that export controls in the EU are country-agnostic, meaning they are not targeted at specific countries but rather at the goods or the technology itself.¹⁰⁵ Unlike the United States, the EU has never enforced export controls aimed at a particular country, except in cases of sanctions regimes or arms embargoes.¹⁰⁶ Not surprisingly, it has been widely argued that the EU should update its strategic approach to export controls after the October 7, 2022, measures, since the current policy is unable to fully protect EU security interests.¹⁰⁷ Before discussing the EU's plans to update its approach towards better coordination on strategic export controls, an outline of the Netherlands controls for the advanced semiconductor manufacturing equipment is provided below.

C. THE 2023 SEMICONDUCTOR-RELATED EXPORT CONTROLS

1. *National Export Controls by the Netherlands*

The Dutch Minister for Foreign Trade and Development Cooperation sent a letter on March 8, 2023, to the House of Representatives of the States General announcing forthcoming national export control measures

100. See Dual-Use Regulation 2021/821, arts. 4(3), 9(1). These catch-all provision are discussed for purposes of this article. However, please note that there are also other catch-all provisions included in the Dual-Use Regulation besides Articles 4 and 9.

101. See *id.* These catch-all provisions that exist under the new Dual-Use Regulation were also present in the old regulation. See Council Regulation 428/2009 of 5 May 2009, Setting Up a Community Regime for the Control of Exports, Transfer, Brokering and Transit of Dual-Use Items (recast), 2009 O.J. (L 134) (EC). However, they have been amended and extended in the recast of the Dual-Use Regulation in 2021. See Dual-Use Regulation 2021/821, arts. 4(3), 9(1).

102. Dual-Use Regulation 2021/821, art. 4(3).

103. *Id.* art. 9(1).

104. See *id.* art. 9(2)–(4).

105. See Tobias Gehrke & Julian Ringhof, *The Power of Control: How the EU Can Shape the New Era of Strategic Export Restrictions* EUR. COUNCIL ON FOREIGN RELS (May 17, 2023), <https://ecfr.eu/publication/the-power-of-control-how-the-eu-can-shape-the-new-era-of-strategic-export-restrictions/> [<https://perma.cc/QK46-VCU3>].

106. See *id.*

107. See *id.*

concerning advanced semiconductor manufacturing equipment.¹⁰⁸ The Minister informed the House of Representatives that the Netherlands considers it necessary, for reasons of national and international security, to impose controls on advanced semiconductor manufacturing equipment with the utmost urgency by setting up a national control list by public ministerial order (Ministerial Order).¹⁰⁹

In response, China issued a formal complaint with the Dutch government, urging the Netherlands not to follow in the footsteps of certain countries that are, according to China, abusing national export control measures.¹¹⁰ In addition, a spokesperson for the Chinese Foreign Ministry has threatened to take retaliatory measures against the Netherlands.¹¹¹

Despite China's complaints and concerns, on June 30, 2023, the Minister published a Ministerial Order implementing Dutch national export controls for advanced semiconductor manufacturing equipment.¹¹² The legal basis for this Ministerial Order stems from Article 9 of the Dual-Use Regulation, which, as outlined above, allows EU member states to take additional export control measures based on public security interests or human rights considerations.¹¹³

The official rationale for these controls is to prevent Dutch goods and technology from being used for undesirable purposes like military deployment or the creation of weapons of mass destruction, to prevent long-term strategic dependencies, and to maintain the Netherlands' position as a technological leader.¹¹⁴ Neither the letter to the House of Representatives nor the Ministerial Order itself, however, mentions China as the targeted country of the measures, and neither is there any reference to cooperation with the United States or Japan in this respect. Although not officially stated, the new Dutch national export controls are deemed to be primarily aimed

108. Letter from the Minister of Foreign Trade and Dev. Cooperation to the President of the House of Representatives of the States Gen. Announcing Forthcoming Export Control Measures Concerning Advanced Semiconductor Mfg. Equip. (Mar. 8, 2023), <https://www.government.nl/documents/parliamentary-documents/2023/03/10/letter-to-parliament-on-additional-export-control-measures-concerning-advanced-semiconductor-manufacturing-equipment> [https://perma.cc/E98S-KESQ].

109. *See id.*

110. *See* Annabelle Liang, *US-China Chip War: Netherlands Moves to Restrict Some Tech Exports*, BBC (Mar. 9, 2023), <https://www.bbc.com/news/business-64897794> [https://perma.cc/HU8X-NRQB].

111. *See* Ma Zhuoyan, *China Urges Japan to be Prudent on Semiconductor Manufacturing Equipment Export Controls*, MSN (Apr. 4, 2023), <https://www.msn.com/en-xl/news/other/china-urges-japan-to-be-prudent-on-semiconductor-manufacturing-equipment-export-controls/ar-AA19ri3q> [https://perma.cc/Y49F-LEBR].

112. *See* Regeling van de Minister voor Buitenlandse Handel en Ontwikkelingssamenwerking van 23 juni 2023 [Regulation of the Minister for Foreign Trade and Development Cooperation of 23 June 2023, Stcrt. 2023, 1 (Neth.)].

113. *See* Dual-Use Regulation 2021/821, art. 9(1).

114. Molly Killeen, *Netherlands to Introduce Export Controls on Crucial Chipmaking Technology*, EURACTIV (Mar. 8, 2023), <https://www.euractiv.com/section/industrial-strategy/news/netherlands-to-introduce-export-controls-on-crucial-chipmaking-technology/> [https://perma.cc/L9PR-42D5].

at China as a country of concern.¹¹⁵ That China is not explicitly mentioned as a country of concern, can easily be explained from the intention to avoid any geopolitical backlash and tensions between the Netherlands and China. Nonetheless, in the ongoing technological rivalry between the United States and China, the Netherlands has expressed its support for the United States and thereby has become part of the technology competition between the two rival countries.

2. The EU's Approach to Strategic Coordination on Export Controls

On June 20, 2023, the European Commission (the Commission) published a Joint Communication to the European Parliament, the European Council, and the Council on “European Economic Security Strategy.”¹¹⁶ The Commission stipulates that the EU needs a comprehensive strategic approach to economic security, de-risking and promoting its technological edge in critical sectors.¹¹⁷ The Commission considers a new approach necessary because of, inter alia, the speed with which critical new technologies are emerging and the blurring of boundaries between the civil and military sectors.¹¹⁸ Although China is not mentioned specifically in the Joint Communication, it is apparent that these arguments are targeting China and its technology industry.

The Commission further stipulates that due to heightened geopolitical tensions and risks to national security “some EU Member States and third countries have stepped up national controls to limit the export of critical technologies outside, or in some cases building on, the processes established in the multilateral export control regimes such as advanced semiconductor manufacturing equipment or equipment related to quantum computing” showing the need for greater flexibility in the EU export control regime.¹¹⁹

In any event, the Commission indicated that it would propose a new framework before the end of 2023 to enhance its current export control regime to address risks related to, amongst others, technology security and strengthen the EU's role as a global actor.¹²⁰ At the time of writing, however, a proposal by the EU is not yet published.

On October 3, 2023, the Commission adopted a recommendation on critical technology areas for the EU's economic security for further risk assessment and published a list of ten critical technologies, selected based on their “transformative nature,” the risks of civil and military fusion, and of enabling violation of human rights.¹²¹ As a first step, however, the Commission

115. See ALLEN & BENSON, *supra* note 77.

116. Joint Communication to the European Parliament, the European Council and the Council on “European Economic Security Strategy,” JOIN (2023) 20 final (June 20, 2023) (EC).

117. *Id.* at 2.

118. *Id.* at 8.

119. *Id.* at 10.

120. See *id.* at 11.

121. *Commission Recommendation on Critical Technology Areas for the EU's Economic Security for Further Risk Assessment with Member States*, at 2, COM (2023) 6689 final (Oct. 3, 2023).

recommends that Member States, together with the Commission, conduct a collective risk assessment of the four technology areas with the highest likelihood of presenting the most sensitive and immediate risks related to technology security and technology leakage by the end of 2023.¹²² These areas are: (i) advanced semiconductor technologies (including photonics); (ii) quantum technologies; (iii) artificial intelligence technologies; and (iv) biotechnologies.¹²³

Furthermore, in order to ensure that sensitive technologies do not fall into the wrong hands and to ensure better coordination of export controls at an EU level, on October 20, 2023, the EU enabled new “autonomous” controls through the publication of the first compilation of EU Member States’ national export control lists.¹²⁴ This action allows Member States to impose authorization requirements on exports of goods and technology included in other Member States’ control lists, as long as these are included in the European Commission’s own compilation.¹²⁵ The list includes the Netherlands’ controls on advanced semiconductor manufacturing equipment, as well as the export controls imposed by Spain on, amongst others, quantum computing and other emerging technologies.¹²⁶

Some have labelled the current EU’s response cumbersome at best, risking becoming a policy taker rather than a policy maker.¹²⁷ Because the EU is also highly dependent on China and the supply chain, the EU is struggling to tailor its new export control policy to address its technological security concerns without directly mentioning China.¹²⁸

3. *Further National Export Controls by the United States*

On October 17, 2023, BIS released two interim final rules (collectively, the October 2023 IFRs) designed to update export controls on advanced computing semiconductors and semiconductor manufacturing equipment, as well as items that support supercomputing applications and end-uses, to arms embargoed countries, including China, and to place additional

122. *Id.*

123. *Id.* at 3.

124. *Compilation of national control lists under Article 9(4) of Regulation (EU) 2021/821 of the European Parliament and of the Council of 20 May 2021 Setting up a Union Regime for the Control of Exports, Brokering, Technical Assistance, Transit and Transfer of Dual-Use Items*, 2023 O.J. (C 441) 1.

125. *Id.*

126. See generally *id.*

127. See, e.g., Tobias Gehrke, *A Maker, Not a Taker: Why Europe Needs an Economic Security Mechanism*, EUROPEAN COUNCIL ON FOREIGN REL. (Nov. 9, 2023), <https://ecfr.eu/article/a-maker-not-a-taker-why-europe-needs-an-economic-security-mechanism/> [<https://perma.cc/Y6E5-BJDG>].

128. See Rhyannon Bartlett-Imadegawa et al., *EU Struggles to Limit China’s Involvement in Sensitive Tech Areas*, NIKKEI ASIA (Oct. 11, 2023), <https://asia.nikkei.com/Economy/Trade-war/EU-struggles-to-limit-China-s-involvement-in-sensitive-tech-areas> [<https://perma.cc/XL8P-VJZG>].

related entities in China on the BIS Entity List.¹²⁹ The official rationale of the October 2023 IFRs is that these updates were necessary to maintain the effectiveness of the semiconductor-related controls, close loopholes, and ensure that they remain durable.¹³⁰ Part of the background of these additional controls may also be the EU's cumbersome response in this situation thus far, and the dissatisfaction of the Dutch approach that still allows for the sale of older DUV models to China.¹³¹ Consequently, the United States decided to implement the October 2023 IFRs, which contain three main rules.¹³²

The first, the Advanced Computing/Supercomputing Interim Final Rule (AC/S IFR), is a set of regulations aimed at controlling the distribution of chips and preventing circumvention efforts, especially those related to China's use of subsidiary firms to obtain controlled technology.¹³³ The AC/S IFR has two main parts. In the first part, it adjusts the thresholds for regulating chips that are controlled, resulting in more chips being subject to U.S. export controls.¹³⁴ The second part of the AC/S IFR updates rules to combat circumvention efforts.¹³⁵

The updated rules expand licensing requirements to forty-three additional countries, including those in D:1 (covers countries with national security risks), D:4 (covers missile technology), and D:5 (covers arms-embargoed countries).¹³⁶ The updated countries include those with a high circumvention risk, such as Kyrgyzstan, which has seen an increase in trade in chips despite having limited imports and exports of chips over the past years.¹³⁷ Overall, this update significantly expands the previous geographic export restrictions and makes it harder for potential Chinese military end-users to obtain controlled technology.¹³⁸

The second rule relates to semiconductor manufacturing equipment (SME).¹³⁹ Key changes made from the October 7, 2022, rule include the following: imposing controls on additional types of semiconductor manufacturing equipment; refining and better focusing the U.S. persons

129. U.S. Dep't of Commerce, *supra* note 66; *see also* Export Controls on Semiconductor Manufacturing Items, 88 Fed. Reg. 73,424 (Oct. 25, 2023) (to be codified at 15 C.F.R. pts. 734, 736, 740, 742, 744, 772, 774); Implementation of Additional Export Controls: Certain Advanced Computing Items; Supercomputer and Semiconductor End Use; Updates and Corrections, 88 Fed. Reg. 73,458 (Oct. 25, 2023) (to be codified at 15 C.F.R. pts. 732, 734, 736, 740, 742, 744, 746, 748, 758, 770, 772, 774).

130. *See* U.S. Dep't of Commerce, *supra* note 66.

131. Gehrke, *supra* note 127.

132. *See* 15 C.F.R. §§ 734, 736, 740, 742, 744, 772, and 774.

133. U.S. Dep't of Commerce, *supra* note 66.

134. *See id.*

135. *See id.*

136. *Id.*

137. *See* Emily Benson, *Updated October 7 Semiconductor Export Controls*, CTR. FOR STRATEGIC & INT'L STUDIES (Oct. 18, 2023), <https://www.csis.org/analysis/updated-october-7-semiconductor-export-controls> [https://perma.cc/M8YG-ZQVQ].

138. *See id.*

139. U.S. Dep't of Commerce, *supra* note 66.

restrictions while codifying previously existing agency guidance to ensure U.S. companies cannot provide support to advanced Chinese semiconductor manufacturing while avoiding unintended impacts; and expanding license requirements for semiconductor manufacturing equipment to apply to additional countries beyond the PRC and Macau, to twenty-one other countries for which the United States maintains an arms embargo.¹⁴⁰

The third rule expands the number of entities added to the U.S. Entity List, to which the export of certain technology is prohibited.¹⁴¹ This update adds to this list thirteen entities involved in developing artificial intelligence that threatens U.S. national security and foreign policy objectives.¹⁴²

Whereas the aftermath of the 2022 controls showed the U.S. willingness to cooperate with its allies to limit the Chinese semiconductor industry, the aftermath of the 2023 controls shows that the United States is still very much inclined to take necessary steps unilaterally to put a hold to the further development of that industry. For a successful outcome, however, ongoing support from U.S. allies, such as the Netherlands and Japan, is paramount.

III. The European Court of Justice

In recent years, the EU has issued a significant number of directives to combat money laundering, illegal profits, and the financing of terrorism.¹⁴³ But in November 2022, the European Court of Justice (ECJ) established a significant roadblock to the availability of personal data that could arguably be used to help combat such crimes.¹⁴⁴

The ECJ implemented this roadblock in the joined cases *WM v. Luxembourg Business Registers* and *Sovim v. Luxembourg Business Registers*.¹⁴⁵ The cases concerned the implementation of Article 30(5)(c) of EU Directive 2015/849 into Luxembourgish law, as amended by Directive 2018/843 (the Fifth Anti-Money Laundering Directive or 5AMLD).¹⁴⁶ The 5AMLD established the Luxembourgish Register of Beneficial Ownership (RBO), and in doing so, prescribed that *any* member of the public could access personal information regarding a beneficial owner registered within the RBO.¹⁴⁷

140. *Id.*

141. *Id.*

142. *Id.*

143. See *EU Context of Anti-Money Laundering and Countering the Financing of Terrorism*, EUROPEAN COMM'N, https://finance.ec.europa.eu/financial-crime/eu-context-anti-money-laundering-and-countering-financing-terrorism_en [https://perma.cc/B55C-CFX2] (last visited Apr. 9, 2024).

144. Case C-37/20, *WM v. Lux. Bus. Regs.*, 2022 EUR-Lex CELEX LEXIS 912 (Nov. 22, 2022) (joined cases C-37/20 and C-601/20).

145. *Id.* ¶¶ 83–88.

146. *Id.* ¶¶ 3–19.

147. See Laurent Fessmann et al., *Luxembourg: Access to the Register of Beneficial Owners*, BAKER MCKENZIE (Feb. 3, 2023), <https://insightplus.bakermckenzie.com/bm/investigations-compliance-ethics/luxembourg-access-to-the-register-of-beneficial-owners> [https://perma.cc/ZZ7B-8KQ3].

After scrutinizing the pertinent evidence, the ECJ convened in the Grand Chamber,¹⁴⁸ and articulated its position that the public access to beneficial owners' data, as found in business registers across the EU, infringed upon the fundamental rights to life and privacy protections stipulated in Articles 7 and 8 of the Charter of the European Union Fundamental Rights.¹⁴⁹

The ECJ noted that the risk of violating one's fundamental rights is heightened by the fact that once information is published, it can be freely accessed, stored, and disseminated without an opportunity to "defend themselves effectively against abuse."¹⁵⁰

It is noteworthy that in recent years, numerous international organizations and institutions beyond the European Union, such as the United Nations, International Monetary Fund, and European Central Bank, among others, have identified the combat against money laundering, illicit profits, terrorism financing, and sanctions avoidance schemes as a strategic imperative for ensuring stability in the global economy. In contrast to the ECJ's ruling in *Luxembourg Business*, these entities contend that providing public access to registry data enables individuals and entities, including the press, to act as watchdogs in the market, thereby exposing and addressing abuses.

Nonetheless, the ECJ has been very clear that this system of public access to data is not necessary to fight money laundering or related crimes. Similarly, the ECJ has observed that the safeguards provided by the EU Directive,¹⁵¹ are ineffective. In summary, the European Court of Justice (ECJ) asserted that the responsibility to combat money laundering, illegal profits, and terrorism financing rests with public authorities and financial institutions, rather than individual citizens or other private entities.

148. The Grand Chamber is composed of fifteen out of the twenty-seven justices of the European Court of Justice when, inter alia, the matter is deemed of particular importance. *See Court of Justice, COURT OF JUSTICE OF THE EUROPEAN UNION*, https://curia.europa.eu/jcms/jcms/Jo2_7024/en/ [https://perma.cc/PAA4-CJAT] (last visited Apr. 9, 2024).

149. *See* Case C-37/20, *WM v. Luxembourg Bus. Regs.* 2022 EUR-Lex CELEX LEXIS 912, ¶¶ 83–88.

150. *Id.* ¶ 43.

151. *See* Directive 2018/843, arts. 36, 38, 2018 O.J. (L 156) 43 (EU).

THE YEAR IN REVIEW
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Middle East Committee Contribution to the 2023 Year in Review

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This article surveys significant legal developments in the Middle East in 2023.

I. Israel: Constitutional Law Trumps All

2023 will be engraved in the legal history of Israel as the year of the so-called “judicial reform,” as presented and led by the Minister of Justice, Mr. Yariv Liven. While most of the issues addressed by the reform remained unresolved, they prompted social discord and severe discussions over constitutional governance, the rule of law, and democracy in this seventy-five-year-old nation-state.

Shortly after Israel’s thirty-seventh government was established, the Minister of Justice declared a legislative initiative for several judicial reforms aimed at limiting the Supreme Court’s power of judicial review over the Parliament (the Knesset) and the Government.¹ However, tragic developments in the fall of this year have eclipsed the social upheaval

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1. See Hadas Gold et. al, *Israel Passed a Bill to Limit the Supreme Court’s Power. Here’s What Comes Next*, CNN (July 24, 2023, 10:51 AM), <https://www.cnn.com/2023/07/24/middleeast/israel-judicial-reforms-vote-explained-mime-intl/index.html> [<https://perma.cc/DY4F-9F4H>].

supporting these reforms. Therefore, for the time being, judicial reform has become muted while the military situation awaits resolution.

As a first step, the Minister declared his intention to pass the following legislative amendments in one comprehensive package:²

First, the package aimed to limit the Court's power of judicial review of the constitutionality of legislation by: (1) enacting the overriding clause, allowing a simple majority of sixty-one members of the Knesset (out of 120) to override any Court decision that invalidates legislation as unconstitutional; (2) empowering the Knesset to re-legislate invalidated legislation, unless such invalidation was made unanimously by the Court; (3) prohibiting judicial review over Basic Laws; and (4) requiring the judicial invalidation of a law as unconstitutional only if the Court sits in a full panel of fifteen judges and obtain the support of at least eighty percent of them.³

Second, the package aimed to change the structure of the Judicial Selection Committee, thereby increasing the influence of political members over professional members. This modification would expand the Committee members from nine to eleven, with seven members appointed by the coalition, one by the opposition, and three justices from the Supreme Court.⁴ However, this change would exclude the Israel Bar Association, a professional organization which plays a vital role in the country's judicial selection process,⁵ by excluding its two representatives from the Committee.⁶

Third, the package aimed to abolish the "Reasonableness Doctrine" as one of the bases for judicial review of the Executive Branch.⁷

2. See Steven A. Cook, *Israel's Judicial Reforms: What to Know*, COUNCIL ON FOREIGN RELATIONS (July 26, 2023, 10:57 AM), <https://www.cfr.org/in-brief/israels-judicial-reforms-what-know> [https://perma.cc/DP2X-BDB4].

3. Chen Maanit & Noa Shpigel, *Netanyahu's Judicial Overhaul: Israel's Knesset Advances Bill Enabling It to Override Top Court*, HAARETZ (Feb. 22, 2023), <https://www.haaretz.com/israel-news/2023-02-22/ty-article/.premium/knesset-advances-bill-barring-top-court-from-intervening-in-ministerial-appointments/00000186-78c1-db94-a9ae-7bc3425c0000> [https://perma.cc/PCN8-9RGT].

4. Compare Basic Law of 1984, the Judiciary, 5748–1984 § 4, <https://www.refworld.org/docid/3ae6b51d24.html> [https://perma.cc/C6A3-U9CU] with The Judiciary Basic Law (Judicial Reforms Amendment) § 4 JERUSALEM INST. OF JUSTICE, INTRODUCTION TO THE 2023 ISRAELI JUDICIAL REFORM 6–7 (2023), <https://jij.org/wp-content/uploads/2023/03/Booklet-Judicial-Reform.pdf> [https://perma.cc/TGC8-JKQB].

5. See *The Judiciary Basic Law Amendments*, KOHELET POLICY FORUM (Jan. 24, 2023), <https://en.kohelet.org.il/publication/the-judiciary-basic-law-amendments> [https://perma.cc/RTL6-3PLA] (noting that the current composition gives members that are not publicly elected officials a majority in the Committee); see also JERUSALEM INST. OF JUSTICE, INTRODUCTION TO THE 2023 ISRAELI JUDICIAL REFORM 8 (2023), <https://jij.org/wp-content/uploads/2023/03/Booklet-Judicial-Reform.pdf> [https://perma.cc/TGC8-JKQB] (noting that the two representatives from the Bar Association tend to vote in a way that gives the judges eight votes under a liberal government and at least six under a conservative government, resulting in judges having absolute control over appointments).

6. See JERUSALEM INST. OF JUSTICE, INTRODUCTION TO THE 2023 ISRAELI JUDICIAL REFORM 6–7 (2023), <https://jij.org/wp-content/uploads/2023/03/Booklet-Judicial-Reform.pdf> [https://perma.cc/TGC8-JKQB].

7. See *id.*

Fourth, it sought to degrade the legal status of the State General Attorney, making his or her legal recommendations solely advisory rather than binding.⁸

However, due to the scope and magnitude of public reaction in opposition to the reform, the Minister of Justice decided to promote his initiative not as one comprehensive legislative package.⁹ Instead, he divided the package into several issues and started with the Reasonableness Doctrine issue.¹⁰ Ultimately, he succeeded in amending the Basic Law provisions regarding the Judiciary, stipulating that the Court may not judicially review governmental actions based on the Reasonableness Doctrine, including decisions concerning the exercise or omission of exercising the governmental authority.¹¹ Several petitions were filed against this amendment's constitutionality.¹² In an unprecedented step, the Supreme Court's Chief Justice decided that a full panel of fifteen members would hear the petitions.¹³ The cases were heard recently in September 2023 and a decision is anticipated by mid-January 2024.¹⁴

II. United Arab Emirates (UAE)

On October 3, 2022, the UAE President issued the "Corporate Tax Law."¹⁵ This ground-breaking legislation establishes the legal framework for the introduction and implementation of federal corporate tax in the UAE, which is set to be effective for financial years beginning on or after June 1, 2023.¹⁶

The introduction of corporate tax¹⁷ in the UAE marks a pivotal step towards realizing the nation's strategic objectives, such as reinforcing

8. *See id.*

9. Niala Boodhoo, *Mass Protests Force Change in Israel*, *AXIOS* (Mar. 28, 2023), <https://www.axios.com/2023/03/28/mass-protests-force-change-in-israel> [<https://perma.cc/3HNG-NXHM>].

10. *See Cook, supra* note 2.

11. *See id.*

12. *See* Jeremy Sharon, *Court Set for Fateful 'Reasonableness' Law Hearing as Constitutional Showdown Looms*, *THE TIMES OF ISR.* (Sept. 11, 2023 5:17 PM), <https://www.timesofisrael.com/court-set-for-fateful-reasonableness-law-hearing-as-constitutional-showdown-looms/> [<https://perma.cc/64EZ-JNA5>].

13. *See id.*

14. Information in this article is current as of the time of writing in late 2023; the High Court decision was released on January 1, 2024. *See* Jeremy Sharon, *In Historic Ruling, High Court Strikes Down Key Judicial Overhaul Legislation*, *THE TIMES OF ISR.* (Jan. 1, 2024 10:57 PM), <https://www.timesofisrael.com/in-historic-ruling-high-court-strikes-down-key-judicial-overhaul-legislation/> [<https://perma.cc/NB6R-SS95>].

15. Federal Decree-Law No. 47 of 10 Oct. 2022 (Taxation of Corporations and Businesses) (U.A.E.) (hereinafter U.A.E. Corporate Tax Law), <https://mof.gov.ae/wp-content/uploads/2022/12/Federal-Decree-Law-No.-47-of-2022-EN.pdf> [<https://perma.cc/6KMY-EBTK>].

16. *Id.* ch. 1, arts. 1, 69.

17. Corporate tax, also referred to as "corporate income tax" or "business profits tax" in other jurisdictions, is a direct tax imposed on the net income of corporations and businesses.

its reputation as a global business and investment hub and propelling its economic growth. Key aspects of the UAE Corporate Tax Law cover its application to a broad category of entities including UAE-based companies, natural persons (individuals) engaged in business activities in the UAE and non-resident juridical persons (foreign legal entities) with a “Permanent Establishment” in the UAE¹⁸ Juridical persons established in UAE free zones are also subject to corporate taxes.¹⁹ However, entities that meet the criteria to be classified as “Qualifying Free Zone Persons” may benefit from a zero percent corporate tax rate on their Qualifying Income.²⁰

The standard tax rate for corporate tax is nine percent, which applies if taxable income exceeds UAE Dirhams 375,000 (approximately US \$102,000).²¹ However, multinational enterprises with annual global consolidated revenue exceeding 750 million euros (approximately US \$794 million) and falling within the scope of pillar two of the Base Erosion and Profit Shifting (BEPS) 2.0 framework issued by the Organization for Economic Cooperation and Development (OECD) will be subject to a different tax rate.²²

Despite the levy of corporate tax, the UAE remains one of the jurisdictions with the lowest tax rates.²³ Additionally, the absence of personal income tax²⁴ continues to make the UAE a favored destination.

18. U.A.E. Corporate Tax Law, ch. 1, art. 1.

19. *Id.* ch. 2, art. 3.

20. *Id.*

21. Cabinet Decision No.116 of 2022 on the Determination of Annual Taxable Income Subject to Corporate Tax art. 3 (U.A.E.), <https://mof.gov.ae/wp-content/uploads/2023/04/Cabinet-Decision-No-116-of-2022-on-the-annual-Taxable-Income-subject-to-Corporate-Tax.pdf> [<https://perma.cc/3WQN-Z232>].

22. Federal Decree-Law No. 60 of 24 Nov. 2023 (Amending Certain Provisions of the Federal Decree- Law No. 47 of 2022 on the Taxation of Corporations and Businesses) art. 1 (U.A.E.), <https://mof.gov.ae/wp-content/uploads/2023/12/Federal-Decree-Law-No.-60-of-2023-Amending-Certain-Provisions-of-the-Federal-Decree-Law-No.-47-of-2022-on-the-Taxation-of-Corporations-and-Businesses.pdf> [<https://perma.cc/23NG-DEM8>].

23. See Natasha Turak, *The UAE Introduces Its First-Ever Corporate Taxes, Set to Start in 2023*, CNBC (Jan. 31, 2022 10:32 AM), <https://www.cnbc.com/2022/01/31/the-uae-introduces-its-first-ever-corporate-taxes-set-to-start-in-2023-.html> [<https://perma.cc/95F7-GSJ7>].

24. See *Worldwide Tax Summaries: United Arab Emirates, Individual – Taxes on Personal Income*, PWC (Sept. 4, 2023), <https://taxsummaries.pwc.com/united-arab-emirates/individual/taxes-on-personal-income> [<https://perma.cc/THB5-8PHZ>].

International Finance & Securities Committee

JENNIFER L. RODRIGUEZ; PRISCILLA TSHIBEMBA PETIT AND
VILLE LATOLA*

This article highlights significant legal developments relevant to International Finance & Securities that took place in 2023.

DEVELOPMENTS IN EUROPE

I. Retail Investment Strategy: The EU Commission releases its strategy for retail investments in Europe

On May 24, 2023, the European Commission adopted a new Retail Investment Strategy (RIS).¹ The proposal is in line with the September 2020 Capital Markets Union Action Plan,² where the Commission announced its intention to put forward a strategy for retail investments and ensure investor protection in Europe. The RIS is designed to address perceived shortcomings in the current European regulatory framework for retail investment and the way products are designed and distributed.³

Accordingly, the Commission has put forth an Omnibus Directive that would amend several directives, including Markets in Financial Instruments Directive (MiFID), Packaged Retail and Insurance-Based Investment Products (PRIIPS), Alternative Investment Fund Managers Directive (AIFMD)—from a product governance angle—and Undertakings for Collective Investment in Transferable Securities (CITS).⁴ Thus, the Commission also intended to amend the Insurance Distribution Directive (IDD) and Solvency 2, most of which are aimed at aligning IDD and

* Jennifer L. Rodriguez serves as the committee editor of this article. Priscilla Tshibemba Petit, Legal Counsel Corporate—Financial Regulatory at Bredin Prat, authored “Retail Investment Strategy: The EU Commission releases its strategy for retail investments in Europe and Sustainable Finance: ESMA publishes requirements on sustainability disclosure in Prospectuses.” Ville Latola, Legal Counsel at Borenus Attorneys, Ltd., authored “International Securities, Capital Markets, and Cybersecurity: The United States, Europe, and Finland.”

1. See *Proposal for a Directive of the European Parliament and of the Council amending Directives (EU) 2009/65/EC, 2009/138/EC, 2011/61/EU, 2014/65/EU and (EU) 2016/97 as regards the Union Retail Investor Protection Rules*, COM (2023) 279 final (May 24, 2023) [hereinafter *RIS Proposal*].

2. See *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A Capital Markets Union for People and Businesses – New Action Plan*, at 2–5, COM (2020) 590 final (Sept. 24, 2020) [hereinafter *Communication from Commission*].

3. See *RIS Proposal*, at 1–2.

4. See *id.* at 3–4.

MiFID.⁵ Given the wider-reaching scope to be addressed, especially on the topics of inducements and product governance in the retail client arena, this has triggered an intense debate and controversy among policymakers and the financial services industry.

From the onset, among other things, the Commission's legislative proposal addressed a full ban on inducements and commissions.⁶ The proposal also introduced measures concerning cost and charges, client onboarding, suitability assessments, and marketing communications.⁷ In addition, it proposed to change the way in which EU "passporting" works in practice, setting forth increased requirements where EU customers are involved.⁸ Regarding the proposed amendments to the PRIIPs Regulation, the amending regulation would change the PRIIPs key information documents to make them more suitable to changing needs of investors and increase legal clarity.⁹

In October 2023, the Commission for Economic Policy (ECON) published two reports on the RIS. The first report discussed the proposed Omnibus Directive—which will amend several pieces of EU legislation, including AIFMD, UCITS and MiFID II;¹⁰ the second report addressed the proposed regulation to amend PRIIPs regarding the improvement of the PRIIPs key information document.¹¹ These reports will be discussed within ECON and voted on in due course.

It is essential to note this version of the RIS is not final. The RIS proposed is to directly amend the main (level 1) MiFID, UCITS, PRIIPs, IDD, AIFMD and Solvency 2 legislation. As a result, the proposal will now need to go through the EU's machinery. Thus, the broader legislative process in relation to the RIS is uncertain, given the European Parliamentary elections in June 2024.¹²

5. *See id.*

6. *Id.* at 8–9.

7. *See generally id.*

8. *Id.* ¶ 25, at 28.

9. *RIS Proposal*, at 3–4.

10. *See generally Draft Report of the Committee of Economic and Monetary Affairs on the proposal for a directive of the European Parliament and of the Council amending Directives (EU) 2009/65/EC, 2009/138/EC, 2011/61/EU, 2014/65/EU and (EU) 2016/97 as regards the Union retail investor protection rules*, 2023/0167 (COD) (Oct. 9, 2023), https://www.europarl.europa.eu/doceo/document/ECON-PR-753711_EN.pdf [<https://perma.cc/NZ5W-ENWA>].

11. *See generally Draft Report of the Committee of Economic and Monetary Affairs on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) No 1286/2014 as regards the modernisation of the key information document* (COM(2023)0278 – C9-0180/2023 – 2023/0166(COD)), 2023/0166 (COD) (Oct. 2, 2023), https://www.europarl.europa.eu/doceo/document/ECON-PR-753665_EN.pdf [<https://perma.cc/73DD-2BDQ>].

12. *See generally* Kevin Cunningham et. al, *A Sharp Right Turn: A Forecast for the 2024 European Parliament Elections*, EUR. COUNCIL ON FOREIGN RELS., <https://ecfr.eu/publication/a-sharp-right-turn-a-forecast-for-the-2024-european-parliament-elections/> [<https://perma.cc/2YFY-GDHM>].

II. Sustainable Finance: ESMA publishes requirements on sustainability disclosure in Prospectuses

On July 11, 2023, the European Securities and Markets Authority (ESMA) issued a public statement describing its expectations regarding how the specific disclosure requirements of the Prospectus Regulation should be satisfied in relation to sustainability related matters.¹³ To increase the quality of sustainability disclosures, ESMA supported the Environmental, Social, and Governance (ESG) transition by taking a holistic view across the sustainable investment value chain and expecting material sustainability-related disclosure.¹⁴ Some provisions in the statement are relevant to issuers preparing non-equity prospectuses for securities not marketed as having an ESG component or objective.¹⁵

DEVELOPMENTS IN THE UNITED STATES & FINLAND

III. International Securities, Capital Markets, and Cybersecurity: The United States, Europe, and Finland

In today's digital age, and amidst heightened global tensions, the threat of cyberattacks looms large over businesses and organizations of all sizes. Finnish publicly listed companies are no exception, and they must be prepared to respond to these threats not only in terms of cybersecurity but also in terms of transparency and disclosure. A cyberattack can have far-reaching consequences, not just for the company but also for its shareholders and the broader financial market.

A cyberattack can take many forms, including data breaches, ransomware attacks, and other malicious activities that compromise a company's digital assets and data.¹⁶ Cybersecurity threats are becoming more advanced, and with increasing geopolitical tensions, the risk of sophisticated cyberattacks by state actors—especially against critical service providers—is ever increasing.¹⁷ In 2017, state-sponsored cyberattacks utilizing malware called NotPetya caused an estimated \$10 billion in damages to companies in Ukraine and abroad.¹⁸ It is essential for publicly listed companies to

13. See EUROPEAN SEC. AND MKTS. AUTH. (ESMA), ESMA STRATEGY 2023–2028, 27–28 (2023), https://www.esma.europa.eu/sites/default/files/library/esma_strategy_2023-2028.pdf [<https://perma.cc/B5H7-F97B>].

14. See *id.* at 27.

15. See *id.* at 27–28.

16. See *generally What is a Cyberattack?*, IBM, <https://www.ibm.com/topics/cyber-attack> [<https://perma.cc/B37L-A2K4>].

17. See Emil Sayegh, *Navigating the Cybersecurity Landscape in 2024*, FORBES (Dec. 19, 2023, 8:04 AM), <https://www.forbes.com/sites/emilsayegh/2023/12/19/navigating-the-cybersecurity-landscape-in-2024/?sh=22c8fb69179a> [<https://perma.cc/5NL4-XXBR>].

18. Michael N. Schmitt, *Russian Cyber Operations in Ukraine: The Legal Framework*, LIEBER INST. W. POINT (Jan. 16, 2022), <https://lieber.westpoint.edu/russian-cyber-operations-ukraine-legal-framework/> [<https://perma.cc/E4A8-F5RG>].

evaluate and assess their material cybersecurity risks and to recognize when they have experienced a cyberattack that qualifies as a disclosable event. Publicly listed companies are obliged to disclose material cybersecurity incidents if they constitute inside information stipulated in the EU Market Abuse Regulation.¹⁹ A serious cyberattack could have a significant impact on the price of the securities.

On July 26, 2023, the U.S. Securities and Exchange Commission (SEC) adopted new rules on cybersecurity incident disclosure by SEC registered companies.²⁰ The new rules require U.S. registrants to disclose material cybersecurity incidents within four business days after the company determines that a cybersecurity incident is material.²¹ Foreign private issuers must furnish this disclosure promptly in the United States after the incident is disclosed or otherwise made public—or is required to be disclosed or otherwise made public—in the registrant’s jurisdiction of domicile.²² Disclosure must be provided to any stock exchange on which the registrant’s securities trade or to security holders.²³ The rules also require publicly traded companies to disclose the following in their annual Form 10-K report and on Form 20-F for Nordic and other foreign private issuers:

- processes for assessing, identifying and managing material cybersecurity risks;
- material effects of risks from cybersecurity threats and past cybersecurity incidents; and
- the role of the board of directors and the management in overseeing and assessing cybersecurity risks.²⁴

In the United States, internal control failures regarding cybersecurity reporting may lead to consequences for the company and its management. On October 30, 2023, the SEC charged SolarWinds Corporation and its chief information security officer with fraud and internal control failures.²⁵ SolarWinds Corporation was charged with misleading investors in its reporting of its cybersecurity practices and known risks from at least the company’s October 2018 initial public offering through at least its December 2020 announcement that it was the target of a massive, nearly two-year long cyberattack.²⁶ In a notable response to evolving regulations, a ransomware group, after launching a cyberattack on MediaLink Group and stealing customer data, claimed to have taken the unusual step of filing

19. See Council Regulation 596/2014, art. 17, 2014 O.J. (L 173) (EU).

20. See Press Release, U.S. Sec. and Exch. Comm’n, SEC Adopts Rules on Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure by Public Companies (July 26, 2023), <https://www.sec.gov/news/press-release/2023-139> [<https://perma.cc/Z3WW-XLN4>].

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. See Press Release, U.S. Sec. and Exch. Comm’n, SEC Charges SolarWinds and Chief Information Security Officer with Fraud, Internal Control Failures (Oct. 30, 2023), <https://www.sec.gov/news/press-release/2023-227> [<https://perma.cc/MM66-G846>].

26. *Id.*

a complaint with the SEC when their ransom demand was not met.²⁷ The complaint reportedly was made because MediaLink had not disclosed the incident within four days.²⁸

In contrast to the stringent regulatory environment of the United States, the Finnish system for managing and disclosing cybersecurity incidents adopts a more flexible and voluntary approach. The exception to this approach deals with companies operating in certain vital sectors identified in EU Directive 2016/1148 on measures for a common level of high network security and information systems across the Union (NIS1 Directive).²⁹ Finnish publicly listed companies, while encouraged to maintain robust cybersecurity measures, are not bound by the same rigid disclosure obligations as their U.S. counterparts.³⁰ The Finnish National Cybersecurity Centre (NCSC-FI) has issued guidance to companies for assessing and monitoring cybersecurity risks and measures, as well as for developing procedures for any cybersecurity incidents.³¹ Companies are advised to develop comprehensive procedures for managing cybersecurity incidents, but the implementation of these guidelines is largely at the discretion of the companies themselves.³² Major cybersecurity incidents that could affect the price of the issued financial instruments nevertheless fall under the disclosure obligations set out in Market Abuse Regulation (MAR).³³

The voluntary adoption of cyber risk management policies is a critical step in safeguarding companies against the escalating threat of cyberattacks. By proactively implementing robust cybersecurity measures, companies can significantly reduce their vulnerability to data breaches, financial losses, and reputational damage. These policies encompass a wide range of practices, including regular software updates, employee training, encryption, and incident response plans. When adopted willingly, they empower businesses to identify and address vulnerabilities, thereby minimizing the potential harm of cyberattacks. In a digital landscape where threats are ever-evolving, voluntary cyber risk management policies are a proactive and cost-effective approach to protect both sensitive data and an organization's financial stability.

The implementation of EU Directive 2022/2555 on measures for a high common level of cybersecurity across the Union (NIS2 Directive), which

27. Cynthia Cole et. al, *Hacker Attempts to Use SEC Rules to Further Exploit Victims*, BAKER MCKENZIE BLOG (Nov. 20, 2023), <https://www.connectontech.com/hacker-attempts-to-use-sec-rules-to-further-exploit-victims/> [https://perma.cc/9BED-NB7Y].

28. *Id.*

29. See Council Directive 2016/1148, 2016 O.J. (L 194) (EU).

30. See generally *Instructions and Guides for Organisations and Companies*, FINNISH TRANSPORT AND COMMUN'S AGENCY NAT'L CYBER SEC. CTR., <https://www.kyberturvallisuuskeskus.fi/en/ncsc-news/instructions-and-guides/instructions-and-guides-organisations-and-companies> [https://perma.cc/U5DR-R958].

31. See *id.*

32. See *id.*

33. See *Market Abuse Regulation*, FINLAND FIN. SUPERVISORY AUTH. (Dec. 19, 2018), <https://www.finanssivalvonta.fi/en/regulation/regulatory-framework/market-abuse-regulation/> [https://perma.cc/62SH-KNTE].

replaced the NIS1 Directive, represents a significant shift in the cybersecurity landscape for Finnish companies.³⁴ The NIS2 Directive expands its scope to include new sectors, covering and specifying obligations for a wider array of Finnish public and private companies.³⁵ The member states have until October 18, 2024 to implement measures necessary to comply with the NIS2 Directive.³⁶ As this EU-wide regulation expands its scope and enforces stricter security requirements, Finnish publicly listed companies—particularly those in critical sectors—will face enhanced obligations.³⁷ The NIS2 Directive applies to entities falling into two categories: “essential” and “important.”³⁸ Classification into these categories is not solely based on the size of the entity, but primarily on the criticality of the services provided.³⁹ Essential entities exceed the threshold for medium sized enterprises and operate in sectors identified as highly critical, while important entities serve in less critical sectors.⁴⁰ For many Finnish public companies, this means a transition from a primarily guidance-based approach to a more regulated environment, necessitating adjustments in their cybersecurity strategies and governance models to comply with these enhanced EU standards.

The NIS2 Directive also imposes new obligations on management bodies, requiring approval and oversight of cybersecurity risk management measures.⁴¹ These measures encompass information system security, supply chain security, cyber hygiene practices, incident handling, and business continuity, and crisis management.⁴² Entities must notify their competent authority of any incident that has a significant impact on the provision of their services.⁴³ An incident is considered to be significant if it: (1) has caused or is capable of causing severe operational disruption of the services or financial loss for the entity concerned; or (2) has affected or is capable of affecting other natural or legal persons by causing considerable material or non-material damage.⁴⁴

Essential and important entities that become aware of a significant cybersecurity incident are required to submit an early warning to the authorities without undue delay—within twenty-four hours—which is to be followed by an incident notification within seventy-two hours and an intermediate report upon the request of the authorities.⁴⁵ Other entities, regardless of whether they fall within the scope of the NIS2 Directive, may

34. See Directive 2022/2555, 2022 O.J. (L 333) (EU).

35. See *id.* art. 2.

36. *Id.* art. 41(1).

37. See *generally* Directive 2022/2555.

38. *Id.* art. 3.

39. *Id.*

40. See *id.*

41. *Id.* arts. 20–24.

42. See *id.*

43. Directive 2022/2555, art. 23.

44. *Id.*

45. *Id.*

notify significant incidents, cyber threats, and near misses on a voluntary basis.⁴⁶

In the framework of the NIS2 Directive, supervisory authorities have the power to apply distinct regulatory oversight and enforcement actions to both essential and important entities.⁴⁷ For example, they can temporarily revoke certifications or authorizations pertinent to the services provided by these entities in cases of non-compliance and can prohibit individuals responsible for discharging managerial responsibilities at the Chief Executive Officer (CEO) or legal representative level from exercising managerial functions until the entity addresses the deficiencies or complies with the requirements that prompted the suspension or prohibition.⁴⁸ Financially, entities under the NIS2 Directive could face maximum administrative fines of up to ten million euros or two percent of their total worldwide annual consolidated turnover, whichever is higher, for essential entities, and up to seven million euros or 1.4 percent of the turnover, whichever is higher, for important entities.⁴⁹

While both the NIS2 Directive and the SEC's new cybersecurity rules aim to enhance cybersecurity resilience and transparency, the NIS2 Directive focuses more on preparedness, cooperation, creating a security culture beneficial for long-term investor confidence, and market reliance across critical sectors in the EU.⁵⁰ In contrast, the SEC rules are centered on timely disclosure of material cybersecurity incidents, detailed reporting on cybersecurity risk management, the explicit responsibilities of boards, and management in the United States, which aligns with investor interests in transparency and timely information in the U.S. market.⁵¹ Most crucially, the SEC regulations are applicable to every company registered with the SEC, while the NIS2 Directive is limited to publicly listed companies that are classified as either essential or important entities.⁵² This categorization effectively excludes certain issuers from the obligations imposed by the NIS2 Directive. These differences reflect the distinct regulatory environments and priorities of the EU and the United States in addressing cybersecurity challenges, each with its own impact on investor perception, risk assessment, and confidence in the digital security of corporations.

The disclosure and reporting obligations of publicly listed companies in Finland and the United States in cybersecurity matters are critical for maintaining investor trust and market integrity. This analysis of the differing regulatory requirements in these two countries highlights the importance of transparency and timely communication in response to cyber threats. It also emphasizes the role of regulatory bodies, like the SEC in

46. *Id.* art. 30.

47. *Id.* arts. 32–33.

48. *See id.* art. 32(5).

49. Directive 2022/2555, art. 34(4)–(5).

50. *See generally* Directive 2022/2555.

51. *See* SEC, *supra* note 20.

52. *Compare id.*, with Directive 2022/2555.

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the United States, in shaping these requirements and the evolving nature of cybersecurity laws. The challenges companies face in navigating these complex regulations underscore the need for robust cybersecurity strategies and effective incident reporting. Ultimately, the ability of companies to comply effectively with these obligations is essential for protecting investor interests and ensuring the stability of financial markets in the digital age.

International Private Client

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This article examines selected legal developments relevant to legal advisors practicing in the field of private client law in 2023.

I. Introduction

2023 saw many jurisdictions implementing legislation mandating the disclosure of (i) the ultimate individual shareholder (beneficiary) of corporations; (ii) the beneficiaries, trustees, and protectors of trusts; and (iii) of cross-border planning structures to tax authorities that circumvent the Common Reporting Standard (“CRS”).¹ The CRS, the automatic exchange of financial information received from entities such as financial institutions, pensions, and trusts, represents the first interstate exchange of financial information between approximately 120 participating jurisdictions.²

To ensure the success of the CRS, the Global Forum on Transparency and Exchange of Information for Tax Purposes³ (the Global Forum) fostered

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1. *Standard for Automatic Exchange of Financial Account Information in Tax Matters, Second Edition*, OECD PUB. PARIS 3, 9–15 (2017).

2. *Id.* at 15.

3. See *Global Forum on Transparency and Exchange of Information for Tax Purposes*, OECD, <https://www.oecd.org/tax/transparency/> [<https://perma.cc/4SJP-Y39N>] (last updated Jan. 2024) (The Global Forum on Transparency and Exchange of Information for Tax Purposes was founded in 2002 and 170 States are members. Its goal is to put an end to offshore tax evasion and is the leading international body working on the implementation of global transparency and exchange of information standards around the world).

by the OECD together Inter-American Development Bank (IDB)⁴ released a toolkit to educate States on the necessity of not only knowledge of the ultimate individual beneficial owner but also arrangements for tax. In addition to the educational toolkit, the Global Forum Secretariat and the IDB also assist States with the amendment of their legislation to comply with the toolkit.⁵ The Global Forum initiative is a result of the OECD's Action Plan on Base Erosion and Profit Shifting (BEPS).⁶ BEPS Action 12 provides model disclosure rules for the mandatory disclosure of Common Reporting Standard (CRS) avoidance schemes.⁷ In particular it provides a disclosure framework for countries to elicit early information relating to aggressive or abusive international tax arrangements.⁸ The European adaptation of BEPS Action 12 is commonly referred to as DAC6 and the Italian adaptation of DAC6 is discussed below.⁹

II. Country Reports

A. CANADA

1. *Beneficial Ownership Transparency—Corporations*

A director of a corporation that was incorporated under the federal Canada Business Corporations Act¹⁰ must, as of January 22, 2024, file annual information returns disclosing individuals who have significant control over the corporation with Corporations Canada.¹¹ Significant control includes direct influence, indirect influence or control in fact.¹² A failure to submit the required information will result in a fine of up to \$100,000.¹³ The information that must be filed with Corporation Canada includes the name of the individual, their address for service if it has been provided to the corporation, and their residential address if it has not been provided to the corporation.¹⁴ This information will be available to the public where

4. *Building Effective Beneficial Ownership Frameworks*, OECD & IDB 1 (2019).

5. *Id.*

6. *See Inclusive Framework on Base Erosion and Profit Shifting*, OECD (July 11, 2023), <https://www.oecd.org/tax/beps/> [<https://perma.cc/U9XR-JXFB>].

7. *Automatic Exchange Portal*, OECD, <https://www.oecd.org/tax/automatic-exchange/common-reporting-standard/> [<https://perma.cc/6MBA-U86R>] (last visited Apr. 9, 2024).

8. *Id.*

9. Francesco Cardone & Guido Petraroli, *Mandatory Disclosure Rule in Italy Under DAC6*, ITR (Mar. 16, 2021), <https://www.internationaltaxreview.com/article/2a6a85hp03txpuijzppipt/mandatory-disclosure-rule-in-italy-under-dac6> [<https://perma.cc/HBZ2-SZ5S>].

10. Canada Business Corporations Act, R.S.C. 1985, C-44.

11. *See* An Act to Amend the Canada Business Corporations Act and to Make Consequential and Related Amendments to other Acts, S.C. 2023, c 29 (An Act to amend the Canada Business Corporations Act and to make consequential and related amendments to other Acts, passed third reading in the House of Commons on June 21, 2023, and received Royal Assent on the 2nd of Nov., 2023. ("Bill C-42")).

12. *Id.*

13. *Id.*

14. *Id.*

the individual is over eighteen years of age and where the individual is capable.¹⁵ If the director reasonably believes that making this information public would present a serious threat to the individual's safety, the individual is incapable or the individual is a public office holder.¹⁶

The Income Tax Act¹⁷ of Canada is amended to allow the Canada Revenue Agency to share shareholder information as provided on a corporation's T2 schedule 50 and schedule 9 to an official of the Department of Industry Canada to verify and validate the shareholder data provided on both schedules with the data remitted by the director of the corporation.¹⁸ Given that section 241 of the Income Tax Act forbids the use or communication of taxpayer information except if authorized by the taxpayer, the amendment of the act was essential to allow for the cross-sharing of information between the Canada Revenue Agency and Industry Canada.¹⁹ A corporation must disclose on schedule 9 of its corporate income tax return all corporations it is related to or affiliated with.²⁰ Schedule 50 requires a corporation to disclose its shareholders.²¹ New paragraph 241(4)(u) of the Income Tax Act allows the CRA to share with Industry Canada the information of a shareholder who holds at least ten percent of shares in a corporation, the shareholder's name, social insurance number, where the shareholder is a corporation, partnership, or trust, its business number, partnership account number or trust account number, the percentage of shares held by the individual, and the classes held.²² Canada Revenue Agency, under paragraph 241(4)(u) of the Income Tax Act, can compare the related corporations by providing Industry Canada with the name of the subject corporation, the jurisdiction of residence, the business number, and the relationship between the particular corporation and the subject corporation.²³

The information submitted by the director to the corporation will also be shared with the Financial Transactions and Reports Analysis Centre of Canada ("FINTRAC"), which is governed by the Proceeds of Crime (Money Laundering) and Terrorist Financing Act.²⁴

2. Trust Transparency Reporting

For taxation years ending after December 31, 2023, Canadian trusts will generally have to file an information return, even if no income was earned during that taxation year.²⁵ The information return must disclose

15. *Id.*

16. *Id.*

17. *See generally* Income Tax Act, R.S.C. 1985, c 1 (Can.).

18. *Id.* (Act also amends The Income Tax Act with the addition of paragraph 241(4)(u)).

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. Proceeds of Crime (Money Laundering) and Terrorist Financing Act, S.C. 2000, c 17 (Can.).

25. Income Tax Act, R.S.C. 1985, c 1, § 150(1.2), § 204.2(1) (Can.).

the name, address, date of birth, the jurisdiction of residence, and the ITN of all trustees, beneficiaries, settlor(s), and protector(s).²⁶ For reporting purposes, a trust includes a bare trust.²⁷ A bare trust is created when legal title is separated from beneficial title.²⁸ For example, a parent solely on title in a financial account with cash that belongs to a child is a bare trustee.²⁹ For the international private client practitioner, the information reporting is relevant given that nominee corporations, which are bare trusts, are often used by Europeans to invest in Canadian commercial and residential real estate.³⁰ The new reporting rules also include a new penalty for failing to file: \$2,500 or five percent of the property's value, whichever is greater, in addition to existing penalties for failure to file a trust return.³¹

3. *Mandatory Disclosure Rules*

Mandatory disclosure rules relating to aggressive tax planning are part of BEPS action 12, the stated primary objectives of which included deterrence, increasing transparency by providing timely information to tax authorities regarding potentially abusive tax planning schemes, and identification of users and promoters of those schemes.³² BEPS Action 12 final report did not include a minimum standard for mandatory disclosure rules.³³ The Canadian mandatory disclosure rules became effective on June 22, 2023, and are contained in subsection 237.3 of the Act.³⁴ Reporting of a tax avoidance plan is done on CRA Form RC312 (Reportable Transaction and Notifiable Transaction Information Return) if it has any 1 of the 3 hallmarks: (a) contingent fees for the promoter; (b) confidential protection; or (c) contractual protection such as tax risk insurance or a promise to defend the scheme.³⁵ Failure to file leads to: severe penalties.³⁶ Although certain transactions are exempted from MDR Reporting, confusion remains on exactly what transactions must be reported. It will take time to understand

26. *Id.*

27. *Id.*

28. *New Reporting Requirements for Trusts: T3 Returns Filed for Tax Years Ending after December 30, 2023*, GOV'T OF CAN. (Mar. 3, 2024), <https://www.canada.ca/en/revenue-agency/services/tax/trust-administrators/t3-return/new-trust-reporting-requirements-t3-filed-tax-years-ending-december-2023.html#toc2> [<https://perma.cc/T29X-SLVJ>].

29. *Id.*

30. *Id.*

31. *Id.*

32. *Action 12 Mandatory Disclosure Rules*, OECD, <https://www.oecd.org/tax/beps/beps-actions/action12/> [<https://perma.cc/5RMN-TWSJ>] (last visited Apr. 9, 2024).

33. *OECD Releases Final Report on Mandatory Disclosure Rules under Action 12*, EY FS INSIGHTS (Oct. 15, 2015), https://www.ey.com/en_tr/financial-services-emeia/oecd-releases-final-report-on-mandatory-disclosure-rules-under-action-12 [<https://perma.cc/Q5B8-P3VU>].

34. *Mandatory Disclosure Rules – Guidance*, GOV'T OF CAN. (Jan. 16, 2024), <https://www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/compliance/mandatory-disclosure-rules-overview/guidance-document.html> [<https://perma.cc/7AH4-QRHR>].

35. *Income Tax Act*, R.S.C. 1985, c 1, § 237.3. (Can.).

36. *Id.* § 237.3(8).

this new legislation.³⁷ The CRA agrees and has stated that: “The CRA’s approach to the application of these rules will develop over time based on our experience in dealing with specific factual circumstances.”³⁸

B. GERMANY

Foreign investors investing in Germany through partnerships should be aware of some recent developments in the taxation of partnerships in Germany:³⁹

1. *Option to be Taxed as Corporation*

Germany, like most jurisdictions, generally follows the principle of tax transparency for partnerships and non-transparency for corporations.⁴⁰ While the income of corporations is taxed at their level, and the shareholders are only involved when profits are distributed, the income of partnerships is immediately attributed to the partners, where it is taxed with the individual tax rate of the partner (up to 47.475%⁴¹). Only for the municipal trade tax levied on trading income, partnerships are regarded as being the taxpayer itself.⁴²

As the combined corporate income tax and trade tax rate for corporations is, on average, around thirty-two percent,⁴³ partnerships have a disadvantage with respect to retained earnings. From 2022 onwards, tax law, therefore, allows that a partnership can—unanimously or with a three-quarter majority of its partners if foreseen by the partnership agreement⁴⁴—opt to be taxed like a corporation (corporate tax option).⁴⁵ While this option has

37. *Id.*

38. *Mandatory Disclosure Rules – Guidance*, *supra* note 34.

39. Christian Roepke & Simon-Alexander Kiene, *Tax Legislation Update on Partnership Filing Obligations in Germany*, ALVAREZ & MARSAL (Feb. 28, 2024), <https://www.alvarezandmarsal.com/insights/tax-legislation-update-partnership-filing-obligations-germany#:~:text=181%20para.,for%20filing%20a%20partnership%20return> [https://perma.cc/7PDW-ELJ7].

40. *Id.*

41. Abgabenordnung [AO] [Fiscal Code of Germany], Oct. 1, 2002, BGBL I at 3866, 32(a), as amended by Gesetz [G], July 2017, BGBL I at 2541 (Ger.); Solidaritätszuschlag [SolzG] [Solidarity Surcharge Act], Jun. 24, 1991, BGBL I at 4130, § 4, as amended by Gesetz [G], Dec. 2011, BGBL I at 2592.

42. Gewerbesteuergesetz [GewStG] [Trade Tax Act], Oct. 15, 2002, BGBL I at 4167, § 2, amended by Gesetz [G], Dec. 2023, BGBL I at 411 (Ger.).

43. Körperschaftsteuergesetz [KStG] [German Corporate Income Tax Act], Oct. 15, 2002, BGBL I at 4144, § 23, as amended by Gesetz [G], Dec. 2023, BGBL I at 411; Gewerbesteuergesetz [GewStG] [Trade Tax Act], Oct. 15, 2002, BGBL I at 4167, § 11, as amended by Gesetz [G], Dec. 2023, BGBL I at 411 (Ger.).

44. Carsten Heinz et. al., *German ‘Check the Box-Election’ for Partnerships, an Interesting Opportunity for Family-Owned Businesses and Family Offices*, NOERR (Nov. 8, 2021), <https://www.noerr.com/en/insights/german-‘check-the-box-election’-for-partnerships-an-interesting-opportunity-for-family-owned-businesses-and-family-offices> [https://perma.cc/6KFW-DLD2].

45. Körperschaftsteuergesetz [KStG] [German Corporate Income Tax Act], Oct. 15, 2002, BGBL I at 4144, § 1a, as amended by Gesetz [G], Dec. 2023, BGBL I at 411.

only been available for partnerships being registered with the (commercial) register, it should—from 2024 onwards—also be available for German civil law partnerships registered in the new partnership register.⁴⁶ The option is available irrespective of the kind of income the partnership receives, in other words, also for mere administrative income (e.g., rental or capital) and is available to partnerships not having their seat or place of management in Germany or which do not receive any German income.⁴⁷

The exercise of the corporate tax option is treated like a change in the legal form under the German Reorganization Tax Act (Umwandlungssteuergesetz), even though from a civil law perspective, no actual change in the legal form takes place.⁴⁸ As a consequence, a taxable transaction is assumed for (corporate) income tax purposes, in other words, any existing hidden reserves would be taxable as current profit.⁴⁹ For business active or trading partnerships (gewerbliche Personengesellschaften), on its application, a tax-neutral deemed transfer of the assets is possible subject to further conditions.⁵⁰ If a tax-neutral transfer was applied for, a subsequent transfer of the partnership interest within a period of seven years leads to retroactive taxation of the hidden reserves existent on the date the option became effective.⁵¹ The retroactive taxation, however, melts down by one-seventh for each full calendar year passed since the effective date.⁵² In contrast, a tax-neutral transfer is not possible for property administering partnerships (vermögensverwaltende Personengesellschaften).⁵³ These should, therefore, only exercise the option if no substantial hidden reserves exist, the capital gain from a disclosure of the hidden reserves is not subject to (German) taxation or the tax benefit from a taxation as corporation exceeds the tax costs from the deemed transfer.⁵⁴

46. Regierungsentwurf [Cabinet Draft], Deutscher Bundesrat: Drucksachen [BR] 588/23 (Ger.).

47. See Christian Bochmann & Jan Bron, *Die nächste Stufe der Modernisierung des Personengesellschaftsrechts: Vom MoPeG zum KöMoG* [The Next Stage of Modernization Partnership Law: From MoPeG to KöMoG], NZG 613, 613 (2021); Roland Wacker et. al., *Zum Optionsmodell nachdem Gesetz zur Modernisierung des Körperschaftsteuerrechts- oder: eventus varios res nova semper habet* [Regarding the Option Model According to the Law to Modernize Corporate Tax Law or: Always Have Different Events and New Things], DEUTSCHES STEUERRECHT DStR.BEIHEFTE [GERMAN TAX LAW DStR. SUPPLEMENT] 3 (2021).

48. Körperschaftsteuergesetz [KStG] [German Corporate Income Tax Act], Oct. 15, 2002, BGBl I at 4144, § 1a (Ger.).

49. See *id.*; Umstrukturierungssteuergesetz [UmwStG] [German Reorganization Tax Act], Oct. 15, 2002, BGBl I at 4133, § 20.

50. Umstrukturierungssteuergesetz [UmwStG] [German Reorganization Tax Act] Oct. 15, 2002, BGBl I at 4133, § 20.

51. *Id.* § 22.

52. *Id.*

53. *Id.*

54. See VERMÖGENSVERWALTENDE PERSONENGESELLSCHAFTEN IM ERTRAGSTEUERRECHT [ASSET MANAGING PARTNERSHIPS IN INCOME TAX LAW], Section B.X. (2023).

After a successful option,

- the partnership is taxed as a non-transparent entity being subject to corporate income tax, solidarity surcharge, and trade tax;⁵⁵
- the opting partnership would qualify as a company within the meaning of Art. 3 ¶ 1 lit. b) of the OECD model tax treaty,⁵⁶ but would not qualify as a company within the meaning of Art. 2 of the EU parent-subsidiary directive (2011/96/EU);⁵⁷ and
- profit distributions are subject to a withholding tax of generally 26.375%⁵⁸ which on application of the foreign partner might be partially refunded subject to an applicable double tax treaty and the German anti-treaty shopping rule of Section 50d paragraph 3 of the German Income Tax Act.

Without timing restriction, the option can be reversed for each following assessment period by the partnership, which is then again treated as a change of the legal form and leads to a deemed distribution of retained earnings and a taxable disclosure of hidden reserves unless an application to retain the book values can be made.⁵⁹

It remains to be seen to what extent the option will be accepted by taxpayers. At the very least, it is to be welcomed that the German legislators provide an option that is in line with international practice.

2. *Modernisation of Partnership Law*

The main parts of the Act to Modernise the Law on Civil Law Partnerships (Personengesellschaftsrechtsmodernisierungsgesetz, “MoPeG”) will come into force on January 1, 2024.⁶⁰ The aim of the law and the resulting reform of partnership law is, in particular, the statutory regulation of the structure of the civil law partnership, giving it the legal capacity for participating in legal transactions independent of its partners.⁶¹ Especially, the MoPeG abolishes for partnerships the principle of joint ownership in assets, i.e., the

55. Adalbert Rödning, *Taxing Partnerships like Corporations under the Modernized German Corporate Income Tax Act - a New Taxation Model Neutral to Legal Form*, GÖRG (Feb. 15, 2022), <https://www.goerg.de/en/insights/publications/15-02-2022/taxing-partnerships-like-corporations-under-the-modernized-german-corporate-income-tax-act-a-new-taxation-model-neutral-to-legal-form> [https://perma.cc/SR4P-8KCM].

56. *Model Tax Convention on Income and on Capital*, OECD 2, 5 (2017).

57. Council Directive 2011/96/EU, art. 2, O.J. (L 345) 8, 9.

58. Einkommensteuergesetz [EStG] [Income Tax Act], Oct. 8, 2009, BGBL I at 3366, § 43, as amended by Gesetz [G], Dec. 2023, BGBL I at 411; Solidaritätszuschlag [SolzG] [Solidarity Surcharge Act], Jun. 24, 1991, BGBL I at 4130, § 4, as amended by Gesetz [G], Dec. 2011, BGBL I at 2592.

59. Umstrukturierungssteuergesetz [UmwStG] [German Reorganization Tax Act] Oct. 15, 2002, BGBL I at 4133, § 11.

60. *The Modernization of the Law on Partnerships through the MoPeG*, BDO 1, 4 (2023).

61. *Id.*

assets are no longer allocated to the partners in their entirety but directly to the partnership.⁶²

It has been questionable whether the abolition of the joint ownership that has applied to partnerships to date will have an impact on their taxation. According to the explanatory memorandum to the law, the MoPeG is not associated with “changes to the income tax principles for the taxation of partnerships.”⁶³ This should apply, in particular, to transparent taxation. While literature supports such a view, especially for business active/trading partnerships, for property administering partnerships this view might not be so clear since their full tax transparency is derived from Section 39 Federal Tax Code (Abgabenordnung) which states that assets under joint ownership are to be attributed pro rata to the joint owners for tax purposes if required for tax purposes.⁶⁴ As already foreseen with the draft of the Growth Opportunities Act (Wachstumschancengesetz)⁶⁵, the Secondary Credit Market Promotion Act (Kreditzweitmarktförderungsgesetz, “SCMPA”),⁶⁶ which passed the upper house of the German parliament on 15 December 2023, eliminates the existing uncertainties. It does so by explicitly amending Section 39 Federal Tax Code in a way, for direct tax purposes, that partnerships with legal capacity are deemed to be jointly owned by the partners and, subsequently, their assets are deemed to be jointly owned assets.⁶⁷ The changes foreseen in the SCMPA will come into effect as of 1 January 2024.⁶⁸ As a result, for income tax purposes, both active/trading and property administering partnerships should remain fully tax-transparent.⁶⁹

62. For details of the MoPeG see Marc Hermanns, *Gesetz zur Modernisierung des Personengesellschaftsrechts (MoPeG)- Entstehung und Überblick* [Law for the Modernization of Partnership Law (MoPeG)- Origin and Overview], 1 DNotZ 3 (2022); Peter Kindler, *Die ‘rechtsfähige Gesellschaft’ als juristische Person- erste Befunde und Überlegungen zum Gesetz zur Modernisierung des Personengesellschaftsrechts (MoPeG)* [The Legal Entity as a Legal Entity- Initial Findings and Considerations on the Law to Modernize Partnership Law (MoPeG)], 4 ZfPW 409 (2022); Roßkopf/Hoffmann, ZPG 2023, page 14 et seq.

63. *The Modernization of the Law on Partnerships through the MoPeG*, supra note 60.

64. Joachim Hennrichs, *Stellungnahme zum RefE eines Gesetzes zur: Stärkung der Finanzmarktintegrität (FISG)* [Statement on the RefE of a Law Strengthening Financial Market Integrity (FISG)], ARBEITSKREIS BILANZRECHT HOCHSCHULLEHRER RECHTSWISSENSCHAFT [WORKING GROUP FOR ACCOUNTING LAW, UNIVERSITY LECTURERS IN LAW] 1, 3 (2021).

65. Regierungsentwurf [Cabinet Draft], Deutscher Bundesrat: Drucksachen [BR] 588/23 (Ger.).

66. Gesetz zur Förderung geordneter Kreditzweitmärkte und zur Umsetzung der Richtlinie (EU) 2021/2167 über Kreditdienstleister und Kreditkäufer sowie zur Änderung weiterer finanzrechtlicher Bestimmungen (Kreditzweitmarktförderungsgesetz) [Act to Promote Orderly Secondary Credit Markets and to Implement Directive (EU) 2021/2167 on Credit Servicers and Credit Purchasers, and to Amend Other Financial Legal Provisions (Secondary Credit Market Promotion Act)], Dec. 22, 2023, BGBl I at No. 411.

67. *Id.* § 14(b).

68. Caroline Herkströter & Ute Brunner-Reumann, *Secondary Credit Market Act (Kreditzweitmarktgesetz – KrZwMG) Brings New Obligations for the German NPL Market*, DLA PIPER (Jan. 17, 2024), <https://www.dlapiper.com/en-ae/insights/publications/2024/01/secondary-credit-market-act> [https://perma.cc/CX4H-KVSS].

69. *Id.*

With respect to German real estate transfer tax, transfers of real estate from the partners to the partnership and vice versa, as well as between partnerships having (partly) the same partners can—based on the joint ownership concept for civil law purposes—currently benefit from tax exemptions subject to certain holding periods.⁷⁰ With the MoPeG coming into effect, it has also been unclear whether such beneficial treatment would remain.⁷¹ In addition, discussions with respect to a general reform of the German real estate transfer tax law with respect to the taxation of share deals are still on-going.⁷² With the SCMPA, the status quo of beneficial treatment is established by stating that registered partnerships shall be treated as joint ownerships.⁷³ Such treatment shall apply only until 31 December 2026.⁷⁴ It seems to be the hope of the legislature that, until then, a general reform of the German real estate transfer tax law will be agreed on and implemented.

C. ITALY

Italy has transposed into its legal system the Directive EU 2018/822 (“DAC6”),⁷⁵ a stringent and combined system contrasting tax noncompliance and relocation of tax bases with elusive and evasive purpose by subjects, natural or legal persons, of Italian jurisdiction.

70. Grunderwerbsteuergesetz [GrEStG] [Real Estate Transfer Tax Act], Feb. 26, 1997, BGBI I at 418, §§ 5,6, as amended by Gesetz [G], Dec. 22, 2023, BGBI I at 411.

71. Christian Joisten & Martin Braun, *Real Estate Transfer Tax Implications of the Revised Partnership Law (MoPeG)*, YPOG (Aug. 18, 2023), <https://www.yvog.law/en/insight/real-estate-transfer-tax-implications-of-the-revised-partnership-law-mopeg> [<https://perma.cc/L7P6-6LHR>].

72. *Id.*

73. *Bundesrat Approves a Partial Implementation of the Growth Opportunities Act into the Act to Promote the Secondary Credit Market*, PWC (Dec. 15, 2023), <https://blogs.pwc.de/de/german-tax-and-legal-news/article/241093/bundesrat-approves-a-partial-implementation-of-the-growth-opportunities-act-into-the-act-to-promote-the-secondary-credit-market/> [<https://perma.cc/F99P-ZFVS>].

74. *Id.*

75. See Council Directive 2018/822, art. 21, 2018 O.J. (L 139) 1, 1–2 (EU) (amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation with regard to reportable cross-border arrangements). See Council Directive 2018/822, art. 21, 2018 O.J. (L 139) 1, 1–2 (EU) (amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation with regard to reportable cross-border arrangements). Secondary legislation ruling technical definitions and procedures for the mandatory exchange of information on transnational schemes to be communicated to the Revenue Agency is Ministerial Decree of 17 November 2020 issued by the Ministry of Economy and Finance. Act of the Director of the Revenue Agency no. 36445 of 26 November 2020 contains implementation provisions of Legislative Decree 100/2020 and Ministerial Decree of 17 November 2020 issued by the Ministry of Economy and Finance. Circular no. 2/E of 10 February 2021 and Circular 12/E of 13 May 2022 of the Revenue Agency contain guidance on the application of Legislative Decree 100/2020. Resolution no. 78/E of 31 December 2021 of the Revenue Agency provides answer by the Revenue Agency on certain request of clarifications submitted by certain companies.

With the above-mentioned legislation, obligations have been imposed between the Member States for the automatic exchange of cross-border information, by intermediaries, whose definition includes professionals, and taxpayers, collected in registers made available to the adherent Member States.⁷⁶ Intermediaries must report to the competent authority the cross-border arrangements identified by the hallmarks listed in DAC6.⁷⁷

The set of sensitive information to be communicated includes, among others, that concerning the identification of the relevant intermediaries and taxpayers, the distinctive elements of cross-border transactions, and the jurisdictions of residence of the taxpayers concerned.⁷⁸ DAC6 provides mechanism to contrast BEPS (Basis Erosion Profit Shifting) behaviours and is intended to contrast both aggressive tax planning and related arrangements designed to undermine the automatic exchange of information between countries (CRS) as well as arrangements that prevent identification of natural persons beneficial owners of assets by using opaque structures.⁷⁹

Relevant hallmarks are listed in Annex IV to DAC6, which has been transposed into Italian legislation.⁸⁰ Among those, Hallmark D2 concerns beneficial ownership and is aimed at contrasting Opaque Offshore Structures that obscure the beneficial owner of assets.⁸¹ A peculiarity of Hallmarks D is that, different from others, they apply irrespective of a potential tax benefit, and, therefore, they do not require the Main Benefit Test.⁸²

1. *Professional Obligations*

DAC6 obligations combine with the provisions of anti-money laundering legislation⁸³ effective in Italy as of 2007, which provides an obligation for intermediaries and professionals to make adequate verification of their clients and identification of the ultimate beneficial owner and duty to report suspicious transactions to the competent authority. The beneficial owner

76. Council Directive 2018/822, art. 21, 2018 O.J. (L 139) 1 (EU).

77. *Id.* art. 6.

78. *Id.* art. 14.

79. *See id.*

80. *Id.* at 11 (Annex IV).

81. *Id.* at 12. Hallmark D2 reads: “An arrangement involving a non-transparent legal or beneficial ownership chain with the use of persons, legal arrangements or structures:

(a) that do not carry on a substantive economic activity supported by adequate staff, equipment, assets and premises; and

(b) that are incorporated, managed, resident, controlled or established in any jurisdiction other than the jurisdiction of residence of one or more of the beneficial owners of the assets held by such persons, legal arrangements or structures; and

(c) where the beneficial owners of such persons, legal arrangements or structures, as defined in Directive (EU) 2015/849, are made unidentifiable.”

82. *Id.*

83. Decreto legislativo 21 Nov. 2007, n. 231, G.U. 13 Dec. 2007, n. 289 (It.) (Implementation of Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing as well as Directive 2006/70/EC laying down implementing measures).

in anti-money laundering legislation, applicable also in DAC6 legislation, is the natural person(s), other than the client, in whose interest, ultimately, the ongoing relationship is established, the professional service is rendered, or the transaction is carried out.⁸⁴ If case identification of the ultimate beneficial owner is not possible for the professional, the latter shall refuse assistance to the client.⁸⁵

Legal professional privilege is only partially safeguarded and the legal professional privilege in the context of DAC6 legislation is aligned to that of the anti-money laundering legislation.⁸⁶ Intermediaries (which in the context of DAC6 include legal professionals) are exempted from the obligation to report for information received by the client, or otherwise obtained, in the phase of analysis of the juridical situation or in the activity of defence in legal proceedings, including tax and arbitration proceedings, and including the advice on whether to start legal proceedings.⁸⁷ Legal professionals are safeguarded from professional responsibility in the case of a breach in good faith of such legal professional privilege.⁸⁸ But exempted intermediaries, including legal professionals, must timely inform the other intermediaries involved in the arrangement, or in their absence, the taxpayer of the reporting obligations.⁸⁹ This latter obligation may, in the view of the authors of this article, jeopardise the legal professional privilege even in the cases it is granted.⁹⁰

2. Duty of Disclosure of Ultimate Beneficial Owners

As required by European anti-money laundering legislation, the Register of Beneficial Owners has been recently established and has become operational in Italy in December 2023.⁹¹ All companies, associations, and foundations with juridical personalities and trusts must disclose information on their beneficial ownership.⁹² The beneficial owner is the natural person(s) who ultimately directly or indirectly own(s) more than twenty-five percent of the legal entity, or otherwise exercise(s) control over such entity.⁹³ All above entities must communicate their beneficial owner(s) and if it is not possible to identify a beneficial owner on the basis of the above criteria, the

84. *Id.* art. 3.

85. *Id.*

86. *Id.* art. 23.

87. Council Directive 2018/822, art. 21, 2018 O.J. (L 139) 1, 7 (EU) (amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation with regard to reportable cross-border arrangements).

88. *Id.*

89. *Id.*

90. *Id.*

91. *The UBO Register is Now Operational in Italy*, OSBORNE CLARK (Oct. 16, 2023), <https://www.osborneclarke.com/insights/ubo-register-now-operational-italy> [<https://perma.cc/M4QZ-7QLG>].

92. *Id.*

93. *Id.*

beneficial owner shall be the natural person(s) who have the powers of legal representation, management or direction of the legal entity.⁹⁴

The Register of Beneficial Owners is accessible by authorities and persons subject to anti-money laundering obligations.⁹⁵ Following a decision by the European Court of Justice, the Register of Beneficial Owners is no longer publicly accessible.⁹⁶

At the very last moment, the Court suspended the provisional basis operation of the Register of Beneficial Owners upon request of fiduciary companies, so the duty of disclosure is now stayed until a decision on the merits by the Court.⁹⁷

D. PERU

Aligned with global initiatives for heightened transparency and equitable taxation, the Peruvian government, echoing jurisdictions worldwide, has undertaken significant legislative changes on mandatory reporting. This section explores key shifts in Peru's information disclosure landscape, adapting domestic laws with international standards set by the OECD and the Financial Action Task Force. The core objectives of these new obligations are to fulfill Peru's international commitments and adhere to recommendations aimed at combating tax avoidance and evasion, establish mutual administrative assistance for fiscal purposes, prevent money laundering, and terrorism financing.

1. *Common Reporting Standard*

Peru's adherence to the Common Reporting Standard (CRS) is anchored in Article 6 of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters,⁹⁸ ratified by 124 jurisdictions, including Peru in 2018. This framework extends to the Multilateral Competent Authority Agreement for the Automatic Exchange of Financial Account Information.⁹⁹ Double taxation

94. *Id.*

95. *Unveiling Beneficial Real Estate Ownership across Europe—Examining the Proposed EU Register of Beneficial Ownership for Overseas Entities*, HERBERT SMITH FREEHILLS (Mar. 11, 2024), <https://hsfnnotes.com/realestatedevelopment/2024/03/11/unveiling-beneficial-real-estate-ownership-across-europe-examining-the-proposed-eu-register-of-beneficial-ownership-for-overseas-entities/#page=1> [<https://perma.cc/7FCD-9ZFY>].

95. 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=lgrec=FR&td=%3BALL&language=EN&num&37/20&jur=C> [<https://perma.cc/4ZMC-MCHD>].

96. *Id.*

97. *Id.*

98. See *The Multilateral Convention on Mutual Administrative Assistance in Tax Matters, Amended by the 2010 Protocol*, OECD & COUNCIL OF EUR. 3, 14 (2010) (Convention on Mutual Administrative Assistance in Tax Matters, signed at Strasbourg on January 25, 1988, as amended by the protocol signed at Paris on May 27, 2010. The Convention became effective on February 1, 2016, and applicable from January 1, 2017).

99. *Id.*

instruments signed with various countries, including Canada, Switzerland, and Mexico, also incorporate clauses on mutual administrative assistance and information exchange.¹⁰⁰ The National Superintendency of Customs and Tax Administration (SUNAT) is authorized to facilitate mutual administrative assistance in tax matters.¹⁰¹ The OECD's Standard for Automatic Exchange of Financial Account Information guides the exchange process in Peru, outlining the required financial information, involved financial institutions, types of accounts, relevant taxpayers, and the reasonable common due diligence procedures institutions must follow.¹⁰²

Since 2018, financial institutions within the national financial system must regularly provide information on passive transactions with clients.¹⁰³ Regulated by Supreme Decree 256-2018,¹⁰⁴ the most notable thing for this obligation is the removal of the need for a judicial order to lift banking secrecy. An individual or legal entity is reportable when they have tax residence in any of the reportable jurisdictions, meaning a jurisdiction that is part of the information exchange agreement, or when it qualifies as a passive non-financial entity whose controllers are residents in any of the reportable jurisdictions.¹⁰⁵ Reporting entities must conduct reviews to obtain identification data of account holders and controllers with foreign tax residences.¹⁰⁶ For instance, prior to opening a new account, financial institutions are required to obtain an affidavit from the account holder, affirming their tax residence in a reportable jurisdiction.¹⁰⁷

At a high level, compliance with the reporting procedure entails due diligence processes, identification of reportable accounts and clients, and annual reporting to SUNAT, who subsequently shares this information with the tax authorities of subscribing countries.¹⁰⁸ This reporting includes detailed data pertaining to account holders and comprehensive information on account specifics such as cumulative balances, earnings, averages, etc.¹⁰⁹ Furthermore, the reporting obligation extends to disclosing the identity and

100. See *id.* Peru has also in force bilateral Information Exchange Agreements with the United States of America (1992), Ecuador (2010), and Argentina (2009). In practice, the Tax Information Exchange Agreement signed by Peru with the United States, in effect since 1992, is not used, as the U.S. promotes the FATCA model.

101. Decreto Supremo [Supreme Decree], No. 133-2013-EF, art. 50, (2013).

102. *Peru Issues Regulations for the Implementation of OECD Common Reporting Standard*, EY GLOB. (Nov. 13, 2018), https://www.ey.com/en_gl/tax-alerts/peru-issues-regulations-for-the-implementation-of-oecd-common-reporting-standard [<https://perma.cc/7TYN-9L78>].

103. *Id.*

104. *Id.*

105. *Automatic Exchange of Financial Account Information: Background Information Brief*, OECD 2, 3–4 (2016).

106. *Id.* at 7.

107. *Id.*

108. *Peru Issues Regulations for OECD Common Reporting Standard for Financial Account Information Exchange – Orbitax Tax News & Alerts*, ORBITAX, <https://orbitax.com/news/archive.php/Peru-Issues-Regulations-for-OE-34474> [<https://perma.cc/VYS4-4DGM>] (last updated Nov. 20, 2018).

109. Decreto Supremo [Supreme Decree], No. 256-2018-EF (2018).

ownership details of the ultimate beneficial owner.¹¹⁰ This includes critical aspects such as name, date and place of birth, domicile, and jurisdictions of residence.¹¹¹

The financial information must be submitted annually between January 2 and May 31 of the subsequent year.¹¹² Non-compliance is subject to fines, emphasizing the importance of maintaining supporting documentation, preserving records and systems, and adhering to due diligence procedures.¹¹³

2. Ultimate Beneficial Ownership Filing

The regulatory framework introducing the obligation of Ultimate Beneficial Ownership (UBO) filing in Peru was established through Legislative Decree No. 1372 on August 2, 2018.¹¹⁴ This mandates both domestic and foreign legal entities, whether established in Peru or abroad, to disclose the identification of their ultimate beneficial owners (UBOs).¹¹⁵ The UBO concept was initially introduced in 2017 through regulations creating Peru's Financial Intelligence Unit,¹¹⁶ but this specific norm aims to unify the definition and regulate the obligation of legal entities to transparently disclose their ultimate beneficiaries.

Entities are required to disclose information on all UBOs, including individuals, legal entities, or autonomous patrimonies managed by third parties.¹¹⁷ The definition encompasses various entities such as investment funds, mutual funds, and trusts.¹¹⁸ Beneficial owners are defined as individuals who effectively and ultimately own or control legal entities or clients involved in transactions.¹¹⁹ To identify UBOs, criteria such as ownership, control, and senior managerial positions are considered.¹²⁰ The criteria are not alternatives but graduated measures, where ownership is considered first, followed by control and, if necessary, senior managerial positions.¹²¹

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Peru Issues Rules for Reporting Ultimate Beneficial Owners for 2022 and 2023*, EY GLOB. (Mar. 25, 2022), https://www.ey.com/en_gl/tax-alerts/peru-issues-rules-for-reporting-ultimate-beneficial-owners-for-2022-and-2023 [https://perma.cc/LR3M-Z2NL].

115. *The Peruvian Tax Administration (SUNAT) Published a Resolution that Establishes the Procedure, Deadlines and Conditions for Submitting the Ultimate Beneficiary Informative Return*, GARRIGUES (Sept. 27, 2019), https://www.garrigues.com/en_GB/new/peruvian-tax-administration-sunat-published-resolution-establishes-procedure-deadlines-and#:~:text=Legislative%20Decree%20No.,identity%20of%20their%20ultimate%20beneficiaries [https://perma.cc/KJB3-D299] [hereinafter *The Peruvian Tax Administration (SUNAT)*].

116. *See* Decreto Supremo [Supreme Decree], 020-2017-JUS (2017) (Regulations for law 27693, Law that creates Peru's Financial Intelligence Unit).

117. *The Peruvian Tax Administration (SUNAT)*, *supra* note 115.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

SUNAT issues resolutions specifying the form, deadline, and conditions for filing the UBO declaration.¹²² In case of changes in ownership or control entities are obliged to update the information.¹²³ To ensure accurate and accessible information, legal entities must implement internal procedures, including reasonable mechanisms to obtain and retain information on the identification of their UBOs.¹²⁴ This involves verifying identity details, keeping UBO information up-to-date, and retaining UBO information.¹²⁵ Non-compliance with filing the report, updating it or not adjusting to the mandatory due diligence internal procedures is subject to significant fines.¹²⁶

3. *Safeguarding Taxpayer Rights in Peru*

While the recent legislative changes in Peru align with international standards and contribute to the global effort against tax avoidance and evasion, practical challenges and confidentiality uncertainties persist. The legislation and implementation systems must yet guarantee that the process is carried out under certain parameters that ensure confidentiality and security in the transmission and processing of the shared data. Ensuring the data requires that the sending, use, and storage of a large volume of information employ secure and compatible methods of transmission between countries as well as effective and efficient data encryption systems. This poses a significant challenge, especially when considering countries that lack advanced computer systems, proper physical facilities, and technically qualified personnel to carry out these tasks.¹²⁷

As the regulatory landscape evolves, addressing these practical considerations becomes crucial for fostering compliance and protecting the rights of taxpayers involved in the process.

E. UNITED STATES

Several reporting requirements promulgated under U.S. tax law and Treasury Regulations require U.S. corporations to disclose identifying information on any shareholder as part of the annual tax return.¹²⁸ Similar requirements apply to foreign corporations engaged in U.S. business.

122. See Resolución Superintendencia [Superintendence Resolution], No. 185-2019/SUNAT (2019).

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. See C. Mares, *Los acuerdos de intercambio de información y sus límites* [Information Exchange Agreements and their Limits], ESTATUTO DEL CONTRIBUYENTE EN EL SIGLO XXI [TAXPAYER STATUTE IN THE 21ST CENTURY] 109–123 (M. I. Lasala ed., 2019).

128. Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59, 498 (Sept. 30, 2022) (to be codified at 31 C.F.R. pt. 1010) [hereinafter 87 Fed. Reg. 59].

Additionally, rules scheduled to go into effect in January 2024, require reporting to the Financial Crimes Enforcement Network (“FinCEN”).¹²⁹

1. *Corporate Annual Tax Return – I.R.S. Reporting*

U.S. Corporations are required to file tax returns and report income on Form 1120 (U.S. Corporation Income Tax Return) at the end of each taxable year.¹³⁰ Similar rules apply to foreign corporations engaged in a U.S. business.¹³¹

As part of their Form 1120, U.S. corporations are required to disclose persons directly owning twenty percent or more of the total voting power of all classes of stock entitled to vote and whether they directly or indirectly own fifty percent or more of the voting power.¹³² If so, identifying information is reported on Schedule G of Form 1120.¹³³

Domestic corporations that are twenty-five percent owned by foreign shareholders¹³⁴ and foreign corporations engaged in a trade or business within the U.S. have additional reporting requirements if they enter a “reportable transaction”¹³⁵ with a related party.¹³⁶ In those instances, the reporting corporation must file Form 5472 (Information Return of a twenty-five percent Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business) and include information about indirect twenty-five percent foreign shareholders.¹³⁷

2. *The Corporate Transparency Act—FinCEN Reporting*

The Corporate Transparency Act¹³⁸ (“CTA”) became effective on January 1, 2021, as part of the U.S. Treasury’s efforts to counter shell companies used to facilitate tax fraud, terrorism financing, drug trafficking, and money laundering.¹³⁹ The CTA requires that certain corporations, limited liability companies, and similar entities (each, a “Reporting Company”) disclose to FinCEN identifying information¹⁴⁰ about the beneficial owners who own

129. *Id.*

130. I.R.C. § 6012(a)(2); Treas. Reg. § 1.6012-2(a)(3) (2022).

131. Treas. Reg. § 1.6012-2(g)(1)(i).

132. See *About Form 1120, U.S. Corporation Income Tax Return*, IRS, <https://www.irs.gov/forms-pubs/about-form-1120> [<https://perma.cc/69DN-YQLF>] (last visited Apr. 13, 2024) (U.S. Corporation Income Tax Return Form 1120 Schedule K).

133. See *id.* (Schedule G of Form 1120 (Information on Certain Persons Owning the Corporation’s Voting Stock)) (reports the shareholder’s name, identification number, country of citizenship or organization, and percentage owned).

134. 87 Fed. Reg. 59, *supra* note 128, at 59595.

135. Treas. Reg. § 1.6012-2(a)(2).

136. I.R.C. §§ 6038A, 6038C; Treas. Reg. §§ 1.6038A-1, 1.6038A-2; See I.R.C. § 6038A(c)(2); Treas. Reg. § 1.6038A-1(d) (for the definition of a “Related Party”).

137. *Id.*

138. Corporate Transparency Act, Pub. L. No. 116-283, 134 Stat. 4604.

139. 87 Fed. Reg. 59, *supra* note 128, at 59498.

140. *Id.*

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or control the Reporting Company and about the applicants who form or register the Reporting Company. A Reporting Company includes any corporation or limited liability company that is not an excluded company.¹⁴¹ Examples of excluded companies include publicly traded companies, entities that exercise governmental authority, banks, businesses that are registered with certain governmental bodies, inactive companies not owned by any foreign persons, large operating companies (twenty or more full-time U.S. employees, more than \$5 million in sales, and a physical operating presence in the United States).¹⁴² The CTA provisions apply to domestic Reporting Companies and foreign Reporting Companies if they are registered to do business in the U.S. by the filing of required documents with the Secretary of a relevant state.¹⁴³

A “Beneficial Owner” is defined under the CTA as any individual who owns twenty-five percent or more of a Reporting Company or directly or indirectly exercises “substantial control” over a Reporting Company.¹⁴⁴ Substantial control includes acting as a senior officer, having authority over the appointment or removal of senior officers or a dominant majority of the board of directors, and having substantial influence over important matters of the company.¹⁴⁵ Where interests in a Reporting Company are held by a trust, the trustees, and in certain circumstances, beneficiaries may be treated as owning interests in or having substantial control over the Reporting Company.¹⁴⁶

An “Applicant” is defined as any individual who files a document with a secretary of state’s office to (1) form a US Corporation (C and S corporation), limited partnership, limited liability company or other entity; or (2) register a foreign corporation, limited partnership, limited liability company, or other entity to do business in a US jurisdiction.¹⁴⁷

The CTA will go into effect on January 1, 2024, and the due date for filing the report will depend on the formation date of the Reporting Company, as follows:

- Any Reporting Company in existence before January 1, 2024, will be required to file the necessary report not later than January 1, 2025.¹⁴⁸
- Any Reporting Company that will be created or registered between January 1, 2024 and December 31, 2024, will be required to file the necessary report within ninety days of its effective creation.¹⁴⁹

141. *Id.*

142. 31 U.S.C. § 5336(a)(11) (2021).

143. 87 Fed. Reg. 59, *supra* note 128, at 59498.

144. 31 U.S.C. § 5336(a)(11) (2021).

145. *See* 87 Fed. Reg. 59, *supra* note 128, at 59498.

146. *Id.*

147. *Id.* at 59596.

148. 31 C.F.R. § 1010.380(a)(1)(iii) (2022).

149. Beneficial Ownership Information Reporting Deadline Extension for Reporting Companies Created or Registered in 2024, 88 Fed. Reg. 66730 (proposed Sept. 27, 2023).

THE YEAR IN REVIEW
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- Any Reporting Company created or registered on or after January 1, 2025, will be required to file the necessary report (including Application information) within thirty days of its effective creation.¹⁵⁰

If there is any change with respect to the information previously submitted to FinCEN, such as a change in any beneficial owner, the Reporting Company must file an updated report within thirty days after the date on which such change occurs.¹⁵¹

150. 31 C.F.R. § 1010.380(a)(1)(i) & (ii) (2022).

151. *Id.* § 1010.380(a)(2).

International Employment Law

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This article discusses significant legal developments in International Employment Law in 2023.

This article highlights important non-compete and restrictive covenant developments in Brazil, Poland, Canada, Ireland, India, and the Netherlands and offers a comparative perspective on changes in the United States, the United Kingdom, and Singapore.

I. Brazil

A. INTRODUCTION

Restrictive covenants are commonly used in Brazil in the context of employment relations, especially in contracts executed with senior employees.² As it happens in other jurisdictions, companies in Brazil use restrictive covenants to safeguard legitimate business interests.³ This section of the paper will discuss developments in 2023 and explore the nuances surrounding the negotiation, execution, and enforceability of such covenants in Brazil while examining the legal framework and their practical implications, especially regarding post-employment non-compete covenants. Although restrictive covenants can be found in agreements executed with independent contractors, consultants, and non-employed officers and directors, in this section only restrictive covenants executed in the context of employment relationships will be considered.

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2. See Caroline Marchi, Fernanda Pellegrino & Machado Meyer, *Restrictive Covenants in Employment (Brazil)*, THOMSON REUTERS (Dec. 1, 2023), [https://ca.practicallaw.thomsonreuters.com/w-035-3709?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://ca.practicallaw.thomsonreuters.com/w-035-3709?transitionType=Default&contextData=(sc.Default)&firstPage=true) [https://perma.cc/GRT5-FRA8].

3. *Id.*

B. LEGAL FRAMEWORK

The Brazilian legal system recognizes the autonomy of contracting parties, allowing them to define the terms of their agreements.⁴ Although employment contracts have certain limitations provided for in the employment legislation—including mandatory benefits, severance, limits to working hours and other mandatory rules—there is no legislation governing or preventing restrictive covenants in Brazil.⁵ For this reason, the labor courts have issued several precedents on restrictive covenants—especially on post-employment non-compete clauses—setting their limits.⁶

C. MOST USED RESTRICTIVE COVENANTS IN BRAZIL

1. *Non-Compete Clauses*

Generally, these clauses restrict a party from engaging in activities that compete with the other contracting party.⁷ In the context of employment specifically, employees agree not to compete with their current or former employer's businesses.⁸

Non-compete clauses that are in force during the employment are generally enforceable as the relevant employee is rendering services to their employer and receiving monthly wages in return.⁹ In other words, these non-compete covenants have a similar effect to an exclusivity clause limited to the employer's business.¹⁰ As exclusivity clauses are widely accepted in employment relations in Brazil, there are no legal issues in implementing non-compete clauses that are in force while the relevant employee is still working for the company.¹¹

By contrast, enforcing post-employment non-compete covenants can be challenging.¹² Labor courts generally uphold the validity of post-employment non-compete clauses only if they are reasonable in scope, duration, and geographic reach, and if they provide proper compensation for the individual during the period, they are prevented from competing with their previous employer.¹³

4. *See id.*

5. *Id.*

6. *Id.*

7. *See id.*

8. Marchi et al., *supra* note 2.

9. *Id.*

10. *See id.*

11. *Id.*

12. *See, e.g.*, T.J.S.P., Santo Amaro de Comarca de Sao Paulo: Case: 1001395-39.2022.5.02.0040, Directo Processual Civil e Do Trabalho, [T.S.T.J], 24.08.2023.

13. *See id.*

2. *Non-Solicitation Agreements*

Agreements that prohibit the solicitation of clients, employees, providers of services and goods, or business associates are enforceable in Brazil.¹⁴ Non-solicitation covenants are also not regulated by legislation.¹⁵ Different from non-compete clauses, non-solicitation covenants are rarely challenged before labor courts in Brazil.¹⁶ For this reason, there are no specific requirements set in the case law for the validity of such covenants, although it is advisable that non-solicitation clauses be drafted such that they are not overly broad or unreasonable under general principles of contracts.¹⁷ This remains the case in 2023.¹⁸

3. *Confidentiality Provisions*

Confidentiality provisions that protect sensitive business information are recognized and enforceable under Brazilian law, with an emphasis on the principle of good faith.¹⁹ Like non-solicitation covenants, confidentiality provisions are rarely challenged before labor courts.²⁰

D. ENFORCEABILITY CRITERIA

As pointed out above, the only restrictive covenant that has clear requirements set out by labor courts in Brazil is the post-employment non-compete type.²¹ The following is a more detailed list of criteria that Brazilian courts apply to determine the enforceability of such covenants, including some notable developments:

- *Reasonableness*: To assess the reasonableness of the covenant, courts consider factors such as duration, geographic scope, and the nature of the restricted activities.²²
- *Legitimate Interest*: Enforceability hinges on the protection of the legitimate interest of an employer to protect its business from the competition of a former employee who developed skills when working at

14. *Id.*

15. *Id.*

16. *See id.*

17. Lei No. 10.406, de 10 de Janeiro de 2002, Código Civil [C.C.] de 01.01.2023 (Braz.); T.S.T., Case: 1000134-86.2022.5.02.0089, Superior Do Trabalho Jurisprudência [T.S.T.J.] 01.01.2024: ((1.) Legal capacity of parties involved to contract; (2.) the subject of the contract must be certain, possible, and its purpose must be legal; and (3.) compliance with formal requirements which may be prescribed by law).

18. *See* T.R.T.-2, Case: 1000134-86.2022.5.02.0089, 24.01.2023, Superior Do Trabalho Jurisprudência [T.S.T.J.], (Braz.).

19. *See id.*

20. *See id.*

21. *See id.*

22. T.S.T., Case: 1000588-51.2016.5.02.0065, 20.04.2022, Ministro, Tribunal Superior Do Trabalho Jurisprudência [T.S.T.J.], (Braz.).

the company and who had access to trade secrets or other proprietary information.²³

- *Good Faith*: Non-compete covenants must be drafted and enforced in good faith, and any ambiguity is generally construed in favor of the former employee.²⁴
- *Compensation*: Post-employment non-compete covenants must provide for compensation during the period when the former employee is restricted from competing with their previous employer.²⁵ According to the labor courts, this requirement is justified because the relevant employees will encounter difficulty obtaining new work in the same sectors or businesses (usually similar to their previous employer's business).²⁶

E. CONCLUSION

In conclusion, restrictive covenant case law continued to evolve in 2023 with no major shifts, still playing a crucial role in protecting the interests of contracting parties of an employment relationship in Brazil.²⁷ By continuing to adhere to the principles of reasonableness, legitimate interest, and good faith, these covenants can continue to serve as effective tools that allow companies to mitigate risks and foster a secure and competitive business environment.²⁸

II. Canada (Ontario)

A. BACKGROUND

In 2021, a prohibition on non-competes in employment contracts was introduced through amendments to the Ontario Employment Standards Act, 2000 ("ESA").²⁹ As of December 2023, Ontario is the only common law province in Canada that has made non-compete agreements illegal in employment contracts.³⁰ A body of caselaw has since developed, with relevant impacts across 2023, which are explored below.

As a threshold, the ESA defines a non-compete as "an agreement, or any part of an agreement, between an employer and employee that prohibits the employee from engaging in any business, work, occupation, profession, project or other activity that is in competition with the employer's business, after the employment relationship between the employee and the

23. See T.S.T., Case: 0000976-88.2017.5.17.0009, 27.08.2018, Tribunal Regional Do Trabalho 17a Regiao [T.R.T.], (Braz.).

24. Lei No. 10.406, de 10 de Janeiro de 2002,Codigo Civil [C.C.] 01.01.2003 (Braz.).

25. See *id.*

26. See T.S.T., Case: 0001066-03.2014.5.12.0022, 10.04.2017, Tribunal Superior Do Trabalho Jurisprudencia [T.S.T.J.].

27. Marchi et al., *supra* note 2.

28. See *id.*

29. Employment Standards Act 2000, S.O. 2000, c.41 (Can.).

30. See *id.*

employer ends.”³¹ Currently, there are no express restrictions on non-solicit agreements.³² The non-compete restrictions also do not apply to C-Suite executive positions.³³

B. CASE LAW DEVELOPMENTS AND THEIR IMPACT IN 2023

1. *Parekh et al. v. Schecter et al.*

The Courts have recently interpreted the new ESA restriction on non-competes.³⁴ The Courts found that the new amendments are *not* to be applied retroactively and would only apply to employment agreements signed after the amendments came into effect.³⁵

In *Parekh et al. v. Schecter et al.*, the Plaintiff purchased a dental practice in 2020, retaining a few employees including the Defendant, who was a dentist.³⁶ The Defendant had an employment agreement which pre-dated the Plaintiff's acquisition of the practice, and that agreement contained a non-compete provision.³⁷ The provision read:

Non-Competition. The Associate shall not during the Term of this Agreement and for two (2) years thereafter, either directly or indirectly, whether as a proprietor, partner, shareholder, employee, associate or otherwise, carry on or be engaged in the practice of dentistry anywhere within a five (5) kilometer radius of the Premises.³⁸

The following year, the Defendant left the practice and began working in dentistry within a five-kilometer radius of his previous employer.³⁹ The Plaintiff applied to the court for interlocutory relief, seeking to enforce the non-compete clause.⁴⁰

The Defendant argued that the new amendments to the ESA made the non-compete illegal and thus void.⁴¹ Furthermore, he argued that the provision applied retroactively “by necessary implication.”⁴²

31. *Id.*

32. See *Non-Compete Agreements*, GOV'T OF ONTARIO (Dec. 21, 2023), <https://www.ontario.ca/document/your-guide-employment-standards-act-0/non-compete-agreements> [<https://perma.cc/3D4S-8WN9>].

33. See *id.*

34. See *Parekh et al. v. Schecter et al.*, [2022] O.N.S.C. 302, ¶ 46 (Can. Ont.).

35. *Id.* ¶ 47.

36. *Id.* ¶ 15.

37. *Id.* ¶ 16.

38. *Id.* ¶ 36.

39. *Id.* ¶ 16.

40. See Jennifer Seal, *Ontario Superior Court of Justice Confirms that Bill 27 Does Not Prohibit Non-Compete Agreements Signed Prior to October 25, 2021*, DLA PIPER (Feb. 14, 2022), <https://www.dlapiper.com/en/insights/publications/2022/02/ontario-superior-court-of-justice-confirms-that-bill-27-does-not-prohibit-non-compete-agreements> [<https://perma.cc/4H5N-T7HZ>].

41. See *id.* ¶ 42.

42. *Id.*

The Court considered the intent of the Legislature, recognizing that the Legislature had included a specific date upon which the provisions were intended to come into force—October 25, 2021.⁴³ Given this express legislative intent, the Court concluded that the amendments were not applicable to the Defendant’s employment agreement as it was entered into prior to October 25, 2021.⁴⁴ However, this did not end the Court’s inquiry as it was nevertheless required to determine whether the non-compete was otherwise enforceable under the common law.⁴⁵ The Court held: “[at] most, and in respect of this case, the new ESA provisions confirm the public policy against restraint of trade, which has already been accepted in the common law.”⁴⁶

The common law test for assessing the enforceability of a non-compete involves assessing the reasonableness of the clause having regard for such factors as the clarity of the language, the breadth of the geographical limits, the temporal scope of the restriction, and the scope of prohibited activities. The Court found that the language in the clause was not ambiguous. The temporal scope and geographic scope were clear and specific. The proscribed activity was not ambiguous. Notably, the Defendant had been involved in negotiating the agreement, including the geographic scope of the non-compete. Ultimately the Court found that, the non-compete was not unreasonable with reference to the public interest and, having regard for the entirety of the circumstances including the Defendant’s negotiations around the agreement, the Court concluded that it was enforceable at common law.⁴⁷

This ruling remains impactful in 2023 in that the Courts established—and continue to hold—that the legislative amendments do not presumptively invalidate non-competes entered into prior to October 25, 2021.⁴⁸ The evaluation of a pre-October 25, 2021, non-compete clause remains, however, subject to an evaluation of its enforceability at common law.

2. *M & P Drug Mart Inc. v. Norton et al.*

The employee in this case, Norton, began working for Hometown IDA pharmacy as a pharmacist in 1980.⁴⁹ IDA was later purchased by M & P Drug Mart Inc. in 2014.⁵⁰ At this time, Norton entered into an employment agreement with M & P that contained a non-compete provision.⁵¹ The non-compete clause provided as follows:

43. *Id.* ¶¶ 44–47.

44. *Id.* ¶ 47.

45. *Id.* ¶ 47–53.

46. *See Parekh*, O.N.S.C. 302, ¶ 48.

47. *See id.* ¶ 112.

48. *See M & P Drug Mart Inc. v. Norton*, [2022] O.N.C.A 398, ¶ 1 (Can. Ont.).

49. *Id.* ¶ 5.

50. *Id.*

51. *Id.* ¶ 7.

The Employee agrees that during the Employee's employment with the Company and during the one year period following the termination of the Employee's employment with the Company, for any reason whatsoever, the Employee shall not carry on, or be engaged in, concerned with, or interested in, directly or indirectly, any undertaking involving any business the same as, similar to or competitive with the business within a fifteen (15) kilometre radius of the business located at 10 Main Street East, Huntsville, Ontario P1H 2C9. [the address of Hometown IDA].⁵²

In 2020, following his resignation with M & P, Norton began working as a pharmacist at Campus Trail Pharmacy, which was under three kilometers from his previous employer.⁵³ The employer commenced proceedings against Norton, alleging that Norton breached the non-compete provision in his employment contract.⁵⁴ At trial, Justice Bale found the non-compete to be unenforceable since it was overly broad and ambiguous.⁵⁵ This decision was appealed.⁵⁶

At the Ontario Court of Appeal, Justice Zarnett reiterated the analysis in *Parekh et al. v. Schecter et al.*⁵⁷

These events occurred prior to the coming into force in December 2021 of the Working for Workers Act, 2021, S.O. 2021, c. 35 (the "WWA"), which prohibits non-competes, subject to certain narrow exceptions.⁵⁸ The parties' rights were therefore governed by the common law principles that treat such a covenant as unenforceable, even if freely entered into, unless it is reasonable as between the parties and with respect to the public interest.⁵⁹

Having agreed that the new prohibition did not apply, the Court of Appeal reiterated the framework for assessing the enforceability of non-competes in Ontario as follows:⁶⁰

- The general rule is that, on public policy grounds, a provision in a contract that restrains a vendor of a business from competing with the purchaser, or an employee upon leaving employment from competing with the employer, is prima facie unenforceable.⁶¹
- The exception to the general rule is that the provision will be upheld if it is reasonable in reference to the interests of the parties and the public, judged in light of the circumstances at the time the covenant is made.⁶²

52. *Id.* ¶ 8.

53. *M & P Drug Mart Inc.*, O.N.C.A 398, ¶ 12.

54. *Id.* ¶ 1.

55. *Id.* ¶ 3.

56. *Id.* ¶ 4.

57. See generally *Parekh*, O.N.S.C. 302.

58. See Working for Workers Act, S.O. 2021, c. 35 (Can.).

59. See *id.* c. 35.

60. See generally *Parekh*, O.N.S.C. 302; *M & P Drug Mart Inc.*, O.N.C.A 398, ¶ 31–38.

61. *M & P Drug Mart Inc.*, O.N.C.A 398, ¶ 32.

62. *Id.* ¶ 32.

- In order to determine whether a non-competition agreement is reasonable, the extent of the activity sought to be prohibited, the geographic coverage of the restriction, and its duration are all relevant.⁶³
- A non-competition covenant in an employment agreement that restricts the post-termination activities of an employee is subject to more rigorous scrutiny than a non-competition covenant in a sales agreement that restricts the post-sale activities of the vendor.⁶⁴
- The party seeking to enforce the restrictive covenant has the onus of demonstrating that it is reasonable as between the parties; the party seeking to avoid enforcement has the onus of showing the covenant is unreasonable with respect to the public interest.⁶⁵
- In order to withstand scrutiny, a covenant must be clear as to activity, time, and geography. A covenant that is ambiguous on any of these matters is *prima facie* unenforceable.⁶⁶
- The court is not permitted “to rewrite a restrictive covenant in an employment contract in order to reflect its own view of what the parties’ consensus *ad idem* might have been or what the court thinks is reasonable in the circumstances.”⁶⁷

Ultimately, the Court of Appeal agreed with the lower courts and dismissed the employer’s appeal.⁶⁸ The provision was too broad as it restricted activities beyond working as a pharmacist for a competitor.⁶⁹ It was also ambiguous as to what activity was restricted, and the Court was not empowered to revise the covenant to make it reasonable.⁷⁰

3. *Dymon Storage Corporation v. Nicholas Caragianis et al.*

Dymon Storage Corporation, the Plaintiff, builds self-storage units in Ottawa and the Greater Toronto Area.⁷¹ The Defendant, Bliss Edwards, resigned from Dymon and began working at a competitor, Smartstop.⁷² Dymon alleged that Edwards breached the non-compete provision in her employment contract and shared confidential information.⁷³

The non-compete clause restricted Edwards from working in any business that would compete with Dymon for a period of ten years, throughout Canada.⁷⁴ Again, since the clause was entered into before October 25,

63. *Id.* ¶¶ 34–36.

64. *Id.* ¶ 34.

65. *Id.* ¶ 35.

66. *Id.* ¶ 36.

67. *M & P Drug Mart Inc.*, O.N.C.A 398, ¶ 38.

68. *Id.* ¶ 4.

69. *Id.* ¶ 45.

70. *Id.* ¶ 49.

71. *Dymon Storage Corp. v. Nicholas Caragianis*, [2022] O.N.S.C. 5883 (Can. Ont.).

72. *Id.* ¶ 11.

73. *Id.* ¶ 1.

74. *Id.* ¶ 39.

2021, the new ESA amendments were not applicable, and the Court assessed the enforceability of the restrictive covenant under the common law.⁷⁵ The Court found the geographical scope to be overly broad as the restriction was Canada wide but—Dymon only operated in the Ottawa and Greater Toronto Area, and the lengthy 10-year scope of the restriction was beyond what other courts have found to be enforceable.⁷⁶

This case also offers insight into the distinction between “know-how” and confidentiality. There are three elements comprising the law of confidentiality: (i) it must have the necessary quality of confidence; (ii) the information must be communicated in confidence; and (iii) the information must be used to the detriment of the owner of the information.⁷⁷ Assuming the last two elements were met, the Court considered the first element. To have the necessary quality of confidence, the information must not be of a general nature, rather it must be specific. The court identified the following considerations in determining whether information has the necessary quality of confidence, including:

- a. The extent to which the information is known outside the business;
- b. The extent to which it is known by employees and others involved in the business;
- c. Measures taken to guard the secrecy of the information;
- d. The value of the information to the holder of the secret and to its competitors;
- e. The effort or money expended in developing the information;
- f. The ease or difficulty with which the information can be properly acquired or duplicated by others; and
- g. Whether the holder and taker of the secret treat the information as secret.⁷⁸

The above was contrasted to “know-how” which the Court described as follows:

“Where information derives from a professional’s experience, knowledge, practice, or skill; or is commonly known within an industry, it is not confidential to another party.”⁷⁹ Put differently, information is not confidential when it derives from a professional’s techniques that are known in the field and could easily be duplicated by one with rudimentary skills in the trade.⁸⁰

75. *See id.* ¶ 38.

76. *See id.* ¶ 44.

77. *Dymon Storage Corp.*, O.N.S.C. 5883 ¶ 47–49.

78. *Id.* ¶ 53.

79. *Id.* ¶ 54.

80. *See id.*

The Court concluded that there was insufficient specific evidence that confidential information had been shared and accordingly declined to issue any order relating to confidentiality.⁸¹

C. WHAT'S IN A NAME?

In his play *Romeo and Juliet*, Shakespeare wrote “That which we call a rose by any other name would smell as sweet.”⁸² Likewise, a non-solicitation agreement that has the same effect as non-competition clause will be interpreted as such.⁸³ Like non-competes, non-solicits are unenforceable unless the party seeking enforcement can demonstrate that they are reasonable and necessary to protect business interests.⁸⁴

Traditionally, non-solicits have been easier to enforce than non-competes because a well-crafted clause is less restrictive and focuses on the relationship between customers and the departing employee.⁸⁵ While challenges to non-solicits as “non-competes in disguise” are not new, it can be anticipated that with the introduction of the legislative prohibition on non-competes, these arguments will be pursued with increased vigour. For contracts entered into after October 25, 2021, it is likely reasonableness will not be a consideration if it can be established that a non-solicit is really a non-compete, and therefore prohibited under the ESA.

1. *Giacomodonato v. PearTree Securities Inc.*

The Plaintiff was employed in the roles of President and Co-Head of Banking with the Defendant, PearTree.⁸⁶ The Plaintiff alleged he was wrongfully dismissed and that he was underpaid from C\$3.194 million to C\$3.927 million.⁸⁷ PearTree denied the allegation of wrongful dismissal and brought a counterclaim against the Plaintiff, alleging that he had breached both the non-solicit and non-compete clauses in his employment agreement.⁸⁸ After finding the non-compete clause to be overly broad, the

81. *Id.* ¶¶ 5–6.

82. WILLIAM SHAKESPEARE, *ROMEO AND JULIET* 73–74, (1586).

83. See Peter A. Steinmeyer, Epstein Becker Green & Robert D. Goldstein, *Hiring from a Competitor: Practical Tips to Minimize Litigation Risks*, THOMSON REUTERS, [https://ca.practicallaw.thomsonreuters.com/6-566-2609?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://ca.practicallaw.thomsonreuters.com/6-566-2609?transitionType=Default&contextData=(sc.Default)&firstPage=true) [<https://perma.cc/D2SU-UGZJ>] (last visited Apr. 13, 2024).

84. See Practical Law Canada Employment, *Employment Contracts Defects*, THOMAS REUTERS, [https://ca.practicallaw.thomsonreuters.com/9-619-1843?transitionType=Default&contextData=\(sc.Default\)](https://ca.practicallaw.thomsonreuters.com/9-619-1843?transitionType=Default&contextData=(sc.Default)) [<https://perma.cc/WVE2-QF72>] (last visited Apr. 13, 2024).

85. See *Non-Compete, Non-Solicit and Non-Disclosure Agreements*, THOMSON REUTERS, [https://ca.practicallaw.thomsonreuters.com/3-623-3332?transitionType=Default&contextData=\(sc.Default\)](https://ca.practicallaw.thomsonreuters.com/3-623-3332?transitionType=Default&contextData=(sc.Default)) [<https://perma.cc/QC6B-9SD5>] (last visited Apr. 13, 2024).

86. *Giacomodonato v. PearTree Securities Inc.* [2023] O.N.S.C. 3197 ¶ 1 (Can. Ont.).

87. *Id.* ¶ 2.

88. *Id.* ¶ 3.

Court went on to consider the non-solicit.⁸⁹ The objectionable portion of the non-solicit clause read as follows:

You ... agree that during the term of your employment and for a period of 24 months after the cessation of your employment for any reason, you shall not ... directly or indirectly, solicit ... any customers or suppliers (which includes issuers, brokers and other intermediaries) of Peartree to secure engagements to underwrite securities offerings or otherwise obtain allocations of securities under those offerings for the purpose of gifting arrangements or other tax structured products.⁹⁰

The provision was found to be “a camouflaged non-competition clause designed to eliminate competition.”⁹¹ The clause restricted the Plaintiff from contacting issuers regarding any “flow-through offering,” not just charitable flow-through products.⁹² As PearTree did not facilitate traditional flow-through offerings, the Court found that the non-solicit was even more restrictive than the non-compete.⁹³ This clause is a perfect example of when a non-solicit is overly broad and overly restrictive, essentially becoming a non-compete.⁹⁴

D. CONCLUSION

The inclusion of the prohibition on non-competes in the ESA has not changed the Ontario Courts’ approach to considering the enforceability of restrictive covenants, including non-competes (in relation to those in effect prior to October 25, 2021). Courts maintain that restrictive covenants of any kind are *prima facie* unenforceable unless their reasonableness is sufficiently established. Courts continue to consider the geographical scope, temporal scope, and clarity of language in assessing non-competes. Further, Courts will consider balancing the public interest in not unduly restricting competition and protecting the ability of individuals to earn a living, against the proprietary interests of employers.

Non-compete clauses have always been hard to enforce in Ontario. Now that they are illegal in Ontario other than for select executive employees, we can expect added scrutiny of non-solicits. Any restrictive covenant should be drafted clearly, keeping the restrictions as reasonable as possible to protect the employer’s interests.

89. *Id.* ¶ 9–10.

90. *Id.* ¶ 235.

91. *Id.* ¶ 235.

92. *Giacomodonato*, O.N.C.S. at 3197, ¶ 239.

93. *Id.*

94. *Id.*

III. Ireland

In Ireland, certain terms are implied into the employment relationship.⁹⁵ For example, employees owe an implied duty of fidelity to their employer. Frequently, employers include express protections in an employee's contract, for example, a provision to the effect that for the duration of the employment, the employee will not compete with their employer's business, solicit its clients or customers, or disclose confidential information regarding its business.⁹⁶ In this way, employers often seek to protect their business from potential damage during the employment relationship. Employers also often wish to seek to protect their business for a period of time after terminating an employee by imposing certain restrictions on former employees competing with their business or soliciting the same potential customers.⁹⁷

Restrictive covenants may seek to prohibit an employee from competing with their former employer or from canvassing or soliciting its clients or employees. As restrictive covenants seek to impede a person's right to earn a living, they are treated as being prima facie void.⁹⁸ As we have continued to see in 2023, however, this does not mean that restrictive covenants will never be enforced before an Irish court. Rather, it means that it is increasingly difficult to persuade a court to do so. The courts will assess the balance of interests between the employer's right to protect its legitimate business interests and the employee's right to earn a livelihood.⁹⁹

The Irish courts will generally consider the following when assessing the potential enforceability of restrictive covenants: (i) whether the employer has a legitimate interest to protect;¹⁰⁰ (ii) whether the restraint on trade is reasonable and does not go beyond what is necessary to protect the legitimate commercial interests of the employer;¹⁰¹ and (iii) the duration and geographical extent of the restraint.¹⁰²

Ryanair v. Bellew is a recent case concerning the enforceability of restrictive covenants.¹⁰³ Mr. Bellew was the Chief Operations Officer of Ryanair prior to his resignation in 2019.¹⁰⁴ His original contract of employment with

95. See Melanie Crowley & Ger Connolly, *Employment and Employee Benefits in Ireland: Overview*, WESTLAW (Mar. 1, 2024), [https://1.next.westlaw.com/Document/I2ef129171ed511e38578f-7ccc38dcbee/View/FullText.html?originationContext=KnowledgeGraph&transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://1.next.westlaw.com/Document/I2ef129171ed511e38578f-7ccc38dcbee/View/FullText.html?originationContext=KnowledgeGraph&transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1) [<https://perma.cc/5D38-7G9H>].

96. See *id.*

97. See *id.*

98. See *Premier Dairies Ltd. v. Doyle* [1996] 1996 WJSC-SC 2228 IR 37, 48 (Ir.).

99. See Seamus Given, Hannah O'Farrell & Niamh Fennelly, *Enforcement of Post-Termination Restrictive Covenants at Injunction Stage is a Balancing Act*, ARTHUR COX (Mar. 19, 2019), <https://www.arthurcox.com/knowledge/enforcement-of-post-termination-restrictive-covenants-at-injunction-stage-is-a-balancing-act/> [<https://perma.cc/K5GL-BNTP>].

100. *Levinwich Ltd. v. Hollingsworth* [2014] IEHC 333, ¶ 5 (H. Ct.) (Ir.).

101. *Murgitroyd v. Purdy* [2005] IEHC 159 [2005] 3 IR 12, 20 (H. Ct.) (Ir.).

102. *Herbert Morris, Ltd. v. Saxelby* [1916] 1 AC 688; 32 TLR 297 (HL) 299 (UK).

103. *Ryanair DAC v. Bellew* [2019] IEHC 907 ¶ 1 (H. Ct.) (Ir.).

104. *Id.* ¶ 37.

Ryanair contained a restrictive covenant that restricted him from working directly or indirectly in any capacity for any business that was wholly or partly in competition with Ryanair.¹⁰⁵ Following his resignation, he started a new role as Chief Operations Officer for another airline, easyJet, a direct competitor of Ryanair.¹⁰⁶ Ryanair brought proceedings in the High Court seeking to enforce the restrictive covenant.¹⁰⁷

Mr. Justice Allen recognized that Ryanair had a legitimate interest in protecting its commercial information.¹⁰⁸ However, he held that the restriction was void and unenforceable as it went far beyond what was necessary to protect Ryanair's interests.¹⁰⁹ It was noted that the restrictive covenant not only applied to low-cost airlines, but also to "legacy or flag or high cost" airlines.¹¹⁰ Mr. Justice Allen found that the restriction applying to low-cost, legacy, or flag airlines was too wide.¹¹¹ He further held that the commercial information to which Mr. Bellew had been privy in his role with Ryanair did not justify restricting him from taking up employment with an airline which operated in a different market area (i.e., not in the low-cost market).¹¹²

Furthermore, Mr. Justice Allen took particular issue with Mr. Bellew being restricted from employment "in any capacity" with a competitor of Ryanair.¹¹³ He found that this restrictive covenant, if construed literally, would prevent Mr. Bellew from working as a pilot or an air steward for another airline.¹¹⁴ Mr. Justice Allen therefore ultimately held that this restriction went beyond the protection of a legitimate business interest and was an unjustifiable restraint on trade.¹¹⁵

In conclusion, the Irish courts will hold that a restrictive covenant is unenforceable where the restriction goes beyond what is necessary and proportionate to protect the employer's legitimate business interests.¹¹⁶ Employers should carefully consider and identify the specific business interests that are sought to be protected by the restrictive covenant.¹¹⁷ Any employer seeking to rely on a restrictive covenant needs to ensure that the scope of the activities restricted is as narrow as possible to reduce the risk

105. *Id.* ¶ 22.

106. *Id.* ¶ 33.

107. *Id.* ¶ 36.

108. *Id.* ¶ 210.

109. *Ryanair DAC* [2019] IEHC 907, ¶ 209.

110. *Id.* ¶ 208.

111. *Id.* ¶ 204.

112. *Id.* ¶ 193.

113. *Id.* ¶ 201.

114. *Id.* ¶ 201.

115. *Ryanair DAC* [2019] IEHC 907, ¶ 211.

116. See Aoife Bradley, 08. *Restrictive Covenants*, L&E GLOB. (July 7, 2023), <https://leglobal.law/countries/ireland/employment-law/employment-law-overview-ireland/08-restrictive-covenants-2/#:~:text=A%20covenant%20which%20is%20overly,the%20discretion%20of%20the%20court> [https://perma.cc/HD4Y-39KT].

117. See *id.*

of it later being deemed unenforceable.¹¹⁸ Particular care should also be taken to define as narrowly as possible the geographical area of any non-compete.¹¹⁹ Crucially, any restrictive covenant should be limited to a certain length of time post-termination.¹²⁰ The longer the restriction the more likely that the courts will deem it unenforceable, with a one-year restriction seeming to be the upper limit in most cases.¹²¹ Ultimately, however, the validity and enforceability of each restrictive covenant will depend on the facts of the case, the nature of the employment relationship, and how well the covenant is drafted.¹²²

IV. India

The Indian legal landscape has been active for several decades regarding employers seeking enforcement of restrictive covenants, such as non-compete or non-disclosure clauses. Such restrictive covenants have seen significant developments in recent years, including in 2023.

A. STATUTORY APPROACH

In India, the issue of enforcement of restrictive components such as non-compete and non-solicitation clauses has always been a contentious matter before the Indian Courts. Article 19 (g) of the Constitution of India clearly provides every citizen the right to practice any profession, trade, or business, subject to reasonable restrictions.¹²³

Section 14(1)(a) of the Specific Relief Act, 1963 provides that a “contract for the non-performance of which compensation in money is an adequate relief” cannot be specifically enforced.¹²⁴ Section 27 of the Indian Contract Act, 1872 (“Contract Act”) provides that “every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.”¹²⁵ The exception is that one who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits as well as an agreement made by the partners in anticipation of certain situations such as dissolution of the firm.¹²⁶

While the Contract Act is a pre-independence statute, it is unlike the law in the United Kingdom in that it does not distinguish between partial and

118. *See id.*

119. *See id.*

120. *See* Dermot Casserly, *Restrictive Covenants – Key Considerations for Employers in Ireland*, DWF (Oct. 11, 2022), <https://dwfgroup.com/pl-pl/news-and-insights/insights/2022/10/restrictive-covenants-key-considerations-for-employers-in-ireland> [<https://perma.cc/TTB5-Y7ZE>].

121. *See* Apex Fire Prot. v Murtagh [1993] IECA 20, ¶ 41 (Competition Auth.) (Ir.).

122. *See* Bradley, *supra* note 116.

123. India Const. art. 19, cl. 1(g).

124. The Specific Relief Act, 1963, §14(1)(a) (Ind.).

125. Indian Contract Act, 1872 § 27.

126. *Id.*

total restraint of trade. Therefore, if a clause in an agreement, especially in an employment contract, amounts to a post-termination restraint, then it is void.¹²⁷

B. JUDICIAL APPROACH

While interpreting Section 27 of the Contract Act, Courts in India have recently affirmed that under Section 27 of the statute:¹²⁸

- (a) a restrictive covenant extending beyond the term of the contract is void and not enforceable;¹²⁹
- (b) the doctrine of restraint of trade does not apply during the continuance of the contract for employment, rather it is applied only when the contract ends;¹³⁰ and
- (c) this doctrine is not limited to contracts of employment, rather it also applies to all other contracts such as promotional, advertising, endorsement, and event management agency contracts.¹³¹

Therefore, to determine whether a restrictive covenant in a contract would be reasonable or valid, the Courts in India have highlighted the following salient aspects:

- i. Negative covenants tied up with positive covenants during the subsistence of a contract, be it of employment, partnership, commerce, agency, or the like, would not normally be regarded as being in restraint of trade, business, or profession unless they are unconscionable or wholly one-sided;
- ii. Negative covenants between employer and employee contracts pertaining to the period post-termination and restricting the employee's right to seek employment, and/or to do business in the same field as the employer, would be in restraint of trade and, therefore, a stipulation to this effect in the contract would be void. In other words, no employee can be confronted with the situation where they have to either work for the present employer or be forced into idleness;
- iii. While construing a restrictive or negative covenant and determining whether such covenant is in restraint of trade, business, or profession, the courts take a stricter view in employer-employee contracts than in other contracts, such as partnership contracts, collaboration contracts, franchise contracts, agency or distributorship contracts, and commercial contracts. The reason is that in the latter kind of contracts, the parties are expected to have dealt with each other on an equal

127. *See id.*

128. *See, e.g., Gujarat Pottling Co. v. The Coca Cola Co.* (1995) AIR 2372 (Ind.).

129. *See id.*

130. *See id.*

131. *See id.*

footing, whereas in employer-employee contracts, the norm is that the employer has an advantage over the employee, and it is quite often the case that employees have to sign standard form contracts or not be employed at all; and

iv. The question of reasonableness as also the question of whether the restraint is partial or complete is not required to be considered at all whenever an issue arises on whether a particular term of a contract is in restraint of trade, business, or profession.¹³²

C. RECENT DEVELOPMENTS

Recently, the Delhi High Court in the judgment of *Global Music Junction Pvt. Ltd. v. Shatrughan Kumar Aka Khesari Lal Yadav & Ors.*, in its order dated September 5, 2023, upheld the restrictive covenant in an agreement executed between the music company and the singer, holding that the agreement between the parties was neither “excessively one sided” nor imposed a “bondage” on the singer.¹³³ Hence, the singer cannot be permitted to renege on his promises under the garb of a restriction allegedly violating any law.¹³⁴

On the other hand, in a case involving an injunction against an employee from carrying on any business in breach of a non-disclosure agreement (NDA), the Delhi High Court in the judgment of *Manipal Business Solutions Private Limited v. Aurigain Consultants Private Limited and Ors.* in its order dated August 17, 2022, observed that not every customer and client database would qualify as confidential information or trade secrets.¹³⁵ The Court held that the party claiming relief must establish that the confidentiality of such database was of economic, business, or commercial value.¹³⁶

D. CONCLUSION

Section 27 of the Contract Act, though contained in legislation from the year 1872, on promulgation of the Constitution of India in the year 1950, confers the right to practice any profession or to carry on any occupation, trade, or business, today has a different connotation.¹³⁷ The Law Commission of India, in its 13th Report, favored a more liberal attitude towards non-compete restraints as reasonable not only between the parties to the agreement but also as regards the general public.¹³⁸ It opined that

132. See, e.g., *Wipro Ltd. v. Beckman Coulter Int'l* (2006) 131 DLT 681, ¶ 47 (Ind.).

133. *Global Music Junction Priv. Ltd. v. Kumar* (2023) FAO(OS) (COMM) 7/2023, at 52 (Ind.).

134. *Id.*

135. *Manipal Bus. Sol. Priv. Ltd. v. Aurigain Consultants Priv. Ltd.* (2022) CS(OS) 190/2022, at 29 (Ind.).

136. *Id.* at 30.

137. See Indian Contract Act, 1872, § 27.

138. See Ministry of Law, 13th Report on Contract Act, 1872, at 27 (Issued on Sept. 26, 1958) (Ind.).

circumstances have changed from a time when trade was underdeveloped and the object underlying enacting Section 27 was to protect trade from restraints, whereas today, trade in India does not lag far behind that in England and USA.¹³⁹ Therefore, this report recommended amending Section 27 of the Contract Act, by substituting the words “is to that extent void, except insofar as the restraint is reasonable having regard to the interest of the parties to the agreement and of the public” in place of the existing words, “is to that extent void.”¹⁴⁰

While restrictive covenants such as post-employment non-competes have been seen as violative of the right of an employee to earn a livelihood, under both the Constitution and the Contract Act, covenants involving protection of confidential information have been upheld by the Court, provided the party seeking protection under law demonstrates the need to safeguard the information.¹⁴¹

As of now, there is no apparent initiative being taken to amend Section 27 of the Contract Act. However, it is possible that unless and until an amendment is implemented, the judiciary may continue to set certain standards for the enforcement of restrictive covenants.

V. Netherlands

This segment describes the main characteristics of the non-compete clause as used within the relationship between an employee and an employer under Dutch law, highlighting a proposed legislative amendment in the area of non-competes in 2023, which would have a significant impact on non-compete rules in the Dutch jurisdiction.

A. VALIDITY OF THE NON-COMPETE CLAUSE

Article 7:653 of the Dutch Civil Code defines a non-compete clause as an agreement between an employer and an employee by which the employee is limited in his or her right to work after termination of their employment.¹⁴² Under Dutch employment law, non-compete clauses (including business relationship clauses) can be included in employment contracts for an indefinite period of time if the clause is agreed to with (i) an adult employee (at least 18 years old); and if (ii) the clause is agreed to in writing.¹⁴³ If one or both of these requirements have not been met, the non-compete clause is null and void.¹⁴⁴ A non-compete clause does not have to be included in the

139. *Id.*

140. *Id.* at 78.

141. See Emily Gallagher, *Enforcement of Post-Termination Restrictive Covenants in Employment Contracts*, DLA PIPER (Oct. 18, 2023), <https://knowledge.dlapiper.com/dlapiperknowledge/globalemploymentlatestdevelopments/india-enforcement-of-post-termination-restrictive-covenants-in-employment-contracts> [https://perma.cc/65FT-6ER8].

142. Art. 7:653, ¶ 1 BW (Neth.).

143. *Id.*

144. See *id.*

employment agreement but can also be laid down in writing separately.¹⁴⁵ Dutch law does not (yet) include any specific restrictions on non-compete clauses in terms of duration or scope, though there is a vast body of case law as to these restrictions in case specific situations.

An employer is in principle not permitted to include a non-compete clause in a fixed-term employment contract.¹⁴⁶ This is only different if the employer substantiates in the non-compete clause that the clause is necessary on the grounds of major business interests (*zwaarwegende bedrijfs- of dienstbelangen*).¹⁴⁷ Those major business interests must exist both at the time of the conclusion of the employment contract and at the moment the employer invokes the non-compete clause.¹⁴⁸ In the end, it will be up to a Court to decide whether the non-compete clause is validly agreed upon and should remain in force in its original form.¹⁴⁹ The Court may mitigate or even wholly or partially annul the non-compete clause, as discussed below.¹⁵⁰

B. VIOLATION OF A NON-COMPETE CLAUSE BY A FORMER EMPLOYEE

Violation of a non-compete clause by a former employee generally constitutes a breach of contract.¹⁵¹ Consequently, the former employer may apply to the Court in summary proceedings or proceedings on the merits, seeking an injunction to stop such violation.¹⁵² In general, the former employer will file summary proceedings due to the urgent importance of the case.¹⁵³ These summary proceedings will usually take place before the Court within several weeks.¹⁵⁴ The Court may order the employee to refrain from the breaching activities, if necessary, by imposing a penalty for violating this obligation.¹⁵⁵ The Court may, however, also deny the claim on the basis of its preliminary opinion that a request to the Court by the former

145. HR 3 maart 2017, JAR 2017, 92 m.nt. CFJ (Eiseres/Verweeder) (Neth.).

146. Kamerstukken [Dutch Parliamentary Paper], 2013/14, file 33818, no. 3, 91 (Neth) (explanatory memorandum).

147. See *id.*; see also *Non-compete Clause*, NETH. ENTER. AGENCY, <https://business.gov.nl/regulation/non-compete-clause/> [<https://perma.cc/SY28-W3P2>] (last visited Apr. 13, 2024).

148. See *id.*

149. See *id.*

150. See *id.*

151. See Eva Jongepler, *Non-Competition Clauses Under Dutch Employment Law*, DUTCH L. INST. (Oct. 25, 2023), <https://dutch-law.com/employment-law/non-competition-clauses-dutch-law.html> [<https://perma.cc/S7WG-R3U5>].

152. See *id.*

153. See Hein Kernkamp, *Non Competition Contracts*, MINERVA ADVOCATEN (Dec. 17, 2019), <https://minerva-advocaten.nl/en/news/non-competition-contracts> [<https://perma.cc/V4D9-2CM2>].

154. See *Summary Proceedings in the Netherlands*, AMS ADVOCATEN (Apr. 24, 2012), <https://www.amsadvocaten.com/blog/dutch-procedural-law/summary-proceedings-in-the-netherlands/> [<https://perma.cc/W5Z6-BSCN>].

155. See Jongepler, *supra* note 151.

employee to wholly or partly annul or mitigate the non-compete clause, would probably be granted.¹⁵⁶

C. POSSIBLE ACTIONS BY THE EMPLOYEE

Article 7:653 of the Dutch Civil Code gives an employee the opportunity to seek annulment or mitigation (as to time, geographical, or functional scope) of the non-compete clause in proceedings on the merits.¹⁵⁷ However, this procedure takes a significant amount of time. The employee will therefore be more likely to be forced to start summary proceedings.

The court judgment in such proceedings will in principle not give a definitive solution as either party could initiate proceedings on the merits. In practice, however, it is likely that proceedings on the merits will not be initiated after summary proceedings.

In assessing whether the non-compete obligation should be temporarily (wholly or partially) suspended, the court will—after it has established the non-compete clause as lawfully agreed upon—weigh the interests of the parties involved.¹⁵⁸ A Court will look at all relevant facts and circumstances and weigh, among others, the following interests:

- (a) change in position of the employee;
- (b) duration and geographical scope of the restrictions;
- (c) importance of the skills and knowledge of the employee;
- (d) trade secrets known to the employee;
- (e) personal contacts the employee has with relations/customers;
- (f) age, position, and ability to acquire another good position (without violation of non-compete obligations) of the employee;
- (g) if the new job results in a considerable improvement for the employee;
- (h) the circumstances under which the agreement was terminated; and
- (i) employer's investment of time and money in the employee from which the new employer may profit.¹⁵⁹

Despite the diversity in case law, some themes on this balancing of interests can be identified. In several decisions, the courts emphasise that the non-compete clause is intended to protect the employer's market position, namely the know-how, reputation and goodwill built up by the employer through insight, effort, and knowledge, and is not intended to bind employees.¹⁶⁰

156. See Christiaan Oberman, 08. *Restrictive Covenants*, L&E GLOB. (Aug. 21, 2023), <https://leglobal.law/countries/netherlands/employment-law/overview-netherlands/08-restrictive-covenants/> [<https://perma.cc/YSP8-DFVB>].

157. See Artikel 7:653 ¶ 3 BW (Neth.).

158. *Id.* ¶ 3(b) BW (Neth.).

159. Rb. Amsterdam, 26 mei 2023, KG 2023, 1566 m.nt. (Neth.).

160. See, e.g., Rb. Amsterdam, KG 2023, 1566 at ¶¶ 3.11–3.12 (Neth.).

D. 2023 NOTICE OF LEGISLATION AND IMPACT

In a letter dated June 2, 2023, the Dutch Minister of Social Affairs and Employment announced an amendment to the current statutory regulation of the non-compete clause.¹⁶¹ The Minister proposes to include the following in a bill:

- limitation of the duration of the non-compete clause;
- an obligation to specify and justify the geographical reach in the clause;
- a non-compete clause can only be included in case this is needed for compelling business interests, also for indefinite-term employment contracts (currently only required for fixed-term employment contracts); and
- when invoking the non-compete clause, the employer is in principle obliged to pay compensation (a certain legally determined percentage of the employee's last earned salary).¹⁶²

It is still unclear whether and, if so, when these changes will be implemented. The Minister expected that a draft bill would be submitted for internet consultation at the end of 2023.¹⁶³ Due to the fall of the Dutch government and the elections on November 22, 2023, it remains to be seen how the legislative process will develop further. In the meantime, a non-compete clause can be agreed upon based on the current legislation.¹⁶⁴ On September 8, 2023, the Tilburg subdistrict court judge ruled that the Minister's plans are not yet concrete enough to anticipate in current cases.¹⁶⁵

VI. Poland

In the Polish labor law system, two types of clauses regulating the subject of competition are allowed: non-competition clause during the employment contract and restrictive covenant after the termination of the employment relationship.¹⁶⁶

A non-competition clause reserved contractually either for the duration of the work or a restrictive covenant after termination of cooperation are both legally non-obligatory restrictions of employees' involvement in competitive activities, voluntarily imposed by the will of the parties.¹⁶⁷ Therefore, it is an additional obligation of the parties to the employment

161. Brief Van de Minister Van Sociale Zaken en Werkgelegenheid [Letter from the Minister of Social Affairs and Employment Opportunities] (June 2, 2023), <https://zoek.officielebekendmakingen.nl/kst-29544-1196.html#extrainformatie> [<https://perma.cc/WU6P-AY2H>].

162. *Id.*

163. *Id.*

164. See Artikel 7:653 BW (Neth.).

165. Ktr. Zeeland-West Brabant 8 september 2023, AWB 2023, 6527 m.nt. (Tristar Europe BV) (Neth.).

166. See *Basic Information on Labour Law*, MINISTRY OF FAM., LAB., AND SOC. POL'Y REP. OF POL., <https://www.gov.pl/web/family/basic-information-on-labour-law> [<https://perma.cc/29HA-PBMC>] (last visited Apr. 13, 2024).

167. See *id.*

contract rather than an obligatory requirement for the effective conclusion of an employment contract in Poland.¹⁶⁸

However, if a contract is concluded, the source of the scope of the agreed-upon competition restrictions is usually solely the text of the clauses.¹⁶⁹ Sometimes, however, especially in cross-border relations, an additional source of interpretation of what the parties have agreed to are the provisions of the Labor Code, which apply regardless of the working conditions agreed upon by the parties.¹⁷⁰ It is not only about situations where the parties have been too restrictive despite the employment contract balancing interests, which the Polish Labor Code strives for.¹⁷¹ Another example is the general obligation of an employee not to disclose business secrets. It is one of the main duties of an employee specified in the Labor Code.¹⁷² Therefore, the existence of this obligation does not depend on the conclusion of an additional clause of the non-competition agreement after the termination of the employment relationship. Hence, an employee who has not even concluded appropriate non-competition clauses is obliged to maintain confidentiality.¹⁷³

A. SOURCES AND FORM OF BOTH CLAUSES IN POLAND

In accordance with the Polish Labor Code (the core provisions of Article 101(1)¹⁷⁴ and Article 101(2)¹⁷⁵ of the Labor Code), the non-compete and

168. *See id.*

169. *See* Kamila Latoszek, *Prohibition of Competition in Polish Labor Law*, JRD, <https://jrd.pl/2023/10/06/prohibition-of-competition-in-polish-labor-law/?lang=en> [<https://perma.cc/2F3W-WD4W>] (last visited Apr. 7, 2024).

170. *See Basic Information on Labour Law*, *supra* note 166.

171. *See id.*

172. *See id.*

173. THE LABOUR CODE art. 100 § 2(5) (Pol.).

174. *Id.* art. 101(1) §§ 1–2 (“Prohibition of competition regarding an employee in an employment relationship: § 1. To the extent specified in a separate agreement, the employee may not conduct activities that are competitive with the employer or provide work under an employment relationship or on another basis for an entity conducting such activities (a non-compete). § 2. An employer who has suffered damage as a result of an employee’s violation of the non-competition clause provided for in the contract may claim compensation for this damage from the employee on the terms set out in the provisions of Chapter I, Section Five.”).

175. *Id.* art. 101(2) §§ 1–3 (“Prohibition of competition regarding a former employee: § 1. Provision of Art. 101(1) § 1 shall apply accordingly when an employer and an employee who has access to particularly important information, the disclosure of which could expose the employer to damage, conclude a non-competition agreement after the termination of the employment relationship. The agreement also specifies the duration of the non-competition ban and the amount of compensation due to the employee from the employer, subject to the provisions of § 2 and § 3. § 2. The prohibition of competition referred to in § 1 shall cease to apply before the expiry of the period for which the contract provided for in this provision was concluded, if the reasons justifying such a prohibition cease to exist or if the employer fails to fulfill its obligation to pay compensation. § 3. The compensation referred to in § 1 may not be lower than twenty-five percent of the remuneration received by the employee before the termination of the employment relationship for a period corresponding to the period of the non-competition ban; compensation

restrictive covenants must be concluded in writing under pain of invalidity. However, Polish labor law is not restrictive as to the integrity of these clauses within the basic document of the employment contract. This means that the regulation of “exclusivity” or other competition issues may constitute a part of the employment contract, i.e., a separate paragraph regarding such clauses, or they may constitute a document separate from the employment contract, for example, in the form of an additional agreement on competitive issues.¹⁷⁶

Given the provisions noted above, the substantive legal restrictions of restrictive covenants regarding the period after the termination of the employment relationship deserve special attention. Namely, such a restrictive covenant must be justified by 1.) business secrecy; and 2.) protection of the employer’s legitimate interests.¹⁷⁷ Additionally, this clause cannot 3.) violate the principles of social coexistence; or 4.) restrict the employee to an excessive extent.¹⁷⁸

As these criteria are broad, in the event of a dispute, they may be understood in a completely different way by the parties to the employment contract. Therefore, judicial decisions in Poland play a very important role in guiding the interpretation of non-compete and restrictive covenants in practice. Polish labor courts not only check the compliance of clauses with the current provisions of Polish labor law, but also decide on proportionality, so-called reasonableness, and adequacy applied by the parties to the disputed employment relationship, analyzing the specific circumstances of a given case.¹⁷⁹ Therefore, the judicial practice of the Polish labor judiciary is a source of predicting whether the non-competition structure designed by the parties to the contract is objectively permitted.

B. RESERVED ONLY FOR IMPORTANT INFORMATION, FOR A SPECIFIED PERIOD AND A FEE

An employer in Poland may implement a restrictive covenant applicable after the termination of the employment relationship only with respect to an employee who has access to particularly important information.¹⁸⁰ An objective measure of whether information is particularly important is whether its disclosure may expose the employer to material or non-material damage.¹⁸¹

may be paid in monthly installments. In the event of a dispute about compensation, the labor court decides.”).

176. See *id.* art. 101(1) § 1; see also *id.* art. 101(2) § 1.

177. See E. Kumor-Jezierska, *Chapter 2: Basic Principles of Individual Labor Law*, PRINCIPLES OF POLISH LABOR LAW 11, 16–17 (Krzysztof W. Baran ed., 2018), https://kppips.wpia.uj.edu.pl/documents/88629380/143250022/Principles_of_Polish_Labour_Law.pdf/8434645b-e121-46e1-969e-1c6bb4f63535 [https://perma.cc/4BGF-M8S8].

178. See *id.* at 81.

179. See K.W. Baran, *Chapter 5: Basic Principles of Procedural Labor Law*, PRINCIPLES OF POLISH LABOR LAW 385, 387–90 (Krzysztof W. Baran ed., 2018), https://kppips.wpia.uj.edu.pl/documents/88629380/143250022/Principles_of_Polish_Labour_Law.pdf/8434645b-e121-46e1-969e-1c6bb4f63535 [https://perma.cc/4BGF-M8S8].

180. See Kumor-Jezierska, *supra* note 177, at 17.

181. See *id.*

Information that causes damage to the employer if disclosed includes, in particular, trade secrets. A trade secret should be understood as undisclosed technical, technological, or organizational information of the enterprise or other information of economic value, for which the entrepreneur has taken the necessary measures to maintain its confidentiality.¹⁸² The concept of a trade secret therefore covers all spheres of an enterprise's activity, and the competitiveness criteria provided for in the provisions regulating competition protection are used to assess this issue.¹⁸³

C. RESTRICTIVE COVENANT WITHOUT A DEADLINE IS INVALID

From the perspective of jurisdictional differences, the restrictive covenant in Poland can only be a fixed-term clause. The Polish legislature did not specify the maximum period for which the parties may terminate the restrictive covenant, but ordered the parties to determine its validity period.¹⁸⁴ The minimum amount of remuneration that an employee must receive for ceasing competitive activity after employment depends on the duration of the covenant.¹⁸⁵ This means that the restrictive covenant for an indefinite period is invalid as it is contrary to Polish civil law.¹⁸⁶ The labor court in Poland also found in one of the cases that an agreement providing for an unpaid ban on competitive activity after the termination of the employment relationship is not invalid, but the gratuitous nature of the clause is automatically replaced by statutory compensation.¹⁸⁷

D. APPLICABLE LAW OF CROSS-BORDER CLAUSES AND CONCLUDING REMARKS

When entering the Polish labor market, it is important that employers, when concluding non-compete and restrictive covenants with a Polish employee, can choose a different substantive law applicable to the contract than Polish law.¹⁸⁸ However, the condition for the effectiveness of such a

182. ACT OF 16 APRIL 1993 ON COMBATTING UNFAIR COMPETITION, art. 11.1, § 4 (Pol.).

183. See Article 11 of the Polish Act of 16 April 1993 on combating unfair competition (consolidated text, Journal of Laws of 2022, item 1233) defines, for example, in § 2, the concept of trade secret, which is primarily: "technical, technological, organizational information of the enterprise or other information of economic value". *Id.*

184. Kumor-Jezińska, *supra* note 177, at 17.

185. *Id.*

186. Sąd Najwyższy [PK] [Supreme Court] Oct. 2, 2003, I PK 453/02, OSNP 2004 nr 19, poz. 331 (Pol.) (finding that the omission of a provision specifying the duration of the prohibition of competitive activity after the termination of the employment relationship renders the restrictive covenant unenforceable).

187. Sąd Najwyższy [PKN] [Supreme Court] Dec. 17, 2001, I PKN 742/00, OSNP 2003 nr 24, poz. 588, at 5 (Pol.).

188. See Alicja Mysluk-Landowska & Joanna Kowal, *Employment Law Guide: Poland*, DUDKOWIAK KOPEC & PUTYRA (Mar. 29, 2024), <https://www.dudkowiak.com/employment-law-in-poland/#:~:text=Choice%20of%20law%20in%20employment%20contracts&text=This%20>

reservation is that the selected foreign law will not be less favorable than Polish law.¹⁸⁹

Within the scope of the requirements of Polish law, it is permissible to apply both non-compete and restrictive covenants even when the employer's goal is not to achieve a positive economic result. For the Polish labor judiciary, it is irrelevant whether the violation of the non-competition clause will lead to property damage because, from a theoretical point of view, non-compete and restrictive covenants do not necessarily result in damages if the employee violates the non-competition clause.¹⁹⁰ When constructing such clauses, the labor court requires that the employee's obligation itself be distinguished from the consequences of its violation.¹⁹¹ Therefore, in Poland, a competitive obligation and the effect of a breach are separate categories.¹⁹² This encourages the use of competition protection tools in the form of non-compete and restrictive covenants because, under Polish law, these clauses make it significantly easier to hold a dishonest employee accountable. In the Polish market, it is in practice sometimes difficult to assess the employer's economic harm directly caused by the employee's competitive activities, and without proper additional contractual protection of the foreign employer's competitive interests, its protection under general principles may be purely illusory.

VII. Comparative Perspectives on Non-Compete Clauses in the United States, United Kingdom, and Singapore

The US Federal Trade Commission (FTC) proposal to prohibit non-competition clauses in employment contracts has ignited a contentious debate.¹⁹³ Proponents laud it for the potential entrepreneurship, innovation, and economic growth that it may stimulate, as the ban asserts potential benefits for over thirty million private sector workers, projecting a \$250 to \$296 billion increase in earnings if implemented.¹⁹⁴ Opponents, however, contend that non-competes are essential for safeguarding confidential

is%20because%20the%20choice,by%20agreement%20of%20the%20parties [https://perma.cc/N2CB-TXDM].

189. *See id.*

190. *See* Krystian Stanasiuk, Katarzyna Kochanowska, & Taylor Wessing, *Non-Compete Clause in an Employment Relationship. What You Should Remember in Order to Be Effective and Respected?*, HLB POL. (Apr. 18, 2017), <https://hlb-poland.global/non-compete-clause-in-an-employment-relationship-what-you-should-remember-in-order-to-be-effective-and-respected/> [https://perma.cc/A5SD-CQ8J].

191. *See* Sąd Najwyższy [PK] [Supreme Court] June 5, 2020, I PK 103/19 (Pol.).

192. *See id.* (expressing this very important court thesis in cross-border practice).

193. Press Release, Fed. Trade Comm'n, FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition (Jan. 5, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition> [https://perma.cc/G9NK-6P5V].

194. *See id.*

information,¹⁹⁵ raising questions about the FTC's legal authority. While the outcome remains uncertain, the proposal has garnered 5000 public comments.¹⁹⁶

The proposed ban's impact may vary across states. In New York, where restrictive covenants are "disfavored," enforceability hinges on protecting legitimate business interests without unreasonably limiting an employee's ability to earn a living. Legal precedent, such as *BDO Seidman v. Hirshberg*, emphasize the importance of narrowly tailoring non-competes.¹⁹⁷ In a state like New York, there may be limited changes to the strict scrutiny already applied to restrictive covenants. In other states, such as the more pro-employer Maryland, the ban, if adopted, would mean a more drastic shift in policy.¹⁹⁸

Examining non-competition practices in the United Kingdom (UK) and Singapore provides valuable insights. In the UK, the enforceability of non-competes adheres to common law principles and statutory regulations. Recent cases, such as *Tillman v. Egon Zehnder Ltd.*¹⁹⁹ and *Marathon Asset Management LLP v. Seddon*,²⁰⁰ demonstrate the courts' scrutiny of reasonableness and necessity. The UK's strict approach ensures that overly broad or restrictive clauses can render non-competes unenforceable.

Singapore, known for its employer-friendly approach, enforces non-competes that protect legitimate business interests and exhibit reasonableness in scope, duration, and geographical coverage.²⁰¹ The courts scrutinize clauses more strictly than in New York, particularly when overlapping with other contract provisions addressing confidential information.²⁰²

Although legal tests in these jurisdictions are similar, outcomes differ due to varying public policy considerations. The UK prioritizes promoting competition and preventing trade restrictions, demanding narrowly tailored non-competes.²⁰³ Singapore, in contrast, generally accepts non-competes as

195. See Ken Klippenstein et al., *Big Business' Plan To Block Biden's Plan on Noncompete Agreements*, THE INTERCEPT (Feb. 3, 2023, 7:00 AM), <https://theintercept.com/2023/02/03/ftc-non-compete-agreement-ban/> [https://perma.cc/8G2V-QRCH].

196. Lina Kahn, Chair, Fed. Trade Comm'n, Address at the FTC Forum Examining Proposed Rule to Ban Noncompete Clauses (Feb. 16, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/FTC-Forum-Examining-Proposed-Rule-to-Ban-Noncompete-Clauses-February-16-2023.pdf [https://perma.cc/WKM5-2Y32].

197. *Seidman v. Hirshberg*, 712 N.E.2d 1220, 1226–27 (N.Y. App. 1999).

198. See Title 3 of Maryland's Code Annotated for Labor and Employment, Section 3-716 only prohibits employers from requiring non-competes when the employee is earning equal to or less than \$15 per hour. MD. CODE ANN., LAB. & EMPL. § 3-716.

199. *Tillman v. Egon Zehnder Ltd.* [2019] UKSC 32, 9, 30 (appeal taken from EWCA) (Eng.).

200. *Marathon Asset Management LLP v. Seddon* [2017] EWHC 300 (Comm), ¶ 114 [29], ¶ 118 [30] (Eng.).

201. See Nadia Moynihan, *Comparative Perspectives on Non-Compete Clauses in the United States, United Kingdom, and Singapore*, ABA (Sept. 14, 2023), <https://businesslawtoday.org/2023/09/comparative-perspectives-on-non-compete-clauses-in-the-united-states-united-kingdom-and-singapore/> [https://perma.cc/737U-7TQB].

202. See *id.*

203. See *id.*

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long as they adhere to specified boundaries.²⁰⁴ In the US, large corporations' significant influence on labor market fluidity, extending even to fast-food workers and entry-level employees, underscores the importance of the FTC's proposed rule.²⁰⁵ Whether implemented or not, U.S. employers are advised to explore alternative mechanisms for safeguarding confidential information, trade secrets, and goodwill.²⁰⁶

The FTC's proposal to ban non-competes has sparked a nationwide discourse, with contrasting opinions on its potential impact. Analyzing practices in the UK and Singapore highlights the nuances in how different jurisdictions balance employer and employee interests. Regardless of the outcome, the proposal prompts a reevaluation of mechanisms for protecting vital business assets.

204. *See id.*

205. *See id.*

206. *See id.*

The International Law Year In Review: Family Law

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This Article discusses significant legal developments in family law from 2023.

I. Marriage

A. MARRIAGE VALIDITY

A Washington State court referenced Indian law in determining that two people were validly married in India.¹ Indian law required that the marriage be registered post-ceremony.² The husband presented contested documentation of this registration, which the trial court accepted.³ The wife, seeking an annulment in lieu of a divorce, challenged the satisfaction of the registration requirement, seeking to void the marriage.⁴ The Court of Appeals affirmed, concluding that, even if registration had been improper, failure to register a marriage was not listed among the reasons for voiding a marriage under the Indian Marriage Act.⁵

B. MARITAL/PRENUPTIAL/POSTNUPTIAL AGREEMENTS

A couple was bound by two “agreements” executed in Colombia that were related to the division of their marital property when the Husband filed for divorce in Minnesota.⁶ The “agreements” were treated as judgments under Colombian law, as they were prepared and executed before a notary, which has a different status from a notary in the United States.⁷ Therefore, the court found that the agreements were entitled to recognition as a matter of comity.⁸

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1. *In re Marriage of Kaur*, No. 38248-6-III, 2022 WL 18005847, at *2 (Wash. Ct. App. Dec. 30, 2022).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* at *2.

6. *Rzeczkowski v. Borrero*, No. A22-0954, 2023 WL 2762442, at *13 (Minn. Ct. App. Apr. 3, 2023) (remanded for the court to resolve whether the agreement was unconscionable under Minnesota law).

7. *Id.* at *3

8. *Id.* at *3–4.

II. Dissolution of Marriage

A. RECOGNITION OF FOREIGN DISSOLUTION

An ex parte Egyptian divorce decree, obtained by the Husband, was not entitled to comity by a New York family court because neither party was domiciled in Egypt, and the Wife did not have proper notice of the proceedings until the day after the divorce decree was issued.⁹ Compare that with a Texas case in which husband, present in Texas, pronounced talaq and notified the appropriate Pakistani government official pursuant to Pakistan's Muslim Family Laws Ordinance 1961.¹⁰ The wife unsuccessfully challenged the divorce in the courts of Pakistan, with the matter ultimately addressed by the Supreme Court of Pakistan.¹¹ The wife separately petitioned for divorce in Texas.¹² The Texas courts dismissed the petition as a matter of comity.¹³

The Supreme Court of Nebraska clarified that a divorce case, filed in Nebraska, under circumstances that permitted a divorce (i.e., one spouse was domiciled for the requisite period of time), could not be dismissed for lack of subject matter jurisdiction.¹⁴ The Defendant argued that an existing Venezuelan divorce decree divested Nebraska of jurisdiction.¹⁵ The Supreme Court concluded that the existence of the foreign divorce judgment would not be relevant to the existence of subject matter jurisdiction, although a trial court could decide to recognize a foreign judgment as a matter of comity.¹⁶

The U.S. Court of Appeals for the Fourth Circuit considered whether a divorce effectuated by the spouses' family members in Ghana, where both spouses were citizens of Ghana but neither spouse was domiciled in Ghana, involved a sufficient nexus between the spouses and Ghana for a Virginia court to recognize the foreign divorce decree as a matter of comity.¹⁷ The long-standing rule is that at least one spouse must have been a domiciliary of the foreign jurisdiction to have their divorce recognized.¹⁸ The Court of Appeals opined that the Ghanaian citizenship of the couple was a sufficient link to justify recognition of the divorce.¹⁹

9. *DAB v. MAS*, 180 N.Y.S.3d 815, 818 (N.Y. Sup. Ct. 2022).

10. *Azhar v. Choudhri*, No. 01-20-00169-CV, 2023 WL 5615810, at *2 (Tex. App.—Houston [1st Dist.] Aug. 31, 2023, *no pet. h.*).

11. *Id.* at *3.

12. *Id.*

13. *Id.* at *4, *13.

14. *Bleich v. Bleich*, 312 Neb. 962, 967–68 (Neb. 2022).

15. *Id.*

16. *Id.* at 969–72.

17. *Adjei v. Mayorkas*, 59 F.4th 659, 662 (4th Cir. 2023).

18. *Id.* at 666.

19. *See id.* at 667–68.

III. Children

A. CUSTODY DETERMINATIONS

1. International Travel of Children

When a trial judge summarily denied a Father's request for a U.S. passport (which was not challenged by the Mother), the Court of Appeals of Nevada, in an unpublished opinion, reversed and remanded, indicating that the court should have examined the child's best interests prior to ruling.²⁰ Further, the appellate court held that, despite the Father's lack of immediate international travel plans, the matter was ripe for judicial review given the significant amount of time to obtain a U.S. passport, especially if the Father must seek court intervention.²¹

2. Relocation of Children

Idaho's Supreme Court concluded that a parent who relocates their child in a manner that either explicitly violates or effectively frustrates the purpose of an existing custody arrangement, retains the burden of proving the move is in the child's best interests, even after the move occurs.²² When an Idaho mother surreptitiously relocated the parties' son to Costa Rica, the court was bothered by the behavior.²³ The court determined that the burden of proving that relocation is in the best interests of a child must be placed on the relocating parent, otherwise there would be no deterrent for the relocating parent to refrain from abducting the child.²⁴

B. JURISDICTION OVER CUSTODY

1. Home State and Significant Connections

U.S. state enactments of the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA) provide the exclusive basis for jurisdiction to issue an initial child-custody order in the United States, except in Massachusetts.²⁵ The Court of Appeals of Texas held that a court must apply the jurisdictional rules in the UCCJEA rather than presuming that the court has subject-matter jurisdiction.²⁶

20. *Lee v. Hollings*, No. 84096-COA, 2023 WL 4752343, at *3–4 (Nev. Ct. App. July 21, 2023).

21. *Id.* at *3.

22. *Gray v. Gray*, 518 P.3d 1185, 1195 (Idaho 2022).

23. *See id.* at 1197.

24. *Id.* at 1196.

25. *See Child Custody Jurisdiction and Enforcement Act*, UNIFORM L. COMM'N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=4cc1b0be-d6c5-4bc2-b157-16b0baf2c56d> [<https://perma.cc/G9KB-RCBQ>] (last visited Apr. 15, 2024).

26. *In re A.J.T.*, 654 S.W.3d 312, 315 (Tex. App.—Eastland 2022, *no pet. b.*).

The UCCJEA defines “home state” as the state in which the child has resided with a parent, or a person acting as a parent, for six consecutive months immediately prior to commencing the lawsuit, minus any temporary absence from that location.²⁷ In January 2023, in the absence of a legislative definition of “temporary absence,” the Court of Appeals of Arizona adopted the “totality-of-the-circumstances” test.²⁸ This is one of three tests that are commonly adopted throughout the United States, with some other states adopting the duration test or the intent test.²⁹

A Maryland Court of Special Appeals affirmed a trial court, which declined to exercise child-custody jurisdiction concerning children residing in Germany.³⁰ The children were residing in Germany with their father (their mother having returned to Maryland alone) almost two years into a five-year temporary relocation.³¹ The trial court found that Maryland was not the home state of one of the children.³² The trial court also relinquished jurisdiction over the second child, with respect to whom a Maryland Juvenile Court had made a custody determination (which would provide Maryland continuing, exclusive jurisdiction).³³

2. *Vacuum Jurisdiction*

A New York family court assumed jurisdiction over a minor child who had never lived in the United States, and was, at the time of the custody lawsuit in New York, living full time in Nigeria, under the UCCJEA’s vacuum jurisdiction provisions.³⁴ The court found that both parents had relocated to New York with their other three children, but left the child at issue in Nigeria when they had difficulty obtaining a visa for the child.³⁵ The child was rotating between relatives’ houses, and both parents had, at least initially, indicated to the New York court that they wanted that child to move to the United States.³⁶ The court found that the child was not residing with a “person acting as a parent” in Nigeria, and therefore, Nigeria was not the child’s home state at the time the mother filed her New York custody suit.³⁷

27. *Id.* at 316 (citing Tex. Fam. Code § 152.102).

28. *Antonetti v. Westerhausen*, 523 P.3d 969, 974 (Ariz. Ct. App. 2023).

29. *Id.* at 973.

30. *Beauchamps v. Beauchamps*, No. 401, 2023 WL 2314832, at *9 (Md. Ct. Spec. App. Mar. 1, 2023).

31. *Id.* at *2.

32. *Id.* at *8.

33. *Id.* at *5.

34. *Olaide O. v. Oluseun O.*, No. V-08484-21, 2022 WL 17727139, at *2–3 (N.Y. Fam. Ct. Dec. 5, 2022).

35. *Id.* at *1–2.

36. *Id.*

37. *Id.* at *2.

3. *Enforcement*

A foreign child-custody order shall be enforced if registered in a U.S. state.³⁸ There are a few arguments permitted against the registration of another country's custody order. One possible argument is that the foreign determination was not made under factual circumstances in substantial conformity with the jurisdictional standards of the UCCJEA.³⁹ When a father argued before the Court of Appeals of Michigan that the German courts did not employ a "best interest" analysis before rendering a child-custody determination and, therefore, the determination was not in substantial conformity with Michigan law, the Michigan court observed that "substantial conformity" relates to jurisdictional standards, not substantive law.⁴⁰

4. *Temporary Emergency Jurisdiction*

The Court of Appeals of California, in an unpublished opinion, affirmed that California courts had temporary emergency jurisdiction pursuant to the UCCJEA to issue a domestic violence restraining order and an associated child custody order relating to a child present in California, where a French court had already issued a child custody judgment.⁴¹ Because California's enactment of the UCCJEA provides that any order issued based on California's temporary emergency jurisdiction "remains in effect until an order is obtained from the other state within the period specified or the period expires," a California court could not renew the order based on temporary emergency jurisdiction.⁴²

IV. International Parental Child Abduction

A. THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

1. *Applicability of the Abduction Convention*

In the United States, the Convention on the Civil Aspects of International Child Abduction, done at The Hague October 25, 1980, (the Abduction Convention) is implemented by the International Child Abduction Remedies

38. *Lorenz v. Lorenz*, Nos. 359832, 361127, 2023 WL 2441727, at *6 (Mich. Ct. App. Mar. 9, 2023).

39. *Id.* at *5 (quoting MICH. COMP. LAWS § 711.1105).

40. *Id.* at *6.

41. *Kinfoussia v. Hamade*, No. B320550, 2023 WL 4940574, at *9 (Cal Ct. App. Aug. 3, 2023).

42. *Id.* at *10. The trial judge made several incorrect statements. The trial judge advised the Father to register and modify the French order in California, which ignored France's continuing exclusive jurisdiction under the UCCJEA. *Id.* at *3, 9. The order stated that the court had jurisdiction to issue custody provisions in the restraining order pursuant to the UCCJEA and the Abduction Convention, but the Abduction Convention does not determine jurisdiction. *Id.* at *3, *6–7. Finally, there was reference to a stipulation made by the parties that agreed to jurisdiction, but subject matter jurisdiction may not be conferred by consent. *Id.* at *10.

Act (ICARA).⁴³ Federal and state courts have concurrent jurisdiction to resolve a parent's request for the return of their child pursuant to the Abduction Convention.⁴⁴

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 "actually exercised" (or would have exercised, but for the abduction), under the law of the child's habitual residence.⁴⁵

Countries may become party to the Abduction Convention as a result of ratification, acceptance, or approval of, or accession to, the Convention.⁴⁶ An accession will have effect between the acceding party and another party to the Convention if the latter party has declared its acceptance of the accession.⁴⁷ The Abduction Convention ceases to provide a return remedy when the child in question turns sixteen.⁴⁸

2. *Petitioner's Case*

a. Habitual Residence

The Abduction Convention does not define the term "habitual residence."⁴⁹ In 2020, the U.S. Supreme Court addressed the undefined term in *Monasky v. Taglieri*,⁵⁰ holding that "a child's habitual residence depends on the totality of the circumstances specific to the case."⁵¹ Justice Ginsburg, in her opinion, included a footnote that provided some considerations that courts have applied when considering whether a child

43. See Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 22514 [hereinafter "Abduction Convention"]; International Child Abduction Remedies Act 22 U.S.C.S. § 9001 [hereinafter "ICARA"]. 22 U.S.C.S. § 9001; International Child Abduction Remedies Act, 1988 Enacted H.R. 3971, 100 Enacted H.R. 3971, 102 Stat. 437.

44. ICARA § 9003(a). Filing a Hague Abduction Convention return petition in state court may create some risk of conflation of Abduction Convention and UCCJEA issues. See, e.g., *Luisa JJ. v. Joseph II.*, 219 A.D.3d 1628, 1629 (App. Div. 2023) (where the mother sought the child's return in state court by filing an Abduction Convention return petition, the father asked the court to exercise temporary emergency jurisdiction and issue an order enjoining the child's return, and the mother filed, but did not seek to register, an Italian custody order that was issued during the pendency of these proceedings, ordering the child returned).

45. *Luisa JJ.*, 2018 A.D.3d at 1631 (quoting the Abduction Convention art. 3(a)–(b), at 98–99).

46. Abduction Convention, art. 43, at 105.

47. See *Alikovna v. Viktorovich*, No. 19-cv-23408, 2019 WL 4038521, at *2–3 (S.D. Fla. Aug. 27, 2019) (dismissing a petition to return a child to Russia because the United States has not accepted Russia's accession).

48. Abduction Convention, Article 4. See, e.g., *Custodio v. Samillan*, 842 F.3d 1084 (8th Cir. 2016).

49. See generally Abduction Convention.

50. *Monasky v. Taglieri*, 140 S. Ct. 719, 726 (2020).

51. *Id.* at 723.

has acclimatized to a habitual residence.⁵² A district court in Michigan subsequently found that a 4-year-old child who had moved frequently between Brazil, China, and Mexico before landing in the United States had her habitual residence in Brazil, because it was the only constant to which the family kept returning.⁵³

A child's habitual residence is a country and is not a parent.⁵⁴ When both parents argued their child's emotional connection to them, and therefore argued they were the child's habitual residence, the court was not persuaded and concluded that it must determine which *country* was the habitual residence, particularly since the law of the child's habitual residence dictates certain other legal determinations in an Abduction Convention case.⁵⁵

A Florida federal judge found that two children who moved to Canada with their Canadian-national parents in September 2020 when their Father was deported from the United States, living there for over a year, never shifted their habitual residence from the United States to Canada.⁵⁶ The parents purchased a house, and obtained employment, in Canada.⁵⁷ When their mother traveled to Florida with them in November 2021, and retained them there, it was not wrongful.⁵⁸ Several witnesses testified that when the family moved to Canada, their intention was never to remain there permanently, but to explore another country where they could live (for example the United States, Europe, or Panama).⁵⁹

The U.S. District Court for the District of Arizona decided that the habitual residence of twins had not changed despite numerous communications between the parents.⁶⁰ These communications did not reflect a shared, settled intent of the parents to raise the children in the United States as their plan "was ever-changing and subject to various unfulfilled contingencies."⁶¹ Therefore, when the mother traveled to Arizona with the children in June 2022 on a one-way plane ticket, and retained them at the end of the trip, her retention was wrongful.⁶² The U.S. District Court for the Middle District of Florida noted that when the two parents had pre-marital discussions of eventually moving from Australia to Florida, this was not a change in their

52. *Id.* at 727 n.3.

53. *Argueta v. Argueta-Ugalde*, No. 22-12840, 2023 WL 1466820, at *6 (E.D. Mich. Feb. 2, 2023).

54. *See Castang v. Kim*, No. 1:22-CV-05136-SCJ, 2023 WL 1927027, at *6 (N.D. Ga. Feb. 9, 2023), *aff'd* *Castang v. Kim*, No. 23-10426, 2023 WL 3317983 (11th Cir. May 9, 2023).

55. *See id.*

56. *Watson v. Watson*, No. 8:22-cv-2613-WFJ-TGW, 2023 WL 1967587, at *6 (M.D. Fla. Feb. 13, 2023).

57. *Id.* at *3-4.

58. *Id.* at *5-7.

59. *Id.* at *6.

60. *Peyre v. McGarey*, No. CV-23-00350-PHX-DWL, 2023 WL 3726728, at *16-17 (D. Ariz. May 30, 2023).

61. *Id.* at *17.

62. *Id.* at *5, *16-17.

future child's habitual residence, or consent to the Mother retaining the child at the end of a three-week trip to Florida in July 2022.⁶³

The U.S. District Court for the Eastern District of Missouri held that a mother who argued that her child's habitual residence was the United States, and not Japan, because she was coerced by the father into living in Japan, could not overcome the volume of evidence that the child was "at home" in Japan.⁶⁴ Her evidence of coercion included the father having her sign a marriage license she did not understand, controlling their finances, speaking only Japanese to the child so as to isolate the child from her, and controlling all important decisions.⁶⁵

The U.S. District Court for the Northern District of Illinois denied a Respondent's motion to dismiss an Abduction Convention return request based on, among other arguments, the parties' prior Illinois custody agreement (incorporated into a court order) that specifies that the United States was the child's habitual residence.⁶⁶ The district court stated, "[t]hat the parties appeared to agree that A.P.'s habitual residence was Illinois as of May 23, 2022 may be relevant to this action's assessment of A.P.'s habitual residence approximately fourteen months later, but it is not identical or dispositive, and does not preclude the instant inquiry."⁶⁷

b. Rights of Custody and 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 "actually exercised" that right at the time of removal or retention, or would have exercised that right, but for the removal or retention.⁶⁸

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*⁶⁹ 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."⁷⁰ The Abduction Convention includes, in two separate places, the opportunity to address the petitioner's actual exercise

63. *Neuwenhoven v. Pisani*, No. 5:23-cv-34-GAP-PRL, 2023 WL 4930852, at *3 (M.D. Fla. Feb. 23, 2023).

64. *Tsuruta v. Tsuruta*, 629 F. Supp. 3d 942, 951–52 (E.D. Mo. 2022), *aff'd*, 76 F.4th 1107 (8th Cir. 2023).

65. *Id.* at 953.

66. *Baz v. Patterson*, No. 23 C 5017, 2023 WL 5671666, at *1 (N.D. Ill. Sept. 1, 2023).

67. *Id.* at *3.

68. Abduction Convention art. 3(a)–(b), at 98–99.

69. 78 F.3d 1060 (6th Cir. 1996).

70. *Id.* at 1065; *see also* *Lopez v. Bamaca*, 455 F. Supp. 3d 76, 82–83 (D. Del. 2020) (a recent case holding that keeping or seeking to keep some sort of regular contact with the child sufficiently demonstrates an exercise of custody rights).

of their custody rights—Articles 3(b) and 13(a).⁷¹ A petitioner must prove, by a preponderance of the evidence that they were actually exercising their rights, but, if the respondent contests it, the burden will also shift to them to prove that the petitioner was not actually exercising their custody rights.⁷² Therefore, when a respondent Mother argued that the petitioner Father had not even seen the children for several months before her removal of them to New York, not only was the petitioner required to prove his actual exercise, but the burden then shifted to the respondent to demonstrate, by a preponderance of the evidence that she had not actually exercised her rights of custody.⁷³

The U.S. District Court for the Southern District of New York held that the Royal Borough of Kensington and Chelsea had a right of custody as the body charged with effectuating orders of the English High Court, and when a child was a Ward of the High Court, said court had a right of custody so that it could seek the return of the child after the child's Mother wrongfully removed that child from England.⁷⁴

3. *Respondent's Case*

There are several exceptions to a State Party's obligation to return a child pursuant to the Abduction Convention that a respondent may assert.

a. Child is Settled

Article 12 of the Abduction Convention provides that a State Party is not obligated to 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.⁷⁵ 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.⁷⁶

71. Abduction Convention arts. 3(b), at 99, 13(a), at 101.

72. See, e.g., *Poix v. Santana*, No. 7:22-cv-04980, 2022 WL 9847347, at *8–9 (S.D.N.Y. Oct. 17, 2022).

73. *Id.* at *10. This section of *The Year in Review* does not address the wisdom or logic of the negotiators' decision to include the actual exercise of rights of custody both as an element of the petitioner's prima facie case and as a possible exception to the obligation to return a wrongfully removed or retained child.

74. *Royal Borough of Kensington & Chelsea v. Bafna-Louis*, No. 22-CV-8303 (PKC), 2023 WL 2387385, at *16 (S.D.N.Y. Mar. 7, 2023), *aff'd*, No. 23-470, 2023 WL 6173335 (2d Cir. Sept. 22, 2023), and *aff'd*, No. 23-470, 2023 WL 6867135 (2d Cir. Oct. 18, 2023).

75. 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. *Monzon v. De La Roca*, 910 F.3d 92 (3rd Cir. 2018).

76. *Palencia v. Perez*, 921 F.3d 1333, 1342–43 (11th Cir. 2019); *Moreno v. Zank*, 456 F.Supp.3d 904, 909 (W.D. Mich. 2020).

The U.S. District Court for the Middle District of Florida held that a child abducted to Florida was now settled notwithstanding the Mother's pending application for asylum.⁷⁷ The U.S. District Court for the Southern District of New York held that a wrongful retention occurred, and thus the twelve-month period began, when a Father reported to police in Spain that the Mother had kidnapped their children.⁷⁸ The U.S. District Court for the District of Massachusetts held that a child was now settled because he had lived half of his life in Massachusetts, was learning English, had an asylum application pending with an interview in early 2024, and had friends, school, and family nearby.⁷⁹

b. Grave Risk or Intolerable Situation

Pursuant to Article 13(b) of the Abduction Convention, a court is not required to 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."⁸⁰ The U.S. District Court for the Western District of North Carolina has held that this exception cannot be decided on a motion to dismiss but requires an evidentiary hearing.⁸¹ The Hague Conference on Private International Law made the following observations:

The specific focus of the grave risk analysis in these instances is the effect of domestic violence on the child upon his or her return to the State of habitual residence of the child, and whether such effect meets the high threshold of the grave risk exception, in light of such considerations as the nature, frequency, and intensity of the violence, as well as the circumstances in which it is likely to be exhibited.⁸²

In addition, a court may consider measures to reduce the likelihood of harm. The Supreme Court has 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"⁸³

In its third opinion in a case, this time after a remand from the U.S. Supreme Court in the *Golan v. Saada* decision, the Ninth Circuit affirmed

77. *Figueredo v. Rojas*, No. 3:22-CV-1268-TJC-LLL, 2023 WL 4419722, at *1 (M.D. Fla. Jul. 10, 2023).

78. *Lomanto v. Agbelusi*, No. 22-CV-7349, 2023 WL 4118124, at *1 (S.D.N.Y. Jun. 22, 2023).

79. *Ferreira da Costa v. Albefaro de Lima*, No. 22-CV-10543-ADB, 2023 WL 4049378, at *8–10 (D. Mass. Jun. 6, 2023), *aff'd*, 94 F.4th 174 (1st Cir. 2024).

80. Abduction Convention, art. 13(b), at 101.

81. *Flores v. Alvarado*, No. 3:17-CV-514-RJC-DSC, 2018 WL 1725615, at *2 (W.D.N.C. Apr. 6, 2018).

82. HAGUE CONF. ON PRIV. INT'L L., GUIDE TO GOOD PRACTICE UNDER THE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION - PART VI ARTICLE 13(1)(B), ¶ 58, at 38 (2020).

83. *Golan v. Saada*, 142 S. Ct. 1880, 1893 (2022).

the return of two children to Germany.⁸⁴ An issue on appeal revolved around whether the District Court violated the Respondent's due process rights when it initiated contact with the U.S. Department of State, and then connected with the German Central Authority in its exploration of ameliorative measures.⁸⁵ The Ninth Circuit clarified that the District Court was interpreting foreign law (the law in Germany and what would happen upon the child's return in the German legal system), that it may consider any relevant material or source, and that it may also engage in its own research.⁸⁶

The U.S. District Court for the District of Colorado relied on Article 13(b) of the Abduction Convention in refusing to order the return of a child, who disclosed a pattern of significant sexual abuse by her Father during an in camera interview.⁸⁷ In this matter, in which both parents requested the return of the child, who had been in the care of family members in the United States, the District Court found that this harm was significant, likely to repeat, and could not be ameliorated.⁸⁸ The judge was concerned that the Mother would not protect the child, the Bahamian authorities would not properly investigate, and the parents would ultimately punish the child for disclosing the abuse.⁸⁹

The U.S. District Court for the District of New Jersey applied Article 13(b) to deny a Father's request to return a child to Colombia, based on the Father's violation of provisional orders of protection entered in Colombia.⁹⁰ The U.S. District Court for the Eastern District of New York has held that a single incident of physical force against a child does not itself satisfy the Article 13(b) threshold.⁹¹

Although Article 13(b) focuses on harm to the child, many courts recognize that sustained spousal abuse can, in some instances, present such harm.⁹²

84. *Radu v. Shon*, 62 F.4th 1165, 1169 (9th Cir. 2023).

85. *Id.* at 1174.

86. *Id.*

87. *Johnson v. Johnson*, 669 F. Supp. 3d 1089, 1104 (D. Colo. 2023).

88. *Id.* at 1105–06.

89. *Id.*

90. *Watts-Farmer v. Cortes*, No. CV 22-4601 (KMW-SAK), 2023 WL 3173387, at *5 (D.N.J. Apr. 30, 2023).

91. *Saavedra v. Montoya*, No. 21-CV-5418(EK)(VMS), 2023 WL 2910654, at *15 (E.D.N.Y. Apr. 12, 2023), *appeal withdrawn*, No. 23-694, 2023 WL 5600054 (2d Cir. Aug. 4, 2023).

92. *Morales v. Sarmiento*, No. 4:23-CV-00281, 2023 WL 3886075, at *11 (S.D. Tex. June 8, 2023). The *Morales* court surveys United States case law:

“Courts have found that evidence of prior intimate partner violence may demonstrate a risk for future child abuse. The Fifth Circuit has rejected “a bright-line rule that allegations of spousal abuse create grave risk to a child.” *Soto v. Contreras*, 880 F.3d 706, 713 (5th Cir. 2018). But it has affirmed that “sustained spousal abuse can, in some instances, create [a grave] risk.” *Id.* See *Gil-Leyva v. Leslie*, 780 Fed.Appx. 580, 590 (10th Cir. 2019) (finding respondent “must ‘draw a connection’ showing that the risk such abuse poses to her ‘constitute[s] a grave risk to the children’”); see also *Gomez v. Fuenmayor*, 812 F.3d 1005, 1010 (11th Cir. 2016) (“While the proper inquiry focuses on the risk faced by the child, not the parent, we hold that sufficiently serious threats and violence directed against a parent can nonetheless pose a grave risk of harm to a child as well.”); *Ermini v. Vittori*, 758 F.3d 153, 164 (2d Cir. 2014) (“Domestic violence can satisfy the defense when the respondent shows by clear and convincing evidence a ‘sustained pattern of

The U.S. District Court for the Southern District of Texas relied upon Article 13(b) to deny a request to return a child after finding that the Petitioner had a history of repeated violence against the mothers of all of his children, was a convicted felon with a criminal record of domestic violence and injunction violations, and had displayed a willingness to inflict abuse in the presence of his children.⁹³ The District Court relied on expert testimony that a child in this child's situation would likely experience a relapse of PTSD symptoms if returned.⁹⁴

The U.S. District Court for the Northern District of Ohio denied a Mother's request to hold in abeyance an Abduction Convention return proceeding pending the outcome of her asylum application, as the Article 13(b) exception requires a higher evidentiary burden, and the Father is not afforded an opportunity to present arguments in the asylum proceedings.⁹⁵

c. Mature Child's Objection

Pursuant to a different part of Article 13 of the Abduction Convention, a court is not required to return a child "if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views."⁹⁶ In applying this exception, the court must consider whether the child objects to being returned to the country of the child's habitual residence and not whether the child has a preference to live in a specific country or with a specific parent.⁹⁷

The Eighth Circuit remanded a case directing the District Court to order the return of a child to Switzerland after concluding that the child had not objected to a return, but instead had stated a preference to remain in the United States.⁹⁸ The child was equivocal when asked whether she objected to returning to Switzerland or simply preferred one location.⁹⁹

Trial courts vary in how to elicit a child's views and on what subject matter they discuss. For instance, one court had two children, ages nine

physical abuse and/or a propensity for violent abuse."); *Van de Sande v. Van de Sande*, 431 F.3d 567, 570 (7th Cir. 2005) (holding respondent's evidence of her husband's propensity for violence was sufficient to deny return: "the probability that [the father] ... would someday lose control and inflict actual physical injury on the children ... could not be thought negligible"); *Walsh v. Walsh*, 221 F.3d 204, 220 (1st Cir. 2000) (a "clear and long history of spousal [or other intimate partner] abuse" may establish grave risk, noting that "both state and federal law have recognized that children are at increased risk of physical and psychological injury themselves when they are in contact with a spousal abuser"). *Morales* 2023 WL 3886075, at *11.

93. *Id.* at *13.

94. *Id.* at *12.

95. *Junior v. Ferreira de Sousa*, No. 1:21-CV-02242, 2023 WL 4725909, at *2–3 (N.D. Ohio Jul. 25, 2023).

96. Abduction Convention, art. 13(b), at 101.

97. *See Dubikovskyy v. Goun*, 54 F.4th 1042, 1048–49 (8th Cir. 2022) (interpreting Abduction Convention art. 13).

98. *Id.* at 1049.

99. *Id.*

and eleven, “testify.”¹⁰⁰ Another court interviewed a 13-year-old on camera in the presence of a Guardian Ad Litem, who provided separate testimony, in determining the child had a particularized objection to returning to Germany.¹⁰¹

Many courts will consider whether the views expressed by a child are the child’s views. One court determined that the testimony of a nine-year-old made “abundantly clear that her views have been unduly influenced by the adults in her life, specifically that she has been influenced regarding the circumstances underlying or resulting in any objection to return, her understanding of these proceedings, and her preference to live with Respondent.”¹⁰² Another court determined that a twelve-year-old autistic child’s parroting of his Mother’s language weighed against a conclusion that his objections were those of a mature child.¹⁰³ Still another court concluded that a twelve-year-old, who had spent nine months living with his Mother and her parents, was unduly influenced in part after the child mirrored adult words and expressed increasing animosity against his Father.¹⁰⁴

d. Human Rights

Article 20 of the Abduction Convention provides that the return of a child may be refused if such return would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.¹⁰⁵

e. Consent and Acquiescence

Pursuant to part of Article 13(a) of the Abduction Convention, a court is not required to order the return of a child if the person, institution, or other body having the care of the person of the child had consented to, or subsequently acquiesced in, the removal or retention.¹⁰⁶ The U.S. District Court for the Western District of Texas court noted that the Fifth Circuit has identified some general principles, including that focus on the inquiry should include the Petitioner’s “subjective intent” and the court should consider “what the petitioner actually contemplated and agreed to in allowing the child to travel outside its home country.”¹⁰⁷ In that case, the

100. *Davis v. Lake*, 647 F. Supp. 3d 482, 489–91 (W.D. Va. 2022).

101. *Carlson v. Carlson*, 651 F. Supp. 3d 516, 521 (D.R.I. 2023).

102. *Preston v. Preston*, No. 4:22-CV-00990-CAN, 2023 WL 300130, at *5 (E.D. Tex. Jan. 17, 2023).

103. *Efthymiou v. LaBonte*, No. 22-CV-04694-VC, 2023 WL 1491252, at *11 (N.D. Cal. Feb. 3, 2023).

104. *McElligott v. McElligott*, CV 23-3175 (RK) (RLS), 2023 WL 5932947 at *29–31 (D. N.J. Sept. 12, 2023).

105. Abduction Convention art. 20, at 101.

106. *Id.* art. 13(a), at 101.

107. *Hernandez v. Erazo*, No. SA-22-CV-01069-XR, 2023 WL 2775165, at *6 (W.D. Tex. Apr. 4, 2023).

court concluded that, although the Father had provided permission for the removal of the child from Mexico, the Mother failed to establish that the Father “clearly and unequivocally intended for [the child] to remain in the United States.”¹⁰⁸

Credibility and documentary evidence can play a large role in a court’s determination as to whether a parent consented to a child’s permanent relocation.¹⁰⁹ For instance, when two parents testified in opposition to one another as to whether the Petitioner consented to the children’s relocation to the United States, the court found that he had consented based primarily on certain WhatsApp exchanges between the parties and his lack of credibility, especially when his testimony seemed to contradict the WhatsApp messages.¹¹⁰

To establish acquiescence by a petitioner, 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.¹¹¹ Some courts have required that the totality of circumstances must be examined to determine whether there was consent or acquiescence.¹¹² In rare instances, cases involving consent or acquiescence can be decided on summary judgment.¹¹³ The U.S. District Court for the Western District of Texas held that a Father who visited his children in Texas, sent their immunization records to the Mother to enroll them in a Texas school, and paid child support did not acquiesce to their retention, because to hold otherwise would encourage petitioning parents to jeopardize the welfare of their children to prove that they had not acquiesced.¹¹⁴

4. *Other Issues*

a. *Attorney’s Fees*

Pursuant to ICARA, a court ordering the return of a child shall order the respondent to pay necessary expenses incurred by or on behalf of the petitioner, including court costs and legal fees, unless the respondent can show that the award would be clearly inappropriate.¹¹⁵ A prevailing

108. *Id.* at *7.

109. *Davis*, 647 F. Supp. 3d at 490.

110. *Id.*

111. *See Diagne v. Demartino*, No. 2:18-cv-11793, 2018 WL 4385659, at *9–10 (E.D. Mich. Sept. 14, 2018), motion for new trial and stay denied, *Diagne v. Demartino*, No. 18-11793. 2018 WL 6064965 (E.D. Mich. Nov. 20, 2018); *see also Djeri v. Djeri*, No. 2:18-CV-1780, 2019 WL 1046893, at *5 (S.D. Ohio Mar. 5, 2019).

112. *See, e.g., Djeri*, 2019 WL 1046893 at *3.

113. *See, e.g., Velozny ex rel. R.V. v. Velozny*, 550 F. Supp. 3d 4 (S.D.N.Y. 2021).

114. *Maduhu v. Maduhu*, No. SA-23-CV-00142-XR, 2023 WL 2994141, at *5 (W.D. Tex. Apr. 18, 2023).

115. ICARA ¶ 9007(b)(3). This may also include expenses incurred defending an appeal. *See also Sundberg v. Bailey*, No. 1:17-cv-00300-MR-DLH, 2019 WL 2550541, at *1 (W.D. N.C. Jun 19, 2019).

respondent is not entitled to recover similar expenses.¹¹⁶ District Courts have broad discretion to determine when an award of costs and fees is inappropriate.¹¹⁷ The “clearly inappropriate” inquiry is dependent on the facts of each case.¹¹⁸ However, the following two considerations are often relied on in determining whether to grant fees and costs under ICARA: (1) whether a fee award would impose such a financial hardship that it would significantly impair the respondent’s ability to care for the child; and (2) whether a respondent had a good faith belief that his or her actions in removing or retaining a child were legal or justified.¹¹⁹

A district court reduced a request for \$199,878.84 in fees and costs to \$85,921.55, after reviewing the expenses, concluding the counsel had driven up costs, and considering the burden on the petitioner.¹²⁰

A court has the authority to order fees and costs even if the child turns 16 after the return order but during the pendency of an appeal.¹²¹

b. Procedural Issues

i. *Stays*

In considering whether to stay a return order in an Abduction Convention case, courts consider the traditional factors: “(1) whether the stay applicant has made a strong showing that 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.”¹²²

ii. *Motions to Dismiss*

A district court denied a respondent’s motion to dismiss an Abduction Convention return petition, concluding that respondent’s challenge was premature, and petitioner would have the opportunity at an evidentiary hearing to demonstrate a right of custody under foreign law.¹²³

116. See, e.g., *Stone v. Stone*, No. CV-19-17962 (MAS) (ZNQ), 2020 WL 491194, at *1 (D.N.J. Jan. 30, 2020).

117. See, e.g., *Whallon v. Lynn*, 356 F.3d 138, 140 (1st Cir. 2004); *West v. Dobrev*, 735 F.3d 921, 932 (10th Cir. 2013).

118. *Whallon*, 356 F.3d at 140.

119. See *Rath v. Marcoski*, 898 F.3d 1306, 1311 (11th Cir. 2018); see also *Wtulich v. Filipkowska*, No. 16-CV-2941 (JO), 2020 WL 1433877, at *2 (E.D.N.Y. Mar. 24, 2020).

120. *Efthymiou v. LaBonte*, No. 22-CV-04694-VC, 2023 WL 3611362, at *1–4 (N.D. Cal. May 24, 2023).

121. *Noergaard v. Noergaard*, 57 Cal. App. 5th 841, 854, 271 Cal. Rptr. 3d 905, 915 (2020), as modified on denial of reh’g (Nov. 24, 2020).

122. *Chafin v. Chafin*, 568 U.S. 165, 179 (2013).

123. *Godinez v. Morales*, No. 3:22-CV-3596, 2022 WL 7553734, at *5 (D.N.J. Oct. 13, 2022).

iii. *Wording of Return Order*

The Eleventh Circuit held that a District Court order that a Father take “physical custody of the Child” so that he could “return the Child to France” was not a custody determination that modified the existing French custody order and did not exceed the district court’s subject matter jurisdiction under ICARA.¹²⁴

c. Criminal Kidnapping

The Pennsylvania Supreme Court held that, when reviewing a prosecutor’s decision disapproving a private criminal complaint, a court may only overturn that decision if the private complainant demonstrates that the decision “amounted to bad faith, occurred due to fraud, or was unconstitutional.”¹²⁵ A prosecutor’s decision not to prosecute based on lack of resources, alternative remedies in other venues, insufficient probable cause, and caution in criminalizing behaviors in estranged parents’ custody disputes was not overturned.¹²⁶

The California Court of Appeals affirmed a criminal conviction against a Father for child abduction.¹²⁷ The Father retained the child in California in violation of a UK custody order.¹²⁸ The Court rejected Father’s claim that return of the child to Mother would expose the child to a grave risk of harm as this would be relevant in an Abduction Convention case.¹²⁹

d. Abduction Prevention

The Colorado Court of Appeals found that the District Court erred when it did not examine all factors in Colorado’s enactment of the Uniform Child Abduction Prevention Act.¹³⁰ In particular,

“[t]he district court here not only failed to make a specific finding that father posed a credible risk of abducting the children, but it also relied on little more than the UAE’s status as a nonsignatory to the [Abduction] Convention, along with the mother’s “fears and concerns,” as a basis for imposing the abduction prevention measures.”¹³¹

The Arizona Court of Appeals refused to find ambiguous a mediated agreement entered into by two parents that provided that “no parent shall be required to give consent to travel to countries that are not signer [sic]

124. *Castang v. Kim*, No. 23-10426, 2023 WL 3317983, at *2 (11th Cir. May 9, 2023), *aff’g*, *Castang*, 2023 WL 1927027.

125. *In re Ajaj*, 288 A.3d 94, 109 (Pa. 2023).

126. *Id.* at 105.

127. *People v. Coulthard*, 90 Cal. App. 5th 743, 775 (Cal. App. Ct. 2023).

128. *Id.* at 749.

129. *Id.* at 762.

130. *In re Marriage of Badawiyeh*, 528 P.3d 194 (Colo. App. 2023).

131. *Id.* at 197.

to the Hague convention.”¹³² The father, originally from Ghana, argued, among other things, that he had a material misunderstanding when agreeing to this language, believing Ghana to be a Contracting State to the Abduction Convention (which it is not).¹³³

The Court of Appeals of Arizona held that the Superior Court had not erred in permitting a Father, who had sole legal decision-making authority over his daughter, to travel with his daughter to Iran to visit his parents.¹³⁴ Several years earlier, the Father had entered into an Agreement with the child’s Maternal Grandparents, which was adopted by the Superior Court, providing that the Father must either obtain a written agreement of the Maternal Grandparents, or a court order, before taking the child outside of the United States.¹³⁵ The Court of Appeals held that the Superior Court’s “finding that travel would be in the child’s best interests necessarily means that Maternal Grandparents have not met the higher burden of showing that travel would endanger the child’s physical health or impair her emotional development.”¹³⁶

V. Financial Matters

A. RECOGNITION OF FOREIGN CHILD SUPPORT ORDER

U.S. state enactments of the Uniform Interstate Family Support Act provide rules for the registration and enforcement of a foreign child support order.¹³⁷ When a mother in Switzerland, which is a Foreign Reciprocating Country with the United States,¹³⁸ but not a Contracting State to the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, obtained a Swiss child support order, a North Carolina District Court held, and the Court of Appeals affirmed, that the Swiss tribunal lacked personal jurisdiction over the Father and, thus, granted the Father’s motion to vacate the registration of the foreign order.¹³⁹

The Court of Appeals of Louisiana affirmed a child support order issued by a Louisiana court.¹⁴⁰ The Mother had first obtained a Spanish child

132. *In re Marriage of Mwinyelle*, No. 2 CA-CV 2022-0057-FC, 2023 WL 1816714, at *5 (Ariz. Ct. App. Feb. 8, 2023).

133. *Id.* at *4.

134. *Azin v. Dresselhuys*, No. 1 CA-CV 22-0672 FC, 2023 WL 4445281 ¶¶ 7–8, at *1–2 (Ariz. Ct. App. July 11, 2023).

135. *Id.* ¶ 4, at *1.

136. *Id.* ¶ 16, at *3.

137. See Chaim Steinberger, *Collecting Child Support: The Uniform Interstate Family Support Act and How It Helps Parents*, ABA (Aug. 10, 2022), https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2022/july-august/collecting-child-support-uniform-interstate-family-support-act-and-how-it-helps-parents/ [https://perma.cc/PD76-SA2W].

138. See Notice of Declaration of Foreign Countries as Reciprocating Countries for the Enforcement of Family Support (Maintenance) Obligations, 79 Fed. Reg. 49,368, 49,369 (Aug. 14, 2021).

139. *Gyger v. Clement*, No. COA22-81, 2022 WL 17985667, ¶ 6–8, at *6–8 (N.C. Ct. App. Dec. 29, 2022).

140. *State v. Lannelongue*, 358 So. 3d 899 (La. Ct. App. 2023).

support order, for which the Father successfully challenged registration in Louisiana.¹⁴¹ Separately, the Mother had a new child support order issued in Louisiana.¹⁴² The Court of Appeals held that Louisiana courts properly exercised jurisdiction in this matter.¹⁴³

The California Court of Appeals affirmed the registration of a Colombian child support order when the Father did not contest validity or enforcement of the order within 20 days, but a motion for relief from default more than five months later.¹⁴⁴ The Court held that the Father failed to meet his burden.¹⁴⁵

B. PROPERTY DIVISION

A New York Supreme Court considered the Mother's violation of its court orders, disrespect for its ongoing proceedings, and abduction of the parties' child to India, when awarding the Father 100% of the parties' marital assets and refusing to award her alimony.¹⁴⁶

VI. International Litigation and Judicial Assistance

A. INTERNATIONAL SERVICE OF PROCESS

The Court of Appeals of Ohio upheld a default divorce judgment issued by the Court of Common Pleas.¹⁴⁷ The trial court had applied Article 15 of the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, which addresses when a court may issue a judgment in the absence of a defendant after the plaintiff has attempted to utilize the Convention.¹⁴⁸ The Husband had sent a service request to the Indian Central Authority for the Convention, and, after receiving no response for over six months, requested that the court authorize alternative service by publication.¹⁴⁹ The court did not appear to address his alternative service motion, and instead simply entered judgment.¹⁵⁰

141. *Id.* at 901.

142. *Id.*

143. *Id.* at 905–06

144. *Shapira v. Lackenbacher*, No. H049775, 2023 WL 2011594, at *1 (Cal. Ct. App. Feb 15, 2023).

145. *Id.* at *4.

146. *S.C. v. R.N.*, 187 N.Y.S.3d 541, 546 (N.Y. Sup. Ct. 2023).

147. *Anumandla v. Kondapalli*, No. 2022CA00094, 2023 WL 3455622, ¶ 27, at *4 (Ohio Ct. App. May 25, 2023).

148. *Id.* ¶¶ 24–25, at *4.

149. *Id.* ¶ 3, at *1.

150. *Id.* ¶ 4, at *1.

International Human Rights

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I. Introduction

This article highlights developments in 2023 that the International Human Rights Committee (IHRC) has focused on in its programming and advocacy work.

II. Climate Change Litigation and Human Rights

A. UNITED STATES

Climate change-related lawsuits, including those asserting rights' violations, have burgeoned in the United States¹ and globally.² In *Held v. Montana*, sixteen Montana youth filed a Complaint for Declaratory and Injunctive Relief in 2020 against the State of Montana, that state's governor, and many of its agencies challenging the constitutionality of the state's fossil fuel-based state energy system, which they alleged causes and contributes

* The Committee Editor is Constance Z. Wagner, Professor, Saint Louis University School of Law. Daniel L. Appelman, Co-Chair, American Bar Association, International Human Rights Committee, wrote Section II.A. Austin J. Pierce, Associate, Latham & Watkins, and Carlos de Miguel Perales, Professor, Faculty of Law (ICADE), Comillas University, Madrid, Spain, wrote Sections II.B and II.C. Alexander Ehrle, Associate, Baker McKenzie, wrote Section III. Linda S. Murnane, Colonel, United States Air Force (ret.) and Wendy Taube, Principal, Taube Law, LLC, wrote Section IV. Elizabeth M. Zechenter, Visiting Professor, University of Warsaw, Faculty of Artes Liberales, wrote Section V. Delissa A. Ridgway, Judge, U.S. Court of International Trade, Member, American Bar Association, Section of International Law, Governing Council, Senior Advisor, International Human Rights Committee, wrote Section VI.

1. See Dana Drugmand, *2022 Was a Big Year for Climate Action in the Courts*, RESILIENCE (Jan. 24, 2023), <https://www.resilience.org/stories/2023-01-24/2022-was-a-big-year-for-climate-action-in-the-courts/#:~:text=More%20than%2020%20U.S.%20cities%2C%20counties%2C%20and%20states,of%20their%20products%20and%20promote%20misleading%20greenwash-ing%20advertising> [https://perma.cc/684D-HTDN].

2. See U.N. Env't Programme, *Global Climate Litigation Report: 2023 Status Review*, U.N. Doc DEL/2550/NA, at XI (2023), https://wedocs.unep.org/bitstream/handle/20.500.11822/43008/global_climate_litigation_report_2023.pdf?sequence=3 [https://perma.cc/X7JB-DS6Y].

to climate change in violation of their rights guaranteed under Montana's Constitution and its Public Trust Doctrine.³

A provision of Montana's Constitution states that "[t]he state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations."⁴ A provision of the Montana Environmental Policy Act (MEPA) forbids the state and its agents from considering the impacts of greenhouse gas emissions or climate change in their environmental reviews and in the state's permitting for coal and gas exploitation.⁵ After the plaintiffs filed their complaint, the Montana legislature amended MEPA to bar courts from being able to "vacate, void, or delay a lease, permit, license, certificate, authorization, or other entitlement or authority" for reasons related to climate change."⁶ On August 14, 2023, after a two-week trial, a Montana judge ruled that both MEPA provisions violated Montana's constitutional obligation to provide its residents a clean and healthy environment and enjoined the State from acting in accordance with those provisions.⁷ The ruling is the first in which a court in the United States has interpreted a state right to a healthy environment to also include a healthy climate.⁸ Montana has appealed the decision.⁹ If the ruling stands however, it could inspire similar lawsuits, strengthen climate-related cases in other states, encourage efforts to amend other state constitutions to provide for a right to a healthy environment, and set new legal precedent regarding whether governments have a duty to protect citizens from the consequences of climate change and global warming.

Montana, New York, and Pennsylvania give their residents a constitutional right to a healthy environment; and Hawaii, Massachusetts, Illinois, and Rhode Island have similar provisions in their constitutions.¹⁰ According to its website, Our Children's Trust, the lawyers representing the plaintiffs in *Held v. Montana*, have developed youth-led climate lawsuits

3. Complaint for declaratory relief and injunctive relief at 35, *Held v. Montana*, No. CDV-2020-307 (Mont. 1st Dist. Ct. Mar. 13, 2020).

4. MONT. CONST. art. IX, § 1.

5. Mont. Code Ann. § 75-1-201(2)(a).

6. *Id.* § 75-1-201(6)(a)(ii).

7. "Plaintiffs have a fundamental constitutional right to a clean and healthful environment, which includes climate as part of the environmental life-support system." *Held v. Montana*, No. CDV-2020-307, at 102 (Mont. Dist. Aug. 14, 2023), https://climatecasechart.com/wp-content/uploads/case-documents/2023/20230814_docket-CDV-2020-307_order.pdf [<https://perma.cc/BJS5-PK9A>].

8. *See id.*

9. Blair Miller, *State of Montana files Supreme Court appeal asking to overturn climate change decision*, DAILY MONTANAN (Feb. 15, 2024), <https://dailymontan.com/2024/02/15/state-of-montana-files-supreme-court-appeal-asking-to-overturn-climate-change-decision/>.

10. Kristoffer Tighe, *Montana Youth Sued Their Government Over Climate Change and Won. Here's Why That's a Big Deal*, INSIDE CLIMATE NEWS (Aug. 15, 2023), https://insideclimatenews.org/news/15082023/montana-youth-climate-lawsuit-ruling-big-deal/?utm_source=InsideClimate+News&utm_campaign=fe672a734b-EMAIL_CAMPAIGN_2023_08_19_01_00&utm_medium=email&utm_term=0_29c928ffb5-fe672a734b-329911810 [<https://perma.cc/6TXW-HYMD>].

and legal actions in all 50 states.¹¹ Our Children's Trust also represents plaintiff youth in *Juliana v. U.S.*, a pending federal case alleging that the government has violated their constitutional rights to life, liberty, and property guaranteed by the Due Process Clause of the U.S. Constitution and has breached constitutional public trust obligations by promoting the production and use of fossil fuels that destabilize the climate.¹²

On a global level, the movement toward recognition of the human right to a healthy environment is growing and may produce further climate change-related litigation.¹³ As of 2019, 110 countries provide a right to a healthy environment explicitly stated in their constitutions;¹⁴ and in 2022 the United Nations General Assembly adopted a resolution declaring that access to a clean, healthy, and sustainable environment is a universal human right.¹⁵

B. COLOMBIA

In July 2023, a trial court in Colombia found in favor of indigenous plaintiffs who had challenged a carbon credits agreement associated with a project impacting their Indigenous community's territory.¹⁶ The projects in question were developed under the United Nations REDD+ framework, focused on avoiding deforestation and forest degradation in the municipality of Cumbal, home to four "resguardos indígenas" including the Gran Cumbal community.¹⁷ However, plaintiffs from the Gran Cumbal community filed a complaint, arguing that no information on the project was shared with the community and that the project had violated the Indigenous community's rights.¹⁸ Although a contract existed between the resguardo's governing authority and the project developer, plaintiffs argued that the authority had exceeded its legal function and that failure to consult the community was

11. *State Legal Actions*, OUR CHILDREN'S TRUST, <https://www.ourchildrenstrust.org/state-legal-actions> [<https://perma.cc/C7TX-T6RM>] (last visited Apr. 11, 2023).

12. *Youth v. Gov: Juliana v. US*, OUR CHILDREN'S TRUST, <https://www.ourchildrenstrust.org/juliana-v-us> [<https://perma.cc/7UNA-4JE5>] (last visited Apr. 11, 2024).

13. See Report by Ional Zamfir & The European Parliamentary Research Service for the European Parliament on "A Universal Right to a Healthy Environment," at 2, PE 698.846 (Dec. 2021), https://www.europarl.europa.eu/RegData/etudes/ATAG/2021/698846/EPRS_ATA%282021%29698846_EN.pdf [<https://perma.cc/Z9QZ-GQ2Z>].

14. *Id.*

15. G.A. Res. 76/300, at 1 (July 28, 2022).

16. Municipal Promiscuous Court of Cumbal-Nariño [Juz Mun.] [Mixed Municipal Court of Cumbal-Nariño], Julio 21, 2023, Carlos Alexander Coral Cuatín, Acción de tutela N° 522274089001-2023-00095-00 [Guardianship action No. 522274089001-2023-00095-00] (p. 2) (Colom.) [hereinafter *Colom. Guardianship Action*], https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2023/20230721_52227-4089-001-2023-00095-00_decision.pdf [<https://perma.cc/RF6M-2DDF>].

17. A "resguardo" is a special sociopolitical and legal institution, by which an Indigenous community or communities have collective, inalienable property rights in a territorial area. See CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 329.

18. *Colom. Guardianship Action*, at 2.

a violation of their rights, including the rights to free, prior, and informed consent and consultation.¹⁹

The trial court enjoined the project as well as the associated purchase agreements for the carbon credits, ordering the defendants to engage in a consultation for free, prior, and informed consent, in accordance with relevant legal instruments, including ILO Convention 169 and the Cancun Safeguards.²⁰ The appellate court affirmed this ruling, while modifying it slightly to require defendants to file a consultation request before the Ministry of the Interior instead of engaging immediately and directly with the indigenous community.²¹

Although not discussed in the decision, this case highlights the potential risks not just to communities, but also to companies, of climate action occurring without a reference to human rights standards.²² Many of the now-enjoined credits had already been retired in that they were used to offset other emissions,²³ creating a potential carbon accounting concern to the extent the credits are ultimately fully invalidated.²⁴

C. EUROPE

In relation to rights-based climate change litigation in Europe, it is worth mentioning some developments at the European Court of Human Rights (ECtHR), concerning certain hearings, cases adjourned, and cases declared inadmissible.

1. *Pending Cases Where Hearings Have Been Held*

Hearings have been held in 2023 in three relevant cases, although rulings have not yet been issued.²⁵

19. *Id.* At 5.

20. *Id.* at 60.

21. Juzgado Tercero Penal Del Circuito de Ipiales (N) [Juzg. Circ.] [Third Criminal Court of The Ipiales Circuit (N)], Agosto 23, 2023, Lorena Del Carmen Pérez Rosero, Tutela Segunda Instancia No. 2023000095-00 [Second Instance Guardianship No. 2023000095-00], (p. 21) (Colom.), https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2023/20230823_52227-4089-001-2023-00095-00_decision.pdf [<https://perma.cc/7U42-GDBV>].

22. *See id.*

23. *See Histórico de Retiros: INFORMACIÓN GENERAL* [Withdrawal History: General Information], COLCX, <https://colcx.com/Retiros?idIniciativa=35> [<https://perma.cc/LWN9-P4XV>] (last visited Apr. 11, 2024).

24. *See id.*

25. Grand Chamber hearing, Verein KlimaSeniorinnen Schweiz and Others v. Switzerland, No. 53600/20 (Mar. 29, 2023), <https://www.echr.coe.int/w/verein-klimasenioren-schweiz-and-others-v-switzerland-no-53600/20-1> [<https://perma.cc/7AAR-KH52>]; Grand Chamber hearing, Carême v. France, No. 7189/21 (Mar. 29, 2023), <https://www.echr.coe.int/w/car%C3%AAme-v-france-no-7189/21-1> [<https://perma.cc/Q7P8-GCMA>]; Grand Chamber hearing, Duarte Agostinho and Others v. Portugal and 32 Others, No. 39371/20 (Sept. 27, 2023), <https://www.echr.coe.int/w/duarte-agostinho-and-others-v-portugal-and-others-no-39371/20-> [<https://perma.cc/>]

a. *Verein KlimaSeniorinnen Schweiz v. Switzerland* (no. 53600/20)²⁶

The ECtHR held a Grand Chamber hearing on March 29, 2023, on the application filed on November 26, 2020.²⁷ The applicants are KlimaSeniorinnen Schweiz, a group of more than 2,000 older women concerned about the consequences of global warming on their living conditions and health, and “four women aged over eighty who complain[ed] of health problems exacerbated during heatwaves.”²⁸ The defendant is the Swiss government.²⁹

On November 25, 2016, “the applicants submitted a request to the Swiss Federal Council and other authorities, pointing to various failings in the area of climate protection and seeking a decision on actions to be taken.”³⁰ “They also called on the authorities to take the necessary measures to meet the 2030 goal set by the 2015 Paris Agreement.”³¹ They complained that Switzerland “has failed to introduce suitable legislation and to put appropriate and sufficient measures in place to attain the targets for combating climate change.”³²

The applicants claimed that Switzerland has failed to do its duty under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) “to protect life effectively (Article 2) and to ensure respect for their private and family life, including their home (Article 8).”³³ They allege that its duties under the ECHR provisions “should be considered in the light of the principles of precaution and intergenerational fairness contained in international environmental law.”³⁴

7ZRA-GRBK]. In respect of these three cases the ECtHR has issued its judgements on April 9, 2024. These judgements will be reported in our 2024 article.

26. Press Release, Registrar of the Court, Grand Chamber Hearing on the Consequences of Global Warming on Living Conditions and Health, 94 Eur. Ct. H.R. (2023) [hereinafter “Verein Hearing”], https://www.google.es/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwisy92I_MeCAxXeTaQEhFMAUuQFnoECBcQAQ&url=https%3A%2F%2Fhudoc.echr.coe.int%2Fapp%2Fconversion%2Fpdf%2F%3Flibrary%3DECHR%26id%3D003-7610087-10470692%26filename%3DGrand%2520Chamber%2520hearing%2520Verein%2520KlimaSeniorinnen%2520Schweiz%2520and%2520Others%2520v.%2520Switzerland.pdf&usg=AOvVaw1PAm8Hor9OYYmxgOEfldMs&opi=8997844.9 [https://perma.cc/9PUD-Q2F7]. https://www.google.es/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwisy92I_MeCAxXeTaQEhFMAUuQFnoECBcQAQ&url=https%3A%2F%2Fhudoc.echr.coe.int%2Fapp%2Fconversion%2Fpdf%2F%3Flibrary%3DECHR%26id%3D003-7610087-10470692%26filename%3DGrand%2520Chamber%2520hearing%2520Verein%2520KlimaSeniorinnen%2520Schweiz%2520and%2520Others%2520v.%2520Switzerland.pdf&usg=AOvVaw1PAm8Hor9OYYmxgOEfldMs&opi=8997844.9

27. *Id.* at 1.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. Verein Hearing, *supra* note 25, at 2.

33. *Id.*

34. *Id.*

They also cite the right to a fair trial (Article 6) and the right to an effective remedy (Article 13).³⁵

b. *Carême v. France* (no. 7189/21)³⁶

The ECtHR held a Grand Chamber hearing on March 29, 2023, on the application filed on January 28, 2021.³⁷ The applicant is a French national and a resident and former mayor of the municipality of Grande-Synthe.³⁸ The defendant is the French government.³⁹ The applicant claimed “that France has taken insufficient steps to prevent climate change and that this failure entails a violation of the right to life” in Article 2 of the ECHR “and the right to respect for private and family life” in Article 8 of the ECHR.⁴⁰

“On November 19, 2018, the applicant, in his own name and in his capacity as mayor of the municipality of Grande-Synthe, sent various requests to the French” Government to take several measures on climate change.⁴¹ When he received no response, the applicant lodged an application with the French Conseil d’État to annul the Government’s tacit refusal of the applicants’ requests.⁴² The Conseil d’État held that Mr. Carême did not have legal standing by himself, but the municipality of Grande-Synthe did, annulled the Government’s tacit refusal, and “ordered the [French] government to take additional measures by March 31, 2022 to attain the target—pursuant to the [2015] Paris Agreement—of a 40% reduction in greenhouse gas emissions by 2030.”⁴³ In his appeal before the ECtHR, the applicant claimed that by dismissing his action, the Conseil d’État disregarded his “right to a normal private and family life.”⁴⁴ He claimed that “he is directly affected

35. *Id.*

36. Press Release, Registrar of the Court, Grand Chamber Hearing Concerning Combat Against Climate Change, 95 Eur. Ct. HR (2023) [hereinafter “Carême Hearing”], <https://www.bing.com/ck/a?!&cp=79f7a79b91287904JmltdHM9MTcxMjg4MDAwMCZpZ3VpZD0-xMjhhZWElMC0wNmM5LTUyZGUtMTU3OS1mZTYzMDJjOTZjZTYmaW5zaWQ9NTIyNw&ptn=3&ver=2&hsh=3&fclid=128aea50-06c9-62de-1579-fe6302c96ce6&p sq=grandchamber+hearing+european+court+of+human+rights+careme+v.+france&u=a1aHR0cHM6Ly9odWRvYy5lY2hyLmNvZS5pbmQvYXBwL2NvbnZlcnNpb24vcGRmLz-9saWJyYXJ5PUVDSFImaWQ9MDAzLTc2MTA1NjEtMTA0NzE1MTMmZmlsZW5hb-WU9R3JhbmQlMjBDbGZlYmVjJTlwaGVhcmZyUyMENhcnVDMYVBQW1lJTlwdi4lMj-BGcmFuY2UucGRm&ntb=1> [https://perma.cc/HJG9-366G].

37. *Id.* at 1.

38. *Id.*

39. *Id.*

40. *Id.* at 2.

41. *Id.* at 1.

42. Carême Hearing, *supra* note 36, at 1.

43. *Id.*

44. *Id.* at 2.

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in obtaining a judgment declaring invalid a decision made by the Norwegian Government to grant petroleum exploration licenses for the Norwegian continental shelf.”⁵⁹ They referred to Articles 2, 8, 13, and 14 of the ECHR.⁶⁰

- d. *Soubeste v. Austria* (nos. 31925/22, 31932/22, 31938/22, 31943/22, and 31974/22)

These cases were brought by five individuals from Belgium, Cyprus, France, Germany, and Switzerland. “The applicants complain[ed] ... that the Energy Charter Treaty inhibits the respondent States from taking immediate measures against climate change, making it impossible for them to attain the [2015] Paris Agreement temperature goals.”⁶¹ They referred to Articles 2, 3, 8, and 14 of the ECHR.⁶²

- e. *Engels v. Germany* (no. 46906/22)

Nine teenagers and young adults brought this application. “The applicants complain[ed] ... that the new goals of the German Climate Protection Act in its amended version which entered into force on August 31, 2021, are insufficient to reduce greenhouse gas emissions to the level necessary for meeting the [2015] Paris Agreement temperature goals.”⁶³ They referred to Articles 2 and 8 of the ECHR.⁶⁴

3. *Cases declared inadmissible*⁶⁵

The ECtHR declared two applications inadmissible on the grounds that the applicants were not sufficiently affected by the alleged breach of the ECHR or its Protocols to claim to be victims of a violation under ECHR Article 34 (right of individual petition).⁶⁶ These cases are *Humane Being and Others v. the United Kingdom* (36959/22), where the applicants “complained ...that the United Kingdom had failed to regulate and take all reasonable steps to safeguard against the risks of factory farming:” and *Plan B. Earth and Others v. the United Kingdom* (no. 35057/22), where the applicants “complained ...that the United Kingdom had failed to take practical and effective measures to tackle the extreme threat from man-made climate change.”⁶⁷

59. *Id.*

60. *Id.*

61. ECHR PRESS UNIT, *supra* note 55, at 4.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. ECHR PRESS UNIT, *supra* note 55, at 4.

III. European Union Corporate Sustainability Due Diligence Directive

The European Union (EU) economy is linked “to millions of workers worldwide through global supply chains.”⁶⁸ This imposes both a responsibility and an opportunity for EU companies to positively impact workers’ rights and environmental standards.⁶⁹ The EU has proven to be aware of that responsibility and to do justice to it through the adoption of a panoply of ESG and human rights protection legislation.⁷⁰ They can be distinguished in two principal categories, supply chain due diligence legislation on the one hand and corporate sustainable reporting obligations on the other.⁷¹ The focus of this Section III will be on the first category of ESG and human rights protection legislation and the EU’s Corporate Sustainability Due Diligence Directive (CSDDD) in particular. The CSDDD is aimed at harmonizing companies’ due diligence obligations regarding human rights and environmental standards across the EU.⁷² EU Member States will be required to transpose the CSDDD into national law.⁷³

The proposal for the CSDDD was first published by the European Commission on February 23, 2022.⁷⁴ Since then, the European Council adopted its own negotiating position or “General Approach” to the proposal.⁷⁵ On June 1, 2023, the European Parliament adopted the CSDDD as a negotiating text with amendments.⁷⁶ Thus, currently, there are three distinct CSDDD proposals.⁷⁷ The most recent draft of the European Parliament from June 1, 2023 (CSDDD draft directive) serves as the foundation for the ongoing trilateral discussions among the European Commission, European Council, and European Parliament, intending to reconcile differences among the legislative proposals.⁷⁸ This CSDDD

68. *Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee*, at 2, COM (2022) 66 final (Feb. 23, 2022).

69. *See id.*

70. *See id.* at 4.

71. *See id.* at 5.

72. *See id.* at 10.

73. JOHANNES JÄGER, ET AL., EXPECTED ECONOMIC EFFECTS OF THE EU CORPORATE SUSTAINABILITY DUE DILIGENCE DIRECTIVE (CSDDD) 6 (Sarah Bruckner ed. 2023).

74. *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937*, COM (2022) 71 final, 2022/0051 (COD) annex (Feb. 23, 2022) [hereinafter *CSDDD Proposal*], <https://data.consilium.europa.eu/doc/document/ST-6145-2024-INIT/en/pdf> [<https://perma.cc/MV2X-UF35>].

75. *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937*, SEC (2022) 95 final, 2022/0051 (COD) (Nov. 30, 2022) [hereinafter *Council Proposal*].

76. *Corporate Sustainability Due Diligence: Amendments adopted by the European Parliament on 1 June 2023 on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937*, at 1, EUR. PARL. Doc. P9-TA(2023)0209 (2023) [hereinafter *CSDDD Amendments*].

77. *See CSDDD Proposal*; *see also Council Proposal*; *CSDDD Amendments*.

78. *See CSDDD Amendments*.

draft directive calls for a significant expansion of the scope of application of the CSDDD, including certain companies from third countries.⁷⁹ The scope of the directive is one controversial topic in the ongoing trilateral negotiations in addition to the questions of civil liability and the inclusion of climate-related due diligence.⁸⁰ Among the positions of the three EU institutions, the amendments of the European Parliament come closest to the requirements of international human rights standards even though non-binding, namely the United Nations Guiding Principles on Business and Human Rights.⁸¹

Given the active legislative process, the current CSDDD draft could undergo further changes. Nonetheless, the CSDDD's formal adoption is only a matter of time and anticipated before 2023 concludes.⁸² Once ratified, EU Member States will have two years to transpose the directive into national law.⁸³ As one example, in Germany, this will likely necessitate amendments to and an expansion of obligations under the Act on Supply Chain Due Diligence (Lieferkettensorgfaltspflichtengesetz or LkSG), which has been in force since January 1, 2023, and which has also served as a source for the drafting of the CSDDD.⁸⁴

The CSDDD draft directive sets out a wide scope of applicability to many businesses in Article 2.⁸⁵ It encompasses both EU-based companies and companies from third countries, provided certain thresholds of employees and turnover are met.⁸⁶ According to the explanatory memorandum of the initial proposal by the European Commission, approximately 13,000 companies inside the EU and approximately an additional 4,000 companies incorporated outside the EU will be covered.⁸⁷ These numbers will be even larger if the amendments proposed by the European Parliament will be adopted.

Based on the EU Parliament's draft, companies constituted organized under the law of an EU Member State would be covered by the CSDDD draft directive if they meet the thresholds of Group 1 or Group 2, as outlined in the table below:⁸⁸

79. *Id.* amends. 89–96, 65–67, 238–39.

80. JÄGER, *supra* note 73, at 6–7.

81. *Id.* at 6.

82. See Anahita Thoms et al., *Supply Chain Due Diligence in the EU and Germany: Navigating the Evolving Landscape*, BAKER MCKENZIE: GLOB. SUPPLY CHAIN COMPLIANCE (Feb. 1, 2024), <https://supplychaincompliance.bakermckenzie.com/2024/02/01/supply-chain-due-diligence-in-the-eu-and-germany-navigating-the-evolving-landscape/> [<https://perma.cc/GGA9-T2U7>].

83. *Id.*

84. *See id.*

85. *See CSDD Proposal*, art. 2., at 46.

86. *Id.* art. 2, at 47.

87. *Id.* at 16.

88. *Id.* art. 2(1), at 46.

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EU Company	Group 1	Companies with <ul style="list-style-type: none"> ■ More than 250 employees on average and ■ A worldwide net turnover exceeding EUR 40 million
	Group 2	Companies that are the ultimate parent company of a group with <ul style="list-style-type: none"> ■ At least 500 employees and ■ A net worldwide turnover of more than EUR 150 million

In contrast, the German LkSG has no turnover threshold and applies to companies with 3,000 or more employees, which will be lowered to 1,000 or more employees as of 2024.⁸⁹

The CSDDD may also cover non-EU companies, including U.S. companies. The CSDDD draft directive provides for obligations for EU companies even without an EU presence, provided they meet the relevant turnover thresholds within the EU outlined in the table below.⁹⁰

non-EU Company	Group 1	Companies with <ul style="list-style-type: none"> ■ A global net turnover of more than EUR 150 million ■ An EU turnover of at least EUR 40 million ■ Incl. turnover of subsidiaries or suppliers
	Group 2	Companies with <ul style="list-style-type: none"> ■ A parent company with at least 500 employees and ■ A global net turnover of more than EUR 150 million and ■ An EU turnover of more than EUR 40 million

The scope of due diligence obligations under the CSDDD extends to the entire value chain.⁹¹ This means due diligence requirements will cover a company's own business activities, as well as those of its subsidiaries, extending to both the upstream and downstream sections of value chains.⁹² The upstream value chain includes all activities of a company related to product manufacturing, such as raw material extraction, and provision of services.⁹³ The downstream value chain includes all activities conducted by business partners regarding distribution, transportation, storage, and disposal.⁹⁴

According to the CSDDD draft directive, companies will be required to undertake due diligence to identify,⁹⁵ to prevent or mitigate potential adverse impacts where necessary,⁹⁶ and to end actual negative impacts of their

89. Lieferkettensorgfaltspflichtengesetz [LkSG] [Act on Corporate Due Diligence Obligations for the Prevention of Human Rights Violation in Supply Chains], July 16, 2021, BUNDESGESETZBLATT [BGBL I] § 1, at 1 (Ger.), https://www.csr-in-deutschland.de/SharedDocs/Downloads/EN/act-corporate-due-diligence-obligations-supply-chains.pdf?__blob=publicationFile [<https://perma.cc/4DFH-Q5GS>].

90. *CSDDD Proposal*, art. 2(2).

91. *Id.* art 1, at 46.

92. *Id.* art. 3(g), at 51.

93. *Id.* ¶¶ 17–18, at 32.

94. *Id.*

95. *Id.* art. 6, at 54.

96. *CSDDD Proposal*, art. 7, at 55.

activities on human rights and the environment.⁹⁷ Such adverse activities include “slavery, child labor, labor exploitation, biodiversity loss, pollution, and environmental degradation.”⁹⁸ Covered “companies will also have to monitor and assess the impact of their value-chain partners including ... suppliers,” as well as partners involved in “sales, transport, distribution, storage, and waste-management” activities.⁹⁹

The CSDDD draft directive includes the possibility of civil liability, which is intended to ensure effective enforcement of due diligence obligations.¹⁰⁰ The CSDDD draft directive enables affected parties to directly file claims against companies for damages stemming from human rights violations or environmental harm within the value chain.¹⁰¹ However, it is questionable whether the concept of liability as a tool to implement policy will be effective.¹⁰² “Realizing liability claims will require long and complex legal proceedings.”¹⁰³ An example regarding environmental adverse impacts is the Shell/Nigeria case, in which only a few farmers who had suffered damages resulting from oil spills from pipelines ultimately received a compensation for their damages after over ten years of litigation.¹⁰⁴

Another tool to enforce the CSDDD requirements will be sanctions in case of violations of due diligence obligations.¹⁰⁵ Sanctions may include fines of up to five percent of the annual group turnover, public disclosure of the violation naming the company, banning the sale or export of products, and more.¹⁰⁶

The CSDDD adopts a comprehensive approach with regard to climate protection due diligence. The European Commissions’ draft required companies to develop plans aligning their business strategies with sustainability and limiting global warming to 1.5 degrees Celsius under

97. *Id.* art. 8, at 56.

98. See *Annex to the proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937*, at 2–3, 5, COM(2022) 71 final (Feb. 23, 2022); Seher Budak, *Due Diligence in Supply Chains Update on human rights and environmental due diligence requirements in the EU*, BAKER MCKENZIE: GLOB. SUPPLY CHAIN COMPLIANCE (July 21, 2023), <https://supplychaincompliance.bakermckenzie.com/2023/07/21/due-diligence-in-supply-chains-update-on-human-rights-and-environmental-due-diligence-requirements-in-the-eu/> [https://perma.cc/72A6-YJWD].

99. Budak, *supra* note 98.

100. CSDDD Proposal, at 16.

101. *Id.* ¶ 60, at 43.

102. See Harm-Jan de Kluiver, *Towards a Framework for Effective Regulatory Supervision of Sustainability Governance in Accordance with the EU CSDD Directive. A Comparative Study*, 20 EUR. CO. FIN. L. REV. 203, 211 (2023) (discussing ineffectiveness of liability as a tool).

103. *Id.*

104. See *id.*

105. CSDDD Proposal, art. 20, at 63–64.

106. These provisions set out in article 20 are also new under the Parliaments amendments. See *Memorandum 6145/24 from the Council on Procedure 2022/0051 (COD): Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937*, art. 20(3), at 103 (Mar. 23, 2024) [hereinafter CSDDD Compromise Proposal] (setting out the draft compromise package agreed upon by the Permanent Representatives’ Committee).

the 2015 Paris Agreement.¹⁰⁷ In the European Parliament's CSDDD draft directive, the obligations go further, demanding a detailed business model and strategy aligning with the EU's goal of climate neutrality by 2050 and a fifty-five percent emission reduction by 2030.¹⁰⁸

One of the focal points of discussion in the ongoing trilateral meetings concerns the responsibility of company management for sustainability. While the European Commission advocates for stricter accountability, including direct and personal responsibility for putting in place and overseeing the due diligence actions, the European Parliament's CSDDD draft weakens these responsibilities.¹⁰⁹

Another point of discussion revolves around management compensation. A company's action plan to align its business strategy and model with the 1.5-degree target will also include variable compensation for the company's management to provide appropriate financial incentives.¹¹⁰

The outcome remains uncertain at this stage, but management is expected to have some oversight role in CSDDD-mandated due diligence. This may be similar to the German LkSG obligations for staying informed about the results of risk analyses.¹¹¹

The CSDDD will likely introduce tight standards for supply chain due diligence. Once implemented into national law, the CSDDD will have broad applicability, comprehensive due diligence obligations and will introduce civil liability and heightened environmental obligations.¹¹²

IV. Support for Afghan Women Judges

Efforts to support the Afghan Women Judges, whose lives were placed in danger when the United States withdrew from Afghanistan in August 2021 and the Taliban resumed control, continued in 2023.¹¹³ While the U.S. Department of State and Department of Justice had supported the development of women judges throughout Afghanistan during the U.S. engagement in the country,¹¹⁴ evidence of support for these women judges during the U.S. withdrawal were non-existent.

107. *CSDD Proposal* art. 15(1), at 60.

108. *CSDD Compromise Proposal* art. 15(1)–(1)(a), at 95.

109. *Compare CSDD Proposal* art. 26 at 66, *with CSDD Compromise Proposal* ¶ 44(c), at 40.

110. *See CSDD Compromise Proposal* arts. 7(2)(d), 8(3)(e), at 75, 80.

111. *Compare id.*, *with* Lieferkettensorgfaltspflichtengesetz [LkSG] [Act on Corporate Due Diligence Obligations for the Prevention of Human Rights Violations], July 16, 2021 BGBl I at 2959, § T 2.145 (Ger.).

112. *See CSDDD Compromise Proposal* art. 22, at 106–08.

113. *See* TALIBAN RESTRICTIONS ON WOMEN'S RIGHTS DEEPEN AFGHANISTAN CRISIS, INT'L CRISIS GRP. 3 (2023), <https://www.crisisgroup.org/asia/south-asia/afghanistan/329-taliban-restrictions-womens-rights-deepen-afghanistans-crisis> [<https://perma.cc/XD7Q-BZST>].

114. *See, e.g.,* U.S. Department of State Public-Private Partnership for Justice Reform in Afghanistan, U.S. DEP'T OF ST. (Nov. 16, 2007), <https://2001-2009.state.gov/p/inl/rls/other/94762.htm> [<https://perma.cc/6363-V3MW>].

Responding to calls for help from the Afghan women judges who had become friends with their U.S. colleagues, the International Association of Women Judges, along with national chapters of the organization around the world, called upon their networks to raise funds and relocate the judges.¹¹⁵ To date, of the 254 women judges who requested assistance in relocating, only forty-six remain in Afghanistan. Of that group, thirty-seven judges have been relocated to the United States. Another twenty or twenty-one judges are expected to arrive in the United States once their immigration documents are cleared by the U.S. Department of State.¹¹⁶

Forty of the judges who were successfully relocated out of Afghanistan remain in a transitional relocation status.¹¹⁷ Many of the judges, with their families, were initially staged in “lily-pad” locations as the available mechanisms to get visas for the judges and their family members were not compatible with the demand on such short notice.¹¹⁸

Meanwhile the judges and their families were under direct threat of death or serious bodily injury. As reported in *The Guardian*, one fifty-three-year-old woman judge who had been in hiding in Pakistan for two years, recently won an appeal of her visa denial and has been allowed to enter the United Kingdom under that country’s Afghan citizen resettlement program.¹¹⁹ She described the situation just before she and her son were able to relocate to the United Kingdom:

Two days before we flew to the UK, our apartment block got raided by police to arrest Afghan refugees. Luckily, we were out at the doctors at the time. Now that we are finally safe in the UK, we so much enjoy being able to walk around safely and freely now, sitting in our family’s garden and feeling just peace around us, and sleeping quietly and comfortably, knowing next day we will wake up in our safe new home.¹²⁰

Relocation, however, is only the start of the challenges these women judge face. With the relocation into temporary lodging in a new country, there are language lessons, job searches, and the challenge of arriving with very little and no credit rating, making the opportunity to lease an apartment or make other purchases of essential goods particularly challenging.

Despite the challenges faced in the relocation process, the judges who have been successfully relocated recognize that they are far better off than

115. See International Association of Women Judges receives Bolch Prize for “swift, breathtaking” Effort to Aid Afghan Women Judges, BOLCH JUD. INST. (Mar. 7, 2023), <https://judicialstudies.duke.edu/2023/03/international-association-of-women-judges-receives-bolch-prize-for-swift-breathtaking-effort-to-aid-afghan-women-judges/> [<https://perma.cc/GPL7-G3W7>].

116. Interview with Judges Vanessa Ruiz and Patricia Whalen (Nov. 19, 2023) (on file with authors).

117. *Id.*

118. *Id.*

119. Diane Taylor, *Female Afghan Judge Wins Legal Battle to Come to UK*, THE GUARDIAN (July 23, 2023), <https://www.theguardian.com/world/2023/jul/23/female-afghan-judge-wins-legal-battle-to-come-to-uk> [<https://perma.cc/VXC8-QQF7>].

120. *Id.*

the women and girls who remain in Afghanistan.¹²¹ The United Nations Office of the High Commissioner for Human Rights issued its report in March 2023, noting that Afghanistan is the only country in the world that forbids girls and women from attending secondary education and higher education.¹²² Among the matters addressed in this release, the United Nations notes: “There are no longer safe spaces for girls to meet, learn and just be children. If the ban on education continues, life outcomes for girls in particular, but also for all children, will continue on a negative trajectory and recovery will take decades. This cannot let this happen.”¹²³

During 2023, the American Bar Association’s Afghan Legal Professionals Scholarship and Mentoring Pilot Project has successfully negotiated the commitment from sixteen law schools throughout the United States to provide full tuition scholarships for qualified Afghan legal professionals, including women judges, to obtain LL.M.s.¹²⁴ The long-term goal is to have those individuals who complete the LL.M. program sit for a bar exam in the United States and continue to contribute their skills and talents in the legal community in the United States.¹²⁵

In all the efforts to assist the Afghan women judges and the legal professionals who have been relocated from Afghanistan, there are mentoring programs aligned with the newly settled refugees.¹²⁶ This is considered to be an important element of the formula for success as these legal professionals attempt to reconstruct their lives.

V. Developments in Women’s Human Rights

The backsliding in women’s human rights continued in 2023. While progress in human rights is typically slow and hard-fought, women’s human rights are particularly fragile and subject to repeated controversies and sudden reversals. The year 2023 saw continued regression in that area, which was correlated with the increase in populist, totalitarian, and autocratic movements around the world.

The modern human rights architecture of the United Nations, including the United Nations Charter, the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Universal Covenant on Economic, Social and Cultural Rights), and the Convention on the

121. *See, e.g., id.*

122. Press Release, Office of the High Comm’r, Afghanistan: Quality Education must be Equally Accessible to All, UN Experts Say (Mar. 20, 2023), <https://www.ohchr.org/en/press-releases/2023/03/afghanistan-quality-education-must-be-equally-accessible-all-un-experts-say> [<https://perma.cc/VN6E-XXLF>].

123. *Id.*

124. *See ABA Afghan Legal Professionals Scholarship & Mentoring Pilot Program*, ABA, https://www.americanbar.org/groups/international_law/international-projects/afghan-legal-professionals-scholarship-mentoring-program/ [<https://perma.cc/7DSE-QTKS>] (last visited Apr. 9, 2024).

125. *Id.*

126. *See id.*

Elimination of All Forms of Discrimination Against Women (CEDAW), grants all people, including women, certain fundamental human rights.¹²⁷ However, many countries continue to refuse to grant women the equal rights guaranteed under international law.

The most recent data demonstrates that progress toward legal equality of women's human rights has slowed or, in many cases, reversed. Only fourteen countries, all developed high-income economies, currently have laws guaranteeing women the same rights as men.¹²⁸ In contrast, the remaining 2.4 billion women have only partial or no rights.¹²⁹ According to the World Bank, the pace of reforms toward equal treatment of women under the law has slumped to a twenty-year low in 2022, creating not only hardship for women and children but also impeding economic growth.¹³⁰ In addition, additional restrictions on the rights of women were newly adopted in many countries with devastating impacts on women, including the continued crackdown on the most basic rights of women and girls in Afghanistan,¹³¹ the ongoing brutal suppression of women's rights in Iran,¹³² and the partisan decision of the U.S. Supreme Court in *Dobbs v. Jackson Women's Health Organization* overturning long-standing precedent and denying to women their bodily integrity and agency by removing the right to abortion, with continuing impacts in 2023 as states enact ever-tougher restrictions on women's healthcare.¹³³

A. AFGHANISTAN

The Taliban's return to power in Afghanistan has had a devastating impact on Afghan women and girls. There is no country in the world where the fundamental human rights of women and girls are more restricted than in

127. See *Human Rights*, U.N., [https://www.un.org/en/global-issues/human-rights#:~:text=It%20has%20also%20established%20mechanisms,in%201945%20and%201948%2C%20respectively.\[https://perma.cc/Q5H2-2LAH\]](https://www.un.org/en/global-issues/human-rights#:~:text=It%20has%20also%20established%20mechanisms,in%201945%20and%201948%2C%20respectively.[https://perma.cc/Q5H2-2LAH]) (last visited Apr. 9, 2024).

128. Katherine Buchholz, *Only 14 Countries Have Full Equal Rights for Women*, WORLD ECON. F. (Mar. 10, 2023), <https://www.weforum.org/agenda/2023/03/only-14-countries-have-full-equal-rights-for-women/> [https://perma.cc/N93W-TY2C].

129. Press Release, The World Bank, *Pace of Reform Toward Equal Rights for Women Falls to 20-Year Low* (Mar. 2, 2023), <https://www.worldbank.org/en/news/press-release/2023/03/02/pace-of-reform-toward-equal-129rights-for-women-falls-to-20-year-low> [https://perma.cc/S6G6-V479].

130. *Id.*

131. See *Intel Brief: The Taliban Continues Its Crackdown on Women in Afghanistan*, THE SOUFAN CTR. (Jan. 25, 2024), <https://thesoufancenter.org/intelbrief-2024-january-25/#:~:text=In%20the%20two%20and%20a,amounting%20to%20institutionalized%20gender%20apartheid> [https://perma.cc/NN6R-A95E].

132. See Press Release, Office of the High Comm'r, Iran: Institutional Discrimination Against Women and Girls Enabled Human Rights Violations and Crimes Against Humanity in the Context of Recent Protests, UN Fact-Finding Mission says (Mar. 8, 2024), <https://www.ohchr.org/en/press-releases/2024/03/iran-institutional-discrimination-against-women-and-girls-enabled-human#:~:text=The%20report%20to%20the%20Human,of%20force%2C%20arbitrary%20deprivation%20of> [https://perma.cc/6GQZ-5B4J].

133. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

Afghanistan, with the almost total denial of all fundamental liberties and a near-total subversion of human autonomy for women and girls.¹³⁴ In the opinion of U.N. experts, the Taliban is practicing “gender apartheid.”¹³⁵ Girls have been banned from middle school and high school, meaning that 2.5 million girls are deprived of getting an education.¹³⁶ In addition, women are barred from attending universities or working for non-government organizations.¹³⁷ As a result, sixth grade is the highest level of education available for women and girls in Afghanistan.¹³⁸ Before this latest round of restrictions, women had been allowed to continue some university studies, but in gender-segregated classrooms.¹³⁹ Even that is no longer possible.¹⁴⁰

In addition, women are restricted from most employment; women working in government jobs have been fired and told to stay home.¹⁴¹ All women must wear head-to-toe clothing in public and are banned from visiting parks, sporting events, and sports arenas.¹⁴² Women cannot even attend gender-segregated gyms.¹⁴³ All-women beauty salons, the last remaining semi-public spaces where women could gather and exchange ideas outside their homes, were banned in 2023.¹⁴⁴ Over 60,000 women who run those beauty salons lost their livelihoods as well.¹⁴⁵

134. See *Afghanistan: Taliban Deprive Women of Livelihoods, Identity*, HUM. RTS. WATCH (Jan. 18, 2022), <https://www.hrw.org/news/2022/01/18/afghanistan-taliban-deprive-women-livelihoods-identity> [<https://perma.cc/HK42-VYCR>].

135. U.N. Office of the High Comm’r, Experts: Taliban Treatment of Women may be “Gender Apartheid” (July 11, 2023), <https://www.ohchr.org/en/stories/2023/07/experts-taliban-treatment-women-may-be-gender-apartheid#:~:text=The%20Taliban%20in%20Afghanistan%20have,amount%20to%20%22gender%20apartheid.%22> [<https://perma.cc/E8HF-MXSC>].

136. See *Let Girls and Women in Afghanistan Learn!*, UNESCO (Jan. 18, 2023), <https://www.unesco.org/en/articles/let-girls-and-women-afghanistan-learn> [<https://perma.cc/85RE-LKGM>].

137. See *id.*

138. Riazat Butt, *2 Years Ago, the Taliban Banned Girls from School. It’s a Worsening Crisis for All Afghans*, AP (Sept. 18, 2023), [https://apnews.com/article/afghanistan-taliban-high-school-ban-girls-7046b3dbb76ca76d40343db6ba547556#:~:text=ISLAMABAD%20\(AP\)%20%E2%80%94Two%20years,The%20U.N.](https://apnews.com/article/afghanistan-taliban-high-school-ban-girls-7046b3dbb76ca76d40343db6ba547556#:~:text=ISLAMABAD%20(AP)%20%E2%80%94Two%20years,The%20U.N.) [<https://perma.cc/HR27-EM54>].

139. Ezzatullah Mehrdad et al., *Taliban Minister says Women Can Attend University, but Not Alongside Men*, THE WASH. POST (Sept. 12, 2021), <https://www.washingtonpost.com/world/2021/09/12/afghanistan-taliban-women-education/> [<https://perma.cc/45JQ-XMLM>].

140. See *In focus: Women in Afghanistan One Year After the Taliban Takeover*, U.N. WOMEN (Aug. 15, 2022), <https://www.unwomen.org/en/news-stories/in-focus/2022/08/in-focus-women-in-afghanistan-one-year-after-the-taliban-takeover> [<https://perma.cc/LNQ4-YK6C>].

141. See *id.*

142. See *Taliban Ban Women from Parks, Morality Ministry says*, REUTERS (Nov. 11, 2022), [https://www.reuters.com/world/asia-pacific/taliban-ban-women-parks-morality-ministry-says-2022-11-11/#:~:text=KABUL%2C%20Nov%2011%20\(Reuters\),Islamic%20attire%20during%20their%20visits.](https://www.reuters.com/world/asia-pacific/taliban-ban-women-parks-morality-ministry-says-2022-11-11/#:~:text=KABUL%2C%20Nov%2011%20(Reuters),Islamic%20attire%20during%20their%20visits.) [<https://perma.cc/3GPR-AM6K>].

143. Riazatt Butt, *Taliban Official: Women Banned from Afghanistan’s Gyms*, AP (Nov. 10, 2022), <https://apnews.com/article/afghanistan-religion-womens-rights-taliban-177fd5045f692b2572b-0f202d25c4d3a> [<https://perma.cc/4C2Y-SS2M>].

144. Christina Goldbaum, *Taliban Shut Beauty Salons, One of Afghan Women’s Last Public Spaces*, N.Y. TIMES (July 25, 2023), <https://www.nytimes.com/2023/07/25/world/asia/taliban-beauty-salons-afghanistan.html> [<https://perma.cc/ASJ3-ENFJ>].

145. *Id.*

All women now have legal guardians and cannot make independent decisions affecting their lives, and women cannot travel or even enter the Kabul airport without a male chaperone.¹⁴⁶ Under newly propagated laws, girls as young as thirteen can now be married off while the girl's male guardians are making these decisions.¹⁴⁷ Just between December 2022 and February 2023, the International Organization for Migration (IOM) received 578 reports of forced marriage, of which 361 were child marriages. Some such marriages are result of dire economic situation where some families feel it is necessary to sell a girl child into marriage to receive mahr (dowry) price, others are forced by Taliban. While such mahr payments happen in all marriages in Afghanistan, more families are forced to seek these payments to help them survive.¹⁴⁸ Moreover, young girls are also being sold into marriage or servitude as a form of debt payment. Between December and February 2023 alone, IOM received 118 reports of children being sold to service family debt.¹⁴⁹

While Afghan women tried various forms of public protest, they have not been successful in lowering the Taliban's restrictions. Their protests were violently stopped, and public advocacy and international pressure had no results.¹⁵⁰ So far, all efforts to make the Taliban uphold women's rights under the International Bill of Human Rights or the U.N. Security Council Resolution 1325, which calls for women's "equal participation and full involvement in all efforts for the maintenance and promotion of peace and security,"¹⁵¹ have had no results.¹⁵² Calls by many human rights organizations, such as Amnesty International, which condemned the continued detention of women's rights activists in Afghanistan and continued restrictions against

146. *Taliban Ban Women in Afghanistan from Flying Without a 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/FWM8-ZULE>].

147. See Beatriz Lucumberri, *Child Weddings on the Rise in Afghanistan: 'Girls are getting married younger and younger; at 11 and 12'*, EL PAÍS (Oct. 9, 2023), [https://urldefense.com/v3/__https://english.elpais.com/international/2023-10-09/child-weddings-on-the-rise-in-afghanistan-girls-are-getting-married-younger-and-younger-at-11-and-12.html__;!!K543PA!NpYpIjayP-_6qfpFcTaF32oKvrPtjOh9755lfoI4sc0-NJEUL-zI43vLwaidNFd9Gkx3V3Jv7i7uEPOfiE8NO9o\\$](https://urldefense.com/v3/__https://english.elpais.com/international/2023-10-09/child-weddings-on-the-rise-in-afghanistan-girls-are-getting-married-younger-and-younger-at-11-and-12.html__;!!K543PA!NpYpIjayP-_6qfpFcTaF32oKvrPtjOh9755lfoI4sc0-NJEUL-zI43vLwaidNFd9Gkx3V3Jv7i7uEPOfiE8NO9o$) [<https://perma.cc/8WE9-HMTQ>].

148. A/HRC/53/21: Situation of women and girls in Afghanistan—Report of the Special Rapporteur on the situation of human rights in Afghanistan and the Working Group on discrimination against women and girls, 2023. <https://www.ohchr.org/en/documents/country-reports/ahrc5321-situation-women-and-girls-afghanistan-report-special-rapporteur>.

149. *Id.*

150. See Lyse Doucet, *Afghanistan: Women Protest Against All-Male Taliban Government*, BBC (Sept. 8, 2021), <https://www.bbc.com/news/world-asia-58490819> [<https://perma.cc/P4EJ-Y6ZE>].

151. S.C. Res. 1325 (Oct. 31, 2000).

152. See *Afghanistans: Concerns Grow Over Detentions of Women, Civil Society Activists Under Taliban Regime*, DEVIDISCOURSE (Nov. 18, 2023), <https://www.devidiscourse.com/article/international/2717501-afghanistan-concerns-grow-over-detentions-of-women-civil-society-activists-under-taliban-regime> [<https://perma.cc/Y4JP-AH4G>].

girls and women, have been disregarded.¹⁵³ The Taliban closed the Ministry of Women's Affairs.¹⁵⁴ They reinstated the Ministry for the Propagation of Virtue and the Prevention of Vice, which monitors women's behavior and is known for using violence and intimidation against any non-conforming women.¹⁵⁵ In short, almost thirty years of modest gains for women's rights in Afghanistan have been eradicated seemingly overnight.

B. POLAND, CHINA, AND CERTAIN OTHER COUNTRIES

Several other countries took action in 2023 to diminish women's rights. Poland, whose conservative government introduced one of the most severe anti-abortion laws in Europe, continued to prosecute women rights activists.¹⁵⁶ Massive strikes by Polish women throughout the entire country provided no relief.¹⁵⁷ Multiple women who died of sepsis because doctors refused to perform medically necessary abortions needed to save the life of the mother also not did not affect the laws.¹⁵⁸ At the same time, the government continued to target women activists.¹⁵⁹

In China, the Chinese government traditionally promoted equality of the sexes, but that has been changing. Facing several high-profile cases involving sexual harassment of women by government officials, the Chinese government began to silence some women activists by imposing new censorship rules banning "feminist" terms and any content they see as "harmful speech" that is "inciting conflict between the genders."¹⁶⁰ Moreover, in his recent speech, President Xi urged the "All-China Women's Federation" to "actively cultivate a new marriage and childbirth culture,

153. *See id.*

154. *Afghanistan: Taliban Deprive Women of Livelihoods, Identity*, HUM. RTS. WATCH (Jan. 18, 2022), <https://www.hrw.org/news/2022/01/18/afghanistan-taliban-deprive-women-livelihoods-identity> [https://perma.cc/77ZM-2QKW].

155. *See id.*

156. *'Stop Killing Us': Polish Women Protest Against Strict Anti-Abortion Law*, REUTERS (June 14, 2023), <https://www.reuters.com/world/europe/stop-killing-us-polish-women-protest-against-strict-anti-abortion-law-2023-06-14/#:~:text=Poland's%20anti%2Dabortion%20laws%2C%20among,du%20in%20October%20or%20November> [https://perma.cc/2DMS-XKJX].

157. *See id.*

158. Vanessa Gera, *Thousands Protest in Poland Against Strict Abortion Law After Pregnant Woman Died of Sepsis*, AP (June 14, 2023), <https://apnews.com/article/poland-abortion-death-sepsis-protests-8b6a8b9451cb7cd9b0325a5c0a67c1d3> [https://perma.cc/WB68-HCNJ].

159. *Poland: Escalating Threats to Women Activists*, HUM. RTS. WATCH (Mar. 31, 2021), <https://www.hrw.org/news/2021/03/31/poland-escalating-threats-women-activists> [https://perma.cc/S57N-RUSS].

160. Wanqing Zhang, *Heavily persecuted, highly influential: China's online feminist revolution*, REST OF WORLD (Sept. 26, 2023), <https://restofworld.org/2023/china-online-feminist-movement/> [https://perma.cc/MHY5-4LRA]; Kanis Leung, *As China censors homegrown feminism, a feminist scholar from Japan is on its bestseller lists*, ASSOC. PRESS (Sept. 28, 2023), <https://apnews.com/article/china-japanese-feminist-scholar-chizuko-ueno-3a7ef7a9e8d5a8ed87314fac69ba768d> [https://perma.cc/Q8KT-B3FM]; Han Zhang, *The Censorship Machine Erasing China's Feminist Movement*, THE NEW YORKER (Aug. 29, 2022), <https://www.newyorker.com/news/news-desk/the-censorship-machine-erasing-chinas-feminist-movement> [https://perma.cc/VU9K-LW93].

strengthen the guidance of young people's views on marriage, parenthood, and family, as well as promote policies to support childbirth."¹⁶¹ After years of advocating one-child policies and punishing women for having more children, the Chinese government wants women to give up their careers, stay home, and produce babies, which can be viewed as a step backward for women's rights.¹⁶²

In many countries, women continued to live in poverty, under constant danger of violence, and without legal recourse. The year 2023 was no exception. The Women, Peace, and Security Index (published by Georgetown University and Oslo's Peace Research Institute) measures women's rights through levels of inclusion in society, representation in the justice system, and feelings of security (at home, in their community, and within conflict settings).¹⁶³ The United Nations' Gender Inequality Index touches on similar data points, such as the number of years of education a woman receives and women's representation at the political level, as well as areas like maternal mortality, early marriage, and teen pregnancy.¹⁶⁴ Combining these two data sets, the ten worst countries for women's rights include Pakistan, CAR, Somalia, Sierra Leone, Sudan, South Sudan, Chad, DRC, Syria, and Afghanistan.¹⁶⁵

C. UNITED STATES

The United States is an outlier in the developed world due to its continued refusal to protect women's rights.¹⁶⁶ In 2023, following the U.S. Supreme Court 2022 decision in *Dobbs v. Jackson Women's Health Organization*, which overturned women's right to abortion, new abortion bans took place in fourteen states.¹⁶⁷ As a result, women are facing a lack of access to sexual and

161. *Facing Population Decline, China's Xi Promotes 'Childbirth Culture' for Women*, TIME (Oct. 31, 2023, 5:45 AM), <https://time.com/6330091/china-population-xi-childbirth-culture/> [<https://perma.cc/9FFA-FEP7>].

162. *See id.*

163. GEO. INST. FOR WOMEN, PEACE & SEC., WOMEN PEACE AND SECURITY INDEX 2023/24: TRACKING SUSTAINABLE PEACE THROUGHOUT INCLUSION, JUSTICE, AND SECURITY FOR WOMEN (2023).

164. *Gender Inequality Index (GII)*, U.N. HUMAN DEV. REPORTS, <https://hdr.undp.org/data-center/thematic-composite-indices/gender-inequality-index#/indicies/GII> (last visited Apr. 16, 2024).

165. *Ten of the Worst Countries for Women's Rights*, CONCERN USA (Aug. 15, 2022), <https://concernusa.org/news/worst-countries-for-womens-rights/#Somalia>.

166. Carrie N. Baker, *United Nations Condemns U.S. Failure to Address Discrimination against Women, Directs U.S. to Ratify ERA and CEDAW*, MS. (Nov. 9, 2023), https://msmagazine.com/2023/11/09/united-nations-usa-women-violence-equal-rights-amendment-sexual-reproductive-health-rights/?omhhide=true&utm_medium=email&utm_source=everyaction&emci=81410926-f97f-ee11-8925-00224832e811&emdi=cc43c3e0-1c80-ee11-8925-00224832e811&ceid=1073973 [<https://perma.cc/X8TS-QPMA>].

167. *The Dobbs v. Jackson Decision, Annotated*, N.Y. TIMES (June 24, 2022), <https://www.nytimes.com/interactive/2022/06/24/us/politics/supreme-court-dobbs-jackson-analysis-roe-wade.html> [<https://perma.cc/83HY-9AK9>]

reproductive healthcare in many states.¹⁶⁸ These bans have made abortion services largely inaccessible and denied women and girls their fundamental human rights to comprehensive healthcare, including sexual and reproductive health.¹⁶⁹ The threat of criminalization in many states has discouraged women and girls from engaging with the healthcare system and seeking prenatal care.¹⁷⁰ A group of Texas women who were denied medically necessary abortions are suing Texas, seeking to clarify when the procedure is permissible under state law.¹⁷¹

In response to these restrictions, thousands of protesters gathered across the United States to protest the end of the federal right to abortion. Despite over 200 public protests including women's marches in forty-six states, there was little progress in protecting women's healthcare access.¹⁷² One bright spot was the recent 2023 referendum in Ohio, in which voters overwhelmingly decided to enshrine the protection of women's reproductive choices in their state constitution.¹⁷³

In its Concluding Observations on the Fifth Universal Periodic Review of the United States issued in November 2023, the U.N. Human Rights Committee called for the U.S. to "redouble its efforts to guarantee protection against sex and gender-based discrimination in its constitution, including through initiatives such as the Equal Rights Amendment."¹⁷⁴ Unlike most countries, namely eighty-five percent of the 194 U.N. member states, which have a provision in their constitutions that guarantees gender equality, the U.S. has none.¹⁷⁵ In addition, 115 countries have a provision that prohibits discrimination based on sex.¹⁷⁶ The U.S. is not among these countries.¹⁷⁷

168. *Human Rights Crisis: Abortion in the United States after Dobbs*, HUM. RTS. WATCH (Apr. 18, 2023, 12:01 AM), <https://www.hrw.org/news/2023/04/18/human-rights-crisis-abortion-united-states-after-dobbs> [https://perma.cc/HCP3-953Z].

169. *See id.*

170. *Id.*

171. Eleanor Klibanoff, *Women Denied Abortions Sue Texas to Clarify Exceptions to the Laws*, TEX. TRIB. (Mar. 7, 2023 3:00 PM), <https://www.texastribune.org/2023/03/07/texas-abortion-lawsuit/> [https://perma.cc/VY5L-4PJG].

172. Holly Honderich, *Roe v. Wade: Thousands March to White House for Abortion Rights*, BBC (July 9, 2022), <https://www.bbc.com/news/world-us-canada-62109971> [https://perma.cc/XLK6-84U9].

173. *Demonstrators Converge Outside Supreme Court after Dobbs Decision*, SCOTUSBLOG (June 24, 2022, 6:33 PM), <https://www.scotusblog.com/2022/06/demonstrators-converge-outside-supreme-court-after-dobbs-decision/> [https://perma.cc/2J4H-B974]; Jenna Amatulli, *Protests planned across US to mark one year since loss of abortion rights*, THE GUARDIAN (June 24, 2023, 4:00 PM), <https://www.theguardian.com/us-news/2023/jun/24/roe-v-wade-overturned-anniversary-protests-abortion-ban> [https://perma.cc/S99L-5KMP].

174. Julie Carr Smyth, *Ohio Voters Enshrine Abortion Access in Latest Statewide Win for Reproductive Rights*, ASSOC. PRESS (Nov. 7, 2023, 10:31 PM), <https://apnews.com/article/ohio-abortion-amendment-election-2023-fe3e06747b616507d8ca21ea26485270> [https://perma.cc/H69V-9M6R].

175. Baker, *supra* note 166; Concluding Observations on the Fifth Periodic Report of the United States of America, U.N. Doc. CCPR/C/USA/CO/5 (Dec. 7, 2023).

176. Baker, *supra* note 166.

177. *Id.*

In addition, unlike 187 nations that have ratified CEDAW, the United States has not.¹⁷⁸ Among U.N. members, only the United States, Iran, Niue, Palau, Somalia, Sudan, and Tonga have not ratified CEDAW.¹⁷⁹

D. COUNTRIES WITH PROGRESS ON WOMEN'S HUMAN RIGHTS

The year 2023 also had a few bright spots for women's human rights. Colombia decriminalized abortion during the first twenty-four weeks of pregnancy¹⁸⁰ following similar 2021 rulings in Mexico and Argentina that improved access to abortion in Latin America.¹⁸¹ India made a landmark move and ruled that a woman's lack of marital status cannot deny her the choice to abort a pregnancy at any time up to twenty-four weeks.¹⁸² Finland passed reforms that eased the strictest abortion laws in the Nordic region.¹⁸³ Spain passed a pioneering sexual and reproductive health law that allows girls aged sixteen and seventeen to undergo abortions without parental consent.¹⁸⁴ Spain also became the first European country to offer state-funded paid leave for women who suffer from painful periods.¹⁸⁵

VI. Human Rights Violations in Iran

Remarkably, the massive, women and youth-led uprising in the Islamic Republic of Iran (IR) continued throughout 2023, challenging actions by the ruling theocracy, many of which involve human rights violations.¹⁸⁶ The uprising erupted following the September 2022 death of Mahsa "Jina"

178. *Id.*

179. *Id.*

180. Stefano Pozzeban et al., *Columbia Becomes Latest Latin American Country to Partially Decriminalize Abortion*, CNN WORLD (Feb. 22, 2022, 2:41 PM), <https://www.cnn.com/2022/02/21/americas/colombia-decriminalize-abortion-intl/index.html> [<https://perma.cc/DTW9-BRYG>].

181. *Mexico: Landmark Reproductive Rights Rulings*, HUM. RTS. WATCH (Sept. 14, 2021, 4:00 AM), <https://www.hrw.org/news/2021/09/14/mexico-landmark-reproductive-rights-rulings> [<https://perma.cc/472S-3SGJ>]; *Argentina Abortion: Senate Approves Legalisation in Historic Decision*, BBC (Dec. 30, 2020), <https://www.bbc.com/news/world-latin-america-55475036> [<https://perma.cc/4LPD-9S2M>].

182. *Abortion: India Supreme Court Says Amended Law to Cover Single Women Too*, BBC (Sept. 29, 2022), <https://www.bbc.com/news/world-asia-india-63071113> [<https://perma.cc/4A76-KKB8>].

183. Elin Hofverberg, *Finland: Parliament Approves Abortion Act Amendments*, LIBR. OF CONG. (Dec. 20, 2022), <https://www.loc.gov/item/global-legal-monitor/2022-12-19/finland-parliament-approves-abortion-act-amendments/> [<https://perma.cc/M8Q7-SESE>].

184. *Spain Approves Menstrual Leave, Teen Abortion, and Trans Laws*, ASSOC. PRESS (Feb. 16, 2023, 12:14 PM), <https://www.npr.org/2023/02/16/1157480905/spain-menstrual-leave-teen-abortion-trans-laws#:~:text=The%20driving%20force%20behind%20the,an%20abortion%20without%20parental%20consent.> [<https://perma.cc/B9DF-BWHU>].

185. Press Release, U.N. Office of the High Comm'r for Hum. Rts., Spain: UN Experts Hail New Feminist Legislation (Feb. 21, 2023), <https://www.ohchr.org/en/press-releases/2023/02/spain-un-experts-hail-new-feminist-legislation> [<https://perma.cc/U229-RWD6>].

186. See Anisha Kohli, *What to Know about the Iranian Protests over Mahsa Amini's Death*, TIME (Sept. 24, 2022, 1:41 PM), <https://time.com/6216513/mahsa-amini-iran-protests-police/> [<https://perma.cc/7KFA-SP33>].

Amini, a twenty-two-year-old Kurdish-Iranian woman gravely injured while in the custody of Iranian “morality police” for allegedly improperly wearing her hijab.¹⁸⁷

As hundreds of thousands of Iranians swarmed streets nationwide, Iranian forces targeted the unarmed protesters,¹⁸⁸ leaving hundreds dead, including dozens of children, some just seven years old.¹⁸⁹ Tens of thousands of protesters sustained severe injuries.¹⁹⁰ At least 22,000 have been imprisoned.¹⁹¹ Charges include moharebeh (“waging war against God”) and efsad-e fel-arz (“corruption on earth”), punishable by death.¹⁹² Sham, closed-door trials often last mere minutes.¹⁹³ Protesters are denied counsel.¹⁹⁴ Sometimes the only evidence is a purported “confession,” exacted by torture.¹⁹⁵ Verdicts are largely preordained.¹⁹⁶ Sentencing is onerous— long prison terms and lashes, or even worse.¹⁹⁷ Some already have been executed.¹⁹⁸

More than seventy lawyers are being prosecuted for counseling protestors—merely for doing their job.¹⁹⁹ Similarly, Iran’s Parliament is

187. *Id.*

188. Alijani Ershad, *How Iran’s Security Forces are Shooting to Kill with ‘Non-Combat’ Shotgun Shells*, THE OBSERVERS (Mar. 11, 2022, 5:03 PM), <https://observers.france24.com/en/middle-east/20221103-investigation-iran-security-forces-police-basij-non-combat-shotguns-lethal> [https://perma.cc/XFR2-UDFY].

189. See *At Least 537 Killed in Iran Protest Crackdown, Rights Says*, VOICE OF AM. (Apr. 4, 2023, 3:54 PM), <https://www.voanews.com/a/at-least-537-killed-in-iran-protest-crackdown-rights-group-says/7036125.html> [https://perma.cc/SFY4-A6ZF]; *New Data Suggest More People Died in Iran During Protests*, IRAN INT’L. (Jan. 24, 2023), <https://www.iranintl.com/en/202301240166> [https://perma.cc/BN4A-XLUS]; *UN Warns Iran to End Violence against Children as ITV News Told 61 Killed Amid Protests*, ITV NEWS (Nov. 24, 2022, 11:41 PM), <https://www.itv.com/news/2022-11-24/61-children-killed-amid-irans-crackdown-on-protests-itv-news-told> [https://perma.cc/8RFA-4KY4].

190. See *Shocking Images of Wounded Iran Protesters Expose Regime Brutality*, IRAN INT’L. (Mar. 26, 2023), <https://www.iranintl.com/en/202303264073> [https://perma.cc/2QJR-Y9JZ].

191. U.N. Secretary-General, *Situation of Human Rights in the Islamic Republic of Iran* ¶ 12, U.N. Doc. A/78/511 (Oct. 6, 2023).

192. See Connor Bradbury, *Harsh Sentences for Iranian Protesters*, THE IRAN PRIMER (July 26, 2023), <https://iranprimer.usip.org/blog/2022/dec/12/harsh-sentences-iranian-protesters> [https://perma.cc/3DCM-76XL].

193. *Id.*

194. *Id.*

195. *Id.*

196. U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., *Iran 2022 H.R. Report* 18-19 (2022).

197. Bradbury, *supra* note 192.

198. U.N. Office of the High Comm’r for Human Rights, Comment by UN Human Rights Office Spokesperson Liz Throssell on Executions of a Child and a Young Man in Iran (Nov. 28, 2023), <https://www.ohchr.org/en/statements/2023/11/comment-un-human-rights-office-spokesperson-liz-throssell-executions-child-and> [https://perma.cc/8X2T-MV2Q].

199. See Monidipa Fouzder *Dozens of Lawyers Arrested and Detained in Iran Amid Protests*, THE L. SOC’Y GAZETTE (Mar. 8, 2023), <https://www.lawgazette.co.uk/news/dozens-of-lawyers-arrested-and-detained-in-iran-amid-protests/5115350.article> [https://perma.cc/X4W8-DLAP]; see also Ardeshtir Tayebi, *Iranian Bar Associations Protest Government Moves They Say Will*

investigating the Bar Association, targeting lawyers for what lawyers do.²⁰⁰ Iranian lawyers will be the focus of the International Day of the Endangered Lawyer for 2024.²⁰¹

The tactics of protesters and the IR have evolved over time.²⁰² Although demonstrations continue, they are no longer the primary form of protest.²⁰³ Instead, women are simply going unveiled—brazenly defying Iran’s hijab law, exercising civil disobedience.²⁰⁴

Authorities have responded by denying unveiled women public services, and beatings and arrests continue.²⁰⁵ On October 1, morality police confronted 16-year-old Armita Geravand as she boarded the subway, sans hijab.²⁰⁶ Moments later, Geravand was lying on the platform, unconscious.²⁰⁷ Officials held her under heavy guard until her death.²⁰⁸

Surveillance is ubiquitous,²⁰⁹ and shopkeepers are being forced to police compliance with the hijab law.²¹⁰ New legislation provides for draconian fines and up to ten years in prison for unveiled women, harsh penalties for celebrities who flout the law, and use of artificial intelligence to identify women who refuse to comply.²¹¹

Erode Their Power, RADIO FREE EUR. RADIO LIBERTY (Aug. 25, 2023), <https://www.rferl.org/a/iran-lawyers-bar-associations-protest/32565060.html> [<https://perma.cc/DC8K-9XSB>].

200. See *Iran: State’s “Investigation” of Bar Association Aims to Crush Dissent*, CTR. FOR HUM. RTS. IN IRAN (June 28, 2023), <https://iranhumanrights.org/2023/06/iran-states-investigation-of-bar-association-aims-to-crush-dissent/> [<https://perma.cc/6G78-8WS6>].

201. See *Iran: Day of the Endangered Lawyer Jan. 24, 2024*, DEFEND LAWS. (May 16, 2023), <https://defendlawyers.wordpress.com/2023/05/16/iran-day-of-the-endangered-lawyer-jan-24-2024/> [<https://perma.cc/WB2U-4BSY>].

202. See Peter Kenyon, *Public Protests are over but More Iranian Women are Refusing to Wear the Hijab*, NPR (June 20, 2023, 5:13 AM), <https://www.npr.org/2023/06/20/1183152677/public-protests-are-over-but-more-iranian-women-are-refusing-to-wear-the-hijab> [<https://perma.cc/V657-BNPA>].

203. *Id.*

204. *Id.*

205. See Maryam Sinaee, *Iran’s Regime Struggles to Enforce Hijab as Women Resist*, IRAN INT’L. (June 9, 2023), <https://www.iranintl.com/en/202306095364> [<https://perma.cc/SJ5K-H2XN>].

206. Mostafa Salem et al., *Iranian Activists Accuse Morality Police of Assault after Teenage Girl Hospitalized*, CNN (Oct. 5, 2023, 11:59 AM), <https://www.cnn.com/2023/10/04/middleeast/iran-activists-morality-police-girl-hospitalized-intl/index.html> [<https://perma.cc/KV6Q-YFEU>].

207. *Id.*

208. See Ruth Comerford, *Amrita Geravand: Iranian Girl Who Collapsed on Tebran Metro Dies*, BBC (Oct. 28, 2023), <https://www.bbc.com/news/world-middle-east-67248449> [<https://perma.cc/PHL4-FRNA>].

209. See *Iranian Interior Minister Defends Public Surveillance for Hijab*, IRAN INT’L. (Nov. 29, 2023), <https://www.iranintl.com/en/202311295496> [<https://perma.cc/55NZ-VPXJ>].

210. See Vivian Yee et al., *Businesses Caught in Cross-Fire as Iran Enforces Hijab Law*, N.Y. TIMES (May 5, 2023), <https://www.nytimes.com/2023/05/05/world/middleeast/iran-hijab-law-businesses.html>.

211. See Tara Subramaniam et al., *Iranian Women Face 10 Years in Jail for Inappropriate Dress after ‘hijab bill’ Approved*, CNN (Sept. 21, 2023, 12:34 PM), https://www.cnn.com/2023/09/21/middleeast/iran-hijab-law-parliament-jail-intl-hnk?cid=ios_app [<https://perma.cc/4DB4-LNRG>].

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Now the protesters' goal is regime change.²¹² And a growing movement seeks recognition of "gender apartheid" as a crime against humanity.²¹³ Like Afghan women, Iranian women suffer systemic oppression.²¹⁴ Beyond mandatory hijab, they cannot divorce their husbands or get child custody, and require male guardians' approval to obtain a passport or travel abroad.²¹⁵ Entire fields of study are closed to women.²¹⁶ Similarly, in court, a woman's testimony, and her life, are worth half of a man's.²¹⁷

As 2023 drew to a close, protesters welcomed the presentation of the 2023 Nobel Peace Prize to renowned rights activist Narges Mohammadi, currently serving over ten years.²¹⁸ The Nobel Committee noted that Mohammadi's prize also recognizes the hundreds of thousands of Iranians who are also protesting the IR's repression of women, echoing the protesters' rallying cry—"Zan. Zendegi. Azadi.—Women. Life. Freedom."²¹⁹

The International Fact-Finding Mission established by the United Nations to investigate the IR's protest-related human rights violations will deliver its final report in March 2024.²²⁰

212. See Jemima Shelley, *The People of Iran Are Shouting for Regime Change—But Is the West Listening?*, TONY BLAIR INST. FOR GLOB. CHANGE (Oct. 2, 2023), <https://www.institute.global/insights/geopolitics-and-security/the-people-of-iran-are-shouting-for-regime-change-but-is-the-west-listening> [https://perma.cc/62NZ-9C9A].

213. See Gissou Nia, *Gender Apartheid is a Horror, Now the United Nations Can Make it a Crime against Humanity.*, ATL. COUNCIL (Oct. 5, 2023), <https://www.atlanticcouncil.org/blogs/new-atlanticist/gender-apartheid-is-a-horror-now-the-united-nations-can-make-it-a-crime-against-humanity/> [https://perma.cc/GN59-E4GY].

214. *Id.*

215. *Id.*

216. *Id.*

217. *See id.*

218. See Narges Mohammadi, *Announcement: The Nobel Peace Prize*, THE NOBEL PRIZE (Oct. 6, 2023), <https://www.nobelprize.org/prizes/peace/2023/press-release/> [https://perma.cc/GFM3-2VWW].

219. *Id.*

220. G.A. Res. S-35/1, ¶ 7 (Nov. 24, 2022).

International Ethics

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This article highlights significant legal developments in International Ethics Law in 2023, specifically the Investor-State Dispute Settlement (ISDS) Code of Conduct.

I. Investor-State Dispute Settlement 2023 Code of Conduct Overview

A. INTRODUCTION

At its fifty-sixth session in July 2023, the United Nations Commission on International Trade Law (“UNCITRAL”) formally adopted the Code of Conduct for Arbitrators in International Investment Dispute Resolution (“the Code”) and accompanying commentary.¹ The Code, which has been under development since 2017, is the result of joint efforts of both the Secretariats of UNCITRAL and the International Centre for Settlement of Investment Disputes (“ICSID”)² to uphold the integrity and credibility of the arbitral process.³ The Code is applicable to arbitration proceedings either by consent of the parties or as required in the instrument of consent (i.e., the relevant investment treaty under which arbitration is commenced).⁴

The adoption of the Code marks the most recent development in the Investor—State Dispute Settlement (“ISDS”) process, signaling

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1. UNCITRAL, *UNCITRAL CODE OF CONDUCT FOR ARBITRATORS IN INTERNATIONAL INVESTMENT DISPUTE RESOLUTION* v (2024) (ebook).

2. Erdinc Dalar & Sezi Atmaca, *A Milestone in Dispute Resolution: UN Adopts Code of Conduct for Investment Dispute Arbitrators*, CBC LAW (July 28, 2023), <https://www.lexology.com/library/detail.aspx?g=b6c7e1a4-1a9b-481c-aed4-165fa4523167> [<https://perma.cc/9LAW-4CBK>]; *UN Member States Adopt ICSID and UNCITRAL Code of Conduct for Arbitrators in International Investment Disputes*, INT’L CTR. FOR SETTLEMENT OF INV. DISPS. (July 14, 2023), <https://icsid.worldbank.org/news-and-events/news-releases/un-member-states-adopt-icsid-and-uncitral-code-conduct-arbitrators> [<https://perma.cc/E89P-3RBX>]; Press Release, UN Information Service, UNCITRAL Working Group III Completes a Draft Code of Conduct for Arbitrators: A First Step Towards Investor-State Dispute Settlement Reform, U.N. Press Release UNIS/L/343 (Apr. 3, 2023), <https://unis.unvienna.org/unis/en/pressrels/2023/unisl343.html> [<https://perma.cc/ULB5-SRMR>].

3. See *UN Member States Adopt ICSID and UNCITRAL Code of Conduct for Arbitrators in International Investment Disputes*, *supra* note 2.

4. *Id.*

an internationally unified statement supporting reform.⁵ Clear ethical expectations and requirements applicable to ISDS players are a welcome development following years of heated debate.⁶ It introduces guidelines addressing two major concerns around arbitrator appointments: disclosure obligations for arbitrators sitting on investment treaty tribunals and “double-hatting” (i.e., the practice of sitting as an arbitrator in one case and serving as a party representative or expert witness in another).⁷

At a minimum, the Code helps to legitimize the oft-criticized process of ISDS. But as the result of compromise, the Code may not be sufficient to fully address perceived flaws within the ISDS process. With limited regulation on double-hatting, a rehaul of confidentiality requirements, and no clear path on enforceability, continuing criticism is inevitable.⁸ The question becomes whether the Code is enough.

If parties value flexibility and freedom, desiring the ability to tailor the arbitration process to the specific facts of their case, then the Code represents a balanced compromise.⁹ On the other hand, if there is still concern about procedural transparency, consistency, and fairness, then the Code seems to fall short.

UNCITRAL received various State proposals during early talks of ISDS reform in 2017.¹⁰ The proposals ranged from introducing binding rules for arbitrators to setting up formal investment courts.¹¹ UNCITRAL ultimately settled on the option which best balanced party flexibility and a widespread desire for increased transparency and impartiality.¹² Whether that compromise is sufficient to address ISDS criticism requires exploring alternative reform options.

B. THE ISDS LEGITIMACY CRISIS

ISDS is designed to create a fair and transparent process to resolve individual investment disputes between investors and States.¹³ But prior to the adoption of the Code, the ISDS regime attracted strong and growing criticism related to inconsistency in arbitral awards, partial and

5. UNCITRAL Working Group III Completes a Draft Code of Conduct for Arbitrators: A First Step Towards Investor-State Dispute Settlement Reform, *supra* note 2.

6. *Id.*

7. *Id.*

8. UNCITRAL CODE OF CONDUCT FOR ARBITRATORS IN INTERNATIONAL INVESTMENT DISPUTE RESOLUTION, *supra* note 1, at 4.

9. See generally *id.* at v (describing the General Assembly’s purpose in adopting the resolution).

10. Issam Hallak, *Multilateral Investment Court: Overview of the Reform Proposals and Prospects*, EUROPEAN PARLIAMENTARY RSCH. SERV. (Jan. 28, 2020), [https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/646147/EPRS_BRI\(2020\)646147_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/646147/EPRS_BRI(2020)646147_EN.pdf) [<https://perma.cc/WWW7-QZ89>].

11. *Id.*

12. *Id.*

13. *The Facts on Investor-State Dispute Settlement*, OFF. OF THE U.S. TRADE REP. (Mar. 2014), <https://ustr.gov/about-us/policy-offices/press-office/blog/2014/March/Facts-Investor-State%20Dispute-Settlement-Safeguarding-Public-Interest-Protecting-Investors> [<https://perma.cc/TL7G-RJCW>].

self-interested arbitrators, long durations and high costs, and a general lack of transparency.¹⁴ Critics often argued that proceedings took place behind closed doors without any accountability in the way of public scrutiny.¹⁵

States differed on the degree of reformation necessary.¹⁶ Two main approaches emerged. Some States supported reforming the ISDS process with additional regulation while others preferred to see it replaced with a multilateral investment court (“MIC”).¹⁷ Thus, the Working Group was saddled with a difficult task: how to strike a compromise between both ends of the spectrum.

Specifically, the practice of double-hatting was—and continues to be—hotly debated.¹⁸ The previous ISDS framework allowed an arbitrator to adjudicate disputes even when conflicts of interest were readily apparent.¹⁹ In *ICS Inspection and Control Services v. Argentina*, the Respondent challenged the arbitrator appointed by the Claimant, who, with his law firm, was simultaneously representing investors in another ISDS proceeding against the Respondent.²⁰ Even though the arbitrator disclosed this information upon acceptance of his appointment, the deciding authority stated his role as counsel placed him “in a situation of adversity” against the Respondent.²¹ Ultimately, the authority stated that this gave rise to doubts of his impartiality and independence.²² In *Exeteco International v. Peru*, the Respondent challenged the Claimant’s arbitrator on the basis that the arbitrator has advised and was concurrently advising several Respondent’s public entities in a number of unrelated matters.²³ While the arbitrator’s independence was not at risk here, the deciding authority did say his role as counsel gave rise to objectively justifiable doubts as to his impartiality.²⁴

14. See *Consistency, Efficiency and Transparency in Investment Treaty Arbitration*, IBA ARB. SUBCOMM. ON INV. TREATY ARB., 6–11 (Nov. 2018), https://uncitral.un.org/sites/uncitral.un.org/files/investment_treaty_report_2018_full.pdf [https://perma.cc/2K3Y-6TBZ].

15. *Id.* at 3–5.

16. See *Draft Code of Conduct for Adjudicators in International Investment Disputes and Commentary Version Four – July 2022, Comments by State/Commenter as of October 21, 2022*, UNCITRAL 2–74 (Oct. 21, 2022), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/compilation_of_comments_for_publication.pdf [https://perma.cc/C6RB-KFVM].

17. Malcom Langford, et al., *Special Issue: UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions*, 21 J. OF WORLD INVS. & TRADE 167, 168 (2020).

18. See Khan Khalid Adnan, *The Double Hatting Paradox in Investment Arbitration: Justification For Abolition?*, KLUWER ARB. BLOG (Dec. 29, 2023), <https://arbitrationblog.kluwerarbitration.com/2023/12/29/the-double-hatting-paradox-in-investment-arbitration-justification-for-abolition/> [https://perma.cc/B4SH-Z3FJ].

19. See Langford, *supra* note 17, at 179–80.

20. *ICE Inspection and Control Services Limited (U.K.) v. Republic of Argentina* 2 (Perm. Ct. Arb. 2010–9).

21. *Id.* at 4.

22. *Id.*

23. *Exceteco Internacional Company, S.L. (España) v. La República Del Perú*, DECISION ON CHALLENGE TO ARBITRATOR, at 7 (UNCITRAL), https://www.italaw.com/sites/default/files/case-documents/italaw10534_0.pdf [https://perma.cc/MKN5-AHLY].

24. *Id.* at 13–19.

A number of other ISDS decisions under the UNCITRAL Arbitration Rules and the ICSID Convention have addressed similar issues.²⁵ Even though the challenges in the above-mentioned cases were successful, the fact remains that the ISDS process permitted both arbitrators to accept appointment in the first place.²⁶

Parties also complained that the length and costs of arbitral proceedings were rising.²⁷ The average cost per ISDS proceeding was about \$8 million USD.²⁸ Eighty to ninety percent of those costs were associated with fees for legal representation and expert witnesses.²⁹ Because proceedings were so resource intensive, smaller enterprises and developing countries had limited access to the ISDS mechanism.³⁰ The protections afforded under investment treaties were not universally accessible because allocation of cost fell to the parties.³¹ Often, this would lead to external funding, known as third-party litigation funders, muddying the water even further.³² Third-party litigation funding raises issues of conflicts of interest, access to justice, disclosure, transparency, and more.³³ The legitimacy of the ISDS system was precarious and ripe for reform.

Algeria first proposed the Code's inception in 2015³⁴ and two years later UNCITRAL's task force specifically tasked with reforming the ISDS process, Working Group III, broke ground on a draft code of conduct.³⁵ The Working Group identified several main concerns with the ISDS framework in place at the time: double-hatting, the appointment process, qualifications to adjudicate, and impartiality.³⁶ During preliminary discussions, it was uncontroversial that the Code should address these concerns.³⁷

25. *Code of Conduct—Background Papers: Double Hatting*, ICSID 3–6 (Feb. 25, 2021), https://icsid.worldbank.org/sites/default/files/Background_Papers_Double-Hatting_%28final%29_2021.02.25.pdf [https://perma.cc/X9HV-NF3T].

26. *Id.* at 3.

27. *Government Perspectives on Investor-State Dispute Settlement: A Progress Report*, OECD 8 (Dec. 14, 2012), <https://www.oecd.org/daf/inv/investment-policy/ISDSprogressreport.pdf> [https://perma.cc/RU5G-M2BD].

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 9.

32. See Jennifer Radford et al., *Third-Party Funding at the Heart of ISDS Reform*, TEREPOSKY & DeROSE LLP (Oct. 9, 2019), <https://tradeisds.com/third-party-funding-at-the-heart-of-isds-reform/> [https://perma.cc/9E5V-UMWD].

33. *Id.*

34. Dalar & Atmaca, *supra* note 2.

35. *UN Member States Adopt ICSID and UNCITRAL Code of Conduct for Arbitrators in International Investment Disputes*, *supra* note 2.

36. *CCSI and UNCITRAL's Working Group III on Investor-State Dispute Settlement Reform*, COLUMBIA CTR. ON SUSTAINABLE INV., <https://ccsi.columbia.edu/content/ccsi-and-uncitral-working-group-iii-investor-state-dispute-settlement-reform> [https://perma.cc/57ZJ-9JBG] (last visited Apr. 14, 2024).

37. Fahira Brodlija, *The Draft Code of Conduct for Adjudicators in International Investment Disputes: Low-Hanging Fruit or Just an Appetizer?*, KLUWER ARB. BLOG (June 7, 2023), <https://arbitrationblog.kluwerarbitration.com/2023/06/07/the-draft-code-of-conduct-for->

States such as the Russian Federation saw the advantages to the current arbitrator system if it was regulated more closely to address existing problems.³⁸ There are roughly two different approaches for regulating the existing arbitration framework depending on the level of regulation.³⁹ First is the approach taken by the Code as further explained below.⁴⁰ Second is to create a separate class of exclusive arbitrators via an outright prohibition on double-hatting.⁴¹

Currently, Article 4 of the Code places temporal limitations on double-hatting.⁴² It further includes the option for parties to agree on issues contrary to certain provisions: multiple roles, ex parte communication, and confidentiality.⁴³ Because the code is not independently enforceable or binding, disputing parties are afforded the option to utilize the Code or forego it entirely.⁴⁴ Thus, the Code is structured as soft law instrument.⁴⁵ It allows the parties to make their own value judgments about flexibility and transparency.⁴⁶ Even if both parties bind themselves to the Code, they retain the ability to agree otherwise on key provisions.⁴⁷

Often, arbitration as a form of dispute resolution is attractive specifically because of procedural flexibility. The Code preserves flexibility while still providing guidelines to address glaring concerns like disclosure obligations and conflicts of interest.⁴⁸

The Code's equivalent within commercial arbitration—the International Bar Association's Guidelines on Conflicts of Interest in International

adjudicators-in-international-investment-disputes-low-hanging-fruit-or-just-an-appetizer/ [https://perma.cc/7SRF-NCS2].

38. See Elliot Glusker, *Arbitration Hurdles Facing Foreign Investors in Russia: Analysis of Present Issues and Implications*, 10 PEPPERDINE DISP. RES. L.J. 595, 619–21 (2010).

39. See generally UNCITRAL CODE OF CONDUCT FOR ARBITRATORS IN INTERNATIONAL INVESTMENT DISPUTE RESOLUTION, *supra* note 1, at 17–20; Ank Santens, *The Move Away from Closed-List Arbitrator Appointments: Happy Ending or a Trend to Be Reversed?*, KLUWER ARB. BLOG (June 28, 2011), <https://arbitrationblog.kluwerarbitration.com/2011/06/28/the-move-away-from-closed-list-arbitrator-appointments-happy-ending-or-a-trend-to-be-reversed/> [https://perma.cc/MY3V-W6L9] (highlighting the two different approaches available).

40. UNCITRAL CODE OF CONDUCT FOR ARBITRATORS IN INTERNATIONAL INVESTMENT DISPUTE RESOLUTION, *supra* note 1, at 17–20.

41. Santens, *supra* note 39.

42. UNCITRAL CODE OF CONDUCT FOR ARBITRATORS IN INTERNATIONAL INVESTMENT DISPUTE RESOLUTION, *supra* note 1, at 17–20.

43. *Id.*

44. See Tara Braulotte, *UNCITRAL Adopts a New Code of Conduct for Arbitrators in International Investment Dispute Resolution*, LINKLATERS (Mar. 25, 2024), <https://www.linklaters.com/en/insights/blogs/arbitrationlinks/2024/march/uncitral-code-of-conduct> [https://perma.cc/Z7SN-XE3E] (discussing enforcement issues).

45. *Id.*

46. *Id.*

47. *Id.*

48. UNCITRAL CODE OF CONDUCT FOR ARBITRATORS IN INTERNATIONAL INVESTMENT DISPUTE RESOLUTION, *supra* note 1, at 17–20.

Arbitration (“Guidelines”)—provides a similar level of flexibility.⁴⁹ Launched in 2004, the Guidelines are a similar soft law instrument that provide guidance regarding the scope of arbitrator’s disclosure obligations and conflict of interest issues.⁵⁰ The Guidelines categorize disclosure requirements into three lists: Green, Orange, and Red.⁵¹ The Green List includes situations in which there is no appearance of a conflict and no actual conflict objectively exists.⁵² The Orange List includes situations that may subjectively, in the view of the parties, give rise to doubts about the arbitrator’s impartiality.⁵³ The Red List is split into waivable and non-waivable conflicts.⁵⁴ Non-waivable conflicts include situations deriving from “the overriding principle that no one person can be his or her own judge.”⁵⁵ The waivable conflict list contains everything else.⁵⁶

Similar to the Code, the Guidelines are not binding and do not specifically address the potential disqualification of an arbitrator.⁵⁷ Nonetheless, the Guidelines have become quite influential and are frequently considered relevant by arbitral institutions for assessing the impartiality and independence of a challenged arbitrator.⁵⁸ In a 2014 survey on the use of soft law instruments in international arbitration, the Guidelines were the second most popular instrument: forty-four percent of respondents use them always or regularly.⁵⁹ Another survey revealed that seventy-one percent of respondents were aware of the Guidelines and have seen them used in practice and sixty percent found the Guidelines effective.⁶⁰

Respondents to the latter listed survey reported that the two most effective ways to regulate arbitrator conduct are (1) through instruments issued by arbitral institutions; and (2) through a code of conduct issued by a professional institution or body for arbitrators.⁶¹ Respondents showed a

49. *IBA Guidelines on Conflicts of Interest in International Arbitration*, INT’L BAR ASS’N 1–3 (Aug. 10, 2015), <https://www.ibanet.org/MediaHandler?id=e2fe5e72-eb14-4bba-b10d-d33dafee8918> [<https://perma.cc/9JMQ-WEKV>].

50. *Id.* at i.

51. *Id.* at 2.

52. *See id.* at 19.

53. *See id.* at 18.

54. *See id.* at 6.

55. *IBA Guidelines on Conflicts of Interest in International Arbitration*, *supra* note 49, at 6.

56. *Id.* at 9.

57. Margaret Moses, *The Role of the IBA Guidelines on Conflicts of Interest in Arbitrator Challenges*, KLUWER ARB. BLOG (Nov. 23, 2017), <https://arbitrationblog.kluwerarbitration.com/2017/11/23/role-iba-guidelines-conflicts-interest-arbitrator-challenges/> [<https://perma.cc/D9GD-989K>].

58. *Id.*

59. Elina Mereminskaya, *Results of the Survey on the Use of Soft Law Instruments in International Arbitration*, KLUWER ARB. BLOG (June 6, 2014), <https://arbitrationblog.kluwerarbitration.com/2014/06/06/results-of-the-survey-on-the-use-of-soft-law-instruments-in-international-arbitration/> [<https://perma.cc/V363-CGKM>].

60. *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, WHITE & CASE 35–36, https://arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf [<https://perma.cc/RTH8-8MK4>].

61. *Id.* at 38.

slight preference for the former at twenty-three percent, but the latter only trailed slightly by one percent.⁶² Seventeen percent of respondents thought the Guidelines were the most effective.⁶³ Considering the similarity between the two, the success of the Guidelines could signal impending success for the Code. At the same time, ISDS does not delve into identifying permissible versus impermissible conflict and leaves a great deal of leeway to the parties in terms of what they will consent to or not.⁶⁴ Under the Guidelines, on the other hand, the Red List does provide that some conflicts are non-waivable and require arbitrator recusal.⁶⁵

The next degree of regulation would be to create a closed class of arbitrators.⁶⁶ This would essentially function as an outright prohibition on double-hatting, which remains a contentious topic within the ISDS community and will likely remain so despite the creation of the Code.⁶⁷

There are several advantages to this approach. Foremost, it would ensure the greatest degree of arbitrator independence and impartiality under the existing framework.⁶⁸ An arbitrator would be insulated from accusations of implicit or explicit bias because their role would be limited to that of adjudicator.⁶⁹

The Code of Conduct for United States Judges is an example of a functioning prohibitory framework.⁷⁰ Per Canon 3(c)(1)(b), a federal judge must disqualify themselves if (1) the judge served as a lawyer in the matter; (2) the judge has been a material witness; or if (3) a lawyer with whom the judge was previously associated served on the matter concurrently with the judge.⁷¹ Contrasted with Article 4 of the Code, the difference is stark.⁷² At no point is a federal judge permitted to adjudicate any matter in which they acted as legal counsel.⁷³ But an arbitrator—in compliance with the Code—could theoretically adjudicate a claim in which they were a disputing party's legal representative.⁷⁴

The stringent ethical requirements required from a federal judge reflects not only the scale of the United States Federal Court system, but also the resources available to fund an independent judiciary. The nature of arbitration is inherently different than adversarial proceedings before a

62. *Id.*

63. *Id.*

64. *Id.* at 33–36.

65. *IBA Guidelines on Conflicts of Interest in International Arbitration*, *supra* note 49, at 6.

66. *See generally* Santens, *supra* note 39.

67. *Code of Conduct—Background Papers: Double Hatting*, *supra* note 25, at 1–2.

68. *See* Santens, *supra* note 39.

69. *See id.*

70. CODE OF CONDUCT FOR UNITED STATES JUDGES, 175 F.R.D. 363, 364 (1998).

71. *Id.* at 368.

72. UNCITRAL CODE OF CONDUCT FOR ARBITRATORS IN INTERNATIONAL INVESTMENT DISPUTE RESOLUTION, *supra* note 1, at 17–20.

73. CODE OF CONDUCT FOR UNITED STATES JUDGES, 175 F.R.D. at 368.

74. *See* UNCITRAL CODE OF CONDUCT FOR ARBITRATORS IN INTERNATIONAL INVESTMENT DISPUTE RESOLUTION, *supra* note 1, at 17–20.

court. ISDS, as a niche aspect of arbitration at large, may not be amenable to those same strict ethical requirements, or the associated financial constraints and requirements.

First, an independent class of arbitrators would force a schism in an already narrow pool of qualified experts. While promoting independence and impartiality, this option runs the risk of decreasing diversity and makes developing the next generation of arbitrators difficult.⁷⁵ A majority of the individuals chosen to serve as international arbitrators are male, from North America or Western Europe, and generally quite senior.⁷⁶ Prohibiting double hatting could reinforce the “male, pale, and stale” profile.⁷⁷ Furthermore, in such a narrow pool of qualified professionals, parties would notice dwindling representation options.⁷⁸

Second, disputing parties could bear the burden of exponentially increased costs.⁷⁹ If an arbitrator accepts an appointment, and is thereby disqualified from pursuing other work, fees will increase to reflect the arbitrator’s opportunity cost.⁸⁰ The Code, in discussing “reasonable fees,” considers the relevant circumstances.⁸¹ This would include situations where the arbitrator would forego other work to accept an appointment.⁸² If the cost of selecting the “best” arbitrator becomes prohibitively expensive, then arbitration becomes less appealing.⁸³

75. Anthea Roberts, *A Possible Approach to Transitional Double Hatting in Investor-State Arbitration*, EJIL: TALK! (July 31, 2017), <https://www.ejiltalk.org/a-possible-approach-to-transitional-double-hatting-in-investor-state-arbitration/> [<https://perma.cc/LE4D-FGJ3>].

76. Joseph Mamounas, *ICCA 2014. Does “Male, Pale, and Stale” Threaten the Legitimacy of International Arbitration? Perhaps, but There’s No Clear Path to Change*, KLUWER ARB. BLOG (Apr. 10, 2014), <https://arbitrationblog.kluwerarbitration.com/2014/04/10/icca-2014-does-male-pale-and-stale-threaten-the-legitimacy-of-international-arbitration-perhaps-but-theres-no-clear-path-to-change/> [<https://perma.cc/S9NY-EFTJ>].

77. *Id.*

78. See Roberts, *supra* note 75 (“If we adopt too stringent an approach against double hatting in the periphery, we are going to make it harder to develop the next generation of arbitrators (generational renewal) and increase the diversity of the existing pool (diversity).”).

79. See generally Matthew Hodgson et al., *2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration*, BRITISH INST. OF INT’L AND COMPAR. L. 11 (June 2021), https://www.biiicl.org/documents/136_isds-costs-damages-duration_june_2021.pdf [<https://perma.cc/ZQ9Y-7J8U>].

80. Jason Fernando, *Opportunity Cost, Definition, Formula, and Examples*, INVESTOPEDIA (Apr. 1, 2024), <https://www.investopedia.com/terms/o/opportunitycost.asp> [<https://perma.cc/2C52-K9PC>] (“Opportunity cost is the forgone benefit that would have been derived from an option other than the one that was chosen.”).

81. UNCITRAL CODE OF CONDUCT FOR ARBITRATORS IN INTERNATIONAL INVESTMENT DISPUTE RESOLUTION, *supra* note 1, at 27–28.

82. See generally Iffy Ibekw, *Determining The Opportunity Cost*, ABOVE THE L. (Apr. 1, 2022), <https://abovethelaw.com/2022/04/determining-the-opportunity-cost/#:~:text=Opportunity%20costs%20refer%20to%20the,choosing%20one%20alternative%20over%20another> [<https://perma.cc/W7HV-57DF>] (“Opportunity costs refer to the potential benefits a lawyer misses when choosing one alternative over another.”).

83. See generally Hodgson, et al., *supra* note 79, at 4 (discussing that cost of arbitrations is a concern for parties).

Parties may be forced to look elsewhere to resolve disputes.⁸⁴ It may also disincentivize candidates from accepting appointments which would ultimately fall back onto disputing parties. This ultimately could snowball into decreasing usage of ISDS as a dispute resolution mechanism altogether.

Third, arbitrator competence could be inadvertently affected. Limiting a candidate's ability to pursue further work because of their appointments inherently restricts representative experience.⁸⁵ While working under one "hat," the arbitrator cannot continue to develop their skillset under the other "hat."⁸⁶ While not a per se negative, it is a tradeoff.

Fourth, there could be a decrease in party autonomy. International arbitration, as a creature of contract (in this context, a treaty), is driven by user interest in selecting arbitrators that will best understand their positions and rights.⁸⁷ It is why arbitration is attractive to parties in the first place. To many, flexibility to select an arbitrator ensures predictability and consistency.⁸⁸ While appointments were never a "free-for-all," any potential narrowing of party freedom is meaningful.⁸⁹ In the thirty-eight session of Working Group III, "it was said" that using a predetermined list of adjudicators or roster would be against the essence of arbitration, unless done on a voluntary basis or where the list or roster would be used for guidance purpose only.⁹⁰

Further afield still is what the European Union advocated for: the establishment of a multilateral investment court ("MIC"), composed of a first instance and appellate tribunal staffed by full-time adjudicators.⁹¹ This would be a major departure from the ISDS process already in place.⁹² Parties would have little or no influence on the appointment of the adjudicators in a standing court.⁹³ Instead of ad hoc arbitration, an MIC would bring key features of domestic and international courts to investment arbitration.⁹⁴ The standing mechanism proposed by the EU would have a first instance tribunal to hear disputes, conduct fact finding, and apply the applicable

84. See *Arbitration vs. Litigation: Making the Right Choice*, LEXISNEXIS (Sept. 20, 2023), <https://www.lexisnexis.com/community/insights/legal/b/thought-leadership/posts/arbitration-vs-litigation> [<https://perma.cc/PX39-AQYW>].

85. See Santens, *supra* note 39.

86. See *id.*

87. Fabio Núñez del Prado, *The Fallacy of Consent: Should Arbitration Be a Creature of Contract?*, 35 EMORY INT'L L. REV. 219, 226 (2021).

88. Mamounas, *supra* note 76.

89. See generally *Number of Arbitrators and Method of Appointment – UNCITRAL Arbitration*, INT'L CTR. FOR SETTLEMENT OF INV. DISPS., <https://icsid.worldbank.org/procedures/arbitration/uncitral/appointments> [<https://perma.cc/2JB9-26GL>] (last visited Apr. 14, 2024).

90. Rep. of Working Group III (Inv.-State Dispute Settlement Reform) on the Work of its Fortieth Session, U.N. Doc. A/CN.9/1050, at 5 (2021).

91. See Issam Hallak, *Multilateral Investment Court: Framework Options*, EUR. PARLIAMENTARY RSCH. SERV. 1 (June 2021), [https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690642/EPRS_BRI\(2021\)690642_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690642/EPRS_BRI(2021)690642_EN.pdf) [<https://perma.cc/P9WJ-JC83>].

92. *Id.* at 2.

93. *Id.*

94. *Id.*

law to the facts.⁹⁵ The appellate tribunal would hear appeals from the tribunal of first instance.⁹⁶ Arbitrators who sat on these tribunals would be salaried and have no outside activities.⁹⁷

The EU considers that a MIC would enhance predictability and consistency of decisions in investor-state disputes.⁹⁸ The transparency of the dispute resolution process would arguably increase because arbitrators would be assigned at random.⁹⁹ A MIC also has the potential to increase diversity, particularly among geographic regions, among arbitrators.¹⁰⁰ The MIC's greatest asset lies in its potential to legitimize process and outcomes.¹⁰¹

The drawbacks of replacing the ISDS system with an MIC include eliminating party autonomy in the arbitrator selection process, potential politicization of judicial appointments, and increased case duration and cost.¹⁰² The Russian Federation expressed these concerns in their comments to the Working Group, highlighting that the advantages of an international investment court do not outweigh the advantages of the existing ISDS process.¹⁰³ Because the MIC tribunals would be composed of judges appointed by the state, the risk of court packing (i.e., only adjudicators sympathetic to the state are appointed) becomes relevant.¹⁰⁴ Moreover, the centralization of disputes also brings the possibility that the system overloads and proceedings carry on unnecessarily.¹⁰⁵

Logistically speaking, most states would have to commit to move away from the ISDS system to a MIC for the MIC to be effective. Otherwise, there would not be sufficient resources to fund such an undertaking. The cost to establish two tiers of professional international tribunals is significant. In the MIC system, it appears that a permanent court financed by

95. Possible Reform of Investor-State Dispute Settlement (ISDS) Submission from the European Union and its Member States, U.N. Doc. A/CN.9/WG.III/WP.159/Add.1 ¶ 3.2 (2019).

96. *Id.* ¶ 3.3.

97. *Id.* ¶ 3.4.

98. *Multilateral Investment Court project*, EUR. COMM'N, https://policy.trade.ec.europa.eu/enforcement-and-protection/multilateral-investment-court-project_en [<https://perma.cc/C8U2-H3T3>] (last visited Apr. 14, 2024).

99. Possible Reform of Investor-State Dispute Settlement (ISDS) Submission from the European Union and its Member States, *supra* note 95, at ¶ 3.8.

100. *See id.* ¶ 3.7.

101. *Multilateral Investment Court project*, *supra* note 98.

102. Julien Chaisse, *Handbook of International Investment Law and Policy*, SPRINGER (2020), https://link.springer.com/referenceworkentry/10.1007/978-981-13-5744-2_81-1 [<https://perma.cc/7MDY-CRW2>].

103. Possible Reform of Investor-State Dispute Settlement (ISDS) Submission from the Government of the Russian Federation, U.N. Doc. A/CN.9/WG.III/WP.188/Add.1, at 2 (2019).

104. *See* Nikos Lavranos, *The ICS and MIC Projects: A Critical Review of the Issues of Arbitrator Selection, Control Mechanisms, and Recognition and Enforcement*, SPRINGER LINK (Feb. 21, 2020), https://link.springer.com/referenceworkentry/10.1007/978-981-13-5744-2_81-1 [<https://perma.cc/6KSN-9XAB>].

105. *Id.*

States may make the adjudicators of the disputes beholden to State interests that would, of course, be funding the system. This could create a disproportionately biased institution and weaken investors' rights seeking redress.

C. WHAT IS IN THE CODE: SPECIFIC PROVISIONS

Ultimately, the final Code caters more to the reformation advocates than those who sought extensive structural change. The Working Group considered commentary from over twenty-five different countries prior to creating the first draft.¹⁰⁶ A first version of the Code was published in 2020 and several subsequent versions were published in 2021 and 2022 following extensive input by various States.¹⁰⁷ The adopted Code¹⁰⁸ includes twelve articles, summarized as follows,¹⁰⁹ with accompanying commentary:

Article 1: Definitions

This article defines key terms used throughout the Code.¹¹⁰

First, International Investment Dispute ("IID") means a dispute between an investor and (1) a State; (2) a regional economic integration organization; (3) any constituent subdivision of a State; (4) agency of a State; or (5) agency if a regional economic integration organization.¹¹¹ The dispute must be submitted before resolution pursuant to an instrument of consent which is defined as either "a treaty providing for the protection of investors," "legislation governing foreign investments," or an investment contract between the above listed parties upon which the consent to arbitrate is based.¹¹² Applicable Rules include the "applicable arbitration rules and any law applicable to the IID proceeding."¹¹³

"An Arbitrator is a person who is a member of an arbitral tribunal or an International Centre for Settlement of Investment Disputes ("ICSID") ad hoc committee and who is appointed to resolve an IID."¹¹⁴ "A Candidate means a person who has been contacted regarding potential appointment as an Arbitrator, but who has not yet been appointed."¹¹⁵

106. Rep. of Working Group III (Inv.-State Dispute Settlement Reform) on the Work of its Fortieth Session, *supra* note 90, at 3.

107. *ICSID and UNCITRAL Release Version Four of the Draft Code of Conduct for Adjudicators in International Investment Disputes*, INT'L CTR. FOR SETTLEMENT OF INV. DISPS. (July 25, 2022), <https://icsid.worldbank.org/news-and-events/news-releases/icsid-and-uncitral-release-version-four-draft-code-conduct> [<https://perma.cc/69FT-UKQX>].

108. UNCITRAL CODE OF CONDUCT FOR ARBITRATORS IN INTERNATIONAL INVESTMENT DISPUTE RESOLUTION, *supra* note 1, at v.

109. *Id.* at 1-7.

110. *Id.* at 1.

111. *Id.*

112. *Id.*

113. *Id.*

114. UNCITRAL CODE OF CONDUCT FOR ARBITRATORS IN INTERNATIONAL INVESTMENT DISPUTE RESOLUTION, *supra* note 1, at 1.

115. *Id.*

Article 2: Application of the Code

Arbitrators in, and any Candidates for, an IID are subject to the Code. The Code may be applied by agreement of the disputing parties or by the instrument of consent.¹¹⁶

Article 3: Independence and Impartiality

An Arbitrator has a duty to be independent and impartial.¹¹⁷ This duty includes the obligation not to (1) be influenced by external loyalties; (2) heed external instructions regarding the international investment dispute; (3) succumb to past, present, or prospective financial or business relationships; (4) use their position to advance personal or financial interests in the disputing parties or the ultimate outcome; (5) engage in behavior which interferes with duty performance; and (6) behave in such a way as to create the appearance of partiality or a lack of independence.¹¹⁸

Article 4: Limit on Multiple Roles

Arbitrators may not act concurrently as legal representative or expert witness unless the disputing parties agree otherwise.¹¹⁹ The scope of this regulation is limited to any proceeding which involves the same measure(s), the same or related party (parties), or the same provision(s) of the same instrument of consent.¹²⁰

Article 4(2) and 4(3) further provide that a former Arbitrator cannot act as a legal representative or expert witness in any other international investment dispute involving the same measure(s) or the same or related party (parties) within three years.¹²¹

The former Arbitrator's ability to be legal representative or expert witness in an international investment dispute involving the same provision(s) of the same instrument is limited to a period of one year.¹²²

Article 5: Duty of Diligence

The Arbitrator has a duty to perform their role diligently, devote sufficient time to the proceedings, and render decisions in a timely manner.¹²³ The commentary clarifies that "Arbitrators should not take on additional cases or responsibilities if [it] would impede [their] ability to perform" duties in a timely manner or cause delays in the proceeding.¹²⁴ The Candidate should not only inform the party of their availability over a certain period of time, but if the candidate anticipates not being able to fulfil their duty of diligence

116. *Id.* at 2.

117. *Id.*

118. *Id.*

119. *Id.*

120. UNCITRAL CODE OF CONDUCT FOR ARBITRATORS IN INTERNATIONAL INVESTMENT DISPUTE RESOLUTION, *supra* note 1, at 2.

121. *Id.* at 3.

122. *Id.*

123. *Id.*

124. *Id.* at 21.

they should not accept the appointment.¹²⁵ What is considered timely will depend on the specific circumstances of any given case.¹²⁶

Article 6: Integrity and Competence

An Arbitrator also has a duty to possess and maintain the skills and knowledge necessary to perform their responsibilities.¹²⁷ The Arbitrator must conduct IID proceedings with “integrity, fairness, and civility.”¹²⁸ Generally, competence is broadly understood to include professional knowledge and experience in investment and public international law.¹²⁹ It also includes linguistic skills.¹³⁰ Civility obligates the arbitrator to be polite, respectful, and professional when interacting with participants in the IID proceeding.¹³¹

Article 7: Ex parte Communications

Ex parte communications are prohibited with limited exceptions.¹³²

The prohibition applies only if the following three criteria are met: “(1) there is a written or oral communication between a Candidate or an Arbitrator on the one hand and a disputing party, its legal representative, affiliate, subsidiary, or other related person on the other; (2) the communication concerns the IID; and (3) the communication is made without the presence of or knowledge of other disputing parties or their legal representatives.”¹³³ A communication must meet all three above listed criteria.¹³⁴

For example, a phone call regarding matters distinct from the IID or a meeting with a disputing party where the other parties’ legal representative participated would not be prohibited under article 7.¹³⁵ If the other party is present remotely or on notice of the contents of the communication, it is not prohibited.¹³⁶ As long as the other disputing party is informed prior to the communication and given an opportunity to take part, the communication is likely permissible.¹³⁷ It is not sufficient that the other party becomes aware of the communication after the fact.¹³⁸

Article 7(1) further provides that ex parte communication is permissible if (1) the Instrument of Consent, (2) the Applicable Rules, or (3) the agreement

125. *Id.*

126. UNCITRAL CODE OF CONDUCT FOR ARBITRATORS IN INTERNATIONAL INVESTMENT DISPUTE RESOLUTION, *supra* note 1, at 21.

127. *Id.* at 3.

128. *Id.*

129. *Id.* at 22.

130. *Id.*

131. *Id.*

132. UNCITRAL CODE OF CONDUCT FOR ARBITRATORS IN INTERNATIONAL INVESTMENT DISPUTE RESOLUTION, *supra* note 1, at 3.

133. *Id.* at 23.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. UNCITRAL CODE OF CONDUCT FOR ARBITRATORS IN INTERNATIONAL INVESTMENT DISPUTE RESOLUTION, *supra* note 1, at 23.

of the disputing parties provides for it.¹³⁹ For instance, the presence or knowledge of both parties is generally required when interviewing a candidate for the role of sole arbitrator.¹⁴⁰ But “parties may agree that ex parte interviews are permissible.”¹⁴¹

Article 7(2) also allows communications between a Candidate and a disputing party for the purpose of vetting the Candidate for potential party appointment.¹⁴² Provided the communication is about the Candidate’s competence, availability, or the existence of potential conflicts of interest, then it is permissible.¹⁴³

Even when ex parte communication is permitted under 7(1) or 7(2), any substantial procedural aspects or issues of merit should not be discussed.¹⁴⁴ A few examples include jurisdiction of the tribunal, the substance of the dispute, and the merit of the claims.¹⁴⁵

Article 8: Confidentiality

An Arbitrator may not “disclose or use any information concerning or acquired in connection with an IID proceeding.”¹⁴⁶ Such information, including draft decisions and IID proceeding deliberations, are confidential.¹⁴⁷ “Disclosure” refers to the sharing or circulation of information or material by making it available to anyone without authorization.¹⁴⁸ This includes making confidential information publicly available.¹⁴⁹ The term “use” refers specifically to availing oneself of information garnered through the IID process and possibly taking advantage of it.¹⁵⁰

Arbitrators are permitted to comment on rendered decisions provided it is made publicly available in accordance with the instrument of consent or applicable rules.¹⁵¹ But commentary is prohibited while IID proceedings are pending, or the decision is subject to a post-award remedy or review.¹⁵² The content of the commentary, when allowed, may list the legal issues dealt with, discuss the procedural aspects of the proceedings, and describe the stated reasoning of the award.¹⁵³ It can never address the content of the deliberations.¹⁵⁴

139. *Id.* at 23–24.

140. *Id.*

141. *Id.* at 24.

142. *Id.*

143. *Id.*

144. UNCITRAL CODE OF CONDUCT FOR ARBITRATORS IN INTERNATIONAL INVESTMENT DISPUTE RESOLUTION, *supra* note 1, at 24.

145. *Id.*

146. *Id.* at 4.

147. *Id.*

148. *Id.* at 25.

149. *Id.*

150. UNCITRAL CODE OF CONDUCT FOR ARBITRATORS IN INTERNATIONAL INVESTMENT DISPUTE RESOLUTION, *supra* note 1, at 25.

151. *Id.* at 25–26.

152. *Id.* at 26.

153. *Id.*

154. *Id.*

There is an exception to the prohibition on commentary when a Candidate or Arbitrator is legally compelled to disclose information, such as a subpoena issued by a domestic court.¹⁵⁵

Article 9: Fees and Expenses

Fees are to be reasonable and in accordance with the applicable rules.¹⁵⁶ What a “reasonable” fee is will fluctuate depending on the complexity of the factual and legal issues that arise in the IID, the amount in dispute, the time spent by the arbitrator, and any other relevant circumstances of the case.¹⁵⁷ The Arbitrator must keep record of their time and expenses available upon request of a disputing party.¹⁵⁸

Article 10: Assistant

Arbitrators are permitted assistants.¹⁵⁹ The disputing parties must, however, agree on the role, scope of duties, and expense prior to engaging the Assistant.¹⁶⁰ Tasks typically carried out by Assistants include legal research, review of pleadings and evidence, case logistics, attendance at deliberations, and other similar assignments.¹⁶¹ The Assistant should never exercise any decision-making function but should always perform tasks under the direction of the Arbitrator.¹⁶²

It is the Arbitrator’s responsibility to ensure that their Assistant acts in accordance with the Code.¹⁶³

Article 11: Disclosure Obligation

Arbitrators have a duty to “disclose any circumstances likely to give rise to justifiable doubts of his or her independence or impartiality.”¹⁶⁴ “Doubts are justifiable if a reasonable person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood the Candidate or arbitrator may be influenced by factors” separate from the merits of the case as presented by the parties in reaching their decision.¹⁶⁵ Furthermore, the disclosure obligation is not subject to temporal limitations.¹⁶⁶ The commentary accompanying Article 11 directs Candidates and Arbitrators to existing international standards, such as the 2014 IBA Guidelines, for practical guidance as to the types of circumstances that require disclosure.¹⁶⁷

155. *Id.*

156. UNCITRAL CODE OF CONDUCT FOR ARBITRATORS IN INTERNATIONAL INVESTMENT DISPUTE RESOLUTION, *supra* note 1, at 4–5.

157. *Id.* at 27.

158. *Id.*

159. *Id.* at 5.

160. *Id.*

161. *Id.* at 28.

162. UNCITRAL CODE OF CONDUCT FOR ARBITRATORS IN INTERNATIONAL INVESTMENT DISPUTE RESOLUTION, *supra* note 1, at 28.

163. *Id.* at 29.

164. *Id.* at 5.

165. *Id.* at 30.

166. *Id.*

167. *Id.*

Specific information which must be disclosed regardless of the catch-all provision in 11(1) is enumerated in 11(2).¹⁶⁸ Mandatory disclosures include any financial, business, professional, or close personal relationship within the last five years with “(1) any disputing party, (2) the legal representative of a disputing party in the IID proceeding, (3) other arbitrators and expert witnesses in the IID proceeding, and (4) any person or entity identified by a disputing party” who has interest in the outcome of the proceeding.¹⁶⁹ This disclosure obligation operates independently of the first provision and is mandatory regardless of whether it gives rise to justifiable doubts.¹⁷⁰

“Business” relationship means any past or present connection related to commercial activities usually shared with financial interest.¹⁷¹ “Professional” relationship includes where a Candidate or Arbitrator was an employee, associate, or partner in the same law firm as another person involved in the IID proceeding.¹⁷² It could also extend to involvement in the same project or case as opposing counsel or co-Arbitrator.¹⁷³ Being a member of the same professional association or charitable organization usually would not constitute a professional relationship.¹⁷⁴ “Close personal” relationships are those involving a degree of intimacy beyond the financial, business, or professional relationships.¹⁷⁵ This could involve familial bonds or long-term friendships.¹⁷⁶ Casual or social acquaintances, distant family ties, or being in the same class at school would not qualify as a close personal relationship.¹⁷⁷

In addition to persons with whom the arbitrator has a relationship, disclosure of any financial or person interest in “(1) the outcome of the IID proceeding, (2) any other proceedings involving the same measure(s), and (3) any other proceeding involving” a related person or party is required.¹⁷⁸ Financial interest does not refer to remuneration of fees or reimbursement of expenses incurred in the IID proceeding.¹⁷⁹

A Candidate or Arbitrator must disclose all IID and related proceedings within the last five years in which they participated in any capacity, including as a legal representative and expert witness.¹⁸⁰ This includes any international or domestic proceeding directly linked with an IID

168. UNCITRAL CODE OF CONDUCT FOR ARBITRATORS IN INTERNATIONAL INVESTMENT DISPUTE RESOLUTION, *supra* note 1, at 5–6.

169. *Id.* at 5.

170. *Id.* at 5–6.

171. *Id.* at 30–31.

172. *Id.* at 31.

173. *Id.*

174. UNCITRAL CODE OF CONDUCT FOR ARBITRATORS IN INTERNATIONAL INVESTMENT DISPUTE RESOLUTION, *supra* note 1, at 31.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 6.

179. *Id.* at 31.

180. UNCITRAL CODE OF CONDUCT FOR ARBITRATORS IN INTERNATIONAL INVESTMENT DISPUTE RESOLUTION, *supra* note 1, at 6.

proceeding, such as a set-aside or enforcement proceeding.¹⁸¹ In contrast, just because a proceeding involved the same disputing parties, addressed the same measure, or is based on the same instrument of consent does not mean it is related.¹⁸²

Arbitrators must also disclose any prospective concurrent appointments.¹⁸³ The obligation to make such disclosures is ongoing as new information arises as is the duty to make reasonable efforts to become aware of a conflict.¹⁸⁴ Erring on the side of disclosure when in doubt is recommended.¹⁸⁵

If an arbitrator's duty to safeguard confidential information prevents a robust disclosure, the arbitrator must disclose only to the extent possible.¹⁸⁶ If disclosure is wholly impossible, then the arbitrator must not accept appointment.¹⁸⁷

Lastly, failing to disclose a conflict of interest is not sufficient to establish a lack of independence or impartiality.¹⁸⁸ It is the content of the omitted information that determines whether there is a violation.¹⁸⁹

Article 12: Compliance with the Code

Arbitrators and Candidates must comply with the Code.¹⁹⁰ Adherence could be promoted by requiring a Candidate to sign a declaration or an Arbitrator to sign one upon appointment.¹⁹¹ Alternatively, if they are unable to comply, then recusal or resignation is mandatory.¹⁹² "Compliance with the Code may also be sought by bodies or institutions established to monitor any breach or impose sanctions."¹⁹³ That process and standard of challenge, disqualification, sanction, and remedy are governed by the instrument of consent or applicable rules.¹⁹⁴

D. WHAT IS NOT IN THE CODE: REGULATION, PROHIBITION, AND ENFORCEMENT

It is equally as important to understand what is not included in the Code as it is to understand what is. First, there is no outright prohibition on double-hatting in the Code. Article 4 provides only for temporal limitations

181. *Id.* at 32.

182. *Id.*

183. *Id.* at 6.

184. *Id.* at 32.

185. *Id.* at 6.

186. UNCITRAL CODE OF CONDUCT FOR ARBITRATORS IN INTERNATIONAL INVESTMENT DISPUTE RESOLUTION, *supra* note 1, at 6.

187. *Id.*

188. *Id.* at 7.

189. *Id.* at 34.

190. *Id.* at 7.

191. *Id.* at 34.

192. UNCITRAL CODE OF CONDUCT FOR ARBITRATORS IN INTERNATIONAL INVESTMENT DISPUTE RESOLUTION, *supra* note 1, at 7.

193. *Id.* at 34–35.

194. *Id.* at 7.

that narrow the scope of when multiple representation is permitted.¹⁹⁵ The closest the Code gets to a prohibition is the mandate against concurrent representation in Article 4(1)(a)–(c).¹⁹⁶ Thus, the Code does not create a separate class of professional arbitrators distinct from legal representatives and expert witnesses.¹⁹⁷ It only regulates the pre-existing role of an arbitrator.¹⁹⁸

Second, several provisions in the Code can be sidestepped via agreement by disputing parties, the instrument of consent, or the applicable rules.¹⁹⁹ This is most apparent in Article 4 where agreement by disputing parties can overcome the mandate against concurrent double-hatting.²⁰⁰

Finally, enforcement of the Code is vague at best. The Code itself does not include an implementation and enforcement mechanism. Article 12 offloads the issue of sanctions and remedies to the instrument of consent or the applicable rules.²⁰¹ In addition to lacking an internal enforcement framework, the Code is not currently incorporated into any existing treaties.²⁰² This means it is not binding unless disputing parties integrate the Code in a case-specific agreement.²⁰³ Until such a time as the Code is officially integrated into treaties, it will function primarily as guidelines that parties can opt to follow but are not required to do so.²⁰⁴

Overall, the Code is a good compromise, if not at least a step in the right direction. It demonstrates a uniform desire to reform the ISDS process albeit to varying degrees. While not the perfect solution, it provides a high degree of autonomy for disputing parties to tailor the resolution to the specific facts, a cornerstone of arbitration. If parties choose to use the Code like the tool it is designed to be, then they will likely find it addresses the major concerns identified by Working Group III. If IBA Guidelines are any indication, the Code is likely to succeed even if the EU continues to advocate for the creation of a MIC. For now, the Code strikes a balance between party autonomy and systemic legitimacy at this point in the ISDS reform process. Only time will tell whether the right balance has been achieved.

195. *Id.* at 2–3.

196. *Id.* at 2.

197. *Id.*

198. UNCITRAL CODE OF CONDUCT FOR ARBITRATORS IN INTERNATIONAL INVESTMENT DISPUTE RESOLUTION, *supra* note 1, at 2.

199. *See generally id.* at 3 (showing that Article 3 allows an instrument of consent to sidestep the prohibition on ex parte communications).

200. *See id.* at 2.

201. *Id.* at 7.

202. Gordon Bell & Marie-Aude Ziadé, *Code of Conduct for Arbitrators in International Investment Dispute Resolution*, GOWLING WLG (Oct. 24, 2023), <https://www.lexology.com/library/detail.aspx?g=88bbc2bf-f4f9-4bba-89b6-8d2d2f4b6e40> [<https://perma.cc/V3WN-AYWZ>].

203. *See id.*

204. *See id.*

Lawyers Abroad Committee, Contribution to the 2023 Year in Review

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Human Rights and Religion globally in 2022-2023; a focus on religion and human rights situations in Turkey, Ukraine, Nicaragua, Iran, and Afghanistan.

The American Bar Association's Lawyers Abroad Committee selected its topic this year from the common concern of our members regarding developments globally with respect to the law, human rights, and religion. The article includes discussion of relevant issues, consistent with this theme, which occurred in the past year in Afghanistan, Iran, Nicaragua, Turkey, and Ukraine.

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I. Afghanistan

A. GIRLS' ACCESS TO EDUCATION

1. *Codified Developments*

On December 22, 2022, Taliban-controlled Afghanistan suspended university education of all women.¹ Two days later, the Taliban banned all forms of women's education beyond grade seven, stating the need to fully segregate girls and boys under their interpretations of Sharia Law.² In late January 2023, Zabihullah Mujahid, the Taliban's Deputy Minister of Culture and Information, shared the Taliban's plan to open classrooms for all girls and women in the Hijri Shamsi Calendar New Year, the March 21, 2023.³ "Primary and secondary schools in cold climate provinces reopened" with the New Year, with "those in hot climate provinces having already reopened earlier in the year."⁴ However, "girls' secondary schools across the country remained closed."⁵ "A letter from the de facto Ministry of Education" "circulated widely on social media" stated "that 'for now [only] girls' schools ... from grade one to six' would be reopened,"⁶ continuing its mark on Afghanistan as the only state with restrictions against female education.⁷

On May 3, 2023, the de facto Ministry of Public Health of Afghanistan announced that only male medical students would be allowed to take the Exit Supplementary Exam, a requirement for pursuing further specialized medical studies.⁸ Subsequently, in July 2023, the de facto Ministry of Higher Education of Afghanistan announced that only male students would receive permission to take the Kankor (university entrance examinations), with the upcoming sessions scheduled in late July.⁹

1. U.N. Human Rights Council, *Situation of Women and Girls in Afg.—Rep. of the Special Rapporteur on the Situation of Hum. Rts. in Afg. and the Working Group on Discrimination Against Women and Girls*, U.N. Doc. A/HRC/53/31 (July 14, 2023) (submitted after the deadline in order to include the most recent information).

2. *Id.*

3. Kathy Gannon, *The AP Interview: Taliban Pledge All Girls in Schools Soon*, AP (Jan. 15, 2022), <https://apnews.com/article/afghanistan-education-united-nations-kabul-taliban-c07aefcb90b560bc82b60b17d9623833> [<https://perma.cc/W4Y5-54QZ>].

4. U.N. Assistance Mission in Afg. [UNAMA], *Human Rights Situation in Afghanistan: Feb.—Apr. 2023 Update* (Apr. 2023) [hereinafter "UNAMA Feb.-Apr. Update"], <https://unama.unmissions.org/file/21163/download?token=1UzWRCh-> [<https://perma.cc/Z7XX-XP7M>].

5. *Id.*

6. *Id.*

7. Press Release, U.N. OHCHR, *Afghanistan: Quality Education Must Be Equally Accessible to All*, U.N. Experts Say (Mar. 20, 2023), <https://www.ohchr.org/en/press-releases/2023/03/afghanistan-quality-education-must-be-equally-accessible-all-un-experts-say> [<https://perma.cc/33MR-J2LH>].

8. UNAMA, *Human Rights Situation in Afghanistan: May—June 2023 Update* (June 2023) [hereinafter "UNAMA May-June Update"], https://unama.unmissions.org/sites/default/files/human_rights_situation_in_afghanistan_may_-_june_2023_0.pdf [<https://perma.cc/XT37-VF5Y>].

9. UNAMA, *Human Rights Situation in Afghanistan: July—Sept. Update 2023 Update* (Sept. 2023) [hereinafter "UNAMA July—Sept. Update"], https://unama.unmissions.org/sites/default/files/human_rights_situation_in_afghanistan_jul-sep_2023.pdf [<https://perma.cc/V3XB-E73W>].

On August 23, 2023, at Kabul International Airport, de facto police prevented a group of female students from traveling to Dubai to pursue higher education, even though the female students had been accepted to a program funded by a UAE businessman because they were not all accompanied by male guardians (mahrams).¹⁰ According to reports, at least some of the women were subsequently able to travel to Dubai.¹¹

2. *Resistance*

In pre-Taliban Afghanistan, women were the majority of educators. From the late 2022 through early 2023, there has been a systemic ban on women in unsegregated workplaces and most teaching positions have been filled with Taliban members, and curricula now reflect the Taliban's beliefs of terrorism, misogyny, and other forms of violence.¹² However, news coming from the region reflects an undying resistance of women and girls to continue education, creating secret schools and placing their lives and well-beings at risk for their futures.¹³ Relatedly, Matiullah Wesa, a prominent Afghan campaigner for female education was arrested by the Taliban for his opposition.¹⁴

3. *Related Occurrences: The Treatment of Women*

a. United Nations Shut Down

On April 5, 2023, the de facto Ministry of Foreign Affairs of Afghanistan informed the United Nations that, effectively immediately, no Afghan

10. See *Taliban Stopped 100 Women Flying to Dubai for Univ. Scholarships: UAE Billionaire*, REUTERS (Aug. 23, 2023), <https://www.reuters.com/world/asia-pacific/taliban-stopped-100-women-flying-dubai-university-scholarships-uae-billionaire-2023-08-23/> [<https://perma.cc/Y5ZP-NP7U>].

11. Mujeeb Rahman Awrang Stanikzai, *UNAMA Releases New Report on Human Rights Situation in Afghanistan*, TOLO NEWS (Oct. 23, 2023), <https://tolonews.com/afghanistan-185686> [<https://perma.cc/84Y8-9YYJ>].

12. The Taliban is restricting access to secular education for women and girls, while increasing access to religious education. The Taliban has converted dozens of public schools, universities, and training centers into Islamic seminaries called madrasahs. This plan deprives a large number of students and teachers of education, jobs, and resources. One example is the conversion of the prestigious Abdul Hai Habibi High School into a madrasa that left its 6,000 students and 130 teachers without access to its modern library, computers, and science labs. The Taliban's goal is to create a vast network of madrasahs that will indoctrinate students in its extremist ideology and generate more Taliban members. The word "Taliban" itself means "students of madrasahs." This is eerily similar to the Taliban's plan in the 1990s, when radical madrasahs promoted militant ideologies. See Abubakar Siddique, *'War on Education': Taliban Converting Secular Schools into Religious Seminaries*, GANDHARA: RADIO FREE EUR./RADIO LIBERTY (June 25, 2022), <https://gandhara.rferl.org/a/taliban-secular-schools-converted-madrasahs-education/31914672.html> [<https://perma.cc/X4XL-TV24>].

13. *The Current, Women's Educ. in Afg. Under Threat*, CBC RADIO (June 22, 2023), <https://www.cbc.ca/radio/thecurrent/women-education-afghanistan-1.6548328> [<https://perma.cc/QN6N-E2TW>].

14. Nicholas Yong, *Afghanistan: Girls' Education Activist Arrested by Taliban*, BBC (Mar. 28, 2023), <https://www.bbc.com/news/world-asia-65095663> [<https://perma.cc/Y5P3-JGX8>].

woman was permitted to work for the UN in Afghanistan.¹⁵ “This decision extended a previous directive announced on December 24, 2022, banning Afghan women from working for national and international non-governmental organizations....¹⁶ Several UN national female personnel [had] experienced restrictions on their movements, including harassment, intimidation, and detention.”¹⁷ As a result, all UN Afghan Staff were instructed not to report to the office until at least May 5, 2023, and subsequently, all have worked from home.¹⁸

b. Freedom of Movement:

- On April 19 and 20, the de facto Department of Hajj and Religious Affairs of Baghlan and Takhar provinces issued letters prohibiting women from gathering during Eid al-Fitr.¹⁹
- The Taliban began enforcing a ban on women’s beauty salons on June 25, giving business owners a deadline of July 25th to close their doors.²⁰ On July 19th, a group of around twenty-five beauty salon owners and employees gathered in Kabul to protest the ban peacefully.²¹ Taliban security forces forcefully dispersed the protest with water cannons and warning shots fired into the air; four female protesters were arrested and released later the same day.²²
- On August 26, 2023, the Taliban Minister of the Ministry for the Propagation of Virtue and the Prevention of Vice in Bamyan province banned women from visiting Band-e-Amir National Park for failing to comply with the hijab order, as women had continued to visit the park despite a previous ban on women using parks, gyms, and public baths nationwide.²³
- In early September 2023, Taliban Department of Propagation of Virtue and the Prevention of Vice officials in Khost and Zabul provinces announced via loudspeaker that women are forbidden from going to local markets or shops without a mahram.²⁴

15. UNAMA, U.N. Protests Order by Taliban De-Facto Authorities Prohibiting Afghan Women Working for United Nations (Apr. 6, 2023), <https://unama.unmissions.org/un-protests-order-taliban-de-facto-authorities-prohibiting-afghan-women-working-united-nations> [https://perma.cc/E2HL-BNMX].

16. *Id.*

17. *Id.*

18. *Id.*

19. UNAMA Feb.—Apr. Update, *supra* note 4.

20. UNAMA July—Sept. Update, *supra* note 9.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* As of this writing, this directive is reportedly still in effect.

B. MEDIA FREEDOM

Following the Taliban's takeover of Afghanistan, the press and media are continually threatened and subject to limitations. Journalists are frequent targets of the de facto government, with raids and death threats.²⁵ Publication counts dropped from nearly 100 to eleven following the Taliban's takeover of Afghanistan.²⁶ Afghanistan was ranked 156/180 countries in the 2022 World Press Freedom Index of Reporters Without Borders (RSF).²⁷ Afghanistan received an eight out of ten score in freedom and scored one out of four in free media.²⁸ Journalists and their families face further economical and psychological pressures.²⁹ Journalists face interrogations, seizures of equipment, and torture.³⁰ The Taliban published ambiguous directives regulating media coverage, banning topics controversial to their enforcements of religious restrictions and negative coverage of national figures, allowing arbitrary and broad monitoring and enforcement.³¹

In February 2023, the Taliban banned several broadcasters, including Voice of America, Radio Free Europe, Radio Liberty, and Radio Azadi.³² Furthermore, Taliban armed forces raided the private broadcaster Tamadon TV and attacked the staff present without cause.³³ Consequently, several broadcasters, including the Afghanistan Journalists Center, relocated abroad.³⁴ At the end of February, media staff were prohibited from photographing and recording meetings in Helmand by de facto governors; this ban was subsequently lifted on March 3rd.³⁵

25. *Censorship of Media in Afghanistan*, FREE PRESS UNLIMITED (Oct. 4, 2021), <https://www.free-pressunlimited.org/en/current/censorship-media-afghanistan> [<https://perma.cc/E8TH-XDJH>].

26. *Afghanistan: Dramatic Loss of Indep. Media and Free Expression Over Past Two Years – Comprehensive New Rep.*, INT'L FED'N OF JOURNALISTS (Aug. 15, 2023), <https://www.ifj.org/media-centre/news/detail/category/press-releases/article/afghanistan-dramatic-loss-of-independent-media-and-free-expression-over-past-two-years-comprehensive-new-report> [<https://perma.cc/4B6E-V2VJ>].

27. UNAMA, *Future of Afghanistan's Media in the Balance as World Marks World Press Freedom Day* (May 3, 2023), <https://unama.unmissions.org/future-afghanistan%E2%80%99s-media-balance-world-marks-world-press-freedom-day> [<https://perma.cc/2ANZ-F3WA>].

28. *See Afghanistan* (2023), FREEDOM HOUSE, <https://freedomhouse.org/country/afghanistan/freedom-world/2023> [<https://perma.cc/CFU4-KK2N>] (last visited Apr. 8, 2024).

29. *Situation of Women and Girls in Afg.*, *supra* note 1, at 9.

30. *Id.* at 16.

31. *Id.* at 4.

32. *Access to VOA and RFE/RL Websites Restricted in Afghanistan*, COMM. TO PROTECT JOURNALISTS (Feb. 13, 2023, 2:24 PM), <https://cpj.org/2023/02/access-to-voa-and-rfe-rl-websites-restricted-in-afghanistan/> [<https://perma.cc/N2M4-U26N>].

33. *Taliban Raid Office of Tamadon TV, Assaults Staff in Afghanistan*, COMM. TO PROTECT JOURNALISTS (Feb. 15, 2023, 1:24 PM), <https://cpj.org/2023/02/taliban-raids-office-of-tamadon-tv-assaults-staff-in-afghanistan/> [<https://perma.cc/N4X7-25T9>].

34. Barry Salaam, *Amid Taliban Repression, Afghan Media Are a Beacon of Hope*, U.S. INST. OF PEACE (Aug. 10, 2023), <https://www.usip.org/publications/2023/08/amid-taliban-repression-afghan-media-are-beacon-hope> [<https://perma.cc/FQ7V-S76Q>].

35. UNAMA Feb.—Apr. Update, *supra* note 4, at 4.

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In March, the Taliban published new guidelines controlling YouTube channels, requiring a license to operate and implementing taxation every three years.³⁶ Journalists were arrested in Baghlan because of their criticism of de facto authorities and were later released within a day.³⁷ But journalist Mortaza Behboudi was arrested on January 7, 2023 and released after 284 days of imprisonment, which was on October 18, 2023.³⁸

Juxtaposed to these actions, the de facto government organized events highlighting World Press Freedom Day, recognized on the May 3rd, to show a commitment to protect the rights of media.³⁹ But the arrests of journalists continued throughout May.⁴⁰ At the end of the month, the Taliban established several committees to monitor media activities, leaving unpublicized the responsibilities of the committees.⁴¹ A secret UNAMA investigation revealed a lack of independence in private radio stations.⁴²

Specifically, the Taliban implemented the following restrictions for media broadcasters:

- A prohibition on broadcasting music;
- Segregation of male and female broadcasters;
- A prohibition on women calling into radio programs, except for programs concerning medical or religious issues of women, which women are allowed to phone in to ask questions;
- A requirement for female employees to comply with the niqab policy and be accompanied by male guardians to enter the workplace;
- A prohibition on broadcasting programs and opinions considered contrary to national interests or critical of the Taliban;
- A requirement for YouTube contributors to be licensed; and
- A requirement to use the term “Islamic Emirates” to refer to the Taliban.⁴³

The Taliban began issuing journalism ID cards on July 25th, and identified journalists are increasingly arrested according to reports.⁴⁴

Recently, the Taliban raided the Hamesha Bahar Radio and TV network in Jalalabad, citing mixed-gender journalism training as the cause.⁴⁵ The

36. *Id.*

37. *Id.*

38. RSF *Announces the Release of Journalist Mortaza Behboudi After 284 Days in Detention in Afghanistan: “the end of a painful ordeal,”* REPORTERS WITHOUT BORDERS (Oct. 18, 2023), <https://rsf.org/en/rsf-announces-release-journalist-mortaza-behboudi-after-284-days-detention-afghanistan-end-painful> [https://perma.cc/89VH-A577].

39. UNAMA May–June Update, *supra* note 8, at 5.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 5, n.4.

44. *Reported Journalist Arrests Hit 2023 High as Taliban Introduce ID Cards: Oct. 3, 2023 Update*, CTR. FOR INFO. RESILIENCE (Aug. 15, 2023), <https://www.info-res.org/post/reported-journalist-arrests-hit-2023-high-as-taliban-introduce-id-cards> [https://perma.cc/N3XC-VRZ3].

45. *Taliban Members ‘forcibly’ enter TV Network’s Office in Jalalabad, Close Journalism Training Course*, AFG. JOURNALISTS CTR. (Aug. 1, 2023), <https://ajfc.media/english/news/>

Taliban police forced two other radio stations located in the same compound to close for alleged associations with Hamisha Bahar.⁴⁶

The Commission on Media Violations held a meeting on August 12th concerning the importance of transparency with the conditions of arrested journalists and the need for clear and effective enforcement mechanisms.⁴⁷ These meetings have provided insight to freedom of media violations.⁴⁸

In August, the de facto government drafted new directives regulating media and freedom of press, revising approximately thirty percent of Afghanistan's pre-Taliban policies.⁴⁹ The draft aims to integrate Taliban interpretations of Sharia Law and requires full transparency and disclosure of media funding,⁵⁰ but has been announced to exclude any gender-based restrictions.⁵¹ It is still unknown when and if the Taliban's supreme leader will approve the draft.⁵²

II. Iran

A. NON-ADHERENCE TO HIJAB REQUIREMENTS

Presently, hijab is compulsory in Iran.⁵³ But this was not historically the case.⁵⁴ The wearing of hijab continues to be a subject of debate,⁵⁵ increasingly in the past year with heated debates surrounding women, life, and freedom protests.

1. Legal Basis for Enforcing Hijab

Article 167 of Iran's Constitution permits judges to rely upon Islamic sources when legal verdicts are absent from codified laws, resulting in massive impacts on anti-compulsory hijab protesters' arrest and punishment.⁵⁶

eastern-province-news/nangerhar/taliban-members-forcibly-enter-tv-network-s-office-in-jalalabad-disrupt-journalism-training-class [https://perma.cc/9NRV-UV9K].

46. U.N. SCOR, 78th Sess., at 8, U.N. Doc. S/2023/678 (Sept. 18, 2023).

47. *AJSC Welcomes the Resumption of work of the Media Violations Comm'n*, AFGHAN JOURNALISTS SAFETY COMM. (Aug. 14, 2023, 2:55 PM), <https://safety-committee.org/782/en-media-violations-commission-meeting-ajsc> [https://perma.cc/YGH9-NJG5].

48. *Id.*

49. Akmal Dawi, *Taliban Leaders Consider New Afghan Media Law*, VOICE OF AMERICA (Aug. 24, 2023, 3:23 PM), <https://www.voanews.com/a/taliban-leader-considers-new-afghan-media-law/7239886.html> [https://perma.cc/DV4U-LEMM].

50. *Id.*

51. *Id.*

52. *Id.*

53. NASIM BASIRI, *COMPULSORY VEIL IN IRAN: A SOCIAL JUSTICE PROBLEM* 54 (2018).

54. *Id.*

55. *Id.* at 50–58.

56. QUANUNI ASSASSI JUMHURI ISLAMAI IRAN [The Constitution of the Islamic Republic of Iran] art. 167 [1989].

Falling under Tazir offenses of the Criminal Code with variable punishments, the hijab is not precisely defined, leaving ambiguity juxtaposed against social norms.⁵⁷

The “Law of Spreading the Culture of Chastity and Hijab” highlights the hijab’s cultural importance and assigns promotion duties.⁵⁸ The “Law of Protecting Those Who Command the Good and Forbid the Evil” empowers individuals to enforce the hijab and Islamic values.⁵⁹

The “Bill to Support the Family by Promoting the Culture of Chastity and the Hijab” is the latest by the Iranian Judiciary following 2022 protests,⁶⁰ updating the “Law of Spreading the Culture of Chastity and Hijab,” as expanded by the Parliamentary Judiciary Committee, from Articles 15 to 70.

The vote by the Internal Committee occurred following the Islamic Consultative Assembly of Iran open session with representatives collectively decided the reviewing the contentious “Chastity and Hijab Bill” within the internal commission, removing it from the public discussion arena.⁶¹ This step, guided by Article 85 of Iran’s constitution, transferred the bill’s examination to a dedicated group of representatives.⁶² Among the assembly’s 238 representatives, a majority of 175 voted in favor of this decision, with forty-nine in opposition, and five abstaining.⁶³ The Guardian Council refused the most recent version in October due to inconsistencies in existing law with huge concerns about adoption.⁶⁴

2. *Proposed Regulations in the Bill*

The proposed bill outlines the responsibilities of public and governmental institutions in enforcing the hijab.⁶⁵ It defines the offense of an unacceptable practice of wearing hijab and imposes penalties for failing to adhere to compulsory veiling.⁶⁶ These penalties range from fines and imprisonment to travel restrictions, passport confiscation, and the loss of citizenship rights.⁶⁷

57. *Responses to Info. Requests*, U.S. DEPT. OF JUSTICE (Feb. 21, 2020), <https://www.justice.gov/eoir/page/file/1258241/dl> [<https://perma.cc/7MCA-4S4J>].

58. *Iran: Law to Protect the Family by Promoting the Culture of Chastity and Hijab Proposed*, LIBR. OF CONGRESS (July 27, 2023), <https://www.loc.gov/item/global-legal-monitor/2023-09-05/iran-law-to-protect-the-family-by-promoting-the-culture-of-chastity-and-hijab-proposed> [<https://perma.cc/RVP3-GK62>].

59. *Id.*

60. Press Release, U.N. OHCHR, Iran Must End Crackdown Against Protestors and Uphold Rights of all Iranians, Especially Women and Girls, Fact-Finding Mission Says (July 5, 2023), <https://www.ohchr.org/en/press-releases/2023/07/iran-must-end-crackdown-against-protesters-and-uphold-rights-all-iranians> [<https://perma.cc/LT9R-4UXZ>].

61. *Iran’s New Hijab Bill Stirs Controversy and Concern*, HUM. RTS. ACTIVISTS IN IRAN (Sept. 7, 2023), <https://www.hra-iran.org/irans-new-hijab-bill-stirs-controversy-and-concern/> [<https://perma.cc/LBU2-YLAW>].

62. *Id.*

63. *Id.*

64. LIBR. OF CONGRESS, *supra* note 58.

65. *Id.*

66. *Id.*

67. *Id.*

The bill's scope defines the public sphere as encompassing all areas outside of private homes, commercial establishments, corporations, and online virtual platforms.⁶⁸ A separate set of regulations govern the manner of dress in private vehicles.⁶⁹ Anyone in violation faces punishment. Additionally, institutions are held accountable for the improper attire of employees, forcing the monitoring of hijab compliance both before, during, and after the employment process.⁷⁰

Under the new bill, police and intelligence agencies—including the Ministry of Intelligence, the Intelligence Organization of the Islamic Revolutionary Guard Corps, the Law Enforcement Command of the Islamic Republic of Iran, the Basij, and the Command of Enjoining Good and Forbidding Wrong—receive authority to directly confront women who do not adhere to veiling regulations.⁷¹

3. *Binding Policies Regarding the Hijab*

Various institutions, including offices, banks, schools, shopping centers, universities, and private companies must withhold services from those not wearing the hijab.⁷² Disciplinary committees within universities must review cases of non-compliance and administer punishments.⁷³ The governmental Central Bank of Iran prohibits services to individuals not adhering to the hijab requirement.⁷⁴ In some provinces, individuals without hijab face access restrictions to hospitals and medical facilities, illustrating the comprehensive state policies and mechanisms to enforce hijab across Iran.⁷⁵

4. *Conclusion*

Iran's legal basis for enforcing hijab, including Article 167 of the Constitution Law, has led to the imposition of various punishments for hijab violations. The proposed "Bill to Support the Family by Promoting the Culture of Chastity and Hijab" faces controversy and was temporarily withdrawn from public discussion. The bill includes regulations that extend throughout public and private spaces, imposing fines, imprisonment, and other penalties for non-compliance. Binding policies at the local and administrative levels have made the enforcement of compulsory hijab even stricter, affecting various aspects of public life, including education and

68. *Id.*

69. *Id.*

70. LIBR. OF CONGRESS, *supra* note 58.

71. *Id.*

72. *Iran: Crackdown on Dissent Ahead of Protest Anniversary*, HUM. RTS. WATCH (Sept. 15, 2023), <https://www.hrw.org/news/2023/09/15/iran-crackdown-dissent-ahead-protest-anniversary> [<https://perma.cc/4DLS-Y45L>].

73. *Id.*

74. *Iran's New Hijab Bill Stirs Controversy and Concern*, HUM. RTS. ACTIVISTS (Sept. 7, 2023), <https://www.hra-iran.org/irans-new-hijab-bill-stirs-controversy-and-concern/> [<https://perma.cc/AY5R-R6Z7>].

75. *Iran: Crackdown on Dissent Ahead of Protest Anniversary*, *supra* note 72.

healthcare. The debate around the enforcement of hijab continues to be a significant issue in Iran, holding potential implications upon individual freedoms and rights.

B. TREATMENT OF BAHAI FAITH

1. *Legal repercussions on the Baha'i minority community for not following already-constricting laws against assembly, organization, or incorporation*

Article 13 of the Constitution of the Islamic Republic of Iran recognizes only three minority religions: Judaism, Zoroastrianism, and Christianity.⁷⁶ While the government limits and constrains the religious expression and practices of these three groups, non-recognized groups, most prominently the Baha'i community, have experienced a zero-tolerance policy by the state, instituting a number of measures that deny such religious groups from forming, let alone being formally recognized. Over the course of 2023, the religious minority of Bahai's have continued to face obstacles in their religious practice, livelihoods, and freedom to participate in Iranian society.

For example, in the first week of November 2023, Iranian security forces were reported to have arrested nineteen adherents of the Baha'i faith,⁷⁷ including five elderly women.⁷⁸ This behavior followed a pattern of similar behaviors, such as arrests of Baha'i leaders in August, the bulldozing of homes, and unsupported accusations of spying.⁷⁹ In 2022, the Tehran Appeals Court supported a local religious court decision to confiscate property and homes from the Baha'i community.⁸⁰

2. *Position of the United States Government & Congress*

The May 2023 U.S. Department of States Country Reports on Religious Freedom detailed numerous reports of government officials targeting members of the Baha'i community,⁸¹ including reports of Iranian government agents arresting and detaining a Baha'i photographer and accusing a family of "activism in cyberspace" without evidence; the family's electronic devices

76. QUANUNI ASSASSI JUMHURI ISLAMAI IRAN [The Constitution of the Islamic Republic of Iran] art. 13 [1979].

77. Tim Sigsworth, *Iran's Secret Police Launch New Raids on Baha'i Faith*, THE TELEGRAPH (Nov. 11, 2023), <https://www.telegraph.co.uk/world-news/2023/11/11/iran-secret-police-new-raids-bahai-faith/> [https://perma.cc/5CD4-3YGH].

78. *Id.*

79. *Id.*; see also U.S. DEP'T OF ST., OFF. OF INT'L RELIGIOUS FREEDOM, 2022 REPORT ON INTERNATIONAL RELIGIOUS FREEDOM: IRAN (2022), <https://www.state.gov/reports/2022-report-on-international-religious-freedom/iran/> [https://perma.cc/H5WQ-WERJ].

80. *Prejudiced Courts Aiding Land Grabs of Baha'i Properties in Iran*, CTR. FOR HUM. RTS. IN IRAN (Aug. 29, 2022), <https://iranhumanrights.org/2022/08/prejudiced-courts-aiding-land-grabs-of-bahai-properties-in-iran/> [https://perma.cc/3LTA-RH2X].

81. U.S. DEP'T OF ST., *supra* note 79.

were seized toward the end of 2022.⁸² The government regularly arrested Baha'is in Shiraz on "unknown charges."⁸³

In February 2023, U.S. Senator Van Hollen introduced Senate Resolution 492 calling to "reverse state-imposed policies denying Baha'is and members of other religious minorities equal opportunities to higher education, earning a livelihood, due process under the law, and the free exercise of religious practices."⁸⁴ The Resolution calls for sanctions and international cooperation to end the Iranian government's mistreatment of the Baha'i community.⁸⁵ As of November 20, 2023, it has yet to pass.⁸⁶

In response to multiple raids of the homes of Baha'i Iranians, confiscation of property, and arbitrary arrests and detention of Baha'is, on September 12th, the U.S. House of Representatives passed a similar resolution, condemning the Iranian government's systemic attacks on the Baha'i community and other religious minorities.⁸⁷ The U.S. Department of Treasury, in a separate action, also sanctioned Iranian government personnel in September 2023, citing, among other reasons, the government's treatment of religious minorities.⁸⁸

3. *Views of the United Nations*

The UN report of the Special Rapporteur on the situation of human rights in the Islamic Republic of Iran, Javaid Rehman, highlights 333 incidents of targeting and attacks against members of the Baha'i faith, with approximately "80 cases of arbitrary detentions, interrogations and unlawful arrests."⁸⁹ Further, the Special Rapporteur notes "destruction of properties, cemetery desecration, as well as denials of education and various forms of economic pressure, including reports of forced closure of Baha'i-owned businesses and confiscation of Baha'i properties," akin to "mental and physical torture[.]"⁹⁰ For example, authorities have denied "appropriate medical treatment of two former leaders of the Baha'i community, Mahvash Sabet and Fariba Kamalabadi."⁹¹ The basis of the arrests of members and leaders of the Baha'i community have varied, but the Iranian authorities frequently cite "causing intellectual and ideological insecurity in Muslim

82. *Id.*

83. *Id.*

84. S. Res. 74, 118th Cong. (2023).

85. *Id.*

86. *Id.*

87. See H.R. Res. 492, 118th Cong. (2023) (enacted).

88. Press Release, U.S. Dep't of Treasury, Treasury Sanctions Iranian Officials and Companies Connected to Repression in Advance of the Anniversary of Mahsa "Zhina" Amini's Death (Sept. 15, 2023), <https://home.treasury.gov/news/press-releases/jy1733> [<https://perma.cc/HA7R-BNDS>].

89. Javaid Rehman (Special Rapporteur on the situation of human rights in the Islamic Republic of Iran), *Situation of human rights in the Islamic Republic of Iran* ¶ 69, U.N. Doc. A/HRC/52/67 (Feb. 7, 2023).

90. *Id.* ¶ 68.

91. *Id.* ¶ 69.

society,”⁹² a position reflecting the Iranian government’s intolerance of religious minorities outside of the predominant Twelver Shia sect and, at least facially, those minority religions mentioned in the Constitution.

Whether the Iranian government will take any steps to address the concerns outlined in the Special Rapporteur’s report and those reported by independent media and NGOs and other institutions, remains to be seen. A primary issue is the enforcement of obligations on the Iranian government to respect international norms, or at a minimum, to honor obligations under international treaties. For example, the Special Rapporteur aptly noted Iran’s membership as a state party, among others, to the International Covenant on Civil and Political Rights.⁹³

Despite the fact that the Iranian Constitution elucidates several rights supporting the inclusion of religious and ethnic minorities, such as the freedom of association, peaceful assembly, and equality, these ends are undercut by the application of a state ideology giving little deference to religious dicta,⁹⁴ leaving aggrieved religious minorities, such as the Baha’is, little room to argue against the constitutionality of the actions of the Iranian government vis-à-vis their rights. Such deference to extra-constitutional interpretations provides the Iranian government the right to suppress and oppose minority groups like the Baha’is. This leaves the question of reform to rest, not simply with the government based on its own interpretation of these apparently positivist constitutional norms, but rather for more robust global and universally accepted obligations under treaties to which Iran is a signatory, supplanted by *jus cogens* norms.

Questions remain regarding the extent to which attempts of reform have yielded progress in the Iranian government’s record with the treatment of religious minorities, including the Baha’i community. The United Nations General Assembly passed resolution A/77/463/Add. 3 on December 5, 2022, calling on the Iranian government to institute reforms against the targeting of religious minorities like the Baha’is.⁹⁵ The Iranian government pushed back on the resolution, accusing the UN of “selective adoption of country-specific mandates,”⁹⁶ yet subsequent actions of the government

92. U.S. DEP’T OF ST., *supra* note 79.

93. *Id.*

94. See QANUNI ASSASSI JUMHURII ISLAMAI IRAN art. 13 [1979]. It is important to mention that despite the recognition of some religious minorities, this constitutional provision places such recognition and associated freedoms “within the limits of the law.”

95. Shalini Gungaram (Rapporteur on Promotion and protection of human rights: human rights situations and reports of special rapporteurs and representatives), *Promotion and protection of Human Rights* ¶ 41, U.N. Doc. A/77/463 (Nov. 28, 2022); Shalini Gungaram (Rapporteur on Promotion and protection of human rights), *Promotion and protection of Human Rights: human rights situations and reports of special rapporteurs and representatives*, at 38–39, U.N. Doc. A/77/463/Add.3 (Dec. 5, 2022).

96. Statement of Intervention, Fatemeh Arab Bafrani, Second Secretary of the Permanent Mission of the Islamic Republic of Iran at the UN General Assembly, On the Draft Resolution L.34 contained in report of the Third Committee A/77/463/Add.3 (Dec. 15, 2022), <https://newyork.mfa.ir/portal/product/10330/451/Statement-on-Situation-of-Human-Rights-in-the-Islamic-Republic-of-Iran-3rd-Committee> [https://perma.cc/RPK4-94U8].

throughout 2023 indicate disregard and, as reports indicate, an increase of targeting religious minorities. This has been the case despite the issuance of subsequent resolutions at the UN.⁹⁷ The extent to which the Iranian government is willing to curtail the freedom of religious expression of its religious minorities remains to be seen, but it is clear from its 2023 records that a reform is yet to take place.

4. *Recommendations*

The Iranian government can still pursue its interests while preserving the rights of religious minorities in the country. Should the government decide—or be compelled—to follow international obligations and norms, it can immediately, without the imposition of any external frameworks, by following already-existing constitutional guarantees to minorities.⁹⁸ The question turns on the government's willingness to pursue this without expecting external recommendations. Given the Iranian government's attitude, it is challenging to imagine external pressure will yield the sort of reform required for the Iranian government to come to bar with international norms.

III. Nicaragua

A. TREATMENT OF THE CATHOLIC CHURCH

1. *Nicaragua and the Catholic Church—an overview of the events from 2022 to 2023*

The relationship between the Nicaraguan government and the Catholic Church is complicated. Throughout 2023, clergy members reported consistent and permanent surveillance of church services as well as incidents of anti-Catholic motivated assaults. A September 2023 United Nations panel discussed the amplifying tensions in Nicaragua, noting that, in the past six months, it has grown to be substantially worse.⁹⁹

The tension between the government of Nicaragua and the Catholic Church escalated considerably since last March when Pope Francis described President Ortega's government as a "gross dictatorship."¹⁰⁰ A few

97. See Human Rights Council, *Resolution adopted by Human Rights Council on 4 April 2023* ¶¶ 1–6, U.N. Doc. A/HRC/RES/52/27 (Apr. 13, 2023); Human Rights Council, *Situation of human rights in the Islamic Republic of Iran* ¶¶ 51, 61, U.N. Doc. A/HRC/53/23 (June 15, 2023).

98. U.S. DEP'T OF ST., *supra* note 79.

99. U.N. OHCHR, Group of Experts on Nicaragua finds escalating persecution against dissent and crackdown on independent academic institutions (Sept. 12, 2023), <https://www.ohchr.org/en/news/2023/09/group-experts-nicaragua-finds-escalating-persecution-against-dissent-and-crackdown?sub-site=HRC> [<https://perma.cc/R4EG-EMAR>].

100. David Alire Garcia, *Insight: Catholic clergy report surveillance, beatings amid Nicaragua's crackdown*, REUTERS (July 7, 2023), <https://www.reuters.com/world/americas/catholic-clergy-report-surveillance-beatings-amid-nicaraguas-crackdown-2023-07-07/> [<https://perma.cc/J39C-SBE4>].

days following the statement, the last Vatican representative in Nicaragua returned to Rome, closing the respective Diplomatic Office.¹⁰¹

In February 2023, the Nicaraguan government convicted and sentenced Bishop Alvarez—imprisoned since August 2022 for treason—to twenty-six years in prison for “undermining national integrity,” stripping him of his citizenship.¹⁰² Press reports revealed that many ministers from various regions face prosecution, detainment, and exile for “no clear reasons.”¹⁰³ Between 2022 and 2023, around sixty-five religious congregations were expelled from Nicaragua, and others were denied entrance.¹⁰⁴

In October 2023, the Nicaraguan government flew 222 political prisoners to exile, stripping them of their nationality; twelve priests were transferred to Rome.¹⁰⁵ Monsignor Alvarez, one of the priests presented with the option to return to Rome, rejected the possibility and was locked in Modelo prison.¹⁰⁶ In May, the government launched a financial investigation for alleged money laundering activities carried out by the Church.¹⁰⁷ Church bank accounts were frozen, and officials requested financial documents,¹⁰⁸ impacting congregational activities and capacity to pay for basic needs. Furthermore, the government confiscated Church property.¹⁰⁹

Publicly disclosed information on the United Nations’ website records public authorities canceling the legal status of over 320 non-profit religious organizations during 2023, affecting radio stations, schools, universities, and other institutions run by religious orders.¹¹⁰ Over twenty-seven institutions faced takeover due to regulatory breaches. For instance, Central American

101. Eduardo Berdejo, *Esta es la Situación de la Iglesia Católica en Nicaragua: 6 Datos que Debes Saber* [Here’s the Situation of the Catholic Church in Nicaragua: 6 Facts You Should Know], ACI PRENSA (Aug. 22, 2023), <https://www.aciprensa.com/noticias/100744/esta-es-la-situacion-actual-de-la-iglesia-catolica-en-nicaragua-6-datos-que-debes-saber> [https://perma.cc/8THD-4JNS].

102. Garcia, *supra* note 100.

103. Linda Bordoni, *Nicaraguan Police Confiscate & Occupy Catholic Schools*, VATICAN NEWS (June 2, 2023), <https://www.vaticannews.va/en/church/news/2023-06/nicaragua-catholic-church-crackdown-nuns-schools-occupied-police.html> [https://perma.cc/7VPG-CHN7].

104. Berdejo, *supra* note 101.

105. Gabriela Selser & Christopher Sherman, *Nicaraguan Bishop who Refused Exile gets 26 Years in Prison*, AP (Feb. 11, 2023), <https://apnews.com/article/politics-united-states-government-caribbean-daniel-ortega-rosario-murillo-c7930c6340472867148ca7e79e09f1eb> [https://perma.cc/J2WM-QYQL].

106. *Id.*

107. Diego Lopez Marina, *Denuncian que Dictadura Bloquea Cuentas Bancarias de Diócesis y Parroquias en Nicaragua* [Dictatorship Blocks Bank Accounts of Dioceses and Parishes in Nicaragua], AP (May 27, 2023), <https://www.aciprensa.com/noticias/99638/denuncian-que-dictadura-bloquea-cuentas-bancarias-de-diocesis-y-parroquias-en-nicaragua> [https://perma.cc/G9BP-UEYT].

108. *Id.*

109. Wilfredo Miranda, *El Régimen de Ortega y Murillo Congela las Cuentas Bancarias de la Iglesia Católica de Nicaragua* [The Ortega-Murillo Regime Freezes the Bank Accounts of Nicaragua’s Catholic Church], EL PAÍS (May 27, 2023), <https://elpais.com/internacional/2023-05-27/el-regimen-de-ortega-y-murillo-congela-las-cuentas-bancarias-de-la-iglesia-catolica-de-nicaragua.html> [https://perma.cc/VY8P-REGY].

110. Press Release, U.N. OHCHR, Nicaragua: UN Experts Urge Freedom for Bishop Alvarez after 12 Catholic Priests were Released (Nov. 7, 2023), <https://www.ohchr.org/en/>

University—one of the country’s foremost institutions—was deprived of its legal status and liquid bank account, resulting in the confiscation of its facilities.¹¹¹ The Jesuit order running the institution shared that they were accused of working as a “center of terrorism.”¹¹²

Legal analysts deem the events as serious human rights violations, attacking critical thinking bastions where people can exercise their freedom of thinking and expression.¹¹³ The United Nations Human Rights Office (Office of the High Commissioner) expressed grave apprehension, stating “deep[] concern[] about the systematic patterns of harassment against members of the Catholic Church and other religious denominations by Nicaraguan authorities.”¹¹⁴

Following the failure of the Nicaraguan government to take adequate measures to address these condemnations of their acts, United Nation Special Rapporteurs on freedom of religion or belief, freedom of opinion or expression, and on human rights defenders, sent an official communication to the head of the state, stating that the freedoms of religion, belief, association, and opinion are consistently violated and that the ongoing events cultivate a systematic attack on Nicaraguan civil society.¹¹⁵

The Annual report of the United Nations High Commissioner for Human Rights from September 2022¹¹⁶ highlights the international community efforts, urging the Nicaraguan government to implement 396 recommendations to strengthen its institutional and legislative framework and form a new basis for democratic values. The government has yet to respond.¹¹⁷ The United States has imposed several sanctions on Nicaragua in the last year, attempting to stimulate a change in direction in the Central American country, ranging from visa restrictions on governmental authorities to suspensions of new U.S. investment for certain sector imports.¹¹⁸

press-releases/2023/11/nicaragua-un-experts-urge-freedom-bishop-alvarez-after-12-catholic-priests [https://perma.cc/9WH5-K3H9].

111. *Id.*

112. *Nicaragua Seizes Catholic University Accused of Being ‘Centre of Terrorism’*, AL JAZEERA (Aug. 17, 2023), <https://www.aljazeera.com/news/2023/8/17/nicaragua-seizes-catholic-university-accused-of-being-centre-of-terrorism> [https://perma.cc/F835-HBD7].

113. Vanessa Buschschlüter, *Nicaragua Strips 94 Prominent Dissidents of Citizenship*, BBC (Feb. 16, 2023), <https://www.bbc.com/news/world-latin-america-64663711> [https://perma.cc/M258-68U4].

114. Press Release, *supra* note 110.

115. *Id.*; see also Special Rapporteurs on Religious Freedom or Belief, *Official Communication From the Special Rapporteurs on Religious Freedom or Belief, Freedom of Opinion or Expression and on Human Rights Defenders to Nicaragua’s Government*, U.N. Doc. AL NIC 2/2023 (Aug. 2, 2023), <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=28270> [https://perma.cc/6VXB-ME4J].

116. Situation of human rights in Nicaragua, Rep. Human Rights Council on its Fifty-First Session, at 2, U.N. Doc. A/HRC/51/42 (2022).

117. Special Rapporteurs on Religious Freedom or Belief, *supra* note 115.

118. *US Targets Nicaragua’s Gold Sector in Latest Push Against Ortega*, AL JAZEERA (Oct. 24, 2022), https://www.aljazeera.com/economy/2022/10/24/us-targets-nicaraguas-gold-sector-in-latest-push-against-ortega?traffic_source=KeepReading [https://perma.cc/8MHC-7M9C].

On July 14th, victims of the Nicaraguan government, alongside national and international NGOs submitted a letter against the EU-CELAC Summit requesting the establishment of a “Group of Friends of the Nicaraguan People” to promote cross-regional responses to the human right crisis in Nicaragua.¹¹⁹

The Catholic Church is conspicuously experiencing adverse consequences stemming from recent governmental measures in Nicaragua.¹²⁰ These measures vis-à-vis the Catholic Church underscore the broader societal context characterized by routine exposure to human rights violations.

IV. Turkey & Ukraine

A. TREATMENT OF THE GREEK ORTHODOX CHURCH

The Greek Orthodox Patriarchate in Turkey and the Ukrainian Orthodox Church (UOC) face intricate legal, religious, and geopolitical challenges.

1. Legal Identity and Property Control under Turkish Law

Following the government-incited riots against the Greek Orthodox minority in 1955, when the community comprised around 100,000 people, the Church has dwindled to its present-day remnant of 3,000 believers or less.¹²¹ The riots of 1955 were a defining moment in the history of the Greek Orthodox Church in Istanbul. The violence which the Turkish government instigated resulted in the displacement and impoverishment of many Greek Orthodox Christians.¹²² The Church has never fully recovered from this event, and its numbers have declined in the years ever since.¹²³ The Church is imperiled by the prolonged closure of the Halki Theological School, the only institution in Turkey for training Orthodox clergy.¹²⁴ This ongoing closure prevents the Greek Orthodox Church in Turkey from training new clergy.¹²⁵

The Turkish authorities have also confiscated many of its historical buildings and churches, converting some into mosques or museums. The two most significant accounts of such seizure are a recent Supreme Court ruling allowing the government to take possession of a historic orphanage

119. *Letter on Nicaragua to EU-CELAC Summit Participants*, HUM. RTS. WATCH (July 14, 2023), <https://www.hrw.org/news/2023/07/14/letter-nicaragua-eu-celac-summit-participants> [<https://perma.cc/FRM7-RJ93>].

120. *See id.*

121. *Megali Katastrofi*, GLOBALSECURITY.ORG (July 8, 2012), <https://www.globalsecurity.org/military/world/war/greco-turkish-megali-katastrofi.htm> [<https://perma.cc/UCW2-7RVP>].

122. *Id.*

123. *Id.*

124. Hugh Fitzgerald, *Turkey Wants to Block Finland and Sweden From Joining NATO*, FRONT-PAGE MAGAZINE (May 25, 2022), <https://www.frontpagemag.com/turkey-wants-block-finland-and-sweden-joining-nato-hugh-fitzgerald/> [<https://perma.cc/6TH3-BM5V>].

125. *Id.*

on the island of Pringipo and the expropriation of 152 properties of the Balukli Hospital in Istanbul.¹²⁶

The denial of legal status impedes the Patriarchate's access to the judiciary, hindering its ability to protect interests and engage in legal advocacy. Turkish Law 5253 on Associations poses ambiguities in forming nonprofit associations.¹²⁷ Despite the absence of explicit prohibitions against religious organizations obtaining legal identity, the Greek Orthodox Patriarchate faces difficulties achieving this status, further restricting access to legal advocacy.¹²⁸

On November 15, 2022, the European Court of Human Rights (ECtHR) declared that Turkey had violated the human rights of the Greek Orthodox Taksiarhis Church when it denied the Church property registration rights.¹²⁹ Historically, the Church is a legal foundation under Turkey's law of the Greek Orthodox Community of Istanbul, making Turkey's refusal to the Greek Orthodox Church to claim its property rights discrimination, which resulted in a fine of 5,000 euros.¹³⁰

2. Tensions within the Ukrainian Orthodox Church resulting from the on-going Russo-Ukrainian War

The Ukrainian Orthodox Church has a complex history, with branches including the Moscow Patriarchate (UOC) and the Orthodox Church of Ukraine (OCU). The 2014 events in Ukraine, including the annexation of Crimea by Russia and the conflict in eastern Ukraine, heightened existing tensions.¹³¹ In January 2019, the Ecumenical Patriarchate of Constantinople granted autocephaly to the OCU, resulting in tensions between the former and the Russian Orthodox Church.¹³²

While autocephaly is a step towards independence, the lack of recognition from the Russian Orthodox Church resulted in internal conflicts and external pressures that some perceive as aligned with Russian political

126. *Id.*

127. Otmir Oehring, *TURKEY: The Fundamental Problem and How it Might be Solved*, FORUM 18 (Feb. 2, 2011), https://www.forum18.org/archive.php?article_id=1537&printer=Y [<https://perma.cc/7GZ3-AUN7>].

128. *Id.*

129. *Arnavutkoy Greek Orthodox Taksiarhis Church Foundation v. Turkey*, (No. 27269/09), Eur. Ct. HR 1, 16 (Nov. 15, 2020), <https://hudoc.echr.coe.int/fre?i=001-220865> [<https://perma.cc/GBD3-XFAR>].

130. *Id.*

131. OSCE, REPORT OF THE HUMAN RIGHTS ASSESSMENT MISSION ON CRIMEA (JULY 6–18, 2015) 5–7 (2015), <https://www.osce.org/odihr/report-of-the-human-rights-assessment-mission-on-crimea> [<https://perma.cc/7CAR-9KUF>].

132. *Help Ukraine by Recognizing OCU's Autocephaly*, THE ORTHODOX CHRISTIAN STUDIES CENTER, FORDHAM UNIV. (Mar. 7, 2022), <https://fordhamorthodoxy.org/help-ukraine-by-recognizing-ocu/> [<https://perma.cc/LPN2-2UAA>].

influence.¹³³ The Russian invasion in 2022 intensified the crisis, prompting a reconsideration of the relationship between religious and national identity.¹³⁴

Metropolitan Onuphry's initial indecision on the war caused a division among the UOC clergy. The invasion prompted a reconsideration of the relationship between religious and national identity, leading some to join the OCU.¹³⁵ Under pressure, the UOC-MP leadership voted to change the Church's status, distancing itself from the Russian Orthodox Church.¹³⁶ However, resistance persists, emphasizing the importance of "canonicity" and viewing the OCU as non-canonical.¹³⁷ The crisis reveals a shift in identity priorities, highlighting national identity and a nuanced relationship between religious and national affiliations.¹³⁸

B. FREEDOM OF RELIGION

1. *Turkey*

Overview of USCIRF Report (Released on November 13, 2023):¹³⁹

- While violent attacks on Greek Orthodox religious sites have decreased in the last decade, vandalism and destruction of Greek Orthodox religious properties persist.
- The highest number of attacks on the Greek Orthodox community was in the Marmara Region, Istanbul, which is associated with the largest concentration of non-Muslim populations.
- The seizure of Prince's Greek Orthodox orphanage in 1964 was cited as an example of property seizure used as a form of retaliation by the Turkish Authorities. Although the Ecumenical Patriarchate regained ownership after sixty years through the European Court of Human Rights, there is significant damage and disrepair due to abandonment and neglect by the Turkish Authorities. The considerable financial burden of repairing and preserving the site lies squarely on the Greek Orthodox community.
- Despite the decrease in violent attacks, vandalism incidents persist, with arson and treasure hunting contributing to the destruction of Greek Orthodox religious property. A lack of prosecution for such incidents was noted.

133. Denys Brylov & Tetiana Kalenychenko, *Identity Migration of Orthodox Churches During the War in Ukraine (Since 2014)*, BLOG FOR TRANSREGIONAL RSCH. (Sept. 1, 2023), https://trafo.hypotheses.org/48569#_ftn8Id [<https://perma.cc/8424-NK8T>].

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. S. COMM'N ON INT'L RELIGIOUS FREEDOM, EXAMINATION OF THREATS TO RELIGIOUS SITES IN TURKEY 3, 5, 16 (2023), <https://www.uscifr.gov/sites/default/files/2023-11/2023%20USCIRF%20Examination%20of%20Threats%20to%20Religious%20Sites%20in%20Turkey.pdf> [<https://perma.cc/Z6CK-BERH>].

2. *Ukraine*

Overview of an article published in the Guardian:¹⁴⁰

- The Ukrainian parliament approved a law to ban the Moscow-linked UOC following allegations of collaboration with Russia after the 2022 invasion.
- The UOC denies ties with the Russian Orthodox Church and disputes the accusations made by Kyiv, asserting that the draft law would be unconstitutional.
- The initial approval of the law occurred in the first reading, with a requirement for a second reading and approval by the president for it to become effective.
- The law aims to ban the activities of religious organizations affiliated with centers of influence in Russia conducting armed aggression against Ukraine, subject to termination by a court.
- Lawmakers support the bill, considering it a historic step toward removing “Moscow priests from the Ukrainian land.”
- The UOC argues that the draft law contradicts the European Convention on Human Rights and Ukraine’s constitution, asserting its independence from the Russian Orthodox Church.
- Ukrainian authorities, post-Russia’s invasion, have viewed the UOC as loyal to Moscow, leading to a crackdown on the church. A government commission maintains that the UOC is still canonically linked to Russia despite the church’s claim of cutting ties in May 2022.
- Metropolitan Pavlo, the UOC’s second most senior priest, faces accusations of inciting inter-religious hatred and justifying Russian aggression. He denies the charges.
- The Ukrainian Security Service reports sixty-eight criminal cases, including treason accusations, initiated against UOC representatives since Russia’s invasion.
- Political analyst Volodymyr Fesenko suggests that a ban on the UOC may not halt its activities, and it could be challenged in Ukrainian courts and at the ECtHR. Fesenko also proposed that the church registers as a new entity without referencing canonical ties to Russia.

140. *Ukrainian Parliament Votes to Ban Orthodox Church Over Alleged Links with Russia*, THE GUARDIAN (Oct. 20, 2023), <https://www.theguardian.com/world/2023/oct/20/ukrainian-parliament-votes-to-ban-orthodox-church-over-alleged-links-with-russia> [<https://perma.cc/W5QT-P56L>].

THE YEAR IN REVIEW
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Customs Law Committee

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2023 was a dynamic year for United States customs law. Against the backdrop of continuing pressure on supply chains and ports due to the effects of the COVID-19 pandemic, continuing impact of the Russia-Ukraine conflict, and ongoing trade tensions between the United States and China, several major developments to United States customs law affected imports and importers. Those developments originated from legislative, judicial, executive, and administrative actions. This article summarizes the most important developments to U.S. customs law in 2023.

I. Section 301 and 232 Year in Review Update (2023)

A. SECTION 301 LITIGATION¹

In March 2023, a three-judge panel for the Court of International Trade reached a final decision *In re Section 301 Cases*² (*HMTX Industries LLC v. United States*) upholding the actions of the Office of the United States Trade Representative (USTR) in issuing List 3 and Final List 4. Lead plaintiffs in the case *HMTX Industries LLC*, filed an appeal with the Court of Appeals for the Federal Circuit on May 12, 2023.³

1. USTR Actions on Section 301 Duties

All previously valid Section 301 exclusions were extended through December 31, 2023.⁴ The Section 301 exclusions are currently valid until

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1. Actions by an United States Trade Representative, 19 U.S.C. § 2411.

2. *In re Section 301 Cases*, No. 21-00052-3J, slip op. at 23–35 (Ct. Int'l Trade 2023).

3. Notice of Appeal of Final Judgment, *HMTX Indus. LLC v. United States*, No. 20-00177 (Ct. Int'l Trade May 12, 2023).

4. See Notice of Extension for Product Exclusions: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 88 Fed. Reg. 62423 (Sept. 11, 2023).

December 31, 2023, and become null as of January 1, 2024.⁵ It is still unknown whether any exclusions will be renewed in 2024 or even perhaps only partially renewed; importers whose imported merchandise qualifies for a Section 301 exclusion have been able to resume declaring these for applicable imports.⁶ There are no signs that renewal of these exclusions will become effective prior to expiration, although it remains a possibility.

2. *Four Year Cycle Review*

In mid-2022, the USTR initiated the statutory four-year review process of the Section 301 tariffs.⁷ Section 307(c) of the Trade Act of 1974 requires USTR to review the effectiveness and economic impact of Section 301 actions every four years to keep the action in force.⁸ The first step in the four-year review process was to notify those interested parties benefitting from the trade actions of the possible termination of the actions, and provide an opportunity for the representatives of such to request continuation of the Section 301 actions.⁹ The second phase of the review provided opportunities for public comments from all interested parties.¹⁰ In early 2023, the timeframe for submitting comments expired and the continuation of the Section 301 tariffs is now under review by USTR.¹¹ The final determination from USTR is now pending as a result of the four-year review and it is anticipated the review outcome will be released in the second half of 2024.

B. SECTION 232 TARIFFS¹²

There were a couple of noteworthy developments in 2023 regarding President Trump's Section 232 tariffs on steel and aluminum products.¹³ One key update is Proclamation 10522 which was issued on February 24, 2023, and raised the Section 232 tariff rate on aluminum articles and derivative

5. *See id.*

6. *See id.*

7. *See* Off. of the U.S. Trade Representative, Notice on Continuation of Actions: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 87 Fed. Reg. 26797 (May 5, 2022).

8. *See* 19 U.S.C. § 2417(c)(3)(A)–(B).

9. *See* Off. of the U.S. Trade Representative, Notice on 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).

10. *See id.*

11. *See id.*

12. RACHEL F. FEFER, CONG. RSCH. SERV., IF 10667, SECTION 232 OF THE TRADE EXPANSION ACT OF 1962 29 (2022). On March 8, 2018, President Trump exercised his authority under Section 232 of the Trade Expansion Act of 1962 to impose a 25 percent tariff on steel imports, with exemptions for Canada and Mexico, to protect American national security. The President's Section 232 decision is the result of an investigation led by the U.S. Department of Commerce (DOC). U.S. Customs and Border Protection began collecting the tariffs on March 23, 2018.

13. *See id.*

aluminum articles that are the product of Russia.¹⁴ Such articles are now subject to a 200 percent ad valorem rate of duty with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. Eastern Standard Time on March 10, 2023.¹⁵

Of specific note is the expanded application of this increased tariff rate to imports of aluminum or derivative aluminum articles where any amount of primary aluminum used in the manufacturing of the articles is smelted in Russia, or the articles are cast in Russia (often termed “trace” articles), will be subject to a 200 percent ad valorem rate of duty.¹⁶ This broadened application took effect on April 10, 2023.¹⁷ Furthermore, imports of aluminum articles, derivative aluminum articles, and trace articles that are the product of Russia are not eligible for any General Approved Exclusions as set forth in supplement number three to part 705 of 15 C.F.R.¹⁸ Therefore, such aluminum imports are restricted from the otherwise available methods to alleviate the burden of Section 232 tariffs.¹⁹ Although imports of aluminum from Russia are not widespread, they could impact certain importing companies.²⁰ In conjunction with this Proclamation and implementing guidance from customs in the form of a CSMS message,²¹ customs is also requiring additional data elements be reported for imports of aluminum products, which include declaring the country of smelting of the raw aluminum.²²

In addition to the Section 232 updates as they relate to Russia, the Department of Commerce’s Bureau of Industry and Security (BIS) issued a proposed rule on August 28, 2023, for requesting Section 232 exclusions from duties on imports of aluminum or steel.²³ Essentially, these proposed modifications would result in a more efficient and fair process, and allow for a more streamlined approval process with higher approval rates for exclusion requests.²⁴ Below are some of the key changes that would take effect if the rule were implemented:

- Create a more efficient process for general approved Section 232 exclusions;
- Create a general denied exclusion process (similar to an objection);

14. See Exec. Off. of the President, Proclamation on Adjusting Imports of Aluminum into the United States, 88 Fed. Reg. 13267 (Mar. 2, 2023).

15. See *id.*

16. See *id.*

17. See *id.*

18. See *id.*

19. See *id.*

20. See *generally* Adjusting Imports of Aluminum into the United States, 88 Fed. Reg. 13267.

21. See U.S. Customs and Border Protection, Bull. CSMS #55407022, Guidance: Section 232 Additional Duties on Russian Aluminum (2023).

22. See *id.*

23. See Revisions of the Section 232 Steel and Aluminum Tariff Exclusions Process, 88 Fed. Reg. 58526 (proposed Aug. 28, 2023) (to be codified at 15 C.F.R. pt. 705).

24. See *id.*

- Updated certification language for exclusion requests (i.e., requestors need to certify that they have made reasonable efforts to source the product domestically); and
- Updated certification language for objections (i.e., require evidence that the objector has sold the product domestically).²⁵

The comment period for this proposed rule closed October 12, 2023.²⁶ BIS is expected to provide a final rule in approximately early 2024. Until then, the current Section 232 exclusion submission protocol remains in effect.²⁷

II. UFLPA Developments

The Uyghur Forced Labor Prevention Act (UFLPA) entered into effect on June 21, 2022.²⁸ Now in its first full year of enforcement, the UFLPA establishes a rebuttable presumption that imports of all goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in Xinjiang, or mined, produced, or manufactured by entities on the UFLPA Entity List, are made with forced labor and are thus prohibited from entry into the United States.²⁹ The UFLPA presumption applies unless U.S. Customs and Border Protection (CBP) determines that it has been rebutted—i.e., that the importer has complied with specified conditions and, by clear and convincing evidence, has demonstrated that the items were not mined, produced, or manufactured wholly or in part by forced labor.³⁰ The presumption also applies to goods made in, or shipped through other countries that include inputs made in Xinjiang.³¹

A. INCREASED ENFORCEMENT

In fiscal year (FY) 2023, Congress allocated \$101 million to UFLPA implementation, which represented a 108 percent increase from FY 2022.³² CBP used this forced labor prevention budget to detain 4,033 shipments in FY 2023, valuing \$1,429 million.³³ Of these, 1,687 shipments were denied

25. *See id.*

26. *See id.*

27. *See generally id.*

28. An act to ensure that goods made with forced labor in the Xinjiang Uyghur Autonomous Region of the People's Republic of China do not enter the United States market, and for other purposes. Pub. L. No. 117–78, 135 Stat. 1525 (2021).

29. *See id.*

30. *See id.*

31. *See id.*

32. *See* Staff of S. Comm. on Appropriations, 117th Cong., Summary Subcommittee on Homeland Security Fiscal Year 2023 Appropriations Bill (2022).

33. *See generally Uyghur Forced Labor Prevention Act Statistics*, U.S. CUSTOMS AND BORDER PROTECTION, <https://www.cbp.gov/newsroom/stats/trade/uyghur-forced-labor-prevention-act-statistics> [<https://perma.cc/7X6A-M934>] (last visited Mar. 24, 2024).

entry, 1,802 shipments were released, and 544 shipments remain pending.³⁴ By value, most detained shipments originated in Malaysia, with Vietnam in second place.³⁵ The electronics industry had the highest number of detained shipments in FY 2023, followed by industrial and manufacturing materials in second place, and apparel, footwear, and textiles in third.³⁶

B. EXPANDED ENTITY LIST

In addition to increased numbers of detentions, the Forced Labor Enforcement Task Force (FLETF) expanded the UFLPA Entity List in 2023.³⁷ On June 12, 2023, the FLETF added two new entities to the UFLPA Entity List: Xinjiang Zhongtai Chemical Co., Ltd., and Ninestar Corporation, including eight of its subsidiaries.³⁸ On August 2, 2023, the FLETF added two more entities to the UFLPA Entity List: Camel Group Co., Ltd., and Chenguang Biotech Group Co., Ltd., including its subsidiary Chenguang Biotechnology Group Yanqi Co. Ltd.³⁹ Finally, on September 27, 2023, the FLETF added three additional entities to the UFLPA Entity List: Xinjiang Tianmian Foundation Textile Co., Ltd.; Xinjiang Tianshan Wool Textile Co. Ltd.; and Xinjiang Zhongtai Group Co. Ltd.⁴⁰

Ninestar Corporation filed suit at the U.S. Court of International Trade in August 2023 challenging its inclusion on the UFLPA Entity List.⁴¹

C. SHIFTING TARGETING PRIORITIES

On July 26, 2023, the FLETF issued its annual strategy update, which noted its shifting enforcement priorities.⁴² Specifically, in addition to the initial “high-priority sectors” set forth in the UFLPA of cotton, tomatoes, and polysilicon, the updated UFLPA strategy notes that, “FLETF will emphasize the importance of monitoring all sectors identified by NGOs ... as potential risk areas, including red dates and other agricultural products, vinyl products and downstream products, aluminum and downstream products, steel and downstream products, lead-acid and lithium-ion

34. *See id.*

35. *See id.*

36. *See id.*

37. *See* Notice Regarding the Uyghur Forced Labor Prevention Act Entity List, 88 Fed. Reg. 38,080, 38,081 (2023).

38. *See id.* at 38,082.

39. *See* Notice Regarding the Uyghur Forced Labor Prevention Act Entity List, 88 Fed. Reg. 50902, 50904 (2023).

40. *See* Notice Regarding the Uyghur Forced Labor Prevention Act Entity List, 88 Fed. Reg. 66496, 66497 (2023).

41. *See* Ninestar Corp. v. United States, No. 23-169, slip op. at 1352 (Ct. Int’l Trade Nov. 20, 2023).

42. *See* DEPT. OF HOMELAND SEC., STRATEGY TO PREVENT THE IMPORATION OF GOODS MINED, PRODUCED, OR MANUFACTURED WITH FORCED LABOR IN THE PEOPLE’S REPUBLIC OF CHINA: REPORT TO CONGRESS (2023), https://www.dhs.gov/sites/default/files/2023-08/23_0728_plcy_uflpa-strategy-2023-update-508.pdf [<https://perma.cc/LA96-5NCD>].

batteries, copper and downstream products, electronics, and tires and other automobile components.”⁴³

Regarding the listed high-priority sectors, CBP employs a dynamic risk-based approach that prioritizes the highest-risk goods within a sector based on current data and information.

III. Russian Sanctions: A 2023 Reflection of U.S. Customs Enforcement of U.S. Sanctions on the Russian Federation

On February 24, 2022, the Russian Federation (Russia) invaded Ukraine.⁴⁴ The resulting impact of that invasion was followed by a significant U.S. economic sanctions on Russia, disrupting global trade flow.⁴⁵ In the ABA Section of International Law Year in Review 2022, a number of economic sanctions outlined were focused on import restrictions of goods from Russia. Those import restrictive measures included the following:

- Restrictions on Import from the Donetsk People’s Republic (DNR) and Luhansk People’s Republic (LNR) regions of Ukraine.⁴⁶
- Import Restrictions on Russian Federation Origin or Goods from the Russian Federation and Gold.⁴⁷
- Suspension of Normal Trade Relations with Russia and Belarus Act and raising of certain imports of Russian goods to thirty-five percent.⁴⁸
- U.S. Commerce Department Downgrades of Russia to Nonmarket Economy Status.⁴⁹

It has been a year since the publication of the 2022 Year in Review, providing an opportunity to reflect on the impact and success of those import

43. *Id.* at 16.

44. See *Russian forces launch full-scale invasion of Ukraine*, AL JAZEERA (Feb. 22, 2024), <https://www.aljazeera.com/news/2022/2/24/putin-orders-military-operations-in-eastern-ukraine-as-un-meets> [https://perma.cc/PFZ7-KMRB].

45. See *id.*

46. See *Russia/Belarus/Ukraine-Related Sanctions*, UNIV. OF MINN., <https://research.umn.edu/units/ric/export-controls/russiabelarusukraine-related-sanctions> [https://perma.cc/LL6A-6DQ2] (last visited Mar. 26, 2024).

47. See *U.S. Treasury Sanctions Nearly 100 Targets in Putin’s War Machine, Prohibits Russian Gold Imports*, U.S. DEPT. OF TREASURY (June 28, 2022), <https://home.treasury.gov/news/press-releases/jy0838#:~:text=GOLD%20IMPORTATION%20PROHIBITION&text=14068%20shall%20apply%20to%20gold,or%20otherwise%20authorized%20by%20OFA> [https://perma.cc/LB7V-B99G].

48. See *A Proclamation on Increasing Duties on Certain Articles from the Russian Federation*, WHITE HOUSE (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/NF8P-8PTK].

49. See Yuka Hayashi, *U.S. Downgrades Russia to Nonmarket Economy*, WALL STREET J. (Nov. 10, 2022), <https://www.wsj.com/articles/u-s-downgrades-russia-to-nonmarket-economy-11668122071> [https://perma.cc/C83U-S352].

related economic sanctions.⁵⁰ Based on data provided by U.S. Census Bureau, U.S. imports of commodities from Russia have steadily decreased since the sanctions were first imposed in February 2022, although U.S. imports from Russia were still relative strong in the first three months following the initial imposition of sanctions.⁵¹ This may be attributable to a series of general license provided to U.S. companies to wind down existing deals.⁵²

Though the U.S. Census Bureau data suggest that U.S. sanctions on Russia are having a desired effect of curbing commodity imports from Russia, the data is silent on what kind of goods the U.S. has continued to import from Russia.⁵³ That information would be helpful to the trade community in determining what U.S. priorities are and where they are headed from a trade and foreign policy perspective.⁵⁴

IV. U.S. Judicial Review of Customs-Related Determinations

The United States Court of International Trade (CIT) and its predecessor bodies have been designed to provide “a comprehensive system for judicial review of civil actions arising out of import transactions and federal transactions affecting international trade.”⁵⁵ The court has exclusive jurisdiction over civil actions commenced pursuant to 28 U.S.C. § 1581⁵⁶ and 28 U.S.C. § 1582.⁵⁷ In the context of customs litigation, the two subparagraphs of Section 1581 most frequently invoked by litigants are subparagraphs (a)⁵⁸ and (i).⁵⁹

50. *See Trade in Goods with Russia*, U.S. CENSUS BUREAU, <https://www.census.gov/foreign-trade/balance/c4621.html> [<https://perma.cc/EBT8-3QYK>] (last visited Mar. 26, 2024).

51. *See id.*

52. *See id.*

53. *See id.*

54. *See id.*

55. *About the Court*, CT. INT’L TRADE, <https://www.cit.uscourts.gov/about-court#:~:text=From%20the%20time%20of%20its,trade.%E2%80%9D%20This%20system%2C%20now> [<https://perma.cc/MC2W-JD72>] (last visited Mar. 24, 2024).

56. *See Civil Actions Against the United States and Agencies and Officers Thereof*, 28 U.S.C. § 1581.

57. *See Civil Actions Commenced by the United States*, 28 U.S.C. § 1582(1)–(3) (providing that the CIT has exclusive jurisdiction of any civil action which arises out of an important transaction and which is commenced by the United States to: (1) recover a civil penalty under section 592, 593A, 641(b)(6), 641(d)(2)(A), 704(i)(2), or 734(i)(2) of the Tariff Act of 1930; (2) to recover upon a bond relating to the importation of merchandise required by the laws of the United States or by the Secretary of the Treasury; or (3) to recover custom duties).

58. *See* 28 U.S.C. § 1581(a) (“Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under Section 515 of the Tariff Act of 1930”).

59. *See id.* § 1581(i). Provides a broader and more general grant of jurisdiction, including actions arising from matters related to (1) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue; (2) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or (3) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.

A. SELECTED DECISIONS BY U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT

1. *Royal Brush Manufacturing, Inc. v. United States*

On July 27, 2023, in *Royal Brush Manufacturing, Inc. v. United States*,⁶⁰ the Court of Appeals for the Federal Circuit (CAFC) ruled that Customs and Border Patrol (CBP) violated U.S. importer Royal Brush Manufacturing, Inc.'s (Royal Brush's) due process rights by failing to share "business confidential information" (BCI) in an AD/CVD proceeding.⁶¹

The case involved entries of pencils that Royal Brush imported to the U.S. from the Philippines between 2017 and 2018.⁶² CBP initiated an EAPA investigation after Dixon Ticonderoga Company (Dixon), a competitor pencil importer, filed a complaint with CBP alleging AD/CVD evasion by Royal Brush under the Enforce and Protest Act of 2015 (EAPA).⁶³ CBP accused Royal Brush of transshipping pencils from China through the Philippines to avoid antidumping duties.⁶⁴ However, when making this determination of evasion, CBP only provided Royal Brush with redacted public summary versions of its evidence (redacting photographs as well as numbers and calculations), claiming it was barred from providing access to certain BCI, and, in addition, denied Royal Brush the opportunity to submit rebuttal evidence.⁶⁵ The CIT held that CBP did not violate Royal Brush's due process rights since it provided public summaries of the confidential information.⁶⁶ Royal Brush appealed.⁶⁷

On appeal, the CAFC ruled that the "relatively immutable" principle of due process, where the government must provide access to the evidence used as the basis for an action that seriously injures an individual, extends to administrative proceedings: "In sum, CBP relied on factual information that was not provided to Royal Brush to determine that Royal Brush had evaded duties. This, in and of itself, is a clear violation of due process."⁶⁸ The court also held that CBP relied on "new" information when it concluded that the pencil manufacturer did not have the capacity to produce the exported pencils including those shipped to Royal Brush and imposed dumping duties on its shipments.⁶⁹ CBP argued that they could avoid compliance with due process requirements by simply failing to provide for a protective order in a statute

60. See *Royal Brush Manufacturing, Inc. v. United States*, 75 F.4th 1250 (Fed. Cir. 2023).

61. See *id.*

62. See *id.* at 14.

63. See *id.* at 2.

64. See *id.*

65. See *id.*

66. See *Royal Brush Mfg., Inc.*, 75 F.4th 1 at 6.

67. See Sydney H. Mintzer & Jennifer L. Parry, *Federal Circuit: CBP's Lack of Protective Order in Evasion Case Violates Importer's Due Process*, MAYER BROWN (Aug. 7, 2023), <https://www.mayerbrown.com/en/insights/publications/2023/08/federal-circuitcbps-lack-of-protective-order-in-evasion-case-violates-importers-due-process> [https://perma.cc/JW9J-X9NP].

68. *Royal Brush Mfg.*, 75 F.4th 1 at 5.

69. *Id.* at 12.

or regulation.⁷⁰ The CAFC rejected that contention outright: “We are aware of no case supporting any such extraordinary theory, and it is untenable on its face.”⁷¹ Instead, the court ruled that CBP “has inherent authority to provide protective orders in EAPA proceedings before the agency.”⁷²

The CAFC remanded the case back to the CIT with instructions that CBP must provide Royal Brush with the redacted information and calculations (BCI) that CBP relied on to determine evasion and be given an opportunity to rebut the information with its own evidence.⁷³ This decision establishes that CBP must establish administrative protective orders in EAPA cases.⁷⁴

2. *PrimeSource Building Products, Inc. v. United States*⁷⁵

On February 7, 2023, the CAFC reversed the decision of the CIT in *PrimeSource Building Products, Inc. v. United States*⁷⁶ and upheld Proclamation 9980 and its steel and aluminum tariffs for derivative products under Section 232 of the Trade Expansion Act of 1962. The CAFC decided that Section 232’s deadlines did not prevent the President from modifying his initial timely adopted plan of action by issuing Proclamation 9980.⁷⁷

In 2018, the President issued Proclamation 9705 to adopt a plan of action to address the national security threat posed by steel imports which contributed to unsustainably low levels of use of domestic steel-producing capacity, starting with the imposition of higher tariffs on steel imports from certain countries.⁷⁸ Then, in 2020, the President issued Proclamation 9980, which established Section 232 tariffs on imports of steel derivatives, such as nails and fasteners.⁷⁹ That proclamation was challenged in two cases filed in the CIT, one by PrimeSource Building Products, Inc. and the other by Oman Fasteners, LLC, Huttig Building Products, Inc., and Huttig, Inc. (collectively, Oman Fasteners).⁸⁰ The CIT decided that Proclamation 9980 was unauthorized by Section 232 because the new derivatives tariffs were imposed after the passing of certain deadlines for presidential action set forth in Section 232, and the government appealed.⁸¹

After the CIT decision, the CAFC decided *Transpacific Steel LLC v. United States* (2022), which led the CIT to issue stays of its judgments in the two

70. Mintzer & Parry, *supra* note 67.

71. *Royal Brush Mfg.*, 75 F.4th 1 at 17.

72. *Id.* at 19.

73. *See id.* at 22.

74. *See id.* at 16.

75. *PrimeSource Building Prods., Inc. v. United States*, 59 F.4th 1255, 1255 (Fed. Cir. 2023).

76. *See id.* at 1263.

77. *See id.*

78. *See id.* at 1257.

79. *See id.*

80. *See id.*

81. *See* David Taylor, *Opinion Summary– PrimeSource Building Products, Inc. v. United States*, FEDCIRCUITBLOG (Feb. 27, 2023), <https://fedcircuitblog.com/2023/02/27/opinion-summary-primesource-building-products-inc-v-united-states/> [<https://perma.cc/YJ6W-K63L>].

cases.⁸² In *Transpacific*, the CAFC upheld the presidential proclamation that increased tariffs on steel beyond Proclamation 9705's rate, concluding that "when the President, within the § 232 time limits at issue, adopts a plan of action that contemplates future contingency-dependent modifications, those time limits do not preclude the President from later adding to the initial import impositions in order to carry out the plan to help achieve the originally stated national-security objective where the underlying findings and objective have not grown stale."⁸³

In rejecting efforts by PrimeSource and Oman Fasteners to distinguish *Transpacific*, the CAFC pointed out that there is no textual basis for reading Section 232 as empowering the President to act only at the initial plan-adoption stage, and not at later modification stages, and also no textual basis for a specific time limit on adjustments under a timely adopted plan.⁸⁴ In upholding Proclamation 9980, the CAFC recognized that the new proclamation's addition of steel derivative tariffs was well within Section 232's authorization of presidential action, and that there is no persuasive reason for overriding the President's judgment.⁸⁵

B. SELECTED DECISIONS BY U.S. COURT OF INTERNATIONAL TRADE

1. *Meyer Corp. v. United States*⁸⁶

Plaintiff Meyer Corp. commenced an action seeking first-sale treatment for its imported cookware from China, and duty-free treatment under the GSP for certain cookware imported from Thailand, a beneficiary developing country (BDC).⁸⁷ In the original litigation,⁸⁸ the CIT rejected Meyer's assertion that it met the first sale conditions specified in *Nissho-Iwai*⁸⁹ that the manufacturer and the middleman deal with each other at arm's length, and in the absence of any non-market influences that affect the legitimacy of the sales price, because the United States does not recognize that the PRC has a "market economy" status under Article 15(a)(ii) and (d) of the PRC's agreement to the World Trade Organization, and "thus it presumptively remains a non-market economy in this and other proceedings."⁹⁰ On appeal,⁹¹ the CAFC rejected the CIT's reasoning, stating that "there is no basis in the statute for Customs or the court to consider the effects of a nonmarket

82. See *PrimeSource Building Prods., Inc. v. United States*, 59 F.4th 1255, 1255 (Fed. Cir. 2023).

83. *Id.* at 1255, 1257.

84. See *id.* at 1262; see also *Transpacific Steel LLC v. United States*, 4 F.4th 1306, 1326–29 (Fed. Cir. 2021).

85. See *PrimeSource Building Prods., Inc.*, 59 F.4th at 1263.

86. *Meyer Corp. v. United States*, No. 13-00154, slip op. at 1376–80 (Ct. Int'l Trade Feb. 9, 2023).

87. See *id.* at 1376.

88. See *Meyer Corp. v. United States*, No. 17-110, slip op. at 1361 (Ct. Int'l Trade Aug. 23, 2017).

89. See *Iwai Nissho Am. Corp. v. United States*, 982 F.2d 505, 505–510 (Fed. Cir. 1992).

90. *Meyer Corp.*, 255 F. Supp. 3d at 1361.

91. See *Meyer Corp., U.S. v. United States*, 43 F.4th 1325 (Fed. Cir. 2022).

economy on the transaction value and require a party to show the absence of all “distortive nonmarket influences.”⁹² The CAFC decision further states that 19 U.S.C. § 1401a(b)(2)(B) “concerns effects of the relationship between the buyer and seller, not effects of government intervention, and especially not with government intervention that affects the industry as a whole.”⁹³ The CAFC then vacated and remanded Meyer’s first-sale claim case back to the CIT to reconsider whether Meyer may rely on the first-sale price.⁹⁴

On remand, the CIT affirmed its original determination that Meyer’s failed to support its assertion that the basis of its first sale was not warranted because the prior analysis showed that Plaintiff’s failure to provide the financial information requested by it during discovery provided an independent reason as to why Plaintiff could not demonstrate a true first-sale value absent of influence—not from a nonmarket-economy country per se—but from the relationships of the related parties.⁹⁵ Further, Plaintiff had more-than-adequate opportunity to make its case for first-sale treatment, and any suggestion now for a retrial was inconsistent with the first CIT ruling to secure the just, speedy, and inexpensive determination of every action and proceeding.⁹⁶

2. *Cyber Power Systems (USA) Inc. v. United States*⁹⁷

This case involves the question of substantial transformation for purposes of determining country of origin marking (19 U.S.C. § 1304(a)) of uninterruptible power supplies (UPS) and a surge voltage protector (SVP).⁹⁸ At the time of entry, the merchandise had been marked as “Made in the Philippines.”⁹⁹ CBP, however, determined that the country of origin for the five UPS and one SVP was China, and excluded their entry into the United States when Cyber Power refused to change the product markings.¹⁰⁰ Cyber Power contended that the assembly operations in the Philippines resulted in a “substantial transformation” of the merchandise into Philippine origin, having a name, character, and use different from each device’s Chinese components.¹⁰¹ The court agreed with Plaintiff as to the origin of one model of subject merchandise because there was sufficient information supplied to support a substantial transformation but found for Defendant as to the

92. *Id.* at 1332.

93. *Id.* at 1332–33.

94. *See id.* at 1333.

95. *See Meyer Corp.*, No. 13-00154, slip op. at 1376–80.

96. *See id.*

97. *Cyber Power Sys. Inc. v. United States*, No. 23–24, slip op. at 1397 (Ct. Int’l Trade Feb. 27, 2023); *Ninestar Corp. v. United States*, No. 23–169, slip op. at 1352 (Ct. Int’l Trade Nov. 20, 2023).

98. *See Cyber Powers Sys. Inc.*, 622 F. Supp. 3d at 1397.

99. *Id.* at 1409.

100. *See id.* at 1400.

101. Lawrence Friedman, *Cyber Power Decision Keeps the Lights on Origin*, *BLOGGER* (Feb. 27, 2023), <https://customslaw.blogspot.com/2023/02/cyber-power-decision-keeps-lights-on.html> [<https://perma.cc/RT9T-URB9>].

remaining five products.¹⁰² For these five products, the court concluded that Cyber failed to carry its burden of proof to overcome the presumption of correctness that attaches to Customs' original determination that the devices were products of China, and to show, by a preponderance of the evidence that these devices were substantially transformed into products of the Philippines.¹⁰³

Despite siding with CBP with respect to the five products found not to have been transformed, the court reiterated its rejection of two potential alternatives offered by the government to the substantial transformation test of name, character, or use: first, an "essence-based" approach that would look only to whether the essential or critical component of a product had been transformed; and second, an approach that would per se decide whether substantial transformation had occurred on a component-by-component basis.¹⁰⁴ Rather, the court confirmed that a change in name, character, or use turns on the nature of the potentially transformative processing, considered in the context of the particular kind of merchandise being manufactured.¹⁰⁵

3. *In Re Section 301 Cases*¹⁰⁶

The CIT ruled that Office of the U.S. Trade Representative (USTR) complied with Administrative Procedure Act (APA) requirements when it set Lists 3 and 4A Section 301 tariffs¹⁰⁷ on China.¹⁰⁸ USTR imposed the contested duties, referred to as "List 3" and "List 4A," in September 2018 and August 2019.¹⁰⁹ Plaintiffs alleged that USTR exceeded its statutory authority and violated the APA when it promulgated List 3 and List 4A.¹¹⁰ Here, the Court found that USTR's remand results were not illegally post hoc simply because USTR addressed the comments on remand.¹¹¹ USTR's responses were simply a fuller explanation of its analysis at the time of agency action, and the USTR was not "required to provide additional explanation regarding its reasons for agreeing with the President that the chosen actions were 'appropriate.'"¹¹²

102. *See Cyber Powers Sys. Inc.*, 622 F. Supp. 3d at 1412–13.

103. *See id.* at 1413.

104. *Id.* at 1411.

105. *See id.*

106. *In re Section 301 Cases*, No. 21-00052-3J, slip op. at 23–35 (Ct. Int'l Trade Mar. 17, 2023).

107. In 2018, the U.S. Trade Representative (USTR) determined, pursuant to an investigation under Section 301 (Title III of the Trade Act of 1974, 19 U.S.C. §§2411–2420), that China's acts, policies, and practices related to technology transfer, intellectual property (IP), and innovation were unreasonable or discriminatory and burdened or restricted U.S. commerce. To counter them and obtain their elimination, the Trump Administration used Section 301 authorities to impose four rounds of increased tariffs on about two-thirds of U.S. imports from China. *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. 47, 974 (2018).

108. *In re Section 301 Cases*, No. 21-00052-3J, slip op. at 23–35.

109. *Id.* at 1239.

110. *See id.* at 1240.

111. *See id.* at 1243.

112. *Id.* at 1247.

Ultimately, the court noted that a disagreement with the conclusions USTR reached is not a basis for the court to overturn its actions.¹¹³

4. *Royal Brush Mfg., Inc. v. United States*¹¹⁴

The CIT dismissed a challenge by Royal Brush to CBP's antidumping evasion finding under the EAPA against the company's pencil imports from the Philippines.¹¹⁵ The case returned to the CIT following the earlier decision of the CAFC, vacating and remanding the case with specific instructions to remand to CBP for further proceedings consistent with the Federal Circuit's decision.¹¹⁶

Essentially, CIT ruled that Royal Brush had to file a protest with CBP to allow the court to order reliquidation for its entries (which the agency illegally liquidated), which Royal Brush failed to do.¹¹⁷ Therefore, CIT did not have jurisdiction to hear the case.¹¹⁸ The company imported five entries, two of which were assessed the AD duties and three of which were not.¹¹⁹ Regarding the duty free entries, the court stated: "because there is no basis upon which the Government may pursue reliquidation of, or penalties for, the duty-free entries, and there being no other apparent form of relief available to Royal Brush, this case is moot."¹²⁰

As for the dutiable entries, the court noted Royal Brush was precluded from obtaining refunds because Royal Brush failed to protest the liquidations.¹²¹ In conjunction with the passing of the deadline for the government to seek penalties, the case was also moot with respect to these entries.¹²² The court emphasized that the limits of Section 1514 applied, quoting the appellate court, and stating "*all liquidations, whether legal or not*, are subject to the timely protest requirement. Without a timely protest, all liquidations become final and conclusive under 19 U.S.C. § 1514. [emphasis added]."¹²³

5. *Otter Prods., LLC v. United States*¹²⁴

On March 29, 2023, the CIT dismissed a lawsuit from cellphone-case-maker Otter Products (Otter) seeking interest on customs duty

113. *See id.* at 1248.

114. *Royal Brush Mfg., Inc. v. United States*, No. 23-177, slip. Op. at 1282-90 (Ct. Int'l Trade Dec. 15, 2023).

115. *See id.*

116. Mintzer & Parry, *supra* note 67.

117. *Royal Brush Mfg.* 675 F. Supp. 3d at 1286.

118. *See id.* at 1294.

119. *See id.* at 1286.

120. *Id.* at 1290.

121. *See id.*

122. *See id.* at 1290-91.

123. *Royal Brush Mfg.* 675 F. Supp. 3d at 1293.

124. *Otter Prods., LLC v. United States*, No. 23-43, slip op. at 1306-1310 (Ct. Int'l Trade Mar. 29, 2023).

overpayments because it lacked jurisdiction.¹²⁵ Seeking the interest on the duty overpayments linked to three prior disclosures on cellphone cases entered between 2006 and 2014, Otter Products argued it was entitled to the interest since the payments were made pursuant to CBP's erroneous classification of its merchandise.¹²⁶

Upon the discovery in 2010 that it had failed to declare the value of certain assists related to certain imported cellphone cases and inconsistently classified those products, Otter filed prior disclosures.¹²⁷ After prevailing in litigation related to the proper classification of the cases, the imports were reclassified under the proper subheading and Otter was afforded a refund, but it was not reimbursed for any interest on the overpayments.¹²⁸ The CIT held that, while the law "requires an importer to submit interest for loss of duties," the company "does not receive interest on its overpayments in connection with prior disclosures because the statute does not provide for interest on duty overpayments."¹²⁹ Since there is no stated waiver of sovereign immunity under the APA for interest paid on overpayments related to prior disclosures, the court lacked jurisdiction.¹³⁰

V. Canada's New Forced Labor Reporting Requirements

On May 3, 2023, the Canadian Parliament passed a supply chain transparency law, the Fighting Against Forced Labor and Child Labor in Supply Chains Act (the Act).¹³¹ Among other amendments to Canada's import laws, notably, the Act introduces a forced labor diligence public reporting requirement that will apply to both private sector entities and government institutions.¹³² It enters into force on January 1, 2024, and the first report deadline for reporting entities is May 31, 2024.¹³³

Reporting entities include all Canadian federal government institutions, Crown corporations and their wholly owned subsidiaries, as well as any private sector "entity" that is:

- producing, selling or distributing goods in Canada or elsewhere;
- importing into Canada goods produced outside Canada; or
- controlling an entity engaged in any activity described in paragraph (a) or (b), with control defined broadly as any direct or indirect control or common control "in any manner."¹³⁴

125. *See id.* at 1307, 1315.

126. *See id.* at 1311.

127. *See id.* at 1307–08.

128. *See id.* at 1315.

129. *Id.* at 1314.

130. *Otter Prods., LLC*, 628 F. Supp. 3d at 1315.

131. *See* Fighting Against Forced Labour and Child Labour in Supply Chains Act, S.C. 2023, ¶ 9 (Can.).

132. *See id.*

133. *See id.* § 6(1).

134. *Id.* § 9.

Policy guidance released by Public Safety Canada in December 2023 elaborates that “importing” for these purposes is understood to mean declaring and accounting for goods under the Customs Act with the Canada Border Services Agency; an entity that purchases imported goods from a third party that declared and accounted for them does not qualify as “importing.”¹³⁵ The reporting requirement does not apply to “entities” that solely provide services that support the production, sale, distribution, or importation of goods without itself actually engaging in these activities.¹³⁶

An “entity” is defined as a corporation or a trust, partnership or other unincorporated organization that meets at least one of the following criteria:

- is listed on a stock exchange in Canada;
- has a place of business in Canada, does business in Canada, or has assets in Canada and that, based on its consolidated financial statements, meets at least two of the following conditions for at least one of its two most recent financial years:
 - it has at least C\$20 million in assets;
 - it has generated at least C\$40 million in revenue; and
 - it employs an average of at least 250 employees; or
- is otherwise prescribed by regulations (none of which has yet been enacted).¹³⁷

For purposes of the second criterion in the “entity” definition, the “Canadian nexus” element (i.e., having a “place of business in Canada, doing business in Canada or having assets in Canada”) should be interpreted using the ordinary sense of these words and with reference to the criteria applied by the Canada Revenue Agency for income tax purposes.¹³⁸

The annual reports filed by private sector entities must include the steps the organization took during the previous financial year to prevent and reduce the risk that forced labor or child labor is used or in the entity’s supply chains.¹³⁹ The report must include the following information in respect of each applicable reporting entity:

- the entity’s structure, activities and supply chains;
- its policies and due diligence processes in relation to forced labor and child labor;
- the parts of its business and supply chains that carry a risk of forced labor or child labor being used and the steps taken to assess and manage that risk;
- any measures taken to remediate any forced labor or child labor;

135. *Prepare a Report – Entities*, GOV’T CAN. (Mar. 20, 2024), <https://www.publicsafety.gc.ca/cnt/cntrng-crm/frcd-lbr-cndn-sply-chns/prpr-rprt-en.aspx#a42> [<https://perma.cc/6YWE-D937>].

136. *Id.*

137. *See* S.C. 2023, § 2 (Can.).

138. *Prepare a report – Entities*, *supra* note 135.

139. *See id.*

- any measures taken to remediate the loss of income to the most vulnerable families that results from any measure taken to eliminate the use of forced labor or child labor in its activities and supply chains;
- the training provided to employees on forced labor and child labor; and
- how the entity assesses its effectiveness in ensuring that forced labor and child labor are not being used in its business and supply chains.¹⁴⁰

The reports require approval by the reporting entity's governing body (board of directors or similar) and an attestation.¹⁴¹ They must be posted publicly on the reporting entity's website and will also be available in a government registry.¹⁴² Corporations formed under the Canada Business Corporation Act or other federal statutes must provide a copy of the report to its shareholders along with its annual financial statements.¹⁴³

Entities or individuals who fail to comply with the obligations under Act or make false or misleading statements, or provides false or misleading information to the Minister (e.g., in an annual report) will be subject to summary conviction with fines up to C\$250,000.¹⁴⁴ Importantly, the Act also creates personal liability for directors and officers, among others, who direct, authorize, assent to acquiesce in or participate in an offence under the Act.¹⁴⁵

VI. A Year in Review in the Australian Customs and Trade Agenda for 2023¹⁴⁶

A. BACKGROUND

2023 was the first full year after the restraints on trade imposed by the COVID-19 pandemic and the first full year in power for Australia's new Federal Government. Many things moved yet many issues remain unresolved. Some of the highlights are summarized below.

B. THE AUSTRALIAN FREE TRADE AGENDA

Australia has actively pursued several bilateral, plurilateral, and regional Free Trade Agreements (FTA) with its major trading partners. An FTA with India (the Australia-India Economic and Trade Agreement known as ECTA) commenced on December 29, 2022.¹⁴⁷ An FTA with the United Kingdom

140. See S.C. 2023, § 2 (Can.).

141. See *id.* §§ 11(4)–(5)

142. See *id.* § 13(1).

143. See *id.* § 13(2).

144. See *id.* § 19.

145. See *id.* § 20.

146. The ABA retains first publication rights for material covered in this section as written in November of 2023, but pursuant to a separate agreement with the author, the materials have been utilized elsewhere.

147. See *Australia-India Economic Cooperation and Trade Agreement (ECTA)*, DEP'T OF FOREIGN AFFAIRS AND TRADE, <https://www.dfat.gov.au/trade/agreements/in-force/australia-india-ecta> [https://perma.cc/VRY2-F9PK] (last visited Apr. 14, 2024).

(UK) (known as the A–UKFTA) commenced on May, 31, 2023.¹⁴⁸ Negotiations continue with India for a wider Australia–India Comprehensive Economic Cooperation Agreement (to be known as CECA).¹⁴⁹ The trade initiatives in ECTA would then be folded into the broader CECA.¹⁵⁰

Negotiations have also been concluded by Australia and the other parties to the ASEAN–Australia–New Zealand Free Trade Agreement (AANZFTA) for a “Second Protocol” to the agreement establishing AANZFTA.¹⁵¹ The “Second Protocol” operates as a significant “upgrade” to the terms of AANZFTA and was signed on August 23, 2023.¹⁵² The provisions of the “Second Protocol” will enter into force when Australia, New Zealand, and at least four ASEAN Member States conclude their ratification and implementation steps.¹⁵³

Australia joined thirteen other countries negotiating the Indo–Pacific Economic Framework Agreement (IPEF) comprised by “Four Pillars.”¹⁵⁴ Subsequent negotiations have led to the conclusion and signing of the “Supply Chain Agreement” (Pillar II of IPEF) on May 27, 2023, but that Agreement has yet to be implemented by the contracting parties.¹⁵⁵ IPEF does not address tariffs or market access as found in traditional FTAs and can better be seen as seeking to establish rules to enhance trade and social outcomes.¹⁵⁶

The FTA process has not all been positive. Australia had been negotiating an FTA with the European Union (the Australia–EU FTA) since June 18, 2018, with a break following Australia cancelling its order of submarines

148. See *Australia–United Kingdom Free Trade Agreement*, DEP’T OF FOREIGN AFFAIRS AND TRADE, <https://www.dfat.gov.au/trade/agreements/in-force/aukfta> [<https://perma.cc/PG7A-FERL>] (last visited Apr. 14, 2024).

149. See *Australia–India Comprehensive Economic Cooperation Agreement (CECA)*, DEP’T OF FOREIGN AFFAIRS AND TRADE, <https://www.dfat.gov.au/trade/agreements/negotiations/aifta/australia-india-comprehensive-economic-cooperation-agreement> [<https://perma.cc/Q3UC-RPWZ>] (last visited Apr. 14, 2024).

150. See Amitendu Palit, *India–Australia ECTA: A Transformative and Strategically Significant Milestone*, AUSTL. INDIA INST. (Apr. 8, 2022), <https://aii.unimelb.edu.au/ecta-a-transformative-and-strategically-significant-milestone/> [<https://perma.cc/BCW5-PUTH>].

151. See MINISTRY OF FOREIGN AFFAIRS AND TRADE, NATIONAL INTEREST ANALYSIS: SECOND PROTOCOL TO AMEND THE AGREEMENT ESTABLISHING THE ASEAN–AUSTRALIA–NEW ZEALAND FREE TRADE AREA 5 (2023), <https://www.mfat.govt.nz/assets/Trade-agreements/AANZFTA/National-Interest-Analysis-Second-Protocol-to-Amend-AANZFTA.pdf>.

152. See *id.*

153. *Id.* at 12.

154. See DEP’T OF FOREIGN AFFAIRS AND TRADE, IPEF SUPPLY CHAIN AGREEMENT POLICY IMPACT ANALYSIS 1 (2023) (Austl.) [hereinafter IPEF SUPPLY CHAIN AGREEMENT ANALYSIS], https://oia.pmc.gov.au/sites/default/files/posts/2023/11/Impact_Analysis_-_IPEF_Supply_Chain_Agreement%5B1%5D.docx [<https://perma.cc/D75T-B54G>].

155. Press Release, Minister for Trade and Tourism, IPEF Supply Chains Agreement – More Resilient Supply Chains for Uncertain Times (May 28, 2023), <https://www.trademinister.gov.au/minister/don-farrell/media-release/ipef-supply-chains-agreement-more-resilient-supply-chains-uncertain-times> [<https://perma.cc/3MRK-BJVD>].

156. IPEF SUPPLY CHAIN AGREEMENT ANALYSIS, *supra* note 154.

from France.¹⁵⁷ While much of the Australia—EU FTA seemed to have been settled, the parties could not reach consensus on some fundamental issues including Australia’s proposed access to the EU’s agricultural markets¹⁵⁸ and on the EU’s demands for protection on a significant number of “Geographical Indicators” which would have jeopardized current Australian use of those indicators.¹⁵⁹ While public statements indicate that discussions will continue, the inability to reach agreement on fundamental issues after five years of negotiations does not suggest that a positive outcome will take place soon.

C. THE TRADE RELATIONSHIP WITH CHINA

One of the most significant trade issues for Australia has been its relationship with China. Even though Australia has an FTA with China (ChAFTA),¹⁶⁰ as the political relationship between Australia and China deteriorated, the trade relationship also fractured. This included restrictions and significant additional duties on Australian exports of seafood, coal, barley, and wine.¹⁶¹ Australia had resorted to proceedings against China at the World Trade Organization (WTO) regarding the measures on barley and wine.¹⁶² Simultaneously, China has also acted against Australian trade measures imposed on Chinese steel products.¹⁶³

Following a change in the Australian Federal Government in 2022, the political relationship seems to have improved. Bans on imports of Australian coal and timber were lifted during 2023.¹⁶⁴ Dumping and countervailing measures imposed on Australian barley were removed in August 2023

157. See Diksha Madhok, *French Submarine Dispute Could torpedo EU-Australia Trade Talks*, CNN (Sept. 20, 2021), <https://www.cnn.com/2021/09/20/business/france-australia-europe-trade-deal/index.html> [https://perma.cc/AF3D-EB9H].

158. See Elyse Kneller, *EU-Australia FTA: Challenges and Potential Points of Convergence for Negotiations in Geographical Indications*, 23 J. WORLD INTLL. PROP. 546, 570 (2020).

159. See *id.* at 561–62.

160. See *China-Australia Free Trade Agreement (ChAFTA)*, AUSTRALIAN TRADE AND INV. COMM’N, [https://www.austrade.gov.au/en/how-we-can-help-you/australian-exporters/free-trade-agreements/china#:~:text=The%20China%2DAustralia%20Free%20Trade,position%20in%20the%20Chinese%20market](https://www.austrade.gov.au/en/how-we-can-help-you/australian-exporters/free-trade-agreements/china#:~:text=The%20China%2DAustralia%20Free%20Trade,position%20in%20the%20Chinese%20market.). [https://perma.cc/W8NN-YB5C] (last visited Apr. 14, 2024).

161. See Georgia Edmonstone, *China’s Trade Restrictions on Australian Exports*, U.S. STUDIES CTR. (Apr. 2, 2024), <https://www.ussc.edu.au/chinas-trade-restrictions-on-australian-exports> [https://perma.cc/6TQA-T22Q].

162. See Request for Consultations by Australia, *China – Anti-Dumping and Countervailing Duty Measures on Barley from Australia*, WTO Doc. WT/DS598/1 (Dec. 21, 2020); see also Request for Consultations by Australia, *China – Anti-Dumping and Countervailing Duty Measures on Wine from Australia*, WTO Doc. WT/DS602/1 (June 28, 2021).

163. See Request for Consultations by China, *Australia – Anti-Dumping and Countervailing Duty Measures on Certain Products from China*, WTO Doc. WT/DS603/1 (June 29, 2021).

164. See Rhiannon Hoyle, *China Moves to Repair Ties With Australia by Lifting Coal Ban*, WSJ (Jan. 12, 2023 4:09 AM), <https://www.wsj.com/articles/china-moves-to-repair-ties-with-australia-by-lifting-coal-ban-11673514548> [https://perma.cc/82RP-YGN9].

after China reviewed the need for the measures.¹⁶⁵ Australian action at the WTO regarding those measures has been withdrawn.¹⁶⁶ The countries have recently announced that China will undertake a review into the dumping duties imposed on Australian wine exports and it can only be hoped that China resolves that ongoing measures will not be required.¹⁶⁷ Australia could then withdraw its action against China at the WTO.

D. DUMPING AND COUNTERVAILING MEASURES

Australia continues to maintain an active trade remedies regime with twenty-seven measures in place and twenty investigations in progress. There are also several applications which have yet to lead to investigations being commenced. Determinations were reached that measures do not apply to aluminum extrusions forming part of certain residential solar panel kits and do not apply to certain steel items forming part of a large solar farm.

E. SANCTIONS AND TRADE RESTRICTIONS

Australia has three categories of sanctions regimes including one based on sanctions imposed by the United Nations (UN), one allowing for autonomous sanctions outside of those imposed by the UN and one allowing for the imposition of “Thematic” sanctions.¹⁶⁸ Australia imposed significant autonomous sanctions in 2022 and 2023 on Russia and Belarus following the initiation of conflict with Ukraine.¹⁶⁹ Those sanctions extended and expanded previous autonomous sanctions imposed on Russia in 2014 and 2015.¹⁷⁰

Those autonomous sanctions include restrictions on the export or supply of certain goods, restrictions on the import, purchase or transport of certain

165. See Press Release, Minister for Foreign Affairs, Resolution of Barley Dispute with China (Aug. 4, 2023), <https://www.foreignminister.gov.au/minister/penny-wong/media-release/resolution-barley-dispute-china> [https://perma.cc/5Q2A-MNE2].

166. See Panel Report, *China – Anti-Dumping and Countervailing Duty Measures on Barley from Australia*, WTO Doc. WT/DS598/R, at 5 (Aug. 24, 2023) (concluding the dispute based on joint notification by the parties that they had reached a mutually agreed solution to the matter).

167. See Sarah Basford Canales, *Australia and China Suspend WTO Wine Tariff Dispute before Anthony Albanese’s Trip to Beijing*, THE GUARDIAN (Oct. 21, 2023 7:24 PM), <https://www.theguardian.com/australia-news/2023/oct/22/australia-and-china-suspend-wto-wine-tariff-dispute-ahead-of-albanese-trip-to-beijing> [https://perma.cc/G95L-N2NF].

168. See Leah Ferris, *Australian Sanctions Law: A Quick Guide*, PARLIAMENT OF AUSTRALIA (Aug. 24, 2022), https://www.aph.gov.au/About_Parliament/Parliamentary_departments/Parliamentary_Library/pubs/rp/rp2223/Quick_Guides/AustralianSanctionsLaw [https://perma.cc/T4HT-LCBR].

169. See Rajae Rouhani et. al, *Australian Sanctions Briefing: Russia, Ukraine and Belarus*, NORTON ROSE FULBRIGHT (Mar. 2022), <https://www.nortonrosefulbright.com/en/knowledge/publications/d2f951ec/australian-sanctions-briefing-russia-ukraine-and-belarus> [https://perma.cc/2RGG-ZAYU]; see also Press Release, Minister of Foreign Affairs, Further Sanctions in Response to Russia’s Invasion of Ukraine (July 20, 2023), <https://www.foreignminister.gov.au/minister/penny-wong/media-release/further-sanctions-response-russias-invasion-ukraine> [https://perma.cc/KZY4-5MWS].

170. *Id.*

goods, restrictions on certain commercial activities, restrictions on the provision of certain services, restrictions on providing assets to designated persons or entities, restrictions on dealing with the assets of designated persons or entities, and travel bans on designated persons.¹⁷¹

In addition to sanctions, Australia has also taken other measures including removing “Most Favored Nation” status for Belarus and Russia and recently extending the additional thirty-five percent customs duty payable on goods imported into Australia from those countries until October 24, 2025.¹⁷²

F. TRADE FACILITATION AND MODERNIZATION

Many countries and international agencies are pursuing versions of the “Trade Facilitation and Modernization” agenda.

Australia’s journey has been somewhat fragmented. Recent research determined that there are twenty-nine agencies which have an interest in goods at the border and 200 pieces of legislation in operation.¹⁷³ This makes a “Trade Single Window” quite an ambitious outcome. Many of the agencies are undertaking their own work. By way of example, legislation has recently been passed which will allow the Australian Border Force (ABF) to conduct a “regulatory sandbox” for “controlled trials” of new processes to facilitate trade which are not allowed by the provisions of the Customs Act 1901.¹⁷⁴

Importantly, the Federal Government established the Simplified Trade Implementation Taskforce (Taskforce) in 2021 as a temporary “whole of government” body to review the trade reform work of the border agencies and recommend trade simplification initiatives to the Federal Government.¹⁷⁵ There have also been significant contributions by the private sector to the work of the border agencies and the Taskforce. The recommendations of the Taskforce are currently before the Federal Government along with associated funding proposals. Many of those in the private sector are hoping that the recommendations are adopted as well as making the Taskforce a permanent agency overseeing the implementation of the trade modernization and facilitation reform being conducted across the border agencies.

171. *See id.*

172. Australian Customs Notice No. 2023/42, Further Extension of the Additional Customs Duty on Russian and Belarusian Goods (Sept. 22, 2023), <https://www.abf.gov.au/help-and-support-subsite/CustomsNotices/2023-42.pdf> [<https://perma.cc/B5EG-XRRN>].

173. *See* DEP’T OF HOME AFFAIRS, SUBMISSION: INQUIRY INTO THE TRADE SYSTEM AND DIGITAL ECONOMY 4 (2018).

174. Explanatory Memorandum, Customs Legislation Amendment (Controlled Trials and Other Measures) Bill 2022 (Cth) 1 (Austl.), https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd2223a/23bd054 [<https://perma.cc/NN8U-L8T5>].

175. *See Department of Home Affairs Annual Report 2021-22 – Part 2: Annual Performance Statement – Purpose 3: Border and Customs Operations*, <https://www.transparency.gov.au/publications/home-affairs/departments-of-home-affairs/departments-of-home-affairs-annual-report-2021-22/part-2%3A-annual-performance-statement-purpose-3%3A-border-and-customs-operations> [<https://perma.cc/5GZP-NZZ6>] (last visited Apr. 14, 2024).

VII. Conclusory Remarks

Although 2023 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 2024.

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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 2023.¹

I. U.S. Export Control Developments

A. INTERNATIONAL TRAFFIC IN ARMS REGULATIONS (ITAR)

1. *Canada-Australia-UK Excluded Items List Amended*

On April 12, 2023, the U.S. Department of State published a final rule, effective May 12, amending Supplement No. 1 to part 126 of the ITAR.² The amendments expanded the types of defense articles that may be exported and defense services that may be furnished pursuant to the Treaty between the U.S. and Australia Concerning Defense Trade Cooperation, the Treaty between the U.S. and the U.K. Concerning Defense Trade Cooperation, and the Canadian exemption in the ITAR.³

2. *U.S. Munitions List (USML) Amendments*

On April 27, State published an interim final rule that amended, effective May 21, USML Category XI(c)(5), to remove from Category XI “certain

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1. Given the publication deadlines, this article generally includes developments occurring between December 1, 2022 and November 30, 2023.

2. International Traffic in Arms Regulations: Expansion of Defense Articles and Defense Services Eligible for Transfer Under the Canadian and Treaty Exemptions, 88 Fed. Reg. 21,910 (Apr. 12, 2023) (to be codified at 22 C.F.R. pt. 126).

3. *Id.*

high-energy storage capacitors and to clearly identify the high-energy storage capacitors that remain in USML Category XI.”⁴

3. *Open General License Pilot Program Extended*

In 2022, State launched a one-year pilot program involving two open general licenses (OGLs), effective August 1, 2022, through July 31, 2023.⁵ On June 1, State updated the OGLs to extend validity through July 31, 2026, and to update citations for ITAR sections moved by rulemaking subsequent to the OGLs issuance.⁶ The OGLs permit certain reexports and in-country retransfers to the Australian, Canadian, and United Kingdom governments and to certain persons within those countries.⁷

4. *Temporary Suspension of Cyprus’ ITAR Section 126.1 Proscribed Destination Status Extended*

Effective October 1, State extended its temporary suspension of Cyprus’ ITAR § 126.1 proscribed destination status through September 30, 2024.⁸ License applications involving a proscribed destination are generally reviewed with a policy of denial, except under certain circumstances for certain proscribed destinations.⁹

B. EXPORT ADMINISTRATION REGULATIONS (EAR)

1. *Semiconductors, Semiconductors Manufacturing, and Advanced Computing Controls Focused on China and U.S. Arms-Embargoed Countries*

On October 7, 2022, the U.S. Department of Commerce’s Bureau of Industry and Security (BIS), which administers the EAR, issued sweeping new export controls focused on leading edge semiconductors and associated manufacturing equipment, materials, software, and technology to restrict China’s ability “to produce advanced military systems including weapons of mass destruction; improve the speed and accuracy of its military decision making, planning, and logistics, as well as of its autonomous military

4. International Traffic in Arms Regulations: U.S. Munitions List Targeted Revisions, 88 Fed. Reg. 25,488 (Apr. 27, 2023) (to be codified at 22 C.F.R. pt. 121).

5. International Traffic in Arms Regulations: Issuance of Open General Licenses 1 and 2, 87 Fed. Reg. 43,366 (July 20, 2022).

6. International Traffic in Arms Regulations: Reissuance and Update of Open General Licenses 1 and 2, 88 Fed. Reg. 35,992, 35,992–94 (June 1, 2023).

7. *Id.* at 35,992–93.

8. International Traffic in Arms Regulations: Prohibited Exports, Imports, and Sales to or From Certain Countries—Cyprus, 88 Fed. Reg. 63,016 (Sept. 14, 2023) (to be codified at 22 C.F.R. pt. 126).

9. See generally 22 C.F.R. § 126.1 (2024).

systems; and commit human rights abuses”¹⁰ (the “2022 Semiconductor Export Controls”). Among the new controls were four new Export Control Classification Numbers (ECCNs) and two new ECCN paragraphs on the Commerce Control List (CCL), a China-specific Regional Stability destination-based control, new supercomputer and semiconductor manufacturing end-use controls, new U.S. person activities controls, modifications to the Entity List Foreign Direct Product (FDP) Rule, and new Advanced Computing and Supercomputer End-Use FDP Rules.¹¹

On January 17, BIS expanded the 2022 Semiconductor Export Controls to apply to the Macau Special Administrative Region (Macau),¹² which is treated distinctly from China under the EAR.¹³ BIS also imposed Nuclear Nonproliferation (NP) destination-based controls against China and Macau by adding each to NP Column 2 effective August 11, 2023—China and Macau were previously subject only to NP Column 1 controls.¹⁴ In imposing the additional NP Column 2 controls, BIS noted the 2022 Semiconductors Export Controls “were intended ‘to protect U.S. national security and foreign policy interests by restricting [China’s] access to advanced computing for its military modernization, including nuclear weapons development ...’”¹⁵

On October 17 (effective November 17), BIS announced significant updates to the 2022 Semiconductor Export Controls.¹⁶ With respect to semiconductor manufacturing equipment (SME), BIS, *inter alia*,

- added additional types of SME to those previously described by ECCN 3B090 and moved all the items from ECCN 3B090 to ECCNs 3B001 and 3B002;¹⁷

10. Press Release, Bureau 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/2F2V-XMEP>].

11. Implementation of Additional Export Controls: Certain Advanced Computing and Semiconductor Manufacturing Items; Supercomputer and Semiconductor End Use; Entity List Modification, 87 Fed. Reg. 62,186, 62,187–88 (Oct. 13, 2022) (to be codified at 15 C.F.R. pts. 734, 736, 740, 742, 744, 762, 772, 774).

12. *See generally* Implementation of Additional Export Controls: Certain Advanced Computing and Semiconductor Manufacturing Items; Supercomputer and Semiconductor End Use; Entity List Modification; Updates to the Controls to Add Macau, 88 Fed. Reg. 2821 (Jan. 18, 2023) (to be codified at 15 C.F.R. pts. 734, 736, 740, 742, 744, 762, 772, 774).

13. *See, e.g.*, 15 C.F.R. Supplement No. 1 (2024).

14. Expansion of Nuclear Nonproliferation Controls on the People’s Republic of China and Macau, 88 Fed. Reg. 54,875, 54,875–76 (Aug. 14, 2023) (to be codified at 15 C.F.R. pts. 738, 742).

15. *Id.* at 54,876 (quoting Implementation of Additional Export Controls: Certain Advanced Computing and Semiconductor Manufacturing Items; Supercomputer and Semiconductor End Use; Entity List Modification, 87 Fed. Reg. at 62,187).

16. Press Release, Bureau Indus. & Sec., Commerce Strengthens Restrictions on Advanced Computing Semiconductors, Semiconductor Manufacturing Equipment, and Supercomputing Items to Countries of Concern (Oct. 17, 2023), <https://www.bis.doc.gov/index.php/documents/about-bis/newsroom/press-releases/3355-2023-10-17-bis-press-release-acsc-and-sme-rules-final-js/file> [<https://perma.cc/M85A-SDKH>].

17. Export Controls on Semiconductor Manufacturing Items, 88 Fed. Reg. 73,424, 73,425 (Oct. 25, 2023) (to be codified at 15 C.F.R. pts. 734, 736, 740, 742, 744, 772, 774).

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- revised software ECCNs 3D001, 3D002, and 3D003, and technology ECCN 3E001 to conform to the movement of SME to ECCNs 3B001 and 3B002;¹⁸
- revised related license exceptions to conform to the above changes;¹⁹
- imposed National Security destination-based controls on newly added SME and SME moved to ECCNs 3B001 and 3B002 for destinations in EAR Country Group D:5 (“U.S. Arms Embargoed Countries”)²⁰ and Macau;
- expanded the Regional Stability (RS) destination-based control to apply to Macau and U.S. Arms Embargoed Countries;²¹
- added a 0% de minimis rule for lithography equipment described in the new ECCN 3B001.f.1.b.2.b;²²
- revised and reformatted the U.S. person activities controls and super-computer and semiconductor end-use controls;²³
- added two new defined terms for “extreme ultraviolet” and “advanced node-integrated circuits;”²⁴ and
- added a new Temporary General License (TGL) to ease transition to the newly modified controls for SME producers in the U.S. and Country Groups A:5 and A:6.²⁵

With respect to advanced computing and supercomputing (and the semiconductors that enable the same), BIS, *inter alia*,

- revised ECCN 3A090 to implement calculations of “total processing performance” and “performance density” to more precisely control the types of semiconductors presentation national security concerns, revised ECCN 4A090 to refer to ECCN 3A090’s performance-based parameters, and made a conforming change to ECCN 3A991.p;²⁶
- revised several ECCNs to add a paragraph “.z” referring to the new end semiconductor performance-based parameters of ECCN 3A090 (either directly or by reference to ECCN 4A090);²⁷
- clarified the scope of the U.S. person and end-use controls relating to advanced computing items and supercomputers;²⁸

18. *Id.*

19. *Id.*

20. *See* Export Controls on Semiconductor Manufacturing Items, 88 Fed. Reg. at 73,425; *see also* 15 C.F.R. § 740, Supplement No. 1 (2024).

21. Export Controls on Semiconductor Manufacturing Items, 88 Fed. Reg. at 73,425.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. Implementation of Additional Export Controls: Certain Advanced Computing Items; Supercomputer and Semiconductor End Use; Updates and Corrections, 88 Fed. Reg. 73,458, 73,459 (Oct. 25, 2023) (to be codified at 15 C.F.R. pts. 732, 734, 736, 740, 742, 744, 746, 748, 758, 770, 772, 774).

27. *Id.*

28. *Id.*

- revised License Exception Consumer Communication Devices to include eligibility for mainstream semiconductors in ECCN 3A991.p and computers containing mainstream semiconductors in ECCN 4A994.1;²⁹
- expanded the RS license requirements and amended the RS licensing policy to adopt a case-by-case license review policy for certain items as well as to adopt a favorable presumption of approval for destinations other than U.S. Arms Embargoed Countries and Macau, except where the recipient(s) are headquartered or have an ultimate parent company headquartered in the same;³⁰
- revised the model certificate first published as part of the 2022 Semiconductor Export Controls and clarified it may be used for all FDP rules;³¹
- added five new red flags to assist with compliance;³²
- added a new TGL;³³ and
- creating a new License Exception Notified Advanced Computing to authorize exports, reexports, and in-country transfers of certain items to or within certain Country Group D countries and to give BIS the opportunity to stop problematic transactions through a prior notification process.³⁴

2. *Russia Export Controls*

Periodic BIS escalations of export controls against Russia (and Belarus) continued in 2023, albeit at a more moderate pace than in 2022.³⁵ On February 24, the first anniversary of Russia's further invasion of Ukraine, BIS released four rules.³⁶ First, BIS expanded its luxury goods sanctions by adding 276 six-digit Harmonized Tariff Schedule (HTS) codes, expanded the Russia and Belarusian Industry Sector Sanctions (RBISS) by adding various chemical and biological weapons precursors as well as 322 HTS codes for industrial items, imposed a policy of denial for licenses to export, re-export, or in-country transfer items used for deepwater, Arctic offshore, or shale projects in Russia or Belarus, and added Taiwan to a list of countries excluded from the application of certain FDP rules.³⁷ Second, BIS targeted

29. *Id.*

30. *Id.*

31. *Id.*

32. Implementation of Additional Export Controls: Certain Advanced Computing Items; Supercomputer and Semiconductor End Use; Updates and Corrections, 88 Fed. Reg. at 73,459.

33. *Id.*

34. *Id.*

35. See generally Implementation of Additional Sanctions Against Russia and Belarus Under the Export Administration Regulations (EAR) and Refinements to Existing Controls, 88 Fed. Reg. 33,422 (May 23, 2023) (to be codified at 15 C.F.R. pts. 734, 746, 750).

36. *Id.*

37. Implementation of Additional Sanctions Against Russia and Belarus Under the Export Administration Regulations (EAR) and Refinements to Existing Controls, 88 Fed. Reg. 12,175, 12,175, 12,177, 12,179, 12,181 (Feb. 27, 2023) (to be codified at 15 C.F.R. pts. 744, 746).

Iran's supply of unmanned aerial vehicles (UAVs) to Russia for its war of aggression against Ukraine by imposing license requirements for certain EAR99 items destined to Iran identified by HTS codes, added a new Iran-specific FDP rule, and revised the existing Russia/Belarus FDP Rule to reference the EAR99 items.³⁸ The third and fourth rules added a total of approximately ninety entities inside³⁹ and outside⁴⁰ Russia due to their support of Russia's war effort.

On May 19, BIS further expanded export controls on Russia and Belarus by, *inter alia*, adding 1,224 HTS codes (including the entirety of Chapters 84, 85, and 90), six chemicals, and other items to the RBISS,⁴¹ expanding the Russia/Belarus FDP Rule to apply to the "temporarily occupied" Crimea Region of Ukraine,⁴² and adding seventy-one entities to the Entity List.⁴³

II. U.S. National Security Investment Reviews

A. COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS)

In published remarks at CFIUS's second annual conference on September 14, Paul Rosen, Assistant Secretary for Investment Security, highlighted CFIUS's focus on enforcement, noting CFIUS is "on track to have more civil monetary penalties issued [in 2023 than in its] entire history."⁴⁴ Assistant Secretary Rosen also noted CFIUS had more than 230 active mitigation agreements in place and forecasted potential amendments to CFIUS's regulations to "(1) allow for increased efficiency and effectiveness in our case processing and review functions, (2) update the Committee's penalty and enforcement authorities, (3) sharpen and enhance the Committee's tools in the non-notified space, and (4) broadly ensure the Committee's tools and processes are best aligned to the current landscape."⁴⁵

38. Export Control Measures Under the Export Administration Regulations (EAR) To Address Iranian Unmanned Aerial Vehicles (UAVs) and Their Use by the Russian Federation Against Ukraine, 88 Fed. Reg. 12,150 (Feb. 27, 2023) (to be codified at 15 C.F.R. pts. 734, 746).

39. Additions of Entities to the Entity List; Revisions of Entities on the Entity List, 88 Fed. Reg. 12,155 (Feb. 27, 2023) (to be codified at 15 C.F.R. pt. 744).

40. Additions of Entities to the Entity List, 88 Fed. Reg. 12,170 (Feb. 27, 2023) (to be codified at 15 C.F.R. pt. 744).

41. Implementation of Additional Sanctions Against Russia and Belarus Under the Export Administration Regulations (EAR) and Refinements to Existing Controls, 88 Fed. Reg. at 33,423.

42. *Id.* at 33,422.

43. Addition of Entities to the Entity List, 88 Fed. Reg. 32,640 (May 22, 2023) (to be codified at 15 C.F.R. pt. 744).

44. Press Release, Paul Rosen, U.S. Dep't Treas., Assistant Sec'y for Inv. Sec., Remarks by Assistant Secretary for Investment Security Paul Rosen at the Second Annual CFIUS Conference (Sept. 14, 2023), <https://home.treasury.gov/news/press-releases/jy1732> [<https://perma.cc/GRT9-C7TD>].

45. *Id.*

B. OUTBOUND INVESTMENT RESTRICTIONS

1. *Executive Order “Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern”*

On August 9, President Biden issued the highly anticipated executive order directing the U.S. Department of the Treasury (Treasury) to develop and implement regulations to prohibit or require notification of U.S. persons’ investments into foreign markets that support the advancement of three industry sectors in “countries of concern:” (i) semiconductors and microelectronics; (ii) quantum information technologies; and (iii) artificial intelligence (the “Outbound Investment E.O.”).⁴⁶ The Outbound Investment E.O.’s Annex expressly identifies China (including the Special Administrative Regions of Hong Kong, and Macau) as a “country of concern.”⁴⁷

2. *Outbound Investment Program Advance Notice of Proposed Rulemaking*

On the same day as the Outbound Investment E.O.’s signing, Treasury released an Advanced Notice of Proposed Rulemaking (ANPRM) outlining the intended scope of the prohibitions and required notifications under the Outbound Investment Program, which will implement the Outbound Investment E.O.⁴⁸ The ANPRM indicates Treasury will not retroactively apply any final rules once issued.⁴⁹ But Treasury may request information from U.S. persons concerning covered outbound investment transactions completed or agreed to on or after August 9.⁵⁰

According to the ANPRM, Treasury anticipates imposing prohibitions or notice requirements when “U.S. persons” engage in certain transactions and investments—“covered transactions”—involving “covered foreign persons,” which the ANPRM proposes to define as persons of a “country of concern” the U.S. person knows or should know will be engaged in an identified activity regarding a “covered national security technology or product.”⁵¹

It is anticipated “covered transactions” will include acquisitions of an equity interest or contingent equity interest in a covered foreign person, the provision of debt financing to a covered foreign person where such debt financing is convertible to an equity interest, greenfield investment that could result in the establishment of a covered foreign person, and the establishment of a joint venture, wherever located, that is formed with a

46. Exec. Order No. 14105, 88 Fed. Reg. 5,4867, 54,868, 54,870 (Aug. 11, 2023).

47. *Id.* at 54,872.

48. See Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern, 88 Fed. Reg. 54,961, 54,964 (Aug. 14, 2024) (to be codified at 32 C.F.R. ch. VIII).

49. *Id.* at 54,963.

50. *Id.*

51. *Id.* at 54,964.

covered foreign person or could result in the establishment of a covered foreign person.⁵²

The ANPRM outlines the specific “covered national security technologies and products” and related activities (e.g., development, production, design, fabrication, packaging, installation, or sale) that will cause a company to be considered a “covered foreign person.”⁵³ The broad economic categories that include “covered national security technologies and products” match the three highlighted in the Outbound Investment E.O.⁵⁴

III. U.S. Economic Sanctions Developments

A. COUNTERING RUSSIA’S WAR OF AGGRESSION AGAINST UKRAINE

After Iranian UAVs deployed by Russia began appearing in Ukraine,⁵⁵ the Office of Foreign Assets Control (OFAC) and State imposed sanctions under Executive Order 14024 in November 2022 against Private Military Company Wagner (Wagner Group), Iran’s Islamic Revolutionary Guards Corps Aerospace Force, Shahed Aviation Industries Research Center, and individuals and counterparties working with those entities on UAV supply to Russia.⁵⁶ Later, in January and early February of 2023, OFAC used authorities under Executive Order 13382, “Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters,” to impose sanctions against several entities and their executives involved in the UAVs’ production or transfer, as well as on two Iranian government-owned vessels involved in UAV launch operations.⁵⁷

On February 24, the first anniversary of Russia’s further invasion of Ukraine, President Biden, OFAC, and State, in conjunction with G7 partners and allies, announced the imposition of new sanctions, export controls, tariffs, and duties relating to Russia, Belarus, and Iran.⁵⁸ OFAC

52. *Id.*

53. *Id.* at 54,966–69.

54. See Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern, 88 Fed. Reg. at 54,964; see also Exec. Order No. 14105, 88 Fed. Reg. at 54,870.

55. See generally *Iranian UAVs in Ukraine: A Visual Comparison*, DEF. INTEL. AGENCY (Aug. 10, 2023), https://www.dia.mil/Portals/110/Documents/News/Military_Power_Publications/UAV_Book.pdf [<https://perma.cc/HAY7-52WM>].

56. Press Release, U.S. Dep’t Treas., Treasury Targets Actors Involved in Production and Transfer of Iranian Unmanned Aerial Vehicles to Russia for Use in Ukraine (Nov. 15, 2022), <https://home.treasury.gov/news/press-releases/jy1104> [<https://perma.cc/5BKW-7PLX>].

57. See Press Release, U.S. Dep’t Treas., Treasury Sanctions Suppliers of Iranian UAVs Used to Target Ukraine’s Civilian Infrastructure (Jan. 6, 2023), <https://home.treasury.gov/news/press-releases/jy1182> [<https://perma.cc/M9ZR-QKPP>]; see also Press Release, U.S. Dep’t Treas., Treasury Sanctions Board of Directors of Iranian UAV Manufacturer (Feb. 3, 2023), <https://home.treasury.gov/news/press-releases/jy1246> [<https://perma.cc/NK4F-SRFX>].

58. Press Release, White House Briefing Room, FACT SHEET: On One Year Anniversary of Russia’s Invasion of Ukraine, Biden Administration Announces Actions to Support Ukraine and Hold Russia Accountable (Feb. 24, 2023), <https://www.whitehouse.gov/briefing-room/>

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and State imposed sanctions on more than 200 individuals and entities, including Russian and third-country actors accused of supporting Russia's war effort.⁵⁹ The sanctions targeted a dozen Russian financial institutions, as well as Russia's defense and technology industry.⁶⁰ Additionally, the sanctions targeted Russia's future energy capabilities, and expanded sanctions on Russia's metals and mining sector.⁶¹ OFAC also issued a determination pursuant to Executive Order 14,024, enabling it, in consultation with State, to impose sanctions on persons who operate or who have operated in the Russian economy's metals and mining sector.⁶²

On May 19, OFAC and State, again in conjunction with G7 partners and allies, imposed additional sanctions against Russia.⁶³ Collectively, OFAC and State imposed sanctions on over 300 individuals, entities, vessels, or aircraft.⁶⁴ OFAC also announced prohibitions on the provision of architecture and engineering services from the United States or by a U.S. person, wherever located, to any person located in Russia pursuant to Executive Order 14071⁶⁵ and issued a determination pursuant to Section 1(a)(i) of Executive Order 14024, authorizing it, after consultation with State, to impose sanctions against persons who operate or who have operated in the architecture, engineering, construction, manufacturing, and transportation sectors of the Russian economy.⁶⁶ Also on May 19, OFAC amended Directive 4 under Executive Order 14024 to impose a new annual reporting requirement on U.S. persons who possess or control property in which the Russian Central Bank, Ministry of Finance, or National Wealth Fund has an interest.⁶⁷

statements-releases/2023/02/24/fact-sheet-on-one-year-anniversary-of-russias-invasion-of-ukraine-biden-administration-announces-actions-to-support-ukraine-and-hold-russia-accountable/ [https://perma.cc/P89K-DUH3].

59. *Id.*

60. *Id.*

61. *Id.*

62. U.S. Dep't Treas., Off. Foreign Assets Control, Determination Pursuant to Section 1(a)(i) of Executive Order 14024: Metals and Mining Sector of the Russian Federation Economy (Feb. 24, 2023), <https://ofac.treasury.gov/media/931336/download?inline> [https://perma.cc/67BP-47YF].

63. See generally Press Release, U.S. Dep't Treas., With Over 300 Sanctions, U.S. Targets Russia's Circumvention and Evasion, Military-Industrial Supply Chains, and Future Energy Revenues (May 19, 2023), <https://home.treasury.gov/news/press-releases/jy1494> [https://perma.cc/5CKW-PMLH].

64. *Id.*

65. U.S. Dep't Treas., Off. Foreign Assets Control, Determination Pursuant to Section 1(a)(ii) of Executive Order 14,071: Prohibitions Related to Architecture Services and Engineering Services (May 19, 2023), <https://ofac.treasury.gov/media/931776/download?inline> [https://perma.cc/33S5-H7VZ].

66. U.S. Dep't Treas., Off. Foreign Assets Control, Determination Pursuant to Section 1(a)(i) of Executive Order 14,024: Architecture, Engineering, Construction, Manufacturing, and Transportation Sectors of the Russian Federation Economy (May 19, 2023), <https://ofac.treasury.gov/media/931771/download?inline> [https://perma.cc/3N7X-RGWN].

67. U.S. Dep't Treas., Off. Foreign Assets Control, Directive 4 (As Amended) Under Executive Order 14,024: Prohibitions Related to Transactions Involving the Central Bank of the Russian Federation, the National Wealth Fund of the Russian Federation, and the Ministry

B. VENEZUELA

On October 18, in recognition of the announcement of a political agreement between representatives of President Nicolás Maduro and the Unitary Platform, OFAC issued three General Licenses temporarily authorizing all transactions related to Venezuelan oil and gas sector operations, certain transactions involving the Venezuelan state-owned mining company Minerven, and removing the secondary market trading bans of certain Venezuela sovereign bonds and PdVSA debt and equity (although the ban on trading in the primary Venezuelan bond market remained in place).⁶⁸

IV. Notable U.S. Enforcement Cases

A. ITAR ENFORCEMENT

1. *3D Systems Corporation*

On February 24, the Directorate of Defense Trade Controls (DDTC) concluded an administrative settlement with 3D Systems Corporation (3D Systems).⁶⁹ In the proposed charging letter, DDTC alleged 3D Systems and its subsidiaries engaged in three categories of ITAR violations.⁷⁰ First, DDTC alleged 3D Systems exported, reexported, and retransferred (in-country) technical data without authorization to or within China, Germany, and Taiwan.⁷¹ Specifically, DDTC alleged 3D Systems' China-based subsidiary, Quickparts.com, Inc. (Quickparts) exported ITAR-controlled technical data received from U.S. customers to Quickparts employees in China without authorization, and that the employees then retransferred and re-exported the data to third-party suppliers in Taiwan and China.⁷² 3D Systems and its subsidiary also allegedly engaged in unauthorized exports of ITAR-controlled technical through the use of an unencrypted email server located in Germany.⁷³ Second, DDTC alleged 3D Systems violated 22 CFR § 127.1(a)(1) by provided unauthorized access to ITAR-controlled data in the United States (i.e., a deemed export) to two non-U.S. person employees from India and the United Kingdom, respectively.⁷⁴ Third, DDTC alleged

of Finance of the Russian Federation (May 19, 2023), <https://ofac.treasury.gov/media/918806/download?inline> [<https://perma.cc/42CC-DR3Q>].

68. Press Release, U.S. Dep't Treas., In Response to Electoral Roadmap, Treasury Issues New Venezuela General Licenses (Oct. 18, 2023), <https://home.treasury.gov/news/press-releases/jy1822> [<https://perma.cc/59TN-DSPW>].

69. See generally U.S. Dep't State, Bureau Pol.-Mil. Affs., Consent Agreement in the Matter of 3D Systems Corporation (Feb. 24, 2023), https://www.pmddtc.state.gov/sys_attachment.do?sys_id=cadbc9111bd5e9102b6ca932f54bcb26 [<https://perma.cc/3XJQ-GLLV>].

70. U.S. Dep't State, Bureau Pol.-Mil. Affs., Proposed Charging Letter in the Matter of 3D Systems Corporation 1–2, https://www.pmddtc.state.gov/sys_attachment.do?sys_id=9adb05511bd5e9102b6ca932f54bcb03 [<https://perma.cc/A772-AAZF>] (last visited Mar. 30, 2023).

71. *Id.* at 5–7.

72. *Id.*

73. *Id.* at 5.

74. *Id.* at 7–8.

3D Systems failed to maintain adequate records of its ITAR-related activities in accordance with ITAR § 122.5.⁷⁵

Under a consent agreement, 3D Systems agreed to a civil penalty of \$20,000,000, half of which was suspended on the condition that 3D Systems apply this amount to remedial compliance costs.⁷⁶ Among other considerations, DDTC cited 3D Systems's failure to voluntarily disclose its alleged unauthorized activities, 3D Systems's disregard for export control compliance requirements and lack of a formal compliance program, and the violations involving exports and retransfers to China, an ITAR § 126.1 proscribed destination, as aggravating factors.⁷⁷

2. *VTA Telecom Corporation*

On April 20, DDTC concluded administrative proceedings against VTA Telecom Corporation (VTA).⁷⁸ DDTC alleged VTA violated ITAR § 127.1(a) (1) by exporting or attempting to export ITAR-controlled defense articles without authorization to Vietnam, including an electro-optical imaging (EO Imaging) video tracker, which is designated as Significant Military Equipment, and related technical data, hobby rocket motors, and a gas turbine engine.⁷⁹ DDTC further alleged VTA knowingly made false statements on shipping documentation associated with the unauthorized shipments.⁸⁰ DDTC determined to pursue the alleged violations based on VTA's alleged exports and attempted exports to an ITAR § 126.1 proscribed destination at the time of the alleged violations (Vietnam), and VTA's failure to voluntarily disclose the alleged violations as aggravating factors.⁸¹ Under a consent agreement, VTA agreed to an administrative debarment for a period of three years.⁸²

3. *Island Pyrochemical Industries Corp.*

On August 25, DDTC concluded an administrative settlement with Island Pyrochemical Industries Corp. (IPI).⁸³ In the proposed charging letter,

75. *Id.* at 8–9.

76. Consent Agreement in the Matter of 3D Systems Corporation, *supra* note 69, at 11–12.

77. Proposed Charging Letter in the Matter of 3D Systems Corporation, *supra* note 70, at 1–2.

78. U.S. Dep't State, Bureau Pol.-Mil. Affs., Order in the Matter of VTA Telecom Corporation (Apr. 20, 2023), https://www.pmddtc.state.gov/sys_attachment.do?sys_id=99e327b21b4ba990d1f1ea02f54bcb8b [<https://perma.cc/4LUK-LTAN>].

79. U.S. Dep't State, Bureau Pol.-Mil. Affs., Proposed Charging Letter in the Matter of VTA Telecom Corporation 3–4, https://www.pmddtc.state.gov/sys_attachment.do?sys_id=99e327b21b4ba990d1f1ea02f54bcb8d [<https://perma.cc/H2N6-BNSU>] (last visited Mar. 30, 2023).

80. *Id.* at 6.

81. *Id.* at 1–2.

82. U.S. Dep't State, Bureau Pol.-Mil. Affs., Consent Agreement in the Matter of VTA Telecom Corporation 2 (Apr. 20, 2023), https://www.pmddtc.state.gov/sys_attachment.do?sys_id=15e363b21b4ba990d1f1ea02f54bcb09 [<https://perma.cc/PT9V-T5VP>].

83. See generally U.S. Dep't State, Bureau Pol.-Mil. Affs., Consent Agreement in the Matter of Island Pyrochemical Industries Corporation 1 (Aug. 25, 2023), https://www.pmddtc.state.gov/sys_attachment.do?sys_id=6a218e7b1bfcf502b6ca932f54bcb1e [<https://perma.cc/PN2M-M29C>].

DDTC alleged IPI and its affiliates engaged in ITAR-controlled brokering activities in violation of ITAR § 127.1 by facilitating the transfer of foreign origin chemical defense articles from China to Brazil without prior DDTC authorization.⁸⁴ DDTC further alleged IPI violated ITAR § 127.2 by falsely listing itself as a manufacturer, seller, and/or source of defense articles on DSP-5 license applications.⁸⁵ To resolve the allegations, DDTC directed IPI to pay a civil penalty of \$850,000, \$425,000 of which was suspended on the condition that IPI use the suspended funds for remedial compliance costs.⁸⁶ As aggravating factors, DDTC cited IPI's failure to voluntarily disclose its alleged unauthorized activities, the alleged violations involved a state-owned corporation of ITAR § 126.1 proscribed destination (China), and certain alleged violations involved false statements, misrepresentations, or omissions of material fact, among other considerations.⁸⁷

B. EAR ENFORCEMENT

On February 16, Justice and Commerce launched the Disruptive Technology Strike Force (the "Strike Force").⁸⁸ Under the leadership of Justice's National Security Division and BIS, the Strike Force targets illicit actors, strengthens supply chains, and protects critical technological assets from being acquired or used by nation-state adversaries.⁸⁹ The Strike Force brings together experts from throughout the U.S. Government including the FBI, Homeland Security Investigations, and fourteen U.S. Attorneys' Offices across twelve metropolitan regions across the country.⁹⁰

On May 16, the Justice announced its first enforcement actions since establishment of the Strike Force in a series of five cases and four arrests from five different U.S. Attorneys' offices.⁹¹ In part, the cases involved actions by

84. U.S. Dep't State, Bureau Pol.-Mil. Affs., Proposed Charging Letter in the Matter of Alleged Violations of the Arms Export Control Act and the International Traffic in Arms Regulations by Island Pyrochemical Industries Corporation 3–6, https://www.pmddtc.state.gov/sys_attachment.do?sys_id=2221427b1bfcf5502b6ca932f54bcbf4 [<https://perma.cc/G4XK-XJD6>] (last visited Mar. 29, 2023).

85. *Id.* at 5.

86. U.S. Dep't State, Bureau Pol.-Mil. Affs., Order in the Matter of Island Pyrochemical Industries Corporation 2 (Aug. 25, 2023), https://www.pmddtc.state.gov/sys_attachment.do?sys_id=6a218e7b1bfcf5502b6ca932f54bcb1c [<https://perma.cc/BA4W-L22B>].

87. Proposed Charging Letter in the Matter of Alleged Violations of the Arms Export Control Act and the International Traffic in Arms Regulations by Island Pyrochemical Industries Corporation, *supra* note 84, at 1–2.

88. Press Release, U.S. Dep't Just., U.S. Dep't Com., Justice and Commerce Departments Announce Creation of Disruptive Technology Strike Force (Feb. 16, 2023), <https://www.bis.doc.gov/index.php/documents/about-bis/newsroom/press-releases/3222-disruptive-tech-strike-force/file> [<https://perma.cc/V27F-AV59>].

89. *Id.*

90. *Id.*

91. Press Release, U.S. Dep't Just., Justice Department Announces Five Cases as Part of Recently Launched Disruptive Technology Strike Force (May 16, 2023), <https://www.justice.gov/opa/pr/justice-department-announces-five-cases-part-recently-launched-disruptive-technology-strike> [<https://perma.cc/NC7X-5T3U>].

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companies and individuals for attempting to divert electronics and aircraft parts to Russia in violation of the EAR, and BIS issued Temporary Denial Orders against several companies and individuals in connection with the cases.⁹² Later in the year, BIS issued a series of temporary denial orders in support of the Strike Force in cases involving Russia.⁹³

On April 19, BIS announced its largest ever standalone administrative penalty in BIS history in an enforcement action against Seagate Technology LLC (Seagate).⁹⁴ BIS imposed the penalty to resolve alleged violations of the EAR's foreign direct product rule related to selling hard disk drives to Huawei Technologies Co. Ltd. (Huawei).⁹⁵ The BIS resolution also included a multi-year audit requirement and a five-year suspended Denial Order.⁹⁶ The penalty was imposed for Seagate's continued business with Huawei after BIS's August 2020 controls over certain foreign-produced items to Huawei.⁹⁷ Seagate had continued to do business with Huawei despite the fact that its only two competitors had stopped selling the hard disk drives to Huawei, resulting in Seagate becoming Huawei's sole source provider.⁹⁸

BIS announced two other multi-million dollar penalties in 2023. On February 7, BIS announced imposition of a \$2,777,750 penalty on 3D Systems.⁹⁹ The BIS settlement resolved nineteen violations by 3D Systems of the EAR by exporting controlled aerospace technology and metal alloy powder to China and export-controlled technology to Germany without the required licenses.¹⁰⁰ On April 6, BIS announced imposition of a combined

92. *Id.*

93. See Press Release, U.S. Dep't Com., BIS Issues Temporary Denial Order in Support of Strike Force Case Against Defense Conglomerate Allegedly Providing Support to Russian Intelligence Services (June 9, 2023), <https://www.bis.doc.gov/index.php/documents/about-bis/newsroom/press-releases/3285-2023-06-09-bis-press-release-aratos-tdo-final/file> [<https://perma.cc/W3Q4-NT9Z>]; see also Press Release, U.S. Dep't Com., BIS Issues Temporary Denial Order in Support of Strike Force Case Against Russian National for Illegally Exporting Sensitive U.S.-Sourced Micro-Electronics with Military Applications to Russia (Aug. 31, 2023), <https://www.bis.doc.gov/index.php/documents/about-bis/newsroom/press-releases/3324-2023-08-31-bis-press-release-petrov-tdo/file> [<https://perma.cc/6JGN-EHGG>]; Press Release, U.S. Dep't Com., BIS Issues Temporary Denial Order Against 7 Persons and 3 Companies for Illegally Exporting Electronics with Military Applications to Russia (Nov. 7, 2023), <https://www.bis.doc.gov/index.php/documents/about-bis/newsroom/press-releases/3382-2023-11-07-bis-press-release-sh-brothers-tdo/file> [<https://perma.cc/9CF6-7G7D>].

94. See generally Press Release, U.S. Dep't Com., BIS Imposes \$300 Million Penalty Against Seagate Technology LLC Related to Shipments to Huawei (Apr. 19, 2023), <https://www.bis.doc.gov/index.php/documents/about-bis/newsroom/press-releases/3264-2023-04-19-bis-press-release-seagate-settlement/file> [<https://perma.cc/F8X3-JFTW>].

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. Press Release, U.S. Dep't Com., BIS Imposes \$2.77 Million Penalty on 3D Printing Company for Exports to China and Germany, Including Aerospace and Military Design Documents (Feb. 27, 2023), <https://www.bis.doc.gov/index.php/documents/about-bis/newsroom/press-releases/3233-2023-02-27-3d-press-release/file> [<https://perma.cc/WT9X-4FT3>].

100. *Id.*

\$3.3 million in civil penalties against Microsoft Corporation for alleged and apparent violations of U.S. export controls and sanctions laws.¹⁰¹ The joint BIS/OFAC action involved violations by Microsoft's Russian subsidiary involving Ukraine/Russia, Cuba, Iran, and Syria.¹⁰²

On July 26, Assistant Secretary for Export Enforcement Matthew Axelrod issued a memorandum for all Export Enforcement employees focused on *Strengthening Antiboycott Reporting and Compliance*.¹⁰³ Axelrod's memorandum followed his earlier policy memorandum on *Enhanced Enforcement of Antiboycott Rules*.¹⁰⁴ Axelrod's July memorandum reiterated the purpose of the EAR's antiboycott rules and amended BIS's "Boycott Reporting Form."¹⁰⁵

Axelrod's July memorandum followed the May 18 announcement of BIS's imposition of a \$283,500 penalty against Regal Beloit FZE (Dubai), a controlled-in-fact foreign subsidiary of Regal Beloit America, Inc.¹⁰⁶ That BIS action resolved eighty-four violations of the EAR's antiboycott provisions and was the first major administrative action reached under the *Enhanced Enforcement of Antiboycott Rules*.¹⁰⁷

C. DEPARTMENT OF JUSTICE AND OFAC SANCTIONS ENFORCEMENT

1. *Department of Justice Enforcement*

Several criminal enforcement actions involving sanctions on Russia stem from individuals engaging in schemes to provide various forms of assistance to sanctioned Russian oligarchs.¹⁰⁸ For example, Justice charged Vladimir Voronchenko a Russian national and permanent U.S. legal resident, with conspiring to evade U.S. sanctions imposed on Russia, alleging that

101. Press Release, U.S. Dep't Com., Microsoft to Pay Over \$3.3 Million in Total Combined Civil Penalties to BIS and OFAC to Resolve Alleged and Apparent Violations of U.S. Export Controls and Sanctions (Apr. 6, 2023), <https://www.bis.doc.gov/index.php/documents/about-bis/newsroom/press-releases/3259-2023-04-06-bis-press-release-bis-ofac-microsoft-settlement/file> [https://perma.cc/CW5C-C9ZN].

102. *Id.*

103. See generally Memorandum from Matthew S. Axelrod on Strengthening Antiboycott Reporting and Compliance to the U.S. Dep't Com. Off. Export Enf't (July 26, 2023) (on file with the U.S. Dep't Com.).

104. See generally Memorandum from Matthew S. Axelrod on Enhanced Enf't of the Antiboycott Rules to the U.S. Dep't Com. Off. Export Enf't (Oct. 6, 2022) (on file with the U.S. Dep't Com.).

105. See Justice and Commerce Departments Announce Creation of Disruptive Technology Strike Force, *supra* note 88, at 1–2.

106. Press Release, U.S. Dep't Com., BIS Imposes \$283,500 Penalty Against Regal Beloit, Resolving 84 Alleged Violations of the Antiboycott Regulations (May 18, 2023), <https://www.bis.doc.gov/index.php/documents/about-bis/newsroom/press-releases/3277-regalbeloit-pr-final-copy/file> [https://perma.cc/CZY9-25FN].

107. *Id.*

108. See, e.g., Press Release, U.S. Dep't Just., Active Russian Agent Andrii Derkach Indicted for Scheme to Violate Sanctions in the United States (Dec. 7, 2022), <https://www.justice.gov/opa/pr/active-russian-agent-andrii-derkach-indicted-scheme-violate-sanctions-united-states> [https://perma.cc/JM79-5W6Z].

Voronchenko maintained properties owned by sanctioned Russian oligarch Viktor Vekselberg and hired a lawyer in New York to acquire properties on behalf of Vekselberg and to manage the finances of the properties through the attorney's IOLTA account.¹⁰⁹

In another case, Sergey Karpushkin and John C. Unsalan were charged with conspiring to violate U.S. sanctions imposed on Sergey Kurchenko and two related companies, Kompaniya Gaz-Alyans, OOO and ZAO Vneshtorgservis.¹¹⁰ According to Justice's announcement, Karpushkin purchased nearly \$150 million in metal products through his company, Metalhouse LLC, from two companies he knew were owned by Kurchenko.¹¹¹ Unsalan, president of Metalhouse LLC, was charged separately.¹¹² In September, Karpushkin pleaded guilty to one count of conspiring to violate the IEEPA and money laundering, and agreed to forfeit \$4,723,625.¹¹³ On October 3, Unsalan agreed to forfeit \$160,416,948.56, equal to the funds obtained through the conspiracy, after pleading guilty to one count of conspiracy to commit money laundering to promote violations of the IEEPA.¹¹⁴ Both Unsalan and Karpushkin are awaiting sentencing.¹¹⁵

In another criminal case, Justice announced that one Russian national, Vladislav Osipov, and one U.K. national, Richard Masters, were charged with facilitating sanctions evasion and money laundering.¹¹⁶ Justice alleged that Masters and Osipov conspired to operate and mask the ownership of a \$90 million 255-foot luxury yacht called Motor Yacht Tango, which is owned by sanctioned Russian oligarch Viktor Vekselberg.¹¹⁷

109. Press Release, U.S. Dep't Just., Associate of Sanctioned Oligarch Indicted for Sanctions Evasion and Money Laundering (Feb. 7, 2023), <https://www.justice.gov/opa/pr/associate-sanctioned-oligarch-indicted-sanctions-evasion-and-money-laundering> [https://perma.cc/4X7X-GWRV].

110. Press Release, U.S. Dep't Just., Second Conspirator in Russia-Ukraine Sanctions Violation Case Arrested (Apr. 19, 2023), <https://www.justice.gov/opa/pr/second-conspirator-russia-ukraine-sanctions-violation-case-arrested> [https://perma.cc/73PL-N5SX].

111. *Id.*

112. *Id.*

113. Press Release, U.S. Dep't Just., Miami-Based Businessman Pleads Guilty to Conspiracy to Violate Russia-Ukraine Sanctions and to Commit International Money Laundering (Sept. 14, 2023), <https://www.justice.gov/usao-mdfl/pr/miami-based-businessman-pleads-guilty-conspiracy-violate-russia-ukraine-sanctions-and> [https://perma.cc/ZY6G-FNUT].

114. *Id.*

115. Press Release, U.S. Dep't Just., President of Metalhouse LLC Pleads Guilty to Conspiracy to Launder Over \$150 Million to Promote Russian Sanctions Violations (Oct. 3, 2023), <https://www.justice.gov/opa/pr/president-metalhouse-llc-pleads-guilty-conspiracy-launder-over-150-million-promote-russian> [https://perma.cc/ZB58-3J8K].

116. Press Release, U.S. Dep't Just., Arrest and Criminal Charges Announced Against British and Russian Businessmen for Facilitating Sanctions Evasion of Russian Oligarch's \$90 Million Yacht (Jan. 20, 2023), <https://www.justice.gov/opa/pr/arrest-and-criminal-charges-announced-against-british-and-russian-businessmen-facilitating> [https://perma.cc/79WE-K8RE].

117. *Id.*

The majority of the other reported enforcement actions relate to sanctions on Iran.¹¹⁸ Notably, on September 8, 2023, Justice announced that it had resolved the first-of-its-kind criminal case arising from Suez Rajan Limited's facilitation of a sale and transport of Iranian-origin oil involving the IRGC and IRGC Qods Force, which resulted in Justice seizing 980,000 barrels of the sanctioned Iranian oil.¹¹⁹ Other criminal actions have stemmed from alleged violations of the Iranian Transactions Sanctions Regulations, where U.S. persons were involved in knowingly procuring and shipping goods to Iran, often through third-party companies or through other means to obfuscate the destination of the goods.¹²⁰ Another criminal enforcement development was the sentencing of Niloufar Bahadorifar of Irvine, California, who pleaded guilty to violating the IEEPA by providing services to Iran and the government of Iran in connection with a scheme to kidnap a journalist, author, and human rights activist.¹²¹ Bahadorifar was sentenced to four years in prison followed by three years of supervised release.¹²² One case brought by Justice arose because a person knowingly exceeded the scope of an OFAC authorization in conducting business in Iran.¹²³

2. *OFAC Enforcement*

Civil enforcement actions have involved a broader swath of U.S. sanctions programs compared to the criminal actions.¹²⁴ Over the past year, there have been approximately thirteen different enforcement actions

118. See, e.g., Press Release, U.S. Dep't Just., Justice Department Announces First Criminal Resolution Involving the Illicit Sale and Transport of Iranian Oil in Violation of U.S. Sanctions (Sept. 8, 2023), <https://www.justice.gov/usao-dc/pr/justice-department-announces-first-criminal-resolution-involving-illicit-sale-and> [https://perma.cc/3WR4-3DEK].

119. *Id.*

120. See, e.g., Indictment ¶ 12, United States v. Ray Hunt, No. 5:22-cr-00375-LCB-HNJ (Dist. Ct. N.D. Ala. Oct. 26, 2022); Press Release, U.S. Dep't Just., Virginia Man Pleads Guilty to Conspiring to Violate Iranian Sanctions (Jan. 9, 2023), <https://www.justice.gov/opa/pr/virginia-man-pleads-guilty-conspiring-violate-iranian-sanctions> [https://perma.cc/6WK9-JT4Q]; Press Release, U.S. Dep't Just., Virginia Man Sentenced to Federal Prison for Conspiring to Violate Iranian Sanctions (July 25, 2023), <https://www.justice.gov/usao-md/pr/virginia-man-sentenced-federal-prison-conspiring-violate-iranian-sanctions> [https://perma.cc/C97A-RKM9].

121. Press Release, U.S. Dep't Just., Woman Sentenced to 48 Months in Prison for Conspiring to Violate U.S. Sanctions Against Iran (Apr. 10, 2023), <https://www.justice.gov/opa/pr/woman-sentenced-48-months-prison-conspiring-violate-us-sanctions-against-iran> [https://perma.cc/3WR4-3DEK].

122. *Id.*

123. Press Release, U.S. Dep't Just., Telecommunications Consultant Pleads Guilty to Violating Sanctions on Iran (Oct. 3, 2023), <https://www.justice.gov/opa/pr/telecommunications-consultant-pleads-guilty-violating-sanctions-iran> [https://perma.cc/T9VP-EA9Y].

124. See, e.g., Kerry B. Contini et al., *Sanctions Enforcement Around the G7: Intro to Blog Series and View From the United States*, BAKER MCKENZIE (Feb. 28, 2023), <https://sanctionsnews.baker-mckenzie.com/sanctions-enforcement-around-the-g7-intro-to-blog-series-and-view-from-the-united-states/> [https://perma.cc/R4DS-SYRE]; see also *Civil Penalties and Enforcement Information*, U.S. DEP'T TREAS., OFF. FOREIGN ASSETS CONTROL, <https://ofac.treasury.gov/civil-penalties-and-enforcement-information> [https://perma.cc/W38V-RVGH] (last visited Mar. 31, 2024).

(including Penalties, Settlements, or Findings of Violation) announced by OFAC, with the penalties totaling 567,046,816.08.¹²⁵ While the number of civil enforcement actions are below the sixteen announced in 2022, the penalties imposed this past year exceed 2022's figure (\$42,664,006.65) by \$524,382,809.43.¹²⁶ Most of this increase can be accounted for by the settlement with British American Tobacco (BAT), which stemmed from BAT's violations of sanctions on North Korea.¹²⁷ The total penalty imposed by the U.S. regulator was \$629,000,000, representing the largest non-financial institution OFAC settlement in history.¹²⁸

V. Canadian Export Control and Economic Sanctions Developments

During 2023, Canada implemented a number of changes to its legal framework on export controls and economic sanctions. The most significant were the implementation of a "deemed ownership" rule, amendments allowing the Canadian government to impose secondary sanctions, and several provisions aimed at enhancing Canada's unique mechanism for confiscating sanctioned personal property in Canada.¹²⁹

In addition to the above structural changes to its legal framework, Canada has continued to expand the scope of its existing sanctions programs. Much of this effort has focused on combating Russia's aggression in Ukraine. There have been more than ten additional rounds of amendments to the *Special Economic Measures (Russia) Regulations*¹³⁰ to intensify pressure on Russia, and to counter sanctions circumvention. Canada has also imposed additional sanctions on Belarus, a longstanding Russian ally, and individuals working in Ukraine's occupied museums and cultural centers who are

125. *Civil Penalties and Enforcement Information*, U.S. DEP'T TREAS., OFF. FOREIGN ASSETS CONTROL, <https://ofac.treasury.gov/civil-penalties-and-enforcement-information> [https://perma.cc/W38V-RVGH] (last visited Mar. 31, 2024).

126. See *id.* (figures from 2022–2023 in row labeled "Year to date totals:").

127. U.S. Dep't Treas., Off. Foreign Assets Control, Enforcement Release: OFAC Settles with British American Tobacco p.l.c. for \$508,612,492 Related to Apparent Violations of the North Korea and Weapons of Mass Destruction Proliferators Sanctions Regulations (Apr. 25, 2022), <https://ofac.treasury.gov/media/931666/download?inline> [https://perma.cc/TG8T-2CV5].

128. *Id.* OFAC imposed a penalty of \$500,000,000 on BAT.

129. John W. Boscarior et al., *Proposed Changes to Canada's Economic Sanctions Laws Create New Challenges and Uncertainty*, MCCARTHY TETRAULT (May 3, 2023), <https://www.mccarthy.ca/en/insights/blogs/terms-trade/proposed-changes-canadas-economic-sanctions-laws-create-new-challenges-and-uncertainty> [https://perma.cc/FB6Z-TJF5]; John W. Boscarior et al., "Deemed Ownership" Rule Now in Force: Addressing Heightened Canadian Sanctions Risk, MCCARTHY TETRAULT (July 19, 2023), <https://www.mccarthy.ca/en/insights/blogs/terms-trade/deemed-ownership-rule-now-force-addressing-heightened-canadian-sanctions-risk#page=1> [https://perma.cc/PN5S-HMS5].

130. See *Special Economic Measures (Russ.) Regulations*, SOR/2014-58 (2014) (Can.).

contributing to the theft and destruction of Ukrainian cultural objects.¹³¹ A new sanctions regime against Moldova has also been implemented to target Moldovan oligarchs and politicians connected to Russia.¹³² Over this past year, Canada has also expanded its existing sanctions against Iran, Myanmar, and Haiti.¹³³

Regarding export controls, Canada updated its *Export Control List* to reflect its commitments under various multilateral export control and non-proliferation regimes, including the *Wassenaar Arrangement*.¹³⁴ There are new controls for marine equipment, aerospace and propulsion technology, and human and animal pathogens and toxins.¹³⁵ Canada has also made changes to its *Export Permit Regulations* to clarify requirements for information to be provided by applicants.¹³⁶ *General Export Permit No. 41*,¹³⁷ which authorizes the export of a wide range of dual-use items to eligible destinations, was also amended to exclude transfers of goods or technology that are intended for rocket systems or unmanned aerial vehicles with a range of 300 km or greater.¹³⁸

A. NEW “DEEMED OWNERSHIP” RULE

Canada added a “deemed ownership” provision to its primary autonomous sanctions statutes—the *Special Economic Measures Act*¹³⁹ (SEMA) and the *Justice for Victims of Corrupt Foreign Official Act (Sergei Magnitsky Law)*¹⁴⁰ (the “Magnitsky Act”)—that sets out the circumstances in which the property of non-designated entities will be considered to be owned by designated entities or individuals. This significantly expands the scope of prohibitions involving dealings in property “owned, held or controlled by or on behalf of a designated person” as well as related disclosure obligations and a new mechanism for seizing and forfeiting property of designated persons.¹⁴¹

131. See Special Economic Measures (Russ.) Regulations, SOR/2014-58 (2014) (Can.); see also Special Economic Measures (Ukr.) Regulations, SOR/2014-60 (2014) (Can.).

132. See Special Economic Measure (Moldova) Regulations, SOR/2023-109 (2023) (Can.).

133. Special Economic Measure (Iran) Regulations, SOR/2010-165 (2010) (Can.); Special Economic Measures (Burma) Regulations, SOR/2007-285 (2007) (Can.); Special Economic Measures (Haiti) Regulations, SOR/2022-226 (2022) (Can.).

134. *Backgrounder: Amendment to A Guide to Canada's Export Control List*, GOV'T CAN. (June 1, 2023), <https://www.international.gc.ca/trade-commerce/controls-controles/ecl-lec/backgrounder-document-information-2023.aspx?lang=eng> [<https://perma.cc/2ESF-RH2E>]; *A Guide To Canada's Export Control List*, GOV'T CAN., <https://www.international.gc.ca/controls-controles/assets/pdfs/documents/guide-2018-eng.pdf> [<https://perma.cc/PS9M-FSRU>] (last visited Mar. 28, 2024).

135. *Id.*

136. Export Permits Regulations, SOR/97-204 (1997) (Can.).

137. General Export Permit No. 41 — Dual-use Goods and Technology to Certain Destinations, SOR/2015-200 (2015) (Can.).

138. Ordering Amending the General Export Permit No. 41 — Dual-use Goods and Technology to Certain Destinations, SOR/2023-188 (2023) (Can.).

139. Special Economic Measures Act, S.C. 1992, c 17, s 2.1 (1992) (Can.).

140. Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law), S.C. 2017, c 21, s 2.01 (2017) (Can.).

141. *Id.*

Under the new rule, property that is owned—or that is held or controlled, directly or indirectly—by any entity will be deemed to be owned by a person, including a designated person, if that person “controls” that entity.¹⁴² Such control is considered to exist where:

(2) [A]ny of the following criteria are met:

- (a) the person holds, directly or indirectly, 50 percent or more of the shares, ownership interests or voting rights in the entity;
- (b) the person is able, directly or indirectly, to change the composition or powers of the entity’s board of directors; or
- (c) it is reasonable to conclude, having regard to all the circumstances, that the person is able, directly or indirectly and through any means, to direct the entity’s activities.¹⁴³

This control test appears broader than what is applied under other Western sanctions regimes, including those of the United States, the United Kingdom, and the European Union. To date, the Canadian government has not issued guidance on how any of the above criteria are interpreted or applied. For instance, it is not clear what is required to appropriately assess the ability of a person to change the composition or the powers of a board, or in what circumstances it is “reasonable to conclude” a person is able to direct an entity’s activities.¹⁴⁴

B. SECONDARY SANCTIONS

Amendments to SEMA in 2023 also laid the groundwork for the imposition of secondary sanctions.¹⁴⁵ Specifically, subsection 4(2) of SEMA was expanded to allow the Canadian government to designate parties in third countries (countries other than Canada and the foreign state that is the target of sanctions) for purposes of the prohibition against dealings in property of designated persons, required disclosures and the property seizure and forfeiture provisions.¹⁴⁶

C. CANADA INITIATES FORFEITURE OF FUNDS AND AIRCRAFT

In 2022, Canada adopted its asset seizure, forfeiture and redistribution mechanism for property situated in Canada that is owned—or that is held or controlled, directly or indirectly—by designated persons under SEMA

142. *Id.*

143. *Id.*

144. *See id.*

145. John W. Boscarior et al., “Deemed Ownership” Rule Now in Force: Addressing Heightened Canadian Sanctions Risk, MCCARTHY TETRAULT (July 19, 2023), <https://www.mccarthy.ca/en/insights/blogs/terms-trade/deemed-ownership-rule-now-force-addressing-heightened-canadian-sanctions-risk#page=1> [<https://perma.cc/KA45-6TA6>].

146. *Id.*

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and the Magnitsky Act.¹⁴⁷ This mechanism was used for the first time, on December 19, 2022, to restrain funds alleged to be indirectly held in a Canadian bank by Russian oligarch Roman Abramovich—a designated person under SEMA.¹⁴⁸ On June 10, Canada announced its seizure of a Russian-owned aircraft that had been grounded at Toronto's Pearson International Airport since the Russian invasion of Ukraine in February of 2022.¹⁴⁹ The owner of the aircraft, Volga-Dnepr Airlines, has reportedly initiated a bilateral investment treaty claim against the Canadian government over the seized aircraft.¹⁵⁰ The Canadian government has announced that will be pursuing forfeiture of both the Abramovich funds and the Volga-Dnepr aircraft in Canadian courts for purposes of assisting Ukraine in its defence against the Russian invasion.¹⁵¹

147. Special Economic Measures Act, S.C. 1992, c 17, ss 5.3–5.6 (1992) (Can.); Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law), S.C. 2017, c 21, ss 4.1–4.4 (2017) (Can.).

148. *Canada starts first process to seize and pursue the forfeiture of assets of sanctioned Russian oligarch*, Gov'T CAN. (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/3TP4-F9HS].

149. *Government of Canada orders seizure of Russian-registered cargo aircraft at Toronto Pearson Airport*, Gov'T CAN. (June 10, 2023), <https://www.canada.ca/en/global-affairs/news/2023/06/government-of-canada-orders-seizure-of-russian-registered-cargo-aircraft-at-toronto-pearson-airport.html> [https://perma.cc/A2VN-Z8W4].

150. *Id.*

151. John W. Boscariol et al., *Canada Initiates Second Forfeiture of Property of Russian Sanctioned Persons, This Time Targeting Russian Aircraft*, MCCARTHY TËTRAULT (June 14, 2023), <https://www.mccarthy.ca/en/insights/blogs/terms-trade/canada-initiates-second-forfeiture-property-russian-sanctioned-persons-time-targeting-russian-aircraft> [https://perma.cc/F9GK-WF79].

International Animal Law

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This Article reviews significant international legal developments made in the area of animal law and policy in 2023.

I. Introduction

Animal law continues to expand internationally—in scope and relevance—in part due to its relation to critical world challenges such as climate change, loss of biodiversity, and zoonotic diseases. Society and global institutions, such as the United Nations, are realizing, as never before, that our treatment and use of animals are having permanent devastating impacts on the planet.

This year's articles include a review of an important U.S. Supreme Court decision impacting the agriculture industry and a review of a U.S. Food and Drug Administration rule related to animals used in scientific research. Both the Court decision and the regulation have international implications. The article will also review a “first of its kind” ban on meat advertising by the Netherlands explicitly enacted to reduce agriculture's impact on the climate. The review will end with a review of two cases from the Supreme Courts of India and Brazil respectively.

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The first case, from the Indian Supreme Court, evaluates the constitutionality of certain state anti-cruelty laws where it refused to declare animals as constitutional rights-holders (thus leaving the issue to the legislature).¹ The second case, from the Brazilian Supreme Court, held that municipalities have authority to prohibit noisy fireworks and other pyrotechnic devices, in part to protect the environment.² The Court's definition of environment included protecting animals from the noise of these devices that cause unnecessary suffering and the devices' possible effects migration, mating, and birds' ability to care for their young in protected areas.³ The Court focused on several of these aspects as "animal mistreatment."⁴

Lastly, while not completely covered in this review, the review introduces the agreement on a High Seas Treaty to protect the world's oceans.⁵ The Treaty came about after ten years of negotiations and ushers in a new global concern for marine life and the environmental impact of unprotected fishing in international waters. The United Nations Secretary-General noted it will:

- Set up a framework for the fair and equitable sharing of benefits arising from activities with respect to marine genetic resources and digital sequence information on marine genetic resources of areas beyond national jurisdiction.⁶
- Enable the establishment of area-based management tools, including marine protected areas, to conserve and sustainably manage vital habitats and species in the high seas and the international seabed area.⁷
- Ensure that environmental impacts of activities in areas beyond national jurisdiction are assessed and considered in decision-making [and] provides, for the first time, an international legal framework for the assessment of the cumulative impacts of activities and the consequences of climate change, ocean acidification, and related impacts in areas beyond national jurisdiction.⁸

1. See *generally* Animal Welfare Board of India v. Union of India, 2016 7 SCC 33–34 (India) [hereinafter Animal Welfare Board of India Decision May 2023].

2. The Brazilian Supreme Court is the highest appellate court in Brazil for constitutional matters. S.T.F.J., Recurso Extraordinário 1.210.727, Relator: Ministro Luiz Fux, 08.05.2023, 11 Diário da Justiça Eletrônico [D.J.e.], 09/15/2023 (Braz.).

3. *Id.* at 5.

4. *Id.*

5. *Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction*, UNITED NATIONS TREATY COLLECTION (June 19, 2023), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-10&chapter=21&clang=_en#EndDec [https://perma.cc/357P-R2QR].

6. *Note to Correspondents – Press Release on Historic Agreement Adopted for Conservation and Sustainable Use of Biodiversity in over Two-Thirds of the Ocean*, UNITED NATIONS SECRETARY-GENERAL (June 19, 2023), <https://www.un.org/sg/en/content/sg/note-correspondents/2023-06-19/note-correspondents-press-release-historic-agreement-adopted-for-conservation-and-sustainable-use-of-biodiversity-over-two-thirds-of-the-ocean> [https://perma.cc/VV6G-C47N].

7. *Id.*

8. *Id.*

- Facilitate cooperation in capacity-building and the transfer of marine technology to assist Parties, in particular developing States Parties, in achieving the objectives of the Agreement.⁹

Countries must still ratify the treaty, which will take time, but the agreement is a historic step in conserving the world's oceans.

II. Pigs Win at the U.S. Supreme Court in a Decision Reflecting the Rationale Adopted by the WTO Adjudicatory Bodies in the *Seal Products Case*

Throughout the world, humans slaughter hundreds of millions of animals every day for food, including 900,000 cows, 1.4 million goats, 1.7 million sheep, 3.8 million pigs, 11.8 million ducks, 202 million chickens, and hundreds of millions of fish.¹⁰ The majority of these animals suffer not only at slaughter but throughout their lives as they are born and raised in concentrated animal feeding operations (CAFOs) where staggeringly large numbers of animals are crowded into confined spaces, creating unhealthy and inhumane conditions, including ninety-eight percent of all pigs raised in the United States.¹¹

Pigs are intelligent animals with complex and social lives, strong maternal instincts, and a life expectancy of twenty years.¹² Yet, they are among the most abused animals, subjected to an inhumane confinement method—the gestation crate, a metal crate so small that the pig is unable to turn around.¹³ Pork producers keep mother pigs, or sows, in these gestation crates for their entire lives, artificially impregnating them continuously, removing their piglets at just a few weeks old, and killing them after just two years.¹⁴

In 2018, Californians made a strong statement in opposition to the cruel confinement of farm animals by approving Proposition 12 (Prop 12) by sixty-three percent.¹⁵ The law established minimum space requirements for sows, egg-laying hens, and veal calves, and prohibited the commercial sale in California of specified products derived from animals confined in

9. *Id.*

10. Max Roser, *How Many Animals Get Slaughtered Every Day?*, OUR WORLD IN DATA (Sept. 26, 2023), <https://ourworldindata.org/how-many-animals-get-slaughtered-every-day> [<https://perma.cc/AD3X-LH6T>].

11. *What is a CAFO?*, FOODINDUSTRY.COM (Sept. 2022), <https://www.foodindustry.com/articles/what-is-a-cafo/#:~:text=There%20are%20over%2020%2C000%20CAFOs,turkeys%20are%20produced%20in%20CAFOs> [<https://perma.cc/BW6Q-T6H7>].

12. *What are Gestation Crates for Pigs and Why are they Bad?*, HUMANE LEAGUE (Oct. 13, 2022), <https://thehumaneleague.org/article/pig-gestation-crates> [<https://perma.cc/ZT22-SPTD>].

13. *Id.*

14. *Id.*

15. Justin Marceau & Doug Kysar, *The Supreme Court's Ruling on Prop 12 is a Win Against Factory Farming. But the Pigs' Lives Will Still Suck*, VOX (May 12, 2023), <https://www.vox.com/future-perfect/23721488/prop-12-scotus-pork-pigs-factory-farming-california-bacon> [<https://perma.cc/YX76-87M2>].

a noncomplying manner.¹⁶ Although Prop 12 provides only twenty-four square-feet for sows, just enough room for them to lie down, stand up, turn around, and fully extending their limbs, and exempted some forty-two percent of all pork products sold in the state,¹⁷ it is among the most protective laws for farmed pigs in the US.

Soon thereafter, the National Pork Producers Council (NPPC) filed suit challenging Prop 12, arguing that it impermissibly burdens interstate commerce.¹⁸ NPPC argued that California makes up thirteen percent of the national market for pork yet produces only a small fraction of pork and thus most of the compliance costs, which effectively requires a shift to group housing, would be borne by out-of-state pork producers.¹⁹ Notably, NPPC conceded that twenty-eight percent of the industry has already converted to group housing for pigs.²⁰ The District Court granted California's motion to dismiss for failure to state a claim, holding that the complaint failed to demonstrate a substantial burden on interstate commerce.²¹ The Ninth Circuit affirmed, and the Supreme Court granted certiorari, later affirming the decision.²²

At the Supreme Court level, the Court first reviewed the Commerce Clause.²³ The U.S. Constitution grants Congress the power "to regulate commerce ... among the several states."²⁴ States have "reserved powers to regulate commerce in their own jurisdiction that may affect interstate commerce; [however, the] Commerce Clause might impliedly bar certain types of state economic regulation ... even in the absence of congressional legislation."²⁵ Specifically, discriminatory state regulation driven by economic protectionism is barred, as antidiscrimination lies at the core of modern dormant Commerce Clause jurisprudence.²⁶ All Justices agreed that Prop 12 was not discriminatory as it treated in-state and out-of-state pork producers identically.²⁷

Thus, the Court, after rejecting NPPC's per se extraterritorial argument,²⁸ turned to the *Pike* analysis to first determine if Prop 12 imposes a substantial burden on interstate commerce and, if so, if such burden is

16. *Id.*

17. *Id.*

18. *National Pork Producers Council v. Ross*, 143 S. Ct. 1142, 1151 (2023).

19. *Id.*

20. See Brief of Amicus Curiae Perdue Premium Meat Company, Inc. d/b/a Niman Ranch in support of Respondents, *National Pork Producers Council v. Ross*, 143 S. Ct. 1142, 1152 (2023) (No. 21-468).

21. See *National Pork Producers Council v. Ross*, 456 F. Supp. 3d 1201, 1210 (S.D. Cal. 2020).

22. *National Pork Producers Council*, 143 S. Ct. at 1152.

23. *Id.*

24. U.S. CONST. art. I, § 8, cl. 3.

25. See generally *National Pork Producers Council*, 143 S. Ct. at 1152 (quoting *Gibbons v. Ogden*, 9 Wheat. 1, 203 (1824)).

26. *Id.* at 1153.

27. *Id.*

28. *Id.* at 1154–57.

excessive in relation to the putative local benefits.²⁹ Justice Gorsuch noted that the dormant Commerce Clause does not give “a roving license for federal courts to decide what activities are appropriate for state and local government to undertake.”³⁰ Justice Gorsuch explained that judges are not institutionally suited to wield such freewheeling power in this context given the economic costs and noneconomic moral and health benefits of the law are incommensurable.³¹ “In a functioning democracy, policy choices like these usually belong to the people and their elected representatives.”³² Justice Gorsuch, joined by three Justices, held that plaintiffs failed to allege facts plausibly demonstrating that Prop 12 imposes a substantial burden on interstate commerce, noting that the “Dormant Commerce Clause does not protect a particular structure or method or operation” and thus *Pike* balancing was unnecessary.³³

Justice Gorsuch’s analysis properly accommodated the inherent normative pluralism of each state in a manner consistent with the analysis of the World Trade Organization (WTO) decision in the *Seal Products* case, a case strikingly like the *NPPC* case but in the international trade arena.³⁴ In 2009, the European Union (“EU”) banned the import of products made from seals—noting the inherently cruel way seals are hunted and killed—to prevent seal suffering and to uphold the morality of its citizens against such cruelty.³⁵ Canada and Norway challenged the ban as a restriction on trade illegal under the General Agreement on Tariffs and Trade (GATT).³⁶

Similar to Dormant Commerce Clause jurisprudence, the WTO regime is founded on principles of non-discrimination including “the principle that no foreign business should be treated less favorably than a domestic business.”³⁷ Nations generally may not restrict trade with other nations unless permitted under specific exceptions, including GATT Article XX(a)—when necessary as a matter of “public morals.”³⁸ The EU argued in defense that the ban was lawful under this exception.³⁹

29. *Id.* at 1157.

30. *Id.* at 1159.

31. See generally *National Pork Producers Council*, 143 S. Ct. at 1159 (quoting *Gibbons v. Ogden*, 9 Wheat. 1, 203 (1824)).

32. *Id.* at 1160.

33. *Id.* at 1163 (Justice Roberts, in dissent, argued the opposite and would have remanded for the lower court to conduct the *Pike* balancing); *id.* at 1167 (Roberts, J. dissenting); see also *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

34. See generally Robert Howse, et al., *Pluralism in Practice: Moral Legislation and the Law of the WTO After Seal Products*, 48 GEO. WASH. INT’L L. REV. 81 (2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2588509 [<https://perma.cc/4ASF-UL9G>].

35. *Id.* at 82.

36. *Id.*

37. Peter M. Gerhart, *The Two Constitutional Visions of the World Trade Organization*, 24 U. PA. J. INT’L ECON. L. 1, 15 (2003), <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1248&context=jil> [<https://perma.cc/M2QF-YD3L>].

38. Howse, *supra* note 34, at 89.

39. *Id.* at 108.

The WTO adjudicatory bodies—the panel and the appellate body—held that the seal ban could be justified as a matter of public morals.⁴⁰ They held that animal welfare is of paramount significance, protected within EU treaties, and thus is a matter of a state’s public morals.⁴¹ Moreover, the ban was necessary finding that the protection of morals is of the highest importance, and, although the ban was highly restrictive, it contributed to the goal and such contribution need not be material.⁴²

While doctrinally distinct, the *NPPC* decision is consistent with the *Seal Products* case in promoting the pluralism of individual states while protecting them from protectionist laws. The Commerce Clause and the WTO provisions are founded on nondiscrimination principles.⁴³ Both allow states to enact nondiscriminatory laws that may burden interstate or international commerce to protect the morals of their citizens so long as the benefits to the state either outweigh the burden on commerce in the US or meet the necessity test in the WTO.⁴⁴ Further, the Court and the WTO bodies recognized the legitimacy of the noneconomic goals of protecting animal welfare and the morality of citizens and understood their roles as targeting protectionist laws while allowing states to strike the appropriate policy balance for their respective jurisdictions.⁴⁵

III. FDA Modernization Act 2.0: Animal Testing No Longer Required for New Drugs

The use of animals in biomedical and scientific research for new drug development has long-amassed concern for the ethics, efficacy, and efficiency of the methodologies used. Due to these concerns and amid consumer demand for “cruelty-free” products which do not conduct tests on animals, many countries across the globe have begun to research, develop, and invest in alternatives to animal models and enact legislation to reduce or ban the

40. Panel Report, *European Communities-Measures Prohibiting the Importation and Marketing of Seal Products* ¶ 7.418 WTO Doc. WT/DS400/R, WT/DS401/R (adopted Nov. 25, 2013) [hereinafter Panel Report]; *European Communities-Measures Prohibiting the Importation and Marketing of Seal Products* ¶ 5.140 WT/DS400/R (adopted May 22, 2014) [hereinafter Appellate Body Report].

41. Howse, *supra* note 34, at 111–12.

42. *See Id.* at 112, 116 (citing Panel Report, *supra* note 40; Appellate Body Report, *supra* note 40).

43. *Principles of the Trading System*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm [<https://perma.cc/255K-6HY8>] (last visited Apr. 20, 2024); *Commerce Clause*, CORNELL LAW SCHOOL: LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/commerce_clause#:~:text=The%20Dormant%20Commerce%20Clause%20refers,or%20excessively%20burdens%20interstate%20commerce [<https://perma.cc/E4UT-PC35>] (last visited Apr. 20, 2024).

44. *See id.*; *see also* “Necessity Tests” in the WTO, World Trade Organization (Dec. 2, 2003), https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=104958,101788,28129&CurrentCatalogueIdIndex=2&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True [<https://perma.cc/W7GG-NB83>].

45. Howse, *supra* note 34.

use of animals in toxicity tests.⁴⁶ Despite the development of nonanimal testing models, toxicity tests on both rodent and nonrodent animals have been a requirement for new drugs to advance to human clinical trials and achieve Food and Drug Administration (FDA) authorization in the United States—until now.⁴⁷

On December 29, 2022, the FDA enacted the Modernization Act 2.0 (Officially titled “The Food and Drug Omnibus Reform Act of 2022”), introducing significant changes to the Federal Food, Drug, and Cosmetic Act (FFDCA) by replacing “preclinical tests (including tests on animals)” with “nonclinical tests,” effectively eliminating the requirement for toxicity tests to be performed on both rodent and nonrodent species before moving onto human clinical trials for new drugs subject to FDA approval.⁴⁸ The amended language now allows for nonanimal methodologies, such as organ chips, computer models, and other nonhuman or human biology-based test methods to satisfy pre-clinical requirements alongside traditional animal models, marking a significant change to drug and biologics regulation in the United States.⁴⁹

Prior to the Act’s passage, the FDA required “adequate information on the chemistry and manufacturing of the drug, controls available for the drug, and primary data tabulations from preclinical tests (including tests on animals) or human studies” before human clinical trials could be conducted.⁵⁰ In an FDA Remand Response to a lawsuit by Vanda Pharmaceuticals Inc. (“Vanda”) in 2019, the FDA further clarified that the “scientific minimum [to advance to human] clinical investigations” was a nine-month rodent study.⁵¹ In contrast, the FDA simultaneously expresses a commitment to advancing the development and use of alternatives to animal models in efforts to reduce the need for animal testing, a responsibility that is carried out primarily by its Alternative Methods Working Group.⁵² The FDA’s dedication to advancing alternative models is further reflected in their 2023 budget, in which the FDA requested an additional \$5 million to develop qualified alternative methods for regulatory use that can replace, reduce, and refine animal testing.⁵³ The FDA clarified these discrepancies in their position on the usefulness of animal models in protecting human

46. Helen Prior, et al., *Reflections on the Progress towards Non-Animal Methods for Acute Toxicity Testing of Chemicals*, 102 *REGULATORY TOXICOLOGY AND PHARMACOLOGY* 30, 30 (2019), <https://www.sciencedirect.com/science/article/pii/S0273230018303155?via%3Dihub> [<https://perma.cc/T66J-Y28G>].

47. See generally 21 U.S.C. § 355.

48. The Food and Drug Omnibus Reform Act of 2022, Pub. L. No. 117–328, 136 Stat. 5807 § 3209(a)(1)(A)–(B).

49. *Id.* at §3209(a)(1)(B)(2)(z)(1)–(5).

50. 21 U.S.C. § 355 (i)(2)(B).

51. *Vanda Pharm. Inc. v. FDA*, 436 F. Supp. 3d 256, 263 (D.D.C. 2019).

52. *Advancing New Alternative Methodologies at FDA*, U.S. FOOD & DRUG ADMIN. (2021), <https://www.fda.gov/media/144891/download> [<https://perma.cc/XU36-4PSV>].

53. FOOD AND DRUG ADMIN., DEPARTMENT OF HEALTH AND HUMAN SERVICES FISCAL YEAR 2023 (2023).

health and safety, by stating that while “animal studies can be critical to evaluating the potential for toxicity, safety and, at times, effectiveness, of FDA-regulated products,” nonanimal alternative methodologies have the potential to “provide both more timely and more predictive information to help accelerate product development, prevent products with increased toxicological risk from reaching the market, assess efficacy, provide insight into disease processes, and enhance emergency preparedness for the benefit of U.S. patients, consumers, and animals.”⁵⁴

The Modernization Act 2.0 has additional implications for the use of nonanimal models in achieving FDA approval for new drugs. Among these are:

- **Ethical Considerations:** The new FDA rules underscore the growing importance of ethical considerations in drug development. By introducing new pathways to authorization that do not require the use of animals in toxicity tests, there is potential for reduced reliance on animal testing. This enables the industry to demonstrate its commitment to minimizing harm to animals and meet consumer demand for “cruelty free” products.⁵⁵
- **Accelerated Drug Development:** Nonanimal test methods, such as computer modeling, can expedite drug development by providing faster and more cost-effective evaluations of drug safety and efficacy.⁵⁶
- **Increased Innovation:** In conjunction with funding allocated to explore new methodologies, the new rules encourage innovation in nonclinical testing methods. As researchers explore and develop new techniques, a diverse range of more ethical, accurate, and efficient testing options will become available.⁵⁷
- **Harmonization with Global Standards:** The amended language aligns U.S. regulations with global standards that favor nonanimal testing methods, facilitating international trade and regulatory compliance.⁵⁸
- **Data Quality:** The new rules emphasize how nonclinical tests can offer more accurate and reproducible data, reducing the likelihood of false positives or negatives in drug safety assessments. In one study, for example, approximately eighty-nine percent of novel drugs that passed animal testing requirements failed in human clinical trials, with

54. See *About Alternative Methods*, U.S. FOOD & DRUG ADMIN. (Nov. 14, 2023), <https://www.fda.gov/science-research/advancing-alternative-methods-fda/about-alternative-methods#:~:text=Alternative%20method-,An%20alternative%20method%20generally%20refers%20to%20a%20testing%20strategy%20that,also%20called%20new%20approach%20met%20hodologies.&text=Organs%20Don%20Dchips%20are%20a%20type%20of%20microphysiologi%20cal%20systems> [https://perma.cc/JJR8-FYWC].

55. *Id.*

56. Rebecca Kusko & Huixiao Hong, *Machine Learning and Deep Learning Promote Computational Toxicology for Risk Assessment of Chemicals* (2023).

57. See *Advancing New Alternative Methodologies at FDA*, *supra* note 52.

58. See generally Su-Jin Lee & Hyang-Ae Lee, *Trends in the Development of Human Stem Cell-Based Non-Animal Drug Testing Models*, KOREAN J. PHYSIOL. PHARMACOL. (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7585597/> [https://perma.cc/M92V-23ZQ].

approximately one-half of those failures due to unanticipated human toxicity.⁵⁹

- **Potential for Reduced Costs:** While the initial transition to nonanimal testing methods may require investment in new technologies and training, the long-term cost savings could be substantial.⁶⁰
- **Regulatory Adaptation:** The new rules will necessitate that regulatory agencies, including the FDA, adapt their guidelines and evaluation processes to accommodate new testing methods. This will likely involve additional updates to the regulatory framework and guidance documents that will better facilitate the adoption of nonanimal models.⁶¹

The Modernization Act 2.0 also comes with additional challenges and considerations regarding the role of the FDA in protecting public safety, such as:

- **Validation:** Ensuring the accuracy and reliability of nonclinical tests is crucial. The industry and regulatory agencies must establish validation criteria to maintain data integrity and to ensure the health and safety of humans involved in new drug clinical trials and the general public.⁶²
- **Standardization:** Standardizing nonclinical testing methods will be essential for regulatory consistency and reliability across different laboratories and organizations.⁶³
- **Education and Training:** Professionals in the pharmaceutical and biotechnology industries will require education and training to utilize new nonclinical testing methods effectively.⁶⁴
- **Regulatory Oversight:** Regulatory agencies will need to develop clear guidelines for the acceptance of nonclinical test data and ensure that these tests meet the necessary standards.⁶⁵
- **International Cooperation:** The pharmaceutical industry operates globally, and international cooperation will be vital to harmonize testing standards and facilitate the acceptance of nonclinical test data in multiple jurisdictions.⁶⁶

It is important to note that while the use of animal models will no longer be required to achieve approval from the FDA to proceed to human clinical trials in the new drug authorization process, this does not necessarily ensure

59. Gail A. Van Norman, *Limitations of Animal Studies for Predicting Toxicity in Clinical Trials*, 5 JACC: BASIC TRANSL. SCI. 387 (Apr. 27, 2020), <https://www.sciencedirect.com/science/article/pii/S2452302X1930316X> [<https://perma.cc/JJX3-P85Q>]

60. *Id.*

61. *Id.*

62. *Id.*

63. See *Advancing New Alternative Methodologies at FDA*, *supra* note 52.

64. *Id.*

65. Navya Reddy et al., *Regulatory Landscape of Alternatives to Animal Testing in Food Safety Evaluations with a Focus on the Western World*, REGUL. TOXICOL. PHARMACOL., <https://www.sciencedirect.com/science/article/abs/pii/S0273230023001381> [<https://perma.cc/R387-84B4>] (last visited Apr. 20, 2024).

66. *Id.*

that fewer animals will be used in new drug research, nor that researchers will choose nonanimal methods more frequently. To receive funding, researchers may be inclined to continue to use animal models, especially in cases where potential funders view animal models as more traditional, accurate, or reliable. Nonetheless, removing the requirements for FDA approval enables researchers and biotechnology companies that wish to avoid the use of animal models to move forward with human clinical trials in their pursuit of FDA approval.

In conclusion, the new FDA rules represent a significant step toward a more ethical, efficient, and innovative approach to new drug and biologics authorization. By redefining the necessary tests for FDA new drug authorization and encouraging the adoption of alternative methods, the FDA is paving the way for a future where animal testing becomes obsolete in the evaluation of drug safety and efficacy.⁶⁷

IV. Haarlem, Netherlands, is the First City in the World to Ban Meat Advertising

Food systems have a global goal to support the ever-growing population of eight billion people. Still, any action or policy must be done in a climate-oriented fashion to reduce and prevent the disproportionate impact of such climate change on developing countries.⁶⁸ So far, the food systems have failed to achieve this goal.⁶⁹

A. A NOVEL STRATEGY TO COMBAT CLIMATE CHANGE: HAARLEM BANS MEAT ADVERTISEMENTS

In September 2022, Haarlem, a Dutch city of 160,000 with a meat-eating population of almost ninety-five percent, moved towards the implementation of a motion submitted by the GroenLinks party on November 11, 2021.⁷⁰ This motion banned meat product advertisements for meat sourced from industrial agricultural farming.⁷¹

67. *Id.*

68. See *World Population Prospects*, UNITED NATIONS (2022), <https://population.un.org/wpp> [<https://perma.cc/K53F-VR8G>].

69. Oliver Milman, *Meat Accounts for Nearly 60% of All Greenhouse Gases from Food Production, Study Finds*, THE GUARDIAN (Sept. 13, 2021), <https://www.theguardian.com/environment/2021/sep/13/meat-greenhouses-gases-food-production-study> [<https://perma.cc/3WQN-ARVK>]; FFAC Staff, *Factory Farming and the Environment: 11 Facts and Statistics*, FACTORY FARMING AWARENESS COAL. (Jan. 18, 2022), <https://ffacoalition.org/articles/factory-farming-and-the-environment-11-facts-and-statistics> [<https://perma.cc/3JL2-5CB5>].

70. See generally Gemeente Haarlem, *Motie: Verleid Niet Tot Verergreen KlimaatCrisis*, GROEN LINKS HAARLEM (Nov. 11, 2021), <https://gemeentebestuur.haarlem.nl/Vergaderingen/Raad/2021/08-november/18:00/22-Motie-GLH-VERLEID-NIET-TOT-VERERGEREN-KLIMAAT-CRISIS.pdf> [<https://perma.cc/6HZX-MXHD>]; Charlotte Van Ouwkerk, *Dutch City to Ban Meat Ads in World First Claim*, PHYS.ORG (Sept. 7, 2022), <https://phys.org/news/2022-09-dutch-city-meat-ads-world.html> [<https://perma.cc/X59V-8RWK>].

71. See *Motie: Verleid Niet Tot Verergreen Klimaat Crisis*, *supra* note 70.

The ban takes effect in 2024 and applies to all public places, including billboards, advertisement screens, and bus/tram stops.⁷² It adopts similar rules already in place in Amsterdam, Leiden, and the Hague, which are all Dutch cities that have banned advertisements for air travel and fossil fuels due to their environmental impact.⁷³

In 2022 Haarlem declared climate change a threat, and the meat advertisement ban policy followed.⁷⁴ Climate change has significant consequences for the Netherlands. In particular, as a low-lying country, Dutch coasts are set to notice the effects of rising sea levels sooner rather than later. The government lists sea level rise, heavy rainfall, drought, heatwaves, and new diseases in the area, such as dengue, as critical threats.⁷⁵ The country's annual mean temperature rose 2.3 C between 1901 and 2020, while yearly rainfall increased twenty-one percent from 1906 to 2020.⁷⁶ Haarlem GroenLinks councilor Ziggy Klazes, who tabled the motion, stated, "Meat is just as harmful to the environment, and we cannot tell people there is a climate crisis and encourage them to buy products that are part of the cause."⁷⁷

In response, the meat sector implemented a campaign titled "Nederland Vleesland," which translates to "Netherlands Food Country," to promote meat eating for financial benefits as a matter of taste.⁷⁸

B. TERMS OF HAARLEM'S MEAT ADVERTISEMENT BAN MOTION

Haarlem's motion primarily addresses the intensive livestock farming that contributes to climate change.⁷⁹

But, fossil fuels also contribute to climate change, and the motion added that although Haarlem has declared a climate crisis and has switched to

72. *See id.*

73. Daniel Boffey, *Dutch City Becomes World's First to Ban Meat Adverts in Public*, THE GUARDIAN (Sept. 6, 2022), <https://www.theguardian.com/world/2022/sep/06/haarlem-netherlands-bans-meat-adverts-public-spaces-climate-crisis> [<https://perma.cc/7FHN-EY8A>]; *see also* Victoria Seveno, *Haarlem Becomes First City in the World to Ban Adverts for Meat*, I AM EXPAT (Sept. 17, 2022), <https://www.iamexpat.nl/lifestyle/lifestyle-news/haarlem-becomes-first-city-world-ban-adverts-meat> [<https://perma.cc/6WGS-9Z8M>].

74. *See generally* Autumn Swiers, *The Real Reason Meat Advertisements Are Now Banned in a Dutch City*, TASTING TABLE (Sept. 7, 2022), <https://www.tastingtable.com/998105/the-real-reason-meat-advertisements-are-now-banned-in-a-dutch-city/> [<https://perma.cc/9GSM-C95A>].

75. *Id.*

76. Nicole Lin Change, *Ads for Climate-damaging Meat Set to be Banned in this Dutch City*, EURONEWS (Sept. 8, 2022), <https://www.euronews.com/green/2022/09/08/ads-for-climate-damaging-meat-set-to-be-banned-in-this-dutch-city> [<https://perma.cc/B3NV-PYAX>].

77. *Haarlem Becomes First City in the World to Ban Meat Advertising*, DUTCHNEWS (Sept. 5, 2022), <https://www.dutchnews.nl/2022/09/haarlem-first-city-to-ban-ads-for-meat-in-public-spaces/> [<https://perma.cc/8837-G6N9>].

78. *See generally id.*

79. *See* Linda Samplonius, *How Meat Advertising Ban in Haarlem Went Totally Viral*, RTL NEWS (Oct. 6, 2022), <https://www.rtlnieuws.nl/nieuws/nederland/artikel/5337971/verbod-vlees-reclames-openbare-ruimtes-haarlem-ging-viral> [<https://perma.cc/F3MD-44W4>].

electric public transportation, numerous fossil fuel advertisements remain on public bus and shelter products.⁸⁰ Therefore, the motion added a request that the Haarlem Municipal executive enter into discussions with the operator of the advertisements in the Haarlem bus shelters and public spaces about no longer allowing advertisements for products that contribute excessively to CO₂ emissions, such as air travel.⁸¹ These means of transportation mainly use fossil fuels and related industry products.⁸²

The 2024 effective date allows some of the contracts between the Municipality of Haarlem and operators of advertisements to continue until they expire.⁸³ There are five such contracts, with four of them to expire in 2024 and 2025, and the fifth in 2031.⁸⁴ To implement the motion, the Municipal executive of Haarlem expressed its intent to prohibit the advertisement of products from factory farming that contribute excessively to carbon dioxide emissions and to submit complaints in the event of contract renewals with the operator of advertisements.⁸⁵ The implementation will be limited to advertisement operators with contracts with the municipality.⁸⁶ Others will be unaffected.⁸⁷ In August 2022, the original motion was cited in the Haarlem City Council Minutes, where the council, for the first time, started notifying advertising agencies to give the motion effect, which attracted global attention.⁸⁸

C. WILL THE MEAT ADVERTISEMENT BAN WORK?

The ban is enforced through private law agreements between Haarlem's Municipal executive and advertisement operators. It is unclear how the ban will effectively be implemented. According to Klazes, questions such as how one separates intensive factory-farmed meat, which contributes to climate change, from organic meat and how we check the source of goods at a butcher's shop will come up.⁸⁹ It will be left to Haarlem's executive to decide how to implement the motion. But, given the nexus between

80. Cristen Hemingway Jaynes, *Dutch City is World's First to Ban Meat Advertising*, EcoWatch (Sept. 6, 2022), <https://www.ecowatch.com/meat-advertising-ban-netherlands.html> [<https://perma.cc/823C-K3CS>].

81. *Id.*

82. *Id.*

83. See generally Nienke Klazinga, *Ban on Meat Advertisements: What's the Deal?*, VVD HAARLEM (Sept. 7, 2022), <https://haarlem.vvd.nl/nieuws/50626/verbod-op-vleesreclames-hoe-zit-het-nou-eigenlijk> [<https://perma.cc/F3MD-BD9G>].

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Haarlem No Longer Wants Meat Advertisements in Public Spaces*, NOS NEWS (Sept. 2, 2022), <https://nos.nl/artikel/2443046-haarlem-wil-geen-vleesreclames-meer-in-de-openbare-ruimte> [<https://perma.cc/CN4K-B9DH>]; Haarlem, *supra* note 70; Van Ouwkerk, *supra* note 70.

89. *Haarlem Ban on Meat Advertising "Patronising,"* BINNENLANDS BESTUUR (Sept. 9, 2011), <https://www.binnenlandsbestuur.nl/ruimte-en-milieu/haarlemse-ban-op-vleesreclame-betuttelend> [<https://perma.cc/4NHF-R8PM>].

climate change and factory-farmed meat, even with strong opposition from the meat lobby, the motion should be enforceable and have a positive effect on climate change.⁹⁰

V. Indian Supreme Court Clarifies Animals Are Not Legal Persons

In a recent decision evaluating the constitutionality of certain state anti-cruelty laws, the Supreme Court of India refused to declare animals as constitutional rights-holders or legal persons,⁹¹ leaving the question to be decided by the legislature.⁹² The decision also allowed the resumption of cultural animal sports, such as Jallikattu and bull-cart racing, by refusing to strike down state legislation that envisioned the practices would continue with stricter regulation.⁹³ The sports had previously been held unlawful and in violation of the Indian Prevention of Cruelty to Animals Act 1960 (the 1960 Act) by a Division Bench⁹⁴ of the Supreme Court of India in *Animal Welfare Board of India v. Nagaraja*.⁹⁵

The *Nagaraja* decision laid the groundwork for animal protection jurisprudence in India. The case involved various challenges to the cultural and traditional practices of bull-cart racing and Jallikattu (a sport whereby people attach themselves to bulls' horns in an attempt to tame them) in the Indian States of Tamil Nadu and Maharashtra.⁹⁶ The decision acknowledged that animals (specifically bulls) are sentient, and the 1960 Act is a law enacted for their welfare.⁹⁷ The judgment evaluated how, when forced to engage in the practice of Jallikattu, bulls experience immense suffering, consisting of mental as well as physical harm.⁹⁸

In *Nagaraja*, the Indian Supreme Court noted that the 1960 Act places certain duties on human beings and confers rights on animals.⁹⁹ It observed that the festival/practice of Jallikattu does not safeguard the well-being of the animals but instead deprives bulls of their rights under the 1960 Act, ignoring their intrinsic worth.¹⁰⁰ When discussing whether bulls are inherently performing animals, the Supreme Court noted that the bodies of bulls, their gait, and their historic usage (as draught animals) disfavor

90. *Id.*

91. *Animal Welfare Board of India v. Union of India* (2023) in Writ Petition No. 23 of 2016 (India) [hereinafter *Animal Welfare Board of India Decision* May 2023].

92. *Id.* ¶ 24.

93. *Id.*

94. A Division bench consists of two to three judges. In this case, it was a two-judge bench. *Id.*

95. *Animal Welfare Board of India*, 7 SCC at 547 (India).

96. *Id.*

97. *Id.* ¶ 12.

98. *Id.* ¶ 15.

99. *Id.* ¶ 27.

100. *See id.*

the idea that bulls are performing animals.¹⁰¹ The court noted that bulls are not anatomically designed to run fast and cannot be used for racing.¹⁰² Hence, according to the court, using the animals in this manner caused them immense suffering.¹⁰³

Accordingly, the court held that Jallikattu, bull-cart racing, and such events violated the 1960 Act and declared that bulls could not be used as performing animals either for Jallikattu events or bull-cart races in the States of Tamil Nadu, Maharashtra, or anywhere else in the country.¹⁰⁴ The court declared that the legal rights guaranteed to bulls under the 1960 Act could not be taken away or restricted except as the law itself allows.¹⁰⁵ The court did not hold that animals are legal persons, but declared that it expects the Indian Parliament to elevate the rights of animals to the status of constitutional rights-holders to protect their honor and dignity.¹⁰⁶

The *Nagaraja* judgment proved to be the building block for other Indian cases, which relied on the decision to delve into questions of animal legal personhood. For example, the Uttarakhand High Court in the case of *Narayan Dutt Bhatt v. Union of India*¹⁰⁷ went as far as to declare the entire animal kingdom, including avian and aquatic species, as being legal entities with a distinct persona, having corresponding duties, rights, and liabilities of a living person.¹⁰⁸ Similarly, the Punjab-Haryana High Court in *Karnail Singh v. State of Haryana* also declared the entire animal kingdom to be legal entities, and declared all citizens throughout the State of Haryana to be persons in loco parentis as the human face for the welfare or protection of animals.¹⁰⁹ Both cases relied on *Nagaraja* to arrive at their conclusions, taking statutory animal rights one step further into animal personhood.¹¹⁰

But, in 2017, a few years after the issuance of the *Nagaraja* decision, the States of Tamil Nadu,¹¹¹ Maharashtra,¹¹² and Karnataka¹¹³ passed laws amending the state anti-cruelty laws and allowing for practices such as Jallikattu and bull-cart racing to continue. The new laws legitimized the practices while regulating how they are carried out, inserting provisions to account for aspects of animal welfare (for example, stipulating the length of

101. *Animal Welfare Board of India*, 7 SCC at 547, ¶ 33 (India).

102. *Id.*

103. *See id.*

104. *Id.* ¶ 77.

105. *See id.*

106. *Id.*

107. *Naryana Dutt Bhatt v. Union of India*, 2018 SCC OnLine 645 (India).

108. *Id.*

109. *Karnail Singh & Others v. State of Haryana*, 2019 SCC OnLine 704 (India).

110. *Naryana Dutt Bhatt*, 2018 SCC OnLine at 645 (India); *Karnail Singh & Others*, 2019 SCC OnLine at 704 (India).

111. Through the Prevention of Cruelty to Animals (Tamil Nadu Amendment) Act, 2017, ¶ ¶ 7–8 (India).

112. Through the Prevention of Cruelty to Animals (Maharashtra Amendment) Act, 2017, ¶ 7 (India).

113. Through the Prevention of Cruelty to Animals (Karnataka Second Amendment) Act, 2017 ¶ 7 (India).

the race, time for rest periods, prohibition on physically abusing animals, etc.).¹¹⁴ The laws were challenged before the Supreme Court of India on the grounds that the state legislatures, by enacting these laws, were seeking to circumvent the court's decision in *Nagaraja*.¹¹⁵

In May 2023, in its decision in *Animal Welfare Board of India v. Union of India*,¹¹⁶ the Supreme Court of India adopted a much more restrained position than it originally had in *Nagaraja*. The court reaffirmed the reasoning in *Nagaraja* regarding the legal rights of animals, i.e., when the legislature imposes restrictions on human beings' use of animals, such restrictions translate to a recognition of animal rights.¹¹⁷ But, when deciding whether animals have constitutional rights, the Indian Supreme Court refused to hold that animals possess constitutionally guaranteed fundamental rights, citing that there is no jurisprudential precedent in India for this proposition.¹¹⁸ Furthermore, the court also denied that animals are considered legal persons under India's constitutional scheme, capable of bringing suits or petitions by themselves.¹¹⁹ Instead, the judges held that animal-related legislation can only be challenged by human beings or other legal persons who may "espouse the cause of animal welfare."¹²⁰ The court reiterated that the *Nagaraja* bench had merely suggested to the legislature that the statutory rights of animals be elevated to the status of constitutional rights but that ultimately, this is a decision solely for the legislature and not the judiciary.¹²¹

On the question of whether the new state laws genuinely protect animals or merely circumvent the court's holding in *Nagaraja*, the Supreme Court of India held that the amendment laws were valid, on the grounds that the new laws attempted to regulate the manner in which the sports are carried out and cater more to the welfare of the animals than was previously the case.¹²² On the one hand, the court acknowledged that despite the amendment in the laws, there could not be any guarantees that the bulls involved would experience no pain and suffering when used during these events.¹²³ But, the judges were quick to point out that even the 1960 Act, which is the main anti-cruelty legislation in India, operates under the assumption that human beings will use animals for certain human ends, while trying to minimize pain and suffering.¹²⁴ Hence, according to the court, the 1960 Act was not intended to prohibit the infliction of pain and suffering, but merely

114. See generally *Through the Prevention of Cruelty to Animals*, *supra* notes 111–13.

115. *Animal Welfare Board of India v. Union of India*, (2023) in Writ Petition No. 23 of 2016 (India) [hereinafter *Animal Welfare Board of India Decision May 2023*].

116. *Id.*

117. *Id.* ¶ 23.

118. *Id.* ¶ 24.

119. See *id.*

120. *Id.*

121. *Animal Welfare Board of India Decision May 2023* ¶ 23.

122. *Id.* ¶ 28.

123. See *id.*

124. See *id.*

to regulate the degree of suffering caused to an animal. Furthermore, the court categorically refused to decide whether a particular form of animal use itself is “necessary” under the law, stating that the legislature should undertake this exercise.¹²⁵

Additionally, while the *Nagaraja* court had decisively stated that Jallikattu and bull-cart racing were not part of the State of Tamil Nadu’s culture and tradition, the *Union of India* bench adopted a more reserved approach towards the question. The court held that whether a certain practice was part of the State’s cultural heritage is again, a question for the legislature and not the judiciary.¹²⁶ The court expressly overturned its decision in *Nagaraja*, where it held that Jallikattu was not a part of the heritage of the people of Tamil Nadu.¹²⁷

In conclusion, while the *Union of India* decision continued to reaffirm the sentience of animals and that they have certain statutory rights, it also stripped bulls of many of the protections afforded under *Nagaraja*, essentially allowing the practices that had been challenged under the original decision to continue. Furthermore, the court’s express denial of animal legal personhood or constitutional rights under the Indian legal framework may have a chilling effect on future High Court decisions involving animal rights. But, since the decision expressly states that the question of animal legal personhood is for the legislature to decide, it may incentivize State and Central legislatures in India to grapple with whether animals should be considered legal persons in the country.

VI. Brazilian Supreme Court: Municipalities Can Ban Noisy Fireworks to Protect Animals and People with Auditory Sensitivities

In May 2023, the Brazilian Supreme Court held that municipalities have authority to prohibit noisy fireworks and other pyrotechnic devices,¹²⁸ a decision that was celebrated by advocates for animals and the autistic community.¹²⁹ In 2017, the Municipality of Itapetininga, in São Paulo State, had passed a law banning the use of noisy fireworks in the urban

125. *Id.* ¶ 31.

126. *See id.*

127. Animal Welfare Board of India Decision May 2023 ¶ 40(ii).

128. The Brazilian Supreme Court is the highest appellate court in Brazil for constitutional matters. S.T.F.J., Recurso Extraordinário 1.210.727, Relator: Ministro Luiz Fux, 08.05.2023, Diário da Justiça Eletrônico [D.J.e.] 09/15/2023 (Braz.), <https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=767710313&prcID=5699175#> [<https://perma.cc/6QHG-BSDJ>] [hereinafter Supreme Court Decision May 2023].

129. *See, e.g.,* Livia Marra, *Município Pode Proibir Fogos de Artifício Barulhentos, Decide STF*, FOLHA DE S.PAULO (May 10, 2023), <https://www1.folha.uol.com.br/blogs/bom-pra-cachorro/2023/05/municipio-pode-proibir-fogos-de-artificio-barulhentos-decide-stf.shtml> [<https://perma.cc/Y5KY-JF2P>]; Carla Caputi, *Anuncia Medidas de Proteção e Apoio a Autistas*, SÃO JOÃO DA BARRA (May 26, 2003), https://www.sjb.rj.gov.br/site/noticia/carla_caputi_anuncia_medidas_de_protecao_e_apoio_a_autistas/14055 [<https://perma.cc/UU4P-EE2D>].

area.¹³⁰ While the text of the law did not mention the effect of fireworks on animals and people, the corresponding bill by which it was introduced had recognized the impacts on both groups.¹³¹ As to animals, the bill explained that the noise of fireworks causes them unnecessary suffering, may affect migration, mating, and birds' ability to care for their young in protected areas, and is even sometimes connected to criminal animal mistreatment.¹³² As to people, the bill noted that the incorrect handling of noisy fireworks is dangerous and can cause serious problems for children, the elderly, and people with psychological issues.¹³³

The Attorney General of the State of São Paulo filed suit challenging the law, arguing that the municipality had exceeded its authority by legislating on production and consumption of goods, matters of federal and state legislative competence under the Brazilian Federal Constitution.¹³⁴ The Attorney General also argued that there are less burdensome ways of avoiding damage to the community and the environment than a ban on fireworks, and that the ban was an unreasonable restraint on trade.¹³⁵

The Court of Justice of the State of São Paulo (the trial court) upheld the law, finding that the municipality could restrict fireworks based on the local interests at stake, including the number of families with companion animals as well as the significant populations of the elderly and children.¹³⁶ The court relied in part on two resolutions from the National Environmental Council¹³⁷ that treated noise pollution as a form of environmental pollution and established noise limits.¹³⁸ The court observed that the ban was not

130. Lei No. 6.212, de 11 de abril de 2017, COL. LEIS REP. FED. BRASIL, <https://legislacao digital.com.br/Itapetininga-SP/LeisOrdinarias/6212#:~:text=Itapetininga%2DSP&text=Art.,artefatos%20pirot%C3%A9nicos%20que%20produzam%20estampido> [https://perma.cc/676J-738N].

131. *See id.*

132. *Id.*

133. Lei No. 01/2016, de 12 de janeiro de 2016, CÂMARA DE MUNICÍPIO DE ITAPETININGA (Braz.).

134. *See generally* Tribunal de Justiça do Estado de São Paulo, Ação Direta de Inconstitucionalidade nº 2006008-32.2018.8.26.0000 (Braz.), <https://esaj.tjsp.jus.br/cposg/show.do?processo.codigo=RI004DLFO0000> [https://perma.cc/8FFA-4RML]; Constituição Federal [C.F.] [Constitution] art. 24 (Braz.).

135. *See id.*

136. *See generally* Tribunal de Justiça do Estado de São Paulo, Órgão Especial, Ação Direta de Inconstitucionalidade nº 2006008-32.2018.8.26.0000, Relator: Desembargador Evaristo dos Santos, 10.10.2018, Diário da Justiça Eletrônico [D.J.e.] 15.10.2018 (Braz.) [hereinafter São Paulo Trial Court Decision Oct. 2018].

137. In Brazil, environmental protection is the responsibility of a group of public bodies called the Brazilian National Environmental System (SISNAMA), which includes federal, state, and municipal public bodies that act jointly under the same principles and guidelines. The National Environmental Council (CONAMA) is the consultative and deliberative body of the SISNAMA. Among its responsibilities is the issuance of resolutions on environmental protection and the sustainable use of environmental resources. *Brazilian Environmental Legislation*, BRAZILIAN NR: HEALTH, SAFETY, AND ENV'T (HSE) IN BRAZ., <https://braziliannr.com/brazilian-environmental-legislation/> [https://perma.cc/6ZNH-F4AT] (last visited Apr. 19, 2024).

138. *See* Resolução CONAMA nº 001/90, <https://www.ibama.gov.br/sophia/cnia/legislacao/MMA/RE0001-080390.PDF> [https://perma.cc/4AJT-9F7P]; *see also* Resolução CONAMA nº

an unreasonable restraint on trade because it was tailored only to reach fireworks that produce noise in the urban area of the municipality.¹³⁹ The court also found that it was clear that the municipality was aiming to protect the local environment and health of its population, matters on which it was best placed to weigh the interests at stake.¹⁴⁰

The Attorney General filed an extraordinary appeal with the Supreme Court of Brazil, arguing that the municipality had no local interest and that it could not legislate on environmental matters in a manner that is contrary to or disharmonious with state and federal legislation.¹⁴¹ Moreover, the Attorney General argued that the municipality could have imposed limits on the use of fireworks (time limits, for example) but that the ban, as imposed, was not reasonable.¹⁴²

There was significant interest in the Supreme Court case, including the filing of five amicus briefs. Amici included the Brazilian Pyrotechnics Association, representing the interests of fireworks manufacturers and suppliers, and the Institute for the Promotion and Protection of Human Rights, representing the interests of people with autism spectrum disorder.¹⁴³ In its amicus brief, the Municipality of São Paulo—which had had its own similar fireworks ban upheld by the Supreme Court in 2021¹⁴⁴—discussed animal welfare, including presenting scientific evidence on the damage caused by noisy fireworks to these sensitive beings.¹⁴⁵

The decision of the Brazilian Supreme Court discussed the irreversible damage that fireworks can cause to animals:

Regarding environmental protection, several scientific studies demonstrate that noise from fireworks causes harm to various animal species. Research from New Zealand indicates that fireworks cause anxiety and harm in horses. An article published in Forbes Magazine reports flocks of birds panicking during the release of fireworks, leading to the death of thousands of birds. Media reports on the suffering caused by fireworks in pets are common.¹⁴⁶

002/90, <https://www.ibama.gov.br/sophia/cnia/legislacao/MMA/RE0002-080390.PDF> [<https://perma.cc/X2CD-CZVX>] (Braz.).

139. *See id.*

140. *See generally* Tribunal de Justiça do Estado de São Paulo, *supra* note 136.

141. In Brazil, extraordinary appeals are reserved for matters of a constitutional nature and are heard by the Supreme Court. *The Evolving Role of Brazil's Supreme Court*, 4 RULE OF LAW BRAZ. INST.: WILSON CENTER, https://www.wilsoncenter.org/sites/default/files/media/documents/publication/bi_rule_of_law-toffoli_finalv2.pdf [<https://perma.cc/7QR8-R79W>].

142. *See generally* Tribunal de Justiça do Estado de São Paulo, *supra* note 136.

143. *Id.*

144. STF, Arguição de Descumprimento de Fundamental 567, Relator: Ministro Alexandre de Moraes, 01.03.2022, Diário da Justiça Eletrônico [D.J.e.] 03/21/2021 (Braz.).

145. *See generally* Amicus brief n. 5772/2021, filed by the Municipality of São Paulo on January 22, 2021, p. 14–16, Ação Direta de Inconstitucionalidade nº 2006008-32.2018.8.26.0000 (Braz.).

146. Supreme Court Decision May 2023, *supra* note 128 at 16.

Thus, the Justices understood and relied on the scientific basis for restricting fireworks as a measure to protect animals and, by extension, the environment.¹⁴⁷ The Court found that the municipal ban complied with “the principle of prevention,” an important tenet of Brazilian environmental law.¹⁴⁸ Under that principle, priority must be given to measures that avoid damage to the environment, since the effective repair of environmental damage is often impossible.¹⁴⁹ The Supreme Court also emphasized the negative impacts that noisy fireworks have on the health of people with autism spectrum disorders and auditory hypersensitivity.¹⁵⁰

The decision became final and unappealable in late September 2023.¹⁵¹ Thus, the Supreme Court has reaffirmed that Brazilian municipalities are competent to legislate concurrently on the environment, as long as they act within the limits of their local interest and as long as the measures are compatible with state and federal legislation.¹⁵²

147. *See id.*

148. *See id.* at 12.

149. *Id.* at 1.

150. *Id.* at 12 (The 2021 Supreme Court decision upholding the similar ban by the Municipality of São Paulo had relied on data from the U.S. Centers for Disease Control and Prevention estimating that one in every 110 people has autism, as well as a scientific article showing that sixty-three percent of people with autism struggle with stimuli above eighty decibels—and noise pollution from fireworks can reach 150 to 175 decibels).

151. *Id.* at 1.

152. *Cf., e.g.,* Susan Schwartz et. al., *International Animal Law*, 56 YEAR IN REV. (ABA) 425, 434 (2022).

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The Year in International Trade Law

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2023 was another eventful year for customs and international trade law. This article describes significant rulings issued by the U.S. Court of Appeals for the Federal Circuit (CAFC) and the U.S. Court of International Trade (CIT), adjudicating actions of U.S. Customs and Border Protection (CBP), U.S. Department of Commerce (Commerce), and U.S. International Trade Commission (ITC), as well as key developments at Commerce in the administration of antidumping duty (AD) and countervailing duty (CVD) law.

I. Court Appeals

A. U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT

1. *PrimeSource Building Products, Inc. v. United States*¹

In February 2023, the CAFC reversed the CIT and found that the U.S. lawfully extended tariffs assessed on steel products pursuant to Section 232 of the Trade Expansion Act of 1962 to downstream steel products.² In March 2018, the President, relying on a January 2018 report from the Secretary of Commerce, found that steel imports were threatening national security and assigned “a 25% tariff on various steel articles (e.g., flat-rolled products, bars and rods, tubes, pipe, and ingots) from many countries.”³ In January 2020, the President extended this tariff to certain steel derivatives, including nails, staples, and tacks.⁴ Importers of these derivative steel products appealed,

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1. *PrimeSource Bldg. Products, Inc. v. United States*, 59 F.4th 1255 (Fed. Cir. 2023).

2. *Id.* at 1263.

3. *Id.* at 1258; Adjusting Imports of Steel into the United States, 83 Fed. Reg. 11,625 (Mar. 15, 2018).

4. *PrimeSource*, 59 F.4th at 1259; Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles into the United States, 85 Fed. Reg. 5281, 5282 (Jan. 24, 2020).

and a three-judge CIT panel in April 2021 invalidated the Presidential action as an “action outside of delegated authority.”⁵ Specifically, the CIT held that the January 2020 action was untimely under the statute because it relied on Commerce’s January 2018 report and occurred outside of the time periods proscribed by statute.⁶

The CAFC reversed the CIT after finding the expansion of Section 232 tariffs to derivative products to have been lawful.⁷ According to the CAFC, the “new imposition reaches imports of steel derivatives, which are within Section 232’s authorization of presidential action based on the Secretary’s finding about imports of steel, and there is no staleness or other persuasive reason for overriding the President’s judgment that including derivatives helps achieve the specific, original national-security objective.”⁸ The CAFC relied upon its 2021 ruling in *Transpacific Steel LLC v. United States*, for the validity of the President subsequently modifying Section 232 relief having “announce[d] a continuing course of action within the statutory time period”⁹—in that case, doubling the twenty-five percent tariff for Turkey.¹⁰ Finally, the CAFC found that the Presidential ability to modify Section 232 tariffs did “not render it an unconstitutional delegation,”¹¹ emphasizing that the statutory national security criteria “make that authority “far from unbounded.””¹²

2. *Solar Energy Industries Association v. United States*¹³

In October 2023, the CAFC reversed the CIT and found that the U.S. lawfully modified safeguard duties assessed on solar products pursuant to Section 201 of the Trade Expansion Act of 1962.¹⁴ The President, in January 2018, adopted safeguard measures, including duties on solar panels imported into the U.S. that (1) began at 30 percent and decreased by five percent each year for its four-year duration; and (2) initially did not apply to “bifacial” solar panels.¹⁵ In October 2020, the President modified this action by (1) increasing the fourth-year duty from fifteen percent to eighteen percent; and

5. *PrimeSource Bldg. Products, Inc. v. U.S.*, 505 F. Supp. 3d 1352, 1357 (Ct. Int’l Trade 2021), *rev’d and remanded*, 59 F.4th 1255 (Fed. Cir. 2023).

6. *Id.* at 1350–51.

7. *PrimeSource*, 59 F.4th at 1263.

8. *Id.* at 1257.

9. *Id.* at 1261 (citing *Transpacific Steel LLC v. United States*, 4 F.4th 1306, 1318–19 (Fed. Cir. 2021)).

10. *Transpacific Steel LLC*, 4 F.4th at 1310–11.

11. *PrimeSource*, 59 F.4th at 1262.

12. *Id.* at 1263 (quoting *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 558–60 (1976)).

13. *Solar Energy Indus. Ass’n (SEIA) v. United States*, 86 F.4th 885 (Fed. Cir. 2023).

14. *Id.* at 901–02.

15. *Id.* at 890; 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, 83 Fed. Reg. 3541, 3542 (Jan. 23, 2018).

(2) withdrawing the exclusion for bifacial solar panels.¹⁶ Importers of bifacial solar panels appealed, and the CIT invalidated both actions in November 2021.¹⁷ The CIT found that, because the statute “permits only trade-liberalizing modifications to existing safeguard measures, the ... withdrawal of the exclusion of bifacial solar panels and increase of the safeguard duties ... constituted both a clear misconstruction [of] the statute and action outside the President’s delegated authority.”¹⁸

The CAFC reversed the CIT after finding the modification of Section 201 duties to have been lawful.¹⁹ Emphasizing “that the safeguard statute has a broad remedial purpose” and that “the President’s modification power is far from unbounded,” the CAFC “conclude[d] it was not a clear misconstruction for the President to interpret his authority ... as permitting him to adopt trade-restrictive modifications, as well as trade-liberalizing modifications.”²⁰ The CAFC further found “that the President is not required to reweigh costs and benefits when modifying a safeguard measure.”²¹ The plaintiff’s relied-upon statutory “provisions expressly apply to the initial adoption of a safeguard measure and make no reference to modification of such measures.”²² Thus, the CAFC reversed the CIT “[b]ecause the President’s interpretation ... is not a clear misconstruction, and because the President did not violate the procedural requirements of the statute.”²³

3. *Royal Brush Manufacturing, Inc. v. United States*²⁴

The CAFC in July 2023 reversed the CIT and ruled that CBP must implement a system to provide confidential information to importers targeted for AD/CVD evasion in Enforce and Protect Act (EAPA) investigations.²⁵ In May 2019, Royal Brush Manufacturing Inc. (Royal Brush) was found to have evaded duties in CBP’s EAPA investigation of the AD order on pencils from China due to “transshipping pencils from China through the Philippines.”²⁶ Royal Brush appealed, arguing that its due process rights were violated because confidential information used by CBP during the investigation had not been provided.²⁷ In 2020, the CIT initially ordered remand, holding

16. *SELA*, 86 F.4th at 889; To Further Facilitate Positive Adjustment to Competition From Imports of Certain Crystalline Silicon Photovoltaic Cells (Whether or Not Partially or Fully Assembled Into Other Products), 85 Fed. Reg. 65,639, 65,640 (Oct. 10, 2022).

17. *Solar Energy Indus. Ass’n v. U.S.*, 553 F. Supp. 3d 1322, 1343–44 (Ct. Int’l Trade 2021), *rev’d and remanded*, 86 F.4th 885 (Fed. Cir. 2023).

18. *Id.* at 1343.

19. *SELA*, 86 F.4th at 901–02.

20. *Id.* at 885.

21. *Id.* at 901.

22. *Id.*

23. *Id.* at 889.

24. *Royal Brush Mfg., Inc. v. United States*, 75 F.4th 1250 (Fed. Cir. 2023).

25. *Id.* at 1262.

26. *Id.* at 1253.

27. *Id.* at 1255.

that CBP failed to provide Royal Brush with meaningful public summaries.²⁸ After those public summaries were provided to Royal Brush, the CIT in 2021 found that CBP satisfied due process requirements.²⁹

The CAFC reversed the CIT, explaining that “CBP relied on factual information that was not provided to Royal Brush to determine that Royal Brush had evaded duties. This, in and of itself, is a clear violation of due process.”³⁰ The CAFC rejected the government position that “unless a protective order is authorized by law, disclosure is not authorized by law The right to due process does not depend on whether statutes and regulations provide what is required by the constitution.”³¹ The CAFC further found that, “because CBP has the inherent authority to issue protective orders, confidential business information released to Royal Brush can be protected from public disclosure.”³² Finally, despite the government’s claiming that Royal Brush was not prejudiced, the CAFC clarified that “when a due process violation has occurred because of a denial of access to new and material information upon which an agency relied, no additional showing of prejudice is required.”³³ This ruling is expected to have a far-reaching impact, with CBP having to develop and implement a protective order system for EAPA investigations.³⁴

4. *Borusan Mannesmann v. United States*³⁵

The CAFC upheld Commerce’s practice of deducting duties applied by the President under Section 232 of the Trade Expansion Act of 1962 as part of the agency’s AD calculations.³⁶ In the 2017–2018 administrative review of the AD order on Circular Welded Carbon Steel Pipes and Tubes from Turkey, Commerce treated the Section 232 duties put in place by a March 2018 presidential proclamation (i.e., Proclamation 9705) as normal U.S. import duties and thus deducted them from U.S. price in the agency’s AD calculations.³⁷ This treatment resulted in a higher AD margin for the mandatory respondent, Borusan Mannesmann Boru Sanayi ve Ticaret A.S. and Borusan Mannesmann Pipe U.S. Inc. (collectively Borusan).³⁸ Borusan appealed Commerce’s treatment of Section 232 duties to the CIT, which

28. *Royal Brush Mfg., Inc. v. United States*, 483 F. Supp. 3d 1294, 1304–08 (Ct. Int’l Trade 2020).

29. *Royal Brush Mfg., Inc. v. United States*, 545 F. Supp. 3d 1357, 1364–69 (Ct. Int’l Trade 2021), *vacated and remanded*, 75 F.4th 1250 (Fed. Cir. 2023).

30. *Royal Brush*, 75 F.4th at 1259.

31. *Id.* at 1260.

32. *Id.*

33. *Id.* at 1262.

34. *Id.*

35. *Borusan Mannesmann v. United States*, 63 F.4th 25 (Fed. Cir. 2023).

36. *Id.* at 37.

37. *Id.* at 29–30.

38. *See id.* at 30.

affirmed Commerce's deduction of these duties from U.S. price.³⁹ Borusan then appealed to the CAFC.

The CAFC sustained the CIT's decision.⁴⁰ The court chose not to "make a statute-wide categorical determination regarding all duties imposed on imports by presidential action" under Section 232, focusing instead on the specific language of Proclamation 9705 that applied additional duties to imports of circular welded carbon steel pipes and tubes from Turkey.⁴¹ The court found that Proclamation 9705 clarifies that these duties should be imposed in addition to, and not to partly or wholly offset, the antidumping duties that would be due without the new duties.⁴² The court concluded that "the only fair reading of Proclamation 9705 is that, when applied to an article covered by antidumping duties, the Proclamation 9705 and antidumping duties must together result in a full imposition of both duties."⁴³

5. *Committee Overseeing Action for Lumber v. United States*⁴⁴

The CAFC in April 2023 overturned the CIT and found that Commerce does have the authority to conduct expedited CVD administrative reviews pursuant to the applicable regulation, 19 C.F.R. § 351.214(k).⁴⁵ Commerce, in July 2019, concluded its first expedited 2015 administrative review of the CVD order on softwood lumber products from Canada, assigning individually determined CVD rates for eight exporters, four of which obtained de minimis rates such that they would be excluded from the CVD order going forward.⁴⁶ The domestic lumber industry appealed, and the CIT in August 2021 invalidated both Commerce's regulation and the expedited review.⁴⁷ Earlier in November 2020, the CIT found that "the statutory text, structure, and legislative history compel the court to conclude that Commerce exceeded its authority" by conducting expedited CVD reviews.⁴⁸

The CAFC reversed the CIT, finding that "statutory authority for the expedited-review process is properly found in ... [19 U.S.C.] § 1677f-1(e) to favor individual company determinations and the ... grant of

39. *Id.* at 30–31.

40. *Id.* at 33–37.

41. *Borusan Mannesmann*, 63 F. 4th at 34.

42. *Id.*

43. *Id.* at 35.

44. *Comm. Overseeing Action for Lumber Int'l Trade Investigations or Negot. v. United States*, 66 F.4th 968 (Fed. Cir. 2023) [hereinafter *Coalition CAFC*].

45. *Id.* at 978–79.

46. *Certain Softwood Lumber Products From Canada: Final Results of Countervailing Duty Expedited Review*, 84 Fed. Reg. 32,121 (July 5, 2019).

47. *Comm. Overseeing Action for Lumber Int'l Trade Investigations or Negotiations v. United States*, 535 F. Supp. 3d 1336, 1363–64 (Ct. Int'l Trade 2021), *rev'd and remanded*, 66 F.4th 968 (Fed. Cir. 2023) and *motion for relief from judgment granted*, 665 F. Supp. 3d 1347 (Ct. Int'l Trade 2023).

48. *Comm. Overseeing Action for Lumber Int'l Trade Investigations or Negotiations v. United States*, 483 F. Supp. 3d 1253, 1263–64 (Ct. Int'l Trade 2020).

regulatory-implementation power to Commerce in [19 U.S.C.] § 3513(a).⁴⁹ 19 U.S.C. § 1677f-1(e), the CAFC held, allows Commerce to depart from the general rule that it should calculate individual CVD rates if the number of respondents is so large that doing so is impractical.⁵⁰ To give effect to the “primary policy of providing individual-company rate determinate,” 19 C.F.R. § 351.214(k) sets out expedited review procedures.⁵¹ The CAFC found this regulation within Commerce’s statutory authority and consistent with the Agreement on Subsidies and Countervailing Measures, which entitles respondents not individually examined in CVD investigations to an expedited review to calculate an individual rate.⁵² In response to the CAFC overruling the CIT and finding that Commerce has statutory authority to conduct expedited CVD reviews,⁵³ the four de minimis companies petitioned the CIT to reinstate their exclusion from the CVD order.⁵⁴ The CIT granted this request and Commerce reinstated their exclusions in December 2023, effective August 28, 2021.⁵⁵

6. *China Custom Manufacturing Inc. v. United States*⁵⁶

The CAFC upheld Commerce’s scope determination that solar panel mounts are subject to the AD/CVD orders on aluminum extrusions from China.⁵⁷ Specifically, Commerce determined that the products did not meet the “finished merchandise” exclusion requirements in the scope language.⁵⁸ China Custom Manufacturing, Inc. and Greentec Engineering, LLC (collectively, CCM), product importers, appealed to the CIT.⁵⁹ The CIT sustained Commerce’s determination, finding that the mounts are not finished merchandise because they are a “part or subassembly” of the finished merchandise, i.e., the solar panel mounting system.⁶⁰ CCM then appealed to the CAFC.⁶¹

The CAFC upheld the CIT’s decision, finding that “CCM’s solar panel mounts are parts or subassemblies and thus cannot be a finished product and cannot qualify for the finished merchandise exclusion.”⁶² In doing so, the CAFC relied on “a straightforward reading of the plain language” and rejected arguments that *Shenyang Yuanda Aluminum Indus. Eng’g Co.*

49. *Coalition CAFC*, 66 F.4th at 977.

50. *Id.* at 977–78.

51. *Id.*

52. *Id.*

53. *Id.* at 978–79.

54. Certain Softwood Lumber Products From Canada: Notice of Reinstatement of Exclusion From the Countervailing Duty Order, 88 Fed. Reg. 85,225, 85,225–26 (Dec. 7, 2023).

55. *Id.* at 85,226.

56. *China Custom Mfg., Inc. v. United States*, 61 F.4th 956 (Fed. Cir. 2023).

57. *Id.* at 958.

58. *Id.*

59. *Id.* at 961.

60. *Id.*

61. *Id.*

62. *China Custom Mfg., Inc.*, 61 F.4th at 961.

v. United States was not precedential or should be overturned.⁶³ In the scope determination underlying *Shenyang*, Commerce found curtain wall units to be covered by the scope of these orders because they are parts and subassemblies of a complete curtain wall made up of multiple units.⁶⁴ The CAFC explained that it found that a part or subassembly cannot be a finished product (the legal conclusion) and applied it to the facts (a curtain wall unit).⁶⁵ Finding that CCM's appeal was "governed squarely"⁶⁶ by *Shenyang*, the CAFC found the solar panel mounts comparative to curtain wall units because they were "undeniably components that are fastened together to form a complete [] system."⁶⁷

7. *Zhejiang Machinery Import & Export Corp. v. United States*⁶⁸

In April 2023, the CAFC affirmed the CIT and found that Commerce properly denied separate rate status for Zhejiang Machinery Import & Export Corp. (ZMC) in the 2016–17 administrative review of the AD order on tapered roller bearings from China.⁶⁹ In AD proceedings involving non-market economy (NME) countries, the CAFC has long recognized the presumption of state control such that unless an exporter can "meet its burden in demonstrating the absence of government control, Commerce can decline to issue a separate company-specific rate and instead apply to that exporter the country-wide [AD] rate."⁷⁰ Commerce denied ZMC's separate rate and assigned it the 92.84 percent China-wide AD rate because ZMC was wholly owned by Zhejiang Sunny I/E Corporation (Sunny), because its labor union and majority shareholder was ultimately controlled by the All-China Federation of Trade Unions, an extension of the Chinese Communist Party; and the minority shareholder was wholly owned by the Zhejiang State-Owned Assets Supervision and Administration Commission of the State Council.⁷¹

The CAFC affirmed the CIT and DOC finding that ZMC had not rebutted the presumption of de facto state control, despite ZMC "characteriz[ing] Sunny's labor union as the nominal "owner" ... because the ultimate owners were the members of Sunny's employee stock ownership committee."⁷² The CAFC found "that the labor union is a majority shareholder of and

63. *Id.* at 961–62 (citing *Shenyang Yuanda Aluminum Indus. Eng'g Co. v. United States*, 776 F.3d 1351, 1358 (Fed. Cir. 2015)).

64. *Shenyang*, 776 F.3d at 1358.

65. *China Custom Mfg., Inc.*, 61 F.4th at 961–62.

66. *Id.*

67. *Id.* at 961.

68. *Zhejiang Machinery Import & Export Corp. (ZMC) v. United States*, 65 F.4th 1364 (Fed. Cir. 2023).

69. *Id.*

70. *Id.* at 1366 (citing *Sigma Corp. v. United States*, 117 F.3d 1401, 1405–06 (Fed. Cir. 1997)).

71. *ZMC*, 65 F.4th at 1367–69.

72. *Id.* at 1368.

has influence over Sunny,” and the minority shareholder had “at least the potential to control ZMC—if not actual control.”⁷³ The CAFC affirmed the separate rate denial because ZMC’s “shareholders, including the labor union, have the power to select managers and keep profit distribution—factors that Commerce has considered in establishing the presumption of state control.”⁷⁴

B. U.S. COURT OF INTERNATIONAL TRADE

1. *Sweet Harvest Foods v. United States*⁷⁵

In November 2023, the CIT upheld the ITC’s June 2022 finding that “critical circumstances” exist concerning Vietnam in the investigation into raw honey from Argentina, Brazil, India, and Vietnam.⁷⁶ Because the ITC, after considering import volumes before and after petition filing, found that “the remedial effect of the [AD] order with respect to subject imports from Vietnam will likely be seriously undermined,” Commerce was lawfully able to extend AD liability ninety-days before the preliminary determinations.⁷⁷ Although Commerce often makes affirmative critical circumstances determinations, it is much rarer for the ITC to do so, and this occurrence can result in extraordinary AD/CVD liability. The CIT dismissed arguments that the ITC focused on the wrong time period, did not give the most recent data sufficient weight, and unreasonably declined to examine inventory data after the suspension of liquidation (November 25, 2021) since the order’s remedial effect began in November 2021.⁷⁸ The CIT further disagreed that the ITC should have considered whether “the exact entries of raw honey from Vietnam that entered during the ninety-day critical circumstances period are in a position to undermine seriously the remedial effect of the order.”⁷⁹

The CIT clarified that the issue was not whether the order’s remedial effect would be seriously undermined without the “90-day retroactive application of duties” but whether the imports that entered during the period after petition filing but before the suspension of liquidation were likely to undermine the duties’ remedial effect seriously.⁸⁰ The CIT next found that the ITC did not misinterpret 19 U.S.C. § 1673d(b)(4)(A)(ii) (II) by not evaluating both historical import level and contemporaneous inventory level data; legislative history supported the ITC’s interpretation of the statute, and its interpretation was sensible given the statute requires

73. *Id.* at 1371.

74. *Id.* at 1372 (citing *Sigma*, 117 F.3d at 1405–06).

75. *Sweet Harvest Foods v. United States*, 669 F.Supp.3d 1346 (Fed. Cir. 2023).

76. *Raw Honey from Argentina, Brazil, India, and Vietnam*, Inv. No. 701-TA-1564, USITC Pub. 5327, (June 3, 2022) (Final), 46–49.

77. *Sweet Harvest Foods*, 669 F.Supp.3d at 1349.

78. *Id.*

79. *Id.* at 1352.

80. *Id.* at 1353.

Commerce to focus critical circumstance reviews on the “post-petition period prior to suspension of liquidation.”⁸¹ Finally, the CIT rejected claims that the ITC’s determination was not supported by substantial evidence because the record did not contain certain information; instead, the ITC acted reasonably because it was never asked to collect this data.⁸² Thus, the CIT dismissed the claim and affirmed the ITC’s critical circumstances determination.⁸³

2. *Stupp Corporation v. United States*⁸⁴

The CIT sustained Commerce’s application of its differential pricing analysis in a respondent’s challenge of the agency’s third remand resulting in an appeal of the final determination in the *AD investigation of Welded Line Pipe from the Republic of Korea*.⁸⁵ The respondent has appealed the case to the CAFC.⁸⁶ The agency uses the differential pricing analysis to determine whether Commerce should apply an alternate method to compare normal value to export (and constructed export) prices due to concerns of targeted dumping.⁸⁷ The CAFC had remanded the case for Commerce to explain its application of the Cohen’s test as part of its differential pricing analysis even if certain statistical assumptions are not met.⁸⁸ The CIT found that Commerce adequately explained the reasonableness of its methodology and sustained the remand results.⁸⁹

3. *HiSteel Co., Ltd. v. United States*⁹⁰

In an appeal of Commerce’s final results in the 2019–20 administrative review of the *AD order on Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Korea*, the plaintiff, Korean pipe producer HiSteel Co., Ltd. (HiSteel), challenged three aspects of the agency’s AD calculations.⁹¹ The defendant-intervenor, domestic pipe producer Nucor Tubular Products Inc. (Nucor Tubular), moved to dismiss two of the three claims for lack of subject matter jurisdiction.⁹² The CIT granted Nucor Tubular’s motion to dismiss those two claims and stayed the remaining claims pending other court litigation.⁹³ The CIT found the dismissed claims

81. *Id.* at 1354.

82. *Id.* at 1354–55.

83. *Sweet Harvest Foods*, 669 F.Supp3d at 1363.

84. *Stupp Corp. v. United States*, 619 F.Supp.3d 1314 (Ct. Int’l Trade 2023).

85. *Id.* at 1317.

86. *Id.*

87. *Id.* at 1321–22.

88. *Id.* at 1318.

89. *Id.* at 1321–28.

90. *HiSteel Co., Ltd. v. United States*, 653 F.Supp.3d 1341 (Ct. Int’l Trade 2023).

91. *Id.* at 1346.

92. *Id.*

93. *Id.* at 1350–51.

“nonjusticiable,” as even if HiSteel prevailed on those issues, “a correction of Commerce’s alleged calculation errors would not result in a changed published dumping margin.”⁹⁴ The CIT further reasoned that HiSteel does not have standing to bring these claims because “the alleged harm of potentially miscalculated adjustments to normal value amounts to a “bare procedural violation” and does not “entail a degree of risk sufficient to meet the concreteness requirement.”⁹⁵

4. *Risen Energy Co., Ltd. v. United States*⁹⁶

2023 was another year featuring CIT litigation over the Government of China’s Export-Import Bank’s Export Buyer’s Credit program (EBCP). The CIT in November 2023 remanded Commerce’s determination for a third time in *Risen*.⁹⁷ Plaintiff Risen had challenged the final results of the 2017 administrative review of the CVD order on crystalline silicon photovoltaic cells, whether or not assembled into modules (solar cells), from China.⁹⁸ In its second remand redetermination, Commerce continued to apply adverse facts available (AFA) to Risen’s unaffiliated U.S. customers’ EBCP usage.⁹⁹ In the second remand, the CIT had instructed Commerce to attempt verification of Risen’s U.S. customer who had submitted certifications of non-use of the program.¹⁰⁰ On remand, Commerce instructed Risen to ask its customers whether they would submit to verification.¹⁰¹ All but one responded in the affirmative, and because the singular customer did not, Commerce determined that the AFA remained appropriate because the non-use information provided was “unverifiable.”¹⁰²

The CIT disagreed, finding that Commerce required an “onerous unnecessary level of verification.”¹⁰³ More specifically, the CIT pointed to the fact that the verification requests were coming six years after the Period of Review and required unaffiliated companies to provide unlimited amounts of sensitive business information while hosting government officials for several days.¹⁰⁴ Since there was “no evidence to the court that these companies are lying about their financials,” “no evidence to indicate that the companies do not know what they are talking about,” and “[e] very piece of evidence presented to Commerce and to the court supports the conclusion that Risen’s sales were not aided by the EBCP,” the CIT

94. *Id.* at 1351.

95. *Id.* at 1352 (citing *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341–43 (2016)).

96. *Risen Energy Co., Ltd. v. United States*, 665 F.Supp.3d 1335 (Ct. Int’l Trade Nov. 17, 2023).

97. *Id.* at 1337.

98. *Id.*

99. *Id.* at 1336.

100. *Id.* at 1339.

101. *Id.* at 1341.

102. *Risen Energy Co., Ltd.*, 665 F.Supp.3d at 1341.

103. *Id.* at 1343.

104. *Id.*

directed Commerce to “not include a subsidy amount for EBCP” in Risen’s CVD rate.¹⁰⁵ In issuing this directed determination, the CIT cited its own decision from a month earlier involving the same parties in a subsequent review where it noted: “Throughout the long history of EBCP litigation in the court[,] there has been an absolute dearth of evidence that any U.S. customer has ever used the program.¹⁰⁶ No party has ever demonstrated that a U.S. customer has received financing through the EBCP.”¹⁰⁷

5. *Kaptan Demir Celik Endustrisi A.S. (Kaptan II) v. United States*¹⁰⁸

The CIT sustained Commerce’s remand redetermination in a challenge of the final results of the 2018 administrative review of the CVD order on Steel Concrete Reinforcing Bar from the Republic of Turkey.¹⁰⁹ Plaintiff Kaptan Demir Celik Endustrisi ve Ticaret A.S. (Kaptan) initially challenged Commerce’s determination that subsidies received by Nur Gemicilik ve Ticaret A.S. (Nur), a shipbuilding company affiliated with Kaptan, were properly attributed to Kaptan based on a cross-owned input supplier relationship as defined by 19 C.F.R. § 351.525(b)(6)(iv). In its April 2023 ruling, *Kaptan Demir Celik Endustrisi ve Ticaret A.S. (Kaptan I) v. United States*, the CIT remanded for further explanation and review finding that “Commerce had failed to properly explain how Nur’s production of steel scrap, which Kaptan bought and melted down to produce rebar, constituted production of the input product [that] is primarily dedicated to production of the downstream product.”¹¹⁰ On remand, Commerce reversed course, focusing on the fact that unprocessed steel scrap is a “common input in a variety of products” and that Nur’s primary business activity is shipbuilding, not steel scrap production.¹¹¹ Thus, Commerce concluded that Nur’s business activity is not “dedicated almost exclusively to the production of a higher value-added product in the manner suggested by the Preamble” and found that it was not appropriate to attribute Nur’s subsidies to Kaptan, reducing Kaptan’s CVD rate for the review to de minimis.¹¹²

In sustaining Commerce’s remand in November 2023, the CIT noted the clear set of criteria Commerce newly established to determine whether the facts on the record trigger the primarily dedicated language in 19 C.F.R. § 351.525(b)(6)(iv).¹¹³ The CIT sustained Commerce’s analysis that

105. *Id.* at 1344.

106. *Risen Energy Co. v. United States*, 658 F.Supp.3d 1364, 1371 (Ct. Int’l Trade Oct. 11, 2023).

107. *Id.* at 1364.

108. *Kaptan Demir Celik Endustrisi Ve Ticaret A.S. v. United States*, 666 F.Supp.3d 1334, (Ct. Int’l Trade Nov. 27, 2023).

109. *Id.* at 1336.

110. *Kaptan Demir Celik Endustrisi ve Ticaret A.S. (Kaptan II) v. United States*, 633 F.Supp.3d 1276 (Ct. Int’l Trade Apr. 26, 2023), *remanded*, 666 F.Supp.3d 1334, 1339.

111. *Kaptan II*, 666 F.Supp.3d at 1340.

112. *Id.*

113. *Id.* at 1345.

considered both the nature of the scrap provided and the supplier's general business activities in determining whether suppliers' production is "primarily dedicated" under the regulations.¹¹⁴ The CIT specifically rejected claims from Defendant-Intervenor that the suppliers' business activities were irrelevant to the inquiry.¹¹⁵ Instead, the CIT sustained the finding that "the production processes involved in [Nur's] shipbuilding [were] far removed from Kaptan Demir's downstream production processes, especially given the extremely limited transactions between the two companies."¹¹⁶

6. *Separate Rate Denials*

In 2023, the CIT resolved multiple appeals of Commerce's denial of separate rates, most of which involved minority-state ownership of respondents that exported tires from China. In March 2023, the CIT affirmed the separate rate denial for 36.9 percent state-owned Pirelli Tyre Co., Ltd. (Pirelli) in the 2017-18 administrative review of the AD order on passenger vehicles and light truck tires.¹¹⁷ In May 2023, the CIT affirmed Commerce's denial of separate rates for the 25.2 percent state-owned respondent Guizhou Tyre Co., Ltd. (GTC) in the 2014-15 administrative review of the AD order on off-the-road tires (OTR) from China;¹¹⁸ and the AD investigation of truck and bus tires from China.¹¹⁹ For a majority state-owned respondent, the CIT, also in May 2023, affirmed Commerce's denial of the separate rate for 65.66% state-owned Double Coin Holdings Ltd. (Double Coin) in the 2015-16 administrative review of the AD order on OTR from China.¹²⁰ Although the CAFC in 2021 ruled that Commerce correctly applied the presumption of state control to Double Coin in that same OTR review,¹²¹ the CIT subsequently considered and rejected an "as-applied" challenge to Commerce's separate rate denial.¹²² Pirelli, GTC, and Double Coin have each appealed to the CAFC, arguing that they, in fact, rebutted the presumption of state control based on specific facts they presented to Commerce.¹²³

In a separate rate case, the government appealed to the CAFC after the CIT's February 2023 contrasting ruling, which invalidated Commerce's

114. *Id.* at 1337.

115. *Id.* at 1346.

116. *Id.* at 1349.

117. *Pirelli Tyre Co., Ltd. v. United States*, 627 F. Supp. 3d 1322, 1332–42 (Ct. Int'l Trade 2023); *Pirelli Tyre Co., Ltd. v. United States*, 638 F. Supp. 3d 1361, 1370–84 (Ct. Int'l Trade 2023).

118. *Guizhou Tyre Co. v. United States*, 641 F. Supp. 3d 1371, 1378–85 (Ct. Int'l Trade 2023).

119. *Id.* at 1386, 1392–96.

120. *China Mfrs. All., LLC v. United States*, 639 F. Supp. 3d 1260, 1264–68 (Ct. Int'l Trade 2023).

121. *China Mfrs. All., LLC v. United States*, 1 F.4th 1028, 1035–40 (Fed. Cir. 2021).

122. *China Mfrs. All.*, 639 F. Supp. 3d at 1263–64.

123. See *Pirelli Tyre Co., Ltd.*, 627 F. Supp. 3d at 1322; *Guizhou Tyre Co.*, 641 F. Supp. 3d at 1371; *China Mfrs. All.*, 639 F. Supp. 3d at 1260.

denial of a separate rate for Jilin Forest Industry Jinqiao Flooring Group Co., Ltd. in the 2015–16 administrative review of the AD order on multi-layered wood flooring from China.¹²⁴ The CIT invalidated the entire premise of Commerce’s presumption of state control: “Although Commerce has used the NME presumption for years, it has never identified the source in law authorizing the presumption or even given a real reason for the NME presumption’s use Commerce’s unexplained NME presumption was entitled to no deference.”¹²⁵ The CAFC’s resolution of the various separate rate appeals filed in 2023 is expected to clarify the circumstances in which Commerce can treat cooperating respondents as part of the NME-wide entity.

II. Significant Commerce Developments

A. CIRCUMVENTION INQUIRIES

Pursuant to a new regulation effective in late 2021, circumvention inquiries continued to make up a large and growing part of Commerce’s AD/CVD docket in 2022 and 2023.¹²⁶ Petitioners were dealt a setback in their effort to have Commerce make expansive circumvention findings in the March 2023 negative determination for *Welded Carbon Steel Standard Pipes and Tubes (standard pipe) from India*.¹²⁷ Exporters of standard pipe from the United Arab Emirates (UAE) and Oman—despite being already subject to AD orders on standard pipe from the UAE and Oman—were allegedly circumventing the AD order on standard pipe from India because they imported the hot-rolled steel (HRS) input from India, among other countries.¹²⁸ Petitioners’ effort toward an expansive circumvention finding by Commerce resulted in a setback because of the March 2023 negative determination for the Petitioner in the matter.¹²⁹

Commerce’s 2023 circumvention inquiries typically involved products allegedly circumventing AD/CVD orders on China and frequently resulted in affirmative determinations. For example, on July 27, 2023, Commerce found that aluminum sheets from China using 4071 aluminum alloy circumvented the AD/CVD orders on Common Alloy Aluminum Sheet

124. *Jilin Forest Indus. Jinqiao Flooring Grp. Co. Ltd. v. United States*, 617 F.Supp.3d 1343, 1347–69 (Ct. Int’l Trade 2023).

125. *Id.* at 1368.

126. Regulations to Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws, 86 Fed. Reg. 52,300 (Sept. 20, 2021).

127. *Certain Welded Carbon Steel Standard Pipes and Tubes from India*, 88 Fed. Reg. 12,917 (Dep’t of Com. Mar. 1, 2023) (negative determ.) (CWP from India Circumvention Final).

128. *Certain Welded Carbon Steel Standard Pipes and Tubes from India*, 87 Fed. Reg. 9571 (Dep’t of Com. Feb. 22, 2022) (initiation of circumvention inquiry).

129. *Certain Welded Carbon Steel Standard Pipes and Tubes from India*, 87 Fed. Reg. 9571 (Dep’t of Com. Aug. 26, 2022) (preliminary determ.), accompanying Decision Memorandum (Aug. 22, 2023), at 20–22, unchanged, CWP from India Circumvention Final, 88 Fed. Reg. 12,917.

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(CAAS) from China.¹³⁰ Commerce found that aluminum sheets produced by using 4071 aluminum constitute a minor alteration in form or appearance and should also be within the scope of the orders.¹³¹ For its determination, Commerce relied on adverse facts available on a country-wide basis.¹³² As a result, any 4071 aluminum sheet from China entered or withdrawn for consumption is subject to suspension of liquidation effective August 26, 2022.¹³³

On November 2, 2023, Commerce found circumvention of certain AD/CVD orders by light-walled rectangular pipe and tube (LWRPT),¹³⁴ light-walled rectangular carbon steel tubing (LWRA),¹³⁵ and certain welded carbon steel pipe and tube products (CWP) from Vietnam.¹³⁶ Specifically, Commerce determined that LWRPT from Vietnam produced with hot-rolled steel from China or Korea and LWR from Vietnam produced with hot-rolled steel from Taiwan are circumventing the respective LWRPT and LWR orders and are thus subject to AD/CVD duties.¹³⁷ Similarly, Commerce determined that CWP from Vietnam produced with hot-rolled steel from China, India, and Korea circumvented the respective CWP orders and is subject to duties.¹³⁸ As of November 9, 2023, to avoid paying AD/CVD duties, qualifying importers and exporters of LWRPT, LWR, and CWP from Vietnam must certify that products are not manufactured using hot-rolled steel from any of the respective countries where Commerce found circumvention.¹³⁹ However, hot-rolled steel from any country where Commerce

130. Common Alloy Aluminum Sheet from the People's Republic of China, 88 Fed. Reg. 48,438 (Dep't Com. Jul. 27, 2023) (affirm. final deter. of circumvention of the antidumping and countervailing duty orders; 4017 Aluminum Sheet).

131. *Id.*

132. *Id.* at 48,439.

133. *Id.* at 48,438–39.

134. Light-Walled Rectangular Pipe and Tube from the People's Republic of China, 88 Fed. Reg. 77,283 (Dep't Commerce Nov. 9, 2023) (final affirm. deter. of circumvention of the antidumping and countervailing duty orders); Light-Walled Rectangular Pipe and Tube from the Republic of Korea, 88 Fed. Reg. 77,266 (Dep't of Com. Nov. 9, 2023) (final affirm. deter. of circumvention of the antidumping duty order).

135. *See* 88 Fed. Reg. 77,274

136. Circular Welded Carbon Quality Steel Pipe from the People's Republic of China, 88 Fed. Reg. 77,287 (Dep't of Com. Nov. 9, 2023) (final affirm. deter. of circumvention of the antidumping duty and countervailing duty orders); Certain Welded Carbon Steel Standard Pipes and Tubes from India, 88 Fed. Reg. 77,279 (Dep't of Com. Nov. 9, 2023) (final affirm. deter. of circumvention of the antidumping duty order); Certain Circular Welded Non-Alloy Steel Pipe from the Republic of Korea, 88 Fed. Reg. 77,270 (Dep't of Com. Nov. 9, 2023) (final affirm. deter. of circumvention of the antidumping duty order).

137. 88 Fed. Reg. 77,283 (LWRPT from China); 88 Fed. Reg. 77,266 (LWRPT from Korea); 88 Fed. Reg. 77,274 (LWR from Taiwan).

138. 88 Fed. Reg. 77,287 (CWP from China); 88 Fed. Reg. 77,279 (CWP from India); 88 Fed. Reg. 77,270 (CWP from Korea).

139. 88 Fed. Reg. 77,283, 77,284 (LWRPT from China); 88 Fed. Reg. 77,266, 77,267–68 (LWRPT from Korea); 88 Fed. Reg. 77,274, 77,276 (LWR from Taiwan); 88 Fed. Reg. 77,287, 77,289 (CWP from China); 88 Fed. Reg. 77,279, 77,280 (CWP from India); 88 Fed. Reg. 77,270, 77,272 (CWP from Korea).

found circumvention that requires further processing in Vietnam before being made into LWR, LWRPT, or CWP is not subject to AD/CVD.

B. NEW COMMERCE INVESTIGATIONS OF PREVIOUSLY INVESTIGATED PRODUCTS

On May 19, 2023, Commerce published its final affirmative CVD determination in its investigation of freight rail couplers from China, and on May 30, 2023, Commerce published its final affirmative determination in AD investigation.¹⁴⁰ Commerce calculated a subsidy rate of 265.99 percent for the mandatory respondents, the non-responsive companies, and all other companies, and an estimated average dumping margin of 169.90 percent for the China-wide entity, which applies to all exporters.¹⁴¹ The Government of China failed to respond in the CVD investigation, and six companies failed to respond to Commerce's questionnaires in the AD investigation. Commerce responded by applying adverse facts available.¹⁴² The investigations follow a similar case on freight rail couplers from China that ended in a negative injury determination by the ITC.¹⁴³

Freight rail couplers were not the only product investigated by Commerce in 2023 that it had previously investigated. In August 2023, Commerce initiated AD investigations of mattresses from a slew of countries, including those rarely targeted in trade remedy actions: Bosnia and Herzegovina, Bulgaria, Burma, India, Italy, Kosovo, Mexico, the Philippines, Poland, Slovenia, Spain, and Taiwan.¹⁴⁴ At that time, Commerce also initiated a CVD investigation of mattresses from Indonesia;¹⁴⁵ an AD order on mattresses from Indonesia was issued in May 2021 alongside AD orders

140. Certain Freight Rail Couplers and Parts Thereof from the People's Republic of China, 88 Fed. Reg. 32,184 (Dep't of Com. May 19, 2023) (final affirm. countervailing duty deter. and final affirm. critical circum. deter., in part); Certain Freight Rail Couplers and Parts Thereof From the People's Republic of China, 88 Fed. Reg. 34,485 (Dep't of Com. May 30, 2023) (final affirm. deter. of sales at less-than-fair value and final affirm. deter. of critical circum.).

141. Certain Freight Rail Couplers and Parts Thereof from the People's Republic of China, 88 Fed. Reg. 32,184; Certain Freight Rail Couplers and Parts Thereof From the People's Republic of China, 88 Fed. Reg. 34,485.

142. Preliminary Decision Memorandum accompanying Certain Freight Rail Couplers and Parts Thereof from the People's Republic of China, 88 Fed. Reg. 13,425 (Dep't of Com. Mar. 3, 2023) (prelim. affirm. countervailing duty deter. and prelim. affirm. critical circum. deter.) at 6; Preliminary Decision Memorandum accompanying Certain Freight Rail Couplers and Parts Thereof From the People's Republic of China, 88 Fed. Reg. 15,372 (Dep't of Com. Mar. 13, 2023) (prelim. affirm. deter. of sales at less than fair value and prelim. affirm. deter. of critical circum.) at 6–7.

143. Freight Rail Coupler Systems and Components from China, 87 Fed. Reg. 41,144 (Jul. 11, 2022) (investigation nos. 701-TA-670 and 731-TA-1570 (final)).

144. Mattresses from Bosnia and Herzegovina, Bulgaria, Burma, India, Italy, Kosovo, Mexico, the Philippines, Poland, Slovenia, Spain, and Taiwan, 88 Fed. Reg. 57,433 (Dep't of Com. Aug. 17, 2023) (initiation of AD invs.).

145. Mattresses from Indonesia, 88 Fed. Reg. 57,412 (Dep't of Com. Aug. 23, 2023) (initiation of CVD inv.).

on mattresses from Cambodia, Malaysia, Serbia, Thailand, Turkey, and Vietnam.¹⁴⁶ In May 2021, Commerce also issued a CVD order on mattresses from China,¹⁴⁷ with the AD order having been issued in 2019.¹⁴⁸ Similar to the explosion in countries targeted for mattress investigations, in October 2023, Commerce initiated AD/CVD investigations of aluminum extrusions from myriad countries, seeking to include additional products as compared to those covered by the scope of the AD/CVD orders on aluminum extrusions from China issued in 2011,¹⁴⁹ as well as seeking for the first time AD/CVD on aluminum extrusions from Indonesia, Mexico, Turkey,¹⁵⁰ as well as AD on aluminum extrusions from Colombia, the Dominican Republic, Ecuador, India, Italy, Korea, Malaysia, Taiwan, Thailand, the UAE, and Vietnam.¹⁵¹

C. NEW AND PROPOSED COMMERCE REGULATORY AND ADMINISTRATIVE REQUIREMENTS

In September 2023, Commerce published a Final Rule to govern procedures related to Administrative Protective Orders (APO) and service of documents in AD/CVD proceedings.¹⁵² To promote efficiency, Commerce adopted changes to its service procedures by allowing parties to utilize electronic services made on a temporary basis due to COVID-19.¹⁵³ Service of a public document, public version of a business proprietary document, and a business proprietary document are now effectuated on parties on the public and APO service lists through ACCESS.¹⁵⁴ Commerce in May 2023 published notice of a significant Proposed Rule to modify its regulations governing AD/CVD proceedings.¹⁵⁵ Written comments were due

146. Mattresses from Cambodia, Indonesia, Malaysia, Serbia, Thailand, the Republic of Turkey, and the Socialist Republic of Vietnam, 86 Fed. Reg. 26,460 (Dep't of Com. May 14, 2023) (AD orders).

147. Mattresses from the People's Republic of China, 86 Fed. Reg. 26,463 (Dep't of Com. May 14, 2021) (CVD order).

148. Mattresses from the People's Republic of China, 84 Fed. Reg. 68,395 (Dep't of Com. Dec. 16, 2019) (CVD order).

149. Aluminum Extrusions from the People's Republic of China, 76 Fed. Reg. 30,650 (Dep't of Com. May 26, 2011) (AD order); Aluminum Extrusions from the People's Republic of China, 76 Fed. Reg. 30,653 (Dep't of Com. May 26, 2011) (CVD order).

150. Aluminum Extrusions from the People's Republic of China, Indonesia, Mexico, and the Republic of Turkey, 88 Fed. Reg. 74,433 (Dep't of Com. Oct. 31, 2023) (initiation of CVD invs.).

151. Aluminum Extrusions from the People's Republic of China, Colombia, the Dominican Republic, Ecuador, India, Indonesia, Italy, the Republic of Korea, Malaysia, Mexico, Taiwan, Thailand, the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam, 88 Fed. Reg. 74,421 (Dep't of Com. Oct. 31, 2023) (initiation of AD invs.).

152. Administrative Protective Order, Service, and Other Procedures in Antidumping and Countervailing Duty Proceedings, 88 Fed. Reg. 67,069 (Dep't of Com. Sept. 29, 2023).

153. *Id.*

154. *Id.*

155. Regulations Improving and Strengthening the Enforcement of Trade Remedies Through the Administration of Antidumping and Countervailing Duty Laws, 88 Fed. Reg. 29,850 (Dep't of Com. May 9, 2023).

in July 2023, but Commerce has yet to publish a Final Rule.¹⁵⁶ The most significant proposed changes address foreign government inaction that benefits foreign producers, transnational subsidies, and particular market situations (PMS).¹⁵⁷ If adopted, these changes would strengthen Commerce's authority to enforce AD/CVD laws and could significantly affect future AD/CVD proceedings.¹⁵⁸

Under the Proposed Rule, Commerce could consider evidence of government inaction and failure to enforce property (including intellectual property), human rights, labor, and environmental protections.¹⁵⁹ Because evidence of government inaction on these issues could distort prices, Commerce could reject certain benchmark data in CVD proceedings and surrogate value data in AD proceedings involving non-market economy countries.¹⁶⁰ For example, Commerce's recent practice disregards Malaysian manufacturing labor costs as surrogate values due to allegations of the widespread use of forced labor throughout the Malaysian electrical and electronics sector.¹⁶¹ In addition, Commerce proposes to eliminate its current transnational subsidies regulation that limits its ability to countervail subsidies provided by a foreign government "other than the country in which the recipient firm is located."¹⁶² Commerce stated that it has observed far more instances in which a government provides a subsidy that benefits foreign production.¹⁶³ Thus, the Proposed Rule would enable Commerce to target transnational subsidy programs such as China's Belt and Road Initiative in CVD proceedings.¹⁶⁴ Finally, Commerce proposes to standardize the information requirements for PMS findings and provides an illustrative list of PMS scenarios, such as overcapacity or oversupply of a significant input in the global marketplace that distorts the cost of production.¹⁶⁵

156. *Id.*

157. *See id.*

158. *See id.*

159. *See id.* at 29,859.

160. *See id.*

161. *See, e.g.,* Certain Activated Carbon from the People's Republic of China, 88 Fed. Reg. 77,553 (Dep't of Com. Nov. 13, 2023) (final results).

162. Regulations Improving and Strengthening the Enforcement of Trade Remedies Through the Administration of Antidumping and Countervailing Duty Laws, 88 Fed. Reg. 29,850, 29,870 (Dep't of Com. May 9, 2023); 19 C.F.R. § 351.527.

163. *See* Regulations Improving and Strengthening the Enforcement of Trade Remedies Through the Administration of Antidumping and Countervailing Duty Laws, 88 Fed. Reg. 29,850, 29,870 (Dep't of Com. May 9, 2023).

164. *Id.*

165. *Id.* at 29,861–67.

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National Security Law

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I. Real Estate-Related National Security Developments in 2023

The year 2023 introduced a new wave of national security-based restrictions on foreign investment in U.S. real estate. These restrictions are codified in both federal and state laws.² Proponents of tighter restrictions on foreign ownership of U.S. real estate have raised national security concerns relating to, among other things, proximity to sensitive sites such as utilities and military bases, and potential risks relating to foreign control of resources such as agricultural land.³ Detractors have criticized these state laws on constitutional grounds, including potential civil rights violations and federal preemption.⁴

1. This article reviews significant international legal developments in National Security Law in 2023. Orga Cadet and Raul Rangel Miguel served as co-committee editors of this article. Barbara Linney, Partner at Baker & Hostetler LLP, Scott C. Jansen, Attorney at Law, and Orga Cadet, Associate at Baker & Hostetler LLP, co-authored “Real Estate-Related National Security Developments in 2023.” Geoffrey Goodale, Partner at Duane Morris, LLP, Lauren E. Wyszomierski, Associate at Duane Morris, LLP, and Jonathan Meyer, Attorney at Law, coauthored “Biden Administration Announces Outbound Investment Program.” Adam R. Pearlman, Senior Attorney & Managing Director of Lexpat Global Services, LLC, authored “Lawful Responses to Hostage-Taking.” Guy C. Quinlan, President of the Lawyers Committee on Nuclear Policy, authored “Nuclear Arms Control 2023.” Joy Momin, Founder and CEO of DeFi Legal, authored “Ransomware and Cryptocurrency in 2023.”

2. See, e.g., H.B. 379, 2023 Leg., Reg. Sess. (Ala. 2023); Regulations Pertaining to Certain Transactions by Foreign Persons Involving Real Estate in the United States, 31 C.F.R. § 802.211(b) (2023).

3. See, e.g., Press Release, The Select Comm. on the Chinese Communist Party, Gallagher, Thompson Lead Bipartisan CFIUS Reform, Protecting U.S. Farmland and Sensitive Sites From Foreign Adversaries Act (July 12, 2023), <https://selectcommitteeontheccp.house.gov/media/press-releases/gallagher-thompson-lead-bipartisan-cfius-reform-protecting-us-farmland-and> [<https://perma.cc/44BQ-983F>].

4. See, e.g., *CAPAC Leaders Introduce Federal Legislation to Preempt Discriminatory State Land Laws*, CONG. ASIAN PAC. AM. CAUCUS (May 25, 2023), <https://capac-chu.house.gov/press-release/capac-leaders-introduce-federal-legislation-preempt-discriminatory-state-land-laws> [<https://perma.cc/44BQ-983F>].

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**A. COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES
NATIONAL SECURITY REVIEW OF REAL ESTATE TRANSACTIONS**

The Committee on Foreign Investment in the United States (CFIUS), an interagency committee tasked with reviewing national security concerns relating to foreign investment in the United States, has been increasingly focused on real estate issues.⁵ In 2018, Congress granted CFIUS expansive new authority to review certain purchases, leases, and concessions of real estate to foreign persons.⁶ In the ensuing years, CFIUS has wielded this new authority to review dozens of real estate transactions, including six in 2022 alone.⁷

In August 2023, CFIUS added eight military bases in six states to its list of sensitive military and government installations for potential national security risk intervention.⁸ These new protected sites are as follows:

- Air Force Plant 42 in California, a classified aircraft manufacturing facility;
- Dyess Air Force Base in Texas, which flies the B-1 and B-21 bombers;
- Ellsworth Air Force Base in South Dakota, which flies the B-1 and B-21 bombers;
- Grand Forks Air Force Base in North Dakota, which flies the Global Hawk RQ-4 drone;
- Iowa National Guard Joint Force Headquarters in Iowa;
- Lackland Air Force Base in Texas, the sole basic training facility for the Air Force;
- Laughlin Air Force Base in Texas, the largest Air Force undergraduate pilot training base; and
- Luke Air Force Base in Arizona, the Air Force's advanced pilot training base for F-16s and F-35s.⁹

As a result, transactions involving real estate within 100 miles of these sites now are subject to increased CFIUS scrutiny.¹⁰

5. See U.S. DEP'T OF THE TREASURY, ANNUAL REPORT TO CONGRESS FOR CY 2022 26 (July 31, 2023), https://home.treasury.gov/system/files/206/CFIUS%20-%20Annual%20Report%20to%20Congress%20CY%202022_0.pdf [<https://perma.cc/6KMZ-4L6F>].

6. See John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 2802, 132 Stat. 1636, 2177–2207 (2018) (codified at 50 U.S.C. § 4565).

7. DEP'T OF THE TREASURY, *supra* note 5, at 12, 26.

8. See Provisions Pertaining to Certain Transactions by Foreign Persons Involving Real Estate in the United States, 88 Fed. Reg. 57348, 57348 (Aug. 23, 2023), <https://www.federalregister.gov/documents/2023/08/23/2023-17678/provisions-pertaining-to-certain-transactions-by-foreign-persons-involving-real-estate-in-the-united> [<https://perma.cc/U484-KRM4>].

9. *Id.* at 57352.

10. Regulations Pertaining to Certain Transactions by Foreign Persons Involving Real Estate in the United States, 31 C.F.R. § 802.211(b), § 802.217 (2023).

B. State Laws Restricting Foreign Investments in Real Estate

In 2023, thirteen states either enacted legislation for the first time or updated existing state law to limit foreign ownership of real estate.¹¹ The new state laws restrict certain foreign ownership of the following:

- land within close proximity of military installations and/or critical infrastructure facilities (e.g., Alabama,¹² and Montana¹³);
- agricultural land (e.g., Ohio,¹⁴ North Dakota,¹⁵ and Virginia¹⁶); and/or
- all real estate within the state (e.g., Tennessee,¹⁷ and Utah¹⁸).

A Florida law enacted in May 2023 prohibits “foreign principals” (including certain individuals and entities from specified countries such as China) from owning or acquiring Florida real estate.¹⁹ This law is facing a legal challenge²⁰ and other criticism based on, among other things, civil rights and federal preemption claims.²¹

In 2023, a high-profile real estate transaction in North Dakota brought these issues to the forefront of U.S. national security law and policy debates.²² The transaction involved a Chinese company’s acquisition of over 300 acres of agricultural land in North Dakota to build a corn processing plant.²³ The U.S. Air Force opposed the purchase, finding that it posed a “significant threat to national security” because nefarious actors from China could use the land to collect data on military drones flying in the vicinity of Grand Forks Air Force Base, which is twelve miles away.²⁴ However, CFIUS determined in December 2022 that it did not have jurisdiction to review the transaction.²⁵ The Grand Forks City Council subsequently terminated

11. See *Foreign Ownership of U.S. Land: FAQs & Resource Library*, THE NAT’L AGRIC. L. CENTER (Mar. 20, 2024), <https://nationalaglawcenter.org/foreign-investments-in-ag/#::~:~:text=States%20that%20enacted%20a%20foreign,real%20property%20within%20the%20state> [https://perma.cc/7798-GCGR].

12. H.B. 379, 2023 Leg., Reg. Sess. (Ala. 2023).

13. S.B. 203, 68th Leg., Reg. Sess. (Mont. 2023).

14. H.B. 33, 135th Gen. Assemb., Reg. Sess. (Ohio 2023).

15. H.B. 1135, 68th Leg. Assemb., Reg. Sess. (N.D. 2023).

16. S.B. 1438, 2023 Leg., Reg. Sess. (Va. 2023).

17. H.B. 0040, 2023 Leg., Reg. Sess. (Tenn. 2023).

18. H.B. 186, 2023 Leg., Gen. Sess. (Utah 2023).

19. S.B. 264, 2023 Leg., Reg. Sess. (Fla. 2023).

20. See *Shen v. Simpson*, No. 4:23-cv-208-AW-MAF (N.D. Fl. 2023), No. 23-12737 (11th Cir., filed June 23, 2023).

21. See *CAPAC Leaders Introduce Federal Legislation to Preempt Discriminatory State Land Laws*, *supra* note 4.

22. See Steve Karnowski, *Air Force Opposes Chinese Company’s Corn Plant for North Dakota*, AIR FORCE TIMES (Feb. 1, 2023), <https://www.airforcetimes.com/news/your-air-force/2023/02/02/air-force-opposes-chinese-companys-corn-plant-for-north-dakota/> [https://perma.cc/8LCB-C8VV].

23. *Id.*

24. *Id.*

25. See Morgan DeVries, *Fufeng Project Cancelled by Grand Forks City Council*, KX NEWS (Feb. 7, 2023), <https://www.kxnet.com/news/state-news/fufeng-project-canceled-by-grand-forks-city-council> [https://perma.cc/HSG2-2AL5].

the development agreement between the city and the planned facility, potentially making the project nonviable,²⁶ and CFIUS subsequently amended its regulations to assert jurisdiction over the base.²⁷

C. CONCLUSION

More laws are likely to be passed in 2024. Dozens of bills have been introduced in the U.S. Congress²⁸ and over a dozen states are considering legislation to further restrict foreign ownership of U.S. real estate. Investors should closely follow these developments and ensure their policies, procedures, and due diligence are up-to-date.²⁹ In addition, investors must ensure they are adequately prepared to analyze new and developing risks and comply with new notice requirements.³⁰

II. Biden Administration's Outbound Investment Program

A. OUTBOUND INVESTMENT EXECUTIVE ORDER

On August 9, 2023, President Biden issued an Executive Order regarding U.S. investments in certain national security technologies and products in countries of concern, which has frequently been referred to as the “Outbound Investment EO” (EO).³¹ The EO is intended to deal with the threat of advancements in military, intelligence, surveillance, and cyber-enabled technologies and products from China and other countries of concern and aims to curb investments from the United States in those sectors and in those countries.³² The EO directs the U.S. Department of the Treasury

26. *See id.*

27. *See* Provisions Pertaining to Certain Transactions by Foreign Persons Involving Real Estate in the United States, 88 Fed. Reg. at 57348 (Aug. 23, 2023); *see also* Regulations Pertaining to Certain Transactions by Foreign Persons Involving Real Estate in the United States, 31 C.F.R. § 802.211(b), § 802.217 (2023).

28. *See, e.g.,* Food Security Is National Security Act, S. 2312, 118th Cong. (2023) (would make Secretaries of Agriculture and Health and Human Services members of CFIUS); Foreign Agricultural Restrictions to Maintain Local Agriculture and National Defense Act, S. 2060, 118th Cong. (2023) (would grant CFIUS authority to review acquisition (purchase or lease) of agricultural lands that exceed \$5 million or 320 acres of land); Promoting Agriculture Safeguards and Security Act of 2023, S. 168, 118th Cong. (2023) (would expand CFIUS jurisdiction to review investments in U.S. agricultural businesses and biotechnology companies).

29. *Foreign Ownership of U.S. Land: FAQs & Resource Library*, *supra* note 11; *see also*, Food Security is National Security Act, S. 2312, 118th Cong. (2023); Foreign Agricultural Restrictions to Maintain Local Agriculture and National Defense Act, S. 2060, 118th Cong. (2023); Promoting Agriculture Safeguards and Security Act of 2023, S. 168, 118th Cong. (2023).

30. *See id.*

31. Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern, 88 Fed. Reg. 54867, 54867 (Aug. 11, 2023) [hereinafter EO 14105]; *see also* *Outbound Investment Security Program*, U.S. DEP'T OF TREAS., <https://home.treasury.gov/policy-issues/international/outbound-investment-program> [<https://perma.cc/Q5KN-WUKQ>] (last visited Apr. 9, 2024).

32. EO 14105, *supra* note 31, at 54868.

(Treasury) to issue regulations prohibiting certain transactions in these sectors (prohibited transactions) and establishing notification requirements for others.³³ Although the EO established no regulations on its own, it provides guidance for how Treasury should implement the EO with room for further expansion of its directives.³⁴

In accordance with the EO, Treasury on the same day published an Advance Notice of Proposed Rulemaking (ANPRM) regarding the forthcoming regulations that will prohibit certain transactions in these sectors and establish notification requirements for others.³⁵ The ANPRM proposed a number of key definitions and invited public comment on over eighty specific issues relating to the implementation of the EO.³⁶

B. SCOPE OF THE EO

The EO directs Treasury to begin a rulemaking process that will designate specific types of investments by U.S. persons in China or in certain Chinese-affiliated entities that develop or produce semiconductors, quantum computers, and artificial intelligence applications as either prohibited or notifiable transactions.³⁷

The forthcoming regulations must cover transactions with “covered foreign persons” from “countries of concern” who engage in activities involving national security technologies or products.³⁸ This also includes entities owned fifty percent or more by the above parties (which could include, e.g., U.S. subsidiaries of a Chinese parent company).³⁹ The People’s Republic of China, along with the special administrative regions of Hong Kong and Macau, is currently the only nation listed as a “country of concern,” but that list is subject to change.⁴⁰ Covered national security technologies and products are those technologies and products critical for the military, intelligence, surveillance, or cyber-enabled capabilities of a country of concern and are limited to three sectors:

33. *Id.* at 54868.

34. *Id.*

35. Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern, 88 Fed. Reg. 54961, 54961 (proposed Aug. 14, 2023) [hereinafter ANPRM].

36. *Id.* at 54963.

37. EO 14105, *supra* note 31, at 54867.

38. *Id.* at 54868.

39. *See id.* at 54870.

40. EO 14105, *supra* note 31, at 54870; *see also* Press Release, White House, President Biden Signs Executive Order On Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern (Aug. 9, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/08/09/president-biden-signs-executive-order-on-addressing-united-states-investments-in-certain-national-security-technologies-and-products-in-countries-of-concern/> [https://perma.cc/6E67-Y34T].

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1. Semiconductors and microelectronics;
2. Quantum information technologies; and
3. Artificial intelligence.⁴¹

Of note, the transaction itself does not need to involve covered national security technologies or products to fall under the EO's purview.⁴² If a foreign party engages in any activities concerning those matters, then any transaction with that party may be subject to the EO.⁴³

The forthcoming regulations may also bar U.S. persons from "knowingly directing" transactions by non-U.S. persons if such dealings would be prohibited transactions if engaged in by an U.S. person.⁴⁴ This restriction would prohibit corporate officers and directors who are U.S. nationals from ordering or approving investments by foreign branches, subsidiaries, or funds into Chinese entities involved in the covered technology sectors.⁴⁵ The restriction would also cover, for example, a U.S. person acting as a general partner of a foreign fund or U.S. venture partners launching and directing a foreign fund.⁴⁶

The EO expressly permits Treasury to exempt certain transactions from the categories of prohibited transactions and notifiable transactions if doing so would "be in the national interest of the United States."⁴⁷ Notable potential exclusions include certain passive or other investments that pose a lower likelihood of conveying intangible benefits.⁴⁸ For example, Treasury is considering excepting certain U.S. investments into publicly traded securities, index funds, mutual funds, exchange-traded funds, and certain investments made as a limited partner, committed but uncalled capital investments, and intracompany transfers of funds from a U.S. parent company to its subsidiary.⁴⁹

The EO directs Treasury to issue its regulations in consultation with the Secretary of Commerce and the heads of other relevant departments and agencies.⁵⁰ The EO also lists a series of other cooperative steps that Treasury must take in its implementation, including consulting with the Secretary of State on foreign policy considerations and the Secretaries of State, Defense, Commerce, and Energy plus the Director of National Intelligence on the implications for military, intelligence, surveillance, or

41. EO 14105, *supra* note 31, at 54870; *see also* Press Release, White House, President Biden Signs Executive Order On Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern.

42. *See* EO 14105, *supra* note 31, at 54869.

43. *Id.*

44. *See id.*

45. *See id.*

46. *See id.*

47. *Id.* at 54871.

48. *See* EO 14105, *supra* note 31, at 54871.

49. *See* ANPRM, *supra* note 35, at 54965.

50. EO 14105, *supra* note 31, at 54868.

cyber-enabled capabilities of certain covered national security technologies and products.⁵¹

C. ADVANCE NOTICE OF PROPOSED RULEMAKING RELATING TO THE EO

The Advance Notice of Proposed Rulemaking Relating to the EO (ANPRM) clarified the intended scope of Treasury's forthcoming regulations and invited public comment on eighty-three specific issues.⁵² In particular, the ANPRM described the types of China-related transactions that the Treasury is considering prohibiting or requiring notification to the U.S. government.⁵³

The ANPRM sought comment on proposed definitions for many key terms, including those relating to:

- U.S. Person;
- Covered Foreign Person;
- Person of a Country of Concern; and
- Covered Transaction.⁵⁴

In addition, the ANPRM sought comments on the proposed parameters for the prohibited and notifiable transactions involving the "covered national security technologies and products," defined as semiconductor and microelectronic technologies and products, quantum information technologies, and AI systems.⁵⁵ Specifically, Treasury sought comment regarding any suggested modifications to the definitions under consideration to enhance clarity or close any loopholes, including modifications to the proposed definitions for particular technologies such as "supercomputer," "electronic design automation software," "quantum computers and components," "quantum sensors," and "AI system."⁵⁶

The ANPRM also requested comments on the liability standards to be included in the regulations, including the "knowledge" standard, the definition of "knowingly directing" transactions, and potential obligations for U.S. persons regarding foreign entities that they control.⁵⁷ Importantly, though, the ANPRM was not intended to be draft regulatory text draft regulations will follow at a later stage in the process.⁵⁸

51. *Id.*

52. ANPRM, *supra* note 35, at 54961.

53. *See id.* at 54963.

54. *Id.* at 54964.

55. *Id.* at 54962.

56. *Id.* at 54968, 54967.

57. *Id.* at 54971.

58. President Biden Signs Executive Order On Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern Press Release, *supra* note 40 (Advanced Notice of Proposed rulemaking will be subject to public notice and comment before it goes into effect).

III. Lawful Responses to Hostage-Taking

On October 7, 2023, Hamas terrorists⁵⁹ stormed into Israel, killing 1,200 people and kidnapping 239.⁶⁰ The kidnapping victims were transported across the border into Gaza City and held as hostages.⁶¹

To say the least, the attack sparked strong reactions from all corners and, in short order, calls for Israel to “show restraint” in its response.⁶² But much of the discussion about Israel’s response—by individuals and organizations (including the American Bar Association),⁶³ alike—betrayed fundamental misunderstandings of the scope of lawful actions a country may take in response to its nationals being taken and held hostage.

As with so many areas of law, a full discussion concerning lawful use of force in hostage situations fills volumes, and this present attempt to summarize the factors relevant to Israel’s response to October 7 undoubtedly leaves out a great many details and associated nuance. But it is uncontested that the use of force—even deadly force—is lawful to affect hostage rescues, whether in a law enforcement or military context.

It is also undisputed that taking and holding hostages is a criminal act, both as a matter of domestic law in most, if not all countries, and certainly in international law. U.S. federal law prohibits hostage-taking as: “[1] seize[ing] or detain[ing] and [2] threaten[ing] to kill, to injure, or to continue to detain another person [3] in order to compel a third person or a governmental organization to do or abstain from doing any act [4] as an explicit or implicit condition for the release of the person detained”⁶⁴ The penalty for hostage-taking can be life imprisonment, or death if the crime results in the death of any person, which could include the hostage, a rescuer, co-conspirator, or bystander.⁶⁵ Federal law and states alike also separately prohibit kidnapping, with similar penalties.⁶⁶

The widespread prohibition on hostage-taking in international law spans human rights law, criminal law, and international humanitarian law (i.e., the law of war). Common Article 3 of the Geneva Conventions

59. *Terrorist Groups: Hamas*, NAT’L COUNTERTERRORISM GUIDE, <https://www.dni.gov/nctc/groups/hamas.html> [<https://perma.cc/B6SY-SAUP>] (last visited Apr. 9, 2024).

60. *Israel Revises October 7 Death Toll After Agonizing Forensics*, FOUND. FOR DEF. OF DEMOCRACIES (Nov. 12, 2023), <https://www.fdd.org/analysis/2023/11/12/israel-revises-october-7-death-toll-after-agonizing-forensics/> [<https://perma.cc/SJJ6-RKD9>].

61. *See id.*

62. *See* Peter Nicholas, Courtney Kube, & Carol E. Lee, *U.S. Officials Privately Warn Israel to Show Restraint in Retaliating Against Hamas*, NBC NEWS (Oct. 13, 2023), <https://www.nbcnews.com/politics/white-house/us-officials-privately-warn-israel-restraint-hamas-retaliation-biden-rcna120286> [<https://perma.cc/49VA-Q74M>].

63. Debra Cassens Weiss, *ABA Withdraws 2 Online Statements on Israel-Hamas War*, ABA JOURNAL (Nov. 30, 2023, 1:10 PM CST), <https://www.abajournal.com/web/article/aba-withdraws-2-online-statements-on-israel-hamas-war#:~:text=They%20said%20the%20Oct.%2018,to%20be%20%E2%80%9Cdeeply%20flawed.%E2%80%9D> [<https://perma.cc/P9EC-D8F6>].

64. 18 U.S.C. § 1203(a).

65. *Id.*

66. *See* 18 U.S.C. § 1201; *see also* MODEL PENAL CODE § 212.1 (AM. L. INST. 1962).

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expressly prohibits taking hostages;⁶⁷ the prohibition is repeated in Article 34 of the Fourth Geneva Convention,⁶⁸ and its violation is an enumerated “grave breach” in Article 147 of that Convention,⁶⁹ which makes it a war crime triable in any number of fora, including the United States.⁷⁰ It is also called a “grave” offense in the International Convention Against the Taking of Hostages, which calls for State cooperation regarding prosecution or extradition of hostage-takers.⁷¹ Closely-related prohibitions in various areas of international law include those related to kidnapping or enforced disappearance,⁷² and the use of human shields.⁷³

67. See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 3(1)(b) (Aug. 12, 1949); 6 U.S.T. 3516; 75 U.N.T.S. 287, Common Article 3(1)(b).

68. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 34 (Oct. 21, 1950); 75 U.N.T.S. 287 (“The taking of hostages is prohibited.”); see also U.S. DEP’T OF DEFENSE, LAW OF WAR MANUAL § 2.5.3.3 (2023).

69. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 147 (Oct. 21, 1950).

70. See, e.g., 18 U.S.C. § 2241; 10 U.S.C. § 950t(7); U.S. DEP’T OF DEFENSE, LAW OF WAR MANUAL § 2.5.3.3 (2023); Rome Statute of the ICC (July 17, 1998); 2187 U.N.T.S. 38544 arts. 8(2)(a)(viii), 8(2)(c)(iii); see also Adam R. Pearlman, *Introductory Note to the Justice for Victims of War Crimes Act (U.S.)*, INT’L LEGAL MATERIALS (Jan. 5, 2023), <https://ssrn.com/abstract=4516063> [<https://perma.cc/M34P-EGEF>].

71. See International Convention Against the Taking of Hostages, Dec. 17, 1979, 1316 U.N.T.S. 21931, art. 2 [hereinafter Hostages Convention], https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-5&chapter=18&clang=_en [<https://perma.cc/C55E-5TV6>] (last visited Mar. 30, 2024).

72. See Rome Statute of the ICC, July 17, 1998, 2187 U.N.T.S. 38544 art. 7(1)(i) (Enforced disappearance is an enumerated crime against humanity in the Rome Statute).

73. See Rule 97.: *Human Shields*, ICRC, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule97> [<https://perma.cc/DSW3-WJVM>] (last visited Mar. 28, 2024) (Although “the use of human shields has often been equated with the taking of hostages,” the term most often connotes the “intentional co-location of military objectives and civilians or persons hors de combat with the specific intent of trying to prevent the targeting of those military objectives.” As it does with hostage-taking, the ICRC considers the prohibition on such activity to be customary international humanitarian law.); see also Rome Statute of the ICC, July 17, 1998, 2187 U.N.T.S. 38544 art. 8(2)(b)(xxiii) (Under the Rome Statute, “Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations” is a prosecutable war crime.); see also Geneva Convention Relative to the Treatment of Prisoners of War art. 23, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (“No prisoner of war may at any time be sent to, or detained in areas where he may be exposed to the fire of the combat zone, nor may his presence be used to render certain points or areas immune from military operations.”); see also Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 28, Oct. 21, 1950, 75 U.N.T.S. 287 (“The presence of a protected person may not be used to render certain points or areas immune from military operations.”). In echoing this prohibition, the DoD Law of War Manual also reasons, misusing protected persons and objects to shield military objectives also offends honor because it constitutes a breach of trust with the enemy and thus undermines respect for the law of war.” U.S. DEP’T OF DEFENSE, LAW OF WAR MANUAL § 2.5.3.3 (2023) (Refrain From the Misuse of Protected Persons and Objects to Shield Military Objectives). Between 2018 and 2023, U.S. law also allowed for the sanctioning of certain individuals who used human shields. See 50 U.S.C. § 1701. Though that provision sunset on December 31, 2023, there are currently multiple bills in Congress that would revive and expand it. See, e.g., H.R. 5917 (118th Cong.); S. 3166 (Title IV) (118th Cong.).

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Despite the U.N. Charter's general prohibition on the use of force,⁷⁴ States have long employed force for reasons such as self-defense (enshrined in Article 51 of the Charter itself),⁷⁵ and protection of their citizens abroad.⁷⁶ Such resorts to force have generally been accepted as legitimate by the international community if the factual predicate for the justification is clear and reasonable.⁷⁷

Decisions to use force lawfully—including in hostage situations—normally⁷⁸ require determinations regarding the imminence of the threat (e.g., the threat to the hostage), discrimination of the would-be target of the force to be used (generally easier in traditional wars where lawful combatants of opposing forces wear uniforms), and proportionality of force necessary to eliminate the threat posed by the initial aggressor (here, the hostage-taker, or, more accurately the hostage-taking force).

Importantly, the notion of proportionality is regularly invoked in colloquial or political rhetoric in ways that have no relation to the term of art embodying the law of war principle. Whether a nation's military response to an attack is proportional under the law is an intent-based test rather than effects-based test.⁷⁹ Specifically, in war, the law looks to the anticipated military advantage to be gained. In this situation, that may include effecting hostage rescues or recovery, and/or neutralizing the longstanding, lethal, and arguably existential threat that the Hamas terrorist organization poses to the sovereign state of Israel and its citizens. Employing whatever level of force that is reasonably necessary to eliminate the threat is proportionate as a matter of law, even if the effects of the force cause blowback in terms of popular opinion and political will. That is, admittedly, a rather cold way

74. U.N. Charter art. 2 ¶ 4.

75. U.N. Charter art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”).

76. See U.S. DEP'T OF DEFENSE, LAW OF WAR MANUAL § 1.11.5.3 (2023), <https://dod.defense.gov/Portals/1/Documents/pubs/Law-of-War-Manual-june-2015.pdf> [<https://perma.cc/RZ3Q-7AA7>] (Use of Force to Protect Nationals Abroad. A State's right to use force in self-defense may be understood to include the right to use force to protect its nationals abroad. “The United States has taken action to protect U.S. nationals abroad when the government of the territory in which they are located was unwilling or unable to protect them. A State need not await actual violence against its nationals before taking such action if an attack against them is imminent.”).

77. See THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 1 (Cambridge Univ. Press, 2002).

78. The doctrine of reprisal is a key exception. See INT'L COMM. OF THE RED CROSS, *Rule 145: Reprisals*, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule145> [<https://perma.cc/KQ7Y-WTQF>] (last visited Apr. 11, 2024).

79. See Geoff Corn, “*The Disproportionate Confusion About Proportionality*,” LAWFIRE (Oct. 26, 2023), <https://sites.duke.edu/lawfire/2023/10/26/geoff-corn-on-the-disproportionate-confusion-about-proportionality/> [<https://perma.cc/C2QW-EEQD>].

of saying that just because the application of force is legal it does not mean that it is either a good idea politically or morally right. At the same time, a response that causes significant death and destruction is not necessarily illegal.⁸⁰

IV. Nuclear Arms Control 2023

In 2023, states possessing nuclear weapons continued to modernize, and in some cases expand, their arsenals.⁸¹ Russia continued its broad modernization program, with the intent of replacing all Soviet-era weapons by the late 2020s.⁸² Russia also proceeded to implement its nuclear sharing agreement with Belarus.⁸³ The U.S. continued its planned deployment of the B-21 Raider stealth bomber, new missile-launching submarines, and a new generation of silo-based intercontinental ballistic missiles (ICBMs).⁸⁴ China continued the modernization and expansion of its arsenal, including deployment of longer range ICBMs, and is now estimated to have about 400 warheads, with more in production.⁸⁵ In November, France announced the successful test firing of a longer range ICBM that it anticipates will “contribute to the lasting credibility of France’s oceanic deterrence in coming decades.”⁸⁶ India continued to pursue “a slow but steady quantitative and qualitative modernization of the Indian arsenal.”⁸⁷ North Korea continued to test fire a variety of nuclear-capable missiles.⁸⁸ No states possessing

80. *See id.*

81. *See, e.g.,* Hans M. Kristensen & Matt Korda, *Nuclear Notebook: United States Nuclear Weapons, 2023*, BULLETIN OF THE ATOMIC SCIENTISTS (Jan. 16, 2023), <https://thebulletin.org/premium/2023-01/nuclear-notebook-united-states-nuclear-weapons-2023/> [<https://perma.cc/CF5Q-8BTX>]; Hans Kristensen et al., *Nuclear Notebook: Chinese Nuclear Weapons 2023*, BULLETIN OF THE ATOMIC SCIENTISTS (Mar. 13, 2023), <https://thebulletin.org/premium/2023-03/nuclear-notebook-chinese-nuclear-weapons-2023/> [<https://perma.cc/D3PW-W5ZW>]; *France Test-Fires Long-Range Ballistic Missile to Boost Nuclear Deterrence*, FRANCE 24 (Nov. 19, 2023), <https://www.france24.com/en/france/20231119-france-test-fires-long-range-ballistic-missile-in-effort-to-boost-nuclear-deterrence-credibility> [<https://perma.cc/4GJR-HHXV>].

82. Hans M. Kristensen et al., *Nuclear Notebook: Russian Nuclear Weapons, 2023*, 79 BULLETIN OF THE ATOMIC SCIENTISTS 174, 174 (May 8, 2023).

83. *Id.* at 179.

84. Kristensen & Korda, *supra* note 81.

85. Hans Kristensen et al., *Nuclear Notebook: Chinese Nuclear Weapons 2023*, BULLETIN OF THE ATOMIC SCIENTISTS (Mar. 13, 2023), <https://thebulletin.org/premium/2023-03/nuclear-notebook-chinese-nuclear-weapons-2023/> [<https://perma.cc/D3PW-W5ZW>].

86. *France Test-Fires Long-Range Ballistic Missile to Boost Nuclear Deterrence*, FRANCE 24 (Nov. 19, 2023), <https://www.france24.com/en/france/20231119-france-test-fires-long-range-ballistic-missile-in-effort-to-boost-nuclear-deterrence-credibility> [<https://perma.cc/4GJR-HHXV>].

87. Christopher Clary, *Twenty-Five Years of Overt Nuclear India*, ARMS CONTROL ASS’N (Oct. 2023), <https://www.armscontrol.org/act/2023-10/features/twenty-five-years-overt-nuclear-india> [<https://perma.cc/7XLK-U82F>].

88. *Fact Sheet: North Korea Missile Test Activity*, CTR. FOR ARMS CONTROL AND NON-PROLIFERATION (Feb. 5, 2024), <https://armscontrolcenter.org/wp-content/uploads/2023/11/North-Korean-Missile-Test-Activity-Fact-Sheet-Feb-5-Edit.pdf> [<https://perma.cc/6YB6-K8K3>].

nuclear arms have ratified the Treaty on the Prohibition of Nuclear Weapons (TPNW).⁸⁹

In October, a report by a special Congressional Commission on strategic nuclear posture concluded that the U.S.'s nuclear arsenal is inadequate to deter both Russia and China, and recommended enhancements including additional numbers of bombers, missile submarines, warheads, and the possible addition of multiple warheads on land-based missiles.⁹⁰ These recommendations were rejected by the Biden administration, which asserted that the arsenal is adequate to deter both adversaries, that the proposed enlargements could trigger a dangerous arms race, and that "the United States does not need to increase our nuclear forces to outnumber the combined total of our competitors in order to effectively deter them."⁹¹

Russia continued its "suspension" of the New START treaty limiting the deployment of strategic nuclear weapons but asserted it would continue to observe the treaty's numerical limits.⁹² No negotiations are currently scheduled to extend or replace the treaty, which is scheduled to expire in early 2026.⁹³

Russia revoked its ratification of the Comprehensive Nuclear Test Ban Treaty (CTBT), but said it had no plans to test, and continued its participation in the CTBT Organization's test detection network.⁹⁴ The CTBT has never entered into force, but all states except North Korea have observed a test moratorium since 1996.⁹⁵ Russia and the U.S. have accused each other of exceeding treaty limits at extremely low yields, although some experts have questioned whether any state could obtain a competitive

89. See *TPNW Signature and Ratification Status*, INT'L CAMPAIGN TO ABOLISH NUCLEAR WEAPONS, https://www.icanw.org/signature_and_ratification_status [<https://perma.cc/W3Z4-2C3B>] (last visited Mar. 30, 2024) (note the omission of all state parties who possess nuclear-capable missiles: Russia, United States, United Kingdom, France, China, India, Pakistan, and North Korea).

90. U.S. SENATE COMM. ON ARMED SERVICES, AMERICA'S STRATEGIC POSTURE: THE FINAL REPORT OF THE CONGRESSIONAL COMMISSION ON THE STRATEGIC POSTURE OF THE UNITED STATES 104 (Oct. 2023), <https://www.armed-services.senate.gov/download/americas-strategic-posture-the-final-report-of-the-congressional-commission-on-the-strategic-posture-of-the-united-states> [<https://perma.cc/X4Y3-A7X5>].

91. *Remarks by National Security Advisor Jake Sullivan for the Arms Control Association (ACA) Annual Forum*, ARMS CONTROL ASS'N. (June 2, 2023), <https://www.armscontrol.org/2023AnnualMeeting/sullivan-remarks> [<https://perma.cc/CE3M-RRZ3>].

92. Jake Cordell, *Putin Submits Law on Suspending Nuclear Arms Treaty*, REUTERS (Feb. 21, 2023), <https://www.reuters.com/world/europe/russia-we-will-still-observe-nuclear-warhead-limits-under-new-start-2023-02-21/> [<https://perma.cc/LL67-FW5X>].

93. See Kingston Reif & Shannon Bugos, U.S., *Russia Extend New START for Five Years*, ARMS CONTROL ASS'N (Mar. 2021), <https://www.armscontrol.org/act/2021-03/news/us-russia-extend-new-start-five-years> [<https://perma.cc/FD4K-VYC5>].

94. *Russia Says It's Completing Its Section of International Nuclear Test Monitoring Network*, REUTERS (Nov. 17, 2023), <https://www.reuters.com/world/europe/russia-says-its-completing-its-section-international-nuclear-test-monitoring-2023-11-17/> [<https://perma.cc/5RP4-K5TJ>].

95. Daryl G. Kimball, *Defending the De Facto Nuclear Test Ban*, ARMS CONTROL ASS'N (Sept. 2023), <https://www.armscontrol.org/act/2023-09/focus/defending-de-facto-nuclear-test-ban> [<https://perma.cc/NHU7-FW97>].

advantage by testing at the extremely low yields in question.⁹⁶ The U.S. has proposed some verification procedures which could be monitored by international observers, but no formal proposal had been made when this article went to press.⁹⁷

No progress was reported on a new agreement to limit Iran's civil nuclear program.⁹⁸ In November, the International Atomic Energy Agency (IAEA) reported that Iran was still enriching uranium to sixty percent, from which it could be more quickly enriched to weapons grade and was blocking access to IAEA inspectors.⁹⁹

The 2023 NPT Review Conference ended without agreement on a Final Document.¹⁰⁰

V. Ransomware and Cryptocurrency Developments in 2023

A. WHITE HOUSE NATIONAL CYBERSECURITY STRATEGY¹⁰¹

The March 2023 White House National Cybersecurity Strategy covered four goals:

- (1) International cooperation to disrupt the ransomware ecosystem and isolate countries that provide safe havens, such as Russia, Iran, and North Korea, for ransomware criminals;
- (2) Law enforcement investigations of ransomware crimes to disrupt ransomware infrastructure and actors;
- (3) Bolstering of critical infrastructure resilience to withstand ransomware attacks; and
- (4) Targeting money laundering through virtual currency abuse.¹⁰²

96. Julien de Troullioud et al., *Reducing Tensions Over Nuclear Testing at Very Low Yield*, ARMS CONTROL ASS'N (Nov. 2023), <https://www.armscontrol.org/act/2023-11/features/reducing-tensions-over-nuclear-testing-very-low-yield> [<https://perma.cc/XGK5-LXRJ>].

97. *Remarks by NNSA Administrator Jill Hruby at the CTBT: Science and Technology Conference 2023*, NAT'L NUCLEAR SEC. ADMIN. (June 19, 2023), <https://www.energy.gov/nnsa/articles/remarks-nnsa-administrator-jill-hruby-ctbt-science-and-technology-conference-2023> [<https://perma.cc/5YXX-67E7>].

98. *IAEA Regrets 'No Progress' as Iran Falls Short of Nuclear Commitments*, FRANCE 24 (Nov. 19, 2023, 1:38 PM), <https://www.france24.com/en/middle-east/20230904-un-nuclear-agency-regrets-lack-of-progress-as-iran-fails-to-fulfil-commitments> [<https://perma.cc/P7XZ-M7SF>].

99. Francois Murphy, *Iran's Nuclear Enrichment Advances as it Stonewalls U.N., IAEA Report Show*, REUTERS (Nov. 15, 2023, 1:31 PM), [https://www.reuters.com/world/middle-east/irans-nuclear-enrichment-advances-it-stonewalls-un-iaea-reports-show-2023-11-15/#:~:text=VIENNA%2C%20Nov%2015%20\(Reuters\),IAEA%20reports%20showed%20on%20Wednesday](https://www.reuters.com/world/middle-east/irans-nuclear-enrichment-advances-it-stonewalls-un-iaea-reports-show-2023-11-15/#:~:text=VIENNA%2C%20Nov%2015%20(Reuters),IAEA%20reports%20showed%20on%20Wednesday) [<https://perma.cc/SM86-WVGJ>].

100. *NPT Review Conference Ends Without Agreement: What Next?*, UNFOLD ZERO (Aug. 6, 2023), <https://www.unfoldzero.org/npt-review-conference-ends-without-agreement-what-next/> [<https://perma.cc/4GYJ-WPSJ>].

101. See generally THE WHITE HOUSE, NAT'L CYBERSECURITY STRATEGY 1 (Mar. 2023), <https://www.whitehouse.gov/wp-content/uploads/2023/03/National-Cybersecurity-Strategy-2023.pdf> [<https://perma.cc/W4EQ-H8FT>].

102. *Id.* at 17.

The U.S. government sought to target ransomware operators' frequently-employed illicit cryptocurrency exchanges and improve international implementation of standards to combat illegal virtual asset finance.¹⁰³ In cooperation with private sector partners, the U.S. government is implementing anti-money laundering and counter-terrorism ("AML" and "CFT") financing regulations to trace and intercept ransomware payments made through U.S. financial institutions offering cryptocurrency services.¹⁰⁴ The U.S. is seeking to establish global standards for the prevention of ransomware payments, consistent with Executive Order ("EO") 14067, "Ensuring Responsible Development of Digital Assets," an initiative based on the principle that government intervention, combined with non-payment of ransoms, and reporting by ransomware victims will effectively deter ransomware criminal groups.¹⁰⁵

B. DEPARTMENT OF THE TREASURY ILLICIT FINANCE RISK ASSESSMENT

In April 2023, Treasury issued a risk assessment report on illicit finance practices.¹⁰⁶ Ransomware actors increasingly target high-value enterprises, demanding larger payouts, with a median ransomware-related payment amount of \$135,000.¹⁰⁷ The rise of decentralized finance (DeFi) services and decentralized mixers exacerbated the challenge of tracking and disrupting ransomware operations.¹⁰⁸ DeFi tools enable ransomware actors to launder illicit proceeds from ransom payments by exchanging virtual assets and obfuscating the movement of funds.¹⁰⁹ One blockchain analytics firm identified a cross-chain bridge that was used to launder over \$50 million ransomware proceeds from over thirteen ransomware strains in the first half of 2022.¹¹⁰

Cybercriminals often employ remote desktop protocol (RDP) endpoints and phishing campaigns to gain access to victim networks, often forming partnerships and sharing resources, such as exploit kits, to enhance attacking capabilities.¹¹¹ Additionally, the "ransomware-as-a-service" (RaaS) model lowered the barrier to entry for aspiring ransomware actors by providing pre-built malware and support services.¹¹² The rise of double extortion

103. *Id.*

104. *Id.* at 18.

105. *See id.*

106. U.S. DEP'T OF THE TREAS., ILLICIT FINANCE RISK ASSESSMENT OF DECENTRALIZED FINANCE (Apr. 2023), <https://home.treasury.gov/system/files/136/DeFi-Risk-Full-Review.pdf> [<https://perma.cc/P23Q-R2SG>].

107. *Id.*

108. *See id.*

109. *Id.*

110. *Cross-Chain Crime: Over Half a Billion Dollars Laundered Through a Cross-Chain Bridge*, ELLIPTIC (Oct. 4, 2022), <https://www.elliptic.co/blog/analysis/cross-chain-crime-more-than-half-a-billion-dollars-has-been-laundered-through-a-cross-chain-bridge> [<https://perma.cc/5UQP-D7HA>].

111. U.S. DEP'T OF THE TREAS., *supra* note 106.

112. *Id.*

tactics, whereby criminals steal, decrypt and threaten to publish confidential data, further compounded this threat.¹¹³

**C. IRS GROSS PROCEEDS AND BASIS REPORTING BY BROKERS AND
DETERMINATION OF AMOUNT REALIZED AND BASIS FOR DIGITAL
ASSET TRANSACTIONS (REG-122793-19)**

In August 2023, The International Revenue Service (IRS) proposed regulations regarding certain digital asset sales and exchanges.¹¹⁴ The proposed regulations expand and clarify the definition of “broker” for reporting purposes, encompassing any individual or entity facilitating the sale of digital assets.¹¹⁵ This includes trading platforms, operators of noncustodial trading platforms, payment processors, kiosk owners, wallet hosting providers, and real estate reporting persons.¹¹⁶ The expansive definition of a “person” includes decentralized autonomous organizations, potentially subjecting governance token holders to reporting requirements.¹¹⁷ Merchants accepting digital assets as payment, cryptocurrency miners, wallet hardware sellers, and wallet software licensors are generally not considered brokers.¹¹⁸ The rules for determining whether a sale occurs inside or outside the U.S. depend on broker classification, with complex rules for non-U.S. brokers and the location of digital assets.¹¹⁹

Further, the proposal expands the definition of a “sale” subject to reporting to include certain dispositions of digital assets for cash, services, property, securities, real estate, and other digital assets.¹²⁰ Brokers are required to report gross proceeds for each reportable sale, accounting for the U.S. dollars or other currencies credited to the customer’s account, the fair market value of any property received, the issue price of debt instruments received by the customer, and the allocable digital asset transaction cost.¹²¹ Brokers are also required to report the adjusted basis of covered securities—digital assets acquired on or after January 1, 2023.¹²² The proposed regulations modify the general rules for determining the adjusted basis and initial basis for securities to accommodate digital assets.¹²³ The initial basis for digital

113. *Id.*

114. Gross Proceeds and Basis Reporting by Brokers and Determination of Amount Realized and Basis for Digital Asset Transactions, 88 Fed. Reg. 59576 (proposed Aug. 29, 2023) (to be codified at 26 C.F.R. pt. 1, 31, 301).

115. *Id.* at 59579.

116. *Id.* at 59587.

117. *Id.*

118. *Id.* at 59588.

119. *See id.* at 59579.

120. *IRS Releases Proposed Digital Asset Regulations*, MORGAN LEWIS (Sept. 15, 2023), <https://www.morganlewis.com/pubs/2023/09/irs-releases-proposed-digital-asset-regulations> [<https://perma.cc/G4YM-8QXK>].

121. *See* Gross Proceeds and Basis Reporting by Brokers and Determination of Amount Realized and Basis for Digital Asset Transactions, *supra* note 114, at 59592, 59609.

122. *Id.* at 59580.

123. *Id.* at 59596.

assets will generally be determined based on the cost of the digital asset, increased by any allocable digital asset transaction costs.¹²⁴ The amount realized from a disposition involving digital assets generally will be the value of any cash, property, or services received, reduced by any allocable digital asset transaction costs.¹²⁵ The proposed regulations are effective for taxable years ending on or after August 29, 2023, and the proposed rules on broker reporting for gross proceeds from the sale of digital assets are applicable if the sale is completed on or after January 1, 2025.¹²⁶

D. CRYPTO-ASSET NATIONAL SECURITY ENHANCEMENT AND ENFORCEMENT ACT (S. 2355)

A bipartisan group of U.S. Senators proposed new legislation, the Crypto-Asset National Security Enhancement and Enforcement Act of 2023 (CANSEE),¹²⁷ to combat money laundering, crypto-facilitated crime, and sanctions violations, seeking to mandate that DeFi services adhere to the same AML and economic sanctions compliance standards as other financial institutions, such as centralized crypto trading platforms, casinos, and pawn shops. This rule would result in DeFi services implementing AML programs, conducting due diligence on their customers, and report suspicious transactions to FinCEN (Financial Crimes Enforcement Network).¹²⁸

The CANSEE Act would also require crypto kiosk operators (also known as “crypto ATMs”) to improve the traceability of funds by verifying the identities of each counterparty to each transaction using a kiosk.¹²⁹ Currently, Treasury Department authorities are limited to transactions conducted in the traditional banking system, but as new technologies like cryptocurrency increasingly enable new ways to conduct financial transactions, CANSEE proposes expanding the Treasury’s authority to crack down on illicit financial activity that may occur outside the banking sector.¹³⁰

E. NOTABLE CASES

1. *Poloniex, LLC*¹³¹

The U.S. Department of the Treasury’s Office of Foreign Assets Control (OFAC) announced in May of 2023 that Poloniex, LLC (“Poloniex”) had

124. *Id.* at 59597.

125. *Id.* at 59624.

126. *Id.* at 59616.

127. Crypto-Asset National Security Enhancement and Enforcement Act of 2023, S. 2355, 118th Cong. § 1, 2 (2023).

128. *See id.* § 4(c)(1).

129. *Id.* § 4(b)(1).

130. *See id.* § 2.

131. U.S. Dep’t of the Treas., Off. of Foreign Assets Control, OFAC Settles with Poloniex, LLC for \$7,591,630 Related to Apparent Violations of Multiple Sanctions Programs (May 1, 2023), <https://ofac.treasury.gov/recent-actions/20230501> [<https://perma.cc/N5R8-KJ5P>].

agreed to pay a \$7.59 million settlement to resolve potential civil liability for apparent violations of U.S. sanctions against Crimea, Cuba, Iran, Sudan, and Syria.¹³²

Between January 2014 and November 2019, Poloniex allowed customers apparently located in sanctioned jurisdictions to make online transactions involving digital assets, such as trades, deposits, and withdrawals.¹³³ These transactions totaled \$15,335,349.¹³⁴ Poloniex knew that these customers were located in sanctioned jurisdictions based on both Know Your Customer (KYC) information and internet protocol (IP) address data.¹³⁵ The OFAC determined that Poloniex's apparent violations were not voluntarily self-disclosed and were not egregious.¹³⁶ As a result, Poloniex agreed to remit \$7,591,630 to settle its potential civil liability.¹³⁷

2. *Ekaterina Zhdanova*¹³⁸

In November 2023, OFAC sanctioned Ekaterina Zhdanova, a Russian national, for her role in laundering and moving funds using virtual currency on behalf of Russian elites and ransomware actors.¹³⁹ Zhdanova assisted in obfuscating the source of wealth for Russian clients, facilitated large cross-border transactions using virtual currency, provided services to individuals connected with the Russian Ryuk ransomware group, and laundered over \$2.3 million of suspected victim payments on behalf of a Ryuk ransomware affiliate.¹⁴⁰ Zhdanova's actions allowed Russian elites and ransomware actors to evade U.S. and international sanctions and obfuscate their identities.¹⁴¹

3. *Samuel Bankman-Fried*

Sam Bankman-Fried ("SBF"), founder of the cryptocurrency exchange FTX, was arrested December 13, 2022, and charged with seven counts of fraud, conspiracy, and money laundering related to the collapse of FTX.¹⁴² FTX, once one of the largest cryptocurrency exchanges globally, filed for

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. U.S. Dep't of the Treas., Off. of Foreign Assets Control, *supra* note 131.

138. U.S. Dep't of the Treas., Off. of Foreign Assets Control, Treasury Designates Virtual Currency Money Launderer for Russian Elites and Cybercriminals (Nov. 3, 2023), <https://home.treasury.gov/news/press-releases/jy1874> [<https://perma.cc/J5P7-EUCC>].

139. *Id.*

140. *Id.*

141. *Id.*

142. Press Release, U.S. Sec. and Exch. Comm'n, SEC Charges Samuel Bankman-Fried with Defrauding Investors in Crypto Asset Trading Platform FTX (Dec. 13, 2022), <https://www.sec.gov/news/press-release/2022-219> [<https://perma.cc/8H4P-WM76>].

bankruptcy in November 2023 after losing billions of dollars in customer funds.¹⁴³

On November 2, 2023, a Manhattan jury convicted SBF on all counts.¹⁴⁴ His conviction was a significant blow to the cryptocurrency industry, which has frequently faced scams and fraud in recent years.¹⁴⁵ The jury found SBF guilty of stealing customer funds from FTX, which he used to finance personal investments, political contributions, charitable donations,¹⁴⁶ and for misleading investors about the financial health of the exchange, which contributed to its collapse.¹⁴⁷

Despite SBF's conviction, there is still a market for virtual assets.¹⁴⁸ The price of bitcoin has more than doubled in 2023, and large financial institutions increasingly seek to invest in cryptocurrencies.¹⁴⁹ FTX may also be set for a comeback, as its current CEO is working on a plan to repay customers who lost money in the exchange's collapse.¹⁵⁰ Some argue that SBF's downfall may ultimately be beneficial for the industry, as it could lead to a more mature and responsible cryptocurrency market.¹⁵¹

143. David Yaffe-Bellany, *Embattled Crypto Exchange FTX Files for Bankruptcy*, N.Y. TIMES (Nov. 11, 2022), <https://www.nytimes.com/2022/11/11/business/ftx-bankruptcy.html> [https://perma.cc/7BYN-8QBN].

144. Anita Ramaswamy, *SBF's Guilty Verdict Will Help Crypto Break Free*, REUTERS BREAKING-VIEWS, REUTERS (Nov. 3, 2023), <https://www.reuters.com/breakingviews/sbfs-guilty-verdict-will-help-crypto-break-free-2023-11-03/> [https://perma.cc/5WPJ-NTHZ].

145. *Id.*

146. *Id.*

147. *Id.*

148. *See id.*

149. *See* Jon Quast, *Bitcoin Has More Than Doubled in Value in 2023. Here's Why It Could Do It Again in 2024*, NASDAQ (Dec. 13, 2023), <https://www.nasdaq.com/articles/bitcoin-has-more-than-doubled-in-value-in-2023.-heres-why-it-could-do-it-again-in-2024> [https://perma.cc/8L25-4H66].

150. Ramaswamy, *supra* note 144.

151. *See* Wayne Jones, *Potential Implications of SBF Verdict on Crypto Leaders*, CRYPTOPOTATO (Nov. 12, 2023), <https://cryptopotato.com/potential-implication-of-sbf-verdict-on-crypto-leaders/> [https://perma.cc/9GW3-M4D7].

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