



THE YEAR IN REVIEW

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

2019 • VOLUME 53

INTERNATIONAL LEGAL DEVELOPMENTS YEAR IN REVIEW: 2018

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International Legal Developments Year in Review: 2018

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

This publication, *International Legal Developments – Year in Review: 2018*, presents a survey of important legal and political developments in international law that occurred during 2018. The volume consists of articles from approximately forty committees of the American Bar Association Section of International Law, whose members live around the world and whose committees report on a diverse range of issues and topics that have arisen in international law over the past year. Not every development in international law is included in this volume and the omission of a particular development should not be construed as insignificant. The Section of International Law committees draft their articles under extremely strict guidelines that limit the number of words that each committee has to roughly 7,000 words, including footnotes. Within these guidelines, committee members contribute submissions that describe the most significant developments in their substantive practice area or geographic region. In some cases, non-section members who have particular knowledge or expertise in an area may also be contributing authors.

Committee chairs and committee editors solicited the contributing authors for each committee article. The committee editors, who are identified in each article, had the daunting task of keeping their authors' collective contributions within the tightly controlled word limits. They made difficult decisions on what to include and what to cut. After the committee editors did their work, Professors Jason Palmer and Kimberly Y. W. Holst, the Co-General Editors, formatted and organized the almost forty 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 the articles again before sending them to the diligent student editors at the Dedman School of Law at Southern Methodist University in Dallas, Texas. Both Elizabeth Pittman, the Editor-in-Chief of *The International Lawyer* this year, and Iris Harris, the *Year in Review* Managing Editor, 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

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

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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 all of the support received from Clifford Sosnow, the Publications Officer for the ABA Section of International Law, all of 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 2018. Readers interested in a particular substantive or geographic area are encouraged to read not only this year's summary, but also those from earlier years.

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

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Customs Law

REBECCA RODRIGUEZ*

I. Introduction

This Article summarizes important developments in 2018 in customs law, including U.S. judicial, legislative, administrative, and executive, and trade developments.¹

II. U.S. Judicial Changes and Appointments

There were no changes to the U.S. Court of Appeals for the Federal Circuit or U.S. Court of International Trade in 2018.

III. Review of Customs-Related Determinations

A. OVERVIEW OF DECISIONS BY THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT (CAFC)

1. *Converse, Inc. v. International Trade Commission*²

Shoe manufacturer Converse, Inc. (Converse) appealed a 2016 final determination of the International Trade Commission (ITC),³ which held invalid Converse's trademark in the midsole design of its Chuck Taylor All Star shoes, U.S. Trademark Registration No. 4,398,753 ('753 Trademark').⁴

In 2016, the ITC found the '753 Trademark invalid and that Converse could not establish the existence of common-law trademark rights.⁵ The ITC determined there was no violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337 (2012), by the importation of the accused infringing products.⁶ The ITC nonetheless addressed infringement,

* The committee editor and author of this article is Rebecca A. Rodriguez, Esq., senior associate attorney with GrayRobinson, P.A. in Miami, Florida.

1. For developments during 2017, see Luis F. Arandia, et al., *Customs Law*, 52 INT'L LAW. 5 (2018).

2. *Converse, Inc. v. U.S. Int'l Trade Comm'n*, 909 F.3d 1110 (Fed. Cir. 2018).

3. In the Matter of Certain Footwear Products, USITC Inv. No. 337-TA-936 (U.S. Int'l Trade Comm'n July 6, 2016).

4. *Converse, Inc.*, 909 F.3d at 1113; The mark consists of the design of the two stripes on the midsole of the shoe, the design of the toe cap, the design of the multi-layered toe bumper featuring diamonds and line patterns, and the relative position of these elements to each other, Registration No. 4,398,753.

5. *Id.*

6. *Id.*

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finding that if the mark were valid, the various accused products would have infringed Converse's mark.⁷ An appeal followed.⁸

On appeal, the CAFC held the ITC erred in applying the wrong standard in aspects of both its invalidity and infringement determinations.⁹ Specifically, the CAFC held the following:

owner's registration of trademark was entitled to presumption of secondary meaning beginning only as of the date of registration; in evaluating the length, degree, and exclusivity of use factor used to determine whether owner's trademark had acquired secondary meaning, the ITC should have relied principally on uses of the mark in the five year period before first infringing uses and date of registration; and the trademark was nonfunctional, and thus was protectable.¹⁰

The CAFC reversed the ITC's determination and remanded for further proceedings.¹¹

2. *DBN Holdings v. International Trade Commission*¹²

DBN Holdings, Inc. (DBN) and BDN LLC (BDN) appealed a decision of the ITC which denied their petition to rescind or modify a civil penalty order involving U.S. Patent No. 7,991,380 ('380 Patent).¹³

In 2013, DBN (formerly known as "DeLorme") entered into a Consent Order with the ITC, wherein DBN agreed to stop importing certain satellite communication devices accused of infringing the '380 Patent.¹⁴ Shortly thereafter, the ITC reopened the action, assessing a \$6.2 million penalty against DBN, finding it violated the terms of the Consent Order.¹⁵

Meanwhile, the U.S. District Court for the Eastern District of Virginia (EDVA) found the underlying '380 Patent claims invalid.¹⁶ Both cases were appealed to the CAFC and were affirmed.¹⁷ The CAFC agreed that the '360

7. *Id.*

8. *Id.* at 1112.

9. *Id.* at 1113.

10. *Id.* at 1111.

11. On remand, the ITC must constrain its analysis of both Converse's use and the use by its competitors to marks substantially similar to Converse's registered mark On remand, the ITC should reassess the accused products to determine whether they are substantially similar to the mark in the infringement analysis. *Id.* at 1122, 1124.

12. *DBN Holding, Inc. v. U.S. Int'l Trade Comm'n*, No. 2017-2128, 2018 WL 6181653 (Fed. Cir. Nov. 27, 2018).

13. *Id.* at *2; U.S. Patent No. 7,991,380 (filed Mar. 30, 2006).

14. *Certain Two-Way Global Satellite Communication Devices, Systems and Components Thereof*, USITC, Inv. No. 337-TA-854 (June 10, 2014).

15. *Id.*

16. *DeLorme Publ'g Co. v. BriarTek IP, Inc.*, 60 F. Supp. 3d 652, 683-84 (E.D. Va. 2014) (holding claims in a patent for a simple text messaging device used to send and receive short messages in the event of emergency were invalid for obviousness).

17. *DeLorme Publ'g Co. v. BriarTek IP, Inc.*, 622 F. App'x 912, 913 (Fed. Cir. 2015) (mem.).

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Patent claims were invalid,¹⁸ but DBN nonetheless violated the terms of the Consent Order.¹⁹ DBN filed a petition for rehearing *en banc* with the CAFC, which was denied.²⁰ DBN then filed a petition for certiorari with the United States Supreme Court, which was also denied.²¹

During the pendency of those proceedings, DBN filed a separate petition with the ITC.²² In the separate petition, DBN claimed the EDVA's judgment of invalidity constituted "changed conditions in fact or law or in the public interest," which warranted the ITC rescinding or modifying the civil penalty order pursuant to 19 C.F.R. § 210.76.²³ The ITC denied DBN's petition on the basis of *res judicata*.²⁴ An appeal followed.²⁵

On appeal, the CAFC concluded the ITC erred by relying on *res judicata* as its basis for denial because neither the ITC nor the CAFC considered whether to rescind or modify the civil penalty in light of the invalidity of the relevant patent claims,²⁶ but opined that law of the case may be the more appropriate doctrine to warrant denial.²⁷

The CAFC reversed the ITC's *res judicata* determination, and remanded for the ITC to consider whether to rescind or modify the civil penalty in light of the EDVA's final judgment of invalidity of the relevant claims of the '380 Patent.²⁸

B. OVERVIEW OF U.S. COURT OF INTERNATIONAL TRADE CASES

The United States Court of International Trade (CIT) has exclusive jurisdiction over any civil action commenced pursuant to 28 U.C.S. §§ 1581

18. *Id.* at 913.

19. *See* DeLorme Publ'g Co. v. U.S. Int'l Trade Comm'n, 805 F.3d 1328, 1336 (Fed. Cir. 2015).

20. In the Matter of Certain Two-Way Global Satellite Communication Devices, System and Components Thereof, USITC, Inv. No. 337-TA-854 (April 4, 2017).

21. *See* DBN Holding, Inc. v. U.S. Int'l Trade Comm'n, 137 S. Ct. 538 (Nov. 28, 2016) (mem.).

22. *See* DBN Holding, Inc., No. 2017-2128, 2018 WL at *2.

23. *Id.* (citing 19 C.F.R. § 210.76 (2010)).

24. In the Matter of Certain Two-Way Global Satellite Communication Devices, System and Components Thereof, USITC, Inv. No. 337-TA-854 (April 4, 2017).

25. *See* DBN Holding, Inc., No. 2017-2128, 2018 WL at *2.

26. *Id.* at *1.

27. *Id.* at *3 ("The [ITC] might have more appropriately referred to the basis of its denial of the petition as barred by the 'law of the case' doctrine, rather than generally invoking '*res judicata*.'").

28. *Id.* at *4.

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and 1582.²⁹ In the context of customs litigation, the two subparagraphs of § 1581 most frequently invoked by litigants are subparagraphs (a)³⁰ and (i).³¹

1. *Cases Involving Presidential Proclamations*

On March 8, 2018, President Trump issued Presidential Proclamation 9704 of March 8, 2018 (Proclamation 9704).³² Therein, President Trump cited to national security reasons and his authority under section 232 of the Trade Expansion Act,³³ stating “aluminum articles are being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security of the United States.”³⁴ Effective March 23, 2018, Proclamation 9704 imposed a ten percent ad valorem tariff on aluminum articles imported from all countries except Canada and Mexico.³⁵

On the same date, President Trump issued Presidential Proclamation 9705 of March 8, 2018 (Proclamation 9705).³⁶ Therein, President Trump, again citing to national security reasons, invoked section 232 of the Trade Expansion Act of 1962, stating “steel articles are being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security of the United States.”³⁷ Effective March 23, 2018, Proclamation 9705 imposed a twenty-five percent ad valorem tariff on steel articles imported from all countries except Canada and Mexico.³⁸ On

29. Any civil action

which arises out of an import transaction and which is commenced by the United States: (1) to 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 customs duties.

28 U.S.C. § 1582 (2006).

30. 28 U.S.C. 1581(a) provides that the “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.” 28 U.S.C. 1581 (2006).

31. *Id.* § 1581(i) (providing a broader and more general grant of jurisdiction, including actions arising from matters related to “(1) revenue from imports or tonnage; (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue; (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or (4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.”)

32. Proclamation No. 9704, 83 Fed. Reg. 11619 (Mar. 8, 2018).

33. “Section 232 of the Trade Expansion Act of 1962, as amended, authorizes the President to adjust the imports of an article and its derivatives that are being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security.” *Id.* ¶ 5; see 19 U.S.C. § 1862 (c)(1)(A) (2012).

34. Proclamation No. 9704, 83 Fed. Reg. 11619 (Mar. 8, 2018).

35. *Id.* at ¶ 7.

36. Proclamation No. 9705, 83 Fed. Reg. 11625 (Mar. 8, 2018).

37. *Id.* at ¶ 5.

38. *Id.* at ¶ 8.

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March 22, 2018, Proclamation 9705 was amended by Presidential Proclamation 9711, to extend additional temporary exemptions to Australia, Argentina, Brazil, the member countries of the European Union, and South Korea.³⁹ These temporary exemptions expired May 1, 2018.⁴⁰ Lawsuits followed.

a. *Severstal Export GMBH v. United States*⁴¹

On March 22, 2018, Severstal Export GMBH (Severstal Export) and Severstal Export Miami Corporation (Severstal Miami) (collectively, “Severstal”) filed suit against the United States of America, U.S. Customs and Border Protection (CBP) Commissioner Kevin K. McAleenan, U.S. Department of Commerce (Commerce) Secretary Wilbur L. Ross, and President Donald Trump.⁴²

In its complaint, Severstal sought to enjoin the government’s enforcement of Proclamation 9705, as subsequently amended by Proclamation No. 9711 (collectively, the “Steel Tarriff”).⁴³ Specifically, Severstal challenged the lawfulness of the Steel Tariff, as applied to Severstal’s expected steel imports, and sought a preliminary injunction to prevent the government from collecting the additional twenty-five percent tariff pending a decision on the merits of its action.⁴⁴ Severstal also sought a declaration from the CIT finding the Steel Tariff unconstitutional, and “not tied to the interest of protective national security.”⁴⁵

Finding the requisite factors for injunction were not sufficiently present, the CIT issued an opinion and order denying Severstal’s request for injunction.⁴⁶ On May 2, 2018, the parties filed a joint stipulation of dismissal with prejudice of all claims in the action.⁴⁷

39. Proclamation No. 9711, 83 Fed. Reg. 13361 (Mar. 22, 2018).

40. *Id.* at ¶ 14.

41. *Severstal Exp. GMBH v. United States*, 39 I.T.R.D. (BNA) 3084 (Ct. Int’l Trade 2018).

42. *Id.* at *1.

43. *Id.*

44. *Id.* at *2.

45. Complaint at 2, *Severstal Exp. GMBH v. United States*, 39 I.T.R.D. 3084 (Ct. Int’l Trade 2018) (No. 18-00057).

46. [T]he court finds that plaintiffs have made a showing, but not a particularly strong showing, of irreparable harm. The degree of potential harm is thus insufficient to overcome plaintiffs’ low likelihood of success on the merits. The balance of hardships and public interest are insufficiently weighted in plaintiffs’ favor to overcome the deficiencies in the first two factors, which are central to the court’s analysis. Therefore, a preliminary injunction will not issue.

Severstal Exp. GMBH, 39 I.T.R.D. at *11.

47. *Severstal Exp. GMBH v. United States*, 39 I.T.R.D. 3084 (Ct. Int’l Trade 2018) (No. 18-00057) (Order Granting Joint Stipulation of Dismissal).

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b. American Inst. for Int'l Steel, Inc., et al., v. United States⁴⁸

On June 27, 2018, American Institute for International Steel, Inc. (AIIS), Sim-Tex LP (SimTex), and Kurt Orban Partners, LLC (Orban) collectively filed suit against the United States and CBP Commissioner Kevin K. McAleenan.⁴⁹ In their joint complaint, AIIS, SimTex, and Orban sought the following:

a declaratory judgment that section 232 of the Trade Expansion Act of 1962, as amended, 19 U.S.C. § 1862 (“section 232”), is unconstitutional as an improper delegation of legislative power to the President, in violation of Article I, section 1 of the Constitution and the doctrine of separation of powers and the system of checks and balances that the Constitution protects.⁵⁰

They also sought an order from the CIT enjoining the government from enforcing the twenty-five percent tariff increase for imports of steel products and other trade barriers imposed by the Steel Tariff.⁵¹ Distilled to its essence, AIIS, SimTex, and Orban argued the following:

[b]ecause section 232 allows the President a virtually unlimited range of options if he concludes, in his unfettered discretion, that imports of an article such as steel threaten to impair the national security, as expansively defined, section 232 lacks the intelligible principle that decisions of the United States Supreme Court have required for a law not to constitute a delegation of legislative authority, which would violate Article I, section 1 of the Constitution.⁵²

AIIS, SimTex, and Orban jointly moved for summary judgment on July 19, 2018.⁵³ Thereafter, the American Iron and Steel Institute, Steel Manufacturers Association, and Basrai Farms, each appeared, *amici curiae*, and filed amicus briefs in opposition to the summary judgment motion.⁵⁴ The CIT heard oral arguments on December 19, 2018.⁵⁵ A ruling is

48. Complaint at 1, *Am. Institution for Int'l Steel v. United States*, No. 18–00152 (Ct. Int'l Trade 2018 argued Dec. 19, 2018).

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 7.

53. Plaintiffs Motion for Summary Judgment at 1, *Severstal Exp. GMBH v. United States*, 39 I.T.R.D. 3084 (Ct. Int'l Trade 2018) (No. 18-00152).

54. Brief for American Iron and Steel Institute and Steel Manufacturers Association as Amici Curiae Opposing Plaintiffs, *Am. Institution for Int'l Steel v. United States*, No. 18–00152 (Ct. Int'l Trade 2018 argued Dec. 19, 2018); Brief for Basrai Farms as Amicus Curiae Opposing Defendants, *Am. Institution for Int'l Steel v. United States*, No. 18–00152 (Ct. Int'l Trade 2018 argued Dec. 19, 2018).

55. *U.S. Court of International Trade Hears Case on Constitutionality of Section 232 Steel and Aluminum Duties*, BRC (Dec. 19, 2018), <http://www.barnesrichardson.com/?t=40&an=86875&format=xml&p=3731>.

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forthcoming in 2019.⁵⁶ The three-judge panel deciding the case consists of Judge Claire Rita Kelly, Judge Jennifer Choe-Groves, and Judge Gary S. Katzmann.⁵⁷

2. *Countervailing Duty Case*

a. *Zhongce Rubber Group Co. Ltd. v. United States*⁵⁸

Plaintiff Zhongce Rubber Group Company Limited (Zhongce) filed suit pursuant to 28 U.S.C. § 1581(c) (2012), seeking injunction and contesting the application of adverse facts available (AFA)⁵⁹ by Commerce in calculating the rate applied to Zhongce during an administrative review of a countervailing duty (CVD) order on passenger vehicle and light truck tires from the People's Republic of China.⁶⁰ Zhongce argued that Commerce's application of AFA is unsupported by substantial evidence and that the "all others" rate should apply to Zhongce.⁶¹

The United States moved to dismiss the action for failure to state a claim upon which relief can be granted under USCIT Rule 12(b)(6).⁶² Specifically, the United States argued Zhongce was not entitled to a statutory injunction because it failed to follow the procedures for obtaining an injunction, and an injunction was not appropriate because Zhongce failed to exhaust its administrative remedies prior to filing suit.⁶³ Zhongce submitted a response in opposition to the motion, arguing that a full briefing on the merits was necessary before the CIT can decide whether Zhongce properly exhausted its administrative remedies and that the CIT's consideration of exhaustion at such stage was premature.⁶⁴

56. *See id.*

57. Chris Gillis, *Trade Court to Review Constitutionality of Steel Tariffs*, AMERICAN SHIPPER (Sep. 24, 2018), <https://www.americanshipper.com/news/?autonumber=72561&source=redirected-from-old-site-link>; *see also Judges of the United States Court of International Trade*, COURT OF INTERNATIONAL TRADE (last visited Jan. 30, 2019), <https://www.cit.uscourts.gov/judges- united-states-court-international-trade> (showing that all three panel judges were appointed to the CIT by President Barack Obama).

58. *Zhongce Rubber Group Co. v. United States*, No. 18–00082, 2018 WL 6118457 (Ct. Int'l Trade Nov. 20, 2018).

59. *Id.* at *1; *Countervailing Duty Order on Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China*, 83 Fed. Reg. 11694, 11695 (U.S. Dep't Commerce Mar. 16, 2018) (final admin. review); *see also* Memorandum from James Maeder, Assoc. Deputy Assistant Sec'y for Antidumping and Countervailing Duty Operations, to Gary Taverman, Deputy Assistant Sec'y for Antidumping and Countervailing Duty Operations (March 9, 2018) (public document and on file with the Dept. of Commerce) (regarding *Countervailing Duty Order on Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China*, 83 Fed. Reg. 11694, 11695 (U.S. Dep't Commerce Mar. 16, 2018) (final admin. review)).

60. *Zhongce Rubber Group Co.*, No. 18–00082, 2018 WL at *1.

61. *Id.*

62. *Id.*

63. *Id.* at *2.

64. *Id.*

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The CIT held “Commerce’s regulations require a challenger to Commerce’s [CVD] determinations to submit a case brief to Commerce that must contain all arguments that the challenger deems relevant to the Secretary’s final results, including any arguments presented before the date of publication of the preliminary results.”⁶⁵ The CIT concluded Zhongce failed to exhaust its administrative remedies prior to filing the suit as required and granted the United States’ motion to dismiss.⁶⁶

65. *Id.* (first citing 19 C.F.R. § 351.309(c)(2) (2018); then citing *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007)).

66. “Zhongce failed to submit a case brief challenging Commerce’s preliminary results, and instead waited to challenge Commerce’s decision before this court The court concludes that Plaintiff should have exhausted its administrative remedies prior to filing its action, and this case is dismissed.” *Zhongce Rubber Group Co.*, No. 18–00082, 2018 WL at *2–3.

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Export Controls and Economic Sanctions

BEAU BARNES, JOHN BOSCARIOL, RANDY COOK, ABIGAIL COTTERILL,
GWENDOLYN JARAMILLO, BARBARA LINNEY, SARAH OLIAI,
TIMOTHY O'TOOLE, CHRISTOPHER STAGG, LAWRENCE WARD*

This article discusses the significant legal developments that occurred in the area of export controls and economic sanctions in 2018.

I. Economic Sanctions Developments

A. RUSSIA RELATED SANCTIONS

In 2018, the driving force behind US sanctions against Russia was the Countering America's Adversaries Through Sanctions Act (CAATSA).¹ Passed in the wake of Russia's 2016 election interference, CAATSA implements or encourages sanctions for a wide array of conduct deemed malign by the US government, including oligarchs' disproportionate benefit from the Russian regime, support for the Russian intelligence and defense sectors, malicious cyber activity, and human rights violations in Russian-occupied territory. During 2018, the US Department of the Treasury's Office of Foreign Assets Control (OFAC) applied key CAATSA provisions for the first time, increasing sanctions risk associated with doing business in Russia.

About half of CAATSA's Russia provisions remain unused to date, including those targeting significant corruption, foreign sanctions evasion, or pipeline projects. Pre-CAATSA sanctions authorities have continued to play a role, with OFAC continuing to enforce the pre-CAATSA embargo on Crimea.

OFAC's so-called "oligarch" designations were the most consequential Russia sanctions of the year.² On April 6, 2018, OFAC added seven Russian billionaires to the Specially Designated Nationals and Blocked Persons List

* Contributing authors include Beau Barnes, Kobre & Kim LLP; John Boscariol, McCarthy Tétrault LLP; Randy Cook, Ankura Consulting Group, LLC; Abigail Cotterill, Miller & Chevalier Chartered; Gwendolyn Jaramillo, Foley Hoag LLP; Barbara Linney, Miller & Chevalier Chartered; Sarah Oliai, Deloitte; Timothy O'Toole, Miller & Chevalier Chartered; Christopher Stagg, Stagg PC.; and Lawrence Ward, Dorsey & Whitney LLP. Mr. Stagg and Mr. Ward served as editors of this article. This article includes developments occurring between December 1, 2017 and November 30, 2018.

1. See *generally* Countering America's Adversaries Through Sanctions Act, Pub. L. No. 115-44, 131 Stat. 886 (2017).

2. See Press Release, U.S. Dep't of the Treasury, Treasury Designates Russian Oligarchs, Officials, and Entities in Response to Worldwide Malign Activity (Apr. 6, 2018), <https://home.treasury.gov/news/press-releases/sm0338>.

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(SDN List), describing them as oligarchs who profit from Russia's corrupt system of malign activity.³ Twelve multi-national companies owned or controlled by the oligarchs were also designated. CAATSA amplifies the impact here, as section 228 introduces the possibility of secondary sanctions against non-US persons for facilitating a significant transaction for or on behalf of one of the designated oligarchs or their companies.⁴

However, these designations appear to have had unintended consequences. Most notably, Oleg Deripaska owns several companies that are well-integrated with the global economy—including the world's second-largest aluminum company, United Company RUSAL—such that many US and European companies will face economic hardship if most dealings with those companies become sanctionable. Accordingly, since April 2018, OFAC has issued, and periodically re-issued, general licenses for the maintenance and wind-down of operations with certain oligarch-owned companies, including United Company RUSAL, the global energy company EN+ Group, and the automotive conglomerate GAZ Group.⁵ OFAC is reportedly negotiating with these companies regarding removal from the SDN List, which will require, at a minimum, divestment by their current oligarch owner.⁶

Another newly implemented CAATSA provision is section 231, which is administered by the Department of State's Bureau of International Security and Nonproliferation (ISN). Section 231 requires the imposition of secondary sanctions on any person, whether US or non-US, who knowingly engages in a significant transaction with the Russian defense or intelligence sectors.⁷ ISN has compiled a list of persons deemed to be part of these two sectors, which now stands at seventy-two entities and individuals.⁸ Furthermore, on September 20, ISN invoked CAATSA section 231 to sanction the Chinese military's Equipment Development Department (EDD), as well as its director, Li Shangfu, in connection with the purchase of aircraft and missile equipment from Russian arms exporter Rosoboronexport.⁹ Accordingly, the United States will now block all EDD assets in the United States and prohibit all EDD transactions with the United States financial system, among other measures. Now that section

3. See *id.* ¶ 3.

4. See Countering America's Adversaries Through Sanctions Act § 228, 131 Stat. at 911.

5. See OFAC, *General Licenses*, U.S. DEP'T OF THE TREASURY, 12A-16D, <https://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx> (last visited Feb. 24, 2019).

6. See Press Release, U.S. Dep't of the Treasury, OFAC Extends Expiration Date of General Licenses Related to EN+ and RUSAL, para. 3 (Sept. 21, 2018), <https://home.treasury.gov/news/press-releases/sm492>.

7. See Countering America's Adversaries Through Sanctions Act § 231(a), 131 Stat. at 916.

8. See Press Release, U.S. Dep't of the Treasury, Sanctions Under Section 231 of the Countering America's Adversaries Through Sanctions Act of 2017 (CAATSA), para. 2 (Sept. 20, 2018), <https://www.state.gov/r/pa/prs/ps/2018/09/286078.htm>.

9. See *id.* ¶ 3.

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231 sanctions have been deployed for the first time, it would not be surprising to see similar actions in 2019.

Two additional CAATSA provisions were utilized in 2018 to target additional malign conduct. On March 15, 2018, OFAC invoked the cybersecurity provisions set forth in CAATSA section 224 to designate nineteen individuals and five entities allegedly involved in Russia's 2016 election interference, sixteen of which had previously been indicted as part of the ongoing Special Counsel investigation.¹⁰ Similarly, in June and August 2018, OFAC designated an additional twelve Russian technology companies and executives in connection with, among other things, the massive NotPetya cyber-attack that is estimated to have inflicted \$10 billion in damage around the world.¹¹ In making these designations, OFAC also relied on the previously rarely-utilized Obama-era Executive Order 13694 targeting malicious cyber-enabled activities. On March 15, 2018, OFAC invoked CAATSA section 228—which targets human rights abuses in territories forcibly occupied by Russia—in order to sanction two individuals and an entity associated with the unrecognized governments of Crimea and Luhansk—disputed Ukrainian regions now controlled by Russia or Russian proxies.¹² Even outside CAATSA, Crimea continues to be a focus of OFAC enforcement, with several designations in January and November of Crimean government officials, Russian companies exporting electrical systems to Crimea, and Crimean business such as resorts, spas, and hotels.¹³ These designations were all made pursuant to pre-CAATSA sanctions authorities implemented in 2014.

Finally, Russia may soon face more sanctions following the March 2018 Novichok chemical attack on a former FSB officer and his daughter in the U.K.¹⁴ In August 2018, the US State Department announced it had determined that the attack violated international law, thereby triggering automatic sanctions under the Chemical and Biological Weapons Control

10. See Press Release, U.S. Dep't of the Treasury, Treasury Sanctions Russian Cyber Actors for Interference with the 2016 U.S. Elections and Malicious Cyber-Attacks, para. 1 (Mar. 15, 2018), <https://home.treasury.gov/index.php/news/press-releases/sm0312>.

11. See Press Release, U.S. Dep't of the Treasury, Treasury Sanctions Russian Federal Security Service Enablers, para. 1, 3 (June 11, 2018), <https://home.treasury.gov/news/press-releases/sm0410>; see also Press Release, U.S. Dep't of the Treasury, Treasury Targets Attempted Circumvention of Sanctions, para. 1 (Aug. 21, 2018), <https://home.treasury.gov/news/press-releases/sm462>.

12. See Treasury Sanctions Russian Cyber Actors for Interference with the 2016 U.S. Elections and Malicious Cyber-Attacks, *supra* note 10, para. 5.

13. See Press Release, U.S. Dep't of the Treasury, Treasury Sanctions Additional Individuals and Entities in Connection with the Conflict in Ukraine and Russia's Occupation of Crimea, para. 1 (Jan. 26, 2018), <https://home.treasury.gov/news/press-releases/sm0266>; see also Press Release, U.S. Dep't of the Treasury, Treasury Sanctions Officials and Targets Entities Supporting Russia's Occupation of Crimea and Forcible Control of Eastern Ukraine, para. 1 (Nov. 8, 2018), <https://home.treasury.gov/news/press-releases/sm543>.

14. See Press Release, U.S. Dep't of the Treasury, Imposition of Chemical and Biological Weapons Control and Warfare Elimination Act Sanctions on Russia, para. 1 (Aug. 8, 2018), <https://www.state.gov/r/pa/prs/ps/2018/08/285043.htm>.

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and Warfare Elimination Act of 1991 (CBW Act).¹⁵ Certain sanctions under the CBW Act have already been imposed in connection with Russia—such as the termination of arms sales and denial of US government trade credit¹⁶—while others may yet be imposed—such as a prohibition on extending credit to the Russian government, a total prohibition of the export of dual-use items, or a ban on the import of Russian-origin items. A decision about the scope of additional CBW Act sanctions should be coming in December 2018 or early in 2019.

B. IRAN RELATED DEVELOPMENTS

On May 8, 2018, the United States announced its withdrawal from the so-called “Iran Deal” (the Joint Comprehensive Plan of Action or JCPOA), setting the course for the United States to return to the pre-2016 sanctions landscape.¹⁷ The Administration established two wind-down periods to allow businesses to conclude activities pursuant to JCPOA-related relief, expiring and reimposing certain sanctions on August 6, 2108, and November 4, 2018.

On August 6, 2018, E.O. 13846 began the process of re-imposing all sanctions waived or lifted in connection to the JCPOA and expanded the scope of sanctions against Iran that had been in effect before January 16, 2016 (Implementation Day under the JCPOA).¹⁸ General licenses relating to commercial aircraft, Iranian-origin carpets, and foodstuffs that were established to facilitate wind-down activities for the August 2018 deadline have expired.¹⁹

JCPOA-related sanctions re-imposed in August 2018 included restrictions on: (1) the purchase or acquisition of US bank notes by the Government of Iran; (2) Iran’s trade in gold and other precious metals; (3) graphite, aluminum, steel, coal, and software used in industrial processes; (4) transactions related to the Iranian rial; (5) activities related to Iran’s issuance of sovereign debt; and (6) Iran’s automotive sector.²⁰

15. *See id.*

16. *See* Determinations Regarding Use of Chemical Weapons by Russia Under the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991, 83 Fed. Reg. 43,723, 43,723 (Aug. 27, 2018).

17. Remarks by President Trump on the Joint Comprehensive Plan of Action, 2018 DAILY COMP. PRES. DOC. 310, para. 4, 13 (May 8, 2018).

18. *See* Exec. Order No. 13846, 83 Fed. Reg. 38,939, 38,939 (2018); *see also* OFAC, *FAQs: Iran Sanctions*, U.S. DEP’T OF THE TREASURY, at 597, 601 (Aug. 6, 2018), https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_iran.aspx#eo_reimposing.

19. *See* OFAC, *General License No. J-1, Authorizing the Reexportation of Certain Civil Aircraft to Iran on Temporary Sojourn and Related Transactions*, U.S. DEP’T OF THE TREASURY (July 29, 2016, amended Dec. 15, 2016), https://www.treasury.gov/resource-center/sanctions/Programs/Documents/iran_glj_1.pdf; *see also* 31 C.F.R. §§ 560.534–.535 (2016).

20. *See* Exec. Order No. 13846, *supra* note 17, at 38,939; *see also* Iranian Transactions and Sanctions Regulations, 83 Fed. Reg. 55269 (2018); OFAC, *Frequently Asked Questions Regarding the Re-Imposition of Sanctions Pursuant to the May 8, 2018 National Security Presidential Memorandum Relating to the Joint Comprehensive Plan of Action (JCPOA)*, U.S. DEP’T OF THE

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On November 5, 2018, OFAC implemented the second and final snapback of US sanctions waived under the JCPOA. With the end of the JCPOA wind-down periods, the provision of goods or services and the extension of additional loans or credits to an Iranian counterparty may result in enforceable violations of US sanctions. This includes activities pursuant to written contracts or agreements in place before May 8, 2018.²¹

OFAC has previously clarified that non-US, non-Iranian persons may receive payment for goods or services, or may receive repayment of loans or credits extended, under certain conditions. These conditions include that goods or services must have been provided before the end of the applicable wind-down period, or loans and credits must have been extended before the end of the wind-down period, and agreed to prior to May 8, 2018, following US sanctions in effect at the time.²² All payments must be consistent with US sanctions and may not involve US persons or the US financial system, unless exempt from regulation or authorized by OFAC.²³

Re-imposing sanctions in November 2018 included sanctions on:

- Iran's port operators and its shipping and shipbuilding sectors;
- Petroleum-related transactions, including the purchase of petroleum, petroleum products, or petrochemical products from Iran;
- Transactions by foreign financial institutions with the Central Bank of Iran and other designated Iranian financial institutions;
- Provision of specialized financial messaging services to the Iranian Central Bank and other financial institutions;
- Provision of underwriting services, insurance, or reinsurance; and
- Iran's energy sector.²⁴

OFAC's November actions also added over 700 individuals, entities, aircrafts, and vessels, including more than seventy Iran-linked financial institutions and their foreign and domestic subsidiaries, to OFAC's SDN List.²⁵ These sanction targets also include approximately 250 persons

TREASURY, at 1.2 (Aug. 6, 2018), https://www.treasury.gov/resource-center/sanctions/Programs/Documents/jcpoa_winddown_faqs.pdf.

21. See *FAQs: Iran Sanctions*, *supra* note 18, at 630-31; see also *Frequently Asked Questions Regarding the Re-Imposition of Sanctions Pursuant to the May 8, 2018 National Security Presidential Memorandum Relating to the Joint Comprehensive Plan of Action (JCPOA)*, *supra* note 19, at 2.6.

22. See *id.* at 2.1.

23. See *id.*

24. See Exec. Order No. 13846, *supra* note 17, at 38,939; see also *Iranian Transactions and Sanctions Regulations*, *supra* note 19; *Frequently Asked Questions Regarding the Re-Imposition of Sanctions Pursuant to the May 8, 2018 National Security Presidential Memorandum Relating to the Joint Comprehensive Plan of Action (JCPOA)*, *supra* note 19, at 1.3.

25. See Press Release, U.S. Dep't of the Treasury, U.S. Government Fully Re-Imposes Sanctions on the Iranian Regime as Part of Unprecedented U.S. Economic Pressure Campaign, para. 1, 13 (Nov. 5, 2018), <https://home.treasury.gov/news/press-releases/sm541>. See generally OFAC, *Publication of Updates to OFAC's Specially Designated Nationals and Blocked Persons List and 13599 List Removals*, U.S. DEP'T OF THE TREASURY (Nov. 5, 2018), https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20181105_names.aspx.

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blocked pursuant to Executive Order (E.O.) 13599.²⁶ The E.O. 13599 List, which blocked specific persons and entities, has been deleted as part of the United States' withdrawal from the JCPOA.²⁷

Significantly, the end of the wind-down periods includes the re-imposition of sanctions requirements under section 1245 of the National Defense Authorization Act for Fiscal Year 2012 (NDAA).²⁸ This section authorizes the President to impose sanctions on any foreign financial institutions, public or private, that knowingly conduct or facilitate certain significant financial transactions with the Central Bank of Iran or engage in oil-related financial transactions. Certain waivers may be granted under section 1245(d)(4)(D) for foreign financial institutions in countries that have significantly reduced crude oil purchases from Iran.²⁹ While a select few countries have received temporary waivers that must be re-evaluated in 180 days, this exception is likely to be granted sparingly.³⁰

The United States does maintain humanitarian authorizations and exceptions to the Iranian sanctions program that allow for the sale of certain agricultural commodities, food, medicine, and medical devices to Iran.³¹ In the changing sanctions landscape, the applicability of these authorizations, exceptions, and the specific persons and financial channels involved require careful review.

26. See U.S. Government Fully Re-Imposes Sanctions on the Iranian Regime as Part of Unprecedented U.S. Economic Pressure Campaign, *supra* note 24, para. 3.

27. See *id.*; see also Exec. Order No. 13599, 77 Fed. Reg. 6659, 6660 (2012).

28. See Exec. Order No. 13846, *supra* note 17, at 38,941; see also National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1245(d)(4)(B)–(C), 125 Stat. 1298, 1647-48 (2011) (codified at 22 U.S.C. § 8513a (2011)).

29. See National Defense Authorization Act for Fiscal Year 2012 § 1245(d)(4)(D).

30. See Michael R. Pompeo, Sec'y of State, Briefing on Iran Sanctions, para. 20 (Nov. 2, 2018), <https://www.state.gov/secretary/remarks/2018/11/287090.htm>; see also Lesley Wroughton et al., *U.S. Grants Temporary Iran Oil Waivers to Eight Countries including China: Pompeo*, REUTERS (Nov. 5, 2018 8:01 AM), <https://www.reuters.com/article/us-usa-iran-sanctions-waivers/us-grants-temporary-iran-oil-waivers-to-eight-countries-including-china-pompeo-idUSKCN1NA1OS> (naming China, India, Greece, Italy, Taiwan, Japan, Turkey, and South Korea as the eight waiver recipients); Debjit Chakraborty & Heesu Lee, *Iran Oil Waivers: How Buyers are Lining Up After U.S. Exemptions*, BLOOMBERG (Nov. 9, 2018 8:14 AM), <https://www.bloomberg.com/news/articles/2018-11-06/iran-oil-waivers-how-buyers-are-lining-up-after-u-s-exemptions>.

31. A preliminary ruling by the International Court of Justice in Iran's case challenging the U.S.'s re-imposition of sanctions ordered the U.S. to remove impediments by a method of its choosing to allow exports and related payments of food, medicine, and spare parts, equipment, and services necessary for the safety of civilian aviation. See *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. U.S.)*, Order, ¶ 98 (Oct. 3, 2018), <https://www.icj-cij.org/files/case-related/175/175-20181003-ORD-01-00-EN.pdf>. However, the U.S. argues that because it already has humanitarian authorizations and exemptions and will consider case-by-case issuance of licenses related to civil aviation safety that the order has no practical effect. See *id.* ¶ 86; see also Elena Chachko, *What to Make of the ICJ's Provisional Measures in Iran v. U.S. (Nuclear Sanctions Case)*, LAWFARE (Oct. 4, 2018 7:23 AM), <https://www.lawfareblog.com/what-make-icjs-provisional-measures-iran-v-us-nuclear-sanctions-case>.

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In response to the United States' withdrawal from the JCPOA and re-imposition of sanctions, the EU has taken actions to provide sanctions relief to Iran while maintaining Iranian compliance with its JCPOA obligations. These measures include updating its Blocking Statute's annex to include US sanctions re-imposed on Iran, active as of August 7, 2018, and reaffirming its commitment to establishing a Special Purpose Vehicle (SPV) to enable sanctions relief under the JCPOA to reach Iran while allowing for European exporters to pursue legitimate trade.³² The Blocking Statute provides recovery for EU operators harmed by extraterritorial sanctions, nullifies effects in the EU of any foreign court ruling based on them, and forbids EU persons from complying with those sanctions unless specifically authorized to do so.³³ The SPV would act as a type of clearing house for Iranian oil transactions, offsetting Iranian proceeds from oil and gas sales against Iranian purchases, in order to keep the EU in compliance with US sanctions and maintain Iranian compliance with the JCPOA.³⁴

While the SPV has yet to be established, its establishment would not prevent the United States from sanctioning companies that use it. Policy divergences between the United States, the EU, Russia, and China, and their respective regulations regarding sanctions on Iran, may also present compliance challenges and conflicts for companies engaged in cross-border business. Companies must carefully examine the specific laws and regulations at issue and the facts of the scenario to evaluate the risks of a failure to comply across multiple jurisdictions in an environment where enforcement of these sanctions programs is prioritized.

C. VENEZUELA RELATED DEVELOPMENTS

In 2018, the US government continued its incremental expansion of sanctions against the Venezuelan government, seeking to further isolate the Maduro regime but stopping short of imposing comprehensive sanctions on the country. The main focus of these sanctions was responding to efforts by

32. See European Commission Press Release IP/18/4805, Updated Blocking Statute in Support of Iran Nuclear Deal Enters into Force (Aug. 6, 2018), http://europa.eu/rapid/press-release_IP-18-4805_en.htm; see also Joint statement by High Representative Federica Mogherini and Foreign Ministers Jean-Yves Le Drian, Heiko Maas and Jeremy Hunt, and Finance Ministers Bruno Le Maire, Olaf Scholz and Philip Hammond, EUROPEAN EXTERNAL ACTION SERVICE (Nov. 2, 2018, 18:06), https://eeas.europa.eu/headquarters/headquarters-homepage/53230/joint-statement-high-representative-federica-mogherini-and-foreign-ministers-jean-yves-le_en.

33. See Council Regulation 2271/96, 1996 O.J. (L 309) 1 (EC); Commission Delegated Regulation 2018/1100, 2018 O.J. (L199) 1 (EC) (*amending Annex to Council Regulation 2271/96*); see also *Guidance Note – Questions and Answers: Adoption of Update of the Blocking Statute*, 2018 O.J. (C 277) 4 (Aug. 7, 2018).

34. See Ole Moehr, *JCPOA in Peril – EU SPV to the Rescue?*, ATLANTIC COUNCIL (Oct. 9, 2018), <http://www.atlanticcouncil.org/blogs/econographics/jcpoa-in-peril-eu-spv-to-the-rescue>; see also Steven Erlanger, *As U.S. Sanctions on Iran Kick In, Europe Looks for a Workaround*, N.Y. TIMES, (Nov. 5, 2018), <https://www.nytimes.com/2018/11/05/world/europe/us-iran-sanctions-europe.html>.

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the Venezuelan government to raise capital by circumventing US financial restrictions.

In December 2017, the Maduro regime announced one such effort: the future development of a state-sponsored digital currency called the “petro” to “overcome the financial blockade.”³⁵ In response, OFAC released guidance that the potential digital currency “would appear to be an extension of credit to the Venezuelan government” in violation of Executive Order 13808 because it “would carry rights to receive commodities in specified quantities at a later date.”³⁶ After the Maduro government officially launched the petro in February, the Trump Administration responded by prohibiting all transactions involving “any digital currency, digital coin, or digital token . . . issued by, for or on behalf of the Government of Venezuela.”³⁷

After Maduro was re-elected to a second term in a controversial election in May 2018, the Trump Administration again expanded sanctions. Calling out the Maduro regime’s “endemic economic mismanagement and public corruption at the expense of the Venezuelan people,” President Trump prohibited US persons from purchasing any debt owed to the Venezuela government (including accounts receivable) or entering into transactions where that debt is pledged as collateral.³⁸ Administration officials noted that the order was intended to prevent the Maduro regime from raising cash by “selling off debt held by government entities, including accounts receivable, for a pittance of what it is worth.”³⁹

The Trump Administration expanded sanctions a third time this year in November 2018 with new prohibitions on the Venezuelan gold mining industry. President Trump authorized the imposition of sanctions on individuals and entities who operate corruptly in the Venezuelan gold sector, as well as in any other economic sector as identified by the Treasury Secretary.⁴⁰ No individuals or entities have yet been designated under this authority, but National Security Advisor John Bolton announced the new sanctions authority as part of an effort to “target networks operating within corrupt Venezuelan economic sectors and deny them access to stolen

35. See Alexander Ulmer & Deisy Buitrago, *Enter the ‘petro’: Venezuela to launch oil-backed cryptocurrency*, REUTERS (Dec. 3, 2017 1:36 PM), <https://www.reuters.com/article/us-venezuela-economy/enter-the-petro-venezuela-to-launch-oil-backed-cryptocurrency-idUSKBN1DX0SQ>.

36. See OFAC, *FAQs: Other Sanctions Programs*, U.S. DEP’T THE TREASURY, 551 (Jan.19, 2018), http://web.archive.org/web/20180427031656/https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_other.aspx (FAQ No. 551 has since been rescinded).

37. See Exec. Order No. 13827, 83 Fed. Reg. 12,469, 12,469 (Mar. 19, 2018).

38. See Exec. Order No. 13835, 83 Fed. Reg. 24,001, 24,001 (May 21, 2018).

39. See Julie Hirschfeld Davis, *U.S. Places New Sanctions on Venezuela Day After Election*, N.Y. TIMES (May 21, 2018), <https://www.nytimes.com/2018/05/21/us/politics/trump-maduro-venezuela-sanctions.html>.

40. See Exec. Order No. 13850, 83 Fed. Reg. 55,243, 55,243 (Nov. 1, 2018).

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wealth.”⁴¹ Other officials highlighted the corruption in Venezuela’s gold mining sector and its links with Turkey and Iran.⁴²

In addition to these new sector-specific prohibitions, designations of high-ranking members of the Maduro regime continued to play an important role in US policy toward Venezuela. In 2017, OFAC sanctioned Venezuelan Vice President Tarek El Aissami, eight members of the Venezuelan Supreme Court, and President Maduro himself, among others. That trend continued in 2018. Between January and May 2018, OFAC sanctioned twelve current and former military and government officials for their involvement in corruption.⁴³ In September 2018, OFAC sanctioned President Maduro’s wife (the former attorney general), as well as Venezuela’s Executive Vice President, Minister of Communication and Information, and Minister of Defense.⁴⁴ As of November 2018, over seventy individuals and entities affiliated with the Maduro regime have been sanctioned as Specially Designated Nationals based on their involvement in corruption and anti-democratic activities.

D. CUBA DEVELOPMENTS

In 2018, the Trump Administration continued to pursue the policy objective of ending economic practices that disproportionately benefit the Cuban government or its military, intelligence, or security agencies or personnel at the expense of the Cuban people that was identified in the National Security Presidential Memorandum on Strengthening the Policy of the United States Toward Cuba (NSPM) that was issued in June 2017.⁴⁵ Specifically, on November 15, 2018, in accordance with the NSPM’s mandate for it to identify entities and sub-entities that are under the control

41. See John R. Bolton, Nat’l Sec. Advisor, Remarks by National Security Advisor Ambassador John R. Bolton on the Administration’s Policies in Latin America, para. 70 (Nov. 2, 2018), <https://www.whitehouse.gov/briefings-statements/remarks-national-security-advisor-ambassador-john-r-bolton-administrations-policies-latin-america>.

42. See Justin Sink & Jonathan Levin, *Trump Orders Sanctions on Venezuela Gold to Pressure Maduro*, BLOOMBERG (Nov. 1, 2018 12:00 PM), <https://www.bloomberg.com/news/articles/2018-11-01/trump-orders-sanctions-on-venezuela-gold-to-pressure-maduro>.

43. See Press Release, U.S. Dep’t of the Treasury, Treasury Sanctions Four Venezuelan Government Officials Associated with Corruption and Oppression, para. 1 (Jan. 5, 2018), <https://home.treasury.gov/news/press-releases/sm0247>; Press Release, U.S. Dep’t of the Treasury, Treasury Sanctions Four Current or Former Venezuelan Officials Associated with Economic Mismanagement and Corruption, para. 1 (Mar. 19, 2018), <https://home.treasury.gov/news/press-releases/sm0318>; Press Release, U.S. Dep’t of the Treasury, Treasury Targets Influential Former Venezuelan Official and His Corruption Network, para. 1 (May 18, 2018), <https://home.treasury.gov/news/press-releases/sm0389>.

44. See Press Release, U.S. Dep’t of the Treasury, Treasury Targets Venezuelan President Maduro’s Inner Circle and Proceeds of Corruption in the United States, para. 1 (Sept. 25, 2018), <https://home.treasury.gov/news/press-releases/sm495>.

45. Originally issued by President Trump on June 16, 2017, the NSPM was published in the Federal Register on October 20, 2017. See Strengthening the Policy of the United States Toward Cuba, 82 Fed. Reg. 48,875, 48,875 (Oct. 20, 2017).

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of, or act for on behalf of, the Cuban military, intelligence, or security services or personnel, the US Department of State added twenty-six sub-entities, including sixteen hotels owned by the Cuban military, to its List of Restricted Entities and Subentities Associated with Cuba (Cuba Restricted List).⁴⁶ When publishing the updated Cuba Restricted List, the State Department reiterated that US persons are generally prohibited from engaging in direct financial transactions with certain entities identified on the Cuba Restricted List pursuant to section 515.209 of the Cuban Assets Control Regulations, and that the US Department of Commerce's Bureau of Industry and Security (BIS) will generally deny applications to export or reexport items for use by entities on the Cuba Restricted List pursuant to section 746.2 of the Export Administration Regulations (EAR).⁴⁷

II. Export Control Developments

This year witnessed impactful changes in US law relating to national security reviews of foreign direct investment (FDI) and export controls relating to critical and foundational technology. These changes reflect a bipartisan Washington policy consensus that enhanced scrutiny of FDI and technology transfers is needed in order protect US national security and strategic interests. The driver of this change is over concern that foreign countries, particularly China, are deliberately utilizing FDI and technology transfers to acquire national security-critical assets, technologies, and information to their strategic advantage.⁴⁸ Two relevant statutes were included in the omnibus National Defense Authorization Act,⁴⁹ which was signed into law on August 13, 2018: the Foreign Investment Risk Review Modernization Act (FIRRMA) and the Export Control Reform Act (ECRA).⁵⁰ Federal agencies have already begun implementing these statutes through new regulations.

A. FOREIGN INVESTMENT RISK REVIEW MODERNIZATION ACT

FIRRMA significantly expands the jurisdiction and activity of the Committee on Foreign Investment in the United States (CFIUS). CFIUS is an interagency US government committee that reviews certain forms of FDI into the United States to identify and address any consequent national

46. See Updating the State Department's List of Entities and Subentities Associated with Cuba (Cuba Restricted List), 83 Fed. Reg. 57,523, 57,523 (Nov. 15, 2018).

47. See *id.*

48. See U.S.-CHINA ECON. AND SEC. REVIEW COMM'N, 2017 ANNUAL REPORT: CHAPTER 1, SECTION 2 75 (2017), available at https://www.uscc.gov/Annual_Reports/2017-annual-report.

49. See John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. 115-232, tit. 17, 132 Stat. 1636, 1653 (2018).

50. See S. COMM. ON ARMED SERVICES, 115TH CONG., FY19 NDAA EXECUTIVE SUMMARY 6 (Comm. Print 2018), <https://www.armed-services.senate.gov/press-releases/sasc-completes-markup-of-national-defense-authorization-act-for-fiscal-year-2019>.

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security risks posed by potential foreign control of a US business.⁵¹ CFIUS is chaired by the Department of the Treasury and comprised of nine standing agency members,⁵² five observing offices,⁵³ and two non-voting, *ex officio* members.⁵⁴ CFIUS reviews seek to balance the United States' foundational commitment to maintaining a free and open investment environment with the need to protect national security.⁵⁵

FIRRMA seeks to address these concerns through several statutory reforms, including (among others):

1. *Expanded Jurisdiction*

FIRRMA explicitly extends CFIUS jurisdiction to any transaction that gives foreign persons access to material non-public information or influence over decision-making⁵⁶ in companies that: (i) own, operate, manufacture, supply, or service critical infrastructure; (ii) produce, design, test, manufacture, fabricate, or develop critical technologies;⁵⁷ or (iii) maintain or collect sensitive personal data of United States citizens.⁵⁸ It also includes any purchase, lease, or concession by a foreign person of real estate in the US proximate to a US government national security-sensitive installation or that is part of a sea, land, or airport; bankruptcy and other default on debt transactions; any change in a foreign person's rights to control or influence a US company where the foreign person already has an investment stake; and any transaction "designed or intended to evade or circumvent CFIUS jurisdiction."⁵⁹

51. See *The Committee on Foreign Investment in the United States (CFIUS)*, U.S. DEP'T OF THE TREASURY, <https://www.treasury.gov/resource-center/international/Pages/Committee-on-Foreign-Investment-in-US.aspx> (last visited Feb. 24, 2019).

52. See *Composition of CFIUS*, U.S. DEP'T OF THE TREASURY, <https://www.treasury.gov/resource-center/international/foreign-investment/Pages/cfius-members.aspx> (last visited Feb. 24, 2019) (Departments of Treasury, Justice, Homeland Security, Commerce, Defense, State, and Energy and the Offices of the U.S. Trade Representative and Science & Technology Policy).

53. See *id.* (Office of Management & Budget, Council of Economic Advisors, National Security Council, National).

54. The Director of National Intelligence and Secretary of Labor.

55. See *Evaluating CFIUS: Administration Perspectives: Hearing on H.R. 4311 Before Subcomm. on National Security, International Development and Monetary Policy*, 115th Cong. 1 (2017) (statement by Heath P. Tarbert, Assistant Secretary of the Treasury), https://financialservices.house.gov/uploadedfiles/03.15.2018_heath_tarbert_testimony.pdf.

56. FIRRMA extensively defines "indirect" investment to carve out non-controlling investments through funds and other arrangements. See John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. 115-232 § 1702(c), 132 Stat. 1636, 2176-77 (2018).

57. Critical technologies are defined to include items subject to international arms controls and other emerging and foundational technologies designated through a semi-annual review process created by the ECRA. See *id.* § 1703(a)(6)(A)(vi).

58. See *id.* § 1703(a)(4)(B)(iii).

59. See *id.* § 1703(a)(4)(B)(iv)(II).

2. *Mandatory Declarations*

FIRRMA provides for an expedited declaration process, where parties may file a brief description of a transaction with CFIUS and obtain a determination whether CFIUS intends to conduct a full review. The declaration provisions also authorize CFIUS to specify classes of deals that will require mandatory declarations. CFIUS used this authority in November 2018, together with its expanded jurisdiction over critical technology-related transactions, to implement pilot program regulations requiring declarations for transaction involving non-passive FDI in critical technology companies in specified strategic industries.⁶⁰

B. EXPORT CONTROL REFORM ACT

The ECRA addresses concerns that the current US export control regime does not sufficiently protect US technological leadership in critical technologies from exploitation and theft by foreign strategic competitors.⁶¹ The ECRA establishes a formal, recurring interagency process, led by the Commerce Department, to identify and review “emerging and foundational technologies that are essential to the national security of the United States.”⁶² The ECRA directs that identified critical technologies be subject to heightened export controls within the context of the existing Export Administration Regulations. In November 2018, the Commerce Department issued a Notice of Proposed Rule Making to identify fourteen emerging technologies.⁶³

Taken together, FIRRMA and the ECRA mark a significant increase in US national security-related scrutiny of and expectations regarding FDI and technology exports. Foreign investors and US firms seeking foreign capital will now operate in an environment with significantly expanded CFIUS authority and energy to review and intervene in transactions. Similarly, US companies that work with critical technologies will see increased export licensing and compliance requirements, particularly where parties or joint venture partners include nationals of countries subject to a US embargo (including China and Russia).

C. UPDATES TO THE INTERNATIONAL TRAFFIC IN ARMS REGULATIONS

In 2018, the US Department of State’s Directorate of Defense Trade Controls (DDTC) continued to forward several long-standing policy goals: it took steps toward reform of US export controls; worked to establish positive control lists that maintain a bright line between the US Munitions

60. *See id.* § 1727(c).

61. *See id.* § 1741.

62. *See id.* § 1703(a)(6)(A)(vi).

63. *See* Review of Controls for Certain Emerging Technologies, 83 Fed. Reg. 58,201, 58,201 (Nov. 19, 2018).

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List (USML) and the Commerce Control List (CCL); and implemented sanctions to address foreign policy and national security concerns related to countries including South Sudan, Russia, and China.

In response to the escalating violent conflict in South Sudan, on February 14, DDTC designated South Sudan as an International Traffic in Arms Regulations (ITAR) section 126.1 country.⁶⁴ This designation, which amounts to a prohibition on the export of ITAR-controlled defense articles and services to South Sudan, is consistent with the prior efforts of the Obama Administration to impose restrictions on the African nation's access to US-origin weaponry in light of its ongoing civil war. The action was followed by a July 2018 resolution of the U.N. Security Council to impose a multilateral arms embargo on South Sudan.⁶⁵

On May 24, DDTC published to the Federal Register long-awaited Proposed Rules for revision of USML Categories I, II, and III.⁶⁶ The Proposed Rules would shift jurisdictional controls over several types of firearms and ammunition from the USML to the BIS under the EAR.⁶⁷ BIS published a similar Proposed Rule on the same day, which contained corresponding proposals for revisions to the CCL that would allow for the proposed transition of non-automatic and semi-automatic firearms and other widely commercially available guns and ammunition from the USML to the CCL.⁶⁸ The BIS Proposed Rule noted that transfer of defense articles from Categories I, II, and III would not affect permanent import controls under the US Munitions Import List (USMIL) and included a proposed revision to the ITAR section 129.2 list of enumerated brokering activities, which would establish continued USML brokering controls over brokering activities involving those defense articles transferred to the CCL.⁶⁹

DDTC's Defense Trade Advisory Group (DTAG) proposed revisions to the ITAR definition of defense services in February 2018 and continued work through the spring on further refinements to the scope of that definition which would apply a catch and release approach to imposing ITAR controls.⁷⁰ Of note, the May 2018 refinements proposed narrowing the scope of activities involving technical data that would be caught by the

64. See Amendment to the International Traffic in Arms Regulations: Addition of South Sudan, 83 Fed. Reg. 6457, 6457-58 (Feb. 14, 2018).

65. See S.C. Res. 2428, ¶¶ 3-4 (July 13, 2018).

66. See International Traffic in Arms Regulations: U.S. Munitions List Categories I, II, and III, 83 Fed. Reg. 24,198, 24,198-205 (May 24, 2018).

67. See *id.*

68. See Control of Firearms, Guns, Ammunition and Related Articles the President Determines No Longer Warrant Control Under the United States Munitions List (USML), 83 Fed. Reg. 24,166, 24,166-95 (May 24, 2018).

69. See *id.* at 24,167.

70. See DEFENSE TRADE ADVISORY GROUP, PLENARY MEETING MINUTES: DEFENSE SERVICES DEFINITION WORKING GROUP 2 PRESENTATION 5 (Feb. 1, 2018), available at https://www.pmdtcc.state.gov/sys_attachment.do?sysparm_referring_url=tear_off&view=true&sys_id=c0e40a86dbb95f4044f9ff621f96199d.

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defense services definition to the provision of assistance or training of foreign persons using traceable US-origin technical data.⁷¹

2018 was also notable for the significant activity in the ongoing Defense Distributed litigation, which centers on DDTC's ability to prevent a web-based US company from engaging in the unauthorized online distribution of computer-aided design (CAD) files for printing 3D weapons and, more broadly, whether those files should be subject to the ITAR. On June 29, 2018, the Company reached a settlement with the US Departments of State and Justice that approved the CAD files for public release online and temporarily modified the USML to allow such publication pending revision of the USML to exempt the files from ITAR control.⁷² On July 31, 2018, the Western District of Washington issued a Temporary Restraining Order ("TRO") to prevent the temporary modification of the USML.⁷³ Defense Distributed began selling CAD blueprints in August 2018, arguing that such activity would not violate the terms of the TRO.⁷⁴

The passage of FIRRMA in August 2018 also signaled key changes for ITAR registrants seeking acquisition by foreign corporations or investors. FIRRMA requires mandatory CFIUS filings for transactions involving critical technologies, including USML defense articles and defense services.⁷⁵ Such critical technologies filings, which form part of the CFIUS Pilot Program that took effect on November 10, 2018, signal the US government's continued interest in keeping strict control over the export of defense articles and services to China and other countries seeking access to cutting-edge US technology, including in circumstances where such exports may occur due to ultimate foreign ownership or control.

D. UPDATES TO THE EXPORT ADMINISTRATION REGULATIONS (EAR)

After a relatively quiet year in 2017, BIS was very active in 2018, making numerous revisions to the EAR. BIS implemented several changes to the EAR as a result of amendments to multilateral agreements, including the imposition of license requirements for products and technology for the

71. See *id.*; see also International Traffic in Arms Regulations: U.S. Munitions List Categories I, II, and III, 83 Fed. Reg. at 24,199.

72. See Clif Burns, *Why Was the State Department Ever Involved With the Debate Over 3D-Printed Guns?*, SLATE (Aug. 2, 2018, 3:42 PM), <https://slate.com/technology/2018/08/defense-distributed-why-the-state-department-was-involved-with-3d-printed-guns.html>.

73. See Deanna Paul et al., *Federal judge blocks posting of blueprints for 3-D-printed guns hours before they were to be published*, THE WASHINGTON POST (July 31, 2018), https://www.washingtonpost.com/news/morning-mix/wp/2018/07/31/in-last-minute-lawsuit-states-say-3-d-printable-guns-pose-national-security-threat/?noredirect=on&utm_term=.81fe653f0e16.

74. See Deanna Paul, *Defense Distributed founder Cody Wilson says he's selling 3-D printed gun blueprints online*, THE WASHINGTON POST (Aug. 28, 2018), https://www.washingtonpost.com/nation/2018/08/28/defense-distributed-founder-cody-wilson-says-hes-now-selling-d-printed-gun-blueprints-online/?utm_term=.f953a0c77a5d.

75. See John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. 115-232 § 1703(a)(6)(A), 132 Stat. 1636, 2181-82 (2018).

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production of tritium;⁷⁶ the amendment of ECCNs 1C350, 2B350, 2B351, and 2B352 to add new items controlled and to clarify certain definitions;⁷⁷ and most recently, the amendment of fifty-four ECCNs across nine categories and revisions to several license exceptions in a final rule published October 24, 2018.⁷⁸

In addition, BIS published rules reflecting the addition of India as a Major Defense Partner of the United States, a participating country in the Australia Group, and member of the Wassenaar Group by removing India from Country Group A:6 and placing it in Country Group A:5 and making related conforming amendments.⁷⁹

BIS also published several important proposed rules and requests for public comment this year, none of which have resulted in final rules as of the time of this writing. In a significant and long-anticipated development, BIS published (simultaneously with the DDTC) a proposed rule to effect the amendment of the three ITAR categories (I, II, and III) that had not been revised as part of the Obama Administration-era Export Control Reform process.⁸⁰ The proposed rule would amend the three categories of the ITAR to remove certain commercial firearms, ammunition, and related parts, accessories and attachments, and transfer them to the Commerce Control List. Two parameters were used to identify articles *not* appropriate for removal to the EAR: articles that (a) are either inherently military or otherwise warrant control under the ITAR, and (b) if not inherently military, either (i) possess parameters or characteristics that provide a critical military or intelligence advantage to United States, and (ii) are almost exclusively available from the United States.⁸¹ The proposed rule would create seventeen new ECCNs and revised seven others, in order to include in the EAR items that are principally: (1) commercial items widely available in retail outlets, and (2) less sensitive military items.

Under its ECRA mandate to establish an interagency process to identify emerging and foundational technologies, BIS on November 19, 2018, published an Advance Notice of Proposed Rulemaking seeking public comment on criteria for identifying emerging technologies that are essential

76. Reclassification of Targets for the Production of Tritium and Related Development and Production Technology Initially Classified under the OY521 Series, 83 Fed. Reg. 14,580, 14,580 (April 5, 2018).

77. Implementation of the February 2017 Australia Group (AG) Intersessional Decisions and the June 2017 AG Plenary Understandings; Addition of India to the AG, 83 Fed. Reg. 13,849, 13,849 (April 2, 2018).

78. Wassenaar Arrangement 2017 Plenary Agreements Implementation, 83 Fed. Reg. 53,742, 53,742 (October 24, 2018).

79. *See id.*; *see also* U.S.-India Major Defense Partners: Implementation Under the Export Administration Regulations of India's Membership in the Wassenaar Arrangement and Addition of India to Country Group A:5, 83 Fed. Reg. 38,018, 38,018 (August 3, 2018).

80. *See* Control of Firearms, Guns, Ammunition and Related Articles the President Determines No Longer Warrant Control Under the United States Munitions List (USML), 83 Fed. Reg. 24,166, 24, 166 (May 24, 2018).

81. *Id.*

to US national security, in order to inform the interagency process.⁸² In that Advance Notice, BIS outlined fourteen representative categories of technology in which BIS will seek to identify any specific emerging technologies that are essential to the national security, including biotechnology, artificial intelligence, robotics, and advanced materials, among others.⁸³

In addition, during the course of the year, BIS made numerous changes to the Entity List in furtherance of US policy toward, in particular, certain actors and groups in Russia, and also the Chinese telecommunications giant ZTE as part of the multi-agency enforcement effort with respect to that entity that began in 2017. As a result of the US government's increasing concern regarding civil war and human rights violations in South Sudan, consistent with controls implemented under the ITAR, BIS added South Sudan to Country Group D:5 (United States arms embargoed countries) and imposed a restrictive licensing policy of denial for exports of 9x515 and 600-series items to that country, with a case-by-case review policy applicable to six categories of items.⁸⁴

III. Canadian Export Control and Economic Sanctions Developments

During 2018, there were a number of significant developments in Canada's export controls and economic sanctions regimes:

1. Canada Creates Sanctions Policy and Operations Coordination Division.

In August, the Sanctions Policy and Operations Coordination Division (Sanctions Division) was established within Global Affairs Canada. The Sanctions Division has already made several important changes with the goal of providing more guidance as to the requirements for compliance with the sanctions regime, in accordance with recommendations of a House of Commons Committee examining the administration of Canada's economic sanctions laws.⁸⁵ Already, the Sanctions Division has reworked the sanctions Q&A on the Global Affairs website and introduced a hotline, and it is expected to launch consultations shortly.

82. Review of Controls for Certain Emerging Technologies, 83 Fed. Reg. 58,201, 58,201 (2018).

83. Emerging Technology Technical Advisory Committee (ETTAC); Notice of Recruitment of Private-Sector Members, 83 Fed. Reg. 39,054, 39,054 (August 8, 2018).

84. Revision of Export and Reexport License Requirements for Republic of South Sudan Under the Export Administration Regulations, 83 Fed. Reg. 38,021, 38,022 (August 3, 2018).

85. See STANDING COMMITTEE ON FOREIGN AFFAIRS AND INTERNATIONAL DEVELOPMENT, A COHERENT AND EFFECTIVE APPROACH TO CANADA'S SANCTIONS REGIMES: SERGEI MAGNITSKY AND BEYOND 25 (April 2017), available at <http://publications.gc.ca/site/eng/9.834916/publication.html>.

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2. *Canada Continues to Expand Magnitsky List.*

On October 18, 2017, Canada passed The Justice for Victims of Corrupt Foreign Officials Bill (Sergei Magnitsky Law) (Magnitsky Law).⁸⁶ The Magnitsky Law permits Canadian officials to issue orders prohibiting dealing with any property of, engaging in transactions with, or providing financial services to designated foreign officials that are involved in gross violations of internationally recognized human rights or are complicit in actions of significant corruption. Shortly afterwards, on November 3, 2017, fifty-two foreign officials from Russia, Venezuela, and South Sudan were added to the list. The list has continued to expand in 2018, with Myanmar Major-General Maung Soe being added on February 16, 2018. Further expansion of the list is likely. Following the murder of Saudi journalist Jamal Khashoggi, the US government announced Magnitsky sanctions on seventeen Saudi officials. On November 15, 2018, the Canadian government reported that it was actively considering doing the same.⁸⁷

3. *Canada Adopts United Nations Sanctions on Mali.*

On October 10, 2018, the Regulations Implementing the United Nations Resolutions on Mali, SOR/2018-203 came into force in Canada.⁸⁸ Per the regulation, Canada will impose a travel ban and asset freeze on individuals and entities designated by the U.N. Committee established under U.N. Resolution S/RES/2374. The potential of UN sanctions is designed to provide a deterrent to those who would disrupt the Malian peace process.⁸⁹ To date, however, the UN has designated no individuals or entities to which the sanctions apply.

4. *Canada Expands Sanctions Against Myanmar (Burma)*

In 2012, the Canadian government substantially scaled back its sanctions on Myanmar following moves towards democracy by the military junta. However, on June 25, the Canadian government in concert with the European Union implemented targeted sanctions against seven Burmese

86. See Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law), SC 2017, c 21 (Can.) (providing greater protection for foreign nationals and amending the Special Economic Measures Act to reflect the similar principles).

87. See Peter Zimonjic, *Canada considering sanctions against Saudis over murder of journalist Jamal Khashoggi*, CBC NEWS (Nov. 15, 2018 3:46 PM), <https://www.cbc.ca/news/politics/saudi-khashoggi-magnitsky-sanctions-freeland-1.4907529>.

88. See *Canadian Sanctions Related to Mali*, GOVERNMENT OF CANADA (date modified Nov. 27, 2018), https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/mali.aspx?lang=eng.

89. See Press Release, Security Council, Security Council Renews Sanctions Regarding Mali, Panel Monitoring Implementation, Unanimously Adopting Resolution 2432 (2018), U.N. Press Release SC/13478, para. 5 (Aug. 30, 2018), <https://www.un.org/press/en/2018/sc13478.doc.htm>.

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military leaders who were reportedly involved in military attacks against the Rohingya people.⁹⁰

5. *Canada Expands Sanctions on Venezuela*

The Canadian government described the May 20, 2018 Venezuelan presidential elections as undemocratic and, on May 30, 2018, levied additional targeted sanctions against fourteen members of the Maduro regime.⁹¹ These sanctions are in addition to the targeted sanctions on forty individuals that were announced in September 2017.⁹²

6. *Canada Expands Sanctions on Libya*

On June 16, 2018, Canada amended its sanctions against Libya to implement certain UN Security Council resolutions. In particular, the amendments to the Regulations Implementing the United Nations Resolution on Libya impose measures against the illegal export of oil from Libya and require UN Security Council approval for the sale of any weapons in Libya, except non-lethal weapons sold for humanitarian purposes.⁹³

7. *Canada Strengthens Sanctions on North Korea*

On January 11, 2018, Canada amended its sanctions on North Korea by incorporating four Resolutions of the UN Security Council issued during 2016 and 2017.⁹⁴ This catch-up amendment tightens an already aggressive sanctions regime applied by Canada against North Korea.

8. *Export Controls*

On January 9, 2018, the Federal Court of Appeal dismissed an appeal from a lower court's refusal to overturn the decision of the Minister of Foreign Affairs to issue permits for the export of light armoured vehicles to Saudi Arabia.⁹⁵ The applicant had argued that the Minister ought to have declined to issue the export permits because there was a reasonable risk that Saudi Arabia might use the vehicles in operations against civilian populations, particularly in Yemen. In 2017, Canada tabled Bill C-47—An Act to amend the Export and Import Permits Act and the Criminal Code (amendments permitting the accession to the Arms Trade Treaty and other amendments). Among its many provisions, Bill C-47 implements the Arms

90. *Regulations Amending the Special Economic Measures (Burma) Regulations*, SOR/2018-135 (Can.).

91. *Regulations Amending the Special Economic Measures (Venezuela) Regulations*, SOR/2018-114 (Can.).

92. *Special Economic Measures (Venezuela) Regulations*, SOR/2017-204 (Can.).

93. *Regulations Amending the Regulations Implementing the United Nations Resolutions on Libya*, SOR/2018-101 (Can.).

94. *Regulations Amending the Regulations Implementing the United Nations Resolutions on the Democratic People's Republic of Korea (DPRK)*, SOR/2018-1 (Can.).

95. *See Turp v. Canada (Foreign Affairs)*, [2018] F.C. 12, ¶ 123 (Can.).

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Trade Treaty by amending the Export and Import Permits Act and Criminal Code to add the offense of brokering—defined as arranging or negotiating a transaction relating to the movement of designated goods or technology between two foreign countries.⁹⁶ Bill C-47 is presently before the Standing Senate Committee on Foreign Affairs and International Trade, having been passed by the House of Commons on June 11, 2018. It is expected to come into force in 2019.

⁹⁶ See An Act to amend the Export and Import Permits Act and the Criminal Code (amendments permitting the accession to the Arms Trade Treaty and other amendments), S.C. 2018, c. 26 (Can.), *available at* <http://www.parl.ca/DocumentViewer/en/42-1/bill/C-47/third-reading>.

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International Antitrust

MIGUEL DEL PINO, ELIZABETH AVERY, DILYS TENG, BRUNO DRAGO,
PAOLA PUGLIESE, MILENA MUNDIM, ADAM S. GOODMAN,
SIMON KUPI, PETER WANG, YIZHE ZHANG, PETER CAMESASCA,
LAURIE-ANNE GRELIER, NAVAL SATARAWALA CHOPRA,
AMAN SINGH SETHI, SHIGEYOSHI EZAKI, VASSILI MOUSSIS,
KIYOKO YAGAMI, NAOKI UEMURA, YOUNGJIN JUNG, LUKE SHIN,
HEMI LEE, LARA GRANVILLE, JASVINDER NAKHWAL,
JONATHAN TICKNER, LISL DUNLOP, AND SHOSHANA SPEISER*

I. Argentina*

A. NATIONAL COMPETITION AUTHORITY

On May 24, 2018, the National Congress enacted the new Antitrust Law No. 27,442 (“Antitrust Law”) bringing a wide range of changes to antitrust enforcement in Argentina.¹ The Antitrust Law creates a new decentralized antitrust authority within the Executive Branch, the National Competition Authority (“NCA”).² The existing system of the Antitrust Commission and the Secretary of Trade will remain in force until the appointment of the members of the NCA.³

B. MERGERS

The Antitrust Law implements a suspensive system under which companies will not be able to close a transaction prior to approval from the NCA.⁴ This system will enter into force one year after the creation of the new authority (expected in the first quarter of 2020).⁵ Until then, the post-closing notification system remains applicable.

The Antitrust Law also increased the notification and *de minimis* exception thresholds; basing them on Adjustable Units (“AU”), to be annually updated

* Co-Editors: Miguel del Pino, Melissa Ginsberg, Kate Mc Neece, Jake Walter-Warner and Valentina Pozzoli.

* Miguel del Pino of Marval, O’Farrell & Mairal. All resources are dated as of 26 November, 2018.

1. Law No. 27442, May 15, 2018, [No. 33.870] B.O. 3 (Arg.).

2. *Id.* art. 18.

3. *Id.* art. 80.

4. *Id.* art. 14, 55(a), 55(d).

5. *See id.* art. 84.

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to prevent inflation and devaluation distortions that characterize the Argentine economy.⁶

The Antitrust Law also increased the late filing fine and introduced a gun-jumping fine (applicable once the pre-closing system enters into force) and a filing fee for parties that file an economic concentration.⁷

In terms of procedural innovations, interested third parties are now allowed to make statements and submit objections to an economic concentration. Those statements will not be binding on the antitrust authority.⁸

Under the new Antitrust Law, the antitrust authority must approve transactions within 45 working days after receipt of a correct and complete filing.⁹ If the regulator has concerns, it will produce a statement of objections and summon a hearing to consider remedies. In these cases, the review timeframe will be extended for an additional 120 working days. There is also a summary proceeding (fast-track) for transactions that do not raise competition concerns.

Finally, this year the Secretary of Trade issued new Guidelines for Merger Control Review.¹⁰ These unify years of jurisprudential criteria and provide clearer rules for parties interested in carrying out a merger control notification in Argentina.¹¹

C. CARTELS AND OTHER ANTICOMPETITIVE CONDUCTS

In order to enhance cartel prosecution, the Antitrust Law now presumes that certain behaviors (hard-core cartels) are absolute restrictions to competition.¹² Such agreements are null and have no effect. The new antitrust authority may, however, grant waivers to enter into these kinds of *per se* illegal contracts if they do not harm the general economic interest.

Fines for both companies and natural persons that engage in anticompetitive conduct have also been increased.¹³

The new law also creates a leniency program. The program establishes two possible benefits for those who apply for leniency: exemption or reduction of fines, as well as immunity from certain criminal sanctions (with certain specific exceptions).¹⁴

6. The AU has been set in ARS 20 for 2018; Law No. 27442, art. 85, May 15, 2018, [No. 33.870] B.O. 3 (Arg.).

7. *Id.* art. 33, 55(d), 59.

8. *Id.* art. 13.

9. *Id.* art. 14.

10. See Ministry of Prod., Resolution No. 208/2018 (Apr. 11, 2018), https://www.argentina.gob.ar/sites/default/files/lineamientos_concentraciones_economicas.pdf.

11. *Id.*

12. Law No. 27442, art. 2, May 15, 2018, [No. 33.870] B.O. 3.

13. *Id.* art. 55

14. *Id.* art. 60.

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Lastly, the Antitrust Commission has published a draft version of the Guidelines for the Analysis of Cases of Abuse of Dominance for public consultation.¹⁵ These guidelines are expected to be issued soon.¹⁶

II. Australia*

A. LEGISLATIVE DEVELOPMENTS

It has been one year since the “Harper Reforms” significantly changed Australia’s competition laws. The reforms, which amended the Competition and Consumer Act 2010 (Cth) (“CCA”) in November 2017, introduced a concerted practices provision,¹⁷ amended the misuse of market power provision to include an “effects test,”¹⁸ and changed the merger process.¹⁹

B. MERGERS

As of 21 November 2018, the Australian Competition and Consumer Commission (“ACCC”) issued twenty-one informal merger clearance decisions: seventeen were approved, three were approved subject to undertakings and one was opposed.²⁰ In addition, 252 transactions were “pre-assessed.”²¹ No merger authorization applications have been made.²²

C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

This year saw criminal cartel charges laid against individuals for the first time. Criminal cartel charges have been laid against:

- Country Care, its Managing Director and a former employee for cartel conduct involving assisted technology products;²³

15. See *Draft Guidelines for the Analysis of Cases of Abuse of Dominance, Preliminary Version*, NATIONAL COMM’N FOR THE DEFENSE OF COMPETITION (Sept. 2018), https://www.argentina.gob.ar/sites/default/files/traduccion_ingles_lineamientos_abuso_posicion_dominante.pdf.

16. *Id.*

* Elizabeth Avery and Dilys Teng of Gilbert + Tobin (Australia), with thanks to Joshua Hetzel for his assistance.

17. *Competition and Consumer Act 2010* (Cth) pt IV div 2 s 45(1)(c) (Austl.).

18. *Id.* at pt IV div 2 s 46(1).

19. *Id.* at pt VII div 1 s 90(7).

20. See *Public Registers: informal merger review*, AUSTL. COMPETITION & CONSUMER COMM’N (Nov. 21, 2018), https://www.accc.gov.au/public-registers/browse-public-registers?search=&f%5B0%5D=field_acc_sub_type%3A484&sort_by=acc_solr_date&items_per_page=10.

21. See *Annual Report*, AUSTL. COMPETITION & CONSUMER COMM’N (Oct. 2018), https://www.accc.gov.au/system/files/ACCC-%26-AER-Annual-Report-2017-18_0.pdf.

22. See *Merger authorisations register*, AUSTL. COMPETITION & CONSUMER COMM’N (Nov. 21, 2018), <https://www.accc.gov.au/public-registers/mergers-registers/merger-authorisations-register>.

23. See *Criminal cartel proceedings commenced against Country Care and its managers*, AUSTL. COMPETITION & CONSUMER COMM’N (Feb. 15, 2018), <https://www.accc.gov.au/media-release/criminal-cartel-proceedings-commenced-against-country-care-and-its-managers>.

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- Citigroup, Deutsche Bank, ANZ and six senior executives for entering a cartel to restrict the supply of, or maintain the price of, ANZ shares;²⁴ and
- The Construction, Forestry, Maritime, Mining and Energy Union and its Divisional Branch Secretary for attempting to induce suppliers of steel fixing and scaffolding services to enter a cartel with builders.²⁵

In 2017, Nippon Yusen Kabushiki was convicted and fined AUD 25 million after pleading guilty to a charge of cartel conduct involving fixed freight prices for transporting vehicles to Australia.²⁶ In April 2018, Kawasaki Kisen Kaisha pleaded guilty to similar conduct, with judgment now pending.²⁷

The largest civil penalty to date for breach of the CCA was handed down in 2018. On appeal, Yazaki Corporation was ordered to pay AUD 46 million for a civil contravention of coordinating quotes with a competitor for the supply of wire harnesses.²⁸

This year saw the ACCC bring its first two “gun jumping” cases. Proceedings were instituted against:

- Cryosite Limited for diverting customers from the target to itself before regulatory approval was obtained and the transaction completed;²⁹ and
- Pacific National (“PN”) and Aurizon for reaching an understanding in the context of a sale to PN which led to Aurizon closing its intermodal business.³⁰

D. DOMINANCE

In May 2018, the Full Federal Court found that whilst Pfizer took advantage of its market power, it did not act for a prohibited

24. See Tom Westbrook, *Citigroup, Deutsche Bank face Australian court in landmark cartel case*, REUTERS (Oct. 9, 2018), <https://www.reuters.com/article/us-australia-banks-cartel/citigroup-deutsche-bank-face-australian-court-in-landmark-cartel-case-idUSKCN1MJ0B4>.

25. See *Criminal cartel charges laid against CFMMEU and its ACT branch secretary*, AUSTRALIAN COMPETITION & CONSUMER COMM’N (Aug. 16, 2018), <https://www.accc.gov.au/media-release/criminal-cartel-charges-laid-against-cfmmeu-and-its-act-branch-secretary>.

26. See Media Release, Austl. Competition & Consumer Comm’n, Second shipping company pleads guilty to criminal cartel conduct (Apr. 5, 2018), <https://www.accc.gov.au/media-release/second-shipping-company-pleads-guilty-to-criminal-cartel-conduct>.

27. *Id.*

28. See Media Release, Austl. Competition & Consumer Comm’n, Record \$46 million in penalties for Yazaki cartel (May 16, 2018), <https://www.accc.gov.au/media-release/record-46-million-in-penalties-for-yazaki-cartel>.

29. See *ACCC institutes proceedings against Cryosite for alleged cartel conduct*, AUSTRALIAN COMPETITION & CONSUMER COMM’N, (July 12, 2018), <https://www.accc.gov.au/media-release/accc-institutes-proceedings-against-cryosite-for-alleged-cartel-conduct>.

30. See *ACCC takes action against Pacific National and Aurizon*, AUSTRALIAN COMPETITION & CONSUMER COMM’N, (July 19, 2018), <https://www.accc.gov.au/media-release/accc-takes-action-against-pacific-national-and-aurizon>.

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(anticompetitive) purpose.³¹ This case was brought under the old test for misuse of market power, which prohibited only taking advantage of market power for anticompetitive purposes but, unlike the current law, did not prohibit conduct that had an anticompetitive effect.³²

III. Brazil*

A. LEGISLATIVE DEVELOPMENTS

Resolution 21/2018³³, ruling on the disclosure of documents from leniency and settlement agreements to support damage claims, was published in 2018. In order to protect and promote the leniency program, which could be weakened by the growing (and legitimate) culture of damage claims, CADE decided that disclosure of documents should only be allowed if imposed by judicial court orders.

Continuing the recent improvement of its soft law via guidelines, CADE has now issued the “remedies guidelines”, aimed at providing transparency, predictability and legal certainty in remedies negotiations.³⁴

B. MERGERS

While 2017 was marked by three blocking decisions, 2018 had one merger blocked: the acquisition of Liquegas by Ultragas – the two largest gas producers in Brazil.³⁵ CADE took the view that the merged entity would allow price control in a market with very few players and, allegedly, prone to collusion.

Gun jumping remains on the spotlight. Since the pre-merger regime came into force in 2012, CADE investigated seventeen cases, out of which fourteen had fines agreed or applied. 2018 was responsible for four of those.³⁶

31. See *High Court refuses the ACCC special leave to appeal Pfizer decision*, AUSTRALIAN COMPETITION & CONSUMER COMM’N (Oct. 19, 2018), <https://www.accc.gov.au/media-release/high-court-refuses-the-accc-special-leave-to-appeal-pfizer-decision>.

32. See Media Release, Austl. Competition & Consumer Comm’n, ACCC unsuccessful in appeal against Pfizer (May. 25, 2018), <https://www.accc.gov.au/media-release/accc-unsuccessful-in-appeal-against-pfizer>.

* Bruno Drago, Paola Pugliese and Milena Mundim of Demarest Advogados.

33. Resolução No. 21, de 5 de Setembro de 2018, CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA, de 11 de Setembro de 2018 (Braz.).

34. See *Guia de Remédios Antitruste*, CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA (2018), http://www.cade.gov.br/ acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/copy_of_GuiaRemdios.pdf.

35. See Press Release, Conselho Administrativo de Defesa Econômica, Cade rejects acquisition of Liquegas by Ultragas (Mar. 1, 2018), <http://www.cade.gov.br/noticias/cade-rejeita-aquisicao-da-liquegas-pela-ultragaz>.

36. See *Administrative procedure for Determination in the Concentration Act n° 08700.000631 / 2017-08*, CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA (Aug. 8, 2018), https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWeaYicbuRZEFhBt-n3BfPLlu9u7akQAh8mpB9yOdnxUslO6XIMglEVsPn7Y0qK

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C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

The largest fines in 2018 were imposed in the so-called “salt cartel”³⁷ (289 million BRL) and the “flexible packaging cartel”³⁸ (306 million BRL). In relation to international investigations: two were brought to trial: the “gas-insulated switchgear cartel”³⁹ and the “TV’s color pictured tubes cartel,”⁴⁰ which resulted in the collection of approximately 5 million BRL in fines and over 80 million BRL in settlements jointly.

Settlements amounts accounted for 1.3 billion BRL, more than twice the value obtained from fines resulting from convictions.⁴¹

mvs00lQoLZ-ijUcyybXCEkjp5OF-QUuXmTwQlqpPTZzBaVed3g3SZA2h58c8R0; see also *Administrative procedure for Determination in the Concentration Act n° 08700.003319/2018-49*, CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA (Aug. 8, 2018), https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWeaYicbuRZEFhBt-n3BfPLlu9u7akQA8mpB9yMqVPQfURh4hAJsbf5ZVAOcimeCsTHpldqVf6dDYmOO_MhvSYZ7FUjX3-2bV9igleqsBudDIHJmOJhEXFvfj5Qn; see also *Administrative procedure for Determination in the Concentration Act n° 08700.010394/2015-13*, CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA (Aug. 8, 2018), https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWeaYicbuRZEFhBt-n3BfPLlu9u7akQA8mpB9yOhg2K0gD5FutRz-Ypxmu_cWwxtLgXBNMja0_RrEEHFtyCwoPbVdZgqx9zA_N8rd0WqtqNeK0gvjH_sWRVL_5HW; see also *Administrative procedure for Determination in the Concentration Act n° 08700.006335/2017-83*, CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA (Aug. 8, 2018), https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWeaYicbuRZEFhBt-n3BfPLlu9u7akQA8mpB9yMUhFV5HGulJa2Cwgk0QFG7c7eDH7zWB_Rl9CTO U9Jzx_NvoL2iDgM951SFILc7vukhKmtDjwOsZBrNGWG5owl.

37. See *Administrative procedure for Determination in the Concentration Act n° 08012.005882/2008-38*, CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA (May 23, 2018), https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWeaYicbuRZEFhBt-n3BfPLlu9u7akQA8mpB9yMfBPDx1J3StY6B35CkctdpOyIGpZKMj3qbVmaQSW7KPq8OyintbW2r2VYAZt3Wbc2v5q6PnGPw0ik8JSwsXt2.

38. See *Administrative procedure for Determination in the Concentration Act n° 08012.004674/2006-50*, CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA (July 4, 2018), https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWeaYicbuRZEFhBt-n3BfPLlu9u7akQA8mpB9yMH3wF-mE0EOZuXH9nQC97SgbEP65yIqTDAWMIv1qfBs_6Va1C4U6yxB2MGi7mp49sKuQ9q5lPoLTSrgBefIN.

39. See *Administrative procedure for Determination in the Concentration Act n° 08012.001376/2006-16*, CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA (Aug. 8, 2018), https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWeaYicbuRZEFhBt-n3BfPLlu9u7akQA8mpB9yMtRzquUceEpAss-9LTFIHfTQyXLriDNEfYs knziYQRrhqUiGctsBm7wflom_M58NhBk_-3oQczsGI1akDNHI6V.

40. See *Administrative procedure for Determination in the Concentration Act n° 08012.002414/2009-92*, CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA (Aug. 22, 2018), https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWeaYicbuRZEFhBt-n3BfPLlu9u7akQA8mpB9yNgfq2cz7k5MwLJhWRaBvsImV4d3UxHlwoXY8I5Yqts7CCGUkJMg_SmiMSRxnRvat1nsoagioF3wy89c0AAoiw.

41. See *CADE in numbers*, CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA (2018), <https://cadenumeros.cade.gov.br/QvAJAXZfc/opensoc.htm?document=Panel%2FCADE%20em%20N%C3%BAmeros.qvw&host=QVS%40srv004q6774&anonymouse=true>.

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D. DOMINANCE

CADE indicated that it is closely and increasingly monitoring the financial sector in order to promote technological innovation and allow the entry and growth of competitors in vertically related markets, e.g. cryptocurrency, credit card issuance, payment arrangements,⁴² which already resulted in the payment of almost 55 million BRL by Banco do Brasil, Bradesco, Cielo, Itaú and Redecard in the investigation of payments arrangements.

E. COURT DECISIONS

Following the trend of civil damages arising from cartels, Whirlpool withdrew its appeal (to the Brazilian Supreme Court) that questioned the confidentiality of the documents related to the settlement reached with CADE in the so called “compressors cartel” due to an out-of-court settlement through which it committed to disclose part of the information and documents.⁴³

IV. Canada*

A. LEGISLATIVE DEVELOPMENTS

In 2018, the Canadian Competition Act’s affiliation rules were amended to provide consistent treatment of corporate and non-corporate entities.⁴⁴

42. See *Administrative procedure for Determination in the Concentration Act n° 08700.003599/2018-95*, CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA (Jan. 18, 2019), https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_processo_exibir.php?0c62g277GvPsZDAxAO1tMiVcL9FcFMR5UuJ6rLqPEJuTUu08mg6wxLt0JzWxCor9mNcMYP8UAjTVP9dxRfPBcSmM4M2ETTN1Mv7wWLGnEUiWmCLsr9jExmU5t47oOILQ; see also *Administrative procedure for Determination in the Concentration Act n° 08700.003187/2017-74*, CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA (Jan. 10, 2019), https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_processo_exibir.php?0c62g277GvPsZDAxAO1tMiVcL9FcFMR5UuJ6rLqPEJuTUu08mg6wxLt0JzWxCor9mNcMYP8UAjTVP9dxRfPBcR_i6sE7OkFJok93LEikHfO95Gv2EzMUx9eRqF7SgYE7; see also *Administrative procedure for Determination in the Concentration Act n° 08700.003187/2017-74*, CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA (Jan. 22, 2019), https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_processo_exibir.php?0c62g277GvPsZDAxAO1tMiVcL9FcFMR5UuJ6rLqPEJuTUu08mg6wxLt0JzWxCor9mNcMYP8UAjTVP9dxRfPBcTZ2dseF2a4phQqC9ZBGO1IfvKAmRqf5iESNkXjkKvLo.

43. See *CADE condemns cartel in the international market of refrigerator compressors*, CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA (Apr. 6, 2016), <http://en.cade.gov.br/press-releases/cade-condemns-cartel-in-the-international-market-of-refrigerator-compressors>.

* Adam S. Goodman and Simon Kupi of Dentons Canada LLP.

44. *An Act to amend the Canada Business Corporations Act, the Canada Cooperatives Act, the Canada Not-for-profit Corporations Act and the Competition Act*, S.C. 2018, c. 8 (Can.). These amendments are currently in force: see *Competition Act*, R.S.C. 1985, c. C-34, ss. 2(2)–2(4)(Can.).

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Furthermore, Parliament introduced a public interest review process for airline joint ventures under the Canada Transportation Act.⁴⁵

B. MERGERS

Canada's Competition Bureau ("Bureau") obtained divestitures in five transactions including: Metro Inc./Jean Coutu Group;⁴⁶ Linde AG/Praxair;⁴⁷ La Coop fédérée/Cargill Limited;⁴⁸ and Bayer AG's USD 66 billion acquisition of the Monsanto Company.

C. CARTELS

The Bureau and the Public Prosecution Service made significant changes to the immunity and leniency framework applicable to cartel activity.⁴⁹ Immunity is now provided later in the process, with cooperation expected under a "Grant of Interim Immunity"; immunity for directors, officers and employees will be considered based on an individual's cooperation; and leniency discounts are now contingent on the value of cooperation provided.⁵⁰

In March 2018, the Bureau executed criminal search warrants against the corporate owners of two leading Canadian newspapers.⁵¹ The Bureau's

45. *Transportation Modernization Act*, S.C. 2018, c. 10, ss. 14, 83-88 (Can.). These amendments were not yet in force as of writing.

46. See *Competition Bureau statement regarding METRO Inc.'s acquisition of The Jean Coutu (PJC) Group Inc.*, COMPETITION BUREAU (May 16, 2018), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04363.html>.

47. See *Competition Bureau statement regarding the proposed merger between Linde AG and Praxair, Inc.*, COMPETITION BUREAU (Oct. 26, 2018), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04400.html>.

48. See *Competition Bureau reaches agreement with La Coop fédérée and Cargill Limited*, COMPETITION BUREAU (Nov. 13, 2018), <https://www.canada.ca/en/competition-bureau/news/2018/11/competition-bureau-reaches-agreement-with-la-coop-federee-and-cargill-limited.html>.

49. See *Immunity and Leniency Programs under the Competition Act*, COMPETITION BUREAU (Sept. 27, 2018), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04391.html>; *Launch of revised Immunity and Leniency Programs will enhance effective enforcement and prosecution*, COMPETITION BUREAU (Sept. 27, 2018), <https://www.canada.ca/en/competition-bureau/news/2018/09/launch-of-revised-immunity-and-leniency-programs-will-enhance-effective-enforcement-and-prosecution.html>.

50. See *Immunity and Leniency Programs under the Competition Act*, COMPETITION BUREAU (Sept. 27, 2018), at 73 – 77, <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04391.html>; See *News Release, Competition Bureau, Launch of revised Immunity and Leniency Programs will enhance effective enforcement and prosecution* (Sept. 27, 2018), <https://www.canada.ca/en/competition-bureau/news/2018/09/launch-of-revised-immunity-and-leniency-programs-will-enhance-effective-enforcement-and-prosecution.html>.

51. See *News Release, Competition Bureau, Statement from the Commissioner of Competition regarding searches in the greater Toronto area* (Mar. 12, 2018), <https://www.canada.ca/en/competition-bureau/news/2018/03/statement-from-the-commissioner-of-competition-regarding-searches-in-the-greater-toronto-area.html>.

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investigation concerns the parties' agreement to swap forty-one publications, and the subsequent closure of thirty-six of them.⁵²

Additionally, a thirteenth defendant pled guilty in connection with the Bureau's car parts investigation,⁵³ and four engineering firm employees were charged in connection with allegations of bid rigging regarding infrastructure projects in Gatineau, Quebec.⁵⁴

D. ABUSE OF DOMINANCE AND OTHER ANTICOMPETITIVE PRACTICES

In the Bureau's Competition Tribunal proceeding challenging an "Agency Model" arrangement in the North American e-books market, the final publisher (HarperCollins) settled in January 2018, terminating the matter in Canada.⁵⁵

The Bureau also concluded its litigation against the Toronto Real Estate Board over restrictions to real estate listing information.⁵⁶

E. COURT DECISIONS

In early 2018, the Federal Court of Appeal held that the Bureau would have to balance confidentiality concerns against procedural fairness on a case-by-case basis.⁵⁷

The Canadian Supreme Court granted defendants leave to appeal the British Columbia optical disk drive certification decision.⁵⁸ The Court will consider whether "umbrella purchasers," who purchased from non-cartelists, have a cause of action in Canada.

52. *Id.*

53. See *Thirteenth guilty plea concludes auto parts bid-rigging investigations with fines totalling over \$86 million*, COMPETITION BUREAU (Oct. 19, 2018), <https://www.canada.ca/en/competition-bureau/news/2018/10/thirteenth-guilty-plea-concludes-auto-parts-bid-rigging-investigations-with-fines-totalling-over-86-million.html>.

54. See *Criminal charges laid against four individuals for bid-rigging in the engineering industry*, COMPETITION BUREAU (Jun. 26, 2018), <https://www.canada.ca/en/competition-bureau/news/2018/06/criminal-charges-laid-against-four-individuals-for-bid-rigging-in-the-engineering-industry.html>.

55. See *Competition bureau reaches settlement with HarperCollins in ebooks case*, COMPETITION BUREAU (Jan. 9, 2018), https://www.canada.ca/en/competition-bureau/news/2018/01/competition_bureau_reaches_settlement_with_harper_collins_in_ebooks_case.html.

56. See News Release, Competition Bureau, Supreme Court will not hear Toronto Real Estate Board's appeal (Aug. 23, 2018), <https://www.canada.ca/en/competition-bureau/news/2018/08/supreme-court-will-not-hear-toronto-real-estate-boards-appeal.html>.

57. See *Vancouver Airport Authority v. Commissioner of Competition*, 2018 F.C.A 24, 39 (Can.). The Bureau did not seek leave to appeal. See *Competition Bureau will not appeal court decision regarding public interest privilege*, COMPETITION BUREAU (Jan. 29, 2018), https://www.canada.ca/en/competition-bureau/news/2018/01/competition_bureau_will_not_appeal_court_decision_regarding_public_interest_privilege.html.

58. *Id.*

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V. China*

A. LEGISLATIVE DEVELOPMENTS

China's antitrust enforcement agencies underwent significant institutional reform in 2018. In April 2018, China established the State Administration for Market Regulation ("SAMR"), combining the antitrust enforcement responsibilities of the previous Price Supervision and Antimonopoly Bureau of the National Development and Reform Commission ("NDRC"), the Antimonopoly Bureau of the Ministry of Commerce ("MOFCOM"), and the Antimonopoly and Anti-unfair Competition Bureau of the State Administration of Industry and Commerce ("SAIC").⁵⁹ The reform will enable SAMR to combine enforcement resources, optimize the use of resources for SAMR's enforcement priorities, resolve overlapping enforcement jurisdictions and harmonize inconsistent rules and practices of previous concurrent agencies.

B. MERGERS

During the first three quarters of 2018, SAMR cleared 319 merger cases,⁶⁰ including 261 cases under the simple case procedure.⁶¹ In 2018 SAMR published eleven penalty decisions for transactions not properly notified, the highest number in the past ten years.⁶²

SAMR imposed conditions on four transactions in 2018.⁶³ In *Bayer / Monsanto*, SAMR imposed global divestitures and behavioral remedies,

* Peter Wang and Yizhe Zhang of Jones Day. All resources are dated as of 26 November, 2018.

59. 国务院机构改革方案 [State Council institutional reform plan] (Promulgated by the Nat'l People's Cong., effective Mar. 17, 2018), Xinhua News Agency, http://www.gov.cn/guowuyuan/2018-03/17/content_5275116.htm.

60. In this section, SAMR refers to SAMR itself and its predecessor agencies. See *List of Unconditional Clearance of Concentrations of Undertakings in the first quarter of 2018*, ANTI-MONOPOLY BUREAU (Apr. 4, 2018), <http://fldj.mofcom.gov.cn/article/zcfb/201804/20180402728018.shtml>; see also *List of Unconditional Clearance of Concentrations of Undertakings in the second quarter of 2018*, ANTI-MONOPOLY BUREAU (July 4, 2018), <http://fldj.mofcom.gov.cn/article/zcfb/201807/20180702762364.shtml>; see also *List of Unconditional Clearance of Concentrations of Undertakings in the third quarter of 2018*, ANTI-MONOPOLY BUREAU (Oct. 10, 2018), <http://fldj.mofcom.gov.cn/article/zcfb/201810/20181002793873.shtml>.

61. See *List of Cases under MOFCOM Simple Case Procedure*, ANTI-MONOPOLY BUREAU (Nov. 27, 2018) <http://fldj.mofcom.gov.cn/article/jyzjzjyajs/?>.

62. See *Transactions Not Properly Notified*, ANTI-MONOPOLY BUREAU (2018), <http://fldj.mofcom.gov.cn/article/ztxx/>.

63. See *Announcement No. 31 of the Ministry of Commerce of the People's Republic of China on the approval of Bayer AG's acquisition of Monsanto's equity in the anti-monopoly review decision*, ANTI-MONOPOLY BUREAU (Mar. 13, 2018), <http://fldj.mofcom.gov.cn/article/ztxx/201803/20180302719123.shtml>; See *Announcement of the General Administration of Market Supervision on the approval of the anti-monopoly review decision on the merger of Esilor International and Luxitika Group with additional restrictive conditions*, STATE ADMINISTRATION FOR MARKETING REGULATION (July 25, 2018), http://samr.saic.gov.cn/gg/201807/t20180726_275250.html; See *Announcement of the General Administration of Market Supervision on Approving the Anti-monopoly*

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including giving open access to Bayer's digital agriculture platform in China to Chinese developers on a fair, reasonable and non-discriminatory basis.⁶⁴ In *Essilor / Luxottica*, SAMR prohibited the combined entity from engaging in exclusive behaviors such as bundling, exclusive dealing, discriminatory licensing or selling below cost.⁶⁵ In *Linde / Praxair*, in addition to capacity divestiture, SAMR requested that Linde constantly supply Chinese customers with certain gas mixtures at reasonable prices and quantities and that Linde divest its shares in four joint ventures in China.⁶⁶ In *UTC / Rockwell*, in addition to global divestitures, the combined entity was prohibited from tying or proactive bundling, among other restrictions.⁶⁷

C. ADMINISTRATIVE ENFORCEMENT

During the first three quarters of 2018, SAMR started investigations of twelve alleged cartels/anticompetitive agreements and eleven alleged abuse of dominance cases.⁶⁸ The published decisions of closed cases mainly involved local cartels.

Review Decision on the Consolidation of Linde Group and Praxair with Additional Restrictive Conditions, STATE ADMINISTRATION FOR MARKETING REGULATION (Sept. 30, 2018), http://samr.saic.gov.cn/gg/201809/t20180930_276188.html; See *Announcement of the General Administration of Markets and Regulations on the Approval of the Anti-monopoly Review of the Joint Technology Company's Acquisition of the Rockwell Collins Equity Case with Additional Restrictive Conditions*, STATE ADMINISTRATION FOR MARKETING REGULATION (Nov. 23, 2018), http://samr.saic.gov.cn/gg/201811/t20181123_277177.html.

64. See *Announcement No. 31 of the Ministry of Commerce of the People's Republic of China on the approval of Bayer AG's acquisition of Monsanto's equity in the anti-monopoly review decision*, ANTI-MONOPOLY BUREAU (Mar. 13, 2018), <http://fldj.mofcom.gov.cn/article/ztxx/201803/20180302719123.shtml>.

65. See *Announcement of the General Administration of Market Supervision on the approval of the anti-monopoly review decision on the merger of Essilor International and Luxitika Group with additional restrictive conditions*, STATE ADMINISTRATION FOR MARKETING REGULATION (July 25, 2018), http://samr.saic.gov.cn/gg/201807/t20180726_275250.html.

66. See *Announcement of the General Administration of Market Supervision on Approving the Anti-monopoly Review Decision on the Consolidation of Linde Group and Praxair with Additional Restrictive Conditions*, STATE ADMINISTRATION FOR MARKETING REGULATION (Sept. 30, 2018), http://samr.saic.gov.cn/gg/201809/t20180930_276188.html.

67. See *Announcement of the General Administration of Markets and Regulations on the Approval of the Anti-monopoly Review of the Joint Technology Company's Acquisition of the Rockwell Collins Equity Case with Additional Restrictive Conditions*, STATE ADMINISTRATION FOR MARKETING REGULATION (Nov. 23, 2018), http://samr.saic.gov.cn/gg/201811/t20181123_277177.html.

68. See *The General Administration of Market Supervision held a press conference on "Analysis of Market Environment Situation in the First Three Quarters of 2018"*, STATE ADMINISTRATION FOR MARKETING REGULATION (Oct. 26, 2018), http://www.china.com.cn/zhibo/content_68249388.htm.

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D. COURT DECISIONS

From January through November 2018, Chinese courts handled 836 unfair competition and antitrust cases.⁶⁹ One notable issue is the divergent approaches between Chinese antitrust agencies and Chinese courts toward resale price maintenance (“RPM”). In short, RPM is essentially treated as per se illegal by SAMR, while Chinese courts assess the effect of the alleged RPM on competition.⁷⁰

In a civil antitrust lawsuit filed by a distributor against Hankook Tire in July 2018, the distributor alleged that Hankook forced the distributor to enter into a vertical agreement to restrict resale prices.⁷¹ Although the Shanghai court confirmed the existence of this agreement, it held that there was no evidence showing anticompetitive harm and, therefore, no RPM.⁷²

Similarly, the Guangdong High Court dismissed an appeal of a private civil antitrust lawsuit filed by a distributor against Gree, a Chinese household appliances brand.⁷³ The Court ultimately concluded that the market for household air conditioners from 2012 to 2013 was highly competitive and the alleged RPM did not have any anticompetitive effect. As a result, the conduct at issue did not constitute an RPM violation.⁷⁴

VI. European Union*

A. LEGISLATIVE DEVELOPMENTS

The European Union (“EU”) adopted legislation to prevent “geo-blocking” European consumers’ access to goods or digital content based on their location.⁷⁵ The European Commission (“EC”) also started reviewing the antitrust rules for distribution of goods and the antitrust exemption for liner shipping consortia, both of which are scheduled to expire in 2020.⁷⁶ In

69. See *China Judgements Online*, CHINA JUDGEMENTS ONLINE, <http://wenshu.court.gov.cn> (Last Visited Jan. 31, 2019).

70. See Anti-monopoly Law of the People’s Republic of China (promulgated by the Nat’l People’s Cong., effective Aug. 3, 2008), <http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201303/20130300045909.shtml>, at art. 14; *But see* Yutai v. Hainan Provincial Price Bureau, China Judgements Online (Hainan Provincial Higher People’s Court, Jan. 29, 2018), <http://wenshu.court.gov.cn/content/content?DocID=23889d51-88d8-4e87-aaa4-a85c01845f73&KeyWord=%E9%94%90%E9%82%A6>.

71. See Wang Yue Chen, *Does the minimum resale price agreement constitute a monopoly? The first relevant case in the country judged by the Shanghai Intellectual Property Court gave the answer*, SHANGHAI OBSERVER (July 27, 2018), <https://www.jfdaily.com/news/detail?id=97967>.

72. *Id.*

73. See Pan Lingna, *The first vertical monopoly agreement dispute in Guangdong*, CHINACOURT.ORG (Aug. 3, 2018), <https://www.chinacourt.org/article/detail/2018/08/id/3442145.shtml>.

74. *Id.*

* Peter Camesasca and Laurie-Anne Grelier. All resources are dated as of 26 November, 2018.

75. 2018 O.J. (L 60) 1-2.

76. See European Commission Staff Working Document, *EU competition rules on vertical agreements – evaluation*, <https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018->

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parallel, the EC continued to consider the implications of big data, a policy focus that will likely continue throughout Commissioner Margrethe Vestager's remaining year in office.⁷⁷

B. MERGERS⁷⁸

Consolidation in the agrochemical space continued to attract EU scrutiny. Ultimately, the EC approved Bayer's planned acquisition of Monsanto, subject to divestments.⁷⁹ The EC also cleared Apple's proposed acquisition of Shazam following a review that highlighted its growing focus on access to big datasets.⁸⁰ In another high-profile deal, the EC cleared Disney's plan to acquire parts of Fox, subject to divestments.⁸¹

The EC continued to enforce suspected non-compliance with the merger review process, fining Altice €125 million (~\$148 million) for "gun jumping".⁸²

C. ANTI-COMPETITIVE PRACTICES

The EC continued vigorously prosecuting cartels. Through November 2018, the EC imposed fines totaling about €800 million (~\$948 million) on companies found to be involved in cartels relating to capacitors, maritime car transports, spark plug and car braking systems.⁸³ It also started or continued investigations of suspected cartel activities, including in metal packaging and styrene monomer purchasing, as well as alleged collusion

5068981_en; see also European Commission Press Release IP/18/5921, Commission invites comments on future regime for liner shipping consortia (Sept. 27, 2018), http://europa.eu/rapid/press-release_IP-18-5921_en.htm.

77. See Margrethe Vestager, Commissioner of Competition, European Comm'n, Fair markets in a digital world (Mar. 9, 2018), (transcript available at https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/fair-markets-digital-world_en).

78. See *Merger Cases*, EUROPEAN COMMISSION, <http://ec.europa.eu/competition/mergers/cases/> (Last Visited Jan. 31, 2019).

79. See *Merger Cases: M.8084 Bayer / Monsanto*, EUROPEAN COMMISSION, http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8084.

80. See *Merger Cases: M.8788 Apple / Shazam*, EUROPEAN COMMISSION, http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8788.

81. See *Merger Cases: M.8785 The Walt Disney Company / Twenty-First Century Fox*, EUROPEAN COMMISSION, http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8785.

82. See European Commission Press Release IP/18/3522, Mergers: Commission fines Altice €125 million for breaching EU rules and controlling PT Portugal before obtaining merger approval (Apr. 24, 2018), http://europa.eu/rapid/press-release_IP-18-3522_en.htm.

83. See European Commission Press Release IP/18/962, Antitrust: Commission fines maritime car carriers and car parts suppliers a total of €546 million in three separate cartel settlements (Feb. 21, 2018), http://europa.eu/rapid/press-release_IP-18-962_en.htm; European Commission Press Release IP/18/2281, Antitrust: Commission fines eight producers of capacitors €254 million for participating in cartel (Mar. 21, 2018), http://europa.eu/rapid/press-release_IP-18-2281_en.htm.

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among car manufacturers to delay the development of clean emissions technology.⁸⁴

The EC also fined four consumer electronics manufacturers a total of €111 million (~\$132 million) for imposing minimum resale prices on their online retailers, the EC's first sanction in a case involving resale price maintenance and the use of pricing algorithms and monitoring software.⁸⁵

D. ABUSE OF A DOMINANT POSITION

The EC imposed a €4.3 billion (~\$5 billion) fine on Google for imposing restrictions on Android device manufacturers and network operators.⁸⁶ It accepted remedies offered by Gazprom to address potential concerns related to restrictions on trans-border gas supply.⁸⁷ The EC also began investigating whether destination clauses in Qatar Petroleum's liquefied natural gas ("LNG") supply contracts may have impeded trans-border trade of LNG.⁸⁸

E. COURT DECISIONS

At the end of 2017 (after publication of the 2017 version of the ABA's Year in Review), the EU Court of Justice ruled that luxury good makers can prevent their distributors from using online marketplaces.⁸⁹

84. See *Cartels Cases*, EUROPEAN COMMISSION, <http://ec.europa.eu/competition/cartels/cases/cases.html> (Last Visited Feb.3, 2019).

85. See European Commission Press Release IP/18/4601, Antitrust: Commission fines four consumer electronics manufacturers for fixing online resale prices (July 24, 2018), http://europa.eu/rapid/press-release_IP-18-4601_en.htm.

86. See European Commission Press Release IP/18/4581, Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine (July 18, 2018), http://europa.eu/rapid/press-release_IP-18-4581_en.htm.

87. See Margrethe Vestager, Commissioner of Competition, European Comm'n, Statement by Commissioner Vestager on Commission decision imposing binding obligations on Gazprom to enable free flow of gas at competitive prices (May. 24, 2018) (transcript available at http://europa.eu/rapid/press-release_SPEECH-18-3928_en.htm).

88. See European Commission Press Release IP/18/4239, Antitrust: Commission opens investigation into restrictions to the free flow of gas sold by Qatar Petroleum in Europe (June 21, 2018), http://europa.eu/rapid/press-release_IP-18-4239_en.htm.

89. See EU Court of Justice Press Release No. 132/17, A supplier of luxury goods can prohibit its authorised distributors from selling those goods on a third-party internet platform such as Amazon (Dec. 6, 2017), <https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-12/cp170132en.pdf>.

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VII. India*

A. LEGISLATIVE AND INSTITUTIONAL DEVELOPMENTS

The Government reduced the size of the Competition Commission of India (“CCI”) from seven commissioners to four.⁹⁰ A new chairman, Ashok Kumar Gupta, was appointed in November 2018.⁹¹ The CCI also amended its merger regulations to provide greater clarity on review timelines and procedures.⁹² In addition, the Government initiated a review of the 2002 Competition Act;⁹³ significant reforms are anticipated.

B. CARTELS AND OTHER ANTI-COMPETITIVE AGREEMENTS

Cartel enforcement continues to be one of CCI’s focuses.⁹⁴ This year saw increased attention to pricing in the healthcare and airline industries.⁹⁵ It also saw the continuation of enforcement activities in connection with the automotive parts industry and with alleged collusion in government tenders.⁹⁶

The CCI continues to use leniency as an effective enforcement tool. While CCI is consistent in granting 100% leniency to first-in-line applicants disclosing the existence of a cartel, applicants who apply at a subsequent

* Naval Satarawala Chopra, Partner and Aman Singh Sethi, Senior Associate at Shardul Amarchand Mangaldas & Co. (“SAMCo.”).

90. See Press Release, Press Information Bureau, Cabinet approves rightsizing the Competition Commission of India (Apr. 4, 2018), <http://pib.nic.in/newsite/PrintRelease.aspx?relid=178397>.

91. See About Us: The Commission, COMPETITION COMMISSION OF INDIA (Jan. 17, 2019), <https://www.cci.gov.in/commission>.

92. See Press Release, Competition Commission of India, Competition Commission of India amends the Combination Regulations vide notification dated 9th October 2018 (Oct. 9, 2018), https://www.cci.gov.in/sites/default/files/press_release/Press%20Release%20%283%29.pdf (last accessed on 29 November 2018).

93. See Press Release, Government of India, Government constitutes Competition Law Review Committee to review the Competition Act (Sept. 30, 2018), <http://pib.nic.in/newsite/PrintRelease.aspx?relid=183835>.

94. See PTI, *Leniency provisions ‘fantastic’ in acting against cartels: CCI chief*, ECONOMIC TIMES (May 13, 2018), <https://economictimes.indiatimes.com/news/economy/policy/leniency-provisions-fantastic-in-acting-against-cartels-cci-chief/articleshow/64148661.cms>.

95. See Divya Rajagopal, *CCI expands investigation on unfair pricing to all super specialty hospitals around Delhi*, ECONOMIC TIMES (Sept. 5, 2018), <https://economictimes.indiatimes.com/industry/healthcare/biotech/healthcare/cci-seeks-to-widen-dgs-powers-in-cases-of-alleged-unfair-pricing-by-super-specialty-hospitals-in-and-around-delhi/articleshow/65689446.cms>; see also PTI, *Airlines under CCI scanner for alleged fixing of airfares*, LIVEMINT (Nov. 1, 2018), <https://www.livemint.com/Industry/grAMdTMl8pvq7XVvWQcepN/Airlines-under-CCI-scanner-for-alleged-fixing-of-airfares.html>.

96. See Veena Mani, *CCI issues 100 notices to auto parts firms to investigate global cartels*, BUSINESS STANDARD (Mar. 5, 2018), https://www.business-standard.com/article/companies/cci-issues-100-notices-to-auto-parts-firms-to-investigate-global-cartels-118030501169_1.html.

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stage have received lower (but still generous) reductions.⁹⁷ In the Flashlights case, despite the filing of two leniency applications, CCI found no violation, holding that pure information exchange in itself is insufficient evidence for finding price fixing.⁹⁸

C. MERGER CONTROL

CCI has adopted an expansive definition of when one enterprise “controls” another for purposes of merger review.⁹⁹ The standard applied to evaluate corporate control in this context includes not just *de jure* control, but also the acquisition of special veto rights, material influence, or *de facto* control of the target.¹⁰⁰

CCI has actively pursued cases involving allegations of gun-jumping, including partial-payments, advance consideration, and token payments.¹⁰¹ Penalties, however, have continued to be nominal, generally up to \$14,000, whereas the maximum penalty that can be levied is 1 percent of the combined assets or turnover of the combination, whichever is higher.¹⁰²

97. See, e.g., Competition Commission of India [CCI] July 11, 2018, *Suo Motu Case No. 2 of 2013, In re Cartelisation by broadcasting service providers by rigging the bids submitted in response to the tenders floated by Sports Broadcasters (India)* available at <https://www.cci.gov.in/sites/default/files/Suo%20-%20Moto%20Case%20No.%2002%20of%202013.pdf>; Competition Commission of India [CCI] Aug. 30, 2018, *Suo Motu Case No. 2 of 2017, In re: Anti-competitive conduct in the Dry-Cell Batteries Market (India)* available at <https://www.cci.gov.in/sites/default/files/Suo%20-%20Moto%20Case%20No.%2002%20of%202017.pdf>; Competition Commission of India [CCI] Apr. 19, 2018, *Suo Motu Case No. 2 of 2016, In re: Cartelization in the Zinc Carbon Dry-Cell Batteries Market (India)*; Competition Commission of India [CCI] May 1, 2018 (India), available at https://www.cci.gov.in/sites/default/files/Suo_Moto_02_of_2016.pdf; Competition Commission of India [CCI] Case No. 50 of 2015, *Fortified Solutions (India)*, available at <https://www.cci.gov.in/sites/default/files/50%20of%202015.pdf>. SAMCo. acted for Indo National in the batteries case and for Globecast.

98. See Competition Commission of India [CCI] Nov. 6, 2018, *Suo Motu Case No. 1 of 2017, In re Alleged Cartelisation in Flashlights Market in India (India)* available at <https://www.cci.gov.in/sites/default/files/SuoMoto-01-of-2017.pdf>. SAMCo. acted for Indo National, the non-applicant.

99. See CCI Mar. 12, 2018, *UltraTech Cement, C-2015/02/246 at 12.8, 12.9*, https://www.cci.gov.in/sites/default/files/246_44_PublicV.pdf.

100. See Competition Commission of India [CCI] Mar. 12, 2018, *UltraTech Cement, C-2015/02/246 (India)* available at https://www.cci.gov.in/sites/default/files/246_44_PublicV.pdf; see also Competition Commission of India [CCI] 3 July 2018, *Proceedings under Section 43A of the Competition Act, 2002 against Telenor ASA, Telenor (India) Communications Private Limited and Telenor South Asia Investments Pte Limited, C-2012/10/87*, available at https://www.cci.gov.in/sites/default/files/Notice_order_document/43A_Public_Telenor.pdf.

101. See CCI Aug. 8, 2018, *Notice given under Section 6(2) of the Competition Act, 2002 given by Chhatwal Group Trust, Shrem Infracore Private Limited and Shrem Roadways Private Limited, C-2018/01/544*, https://www.cci.gov.in/sites/default/files/Notice_order_document/43%20A_544_Order.pdf

102. See Competition Commission of India [CCI] Aug. 8, 2018, *Notice given under Section 6(2) of the Competition Act, 2002 given by Chhatwal Group Trust, Shrem Infracore Private Limited and Shrem Roadways Private Limited, C-2018/01/544 (India)*, available at <https://www>

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CCI generally continues to demand India-specific behavioural remedies in global transactions. Such remedies include undertakings to license agricultural technology on fair reasonable and non-discriminatory terms and requiring divestments (even of minority stakes) in competing businesses.¹⁰³

CCI cleared Walmart's acquisition of e-tailer Flipkart despite criticisms of Flipkart's business practices, which include Flipkart's alleged use of deep discounts.¹⁰⁴ CCI considered those criticisms as ancillary concerns and addressed them in separate enforcement proceedings.¹⁰⁵

D. DOMINANCE

In 2018, CCI fined Google \$21 million for abusing its dominance in the online web search and search advertising markets.¹⁰⁶ In contrast, CCI dismissed, at the threshold stage, claims against Uber and Ola alleging that those companies improperly exercised collective dominance or formed part of the same dominant 'group' based on their alleged common shareholders.¹⁰⁷

E. NOTABLE COURT DECISIONS

The Supreme Court set aside a lower appeals court's determination that a cartel had formed in the cylinder manufacturer market, finding that evidence

[.cci.gov.in/sites/default/files/Notice_order_document/43%20A_544_Order.pdf](https://www.cci.gov.in/sites/default/files/Notice_order_document/43%20A_544_Order.pdf); CCI July 30, 2018, Notice given by Adani Transmission Limited, C-2018/01/547, https://www.cci.gov.in/sites/default/files/Notice_order_document/Order%20under%20Section%2043A_1.pdf.

103. *See, e.g.*, Competition Commission of India [CCI] June 14, 2018, Notice under sub-section (2) of Section 6 of Competition Act, 2002 given by Bayer AG, C-2017/08/523 (India), *available at* https://www.cci.gov.in/sites/default/files/Notice_order_document/Order_14.06.2018.pdf; Competition Commission of India [CCI] Sept. 6, 2018, Notice under Section 6(2) of the Competition Act, 2002 given by Linde Aktiengesellschaft and Praxair, Inc., C-2018/01/545 (India), *available at* https://www.cci.gov.in/sites/default/files/Notice_order_document/C-2018-01-545.pdf; Competition Commission of India [CCI] Oct. 27, 2018, Notice under Section 6 (2) of the Competition Act, 2002 given by Agrium Inc. and Potash Corporation of Saskatchewan, Inc., C-2016/10/443 (India), *available at* https://www.cci.gov.in/sites/default/files/Notice_order_document/36%20Order_C-2016-10-443.pdf. SAMCo. acted for Monsanto, Linde, Agrium and PotashCorp.

104. *See* Competition Commission of India [CCI] Aug. 8, 2018, Notice under sub-section (2) of Section 6 of the Competition Act, 2002 filed by Wal-Mart International Holdings, Inc., C-2018/05/571 (India), *available at* https://www.cci.gov.in/sites/default/files/Notice_order_document/Walmart%20PDF.pdf. SAMCo. acted for Walmart.

105. *See* Competition Commission of India [CCI] Nov. 6, 2018, All India Online Vendors Association v Flipkart India, Case No. 20 of 2018 (India), *available at* <https://www.cci.gov.in/sites/default/files/20-of-2018.pdf>. SAMCo. acted for Flipkart.

106. *See* Press Release, Competition Commission of India, CCI issues order against Google for search bias, imposes penalty (Aug. 2, 2018), https://www.cci.gov.in/sites/default/files/press_release/Press%20Release-%2007%20%26%20%2030%20of%202012_0.pdf.

107. *See* Competition Commission of India [CCI] June 20, 2018, Meru India Systems v ANI Technologies and Others, Case Nos. 25 – 28 of 2017, *available at* <https://www.cci.gov.in/sites/default/files/25%20-%2028%20of%202017.pdf>. SAMCo. acted for Uber.

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of parallel pricing, contemporaneous trade association meetings, and an assessment of general market conditions was insufficient to return a finding of an anti-competitive agreement.¹⁰⁸

The High Courts of Delhi¹⁰⁹ and Madras¹¹⁰ issued decisions allowing the Director General's office ("DG") to expand the scope of its investigations to include parties other than those specifically mentioned in the CCI's order directing an investigation. Further, the High Court of Delhi held that the DG can proceed against directors and employees of a company parallel to its investigation of the company itself for violations of the Competition Act.¹¹¹

In addition, the National Company Law Appellate Tribunal ("NCLAT") directed that at the time of final disposal of a case, CCI must rigorously and independently consider all evidence collected by the DG during the course of the investigation, rather than simply affirming the DG's investigation report.¹¹²

VIII. Japan*

A. LEGISLATIVE DEVELOPMENTS

In June, the legislature adopted new "Commitment Procedures" that allow the Japan Fair Trade Commission ("JFTC") and an investigated company to resolve an alleged violation of the Antimonopoly Act ("AMA") by mutual consent.¹¹³ Subsequently, the JFTC issued new Guidelines on the Commitment Procedures¹¹⁴ that provide detailed protocols and examples of

108. See *Rajasthan Cylinders and Containers Ltd. v. Union of India and Another*, (S.C. 2018) Civil Appeal No. 3546 of 2014, *available at* https://www.sci.gov.in/supremecourt/2014/3644/3644_2014_Judgement_01-Oct-2018.pdf.

109. See *Cadila Healthcare v CCI*, (Delhi HC 2018) LPA 160 of 2018, *available at* <http://lobis.nic.in/ddir/dhc/SRB/judgement/13-09-2018/SRB12092018LPA1602018.pdf>.

110. See *Hyundai Motor India Ltd. v CCI*, (Madras HC 2018), WA 340 of 2015, *available at* <https://indiankanoon.org/doc/74566858/>.

111. See *Cadila Healthcare v CCI*, (Delhi HC 2018) LPA 160 of 2018, *available at* <http://lobis.nic.in/ddir/dhc/SRB/judgement/13-09-2018/SRB12092018LPA1602018.pdf>.

112. See *Hyundai Motor India Ltd. v CCI*, (NCLAT, 2018), Competition Appeal (AT) No. 6 of 2017, *available at* <https://nclat.nic.in/Useradmin/upload/6594600435ba2337253f81.pdf>.

* Shigeyoshi Ezaki, Vassili Moussis, Kiyoko Yagami and Naoki Uemura of Anderson Mori & Tomotsune. All resources are dated as of 26 November, 2018.

113. See Press Release, Japan Fair Trade Comm'n [JFTC], Enactment of the Act for Partial Amendment of the Act on the Development of Related Legislation Following the Conclusion of the Trans-Pacific Partnership Agreement (June 29, 2018), *available at* <https://www.jftc.go.jp/en/pressreleases/yearly-2018/June/180629.html>.

114. See Press Release, JFTC, About formulation of "Response Policy on Prosecution Procedures" and Partial Revision of "Policy on Response to Procedure of Business Combination Examination" (Sept. 26, 2018), *available at* <https://www.jftc.go.jp/houdou/pressrelease/h30/sep/180926kakuyaku.html>.

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possible remedies that may be proposed by investigated companies. The Commitment Procedures became enforceable in December 2018.¹¹⁵

B. MERGERS AND ACQUISITIONS

In August, the JFTC gave clearance to Fukuoka Financial Group, Ltd. for the acquisition of shares in The Eighteenth Bank, Ltd. after an in-depth review that took into account remedies (including assignment of account receivables to competitors, periodical reporting to the JFTC, etc.) proposed by the parties.¹¹⁶ In total, for the fiscal year April 1, 2017 to March 31, 2018, the JFTC cleared 299 cases.¹¹⁷ Of these clearances, six — including the acquisition of shares in Santoku Corporation by Hitachi Metals, Ltd. and Broadcom’s integration with Brocade — were cleared contingent on the implementation of remedies proposed by the parties.¹¹⁸

C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

In March, the JFTC filed a criminal accusation with the Public Prosecutor-General against the four largest construction companies in Japan: Taisei Corporation, Kajima Corporation, Obayashi Corporation, and Shimizu Corporation (the so-called “Super 4”), as well as two executives, for bid rigging in the maglev railway construction project.¹¹⁹ According to the JFTC, these companies exchanged information regarding price quotes for the bids and agreed upon the successful bidder on certain construction projects. In October, the Tokyo District Court ordered Obayashi Corporation and Shimizu Corporation to pay fines totaling ¥380 million.¹²⁰ The court’s decisions regarding Taisei Corporation, Kajima Corporation and the two executives remain pending. Although done infrequently, the JFTC can file criminal accusations with the Public Prosecutor-General for “serious and vicious” violations following compulsory investigations.¹²¹ This

115. See Press Release, JFTC, Overview of the Commitment Procedures introduced into the AMA (June, 2018), https://www.jftc.go.jp/en/pressreleases/yearly-2018/July/180711_files/180711_4.pdf.

116. See Press Release, JFTC, The JFTC Reviewed the Proposed Acquisition of Shares of The Eighteenth Bank, Ltd. By Fukuoka Financial Group, Ltd. (Aug. 24, 2018), *available at* <https://www.jftc.go.jp/en/pressreleases/yearly-2018/August/180824.html>.

117. See *Statistical Situation of Business Combination Cases in Fiscal Year 2017*, JFTC (June 6, 2018), https://www.jftc.go.jp/dk/kiketsu/toukeishiryoyoujoukou_files/doukou29.pdf.

118. See *Major Business Combination Cases in Fiscal Year 2017*, JFTC (June 6, 2018), https://www.jftc.go.jp/houdou/pressrelease/h30/jun/180606_01/180606_02.pdf.

119. See Press Release, JFTC, JFTC’s criminal accusation against construction companies over coordination of bids in maglev railway construction project (Mar. 23, 2017), *available at* https://www.jftc.go.jp/en/pressreleases/yearly-2018/March/180323_2.html.

120. See Kyodo, *Court fines two contractors for maglev project bid-rigging*, JAPAN TIMES (Oct. 23, 2018), <https://www.japantimes.co.jp/news/2018/10/23/national/crime-legal/court-fines-two-contractors-maglev-project-bid-rigging/#.XFZJ1FxFKg2w>.

121. Shiteki-dokusen no Kinshi oyobi Koseitorihiki no Kakuho ni Kansuru Horitsu [Dokusen Kinshiho] [Antimonopoly Act] Law No. 54 of 1947, art. 74, para. 1; *The Fair Trade Commission’s Policy on Criminal Accusation and Compulsory Investigation of Criminal Cases Regarding*

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is one of the rare cases where the JFTC has made use of such criminal referral powers.

With respect to cartels, the JFTC issued a series of cease-and-desist orders and surcharge payment orders to several distributors of uniforms for rigging bids for uniforms supplied to the transportation and service industries.¹²² According to JFTC press releases, leniency applications were used in all these cases¹²³.

In addition, in 2018 the JFTC closed three investigations — including investigations of Apple Inc. and Airbnb — without taking any legal action against the investigated companies because they voluntarily proposed remedies (including amendment or waiver of certain contract provisions which are alleged to be restrictive) to rectify the conduct that was suspected to be in violation of the AMA.¹²⁴

IX. Korea*

A. LEGISLATIVE DEVELOPMENTS

In August 2018, Korea’s National Assembly amended the Monopoly Regulation and Fair Trade Law (“FTL”) to allow punitive damages of up to three times actual damages to plaintiffs harmed by (i) cartels or (ii)

Antimonopoly Violations, JFTC (2009), https://www.jftc.go.jp/en/legislation_gls/antimonopoly_rules_files/legislation_guidelinesamapdfpolicy_on_criminalaccusation.pdf.

122. See Press Release, JFTC, The JFTC Issued Cease and Desist Orders and Surcharge Payment Orders to the Distributors of Uniform Ordered by East Japan Railway Company and West Japan Railway Company (Jan. 12, 2018), <https://www.jftc.go.jp/en/pressreleases/yearly-2018/January/180112.html>; see also Press Release, JFTC, The JFTC Issued a Cease and Desist Order to the Participants in Bidding for Uniform (Working Wear) Ordered by Nippon Telegraph and Telephone East Corporation (Feb. 20, 2018), <https://www.jftc.go.jp/en/pressreleases/yearly-2018/February/180220.html>; see also Press Release, JFTC, The JFTC Issued Cease and Desist Orders and Surcharge Payment Orders to the Distributors of Uniforms Ordered by All Nippon Airways Co., Ltd (July 12, 2018), <https://www.jftc.go.jp/en/pressreleases/yearly-2018/July/180712.html>; see also Press Release, JFTC, The JFTC Issued Cease and Desist Orders and Surcharge Payment Orders to the Companies who Participated in the Bidding for Manufacturing of Uniforms and Providing Rental Service of such Uniforms to the Retail Stores of NTT DOCOMO ordered by NTT DOCOMO (Oct. 18, 2018), <https://www.jftc.go.jp/en/pressreleases/yearly-2018/October/181018.html>.

123. *Id.* at n.9.

124. See Press Release, JFTC, Closing the investigation on the suspected violation of the Antimonopoly Act by Apple Inc. regarding its agreements with mobile network operators (July 11, 2018), <https://www.jftc.go.jp/en/pressreleases/yearly-2018/July/180711.html>; see also Press Release, JFTC, Closing the Investigation on the Suspected Violation of the Antimonopoly Act by Airbnb Ireland UC and Airbnb Japan K.K (Oct. 10, 2018), <https://www.jftc.go.jp/en/pressreleases/yearly-2018/October/181010.html>.

* Youngjin Jung, Luke Shin, and Hemi Lee of Kim & Chang.

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retaliatory conduct for filing a complaint with the Korea Fair Trade Commission (“KFTC”).¹²⁵

On August 24, the KFTC proposed the first comprehensive overhaul of the FTL since the FTL was enacted some 38 years ago.¹²⁶ Among other changes, the bill proposes to: (i) allow prosecutors to launch investigations and issue indictments against hard-core cartels (e.g., price fixing, bid rigging) without the KFTC’s referral; (ii) allow private individuals to seek injunctive relief from the courts without having to go through the KFTC; (iii) raise the ceiling amount of fines by 100% for all violation types; and (iv) introduce a “size of transaction” threshold for notifying mergers that would capture mergers with a high acquisition price.

In March 2018, the KFTC introduced amended Guidelines on Criminal Referrals for FTL Violations.¹²⁷ Under the amended Guidelines, which are now in effect, the KFTC is expected to actively pursue criminal referrals of individual executives and employees, in addition to companies.¹²⁸

B. MERGERS

The KFTC approved two global mergers with conditions in 2018.¹²⁹ The KFTC required both structural and behavioral remedies in respect of the proposed acquisition of NXP Semiconductors N.V. by global chipmaker Qualcomm.¹³⁰ The KFTC also approved the proposed merger between Linde AG and Praxir Inc. on the condition that one party divest its assets in Korea and/or the U.S.¹³¹

125. See Press Release, Korean Fair Trade Commission [KFTC], Amendment to the Fair Trade Act Passed by the National Assembly (Aug. 31, 2018), http://www.ftc.go.kr/www/selectReportUserView.do?key=10&rptype=1&report_data_no=7908.

126. See Press Release, KFTC, Notice of Legislative Amendment to the Reorganization of the Fair Trade Act (Aug. 24, 2018), http://www.ftc.go.kr/www/selectReportUserView.do?key=10&rptype=1&report_data_no=7899.

127. See Press Release, KFTC, Enforcement of amendment complaint guidelines (Mar. 8, 2018), http://www.ftc.go.kr/www/selectReportUserView.do?key=10&rptype=1&report_data_no=7698.

128. *Id.*

129. See Press Release, KFTC, Qualcomm Incorporated and other companies violating the restriction of business combination (Jan. 18, 2018), http://www.ftc.go.kr/www/selectReportUserView.do?key=10&rptype=1&report_data_no=7640; Press Release, KFTC, Corrective actions for business combination between global industrial gas manufacturers (Oct. 2, 2018), http://www.ftc.go.kr/www/selectReportUserView.do?key=10&rptype=1&report_data_no=7942.

130. See Press Release, KFTC, Qualcomm Incorporated and other companies violating the restriction of business combination (Jan. 18, 2018), http://www.ftc.go.kr/www/selectReportUserView.do?key=10&rptype=1&report_data_no=7640.

131. See Press Release, KFTC, Corrective actions for business combination between global industrial gas manufacturers (Oct. 2, 2018), http://www.ftc.go.kr/www/selectReportUserView.do?key=10&rptype=1&report_data_no=7942.

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C. CARTELS AND OTHER ANTI-COMPETITIVE PRACTICES

The KFTC imposed corrective orders and fines in a number of cartel cases, including a combined fine of KRW 1.715 billion against two Japanese ball bearings manufacturers,¹³² a combined fine of KRW 119.4 billion against six steelmakers,¹³³ and a combined fine of KRW 36 billion against nine Japanese condenser manufacturers.¹³⁴ The KFTC referred respondent companies in each matter (and one foreign national individual in the latter case) for criminal prosecution.

D. DOMINANCE

In January 2018, the KFTC imposed corrective orders and a combined fine of about KRW 6.2 billion against global CT and MRI equipment maker Siemens and two of its affiliates for excluding a group of CT/MRI maintenance/repair newcomers from the relevant market for Siemens products.¹³⁵

X. South Africa*

A. LEGISLATIVE DEVELOPMENTS

Parliament passed extensive amendments to the Competition Act¹³⁶ designed to address high levels of concentration and support small, medium and black owned businesses. The amendments include new provisions to address buyer power, stronger abuse of dominance provisions and enhanced powers for the Competition Commission (“COMPCOM”) in market inquiries and introduce a veto power for foreign acquisitions which may adversely affect national security.¹³⁷

132. See Press Release, KFTC, The unfair joint action of two steel ball manufacturing and sales companies (Jan. 9, 2018), http://www.ftc.go.kr/www/selectReportUserView.do?key=10&rpptype=1&report_data_no=7626.

133. See Press Release, KFTC, KFTC sanctions six steel manufacturing companies for price fixing (Sept. 7, 2018), http://www.ftc.go.kr/solution/skin/doc.html?fn=afceca844fe8d449f9fb055be39349f67144c43f8896da8b8b0019b32ed58da6&rs=/fileupload/data/result/BBSMSTR_00000002402/.

134. See Press Release, KFTC, KFTC sanctions global electronic parts cartels (Sept. 14, 2018), http://www.ftc.go.kr/solution/skin/doc.html?fn=dd5ea0d53b137c49b01dd822a845bcf3011788204e3a512a4e8c153af2453d7c&rs=/fileupload/data/result/BBSMSTR_00000002402/.

135. See Press Release, KFTC, Abuse of market dominant position such as Siemens (Jan. 17, 2018), http://www.ftc.go.kr/www/selectReportUserView.do?key=10&rpptype=1&report_data_no=7637.

* Lara Granville, Director, Cliffe Dekker Hofmeyr Inc. The author would like to thank Reece May for his help with this chapter.

136. Competition Act 89 of 1998 (S. Afr.).

137. Competition Amendment Bill, 2018, Bill 23B-2018 (S. Afr.), available at <https://pmg.org.za/files/B23B-2018.pdf>.

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B. MERGERS

In 2018, COMPCOM prohibited three mergers.¹³⁸ Public interest remains a key consideration in merger review, as in *Off the Shelf/Chevron*, in which onerous public interest conditions were imposed.¹³⁹

C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

An increasing number of cartel referrals are proceeding to trial rather than being settled. In 2018, the Competition Tribunal (“Tribunal”) considered six cartel cases in a variety of industries.¹⁴⁰

COMPCOM’s long-running healthcare inquiry may be nearing completion. COMPCOM published a provisional report finding that over-servicing and over-supply underlies rising private healthcare costs.¹⁴¹

D. ABUSES OF DOMINANCE

The Tribunal’s *Media24* decision on predatory pricing was overturned by the Competition Appeal Court (“CAC”), which found no predatory pricing

138. These mergers are: intermediate merger between SA Airlink and Safair; small merger between IRL (South Africa) Resources Investment (Pty) Ltd and Mapochs Mine (Pty) Ltd and large merger between British American Tobacco and Twisp (Pty) Ltd. See Media Statement, Competition Commission of South Africa [COMPCOM], Sa Airlink and Safair Merger Abandoned, COMPCOM (Nov. 7, 2018), <http://www.compcom.co.za/wp-content/uploads/2018/01/SA-AIRLINK-AND-SAFAIR-MERGER-ABANDONED.pdf>; see also Weekly Media Statement, COMPCOM, Latest Decisions by the Competition Commission, COMPCOM (July 20, 2018), <http://www.compcom.co.za/wp-content/uploads/2018/01/Weekly-Media-Statement-20-July-2018.pdf>; see also Weekly Media Statement, COMPCOM, Latest Decisions by the Competition Commission, COMPCOM (July 26, 2018), <http://www.compcom.co.za/wp-content/uploads/2018/01/Weekly-Media-Statement-26-July-2018.pdf>.

139. See Media Release, Competition Tribunal, Competition Tribunal approves the second bid to control Chevron SA with conditions (Sept. 13, 2018), <https://news.comptrib.co.za/wp-content/uploads/2018/09/Competition-Tribunal-approves-second-Chevron-SA-transaction-with-conditions.html>.

140. Competition Comm’n v. Global Sustainable Risk Control Mgmt. Pty Ltd., Case No. CR031Jun15 (Oct. 4, 2016), available at <http://www.saflii.org/za/cases/ZACT/2016/111.pdf>; Competition Comm’n v. Primedia (Pty) Ltd., Case No. CR191Mar12 (Feb. 5, 2018), available at <http://www.saflii.org/za/cases/ZACT/2018/11.pdf>; Competition Comm’n v. Eye Way Trading (Pty) Ltd. & Seardel Grp. Trading (Pty) Ltd., Case No. CR073Aug16/CR074Aug16 (Feb. 22, 2018), available at <https://www.comptrib.co.za/assets/Uploads/CR073Aug16-CR074Aug16.pdf>; Competition Comm’n v. Wasteman Holdings (Pty) Ltd., Case No. CR210Feb17 (Sept. 17, 2018), available at <https://www.comptrib.co.za/assets/Uploads/Tribunal-DecisionCommissionWasteman.pdf>; Competition Comm’n v. A’ Africa Pest Prevention CC and Mosebetsi Mmoho ProfI Serv. s CC Case No. CR129Oct16 (Sept. 21, 2018), available at <https://www.comptrib.co.za/assets/Uploads/CR129Oct16.pdf>; Competition Comm’n v. Geometry Global (Pty) Ltd., Case No. CR182Dec16 (Oct. 3, 2018), available at <https://www.comptrib.co.za/assets/Uploads/CR182Dec16.pdf>.

141. *Provisional findings and recommendations report*, COMPCOM (July 5, 2018), <http://www.compcom.co.za/provisional-findings-and-recommendations-report/>.

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had occurred.¹⁴² COMPCOM referred another case alleging predatory pricing against regional airline SA Airlink to the Tribunal.¹⁴³

E. COURT DECISIONS

COMPCOM is appealing a CAC ruling that confirmed the Tribunal and CAC have jurisdiction to issue a declarator on whether a transaction is notifiable, even where COMPCOM has not first considered the transaction.¹⁴⁴ The Constitutional Court confirmed that COMPCOM can use investigatory powers including the issuing of summons, and dawn raids, in investigating whether a transaction is notifiable.¹⁴⁵

XI. United Kingdom*

A. LEGISLATIVE DEVELOPMENTS

Uncertainty continues over the form of the UK's post-Brexit competition regime, although some indication was given by the draft withdrawal agreement published in November 2018.¹⁴⁶

Whatever the fate of that agreement, the Competition & Markets Authority ("CMA") has confirmed it is likely that the UK will introduce a state aid regime that is very similar to the current EU regime.¹⁴⁷

If the deal is agreed (in identical or similar form), the EU Commission and Courts will continue to have jurisdiction over competition law issues during any "transition period."¹⁴⁸ But there will be scope for UK and EU law to diverge in the future.

Corporations that are currently facing a Commission investigation should be aware that, if there is no Brexit deal, the CMA will be free to open a new

142. See *Media 24 (Pty) Ltd. v. Competition Comm'n of So. Africa*, Case No. 146/CAC/Sep16 (Mar. 19, 2018), available at <https://www.comptrib.co.za/assets/Uploads/146.CAC.Sep16-Judgment.pdf>.

143. See Media release, COMPCOM, SA Airlink to be Prosecuted for Abuse of Dominance (Feb. 14, 2018), <http://www.compcom.co.za/wp-content/uploads/2018/01/Airlink-Final.pdf>.

144. Ann Crotty, *Decision by top court could spark big changes in process of merger control*, BUSINESS LIVE (Aug. 16, 2018), <https://www.businesslive.co.za/bd/national/2018-08-16-decision-by-top-court-could-spark-big-changes-in-process-of-merger-control/>.

145. *S.O.S Support Pub. Broad. Coal. v. So. African Broad. Corp. (SOC) Ltd.* 2018 ZACC 37 (S. Afr.).

* Jasvinder Nakhwal & Jonathan Tickner, Peters & Peters Solicitors LLP.

146. TF50 (2018) 55, Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as agreed at negotiators' level on 14 November 2018, European Commission (Nov. 14, 2018), art. 92(1)(b), https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement_0.pdf.

147. Juliette Enser, Director of State Aid, Competition and Markets Authority [CMA], Post-Brexit state aid in the UK (Oct. 30, 2018), (transcript available at <https://www.gov.uk/government/speeches/post-brexit-state-aid-in-the-uk>).

148. See TF50 (2018) 55, Draft Agreement at art. 92(4) – (5).

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investigation even though the Commission's investigation has not concluded.¹⁴⁹

UK competition lawyers have continued to seek qualification in Ireland, to ensure they retain access to EU legal privilege following Brexit.¹⁵⁰

B. MERGERS

A proposed merger between major UK supermarket chains J Sainsbury Plc and Asda Group Ltd is currently under phase 2 investigation by the CMA.¹⁵¹ Among other issues, the CMA has said it will weigh the merged company's increased buying power against the growing competition it would face from discount supermarkets such as Aldi and Lidl.¹⁵²

C. CARTELS & OTHER ANTICOMPETITIVE PRACTICES

The CMA has launched a confidential investigation into suspected anti-competitive arrangements in the financial services sector but has not yet determined there is sufficient evidence to issue a statement of objections.¹⁵³

The CMA also partially closed an investigation into anti-competitive agreements in the pharmaceutical sector to prioritize the use of its resources elsewhere.¹⁵⁴ The decision followed losses in appeals brought by Pfizer and Flynn Pharma in the Competition Appeal Tribunal ("CAT"), which did not accept the CMA's finding that abuse had taken place.¹⁵⁵

The infrequency of criminal cases (the UK's most recent criminal cartel prosecution concluded in September 2017)¹⁵⁶ continues to raise questions about whether the CMA is making sufficient use of its substantial enforcement powers.

149. See *Brexit: merger review implications and recommendations*, NORTON ROSE FULBRIGHT (Jan. 2017), <http://www.nortonrosefulbright.com/knowledge/publications/145758/brexit-merger-review-implications-and-recommendations>.

150. See *No-deal Brexit guidance: Providing legal services in the EU*, THE LAW SOCIETY (Nov. 8, 2018), <https://www.lawsociety.org.uk/support-services/advice/articles/no-deal-brexit-providing-legal-services-in-eu/>.

151. See *J Sainsbury PLC / Asda Group Ltd merger inquiry*, CMA (Dec. 13, 2018), <https://www.gov.uk/cma-cases/j-sainsbury-plc-asda-group-ltd-merger-inquiry>.

152. See Press Release, CMA, CMA sets out scope of Sainsbury's / Asda merger investigation (Oct. 16, 2018), <https://www.gov.uk/government/news/cma-sets-out-scope-of-sainsburys-asda-merger-investigation>.

153. See Press Release, CMA Financial services sector: suspected anti-competitive practices (Nov. 16, 2018), <https://www.gov.uk/cma-cases/financial-services-sector-suspected-anti-competitive-practices>.

154. See Press Release, CMA, Pharmaceutical sector: suspected anti-competitive agreements (Nov. 15, 2018), <https://www.gov.uk/cma-cases/pharmaceutical-sector-suspected-anti-competitive-agreements>.

155. *Flynn Pharma Ltd v CMA* [2018] CAT 11; *Pfizer Inc. v CMA* [2018] CAT 11.

156. See Press Release, CMA, Supply of precast concrete drainage products: criminal investigation (Sept. 15, 2017), <https://www.gov.uk/cma-cases/criminal-investigation-into-the-supply-of-products-to-the-construction-industry>.

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D. CASES

In what the CMA views as a landmark case, the CAT found that golf club manufacturer Ping Europe Limited had breached competition law by banning the sale of its golf clubs on the internet.¹⁵⁷ But the judgment still allows for more limited regulation of online supply.

XII. United States*

A. MERGERS

The U.S. federal antitrust agencies, the Federal Trade Commission (“FTC”) and United States Department of Justice Antitrust Division (“DOJ”) received 2,052 HSR filings in the 2017 fiscal year, a twelve percent increase over 2016. Of these, fifty-one (2.5%) were investigated, and thirty-nine (1.9%) resulted in enforcement action.¹⁵⁸

The most significant merger litigation of 2018 was the DOJ’s challenge to AT&T’s acquisition of Time Warner.¹⁵⁹ The DOJ claimed that the merger would substantially lessen competition in the video programming and distribution market by enabling AT&T to hinder its rivals by forcing them to pay hundreds of millions of dollars more per year for Time Warner’s “must have” networks. After a six-week trial, the U.S. District Court denied the DOJ’s request for an injunction and permitted the transaction to close.¹⁶⁰ The DOJ has appealed the decision.¹⁶¹

The challenge demonstrates a policy shift away from “behavioural” remedies, which require ongoing monitoring and enforcement. Under prior administrations, such remedies had been used to resolve competitive concerns in vertical transactions, but DOJ refused to consider them in the AT&T case.¹⁶²

157. Ping Europe Ltd. v CMA [2018] CAT 13, Sec. G.

* Lisl Dunlop and Shoshana Speiser of Manatt, Phelps & Phillips, LLP.

158. FEDERAL TRADE COMM’N & U.S. DEP’T OF JUSTICE, Hart-Scott-Rodino Annual Report, Fiscal Year 2017 (2017) *available at* https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014_fy_2017_hsr_report_final_april_2018.pdf.

159. Compl., United States v. AT&T Inc. et al, U.S. District Court, D.D.C., Case No. 1:17-cv-02511, (Nov. 20, 2017) *available at* <https://www.justice.gov/atr/case-document/file/1012916/download>.

160. United States v. AT & T Inc., 310 F. Supp. 3d 161, 254 (D.D.C. 2018).

161. United States v. AT&T, INC., ET AL, 18-5214 (D.C. Cir., 2019).

162. Makan Delrahim, Assistant Attorney General, Dept. of Justice, Assistant Attorney General Makan Delrahim Delivers Keynote Address at American Bar Association’s Antitrust Fall Forum (Nov. 16, 2017).

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B. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

The DOJ has continued to prosecute domestic and international cartels, although there has been a notable decrease in the total number of criminal cases filed and penalties imposed by the DOJ in the past two years.¹⁶³

The next frontier of aggressive antitrust enforcement is in the area of “no-poaching” agreements. Following the 2016 release of agency guidance on human-resources related antitrust violations,¹⁶⁴ there have been several actions brought by state attorneys general as well as civil class-action lawsuits.¹⁶⁵ In 2018, the DOJ announced a settlement with rail equipment suppliers Knorr-Bremse AG and a Westinghouse subsidiary in connection with alleged unlawful agreements not to compete for each other’s employees, the first such settlement since the agency guidance.¹⁶⁶

C. AGENCY GUIDANCE AND ADVOCACY

The FTC has held a series of public hearings starting in September 2018 on *Competition and Consumer Protection in the 21st Century*.¹⁶⁷ The hearings examine whether broad-based changes in the economy, evolving business practices, new technologies, or international developments might require adjustments to competition and consumer protection law, enforcement priorities, and policy. To date, the hearings have addressed exclusionary conduct by digital and technology-based platform businesses; acquisitions of potential competitors in digital marketplaces; vertical mergers; and privacy, big data, algorithms, and artificial intelligence.

163. David Higbee, John Cove, Jessica Delbaum, Djordje Petkoski, Ryan Shores, Todd Stenerson and Mark Weiss, *United States: Cartels*, GLOBAL COMPETITION REVIEW (Sept. 7, 2018), <https://globalcompetitionreview.com/insight/the-antitrust-review-of-the-americas-2019/1173899/united-states-cartels>.

164. *Antitrust Guidance for Human Resource Professionals*, FED. TRADE COMM’N & U.S. DEP’T OF JUSTICE (Oct. 6, 2016), <https://www.justice.gov/atr/file/903511/download>.

165. See e.g., Compl., *Deslandes v. McDonalds USA LLC et al.*, Case No. 1:17-cv-04857, N.D. Ill. (June 28, 2017).

166. Press Release, US Dep’t of Justice, Justice Department Requires Knorr and Wabtec to Terminate Unlawful Agreements Not to Compete for Employees (April 3, 2018), <https://www.justice.gov/opa/pr/justice-department-requires-knorr-and-wabtec-terminate-unlawful-agreements-not-compete>.

167. See *Hearings on Competition and Consumer Protection in the 21st Century*, FED. TRADE COMM’N, <https://www.ftc.gov/policy/hearings-competition-consumer-protection> (Last Visited on Feb. 1, 2019).

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WILLIAM P. JOHNSON, WILLEM DEN HERTOOG, MARTIN AQUILINA,
AND SAMUEL G. WIECZOREK*

I. Introduction

Important roles that any lawyer who counsels clients regarding contractual arrangements will play include to anticipate and allocate risk, to make clear the respective obligations of the parties, and to ensure that the writing (when there is one) reflects the actual bargain struck; in short, to facilitate greater certainty. But of course, no matter how effective the lawyer is or how comprehensive the writing is, certainty can be elusive. This is especially true in a cross-border arrangement, when the bodies of law that are potentially applicable are likely to be varied and unfamiliar. Indeed, in the context of cross-border contracts, when there is more than one jurisdiction whose domestic law might apply and there are international treaties that are potentially applicable, uncertainty can quickly follow.

In this article, the authors describe some of the international contract issues that arose and legal developments that occurred in 2018, focusing on both substantive and procedural questions concerning applicable law in a variety of multijurisdictional contractual contexts. Section II describes the continuing relevance in the United States of the United Nations Convention on Contracts for the International Sale of Goods (CISG),¹ an important treaty that governs cross-border sales transactions; Section III recounts the Private International Law (or conflicts of law) analysis by a Dutch court of a contract formation question involving the website General Conditions of an Irish company;² Section IV describes the Supreme Court of Canada's treatment of the relevance of the civil law principle of unforeseeability for an otherwise enforceable contract;³ and Section V identifies notable developments with respect to franchising in the United States.

* The authors are William P. Johnson, Saint Louis University School of Law, St. Louis, Missouri (Sections I and II); Willem den Hertog, denhertog legal, The Hague, The Netherlands (Section III); Martin Aquilina (assisted by Marcela Souki), HazloLaw P.C., Ottawa, Ontario, Canada (Section IV); and Samuel G. Wieczorek, Cheng Cohen LLC, Chicago, Illinois (Section V). The article was edited by William P. Johnson.

1. See United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG].

2. See Hof's-Haag 23 januari 2018, RvdW 2018, m.nt. UDH (Ryanair / PR Aviation) (Neth).

3. See Churchill Falls (Labrador) Corp. v. Hydro-Quebec, [2018] S.C.R. 46 (Can.).

II. Continuing Relevance in the United States of the UN Convention on Contracts for the International Sale of Goods

This section provides an update on developments in 2018 that highlight the continuing relevance within the United States of the CISG.⁴ Calendar year 2018 offered one relatively significant decision on the CISG by a US court.⁵ It was a year that otherwise suggested a relative slowdown in development of the CISG as a relevant body of law for cross-border sales transactions involving US contracting parties.

On the one hand, in 2018 the CISG entered into force for three new states based on accessions that occurred in 2017: Cameroon, Costa Rica, and Fiji.⁶ That continues a recent trend of steady growth and, in particular, of states in the Global South joining the convention.⁷ However, interestingly, no new states acceded to the CISG during 2018, halting the trend of steady growth.⁸ It remains to be seen whether 2018 is an outlier or the start of a new trend.

In addition, despite the fact that the CISG has been in force for the United States for thirty years and applies by its terms to an enormous volume of international trade in goods involving US buyers and sellers,⁹ only four decisions by US courts in 2018 interpreted, analyzed, or ruled on application of the CISG.¹⁰ There were three additional decisions by US courts that reproduced choice-of-law clauses that included express exclusion of the CISG, but those decisions did not engage in any analysis of the CISG or consider its potential application.¹¹

4. See CISG, *supra* note 1.

5. *Transmar Commodity Grp. Ltd. v. Cooperativa Agraria Indus. Naranjillo Ltda.*, 721 F. App'x 88 (2d Cir. 2018).

6. See U.N. Treaty Collection, Int'l Trade and Dev., Chapter X, CISG, Status as of 09-03-2019, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&lang=en (last visited Mar. 18, 2019).

7. See *id.*

8. See *id.* The five-year period immediately prior to 2018 saw an average of 2.2 state accessions per year. See *id.*

9. See William P. Johnson, *Understanding Exclusion of the CISG: A New Paradigm of Determining Party Intent*, 59 BUFFALO L. REV. 213, 213-14, 218-20 (2011).

10. *Transmar Commodity Grp. Ltd. v. Cooperativa Agraria Indus. Naranjillo Ltda.*, 721 F. App'x. 88 (2d Cir. 2018) (vacating the order of the district court and ordering the district court to apply the CISG); *Waterford Crossings Apartments v. Tipton*, No. 3:18-0131, 2018 WL 1811554 (M.D. Tenn. Apr. 16, 2018) (concluding that the CISG is not applicable and remanding to state court); *Target Corp. v. JJS Dev.s Ltd.*, No. 16-cv-1184, 2018 WL 809587 (D. Minn. Feb. 9, 2018) (concluding that the CISG does not apply); *Fed. Nat'l Mortg. Ass'n v. Boldrini*, No. 3:17-CV-2357, 2018 WL 4345279 (M.D. Pa. Jan. 9, 2018) (concluding that the CISG was not applicable and remanding to state court).

11. *MD Distrib. Corp. v. Dutch Ophthalmic Research Ctr.* Int'l B.V., 322 F. Supp. 3d 272 (D.P.R. July 23, 2018); *Graphic Sys., Inc. v. Avanti Comput. Sys. Ltd.*, No. 17-4647 (MJD/HB), 2018 WL 1277007 (D. Minn. Mar. 12, 2018); *SRS Techs., LLC v. Nat'l Minority Trucking Ass'n, Inc.*, No. 17-13207, 2018 WL 925847 (E.D. Mich. Feb. 16, 2018).

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The most significant decision was a decision by the Second Circuit.¹² The *Transmar Commodity Group Ltd.* decision is a summary order that involved a dispute arising out of six nearly identical contracts for the sale of cocoa butter over a period of six months.¹³ The seller, Cooperativa Agraria Industrial Naranjillo Ltda. (Naranjillo), had its place of business in Peru.¹⁴ The buyer, Transmar Commodity Group Ltd. (Transmar), had its place of business in the United States.¹⁵ The dispute arose when Naranjillo allegedly defaulted on its obligation to deliver the cocoa butter, and the dispute went to arbitration.¹⁶

The arbitration panel found that Naranjillo was in default, and it ordered Naranjillo to pay Transmar more than USD \$2.6 million.¹⁷ That award was subsequently vacated by the US District Court for the Southern District of New York on the basis that the parties had not actually agreed to arbitrate their disputes.¹⁸ The district court reached its conclusion by applying domestic New York law.¹⁹ That was error, because the contracts were governed by the CISG.²⁰

The Second Circuit noted in its reasoning that the CISG is different than New York domestic sales law (i.e., Article 2 of the UCC) “in several important respects.”²¹ The court identified Article 8(3) of the CISG and its requirement that courts consider extrinsic evidence to determine the expectations of the parties, as well as Article 9(2) of the CISG, which causes usages to be part of the agreement between the parties under certain circumstances.²² The Second Circuit vacated the order of the district court and remanded the case with instructions that the court below consider Articles 8(3) and 9(2) of the CISG in its analysis.²³

Thus, *Transmar Commodity Group* confirms the general understanding that a different kind of analysis is contemplated by Article 8(3)²⁴ and Article 9(2)²⁵ of the CISG, in both cases, relative to Article 2 of the Uniform Commercial Code. In addition, it highlights the need to remember that the CISG applies

12. See *Transmar*, 721 Fed. App’x. 88. This decision is significant in part, simply because it is a decision of a US federal appellate court, and there is not a large amount of case law of such courts.

13. See *id.* at 89.

14. See *id.*

15. See *id.*

16. See *id.*

17. See *id.*

18. See *id.*

19. See *id.*

20. See *id.*

21. See *id.* at 90.

22. See *id.*

23. See *id.*

24. See Johnson, *supra* note 8, at 266-69.

25. See William P. Johnson, *The Hierarchy That Wasn’t There: Elevating ‘Usage’ to its Rightful Position For Contracts Governed by the CISG*, 32 NORTHWESTERN J. INT’L L. & BUS. 263, 269-70 (2012).

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automatically by its terms, displacing domestic sales law, when it is not effectively excluded by the parties under Article 6.

While there are no other significant substantive decisions of US courts pertaining to the CISG during 2018, there are two additional noteworthy items. The first additional item is one court's application of Article 10 of the CISG.²⁶ In *Target Corp.*, the court arguably misunderstood application of Article 10, paying attention only to one part of the article. The case involved a dispute arising from multiple agreements entered into by Target Corporation (Target) and JJS Developments LTD (ERS) for the sale by Target and purchase by ERS of television sets and other non-TV electronics for recycling or other disposition.²⁷ Target terminated one of the agreements and brought a claim against ERS when ERS did not pay the amount due upon termination.²⁸ ERS brought counterclaims, and Target filed a motion for summary judgment.²⁹

The parties disagreed regarding applicable law, disputing the location of the relevant ERS place of business for determining whether the CISG applied.³⁰ Target's place of business was in the United States; ERS had its principal place of business in Canada but also opened a facility in Indianapolis to facilitate performance under the agreement.³¹ Recognizing that ERS had more than one place of business, the court cited Article 10 of the CISG, which provides direction for determining which place of business is relevant for the purpose of determining the applicability of the CISG.³² Article 10 provides that when a party has more than one place of business, "the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract."³³

In its analysis, the court acknowledged that the contracts identify a Canadian address as the principal place of business for ERS but reasoned that ERS acknowledged that it opened a facility in Indianapolis to accommodate Target's product volume.³⁴ The court concluded that "ERS's place of business for the purposes of ERS's contracts with Target is in the United States. The CISG does not apply."³⁵

The court appears to have been focused on the first part of Article 10, which provides that the relevant place of business is the place of business

26. See *Target Corp. v. JJS Dev.s Ltd*, No. 16-cv-1184, 2018 WL 809587, at *1 (D. Minn. Feb. 9, 2018).

27. See *id.* at *1.

28. See *id.* at *1, *3.

29. See *id.* *1.

30. See *id.* at *3.

31. See *id.*

32. See *id.* at *3.

33. *Id.* (quoting CISG, 1489 U.N.T.S. 3, art. 10(a)).

34. See *id.* at *4.

35. *Id.*

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with the closest relationship to the performance of the contract.³⁶ However, the second part of Article 10 requires that analysis to be done considering what was known or contemplated by the parties at the time the contract was negotiated or finalized.³⁷ Thus, what happens after the contract is finalized – including development of a new facility – is only relevant for Article 10 if it was contemplated by the parties before or at the time of entry into the contract. Practitioners should be aware that other courts might engage in analysis of Article 10 in ways that differ from the analysis in the *Target Corp.* decision.

The second additional item is a reminder of the role that the CISG plays in connection with removal to federal court of a claim brought in state court. Namely, when a dispute arises from a transaction between a US party and a non-US party, there usually will be a statutory basis for jurisdiction in federal courts, even though federal courts are courts of limited jurisdiction, because one basis for jurisdiction arises when the claim involves a federal question, and any claim that arises under a treaty – including the CISG – will involve a federal question.³⁸ If the federal district courts have original jurisdiction, then even if one party files a claim in state court, the other party can remove the claim to federal court.³⁹

In two cases in 2018, defendants attempted to use the CISG to remove a state action to federal court.⁴⁰ Both cases involved pro se defendants located in the United States who had state law claims brought against them in state court by US plaintiffs, and there was no suggestion of any sale of goods.⁴¹

In *Federal National Mortgage Association v. Boldrini*, a state mortgage foreclosure case was pending against the defendant, Antonello Boldrini, in state court in Maryland, and Boldrini filed notice of removal to avoid foreclosure by “asserting various defenses which he alleges exist under” the CISG.⁴² The court stated that Boldrini’s “invocation of the court’s federal question jurisdiction . . . misconstrues the nature of that removal jurisdiction” and concluded that the plaintiff’s “well-pleaded complaint does not reveal that a federal question [under the CISG] is presented on the face of that well-pleaded complaint.”⁴³

Additionally, in *Waterford Crossings Apartments, LaTosha Nichole Tipton* (Tipton) removed to federal court a case brought in state court in Tennessee in which Waterford Crossings Apartments sought a detainer warrant against

36. See CISG, 1489 U.N.T.S. 3, art. 10.

37. See *id.*

38. “The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1441 (2011).

39. *Id.*

40. *Waterford Crossings Apartments v. Tipton*, No. 3:18-0131, 2018 WL 1811554 (M.D. Tenn. Apr. 16, 2018); *Fed. Nat’l Mortg. Ass’n v. Boldrini*, No. 3:17-CV-2357, 2018 WL 4345279 (M.D. Pa. Jan. 9, 2018).

41. See *Waterford*, 2018 WL 1811554, at *1; see *Fed. Nat’l*, 2018 WL 4345279, at *1.

42. See *Fed. Nat’l*, 2018 WL 4345279, at *1.

43. *Id.* at *4.

her in connection with an apartment lease contract.⁴⁴ Tipton’s notice of removal argued that the federal court had original jurisdiction because of the CISG.⁴⁵ The court described Tipton’s contention that there was federal question jurisdiction as “nonsensical.”⁴⁶

While the CISG did not help these two defendants, international contracts lawyers should be mindful of the ability to remove a claim that arises under the CISG to federal court, at least when the claim actually does arise under the CISG.

III. Dutch Court of Appeal Interprets Irish Law

On January 23, 2018, the Hague Court of Appeal rendered a decision⁴⁷ that is quite interesting from the viewpoint of Private International Law (PIL), the system decision-makers use to determine which law is applicable to contractual (and non-contractual) relationships between parties in different jurisdictions.⁴⁸ In this case, the court also answered interesting questions on Dutch copyright law and the European Database Directive.⁴⁹ In this summary of the case, however, only the contractual aspects and their PIL implications are described.

A. THE DISPUTE

The parties to the case were Ryanair, the well-known Irish low-cost airline, and a Dutch company called PR Aviation.⁵⁰ The issue involved PR Aviation’s practice of engaging in “screen-scraping,” or collecting data from Ryanair’s website for its own commercial purposes, including, among other purposes, comparing prices with the prices of other airlines and acting as an intermediary in booking Ryanair flights.⁵¹

Ryanair asserted three causes of action: (1) infringement of “database rights protection” under the Dutch Database Act (*Databankenwet*), the implementation into Dutch law of the European Database Directive; (2) copyright infringement under the Dutch Copyright Act (*Auteurswet*); and (3) breach of the Ryanair website General Conditions (General Conditions), which, according to Ryanair, prohibited PR Aviation’s screen-scraping activities.⁵² Ryanair construed this as malperformance under a contract

44. See Waterford, 2018 WL 1811554, at *1.

45. *Id.*

46. *Id.* at *2.

47. Hof’s-Haag 23 januari 2018, RvdW 2018, m.nt. UDH (Ryanair / PR Aviation) (Neth).

48. PIL is known as Conflict of Laws in the US legal tradition. For more information, see Robert L. Brown & Alan S. Gutterman, *Private International Law*, 1 Cal. Transactions Forms—Bus. Transactions § 7:57 (Mar. 2019).

49. See Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, 1996 O.J. (L 77) 20.

50. See PR Aviation, ECLI:NL:GHDHA:2018:61, ¶ 1.

51. See *id.* ¶ 4.

52. See *id.*

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between the parties that arose, according to Ryanair, when PR Aviation accepted the General Conditions. PR Aviation disputed having accepted them.

Ryanair started litigation before the Utrecht District Court in May 2008 to compel PR Aviation to cease and desist from screen-scraping and to pay damages.⁵³ The Utrecht District Court denied the claims based on the Database Act, but granted them almost entirely based on the Copyright Act.⁵⁴ The court reserved judgment on breach of the General Conditions.

After that decision was rendered by the district court, the case then went (i) to the Amsterdam Court of Appeal, which in March 2012 denied all claims;⁵⁵ (ii) to the Dutch Supreme Court, or *Hoge Raad (HR)*, which in January 2014 certified a prejudicial question to the European Court of Justice (ECJ);⁵⁶ (iii) to the ECJ, which in January 2015 provided an answer to the HR's question concerning the Database Directive;⁵⁷ and (iv) back to the HR again for a final decision in March 2016, when the HR concluded that the claims based on database rights and copyright were rightfully denied, but the claims based on contract must be examined by the Hague Court of Appeal.⁵⁸ That led to the decision rendered in 2018 by the Hague Court of Appeal that is the subject of this section.

B. CASE FOLLOWING REFERRAL TO THE HAGUE COURT OF APPEAL

When the case was referred to the Hague Court of Appeal, all claims based on intellectual property rights had been dismissed.⁵⁹ Thus the only claims before the Hague Court of Appeal (the “Court of Appeal”) were those based on the contract that Ryanair claimed was established when PR Aviation accepted the Ryanair website's General Conditions. PR Aviation disputed having accepted these General Conditions. Ryanair also asserted a claim based on tort (*onrechtmatige daad*⁶⁰), but this was denied by the Court of Appeal, mostly on formal grounds.⁶¹

To determine whether PR Aviation accepted Ryanair's General Conditions, the Court of Appeal first had to determine the jurisdiction whose law would apply. To do so, the Court of Appeal had to factually

53. See *id.* ¶ 4.

54. See Hof's-Haag 23 januari 2018, RvdW 2018, m.nt. UDH (Ryanair / PR Aviation) (Neth) ¶ 4.

55. See *id.* ¶¶ 7-9. Full case can be found at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2018:61> (in Dutch).

56. See *id.* ¶¶ 10-12.

57. See *id.* ¶ 13. Full case can be found at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62014CJ0030&from=NL>.

58. See *id.* ¶ 14. Full case can be found at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2016:390> (in Dutch).

59. See Hof's-Haag 23 januari 2018, RvdW 2018, m.nt. UDH (Ryanair / PR Aviation) (Neth) ¶ 15.

60. Art. 6:162 BW (Neth.).

61. See *PR Aviation*, ¶ 15.

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establish what period was relevant and how the claimed acceptance occurred (if at all), that is, by “*browse-wrapping*” (continuing to browse after having been alerted to the existence of general conditions) or by “*click-wrapping*” (actively clicking or ticking an “*accept*” button or box).⁶² According to the Court of Appeal, the latter method more readily leads to acceptance (and therefore contract formation) than the former.

The Court of Appeal found that the relevant period was 2004 through August 11, 2010.⁶³ As to the method of possible acceptance, the Court of Appeal found, partly on formal grounds due to unfortunate litigation by Ryanair, that in the relevant period Ryanair employed the browse-wrapping method.

The General Conditions originally contained a choice-of-law clause choosing English law (2004 – early 2009) and later choosing Irish law (early 2009 – August 11, 2011).⁶⁴ It turned out that since April 1, 2009, the parties had concentrated on the potential applicability of Irish law alone, and had more or less forgotten about English law.⁶⁵ At a hearing before the Court of Appeal, the parties’ attorneys declared that the “parties did not wish to complicate the matter” and that they were willing to assume that English law on this matter was the same as Irish law.⁶⁶ The Court of Appeal interpreted this to mean that insofar as the Court of Appeal finds English law to be applicable, the parties (retroactively) made a choice for Irish law (article 3, sections 1 and 2, Rome I Regulation).⁶⁷

The Court of Appeal had to determine the applicable law by applying the rules of the Rome I Regulation, as well as the preceding Rome Convention⁶⁸ for the period ending December 17, 2009.⁶⁹ Fortunately, at least as was applicable in this instance, the Court of Appeal found that both are largely the same.

Both follow the *bootstrap principle*. That is, they both stipulate that the validity of the choice of law provision must be decided by the law applicable if the choice of law were valid. Thus, the Court of Appeal turns to Irish law.⁷⁰

The parties each presented learned opinions by Irish barristers on Irish law in this respect. Although the Court of Appeal stressed that according to

62. See *id.* ¶ 28.

63. See *id.* ¶ 29.

64. See Hof’s-Haag 23 januari 2018, RvdW 2018, m.nt. UDH (Ryanair / PR Aviation) (Neth) ¶ 54.

65. See *id.* ¶ 55.

66. See *id.*

67. See *id.*; see also Council Regulation 593/2008, of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), 2009 O.J. (L 177) 6 (EC).

68. See Council Convention On The Law Applicable To Contractual Obligations, 1980 O.J. (L 226) 1 (EEC).

69. See Hof’s-Haag 23 januari 2018, RvdW 2018, m.nt. UDH (Ryanair / PR Aviation) (Neth) ¶ 44.

70. See *id.* ¶¶ 59-60.

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Dutch law the contents of foreign law had to be applied by the Court of Appeal *ex officio* and were not facts requiring proof, the Court of Appeal still felt it was necessary to discuss the parties' submissions on this matter.⁷¹

First the Court of Appeal considered four Irish decisions submitted by Ryanair. After careful consideration, the Court of Appeal found that three of these decisions did not concern choice of law at all, but rather choice of jurisdiction, to which different rules apply. The fourth was given in an interlocutory application that has no binding authority.

The Court of Appeal then turned to general principles of Irish law. After discussing general principles of Irish contract law concerning contract formation (offer, acceptance, consideration and intention to create legal obligations), the Court of Appeal focused on the question whether PR Aviation could be said, through the principle of *browse-wrapping*, to have accepted the choice-of-law clause in the General Conditions.⁷²

The Court of Appeal applied the *objective principle*.⁷³ It quoted Professor Clark in his handbook on Irish contract law: "A person may be bound by his conduct if, objectively speaking, that person conducts himself or herself in such a way that the conduct would indicate to a reasonable person that he or she intends to be bound."⁷⁴

It then found that PR Aviation cannot be said to have accepted the choice of law in the General Conditions through *browse-wrapping*:

PR Aviation visited the website, through automated means, to collect data that were freely and free of charge available to anyone and were not legally protected by any right, neither by database right, copyright or otherwise. Where these legally unprotectable data are published and are freely and free of charge made available to anyone on a public website, a reasonable person will not consider that PR Aviation, merely by visiting the website and/or collecting those data, wanted to be bound by the conditions of use that prohibit collecting and using those data, nor to be bound by the choice of law contained therein.⁷⁵

Thus, Irish law is not applicable to a possible contract between Ryanair and PR Aviation through the choice-of-law clause in the General Conditions.

In a somewhat surprising twist the Court of Appeal then found that under general applicable law rules as laid down in the Rome Convention and the Rome I Regulation, the applicable law to a contract between parties, if it must be deemed to have been reached is, ironically, *Irish law*, as the law of the party performing the characteristic performance (Article 4 of the Rome

71. *See id.* ¶ 60.

72. *See id.* ¶ 74.

73. *See id.* ¶ 77.

74. *See id.*

75. *See id.* ¶ 79.

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Convention) or the law of the service provider (Article 4 of the Rome I Convention).

C. CONCLUSION

Given the Court of Appeal's reasoning in denying that PR Aviation had accepted the choice-of-law clause in the General Conditions, according to Irish law, it is no surprise that it concluded that PR Aviation also had not accepted the other articles of the General Conditions, notably those forbidding it to indulge in *screen-scraping*. Ryanair's claims were therefore denied.⁷⁶

This decision is a wonderful Dutch example of the application of PIL rules. The author leaves it to the Irish legal community to determine whether it constitutes a precedent that is binding on Irish courts.

IV. The (In)existence of the Doctrine of Unforeseeability in Québec's Civil Law System

In the very recently decided *Churchill Falls (Labrador) Corp. v. Hydro-Québec*,⁷⁷ the Supreme Court of Canada (the "SCC") considered whether the doctrine of unforeseeability applies to contracts entered into under Québec's civil law system. The SCC attempted to clarify the application of what is known in many jurisdictions as the concept of "hardship," ruling that, although the Civil Code of Québec may allow the renegotiation of contractual obligations in cases of hardship resulting from unforeseen events, hardship cannot be broadened to encapsulate the doctrine of unforeseeability.⁷⁸ Moreover, the SCC rejected the existence of the right to renegotiate terms of contracts on the grounds of good faith and equity alone, because allowing the renegotiation of a contract on such grounds would also result in a broadening of the scope of those principles to include the doctrine of unforeseeability.

A. THE CASE

In 1969, Churchill Falls (Labrador) Corp. entered into an agreement with Hydro-Québec for the construction and operation of a hydroelectric plant. According to the agreement, which had a duration of 65 years, Hydro-Québec would be responsible for installing power lines to carry electricity into the province and would purchase most of the electricity produced by Churchill Falls, whether it needed it or not. On the other hand, Hydro-Québec negotiated and obtained the right to purchase electricity at fixed prices for the entire term of the contract. But shortly after the execution of the contract, the price of electricity rose sharply due to an increased demand

76. See *id.* ¶ 99.

77. *Churchill Falls (Labrador) Corp. v. Hydro-Quebec*, [2018] S.C.R. 46 (Can.).

78. See *id.* ¶¶ 88-92, 99

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in the market. Churchill Falls was consequently saddled with an agreement to sell electricity to Hydro-Québec at prices far below market rates.⁷⁹

Considering the drastic change of circumstances, Churchill Falls sought to obtain an order compelling the renegotiation of the contract on the basis that its terms had become unfair and that a draconian rise in the price of electricity was unforeseen at the time the parties entered into the contract. Churchill Falls based its plea on the doctrine of unforeseeability, as well as the concepts of good faith and equity.⁸⁰

In *Churchill Falls*, the SCC accepted Hydro-Québec's position that the appellant's argument regarding the unforeseeability of the changes in the price of electricity was nothing other than an attempt to import into Québec law the doctrine of unforeseeability. Yet, this doctrine, or "théorie de l'imprévision" as it is known in French law,⁸¹ according to which parties ought to be excused from performing contractual obligations the performance of which has become excessively onerous due to unforeseen events, does not apply in Québec.⁸² The legislature's decision not to turn unforeseeability into a stand-alone legal rule must be respected.⁸³

French courts have traditionally and quite consistently rejected demands to renegotiate contracts in the face of hardship. It is therefore surprising for such an argument to be put forward.

The SCC also refused to apply "equity"⁸⁴ to grant an order for the renegotiation of the contract, explaining that by doing so, the court would be indirectly introducing the doctrine of unforeseeability in Québec law.⁸⁵ The SCC explained that equity would only potentially apply if there was a situation of inequality or vulnerability in regard to one of the parties, which was not the case.⁸⁶ The SCC also stressed that equity applies to "imperfect" contracts.⁸⁷ Here, however, the contract could not be considered imperfect, as all the necessary elements of a contract were present when the agreement

79. *See id.* ¶ 3.

80. *See id.* ¶¶ 4-5.

81. Quebec's legal system takes its origins from French law and it is thus not unheard of for a litigant to invoke it to clarify or supplement Québec law.

82. *See id.* ¶¶ 92-3, 105-06.

83. *See id.* ¶ 105.

84. When Quebec courts refer to equity (*équité*), they are not referring to the set of rules that originated in England in the middle ages. In French law, as well as in Quebec law, "*équité*" refers to judicial fairness rather than to a legal system with its own rules, which can only be applied through indirect means such as statutory interpretation. In French law, "*équité*" is often applied where a party has abused its rights. *See generally*, Anne-Francois Debruche, *What is Equity? Of Comparative Law, Time Travel and Judicial Cultures*, 39 ERUDIT REVUE GÉNÉRALE DE DROIT 203 (2009), <https://www.erudit.org/fr/revues/rgd/2009-v39-n1-rgd01547/1026985ar.pdf> (last visited Mar. 18, 2019) (explaining the French view of equity and contrasting it with the English view).

85. *Churchill Falls (Labrador) Corp. v. Hydro-Quebec*, [2018] S.C.R. 46, ¶¶ 94-5, 106, 109 (Can.).

86. *See id.* ¶ 109.

87. *See id.* ¶ 179.

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was drafted and executed and its wording aligned perfectly with the parties' intentions and expectations.

That the circumstances that prevailed at the time a contract was concluded have now changed is insufficient to argue that the contract is imperfect. If this approach were to be followed, for a contract to be perfect, the provisions in the agreement would have to cover all possible unforeseeable situations capable of causing any sort of imbalance, which is something virtually impossible – and unreasonable – to accomplish. The argument that parties cannot consent to something that they are not aware of because it is unforeseen at the moment of the execution of the contract therefore did not prevail. If that argument were to be accepted, it would open the floodgate to the reopening of several contracts on the basis that the parties could not have agreed to different conditions imposed by a change in circumstances, and that it is therefore unfair for them to be bound by their agreements.⁸⁸

B. CANADA'S APPROACH TO GOOD FAITH

Canada's provinces that have adopted a common law system—namely, all provinces other than Québec—have denied the existence of a stand-alone duty of good faith in its contract law system for years.⁸⁹ Although the principle of good faith has been explicitly recognized in the law of Québec since 1994,⁹⁰ it cannot be used to temper the principles of the binding force of contracts and autonomy of will.⁹¹ Nonetheless, the SCC recognized that if unforeseeable events cause hardship to a party who can prove that it did not accept to bear the unforeseen risks inherent to the bargain when it concluded the contract, the principle of good faith might give rise to a right to renegotiate the contract. Here, however, Hydro-Québec's refusal to renegotiate the contract did not constitute a breach of that duty and did not amount to a disruption of the contract's equilibrium.⁹² The SCC found

88. *See id.* ¶ 109.

89. This approach was altered in 2014 in the SCC's landmark decision *Bhasin v. Hrynew*, 2014 SCC 71, in which the court found that there is a duty to act honestly, not capriciously and arbitrarily, in the performance of contractual obligations. Nonetheless, it is hard to argue that the application of such good faith duty has been broadly accepted in common law provinces and the courts of Ontario and Saskatchewan have rejected plaintiffs' attempts to establish a breach of a duty of good faith implying that *Bhasin* didn't provide any significant changes to the law. *See* James Hardy, *Did Bhasin Honestly Change Canadian Contract Law?*, THORNTON GROUT FINNIGAN Oct. 20, 2017, <http://www.tgf.ca/resources/publications/publication/did-bhasin-honestly-change-canadian-contract-law> (last visited Mar. 18, 2019).

90. *See* Civil Code of Québec, S.Q. 1991, c 64, arts 6-7 (Can.). Article 6: "Every person is bound to exercise his civil rights in accordance with the requirements of good faith."; article 7: "No right may be exercised with the intent of injuring another or in an excessive and unreasonable manner, and therefore contrary to the requirements of good faith."

91. *Churchill Falls (Labrador) Corp. v. Hydro-Quebec*, [2018] S.C.R. 46, ¶ 13 (Can.).

92. *See id.* ¶¶ 118-19.

Hydro-Québec's conduct to be neither unreasonable nor aimed at maliciously preventing the performance of the contract by Churchill Falls.⁹³

In the end, the SCC refused to recognize a right to renegotiate the contract on the basis of hardship because the contract between Churchill Falls and Hydro-Québec was of such nature as to imply that Churchill Falls accepted the unforeseen risks related to the fluctuation of the prices of electricity when it agreed to sell it for a fixed rate to Hydro-Québec in return for certain guarantees.⁹⁴

On an a contrario reading of the case, it would be possible to rely on the duty of good faith to force a renegotiation of the terms of a contract when unforeseen events cause hardship to a contracting party that the party clearly purported not to accept.

C. CONCLUSION

In this writer's view, the SCC's approach to the sanctity of contracts is cause for concern. Indeed, the SCC's willingness to analyze the contract to ascertain what the SCC refers to as the contract's "paradigm," that is, the way the parties have allocated the risks and benefits between them, as well as its efforts to qualify the contract as transactional rather than relational,⁹⁵ appears to leave the door open for the imposition of a disguised doctrine of unforeseeability. Justice Rowe's dissenting opinion only increases the possibility of this occurring in the future.⁹⁶ Thus, when the agreement is considered relational or when the contract's paradigm is not clear or is deemed not to establish a proper equilibrium between the parties (as determined ex post facto by a court), it now appears open, in the face of a change of circumstances, for an aggrieved party to petition a court to have the contract renegotiated. With deference, by penning a multi-faceted analysis of hardship, the SCC has rendered quite a disservice to those placing their trust in a contract governed by the law of Québec.

V. Franchising in the United States

With two notable exceptions, franchising in the United States remained fairly status quo during the 2018 calendar year. The two biggest developments surrounded employment issues. First, the joint-employer issue continued to evolve in 2018, with the pendulum seemingly swinging back toward the more traditional view that franchisors are not joint employers of

93. See *id.* ¶ 119.

94. See *id.* ¶¶ 54, 80, 124.

95. See *Churchill Falls (Labrador) Corp. v. Hydro-Quebec*, [2018] S.C.R. 46, ¶ 59 (Can.). The theory of relational contracts, developed by American legal scholars, prioritizes the preservation of the loyalty between the parties rather than the strict performance of contractual obligations. For more information. See Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089 (Sept. 1981).

96. See *Churchill Falls (Labrador) Corp. v. Hydro-Quebec*, [2018] S.C.R. 46, ¶ 140-90 (Can.).

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their franchisees' employees.⁹⁷ Second, so-called “no-poach” provisions in franchise agreements have come under heavy scrutiny and attack, both by regulators and by employees in 2018.⁹⁸ Those two developments, together with a third matter currently percolating at the Federal Trade Commission, are the subject of this Section.

A. JOINT-EMPLOYER ISSUE CONTINUES TO BE IN FLUX

1. *Developments from the NLRB*

On September 14, 2018, the National Labor Relations Board (NLRB) published a Notice of Proposed Rulemaking in the Federal Register regarding its joint-employer standard.⁹⁹ Under the proposed rule, “an employer may be found to be a joint employer of another employer’s employees only if the two employers share or codetermine the employee’s essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction.”¹⁰⁰ As the NLRB explains, “a putative joint employer must possess and actually exercise substantial direct and immediate control over the employees’ essential terms and conditions of employment in a manner that is not limited and routine.”¹⁰¹

This new standard, if adopted, would reverse the standard introduced by the NLRB in the *Browning-Ferris* case in August of 2015, which established that a company could be deemed a joint employer even if its “control” over the essential working conditions of another business’s employees was indirect, limited, and routine or contractually reserved but never exercised.¹⁰²

As of the time of this writing, these are merely proposed rules and do not yet formally reverse the *Browning-Ferris* standard. The publication of the proposed rules commenced a 60-day comment period (which the NLRB has extended to December 13, 2018),¹⁰³ during which the public may submit comments to the NLRB regarding the proposed rules. If this new standard is adopted, it should bring clarity that franchisors – at least under typical circumstances – are not joint employers with their franchisees of the

97. See, e.g., *In re Domino’s Pizza Inc.*, No. 16-CV-2492 (AJN)(KNF), 2018 WL 4757944 (S.D.N.Y. Sept. 30, 2018).

98. See, e.g., Press Release, Illinois Attorney General, Attorney General Madigan Announces Investigation of No-Poach Agreements at National Fast Food Franchises (July 9, 2018), http://www.illinoisattorneygeneral.gov/pressroom/2018_07/20180709.html (last visited Mar. 18, 2019).

99. The Standard for Determining Joint-Employer Status, 83 Fed. Reg. 46681-01 (proposed Sept. 14, 2018) (to be codified 29 C.F.R. ch. 1).

100. *Id.* at 46681.

101. *Id.*

102. *Browning-Ferris Indus. of Cal., Inc.*, 362 N.L.R.B. No. 186 (Aug. 27, 2015).

103. Press Release, Office of Public Affairs of National Labor Relations Board, NLRB Extends Time for Submitting Comments on Proposed Joint-Employer Rulemaking (Oct. 30, 2018), <https://www.nlr.gov/news-outreach/news-story/nlr-extends-time-submitting-comments-proposed-joint-employer-rulemaking> (last visited Mar. 18, 2019).

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franchisees' employees under the federal laws within the NLRB's purview. It also remains to be seen whether other federal agencies (particularly the United States Department of Labor and the Occupational Safety and Health Administration) follow suit after having previously changed their standards to align with the NLRB's position.

2. *Case Law Developments on the Joint-Employer Issue*

From a caselaw perspective, the decisions have been interesting in their interpretations of joint employment, not only under related federal statutes, but also under various states' employment laws. For example, on September 30, 2018, the United States District Court for the Southern District of New York granted summary judgment in favor of the franchisor of the Domino's Pizza franchise system, holding that the franchisor is not a joint employer of its franchisees' employees for purposes of the Fair Labor Standards Act and the New York Labor Law.¹⁰⁴

In making its decision, the court examined four "formal control factors," namely "whether the alleged employer: (1) had the power to hire and fire employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records."¹⁰⁵ The court found that the plaintiffs had failed to satisfy any of these four factors, and thus moved to an analysis of "functional control factors" to determine whether the franchisor was a joint employer.¹⁰⁶

Under the "functional control factors," the court examines:

(1) whether the alleged employers' premises and equipment were used for the plaintiffs' work; (2) whether the subcontractors had a business that could or did shift as a unit from one putative joint employer to another; (3) the extent to which [the] plaintiffs performed a discrete line job that was integral to the alleged employers' process of production; (4) whether responsibility under the contracts could pass from one subcontractor to another without material changes; (5) the degree to which the alleged employers or their agents supervised [the] plaintiffs' work; and (6) whether [the] plaintiffs worked exclusively or predominantly for the alleged employers.¹⁰⁷

The court found that the second, third, and sixth factors did not really apply to the franchisor-franchisee context and that the plaintiffs did not satisfy the remaining factors. As such, the franchisor was not a joint

104. *See In re Domino's Pizza Inc.*, No. 16-CV-2492 (AJN)(KNF), 2018 WL 4757944, at *10 (S.D.N.Y. Sept. 30, 2018).

105. *Id.* at *5 (citing *Irizarry v. Catsimatidis*, 722 F.3d 99, 105 (2d Cir. 2013)).

106. *Id.* at *7.

107. *Id.* (citing *Olvera v. Bareburger Group LLC*, 73 F. Supp. 3d 201, 205-06 (S.D.N.Y. 2014)).

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employer of the plaintiff franchisees under a theory of “functional control.”¹⁰⁸

Overall, these developments indicate that the joint-employer issue in 2019 will continue to be a developing topic, but that the trend seems to be toward finding that in a standard franchisor-franchisee relationship, franchisors are not joint employers with their franchisees.

**B. NO-POACH PROVISIONS IN FRANCHISE AGREEMENT FACE
SCRUTINY**

In 2018, the issue of “no-poach” provisions in franchise agreements gained increased visibility, resulting in various states’ attorneys general commencing investigative proceedings and, in some cases, filing lawsuits against certain franchisors,¹⁰⁹ and the plaintiffs’ bar filing class-action lawsuits on behalf of franchisee employees based on these provisions in franchise agreements.

In general, a “no-poach” provision prohibits franchisees from soliciting or hiring the employees of the franchisor or other franchisees.¹¹⁰ Traditionally, franchisors included these provisions to protect franchisees so that the franchisor and its franchisees do not expend time, effort, and money to train an employee only to have another franchisee “poach” that employee. The franchisee employees are not parties to those agreements and are often unaware of the existence of those no-poach provisions.

In January 2018, the Attorney General of Washington State began investigating no-poach provisions among fast-food franchisors on the basis that those provisions violated the state’s antitrust laws.¹¹¹ Then, in July 2018, attorneys general from 10 states and the District of Columbia sent a letter to eight national fast-food franchisors¹¹² requesting information from those franchisors on their use of no-poach provisions that restricted workers’ ability to seek a job with another franchisee in the same franchise system.¹¹³ The letter indicated the attorneys general were concerned that:

108. *Id.* at *8–9.

109. *See* Press Release, Washington State Office of the Attorney General, AG Ferguson Announces Major Milestones in Initiative to Eliminate No-Poach Clauses Nationwide, Files Lawsuit Against Jersey Mike’s (Oct. 15, 2018), <https://www.atg.wa.gov/news/news-releases/ag-ferguson-announces-major-milestones-initiative-eliminate-no-poach-clauses> (last visited Mar. 18, 2019).

110. *See* Press Release, Illinois Attorney General, Attorney General Madigan Announces Investigation of No-Poach Agreements at National Fast Food Franchises (July 9, 2018), http://www.illinoisattorneygeneral.gov/pressroom/2018_07/20180709.html (last visited Mar. 18, 2019).

111. *See* AG Ferguson, *supra* note 109.

112. The fast-food franchisors were Arby’s, Burger King, Dunkin’ Donuts, Five Guys Burgers and Fries, Little Caesars, Panera Bread, Popeyes Louisiana Kitchen and Wendy’s. *See* AG Madigan, *supra* note 110.

113. *See id.*

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By limiting potential job opportunities, these [no-poach] agreements may restrict employees' ability to improve their earning potential and the economic security of their families. These provisions also deprive other franchisees of the opportunity to benefit from the skills of workers covered by a No Poach Agreement whom they would otherwise wish to hire. When taken in the aggregate and replicated across our States, the economic consequences of these restrictions may be significant.¹¹⁴

Cited in the letter was a Princeton University study conducted in July, 2017, that found that 80 percent of 156 quick-service restaurant franchise contracts analyzed in the study contained no-poach provisions.¹¹⁵

Arising out of these investigations, as of October 15, 2018, the Washington State Attorney General has entered into binding "assurances of discontinuance" with 30 franchisors, requiring them to remove no-poach provisions from both their existing franchise agreements nationwide and the forms of franchise agreement they were then using with new franchisees nationwide.¹¹⁶ Of these 30 franchisors, the majority are within the restaurant industry, but the Washington attorney general has also entered into assurances of discontinuance with franchisors in the fitness, auto-repair, and convenience-store industries.¹¹⁷

Sensing an opportunity to capitalize on these franchisors entering into the assurances of discontinuance, employees of various fast-food franchisees have begun filing follow-on class-action lawsuits against franchisors (and sometimes their franchisees) alleging violation of antitrust statutes by franchisors and franchisees who have entered into franchise agreements that contain no-poach provisions.¹¹⁸

In addition to the investigations conducted by the state attorneys general and the resulting follow-on class-action lawsuits, US Senators Cory Booker and Elizabeth Warren have been active in trying to eliminate no-poach provisions.¹¹⁹ In early 2018, Senators Booker and Warren introduced a Senate bill, *The End Employer Collusion Act*, which would ban no-poach agreements between franchisors and franchisees.¹²⁰ As of this writing, the bill has been referred to the Committee on Health, Education, Labor, and Pensions, but has not proceeded any further. Perhaps sensing that their bill

114. See Letter from 11 Attorneys General to 8 Fast-Food Franchisors Regarding Request for Information Regarding Franchise Agreements (July 9, 2018), https://ag.ny.gov/sites/default/files/nph_letter_redacted.pdf (last visited Mar. 19, 2019).

115. *Id.* (citing Alan B. Krueger & Orley Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise Sector* (IZA Institute Of Labor Economics Discussion Paper No. 11672, 2018), <http://ftp.iza.org/dp11672.pdf>).

116. See AG Ferguson, *supra* note 109.

117. See *id.*

118. See, e.g., *Ogden v. Little Caesar's Enterprises, Inc.*, No. 2:18-cv-12792, 2018 WL 7164263 (E.D. Mich. Oct. 26, 2018).

119. See End Employer Collusion Act, S.2480, 115th Cong. (2018).

120. See *id.*

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was unlikely to pass under the current administration, on July 12, 2018, Senators Booker and Warren sent a letter to nearly 100 large franchisor CEOs (1) requesting information regarding their no-poach practices and (2) urging them to eliminate from their franchise agreements “any language that imposes limits on worker mobility.”¹²¹

Suffice it to say, based on this increased governmental scrutiny, no-poach provisions will continue to be a significant topic in US-based franchising in 2019. However, the trend appears to be away from their usage, particularly in the quick-service restaurant industry.

C. FTC SCHEDULED TO REVIEW FRANCHISE RULE

There is one last issue hovering over the franchising industry in the United States, namely, the Federal Trade Commission’s scheduled review of its rules governing franchising.¹²² In the United States, the amended FTC Franchise Rule (the “FTC Franchise Rule”) governs the offer and sale of franchises on a nationwide basis.¹²³ The FTC is required to review the FTC Franchise Rule every 10 years and, in 2018, the FTC is scheduled to initiate a review of, and solicit public comments on, the current FTC Franchise Rule.¹²⁴ As of the end of 2018, the FTC had not yet issued any further statements on the scope of its review of the current FTC Franchise Rule. However, it is reasonable to expect that this issue will take center stage in the US franchising industry in 2019, particularly if the FTC makes a move to discontinue the FTC Franchise Rule or to make any significant changes to the current FTC Franchise Rule. As such, franchisors that conduct business in the United States should monitor this issue and be ready to implement any changes that may arise from a potential rewrite of the FTC Franchise Rule.

121. Letter from Sen. Cory A. Booker and Sen. Elizabeth Warren to Nearly 100 Large Franchise CEOs (July 12, 2018), <https://www.warren.senate.gov/imo/media/doc/No%20poach%20letter%20generic.pdf> (last visited Mar. 18, 2019).

122. See *generally* FEDERAL TRADE COMMISSION, RETROSPECTIVE REVIEW OF FTC RULES AND GUIDES, <https://www.ftc.gov/enforcement/rules/retrospective-review-ftc-rules-guides> (last visited Mar. 18, 2019).

123. See 16 C.F.R. § 436.2 (2007). Certain states also have state-specific laws that govern the offer and sale of franchises and that may supplement the amended FTC Franchise Rule.

124. See Press Release, FTC Announces Regulatory Review Schedule (Feb. 14, 2018), <https://www.ftc.gov/news-events/press-releases/2018/02/ftc-announces-regulatory-review-schedule> (last visited Mar. 19, 2019).

International M&A and Joint Ventures

STEVEN DE SCHRIJVER, MICHA VAN DEN ABEELE, JASON SALTZMAN,
GORDON CAMERON, ALEX YONG HAO, XI GUO,
PROF. KONSTANTINOS TSIMARAS, DR. HARRY STAMELOS,
AVIKSHIT MORAL, NEHA THAKKAR, LUIGI PAVANELLO,
VASSILY RUDOMINO, ANTON DZHUPLIN, MARK HOWARD,
DANIEL ROSENBERG, PAUL STONE, AND GEOFFREY M. GOODALE*

This article summarizes important developments during 2018 in international mergers and acquisitions and joint ventures in Belgium, Canada, China, Cyprus, Greece, India, Italy, Russia, United Kingdom, and the United States of America.

I. Belgium

A. THE NEW COMPANY AND ASSOCIATIONS CODE

The entry into force of the new Belgian Company and Associations Code (the New Code) is expected by the beginning of next year. The main objectives of the New Code are the modernization, simplification, flexibility, and adaptation to European evolutions and trends. The draft of the New Code contains numerous innovations compared to current law. Mainly, the objective of flexibility will affect M&A transactions.¹

One of the most fundamental changes in the New Code is the replacement of the current BVBA (i.e., the private limited liability company) by the BV (i.e., the private company), which is characterized by a very

* Committee Editor—Renata Antiquera, a partner of Pereira Pulici Advogados. Belgium—Steven de Schrijver and Micha Van den Abeele are partners at Astrea. Canada—Jason Saltzman, author of Part A, is a partner at Borden, Ladner Gervais, and Gordon Cameron, author of Part B, is a principal at the New York offices of Bennett Jones (US) LLP. China—Alex Yong Hao and Justin Xi Guo, partner and associate of Jun He Law Offices (New York), respectively. Cyprus and Greece—Dr. Harry Stamelos is a Scientific Collaborator and Dr. Konstantinos Tsimaras is Dean, Associate Professor, both at Law School, European University Cyprus. India—Avikshit Moral is partner and Neha Thakkar associate at Juris Corp Advocates and Solicitors. Italy—Luigi Pavanello is partner of PLLC - Diritto & Finanza D'Impresa. Russia—Vassily Rudomino is senior partner and Anton Dzhuplin is partner of Alrud Law Firm. United Kingdom—Mark Howard, Paul Stone and Daniel Rosenberg are partners at Charles Russell Speechlys LLP. United States—Geoffrey M. Goodale is a partner of FisherBroyles, LLP.

1. See tot invoering van het Wetboek van vennootschappen en verenigingen en houdende diverse bepalingen [Introducing the Code of Companies and Associations and Containing Various Provisions] of June 4, 2018, BELGISCH STAATSBLAD [B.S.] [Official Gazette of Belgium], June 4, 2018, <http://www.lachambre.be/FLWB/PDF/54/3119/54K3119001.pdf>.

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flexible regime.² The link between shares and capital contribution will be disconnected.³ This creates opportunities such as multiple voting rights, incorporation without capital, and the free regulation of the transfer of shares.

The New Code also stipulates the replacement of the actual registered office in favor of the statutory registered office. This is in line with European developments and is a logical consequence of case law of the European Court of Justice.⁴ The founders and shareholders of a Belgian company are free to choose the law and jurisdiction governing the company. A Belgian company may opt for the law of a foreign state without any real connection to its jurisdiction.

Furthermore, the New Code limits the liability of directors by law, depending on the size of the company.⁵ It is expected that, as a result, many companies with their actual activity in Belgium will still opt to apply Belgian company law.

B. ULTIMATE BENEFICIAL OWNERS (UBO) REGISTER

As of October 31, 2018, every company, association, foundation, non-profit association, or trust incorporated in Belgium will be obliged to register all UBOs into the new UBO register.⁶ UBOs are the natural persons who are the ultimate beneficial owners, or who have control over the company, association, foundation, non-profit association, or trust.⁷

For companies, these are (in principle) the natural persons who own directly and/or indirectly (cumulated) 25 percent or more of the voting rights, the shares, or the capital of the company.⁸ Also, natural persons who control a company in another way (e.g., through arrangements in a shareholders' agreement) are ultimate beneficiaries. If it is not possible to identify the ultimate beneficial owner(s) based on the above, the members of the senior management are considered as the ultimate beneficial owners.

All such entities (i.e., those “responsible for providing information”) will have to provide the relevant information through the UBO-register

2. *See id.* § 2.2.

3. *See id.*

4. *See id.* § 2.3.

5. *See id.* § 3.3.

6. *See* Koninklijk besluit betreffende de werkwijze van het UBO-register [Royal Decree Concerning the Operating Procedures of the UBO Register] of July 30, 2018, BELGISCH STAATSBLAD [B.S.] [Official Gazette of Belgium], Aug. 14, 2018, https://finance.belgium.be/sites/default/files/20180817_AR%20UBO_EN.pdf.

7. *See* Wet tot voorkoming van het witwassen van geld en de financiering van terrorisme en tot beperking van het gebruik van contanten [Law on the prevention of money laundering and terrorist financing and on the restriction of the use of cash] of Sept. 18, 2017, BELGISCH STAATSBLAD [B.S.] [Official Gazette of Belgium], Oct. 6, 2017, Art. 4, 27°, http://www.ctif-cfi.be/website/images/FR/law_be/loifrnlen31082018.pdf.

8. *See id.*

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ultimately by March 31, 2019.⁹ If they fail to do so, the Minister of Finance may impose an administrative fine of EUR 250 to EUR 50,000.¹⁰ The UBO-register has recently been made accessible to all those responsible for providing the information.

II. Canada

A. LEGALIZATION OF CANNABIS IN CANADA IN 2018: CANADIAN CAPITAL MARKETS AND M&A IMPLICATIONS

On October 17, 2018, the date Canada legalized cannabis, one of Canada's largest public companies with a market capitalization of over C\$15 billion was a company focused solely on producing, distributing, and selling cannabis.¹¹ Justin Trudeau of the Liberal Party was elected Prime Minister in 2015 on a promise to legalize cannabis and, acting on his promise, he introduced and enacted Bill C-45 An Act Respecting Cannabis (the Act) in 2018.¹²

The Act has a focus on preventing distribution of cannabis to youth. Under the Act, no person can sell or provide cannabis to any person under the age of eighteen, with maximum penalties of fourteen years in jail for giving or selling cannabis to youth. But persons who are eighteen years or older are able to legally possess up to thirty grams of legal dried cannabis, share up to thirty grams of legal cannabis with other adults, purchase dried or fresh cannabis and cannabis oil from a provincially-licensed retailer, or grow up to four cannabis plants per residence for personal use.

Canadian federal, provincial, and territorial governments share responsibility for overseeing the new system. The federal government's responsibilities are to set strict requirements for producers who grow and manufacture cannabis and set industry-wide rules and standards. The provinces and territories license and oversee the distribution and sale of cannabis, subject to federal conditions.

In these early days of legalization, the cannabis industry in Canada is still very fragmented with a few large leaders (e.g., Tilray, Canopy Growth, Aurora, and Aphria) listed on the Toronto Stock Exchange (TSX), but also numerous other smaller players. But there is significant interest by international investors in this new market. This, coupled with ongoing consolidation, has led to an active M&A environment which is expected to continue. Many Canadian public companies have solely Canadian domestic operations, as currently the TSX will not allow companies to list that have

9. See Laurent Donnay de Casteau, *INSIGHT: Obligations of Belgium's Ultimate Beneficial Owner Register*, BLOOMBERG (Nov. 2, 2018), <https://www.bna.com/insight-obligations-belgiums-n57982093508/>.

10. See *id.*

11. See Jen Skerritt, *Why the World is Watching Canada's Pot Legalization*, BLOOMBERG (Sept. 5, 2018), <https://www.bloomberg.com/news/articles/2018-09-06/why-the-world-is-watching-canada-s-pot-legalization-quicktake>.

12. See Cannabis Act, S.C. 2018, c C-45 (Can.).

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any “leaf touching” operations in the U.S. The Canadian Securities Administrators has stated that Canadian stock exchanges can apply their own listing requirements regarding U.S. cannabis-related activities given the unclear legal status of cannabis in the U.S. at the federal level.¹³ While the TSX prohibits issuers with U.S. cannabis business activities, not all Canadian exchanges take the same approach. The Canadian Securities Exchange, a minor player in the juniors’ market, has been more permissive on this issue, and thus has become a repository for several so-called “U.S. Marijuana Issuers” in Canada creating a boom for that exchange. International players, such as U.S.-based Constellation Brands, have made significant investments in Canadian cannabis companies and that trend is expected to continue.¹⁴

B. USE OF SHAREHOLDER RIGHTS PLANS IN CANADA

For nearly thirty years, Canadian boards have adopted shareholder rights plans to help fight hostile takeover bids. Generally, there are two types of rights plans, those adopted by boards and approved by shareholders as a general preventative measure when no bid is pending, and tactical plans that are adopted by boards in response to an actual bid.

In Canada, rights plans are generally permitted to afford a board time to seek alternatives to a bid. Canadian regulators have historically held that after a reasonable period (commonly up to sixty days) plans will have served their purpose and should be cease traded.

1. Changes to the Takeover Bid Regime

In 2016, sweeping changes were made to Canadian takeover bid rules.¹⁵ One of the most significant changes was to increase the minimum bid period from 35 to 105 days.¹⁶ As rights plans were typically cease traded after sixty days, many market participants questioned whether this would end the use of rights plans.

2. Shareholder Approved Plans

Since the bid rules were amended, a significant number of Canadian companies have continued to adopt shareholder approved plans. While these plans are likely to be cease traded following an actual bid, they can be

13. See *CSA Staff Notice 51-352 (Revised) Issuers with U.S. Marijuana-Related Activities*, ONT. SEC. COMM’N (Feb. 8, 2018), https://www.osc.gov.on.ca/documents/en/Securities-Category5/csa_20180208_51-352_marijuana-related-activities.pdf.

14. See *Canada Just Legalized Pot. Who Could Profit?*, PBS (Oct. 17, 2018), <https://www.pbs.org/newshour/economy/making-sense/canada-just-legalized-pot-who-could-profit>.

15. See Press Release, Ont. Sec. Comm’n, Canadian Securities Regulators Adopt Fundamental Changes to Take-over Bid Regime, (Feb. 25, 2016), http://www.osc.gov.on.ca/en/NewsEvents_nr_20160225_changes-take-over-bid.htm.

16. 16. See *id.*

useful to prevent acquisitions of control through transactions exempt from the takeover bid rules.

3. *Tactical Plans*

In November 2017, CanniMed Therapeutics, Inc. was the first Canadian issuer to adopt a tactical plan following the new rules, and the regulators weighed in on the plan in early 2018 in *Aurora Cannabis, Inc. (Re)*.¹⁷

Following CanniMed's announcement to acquire Newstrike Resources, Ltd., Aurora launched a hostile bid for CanniMed and announced that it had entered into lock-up agreements with CanniMed shareholders holding approximately 36 percent of CanniMed's shares.¹⁸ The Aurora bid was conditional on, among other things, the Newstrike deal not proceeding, which was subject to approval by CanniMed shareholders.

In response to Aurora's bid, CanniMed adopted a rights plan. Among other things, the plan prevented Aurora (or the locked-up shareholders) from acquiring shares that they otherwise could have voted against the Newstrike deal.

In cease trading CanniMed's plan, the regulators commented that with the new rules in place, there will be very limited circumstances where they will not immediately cease trade a tactical plan. Despite the outcome in Aurora, CanniMed's plan was effective as it prevented Aurora from purchasing additional shares before the Newstrike vote.

Based on this decision, it seems that tactical plans will be of limited use other than in situations where there may be a benefit in having a plan in place during the short period following adoption of the plan and the hearing at which it is cease traded.

III. China

A. CHINA FURTHER EASED RESTRICTIONS ON FOREIGN INVESTMENTS

The year 2018 witnessed China's continuing efforts in easing restrictions on inbound foreign investments in respect to foreign-invested enterprises' registration procedure and access to certain industries.

1. *The "Single Window" Mode*

In February, China implemented Notice 87,¹⁹ effectively accelerating the registration procedure for foreign-invested enterprises. The "Single

17. See *Aurora Cannabis, Inc. (Re)*, 2018 ONSEC 10 (Fin. & Consumer Affairs Auth. of Sask. & Ont. Sec. Comm'n Mar. 15, 2017).

18. See Debra Borchardt, *Aurora Buys CanniMed in Billion Dollar Deal*, GREEN MKT. REPORT (Jan. 25, 2018), <https://www.greenmarketreport.com/aurora-buys-cannimed-billion-dollar-deal/>.

19. See Guanyu Shixing Waishang Touzi Qiye Shangwu Bei'an Yu Gongshang Dengji "Danyi Chuangkou," "Danyi Biaoge" Shouli Yougan Gongzuo De Tongzhi

Window” mode integrates the previous independent applications by foreign-invested enterprises to authorities for commercial affairs and authorities for industry and commerce into one application.²⁰ The Mode was first implemented in the Shanghai Free Trade Zone in 2013,²¹ and Notice 87 expanded its implementation nationally.²²

Note that the “Single Window” Mode does not apply to foreign-invested enterprises subject to the restricted industries under the Catalogue of Industries for Guiding Foreign Investments (2017 Revision) (2017 Catalogue).²³

2. *Reducing Restricted Industries*

China issued the Special Administrative Measures (Negative List) for the Access of Foreign Investment (2018)²⁴ (2018 Measures) as an amendment to the list of restricted industries under the 2017 Catalogue.²⁵ Accordingly, China eliminated or eased restrictions on foreign investments in twenty-two industries, including Finance, Vehicle Manufacturing, Infrastructure, Transport, Agriculture, Energy, and Natural Resources.²⁶

Among the major changes, the 2018 Measures removed the current 50 percent foreign-share restriction in joint ventures manufacturing special-purpose vehicles and new energy cars.²⁷ Furthermore, the 2018 Measures promised to eliminate the above restriction for commercial vehicles and

(关于实行外商投资企业商务备案与工商登记“单一窗口、单一表格”受理有关工作的通知) [Notice on Implementation of the “Single Window, Single Form” for the Business Recording and Business Registration of Foreign-Invested Enterprises] (promulgated by Gen. Off. of the St. Admin. for Indust. and Com. and the Gen. Off. of the Ministry of Com., Feb. 28, 2018, effective June 30, 2018), <http://www.mofcom.gov.cn/article/b/f/201803/20180302717939.shtml> [hereinafter Notice 87].

20. See *id.*

21. See Dechun Huang, *Shanghai Pilot Free Trade Zone and Its Effect on Economic Growth: A Counter-Factual Approach*, 5 OPEN J. SOC. SCI. 73, 74 (2017).

22. See Notice 87, *supra* note 19.

23. See Waishang Touzi Chanye Zhidao Mulu (2017 Nian Xiuding) (外商投资产业指导目录(2017年修订)) [Catalogue of Industries for Guiding Foreign Investment (Revision 2017)] (promulgated by Dir. of the Nat'l Dev. & Reform Comm'n and Minister of Com., June 28, 2017, effective July 28, 2017) [hereinafter Catalogue 2017]; see also *infra* note 24 (also note that the catalogue of restricted industries was updated by 2018 Measures).

24. See Waishang Touzi Zhunru Tebie Guanli Cuoshi (Fumian Qingdan)(2018 Nian Ban) (外商投资准入特别管理措施(负面清单)(2018年版)) [Special Management Measures for Foreign Investment Access (negative list) (2018 edition)] (promulgated by Dir. of the Nat'l Dev. & Reform Comm'n and Minister of Com., June 28, 2018, effective July 28, 2018) [hereinafter 2018 Measures].

25. See State Council, *Significantly Eased Access to 22 Industries by Foreign Investments*, PEOPLE'S REPUBLIC OF CHINA (Jun. 29, 2018), http://www.gov.cn/zhengce/2018-06/29/content_5302005.htm.

26. See 2018 Measures, *supra* note 24.

27. See *id.* art. 3, § 8.

passenger car manufacturing joint ventures by 2020 and 2022, respectively.²⁸ Meanwhile, the rule that a single foreign investor shall not have more than two joint ventures manufacturing the same vehicle type in China will also be abolished by 2022.²⁹

In the financial sector, China promises to cancel the 51 percent foreign-share restriction in joint venture securities companies, securities investment fund management companies, futures companies, and life insurance companies by 2021.³⁰

Nevertheless, China still forbids foreign-invested enterprises from accessing Chinese cultural and tobacco industries.³¹

IV. Cyprus

Recent developments of mergers in Cyprus, based on the official announcements of the Competition Commission of Cyprus, include an approval of a proposed merger in the oil and gas sector (expecting the Exxon Mobil drillship ‘Stena Icemax’ to drill for oil and gas in Block 10 of Cyprus’ Exclusive Economic Zone³²) and notifications of various mergers.

The Commission, acting on the basis of Section 28(1)(a) of Control of Concentrations between Enterprises Law no. 83(I)/2014,³³ decided³⁴ unanimously to declare the concentration for the creation of an oil and gas joint venture (VLPG Plant, Ltd.) by Petrolina Holdings Public, Ltd., Synergaz Cooperative, Ltd., and Intergaz, Ltd., compatible with the functioning of competition in the market, subject to following the commitments, among others, undertaken by stakeholders for the entire period of VLPG’s operation:

28. *See id.*

29. *See id.*

30. *See id.* art. 8, § 21.

31. *See id.* art. 5, § 13, art. 14.

32. *See Exxon Mobil Drillship in Cyprus by Monday, Will Explore for Oil, Gas*, EKATHIMERINI (Mar. 11, 2019), <http://www.ekathimerini.com/234559/article/ekathimerini/news/exxon-mobil-drillship-in-cyprus-by-monday-will-explore-for-oil-gas>.

33. Nomos (2014:83(I)) NOMOS POU PROBLEPEI GIA TON ELENCHO TON SYNKENTROSEON EPICHEIRESEON GIA SKOPOUS DIAPHYLAXES TOU APOTELESMATIKOU ANTAGONISMOU [The Control of Concentrations Between Undertakings Law] Epissimi Ephimeris tis Dimocratias] 2014, L:128 (Cyprus), *translated in* [http://www.competition.gov.cy/competition/competition.nsf/All/5937AB49B8B38080C2257FB2003A442B/\\$file/Law%2083\(I\)2014.pdf](http://www.competition.gov.cy/competition/competition.nsf/All/5937AB49B8B38080C2257FB2003A442B/$file/Law%2083(I)2014.pdf).

34. *See* Press Release, Comm’n for the Prot. of Competition, The Comm’n for the Prot. of Competition Has Decided to Declare the Concentration Regarding the Creation of the Joint Venture VLPG PLANT LTD by the Companies Petrolina (Holdings) Public Ltd, Coop. Soc’y SYNGERGAX Ltd and Intergaz Ltd, Compatible with the Operation of Competition in the Mkt., Subject to Specific Conditions Undertaken by the Undertakings Participating in the Transaction (Oct. 9, 2018), <http://www.competition.gov.cy/competition/competition.nsf/All/C478B49FF2422BFDC225832100270830?OpenDocument>.

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- (i) Amendment of the Shareholders' Agreement of VLPG PLANT LTD in order to ensure that there will not be different pricing policies or terms and conditions between the companies involved and customers
- (ii) . . . [E]nsure the cost-oriented pricing policy of the New Company regarding the provision of storage space, access to anchorage and transport pipelines,
- (iii) Ensuring the possibility of renting storage space to at least two companies with a decrease in the minimum level of space necessary for accepting a company, and a commitment by VLPG that in the case where 10 percent of the total storage space is not used by a third party, then 100MT will be provided to the next applicant, even if the total storage space to third parties exceeds 10 percent,
- (iv) Ensuring the provision of 10 percent of total storage space to third parties, in the case of extending the storage space,
- (v) The provision of a manual for protecting competition to all the members of staff of VLPG, in which all the policies of the New Company will be documented,
- (vi) Appointment of an independent third party responsible to check whether all the commitments have been met and to submit an annual report to Commission within the first semester of each year,
- (vii) Commitment not to prevent any client of VLPG to use or rent any facilities, thus limiting any activity in the upstream or downstream market,
- (viii) During the period of construction of the necessary facilities of the storage space and the twelve (12) month period from the start of the New Company's operation, the companies are obliged to hold any Board of Directors' meetings of VLPG in the presence of an independent third party, who will ensure that no illegal coordination exists in the affected markets and that no sensitive information regarding VLPG is exchanged,
- (ix) The members of the Board of Directors and the chief executive officers of the Companies shall not hold any position in the Board of Directors of the New Company, twelve (12) months after the start of VLPGS' operation.³⁵

Other recent notifications of concentrations to the Competition Commission of Cyprus are the following:

- (1) The joint venture company Broadband Connectivity Solutions (Restricted) Limited, for fixed satellite services will be created by Al Yah Satellite Communications PrJSC (United Arab Emirates) and US firm Hughes Network Systems, LLC (10/18/2018).³⁶

35. *Id.*

36. See Press Release, Comm'n for the Prot. of Competition, Notification of a Concentration Concerning the Creation of the Joint Venture Co. Broadband Connectivity Sol. (Restricted) Ltd., by Al Yah Satellite Commc'n PrJSC and Hughes Network Sys. LLC (Oct. 18, 2018),

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- (2) The acquisition of the share capital of Norddeutsche Reederei H. Schuldt GmbH, and of assets by Advent International Corporation (10/18/2018).³⁷
- (3) The joint control of UCPIH Ltd by the Goldman Sachs Group, Inc., and Dragon Capital Investment, Ltd. (10/09/2018).³⁸
- (4) The acquisition of part of the share capital of Sportradar AG (delivery of sports data) by Canada Pension Plan Investment Board (investment organization for stable income).³⁹

V. Greece

Recent developments of mergers in Greece based on the official announcements of the Competition Commission of Greece include an approval of a proposed merger in the sectors of energy, retail stores, entertainment, and telecommunications.

By a unanimous Decision,⁴⁰ the Hellenic Competition Commission (HCC) approved, under Greek merger control rules, the proposed acquisition by Motor Oil Hellas S.A. of sole control over NRG Trading House S.A., a company active in the energy market in Greece, through the acquisition of 90 percent of its shares from NRG Global Energy House Limited. According to the decision, the notified transaction, regarding the generation and wholesale supply of electricity market and the market for the retail supply of electricity to customers connected to medium and low voltage grid, does not raise serious doubts as to its compatibility with competition rules.⁴¹

By its Decision No. 665/2018,⁴² the HCC unanimously cleared, under Greek merger control rules, the notified concentration regarding the

<http://www.competition.gov.cy/competition/competition.nsf/All/C4250A18248002A3C225832A002CA011?OpenDocument>.

37. See Press Release, Comm'n for the Prot. of Competition, Notification of a Concentration Concerning the Acquisition by Advent Int'l Corp. of the Share Capital of Norddeutsche Reederei H. Schuldt GmbH & Co. KG, Verwaltung "NRS" GmbH and of Certain assets, CPC (Oct. 18, 2018), <http://www.competition.gov.cy/competition/competition.nsf/All/C478B49FF2422BFDC225832100270830?OpenDocument>.

38. See Press Release, Comm'n for the Prot. of Competition, Notification of a Concentration Concerning the Joint Control of the UCPIH Ltd by Goldman Sachs Group, Inc. and Dragon Capital Inv. Ltd (Oct. 9, 2018), <http://www.competition.gov.cy/competition/competition.nsf/All/025153B689FE2E87C22583210026ADB3?OpenDocument>.

39. See Press Release, Comm'n for the Prot. of Competition, Notification of a Concentration Concerning the Acquisitions of Part of the Share Capital of Sportradar AG by Canada Pension Plan Investment Board (Aug. 3, 2018), <http://www.competition.gov.cy/competition/competition.nsf/All/9E15330E2FAC82A4C22582DE003BB2B1?OpenDocument>.

40. See Press Release, Hellenic Competition Comm'n, Clearance of the Proposed Acquisition by Motor Oil (Hellas) Corinth Refineries S.A. (MOH) of Sole Control over NRG Trading House S.A. (Sept. 6, 2018), available at <https://www.epant.gr/en/>.

41. *Id.*

42. See Press Release, Hellenic Competition Comm'n, Clearance of the Acquisition by DIAMANTIS MASOUTIS S.A. SUPERMARKETS, of Sole Control over

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acquisition by Diamantis Masoutis S.A. supermarket chain, of sole control of Promitheftiki Trofimon (Food Supply) S.A. super market chain, subject to structural commitments offered by the notifying party to remedy the HCC's concerns as to the compatibility of the transaction with Greek merger control rules. In particular, the transaction involves the acquisition by Diamantis Masoutis S.A. of fifty-four supermarket retail stores in the Prefecture of Attica and three in the island of Andros.⁴³ The HCC's investigation has indicated that the proposed transaction raised competition concerns notably in the local retail market of Andros Island. The notifying party offered commitments to address these concerns, namely Diamantis Masoutis S.A. undertook to divest a supermarket store in the relevant local retail market, where there is a horizontal overlap and a very high market share of the combined entity.⁴⁴ According to the HCC, the above commitment is suitable, sufficient, and proportionate to safeguard conditions of effective competition in the relevant market.⁴⁵ The Commission decision stipulates that, in the event of non-compliance with its terms and conditions, a fine of up to 10 percent of the turnover for the last financial year may be imposed on the parties.⁴⁶ A Monitoring Trustee will be appointed to ensure compliance with the commitment.⁴⁷

In accordance with article 8, paragraph 3, of Greek Competition Law 3959/2011,⁴⁸ the HCC decided unanimously to approve the notified merger dated May 17, 2018, regarding the acquisition of joint control of Golf Residences S.A. by the company Evergolf Touristic Investments S.A. and the remaining shareholders, as this concentration, although falling within the scope of paragraph 1 of Article 6 of Law 3959/2011, does not raise serious doubts as to its compatibility with the competition requirements in the relevant markets.⁴⁹

By its unanimous Decision No. 656/2018, the HCC approved, under Greek merger control rules, the proposed acquisition by Vodafone Greece of sole control over Cyta Hellas, a company active in the telecommunications market in Greece, regarding the subject-matters falling within its

PROMITHEFTIKI TROFIMON S.A. Subject to Conditions and Obligations (July 27, 2018), available at <https://www.epant.gr/en/>.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. See Nomos (2011:3959) Prostatía tou Antagonismou [Protection of Free Competition], EPHEMERIS TES KYVERNESEOS TES HELLENIKES DEMOKRATIAS [E.K.E.D] 2011, A:93 (Greece), translated in <https://www.scribd.com/document/249168797/Law-3959-2011>.

49. See Press Release, Hellenic Competition Comm'n, Approval of Concentration for the Acquisition of 70% of the Share Capital of the Co. Golf Residences SA by the Co. under the Name Evergolf Touristic Investments SA (Jul. 6, 2018).

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competence.⁵⁰ According to the decision, the notified transaction does not raise serious doubts as to its compatibility with competition rules on the market for the acquisition of audio-visual TV content, including rights of transmission of other TV channels, and on the market for the provision of Pay-TV services.⁵¹ Regarding the provision of multiple play services, bundled telecommunication services that include Pay-TV services (a. fixed telephony, broadband internet access services, Pay-TV services and b. fixed telephony, broadband internet access services, Pay-TV services and mobile telephony) shall be examined by the Hellenic Telecoms Agency, in the context of the cooperation between the two Authorities.⁵²

VI. India

India in the last decade has witnessed substantial numbers of mergers and acquisitions together with corporate restructuring. Earlier, M&A in India faced a plethora of hurdles with regard to the legislative requirements such as compliances, cumbersome and long procedures to adhere, and approvals from various authorities; thereby leading to significant delays and increases in costs.⁵³ The Indian government has taken steps in the last few years to promote M&A in India and to make the process simpler. The enactment of the Insolvency and Bankruptcy Code 2016 (IBC),⁵⁴ has re-energized the M&A space in India, particularly in the steel and power sectors that have been under financial stress in the past few years. Historically, M&A in India consisted mainly of friendly deals with very few exceptions of hostile takeover attempts. The primary reason for this has been strong family-controlled businesses, a cumbersome process of obtaining approvals, and the Indian takeover code discouraging such hostile attempts.⁵⁵

The interplay between the various laws and IBC remains a challenging issue to date with most regulators, like the Securities Exchange Board of India, being forced to create exemptions within their regulatory framework to smooth out the process. Exemptions have been created for the issuance and delisting of securities,⁵⁶ and takeover norms for actions taken under the

50. See Press Release, Hellenic Competition Comm'n, Clearance of the Proposed Acquisition by Vodafone Greece of Sole Control over Cyta Hellas (Apr. 23, 2018), <https://www.epant.gr/en/>.

51. *Id.*

52. See *id.*

53. See Ashish Parwani et al., *Mergers and Acquisitions: Outlook in India for 2018*, FORBES INDIA (Apr. 3, 2018), <http://www.forbesindia.com/blog/rbi/mergers-and-acquisitions-outlook-in-india-for-2018/>.

54. See The Insolvency and Bankruptcy Code, 2016, Gazette of India, pt. II, § 1 (May 28, 2016).

55. See Suman Layak & Bailju Kalesh, *Why 2018 May Become a Blockbuster Year for Mergers and Acquisitions*, ECON. TIMES (Mar. 24, 2018), <https://economictimes.indiatimes.com/news/company/corporate-trends/why-2018-may-become-a-blockbuster-year-for-mergers-and-acquisitions/articleshow/63446545.cms>.

56. See Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) (Amendment) Regulations, 2018, Gazette of India, pt. III, § 4 (June 1, 2018).

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IBC.⁵⁷ The IBC is being hailed as a path-breaking law as it smooths out most of the earlier issues faced by acquirers. Ordinarily acquirers would have been required to approach various authorities for approvals due to change in control. But the enactment of IBC has brought about a change by having a process which is under the supervision of the NCLAT solely. Also, the ability to write off the past debts and liabilities has increased the number of M&As in India.

In the last year, many Indian corporations partnered with financial players to jointly bid for assets under the IBC. Numetal-VTB's bid for Essar Steel is one such example. The market trend is one where financial institutions are looking for corporations to hold hands with in the acquisitions process.⁵⁸ Another important trend is leveraged buyout (LBO) structures. Corporations have infused capital in the form of private equity investments and have taken debt at the target company level to finance such acquisitions. The next step is the merger of the target and the acquirer company. This structure is beneficial as corporations are not required to put upfront capital for such acquisitions and the debt taken at the target level can be repaid through the cashflows of the target over a period of time. The bulk of the acquisitions are fueled by LBO structures as they are financially viable and more attractive.

Another new trend is joint ventures with asset reconstruction companies. One such leading example is of Aditya Birla Capital Limited joining hands with Varde Partners, a U.S.-based global alternative investment advisor firm, wherein they would jointly track and invest in stressed and distressed assets in India.⁵⁹

One of the major issues faced in Indian M&A is the tax and stamp duty payable, especially in cases where the M&A results in acquisition of assets across different states. This leads to much confusion on the stamp duty being charged on acquiring such assets, as the stamp duty varies in different states. Also, tax laws in India keep changing and lack clarity. While the authorities have ensured the effectiveness of IBC by amending various laws from time to time, for IBC to be truly successful, it is important that the uncertainty around the stamp duty and tax be resolved.

57. See *id.*

58. See Surya Sarathi Ray, *Russia's VTB Capital-backed Numetal's Second Bid for Bankrupt Essar Steel Valid, Rules NCLT*, FIN. EXPRESS (Sept. 8, 2018), <https://www.financialexpress.com/industry/russias-vtb-capital-backed-numetals-second-bid-for-bankrupt-essar-steel-valid-rules-nclt/1306426/>.

59. See *Aditya Birla Forms JV with Varde Partners to Invest \$1 billion in Stressed Assets*, HINDU BUS. LINE (Aug. 29, 2018), <https://www.thehindubusinessline.com/money-and-banking/aditya-birla-capital-forms-jv-with-varde-partners-to-invest-in-stressed-assets/article24812882.ece>.

VII. Italy

A. PUT OPTIONS - A NEW DECISION OF THE ITALIAN CORTE DI CASSAZIONE

Validity of fixed price put options has been widely debated in Italy. Scholars have argued whether they comply with the provisions of Articles 1332 (agreement meritorious to be upheld by the law), 1354 (agreement designed to circumvent the law), and more importantly 2265 (leonine pact, i.e., a provision or agreement whereby a shareholder/partner is permanently shielded from any loss or prevented from obtaining any profit in a company) of the Italian Civil Code.

To date, the court position on the matter was based upon the seminal case of the Corte di Cassazione (the Italian Supreme Court in civil and criminal cases) *Finanziaria Regionale Friuli Venezia Giulia - FRIULLA S.p.A. v. Galotto et al.*⁶⁰ involving a regional governmental entity that tried to enforce the fixed price put option. In its decision, the court stated that (i) Article 2265 of the Civil Code applies to any kind of company; (ii) Article 2265 of the Civil Code applies regardless whether the put option is contained in the company by-laws or in a shareholders' agreement; and (iii) in order to determine whether there has been a violation of Article 2265 of the Civil Code, one should look at the overall effect and practical results of the pertinent provisions and if the same determine an actual and permanent full shield from losses and/or permanently prevents someone gaining any of the profits of the company. In short, the decision must be made on a case by case basis to ascertain whether Article 2265 of the Civil Code has been violated also—indirectly—by violating Articles 1332 and 1354 of the Civil Code.

Despite not being bound by the *stare decisis rule* and relatively few numbers of these cases being decided by courts, as most of them are decided during arbitration proceedings,⁶¹ most of the Italian trial and appellate courts have followed the *Galotto* case, noting that an investor holding equity cannot reclaim its full investment back regardless of the performance of the company, as a shareholder, by its nature, assumes the risk related to the performance of the company.⁶²

But most recently, the Corte di Cassazione has issued a decision that could potentially change the law if followed by lower courts, upholding the validity of a fixed price put option and stating that: (i) Article 2665 of the Civil Code is a provision of exceptional nature and as such is applicable only to the corporate documents and the direct relationship between shareholders and

60. See Cass. no. 8927 dated October 24, 1994, *Giur Comm.*, 1995, II, p. 478 ss., *Nuove leggi civ.*, 1995, I, p. 1161 ss.

61. To date, the majority of the arbitral courts have followed the majority jurisprudence deriving from the *Gallotto* case and declared null and void put options that violate the leonine pact.

62. *Ex multis* Tribunal of Milan December 30, 2011 no. 15833, affirmed by Appeal Court of Milan February 19, 2016 no. 626. On an opposite position, Tribunal of Cagliari, June 19, 2000, *Riv. Giur. Sarda*, 2001, p. 471 and Tribunal of Naples, December 10, 2009, *Foro It.*, I, p. 1355.

the company, and not to the personal relationship among shareholders, including shareholders agreements; (ii) the company will continue to attribute profits/losses to all of the shareholders without distinction and without violation to Article 2665 provided that (a) the relationship between the company and its shareholders is unchanged and compliant with the law and (b) the company is not a party nor has any interest in the relationship and agreement among shareholders calling for the put option.

In short, the latest order of the Corte di Cassazione has held that fixed price put options are not null and void because (i) Article 2665 of the Italian Civil Code does not apply to agreements among shareholders, including shareholders agreements, so there cannot be any violation of the *leonine pact*, and (ii) they pursue a meritorious and lawful interest for purposes of Article 1322 of the Italian Civil Code.

VIII. Russia

Last year, 2018, was marked by significant amendments to the Russian civil legislation that have produced an impact on M&A and joint venture transactions. The amendments have introduced new legal institutes as well as rules and have mastered current regulation.

Pursuant to the law introducing amendments to operation of joint stock companies (JSC), public JSCs shall arrange risk management and internal control in the company. It will be the competence of the board of directors to adopt the respective internal policies.⁶³ Starting from July 1, 2020, risk management and internal control efficiency in public JSCs must be subject to internal audit.⁶⁴

According to the new law, JSC preference shareholders have acquired additional voting rights with respect to (i) those issues adopted unanimously by all shareholders, and (ii) supplementing the charter with provisions on authorized preference shares, which issue will result in decrease of the dividends or liquidation value payable on such preference shares. These amendments have broadened the voting rights of preference shareholders because they do not have voting rights by default unless expressly granted by law.

A newly adopted ruling of the Supreme Court of the Russian Federation has clarified and updated the rules applicable to major and interested-party transactions.⁶⁵ In particular, the ruling states that shareholders not

63. See Federal'nyj Zakon ot 19 Ijulja 2018 g. N 209-FZ "O Vnesenii Izmenenij v Federal'nyj Zakon" Ob akcionerных Obshhestvah, Federal Law of July 19, 2018 N 209-FZ "On Amendments to the Federal Law On Joint-Stock Companies," ROSSIYSKAYA GAZETA [ROS. GAZ.] July 25, 2018, <https://rg.ru/2018/07/25/akcio-dok.html>.

64. See *id.*

65. See Postanovleniye Plyenooma Vyerhovnogo Sooda Rossiyskoy Fyedyeratsii ot 27N 27 g. Moskva "Ob osparivanii kroopnih sdyelok i sdyelok, v sovyershynii kotorih imyeyetsya zaintyryesovannost" [Resolution of the Plenum of the Supreme Court of the Russian Federation of 27N27 Moscow "On Challenging Major Transactions and Transactions of

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interested in the transactions but being under control of interested persons cannot participate in voting on the issue for approval of interested-party transaction. The ruling also has changed the procedure for approving transactions being at the same time major and interested-party transactions. Such transactions shall be approved in compliance with both approval procedures.

One of the important changes has touched the foreign investment in the strategic sector of the Russian economy. The recent amendments have introduced new concepts of regulation of investment from offshore jurisdictions.⁶⁶ New regulation replaces the term “offshore” by the term “companies . . . which do not disclose . . . information about their beneficiaries, owners and controlling persons.”⁶⁷ This allows investors from offshore jurisdictions who disclose the required information to acquire control over strategic legal entities subject to receipt of strategic clearance. Previously, such acquisitions were prohibited for offshore companies.

A change in Russian law created a new entity for international companies.⁶⁸ A foreign legal entity that satisfies certain criteria, including the amount of investment in the Russian Federation, may obtain the status of international company, if it changes its *lex personalis* according to the new Russian law and registers in so-called Russian offshore zones (Primorskiy and Kalinigrad regions).⁶⁹ Major tax exemptions are applicable to those international companies that successfully obtain the status of international holding company.

On June 1, 2018, new amendments in respect to escrow accounts entered into force, which allow public notaries to become escrow agents.⁷⁰ From a

Interest”], ROSSIYSKAYA GAZETA [ROS. GAZ.] July 6, 2018, <https://rg.ru/2018/07/06/zainteresovannost-dok.html>.

66. See Fyederal’niy Zakon ot 31 Maya 2018 g. N 122-FZ “O Vnyesenyii Izmyenyeniyy v Otdyel’niye Zakonodatel’niye akti Rossiyskoy Fyederatsii v Chasti Ootchnyeniya Ponyatiya ‘Inostranniy Inyestor’,” [Federal Law of May 31, 2018 N 122-FZ “On Amendments to Certain Legislative Acts of the Russian Federation Regarding the Clarification of the Notion ‘Foreign Investor’”], ROSSIYSKAYA GAZETA [ROS. GAZ.] May 30, 2018, <https://rg.ru/2018/06/04/investor-dok.html>.

67. See *id.*

68. See Fyederal’niy Zakon ot 3 Avgoosta 2018 g. N 290-FZ “O Myezhdunarodnih Kompaniyah,” [Federal law of August 3, 2018 N 290-FZ “On international companies”], ROSSIYSKAYA GAZETA [ROS. GAZ.] July 28, 2018, <https://rg.ru/2018/08/06/kompanii-dok.html>.

69. See Fyederal’niy Zakon ot 3 Avgoosta 2018 g. N 291-FZ “O Spyetsial’nih Administrativnih Rayonah na Tyerritoriyah Kaliningradskoy Oblasti i Primorskogo Kraya,” [Federal Law of August 3, 2018 N 291-03 “On Special Administrative Regions in the Territories of the Kaliningrad Region and Primorsky Territory”], ROSSIYSKAYA GAZETA [ROS. GAZ.] Aug. 6, 2018, <https://rg.ru/2018/08/06/fz-291-dok.html>.

70. See Fyederal’niy Zakon ot 26 Iyoolya 2017 g. N 212-FZ “O Vnyesenyii Izmyenyeniyy v Chasti Pyervooyoo i Vtorooyoo Grazhdanskogo Kodyeksa Rossiyskoy Fyederatsii i Otdyel’niye Zakonodatel’niye Akti Rossiyskoy Fyederatsii,” [Federal Law of July 26, 2017 N 212-FZ “On Amendments to Parts One and Two of the Civil Code of the Russian Federation and Certain Legislative Acts of the Russian Federation”], ROSSIYSKAYA GAZETA [ROS. GAZ.] July 31, 2017, <https://rg.ru/2017/07/31/bank-dok.html>.

practical perspective, Russian notaries were already carrying out escrow activity that gradually made escrow a desired instrument in the Russian M&A market.

IX. United Kingdom

A. U.K. GOVERNMENT PROPOSALS FOR REVIEWING MERGERS AND OTHER INVESTMENTS ON NATIONAL SECURITY GROUNDS

The U.K. Government has announced proposals⁷¹ to implement a new voluntary notification regime for reviewing mergers and other investments on national security grounds.⁷² The proposals follow certain short-term changes implemented on June 11, 2018, to the thresholds for reviewing mergers under the U.K. merger control rules in three specific areas of the economy, namely: military/dual-use, computer processing units, and quantum technology.⁷³ The regime now proposed represents a significant further expansion of the Government's current powers.

B. HOW WILL THE NEW REGIME WORK?

The Government is proposing a voluntary notification regime involving a short preliminary assessment period of fifteen working days, with the possibility of an additional period of fifteen working days where further time is required.⁷⁴ At the end of the preliminary assessment, the Government will call in those cases that raise national security concerns and carry out a full assessment to investigate the concerns.

Once a transaction has been called in, parties must not complete the transaction until approval has been granted (or, if it is has completed, take any further measures to increase the acquirer's control or any steps that would make it more difficult for the transaction to be unwound). If the Government concludes that there are concerns, it will impose conditions to prevent or mitigate the national security risks. These conditions could include blocking the transaction or unwinding it, if it has already taken place.

The new rules will apply to any transactions involving an acquisition of control or significant influence over a U.K.-based entity or asset, or a non-U.K.-entity carrying on activities in the U.K., or a non-U.K. asset used in connection with activities taking place in the U.K. Transactions that will be caught will potentially include acquiring more than 25 percent of an entity's

71. See DEPARTMENT FOR BUSINESS, ENERGY & INDUSTRIAL STRATEGY, NATIONAL SECURITY AND INVESTMENT, 2018, Cm. 9637.

72. See *Government Upgrades National Security Investment Powers*, GOV.UK (Jul. 24, 2018), <https://www.gov.uk/government/news/government-upgrades-national-security-investment-powers>.

73. See Explanatory Memorandum to The Enterprise Act 2002 (Turnover Test) (Amendment) Order 2018 (June 11, 2018).

74. See DEPARTMENT FOR BUSINESS, ENERGY & INDUSTRIAL STRATEGY, *supra* note 71.

shares or votes or any other acquisition of significant influence or control over an entity.⁷⁵

Where parties decide not to notify, the Government will have the ability to intervene of its own initiative, including after the transaction has taken place within a possible period of up to six months.

A key issue under the new regime will be whether a transaction raises national security concerns. Here the proposals identify three specific risk factors:

- (a) Target risk: where the acquisition of control of entities and assets could be used to undermine national security. These are referred to as “core areas” and are likely to be certain parts of the national infrastructure sectors, certain advanced technologies, critical direct suppliers to the Government, and the emergency service sector and military or dual-use technologies.⁷⁶
- (b) Trigger event risk: where an entity or asset could undermine national security, for example through disruptive or destructive actions, espionage or inappropriate leverage (the ability to exploit an investment to dictate or alter services or investment decisions).⁷⁷
- (c) Acquirer risk: where an acquirer may seek to use its control over the entity or asset to undermine national security. The proposals create a concept of “hostile parties,” who may seek to use their acquisition of control over entities or assets to undermine the UK’s national security.⁷⁸

C. OVERALL IMPLICATIONS

The Government expects there to be around 200 notifications each year but anticipates it will be able to screen out around half of those as not raising concerns.⁷⁹ These numbers are significant, particularly when compared with the total number of cases reviewed by the CMA each year under the U.K. merger control rules (currently around sixty), albeit on competition grounds, and the total number of national security interventions by the Government under those rules in the last year (one).

The proposals are not yet final but the deadline for responses closed on October 16, 2018.

X. United States

Actions taken by, relating to, or involving the Committee on Foreign Investment in the United States (CFIUS) represented the most significant

⁷⁵. *See id.*

⁷⁶. *See id.*

⁷⁷. *See id.*

⁷⁸. *See id.*

⁷⁹. *See id.*

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developments in the United States for cross-border M&A transactions in 2018.

CFIUS is an inter-agency committee for which the Secretary of the Treasury serves as Chair, that is authorized to review any transaction that could result in a foreign person obtaining the ability to control a U.S. business that could pose a threat to U.S. national security.⁸⁰ If, based on its review of a transaction, CFIUS concludes that a transaction threatens to impair U.S. national security, it can recommend that the President suspend or prohibit the transaction.⁸¹

While such power rarely has been invoked, President Trump has shown his willingness to exercise such authority. For example, on March 12, 2018, President Trump signed an executive order to prohibit the proposed acquisition of U.S.-based Qualcomm by Singapore-based Broadcom in accordance with CFIUS's recommendations and concerns about Broadcom's relationships with third party foreign entities and the national security effects of Broadcom's business intentions with respect to Qualcomm.⁸²

As powerful as CFIUS was demonstrated to be by these actions taken by President Trump, the U.S. Congress sought to strengthen CFIUS by passing the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), which President Trump signed into law on August 13, 2018.⁸³ Specifically, as discussed below, FIRRMA is intended to expand the scope of jurisdiction and powers of CFIUS.

In terms of scope, FIRRMA amends the Defense Production Act of 1950 by broadening the scope of "covered transactions" that are subject to CFIUS review.⁸⁴ Specifically, FIRRMA creates the following four new types of covered transactions:

- (1) any other investment by a foreign person in any U.S. business involved in critical infrastructure, the production of critical technologies, or that maintains sensitive personal data that, if exploited, could threaten national security;
- (2) any change in a foreign investor's rights regarding a U.S. business where that change would result in foreign "control" of a U.S. business or where the change involves critical infrastructure or critical technology companies;
- (3) any other transaction, transfer, agreement, or arrangement designed to circumvent or evade CFIUS; or

80. *See* 50 U.S.C. § 4565 (2015); Exec. Order No. 11,858, 3 C.F.R. 990 (1971 – 1975).

81. *See* 50 U.S.C. § 4565(d)(2).

82. *See* Proclamation No. 5479, 83 Fed. Reg. 11,631 (Mar. 12, 2018).

83. *See* Press Release, U.S. Dep't of Treasury, Treasury Sec'y Mnuchin Statement on Signing of FIRRMA to Strengthen CFIUS (Aug. 13, 2018).

84. *See* Foreign Investment Risk Review Modernization Act (FIRRMA), Pub. L. No. 115-232, § 1703, 132 Stat. 2174 (2018).

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(4) the purchase, lease, or concession by or to a foreign person of certain real estate near military or other sensitive national security facilities.⁸⁵

Once the necessary implementing regulations are issued by the U.S. Department of the Treasury (Treasury Department), CFIUS will have the authority to review, mitigate, or recommend the blocking or divesture of these new kinds of covered transactions.

With respect to the power of CFIUS, FIRRMA clarifies that CFIUS may initiate its own reviews of transactions and possesses the ability to stop a transaction from closing when CFIUS perceives a threat to national security that may require mitigation or result in a recommendation that the transaction be blocked.⁸⁶ FIRRMA also grants CFIUS the authority to use mitigation agreements and conditions to address situations where the parties have chosen to abandon a transaction without a presidential order as well as to impose interim mitigation agreements and conditions for national security risks posed by completed transactions while such transactions are undergoing CFIUS review.⁸⁷

On October 11, 2018, the Treasury Department promulgated two sets of FIRRMA implementing regulations. The first set of regulations was largely administrative in nature and served to amend the existing CFIUS regulations to implement certain FIRRMA provisions that took effect immediately upon being signed into law.⁸⁸ The other set of regulations enumerated procedures and requirements relating to a pilot program expanding CFIUS jurisdiction over certain non-controlling foreign investments in critical technology companies and requiring that mandatory declarations be filed with CFIUS relating to foreign investments in such companies.⁸⁹

^{85.} See *id.*

^{86.} See *id.* § 1708.

^{87.} See *id.* § 1718.

^{88.} See Provisions Pertaining to Certain Investments in the United States by Foreign Persons, 83 Fed. Reg. 51,316 (Oct. 11, 2018).

^{89.} See Determination and Temporary Provisions Pertaining to a Pilot Program to Review Certain Transactions Involving Foreign Persons and Critical Technologies, 83 Fed. Reg. 51,322, 51,323 (Oct. 11, 2018).

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International Trade

JONATHAN BABCOCK, CHLOE BALDWIN, THEODORE P. BRACKEMYRE,
SYLVIA Y. CHEN, LAURA A. EL-SABAawi, CYNTHIA C. GALVEZ,
GEOFFREY GOODALE, DERICK G. HOLT, ELIZABETH S. LEE,
USHA NEELAKANTAN, MOLLY O'CASEY, BRITTNEY POWELL,
ZACHARY SIMMONS*

This article outlines the most important developments in international trade law during 2018. It summarizes developments in the US trade policy development, World Trade Organization (WTO) dispute settlement activities, and US trade cases at the Department of Commerce (Commerce) and International Trade Commission (ITC).

I. US Trade Policy Developments

A. SECTION 232

Section 232 of the Trade Expansion Act of 1962 authorizes the US Department of Commerce to investigate whether a product is being imported “in such quantities or under such circumstances as to threaten to impair the national security.”¹ The Act also grants the President the statutory authority to then “adjust the imports” through tariffs or quotas.² Accordingly, as of March 23, 2018, following two presidential proclamations signed under section 232, steel and aluminum imports are subject to a twenty-five percent tariff³ and a ten percent tariff, respectively.⁴ Similarly, on May 23, 2018, the US Secretary of Commerce, Wilbur Ross, initiated a section 232 investigation to determine whether imports of automobiles and of automotive parts into the United States present a threat to national security.⁵

* This article surveys developments in international trade law during 2018. The committee editors of this article were Sylvia Y. Chen, Arnold & Porter Kaye Scholer LLP, and Cynthia Galvez, and Laura El-Sabaawi, Wiley Rein LLP. The authors were Chloe Baldwin and Zachary Simmons, Steptoe & Johnson LLP; Jonathan Babcock, Theodore P. Brackemyre, Laura El-Sabaawi, Derick Holt, Elizabeth S. Lee, Usha Neelakantan, Wiley Rein LLP; Geoffrey Goodale, FisherBroyles, LLP; Brittney Powell, Fox Rothchild LLP; and Molly O'Casey, Cornell University.

1. Trade Expansion Act § 232, 19 U.S.C. §1862 (1962).

2. *Id.*

3. Proclamation No. 9777, 83 Fed. Reg. 45,025 (2018).

4. Proclamation No. 9776, 83 Fed. Reg. 45,019 (2018).

5. See *U.S. Department of Commerce Initiates Section 232 Investigation into Auto Imports*, U.S. DEP'T OF COMMERCE (May 23, 2018), <https://www.commerce.gov/news/press-releases/2018/05/us-department-commerce-initiates-section-232-investigation-auto-imports>.

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The metal 232 tariff does not apply to those countries that agreed to quotas for steel, namely South Korea, Brazil, Argentina and Australia, or for aluminum, namely Argentina and Australia.⁶ The stated purpose of these tariffs is to respond to the distortion in the US and global steel markets caused by large volumes of excess global steel production, created in large part by “unfair practices by overseas competitors.”⁷

But the metal 232 tariffs have spawned multiple requests for World Trade Organization (WTO) panels to examine whether the tariffs constitute illegal safeguard measures.⁸ Additionally, other countries have retaliated with their own tariffs.⁹ Similarly, concerning the auto 232 tariff, members of the WTO warned that the proposed measure could cause “serious disruption” to world markets and the multilateral trading system.¹⁰

B. SECTION 301—CHINA

Section 301 of the Trade Act of 1974 provides the United States with statutory power to enforce trade agreements and address “unfair” foreign barriers to US exports.¹¹ In 2018, the United States Trade Representative (USTR) imposed tariffs on Chinese imports.¹² First, twenty-five percent tariffs went into effect on fifty billion dollars’ worth of imports.¹³ Then, ten percent tariffs went into effect on approximately \$200 billion worth of imports, and these tariffs will increase to twenty-five percent on January 1, 2019.¹⁴

6. See *Section 232 Tariffs on Aluminum and Steel: Duty on Imports of Steel and Aluminum Articles under Section 232 of the Trade Expansion Act of 1962*, DEP’T OF HOMELAND SECURITY, <https://www.cbp.gov/trade/programs-administration/entry-summary/232-tariffs-aluminum-and-steel> (last visited Mar. 30, 2019).

7. Neil Irwin, *The Real Risks of Trump’s Steel and Aluminum Tariffs*, N.Y. TIMES (Mar. 1, 2018), <https://www.nytimes.com/2018/03/01/upshot/trump-tariff-steel-aluminum-explain.html>. See Proclamation No. 9777, 83 Fed. Reg. 45,025 (2018).

8. See *Panels Established to Review US Steel and Aluminum Tariffs, Countermeasures on US Imports*, WTO.ORG, https://www.wto.org/english/news_e/news18_e/dsb_19nov18_e.htm (last visited Mar. 30, 2019).

9. *Id.*

10. *Members Raise Concerns Over US Section 232 Investigation on Automobiles and Automotive Parts*, WTO.ORG, https://www.wto.org/english/news_e/news18_e/good_03jul18_e.htm (last visited Mar. 30, 2019).

11. Trade Act of 1974 § 301, 19 U.S.C. §2411 (1974).

12. See China’s Acts, Policies, and Practices Related to Tech. Transfer, Intellectual Prop., and Innovation, 83 Fed. Reg. 14,906 (U.S. Trade Representative April 6, 2018) (Notice and Request for Comment Pursuant to Section 301); *see also* China’s Acts, Policies, and Practices Related to Tech. Transfer, Intellectual Prop., and Innovation, 83 Fed. Reg. 28,710 (U.S. Trade Representative June 20, 2018) (Notice of action, request for comments, and notice for public hearing).

13. *Id.*

14. See China’s Acts, Policies, and Practices Related to Tech. Transfer, Intellectual Prop., and Innovation, 83 Fed. Reg. 33,608 (U.S. Trade Representative July 17, 2018) (Request for comments and notice of public hearing).

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The stated purpose of the tariffs is to target China's "economic aggression."¹⁵ Namely, the tariffs are considered a response to Chinese policies forcing technology transfers from US companies to Chinese entities through investment processes; preventing market-based returns for US intellectual properties (IPs) through unfair licensing practices; generating large-scale technology and IP transfers through investments and acquisitions; and gaining access to business information through cyber intrusions into US computer networks.¹⁶

II. USMCA

On November 30, 2018, North American leaders signed the US-Mexico-Canada Agreement (USMCA or the Agreement),¹⁷ a new trilateral trade agreement to replace the North American Free Trade Agreement (NAFTA) which had been in effect since 1994.¹⁸ The USMCA modernizes the twenty-four-year-old NAFTA with key changes for targeted industries (e.g. automotive and dairy), revises origin rules, and the harmonizes regulatory systems.¹⁹ The USMCA consists of thirty-four chapters, twelve more than NAFTA's twenty-two chapters, and includes new or revised chapters on labor, the environment, anticorruption, competitiveness, and digital trade.²⁰ Although the USMCA preserves core NAFTA principles discussed herein, observers note roughly two-thirds of the Agreement is borrowed from the now-abandoned Trans-Pacific Partnership (TPP).²¹ The discussion below highlights a number of key provisions of the USMCA text that diverge from NAFTA.

Unlike NAFTA, which lacked a sunset/review process or expiration date, the USMCA stipulates the agreement will terminate sixteen years after the date of its entry into force, unless the parties agree to renew it for another sixteen-year term.²² The Agreement provides for a joint review process to

15. Remarks on Signing a Memorandum on Actions by the United States Related to the Section 301 Investigation of China's Laws, Policies, Practices, or Actions Related to Technology Transfer, Intellectual Property, and Innovation and an Exchange with Reporters, 2018 DAILY COMP. PRES. DOC. 2 (Mar. 22, 2018).

16. Memorandum on Actions by the United States Related to the Section 301 Investigation of China's Laws, Policies, Practices, or Actions Related to Technology Transfer, Intellectual Property, and Innovation, 2018 DAILY COMP. PRES. DOC. 180 (Mar. 22, 2018).

17. Agreement Between the United States of America, the United Mexican States, and Canada, Can.-Mex.-U.S., Nov. 30, 2018, USTR.GOV, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> [hereinafter USMCA].

18. North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 and 605 (1993) [hereinafter NAFTA].

19. *Id.*

20. *Id.*

21. See e.g., Michael Collins, *New Trade Deal with Canada, Mexico Borrows Heavily from Pact that Trump Abandoned*, USA TODAY, (Oct. 3, 2018), <https://www.usatoday.com/story/news/politics/2018/10/03/usmca-new-trade-deal-canada-borrows-pact-trump-abandoned/1498224002/>.

22. USMCA, *supra* note 17, art. 34.7(1).

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begin six years after its entry into force and at the beginning of every renewal period.²³ Notwithstanding, any country may withdraw from the Agreement with six months' written notice and without justification.²⁴

The USMCA maintains the NAFTA criteria for originating goods²⁵ and methods for calculating Regional Value Content²⁶ and transaction value; however, it increases the *de minimis* threshold for non-originating content to ten percent.²⁷ The Agreement also establishes a special rule for sets of goods and kits,²⁸ which are now considered "originating only if each good in the set is originating and both the set and the goods meet the other applicable requirements"²⁹

The USMCA also revises the origin rules for the automotive industry and raises the percentage of a vehicle's content that must be made in North America to qualify for preferential treatment from 62.5 percent to seventy-five percent.³⁰ Seventy percent of the steel and aluminum used must originate in one of the countries.³¹ New wage requirements will also be phased in over five years.³² The Agreement modifies the acceptable methods to certify the origin of goods, removes the requirement for a prescribed certification format,³³ and allows certifications of origin to be provided on invoices if other minimum requirements are met.³⁴

Recognizing the importance of international standards, the USMCA overhauls NAFTA's chapter on standards-related measures and incorporates the World Trade Organization's Technical Barriers to Trade Agreement (TBT Agreement).³⁵ The USMCA defines the definition to standards that are consistent with the TBT Agreement,³⁶ requiring application of the TBT Committee Decision on International Standards to determine whether there is an applicable international standard or recommendation.³⁷ The USMCA imposes new obligations on the Parties to conduct a review of any "major technical regulations it proposes to adopt" and establish procedures for

23. *Id.* art. 34.7(2).

24. *Id.* art. 34.6.

25. Compare USMCA, *supra* note 17, art. 4.2 with NAFTA, *supra* note 18, art. 401.

26. Compare USMCA, *supra* note 17, art. 4.5 with NAFTA, *supra* note 18, art. 402.

27. Compare USMCA, *supra* note 17, art. 4.12 with NAFTA, *supra* note 18, art. 405.

28. See USMCA, *supra* note 17, art. 4.17; *General Rules for the Interpretation of the Harmonized System*, WCOOMD.ORG, http://www.wcoomd.org/~media/wco/public/global/pdf/topics/nomenclature/instruments-and-tools/hs-interpretation-general-rules/0001_2012e_gir.pdf?la=en (last visited Mar. 30, 2019).

29. USMCA, *supra* note 17, art. 4.17.

30. *Id.* Annex 4-B, art. 4-B.3(1).

31. *Id.* Annex 4-B, art. 4-B.6(1).

32. *Id.* Annex 4-B, art. 4-B.7(1).

33. *Id.* art. 5.2(2).

34. *Id.*

35. USMCA, *supra* note 17, art. 11.3.

36. Compare USMCA, *supra* note 17, art. 11.1 with NAFTA, *supra* note 18, art. 915.

37. Compare USMCA, *supra* note 17, art. 11.4 with NAFTA, *supra* note 18, art. 905 (USMCA art. 11.4(3), The USMCA further prohibits the use of principles or criteria outside of the TBT Committee Decisions to recognize applicable international standards).

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Parties to petition review of regulations.³⁸ The Parties maintain discretion to decide whether a proposed regulation is considered major.³⁹

The USMCA also sets forth an updated framework to provide greater protection of IP rights, and extends the period of IP protection for works, performances, or phonograms to seventy years after an author's death, an increase from the previous fifty-year protection period.⁴⁰ The updated framework also requires a domain name dispute mechanism,⁴¹ enlarges the damages available to litigants for trademark infringement,⁴² and authorizes the imposition of criminal and civil penalties for trade secrets violations.⁴³

Furthermore, the USMCA allows Parties to levy sanctions for labor violations that impact trade,⁴⁴ prohibits the importation of goods produced by forced or child labor,⁴⁵ requires the adoption of labor rights recognized by the International Labor Organization,⁴⁶ and mandates the adoption of collective bargaining rights in Mexico.⁴⁷ In a new chapter on digital trade, the Agreement adopts rules that restrict data localization policies,⁴⁸ ban restrictions on data transfers across borders,⁴⁹ and prohibit customs and other charges on digital products.⁵⁰ Under the USMCA, Parties are required to give the others three months' notice before beginning negotiations of a free trade agreement with a non-market economy country.⁵¹ The USMCA also reportedly contains the first provision in a trade agreement to address currency manipulation by partners and requires the publication of foreign exchange market data.⁵²

III. WTO Dispute Settlement

This year saw no shortage of activity for the WTO's dispute settlement system, the organization's judicial arm designed to resolve the world's most pressing trade disputes.⁵³ Noteworthy challenges include: (1) China's

38. USMCA, *supra* note 17, art. 11.5.

39. *Id.* art. 11.5(1)(b).

40. *Id.* art. 20.63.

41. *Id.* art. 20.27.

42. *Id.* art. 20.82.

43. *Id.* art. 20.71.

44. USMCA, *supra* note 17, art. 23.5(2)(h).

45. *Id.* art. 23.6.

46. *Id.* art. 23.2.

47. *Id.* art. 23.

48. *Id.* art. 19.12 ("No Party shall require a covered person to use or locate computing facilities in that Party's territory as a condition for conducting business in that territory.")

49. *Id.* art. 19.8.

50. USMCA, *supra* note 17, art. 19.3.

51. *Id.* art. 32.10.

52. See C. Fred Bergsten, *A Positive Step in the USMCA: Countering Currency Manipulation*, PETERSON INST. FOR INT'L ECON., October 4, 2018, <https://pie.com/blogs/trade-investment-policy-watch/positive-step-usmca-countering-currency-manipulation>.

53. This review is limited to developments in the WTO dispute settlement system as of December 1, 2018.

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challenges to the European Union's and United States' treatment of China as a non-market economy (NME) in antidumping cases looming over the dispute settlement system⁵⁴ and (2) a number of trade disputes between the United States and Canada, including the latest iteration of the historic softwood lumber dispute.⁵⁵ Some significant and longstanding US trade disputes, including those challenging European subsidies on aircraft and Indian subsidies on solar panels, received consequential verdicts in 2018.⁵⁶ And, the dispute settlement system processed a significant number of cases that did not involve the United States, for example, the multi-party challenge to Australia's tobacco plain packaging measure.⁵⁷ But what seemed to dominate the dispute settlement system in 2018 was the myriad of cases challenging various US import tariffs, for example, the section 232 national security tariffs on steel and aluminum products.⁵⁸

Following the expiration of Article 15(a)(ii), its Accession Protocol, on December 11, 2016, China requested consultations with the United States and European Union regarding their treatment of China as an NME in antidumping cases.⁵⁹ In its requests for consultations, China alleged that the United States' and European Union's use of information other than Chinese prices and costs to determine normal value in antidumping cases runs afoul of various provisions of the General Agreement on Tariffs and Trade (GATT) 1994 and the Antidumping Agreement.⁶⁰ Although the dispute challenging certain US measures (DS515) has not advanced beyond the consultations stage, the dispute involving the European Union's Basic Regulation (DS516) is now before a dispute settlement panel, with briefing

54. See, e.g., Award of the Arbitrator, *United States – Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China*, WTO Doc. WT/DS471/RPT (Jan. 19, 2018).

55. Request for the Establishment of a Panel by the United States, *United States – Countervailing Measures on Softwood Lumber from Canada*, WTO Doc. WT/DS533/2 (Mar. 16, 2018).

56. Request for the Establishment of a Panel United States, *India – Certain Measures Relating to Solar Cells and Solar Modules Recourse to article 21.5 of the DSU by India*, WTO Doc. WT/DS456/20 (Jan. 29, 2018).

57. Panel Report, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc. WT/DS467/23 (Aug. 30, 2018).

58. Request for the Establishment of a Panel by the United States, *China – Certain Measures Concerning the Protection of Intellectual Property Rights*, WTO Doc. WT/DS542/8 (Oct. 19, 2018).

59. Dr. Cora JungBluth, *NEW STUDY: The EU, Anti-Dumping and China's New Market Economy Status*, GED-PROJECT.DE (Dec. 9, 2016), https://ged-project.de/videos/competitiveness/impact_of_emerging_markets/china-to-be-or-not-to-be-a-market-economy-is-not-the-question/.

60. See e.g., Acceptance by the United States of the Requests to Join Consultations, *United States – Measures Related to Price Comparison Methodologies*, WTO Doc. WT/DS515/15 (Dec. 18, 2017); Communication from the Panel, *European Union – Measures Related to Price Comparison Methodologies*, WTO Doc. WT/DS516/12 (Nov. 27, 2018).

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and argument having concluded in the second half of 2018.⁶¹ The panel expects to issue its final report in the second quarter of 2019.⁶²

In 2018, the dispute settlement system delivered results in longstanding trade disputes between the United States and China and also witnessed the commencement of new disputes between the two Members. In a dispute concerning various aspects of the US Department of Commerce's countervailing duty methodology (DS437), a compliance panel ruled that while the United States had acted inconsistently with WTO-covered agreements in part, China had failed to demonstrate its remaining allegations, for example, with respect to the legal standard for public body determinations under Article 1.1(a)(1) of the Agreement on Subsidies and Countervailing Measures.⁶³ Both the United States and China have since appealed aspects of the compliance panel's report to the Appellate Body.⁶⁴ In a dispute concerning various aspects of the US Department of Commerce's antidumping duty methodology (DS471), including the presumption that all firms in China operate as part of a single economic entity subject to state control, an arbitrator granted the United States fifteen months—until August 22, 2018—to implement the recommendations and rulings of the Dispute Settlement Body (DSB) in the proceeding.⁶⁵ Following this deadline, on September 9, 2018, China requested authorization to suspend concessions or other obligations totaling \$7.043 billion on the grounds that the United States failed to comply with the DSB's recommendations and rulings within the established reasonable period of time.⁶⁶ The United States has objected to China's proposed level of suspension of concessions.⁶⁷ In addition, a compliance panel delivered what was largely a victory for the United States in its challenge to China's redetermination of antidumping and countervailing duties on broiler chicken from the United States (DS427). Among other findings, the compliance panel determined that the cost of production methodology

61. See e.g., Communication from the Panel, *European Union – Measures Related to Price Comparison Methodologies*, WTO Doc. WT/DS516/12 (Nov. 27, 2018).

62. *WTO Panel Set to Decide EU-China Dumping Row Next Year*, LAW 360 (Nov. 27, 2018), https://www.law360.com/internationaltrade/articles/1105243/wto-panel-set-to-decide-eu-china-dumping-row-next-year?nl_pk=152520c5-0e76-4df1-9b33-d06a5348a3fc&utm_source=newsletter&utm_medium=email&utm_campaign=internationaltrade.

63. Panel Report, *United States – Countervailing Duty Measures on Certain Products from China*, WTO Doc. WT/DS437/RW (March 21, 2018).

64. Notification of an Appeal by the United States, *United States – Countervailing Duty Measures*, WTO Doc. WT/DS437/24 (April 27, 2018); Notification of an Other Appeal by China, *United States – Countervailing Duty Measures*, WTO Doc. WT/DS437/25 (May 2, 2018).

65. Award of the Arbitrator, *United States – Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China*, WTO Doc. WT/DS471/RPT (Jan. 19, 2018).

66. Recourse to Article 22.2 of the DSU by China, *United States – Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China*, WTO Doc. WT/DS471/18 (Sept. 9, 2018).

67. Recourse to Article 22.6 of the DSU by the United States, *United States – Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China*, WTO Doc. WT/DS471/20 (Sept. 21, 2018).

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applied by China, which estimated the average cost of producing a chicken, and then calculated the cost of producing the various parts by determining how much they weighed in relation to a given chicken's weight, was inconsistent with Article 2.2.1.1 of the Antidumping Agreement.⁶⁸ The United States and China also commenced new trade disputes in 2018, for example, the United States' challenge to certain Chinese intellectual property measures (DS542), and China's challenge to state-level subsidies and domestic content requirements in the US energy sector (DS563).⁶⁹

In May, Canada requested the establishment of a dispute settlement panel in two separate complaints over the United States' antidumping and countervailing duties in the long-running dispute on softwood lumber (DS533 and DS534).⁷⁰ The panels were established in April, and have indicated that they expect to issue their reports within the first half of 2019.⁷¹ Also in May, the United States requested the establishment of a panel with respect to measures maintained by the Canadian province of British Columbia governing the sale of wine in grocery stores (DS531).⁷² The panel was established in July, but has not yet been composed. Finally, in July 2018, the panel upheld Canada's challenge to the United States' countervailing duties on supercalendered paper and the investigation underlying the imposition of those duties (DS505).⁷³ The United States has appealed these findings, with the matter awaiting hearing by the Appellate Body in 2019.⁷⁴

Some significant and longstanding US trade disputes also received consequential verdicts in 2018. The Appellate Body delivered its latest ruling in the dispute between the United States and the European Union over E.U. subsidies to Airbus (DS316), finding that the European Union had not fully complied with previous adverse rulings but rejecting claims by the United States related to import substitution subsidies.⁷⁵ Both the United

68. Panel Report, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WTO Doc. WT/DS427/RW (Jan. 18, 2018).

69. Request for Consultations by the United States, *China – Certain Measures Concerning the Protection of Intellectual Property Rights*, WTO Doc. WT/DS542/1 (Mar. 23, 2018); Request for Consultations by the United States, *United States – Certain Measures Related to Renewable Energy*, WTO Doc. WT/DS563/1 (Aug. 14, 2018).

70. Request for the Establishment of a Panel by Canada, *United States – Countervailing Measures on Softwood Lumber from Canada*, WTO Doc. WT/DS533/2 (Mar. 15, 2018); Request for the Establishment of a Panel by Canada, *United States – Anti-Dumping Measures Applying Differential Pricing Methodology to Softwood Lumber from Canada*, WTO Doc. WT/DS534/2 (Mar. 15, 2018).

71. *See id.*

72. Request for the Establishment of a Panel by the United States, *Canada – Measures Governing the Sale of Wine in Grocery*, WTO Doc. WT/DS531/7 (May 25, 2018).

73. Panel Report, *United States – Countervailing Measures on Supercalendered Paper from Canada*, WTO Doc. WT/DS505/R at 96 (July 5, 2018).

74. Notification of an Appeal by the United States, *United States – Countervailing Measures on Supercalendered Paper from Canada*, WTO Doc. WT/DS505/6 (August 27, 2018).

75. Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WTO Doc. WT/DS316/AB/RW (May 15, 2018).

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States and the European Union hailed the findings by the Appellate Body as a victory, with the United States using the Appellate Body's ruling to request the imposition of billions of dollars' worth of sanctions on European products, while the European Union subsequently requested the composition of a further compliance panel.⁷⁶ The latest compliance panel is not expected to complete its work before the end of 2019, meaning a continuation of the ongoing saga of the aircraft disputes well into its fifteenth year of litigation.⁷⁷ In another longstanding (and continuing) dispute, the United States requested authorization to retaliate against India following adverse rulings against its national solar power program, which the Appellate Body ruled in 2016 was discriminatory (DS456).⁷⁸ Shortly thereafter, India responded by requesting the establishment of a compliance panel, meaning that the dual requests for retaliation and compliance rulings will continue into 2019.⁷⁹

Moreover, in this past year, a ruling by the Appellate Body in a dispute brought by Vietnam against Indonesian safeguards upheld the panel's findings that the tariffs were not safeguards because they did not suspend or modify concessions under the GATT 1994.⁸⁰ Significantly, the Appellate Body established a standard of review which could have a direct bearing on the adjudication of the disputes involving US section 232 tariffs. In addition, the panel provided its long-awaited report on Australia's tobacco plain packaging measure, which had been challenged by four separate complainants (Indonesia, Cuba, Honduras, and the Dominican Republic).⁸¹ The panel rejected all claims of all complainants, and while Honduras and the Dominican Republic have appealed certain aspects of the panel's findings to the Appellate Body,⁸² the reports in respect of the disputes

76. Request for Consultations by the European Union, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WTO Doc. WT/DS316/36 (May 29, 2018).

77. See generally, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WTO WT/DS316.

78. Recourse to Article 22.2 of the DSU by the United States, *India – Certain Measures Relating to Solar Cells and Solar Modules*, WTO Doc. WT/DS456/18 (Dec. 20, 2018).

79. Recourse to Article 21.5 of the DSU by India, *India – Certain Measures Relating to Solar Cells and Solar Modules*, WTO Doc. WT/DS456/20 (Jan. 29, 2018).

80. Appellate Body Report, *Indonesia – Safeguard on Certain Iron or Steel Products*, WTO Doc. WT/DS496/AB/R at 30 (Aug. 15, 2018). See also Brett Fortnam, Indonesia-Vietnam ruling could hint at WTO view of Section 232, *WORLD TRADE ONLINE* (Aug. 21, 2018), <https://insidetrade.com/daily-news/indonesia-vietnam-ruling-could-hint-wto-view-section-232>.

81. See Panel Reports, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc. WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R (June 28, 2018).

82. Notification of an Appeal by Honduras, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc. WT/DS435/23 (July 19, 2018); Notification of an Appeal by the Dominican Republic, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc. WT/DS441/23 (Aug. 23, 2018).

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brought by Indonesia and Cuba were adopted by the DSB on August 27, 2018.⁸³ Depending on the ability to resolve the fate of the Appellate Body, however, the tobacco plain packaging appeals may be one of the last to be heard by the Appellate Body as it currently stands.

Throughout the course of 2018, the United States has continued to reject proposals to fill vacancies on the Appellate Body bench, citing longstanding concerns about the need for reform of the Appellate Body's operation and functions. In particular, the United States has criticized the Appellate Body for being overly judicially active, for delving too far into the review of factual findings, and for failing to issue reports within the time required under the DSU.⁸⁴ In November 2018, the European Union, China, and ten other WTO Members issued a proposal to amend the rules governing the Appellate Body in ways that seek to address these criticisms.⁸⁵ As of October 2018, the Appellate Body was down to the minimum of three Members required to hear an appeal and, if the United States continues to block appointments to the bench, the Appellate Body will be unable to operate as of December 2019.⁸⁶

IV. Significant Department of Commerce Cases

Another active year for anti-dumping (AD) and countervailing duties (CVD) litigation at Commerce, 2018 involved Commerce initiating over sixty AD and CVD investigations, involving at least seventeen different countries and a variety of products ranging from steel pipe products, to stainless steel kegs, to mattresses, to magnesium, to aluminum wire and cable.⁸⁷ A selection of Commerce proceedings are discussed below.

83. Action by the Dispute Settlement Body, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc. WT/DS441/24, WT/DS458/22 (Aug. 28, 2018).

84. See e.g., Brett Fortnam *U.S. Rejects Proposal Brought by 58 Members to Fill WTO Appellate Body Slots*, WORLD TRADE ONLINE (Jan. 22, 2018), <https://insidetrade.com/daily-news/us-rejects-proposal-brought-58-members-fill-wto-appellate-body-slots>; Jack Caporal, *U.S. Opens New Front Against Appellate Body Over Delayed Reports*, WORLD TRADE ONLINE (June 22, 2018), <https://insidetrade.com/daily-news/us-opens-new-front-against-appellate-body-over-delayed-reports>; Hannah Monicken, *U.S.: DSU Bans Appellate Body Practice of 'Advisory Opinions'*, WORLD TRADE ONLINE (Oct. 31, 2018), <https://insidetrade.com/daily-news/us-dsu-bans-appellate-body-practice-advisory-opinions>.

85. European Commission Press Release IP/18/6529, *WTO reform: EU proposes way forward on the functioning of the Appellate Body* (Nov. 26, 2018); Brett Fortnam, *WTO proposal would amend rules to address U.S. Appellate Body criticisms*, WORLD TRADE ONLINE (Nov. 26, 2018), <https://insidetrade.com/inside-us-trade/wto-proposal-would-amend-rules-address-us-appellate-body-criticisms>.

86. See *Appellate Body Members*, WTO https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm (indicating that the terms of Ujal Singh Bhatia and Thomas R. Graham will end Dec. 10, 2019).

87. For a list of filed investigations see *ACCESS*, INT'L TRADE ADMIN., <https://access.trade.gov/login.aspx>.

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A. “SOLAR I” AND “SOLAR II” PROCEEDINGS

The proceedings on *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from China (Solar I)* continued this year, with ongoing administrative reviews in each. The final results of the fourth *Solar I* AD/CVD administrative reviews were issued in July 2018, calculating combined duty margins ranging between 24.97–27.44 percent, with a 238.95 percent margin for the China-wide entity (unchanged from prior review).⁸⁸ Preliminary results are expected in the fifth *Solar I* administrative reviews in December 2018 and January 2019. The final result of the second *Solar II* AD administrative review was issued in June 2018.⁸⁹ The AD duty margins for Taiwan were 1.33 percent.⁹⁰ Commerce rescinded the second administrative reviews of the *Solar II* China orders.⁹¹ The preliminary results of the third administrative reviews of the China and Taiwan orders are expected in January 2019.

Notably, Commerce’s determination that certain so-called “hybrid” solar cells, which contain both a crystalline silicon component and a thin film component, are covered by the scope of the *Solar I* orders was upheld by the US Court of International Trade in 2017 and is now pending before the US Court of Appeals for the Federal Circuit.⁹² A related decision of the US Court of International Trade, involving the extent of US Customs and Borders Protection’s authority to determine whether merchandise is within the scope of an order, was reversed by the Court of Appeals.

Finally, in November, Commerce and the ITC initiated five-year “sunset” reviews of the *Solar I* orders, to determine whether revocation of the orders would be likely to lead to continuation or recurrence of material injury to the domestic industry.⁹³ After conducting expedited sunset reviews, Commerce determined that revocation of the orders would likely lead to a continuation or recurrence of dumping at weighted-average dumping

88. Crystalline Silicon Photovoltaic Cells, Whether or not Assembled into Modules, from the People’s Republic of China, 83 Fed. Reg. 34,828 (July 23, 2018) (final results of countervailing duty admin. rev. and partial rescission of countervailing duty admin. rev., 2015); Crystalline Silicon Photovoltaic Cells, Whether or not Assembled into Modules, from the People’s Republic of China, 83 Fed. Reg. 54,566 (Oct. 30, 2018) (amended final results of countervailing duty admin. rev., 2015); Crystalline Silicon Photovoltaic Cells, Whether or not Assembled into Modules, from the People’s Republic of China, 83 Fed. Reg. 35,616 (July 27, 2018) (final results of antidumping duty admin. rev. and final determ. of no shipments, 2015-2016).

89. Certain Crystalline Silicon Photovoltaic Products from Taiwan, 83 Fed. Reg. 30,401 (June 28, 2018) (final results of anti-dumping duty admin. rev., 2016–2017).

90. *Id.* at 30,402.

91. *Id.* at 30,403.

92. *SolarWorld Americas, Inc. v. United States*, 273 F. Supp. 3d 1254 (Court Int’l Trade Oct. 18, 2017).

93. Initiation of Five-Year (Sunset) Reviews, 82 Fed. Reg. 50,612 (Nov. 1, 2017); Crystalline Silicon Photovoltaic Cells and Modules from China, 82 Fed. Reg. 50, 681 (Nov. 1, 2017) (institution of five-year reviews).

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margins as high as 249.96 percent, and net countervailable subsidies at margins as high as 19.41 percent.⁹⁴

**B. CERTAIN HARDWOOD PLYWOOD PRODUCTS FROM CHINA AD/
CVD INVESTIGATIONS**

In November 2017, Commerce made affirmative final determinations in the AD/CVD investigations of hardwood plywood from China.⁹⁵ The weighted-average dumping margins calculated for mandatory respondents, separate-rate recipients, and the China-wide entity was 183.36 percent,⁹⁶ and the subsidy rates ranged from 22.98 percent to 194.90 percent.⁹⁷ In its final margin calculations in the AD investigation, Commerce relied upon the intermediate input methodology.⁹⁸ Following the ITC's final affirmative determination of material injury by reason of subject imports, the AD/CVD orders on hardwood plywood from China were published on January 4, 2018.⁹⁹

**C. ALUMINUM EXTRUSIONS CIRCUMVENTION PROCEEDING
INVOLVING VIETNAM**

On March 5, 2018, Commerce initiated anti-circumvention inquiries to determine whether extruded aluminum products that are exported from the

94. Crystalline Silicon Photovoltaic Cells, Whether or not Assembled into Modules, from the People's Republic of China, 83 Fed. Reg. 10,663 (Mar. 12, 2018) (final results of the expedited first sunset review of the anti-dumping duty order); Crystalline Silicon Photovoltaic Cells, Whether or not Assembled into Modules, from the People's Republic of China, 83 Fed. Reg. 10,431 (Mar. 9, 2018) (final results of the expedited first sunset review of the countervailing duty order).

95. See the Issues and Decision Memorandum accompanying Certain Hardwood Plywood Products from the People's Republic of China, 82 Fed. Reg. 53,460 (Nov. 16, 2017) (final determ. of sales at less than fair value, and final affirm. determ. of critical circumstances, in Part); see the Issues and Decision Memorandum accompanying Countervailing Duty Investigation of Certain Hardwood Plywood Products from the People's Republic of China, 82 Fed. Reg. 53,473 (Nov. 16, 2017) (final affirm. determ., and final affirm. critical circumstances determ., in Part).

96. Certain Hardwood Plywood Products from the People's Republic of China, 83 Fed. Reg. 504 (Jan. 4, 2018) (amended final determ. of sales at less than fair value, and anti-dumping duty order).

97. Certain Hardwood Plywood Products from the People's Republic of China, 83 Fed. Reg. 513 (Jan. 4, 2018) (countervailing duty order).

98. See the Issues and Decision Memorandum accompanying Certain Hardwood Plywood Products from the People's Republic of China, 82 Fed. Reg. 53,460 at cmt. 2 (Nov. 16, 2017) (final determ. of sales at less than fair value, and final affirm. determ. of critical circumstances, in Part).

99. Certain Hardwood Plywood Products from the People's Republic of China, 83 Fed. Reg. 504 (Jan. 4, 2018) (amended final determ. of sales at less than fair value, and anti-dumping duty order); Certain Hardwood Plywood Products from the People's Republic of China, 83 Fed. Reg. 513 (Jan. 4, 2018) (countervailing duty order).

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Socialist Republic of Vietnam (Vietnam) are circumventing the AD¹⁰⁰ and CVD¹⁰¹ orders on aluminum extrusions from the People's Republic of China (China).¹⁰² Notably, Commerce initiated both a “merchandise completed or assembled in other foreign countries” inquiry pursuant to section 781(b) of the Tariff Act of 1930, as amended (the Act), and a “minor alterations” inquiry pursuant to section 781(c) of the Act.¹⁰³ Commerce initiated the anti-circumvention inquiries in response to a request from the Aluminum Extrusions Fair Trade Committee (AEFTC), who alleged that China Zhongwang Holdings Ltd. and its affiliates were circumventing the AD/CVD orders on aluminum extrusions by completing Chinese extrusions in Vietnam, by re-melting and re-extruding, and then shipping them to the United States. The AEFTC presented evidence that Vietnam's imports of Chinese aluminum extrusions, as well as Vietnam's exports of aluminum extrusions to the United States, have surged since the original investigations on aluminum extrusions, among other evidence. Commerce found the information provided by the AEFTC to be compelling enough to find that there exists a sufficient basis to initiate the anti-circumvention inquiries. Commerce's preliminary determination is currently pending.

V. Significant International Trade Commission Cases

A. LARGE DIAMETER WELDED PIPE FROM CANADA, CHINA, GREECE, INDIA, KOREA, AND TURKEY

Following a January 17, 2018 petition filed by a group of domestic producers of large diameter welded pipe for use in oil and gas and structural applications, the ITC issued affirmative preliminary determinations against imports from all of the subject countries – Canada, China, Greece, India, Korea and Turkey – in March 2018.¹⁰⁴ The ITC's vote was unanimous, with the four appointed Commissioners at the time finding a reasonable indication that the domestic industry was materially injured and threatened with material injury by reason of subject imports.¹⁰⁵ The ITC cumulated and found present material injury with regard to imports from Canada, China, India, Korea and Turkey. Finding Greek imports to be negligible, but also likely to imminently exceed the negligibility threshold, the ITC made an affirmative finding of threat of material injury with regard to Greece.¹⁰⁶

100. Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order, 76 Fed. Reg. 30,650 (May 26, 2011).

101. *Id.* at 30,653.

102. Aluminum Extrusions from the People's Republic of China: Initiation of Anti-Circumvention Inquiries, 83 Fed. Reg. 9,267 (Mar. 5, 2018).

103. *Id.* at 9,271-72.

104. Large Diameter Welded Pipe from Canada, China, Greece, India, Korea, and Turkey, Inv. Nos. 701-TA-593-596 and 731-TA-1401-1406, USITC Pub. 4768 (Mar. 2018) (Preliminary).

105. *Id.*

106. *Id.*

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Briefing has recently concluded in the final phase of the ITC's investigation.¹⁰⁷ Because the Commerce investigations on China and India proceeded more expeditiously than the other cases due to a lack of participation from Chinese and Indian respondents, the ITC will issue its final determinations on China and India in December 2018, with its final determinations on the four remaining countries following early the next year.

B. WIRE ROD FROM TEN COUNTRIES

In January 2018, the ITC found that the US wire rod industry was materially injured by dumped imports from Belarus, Russia, and the UAE.¹⁰⁸ While arguments for separate domestic like products were raised pertaining to grade 1080 and above tire bead and tire cord wire rod, the ITC defined a single domestic like product corresponding to the scope of the orders.¹⁰⁹ In March 2018, the ITC found that the US wire rod industry was materially injured by dumped imports of wire rod from South Africa and Ukraine.¹¹⁰ Finally, in May 2018, the agency found that the domestic wire rod industry was materially injured by wire rod imports from Italy, Korea, Spain, Turkey, Ukraine, and the United Kingdom.¹¹¹

C. STAINLESS STEEL FLANGES FROM INDIA AND CHINA

In August 2017, the ITC and Commerce began AD and CVD investigations of stainless steel flanges from China and India in response to the petitions filed with the ITC and Commerce by the Coalition of Stainless Steel Flange Producers.¹¹² Following affirmative preliminary determinations from both agencies, these investigations entered their final stages over the course of the spring and summer of 2018. The ITC found that the US stainless steel flanges industry was materially injured by subsidized and dumped imports from China on May 11, 2018 and July 13, 2018, respectively.¹¹³ On September 18, 2018, the ITC found that the US stainless steel flanges industry was materially injured by subsidized and dumped

107. *Id.*

108. Carbon and Certain Alloy Steel Wire Rod from Belarus, Russia, and the United Arab Emirates, Inv. Nos. 731-TA-1349, 1352, and 1357, USITC Pub. 4752 (Jan. 2018) (Final).

109. *Id.* at 9-15.

110. Carbon and Certain Alloy Steel Wire Rod from South Africa and Ukraine, Inv. Nos. 731-TA-1353 and 1356, USITC Pub. 4766 (Mar. 2018) (Final).

111. Carbon and Certain Alloy Steel Wire Rod from Italy, Korea, Spain, Turkey, and the United Kingdom, Inv. Nos. 701-TA-573-574 and 731-TA-1350, 1351, 1354, 1355, and 1358, USITC Pub. 4782 (May 2018) (final).

112. Stainless Steel Flanges from India, Inv. Nos. 701-TA-586 and 731-TA-1384, USITC Pub. 4828 at 1 (Sept. 2018) (Final); Stainless Steel Flanges from China, Inv. No. 731-TA-1383, USITC Pub. 4807 at 1 (July 2018) (Final); Stainless Steel Flanges from China, Inv. Nos. 701-TA-585, USITC Pub. 4788 at 1 (May 2018) (Final).

113. *See* Stainless Steel Flanges from India, Inv. Nos. 701-TA-586 and 731-TA-1384, USITC Pub. 4828 at I-1 – I-4 (Sept. 2018) (Final); *see also* Stainless Steel Flanges from China, Inv. No.

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imports from India.¹¹⁴ Commerce also reached affirmative determinations in both investigations as well.¹¹⁵ As a result of these affirmative findings from both the ITC and Commerce, AD and CVD orders are now in effect on stainless steel flanges from China at margins of 257.11 percent and 174.13 percent, respectively;¹¹⁶ and, AD and CVD orders are in place on stainless steel flanges from India at margins ranging from 19.16 percent to 145.25 and 4.92 percent to 256.16 percent, respectively.¹¹⁷

Notably, one of the respondent companies—Viraj Profiles Limited (Viraj),¹¹⁸ an affiliate of Bebitz Flange Works Pvt. Ltd.—in Commerce’s AD and CVD investigations of stainless steel flanges from India, was already prohibited from importing certain stainless steel products into the United States. In October 2014, the ITC began investigating Viraj’s imports of stainless steel products in response to a September 2014 complaint filed by Slater Stainless, Inc., Valbruna Stainless, Inc., and Acciaierie Valbruna S.p.a. (collectively, Valbruna), which alleged that Viraj had violated section 337 of the Act by importing and selling certain stainless steel products manufactured using Valbruna’s stolen trade secrets.¹¹⁹ On May 25, 2016, the ITC found that Viraj had violated section 337 of the Act, and issued a limited exclusion order against Viraj, in which it prohibited Viraj from importing into the United States for a period of 16.7 years any stainless steel products that were manufactured or sold using any of the misappropriated trade secrets from Valbruna.¹²⁰ On September 11, 2017, the US Court of Appeals for the Federal Circuit affirmed the ITC’s decision.¹²¹

731-TA-1383, USITC Pub. 4807 at I-1 – I-3 (July 2018) (Final); *see also* Stainless Steel Flanges from China, Inv. Nos. 701-TA-585, USITC Pub. 4788 at I-1 – I-2 (May 2018) (Final).

114. Stainless Steel Flanges from China, Inv. Nos. 701-TA-585, USITC Pub. 4788 at 36, I-2 (May 2018) (Final); Stainless Steel Flanges from China, Inv. No. 731-TA-1383, USITC Pub. 4807 at 4, I-2 (July 2018) (Final).

115. *See* Stainless Steel Flanges from India, Inv. Nos. 701-TA-586 and 731-TA-1384, USITC Pub. 4828 at 8, I-2 (Sept. 2018) (Final).

116. Stainless Steel Flanges from China, Inv. No. 731-TA-1383, USITC Pub. 4807 at I-3 (July 2018) (Final); Stainless Steel Flanges from China, Inv. Nos. 701-TA-585, USITC Pub. 4788 at I-10 (May 2018) (Final).

117. Stainless Steel Flanges from India, Inv. Nos. 701-TA-586 and 731-TA-1384, USITC Pub. 4828 at I-3 – I-4 (Sept. 2018) (Final).

118. *See* Stainless Steel Flanges from India, Inv. Nos. 701-TA-586 and 731-TA-1384, USITC Pub. 4828 at I-4 (Sept. 2018) (Final).

119. *See* Certain Stainless Steel Products, Certain Processes for Manufacturing or Relating to Sam, and Certain Products Containing Same, Inv. No. 337-TA-933, 2016 WL 4103468 at 1 (May 25, 2016) (Viraj Limited Exclusion Order).

120. *Id.* at 1-3.

121. *Viraj Profiles Ltd. v. Int’l Trade Comm’n*, 697 Fed. Appx. 699 (Fed. Cir. 2017).

D. HARDWOOD PLYWOOD FROM CHINA

In December 2017, the ITC issued an affirmative final determination of material injury with respect to imports of hardwood plywood from China.¹²² Back in November 2016, the ITC had instituted investigations into imports of hardwood plywood from China, following the filing of a petition by the Coalition for Fair Trade of Hardwood Plywood and its individual members.¹²³ In a unanimous decision in December 2017, the ITC found that an industry in the United States is materially injured by reason of dumped and subsidized imports of hardwood plywood from China.¹²⁴ Specifically, the ITC found that the volume of subject imports, as well as the increase in volume, was significant both in absolute terms and relative to production and consumption.¹²⁵ In addition, the ITC found there was significant underselling of the domestic like product by subject imports and that the significant and increasing volume of low-priced subject imports prevented price increases that otherwise would have occurred.¹²⁶ Furthermore, the ITC concluded that dumped and subsidized imports of hardwood plywood from China had a significant impact on the domestic industry.¹²⁷

VI. Section 337 Developments

Several significant section 337 developments occurred in 2018. These included: (1) the promulgation by the ITC of revisions to its section 337-related regulations; (2) three key decisions by the US Court of Appeals for the Federal Circuit (CAFC); and (3) several seminal Commission determinations.

This year, the ITC published a final rule to amend its regulations relating to the rules of practice and procedure governing section 337 investigations (the Final Rule), and the Final Rule entered into effect on June 7, 2018.¹²⁸

The CAFC issued three important decisions in 2018. In *Diebold Nixdorf*, the CAFC reversed the ITC's ruling in the *Certain Automated Teller Machines, ATM Modules, Components Thereof, and Products Containing the Same* case (Inv. No. 337-TA-989) and held that that all of the asserted claims of the patent at issue of the complainant, Nautilus Hyosung, were invalid as indefinite and that, therefore, Diebold Nixdorf had not violated section

122. Hardwood Plywood from China, 82 Fed. Reg. 61,325 (Dec. 27, 2017); Hardwood Plywood from China, Inv. Nos. 701-TA-565 and 731-TA-1341, USITC Pub. 4747 at 1 (Dec. 2017) (Final) [hereinafter Hardwood Plywood ITC Determination].

123. Hardwood Plywood from China, Inv. Nos. 701-TA-565 and 731-TA-1341, USITC Pub. 4747 at 1 (Dec. 2017) (Final).

124. *See generally id.*

125. *See id.* at 21–22.

126. *Id.* at 22–24.

127. *Id.* at 25–28.

128. *Id.*

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337.¹²⁹ In *Converse*, the CAFC vacated the decision that the ITC had issued in the *Certain Footwear Products* (Inv. No. 337-TA-936) and remanded the matter to the ITC for further proceedings based on the CAFC's determination that the ITC had erred by applying incorrect standards in determining trademark invalidity and infringement.¹³⁰ In *DBN Holding*, the CAFC ruled in favor of DBN Holding, which was previously known as DeLorme Publishing Company (DeLorme), and reversed and remanded a decision issued by the ITC in response to a petition filed by DeLorme asking the ITC to rescind or modify a civil penalty order based upon the CAFC's determination that the ITC erred in finding that DeLorme's arguments were barred by *res judicata*.¹³¹

The ITC also issued several seminal decisions in 2018. In *Certain Non-Volatile Memory Devices and Products Containing Same* (Inv. No. 337-TA-1046), the ITC held that economic investments and activities related to research prototypes can meet the economic prong of the domestic industry requirement.¹³² In addition, in *Certain Solid State Storage Drives, Stacked Electronics Components*, the ITC ruled that investments in non-manufacturing activities, such as engineering and research and development, can be used to satisfy the domestic industry requirements relating to "significant investment in US plant and equipment" or "significant employment of US labor or capital."¹³³ Moreover, in *Robotic Vacuum Cleaning Devices*, the ITC reaffirmed that the economic prong of the domestic industry requirement could be satisfied by, among other expenditures, significant investment in engineering labor in the United States, even if the manufacturing of the subject products occurred in a foreign country.¹³⁴ Collectively, these rulings demonstrate that the statute's requirements relating to plant, labor, or capital investments can be satisfied by engineering and development activities that fit within those general categories.

129. *Diebold Nixdorf, Inc. v. Int'l Trade Comm'n*, 899 F.3d 1291 (Fed. Cir. Aug. 15, 2018).

130. *Converse, Inc. v. Int'l Trade Comm'n*, 909 F.3d 1110 (Fed. Cir. Oct. 30, 2018).

131. *DBN Holding, Inc. v. Int'l Trade Comm'n*, 2017-2128, 2018 WL 6181653 (Fed. Cir. Nov. 27, 2018).

132. *See generally* *Certain Non-Volatile Memory Devices and Products Containing Same* Notice of the Commission's Final Determination Finding a Violation of Section 337; Issuance of a Limited Exclusion Order and Cease and Desist Orders; Termination of the Investigation, 83 Fed. Reg. 51,980 (Oct. 15, 2018).

133. *Certain Solid State Storage Drives, Stacked Electronics Components, and Products Containing Same*, Inv. No. 337-TA-1097 (June 29, 2018).

134. *See generally* *Certain Robotic Vacuum Cleaning Devices and Components Thereof Such as Spare Parts*; Notice of the Commission's Final Determination Finding a Violation of Section 337; Issuance of a Limited Exclusion Order and Cease and Desist Orders; Termination of the Investigation, 83 Fed. Reg. 63,186 (Dec. 7, 2018).

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SUJEY HERRERA, MARCUS QUINTANILLA, MARTINE FORNERET,
EMILY SCHERKER, JEFFREY ROSENTHAL,
JAMES A. EGERTON-VERNON, RICHARD DEUTSCH,
RANJAN AGARWAL, FÉLIX POGGIO, RAFAEL PEREYRA ZORRAQUIN,
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TIMUR IBRAHIM SEN, ANDREW WHITE, JAYESH H,
DAWN YAMANE HEWETT, JULIANNE JAQUITH, CHELSEA POLLARD,
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VALERIE VERBERNE, MARKIAN MALSKYY, OKSANA KAREL,
DARYNA HREBENIUK, KEARA A. BERGIN, AND
CHRISTOPHER P. DENICOLA*

I. Introduction

This article surveys developments in International Arbitration in 2018. Section I addresses significant arbitration developments in U.S. courts while

* Sujey Herrera of Reed Smith LLP and Marcus Quintanilla of Jones Day were the general editors of this article, with assistance from Sara Tabrizi of Jones Day; Martine Forneret, Emily Scherker, and Jeffrey Rosenthal of Cleary Gottlieb Steen & Hamilton LLP contributed Section II; the following authors contributed to Section III: James A. Egerton-Vernon of Jones Day (on Brazil); Richard Deutsch of McGuireWoods LLP (on Mexico); Ranjan Agarwal of Bennett Jones LLP (on Canada); Félix Poggio and Rafael Pereyra Zorraquin of Navarro Castex (on Argentina); Joyce Fong and Dan Perera of Reed Smith LLP (on Singapore; Reed Smith LLP is licensed to operate as a foreign law practice in Singapore under the name and style, Reed Smith Pte Ltd. Where advice on Singapore law is required, they will refer the matter to and work with Reed Smith's Formal Law Alliance partner in Singapore, Resource Law LLC, where necessary); Rong Gu, LL.M. Candidate at University of Pennsylvania (on Hong Kong); Helen Tang and Weina Ye of Herbert Smith Freehills LLP (on China); Timur Ibrahim Sen of Sen Law firm (on Turkey); Andrew White of Yulchon LLC (on South Korea); Jayesh H of Juris Corp, Advocates & Solicitors (on India); Dawn Yamane Hewett and Julianne Jaquith of Quinn Emanuel Urquhart & Sullivan LLP (on Japan); Chelsea Pollard of the Asian International Arbitration Centre in Malaysia; Ibrahim Sattout and Adnan Gaafar of ASAR – Al Ruwayeh & Partners (on Kuwait); Myriam Khedair, LL.M. Candidate at Columbia Law School (on Iraq); James Boykin and Stijn Winters of Hughes Hubbard & Reed LLP (on Switzerland); Amanda Lee of Seymours (on apparent bias in the United Kingdom); Peter Ashford and Sabrina Janzik of Fox Williams LLP (on time limits clarifications and the pro-enforcement bias in the United Kingdom); Christina Nitsche of Reed Smith LLP (on Germany); Gerard Meijer and Valerie Verberne of NautaDutilh (on the Netherlands; Markian Malskyy, Oksana Karel, and Daryna Hrebeniuk of Arzinger (on Ukraine); Keara A. Bergin and Christopher P. DeNicola of Dewey Pegno & Kramarsky LLP (on ICSID).

Section II highlights developments across the globe, including in Brazil, Mexico, Canada, Argentina, Singapore, Hong Kong, China, Turkey, South Korea, India, Japan, Malaysia, Kuwait, Iraq, Switzerland, the United Kingdom, Germany, the Netherlands, Ukraine, and at the International Centre for Settlement of Investment Disputes (ICSID).

II. Arbitration Developments in U.S. Courts

A. LABOR ARBITRATION CONTRACTS

The Supreme Court issued an opinion this year upholding enforcement of arbitration clauses in employment contracts.¹ In *Epic Systems v. Lewis*, the Court held that employers can use arbitration clauses in employment contracts to prohibit workers from engaging in collective action and class action procedures under the Fair Labor Standards Act and state law.² This decision resolved a circuit split on arbitration clauses in employment agreements,³ and may lead to the increased use of such agreements by employers.

Newly-appointed Justice Gorsuch, writing for the majority, found that the savings clause of the Federal Arbitration Act (FAA)—which provides that arbitration agreements are presumptively enforceable “save upon such grounds as exist at law or in equity for the revocation of any contract”—did not give federal courts a basis for refusing to enforce arbitration agreements in which an employee agrees to arbitrate claims against an employer on an individual basis.⁴ Relying upon *AT&T Mobility LLC v. Concepcion* and *Kindred Nursing Centers L.P. v. Clark*,⁵ Justice Gorsuch reasoned that the employees’ challenge to the individualized nature of arbitration proceedings (as opposed to a claim that the arbitration agreements were unconscionable or otherwise unenforceable) interfered with “one of arbitration’s fundamental attributes.”⁶ The decision then rejected the argument that the FAA contradicts the National Labor Relations Act (NLRA), finding that class and collective action procedures do not constitute the “concerted activities” protected by the NLRA.⁷

Justice Ginsburg’s dissent accused the majority of elevating the FAA over employee-protective labor legislation and urged “[c]ongressional correction” of the Court’s decision.⁸

1. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

2. *Id.*

3. *Compare* *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1016 (5th Cir. 2015), *with* *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1151, 1155 (7th Cir. 2016), *rev’d* 138 S. Ct. 1612 (2018).

4. *Epic Sys. Corp.*, 138 S. Ct. at 1622.

5. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Kindred Nursing Ctrs. L.P. v. Clark*, 137 S. Ct. 1421, 1423 (2017).

6. *Epic Sys. Corp.*, 138 S. Ct. at 1622 – 23.

7. *Id.* at 1624 – 26.

8. *Id.* at 1633 (Ginsburg, J., dissenting).

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B. ENFORCEMENT OF ARBITRAL AWARDS

1. *Public Policy Exception*

At the end of 2017 and in 2018, two D.C. courts reached different conclusions on whether to deny enforcement of an arbitral award based on the public policy exception. In *Sharp Corp. v. Hisense USA Corp.*, the district court rejected a challenge to an arbitral award based on an alleged conflict with the First Amendment.⁹

Following an arbitration in Singapore, Hisense received an award against Sharp arising from Sharp's efforts to terminate a licensing agreement that allowed Hisense to produce, advertise, and sell Sharp-branded televisions.¹⁰ The award, in part, enjoined Sharp from disparaging Hisense, issuing press releases about the arbitration, or discussing it with retailers or regulators.¹¹ In the U.S. court proceeding, Sharp argued that the gag order was unenforceable because it flouted the free speech protections of the First Amendment.¹²

The district court rejected Sharp's argument, stating that a foreign arbitral tribunal was free to restrict the free speech of a private party.¹³ It reasoned that the First Amendment only regulates state action and joined courts in other circuits in finding that judicial enforcement of an arbitration award fails to meet that standard.¹⁴ Lastly, referring to the "numerous cases" permitting speech restrictions in private contracts and arbitration agreements, the court found that no "well defined and dominant" public policy exception to the state-action doctrine existed that protected the speech of private parties.¹⁵

In a separate decision this year, a D.C. court refused to enforce an award on the grounds that it violated U.S. public policy by "severely affront[ing]" a foreign state's sovereignty.¹⁶ In *Hardy Exploration & Production [India] Inc. v. Government of India*, the district court found that the specific-performance portion of an award issued against the Government of India posed sovereignty concerns that took precedence over the United States' public

9. *Sharp Corp. v. Hisense USA Corp.*, 292 F. Supp. 3d 157, 163–64 (D.D.C. 2017).

10. *Id.* at 164.

11. *Id.*

12. *Id.* at 164 – 65.

13. *Id.* at 163.

14. *Id.* at 175 (citing *Roberts v. AT&T Mobility LLC*, 2016 WL 1660049, at *34 (N.D. Cal. Apr. 27, 2016)); *Davis v. Prudential Securities, Inc.*, 59 F.3d 1186, 1192 (11th Cir. 1995) (rejecting the argument that a district court's confirmation of an arbitration award provided the requisite state action for a constitutional claim). The court noted that in one limited instance, the Supreme Court had found that court enforcement of an agreement between private parties can be considered governmental action, but that this holding had been confined to the race-discrimination context. *Id.* at 176 (citing *Shelley v. Kraemer*, 334 U.S. 1 (1948)).

15. *Sharp*, 292 F. Supp. at 176.

16. *Hardy Exploration & Production [India] Inc. v. Gov't of India*, 314 F. Supp. 3d 95, 115 (D.D.C. 2018), *appeal docketed*, No. 18-7093 (D.C. Cir. July 6, 2018).

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policy in favor of the speedy confirmation of arbitral awards.¹⁷ While this is an unusual instance of a U.S. court declining to confirm an arbitration award on public policy grounds, it remains to be seen whether the district court’s judgment will be upheld, as the decision has been appealed to the D.C. Circuit.¹⁸

2. *Forum Non Conveniens*

In *Balkan Energy Ltd. v. Republic of Ghana*, the district court confirmed an arbitral award issued against Ghana by a Hague tribunal.¹⁹ The district court found that Ghana’s argument on *forum non conveniens* was “squarely foreclosed” by the D.C. Circuit’s decision—in *TMR Energy Lt v. State Prop. Fund of Ukraine*—that *forum non conveniens* does not apply to actions in the United States to enforce arbitral awards against foreign nations.²⁰ Ghana has since appealed the district court’s decision, arguing that *TMR Energy Ltd.* conflicts with D.C. Circuit and U.S. Supreme Court precedent.²¹

When read in conjunction with *Tatneft v. Ukraine*, another decision from the District Court for the District of Columbia (which is also on appeal), it is clear that district courts in D.C. do not embrace *forum non conveniens* arguments in relation to enforcement actions against foreign nations.²² In *Tatneft*, the court reaffirmed *TMR Energy*’s holding that only a U.S. court may attach the commercial property of a foreign nation located in the United States, and that a foreign nation’s lack of attachable property in the United States has no bearing on whether that court is an inconvenient forum.²³ Applying this precedent, the court in *Tatneft* found that Ukraine had failed to establish a basis for *forum non conveniens*, both because its lack of attachable property in the U.S. was immaterial and because Tatneft had raised a “credible issue” about its ability to obtain justice in Ukraine.²⁴ The arbitration award was premised upon the wrongful actions of Ukrainian prosecutors and court officials, thus supporting the claim that Tatneft itself could not expect impartiality in the Ukrainian courts.²⁵

C. REJECTION OF “MANIFEST DISREGARD OF THE LAW”

This year, state and federal courts in New York addressed the issue of whether “manifest disregard of the law” is a valid ground for vacatur of arbitral awards.²⁶ The circuits had split on this issue following the Supreme

17. *Id.* at 113.

18. *Id.* at 114.

19. *Balkan Energy Ltd. v. Rep. of Ghana*, 302 F. Supp. 3d 144 (D.D.C. 2018).

20. *Id.* at 155.

21. Brief for Appellant at 1 – 4, *Balkan Energy*, 302 F. Supp. 3d 144 (D.C. Cir. 2018) (Nos. 18-7061, 18-7062, 18-7063, 18-7064), 2018 WL 4822652.

22. *Tatneft v. Ukr.*, 301 F. Supp. 3d 175 (D.D.C. 2018).

23. *Id.* at 193 (citing *TMR Energy Ltd. v. State Prop. Fund of Ukr.*, 411 F.3d 296 at 304).

24. *Id.* at 194.

25. *Id.* at 193.

26. *Daesang Corp. v. NutraSweet Co.*, 167 A.D.3d 1 (N.Y. App. Div. Sept. 27, 2018).

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Court's decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, which held that section ten of the FAA provides the exclusive grounds under the statute for vacatur of arbitration awards.²⁷ In two appellate decisions this year, New York courts rejected an expansive interpretation of the “manifest disregard” doctrine.²⁸

Following a controversial and heavily criticized decision issued by a New York state lower court partially annulling an arbitral award on the basis that an International Chamber of Commerce tribunal had manifestly disregarded the law, a unanimous panel of the New York Supreme Court Appellate Division, First Department (First Department), concluded that the lower court had erred in its application of the “manifest disregard” doctrine.²⁹ In *Daesang Corp. v. NutraSweet Corp.*, the First Department found that the tribunal had not ignored the law, but had made a “good-faith effort” to apply the proffered legal standard to the facts of the case.³⁰ The First Department concluded that any errors in the tribunal's application of the law did not rise to the level of manifest disregard, because it did not appear that the tribunal ignored or refused to apply the relevant legal principles,³¹ nor were any errors in their application of the law “obvious and capable of being readily and instantly perceived by the average person qualified to serve as arbitrator.”³²

Given the alarm caused by the lower court's decision in an important jurisdiction for arbitration, the First Department's decision in *Daesang* offered reassurance that New York courts will continue to be hospitable to litigants seeking to enforce arbitration awards. A decision by the Second Circuit in *Pfeffer v. Wells Fargo Advisors, LLC*, reaffirmed that federal courts in New York are also wary of efforts to vacate awards on the grounds of manifest disregard.³³ In *Pfeffer*, the Court upheld a district court's decision confirming a FINRA arbitration panel's award, reaffirming that the Second Circuit does not recognize manifest disregard of the evidence as grounds for vacatur of an award.³⁴

D. DELEGATION OF ARBITRABILITY TO ARBITRATOR

In *Henry Schein v. Archer & White Sales, Inc.*, the Fifth Circuit reaffirmed that courts need not enforce an agreement delegating gateway issues of arbitrability to an arbitrator where an assertion that the relevant claim falls within the scope of the arbitration agreement is “wholly groundless.”³⁵

27. *Hall Street Assocs. v. Mattel, Inc.*, 552 U.S. 576, 584 (2008).

28. See *Daesang*, 167 A.D.3d at 17.

29. *Id.*

30. *Id.* at 18.

31. *Id.* at 19.

32. *Id.* (citing *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 – 34 (2d Cir. 1986)).

33. *Pfeffer v. Wells Fargo Advisors, LLC*, 723 Fed. Appx. 45 (2d Cir. 2018).

34. *Id.*

35. *Henry Schein v. Archer & White Sales, Inc.*, 878 F.3d 488, 495 (5th Cir. 2017).

Although courts generally determine the arbitrability of disputes unless the parties “clearly and unmistakably delegate that decision to arbitrators,” this rule has been eroded in recent years by judicial findings that the incorporation of certain bodies’ rules of arbitration into an agreement met the “clear and unmistakable” standard.³⁶

Schein highlights a circuit split as to whether the “wholly groundless” test is a valid basis for determining whether questions of arbitrability should be decided by an arbitrator even when that issue is delegated.³⁷ Litigants will likely gain further clarity on this issue in the coming year because the Supreme Court recently granted certiorari in *Schein*.³⁸

III. Arbitration Developments Around the World

A. AMERICAS

In Brazil, three court decisions mark key developments in international arbitration. In *Abengoa v. Ometto*, the Superior Tribunal de Justiça (STJ), Brazil’s highest appellate court, denied recognition of an arbitral award in part because the tribunal chair’s law firm did not disclose that it received \$6.5 million in unrelated legal fees from Abengoa Group companies during the course of the arbitration.³⁹ This conduct, the court ruled, violated the impartiality and independence provisions of the Brazilian Arbitration Act.⁴⁰ This ruling heralds an objective approach to the issue of arbitral impartiality in Brazil.

A second case involved a dispute between Petrobras and Brazil’s National Agency of Petroleum (ANP).⁴¹ When the ANP argued that the tribunal lacked jurisdiction, the STJ sided with Petrobras, citing the well-known

36. See, e.g., *Brittania-U Nigeria, Ltd. v. Chevron USA, Inc.*, 244 F. Supp. 3d 121, n.31 (finding that agreements that incorporate the United Nations Commission on International Trade Law rules clearly and unmistakably delegate issues of arbitrability); *Portland Gen. Elec. Co. v. Liberty Mut. Ins. Co.*, 862 F.3d 981 (9th Cir. 2017) (finding the same with respect to agreements that incorporate the International Chamber of Commerce rules).

37. *Compare* *Simply Wireless, Inc. v. T-Mobile US, Inc.*, 877 F.3d 522, 528 – 29 (4th Cir. 2017) (reaffirming the “wholly groundless” test), *with* *Jones v. Waffle House Inc.*, 866 F.3d 1257, 1269 (11th Cir. 2017) (finding that “the wholly groundless exception is in tension with the Supreme Court’s arbitration decisions”); *Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1286 (10th Cir. 2017).

38. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 138 S. Ct. 2678 (2018). In January 2019, the Supreme Court resolved the issue by holding that the contract delegates the question of the arbitrability of the dispute to an arbitrator, a court may not override the contract, even if the court believes that the argument is wholly groundless. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019).

39. See S.T.J., Ap. Civ. No. 9.412/US (2013/0278872-5), Relator: Ministro Felix Fischer, 19.04.2017, DIÁRIO DA JUSTIÇA [D.J.], 30.05.2017, 67 (Braz.).

40. *Id.*

41. See S.T.J, Conflito de Competência No. 139.519/RJ (2015/0076635-2), Relator: Ministro Napoleão Nunes Maia Filho, 09.11.2016, DIÁRIO DA JUSTIÇA [D.J.], 30.05.2017, 67 09.11.2016, 1 (Braz.).

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Kompetenz-Kompetenz principle that the arbitral tribunal has the power to decide its own jurisdiction.⁴²

The third case concerns arbitration clauses in related contracts. Based on a “related contracts” theory, the STJ held that the arbitral tribunal constituted under the main contract had jurisdiction over other collateral agreements, even though these collateral agreements subjected disputes to the jurisdiction of the São Paulo courts.⁴³

In Mexico, the Secretary of the Economy signed the ICSID convention on January 11, 2018.⁴⁴ This step signals Mexico’s commitment to foreign investment by providing foreign investors a measure of security through ICSID’s enforcement mechanism. Uncertainty abounds, however, following the re-negotiations of NAFTA Chapter 11, which revamped the dispute resolution procedures that NAFTA parties have used since the treaty’s inception.⁴⁵

In Canada, 2018 marked a pro-arbitration year. In *Trade Finance Solutions Inc. v. Equinox Global Limited*, the Ontario Court of Appeal held that the UNCITRAL Model Law applies even where parties have agreed only to subject certain disputes to arbitration, as opposed to all disputes.⁴⁶ In *Consolidated Contractors Group S.A.L. (Offshore) v. Ambatovy Minerals S.A.*, the Ontario Court of Appeal affirmed that only the most extreme circumstances will justify setting aside an international commercial arbitration award.⁴⁷ In *Heller v. Uber Technologies Inc.*, a class action by drivers for employment benefits, the motion judge referred the matter to arbitration in Netherlands.⁴⁸

In Argentina, the International Commercial Arbitration Law⁴⁹ (ICAL) was enacted after a long struggle. ICAL, which is based on the UNCITRAL Model Law,⁵⁰ adopts internationally accepted standards, thus updating

42. *Id.*

43. See S.T.J., Recurso Especial No. 1.639.035 – SP (2015/0257748-2), Relator: Ministro Paulo De Tarso Sanseverino. 12.09.2018 (Braz.) See S.T.J., Recurso Especial No. 1.639.035/SP (2015/0257748-2), Relator: Ministro Paulo De Tarso Sanseverino, 12.09.2018, DIÁRIO DA JUSTIÇA [D.J.], 15.10.2018, 20 (Braz.).

44. *Mexico Signs the ICSID Convention*, ICSID NEWS RELEASE (Jan. 10, 2018), <https://icsid.worldbank.org/en/Pages/News.aspx?CID=267>.

45. Heather Long, *U.S., Canada and Mexico just reached a sweeping new NAFTA deal. Here’s what’s in it*, WASH. POST (Oct. 1, 2018), https://www.washingtonpost.com/business/2018/10/01/us-canada-mexico-just-reached-sweeping-new-nafta-deal-heres-whats-it/?utm_term=.16e1f19d70e6.

46. *Trade Fin. Sols. Inc. v. Equinox Glob. Ltd.*, [2018] O.N.C.A. 12 (Can. Ont.).

47. *Consol. Contractors Grp. S.A.L. (Offshore) v. Ambatovy Minerals S.A.*, [2017] O.N.C.A. 939 (Can. Ont.).

48. *Heller v. Uber Techs. Inc.*, [2018] O.N.C.A. 1 (Can. Ont.).

49. Law No. 27.449, Aug. 4, 2018, B.O. 697 (Arg.).

50. See María Inés Corrá, *Reinforcing the Arbitration Path in Latin America: Argentina Adopted an International Commercial Arbitration Act*, KLUWER ARB. BLOG (Aug. 24, 2018), <http://arbitrationblog.kluwerarbitration.com/2018/08/24/investment-arbitration-tbc/>.

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Argentine legislation and establishing it as an attractive seat of arbitration for international business operators.

B. ASIA

In Singapore, both the PCA and ICC opened offices in 2018.⁵¹ In addition, the Singapore International Arbitration Centre signed MOUs with various counterparts in China such as the Shenzhen Court of International Arbitration, the Xi'an Arbitration Commission, the China International Economic and Trade Arbitration Commission, and Peking University Law School, establishing mutual cooperation agreements involving the sharing of knowledge and resources.⁵²

Case law developments were also significant. In dicta, the Singapore Court of Appeal stated that, where one party to a contract containing an arbitration clause initiates court proceedings, this is likely prima facie evidence of breach of contract by repudiation of the arbitration agreement.⁵³ The court stated that such evidence may be rebutted or confirmed with reference to the facts.⁵⁴ The court's approach marks a departure from English authorities that require a specific finding of repudiatory intent before repudiatory breach can be established.⁵⁵ Also relevant is a Singapore High Court holding that it has the power to grant permanent anti-suit injunctions on foreign court proceedings in support of arbitration.⁵⁶

In Hong Kong, the revised Hong Kong International Arbitration Center (HKIAC) Administered Arbitration Rules (2018 Rules) became effective on November 1.⁵⁷ The new rules made noteworthy amendments to the 2013 version,⁵⁸ including: (1) addressing third-party funding issues;⁵⁹ (2) encouraging effective use of technology;⁶⁰ (3) allowing parties to commence a single arbitration under multiple arbitration agreements⁶¹ and allowing tribunals to run multiple arbitrations concurrently if a common question of

51. See *Singapore Office*, PERMANENT CT. OF ARB., <https://pca-cpa.org/en/about/structure/singapore-office/> (last visited Apr. 11, 2019); *ICC Court case management team begins operations in Singapore*, INT'L CHAMBER OF COMM., <https://iccwbo.org/media-wall/news-speeches/icc-court-case-management-team-begins-operations-singapore/> (last visited Mar. 12, 2019).

52. *Home*, SING. INT'L ARB. CTR., <http://www.siac.org.sg/> (last visited Apr. 11, 2019).

53. *Marty Ltd. v. Hualon Corporation (Malay.)*, [2018] SGCA 63.

54. *Id.*

55. *Id.*

56. *Hilton Int'l Manage (Maldives) Pvt. Ltd. v. Sun Travels & Tours Pvt. Ltd.*, [2018] SGHC 56.

57. *2018 Administered Arbitration Rules*, H.K. INT'L ARB. CTR., available at http://hkiac.org/sites/default/files/ck_filebrowser/PDF/arbitration/HKIAC%20Rules%20-26%20Sept%202018.pdf [hereinafter 2018 Arbitration Rules].

58. *2013 Administered Arbitration Rules*, H.K. INT'L ARB. CTR., available at http://www.hkiac.org/sites/default/files/ck_filebrowser/PDF/arbitration/2013_hkiac_rules.pdf [hereinafter 2013 Arbitration Rules].

59. *2018 Arbitration Rules*, *supra* note 57, arts. 34.4, 44 – 45.

60. *Id.* art. 3.1.

61. *Id.* art. 29.

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law or fact exists;⁶² (4) introducing an early determination procedure;⁶³ (5) allowing parties to request suspension to pursue alternative dispute resolution after the arbitration commences;⁶⁴ (6) extending the timing of application for emergency relief, shortening time limits under the emergency arbitrator procedure, and capping emergency arbitrator fees;⁶⁵ and (7) requiring that tribunals notify the parties and HKIAC of the anticipated date of award delivery, which should be within three months after the closure of the proceedings.⁶⁶

In China, two Chinese Supreme People's Court (SPC) interpretations on judicial review of arbitration matters became effective in January.⁶⁷ The interpretations clarified the scope of judicial review of arbitrations and addressed various related procedural issues. In particular, the interpretations extended applicability of the "prior reporting system," which requires lower Chinese courts to obtain approval by the SPC prior to adopting decisions to set aside or not enforce arbitral awards.⁶⁸ While this requirement was formerly limited to foreign or foreign-related arbitral awards, the system now also applies to domestic awards.⁶⁹

In March, a third SPC interpretation on arbitral award enforcement came into force.⁷⁰ This interpretation, among other things, provides additional guidance on criteria for determining whether to refuse enforcement of an award.⁷¹ Collectively, these three interpretations demonstrate the increasingly pro-arbitration stance of the Chinese SPC.

A final significant development is the establishment of two Chinese International Commercial Courts (CICC) in Xi'an and Shenzhen.⁷² The CICCs are designed to attract more international disputes to resolution in China by working alongside mediation and arbitration institutions to offer a

62. *Id.* art. 30.

63. *Id.* art. 43.

64. *Id.* art. 13.8.

65. See 2018 *Arbitration Rules*, *supra* note 57, art. 23.1, sch. 4.

66. *Id.* art. 31.2.

67. *SPC Interpretations on Arbitral Judicial Review Cases*, BUREN, <https://www.burenlegal.com/en/news/spc-interpretations-arbitral-judicial-review-cases> (last visited Apr. 11, 2019); *Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Judicial Review of Arbitration Cases*, CHINA JUSTICE OBSERVER, <https://www.chinajusticeobserver.com/provisions-of-the-spc-on-several-issues-concerning-the-trial-of-judicial-review-of-arbitration-cases> (last visited Apr. 11, 2019).

68. *Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Judicial Review of Arbitration Cases*, CHINA JUSTICE OBSERVER, <https://www.chinajusticeobserver.com/provisions-of-the-spc-on-several-issues-concerning-the-trial-of-judicial-review-of-arbitration-cases> (last visited Apr. 11, 2019).

69. *Id.*

70. Falk Lichtenstein, *New provisions of the Supreme People's Court concerning enforcement of arbitration awards*, LEXOLOGY (Apr. 20, 2018), <https://www.lexology.com/library/detail.aspx?g=923afc10-f695-4d00-aea2-c06261ccfb2d>.

71. *Id.*

72. *About China International Commercial Court*, CHINA INT'L COMM. CT., <http://cicc.court.gov.cn/html/1/219/193/195/index.html> (last updated June 28, 2018).

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one-stop dispute resolution mechanism.⁷³ The CICC will refer interested parties to arbitral institutions and also provide mechanisms for obtaining interim protective measures and enforcement or setting aside of final awards.⁷⁴

In Turkey, the Omnibus Bill (Code No. 7101)⁷⁵ introduced significant changes to, inter alia, the Turkish Enforcement and Bankruptcy Code (TEBC), the Turkish Code of Civil Procedure (TCCP), the Turkish Commercial Code (TCC), and the Turkish International Arbitration Law (TIAL). The amendments brought about four noteworthy changes affecting international arbitrations.

First, in cases where Expedited Trial (Basit Yargilama) procedures apply, the TCCP is amended to limit expert witness opinion submissions to a two-month window with an option of a two-month extension at the court's approval.⁷⁶ The shortening of the total period from six months to four months is an effort to ensure the timeliness of legal proceedings.⁷⁷

Next, by amendment to the TIAL (No. 4686), the Regional Courts of Appeal (RCAs) will now be the competent courts for annulment proceedings, assuming the jurisdiction once held by local District Courts.⁷⁸ The High Court of Appeal in Ankara (Yargitay) is now the final appellate venue for RCA decisions.⁷⁹

Third, depending on the subject of a dispute, the civil or commercial courts of first instance in the seat of the arbitration will be the competent courts to undertake court actions during the course of the arbitration and before the final arbitral award is issued.⁸⁰ The Regional Courts of Appeal had previously held this jurisdiction.⁸¹

And finally, where courts set aside arbitral awards for failure to abide by mandatory arbitration periods, TCCP amendments enable the

73. *Id.*

74. Helen Tang et al., *Supreme People's Court Issues Rules of Procedure for the China International Commercial Courts*, HERBERT, SMITH, FREEHILLS (Dec. 7, 2018), <https://hsfnotes.com/arbitration/2018/12/07/supreme-peoples-court-issues-rules-of-procedure-for-the-china-international-commercial-courts/>.

75. Kanun No. 7101, RESMÎ GAZETE NO. 30361, Mar. 15, 2018, <http://www.resmigazete.gov.tr/eskiler/2018/03/20180315.pdf>.

76. *Id.*

77. *Id.*

78. *Turkey International Arbitration 2018*, INT'L COMP. LEGAL GUIDES, § 10.4 (July 25, 2018) <https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/turkey#chapter-content10>.

79. *Id.*

80. *Id.* § 6.7.

81. Pelin Baysal & Baril Y. Sapan, *Litigation & Dispute Resolution 2018 in Turkey*, GUN & PARTNERS (Feb. 21, 2018), <https://gun.av.tr/litigation-dispute-resolution-2018-in-turkey/>.

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redetermination of choice and appointment of arbitrations and arbitration periods unless the parties have agreed otherwise.⁸²

In South Korea, the Korean Commercial Arbitration Board (KCAB) opened a specialized maritime arbitration center in Busan.⁸³ By 2022, the new Asia-Pacific Maritime Arbitration Center is anticipated to handle as many as 100 cases annually.⁸⁴ The center is currently drafting its set of arbitration rules, specifically tailored for maritime disputes.⁸⁵ The KCAB also launched KCAB International, its new international division, to more efficiently handle cross-border disputes and better promote Seoul as a seat for international arbitration.⁸⁶ Also noteworthy is the merger and expansion of the Seoul International Dispute Resolution Center's facilities with KCAB's facilities in a new Gangnam location.⁸⁷

In India, the Supreme Court of India held in *Union of India v. Hardy Exploration and Production (India) Inc.*⁸⁸ that (1) the “venue” of an international commercial arbitration cannot be automatically considered its “seat,”⁸⁹ and (2) that if the term “place” is used, it becomes the “seat” unless it is accompanied by any condition, in which case it becomes the “seat” upon satisfaction of that condition.⁹⁰

In Japan, the Japan International Dispute Resolution Center (Center) opened in Osaka. The Center provides services for business disputes, investor-state disputes, as well as other types of cases, including sports cases.⁹¹ It can be used for ad-hoc arbitration hearings, as well as institutional arbitrations by various arbitral institutions, and has capability for simultaneous interpretation in four languages.⁹² Center services began in May and are managed by an association of Osaka-based lawyers and

82. See Ziya Akinci & Selin E. Onur, *Amendments to Turkish Code of Civil Procedure governing domestic arbitration*, THOMPSON REUTERS PRAC. L. (Nov. 1, 2012), [https://uk.practicalaw.thomsonreuters.com/2-522-1806?transitionType=Default&contextData=\(sc.Default\)](https://uk.practicalaw.thomsonreuters.com/2-522-1806?transitionType=Default&contextData=(sc.Default)).

83. *South Korea Opens Arbitration Center for Maritime Disputes in Busan*, YONHAP NEWS AG. (Apr. 5, 2018; 2:50 PM), <https://en.yna.co.kr/view/MYH20180405011400345>.

84. Tae-Jun Kang, *Busan to open maritime arbitration centre*, LLOYD'S LIST (Mar. 15, 2018), <https://lloydlist.maritimeintelligence.informa.com/LL1121843/Busan-to-open-maritime-arbitration-centre?vid=Maritime>.

85. Paul Yoon, *SMAA to be launched 1st half next year*, MARITIME PRESS (Nov. 15, 2017), <http://eng.maritimepress.com/news/articleView.html?idxno=3324>.

86. *About KCAB International*, KCAB INT'L, http://www.kcabinternational.or.kr/common/index.do?jpath=/contents/sub0402&CURRENT_MENU_CODE=MENU0020&TOP_MENU_CODE=MENU0018 (last visited Apr. 11, 2019).

87. *Facilities*, KCAB INT'L, <http://www.kcabinternational.or.kr/common/index.do?jpath=/contents/sub0106> (last visited Apr. 11, 2019).

88. *Union of India v. Hardy Exploration and Production (India) Inc.*, (2018) 7 SCC 374 (India).

89. *Id.* at 403.

90. *Id.* at 402.

91. *Japan's first international arbitration center debuts in Osaka*, JAPAN TIMES (July 31, 2018), <https://www.japantimes.co.jp/news/2018/07/31/business/japans-first-international-arbitration-center-debuts-osaka/#.W-Rl2NVKguU>.

92. *Id.*

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arbitration experts.⁹³ The Center hopes to make arbitration in Japan more efficient and less costly and is funded by annual membership fees paid by corporations and individuals.⁹⁴

In Malaysia, the Arbitration Act 2005 (Act) was amended⁹⁵ to more closely conform to other UNCITRAL Model Law jurisdictions.⁹⁶ It strengthened arbitral awards by repealing section forty-two, thus preventing parties from bringing questions of law before the High Court after an award is issued.⁹⁷ Section thirty-seven now provides the only remaining recourse for parties seeking to set aside an award.⁹⁸ The Act also rebranded the Kuala Lumpur Regional Centre for Arbitration as the Asian International Arbitration Centre.⁹⁹

In Kuwait, a recent Court of Appeals decision underscored the country's need for a modern approach to international arbitration. For years, international arbitrations in Kuwait have been frustrated by Articles 199 and 200 of the Civil and Commercial Procedures law number thirty-eight of 1980 (CCPL), which provide, inter alia, that foreign arbitral awards may not contradict judgments issued by Kuwaiti courts.¹⁰⁰ Although Kuwait did ratify the New York Convention (Convention),¹⁰¹ the condition subsequently imposed by Articles 199 and 200 have allowed litigants to manipulate the system and defeat enforcement procedures.

A recent matter raised before Kuwaiti courts highlighted this problem. There, a litigant was issued an arbitral award in a foreign jurisdiction after the opposing party defendant refrained from participating in the arbitral proceedings. The defendant subsequently obtained judgement from Kuwaiti courts declaring the arbitration agreement null and void. The claimant, meanwhile, sought to have the arbitral award enforced in Kuwait pursuant to the Convention; Kuwaiti courts, however, rejected the enforcement action on the ground that a contradictory judgment was previously issued by a Kuwaiti Court.¹⁰² This deviation from the

93. *Id.*

94. *About the Japan International Dispute Resolution Center*, JAPAN INT'L DISP. RES. CTR., http://www.idrc.jp/index_en.html (last visited Apr. 11, 2019).

95. Law of Malaysia, Act A1469 Arb. (Amend.) (No. 2) 2018, http://www.federalgazette.agc.gov.my/outputaktap/20180504_A1569_BI_Act%20A1569.pdf.

96. See Kuala Lumpur, *Amendments to the Arbitration Act 2005 (Act 646) — News*, ASIAN INT'L ARB. CTR. (May 8, 2018), <https://www.aiac.world/news/253%20KLRCA>.

97. Law of Malaysia, *supra* note 95.

98. U. N. Comm'n Int'l Trade Law, UNCITRAL Model Law on Int'l Comm. Arb., U.N. Doc. A/40/17, annex 1, art. 34 (1994).

99. Kuala Lumpur, *supra* note 96.

100. Saad Badah, *The Enforcement of Foreign Arbitral Awards in the GCC Countries: Focus on Kuwait*, 3 INT'L L. RES. 24, 24 – 37 (2014).

101. *Id.* at 32.

102. See Court of Appeals, 12 June 2018 (this source contains confidential information, thus no further details can be disclosed at this time).

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Convention's enforcement requirements falls in line with other Kuwaiti court judgments contradicting globally recognized arbitration principles.¹⁰³

In Iraq, the first step has been taken to accede to the New York Convention. The Iraqi cabinet voted for the accession on February 6, with a reservation mandating non-retroactivity.¹⁰⁴ The next step to finalize the ratification will be the vote of the Iraqi Parliament.

C. EUROPE

In Switzerland, the Swiss Federal Supreme Court denied requests from the Russian Federation to set aside two UNCITRAL Awards.¹⁰⁵ The two awards upheld the arbitral tribunal's jurisdiction over treaty claims brought by Ukrainian investors under the 1998 Russia-Ukraine BIT involving property seized in Crimea in the wake of the 2014 annexation.¹⁰⁶ The Court held that the tribunal in both arbitrations was correct in holding that Ukrainian investments originally made in Ukrainian Crimea became protected investments in Russia-controlled Crimea.¹⁰⁷ All five justices agreed that the BIT's territorial scope changed to reflect the de facto change in the contracting states' territories.¹⁰⁸ Only one of the five justices accepted the Russian Federation's argument that the BIT required investments to be cross-border at the time they were made in order to be protected.¹⁰⁹ This decision is of critical importance to at least six other investment arbitrations against the Russian Federation arising out of its expropriation of Ukrainian owned property on the peninsula. Notably, in May, one tribunal seated in the Netherlands awarded \$150 million to Ukrainian investors for expropriations of their Crimean real estate holdings.¹¹⁰

In the United Kingdom, the English Court of Appeal considered apparent bias in an appeal of an application to remove an arbitrator.¹¹¹ Dismissing the

103. See Cassation Court 2, No. 568 of 23 January 2000; Salah Abdulwahab Al Jassem Directory.

104. See Sami Tannous & Amr Omran, *The Middle Eastern and African Arbitration Review 2018*, GLOBAL ARB. REV. (May 11, 2018), <https://globalarbitrationreview.com/benchmarking/the-middle-eastern-and-african-arbitration-review-2018/1169358/middle-east>; see *The Cabinet approves Iraq's accession to the N.Y. Convention on int'l arb.*, GOV'T OF IRAQ (Apr. 25, 2018), <https://gds.gov.iq/cabinet-approves-iraqs-accession-new-york-convention-international-arbitration/>.

105. Nathalie Voser, *Swiss Supreme Court dismisses challenges to interim awards on jurisdiction rendered in investor-state arbitrations*, LEXOLOGY (Nov. 28, 2018), <https://www.lexology.com/library/detail.aspx?g=ec2605a4-a097-4509-b3fd-a197b7570076>.

106. *Id.*

107. *Id.* This publication was submitted before the Swiss Federal Tribunal released a transcript of its public deliberation. This article is based on the eyewitness report of co-author J. Boykin.

108. *Id.*

109. *Id.*

110. Mykhaylo Soldatenko, *Ongoing Territorial Challenges in Crimea Cases: Putting Everest v. Russia in Context*, KLUWER ARB. BLOG (Nov. 5, 2018), <http://arbitrationblog.kluwerarbitration.com/2018/11/05/territorial-challenges-expected-in-crimea-cases-putting-everest-v-russia-in-context/>.

111. *Halliburton Co. v. Chubb Bermuda Ins. Ltd. & Ors.* [2018] 1 W.L.R. 3361.

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appeal, the Court clarified that arbitrators may accept appointments in multiple references concerning overlapping or identical subject matters with only one common party without inevitably giving rise to an appearance of bias.¹¹² The Court reiterated that the applicable test is whether, after consideration of the facts, a fair-minded and informed observer would conclude that there was a real possibility of bias.¹¹³ Recognizing that many arbitral rules impose stricter subjective tests, the Court ruled that under English law the “more certain” objective observer standard applies.¹¹⁴ The Court also held that although non-disclosure is a relevant factor, it cannot justify an inference of apparent bias unless it gives rise to justifiable doubts regarding an arbitrator’s impartiality.¹¹⁵ In other words, “something more” than non-disclosure is required.¹¹⁶ Arbitrators do not have a “duty of inquiry”¹¹⁷ but must disclose facts or circumstances that “would or might” lead an informed observer to conclude that there was a real possibility of bias, which could include repeat appointments.¹¹⁸

The English Court also elaborated on the time limits for challenging arbitration awards in cases where parties have previously sought clarifications or corrections. In *Daewoo Shipbuilding & Marine Engineering Company Ltd. v. Songa Offshore Endurance Ltd.*,¹¹⁹ the Court held that applying for an “immaterial” correction does not extend the start date for the running of time. But “material” corrections, or ones which must necessarily be sought in order to bring the challenge, are treated differently.¹²⁰ Time begins running from the date a material clarification is made.¹²¹

A long-standing policy on arbitrations was also confirmed by the English courts this year. The holding in *RBRG Trading (UK) Ltd. v. Sinocore International Co. Ltd.*¹²² demonstrated the strong pro-enforcement bias towards New York Convention awards, even where a party has behaved fraudulently. Sinocore, despite having attempted to extract payment through forged bills of lading, prevailed in a CIETAC arbitration addressing RBRG’s breach of contract.¹²³ When Sinocore sought enforcement from English courts, RBRG contended that the recognition and enforcement of the Award would be contrary to public policy.¹²⁴ RBRG’s application was

112. *Id.* at [53].

113. *Id.* at [39].

114. *Id.* at [67 – 68].

115. *Id.* at [67].

116. *Id.* at [77].

117. *Halliburton Co.* [2018] 1 W.L.R. at [69].

118. *Id.* at [71].

119. *Daewoo Shipbuilding & Marine Engineering Co. Ltd. v. Songa Offshore Equinox Ltd.* [2018] EWHC (Comm) 538 [51].

120. *Id.* at [62].

121. *Id.* at [43].

122. *RBRG Trading (UK) Ltd. v. Sinocore Int’l Co. Ltd.* [2018] EWCA (Civ) 838 [25].

123. *Id.* at [13].

124. *Id.* at [3].

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dismissed on the basis that the breach predated the forgery and RBRG had not been deceived by the fraud.¹²⁵

In Germany, the German Arbitration Institute (Deutsche Institution für Schiedsgerichtsbarkeit DIS) has revised its arbitration rules for the first time in twenty years.¹²⁶ The new DIS rules came into effect on March 1, 2018 (DIS Rules)¹²⁷ and reflect developments in international arbitration practice, with a strong focus on efficiency and transparency. The DIS Rules provide for numerous changes that align them with international arbitration standards shared by leading arbitration institutions, while maintaining established procedures manifested in civil law.

Key changes include accelerating the process by which parties communicate and by which an arbitral tribunal is constituted.¹²⁸ Responses to a request for arbitration, for example, must now be filed with the DIS within forty-five days of receipt.¹²⁹ Previously, the time limit for filing a response had been set by the tribunal.¹³⁰ More stringent time constraints have been imposed upon several other steps of the arbitral process, including for the nomination of arbitrators and presidents,¹³¹ and the parties are now required to hold case management conferences.¹³² On the other hand, the DIS considers the efficiency of case management by the arbitral tribunal when determining the tribunal fees.¹³³

In the Netherlands, it was a milestone year in international investment arbitration due to a European Court of Justice (ECJ) decision in a dispute between the Slovak Republic and Achmea BV. The ECJ found that an arbitration clause in an international investment agreement between two European Union member states is incompatible with EU law.¹³⁴ Consequently, the Netherlands was the first EU member to announce its intention to terminate its intra-EU BITs.¹³⁵ Non-European parts of the Kingdom of the Netherlands, however, are not bound by the decision of the

125. *Id.* at [31].

126. See *DIS-Arbitration Rules 98*, GERMAN ARB. INST. (DIS), <http://www.disarb.org/en/16/rules/dis-arbitration-rules-98-id10> (last visited Apr. 11, 2019). The former rules were adopted on 1 January 1998.

127. 2018 DIS Arbitration Rules, GERMAN ARB. INST. (DIS), *available at* http://www.disarb.org/upload/varia/180119_DIS_NewRules_EN.pdf.

128. *Id.* arts. 4, 13.4.

129. *Id.* art. 7.2. The time limit may be extended by twenty days upon request to be filed with the DIS.

130. *DIS-Arbitration Rules 98*, *supra* note 126, § 9.

131. *2018 DIS Arbitration Rules*, *supra* note 57, arts. 7.1, 12.2.

132. *Id.* art. 27.2.

133. *Id.* art. 34.4.

134. Case C-284/16, *Slowakische Republik (Slovak Republic) v. Achmea BV*, 2018 E.C.J. 158 ¶ 57.

135. Marie Davoise & Markus Burgstaller, *Another One BIT the Dust: Is the Netherlands' Termination of Intra-EU Treaties the Latest Symptom of a Backlash Against Investor-State Arbitration?*, KLUWER ARB. BLOG (Aug. 11, 2018), <http://arbitrationblog.kluwerarbitration.com/2018/08/11/another-one-bit-dust-netherlands-termination-intra-cu-treaties-latest-symp tom-backlash-investor-state-arbitration/>.

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European court and have decided to keep their BITs intact.¹³⁶ Consequently, investors looking to restructure their investments may still do so under the non-European jurisdictions.

A first draft of a Netherlands Model BIT was also published for public consultation in May of 2018.¹³⁷ Its main features are stricter definitions of “investor” and “investment” and the introduction of a closed list of breaches of the fair and equitable treatment standard.¹³⁸

And finally, the infamous investment-related arbitration involving Chevron and the government of Ecuador was resolved after more than two decades. The subject of the arbitration was the validity of a 9.5 billion dollar judgment rendered against Chevron by an Ecuadorian judge.¹³⁹ The arbitral tribunal, administered by the Permanent Court of Arbitration in the Hague, granted Chevron’s claims against Ecuador based on denial of justice principles.¹⁴⁰

In Ukraine, 2018 marked the first year of the judicial reforms to the Civil and Commercial Procedure Codes.¹⁴¹ Arbitration-related developments included broadening the spheres of arbitrability to include certain commercial real estate disputes and shareholder agreements,¹⁴² introducing court assistance with the arbitral process,¹⁴³ and expediting court procedures for setting aside,¹⁴⁴ recognizing, and enforcing arbitral rulings.¹⁴⁵

Probably the most widely requested arbitration related tool in Ukraine in 2018 was interim relief. When considering applications for injunction in support of arbitration, Ukrainian courts have set a very high standard of proof, requesting on multiple occasions that actual dissemination of assets has taken place as a precondition for interim relief. When a foreign party

136. See *Kingdom of the Netherlands: One Kingdom – Four Countries; European and Caribbean*, MINISTRY OF FOREIGN AFF. (Apr. 6, 2015), available at <https://www.government.nl/documents/leaflets/2015/06/05/kingdom-of-the-netherlands-one-kingdom-four-countries-european-and-caribbean>.

137. See *Neth. draft model BIT*, GLOBAL ARB. REV., available at https://globalarbitrationreview.com/digital_assets/820bcdd9-08b5-4bb5-a81e-d69e6c6735ce/Draft-Model-BIT-NL-2018.pdf.

138. *Id.*

139. Press Release, *International Tribunal Rules for Chevron in Ecuador Case*, CHEVRON (Sept. 7, 2018), <https://www.chevron.com/stories/international-tribunal-rules-for-chevron-in-ecuador-case>.

140. *Id.*

141. Law of Ukr. No. 2147-VIII, *On Amendments to the Commercial Procedural Code of Ukraine, the Civil Procedural Code of Ukraine, the Code of Administrative Justice of Ukraine and other legislative acts*, LEGIS. OF UKR., (Dec. 15, 2017), <http://zakon.rada.gov.ua/laws/show/2147-19#n2972>.

142. Econ. Proc. Code of Ukr. No. 1798-XII, art. 22 (Aug. 28, 2018), LEGIS. OF UKR., <http://zakon.rada.gov.ua/laws/show/1798-12>.

143. Civ. Proc. Code of Ukr. No. 1618-IV, arts. 84.11, 94, 116.7 – 8, 149.3 (Apr. 11, 2018), LEGIS. OF UKR., <http://zakon.rada.gov.ua/laws/show/1618-15>.

144. *Id.* § VII.

145. *Id.* § IX, ch. 3.

entity has requested interim relief in Ukraine, the courts have required the moving party to post security.¹⁴⁶

D. ICSID

On May 16, 2018, a tribunal of the International Centre for the Settlement of Investment Disputes issued an award in *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, holding that Spain breached the fair and equitable treatment (FET) standard under Article 10(1) of the Energy Charter Treaty.¹⁴⁷ The claimant, Masdar Solar & Wind Cooperatief U.A. (Masdar), is an investor in renewable energy projects.¹⁴⁸ Masdar asserted that Spain breached the applicable FET standard by upending the regulatory regime in place when Masdar invested in three solar plants in 2008 and 2009, thereby causing it significant damages.¹⁴⁹ In particular, Masdar asserted that its investment decisions were based on Spain's guarantee of the stability of certain benefits—including feed-in tariffs and priority of dispatch to the grid—which Spain had offered to attract investment in the capital-intensive renewable sector by Royal Decree No. 661/2007 (RD661/2007).¹⁵⁰ During 2012 and 2014, however, Spain passed a series of measures that substantially modified RD661/2007 and effectively eliminated those benefits.¹⁵¹

A key issue was whether Masdar had a legitimate expectation of stability in the framework established by RD661/2007.¹⁵² The tribunal concluded that Masdar did have such a legitimate expectation, because Spain had made a unilateral offer to guarantee the stability of those benefits as long as Masdar fulfilled certain conditions, and subsequently issued a specific resolution for each of the three plants stating that the applicable compensation “consists of the tariffs established in Royal Decree 661/2007.”¹⁵³ Consequently, the ICSID tribunal held that Spain breached its FET obligations to Masdar when it modified RD661/2007.¹⁵⁴

146. Olena Perepelynska, *Arbitration Reform in Ukraine: New Possibilities for Arbitration Users*, CIS ARB. FORUM (Feb. 8, 2018), <http://www.cisarbitration.com/2018/02/08/arbitration-reform-in-ukraine-new-possibilities-for-arbitration-users/>.

147. *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case. No. ARB/14/1, Award (May 16, 2018).

148. *Id.* ¶ 82.

149. *Id.* ¶ 5.

150. *Id.* ¶¶ 348 – 50.

151. *Id.* ¶¶ 521 – 22.

152. *Id.* ¶¶ 489 – 90.

153. *Masdar Solar*, *supra* note 147, ¶¶ 512 – 20.

154. *Id.* ¶¶ 521 – 22.

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SARA OCHS, PAULA HENIN, HAYDEE DIJKSTAL, KABIR DUGGAL,
KATELYN HORNE, MICHAEL RODRIGUEZ, AND
KATHERINE MADDUX DAVIS*

This Article reviews some of the most significant developments made by international courts and tribunals in 2018.

I. The International Court of Justice (ICJ)

In 2018, the International Court of Justice (Court) rendered one judgment on preliminary objections, three judgments on the merits, and two provisional measures orders.

A. PRELIMINARY OBJECTIONS

In its June 6, 2018, judgment concerning *Immunities and Criminal Proceedings*,¹ the Court rejected two of France’s three preliminary objections to its jurisdiction and the admissibility of Equatorial Guinea’s application.² The dispute, which is pending before the Court, relates to criminal proceedings instituted in France against the current Vice-President of Equatorial Guinea, Mr. Teodoro Nguema Obiang Mangue (the Accused), in the so-called “*biens mal acquis*” (ill-gotten assets) case.³

Equatorial Guinea’s claims were brought pursuant to Article 35 of the 2000 United Nations Convention against Transnational Organized Crime (Palermo Convention) and Article I of the 1961 Optional Protocol to the 1961 Vienna Convention on Diplomatic Relations (Vienna Convention) concerning the Compulsory Settlement of Disputes (Protocol).⁴

The Palermo Convention claims concerned France’s alleged “violation of the [Accused’s] “immunity from foreign criminal jurisdiction,”

* The Committee Editor is Sara Ochs, Teaching Fellow at Elon University School of Law. Paula Henin, Senior Associate at Freshfields Bruckhaus Deringer US LLP, authored Section I. Haydee Dijkstal, International Criminal and Human Rights Lawyer, contributed Section II. Sara Ochs authored Section III. Kabir Duggal, Katelyn Horne, and Michael Rodriguez of Arnold & Porter Kaye Scholer LLP contributed Section IV. Katherine Maddox Davis, Associate at Gibson, Dunn & Crutcher, authored Section V. The views expressed in this article are the authors’ own and do not necessarily represent the views of their law firms or organizations, or their firms’ or organizations’ clients.

1. *Immunities and Criminal Proceedings* (Eq. Guinea v. Fr.), Preliminary Objections (June 6, 2018), <https://www.icj-cij.org/files/case-related/163/163-20180606-JUD-01-00-EN.pdf>.

2. *Id.* ¶ 154.

3. *See id.* ¶¶ 23-41.

4. *Id.* ¶¶ 43-45.

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“overextension of its criminal jurisdiction,” and “failure to respect the immunity of the building at 42 Avenue Foch in Paris” (the Building) as “State property.”⁵ The Court found that these claims did not concern the interpretation or application of the Palermo Convention, and thus fell outside its jurisdiction pursuant to Article 35.⁶

Equatorial Guinea further argued that France’s actions vis-à-vis the Building and movable property located therein violated Article 22 of the Vienna Convention, which provides a regime of inviolability, protection, and immunity for “premises of [a] diplomatic mission.”⁷ The Court found that this aspect of the dispute did concern the interpretation or application of the Vienna Convention, and unanimously upheld its jurisdiction over these claims pursuant to the Protocol.⁸

Finally, the Court rejected France’s admissibility objection based on abuse of process (for lack of evidence) and abuse of rights (because it pertained to the case’s merits, not its admissibility).⁹

B. MERITS

On February 2, 2018, the Court delivered two merits judgments in boundary disputes between Costa Rica and Nicaragua.

The issues presented in *Question of Compensation*¹⁰ arose from the Court’s December 2015 judgment, in which it ruled that Costa Rica possesses sovereignty over a three square-kilometer area of wetland in the northern part of Isla Portillos, and that certain activities by Nicaragua in that territory—including excavating channels and establishing a military presence—were in breach of Costa Rica’s sovereignty.¹¹ The Court held that this breach gave rise to an “obligation to compensate Costa Rica for material damages caused by Nicaragua’s unlawful activities on Costa Rican territory.”¹² On February 2, the Court determined that Nicaragua owed Costa Rica a total of U.S. \$378,890.59 (inclusive of pre-judgment interest) as compensation for: (1) environmental damage caused by Nicaragua’s unlawful activities on Costa Rican territory, including the “impairment or loss of environmental goods and services” and certain restoration costs; and (2) other “costs and expenses incurred by Costa Rica as a direct consequence of

5. *Id.* ¶ 52.

6. *Id.* ¶¶ 102, 117-18, 154(1).

7. *Id.* ¶¶ 53, 57-59, 70, 120.

8. *Id.* ¶¶ 135, 137-38, 154(2).

9. *Id.* ¶¶ 150-52, 154(3).

10. Certain Activities Carried Out by Nicar. in the Border Area (Costa Rica v. Nicar.), Judgment, (Feb. 2, 2018), <https://www.icj-cij.org/files/case-related/150/150-20180202-JUD-01-00-EN.pdf> [hereinafter Compensation Judgment].

11. Certain Activities Carried Out by Nicar. in the Border Area (Costa Rica v. Nicar.) and Construction of a Road in Costa Rica Along the San Juan River (Nicar. v. Costa Rica), Judgment, ¶ 229 (Dec. 16, 2015), <https://www.icj-cij.org/files/case-related/150/150-20151216-JUD-01-00-EN.pdf>.

12. *Id.* ¶ 229(5)(a).

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[those activities].”¹³ This marked the first time the Court determined a damages claim for environmental harm. On March 8, 2018, Nicaragua transferred the full judgment amount.¹⁴

In the second judgment, the Court decided the merits of two joined cases concerning *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean* and the *Land Boundary in the Northern Part of Isla Portillos*.¹⁵ In the land boundary dispute, the Court held that Costa Rica “has sovereignty over the whole northern part of Isla Portillos . . . with the exception of Harbor Head Lagoon and the sandbar separating it from the Caribbean Sea,”¹⁶ which the Parties had agreed fall within Nicaragua’s sovereignty.¹⁷ Consequently, Nicaragua had violated Costa Rica’s sovereignty by establishing and maintaining a military camp on the beach of Isla Portillos.¹⁸ Nicaragua was therefore obligated to remove the military camp.¹⁹ The Court also fixed the maritime boundaries between the two countries in the Caribbean Sea and the Pacific Ocean.²⁰

On October 1, 2018, the Court delivered its merits judgment in the case brought by Bolivia concerning Chile’s alleged *Obligation to Negotiate Access to the Pacific Ocean*, dismissing Bolivia’s claims in their entirety.²¹ The Court determined that the interactions between Bolivia and Chile following the conclusion of the 1904 Treaty of Peace and Friendship, which officially ended the War of the Pacific as between these two countries and delimited their common boundary (leaving Bolivia landlocked), had not given rise to a legal obligation requiring Chile to negotiate sovereign access to the sea for Bolivia.²² Neither the bilateral instruments invoked by Bolivia nor Chile’s declarations and other unilateral acts established such a legal obligation.²³ The Court also rejected Bolivia’s arguments that a legal obligation had arisen as a result of acquiescence,²⁴ estoppel,²⁵ or Bolivia’s “legitimate expectations,”²⁶ or that it flowed from certain international organization

13. Compensation Judgment, *supra* note 10, ¶¶ 156–57.

14. Press Release No. 2018/15, Int’l Ct. of Just., Nicar. Transfers the Total Amount of Compensation Awarded to Costa Rica (Mar. 23, 2018), <https://www.icj-cij.org/files/case-related/150/150-20180323-PRE-01-00-EN.pdf>.

15. *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicar.)* and *Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicar.)*, Judgment (Feb. 2, 2018), <https://www.icj-cij.org/files/case-related/157/157-20180202-JUD-01-00-EN.pdf>.

16. *Id.* ¶ 205(2).

17. *Id.* ¶ 73.

18. *Id.* ¶ 205(3)(a).

19. *Id.* ¶ 205(3)(b).

20. *See id.* ¶ 205(4)–(5) and Annex 2.

21. *Obligation to Negotiate Access to the Pacific Ocean (Bol. v. Chile)*, Judgment, ¶ 177 (Oct. 1, 2018), <https://www.icj-cij.org/files/case-related/153/153-20181001-JUD-01-00-EN.pdf>.

22. *Id.* ¶¶ 175, 177.

23. *Id.* ¶¶ 139, 147–48.

24. *Id.* ¶ 152.

25. *Id.* ¶ 159.

26. *Id.* ¶ 162.

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documents.²⁷ Lastly, the Court rejected Bolivia's argument that the cumulative effect of Chile's successive acts had given rise to an obligation to negotiate.²⁸

C. PROVISIONAL MEASURES

In 2018, six new contentious proceedings were initiated before the Court. In two, the application instituting proceedings contained a request for the indication of provisional measures.

Iran v. United States concerns the United States' withdrawal from the Joint Comprehensive Plan of Action (JCPOA) and the re-imposition on Iran of sanctions lifted or waived in connection with the JCPOA.²⁹ On October 3, 2018, the Court unanimously ordered the United States to:

remove, by means of its choosing, any impediments arising from the measures announced on [May 8, 2018] to the free exportation to the territory of [Iran] of (i) medicines and medical devices; (ii) foodstuffs and agricultural commodities; and (iii) spare parts, equipment and associated services . . . necessary for the safety of civil aviation;³⁰

and, insofar as they relate to these goods and services, to "ensure that licenses and necessary authorizations are granted and that payments and other transfers of funds are not subject to any restriction."³¹

In *Qatar v. United Arab Emirates*, Qatar alleges that, since June 5, 2017, the United Arab Emirates has discriminated against and violated the human rights of Qatari citizens, in breach of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination.³² On July 23, 2018, the Court provisionally ordered the United Arab Emirates to:

ensure that (i) families that include a Qatari, separated by the measures adopted by the [United Arab Emirates] on [June 5, 2017], are reunited; (ii) Qatari students affected [by these measures] are given the opportunity to complete their education in the [United Arab Emirates] or to obtain their educational records if they wish to continue their studies elsewhere; and (iii) Qataris affected by [these measures] are allowed access to tribunals and other judicial organs of the [United Arab Emirates].³³

27. *Id.* ¶¶ 165–67, 171.

28. *Id.* ¶ 174.

29. Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (*Iran v. U.S.*), Order, ¶ 20 (Oct. 3, 2018), <https://www.icj-cij.org/files/case-related/175/175-20181003-ORD-01-00-EN.pdf> [hereinafter *Iran v. U.S.*].

30. *Id.* ¶ 102(1).

31. *Id.* ¶ 102(1)–(2).

32. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Qatar v. U.A.E.*), Order, ¶¶ 19–21 (July 23, 2018), <https://www.icj-cij.org/files/case-related/172/172-20180723-ORD-01-00-EN.pdf> [hereinafter *Qatar v. UAE*].

33. *Id.* ¶ 79(1).

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In addition to indicating “provisional measures for the purpose of preserving specific rights,”³⁴ the Court also ordered the Parties in both cases to “refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.”³⁵

II. The International Criminal Court (ICC)

In 2018, the International Criminal Court (ICC) made significant jurisprudential developments.

A. NEW CASES

Pre-Trial Chamber I opened two new cases after issuing a second arrest warrant for Mahmoud Mustafa Busayf Al-Werfalli in July for war crimes arising from the killing of ten people in Benghazi,³⁶ and an arrest warrant for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud in March for crimes committed in Mali in 2012 and 2013.³⁷ Al Hassan was transferred to The Hague on March 31,³⁸ with an initial appearance on April 4.³⁹ His confirmation hearing is scheduled for May 2019.⁴⁰

B. PRELIMINARY EXAMINATIONS

The Office of the Prosecutor (OTP) opened three separate preliminary examinations in 2018, including in the Philippines, where the OTP will analyze potential crimes related to the “war on drugs.”⁴¹ This prompted the Government of the Philippines to announce its withdrawal from the Rome Statute, to which the Court responded by publicly clarifying that it retains jurisdiction over crimes committed during Rome Statute membership, even

34. *Id.* ¶ 76; Iran v. U.S., *supra* note 29, ¶ 99.

35. Iran v. U.S., *supra* note 29, ¶ 102(3); Qatar v. U.A.E., *supra* note 32, ¶ 79(2).

36. Prosecutor v. Al-Werfalli, ICC-01/11-01/17, Second Warrant of Arrest, ¶ 17 (July 4, 2018), <https://www.icc-cpi.int/Pages/record.aspx?docNoC-01/11-01/17-13>.

37. Prosecutor v. Al Hassan, ICC-01/12-01/18, Mandat d'arrêt à l'encontre d'Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud [Arrest warrants against Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud], ¶¶ 7-10 (Mar. 27, 2018), https://www.icc-cpi.int/itemsDocuments/CR2018_01863_FRA.pdf.

38. Press Release, Int'l Crim. Ct., Situation in Mali: Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud Surrendered to the ICC on Charges of Crimes Against Humanity and War Crimes in Timbuktu (Mar. 31, 2018), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1376>.

39. Press Release, Int'l Crim. Ct., Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud Makes First Appearance Before the ICC (Apr. 4, 2018), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1377>.

40. Prosecutor v. Al Hassan, ICC-01/12-01/18, Decision Postponing the Date of the Confirmation Hearing, ¶ 28 (July 20, 2018), https://www.icc-cpi.int/CourtRecords/CR2018_04892.pdf.

41. Press Release, Int'l Crim. Ct., Statement of the Prosecutor of the Int'l Crim. Ct., Mrs Fatou Bensouda, on Opening Preliminary Examinations into the Situations in the Phil. and in Venez. (Feb. 8, 2018), <https://www.icc-cpi.int/Pages/item.aspx?name=180208-otp-stat> [hereinafter Preliminary Examinations Press Release].

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after withdrawal.⁴² A preliminary examination in Venezuela will analyze alleged 2017 crimes concerning excessive force used by Venezuelan security forces during demonstrations,⁴³ following a referral by six State Parties, including Argentina, Colombia, Canada, Chile, Paraguay and Peru.⁴⁴ The OTP's third preliminary examination will analyze potential crimes against the Rohingya Muslims in Myanmar and Bangladesh.⁴⁵ Following an OTP request regarding these potential crimes, the Chamber concluded on September 6, 2018, that the Court has jurisdiction over the crime of deportation when it begins in a non-State Party and continues onto the territory of a State Party, as long as one element of the crime occurred within the State Party.⁴⁶

The Pre-Trial Chamber also requested further information on the OTP's request to open an investigation into crimes committed in Afghanistan,⁴⁷ and ordered the OTP to reconsider its decision not to investigate the Gaza Freedom Flotilla attack.⁴⁸

C. ONGOING MATTERS

On June 8, 2018, the Appeals Chamber issued its judgment acquitting Jean-Pierre Bemba of crimes against humanity and war crimes, including murder, rape, and pillage in the Central African Republic in 2002 and 2003.⁴⁹ Consequently, Bemba was re-sentenced on September 17, 2018, for his affirmed conviction of crimes against the administration of justice to one-

42. Press Release, Int'l Crim. Ct., ICC Statement on the Philippines' Notice of Withdrawal: State Participation in Rome Statute System Essential to Int'l Rule of Law (Mar. 20, 2018), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1371>.

43. See Preliminary Examinations Press Release, *supra* note 41.

44. Press Release, Int'l Crim. Ct., Statement of the Prosecutor of the Int'l Crim. Ct., Mrs. Fatou Bensouda, on the Referral by a Group of Six States Parties Regarding the Situation in Venez. (Sept. 27, 2018), <https://www.icc-cpi.int/Pages/item.aspx?name=180927-otp-stat-venezuela>.

45. Press Release, Int'l Crim. Ct., Statement of ICC Prosecutor, Mrs. Fatou Bensouda, on Opening a Preliminary Examination Concerning the Alleged Deportation of the Rohingya People from Myan. to Bangl. (Sept. 18, 2018), <https://www.icc-cpi.int/Pages/item.aspx?name=180918-otp-stat-Rohingya>.

46. *Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute,"* Case No. ICC-RoC46(3)-01/18-37, Int'l Crim. Ct., ¶¶ 78–79 (Sept. 6, 2018), https://www.icc-cpi.int/CourtRecords/CR2018_04203.pdf.

47. *Second Order to the Prosecutor to Provide Additional Information*, Case No. ICC-02/17, Int'l Crim. Ct., ¶ 4 (Feb. 5, 2018), https://www.icc-cpi.int/CourtRecords/CR2018_00707.pdf.

48. *Decision on the "Application for Judicial Review by the Government of the Union of the Comoro,"* Case No. ICC-01/13-68, Int'l Crim. Ct., ¶ 117 (Nov. 15, 2018), https://www.icc-cpi.int/CourtRecords/CR2018_04203.pdf.

49. *Prosecutor v. Bemba*, ICC-01/05-01/08 A, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment Pursuant to Article 74 of the Statute," ¶ 194 (June 8, 2018), https://www.icc-cpi.int/CourtRecords/CR2018_02984.pdf.

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year imprisonment (time served) and a _ 300,000 fine.⁵⁰ His co-accused, Aimé Kilolo Musamba and Jean-Jacques Mangenda Kabongo, were sentenced to eleven months imprisonment (time served) and a _ 30,000 fine.⁵¹ On October 18, 2018, Bemba’s defense filed a Notice of Appeal on the re-sentencing decision.⁵² Submissions were also made concerning whether a reparations order could be made for victims, despite Bemba’s acquittal.⁵³

Concerning reparations, victims appealed the Trial Chamber II’s December 2017 reparations order against Thomas Lubanga Dyilo, alleging errors regarding victim eligibility for collective reparations.⁵⁴ The Appeals Chamber both affirmed in part the reparations order against Ahmed Al Faqi Al Mahdi⁵⁵ and affirmed the reparations order against Germain Katanga with one amendment on reassessing the causal nexus of transgenerational victims.⁵⁶

In the trial against Dominic Ongwen—charged with seventy counts of crimes against humanity and war crimes in Northern Uganda⁵⁷—the prosecution concluded its case in April.⁵⁸ The defense commenced its case on September 18, arguing that Ongwen is a victim as a former child soldier.⁵⁹

In the case against Laurent Gbagbo & Charles Blé Goudé, both charged with crimes against humanity relating to Côte d’Ivoire’s 2010–2011 post-

50. Prosecutor v. Bemba et al., ICC-01/05-01/13, Decision Re-sentencing Mr. Jean-Pierre Bemba Gombo, Mr. Aimé Kilolo Musamba and Mr. Jean-Jacques Mangenda Kabongo, 50–51 (Sept. 17, 2018), https://www.icc-cpi.int/CourtRecords/CR2018_04355.pdf.

51. *Id.* at 50.

52. Prosecutor v. Bemba et al., ICC-01/05-01/13, Notice of Appeal, ¶ 1 (Oct. 18, 2018), https://www.icc-cpi.int/CourtRecords/CR2018_04903.pdf.

53. Alex Foster, *Observations on Reparations After Bemba Acquittal*, ICL MEDIA REV. (July 11, 2018, 5:26 PM), <http://www.iclmediareview.com/10-july-2018-news-abput-courts-observations-reparations-bemba-acquittal>.

54. Prosecutor v. Lubanga, ICC-01/04-01/06, Notice of Appeal against Trial Chamber II’s “Décision fixant le montant des réparations auxquelles Thomas Lubanga est tenu” [Decision fixing the amount of the reparations to which Thomas Lubanga is liable] of 15 December 2017, 6 (Jan. 15, 2018), https://www.icc-cpi.int/CourtRecords/CR2018_00264.pdf.

55. Prosecutor v. Al Mahdi, ICC-01/12-01/15 A, Public Redacted Judgment on the Appeal of the Victims Against the “Reparations Order,” ¶¶ 98–99 (Mar. 8, 2018), https://www.icc-cpi.int/CourtRecords/CR2018_01623.pdf.

56. Prosecutor v. Katanga, ICC-01/04-01/07 A3 A4 A5, Public Redacted Judgment on the Appeals Against the Order of Trial Chamber II of 24 March 2017 Entitled “Order for Reparations Pursuant to Article 75 of the Statute,” ¶ 260 (Mar. 8, 2018), https://www.icc-cpi.int/CourtRecords/CR2018_01651.pdf.

57. Hiba Morgan, *Dominic Ongwen ICC Trial: Child Victim or War Criminal?*, ALJAZEERA (Sept. 18, 2018), <https://www.aljazeera.com/news/2018/09/dominic-ongwen-icc-trial-child-victim-war-criminal-180918154350648.html>.

58. Prosecutor v. Ongwen, ICC-02/04-01/15-1226, Directions on Closing Briefs and Closing Statements (Apr. 13, 2018), https://www.icc-cpi.int/CourtRecords/CR2018_02135.pdf.

59. Morgan, *supra* note 57.

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election violence,⁶⁰ the OTP filed a “mid-trial brief” clarifying links between the evidence presented and elements of the crimes charged.⁶¹ After the OTP closed its case on July 23, 2018, the defense teams filed motions alleging that there was “no case to answer.”⁶² In the case against Bosco Ntaganda, Trial Chamber VI heard closing arguments for charges of crimes against humanity and war crimes committed in the Democratic Republic of Congo in 2002 and 2003.⁶³

In September, appeal hearings were held after the Pre-Trial Chamber II granted Jordan’s leave to appeal the Article 87(7) decision on non-compliance with its obligation to arrest Sudanese President Omar Al-Bashir while he visited Jordan in March 2017 and referring Jordan to the UN Security Council and Assembly of States Party.⁶⁴

III. International and Hybrid Criminal Tribunals

In the past year, significant developments have been made by the Mechanism for International Criminal Tribunals (MICT), the Extraordinary Chambers in the Courts of Cambodia (ECCC), the Special Tribunal for Lebanon (STL), and the newest international criminal tribunal, the Kosovo Specialist Chambers (KSC).

A. THE MICT

Upon the official closing of the International Criminal Tribunal for the Former Yugoslavia (ICTY) on December 31, 2017, the MICT assumed responsibility for all residual functions of both the ICTY and the International Criminal Tribunal for Rwanda (ICTR).⁶⁵ The UN Security Council created the MICT in 2010 to complete all outstanding essential

60. *The Laurent Gbagbo and Charles Blé Goudé Trial*, HUM. RTS. WATCH (Jan. 25, 2016), <https://www.hrw.org/news/2016/01/25/laurent-gbagbo-and-charles-ble-goude-trial>.

61. *Prosecutor v. Gbagbo and Blé Goudé*, ICC-02/11-01/15, Prosecution’s Mid-Trial Brief Submitted Pursuant to Chamber’s Order on the Further Conduct of the Proceedings (ICC-02/11-01/15-1124), ¶ 3 (Mar. 19, 2018), https://www.icc-cpi.int/CourtRecords/CR2018_01754.pdf.

62. *Prosecutor v. Gbagbo and Blé Goudé*, ICC-02/11-01/15, Public Redacted Version of “Corrigendum to the ‘Blé Goudé Defence No Case to Answer Motion’ (ICC-02/11-01/15-1198-Conf), 23 July 2018,” [3 August 2018, ICC02/11-01/15-1198-Conf-Corr, ¶ 4 (Sept. 28, 2018), https://www.icc-cpi.int/CourtRecords/CR2018_04638.pdf.

63. See Toby Sterling, *War Crimes Prosecutor Calls for Conviction in Congo Sexual Slavery Case*, REUTERS (Aug. 28, 2018, 8:27 AM), <https://www.reuters.com/article/us-warcimes-congo-ntaganda/war-crimes-prosecutor-calls-for-conviction-in-congo-sexual-slavery-case-idUSKCN1LD1IP>.

64. *Prosecutor v. Al Bashir*, ICC-02/05-01/09, Decision on Jordan’s Request for Leave to Appeal (Feb. 21, 2018), https://www.icc-cpi.int/CourtRecords/CR2018_01458.pdf.

65. *About*, U.N. INT’L RESIDUAL MECH. FOR CRIM. TRIB., <http://www.irmct.org/en/about> (last visited Dec. 1, 2018).

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functions following the ad hoc international criminal tribunals' completion of their respective mandates.⁶⁶

In April, the MICT Appeals Chamber rendered its judgment in Vojislav Šešelj's appeal.⁶⁷ Šešelj, a former President of the Serbian Radical Party, was charged with three counts of crimes against humanity and six counts of violations of the laws of war.⁶⁸ The Prosecution alleged that he created and ordered a joint criminal enterprise with the purpose of forcibly removing a majority of Croat, Muslim, and non-Serb populations from the Republic of Serbia.⁶⁹ The ICTY Trial Chamber acquitted Šešelj of all charges on March 31, 2016, finding the Prosecution failed to prove the existence of a joint criminal enterprise.⁷⁰ The Appeals Chamber reversed Šešelj's acquittals and entered convictions against him for instigating deportation, persecution, and other inhumane acts against non-Serb populations,⁷¹ and sentenced him to ten years imprisonment, satisfied by time served.⁷²

In April, the MICT Appeals Chambers also heard oral arguments in the appeal of Radovan Karadžić, who was convicted of genocide, crimes against humanity, and war crimes and sentenced to forty years imprisonment by the ICTY Trial Chamber.⁷³ The appeal judgment remains pending.⁷⁴

From its seat in Arusha, Tanzania, the prior location of the ICTR, the MICT Office of the Prosecutor issued an indictment in September outlining charges against Maximilien Turinabo, Anselme Nzabonimpa, Jean de Dieu Ndagijimana, Marie Rose Fatuma, and Dick Prudence Munyeshuli for contempt and attempted contempt of the ICTR, premised on witness interference and disclosure of confidential protected witness information in

66. *Id.*

67. See Prosecutor v. Šešelj, MICT-16-99-A, Judgment (Apr. 11, 2018), http://jrad.unmict.org/webdrawer/webdrawer.dll/webdrawer/search/rec&sm_recnbr&sm_ncontents=mict-16-99&sm_created&sm_fulltext&sort1=rs_datecreated&count&rows=100 [hereinafter Šešelj Appeal Judgment].

68. Prosecutor v. Šešelj, IT-03-67, Third Amended Indictment, ¶¶ 3–4 (Dec. 7, 2007), <http://www.icty.org/x/cases/seselj/ind/en/seslj3rdind071207e.pdf>.

69. *Id.* ¶ 6.

70. Prosecutor v. Šešelj, IT-03-67-T, Judgement, 109–10 (June 14, 2016), <http://www.icty.org/x/cases/seselj/tjug/en/160331.pdf>.

71. Šešelj Appeal Judgment, *supra* note 67, ¶ 178.

72. *Id.* ¶ 179.

73. Press Release, U.N. Int'l Residual Mech. for Crim. Trib., The Appeals Chamber of the Mechanism for International Criminal Tribunals Hears Oral Arguments in the Karadžić Case (Apr. 24, 2018), <http://www.irmct.org/en/news/appeals-chamber-mechanism-international-criminal-tribunals-hears-oral-arguments-karad%C5%BEi%C4%87-case>.

74. *Karadžić, Radovan (MICT-13-55)*, U.N. Int'l Residual Mech. for Crim. Trib., <http://www.irmct.org/en/cases/mict-13-55> (last visited Dec. 1, 2018).

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violation of court orders.⁷⁵ The defendants have made their initial appearances, and the matter remains in the pre-trial stage.⁷⁶

B. THE ECCC

On November 16, 2018, the ECCC became the first hybrid tribunal to return a genocide conviction.⁷⁷ The ECCC Trial Chamber convicted Nuon Chea and Khieu Samphan of genocide against the Cham Muslims and Vietnamese, along with crimes against humanity pertaining to the establishment and operation of security centers and worksites committed during the Khmer Rouge regime in the 1970s.⁷⁸ This marks the Trial Chamber's second judgment against these two defendants, the first of which convicted them of crimes against humanity for extermination, murder, and persecution on political grounds and sentenced them to life imprisonment.⁷⁹ The November 2018 judgment re-sentenced the defendants to life imprisonment.⁸⁰

In August, the Pre-Trial Chamber issued an order affirming the dismissal of all charges against defendant Im Chaem for lack of personal jurisdiction.⁸¹ This decision is the latest development in the ongoing battle between the Cambodian and international arms of the ECCC, stemming from the Cambodian prosecutors' and judges' opposition to prosecutions beyond the three defendants already convicted.⁸² At the time of writing, three defendants face charges before the Tribunal, and each has contested the Tribunal's lack of personal jurisdiction on grounds similar to those asserted by Im Chaem.⁸³

75. See Prosecutor v. Turinabo et al., MICT-18-116, Notice of Filing Public Redacted Version of the Indictment (Sept. 5, 2018), <http://www.irmct.org/sites/default/files/casedocuments/mict-18-116/indictments/en/20180905-turinaboindictmenten.pdf>.

76. Press Release, U.N. Int'l Residual Mech. for Crim. Trib., Statement of the Office of the Prosecutor on the Arrest of Five Accused in Rwanda (Sept. 5, 2018), <http://www.irmct.org/en/news/statement-office-prosecutor-arrest-five-accused-rwanda>.

77. Nuon Chea and Khieu Samphan, Case No. 002/19-09-2007/ECCC/TC, Summary of Judgement Case 002/02, ¶ 71 (Nov. 16, 2018), https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-in-tz%5D/20181119%20Summary%20of%20Judgement%20Case%20002-02%20ENG_checked%20against%20delivery_amended%20a.pdf [hereinafter Summary of Judgment].

78. *Id.* ¶ 72.

79. Prosecutor v. Nuon Chea, Case No. 002/19-09-2007/ECCC/TC, Case 002/01 Judgement, ¶¶ 1057–1058 (Extraordinary Chambers in the Cts. of Cambodia Aug. 7, 2014), https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2014-08-07%2017%3A04/E313_Trial%20Chamber%20Judgement%20Case%20002_01_ENG.pdf.

80. Summary of Judgment, *supra* note 77, ¶¶ 75–76.

81. See Prosecutor v. Im Chaem, Case No. 004-1-07-09-2009-ECCC/OCIJ (PTC50), Considerations on the Int'l Co-Prosecutor's Appeal of Closing Orders (Reasons) § VI (Extraordinary Chambers in the Cts. of Cambodia June 28, 2018), https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-in-tz%5D/D308_3_1_20_EN.pdf.

82. *Id.* § 1.

83. See generally *Charged or Accused Persons Before the ECCC*, EXTRAORDINARY CHAMBERS IN THE CTS. OF CAMBODIA, <https://www.eccc.gov.kh/en/all-cases> (last visited Dec. 1, 2018).

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C. THE STL

The STL, which was created to prosecute the persons involved in the February 14, 2005, Beirut bombings that killed more than twenty-two people, including then Lebanese Prime Minister Rafiq Hariri,⁸⁴ made substantial developments in both its primary case as to liability and related contempt cases.

In 2018, the STL concluded the trial against Salim Jamil Ayyash, Hassan Habib Merhi, Hussein Hassan Oneissi, and Assad Hassan Sabra.⁸⁵ Per the indictment, all four defendants were charged with conspiracy to commit a terrorist attack, with additional charges against Mr. Ayyash for committing the February 2015 terrorist attack and intentional homicide by means of an explosive device.⁸⁶ The trial had been ongoing since January 16, 2014, and totaled 406 days of proceedings.⁸⁷ The Tribunal concluded closing arguments on September 21. The trial judgment remains pending.⁸⁸

The STL also closed and lifted confidentiality of the contempt case against Ibrahim Al Amin, following Mr. Al Amin's payment of his contempt fine of \$20,000.⁸⁹ The STL Contempt Judge previously found Mr. Al Amin, along with Akbar Beirut S.A.L., guilty of contempt for publishing information pertaining to confidential witnesses in the *Ayyash et al.* matter, and fined each party separately.⁹⁰ Akbar Beirut's \$6,000 fine remains outstanding.⁹¹

D. THE KSC

The KSC is the newest international criminal tribunal, established by Kosovar law with substantial support from the European Union.⁹² The KSC

84. *STL Close-up*, Special Trib. for Leb., https://www.stl-tsl.org/images/stories/About/STL_Close-up_EN.pdf (last visited Nov. 26, 2018).

85. *Conclusion of the Closing Arguments in the Ayyash et al. Case*, Special Trib. for Leb. (Sept. 21, 2018), <https://www.stl-tsl.org/en/media/press-releases/6290-conclusion-of-the-closing-arguments-in-the-ayyash-et-al-case> [hereinafter *Conclusion of Closing Arguments*].

86. *Prosecutor v. Ayyash*, STL-11-01/T/TC, Public Redacted Amended Indictment (Special Trib. for Leb. June 21, 2013), https://www.stltsl.org/crs/assets/Uploads/20130802_F1026_A02_PUBLIC_PRV_OTP_Signed_Amend_Indict_Filed_EN_LW_RECLASSIFIED_Joomla.pdf?

87. *Conclusion of Closing Arguments*, *supra* note 85.

88. *Id.*

89. *Contempt Case STL-14-06 against Mr. Ibrahim Al Amin Closed; Enforcement of Sentence Against Akhbar Beirut S.A.L. Outstanding*, Special Trib. for Leb. (Oct. 17, 2018), <https://www.stl-tsl.org/en/media/press-releases/6294-contempt-case-stl-14-06-against-mr-ibrahim-al-amin-closed-enforcement-of-sentence-against-akhbar-beirut-s-a-l-outstanding> [hereinafter *Contempt Case STL-14-06*].

90. *Prosecutor v. Akhbar Beirut S.A.L.*, STL-14-06/T/CJ, Public Redacted Version of the Judgment, ¶ 168 (Special Trib. Of Leb. July 15, 2016), https://www.stl-tsl.org/index.php?option=com_k2&id=8077_a345a9b169a61927c76e6cf289f1584a&lang=en&task=download&view=item.

91. *Contempt Case STL-14-06*, *supra* note 89.

92. *KSC Background*, KOS. SPECIALIST CHAMBERS & SPECIALIST PROSECUTOR'S OFFICE, (Sept. 20, 2018) <https://www.scp-ks.org/en/background> [hereinafter *KSC Background*].

is attached to each level of the Kosovo court system, but is housed in The Hague, and staffed by Kosovan and international lawyers and prosecutors.⁹³ The KSC's mandate covers the prosecution of certain crimes committed between January 1, 1998 and December 31, 2000, including war crimes, crimes against humanity, and crimes recognized under Kosovo law, by or against citizens of Kosovo or the Federal Republic of Yugoslavia.⁹⁴

The Specialist Prosecutor's Office has yet to commence proceedings against defendants. It spent 2018 conducting investigations into potential suspects.⁹⁵ Further prosecutorial developments are anticipated in 2019.

IV. The International Centre for Settlement of Investment Disputes (ICSID)

2018 marked a year of many noteworthy developments in ICSID arbitration.

A. JURISDICTION

In *Axos v. Kosovo*, the ICSID Tribunal determined it lacked jurisdiction over a claim relating to the purchase of shares of a public entity in a privatization process because there was no investment under the relevant Bilateral Investment Treaty (BIT).⁹⁶ The Tribunal rejected the claimant's argument that an exchange of documents between the parties during the bidding process constituted a contract, and therefore an investment.⁹⁷ The Tribunal first found that there was no contract because there was no offer and acceptance, and only an invitation to the claimant to enter into a binding agreement.⁹⁸ Also, because the claimant was only one member of the consortium selected as the bidder, it could not avail itself of rights that the consortium could only exercise jointly.⁹⁹ Further, the Tribunal determined no contract was formed because the respondent possessed the right to cancel the privatization until the share purchase agreement was signed,¹⁰⁰ and the requirement that the "highest representative" of the contracting authority sign the purchase agreement had not been met.¹⁰¹ The Tribunal's finding that no contract was executed was supported by the parties' conduct

93. *KSC at a Glance*, KOS. SPECIALIST CHAMBERS & SPECIALIST PROSECUTOR'S OFFICE, (Oct. 4, 2018) https://www.scp-ks.org/sites/default/files/public/content/ksc_at_a_glance_eng_1.pdf.

94. *KSC Background*, *supra* note 92.

95. Kosovo Specialist Chambers & Specialist Prosecutor's Office, First Report 51–53 (2018), https://www.scp-ks.org/sites/default/files/public/content/ksc_spo_first_report_en.pdf.

96. See *ACP Axos Capital GmbH v. Kosovo*, ICSID Case No. ARB/15/22, Award, ¶ 256 (May 3, 2018), <https://www.italaw.com/sites/default/files/case-documents/italaw9648.pdf>.

97. See *id.* ¶ 152.

98. *Id.* ¶¶ 156, 169, 171.

99. *Id.* ¶¶ 192, 194.

100. *Id.* ¶ 196.

101. *Id.* ¶¶ 217–18.

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following the exchange, including the claimant's attempts to change the terms of the share purchase.¹⁰²

The Tribunal also rejected the claimant's argument that the monies spent and knowledge transferred during the bidding process constituted claims for money under the BIT.¹⁰³ To be investments, claims for money must have a basis other than the relevant treaty itself;¹⁰⁴ otherwise, any claim under a treaty would constitute an investment.¹⁰⁵

B. MOTIONS

In *Raiffeisen Bank v. Croatia*, the Chairman of the Administrative Council of the World Bank, Dr. Jim Yong Kim, heard Croatia's challenge of the claimant's arbitrator, Dr. Stanimir Alexandrov.¹⁰⁶ Croatia argued that Dr. Alexandrov had been appointed in thirty-five out of thirty-eight of the claimant's cases,¹⁰⁷ four of which had been against Croatia.¹⁰⁸ Croatia also argued there was a "history of appointments" between Dr. Alexandrov and the claimant's counsel.¹⁰⁹

Dr. Kim dismissed Croatia's challenge on both grounds, first finding that Croatia had "not submitted any evidence of Dr. Alexandrov's bias beyond allegations of unconscious bias."¹¹⁰ Dr. Kim further found that, "without 'something more,' this tally of 'cross-appointments' would not by itself demonstrate to a third party undertaking a reasonable evaluation of the evidence" a lack of compliance with the ICSID Convention.¹¹¹

In *Hela Schwarz v. China*, the investor sought provisional measures against China.¹¹² The investor had previously sought provisional measures before the Tribunal was constituted to prevent demolition of its premises.¹¹³ The investor reinstated its motion once the Tribunal was constituted, following the premises' demolition.¹¹⁴ In its renewed application, the investor requested relief against potential "further actions [by China] that [could] aggravate or threaten the integrity of the dispute."¹¹⁵

102. *Id.* ¶¶ 223, 226.

103. *Id.* ¶¶ 250, 251.

104. *Id.* ¶¶ 249–50.

105. *Id.* ¶ 249.

106. See *Raiffeisen Bank Int'l AG and Raiffeisenbank Austria dd v. Croatia*, ICSID Case No. ARB/17/34, Decision on the Proposal to Disqualify Stanimir Alexandrov (May 17, 2018), <https://www.italaw.com/sites/default/files/case-documents/italaw9732.pdf>.

107. *Id.* ¶ 16.

108. *Id.* ¶ 17.

109. *Id.* ¶¶ 29–31.

110. *Id.* ¶ 89.

111. *Id.* ¶ 95.

112. *Hela Schwarz GmbH v China*, ICSID Case No. ARB/17/19, Procedural Order 2 (Aug. 10, 2018), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C6447/DS11402_En.pdf.

113. *Id.* ¶ 48.

114. *Id.* ¶ 76.

115. *Id.* ¶ 77.

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The Tribunal explained that provisional measures “can only ever be warranted in circumstances in which the need for such measures is urgent and the measures in contemplation are necessary, inter alia, to prevent imminent harm to a party.”¹¹⁶ In the present case, because the buildings had been demolished, the Tribunal rejected the request for provisional measures, as there was “no longer anything onto which a recommendation of provisional measures could properly fasten.”¹¹⁷

C. MERITS

In *A11Y LTD. v. Czech Republic*, the ICSID Tribunal considered a claim of indirect expropriation under a BIT between the Czech Republic and the United Kingdom.¹¹⁸ The claimant’s business involved selling electronic aids for the blind in the Czech Republic.¹¹⁹ The claimant alleged that the Czech Republic, through its Labor Office, had adopted a series of measures that ultimately destroyed its investment by deliberately persuading the claimant’s customers to switch providers, disclosing business information to the claimant’s competitors, and rigging assessments of the claimant’s assistive technology solutions.¹²⁰ The Czech Republic argued that the claimant failed to establish that the investment was destroyed by the alleged measures, as opposed to the claimant’s “flawed business model.”¹²¹ The Tribunal agreed with the Czech Republic that the claimant had failed to demonstrate the requisite causal link.¹²² The Tribunal further determined that the measures were *bona fide* regulatory measures that applied generally to companies providing aids,¹²³ but it found that the Labor Office had behaved improperly.¹²⁴ Although it concluded that the Labor Office had behaved improperly and that this improper behaviour “probably caused damage to the Claimant,”¹²⁵ the Tribunal found that the claimant failed to distinguish the effects of the improper behaviour from the effects of the *bona fide* regulatory measures, and therefore rejected the claimant’s claim.¹²⁶

In *Mercer International Inc. v. Canada*, the ICSID Tribunal rejected the claimant’s suit for discriminatory treatment in violation of Articles 1102 or 1103 of NAFTA.¹²⁷ The Tribunal agreed that the claimant’s investment, a

116. *Id.* ¶ 110.

117. *Id.* ¶ 111.

118. See A11Y L77.TD. v. Czech, ICSID Case No. UNCT/15/1, Award (June 29, 2018), <https://www.italaw.com/sites/default/files/case-documents/italaw9853.pdf>.

119. See *id.* ¶¶ 35, 36.

120. See *id.* ¶ 161.

121. *Id.* ¶¶ 181–82.

122. *Id.* ¶ 225.

123. *Id.* ¶ 217.

124. *Id.* ¶ 223.

125. *Id.* ¶¶ 217, 223.

126. *Id.* ¶ 224.

127. See *Mercer Int’l Inc. v. Gov’t of Can.*, ICSID Case No. ARB(AF)/12/3, Award (Mar. 6, 2018), https://www.italaw.com/sites/default/files/case-documents/italaw9651_0.pdf.

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pulp mill, was treated differently from other pulp mills in the province, but held that the differential treatment “[was] not proven to be ‘discriminatory treatment’ in violation of NAFTA Articles 1102 or 1103.”¹²⁸ Specifically, the Tribunal found that “whilst [the other pulp mills were] ostensibly comparators, none were ‘in like circumstances,’” and the different treatment was explained by their individual circumstances.¹²⁹ Rejecting the claimant’s case, the Tribunal noted that, because the claimant failed to satisfy its initial burden of proof, “the evidential burden never shifted to the Respondent.”¹³⁰ The Claimant restated the same allegations, bringing a claim under NAFTA Article 1105(1) (concerning fair and equitable treatment and full protection and security).¹³¹ The Tribunal likewise rejected this claim, as the claimant’s arguments “add[ed] nothing to the Claimant’s claims under NAFTA Articles 1102 and 1103.”¹³²

D. OTHER KEY DEVELOPMENTS

The United States-Mexico-Canada Agreement (USMCA), which replaces the North American Free Trade Agreement (NAFTA), creates a new regime for investor-state arbitration.¹³³ First, arbitration for investments made while NAFTA remains in force is available for three years after NAFTA’s termination.¹³⁴ Thereafter, Investor State Dispute Settlement is not available by Canadian investors or against Canada.¹³⁵ United States or Mexican investors can file claims, respectively, against Mexico or the United States only for post-establishment national treatment, most-favored-nation treatment, or direct expropriation.¹³⁶ These claims must be brought within four years from the date in which the claimant acquired knowledge of the purported breach, but the investor must first seek recourse in local courts for a minimum of thirty months.¹³⁷ Government contracts in the oil and gas, power generation, telecommunications, transportation, and infrastructure sectors are subject to broader protection, including minimum standard treatment and indirect expropriation.¹³⁸ These claims must be brought within three years from the date in which the claimant acquired knowledge of the purported breach, but are not subject to local courts’ requirements.¹³⁹

128. *Id.* ¶ 7.45.

129. *Id.*

130. *Id.*

131. *See id.* ¶¶ 7.47–7.48.

132. *Id.* ¶ 7.60.

133. United States-Mexico-Canada Agreement, Can.-Mex-U.S., Protocol, Nov. 30, 2018, Office of the U.S. Trade Representative, https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/USMCA_Protocol.pdf.

134. *Id.*

135. *Id.* Annex 14-D.

136. *Id.* art. 14.D.3.1.

137. *Id.* art. 14.D.5.1(b) & (c).

138. *Id.* Annex 14-E(2)(a)(i). *See also, id.* arts. 14.4–14.8.

139. *Id.* Annex 14-E(4)(b).

V. India Recalibrates its Bilateral Investment Treaties

In 2018, India achieved its first-known victory in an investor-state arbitration.¹⁴⁰ *Louis Dreyfus Armateurs SAS (France) v. The Republic of India* was seated at the Permanent Court of Arbitration (PCA).¹⁴¹ The \$36 million claim¹⁴² was brought under the 1997 France-India bilateral investment treaty (BIT).¹⁴³ The PCA's dismissal is a major development as India continues its nuanced embrace of international law, joining a variety of world powers in reassessing their BITs.¹⁴⁴

Louis Dreyfus Armateurs concerned a ten-year contract between Haldia Bulk Terminals (in which French shipping company Louis Dreyfus Armateurs is a minority partner) and the Kolkata Port Trust (an extension of the Indian government).¹⁴⁵ Haldia Bulk Terminals modernized and ran two mechanized berths at Haldia Port beginning in 2010.¹⁴⁶ Haldia Bulk Terminals withdrew prematurely from the contract in 2012, alleging that “in Bengal, especially in Haldia, the private and personal interests of some people always come before the general interests of the port and the country.”¹⁴⁷ Louis Dreyfus Armateurs's CEO Edouard Louis-Dreyfus described the allegations:

When workers are attacked at gunpoint by a mob wearing masks to hide their face, when a small child is traumatised, when the police [are] not responding to emergency calls and not protecting its citizens and when political leaders are denying that these facts ever happened, this is not democracy any more.¹⁴⁸

In 2014, Louis Dreyfus Armateurs filed a claim before the PCA alleging a government conspiracy to undermine the venture.¹⁴⁹ Working from its

140. See *Louis Dreyfus Armateurs SAS (France) v. India*, (Perm. Ct. Arb. 2018) <https://pca-cpa.org/en/cases/113/>.

141. *Id.*

142. Sambit Saha, *French Firm Suffers a Jolt*, THE TELEGRAPH (Sept. 9, 2018), <https://www.telegraphindia.com/business/french-firm-suffers-a-jolt/cid/1667975>.

143. See *Louis Dreyfus Armateurs v. India*, *supra* note 140.

144. See PRABHASH RANJAN ET AL., INDIA'S MODEL BILATERAL INVESTMENT TREATY: IS INDIA TOO RISK AVERSE?, (Brookings India IMPACT Series No. 082018, Aug. 2018).

145. Deepshikha Sikarwar, *French Firm Louis Dreyfus Armateurs Serves Global Arbitration Notice on India*, ECONOMIC TIMES (Apr. 23, 2014), <https://economictimes.indiatimes.com/industry/transportation/shipping/-transport/french-firm-louis-dreyfus-armateurs-serves-global-arbitration-notice-on-india/articleshow/34084442.cms>.

146. Herbert Smith, *Tribunal awards India First BIT case win, dismissing claims of French investor*, LEXOLOGY (Sept. 17, 2018), <https://www.lexology.com/library/detail.aspx?g=f20d55ee-4a91-480e-ac98-cc83171872e5>; Sambit Saha, *French Firm Suffers a Jolt*, THE TELEGRAPH (Sept. 9, 2018), <https://www.telegraphindia.com/business/french-firm-suffers-a-jolt/cid/1667975>.

147. Sambit Saha, *Foreign Partner Speaks Out*, THE TELEGRAPH (Feb. 11, 2012), <https://www.telegraphindia.com/india/foreign-partner-speaks-out/cid/361775>.

148. *Id.*

149. See Sirkarwar, *supra* note 145.

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classic legal playbook, India objected to international jurisdiction.¹⁵⁰ The PCA agreed, finding it lacked jurisdiction to assess the underlying contract because the BIT only permitted arbitration claims by majority shareholders.¹⁵¹ After granting Louis Dreyfus Armateurs an opportunity to articulate claims of proper jurisdiction, the Court dismissed all claims, the majority for lack of jurisdiction and the others on merits.¹⁵² India's first investment arbitration victory comes after years of arbitral losses, amidst a broader unique footing in international law, and as India and other major powers assess the role of BITs in their economies and international relations.

India's historical relationship with international law is exceptional: the League of Nations' only non-self-governing member;¹⁵³ a non-aligned power during the Cold War;¹⁵⁴ a nuclear power but non-nuclear state, per the Nuclear Nonproliferation Treaty;¹⁵⁵ historically resistant to the jurisdiction of the International Court of Justice (ICJ),¹⁵⁶ though now imploring ICJ authority as an Indian spy sits imprisoned on Pakistan's death row;¹⁵⁷ and currently occupying a seat on the United Nations Human Rights Council after years of decrying universal human rights norms.¹⁵⁸ Against the odds, rises on India's terms. Its nuanced embrace of international arbitration law, advancing from "the periphery of mainstream international law," is no exception.¹⁵⁹

The *Louis Dreyfus* dismissal is a marked departure from India's history of investor-state arbitration losses. In 2011, a BIT arbitration loss to an Australian investor stung India and left the state inundated with regulatory

150. See Katherine Maddox Davis, *Hurting More Than Helping: How the Marshall Islands' Seeming Bravery Against Major Powers Only Stands to Maim the Legitimacy of the World Court*, 25 MINN. J. INT'L L. 79, 116–17 (2016).

151. See Smith, *supra* note 146.

152. *Id.*

153. Stephen Legg, *An International Anomaly? Sovereignty, the League of Nations and India's Princely Geographies*, 43 J. HIST. GEO. 96, 100 (2014), <https://www.sciencedirect.com/science/article/pii/S0305748813000376>.

154. See Kate Sullivan, *Policy Report: Is India a Responsible Nuclear Power?* 9 (2014), https://www.rsis.edu.sg/wp-content/uploads/2014/07/PR140301_Is_India_a_Responsible_Nuclear_Power.pdf.

155. See Kate Sullivan, *How the World Warmed to a Nuclear India*, INSIDE STORY (May 3, 2012), <https://insidestory.org.au/how-the-world-warmed-to-a-nuclear-india/>.

156. India argued against ICJ jurisdiction in contentious cases filed by Portugal (1955), Pakistan (1973 and 1999), and the Marshall Islands (2014). See Davis, *supra* note 150, at 116–17.

157. See generally Katherine Maddox Davis, *World Court Grants India's Petition for Stay of Execution*, 52 ABA/SIL YIR 629 (2018).

158. See Katherine M. Davis, *The Gujarat Shift: The Tipping Point in India's Post-Cold War Discourse on Human Rights*, 4 (May 29, 2012) (unpublished M.Sc. dissertation, University of Oxford), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2577114 (India was first elected to the HRC in 2011).

159. See V.G. Hedge, *Indian Courts and International Law*, 23 LEIDEN J. INT'L L. 53 (2010), <https://www.cambridge.org/core/journals/leiden-journal-of-international-law/article/indian-courts-and-international-law/B3F3815FF2B0111D94DF06A9ADA359E7>.

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claims relative to most favoured nation clauses.¹⁶⁰ By 2016, India was reportedly “one of the most frequently-named respondent states in BIT proceedings.”¹⁶¹ This arbitral wave likely contributed to India’s decision to terminate existing BITs and adopt a new model BIT.¹⁶² India’s new model restricts investors’ security from full protection to only physical security; removes fair and equitable treatment provisions in favor of fundamental discrimination or manifest abuse under customary international law, a sensitive point of domestic interpretation;¹⁶³ and excludes “most favoured nation” treatment, which long served as an equalizer among states.¹⁶⁴

In 2016, India notified fifty-eight states with whom it held soon-to-expire BITs that the treaties would be renegotiated relative to India’s new model.¹⁶⁵ The other twenty-five states with whom India holds BITs were asked to collaborate on joint interpretive statements, though only Bangladesh is known to have complied.¹⁶⁶ Notably, for purposes of *Louis Dreyfus* and other ongoing arbitrations pursuant to BITs with India at the time of the noticed termination, most of the standing BITs had extensive sunset provisions protecting the parties for several years beyond notification.¹⁶⁷

India is not the only world power to reassess its stance on investor-state dispute settlements. The United States and Canada have likewise aimed to sharpen the substantive provisions of their model BITs.¹⁶⁸ In 2011, Australia went as far as publicly stating that its treaties would no longer contain investor-state dispute settlement provisions, though it qualified that statement slightly by 2013.¹⁶⁹ Even the ICJ re-assessed its relationship with investor-state arbitration in 2018. In October, Somalian ICJ President Abdulqawi Ahmed Yusuf announced that ICJ judges would cease to arbitrate investor-state or commercial matters.¹⁷⁰

160. RANJAN, *supra* note 144, at 8.

161. Nicholas Peacock & Nihal Joseph, *Mixed Messages to Investors as India Quietly Terminates Bilateral Investment Treaties with 58 Countries*, ARB. NOTES, (Mar. 16, 2017), <https://hsfnotes.com/arbitration/2017/03/16/mixed-messages-to-investors-as-india-quietly-terminates-bilateral-investment-treaties-with-58-countries/>.

162. RANJAN, *supra* note 144, at 9.

163. Katherine M. Davis, *I, Too, Sing America: Customary International Law for American State and Federal Courts’ Post-Kiobel Jurisprudence, Guided by Australian and Indian Experiences*, 29 EMORY INT’L L. REV. 119, 158 (2014).

164. See, e.g., *Withdrawal from Investment Treaties: An Omen for Waning Investor Protection in AP?*, Baker McKenzie (May 12, 2017), <https://www.bakermckenzie.com/en/insight/publications/2017/05/withdrawal-from-investment-treaties> [hereinafter *Withdrawal from Investment Treaties*].

165. RANJAN, *supra* note 144, at 10 (France, the United Kingdom, and Germany are among the fifty-eight states).

166. *Id.* (these states include China, Mexico, and Finland).

167. See *Withdrawal from Investment Treaties*, *supra* note 164.

168. RANJAN, *supra* note 144, at 7.

169. *Id.*

170. Gebhard Bücheler, *Investor-State Arbitration and the Argentine Cases*, PROPORTIONALITY IN INVESTOR-STATE ARBITRATION, 6–7 (2015).

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Louis Dreyfus may leave India less risk averse in arbitration—though that prospect is not likely. Identifying and sourcing international legal norms is a significant, ongoing endeavor for Indian courts and the Indian government in its BIT negotiations.¹⁷¹ Practitioners will be keen to monitor states' responses to India's new BITs, both in international relations and in practical application before tribunals.

171. See Hedge, *supra* note 159.

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The International Law Year in Review: Family Law

ROBERT G. SPECTOR* & MELISSA A. KUCINSKI**

I. International Litigation

A. THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION (“THE CHILD ABDUCTION CONVENTION”)

Most United States (US) international family law litigation involved the Child Abduction Convention and its implementing legislation, the International Child Abduction Remedies Act (ICARA).¹ US federal and state courts have concurrent jurisdiction to decide a request for return of a child under the Convention.

The Child Abduction Convention operates to promptly return children to their habitual residence. To obtain an order returning the child, a 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 he/she was “actually exercising” (or would have exercised, but for the abduction), under the law of the child’s habitual residence.²

1. *Applicability of the Abduction Convention*

The Child Abduction Convention only applies to countries that have ratified or acceded to it, and between countries that have accepted the other as a treaty partner. It cannot be made applicable to a case by the parties’ stipulation. The Convention ceases to apply when the child in question turns age sixteen.³ A retention or abduction occurs at a particular moment in time and if that time was before the United States recognized the other country’s accession to the Convention, then the Convention is not applicable.⁴

* Robert G. Spector is the Glenn R. Watson Chair and Centennial Professor of Law Emeritus at the University of Oklahoma Law Center.

** Melissa A. Kucinski is a private practice family lawyer and mediator in Washington, D.C. and Maryland.

1. International Child Abduction Remedies Act, 22 U.S.C. §§ 9001–9011 (2014) (originally codified as 42 U.S.C. § 11603 et seq.).

2. *Id.*

3. *Id.* art. 4.

4. *Ex rel. Marks v. Hochhauser*, 876 F.3d 416, 418 (2d Cir. 2017).

A court can rarely decide whether a child should be returned or not based on the pleadings filed with the court because most of the determinations require an analysis of the facts.⁵

2. *Child's Habitual Residence*

a. Intent Cases

The Child Abduction Convention does not define the term “habitual residence.” Therefore, courts have made this fact-based determination in a number of cases, leading to a split among the circuits as to its definition. The majority view, pioneered by the Ninth Circuit, looks to the parents’ shared intent in determining their child’s habitual residence. In one case, a Cuban mother seeking political asylum in the United States was required to send her son back to his father in Canada because both parents were political refugees who abandoned Cuba with the intent to settle in Canada.⁶ In another case, the parents and child left El Salvador intending to enter the United States illegally.⁷ The parents were deported but the child remained with an aunt.⁸ The parents’ actions clearly indicated they abandoned their habitual residence in El Salvador, which meant the child had a habitual residence in the United States and therefore the parents’ action to seek the child’s return to El Salvador was rejected.⁹

In a North Carolina case, the court determined that most of the evidence indicated that the child’s stay in the United States was not intended to be permanent.¹⁰ The mother obtained employment and enrolled the child in preschool upon arriving in the United States.¹¹ However, before leaving Sweden, she enrolled the child in a Swedish preschool, signed a tenancy agreement with the father that allowed her to seek a housing allowance from the Swedish government, maintained a Swedish bank account, continued to receive a child benefit from the Swedish government, and the child remained enrolled in the Swedish health system.

To the same effect is a Louisiana case, where the court found that the parents’ shared intent was not to relocate the children from Bangkok, Thailand to New Orleans.¹² Instead, the father initially communicated to the mother that the New Orleans trip was a vacation to see the children’s grandparents—consistent with past summer visits. Before this trip, both children resided in Thailand for six years. Both children went to school in Thailand and lived with their parents there. The court concluded that the

5. Diaz v. Lopez, No. 3:18-CV-260-DPJ-JCG, 2018 WL 3715834, at *2 (S.D. Miss. Aug. 3, 2018).

6. Valero v. De Nevi, No. 17-20745-CIV, 2017 WL 3917161, at *2 (S.D. Fla. Sept. 6, 2017).

7. Peralta v. Garay, 284 F.Supp.3d 858 (S.D. Tex. 2018).

8. *Id.*

9. *Id.* at 832.

10. Sundberg v. Bailey, 293 F. Supp. 3d 548, 555 (W.D.N.C. 2017).

11. *Id.* at 556.

12. Kim v. Ferdinand, 287 F.Supp.3d 607, 621 (E.D. La. 2018).

parents never agreed on changing the children’s habitual residence from Thailand to the United States.¹³

In determining whether the parties agreed to change the child’s habitual residence, the court must often sort through conflicting testimony.¹⁴ In a Texas case, the court concluded based on conflicting testimony that the parents mutually agreed to move to Mexico either permanently or at least for an indefinite duration, and that they made “a joint decision” to raise the child in the new country and therefore changed the child’s habitual residence to Mexico.¹⁵ If the court is unable to determine credibility when analyzing their intent, the court must resort to other facts to determine the parents’ probable intent.¹⁶

An Arizona court determined that it is entirely possible that the parties intended one child to live in Canada and the other to live in the United States.¹⁷ Therefore, the Court returned one child to Canada with the other child staying in Arizona.¹⁸

b. Acclimatization Cases

The Sixth and Eighth Circuits continue to adhere to the doctrine that a child’s perspective determines his habitual residence. However, the Sixth Circuit recently held that in cases involving very young children it would be appropriate to use the shared parental intent standard.¹⁹ In another Sixth Circuit case, the child’s “habitual residence” was Italy rather than the United States, supporting the father’s petition for return of the child to Italy.²⁰ The child was born in Italy and resided there exclusively until her mother took her to the United States when she was eight weeks old.²¹

The Sixth Circuit overturned a district court ruling that if a child has been wrongfully taken from the United States, a habitual residence can never be established in the abducted-to country regardless of the time spent there.²² This fact, the appeals court said, cannot outweigh the child’s acclimatization to the new country, at least when the left behind parent has failed to pursue procedures under the treaty to have the child returned.²³

13. *Id.*

14. *See Flores v. Elias-Arata*, No. 3:18-CV-160-J-34JBT, 2018 WL 3495865, at *8 (M.D. Fla. July 20, 2018).

15. *Velarde v. Gurgan*, No. SA-17-CA-792-XR, 2017 WL 4570304, at *14 (W.D. Tex. Oct. 13, 2017).

16. *Alvarez v. Rosas*, No. CV-18-01726-PHX-DGC, 2018 WL 3957689, at *2 (D. Ariz. Aug. 17, 2018).

17. *Asumadu v. Baffoe*, CV-18-01418-PHX-DLR, 2018 WL 3957696, at *5 (D. Ariz. Aug. 17, 2018).

18. *Id.*

19. *Ahmed v. Ahmed*, 867 F.3d 682, 690 (6th Cir. 2017).

20. *Taglieri v. Monasky*, 876 F.3d 868, 876 (6th Cir. 2017).

21. *Id.* at 879.

22. *Moreno v. Zank*, 895 F.3d 917, 924 (6th Cir. 2018), rev’d, 280 F.Supp.3d 1019 (W.D. Mich. 2017).

23. *Id.*

One court noted that in a wrongful retention case, it is necessary to date the point in time when the abduction/retention occurred.²⁴ The Court determined an abduction/retention to exist when the non-abducting parent is clearly on notice that the abducting parent does not intend to return the child from the country to which the child was taken.²⁵ The period prior to the point in time when the abduction/retention occurred is when it is to be determined whether the child is acclimatized to the new country.²⁶

3. *Rights of Custody and Their Exercise*

a. Rights of Custody

A removal or retention is only wrongful if the left-behind parent had a right of custody and was “actually exercising” that right at the time of removal, or would have exercised that right but for the removal.²⁷ A right of visitation does not constitute a right of custody and most federal courts will not enforce such rights.²⁸ While normally the petitioner is the left behind parent, rights of custody can exist in public bodies and institutions.²⁹

The Mexican doctrine of *patria potestas* confers a right of custody upon parents of a child.³⁰ Such a right is not extinguished by a divorce decree unless the decree specifically so provides.³¹ In Ireland, an unwed father has a right of custody by living with their child’s mother for at least twelve consecutive months, three of which occurred after the child’s birth.³² His absence for overnight work did not require the time period to begin again.³³ The mother’s contention that her child’s father lacked custody rights is belied by the fact she had him sign a “temporary consent” allowing her to bring the child to the United States for what he thought was a short visit.³⁴

When a sole custodian father dies and the court appoints the child’s paternal uncle as custodian, the child’s mother does not have a right of custody.³⁵ When the parties’ divorce decree ordered the husband to have custody of the children until the end of March 2017, whereupon the mother would then have custody, the father’s right of custody expired on that date.³⁶

24. *Miller v. Miller*, 1:18-CV-86, 2018 WL 4008779, at *12 (E.D. Tenn. Aug. 22, 2018).

25. *Id.* at *13.

26. *Id.* at *12.

27. *Id.* at *7-8.

28. *Done v. Pichardo*, No. 1:18-CV-795-RWS, 2018 WL 1930081, at *4 (N.D. Ga. Apr. 24, 2018).

29. Convention on the Civil Aspects of International Child Abduction, art. 3(a).

30. *Pena v. Serrano*, 1:17-CV-903-RP, 2017 WL 6542758, at *5 (W.D. Tex. Dec. 21, 2017).

31. *Id.*

32. *Crossan v. Clohessy*, 330 F. Supp. 3d 1098, 1102 (W.D. La. 2018).

33. *Id.*

34. *Elias-Arata*, No. 3:18-CV-160-J-34JBT, 2018 WL 889023, at *3 (M.D. Fla. Feb. 14, 2018).

35. *Frenken v. Hunter*, No. 17-CV-03125-HSG, 2018 WL 1536754, at *4 (N.D. Cal. Mar. 29, 2018).

36. *Ogawa v. Kang*, 2:18CV335DAK, 2018 WL 2376338, at *4 (D. Utah May 24, 2018).

Therefore, the mother's removal of the children after that date was not wrongful because it did not violate a right of custody.³⁷

In an unusual case, an American father argued that the Dominican mother was not a parent, but rather was a surrogate, and therefore had no custody rights.³⁸ The court rejected the father's argument.³⁹

b. Exercise of the Right to Custody

Normally the question of whether a parent was exercising his/her custody rights is not an issue in the case. However, in one case, a father failed to establish that he was exercising his custodial rights under Turkish law at the time of the children's removal by their mother to the United States.⁴⁰ The father was a dual American-Turkish citizen. The custody rights at issue were the right to withhold consent to the children's removal from his home, and/or his right to determine the children's religious education. The father provided financial support to his estranged wife and children. However, the father largely acquiesced to the removal of the children from his home, did not maintain a physical presence in the children's lives, did not provide them with physical care, and had not visited the children in America. There was no evidence showing that the father communicated his ideas regarding the children's religion at any time.⁴¹

4. *Defenses*

There are a number of defenses that a respondent may assert in arguing that a child should not be returned to the child's habitual residence.

a. Child is Settled in His/Her New Environment

Article 12 of the Child Abduction Convention provides that authorities need not return a child if more than one year has elapsed between the child's abduction or retention and the child is now settled in the child's new environment.⁴² The one-year period runs from the date the retention or removal became "wrongful."⁴³ The factual findings used in determining the "now settled" defense are reviewed under the clear error standard. A trial court that dismissed a return petition because it was filed more than one year after the abduction without determining whether the child was settled must be reversed and remanded to make that determination.⁴⁴

37. *Id.*

38. *Duran-Peralta v. Luna*, 16 CIV. 07939 (JSR), 2017 WL 2558758, at *3 (S.D.N.Y. May 30, 2017).

39. *Id.* at *2.

40. *Leonard v. Lentz*, 297 F. Supp. 3d 874, 885 (N.D. Iowa 2017).

41. *Id.* at 888.

42. *Castellanos Monzon v. De La Roca*, 731 Fed. Appx. 117, 118 (3d Cir. 2018).

43. *Id.*

44. *Id.*

i. Child Not Returned

In a Minnesota case, the court refused to return the children to Israel.⁴⁵ The petition was filed more than one year after the abduction and the father's testimony that the delay was due to his inability to locate the mother was, the court decided, not credible. The children are now fluent in English and well integrated into their school.

ii. Child Returned

On the other hand, a New Jersey court⁴⁶ found that the child was to be returned to Ecuador even though more than one year had passed before the filing of the return petition. The most convincing factors were that most of the child's family lived in Ecuador, the child was only seven years old, and the child and mother have an uncertain immigration status.

b. Grave Risk of Harm/Intolerable Situation*i. Defense Not Sustained*

Under Article 13(b), a court need not return a child if there is "a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."⁴⁷ Such a defense cannot be decided on a motion to dismiss but requires an evidentiary hearing.⁴⁸

A California court decided that this defense cannot be sustained unless (1) the foreign court is incapable of or unwilling to adequately protect the child; and (2) there is no alternative remedies that California could implement to avoid or minimize the risk of harm that would otherwise exist and still allow the child's return to the foreign country.⁴⁹ When faced with conflicting testimony between the petitioner and the respondent, the court can only make its determination based on the credibility of the parties.⁵⁰ Given the respondent's high burden of proof for this defense, the usual result is the child being returned.⁵¹

The child's comfort level in his current environment is not a basis for the refusal to return the child.⁵² "Whatever re-adjustment period the child may have to undergo in" . . . {the habitual residence} . . . is not considered a

45. *Amdamaskal v. Amdamaskal*, No. 17-CV-4961 (PJS/SER), 2018 WL 3360767, at *5 (D. Minn. July 10, 2018).

46. *Saltos v. Severino*, No. CV 18-8704 (JLL), 2018 WL 3586274, at *6 (D.N.J. July 25, 2018).

47. *Id.* at *8.

48. *Flores v. Alvarado*, No. 3:17-CV-514-RJC-DSC, 2018 WL 1725615, at *2 (W.D.N.C. Apr. 6, 2018).

49. *Handzlik v. Handzlik*, No. E063896, 2017 WL 6030655, at *3 (Cal. Ct. App. Dec. 6, 2017).

50. *Saltos*, 2018 WL 3586274, at *1.

51. *Alvarado*, 2018 WL 3715753, at *6.

52. *LM v. JF*, 60 Misc. 3d 369, 389, 75 N.Y.S.3d 879, 893 (N.Y. Sup. Ct. 2018).

“grave harm” under the Convention.”⁵³ “It is an unfortunate consequence that nearly every child wrongfully removed {will} experience.”⁵⁴

A Honduran mother argued that the Honduran courts, which favor fathers in custody cases, created an intolerable situation because gender discrimination is incorporated into the country’s laws.⁵⁵ The argument was rejected because she failed to show how this would harm the child and failed to explain how Honduran law creates an intolerable situation for the child. The court found there was no credible evidence that the father harmed the child or threatened to harm the child.⁵⁶ In another case, evidence that the Arizona school system can better cope with a child’s dyslexia than the Italian school system, along with the father smoking marijuana, was insufficient to constitute a grave threat to the child.⁵⁷

Although harm to the child is required under 13(b), most courts recognize that sustained spousal abuse can, in some instances, create such a risk. Where a court considers spousal abuse and finds it does *not* create a grave risk to the child, the appellate court will affirm unless the factual findings are in clear error and there is an abuse of discretion.⁵⁸

In a North Carolina case, a mother failed to make out a 13(b) defense because she was unable to produce sufficient evidence that El Salvador was a war zone.⁵⁹

ii. Defense Sustained

In the Second Circuit, the 13(b) defense was sustained when there was overwhelming evidence of the father’s extreme violence and uncontrollable anger, as well as his psychological abuse of the mother over many years, much of which was witnessed by the child.⁶⁰

In Michigan, a court refused to return children to Mexico when both the petitioner and respondent had moved to the United States and the children voiced fears about being returned to a country where neither of their parents lived.⁶¹ In Montana, a court refused to return children to Mexico because the father’s emotional and physical abuse of the mother, witnessed by their sons, presented a grave risk of psychological harm to the boys.⁶² However, if the father could show that protections available in Mexico will reduce threats to the children’s safety, they might someday be returned.

53. *Id.*

54. *Id.*

55. *Orellana v. Cartagena*, 3:16-CV-444-CCS, 2017 WL 5586374, at *9 (E.D. Tenn. Nov. 20, 2017).

56. *Id.*

57. *Von Meer v. Hoselton*, No. CV-18-00542-PHX-JJT, 2018 WL 1281949, at *4 (D. Ariz. Mar. 13, 2018).

58. *Soto v. Contreras*, 880 F.3d 706, 712 (5th Cir. 2018).

59. *Salguero v. Argueta*, 256 F. Supp. 3d 630, 640 (E.D.N.C. 2017).

60. *Davies v. Davies*, 717 Fed. Appx. 43, 48–49 (2d Cir. 2017).

61. *Neumann v. Neumann*, 310 F. Supp. 3d 823, 836 (E.D. Mich. 2018).

62. *See Gonzales v. Peterson*, No. CV-34-BLG-SPW, 2017 WL 2633491 (D. Mo. Jun. 16, 2017).

iii. Conditional Returns

In Virginia, a court determined that the mother's extraordinary use of drugs created an unreasonable risk of harm.⁶³ However, the child was still to be returned to the habitual residence if the parties could agree to undertakings that would protect the child that would be enforced by the Canadian courts. Another district court noted that a court only has the power to order a child returned to a particular jurisdiction.⁶⁴ A court does not have the power to dictate who should exercise custody over the children during their travel back or upon their arrival.⁶⁵

c. Mature Child's Objection

In applying this Article 13(b) defense, courts 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.⁶⁶ This issue is subject to review under the clear error standard.⁶⁷ In Michigan, the court refused to return children to Mexico when both the petitioner and respondent had moved to the United States and the children voiced fears about being returned to a country where none of their parents lived.⁶⁸

In Idaho, the court returned a fifteen-year-old to England because, although mature, the child:

[Had] not acquired close friendships here, and spends much of his free time doing solitary indoor activities, which is what he did in the United Kingdom. There is no evidence that he is having unique experiences here that he could not have in the United Kingdom. He had no strong pre-removal desire to come to the United States, but testified that he made up his mind to leave with his mother just prior to coming here. Importantly, he testified that if he was returned to the United Kingdom, he was not sure whether he would return to the United States when he turned sixteen.⁶⁹

Another court refused to return a fifteen-year-old to Italy because the child appeared to be unduly influenced by her mother when he objected.⁷⁰

63. *Wertz v. Wertz*, No. 7:18CV00061, 2018 WL 1575830, at *15 (W.D. Va. Mar. 30, 2018).

64. *Yaman v. Yaman*, 919 F. Supp. 2d 189, 191 (D.N.H. 2013).

65. *Warren v. Ryan*, No. 15-cv-00667-MSK-MJW, 2015 WL 3542681, at *2-*3 (D. Colo. Jun. 15, 2015).

66. *Custodio v. Samillan*, 842 F.3d 1084, 1089 (8th Cir. 2016).

67. *Id.* at 1090.

68. *Neumann*, 310 F. Supp. 3d at 836; *see also Kovacic v. Harris*, 328 F. Supp. 3d 508, 526 (D. Md. 2018) (fifteen-year-old girl did not have to be returned to Croatia because she preferred to stay in the US and her reasons were well thought out and articulate).

69. *Smith v. Smith*, No. 1:17-CV-489-BLW, 2018 WL 953338, at *4 (D. Idaho Feb. 20, 2018); *see also Saltos*, 2018 WL 3586274, at *1 (seven-year-old girl's preference not to be returned to Ecuador not followed because she was under the influence of her mother).

70. *Von Meer*, 2018 WL 1281949, at *5.

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d. Human Rights and Fundamental Freedoms

Article 20 provides that the return of a child “may be refused if this would not be permitted by the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms.”⁷¹ As usual there were no cases discussing this defense.

e. Consent/Acquiescence to the Removal

A mother’s consent that the children live with their father in the United States on the implicit condition that she would be joining them as soon as she received a visa did not establish her consent that the children should live permanently in the United States.⁷²

In Tennessee, a court found that the father/petitioner had filed the Hague return proceeding to avoid divorce and custody proceedings in Tennessee and forced the mother/respondent into the difficult position of having to pursue proceedings in father’s preferred forum in Canada.⁷³ Although the court did not expressly hold that this use of the Hague Convention to “forum-shop” disqualified petitioner from succeeding in the case, it did state that in its opinion it ought to do so.⁷⁴

5. *Other Issues under the Child Abduction Convention and ICARA*

a. Attorney’s Fees

A trial court reduced the amount of attorney fees because the lawyer was inexperienced in Hague return proceedings and, although an admitted expert in intellectual property, he was not warranted in charging the same fee that he would in those cases.⁷⁵ Therefore, his hourly fee was reduced from \$850 to \$400.⁷⁶ Another federal court held that the fees charged by an attorney experienced in Hague return cases who sat second chair while an associate successfully tried the case must be deducted from the final bill.⁷⁷

One federal court reduced the requested fee by one-third because an award of all fees would be over 80% of the respondent’s annual salary before taxes, which “would be a substantial burden on anyone let alone a parent who does not have permanent status in her child’s resident country.”⁷⁸ In

71. Convention on the Civil Aspects of International Child Abduction, art. 20.

72. *In re AAUM*, No. 16-CV-6126 (BMC), 2018 WL 2451199, at *3 (E.D.N.Y. May 31, 2018).

73. *Miller v. Miller*, 2018 WL 4008779, at *10.

74. *Id.* at *11.

75. *Duran-Peralta*, 2018 WL 1801297, at *3.

76. *Id.* at *6.

77. *Schaeffer v. Jackson-Schaeffer*, No. 1:17-CV-147, 2018 WL 2074178, at *1 (E.D. Tenn. May 3, 2018).

78. *Moonga v. Moonga*, No. 1:17-CV-2136-TWT, 2018 WL 4026020, at *4 (N.D. Ga. Aug. 23, 2018).

Louisiana⁷⁹, a court reduced the mother's attorney fees request by one-third given the comparative economic resources of the parties. Moreover, in Oklahoma, a court awarded the petitioner \$5,583.30 out of the \$28,989.44 requested because of the extreme discrepancy in finances between the parents.⁸⁰ The entire award was for costs incurred by the petitioner and none was for attorney fees.

An abducting mother must pay the expenses incurred by the father's lawyer, even though the attorneys provided their services for free.⁸¹ But, the fact that the attorney provided his/her services pro bono can be a factor in reducing the total amount of the fee.⁸²

An abducting mother's "good faith" belief that she is permitted to remove her son from the Czech Republic without the father's consent is not a defense to the father's request for fees in a successful return action.⁸³ A father's request for a \$58,600 fee award was cut by three-quarters because the requested award would have a negative effect on the mother's ability to care for the child, given that the father will not pay child support.⁸⁴

If a child is voluntarily returned, there is no authority to provide for attorney fees.⁸⁵

Attorney fees awarded in a proceeding under the Child Abduction Convention cannot be discharged in bankruptcy.⁸⁶

b. Procedural Issues

A voluntary return moots a return proceeding.⁸⁷ A court, however, does not lose jurisdiction to enforce its own order.⁸⁸ Nor does a court lose jurisdiction when the petitioner moves permanently to the country when the respondent abducted the children.⁸⁹

c. Stays

If the state court will not decide all the issues, it is appropriate for the federal court to order a stay in the state court proceedings until the federal

79. *Soonhee Kim v. Ferdinand*, No. CV 17-16180, 2018 WL 1635795, at *7 (E.D. La. Apr. 5, 2018).

80. *Crane v. Merriman*, No. CIV-17-849-D, 2018 WL 4291755, at *2 (W.D. Okla. Sept. 7, 2018).

81. *Salguero v. Argueta*, No. 5:17-CV-125-FL, 2017 WL 4475995, at *2 (E.D.N.C. Oct. 6, 2017).

82. *Duran-Peralta*, 2018 WL 1801297, at *2.

83. *Rath v. Marcoski*, 898 F.3d 1306, 1312 (11th Cir. 2018); *see also Sundberg*, 2018 WL 1220576, at *3.

84. *Pliego v. Hayes*, No. 5:15-CV-00146-TBR, 2017 WL 4322445, at *4 (W.D. Ky. Sept. 28, 2017).

85. *Garcia v. Segovia*, No. 1:17 CV 239, 2017 WL 6757647, at *2 (W.D.N.C. Nov. 22, 2017).

86. *In re Coe*, No. 16-13895-BFK, 2017 WL 5054312, at *3 (Bankr. E.D. Va. Nov. 2, 2017).

87. *Garcia*, 2017 WL 6757647, at *2.

88. *Duran-Peralta*, 2018 WL 637420, at *1.

89. *Neumann*, 310 F. Supp. 3d at 834.

court can determine the abduction claim.⁹⁰ But, a state court need not automatically stay its own proceeding when informed of a Hague return proceeding if it is clear that the Child Abduction convention does not apply. Any error becomes harmless when the federal abduction proceeding is ended by summary judgment in favor of the respondent.⁹¹

d. Temporary Restraining Orders

A petitioner seeking a preliminary injunction must establish that he or she is likely to succeed on the merits, that he or she is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his or her favor, and that an injunction is in the public's interest.⁹² Of particular importance is the past history of respondent in secreting the child.⁹³ Another major consideration is whether there is a risk of the respondent removing the child to a country that is not a party to the Child Abduction Convention.⁹⁴

However, when the allegations in the petition for return are merely conclusory on habitual residence and rights of custody, a court may properly deny a temporary restraining order because it is not clear that the petitioner would prevail on the merits.⁹⁵

e. Relationship to the UCCJEA

The question of whether a United States court should recognize a foreign court's refusal to return the child is a question of comity.⁹⁶ But, a foreign court's decision on the return question does not decide custody and therefore does not deprive a United States court of jurisdiction to decide the custody of the child.⁹⁷

90. *Sundberg*, 2017 WL 5760104, at *2.

91. *Guardianship of J.F.*, No. A152392, 2018 WL 3526641, at *3 (Cal. Ct. App. July 23, 2018).

92. *Cocom v. Timofeev*, No. 2:18-CV-002247, 2018 WL 3958129, at *2 (D.S.C. Aug. 17, 2018) (enjoining the father and his mother from removing the child); *Hodge v. Hughes*, No. 18-CV-21571, 2018 WL 2688800, at *1 (S.D. Fla. Apr. 23, 2018); *Muwakil-Zakuri v. Zakuri*, No. 17-CV-2062 (JCH), 2017 WL 6453399, at *1 (D. Conn. Dec. 11, 2017).

93. *See Smith*, 2017 WL 6040068, at *2 (TRO is especially appropriate when the abductor has moved several times to prevent service of process); *Calixto on behalf of M.A.Y. v. Lesmes*, No. 8:17-CV-2100-T-33JSS, 2017 WL 3877650, at *1 (M.D. Fla. Sept. 5, 2017).

94. *Rose v. Blake*, No. 17-61602-CIV, 2017 WL 3491873, at *1 (S.D. Fla. Aug. 14, 2017); *see also Hernandez v. Ochoa*, No. CV 17-830 JCH/LF, 2017 WL 3575487, at *2 (D.N.M. Aug. 17, 2017).

95. *Dona v. Castilblanco*, No. 3:17-CV-2469-L, 2018 WL 928976, at *6 (N.D. Tex. Feb. 16, 2018).

96. *Guimaraes v. Brann*, 01-16-00093-CV, 2018 WL 3543022, at *7 (Tex. App.—Houston [1st Dist.] July 24, 2018, no pet).

97. *Id.* at *5.

f. Other Procedural Issues

It is usually never appropriate for a federal court to abstain from deciding an abduction case merely because a proceeding for custody had been previously filed in state court.⁹⁸ Abstention is only proper if the state proceeding will decide all the issues in the abduction case.⁹⁹

A federal court has the authority to allow the left-behind parent to testify remotely. Normally such a request will be granted,¹⁰⁰ and documents relating to the custody proceeding in the foreign country should be admitted via certificates or affidavits.¹⁰¹

B. THE HAGUE SERVICE CONVENTION

Failure to follow the procedures of The Hague Service Convention means that New York can refuse to enforce a Greek child support order.¹⁰² It also means that service of process on a Greek husband by mail when Greece objects to service by mail makes the service insufficient and requires dismissal of the Delaware divorce.¹⁰³

C. THE HAGUE CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS¹⁰⁴

The continuing saga of the attempts of a German divorce court to obtain information from an American husband continued in *In Re Mutual Assistance of Local Court of Wetzlar, Germany*,¹⁰⁵ where the court issued an order compelling the husband to comply with subpoenas issued by the US attorney's office.¹⁰⁶

98. See *Bordelais v. Bordelais*, No. 17 C 4697, 2017 WL 6988655, at *2 (N.D. Ill. Dec. 19, 2017) (federal return case is a duplicate of the state case and therefore abstention is proper).

99. See *id.*

100. *Alvarado*, 2018 WL 1697314, at *1; *Vite-Cruz v. Sanchez*, 3:18-CV-01943-DCC, 2018 WL 4359217, at *1 (D.S.C. Sept. 13, 2018).

101. *Kovacic*, 2018 WL 3105772, at *3.

102. *In re Lorandos v. Karakatsiotis*, 64 N.Y.S.3d 559, 559–560 (N.Y. App. Div. 2017).

103. *Daskin v. Knowles*, 193 A.3d 717, 724 (Del. 2018).

104. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Oct. 7, 1972, 23 U.S.T. 2555, T.I.A.S. No. 744.

105. *In re Mut. Assistance of Local Court of Wetzlar, Germany*, No. 1:17-MC-00078-SKO, 2018 WL 2183966, at *5 (E.D. Cal. May 11, 2018).

106. See *id.* at *2–3 (denying the motion to seal the United States application for appointing a commissioner and appointing an Assistant US attorney as a commissioner).

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D. THE HAGUE CONVENTION OF 19 OCTOBER 1996 ON
JURISDICTION, APPLICABLE LAW, RECOGNITION,
ENFORCEMENT AND CO-OPERATION IN RESPECT OF
PARENTAL RESPONSIBILITY AND MEASURES FOR
THE PROTECTION OF CHILDREN

This Convention has been signed by the United States, but it has not been ratified. In a very startling decision, the Washington Court of Appeals applied the Convention.¹⁰⁷ The father in that case convinced an Italian tribunal to take “urgent measures” under Article 11 of the Convention.¹⁰⁸ The Italian court did so and the husband asked the Washington court to enforce the order. The trial court in Washington determined that it had jurisdiction to make a custody determination under the Uniform Child Custody Jurisdiction and Enforcement Act and declined to enforce the Italian order.

The appellate court noted that Article 11 also limits the duration of urgent protective measures taken under it:

(2) The measures taken under the preceding paragraph with regard to a child habitually resident in a Contracting State shall lapse as soon as the authorities which have jurisdiction under Articles 5 to 10 have taken the measures required by the situation.¹⁰⁹

The appellate court determined that the Italian urgent order lapsed under the Convention because Washington is the habitual residence of the child and took the measures required by the situation. The court appeared not to understand the difference between being a member of the Hague Conference on Private International Law and ratifying one of the Conference’s conventions.¹¹⁰

E. OTHER CASES INVOLVING INTERNATIONAL FAMILY LAW
LITIGATION

1. *Marriage and Divorce*

An Italian woman, unable to personally appear in her husband’s Massachusetts divorce action, should have been allowed to testify electronically.¹¹¹ In Texas, when service has been by publication and the defendant does not appear, the court must appoint an attorney to represent the defendant.¹¹² The failure of the trial court to do so meant that a Texas

107. *In re Marriage of Long & Borrello*, 421 P.3d 989, 994 (Wash. Ct. App. 2018).

108. *Id.* at 991.

109. *Id.* at 993

110. *In re Marriage of Long & Borrello*, 421 P.3d at 993.

111. *Bonaparte v. Devoti*, 93 Mass. App. Ct. 603, 607–08 (2018).

112. *Jackson v. Jackson*, No. 04-17-00771-CV, 2018 WL 3998627, at *2 (Tex. App.—San Antonio Aug. 22, 2018, no pet.).

husband's divorce against his Kyrgyzstan wife was vacated and the case remanded for a new trial.¹¹³

2. *Children's Issues*

a. Custody

i. *Jurisdiction and Enforcement*

Home State

New York has no jurisdiction to hear an original child custody determination when the child's home state is Pakistan.¹¹⁴ When Germany had home state jurisdiction and had not declined to exercise it when the termination petition was filed, the North Carolina trial court could not have jurisdiction under the UCCJEA.¹¹⁵

Oregon adopted the totality of the circumstances test, rather than the duration test or the intent test, to determine whether the child's absence from Indonesia was a "temporary absence" within the meaning of the Uniform Child Custody Jurisdiction and Enforcement Act or whether the child's stay in Indonesia was long enough to qualify Indonesia as the child's home state.¹¹⁶ Illinois followed suit in a case involving Illinois and Canada and determined that the parties' three years in Canada were temporary, especially given the parties' agreement that the United States was the child's habitual residence.¹¹⁷

Minnesota determined that the six months extended home state period does not begin to run until the left-behind parent had reason to recognize the permanency of the out-of-state absence.¹¹⁸ Therefore, when the mother took the children to Japan, the six-month period did not begin until four months after her departure when it became clear that she was not going to return.¹¹⁹

Significant Connections

Oregon adopted the totality of circumstances test to determine whether an absence is temporary and therefore had significant connections

113. *Id.* at *3.

114. *Sadia I. v. Waqas I.*, 68 N.Y.S.3d 380 (N.Y. Fam. Ct. 2017); *see also* *Ramamoorthi v. Ramamoorthi*, 918 N.W.2d 191, 196 (Mich. Ct. App. 2018) (Michigan does not have jurisdiction to determine the custody of children when their home state is India); *Banergee v. Banergee*, 2017 WL 6347988 (La. Ct. App. 2017) (Louisiana does not have jurisdiction over children who have lived their entire life in India).

115. *In re A.G.D.*, 810 S.E.2d 416 (N.C. Ct. App. 2018); *see also* *Hagans v. Hagans*, M201700174COAR3CV, 2018 WL 1640373, at *6 (Tenn. Ct. App. 2018) (Tennessee cannot decide custody when home state is Scotland); *M.M. v. M.A.*, 60 Misc. 3d 1212(A) (N.Y. Fam. Ct. 2018) (New York may not decide custody when Morocco is the home state).

116. *In re Marriage of Schwartz and Battini*, 410 P.3d 319, 325 (Ore. Ct. App. 2017).

117. *In re Marriage of Milne*, 2018 IL App (2d) 180091, ¶ 36, 109 N.E.3d 911, 921 (Aug. 2, 2018).

118. *Cook v. Arimitsu*, 907 N.W.2d 233, 239 (Minn. Ct. App. 2018).

119. *Id.* at 241.

jurisdiction in a case where the mother, a United States citizen from Oregon, and father, a French national, were married in France in 2010.¹²⁰ In March 2011, the parties came to Oregon to stay with the mother's family shortly before she gave birth to the child in April of the same year.¹²¹ After the child's birth, the parties bounced between Oregon, France, and Indonesia, staying no more than seven months in one place. The parties remained in Oregon until the child was five or six months old, at which time they traveled to Aixen-Provence, France, where they stayed for five months. They then returned to Oregon for three months. Next the family went to Bali, Indonesia, where the mother's parents have a home in which they live half time. The parents and child:

stayed for two months and followed up with a trip to Paris, where they remained for seven months. They then returned to Bali, where they remained for almost six months. Then, on September 27, 2013, mother flew from Bali to the United States to see friends and family. Father remained in Bali but relocated to Singapore shortly thereafter. The parties had been contemplating moving to Singapore, where father had been pursuing employment, but were also contemplating a move to New York.¹²²

Emergency

While Hawai'i properly exercised temporary emergency jurisdiction over a child whose home state was Canada, it should have vacated the order once an order was obtained from Canada.¹²³

Modification

Washington appropriately modified an Italian order when the Italian court determined that it no longer had jurisdiction and Washington had significant connection jurisdiction.¹²⁴ In addition, no other state could exercise jurisdiction.¹²⁵

Forum Non Conveniens

New Jersey appropriately declined jurisdiction in favor of Canada where the child resided for several years pursuant to the parties' settlement agreement.¹²⁶ A New York court should not decline jurisdiction in favor of Israel when the child had lived all its life in New York, even though the

120. *In re Marriage of Schwartz and Battine*, 410 P.3d 319, 325 (Ore. Ct. App. 2017).

121. *Id.* at 321.

122. *Marriage of Schwartz and Battine*, 410 P.3d at 335; see also *Gorelick v. Gorelick* 815 S.E.2d 330, 333 (Ga. 2018) (Georgia and Turkey are both significant connection states and since the Turkey proceeding was filed first Georgia must defer to it).

123. *WP v. MS*, 141 Hawai'i 246, 407 P.3d 1282 (Ct. App. 2017).

124. *In re Marriage of Long & Borrello*, 421 P.3d at 995.

125. *Id.*

126. *K.L.D. v. J.D.*, No. A-0970-16T2, 2017 WL 5171932, at *1 (N.J. Super. Ct. App. Div. Nov. 6, 2017).

parties' parenting agreement attempted to confer exclusive jurisdiction on the family court in Israel.¹²⁷

On the other hand, a dismissal of a petition for dissolution of marriage based on *forum non-conveniens* was warranted in an action where Florida courts had jurisdiction over issues related to child under the UCCJEA but the dissolution of the marriage was being litigated in London.¹²⁸ Although the trial court had jurisdiction over the issues involving the child, neither the parties nor the child had lived in Florida for over a year when the hearing was held, the parties owned no property in Florida, they had no family living in Florida, and no Florida witnesses had been identified.¹²⁹

Indiana enforced a custody order from Mali over the mother's objection that Mali custody law violated fundamental principles of human rights.¹³⁰ Her argument was rejected because the child custody decision was not based on the relative fault of the parties. Instead, the Malian court expressly stated that its decision was based solely on the best interests of the children, and it conducted an analysis of those interests not at all unlike the law of Indiana.¹³¹

b. Relocation

A Pennsylvania appellate court affirmed an order prohibiting the mother from traveling to Russia because the United States and Russia "have had—and continue to have—a contentious relationship."¹³² In Texas, a court determined that giving *carte blanche* permission to the mother to control the child's international travel to Kenya was contrary to the statute and reversed the order.¹³³ In another case, a Florida trial court's decision that a mother could take her child if she was ever deported to the Philippines was reversed for failure to consider all of the statutory factors.¹³⁴

Rhode Island prohibited a custodial mother from moving to Australia with her four children, even though it would have helped her financially to be living with her family.¹³⁵ A court found that the children had "bonded" to Rhode Island because they lived in Rhode Island their entire lives.¹³⁶ The court also noted that it took between 10 and 12 emails for the parents to arrange domestic visitation and questioned whether they could possibly arrange for international visitation.¹³⁷

But, Massachusetts allowed a mother to relocate to Germany with her child, over the father's objection, because she has been the primary caregiver

127. *LL. v. MM.*, 155 A.D.3d 1336, 1339–40 (N.Y. App. Div. 2017).

128. *DeStefanis v. Tan*, 231 So. 3d 537, 539 (Fla. Dist. Ct. App. 2017).

129. *Id.*

130. *Coulibaly v. Stevance*, 85 N.E.3d 911, 921 (Ind. Ct. App. 2017).

131. *Id.* at 921.

132. *A.D.C. v. D.C.*, No. 568 MDA 2017, 2017 WL 4799864, at *4 (Pa. Super. Ct. Oct. 23, 2017).

133. *Smith v. Karanja*, 546 S.W.3d 734, 741 (Tex. App.—Houston [1st Dist.] 2018, no pet.).

134. *Castleman v. Bicaldo*, 248 So. 3d 1181, 1183 (Fla. Dist. Ct. App. 2018).

135. *Ainsworth v. Ainsworth*, 186 A.3d 1074, 1084 (R.I. 2018).

136. *Id.*

137. *Id.*

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and the move was in the child's best interest.¹³⁸ Minnesota approved an international joint custody arrangement whereby the child would attend school in Chile with the respondent for most of the year and spend breaks in Minnesota with the father.¹³⁹

c. Parentage and Child Support

A Saudi father who left Oregon when his student visa expired is nonetheless subject to the state's jurisdiction in his wife's child support action because the contacts formed with the state while the family lived there were sufficient.¹⁴⁰

Colombia lost its continuing exclusive jurisdiction under the Uniform Interstate Family Support Act when both parents agreed to Missouri having jurisdiction.¹⁴¹

California enforced an Italian child support order, finding that Italy was a state under the Uniform Interstate Family Support Act and had child support procedures equivalent to those under UIFSA.¹⁴²

d. Juvenile

In what seems like a unique case, New York determined that it could appoint a guardian for an undocumented transgender Honduran youth whose backpack is in Brooklyn, although the child is in an immigrant detention center in New Mexico.¹⁴³ The child petitioned the court for appointment of a New York "friend and mentor" as her legal guardian for purposes of seeking Special Immigrant Juvenile Status under federal law.¹⁴⁴ The court appointed such a guardian because under state law, a county family court may appoint a guardian for a "non-resident minor's person or property, or both" if he or she "has property situated in that county."¹⁴⁵

3. *Other Cases*

a. Criminal Law

In California, a defendant was convicted of violating a California statute that makes it a crime for "[e]very person who takes, entices away, keeps, withholds, or conceals a child and maliciously deprives a lawful custodian of a right to custody."¹⁴⁶ In that case, even though the initial removal of the

138. *Miller v. Miller*, 88 N.E.3d 843, 848 (Mass. 2018).

139. *Burnett v. Parra*, No. A17-1107, 2018 WL 817783, at *5 (Minn. Ct. App. Feb. 12, 2018); see also *In re Marriage of R. & Y. R.*, No. D071908, 2018 WL 2676645, at *2 (Cal. Ct. App. June 5, 2018) (mother allowed to relocate to Japan; father can visit for two weeks in Japan every year).

140. *In re Marriage of Albar & Najjar*, 424 P.3d 774, 779 (Ore. 2018).

141. *Rosas v. Lopez*, 556 S.W.3d 620, 625 (Mo. Ct. App. 2018).

142. *Cima-Sorci v. Sorci*, 225 Cal. Rptr. 3d 813, 822 (Ct. App. 2017).

143. *Christian J.C.U. v. Jorge R.C.*, 77 N.Y.S.3d 834, 838 (N.Y. Fam. Ct. 2018).

144. *Id.* at 836.

145. *Id.* at 837.

146. *People v. Jo*, 224 Cal. Rptr. 3d 82, 102 (Ct. App. 2017).

child to South Korea may have been lawful, it became criminal when the defendant concealed the child from the father after the mother knew that the father had been awarded visitation privileges.

A federal court must give a detailed explanation for continuing the pretrial detention of a woman accused of kidnapping her children to Russia during a contentious divorce and remaining there with them for years.¹⁴⁷ The woman's allegation of domestic violence should be addressed when the district court reconsiders detention. The trial court would need additional details, other than the fact that she has dual US-Russian citizenship and a history of violating court orders.¹⁴⁸

A United Kingdom charge of child abduction criminalized the same essential conduct as United States international parental kidnapping.¹⁴⁹ Thus, a fugitive's extradition to the United Kingdom to face a charge of childhood abduction under United Kingdom's Child Abduction Act of 1984—which outlawed removal of a child under the age of sixteen from one country to another by one parent in violation of a court order or in a manner that interfered with the other parent's custodial or visitation rights—satisfied the extradition treaty's requirement of dual criminality. Both countries' statutes outlawed the removal of a child under the age of sixteen from one country to another by one parent in violation of a court order or in a manner that interfered with the other parent's custodial or visitation rights. Both were therefore punishable for a period of one year or more or by a more severe penalty.¹⁵⁰

Another chapter in the long running Miller-Jenkins saga came to an end when the Second Circuit upheld the conviction of Philip Zodiates for aiding and abetting Lisa Jenkins in abducting the child and thus violating the International Parental Kidnapping Crime Act ("IPKCA")¹⁵¹

b. Torts

After proceedings in Israel concerning his divorce and child custody, a husband filed a civil complaint against the Rabbinical Courts of Israel for aiding and abetting in the kidnaping of his daughter, defamation, and intentional infliction of emotional distress.¹⁵² The State Department's suggestion of sovereign immunity was accepted by the New Jersey courts.¹⁵³

c. Affidavit of Support

A Fijian wife's contractual right to support under the federal affidavit filed by her husband in connection with her immigration to the US is enforceable

147. *United States v. Mobley*, 720 F. Appx 441, 444 (10th Cir. 2017).

148. *Id.* at 443.

149. *In re Extradition of Fordham*, 281 F. Supp. 3d 789, 800–01 (D. Alaska 2017).

150. *Id.* at 800-01; *see also* *Fordham v. United States*, No. 3:17-CV-00268-SLG, 2018 WL 832836, at *4 (D. Alaska Feb. 12, 2018) (denying mother's habeas corpus petition).

151. *See* 18 U.S.C. § 371 (2011).

152. *Ben-Haim v. Edri*, 453 N.J.Super. 526, 530–31 (N.J.Super.A.D., 2018).

153. *Id.* at 537.

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in their state divorce action, even though she did not qualify for alimony due to the short length of the marriage.¹⁵⁴ In determining income for purposes of deciding how much is owed under the affidavit of support, a woman's food stamps are income and therefore reduce what her ex-husband must pay pursuant to the federal support affidavit he signed in sponsoring her immigration from Turkey.¹⁵⁵

154. *In re Marriage of Kumar*, 13 Cal. App. 5th 1072, 1083, 220 Cal. Rptr. 3d 863, 870 (Ct. App. 2017).

155. *Erler v. Erler*, No. 12-CV-02793-CRB, 2017 WL 5478560, at *1 (N.D. Cal. Nov. 15, 2017).

International Litigation

AARON MARR PAGE, JONATHAN I. BLACKMAN,
CARMINE D. BOCCUZZI, THEODORE J. FOLKMAN,
PHILLIP B. DYE, JR., MATTHEW D. SLATER, HOWARD S. ZELBO,
IGOR V. TIMOFEYEV, CHARLES A. PATRIZIA, AND
JOSEPH R. PROFAIZER*

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. JURISDICTIONAL EXCEPTIONS

In *Helmerich & Payne International Drilling Co. v. Bolivarian Republic of Venezuela*, the U.S. Court of Appeals for the D.C. Circuit, on remand from the U.S. Supreme Court, applied the heightened standard previously announced for establishing jurisdiction over a sovereign under the FSIA’s expropriation exception.² Following the Supreme Court’s determination that a plaintiff must make more than a non-frivolous showing that the

* This article summarizes developments in international litigation during 2018. The article was edited by Aaron Marr Page, managing attorney at Forum Nobis PLLC in Washington, D.C. Jonathan I. Blackman, a partner at Cleary Gottlieb Steen & Hamilton LLP in New York and London, and Carmine D. Boccuzzi, a Cleary Gottlieb partner in New York, authored Sections I and VII, with assistance from Paul Kleist and Katie Gonzalez, associates, and Hyungwoo Lee and Canem Ozyildirim, law clerks, at the same firm. Theodore J. Folkman, a shareholder at Murphy & King in Boston and author of Letters Blogatory: The Blog of International Judicial Assistance, authored Section II. Phillip B. Dye, Jr., a partner at Vinson & Elkins L.L.P. in Houston, Texas, authored Sections III and VIII, with assistance from Anna Rose Johnson and Jessica M. Pagano, associates at the same firm. Matthew D. Slater, a partner at Cleary Gottlieb in Washington, D.C., authored Section IV, with assistance from Caroline Stanton, associate, and Sameer Jaywant, law clerk, at the same firm. (Note: The firm represented Anheuser-Busch and BNP Paribas in the cases described in Section IV.) Howard S. Zelbo, a partner at Cleary Gottlieb in New York, authored Section V, with assistance from Paul Kleist and Katie Gonzalez. Igor V. Timofeyev, Charles A. Patrizia, and Joseph R. Profaizer, partners at Paul Hastings LLP in Washington, D.C., authored Section VI and IX, with assistance from Katherine Johnson, Noah N. Simmons, and Jay Tymkovich, associates at the same firm.

1. 28 U.S.C. §§ 1602 *et seq.*

2. *Helmerich & Payne Int’l Drilling Co. v. Bolivarian Republic of Venezuela*, 743 Fed. App’x 442, 446 (D.C. Cir. 2018).

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expropriation exception applies,³ the court held that a U.S. parent company, but not its Venezuelan subsidiary, had sufficiently alleged a violation of international law when Venezuela assumed control of its Venezuelan subsidiary.⁴ But the Venezuelan subsidiary was barred from suit by the “domestic takings rule,” which precludes nationals from seeking redress for property seized by their home country.⁵

In *Comparelli v. Republica Bolivariana De Venezuela*, the U.S. Court of Appeals for the Eleventh Circuit applied *Helmerich* to revive claims against Venezuela, which had been dismissed by the district court.⁶ The court held that the expropriation exception’s “nexus requirement[—] providing a requisite connection to the United States sufficient to allow extraterritorial application”—would be sufficient to rebut the presumption against extraterritoriality.⁷ The court remanded to the lower court to determine whether Plaintiffs met the nexus requirement.⁸

In *Schubarth v. Federal Republic of Germany*, the D.C. Circuit affirmed in part and reversed in part the dismissal of a suit, claiming that Germany and its agency or instrumentality unlawfully seized Plaintiff’s property in Germany.⁹ The court followed its previous decision in *De Csepel v. Republic of Hungary*¹⁰ to determine that the expropriation exception applies differently to an agency or instrumentality of a foreign state than it does to the state itself.¹¹ The court explained that although Germany was immune from suit under the expropriation exception because the property was not located in the United States, there is no such restriction to claims against an agency or instrumentality of a foreign state for property located abroad.¹²

As to the FSIA’s waiver exception, in *BAE Systems v. Korea’s Defense Acquisition Program Administration*, the U.S. Court of Appeals for the Fourth Circuit found that Korea implicitly waived its immunity because it failed to assert sovereign immunity in either its motion to dismiss or its first responsive pleading.¹³ The court thus joined the Second and Seventh Circuits in holding that a foreign state waives its sovereign immunity defense by failing to raise it in its initial pleading.¹⁴

3. *Bolivarian Republic of Venezuela v. Helmerich & Payne Int’l Drilling Co.*, 137 S. Ct. 1312, 1324 (2017).

4. *Helmerich & Payne Int’l Drilling Co.*, 743 Fed. App’x at 455.

5. *Id.* at 447–48, 453.

6. *Comparelli v. Republica Bolivariana De Venezuela*, 891 F.3d 1311, 1315 (11th Cir. 2018).

7. *Id.* at 1324–25.

8. *Id.* at 1326.

9. *Schubarth v. Fed. Republic of Ger.*, 891 F.3d 392, 402 (D.C. Cir. 2018).

10. *De Csepel v. Republic of Hung.*, 859 F.3d 1094, 1110 (D.C. Cir. 2017), *petition for cert. filed*, No. 17-1165, 2018 WL 1028055 (U.S. Feb. 16, 2018).

11. *Schubarth*, 891 F.3d at 401.

12. *Id.* at 399–401.

13. *BAE Sys. Tech. Sol. & Servs., Inc. v. Republic of Korea’s Def. Acquisition Program Admin.*, 884 F.3d 463, 473 (4th Cir. 2018).

14. *See Haven v. Polska*, 215 F.3d 727, 731 (7th Cir. 2000); *Drexel Burnham Lambert Grp. Inc. v. Comm. of Receivers for Galardi*, 12 F.3d 317, 326 (2d Cir. 1993).

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B. EXECUTION EXCEPTIONS

In *Rubin v. Islamic Republic of Iran*, the U.S. Supreme Court resolved a circuit split regarding execution under the FSIA's "terrorism" exception in § 1610(g).¹⁵ In an 8–0 decision, the Supreme Court held that § 1610(g), which provides for automatic veil-piercing to enforce judgments against state sponsors of terrorism under § 1605A's terrorism exception to jurisdictional immunity, does not provide a "freestanding" exception to execution immunity because the property at issue must be otherwise not immune under a separate provision of § 1610.¹⁶ The Court rejected Petitioners' argument that § 1610(g) provided an independent basis for execution immunity because doing so would render the remaining § 1610 provisions "superfluous" and is at odds with "historical practice."¹⁷ Therefore, the judgment holders who sought to execute against artifacts owned by Iran and located in the United States could not do so because they had not "identif[ied] a basis under one of § 1610's express immunity-abrogating provisions to attach and execute against a relevant property."¹⁸

C. JURISDICTION OVER CRIMINAL CASES

In *In re Grand Jury Subpoena*, the U.S. Court of Appeals for the D.C. Circuit rejected a foreign state-owned corporation's argument that it had sovereign immunity against enforcement of a subpoena issued in a grand jury investigation (reportedly the investigation led by Special Counsel Robert S. Mueller III into Russian interference in the 2016 presidential election).¹⁹ Assuming that sovereign immunity "extends to the criminal context,"²⁰ the court held that foreign state-owned corporations are subject to criminal jurisdiction in the U.S. and that the FSIA's immunity exceptions apply to criminal as well as civil cases.²¹ The court then went on to find that the commercial activity exception covered the subpoena.²² This decision departs from the normal understanding that the FSIA by its terms applies only to civil litigation, and it will be interesting to see whether it is followed in other cases.

15. *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 827 (2018). See *Rubin v. Islamic Republic of Iran*, 830 F.3d 470, 487 (7th Cir. 2016); *Bennett v. Islamic Republic of Iran*, 825 F.3d 949, 959 (9th Cir. 2016).

16. *Rubin*, 138 S. Ct. at 827.

17. *Id.* at 825.

18. *Id.* at 824.

19. See *In re Grand Jury Subpoena*, No. 18 Civ. 3071 (D.C. Cir. Dec. 18, 2018), ECF No. 1764819. The court indicated that a fuller opinion will follow.

20. *Id.* at 1.

21. *Id.* at 2–3.

22. *Id.* at 3.

II. International Service of Process

As noted in last year's Year in Review, the U.S. Supreme Court recently resolved a key interpretative question under the Hague Service Convention²³ by holding that Article 10(a) permits service of process by postal channels in the absence of objection from the state of destination.²⁴ In 2018, U.S. courts turned their attention to another longstanding interpretative question: to what extent can parties contract around the Convention?

In *Rockefeller Technology Investments (Asia) VII v. Changzhou SinoType Technology Co.*,²⁵ the parties' arbitration agreement included a provision accepting service of process by FedEx or a similar courier in the event of later proceedings.²⁶ When Rockefeller sought to confirm an arbitral award in the Los Angeles County Superior Court and served process on SinoType by FedEx, SinoType defaulted and then moved to set aside the judgment as void on the grounds of insufficient service of process because China had objected to service by postal channels under Article 10(a).²⁷ The lower court denied the motion, but on appeal, the court reversed.²⁸

The holding is consistent with the baseline understanding of the Convention as "exclusive," but not "mandatory," in the words of the Hague Conference on Private International Law.²⁹ The Convention's exclusive character means that when it applies, parties *must* use one of the methods of service it authorizes or permits. The Convention's non-mandatory character means that the law of the forum, not the Convention itself, determines when there is "occasion to transmit a judicial . . . document for service abroad."³⁰ This already difficult distinction has become even more complicated by the unfortunate substitution of the word "mandatory" for the word "exclusive" in some U.S. cases, including the leading case of *Volkswagenwerk AG v. Schlunk*.³¹ In *Volkswagenwerk*, the Court stated that the

23. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 [hereinafter Convention].

24. See *Water Splash, Inc. v. Menon*, 137 S. Ct. 1504, 1513 (2017).

25. *Rockefeller Tech. Investments (Asia) VII v. Changzhou Sinotype Tech. Co.*, 233 Cal. Rptr. 3d 814 (2018), *pet. for rev. granted*, 426 P.3d 303 (Sept. 26, 2018).

26. *Rockefeller*, 233 Cal. Rptr. 3d at 818.

27. *Id.* at 819; see also *Declarations of People's Republic of China*, HCCH, <https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=393&disp=resdn> (last visited Apr. 10, 2019) (related to Special Administrative Region of Hong Kong Convention).

28. *Rockefeller*, 233 Cal. Rptr. 3d at 823.

29. See, e.g., Hague Conference on Private International Law [HCCH], *Conclusions & Recommendations Adopted by the Special Commission on the Practical Operation of the Hague Apostille, Evidence & Service Conventions*, at 13 (Oct. 28–Nov. 4, 2003), <https://assets.hcch.net/docs/0edbc4f7-675b-4b7b-8e1c-2c1998655a3e.pdf>; Hague Conference on Private International Law [HCCH], *Conclusions and Recommendations of the Special Commission on the Practical Operation of the Hague Apostille, Service, Taking of Evidence and Access to Justice Conventions*, at 4 (Feb. 2–12, 2009), https://assets.hcch.net/upload/wop/jac_concl_e.pdf.

30. Convention, *supra* note 19, art. 1.

31. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988).

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Convention was “mandatory” when it applied, but that because state law authorized service on a German defendant by delivering the summons and complaint to its US subsidiary, the Convention did not apply—or in the Hague Conference’s preferred language, that the Convention is exclusive but non-mandatory.³²

In *Rockefeller*, the parties not only agreed to a particular method of service, but also implicitly agreed that it was necessary to transmit the summons and complaint to China. Thus, the Convention applied, and the parties’ agreement was an agreement contrary to the exclusive character of the Convention. The *Rockefeller* court correctly recognized that more than the parties’ private interests are involved. China itself has an interest. The Convention gives “each contracting state—not the citizens of those states”—the power to decide whether alternate methods of service are permissible.³³ In particular, Article 10 gives the “state of destination” the power to object,³⁴ which China has done. Chinese internal law also makes it clear that service of process in China is impermissible without the consent of the relevant Chinese authorities.³⁵ The Chinese approach is consistent with the view of many civil law states, which regard the service of process on their territory as a sovereign act that must be performed by state officials.

The court rejected what it took to be the holding of the New York case, *Alfred E. Mann Living Trust v. ETIRC Aviation S.A.R.L.*,³⁶ namely, that parties could waive the application of the Convention. While the *Mann* court indeed stated, without support or citation, that it saw “no reason why the requirements of the Convention may not be waived by contract,”³⁷ this conclusion was not necessary because the party challenging proper service in *Mann* had more broadly “waived [his] right to service of process of any summons or complaint.”³⁸ Thus, the conflict between the New York and California cases may be less stark than it appears.

Read together, the cases appear to reflect that, because the Convention is non-mandatory, parties wishing to avoid the burdens of service under the Convention may agree *ex ante* to appointment an agent for service of process in the United States or may agree to waive the requirement of service of process altogether. Such agreements would raise no problems under the Convention (though they might raise other concerns under the Due Process Clause if there were an issue about actual notice) because they avoid the need to transmit papers to China at all and thus render the Convention inapplicable. It is also noteworthy that a failure to raise the service issue in an answer will waive the issue, regardless of the Convention issues

32. *Id.* at 705, 707–08.

33. *Rockefeller*, 233 Cal. Rptr. 3d at 826.

34. Convention, *supra* note 19, art. 10.

35. *Rockefeller*, 233 Cal. Rptr. 3d at 826 (citing Civil Procedure Law of the PRC, art. 261).

36. *Alfred E. Mann Living Tr. v. ETIRC Aviation S.a.r.l.*, 910 N.Y.S.2d 418 (App. Div. 2010).

37. *Id.* at 421.

38. *Id.* at 420.

involved.³⁹ Thus, in the wake of *Rockefeller*, contracting parties may wish to consider careful drafting to avoid the issue raised by the case.

III. Personal Jurisdiction

A. SPECIFIC JURISDICTION

In *Walden v. Fiore*, analyzed in the 2014 volume of the Year in Review, the U.S. Supreme Court “le[ft] . . . for another day” questions concerning how defendants’ virtual presence and conduct may translate into contacts with a state that are sufficient to provide for personal jurisdiction—or more simply, the question of when a website can constitute purposeful availment for personal jurisdiction purposes.⁴⁰ In 2018, the U.S. Court of Appeals for the First Circuit took up these questions in *Plixer Int’l, Inc. v. Scrutinizer GmbH*.⁴¹ The court found specific personal jurisdiction over a German corporation with no ties to the United States, except modest web-based sales.⁴²

In the case, Scrutinizer operated an English software development website, while Plixer, “a Maine corporation,” owned the U.S. registered trademark “Scrutinizer.”⁴³ Plixer sued Scrutinizer for trademark infringement, asserting personal jurisdiction over Scrutinizer under FRCP 4(k)(2), which broadly grants personal jurisdiction where the exercise does not violate due process and certain other requirements are met.⁴⁴ To satisfy due process requirements, Plixer needed to show that Scrutinizer’s forum contacts represented purposeful availment of the forum.

Scrutinizer responded with three arguments. First, Scrutinizer argued that it “did no more than enter its products into the stream of commerce.”⁴⁵ The court disagreed, noting that stream-of-commerce analysis applies in cases where entities cannot “predict or control” where their products will land, whereas Scrutinizer had the ability to predict and control where its website was accessible.⁴⁶ Second, Scrutinizer argued that its contacts with the United States were the result of U.S. customers’ “unilateral actions,” not Scrutinizer’s.⁴⁷ The court also found this unpersuasive, asserting that Scrutinizer could not claim its contacts with the United States were involuntary after knowingly serving U.S. customers for over three years with no attempts to limit its website’s accessibility to those customers.⁴⁸ Third,

39. See CAL. CIV. P. CODE § 430.80(a); cf. FED. R. CIV. P. 12(h)(1).

40. *Walden v. Fiore*, 571 U.S. 277, 290 n.9 (2014).

41. *Plixer Int’l, Inc. v. Scrutinizer GmbH*, 905 F.3d 1 (1st Cir. 2018).

42. *Id.* at 4.

43. *Id.* at 4–5.

44. *Id.* at 5. Scrutinizer conceded that the claim arose from their forum activities. *Id.* at 7.

45. *Id.* at 8.

46. *Id.* For example, Scrutinizer could have included a disclaimer on its website that it was not intended for U.S. customers, or blocked U.S. users from accessing the website in the first place.

47. *Id.*

48. *Id.* at 9.

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Scrutinizer argued that it “did not specifically target the United States,”⁴⁹ relying on the Supreme Court case of *J. McIntyre Mach., Ltd. v. Nicastro*, where a plurality opinion held that personal jurisdiction was permitted “only where the defendant can be said to have targeted the forum.”⁵⁰ The First Circuit declined to adopt this rule.⁵¹ Instead, the court followed Justice Breyer’s concurrence, which the court viewed as the narrowest holding from *Nicastro*, as it required nothing more than following then-existing Supreme Court precedent.⁵² This approach meant analyzing the case under *Asahi Metal Indus. Co. v. Superior Court of California, Solano Cty*⁵³ and *Keeton v. Hustler Magazine*.⁵⁴ Under this analysis, the First Circuit concluded that Scrutinizer’s “regular flow or regular course of sales” in the U.S. demonstrated its purposeful availment of the U.S. forum.⁵⁵ Further, the court found that Scrutinizer’s “voluntary service” of U.S. customers indicated that it could anticipate U.S. litigation.⁵⁶ But the First Circuit emphasized that its ruling was highly fact-specific and expressly declined to create any general guidelines for how online activities should factor into minimum contacts analysis.⁵⁷

B. GENERAL JURISDICTION

There is still a divide between states that do and do not extend personal jurisdiction based on corporate registration statutes. In *Webb-Benjamin, LLC v. Int’l Rug Grp., LLC*, the Superior Court of Pennsylvania held that Pennsylvania courts not only have jurisdiction over registered corporations, but that such jurisdiction also extends to cases arising from events that occurred prior to a corporation’s in-state registration.⁵⁸

In *Waite v. All Acquisition Corp.*, however, the U.S. Court of Appeals for the Eleventh Circuit ruled that a registered corporation in Florida was not automatically subject to general personal jurisdiction.⁵⁹ The Montana Supreme Court in *DeLeon v. BNSF Ry. Co.* also rejected the notion that registration automatically provided for personal jurisdiction and found, on

49. *Id.* at 8.

50. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 882 (2011).

51. *Plixer Int’l, Inc.*, 905 F.3d at 10.

52. *Id.* The court clarified that it did not intend to follow the New Jersey test described in *Nicastro*, which would confer jurisdiction on foreign defendants who know their products are distributed through a “system that might lead to those products being sold” anywhere.

53. *Asahi Metal Indus. Co. v. Superior Court of California, Solano Cty.*, 480 U.S. 102, 103–04 (1987).

54. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 770, 104 S. Ct. 1473, 1476, 79 L. Ed. 2d 790 (1984) 465 U.S. 770, 781 (1984).

55. *Plixer Int’l, Inc.*, 905 F.3d at 10.

56. *Id.* at 10.

57. *Id.* at 7–8.

58. *Webb-Benjamin, LLC v. Int’l Rug Grp., LLC*, 192 A.3d 1133, 1137 (Pa. Super. Ct. 2018).

59. *Waite v. All Acquisition Corp.*, 901 F.3d 1307, 1321–22 (11th Cir. 2018).

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the facts of the case, that registration, even combined with some business in the state, was insufficient for personal jurisdiction.⁶⁰

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 deem acts of foreign sovereigns taken within their own jurisdictions as valid.⁶¹

A. ANTITRUST CLAIMS

In *Sea Breeze Salt, Inc. v. Mitsubishi Corp.*,⁶² the U.S. Court of Appeals for the Ninth Circuit rejected antitrust claims against the Mexican salt production corporation, ESSA, 51% owned by the Mexican government, and Mitsubishi Corporation, which owned the remaining 49%, arising out of ESSA's refusal to honor plaintiffs' purchase orders on account of an exclusivity deal with Mitsubishi.⁶³ The Ninth Circuit applied the act of state doctrine on the basis that ESSA was the instrument through which Mexico determined how to exploit its natural resources and that the plaintiffs' claim would require the court to adjudicate those determinations.⁶⁴ The court held that "an official act for purposes of the act of state doctrine may be performed by an instrumentality of a foreign sovereign, such as a government-owned corporation."⁶⁵

In *Mountain Crest SRL, LLC v. Anheuser-Busch InBev SA/NV*,⁶⁶ a Wisconsin district court similarly rejected antitrust claims against U.S. breweries on act of state grounds because the claims would have required the court to adjudicate the validity of distribution policies agreed to by Ontario state instrumentalities and later ratified by Ontario legislation.⁶⁷ The Court found influential, but not controlling, the fact that an Ontario court rejected similar antitrust claims against the Ontario government instrumentality and the defendants' Canadian subsidiaries on the basis that the conduct at issue was authorized by valid Ontario government policy.⁶⁸

60. DeLeon v. BNSF Ry. Co., 392 Mont. 446, 453–54 (Mont. 2018)

61. See, e.g., *WS Kirkpatrick & Co. Inc. v. Envtl. Tectonics Corp. Int'l*, 493 U.S. 400, 406 (1990); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964).

62. *Sea Breeze Salt, Inc. v. Mitsubishi Corp.*, 899 F.3d 1064 (9th Cir. 2018).

63. *Id.* at 1067.

64. *Id.* at 1069.

65. *Id.* The Court applied its own and Fifth Circuit precedent rejecting antitrust claims against OPEC states on similar grounds. See *id.* at 1070; *Spectrum Stores, Inc. v. Citgo Petroleum Corp.*, 632 F.3d 938, 944 (5th Cir. 2011).

66. *Mountain Crest SRL, LLC v. Anheuser-Busch InBev SA/NV*, No. 17-CV-595-JDP, 2018 WL 2247224 (W.D. Wis. May 16, 2018)

67. *Id.* at *6–7.

68. *Id.* at *8.

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B. SECOND HICKENLOOPER AMENDMENT

Enacted after *Sabbatino*,⁶⁹ the Second Hickenlooper Amendment restricts application of the act of state doctrine with respect to a “confiscation or other taking after January 1, 1959” that “violates principles of international law.”⁷⁰ In *Von Saher v. Norton Simon Museum of Art at Pasadena*,⁷¹ the U.S. Court of Appeals for the Ninth Circuit rejected a quiet title action to recover paintings taken by the Nazis.⁷² The paintings had been claimed by another party in Dutch post-war restitution proceedings, which the Dutch government settled by agreeing to sell the paintings to the other party, who in turn conveyed them to a U.S. museum.⁷³ The Court held that the act of state doctrine barred the claim and rejected the argument that the claim fell within the Second Hickenlooper Amendment’s exception because the Dutch government’s acts did not violate international legal principles by which it was bound at the time of its acts, but rather were acts done in accordance with a restitution scheme that aligned with those established by the United States and other Allied powers after World War II.⁷⁴

C. INDIRECT CLAIMS

In *Kashef v. BNP Paribas SA*,⁷⁵ the U.S. Court of Appeals for the Second Circuit rejected claims of a putative class of Sudanese nationals against BNP Paribas for allegedly conspiring with and aiding and abetting the Sudanese government’s human rights abuses by financing the government. Plaintiffs argued that the act of state doctrine did not bar their claims because they were seeking not to invalidate the acts of the Sudanese government, but rather to “obtain damages” from a private party.⁷⁶ The Court rejected this argument, holding that Plaintiffs’ secondary liability claims could only be sustained by assessing whether “the actions of the Government of Sudan, occurring within the then-existing territorial borders of Sudan, against the people of Sudan, amounted to state law violations”⁷⁷

69. *Sabbatino*, 376 U.S. at 436–37 (act of state doctrine applies to expropriation).

70. 22 U.S.C. § 2370(e)(2).

71. *Von Saher v. Norton Simon Museum of Art at Pasadena*, 897 F.3d 1141 (9th Cir. 2018).

72. *Id.* at 1143.

73. *Id.*

74. *Id.* at 1153–55. In *Comparelli v. Venezuela*, the Court remanded for further assessment whether the expropriation exception to sovereign immunity and the Hickenlooper exception applied. 891 F.3d 1311, 1328 (11th Cir. 2018).

75. *Kashef v. BNP Paribas SA*, 316 F. Supp. 3d 770 (S.D.N.Y. 2018), *appeal filed*, No. 18-1304 (2d Cir. Apr. 30, 2018).

76. *Id.* at 777.

77. *Id.*

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D. APPEALABILITY

In *Petersen Energía Inversora S.A.U. v. Argentine Republic and YPF S.A.*, the Second Circuit held that rejection of an act of state defense is not immediately appealable by a foreign sovereign.⁷⁸

V. International Discovery

A. OBTAINING U.S. DISCOVERY FOR USE IN FOREIGN PROCEEDINGS

Among the statutory requirements for obtaining United States discovery for use in foreign proceedings under 28 U.S.C. § 1782 is that the discovery target “reside[]” or be “found” in the judicial district in which the application is filed.⁷⁹ Following a recent trend, two U.S. district courts in the Southern District of New York denied § 1782 applications for discovery from foreign banks, holding that the due process requirements of *Daimler AG v. Bauman* apply in the § 1782 context.⁸⁰ The courts held that the mere presence of a branch office, accompanied by limited commercial activity, does not render a bank “essentially at home” in New York such that the *Daimler* test, and thus § 1782, is satisfied. Similarly, but without deciding conclusively whether the *Daimler* test or some lesser standard applies, a D.C. federal district court held that two U.S. banks were neither “at home” in D.C. nor “found” there for purposes of § 1782, although both banks maintained branches and ATMs in D.C., and one sponsored the Washington Redskins football team.⁸¹ While the law in this area remains unsettled,⁸² these decisions suggest that a party seeking § 1782 discovery should carefully consider the target’s contacts with the judicial district in which the application is to be filed, as a § 1782 application could be denied if the target has minimal local ties (including because it is headquartered abroad and conducts most of its operations outside of the United States).

In another notable 2018 case, *Kiobel v. Cravath, Swain & Moore LLP*, the U.S. Court of Appeals for the Second Circuit held that it would be an abuse of discretion to permit § 1782 discovery of information held by U.S. counsel related to a foreign party that was in counsel’s possession solely because of

78. *Petersen Energia Inversora S.A.U. v. Argentine Republic & YPF S.A.*, 895 F.3d 194, 211–12 (2d Cir. 2018), *petition for cert. filed, sub nom*, *Argentine Republic v. Petersen Energía Inversora S.A.U.*, et al., No. 18-581 (Nov. 2. 2018).

79. 28 U.S.C. § 1782(a).

80. *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 117 (2014); *see In re Del Valle Ruiz*, 342 F. Supp. 3d 448, 455–56 (S.D.N.Y. 2018); *see also In re Fornaciari*, No. 17mc521, 2018 WL 679884, at *2 (S.D.N.Y. 2018).

81. *In re Masters*, 315 F. Supp. 3d 269, 275–77 (D.D.C. 2018).

82. Some courts, including another S.D.N.Y. court just this year, have held that a § 1782 discovery target is “found” within a judicial district if it maintains an office in the district, without any further examination under *Daimler*. *See Ayyash v. Crowe Horwath LLP*, No. 17-mc-482 (AJN), 2018 WL 1871087, at *2 (S.D.N.Y. 2018); *see also In re Qualcomm Inc.*, 162 F. Supp. 3d 1029, 1036–38 (N.D. Cal. 2016).

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the firm's representation of that party in earlier U.S. litigation.⁸³ The *Kiobel* decision suggests that courts may be reluctant to grant § 1782 requests aimed at U.S. counsel, particularly where, as in *Kiobel*, the material sought is undiscoverable abroad because doing so might chill attorney-client relations and damage the international standing of U.S. law firms.⁸⁴ And in *In re Postalis*, a S.D.N.Y. district court enforced the statute's "for use" requirement, concluding on the basis of a § 1782 applicant's public statements that it was seeking impermissible pre-action discovery in contemplation of a lawsuit in the United States against the Section 1782 target rather than information "for use" in a foreign proceeding.⁸⁵

B. OBTAINING DISCOVERY FROM ABROAD FOR USE IN U.S. PROCEEDINGS

U.S. courts, in considering whether to order the production of discovery abroad for use in U.S. proceedings, sometimes hesitate to do so on the basis of foreign blocking statutes. This was the case in *Salt River Project Agricultural Improvement & Power District v. Trench France SAS*, where the court deferred to a French blocking statute.⁸⁶ The more common practice, however, is to compel production despite such statutes.⁸⁷

The European Union's General Data Protection Regulation ("GDPR") became effective on May 25, 2018.⁸⁸ It remains to be seen whether it will be accorded the same treatment as blocking statutes. The GDPR significantly restricts the disclosure of personal data—a broadly defined term likely to encompass a vast amount of otherwise discoverable material—and unlike some blocking statutes, contemplates harsh penalties, including steep fines and potential criminal liability.⁸⁹ Although no U.S. court appears to have yet considered whether the GDPR impedes granting overseas discovery, the U.S. Supreme Court suggested in dicta in *Société Nationale Industrielle Aérospatiale v. U.S. District Court for the Southern District of Iowa* that to the

83. *Kiobel by Samkalden v. Cravath, Swaine & Moore LLP*, 895 F.3d 238, 247–48 (2d Cir. 2018).

84. *See id.*

85. *In re Postalis*, No. 18-00497 (S.D.N.Y. Dec. 20, 2018), ECF No. 20.

86. *Salt River Project Agricultural Improvement and Power District v. Trench France SAS*, 303 F. Supp. 3d 1004, 1009–10 (D. Ariz. 2018).

87. *See, e.g., Royal Park Investments SA/NV v. HSBC Bank USA, N.A.*, No. 14 Civ. 8175 (LGS), 2018 WL 745994, at *2 (S.D.N.Y. Feb. 6, 2018) (ordering production despite Belgian blocking statute); *Knight Cap. Partners Corp. v. Henkel AG & Co., KGAA*, 290 F. Supp. 3d 681, 690–92 (E.D. Mich. 2017) (ordering production despite German blocking statute).

88. Council Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016, on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directives 95/56/EC (General Data Protection Regulation).

89. *Id.*

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extent a foreign rule of law is “substantive,” it is entitled to greater deference than a mere blocking statute.⁹⁰

VI. Extraterritorial Application of United States Law

A. STORED COMMUNICATIONS ACT

As noted in last year’s Year in Review, the U.S. Supreme Court granted certiorari in October 2017 to decide whether the warrant provisions of the Stored Communications Act (“SCA”)⁹¹ apply extraterritorially to data stored at Microsoft’s datacenter in Ireland.⁹² The U.S. Court of Appeals for the Second Circuit had decided in 2016 that the presumption against extraterritoriality barred application of the SCA to data stored abroad even if controlled by a U.S. entity.⁹³ On March 23, 2018, Congress amended the SCA through the Clarifying Lawful Overseas Use of Data Act (“CLOUD Act”), which requires a data service provider to produce electronic records within its possession regardless of whether they are located inside or outside the United States.⁹⁴ The U.S. government subsequently obtained a warrant pursuant to the CLOUD Act for the information it had sought under the SCA.⁹⁵ Accordingly, the Supreme Court vacated the Second Circuit’s judgment and remanded with instructions to dismiss the case as moot.⁹⁶

B. INTELLECTUAL PROPERTY

In *WesternGeco LLC v. ION Geophysical Corporation*, the U.S. Supreme Court held that a patent owner may recover lost foreign profits from an infringer who exports components of a patented invention from the United States when those components are assembled into the infringing invention abroad.⁹⁷ WesternGeco owns patents to a system for surveying the ocean floor.⁹⁸ ION Geophysical began selling a competing system with components that were manufactured in the United States and then shipped to companies abroad for assembly and usage.⁹⁹ WesternGeco sued for patent infringement under 35 U.S.C. § 271(f)(2), which prohibits “suppl[ying]” components of a patented invention “in or from the United States” with the intent that they “will be combined outside of the United States in a manner that would infringe the patent if such combination

90. *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 544 n.29 (1987).

91. 18 U.S.C. §§ 2701–2712 (2018).

92. *Id.*

93. *Microsoft Corp. v. United States*, 829 F.3d 197, 221 (2d Cir. 2016).

94. *United States v. Microsoft Corp.*, 138 S. Ct. 1186, 1187–88 (2018).

95. *Id.* at 1187.

96. *Id.* at 1188.

97. *WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129, 2138 (2018).

98. *Id.* at 2135.

99. *Id.*

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occurred within the United States.”¹⁰⁰ After reaffirming the presumption against extraterritoriality, the Court held that the “focus” of § 271(f)(2) was on domestic conduct: the manufacture and export of components.¹⁰¹ Accordingly, the lost-profits award against ION was not an impermissible extraterritorial application of U.S. law, even though those profits were earned abroad.¹⁰²

C. ANTITRUST

In *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co.*, the U.S. Supreme Court held that federal courts must consider, but are not bound by, a foreign government’s official statement regarding the meaning and interpretation of its laws.¹⁰³ Petitioners, U.S.-based purchasers of vitamin C, alleged a price-fixing conspiracy by manufacturers and exporters of vitamin C in the People’s Republic of China (“PRC”).¹⁰⁴ The PRC companies countered that the alleged price fixing was mandated by their government.¹⁰⁵ The PRC Ministry of Commerce filed an amicus brief supporting the companies, stating that the price controls were “a regulatory pricing regime mandated by the government of China.”¹⁰⁶ The Second Circuit held that conclusive weight must be given to the PRC government’s interpretation of Chinese law, and dismissed the suit.¹⁰⁷ The Supreme Court reversed, criticizing that standard as too “deferential,” and held that a federal court should accord “respectful consideration”—but not “conclusive effect”—to a “foreign government’s statements.”¹⁰⁸

D. CONTINUING CRIMINAL ENTERPRISE

In *United States v. Vasquez*, the U.S. Court of Appeals for the Fifth Circuit held that 21 U.S.C. § 848(e)(1)(A), which criminalizes the killing of an individual while engaging in a continuing criminal enterprise, applies extraterritorially.¹⁰⁹ The defendant was convicted of killing while engaged in a drug trafficking operation, with the murders occurring in Mexico.¹¹⁰ The Fifth Circuit found clear Congressional intent that § 848(e) should apply extraterritorially (overcoming the presumption against extraterritoriality) because the predicate statutory offenses—operating drug trafficking cartels—plainly applied to at least some foreign conduct.¹¹¹

100. *Id.*

101. *Id.* at 2138.

102. *Id.*

103. *Animal Sci. Prod., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1869–70 (2018).

104. *Id.* at 1870.

105. *Id.*

106. *Id.*

107. *Id.* at 1872.

108. *Id.* at 1868, 1874.

109. *United States v. Vasquez*, 899 F.3d 363, 377–78 (5th Cir. 2018).

110. *Id.* at 368–370.

111. *Id.* at 377.

E. *Bivens*

In *Hernandez v. Mesa*, the Fifth Circuit, sitting *en banc*, refused to extend the *Bivens* damages remedy extraterritorially.¹¹² In *Mesa* (analyzed in the 2015, 2016, and 2017 volumes of Year in Review), a Border Patrol agent fired across the border, fatally wounding a Mexican teenager.¹¹³ The teenager's family sued for unjustified use of deadly force in violation of the Fourth and Fifth Amendments.¹¹⁴ The Fifth Circuit declined to extend a cause of action to a foreign citizen, injured on foreign soil, partly out of concern that such suits against a federal employee would interfere with delicate matters of international relations.¹¹⁵

By contrast, a divided Ninth Circuit panel in *Rodriguez v. Swartz* extended *Bivens* in an analogous cross-border shooting by a Border Patrol agent in Arizona, finding that the presumption against extraterritoriality was overcome.¹¹⁶ The Ninth Circuit acknowledged that its decision created a split with the Fifth Circuit,¹¹⁷ and the Supreme Court called for the views of the Solicitor General in both cases as it considers granting certiorari.¹¹⁸

VII. Recognition and Enforcement of Foreign Judgments

In U.S. courts, the U.N. Convention on the Recognition and Enforcement of Foreign Arbitration Awards, otherwise known as the “New York Convention,” governs the recognition and enforcement of most foreign arbitral awards.¹¹⁹ State law, however, governs the recognition and enforcement of foreign court judgments.

A. FOREIGN ARBITRAL AWARDS

Article V of the New York Convention outlines the limited circumstances under which a court may refuse to recognize and enforce a foreign arbitral award, including because “[t]he award has not yet become binding on the parties.”¹²⁰ The U.S. Court of Appeals for the D.C. Circuit relied on this

112. *Hernandez v. Mesa*, 885 F.3d 811, 819–20 (5th Cir. 2018) (*en banc*).

113. *Id.* at 814.

114. *Id.* at 815.

115. *Id.* at 822–23.

116. *Rodriguez v. Swartz*, 899 F.3d 719, 747 (9th Cir. 2018).

117. *Id.* at 731; *see also id.* at 751–52 (M. Smith, J., dissenting).

118. *Swartz v. Rodriguez*, No. 18-309, 2018 WL 5314938 (U.S. Oct. 29, 2018); *Swartz v. Rodriguez*, No. 18-309, 2018 WL 5314938 (U.S. Oct. 29, 2018); *Hernandez v. Mesa*, No. 17-1678, 2018 WL 4682960 (U.S. Oct. 1, 2018).

119. 21 U.S.T. 2517. The Convention is implemented in U.S. law through Chapter 2 of the Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 201-08 (2013). The Inter-American Convention on International Commercial Arbitration 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. The Inter-American Convention is implemented in Chapter 3 of the FAA.

120. 21 U.S.T. 2517., Art. V(1)(e).

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provision in *Diag Human S.E. v. Czech Republic Ministry of Health*,¹²¹ to find that an award in a Czech-seated arbitration was not binding on the Czech Republic, and therefore unenforceable, because it had been nullified by a “Resolution” issued by a “second arbitral panel” sitting in review of the original arbitral panel’s decision.¹²² The court explained, with reference to a Czech legal treatise and expert testimony, that this two-tier review process, although rarely used in practice, was a particular feature of Czech arbitration law.¹²³ The Court found that the second arbitral panel both intended to nullify the award, and that it had the power to do so.¹²⁴ The Court also emphasized that the parties had provided for two-tier review, “mirroring” applicable Czech law, in their own arbitration agreement.¹²⁵

In *Leidos, Inc. v. Hellenic Republic*, the D.C. Circuit considered whether a district court abused its discretion by granting an enforcement Petitioner’s post-judgment motion to convert its arbitral award from euros to U.S. dollars, thereby boosting the value of the award by nearly twelve million dollars.¹²⁶ The Court noted that the Petitioner had previously requested judgment in euros in its complaint and in two iterations of a proposed judgment, and that a request to recover in dollars “could have—and should have—been made long before judgment was entered.”¹²⁷ The Court found that it was an abuse of discretion to permit a party to use a Federal Rule of Civil Procedure 59(e) motion to alter or amend a judgment as “a vehicle to present a new legal theory that was available prior to judgment.”¹²⁸ The Court further pointed out that U.S. courts are no longer reluctant to enter judgments in foreign currencies, and that the Petitioner’s delay harmed the judgment debtor, which had not hedged against the risk of currency fluctuations.¹²⁹

B. FOREIGN COURT JUDGMENTS

In *AlbaniaBEG Ambient Sh.p.k. v. Enel S.p.A.*,¹³⁰ the Appellate Division of the New York Supreme Court, hearing a petition to enforce a foreign judgment, addressed a judgment debtor’s motion to dismiss for lack of personal jurisdiction on account of the fact that the debtor had no physical presence in New York and the enforcement Petitioner failed to identify any property the debtor owned there.¹³¹ The Appellate Division first concluded

121. *Diag Human S.E. v. Czech Republic - Ministry of Health*, 907 F.3d 606 (D.C. Cir. 2018).

122. *Id.* at 612.

123. *Id.* at 611.

124. *Id.* at 612.

125. *Id.*

126. *Leidos, Inc. v. Hellenic Republic*, 881 F.3d 213, 215 (D.C. Cir. 2018).

127. *Id.* at 218.

128. *Id.*

129. *Id.* at 218–19.

130. *AlbaniaBEG Ambient Sh.p.k. v. Enel S.p.A.*, 160 A.D.3d 93 (N.Y. App. Div. [1st Dept.] 2018).

131. *Id.* at 96–97.

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that *Daimler* did not require dismissal, because *Daimler*'s "restriction of general jurisdiction to states where a corporate defendant is 'at home'" should not "be extended to proceedings to recognize or enforce foreign judgments."¹³² The Court nevertheless granted the motion to dismiss, holding that no basis, "whether arising from [the debtor's] residence, the location of [its] property or otherwise," existed "to justify [the debtor's] being subject to the court's power."¹³³ In so holding, the Court distinguished the Appellate Division precedent of *Abu Dhabi Commercial Bank PJSC v. Saad Trading, Contracting & Financial Services Co.*,¹³⁴ where the Court had exercised jurisdiction notwithstanding the debtor's lack of New York contacts, by noting that the debtor in that case had chosen not to argue the statutory grounds for non-recognition of a foreign court judgment under New York law.¹³⁵

VIII. Forum Non Conveniens

The doctrine of *forum non conveniens* presupposes at least two forums in which the defendant is amenable to process.¹³⁶ Thus, at the outset of any *forum non conveniens* inquiry, the court must determine whether an alternative forum exists.¹³⁷ The party seeking dismissal bears the burden of proving the availability of an adequate alternative forum.¹³⁸ In *Associacao Brasileira de Medicina v. Stryker Co.*, the U.S. Court of Appeals for the Sixth Circuit held that while in some particularly clear cases the burden of proving an available adequate forum could be satisfied by pleadings and preliminary submissions, more complex matters require expert evidence concerning a particular court's ability to exercise jurisdiction.¹³⁹

In the case, a Brazilian non-profit association of health insurance providers filed suit against Stryker Corporation, a Michigan company producing and distributing medical devices.¹⁴⁰ The suit alleged that Stryker orchestrated an illegal scheme of improper payments to influence physicians to use Stryker products.¹⁴¹ Stryker moved to dismiss on *forum non conveniens* grounds.¹⁴² The only showing by Stryker that Brazil was an adequate alternative forum was a single line in Stryker's reply brief claiming that

132. *Id.* at 103.

133. *Id.* at 111–12.

134. *Abu Dhabi Commercial Bank PJSC v. Saad Trading, Contracting & Fin. Servs. Co.*, 117 A.D.3d 609 (N.Y. App. Div. [1st Dept.] 2014).

135. *Id.* at 611.

136. *See, e.g.*, *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 506–07 (1947).

137. *See, e.g.*, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22.

138. *See, e.g.*, *Koster v. (Am.) Lumbermens Mut. Casualty Co.*, 330 U.S. 518, 535 (1947).

139. *Associacao Brasileira de Medicina de Grupo v. Stryker Corp.*, 891 F.3d 615, 620 (6th Cir. 2018).

140. *Id.* at 618.

141. *Id.*

142. *Id.*

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“Stryker consents to jurisdiction in Brazil, so Brazil is an available forum.”¹⁴³ This was sufficient for the federal district court for the Western District of Michigan, which dismissed on *forum non conveniens* grounds, but not for the Sixth Circuit, which reversed and remanded for proceedings which would require Stryker to meet its burden to show that Brazil was an available and adequate alternative forum.¹⁴⁴ The court found that it was not obvious from the pleadings alone that a Brazilian court could exercise jurisdiction over Stryker, nor that Stryker’s purported submission to jurisdiction would be legally meaningful to a Brazilian court, even if presented in a proper evidentiary form.¹⁴⁵

The U.S. Supreme Court has made clear in *Atlantic Marine Construction Company v. United States District Court* that *forum non conveniens* litigation is an appropriate way to enforce a forum-selection clause.¹⁴⁶ The Court went on to say that in conducting a *forum non conveniens* balancing test, a valid forum selection clause should be given controlling weight in all but the most exceptional cases, but did not expand on what situations might be considered exceptional.¹⁴⁷ In *Yei A. Sun v. Advanced China Healthcare, Inc.*, the U.S. Court of Appeals for the Ninth Circuit framed a test for the “extraordinary circumstances” where courts may deviate from the *Atlantic Marine* inquiry.¹⁴⁸

In the case, a dispute had arisen when purchasers of stock brought an action against the president of a healthcare company in Washington Federal District Court even though a forum-selection clause designated California state court as the proper forum.¹⁴⁹ The district court dismissed the suit.¹⁵⁰ On appeal, the court looked to the Supreme Court’s earlier decision in *M/S Bremen v. Zapata Off-Shore Co.*¹⁵¹ to determine when the extraordinary circumstances alluded to in *Atlantic Marine* might arise. In *Bremen*, the Supreme Court outlined three extraordinary circumstances that may invalidate a forum-selection clause: 1) the presence of “fraud or overreaching;” 2) when enforcement would contravene a strong public policy; or 3) when trial would be so difficult in the contractual forum that the litigant is deprived of a fair trial.¹⁵² After examining the *Bremen* factors, the Ninth Circuit found that there was no extraordinary circumstance to prevent the application of the forum-selection clause and it mandated the suit be tried in California.¹⁵³

143. *Id.* at 621.

144. *Id.* at 622.

145. *Id.* at 621–22.

146. *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 571 U.S. 49, 60 (2013).

147. *Id.* at 62.

148. *Yei A. Sun v. Advanced China Healthcare, Inc.*, 901 F.3d 1081, 1088 (9th Cir. 2018).

149. *Id.*

150. *Id.* at 1085–86.

151. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

152. *M/S Bremen*, 407 U.S. at 1.

153. *Yei A. Sun*, 901 F.3d at 1093.

IX. Parallel Proceedings

A. INTERNATIONAL ABSTENTION

Federal courts continue to adhere to their “virtually unflagging obligation” to exercise jurisdiction, even in the face of parallel foreign proceedings, absent “exceptional” circumstances.¹⁵⁴ In *Leopard Marine & Trading, Ltd. v. Easy Street Ltd.*,¹⁵⁵ the U.S. Court of Appeals for the Second Circuit reaffirmed the multi-factor test it first set out in *Royal & Sun Alliance Insurance Co. of Canada v. Century International Arms, Inc.*¹⁵⁶ for deciding whether to abstain due to simultaneous foreign litigation. These factors are based in part on the U.S. Supreme Court’s decision in *Colorado River Water Conservation District v. United States*¹⁵⁷ and include the similarity of issues and parties, the order in which the actions were filed, the adequacy of the alternative forum, the potential prejudice to either party, the convenience for the parties, the connection between the litigation and the United States, and the connection between the litigation and the foreign jurisdiction.¹⁵⁸

The moving party in *Leopard Marine* sought abstention in light of parallel Panamanian proceedings and invoked the doctrine of international comity.¹⁵⁹ The Second Circuit, however, explained that comity was “not an imperative obligation,” but rather a flexible rule of “practice, convenience, and expediency.”¹⁶⁰ Focusing on the connection between the litigation and the United States, the court concluded that the “public interest” weighed in favor of having the case heard in a forum “at home with the” law governing the case, which was U.S. law.¹⁶¹ The court also rejected the argument that Panamanian exercise of *in rem* jurisdiction over the subject of the litigation, an ocean vessel, was an exceptional circumstance necessitating abstention.¹⁶² The court pointed out that the American proceeding was not *in rem*, but *in personam*, and so the American court, unlike its Panamanian counterpart, did not have to keep custody over the vessel to retain jurisdiction.¹⁶³ Accordingly, allowing the American proceedings to continue alongside the Panamanian ones would not require two different courts to keep custody over the same property.¹⁶⁴

In *Holland America Line, N.C. v. Orient Denizcilik Turizm Sanayi VE Ticaret, A.S.*, the federal district court for the Western District of Washington focused on a different *Colorado River* factor: whether the

154. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-18 (1976).

155. *Leopard Marine & Trading, Ltd. v. Easy St. Ltd.*, 896 F.3d 174, 189-90 (2d Cir. 2018).

156. *Royal & Sun All. Ins. Co. of Canada v. Century Int’l Arms, Inc.*, 466 F.3d 88, 94 (2d Cir. 2006).

157. *Colorado River*, 424 U.S. at 818-20.

158. *Royal & Sun*, 466 F.3d at 94.

159. *Leopard Marine*, 896 F.3d at 190.

160. *Id.* at 190 (internal quotation marks and citation omitted).

161. *Id.* at 191 (internal quotation marks and citation omitted).

162. *Id.* at 193.

163. *Id.*

164. *Id.*

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domestic litigation or the parallel foreign proceedings began first.¹⁶⁵ But the court's analysis went beyond the fact that the parallel suits in Turkish commercial court were filed first to consider facts relating to the timing of demand letters, the parties' failed arbitration attempts, and the dates of service before ultimately concluding that the factor was "neutral" and did not favor or weigh against abstention.¹⁶⁶ The court's analysis demonstrates that this *Colorado River* factor is not a simple "first to file" rule or a race between foreign and domestic courts.¹⁶⁷

B. ANTI-SUIT INJUNCTIONS

In *BAE Systems*,¹⁶⁸ the U.S. Court of Appeals for the Fourth Circuit joined other circuits in cautioning district courts to grant anti-suit injunctions "sparingly" in deference to the principle of international comity.¹⁶⁹ In *BAE*, an American defense contractor sought a declaratory judgment in federal district court that it had not breached a contract with the Republic of Korea.¹⁷⁰ After Korea filed a parallel action in a Korean court, the district court denied the contractor's motion for a permanent injunction prohibiting Korea from litigating in Korean court.¹⁷¹ The Fourth Circuit also noted that "anti-suit injunctions against foreign sovereigns are so unusual" that "no circuit precedent (and little out-of-circuit precedent) exists to guide courts."¹⁷² Upholding that decision, the Fourth Circuit observed that "comity concerns are near their peak" when "an injunction would bar a foreign sovereign," as opposed to a private party, "from litigating a dispute in its own courts."¹⁷³ An anti-suit injunction in such circumstances would "impinge on" both "the sovereignty of the Korean courts (to hear the case) and the Korean government (to litigate it)."¹⁷⁴

165. *Holland Am. Line, N.C. v. Orient Denizcilik Turizm Sanayi VE Ticaret, A.S.*, No. C17-1726-JCC, 2018 WL 3742197, at *6 (W.D. Wash. Aug. 7, 2018).

166. *Id.* at *7.

167. *Id.* at *8.

168. *BAE Sys. Tech. Sol. & Servs., Inc. v. Republic of Korea's Def. Acquisition Program Admin.*, 884 F.3d 463, 479 (4th Cir. 2018).

169. *Id.* at 479.

170. *Id.* at 467.

171. *Id.*

172. *Id.* at 480.

173. *Id.*

174. *Id.*

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International Employment Law

SAJAI SINGH AND DEIRDRE LYNCH*

This article reviews significant legal developments in India and Ireland during 2018 in the field of international employment law.

I. India

A. RULES FOR CRECHE FACILITIES UNDER THE MATERNITY BENEFIT ACT, 1961

The Maternity Benefit Act, 1961 was amended in 2017, enhancing maternity leave and requiring employers with more than fifty employees to provide creche facilities.¹ Subsequently, the State of Haryana announced through a press release rules governing creche facilities.² The State of Karnataka also published draft rules, inviting public comments prior to their promulgation.³

The Haryana rules and the Karnataka draft rules appear to be similar in many respects. By and large, they focus on the distance within which the creche is required to be located, the physical specifications of the creche, and the requirement to provide refreshments such as milk to children attending the creche. The Karnataka draft rules also require the creche to be operational during the working hours of the women availing themselves of the facility and require it to be located on the ground floor of the building.⁴

Employers may find it difficult to comply with some of the rule requirements. For example, many employers may find it difficult to comply with the requirement that the creche be situated on the ground floor of the building. Employers might also find it difficult to limit the creche to only thirty children.⁵

* Deirdre Lynch Employment Department, ByrneWallace, Dublin served as committee editor and authored the section on Ireland and Sajai Singh, Partner & Co-chair, Corporate Practice, J. Sagar Associates, Bangalore, India authored the section on India.

1. Maternity Benefit (Amendment) Act, 2017, No. 6 of 2017, Gazette of India, pt. II sec. 1 (Mar. 27, 2017).

2. Press Release, Directorate of Information, Public Relations & Languages, Government of Haryana, The Haryana Government Has Framed And Notified Rules Under The Maternity Benefit (Amended) Act, 2017, <https://www.prharyana.gov.in/en/the-haryana-government-has-framed-and-notified-rules-under-the-maternity-benefit-amended-act-2017>.

3. Karnataka Maternity Benefit (Amendment) Rules-2018 (not reported), <http://labour.kar.nic.in/labour/Maternity%20benefit%20act%20Rules%20Amendment.pdf>.

4. *Id.* §§ 2(i), 2(vi), 4.

5. *Id.* § 1.

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B. DECRIMINALIZATION OF HOMOSEXUALITY

In a landmark decision, the Supreme Court of India declared Section 377 of the Indian Penal Code, 1860 to be unconstitutional insofar as it criminalized private consensual same-sex relationships between two adults.⁶ Employers in India, who may have been hesitant to explicitly support their LGBTQ employees, may now be motivated to strengthen their diversity programs and to robustly show support for their LGBTQ employees.

C. DISCLOSURE REQUIREMENTS RELATED TO PREVENTION OF SEXUAL HARASSMENT

The recently ratified Companies (Accounts) Amendment Rules, 2018⁷ now require companies to disclose compliance with the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (“POSH Act”) in their boards’ reports.⁸

The POSH Act requires an employer to constitute an Internal Committee (“IC”)⁹ to resolve sexual harassment complaints at the workplace. The IC must have an external member experienced in handling such matters and committed to the cause of women. A court may order reconstitution of the IC if it is not formed in accordance with the POSH Act.

The Delhi High Court ordered the reconstitution of one company’s IC where it believed that the external member did not have the requisite qualifications to handle matters of this nature.¹⁰ In this case, the external member was an employment lawyer. The court observed that although the member may have been experienced in handling labour matters, nothing in the record demonstrated that he was committed to the cause of women.

D. AMENDMENT TO THE PAYMENT OF GRATUITY ACT, 1972 (“GRATUITY ACT”)

The Gratuity Act provides for social security benefits to employees on their retirement or their attaining superannuation. Payment of gratuity was capped at INR 10,00,000/-. By way of an amendment, which came into effect on March 29, 2018, this ceiling was revised to INR 20,00,000/-.¹¹

6. *Navej Singh Jobar & Ors. v. Union of India Thru. Secretary Ministry of Law and Justice*, W. P. (Crl.) No. 76 of 2016 (Supreme Court of India) (Sept. 6, 2018).

7. Companies (Accounts) Amendment Rules, 2018, No. 18 of 2013, Gazette of India, pt. II sec. 3 (July 31, 2018).

8. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, No. 14 of 2013, ch. VIII, § 21(I), Gazette of India, pt. II sec. 3 (Apr. 22, 2013).

9. *Id.* at ch. II, § 4(I).

10. *Ruchika Singh Chhabra vs. M/S. Air France India*, No. 237 of 2018, (Del. HC) ¶ 32(c) (May 30, 2018).

11. Payment of Gratuity (Amendment) Act, 2018, Gazette of India, pt. II sec. 3 (Mar. 29, 2018).

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E. RIGHT TO STRIKE

The High Court of Himachal Pradesh, India, reaffirmed the legal position that the right to strike is not an absolute right and that it “is subject to reasonable restrictions.”¹² The right of an Indian worker to strike has been recognized but has been qualified with the condition that the right to strike must be exercised peacefully.¹³ The courts will not tolerate violence and will not allow workers to take the “law into their own hands.”¹⁴ An employer’s management has every right to ensure that its work is not hindered or obstructed due to the strike. Therefore, when addressing the right to strike, a balance must be struck between competing interests.

II. Ireland

There were several legislative and judicial developments in Irish employment and labour law in 2018. These developments emerged in the context of continued economic recovery and a return to pre-economic crisis levels of employment. On January 1, 2018, the minimum wage increased to €9.55 per hour¹⁵ and on January 1, 2019, it is expected to increase to €9.80 per hour.¹⁶ Moreover, the rate of unemployment fell to a ten-year low of 5.3 percent in October of 2018.¹⁷ This rate was a marked decrease from the 6.6 percent rate of unemployment of October of the previous year and was a more than ten percent decrease from the post-crisis peak of 15.9 percent in early 2012.¹⁸

A. DISABILITY AND REASONABLE ACCOMMODATION

The interpretation of disability law underwent a significant change in 2018. The Employment Equality Acts 1998–2015 prohibit discrimination on the grounds of disability¹⁹ and obligate employers to make reasonable accommodations regarding the recruitment, retention, promotion, and

12. *Gujarat Steel Tubes Ltd. vs. Gujarat Steel Tube*, (2018) 535 LLR (H.P. HC) ¶ 11 (Mar. 8, 2018).

13. *Id.* ¶ 9–10.

14. *Id.* ¶ 14.

15. GOV’T OF IR., DEPARTMENT OF EMPLOYMENT AFFAIRS AND SOCIAL PROTECTION, *20 BILLION TO BE SPENT IN 2018 FOR 2 MILLION BENEFICIARIES* (2017), <https://www.welfare.ie/en/Pages/Budget-2018.aspx>.

16. GOV’T OF IR., DEPARTMENT OF EMPLOYMENT AFFAIRS AND SOCIAL PROTECTION, *€20.5 BILLION TO BE SPENT ON SOCIAL WELFARE IN 2019 INCLUDES €361.6 MILLION OF ADDITIONAL BUDGET MEASURES* (2018), <https://www.welfare.ie/en/Pages/Budget-2019.aspx>.

17. GOV’T OF IR., CENTRAL STATISTICS OFFICE, *MONTHLY UNEMPLOYMENT OCTOBER 2018* (2018), <https://www.cso.ie/en/releasesandpublications/er/mue/monthlyunemploymentoctober2018/>.

18. Eoin Burke-Kennedy, *Unemployment in Ireland falls to new post-crash low of 5.4%*, THE IRISH TIMES, <https://www.irishtimes.com/business/economy/unemployment-in-ireland-falls-to-new-post-crash-low-of-5-4-1.3648827> (last updated Oct. 2, 2018).

19. Employment Equality Act, 1998 (Act No. 21/1998) (Ir.), at pt. II, § 6(2)(g).

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training of candidates and employees with disabilities. This obligation exists as long as it does not place a disproportionate burden on the employer.²⁰

Over the past twenty years, a voluminous body of case law has developed regarding the obligation to provide reasonable accommodation for disabled employees. Until recently, the principles applicable to the duty to make reasonable accommodation were those which emanated from a handful of early cases and the jurisprudence was relatively well-settled. As is often the case in employment law, it was the process adopted by the employer that was found to be in error in many cases. Employees were often able to show that their employers never considered whether a reasonable accommodation could have enabled the employees to carry out their duties.²¹

On January 31, 2018, the Court of Appeal delivered a significant judgment concerning the extent of the employer's obligation to provide reasonable accommodation.²² The Court unanimously held that the employer has an obligation to consider appropriate measures, including redistribution of tasks associated with a duty or duties attached to the position in order to enable the worker with a disability to be fully competent or capable of undertaking the duties attached to the position. But this obligation does not extend to consideration of the removal of a duty which is "a main duty or essential function of the position concerned by the redistribution of all tasks demanded by that duty."²³ The Court held that there is not a freestanding obligation on an employer to carry out an evaluation of reasonable accommodation for an employee. The Court further held that where no reasonable adjustments can be made for a worker with a disability, the employer is not liable for failing to consider the matter. The Court decided that "[i]t is not a matter of review of process but of practical compliance. If reasonable adjustments cannot be made, as objectively evaluated the fact that the process of decision is flawed does not avail the employee."²⁴ The decision has been appealed to the Supreme Court.²⁵

B. MANDATORY RETIREMENT

Following a period of consultation with employer and employee representative organizations, the Workplace Relations Commission published the Code of Practice on Longer Working in December 2017.²⁶ The Code's objective is to provide best practice on managing the engagement between employers and employees in the period of time leading to retirement. The Code is not legally binding; however, compliance with

20. *Id.* § 16(3)(c).

21. *E.g.*, *A Meat Worker v. A Meat Processor* [2016] 27 ELR 322 (Ir.).

22. *Nano Nagle School v Daly* [2018] IECA 11 [2018] 29 E.L.R. 249 (Ir.).

23. *Id.* ¶ 32.

24. *Id.* ¶ 63.

25. *Nano Nagle School v Marie Daly* [2018] IESCDET 103 (Unreported, SC, July 6, 2018) (Ir.).

26. Industrial Relations Act 1990 (Code of Practice on Longer Working) (Declaration) Order 2017 (SI 600/ 2017) (Ir.), <http://www.irishstatutebook.ie/eli/2017/si/600/made/en/print>.

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its provisions will assist employers in defending against claims of discrimination in relation to retirement.

The Code advises employers that, as an employee is nearing retirement age, it is good practice to notify the employee of his or her contractual retirement date approximately six to twelve months before that date arrives and thereafter to engage in a period of consultative guidance through notifications in writing and face-to-face meetings. The Code also provides examples of legitimate objectives which an employer could cite as grounds for imposing a mandatory retirement age: intergenerational fairness in order to allow younger workers to progress; “[m]otivation and dynamism through the increased prospect of promotion”; health and safety (which is generally only applicable in “safety critical occupations”); the “[c]reation of a balanced age structure in the workforce”; “personal and professional dignity,” such as “avoiding capability issues” as employees age; and for succession planning.²⁷

C. LEGAL REPRESENTATION DURING DISCIPLINARY PROCESS

The Court of Appeal recently settled a year of uncertainty as to whether an employee, subject to a disciplinary investigation, is entitled to legal representation during the investigation. In May 2017, the High Court suggested that the full panoply of fair procedures is available to an employee during the investigation stage of a disciplinary procedure, including the right to cross-examine witnesses and the right to be legally represented.²⁸ This decision was quickly followed by two further High Court decisions,²⁹ which appeared to run contrary to those findings. On these subsequent occasions, the High Court concluded that the rights to legal representation and cross-examination of witnesses are confined to the formal disciplinary hearing stage—the point at which an adverse decision against the employee can be made and not before.³⁰

On October 31, 2018, the Court of Appeal emphasized that employees who are the subject of internal disciplinary inquiries will not normally be entitled to have legal representation during such inquiries.³¹ The Court of Appeal found that whether an entitlement to legal representation arises depends on the circumstances of each case. Circumstances which must be considered are as follows: “the seriousness of the charge” and the proposed penalty; whether any points of law are likely to arise; “the capacity of the particular [person] to present his [or her] own case”; procedural difficulty; “the need for reasonable speed in making the adjudication”; and “the need

27. *Id.*

28. Lyons v. Longford Wesmeath Education and Training Board [2017] IEHC 272 [2018] 29 E.L.R. 35 (Ir.).

29. N.M. v. Limerick and Clare Education and Training Board [2017] IEHC 588, (Unreported, HC, McDermott J., June 27, 2017) (Ir.); E.G. v. Society of Actuaries in Ireland [2017] IEHC 392, (Unreported, HC, McDermott J., June 16, 2017) (Ir.).

30. *Limerick* [2018] IEHC ¶ 112; *Society of Actuaries in Ireland* [2017] IEHC ¶ 84.

31. Iarnród Éireann / Irish Rail v. Barry McKelvey [2018] IECA 346, ¶ 90 (Unreported, CA, Oct. 31, 2018) (Ir.).

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for fairness” between the different categories of people involved in the process.³² The Court of Appeal was not asked to determine the status of the right to cross-examine on this occasion, so there is still incongruity in judicial guidance concerning when this right crystallizes for an employee during the disciplinary process.

32. *Id.* ¶ 38.

International Procurement

ERIC P. ROBERSON, PAUL M. LALONDE, AND LARYSA WORKEWYCH*

This article reviews international law developments in the field of international procurement in 2018.

I. A Comparative Analysis of Recent Developments in EU/UK Procurement: Cost/Price Realism, E-Invoicing, and Supply Chain Development

Government contractors doing business in the European Union and the United Kingdom should take note of recent developments related to unrealistically low prices, new electronic invoicing requirements (e-invoicing), and Brexit. Notably, these developments reflect similar changes occurring in the United States, which signals a convergence in procurement policies and approaches on an international scale.

A. COST/PRICE REALISM

In *SRCL, Ltd. v. National Health Service Commissioning Board*, the High Court of Justice for England and Wales addressed the question of whether contracting authorities have an affirmative obligation to investigate “abnormally low tenders” (ALTs).¹ Companies doing business in the United States will find this concept similar to cost and price realism, which is addressed in Part 15 of the Federal Acquisition Regulation (FAR).² The Court, in *SRCL*, discussed ALTs in EU procurements, determining that, in

* The first section, “A Comparative Analysis of Recent Developments in EU/UK Procurement: Cost/Price Realism, E-Invoicing, and Supply Chain Development,” was drafted by Eric P. Roberson, an associate in the Washington, DC, office of DLA Piper LLP (US) where his practice covers a wide range of government contracting matters. The second section, “Government Procurement in North America and the Impact of the United States-Mexico-Canada Agreement,” was drafted by Paul Lalonde and Larysa Workewych. Mr. Lalonde is a partner in Dentons Canada LLP’s Toronto office, where he focuses on government contracting law, international trade, anti-corruption and international arbitration. Ms. Workewych is a Student-at-Law at Dentons Canada LLP, in Toronto. Samuel W. Jack, an Attorney Advisor for the U.S. Agency for International Development (USAID), served as the editor of the International Procurement Committee’s Year in Review for 2018. The views of the authors and editor are not attributable to their law firms or government agency. The article covers developments during 2018. For more information about the International Procurement Committee visit: <http://apps.americanbar.org/dch/committee.cfm?com=IC760000>.

1. *SRCL, Ltd. v. The Nat’l Health Serv. Commissioning Bd.* [2018] EWHC (QB) 1985 [16] (UK).

2. See Federal Acquisition Regulations System, 48 C.F.R. §§ 15.001–15.609 (2019).

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order for contract awards to be based on the “most economically advantageous bid,” contracting authorities should consider whether a submitted price is so low that there is a risk of non-performance, or a risk that the contractor is incapable of complying with certain national environmental, social, or labor laws (e.g., payment of minimum wages).³

Importantly, the Court recognized that contracting authorities generally have the discretion to reject an ALT but are only required to reject such bids when the abnormally low price occurred due to non-compliance with certain mandatory laws.⁴ The Court also noted that the bidders must be given the opportunity to explain why a bid price might appear to be abnormally low, recognizing that there could be legitimate business reasons to submit a low price, such as to allow the bidder to enter a new market, or develop an emerging line of business.⁵

Similarly, in United States-based procurements, FAR Part 15 describes the methodologies contracting officials may use when performing a price or cost realism analysis. It allows proposals to be rejected for unsupported costs or prices deemed too low.⁶ Additionally, the FAR describes the practice of “buying-in,” where a bidder may submit an abnormally low offer, even at a loss, to increase the likelihood of obtaining a contract with the lowest price.⁷ While “buying-in” is not inherently improper, and there may be legitimate business reasons for submitting a low offer, the FAR instructs contracting officials to guard against improper buying-in practices, such as when the bidder unnecessarily increases the contract price after award, or where the bidder intends to receive a follow-on contract at artificially high prices to recover losses incurred on the buy-in contract.⁸ While buying-in is distinct from cost/price realism, the two concepts may overlap in cases where a bidder submits an artificially low proposal as a buy-in attempt, and the proposal is then rejected following a realism analysis.

In sum, the *SRCL* case offers a valuable reminder for companies doing business with governmental entities in the EU and the United States: that bidders should take proactive steps to justify their proposed pricing when bidders are explicitly warned that unjustified pricing may indicate a lack of understanding or demonstrate a risk of non-performance. Bidders who fail to heed such warnings risk their proposals being rejected.

B. E-INVOICING

In another recent development, Scotland has required the central government and other public sector bodies to implement electronic

3. *SRCL, Ltd. v. The Nat'l Health Serv. Commissioning Bd.* [2018] EWHC (QB) 1985 [183] (UK).

4. *Id.*

5. *Id.* at [163].

6. *See* 48 C.F.R. § 15.404-1.

7. 48 C.F.R. § 3.501-1.

8. *See id.*

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invoicing, recognizing the efficiencies that e-invoicing can provide.⁹ In a related move, England and Northern Ireland modified the applicable rules on public contract invoicing by (1) allowing companies to submit “unstructured” e-invoices, and (2) instructing contracting authorities to amend contracts that previously prohibited e-invoicing.¹⁰ These e-invoicing practices align with current practices in the United States, notably those outlined in the United States Office of Management and Budget Memo No. M-15-19 (July 17, 2015), which directed United States federal government agencies to transition to electronic invoicing for appropriate federal procurements by the end of the 2018 fiscal year.¹¹ The United States Department of Defense has implemented similar e-invoicing requirements through the Defense Finance and Accounting Service.¹² Indeed, contracting officials in both systems may benefit from exchanges and engagement with each other to identify best practices and lessons learned and in turn improve implementation and maximize efficiency of such payment systems.

C. SUPPLY CHAIN

Separately, the Public Accounts Commission of the U.K. Parliament recently released a report on strategic suppliers, which examines ways to incorporate small and medium sized enterprises (SMEs) into supply chains.¹³ The U.K. Government also issued proposed guidance to encourage new entrants in the public procurement marketplace, and proposed amendments to existing laws, which encourage charitable enterprises to bid on public contracts.¹⁴ These efforts are focused on reinvigorating the supply base to serve two fundamental goals: (1) driving innovation to improve services; and, (2) realizing taxpayer savings through competition.

Likewise, contracting officials in the United States have undertaken initiatives to improve the public contracting system and increase the defense supply base. For example, the United States Congress spurred the creation of the Section 809 Panel to improve the defense acquisition process, by identifying ways to reduce barriers to entry into the government

9. *Introduction of Electronic Invoicing in Public Procurement*, SCOTTISH GOV'T (Nov. 16, 2018), <https://consult.gov.scot/ecommerce/public-procurement/>.

10. *Procurement Policy Note- Acceptance of unstructured electronic invoices by central government authorities*, CROWN COM. SERV. (June 22, 2015), <https://www.gov.uk/government/publications/procurement-policy-note-1115-unstructured-electronic-invoices>.

11. Memorandum from the Office of Management and Budget on Improving Government Efficiency and Saving Taxpayer Dollars Through Electronic Invoicing, Memo No. M-15-19 (July 17, 2015).

12. *See Contractor and Vendor Payment Information Booklet*, DEF. FIN. AND ACCT. SERV. (April 4, 2018), <https://www.dfas.mil/dam/jcr:ba0ad550-be42-4c7f-9ee6-438b8dd5e4a6/ContractPayInformation-011110.pdf>.

13. COMMITTEE OF PUBLIC ACCOUNTS, STRATEGIC SUPPLIERS, 2017-19, HC 1031, ¶ 45-6 (UK).

14. U.K. Cabinet Office Press Release, Government announces major changes to rebuild trust after Carillion (June 25, 2018).

procurement marketplace.¹⁵ Specifically, the Section 809 Panel is charged with many of the same types of responsibilities to improve government procurement as is the U.K. Public Accounts Committee.¹⁶ Procurement officials from both systems may benefit from closer collaboration, sharing of best practices, and monitoring of each other's successes and failures to better reform and improve each country's procurement system.

II. Government Procurement in North America and the Impact of the United States-Mexico-Canada Agreement

On November 30, 2018, the former North American Free Trade Agreement (NAFTA) parties – Canada, Mexico, and the United States – signed the text of a new trilateral agreement to replace NAFTA.¹⁷ The agreement is touted as a “modernized trade agreement for the Twenty-First Century.”¹⁸ Its name varies depending on which country is referring to it—the agreement is called the United States-Mexico-Canada Agreement (USMCA) in the United States, and the Canada-United States-Mexico Agreement (CUSMA) in Canada.

One of the points of discord during the negotiations was the text of NAFTA's chapter ten, on government procurement.¹⁹ This chapter regulated suppliers' access to domestic markets, with the aim of ensuring open, transparent and non-discriminatory treatment of suppliers and increasing competition in the market.²⁰ During those negotiations, Canada sought to create a freer market for government procurement by excluding

15. National Defense Authorization Act of 2016, Pub. L. No. 114-92, § 809, 129 Stat. 726, 889 (2015) [hereinafter “NDAA 2016”]; *see also* Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations, Vol. I-III, Section 809 Panel (Jan. 2019), <https://section809panel.org/>.

16. *Compare* COMMITTEE OF PUBLIC ACCOUNTS, *supra* note 14, ¶ 3 (“The PAC’s role is to examine the efficiency, effectiveness and economy of Government spending.”), *with* NDAA 2016, 129 Stat. at 889 (“The panel shall. . . review the acquisition regulations applicable to the Department of Defense with a view toward streamlining and improving the efficiency and effectiveness of the defense acquisition process and maintaining defense technology advantage.”).

17. *See* United States-Mexico-Canada Agreement, Nov. 30, 2018, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> [hereinafter “USMCA”].

18. Global Affairs Canada, *Joint Statement from United States Trade Representative Robert Lighthizer and Canadian Foreign Affairs Minister Chrystia Freeland*, GOV'T OF CAN. (Sept. 30, 2018), <https://www.canada.ca/en/global-affairs/news/2018/09/joint-statement-from-united-states-trade-representative-robert-lighthizer-and-canadian-foreign-affairs-minister-chrystia-freeland.html>.

19. *See* Mike Blanchfield, *U.S. procurement demand on Canada, Mexico fading from NAFTA: sources*, THE GLOBE AND MAIL (Sept. 19, 2018), <https://www.theglobeandmail.com/politics/article-us-backs-down-from-buy-american-demand-in-nafta-renegotiations/> (The contentious nature of the procurement demands can be observed through media coverage of the ongoing NAFTA negotiations).

20. *See Government Procurement*, GLOBAL AFF. CAN. (Feb. 20, 2018), <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/gp-mp/index.aspx?lang=eng>.

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local-content provisions and expanding coverage to sub-central entities, as was similarly achieved in the Canada-EU Comprehensive Economic and Trade Agreement (CETA) negotiations.²¹ The United States, by contrast, sought to strengthen domestic policies designed to encourage local purchasing, such as “Buy America,” and to exclude sub-central government entities from coverage.²² The final version of the new chapter ultimately mirrors the government procurement chapter of the now-inoperative Trans-Pacific Partnership (TPP) agreement, from which the United States withdrew shortly after the election of President Trump.²³

Most notably, the USMCA procurement chapter excludes Canada as a party. As a result, the chapter applies only between Mexico and the United States.²⁴ Consequently, while Mexico-United States procurement will be governed by the USMCA, procurement between Canada and the other two former NAFTA parties will be regulated by the revised World Trade Organization Agreement on Government Procurement (WTO GPA).²⁵ Canada-Mexico procurement, on the other hand, will be governed by the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), when it comes into force.²⁶

The USMCA government procurement chapter offers the former NAFTA parties a much-needed revival of the twenty-five-year-old chapter that preceded it and provides greater harmony with government procurement chapters in other free trade agreements, such as the WTO GPA and the CPTPP.

A. GOVERNMENT PROCUREMENT UNDER THE USMCA: MEXICO-UNITED STATES PROCUREMENT

When the text of the USMCA government procurement chapter is adopted, Mexico-United States procurement will include specific requirements designed to ensure fairness, provide greater transparency, and create predictable procurement procedures.

The USMCA procurement chapter establishes a default open tendering procedure, which must be used unless specified circumstances allowing

21. Chrystia Freeland, Foreign Affairs Minister, Address on the modernization of the North American Free Trade Agreement (NAFTA) (Aug. 14, 2017).

22. *Summary of Objectives for the NAFTA Renegotiation*, OFF. OF THE U.S. TRADE REPRESENTATIVE (Nov. 2017), <https://ustr.gov/sites/default/files/files/Press/Releases/Nov%20Objectives%20Update.pdf>.

23. *Consolidated TPP Text -Chapter 15- Government Procurement*, GOV'T OF CAN. (Nov. 29, 2016), <https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ppp-tpp/text-texte/15.aspx?lang=eng>.

24. USMCA, *supra* note 18, art. 13.2.3.

25. See WORLD TRADE ORG., REVISED AGREEMENT ON GOVERNMENT PROCUREMENT (Mar. 30, 2012), https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm.

26. The CPTPP is a revival of the TPP and includes all of the original TPP parties save for the United States.

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limited or qualified tendering procedures apply.²⁷ All parties must promptly publish procurement information,²⁸ as well as publish a notice of intended procurement that (1) contains the procuring entity's contact information, (2) identifies the nature and quantity of the goods or services being procured, (3) includes the time-frame for delivery and for tendering, and (4) indicates that the procurement is covered by the USMCA procurement chapter.²⁹ Procuring entities must also guarantee that tenders will be received, opened, and treated "under procedures that guarantee fairness and impartiality of the procurement process and the confidentiality of tenders."³⁰ To increase transparency in contract award decision-making, unsuccessful bidders can request an explanation of the reasons why their bid was not selected and the relative advantages of the successful bidder's tender.³¹ The procuring entity must provide this information upon request.³²

The USMCA government procurement chapter further requires parties to create measures and review mechanisms that promote integrity in procurement practices. Parties must ensure that "criminal, civil, or administrative measures exist that can address corruption, fraud, and other wrongful acts in its government procurement," and must put into place policies to address potential conflicts of interest.³³ Parties are further required to maintain, establish or designate an independent reviewing authority that can assess challenges and complaints in a "non-discriminatory, timely, transparent and effective" manner.³⁴

In line with the United States' objectives during the NAFTA negotiations, the USMCA does not cover sub-central government entities. Its coverage is, therefore, not as expansive as government procurement chapters in other free trade agreements. That being the case, and notwithstanding the impact of Canada's exclusion from the chapter, the USMCA chapter gives Mexico and the United States a modernized procurement chapter designed to ensure greater transparency and predictability.

B. CANADA-MEXICO PROCUREMENT POST-USMCA

Once the USMCA comes into effect, Canada-Mexico procurement will be governed by a separate free trade agreement to which both countries are parties. The CPTPP—which both Canada and Mexico have ratified, and which entered into force on December 30, 2018—affords favorable treatment under the agreement's government procurement chapter.

27. USMCA, *supra* note 18, art. 13.4.4.

28. *Id.* art. 13.5.1.

29. *Id.* art. 13.6.3.

30. *Id.* art. 13.14.1.

31. *Id.* art. 13.15.2.

32. *Id.*

33. USMCA, *supra* note 18, art. 13.17.1, 13.17.3.

34. *Id.* art. 13.18.1.

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The CPTPP is similar to the USMCA in many respects, in large part because the USMCA's inspiration was the CPTPP's predecessor, the TPP. There are minor additions in the USMCA chapter aimed at increasing transparency and accountability, such as provisions relating to collection and reporting of statistics, and a more-detailed article on integrity in procurement practices.³⁵ For the most part, however, Canada-Mexico regulation under the CPTPP will be very similar to what the parties would have experienced under the USMCA.

Under article two of the CPTPP, certain provisions will not be in force immediately.³⁶ The Annex to the CPTPP lists two articles from the procurement chapter that are excluded from immediate effect: article 15.8.5, which clarifies the ability of procuring entities to promote compliance with the labor laws of the producing country, and article 15.24.2, which relates to holding further negotiations for expanding coverage, and sub-central coverage, within three years after the date the CPTPP comes into force.³⁷ Suspending these articles from the CPTPP procurement chapter does not fundamentally impact the obligations of procuring entities under the CPTPP.

The CPTPP does include sub-central government coverage. Pursuant to Annex 15-A – Schedule of Canada,³⁸ sub-central government entities in all of Canada's provinces and territories undertook procurement commitments. Consequently, Canada-Mexico procurement under the CPTPP offers greater coverage than what both parties would have had under the USMCA, and Canada has gained from Mexico the expanded coverage it sought in the NAFTA negotiations.

C. CANADA-UNITED STATES PROCUREMENT POST-USMCA

The United States is not a party to the CPTPP. Once the USMCA takes effect, Canada-United States procurements will be governed by the WTO GPA. The WTO GPA is itself a modernized text, as it was updated in 2014 to clarify and expand on the original 1994 GPA.³⁹

Although the text of the WTO GPA and the text of the USMCA contain a number of similarities, the USMCA is more comprehensive than the WTO GPA. This is due to the former's reliance on the "ambitious,

35. USMCA, *supra* note 1, art. 13.15.5, 13.17.

36. See Comprehensive and Progressive Agreement for Trans-Pacific Partnership, art. 2, Feb. 21, 2018, <https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/toc-tdm.aspx?lang=eng>.

37. *Id.* at annex.

38. See *Consolidated TPP Text -Chapter 15A- Government Procurement*, GOV'T OF CAN. (Dec. 05, 2016), <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/15-a3.aspx?lang=eng>.

39. See WORLD TRADE ORG., AGREEMENT ON GOVERNMENT PROCUREMENT, (2019), https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm; see also WORLD TRADE ORG., REVISED AGREEMENT ON GOVERNMENT PROCUREMENT, (2019), https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm.

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comprehensive and high-standard” text of the TPP agreement (which itself was an update of the WTO GPA).⁴⁰ While the WTO GPA offers Canada and the United States an improved chapter when compared to the text of NAFTA chapter ten, the USMCA would have offered both countries greater certainty and transparency due to the USMCA’s more detailed provisions.

In line with Canada’s interests, and unlike the USMCA, the WTO GPA secures procurement opportunities with sub-central government entities. Both Canada and the United States have identified sub-central government entities subject to the agreement in their respective WTO GPA Annexes: Canada identifies government entities in all province and territories of Canada with the exception of Nunavut, while the United States identifies government entities in thirty-seven of the country’s fifty states.⁴¹ Under the WTO GPA, procuring entities in Canada and the United States will have broader coverage than previously existed under NAFTA chapter ten. This expanded coverage offers Canada a form of the sub-central government coverage it attempted to achieve in the USMCA procurement chapter.

D. CONCLUSION

Canada’s exclusion from the USMCA procurement chapter means that government procurement in the three former-NAFTA parties will no longer be regulated under one agreement. While Mexico-United States procurement will be regulated under the USMCA, regulation of Canada-Mexico and Canada-United States procurement will need to rely on alternative free trade agreements, respectively the CPTPP and the WTO GPA. The similarities between the USMCA, CPTPP and WTO GPA may have a general harmonizing effect, and bring the USMCA in line with free trade agreements around the world. The disunity of coverage for the three former NAFTA parties, however, undermines one of the primary benefits of having a trilateral free trade agreement. Although the USMCA government procurement chapter offers a much-needed update to the twenty-five-year-old text of NAFTA chapter ten, its implementation will nevertheless create a disjointed procurement landscape in North America.

40. See *Joint Statement by TPP Ministers*, OFF. OF THE U.S. TRADE REPRESENTATIVE (July 31, 2015), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/july/joint-statement-tpp-ministers>.

41. See *Agreement on Government Procurement Coverage Schedules*, WORLD TRADE ORG. (2019), https://www.wto.org/english/tratop_e/gproc_e/gp_app_agree_e.htm#revisedGPA.

International Investment and Development Committee

COURTNEY KIRKMAN-GÜCÜK*

2018 was a very significant year in Turkey for legal developments in the areas of energy and natural resources.

One of the most important developments was the new organizational structure of the Ministry of Energy and Natural Resources (MENR). MENR's sub-units underwent significant restructuring with the abolition of several units, transfers of duties, mergers, and name changes.¹ The major changes are: (i) the General Directorate of Renewable Energy was abolished and its duties were transferred to the General Directorate of Energy Affairs; (ii) "the Department and Board of Transit Petroleum Pipelines was abolished and its duties were transferred to the General Directorate of Foreign Affairs and International Projects;" and (iii) the General Directorate of Mining Affairs and the General Directorate of Petroleum Affairs merged to become the General Directorate of Mining and Petroleum Affairs.²

Another significant development was new solar power project tenders in Renewable Energy Resource Areas (RERA)³ and new wind power project tenders in RERA.⁴ MENR "announced tenders for three new solar power projects with a total of 1,000 MWe based on the renewable energy resource area ("RERA") model."⁵ The application deadline is January 31, 2019.⁶ MENR also announced tenders for four new wind power projects, each with

* Courtney Kirkman-Gücük is an associate in Çakmak Avukatlık Ortaklığı's Ankara office and a member of the Dispute Resolution Group. Her practice focuses on international commercial arbitration, particularly in the energy and construction sectors.

1. With the Statutory Decree No. 703 Amending Certain Laws and Decrees for the Purposes of Compliance with the Amendments to the Constitution, the Law No. 3154 on the Organization and Duties of the Ministry of Energy and Natural Resources was repealed. T.C. Resmî Gazete [Turkish Republic Official Gazette] No. 30474 (July 10, 2018). The organization and duties of MENR were reshaped by the Presidential Decree No. 1 published in the Official Gazette No. 30474 dated 10 July 2018. *Id.*

2. Cakmak, *Turkish Energy & Infrastructure*, <http://www.cakmak.av.tr/newsletters/Newsletter2018Fall.pdf> (last visited Jan. 26, 2019).

3. T.C. Resmî Gazete [Turkish Republic Official Gazette] No. 30556 (Oct. 5, 2018).

4. T.C. Resmî Gazete [Turkish Republic Official Gazette] No. 30588 (Nov. 7, 2018).

5. Mustafa Durakoglu et. al., *New Solar Power Project Tenders in Renewable Energy Resource Areas (YEKA GES II)*, <http://www.cakmak.av.tr/articles/Power/610081677.pdf> (last visited Apr. 8, 2019).

6. *Id.*

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a capacity of 250 MWe, based on the RERA model.⁷ The application deadline is March 7, 2019.⁸

2018 also saw amendments to the Electricity Market Licensing Regulation.⁹ The Energy Market Regulatory Authority (EMRA) introduced several amendments to the Electricity Market Licensing Regulation that relate mainly to: (i) the obligations of pre-license and license holders regarding the issuance of shares and the use of immovable property directly affected by the project; (ii) the obligations of supplier companies in the event they fall short in the amount of electrical power provided to distribution companies; (iii) the administrative structure; and (iv) additional exemptions from pre-license or license requirements for certain electricity storage, market activities, and renewable energy source based facilities.¹⁰

Additionally, the Natural Gas Organized Wholesale Market (“Market”) became operational on September 1, 2018.¹¹ The Market is a formal market for spot trading that complements the bilateral agreements in place among market participants and enables market participants to remedy their imbalances.¹² It is operated through an electronic platform called the Continuous Trading Platform (CTP).¹³ Wholesale, import and export license holders can transact in the CTP as market participants¹⁴.

Finally, in 2018, Turkey created a Nuclear Regulatory Authority (NRA).¹⁵ To comply with the Convention on Nuclear Safety, the NRA was established as an independent regulatory authority for nuclear energy related activities.¹⁶ The NRA took over the Turkish Atomic Energy Institution’s “responsibilities and power for regulating, coordinating, and supervising nuclear energy related activities.”¹⁷

7. Kemal Ertug, *Second Tender for Renewable Energy Resource Fields (YEKA) Oriented for Wind Energy To Be Held On March 7th, 2019*, MONDAQ (Dec. 17, 2018), <http://www.mondaq.com/turkey/x/765258/Renewables/Second+Tender+For+Renewable+Energy+Resource+Fields+Yeka+Oriented+For+Wind+Energy+To+Be+Held+On+March+7th+2019>.

8. *Id.*

9. T.C. Resmî Gazete [Turkish Republic Official Gazette] No. 30511 (Aug. 16, 2018).

10. Ertug, *supra* note 8.

11. T.C. Resmî Gazete Resmî Gazete [Turkish Republic Official Gazette] No. 30024 (March 2017); [Turkish Republic Official Gazette] No. 30189 (Sept. 23, 2018).

12. Cakmak, *supra* note 3.

13. *Id.*

14. *Id.*

15. *Id.*

16. T.C. Resmî Gazete [Turkish Republic Official Gazette] No. 30473 (July 9, 2018).

17. Dr. Cem Çagatay Orak & Nigar Özbek, *Nuclear Regulatory Authority*, <http://www.cakmak.av.tr/articles/Power/NuclearRegulatoryAuthority.pdf> (last visited Apr. 8, 2019).

International Private Client Committee

FREDERICK K. SCHOENBRODT, II*

2018 saw important and substantial changes in the law governing the taxation of wealth transfer in the United States. Most notably, under the Tax Cuts and Jobs Act of 2017 (TCJA),¹ the federal estate and gift tax exemption increased in 2018 to \$11,180,000 per person, indexed for inflation.² This is the amount that an individual can pass to beneficiaries other than a spouse (for whom the unlimited estate tax marital deduction will ordinarily apply) or charity (for which the estate tax charitable deduction may apply) without generating a federal estate or gift tax equal to forty percent of the amount over the exemption.³ This increase effectively doubled the prior federal exemption of \$5,490,000 in 2017.⁴ Through a feature of the federal estate tax law known as “portability” of the estate tax exemption, a married couple effectively has a combined exemption in 2018 of more than \$22,000,000.⁵ For clients interested in multi-generational wealth transfer planning, the TCJA also increased the generation-skipping transfer tax exemption, or GST exemption, to \$11,180,000.⁶ All three of these federal exemptions—estate, gift, and GST—match and are set to increase through inflation indexing over time. Note, however, that the GST exemption is not portable between spouses, so a couple that wishes to maximize the use of their GST exemptions will need to engage in planning at the first spouse’s death to ensure that both exemptions are fully utilized, or at least utilized to the maximum extent possible. The individual reforms of the TCJA, including the increases in the estate, gift, and GST exemptions, are currently set to sunset on January 1, 2026.⁷ If that occurs, those exemptions will revert to pre-TCJA levels. Very wealthy clients may consider using their increased exemptions through the funding of lifetime

* Frederick K. Schoenbrodt, II, committee co-chair, served as chapter editor and contributing author. He is a principal at Bressler, Amery & Ross in Florham Park, New Jersey and chairs the firm’s estate planning and administration practice.

1. Tax Cut and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054.

2. I.R.C. § 2010(c) (West 2018); Rev. Proc. 2018-18, 2018-10 I.R.B. 392 (2018).

3. I.R.C. § 2001 (West 2018).

4. *Compare* I.R.C. § 2010(c) (West 2017) *with* I.R.C. § 2010(c) (West 2018); Rev. Proc. 2016-55, 2016-45 I.R.B. 707 (2016).

5. I.R.C. § 2010(c) (2018). Portability allows a surviving spouse to succeed to a deceased spouse’s unused estate tax exemption, called the deceased spousal unused exclusion (DSUE) amount, so long as a so-called “portability election” is made on a timely-filed federal estate tax return for the deceased spouse’s estate. *Id.*

6. I.R.C. § 2631(c) (West 2018); I.R.C. § 2010(c) (West 2018); Rev. Proc. 2018-18, 2018-10 I.R.B. 392 (2018).

7. I.R.C. § 2010(c)(3)(C) (West 2018).

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trusts to avoid the loss of this unprecedented planning opportunity if sunset occurs.

The TCJA made other substantial changes to the tax law, including reducing both individual⁸ and corporate⁹ tax rates and limiting certain long-standing income tax deductions, including limiting the deduction for state and local taxes (the so-called “SALT deduction”) to \$10,000¹⁰ and capping new deductible mortgage interest (so-called “qualified residence interest”) on home loans of up to \$750,000.¹¹ On the other hand, the TCJA increased the standard deduction to \$12,000 for an individual and \$24,000 for a couple.¹² This higher standard deduction, coupled with the limitations on the SALT and mortgage deductions, may make the standard deduction more beneficial than itemized deductions. The resulting shift away from the use of itemized deductions may eliminate the benefit of the charitable deduction for many.¹³ For clients who wish to use their charitable deductions, bunching future contributions into one larger current year contribution to a family donor-advised fund at a public charity that will (when taken in conjunction with other itemized deductions) exceed the standard deduction will allow them to wring out a tax benefit from their charitable contributions.

Further, under the TCJA, clients may consider restructuring certain business and investment structures to take advantage of new provisions in the tax code. Notably, for qualifying small business owners who operate using certain pass-through entities like partnerships, LLCs, and S corporations, a new deduction under Section 199A of the Internal Revenue Code for up to twenty percent of the owner’s qualified business income may be available.¹⁴ Also, the corporate tax rate applicable to C corporations was “permanently” reduced to twenty-one percent, which may lead to certain businesses to evaluate possible reorganization as a C corporation.¹⁵ Finally, the tax law established the Qualified Opportunity Zone program, which provides a potential vehicle for owners to defer, or potentially eliminate, the recognition of capital gain on qualifying investments in certain distressed

8. I.R.C. § 1(j) (West 2018); Rev. Proc. 2018-18, 2018-10 I.R.B. 392 (2018). These reduced rates will apply for taxable years 2018 through 2025. I.R.C. § 1(j).

9. I.R.C. § 11(b) (West 2018).

10. I.R.C. § 164(b)(6)(B) (West).

11. I.R.C. § 163(h)(3) (2018); I.R.C. § 163(h)(3)(F) (2018). This limit is \$375,000 for a taxpayer with a “married filing separately” status, and these deduction limits will apply for taxable years 2018 through 2025. *Id.*

12. I.R.C. § 63(c) (West 2018). The increased standard deduction will apply for taxable years 2018 through 2025 and, during that time, are subject to adjustment for inflation. *Id.*

13. The deduction for charitable contributions is an itemized deduction. I.R.C. § 170(c) (West 2018).

14. I.R.C. § 199A (West 2018).

15. I.R.C. § 11(b) (West 2018).

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areas.¹⁶ This development is being widely discussed among US private client advisors.

In summary, the year brought substantial and important changes to the law applicable to the estate, tax, and financial planning of many of private clients. The dominant theme in trusts and estates over the past decade or so has been uncertainty in the rules that will govern an individual's estate at the time of his death. Given the increased exemptions and sunset provisions under the new law, it seems likely that this theme will continue into 2019 and beyond.

16. I.R.C. §§ 1400Z-1, 1400Z-2 (West 2018). If an eligible taxpayer reinvests gain on the sale of property to an unrelated party in a Qualified Opportunity Fund (QOF) within 180 days, that gain may be deferred until the earlier of the taxpayer's disposition of the QOF investment or December 31, 2026. I.R.C. § 1400Z-2(a). The election to defer gain must be made on an IRS Form 8949 and attached to the taxpayer's tax return for the year in which the gain would have been recognized. The gain on appreciation of the new investment within the QOF may be reduced, and even eliminated, depending on the length of time that the taxpayer holds its investment in the QOF. *Id.*

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Aerospace and Defense Industries

JOHNY CHAKLADER, MICHAEL BEALEY, NEAL PETRO,
DANISH HAMID*

This article addresses some of the most significant legal and policy developments relevant to the aerospace and defense industries in 2018, including U.S. tariff actions against China, a new conventional arms policy, assessments on the manufacturing and defense industrial base and supply chain of the United States, the completion of a first full-scope, Defense Department financial statement audit, and key changes to national security reviews of foreign investments and acquisitions.

I. U.S. Tariff Actions Against China

Over the past year, the United States imposed additional tariffs on over two hundred billion dollars of imports from China. The following section outlines key developments associated with the ongoing U.S.-China Trade War.

On August 18, 2017, the U.S. Trade Representative (USTR) launched an investigation under Section 301 of the Trade Act of 1974.¹ The USTR concluded that: (a) China uses joint venture requirements, foreign investment restrictions, and administrative review and licensing processes to require or pressure technology transfer from U.S. companies; (b) China deprives U.S. companies of the ability to set market-based terms in licensing and other technology-related negotiations; (c) China directs and unfairly facilitates the systematic investment in, and acquisition of, U.S. companies and assets to generate large-scale technology transfers; and (d) China conducts and supports cyber intrusions into U.S. commercial computer

* Johnny Chaklader served as committee editor of this article, leads BDO USA, LLP's Export Controls and International Trade practice, and is a Director in the firm's Industry Specialty Services—Government Contracts group, where Michael Bealey is a Senior Associate and Neal Petro is an Associate. Johnny Chaklader, Michael Bealey, and Neal Petro contributed to sections I through IV of this article. Danish Hamid is a partner at a prominent international law firm and is based in Washington, D.C. He has a comprehensive international corporate, regulatory, and investigations practice. Danish Hamid contributed section V of this article. The views expressed herein are solely those of the authors and not of their respective firms. This article is intended for informational purposes only and does not constitute legal advice.

1. Office of the President, Presidential Memorandum on the Actions by the United States Related to the Section 301 Investigation (Mar. 22, 2018).

networks to gain unauthorized access to commercially valuable business information.²

As a result of these findings, the USTR imposed an additional 25% tariff on a “first tranche”—\$34 billion worth—of imports from China that took effect on July 6, 2018. The U.S. then launched a 25% tariff hike on a “second tranche”—\$16 billion worth—of imports from China that took effect on August 23, 2018. In response, the Chinese Ministry of Commerce issued a retaliatory tariff of 25% on \$16 billion worth of U.S. imports. The U.S. responded with a 10% tariff hike on a “third tranche”—\$200 billion worth—of Chinese imports that took effect on September 24, 2018, and announced a possible increase to 25% on another \$267 billion worth of imports from China in January 2019.

USTR held public hearings and solicited public comments during each round of tariff hikes. USTR also opened dockets for companies to submit product exclusion requests for items covered under the first and second tranches. When evaluating product exclusion requests, USTR considered: (1) whether the product in question was available from non-Chinese sources; (2) whether the new Section 301 tariff would cause “severe economic harm” to the company; and (3) whether the product is strategically important or related to the “Made in China 2025” industrial policy. Thus far, USTR has granted very few requests for Harmonized Tariff Codes or products to be excluded from the additional duties.

These actions led to sharp cost increases for a wide swath of U.S. importers, manufacturers, and distributors, including those in the Aerospace and Defense industries. U.S. companies are reviewing their import strategies and exploring alternative supply lines where possible to mitigate the impact of new tariffs.

II. New Conventional Arms Policy (CAP)

During FY 2018, the United States-authorized arms-export market rose thirteen percent to \$192.3 billion.³ This growth was accompanied by a renewed focus on better aligning the United States’ approach to conventional arms transfers with its national and economic security interests.

On April 19, 2018, President Trump issued a National Security Presidential Memorandum regarding the United States’ Conventional Arms Transfer Policy.⁴ The memorandum outlines a number of policy objectives for U.S. arms transfers including: (a) bolstering the security of the United States and its allies; (b) maintaining technological advantages of the United

2. U.S. Trade Representative, USTR Finalizes Tariffs on \$200 Billion of Chinese Imports in Response to China’s Unfair Trade Practices (Sept. 2018).

3. U.S. Dep’t of State, U.S. Arms Transfers Rise 13 Percent in 2018, Highlighting Administration’s Success Strengthening Security Partners While Growing American Jobs (Nov. 8, 2018).

4. Office of the President, National Security Presidential Memorandum Regarding U.S. Conventional Arms Transfer Policy (Apr. 19, 2018).

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States military; (c) increasing trade opportunities for United States companies; (d) strengthening the manufacturing and defense industrial base and lower unit costs for the United States and our allies and partners; (e) facilitating ally and partner efforts, through United States sales and security cooperation efforts; (f) strengthening relationships and enhancing military interoperability; (g) preventing proliferation by exercising restraint in transfers; (h) continuing participation in multilateral agreements to promote shared national policies of restraint; (i) working to assist other state suppliers of conventional arms in developing export control mechanisms; and (j) continuing to meet the requirements of all applicable statutes, including the Arms Export Control Act, the Foreign Assistance Act, the International Emergency Economic Powers Act, and the annual National Defense Authorization Acts.

The memorandum establishes that arms transfer approvals must account for a number of considerations, including the: (a) national security of the United States; (b) appropriateness of the transfer; (c) degree to which the transfer contributes to ally interoperability; (d) consistency with the United States' interests in regional stability; (e) effect on the United States' technological advantage; (f) recipient's nonproliferation record; (g) transfer's contribution to counter threats to national security; (h) economic security of the United States and its innovation; (i) transfer's financial or economic effect on United States industry and effect on the defense industrial base; (j) recipient's ability to obtain comparable systems from competing foreign suppliers; (k) likelihood that a transfer may undermine international peace and security, and (l) the United States' actual knowledge at the time of authorization that the transferred arms will be used to commit human rights abuses.

In July 2018, the U.S. Secretary of State submitted an Implementation Plan required under the Conventional Arms Policy.⁵ The plan goals are to be implemented in three "Lines of Effort" (LOE). The first LOE prioritizes strategic and economic competition. This LOE tasks agencies with reorienting the U.S. to assume a proactive arms transfer approach and address challenges in increasing strategic competition. The second LOE calls upon agencies to streamline the International Traffic in Arms Regulations, revise the United States Munitions List, update the Commerce Control List, and establish objective milestones and standard timelines for Foreign Military Sales (FMS) transactions. The third LOE tasks agencies to create conducive environments by working with Congress and the business community to: (a) facilitate efficiency in defense trade; (b) improve the approach to developing FMS requirements; (c) reduce costs associated with FMS, and (d) improve efforts to promote trade.

5. U.S. Dep't of State, Conventional Arms Transfer (CAT) Policy Implementation Plan Update (Nov. 8, 2018).

III. Review of Defense Industrial Base and Supply Chain

On July 21, 2017, President Trump issued Executive Order 13806 on assessing and strengthening the manufacturing and defense industrial base and supply chain of the United States.⁶ The order highlighted several issues with the defense industrial base including the loss of American factories, key companies, and manufacturing jobs. In addition, it required an assessment of the manufacturing capacity, defense industrial base, and supply chain resiliency of the United States to be delivered within 270 days of the order's issuance.

On October 5, 2018, the Department of Defense (DOD) presented its report, "Assessing and Strengthening the Manufacturing and Defense Industrial Base and Supply Chain Resiliency of the United States" to President Trump.⁷ The report evaluated risk on current and planned operating priorities as of the late 2017 to early 2018. An Interagency Task Force led by the DOD developed sixteen working groups which included over 300 subject-matter experts across the government. Nine of the working groups focused on traditional sectors which included areas such as Aircraft, Ground Systems, and Shipbuilding while seven working groups assessed cross-cutting capabilities such as Cybersecurity for Manufacturing, Electronics, and the Workforce.⁸

The working groups identified five macro forces that cause risk across the industrial base. These macro forces include: (a) sequestration and uncertainty of U.S. government spending; (b) decline of U.S. manufacturing capability and capacity; (c) U.S. government business practices; (d) industrial policies of competitor nations; and (e) diminishing U.S. Science Technology Engineering and Math trade and skills. The working groups categorized industry risk into the following archetypes: (a) sole source; (b) single source; (c) fragile supplier; (d) fragile market; (e) capacity constrained supply market; (e) foreign dependency; (f) diminishing manufacturing sources and material shortages; (g) gap in U.S.-based human capital; (h) erosion of U.S.-based infrastructure; and (i) product security.

The DOD identified several ongoing efforts to combat these challenges as well as recommendations for investment, policy, regulation, and legislation. In particular, the DOD advocates for an industrial policy that supports national security priorities, including the need to diversify from dependence on politically unstable supply sources. The DOD's recommendations are organized into an Action Plan flowing from a comprehensive study on modernization efforts.

6. Exec. Order No. 13806 (2017).

7. U.S. Dep't of Defense, Deputy Secretary of Defense delivers Defense Industrial Base Report to President Trump (Oct. 5, 2018).

8. Interagency Task Force, Assessing and Strengthening the Manufacturing and Defense Industrial Base and Supply Chain Resiliency of the United States (Sept. 2018).

IV. Department of Defense Financial Statement Audit

On November 16, 2018, the Department of Defense announced it had completed its first full-scope, department-wide financial statement audit. The department began the audit in December 2017, which included more than 1,200 auditors and 900 site visits at over 600 locations.⁹ Five organizations from the department received a clean opinion, which indicates no discrepancies in their records. These organizations included the U.S. Army Corps of Engineers—Civil Works, Military Retirement Fund, Defense Health Agency—Contract Resource Management, Defense Contract Audit Agency, and the Defense Finance and Accounting Services Working Capital Fund. Two other organizations received a modified opinion including the Medicare-Eligible Retiree Health Care Fund and the Defense Commissary Agency. Other agencies within the department received disclaimers, which mean that issues were found with financial reporting, inventory discrepancies, and information technology systems security issues. Nonetheless, auditors noted that the Army, Navy, and Air Force properly accounted for major military equipment, and military and civilian pay. In addition, no evidence of fraud was found.¹⁰

V. Significant Changes Impact National Security Reviews of Foreign Investments and Acquisitions in the Aerospace and Defense Industries

2018 has seen major legislative and regulatory developments regarding the Committee on Foreign Investment in the United States (CFIUS), the U.S. inter-governmental agency committee responsible for screening foreign investments in or acquisitions of U.S. businesses.¹¹ On August 13, 2018, the President of the United States signed the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) into law.¹² FIRRMA amends Section 721(a) of the Defense Production Act of 1950,¹³ the law which governs CFIUS. On October 10, 2018, the Department of the Treasury issued interim regulations¹⁴ (the Interim Regulations) pursuant to FIRRMA which, among other matters, require parties to certain types of investments or

9. U.S. Dep't of Defense, DoD Completes First Full Financial Statement Audit; Findings Will Directly Benefit Readiness (Nov. 16, 2018).

10. U.S. Dep't of Defense, Agency Financial Report FY 2018 (Nov. 14, 2018).

11. 31 CFR § 800.101.

12. John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232 (2018). Congress incorporated FIRRMA into the National Defense Authorization Act for Fiscal Year 2019 (NDAA). The NDAA consists not only of FIRRMA, but also the Export Control Reform Act of 2018 and the Anti-Boycott Act of 2018.

13. Defense Production Act of 1950, 50 U.S.C. § 4565 (2018) (DPA).

14. Determination and Temporary Provisions Pertaining to a Pilot Program to Review Certain Transactions Involving Foreign Persons and Critical Technologies, 83 Fed. Reg. 51322 (interim rule Oct. 11, 2018), 31 CFR 801.

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acquisitions of U.S. critical technology/defense¹⁵ companies to file mandatory declarations with CFIUS.¹⁶ In this context, critical technologies include items subject to various U.S. export controls as well as “emerging and foundational technologies” that have yet to be defined by future export control regulations issued pursuant to the Export Control Reform Act of 2018 (ECRA).¹⁷ ECRA contemplates that various government agencies (including those part of CFIUS) will coordinate efforts between themselves, and their respective processes will be interlinked, especially with respect to regulating critical technology.¹⁸ New export control regulations are expected. In this regard, on November 19, 2018, the Bureau of Industry and Security of the Department of Commerce (BIS) issued an Advance Notice of Proposed Rulemaking (the ANPRM) titled “*Review of Controls for Certain Emerging Technologies.*” The ANPRM seeks public comment on identifying “emerging technology” for export control purposes, which in turn will impact CFIUS’s jurisdiction.¹⁹

A. OVERVIEW OF CFIUS

U.S. law authorizes CFIUS to review certain foreign investments in or acquisitions of U.S. businesses, otherwise known as “covered transactions.”²⁰ CFIUS evaluates covered transactions to determine their effect on the national security of the United States. Based on this review, CFIUS advises the President of the United States. U.S. law authorizes the President to suspend or prohibit a covered transaction if, in the President’s judgment, there is credible evidence that the foreign investor or acquirer might take action that threatens to impair U.S. national security.²¹

CFIUS has raised several concerns for both foreign investors and target companies. These concerns arose because CFIUS’s jurisdiction over foreign investments in the United States was already quite broad. With the introduction of FIRRMA, the scope of that jurisdiction has now expanded even further. CFIUS traditionally covered investments that resulted in

15. Specifically, FIRRMA defines “critical technologies” as (i) defense articles or defense services included on the U.S. Munitions List; (ii) items included on the Commerce Control List; (iii) certain nuclear facilities, equipment, parts, components, materials, software and technology prescribed by certain U.S. regulations; (iv) select agents and toxins covered by certain U.S. regulations; and (v) “emerging and foundational technologies” controlled pursuant to section 1758 of the Export Control Reform Act of 2018 (to be identified by a regular, ongoing interagency process between CFIUS and the various U.S. export control agencies). Section 1703(a)(6)(A) of FIRRMA.

16. 31 CFR § 801.401.

17. Section 1703(a)(6)(A)(vi) of FIRRMA.

18. Section 1752(10) of ECRA.

19. Review of Controls for Certain Emerging Technologies, 83 Fed. Reg. 58201 (advance notice of proposed rulemaking Nov. 19, 2018).

20. 31 CFR § 800.207.

21. 31 CFR § 800.101.

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foreign control of a U.S. business; now certain non-controlling investments are also covered by CFIUS.²²

A significant challenge for investors and companies is that the CFIUS review process can be opaque. CFIUS accounts for a variety of factors when determining the national security implications of a foreign investment. Although certain triggers can be identified by parties to an investment transaction in advance, CFIUS does not disclose all the specific data points that influence its determinations. CFIUS is counseled by U.S. national security agencies that may access non-public, classified information regarding the parties and the implications of the proposed investment which they will not share with the transaction parties.²³

B. VOLUNTARY NOTICES TO CFIUS

Applicable regulations permit parties to foreign investments and acquisitions to submit a voluntary notice to CFIUS explaining their respective backgrounds, the details of the proposed transactions, and the reasons why they feel that U.S. national security will not be impaired by the transaction.²⁴ If the notice is compelling, CFIUS can inform the parties that it does not intend to take any further action, resulting in a safe harbor which would protect the foreign investment from further CFIUS challenges in the future.²⁵ However, if CFIUS identifies a concern arising from the notice, CFIUS may launch an investigation, propose mitigation measures, and inform the parties that CFIUS will recommend that the President block the transaction unless the parties withdraw on their own accord.²⁶

CFIUS is not subject to any statute of limitations. Parties that fail to submit a voluntary notice with respect to a deal that poses material risk may be subject to CFIUS scrutiny and challenge at *any time* after the transaction closes. CFIUS may self-initiate a review and direct the parties to submit a notice to CFIUS six months, one year, five years, or at any other point after the transaction is completed. CFIUS may also question the parties as to why they did not submit a notice to CFIUS before completing their deal. If the parties are unable to provide a compelling explanation, CFIUS may view them with suspicion and apply a more aggressive scrutiny standard during its self-initiated review. Companies in the aerospace and defense industries traditionally have caused significant concern to CFIUS, especially if those companies maintain classified contracts with the U.S. government or

22. Section 1703(a)(4)(D) of FIRRMA.

23. The Director of National Intelligence serves as an *ex officio* member of CFIUS and provides independent analyses of any national security threats posed by transactions. The Foreign Investment and National Security Act of 2007, Public Law 110-49, 121 Sta. 246, which amends the DPA.

24. 31 CFR § 800.401.

25. 31 CFR § 800.601.

26. 31 CFR § 800.218, 800.503, 800.506, 800.507.

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military.²⁷ Parties to foreign investments in those industries should reveal their intentions to CFIUS in advance.

C. THE PASSAGE OF FIRRMA

CFIUS has been in place for many years. For the first time in a decade, however, Congress decided on a non-partisan basis to update and enhance CFIUS's role with the promulgation of FIRRMA. While FIRRMA does not expressly focus on investments from particular countries, Congressional commentary and debates regarding FIRRMA referenced Chinese-led investments as a motivating force behind FIRRMA.²⁸ Also, FIRRMA itself states that when reviewing national security risks, CFIUS may consider, among various factors, whether the transaction involves a country of "special concern"²⁹ that has a demonstrated or declared strategic goal of acquiring a type of critical technology or critical infrastructure³⁰ that would affect U.S. leadership in national security areas. As has been well publicized, China has a declared strategic goal of acquiring critical technology.

D. ENHANCEMENTS INTRODUCED BY FIRRMA

FIRRMA codifies certain practices that CFIUS had already been following. FIRRMA also introduces new elements that strengthen CFIUS' ability to review foreign investments and acquisitions in the United States, especially concerning transactions targeting U.S. companies involved with critical technologies. Among various enhancements, FIRRMA (i) increases CFIUS's budget;³¹ (ii) permits CFIUS to issue regulations allowing the committee to charge parties filing fees—not to exceed the lesser of 1% of the value of the transaction or \$300,000 (adjusted for inflation);³² (iii) expands the types of corporate transactions that are subject to CFIUS's jurisdiction;³³ and (iv) requires the filing of mandatory declarations with CFIUS in certain limited circumstances subject to further regulation.³⁴ FIRRMA addresses most matters on a high-level basis and contemplates that

27. CFIUS is concerned with foreign investments in U.S. critical technology companies. Critical technologies include defense articles and defense services subject to U.S. export controls. 31 CFR § 800.209(a).

28. See A. Alexis, *Congress Seen Adding Clarity to Tricky Path for Foreign Deals*, Bloomberg Government, July 2, 2018.

29. Section 1702 (c)(1) of FIRRMA.

30. FIRRMA defines "critical infrastructure" as (subject to further regulations prescribed by CFIUS) systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on national security. Traditionally, critical infrastructures have included, but have not been limited to, electrical grids, telecommunications systems, transportation systems, and water supply networks. Section 1703 (a)(5) of FIRRMA.

31. Section 1723(2) of FIRRMA.

32. Section 1723(3) of FIRRMA.

33. Section 1703(a)(4) of FIRRMA.

34. Section 1706 of FIRRMA.

CFIUS and the U.S. Department of the Treasury will issue revised regulations to address those concerns on a more granular level. The Interim Regulations referenced above implement a pilot program concerning mandatory declarations impacting investments in certain types of critical technologies. CFIUS intends to use information gathered from this pilot program to design permanent regulations.³⁵ The Treasury Department may implement additional pilot programs under FIRRMA to help guide its final regulatory regime.

E. CFIUS JURISDICTION EXPANDED

CFIUS has jurisdiction to review “covered transactions,” a term which traditionally included an investment, acquisition, merger, takeover, or joint venture that could result in the foreign “control” of a U.S. business.³⁶ “Control” is the power—whether or not exercised—to directly or indirectly determine, direct, decide, take, reach, or cause decisions regarding important matters affecting a U.S. business.³⁷ “Control” covers a majority investment as well as a *dominant* minority investment.³⁸ CFIUS regulations hold that, in certain circumstances, a foreign person does *not* control a U.S. business (and can avoid CFIUS jurisdiction) if the foreign person holds 10% or less of the voting interest in the U.S. business *and* holds that interest solely for passive investment purposes.³⁹ However, FIRRMA and the Interim Regulations have narrowed this passive investment exception for investments in certain types of critical technology companies. These recent developments suggest that there may be some cases where CFIUS can claim jurisdiction even if the investor has less than a 10% voting interest. For example, CFIUS jurisdiction may exist if a minority foreign investor gains access to material non-public information regarding critical technology.⁴⁰

FIRRMA expands CFIUS’s jurisdiction by adding the following matters to the scope of “covered transactions”: (i) certain types of real estate transactions;⁴¹ (ii) any “other investment” (discussed below) by a foreign person in any U.S. business that is involved with critical infrastructure, critical technology, or sensitive personal data; (iii) certain changes in a foreign investor’s existing rights with respect to a U.S. business if that change could result in foreign control of the U.S. business or an “other

35. 31 CFR § 801(II).

36. 31 CFR § 800.207, 800.224.

37. 31 CFR § 800.204.

38. 31 CFR § 800.204.

39. 31 CFR § 800.223, 800.302(b).

40. 31 CFR §§ 801.208, 801.302.

41. According to FIRRMA, CFIUS jurisdiction will cover the purchase, lease, or concession by or to a foreign person of certain real estate in close proximity (a distance within which the transaction could pose a national security risk) to U.S. military or other sensitive national security facilities. Sections 1703(a)(4)(B)(ii) and 1703(a)(4)(C)(ii) of FIRRMA.

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investment”; and (iv) any other transaction or agreement designed to circumvent or evade CFIUS.⁴²

Under FIRRMA, “other investments” afford a foreign person the following abilities with respect to a U.S. business involved with critical infrastructure, critical technologies, or sensitive personal data of U.S. citizens: (i) access to any material non-public technical information in the possession of the U.S. business;⁴³ (ii) membership or observer rights on the board of directors or equivalent governing body of the U.S. business; (iii) the right to nominate an individual to a position on the board of directors or equivalent governing body of the U.S. business; or (iv) any involvement, other than through voting of shares, in substantive decision making of the U.S. business regarding critical infrastructure, critical technologies, or sensitive personal data of U.S. citizens.⁴⁴

F. MANDATORY DECLARATIONS TO CFIUS

One of the most significant features of FIRRMA is that it introduces the concept of a mandatory declaration in certain circumstances. Parties that fail to file the mandatory notice with CFIUS, if applicable, may be subject to a fine up to the value of the investment.⁴⁵

A declaration is supposed to be shorter than a formal notice and is not supposed to exceed five pages. FIRRMA does not specify all the instances in which the parties must file a mandatory declaration; instead, FIRRMA *requires* CFIUS to prescribe regulations specifying the types of covered transactions for which parties must file a *mandatory* declaration with CFIUS. CFIUS has yet to issue those regulations.⁴⁶ However, CFIUS released the Interim Regulations that impose a pilot program that requires parties to submit a mandatory declaration concerning certain foreign investments in U.S. businesses that produce, design, test, manufacture, fabricate, or develop critical technologies in one of 27 industries identified by their NAICS code.⁴⁷

42. Section 1703(a)(4) of FIRRMA.

43. FIRRMA defines “material non-public technical information” to mean information that (i) provides knowledge, know-how, or understanding, not available in the public domain, of the design, location, or operation of critical infrastructure; or (ii) is not available in the public domain, and is necessary to design fabricate, develop, test, produce or manufacture critical technologies, including processes, techniques, or methods. FIRRMA also states that its definition of “material non-public technical information,” is subject to regulations prescribed by CFIUS. CFIUS has yet to issue revised regulations that will address this matter. As a result, further refinement with respect to this term is likely and it would be prudent to revisit the concept of “material non-public technical information” once CFIUS issues new regulations. Section 1703 (a)(4)(D)(ii) of FIRRMA.

44. Section 1703 (a)(4)(D) of FIRRMA.

45. Section 1706 of FIRRMA.

46. *Id.*

47. 31 CFR 801.302, Annex A to Part 801 – Industries.

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Those 27 industries include, but are *not* limited to: (i) Aircraft Manufacturing (NAICS Code: 336411); (ii) Aircraft Engine and Engine Parts Manufacturing (NAICS Code: 336412); (iii) Guided Missile and Space Vehicle Manufacturing (NAICS Code: 336414); (iv) Guided Missile and Space Vehicle Propulsion Unit and Propulsion Unit Parts Manufacturing (NAICS Code: 336415); (v) Military Armored Vehicle, Tank, and Tank Component Manufacturing (NAICS Code: 336992); (vi) Computer Storage Device Manufacturing (NAICS Code: 334112); (vii) Electronic Computer Manufacturing (NAICS Code: 334111); (viii) Optical Instrument and Lens Manufacturing (NAICS Code: 333314); (ix) Other Guided Missile and Space Vehicle Parts and Auxiliary Equipment Manufacturing (NAICS Code: 336419); (x) Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing (NAICS Code: 334220); (xi) Search, Detection, Navigation, Guidance, Aeronautical, and Nautical System and Instrument Manufacturing (NAICS Code: 334511); and (xii) Semiconductor and Related Device Manufacturing (NAICS Code: 334413).⁴⁸

The pilot program covers controlling as well as certain non-controlling investments that afford a foreign investor: (i) access to any material nonpublic technical information; (ii) membership, observer, or nomination rights on the board of directors; and (iii) any involvement in substantive decision-making regarding the critical technology (other than through voting shares).⁴⁹ Even a 2% investment in a critical technology business in one of the designated industries can trigger a CFIUS mandatory declaration if any one of the conditions listed above are satisfied.

Once CFIUS has received a mandatory declaration, CFIUS has the ability to (i) request that the parties submit a written notice; (ii) inform the parties that CFIUS is not able to complete its review and the parties may file a written notice; (iii) initiate a unilateral review; or (iv) notify the parties that it has concluded all action.⁵⁰ Even if the parties undergo the effort to file a mandatory declaration, they may still need to file a more substantial notice. In practice, certain parties may determine that their facts and circumstances merit filing a more detailed notice instead of the declaration. In addition, CFIUS's approval of a transaction disclosed in a notice will result in a safe harbor protection (occasionally subject to certain conditions) that would apply not only to the foreign investor's current investment covered by the notice, but also future investments by the same investor in the same company.⁵¹ In contrast, any safe harbor associated with CFIUS's approval or no-action determination in relation to a declaration would be limited to the four corners of the current investment discussed in the declaration. CFIUS

48. *Id.*

49. 31 CFR §§ 801.209, 801.302.

50. 31 CFR § 801.407.

51. 31 CFR § 800.601; Section 7(f) of Executive Order 11858; Process Overview; <https://www.treasury.gov/resource-center/international/foreign-investment/Pages/cfius-overview.aspx>.

would still retain jurisdiction over future investments by that foreign investor in the same company.

G. CFIUS AND EXPORT CONTROLS

A prior version of FIRRMA contemplated allowing CFIUS to claim jurisdiction in certain cases over a U.S. critical technology company's *outbound* transfers and contributions (including *via* a joint venture) of intellectual property to a foreign person, even if that transfer or contribution did not result in a foreign person gaining "control" over the U.S. business. This provision could have been a truly novel development that would have had a direct impact on a critical technology company seeking to assign or license its IP or associated support to a foreign joint venture or affiliate. However, the final version of FIRRMA did *not* expand CFIUS' jurisdiction over transfers and contributions of IP. Instead, Congress decided that it would be more appropriate for outbound contributions of IP to continue to be monitored under U.S. export control laws and *not* CFIUS. However, Congress determined that *existing* U.S. export controls were not sufficient to address these concerns. As a result, in parallel with FIRRMA, Congress also passed the Export Control Reform Act of 2018 (ECRA) to enhance export controls.

Although CFIUS will not regulate contributions of critical technology IP to foreign persons outside of covered transactions, from a practical perspective, the CFIUS process will continue to be connected closely to export control concerns. If a foreign person invests in or acquires a U.S. business that manufactures or develops products subject to export restrictions, CFIUS will consider this factor in its national security risk assessment of the transaction.⁵²

H. ECRA AND THE ANPRM

ECRA contemplates that the Executive Branch of the U.S. government will reform and enhance U.S. export controls to address and restrict the transfer and contribution of certain types of critical technologies to foreign persons. FIRRMA itself expanded the definition of critical technologies to include "emerging and foundational technologies" that will be subject to export controls issued pursuant to ECRA.⁵³ In an effort to help guide the ECRA regulatory process, BIS issued the November 19 ANPRM requesting public comment on identifying "emerging technologies" not already subject to export controls but that are essential to U.S. national security, including those that could provide the United States with qualitative military or intelligence benefits. The ANPRM lists 14 representative general categories of emerging technologies including, but not limited to, certain types of artificial intelligence, position, navigation, and timing technology, advanced

52. 31 CFR § 800.402(c)(4)(i).

53. Section 1703(a)(6)(A)(vi) of FIRRMA.

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computing technology, data analytics technology, logistics technology, robotics, hypersonics (flight control algorithms, propulsion technologies, thermal protection systems, or specialized materials for structures or sensors), and advance surveillance technologies. BIS has also indicated that it is still reviewing other emerging and cutting-edge technologies for proposed regulation.⁵⁴

BIS required that the public deliver their comments in response to the ANPRM by December 19, 2018. Those comments may include, among other matters, suggestions on the definition of emerging technology, the criteria used for determining whether technologies are critical to U.S. national security, and the impact that such items would have on U.S. technological leadership. After receiving those comments, BIS will propose new export control rules governing emerging technologies and, which in turn, will trigger the CFIUS mandatory declaration in certain circumstances. BIS also intends to issue a separate ANPRM for “foundational technology” which will follow a similar process and impact the scope of the CFIUS mandatory declaration.⁵⁵

54. Review of Controls for Certain Emerging Technologies, 83 Fed. Reg. 58201 (advance notice of proposed rulemaking Nov. 19, 2018).

55. *Id.*

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Energy and Natural Resources Across the Globe: An Update to Energy Policy in Africa, South America and Asia¹

RICARDO SILVA, AMALA NATH, CHRISTOPHER PEARSON,
MARIANA ARDIZZONE, MATHIAS DANTIN, RICARDO ALVES SILVA,
SARA FRAZÃO, WILLIAM KLAWONN

This Article updates selected international legal developments relating to energy and natural resources in 2018.

I. Africa

A. ANGOLA

In the nation's petroleum sector, Angola issued six important Presidential Decrees:

1. Presidential Decree 86/18 (which approved new rules applicable to both public tenders for the selection of Sonangol EP associates and the procurement of goods and services for petroleum operations, which inter alia increased contractual thresholds);²
2. Presidential Decree 91/18 (on abandonment of wells and decommissioning of oil and gas facilities);³
3. Presidential Legislative Decree 5/18 (on additional exploration activities within development areas of petroleum concessions);⁴
4. Presidential Legislative Decree 6/18 (on incentives and procedures for the adaptation of contractual and fiscal terms applicable to Qualified Marginal Zones);⁵

* By Ricardo Silva, Partner at Miranda Alliance's Lisbon Headquarters. Contributing authors include Amala Nath, Christopher Pearson, Mariana Ardizzone, Mathias Dantin, Ricardo Alves Silva, Sara Frazão, William Klawonn.

2. *More Flexible Rules Enacted for Hiring of Oilfield Contractors*, MIRANDA ALLIANCE (Apr. 3, 2018), <http://www.mirandalawfirm.com/en/insights-knowledge/publications/alerts/more-flexible-rules-enacted-for-hiring-of-oilfield-contractors>.

3. *Rules on Abandonment and Decommissioning Approved*, MIRANDA ALLIANCE (Apr. 30, 2018), <http://www.mirandalawfirm.com/en/insights-knowledge/publications/legal-news/angola-legal-news-april-2018>.

4. *Angola Enacts Abandonment and Decommissioning Rules*, PETROLEUM AFRICA (Apr. 16, 2018), <https://www.petroleumafrika.com/angola-enacts-abandonment-and-decommissioning-rules/>.

5. *New Statutes for the Oil and Gas Sector*, MIRANDA ALLIANCE (May 22, 2018), <https://www.mirandalawfirm.com/en/insights-knowledge/publications/alerts/new-statutes-for-the-oil-and-gas-sector>.

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5. Presidential Legislative Decree 7/18 (legal and fiscal regime applicable to natural gas);⁶ and
6. Presidential Order 112/18 (the creation of the Installation Committee for the Nacional Agency of Petroleum and Gas, which will assume the role of concessionaire currently entrusted with Sonangol EP).⁷

Moreover, in July 2018, Angola approved a new Diamond Marketing Policy.⁸ The policy sets forth numerous objectives: the possibility for mining companies to sell up to 60 percent of their production to subsidiaries or companies of their choosing; the replacement of the old “Preferential Customers” system with a “Long-Term Contracts Customers” system (subject to parameters to be approved by the Ministry of Mineral Resources and Petroleum); and the progressive implementation of uniform criteria for classification and valuation of rough diamonds aimed at simplifying and promoting transparency in pricing.⁹

B. BURKINA FASO

Throughout 2018, Burkina Faso confirmed that it was committed to pursuing an energy transition by joining the International Solar Alliance (ISA)¹⁰ and announcing its participation in several ISA initiatives in collaboration with Benin, Gabon, Niger, and Togo.¹¹ Together, these nations look to mobilize and facilitate investment¹² and create a digital

6. *Id.*

7. *Organizational Restructuring of the Petroleum Sector*, MIRANDA ALLIANCE (Aug. 28, 2018), <http://www.mirandalawfirm.com/en/insights-knowledge/publications/legal-news/angola-legal-news-july-and-august2018>.

8. *New Diamond Marketing Policy Approved*, MIRANDA ALLIANCE (Aug. 28, 2018), <http://www.mirandalawfirm.com/en/insights-knowledge/publications/legal-news/angola-legal-news-july-and-august2018>.

9. *Id.*

10. International Solar Alliance (ISA) is an alliance of more than 121 countries initiated by India, whose primary objective is to work for the efficient exploitation of solar energy to reduce dependence on fossil fuels. See *About ISA*, INT’L SOLAR ALL., <http://isolaralliance.org/AboutISA.aspx> (last visited Mar. 27, 2019).

11. Press Release, Presidency of Burkina Faso, Africa: Burkina Faso Joins the International Solar Alliance (ISA) and Confirms its Commitment to Pursue Energy Transition (Mar. 13, 2018) (published by AllAfrica), <https://allafrica.com/stories/201803130712.html>; see also *ISA Prospective Member Countries*, INT’L SOLAR ALL., <http://isolaralliance.org/MemberCont.aspx> (last visited Mar. 27, 2019).

12. *Energie solaire: à Lomé, six pays africains se mobilisent pour plus d’investissements*, TRIBUNE AFRIQUE (Sept. 14, 2018), <https://afrique.latribune.fr/afrique-de-l-ouest/togo/2018-09-14/energie-solaire-a-lome-six-pays-africains-se-mobilisent-pour-plus-d-investissements-790408.html>.

platform for members of ISA to purchase solar energy and other forms of renewable energy through group purchases.¹³

In July 2018, the African Development Bank issued a report outlining the main objectives of their reform support program for Burkina Faso's energy sector.¹⁴ The program includes a loan of fifteen million euros and aims at improving the country's legal and regulatory environment, as well as the framework for public and private investment in the energy sector.¹⁵ In particular, one of the program's main objectives is to improve the regulatory and institutional framework for public-private partnerships.¹⁶

1. *Electricity*

In July 2018, the Burkina Faso government issued a decree¹⁷ that gave concrete form to the end of the monopoly of the national company, Sonabel, in terms of electricity production.¹⁸ This decree is in line with law no. 014-2017 regulating the energy sector, which had already opened the electricity production market to private companies.¹⁹

In August 2018, the government launched a call for tenders for the electrification of twelve localities as part of a project financed as a whole by the Islamic Development Bank to extend both its transportation and distribution networks.²⁰

13. Nicolas Stiel, *L'Afrique met en place un marché commun de l'énergie*, CHALLENGES (Sept. 27, 2018), https://www.challenges.fr/economie/l-afrique-met-en-place-un-marche-commun-de-l-energie_615681.

14. AFR. DEV. FUND, BURKINA FASO: ENERGY SECTOR REFORM SUPPORT PROGRAM (PARSE): PROGRAMME APPRAISAL REPORT (2018), https://www.afdb.org/fileadmin/uploads/afdb/Documents/Boards-Documents/BURKINA_FASO_-_Energy_Sector_Reform_Support_Program_EN.pdf.

15. *Id.* at iii – v.

16. *Id.* at v.

17. *Compte rendu du Conseil des ministres du mardi 24 juillet 2018*, SERVICE D'INFORMATION DU GOUVERNEMENT (July 24, 2018), <http://www.sig.bf/2018/07/compte-rendu-du-conseil-des-ministres-du-mardi-24-juillet-2018/> (Burk. Faso).

18. *Burkina Faso – Electricité: la Sonabel perd le monopole*, NETAFRIQUE.NET (July 24, 2018), <http://netafrique.net/burkina-faso-electricite-la-sonabel-perd-le-monopole/>.

19. *See* Loi 014-2017 du 20 avril 2017 portant réglementation générale du secteur de l'énergie [Law 014-2017 of April 20, 2017 Determining General Rules of the Energy Sector] art. 6 (Burundi), https://lavoixdujuristebf.files.wordpress.com/2018/02/loi_014-2017_portant_regle_mentation_gle_du_secteur_de_l_electricite.pdf (providing that private companies are actors of the energy sector along with Sonabel).

20. Gwladys Johnson Akinochi, *Burkina Faso: le gouvernement lance un appel d'offres pour l'électrification de 12 localités*, AGENCE ECOFIN (Aug. 22, 2018), <https://www.agenceecofin.com/investissement/2208-59306-burkina-faso-le-gouvernement-lance-un-appel-d-offres-pour-l-electrification-de-12-localites>.

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2. *Hydrocarbons*

According to a statement by the Minister of Mines in April 2018, traces of oil and uranium were discovered north of Nouna and Essakane.²¹ This discovery could be Burkina Faso's first attempt at exploiting oil and uranium.²²

C. BURUNDI

1. *Renewable Energy*

This year Burundi signed or ratified several agreements aiming to favor renewable energy, including ratifying the 2015 Paris Agreement on Climate Change,²³ signing the framework agreement for Adherence of the Republic of Burundi to the ISA,²⁴ and ratifying the agreement with the International Bank for Reconstruction and Development for the financing of the Jiji and Mulembwe Hydroelectric Project.²⁵ The Jiji and Mulembwe Hydroelectric Project is of major importance, as it aims to double Burundi's electricity production.²⁶ Additionally, a comprehensive Ministry of Hydraulics, Energy and Mines was created comprising several competences.²⁷

On August 22, 2018, President Nkurunziza launched the very first National Development Plan for the period 2018 – 2027.²⁸ This plan

21. Ibrahima Bayo Jr., *Le Burkina Faso, bientôt producteur de pétrole et d'uranium?*, TRIBUNE AFRIQUE (April, 13 2018), <https://afrique.latribune.fr/entreprises/industrie/energie-environnement/2018-04-13/le-burkina-faso-bientot-producteur-de-petrole-et-d-uranium-775173.html>.

22. *Id.*

23. *Burundi Ratifies Paris Agreement as 174th Party*, ENVIRONNEWS NIGERIA (Mar. 20, 2018), <https://www.environmentnewsnigeria.com/burundi-ratifies-paris-agreement-174th-party/>.

24. Press Release, Presidency of the Republic of Burundi, Communiqué de presse de la réunion du Conseil des Ministres du 19 septembre 2018 [Press Release of the Ministers' Council Meeting on September 19, 2018] (Sept. 20, 2018), <http://www.presidence.gov.bi/2018/09/20/communiquede-presse-de-la-reunion-du-conseil-des-ministres-du-mercredi-19-septembre-2018>.

25. Press Release, Presidency of the Republic of Burundi, Communiqué de presse de la réunion du Conseil des Ministres du 27 mars 2018 [Press Release of the Ministers' Council Meeting on March 27, 2018] (Mar. 28, 2018), <http://www.presidence.gov.bi/wp-content/uploads/2018/03/cqu%C3%A9-du-conseil-du-27-mars-2018-1.pdf>.

26. Michael Harris, *AfDB Commits to Burundi's Jiji, Mulembwe Hydropower Projects*, HYDRO REVIEW (June 24, 2014), <https://www.hydroworld.com/articles/2014/06/afdb-commits-to-burundi-s-jiji-mulembwe-hydropower-projects.html>.

27. Décret 100/095 du 08 août 2018 portant missions et organisation du Ministère de l'hydraulique, de l'énergie et des mines [Decree 100/095 of August 8, 2018 on the Missions and Organization of the Ministry of Hydraulics, Energy and Mines] (Burundi), <https://www.presidence.gov.bi/2018/08/09/decret-n100095-du-08-aout-2018-portant-missions-et-organisation-du-ministere-de-lhydraulique-de-lenergie-et-des-mines/>.

28. PRESIDENCY OF THE REPUBLIC OF BURUNDI, PLAN NATIONAL DE DÉVELOPPEMENT DU BURUNDI (June 2018), <http://www.presidence.gov.bi/wp-content/uploads/2018/08/PND-Burundi-2018-2027-Version-Finale.pdf>.

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comprises five strategic goals in the energy sector and is aimed at enhancing renewable energy by producing 300 megawatts of hydropower electricity.²⁹

2. *Oil & Gas*

The Ministry of Hydraulics, Energy and Mines organized a validation workshop in September 2018 to draft petroleum legislation in partnership with the United Nations Development Program.³⁰ This project includes a Hydrocarbons Code Project, a Hydrocarbons Regulation Project, and a new Production Sharing Agreement Model.³¹

3. *Mining*

The Gakara Project, the first rare earths African mine and one of the highest grade rare earth projects globally, started its first production and export of rare earth concentrate in December 2017.³²

D. EQUATORIAL GUINEA

Through Order 1/2018, the Ministry of Mines and Hydrocarbons updated the rules for registration of companies that wish to carry out activities in the oil, gas, and mining sectors.³³ The new statute also sets forth the procedure for granting licenses for the commercialization of liquefied petroleum gas and liquid fuels for domestic use.³⁴ Subcontractors performing short-term work in the country now have access to a special authorization regime that can grant work for up to three projects.³⁵

E. MALI

1. *Renewables*

Together with Benin, Gabon, Burkina Faso, Niger, and Togo, Mali announced its participation in several initiatives launched by and with the ISA.³⁶ These initiatives will focus on mobilizing and facilitating investment³⁷

29. *Id.* at 20.

30. Ezechiel Misigaro, *Atelier de validation du projet de législation pétrolière du Burundi*, PUBLICATION DE PRESSE BURUNDAISE, <https://www.ppbd.com/index.php/ubum/imibano/9-actualite/10991-ministere-en-charge-de-l-hydraulique-atelier-de-validation-du-projet-de-legislation-petroliere-du-burundi>.

31. *Id.*

32. See Press Release, Rainbow Rare Earths, Rainbow Rare Earths Ltd. ('Rainbow' or 'the Company') (LSE: RBW) Audited Results for the Year Ended 30 June 2018 (Sept. 19, 2018), <http://rainbowrareearths.com/wp-content/uploads/2018/09/Final-Results-For-Year-Ended-30-June-2018-19.09.18-FINAL.pdf>.

33. *New Company Registration Rules for Petroleum and Mining Sectors*, MIRANDA ALLIANCE, http://www.mirandalawfirm.com/download/1125/49fd9c464fadbb2059ad20114b83dc20/In_eq_uatorial_guinea_may_2018_en.pdf (last visited Mar. 27, 2019).

34. *Id.*

35. *Id.*

36. See *supra* text accompanying note 9.

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and creating a digital platform for members of ISA to purchase solar energy and other forms of renewable energy production through group purchases.³⁸

2. *Electricity*

In early 2018, the Republic of Guinea and Mali launched an electricity interconnection project.³⁹ According to government officials of both Guinea and Mali, this project will provide electricity to over 200 localities in both Mali and Guinea.⁴⁰ In March, the Malian government issued a decree to set up, organize, and operate procedures for the steering committee and the management unit of the interconnection project between the two countries.⁴¹ The government also issued a decree in 2018 authorizing the financing of the project by the African Development Fund and the European Investment Fund.⁴²

In February, the national energy management company, Société de gestion de l'énergie de Manantali, launched a call for tenders for the construction of an interconnection between Mali and Senegal.⁴³ The project will be financed largely by funding obtained by Mali from the International Development Association (IDA).⁴⁴

37. *Energie solaire*, *supra* note 12.

38. Nicolas Stiel, *L'Afrique met en place un marché commun de l'énergie*, CHALLENGES (Sept. 27, 2018), https://www.challenges.fr/economie/l-afrique-met-en-place-un-marche-commun-de-l-energie_615681.

39. Emmanuel Atcha, *Energie: la Guinée et le Mali lancent un projet d'interconnexion électrique*, TRIBUNE AFRIQUE (Feb. 26, 2018), <https://afrique.latribune.fr/economie/strategies/2018-02-26/energie-la-guinee-et-le-mali-lancent-un-projet-d-interconnexion-electrique-769779.html>.

40. *Id.*

41. Décret 2018-0244/PM-RM du 8 mars 2018 portant création, organisation et modalités de fonctionnement du comité de pilotage et de l'unité de gestion du projet d'interconnexion électrique 225 Kv Guinée-Mali [Decree 2018-0244/PM-RM of March 8, 2018 on the Creation, Organization and Operation of the Steering Committee and the Management Unit of the 225 Kv Guinea-Mali Interconnector Project], JOURNAL OFFICIEL DE LA RÉPUBLIQUE DU MALI [J.O.] [OFFICIAL GAZETTE OF MALI], Mar. 23, 2018, p. 497.

42. Décret 2018-0245/P-RM du 12 mars 2018 portant ratification de l'accord de prêt, signé à Abidjan (côte d'Ivoire), le 11 janvier 2018, entre le Gouvernement de la République du Mali et le Fonds Africain de Développement, relatif au financement du projet d'interconnexion électrique en 225 Kv Guinée-Mali [Decree No. 2018-0245/P-RM of March 12, 2018 Ratifying the Loan Agreement Signed in Abidjan (Côte d'Ivoire) on January 11, 2018 between the Government of the Republic of Mali and the African Fund of Development Relating to the Financing of the 225 Kv Guinea-Mali Electricity Interconnection Project], J.O., Mar. 23, 2018, p. 499 (Mali).

43. Gwladys Johnson Akinocho, *Le Mali à la recherche d'entreprises pour la construction de la ligne électrique le reliant au Sénégal*, AGENCE ECOFIN (Feb. 26, 2018), <https://www.agenceecofin.com/gestion-publique/2602-54716-le-mali-a-la-recherche-d-entreprises-pour-la-construction-de-la-ligne-electrique-le-reliant-au-senegal>.

44. *Id.* The IDA is a member of the World Bank whose purpose is to offer loans and grants to the world's poorest developing countries. See *What is IDA?*, INT'L DEV. ASS'N, <http://ida.worldbank.org/about/what-is-ida> (last visited April 1, 2019).

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3. *Mines*

In March, while in the midst of negotiations with mining companies regarding the revision of the Mining Code, the government announced that it was willing to unilaterally revise the law if no compromise is reached.⁴⁵

F. MOROCCO

1. *Gas*

In late 2017, the Ministry of Energy presented a draft law relating to downstream natural gas regulations, which aims at developing renewable energy and fuel diversification by increasing the share of natural gas in the energy mix and improving energy efficiency.⁴⁶ This draft law is aimed at setting appropriate pricing and organization structures for the natural gas sector to increase investments and regulate various security and environmental aspects of the sector.⁴⁷

In July 2018, Nigeria and Morocco signed a Memorandum of Understanding for the establishment of the Nigeria-Morocco Gas Pipeline.⁴⁸ In addition to Nigeria and Morocco, this pipeline will provide West African states with the potential for pipelines to extend into Europe.⁴⁹ The first negotiations and the preparation of preliminary documents with international banks are expected to begin in early 2019.⁵⁰

2. *Infrastructure*

In July 2018, the Ministry of Finance presented a draft law amending existing legislation on Public-Private Partnership as part of a wider project to improve the regulatory framework for infrastructure projects.⁵¹ The new law aims to enlarge the definition of Collectivité Territoriales, to broaden

45. *Le Mali dit négocié la révision du code minier mais pourrait agir unilatéralement*, INTELLIVOIRE (Mar. 20, 2018), <https://intellivoire.net/le-mali-dit-negocier-la-revision-du-code-minier-mais-pourrait-agir-unilateralement/>.

46. Draft Law and Introductory Note, Ministry of Energy, Mines and Sustainable Development, Law No. 94-17 Relating to the Downstream Natural Gas Sector (Dec. 13, 2017) (Morocco), <http://www.sgg.gov.ma/portals/0/AvantProjet/157/Projet%20de%20loi%2094.17-fr.pdf>.

47. *Id.*

48. *Le projet du Gazoduc Nigéria-Maroc aura un impact significatif sur les populations de l'Afrique de l'Ouest, du Maroc et de la Mauritanie*, AGENCE MAROCAINE DE PRESSE (June 10, 2018), <http://www.mapexpress.ma/actualite/economie-et-finance/le-projet-du-gazoduc-nigeria-maroc-aura-un-impact-significatif-sur-les-populations-de-lafrique-de-louest-du-maroc-et-de-la-mauritanie/>.

49. *Id.*

50. *Nigeria, Morocco Sign Pipeline MoU*, OIL & GAS YEAR (June 11, 2018), <https://www.theoilandgasyear.com/news/nigeria-morocco-sign-pipeline-mou/>.

51. Draft Law and Introductory Note, Ministry of Economics and Finance, Law No. 46-18, Amending and Supplementing Law No. 86-12 on Public-Private Partnership Contracts (July 27, 2018) (Morocco), http://www.sgg.gov.ma/portals/0/AvantProjet/175/Projet_loi_46.18_Fr.pdf.

the scope of the State's liability, to establish a National Commission for Public-Private Partnerships, to simplify the spontaneous tender process, and to harmonize general legal provisions with sectorial provisions.⁵²

3. *Mining*

In January 2018, the Ministry of Equipment and Transportation published a draft decree within the framework of modernization of mining processes, aiming mainly at establishing automatized mining procedures, which will allow administrations to follow mining exploitation processes remotely.⁵³

In July 2018, the Ministry of Energy presented a decree amending the mining code.⁵⁴ The amendment plans to introduce a special regulatory framework regarding the grant of licenses to define and exploit spoil heaps and waste rock removed in mining processes.⁵⁵

G. MOZAMBIQUE

In June 2018, the Ministry of Energy and Mineral Resources approved, inter alia, a mechanism for the implementation of a fuel-tagging program.⁵⁶ These procedures impose specific obligations on companies operating petroleum facilities at distribution terminals.⁵⁷

H. SENEGAL

1. *Oil and Gas*

After his victory at the parliamentary elections in July 2017, President Macky Sall conducted a cabinet reorganization that unveiled a new Ministry of Petroleum and Energies, replacing the Ministry of Energy and Renewable Energies Development.⁵⁸ This new Ministry is not only aimed at promoting the exploration and exploitation of hydrocarbons, but to also foster

52. *Id.*

53. Draft Decree, Ministry of Equipment, Transport, Logistics and Water, Decree on the Modernization of Mining Procedures (Jan. 31, 2018) (Morocco), http://www.sgg.gov.ma/portals/0/AvantProjet/161/Avp_arrete_carriere_Fr.pdf.

54. Draft Decree and Introductory Note, Ministry of Energy, Mines and Sustainable Development, Decree No. 2-18-548 on the Application of Law No. 33-13 Relating to Mines and the Procedure for Granting Authorizations for the Exploitation of Waste Dumps and Spoil Heaps (July 18, 2018) (Morocco), http://www.sgg.gov.ma/portals/0/AvantProjet/174/Avp_dec_2.18.548_Fr.pdf.

55. *Id.*

56. *Fuel Adulteration with New Control Mechanism*, MIRANDA ALLIANCE (Aug. 31, 2018), <http://www.mirandalawfirm.com/en/insights-knowledge/publications/legal-news/mozambique-legal-news-may-through-july-2018>.

57. *Id.*

58. Presidential Decree No. 2017-1574 of September 13, 2017 Relating to the Attributions of the Minister of Petroleum and Energies, GOUVERNEMENT DE LA RÉPUBLIQUE DU SÉNÉGAL, <https://www.sec.gouv.sn/d%C3%A9cret-n%C2%B02017-1574-du-13-septembre-2017-relatif-aux-attributions-du-ministre-du-p%C3%A9trole-et-des> (last visited April 3, 2019).

renewable energy, energy efficiency, and the electrification of rural areas and local content.⁵⁹

With the prospect of the adoption of a new Petroleum Code, the government requested that Gilles Lhuilier, Professor of Law at the École Normale Supérieure, review twelve Upstream Government Petroleum Contracts. Professor Lhuilier's report found that the petroleum contracts were unbalanced and fell below international best practices.⁶⁰ The report called for a renegotiation of the contracts.⁶¹

In July 2018, the Secretary-General of the International Centre for Settlement of Investment Disputes registered a request for the initiation of the first arbitration proceeding in the oil and gas sector against Senegal.⁶² In this proceeding, the Africa Petroleum Corporation seeks compensation for the cancellation by Senegal of two oil and gas licenses.⁶³

2. *Mining*

In May 2018, Senegal was declared the first country in Africa to have made satisfactory progress in implementing the Extractive Industries Transparency Initiative (EITI) Standard.⁶⁴ The EITI Standard requires the gathering of information along the extractive industry value chain from the point of extraction to how revenue makes its way through the government to how this revenue contributes to the state's economy.⁶⁵

3. *Power*

Senegal is the second African state to benefit from the World Bank Group's Scaling Solar program (Zambia being the first).⁶⁶ The program is designed to help remove obstacles to developing large-scale solar power in

59. *Id.*

60. GILLES LHUILIER, REVUE CRITIQUE DES CONTRATS PÉTROLIERS ET GAZIERS SÉNÉGALAIS 10–11 (AGIS 2018).

61. *Id.*

62. African Petroleum Sen. Ltd. v. Republic of Sen., ICSID Case No. ARB/18/24, Request for Institution of Proceeding (July 11, 2018), <https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/18/24>.

63. *African Petroleum Corporation Involved in Arbitration Against 2 African States*, I-ARB AFRICA (June 2, 2017), <https://www.iarbafrica.com/en/news-list/17-news/577-african-petroleum-corporation-involved-in-arbitration-against-2-african-states>.

64. EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, BOARD DECISION ON THE VALIDATION OF SENEGAL (May 8, 2018), https://eiti.org/sites/default/files/documents/validation-board-decision-validation_of_senegal.pdf.

65. *Who We Are*, EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, <https://eiti.org/who-we-are> (last visited Mar. 21, 2019).

66. *See generally Scaling Solar Delivers Low-Cost Clean Energy for Zambia*, INT'L FIN. CORP. (June 14, 2016), https://www.ifc.org/wps/wcm/connect/news_ext_content/ifc_external_corporate_site/news+and+events/news/scaling+solar+delivers+low+cost+clean+energy+for+zambia.

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developing countries producing electricity for under five cents (U.S. dollars) per kilowatt hour.⁶⁷

I. SOUTH AFRICA

1. *Oil and Gas*

Pending the completion of the ongoing reform of the upstream oil and gas sector, the Minister of Mineral Resources issued a general moratorium on the granting of applications for technical co-operation permits, exploration rights and production rights.⁶⁸

Moreover, in *Stern N.O. and Others v. Minister of Mineral Resources*, the High Court of South Africa held that the 2015 Regulations of Petroleum and Production are invalid, which helps to further explain the large-scale prohibition on hydraulic fracturing in South Africa.⁶⁹

2. *Mining*

In September 2018, the Mining Charter III was published in the Government Gazette.⁷⁰ This important text aims to transform the mining industry, and “deracialise ownership patterns in the mining industry through redress of past imbalances and injustices.”⁷¹ To that end, this instrument requires the mining industry to favor “Black Economic Empowerment” with regard to ownership, mine community development, employment equity, procurement, beneficiation, housing and living conditions, and human resources.⁷²

J. TUNISIA

1. *Hydrocarbons, Mining & Power*

An important governmental decree regarding the rationalization of administrative authorizations for business activities was enacted in May 2018.⁷³ This decree addresses the hydrocarbon, mining, and power sectors,

67. *Senegal: Scaling Solar Programme Sets New Tender Benchmark*, ESI-AFRICA (Apr. 11, 2018), <https://www.esi-africa.com/industry-sectors/business-and-markets/senegal-scaling-solar-tender-scraps-last-record/>.

68. Restriction in Terms of Section 49(1) of the Mineral and Petroleum Resources Development Act, GN 657 of GG 41743 (28 June 2018) (S. Afr.); see also Jacinta Windham, *South Africa Imposes Licensing Restrictions*, PETROLEUM ECONOMIST (Oct. 1, 2018), <https://www.petroleum-economist.com/articles/politics-economics/africa/2018/south-africa-imposes-licensing-restrictions>.

69. *Stern v. Minister of Mineral Res.* [2017] ZAECGHC 109 [43] (S. Afr.).

70. Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry 2018, GN 1002 of GG 41934 (27 Sept. 2018) (S. Afr.).

71. *Id.* at 12.

72. *Id.* at 4.

73. Décret 2018-417 du 11 mai 2018, fixant la publication de la liste limitative des activités économiques soumises à autorisation et de la liste des autorisations administratives pour la réalisation de projets et fixation des dispositions y relatives et de simplification [Decree 2018-

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and sets a common sixty-day-long period for the administration to process authorization applications with an obligation to justify its silence if it does not respond in time.⁷⁴

2. *Renewable Energy*

Through a Presidential decree dated August 31, 2018, Tunisian Head of State Youssef Chahed dismissed the Ministry of Energy, Mines and Renewable Energies.⁷⁵ Following this decision, this Ministry will now be attached to the Ministry of Industry and Trade.⁷⁶

On February 28, 2018, the Tunisian Ministerial Council launched the Tunisian Solar Plan (TSP),⁷⁷ which aims to increase renewable electricity production to thirty percent of total Tunisian electricity production by 2030, with an intermediate target of twelve percent in 2020.⁷⁸

3. *Power*

In January 2018, a governmental decree fixed penalties for electricity theft,⁷⁹ while former Minister of Energy Khaled Kaddour announced a future bill criminalizing electricity theft.⁸⁰

417 of May 11, 2018 Setting the Publication of the Restricted List of Economic Activities Subjected to Authorisation and the List of Administrative Authorisations for the Realisation of Projects and Implementation of Relative Dispositions and Simplification], JOURNAL OFFICIEL DE LA RÉPUBLIQUE DE TUNISIENNE [J.O.] [OFFICIAL GAZETTE OF TUNISIA], May 11, 2018, No. 38.

74. *Id.*

75. Direction Générale Trésor, *Brèves économiques de Tunisie et de Libye – Semaines du 17 août au 30 août 2018*, MINISTÈRE DE L'ÉCONOMIE ET DES FINANCES (August 31, 2018), <https://www.tresor.economie.gouv.fr/Articles/2018/08/31/breves-economiques-de-tunisie-et-de-libye-semaines-du-17-aout-au-30-aout-2018>.

76. Tarek Amara, *Tunisian Energy Minister, Officials Sacked Over Graft Accusations – Government*, REUTERS, Aug. 31, 2018, <https://www.reuters.com/article/us-tunisia-corruption/tunisian-energy-minister-officials-sacked-over-graft-accusations-government-idUSKCN1LG0YI>.

77. MINISTRY OF ENERGY, MINES AND RENEWABLE ENERGIES, PLAN SOLAIRE TUNISIENNE (2018) (Tunis.), <http://www.tn.undp.org/content/dam/tunisia/docs/Publications/Plan%20Solaire.pdf>.

78. *Id.* at 10.

79. Décret 2018-59 du 16 janvier 2018 fixant le barème du montant de l'amende administrative prévu par l'article 45 (nouveau) de la loi no. 2017-20 du 12 avril 2017 modifiant [Decree 2018-59 of January 16, 2018 Setting the Scaled Amount of the Administrative Fines as Provided for in Article 45 (New) of the Law No. 2017-20 Dated April 12, 2017], J.O., Jan. 19, 2017, No. 6, p. 216 (Tunis).

80. Direction Générale Trésor, *Brèves économiques de Tunisie et de Libye – Semaine du 22 au 28 juin 2018*, MINISTÈRE DE L'ÉCONOMIE ET DES FINANCES (June 29, 2018), <https://www.tresor.economie.gouv.fr/Articles/2018/06/29/breves-economiques-de-tunisie-et-de-libye-semaine-du-22-au-28-juin-2018> (Fr.).

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In April 2018, the Société Tunisienne de l'Electricité et du Gaz was restructured by a governmental decree.⁸¹

II. South America

A. ARGENTINA

1. *Natural Gas Exports Resume Under New Exports Authorization Framework*

After increasing its natural gas production and overcoming its natural gas deficit through a number of policies,⁸² exports of natural gas to neighboring Chile resumed in 2018.⁸³

Resolution 104/2018 of the Argentine Ministry of Energy⁸⁴ enacted a comprehensive new set of Natural Gas Export Authorization Proceedings and repealed numerous provisions, including the standard natural gas export authorization proceedings;⁸⁵ special automatic natural gas export authorization proceedings;⁸⁶ the suspension of natural gas exports;⁸⁷ and a temporary export authorization system, which was implemented in 2017 to allow assistance exports for emergency situations and exports in the context of transportation capacity restrictions for terms no longer than two years.⁸⁸

The new Natural Gas Export Authorization Proceedings allow for the granting of:

- Long term firm export authorizations, which may be granted for up to ten years but subject to review and validation at year five;
- Short term firm export authorizations for up to one year;
- Long term interruptible export authorizations, which may be granted for up to ten years;
- Interruptible short term export authorizations for up to one year;
- Firm summer export authorization to take effect between October 1 and April 30 for up to five years; and
- Operational exchanges and emergency exports for up to twelve months and subject to re-import of the exported volumes.⁸⁹

81. Décret 2018-336 du 10 avril 2018 fixant l'organigramme de la société tunisienne de l'électricité et du gaz [Decree 2018-336 of April 10, 2018 Setting the Organizational Chart of the Tunisian Company of Electricity and Gas], J.O., Apr. 10, 2018, No. 30, p. 1138 (Tunis.).

82. See, e.g., Resolución No. 46-E/2017, Mar. 3, 2017, [33577] B.O. 2 (Arg.); *Aumentó la producción de gas y petróleo*, EL CRONISTA (June 6, 2018), <https://www.cronista.com/economia politica/Aumento-la-produccion-de-gas-y-petroleo-20180606-0042.html>.

83. Press Release, Ministry of Energy, The Export of Gas to Chile After 11 Years Resumes (Aug. 22, 2018) (Arg.), <https://www.argentina.gob.ar/noticias/se-reanuda-la-exportacion-de-gas-chile-luego-de-11-anos>.

84. See Resolución No. 104/2018, Aug. 22, 2018, [33937] B.O. 18 (Arg.).

85. *Id.* at 18-19.

86. *Id.*

87. *Id.* at 20.

88. *Id.* at 19.

89. Resolución No. 104/2018, Aug. 22, 2018, [33937] B.O. Annex 1, ¶ 2 (Arg.).

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But every type of export authorization will be granted to the extent that the domestic supply is not affected and will be conditioned to assuring such security.⁹⁰ In assessing natural gas export applications, the National Secretary of Energy shall conduct a comprehensive and systemic analysis of the operating conditions of the domestic market to assure its efficient and secure supply.⁹¹

The proceedings for firm export authorizations require the submission of an application with a summary of the terms of the intended exports, the exporter reserves, production and delivery capabilities, the regulations governing the import at its destination, the transportation arrangements for the natural gas to be exported, and an assessment by the exporter that the projected export shall not jeopardize the domestic market nor its supply security.⁹²

The application package shall be published,⁹³ and eligible interested third parties who express interest in acquiring the natural gas intended to be exported shall be allowed to submit an irrevocable purchase offer for such volumes.⁹⁴

2. New Offshore G&G Data Multi-Client Seismic Survey Regulations

In an effort to boost offshore seismic acquisition over the country's extensive and little explored continental platform and to pave the way for the much-planned offshore licensing round,⁹⁵ Resolution 197/2018 of the National Ministry of Energy and Mining approved a set of regulations to govern offshore reconnaissance permits subject to national jurisdiction and multi-client geological and geophysical data acquisition and marketing.⁹⁶

Reconnaissance permits provided under sections fourteen and fifteen of Hydrocarbons Law 17319 required companies acquiring G&G data thereunder to deliver the acquired data to the government under a two year confidentiality restriction, affording little incentive to risk the cost of the exploration works.⁹⁷ Under the new resolution, interested service companies with a record of over five years of experience in G&G data acquisition are allowed to apply for one or more surface reconnaissance permits to acquire data over open acreage offshore areas and licensed offshore areas with the approval of the relevant license holders.⁹⁸ Surface reconnaissance permits shall extend for up to eight years and shall be granted to qualified applicants

90. *Id.* ¶ 1.4.

91. *Id.*

92. *Id.* ¶ 3.2.

93. *Id.* ¶ 3.3.

94. *Id.* ¶ 3.4.

95. Baretta Godoy, *First Round of Competitive Bidding for Offshore Exploration Launched*, LEXOLOGY (Dec. 17, 2018), <https://www.lexology.com/library/detail.aspx?g=94275587-8825-4589-9f32-1c7d72991b92>.

96. Resolución 197/2018, May 16, 2018, [33871] B.O. 41 (Arg.).

97. *See* Law No. 17319, June 23, 1967, [21220] B.O. 1 (Arg.).

98. Resolución No. 197/2018, May 16, 2018, [33871] B.O. Annex 1, art. 7(b) (Arg.).

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within sixty days from completing their applications, but the works shall only proceed after concluding the required environmental impact study and obtaining other applicable permits.⁹⁹

Key to the resolution is the so-called “commercial profit rights” afforded to the reconnaissance permit holders to disseminate and market the data obtained in a transparent and non-discriminatory manner for a term of two years following the expiration of the term of the permit.¹⁰⁰ After the expiration of such two-year term, the government may disclose the data to third parties.¹⁰¹

Irrespective of said commercial profit rights, ownership of the acquired G&G data shall vest with the permit holder and the government jointly.¹⁰²

Finally, the resolution allowed expressly the conversion into the new framework of reconnaissance permits granted under the old framework,¹⁰³ such as the permit granted to Spectrum ASA under Resolution of the Ministry of Energy and Mining 19-E/2017. This permit allowed Spectrum—who had taken chances and started a massive acquisition campaign without assurance that commercial rights to disseminate and market such data would be recognized to them—to survey the northern Argentine continental shelf.¹⁰⁴

B. CHILE

On January 30, 2018, the Government of Chile, along with the Asociación de Generadoras de Chile announced plans to start the phase-out of certain coal power plants in the country.¹⁰⁵ This announcement marked a new direction for energy policy in Chile, which used coal for about 40 percent of its energy production in 2016.¹⁰⁶ Chile and the Association, which includes AES Gener SA, Colbún SA, Enel SpA, and Engie SA, announced three items:¹⁰⁷

1. The Association agreed not to undertake new coal power projects that lack carbon capture and storage technology or similar systems.¹⁰⁸

99. *Id.*

100. *Id.* art. 26.

101. *Id.*

102. *Id.*

103. *Id.* art. 33.

104. *Spectrum Extends 2D Seismic Coverage Offshore Argentina*, OFFSHORE (Nov. 16, 2017), <https://www.offshore-mag.com/articles/2017/11/spectrum-extends-2d-seismic-coverage-off-shore-argentina.html>; see generally Resolución No. 19-E/2017, Feb. 2, 2017, [33558] B.O. 22 (Arg.).

105. Press Release, Ministry of Energy, Government and Generators Announce End of New Developments of Coal Plants (Jan. 30, 2018) (Arg.), <http://www.energia.gob.cl/tema-de-interes/gobierno-y-generadoras-anuncian>.

106. Sonal Patel, *Chile to Pursue Dramatic Coal Generation Reduction*, POWER (Apr. 1, 2018), <https://www.powermag.com/chile-to-pursue-dramatic-coal-generation-reduction/>.

107. Press Release, Ministry of Energy, *supra* note 105.

108. *Id.*

2. Chile and the Association agreed to create a working group to discuss the technological, environmental, social, and economic elements relating to each coal power plant's safety and sufficiency, and to the electrical system as a whole, within the context of Chile's Energy Policy 2050,¹⁰⁹ which aims to ensure that seventy percent of Chile's 2050 energy requirements are met by renewable sources.¹¹⁰ The working group will establish timelines for the gradual cessation of operations at coal plants that do not have carbon capture and storage technology or similar systems.¹¹¹

3. Chile's Ministerio de Energía will coordinate the working group and ensure it is included in all discussions relating to the plans to reduce coal usage.¹¹² After the plan's announcement, Engie SA declared its intention to shut down its coal-fired power plants in Chile and replace them with renewable energy.¹¹³ The announcement aligns Chile with nations such as the United Kingdom, Canada, and France, who are part of the Power Past Coal Alliance, an organization committed to phasing out its members' use of coal.¹¹⁴

III. Asia

A. TIMOR-LESTE

In March 2018, the "Treaty Between Australia and the Democratic Republic of Timor-Leste Establishing their Maritime Boundaries in the Timor Sea" (the "Maritime Boundary Treaty") was signed before the United Nations' Secretary-General, the Honorable António Guterres.¹¹⁵ The Maritime Boundary Treaty is a major breakthrough in the relations between the two States, and was an outcome of the Compulsory Conciliation process initiated by Timor-Leste in April 2016 under section two, annex V, of the United Nations Convention on the Law of the Sea.¹¹⁶ After decades of discussion and dispute, this important boundary has finally been delimited, thus reinforcing Timor-Leste's political and economic sovereignty.¹¹⁷ The

109. *Id.*

110. Baburajan Kizhakedath, *Chile Targets 70% Power to Come from Renewable Energy*, GREENTECH LEAD (Dec. 31, 2015), <https://www.greentechlead.com/renewable-energy/chile-to-increase-renewable-energy-use-29485>.

111. Press Release, Ministry of Energy, *supra* note 105.

112. *Id.*

113. Vanessa Dezem, *French Power Company to Close Coal Plants in Chile With a Move Towards Renewables*, BLOOMBERG (Mar. 27, 2018), <https://www.bloomberg.com/news/articles/2018-03-27/engie-to-close-coal-plants-in-chile-after-mulling-potential-sale>.

114. Patel, *supra* note 106.

115. *Timor-Leste and Australia Sign Landmark Maritime Boundary Treaty*, MIRANDA ALLIANCE (Mar. 7, 2018), <http://www.mirandalawfirm.com/en/insights-knowledge/publications/alerts/timor-leste-and-australia-sign-landmark-maritime-boundary-treaty>.

116. *Id.*

117. *Id.*

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Joint Petroleum Development Area, previously in force under the Timor Sea Treaty, will be dissolved as soon as the Maritime Boundary Treaty is ratified.¹¹⁸

118. *Id.*

International Transportation Law

MARTIN ABADI, JAY JUNEKUN CHOI, ATTILIO M. COSTABEL,
ANDREW M. DANAS, JASON W. DROUYOR, GREGORY C. MADDALeni,
AND PHILIP PENG*

International transportation encompasses a variety of modes of transport and industries, including passenger and cargo transportation by air, ocean, motor, and rail. Ocean shipping saw an increase of liability for those moving cargo through California ports, and a significant deregulation with respect to the Non-Vessel Owning Common Carriers. The FAA Reauthorization Act of 2018 was signed along with updates to free trade agreements among the United States, Korea, Canada, and Mexico. Autonomous transportation is quickly proliferating both domestically and abroad. Lastly, interesting updates in Canada, Italy, and China have far reaching implications for the United States.

I. Ocean Shipping

This year has seen some significant changes that will have a profound effect throughout the ocean shipping industry. These changes include the addition of new drayage laws in California, and revised contracting requirements for Non-Vessel Owning Common Carriers (“NVOCC”).

* This chapter was compiled by Jason W. Drouyor. Jason W. Drouyor is an Associate with Mitchell-Handschuh Law Group. Martin Abadi is Counsel at the Toronto office of Borden Ladner Gervais LLP and contributed the U.S.-Mexico-Canada Free Trade Agreement and Cross Border Updates in Canada sections. Jay JuneKun Choi is the former US member of the US-Korea Committee on Business Cooperation US Commerce Department under Secretary Ron Brown and contributed the Updates to The United States – Korea Free Trade Agreement section. Attilio M. Costabel is Co-Chair of American Bar Association Section of International Law (“ABA SIL”) International Transportation Committee and contributed the sections on New Technology Developments and Punitive Damages in Italy sections. Andrew M. Danas is a Partner with Grove, Jaskiewicz and Cobert LLP in Washington, D.C. and contributed the FAA Reauthorization Act of 2018 section. Jason W. Drouyor contributed the Ocean Shipping section. Gregory C. Maddaleni is a graduate of Georgia State University College of Law, a licensed customs broker, and contributed the Enforcement for Air Cargo Manifest Regulations section. Philip Peng is a Partner for DeHeng Law Office in Beijing, China, and contributed the section on Legal Interpretation in China. Special thanks to Jessica B. Horwitz for her assistance in making this year’s article possible. Jessica B. Horwitz is an Associate at Bennett Jones LLP, and is Co-Chair of the ABA SIL International Transportation Committee (ITC).

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A. CALIFORNIA PORT DRAYAGE REGULATION

As of 2019, beneficial cargo owners (“BCOs”), shippers, and any entity using port drayage services will be exposed to additional liability when moving maritime cargo through California ports.¹ California Senate Bill (SB)-1402 provides for joint and several liability for those using port drayage services from motor carriers that are listed on a blacklist.² The creation of such a blacklist falls to the California Division of Labor Standards Enforcement.³ The list will comprise of motor carriers that have an unsatisfied judgment for a host of employment related reasons, including failure to provide workers compensation insurance, or pay employment taxes or wages.⁴ The hope of this legislation is to provide an economic incentive to utilize reputable motor carriers. It also shifts the burden over to the entities seeking drayage to review and keep thoroughly apprised of motor carriers’ activities. Its aim is also to dissuade motor carriers from not performing their duties because their customers will be ensuring their compliance.

B. NEW CONTRACTING REGULATIONS FOR NON-VESSEL OWNING COMMON CARRIERS

United States federal regulation of maritime activities continued to have a profound presence despite other transportation modes seeing significant strides toward deregulation. Much of that regulation has been centered on contracting among shippers and transportation providers. While not completely deregulated, NVOCCs will benefit from new regulations that permit NVOCC to forgo filing their service and rate agreements with the Federal Maritime Commission (“FMC”), the regulating body for maritime shipping.⁵ This means that NVOCC service agreements will be effective the moment the parties sign, and rate agreements will be active through either signing, electronic acceptance, or by booking a load with an NVOCC.⁶ Rate agreements are now amendable permitting more flexibility.⁷ While NVOCCs will still have to keep their published tariffs up to date and disclose that service and rate agreements are being used, this change should be welcome in an industry already looking to improve efficiency.⁸ Forgoing the filing requirement reduces the regulatory load of the FMC and allows government resources to be directed elsewhere.

1. Cal. 1402, 2018 Leg., Reg. Sess. (Cal. 2018).

2. *Id.*

3. *Id.*

4. *Id.*

5. 46 C.F.R. 531, 532 (2018).

6. *Id.*

7. *Id.*

8. *Id.*

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II. Aviation

Aviation had significant updates in 2018. On October 5, 2018, the FAA Reauthorization Act of 2018 was signed into law reauthorizing the US Federal Aviation Administration (“FAA”) for fiscal years 2019 through 2023 at a cost of \$97 billion.⁹ Advance cargo manifest requirements have also come into effect for various countries regarding air cargo.

A. FAA REAUTHORIZATION ACT OF 2018

The FAA Reauthorization Act of 2018 contains 1994 sections addressing a variety of subject areas within the jurisdiction of the FAA and Department of Transportation. The wide-ranging details of this comprehensive law are too numerous to include in this report. Some of the issues addressed by the law include airport and aviation infrastructure; air safety issues; international aviation; unmanned aerial systems (“UAS” or drones); transportation security; airline passenger protections and air service improvements; and the promotion of Spaceports.¹⁰ A copy of the law can be found on the Congress.gov website.¹¹

1. *Safety Issues*

The Reauthorization Act has a number of provisions directed at aviation safety. Most are contained in Titles II and III of the law.¹² In addition to mandating numerous safety studies and equipment safety standards, the Act’s new safety provisions also include provisions addressing the transportation of lithium batteries and the safety of flight crews, including their working hours and rest periods.

The Act addresses safe air transportation of lithium cells and batteries by seeking to clarify the legal status of when and how lithium batteries can be transported on airplanes. Within ninety days of October 5, 2018, Section 333 of the Act requires the FAA to conform its regulation of lithium batteries and cells to the regulations adopted by the International Civil Aviation Organization (ICA) 2015-2016 technical requirements for the transport of such batteries.¹³

With respect to flight crews, within thirty days of October 5, 2018, Section 335 of the Act requires the FAA to modify its HOS, or hours-of-service, regulations for flight attendants to provide that such attendants will have a scheduled rest period for at least 10 consecutive hours for every duty

9. H.R.4, 115th Cong. (2018).

10. *Id.*

11. H.R. 302, 115th Cong. (2018), <https://www.congress.gov/bill/115th-congress/house-bill/302/text?q=%7B%22search%3A%5B%22FAA+Reauthorization%22%7D&r=3> (last visited Mar. 12, 2019).

12. H.R.4 Title II, III.

13. *Id.* § 509(b)(5)(B).

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period of fourteen hours or less.¹⁴ Section 335(b) requires airlines to produce fatigue risk management plans for their employees.¹⁵

2. *Unmanned Aircraft Systems – UAS or Drones*

Title III, Subtitle B of the Act addresses a significant number of issues regarding the regulation of drones. Section 349(a) of the law amends 49 U.S.C. § 44809 to establish rules providing for recreational operations of UAS, including a requirement that operators pass a test on aeronautical knowledge and that the UAS be flown below 400 feet above ground level ceiling.¹⁶ With respect to commercial operations, including commercial package delivery, Section 348 of the Act amends 49 U.S.C. § 44808 to require the FAA to allow such operations via an update to its existing regulations by October 5, 2019.¹⁷ In adopting regulations, the FAA is required to consider risk assessments and “performance-based requirements.”¹⁸

The Act authorizes the FAA to approve the operation of drones by government agencies for such activities as firefighting and policing.¹⁹ Section 347 of the Act adds 49 U.S.C. § 44807 authorizing the FAA to issue permits to UAS for “special authority,” including operations beyond the visual line of sight of the UAS operator.²⁰ The FAA is required to use a “risk-based approach” when issuing such permits to determine if the UAS can safely navigate.²¹ Congress also retained a program for deploying commercial and research drones in the Arctic on a permanent basis in Section 344 of the Act.²²

Given that drones are a developing technology, Congress also mandated that a number of studies and reports by the FAA include UAS and drones in their analysis and study groups. This mandate includes codification of the Safety Oversight and Certification Advisory Committee, with a requirement that at least one UAS manufacturer or operator be a member of the Committee;²³ the creation of a FAA Task Force on Flight Standards Reform, which must also include at least one member from the UAS industry;²⁴ and an update of the FAA Comprehensive plan, including details regarding UAS activity.²⁵ The FAA is also required under the Act to establish safety

14. *Id.* § 312(a)(2)(A).

15. *Id.* § 312(b).

16. H.R.4 § 34; *see also* 49 U.S.C. § 44809 (2018).

17. 49 U.S.C. §44808(a) (2018).

18. *Id.* §44808(b).

19. H.R.4 § 347.

20. 49 U.S.C. § 44807 (2018); H.R.4, § 347 (2018).

21. 49 U.S.C. § 44807; H.R.4, at § 347.

22. H.R.4 § 45502(c)(1).

23. *Id.* § 202.

24. *Id.* § 232.

25. *Id.* § 340.

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standards related to the design, production, and modification of small UAS.²⁶

3. *Passenger Issues*

Although many consumer advocates expressed some disappointment in the final version of the law, Congress included a number of “consumer friendly” provisions in the FAA Reauthorization Act. These provisions include a ban on all cell phone calls while on airplanes²⁷ and the use of electronic cigarettes.²⁸ Section 425 of the Act, also known as the “Transparency Improvements and Compensation to Keep Every Ticketholder Safe Act of 2018” or the “Tickets Act,” prohibits airlines from removing paying passengers involuntarily from the plane once they have boarded or from denying them the right to board the plane once their ticket has been collected or scanned by a gate agent.²⁹

Congress also directed the FAA to examine issues regarding passengers’ comfort and safety when on an airplane. Although many consumer advocates suggested that this will simply cement current standards rather than determine whether those standards are acceptable, the law also requires the FAA to issue regulations by October 5, 2019, establishing minimum airline seat width, length, and pitch.³⁰ Congress also required the Comptroller General of the United States to submit a report to Congress within 180 days of enactment of the Act on the availability of lavatories on commercial aircraft, including the extent to which air carriers are reducing the size and number of lavatories to add more seats and whether this creates passenger lavatory access issues.³¹

4. *Foreign Regulations*

The Act allows the FAA to accept a non-US country’s airworthiness directive if the directives are from a country where the product is designed.³² It also requires the FAA to assist US companies if they are experiencing a delay in receiving a foreign airworthiness directive.³³ Congress also requires the FAA to have a foreign engagement plan within one year³⁴ and to exercise leadership on creating a global approach to improving aircraft tracking by working with the International Civil Aviation Organization (“ICAO”), other international organizations, and the private sector.³⁵

26. *Id.* § 345.

27. 49 U.S.C. 41725 (2018); H.R.4 § 402.

28. 49 U.S.C. 41706 (2018); H.R.4 § 534.

29. S. 947, 115th Cong. § 2 (2018).

30. H.R.4 § 541.

31. *Id.*

32. *Id.* § 252.

33. *Id.* § 253(a)(3).

34. *Id.* § 253(b).

35. *Id.* § 303.

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5. *Spaceports*

The FAA Reauthorization Act addressed issues related to space transportation. Section 580(a) of the Act expresses the “Sense of Congress on State Spaceport Contributions.”³⁶ Section 580(b) of the Act adds 51 U.S.C. § 51501 to the US Code, requiring the Secretary of Transportation to establish an Office of Spaceports within the Office of Commercial Space Transportation.³⁷ Among other functions, the Office of Spaceports will support licensing activities for operation of launch and reentry sites; develop policies that promote infrastructure improvements at spaceports; provide technical assistance and guidance to spaceports; and help strengthen the US competitiveness in commercial space transportation infrastructure and “increase resilience for the Federal Government and commercial customers.”³⁸

B. ENFORCEMENT BEGINS FOR AIR CARGO MANIFEST REGULATIONS

Some key cargo manifest regulations moved into their enforcement stage. Both China and the United States have taken two air cargo manifest regulations and moved them into enforcement meaning that non-compliance by air carriers could lead to delays or penalties or both. China’s regulation, commonly known as the China 24 Hour Advance Manifest Regulation, went into effect June 1, 2018.³⁹ Primary to the regulation is for air carriers to report, for international shipments, the full cargo description of what is being carried, the container load plan and full contact details of the shipper and the consignee, including the enterprise code such as the Employer Identification Number (“EIN”) for US companies.⁴⁰ All of this information must be available twenty-four hours prior to aircraft loading, which means that air carriers need to be actively capturing, or have readily on file, shipper and consignee information, in particular the enterprise codes.⁴¹ The regulation itself was established back in 2015, but with only sporadic enforcement up until this year.⁴²

The United States government moved its Air Cargo Advance Screening (“ACAS”) regulation into enforcement in the same month, on June 12,

36. *Id.* § 599(D).

37. 51 U.S.C. § 51501; H.R.4 § 599(D).

38. 51 U.S.C. § 51501; H.R.4 § 599(D).

39. *General Administration of Customs China (GACC)*, Announcement No.56 [2017], <http://www.customs.gov.cn/customs/302249/302266/302267/747313/index.html> (last visited Mar. 13, 2019).

40. Greg Knowler, *China Shippers Risk Delays if they Lack Advance Customs Filing*, JOURNAL OF COMMERCE (May 31, 2018), https://www.joc.com/regulation-policy/customs-regulations/china-shippers-risk-delays-if-they-lack-advance-customs-filing_20180531.html.

41. *Id.*

42. *Id.*

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2018.⁴³ ACAS requires the advanced submission of air cargo information for shipments arriving in the United States from a foreign location.⁴⁴ The ACAS program was initially set up as a voluntary public/private cooperation with air carriers to use advance information to identify and intercept high risk shipments in advance of them being loaded on planes.⁴⁵ Now that it is mandatory, it is intended to enhance aircraft and passenger safety alike by identifying and preventing the loading of any high risk air shipments destined for the United States.⁴⁶

III. Developments in Free Trade Agreements

Free Trade Agreements (“FTAs”) in North America saw a turbulent year in 2018 with the re-opening of the North American Free Trade Agreement (“NAFTA”) negotiations, withdrawal of the US from the Trans-Pacific Partnership, implementation of the Canada-EU Comprehensive Economic and Trade Agreement, and the collapse of negotiations for the US-EU Transatlantic Trade and Investment Partnership. This section reviews developments of note to the transportation community resulting from FTA changes this year with a focus on North America.

A. THE US-MEXICO-CANADA FREE TRADE AGREEMENT

The principal (and obvious) update for NAFTA in 2018 is the US-Mexico-Canada Free Trade Agreement (“USMCA”) that, once ratified, will supersede and supplant it, as reached in principle by all three parties in September.⁴⁷ If the USMCA is ratified, it would cause, among other things, a replacement of Chapter 12 of NAFTA (on cross-border trade) with a more comprehensive and liberal Chapter 15.⁴⁸ The proposed text would, among other things, remove *all* the quantitative restrictions that the three parties had been allowed to implement under NAFTA, relating to the quantity and/or value of services and service providers in the market.⁴⁹ In addition, Chapter 20 “Intellectual Property Rights” of the USMCA will establish stricter controls against counterfeit goods, and give customs officials the

43. See 83 C.F.R. § 122.48b (2018).

44. *Air Cargo Advance Screening (ACAS)*, U.S. CUSTOMS AND BORDER PROTECTION, <https://www.cbp.gov/border-security/ports-entry/cargo-security/acas> (last visited Mar. 13, 2019).

45. *Air Cargo Advance Screening (ACAS) Fact Sheet*, U.S. CUSTOMS AND BORDER PROTECTION, <https://www.cbp.gov/sites/default/files/assets/documents/2018-Jun/ACAS%20Fact%20Sheet%20060518A%20FINAL.pdf> (last visited Mar. 13, 2019).

46. *Id.*

47. See *A New Canada-United States- Mexico Agreement*, GOVERNMENT OF CANADA, <https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/usmca-aeumc/index.aspx?lang=eng> (last visited Mar. 13, 2019); United States-Mexico-Canada Agreement, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement> (last visited Mar. 13, 2019).

48. United States-Mexico-Canada Agreement, Can-Mex.-U.S., art. 15.2, Nov. 30, 2018.

49. *Id.*

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discretion to inspect, detain, and destroy suspected counterfeit goods at the border.⁵⁰ Both of these provisions would have an important general spill-over effect on cross-border transport activity and in particular with respect to flow (and delays, as in the case of counterfeit goods) of commercial carriers.⁵¹

B. UPDATES TO THE UNITED STATES – KOREA FREE TRADE AGREEMENT

President Trump made history by signing off on the revision to the Free Trade Agreement between the United States of America and the Republic of Korea (“US Korea FTA”), which will amend the original US Korea FTA (“Amendment”), on September 24, 2018.⁵² Both nations agreed to effectuate the Amendment by January 1, 2019.⁵³ Although the Republic of Korea needs its legislative approval, the Amendment has a good chance of going into effect without any further modification. It was a significant agreement for the Trump administration especially given its timing in September, ahead of the upcoming trade negotiations with different regional and individual bilateral parties, including North American Trade Agreement renegotiation, China tariff negotiation, and potentially joining in the ASEAN Free Trade Agreement. The Amendment consists of the following four provisions: (1) Modification of the General Notes of the US Tariff Schedule,⁵⁴ (2) Modification of the US Tariff Schedule Annex 2-B,⁵⁵ (3) Modification of trade remedies in Chapter 10,⁵⁶ and (4) Modification of investor treatment in Chapter 11.⁵⁷

As for the transportation industry’s impact, the Amendment will increase the US truck quota by one hundred percent, from 25,000 to 50,000 units per year, allowing more US truck sale.⁵⁸ Potential US quota on Korean steel products and US tariff on Korean aluminum products may affect the US manufacturing industry, and other heavy equipment and infrastructure industries.⁵⁹ Furthermore, although it is not a part of the Amendment, the US Treasury has been discussing the foreign currency exchange rate policy

50. *Id.* art. 20.82(12).

51. *See id.* art. 15.2, 20.82.

52. *Protocol Amendment Agreement*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <https://ustr.gov/sites/default/files/files/agreements/FTA/KORUS/KORUS%20Protocol%20Amending%20Agreement%20-%20Signed.pdf> (last visited Mar. 13, 2019).

53. U.S.-South Korea (KORUS) FTA, CONGRESSIONAL RESEARCH SERVICE (Dec. 28, 2018) <https://fas.org/sgp/crs/row/IF10733.pdf>.

54. *Protocol Amendment Agreement*, *supra* note 43.

55. *Id.*

56. *Id.*

57. *Id.*

58. *New U.S. Trade Policy and National Security Outcomes with the Republic of Korea*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2018/march/new-us-trade-policy-and-national> (last visited Mar. 13, 2019).

59. *Id.*

and its ongoing macroeconomic effect on both nations.⁶⁰ Korea is the sixth largest trading partner according to 2017 trade statistics, with approximately \$120 billion goods trade, \$35 billion services trade, and \$93 billion bilateral foreign direct investments.⁶¹

IV. New Technology Developments

A. AUTONOMOUS SHIPS

In March 2017, the CMI Working Group on Unmanned Ships circulated a questionnaire among the Member Associations of the CMI with the aim to identify the nature and extent of potential obstacles in the current international legal framework to the introduction of (wholly or partly) unmanned ships.⁶² As of February 13, 2018, the Working Group has received responses from the following delegations: Argentinian, Brazilian, British, Canadian, Chinese, Croatian, Danish, Dutch, Finnish, French, German, Irish, Italian, Japanese, Maltese, Panamanian, Singaporean, Spanish, and the US⁶³

The Maritime Safety Committee (“MSC”) held its ninety-ninth Session at the London Headquarters on May 25, 2018.⁶⁴ The Committee examined answers to questionnaires from several member nations and set a framework for the regulatory scoping exercise.⁶⁵ The Committee finally agreed to focus on the regulatory scoping exercise and instructed the working group to invite submissions to MSC 100 in this respect and to maintain 2020 as the target completion year and to review it in the future, based on progress made with the work on the output.

The Baltic and International Maritime Council (“BIMCO”) will also be joining the International Maritime Organization to facilitate the harmonization of data ahead of the April 2019 deadline, when new mandatory requirements will come into force for automated ship reporting. From April 2019, new mandatory requirements for the electronic exchange of information from ships to the relevant onshore parties when approaching a port will require public authorities to have systems in place to assist ship clearance processes.

60. *Id.*

61. *Korea*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <https://ustr.gov/countries-regions/japan-korea-apec/korea> (last visited Mar. 12, 2019).

62. *Summary of Responses to the CMI Questionnaire on Unmanned Ships*, CMI IWG, <https://comitemaritime.org/wp-content/uploads/2018/05/Summary-of-Responses-to-the-CMI-Questionnaire.docx> (last visited Mar. 12, 2019).

63. *Id.*

64. *Maritime Safety Committee (MSC), 99th Session 16-25 May 2018*, INTERNATIONAL MARITIME ORGANIZATION (May 25, 2018), <http://www.imo.org/en/mediacentre/meetingsummaries/msc/pages/msc-99th-session.aspx>

65. See *Summary of Responses to the CMI Questionnaire on Unmanned Ships*, *supra* note 52a.

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B. AUTONOMOUS VEHICLES

Autonomous transportation is a technology that allows vehicles to take actions independent of human control.⁶⁶ There are six levels of independence ranging from level one, minimal human interference, to level six, no human presence and control at all.⁶⁷ The lower levels have been in use for some time throughout the transportation industry, especially in aviation.

But the use of autonomous vehicles is beginning to surge. Factories⁶⁸ and manufacturers⁶⁹ are using automated trucks commercially, while retailers are testing public reception to the use of automated vehicles for deliveries.⁷⁰ In Sweden, a fleet of driverless buses started making their way along a one and a half kilometer stretch from the science suburb Kista to central Stockholm.⁷¹ In Gothenburg, one hundred driverless Volvos were tried out as part of a project to have more driverless cars introduced.⁷² Singapore has built a mini town served only by automated vehicles. The two-hectare complex, unveiled in November, has intersections, traffic lights, bus stops, and pedestrian crossings, all built to the specifications that Singapore uses for its public roads.⁷³ China also aspires to have thirty million autonomous vehicles by the end of the next decade.⁷⁴

While technology is continuing to move along, increased regulation and new laws in this area are increasing.⁷⁵ For instance, the United States

66. *Autonomous Car*, TECHOPEDIA, <https://www.techopedia.com/definition/30056/autonomous-car> (last visited Mar. 12, 2019).

67. Loz Blain, *Self-Driving Vehicles: What are the Six Level of Autonomy?*, NEW ATLAS (June 7, 2017), <https://newatlas.com/sae-autonomous-levels-definition-self-driving/49947/>.

68. Tamara Chuang, *Self-Driving Truck's Beer Run on Colorado's Interstate 25 Gets Guinness World Record*, DENVER POST (June 29, 2017), <https://www.denverpost.com/2017/06/29/self-driving-beer-truck-world-record/>.

69. Alex Davies, *Self-Driving Trucks are Now Delivering Refrigerators*, WIRED (Nov. 13, 2017), <https://www.wired.com/story/embark-self-driving-truck-deliveries/>.

70. The Associated Press, *Ford, Walmart Test Self-Driving Grocery Delivery in South Florida*, TAMPA BAY TIMES (Nov. 14, 2018), <http://www.tampabay.com/business/ford-walmart-test-self-driving-grocery-delivery-in-south-florida-20181114/>.

71. Emma Lofgren, *Stockholm get Scandinavia's First Driverless Buses on Public Roads*, THE LOCAL (Dec. 27, 2017), <https://www.thelocal.se/20171227/stockholm-gets-scandinavia-first-driverless-buses-on-public-road>.

72. Heather Farmbrough, *Ugly But Useful: Stockholm Introduces Driverless Buses*, FORBES (Jan. 31, 2018), <https://www.forbes.com/sites/heatherfarmbrough/2018/01/31/ugly-but-useful-stockholm-introduces-driverless-buses/#1166a60c60f4>.

73. Kyunghye Park, *Singapore Built a Dedicated Town for Self-Driving Buses*, BLOOMBERG (June 4, 2018), <https://www.bloomberg.com/news/features/2018-06-04/singapore-built-a-town-to-test-autonomous-self-driving-vehicles>.

74. Yan Zhang, *Wanted in China: Detailed Maps for 30 Million Self-Driving Cars*, BLOOMBERG (Aug. 22, 2018), <https://www.bloomberg.com/news/articles/2018-08-22/wanted-in-china-detailed-maps-for-30-million-self-driving-cars>.

75. See Brock, L., & Tropnas, L, *Survey on the regulations of autonomous vehicles*, 10 JOURNAL OF MULTIDISCIPLINARY RESEARCH No. 3, at 23-44, <http://www.jmrpublication.org/Portals/JMR/Documents/JMR%2010-3%20Fall%202018-To%20be%20indexed.pdf>.

Department of Transportation and the National Highway Traffic Safety Agency released new federal guidance for *Automated Driving Systems (ADS): A Vision for Safety 2.0*.⁷⁶ At the state level, twenty-three states have authorized operation of autonomous vehicles.⁷⁷ California leads the pack,⁷⁸ and others are following closely.⁷⁹ Some states are also working to take proactive steps to address the ways this emerging technology will be utilized beyond just the presence on the road. Mississippi issued regulations or guidance that include a form of commercial land transport called “platooning,” where a group of individual motor vehicles travel in a unified manner at electronically coordinated speeds closer than would be reasonable and prudent without such coordination.⁸⁰

New regulations are also being seen in other countries as well. China has instituted National Rules subsequent to local regulations on self-driving car road testing in Beijing, Shanghai, and Chongqing (“Local Regulations”), and took effect May 1, 2018.⁸¹ On April 11, 2018, the Ministry of Industry and Information Technology (“MIIT”), the Ministry of Public Security (“MPS”) and Ministry of Transport (“MOT”) jointly issued the Administrative Rules on Intelligent and Connected Vehicle Road Testing (Trial) (the “National Rules”).⁸² Singapore introduced Autonomous vehicle rules (“AV Rules”) in February 2017 providing rules for trials of autonomous vehicles and automated vehicle technology, and prospective use of autonomous vehicles.⁸³

V. Selected Country Updates

Some interesting updates have occurred outside of the United States this year that have the potential to affect the whole transportation sector.

76. *Autonomous Vehicles Self Driving Vehicles Enacted Legislation*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Nov. 7, 2018), <http://www.ncsl.org/research/transportation/autonomous-vehicles-self-driving-vehicles-enacted-legislation.aspx>.

77. Alabama, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Louisiana, Michigan, New York, Nevada, North Carolina, North Dakota, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, Vermont and Washington D.C.

78. *Autonomous Vehicles in California*, STATE OF CALIFORNIA, <https://www.dmv.ca.gov/portal/dmv/detail/vr/autonomous/bkgd> (last visited Mar. 12, 2019).

79. S.B. 17-213, 72nd Gen. Assemb., Reg. Sess. (Colo. 2017); Comm. B. 260, Gen. Assemb., 2017 Reg. Sess. (Conn. 2017); H.B. 472, 144th Gen. Assemb., Reg. Sess. (GA. 2017); S.B. 116, 2018 Reg. Sess. (Ky. 2018) (allows motor carrier to operate a platoon on Kentucky’s highways); H.B. 1343, 2018 Reg. Sess. (Miss. 2018).

80. H.B. 1343, 2018 Reg. Sess. (Miss. 2018).

81. Mark Schaub, *China Issues Self-Driving Car Road Testing Regulations*, CHINA LAW INSIGHT (Apr. 13, 2018), <https://www.chinalawinsight.com/2018/04/articles/uncategorized/china-issues-self-driving-car-road-testing-regulations/>.

82. *Id.*

83. Anne L. Petterd, *Autonomous Vehicle Landscape in Singapore and China Continues to Evolve*, LEXOLOGY (Feb. 14, 2018), https://www.lexology.com/library/detail.aspx?g=05a24ec3-027d-4478-b44d-04455db71c8a&utm_source=Lexology+Daily+Newsfeed&utm_medium=HTML=email+.

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A. CROSS BORDER UPDATES IN CANADA

In addition to the USMCA, the following seven transport-related developments affecting Canada merit mentioning. First, while it was a last-minute 2017 development (December 16, 2017), Transport Canada's amendment to the *Commercial Vehicle Drivers Hours of Service Regulations*, under the *Motor Vehicle Transport Act*, is mostly considered, in terms of its impact on carriers, a 2018 development.⁸⁴ This amendment will make it mandatory by 2020 for commercial truck and bus drivers in Canada to use electronic logging devices ("ELDs") to track their activities. ELDs, synced to the vehicles' engines, are currently mandatory in the US, yet paper logs – vulnerable to manipulation – are still relied upon in Canada.⁸⁵

Second, on April 23, 2018, the *Administrative Monetary Penalties and Notices Regulations* were amended to broaden the scope of use of administrative monetary penalties ("AMPs") to promote compliance with the requirements of the *Canada Shipping Act*.⁸⁶ The Regulations will add 572 violations to seven pieces of legislation, including to the *Safety Management Regulations*, *Vessel Pollution and Dangerous Chemicals Regulations*, and *Collision Regulations*.⁸⁷

Third, on May 19, 2018, the *Vehicle Regulations* under the *Motor Vehicle Safety Act* were amended to specify which vehicles may be imported from Mexico, and under what conditions.⁸⁸ Under the NAFTA provisions, as of January 1, 2019, Canada's ability to adopt or maintain restrictions on the importation of used vehicles from Mexico may be curtailed. The proposed amendment "would reduce trade barriers by amending the requirements related to temporary importation, vehicles imported from Mexico, and vehicles imported from the United States and Mexico for parts. . .[delivering] on specific commitments to remove barriers to the importation of used motor vehicles from Mexico."⁸⁹

Fourth, on May 23, 2018, the *Transportation Modernization Act*, which amends the *Canada Transportation Act* with respect to air and railway

84. *Regulations Amending the Commercial Vehicle Drivers Hours of Service Regulations*, GOVERNMENT OF CANADA (Dec. 16, 2017), <http://gazette.gc.ca/rp-pr/p1/2017/2017-12-16/html/reg5-eng.html>.

85. *Id.*

86. *Regulations Amending the Administrative Monetary Penalties and Notices (CSA 2001) Regulations: SOR/2018-86*, GOVERNMENT OF CANADA (Apr. 23, 2018), <http://www.gazette.gc.ca/rp-pr/p2/2018/2018-05-02/html/sor-dors86-eng.html>.

87. *Id.*

88. *Canada Gazette, Part I, Volume 152, Number 20: Regulations Amending Certain Regulations Made Under the Motor Vehicle Safety Act (National Safety Marks and Importation)*, GOVERNMENT OF CANADA (May 19, 2018), <http://www.gazette.gc.ca/rp-pr/p1/2018/2018-05-19/html/reg5-eng.html>.

89. *Id.* This amendment proposes to update the Vehicle Regulations to specify which vehicles may be imported from Mexico and to set out the conditions and the requirements under which these vehicles may be imported into Canada.

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transportation, received Royal Assent.⁹⁰ For air transportation, the Act imposes higher passenger rights standards for commercial airline transportation and loosens international ownership restrictions for Canadian air carriers. It also creates a new process for the review and authorization of arrangements involving two or more transportation undertakings providing air services. For rail travel, the Act makes a series of amendments related to reporting requirements and dispute settlement.⁹¹ It also requires railways to install recording equipment in locomotives and enables shippers to obtain terms in their contracts dealing with amounts due that arise from a railway company's failure to meet service obligations. The Act also amends a constellation of additional and related legislation, including, among others, the *Railway Safety Act*, the *Coasting Trade Act* – allowing empty containers to be repositioned by ships registered in any register – and the *Canada Marine Act*.⁹²

Fifth, on June 20, 2018, *Bill C-21 – An Act to Amend the Customs Act* reached the third reading at the Canadian parliament. This bill is significant for cross-border trade because it includes the added provision that all exported goods (excluding those that end up back in Canada) must be reported.⁹³ This would naturally have varying levels of effect (depending on the carrier's mandate and involvement in freight brokerage or customs logistics) on commercial carriers engaged in cross-border activity by adding an additional layer of compliance for cargo moving across the border.⁹⁴

Sixth, on August 1, 2018, the Canada Border Services Agency (“CBSA”) amended its licensing policy for temporarily-imported vessels.⁹⁵ Now, a coasting trade license⁹⁶ will no longer be cancelled by the CBSA when a vessel leaves Canadian waters, unless the license has expired, or its purpose has been fulfilled. While temporarily-imported vessels will remain subject to any existing CBSA reporting requirements upon departure and re-entry into Canada, this amendment may reduce bureaucratic prolixity and redundancy in cross-border licensing.⁹⁷

90. Christopher Wong, *Changes En Route: Bill C-49 Becomes Law, Canadian Airlines Get New Ownership Rules*, JDSUPRA (May 29, 2018), <https://www.jdsupra.com/legalnews/changes-en-route-bill-c-49-becomes-law-47068/>.

91. Transportation Modernization Act, S.C. 2018, C 10 (Can.), https://laws-lois.justice.gc.ca/eng/AnnualStatutes/2018_10/page-1.html.

92. *Id.*

93. An Act to Amend the Customs Act, B. C-21, 42nd Parl. (2018) (Can.).

94. *Id.*

95. *Coasting Trade Vessels Leaving Canadian Waters*, CANADA BORDER SERVICES AGENCY (Aug. 1, 2018), <https://www.cbsa-asfc.gc.ca/publications/cn-ad/cn18-12-eng.html>.

96. Coasting trade (or sometimes referred to as “cabotage”, meaning point-to-point movements within a sovereign territory by a foreign conveyance) refers to any commercial marine activity within Canadian waters. These activities are regulated and ordinarily reserved in Canada to Canadian registered duty paid vessels, with limited exemptions. Under relevant Canadian legislation, there is a process to temporarily import a foreign or non-duty paid vessel under a coasting trade license when a suitable Canadian-registered duty paid vessel is not available.

97. *Coasting Trade Vessels Leaving Canadian Waters*, *supra* note 95.

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Seventh, Canada launched a pilot project in early October, regarding the clearing of commercial cargo and conveyances for certain vessels operating in the Arctic. Currently, under the *Reporting of Imported Goods Regulations*, marine carriers must report all cargo and conveyances to the nearest CBSA office, which can prove logistically challenging. Under this pilot project, vessels bound for the Arctic can report and clear their conveyances, crew, and cargo *virtually*. The project could prove especially beneficial in areas where there is a lower CBSA presence.⁹⁸

B. PUNITIVE DAMAGES IN ITALY

In July 2017 and June 2018 respectively, the Italian Supreme Court and the British Court of Appeal issued two important judgments allowing awards of punitive damages. While the British judgment⁹⁹ is just a confirmation of the category of exemplary damages already existing at British common law,¹⁰⁰ the Italian judgment¹⁰¹ brings a striking innovation to the civil law landscape, making American punitive damages awards enforceable in Italy.

A Buyer of Italian-made helmets for motorcycles sued the Florida seller (importer and dealer) for serious injuries allegedly caused by helmet defects. The seller reached a million and a half settlement that included punitive damages, then sued the Italian manufacturer for indemnity.¹⁰² The 17th Judicial Circuit for Broward County (Florida) awarded plaintiff all the requested damages and plaintiff then filed for recognition and enforcement of the award in Italy. The court of Venice allowed recognition and defendant appealed to the Supreme Court, arguing, among other grounds, that punitive damages are not allowed under Italian law and public policy. The Italian Supreme Court affirmed. The Florida award was found not to be contrary to Italian law on tort damages or to Italian “public policy.”¹⁰³

The opinion overrules precedents holding that tort damages have the function only of compensating victims and that punishment of tortfeasors is outside the scope of civil law torts. The Court cites a long list of statutes allowing awards that can be given in addition to pure monetary compensation, like in cases of patents and trademarks,¹⁰⁴ consumer protection,¹⁰⁵ child maintenance,¹⁰⁶ labor and discrimination,¹⁰⁷ and illicit

98. *Arctic Shipping Electronic Commercial Clearances Program*, CANADA BORDER SERVICES AGENCY (Oct. 9, 2018), <https://www.cbsa-asfc.gc.ca/publications/cn-ad/cn18-14-eng.html>.

99. *AXA Insurance UK PLC v. Financial Claims Solutions Ltd.*, [2018] EWCA Civ. 1330 (Eng.).

100. *Rookes v Barnard* [1964] AC 1129 (HL) 34 (Lord Devlin) (appeal taken from Ct. of App.) (UK).

101. Cass. sez. un., 5 luglio 2017, n. 16601, 2017 (It.).

102. *Id.*

103. *Id.* § 2.

104. *Id.* (citing D.Lgs. 10 February 2005, n. 30).

105. *Id.* (citing D.Lgs. 6 September 2005, n. 206, art. 140).

106. *Id.* (citing L. 8 February 2006, n. 54).

107. *Id.* (citing Art. 28 of d.lgs n. 150/2011).

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eavesdropping.¹⁰⁸ The Court concluded that in the Italian tort system, damages are not limited to achieve mere compensation but have also a “polyfunctional” component of punitive damages.¹⁰⁹ It must be noted, however, that the Court made a specific note that punitive damages must have a “normative foundation” as required by the Italian Constitution.¹¹⁰ Strictly interpreted, this seems to mean that punitive damages would be awarded only where allowed by a statute. But, in its conclusion, the Court solemnly announced this broad principle:

In the current legal system, civil responsibility is not limited to the only task of restoring the assets of the subject who has suffered the injury; the deterrence and the sanctioning of civil liability are also functional components of the system.¹¹¹

The Court found that the Florida award was premised on a “normative foundation” in its own (American) legal system, and thus it was meritorious of recognition.¹¹² The Court cited the evolution of punitive damages in America, from extremes like the famous *BMW* case¹¹³ to the corrections by the *Philip Morris*¹¹⁴ and the *Exxon v. Baker*¹¹⁵ cases (the latter cited with approval and satisfaction for its “one to one” approach).

Thus, on one side, the Court appears to limit punitive damages to statutory sanction (in Italy) and to “legal foundation” in a foreign jurisdiction.¹¹⁶ On the other side, the solemn pronouncement that punitive damages, far from being contrary to public policy, are a functional component of torts and the long list of statutory rules cited in support of this conclusion, may be read as though “the Congress has spoken” and may be the foundation for future straight awards of punitive damages in Italy.¹¹⁷

C. LEGAL INTERPRETATIONS IN CHINA

On May 15, 2018, the Chinese Supreme Court published a judgment clarifying the difference between “voyage” and “underway” in a vessel insurance case.¹¹⁸

108. *Id.* (citing L. 20 November 2006, n. 281).

109. *Id.* (citing to dicta in precedents of the Italian Constitutional Court).

110. *Id.* §§ 7, 8.

111. *Id.* §§ 8.

112. *Id.* § 7.

113. *Id.* (citing *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996)).

114. *Id.* (citing *Philip Morris USA v. Williams*, 549 U.S. 346 (2007)).

115. *Id.* (citing *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008)).

116. *See id.* § 8.

117. *Id.*

118. *M/V Lu Rong Yu 1813 and M/V Lu Rong Yu 1814*, 2018 SUP. CT. 413 (Sup. Ct. 2018) (China), <http://wenshu.court.gov.cn/content/content?DocID=1076ca01-1b2c-4548-b581-a93b00ccb0ae>.

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On June 25, 2011, the shipowner (the insured) attempted to shift two fishing vessels to a safer berth to avoid an upcoming typhoon.¹¹⁹ But both vessels became stranded after losing control and suffered losses. The insurers refused to undertake their insurance liability and the shipowner then filed suit. The cause of accident included the following: (1) the engine of M/V Lu Rong Yu 1813 was at the time temporarily taken out for maintenance and this vessel had no power. MV/ Lu Rong Yu 1814 only had three crew members, but regulations required fish vessels to have five crew members; (2) while MV/ Lu Rong Yu 1814 towed M/V Lu Rong Yu 1813 in, water leaked into the engine of MV/ Lu Rong Yu 1814; and (3) the tow lines between the two vessels were unstably connected. The insurers contended, *inter alia*, that as per article 244.1 of *Chinese Maritime Code*:

Unless otherwise agreed in the insurance contract, the insurer shall not be liable for the loss of or damage to the insured ship arising from any of the following causes: (1) Unseaworthiness of the ship at the time of the commencement of the voyage, unless where under a time policy the insured has no knowledge thereof.¹²⁰

As such, the insurers refused to compensate the insured because the vessels were unseaworthy at the time of the commencement of the voyage.

The Chinese Supreme Court finally held the insurers liable for 75% of the shipowner's losses because the insurance policy provided:

Clause 2 (scope of insurance)

This insurance covers total loss or partial loss of the insured vessel, as well as the salvage costs, if the loss is caused by:

1. Rainstorm, typhoon. . .grounding, collision, contact with any object. . .
2. Latent defect of hull or machinery
3. Negligence of master, chief officer, crew, pilot or ship repair engineers

Clause 3 (exclusions)

This insurance does not cover any loss, which is caused by. . .losses caused by un-seaworthiness of the insured vessel.¹²¹

Second, the shipowner, when knowing that the typhoon was coming, decided to shift the vessels to a safer place (for about four nautical miles) and such decision of the shipowner was not inappropriate. At that time, repair and maintenance of the two vessels was not completed and one of the vessels lacked power requiring it to be towed by the other vessel. But due to insufficient manning, the crew on board were not able to take care of the two vessels at the same time. As such, this accident was caused by reasons of

119. *Id.*

120. *Id.*

121. *Id.*

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typhoon, fault of ship-owner, and fault of crew jointly, with the typhoon as the main cause.¹²²

Third, seaworthiness as defined in *Chinese Maritime Code* means that the vessel should be in every aspect suitable for her intended voyage and strong enough to resist possible perils of sea that may be encountered during her sea passage.¹²³ The reason why the *Chinese Maritime Code* limits the time for seaworthiness to commencement of voyage is that the risk that the vessel may come across peril in the course of her intended voyage is much higher than staying in port. Objectively speaking, regarding when a vessel stays in port under repair, loading, or unloading, it cannot be guaranteed that the vessel would be in a state suitable for departing the port for sea passages.¹²⁴

As a result, the term “voyage” in article 244.1 of *Chinese Maritime Code* means “vessel’s departure of the port for the sea passage,” thus vessel’s shifting operation in port is not included.¹²⁵ Also, in shipping practice, vessel’s turning from status of mooring, fastening to terminal, stranding to non-mooring, non-fastening, and non-stranding is called “underway.”¹²⁶ Not all “underway” falls under the meaning of “commencement of the voyage” as stipulated in the above-mentioned law. As such, it is not correct for the insurers to be exempt from insurance liability for reason of “losses caused by un-seaworthiness of the insured vessel.”¹²⁷ In this case, the typhoon and crew’s fault are insured risks, but shipowner’s fault is not an insured risk. The court, after deliberation, exercised its judicial discretion to hold that the insurers were liable for seventy-five percent of the shipowner’s loss, and the shipowner itself shall assume the remaining twenty-five percent loss.¹²⁸

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

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Sexual Orientation and Gender Identity

MARK E. WOJCIK, DAVID W. AUSTIN, ANDREA DEFFENU,
AND JON FORTIN*

This article surveys selected international developments affecting legal issues in sexual orientation and gender identity during 2018.¹ Among other developments described in this article, India repealed its sodomy law, the Supreme Courts of the United States and the United Kingdom each ruled on the rights of bakers who objected to making cakes for same-sex weddings or in support of same-sex marriage, and the number of nations recognizing same-sex marriage increased to twenty-six.² Other countries, such as Italy, have made progress toward equality for same-sex persons but still fall short of full equality.³ But in many other countries, LGBTI persons are still subject to discrimination, harassment, and violence.⁴

I. Equality and Non-Discrimination

A. NATIONAL CONSTITUTIONS

As of the end of 2018, sexual orientation was expressly protected under the national constitutions of nine countries: Bolivia,⁵ Ecuador,⁶ Fiji,⁷

* Mark E. Wojcik is a Professor of Law at The John Marshall Law School in Chicago, Illinois. David W. Austin is a Professor at the California Western School of Law in San Diego, California. Andrea Deffenu is a Professor of Public Law at the University of Cagliari in Italy. Jon Fortin is a student at The John Marshall Law School in Chicago.

1. Because of severe space limitations, this article does not include all of the developments in sexual orientation and gender identity law during 2018. The omission of a particular development from 2018 should not be interpreted as suggesting that it was not important.

2. Catherine Pepinster, *Two Cakes, Two Courts, Two Countries: Same Result*, NCR (Oct. 15, 2018), <https://www.ncronline.org/news/politics/two-cakes-two-courts-two-countries-same-result>; Michael Safi, *Campaigners celebrate as India decriminalises homosexuality*, THE GUARDIAN (Sept. 6, 2018), <https://www.theguardian.com/world/2018/sep/06/indian-supreme-court-decriminalises-homosexuality>; Grace Donnelly, Alex Scimecca, *The 26 Countries That Have Legalized Same-Sex Marriage — And Photos of the Celebrations*, FORTUNE (Dec. 7, 2017), <http://fortune.com/2017/12/07/countries-that-legalized-same-sex-marriage/>.

3. *Italy one of the worst countries in Western Europe for gay rights: report*, THE LOCAL (May 17, 2017), <https://www.thelocal.it/20170517/italy-one-of-the-worst-countries-in-western-europe-for-gay-rights-report>.

4. *LGBT people suffer widespread violent abuse, discrimination: new UN report*, THE GUARDIAN (June 2, 2015), <https://www.theguardian.com/world/2015/jun/02/lgbt-people-suffer-widespread-violent-abuse-discrimination-new-un-report>.

5. PLURINATIONAL STATE OF BOLIVIA CONST. art. 14(II) (“The State prohibits and punishes all forms of discrimination based on sex, color, age, sexual orientation, gender identity, origin, culture, nationality, citizenship, language, religious belief, ideology, political affiliation or

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Kosovo,⁸ Malta,⁹ Mexico,¹⁰ Portugal,¹¹ South Africa,¹² and Sweden.¹³ Sexual

philosophy, civil status, economic or social condition, type of occupation, level of education, disability, pregnancy, and any other discrimination that attempts to or results in the annulment of or harm to the equal recognition, enjoyment or exercise of the rights of all people.”).

6. ECUADOR CONST. arts. 11(2) and 83(14). Article 11(2) provides: “No one shall be discriminated against for reasons of ethnic belonging, place of birth, age, sex, gender identity, cultural identity, civil status, language, religion, ideology, political affiliation, legal record, socio-economic condition, migratory status, sexual orientation, health status, HIV carrier, disability, physical difference or any other distinguishing feature, whether personal or collective, temporary or permanent, which might be aimed at or result in the diminishment or annulment of recognition, enjoyment or exercise of rights. All forms of discrimination are punishable by law.” Article 83(14) provides that: “Ecuadorians have the following duties and obligations, without detriment to others provided for by the Constitution or by law . . . To respect and recognize ethnic, national, social, generational, and gender differences and sexual orientation and identity.”

7. FIJI CONST. art. 26(3)(a) (protecting both gender identity and expression) (“A person must not be unfairly discriminated against, directly or indirectly on the grounds of his or her . . . actual or supposed personal characteristics or circumstances, including race, culture, ethnic or social origin, colour, place of origin, sex, gender, sexual orientation, gender identity and expression, birth, primary language, economic or social or health status, disability, age, religion, conscience, marital status or pregnancy . . .”).

8. REPUBLIC OF KOSOVO CONST. art. 24(2) (Art 24(2) stating: “No one shall be discriminated against on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status.”). Die Morina, *Pacoli Tours Asia Seeking More Kosovo Recognitions*, BALKANINSIGHT (May 4, 2018), <https://balkaninsight.com/2018/05/04/kosovo-s-foreign-minister-on-diplomatic-tour-aiming-support-from-asia-05-03-2018/> (Although not all nations recognize Kosovo as an independent country following its declaration of independence in 2007, as of 2018 the Republic of Kosovo has received 116 diplomatic recognitions as an independent state.).

9. MALTA CONST. arts. 32, 45(3), and 45(5)(b). Article 32 of the Malta Constitution addresses Fundamental Rights and Freedoms of the Individual: “Whereas every person in Malta is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed, sex, sexual orientation or gender identity but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely: (a) life, liberty, security of the person, the enjoyment of property and the protection of the law; (b) freedom of conscience, of expression and of peaceful assembly and association; and (c) respect for his private and family life, the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of that protection as are contained in those provisions being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.” Article 45 defines the word “discriminatory” as affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour, creed, sex, sexual orientation or gender identity whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.” And article 45(5)(b) provides: “Nothing contained in any law shall be held to be inconsistent with or in contravention of sub-article (1) of this article to the extent that it makes provision . . . with respect to qualifications (not being qualifications specifically relating to sex, sexual orientation

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orientation is also protected under the Human Rights Act of New Zealand,¹⁴ the Northern Ireland Act 1988, as amended,¹⁵ and the Scotland Act 1988, as amended.¹⁶ “Gender identity” is protected as an additional category under the constitutions of Bolivia,¹⁷ Ecuador,¹⁸ and Malta.¹⁹ The Constitution of Fiji was the first to protect explicitly the categories of sexual orientation, gender identity, and gender expression.²⁰

or gender identity) for service as a public officer or for service of a local government authority or a body corporate established for public purposes by any law.”

10. CONSTITUCIÓN POLITICA DE LOS ESTADOS UNIDOS MEXICANOS [C.P.], art. 1 (Political Constitution of the United Mexican States) (“Any form of discrimination, based on ethnic or national origin, gender, age, disabilities, social status, medical conditions, religion, opinions, sexual orientation, marital status, or any other form, which violates the human dignity or seeks to annul or diminish the rights and freedoms of the people, is prohibited.”).

11. PORTUGAL CONST., art. 13(2) (“No one shall be privileged, favoured, prejudiced, deprived of any right or exempted from any duty on the basis of ancestry, sex, race, language, place of origin, religion, political or ideological beliefs, education, economic situation, social circumstances or sexual orientation.”).

12. S. AFR. CONST., art. 9(3) (“The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”).

13. SWEDEN CONST., chap. 1, art. 2 and chap. 2, art. 12. *See also* Freedom of the Press Act, chap. 7, art. 4 (prohibiting agitation against a population group, whereby a person threatens or expresses contempt for a population group or other such group with allusion to race, colour, national or ethnic origin, religious faith or sexual orientation.”).

14. N.Z. HUMAN RIGHTS ACT Part 2, Subpart 3, art. 21(1)(m); Part 2, Subpart 5, art. 27(2); Part 2, Subpart 9, art. 45; and Part 2, Subpart 11, art. 59.

15. NORTHERN IRELAND ACT art. 75(1)(a) (providing that “[a] public authority shall in carrying out its functions relating to Northern Ireland have due regard to the need to promote equality of opportunity . . . between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation.”).

16. SCOTLAND ACT section L2 (Interpreting “equal opportunities” to mean “the prevention, elimination or regulation of discrimination between persons on grounds of sex or marital status, on racial grounds, or on grounds of disability, age, sexual orientation, language or social origin, or of other personal attributes, including beliefs or opinions, such as religious beliefs or political opinions.”).

17. PLURINATIONAL STATE OF BOLIVIA CONST., art. 14(II).

18. ECUADOR CONST., arts. 11(2) and 83(14).

19. Rep. of the U.N. High Comm’n for Human Rights, *Discrimination and Violence Against Individuals Based on Their Sexual Orientation and Gender Identity*, ¶ 72, U.N. Doc. A/HRC/29/23 at 19, ¶ 72 (May 4, 2015) [hereinafter A/HRC/29/23].

20. FIJI CONST., art. 26(3)(a) (protecting both gender identity and expression).

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B. GENDER IDENTITY: RECOGNIZING INTERSEXUALITY AND NON-BINARY GENDERS

Several countries, including Australia,²¹ Austria,²² Bangladesh,²³ Canada,²⁴ Chile,²⁵ Denmark,²⁶ India,²⁷ Nepal,²⁸ the Netherlands,²⁹ New Zealand,³⁰ Portugal,³¹ and Uruguay³² afford various levels of legal recognition to a non-

21. See, e.g., *Australian passports to have third gender option; X category aims to counter discrimination against intersex people, while transgender people can pick male or female*, THE GUARDIAN (Sept. 15, 2011), <https://www.theguardian.com/world/2011/sep/15/australian-passports-third-gender-option>; A/HRC/29/23, *supra* note 19, at 19, ¶ 73.

22. Jenny Gesley, *Austria: Court Allows Intersex Individuals to Register Third Gender Other Than Male or Female*, GLOBAL LEGAL MONITOR (July 6, 2018), <http://www.loc.gov/law/foreign-news/article/austria-court-allows-intersex-individuals-to-register-third-gender-other-than-male-or-female>; Verfassungsgerichtshof [VfGH] [Constitutional Court], June 15, 2018, Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes [VfSlg] No. 77/2018-9 (Austria) https://www.vfgh.gv.at/downloads/VfGH_Entscheidung_G_77-2018_unbestimmtes_Geschlecht_anonym.pdf; *discussed in* Lena Holzer, *Non-Binary Gender Registration Models in Europe, Report on third gender marker or no gender marker options*, ILRA-EUROPE, 41 (Sept. 2018), https://www.ilga-europe.org/sites/default/files/non-binary_gender_registration_models_in_europe_0.pdf.

23. A/HRC/29/23, *supra* note 19, at 19, ¶ 73.

24. See, e.g., Mythli Sampathkumar, *Canada to add third gender option to next census*, THE INDEP. (May 16, 2018), <https://www.independent.co.uk/news/world/americas/canada-third-gender-census-lgbtq-rights-spectrum-identity-statistics-a8355031.html>; see also Mattha Busby, *Canada introduces gender-neutral 'X' option on passports: LGBT groups welcome change as positive step for rights of non-binary, intersex and transgender people*, THE GUARDIAN (Aug. 31, 2017), <https://www.theguardian.com/world/2017/aug/31/canada-introduces-gender-neutral-x-option-on-passports>.

25. See, e.g., Sofia Lotto Persio, *Chile approves new gender identity law in 'great victory for trans people'*, PINKNEWS (Sept. 13, 2018), <https://www.pinknews.co.uk/2018/09/13/chile-gender-identity-law-trans-people/>.

26. See, e.g., Emine Saner, *Europe's terrible trans rights record: will Denmark's new law spark change?*, THE GUARDIAN (Sept. 1, 2014), <https://www.theguardian.com/society/shortcuts/2014/sep/01/europe-terrible-trans-rights-record-denmark-new-law>.

27. See Nat'l Legal Servs. Auth. v. Union of India, (2014) 5 SCC 438 (India); see also Mark E. Wojcik, *Male. Female. Other. India Requires Legal Recognition of a Third Gender*, ABA (Nov. 8, 2014), https://www.americanbar.org/groups/international_law/publications/international_law_news/2014/fall/male_female_other_india_requires_legal_recognition_a_third_gender/.

28. See, e.g., Michael Bochenek and Kyle Knight, *Nepal's Third Gender and the Recognition of Gender Identity*, JURIST (Apr. 23, 2012), <https://www.jurist.org/commentary/2012/04/bochenek-knight-gender/>; A/HRC/29/23, *supra* note 19, at 19, ¶ 73.

29. Sabrina Barr, *Netherlands Issues Gender Neutral Passport for First Time in its History*, THE INDEP. (Oct. 19, 2018), <https://www.independent.co.uk/travel/netherlands-gender-neutral-passport-sex-dutch-leonne-zeegers-a8592091.html>.

30. *New Zealand adopts gender marker for non-binary gendered people!*, INTERSEX CAMPAIGN FOR EQUALITY (July 18, 2015), <https://www.intersexequality.com/new-zealand-adopts-gender-marker-for-non-binary-gendered-people>; A/HRC/29/23, *supra* note 19, at 19, ¶ 73.

31. Louisa Wright, *Portugal's parliament approves new gender identity bill*, DEUTSCHE WELLE (July 13, 2018), <https://www.dw.com/en/portugals-parliament-approves-new-gender-identity-bill/a-44655418>. (“From the age of 16, Portuguese citizens will be able to choose their gender without a ‘gender disruption’ diagnosis. The bill also prohibits surgical procedures on inter-sex babies, so they can choose their gender later.”).

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binary third gender (neither male nor female). For example, these jurisdictions may issue gender-neutral birth certificates, passports, and other official documents.³³ Advances were made in the United States, specifically in California, Illinois, and Oregon, in recognizing intersexuality and simplifying one's ability to change his or her gender marker on birth certificates and other documents.³⁴

In *Zzyym v. Pompeo*,³⁵ the federal district court in Colorado ordered the U.S. Department of State to issue a passport to Dana Alix Zzyym, an intersex individual who identified as neither male nor female. Dana was otherwise qualified to receive a passport but was requesting the letter "X" to indicate gender rather than "M" (male) or "F" (female).³⁶ Some other countries and the International Civil Aviation Organization provide for travel documents that use an "X" for gender.³⁷

The State Department refused to issue such a passport.³⁸ The State Department argued that requiring binary gender markers: (1) ensured the accuracy and verifiability of the passport holder's identity; (2) are used to determine a person's eligibility to receive a passport; (3) ensures easy verification of the passport holder's identity in domestic contexts; (4) was necessary because there is no generally-accepted medical consensus on how to define a third sex; and (5) altering the State Department system would be expensive and time-consuming.³⁹ Addressing each of these reasons in its decision, the federal district court found them all to be arbitrary and capricious.⁴⁰ The court found that the denial of Dana's passport exceeded the authority delegated by Congress to the State Department.⁴¹ Recognizing the unreasonable delays that Dana endured in obtaining a passport with an intersex marker, the federal district court enjoined the State Department "from relying upon its binary-only gender marker policy to withhold the requested passport from Dana."⁴²

32. James Besanville, *Trans people in Uruguay can now self-identify their gender, without surgery*, GAY STAR NEWS (Oct. 19, 2018), <https://www.gaystarnews.com/article/uruguay-transgender-rights/#gs.9FRQ3zM>.

33. See, e.g., *Non-binary*, EQUAL RECOGNITION, <http://equalrecognition.scot/non-binary> (last visited Mar. 31, 2019).

34. See 410 Ill. Comp. Stat. 535/1(15); see also 410 Ill. Comp. Stat. 535/17(1)(d); see also Mary Emily O'Hara, *Oregon Becomes First State to Add Third Gender to Driver's Licenses*, NBC NEWS (June 15, 2017), available at <https://www.nbcnews.com/feature/nbc-out/oregon-becomes-first-state-add-third-gender-driver-s-licenses-n772891>; Mary Bowerman, *Female, male or non-binary: California legally recognizes a third gender on identification documents*, USA (Oct. 19, 2017), <https://www.usatoday.com/story/news/nation-now/2017/10/19/female-male-non-binary-california-legally-recognizes-third-gender-identification-documents/779188001/>.

35. See *Zzyym v. Pompeo*, 341 F. Supp. 3d 1248 (D. Colo. 2018).

36. *Id.* at 1251.

37. *Id.* at 1255.

38. *Id.* at 1252–4. Before 1976, U.S. passports did not indicate gender.

39. *Zzyym*, 341 F. Supp. 3d at 1255–56.

40. *Id.* at 1256–59.

41. *Id.* at 1259–60.

42. *Id.* at 1260.

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Despite this ruling, at various points in 2018, the Trump Administration has attempted to erase civil rights for transgender and intersex persons. As of this writing, those attempts have not been successful.⁴³

In November 2018, the Caribbean Court of Justice ruled in *McEwan v. Attorney General of Guyana* that it was unconstitutional for Guyana to make it a criminal offense for a man or woman to appear in a public place while dressed in clothing of the opposite sex for an “improper purpose.”⁴⁴

C. SAME-SEX MARRIAGE

The number of countries recognizing same-sex marriage continues to increase. As of the end of 2018, same-sex marriage is legal in twenty-five countries: Argentina; Australia; Belgium; Brazil; Canada; Colombia; Denmark (including Greenland, an autonomous Danish dependent territory); Finland; France; Germany; Iceland; Ireland; Luxembourg; Malta; the Netherlands; New Zealand; Norway; Portugal; South Africa; Spain; Sweden; the United States; and Uruguay.⁴⁵ Same-sex marriage will also be legal in Austria as of January 1, 2019.⁴⁶

Following a ruling in January 2018 from the Inter-American Court of Human Rights, a same-sex marriage ban was declared unlawful in August 2018 by the Constitutional Chamber of the Supreme Court of Justice of Costa Rica, but the Court delayed the effective date of its ruling until eighteen months after its publication.⁴⁷ The ruling from the Inter-American Court of Human Rights may lead to the legalization of same-sex marriage in up to fifteen other countries of Central and South America. Additionally, an attempt to ban same-sex marriage failed in Romania in 2018 when not enough voters voted in the referendum.⁴⁸

Mexico has recognized same-sex marriages in thirteen of its thirty-one states at the end of 2018, but the Mexican Supreme Court has required all

43. See, e.g., Emma Pettit, *Federal Proposal to Redefine Gender Creates Uncertainty for Colleges*, CHRONICLE OF HIGHER EDUC. (Nov. 2, 2018), <https://www.chronicle.com/article/Federal-Proposal-to-Redefine/244878>.

44. *Mc Ewan v. Guyana*, [2018] CCJ 30 (AJ) (Nov. 12, 2018), available at <http://www.ccj.org/wp-content/uploads/2018/11/MC-EWAN-et-al-v-AG-OF-GUYANA-Copy.pdf> (Guyana).

45. Rex Wockner, *Marriage Equality Around the World*, WOCKNER (Nov. 24, 2018), <https://wockner.blogspot.com>.

46. See, e.g., Harriet Agerholm, *Austria court legalizes same-sex marriage from start of 2019, ruling all existing laws discriminatory*, INDEP. (Dec. 5, 2017), <https://www.independent.co.uk/news/world/europe/austria-same-sex-gay-marriage-legal-constitutional-court-lgbt-rights-start-date-couples-a8092516.html>.

47. See e.g., Laura Alvarado, *Supreme Court in Costa Rica Pronounced Its Decision on Same Sex Marriage*, THE COSTA RICA STAR (Aug. 9, 2018), <https://news.co.cr/constitutional-chamber-in-costa-rica-pronounced-its-decision-on-same-sex-marriage/75068/>.

48. See e.g., Kit Gillet, *Romania Conservatives Wanted Voters to Limit Definition of ‘Family.’ They Failed.*, N.Y. TIMES, (Oct. 7, 2018), <https://www.nytimes.com/2018/10/07/world/europe/romania-referendum-marriage.html>; Joanna Kakissis, *Romanian Referendum To Ban Same-Sex Marriage Fails*, NPR (Oct. 8, 2018), <https://www.npr.org/2018/10/08/655528971/romanian-referendum-that-would-define-marriage-fails>.

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Mexican states to recognize lawful same-sex marriages performed in other Mexican states.⁴⁹ Same-sex couples can seek a writ of *amparo* to have their same-sex marriages recognized in states that do not yet officially recognize same-sex marriage.⁵⁰

Despite the advances for the recognition of same-sex marriage in many countries, other countries define marriage as a union solely between a man and a woman. Constitutions defining marriage as a union of a man and a woman include the constitutions of Belarus,⁵¹ Bolivia,⁵² Bulgaria,⁵³ Burundi,⁵⁴ Honduras,⁵⁵ Hungary,⁵⁶ Latvia,⁵⁷ Lithuania,⁵⁸ Moldova,⁵⁹ Montenegro,⁶⁰ Mozambique,⁶¹ Nicaragua,⁶² Panama,⁶³ Poland,⁶⁴ Rwanda,⁶⁵

49. See Randal C. Archibold & Paulina Villegas, *With Little Fanfare, Mexican Supreme Court Legalizes Same-Sex Marriage*, N.Y. TIMES (June 14, 2015), <https://www.nytimes.com/2015/06/15/world/americas/with-little-fanfare-mexican-supreme-court-effectively-legalizes-same-sex-marriage.html>.

50. See Vincent M. Mallozzi, *A Same-Sex Marriage Under Mexican Law, but Outside Mexico*, N.Y. TIMES (Nov. 28, 2018), <https://www.nytimes.com/2018/11/28/fashion/weddings/a-same-sex-marriage-under-mexican-law-but-outside-mexico.html>.

51. BELARUS CONST. art. 32 (“On reaching the age of consent a woman and a man shall have the right to enter into marriage on a voluntary basis and found a family.”).

52. PLURINATIONAL STATE OF BOLIVIA CONST. art. 63(I) (“The marriage between a man and a woman is formed by legal bond and is based on equality of the rights and duties of the spouses.”).

53. BULGARIA CONST. art. 46(1) (“Matrimony shall be a free union between a man and a woman. Only a civil marriage shall be legal.”).

54. BURUNDI CONST. art. 29 (“Le mariage entre deux personnes de meme sexe est interdit.”).

55. HONDURAS CONST. arts. 112 and 116. Article 112 prohibits the performance or recognition of same-sex marriages in Honduras. HONDURAS CONST. art. 112 (“Marriage and de facto union between persons of the same sex is prohibited. Marriages or de facto unions between persons of the same sex that are celebrated or recognized under the laws of other countries shall not be valid in Honduras.”). Article 116 prohibits adoptions by couples who have a same-sex marriage. HONDURAS CONST. art. 116 (“The giving of children through adoption to persons of the same sex who form marriages or de facto unions is prohibited. The law shall regulate this institution.”).

56. HUNGARY CONST. art. L(1) (“Hungary shall protect the institution of marriage as the union of a man and a woman established by voluntary decision, and the family as the basis of the survival of the nation”).

57. LATVIA CONST. art. 110 (“The State shall protect and support marriage – a union between a man and a woman, the family, the rights of parents and rights of the child.”).

58. LITHUANIA CONST. art. 38 (“Marriage shall be concluded upon the free mutual consent of man and woman.”).

59. MOLDOVA CONST. art. 48(2) (“The family shall be founded on a freely consented marriage between a husband and wife”).

60. MONTENEGRO CONST. art. 71 (“Marriage may be entered into only on the basis of a free consent of a woman and a man”).

61. MOZAMBIQUE CONST. art. 14(1) (“Men and women of full age, without any limitation due to race, colour, ethnic origin, nationality, religion, creed or social or economic status shall have the right to marry and to found a family”). It should be noted that this provision might also be construed to say that men have the right to marry and that women have the right to marry.

62. NICARAGUA CONST. art. 72 (“Marriage and stable de facto unions are protected by the State; they rest on the voluntary agreement between a man and a woman . . .”).

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Serbia,⁶⁶ the Seychelles,⁶⁷ Slovakia,⁶⁸ Somalia,⁶⁹ South Sudan,⁷⁰ Tajikistan,⁷¹ Uganda,⁷² Ukraine,⁷³ and Vietnam.⁷⁴ The constitutions of Peru⁷⁵ and Venezuela⁷⁶ also provide for common law marriage only between a man and a woman.

**D. RELIGIOUS OBJECTIONS TO SAME-SEX MARRIAGE: WEDDING
CAKE BAKERS**

The previous section shows a continuing increase in the number of jurisdictions recognizing marriage equality. As same-sex couples sought to arrange their wedding ceremonies, some found pockets of resistance that denied them either the right to get married or denied products and services for a same-sex wedding. Because these denials of products and services are infrequent, they tend to have extensive news coverage when they do happen. For example, an elected court clerk in Kentucky, Kim Davis, received

63. PANAMA CONST. art. 58 (“The de facto union of persons of different sex with the legal capacity to enter into marriage which is sustained for five consecutive years in conditions of single partnership and stability shall produce the full effects of a civil marriage.”).

64. POLAND CONST. art. 18 (“Marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland.”).

65. RWANDA CONST. art. 26 (“Civil monogamous marriage between a man and a woman is the only recognized [form of marriage].”).

66. SERBIA CONST. art. 62 (“Marriage shall be entered into based on the free consent of man and woman before the state body.”).

67. SEYCHELLES CONST. art. 32 (“1. The State recognizes that the family is the natural and fundamental element of society and the right of everyone to form a family and undertakes to promote the legal, economic, and social protection of the family. 2. The right contained in clause (1) may be subject to such restrictions as may be prescribed by law and necessary in a democratic society including the prevention of marriage between persons of the same sex or persons within certain family degrees.”).

68. SLOVAKIA CONST. art. 41(1) (“Marriage is a unique union between a man and a woman.”).

69. SOMALIA CONST. art. 28(1) (“No marriage shall be legal without the free consent of both the man and the woman . . .”).

70. SOUTH SUDAN CONST. art. 15 (“Every person of marriageable age shall have the right to marry a person of the opposite sex . . .”).

71. TAJIKISTAN CONST. art. 33 (“Men and women who have reached the marital age have the right to freely enter into a marriage.”).

72. UGANDA CONST. art. 31(2a) (“Marriage between persons of the same sex is prohibited.”).

73. UKRAINE CONST. art. 51 (“Marriage is based on the free consent of a woman and a man”).

74. VIETNAM CONST. art. 36(1) (“Male and female have the right to marry and divorce. Marriage shall conform to the principles of free consent, progressive union, monogamy and equality between husband and wife, and mutual respect.”).

75. PERU CONST. art. 5 (“The stable union between a man and a woman, free of any impediment to matrimony, who establishes a common-law marriage, creates community property subject to a marital assets regime, where applicable.”).

76. VENEZUELA CONST. art. 77 (“Marriage, which is based on free consent and absolute equality of rights and obligations of the spouses, is protected. A stable de facto union between a man and a woman which meets the requirements established by law shall have the same effects as marriage.”).

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extensive publicity in 2015 when she was jailed after refusing to issue marriage licenses to same-sex couples despite federal court orders to do so.⁷⁷ In 2018, she was voted out of office and replaced by a man to whom she had denied a marriage license.⁷⁸

Two court decisions in 2018 considered whether bakers could refuse to create cakes for same-sex weddings or with political messages supporting or opposing marriage equality. The Supreme Court of the United States and the Supreme Court of the United Kingdom each issued decisions on wedding cakes in 2018.⁷⁹

1. *United States*

In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,⁸⁰ the U.S. Supreme Court reviewed a determination by the Colorado Civil Rights Commission that a Christian baker had violated the state anti-discrimination law by refusing to make a wedding cake for a same-sex couple in 2012. Because same-sex marriage was not legal in Colorado in 2012, the couple was going to marry legally in Massachusetts and have a celebration back in Colorado.⁸¹ The baker refused, stating that he would not “create wedding cakes for same-sex weddings because of his religious opposition to same-sex marriage and because Colorado (at that time) did not recognize same-sex marriages.”⁸² The Colorado Civil Rights Commission found the baker had violated the state anti-discrimination law that prohibits discrimination based on sexual orientation in a “place of business engaged in any sales to the public and any place offering services . . . to the public.”⁸³ The Colorado state courts affirmed the Commission’s ruling and its enforcement order.⁸⁴

77. Liam Stack, *Jailed Kentucky Clerk Starts Federal Appeal*, NEW YORK TIMES (Sept. 6, 2015), <https://www.nytimes.com/2015/09/07/us/jailed-kentucky-clerk-starts-federal-appeal.html>.

78. See, e.g., Juliana Rose Pignataro, *Kim Davis Voted Out As Kentucky County Clerk 3 Years After Being Jailed for Refusing to Issue Same-Sex Marriage Licenses*, NEWSWEEK, Nov. 6, 2018, <https://www.newsweek.com/kim-davis-voted-out-kentucky-county-clerk-3-years-after-being-jailed-refusing-1204806>.

79. Catherine Pepinster, *Two Cakes, Two Courts, Two Countries: Same Result*, NCR (Oct. 15, 2018), <https://www.ncronline.org/news/politics/two-cakes-two-courts-two-countries-same-result>.

80. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S.Ct. 1719, 1720 (2018).

81. *Id.* at 1724.

82. *Id.* at 1745. A concurring opinion by Justice Thomas stated that the baker “also refuses to bake cakes containing alcohol, cakes with racist or homophobic messages, cakes criticizing God, and cakes celebrating Halloween — even though Halloween is one of the most lucrative seasons for bakeries

83. *Id.* at 1725.

84. *Id.* at 1723.

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In a 7-2 vote, the U.S. Supreme Court found that the baker had not received a fair hearing before the Commission.⁸⁵ The Court cited two reasons.

First, the Court ruled that the Commission had not treated the baker's religious defense respectfully.⁸⁶ The baker had argued that forcing him to create a wedding cake for a same-sex couple would violate the Free Speech and Free Exercise of Religion Clauses of the First Amendment.⁸⁷ The Court found "hostility" at two public hearings where the Commissioners rejected these defenses and appeared to endorse "the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, implying that religious beliefs and persons are less than fully welcome in Colorado's business community."⁸⁸ The Court found that certain statements made showed "lack of due consideration for [the baker's] free exercise rights"⁸⁹ At one hearing, for example, a commissioner stated "we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to — to use their religion to hurt others."⁹⁰ The majority decision stated that the statement "disparage[d] his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical — something insubstantial and even insincere."⁹¹

Second, the Court found discriminatory treatment of the Christian baker as compared to three other cases where the Commission dismissed cases against other bakers who refused to bake cakes with messages opposing same-sex marriage. These dismissals occurred three months after the Administrative Law Judge in Colorado ruled in favor of the same-sex couple.⁹² The three cases stemmed from three Colorado bakeries that

85. *Id.* at 1719. (Justice Kennedy authored the majority opinion. Justice Kagan wrote a concurring opinion in which Justice Breyer joined. Justice Gorsuch wrote a concurring opinion in which Justice Alito joined. Justice Thomas wrote a concurring opinion in which Justice Gorsuch joined. Justices Ginsburg and Sotomayor dissented.)

86. *Id.* at 1729.

87. *Id.* at 1728.

88. *Id.* at 1729.

89. *Masterpiece Cakeshop*, 138 S. Ct. at 1729.

90. *Id.*

91. *Id.* (The majority decision also stated: "The commissioner even went so far as to compare Phillips' invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. This sentiment is inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado's antidiscrimination law — a law that protects against discrimination on the basis of religion as well as sexual orientation.") Although the Supreme Court described these references as "inappropriate," it did not disprove that religious beliefs had been invoked to justify slavery, the Holocaust, and other civil rights violations. See, e.g., Bernadette J. Brooten, *Same-gender marriage, slavery, and the Holocaust*, BRANDEIS NOW (June 11, 2018), <http://www.brandeis.edu/now/2018/june/brooten-cake-opinion.html>.

92. *Id.*

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refused to create cakes resembling an open Bible with Biblical verses opposing homosexuality.⁹³

Although the baker won in that case because of perceived hostility before the administrative tribunal, the U.S. Supreme Court's ruling does not grant a license for providers of wedding products and services to deny services to same-sex couples.

First, the majority opinion notes that "[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth" and that "the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights."⁹⁴ And although "religious and philosophical objections are [also] protected," the Supreme Court said "it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law."⁹⁵

Second, the Court stated that although the anti-discrimination law could not compel clergy to perform a same-sex wedding in violation of their religious beliefs (an exception "that gay persons could recognize and accept without serious diminishment of their own dignity and worth"), that exception is limited.⁹⁶ "If that exception were not confined," said the Court, "then a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations."⁹⁷

And third, because same-sex marriages are now legal throughout the United States following the U.S. Supreme Court's decisions in *Windsor*⁹⁸ and *Obergefell*,⁹⁹ it is no longer a valid argument that the message promotes an unlawful activity.

In finding that the Commission exhibited animus against the Christian baker by later dismissing three other cases against bakers who refused to create cakes with messages opposing same-sex marriage, the U.S. Supreme Court majority decision ignored the fact that the wedding cake was to celebrate a wedding while the other cakes sought purely political messages about same-sex marriage.¹⁰⁰ The distinction was recognized, however, in a case decided by the Supreme Court of the United Kingdom.¹⁰¹

93. *Masterpiece Cakeshop*, 138 S. Ct. at 1749 (Ginsburg, J., dissenting).

94. *Id.*

95. *Id.* at 1727.

96. *Id.*

97. *Id.*

98. *United States v. Windsor*, 570 U.S. 744 (2013).

99. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

100. The dissenting opinion did not overlook this distinction. See *Masterpiece Cakeshop*, 138 S.Ct. at 1749 (Ginsburg, J., dissenting).

101. See *Lee v. Ashers Baking Company*, [2018] UKSC 49.

2. *United Kingdom*

In *Lee v. Asbers Baking Company, Ltd.*,¹⁰² the Supreme Court of the United Kingdom ruled that a bakery in Northern Ireland could not be compelled to create a cake supporting same-sex marriage in violation of the baker's religious beliefs. The bakery had been asked by a gay rights advocate to supply a cake not for a same-sex wedding, but rather a cake iced with the message "Support Gay Marriage" and a colored picture of the Muppet characters Bert and Ernie.¹⁰³ The bakery initially took the order but later refunded the man's money "because they were a Christian business and could not print the slogan requested."¹⁰⁴

The customer complained to the Equality Commission of Northern Ireland, which supported his claim for direct and indirect discrimination based on sexual orientation, religious belief, and political opinion.¹⁰⁵ A district court found that the refusal to fulfill the order was direct discrimination on all three grounds and awarded the customer damages of £500.¹⁰⁶ The appellate court dismissed the bakery's appeal, holding that the refusal to make the cake "was a case of associative direct discrimination on grounds of sexual orientation" without deciding whether it was also political and religious discrimination against the customer.¹⁰⁷ In effect, the district court found that it was enough that the bakery discriminated against the customer on the basis of his actual or perceived sexual orientation.¹⁰⁸ The case was further appealed to the Supreme Court of the United Kingdom, which reversed and found no discrimination based on sexual orientation.¹⁰⁹

The U.K. Supreme Court found that the bakery refused to fulfill the order not because of the customer's sexual orientation, but because of the message on the cake.¹¹⁰ As stated by Lady Hale (the President of the U.K. Supreme Court), "[t]he objection was to the message, not the messenger."¹¹¹ She noted that people of all sexual orientations "can and do support gay marriage" and that "[s]upport for gay marriage is not a proxy for any particular sexual orientation."¹¹² The bakery would have refused the order because of the message, no matter who had placed the order.¹¹³

The U.K. Supreme Court noted that the U.S. Supreme Court had issued its decision in the *Masterpiece Cakeshop* after the U.K. Supreme Court had

102. *Id.*

103. *Id.* at 843.

104. *Id.* at 848.

105. *Id.*

106. *Lee*, [2018] UKSC 49 at 848.

107. *Id.*

108. *Id.* at 855.

109. *Id.* at 843.

110. *Id.* at 844.

111. *Lee*, [2018] UKSC 49 at 849.

112. *Id.* at 850.

113. *Id.*

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heard oral argument but before it made its own ruling.¹¹⁴ Stating simply that “[t]he facts are not the same,” the U.K. Supreme Court wrote that in the *Masterpiece Cakeshop* case: “a Christian baker refused to create a wedding cake for a gay couple because of his opposition to same sex marriage. There is nothing in the reported facts to suggest that the couple wanted a particular message or decoration on their cake.”¹¹⁵

The U.K. Supreme Court wrote that the U.S. Supreme Court had recognized that businesses could not generally refuse to supply products and services for gay weddings, but that the baker in this case “saw creating a wedding cake as an expressive statement involving his First Amendment rights.”¹¹⁶

“The important message from the *Masterpiece Bakery* case,” wrote the U.K. Supreme Court, is “a clear distinction between refusing to produce a cake conveying a particular message, for any customer who wants such a cake, and refusing to produce a cake for the particular customer who wants it because of that customer’s characteristics.”¹¹⁷ Because the bakery’s objection was to the message rather than the messenger, there was no discrimination based on the sexual orientation of the customer.¹¹⁸ Under this reasoning, the Court may have reached a different result if a wedding cake was denied to a same-sex couple because they were a same-sex couple.

E. CIVIL UNIONS AND OTHER FORMS OF LEGAL RECOGNITION OF
SAME-SEX RELATIONSHIPS FALLING SHORT OF MARRIAGE
EQUALITY

Some jurisdictions that do not yet recognize same-sex marriage may nonetheless provide for civil unions or similar forms of legal recognition such as registered partnerships, domestic partnerships, reciprocal beneficiary relationships, civil solidarity pacts, and similar relationships.¹¹⁹ Some of these legal creations falling short of marriage may be open to both same-sex and opposite-sex couples,¹²⁰ although some jurisdictions may limit civil unions to same-sex couples.

The lack of legal recognition for same-sex couples can result in mistreatment by state actors, private actors (including health care-providers),

114. *Id.* at 858.

115. *Id.*

116. Lee, [2018] UKSC 49 at 858.

117. *Id.* at 858–59.

118. *Id.* at 849.

119. See e.g., *Italy one of the worst countries in Western Europe for gay rights: report*, THE LOCAL (May 17, 2017), <https://www.thelocal.it/20170517/italy-one-of-the-worst-countries-in-western-europe-for-gay-rights-report>.

120. See e.g., 750 ILL. COMP. STAT. 75/10 (2011). (defining civil unions to include “a legal relationship between 2 persons, of either the same or opposite sex . . .”). Illinois recognizes same-sex marriage but also continues to offer civil unions.

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and insurance companies.¹²¹ Countries that do not protect same-sex couples may see political and legal challenges to provide legal recognition of relationships.

In 2015, the European Court of Human Rights (“ECHR”) ruled in favor of three same-sex couples in *Oliari and Others v. Italy*,¹²² where it held that the Italian Government failed to fulfill its “positive obligation to ensure” that same-sex couples in Italy “have available a specific legal framework providing for the recognition and protection of their same-sex unions.”¹²³ The ECHR held that Italy’s failure to protect same-sex couples violated Article 8 of the European Convention on Human Rights.¹²⁴ In the same year, the Italian Court of Cassation ruled that the Italian Constitution did not require Italy to recognize same-sex marriages as such, but the court also stated that same-sex couples in Italy had a right to some form of legal recognition for their relationships.¹²⁵

After a provision allowing stepchild adoption was removed, legislation allowing same-sex civil unions was passed by the Italian parliament in 2016, signed by the President Sergio Mattarella, and published in the Official Gazette (*Gazzetta Ufficiale*) on May 21, 2016.¹²⁶ After the Ministry of the Interior published implementing regulations in July 2016,¹²⁷ the first civil unions could be performed in Italy as of July 29, 2016.

The Italian Civil Union Law creates civil unions as a “specific social formation” (*specifica formazione sociale*) in the spirit of Articles Two and Three of the Italian Constitution.¹²⁸ Article Two of the Italian Constitution

121. Shabab Mirza and Caitlin Rooney, *Discrimination Prevents LGBTQ People from Accessing Health Care*, CENTER FOR AMERICAN PROGRESS (Jan. 18, 2018), <https://www.americanprogress.org/issues/lgbt/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care/>.

122. Case of *Oliari and Others v. Italy*, 2015-65 Eur. Ct. H.R. 26 (2015).

123. *Id.* at ¶¶ 110, 185; see also Jim Yardley, *Italy Divided Over Allowing Civil Unions: An Outlier in the West Moves on Gay Rights*, N.Y. TIMES (Jan. 25, 2016), <https://www.nytimes.com/2016/01/25/world/europe/italy-divided-over-effort-to-legalize-civil-unions-for-gays.html>.

124. EURO. CONV. HUM. RTS. art. 8. Article 8 on the “Right to Respect for Private and Family Life” provides that (1) “Everyone has the right to respect for his private and family life, his home and his correspondence,” and (2) “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.”

125. Michael Lavers, *Italy High Court Rejects Same-Sex Marriage*, WASH. BLADE (Feb. 12, 2015), <http://www.washingtonblade.com/2015/02/12/italy-high-court-rejects-sex-marriage/>.

126. *Italy one of the worst countries in Western Europe for gay rights: report*, THE LOCAL (May 17, 2017), <https://www.thelocal.it/20170517/italy-one-of-the-worst-countries-in-western-europe-for-gay-rights-report>.

127. *Decreto del Presidente del Consiglio dei Ministri recante disposizioni transitorie per la tenuta dei registri nell'archivio dello stato civile, da emanare ai sensi dell'articolo 1, comma 34, della legge n. 76 del 2016*, Nr. 22/A2016-001775 (2016), D.P.C.M. 23/07/2016, N. 144, G.U. 28/07/2016.

128. Michele Capocchi, *On civil unions and de facto couples*, FLORENTINE (May 26, 2016), <http://www.theflorentine.net/lifestyle/2016/05/civil-unions-de-facto-couples/>.

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provides that Italy will recognize “inviolable rights of man, for the individual, and for social groups where personality is expressed”¹²⁹ Article Three affirms that “[a]ll citizens have equal social dignity and are equal before the law, without distinction as to sex, race, language, religion, political opinions, or personal or social condition.”¹³⁰ By citing only Articles Two and Three when creating the “specific social formation” of civil unions, the legislature rejected any argument that civil unions should be equated to traditional matrimony. The legislation did not cite article Twenty-Nine of the Italian Constitution, in which Italy “recognizes the rights of the family as a natural association founded on matrimony.”¹³¹ By not citing Article Twenty-Nine in the Civil Union Law, civil unions in Italy have a lower legal status than marriage. Partners in a civil union are unable to adopt children, even the stepchildren of one of the partners.¹³² Additionally, partners in a civil union expressly have no duty of fidelity, whereas infidelity is otherwise grounds for divorce in Italy.¹³³

Although the Italian Civil Union Law entered into effect in 2016, as of 2018 there have been relatively few same-sex couples taking advantage of its provisions.¹³⁴ First, there is anecdotal evidence that even long-term same-sex couples are not taking advantage of the civil union law because it provides no tangible benefits of importance that they cannot otherwise arrange by private property transactions (wills, joint tenancy, and trusts).¹³⁵ Second, same-sex couples reject the lesser dignity of a civil union as compared to marriage. When traveling outside of Italy, partners in a civil union may be denied certain rights that they would otherwise have if married.¹³⁶ For example, if one partner in a civil union is injured and hospitalized while abroad, the other partner may be denied visitation rights in that hospital.¹³⁷ And third, many Italian couples prefer getting married in other (usually European) jurisdictions where they can have full marriage

129. ITALY CONST. art. 2.

130. ITALY CONST. art. 3. Article 3 also provides that: “It is the duty of the Republic to remove those obstacles of an economic and social nature that, by in fact limiting the freedom and equality of citizens, impede the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country.”

131. ITALY CONST. art. 29.

132. *Why Not Everyone Is Happy With Italy’s Civil Unions Bill*, THE LOCAL IT (May 12, 2016), <https://www.thelocal.it/20160512/why-not-everyone-is-happy-with-italys-civil-unions-bill>.

133. *Id.*

134. See *Total number of same-sex civil partnerships in capitals of Italian region as of January 2017*, STATISTA, <https://www.statista.com/statistics/742552/total-number-of-same-sex-civil-unions-in-italy/>.

135. *Differences Between Civil Unions and Marriage*, GAY FRIENDLY ITALY (Mar. 9, 2019), <https://www.gayfriendlyitaly.com/differences-between-civil-unions-and-marriage>.

136. *Id.*

137. See e.g., Garrett Riou, *Hospital Visitation and Medical Decision Making for Same-Sex Couples*, CENTER FOR AMERICAN PROGRESS (Apr. 15, 2014), <https://www.americanprogress.org/issues/lgbt/news/2014/04/15/88015/hospital-visitation-and-medical-decision-making-for-same-sex-couples/>.

rights.¹³⁸ Although Italy may recognize the foreign same-sex marriage as a civil union under Italian law, couples prefer the full rights of marriage when traveling to other countries that will recognize their marriage as a marriage.¹³⁹

II. Sodomy Laws

States that criminalize sexual acts between consenting adults violate international human rights law because “these laws, by their mere existence, violate the rights to privacy and non-discrimination.”¹⁴⁰ Although the U.N. Human Rights Committee and other human rights mechanisms have urged states to repeal sodomy laws since the 1994 landmark decision in *Toonen v. Australia*, many states still have laws that criminalize and harass people on the basis of their sexual orientation and gender expression.¹⁴¹ *Countries that may punish consensual acts of homosexuality with the death penalty include Brunei, the Islamic Republic of Iran, Mauritania, Saudi Arabia, Sudan, Yemen, and parts of Nigeria and Somalia.*¹⁴²

In 2013, the *India Supreme Court reversed a lower court ruling that had found India’s sodomy law to be unconstitutional.*¹⁴³ In 2018, the Indian Supreme Court overruled that 2013 decision and declared the sodomy law in Section 377 of the Indian Penal Code to be unconstitutional under the Indian Constitution.¹⁴⁴ In *Johar v. Union of India*,¹⁴⁵ the Supreme Court of India decriminalized all consensual sex among adults in private, including consensual sex between persons of the same gender.¹⁴⁶ Some parts of Indian Penal Code Section 377 relating to sex with minors, non-consensual sexual acts (such as rape), and bestiality remain in force.¹⁴⁷ The declaration that Section 377 was unconstitutional as to consenting adults had been expected after the Indian Supreme Court’s ruling in *Puttaswamy v. Union of India*,¹⁴⁸ in which a nine-judge bench recognized a fundamental right of privacy in favor of all persons.

138. See e.g., *The Freedom to Marry Internationally*, FREEDOM TO MARRY (Mar. 26, 2019), <http://www.freedomtomarry.org/pages/the-freedom-to-marry-internationally>.

139. As a legal entity peculiar to Italian law, an Italian civil union may (or may not) enjoy any legal recognition in other countries.

140. Rep. of the Office of the United Nations High Commissioner for Human Rights on the operations of the Voluntary Fund for Financial and Technical Assistance in the Implementation of the Universal Periodic Review, Human Rights Council, 29th session, ¶ 43, U.N. Doc. A/HRC/29/23 at 12 (Apr. 2, 2015).

141. *Id.* at 12–13, ¶¶ 43–44.

142. *Id.* at 13, ¶ 46.

143. Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1 (India).

144. Michael Safi, *Campaigners celebrate as India decriminalises homosexuality*, THE GUARDIAN (Sept. 6, 2018), <https://www.theguardian.com/world/2018/sep/06/indian-supreme-court-decriminalises-homosexuality>.

145. *Johar v. Union of India*, W. P. (CrI.) No. 76 of 2016 (Supreme Court of India).

146. *Id.* at 164–65, ¶¶ 253(xv), (xvi) (Opinion of Chief Justice Dipak Misra).

147. See *id.* at 165, ¶ 253(xvii).

148. *Puttaswamy v. Union of India*, (2017) 10 SCC 1 (India).

Women's Interest Network

DANA KATZ, ED., HANNAH ALDERKS, MARIE ELENA ANGULO,
MELODIE ARIAN, MICHELA COCCHI, LAUREN GABUZZI,
ANGELA M. GALLERIZZO, KRISTINA HOLM, JULIANNE JAQUITH,
DAWN YAMANE HEWETT, HANNAH JUNG, MYRIAM KHEDAIR,
CHRISTINE KORPER, MOLLY O'CASEY, SUSAN POLIZZOTTO,
KAREN SHERMAN, SANDHYA TANEJA, LEANNE R. E. TORRES*

This article reviews significant legal and political developments impacting women internationally in 2018. Highlighted areas of interest include: legal empowerment, gender-based and sexual violence, sexual harassment and assault, human trafficking, peace and security measures for women, and international courts and tribunals.

I. Legal Empowerment

2018 ushered in worldwide protests demanding equal political representation, pay, and rights for women in the second Women's March.¹ Women's movements such as #MeToo have led to hundreds of prominent figures across industries being accused of sexual harassment and abuse.² International and national-level agitation encouraged many governments to

* Dana Katz, a lawyer admitted in Connecticut and Texas, served as editor and a contributing author. Hannah Alderks is a J.D. Candidate at The John Marshall Law School. Marie Elena Angulo is an attorney with Jones Day in Miami, Florida. Melodie Arian is a law clerk in the Southern District of Florida. Michela Cocchi is an attorney with Studio Legale in Bologna. Lauren Gabuzzi is a Documentary Editor in New York. Angela M. Gallerizzo is a lawyer registered in New York, New Jersey, and Washington, D.C. Dawn Yamane Hewett is Of Counsel with Quinn Emanuel Urquhart & Sullivan, LLP in Washington, D.C. Kristina J. Holm is a commercial litigator with Perkins Coie in Portland, Oregon. Julianne Jaquith is an associate with Quinn Emanuel Urquhart & Sullivan, LLP in Washington, D.C. Hannah Jung is a J.D. Candidate at Cornell Law School. Myriam Khedair is an L.L.M. Candidate at Columbia Law School. Christine Korper is an Associate at Tetzlaff Law Offices in Chicago, Illinois. Molly O'Casey is an associate with KPMG's Trade & Customs Practice. Susan Polizzotto, Commander, U.S. Coast Guard (Ret.), practices and consults in immigration and maritime law matters. Karen Sherman, a New York immigration lawyer, works on *pro bono* projects in Connecticut. Sandhya Taneja is a law student at the Thomas R. Kline School of Law. Leanne R. E. Torres is an Associate Attorney at the Law Offices of Robert W. Snyder in California. The views expressed are attributed to the authors individually and do not represent the views of their respective organizations or workplaces.

1. *Women's March 2018: Protesters Take to the Streets for the Second Straight Year*, N.Y. TIMES (Jan. 20, 2018), <https://www.nytimes.com/2018/01/20/us/womens-march.html>.

2. Riley Griffin et al., *#MeToo: One Year Later*, BLOOMBERG (Oct. 5, 2018), <https://www.bloomberg.com/graphics/2018-me-too-anniversary/>.

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commit to gender equality through national and foreign policy creation and funding.³

A. WOMEN'S REPRESENTATION IN POLITICAL LEADERSHIP

Although gender parity in national parliaments remains a distant goal, progress continued in 2018 with women holding twenty-four percent of seats, globally.⁴ Women also gained political representation in upper houses.⁵ Additionally, five countries welcomed their first-ever female heads of state: Barbados,⁶ Ethiopia,⁷ Trinidad and Tobago,⁸ Vietnam,⁹ and Romania.¹⁰ The U.S. saw record-breaking midterm elections, more than doubling women's representation in Congress.¹¹ Next year, the U.S. House of Representatives will hold the most women in its history.¹² Furthermore, several countries, including Ethiopia,¹³ Colombia,¹⁴ and Canada, gained gender parity in ministerial positions.¹⁵

3. Int'l Dev. Law Org. [IDLO], *Justice for Women: Launch of the High-level Group Report* (Mar. 24, 2019), <https://www.idlo.int/news/events/high-level-group-justice-women>.

4. Inter-Parliamentary Union [IPU], *Women in National Parliaments: Situation as of 1st January 2019* (Jan. 1, 2019), <http://archive.ipu.org/wmn-e/world.htm>.

5. *Id.*

6. Kenya Downs, *In Historic Landslide, Barbados Elects First Female Prime Minister*, HUFFINGTON POST (May 25, 2018), https://www.huffingtonpost.com/entry/mia-victory-barbados-elects-first-female-prime-minister-amor-mottley_us_5b0832eae4b0802d69cae087.

7. Bekele Atoma, *Sable-Work Zewde Becomes Ethiopia's First Female President*, BBC NEWS (Oct. 25, 2018), <https://www.bbc.com/news/world-africa-45976620>.

8. Ismail Akwei, *Trinidad and Tobago's First Female President Sworn into Office*, FACE2FACE AFRICA (Mar. 20, 2018), <https://face2faceafrica.com/article/trinidad-tobagos-first-female-president-sworn-office>.

9. Jared Ferrie, *Vietnam has First Female President, but Activists are Unimpressed*, REUTERS (Sept. 24, 2018), <https://www.reuters.com/article/us-vietnam-politics-women/vietnam-has-first-female-president-but-activists-are-unimpressed-idUSKCN1M41GG>.

10. *Romania to Have First Female Prime Minister, Viorica Dancila*, BBC NEWS (Jan. 17, 2018), <https://www.bbc.com/news/world-europe-42723492>.

11. Denise Lu & Keith Collins, *'Year of the Woman' Indeed: Record Gains in the House*, N.Y. TIMES (last updated Nov. 16, 2018), <https://www.nytimes.com/interactive/2018/11/09/us/women-elected-midterm-elections.html>.

12. *Id.*

13. Paul Schemm, *In Ethiopian Leader's New Cabinet, Half the Ministers are Women*, WASH. POST (Oct. 16, 2018), https://www.washingtonpost.com/world/africa/ethiopias-reformist-leader-inaugurates-new-cabinet-half-of-the-ministers-women/2018/10/16/b5002e7a-d127-11e8-b2d2-f397227b43f0_story.html?noredirect=on&utm_term=.4cbef556849c.

14. Anastasia Moloney, *Half of Colombia's New Cabinet will be Women*, WORLD ECON. F. (July 30, 2018), <https://www.weforum.org/agenda/2018/07/colombia-shatters-glass-ceiling-with-gender-equal-cabinet>.

15. *Quick Take: Women in Government*, CATALYST: WORKPLACES THAT WORK FOR WOMEN (Feb. 1, 2019), <https://www.catalyst.org/research/women-in-government/>.

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B. LEGAL EQUALITY IN CONSTITUTIONS AND LAWS

While the United Nations' (U.N.) 2030 Agenda for Sustainable Development has been approved by the U.N.'s 193 Member States, only ten Member States recognize gender equality as an issue across all seventeen of the Sustainable Development Goals (SDGs).¹⁶ The SDGs address a wide range of issues including the eradication of poverty, reduction of inequalities, end of conflict, sustainable peace, and climate change, with SDG 5 focusing specifically on gender equality.¹⁷ No country has achieved gender equality; it is estimated that it will take 217 years to achieve global economic gender equality assuming progress continues at its current rate.¹⁸

1. Right to Economic and Social Equality

Globally, men are paid significantly more than women for equal work.¹⁹ In 2018, leaders from governments, civil society, trade unions, and private sector companies worldwide pledged to close the twenty-percent-less-than-men gender pay gap by 2030 at the Equal Pay International Coalition held during the U.N. General Assembly.²⁰ At the Coalition, the President of Iceland committed to implement the Law on the Equal Pay Certification, a first-of-its-kind legislation.²¹

Socially, while Saudi Arabia began issuing driver's licenses to women in June, it also arrested and continued to detain feminist activists who previously protested for a woman's right to drive.²² Additionally, Saudi

16. See U.N. Entity for Gender Equal. and the Empowerment of Women [U.N. Women], *Turning Promises into Action: Gender Equality in the 2030 Agenda for Sustainable Development*, at 24, 38 (2018), <http://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2018/sdg-report-gender-equality-in-the-2030-agenda-for-sustainable-development-2018-en.pdf?la=en&vs=4332>.

17. See *id.* at 24, 27.

18. *Press Release: UN Women convenes global business and philanthropic leaders to help accelerate SDG action through women's empowerment*, U.N. WOMEN (Sept. 27, 2018), <http://www.unwomen.org/en/news/stories/2018/9/press-release-un-women-convenes-global-business-and-philanthropic-leaders-for-sdg-5-forum>; *The Global Gender Gap Report 2017*, WORLD ECON. F., 25 (2017), http://www3.weforum.org/docs/WEF_GGGR_2017.pdf.

19. See *Press release: Global leaders and companies pledge to reduce the gender pay gap by 2030*, U.N. WOMEN (Sept. 26, 2018), <http://www.unwomen.org/en/news/stories/2018/9/press-release-equal-pay-international-coalition-pledging-event>.

20. *Id.*

21. *Id.*

22. See Margaret Coker, *Saudi Women Can Drive, but Here's the Real Roadblock*, N.Y. TIMES (June 22, 2018), <https://www.nytimes.com/2018/06/22/world/middleeast/saudi-arabia-women-driving.html>; Samah Hadid, *Saudi Arabia: Outrageous Ongoing Detention of Women's Rights Defenders Reaches 100 Days*, AMNESTY INT'L (Aug. 23, 2018), <https://www.amnesty.org/en/latest/news/2018/08/saudi-arabia-outrageous-ongoing-detention-of-women-rights-defenders-reaches-100-days/>; Lynn Maalouf, *Saudi Arabia: Reports of Torture and Sexual Harassment of Detained Activists*, AMNESTY INT'L (Nov. 20, 2018), <https://www.amnesty.org/en/latest/news/2018/11/saudi-arabia-reports-of-torture-and-sexual-harassment-of-detained-activists/>.

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Arabia continued its restrictive guardianship system, through which women are dependents of male relatives.²³

Over ten million individuals are considered stateless.²⁴ U.N. Women, the U.N. High Commissioner for Refugees (UNHCR), and the U.N. Children's Fund (UNICEF) called for a reduction in gender inequality in nationality laws, which, in part, drives statelessness.²⁵ In over fifty countries, women are denied equal rights with respect to their own nationality.²⁶ Additionally, nationality laws in twenty-five countries do not allow women to confer their nationality to their children under the same conditions as men.²⁷

2. *Marriage Rights*

Marriage inequalities persist internationally.²⁸ Despite U.N. SDGs, some countries still allow girls younger than the age of 18 to marry.²⁹ Senator Sherry Rehman of Pakistan submitted a bill to end child marriage.³⁰ Similarly, the UK Parliament introduced a bill to ban child marriage in England and Wales.³¹

Same-sex marriage remains a topic of debate. Cuba's legislature considered modifying its constitution to recognize same-sex marriage.³² In Taiwan, the battle over same-sex marriage continued despite last year's ruling from the country's highest court in favor of same-sex marriage.³³ The government of Bermuda is appealing last year's Supreme Court decision

23. See Coker, *supra* note 22.

24. See Inst. on Statelessness and Inclusion [ISI], *Statelessness in Numbers 2018: An Overview and Analysis of Global Statistics*, 1 (June 2018), https://www.institutesi.org/ISI_statistics_analysis_2018.pdf.

25. See *Press release: UN Agencies call for stronger action to achieve equal nationality rights for all*, U.N. WOMEN (Mar. 15, 2018), <http://www.unwomen.org/en/news/stories/2018/3/press-release-un-agencies-call-for-stronger-action-to-achieve-equal-nationality-rights-for-all>.

26. See *id.*

27. See *id.*

28. See Lucy Westcott, *Child Marriages, Less Pay: The World for Women is Still Unequal*, NEWSWEEK (Mar. 9, 2015), <https://www.newsweek.com/gender-gaps-persist-most-worlds-countries-312203>.

29. See U.N. Sustainable Dev. Sol. Network [SDSN], Indicators and a Monitoring Framework: Launching a Data Revolution for the SDGs, <http://indicators.report/targets/5-3/> (last visited Apr. 16, 2019).

30. The Child Marriage Restraint (Amendment) Bill, 2014 (withdrawn Jan. 14, 2016) (Pak.), available at http://www.na.gov.pk/uploads/documents/1397730973_450.pdf; see Saroop Ijaz, *Time to End Child Marriage in Pakistan*, HUMAN RIGHTS WATCH (Nov. 9, 2018), <https://www.hrw.org/news/2018/11/09/time-end-child-marriage-pakistan>.

31. See Heather Barr, *Ending Child Marriage in the United Kingdom*, HUMAN RIGHTS WATCH (Sept. 6, 2018), <https://www.hrw.org/news/2018/09/06/ending-child-marriage-united-kingdom>.

32. See *Cuba's Legislature Considers Same-Sex Marriage*, HAVANA TIMES (July 22, 2018), <https://havanatimes.org/?p=136268>.

33. See Catherine Shu, *As Taiwan Prepares to Vote on LGBTQ Issues, a Homophobic Group is Running ads before Kid Videos on YouTube*, TECHCRUNCH (Nov. 22, 2018), <https://techcrunch.com/2018/11/22/as-taiwan-prepares-to-vote-on-lgbtq-issues-a-homophobic-group-is-running-ads-before-kid-videos-on-youtube/>.

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declaring a ban on same-sex marriage unconstitutional.³⁴ The Costa Rica Supreme Court declared a law prohibiting same-sex marriage unconstitutional and gave lawmakers eighteen months to extend marriage rights to same-sex couples.³⁵

3. *Right to Health*

The Human Rights Committee of the U.N. Office of the High Commissioner for Human Rights (OHCHR) called for decriminalizing abortion in its “General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life.”³⁶ It deemed criminalization of abortion inherently in conflict with the right to life.³⁷ The “comment” urges governments to provide legal and safe access to abortion if the woman’s life is in danger, if carrying to term would cause pain and suffering, in cases of rape or incest, or, if the pregnancy is not viable.³⁸ The Human Rights Committee also called on governments not to further restrict abortion rights.³⁹

In Argentina, the Senate rejected a bill to decriminalize abortion until fourteen weeks of pregnancy; under current law, abortion is legal only if a woman’s health is in jeopardy or in the case of rape.⁴⁰ Poland allows abortion only if the woman’s life is in danger, in cases of rape, or due to fetal abnormality; a proposed a bill would remove the last exception.⁴¹ Norway, one of the most liberal countries in Europe, is contemplating tightening its abortion laws.⁴²

.com/2018/11/22/as-taiwan-prepares-to-vote-on-lgbtq-issues-a-homophobic-group-is-running-ads-before-kid-videos-on-youtube/.

34. See Esan Swan, *Bermuda Government Fights against Same-Sex Marriage in Court of Appeal*, CNN (last updated Nov. 8, 2018), <https://www.cnn.com/2018/11/08/world/bermuda-government-same-sex-marriage-appeal/index.html>.

35. See Michael K. Lavers, *Costa Rica Lawmakers Ordered to Legalize Same-Sex Marriage*, WASH. BLADE (Nov. 4, 2018), <https://www.washingtonblade.com/2018/11/14/costa-rica-lawmakers-ordered-to-legalize-same-sex-marriage/>.

36. U.N. Office of the High Comm’r for Human Rights [OHCHR], General comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the right to life, U.N. Doc. CCPR/C/GC/36 (Oct. 30, 2018), https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf.

37. *Id.* at 2.

38. *Id.*

39. *See id.*

40. *See Argentina: Pass Law to Legalize Abortion*, HUMAN RIGHTS WATCH (Aug. 8, 2018), <https://www.hrw.org/news/2018/08/08/argentina-pass-law-legalize-abortion>; *see also* Anthony Faiola & Max Radwin, *Argentina’s Senate Rejects Bill Legalizing Abortion During the first 14 Weeks of a Pregnancy*, WASH. POST (Aug. 9, 2018), https://www.washingtonpost.com/world/the_american_showdown-in-argentina-over-the-broad-legalization-of-abortion/2018/08/08/a07d4c44-9699-11e8-818b-e9b7348cd87d_story.html?utm_term=.4fce3bd4498c.

41. *See Poland Abortion: Protests Against bill Imposing new Limits*, BBC NEWS (Mar. 26, 2018), <https://www.bbc.com/news/world-europe-43514965>.

42. *See* Lisbeth Kirk, *Norway Plays Politics with Abortion Laws*, EUOBSERVER (Oct. 30, 2018), <https://euobserver.com/news/143242>.

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Conversely, Ireland intends to increase abortion rights after a landslide referendum to repeal its Eighth Amendment.⁴³ Previously, a woman and her unborn child had an equal right to life under the Irish Constitution, permitting abortion only if the woman's life was in danger.⁴⁴ As well, under Indonesian law, abortion is illegal except in circumstances such as rape, and it must be carried out within six weeks.⁴⁵ Nevertheless, the High Court of Jambi released a woman convicted under this law even though she had her abortion at seven months.⁴⁶

International efforts to eliminate female genital mutilation/cutting (FGM) have continued, such as with the United Nations' Zero Tolerance Day, and a U.N. call to criminalize FGM.⁴⁷ In Somalia, although no criminal legislation specific to FGM exists,⁴⁸ the Attorney General has announced the first prosecution for FGM following the death of a ten-year-old girl.⁴⁹

In response to the massive defunding of the U.N. Population Fund (UNFPA) and non-governmental health service providers by the expanded U.S. Global Gag Rule of 2017,⁵⁰ the EU donated €2 million to UNFPA to grant access to contraceptives to women in Yemen,⁵¹ and the UK invested £200 million in its new Women's Integrated Sexual Health program to help women in Africa and Asia access contraceptives.⁵²

43. See *Eighth Amendment Repealed as Irish President Signs bill into law*, BBC NEWS (Sept. 18, 2018), <https://www.bbc.com/news/world-europe-45568094>.

44. Constitution of Ireland 1937 amend. 8, <http://www.irishstatutebook.ie/eli/1983/ca/8/enacted/en/html>.

45. See Amnesty Int'l, *Indonesia: Release 15-year-old Rape Survivor Jailed for Abortion*, AI Index ASA 21/8852/2018 (July 31, 2018), <https://www.amnesty.org/download/Documents/ASA2188522018ENGLISH.pdf>.

46. See Kate Lamb, *Indonesia: Rape Victim Wins Release from Abortion Jail Sentence*, GUARDIAN (Aug. 29, 2018), <https://www.theguardian.com/world/2018/aug/29/indonesia-victim-wins-release-from-abortion-jail-sentence>.

47. See U.N. Secretary-General, *Intensifying Global Efforts for the Elimination of Female Genital Mutilation*, ¶ 1, U.N. Doc. A/73/266 (July 22, 2018).

48. See Emma Batha, *Somalia Announces First Prosecution for Female Genital Mutilation*, REUTERS (July 25, 2018), <https://www.reuters.com/article/us-somalia-fgm-prosecution/somalia-announces-first-prosecution-for-female-genital-mutilation-idUSKBN1KF2JE>.

49. See U.N. Population Fund [UNFPA], *Somalia Announces First Prosecution for FGM* (July 31, 2018), <https://somalia.unfpa.org/en/news/somalia-announces-first-prosecution-fgm>.

50. See *Trump's 'Mexico City Policy' or 'Global Gag Rule': Questions and Answers*, HUMAN RIGHTS WATCH (last updated Feb. 8, 2018), <https://www.hrw.org/news/2018/02/14/trumps-mexico-city-policy-or-global-gag-rule>.

51. See *Press Release: European Union supports reproductive health and protection services for women and girls in Yemen with funding to UNFPA*, U.N. POPULATION FUND (Sept. 19, 2018), <https://www.unfpa.org/press/european-union-supports-reproductive-health-and-protection-services-women-and-girls-yemen>.

52. See *Press release: UK announces major investments in future of African youth through education and voluntary family planning*, GOV.UK (Aug. 30, 2018), <https://www.gov.uk/government/news/uk-announces-major-investments-in-future-of-african-youth-through-education-and-voluntary-family-planning>; see also Liz Ford, *UK Gives 'Landmark' £200m to Improve Contraceptive Access in Africa and Asia*, GUARDIAN (Nov. 13, 2018), <https://www.theguardian>

II. Gender-Based and Sexual Violence, Sexual Harassment and Assault

The 2018 Nobel Peace Prize went to Congolese physician Denis Mukwege and Yazidi sexual-slavery survivor and activist Nadia Murad “for their efforts to end the use of sexual violence as a weapon of war and armed conflict.”⁵³ Murad’s attorney, Amal Clooney, said the Prize “sends a message that survivors of sexual violence must not be ignored, and that their abusers must be held to account.”⁵⁴

Gender-based and sexual violence is a “global pandemic” affecting thirty-five percent of women and knows no social, geographic, or economic boundaries;⁵⁵ it includes sexual harassment and assault.⁵⁶ In conflict-heavy regions, violence increases as conflicts worsen—and women and girls pay the heaviest price; women and girls account for seventy-five percent of those displaced by conflict.⁵⁷ In Yemen, considered the world’s worst humanitarian crisis, three million women and girls are at risk of gender-based and sexual violence.⁵⁸

A. SEXUAL HARASSMENT

Though the #MeToo movement began in the United States, it spread throughout the world as #BalanceTonPorc (France),⁵⁹ #QuellaVoltaChe (Italy),⁶⁰ #YoTambien (Spain),⁶¹ and #AnaKaman (Arabic-speaking

.com/global-development/2018/nov/13/uk-gives-landmark-200m-to-improve-contraceptive-access-in-africa-and-asia.

53. *The Nobel Peace Prize 2018*, THE NOBEL PEACE PRIZE (Oct. 5, 2018), <https://www.nobelpeaceprize.org/The-Nobel-Peace-Prize-2018>.

54. *The Latest: Lawyer Clooney Says Client’s Nobel Sends Message*, AP NEWS (Oct. 5, 2018), <https://www.apnews.com/f6d1084cd6e0420f853aab7031be5ab6>.

55. *Gender-Based Violence (Violence Against Women and Girls)*, WORLD BANK (Oct. 5, 2018), <http://www.worldbank.org/en/topic/socialdevelopment/brief/violence-against-women-and-girls>.

56. See Eur. Consult. Ass., *Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Abuse*, Doc. No. 210 (2011).

57. See U.N. Population Fund [UNFPA], *Leaders Demand Protection for Women and Girls Affected by Conflict* (Sept. 28, 2018), <https://www.unfpa.org/news/leaders-demand-protection-women-and-girls-affected-conflict>.

58. *Id.*; see Neha Wadekar, *Women Want to Put Yemen Back Together Again*, FOREIGN POL’Y (Nov. 27, 2018), <https://foreignpolicy.com/2018/11/27/women-want-to-put-yemen-back-together-again/#>.

59. Rachel Donadio, *BalanceTonPorc Is France’s #MeToo*, ATLANTIC (Oct. 18, 2017), <https://www.theatlantic.com/international/archive/2017/10/the-weinstein-scandal-seen-from-france/543315/>.

60. *Id.*

61. Karla Adam & William Booth, *A Year After it Began, has #MeToo Become a Global Movement?*, WASH. POST (Oct. 5, 2018), https://www.washingtonpost.com/world/a-year-after-it-began-has-metoo-become-a-global-movement/2018/10/05/1fc0929e-c71a-11e8-9c0f-2ffaf6d422aa_story.html?utm_term=.23422b4e1d58.

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countries).⁶² These hashtags unified victims, amplified their voices, and empowered them to publicly accuse their abusers and hold them responsible.⁶³ However, in regions like Russia,⁶⁴ sub-Saharan Africa, and China, the impact of the movement has been more modest due to government opposition, cultural sexism, and resistance to perceived “American influence.”⁶⁵

In the U.S., Time’s Up, a legal defense fund administered by the National Women’s Law Center, was formed to help cover costs for victims of sexual harassment or related retaliation in the workplace.⁶⁶ Google, Facebook, and Microsoft announced that they were ending mandatory arbitration for claims of sexual harassment in the workplace, in part because the confidential nature of arbitration silences victims and protects their abusers from scrutiny or repercussions.⁶⁷

1. *Domestic Sexual Harassment Laws*

While sexual harassment awareness has increased, gaps in the law remain.⁶⁸ Several states in the U.S. (Arizona, Maryland, New York, Tennessee, Vermont, and Washington) have passed laws restricting the use of nondisclosure agreements in employment agreements and settlement of sexual harassment claims in the workplace.⁶⁹ Four of these states (Maryland, New York, Vermont, and Washington) also have limited mandatory arbitration for workplace-related claims.⁷⁰

62. *Id.*

63. See *Behind Closed Doors: American Business and #MeToo*, ECONOMIST (Sept. 27, 2018), <https://www.economist.com/business/2018/09/27/american-business-and-metoo>.

64. Hayes Brown, *This #MeToo Moment Is Tearing The Russian Internet Apart*, BUZZFEED NEWS (Nov. 9, 2018), <https://www.buzzfeednews.com/article/hayesbrown/this-metoo-moment-is-tearing-the-russian-internet-apart>.

65. See David Crary, *For #MeToo Movement, a Mixed Reception in Nations Outside US*, AP NEWS (Mar. 6, 2018), <https://www.apnews.com/e16f5ff6c97e438b92b4ef4a80a24197>.

66. See *History*, TIME’S UP, <https://www.timesupnow.com/history> (last visited Apr. 15, 2019).

67. See Jena McGregor, *Google and Facebook Ended Forced Arbitration for Sexual Harassment Claims. Why more Companies Could Follow*, WASH. POST (Nov. 12, 2018), https://www.washingtonpost.com/business/2018/11/12/google-facebook-ended-forced-arbitration-sex-harassment-claims-why-more-companies-could-follow/?utm_term=.beece0a67290.

68. See Maya Raghu, *We Can’t Stop Sexual Harassment Without Addressing Retaliation*, NAT’L WOMEN’S L. CTR. (Jan. 23, 2018), <https://nwlc.org/blog/we-cant-stop-sexual-harassment-without-addressing-retaliation/>.

69. See *2018 Legislation on Sexual Harassment in the Legislature*, NAT’L CONF. OF ST. LEG. (Feb. 11, 2019), <http://www.ncsl.org/research/about-state-legislatures/2018-legislative-sexual-harassment-legislation.aspx>; see also *States Move to Limit Workplace Confidentiality Agreements*, CBS NEWS (Aug. 27, 2018), <https://www.cbsnews.com/news/states-move-to-limit-workplace-confidentiality-agreements/>.

70. See Porter Wells, *States Take Up #MeToo Mantle in Year After Weinstein*, BLOOMBERG L. (Oct. 3, 2018), <https://www.bna.com/states-metoo-mantle-n73014482949/>.

2. *Regional and International Sexual Harassment Laws*

The 107th Session of the International Labour Conference (ILC) took place in 2018, following the release of a report issued by the International Labour Organization (ILO) titled “Ending Violence and Harassment in the World of Work.”⁷¹ The report was “intended to facilitate the standard-setting discussion of violence and harassment against men and women in the world of work at the [2018 ILC].”⁷² The report analyzed the regulatory frameworks of eighty countries, examining the issue of violence and harassment in the workplace.⁷³ Researchers examined the policies, legislation, agreements, and other initiatives within these countries to provide a repository of information on the laws and practices across the world concerning violence and harassment in the workplace.⁷⁴ This was the first time that the issue of workplace violence and harassment has been considered within the ILO from a standard-setting perspective, and it was also the first time that the ILC held discussions on the possibility of setting new standards to put an end to workplace violence and harassment.⁷⁵

The ILO’s report informed the ILC’s discussions on the issue by highlighting the lack of clarity in key definitions and scope of coverage, the lack of an instrument consistent with national circumstances, the lack of control employers have in preventing violence and harassment in the workplace, and the need to deal with gender-based violence.⁷⁶ The clear consensus throughout the report was the need for an inclusive and integrated approach to tackle the issues identified.⁷⁷

B. ELIMINATION OF VIOLENCE AGAINST WOMEN

In December, the EU and the U.N. approved €260 million in funding for the “Spotlight Initiative” program, in an effort to eliminate all forms of violence against women and girls. The “total investment across the 13 countries is the largest commitment of its kind, ever.”⁷⁸ The program will launch campaigns targeted at “addressing sexual and gender-based violence, child marriage, female genital mutilation and their linkages to sexual and

71. ILO, *Ending Violence and Harassment against Men and Women in the World of Work*, ILC/107/V/1 (2017), https://www.ilo.org/ilc/ILCSessions/107/reports/reports-to-the-conference/WCMS_553577/lang-en/index.htm; *Ending Violence and Harassment in the World of Work*, ILC/107/V/2 (2018), https://www.ilo.org/ilc/ILCSessions/107/reports/reports-to-the-conference/WCMS_619730/lang-en/index.htm. The 2018 report was issued in response to the questionnaire contained in the 2017 report.

72. *Ending Violence and Harassment in the World of Work*, *supra* note 71, ¶ 12.

73. *Id.*

74. *Id.* ¶ 12.

75. *Id.*

76. *Ending Violence and Harassment against Men and Women in the World of Work*, *supra* note 71, at 3, 5, 10.

77. *Supra* note 72.

78. *Supra* note 72.

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reproductive health access”⁷⁹ in Africa, and “femicide”⁸⁰ in Latin America, a region where twelve women, on average, are murdered every day.⁸¹ The Initiative will work closely with U.N. agencies, civil society, and the governments of the thirteen program countries selected to focus on reaching women and girls most at risk of violence by tackling legislative and policy gaps, fostering gender-equitable attitudes, and “providing high-quality interventions that can save women and girls’ lives.”⁸²

1. *Domestic Violence as a Criminal Offense*

In the past year, the Committee on the Elimination of Discrimination Against Women (CEDAW) has continued to urge countries to promote, advance, and protect women’s rights by “confronting sexual violence,” and to expand legislation to include domestic violence as a criminal offense.⁸³ In Liberia, an executive order issued by President Ellen Johnson Sirleaf temporarily outlawed domestic violence and FGM; however, the legislature declined to ratify the order, which is set to expire in January of 2019.⁸⁴ Italy passed a law that extends a right to legal representation for both civil and criminal matters to minor orphans affected by domestic violence.⁸⁵ The Kingdom of Eswatini passed the country’s first law criminalizing domestic violence.⁸⁶ But forty-nine countries have no laws that specifically protect women from such violence.⁸⁷

79. Press Release, *EU and UN Green-Light €260 Million to Save Women’s Lives in 13 Countries*, SPOTLIGHT INITIATIVE (Dec. 14, 2018), <http://spotlightinitiative.org/EU-and-UN-green-light-260-million-to-save-womens-lives-in-13-countries.html>.

80. “Femicide is when a woman or girl falls victim to an attack and is killed merely because of her gender.” European Commission Memorandum MEMO/18/5904, Questions and Answers: EU-UN Spotlight Initiative to Eliminate Violence Against Women and Girls (Feb. 26, 2019); see European Commission Press Release IP/18/5906, European Union and United Nations Join Forces to end Femicide in Latin America Under the Spotlight Initiative (Sept. 27, 2018).

81. European Commission Press Release IP/18/5906, *supra* note 80.

82. Press Release, *Spotlight Initiative: European Union and United Nations Join Forces to end Violence Against Women in Latin America*, UNDP IN LATIN AMERICA AND THE CARIBBEAN (Sept. 27, 2018), <http://www.latinamerica.undp.org/content/rblac/en/home/presscenter/pressreleases/2018/spotlight-initiative—european-union-and-united-nations-join-for.html>.

83. The Office of the High Comm’r on Human Rights, Rep. of the Comm. on the Elimination of Discrimination against Women, U.N. Doc. A/73/38, at 39, 41 – 42 (Mar. 29, 2018).

84. Hanibal Goitom, *Liberia: Temporary Ban on Domestic Violence, Including Female Genital Mutilation*, L. LIBRARY OF CONG. (Jan. 31, 2018), <http://www.loc.gov/law/foreign-news/article/liberia-temporary-ban-on-domestic-violence-including-female-genital-mutilation/>.

85. Dante Figueroa, *Italy: Protection of Minors Orphaned by Domestic Violence*, L. LIBRARY OF CONG. (Feb. 28, 2018), <http://www.loc.gov/law/foreign-news/article/italy-protection-of-minors-orphaned-by-domestic-violence/>.

86. *Eswatini: New law on Sexual and Domestic Violence a Vital Achievement and Opportunity for Change*, INT’L COMM. OF JURISTS (July 19, 2018), <https://www.icj.org/eswatini-new-law-on-sexual-and-domestic-violence-a-vital-achievement-and-opportunity-for-change/>.

87. U.N., Goal 5: Achieve Gender Equality and Empower all Women and Girls, <https://www.un.org/sustainabledevelopment/gender-equality/>.

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This year, Brazil's National Council of Justice and Federal Council of Psychology "signed a protocol of intentions to give psychological assistance to women who have been subjected to domestic and family violence, as well as to their dependents."⁸⁸ Similarly, New Zealand's Parliament passed a law granting victims of domestic violence, upon request, up to two months of a work variation schedule to cope with the effects of domestic violence; employers have a period of ten days to comply with the request.⁸⁹ Although at least 144 countries have passed some type of laws on domestic violence and 154 have laws on sexual harassment, more remains to be done to ensure that countries are compliant with international standards, that they support victims of violence, and that they adequately enforce existing laws.⁹⁰

2. *Online Abuse and Violence*

As online harassment, stalking, threats, and extortion have become more prevalent, the United Nations Human Rights Council (UNHRC) called on states to take immediate and effective action to prevent all forms of violence against women and girls, including in digital contexts.⁹¹ Specifically, the UNHRC reaffirms that the rights against abuse and harassment that people have offline must also be protected online.⁹²

According to a report by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs, twenty percent of young women in the EU have experienced online sexual harassment, and fourteen percent of women have experienced cyberstalking since the age of fifteen.⁹³ An Amnesty International study also found that violence on online social media platforms, and Twitter in particular, leads women to censor their posts, limits their interactions with others on the site, and may even drive women away from the platforms completely.⁹⁴ The U.N. CEDAW found that adolescent girls are more than twice as likely to be both victims and perpetrators of cyberbullying, which takes the form of name-calling, rumors,

88. Eduardo Soares, *Brazil: National Council of Justice and Federal Council of Psychology Sign Protocol of Intentions to Help Victims of Violence*, L. LIBRARY OF CONG. (July 11, 2018), <http://www.loc.gov/law/foreign-news/article/brazil-national-council-of-justice-and-federal-council-of-psychology-sign-protocol-of-intentions-to-help-victims-of-violence/>.

89. Domestic Violence—Victims' Protection Act 2018, pt 6AB (N.Z.).

90. *Facts and Figures: Ending Violence Against Women*, U.N. WOMEN (last updated Nov. 2018), <http://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures>.

91. G.A. Res. 38/L.6, U.N. Doc. A/HRC/38/L.6 (July 2, 2018), *available at* <https://undocs.org/A/HRC/38/L.6>.

92. *Id.*

93. *Cyber Violence and Hate Speech Online Against Women*, POL'Y DEP'T FOR CITIZENS' RIGHTS & CONST. AFFAIRS: DIRECTORATE GEN. FOR INTERNAL POLICIES OF THE E.U. (Sept. 2018), *available at* [http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604979/IPOL_STU\(2018\)604979_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604979/IPOL_STU(2018)604979_EN.pdf).

94. *#ToxicTwitter, Violence and Abuse Against Women Online*, AMNESTY INT'L (2017), *available at* <https://www.amnestyusa.org/wp-content/uploads/2018/03/Toxic-Twitter.pdf>.

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threats, disclosure of confidential information, images and videos, revenge porn, sexual harassment and sexual advances, often from strangers.⁹⁵

The U.N. Special Rapporteur on violence against women cautioned that the problem should be viewed from a human rights perspective.⁹⁶ In response, the UNHRC adopted a resolution promoting the protection and enjoyment of human rights on the internet, condemning online attacks against women, and calling upon Member States to ensure accountability for gender-based violence “committed against persons for exercising their human rights and fundamental freedoms on the Internet”⁹⁷

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.⁹⁸ Thirty-two out of the thirty-five Member States of the Organization of American States (OAS) have ratified the Belém do Pará Convention and three have neither signed nor ratified it.⁹⁹ 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.¹⁰⁰ MESECVI’s Third Multilateral Evaluation Round is ongoing and scheduled to be completed in 2020.¹⁰¹ The

95. U.N. Office of the High Comm’r on Human Rights, U.N. Doc. CEDAW/C/GC/36, ¶ 70 (Nov. 27, 2017), available at <https://undocs.org/CEDAW/C/GC/36>.

96. See G.A. Res. 38/47, U.N. Doc. A/HRC/38/47 (June 18, 2018), available at <https://undocs.org/A/HRC/38/47>.

97. G.A. Res. 38/7, U.N. Doc. A/HRC/38/L.10/Rev. 1, at 10-11 (Jul. 4, 2018), available at ap.ohchr.org/documents/E/HRC/d_res_dec/A_HRC_38_L10_rev1.docx.

98. See *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women*, DEPT. OF INT’L L., ORG. OF AM. STATES (June 9, 1994), <http://www.oas.org/juridico/english/treaties/a-61.html> [hereinafter *Belém do Pará Convention*]; see also, *Regional Tools to Fight Violence Against Women: the Belém do Pará and Istanbul Conventions*, ORG. OF AM. STATES & COUNCIL OF EUR. (Feb. 2014), <http://www.oas.org/en/mesecvi/docs/MESECVI-CoE-CSWPub-EN.pdf> [hereinafter *Regional Tools*].

99. See *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women: Signatories Table*, ORG. OF AM. STATES, <http://www.oas.org/en/mesecvi/docs/Signatories-Table-EN.pdf>.

100. See *What is MESECVI?*, ORG. OF AM. STATES, <http://www.oas.org/en/mesecvi/about.asp> (last visited Apr. 16, 2019).

101. See *Third Hemispheric Report on the Implementation of the Belém do Pará Convention: Prevention of Violence Against Women in the Americas: Paths to Follow*, ORG. OF AM. STATES (2017), <http://www.oas.org/en/mesecvi/docs/TercerInformeHemisferico-EN.pdf>; see also *National Reports*, ORG. OF AM. STATES, <http://www.oas.org/en/mesecvi/nationalreports.asp> (last visited Apr. 16, 2018); see also *National Reports on the Implementation of the Belém do Pará Convention*, ORG. OF AM. STATES, <http://www.oas.org/en/mesecvi/NationalReportsThirdRound.asp> (last visited Apr. 16, 2018); and see also *Sistema de Indicadores: Tercera Ronda de Evaluación Multilateral*, MECANISMO DE SEGUIMIENTO DE LA CONVENCION DE BELÉM DO PARÁ (2018), <http://www.oas.org/es/mesecvi/docs/MESECVI-CE-ESP-IndicadoresTerceraRonda.pdf>.

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MESECVI has developed a comprehensive Model Law to prevent, punish, and eradicate femicide.¹⁰² This Model Law was adopted during the 15th Meeting of the MESECVI's Committee of Experts in December 2018.¹⁰³

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.¹⁰⁴ Forty-five out of the forty-seven Council of Europe Member States have signed the Istanbul Convention, thirty-three have ratified it, and two have neither signed nor ratified it.¹⁰⁵ During 2018, one country signed the Istanbul Convention, six ratified it, and the Convention entered into force in nine countries.¹⁰⁶ 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.¹⁰⁷ GREVIO received reports from four countries, visited two of those countries in addition to two others, and issued recommendations for another four countries.¹⁰⁸

July marked the fifteenth anniversary of the adoption of the Maputo Protocol by the Assembly of the African Union.¹⁰⁹ Forty-nine out of the fifty-five African Union Member States have signed the Maputo Protocol, forty have ratified it, and six have neither signed nor ratified it.¹¹⁰ During 2018, only Tunisia ratified the Protocol.¹¹¹ The African Union Member States continued to work on universal ratification and domestication of the

102. *Report of the Platform of Independent International and Regional Mechanisms on Violence Against Women And Women's Rights*, U.N. OFFICE OF THE HIGH COMM'R ON HUMAN RIGHTS (Oct. 2, 2018), <https://www.ohchr.org/Documents/Issues/Women/SR/ReportColorado2Oct2018.pdf>.

103. *See id.*; *see OAS Semi-Annual Resource Management and Performance Report from January 1 to December 31, 2018, Main Programmatic Results by Chapter* (Dec. 31, 2018), available at http://www.oas.org/saf/SAF/2018-Dec/Eng/Prog_results-Dec-18-ENG.pdf.

104. *See Convention on Preventing and Combating Violence Against Women and Domestic Violence: Treaty 210*, COUNCIL OF EUR., (May 5, 2011), <https://rm.coe.int/168008482e> [hereinafter *Istanbul Convention*]; *see also Regional Tools*, *supra* note 98.

105. *See Chart of Signatories and Ratifications of Treaty 210*, COUNCIL OF EUR., https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures?p_auth=C4Rjbe9C (last visited Apr. 16, 2019).

106. *See id.*

107. *About GREVIO – Group of Experts on Action Against Violence against Women and Domestic Violence*, COUNCIL OF EUR., <https://www.coe.int/en/web/istanbul-convention/grevio> (last visited Apr. 16, 2019).

108. *See Country-Monitoring Work*, COUNCIL OF EUR., <https://www.coe.int/en/web/istanbul-convention/country-monitoring-work> (last visited Apr. 16, 2019).

109. *See Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS, (July 11, 2003), http://www.achpr.org/files/instruments/women-protocol/achpr_instr_proto_women_eng.pdf.

110. *See Ratification Table: Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, AFRICAN COMM'N. ON HUMAN RIGHTS AND PEOPLES' RIGHTS, <http://www.achpr.org/instruments/women-protocol/ratification/> (last visited Apr. 16, 2019).

111. *See id.*

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Protocol by 2020, the objective adopted with the launch of the African Women's Decade in 2009.¹¹²

The African Court of Human and Peoples' Rights issued its first ruling concerning the Maputo Protocol in *Association Pour le Progrès et la Défense des Droits des Femmes Maliennes (A.P.D.F.) and the Institute of Human Rights and Development in Africa (I.H.R.D.A.) v. Republic of Mali*.¹¹³ The Court found that Mali had violated specific provisions of the Maputo Protocol and other international treaties and ordered Mali to amend the Family Code to bring it in line with international human rights standards.¹¹⁴

In Southeast Asia, the debate continued as to how far the Association of Southeast Asian Nations (ASEAN) Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) can go in promoting human rights and fundamental freedoms of women in the ASEAN region and the full implementation of CEDAW across all ASEAN Member States. In October, the ASEAN Ministers/Heads of Delegations, who are responsible for promoting gender equality and women's empowerment, issued a joint statement on the theme of "Social Protection for Women and Girls: Toward the ASEAN Community Vision 2025" during the Third ASEAN Ministerial Meeting on Women.¹¹⁵ But as this ministerial statement is not legally binding, the ACWC's effectiveness remains limited.¹¹⁶

4. *United Nations*

In November, the U.N. and UNiTE¹¹⁷ brought survivors and advocates¹¹⁸ to the U.N. Headquarters to jumpstart¹¹⁹ "16 Days of Activism"¹²⁰ with The

112. See *African Women's Decade*, AFRICAN UNION, <https://au.int/en/documents-43> (last visited Apr. 16, 2019).

113. See Application No. 046/2016, *Association Pour le Progrès et la Défense des Droits des Femmes Maliennes (APDF) & the Institute of Human Rights and Development in Africa (IHRDA) v. Republic of Mali*, Judgment (May 11, 2018), <http://en.african-court.org/images/Cases/Judgment/046%20-%202016%20-%20Association%20Pour%20le%20Progrès%20et%20la%20Defense%20Des%20Droits%20Des%20Femmes%20Maliennes%20-%20APDF%20Vs.%20Mali%20-%20Judgement%20of%2011%20Mai%202018%20-%20Optimized.pdf>.

114. See *id.* ¶ 111 – 115.

115. See *Joint Statement of the Third ASEAN Ministerial Meeting on Women*, ASS'N OF SOUTHEAST ASIAN NATIONS (Oct. 25, 2018), <https://asean.org/storage/2018/11/24-Joint-Statement-of-the-3rd-AMMW1.pdf>.

116. See *id.*

117. See *UNiTE to End Violence against Women*, U.N. WOMEN (2018), <http://www.unwomen.org/en/what-we-do/ending-violence-against-women/take-action/unite>.

118. See *Press Release: As global mobilizations soar, UN Women brings survivors of violence and advocates to centre stage on International Day for the Elimination of Violence against Women and Girls*, U.N. WOMEN (Nov. 19, 2018), <http://www.unwomen.org/en/news/stories/2018/11/press-release-international-day-for-the-elimination-of-violence-against-women-and-girls>.

119. See *Ending Inequality Means Ending 'Global Pandemic' of Violence Against Women* – U.N. Chief, U.N. NEWS (Nov. 19, 2018), <https://news.un.org/en/story/2018/11/1026071>.

120. See *16 Days of Activism*, RUTGERS SCH. OF ARTS AND SCI. (2018), <https://16dayscwg.rutgers.edu> (last visited Apr. 16, 2019).

International Day for the Elimination of Violence Against Women.¹²¹ This year's theme, "Orange the World: #HearMeToo,"¹²² is a call to listen to and believe survivors of violence, seeking to ensure accountability for offenders.¹²³ In its Report on the Rights of Girls and Women to Education, the U.N. called upon all countries to limit violence against women by developing clear legislative and policy measures to ensure that, when girls and women participate in male-dominated disciplines and activities in educational institutions, they are protected from sexual harassment and violence.¹²⁴

III. Human Trafficking

Despite ongoing efforts to combat human trafficking, it continued to plague every corner of the world.¹²⁵ An estimated thirty million women and girls¹²⁶ have been sold, abducted, coerced or deceived into sex and labor trafficking, domestic servitude, forced marriages, organ donations, begging, online pornography, and child soldiering.¹²⁷ Human trafficking is a \$150 billion industry¹²⁸ and the world's second most profitable criminal enterprise after drug trafficking.¹²⁹ This year, the world's worst offender is North Korea.¹³⁰ In addition to state-sponsored human trafficking through forced labor, North Korean women and girls are frequently trafficked into involuntary servitude or sold into marriages, prostitution, and the internet-sex industry in China.¹³¹ Many victims forcibly returned by Chinese

121. See *16 Days of Activism*, U.N. WOMEN (2018), <http://www.unwomen.org/en/what-we-do/ending-violence-against-women/take-action/16-days-of-activism>.

122. *Message from Phumzile Mlambo-Ngcuka, U.N. Under-Secretary-General and Executive Director of U.N. Women on the International Day for the Elimination of Violence against Women, 25 November 2018*, U.N. WOMEN (Nov. 15, 2018), <http://www.unwomen.org/en/news/stories/2018/11/statement-ed-phumzile-mlambo-ngcuka-international-day-for-the-elimination-of-violence-against-women>.

123. *Id.*

124. See *supra* note 95, ¶ 62.

125. See *Accelerating Action to Eliminate Child Labour, Forced Labour and Modern Slavery with a Particular Focus on Global Supply Chains*, ILO (Feb. 20, 2018), https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/multilateral-system/g20/reports/WCMS_646039/lang-en/index.htm; see generally U.S. Dep't of State, *Trafficking in Persons Report June 2018*, <https://www.state.gov/documents/organization/282798.pdf>.

126. *The Facts*, POLARIS PROJECT, <https://polarisproject.org/human-trafficking/facts> (last visited Apr. 16, 2019).

127. See Mely Caballero-Anthony, *A Hidden Scourge*, IMF: FIN. AND DEV. VOL. 55, NO. 3, (Sept. 2018), <https://www.imf.org/external/pubs/ft/fandd/2018/09/human-trafficking-in-southeast-asia-caballero.htm>.

128. *Id.*

129. *What is Human Trafficking?*, U.S. DEP'T OF HOMELAND SEC., <https://www.dhs.gov/blue-campaign/what-human-trafficking> (last visited Apr. 16, 2019).

130. Ellen Wulfhurst, *North Korea, Eritrea Have World's Highest Rates of Modern Slavery: Report*, REUTERS (July 19, 2018), <https://www.reuters.com/article/us-global-slavery-countries/north-korea-eritrea-have-highest-rates-of-modern-slavery-report-idUSKBN1K90KQ>.

131. *Trafficking in Persons Report 2018*, *supra* note 125, at 256.

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authorities to North Korea are subjected to forced-labor camps, involuntary abortions, or death.¹³²

Global pressure increased on both private and public procurers to stop sourcing goods and services produced by forced labor and to practice human-rights due diligence in operations and supply chains.¹³³ Some banks and regulators have been using digital technology to track money flows, monitor labor management, and enable better communication among workers to prevent and detect abuse.¹³⁴

A. THE ASIA PACIFIC REGION

Two-thirds of all global trafficking originates or occurs in the Asia-Pacific region, the most profitable region for trafficking in the world.¹³⁵ Although some countries in this region have enacted strong anti-trafficking laws that accord with the principles set forth in multilateral anti-trafficking agreements like The Palermo Protocol and the ASEAN Convention Against Trafficking in Persons, Especially Women and Children, it is clear that these laws are not being adequately enforced.¹³⁶

Women and girls from Thailand, Myanmar, Laos, Cambodia, and the Philippines are trafficked within the region and sent to surrounding countries to be enslaved in sex trafficking rings, forced marriages, or domestic servitude.¹³⁷ Thailand's commercial sex industry is largely populated by desperate foreign women and children.¹³⁸

Armed conflicts and frequent natural disasters increase susceptibility to trafficking, especially of women and children.¹³⁹ Since August 2017, Myanmar has experienced multiple catastrophic floods, displacing over 150,000 people. Also, violent armed conflicts caused a mass exodus of more than 700,000 Rohingya, the stateless minority group whose villages were burned and members brutally attacked.¹⁴⁰ Other ethnic minorities in

132. *Id.*

133. See *The Issue*, KNOW THE CHAIN, <https://knowthechain.org/the-issue> (last visited Apr. 16, 2019); see also *Accelerating Action to Eliminate Child Labour, Forced Labour and Modern Slavery with a Particular Focus on Global Supply Chains*, *supra* note 125, at 9.

134. See *Software that Detects Human Trafficking*, ECONOMIST (May 3, 2018), <https://www.economist.com/science-and-technology/2018/05/03/software-that-detects-human-trafficking>; *How Digitalization Can Help Achieve Fair Migration*, ILO (Oct. 31, 2018), https://www.ilo.org/asia/media-centre/news/WCMS_648541/lang-en/index.htm; *11th ASEAN Forum on Migrant Labour*, ILO (Oct. 2018), https://www.ilo.org/asia/events/WCMS_644224/lang-en/index.htm.

135. See Caballero-Anthony, *supra* note 127, at 1 – 2.

136. *Id.* at 2 – 3; See generally *Slavery Index*, GLOB. SLAVERY INDEX, available at <https://www.globallslaveryindex.org/resources/downloads/> (last visited Apr. 16, 2019).

137. Julius Cesar Trajano, *Combating Human Trafficking in East Asia: Mind the Gaps*, NTS INSIGHT (July 2018), available at <https://www.rsis.edu.sg/wp-content/uploads/2018/07/NTS-insight-Human-trafficking-july2018.pdf>.

138. *Id.*

139. *Id.*

140. See *Bangladesh: Rohingya Refugee Crisis Response, Situation Overview of Human Trafficking*, IOM U.N. MIGRATION (Oct. 2018), <https://www.iom.int/sitreps/bangladesh-rohingya-refugee->

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Myanmar were trafficked into Thailand as sex slaves or sold to men in China as brides.¹⁴¹ Those who escaped to Bangladesh languish in refugee camps where women and young girls are routinely re-victimized by traffickers.¹⁴²

B. COMBATING TRAFFICKING OF WOMEN AND GIRLS

According to the 2018 Global Slavery Index,¹⁴³ 40.3 million people live in modern slavery, 24.9 million are forced into labor, seventy-one percent are women, and the primary victims are women and girls¹⁴⁴ who are disproportionately affected by poverty, discrimination, violence, and exploitation.¹⁴⁵

Combating modern slavery and human trafficking has never been more challenging,¹⁴⁶ especially in the midst of the worst migration crisis since World War II.¹⁴⁷ At the U.N., despite some progress after the adoption of the U.N. Global Plan of Action to Combat Trafficking in Persons¹⁴⁸ and the U.N. SDGs aimed at eradicating trafficking of women and girls by 2030, much remains to be done.¹⁴⁹

National laws relating to modern slavery are a relatively recent legal development. In Australia, the Modern Slavery Act 2018 was signed into law in December.¹⁵⁰ In addition, the Canadian House of Commons

crisis-response-situation-overview-human-trafficking-october; see also Karishma Vyas, *Tricked and Trapped: Inside the Rohingya Trade*, AL JAZEERA (Mar. 13, 2018), <https://www.aljazeera.com/indepth/features/tricked-trafficked-traded-rohingya-trade-180312071402525.html>.

141. Caballero-Anthony, *supra* note 127, at 2.

142. See Karishma Vyas, *supra* note 140.

143. See generally *Slavery Index*, *supra* note 136.

144. See Ewelina U. Ochab, *Human Trafficking is a Pandemic of the 21st Century*, FORBES (July 26, 2018), <https://www.forbes.com/sites/ewelinaochab/2018/07/26/human-trafficking-is-a-pandemic-of-the-21st-century/#37abe5096195>. “What is surprising (and breaking with the stereotype) is that in many countries where statistics on the gender of the traffickers are obtained, women are the main perpetrator of human trafficking.”

145. See generally Ian Fraiser, Madeleine Koalick, & Carolin Seeger, *Seizing Opportunities, Minimising Risks: Empowering Women in the Supply Chain Approaches and Case Studies for Business*, U.N. GLOB. COMPACT: GLOB. COMPACT NETWORK GERMANY (2018), available at https://www.globalcompact.de/wAssets/docs/Lieferkettenmanagement/Chancen-nutzen_FINAL_WEB.pdf.

146. See generally ICAT, *The Role of the Sustainable Development Goals (SDGs) in Combating Trafficking in Persons*, (Apr. 2018), http://icat.network/sites/default/files/publications/documents/ICAT_Issue_Brief_SDGs%202018.pdf.

147. On the theme of ‘Women and Migration,’ see *Global Compact for Safe, Orderly and Regular Migration*, GLOB. COMPACT FOR MIGRATION (July 11, 2018), https://refugeesmigrants.un.org/sites/default/files/180711_final_draft_0.pdf.

148. See G.A. Res. 64/293, (Aug. 12, 2010), available at http://www.unodc.org/documents/human-trafficking/United_Nations_Global_Plan_of_Action_to_Combat_Trafficking_in_Persons.pdf.

149. See *The Sustainable Development Goals that Aim to End Human Trafficking*, UNICEF (Jan. 2016), Goals 5, 8, 16, <https://www.unicefusa.org/stories/sustainable-development-goals-aim-end-human-trafficking/29864>, see Goals 5, 8, & 16.

150. *Modern Slavery Act of 2018* (Cth) (Austl.).

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produced the report, “A Call to Action: Ending the Use of All Forms of Child Labour in Supply Chains” from the Standing Committee on Foreign Affairs and International Development, which strongly calls for legislation.¹⁵¹

Domestically, in 2018, the U.S. Congress passed the “Allow States and Victims to Fight Online Sex Trafficking Act of 2017” to clarify that section 230 of the Communications Decency Act does not prohibit enforcement against providers and users of “interactive computer services,”¹⁵² where third party content “unlawfully promote[s] and facilitate[s] prostitution and . . . facilitate[s] traffickers in advertising the sale of unlawful sex acts with sex trafficking victims.”¹⁵³ The legislation resulted in the shuttering of powerhouse website Backpage by the Federal Bureau of Investigation (FBI), and its CEO, Carl Ferrer, pleaded guilty to felonies in several states.¹⁵⁴ In addition, Craigslist shut down its “Personals” section after the law’s passage.¹⁵⁵

IV. Women, Peace, and Security

For purposes of implementation of U.N. Resolution 1325,¹⁵⁶ the annual Report of the Secretary-General on Women and Peace and Security was submitted. The report describes the continuing need to strengthen commitments to international law and humanitarian law standards, especially in terms of preventing discriminatory treatment against women and violations of their human rights.¹⁵⁷

According to U.N. estimates, there was a fifty-six percent increase in gender-based violence from 2016.¹⁵⁸ The U.N. continues to recognize the importance of women’s representation and involvement in peacebuilding efforts, and its system-wide gender-parity strategy introduced last year has proved to be effective, as evidenced by the gender parity achieved in senior positions of numerous peacekeeping departments.¹⁵⁹

151. See generally Michael Levitt & Anita Vandenbeld, *A Call to Action: Ending the Use of All Forms of Child Labour in Supply Chains*, HOUSE OF COMMONS CANADA (42ND PARL., 1ST SES.) (Oct. 2018) available at <http://www.ourcommons.ca/Content/Committee/421/FAAE/Reports/RP10078750/faaerp19/faaerp19-e.pdf>.

152. See Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018).

153. *Id.* § 2.

154. Anna Schechter and Dennis Romero, *FOSTA Sex Trafficking Law Becomes Center of Debate About Tech Responsibility*, NBC NEWS (July 19, 2018), <https://www.nbcnews.com/tech/tech-news/sex-trafficking-bill-becomes-center-debate-about-tech-responsibility-n892876>.

155. *Id.*

156. See S.C. Res. 1325, ¶ 16 (Oct. 31, 2000).

157. See generally U.N. Secretary-General, *Report of the Secretary-General on Women and Peace and Security General*, U.N. Doc. S/2018/900 (Oct. 9, 2018).

158. *Id.* ¶ 5.

159. See *id.* ¶ 9.

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National-level efforts continued, as eight additional Member States adopted national action plans on women, peace, and security.¹⁶⁰ Also, eleven regional frameworks on women, peace, and security have been adopted.¹⁶¹

Women continued to lack representation in transitional justice and rule of law institutions, which are key to providing women and girls with protection in conflict countries. As of July, only thirty percent of commissioners on U.N.-supported truth commissions are women.¹⁶² Some countries, such as Colombia, have appointed women to senior transitional justice positions,¹⁶³ while the government of Kosovo worked in partnership with U.N. bodies and civil society associations to establish a commission that would enhance access to reparations for survivors of conflict-related sexual violence.¹⁶⁴

Finally, the Security Council unanimously adopted resolution 2405, extending the mandate of the U.N. Assistance Mission in Afghanistan through March 17, 2019.¹⁶⁵ This resolution has been adopted amid calls for women's empowerment and statements by two Afghan women leaders that stressed the importance of peace process outcomes and the political and social agency the country's Constitution can provide for Afghan women.¹⁶⁶

V. International Courts and Tribunals

A. INTERNATIONAL CRIMINAL COURT (ICC)

The ICC Appeals Chamber held hearings in September on Jordan's appeal to a pre-trial decision. The decision related to Jordan's non-compliance with the ICC's request for the arrest and surrender of President Omar Al-Bashir of Sudan.¹⁶⁷ Al-Bashir had two outstanding arrest warrants issued by the ICC for multiple counts of genocide, war crimes, and crimes against humanity; charges include murder, extermination, forcible transfer, torture, and rape committed in Darfur, Sudan, between 2003 and 2008.¹⁶⁸ Al-Bashir remained at large in 2018. In accordance with procedural rules, he must be present for the case to proceed; thus, the case was placed on hold.¹⁶⁹

160. *See id.* ¶ 50.

161. *See id.* ¶ 53.

162. *See id.* ¶ 84.

163. *See* U.N. Secretary-General, *Report of the Secretary-General on Women and Peace and Security General*, U.N. Doc. S/2018/900 (Oct. 9, 2018).

164. *See id.* ¶ 88.

165. *See* Press Release, Security Council, Security Council Adopts Resolution 2405, Extends Mandate of United Nations Assistance Mission in Afghanistan amid Calls for Women's Empowerment, U.N. Press Release SC/13240 (Mar. 8, 2018).

166. *See id.*; *cf.* S.C. Res. 2405 (Mar. 8, 2018).

167. *See* ICC, Media Advisory, *Al-Bashir Case: ICC Appeals Chamber Hearing Submissions on Legal Matters Raised By Jordan From 10 to 14 September 2018* (Sept. 4, 2018), <https://www.icc-cpi.int/Pages/item.aspx?name=ma232>.

168. *See id.*

169. *See* Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, Pretrial Documents and Videos (Apr. 7, 2017).

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The trial of Congo militia leader Bosco Ntaganda concluded in August 2018 with closing statements; the Trial Chamber will pronounce its decision following deliberations.¹⁷⁰ Ntaganda was charged with war crimes and crimes against humanity, among them were enlistment and conscription of child soldiers, rape (including rape of female child-soldier recruits)¹⁷¹ and sexual slavery.¹⁷²

In July, the ICC postponed the confirmation of charges in the case against Al Hassan Ag Abdoul Aziz Ag Mohamed until next year.¹⁷³ Al Hassan is in ICC custody facing allegations of war crimes and crimes against humanity, including allegations that he participated in a policy of forced marriage that led to the rapes and sexual enslavement of women and girls in Mali.¹⁷⁴

B. EXECUTION OF FEMALE JUVENILE OFFENDER, VICTIM OF DOMESTIC VIOLENCE

A 24-year-old Iranian-Kurdish woman, Zeinab Sekaanvand Lokran, was executed in October 2018 for a crime she was alleged to have committed at age seventeen.¹⁷⁵ Charged with murdering her physically abusive husband, she was denied access to a lawyer until her final court hearing, several years after her arrest.¹⁷⁶ The age of majority and criminal responsibility in Iran is fifteen-years-old for boys but only nine-years-old for girls.¹⁷⁷ Although Iran is a party to the Convention on the Rights of the Child, the government maintains: “[i]f the text of the Convention is or becomes incompatible with the domestic laws and Islamic standards at any time or in any case, the Government of the Islamic Republic shall not abide by it.”¹⁷⁸

170. See ICC, Press Release, *ICC Trial Chamber VI To Deliberate On The Case Against Bosco Ntaganda* (Aug. 30, 2018), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1402>.

171. *In The Hague, Trial Opens for Congo Warlord Bosco Ntaganda*, DW (Sept. 2, 2015), <https://www.dw.com/en/in-the-hague-trial-opens-for-congo-warlord-bosco-ntaganda/a-18688983>.

172. See ICC, *Alleged Crimes (Non-Exhaustive List)* (June 9, 2014), <https://www.icc-cpi.int/drc/ntaganda/pages/alleged-crimes.aspx>.

173. See ICC, Media Advisory, *Al Hassan Case: Confirmation of Charges Hearing Postponed To 6 May 2018* (Jul. 20, 2018), <https://www.icc-cpi.int/Pages/item.aspx?name=MA230>.

174. *Id.*

175. Mansoureh Mills, *She Was a Teenage Victim of Domestic Violence and Rape. She Sought Help. This Week, Iran Executed Her*, TIME (Oct. 5, 2018), <http://time.com/5415628/zeinab-sekaanvand-iran-execution-violence/>.

176. *Id.*

177. See ISLAMIC PENAL CODE [CODE OF CRIMINAL LAWS] art. 147 (Iran).

178. See *Children's Rights: Iran*, LIBRARY OF CONG., available at <https://www.loc.gov/law/help/child-rights/iran.php> (last visited Apr. 16, 2019).

Canada's Legalization of Cannabis and the Impact on the American Border

DENISE CALLE*

I. Introduction

On June 19, 2018, the Canadian Senate passed the Cannabis Act (the Act),¹ making Canada the first G7 country² to legalize the use and sale of cannabis for recreational purposes and the second country overall after Uruguay.³ The Act became effective on October 17, 2018, after numerous amendments were made and apprehensions were voiced by Conservative Canadian senators, including concerns of slower US border crossings.⁴ Although Canada and a majority of the United States have legalized the use of cannabis in some form, the US federal prohibition is still effective and supersedes state law.⁵ Now that the largest bordering neighbor has legalized the recreational use of cannabis nationwide, the US border states are seeing increased movement of cannabis and drug paraphernalia across border lines in violation of the federal prohibition.⁶ Since the Act came into force, US Customs and Border Protection (CBP) has seized cannabis and drug paraphernalia from travelers and from packages mailed across the border.⁷

* Denise Calle is an Associate Attorney with Diaz Trade Law, P.A. Denise practices Customs and International Trade Law. She assists foreign and domestic businesses, manufacturers, distributors, importers, and exporters with regulatory compliance, trade, and enforcement matters.

1. Cannabis Act, S.C. 2018, c 16 (Can.).

2. The G7 countries include Canada, France, Germany, Italy, Japan, the United Kingdom, and the United States. *The G7 and the Future of Multilateralism*, COUNCIL ON FOREIGN RELATIONS (Jan. 24, 2019), <https://www.cfr.org/background/g7-and-future-multilateralism>.

3. *Canada Becomes Second Country to Legalise Recreational Cannabis*, BBC (Oct. 17, 2018), <https://www.bbc.com/news/world-us-canada-45806255>.

4. Greg Quinn, *Marijuana Will Become Legal in Canada on Oct. 17, Trudeau Says*, BLOOMBERG (June 19, 2018, 6:58 PM), <https://www.bloomberg.com/news/articles/2018-06-19/legal-pot-gets-green-light-after-canadian-senators-sign-off>.

5. Controlled Substances Act, 21 U.S.C §§ 801–904 (2012).

6. *Legal Notice: Notice of Seizure and Intent to Forfeit*, U.S. CUSTOMS AND BORDER PROT. (Nov. 15, 2018), <https://www.forfeiture.gov/pdf/CBP/OfficialNotification.pdf> (listing all seized merchandise as of November 2018, including drug paraphernalia); *CBP addresses border crossing in the wake of Canada's legalization of marijuana*, KBZK (Nov. 5, 2018, 2:08 PM), <https://kbzk.com/news/crime-courts/2018/11/05/cbp-addresses-border-crossing-in-the-wake-of-canadas-legalization-of-marijuana>.

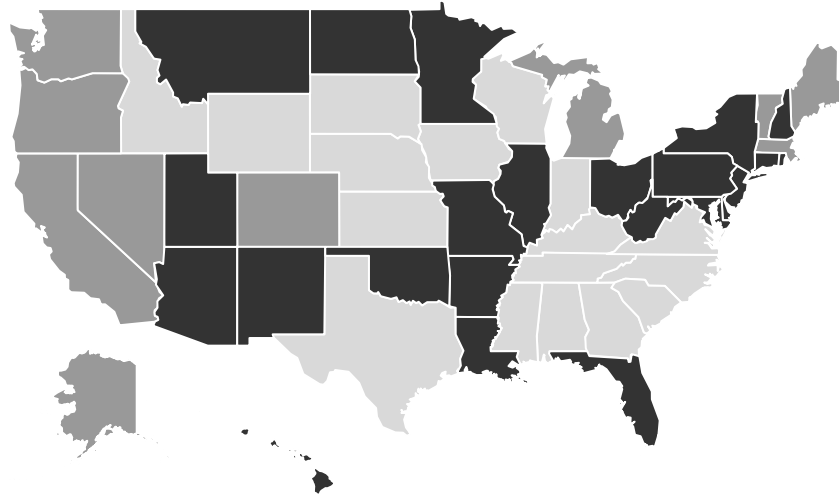
7. *Legal Notice*, *supra* note 6, at 151, 238; *CBP Addresses Border Crossing*, *supra* note 6.

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Information is current as of Nov. 7, 2018.



Marijuana Legalization Status

- Medical marijuana broadly legalized
- Marijuana legalized for recreational use
- No broad laws legalizing marijuana

II. The Cannabis Act

The Act regulates the growth, distribution, sale, and possession of cannabis across Canada.⁸ It was drafted with the intent to protect public health and public safety. The federal government continues to regulate the production of cannabis. The Act permits individuals eighteen years of age or older to possess up to thirty grams of cannabis in public (this amount is also permitted to be shared with other adults); buy cannabis and cannabis oil from a provincially licensed retailer (if there is no retail framework established in the province, purchases of cannabis can be made online from federally licensed producers); grow up to four cannabis plants per residence for personal use; and make edible cannabis products at home with controlled concentration levels (retailers are prohibited from selling edible products for the first year).⁹

8. Cannabis Act, c 16 (Can.); *Cannabis Legalization and Regulation*, CANADA DEPT. OF JUSTICE (Oct. 17, 2018), <https://www.justice.gc.ca/eng/cj-jp/cannabis/>.

9. *Id.*

III. The Impact on the American Border

The US legal cannabis industry generated approximately \$11 billion in sales in 2018.¹⁰ The industry currently employs more than 200,000 workers.¹¹ Ten states and Washington, D.C., have legalized recreational use of cannabis, while thirty-three states have legalized medicinal cannabis.¹² A 2017 Gallup poll showed that 64% of Americans favor legalization.¹³ Nevertheless, until the federal government removes tetrahydrocannabinols from the controlled substance list, cannabis remains illegal.¹⁴

Generally, importing or exporting cannabis to and from Canada is illegal.¹⁵ Travelers are prohibited from transporting cannabis across the international border, even if the bordering state permits the use of cannabis.¹⁶ Anyone attempting to export cannabis from Canada is subject to criminal charges in Canada; in the United States, one may face criminal charges, seizure, fines, arrest, and denial of admission.¹⁷ CBP has warned that persons traveling to the United States for reasons related to the cannabis industry may be deemed inadmissible and denied entry during future travels.¹⁸ Interestingly, CBP has also routinely seized drug paraphernalia, including grinders, rolling paper, pipes, and vapes despite the paraphernalia being imported into a state that has legalized the use of cannabis.¹⁹

CBS's presence at the Canadian-US border is stronger than ever and ensures that Canadian cannabis and drug paraphernalia do not enter US territory.²⁰ As an "enforcement agency," CBP has statutory authority to

10. Craig Giammona, *Marijuana Legalization: A Budding Industry*, BLOOMBERG (Nov. 8, 2018, 11:47 AM), <https://www.bloomberg.com/quicktake/marijuana-legalization>.

11. *Id.*

12. Jeremy Berke, *Here's Where You Can Legally Consume Marijuana in the US in 2018*, BUS. INSIDER (Nov. 7, 2018), <https://www.businessinsider.com/where-can-you-can-legally-smoke-weed-2018-1>.

13. Justin McCarthy, *Record-High Support for Legalizing Marijuana Use in U.S.*, GALLUP (Oct. 25, 2017), <https://news.gallup.com/poll/221018/record-high-support-legalizing-marijuana.aspx>.

14. 21 U.S.C. § 812.

15. Quinn, *supra* note 4.

16. T. Augustine Lo & David Townsend, *Canada-U.S. Trade in Marijuana-Related Products is Fraught with Peril*, CROSS-BORDER COUNS. (Dec. 20, 2018), <https://crossbordercounselor.com/canada-u-s-trade-in-marijuana-related-products-is-fraught-with-peril>.

17. S.C. 2018, c 16; *CBP Statement on Canada's Legalization of Marijuana and Crossing the Border*, U.S. CUSTOMS AND BORDER PROT. (Sept. 21, 2018), <https://www.cbp.gov/newsroom/speeches-and-statements/cbp-statement-canadas-legalization-marijuana-and-crossing-border> [hereinafter *CBP Statement*].

18. *Id.*

19. Legal Notice, *supra* note 7; Jennifer Diaz, *HELP! CBP Seized My Tobacco Products as Drug Paraphernalia, What Now?*, CUSTOMS & INT'L TRADE LAW, May 30, 2017, <http://customsandinternationaltradelaw.com/2017/05/30/help-cbp-seized-my-tobacco-products-as-drug-paraphernalia-what-now>.

20. *CBP Statement*, *supra* note 17; see *Border Patrol History*, U.S. CUSTOMS AND BORDER PROT., <https://www.cbp.gov/border-security/along-us-borders/history> (last visited Mar. 2, 2019).

conduct administrative proceedings (i.e., seizures) and issue penalties.²¹ CBP has the express power to authorize *or deny* any merchandise that comes into the United States.²² Thus, CBP can detain and seize items it deems drug paraphernalia, leaving an importer to argue it intends to use the product for a legitimate tobacco use.²³

According to Chief CBP Officer Aaron Bowker, “[CBP’s] primary mission is terrorism and interdicting terrorists, but second to that has always been narcotics.”²⁴ In 2017, CBP seized 361,564 pounds of cannabis.²⁵ The city of Port Huron, Michigan, seized over 1,650 pounds of marijuana days before the Act was enacted.²⁶ Ports at the border have reported seizures of packages mailed from Canada containing cannabis. At Port Champlain, New York, there were approximately 108 cannabis seizures just in October 2018—a whopping 140% increase from the previous year.²⁷ A majority of the seized cannabis is found in packages, but CBP has seized product from travelers attempting to cross the border carrying twenty or twenty-five grams. These individuals are subject to seizures, fines, and arrests.²⁸

IV. The Impact of a National Security Regulator for Canada in a Global Economy²⁹

What is one financial factor that sets Canada apart from its peers in the G20? Prior to November 2018, Canada was the only nation in the G20 that did not have a national securities regulator.³⁰ This unique circumstance resulted from the Canadian Constitution, which grants provinces jurisdiction over the conduct of trade and commerce within their respective provinces.³¹ The seminal case of *Lymburn v. Mayland*, decided by the

21. See Tariff Act of 1930, 19 U.S.C. § 1581 - 1631 (empowering CBP with enforcement authority).

22. See *id.*

23. 19 U.S.C. § 1595a(c); 21 U.S.C. § 863.

24. Alex Haight, *Marijuana Seizures Up 140 Percent After Legalization in Canada*, SPECTRUM NEWS BUFFALO (Nov. 9, 2018), <https://spectrumlocalnews.com/nys/buffalo/news/2018/11/09/marijuana-seizures-up-140-at-border-following-legalization-in-canada>.

25. CBP Enforcement Statistics FY2018, U.S. CUSTOMS AND BORDER PROT. (Dec. 17, 2018), <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics>.

26. *Over 1650lbs of Marijuana Seized at Blue Water Bridge*, U.S. CUSTOMS AND BORDER PROT. (Oct. 2, 2018), <https://www.cbp.gov/newsroom/local-media-release/over-1650lbs-marijuana-seized-blue-water-bridge>.

27. Haight, *supra* note 24.

28. *CBP Statement*, *supra* note 17.

29. Anumeet (Anu) Toor recently graduated from the Dual J.D. program between the University of Windsor and University of Detroit Mercy, where she focused on cross-border trade and international law. Anu attended the 2018 Annual International Monetary Fund and World Bank Meetings in Bali, Indonesia, as a member of the Young Diplomats of Canada.

30. Peter J. Thompson, *Canada’s Proposed National Securities Regulator ‘Significantly Compromised’: Report*, FIN. POST (Sept. 18, 2017), <https://business.financialpost.com/news/fp-street/canadas-proposed-national-securities-regulator-significantly-compromised-report>.

31. Constitution Act, 1867, 30 & 31 Vict., c. 3, s. 91(2) (U.K.).

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Supreme Court of Canada in 1932, gave rise to the jurisdictional division of securities regulation throughout Canada.³²

The *Lymburn* ruling caused a deeper division among Canadian provinces as trade continued to globalize. In 2011, the province of Ontario advocated for a united regulatory body that would provide conformed regulatory standards throughout the nation.³³ The Supreme Court of Canada ruled in favor of maintaining the provincial jurisdiction for the regulation of securities.³⁴ Nevertheless, the motivation to unite Canada under a cohesive regulatory scheme remained and was presented again by Ontario, British Columbia, Saskatchewan, New Brunswick, Prince Edward Island, and Yukon to the Supreme Court in 2018.³⁵

The impact of these continuing efforts actualized on November 9, 2018, when the Supreme Court amended the previous ruling to allow provinces the option of joining regulatory agreements.³⁶ The Court ultimately stated that “[e]ven though a statute’s subject matter may fall within the jurisdiction of the enacting legislature, that statute may still contravene the rule against legislative delegation if it purports to transfer primary legislative authority to the other level of government.”³⁷ This ruling was welcomed by many provinces, as it allowed them to appeal to international investors reaching global markets.³⁸

Prior to this decision, the need for compatible global regulatory measures was discussed at the 2018 International Monetary Fund and World Bank Meetings.³⁹ In October 2018, the Future of Finance panel at the Meetings explained that the global integration of finance will require international cooperation to ensure that incompatibility between systems does not arise.⁴⁰ In the same month, seven global banks also collectively signed a Memorandum of Understanding, known as the Trade Information Network, with the goal of developing a digital network for trade finance that would operate on a global scale.⁴¹ With these upcoming changes, this ruling by the Supreme Court of Canada is a fundamental step toward helping Canadians

32. *Lymburn v. Mayland*, [1932] 2 D.L.R. 6 (Can. Alta., A.C.).

33. Reference re Sec. Act, [2011] 2 S.C.R. 837 (Can.).

34. *Id.* at 838, 840.

35. Reference re Pan-Canadian Sec. Regulation, 2018 S.C.C. 48 (Can.).

36. *Id.*

37. *Id.* at 125.

38. John Tuzyk, Andrea Laing & Liam Churchill, *Second Time’s A Charm: SCC Gives the Green Light to National Securities Regulator*, BLAKES BUS. CLASS (Nov. 12, 2018), <https://www.blakesbusinessclass.com/second-times-charm-scc-gives-green-light-national-securities-regulator/>.

39. *The Future of Finance: Charting New Waters in the Next Decade*, INT’L MONETARY FUND (Oct. 13, 2018, 2:00 PM), <https://meetings.imf.org/en/2018/Annual/Schedule/2018/10/13/IMF-seminar-the-future-of-finance>.

40. *Id.*

41. Lea Nonninger, *Seven Global Banks Have Agreed to Develop a Digital Trade Finance Platform*, BUS. INSIDER (Oct. 19, 2018), <https://www.businessinsider.com/banks-trade-information-network-digital-banking-2018-10>.

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engage in a global marketplace. The youth of Canada will have the benefit of being able to engage in trade with international actors as the outcome from this ruling takes effect.

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Cross Border Real Estate

AVIKSHIT MORAL, ADITI JOSHI, AND TIMUR BONDARYEV*

I. India

At the beginning of 2018, the real estate sector in India witnessed a tremendous drop in investments and property prices plummeted briefly, especially after demonetization.¹ There has always been a sense of skepticism about investing in the real estate sector in India, and the government makes constant efforts to improve the transparency and organization of the industry. The onset of the goods and services tax (GST),² enactment of the Real Estate (Regulation and Development) Act and rules,³ the Insolvency and Bankruptcy Code,⁴ and the recent amendments to the Benami Property Act⁵ have been significant initiatives in achieving this purpose.⁶

* Avikshit Moral and Aditi Joshi authored the section on India and Timur Bondaryev authored the section on the Ukraine. The committee editors are Laura Maso Mora and Tracie Porter. Timur Bondaryev, Managing Partner, attorney-at-law, Head of Real Estate and Construction, Arzinger Law Firm; Bohdan Shmorhun, Associate, Real Estate and Construction, Arzinger Law Firm.

1. On November 8, 2016 the Government of India announced the demonetization of all currencies of Indian Rupees 500 and 1000 banknotes of the Mahatma Gandhi Series. Bhaskar Chakravorti, *When India Killed Off Cash Overnight*, HARVARD BUSINESS REVIEW (Jun. 27, 2018), <https://hbr.org/ideacast/2018/06/when-india-killed-off-cash-overnight.html>.

2. The GST is an indirect tax (or consumption tax) levied in India on the supply of goods and services. It came into effect on July 1, 2017 after the enactment of the Central Goods and Services Tax Act, 2017. The Central Goods and Services Tax Act, 2017, No. 12, Acts of Parliament, § 9(1), 2017 (India), *available at* gstcouncil.gov.in/sites/default/files/CGST.pdf.

3. The Real Estate (Regulation and Development) Act, 2016 is an Act of the Parliament of India which seeks to protect home-buyers as well as help boost investments in the real estate industry. The Real Estate (Regulation and Development) Act, 2016, No. 16, Acts of Parliament, 2016 (India), *available at* http://mohua.gov.in/upload/uploadfiles/files/1Real_Estate_Act_2016.pdf.

4. The Insolvency and Bankruptcy Code, 2016 is the bankruptcy law of India which seeks to consolidate the existing framework by creating a single law for insolvency and bankruptcy. The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India), *available at* <http://mca.gov.in/Ministry/pdf/TheInsolvencyandBankruptcyofIndia.pdf>.

5. The Benami Property Act, 1998 was amended through the Benami Transactions (Prohibition) Amended Act, 2016. The amended law empowers the specified authorities to provisionally attach benami properties [that can eventually be confiscated]. The Benami Transactions (Prohibition) Act, 2016, No. 43, Acts of Parliament, § 24(3), 2016 (India), *available at* <https://www.prsindia.org/uploads/media/Benami/Benami%20Transactions%20Act,%202016.pdf>.

6. Benami Property” under the Act is defined with reference to the definition of the said term under the Prohibition of Benami Property Transactions Act, 1988 (“Benami Act”). Under

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Companies in the real estate sector often borrow money from banks, other financial institutions, and investors to finance projects. Projects are also financed through advances towards the purchase consideration received from customers. In a decent-sized project, the total amount of borrowing is often well above \$15 million. There have been instances such as in the case of Unitech Limited,⁷ where due to the large losses suffered by the company, the promoters of the company failed to complete the projects for which they had raised finances and could neither repay the advances received from the buyers nor the amounts borrowed from financial institutions. In such cases, it becomes crucial to hold the responsible parties accountable and ensure that they do not escape the legal process by fleeing the country. To address such issues, the Fugitive Economic Offenders Act, 2018 provides “for measures to deter fugitive economic offenders from evading the process of law in India by staying outside the jurisdiction of Indian courts, to preserve the sanctity of the rule of law in India and for matters connected therewith or incidental thereto.”⁸ The Act intends to achieve this objective with provisions for confiscation of property of the fugitive economic offender, and by setting up authorities and defining their powers such as the power to investigate, power of search and seizure, or power to attach properties, among others.⁹ Confiscation of any property owned by a fugitive economic offender¹⁰ then becomes vested with the government free from all encumbrances. This property may then be used to discharge all liabilities owed to banks and other creditors.

Over the last few years, India’s government-owned banks have been under great pressure due to corporate loan defaults.¹¹ As of September 2017, the bad loans ratio of these banks stood at 13.5 percent, and the corporate

the Benami Act “Benami Property” means any property which is the subject matter of a benami transaction and also includes the proceeds from such property. Further, “benami transaction” is defined under the Benami Act to mean—

- (A) a transaction or an arrangement—
 - (a) where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person; and
 - (b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration,

See The Benami Transactions (Prohibition) Act, 1988, Acts of Parliament, § 2 (8)-(9), 1988 (India), available at <http://www.legislative.gov.in/sites/default/files/A1988-45A.pdf>.

7. See Kailash Babar, *The Rise and Stunning Fall of Unitech*. ECONOMIC TIMES (INDIA) (Dec. 9, 2017, 7:52 AM), <https://economictimes.indiatimes.com/news/company/corporate-trends/the-rise-and-stunning-fall-of-unitech/articleshow/61990781.cms>.

8. See The Fugitive Economic Offenders Act, 2018, No. 17, Acts of Parliament, 2018 (India), available at <http://legislative.gov.in/sites/default/files/A2018-17.pdf>.

9. See *id.*

10. See The Fugitive Economic Offenders Act, 2018, No. 17, Acts of Parliament, 2018 (India), available at <http://legislative.gov.in/sites/default/files/A2018-17.pdf>.

11. Vivek Kaul, *Nirav Modi Fraud Case and India’s Bank Debt Crisis*, BBC (Feb. 20, 2018), <https://www.bbc.com/news/world-asia-india-43123337>.

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default rate was even higher.¹² Largely due to corporate loan defaults, Indian banks have had to write off loans worth around \$38.8 billion between March 2012 and the end of 2017.¹³

To keep these banks going, the Indian government must regularly inject capital into them. Every rupee that goes into these banks is taken away from several other sectors like agriculture, education, health, and defense. Some of the recent large-scale financial frauds have vastly contributed towards this plight. Without any stringent legal framework to tackle such a situation, India witnessed a substantial rise in the increase in financial frauds.

Saddled with the responsibility of guarding the economy of the country from any further scams involving debtors' default, the Fugitive Economic Offenders Act, 2018 came into force in July 2018. Per the Act, a fugitive economic offender is "any individual against whom a warrant for arrest in relation to a scheduled offence has been issued by any court in India and who has either left India to avoid criminal prosecution, or who, being abroad, refuses to return to India to face criminal prosecution."¹⁴ The Act further states that a person is declared a fugitive economic offender only when an arrest warrant has been issued against him for specified offences over \$15 million USD.¹⁵

The list of offenses that can classify an individual as an economic offender are enumerated in the schedule to the Act, which includes offences such as tax evasion, money laundering, transactions defrauding creditors, benami transactions, counterfeiting government stamps or currency, and dishonoring checks, among other offences, under various enactments such as the Negotiable Instruments Act 1881,¹⁶ the Reserve Bank of India Act 1934,¹⁷ the Central Excise Act 1944,¹⁸ the Customs Act 1962,¹⁹ the

12. *Id.*

13. See Ankit Kumar, *PNB fraud: Nirav Modi's Vicious Cycle of LoUs*, BUSINESS TODAY (Aug. 31, 2018, 9:05 PM), <https://www.businesstoday.in/current/economy-politics/pnb-fraud-how-nirav-modi-created-complex-web-of-shadow-companies-to-fool-banks/story/281815.html>.

14. The Fugitive Economic Offenders Act, *supra* note 10, § 2(1)(f).

15. See *id.* § 2(1)(m).

16. Negotiable Instruments Act, 1881 is an act in India relating to negotiable instruments such as promissory notes, bills of exchange and checks. See The Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002, Acts of Parliament, 2002 (India), available at <https://financialservices.gov.in/sites/default/files/Negotiable%20Instruments%20Act1881.pdf>.

17. Reserve Bank of India Act, 1934 is the legislative act under which the Reserve Bank of India was formed and provides for framework for the supervision of banking firms in India. See Reserve Bank of India Act, 1934, Acts of Parliament, 2018 (India), available at <https://rbidocs.rbi.org.in/rdocs/Publications/PDFs/RBIA1934170510.pdf>.

18. See The Central Excise Act, 1944, No. 1, Acts of Parliament, 1944 (India), available at <http://www.cbic.gov.in/htdocs-cbec/excise/cx-act/cx-act-ch2-june16>.

19. The Customs Act, 1962 includes provisions for the imposition of tax in India on goods when transported across international borders. The Customs Act, 1962, No. 52, Acts of Parliament, 1962 (India), available at <http://www.servicetax.gov.in/htdocs-cbec/customs/cs-act/cs-act-ch1-revised2>.

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Prohibition of Benami Property Transactions Act 1988,²⁰ the Prevention of Money Laundering Act 2002,²¹ and the Indian Penal Code 1860.²²

The Act will help to re-establish the rule of law, as the accused will be forced to return to India to submit to the jurisdiction of its courts and face trial for his offenses. The Act will also empower authorities to attach and confiscate properties and assets of fugitive economic offenders.²³ This would help the banks and other financial institutions to achieve greater recovery from financial defaults committed by the fugitive economic offenders. A broad overview of the process under the Act is as follows:

A. Only those individuals who have left India to avoid criminal prosecution, who refuse to return to India to face trials, and whose offense value is more than approximately \$14 million USD, are covered under the Act and can be considered as ‘Fugitive Economic Offenders.’²⁴

B. A Director²⁵ who has reason to believe that any individual is a fugitive economic offender may file an application in the Special Court²⁶ to get such a person declared as a fugitive economic offender. While filing the application, the Director must list the alleged offender’s property in India and abroad that is believed to have been purchased with the proceeds of the crime.²⁷ Immediate confiscation of this property can be recommended by the Director.²⁸ In addition to the

20. Benami Transactions (Prohibition) Act, 1988 is an Act in India that prohibits any transaction in which property is transferred to one person for consideration paid by another person. Benami Transactions (Prohibition) Act, *supra* note 6.

21. Prevention of Money Laundering Act, 2002 is an Act in India enacted to prevent money-laundering and to provide for confiscation of property derived from money-laundering. The Prevention of Money-Laundering Act, 2002, No. 15, Acts of Parliament, 2003 (India), *available at* <http://www.enforcementdirector.gov.in/PreventionOfMoneyLaunderingAct2002.pdf?p1=117281489017600032>.

22. The Indian Penal Code is a comprehensive code intended to cover all substantive aspects of criminal law in India. *See* PEN. CODE *available at* <https://indiacode.nic.in/bitstream/123456789/2263/3/A1860-45.pdf>.

23. *See* The Fugitive Economic Offenders Act, *supra* note 10, § 5.

24. *See id.* § 2(f), 2(m).

25. Director means the Director appointed under sub-section (1) of Section 49 of the Prevention of Money-laundering Act 2002 by the central government. The Prevention of Money Laundering Act, *supra* note 21, § 49(1).

26. Special Court means a Court of Sessions designated as a Special Court under Sub-section (1) of Section 43 of the Prevention of Money-laundering Act 2002. The Prevention of Money Laundering Act, *supra* note 21, § 43(1).

27. Section 2 (k) of the Act defines “proceeds of crime” to mean any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a Scheduled Offence, or the value of any such property, or where such property is taken or held outside the country, then the property equivalent in value held within the country or abroad. The Fugitive Economic Offenders Act, *supra* note 10, § 2(k).

28. *Id.* §4 (2)(c).

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above, the Director also has the power of search and seizure of any place and/or person in connection with the crime.²⁹

C. Upon receiving the application, the Special Court shall issue a notice to the alleged offender requiring him to appear at a specified place within six weeks from the date of issue of such notice. If the person appears at the specified place, the Special Court will terminate its proceedings under the provisions of the Act. If the person fails to appear before the Special Court within the prescribed time, then such person will be declared as a fugitive economic offender.³⁰

D. Upon being declared as a fugitive economic offender, the property of such offender may be confiscated by the Director. The property that can be attached by the Director include property held by such offender in his own name or in the names of proxies like minors, as well as benami properties.³¹ Thus, the scope of property that can be attached under the Act is wide.

E. Subsequently, an administrator will be appointed by the Special Court to dispose of the confiscated properties and satisfy the credit claims.³²

F. Any property belonging to the fugitive economic offender may be provisionally attached without the prior permission of the Special Court, provided that an application is filed before the court within thirty days from the date of such attachment.³³

G. The fugitive economic offender or any company associated with him is specifically prohibited from filing or defending a civil claim in court.³⁴

H. Appeals against the orders of the Special Court will lie before the High Court³⁵ of the state having jurisdiction over the matter.³⁶

The powers given to the Director and the provisions under the Act are intended to provide for an effective, expeditious, and constitutional way to stop the economic offenders from escaping the trial and judicial process in India. In the absence of the Act, there is no legislation addressing this issue. Under the previous statutory regime, the Prevention of Money-laundering Act 2002 would have been applicable in connection with confiscation of property of the economic offender. But confiscation of property under that statute was only possible after the conclusion of a trial. And the absence of the economic offender from India caused inordinate delay in concluding a trial, thereby resulting in delay in attaching the property and repaying the bank loans. The Act seems to address this major flaw and aims to

29. *Id.* §6.

30. *Id.* §10(3)(b).

31. *Id.* §12(2)(a)-(b).

32. *Id.* §15(1)-(3).

33. *Id.* §5(2)(b).

34. *Id.* §14(a).

35. High Courts are the highest judicial forums in each state in India.

36. The Fugitive Economic Offenders Act, *supra* note 10, §17(1).

expeditiously repay money owed by the economic offender to the banks and other creditors.

The Act also may have a deterrent effect on would-be fugitive economic offenders, making it preferable for them to stay in the country and face trial as opposed to leaving the country and having their assets frozen. Also, the wide ambit of the assets that may be confiscated under the Act is a welcome change.

II. Ukraine

In 2018, a new squad of executives who came to their positions from business and understood the requirements of the real estate market launched multiple sustainable reforms. Since their inception, the reforms were aimed at simplifying the processes and bringing more transparency to notarization and registration procedures. Pursuing this goal, the Ukrainian government has launched reforms for the creation of digital registers in the areas of corporate and property rights, moved land cadastral maps to the Internet, and added Blockchain technology that opened data to the public.³⁷ Such actions have borne fruit, and today, the Ukrainian real estate market enjoys the benefits of using publicly available data and accurate information on properties.

Many efforts to implement effective protection of investor's rights and interests have also been implemented. Changes have been made in the corporate, judicial, and banking spheres; and as a result, the real estate market has started to grow step by step.³⁸

Together with the market, the laws, bylaws and regulations are trying to follow the trends and are moving towards harmonization with international best practices and standards.

A. THE EUROPEAN COURT OF HUMAN RIGHTS JUDGMENT ON VIOLATION OF HUMAN RIGHTS BY SETTING BAN ON LAND ALIENATION

Since the beginning of 21st century, Ukraine has imposed a ban on alienation of certain types of farmlands—a so-called “moratorium” that remains effective today. Since 2001, the Land Code of Ukraine states that until the law of Ukraine on turnover of the land plots of agricultural

37. Про затвердження Положення про набори даних, які підлягають оприлюдненню у формі відкритих даних [Decree of the Cabinet of the Ministers of Ukraine “On Approval of the Regulation On the Datasets which Shall be Publicly Available in Open Data Form”] issued Oct. 21, 2015, effective Oct. 24, 2015, No. 835, *available at* <http://zakon.rada.gov.ua/laws/show/835-2015-%D0%BF> (Ukrainian only).

38. Tim Louzonis, *Ukraine Property Market: Is Now the Time to Invest in Ukrainian Real Estate?* BUSINESS UKRAINE (Oct. 10, 2018), <http://bunews.com.ua/investment/item/property-market-is-now-the-right-time-to-invest-in-ukrainian-real-estate>.

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designated use—but not earlier than 1 January 2019—the disposal in any kind of certain land plots is prohibited.³⁹

The idea was to protect the owners of the land shares that were acquired under the privatization of the lands previously owned by state enterprises. In practice, the ban on land alienation causes the absence of competition on the market, and due to an inability of many people to work the land on their own, the farmlands are being transferred into long-term leases to agriholdings.

This year, the European Court of Human Rights (the “ECHR”) has received two applications filed by Ukrainian individuals against Ukraine, which stated that the ban on alienation of the farmlands violates the right to the peaceful enjoyment of possessions. In order to clarify the nature of the ban, the ECHR studied the history of the land moratorium, constitutional matters as well as the political background of it. Having reviewed the relevant matters, the ECHR held that imposing a ban on alienation of the farmlands constituted a violation of Article 1 of Protocol No. 1 to the Convention.⁴⁰ In turn, the ECHR made certain recommendations to Ukraine regarding the lifting the ban.⁴¹

The ECHR pointed out that it is necessary “to ensure a fair balance between the interests of agricultural landowners on the one hand, and the general interests of the community, on the other hand.”⁴² Based on this, it was recommended to create relevant legislation for this purpose. But the ECHR has noted that such recommendation should not be considered as an immediate claim for opening a land market.⁴³

Considering the political part of this question, the ECHR duly stressed that the land moratorium should be lifted, and its lifting should be made under special internal legislation of Ukraine. The ECHR judgment should be deemed a forward-looking sign and another instrument of political influence on Ukraine. All in all, the attention of the international community and institutions is anticipated to speed up the process of internal legislation and lifting the moratorium.

39. Земельний кодекс України [Land Code of Ukraine] issued Oct. 25, 2001, effective Jan. 1, 2002, Code No. 2768-III, *available at* <http://zakon.rada.gov.ua/laws/show/2768-14> (Ukrainian only).

40. *Zelenchuk and Tsytsyura v. Ukraine*, App Nos. 846/16 and 1075/16, Eur. Ct. H. R., ¶104, May 22, 2018, *available at* <http://hudoc.echr.coe.int/eng?i=001-183128>.

41. *See id.*

42. *Id.* ¶ 150.

43. *Id.*

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**B. NEW RULES FOR PRIVATIZATION OF THE STATE AND
MUNICIPAL PROPERTY**

In early 2018, the amendment of the Law of Ukraine “On Privatization of State and Municipal Property” (the “Privatization Law”) was adopted.⁴⁴ The new and major points of the Privatization Law provide for more efficient and transparent regulation of privatization procedures.

The amended Privatization Law introduces a new classification of the objects subject to privatization. Previously, the privatization objects could have been attributed to one of six groups depending on several factors (for instance, whether it is an asset or an interest in the share capital, etc.). This classification created confusion when the objects were prepared for the privatization. Based on the effective amendment of the Privatization Law, there will remain only two groups of privatization objects—objects of large and small privatization. The objects of the large privatization group today include real property—the Integrated Property Complexes and blocks of shares exceeding 50 percent in capitals of companies with net assets for the last year (before privatization) amounting to more than 250 million UAH.⁴⁵ The other objects are attributed to the objects of small privatization and could be disposed of through the official e-platforms which are easily accessible and consistently used by interested individuals.⁴⁶

The other notable invention of the Privatization Law is the shift from seven to two principal types of procedure for the privatization of an object. As per effective privatization legislation, the only possible options for privatization of the object are bidding and direct acquisition. But the option with a direct acquisition could be chosen solely upon inability to dispose of property under the bidding procedure (failure to launch bidding due to the absence of participants or the presence of only a sole participant).⁴⁷

The new Privatization Law introduces a down payment requirement for participating in the bidding procedure. The down payment is calculated based on the initial price of the object and cannot be less than specified in initial bidding announcement. The amount of the down payment equals 5 percent for objects of large privatization and 10 percent for objects of small privatization. Such down payment is credited as a part of a contractual payment in case the participant wins the bid.⁴⁸ In case the participant has not succeeded in bidding, the down payment is returned to the participant.⁴⁹

44. Про приватизацію державного і комунального майна [Law of Ukraine “On Privatization of the State and Communal Property”] issued Jan. 1, 2018, effective Mar. 7, 2018, Law No. 2269-VIII, *available at* <http://zakon.rada.gov.ua/laws/show/2269-19> (Ukrainian only).

45. *Id.* Article 5(3).

46. *Id.* Article 15(1)-(2).

47. *Id.* Article 15(8).

48. *Id.* Article 19(14).

49. *Id.*

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In addition, the amendment of the Privatization Law provides for better security of the investor's interests. For example, the new concepts of the Privatization Law are as follows:

- The ban on starting insolvency procedures within the process of privatization and within one year upon accomplishment of the privatization on the grounds which occurred before the privatization;⁵⁰
- New statutes of limitations on the ineffectiveness of privatization or the sale and purchase agreement, executed based on bidding results, constitute three years for objects of large privatization and three months for objects of small privatization;⁵¹
- Until January 1, 2021, upon the relevant decision of the relevant state or municipal, objects of large privatization could be disposed based on the provisions of Laws of England or Wales.⁵² The registration and entitling issues shall remain to be governed by the relevant Laws of Ukraine;⁵³
- The arbitration clause in a relevant agreement on disposal of the property could be applied upon the consent of the Parties.⁵⁴ In case they fail to agree on the seat of arbitration, the seat shall be Stockholm.⁵⁵

The amendment of the Privatization Law starts a new round of privatization which is deemed to be more efficient than before, and which will provide for a new wave of investments into the properties owned by a state or municipality.

C. NEW PLAYERS ON THE MARKET OF UKRAINE

In 2018, there has been a significant increase in the interest of major international players in the market of Ukraine. Such increased interest of these major players shows the positive shifts in investment attractiveness of the entire country. The basis for such interest increase should be first attributed to the amelioration of the current situation and requirements for conducting business. Further, the transfer of certain services into a digital sphere has also ensured a lot of transparency of communication with state bodies and local authorities.

In 2018, Ukraine experienced market entry by major retail brands such as H&M, IKEA (officially announced to be entering the market), Under Armor, Inditex–Zara Home, Koton, DeFacto, and Decathlon (officially announced to be entering the market).⁵⁶ The entry by such globally

50. *Id.* Article 12(5).

51. *Id.* Article 30(2).

52. *Id.* V(7).

53. *Id.*

54. *Id.* Article 26(12).

55. *Id.*

56. Louzonis, *supra* note 38.

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recognized brands is likely to become another significant step towards the development of the retail market in Ukraine.

The increase in the number of players in the Ukrainian retail market is expected to be a good sign for future developments of the economy itself and a good signal on the effectiveness of the recently launched reforms. Additionally, the so-called “political” issues such as corruption, which previously caused a toxic impact on the market attractiveness, are being replaced by compliance trends. This makes the market more attractive for major internationally recognized companies with high standards of corporate culture.

It is anticipated that this trend of increasing market transparency and providing more comfortable conditions for major investors will continue and will itself boost fair competition on the market.

Immigration and Naturalization

EDITED BY KEVIN J. FANDL AND BETINA SCHLOSSBERG;*
CONTRIBUTIONS BY STEWART CHANG, SABRINA DAMAST,
ANJU GUPTA, POOJA MEHTA, AND SAMANTHA RUMSEY

I. Introduction

Immigration law has always been interesting and controversial. Yet in 2018, it became disproportionately so. Law and policymakers identified issues such as unlawful migration, the border between the United States and Mexico, Muslim immigration, and even high-skilled worker visas as critical election issues in anticipation of the 2018 midterm election. Additionally, the current U.S. Executive Branch has taken a hardline approach to immigration, pursuing opportunities to limit, rather than expand, access by non-citizens to U.S. opportunities. As a prime policy example, the fact that U.S. Citizenship and Immigration Services (USCIS), that is responsible for processing immigration and naturalization applications and establishing policies regarding immigration services, changed its mission statement from “America’s promise as a nation of immigrants” to “protecting Americans, securing the homeland, and honoring our values” gives us a perspective of the scope of the transformation.¹ From the Trump-era immigration policy changes that include family separations, to indefinite detention with no right to bond hearings, to the horrors of denying asylum to victims of domestic violence, to forcefully “outing” same sex partners of diplomats, we will review some of the new American immigration reality.

II. The Trump Administration’s Discreet and Indiscreet Hurdles of Immigration Law²

This administration has put in place policies styled to intentionally thwart and remove immigrants from entering or establishing themselves in this

* Kevin Fandl is Assistant Professor, Fox School of Business, Temple University. Former Counsel to the Assistant Secretary, U.S. Immigration and Customs Enforcement. Ph.D., George Mason University, 2010. J.D., M.A., American University, 2003. B.A., Lock Haven University, 1998. Betina Schlossberg is Principal at Schlossberg Legal, pllc in Ann Arbor, MI, where she contributes to the “Melting Pot.” L.L.M., DePaul University College of Law, 2019. J.D. Wayne State University Law School, 2007. LL.B Universidad de Buenos Aires- Facultad de Derecho y Ciencias Sociales, 1998.

1. *About Us*, U.S. CITIZENSHIP AND IMMIG. SERV. (Mar. 6, 2018), <https://www.uscis.gov/aboutus>.

2. Pooja Mehta is partner at Dalal & Mehta, an Immigration and Family law firm in New Jersey. She is a graduate of New England School of Law — Boston and Rutgers University.

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country. Ultimately, attorneys and pro se litigants will have a significantly more difficult time than before to legalize their status.

A. EXECUTIVE BRANCH

Congress alone has authority to change immigration laws;³ however, the Executive Branch has limited powers to regulate immigration for the welfare of the country.⁴ The Attorney General is “statutorily charged,” along with the Secretary of the Department of Homeland Security (DHS), to administer and enforce immigration laws.⁵ The Attorney General can exercise “this authority on his own motion or through the referral of cases to him by the Board of Immigration Appeals (BIA) or the Secretary of the [DHS.]”⁶ Certification power is a powerful tool allowing the Attorney General to “pronounce new standards for the agency and overturn longstanding BIA precedent.”⁷ Since 1956, the policy has been used sparingly at most.⁸

The current administration is using USCIS to set immigration policies. One example is the criminalization of asylum seekers leading to mass family separation as a method to stop migrants from seeking asylum.⁹ A key provision of the 1951 United Nations Refugee Convention was that “no Contracting State shall expel or return a refugee in any manner to . . . territories where his life or freedom would be threatened.”¹⁰ In 1967 the U.S. became a signatory.¹¹ In 1980, Congress enacted The Refugee Act, conforming domestic law with the Convention.¹² Thus, though asylum seeker entries into the country are generally charged as civil violations, they may be deemed criminal violations under certain circumstances.¹³

On April 6, 2018, former Attorney General Jeffrey Sessions (AG Sessions) issued a memorandum directing federal prosecutors and immigration officials to enforce President Trump’s zero-tolerance policy by more

3. Hon. Alberto R. Gonzalez & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General’s Review Authority*, 101 IOWA L. REV. 841, 844.

4. Matt Ford, *The President’s Extreme Immigration Powers*, THE NEW REPUBLIC (Jan. 8, 2018), <https://newrepublic.com/article/146546/presidents-extreme-immigration-powers>.

5. *Id.* at 850.

6. *Id.* at 846-47.

7. *Id.* at 847.

8. *Id.* at 847, 894-95.

9. See generally, Geneva Sands, *81 children separated at border since Trump’s executive order on dividing families*, CNN (Dec. 6, 2018), <https://www.cnn.com/2018/12/06/politics/immigrant-family-separations-children-border-undocumented/index.html>.

10. Sharon A. Healy, *The Trend Toward the Criminalization and Detention of Asylum Seekers*, 12 HUMAN RIGHTS BRIEF 14, 14 (2004).

11. *Id.*

12. *Id.*

13. For a general discussion, see Healy, *supra* note 10.

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aggressively criminally charging people who enter illegally.¹⁴ Since then, all those who illegally enter endure criminal prosecution.¹⁵ Prosecution required parents to serve time in detention facilities, where children are not legally allowed.¹⁶ Thus, immigration officials forced separations between parents and children.¹⁷ All children were turned over to the U.S. Health and Human Services Department, responsible for placing the child with a sponsor as the child's immigration case was resolved.¹⁸

Another policy change was the July 13, 2018 USCIS Policy Memorandum titled "Issuance of Certain RFEs and NOIDs."¹⁹ USCIS rescinded its decades-long review standard for benefit application. Now, adjudicators may issue denials without sending a Request for Evidence or Notice of Intent to Deny to correct an application's flaw if the application (1) has no legal request for the benefit, or (2) if all the required initial evidence was not submitted with the request. USCIS is also making extra effort to validate all contentions within any application. Minor omissions of facts can lead to a misunderstanding that cannot be corrected without the issuance of a Request for Evidence or Notice of Intent to Deny. Resultantly, denied family and employment-based cases will cause loss of status and possible deportation issues.

Yet another change of policy came in the August 9, 2018, USCIS Policy Memorandum regarding "Accrual of Unlawful Presence and F, J, and M Nonimmigrants."²⁰ Previously, if the government found an international student on a F-1 or J-1 status had violated his/her status, the individual did not start accruing unlawful presence until the date that the USCIS or an immigration judge determined that a violation occurred.²¹ Under the new

14. See AM. IMMIGR. COUNCIL, PROSECUTING MIGRANTS FOR COMING TO THE UNITED STATES 1, 3 (May 1, 2018), <https://www.americanimmigrationcouncil.org/research/immigration-prosecutions>.

15. See Q&A: Trump Administration's "Zero-Tolerance" Immigration Policy, HUMAN RIGHTS WATCH (Aug. 16, 2018, 8:00 AM), <https://www.hrw.org/news/2018/08/16/qa-trump-administrations-zero-tolerance-immigration-policy#q1>.

16. See Q&A: Trump, *supra* note 15.

17. *Id.*

18. See Miriam Valverde, *What you need to know about the Trump administration's zero-tolerance immigration policy*, POLITIFACT (June 6, 2018, 10:38 AM), <https://www.politifact.com/truth-o-meter/article/2018/jun/06/what-you-need-know-about-trump-administrations-zero/>.

19. U.S. CITIZENSHIP AND IMMIGR. SERV., PM-602-0163, POLICY MEMORANDUM: ISSUANCE OF CERTAIN RFEs AND NOIDs; REVISIONS TO ADJUDICATOR'S FIELD MANUAL (AFM) CHAPTER 10.5(A), CHAPTER 10.5(B) (2018), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/AFM_10_Standards_for_RFEs_and_NOIDs_FINAL2.pdf.

20. F nonimmigrants are foreign students, J nonimmigrants are exchange visitors (such as research scholars and professors), and M nonimmigrants are foreign vocational students. See U.S. CITIZENSHIP AND IMMIGR. SERV., PM-602-1060.1, POLICY MEMORANDUM: ACCRUAL OF UNLAWFUL PRESENCE AND F, J, AND M NONIMMIGRANTS (2018), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-08-09-PM-602-1060.1-Accrual-of-Unlawful-Presence-and-F-J-and-M-Nonimmigrants.pdf>.

21. See *USCIS Changing Policy on Accrued Unlawful Presence by Nonimmigrant Students and Exchange Visitors*, U.S. CITIZENSHIP AND IMMIGR. SERV. <https://www.uscis.gov/news/news->

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policy, a student or scholar on a F-1 or J-1 visa would start accruing unlawful presence from the day after the violation occurred.²² The new policy affects international students, scholars, and their dependents.²³

Limitations of H-1B Nonimmigrant Applications have also been used as a form of thwarting legal immigration.²⁴ From September 11, 2018, through February 19, 2019, USCIS will stop the premium processing of H1-B visa applications.²⁵ This expedited processing, which adjudicated cases within fifteen days, allowed employers to have their foreign employees available for work on the starting dates and avoided the uncertainty and economic harm of having to wait six months or more.²⁶

And to make matters worse, citing the “Buy American, Hire American” executive order, the Trump administration has started to revoke or refuse to provide H-4 employment authorizations for the dependent spouses of H1-B applicants.²⁷ It is expected to be completely cancelled by January 2019.²⁸

Other issues currently being faced by the business industry and USCIS are: (1) managing inconsistent decisions among similar scenarios, (2) managing narrowed eligibility criteria without guidance to adjudicators or the public, and (3) the reality of being placed into deportation proceedings if renewal applications are denied.²⁹

B. CASELAW

In addition to policy changes in USCIS, three case opinions from 2018 will impact the way individuals go about legalizing their status. First, on May 17, 2018 in *Matter of Castro – Tum*, 27 I&N Dec. 271 (A.G. 2018), then AG Sessions revoked immigration judges’ and the BIA’s general

releases/uscis-changing-policy-accrued-unlawful-presence-nonimmigrant-students-and-exchange-visitors (last updated May 11, 2018).

22. *Id.*

23. *Id.*

24. H-1B visas are for those who have employment at a university and have a minimum of a Bachelor’s degree. *Comparing Non-Immigrant Visa Statuses J-1, H-1B, and TN Employment Options*, UT HEALTH SAN ANTONIO INTL’ SERV., 2 (Sept. 2018), <https://wp.uthscsa.edu/ois/wp-content/uploads/sites/40/2018/09/Comparison-of-J-1-H-1B-and-TN-visas.pdf>.

25. *USCIS Extends and Expands Suspension of Premium Processing for H-1B Petitions to Reduce Delays*, U.S. CITIZENSHIP AND IMMIG. SERV., <https://www.uscis.gov/news/uscis-extends-and-expands-suspension-premium-processing-h-1b-petitions-reduce-delays> (last updated Aug. 28, 2018).

26. *Id.*

27. Jethro Mullen, *Trump to Propose Ending Rule Allowing Spouses of H-1B Holders to Work in U.S.*, CNN (Dec. 15, 2017, 1:55 PM), <https://money.cnn.com/2017/12/15/technology/h1b-visa-spouses-h4-trump/index.html>.

28. See Kritika Bansal, *U.S. to Propose Major Changes in H-1B Visas by January 2018*, INDIA TODAY (Oct. 18, 2018), <https://www.indiatoday.in/business/story/worry-for-indian-it-firms-us-to-propose-major-changes-in-h-1b-visas-1370613-2018-10-18>.

29. Nick Kolakowski, *Tech CEOs Issue Open Letter Over H-1B, Immigration Concerns*, DICE (Aug. 29, 2018), <https://insights.dice.com/2018/08/29/tech-ceos-issue-open-letter-h-1b-immigration-concerns/>.

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authority to administratively close cases, or temporarily close cases, without deciding them.³⁰ A person with an administratively closed case was still in removal proceedings, but the case remained inactive and off the docket.³¹ The tool was beneficial for docket management and prioritization of caseload. With the decision, these cases will be re-calendared, overflowing the immigration courts and bringing respondent back into litigation with the DHS.³²

Second, on June 21, 2018, in *Pereira v. Sessions*, 585 U. S. ____ (2018), the Supreme Court of the United States stated that a notice to appear for an immigration hearing, that does not include a time and place for a hearing, does not trigger the stop-time rule for an individual's residency clock.³³ Specifically, "[a] notice that does not inform a noncitizen when and where to appear for removal proceedings is not a 'notice to appear under [USC] section 1229(a)' and therefore does not trigger the stop-time rule."³⁴ This opened the doors to thousands of people in courts to apply for relief based on residency, considering that the stop-time rule arises in conjunction with a non-citizen's application for relief from removal in the form of cancellation of removal.

And third, on August 31, 2018, in *Matter of Bermudez - Cota*, 27 I&N Dec. 441 (BIA 2018), the BIA narrowed the decision of *Pereira v. Sessions* (referenced above) saying that 8 CFR § 1003.14(a) vests jurisdiction with the immigration court when a charging document is filed.³⁵ Because the regulation does not specify that the charging document contain time and place of the hearing, the BIA reasoned there was no jurisdictional problem.³⁶ The BIA also stated that if a notice of hearing specifying this information is later sent to the alien, it fulfills the requirements of section 239(a) of the Act.³⁷

III. U.S. Supreme Court Weighs in on Indefinite Civil Detention of Immigrants³⁸

In *Jennings v. Rodriguez*, the U.S. Supreme Court weighed in on whether the statutes governing detention of so-called "mandatory detainees" by immigration authorities were properly interpreted by the federal appellate courts to require periodic bond hearings.³⁹ At issue was the continued

30. See *Castro - Tum*, 27 I. & N. Dec. 271, 293 (A.G. 2018).

31. See *Castro*, 27 I&N at 272—273.

32. See *id.* at 273.

33. See *Pereira v. Sessions*, 138 S. Ct. 2105, 2108 (2018).

34. *Pereira*, 138 S. Ct. at 2110.

35. See *Bermudez-Cota*, 27 I. & N. Dec. 441, 444 (B.I.A. 2018) (interim decision).

36. See *Bermudez-Cota*, 27 I. & N. Dec. at 445.

37. *Id.* at 447.

38. Sabrina Damast, Law Office of Sabrina Damast, JD Cardozo School of Law 2011. BA New York University 2008.

39. See *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018).

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detention of three classes of immigrant detainees.⁴⁰ The first class, known as arriving aliens, consisted of non-citizens who had been detained after applying for admission at a port of entry and included asylum seekers and long-term permanent residents (sometimes referred to as “green card holders”) who had committed certain criminal offenses or other immigration violations and then traveled abroad.⁴¹ The second class consisted of immigrants who had committed certain types of criminal offenses, regardless of whether they had subsequently applied for admission at a port of entry. Prior to the advent of the *Rodriguez* litigation, neither of these classes of detainees were entitled to bond hearings. The third class consisted of other detainees who were eligible for a bond hearing, but who had either been denied bond at this initial hearing, or remained detained after 180 days because of an inability to pay the bond amount set during the initial hearing.⁴²

The litigation, which arose out of the Central District of California, had already been to the Ninth Circuit three times prior to arriving at the Supreme Court. The third decision of the Ninth Circuit employed the constitutional avoidance canon of statutory construction to determine that each of these statutes, no matter how mandatory the language regarding detention, must be read to allow for periodic bond hearings, lest they implicate due process concerns.⁴³ Specifically, the Ninth Circuit crafted a review scheme whereby members of each of these classes would be entitled to a bond hearing every six months, regardless of the statutory basis for their detention. Moreover, the government would bear the burden in these hearings of proving by clear and convincing evidence that the detainee was a flight risk or a danger to the community, such that continued detention was justified.⁴⁴

The Supreme Court disagreed with the entirety of the Ninth Circuit’s analysis. It found nothing in the language of the statutes authorizing detention of the first two classes of people to authorize bond hearings at any time. Thus, the canon of constitutional avoidance was not applicable, as there were no competing plausible interpretations of the statutory text.⁴⁵ Even the third class of detainees fared poorly before the Supreme Court. While the Court recognized a clear statutory basis for according one bond hearing to these individuals, it found nothing in the statutory text to support periodic bond hearings or the burden of proof set forth by the Ninth Circuit.⁴⁶

Though the Supreme Court roundly rejected the statutory interpretation of the Ninth Circuit, that did not resolve the controversy. The Supreme

40. See *Jennings*, 138 S. Ct. at 836.

41. See *id.* at 833.

42. See *id.*

43. See *id.* at 833.

44. See *id.* at 847–48.

45. *Jennings*, 138 S. Ct. at 842–43, 845.

46. *Id.* at 847.

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Court recognized the possibility that the Constitution itself might mandate bond hearings for these classes of individuals who were suffering prolonged and seemingly indefinite detention. Because the District Court that originally issued the injunction had never considered a constitutional basis for its ruling, the Supreme Court remanded for consideration of the constitutional implications of the detention scheme.⁴⁷

The Ninth Circuit took up that invitation with vigor in *Rodriguez v. Marin*.⁴⁸ Though the court remanded to the District Court to resolve the constitutional question in the first instance, it included its own strongly-worded reflection on the matter.⁴⁹

“We have grave doubts that any statute that allows for arbitrary prolonged detention without any process is constitutional or that those who founded our democracy precisely to protect against the government’s arbitrary deprivation of liberty would have thought so. Arbitrary civil detention is not a feature of our American government.”⁵⁰

It is clear the *Rodriguez* saga, which commenced in 2007, is far from over.

The Supreme Court’s decision, though almost scolding in its analysis of the Ninth Circuit’s rationale, has not deterred other circuits from continuing to use the canon of constitutional avoidance to justify bond hearings for civil detainees subject to prolonged detention by immigration authorities.⁵¹ The willingness of other circuits to recognize the injustice of indefinite civil detention nearly guarantees that this issue will return to the Supreme Court.

At a time when thousands of immigrants are waiting in Tijuana to make their claim for asylum, and the Trump administration seeks to direct all of them to make their claims at ports of entry (guaranteeing that they will be classified as arriving aliens and potentially subjecting them to the indefinite detention that the Ninth Circuit finds so repugnant) or lose their eligibility for asylum, the legality and future of prolonged civil detention of immigrants could not be more relevant. We will watch to see how other circuits handle this issue after the Supreme Court’s decision in *Rodriguez*, and how the Central District of California will view the constitutional questions posed on remand.

47. *Id.* at 851.

48. *Rodriguez v. Marin*, 909 F.3d 252 (9th Cir. 2018).

49. *See id.* at 257.

50. *Id.* at 256.

51. *See e.g.*, *Guerrero-Sanchez v. Warden York County Prison*, 905 F.3d 208, 223 (3d Cir. 2018).

IV. Asylum Eligibility for Victims of Domestic Violence⁵²

The 1980 Refugee Act provides for asylum protection for those who can show that they would be persecuted in their home country “on account of race, religion, nationality, membership in a particular social group, or political opinion.”⁵³ The persecution must be at the hands of the government or by forces the government is unwilling or unable to control.⁵⁴

In 2014, after a decades-long battle to recognize asylum eligibility for victims of domestic violence, the BIA issued *Matter of A-R-C-G-*, a decision in which it held that the applicant, who had suffered repugnant abuse at the hands of her husband, could be eligible for asylum based on the particular social group of “married women in Guatemala who are unable to leave their relationship.”⁵⁵ The BIA noted that the DHS conceded that the applicant had been harmed on account of a cognizable particular social group, but it further stated that the DHS’s position comports with its own requirements for particular social groups and went on to analyze the delineated group under its own case law, ultimately finding it cognizable.⁵⁶

After *Matter of A-R-C-G-* was issued, immigration judges and the BIA began granting asylum to some applicants whose cases were based on domestic violence. But some domestic violence-based cases were still being denied for various reasons. In December 2015, an immigration judge denied asylum to A-B-, a Salvadoran applicant who suffered extreme abuse at the hands of her partner over the course of several years.⁵⁷ In December 2016, the BIA reversed in an unpublished decision, finding, *inter alia*, that the applicant had established that she was abused on account of her membership in the particular social group of “El Salvadoran women who are unable to leave their domestic relationships where they have children in common.”⁵⁸ The BIA also found that the applicant had established that the Salvadoran police were unwilling or unable to protect her from the abuse.⁵⁹ The BIA remanded for the completion of background checks.⁶⁰ On remand, however, the immigration judge again refused to grant asylum, questioning whether *Matter of A-R-C-G-* was still good law in his court’s jurisdiction, and certified the case back to the BIA.⁶¹

52. Anjum Gupta, Professor of Law, Judge Chester J. Straub Scholar, and Director of the Immigrant Rights Clinic, Rutgers Law School. J.D., Yale Law School, 2003. L.L.M., Georgetown Law, 2013. B.A., University of Michigan—Ann Arbor, 1999. Samantha Rumsey, Staff Attorney/Fellow, Immigrant Rights Clinic, Rutgers Law School. J.D., Seton Hall Law School, 2014. B.A., The College of William and Mary, 2010.

53. Refugee Act of 1980, Pub. L. No. 96-12, 94 Stat. 102.

54. Acosta, 19 I. & N. Dec. 211, 222 (B.I.A. 1985) (interim decision).

55. *A-R-C-G- Et Al.*, Respondents, 26 I. & N. Dec. 388, 388 (B.I.A. 2014) (interim decision).

56. *See A-R-C-G-*, 26 I. & N. Dec. at 392–395.

57. *See A-B-*, Respondent, 27 I. & N. Dec. 316, 321 (A.G. 2018) (interim decision).

58. *See A-B-*, Respondent, 27 I. & N. Dec. at 321.

59. *See A-B-*, ___ I. & N. Dec. 1, 3 (B.I.A. 2016) (interim decision) (unpublished).

60. *See A-B-*, ___ I. & N. Dec. at 4.

61. *See A-B-*, Respondent, 27 I. & N. Dec. at 321–322.

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Before the BIA could act, then AG Sessions invoked a previously seldom-used regulation giving him the authority to certify the BIA's original decision to himself.⁶² He called for potential amici to opine on the question of whether victims of harms committed by private actors could qualify for asylum based on the protected category of particular social group.⁶³ Organizations and individuals submitted at least eleven amicus briefs demonstrating, *inter alia*, that it was well established in the BIA and every federal circuit court that individuals who experienced or feared harm by non-state actors could qualify for asylum, so long as they could show that their home country's government was unwilling or unable to control the persecutors.⁶⁴ Nevertheless, on June 11, 2018, the AG Sessions issued a sweeping decision vacating the BIA's unpublished decision in *Matter of A-B-*, as well as its 2014 published decision in *Matter of A-R-C-G-*.⁶⁵

Despite the decades of precedent holding that victims of harms committed by private actors could be eligible for asylum, AG Sessions stated that *Matter of A-R-C-G-* "caused confusion because it recognized an expansive new category of particular social groups based on private violence."⁶⁶ AG Sessions further assailed the BIA's decision in *Matter of A-R-C-G-* for completing only a "cursory analysis."⁶⁷

Performing his own analysis, AG Sessions found that "[s]ocial groups defined by their vulnerability to private criminal activity likely lack the particularity required under [BIA precedent], given that broad swaths of society may be susceptible to victimization."⁶⁸ He further found that "narrow" social groups such as the one proposed in *A-R-C-G-* "will often lack sufficient social distinction to be cognizable" and are often merely "a description of individuals sharing certain traits or experience."⁶⁹ He further reasoned that particular social groups must not be defined by the harm feared, and that the BIA erred in failing to consider that "the inability 'to leave' was created by harm or threatened harm."⁷⁰ Yet, the Attorney General himself failed to consider that there are often other factors—societal, cultural, and personal—that prevent women from leaving abusive relationships.

With respect to the state action requirement, AG Sessions emphasized that an applicant "must show more than 'difficulty . . . controlling' private

62. See 8 C.F.R. 1003.1(h)(1)(i) (2018).

63. See *A-B-*, 27 I. & N. Dec. 227, 227 (A.G. 2018) (interim decision).

64. See *e.g.*, Brief Amici Curiae of Sixteen Former Immigration Judges and Members of the Board of Immigration Appeals Urging Vacatur of Referral Order in Support of Respondent at 19, *A-B-*, 27 I. & N. Dec. 227 (A.G. 2018) (interim decision) (No. 18043060). One brief was filed in opposition to Ms. *A-B-*.

65. See *A-B-*, Respondent, 27 I. & N. Dec. 316, 317 (A.G. 2018) (interim decision).

66. See *A-B-*, Respondent, 27 I. & N. Dec. at 319.

67. *Id.* at 331.

68. *Id.* at 335.

69. *Id.* at 336.

70. *Id.* at 335.

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behavior.”⁷¹ Relying on three cases cherry picked from the circuit courts, he continued to state: “The applicant must show that the government condoned the private actions or at least demonstrated a complete helplessness to protect the victims.”⁷² He gave no rationale for adopting this heightened standard and departing from the well-established “unwilling or unable” standard.

With respect to the requirement that the persecution have a nexus to a protected ground, AG Sessions opined, “private criminals are motivated more often by greed or vendettas than by an intent to ‘overcome [the protected] characteristic of the victim.’”⁷³ In the Attorney General’s opinion, the BIA in *Matter of A-R-C-G-* failed to show that the abuser attacked the victim because he was aware of and hostile to her social group. “Rather, he attacked her because of his preexisting personal relationship with the victim.”⁷⁴

It is worth noting that although A-B-’s claim was based on domestic violence, AG Sessions attempted in dicta to broaden the scope of the decision to other types of claims based on harms committed by private actors. For example, he stated, “[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum.”⁷⁵ Similarly, in a footnote, he cast doubt on *Matter of L-E-A-*, a case in which the BIA held that an applicant’s family could constitute a particular social group in some circumstances.⁷⁶ He further attempted, in dicta, to expand the scope of the decision beyond the procedural posture of the case before him. Although A-B- had been denied asylum after a hearing, AG Sessions suggested that such cases could be denied even without a hearing.⁷⁷

Because the Attorney General remanded the case back to the immigration judge, the decision has not been directly appealed to the circuit court. But several cases in which *Matter of A-B-* is implicated are currently on appeal at the various circuit courts. It remains to be seen whether the circuit courts defer to the Attorney General’s decision in whole or in part. In the meantime, the DHS has given asylum officers explicit instructions to follow the BIA’s holdings in *Matter of A-B-*,⁷⁸ and immigration judges must follow

71. *Id.* at 337 (quoting *Menjivar v. Gonzales*, 416 F.3d 918, 921 (8th Cir. 2005) (quoting *McMullen*, 17 I. & N. Dec. 542, 546 (B.I.A. 1980))).

72. *See* A-B-, Respondent, 27 I. & N. Dec. 316, 317 (A.G. 2018) (interim decision) (quoting *Galina v. INS*, 213 F.3d 955, 958 (7th Cir. 2000)).

73. *See* A-B-, Respondent, 27 I. & N. Dec. at 337 (quoting *Kasinga*, 21 I. & N. Dec. 357, 365 (B.I.A. 1996)).

74. *Id.* at 339.

75. *Id.* at 320 (emphasis added).

76. *Id.* at 333 n.8 (discussing *L-E-A-*, 27 I. & N. Dec. 40 (B.I.A. 2017)).

77. A-B-, 27 I. & N. at 320 n.1.

78. U.S. CITIZENSHIP AND IMMIG. SERV., POLICY MEMORANDUM: GUIDANCE FOR PROCESSING REASONABLE FEAR, CREDIBLE FEAR, AND REFUGEE CLAIMS IN ACCORDANCE WITH MATTER OF A-B- 1, 1 (2018), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-18-PM-602-0162-USCIS-Memorandum-Matter-of-A-B.pdf> .

the decision to the extent that it does not conflict with relevant federal circuit court precedent, making obtaining asylum more challenging for thousands of immigrants nationwide.

V. DOS Policy - The Problem with Umbrellas⁷⁹

The problem with umbrellas is that they cover such a small space. There is just enough shelter to keep maybe a couple of people relatively dry, as long as they remain tightly huddled together beneath the short canopy above them, even while the storm continues to rage in the world around them.

When the Supreme court decided *Obergefell v. Hodges*,⁸⁰ many in the gay community believed the rain had stopped, and that having achieved the goal of marriage equality, we had finally reached the pot of gold at the end of the rainbow.⁸¹ Others were more wary, particularly concerned by Justice Kennedy's nestling of same-sex rights within the penumbral right of privacy.⁸² *Obergefell* frames marriage equality as a due process protection of the fundamental right to marry—it does not, nor does it seek to, extend equal protection to gay individuals as members of a constitutionally protected class.⁸³ Among the wary, some believed that *Obergefell*, with its veneration of marriage as a fundamental attribute that makes a person complete, portended less of a right to marry than a mandate to marry.⁸⁴

This fear fully manifested this year, as the Trump administration instituted a policy that reverses the pre-*Obergefell* and pre-*Windsor* State Department policy of issuing derivative visas to unmarried same-sex partners of diplomats.⁸⁵ The new policy insists, now that same-sex marriage is federally legal in the United States, that in order for foreign same-sex partners of diplomats to join their partners in the United States, they must

79. Stewart Chang, Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas. Ph.D. University of California, Irvine, 2010. J.D. Georgetown University Law Center, 1999. M.A. Stanford University, 1996. B.A. University of California, Los Angeles, 1995.

80. See generally, *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

81. See generally, Alphonse A. Gerhardstein, *At the End of the Rainbow?*, 34:1 GPSOLO 12 (2017); Akhil Reed Amar, *Anthony Kennedy and the Ghost of Earl Warren*, SLATE: OUTWARD (July 6, 2015, 4:17 PM), <https://slate.com/human-interest/2015/07/obergefell-v-hodges-anthony-kennedy-continues-the-legacy-of-earl-warren.html>.

82. See, e.g., Katherine Franke, "Dignity" Could Be Dangerous at the Supreme Court, SLATE: OUTWARD (June 25, 2015, 4:16 PM), http://www.slate.com/blogs/outward/2015/06/25/in_the_sotus_same_sex_marriage_case_a_dignity_rationale_could_be_dangerous.html; Nan D. Hunter, *The Undetermined Legacy of 'Obergefell v. Hodges'*, THE NATION (June 29, 2015), <http://www.thenation.com/article/the-undetermined-legacy-of-obergefell-v-hodges/>.

83. See *Obergefell*, 135 S.Ct. at 2604—2605.

84. See e.g., Erez Aloni, *Deprivative Recognition*, 61 UCLA L. REV. 1276 (2014); Stewart Chang, *Is Gay the New Asian?: Marriage Equality and the Dawn of a New Model Minority*, 23 ASIAN AM. L. J. 5, 6—7 (2016).

85. Edward Wong and Michael Schwartz, *U.S. Bans Diplomatic Visas for Foreign Same-Sex Domestic Partners*, N.Y. TIMES (Oct. 2, 2018), <https://www.nytimes.com/2018/10/02/us/politics/visa-ban-same-sex-partners-diplomats.html>.

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get married. The Trump administration's new policy regarding same-sex partners of diplomats demonstrates just how small of a shelter marriage equality is for the gay and lesbian community.

Typically, diplomatic visa holders are allowed to have qualifying family members, namely spouses and children, join them in the United States under derivative visas. But until very recently, same-sex partners of primary visa holders had been ineligible for derivative visas, even if they were married. In *Adams v. Howerton*, which predated the Defense of Marriage Act (DOMA), the Ninth Circuit limited "marriage" to opposite-sex couples for the purpose of immigration benefits.⁸⁶ It was in the *Howerton* era that the Obama administration created an exemption for same-sex domestic partners of diplomats to be allowed derivative visas in November 2008.⁸⁷ Citing how the Vienna Convention on Diplomatic Relations requires that family members of the same household of a diplomat be accorded the same privileges and immunities as the primary visa holder, Secretary of State Hillary Clinton extended the definition of "family" to include same-sex domestic partners.⁸⁸ This exception was made with the understanding that not all foreign countries granted marriage rights to same-sex partners. Also, even if their same-sex marriages were valid under foreign law, the United States government would not recognize those marriages on the federal level because of DOMA, even if individual states did.

After *United States v. Windsor*, which invalidated significant portions of DOMA,⁸⁹ Secretary of Homeland Security Janet Napolitano directed United States Citizenship and Immigration Services to review immigration petitions filed on behalf of same-sex spouses "in the same manner as those filed on behalf of an opposite-sex spouse."⁹⁰ Yet despite the drastic shift in immigration policy immediately after *Windsor*, the State Department policy on derivative visas for same-sex domestic partners of diplomats remained in place.

The continued policy highlights the diversity of how same-sex relations are treated across the world as not all diplomats and their same-sex partners may have access to marriage. While some countries recognize same-sex marriage, most do not, and others still criminalize same-sex sexual relations. In this way, the Department of State policy was sensitive to the fact that same-sex relationships in the international context are distinct from

86. See *Adams v. Howerton*, 673 F.2d 1036, 1043 (9th Cir. 1982).

87. See U.S. Dep't of State, Diplomatic Note 18-1029 1 (2009) <https://www.state.gov/documents/organization/284115.pdf>.

88. See generally Carol Morello, *State Department Changes Visa Rules for Same-Sex Partners of Foreign Diplomats*, THE WASHINGTON POST, Oct. 2, 2018, https://www.washingtonpost.com/world/national-security/state-department-changes-visa-rules-for-same-sex-partners-of-foreign-diplomats/2018/10/02/8121759a-c651-11e8-9b1c-a90f1daae309_story.html?utm_term=.3296443d45de.

89. See *U.S. v. Windsor*, 570 U.S. 744, 775 (2013).

90. *Implementation of the Supreme Court Ruling on the Defense of Marriage Act*, U.S. CITIZENSHIP & IMMIG. SERV., <https://www.uscis.gov/archive/archive-laws/implementation-supreme-court-ruling-defense-marriage-act> (last updated July 2, 2013).

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opposite-sex relationships and have separate struggles and complications. Marriage is not a one-size-fits all solution for many same-sex couples across the world. Equal treatment for same-sex couples, then, must take into account the ways in which same-sex relationships are treated differently in the global context.

Obergefell, however, does not take into consideration these global nuances. In the mind of Justice Kennedy, marriage is the necessary end of any same-sex couple who wishes to be treated equally with opposite-sex couples.⁹¹ Rather than engage in equal protection analysis and the question whether same-sex couples are to be treated with the same dignity and respect as opposite-sex couples, Kennedy employs a universalist argument that marriage is a universal right that should be enjoyed by all people. Under the due process analysis that Justice Kennedy employs, marriage rather than equality becomes the focal point, and it is under the umbrella of the fundamental right to marry that equality is understood and realized. When equal protection for same-sex couples is confined within marriage, those who do not subscribe to the institution remain unprotected by their own choice. Instead of giving the relationships of same-sex couples the same benefits and protections as marriage, Kennedy anoints marriage as the exclusive means to enjoy those benefits and protections. Furthermore, rather than recognize sexual orientation as a classification deserving equal protection across the board, *Obergefell* assures equality for same-sex couples only in the context of the fundamental right to marriage. Same-sex couples have the right to access marriage only in the same way as everyone universally has the same right to access those benefits.

Justice Kennedy assumes, however, that marriage indeed applies universally, forgetting that up until the moment that he penned his decision, that the United States was among the majority of countries that did not completely recognize same-sex marriage. Marriage is not a universal solution that affords protection for many same-sex couples in the world. By not taking an equal protection approach, Justice Kennedy leaves open the possibility of continued unequal treatment of same-sex couples outside the parameters of marriage. Inside the United States, marriage does not protect same-sex couples from many forms of discrimination, including in the workplace or by other private citizens. Some same-sex couples who married immediately following *Obergefell* were fired when they returned to work.⁹² *Masterpiece Cakeshop v. Colorado Civil Rights Commission* left the issue of whether there could be religious exemptions to state anti-discrimination

⁹¹ See generally *Obergefell*, *supra* note 80.

⁹² Katherine Franke, *Giving Obergefell the "Roe-Treatment,"* COLUMB. L. SCH.: THE LAW, RIGHTS, AND RELIGION PROJECT (July 13, 2015), <http://blogs.law.columbia.edu/publicrights/privateconscience/2015/07/13/giving-obergefell-the-roe-treatment/>; Naomi Shavin, *Gay Couples Can Marry Now, But They Can Still Be Fired for Being Gay*, NEW REPUBLIC (June 26, 2015), <https://newrepublic.com/article/122181/gay-couples-celebrating-today-could-be-fired-monday-being-gay>.

laws unsettled.⁹³ Outside the United States the risks to same-sex couples is often greater. Sexual conduct between members of the same sex remains illegal in many countries, where it can be punishable by imprisonment, corporal punishment, or even death.⁹⁴ Marriage may make same-sex couples from countries with anti-sodomy laws publicly visible and put them in danger of arrest and prosecution once they return to their countries.

The prior State Department policy took an equal protection approach to same-sex relationships, recognizing that those relationships are sometimes different from marriage, but should enjoy the same benefits. By contrast, the new Trump administration policy that forces diplomats and their same-sex partners to marry in order to remain together while in the United States exposes the regional myopia of *Obergefell* and of the American marriage equality movement as a means of obtaining rights for same-sex couples. Marriage is a frame that only a privileged few in limited parts of the world have the luxury of fully embracing. Even though marriage equality was viewed as the final destination of gay rights advocacy in the United States,⁹⁵ it is by no means the answer in other parts of the world. Indeed, the rain did not stop with *Obergefell*—the decision affords only a small dry patch in a localized corner, while the downpour continues in the wider world outside. The Trump administration policy coerces same-sex diplomatic couples to take temporary shelter under the tight space of the *Obergefell* umbrella, only to push them back out into the exposure of the global storm once their terms of service are up.

VI. Conclusion

There is much more to say, but the limitations of this publication allow us only to provide this narrow perspective on the realities of immigration law and policy today. While the struggle to balance the legal rights of U.S. citizens with aliens goes on, the struggles of immigrant parents looking for their children, American employers looking for foreign employees, and immigration practitioners trying to adjust to a new normal, continue. We remain hopeful as practitioners that the coming year brings new opportunities to defend not only the rule of law, but also the principles of openness and opportunity that this country was founded upon.

93. See *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S.Ct. 1719, 1732 (2018).

94. See generally, Avani Uppalapati et al., *International Regulation of Sexual Orientation, Gender Identity, and Sexual Anatomy*, 18 GEORGETOWN J. GENDER & L. 635 (2017).

95. See Jeremiah A. Ho, *Weather Permitting: Incrementalism, Animus, and the Art of Forecasting Marriage Equality After U.S. v. Windsor*, 62 CLEV. ST. L. REV. 1, 7 (2014).

International Tax

EDITOR: SUNITA DOOBAY

AUTHORS: PETER FEROS, PAMELA A. FULLER,
SELINA ELISABETH GROSSMANN, HANS-PETER HANSEN,
JENNIFER HORTON, HENRIQUE LOPES, PATRICK MARLEY,
SHIGEKI MINAMI, KELVIN NG, THEODORE PASIALIS,
EUGENIO ROMITA, NIV TADMORE AND SILVANA M. YANICHEVSKY.*

The focus of this article is on the response of various governments to the loss of income tax and sales tax revenue caused by the shift of sales from traditional brick and mortar stores to e-commerce sellers through disruptors of the traditional economy such as Netflix and Uber.

I. Argentina

Although Argentina has a long way to go to thoroughly address Base Erosion and Profit Sharing (BEPS) Action 1,¹ some measures already have been taken at both the National and Provincial levels. At a national level, the comprehensive tax reform published in December 2017² amended the

* Sunita Doobay (editor) is a tax partner with Blaney McMurtry LLP based in Toronto, Canada. Peter Guang Chen (author of the Chinese section) is a tax partner with Zhong Lun Law Firm based in Hong Kong. Peter Feros (co-author of the Australian section) is a tax partner at Clayton Utz based in Sydney, Australia. Pamela A. Fuller is a corporate and international tax attorney with Tully Rinckey PLLC in New York City, and Of Counsel to Royse Law Firm in San Francisco and Silicon Valley. Selina Elisabeth Grossmann (co-author of the German section) is a tax specialist at Pfaff Steuerberatungsgesellschaft based in Frankfurt, Germany. Hans-Peter Hansen (co-author of the German section) is a tax partner at Schiedermaier Rechtsanwälte based in Frankfurt, Germany. Jennifer Horton (co-author of the Canadian section) is a tax associate with Osler, Hoskin & Harcourt LLP based in Toronto, Canada. Henrique Lopes (author of the Brazilian section) is a tax partner with Koury Lopes Advogados based in Sao Paulo, Brazil. Patrick Marley (co-author of the Canadian section) is a tax partner with Osler, Hoskin & Harcourt LLP based in Toronto, Canada. Shigeki Minami (author of the Japanese section) is a tax and M&A partner with Nagashima Ohno & Tsunematsu based in Tokyo, Japan. Kevin Ng (co-author of the Australian section) is a senior tax associate with Clayton Utz based in Sydney, Australia. Theodore Pasialis (co-author of the Australian section) is a tax lawyer with Clayton Utz based in Sydney, Australia. Eugenio Romita (author of the Italian section) is a tax partner with Giovannelli e Associati law firm based in Milan, Italy. Dr. Niv Tadmire (co-author of the Australian section) is a tax partner with Clayton Utz based in Melbourne, Australia. Silvana M. Yanichevsky (author of the Argentinian section) is a tax lawyer based in Buenos Aires, Argentina.

1. OECD, ADDRESSING THE TAX CHALLENGES OF THE DIGITAL ECONOMY (2015), <https://doi.org/10.1787/9789264241046-en>.

2. Law No. 24730, Dec. 29, 2017 (Arg.).

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Value-Added Tax Law³ (VAT) by including as a taxable event the provision of digital services through any application. Digital services include not only the hosting of websites but also other services aimed at offering or facilitating the presence of individuals or entities online. This law became effective January 1, 2018.⁴

The tax reform includes the presumption that the effective exploitation of the digital services is deemed to be located in Argentina when services are rendered by a non-resident provider and the following items are located in Argentina: (1) the IP address of the device used by the customer or SIM card country code, (2) the billing address of the client, (3) the bank account used for paying such services, and/or (4) the billing address of the customer of such bank or financial institution issuing the credit or debit card used for purposes of such payment.⁵ Regulations for purposes of the VAT on digital services⁶ set forth that the responsible party of such VAT is the customer—or the intermediary entity that facilitates and manages the relevant payments by itself or as a collection and payment agent.

At the provincial level, only Córdoba and Salta have amended their local tax codes to capture indirect tax on revenue generated from digital services. Both provinces set forth that a taxable event for turnover tax⁷ purposes exists where there is a provision of a service that requires online subscription to access online entertainment that is broadcast through the internet. The turnover tax also will apply to the intermediation of services such as Uber or Airbnb and online game activity, regardless of the location of the servers or digital platform.⁸ Other provinces such as the City of Buenos Aires are considering amendments of their local tax codes so as to extend the scope of their turnover tax to revenue generated from the provision of digital services. The amendments likely will include an amendment to the concept of “significant digital presence.”

For Income Tax purposes, Argentina has not yet determined how or whether to levy an income tax on digitally generated revenue.

3. Law No. 23349, Aug. 7, 1986., B.O. 25978 (Arg.) (amending Law No. 20631 which was organized by Decree 280/97, as amended).

4. EY, *Key aspects of the Argentine tax reform discussed*, TAX NEWS UPDATE (Jan. 9, 2018), <https://taxnews.ey.com/news/2018-0047-key-aspects-of-the-argentine-tax-reform-discussed>.

5. *Id.*

6. Decree 354/2018, Apr. 23, 2018 (Arg.); General Resolution 4020/2018, Mar. 31, 2017 (Arg.).

7. Turnover tax is an indirect tax levied by the 23 provinces and the City of Buenos Aires. (EY, *Argentine Province of Cordoba imposes turnover tax withholding system on nonresidents*, AMERICAN TAX CENTER (July 19, 2017), <https://www.ey.com/gl/en/services/tax/international-tax/alert-argentine-province-of-cordoba-imposes-turnover-tax-withholding-system-on-non-residents>).

8. ToDoTvNews, *Netflix and Spotify to Face Taxes in Argentina*, TTVNEWS (May 7, 2017), <http://www.todotvnews.com/news/Netflix-and-Spotify-to-Face-Taxes-in-Arentina.html>.

II. Australia

“Residency” of a taxpayer and “source” of income are fundamental to establish whether an entity will be subject to tax in Australia.⁹ As such, income generating activities must have a sufficient nexus to Australia before Australia can assert its taxing rights. Subject to its international double taxation agreements, Australia generally seeks to impose income tax on the worldwide income of resident businesses (with credits for overseas tax paid and, in certain circumstances, exemptions—e.g., for non-portfolio dividends, branch profits, and certain offshore capital gains).¹⁰ Non-residents carrying on business through “permanent establishments” (PE) are taxed on their business income generated in Australia as well as income and capital gains on land and “land rich” entities.¹¹ Interest, dividends, and royalties earned in Australia and paid off-shore are subject to withholding taxes (subject to treaty relief).¹² This tax regime is supplemented by an accruals taxation regime (CFC rules), which taxes Australian residents on certain amounts earned in foreign branches and foreign subsidiaries.¹³

Recently, through the Multinational Anti-Avoidance Law (MAAL), Australia’s taxing jurisdiction has been extended by targeting certain structures designed to avoid permanent establishment for significant global entities.¹⁴ The main targets of this effort have been players in the digital economy.

The Australian goods and services tax (GST) also may apply to supplies with a relevant connection with the “indirect tax zone”¹⁵—a test that, in the context of digital supplies, usually would require such supplies to be made through a presence in Australia. But, perhaps as a forerunner to further changes being considered, Australia extended the application of GST to digital products and other intangible supplies made by offshore suppliers to “Australian consumers” from 1 July 2017¹⁶—a measure that has drawn in businesses with no presence in Australia into the GST regime.

Historically, multi-nationals had supply chains located across numerous jurisdictions with assets, labour, and staff in different countries. PE rules would allocate profits to the location of the multi-national’s labour, assets

9. Board of Taxation, *Reforming the Income Tax Residency Rules for Individuals*, AUSTRALIAN GOVERNMENT (Sept. 2018), <https://cdn.tspace.gov.au/uploads/sites/70/2018/07/T307956-income-tax-res-rules.pdf>.

10. *Income Tax Assessment Act 1997* (Cth) sub-divs 768-A & 768-G (Austl.); *Income Tax Assessment Act 1936* (Cth) s 23AH (Austl.).

11. *Income Tax Assessment Act 1997* (Cth), s 6-5, div 855 (Austl.); *Income Tax Assessment Act 1936* (Cth), s 6(1) (Austl.).

12. PWC, *Australia Corporate – Withholding taxes*, WORLDWIDE TAX SUMMARIES (Dec. 1, 2018), <http://taxsummaries.pwc.com/ID/Australia-Corporate-Withholding-taxes>.

13. *Income Tax Assessment Act 1936* (Cth), Part X (Austl.).

14. *Income Tax Assessment Act 1936* (Cth), s 177DA (Austl.).

15. *A New Tax System (Goods and Services Tax) Act 1999* (Cth), s 9-25 (Austl.).

16. *Tax and Superannuation Laws Amendment (2016 Measures No. 1) Act 2016* (Cth), s 3 & sch 1 (Austl.).

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capital, and legal or commercial risks that generate that income. The prevalence of digitalised businesses operating online has been identified as a threat to Australia's tax base. The 'traditional' residency and source models (and other features of Australia's tax system such as thin capitalisation, transfer pricing, and CFC rules designed to protect Australia tax base), are unable to address the challenges associated with digitalised business that can generate significant revenues from Australia with little or no physical presence in Australia.

Australia's Treasury addresses this issue in its discussion paper titled "The digital economy and Australia's corporate tax system."¹⁷ It recognises that current rules determining Australia's taxing rights over digitalised businesses focus on physical presence as an indicator of economic presence. It suggests this concept needs to adapt to the changing economy in which mobile intangible assets located anywhere sees digitalised businesses disrupting traditional business models and eroding Australia's tax base.

The reliance by many foreign resident digitalised businesses on user-generated content (social media), user data (search engines), or user participation (booking websites/applications) raises concerns that value created by Australian users escape the scope of Australia's income tax laws (despite Australia implementing many actions proposed by the BEPS Project). International discussion regarding user-created value is based on "the idea that a country that provides the market where a foreign enterprise's goods and services are supplied on its own provides a sufficient link to create a nexus for tax purposes."¹⁸

The Australia Treasury's Paper seeks to comment on potential changes to domestic laws and international agreements to target the perceived tax leakage posed by digitalised businesses. It explores whether changes could be made to existing profit attribution rules so that taxing rights could reflect user-created value or the value associated with intangibles. For instance, if user data or user contributions were to create taxing rights, law maker would have to agree on a mechanism to estimate the value of such user data or user-generated content. The Treasury's Paper raises questions about the need for a replacement of the arm's length principle with formulary apportionment, a "location of user" basis for source, and a "virtual PE" (which would attribute profits to entities calculated as a percentage of profits based on industry and type of services provided). The Paper further observes that in the absence of short-term consensus at the Organization for Economic Co-Operation and Development (OECD) level, there may be a need for interim measures (recognising the activity of other jurisdictions in

17. THE TREASURY OF THE AUSTRALIAN GOVERNMENT, THE DIGITAL ECONOMY AND AUSTRALIA'S CORPORATE TAX SYSTEM (2018), <<https://static.treasury.gov.au/uploads/sites/1/2018/10/c2018-t306182-discussion-paper-1.pdf>>.

18. OCEF, TAX CHALLENGES ARISING FROM DISITALISATION – INTERIM REPORT 2018 172 (2018), <https://www.oecd-ilibrary.org/docserver/9789264293083en.pdf?expires=1553192988&id=id&accname=guest&checksum=B59A4512CBDA09BF9CBB8176D1CC2F5E>.

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this regard – e.g., Hungary, Italy, Spain, and India).¹⁹ Such interim measures will need to apply an appropriate “nexus test” and appropriate thresholds for its application.²⁰ It is expected that in the coming months Australia is likely to introduce interim measures addressing those revenue concerns.

III. Brazil

The Brazilian Constitution provides for three levels of government (Federal, State, and Municipal), each with its own competence to impose taxes.²¹

Brazil does not impose direct tax liability on foreign entities (which usually are taxed through withholding taxes) and does not have clear permanent establishment rules. But Brazil does have specific rules on taxation of representatives or commissionaires of foreign persons.²²

In addition to income taxation, Brazilian companies are subject to a large number of transactional taxes. The most important of these taxes are the Brazilian excise tax (ICMS) (tax on transactions of circulation of goods and services of transportation and communication), which are charged by the States, the Brazilian Municipal Service Tax (ISS) (tax on services in general), and municipalities. These taxes date back to the 1960s and are not originally designed to capture the realities of the digital economy. This results in a significant effort of interpretation and frequent conflicts in their application.

At a more general level, the first issue of qualification is whether the digital product constitutes a good, a service, or a royalty not identifiable as a good or service. If it is a good (equivalent to merchandise), it will potentially be subject to ICMS and not to withholding taxes. The Brazilian Supreme Court has determined that standard (off the shelf) software, sold in large scale transactions, constitutes a good and is, therefore, subject to ICMS.²³

If the product is a service, it will potentially be subject to ISS and to withholding taxes. Levy of the ISS depends on the service being listed in a federal law, which has been expanded to encompass new services of the digital economy.²⁴ Services of a technical nature are subject to a withholding income tax of 15 percent and a contribution named Contribution for Intervention in the Economic Domain (CIDE) of 10 percent (not an income tax, and consequently with no foreign tax credit and not subject to double tax

19. THE TREASURY OF THE AUSTRALIAN GOVERNMENT, *supra* note 17 at 23.

20. *Id.*

21. CONSTITUIÇÃO FEDERAL, título VI (Braz.), http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao.htm.

22. Lei No. 3470/58, de 28 de Novembro de 1958, art. 76 (Braz.), http://www.planalto.gov.br/ccivil_03/LEIS/L3470.htm.

23. S.T.F., RE 176626 SP, Recurso Extraordinário 176.626-3, de 10 de Novembro de 1998 (Braz.), <https://stf.jusbrasil.com.br/jurisprudencia/740089/recurso-extraordinario-re-176626-sp>.

24. Lei Complementar 116/03, de 31 de Julho de 2003 (Braz.) http://www.planalto.gov.br/ccivil_03/LEIS/LCP/Lcp116.htm.

treaties) when paid to foreign providers (in addition to turnover taxes of 9.25 percent). Services of a non-technical nature are subject to a withholding income tax of 25 percent and not CIDE (in addition to turnover taxes of 9.25 percent).

If the digital product does not qualify either as a good or as a service, it may not be subject to ICMS or ISS. That position is becoming less common because both States and Municipalities are constantly trying to expand their reach²⁵, and the Brazilian Supreme Court has been moving away from the traditional concepts of goods as tangible property only and of services as the product of human activity only.²⁶

A royalty that does not qualify as a good or a service requires further classification to determine its specific tax regime. If the agreement involves the transfer of technology, the withholding income tax of 15 percent and CIDE of 10 percent apply, but the turnover taxes of 9.25 percent does not apply. Deductibility of the expense is subject to a special set of rules that allows a maximum royalty of 5 percent of net revenues. No transfer pricing rules apply. A software license without the transfer of the source code is subject to the withholding income tax of 15 percent, but it is not subject to CIDE or turnover taxes. Additionally, software licenses are subject to the ISS. Other intangibles, such as distribution rights, software, and other digital products may be subject to other specific rules. For example, standard software acquired for the use of the acquirer was considered by the Brazilian Revenue as merchandise that is not subject to withholding tax. But the same software acquired for copy and distribution was considered an intangible, subject to the withholding tax.²⁷

IV. Canada

While Canadian consumers of foreign-based digital services are currently responsible for self-assessing applicable sales taxes, the government has acknowledged this rarely happens, resulting in lost revenue at both the federal and provincial levels. As a limited response, the federal government entered into a deal with Netflix, which states the company committed to invest \$500 million into Canadian productions over a five-year period instead of requiring Netflix to collect and remit sales tax.²⁸ Furthermore, as

25. See Decisão Normativa CAT 4/17, 9.4.2009, DIÁRIO OFICIAL DOS ESTADOS [D.O.E.], 10.4.2009 (Braz.) (stating that physical existence is not a requirement to characterize merchandise), http://info.fazenda.sp.gov.br/NXT/gateway.dll/legislacao_tributaria/decisoes_normativas/denorm062009.htm?f=templates&fn=default.htm&vid=sefaz_tributaria:vtribut.s&fn=default.htm&vid=sefaz_tributaria:vtribut.

26. See, e.g., S.T.F., RCL 31580 / SP, Relator: Min. Edson Fachin, 6.10.2018, <http://portal.stf.jus.br/processos/downloadPeca.asp?id=315218770&ext=.pdf>.

27. C.P.F., Cosit Fls. 2, 18 de novembro de 2016, <http://normas.receita.fazenda.gov.br/sijut2consulta/link.action?idAto=79056&visao=anotado>.

28. *Netflix Set to Invest \$500 Million in Canadian Programs*, TORONTO SUN (Sep. 27, 2017), <https://torontosun.com/2017/09/27/netflix-set-to-invest-in-500-million-in-canadian-programs/wcm/d35334b0-1aa1-4d11-9876-9caed76b4ab0>.

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a member of the OECD, Canada is involved in a multilateral process to develop an international standard for collecting tax on digital services by 2020, which will follow a report set to be released in 2019.

Although some countries (such as Australia) and the European Union have announced an intention to implement interim measures, Canada does not intend to take action at the federal level until an international consensus is reached. Canada's approach appears consistent with comments by the US Treasury Secretary, urging other members of the OECD to complete the process currently underway instead of taking unilateral action.²⁹ However, the government in the province of Québec decided to collect sales tax on digital services as of January 1, 2019, and finalized legislative amendments that will shift the obligation to collect and remit sales tax on certain digital services away from the consumer to the supplier.³⁰ Given that the federal government has not implemented a similar policy, parties subject to the new rules in Québec are obliged to collect only the provincial portion of sales tax.³¹

The amendments essentially require certain non-resident suppliers and digital platforms to register under the Act respecting the Québec Sales Tax to collect and remit the Québec sales tax applicable to certain taxable supplies made to Québec consumers. For foreign-specified suppliers, the amendments came into force on January 1, 2019, while Canadian specified suppliers and operators of specified digital platforms have until September 1, 2019, to comply with Québec's registration requirements (set out in new Chapter VIII.1 of the Act respecting the Québec Sales Tax).³²

Under the new Chapter VIII.1, if a specified supplier (essentially a supplier that is conducting business outside Québec) or an operator of a specified digital platform is not otherwise registered for Québec sales tax purposes, the supplier or operator must now register as of the first day of the month in which the supplier's or operator's specified threshold exceeds

29. Secretary Statement & Remarks, U.S. Department of the Treasury, Secretary Mnuchin Statement on Digital Economy Taxation Efforts, *Press Release* (Oct. 25, 2018), <https://home.treasury.gov/news/press-releases/sm534>.

30. Amendments to the Act respecting the Québec Sales Tax, R.S.Q., c T-0.1 (Can.); The Tax Administration Act, R.S.Q., c A-6.002 (both were assented to on June 12, 2018 (formerly referred as Bill 150)).

31. Article 16 of the Act respecting the Québec Sales Tax sets the rate of Québec sales tax at 9.975%. The new collection provisions found in article 447.6 of the Act respecting the Québec Sales Tax specifically requires that applicable taxpayers collect the tax payable by a recipient under section 16, which does not include the federal goods and services tax (GST).

32. A "foreign specified supplier" is a specified supplier that does not carry on business in Canada or have a permanent establishment in Canada, and is not registered under section 240 of the Excise Tax Act, R.S.C., 1985, c E-15 (Can.). Conversely, a "Canadian specified supplier" is a specified supplier that is registered under section 240 of the Excise Tax Act. A "specified digital platform" is a digital platform for the distribution of property or services, through which a particular person enables a separate specified supplier to make a taxable supply in Québec, where the particular person controls the essential elements of the transaction between the specified supplier and the recipient (defined in the Act respecting the Québec Sales Tax, R.S.Q., art. 477.2 (Can.)).

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C\$30,000.³³ A newly registered specified supplier who makes a taxable supply in Québec of incorporeal movable property or a service to a specified Québec consumer must collect the Québec sales tax payable by the recipient.³⁴ The onus is on the supplier to determine whether a given recipient is a specified Québec consumer by obtaining identification in the ordinary course of business that is indicative of residence.³⁵

For Canadian specified suppliers, the obligation to collect Québec sales tax also extends to taxable supplies of corporeal property.³⁶ Furthermore, supplies of incorporeal movable property made by a foreign specified supplier to a specified Québec consumer are deemed to be made in Québec, notwithstanding presumptions to the contrary set out elsewhere in the Act respecting the Québec Sales Tax.³⁷ Finally, if an operator of a specified digital platform, acting as an intermediary, receives an amount for such taxable supplies, the operator has the obligation to collect the applicable Québec sales tax.³⁸

Newly registered suppliers are subject to quarterly filing and remittance obligations. In computing the net tax, a deduction is available for any refunds made in respect of Québec sales tax charged in error. For a person registered under the general registration system who is not a specified Québec consumer, any Québec sales tax that was mistakenly collected by the non-resident supplier can be refunded only by that non-resident supplier. However, a specified Québec consumer is permitted to apply for a rebate from either the non-resident supplier or from Revenu Québec.³⁹ Finally, there is a penalty in place to ensure compliance by the recipient. A recipient who evades (or attempts to evade) paying Québec sales tax by providing false information regarding his or her residency will be liable for the greater of \$100 or 50 percent of the amount that was evaded (or that the recipient intended to evade).⁴⁰

33. The following definitions are found in art. 477.2: a “specified supplier” is a supplier that does not carry on business in Québec, does not have a permanent establishment in Québec, and is not registered under Division I of Chapter VIII.” The “specified threshold” for a particular month is the total of all amounts that became due or were paid in the preceding 12 months, as consideration for making taxable supplies of incorporeal movable property to a consumer in Québec (The Act respecting the Québec Sales Tax, R.S.Q., art. 477.5 (Can.)).

34. A “specified Québec consumer” is the recipient of a supply, who is not registered under Chapter VIII, Division I and whose usual place of residence is Québec. However, if the recipient of a supply of incorporeal movable property or services provides the supplier with a Québec sales tax registration number then the supplier can consider the recipient not to be a specified Québec consumer (*Id.* art. 477.2).

35. *Id.* art. 477.3.

36. *Id.* art. 477.6.

37. *Id.* art. 477.4.

38. DELOITTE, THE NEW QST REGISTRATION REGIME FOR NON-RESIDENTS SELLING INTO QUEBEC – IMPORTANT CLARIFICATIONS 2 (2018).

39. *Exports of Property – Zero-rated Property*, REVENU QUEBEC (2018), <https://www.revenuquebec.ca/en/businesses/consumption-taxes/gsthst-and-qst/special-cases-gsthst-and-qst/exports/exports-of-property/>.

40. The Act respecting the Québec Sales Tax, R.S.Q., art 477.19 (Can.).

It remains to be seen how effective the new measures implemented by Québec will be in recuperating the revenue currently lost by the government. While other Canadian provinces have not followed suit, success by Québec may incentivize others to develop a similar regime.

V. China

China surpassed the US in 2014 to become the largest e-commerce market globally. The 2018 b2c (business to consumers) retail ecommerce is estimated to be US\$590 billion dollars, with the prediction that by 2021, the figure will exceed US\$950 billion dollars.⁴¹

In July 2016, at a meeting of G20 finance ministers in Chengdu in Sichuan province, Mr. Lou Jiwei, China's Minister of Finance said, "Innovation doesn't necessarily mean tax cuts. The first thing we need to do is to ensure fair taxation."⁴² Additionally, Mr. Jiwei said, "We should levy taxes on the digital economy, but it is very difficult to do so. The digital economy has an increasingly stronger social influence, and there are also vested interest groups."⁴³

China has, by the latest count, more than fourteen types of taxes, including income taxes, turnover taxes (such as VAT – Value Added Tax, Consumption Tax), and ad valorem taxes (such as property tax). In terms of ranking by the size of tax revenue, VAT has always been the largest revenue source, collecting more than double the amount of revenue from China's corporate income tax.⁴⁴

A. CROSS BORDER ONLINE SALES INTO CHINA

In March 2016, the General Administration of Customs (GAC) and the State Administration of Taxation (SAT) issued the Circular on Tax Policies for Retail Import in Cross-Border E-Commerce,⁴⁵ which changed China's tax policy for retail imports in cross-border e-commerce. Previously, cross-border e-commerce transactions were treated as personal parcels and subject to VAT and customs duty tax when they crossed a *de minimis* threshold.⁴⁶

This circular was a significant change. It was aimed at closing tax loopholes and facilitating fairness of trading. The new tax policy, effective

41. *Total retail e-commerce revenue in China 2017-2023*, STATISTA (June 2018), <https://www.statista.com/statistics/246041/forecast-of-b2c-e-commerce-sales-in-china/>.

42. *China's digital economy hard to tax, says finance chief*, SOUTH CHINA MORNING POST, July 24, 2016.

43. *Id.*

44. STATE TAXATION ADMINISTRATION OF THE PEOPLE'S REPUBLIC OF CHINA, REVENUE STATISTICS 1 (2015).

45. See, e.g., KPMG, *China's New Import Tax Policies for Cross-border E-commerce worth the attention of the whole industry*, CHINA TAX ALERT 14 (March 2016), <https://home.kpmg/cn/en/home/insights/2016/03/china-tax-alert-14-cross-border-ecommerce.html>.

46. *Id.*

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April 8, 2016, made changes to types of taxes, tax rates, and purchase price cap of imported commodities.⁴⁷

The new tax policy mandated that all cross-border e-commerce transactions be subject to import taxes with no exemptions allowed.⁴⁸ Single transactions below RMB 2,000 (about US\$290) and total annual transactions for one person below RMB 20,000 (approximately US\$2,900) qualified for a temporary zero percent tariff rate and reduced import VAT (Value Added Tax) and CT (Consumption Tax) rates.⁴⁹

“In addition, the customs authorities published a whitelist involving 1,142 commodity items, stipulating that only those on the list can be imported to China through cross-border e-commerce.”⁵⁰ This whitelist was issued by eleven government agencies, including the Ministry of Finance and the National Development and Reform Commission.⁵¹ Only goods bearing HS codes shown on the list are importable under the March 2016 announced tax policy for cross-border e-commerce. All other goods are importable under the general trade system.⁵²

The concurrent release of the new tax policy (announced in March 2016 with published effective date of April 8, 2016) on ecommerce and the “whitelist” caused tremendous logistical problems for many ecommerce firms, such as obstacles in the customs clearance of some commodities.⁵³ “For example, after the release of the first list, there were reports that some cross-border e-commerce enterprises were unable to get clear baby formula, which was not on the list, leaving the products ‘stuck’ in bonded warehouses.”⁵⁴ Many firms were forced to shut down, as they were hit by cash strains or insufficient supply of certain goods.

In response to the severe negative effect to e-commerce firms and the consumers in China, the Chinese government postponed the effective date of the new tax policy announced in Cai Guan Shui [2016] 18, not once, but

47. *Id.*

48. *Id.*

49. *Id.*

50. *New tax regime has shaken up China's cross-border e-commerce sector*, TECHNODÉ (April 14, 2017), <https://technode.com/2017/04/14/new-tax-regime-has-shaken-up-chinas-cross-border-e-commerce-sector/>; see also Juha Hiltunen, *Using E-Commerce and Growth Hacking to Enter the Chinese Market* (Nov. 6, 2017) (unpublished B.A. thesis, Helsinki Metropolia University of Applied Sciences), available at <https://pdfs.semanticscholar.org/c47b/f38e23f7a39f419e91ebb917228cd300649.pdf>.

51. *Cross-Border E-Commerce: China Policy Update*, HKTDC RESEARCH (June 8, 2016), <https://hkmb.hktdc.com/en/1X0A6AHP/hktdc-research/Cross-Border-E-Commerce-China-Policy-Update>.

52. *See id.*

53. *See E-commerce in China*, EXPORT VIRGINIA (August 2018), http://exportvirginia.org/wp-content/uploads/2018/08/E-Commerce_China_Aug_2018.pdf.

54. *See id.* at 12.

twice.⁵⁵ The first postponement deferred the effective date from April 8, 2016, to the end of 2017.⁵⁶ The second postponement further delayed the effective date to the end of 2018.

VI. European Union

A recent E.U. study concluded that while brick and mortar companies in the European Union pay corporate income tax at a rate of approximately 23 percent, digital companies pay at a rate of approximately only 9 percent.⁵⁷ Not surprisingly, this difference has caught the attention of various taxing authorities—including those within the European Union.

Although the idea stems initially from the European Union, the taxation of digital companies within Europe has, in particular, caught the attention of French politicians and its taxing authorities.⁵⁸ Though it is still entirely unclear as to what type of activities may eventually be subject to the digital tax, initial discussions have focused on revenues generated from digital media advertisements, digital interfaces used for people to communicate with one another, sales of certain goods, and services as well as from revenues generated by companies exploiting user data.⁵⁹ Only “larger” companies are to be subject to digital taxation, meaning only those that have annual worldwide revenues in excess of EUR 750 million, of which EUR 50 million have been generated in the European Union.⁶⁰

A tax rate of three percent of revenues is being discussed.⁶¹ The tax is to be levied only in the E.U. member state where the users are located; for this, the respective IP address or other geolocation options will be determinative (this may eventually be an issue from a data privacy perspective). Double taxation is to be avoided by allowing the taxpayer to deduct the digital tax from its taxable income. The idea is also to introduce a one-stop-shop approach in that a separate digital tax return would be used to impose the digital tax. As the digital tax rate is to be uniform throughout the European Union, forum shopping within the European Union should not be an issue.

55. See *China's import tax policies for cross-border e-commerce*, KPMG (April 2016), https://assets.kpmg/content/dam/kpmg/pdf/2016/04/china-tax-weekly-update-12.pdf?_ga=2.164235007.1345695567.1554084210-1839469265.1553973198.

56. *Id.*

57. See Shakuntala Banerjee, *Digitalsteuer: Wird das die Zukunft der Besteuerung?*, March 23, 2018, <https://www.zdf.de/nachrichten/heute/moscovici-will-digitalsteuer-fuer-konzerne-100.html>.

58. Bjarke Smith-Meyer & Nicholas Vinocur, *France's lonely crusade for a 'digital tax'*, POLITICO.EU, March 22, 2018, <https://www.politico.eu/article/france-digital-tax-lonely-crusade-germany-cool-on-idea/>.

59. *Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence*, EUROPEAN COMMISSION, March 21, 2018, https://ec.europa.eu/taxation_customs/sites/taxation/files/proposal_significant_digital_presence_21032018_en.pdf.

60. See *The European Union's Proposed Digital Services Tax: A De Facto Tariff*, PIIIE (June 2018), <https://piie.com/system/files/documents/pb18-15.pdf>.

61. *Id.*

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E.U. member states are not in agreement on the implementation of a digital taxation. For example, the German *Bundesrat* (Germany's upper house of parliament that represents Germany's 16 states) believes that companies that provide digital services only as a "secondary" business should be exempt from this tax.⁶² Denmark, Sweden, and Ireland are reluctant to introduce such a tax altogether. This is partially because not only may such a tax be viewed as a retaliatory European answer to the high profits of US conglomerates such as Google, Apple, Facebook, and Amazon, (which may lead to even greater tension with the United States) but the tax also may lead to such companies reducing their services in the European Union.

If the European Union should decide to introduce a digital tax, it is important not to forget that E.U. legislation on tax matters requires unanimous approval by the member states. Since at least 110 countries are currently considering introducing a digital tax, the ultimate goal may be to regulate digital taxation at the OECD level. Germany is also leaning toward this proposal at present.⁶³ As the introduction of such a tax by the European Union or the OECD will not take place within the foreseeable future, a number of E.U. member states (such as Spain, Italy, and the United Kingdom) are considering venturing out on their own.⁶⁴

Some commentators fear that introducing a digital tax would result in a high cost of implementation and execution. Simultaneously, they fear the resulting tax revenues would be relatively low as the number of companies to which it would apply would be quite low. Relying entirely on estimates provided by the E.U. Commission, Germany estimates it would generate annual tax revenues of EUR 600 million.⁶⁵ Some see this as bad business for Germany. Regardless, it has become clear that introducing a digital tax would require a fundamental change to double taxation treaties—namely, the concept of "virtual establishments" would need to be introduced. Virtual establishments are not yet covered in any double-taxation treaty.

One question that remains open for discussion is whether the concept of digital taxation even fits into the picture of international tax standards. It is clear that a new digital tax from the European Union should not be the answer to other countries' taxing regimes, as fiscal sovereignty should not be compromised.

62. Vorschlag für eine Richtlinie des Rates [Proposal for a Council Directive], Deutscher Bundesrat: Beschluss des Bundesrates [BR] 94/18, [https://www.bundesrat.de/SharedDocs/drucksachen/2018/0001-0100/94-18\(B\).pdf?__blob=publicationFile&v=1](https://www.bundesrat.de/SharedDocs/drucksachen/2018/0001-0100/94-18(B).pdf?__blob=publicationFile&v=1) (Ger.).

63. *Wir sind uns einig in dem Ziel, die Steuervermeidung multinationaler Konzerne zu beenden*, BUNDESMINISTERIUM DER FINANZEN, November 12, 2018, <https://www.bundesfinanzministerium.de/Content/DE/Interviews/2018/2018-11-12-spiegel-online.html>.

64. *Grauzone-Europa: Scheitert die EU bei der 3-Prozent-Steuer?* WALL STREET ONLINE, Nov. 07, 2018, <https://www.wallstreet-online.de/nachricht/10993434-digitalsteuer-grauzone-europa-scheitert-eu-3-prozent-steuer>.

65. DANIEL BUNN, A SUMMARY OF CRITICISMS OF THE EU DIGITAL TAX, 1 (Tax Foundation ed., 2018).

VII. Italy

Italy has decided not to wait for actions at an international or E.U. level and unilaterally enacted domestic provisions to tax income from digital businesses that could be considered sufficiently connected with the Italian territory.⁶⁶ In fact, with the Budget Law 2018,⁶⁷ Italy introduced a domestic tax on digital transactions, which is referred to as the Web Tax, which differs from the E.U. web tax proposal and is expected to become effective as of January 1, 2019.

In particular, the Italian Web Tax is applicable to digital transactions having the following features: (1) supply of services via electronic means (internet or other networks), where services are deemed to be provided electronically if their supply is by nature automated via the use of information technology and minimal human intervention; (2) involvement on both sides of the transactions, of Italian residents, or Italian PEs of non-residents earning business income (B2B destination principle);⁶⁸ and (3) the volume of transactions must exceed 3,000 units for a specific service provider/taxpayer within a given calendar year. Where the above conditions are cumulatively met, the Italian Web Tax is levied at 3 percent rate excluding VAT.⁶⁹ A ministerial decree will identify the “services supplied through electronic means.”⁷⁰

Budget Law 2018 also amended the definition of permanent establishment contained in the Italian Tax Code⁷¹ by incorporating the recommendations of the OECD BEPS project.⁷² In particular, the amendment introduced an anti-avoidance provision under which a permanent establishment is deemed to exist in Italy where there is a significant and continuous economic presence. As a result, the domestic notion of permanent establishment has become significantly wider, thereby increasing a foreign enterprise’s business income probabilities to tax liability in Italy.

66. Piergiorgio Valente, *The Italian Web Tax from a National and International Perspective*, 5 EUROPEAN TAX’N 186 (2018), https://online.ibfd.org/kbase/#topic=doc&url=/highlight/collections/et/html/et_2018_05_it_1.html&q=%2522web%2522&WT.znav=Search.

67. Legge 27 dicembre 2017, n. 205, G.U. Dec. 29, 2017, n. 302 (It.), art. 1 (1011), <http://www.gazzettaufficiale.it/eli/id/2017/12/29/17G00222/sg>.

68. The place where the transaction is carried out is not relevant (L. n. 205/2017, art. 1(1013) (It.)); *see also supra*, note 32.

69. L. n. 205/2017, art. 1(1013) (It.).

70. *See Recent Developments in International Taxation*, INTERNATIONAL BAR ASSOCIATION (May 2018), <https://www.maisto.it/content/file/taxalert/2018-01.pdf>.

71. Decreto Presidente della Repubblica 22 dicembre 1986, n. 917, G.U. Dec. 31, 1986, n. 302 (It.), art. 162(2)(f-bis).

72. *See* OECD, PREVENTING THE ARTIFICIAL AVOIDANCE OF PERMANENT ESTABLISHMENT STATUS, (OECD Publishing ed., 2015), <http://www.oecd.org/ctp/preventing-the-artificial-avoidance-of-permanent-establishment-status-action-7-2015-final-report-9789264241220-en.htm>.

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VIII. Japan

A. SUMMARY OF JAPANESE DIGITAL TAXATION

Japan thus far has taken no unilateral action to tax digital activities or to expand the tax base to capture digital presence for the purpose of income taxation. But in 2015, Japan introduced the Consumption Tax (VAT) to digital services including e-books, online music, and videos provided by non-Japan resident service providers.

B. JAPANESE PERSONAL INCOME/CORPORATE TAXATION ON DIGITAL ECONOMY

Japan has yet to take any legislative action to tax digital presence for the purpose of taxation on income of individuals or corporations. Namely, the Japanese tax law has maintained the traditional concept of “permanent establishment” and a series of conventional source rules in line with the OECD Model Tax Convention.⁷³

For example, with respect to a computer server located in Japan, there were arguments that users’ income should be attributed to the server, which would be deemed as foreign users’ permanent establishment. However, the Japanese tax authority’s position regarding the co-location services for high frequency trading, published by the Tokyo Stock Exchange, provides that non-Japan-resident investors are *not* deemed to have a permanent establishment in Japan solely based on the fact that they place and reserve data for a computer program in a server located in Japan and implement that program for making selling/purchasing orders⁷⁴ The Japanese tax authority points out that the server is not (a) for sale or otherwise at the disposal of, or (b) for sublease or otherwise for any profitable use for, foreign investors, and thus is not viewed as a permanent establishment.⁷⁵

Still, the Japanese tax authority appears to be eager to capture digital presence. For example, in 2009, it was reported that the Japanese tax authority made adjustments with respect to certain Japanese affiliates of Amazon.com International Sales (Amazon US) because these Japanese affiliates constituted (either branch or agency) permanent establishments of Amazon US based on the finding that Amazon US’s computers were used in Japan, Japanese employees were instructed by Amazon US, and the Japanese

73. Nihon no shotoku zeiho [Japanese Income Tax Act] Law No. 33 of 1965, Articles 2(a)(viii-iv) & 161(1); Nihon no hojin zeiho [Japanese Corporation Tax Act] Law No. 34 of 1964, Articles 2(xii-xix) & 138(1).

74. *Tax Treatment of Foreign Investors Who Use Servers Located in Japan*, TOKYO STOCK EXCHANGE, June 16, 2011.

75. *Does a high-frequency trading server constitute a permanent establishment?*, NISHIMURA & ASAHI, Sep. 16, 2011, <https://www.internationallawoffice.com/Newsletters/Corporate-Tax/Japan/Nishimura-Asahi/Does-a-high-frequency-trading-server-constitute-a-permanent-establishment?redir=1>.

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affiliates functioned as more than mere logistics providers for Amazon US.⁷⁶ However, through a mutual agreement procedure, the US and Japanese governments reached an agreement in 2010, resulting in no significant tax expense for Amazon US.⁷⁷

Another example is one in which a US resident online car-parts vendor was viewed to have a permanent establishment in Japan, subject to the Japanese income taxation, for the reason that it rented an apartment and a warehouse in Japan. The roles and functions of the warehouse were essential and material for the sales activities of the US vendor. The tax adjustment was approved by the court.⁷⁸

When the OECD makes specific recommendations for taxing digital activities, possibly in 2020, the Japanese government is expected to move to enforce or take legislative actions in line with them.

C. JAPANESE CONSUMPTION TAXATION (VAT) ON DIGITAL SERVICES

Effective since October 1, 2015, cross-border digital services provided by non-resident providers to Japanese resident customers have been subject to the two-tiered regime of the Japanese Consumption Tax, which is equivalent to the European Value-Added Tax.⁷⁹ The first tier is for the business to business (B2B) transactions for which Japanese business customers/recipients are responsible for paying the Consumption Tax in Japan on behalf of the non-Japan service provider under the reverse charge mechanism. As the Japanese business customers/recipients are eligible for input tax credits in the same amount as the output tax on the condition that the non-resident service providers are registered with the Japanese tax authority, no actual payments result in most cases. Also, the scope of the applicable taxpayers is tentatively limited by the Act “for the time being.” The second tier is for the business to customer (B2C) transactions for which non-resident service providers are responsible for paying the Consumption Tax in Japan by appointing a paying agent in Japan. The current rate of the Consumption Tax is eight percent of gross revenue, but is scheduled to be raised to 10 percent on or after October 1, 2019.⁸⁰

The covered transactions are “services provided *through* telecommunications”⁸¹ or “electronic services.” “Electronic services” include e-books, digital newspapers, online downloading of music and videos, online games, cloud services, internet advertisements, and online

76. *Japan: Corporate Tax 2019*, ICLG (Nov. 16, 2018), <https://iclg.com/practice-areas/corporate-tax-laws-and-regulations/japan>.

77. Amazon.com, Inc., Quarterly Report (Form 10-Q) (Sep. 30, 2010).

78. *Japan*, EDIPLOMAT (July 2004), http://www.ediplomat.com/np/post_reports/pr_jp.htm.

79. Nihon no shohi-ho [Japanese Consumption Tax Act] Law No. 108 of 1998, Section 4(1)(3)(iii) & 5(1).

80. *Id.*

81. Nihon no shohi-ho [Japanese Consumption Tax Act] Law No. 108 of 1998, Section 2(1)(viii-ii)(viii-iii)(viii-iv).

schools. In contrast, “electronic services” do *not* include internet banking or software development (for which the completed product is delivered online), as these online telecommunications are merely ancillary or incidental to other off-line services.

IX. United States

Although the United States is participating in the OECD’s Inclusive Framework consultations in Paris on how best to address taxation challenges presented by the digital economy, top US officials have expressed “strong concerns” that the unilateral approaches now being considered by the E.U., and already effected in other jurisdictions, are wrong-headed. Responding to the OECD’s March Interim Report, US Treasury Secretary Mnuchin stated that,

the issues are not unique to technology companies, but also relate to other companies, particularly those with valuable intangibles * * * [and it would be] unfair [to impose a] gross sales tax that targets our technology and internet companies. A tax should be based on income, not sales, and should not single out a specific industry for taxation under a different standard. We urge our partners to finish the OECD process with us rather than taking unilateral action in this area.⁸²

In addition, the chair of the US House committee in charge of US tax legislation slammed the U.K.’s new cross border digital tax. “Singling out a key global industry dominated by American companies for taxation that is inconsistent with international norms is a blatant revenue grab.”⁸³

Somewhat ironically, on June 21, 2018, the US Supreme Court issued a landmark decision in *South Dakota v. Wayfair, Inc.*,⁸⁴ overturning the Court’s decades-old restriction⁸⁵ on the power of US states to assert sales tax jurisdiction over out-of-state sellers. The issue before the Court was whether South Dakota’s sales tax statute violates the Commerce Clause of the US Constitution, which requires out-of-state sellers to have “minimum contacts” with a state before the state can exercise its tax jurisdiction over the seller. South Dakota’s statute requires out-of-state retailers to collect, on the state’s behalf, sales tax on Internet sales to customers residing in South Dakota, even if the retailer has no actual, physical presence in the state.

In reviewing its 1992 decision in *Quill Corporation*—which had affirmed that a *physical presence* in the state was necessary and which was decided before Internet sales became widespread—the Court first found that “physical presence” is not the exclusive type of minimum contact that can establish the essential nexus between a state and a business. Additionally, the

82. *Netflix Set to Invest*, *supra* note 28.

83. Kevin T. Brady (@Rep KevinBrady), TWITTER (Oct. 31, 2018), <https://twitter.com/WaysandMeansGOP/status/1057643286863773696>.

84. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018).

85. *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

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Court found that the physical presence test enunciated in *Quill* “creates rather than resolves market distortions” by putting in-state sellers at an “unjust and unfair” competitive disadvantage. Lastly, the Court found that the physical presence test is tantamount to a “judicially created tax shelter” imposing an “arbitrary, formalistic distinction” by requiring online remote retailers with an in-state warehouse to collect sales tax but allowing those without one to conclude similar sales without having to collect and remit the sales tax.

By holding that remote online retailers that sell to customers have established a sufficient nexus with a state, the Supreme Court extended US states’ taxing power with respect to *sales taxes*—an indirect consumption tax.⁸⁶ But its *Wayfair* decision does not affect states’ *income tax* jurisdiction, which is expressly restricted by federal statute—at least with respect to remote sellers of tangible property.⁸⁷ Nonetheless, *Wayfair* may embolden some states to mount judicial or legislative campaigns to repeal that federal statute in order to extend their *income tax jurisdiction* over remote online sellers.

The *Wayfair* decision’s impact on non-US online retailers could be immense. US states and smaller municipalities might now contend they can legally require foreign sellers with online customers in the US to collect and remit sales taxes to their jurisdictions (which number in the thousands). Tax treaties, which generally protect foreign sellers from income tax liability if the seller’s activities do not amount to a *permanent establishment* in the consumer’s country—which test is strikingly similar to the physical presence test—do not expressly apply to state and municipal taxes or to sales taxes. Without any treaty protection, foreign sellers of digital services—and, if the federal statutory restriction is changed, foreign sellers of goods, including digital goods—may find themselves subject to US state tax jurisdiction in the wake of *Wayfair*.

X. Other International Implications

Given the official US criticism of proposals to create a “digital permanent establishment,” it seems paradoxical that the US state tax statute, blessed as constitutional by the Court in *Wayfair*, shares key features with both the digital PE alternative described in BEPS Action 1 and the digital services tax (DST) now being considered by the E.U.⁸⁸ Under those digital PE provisions, an online business would have a permanent establishment in a country if it generates more than a threshold amount of revenue from that country, has more than a threshold number of users in that country, or concludes more than a threshold number of contracts with residents of such

^{86.} *Id.* at 2103; see also Thomas Ecker, *Digital Economy International Administrative Cooperation and Exchange of Information in the area of VAT*, in *VAT/GST IN A GLOBAL DIGITAL ECONOMY* 141 (Croydon: Kluwer Law International, Michael Lang & Ine Lejeune eds., 2015).

^{87.} Interstate Income Act of 1959, Pub. L. 86-272, 15 U.S.C. §§ 381–384 (1959).

^{88.} Smith-Meyer & Vinocur, *supra*, note 58.

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country. These criteria are comparable to South Dakota's statute, which also is based on the dollar amount or number of sales. The striking similarity of the US states' approach for taxing online transactions to those now being considered by both the E.U. and OECD casts doubt on how persuasively US Treasury officials will be able to argue that the world's tax authorities would be wise to not depart from the traditional PE definition and the more traditional models for determining the limits of nation states' taxing jurisdiction over remote sellers in the digital economy.

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Anti-Corruption

MARC ALAIN BOHN, COLLMANN GRIFFIN,
UCHE EWELUKWA OFODILE, FRANK FARIELLO,
AND DMITRI LOHVINSKI*

I. Anti-Corruption Developments in the United States

Enforcement of the Foreign Corrupt Practice Act (“FCPA”) held steady in 2018. Together, the United States (“U.S.”) Department of Justice (“DOJ”) and Securities and Exchange Commission (“SEC”) brought a total of twenty-one corporate enforcement actions against 16 companies over the course of the year, which is on par with the median of approximately twenty such cases a year over the past ten years. Penalties averaged approximately U.S. \$62 million per company (for a total of more the U.S. \$996 million), which is slightly below the average of U.S. \$69.5 million per company over the same ten-year period. Notably, however, many of the enforcement actions wrapped up long-running, multi-year investigations, with charges stemming from conduct that occurred years ago. With regard to FCPA-related litigation, the U.S. Supreme and appellate courts continued to narrow U.S. prosecutors’ broad but largely untested interpretations of the FCPA, most notably by limiting the jurisdictional nexus required for prosecution of FCPA conspiracy charges.

A. SIGNIFICANT POLICY DEVELOPMENTS IN THE UNITED STATES

1. *FCPA Corporate Monitor Policy*

The major FCPA policy development in 2018 is a new internal DOJ policy memorandum on corporate monitors. Announced by Assistant Attorney General for the DOJ Criminal Division Brian Benczkowski on October 11, 2018, the new policy sets forth a series of factors the DOJ will consider when determining whether a compliance monitor will be required as a condition of an FCPA settlement, including whether the corporation has made significant investments in, and improvements to, its corporate compliance program and internal control systems.¹ The new guidelines are

* Marc Alain Bohn (Committee Editor and Part I) is Counsel with Miller & Chevalier Chartered; Collmann Griffin (Part I) is an Associate with Miller & Chevalier Chartered; Professor Uche Ewelukwa Ofodile (Part II) is the E. J. Ball Professor of Law at the University of Arkansas School of Law; Frank Fariello (Part III) is Lead Counsel, Legal Vice Presidency for The World Bank; and Dmitri Lohvinski (Part IV) is an investigation attorney with Consilio LLC.

1. Memorandum from Brian Benczkowski, Assistant Att’y Gen. to All Crim. Div. Pers. (Oct. 11, 2018), <https://www.justice.gov/opa/speech/file/1100531/download>.

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largely a formalization of pre-existing DOJ practices. But they may produce a monitor selection process that is more predictable and, potentially less burdensome on the company reaching a settlement.² The new memorandum also formalizes the DOJ's process for reviewing and approving monitor candidates.³

B. CORPORATE ENFORCEMENT ACTIONS IN THE UNITED STATES

1. *Elbit Imaging Ltd.*

On March 8, 2018, the U.S. publicly traded, Israel-based real estate development company Elbit Imaging Ltd., reached a U.S. \$500,000 settlement with the SEC to resolve FCPA books-and-records and internal-accounting-controls charges.⁴ The charges arose out of the Elbit's alleged failure to conduct due diligence on two real estate valuation consultants in Romania, whom the company had engaged from 2006 to 2011 in connection with efforts to develop shopping and entertainment centers in Central and Eastern Europe.⁵ According to the SEC's Cease-and-Desist order, the lack of due diligence created the risk that consultants may have passed on a portion of their fees to government officials.⁶

2. *Transport Logistics International Inc.*

On March 13, 2018, Maryland-based Transport Logistics International Inc. ("TLI") reached a Deferred Prosecution Agreement ("DPA") with the DOJ to settle charges of conspiring to violate the anti-bribery provisions of the FCPA.⁷ According to the DPA, the company was at the center of a conspiracy from 2004 to 2014 to pay bribes to an executive at JSC Technabexport ("TENEX"), the overseas trading arm of the Russian state-owned nuclear energy corporation Rosatom.⁸ As part of the agreement with the DOJ, TLI was required to pay a penalty of U.S. \$2 million, reduced from U.S. \$28 million due to the company's inability to pay. A TENEX official and TLI executives have faced separate FCPA and money laundering charges in connection with the alleged scheme.⁹

2. *Id.*

3. *Id.*

4. Elbit Imaging Ltd., Exchange Act Release No. 82849, 2018 WL 1234195 (Mar. 9, 2018).

5. *Id.*

6. *Id.*

7. Press Release, Dep't of Just., Transport Logistics International Inc. Agrees to Pay \$2 Million Penalty to Resolve Foreign Bribery Case (Mar. 13, 2018) <https://www.justice.gov/opa/pr/transport-logistics-international-inc-agrees-pay-2-million-penalty-resolve-foreign-bribery>.

8. *Id.*

9. Press Release, Dep't of Just., Former President of Maryland-Based Transportation Company Indicted on 11 Counts Related to Foreign Bribery, Fraud and Money Laundering Scheme (Jan. 12, 2018) <https://www.justice.gov/opa/pr/former-president-maryland-based-transportation-company-indicted-11-counts-related-foreign>.

3. *Kinross Gold Corporation*

On March 26, 2018, the U.S. publicly traded Canadian mining company, Kinross Gold Corporation, agreed to pay U.S. \$950,000 to settle books-and-records and internal-accounting-controls charges by the SEC.¹⁰ The charges arose out of a variety of alleged accounting and controls weaknesses that affected the company's newly acquired Ghana and Mauritania mines from 2010 to 2015, including lack of supporting documentation for payments to consultants in connection with government interactions, as well as circumvention of existing procurement processes to select preferred vendors of government officials.¹¹

4. *Dun & Bradstreet Corporation*

On April 23, 2018, the SEC issued a Cease-and-Desist Order to the New Jersey based business intelligence provider Dun & Bradstreet Corporation, under which the company agreed to pay a total of approximately U.S. \$9 million to settle alleged FCPA books-and-records and internal-accounting-controls violations.¹² According to the SEC, before 2012 Dun & Bradstreet failed to ensure that employees at two of its China affiliates—a joint venture with a Chinese partner and a recently acquired Chinese subsidiary—had not made improper payments to government officials to obtain corporate and personal data useful for Dun & Bradstreet's business intelligence products.¹³ On April 23, the DOJ also issued an official declination from prosecution to Dun & Bradstreet, based in part on the company's voluntary disclosure of the alleged misconduct to the agency.¹⁴

5. *Panasonic Corporation and Panasonic Avionics Corporation*

On April 30, 2018, the DOJ announced a DPA with the California-based manufacturer of in-flight entertainment and aircraft communications systems, Panasonic Avionics Corporation ("PAC").¹⁵ Simultaneously, the SEC issued a Cease-and-Desist Order to Panasonic Corporation—PAC's

10. Press Release, Sec. & Exch. Comm'n, Kinross Gold Charged With FCPA Violations (Mar. 26, 2018) <https://www.sec.gov/news/press-release/2018-47>.

11. *Id.*

12. The Dun & Bradstreet Corp., Exchange Act Release No. 83088, 2018 WL 1907132 (Apr. 23, 2018).

13. *Id.*

14. Letter from Craig Carpentino, U.S. Att'y, by Paul Murphy, Chief, Econ. Crimes Unit, U.S. Attorneys' Off., and Sandra Moser, Acting Chief, Fraud Sec., Crim. Div., U.S. Dep't of Just., by Daniel Kahn, Chief, FCPA Unit, Fraud Sec. & Tarek Helou, Assistant Chief, FCPA Unit, Fraud Sec., to Peter Spivack, Hogan Lovells (Apr. 23, 2018) <https://www.justice.gov/criminal-fraud/file/1055401/download>.

15. Press Release, Dep't of Just., Panasonic Avionics Corporation Agrees to Pay \$137 Million to Resolve Foreign Corrupt Practices Act Charges (Apr. 30, 2018) <https://www.justice.gov/opa/pr/panasonic-avionics-corporation-agrees-pay-137-million-resolve-foreign-corrupt-practices-act>.

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Japan-based, U.S. publicly traded parent.¹⁶ Altogether, Panasonic and PAC paid the U.S. government U.S. \$280 million in penalties to resolve charges that PAC caused its parent Panasonic Corporation to violate the books-and-records and internal-accounting-controls provisions of the FCPA, in addition to the Panasonic Corporation itself having violated anti-bribery and accounting provisions of the FCPA and other U.S. securities and tax laws.¹⁷ The FCPA-related charges arose out the company's "Office of the President Budget," a fund for executive travel, corporate entertainment, and consultancy expenses, which, from 2008 to 2014, was allegedly used to make payments to a consultant with improper connections to a Middle East state-owned airline customer.¹⁸

6. *Société Générale and SGA Société Générale Acceptance N.V.*

On June 4, 2018, the French financial services company Société Générale ("SocGen") and its subsidiary SGA Société Générale Acceptance N.V. ("SGA SocGen") reached agreements with the U.S. DOJ and the French Parquet National Financier ("PNF") to resolve anti-corruption charges in both countries.¹⁹ Specifically, the two French financial service companies will pay a total of nearly U.S. \$293 million under a DPA with the DOJ to resolve FCPA anti-bribery conspiracy charges arising out of an alleged scheme to make payments to a close relative of Libyan leader Muammar Gaddafi from about 2006 to 2009.²⁰ In exchange, the Gaddafi relative allegedly used his influence to cause the Libyan government to invest with SocGen. SocGen and SGA SocGen will also pay another penalty worth nearly U.S. \$293 million to resolve similar French anti-corruption charges brought by the PNF.²¹ The corruption-related charges were part of a broader U.S. \$1.3 billion settlement with the DOJ, PNF, and U.S. Commodity Futures Trading Commission, which also covered charges that SocGen had helped to manipulate the London Interbank Offered Rate ("LIBOR"), a U.K. benchmark interest rate that has been at the center of numerous criminal charges against large financial institutions.²²

16. Press Release, Sec. & Exch. Comm'n, Panasonic Charged With FCPA and Accounting Fraud Violations (Apr. 30, 2018) <https://www.sec.gov/news/press-release/2018-73>.

17. See Panasonic Avionics Corporation Agrees to Pay \$137 Million to Resolve Foreign Corrupt Practices Act Charges, *supra* note 15.

18. *Id.*

19. Press Release, Dep't of Just., Société Générale S.A. Agrees to Pay \$860 Million in Criminal Penalties for Bribing Gaddafi-Era Libyan Officials and Manipulating LIBOR Rate (June 4, 2018) <https://www.justice.gov/opa/pr/soci-t-g-n-rale-sa-agrees-pay-860-million-criminal-penalties-bribing-gaddafi-era-libyan>.

20. *Id.*

21. Karen Freifeld & Sudip Kar-Gupta, *SocGen to pay \$1.3 billion to settle Libya, Libor probes*, REUTERS (June 4, 2018, 1:28AM), <https://www.reuters.com/article/us-socgen-lawsuit/socgen-to-pay-1-3-billion-to-settle-libya-libor-probes-idUSKCN1J00KU>.

22. Greg Farrell & Fabio Benedetti Valentini, *SocGen to Pay \$1.3 Billion to Settle U.S. Sanctions Case*, BLOOMBERG (Nov. 20, 2018, 2:54AM), <https://www.bloomberg.com/news/articles/2018-11-19/socgen-settles-u-s-sanctions-cases-agrees-to-pay-1-3-billion>.

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7. *Legg Mason, Inc.*

On June 4, 2018, the DOJ announced a Non-Prosecution Agreement (“NPA”) with the Baltimore, Maryland-based investment management firm Legg Mason, Inc., under which the company agreed to pay U.S. \$64.2 million.²³ According to the NPA, a Legg Mason subsidiary— Permal Group Ltd. (“Permal”)—partnered with SocGen to solicit business from Libyan state-owned institutions between 2004 and 2010; during this time, SocGen allegedly made payments to a Gaddafi family member to influence the Libyan government to invest with the company.²⁴ The NPA also made clear that the DOJ saw Legg Mason as less culpable than SocGen in the Libya bribery scheme, in part because Legg Mason’s alleged misconduct had involved only two mid-to-lower level employees of Permal, whereas SocGen was responsible for originating and leading the scheme.²⁵

8. *Beam Suntory, Inc.*

On July 2, 2018, the SEC issued a Cease-and-Desist Order to Beam Suntory, Inc. (“Beam”), a Chicago, Illinois-based producer of several well-known brands of distilled spirits, including Jim Beam bourbon.²⁶ According to the SEC, from 2006 to 2012 employees at Beam’s subsidiary in India used fabricated and inflated invoices to reimburse third-party sales promoters and distributors, with the understanding that these illicit payments would be passed on to employees at government-controlled Indian alcohol depots and retail stores to increase sales orders, get better positioning on store shelves, and facilitate the distribution of Beam products.²⁷ Beam voluntarily disclosed this alleged misconduct to the SEC and agreed to pay a total of approximately U.S. \$8.3 million to resolve the resulting FCPA books-and-records and internal-accounting-controls charges.²⁸ Beam also disclosed misconduct to the DOJ, although the outcome of any resulting DOJ investigation is not yet public.²⁹

9. *Credit Suisse Group AG and Credit Suisse (Hong Kong) Limited*

On July 5, 2018, the SEC issued a Cease-and-Desist Order to the Zurich, Switzerland-based investment bank and financial services company Credit

23. Press Release, Dep’t of Just., Legg Mason Inc. Agrees to Pay \$64 Million in Criminal Penalties and Disgorgement to Resolve FCPA Charges Related to Bribery of Gaddafi-Era Libyan Officials (June 4, 2018) <https://www.justice.gov/opa/pr/legg-mason-inc-agrees-pay-64-million-criminal-penalties-and-disgorgement-resolve-fcpa-charges>.

24. *Id.*

25. *Id.*

26. Beam Inc., Exchange Act Release No. 83575, 2018 WL 3217607 (Jul. 2, 2018).

27. *Id.*

28. *Id.*

29. *Id.*

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Suisse Group AG (“CASG”).³⁰ The same day, the DOJ announced an NPA with CASG’s Hong Kong subsidiary Credit Suisse (Hong Kong) Limited (“CSHK”).³¹ The charges against CASG and CSHK arose out of CSHK’s hiring program in the Asia Pacific region from 2007 to 2013, which allegedly gave preferential hiring treatment to family members of influential government officials and executives at Chinese state-owned entities (“SOEs”) at a time when such SOEs were clients of CSHK.³² According to the SEC, this hiring practice demonstrated that CASG’s internal accounting controls were insufficient to reasonably enforce the bank’s policy against such relationship-based hires.³³ According to the DOJ, these relationship or referral hires were part of a *quid pro quo* with government and SOE officials to win business.³⁴ In settling with enforcement authorities, CASG and CSHK agreed to pay a total of U.S. \$76 million in fines and disgorgement.³⁵

10. *Sanofi S.A.*

On September 4, 2018, the SEC issued a Cease-and-Desist Order to the Paris, France-based pharmaceutical company Sanofi S.A.³⁶ From 2011 to 2015, employees and agents at Sanofi subsidiaries in Central Asia and the Middle East allegedly made improper payments to healthcare professionals in order to be awarded public tenders and increase prescriptions of Sanofi products.³⁷ The funds used for these payments were allegedly generated through fake documentation for travel and entertainment expenses, such as clinical trial and consulting fees, which were recorded as legitimate expenses in Sanofi’s books and records.³⁸ Based on this alleged misconduct, the SEC found that Sanofi failed to devise and maintain a sufficient system of internal accounting controls in violation of the FCPA.³⁹ Sanofi agreed to pay more than U.S. \$25 million to resolve charges arising out of the alleged misconduct.⁴⁰ Previously, in March 2018, Sanofi separately disclosed that

30. Credit Suisse Group AG., Exchange Act Release No. 83593, 2018 WL 3302863 (Jul. 5, 2018).

31. Press Release, Dep’t of Just., Credit Suisse’s Investment Bank in Hong Kong Agrees to Pay \$47 Million Criminal Penalty for Corrupt Hiring Scheme that Violated the FCPA (Jul. 5, 2018) <https://www.justice.gov/opa/pr/credit-suisse-s-investment-bank-hong-kong-agrees-pay-47-million-criminal-penalty-corrupt>.

32. *Id.*

33. *FCPA Review Autumn 2018*, MILLER & CHEVALIER (Nov. 2, 2018), <https://www.millerchevalier.com/publication/fcpa-autumn-review-2018>.

34. *Id.*

35. *Id.*

36. Press Release, Sec. & Exch. Comm’n, Sanofi Charged With FCPA Violations (Sep. 4, 2018) <https://www.sec.gov/news/press-release/2018-174>.

37. *FCPA Review Autumn 2018*, *supra* note 33.

38. *Id.*

39. *Id.*

40. *Id.*

the DOJ had closed a four-year investigation into the company without enforcement.⁴¹

11. *United Technologies Corporation*

On September 12, 2018, the SEC issued a Cease-and-Desist Order to the Farmington, Connecticut-based technology conglomerate United Technologies Corporation (“UTC”).⁴² The allegations in the SEC Order related to a range of reported misconduct by the company’s subsidiaries.⁴³ For example, from 2012 to 2014, UTC’s wholly-owned subsidiary Otis Elevator Company allegedly executed contracts for the sale of elevator equipment with sham subcontractors and intermediaries with the understanding that the equipment would subsequently be sold to Azerbaijan public housing authorities at inflated prices, thereby creating a pool of money for kickbacks to government officials.⁴⁴ Similarly, from 2006 to 2013, UTC’s affiliates Pratt & Whitney and International Aero Engines allegedly engaged a sales agent for the sale of airplane engines in China, conducted no due diligence on the sales agent, and agreed to pay him a “success fee commission” of between 1.75 percent to 4 percent of sales to Chinese state-owned airlines, which created a pool of money that could be used for bribes to government officials.⁴⁵ UTC agreed to pay a total of U.S. \$13.9 million to resolve anti-bribery, books-and-records, and internal-accounting-controls FCPA allegations arising out of this conduct.⁴⁶

12. *Petróleo Brasileiro S.A.*

“On September 27, 2018, the Brazilian national oil company *Petróleo Brasileiro S.A.* (“Petrobras”) reached FCPA settlements with the DOJ and SEC as part of a coordinated settlement with Brazilian authorities to resolve anti-corruption charges arising out of its role at the center of the “Operation Car Wash” scandal in Brazil.⁴⁷ Operation Car Wash has already resulted in several massive global corruption settlements, including the U.S. \$2.6 billion global settlement between the engineering companies Odebrecht and Braskem with U.S. and Brazilian authorities,⁴⁸ currently the largest in anti-

41. Sanofi, Annual Report (Form 20-F) (Mar. 7, 2018).

42. Press Release, Sec. & Exch. Comm’n, United Technologies Charged With Violating FCPA (Sep. 12, 2018) <https://www.sec.gov/news/press-release/2018-188>.

43. *FCPA Review Autumn 2018*, *supra* note 33.

44. *Id.*

45. *Id.*

46. *Id.*

47. Press Release, Dep’t of Just., *Petróleo Brasileiro S.A. – Petrobras Agrees to Pay More Than \$850 Million for FCPA Violations* (Sep. 27, 2018), <https://www.justice.gov/opa/pr/petrleo-brasileiro-sa-petrobras-agrees-pay-more-850-million-fcpa-violations>; Press Release, Sec. & Exch. Comm’n, *Petrobras Reaches Settlement With SEC for Misleading Investors* (Sep. 27, 2018), <https://www.sec.gov/news/press-release/2018-215>.

48. Press Release, Dep’t of Just., *Odebrecht and Braskem Plead Guilty and Agree to Pay at Least \$3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History* (Dec.

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corruption history. As a part of these settlements, prosecutors alleged that these companies made improper payments to Brazil's political elite in exchange for Petrobras's awarding inflated engineering and oilfield service contracts.⁴⁹ Now Petrobras has been charged with violating the FCPA's accounting provisions by failing to make and keep accurate books and records, and "knowingly and willfully" failing to implement internal financial and accounting controls—failures that enabled Petrobras executives to facilitate the bribery of Brazilian politicians and Brazilian political parties.⁵⁰ In total, Petrobras has agreed to pay approximately U.S. \$1.7 billion in fines and disgorgement to settle U.S. and Brazilian charges, including a total of U.S. \$108 million to be paid to U.S. authorities.⁵¹

13. *Stryker Corp.*

On September 28, 2018, the SEC issued a Cease-and-Desist Order to Stryker Corp., a Kalamazoo, Michigan-based medical device company.⁵² According to the SEC, at the time of the alleged misconduct, Stryker had implemented various anti-corruption policies and procedures but failed to follow them in India, China, and Kuwait at various times between 2010 and 2017, resulting in books-and-records and internal-accounting-controls violations.⁵³ The company agreed to pay a total of U.S. \$7.8 million to settle these charges.⁵⁴ The company previously settled with the SEC in 2013 for FCPA allegations in connection with its business in Mexico, Poland, Romania, Argentina, and Greece.⁵⁵

14. *Vantage Drilling International*

On November 19, 2018, the SEC issued a Cease-and-Desist Order to Vantage Drilling International, a Houston-based offshore drilling company.⁵⁶ According to the SEC, the company failed to devise a system of internal accounting controls relating to a former outside director and the company's use of third-party marketing agents.⁵⁷ These failures resulted in the former director, who was the company's largest shareholder and sole source of drilling assets, making questionable payments to former Petrobras officials in Brazil in connection with a \$1.8 billion drilling services

21, 2016), <https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve>.

49. *FCPA Review Autumn 2018*, *supra* note 33.

50. *Id.*

51. *Id.*

52. Stryker Corp., Exchange Act Release No. 84308, 2018 WL 4678504 (Sep. 28, 2018).

53. *FCPA Review Autumn 2018*, *supra* note 33.

54. Stryker Corp., Exchange Act Release No. 84308, 2018 WL 4678504 (Sep. 28, 2018).

55. Press Release, Sec. & Exch. Comm'n, SEC Charges Stryker Corporation With FCPA Violations (Oct. 24, 2013), <https://www.sec.gov/news/press-release/2013-229>.

56. Vantage Drilling Int'l, Exchange Act Release No. 84617, 2018 WL 6040668 (Nov. 19, 2018).

57. *Id.*

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contract.⁵⁸ Vantage agreed to disgorge U.S. \$5 million to resolve charges arising out of the alleged misconduct.⁵⁹ The company previously disclosed that the DOJ had closed its parallel investigation in 2017 without enforcement.⁶⁰

15. *Centrais Elétricas Brasileiras S.A.*

On December 26, 2018, the SEC issued a Cease-and-Desist Order to Centrais Elétricas Brasileiras S.A., a Brazilian state-controlled power generation, transmission, and distribution company.⁶¹ According to the SEC, the company violated the books-and-records and the internal-accounting-controls provisions of the FCPA, allowing former officers at the company's nuclear power subsidiary to engage in a bid-rigging scheme with private Brazilian construction companies in connection with the Angra III nuclear power plant.⁶² The company will pay civil money penalty of \$2.5 million to resolve the SEC's charges.⁶³

16. *Polycom, Inc.*

On December 26, 2018, the SEC issued a Cease-and-Desist Order issued to Polycom, Inc., a San Jose, California-based voice and video communications provider.⁶⁴ According to the SEC, from 2006 through 2014, senior executives at Polycom Inc.'s China subsidiary provided discounts to distributors and resellers, knowing and intending that these third parties would use the discounts to make payments to officials at Chinese government agencies and government-owned enterprises.⁶⁵ The SEC alleged that this conduct violated the internal-accounting-controls and books-and-records provisions of the FCPA, and imposed a penalty of approximately \$16 million in disgorgement, prejudgment interest, and civil penalties.⁶⁶ The DOJ also released a letter formally declining to prosecute Polycom, Inc., in exchange for the company agreeing to disgorge approximately \$30 million, of which approximately \$10.7 million was off-set by disgorgement paid to the SEC.⁶⁷

58. *Id.*

59. *Id.*

60. *Vantage Drilling International Announces Closing of FCPA Investigation by the DOJ*, MARKET WIRED (Aug. 16, 2017, 11:41 ET), <https://www.sec.gov/litigation/admin/2018/34-84617.pdf>.

61. Centrais Elétricas Brasileiras S.A., Exchange Act Release No. 4010, 2018 WL 6804091 (Dec. 26, 2018).

62. *Id.*

63. *Id.*

64. Polycom, Inc., Exchange Act Release No. 4011, 2018 WL 6804090 (Dec. 26, 2018).

65. *Id.*

66. *Id.*

67. *Id.*

C. RECENT LITIGATION IN THE UNITED STATES

1. *United States v. Hoskins*

On August 24, 2018, the United States Court of Appeal for the Second Circuit held in *United States v. Hoskins* that the U.S. government cannot use an alleged FCPA conspiracy with U.S. persons to bring FCPA charges against a foreign national not otherwise within the statute's jurisdiction.⁶⁸ Specifically, U.S. prosecutors brought FCPA conspiracy charges against the defendant, Hoskins, a British national operating outside the United States, on the theory that his participation in a corrupt scheme involving the U.S. subsidiary of a multinational company provided grounds for jurisdiction.⁶⁹ The Second Circuit disagreed, holding that the FCPA's textual limits on extraterritoriality precluded such conspiracy charges when the defendant was not otherwise subject to U.S. jurisdiction.⁷⁰ U.S. prosecutors have not appealed the decision but have asserted that it creates a "circuit split" where different U.S. appellate courts have reached contrary interpretations of the same law.⁷¹

II. Anti-Corruption Developments Abroad

A. ANTI-CORRUPTION LEGISLATION AND INITIATIVES ABROAD

1. *Argentina*

On March 1, 2018, Argentina's new anti-corruption regulation, Law 27.401 ("Criminal Liability of Legal Persons for Corruption Offenses") went into effect.⁷² Enacted in December 2017, the new law for the first time establishes a criminal liability regime applicable to private legal persons, whether of national or foreign capital, with or without state ownership.⁷³ The law also makes it mandatory for any company wishing to contract with the national government to put in place an adequate "integrity program."⁷⁴

2. *Brazil*

In Brazil, local authorities are increasingly adopting rules and regulations that introduce mandatory compliance programs for companies. For example, in February 2018, the Federal District of Brazil passed Law n°

68. *United States v. Hoskins*, 902 F.3d 69, 96–97 (2nd Cir. 2018) (No. 16-1010).

69. *FCPA Review Autumn 2018*, *supra* note 33.

70. *United States v. Hoskins*, 902 F.3d at 97.

71. *FCPA Review Autumn 2018*, *supra* note 33.

72. Matteson Ellis, *Argentina Introduces Corporate Liability and Compliance Standards in New Anti-Corruption Law*, FCPAMÉRICAS (Mar. 6, 2018), <http://fcpamericas.com/english/anti-corruption-compliance/argentina-introduces-corporate-liability-compliance-standards-anti-corruption-law/#>.

73. *Id.*; see also Law No. 27.401, Mar. 1, 2018, B.O.(Arg.).

74. Law No. 27.401, Mar. 1, 2018, B.O. (Arg.).

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6,112/2018.⁷⁵ The law mandates any company that enters into a contract, partnership, agreement, concession, or public-private partnership with the public administration of the Federal District to implement a compliance program within 180 days of entering into such a contract or partnership.⁷⁶ The requirement applies only to contracts that meet a specified monetary threshold.⁷⁷ In October 2017, the Rio de Janeiro state government approved a somewhat similar law – Law n° 7,753/17.⁷⁸

3. *China*

On March 20, 2018, the National People’s Congress (“the “NPC”) of the People’s Republic of China (“China”) approved a constitutional amendment creating what is now China’s highest anti-corruption agency, the National Supervision Commission (the “NEW COMMISSION”).⁷⁹ To govern the operation of the New Commission, the NPC passed the Supervision Law.⁸⁰ The law has been criticized by some as a potential threat to individual rights and fundamental freedoms.⁸¹

4. *India*

On July 26, 2018, India’s Prevention of Corruption (“Amendment”) Act, 2018, entered into force.⁸² The new law introduces some important amendments to the Prevention of Corruption Act of 1988. Among other things, it adds a new Section 17A that requires public officers to obtain prior approval from the union or state government before commencing any inquiry or investigation into an offense alleged to have been committed by a public servant.⁸³

75. *New Law Requires Companies to Adopt a Compliance Program If They Supply Goods Or Services To The Government Of The Federal District*, VIEIRA REZENDE ADVOGADOS (Feb. 7, 2018), <http://www.vieirarezende.com.br/en/new-law-requires-companies-to-adopt-compliance-program-if-they-supply-goods-or-services-to-the-government-of-the-federal-district/>.

76. *Id.*

77. *Id.*

78. *Id.*

79. Zhōnghuá rénmín gònghéguó jiānchá fǎ

(中华人民共和国监察法) [Supervision Law of the People’s Republic of China](promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 20, 2018, effective Mar. 20, 2018) PEKING UNIV. L. ENG. NETWORK, [http://en.pkulaw.cn/display.aspx?id=3337edfcffbb1b29bdfb&lib=law&SearchKeyword=&SearchCKeyword=\(China\)](http://en.pkulaw.cn/display.aspx?id=3337edfcffbb1b29bdfb&lib=law&SearchKeyword=&SearchCKeyword=(China)).

80. *Id.*

81. *China to revise criminal law to accommodate powerful anti-graft commission*, REUTERS (Mar. 11, 2018, 11:16PM), <https://www.reuters.com/article/us-china-politics-corruption/china-to-revise-criminal-law-to-accommodate-powerful-anti-graft-commission-idUSKCN1G00AD>.

82. The Prevention of Corruption (Amendment) Act, No. 16 of 2018, Gaz. of India (2018), pt. II sec. 1 (Jul. 26, 2018), <http://www.egazette.nic.in/WriteReadData/2018/187644.pdf>.

83. *Id.* at 5–6.

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5. *Ireland*

Ireland's new Criminal Justice ("Corruption Offences") Act 2018 was signed into law on June 5, 2018 and entered into force on July 30, 2018.⁸⁴ The law consolidates anti-corruption legislation from as far back as 1889 and modernizes a host of other legislation relevant to corruption.⁸⁵ The law also creates a number of new offenses and a new strict liability offense for corporate bodies where any specified individual connected with the company has been found guilty of corruption.⁸⁶

6. *Malaysia*

The Malaysian Anti-Corruption Commission ("Amendment") Act was passed and gazetted on May 4, 2018, introducing significant changes to the *Malaysian Anti-Corruption Commission ("MAAC") Act* of 2009.⁸⁷ The Act went into effect on October 1, 2018, except for Section 4, which introduces new rules for corruption offenses by corporations and will enter into force in 2020.⁸⁸

7. *Tanzania*

On July 13, 2018, the Tanzanian Government, acting under Section 106(3) of the Mining Act 2010, issued the Mining ("Integrity Pledge") Regulation, 2018.⁸⁹ The regulation requires every holder of mineral rights who undertake prospecting and mining activities in Tanzania mainland to sign an Integrity Pledge.⁹⁰ An Integrity Pledge is defined as "a formal and concrete expression of commitment by a mineral right holder to abide in ethical business practices and support a national stand against corruption."⁹¹ The objectives of the Integrity Pledge are, among other things, to "promote

84. Criminal Justice (Corruption Offences) Act 2018 (Act No. 9/2018) (Ir.), <http://www.irishstatutebook.ie/eli/2018/act/9/enacted/en/html>.

85. *Minister Flanagan announces passage of Criminal Justice (Corruption Offences) Bill 2017*, DEP'T OF JUST. & EQUAL. (May 30, 2018), <http://www.justice.ie/en/JELR/Pages/PR18000167>.

86. Criminal Justice (Corruption Offences) Act 2018 (Act No. 9/2018) (Ir.), <http://www.irishstatutebook.ie/eli/2018/act/9/enacted/en/html>.

87. Malaysian Anti-Corruption Commission (Amendment) Act 2018 (Act A1567), Att'y Gen. Chambers of Malay., http://www.federalgazette.agc.gov.my/outputaktap/20180504_A1567_BI_Act%20A1567.pdf.

88. *The Malaysian Anti-Corruption Commission (Amendment) Bill 2018*, BAKER MCKENZIE (Oct. 5, 2018), <https://www.bakermckenzie.com/en/insight/publications/2018/10/the-malaysian-anti-corruption-commission>.

89. The Mining (Integrity Pledge) Regulations, 2018, Govt. Notice No. 304, Gaz. of the United Republic of Tanz., No. 28, Vol. 99 (Jul. 13, 2018), <https://www.madini.go.tz/wp-content/uploads/2018/09/10.09.2018-THEMINING-INTERGRITY-PLEDGE-REGULATIONS-2018-GN-NO.-304-OF-2018.pdf>.

90. Amalia Lui, Amreen Ayub & Kankiza Tibaijuka, *Tanzania Briefing: New Local Content Submission Guidelines and Integrity Pledge Regulations*, CLYDE & Co. (Jul. 20, 2018), <https://www.clydeco.com/insight/article/tanzania-briefing-local-content-integrity-pledge>.

91. The Mining (Integrity Pledge) Regulations, 2018, Govt. Notice No. 304, Gaz. of the United Republic of Tanz., No. 28, Vol. 99 (Jul. 13, 2018), <https://www.madini.go.tz/wp->

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integrity, accountability and proper management of anti-corruption programme” and to “complement the Prevention and Combating of Corruption Bureau’s efforts to set up the best business practice in Tanzania.”⁹²

8. *Thailand*

On July 21, 2018, the Thailand Government Gazette published the Act Supplementing the Constitution Relating to the Prevention and Suppression of Corruption, B.E. 2561.⁹³ The Act, which went into effect on July 22, repeals and replaces the 1999 Organic Act on Counter Corruption.⁹⁴ One of the most significant changes in the new law is the expansion of the definition of persons who commit bribery to include foreign juristic persons registered abroad but operating a business in Thailand.⁹⁵

9. *United Kingdom*

On January 31, 2018, the new powers of “unexplained wealth orders” (“UWOs”) and the supporting “interim freezing orders” commenced.⁹⁶ The UWO is both a civil power and an investigation tool that:

Requires a person who is reasonably suspected of involvement in, or of being connected to a person involved in, serious crime to explain the nature and extent of their interest in particular property, and to explain how the property was obtained, where there are reasonable grounds to suspect that the respondent’s known lawfully obtained income would be insufficient to allow the respondent to obtain the property . . .⁹⁷ A failure to provide a response to a UWO may give rise to a presumption that the property is recoverable under any subsequent civil recovery action.⁹⁸

One month later, in February, the National Crime Agency secured its first two UWOs to investigate assets totaling £22 million (U.S. \$30 million).⁹⁹

content/uploads/2018/09/10.09.2018-THEMINING-INTERGRITY-PLEDGE-REGULATIONS-2018-GN-NO.-304-OF-2018.pdf.

92. *Id.* at 3.

93. Peerapan Tungsuwan & Yuthana Sivaraks, *The new Anti-Corruption Act: clearly defined to cover foreign juristic persons registered abroad*, BAKER MCKENZIE (Aug. 10, 2018), <https://globalcompliancenews.com/anti-corruption-thailand-20180810/>.

94. *See id.*

95. *See id.*

96. *Circular 003/2018: unexplained wealth orders*, GOV.UK (Feb. 1, 2018), <https://www.gov.uk/government/publications/circular-0032018-criminal-fines-act-unexplained-wealth-orders/circular-0032018-unexplained-wealth-orders>.

97. *Id.*

98. *Id.*

99. *NCA secures first two unexplained wealth orders*, NAT’L CRIME AGENCY (Feb. 28, 2018), <http://www.nationalcrimeagency.gov.uk/news/1297-nca-secures-first-unexplained-wealth-orders>.

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10. *Deferred Prosecution Agreement – A Growing Internationalization: Australia, Canada, Singapore*

The year 2018 saw the continued expansion of the deferred prosecution agreement (“DPA”) as a tool used by enforcement authorities to resolve corporate criminal investigations. First introduced in the United States, the DPA has in recent years been adopted by jurisdictions such as Brazil, France, and the United Kingdom.¹⁰⁰ Continuing this trend, in March 2018, the Singaporean parliament approved an amendment to the Criminal Justice Reform Act that creates, for the first time, a DPA framework for scheduled crimes.¹⁰¹ The same month, the Canadian Government announced that it had introduced legislative amendments to create a “made-in-Canada” version of the DPA, to be known as a Remediation Agreement Regime.¹⁰² In a “Backgrounder” released in September, the Canadian Government gave details of the new Remediation Agreement Regime.¹⁰³ On September 19, 2018, amendments to *Criminal Code* creating the Remediation Agreement Regime entered into force.¹⁰⁴ Similarly, on June 8, 2018, the Australian Government released a draft Deferred Prosecution Agreement (“DPA”) Scheme Code of Practice for public consultation.¹⁰⁵ The DPA is a controversial enforcement tool and has been criticized as both too harsh and too lenient on corporate offenders.¹⁰⁶

100. See 2018 2018 Year-End Update on Corporate Non-Prosecution Agreements and Deferred Prosecution Agreements, GIBSON DUNN (Jan. 10, 2019), <https://www.gibsondunn.com/2018-year-end-npa-dpa-update/>.

101. Criminal Justice Reform Bill, (No. 14/2018), PARLIAMENT OF SING. (Mar. 19, 2018), <https://www.parliament.gov.sg/docs/default-source/default-document-library/criminal-justice-reform-bill-14-2018.pdf> (Sing.).

102. Pub. Serv. & Procurement Canada, *Canada to enhance its toolkit to address corporate wrongdoing*, GOV'T OF CANADA (Mar. 27, 2018), <https://www.canada.ca/en/public-services-procurement/news/2018/03/canada-to-enhance-its-toolkit-to-address-corporate-wrongdoing.html>.

103. Dep't of Just. Canada, *Remediation Agreements and Orders to Address Corporate Crime*, GOV'T OF CANADA (Sep. 11, 2018), <https://www.canada.ca/en/department-justice/news/2018/03/remediation-agreements-to-address-corporate-crime.html>.

104. Lawrence Ritchie & Malcolm Aboud, *Deferred Prosecution Agreements come into force in Canada*, OSLER (Sep. 19, 2018), <https://www.osler.com/en/blogs/risk/september-2018/deferred-prosecution-agreements-dpas-come-into-force-in-canada>.

105. Press Release, Att'y Gen. for Austl., Consultation on new measure to combat corporate crime (June 8, 2018), <https://www.attorneygeneral.gov.au/Media/Pages/Consultation-on-new-measure-to-combat-corporate-crime-8-june-2018.aspx>.

106. See Isaac Gorodetski & James Copland, *The Shadow Lengthens: The Continuing Threat of Regulation by Prosecution*, MANHATTAN INST. (Feb. 25, 2014), <https://www.manhattan-institute.org/html/shadow-lengthens-continuing-threat-regulation-prosecution-5898.html>; see also *Going Soft on Corporate Crime*, N.Y. TIMES, (Apr. 10, 2008), <https://www.nytimes.com/2008/04/10/opinion/10thu2.html>.

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B. ENFORCEMENT ACTIONS ABROAD

1. *Italy*

Oil giants Royal Dutch Shell and Eni are currently on trial in Italy in what has been dubbed “one of the biggest corruption cases in corporate history.”¹⁰⁷ In June 2018, “Italy’s Supreme Court threw out an appeal from Shell and four former Shell managers to stymie” the trial.¹⁰⁸

2. *Japan*

On October 19, 2018, Nissan Motor Co. Chairman Carlos Ghosn was arrested in Japan over claims of financial misconduct and alleged corruption along with Greg Kelly, a representative director at Nissan.¹⁰⁹ According to a company statement, Ghosn and Kelly had been under-reporting Ghosn’s compensation in the company’s securities filings for years.¹¹⁰ Ghosn also serves as chairman and chief executive of France’s Renault and chairman of Mitsubishi.¹¹¹

3. *Malaysia*

In July 2018, former Malaysian Prime Minister Najib Razak, “was charged with three counts of criminal breach of trust and one charge of abuse of power” for embezzling money from 1Malaysia Development Berhad (“1MDB”), a Malaysian strategic development company.¹¹² Additional counts of money laundering and other corruption-related offenses have since been brought against Razak.¹¹³

107. Ben Chapman, *Shell and Eni face one of the biggest corruption cases in corporate history over \$1.3bn Nigerian oil field*, INDEPENDENT (Sep. 16, 2018), <https://www.independent.co.uk/news/business/analysis-and-features/shell-and-eni-face-one-of-the-biggest-corruption-cases-in-corporate-history-over-13bn-nigerian-oil-a8537506.html>.

108. *Italy’s top court rejects appeal to stymie Shell, Eni corruption trial*, REUTERS (June 13, 2018), <https://www.reuters.com/article/us-shell-trial-nigeria-appeal/italy-top-court-rejects-appeal-to-stymie-shell-eni-corruption-trial-idUSKBN1J922L>.

109. Sean McLain, William Boston & Nick Kostov, *Nissan’s Carlos Ghosn Arrested, to Be Ousted as Chairman Amid Financial Misconduct Probe*, WALL STREET J. (Nov. 19, 2018), <https://www.wsj.com/articles/nissans-carlos-ghosn-arrested-to-be-ousted-as-chairman-amid-misconduct-probe-1542634696>.

110. Paul A. Eisenstein, *Nissan Chairman Carlos Ghosn arrested; misconduct probe finds \$44.6 million in hidden pay*, NBC NEWS (Nov. 19, 2018), <https://www.nbcnews.com/business/autos/nissan-chairman-arrested-hiding-millions-pay-n937901>.

111. *Id.*

112. Ushar Daniele & Jamie Tarabay, *Former Malaysian Prime Minister Najib Razak charged with corruption*, CNN (July 4, 2018), <https://www.cnn.com/2018/07/03/asia/razak-malaysia-arrest-intl/index.html>.

113. Selvanaban Mariappen, *Former Malaysian PM Najib slapped with 25 more corruption charges*, CNN (Sept. 20, 2018), <https://www.cnn.com/2018/09/20/asia/najib-razak-1mdb-charges-intl/index.html>.

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4. *South Korea*

In April 2018, a district court in Seoul sentenced former South Korean President Park Geun-hye to twenty-four years in prison and imposed a fine of U.S. \$16.8 million in connection with charges of bribery, extortion, abuse of power, and other charges.¹¹⁴ In August, a South Korean high court extended Park Geun-hye's sentence and increased her fine.¹¹⁵ On October 5, 2018, another former President of South Korea, Lee Myung-bak, was convicted and sentenced to fifteen years in prison for involvement in a separate corruption scandal.¹¹⁶

5. *South Africa*

On March 16, 2018, the director of South Africa's National Prosecuting Authority announced that Former South African President Jacob Zuma would face charges for corruption, racketeering, and fraud related to a government arms deal in the late 1990s.¹¹⁷ According to the eighty-nine page indictment in the case of *State v. Jacob Gedleyihlekisa Zuma and Thales South Africa (Pty) Ltd.*, Zuma now faces one count of racketeering, two counts of corruption, one count of money laundering, and twelve counts of fraud.¹¹⁸

6. *China*

In September 2018, Mr. Meng Hongwei, the head of the global crime-fighting agency Interpol disappeared in China while on a trip to the country.¹¹⁹ In a statement released on October 8, 2018, the Chinese Ministry of Public Security acknowledged that the Chinese government was holding Hongwei on charges of corruption.¹²⁰ Hongwei, who had previously

114. *Korea court extends ex-leader Park's length prison term*, ASSOCIATED PRESS (Aug. 24, 2018), <https://www.apnews.com/62a5a79e4f424f6eb317e28f783058bb>.

115. *Id.*

116. Choe Sang-Hun, *In South Korea, Another Former President Lands in Jail*, N.Y. TIMES (Mar. 22, 2018), https://www.nytimes.com/2018/03/22/world/asia/south-korea-lee-myung-bak-arrest-corruption.html?rref=collection%2Ftimestopic%2FLee%20Myung-bak&action=click&contentCollection=timestopics®ion=stream&module=stream_unit&version=latest&contentPlacement=2&pgtype=collection; see also Choe Sang-Hun, *Former South Korean President Gets 15 Years in Prison for Corruption*, N.Y. TIMES (Oct. 5, 2018), <https://www.nytimes.com/2018/10/05/world/asia/lee-myung-bak-south-korea-convicted.html>.

117. Krista Mahr, *Jacob Zuma to face 16 counts of corruption over arms deal*, TELEGRAPH (Mar. 16, 2018), <https://www.telegraph.co.uk/news/2018/03/16/zuma-charged-corruption-arms-deal/>.

118. Ana Reporter, *NPA: Zuma indictment shows 'common purpose' bribes for political protection*, INDEPENDENT ONLINE (Apr. 9, 2018), <https://www.iol.co.za/news/politics/npa-zuma-indictment-shows-common-purpose-bribes-for-political-protection-14339930>.

119. Chris Buckley & Aurelien Breeden, *Head of Interpol Disappears, and Eyes Turn Toward China*, N.Y. TIMES (Oct. 5, 2018), <https://www.nytimes.com/2018/10/05/world/europe/meng-hongwei-missing-interpol.html>.

120. Ben Westcott & Steven Jiang, *Head of Interpol Meng Hongwei accused of corruption, Chinese government says*, CNN (Oct. 8, 2018), <https://www.cnn.com/2018/10/08/asia/interpol-president-china-meng-hongwei-corruption-intl/index.html>.

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served as a Vice Minister of Public Security in China, is accused of “accepting bribes and committing unspecified other crimes.”¹²¹

III. Treaties and International Organizations

A. TREATIES

1. *African Union Convention on Preventing and Combating Corruption* (“AUCPCC”)

a. New Members

Mauritius became the fortieth signatory to ratify the Convention on May 4, 2018.¹²²

b. Reports and Announcements

The African Union has dubbed 2018 as the year for “winning the fight against corruption,”¹²³ and, for the first time ever, all fifty-five of its members have collectively sought to raise anti-corruption awareness through symbolically designating an “Anti-Corruption Day.”¹²⁴

2. *Organization for Economic Co-Operation and Development* (“OECD”) *Anti-Bribery Convention*

a. New Members

Peru joined the OECD Anti-Bribery Convention on July 27, 2018, becoming the forty-fourth party to the treaty.¹²⁵

b. Reports and Announcements

In February 2018, the OECD released a report on Illicit Financial Flows: The Economy of Illicit Trade in West Africa, which examines thirteen

121. *Interpol Meets to Select New President After Leader’s Arrest in China*, N.Y. TIMES (Nov. 18, 2018), <https://www.nytimes.com/2018/11/18/world/asia/interpol-president-china.html>.

122. *Buhari pledges to extend anti-corruption effort across Africa*, PREMIUM TIMES (July 2, 2018), <https://www.premiumtimesng.com/news/top-news/274610-buhari-pledges-to-extend-anti-corruption-effort-across-africa.html>.

123. *How to Win the Fight Against Corruption in Africa*, TRANSPARENCY INT’L (July 11, 2018), https://www.transparency.org/news/feature/how_to_win_the_fight_against_corruption_in_africa; see also Press Release, African Union, African Union to Launch 2018 as the African Anti-Corruption Year. . . (Jan. 22, 2018), <https://au.int/en/pressreleases/20180122/african-union-launch-2018-african-anti-corruption-year%E2%80%A6>.

124. Muhammadu Buhari, *African Anti-Corruption Day is a Call to Action*, THE GUARDIAN (July 14, 2018), <https://www.theguardian.com/commentisfree/2018/jul/14/african-anti-corruption-day-call-to-action-muhammadu-buhari>.

125. Press Release, Org. for Econ. Cooperation and Dev., Peru to Join Two Major OECD Conventions: Anti-Bribery Convention and Multilateral Convention on Mutual Administrative Assistance in Tax Matters (May 28, 2018), <http://www.oecd.org/corruption/peru-to-join-two-major-oecd-conventions-anti-bribery-convention-and-multilateral-convention-on-mutual-administrative-assistance-in-tax-matters.htm>.

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criminal economies to identify the drivers behind them.¹²⁶ In March 2018, the OECD released a report on *The Role of the Media and Investigative Journalism in Combating Corruption*,¹²⁷ building on its 2017 study on the *Detection of Foreign Bribery*. That same month, the OECD also released its *Strategic Approach to Combating Corruption and Promoting Integrity*, a reflective report aimed at increasing the effectiveness of the organization's future work.¹²⁸

Continuing with its work on Phase 4 of the peer-review process, the OECD Working Group on Bribery released its reports on Australia,¹²⁹ Switzerland,¹³⁰ Germany,¹³¹ and Norway,¹³² which, among other things, reviewed the progress made by these countries and tracks outstanding issues from past reports.

3. *United Nations Convention Against Corruption* (“UNCAC”)

a. New Members

In April 2018, Samoa¹³³ acceded to the UNCAC, followed by Equatorial Guinea¹³⁴ in May and Chad¹³⁵ in June. Currently, there are 186 state parties to the Convention.¹³⁶

126. ORG. FOR ECON. COOPERATION AND DEV., *Illicit Financial Flows: The Economy of Illicit Trade in West Africa* 3 (Feb. 20, 2018), <http://www.oecd.org/development/accountable-effective-institutions/Illicit-Flows-Economy-of-Illicit-Trade-in-West-Africa.pdf>.

127. ORG. FOR ECON. COOPERATION AND DEV., *The Role of Media and Investigative Journalism in Combating Corruption* 3 (Mar. 27, 2018) <http://www.oecd.org/daf/anti-bribery/The-role-of-media-and-investigative-journalism-in-combating-corruption.pdf>.

128. ORG. FOR ECON. COOPERATION AND DEV., *OCED Strategic Approach to Combating Corruption and Promoting Integrity* 3 (Mar. 27, 2018) <http://www.oecd.org/corruption/OECD-Strategic-Approach-Combating-Corruption-Promoting-Integrity.pdf>.

129. *Australia Takes Major Steps to Combat Foreign Bribery, but OECD Wants to see More Enforcement*, OECD (Dec. 19, 2017), <http://www.oecd.org/corruption/australia-takes-major-steps-to-combat-foreign-bribery-but-oecd-wants-to-see-more-enforcement.htm>.

130. *Switzerland's Significant Foreign Bribery Enforcement Should Be Accompanied by Harsher Penalties and Private Sector Whistleblower Protection*, OECD (Mar. 27, 2018), <http://www.oecd.org/corruption/switzerlands-significant-foreign-bribery-enforcement-should-be-accompanied-by-harsher-penalties-and-private-sector-whistleblower-protection.htm>.

131. *Germany's Strong Anti-Bribery Enforcement against Individuals Needs to Be Matched by Comparably Strong Enforcement against Companies*, OECD (June 21, 2018), <http://www.oecd.org/corruption/germany-s-strong-anti-bribery-enforcement-against-individuals-needs-to-be-matched-by-comparably-strong-enforcement-against-companies.htm>.

132. *Norway Has Successfully Enforced its Foreign Bribery Laws But Faces Potential Obstacles*, OECD (June 21, 2018), <http://www.oecd.org/corruption/norway-has-successfully-enforced-its-foreign-bribery-laws-but-faces-potential-obstacles.htm>.

133. U.N. Office on Drugs and Crime, U.N. Convention against Corruption: Signature and Ratification Status (June 26, 2018), <https://www.unodc.org/unodc/en/corruption/ratification-status.html>.

134. *Id.*

135. *Id.*

136. *Id.*

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b. Reports and Announcements

The Conference of the States Parties to the UNCAC held its seventh session from November 6 to 10, 2017.¹³⁷ The report on the Conference emphasized the links between anti-corruption efforts and the sustainable development agenda, and highlighted the threat corruption holds against the 2030 Agenda for Sustainable Development in reference to Goal 16,¹³⁸ which aims to promote peaceful and inclusive societies for sustainable development, provide access to justice for all, and build effective, accountable and inclusive institutions at all levels.¹³⁹

The Conference adopted eight new resolutions which, among others, address the need to strengthen mutual legal assistance for international cooperation and asset recovery¹⁴⁰, the necessity to use a multidisciplinary approach in fighting corruption¹⁴¹, enhance synergies between multilateral organizations responsible for review mechanisms in the field of anti-corruption¹⁴², and strengthen the implementation of the UNCAC in small island developing nations.¹⁴³ In addition, it also adopted Resolution 7/8¹⁴⁴, which for the first time addressed the issue of corruption in sport.¹⁴⁵

4. *Organization of American States (“OAS”) Inter-American Convention Against Corruption (“IACAC”)*

a. New Members

Barbados ratified the IACAC in January 2018, after previously having signed the Convention in April 2001.¹⁴⁶

137. UN Conference of the State Parties to the U.N. Convention against Corruption, *Report of the Conference of the State Parties to the U.N. Convention against Corruption on its seventh session, held in Vienna, from 6 to 10 Nov. 2017*, 1, U.N. Doc. CAC/COSP/2017 (Nov. 10, 2017).

138. *Id.*

139. G.A. Res. 70/1, ¶ 8-9 (Oct. 21, 2015).

140. Conference of the States Parties to the United Nations Convention against Corruption, Res. 7/1 (Nov. 10, 2017).

141. Conference of the States Parties to the United Nations Convention against Corruption, Res. 7/2 (Nov. 10, 2017).

142. Conference of the States Parties to the United Nations Convention against Corruption, Res. 7/4 (Nov. 10, 2017).

143. Conference of the States Parties to the United Nations Convention against Corruption, Res. 7/7 (Nov. 10, 2017).

144. Conference of the States Parties to the United Nations Convention against Corruption, Res. 7/8 (Nov. 10, 2017).

145. U.N. Conference of the States Parties to the United Nations Convention Against Corruption, U.N. Doc. CAC/COSP/2017/8.

146. *Inter-American Convention Against Corruption: Signatories and Ratifications*, OAS http://www.oas.org/en/sla/dil/inter_american_treaties_B-58_against_Corruption_signatories.asp (last visited Feb. 10, 2019).

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b. Reports and Announcements

In February 2018, more than 20 years after the adoption of the IACAC on March 29, 1996,¹⁴⁷ OAS released a report on the institutional framework of the Mechanism for Follow-up on Implementation of the IACAC (“MESICIC”).¹⁴⁸ The report elaborated MESICIC’s missions and the activities it conducts to meet its objectives, outcomes, and the challenges identified as a result of its analysis.¹⁴⁹ The report contained information from the MESICIC Committee of Experts as well as the Conference of the State Parties.¹⁵⁰

B. INTERNATIONAL ORGANIZATIONS

1. *Asian Development Bank (“ADB”)*

In March 2018, the ADB’s Office of Anticorruption and Integrity released its annual report for 2017, highlighting its enforcement and prevention methods, including its numerous outreach programs.¹⁵¹ According to the report, thirty firms and twenty individuals were debarred in 2017, compared to ninety-eight firms and forty individuals in 2016.¹⁵² Another 153 firms and thirty-six individuals were cross debarred.¹⁵³ A further three firms and four individuals were in turn submitted to other multilateral development banks for cross debarment.¹⁵⁴

2. *European Bank for Reconstruction and Development (“EBRD”)*

In April 2018, the EBRD’s Office of the Chief Compliance Officer (“OCCO”) released its annual report for 2017.¹⁵⁵ The report discussed the various trainings, investigations, and standards and policies of the EBRD in the field of anti-corruption, including completing a formal review of its Code of Conduct for EBRD Personnel and Code of Conduct for Officials of the Board of Directors.¹⁵⁶ According to the report, the EBRD Enforcement

147. Org. of Am. States, *Inter-American Convention Against Corruption*, Mar. 29, 1996, 35 I.L.M. 724.

148. ORG. OF AM. STATES, *20 years after the adoption of the OAS Convention against Corruption* (Feb. 2018), http://www.oas.org/juridico/PDFs/mesicic_report_coop_against_corruption_2018.pdf.

149. *Id.* at 4.

150. *Id.*

151. Asian Dev. Bank, *Office of Anticorruption and Integrity 2017 Annual Report 4* (2018), <https://www.adb.org/sites/default/files/institutional-document/408321/oai-ar2017.pdf>.

152. *Id.*

153. *Id.* (Cross debarment refers to the debarment of individuals and entities based on notifications received from other participation international financial institutions (“IFIs”), pursuant to the Agreement for Mutual Enforcement of Debarment Decisions.)

154. *Id.*

155. European Bank for Reconstruction and Development, *Integrity and Anti-Corruption Report 2017* (Apr. 2018), <https://www.ebrd.com/integrity-and-compliance.html>.

156. *Id.* at 1.

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Commissioner debarred six individuals and entities, compared to sixteen in 2016.¹⁵⁷ It further cross debarred ninety-one corporations and twenty-eight individuals.¹⁵⁸ The OCCO also helped to implement twenty-one compliance action plans, where clients agreed to improve their internal controls as a condition of EBRD financing.¹⁵⁹

3. *European Investment Bank (“EIB”)*

In January 2018, the EIB entered into a settlement agreement with the Spanish company, IBERINCO, in connection with an EIB-financed thermal power plant project contracted in Latvia in 2005.¹⁶⁰ Under the agreement, IBERINCO was debarred from entering into EIB-financed projects for twelve months.¹⁶¹ IBERINCO also agreed to implement a sponsorship program to support anti-corruption efforts and exchange best practices concerning compliance standards with EIB.¹⁶²

4. *Inter-American Development Bank (“IDB”)*

The IDB’s Office of Institutional Integrity (“OII”) issued its annual report for 2017.¹⁶³ Among other things, the report evaluates the evolution and status of integrity, fraud, and corruption risk management in IDB Group operations during the last fifteen years.¹⁶⁴ The report showcased the organization’s move from a reactive stance to a more risk-based approach,¹⁶⁵ exemplified by the development of IDB’s Anti-Money Laundering Framework in 2017.¹⁶⁶ OII also improved its efficacy in investigations and in its filtering mechanisms, with data showing that it took approximately ten percent less time to process matters compared to 2016.¹⁶⁷ A key milestone is that 2017 was the first year the updated Sanctions Procedures, amended in 2015,¹⁶⁸ were implemented in decisions.¹⁶⁹

157. *Id.* at 25.

158. *Id.* at 26.

159. *Id.* at 5.

160. Press Release, European Investment Bank, EIB and IBERINCO Settlement Agreement to address and combat fraud (Jan. 5, 2018), <http://www.eib.org/en/infocentre/press/news/all/eib-and-iberinco-settlement-agreement-to-address-and-combat-fraud.htm>.

161. *Id.*

162. *Id.*

163. Inter-American Development Bank, *Office of Institutional Integrity and Sanction System 2017 Annual Report* (2018), <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=EZSHARE-1138756496-150>.

164. *Id.* at 6.

165. *See id.* at 17.

166. *Id.* at 129.

167. *Id.* at 110, 112.

168. The amended Sanctions Procedures authorize OII to engage in negotiated resolution where parties agree to provide evidence to the IDB group; *see* Inter-American Development Bank, *Office of Institutional Integrity and the Sanctions System Annual Report: 2015*, 5 (2015), <https://publications.iadb.org/bitstream/handle/11319/7616/Office-of-Institutional-Integrity-and-the-Sanctions-System-Annual-Report-2015.pdf?sequence=1&isAllowed=y>.

5. *World Bank Group*

In October 2018, the World Bank Group's Integrity Vice Presidency ("INT"), Office of Suspension and Disbarment ("OSD"), and Sanctions Board jointly released the first ever World Bank Group Sanctions System Annual Report for the 2018 fiscal year.¹⁷⁰ According to the report, seventy-eight firms and individuals were debarred, five were sanctioned with conditional non-debarment, and seventy-three cross-debarments from other multilateral banks were recognized.¹⁷¹ Of this number, twenty were sanctioned by the Sanctions Board on appeal.¹⁷²

INT's Integrity Compliance Office ("ICO") found fifteen firms and individuals to have met conditions required to be released from sanctions and provided guidance to a further eighty parties on reform in accordance with the Bank Group's Integrity Compliance Guidelines.¹⁷³

IV. Civil Society Efforts

A. TRANSPARENCY INTERNATIONAL ("TI")

In February 2018, TI released its annual Corruption Perception Index ("CPI") for 2017, which scores countries based on perceived levels of corruption.¹⁷⁴ For 2017, TI indicated that "a majority of countries are making little or no progress in ending corruption."¹⁷⁵ As a result, the CPI for 2017 demonstrates striking similarities to preceding years. For example, Denmark, New Zealand, and Finland all scored at the very top¹⁷⁶, while South Sudan, Somalia, and Syria scored at the very bottom¹⁷⁷, similar to their positions in 2016.¹⁷⁸

For this most recent publication of the CPI, TI also highlighted the relationship between corruption and freedom of expression.¹⁷⁹ The countries that performed better in the CPI generally have better protection for media and activists.¹⁸⁰ The countries at the bottom of the index have

169. *Id.* at 121.

170. Press Release, World Bank, World Bank Issues First Joint Sanctions System Annual Report (Oct. 3, 2018), <https://www.worldbank.org/en/news/press-release/2018/10/03/world-bank-group-debarred-78-firms-and-individuals-during-fiscal-year-2018>.

171. *Id.*

172. *Id.*

173. *Id.*

174. Transparency International, *Corruption Perception Index 2017*, 3, (Feb. 2018), https://www.transparency.org/whatwedo/publication/corruption_perceptions_index_2017 (to view, click "Download the Report").

175. Transparency International, *Corruption Perceptions Index 2017 Surveys* (Feb. 21, 2018), https://www.transparency.org/news/feature/corruption_perceptions_index_2017.

176. *Corruption Perceptions Index 2017*, *supra* note 174, at 4.

177. *Id.* at 5.

178. Transparency International, *Corruption Perceptions Index 2016* (2017), <https://www.transparency.cz/wp-content/uploads/CPI-2016-World-Map-And-Country-Results.pdf>.

179. *Corruption Perceptions Index 2017*, *supra* note 174, at 3.

180. *Id.*

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persistently sought to restrict journalists and citizens from exposing corruption and the injustice that it causes.¹⁸¹

In September, TI released its 2018 Progress Report, which serves as an independent assessment of the status of enforcement of the OECD Anti-Bribery Convention.¹⁸² The report assesses enforcement of prohibitions on the bribery of foreign public officials in forty-one out of forty-four signatory countries.¹⁸³ Additionally, TI's report assessed enforcement by non-OECD parties—China, Hong Kong, India, and Singapore—for the first time.¹⁸⁴ TI classified countries into four enforcement levels, from Active to Moderate to Limited to Little/No enforcement.¹⁸⁵ Since the last Progress Report in 2015, “there has been little change in the overall enforcement level.”¹⁸⁶

B. EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE (“EITI”)

The EITI, a standard that promotes transparency, accountability, and good governance for oil, gas and mineral resources, both added and lost members in 2018, leaving the number of countries that have implemented the standard at fifty-one.¹⁸⁷

In June 2018, The Netherlands, which has been involved with the EITI since inception, moved from a supporting to an implementing country.¹⁸⁸ The Solomon Islands' withdrew from the initiative due to limited activities in the extractive sector.¹⁸⁹ In August 2018, Liberia was suspended for failure to comply with the EITI Standard.¹⁹⁰

Finally, in September 2018, Ukraine's Parliament passed a law on “Ensuring transparency in extractive industries” in an effort to harmonize its

181. *Id.*

182. Transparency Int'l, *Progress Report 2018: Assessing Enforcement of the OECD Anti-Bribery Convention*, 6 (2018), https://www.transparency.org/whatwedo/publication/exporting_corruption_2018 (to view, click “Download the report”).

183. *Id.* at 9.

184. *Id.* at 6.

185. *Id.*

186. *Id.*

187. Extractive Industries Transparency Initiative, *Fact Sheet: The Global Standard for the Good Governance of Oil, Gas, and Mineral Resources* (Oct. 2018), https://eiti.org/sites/default/files/documents/eiti_factsheet_en_oct2018.pdf.

188. Press Release, Extractive Industries Transparency Initiative, The Netherlands joins the EITI (June 23, 2018), <https://eiti.org/news/netherlands-joins-eiti>.

189. Letter from the Hon. Mannaseh D. Sogavare, Deputy Prime Minister, Solomon Island, to the Hon. Fredrik Reinfeldt, Chair, Extractive Industries Transparency Initiative Board (June 25, 2018), https://eiti.org/sites/default/files/documents/solomon_islands_voluntary_withdrew_letter-eiti_implementation_2018.pdf.

190. Extractive Industries Initiative Board, *The board agreed that Liberia is ineligible for an extension of the reporting and Validation deadlines and is suspended effective 4 September 2018*, 2018-45/BC-256 (Aug. 2018), <https://eiti.org/BD/2018-45>.

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domestic legislation with the EITI standard.¹⁹¹ Among other things, the law establishes the payment disclosure norms and mandates ultimate beneficial ownership transparency by extractive companies.¹⁹²

C. WORLD JUSTICE PROJECT (“WJP”)

This year the WJP published its seventh annual report entitled the WJP The Rule of Law Index 2017–2018.¹⁹³ The report provides a portrait of the rule of law in 113 countries based on “the experience and perception of the general public and in-country experts.”¹⁹⁴ The European Union, European Free Trade Association, and North America region ranked at the top of the report’s rule of law index, while South Asia ranked at the bottom.¹⁹⁵ The highest improvement in the index’s performance was registered by France, Argentina, and Burkina Faso.¹⁹⁶

191. See EITI Secretariat, *Ukraine passes extractive industries transparency law based on best practice from EITI and EU*, EITI (Sept. 20, 2018), <https://eiti.org/news/ukraine-passes-extractive-industries-transparency-law-based-on-best-practice-from-eiti-eu>.

192. *Id.*

193. World Justice Project, *Rule of Law Index 2017–2018*, 5 (2018), https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition_0.pdf.

194. *Id.* at 5.

195. *Id.* at 22.

196. *Id.* at 30.

International Anti-money Laundering Committee

HARRY DIXON, NICOLE S. HEALY, ALBERT JANET, AND
JO RITCEY-DONOHUE*

I. Introduction

In 2018, the European Union significantly expanded and revised its anti-money laundering/counter terrorist finance (AML/CFT) directives. This article discusses those revisions, which are intended to provide better coordination among EU AML/CFT efforts and to address new threats, including those related to cryptocurrencies. This year-in-review update also addresses the 2018 Basel AML Index results, which annually ranks countries based on their AML/CFT risks.

Additionally, because actions in the U.S. have international implications, this article discusses certain developments in U.S. AML/CFT enforcement. The Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) continued its efforts to prevent misuse of the financial system by adopting a new rule requiring disclosure of beneficial ownership of accounts at covered financial institutions.¹ FinCEN also extended and expanded the existing Geographic Targeting Orders (GTOs) requiring title insurers to identify all beneficial owners holding a twenty-five percent or greater interest in real estate purchased in whole or in part in cash, cash substitutes such as cashiers' checks, or virtual currency.² The expansion applies to residential property in twelve major metropolitan areas, at a reduced singular threshold of \$300,000.³ Additionally, FinCEN cooperated with other U.S. agencies to target overlapping money laundering risks with

* Contributing authors: Harry Dixon, Taylor English Duma LLP (Atlanta, GA); Nicole S. Healy, Ropers Majeski Kohn & Bentley PC (Redwood City, CA); Albert Janet, Heres (Paris, France); Jo Ritcey-Donohue, JRD Law PLLC (Washington, DC). Mr. Dixon, Ms. Healy and Ms. Ritcey-Donohue served as editors of this article.

1. See *generally* 31 C.F.R. § 1010.230 (2018).

2. See FIN. CRIMES ENF'T NETWORK, U.S. DEP'T OF THE TREASURY, GEOGRAPHIC TARGETING ORDER COVERING TITLE INSURANCE COMPANY 2-4 (2018), https://www.fincen.gov/sites/default/files/shared/Real%20Estate%20GTO%20GENERIC_111518_FINAL%20508.pdf.

3. *Id.* at 1-2.

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related cross-border risks.⁴ Specifically, they focused on economic sanctions targeting Iran and corrupt funds from senior political officials.⁵

A. THE EUROPEAN UNION'S FIFTH AND SIXTH ANTI-MONEY LAUNDERING DIRECTIVES

Money laundering is a key driver of criminal behavior. Consequently, it has been a major area of concern for the European Union for the past twenty years. With the advent of the digital age, it is easier to escape the oversight of regulators through the use of prepaid payment cards, PayPal accounts, cryptocurrencies, or mobile phone payments.⁶ The European Union has struggled to both keep pace with these new methods of money laundering and fill any regulatory and legislative loopholes.⁷

In 2018, the European Union attempted to fill these regulatory gaps with EU Directive 2018/843, which was enacted on May 30, 2018; it amends EU Directive 2015/849 on the Prevention of the Use of the Financial System for the Purposes of Money Laundering or Terrorist Financing, known as the "Fifth Money Laundering Directive" (Fifth AML Directive).⁸ Soon after, the European Union enacted EU Directive 2018/1673 on October 23, 2018 (Sixth AML Directive), which was intended to combat money laundering by harmonizing the relevant criminal laws of Member States.⁹ These legislative efforts to increase coordination across the Member States further strengthens the legal framework to protect the European financial system from infiltration by dirty money or illicit proceeds.

4. See Fin. Crimes Enft Network, U.S. Dep't of the Treasury, FIN-2018-A003, Advisory on Human Rights Abuses Enabled by Corrupt Senior Foreign Political Figures and their Financial Facilitators 1 (2018) [hereinafter FinCEN Advisory on Human Rights Abuses], https://www.fincen.gov/sites/default/files/advisory/2018-06-12/PEP%20Facilitator%20Advisory_FINAL%20508.pdf.

5. Fin. Crimes Enft Network, U.S. Dep't of the Treasury, FIN-2018-A006, Advisory on the Iranian Regime's Illicit and Malign Activities and Attempts to Exploit the Financial System 1 (2018) [hereinafter FinCEN Advisory on Iranian Regime's Malign Activities], <https://www.fincen.gov/sites/default/files/advisory/2018-10-12/Iran%20Advisory%20FINAL%20508.pdf>.

6. See, e.g., Alexon Bell, *Money Laundering in a Digital World*, NEW ECON.: BUS. (May 1, 2018), <https://www.theneweconomy.com/business/money-laundering-in-a-digital-world>.

7. See, e.g., Giulia Paravicini, *Europe is Losing the Fight Against Dirty Money*, POLITICO (Apr. 2, 2018, 6:00 PM), <https://www.politico.eu/article/europe-money-laundering-is-losing-the-fight-against-dirty-money-europol-crime-rob-wainwright>.

8. Directive (EU) 2018/843, of the European Parliament and of the Council of 30 May 2018 Amending Directive (EU) 2015/849 on the Prevention of the Use of the Financial System for the Purposes of Money Laundering or Terrorist Financing, and Amending Directives 2009/138/EC and 2013/36/EU, 2018 O.J. (L 156) 43 [hereinafter Fifth AML Directive].

9. Directive (EU) 2018/1673, of the European Parliament and of the Council of 23 October 2018 on Combating Money Laundering by Criminal Law, 2018 O.J. (L 284) 24 [hereinafter Sixth AML Directive].

1. *The Fifth Money Laundering Directive: Update of the European Union's Anti Money Laundering Regime*

Although not as extensive as the Fourth AML Directive of May 20, 2015,¹⁰ this upgrade introduces several significant changes to the European AML/CFT regime. The European Union enacted the Fifth AML Directive in response to the terrorist attacks perpetrated in Paris on November 13, 2015 and the Brussels bombings of March 22, 2016, which demonstrated the vulnerability of financial institutions to terrorist financing.¹¹ In addition, the Fifth AML Directive was a reaction to the Panama Papers leaks of April 2016, which shed an embarrassing spotlight on offshore financial dealings.¹² It comes into force just one year after the Fourth AML Directive was embedded into the national laws throughout the European Union and has five main functions.

First, the Fifth AML Directive is designed to enhance cooperation between the financial intelligence units (FIUs) from each Member State.¹³ The FIUs are central, national units responsible for receiving and analyzing information from private entities related to financial transactions that may be linked to money laundering and terrorist financing.¹⁴ Through the Fifth AML Directive, these FIUs will gain broader access to information through centralized bank and payment account registers or data retrieval systems.¹⁵

Second, the Fifth AML Directive makes the registers of ultimate beneficial ownership (created under the Fourth AML Directive) publicly accessible for companies, which will help the general public identify the true

10. Directive (EU) 2015/849, of the European Parliament and of the Council of 20 May 2015 on the Prevention of the Use of the Financial System for the Purposes of Money Laundering or Terrorist Financing, Amending Regulation (EU) No. 648/2012 of the European Parliament and of the Council, and Repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, 2015 O.J. (L 141) 73 [hereinafter Fourth AML Directive].

11. Fifth AML Directive, *supra* note 8, at 43 (“Recent terrorist attacks have brought to light emerging new trends, in particular regarding the way terrorist groups finance and conduct their operations.”).

12. See European Commission Statement STATEMENT/18/3429, Statement by First Vice-President Timmermans, Vice-President Dombrovskis and Commissioner Jourovà on the Adoption by the European Parliament of the 5th Anti-Money Laundering Directive (Apr. 19, 2018) (“With its vote, the Parliament concludes an ambitious round of negotiations initiated two years ago. In July 2016, in the aftermath of the terrible terrorist attacks that struck the EU and the vast financial dealings uncovered by the ‘Panama Papers’, the Commission decided to take urgent counter-measures. The revised directive is part of that action plan.”).

13. See Fifth AML Directive, *supra* note 8, art. 1, at 68 (“Member States shall ensure that FIUs exchange, spontaneously or upon request, any information that may be relevant for the processing or analysis of information by the FIU related to money laundering or terrorist financing and the natural or legal person involved”) (amending Fourth AML Directive, *supra* note 10, art. 53, at 106).

14. See *What We Do*, FIN. CRIMES ENF’T NETWORK, <https://www.fincen.gov/what-we-do> (last visited Feb. 15, 2019) (“FinCEN serves as the FIU for the United States and is one of more than 100 FIUs making up the Egmont Group”).

15. See Fifth AML Directive, *supra* note 8, at 47.

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owners of firms operating in the European Union.¹⁶ This measure will put an end to the corrupt use of letterbox companies—known in the U.S. as shell companies—which are often used to launder money or hide assets. This measure will also require the granting of access to data on ultimate beneficial owners of trusts to authorities, as well as others demonstrating a legitimate interest.¹⁷ Access to the beneficial ownership registers at the EU level will be completed by 2021 to facilitate cooperation and exchange of information.¹⁸

Third, the Fifth AML Directive significantly changes the crypto-market. Specifically, it will regulate the use of digital or virtual currencies (like Bitcoin, Ether, or Ripple), as well as limit the use of prepaid cards to transaction amounts of €150 or less for businesses and €50 for online transactions.¹⁹ To end the anonymity of virtual currencies, the measure will ensure that exchange platforms between virtual currencies and fiat currencies—as well as custodian wallet providers—are applying customer due diligence controls and are registered.²⁰

Fourth, the Fifth AML Directive limits business relationships or transactions involving third countries when companies identify significant weaknesses in these countries' AML/CFT regimes.²¹ The European Union will have to establish safeguards and enhanced due diligence measures with regard to financial transactions to and from those countries to manage and mitigate the risks.²²

Finally, the Fifth AML Directive also instructs that professionals who provide services in connection with trading works of art—including those services carried out by art galleries and auction houses—must now identify their customers and report any suspicious activity when the value of the transaction (or a series of linked transactions) amounts to €10,000.00.²³

The Fifth AML Directive entered into force on July 9, 2018, and Member States have until January 10, 2020 to implement it into their national legislation.²⁴ But in a note dated November 23, 2018, the Council of the

16. *Id.* art. 1, at 59 (amending Fourth AML Directive, *supra* note 10, art. 30, at 96–97).

17. *Id.* art. 1, at 60–61 (amending Fourth AML Directive, *supra* note 10, art. 31, at 97–98).

18. See Jenny Gesley, *European Union: 5th Anti-Money Laundering Directive Enters into Force*, L. LIBR. OF CONGRESS: GLOBAL LEGAL MONITOR (July 16, 2018), <http://www.loc.gov/law/foreign-news/article/european-union-5th-anti-money-laundering-directive-enters-into-force/>.

19. Fifth AML Directive, *supra* note 8, art. 1, at 55–56 (amending Fourth AML Directive, *supra* note 10, art. 12, at 91–92).

20. *Id.* art. 1, at 67 (replacing paragraph 1 of Fourth AML Directive, *supra* note 10, art. 47, at 104).

21. *Id.* art. 1, at 57–58 (inserting an article 18a into Fourth AML Directive, *supra* note 10).

22. *Id.*

23. *Id.* art. 1, at 53 (amending Fourth AML Directive, *supra* note 10, art. 2, at 83–84).

24. *Id.* art. 4–5, at 73.

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European Union invited Member States to transpose the Fifth AML Directive ahead of the 2020 deadline.²⁵

2. *The Directive 2018/1673 of 23 October 2018 is Intended to Combat Money Laundering Through Criminal Law*

The Sixth AML Directive establishes baseline rules defining criminal offenses and sanctions related to money laundering to create uniformity among the Member States.²⁶

First, the Sixth AML Directive criminalizes money laundering when intentional and with the knowledge that the property was derived from criminal activity.²⁷ It does not distinguish between property derived directly or indirectly from criminal activity.²⁸

To create continuity, the Sixth AML Directive compels Member States to ensure that money laundering is punishable by a maximum term of imprisonment of at least four years without prejudice to the individual nature of penalties and the circumstances in each individual case.²⁹ Article 2 of the Sixth AML Directive includes twenty-two separate predicate offenses considered criminal activities throughout the European Union. For example, the directive includes insider trading and market manipulation, counterfeiting of currency, cybercrimes, environmental crimes, and illicit trafficking in narcotics drugs or arms.³⁰

The Sixth AML Directive also provides for tougher sanctions against corporate entities and legal persons, where the lack of supervision has facilitated the commission of an offense.³¹ These sanctions can include loss of entitlements to public benefits, exclusion from public funding or tender procedures, or judicial winding-up orders.³² This particular measure can ultimately lead to the permanent closure of establishments used to commit the offense.³³ This new directive will have to be transposed into each Member States' national law before December 3, 2020 through appropriate implementation measures.³⁴

25. Council of the European Union, Draft Council Conclusions on an Anti-Money Laundering Action Plan of 23 Nov. 2018, <http://data.consilium.europa.eu/doc/document/ST-14387-2018-INIT/en/pdf>.

26. Sixth AML Directive, *supra* note 9, at 23 (recital 5 of the directive).

27. *Id.* at 24 (recital 13 of the directive).

28. *Id.*

29. *Id.* (recital 14 of the directive); *see also id.* art. 5, at 28.

30. *Id.* art. 2, at 26–27.

31. *Id.* art. 7, at 28–29.

32. Sixth AML Directive, *supra* note 9, art. 8, at 29.

33. *Id.*

34. *Id.* art. 13, at 30.

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B. THE BASEL AML INDEX 2018 REPORT

On October 9, 2018, the University of Basel's Basel Institute on Governance released its seventh annual Basel Anti-Money Laundering Index (the Index).³⁵ The Index is an independent annual ranking assessing the risk of both money-laundering and terrorist financing around the world.³⁶ Scores are based on fourteen publicly available indicators, such as "anti-money laundering and countering the financing of terrorism (AML/CFT) frameworks, corruption risk, financial transparency and standards, and public transparency and accountability."³⁷

The key features of the Index include an overview of 129 countries, ranked "according to their risk of money laundering and terrorist financing" as well as a "[r]esearch-led, composite index based on public sources and third-party assessments."³⁸ Finland is ranked as the lowest-risk country, ranked at 129, and Tajikistan is the highest-ranked country at Number one.³⁹ The U.S. is ranked at eighty-two.⁴⁰

The Index's methodology follows a process of independent research, data selection, weighting, and results verification.⁴¹ The main areas that impact a country's score are:

1. Quality of AML/CFT framework (65%);
2. Corruption risk (10%);
3. Financial transparency and standards (15%);
4. Public transparency and accountability (5%); and
5. Political and legal risk (5%).⁴²

The Index puts money laundering and terrorist financing risks in context, noting they "continue to cripple economies, distort international finances and harm citizens around the globe," with costs ranging from \$500 billion to \$1 trillion.⁴³ Unfortunately, the Index reports "[m]ost countries are making little to no progress ending corruption and public transparency is showing signs of decline, with governments making less information available about how they manage public funds."⁴⁴ Furthermore, the Index reports that press

35. Basel AML Index Reveals Slow Progress in Combating Money Laundering, BASEL INST. ON GOVERNANCE (Oct. 9, 2018), <https://www.baselgovernance.org/news/basel-aml-index-reveals-slow-progress-combating-money-laundering>.

36. *Id.*

37. *Id.*

38. BASEL INST. ON GOVERNANCE, BASEL AML INDEX 2018 REPORT 2 (2018) [hereinafter INDEX 2018].

39. *Id.* at 3–5.

40. *Id.* at 4.

41. *Id.* at 11.

42. *Id.* at 12.

43. *Id.* at 2.

44. INDEX 2018, *supra* note 38, at 2 (footnote omitted).

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freedom has declined slightly, despite the fact that multiple investigative reports such as the Panama Papers have been published in recent years.⁴⁵

The Index reports a few negative key trends during the past year: (1) minor measurable progress countering money laundering; (2) program effectiveness lags behind technical compliance; (3) money laundering and terrorist financing are not isolated risks; and (4) no countries are rated as having zero risk in money laundering or terrorist financing.⁴⁶

The Index has consistently measured slow progress in countries improving their risk scores.⁴⁷ Sixty-four percent of the countries on the Index can be loosely classified as significant risks for money laundering and terrorist financing activity.⁴⁸ Many countries have become bigger risks for money laundering and terrorism financing, with thirty-seven percent of countries faring worse on the Index than they did in 2012.⁴⁹

Most countries have ineffective programs to combat these risks, even if the countries comply with those programs.⁵⁰ Forty-seven percent of the countries have a low level of effectiveness in investigating and prosecuting money laundering offenses, and forty percent are not achieving outcomes from conducting asset forfeiture.⁵¹

The Index found that countries with a high risk of money laundering activity share some or all of the following characteristics: (1) weak rule of law; (2) low levels of transparency; (3) restrictions on press freedom; (4) inability to control the financial system due to lack of resources; (5) cash-based economies; and (6) high levels of smuggling and trafficking, whether in humans, drugs, wildlife, etc.⁵² The interconnectedness of these factors meant that even where a country improved in some areas, deficiencies in other areas negated these improvements.⁵³

According to the Index, even the countries with the lowest scores for money laundering risks still had areas of improvement.⁵⁴ For example, beneficial ownership issues and screening for politically exposed persons were present in every country.⁵⁵ Significantly, because money launderers constantly innovate, the task of effective money laundering compliance is never complete.⁵⁶ But the Index also noted that countries with low scores provide models for other countries.⁵⁷ Low risk countries like Finland, New Zealand, Sweden, and Israel all share: (1) strong legislation for anti-money

45. *Id.*

46. *Id.* at 5–7.

47. *Id.* at 5.

48. *Id.*

49. *Id.*

50. INDEX 2018, *supra* note 38, at 6.

51. *Id.*

52. *Id.* at 7.

53. *Id.*

54. *Id.* at 7–8.

55. *Id.*

56. INDEX 2018, *supra* note 38, 7–8.

57. *Id.* at 8.

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laundering and counter-terrorism financing; (2) competent authorities that can investigate and prosecute money laundering and terrorist financing offenses and sanction institutions for non-compliance; (3) comprehensive measures to ensure domestic and international cooperation; (4) high levels of press freedom allowing the press to actively uncover and report on stories of financial crime; and (5) highly-regulated financial sectors with few cash transactions and supervision by competent authorities.⁵⁸

On this year's Index, countries with historically high scores witnessed improvement in their score.⁵⁹ For those countries, two factors were consistently the cause. First, changes in the methodology underlying the Financial Secrecy Index—which measures the level of secrecy, a country's offshore banking activity, and the size of a country's financial center—altered some scores.⁶⁰ Second, some countries were removed as “Jurisdictions of Primary Concern” from the U.S. State Department's International Narcotics Control Strategy Report.⁶¹

C. FINCEN'S NEW CUSTOMER DUE DILIGENCE (CDD) RULE FOR FINANCIAL INSTITUTIONS⁶²

As of May 11, 2018, FinCEN, a bureau of the U.S. Treasury Department, requires “covered financial institutions” to obtain information concerning the beneficial ownership of newly-opened accounts held by “legal entity” customers.⁶³ Not all entities otherwise subject to AML compliance requirements are included within this rule.⁶⁴ Rather, the term “covered financial institution” means federally insured banks and credit unions, commercial banks, U.S. agencies or branches of foreign banks, savings associations, federally-regulated trust banks or companies, international or foreign banking corporations organized pursuant to 12 U.S.C. § 611 *et seq.*,

58. *Id.* at 8–9.

59. *See id.* at 9.

60. *Id.*

61. *Id.* at 10.

62. Customer Due Diligence Requirements for Financial Institutions, 81 Fed. Reg. 29,398 (May 11, 2016) (to be codified at 31 C.F.R. pts. 1010, 1020, 1023, 1024, 1026).

63. *See* 31 C.F.R. § 1010.230(b)(1) (2018). “Legal entity customer” is defined as “a corporation, limited liability company, or other entity that is created by the filing of a public document with a Secretary of State or similar office, a general partnership, and any similar entity formed under the laws of a foreign jurisdiction that opens an account.” 31 C.F.R. § 1010.230(e)(1).

64. Note that entities that are otherwise defined as “financial institutions” for AML compliance purposes are not “covered financial institutions” under the new CDD Rule. For example, the following types of entities are not included within the rule: casinos, card clubs, and money services businesses, including providers of prepaid access and money transmitters. *Compare* 31 C.F.R. § 1010.100(i)(3)–(6), (ff)(4) (2018) (defining “financial institution”), *with* 31 C.F.R. § 1010.605(e) (2018) (defining “covered financial institution”), *and* 31 C.F.R. § 1010.230(f) (“For the purpose of this section, covered financial institution has the meaning set forth in § 1010.605(e)(1) of this chapter.”).

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mutual funds, securities brokers and dealers, futures commission merchants, and introducing brokers in commodities.⁶⁵

For purposes of the CDD Rule, “beneficial ownership” information means the identification of all persons owning twenty-five percent or more of a legal entity customer,⁶⁶ and the identification of one control person.⁶⁷ Some banks are reportedly setting lower reporting thresholds, as permitted by the rule.⁶⁸ Moreover, while a single individual may occupy both categories, financial institutions must undertake both analyses.⁶⁹

Where a “beneficial owner” holding a twenty-five percent or greater interest in a customer is itself a legal entity, including a trust, the rule provides for identification of one or more individuals holding that percentage ownership, except in the case of a trust. For trusts, the beneficial owner means the trustee; although, if the beneficial owner is an excluded entity, then no individual must be identified.⁷⁰ Excluded entities include federally or state-regulated financial institutions; entities regulated by the Securities and Exchange Commission (SEC) or the Commodities Futures Trading Commission (CFTC); pooled investment vehicles operated by an excluded entity, bank or savings and loan holding companies; state-regulated insurance companies; foreign financial institutions “established in a

65. See 31 C.F.R. § 1010.605(e)(1).

66. Specifically, “[e]ach individual, if any, who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, owns 25 percent or more of the equity interests of a legal entity customer[.]” See 31 C.F.R. § 1010.230(d)(1).

67. 31 C.F.R. § 1010.230(d)(2) (referring to “[a] single individual with significant responsibility to control, manage, or direct a legal entity customer, including: (i) [a]n executive officer or senior manager (e.g., a Chief Executive Officer, Chief Financial Officer, Chief Operating Officer, Managing Member, General Partner, President, Vice President, or Treasurer); or (ii) [a]ny other individual who regularly performs similar functions.”). 31 C.F.R. § 1010.230(d)(2).

68. 31 C.F.R. § 1010.230(d) note (“[a] covered financial institution may also identify additional individuals as part of its customer due diligence if it deems appropriate on the basis of risk.”).

69. In a note to paragraph (d) of section 1010.230, FinCEN cautions that the “number of individuals that satisfy the definition of ‘beneficial owner,’ and therefore must be identified and verified pursuant to this section, may vary.” 31 C.F.R. § 1010.230(d) note. Thus, given the twenty-five percent threshold under the ownership prong of paragraph (d)(1), “depending on the factual circumstances, up to four individuals may need to be identified.” *Id.* Under the control prong of paragraph (d)(2), “only one individual must be identified.” *Id.* FinCEN recognizes that a single individual may be identified under both prongs. *Id.* In addition, “[a] covered financial institution may also identify additional individuals as part of its customer due diligence if it deems appropriate on the basis of risk.” *Id.*

70. 31 C.F.R. § 1010.230(d)(3) (“If a trust owns directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, 25 percent or more of the equity interests of a legal entity customer, the beneficial owner for purposes of paragraph (d)(1) of this section shall mean the trustee. If an entity listed in paragraph (e)(2) of this section owns directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, 25 percent or more of the equity interests of a legal entity customer, no individual need be identified for purposes of paragraph (d)(1) of this section with respect to that entity’s interests.”).

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jurisdiction where the regulator of such institution maintains beneficial ownership information regarding such institution”;⁷¹ and non-profit corporations.⁷² Essentially, where the entity is already subject to regulatory oversight, the CDD Rule does not require identification of individual beneficial owners with two exceptions. Specifically, both pooled investment vehicles operated or advised by financial institutions and not excluded under the CDD Rule, as well as state-chartered non-profit corporations, are subject to the control prong. Accordingly, the financial institution must identify a control person when opening a new account for one of these entities.⁷³

The term “new account” is defined as “each account opened at a covered financial institution by a legal entity customer on or after the applicability date.”⁷⁴ That means not only accounts opened by new customers, but also any new accounts opened by, or new extensions of credit made to, a current customer after the effective date of the rule.⁷⁵

The CDD Rule requires financial institutions to “identify” the beneficial owner(s) of the account, “verify” their information, and maintain identification information for “five years after the date the account is closed,” as well as verification records “for five years after the record is made.”⁷⁶ To satisfy the identification requirement, a covered financial institution may obtain a certification from the individual opening the account on behalf of the legal entity customer, or in some other form, so long as the individual certifies its accuracy.⁷⁷ To satisfy the verification

71. 31 C.F.R. § 1010.230(e)(2)(xiv). This would appear to include financial institutions subject to the Fifth European Union Anti-Money Laundering Directive. See generally Fifth AML Directive, *supra* note 8.

72. For a complete list of the excluded entities, see 31 C.F.R. § 1010.230(e)(2)(i)–(xvi).

73. See 31 C.F.R. § 1010.230(e)(3).

74. 31 C.F.R. § 1010.230(g).

75. The term “account” is defined at 31 C.F.R. §§ 1020.100(a) (banks), 1023.100(a) (securities brokers or dealers), 1024.100(a) (mutual funds), and 1026.100(a) (futures commission merchants and introducing brokers in commodities). 31 C.F.R. § 1010.230(e). Each definition provides for a formal or contractual relationship to provide certain services. See, e.g., 31 C.F.R. § 1020.100(a)(1) (2018) (“Account means a formal banking relationship established to provide or engage in services, dealings, or other financial transactions including a deposit account, a transaction or asset account, a credit account, or other extension of credit. Account also includes a relationship established to provide a safety deposit box or other safekeeping services, or cash management, custodian, and trust services.”).

76. 31 C.F.R. § 1010.230(i).

77. 31 C.F.R. § 1010.230(b)(1). A covered financial institution may rely on CDD conducted by another financial institution, including an affiliate, concerning a legal entity customer:

that is opening, or has opened, an account or has established a similar business relationship with the other financial institution to provide or engage in services, dealings, or other financial transactions, provided that: (1) [s]uch reliance is reasonable under the circumstances; (2) [t]he other financial institution is subject to a rule implementing 31 U.S.C. 5318(h) and is regulated by a Federal functional regulator; and (3) [t]he other financial institution enters into a contract requiring it to certify annually to the covered financial institution that it has implemented its

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requirement, the covered financial institution must “[v]erify the identity of each beneficial owner identified to the covered financial institution, according to risk-based procedures to the extent reasonable and practicable.”⁷⁸ The rule provides a safe harbor for covered financial institutions. Specifically, they “may rely on information supplied by the legal entity customer regarding the identity of its beneficial owner or owners,” provided, however, that they have “no knowledge of facts that would reasonably call into question the reliability of such information.”⁷⁹

The CDD Rule exempts covered financial institutions from obtaining identification and verification information when they open certain kinds of accounts for legal entities.⁸⁰ Such accounts are limited to providing point-of-sale credit products to purchase retail goods up to \$50,000 or to finance postage, insurance premiums remitted to the provider or broker, or equipment leasing if remitted directly to the vendor or lessor.⁸¹ These limited exemptions are not available when the legal entity customer can make or receive payments to or from third parties or when cash refunds are available.⁸²

Although the CDD Rule appears reasonably comprehensive, some open questions remain. For example, an individual may hold indirect “ownership” of a legal entity through a “contract, arrangement, understanding, relationship, or otherwise”⁸³ But it is unclear how far these terms—in particular, “otherwise”—extend. Specifically, does “indirect” control exist on the basis of a put or a call option, right of first refusal, or other circumstance that gives an individual some potential future authority over a legal entity but not a present interest?⁸⁴ In addition, the question remains whether FinCEN will expand the rule to cover other financial institutions, such as money services businesses, cryptocurrency platforms, casinos, and other entities not currently covered. The application of the CDD Rule in practice will bear watching.

anti-money laundering program, and that it will perform (or its agent will perform) the specified requirements of the covered financial institution’s procedures to comply with the requirements of this section.

31 C.F.R. § 1010.230(j), (1)–(3).

78. 31 C.F.R. § 1010.230(b)(2).

79. *Id.*

80. *See* 31 C.F.R. § 1010.230(h)(1).

81. *See* 31 C.F.R. § 1010.230(h)(1)(i)–(iv).

82. 31 C.F.R. § 1010.230(h)(2).

83. 31 C.F.R. § 1010.230(d)(1).

84. The CDD Rule requires the aggregation of individual ownership interests, including indirect interests, linked or controlled “through any contract, arrangement, understanding, relationship or otherwise” 31 C.F.R. § 1010.230(d)(1).

D. AML COMPLIANCE AND ENFORCEMENT INCREASINGLY INTERSECT WITH OTHER CROSS-BORDER COMPLIANCE RISKS

During the past year, anti-money laundering laws and the government authorities that enforce them have explicitly overlapped with other cross-border risk and legal compliance areas—particularly economic sanctions and anti-bribery. This overlap has been most evident with respect to Iran, which for decades has been the target of U.S. and international sanctions and is increasingly the target of U.S. and international anti-money laundering risk mitigation actions.⁸⁵ In addition, Iran—along with several other countries—has been identified as posing an elevated anti-money laundering risk precisely due to sanctions risks related to corruption and other human rights abuses.⁸⁶ The U.S. and other governmental enforcement officials' guidance and public notices identifying these cross-over risks between anti-money laundering and other cross-border compliance risks provide an indication of their expectations for corporate compliance internal controls.

1. *AML Measures Targeting Iran*

a. International

On October 19, 2018, the Financial Action Task Force (FATF), which is the international AML standard-setting body, gave Iran until February 2019 to implement previously recommended legal measures to counter money laundering or risk the imposition of restrictions on its global financial transactions.⁸⁷ The impact of FATF actions will extend well beyond the U.S. and affect any financial market and commercial actors impacted by U.S. sanctions targeting Iran. Even countries that have maintained public ties with Tehran, such as Russia and China—which are both FATF members—would impose restrictions.

Only two countries, Iran and North Korea, are listed by FATF as countries of the highest concern for money laundering.⁸⁸ Countries in this highest risk category are subject to FATF countermeasures, which can include prohibitions on financial transactions with the country creating a similar impact as the economic sanctions currently imposed by the U.S.⁸⁹

85. See generally Jeffrey J. Schott, *Economic Sanctions Against Iran: Is the Third Decade a Charm?*, 47 BUS. ECON. 190 (2012); Josh Levs, *A Summary of Sanctions Against Iran*, CNN: WORLD (Jan. 23, 2012), <https://www.cnn.com/2012/01/23/world/meast/iran-sanctions-facts/index.html>.

86. See FinCEN Advisory on Human Rights Abuses, *supra* note 4, at 2.

87. *Public Statement – October 2018*, FIN. ACTION TASK FORCE (Oct. 19, 2018), <http://www.fatf-gafi.org/publications/high-riskandnon-cooperativejurisdictions/documents/public-statement-october-2018.html>.

88. Interactive Map of High-Risk and Other Monitored Jurisdictions, FIN. ACTION TASK FORCE, <http://www.fatf-gafi.org/countries/#high-risk> (last visited Mar. 2, 2019).

89. *High-Risk and Other Monitored Jurisdictions*, FIN. ACTION TASK FORCE, <http://www.fatf-gafi.org/publications/high-riskandnon-cooperativejurisdictions/more/more-on-high-risk-and->

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North Korea is currently subject to such countermeasures.⁹⁰ Iran has avoided countermeasures for years by promising to undertake efforts to strengthen AML statutes and regulations and align them with internationally-accepted principles.⁹¹

On June 24, 2016, FATF suspended the imposition of countermeasures on Iran for an initial period of twelve months based on Iran's commitment to make improvements called for by the international body.⁹² Under the FATF suspension of countermeasures, which have been extended multiple times before the most recent extension until February 2018, Iran is required to take specific legal steps, including identifying and freezing terrorist assets targeted by U.N. Security Council sanctions and resolutions, and to adopt certain international norms, such as the Palermo and Terrorist Financing Conventions.⁹³

The FATF action plan for Iran expired in January 2018.⁹⁴ Since that time, the Iranian government has reportedly been divided on whether to adopt the measures required by the FATF plan.⁹⁵ Specifically, reports suggest hardliners in the Iranian government regime disfavor adopting the FATF requirements, which they see as a threat to Iran's support for Hezbollah operating out of Lebanon, and Hamas, linked with the Palestinian Liberation Organization.⁹⁶ Both Hezbollah and Hamas are considered international terrorist groups under U.S. sanctions,⁹⁷ but are not targeted by U.N. sanctions.⁹⁸

non-cooperative-jurisdictions.html?hf=10&b=0&s=desc(fatf_releasedate) (last visited Mar. 2, 2019).

90. *Public Statement – October 2018*, FIN. ACTION TASK FORCE, *supra* note 87.

91. *See e.g., id.*

92. *Public Statement – 24 June 2016*, FIN. ACTION TASK FORCE (June 24, 2016), <http://www.fatf-gafi.org/countries/d-i/iran/documents/public-statement-june-2016.html>.

93. *Id.*; *see generally* International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, S. TREATY DOC. NO. 106-49, 2178 U.N.T.S. 197; G.A. Res. 55/25, annex, United Nations Convention Against Transnational Organized Crime (Nov. 15, 2000).

94. *Public Statement – October 2018*, FIN. ACTION TASK FORCE, *supra* note 87.

95. *See e.g.*, Iran Anti-Money Laundering Law Faces Challenges as Deadline Looms, REUTERS: WORLD NEWS (Aug. 18, 2018, 4:07 AM), <https://www.reuters.com/article/us-iran-moneylaundering/iran-anti-money-laundering-law-faces-challenge-as-deadline-looms-idUSKBN1L308P>; *Iran Judiciary Criticizes Money Laundering Claims*, DAILY MAIL (Nov. 19, 2018), <https://www.dailymail.co.uk/wires/afp/article-6406853/Iran-judiciary-criticises-money-laundering-claims.html>.

96. *See e.g.*, Dominic Dudley, *Iran Steps Back from Introducing Antiterrorism Finance Rules as Fresh U.S. Sanctions Loom*, FORBES (June 12, 2018, 11:27 AM), <https://www.forbes.com/sites/dominicdudley/2018/06/12/iran-anti-terrorism-finance-rules/#511b3498f93d>.

97. List of Designated Foreign Terrorist Organizations, U.S. DEP'T OF STATE, <https://www.state.gov/j/ct/rls/other/des/123085.htm> (last visited Mar. 2, 2019).

98. *See e.g.*, Adam Shaw, *UN Fails to Adopt US Resolution Condemning Hamas Terrorism*, FOX NEWS, Dec. 6, 2018, <https://www.foxnews.com/politics/haley-set-for-un-showdown-over-historic-vote-to-condemn-hamas>; Tom Rogan, *On Hezbollah Tunnels, the UN is About to Prove its Own Impotence*, WASH. EXAMINER (Dec. 17, 2018, 3:26 PM), <https://www.washingtonexaminer.com/opinion/on-hezbollah-tunnels-the-un-is-about-to-prove-its-own-impotence>.

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If Iran fails to meet the February deadline and FATF re-imposes countermeasures, banks and other financial institutions (FIs) around the globe will, at a minimum, impose heightened due diligence requirements for transactions involving Iran (many FIs in major jurisdictions do so already) and could eventually impose additional restrictions. For example, current FATF countermeasures on North Korea include financial sanctions, closures of North Korean banks in FATF countries, and terminated correspondent relationships with North Korean banks.⁹⁹

b. United States

This past year, U.S. anti-money laundering legal authorities increased their publicly coordinated efforts with economic sanctions governmental authorities in order to target Iran. On October 11, 2018, FinCEN and the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) jointly issued notices regarding the money laundering threats posed by targets of U.S.-Iran sanctions.

The FinCEN notice reminded Financial Institutions ("FI") about their U.S. correspondents' obligations and warned against AML/CFT and U.S. economic sanctions risks.¹⁰⁰ FinCEN noted Iran's long-standing practice of using shell companies to evade detection by FIs when transferring funds that represent revenues from or support for activities targeted by U.S. economic sanctions, such as international terrorism, human rights abuses, and support for the Syrian Government.¹⁰¹ FinCEN's stated aim was to highlight the Iranian government's methods of exploiting "financial institutions worldwide" and identify "red flags" that FIs can use to detect such evasive tactics.¹⁰²

FinCEN identified a number of red flags related to transfers from the personal accounts of senior officials of the Central Bank of Iran (CBI), the use of exchange houses and shell entities to transfer funds, commercial aviation trade in goods transactions, falsified shipping documentation, virtual currency transactions, and other suspicious transactions.¹⁰³ FinCEN further requested that FIs include a special identifier—"Iran FIN-2018-A006"—in Suspicious Activity Reports (SARs) when related to Iranian sanctions or otherwise related to the new FinCEN Iran advisory.¹⁰⁴

OFAC, which does not typically issue notices about FinCEN or other agency actions, issued a notice regarding FinCEN's October 11, 2018 advisory on Iran. On October 16, 2018, OFAC designated a vast array of entities and individuals, including banks and investment companies, that "provid[ed] financial support" to a sanctioned entity, the Iranian

99. *Public Statement – October 2018*, FIN. ACTION TASK FORCE, *supra* note 87.

100. FINCEN ADVISORY ON IRANIAN REGIME'S MALIGN ACTIVITIES, *supra* note 5, at 1.

101. *Id.*

102. *Id.*

103. *Id.* at 2.

104. *Id.* at 19.

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Revolutionary Guard Corp.¹⁰⁵ Subsequently, on November 20, 2018, OFAC issued an Advisory to the Maritime Petroleum Shipping Community, which among other things advised FIs and global companies to ensure compliance consistent with FATF AML/CFT standards and conduct enhanced due diligence to detect and deter against attempts to evade U.S. sanctions by Iranian and Syrian regime supporters.¹⁰⁶

2. U.S. AML Authorities Target Corruption

On June 12, 2018, FinCEN issued an Advisory detailing various anti-money laundering risks and red flags most commonly presented by corrupt government officials and politically exposed persons (PEPs).¹⁰⁷ The FinCEN public notice highlighted U.S. economic sanctions laws and regulations that target corrupt PEPs and other human rights abusers, as well as the need for enhanced diligence to prevent those sanctions targets and other PEPs from abusing the U.S. financial system.¹⁰⁸ For instance, FinCEN noted that its sister agency in the U.S. Treasury Department, OFAC, targets corrupt PEPs under the Global Magnitsky Act of 2016, which authorizes the freezing of assets and other restrictions on individuals who engage in corrupt activity, cronyism, and other illegal activities.¹⁰⁹ FinCEN identifies common means that such individuals employ to launder the proceeds of illicit activity and red flags to help detect and deter such laundering.¹¹⁰

These country specific advisories are not new. FinCEN has previously issued country-specific advisories related to anti-money laundering risks posed by PEPs and targets of sanctions related to corruption. In September 2017, FinCEN issued such a notice with respect to Venezuela.¹¹¹ In the latest notice in June 2018, FinCEN described three general methods commonly used to launder the proceeds of corruption through the U.S. financial system:

- (1) Misappropriation of State Assets: Senior government officials may abuse their position by engaging in corruption or otherwise illegal activities, for their personal gain, and then launder those monies through shell companies and other businesses;

105. Press Release, U.S. Dep't of the Treasury, Treasury Sanctions Vast Financial Network Supporting Iranian Paramilitary Force that Recruits and Trains Child Soldiers (Oct. 16, 2018), <https://home.treasury.gov/news/press-releases/sm524>.

106. U.S. DEP'T OF THE TREASURY, OFAC ADVISORY TO THE MARITIME PETROLEUM SHIPPING COMMUNITY 4 (2018), https://www.treasury.gov/resource-center/sanctions/Programs/Documents/syria_shipping_advisory_11202018.pdf.

107. FIN. ADVISORY ON HUMAN RIGHTS ABUSES, *supra* note 5, at 1–8.

108. *Id.*

109. *Id.*

110. *Id.*

111. FIN. CRIMES ENF'T NETWORK, U.S. DEP'T OF THE TREASURY, FIN-2017-A006, ADVISORY ON WIDESPREAD PUBLIC CORRUPTION IN VENEZUELA 1 (2017), <https://www.fincen.gov/sites/default/files/advisory/2017-09-20/FinCEN%20Advisory%20FIN-2017-A006-508%20Compliant.pdf>.

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- (2) Use of Shell Companies: Senior government officials use shell companies with no physical presence or operations “to obfuscate ownership and mask the true source of the proceeds of corruption”; and
- (3) Corruption in the Real Estate Sector: Real estate transactions are particularly vulnerable to money laundering because they often involve limited transparency, multiple entities, and complexity.¹¹²

The Advisory provides fourteen red flags that should alert persons engaged in financial transactions with PEPs to take added precautions to protect against potential money laundering. These red flags include: (1) use of third parties when it appears to shield the identity of a PEP or his/her family member; (2) use of family members or close associates as legal owners; (3) declarations of information that are inconsistent with publicly available information, including availability of personal wealth or assets; and (4) a PEP or financial facilitator transferring funds among countries with which the PEP is not otherwise affiliated.¹¹³

112. FINCEN ADVISORY ON HUMAN RIGHTS ABUSES, *supra* note 5, 4–5.

113. *Id.* at 5–6.

International Art and Cultural Heritage Law

PATTY GERSTENBLITH, ANNE-SOPHIE NARDON, MICHELA COCCHI,
AND KEVIN RAY*

This article surveys significant legal developments in international art and cultural heritage law during the calendar year 2018.

I. Nazi-Looted Art: *von Saher v. Norton Simon Museum of Art*

This past year the Ninth Circuit may have brought to conclusion the long-running dispute concerning ownership of a diptych, *Adam and Eve*, painted by Lucas Cranach the Elder. The Dutch collector, Jacques Goudstikker, purchased the diptych in 1931 from the Soviet government.¹ In May 1940, Goudstikker was forced to relinquish all his assets, including the paintings, to the Nazis in two forced sales.² He then died while fleeing the Netherlands. At the end of the Second World War, the Allied Forces returned the paintings to the Dutch government for restitution. In 1966, the Dutch government sold the paintings to the Russian collector George Stroganoff-Sherbatoff in settlement of his claim of ownership of the paintings before the Russian Revolution and their expropriation by the Soviet government.³ Stroganoff subsequently sold the diptych to the Norton Simon Museum in 1971.⁴ Goudstikker's daughter-in-law and successor in interest, Marei von Saher, sued the Norton Simon Museum in 2007, claiming ownership of the diptych.⁵

* Patty Gerstenblith is Distinguished Research Professor, DePaul University College of Law, and a Senior Advisor to the ABA's Art & Cultural Heritage Law Committee (Part I). Anne-Sophie Nardon is an attorney with Borghese Associés, Paris (Part II). Michela Cocchi is an attorney with Michela Cocchi - Studio Legale, Bologna (Part III). Kevin Ray is Of Counsel, Greenberg Traurig, LLP, Chicago, and a Senior Advisor to the ABA's Art & Cultural Heritage Law Committee (Editor) (Part IV).

1. *Von Saher v. Norton Simon Museum of Art*, 897 F.3d 1141, 1143 (9th Cir. 2018).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* at 1146. The claim was originally filed in 2007. The Ninth Circuit Court of Appeals has twice previously heard this dispute. *Von Saher v. Norton Simon Museum of Art (von Saher II)*, 754 F.3d 712, 714 (9th Cir. 2014); *von Saher v. Norton Simon Museum of Art (von Saher I)*, 592 F.3d 954, 956 (9th Cir. 2010). The earlier Ninth Circuit decisions addressed the validity of two different "special" California statutes of limitation extending the time period for recovery of stolen artworks. In the first decision, the Ninth Circuit held that the statute, which applied only to artworks stolen during the Holocaust, was unconstitutional under the federal foreign affairs preemption doctrine; in the second decision, the Ninth Circuit upheld a broader version

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Following the Second World War, the Dutch government established a procedure for seizing enemy property, which included the Goudstikker assets that had been acquired by Alois Miedl and Hermann Göring. Ownership of seized enemy property was then vested in the Dutch government. The Dutch government also established a process for restitution to victims who filed claims by a certain deadline. The Goudstikker heirs, however, chose not to file claims for the assets taken by Göring, which included the Cranach paintings. In 1999, the Dutch government refused to restore von Saher's right to the Cranachs, finding that the Goudstikker heirs had made a conscious, and well-considered, decision to waive rights to the artworks taken by Göring.⁶

In 2001, influenced by the 1998 Washington Conference Principles, the Dutch government established a new policy of restitution that would be less legalistic and "more moral."⁷ But the new policy explicitly did not apply to settled cases, including those in which a claim for restitution had been settled in a conscious and deliberate manner and those in which the claimant had expressly renounced a claim for restitution.⁸ A restitution committee was then established to administer the new policy; von Saher brought a claim to recover 267 works of art but did not include the Cranach paintings, which were no longer in the possession of the Dutch government.⁹ In 2006, approximately two hundred of these claimed works were returned, although the Dutch State Secretary for Education, Culture and Science ("The Secretary") determined that the claim had been waived.¹⁰ The Secretary regarded the claim to the Cranachs as fully settled and referenced the earlier acts to this effect.

Following the Ninth Circuit's 2014 decision upholding the revised California statute of limitations, which extended the time period in which suits for recovery of stolen art works could be brought, in 2015 the district court held that von Saher's claim was not barred by the statute of limitations.¹¹ However, the district court subsequently granted summary judgment to the Museum on the grounds that the Dutch government had good title to the paintings under its post-war decree when it sold them to the Museum.¹² Upon reaching the Ninth Circuit for the third time, the case was resolved on the basis of the act of state doctrine. At the outset, the Ninth Circuit noted that adjudication of von Saher's claim to the Cranachs would necessitate evaluating numerous actions of the Dutch government: the first

of the statute of limitations. See CAL. CIV. PROC. CODE § 338 (Deering, LEXIS through 2018 Sess.) (amended 2010).

6. *Von Saher*, 897 F.3d at 1153.

7. *Id.* at 1152.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Von Saher v. Norton Simon Museum of Art*, No. CV 07-2866-JFW (JTLx), 2015 U.S. Dist. LEXIS 188627, at *24 (C.D. Cal. Apr. 2, 2015).

12. *Von Saher v. Norton Simon Museum of Art*, No. CV 07-2866-JFW (SSx), 2016 U.S. Dist. LEXIS 187490, at *42-43 (C.D. Cal. Aug. 9, 2016).

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act, viewed holistically, involved the Dutch post-war decree nationalizing enemy property, the post-war decree vesting ownership of such assets in the Dutch government, the process for restitution of assets to victims of the Nazis, and the decision to return the Cranachs to Stroganoff in settlement of his restitution claim;¹³ the second act was the 1999 Dutch court decision denying von Saher's rights to the Cranachs; and the third act occurred in 2006, reiterating the 1999 decision and concluding that any claim to the Cranachs was settled.¹⁴

The act of state doctrine is based on the premise that:

[T]he Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.¹⁵

The justification for the doctrine has evolved over the years. In the past, it was considered to be an expression of international law, based on principles of international comity, but subsequently it has been described as “reflecting ‘the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder’ the conduct of foreign affairs.”¹⁶ The doctrine arises frequently in the context of expropriation of property by foreign governments.¹⁷

While the Dutch government's decisions not to return the Cranachs satisfied all the doctrinal elements, the Ninth Circuit considered two exceptions. The Ninth Circuit acknowledged the possibility of an exception for commercial acts—that is, acts in which a private citizen could engage. On the other hand, regardless of whether such an exception exists, the Ninth Circuit held that “[e]xpropriation, claims processing and government restitution schemes are not the province of private citizens. Those are ‘sovereign policy decision[s]’ befitting sovereign acts.”¹⁸ These acts would therefore not qualify as purely commercial acts, which might be exempted from the act of state doctrine.

The second exception is contained in the Second Hickenlooper Amendment, which states in part:

13. *Von Saher*, 897 F.3d at 1145–46, 1149–50. The District Court found that the diptych was never owned by the Stroganoff family. *Von Saher*, 2016 U.S. Dist. LEXIS 187490, at *3.

14. *Von Saher*, 897 F.3d at 1151–52.

15. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964).

16. *W.S. Kirkpatrick & Co. v. Env'tl. Tectonics Corp., Int'l*, 493 U.S. 400, 404 (1990) (quoting *Banco Nacional de Cuba*, 376 U.S. at 423). [This is later cited as *Sabbatino*, which is the more common way it is cited]

17. *See, e.g., Konowaloff v. Metro. Museum of Art*, 702 F.3d 140, 145 (2d Cir. 2012) (refusing to examine the validity of the expropriation of a work of art by the Soviet Government in 1918).

18. *Von Saher*, 897 F.3d at 1154.

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Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation . . .¹⁹

The initial expropriation of the Goudstikker assets occurred long before 1959. The Ninth Circuit declined to characterize the 1966 sale to Stroganoff as a second expropriation because the Goudstikker heirs had already waived their rights to the diptych and the Dutch government was therefore the owner. Further, the Hickenlooper Amendment applies only when the taking is in violation of principles of international law, judged by the law as it existed at the time of the taking. In this case, at the time of the post-war decrees concerning restitution, the Allies had imposed deadlines for the filing of restitution claims after which claims would be forever barred. Thus, the Dutch government's post-war decrees, and the deadlines they established, were not in violation of international law at the time.²⁰

The Ninth Circuit also referenced three circumstances in which the policies underlying the act of state doctrine might weigh against its application. These three policies involve the degree to which a consensus exists concerning an international law principle, the extent of implications of the issue involved for foreign relations, and whether the government that perpetrated the challenged act is still in existence.²¹ According to the Ninth Circuit, all three of these policy considerations indicate that the act of state doctrine should apply. First, there is no consensus of international law that the Dutch post-war restitution process was flawed; second, delving into the decision-making processes of the Dutch government would be potentially detrimental to U.S. foreign relations with the Netherlands; and third, the same Dutch government has been continuously in existence from the post-war period until today and is the government that engaged in these acts of state. In conclusion, the Ninth Circuit stated that this was an appropriate case for application of the doctrine and that it would "presume the validity of the Dutch government's sensitive policy judgments and avoid embroiling our domestic courts in re-litigating long-resolved matters entangled with foreign affairs."²²

This long-running litigation has entailed consideration of statutes of limitation on claims for recovery of stolen art works, the foreign affairs preemption doctrine, and now the act of state doctrine, all against the

19. 22 U.S.C. § 2370(e)(2) (2012).

20. *Von Saber*, 897 F.3d at 1155.

21. *Id.* (citing *Sabbatino*, 376 U.S. at 428).

22. *Id.* at 1156.

backdrop of the expropriation of art works during the Holocaust. The circumstances in which the act of state doctrine may apply to the expropriation of art works have become limited. The *von Saber* litigation has given us new insight into the application of the doctrine in the context of post-Second World War restitutions.

II. Nazi-Looted Art: *Bauer v. Toll*

In 2017, the heirs of Simon Bauer sued American defendants Bruce and Robbi Toll before the Paris High Court to obtain the restitution of a painting by Camille Pissarro, entitled *La Cueillette*,²³ that had been fortuitously on loan at the Marmottan Museum in Paris. Ruling on various issues, including transfer of title and statute of limitation, the court ordered the restitution of the painting to the Bauer heirs.²⁴

A. BACKGROUND

On October 1, 1943, French businessman Simon Bauer's art collection, including *La Cueillette*, was confiscated by Jean-François Lefranc, an art dealer appointed administrator and receiver by the General Commissariat for Jewish Questions in charge of economic aryanization under anti-Jewish legislation.²⁵ A few months later, in April 1944, Lefranc fraudulently diverted part of the collection and sold the painting to Jane Eudeline for the price of 250,000 francs.²⁶

When Simon Bauer returned from captivity, he immediately tried to recover his collection. As republican legality was restored,²⁷ he brought criminal charges against Lefranc and filed a restitution claim in accordance with the special summary procedure for victims of spoliation set up by the Ordinance of April 21, 1945.²⁸ The two lawsuits proved successful. As early

23. Also known as *La Cueillette des Pois*, or *Harvesting the Peas*.

24. Samuel Petrequin, *French court rules Pissarro painting belongs to Jewish heirs*, AP NEWS (Oct. 2, 2018), <https://www.apnews.com/a4319145addd4c78a678c7d2c9c2fda6> (discussing Cour d'appel Paris [CA] [regional court of appeal] Paris, 1e ch., Oct. 2, 2018, 17/20580 (Fr.)).

25. See generally JEAN MATTÉOLI, RAPPORT GÉNÉRAL: MISSION D'ÉTUDE SUR LA SPOLIATION DES JUIFS DE FRANCE [GENERAL REPORT: THE STUDY MISSION ON THE SPOLIATION OF THE JEWS OF FRANCE] (2000), available at <https://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/004000897.pdf>.

26. Roos Hoek, *French court orders restitution of looted Pissarro — does this set a precedent?*, GMW ADVOCATEN (Nov. 12, 2018), <https://www.gmw.nl/en/topics/art-culture-law/articles/french-court-orders-restitution-of-looted-pissarro-does-this-set-a-precedent/>.

27. Ordonnance du 9 août 1944 relative au rétablissement de la légalité républicaine sur le territoire continental [Ordinance of August 9, 1944, Concerning the Restoration of Republican Legality Within the Continental Territory], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 9, 1944, pp. 688–94.

28. Ordonnance 45-770 du 21 avril 1945 portant deuxième application de l'ordonnance du 12-11-1943 sur la nullité des actes de spoliation accomplis par l'ennemi [Ordinance 45-770 of April 21, 1945 Implementing for the Second Time the Ordinance of November 12, 1943, on the Nullity of Acts of Spoliation Committed by the Enemy], J.O., Apr. 22, 1945, pp. 2283–85.

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as November 8, 1945, all of Lefranc's art sales, including the sale of the painting, were pronounced null and the artworks were ordered to be immediately returned to Simon Bauer.²⁹ Two years later, Lefranc was found guilty and sentenced to five years imprisonment.³⁰ Simon Bauer died on January 1, 1947, having recovered some pieces of his collection, but not the missing painting.³¹

In 1965, Bauer's heirs learned that *La Cueillette* had been sold by Eudeline to an American gallery owner named Peter Findlay.³² A criminal claim was filed, and the painting seized. The investigating magistrate eventually released it, having determined no grounds for a criminal procedure against Findlay. The painting left France in 1966, with a valid export notice, and sold at auction in London the same year.³³

In May 1995, the defendants purchased the painting at auction in New York and, in 2017, loaned it to the Marmottan Museum.³⁴ When the Bauer heirs learned about its whereabouts, they filed a request before the Paris High Court to obtain the sequestration of the painting and the communication of all documentary evidence. The request being a non-contradictory procedure, the President granted the order to communicate all documents but refused the sequestration plea. The Bauer heirs then cited the Tolls before the motion section of the Paris High Court which, in a summary judgment dated May 30, 2017, granted the sequestration order providing a referral to the Court before July 14, 2017.³⁵ On July 13, 2017, the defendants were served a summons to appear before the court in a restitution claim based on the former judgment of November 8, 1945.³⁶ The court held in favor of the Bauer heirs.

The case raised two core questions: (1) whether the 1945 Ordinance could apply to a 1995 purchase that took place in the United States, and (2) whether the replevin claim was time-barred on the basis of either acquisitive or extinctive prescription.

29. The decision of the Seine High Court of November 8, 1945 was confirmed by CA Paris May 4, 1951. Laetitia Nicolazzi, et al., *Affaire La cueillette de Pissarro – Héritiers Simon Bauer c. Bruce et Robbi Toll* [*The Case of Pissarro's La Cueillette—Heirs Simon Bauer v. Bruce and Robbi Toll*], ARTHEMIS 1, 2 (July 2018), <https://plone.unige.ch/art-adr/cases-affaires/la-cueillette-de-pissarro-2013-heritiers-simon-bauer-c-bruce-et-robby-toll/fiche-2013-la-cueillette-de-pissarro>.

30. ELIZABETH CAMPBELL KARLSGODT, DEFENDING NATIONAL TREASURES: FRENCH ART AND HERITAGE UNDER VICHY intro. (2011) (noting LeFranc's imprisonment for five years, a result of a decision from the Tribunal correctionnel de la Seine, Apr. 26, 1947).

31. Hoek, *supra* note 26.

32. *Id.*

33. *Id.*

34. *Id.*

35. Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Nov. 7, 2017, 17/58735 p. 4 (Fr.); *see also* Hoek, *supra* note 26.

36. TGI Paris, Nov. 7, 2017, 17/58735 p. 4 (Fr.).

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B. THE APPLICABILITY OF THE ORDINANCE OF APRIL 21, 1945

The 1945 Ordinance implementing the London Declaration of 1943³⁷ (the “1945 Ordinance”) had two main purposes: (1) to declare null all transfers or transactions that took the form of admitted plunder or sacking, or which were ostensibly illegal, even when they appeared to have been undertaken with the consent of the victims; and (2) to provide victims of spoliation with a speedy and effective procedure for the recovery of their goods or assets, free of all charges and mortgages, before the President of the civil or commercial court. To avoid any contest, Article 4 states that the successive purchasers of spoliated works are deemed to be bad faith possessors as it relates to the dispossessed owner.³⁸ Subsequent case law held that the 1945 Ordinance superseded any other laws,³⁹ and was outside the scope of common law. It is on the basis of the 1945 Ordinance that Simon Bauer had obtained the final and enforceable decision,⁴⁰ which was applied with respect to the defendants. The defendants challenged both the applicability of the 1945 Ordinance to their case, and the enforceability of the November 1945 restitution decision.

The court dismissed the argument by first citing the London Declaration of January 5, 1943, stressing that eighteen countries, including France, Great Britain, and the United States had signed it, and that the French National Liberation Committee representing France had accepted full execution of this declaration by ordinance dated November 12, 1943.⁴¹ Regarding the applicability of the 1945 Ordinance, the Court noted that (i) the text provided no time limit to the presumption of bad faith of the subsequent purchasers with regard to the dispossessed person, adding that “the effectiveness intended by the authors of the order for re-establishment to their rights of the dispossessed persons requires this solution,”⁴² (ii) the 1945 Ordinance is still enforceable, and (iii) the Paris court had jurisdiction because the Bauer heirs are of French nationality and are partly domiciled in Paris, and the painting was located in Paris at the time of the sequestration.

37. *Inter-Allied Declaration Against Acts of Dispossession Committed in Territories under Enemy Occupation or Control; Establishment of Inter-Allied Sub-Committee on Acts of Dispossession*, I FOREIGN REL. U.S.: DIPLOMATIC PAPERS 438 (Jan. 5, 1943) [hereinafter *London Declaration*].

38. Ordonnance 45-770 du 21 avril 1945 portant deuxième application de l'ordonnance du 12-11-1943 sur la nullité des actes de spoliation accomplis par l'ennemi [Ordinance 45-770 of April 21, 1945 Implementing for the Second Time the Ordinance of November 12, 1943, on the Nullity of Acts of Spoliation Committed by the Enemy], J.O., Apr. 22, 1945, art. 4 (Fr.).

39. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., June 15, 1955, Bull. civ. I, No. 251 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ., June 9, 1952, Bull. civ. II, No. 194 (Fr.); Conseil d'état [CE] [highest administrative court] Sect., July 30, 2014, Rec. Lebon 349789 (Fr.).

40. Cour d'appel Paris [CA] [regional court of appeal] Paris, 1e ch., Oct. 2, 2018, 17/20580 (Fr.).

41. Ordonnance du 12 novembre 1943 sur la nullité des actes de spoliation accomplis par l'ennemi ou sous son contrôle [Ordinance of November 12, 1943 on the Annulment of Acts of Spoliation Committed by the Enemy or Under its Control], J.O., Nov. 18, 1943, p. 277.

42. CA Paris, 1e ch., Oct. 2, 2018, 17/20580 (Fr.).

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On the subject of the nullity of the sale, the Court noted that it is a “legal fact,” enforceable against third parties to the transaction, in particular the successive sub-purchasers, and lastly the defendants, even though thirty years have elapsed since the appellate court decision of 1951.⁴³ In addition, with the obvious desire to leave no loose ends, the court noted that Simon Bauer had indeed been the victim, in 1943, of a measure of spoliation, and that he had lost no time in pursuing his claim upon his return from the Drancy internment camp in 1944.⁴⁴ The Court acknowledged that Bauer had complied with the six-month delay awarded to the victims by the 1945 Ordinance to file a claim.

C. PRESCRIPTION AND STATUTES OF LIMITATION

Under French law, a property claim concerning a lost or stolen movable may be dismissed by either of two legal means: (i) acquisitive prescription, or (ii) extinctive prescription. A prescription is deemed acquisitive when a person of good faith is in possession of a lost or stolen movable and no adverse claim has been filed within three years of the theft or loss.⁴⁵ Providing the possession is public, peaceful, continuous, and unequivocal, the title of property is granted to the good faith possessor. A prescription is extinctive when the statute of limitations has run. At the time of the purchase, in 1995, the general statute of limitations was thirty years, but could be suspended if the person was unable to act.⁴⁶

The defendants opposed the two prescriptions, claiming (i) that their unchallenged good faith possession since 1995 met the criteria required by the law, so that they had acquired good title, and (ii) that the Bauer heirs were time-barred under various statutes of limitations, including not only the prescription extinctive, but also the U.K. Limitation Act of 1980⁴⁷ and the U.S. Holocaust Expropriated Art Recovery Act of 2016.⁴⁸

The court disagreed with this line of defense, holding that the possession of the painting by the defendants was not subject to the rules as set forth in the Civil Code, nor to any statute of limitations from any foreign law. The court found that the exceptional provisions of the 1945 Ordinance were to

43. *Id.*

44. Naomi Rea, *After a Long Legal Battle, French Court Orders American Couple to Return Nazi-Looted Picasso*, ARTNET NEWS (Nov. 8, 2017), <https://news.artnet.com/art-world/french-court-orders-restitution-of-nazi-looted-but-now-american-owned-pissarro-1142555>.

45. CODE CIVIL [C. CIV.] [CIVIL CODE] art. 2276 (Fr.).

46. C. CIV. arts. 2262, 2235 (Fr.) (before their modification by Loi 2008-561 of June 17, 2008, which changed the statute of limitation from a thirty-year period to a five-year period). See Loi 2008-561 du 17 juin 2008 portant réforme de la prescription en matière civile [Law 2008-561 of June 17, 2008, Reforming Limitation Periods in Civil Matters], J.O., June 17, 2008, p. 9856, art. 1.

47. Limitation Act 1980, c. 58, § 5 (Eng. & Wales), available at <https://www.legislation.gov.uk/ukpga/1980/58>.

48. Holocaust Expropriated Art Recovery (HEAR) Act of 2016, Pub. L. No. 114-308, §§ 4–5, 130 Stat. 1524, 1525–28.

be applied, and that it fulfilled the purpose that the Allies had set in 1945, with the court adding firstly the United States of America.⁴⁹ The court noted that Simon Bauer had acted well within the allotted timeframe and that according to the 1945 Ordinance the successive purchasers were deemed to be bad faith possessors in relation to the dispossessed owner. The court thus determined that the defendants could not invoke an acquisitive prescription defense.

The court also noted that the action of the Bauer heirs was not time-barred on the grounds of the thirty-year prescription. The court granted the defendants their right to invoke a public possession since their purchase in 1995 but observed that the defendants cannot add to it the period of possession of unknown previous owners, whose possession cannot, therefore, be considered public. The court also stated that a victim of spoliation cannot be required to be constantly on the lookout for his or her looted possession. Furthermore, because the painting had been in unknown hands from 1966 until 1995, the thirty-year prescription had not run.⁵⁰

III. The Visual Artists Rights Act and Street Art: 5Pointz

2018 marked a milestone in the ongoing saga of what has commonly become known as the 5Pointz litigation. At one time, what came to be known as 5Pointz has been variously described as the “United Nations,”⁵¹ “the Sistine Chapel of graffiti,”⁵² “a world-class museum on Jackson Avenue in Long Island City . . . free . . . open 24/7,” showing “the top artists in their field . . . hundreds of artworks,” or “New York’s hub for the high aerosol – or spray-can – art.”⁵³ 5Pointz had “the blessing of the building’s landlord, the developer Jerry Wolkoff, who has owned it since 1971.”⁵⁴

In 2013, Wolkoff announced that he would demolish 5Pointz and replace it with a condominium complex.⁵⁵ The 5Pointz litigation was initiated by twenty-one aerosol artists, each of whom had contributed artworks to

49. Cour d’appel Paris [CA] [regional court of appeal] Paris, 1e ch., Oct. 2, 2018, 17/20580 (Fr.).

50. Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Nov. 7, 2017, 17/58735 pp. 9?10 (Fr.).

51. Scott Manson, *New York’s ‘United Nations of graffiti,’* THE GUARDIAN (Sept. 20, 2011, 4:37 AM), <https://www.theguardian.com/travel/2011/sep/20/new-york-graffiti-street-art-5pointz>.

52. *5Pointz, la “capilla sxtina” del grafiti en Nueva York que fue demolida y por la que un grupo de artistas recibirá US\$6,7 millones de indemnización* [5Pointz, *The “Sistine Chapel” of graffiti in New York that was demolished and for which a group of artists will receive US \$ 6.7 million in compensation*], BBC MUNDO (Feb. 15, 2018), <https://www.bbc.com/mundo/noticias-43070893>.

53. Sarah Bayliss, *ART/ARCHITECTURE; Museum With (Only) Walls*, N.Y. TIMES, Aug. 8, 2004, at 2002026, available at <https://www.nytimes.com/2004/08/08/arts/art-architecture-museum-with-only-walls.html>.

54. *Id.*

55. Ann-Derrick Gaillot, *Fight for your right to spray paint: A conversation with graffiti artist Lady Pink about the demolition of legendary graffiti spot 5Pointz—and the lawsuit that may prevent a similar tragedy from ever happening again*, THE OUTLINE (Feb. 20, 2018, 3:30 PM), <https://theoutline.com/post/3464/5pointz-lawsuit-lady-pink-interview?zd=1&zi=qrhkdoh>.

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5Pointz.⁵⁶ The artists sought a preliminary injunction, under the Visual Artists Rights Act of 1990 (VARA), 17 U.S.C. § 106A,⁵⁷ against Gerald Wolkoff and four of his real estate entities to prevent the demolition of 5Pointz and the consequent destruction of their paintings.⁵⁸ On November 12, 2013, Judge Frederic Block denied preliminary injunctive relief,⁵⁹ but stated that a written opinion would soon follow.⁶⁰ But on November 19, 2013, before the judge's written opinion could be issued, Wolkoff ordered the whitewashing of 5Pointz "in the middle of the night."⁶¹

Despite unsuccessful attempts to save the 5Pointz murals, "the artists continued to pursue their claims."⁶² On February 12, 2018, in *Cohen v. G&M Realty L.P.*, Judge Block handed down his final verdict on the 5Pointz case, holding that Wolkoff had violated the artists' "moral rights," and awarded the plaintiffs the maximum allowable statutory damages, in the amount of \$ 6.7 million.⁶³ The case "marks the first time that a court has had to determine whether the work of an exterior aerosol artist – given its general ephemeral nature – is worthy of any protection under the law."⁶⁴ The case also marks the first time that graffiti artists have won a lawsuit based on VARA.⁶⁵

The court has applied the holding of *Carter v. Helmsley-Spear, Inc.*,⁶⁶ determining that forty-five of the forty-nine paintings that were at issue in the case were works of visual art "of recognized stature," considering the artistic recognition outside of 5Pointz achieved by the plaintiffs and detailed findings as to the skill and craftsmanship of the works provided by a highly qualified expert.⁶⁷

56. Aislinn O'Connell, *The 5Pointz Case: Damages awarded against property owner for whitewashing street art*, 13 J. INTELL. PROP. L. & PRAC. 529, 530 (2018).

57. Visual Artists Rights Act of 1990, 17 U.S.C. § 106A(a)(3) (2012).

58. See *Cohen v. G&M Realty L.P.*, No. 13-CV-05612 (FB) (RLM), 2018 U.S. Dist. LEXIS 99250, at *1 (E.D.N.Y. June 13, 2018).

59. See *Cohen v. G&M Realty L.P.*, 988 F. Supp. 2d 212, 214 (E.D.N.Y. 2013).

60. See *Id.*

61. Gaillot, *supra* note 55.

62. See *Cohen*, 2018 U.S. Dist. LEXIS 99250; see also Megan E. Noh & Christopher J. Robinson, *5Pointz Opinion: Maximum Statutory Damages Awarded to Aerosol Artists; Additional Clarity on "Recognized Stature" Standard*, N.Y. CNTY. LAW. ASS'N L. BLOG (Feb. 23, 2018), <https://nyclalaw.wordpress.com/tag/cohen-et-al-v-g-m-realty-l-p-et-al/>.

63. *Cohen v. G&M Realty L.P.*, 320 F. Supp. 3d 421, 428, 447 (E.D.N.Y. 2018).

64. *Id.* at 427 (quoting *Cohen*, 988 F. Supp. 2d at 214).

65. See O'Connell, *supra* note 56 at 530.

66. See *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303 (S.D.N.Y. 1994).

67. Judge Block observed that "expert testimony is not the *sine qua non* for establishing that a work of visual art is of recognized stature," recognizing the need for courts to utilize common sense in assessing whether a visual work is of recognized stature. *Cohen*, 320 F. Supp. 3d at 438; see also Uché Ewelukwa Ofodile, *Do Intellectual Property Rights Extend to Graffiti Art?: The 5Pointz Case*, JURIST (Mar. 30, 2018, 5:13 PM), <http://jurist.org/forum/2018/03/Ofodile-Graffiti-Art.php>.

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The 5Pointz decision continues to reverberate,⁶⁸ not only in the U.S., but worldwide,⁶⁹ suggesting that under the right circumstances graffiti art can be protected by existing copyright law.⁷⁰ This reverses both the perception of graffiti art as fringe (or, worse, illegal) art and the notion that graffiti artists must stand by helplessly as their works are destroyed or appropriated by more powerful players.⁷¹

Even after the damages award decision, the 5Pointz litigation continues. On September 21, 2018, Wolkoff filed an appeal of the decision, claiming that graffiti works are “ephemeral” and painting over them is “part of the culture.”⁷² More specifically, Wolkoff claimed that these pieces are not

68. For comments on the verdict, see Lise Berichel, *Around the Block Ruling in 5Pointz*, CTR. ART LAW (Apr. 10, 2018), <https://itsartlaw.com/2018/04/10/around-the-block-ruling-in-5pointz/>; see also Steve Schindler & Katie Wilson-Milne, *Moral Rights in Street Art: The 5Pointz Story*, ART LAW PODCAST (Apr. 9, 2018), <http://artlawpodcast.com/2018/04/09/5pointz-and-the-moral-rights-of-artists/>; Eileen Kinsella, *After 5Pointz, Can Artists and Developers Ever Work Together Again? Experts Lay Out the Way Forward*, ARTNET NEWS (Mar. 7, 2018), <https://news.artnet.com/art-world/5pointz-graffiti-art-vara-lawsuit-1234652>.

69. See 5Pointz, *la “capilla sixtina” del graffiti en Nueva York que fue demolida y por la que un grupo de artistas recibirá US\$6,7 millones de indemnización*, supra note 52; Ephrat Livni, *A landmark court case affirms that street art is high art*, QUARTZ (Feb. 15, 2018), <https://qz.com/1206623/a-landmark-5pointz-case-shows-the-legal-reasons-why-graffiti-is-art/>; Helga Marsala, *La battaglia di 5Pointz a Nyc. Vincono gli artisti: mega risarcimento per i graffiti cancellati* [The Battle of 5Pointz in N.Y.C. The Artists Win: Huge Damages for Erased Graffiti], ARTRIBUNE (Feb. 17, 2018), <https://www.artribune.com/arti-visive/street-urban-art/2018/02/la-battaglia-di-5pointz-a-nyc-vincono-gli-artisti-mega-risarcimento-per-i-graffiti-cancellati/> (It.); *New York: un juge donne gain de cause aux graffeurs du “5 Pointz,”* [New York: a judge wins the case for the graffiti artists of the “5Pointz”], FR. INFO (Feb. 21, 2018, 4:48 PM), https://www.francetvinfo.fr/economie/emplem/metiers/art-culture-edition/new-york-un-juge-donne-gain-de-cause-aux-graffeurs-du-5-pointz_2621932.html.

70. The number of cases involving street art are increasing, see, e.g., the Swedish fashion company H&M’s complaint filed on March 9, 2018, and voluntarily dismissed on March 16, 2018, against the graffiti artist Jason Williams, whose mural the fast-fashion brand used in an advertising campaign, and over which they claimed that the artist did not own any copyright. See Henri Neuendorf, *Street Artist Revok and H&M Settle Dispute Over an Ad That Featured His Work Without Permission*, ARTNET NEWS (Sept. 7, 2018), <https://news.artnet.com/art-world/revok-hm-ad-campaign-1345127>; H&M (@hm), TWITTER (Mar. 15, 2018, 1:37 PM), <https://twitter.com/hm/status/974384097319743840>; *UPDATED: H&M Calls Foul on “Vandal” Graffiti Artist’s Threat of Lawsuit*, THE FASHION LAW (Mar. 15, 2018), <http://www.thefashionlaw.com/home/hm-calls-foul-on-vandal-graffiti-artists-threat-of-lawsuit>.

71. See Francesco Mazzucchelli, *Street(icono)clashes: Blu vs Genus Bononiae: un caso di iconoclastia urbana* [Street(icono)clashes: Blu vs Genus Bononiae: A Case of Urban Iconoclasm], 18 OCULA 22 (2017) (exploring the events that accompanied *Banksy and Co: Art in the Urban Form*, an exhibition held in the City Museum of Bologna in May 2016, with a special focus on the reaction of the street artist Blu, who decided to erase all his street artworks in the city of Bologna) (It.).

72. Nicholas Rizzi, *5Pointz Developers File Appeal Over \$6.8M Judgement for Whitewashing Graffiti*, COMM. OBSERVER (Sept. 25, 2018, 12:13 PM), <https://commercialobserver.com/2018/09/5pointz-developers-file-appeal-over-6-75m-judgement-for-whitewashing-graffiti/>; see Eileen Kinsella, *The 5Pointz Developer Ordered to Pay Street Artists \$6.8 Million for Whitewashing Their Work Is Now Pushing Back*, ARTNET NEWS (Sept. 27, 2018), <https://news.artnet.com/art-world/5pointz-real-estate-developer-appeals-order-to-pay-street-artists-1358323>.

protected under VARA, because VARA requires formal recognition of an artwork, not “subjective assessments of the works’ quality.”⁷³ In an interview with the *Commercial Observer*, Wolkoff argued that “[t]he nature of graffiti in itself is to paint over itself constantly, and [the artists] made reference to that and it’s what happened over the [twenty-seven] odd years.”⁷⁴ Meanwhile, a museum for 5Pointz has been established—the Museum of Street Art, or MOSA.⁷⁵

IV. Convention on Cultural Property Implementation Act: *United States v. Ancient Coin Collectors Guild*

After almost ten years, the U.S. Court of Appeals for the Fourth Circuit has resolved the litigation surrounding the import of ancient Cypriot and Chinese coins. In early 2009, in response to the U.S. Department of State entering into memoranda of understanding with Cyprus and China imposing import restrictions on certain categories of cultural objects (including ancient coins), the Ancient Coin Collectors Guild (an organization formed to lobby and litigate against restrictions on the ancient coin trade) (the “Guild”) shipped, through a London-based coin dealer, twenty-three ancient Cypriot and Chinese coins to Baltimore.⁷⁶ The invoice for the coins stated that the coins lacked any recorded provenance and that their respective find spots were unknown. Upon arrival in the United States, the coins were detained by Customs, which sent a Notice of Detention to the Guild, requiring that it provide Customs with documentation showing that the coins were being imported in compliance with the Convention on Cultural Property Implementation Act (CPIA).⁷⁷

Before the U.S. government filed a forfeiture action, the Guild brought suit against the State Department, Customs and Border Protection, and certain officials, alleging, among other things, that the seizure of the coins violated the Administrative Procedures Act and the Guild’s First and Fifth Amendment rights, and that in imposing import restrictions on ancient Cypriot and Chinese coins, the State Department had exceeded its authority. In August 2011, the U.S. District Court for the District of Maryland rejected the Guild’s claims,⁷⁸ specifically holding that, under the CPIA, Customs may seize items that are listed by category pursuant to a memorandum of understanding, and the burden then shifts to the importer

73. See Keith Estiler, *5Pointz Developers File Appeal Over \$6.8 Million USD Payment For Whitewashed Works*, HYPEBEAST (Sept. 28, 2018), <https://hypebeast.com/2018/9/5pointz-developers-file-appeal> (internal quotation marks omitted).

74. *Id.*; see Rizzi, *supra* note 72.

75. Lauren Hard, *5 Years Ago, Their 5Pointz Art Was Erased. Now There’s a Museum for It*, N.Y. TIMES, Sept. 16, 2018, at A22, available at <https://www.nytimes.com/2018/09/16/nyregion/5pointz-street-art-graffiti-museum-nyc.html>.

76. *Ancient Coin Collectors Guild v. U.S. Customs & Border Prot., Dep’t of Homeland Sec.*, 801 F. Supp. 2d 383, 418 (D. Md. 2011), *aff’d*, 698 F.3d 171 (4th Cir. 2012).

77. Convention on Cultural Property Implementation Act, 19 U.S.C. §§ 2601-13 (2012).

78. *Ancient Coin Collectors Guild*, 801 F. Supp. 2d at 418.

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to establish that the items at issue were properly exported from their country of origin. In October 2012, a unanimous panel of the U.S. Court of Appeals for the Fourth Circuit affirmed the district court's decision.⁷⁹ But the Fourth Circuit did note, in a forfeiture action, that the Guild would be entitled to "press a particularized challenge to the government's assertion that the twenty-three coins are covered by import restrictions."⁸⁰

Following the Fourth Circuit's 2012 decision, the U.S. government filed a forfeiture action. In its amended answer, the Guild asserted multiple affirmative defenses in the nature of re-arguing and re-litigating the issues the district court and the Fourth Circuit had already decided in their earlier decisions, and the district court struck those affirmative defenses. In March 2017, the district court ruled on the parties' cross motions for summary judgment,⁸¹ granting the Guild summary judgment with respect to seven of the Chinese coins that did not match the categories of coins on the Chinese designated list and granting the U.S. government summary judgment with respect to the seven Cypriot coins and eight of the Chinese coins.⁸²

The Guild appealed the district court's decision, arguing that: (1) in a forfeiture action under the CPIA, the government bears the burden of showing that the coins were (a) first discovered in the State Party that requested the memorandum of understanding and subject to that country's export control, and (b) illegally removed after the date the import restrictions went into effect; (2) the district court improperly excluded the Guild's expert witness testimony as to the circulation of ancient coins; (3) the Customs regulation codified at 19 C.F.R. § 12.104 improperly deviated from the CPIA's definition of "archaeological or ethnological material of the State Party" by failing to require that such objects were "first discovered within, and [are] subject to export control by, the State Party";⁸³ (4) the district court improperly refused to approve the Guild's efforts at relevant discovery; and (5) the district court improperly struck the Guild's amended answer. In its March 22, 2018 decision, the Fourth Circuit affirmed the district court's decision in toto.⁸⁴

In its decision, the Fourth Circuit rejected the Guild's assertion that the government bears the burden of establishing the provenance and find spot of the specific coins at issue. The court noted that "Congress drafted the CPIA in an effort to balance procedural efficiency with procedural recourse."⁸⁵ The court held that the government met its burden when it showed that the

79. *Ancient Coin Collectors Guild v. U.S. Customs & Border Prot., Dep't of Homeland Sec.*, 698 F.3d 171, 175 (4th Cir. 2012).

80. *Id.* at 185.

81. *United States v. 3 Knife-shaped Coins*, 246 F. Supp. 3d 1102 (D. Md. 2017), *aff'd sub nom. United States v. Ancient Coin Collectors Guild*, 899 F.3d 295 (4th Cir. 2018), *cert. denied*, No. 18-767, 2019 WL 659850 (U.S. Feb. 19, 2019).

82. *Id.* at 1123-24.

83. *United States v. Ancient Coin Collectors Guild*, 899 F.3d 295, 320 (4th Cir. 2018), *cert. denied*, No. 18-767, 2019 WL 659850 (U.S. Feb. 19, 2019) (internal quotation marks omitted).

84. *See id.* at 301.

85. *Id.* at 315.

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items at issue are listed pursuant to an MOU, and the burden then shifted to the importer to show that the items are properly imported. The court reasoned:

The second sentence of [CPIA] § 2604 requires the government in a forfeiture action to demonstrate that the listed, restricted material is “covered by” the relevant MOU. The first requirement of that sentence does not oblige the government to establish that the material at issue was “first discovered” within the relevant State Party.⁸⁶

The court also rejected the Guild’s claim that the language of the Customs regulation conflicts with the language of Section 2601(2) of the CPIA, and that this conflict resulted in a lack of fair notice to the Guild that the coins were subject to import restrictions. The court noted:

The Guild concedes that it used the Cypriot and Chinese Designated Lists as guideposts in deciding which ancient coins were likely to be seized by Customs. The fact that the Guild . . . correctly identified the coins subject to the import restrictions, shows beyond peradventure that importers of ordinary intelligence are able to ascertain the conduct that contravenes federal law. In these circumstances, the Guild’s due process rights were not violated . . .⁸⁷

This latest decision from the Fourth Circuit concludes this litigation challenging the applicability of memoranda of understanding under the CPIA to ancient coins. In both this and its earlier decision, the Fourth Circuit has analyzed and laid out the elements that each party in a civil forfeiture under the CPIA must establish and the placement of the burden of proof at different stages of the proceedings. Perhaps most significantly, however, these decisions indicate that no category of ancient artifact is, purely by its nature, exempt from import restrictions imposed by the CPIA.

^{86.} *Id.*

^{87.} *Id.* at 322–23.

International Human Rights

SHEKINAH APEDO, DANIEL L. APPELMAN, ELENA ATEVA,
ARZU RANA DEUBA, MARK DU, CLAUDIA FELDKAMP,
FEDERICA DELL'ORTO HADAR, CORINNE LEWIS, TSCHIKA McBEAN,
SOPHIE POUGET, CAROLINE RENNER, JUDITH WOOD, AND
CONSTANCE Z. WAGNER*

I. Introduction

This article highlights important international and national developments in 2018 in the fields of international human rights and business and human rights.

II. International Developments

A. DRAFT UN TREATY ON BUSINESS AND HUMAN RIGHTS

The “Zero Draft,” a draft UN treaty on business and human rights, was discussed during the fourth session of the Open-ended Intergovernmental Working Group (OIWG), held in Geneva, in October 2018. An annex concerning a National Implementation Mechanism was also presented. While the treaty is drafted so as to be legally binding on States and not businesses, a reference to businesses’ responsibility to respect human rights is contained in the preamble.¹

A 2014 UN Human Rights Council resolution mandated the OIWG to create a binding instrument that regulates “activities of transnational corporations and *other business enterprises*,” however, a footnote adds that “other business enterprises” means those of “a transnational character in

* The Committee Editor is Professor Constance Z. Wagner, Saint Louis University School of Law. Corinne Lewis, Partner, Lex Justi, wrote Section II.A. Constance Wagner and Caroline Renner, J.D. 2019, Saint Louis University School of Law, wrote Section II.B. Sophie Pouget, President of Committee for Refugee Relief (France), wrote Section II.C. Daniel L. Appelman, Partner, M&H, LLP, wrote Section II.D. Claudia Feldkamp, Counsel, Fasken, Martineau, wrote Section III.A. Elena Ateva, Attorney, White Ribbon Alliance, and Arzu Rana Deuba, Founder, Safe Motherhood Network Federation (Nepal), wrote Section III.B. Shekinah Apedo, J.D. 2019, Western Michigan University Cooley Law School, wrote Section III.C. Federica Dell’Orto Hadar, Attorney, and Judith L. Wood, Partner, Law Offices of Judith L. Wood, wrote Section III.D. Tschika McBean, Human Rights Officer for Baha’is of the United States, wrote Section III.E. Mark Du, City of New York, Administrative Judge, wrote Section III.F.

1. Zero Draft Legally Binding Instrument to Regulate, in *International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises* art. 1, July 16, 2018, UN HUMAN RIGHTS COUNCIL [hereinafter Zero Draft].

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their operational activities, and does not apply to local businesses” registered under domestic law.² States and civil society organizations have faulted the OIWG’s work for excluding businesses that are not carrying out transnational operations. While the Zero Draft covers “any *business activities* of a transnational character,”³ this wording was criticized during the session⁴ and remains inconsistent with the UN Guiding Principles on Business and Human Rights (UNGPs) coverage of “all business enterprises, both transnational and others.”⁵

Additionally, participants noted that the Zero Draft defines “business activities of a transnational character” as “for-profit economic activity,”⁶ which excludes State-owned enterprises from the treaty’s ambit.⁷ Moreover, the scope of human rights under the treaty—“all international human rights and those rights recognized under domestic law”⁸—engendered concern that because States have ratified different human rights treaties and have different national laws, divergent and inconsistent interpretations and implementation of the treaty could arise.⁹

The Draft stated that the courts of the State where the acts or omissions occurred or where the alleged perpetrator is domiciled shall have jurisdiction; and States are to take steps to ensure that criminal, civil, and administrative liability is available under domestic law for violations of human rights.¹⁰ But some delegations objected to the requirement that States provide for universal jurisdiction under their national laws for crimes.¹¹ Concerns were also raised that the provision on business enterprises’ liability for harm caused by a subsidiary or a supplier is contrary to the doctrine of separate legal personality.¹²

Although Article 9 of the Zero Draft on prevention reflects developments in human rights due diligence, such as the French law,¹³ it was criticized for being aligned with neither the UNGPs’s nor the OECD’s due diligence

2. Human Rights Council Res. 26/9, U.N. Doc. A/HRC/RES/26/9, at 1 (June 26, 2014).

3. Zero Draft, *supra* note 1, art. 3, ¶ 1.

4. Luis Gallegos, (Chair-Rapporteur), *Report on the Fourth Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, ¶¶ 35 – 36, 73, U.N. Doc. A/HRC/40/48 (Jan. 2, 2019).

5. *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, 1, 14, (2011) https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

6. Zero Draft, *supra* note 1, art. 4, ¶ 2.

7. Gallegos, *supra* note 4, ¶ 14.

8. Zero Draft, *supra* note 1, art. 3, ¶ 2.

9. *See* Gallegos, *supra* note 4, ¶ 15.

10. Zero Draft, *supra* note 1, art. 5, ¶¶ 1, 10.

11. Gallegos, *supra* note 4, ¶¶ 18, 70.

12. *Id.* ¶ 80.

13. Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre [Law 2017-399 of March 27, 2017 Relating to the Duty of Vigilance of the Parent Companies and the Companies Giving Order], Legifrance, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034290626&categorieLien=id>.

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standards.¹⁴ Moreover, some delegations and NGOs expressed their desire that a Committee, to be created under Article 14, not just receive reports and provide observations and recommendations, but also receive, review, and issue binding decisions on complaints.¹⁵

Numerous requests were made at the session for increased clarity and precision in the Draft's language and for inclusion of additional protections, including for women and human rights defenders.¹⁶ "Minorities" are also not mentioned in Articles 9(2)(g) and 15(5), as well as other groups of persons that receive particular attention due to heightened risks of human rights violations from business activities, in contrast with the UNGPs' inclusion of this group.¹⁷

A revised treaty will be prepared by the end of June 2019 to enable the OIWG to hold direct substantive intergovernmental negotiations.¹⁸

B. CORPORATE HUMAN RIGHTS DUE DILIGENCE

On July 26, 2018, the Working Group on Business and Human Rights presented its report on corporate human rights due diligence (Report) to the UN General Assembly.¹⁹ In 2011, the UN Human Rights Council had unanimously endorsed the Guiding Principles on Business and Human Rights, which was the first "globally recognized and authoritative framework for the respective duties and responsibilities of Governments and business enterprises to prevent and address" adverse human rights impacts on people resulting from globalization and business activity.²⁰ The Guiding Principles impose on business enterprises the responsibility to respect human rights and explicitly require them to exercise human rights due diligence "to identify, prevent, mitigate and account for how they address impacts on human rights."²¹ The goal of such due diligence is to prevent adverse impacts and human rights violations, which can be achieved by using four core components, including identifying and assessing actual or potential adverse human rights impacts; integrating findings from impact assessments

14. Gallegos, *supra* note 4, ¶ 58.

15. *Id.* ¶ 86.

16. *See, e.g., id.* ¶¶ 46, 56, 74, 90.

17. *Guiding Principles, supra* note 5, at 5 – 6, 14.

18. *Fourth UN Intergovt. Working Group Session on Proposed Business & Human Rights Treaty*, BUS. & HUMAN RIGHTS RESOURCE CENT. (Oct. 15, 2018), <https://www.business-humanrights.org/en/binding-treaty/intergovernmental-working-group-sessions/fourth-un-intergovt-working-group-session-on-proposed-business-human-rights-treaty-15-19-oct-2018>.

19. U.N. Secretary-General, *The Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. Doc. A/73/163 (July 16, 2018).

20. *Corporate Human Rights Due Diligence – Identifying and Leveraging Emerging Practice*, UN HUMAN RIGHTS: OFFICE OF THE HIGH COMMISSIONER, <https://www.ohchr.org/EN/Issues/Business/Pages/CorporateHRDueDiligence.aspx>.

21. *Id.*

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across relevant company processes; and communicating on how impacts are being addressed.²²

The Report “highlights key features of human rights due diligence and why it matters; gaps and challenges in current business and Government practice; emerging good practices; and how key stakeholders,” including governments and investors, can contribute to enhanced due diligence.²³ The Report notes that some large corporations have started to develop good practices for such due diligence, but most businesses are unaware of their responsibility under the Guiding Principles or are unable or unwilling to implement such due diligence.²⁴ To close this gap, it will require “concerted efforts by all actors.”²⁵ The Report recommends that businesses “just get started,” that investors “require effective human rights due diligence by companies they invest in,” and that governments “use all available levers,” including legislation and policy initiatives, to advance human rights due diligence as part of standard business practice.²⁶

The Working Group also developed two “companion notes” that were annexed to the Report. Using a frequently asked questions format, Companion Note I provides further background on the rationale for, components of, and relationship to legal risk management of human rights due diligence.²⁷ This Note also connects the due diligence requirement of the Guiding Principles with the OECD’s Due Diligence Guidance for Responsible Business Conduct, as well as various sector-specific guidance on this topic.²⁸

Companion Note II provides steps that a business should take to approach due diligence and also provides an overview of tools and resources.²⁹ Importantly, the Note recognizes that due diligence looks different for each organization based on the sector, business model, geographical location, and operating context.³⁰ The key first step is identifying the potential adverse impacts to determine what steps the entity should take. The Note also identifies steps that the entity should take in the process of human rights due diligence—some of which are steps that any entity would or should take in adopting any business practice—such as identifying enablers and potential blockers within the organization, ensuring that management is on board, engaging stakeholders, and conducting training on key internal functions for

22. *Id.*

23. *Id.*

24. *See id.*

25. U.N. Secretary General, *supra* note 19, ¶ 92.

26. *Id.* ¶¶ 93 – 94.

27. *Companion Note I to the Working Group’s 2018 Report to the General Assembly (A/73/163)*, UN HUMAN RIGHTS: OFFICE OF THE HIGH COMMISSIONER, 1 (Oct. 16, 2018), <https://www.ohchr.org/Documents/Issues/Business/Session18/CompanionNote1DiligenceReport.pdf>.

28. *Id.* at 6 – 9.

29. *Companion Note II to the Working Group’s 2018 Report to the General Assembly (A/73/163)*, UN HUMAN RIGHTS: OFFICE OF THE HIGH COMMISSIONER, 1 (Oct. 16, 2018), <https://www.ohchr.org/Documents/Issues/Business/Session18/CompanionNote2DiligenceReport.pdf>.

30. *Id.*

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human rights.³¹ The Note recognizes that the components of an entity's human rights due diligence will change over time, as the risk and issues facing that entity evolve.³² The Note contains practical advice and recommendations for implementing a successful human rights due diligence program, regardless of the size of the organization.³³ This advice includes a discussion of building and exercising leverage,³⁴ transparency and meaningful reporting,³⁵ and integrated stakeholder engagement.³⁶

Companion Note II also includes a special focus on the role of business lawyers in the context of human rights due diligence.³⁷ Such due diligence may be a difficult task for business lawyers who are not used to identifying and analyzing human rights risks; environmental risks and standards; and labor rights and standards.³⁸ It can also be difficult for lawyers, and other business professionals, to understand that all companies have such potential risks regardless of size or sector. The Note suggests that it would be positive to change from corporate lawyers analyzing human rights issues as a niche service to having lawyers function as "wise counselors" who practice human rights risk management "in line with the Guiding Principles as a core element" of their practice.³⁹ Companion Note II provides a list of resources for business lawyers to use for such purpose.⁴⁰

C. INTERNATIONAL DEVELOPMENTS ON THE DUTY TO RESCUE AT SEA

In 2017, the number of forcibly displaced people in the world increased by 2.9 million, reaching a total of 68.5 million people.⁴¹ While migratory routes across the Mediterranean are still chosen to reach Europe, the number of deaths in the Mediterranean has constantly dropped with 4,713 fatalities in 2016; 3,009 in 2017; and 2,063 from January to November 2018.⁴² But recent tensions on the interpretation and implementation of the international duty to rescue persons in distress-at-sea show the need for a stronger framework to ensure the safety of migrants choosing the Mediterranean route to Europe.

31. *Id.* at 3 – 4.

32. *See id.*

33. *Id.* at 7.

34. *Id.* at 15.

35. *Companion Note II, supra* note 29, at 12.

36. *Id.* at 10 – 11.

37. *Id.* at 19.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Global Trends: Forced Displacement in 2017*, UN REFUGEE AGENCY, 2 (2018), <http://www.unhcr.org/5b27be547.pdf>.

42. *Missing Migrants Project*, INTERNATIONAL ORGANIZATION FOR MIGRATION, http://missingmigrants.iom.int/region/mediterranean?migrant_route%5B%5D=1376 (last visited Nov. 21, 2018) (estimates as of Nov. 21, 2018).

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On June 9, 2018, the *Aquarius*, a boat chartered and operated by two French non-governmental organizations, reached the Italian territorial sea and, following instructions from the Italian Maritime Rescue Coordination Center, proceeded to the rescue of 629 people, including 7 pregnant women, 11 children, and 123 unaccompanied minors from Eritrea, Ghana, Nigeria, and Sudan.⁴³ On June 11, 2018, Italy decided to close its ports calling on the *Aquarius* to dock in Malta.⁴⁴ Malta immediately refused and Spain then stepped up to offer “safe harbor” to the rescue ship.⁴⁵ These diplomatic tensions resulted in the suspension of all rescue ship missions in the Mediterranean between June 28 and July 8, 2018, which resulted in an estimated 300 fatalities.⁴⁶

These events show that front line countries, and particularly EU Member States such as Italy, are challenged by their legal duty to rescue people at sea. International obligations regarding rescue-at-sea are governed by international conventions, particularly the 1974 International Convention for the Safety of Life at Sea and the 1982 UN Convention on the Law of the Sea.⁴⁷ Accordingly, shipmasters have the obligation to carry out certain duties to ensure the safety of life at sea and the integrity of search-and-rescue (SAR) services.⁴⁸ Respectively, the country responsible for operations in the area is responsible for disembarking persons rescued-at-sea.⁴⁹ If the rescued-at-sea are refugees or asylum-seekers, international conventions applicable to refugees apply, imposing on the country responsible for the rescue-at-sea to provide a place of safety to these persons.⁵⁰

Until now, front line countries were considered solely and entirely responsible for providing safety to persons rescued-at-sea. In 2012, the European Court of Human Rights, in its first case on interception-at-sea, it considered that Italian authorities sent twenty-four people rescued-at-sea to Libya, originally from Somalia and Eritrea, without allowing them to claim asylum in Italy, and consisted of inhumane and degrading treatment, thus exposing the rescued-at-sea people not only to the risk of ill treatment in Libya but also in their home countries in case of repatriation.⁵¹

43. *Spain to Accept Disputed Migrant Ship Aquarius*, BBC NEWS (June 12, 2018), <https://www.bbc.com/news/world-europe-44441386>.

44. *Id.*

45. *Id.*

46. *Monthly Trend Report: Covering Mixed Migration to, through & from North Africa*, MIXED HUB REPORT (Sept. 30, 2018), <http://www.mixedmigrationhub.org/wp-content/uploads/2018/10/MHub-Trend-Bulletin-September-2018-1.pdf>.

47. Int'l Maritime Org. [IMO], International Convention for the Safety of Life at Sea, 1974, ch. V, reg. 33 (Nov. 1, 1974), <https://www.ifrc.org/docs/idrl/I456EN.pdf>; U.N. Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 3, art. 98, ¶ 1, (entered into force Nov. 16, 1994).

48. *Id.*

49. *Id.*

50. Convention Relating to the Status of Refugees, art. 33, ¶ 1, *opened for signature* July 28, 1951, U.N.H.C.R. (entered into force Apr. 22, 1954).

51. *Hirsi Jamaa v. Italy*, App. No. 27765/09, 38 (Eur. Ct. H.R. Feb. 23, 2012).

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Just as shipmasters have the obligation to provide SAR services, states have the obligation to ensure that people rescued-at-sea are disembarked in a place of safety.⁵² But in the EU, the tension between front line and other EU Member States is aggravated by the Dublin Regulation⁵³ providing that the EU Member State responsible for processing asylum requests is usually the first EU Member State in which the person arrives (often Italy or Greece). Therefore, the country responsible for operations has both the obligation to provide a place of safety and also to examine asylum requests with all the legal obligations attached to it.⁵⁴

To prevent further disputes over rescues that put lives at risk, a coordinated European response is being discussed on an international legal mechanism of disembarkation. In June 2018, UNHCR and IOM issued a joint proposal for a regional cooperative arrangement ensuring predictable and responsible disembarkation and subsequent processing of persons rescued-at-sea.⁵⁵ The joint proposal proposes to share the responsibility of disembarkation between all the countries across the Mediterranean, and suggests a comprehensive approach to ensure the safety of migration routes.⁵⁶ It provides measures facilitating collaboration and cooperation between countries in the region to better implement the international norms already in place. The implementation of this proposal will test the capacity of the EU to deal with the migration issue in a collaborative approach.

D. INTERNATIONAL CRIMINAL COURT CLAIMS OF CRIMES AGAINST HUMANITY BY THE MYANMAR MILITARY INVOLVING THE ROHINGYA MINORITY

2018 was the twentieth anniversary of the adoption of the Rome Statute, the treaty authorizing the establishment of the International Criminal Court (ICC).⁵⁷ The ICC is the first permanent international court with the authority to hold accountable those who commit war crimes, crimes against humanity, genocide, and crimes of aggression.⁵⁸ But jurisdictional limitations written into the Rome Statute as political compromises have

52. See *Monthly Trend Report*, *supra* note 46.

53. Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013, 2013 O.J. (L 180) 31, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0604&from=EN> (also called Dublin III Regulation).

54. *Id.*

55. *Proposal for a Regional Cooperative Arrangement Ensuring Predictable Disembarkation and Subsequent Processing of Persons Rescued-at-sea*, UN REFUGEE AGENCY (June 27, 2018), <https://www.unhcr.org/partners/eu/5b35e60f4/proposal-regional-cooperative-arrangement-ensuring-predictable-disembarkation.html>.

56. *Id.*

57. *Rome Statute of the International Criminal Court*, U.N. Doc A/CONF.183/9 (July 17, 1998), <https://www.icc-cpi.int/nr/rdonlyres/add16852-ae9-4757-abe7-9cdc7cf02886/283503/rome-statuteng1.pdf>.

58. *Id.* art. 5, ¶ 1.

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prevented the Court from addressing some of the world's most horrific human rights abuses.⁵⁹

The Rome Statute permits the Court to address crimes only when they are referred to the Court's Prosecutor (i) by a State Party (a state that has ratified the Statute), or a state not a party to the Statute that accepts the Court's jurisdiction;⁶⁰ (ii) by the Prosecutor acting on her own initiative following an investigation of crimes committed in the territory of, or by, a national of a State Party;⁶¹ or (iii) by the UN Security Council, in the case of crimes committed in a country that has not ratified the Statute.⁶² Members of the Security Council have frequently exercised their veto powers to prevent referrals of non-State Parties to the Court.⁶³

These constraints on the ICC's jurisdiction to address human rights violations in countries that have not ratified the Rome Statute were tested in 2018 by the atrocities perpetrated against the Rohingya minority in Myanmar.⁶⁴ Myanmar is not a party to the Statute and will not submit voluntarily to the Court's jurisdiction.⁶⁵ In addition, the UN Security Council will not refer Myanmar to the Court because of opposition from China.⁶⁶

Given these obstacles and the dire situation of the Rohingya, the ICC's Prosecutor sought to begin a preliminary inquiry into possible charges of crimes against humanity against officers of the Myanmar military using a novel procedure and a novel theory. The novel procedure was to ask the Pre-Trial Chamber for an advisory opinion on the matter of her jurisdiction based on a single sentence in the Statute: "The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility."⁶⁷ The novel theory was that the jurisdictional requirements of the Statute were satisfied because one element of the crime (crossing a border in the crimes

59. . See, e.g., Ionel Zamfir, *International Criminal Court Achievements and Challenges 20 years After the Adoption of the Rome Statute*, EUROPEAN PARLIAMENT RES. SER. (July 2018), [http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/625127/EPRS_BRI\(2018\)625127_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/625127/EPRS_BRI(2018)625127_EN.pdf).

60. *Rome Statute of the International Criminal Court*, *supra* note 57, art. 13, ¶ a, art. 12, ¶ 2.

61. *Id.* art. 13, ¶ c.

62. *Id.* art. 13, ¶ b.

63. See, e.g., Edith M. Lederer, *UN Chief Calls for Syria Referral to International Court*, AP NEWS (Jan. 26, 2018), <https://www.apnews.com/24e1d609e7944e37a17f1b7abb0af>.

64. Krishnadev Calamur, *The World Isn't Prepared to Deal With Possible Genocide In Myanmar*, ATLANTIC (Aug. 28, 2018), <https://www.theatlantic.com/international/archive/2018/08/rohingya/568618/>.

65. Verena Hölzl (Yangon), *Rohingya genocide: Will Myanmar Generals face ICC Justice?*, DW (Nov. 9, 2018), <https://www.dw.com/en/rohingya-genocide-will-myanmar-generals-face-icc-justice/a-45450020>.

66. *Id.*

67. *Rome Statute of the International Criminal Court*, *supra* note 44, art. 19, ¶ 3; see also, International Criminal Court [ICC], *Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute*, Office of the Prosecutor, ¶ 52 (Apr. 9, 2018) ICC-RoC46(3)-01/18-1, https://www.icc-cpi.int/CourtRecords/CR2018_02057.pdf.

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against humanity's crime of deportation)⁶⁸ occurred in part on the territory of a State Party, Bangladesh.⁶⁹ The Pre-Trial Chamber agreed and granted the Prosecutor permission to begin the preliminary investigation.⁷⁰

The Pre-Trial Chamber's ruling that the alleged deportation of victims from a non-State Party to the territory of a State Party satisfied the jurisdictional requirements of the Rome Statute is a decision of first impression. The Prosecutor's request seeking an advisory opinion from the Pre-Trial Chamber on that question, or on any question, is also unprecedented.⁷¹ In addition to the fact that the Pre-Trial Chamber's ruling paves the way for ICC involvement in the Myanmar situation by means of a preliminary investigation, its acceptance of the Prosecutor's request for an advisory opinion in and of itself may set an important procedural precedent that enables the Court to overcome in future cases some of the jurisdictional barriers otherwise posed by the Statute.⁷²

III. National Developments

A. CREATION OF THE CANADIAN OMBUDSPERSON FOR RESPONSIBLE ENTERPRISE

On January 17, 2018,⁷³ the Government of Canada announced its intention to establish a Canadian Ombudsperson for Responsible Enterprise (CORE) and with it, a multi-stakeholder Advisory Body on Responsible Business Conduct. The CORE will have a mandate to investigate allegations of human rights abuses related to the business operations of Canadian companies abroad, while the Advisory Council is tasked with advising the Canadian government on further development of its laws and policy around Business and Human rights, including advising the government on the CORE's mandate and operating procedures.

68. *Rome Statute of the International Criminal Court*, *supra* note 44, art. 7, ¶ 1(d).

69. *Id.* art. 12, ¶ 2(a) (“[T]he Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3: (a) The State on the territory of which the conduct in question occurred . . .”).

70. International Criminal Court [ICC], Pre-Trial Chamber, Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute,” ¶ 72 (Sept. 6, 2018) ICC-RoC46(3)-01/18-1, https://www.icc-cpi.int/CourtRecords/CR2018_04203.pdf.

71. See Alex Whiting, *Process as well as Substance Is Important in ICC’s Rohingya Decision*, JUST SECURITY (May 15, 2018), <https://www.justsecurity.org/56288/process-substance-important-iccs-rohingya-decision/>.

72. See *id.* (for a discussion of the procedural significance of the decision).

73. *The Government of Canada Brings Leadership to Responsible Business Conduct Abroad*, GLOBAL AFFAIRS CANADA (Jan. 17, 2018), https://www.canada.ca/en/global-affairs/news/2018/01/the-government_ofcanadabringingleadershiptoresponsiblebusinesscond.html.

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The CORE replaces the CSR Counsellor, in place since 2009,⁷⁴ which focused on early prevention and resolution of disputes between companies and communities and assisting Canadian companies in effectively incorporating CSR guidelines, including the United Nations' *Guiding Principles on Business and Human Rights*⁷⁵ and sector-specific CSR guidelines into their operations. The Ombudsperson is supposed to play a complementary role to Canada's National Contact Point (NCP).⁷⁶

The Canadian government has promoted the announced CORE as part of a strengthened government approach to the oversight of Canadian companies operating overseas. While there remain several unknowns, including critical details on the CORE's operating procedures, the government is citing certain changes as reflective of its shift in approach. First, the Ombudsperson will be able to initiate independent fact-finding even in the absence of a complaint and will also be able to engage in collaborative fact-finding. Second, the Ombudsperson will be making recommendations, albeit non-binding, to the complainants and companies. These recommendations can include a public apology, mitigation measures, and changes to corporate policies. Third, the CORE will be required to report publicly throughout the investigation and during the period of implementation of recommendations.

Importantly, as well, in contrast to the CSR Counsellor, which was focused exclusively on the mining, oil, and gas sectors, the CORE's scope will be multi-sectoral and include the garment sector in the first year and expand to other business sectors in subsequent years after the Ombudsperson takes office. What has not changed is the sanction for non-participation or lack of cooperation. As was the case for the CSR Counsellor under Canada's 2014 CSR Strategy, the CORE can recommend denial or withdrawal of trade advocacy services or financing from Canada's Export Development Agency either as an interim measure or final recommendation.⁷⁷

The creation of the Ombudsperson is controversial. While it has been eagerly anticipated by many in the NGO community, others, including industry players, have expressed concerns about the Ombudsperson's

74. *Canadian CSR Ombudsman to Replace CSR Counsellor*, CANADIAN MINING J. (Apr. 1, 2018), <http://www.canadianminingjournal.com/features/canadian-csr-ombudsman-replace-csr-counselor/>.

75. *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (2011), https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

76. The NCP will continue in its role, among other things, to resolve issues through mediation related to the implementation of the OECD Guidelines for Multi-National Enterprises.

77. *Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad*, GLOBAL AFFAIRS CANADA (Nov. 14, 2014), https://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Enhanced_CS_Strategy_ENG.pdf.

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capacity to effectively address what are complex transnational human rights allegations, and the Ombudsperson's ability to provide expeditious remedies where necessary.⁷⁸ The success of the Ombudsperson will ultimately depend as much on the Ombudsperson's ability to successfully leverage and manage relationships across governments (internationally and domestically), within communities, and with both industry and civil society, in addition to the mechanisms of the office. The ability of the Advisory Council to meaningfully advance Canada's approach to responsible business conduct, too, will depend in part on whether, as heralded by the government, its creation has initiated "a new era of cooperation between government, business and non-governmental organizations to ensure greater respect for human rights."⁷⁹

B. NEPAL'S SAFE MOTHERHOOD AND REPRODUCTIVE HEALTH RIGHTS ACT

In October 2018, the House of Representatives of Nepal passed the Safe Motherhood and Reproductive Health Rights Act, 2018 (the Act).⁸⁰ This marks years of transition in Nepal's modern history from a monarchy to a multi-party democracy set up to protect the rights of all people. A necessary precursor to the Act was the adoption of the new Constitution of Nepal in 2015.⁸¹ Article 35 of the Constitution defines the right to health to include the right to free basic and emergency health services,⁸² and Articles 38 and 39 define the rights of women and children.⁸³ The Constitution also defines the rights of marginalized classes of citizens, specifically guaranteeing their right to health.⁸⁴

78. See, e.g., Mora Johnson, *The Promise and Limitations of the New Canadian Business and Human Rights Ombudsperson*, MORA JOHNSON LAW (Jan. 26, 2018), <https://www.morajohnsonlaw.ca/blog/2018/1/26/the-promise-and-limitations-of-the-new-canadian-business-and-human-rights-ombudsperson>.

79. *The Government of Canada Brings Leadership to Responsible Business Conduct Abroad*, *supra* note 73.

80. See Safe Motherhood and Reproductive Health Rights Act, 2018 (unofficial translation available on file with the authors).

81. See NEPAL CONST., http://constitutionnet.org/sites/default/files/2017-07/Constitution-of-Nepal_English_-with-1st-Amendment_2_0.pdf (official English translation by the Ministry of Law, Justice and Parliamentary Affairs of Nepal).

82. *Id.* art. 35.

83. *Id.* arts. 38 – 39.

84. NEPAL CONST. arts. 40 – 42, *amended by* NEPAL CONST. (First Amend.), 2016. (Art. 40 defines the rights of the Dalit minority; Art. 41 defines the rights of senior citizens; Art. 42 defines the rights of "the economically, socially or educationally backward women, Dalit, indigenous nationalities, Madhesi, Tharu, Muslims, backward classes, minorities, marginalized communities, persons with disabilities, gender and sexual minorities, farmers, labourers, oppressed or citizens of backward regions and indigent Khas Arya" including their right to "special opportunities and benefits in . . . health.").

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The new Act enumerates the following fundamental human rights related to family planning: pregnancy, childbirth, and the postpartum period.⁸⁵ Article 19 of the Act defines the right to privacy of information and documents related to the reproductive health of a woman and the services and consultations provided to her.⁸⁶ The right to confidentiality of information related to the healthcare of a person seeking reproductive health services is further specified in Article 4.⁸⁷ Articles 11, 12, and 16 define the right to information and consent.⁸⁸ The law provides for the right to information about reproductive health.⁸⁹ It requires consent for family planning, contraception, and abortion, while prohibiting the use of force, threat, grooming, or greed.⁹⁰ The Act also provides prohibition against discrimination based on origin, religion, tribe, caste, sex, community, occupation, profession, sexual orientation, physical or health condition, disability, marital status, pregnancy, belief, affected by any disease or risk to it, reproductive health morbidity, personal relations, or any other factor (Art. 18). In addition, Article 28 of the Act stipulates that services should be adolescent and disability-friendly.⁹¹

The Act includes protection for safe motherhood and newborn health (Arts. 5 – 14), safe abortion (Art. 15),⁹² and reproductive health morbidity (Arts. 20 – 21).⁹³ It further guarantees budget allocations to support the application of the law (Arts. 22 and 23)⁹⁴ and creates criminal and civil liability for offenses (Arts. 25 – 27).⁹⁵

There is a general prohibition against identifying the sex of the fetus during pregnancy and termination of pregnancy is prohibited after such identification (Art. 17).⁹⁶ The law protects children's rights by ensuring that each child is registered at the facility where they were born and is issued a birth certificate with their name on it (Art. 9).⁹⁷ Maternity leave is provided to women after childbirth, as well as to women who experience stillbirth or neonatal loss (Art. 13).⁹⁸

85. *See id.*

86. *See* NEPAL CONST., *supra* note 81, art. 19.

87. *Id.* art. 4.

88. *Id.* arts. 11 – 12, 16.

89. *Id.* art. 38.

90. *Id.*

91. *Id.* art. 28.

92. *See generally* Rachel Rebouche, *The Limits of Reproductive Rights in Improving Women's Health*, 63 ALA. L. REV. 1, 3 – 4 (2011) (for background information on the long road to legalization of abortion in Nepal).

93. NEPAL CONST., *supra* note 81, arts. 20 – 21.

94. *Id.* arts. 22 – 23.

95. *Id.* arts. 25 – 27.

96. *See* Sarmila Shrestha, *Laws and Policies on Reproductive Health Rights with Particular Reference to Judicial Response through Public Interest Litigation in Nepal*, 4 NJA L.J. 133, 135 – 36 (2010) (citing male preference attitudes and sex-selective abortions).

97. NEPAL CONST., *supra* note 81, art. 9.

98. *Id.* art. 13.

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The Act confers a responsibility on healthcare institutions to record the number of maternal deaths, stillbirths, and abortions (Art. 9).⁹⁹ It provides for the right of women to receive services and care for reproductive morbidity, including risk mitigation measures after surgery (Art. 20).¹⁰⁰ Further, it specifically prohibits stigma associated with reproductive morbidity, by prohibiting divorce, banishment, or displacement from the home due to a woman's reproductive health morbidity (Art. 21).¹⁰¹

**C. U.K. LITIGATION INVOLVING A STATE'S DUTY TO PROTECT
TRAFFICKED REFUGEES**

Legal victories¹⁰² in the United Kingdom (U.K.) have set precedent for protecting noncitizen victims of trafficking in 2018. In June, the Court of Appeal ruled in favor of a fifteen-year-old Vietnamese boy who was identified as a victim of trafficking, deciding that the Government did not comply with the obligation of protecting trafficked persons under Article 4 of the European Convention on Human Rights (ECHR). *R-TDT v. SSHD*¹⁰³ is the first case in the U.K. to hold the State accountable for breaching its duty to provide protective measures.¹⁰⁴

In September 2015, the Appellant and fifteen other males were found by police in the back of a truck and detained by immigration authorities.¹⁰⁵ He was assumed to be over eighteen and was not given an age or assessed as a potential victim of trafficking. In October, the Appellant met with an attorney, who perceived him to be underage and a trafficking victim.¹⁰⁶ He told the attorney that his date of birth was December 5, 1999.¹⁰⁷ The attorney informed the U.K. Home Office and initiated proceedings for judicial review.¹⁰⁸ Within two weeks, the High Court reviewed the case and

99. *Id.* art. 9.

100. *Id.* art. 20.

101. See, e.g., Payal Shah, *Uterine Prolapse and Maternal Morbidity in Nepal: A Human Rights Imperative*, 2 DREXEL L. REV. 491 (2010) (discussing uterine prolapse as an example of severe morbidity that has been addressed by the Nepal Supreme Court as a human rights violation in the groundbreaking case of Prakash Mani Sharma v. Gov't of Nepal, Writ No. 064 (2008) (SC) para. 48)).

102. Diane Taylor, *Modern Slavery Ruling May Lead to More Victims Getting Leave to Remain*, GUARDIAN (Feb. 14, 2018), <https://www.theguardian.com/law/2018/feb/14/modern-slavery-ruling-may-lead-to-more-victims-getting-leave-to-remain>.

103. R (on the app. of TDT, by his litigation friend Tara Topteagarden) v. Secretary of State for the Home Dept., [2018] EWCA (Civ) 1395 [hereinafter *R-TDT v. SSHD*].

104. May Bulman, *Home Office Broke Law by Failing to Protect Child Trafficking Victim, Court Rules in Landmark Case*, INDEPENDENT (June 19, 2018), <https://www.independent.co.uk/news/uk/home-news/child-trafficking-home-office-victim-protection-breach-court-appeal-a8406781.html>.

105. *R-TDT*, EWCA (Civ) 1395, [1(1)].

106. *Id.*

107. *Id.* [1(2)].

108. *Id.*

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granted him temporary admission.¹⁰⁹ On the same day, the Home Office released him from detention without informing his representatives and ignored the attorney's prearranged accommodation with a local agency.¹¹⁰ Litigation was continued in the youth's absence, alleging the State breached its duty under Article 4 by not protecting him from being re-trafficked.¹¹¹

In *Rantsev v. Cyprus and Russia*,¹¹² the European Court of Human Rights (ECHR) determined that *trafficking* falls within the scope of Article 4. In order for a positive obligation to emerge, it must be demonstrated that the State knew, or should have known, of conditions that rise to *credible suspicion* that an individual had been, or was at genuine and impending danger of, being trafficked.¹¹³ *Rantsev* clarifies that Articles 2 – 4 of ECHR involve a procedural responsibility for State authorities to investigate potential trafficking.¹¹⁴ The obligation to investigate is not dependent upon the victim's complaint, rather, once the authorities are aware of the matter, they must act.¹¹⁵ Together with the mandate to investigate, the State must provide assistance when a "competent authority" has "reasonable grounds" to suspect a person has been deprived of their right to life or subjected to inhumane treatment.¹¹⁶

In *R-TDT-v-SSHD*, the Court identified threshold tests for the *protective duty* under ECHR Article 4 and the *investigative duty* under the Council of Europe Trafficking Convention and Directive 2011/36/EU.¹¹⁷ The protective duty has a *credible suspicion* standard and the investigative duty has a *reasonable grounds* standard.¹¹⁸

The issue on appeal involved *credible suspicion* and whether the Vietnamese minor was at direct risk of being re-trafficked.¹¹⁹ Lord Justice Underhill determined the threshold was crossed when the minor's attorney communicated to the Home Office her concerns about the minor's age and his account of travelling to the U.K. from Russia.¹²⁰ The minor met the psychological indicators of a trafficked victim, as evaluated by the Refugee Council, described in the Home Office procedures.¹²¹ The court also noted that the high statistics of Vietnamese boys trafficked to the U.K. for labor

109. *Id.* [1(6)].

110. *Id.* [1(7)].

111. *R-TDT*, EWCA (Civ) 1395, [1].

112. *Rantsev v. Cyprus & Russia*, App. No. 25965/04 (Eur. Ct. H.R. Jan. 7, 2010).

113. *Rantsev*, 25965/04 ¶ 286.

114. *Id.* ¶ 288.

115. *Id.*

116. Directive 2011/36/EU, of the European Parliament and of the Council of 5 April 2011 on Preventing and Combating Trafficking in Human Beings and Protecting its Victims, and Replacing Council Framework Decision 2002/629/JHA, 2011 O.J. (L 101) 1, 8, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0036&from=EN>.

117. *R-TDT*, EWCA (Civ) 1395, [31].

118. *Id.*

119. *Id.* [76], [77].

120. *Id.* [78].

121. *Id.*

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exploitation was sufficient evidence to raise *credible suspicion*.¹²² The central criticism was that even if the Appellant were an adult, if he was found to be a potential trafficking victim, the Home Office should not have released him without implementing protection to prevent re-trafficking.¹²³

R-TDT v. SSHD sets a new standard of practice for the U.K. Secretary of State for the Home Department to assess the potential risk of an individual being re-trafficked.¹²⁴ And, it asserts credible suspicion when the individual is a member of a class that is frequently trafficked.¹²⁵ This case reveals the systemic failure of protecting trafficking victims, namely refugees, and the necessity of judicial authorities to right government wrongs.

**D. EROSION OF WOMEN’S RIGHTS IN U.S. IMMIGRATION CASES
INVOLVING ASYLUM SEEKERS**

Worldwide, women continue to suffer from discrimination, and they are often denied the opportunity of being equal to men in all aspects of daily living. The recent decision in *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018) reinforces the wrongful belief that domestic violence and violence against women are private matters.¹²⁶

The Executive Office of the United Nations High Commissioner for Refugees (UNHCR) addressed the need for special training on gender-related issues¹²⁷ and called upon states to adopt a gender-sensitive interpretation of the 1951 UN Refugee Convention and its 1967 Protocol. It also referenced its 2002 “Guidelines on International Protection: Gender Related Persecution Within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees.”¹²⁸ To properly evaluate the claims of women, one must be receptive to the issue of gender discrimination and inequality. To receive asylum in the United States, applicants need to meet the definition of “refugee;”¹²⁹ an applicant qualifies as a refugee if he is unable or unwilling to return to his home country because of a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The category of Particular Social Group (PSG) has never been exactly defined. Neither the U.S. Immigration and Nationality Act nor the 1951 UN Refugee Convention define PSG. The most relevant

122. *Id.*

123. *R-TDT*, EWCA (Civ) 1395, [84], [86].

124. *Id.* [41].

125. *Id.* [47].

126. *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018), <https://www.justice.gov/eoir/page/file/1070866/download>.

127. Executive Committee of the High Commissioner’s Programme, *Conclusion on Protection from Sexual Abuse and Exploitation No. 98 (LIV)–2003*, UN REFUGEE AGENCY (Oct. 10, 2003), <https://www.unhcr.org/excom/exconc/3f93b2c44/conclusion-protection-sexual-abuse-exploitation.html>.

128. *Id.*

129. 8 U.S.C. § 1101(a)(42).

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interpretation of PSG in the United States was given in the Board of Immigration Appeals' (BIA) decision in *Matter of Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985), where the Board held that a particular social group is composed of members who share a common immutable characteristic, such as sex, color, kinship ties, or past experience that a member either cannot change or that is so fundamental to their identity or conscience of the member that he or she should not be required to change it.¹³⁰ This standard remained unchanged for many years, until more restrictive PSG requirements were introduced.¹³¹

With regard to domestic violence, one of the most significant decisions was *Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (B.I.A. 2014), where the BIA specifically recognized domestic violence based asylum claims and held that "married women in Guatemala who are unable to leave their relationship" can constitute a cognizable particular social group.¹³² But this changed in 2018 when the BIA and the U.S. Attorney General (AG) issued a number of decisions significantly limiting PSGs. Specifically, in *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018), the AG overruled the precedent established in *A-R-C-G-*, and found that in *A-R-C-G-*, the BIA did not accurately apply the Board's precedents regarding social distinction and particularity and that "[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum."¹³³ By so ruling, the AG made it less likely that a woman victim of violence and discrimination who is persecuted because of her gender will win asylum on the merits.

It is fundamental that attorneys adopt a creative approach when dealing with PSGs regarding abused women. In spite of *Matter of A-B-*, PSGs can still viably be proposed and upheld if they are cognizable under the BIA's test of immutability, particularity, and social distinction as established in *Matter of M-E-V-G-*, 26 I. & N. Dec. 227 (B.I.A. 2014).¹³⁴ Additionally, while *Matter of A-B-* affects PSGs, many domestic violence cases can also be presented and based on political opinion or imputed political opinion. Numerous women may be persecuted because their attackers intend to punish them for an imputed political opinion of opposition to female subjugation, or because the victim opposed practices that discriminate on the basis of gender, or on the basis of their feminist beliefs. Linking a respondent's persecution to an imputed political opinion is subject to significant discretion, but an argument may be made that for purposes of asylum, a political opinion does not need to be manifested expressly and can instead be nonverbally communicated. The respondent is not required to act on her political opinion, which can be imputed by the persecutors. A

130. *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

131. *See Matter of S-E-G-*, 24 I. & N. Dec. 579 (B.I.A. 2008); *Matter of E-A-G-*, 24 I. & N. Dec. 591 (B.I.A. 2008).

132. *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 388 (B.I.A. 2014).

133. *Matter of A-B-*, *supra* note 126 at 320.

134. *Matter of M-E-V-G-*, 26 I. & N. Dec. 227 (B.I.A. 2014).

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woman victim of domestic violence can often be found to have the imputed political opinion that ‘men do not have the right to dominate’ and it can be argued that she showed her political opinion by fleeing the country. It is crucial to avoid “circular” PSGs, i.e., a PSG primarily based on the past harm suffered. In *Kante v. Holder*, 634 F.3d 321 (6th Cir. 2011) for example, the court found that the PSG of “women subjected to rape as a method of government control” did not qualify because the applicant was circularly defined by the persecution suffered.¹³⁵ If the harm defines the social group, the PSG is not cognizable. In the light of *Matter of A-B-* and existing case law, it appears that to make gender-based asylum claims successful, it is vital to elaborate PSG definitions tied with political opinions.

E. BLASPHEMY LAWS AND HUMAN RIGHTS VIOLATIONS OF
RELIGIOUS MINORITIES IN YEMEN

Enshrined in the International Covenant on Civil and Political Rights¹³⁶ and the Universal Declaration of Human Rights¹³⁷ is the idea that freedom of expression and the freedom of religion are integral to sustaining human rights. Therefore, domestic laws that criminalize these inherent human rights, such as blasphemy laws, are fundamentally inconsistent with international human rights law. Generally, blasphemy is defined as oral and written assertions that offend religious beliefs, practices, or a deity.¹³⁸ For example, Article 194(1) of the Penal Code of Yemen criminalizes “whoever publicly broadcasts (i.e., communicates) views including ridicule and contempt of religion, in its beliefs, practices, or teachings.”¹³⁹ Further, Article 195 provides for a weightier punishment “if Islam is the religion or doctrine that is the subject of ridicule, contempt, or belittlement.”¹⁴⁰

Evidently, Yemen’s Penal code favors one religion over others and punishes those who attempt to freely express their views. Notably, the term “views,” as employed in Yemen’s Penal Code, is not limited to ridicule and contempt of religion; the vague language used in the Penal Code leaves religious minorities unprotected and subject to arbitrary persecution. The

135. *Kante v. Holder*, 634 F.3d 321, 326 (6th Cir. 2011).

136. International Covenant on Civil and Political Rights art. 18, Dec. 16, 1966, 999 U.N.T.S. 17.

137. G.A. Res. 217 (III) A, art. 18, Universal Declaration of Human Rights (Dec. 10, 1948).

138. See Joelle Fiss & Jocelyn Getgen Kestenbaum, *Respecting Rights? Measuring the World’s Blasphemy Laws: Abbreviated Version*, UNITED STATES COMMISSION ON RELIGIOUS FREEDOM 1 (July 2017), <https://www.uscirf.gov/sites/default/files/Blasphemy%20Laws%20Report.pdf>.

139. *Blasphemy and Relatable Laws in Selected Jurisdiction*, LAW LIBRARY OF CONGRESS 1, 44 (Jan. 2017), <https://www.loc.gov/law/help/blasphemy/blasphemy.pdf> (quoting Presidential Decree of Law 12-1994, al Jarida al Rasmiyya, vol. 19, 12 [Oct.] 1994, <http://www.wipo.int/edocs/lexdocs/laws/ar/ye/ye007ar.pdf> (in Arabic) archived at <https://perma.cc/DQG9-FHGF>).

140. *Id.* at 44.

case of Mr. Hamed Kamal bin Haydara¹⁴¹ exemplifies how human rights are violated under this pretext.

On December 3, 2013, Mr. Haydara was arrested in Shabwa province, Yemen, but he was not officially charged until January 8, 2015.¹⁴² The official indictment charging Mr. Haydara included religious practices that were deemed violations of domestic laws.¹⁴³ For example, Mr. Haydara was charged with offering literacy classes that followed a curriculum that is incompatible with Islam and was prepared by the Bahá'í Universal House of Justice¹⁴⁴ in Israel. Further, during the initial months of his unlawful incarceration, Mr. Haydara suffered torture by electrocution¹⁴⁵ and daily beatings, which resulted in his loss of hearing and debilitating health. In response, the UN Human Rights Council issued a resolution¹⁴⁶ calling for the release of all Bahá'í prisoners.¹⁴⁷

Despite the urging of the UN, on January 2, 2018, Mr. Haydara was sentenced to death in absentia; his offense, communicating with the House of Justice.¹⁴⁸ Moreover, the human rights abuse suffered by Mr. Haydara is a departure from the obligations found in the Convention on Civil and Political Rights, which Yemen acceded to on February 9, 1987.¹⁴⁹ Significantly, it is important to underscore that even though Mr. Haydara's case was adjudicated under Houthi rebel authority, non-state actors, especially those with some level of territorial control, are still subject to international obligations that protect human rights.¹⁵⁰

F. LOSS OF HUMAN RIGHTS IN CAMBODIA

2018 saw the rule of law regress in Cambodia when Prime Minister Hun Sen dismantled all remaining institutional checks on executive power by deploying the state's powers, armed forces, and legal system to eliminate political challengers. Cambodia's governmental institutions and civil society were rebuilt from scratch by the UN following genocide under Pol Pot's

141. *The Case of Hamed Bin Haydara*, BAHÁ'Í INT'L COMMUNITY (Jan. 18, 2018), <https://www.bic.org/situation-in-yemen/Case-Hamed-Bin-Haydara-March-2017>.

142. *Id.*

143. *Id.*

144. See THE UNIVERSAL HOUSE OF JUSTICE: AN OFFICIAL WEBSITE OF THE BAHÁ'Í FAITH, <https://universalhouseofjustice.bahai.org/> (last visited Nov. 12, 2018).

145. *Situation of the Bahá'ís in Yemen*, BAHÁ'Í INT'L COMMUNITY (Mar. 22, 2018), <https://www.bic.org/statements/situation-bahais-yemen>.

146. Human Rights Council Res. 36/31, Human Rights, Technical Assistance and Capacity-Building in Yemen, U.N. Doc. A/HRC/RES/36/31 (Sep. 29, 2017).

147. *Id.* ¶ 7.

148. *The Case of Hamed Bin Haydara*, *supra* note 141.

149. *Convention on Civil and Political Rights: Status*, UN TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND#EndDec (last visited Oct. 29, 2018).

150. S.C. Res. 2140, ¶ 9 (Feb. 26, 2014); see also S.C. Res. 2216, ¶ 8 (Apr. 14, 2015).

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Khmer Rouge regime.¹⁵¹ Modern Cambodia was born in 1993 with the creation of the United Nations Transitional Authority in Cambodia (UNTAC).¹⁵² UN Security Council Resolution 745 tasked UNTAC with establishing a government that safeguarded human rights, rule of law, and free and fair elections.¹⁵³

Until 2018, Hun Sen maintained the semblance of protecting human rights. But the campaign strategy wielded by the state in the election held on July 29, 2018, to ensure political dominance for the Cambodian People's Party (CPP), uprooted the human rights infrastructure.¹⁵⁴ The government detained local journalists and expelled members of the foreign media. Kem Sokha, a former president of the Cambodian National Rescue Party (CNRP), the only credible political opposition, was jailed under charges of "treason."¹⁵⁵ Opposition lawmakers fled the country. The government filed a lawsuit against the CNRP seeking its dissolution for what amounted to basic political campaigning.¹⁵⁶ In November 2017, Cambodia's Supreme Court granted the government's petition and 118 CNRP candidates were banned from participating in the election.¹⁵⁷

Independent newspaper Phnom Penh Post was forcibly sold to an investor with close ties to the Cambodian government in May 2018 after receiving an invoice for unpaid taxes.¹⁵⁸ Under a new media Code of Conduct promulgated by Cambodia's National Election Commission, journalists were forbidden from "publishing or broadcasting news that affects national security, political and social stability" or "broadcasting news leading to confusion and confidence loss in the election."¹⁵⁹ In June 2018, the Commission threatened prosecution of anyone calling for a boycott of the elections.¹⁶⁰

151. Brad Adams, *Cambodia's Dirty Dozen*, HUMAN RIGHTS WATCH (June 27, 2018), <https://www.hrw.org/report/2018/06/27/cambodias-dirty-dozen/long-history-rights-abuses-hun-sens-generals>.

152. *Id.*

153. S.C. Res. 745 (Feb. 28, 1992).

154. Prak Chan Thul & Amy Sawitta Lefevre, *Cambodian PM's Party Claims Election Rout, Opposition Sees 'Death of Democracy'*, REUTERS (July 29, 2018), <https://www.reuters.com/article/us-cambodia-election-idUSKBN1KK01C>.

155. Prak Chan Thul, *Cambodian Government Files Lawsuit to Dissolve Main Opposition Party*, REUTERS (Oct. 6, 2017), <https://www.reuters.com/article/us-cambodia-politics/cambodian-government-files-lawsuit-to-dissolve-main-opposition-party-idUSKBN1CB0U1>.

156. *Id.*

157. Samrang Pring, *Cambodia: July 29 Elections Not Genuine*, HUMAN RIGHTS WATCH (July 25, 2018), <https://www.hrw.org/news/2018/07/25/cambodia-july-29-elections-not-genuine-0>.

158. *Id.*

159. Human Rights Council, Rep. of the Special Rapporteur on the Situations of Human Rights in Cambodia, ¶ 70, U.N. Doc. A/HRC/39/73/ Add. 1 (Sept. 7, 2018), <https://undocs.org/A/HRC/39/73>.

160. See Mech Dara, *Regulator 'Not Forcing' Vote Texts*, PHNOM PENH POST (June 21, 2018), <https://www.phnompenhpost.com/national/regulator-not-forcing-vote-texts>.

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In the final months, Cambodian active duty military personnel began actively campaigning for the CPP.¹⁶¹ Police organized rallies in shows of force and instructing the population who to vote for. Rallies were widespread, despite military personnel being banned from participating in political activities under relevant law.¹⁶² Hun Sen began hinting towards violence and chaos should the opposition prevail.

In an election that was neither free nor fair, the CPP took every seat in parliament. The National Election Committee revealed that 8.4 percent of ballots or 594,843 votes cast were deliberately spoiled over a lack of genuine choice.¹⁶³ Kem Sokha remained under house arrest with charges of “treason” still pending.¹⁶⁴ The United States and European Union had suspended election aid and election monitoring assistance, and proposals have been raised in legislatures in Europe and the United States for financial sanctions against members of the regime and curtailing of foreign aid.¹⁶⁵

UNTAC involved forty-six UN members in rebuilding Cambodia and produced a constitution that literally restates the Universal Declaration of Human Rights.¹⁶⁶ The UNHCR maintained an office in Phnom Penh following withdrawal of UNTAC in 1993 and regularly renewed its mandate with the Cambodian government by advising, cooperating, and implementing human rights. The 2018 elections took place in plain sight of the UNHCR, with troubling implications for future international human rights projects.

161. Samrang, Pring, *Cambodia: Military, Police Campaigning for Ruling Party*, HUMAN RIGHTS WATCH (July 12, 2018) <https://www.hrw.org/news/2018/07/12/cambodia-military-police-campaigning-ruling-party>.

162. Preah Reach Kram No. CS/RKM/1197/005 (Nov. 16, 1997), art. 9.

163. Prak Chan Thul, *Spoilt Cambodian Ballot Papers Seen As Protest Over ‘Sham’ Elections*, REUTERS (July 30, 2018), <https://www.reuters.com/article/us-cambodia-election-spoilt/spoilt-cambodian-ballot-papers-seen-as-protest-over-sham-election-idUSKBN1KK184>.

164. Meas Sokchea, *Court to Decide Kem Sokha Fate*, PHNOM PENH POST (Nov. 5, 2018), <https://www.phnompenhpost.com/national/court-decide-kem-sokha-fate>.

165. Joshua Kurlantzick, *Cambodian Politics Enters its Post-Election Phase*, COUNCIL ON FOREIGN RELATIONS (Sept. 10, 2018), <https://www.cfr.org/blog/cambodian-politics-enters-its-post-election-phase>.

166. 1993 CONST. Cambodia, art. 31.

Life Sciences & Health Law

EDITOR: CARLY TOEPKE

CONTRIBUTORS: KATRIN HANSCHITZ, YEVGENIYA OCHERETKO,
AND DANNY SHEBACLO*

This Article updates selected international legal developments relating to health and life sciences in 2018.

I. African Updates

A. MADAGASCAR

At the beginning of 2018, Madagascar passed the Reproductive Health and Family Planning Law.¹ This law discards colonial era prohibitions on the promotion of contraception and recognizes reproductive health and family planning as basic human rights. This new law updates the legal framework and aligns it with the government's dedication to protect the reproductive well-being of the Malagasy people. It also includes provisions to give health providers the authority to promote family planning and reproductive health in the adolescent population. Currently, one out of three girls become pregnant before their eighteenth birthday. The new law authorizes health providers to offer advice regarding contraception to all patients, regardless of the patient's age. Other aspects of the law promote family planning, outreach campaigns, bolster community lead services, and make contraceptive commodities, including emergency contraception, more widely available. This law marks a change in governmental ideology and realigns it to address a public health concern.

B. SOMALIA

Currently, in Somalia, there is only one health care professional per every 2,500 people. The World Health Organization, on November 8, met with the Somalian government to develop a roadmap to attain universal health

* Contributors to the 2018 YIR Life Sciences and Health Law Committee are: Katrin (Knoetzel), Yevgeniya Ocheretko (Arzinger), Danny Shebacló (student, University of Texas School of Law LL.M. '19), Carly Toepke, *editor* (University of Texas School of Law).

1. Journal officiel de la République démocratique de Madagascar [Official Journal of the Democratic Republic of Madagascar] is not publicly accessible. *See generally* Reproductive Health and Family Planning Law, 04-HCC / D3 (2018) (Madag.); *see also* *Madagascar Passes Landmark Reproductive Health and Family Planning Law*, HEALTH POLICY PLUS <http://www.healthpolicyplus.com/madagascarHFPLaw.cfm> (last visited Apr. 9, 2019).

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coverage in the country.² The goal of this roadmap is to offer essential and quality healthcare to every Somalian citizen without the imposition of a financial burden. Led by the Somalian Ministry of Health, the roadmap implements a collaboration between government representatives, United Nations (UN) agencies, and nongovernmental organizations to review the current health situation and host a joint summit to construct a plan to effectively move forward. The Director-General for the Somali Ministry of Health, Dr. Abdullahi Hashi, outlined in a resolution the importance and necessity of developing an effective roadmap with international support.³ The international partners, in developing this roadmap, considered options to finance the universal healthcare system, to enact true government reform, and to deliver essential and important health services. Somalia has reiterated its dedication to furthering the health of its people through new legislation.

C. SOUTH AFRICA

South Africa is proposing a State Liability Amendment Bill, which may have consequences for medical malpractice claimants.⁴ This Bill limits and structures the payment of a victim's damages from a medical malpractice claim against a state hospital. This Amendment was triggered after an increase in medical malpractice claims against the state that have caused budgetary issues.

D. TANZANIA

In the year 2017, there were more than 500,000 "people of concern" in Tanzania, including refugees and "asylum seekers."⁵ Malaria is an ongoing epidemic and accounts for a significant percentage of outpatient visits in refugee camp health facilities.⁶ Additionally, the Ministry of Health and the World Health Organization report that new cases of cholera continue to

2. World Health Organization [WHO], WHO and Somali Government roll out process to deliver quality health services to all Somalis, <http://www.emro.who.int/pdf/som/somalia-news/quality-health-services.pdf?ua=1>.

3. See Qorshaha Qaranka ee lagu heli karo Caymiska Caafimaadka ee Universal [National Plan to Attain Universal Health Coverage], Bolletino ufficiale della Repubblica Democratica Somala [Official Bulletin of the Democratic Republic of Somalia], (Nov. 2018) (Somal); *see also id.*

4. *See generally* State Liability Amendment Bill 16 of 2018 (S. Afr.) <http://www.justice.gov.za/legislation/bills/2018-B16-StateLiability.pdf>.

5. US Agency for Int'l Dev., *Tanzania: Food Assistance Fact Sheet* (Sept. 30, 2018), <https://reliefweb.int/sites/reliefweb.int/files/resources/FFP%20Fact%20Sheet%20Tanzania%2009.30.18.pdf>; *see generally* Tanzania Refugee Situation Public Health and Nutrition Strategy 2016–2018, UNHCR (2016), <https://data2.unhcr.org/es/documents/download/52191>.

6. *See* UNICEF Annual Report 2017 Burundi.

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break out, totaling 32,285 since 2015.⁷ Although public health law enforcement has been bolstered due to environmental health officers and closing vendors not in compliance, issues continue to arise. In addition, to fight the recent outbreak of the Ebola Virus Disease, thermal scanners are at all the ports of entry along the borders of the DRC.

E. ZIMBABWE

In Zimbabwe, the colonial-era public health laws have been cited as not guaranteeing human rights to all and the dignity and equality of everyone. Particularly, Article 35 of the Public Health Act Amendment Bill could put adolescent girls' health at risk, as it denies anyone under eighteen years old to consent to receiving health information and services.⁸ The age of consent is sixteen years old; but, girls seeking access to sexual and reproductive health information and services are denied access until they reach eighteen years old, the prescribed age of capacity in the Bill.⁹

II. Asian Updates

A. PEOPLE'S REPUBLIC OF CHINA

The 2018 Draft Amendment to the "Regulations on the Supervision and Administration of Medical Device" introduced possible changes that will significantly affect all the market players in the medical device industry.¹⁰ These changes aim to improve the Market Authorization Holder (MAH) mechanism, reform the clinical trial management system, and change post-marketing regulatory requirements. This draft was released by the Central Office of the Communist Party of China and the Office of the State Council (f/k/a China Food and Drug Administration).

In Chinese law, a "right to health" has been a negative civil right in civil law, but in 2018, a draft of the Basic Healthcare and Health Promotion Law, has proposed a "right to health" as a positive social right by National People's Congress Education, Science, Culture and Public Health Committee to the National People's Congress.¹¹ If passed, this will create a

7. World Health Organization Tanzania [WHO Tanz.], Working Together to Promote Health, Annual Report (2017), https://afro.who.int/sites/default/files/2018-08/WHO%20Annual%20Report%202017_0.pdf.

8. See Public Health Bill (2017), (Zimb.), <https://www.parlzim.gov.zw/component/k2/public-health-bill-2017>.

9. Amnesty Int'l, "Lost Without Knowledge" Barriers to Sexual and Reproductive Health Information in Zimbabwe, AI Index AFR 46/7700/2018 at 7, Jan. 26, 2018, <https://www.amnesty.org/en/documents/afr46/7700/2018/en/>.

10. See *generally* Yiliáo qixiè jiāndu guānlǐ tiáolǐ xiūzhèng àn cǎo'àn (医疗器械监督管理条例修正案草案) [Draft Amendment to the Medical Device Supervision and Administration Regulations] (promulgated by Ministry of Just., June 25, 2018, effective June 25, 2018) (China).

11. See Jiben yiliáo wèishēng yu jiànkāng cùjìn fǎ cǎogāo (基本医疗卫生与健康促进法 草稿) [Basic Health Care, Medicine and Health Promotion Law (Draft)] (promulgated by Standing

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“right to health” as a basic human right in Chinese law, advancing health care on both institutional and strategic levels. It may even develop into a constitutional right. With epidemiological studies showing that the Chinese population is aging, this right becomes even more central.

B. JAPAN

In Japan, tobacco regulations became stricter as Act No. 103 of 2002 amended the Health Promotion Act.¹² This amendment aims to protect people who want to avoid second-hand smoke when in indoor facilities.¹³ Facilities used by “many people” are obligated to make the indoor area smoke-free, with only a few exceptions.¹⁴ The amended Act will ban smoking indoors at schools, hospitals, and government offices within eighteen months of the implementation date. Smaller establishments, not owned by large corporations, will be given a grace period of execution. Failure of an individual to stop smoking in a smoke-free area is punishable by fine of approximately USD \$2,700.

C. MALAYSIA

The government in Kuala Lumpur enacted an amendment to the law that forces cancer patients to pay high rates for treatment at public hospitals if they are referred there by private or university hospitals. This 2017 amendment to the Fee (Medical) (Amendment) Order is now causing issues in 2018 and is creating financial difficulties for patients seeking treatment.¹⁵ The government has been urged to standardize the fee structure in all government hospitals.

D. SOUTH KOREA

In an effort to fight the overconsumption of caffeine, South Korea will introduce new regulations banning the sale of coffee, and other caffeinated drinks, on all school campuses across the country.¹⁶ The Ministry of Food and Drug Safety (MFDS) advocated for this ban, hoping that students facing intense academic pressure will adopt healthier sleeping and eating habits. South Korean consumption of caffeine has already surpassed all other Asian

Comm. Nat'l People's Cong.), Dec. 29, 2017 (China); *see also* Zijun Zhao, *Recent Legislative Progress on Healthcare Law in China: Establishing “Right to Health” as a Basic Right*, OXFORD HUMAN RIGHTS HUB (May 18, 2018), <http://ohrh.law.ox.ac.uk/recent-legislative-progress-on-healthcare-law-in-china-establishing-right-to-health-as-a-basic-right/>.

12. *See* Kenko Zoshin-ho [Health Promotion Act], Law No. 78 of 2018, art. 1, para. 1 (Japan).

13. *Id.*

14. *Id.*

15. *See generally* Perintah Fi (Perubatan), [Fees (Medical) (Amendment)] 2017 Order, P.U. (A) 47 (Malay.).

16. Eolin-i sigsaenghwal-anjeongwanli teugbyeolbeob [Special Act on Safety of Children's Eating and Living Safety], Act. No. 14263, May 29, 2016, *amended by* Act. No. 15485, Mar. 13, 2018, (S. Kor.).

countries and continues to increase. Despite being aware of the risks of excessive caffeine intake, according to a MFDS conducted study, more than half of South Korean students consume some sort of caffeinated beverage in an effort to stay awake longer and study more arduously. The law became effective on September 14 and attempts to combat the increasing number of students seeking treatment for caffeine related heart palpitations. Students have also been complaining of caffeine related dizziness, tachycardia, sleep disorders, and debilitating nervousness as other symptoms; however, the MFDS has also linked the increase rate of childhood obesity and diabetes to the increased consumption of sugary and dairy based caffeinated drinks. Earlier this year, South Korea also banned the sale of energy drinks in schools.

In another effort to increase awareness and public health in the youth population, South Korea also prohibited advertisement for fast food restaurants, sugary snacks, and high caffeine beverages during the times that most children's programs air. South Korean childhood obesity has increased more than 13% in the last six years, catalyzing the strict legislative response.

III. Caribbean Updates

A. CAYMAN ISLANDS

On November 14, the Cayman Islands Legislative Assembly voted to amend the Penal Code and introduce into law the Stalking (Civil Jurisdiction) Bill, which clarifies a legal lacuna in this jurisdiction and allows the police to analyze legal patterns of behavior which, when combined, can amount to stalking.¹⁷ The new bill allows for a victim of stalking to petition the courts for a protective order barring all forms of communication and interaction with the stalker either on a temporary or permanent basis.¹⁸ In the Cayman Islands, psychiatric harm can amount to the criminal offenses of either actual bodily harm or grievous bodily harm. Clarifying this lacuna makes the stalker criminally liable for any psychiatric or physical harm caused to the stalked individual. Additionally, as they would be legally protected for the first time ever in this jurisdiction, it is likely that this law will decrease the trauma and mental health detriments endured by victims of stalking. Furthermore, these legislative changes are likely to protect the physical health of the stalked individual because imposing upon the stalker a legal bar of communication and interaction with the stalking victim would likely greatly decrease the victim's risk of assault and battery and the associated subsequent injuries. By ratifying these legislations, the Cayman Islands has taken a huge step forward in its peoples' public health.

17. Stalking (Civil Jurisdiction) Bill 2018, at 1 (Cayman Is.).

18. *Id.* at 2.

IV. European Updates

A. AUSTRIA

In the absence of clear guidance from the European Court of Justice, there has been some uncertainty in Austria – and in many EU Member States – on whether, in pharmaceutical product liability cases turning on “failure to warn,” the information and warnings supplied directly to health care professionals are to be taken into account.¹⁹ In its ruling of 18 February 2018, the Austrian Supreme Court confirmed a decision of the Higher Regional Court of Vienna, which clarified that, with prescription-only medication, the task of assessing the risks, deciding on the suitability of this (type of) medication and warning the patient about side effects, all fall primarily upon the physician.²⁰ The court viewed the manufacturer’s package information leaflet as *additional* information provided to the patient at a later date and secondary to the obligatory, critical, information provided by the prescribing physician.²¹

B. GERMANY

In Germany, as in the rest of the EU, advertising for medicinal products is strictly regulated. Prescription-only medicinal products may be promoted only to healthcare professionals qualified to prescribe or supply them (Sec 10 Advertising of Medicines Act, HWG).²² General advertising of medicinal products to the public is entirely prohibited.²³ The preamble to the Directive clarifies that, in order to safeguard public health, information supplied to users should provide ample consumer protection so that medicinal products may be used correctly on the basis of full and comprehensible information (Recital 40); this public interest justifies the restriction of the principle of freedom of expression.

“Advertising,” is defined in the Directive as “any form of door-to-door information, canvassing activity or inducement designed to promote the prescription, supply, sale or consumption of medicinal products” and is interpreted very broadly by the German and European courts. The term encompasses dissemination on the internet of information relating to medicinal products (ECJ C-421/07, *Damgaard*, in which information was

19. See generally Council Directive 85/374, 1985 O.J. (L 210) 29 (EEC).

20. Oberster Gerichtshof [OGH] [Supreme Court] Feb. 18, 2018, 10 Ob 8/18a, https://rdb.manz.at/document/ris.just.JJT_20180220_OGH0002_0100OB00008_18A0000_000.

21. For more information see generally Katrin Hanschitz, *Austria: “Failure To Warn” In Pharmaceutical Product Liability Cases*, MONDAQ (Nov. 19, 2018), <http://www.mondaq.com/Austria/x/756214/food+drugs+law/Failure+To+Warn+In+Pharmaceutical+Product+Liability+Cases>.

22. Gesetz über die Werbung auf dem Gebiete des Heilwesens [Act on Advertising in the Field of Health Law], Dec. 20, 2016 (Ger.).

23. See Directive 2001/83, of the European Parliament and of the Council of Nov. 6 2001 on the Community Code Relating to Medicinal Products for Human Use, Art. 86 et seq., 2001 O.J. (L 311).

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published by a journalist on his website).” If the message is designed to promote the prescription, supply, sale or consumption of medicinal products, it is advertising for the purposes of that directive. But material that is purely informative, without promotional intent, is not covered by the provisions of that directive relating to advertising of medicinal products.”²⁴

In a recent decision handed down by the Higher Regional Court of Cologne,²⁵ the court was called upon to decide whether public messages pertaining to a prescription-only veterinary product may be permissible if made in reaction to ongoing negative discussions about the product that appeared on social media. While the decision pertains to a veterinary drug, it is more broadly relevant for two reasons. First, under German law, as is reflective of the law in a number of EU member states, veterinary products are subject to the same advertising restrictions as human medicinal products. Secondly, this recent decision further develops the line of jurisprudence introduced by the German Supreme Court in 2009,²⁶ which allowed Pfizer’s public statements in reaction to public discussions on pricing of its (human medicinal) product “Sortis.” Until the European Court of Justice is called upon to address the questions of whether and to what extent manufacturers may make public statements in reaction to negative media, a clear and well-reasoned line of case law in a Member State may help to establish a consistent body of jurisprudence within the EU and provide manufacturers with much-welcome guidance.

In this case, the Appeal Court decided that, when hit by a media “shitstorm” (original phraseology unedited), a pharmaceutical manufacturer may defend its product in publicly disseminated materials. The defendant’s product in the subject case had been massively maligned in social media with incorrect and substantiated allegations about its side effects. In response, the defendant posted several items on Facebook with links to its homepage for “further information.” The competitor’s application for a preliminary injunction was successful in the court of first instance but was largely overturned by the Court of Appeal. The upper court applied an overall assessment of the parties’ constitutional rights, in particular the right to free speech and the freedom to practice a profession on the one hand and the public interests underlying the advertising prohibition on the other hand. To the extent the manufacturer’s Facebook posts and linked information specifically addressed the social media discussions and were, for readers, clearly a response to these, they were held to be permissible, even if the

24. Bundesgerichtshof [BGH][Federal Court of Justice] May 5, 2011, ECJ C-316/09 (Ger.) (discussing the Medicinal products for human use - Directive 2001/83/EC - Prohibition on the advertising to the general public of medicinal products available only on prescription - Definition of ‘advertising’ - Information communicated to the competent authority - Information accessible on the internet, which allowed the literal reproduction of the package leaflet on the manufacturer’s website).

25. Oberlandesgericht Köln [Higher Regional Court of Cologne] Jan. 12, 2018, 6 U 92/17 (Ger.).

26. Bundesgerichtshof [BGH][Federal Court of Justice] March 26, 2009, I Zr 213/06 (Ger.).

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content would otherwise be deemed promotional. To the extent the Facebook post claimed the drug was “safe and effective” and did not sufficiently clearly address the public discussion, the injunction was confirmed.²⁷

C. NORWAY

At the beginning of this year, Norway, which has one of the highest drug overdose mortality rates in Europe, implemented law that no longer punishes individuals suffering from drug addiction, but instead provides help and treatment.²⁸ By doing so, Norway decriminalized drugs and redirected state funding and resources to instead combat the increasing public health risk of drug addiction in the Norwegian jurisdiction. The new legislation focuses on decriminalizing only non-violent drug related offences and promotes investment in treatment programs, after-care facilities, and drug substitution therapies. With the interests of public health at its heart, the aim of this new law is to step away from the relatively ineffective punitive approach to those charged with non-violent drug offences by the criminal justice system and instead offer a curative model. By extending a hand through medical treatment, the Norwegian government hopes to influence societal change with the ratification of this new law. Backed by the majority of the Storting, the Norwegian Parliament, Norway moved to decriminalize the offences of possession, dealing, using illicit drugs. Furthermore, this legislation will test the provision of free heroine, coupled with state regulated education and prevention programs, as a curative therapy for those addicted to heroin.

The Norwegian Parliament’s ultimate goal is to rid drug users of their drug dependency. Policy makers do not advocate the legalization of drugs but, instead, hope to help those struggling with drug use return to a healthy lifestyle. Through these controversial measures, Norway joins Switzerland, the Netherlands, and Denmark in attempting to better the lives of its citizens suffering from drug addiction.

D. UKRAINE

Medical reform is the aim of a new health care financing system in Ukraine. The System will reorganize publicly owned medical institutions, which will obtain more operational and financial autonomy; transition from the mechanism of financing of publicly owned clinics’ infrastructure, payment for the number of hospital beds available at the clinic to

27. For more information, *see generally* Knoetzl, European Union: Are Pharmaceutical Manufacturers Permitted To Publicly Respond To Negative Media?, *mondaq* (Nov. 22, 2018), <http://www.mondaq.com/germany/x/757228/Social+Media/Are+Pharmaceutical+Manufacturers+Permitted+To+Publicly+Respond+To+Negative+Media>.

28. Forskrift om narkotikaprogram med domstolskontroll [Regulations on drug program with judicial review] (Justis-og beredskapsdepartementet) [FOR] (2017) (Nor.).

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reimbursement of cost of medical services actually provided to patients; and procurement of standardized medical services under unified tariffs.²⁹

Private clinics and individual doctors have concluded agreements with National Health Service of Ukraine, a newly created authority playing the key role in the process of financing of healthcare institutions. As a result, the clinics and doctors will receive access to the public funds along with publicly owned medical institutions. The access to public funds should lead to increase of competition, as well as improve the quality of medical services in Ukraine.

Another key element of the reform is the *National essential medicines list (NEML)*. Starting in 2018, medicines included into the NEML have a priority in terms of public procurements. At first, publicly owned medical institutions must cover 100% of their need in medicines included into NEML, and only then may other medicines be procured.

NEML will also play the key role in reimbursement and provision of inpatient medical care, as only medicines included into the NEML will be selected for reimbursement and will be covered for inpatient use.

Additionally, a nation-wide E-health system is currently being implemented to ensure operation of unified and updated registries of patients, clinics, doctors, and medicines in electronic form.

Furthermore, the reform calls for individual licensing of doctors. It is expected that starting in 2020, doctors will have to obtain an individual license for medical practice from the Licensing Council of the Ministry of Health. The Licensing Council of the Ministry of Health consists of 30 doctors, including foreign experts, and is authorized to consider patients' complaints on the doctors' actions, as well as to impose sanctions such as cancelling licenses, or suspending a doctor from practicing. This measure is expected to raise the level of doctors' responsibility when treating the patients.

Finally, the reform requires opening of the transplantology market for private clinics. Currently, only publicly owned healthcare institutions may operate in the sphere of transplantology. New legislation entering into force in 2019 opens the transplantology market to private clinics. Before the Law comes into force, the Cabinet of Ministers should review the Licensing Terms for Conducting Medical Practice in terms of requirements for the material and technical base of the clinics, which will carry out transplantation activities.

29. See generally Про державні фінансові гарантії медичного обслуговування населення [On State Financial Guarantees of Public Health Care], Відомості Верховної Ради [ВВР] [Bulletin of the Verkhovna Rada] No. 2168-VIII dd. Oct. 19, 2017 (Ukr.).

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E. UNITED KINGDOM

In Northern Ireland, the High Court is reviewing a case to have the near-blanket ban on abortion declared unlawful.³⁰ Abortions in Northern Ireland are illegal in all but exceptional medical and mental health circumstances. This comes after the Supreme Court had narrowly dismissed a legal challenge by the Northern Ireland Human Rights Commission regarding the ban, determining that it had no jurisdiction because there was no actual or potential victim of an unlawful act involved in the challenge.

The First Global Ministerial Mental Health Summit took place in the United Kingdom.³¹ It was a widespread event aimed at raising awareness and discussing the future of mental health worldwide, but was criticized for a lack, or very little, involvement of users. In addition, the United Kingdom wanted to present itself as a ‘leader’ on mental health, but according to the concluding observations from the United Nations Convention on the Rights of Persons with Disabilities (CRPD) Committee, the country is far from being a good example.³² At the summit, the Lancet Commission on Global Mental Health and Sustainable Development launched a report on global mental health in the context of the 2030 Sustainable Development Goals (SDGs), consisting of seventeen universal goals to achieve a better and more sustainable future for all.³³ SDG 3, specifically, seeks to ensure “healthy lives and promote well-being for all at all ages.”³⁴ Certain organizations, including Mental Health Europe (MHE), published a critical response to this report.³⁵ MHE’s criticism stems from the idea that the Commission’s report focuses on the biomedical viewpoint of mental health, instead of recognizing both the psychosocial model of mental health and community services.³⁶ MHE goes on in the report to criticize the of the role of inequalities, violence, and poverty as determinants of mental health.³⁷ MHE argues that these factors need to be addressed in order to overcome both social and structural determinants of mental health.³⁸ Furthermore, MHE

30. See *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review* [2018] UKSC 27 (appeal taken from NI).

31. COMMONWEALTH FUND INTERNATIONAL, *World’s First Global Ministerial Mental Health Summit*, Commonwealth Fund International Health News Brief: 2019, No. 2 (Feb. 26, 2019), <https://www.commonwealthfund.org/publications/newsletter-article/2019/feb/worlds-first-global-ministerial-mental-health-summit>, at 1.

32. See Jessica Hullinger, *The good, the bad, and the ugly of England’s universal health care system*, THE WEEK (Dec. 26, 2018), <https://theweek.com/articles/789287/good-bad-ugly-englands-universal-healthcare-system>.

33. See G.A. Res. 70/1 *Transforming our world: the 2030 Agenda for Sustainable Development* U.N. Doc. A/RES/70/1 (Oct. 21, 2015).

34. *Id.* at 14.

35. See generally MENTAL HEALTH EUROPE, *MHE Response to the Lancet Commission Report on Global Mental Health and Sustainable Development*, <https://mhe-sme.org/mhe-response-to-the-lancet-report-gmh/> (last visited Dec. 6, 2018).

36. *Id.* ¶ 7.

37. *Id.* ¶ 10.

38. *Id.*

argues that the CRPD was not acknowledged strongly enough within the report.³⁹ As the EU, along with most of the world, has ratified the CRPD, there should be a stronger commitment to promote and implement the rights protected within this internationally binding treaty.

F. WORLD HEALTH ORGANIZATION

The World Health Organization (WHO) removed being transgender from the latest edition of the International Classification of Diseases, which lists both mental and physical disorders. Gender incongruence will now be classified as a sexual health condition.⁴⁰ This is a sign of progress and a move away from stigma in the community, promoting inclusivity and acceptance.

However, “gaming disorders” has been added to the International Classification of Diseases.⁴¹ The disorder is characterized by “impaired control” with increasing priority given to gaming and “escalation” despite “negative consequences.” It includes only a clinic description and not prevention or treatment options. Excessive use of the Internet, computers, and other electronic devices have led to health problems.

V. Middle East Updates

A. IRAN

In November, Iranian officials passed a law punishing cosmetic surgeons and their patients who undergo eccentric cosmetic surgery procedures.⁴² The Judicial and Legal Committee of the Islamic Consultative Assembly said “unconventional procedures”⁴³ that grossly alter a person’s appearance, like the current Iranian trend to undergo procedures for “cat eyes” or “donkey ears,”⁴⁴ would be held to have committed offenses against the public moral, a violation of Article 638 of the Islamic Penal Code of Iran. Those convicted of this offense will be punished by either imprisonment from ten to sixty days or subject to seventy-four lashes. This law is in response to what has been described as epidemic plastic surgery. In Iran, a person is seven times more likely to have undergone plastic surgery than in the United States. Rhinoplasties have become so commonplace that a Johns Hopkins study was conducted in conjunction with the Rhinology Research Society of Iran. The study found that each Iranian plastic surgeon performs almost

39. *Id.* ¶ 11.

40. *Gender Incongruence*, ICD-11 for Mortality and Morbidity Statistics, <https://icd.who.int/browse11/l-m/en#/http%3a%2f%2fid.who.int%2fcd%2fent%2f411470068>, (last visited Mar. 23, 2019).

41. *Id.* See also *Gaming Disorder*, WORLD HEALTH ORGANIZATION, <https://www.who.int/features/qa/gaming-disorder/en/> (Sept. 2018) for more information.

42. See QANOON-E JAZAI-E ELSAMI [ISLAMIC PENAL CODE] [1990], art. 638 (Iran).

43. Michael Cook, *Iran promises the lash for unconventional cosmetic surgery*, BioEDGE (Nov. 17, 2018), <https://www.bioedge.org/bioethics/iran-promises-the-lash-for-unconventional-cosmetic-surgery/12899>, ¶ 2.

44. *Id.*

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200 rhinoplasties every year. This law also hopes to combat procedures performed by unlicensed surgeons. Unlicensed surgeons are in demand due to the relatively high cost of plastic surgery in Iran where the average income is a few hundred dollars a month. Although seemingly nonsensical, this law hopes to decrease the number of plastic surgery “horror stories” and regulate an industry, which has become the center point of controversy and malpractice.

B. REPUBLIC OF LEBANON

The Lebanese Medical Association for Sexual Health (LebMASH), a non-governmental organization comprising of mental health professionals, in conjunction with the Lebanese Psychiatric Society, and the Lebanese Psychological Association, publicly denounced the use of conversion therapy on members of the LGBTQ community. LebMASH launched a campaign entitled “Homosexuality is Not a Disease” (HINAD) following multiple endorsements for conversion therapy by local physicians, some of whom advocated the use of shock therapy to reverse homosexual tendencies and perpetuate the belief that homosexuality is a choice or mental illness. This public denunciation follows a 2018 three-judge bench appeals court decision not to prosecute nine homosexual and transgender individuals under Article 534 of the Lebanese Penal Code that states “any sexual intercourse contrary to the order of nature is punishable by up to one year of prison.”⁴⁵ The court questioned the current, strict interpretation of the ninety-eight year old law and found it was discriminatory and against the human rights of individuals in 2018. The court confirmed the lower court’s decision preventing the prosecution of those accused of violating the Penal Code.⁴⁶ Parliament has left the interpretation of Article 534 to the courts, creating an uncertainty that rests when standing bench trial. The Court of Criminal Appeal’s decision and the respected medical bodies’ public condemnation is a modernizing step in the areas of public and mental health which has already affected the nation’s policy and is suggestive of change in the Lebanese attitude toward mental health.⁴⁷

C. SUDAN

In July 2018, Sudanese officials from the Federal Ministry of Health, Ministry of Animal Resources and Fisheries, and Ministry of Agriculture and Forestry in conjunction with the WHO and the United Nations (UN)

45. Legislative Decree 340 of 3 Jan. 1943 (Leb.)

46. Maʿkamat al-Istiʿnaf [Istiʿnaf] [Court of Appeals], Mount Lebanon, 12 July 2018, MAJALLAT AL-ʿADL (ʿADL OR AL-ʿADL), 2018 (Leb.), <http://www.legal-agenda.com/uploads/%D8%A7%D9%84%D8%AD%D9%83%D9%85%202018.pdf>.

47. See generally, *Lebanon: Same-Sex Relations Not Illegal*, Human Rights Watch (July 19, 2019, 12:00 a.m.), <https://www.hrw.org/news/2018/07/19/lebanon-same-sex-relations-not-illegal>.

formulated a national plan to combat antimicrobial resistance (AMR).⁴⁸ The plan is a product of a three-year collaboration where the Federal Ministry of Health worked closely with the WHO and the UN to implement this plan which will become the mainstay in combatting what could become a public health crisis. AMR is a public health threat and has risen to dangerously high levels, undermining the efforts of medical professionals in combatting commonplace infections. The danger of AMR is especially commonplace in developing countries where the population lacks a proper education on the use of antimicrobial agents such as antibiotics. The national plan includes, in its efforts, five objectives it hopes to accomplish. These efforts are education and training aimed at helping the population understand AMR and its associated risks, obtaining greater empirical data through surveillance and research, instilling effective sanitation, hygiene, and prevention measures to reduce the incidence of infection, optimizing the use of antimicrobial medicines in both areas of human and veterinary medicine, and economic support aimed at increasing investment in new medicines, diagnostic tools, vaccines, and other interventions. Working in union with the WHO and the UN, Khartoum hopes to effectively implement the guidelines outlined by the plan with international support.

VI. Northern American Updates

A. CANADA

Canada was the second nation and first G7 nation to legalize marijuana through its Bill C-45, also known as the Cannabis Act.⁴⁹ It aims to keep cannabis out of the hands of youth and keep the profits out of the hands of criminals. Along with this Act, changes to impaired driving laws addressing the repercussions for driving under the influence of cannabis have also been implemented.

B. UNITED STATES

Legalized cannabis use in Oregon is making it harder for those who have a prescription for medical marijuana to obtain the product needed. There are only three medical-only processors left in the entire state of Oregon. In addition, Oregon is currently down to eight medical dispensaries, from 420 dispensaries in 2016, because many of the processors have shifted towards processing recreational product. Sick people, for which the law was originally enacted, are now having to turn to the black market because the recreational dispensaries cap the amount allowed in recreational products, which is far under what is needed for medicinal use. Additionally, these

⁴⁸ *Ministry of Health of Sudan, with WHO and partners, launch AMR national action plan*, WHO, ¶ 1 (July 22, 2018), <http://www.emro.who.int/sdn/sudan-news/ministry-of-health-of-sudan-with-who-and-partners-launch-amr-national-action-plan.html>.

⁴⁹ *See Cannabis Act 2018, S.C. 2018, c. 16* (Can.).

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recreational products are quite expensive, leaving those who need the cannabis for medical purposes in a difficult position.

The Federal Circuit cleared up the split decisions from lower courts and found that Congress lawfully withheld funding for the Affordable Care Act (“ACA”) “risk corridor program,” essentially denying health insurance companies billions of dollars in ACA funding. This program was structured to shift money from profitable ACA insurers to money-losing ACA insurers. As profits did not cover losses, Congress did not have to pay the \$12 billion.⁵⁰

The U.S. Supreme Court denied review of the case between Kindred Hospitals East LLC and the Estate of Marianne Klemish, affirming the Florida Appellate Court, which found a patient arbitration agreement unenforceable due to a conflict with state law.⁵¹ The healthcare provider warned that this ruling could render every health care arbitration agreement in Florida unenforceable, but the court found that the healthcare provider’s selective use of Florida’s Medical Malpractice Act in the agreement favoring health care provider and keeping out language favorable to the patient created an invalid agreement.

In California, the superior court overturned a 2016 state law that allows doctors to prescribe lethal drugs to terminally ill adult patients, known as The End of Life Option Act.⁵² But the decision to overturn the Act was stayed, reinstating the Act while litigation is ongoing. The American Academy of Medical Ethics argued that the Act’s purpose was not to give medical aid to the dying. Since the Act’s passage, approximately 504 California adults have received life-ending drugs from their doctors.

The United States surprised the world at the World Health Assembly when they threatened trade restrictions and the removal of military aid in Ecuador if the Ecuadorean government did not drop the Breastfeeding Resolution.⁵³ That Resolution said that mother’s milk is the healthiest for children and countries should strive to limit the inaccurate or misleading marketing of breast milk substitutes.⁵⁴ The United States Department of Health and Human Services wanted to remove the language regarding governments’ duty to “protect, promote and support breast-feeding” and to restrict promotion of food products that had harmful effects on young children. In the end, the final resolution stayed intact. However, in this

50. See *Land of Lincoln Mut. Health Ins. Co. v. U.S.*, 892 F.3d 1184, 1185-86 (Fed. Cir. 2018); *Moda Health Plan Inc. v. U.S.*, 908 F.3d 738, 740 (Fed. Cir. 2018).

51. *Klemish v. Villacastin*, 216 So. 3d 14, 17 (Fla. App. 2016), *cert. denied*, 138 S. Ct. 645 (2018).

52. See *generally* *People ex rel. Becerra v. Superior Ct.*, 240 Cal. Rptr. 3d 250, (Cal. Ct. App. 2018).

53. Andrew Jacobs, *Opposition to Breast-Feeding Resolution by U.S. Stuns World Health Officials*, N.Y. TIMES (July 8, 2018), <https://www.nytimes.com/2018/07/08/health/world-health-breastfeeding-ecuador-trump.html>, ¶ 3.

54. See WHO Res. EB142/22, Exec. Board 142d Sess. (Jan. 2, 2018).

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same World Health Assembly, the United States also removed statements from documents supporting soda taxes in countries with high obesity rates.

The current U.S. immigration policies are making it more difficult for foreign doctors to continue to work in the U.S. This stems from the “Buy America, Hire America Executive Order.”⁵⁵ Doctors who were already confirmed for visas in past years are being rejected after presenting USCIS with the same information they had in past years. Approximately 25 percent of foreign medical residents rely on H-1B visas. Furthermore, about 8,000 doctors were from countries included in the original travel ban. These visa restrictions are making it more difficult for healthcare facilities to hire foreign doctors because there is no guarantee that they will get the visa even after the facility has paid for it. These restrictions may incline foreign-trained doctors to go elsewhere, adding to the projected 40,800-105,000 shortage of doctors.

The Mexico City policy or global “gag rule,” rebranded as the Protecting Life in Global Health Assistance by the Trump Administration, was aimed at reducing the number of abortions by blocking U.S. federal funding for NGOs that provide abortion counselling or referrals, advocate for decriminalizing abortion, or expand abortion services. But certain communities, like Kibera in Africa, are reliant on international donors for support, contraceptives, and family planning options. Blocking this funding takes away \$8.8 billion in U.S. global health assistance and, although aimed at lowering abortions, studies have found that where this policy is in place, women were up to 2.73 times more likely to get abortions than in countries without this policy. Without the option to get a medically authorized abortion, the women get botched abortions, which are more affordable to them, but end up costing much more in medical treatment than a medically authorized abortion would.

The “gag rule” affects U.S. citizens as well. President Trump also has plans to cut Planned Parenthood from the federal family planning program, Title X in the Public Health Service Act. The program provides wellness exams and comprehensive contraceptive services, including screenings for cancer and STDs. Planned Parenthood cares for more than 40% of the federal family planning program’s 4 million patients. The Office of Management and Budget would require any facility that receives federal family planning funds to be physically separate from those that perform abortion, eliminate requirement that women be counseled on their full range of reproductive options, and ban abortion referrals. Consequences of this would be widespread, but would affect remote areas most where Planned Parenthood is the only provider that stocks all methods of birth control.

The U.S. Department of Health and Human Services is considering regulatory changes to a rule issued by President Obama that prevented discrimination against transgender people in the Affordable Care Act

55. Exec. Order No. 13,788, 82 Fed. Reg. 18,837 (April 21, 2017), sec. 2(b).

(ACA).⁵⁶ The Act affected all providers and insurers that received any federal funding and forbid any discrimination based on “gender identity” and “stereotypical notions” about gender. The proposed changes create barriers to healthcare for many LGBT people. The proposed rule broadens existing religious exemptions in healthcare law, allowing insurers, hospitals, and providers to deny service or treatment to patients based on their own religious beliefs. This was brought to the forefront in a decision by the district court Judge O’Connor, who temporarily stopped enforcement of the protections for transgendered patients based on the idea that discrimination based on gender was clearly outlawed by the law but transgender status was not.⁵⁷ This decision follows Judge O’Connor’s previous decision finding that the ACA is lawful and does not contradict the Constitution.⁵⁸

VII. South American Updates

A. ARGENTINE REPUBLIC

Despite strong public support, passing through the lower house (129-125), and the promise of President Mauricio Macri to sign it, the Argentine senate rejected a bill to legalize abortion in the first 14 weeks.⁵⁹ This bill would have ceased to make abortion illegal, but after fifteen hours of debating, the senate voted against the bill thirty-eight to thirty-one.⁶⁰ With the rejected bill, abortion remains legal only in the cases of rape or if the woman’s life is in danger. This is the sixth bill in the last thirteen years to attempt to decriminalize abortion. It is suspected that the Catholic Church’s opposition of the bill was a main factor in its failure. There are 500,000 estimated abortions each year in Argentina, but as it is illegal, there are no official records. The Health Ministry revealed that in 2016, 43 deaths were caused by abortions.

56. See 42 U.S.C. § 18116; Robert Pear, *Trump Plan Would Cut Back Health Care Protection for Transgender People*, N.Y. TIMES (April 21, 2018), <https://www.nytimes.com/2018/04/21/us/politics/trump-transgender-health-care.html>, ¶ 1.

57. *Texas v. United States*, 201 F. Supp. 3d 810, 836 (N.D. Tex. 2016).

58. *Texas v. United States*, 300 F. Supp. 3d 810, (N.D. Tex. 2018).

59. See generally Daniel Politi and Ernesto Londoño, *Argentina’s Senate Narrowly Rejects Legalizing Abortion*, N.Y. TIMES (Aug. 9, 2018), <https://www.nytimes.com/2018/08/09/world/americas/argentina-abortion-vote.html>; also see Emily Stuart, *Argentina’s historic vote to decriminalize abortion, explained*, VOX (Aug. 8, 2018 4:14 PM), <https://www.vox.com/2018/6/13/17460824/argentina-abortion-bill-ni-una-menos>.

60. Proyecto de Ley de Interrupción Voluntaria del Embarazo en Argentina Expte. [Draft Law of Voluntary Interruption of Pregnancy in Argentina] 230-D-2018 (Arg.).

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B. FEDERATIVE REPUBLIC OF BRAZIL

A Personal Data Protection Law was enacted in 2018.⁶¹ This law protects a person's fundamental rights of freedom, privacy, and free development of personality as their personal data is processed. Processing of personal data may only be carried out with the consent of the holder and is limited to certain uses, including for the protection of health, in a procedure carried out by health professionals or health entities. This consent must be provided in writing or in other means, which demonstrates the expression of will of the holder.

C. CHILE

At the end of August, the newly elected Chilean President Sebastián Piñera and Chilean Health Minister Emilio Santelices thwarted an attempt by Gilead, the manufacturer of an expensive Hepatitis C drug called Sovaldi, and the International Federation of Pharmaceutical Manufacturers (IFPM) to overturn Resolution 399/2018.⁶² Resolution 399/2018 allowed for the Ministry of Health, in an effort to make Sovaldi more affordable, to adopt measures to obtain compulsory licenses for Hepatitis C drugs. Resolution 399/2018 was enacted to ensure that those infected with Hepatitis C would be able to access this treatment course previously barred due to its high price of 36,000 USD per patient. Up until this past year, the drug was excluded from being publicly funded. Gilead and IFPM's efforts included domestic and international lobbying as well as arguing that Resolution 399/2018 did not have legal merit due to the government's consideration of the drug's price in its decision to include Sovaldi in Resolution 399/2018. The Chilean government argued that Sovaldi was justified in its inclusion of Resolution 399/2018 because of "the freedoms granted by the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) as well as in the Doha Declaration on TRIPS and Public Health."⁶³ Ultimately, Resolution 399/2018 was upheld and negotiations are underway between Gilead and the Chilean government to grant the government a voluntary license in order to avoid a legal precedent risking further loss of income in the region. This decision grants Chile the right to legally put life and health of its people first and ignore the lobbying and political pressures of big corporations.

61. Lei Geral de Proteção de Dados [LGPD] [Personal Data Protection Law], Law 13,709/2018 (translated by Ronaldo Lemos, Daniel Douek, Sofia Lima Franco, Ramon Alberto dos Santos, and Natalia Langenegger) (Braz.), art. 1.

62. See generally Res. 399/2018 to Require the Ministry of Health to Adopt Measures to Obtain Compulsory License's for Hepatitis C Drugs (Sept. 1, 2018) (Chile).

63. Luis Villarroel, *Inside Views: New Health Ministry Of Chile Reaffirms Path to Compulsory Licence For Hepatitis C Drugs*, INTELLECTUAL PROPERTY WATCH, ¶ 5 (April 9, 2018) <https://www.ip-watch.org/2018/09/04/new-health-ministry-chile-reaffirms-path-compulsory-licence-hepatitis-c-drugs/>.

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National Security Law

GEOFFREY M. GOODALE, LUCILLE HAGUE, MATTHEW O'HARE,
JONATHAN M. MEYER, MARIO MANCUSO, GUY C. QUINLAN,
SERGIO L. SUAREZ, LOREN VOSS*

This article surveys 2018 international legal developments relevant to National Security Law.

I. Tensions between the United States and Russia

The relationship between the United States and Russia endured frequent and tumultuous changes in 2018. Some of the Trump Administration's Russian policies related to the Countering America's Adversaries Through Sanctions Act (CAATSA).¹ In January 2018, as required by Sections 241 and 242 of the CAATSA, the U.S. Department of the Treasury (Treasury Department) submitted to Congress a Report on Senior Foreign Political Figures and Oligarchs in the Russian Federation (Section 241 Report) and a Report on Effects of Expanding Sanctions to Include Sovereign Debt and Derivative Products (Section 242 Report).² The Section 242 Report generated little fanfare because the United States did not expand sanctions against Russia to include sovereign debt and derivative products.³ Conversely, even though the Treasury Department made clear it was not a

* The committee co-editors of this article were Dr. Joseph D. Prestia (managing) and Ms. Anne R. Jacobs. Mr. Geoffrey M. Goodale, Partner, FisherBroyles, LLP, and Mr. Jonathan M. Meyer, Attorney at Law, contributed "Tensions Between the United States and Russia"; Mr. Philip D. O'Neill, Jr., Independent Arbitrator, contributed "Cybersecurity Policy"; Captain Sergio L. Suarez, Judge Advocate, U.S. Army, contributed "Intelligence & Surveillance"; Mr. Guy C. Quinlan, President, Lawyers Committee on Nuclear Policy, contributed "Nuclear Arms Control"; Ms. Loren Voss, Truman National Security Project, Security Fellow, contributed "The United States' Abandonment of the Iran Deal: International Legal Implications"; Mr. Mario Mancuso (Partner), Ms. Lucille Hague (Associate), and Mr. J. Matthew O'Hare (Associate), Kirkland & Ellis, LLP, contributed "Expansion of CFIUS' Jurisdiction and Authority under FIRRMA." The views expressed in this article are solely those of the authors in their private capacities and do not in any way represent the views of the United States or any United States government entity.

1. See *generally* Countering America's Adversaries Through Sanctions Act, Pub. L. No. 115-44, 131 Stat. 886 (2017).

2. See *id.* §§ 241 – 242.

3. See DEP'T OF THE TREASURY, REPORT TO CONGRESS PURSUANT TO SECTION 242 OF THE COUNTERING AMERICA'S ADVERSARIES THROUGH SANCTIONS ACT OF 2017 REGARDING POTENTIAL EFFECTS OF EXPANDING SANCTIONS TO INCLUDE SOVEREIGN DEBT AND THE FULL RANGE OF DERIVATIVE PRODUCTS (2018), <https://assets.bwbx.io/documents/users/iqjWHBFdfxIU/r5nYIUf7jwuU/v0>.

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sanctions list, the Section 241 Report created a stir because the public version listed 114 Russian political figures and ninety-six Russian oligarchs.⁴

In fact, the Treasury Department subsequently placed numerous individuals and entities listed in the Section 241 Report on the List of Specially Designated Nationals and Blocked Persons (SDN List) on April 6, 2018 (April 2018 Sanctions Notice).⁵ These individuals and entities included seven oligarchs and twelve companies that the oligarchs either owned or controlled, seventeen senior Russian government officials, and a state-owned Russian weapons trading company and its subsidiary (a bank) that the Treasury Department determined had engaged in malign activities for or on behalf of the Russian Government.⁶ Significantly, the Treasury Department established general licenses to authorize certain limited types of transactions with some of the entities identified in the April 2018 Sanctions Notice to avoid extremely detrimental effects on those sanctioned entities and potentially affected U.S. persons.⁷

The U.S. Government also utilized CAATSA to impose sanctions on Russian persons identified in indictments brought by the Department of Justice (Justice Department) in connection with the special investigation related to Russian interference in the 2016 presidential election. On March 15, 2018, the Treasury Department added nineteen individuals and five entities to the SDN List for engaging in malign Russian cyber activity (March 2018 Sanctions Notice).⁸ In addition, on September 20, 2018, the Department of State (State Department) placed on the Section 231 List the individuals and entities identified in the March 2018 Sanctions Notice, as well as twelve Russian intelligence officers named in a Justice Department indictment in July 2018 for their role in cyber hacking the computers of numerous U.S. persons during the 2016 presidential election.⁹

The U.S. Government also took actions against Russia for its alleged involvement in the nerve-agent attack on Sergei and Yulia Skripal in the United Kingdom in March 2018.¹⁰ Specifically, in March 2018, the U.S.

4. *See id.*

5. *See* Notice of OFAC Sanctions Actions, 83 Fed. Reg. 19138 (May 1, 2018).

6. *See id.* at 19138 – 40.

7. The Treasury Department has periodically amended the general licenses issued to permit limited transactions with certain entities identified in the April 2018 Sanctions Notice. At the time of this writing, the Treasury Department had most recently amended the general licenses on November 9, 2018. *See* Press Release, Dep't of the Treasury, OFAC Extends Expiration Date of General Licenses Related to EN+, RUSAL, and GAZ (Nov. 9, 2018), <https://home.treasury.gov/news/press-releases/sm544>.

8. *See* Notice of OFAC Sanctions Actions, 83 Fed. Reg. 12238 (Mar. 20, 2018); Notice of OFAC Sanctions Actions, 83 Fed. Reg. 12239 (Mar. 20, 2018).

9. *See* Notice of Department of State Sanctions Actions Pursuant to Section 231(a) of the Countering America's Adversaries Through Sanctions Act of 2017 (CAATSA) and Executive Order 13849 of September 20, 2018, and Notice of Additions to the CAATSA Section 231(d) Guidance, 83 Fed. Reg. 50433 (Oct. 5, 2018).

10. *See, e.g., Skripal Attack: Russia Faces US Sanctions over Poisoning*, BBC NEWS (Aug. 9, 2018), <https://www.bbc.com/news/world-us-canada-45122723>.

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Government expelled sixty Russian diplomats and closed Russia's consulate in Seattle, to which Russia responded by expelling sixty U.S. diplomats and closing the U.S. consulate in St. Petersburg, Russia.¹¹ Subsequently, on August 27, 2018, to impose additional sanctions on Russia for the use of a nerve agent on U.K. soil, the State Department issued a rulemaking notice that significantly restricted the types of goods and technologies U.S. persons can export to Russia without first obtaining an export license from the cognizant U.S. government agency.¹²

Notwithstanding the above actions the U.S. took against Russia, President Trump and President Putin participated in a summit in Helsinki on July 16, 2018, during which the two leaders attempted to ease tensions between the two countries.¹³ While the summit yielded few concrete results, both leaders described it as being quite successful, and they are planning to hold another summit in 2019.¹⁴

II. Cybersecurity Policy

This year, the pendulum swung from the more risk-averse and reactive defensive process previously favored¹⁵ to one of cyber exploitation and offense intended to deter adversaries.¹⁶ The increasing number of malicious attacks on U.S. cyber interests prompted the Trump administration to opt for a more "forward-based," pre-emptive defense to confront and deter¹⁷ States that pose long-term, competitive strategic threats (i.e., Russia and China).¹⁸ President Trump rescinded the former Presidential Policy Directive 20 in August 2018¹⁹ and replaced it with a highly-classified legal

11. See, e.g., Oren Dorrell, *What Does it Mean to Expel a Diplomat? Russia Tells 60 Americans to Go Home*, USA TODAY (Mar. 26, 2018, 2:55 PM), <https://www.usatoday.com/story/news/world/2018/03/26/what-expelling-russian-diplomats-means/458474002/>.

12. See Determinations Regarding Use of Chemical Weapons by Russia Under the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991, 83 Fed. Reg. 43723 (Aug. 27, 2018).

13. See, e.g., Vladimir Isachenkov, *Putin, Trump to Hold Summit in Helsinki on July 16*, AP NEWS (June 28, 2018), <https://www.apnews.com/d42a93669d224845811c7b6c5871417a>.

14. See, e.g., Andrew Kramer, *Putin Says Trump's Critics in U.S. are Trying to Undermine Meeting*, N.Y. TIMES, July 19, 2018, A16, <https://www.nytimes.com/2018/07/19/world/europe/putin-donald-trump-summit.html>.

15. See, e.g., Presidential Policy Directive 20, U.S. Cyber Operations Policy (Oct. 16, 2012), <https://fas.org/irp/offdocs/ppd/ppd-20.pdf>.

16. For a description of the historical struggle over cyber national security policy, see generally FRED KAPLAN, DARK TERRITORY: THE SECRET HISTORY OF CYBER WAR (2016).

17. For a discussion of cyber-deterrence, see generally Michael Sulmeyer, *How the U.S. Can Play Cyber Offense: Deterrence Isn't Enough*, COUNCIL ON FOREIGN RELATIONS (Mar. 22, 2018), <https://www.foreignaffairs.com/articles/world/2018-03-22/how-us-can-play-cyber-offense>.

18. See generally Nina Kollars & Jacquelyn Schneider, *Defending Forward: The 2018 Cyber Strategy Is Here*, WAR ON THE ROCKS (Sep. 20, 2018), <https://warontherocks.com/2018/09/defending-forward-the-2018-cyber-strategy-is-here/>.

19. PPD-20 was originally highly classified when issued in 2012, but Edwin Snowden leaked it to the public in 2013. See, e.g., Eric Geller, *Trump Scraps Obama Rules on Cyberattacks, Giving*

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regime that lowered the threshold necessary for a response.²⁰ Together with the September 2018 release of an unclassified summary of the new Department of Defense (DOD) Cyber Strategy²¹ and, days later, a new National Cyber Strategy,²² these documents illuminate an evolving devolution of cyber force authority.²³ This loosening of prior restrictions, combined with new authorities,²⁴ is expected²⁵ to permit offensive cyber engagement to penetrate foreign networks for the purpose of contesting “the full spectrum of conflict.”²⁶

The DOD mission extends to defense of the “critical infrastructure” from “a significant cyber incident.”²⁷ A “significant cyber incident” is an event or group of related events that is “likely to result in demonstrable harm to the national security interests, foreign relations, or economy of the United States or to public confidence, civil liberties, or public health and safety of the American people (Presidential Policy Directive 41).”²⁸ This mission statement should be read in conjunction with the John S. McCain Defense Authorization Act for Fiscal Year 2019 (NDAA),²⁹ which expressly authorizes

Military Freer Hand, POLITICO (Aug. 16, 2018, 2:39 PM), <https://www.politico.com/story/2018/08/16/trump-cybersecurity-cyberattack-hacking-military-742095>.

20. See Dustin Volz, *Trump, Seeking to Relax Rules on U.S. Cyberattacks, Reverses Obama Directive*, WALL ST. J. (Aug. 15, 2018, 11:36 PM), <https://www.wsj.com/articles/trump-seeking-to-relax-rules-on-u-s-cyberattacks-reverses-obama-directive-1534378721>; see also Patrick Barry, *The Trump Administration Just Threw Out America's Rules for Cyberweapons*, FOREIGN POL'Y (Aug. 21, 2018, 1:35 PM), <https://foreignpolicy.com/2018/08/21/the-trump-administration-just-threw-out-americas-rules-for-cyberweapons/>; Mack DeGeurin, *U.S. Silently Enters New Age of Cyberwarfare*, N.Y. MAG. INTELLIGENCER (Sept. 11, 2018), <http://nymag.com/intelligencer/2018/09/us-rescinds-ppd-20-cyber-command-enters-new-age-of-cyberwar.html>.

21. See generally DEP'T OF DEF., SUMMARY: DEPARTMENT OF DEFENSE CYBER STRATEGY (2018), https://media.defense.gov/2018/Sep/18/2002041658/-1/-1/1/CYBER_STRATEGY_SUMMARY_FINAL.pdf. De-escalation of cyber conflict is no longer reflected as a strategic goal. See Josephine Wolff, *Trump's Reckless Cyber Plan*, N.Y. TIMES, Oct. 2, 2018, A27, <https://www.nytimes.com/2018/10/02/opinion/trumps-reckless-cybersecurity-strategy.html>.

22. See generally NATIONAL CYBER STRATEGY OF THE UNITED STATES OF AMERICA (2018), <https://www.whitehouse.gov/wp-content/uploads/2018/09/National-Cyber-Strategy.pdf>.

23. PPD-20 required, with narrow exceptions, compliance with a significant inter-agency deliberative process and often presidential decision before authorizing cyber-attacks. See Presidential Policy Directive 20, *supra* note 15, at 3 – 4.

24. See Robert Chesney, *The 2018 DOD Cyber Strategy: Understanding 'Defense Forward' in Light of the NDAA and PPD-20 Changes*, LAWFARE (Sept. 25, 2018, 6:45 PM), <https://www.lawfareblog.com/2018-dod-cyber-strategy-understanding-defense-forward-light-ndaa-and-ppd-20-changes>.

25. See Elis Groll, *Trump Has a New Weapon to Cause 'the Cyber' Mayhem*, FOREIGN POL'Y (Sept. 21, 2018, 4:58 PM), <https://foreignpolicy.com/2018/09/21/trump-has-a-new-weapon-to-cause-the-cyber-mayhem/> (National Security Adviser Bolton describing the changes as moving the decision-making authority for cyber attacks down the chain of command).

26. See DEPARTMENT OF DEF., *supra* note 21, at 1.

27. *Id.* at 3.

28. *Id.* at 3 n.3.

29. John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, 132 Stat. 1636 (2018), <https://www.congress.gov/bill/115th-congress/house-bill/5515/text>. The 2019 National Defense Authorization Act also included authorization of the so-called

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the DOD “to take appropriate and proportional action in foreign cyberspace to disrupt, defeat and deter” in response to an active, systematic, and ongoing campaign of attacks against the government or people of the United States in cyberspace, including attempting to influence American elections and democratic political processes where the malicious source is Russian, Chinese, Iranian or North Korean state actors.³⁰ The NDAA also clarifies that such activity is “traditional military activity” under the Title 50 exception to the definition of covert action.³¹

The new 2018 strategies³² and tactical shifts otherwise range from the Department of Homeland Security’s revision of critical infrastructure risk prioritization³³ to the Treasury Department’s imposition of greater costs on those attacking our financial system.³⁴ As such, this year’s issuance of new, more comprehensive strategies builds upon a process the administration began last year, which had included agency review pursuant to an executive order³⁵ and, in 2018, the elevation of the U.S. Cyber Command to a unified combatant command³⁶ with the goal of achieving and maintaining cyberspace superiority.³⁷ These and other steps are calculated to maintain

“Cyber Solarium Commission,” a fourteen-person commission that will report on developing strategic defense policy for cyber space and national security by September 1, 2019. *See generally* Press Release, Senator Ben Sasse, Final Defense Bill Includes Sasse’s Cyberspace Solarium Commission (July 23, 2018), <https://www.sasse.senate.gov/public/index.cfm/2018/7/final-defense-bill-includes-sasse-s-cyberspace-solarium-commission>.

30. *See* John S. McCain National Defense Authorization Act for Fiscal Year 2019 § 1624.

31. *See* Chesney, *supra* note 24.

32. *See also* DEP’T OF HOMELAND SEC., U.S. DEPARTMENT OF HOMELAND SECURITY CYBER SECURITY STRATEGY (2018), https://www.dhs.gov/sites/default/files/publications/DHS-Cybersecurity-Strategy_1.pdf.

33. *See, e.g.*, Phil Goldstein, *DHS’ New Cybersecurity Strategy Highlights Risk Prioritization*, FEDTECH MAG., (May 22, 2018), <https://fedtechmagazine.com/article/2018/05/dhs-new-cybersecurity-strategy-highlights-risk-prioritization>; *see also* Press Release, Dep’t of Homeland Sec., Statement by Secretary Kirstjen M. Nielsen on the Release of the National Cyber Strategy (Sept. 20, 2018), <https://www.dhs.gov/news/2018/09/20/statement-kirstjen-m-nielsen-national-cyber-strateg>.

34. *See, e.g.*, Press Release, Dep’t of the Treasury, Secretary Mnuchin Statement on National Cyber Strategy (Sept. 20, 2018), <https://home.treasury.gov/news/press-releases/sm491>.

35. *See, e.g.*, Zack Whittaker, *Trump’s Cybersecurity Executive Order Met with Mixed Reviews*, ZD NET (May 11, 2017), <https://www.zdnet.com/article/trump-signs-impossible-cybersecurity-order-say-critics/>.

36. *See* Jim Garamone & Lisa Ferdinando, *DoD Initiates Process to Elevate U.S. Cyber Command to Unified Combatant Command*, DEP’T OF DEF. (Aug. 18, 2017), <https://dod.defense.gov/News/Article/Article/1283326/dod-initiates-process-to-elevate-us-cyber-command-to-unified-combatant-command/>.

37. *See generally* U.S. CYBER COMMAND, ACHIEVE AND MAINTAIN CYBER SUPERIORITY (2018), <https://www.cybercom.mil/Portals/56/Documents/USCYBERCOM%20Vision%20April%202018.pdf?ver=2018-06-14-152556-010>.

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an open and secure digital foundation for U.S. national economic interests and way of life.³⁸

As part of its National Cyber Strategy, and despite these changes, the United States remains expressly committed to using recognized norms to shape global governance of responsible state behavior.³⁹ But the shift to an offensive cyber posture implemented by less transparent action suggests a reliance on customary practice, harkening back to the unwritten rules of conduct in the Cold War.

III. Intelligence & Surveillance

A. FISA AMENDMENTS REAUTHORIZATION ACT OF 2017

Early in 2018, the U.S. Congress was tasked to determine whether it would recertify the controversial section 702 of the Foreign Intelligence Surveillance Act (FISA) Amendment Act.⁴⁰ The FISA Amendments Reauthorization Act of 2017 had several important provisions, the most telling of which addressed “about” communication. “About” communication contains a reference to, but is not to or from, a target.⁴¹ The law gives the government, mainly the Federal Bureau of Investigation (FBI), the authority to collect communications (e.g., emails, text messages, phone calls) of individuals not in the United States who have been targeted for intelligence surveillance.⁴² The Director of National Intelligence (DNI) and the Attorney General must adopt procedures consistent with the requirements of the Fourth Amendment for information collected under the authority of section 702.⁴³ The act also prohibits the FBI from accessing communications of U.S. persons unless part of an existing criminal investigation and subsequent court order.⁴⁴ Critics assert that, as written, this provision will not prevent surveillance of Americans’ private communications.⁴⁵ Congress also provided for review of upstream “about”

38. See NATIONAL CYBER STRATEGY OF THE UNITED STATES OF AMERICA, *supra* note 22, at 6 (reflecting the protection of the “American People, the Homeland, and the American Way of Life” as the first pillar of the strategy).

39. *Id.* at 20 – 21.

40. See Kaitlyn Schallhorn, *FISA Surveillance Program: What Is It and Why Is It So Controversial?*, FOX NEWS (Mar. 7, 2018), <https://www.foxnews.com/politics/fisa-surveillance-program-what-is-it-and-why-is-it-so-controversial>.

41. FISA Amendments Reauthorization Act of 2017, Pub. L. No. 115-118, § 103(b)(1), 132 Stat. 3, 10 (2018).

42. Charlie Savage, *Warrantless Surveillance Is Headed for Renewal*, N.Y. TIMES, Jan. 16, 2018, A11, <https://www.nytimes.com/2018/01/16/us/politics/senate-vote-section-702-fisa-amendments-surveillance.html>.

43. Emma Kohse, *Summary: The FISA Amendments Reauthorization Act of 2017*, LAWFARE (Jan. 18, 2018, 4:29 PM), <https://www.lawfareblog.com/summary-fisa-amendments-reauthorization-act-2017>.

44. See FISA Amendments Reauthorization Act of 2017 § 101(a)(1).

45. See Savage, *supra* note 42.

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collection, i.e., information gathered from internet communications based on the mention of certain selectors found within the communication itself.⁴⁶

The act's oversight provision requires the DNI and the Attorney General to notify Congress within thirty days of initiating surveillance under the previous program.⁴⁷ The notice must contain a Foreign Intelligence Surveillance Court (FISC) order, opinion, or decision approving the program together with a "summary of the protections in place to detect any material breach."⁴⁸ Additionally, the law includes a provision requiring the appointment of an amicus curiae under FISA section 103(i)(2)(A) to litigate "novel or significant interpretations of the law" before a section 702 certification authorizing "about" collection.⁴⁹

B. U.S. COURTS WEIGH IN ON SURVEILLANCE

The case of *United States v. Hasbajrami* tested the viability of the newly-enacted authorization provisions of section 702.⁵⁰ The case addressed a request to suppress evidence obtained under the section,⁵¹ focusing on the constitutionality and applicability of 50 U.S.C. § 1881a(a), (c), and (i)(3)(A)—the so-called "warrantless wiretap" provisions.⁵² The district court determined that warrantless surveillance of communications between a U.S. person and individuals who are legitimate targets of section 702 surveillance does not violate the Fourth Amendment because (a) the Fourth Amendment does not apply to foreign persons abroad, and (b) incidental collection does not trigger a warrant requirement.⁵³ The court also determined that collection under the National Security Agency's (NSA) code name PRISM program is reasonable under the Fourth Amendment due to the diminished expectation of privacy of email communication sent between U.S. persons and non-U.S. persons outside the United States.⁵⁴ Further, the targeting and minimization procedures, as codified, are reasonable given the limitation on the amount of information actually collected when balanced against the government's security interest in intelligence.⁵⁵

The district court also examined the practice of "U.S. person queries," warrantless searches into the collected 702 database to identify and compile

46. See Kohse, *supra* note 43.

47. See Chinmayi Sharma, *Summary: FISA Amendments Reauthorization Act*, LAWFARE (Oct. 27, 2017, 3:30 PM), <https://www.lawfareblog.com/summary-fisa-amendments-reauthorization-act>.

48. See FISA Amendments Reauthorization Act of 2017 § 103(b)(3).

49. *Id.* § 103(b)(6).

50. See *generally* *United States v. Agron Hasbajrami*, No. 11-CR-623 (JG), 2016 WL 1029500 (E.D.N.Y. Mar. 8, 2016).

51. See *id.* at *1.

52. See *id.* at *5.

53. See *id.* at *9 nn.14 – 15, *14.

54. See *id.* at *12 n.20.

55. *Id.* at *10.

information regarding a specific U.S. person.⁵⁶ This practice, which entails the government's use of identifiers to search through collected information, provides few avenues for judicial review and may circumvent the individualized judicial review generally required by the Fourth Amendment.⁵⁷ The government's argument relied on a reasonableness analysis and further contended that a foreign intelligence exception exists under the Fourth Amendment.⁵⁸ The U.S. Supreme Court, in a recent case requiring search warrants for cell-site records, made clear that its decision was narrow and did not consider other collection techniques involving foreign affairs or national security.⁵⁹ Given the contentious nature of this electronic surveillance and the Supreme Court's willingness to scrutinize law enforcement tools,⁶⁰ it is foreseeable that the Court soon will have to answer whether a foreign intelligence exception applies to section 702 collected data.

IV. Nuclear Arms Control

On October 20, 2018, the United States announced its intention to withdraw from the Intermediate Nuclear Forces (INF) Treaty.⁶¹ The treaty prohibits the development or possession of ground-launched missiles with a range of 500 km to 5,500 km and launchers for such missiles.⁶² For several years, the United States has alleged that Russia is developing a missile forbidden by these limits.⁶³ Simultaneously, the United States has denied a Russian allegation that it is the United States, with its use of a particular type of launcher in its missile defense program, that is the party in violation of the treaty.⁶⁴ Most U.S. allies expressed concern about the proposed withdrawal

56. Sharon Bradford Franklin, *What Happened at the Court: The Hasbajrami Oral Argument on Section 702 of FISA and the Fourth Amendment*, JUST SECURITY (Aug. 29, 2018), <https://www.justsecurity.org/60505/happened-court-hasbajrami-oral-argument-section-702-fisa-fourth-amendment/>.

57. *Id.*

58. *Id.*

59. *Carpenter v. United States*, 138 S.Ct. 2206, 2220 (2018) (“[O]ur opinion does not consider other collection techniques involving foreign affairs or national security.”).

60. Cristian Farias, *The Supreme Court Just Put a Ding in the Surveillance State*, N.Y. MAG. INTELLIGENCER (June 22, 2018), <http://nymag.com/intelligencer/2018/06/the-supreme-court-just-put-a-ding-in-the-surveillance-state.html?gtm=top>m=top>.

61. See, e.g., Sophie Tatum et al., *Trump Says U.S. Is Ending Decades-Old Nuclear Arms Treaty with Russia*, CNN (Oct. 21, 2018, 4:59 PM), <https://www.cnn.com/2018/10/20/politics/donald-trump-us-arms-agreement-russia/index.html>. See generally Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter-Range Missiles, U.S.-U.S.S.R., Dec. 8, 1987, S. TREATY DOC. NO. 100-11 (1988), <https://www.state.gov/t/avc/trty/102360.htm#text>.

62. Daryl Kimball & Kingston Reif, *Trump's Counterproductive Decision to "Terminate" the INF Treaty*, ARMS CONTROL ASS'N (Oct. 21, 2018), <https://www.armscontrol.org/issue-briefs/2018-10/trumps-counterproductive-decision-terminate-inf-treaty>.

63. See *id.*

64. See *id.*

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and urged reconsideration.⁶⁵ The inspection and verification provisions of the INF Treaty expired by their terms in 2001, and neither party has suggested their revival.⁶⁶

The New Strategic Arms Reduction Treaty (START),⁶⁷ which limits the United States and Russia to 1,550 deployed strategic warheads and 700 delivery vehicles, expires by its terms in February 2021 but can be renewed by agreement of the two presidents.⁶⁸ As this article went to press, some informal preliminary discussions had apparently begun but no substantive announcements had been made.

In 2018, all of the world's nuclear powers continued to modernize their nuclear arsenals.⁶⁹ The Nuclear Posture Review announced by the United States in February 2018 called for the development of new low-yield nuclear warheads to provide more flexible options for possible use and expanded the list of situations in which the United States might consider the first use of nuclear weapons.⁷⁰ In November 2018, Pakistan announced it would match India's deployment of a nuclear missile submarine.⁷¹

No nuclear arms control negotiations among the five permanent members of the U.N. Security Council⁷² took place or were scheduled in 2018. In May, the Secretary General of the United Nations called for a new disarmament initiative.⁷³ He urged the nuclear weapons states to assume "primary responsibility" for moving forward with their Non-Proliferation Treaty (NPT) obligation⁷⁴ of good faith negotiations for an end to the

65. See *Top Senators Slam Trump's INF Treaty Pullout, Call It 'Gift to Russia'*, RT (Dec. 5, 2018), <https://www.rt.com/usa/445556-senators-blast-trump-quitting-inf/>.

66. See Kimball & Reif, *supra* note 62.

67. Treaty between the United States of America and the Russian Federation on Measures for the Further Reduction and Limitation of Strategic Offensive Arms, Russ.-U.S., Apr. 8, 2010, S. TREATY DOC. NO. 111-5 (2010), <https://www.state.gov/documents/organization/140035.pdf>.

68. *Id.* art. II, XIV.

69. See *Modernization of Nuclear Weapons Continues: Number of Peacekeepers Declines*, STOCKHOLM INT'L PEACE RES. INST. (June 18, 2018), <https://www.sipri.org/media/press-release/2018/modernization-nuclear-weapons-continues-number-peacekeepers-declines-new-sipri-yearbook-out-now>.

70. See DEP'T OF DEF., NUCLEAR POSTURE REVIEW 12 (2018), <https://media.defense.gov/2018/Feb/02/2001872886/-1/-1/1/2018-NUCLEAR-POSTURE-REVIEW-FINAL-REPORT.pdf>.

71. Farhan Bokhari, *India's Nuclear Submarine Provokes Pakistan to Renew Arms Race*, NIKKEI ASIAN REV. (Nov. 12, 2018), <https://asia.nikkei.com/Politics/International-relations/India-s-nuclear-submarine-provokes-Pakistan-to-renew-arms-race>.

72. United States, Russia, China, United Kingdom and France are the permanent members of the United Nations Security Council. The "P5" are also the Nuclear Weapons States recognized under the Treaty on the Non-Proliferation of Nuclear Weapons (NPT). See *generally* Treaty on the Non-Proliferation of Nuclear Weapons, Jul. 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 [hereinafter NPT], <https://www.un.org/disarmament/wmd/nuclear/npt/text/>.

73. António Guterres, Sec'y Gen., United Nations, Remarks at the University of Geneva on the Disarmament Agenda (May 24, 2018), <https://www.un.org/sg/en/content/sg/speeches/2018-05-24/launch-disarmament-agenda-remarks>.

74. See NPT, *supra* note 72, art. VI.

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nuclear arms race and elimination of nuclear arsenals and noted that some of these obligations are “decades overdue.”⁷⁵

Tensions eased in Korea after a summit meeting between President Trump and Chairman Kim Jong Un of the Democratic People’s Republic of Korea (DPRK),⁷⁶ at which “President Trump committed to provide security guarantees to the DPRK, and Chairman Kim Jong Un reaffirmed his firm and unwavering commitment to the complete denuclearization of the Korean peninsula.”⁷⁷ As this issue went to press, talks were continuing on the implementation of these general statements; plans for a second summit were announced, but no date had been set.

With the support of 122 non-nuclear weapons states, the First Committee of the U.N. General Assembly⁷⁸ adopted a resolution⁷⁹ endorsing the 2017 Treaty on the Prohibition of Nuclear Weapons (TPNW)⁸⁰ and calling on all states to adopt it “at the earliest possible date.” All nine of the nations possessing nuclear weapons, which had boycotted the conference adopting the treaty, also opposed this resolution.⁸¹ Another First Committee resolution, expressing concern that “several thousand nuclear weapons remain on high alert ready to be launched within minutes,” called on the nuclear powers to take steps “ensuring that all nuclear weapons are removed from high alert.”⁸² While 173 nations voted for the resolution, the United States joined with Russia, the United Kingdom, and France in opposing it.

75. See Guterres, *supra* note 73.

76. See Mark Landler, *President’s Pitch to Kim Yields Vow with Few Details*, N.Y. TIMES, June 12, 2018, A1, <https://www.nytimes.com/2018/06/12/world/asia/north-korea-summit.html>.

77. See Press Release, Joint Statement of President Donald J. Trump of the United States of America and Chairman Kim Jong Un of the Democratic People’s Republic of Korea at the Singapore Summit (June 12, 2018), <https://www.whitehouse.gov/briefings-statements/joint-statement-president-donald-j-trump-united-states-america-chairman-kim-jong-un-democratic-peoples-republic-korea-singapore-summit/>.

78. The First Committee, consisting of all UN Member-States, “considers all disarmament and international security matters within the scope of the [UN] Charter . . .” See *Disarmament and International Security (First Committee)*, UNITED NATIONS, <http://www.un.org/en/ga/first> (last visited Mar. 31, 2019). First Committee resolutions are normally adopted as a matter of course by the General Assembly when it meets in plenary session.

79. 1st Comm. GAOR Res., U.N. Doc. A/C.1/73/L.24 (Oct. 19, 2018). The First Committee’s draft resolution was later adopted at a plenary meeting of the General Assembly. See G.A. Res. 73/48 (Dec. 12, 2018).

80. See *generally* Treaty on the Prohibition of Nuclear Weapons, Sept. 20, 2017, 729 U.N.T.S. 161. As of April 7, 2019, the TPNW had been ratified by 70 states, exceeding the 50 ratifications necessary for its entry into force. See Disarmament Treaties Database: Treaty on the Prohibition of Nuclear Weapons, UNITED NATIONS, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-9&chapter=26&clang=_en.

81. These nations are the United States, Russia, China, United Kingdom, France, India, Pakistan, Israel and North Korea. See, e.g., Aria Bendix, *122 Nations Approve ‘Historic’ Treaty Banning Nuclear Weapons*, ATLANTIC (July 8, 2017), <https://www.theatlantic.com/news/archive/2017/07/122-nations-approve-historic-treaty-to-ban-nuclear-weapons/533046/>.

82. 1st Comm. GAOR Res., U.N. Doc. A/C.1/73/L.52 (Oct. 17, 2018). The First Committee’s draft resolution was later adopted at a plenary meeting of the General Assembly. See G.A. Res. 73/60 (Dec. 13, 2018).

In 2018, several expert studies reported that new developments in technology are increasing the danger of nuclear war by accident or miscalculation.⁸³

Following its earlier decision to withdraw from the agreement limiting Iran's nuclear program,⁸⁴ as well as a subsequent partial re-imposition of sanctions,⁸⁵ the U.S. government announced on November 2, 2018, the revival of sanctions on Iranian oil exports, effective November 5, 2018, but also granted temporary waivers to several of the largest importers of Iranian oil, including China, India, and Japan.⁸⁶ In November 2018, the International Atomic Energy Agency reported that Iran continues to comply with the agreement.⁸⁷

V. The United States' Abandonment of the Iran Deal: International Legal Implications

On May 8, 2018, President Trump announced that he was pulling the United States out of the Joint Comprehensive Plan of Action (JCPOA), an international agreement that lifted nuclear-related sanctions on Iran in exchange for Iranian commitments to constrain certain nuclear-related activities.⁸⁸ A presidential memorandum claimed two violations of the JCPOA: (1) Iran had publicly declared that it would deny the International

83. See generally EDWARD GEIST & ANDREW LOHN, HOW MIGHT ARTIFICIAL INTELLIGENCE AFFECT THE RISK OF NUCLEAR WAR? (2018), <https://www.rand.org/pubs/perspectives/PE296.html>; CHRISTOPHER BIDWELL & BRUCE MACDONALD, EMERGING DISRUPTIVE TECHNOLOGIES AND THEIR POTENTIAL THREAT TO STRATEGIC STABILITY AND NATIONAL SECURITY (2018), https://fas.org/wp-content/uploads/media/FAS-Emerging-Technologies-Report.pdf?utm_source=FAS+General&utm_campaign=9b44d2bccd-EMAIL_CAMPAIGN_2017_02_21_COPY_01&utm_medium=email&utm_term=0_56a7496199-9b44d2bccd-222162373; PAGE STOUTLAND & SAMANTHA PITTS-KIEFER, NUCLEAR WEAPONS IN THE NEW CYBER AGE (2018), https://media.nti.org/documents/Cyber_report_finalsmall.pdf; Beyza Unal & Patricia Lewis, CYBERSECURITY OF NUCLEAR WEAPONS SYSTEMS (2018), <https://www.chathamhouse.org/sites/default/files/publications/research/2018-01-11-cybersecurity-nuclear-weapons-unal-lewis-final.pdf>.

84. Mark Landler, *Trump Abandons Iran Pact He Long Scorned*, N.Y. TIMES, May 8, 2018, A1, <https://www.nytimes.com/2018/05/08/world/middleeast/trump-iran-nuclear-deal.html>.

85. Press Release, Statement from the President on the Reimposition of Sanctions with Respect to Iran (Aug. 6, 2018), <https://www.whitehouse.gov/briefings-statements/statement-president-reimposition-united-states-sanctions-respect-iran/>.

86. Garinder Harris, *U.S. Reimposes but Exempts Big Customers*, N.Y. TIMES, Nov. 2, 2018, A10, <https://www.nytimes.com/2018/11/02/world/middleeast/us-iran-sanctions-oil-waivers.html>.

87. Kiyoko Metzler, *UN Nuclear Watchdog Says Iran Abiding with 2015 Limits*, AP NEWS (Nov. 12, 2018), <https://www.apnews.com/544bd03f7f264e57827fba5ca99fa5ff>.

88. Memorandum from President Trump on Ceasing U.S. Participation in the JCPOA and Taking Additional Action to Counter Iran's Malign Influence and Deny Iran All Paths to a Nuclear Weapon (May 8, 2018), <https://www.whitehouse.gov/presidential-actions/ceasing-u-s-participation-jcpoa-taking-additional-action-counter-irans-malign-influence-deny-iran-paths-nuclear-weapon/>.

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Atomic Energy Agency access to military sites, and (2) Iran had twice violated the JCPOA's heavy-water stockpile limits in 2016.⁸⁹

The memorandum also directed the immediate commencement of steps to reimpose all U.S. sanctions lifted or waived in relation to the JCPOA.⁹⁰ All steps were to be completed no later than 180 days after the date of the memorandum, with the last set of sanctions coming into force on November 5, 2018.⁹¹

The Obama Administration understood the JCPOA to be a nonbinding political commitment.⁹² Under this interpretation of the JCPOA, the decision by President Trump to withdraw from the agreement was valid under international and domestic law.⁹³ But United Nations Security Council Resolution (UNSCR) 2231 endorsed the JCPOA and called "upon all Member States, regional organizations and international organizations to take such actions as may be appropriate to support the implementation of the JCPOA."⁹⁴ If one believes that UNSCR 2231 made the JCPOA binding under international law, the President's withdrawal is somewhat more contested.⁹⁵ Most jurists agree that while decisions of the U.N. Security Council are binding on states, in most cases recommendations are just that and, therefore, have no binding force.⁹⁶ On its face, UNSCR 2231 appears to contain a combination of non-binding recommendations and binding

89. *See id.*

90. *Id.*

91. *Id.*; *see also* Matthew Lee, *US Restores Iran Sanctions Lifted Under Obama Nuclear Deal*, AP NEWS (Nov. 2, 2018) <https://www.apnews.com/8740cd7cc98646fa883984e03cea178b>.

92. *See* OFFICE OF THE LEGAL ADVISER, U.S. DEP'T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 123 (2015), <https://www.state.gov/documents/organization/258206.pdf> (referring to the JCPOA as a "non-binding political arrangement").

93. This article does not cover the domestic law implications of leaving the JCPOA. For additional information on this topic, refer to the Iran Nuclear Agreement Review Act (providing certain congressional review and oversight over the JCPOA) and STEPHEN MULLIGAN, CONG. RESEARCH SERV., R44761, WITHDRAWAL FROM INTERNATIONAL AGREEMENTS: LEGAL FRAMEWORK, THE PARIS AGREEMENT, AND THE IRAN NUCLEAR AGREEMENT (2018), <https://fas.org/sgp/crs/row/R44761.pdf> (discussing the domestic law implications of leaving the JCPOA).

94. S.C. Res. 2231, ¶ 1 – 2 (July 20, 2015).

95. *See* Colum Lynch & John Hudson, *Obama Turns to U.N. to Outmaneuver Congress*, FOREIGN POL'Y (July 15, 2015, 7:18 PM), <http://foreignpolicy.com/2015/07/15/obama-turns-to-u-n-to-outmaneuver-congress-iran-nuclear-deal/> (stating that a Security Council resolution makes a U.S. president "legally required" to comply with the many of the "key provisions" in the JCPOA).

96. *See* Mulligan, *supra* note 93, at 23 nn.189 & 191, providing the following citations: Marko Divac Öberg, *Agora: The ICJ's Kosovo Advisory Opinion: The Legal Effects of United Nations Resolutions in the Kosovo Advisory Opinion*, 105 AM. J. INT'L L. 81, 82 (2011); John Quigley, *Who Admits New Members to the United Nations (Think Twice Before You Answer)*, 44 GEO. WASH. INT'L L. REV. 179, 222 (2012); Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K.), Preliminary Objection, 1998 I.C.J. 9, ¶ 44 (Feb. 27) ("As to Security Council resolution 731 (1992) . . . it could not form a legal impediment to the admissibility of the latter because it was a mere recommendation without binding effect. . . .").

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decisions.⁹⁷ By using the word “decide,” the Security Council clearly intended that the provision that lifted prior sanctions on Iran be binding.⁹⁸ On the other hand, some jurists appear to interpret the language of UNSCR 2231—i.e., “calls upon”—to indicate that the resolution is a recommendation.⁹⁹ But even if one believes the Security Council intended for the resolution to be binding, the resolution calls upon states to support the implementation of the JCPOA, which itself refers to the commitments within it as *voluntary* measures, providing additional support for its non-binding nature.¹⁰⁰

On July 16, 2018, Iran instituted proceedings in the International Court of Justice (ICJ) against the United States regarding the imposition of sanctions as alleged violations of the Treaty of Amity, Economic Relations, and Consular Rights between Iran and the United States (Treaty of Amity).¹⁰¹ Iran made a request for indication of provisional measures.¹⁰² On October 3, 2018, the ICJ rejected the U.S. challenge to its jurisdiction to hear the case.¹⁰³ The ICJ issued a unanimous order indicating limited provisional measures against the United States, specifically mandating that the United States ensure that reimposed sanctions exempt certain humanitarian goods and equipment and services related to civil aviation safety.¹⁰⁴

As a result, Secretary of State Pompeo announced the termination of the Treaty of Amity with Iran.¹⁰⁵ But in accordance with article XXIII(3) of the treaty, the U.S. withdrawal will not affect the ICJ case because the withdrawal will only come into force a year after Secretary Pompeo’s announcement.¹⁰⁶ The upcoming merits stage of the case will determine if this litigation will present any significant obstacle to the U.S. nuclear

97. See Mulligan, *supra* note 93, at 24.

98. See U.N. Charter art. 41; Frederic L. Kirgis Jr., *The United Nations at Fifty: the Security Council’s First Fifty Years*, 80 AM. J. INT’L L. 506, 520 (1995).

99. See Mulligan, *supra* note 93, at 24 – 25; see also S.C. Res. 2231, *supra* note 94, ¶ 1 – 2.

100. Joint Comprehensive Plan of Action, July 14, 2015, 55 I.L.M. 108 (referring to the phrase “Iran and E3/EU+3 will take the following voluntary measures within the timeframe as detailed in this JCPOA and its Annexes” placed before the “NUCLEAR” section of the JCPOA).

101. See *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. U.S.)*, Order on Request for the Indication of Provisional Measures, 2018 I.C.J. 175, ¶ 1 (Oct. 3).

102. *Id.*

103. *Id.* ¶ 52.

104. *Id.* ¶ 98.

105. Secretary of State Michael Pompeo Remarks to the Media, U.S. DEP’T OF STATE (Oct. 3, 2018), <https://www.state.gov/secretary/remarks/2018/10/286417.htm>; Roberta Rampton et al., *U.S. Withdraws from International Accords, Says U.N. World Court ‘Politicized’*, REUTERS, (Oct 3, 2018, 12:35 PM), <https://www.reuters.com/article/us-usa-diplomacy-treaty/us-reviewing-agreements-that-expose-it-to-world-court-bolton-idUSKCN1MD2CP>.

106. Elena Chachko, *What to Make of the ICJ’s Provisional Measures in Iran v. U.S. (Nuclear Sanctions Case)*, LAWFARE (Oct. 4, 2018, 7:23 AM), <https://www.lawfareblog.com/what-make-icjs-provisional-measures-iran-v-us-nuclear-sanctions-case>.

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sanctions against Iran, likely determining the applicability of the national security exception of article XX(1) of the Treaty of Amity.¹⁰⁷

VI. Expansion of CFIUS's Jurisdiction and Authority under FIRRMA

On August 13, 2018, President Trump signed the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) into law.¹⁰⁸ FIRRMA¹⁰⁹ strengthens and modernizes the process by which the Committee on Foreign Investment in the United States (CFIUS) reviews foreign investments in U.S. businesses to assess such investments' impacts on U.S. national security. On November 10, 2018, provisions of FIRRMA relating to certain investments in U.S. critical technology companies became effective through the release of a pilot program, which requires that CFIUS be notified of some foreign investments in U.S. businesses in advance of closing.¹¹⁰ This requirement represents a foundational change to the CFIUS process, which has historically been voluntary.¹¹¹ Once fully implemented, FIRRMA will significantly affect timing, certainty, feasibility, and costs of cross-border transactions across diverse sectors.¹¹²

Established in 1975, CFIUS is an interagency regulatory body initially authorized to review "control" transactions involving a "foreign person" and any U.S. business engaged in interstate commerce.¹¹³ CFIUS has long interpreted "control" very broadly, such that a foreign investor's possession of a single board seat is typically deemed to confer control even if the investor cannot control, in a traditional sense, a board's decisions.¹¹⁴

In recent years, U.S. government stakeholders have expressed concern that CFIUS lacked sufficient legal authority and resources to review and address national security risks arising from, among other things, minority, "non-controlling" investments in U.S. companies and joint ventures established outside the United States.¹¹⁵ In parallel, the scope of CFIUS's

107. *Id.*

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

109. See Foreign Investment Risk Review Modernization Act of 2018, H.R. 5515, 115th Cong. § 1701 (2018).

110. Mandatory Declarations Under the Pilot Program, 31 C.F.R. § 801.401(a) (2018).

111. Alejandro Fiuza & Harrison Freeman, *Foreign Investment into U.S. Now Subject to Broader National Security Reviews*, BROWN RUDNICK (Nov. 28, 2018), <http://www.brownrudnick.com/alert/foreign-investment-u-s-now-subject-broader-national-security-reviews/>.

112. See Mario Mancuso et al., *New Bipartisan CFIUS Reform Begins to Take Shape*, LAW360 (Nov. 13, 2017, 6:14 PM), <https://www.law360.com/articles/983836/new-bipartisan-cfius-reform-begins-to-take-shape>.

113. See, e.g., Judith Allison Lee et al., *An Update on CFIUS Reform*, LAW 360 (June 6, 2018, 1:55 PM), <https://www.law360.com/articles/1050928/an-update-on-cfius-reform>.

114. See MARIO MANCUSO, A DEALMAKER'S GUIDE TO CFIUS 30 (2017).

115. Mario Mancuso et al., *Dealmakers, Take Note: GAO to Study CFIUS at Congress' Urging*, KIRKLAND & ELLIS: KIRKLAND ALERT (Oct. 17, 2016), <https://www.kirkland.com/-/media/>

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national security analysis has become increasingly far-reaching: CFIUS has raised questions about transactions that historically have not been considered to have national security implications (e.g., in the healthcare sector), and a growing number of high-profile transactions have been blocked, abandoned, or delayed due to CFIUS's concerns.¹¹⁶

In November 2017, a bipartisan group of congressmen proposed new legislation to address these perceived inadequacies.¹¹⁷ Following seven congressional hearings and intense debate, the final text of FIRRMA was agreed in July 2018.¹¹⁸

A. CERTAIN KEY TAKEAWAYS REGARDING FIRRMA

First, FIRRMA empowers CFIUS to review a broader universe of investments. Under FIRRMA, four types of transactions will be newly subject to CFIUS's jurisdiction:

1. A non-passive investment by a foreign person in "critical infrastructure" and "critical technology" companies, as well as companies that maintain or collect personal data of U.S. citizens.¹¹⁹
2. The purchase, lease, or concession by or to a foreign investor of real estate in "close proximity" to U.S. military sites or other sensitive facilities.¹²⁰
3. Any change in a foreign investor's rights regarding a U.S. business.¹²¹
4. Any transaction or arrangement designed to circumvent or evade CFIUS's jurisdiction.¹²²

Second, FIRRMA applies to all foreign investors, regardless of country. Initial drafts of FIRRMA would have required investors from specified "countries of concern" (e.g., China, Russia, and Venezuela) to notify CFIUS

publications/alert/2016/10/dealmakers-take-note-gao-to-study-cfius-at-congres/dealmakers-takenotegaotostudycfiusatcongressurging.pdf.

116. See, e.g., Mario Mancuso et al., *CFIUS Weighs in on Broadcom/Qualcomm Fight*, KIRKLAND & ELLIS: KIRKLAND ALERT (Mar. 9, 2018), https://www.kirkland.com/-/media/publications/alert/2018/03/cfius-weighs-in-on-broadcomqualcomm-fight/cfius_weights_in_on_broadcom_qualcomm_fight.pdf.

117. See Mancuso et al., *supra* note 112.

118. See Mario Mancuso & Lucille Hague, *Where CFIUS Reform Stands Now*, BLOOMBERG LAW (July 12, 2018), <https://www.bna.com/insight-cfius-reform-n73014477405/>.

119. See Foreign Investment Risk Review Modernization Act of 2018, H.R. 5515, 115th Cong. § 1703(a)(4) (2018). Provisions relating to non-passive investments in critical technology companies have been implemented on an interim basis through the pilot program; but the other provisions have not yet become effective. See, e.g., Kimberly Hope Caine et al., *President Trump Signs Into Law CFIUS Reform Bill*, NORTON ROSE FULBRIGHT (Aug. 16, 2018), <https://www.nortonrosefulbright.com/en-us/knowledge/publications/2405ee63/president-trump-signs-into-law-cfius-reform-bill>.

120. See H.R. 5515, 115th Cong. § 1703(a)(4).

121. See *id.*

122. See *id.*

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of their investments in U.S. businesses.¹²³ While much discussion around FIRRMA has focused on mitigating perceived threats arising from Chinese investments, FIRRMA is broadly drafted, empowering CFIUS to review transactions largely irrespective of an investor's country of origin.¹²⁴ But FIRRMA permits CFIUS to promulgate regulations exempting certain categories of foreign persons from notifying CFIUS of transactions that would otherwise be mandatory.¹²⁵

Third, FIRRMA will increase information-sharing among the United States and its allies. FIRRMA authorizes CFIUS to share information important to its analysis or decisions with foreign allies and partners, subject to appropriate confidentiality and classification requirements, in furtherance of "national security purposes."¹²⁶ As Germany, Canada, and other countries continue to strengthen their own national security review regimes, it is increasingly likely that regulators will share information with one another.¹²⁷ As a result, transaction parties will need to carefully choreograph the substance and timing of disclosures to national security regulators.¹²⁸

Fourth, non-notified transactions will be at heightened risk for independent scrutiny from CFIUS. Historically, CFIUS member agencies have taken different approaches to evaluating non-notified transactions, which has caused difficulties and delays in coordinating reviews of certain non-notified transactions. FIRRMA directs CFIUS to create a formal process to identify non-notified transactions and provides CFIUS with additional resources to implement this process.¹²⁹ Accordingly, parties can expect that transactions that are not voluntarily notified to CFIUS will be subject to greater risk of receiving requests to file from CFIUS and to heightened scrutiny in the review process.¹³⁰

123. See Mancuso & Hague, *supra* note 118.

124. 31 C.F.R. § pt. 801 (2018).

125. See H.R. 5515, 115th Cong. § 1706(v)(1)(C)(v)(IV)(bb)(CC).

126. *Id.* § 1713(c)(2)(C).

127. Mario Mancuso et al., *EU Poised to Enact a 'European CFIUS'—Four Considerations for Cross-Border M&A*, KIRKLAND & ELLIS, (Jan. 16, 2019), <https://www.kirkland.com/publications/article/2019/01/eu-poised-to-enact-a-european-cfius-four-considera>.

128. *Id.*

129. H.R. 5515, 115th Cong. § 1710(b)(1)(H).

130. See John P. Barker et al., *New Mandatory Submissions to CFIUS: Interim Regulations Under FIRRMA Take Effect November 10, 2018*, ARNOLD & PORTER (Oct. 16, 2018), <https://www.arnoldporter.com/en/perspectives/publications/2018/10/new-mandatory-submissions-to-cfius>.

International Legal Education and Specialist Certification Committee

MARA A. SMITH*

2018 saw the continued growth of certificate programs in both JD and LLM programs. Certificate programs, by definition, entail a student successfully completing a specialized curriculum in addition to their JD or LLM requirements. Schools vary widely in the requirements for certificates. Generally, a specialized series of required course electives comprises the core of the program. Universities vary the number of credit hours, from six to twenty-one credits for a specialty certificate. Some programs require an in-depth research paper or a practical skills program with varying amounts of hours.

No regulated set of requirements exists to determine a baseline standard for a specialty certificate. Several universities offer concentrations or areas of specialty which serve a similar purpose to certificate programs. The concentrations offer additional coursework in a particular area of specialty and encourage additional writing or experiential learning opportunities.

Universities market certificate programs as providing specific skills and an educational focus for a particular area of expertise. Students are encouraged to pursue a certificate of concentration in order to graduate with an additional value in a focused specialty. Universities proffer certificate programs as promoting increased job potential which may entice students to enroll in a particular JD or LLM program.

Certificate programs provide a specialized focus for students creating increased engagement and interest in JD and LLM programs. Warren Burger said,

[P]erhaps overriding other causes, is our historic insistence that we treat every person admitted to the bar as qualified to give effective assistance on every kind of legal problem that arises in life. . . . [L]egal educators can and should develop some system whereby students or new graduates who have selected, even tentatively, specialization in trial work can learn its essence under the tutelage of experts, not by trial and error at clients' expense.¹

* Mara A. Smith Esq., LLM. Thank you to Victor Primov, MA and Jude TA Smith, Esq, for their assistance with the research for this article, without which the article would not have been possible.

1. Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 *FORDHAM L. REV.* 227, 229–231 (1973).

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While his call is for specialization in one area, this concept of specialization is what certificate programs attempt to reconcile by allowing students to develop more focalized education for particular types of practice.

As bar passage rates drop, some criticize certificate programs for drawing students away from core bar courses. Certificate programs encourage specialization in focused areas of law leading to outcomes of less generalized legal knowledge and market glut of niche legal practice areas.² Historically, the concern for the development of specialty certification was the eventual lead to regulation in specialty areas and exclusion of general attorneys from areas that are considered specialties.³ But as of today, only two specializations in law require additional regulation: the Patent Bar and Admiralty Law.⁴ There has also been a trend toward regulation of Alternative Dispute Resolution professionals, but the debate over law or layman is still quite entrenched. While there is room for additional regulation, especially in specialty areas such as environmental law and types of business law (i.e., foreign direct investment), the core principles of each of these areas directly relate to other core general law classes (i.e., property law, general environmental law, business associations, contract law, etc.). There does not seem to be any move toward additional regulation within specialty fields at the moment.

Along with certifications, 2018 saw a rise in Master of Legal Studies (MLS) or Master of Jurisprudence (MJ) certificate options: online, part-time, and in-residence. The concept of a Master's certificate in a specialty focused area for non-lawyers is to provide advanced information, which includes basic legal concepts, at a graduate level, to non-lawyer professionals. These programs are marketed as employment promotion potential to prospective candidates. The MLS or MJ appears to have the least ABA oversight since it does not purport to grant a law degree or steps toward bar licensure. The MLS or MJ appears to be intended to improve knowledge and working relations between non-lawyers and lawyers and provide individuals with a personal interest a higher level of understanding in a particular legal-based field.

Data Analysis:⁵

- Percentage of law schools with only one specialty certificate: 3%
- Percentage of law schools with multiple specialty certificates: 36%

2. Robert Steinbuch, *Why Certificate Programs Are Not Good for Legal Education*, THE NAT'L JURIST (June 5, 2015, 11:25 AM), <http://www.nationaljurist.com/national-jurist-magazine/why-certificate-programs-are-not-good-legal-education>.

3. Marvin W. Mindes, *Lawyer Specialty Certification: The Monopoly Game*, 61 A.B.A. J. 42, 42 (1975), available at www.jstor.org/stable/25727018.

4. See MODEL RULES OF PROF'L CONDUCT R. 7.4 (2018), available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_7_4_communication_of_fields_of_practice_specialization/.

5. Information compiled from Full ABA Accredited schools only, based on information gathered from ABA University JD and LLM program websites.

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- Percentage of law schools with a specialty certificate that is international focused: 62%
- Percentage of law schools with a LLM: 65%
- Of law schools with a LLM, the percentage with a specialty LLM: 95%
- Of law schools with a LLM, the percentage of LLMs with an international focused specialty: 67%
- Percentage of law schools with a MSJ or MJ for non-lawyers: 26%
- Percentage of MSJ/MJ for non-lawyers which offer online options: 23%

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U.S. Lawyers Abroad

LINDA STRITE MURNANE*

#MeToo - Time for Whistleblower Protections That Work

This article examines the impact of the #MeToo movement in relation to the United Nations and its peacekeeping operations and international institutions in 2018.

I. Introduction

Citizens from around the world were riveted as Dr. Christine Blasey Ford brought #MeToo to the U.S. Senate during the high-profile hearings on the suitability of now-Justice Brett Kavanaugh for appointment to the highest court in the United States. The testimony of Dr. Ford included allegations that she had been sexually assaulted by the nominee. In the legal arena, the exposure of sexual harassment and sexual assault, including unwanted sexual advances in both the federal and state judiciaries, has been a significant recent legal and political development in the United States. But the issue extends beyond U.S. national borders and has also commanded attention within the United Nations (U.N.), including its peacekeeping operations and international institutions.

II. Background

Sexual harassment in the U.S. federal judiciary had surfaced as a pressing issue before the Kavanaugh hearings. In December 2017, Chief Justice John G. Roberts, Jr. of the United States Supreme Court convened a working group following several reports of harassment levied against a prominent federal judge, Alex Kozinski.¹ “The Working Group included in its review

* Linda Strite Murnane is a past Chair of the American Bar Association Judicial Division. She served 29.5 years on active duty in the United States Air Force, including ten years as a military judge or Chief Circuit Military Judge. From 2006 to 2008, she was the Senior Legal Officer for Trial Chamber III at the International Criminal Tribunal for the Former Yugoslavia (ICTY), The Hague, The Netherlands. She also served at the ICTY between 2009 and 2012, as the Chief, Court Management Services Section, and as the Acting Head of Chambers and Acting Deputy Registrar. She served as the Chief, Court Management Services Section at the Special Tribunal for Lebanon between 2014 and 2017. She currently works for Lexis-Nexis in Miamisburg, Ohio. She is a 2008 recipient of the American Bar Association’s “Margaret Brent Women Lawyers of Achievement Award” and retired from her military service in the grade of colonel (O-6).

1. See FED. JUDICARY WORKPLACE CONDUCT WORKING GRP., REPORT OF THE FEDERAL JUDICIARY WORKPLACE CONDUCT WORKING GROUP TO THE JUDICIAL CONFERENCE OF THE

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the entire federal Judiciary, including judges, court unit executives, managers, supervisors and others serving in supervisory roles, as well as employees, law clerks, interns, externs, and other volunteers.”²

In its *Report of the Federal Judiciary Workplace Conduct Working Group to the Judicial Conference of the United States* (“Working Group Report”), issued on June 1, 2018, the Working Group made recommendations designed to ensure a workplace environment that would reduce the prevalence of sexual harassment and sexual assault and provide a healthier environment for those working in courthouses throughout the United States.³

In July 2018, Law Clerks for Workplace Accountability sent a letter of concern to Chief Justice Roberts responding to the Working Group Report. In its letter, the Law Clerks for Workplace Accountability noted that the Working Group’s recommendations did not adequately address retaliation. Both within and outside the legal arena, the lack of protection for those who report sexual assault and harassment often leads to late reporting, non-reporting, ineffective investigation, and ineffective prosecution of perpetrators. This lack of protection was evident during the testimony of Dr. Ford. In its response, the Law Clerks for Workplace Accountability authors urged that the Working Group’s recommendations include a section on “[c]rafting concrete solutions to address the risk of retaliation.”⁴

Specifically, the authors noted:

Possibly the largest barrier to the reporting of harassment is the victim’s fear of retaliation. The [Working Group] Report correctly recognizes this problem, noting that every employee should be able to ‘seek and receive remedial action free from retaliation.’ It also says that retaliation ‘will not be tolerated’ and ‘constitutes misconduct.’ But the Report does not specify how the Judiciary should go about determining whether retaliation has occurred and, in instances where it learns of retaliation, what remedies are available for the victim and what disciplinary action may be taken against an offending judge. We recommend that the Judicial Conference craft specific proposals to address retaliation. . . .⁵

While this inquiry into the U.S. judiciary was underway, the U.N. announced that “[m]ore than 50 allegations of sexual exploitation and abuse

UNITED STATES 1 (2018), available at https://www.uscourts.gov/sites/default/files/workplace_conduct_working_group_final_report_0.pdf; see also Niraj Chokshi, Federal Judge Alex Kozinski Retires Abruptly After Sexual Harassment Allegations, *The N.Y. Times* (Dec. 18, 2017), <https://www.nytimes.com/2017/12/18/us/alex-kozinski-retires.html>.

2. FED. JUDICIARY WORKPLACE CONDUCT WORKING GRP., *supra* note 1, at 3.

3. *Id.* at 5.

4. Memorandum from Law Clerks for Workplace Accountability, Response to the Federal Judiciary Workplace Conduct Working Group’s June 1, 2018, Report, at 10 (July 20, 2018), available at <http://clerksforaccountability.org/response-to-working-group-report?v2>.

5. *Id.* at 15.

involving personnel serving with the United Nations and its partners in the field were received in the first three months” of 2018.⁶

III. The Need for Meaningful Whistleblower Protections—the U.N. Bulletin

While the Working Group Report and the Law Clerks for Judicial Accountability letter touch on this critical issue, fear of retaliation is perhaps the single greatest reason that many people who have experienced sexual harassment or sexual assault begin reporting their experiences by asking that no one be told.

Within the U.N., the Secretary General’s Bulletin, ST/SGB/2017/2/Rev.1, purports to establish whistleblower protections for individuals who report misconduct and or cooperate with investigations into misconduct, and who find themselves subject to retaliation as a result of their reporting or cooperation.⁷ That bulletin begins by obliging U.N. staff members both to report misconduct and to cooperate with investigations, stating: “It is the duty of staff members to report any breach of the Organization’s regulations and rules to the officials whose responsibility it is to take appropriate action. An individual who makes such a report in good faith has the right to be protected against retaliation.”⁸

The Bulletin fails, however, to detail that protection does not attach automatically from the moment a staff member reports misconduct or cooperates in an investigation. The U.N. Secretariat’s Ethics Office receives requests for protection from staff members, which means that a staff member must proactively seek protection. Furthermore, protection is not automatically afforded upon the request of a reporter. Rather a staff member only becomes eligible for protection once retaliation has occurred.⁹ Once a staff member is eligible, meaning the staff member believes that retaliation has already taken place, the Ethics Office then undertakes a review of whether there is prima facie evidence that the alleged retaliation has in fact occurred.¹⁰ This shifts the burden to the staff member who is seeking protection. Often, such burden-shifting means that retaliation has already inflicted irreparable harm on the staff member, such as through the

6. UN Affairs, *Combating ‘Scourge’ of Sexual Abuse Allegations Remains ‘Key’ UN Priority, as 54 New Allegations Emerge*, UN NEWS (May 1, 2018), <https://news.un.org/en/story/2018/05/1008712>.

7. U.N. Secretary-General, *Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations*, ¶¶ 1.1–1.3, U.N. Doc. ST/SGB/2017/2/Rev.1 (Nov. 28, 2017).

8. *Id.* ¶ 1.1.

9. ETHICS OFFICE, *Requesting Protection Against Retaliation*, UNITED NATIONS, <http://www.un.org/en/ethics/retaliation.shtml> (last visited Mar. 30, 2019).

10. UNDP, POLICY FOR PROTECTION AGAINST RETALIATION: FOR REPORTING MISCONDUCT OR COOPERATING WITH A DULY AUTHORIZED AUDIT OR INVESTIGATION ¶¶ 6.4, 6.6 (2015), *available at* <http://www.undp.org/content/dam/undp/img/corporate/ethics/PaR%202015%20Final.pdf>.

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non-renewal of an employment contract or the loss of a promotion, before any protection attaches. On other occasions, retaliation takes the form of verbal abuse or reputational harm, making it difficult for a staff member to produce prima facie evidence to the Ethics Office. As a result, a staff member reporting misconduct may be left vulnerable to retaliatory acts for a considerable period of time. Victims of sexual harassment by a supervisor, for example, may continue to work under the supervisor for the duration of the underlying misconduct investigation.

Investigations into misconduct take, on average, one to three years, and during that time the reporting staff member may be left without protection. The risk of continuing abuse during that time is high. Additionally, in order to prevail with a complaint of sexual harassment or assault, the evidence must meet the “clear and convincing evidence” standard.¹¹ Most harassment tends to be verbal and occur privately in the absence of witnesses. It is common for victims to fear that they lack sufficient evidence to meet the heightened standard, which leads to underreporting of harassment and assault.¹² In reality, the rules governing retaliation result in a lack of protection for individuals who dutifully report allegations of sexual harassment, sexual assault, sextortion, and like conduct, particularly with respect to superiors.

When the alleged perpetrator of the misconduct serves as a member of the international judiciary, the circumstances are even more difficult for a staff member. Judges are not U.N. staff members but rather hold the status of appointees. Judges are therefore not subject to the U.N.’s internal investigation authority; when a staff member reports an abuse, the Judge is not investigated by the U.N. system. This leaves a staff member without a clear investigative path to follow.

In the rare instance when there is an actual judicial code of conduct, enforcement of that code of conduct is undertaken internally by judicial peers of the internationally-appointed judges.¹³ This is true within the U.N., as U.N. staff members may be subject to U.N. staff rules, but achieving investigation of the alleged misconduct is a challenge, particularly

11. “Clear and convincing proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt—it means that the truth of the facts asserted is highly probable.” *Molari v. Secretary-General of the United Nations*, Judgments U.N. Admin. Trib., No. 164, ¶ 30, U.N. Doc. AT/OCT/21 (2011); *see also* *Aqel v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgments U.N. Admin. Trib., No. 040, ¶ 27, U.N. Doc. AT/JULY/1 (2010).

12. Misconduct of this nature may warrant termination and thus in turn requires the heightened standard of “clear and convincing evidence,” whereas other types of misconduct only warrant the “preponderance of evidence” standard. Thus, staff members complaining of sexual harassment must meet a heightened standard of proof when the very nature of such misconduct is often “he said, she said,” done in secrecy, and thus often won’t meet the clear and convincing standard.

13. *See, e.g.*, Code of Judicial Ethics, ICC-BD/02-01-05, at 3 (Sept. 3, 2005), *available at* https://www.icc-cpi.int/NR/rdonlyres/A62EBC0F-D534-438F-A128-D3AC4CFDD644/140141/ICCBD020105_En.pdf.

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where the reporter bears the burden of establishing a prima facie case. The General Assembly did not adopt a reporting mechanism for complaints against Administration of Justice judges until December 31, 2015.¹⁴ It requires that complaints levied against a Judge be sent to the President Judge. “If the President or receiving judge is of the view that there are sufficient grounds to warrant a formal investigation, he or she shall establish a panel of outside experts to investigate the allegations and report its conclusions and recommendations to the President.”¹⁵ From the establishment of the Administration of Justice in 2009 until the reporting mechanism was adopted in late 2015, there was no clear procedure available to a staff member who had been abused by a judge.

When a staff member reports harassment or assault to a member of the court staff in a U.S. court or to a U.N. staff member, the absence of meaningful and prompt whistleblower protections places the person receiving the report of misconduct in the difficult and compromising position of either maintaining the confidence of the initial reporter or violating that confidence and taking further action. When there is no meaningful protection for the job opportunity of the initial reporter, the consequences for that reporter may be lifelong. For example, where the person reporting the behavior is a law clerk to a judge, the probability of a positive reference for future employment is at risk. Leaving before the end of a clerkship is a significant detriment to future employment. Within the U.N. system, failing to report is sometimes far preferable to being reassigned to work outside the preferred area. When the alleged offender is a U.N. judge, the possibility of any meaningful recourse is virtually non-existent.

Sexual harassment, like sexual assault, is most often found in situations in which the balance of power between the perpetrator and the victim favors the former. When a judge or a superior makes continuous unwanted advances, the person in the subordinate position is already vulnerable—at risk of losing employment, of not being believed, and of long-term professional implications.

For that reason, any plan to change the workplace to ensure reporting of and accountability for misconduct related to sexual assault, sextortion, and sexual harassment requires effective whistleblower protections, which are immediate and do not require the reporter to establish a prima facie case.

In 2018, Secretary General Guterres announced the formation of a “Circle of Leadership” and appointed a Victim Rights Advocate as steps toward affirming the U.N.’s commitment to “zero tolerance” for sexual harassment and sexual assault as a priority this year.¹⁶

14. G.A. Res. 70/112 (XI), at 1, 6 (Dec. 31, 2015).

15. *Id.* ¶ 15.

16. UN NEWS, *Combating ‘Scourge’ of Sexual Abuse Allegations Remains ‘Key’ UN Priority, as 54 New Allegations Emerge*, UN AFFAIRS (May 1, 2018), <https://news.un.org/en/story/2018/05/1008712/>.

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While other measures—such as greater specificity within judicial codes of conduct, independent reporting mechanisms, regular reporting on these issues, and meaningful discipline for those perpetrators found to have committed the misconduct—are also needed, an important first step is meaningful whistleblower protections that make it safe to report the misconduct and ensure that the allegations will be investigated.

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Africa

MIRIAM ABAYA, RAHEL ALEMAYEHU AYANA, CHIOMA AYOGU,
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NICOLAS BREMER, SHERRI MARIE CARR, YOLANDA CHITOHWA,
MICHELA COCCHI, UCHECHI DURUNNA, KHALED ABOU EL HOUDA,
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JACQUES-BRICE MOMNOUGUI, FILIPA MONTEIRO,
RICARDO ALVES SILVA, FRANCES SOCASH, MARC WEITZ,
NAHOM ABRAHAM WOLDEABZGHI*

I. North Africa

A. ALGERIA

1. Migrant, Refugee Expulsions

In June, reports indicated that Algeria had expelled over 13,000 sub-Saharan African migrants over the previous fourteen months and abandoned

* Committee Editor (Bodley); Algeria (Katz); Angola (Silva, Miranda, Frazão); Benin (Gassikia); Botswana (Ed.); Burkina Faso (Ed.); Burundi (Ed.); Cameroon (Silva, Miranda, Frazão); Cape Verde (Silva, Miranda, Frazão); CAR (Weitz); Chad (Weitz); Comoros (Meise, Ed.); DRC (Ed., Monteiro); Congo (Silva, Miranda, Frazão); Côte d'Ivoire (Houda); Djibouti (Ed.); Egypt (Bremer, Ed.); Equatorial Guinea (Ed., Silva, Miranda, Frazão); Eritrea (Socash, Cocchi, Woldeabzghi); Ethiopia (Socash, Cocchi, Kaltiso); Gabon (Silva, Miranda, Frazão, Ed.); Gambia (Evans, Mbaku); Ghana (Abu-Bonsrah); Guinea (Ed.); Guinea-Bissau (Ed.); Kenya (Socash); Lesotho (Ed.); Liberia (Durunna); Libya (Katz); Madagascar (Ed.); Malawi (Holmes); Mali (Ed.); Mauritania (Houda); Mauritius (Ed.); Morocco (Cocchi, Durunna); Mozambique (Silva, Miranda, Frazão); Namibia (Ed.); Niger (Ed.); Nigeria (Abaya, Cocchi); Rwanda (Meise); São Tomé and Príncipe (Silva, Miranda, Frazão); Senegal (Houda); Seychelles (Carr); Sierra Leone (Ed.); Somalia (Meise); South Africa (Evans, Cocchi); South Sudan (Woldeabzghi); Sudan (Ed.); Swaziland (Holmes); Tanzania (Ayogu); Togo (Ed.); Tunisia (Bishai); Uganda (Meise); Western Sahara (Ed.); Zambia (Ed.); Zimbabwe (Chitohwa); AfCHPR (Ed.); AEC (Ayana); AU (Ayana, Mbaku, Cocchi); ECOWAS (Ed.); EAC (Bishai); AfDB (Ed.); Afreximbank (Ed.); ECA (Ed.); SADC (Meise, Holmes); COMESA (Ed.); IGAD (Woldeabzghi); ECCAS (Ed.); UMA (Ed.); OHADA (Momnougui, Cocchi); biographies: <http://www.abanet.org/dch/committee.cfm?com=IC805000>.

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them in the Sahara Desert.¹ Human rights groups claim that racial profiling was used, and that some deportees had valid visas.²

2. *Speaker “Coup;” President Seeks Fifth Term*

In October, deputies voted out Speaker Bouhadja.³ Opposition parties boycotted the process citing a lack of constitutional authority, while Bouhadja refused to step down.⁴ President Bouteflika has announced that he will seek a fifth five-year term in the 2019 elections, despite a two-term presidential limit set in 2016 and continued unrest.⁵

B. EGYPT

1. *‘Cybercrime’ Legislation*

In August, President Abdel Fattah el-Sisi signed “cybercrime” legislation into law allowing authorities to block websites deemed to “constitute a threat” . . . as well as to jail or fine those who run them.⁶ Critics deplore the legislation as an attack against freedom of speech.⁷

C. LIBYA

1. *December Elections Delayed*

In May, rival factions agreed to a legal framework for forthcoming UN-backed elections.⁸ Prime Minister Fayeaz al-Sarraj, the Libyan National Army’s Khalifa Haftar, House of Representatives President Aguila Saleh Issa, and High Council of State head Khalid al-Mishri all contested

1. See, e.g., Lori Hinnant, *Walk or Die: Algeria strands 13,000 migrants in the Sahara*, ASSOCIATED PRESS (June 25, 2018), <https://apnews.com/9ca5592217aa4acd836b9ee091ebfc20>.

2. *Algeria: Mass racial profiling used to deport more than 2,000 sub-Saharan migrants*, AMNESTY INT’L (Oct. 23, 2017), <https://www.amnesty.org/en/latest/news/2017/10/algeria-mass-racial-profiling-used-to-deport-more-than-2000-sub-saharan-migrants>.

3. *Algerian lawmakers oust parliament speaker, elect youthful replacement*, REUTERS (Oct. 24, 2018, 10:05 AM), <https://www.reuters.com/article/us-algeria-politics/algerian-lawmakers-oust-parliament-speaker-elect-youthful-replacement-idUSKCN1MY25Q>.

4. *Id.*

5. Ahmed Marwane, *A Fifth Presidential Term for Bouteflika?*, WASH. INST. (July 19, 2018), <https://www.washingtoninstitute.org/fikraforum/view/a-fifth-presidential-term-for-bouteflika>.

6. *Egypt’s Sisi signs new law tightening government control online*, AL JAZEERA (Aug. 18, 2018), <https://www.aljazeera.com/news/2018/08/egypt-sisi-signs-law-tightening-government-control-online-180818144043935.html>.

7. *Id.*

8. John Irish & Marine Penetier, *Libyan factions agree to December 10 elections at Paris talks*, REUTERS (May 29, 2018), <https://www.reuters.com/article/us-libya-security-meeting/libyan-factions-agree-to-december-10-elections-at-paris-talks-idUSKCN1IU188>.

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leadership.⁹ In September, however, the UN extended the Libya mission by another year and withdrew support for the December elections.¹⁰

D. TUNISIA

1. *Female Equality Initiatives*

In August, President Beji Caid Essebsi called for legislation allowing women to receive equal inheritance shares vis-à-vis men, aiming to overturn Islamic law, which traditionally permits women to inherit only one-half the amount that their male relatives receive.¹¹ The President's Commission on Individual Freedoms and Equality also recommended adoption of a Code of Individual Rights and Liberties including a law to abolish discrimination against women and children.¹²

2. *CSO Registrations*

In July, Tunisia's parliament passed Law 30 requiring civil society organizations to register with the newly created National Registry of Institutions.¹³ Penalties include imprisonment and fines between 10,000 and 50,000 Dinars (between US \$3,436-US\$17,182), raising concerns that the law constitutes "a backdoor way to increase government oversight of civil society."¹⁴

E. MOROCCO

1. *Domestic Worker Rights*

In October, a 2016 law on domestic worker rights went into effect requiring written contracts, limiting working hours, guaranteeing twenty-four hours of rest per week, and imposing financial penalties on employers who break

9. Alissa J. Rubin, *Libyan Factions Agree to Elections Despite Deep Divisions*, N.Y. TIMES, May 29, 2018, A7, available at <https://www.nytimes.com/2018/05/29/world/middleeast/libya-macron-factions-elections.html>.

10. *UN renews Libya mission, delays vote indefinitely*, AL JAZEERA (Sept. 13, 2018), <https://www.aljazeera.com/news/2018/09/renews-libya-mission-delays-vote-indefinitely-180913190030806.html>.

11. Brennan Cusack, *Tunisia's Equal Inheritance Law Could Boost Female Entrepreneurship*, FORBES (Aug. 22, 2018, 7:08 AM), <https://www.forbes.com/sites/brennancusack/2018/08/22/tunisia-equal-inheritance-law-could-boost-female-entrepreneurship/#167be0d2155a>.

12. *Tunisia: Landmark Proposals on Gender Bias, Privacy*, HUMAN RIGHTS WATCH (July 26, 2018, 5:00 AM), <https://www.hrw.org/news/2018/07/26/tunisia-landmark-proposals-gender-bias-privacy>.

13. *Civic Freedom Monitor: Tunisia*, INT'L CTR. FOR NOT-FOR-PROFIT L., <http://www.icnl.org/research/monitor/Tunisia.html> (last updated Dec. 12, 2018).

14. *Id.*; Sarah E. Yerkes, *The Quiet Threat to Human Rights in Tunisia*, FOREIGN AFFAIRS (Aug. 7, 2018), <https://www.foreignaffairs.com/articles/middle-east/2018-08-07/quiet-threat-human-rights-tunisia>.

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the law.¹⁵ While domestic worker rights remain weaker than others, there were previously no rights or limits on hours worked.¹⁶

2. *Constitutional Challenges Permitted*

In February, Parliament approved Law No. 15.86, introducing procedures for individuals to challenge the constitutionality of laws.¹⁷ The law sets a fee and imposes conditions, including a condition that the issue has not been previously determined.¹⁸

F. WESTERN SAHARA

1. *UN Mission Re-extended*

In October, the UN Security Council extended the mandate of its Mission for the Referendum in Western Sahara (MINURSO) until April 2019.¹⁹ Resolution 2240 (2018) expressed support for the Secretary-General's plan to renew negotiations toward a mutually acceptable solution to "provide for the self-determination of the people of Western Sahara."²⁰ Established in 1991, MINURSO is tasked with, among other things, holding a referendum in which Western Sahara "choose[s] between independence and integration with Morocco."²¹

II. West Africa

A. BENIN

1. *Anti-Terrorism Court Created*

In July, the National Assembly created a new court for the repression of economic offenses and terrorism that some see as a tool to prosecute

15. *Morocco: New Domestic Workers Law Takes Effect*, HUMAN RIGHTS WATCH (Oct. 4, 2018, 12:01 AM), <https://www.hrw.org/news/2018/10/04/morocco-new-domestic-workers-law-takes-effect>.

16. *Id.*

17. *Morocco: New Law Establishes Processes for Individuals to Challenge Constitutionality of Laws*, LIBR. CONGRESS (Apr. 25, 2018), <http://www.loc.gov/law/foreign-news/article/morocco-new-law-establishes-processes-for-individuals-to-challenge-constitutionality-of-laws>.

18. *Id.*

19. *U.N. Security Council Extends Mission in Western Sahara for Another Year*, INT'L L. PROF BLOG (Oct. 31, 2018), https://lawprofessors.typepad.com/international_law/2018/10/western-sahara.html.

20. *Id.*

21. *Id.*

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opposition members.²² In October, the court issued an arrest warrant for opposition activist Sébastien Adjavon, who is seeking asylum in France.²³

B. BURKINA FASO

1. Further Attack

In March, terrorists targeted Burkina Faso with an attack on its military headquarters and French embassy that killed at least thirty people.²⁴ As a member of the Trans-Saharan Counterterrorism Partnership, with peacekeeping troops in Mali and Sudan, Burkina Faso has been made a target in the region but an investigation led to the arrests of active and former soldiers rather than of foreigners.²⁵

C. CAPE VERDE

1. Tax Arbitration Center; Ethics Code

In May, Cape Verde created a Tax Arbitration Center to resolve tax disputes.²⁶ In April, it enacted the Tax Arbitration Ethics Code regulating arbitrators' appointments and conduct including their removal.²⁷ Banking regulations tightened in line with international trends requiring financial institutions "to provide . . . [increased] information to Cape Verde tax authorities, notably . . . [to] convey[] such information to . . . other States, under international agreements"²⁸

22. Cyrille Ligan, *Bénin/Installation de la CRIET: L'arme fatale de la rupture pour l'éradication de la délinquance financière* [Benin/Creation of the CRIET: Ultimate weapon to wipe out financial crime], PHARAONS (Aug. 28, 2018), <https://www.lespharaons.com/benin-installation-de-la-criet-larme-fatale-de-la-rupture-contre-leradication-de-la-delinquance-financiere/>.

23. *Bénin: Sébastien Adjavon demande l'asile politique en France* [Benin: Sébastien Adjavon seeks political asylum in France], RADIO FR. INT'L (Oct. 20, 2018), <http://www.rfi.fr/afrique/20181019-benin-sebastien-ajavon-asile-politique-france-avocat-mandat-arret>.

24. David Chazan, *At least 30 dead as French embassy comes under attack in Burkina Faso*, TELEGRAPH (Mar. 2, 2018, 4:24 AM), <https://www.telegraph.co.uk/news/2018/03/02/least-30-dead-french-embassy-comes-attack-burkina-faso/>.

25. *Burkina Faso: Extremism & Counter-Extremism*, COUNTER EXTREMISM PROJECT, <https://www.counterextremism.com/countries/burkina-faso> (last visited Feb. 19, 2019); Nicolas Haque, *Burkina Faso Attack: Soldiers arrested in investigation*, AL JAZEERA (Mar. 10, 2018), <https://www.aljazeera.com/news/2018/03/burkina-faso-attack-soldiers-arrested-investigation-180310103444297.html>.

26. *Cape Verde - Legal News - April through June 2018*, MIRANDA ALL. (July 31, 2018), <http://www.mirandalawfirm.com/en/insights-knowledge/publications/legal-news/cape-verde-legal-news-april-through-june-2018#>.

27. *Id.*

28. *Cape Verde - Legal News - January through March 2018*, MIRANDA ALL. (Mar. 30, 2018), <http://www.mirandalawfirm.com/en/insights-knowledge/publications/legal-news/cape-verde-legal-news-january-through-march2018>.

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D. CÔTE D'IVOIRE

1. *Post-Election Amnesties*

In August, President Ouattara granted amnesty to 800 people prosecuted following the 2010-2011 post-election crisis, including former first lady Simone Gbagbo—whose husband Laurent Gbagbo remains imprisoned in The Hague.²⁹ The conflict “was the deadliest crisis the country has experienced, with at least 3,000 people, mostly Gbagbo opponents, killed during the six-month standoff.”³⁰

E. GAMBIA

1. *Truth and Reparations Commission*

In October, President Adama Barrow “announced the creation of a Truth and Reparations Commission to investigate crimes committed by exiled former president Yahya Jammeh.”³¹ The Commission will be modeled after South Africa’s Truth and Reconciliation Commission and aims to offer reparations to victims.³²

F. GHANA

1. *Office of the Special Prosecutor Created*

In January, President Akufo-Addo created the Office of the Special Prosecutor as a specialized agency to root out corruption.³³ Anyone with evidence of corruption may lodge a complaint.³⁴

G. GUINEA

1. *Bauxite Mining Threatens Livelihoods*

In October, rights groups warned that Guinea’s growing bauxite industry threatens livelihoods through destruction of ancestral farmlands and water

29. Ruth Maclean, *Ivory Coast president pardons 800 people including ex-first lady*, GUARDIAN (Aug. 7, 2018), <https://www.theguardian.com/world/2018/aug/07/ivory-coast-president-pardons-800-people-ex-first-lady-simone-gbagbo>.

30. Leanne de Bassompierre, *Ivory Coast’s Ouattara gives Amnesty to ex-First Lady, Prisoners*, BLOOMBERG (Aug. 7, 2018, 1:41 AM), <https://www.bloomberg.com/news/articles/2018-08-07/ivory-coast-s-ouattara-gives-amnesty-to-ex-first-lady-prisoners>.

31. Manny Marotta, *Gambia launches truth and reparations commission*, JURIST (Oct. 16, 2018, 3:36 PM), <https://www.jurist.org/news/2018/10/gambia-launches-truth-and-reparations-commission/>.

32. *Id.*

33. Eva Frempon-Ntiamoah, *Parliament Passes Office of Special Prosecutor Bill, 2017*, GOV’T GHANA, <http://www.ghana.gov.gh/index.php/media-center/news/4184-parliament-passes-office-of-special-prosecutor-bill-2017> (last visited Nov. 10, 2018).

34. *Id.*

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sources.³⁵ Guinea has the world's largest bauxite reserves, but demand has increased as other countries have banned exports due to the industry's environmental impact.³⁶ A report called on the Guinean government, which has transformed Guinea into the world's third-largest exporter, "to better regulate companies and protect communities."³⁷

H. GUINEA-BISSAU

1. *UN Calls for Support; November Elections*

In August, the UN Secretary-General's Special Representative for Guinea-Bissau and head of the UN Integrated Peacebuilding Office (UNIOGBIS), José Viegas Filho, called for international support ahead of November legislative elections.³⁸ He "highlighted . . . developments, including [a] . . . new gender-parity quota law . . . which establishes a minimum 36 percent . . . [of] women . . . candidates for legislative and local government elections"³⁹

I. LIBERIA

1. *Landmark Land Rights Law*

In September, President George Weah signed the Land Rights Act into law helping communities to fight foreign land grabs, giving them ownership of ancestral lands.⁴⁰ Liberia "has signed away more than 40 percent of [its] . . . territory in logging, mining and agriculture concessions," with the majority of the population holding no formal rights to land.⁴¹

J. MAURITANIA

1. *Apostasy Death Penalty*

In April, the National Assembly replaced Article 306 of the Criminal Code making the death penalty mandatory for anyone convicted of "blasphemous

35. *Guinea: Bauxite Mining Boom Threatens Rights*, HUMAN RIGHTS WATCH, (Oct. 4, 2018, 12:01 AM), <https://www.hrw.org/news/2018/10/04/guinea-bauxite-mining-boom-threatens-rights>.

36. *Id.*

37. *Id.*

38. *Guinea-Bissau: Upcoming election vital to prevent 'relapse' into instability, says UN envoy*, U.N. NEWS (Aug. 30, 2018), <https://news.un.org/en/story/2018/08/1018072>.

39. *Id.*

40. James Giahvue, *Liberia passes landmark law to secure ancestral land rights*, REUTERS (Sept. 20, 2018, 10:17 AM), <https://www.reuters.com/article/us-liberia-landrights-lawmaking/liberia-passes-landmark-law-to-secure-ancestral-land-rights-idUSKCN1M02FG>.

41. *Id.*

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speech” or “sacrilegious acts”⁴² Imprisonment for those who repent is no longer available.⁴³

2. *Senate Abolished*

In August, Mauritania abolished its Senate in a referendum boycotted by the opposition.⁴⁴ The result is “a victory for President Mohamed Ould Abdel Aziz, who is accused of trying to extend his mandate.”⁴⁵ Abdel Aziz “is barred by the constitution from running a third term.”⁴⁶

K. MALI

1. *Amnesty Proposed*

In his 2017 end-of-year address, Malian President Keita proposed amnesty to “those involved in an armed rebellion” provided they have “no blood on their hands.”⁴⁷ The announcement followed the appointment of a new government and the weeklong return of “his predecessor Amadou Amani Touré, after five years of exile in Senegal.”⁴⁸ Northern Mali fell to al Qaeda and jihadist groups in 2012, but the jihadists were largely driven out following the 2013 launch of an ongoing international military intervention.⁴⁹

L. NIGER

1. *Finance Law Protests*

In January, thousands demonstrated at the capital, Niamey, against the 2018 finance law, which some believed was “anti-social” and would drive prices up at the expense of the poor.⁵⁰ An October 2017 “demonstration against the same . . . law degenerated into riots.”⁵¹

42. *Mauritania: Mandatory Death Penalty for Blasphemy*, HUMAN RIGHTS WATCH (May. 4, 2018, 12:00 AM), <https://www.hrw.org/news/2018/05/04/mauritania-mandatory-death-penalty-blasphemy>.

43. *Id.*

44. *Mauritania Senate abolished in referendum*, BBC (Aug. 7, 2017), <https://www.bbc.com/news/world-africa-40847092>.

45. *Id.*

46. *Id.*

47. Daniel Mumbere, *Mali; Government to propose new amnesty law in ongoing peace process*, AFRICANEWS (Jan. 2, 2018), <http://www.africanews.com/2018/01/02/mali-government-to-propose-new-amnesty-law-in-ongoing-peace-process/>.

48. *Id.*

49. *Id.*

50. *Protesters in Niger kick against “anti-social” finance law*, AFRICANEWS (Jan. 1, 2018), <http://www.africanews.com/2018/01/01/protesters-in-niger-kick-against-anti-social-finance-law/>.

51. *Id.*

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M. NIGERIA

1. *Trade Agreements Rejected*

In 2018, Nigeria declined to sign both the Economic Partnership Agreement—that aims to reduce trade restrictions between West African countries and the EU—and the pan-African African Continental Free Trade Agreement (AfCTA).⁵²

N. SÃO TOMÉ AND PRÍNCIPE

1. *New PPP Law*

In 2018, a new Public-Private Partnerships Law was approved to develop and regulate PPPs.⁵³ The law includes statutory requirements, mandatory approval by the Audit Court, and the submission of disputes to domestic or international arbitration.⁵⁴

O. SENEGAL

1. *Mauritania/Senegal Gas Field Agreement*

In February, Mauritania and Senegal signed an agreement for the joint exploitation of 450 billion cubic meters of the Grand Tortue/Ahmeyim offshore gas field straddling their maritime borders.⁵⁵ Announcing the discovery in January 2016, Senegal described the field as the biggest offshore gas deposit in West Africa.⁵⁶ In 2017, Senegal created its first Ministry of Oil and Energy.⁵⁷

52. Chris Giles, *Nigeria rejects West Africa-EU free trade agreement*, CNN (Apr. 6, 2018), <https://edition.cnn.com/2018/04/06/africa/nigeria-free-trade-west-africa-eu/index.html>.

53. *Public-Private Partnerships Made Easier by New Law*, MIRANDA ALL. (Apr. 24, 2018), <http://www.mirandalawfirm.com/en/insights-knowledge/publications/alerts/public-private-partnerships-made-easier-by-new-law#>.

54. *Id.*

55. *Mauritania-Senegal summit yields accord on giant gas field*, DAILY MAIL (Feb. 9, 2018), <https://www.dailymail.co.uk/wires/afp/article-5373543/Mauritania-Senegal-summit-yields-accord-giant-gas-field.html>.

56. *Id.*

57. Olivier de Souza, *Après trois ans de découvertes effrénées, le Sénégal se dote d'un ministère du pétrole* [After three years of unbridled discoveries, Senegal has a ministry of oil], AGENCE ECOFIN (Sept. 11, 2017), <https://www.agenceecofin.com/gestion-publique/1109-50103-apres-trois-ans-de-decouvertes-effrenees-le-senegal-se-dote-d-un-ministere-du-petrole>.

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P. SIERRA LEONE

1. *New President*

On March 7, 2018, the country held general elections to elect the president, parliament, and local council positions.⁵⁸ The incumbent President, Ernest Bai Koroma, was ineligible after ten years in office.⁵⁹ No presidential candidate received 55 percent of the vote required to win the first round, requiring a run-off election, which opposition leader Julius Maada Bio (Sierra Leone People's Party) won with 51.8 percent of the vote.⁶⁰ The 124-member Parliament was elected from single-member constituencies in first-past-the-post voting with twelve seats reserved for paramount chiefs, who are elected indirectly.⁶¹

Q. TOGO

1. *Protests Continue; December Constitutional Referendum*

Since 2017, there have been widespread protests against the fifty-year rule of President Faure Gnassingbé's family.⁶² In response to calls that he resign, Gnassingbé offered enactment of a two-term limit—staying in power to 2030 that was rejected. December legislative and local elections will also hold a referendum on constitutional reform.^{63,64}

III. Central Africa

A. CAMEROON

1. *New Public Contracts Code*

In July, Decree No. 2018/366 brought in a new Public Contracts Code, “strengthening the powers of the Contracting Authorities and . . . reinforcing . . . provisions on transparency and ethics”⁶⁵ The Public

58. *Elections in Sierra Leone: 2018 General Elections: Frequently Asked Questions*, INT'L FOUND. ELECTORAL SYS. 1 (Mar. 2, 2018), https://www.ifes.org/sites/default/files/2018_ifes_sierra_leone_general_elections_faqs_final.pdf.

59. *Id.*

60. Jaime Yaya Berry, *Sierra Leone's Opposition Leader is Sworn In as President*, N.Y. TIMES, Apr. 4, 2018, A11, available at <https://www.nytimes.com/2018/04/04/world/africa/sierra-leone-president.html>.

61. *Elections in Sierra Leone*, *supra* note 58.

62. Tim Cocks, *Togo must introduce two-term limit swiftly to prevent crisis-UN*, REUTERS (Sept. 7, 2017, 9:15 AM), <https://reuters.com/article/topNews/idAFKCN1BK0KN-OZATP>.

63. *Id.*

64. *Togo announces referendum, legislative election dates*, AL JAZEERA (Sept. 18, 2018), <https://www.aljazeera.com/news/2018/09/togo-announces-referendum-legislative-election-dates-180918190412347.html>.

65. *New Public Procurement Framework*, MIRANDA ALL. (July 18, 2018), <http://www.miranda-lawfirm.com/en/insights-knowledge/publications/alerts/new-public-procurement-framework>.

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Contracts Code “no longer applies to procurement by State-owned companies.”⁶⁶

B. CENTRAL AFRICAN REPUBLIC

1. Warlord Conviction; Criminal Court Established

In January, a Bangui Court convicted warlord Rodrigue Ngaibona (“General Andjilo”) of war crimes committed between 2014 and 2015, marking a step forward for the country’s efforts to combat impunity.⁶⁷ The UN-funded Special Criminal Court started work in October and was charged with redressing war crimes committed since the country’s civil war in 2012.⁶⁸

2. CAR/Russia Military Treaty

In August, CAR signed a military cooperation treaty with Russia, said to involve military training by the 175 Russian soldiers stationed in the country.⁶⁹ The European Union has also provided military training to the Central African Republic and enlarged its role in July.⁷⁰

C. CHAD

1. Habré Fund Established

In February, a fund was set up to compensate victims of former Chadian president Hissène Habré, with France and the United States expected to contribute.⁷¹ Habré, convicted in 2016 for crimes against humanity in a specially-convened international court in Senegal, is reputed to have stolen US\$150 million dollars from the country’s treasury.⁷²

66. *Id.*

67. *Centrafrique: un ancien chef de guerre condamné à la perpétuité* [Central African Republic: former warlord sentenced to life imprisonment], LE MONDE (Jan. 22, 2018), https://www.lemonde.fr/afrique/article/2018/01/22/centrafrique-un-ancien-chef-de-guerre-condamne-a-la-perpetuite_5245390_3212.html?xtmc=republique_centrafricaine&xtcr=38.

68. Antonio Cascais, *CAR: A tribunal to ensure war crimes are prosecuted*, DEUTSCHE WELLE (Sept. 27, 2018), <https://www.dw.com/en/car-a-tribunal-to-ensure-war-crimes-are-prosecuted/a-45656377>.

69. Andrew Higgins, *Pushing Further into Africa, Russia Signs a New Military Accord*, N.Y. TIMES (Aug. 21, 2018), <https://www.nytimes.com/2018/08/21/world/europe/russia-central-african-republic-military-accord.html>.

70. *Centrafrique: l’UE élargit sa mission de formation militaire* [Central African Republic: EU expands its military training mission], LE FIGARO (July 30, 2018), <http://premium.lefigaro.fr/flash-actu/2018/07/30/97001-20180730FILWWW00182-centrafrique-l-ue-elargit-sa-mission-de-formation-militaire.php>.

71. Ruth Maclean, *After 25 years, a breakthrough for victims of Chad dictator Hissène Habré*, GUARDIAN (Feb. 9, 2018, 7:18 PM), <https://www.theguardian.com/global-development/2018/feb/09/trust-fund-established-for-victims-of-former-chad-dictator-hissene-habre>.

72. *Id.*

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2. *New Constitution: Government Resigns*

In April, the legislature adopted a new constitution forming the country's fourth republic.⁷³ Boycotted by MPs who favored a referendum, the new constitution eliminates the prime minister and vice president positions and strengthens the presidency—extending the mandate from five to six years, renewable once.⁷⁴ In May, incumbent President Idriss Déby, in power for over two decades, announced that the government had resigned in line with the new constitution.⁷⁵

D. CONGO (DEMOCRATIC REPUBLIC)

1. *Bemba to Challenge Presidency*

Acquitted of war crimes in June by the International Criminal Court after ten years in prison, Jean-Pierre Bemba returned to the DRC in August to huge crowds.⁷⁶ The former warlord vowed to contest President Joseph Kabila in twice-delayed elections to take place December 23.⁷⁷ Kabila was to stand down at the end of 2016 after his second elected term—the last permitted under the constitution—but has stayed on under a clause permitting him to remain in office until a successor is elected.⁷⁸

2. *New Mining Law*

In March, President Kabila overhauled DRC's 2002 Mining Code by increasing royalties, taxes and mining company obligations, and terminating a stability right in the 2002 Code that provided companies with a ten-year grace period if the Code changed.⁷⁹ The change was met with outcries from

73. *Le Tchad adopte une nouvelle Constitution [Chad adopts a new Constitution]*, LE FIGARO (Apr. 30, 2018), http://www.lefigaro.fr/flash-actu/2018/04/30/97001-20180430FILWWW00230-le-tchad-adopte-une-nouvelle-constitution.php?redirect_premium.

74. *Id.*; *Le gouvernement tchadien démissionne, conformément à la nouvelle Constitution [The Chadian government resigns, in accordance with the new Constitution]*, LE MONDE (May 4, 2018), https://www.lemonde.fr/afrique/article/2018/05/04/le-gouvernement-tchadien-demissionne-conformement-a-la-nouvelle-constitution_5294286_3212.html?xtmc=republique_du_tchad&xtcr=22.

75. *Le gouvernement tchadien démissionne, conformément à la nouvelle Constitution [The Chadian government resigns, in accordance with the new Constitution]*, LE MONDE (May 4, 2018), https://www.lemonde.fr/afrique/article/2018/05/04/le-gouvernement-tchadien-demissionne-conformement-a-la-nouvelle-constitution_5294286_3212.html?xtmc=republique_du_tchad&xtcr=22.

76. *Former DR Congo warlord Bemba returns with eyes on the presidency*, TELEGRAPH (Aug. 1, 2018, 5:14 PM), <https://www.telegraph.co.uk/news/2018/08/01/former-dr-congo-warlord-bemba-returns-eyes-presidency/>.

77. *Id.*

78. *Id.*

79. Christophe Asselineau, *DRC Mining Code changes: Where to now?*, MINING REV. AFR. (Mar. 26, 2018), <https://www.miningreview.com/drc-mining-code-changes-where-to-now/>.

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mining companies threatening arbitration or predicting a downturn in investment in the country.⁸⁰

E. CONGO (REPUBLIC)

1. *Land Rights Strengthened*

Law No. 21-2018 of June 13 increased legal protections afforded to real estate owners, notably by defining the scope of owners' rights, introducing protective measures for "customary land," and penalties for illegal occupation, along with restrictions on the acquisition of property by foreigners.⁸¹

F. EQUATORIAL GUINEA

1. *"Coup" Thwarted*

In January, Equatorial Guinea claimed to have "thwarted an attempted 'coup' against President Teodoro Obiang Nguema Mbasogo, Africa's longest-serving leader"—in power since 1979.⁸² The government "accused armed mercenaries from Chad, Sudan, and Central African Republic of attempting to overthrow Mbasogo with the support of . . . [local] forces."⁸³ Rights groups decry the corruption and repression persisting under Mbasogo.⁸⁴

2. *AML Committee Created*

In April, Decree 75/2018 created a Coordination Committee against Money Laundering.⁸⁵ The Committee will lead Equatorial Guinea's fight against money laundering and terrorist financing, supporting the G7's Financial Action Task Force on Money Laundering (FATF).⁸⁶

80. *Id.*

81. *Republic of the Congo - Legal News - May through July 2018*, MIRANDA ALL. (July 27, 2018), <http://www.mirandalawfirm.com/en/insights-knowledge/publications/legal-news/republicofthecongo-legal-news-maythrough-july-2018>.

82. *Equatorial Guinea says attempted 'coup' thwarted*, AL JAZEERA (Jan. 4, 2018), <https://www.aljazeera.com/news/2018/01/equatorial-guinea-attempted-coup-thwarted-180104055905005.html>.

83. *Id.*

84. *Id.*

85. *Equatorial Guinea - Legal News - May 2018*, MIRANDA ALL. (May 31, 2018), <http://www.mirandalawfirm.com/en/insights-knowledge/publications/legal-news/equatorial-guinea-legal-news-may-2018>.

86. *Id.*; The Financial Action Task Force and FATF-Style Regional Bodies, U.S. DEP'T STATE, <https://www.state.gov/j/inl/rls/nrcrpt/2016/vol2/253361.htm> (last visited Feb. 21, 2019).

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G. GABON

1. *“One-Stop-Shop” Investment Desk*

In August, Gabon set up a One-Stop Shop Investment Desk “aimed at simplifying . . . administrative procedures . . . [for] foreign companies wishing to invest in Gabon.”⁸⁷ The new desk “deals with all permits and authorisations required for companies to incorporate and operate in the country.”⁸⁸

2. *VP to Chair in President’s Illness*

In November, Gabon’s constitutional court “ruled that vice president Pierre-Claver Maganga Moussavou would chair the cabinet in the absence of President Ali Ben Bongo,” filling the vacuum created when Bongo was hospitalized in October following a stroke.⁸⁹ The Bongo family has ruled for nearly 50 years with Bongo succeeding his father in 2009.⁹⁰ Bongo’s 2016 reelection “was marred by claims of fraud and violent protest.”⁹¹

IV. East Africa

A. BURUNDI

1. *Presidential Terms Limited*

In a May referendum, in which some reporters were banned from the country, over 70 percent of voters supported constitutional amendments.⁹² The changes reintroduced the post of Prime Minister, reduced the number of vice presidents to one, and restricted the president to two terms.⁹³ Still, President Pierre Nkurunziza will be allowed to stand for re-election, despite his three terms.⁹⁴ Nkurunziza’s run for a controversial third term in 2015 triggered a crisis in which 1,200 people have been killed, and approximately 400,000 people have fled their homes in the country of 10.5 million.⁹⁵

87. Gabon - Legal News - August 2018, MIRANDA ALL., (Aug. 31, 2018) <http://www.miranda.com/en/insights-knowledge/publications/legal-news/gabon-legal-news-august-2018>.

88. *Id.*

89. *Gabon VP Takes over cabinet amid President Bongo’s illness*, EURONEWS (Nov. 15, 2018), <https://www.euronews.com/2018/11/15/gabon-vp-takes-over-cabinet-amid-president-bongos-illness>.

90. *Id.*

91. *Id.*

92. *See Burundi Commission: Voters Backed Constitution Changes*, VOA NEWS (May 21, 2018, 12:30 PM), <https://www.voanews.com/a/burundi-commission-voters-backed-constitutional-changes/4403260.html>.

93. *Id.*

94. *Id.*

95. *Burundi bans BBC and Voice of America before referendum*, AL JAZEERA (May 5, 2018), <https://www.aljazeera.com/news/2018/05/burundi-bans-bbc-voice-america-referendum-180505092310602.html/>.

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B. DJIBOUTI

1. *Djibouti Seizes Port*

In February, Djibouti seized control of the Doraleh Container Terminal operated by U.A.E.-based company DP World, contending the contract was damaging its sovereignty and the company had refused to “settle amicably.”⁹⁶ DP World “won a thirty-year concession in 2006 to operate the . . . [port] . . . [that] opened in 2009.”⁹⁷ The terminal is critical to landlocked Ethiopia “as more than 95 percent of the country’s imports come through Djibouti.”⁹⁸

C. ERITREA

1. *Eritrea/Ethiopia Restore Relations*

At the July 2018 Eritrea-Ethiopia Peace Summit, Eritrean President Isaias Afwerki and Ethiopian Prime Minister Abiy Ahmed signed a historic Joint Declaration formally ending the conflict that had persisted since the 1998-2000 war.⁹⁹ The countries also signed an “Agreement on Peace, Friendship and Comprehensive Cooperation” in September that set goals to develop joint investment projects.¹⁰⁰

2. *Eritrea Elected to U.N. Human Rights Council*

In October, Eritrea was elected “to the Geneva-based Human Rights Council, the UN body responsible for promoting and protecting human rights . . . [globally].”¹⁰¹ The move “attracted the ire of . . . human rights groups who insist that Eritrea, Cameroon, and Somalia ha[ve] no business serving on the Council given their . . . [human] rights records.”¹⁰²

96. *Djibouti seizes control of Dubai-run Doraleh port*, AL JAZEERA (Feb. 23, 2018), <https://www.aljazeera.com/news/2018/02/djibouti-seizes-control-dubai-run-dolareh-port-180223200900708.html>.

97. *Id.*

98. *Id.*

99. Abigail Abrams, *Landmark Peace Declaration Ends ‘State of War’ Between Ethiopia and Eritrea*, TIME (July 12, 2018), <http://time.com/5336629/ethiopia-eritrea-peace/>.

100. *Ethiopia, Eritrea sign agreement on peace, friendship and cooperation in Jeddah*, ETH. SATELLITE TELEVISION AND RADIO (Sept. 18, 2018), <https://ethsat.com/2018/09/ethiopia-eritrea-sign-agreement-on-peace-friendship-and-cooperation-in-jeddah/>.

101. *Eritrea Elected to the UN Human Rights Council*, ERI. MINISTRY INFO. (Oct. 19, 2018), <http://www.shabait.com/news/local-news/27222-eritrea-elected-to-the-un-human-rights-council>.

102. Abdur Rahman Alfa Shaban, *Eritrea, Cameroon among African reps on UN Human Rights Council*, AFRICANEWS (Oct. 19, 2018), <http://www.africanews.com/2018/10/13/eritrea-cameroon-among-african-reps-on-un-human-rights-council/>.

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D. ETHIOPIA

1. *New P.M.; Reform Agenda*

Taking office in February, newly elected Prime Minister Abiy Ahmed initiated reforms that began with lifting the 2016 state of emergency—imposed after security forces killed hundreds campaigning for democratic freedoms 2015-2017.¹⁰³ He followed with the release of more than 2,000 political prisoners and an amnesty law for former detainees.¹⁰⁴ He also appointed a new cabinet with half the positions filled by women and appointed Ethiopia’s first female president, Sahle-Work Zewde.¹⁰⁵

E. KENYA

1. *Government Media Blackout*

In January, Kenya “flouted its own judges . . . [by] refus[ing] to suspend an unprecedented shutdown of three independent television stations” after they broadcast the “inauguration” of opposition leader Raila Odinga.¹⁰⁶ Odinga had “himself sworn in as ‘the people’s president’ after refusing to accept . . . [Kenyatta’s] victory in . . . [the 2017] elections”¹⁰⁷

F. RWANDA

1. *Labor Law Overhauled; Penalties for Writings “Humiliating” Officers*

In August, Rwanda repealed a 2009 law and reformed the country’s labor laws, introducing a raised minimum wage, protecting against workplace discrimination, further regulating child labor, and circumscribing employee termination.¹⁰⁸ Another new law prohibits “writings or cartoons that

103. *Ethiopia state of emergency must be lifted - Nega tasks PM to ‘walk the talk’*, AFRICANEWS (May 2, 2018), <http://www.africanews.com/2018/05/02/ethiopia-state-of-emergency-must-be-lifted-eskinder-nega-tasks-pm-to-walk-the/>.

104. *Abiy Ahmed: Ethiopia’s prime minister*, BBC (Sept. 14, 2018), <https://www.bbc.com/news/world-africa-43567007>; Maggie Fick, *Ethiopia offers amnesty to recently freed political prisoners*, REUTERS (July 20, 2018, 8:32 AM), <https://www.reuters.com/article/us-ethiopia-prisoners/ethiopia-offers-amnesty-to-recently-freed-political-prisoners-idUSKBN1KA1U0>.

105. *Ethiopia ‘Sets the Standard’ With Election of First Female President and a Gender-Balanced Cabinet*, ETHIO DAILY POST (Oct. 26, 2018), <https://ethiodailypost.com/2018/10/26/ethiopia-sets-the-standard-with-election-of-first-female-president-and-a-gender-balanced-cabinet/>.

106. Adrian Blomfield, *Kenya media blackout continues despite Western pressure*, TELEGRAPH (Feb. 2, 2018), <https://www.telegraph.co.uk/news/2018/02/02/kenya-media-blackout-continues-despite-western-pressure>.

107. *Id.*

108. *Major changes in the new labour law*, RWANDA L. REFORM COMMISSION (Sept. 25, 2018), http://www.rlrc.gov.rw/index.php?id=82&tx_news_pi1%5Bnews%5D=61&tx_news_pi1%5Bcontroller%5D=News&tx_news_pi1%5Baction%5D=detail&cHash=b69f6019dcb0ff868f7ef72b5b034de1.

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‘humiliate’ lawmakers, cabinet members, or security officers” and subjects violators to up to two years in prison or a fine of up to US\$1,152.¹⁰⁹

G. SEYCHELLES

1. *Constitutional Amendments: Emoluments*

In August, an enactment by the President of the National Assembly amended the Seychelles constitution removing the provision that “[t]he pension payable to the Chairperson of the Commission shall be prescribed by or under an Act and the pension shall be a charge on the Consolidated Fund.”¹¹⁰

H. SOMALIA

1. *First FGM Prosecution*

The first prosecution for female genital mutilation (FGM) under Somalia’s criminal law for assault occurred in July.¹¹¹ The prosecution followed the death of a ten-year old girl from FGM performed by a traditional “cutter” with two more girls dying as the investigation continued.¹¹² The deaths have renewed calls for Somalia to pass a law prohibiting FGM.¹¹³

I. SOUTH SUDAN

1. *IGAD Considers Deploying Forces*

In October, the eight-country economic bloc discussed deploying IGAD forces in South Sudan agreeing to form a joint working group.¹¹⁴ Under the September IGAD Summit, “Djibouti, Somalia, Sudan, and Uganda will deploy troops within the framework of the 4,000-troop Regional Protection Force that the [UN] Security Council decided to deploy in South Sudan in support of the 13,000 UNMISS force.”¹¹⁵

109. Abdi Latif Dahir, *Rwanda’s new penal code bans cartoons that ‘humiliate’ public officials*, QUARTZ AFR. (Oct. 2, 2018), <https://qz.com/africa/1410418/rwanda-bans-cartoons-that-humiliate-government-officials/>.

110. REPUBLIC SEY. CONST., Eighth Amendment Act 5 of 2017; REPUBLIC SEY. CONST., Ninth Amendment Act 8 of 2018.

111. Emma Batha, *Somalia announces first prosecution for female genital mutilation*, REUTERS (Jul. 25, 2018), <https://www.reuters.com/article/us-somalia-fgm-prosecution/somalia-announces-first-prosecution-for-female-genital-mutilation-idUSKBN1KF2JE>.

112. *Id.*; Laignee Barron, *Two Sisters Bled to Death in Somalia After a Female Genital Mutilation Procedure*, TIME (Sept. 14, 2018), <http://time.com/5396125/somalia-female-genital-mutilation-death/>.

113. Batha, *supra* note 111.

114. *IGAD Military Leaders Decide To Assess South Sudan’s Security Situation*, HORN DIPLOMAT (Oct. 23, 2018), <http://www.horndiplomat.com/2018/10/23/igad-military-leaders-decide-to-assess-south-sudans-security-situation/>.

115. *Id.*

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J. SUDAN (REPUBLIC)

1. *Devaluation, Austerity Measures to Avert Economic Collapse*

Cash machines in Khartoum ran out of banknotes in November as the Sudanese government scrambled to prevent economic collapse by introducing “a sharp devaluation and emergency austerity measures.”¹¹⁶ Sudan “has suffered a lack of foreign currency” since losing three-quarters of its oil output when South Sudan seceded in 2011.¹¹⁷

K. TANZANIA

1. *New Media Regulations Suspended*

In May, Judge Fauz Twaib blocked implementation of the Electronic and Postal Communications (Online Content) Regulations 2018, following a challenge by human rights and media groups.¹¹⁸ The regulations prohibit content that “causes annoyance” or “leads to public disorder” and require, among other things, that bloggers and others pay an annual fee of US\$930.¹¹⁹ Violators are subject to penalties of at least TSH5 million (approximately US\$2,200) and imprisonment for at least 12 months.¹²⁰

2. *Court of Justice Annuls Newspaper Ban*

In June, the East African Court of Justice decided *Mseto v. Attorney General*, annulling a Tanzanian ministry order banning the newspaper, Mseto, over a story alleging that a government minister took bribes to raise funds for Magufuli’s presidential campaign.¹²¹ The court ruled that the government’s action violated the right to freedom of expression found in the Constitution of Tanzania and the African Charter.¹²²

116. Khalid Abdelaziz, *Cash runs out in Khartoum as Sudan tries to halt economic crisis*, REUTERS (Nov. 12, 2018, 8:03 AM), <https://reuters.com/article/us-sudan-economy/cash-runs-out-in-khartoum-as-sudan-tries-to-halt-economic-crisis-idUKKCN1NH1N4>.

117. *Id.*

118. *Tanzania bloggers win temporary court order against state crackdown*, REUTERS (May 4, 2018, 7:01 AM), <https://www.reuters.com/article/us-tanzania-internet/tanzania-bloggers-win-temporary-court-order-against-state-crackdown-idUSKBN1I51DC>.

119. *Id.*; *Tanzania: Electronic and Postal Communications (Online Content) Regulations 2018*, ARTICLE 19 18, 21 (Apr. 2018), <https://www.article19.org/wp-content/uploads/2018/05/Tanzania-Online-Content-Regulations-2018-Final.pdf>.

120. *Tanzania bloggers win temporary court order against state crackdown*, *supra* note 118.

121. *Mseto v. Attorney General*, COLOM. U.: GLOBAL FREEDOM EXPRESSION, <https://globalfreedomofexpression.columbia.edu/cases/mseto-v-attorney-general/> (last visited Nov. 18, 2018).

122. *Id.*

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L. UGANDA

1. *Social Media Tax*

In July, a government tax went into effect on popular social media platforms that offer voice and messaging services, such as Facebook, up to US\$19 annually.¹²³ The government says the tax is to improve internet services, but critics decry it as an attempt to dampen freedom of expression.¹²⁴

V. Southern Africa

A. ANGOLA

1. *Investment Law Overhaul*

In June, the Private Investment Law set forth new rules to promote private investment in Angola.¹²⁵ Law No. 10/18 changed the existing framework such as no minimum investment to be eligible for benefits and incentives; local partnerships no longer mandatory in some economic sectors; and the introduction of two regimes for approval of investment projects.¹²⁶

B. COMOROS

1. *Ex-President Implicated in Citizenship-Selling*

In May, former Comoros president Ahmed Abdallah Mohamed Sambi “was put under house arrest over his suspected role in a scheme to sell citizenships”¹²⁷ Comoros “launched a [2008] program with the United Arab Emirates and Kuwait . . . sell[ing] citizenship[s] to stateless [persons] in those countries,” but a parliamentary investigation found that “passports were sold outside official channels . . . and at least US\$100 million in revenue [was] missing.”¹²⁸ President Azali Assoumani says the scheme is “suspended and promised to hold to account those who broke the law or embezzled money.”¹²⁹

123. Patricia Akumu, *Uganda introduces social media tax despite criticism*, AL JAZEERA (July 1, 2018), <https://www.aljazeera.com/news/2018/06/uganda-introduces-social-media-tax-criticism-180630180322121.html>.

124. *Id.*

125. *Angola - Legal News - June 2018*, MIRANDA ALL. (July 31, 2018), <http://www.mirandalawfirm.com/en/insights-knowledge/publications/legal-news/angola-legal-news-june-2018>.

126. *Id.*

127. *Comoros Ex-President Says Government Actions Endangering Democracy*, U.S. NEWS (May 20, 2018, 9:08 AM), <https://www.usnews.com/news/world/articles/2018-05-20/comoros-ex-president-says-government-actions-endangering-democracy>.

128. *Id.*

129. *Id.*

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C. BOTSWANA

1. *Refugees Given Two Months*

In May, over 900 Namibian refugees in Botswana were given two months to leave.¹³⁰ The Namibians had lived at the Dukwi camp for two decades after fleeing in 1999, following a civil war with the Caprivi Liberation Army.¹³¹ Justice Minister Shaw Kgathi said that after “cessation of their refugee status in December 2015 . . . they should go back to Namibia.”¹³²

D. LESOTHO

1. *Attempted Murder Trial Postponed*

The trial against five suspected attackers of Lesotho Times editor, Lloyd Mutungamiri, was again postponed in 2018.¹³³ Mutungamiri was shot in July 2016 by assailants after publishing a story that the head of the Lesotho Defense Force, Lieutenant General Tlali Kamoli, was to receive an exit package of approximately US\$3.5 million.¹³⁴ LDF members were charged with attempted murder, but the trial has never begun.¹³⁵

E. MADAGASCAR

1. *Past Presidents in Runoff*

Although neither won the 50 percent required for a first-round victory, two former presidents, Andry Rajoelina and Marc Ravaomanana, are to face each other in the December runoff elections.¹³⁶ Both candidates (out of thirty-six running) allege fraud by election officials and hope to claim a first-round victory in court.¹³⁷ Both Ravalomanana and Rajoelina “were banned from running in . . . 2013 under international pressure to avoid a repeat of the . . . political violence that engulfed the island in 2009.”¹³⁸

130. Arnaldo Vieira, *Namibian refugees in Botswana given two months return home*, DAILY NATION (May 17, 2018), <https://www.nation.co.ke/news/africa/Botswana-quit-notice-to-refugees/1066-4566862-xh3pxo/index.html>.

131. *Id.*

132. *Id.*

133. *Lesotho: Still no justice for attempted murder of newspaper editor*, AMNESTY INT’L (July 9, 2018), <https://www.amnesty.org/en/latest/news/2018/07/lesotho-still-no-justice-for-attempted-murder-of-newspaper-editor/>.

134. *Id.*

135. *Id.*

136. *Former Madagascar leaders head to election runoff*, AL JAZEERA (Nov. 18, 2018), <https://www.aljazeera.com/news/2018/11/madagascar-leaders-head-election-run-181117194133109.html>.

137. *Id.*

138. *Id.*

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F. MALAWI

1. *New Law Ahead of 2019 Elections*

In advance of 2019 elections, Malawi adopted the Political Parties Act 2018 to replace the 1993 Political Parties (Registration and Regulation) Act.¹³⁹ Advocates encouraged its implementation—feeling it would improve transparency and ensure an issue-focused campaign.¹⁴⁰

2. *High Court Decisions on Prisoners*

In 2018, two High Court orders addressed prison conditions and detainees. Restating the Child Care, Protection and Justice Act, 2010, one case, on remand, held that the children in Kachere and Bvumbwe Prisons be sent to safe homes, while children serving sentences be sent to reform centers.¹⁴¹ The second case stopped the return of six people diagnosed with drug resistant tuberculosis to Maula and Mzimba Prisons.¹⁴²

G. MAURITIUS

1. *ICJ Hears Chagos Islands Case*

In September, the International Court of Justice heard arguments for a UN General Assembly-requested advisory opinion “on the legality of British sovereignty over the Chagos Islands.”¹⁴³ Mauritius told the Court “the UK had unduly pressured it in 1965 to give up . . . [the] remote . . . island[s] . . . in exchange for independence.”¹⁴⁴ The UK does not recognize the claim but has “undertaken to cede it to Mauritius when no longer required for defence [sic] purposes”¹⁴⁵

139. Wanga Gwede, *Malawi Parliament passes Political Parties Bill: Law prohibits handouts to entice voters*, NYASA TIMES (Dec. 1, 2017), <https://www.nyasatimes.com/malawi-parliament-passes-political-parties-bill-law-prohibits-handouts-entice-voters/>.

140. *Id.*

141. *R v. Children in Detention at Bvumbwe and Kachere Prisons*, Criminal Cause No. 21 of 2017, p. 6 (June 5, 2018), *available at*: <https://malawilii.org/mw/judgment/high-court-general-division/2018/792>.

142. *Court Stops Hospitals from Returning Patients with Multi-Drug Resistant TB (MDR-TB) to Prison*, S. AFR. LITIG. CTR. (Oct. 12, 2018), <http://www.southernafricalitigationcentre.org/2018/10/12/news-release-court-stops-hospitals-from-returning-patients-with-multi-drug-resistant-tb-mdr-tb-to-prison/>.

143. *Mauritius challenges Britain’s claim to Chagos Islands at ICJ*, AL JAZEERA (Sept. 3, 2018), <https://www.aljazeera.com/news/2018/09/mauritius-challenges-britain-claim-chagos-islands-icj-180903142332744.html>.

144. *Id.*

145. *Mauritius territorial claim against UK of interest to Cyprus*, CYPRUSMAIL (Sept. 1, 2018), <https://cyprus-mail.com/2018/09/01/mauritius-territorial-claim-against-uk-of-interest-to-cyprus/>.

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H. MOZAMBIQUE

1. *Constitutional Amendment Decentralizes State*

With a view to administrative decentralization in “unitary state” in June, the Mozambique Assembly amended the Constitution with Law 1/2018.¹⁴⁶ Reflecting an agreement between President Filipe Nyusi and RENAMO head Afonso Dhlakama, the amendment ends mayoral elections but limits further decentralization.¹⁴⁷ A new section of the constitution adds a tier of municipal assemblies to provincial and district assemblies in existence.¹⁴⁸

I. NAMIBIA

1. *Namibia to Expropriate Land for Black Population*

In October, Namibian President Hage Geigob called for a change in the country’s constitution allowing expropriation of 43 percent of its arable agricultural land (58,000 square miles) for redistribution to the majority black population.¹⁴⁹ White Namibians own 70 percent of the agricultural land while blacks own only 16 percent.¹⁵⁰ After many were “driven off their lands in the 19th and 20th centuries . . . and denied ownership or tenure rights” to the lands they occupied.¹⁵¹

J. SOUTH AFRICA

1. *Zuma Resigns*

In October 2017, the Supreme Court of Appeal upheld a decision to prosecute then-President Jacob Zuma on charges of fraud, racketeering, and money laundering.¹⁵² Zuma resigned in February after being repudiated by his own African National Congress, and MPs elected new ANC leader Cyril Ramaphosa to succeed him.¹⁵³

146. *Mozambique - Legal News - May through July 2018*, MIRANDA ALL. (Aug. 31, 2018), <http://www.mirandalawfirm.com/en/insights-knowledge/publications/legal-news/mozambique-legal-news-may-through-july-2018>.

147. *Mozambique: Constitutional amendments definitively approved*, CLUB MOZAMBIQUE (May 24, 2018), <https://clubofmozambique.com/news/mozambique-constitutional-amendments-definitively-approved/>.

148. *Id.*

149. *Namibia pledges land reforms to boost black ownership*, AL JAZEERA (Oct. 2, 2018), <https://www.aljazeera.com/news/2018/10/namibia-pledges-land-reforms-boost-black-ownership-181002063432944.html>.

150. *Id.*

151. *Id.*

152. Amogelang Mbatha, *Former South African President Jacob Zuma Charged With Fraud, Corruption, Graft and Racketeering*, TIME (Mar. 16, 2018), <http://time.com/5202938/jacob-zuma-corruption-fraud-charges-trial/>.

153. *Cyril Ramaphosa sworn in as new South African President*, AFRICANEWS (Feb. 15, 2018), <http://www.africanews.com/2018/02/15/cyril-ramaphosa-sworn-in-as-new-south-african-president/>.

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K. SWAZILAND

1. *Political Party Involvement in Elections*

Swaziland held national elections in August without use of political parties despite a challenge ahead of the election.¹⁵⁴ The Kingdom maintains that parties are inconsistent with the *tinkhundla* system, which aims to select candidates on merit rather than party membership.¹⁵⁵

L. ZAMBIA

1. *Opposition Figure Deported to Zimbabwe*

In August, Zambian authorities deported Zimbabwe Movement for Democratic Change opposition figure, Tendai Biti, “rejecting his [asylum] . . . claim after he fled allegations of inciting post-election protests” in Zimbabwe over claims that the elections were rigged.¹⁵⁶ Biti challenged the order seeking to have his case reviewed, but the Zambian government said it was received late.¹⁵⁷ The UN’s refugee agency said it was “gravely concerned about reports of [his] forced return.”¹⁵⁸

M. ZIMBABWE

1. *Mugabe Successor Wins Presidency*

Thirty-seven-year President Robert Mugabe resigned in November 2017—narrowly avoiding impeachment—after he was placed under house arrest when he fired vice president Emmerson Mnangagwa, generating speculation that he would appoint his wife Grace as successor.¹⁵⁹ Mnangagwa, “a close aide of Mugabe implicated in atrocities committed under his rule,” won July 2018 elections by 50.8 percent of the vote—just enough to avoid runoff elections.¹⁶⁰

154. *Swaziland: eSwatini’s tinkhundla-based electoral system to be tested in potentially ground-breaking court case*, S. AFR. LITIG. CTR. (Aug. 19, 2018), <http://www.southernafricalitigationcentre.org/2018/08/19/swaziland-eswatinis-tinkhundla-based-electoral-system-to-be-tested-in-potentially-groundbreaking-court-case/>.

155. *Id.*

156. *Zimbabwean opposition figure Biti ‘deported from Zambia’ after asylum bid*, TELEGRAPH (Aug. 9, 2018), <https://www.telegraph.co.uk/news/2018/08/09/zimbabwean-opposition-figure-biti-deported-zambia-asylum-bid/>.

157. *Id.*

158. *Id.*

159. *Zimbabwe’s Mugabe ‘under house arrest’ after army takeover*, BBC (Nov. 15, 2017), <https://www.bbc.com/news/world-africa-41997982>.

160. Jason Burke, *Zimbabwe Election: Mnangagwa Narrowly Wins Presidential Poll*, GUARDIAN (Aug. 3, 2018), <https://www.theguardian.com/world/2018/aug/02/mnangagwas-zanu-pf-on-track-to-pull-off-narrow-win-in-zimbabwe-election>.

VI. African Institutions

A. AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

1. *Elections and Hearings*

In June, the African Union Executive Council elected four new judges to the eleven-member AfCHPR.¹⁶¹ Among other cases, the Tanzania-based human rights court will hear *Guehi v. Tanzania* wherein the Ivorian national challenges his conviction and death sentence for murdering his wife “on the ground that it violated his right to a fair trial.”¹⁶²

B. AFRICAN ECONOMIC COMMUNITY

1. *African Free Trade Area*

In March, forty-four countries signed the African Continental Free Trade Area (AfCFTA), moving toward a single market for goods and services and the free movement of people and capital for the continent's 1.2 billion people.¹⁶³ While all fifty-five members of the African Union were involved in negotiations—the largest free trade agreement since establishment of the WTO—the holdouts included Nigeria, Africa's largest economy.¹⁶⁴ The AfCFTA “will come into effect when fifteen or twenty-two states have ratified it” and lead to other agreements, such as a customs union.¹⁶⁵

C. AFRICAN UNION

1. *Air Transport Market*

The first flagship initiative of “Agenda 2063,” the Single African Air Transport Market (SAATM), “was launched in January at the 30th Ordinary Session of the Assembly of Heads of State and Government of the A[frican] U[nion] . . . in Addis Ababa, Ethiopia.”¹⁶⁶ SAATM aims to create a single market for air transport in Africa.¹⁶⁷

161. *African Court on Human and Peoples' Rights: 2018 Elections*, INT'L JUST. RESOURCE. CTR.: AFR. HUMAN RIGHTS SYSTEM, <https://ijrcenter.org/wp-content/uploads/2018/07/June-2018-Elections-in-the-African-System-7.23-1.pdf> (visited Nov. 19, 2018).

162. *African Court on Human and Peoples' Rights to hear three applications next week*, AFR. COURT ON HUMAN AND PEOPLES' RIGHTS (May 2, 2018), <http://en.african-court.org/index.php/news/press-releases/item/236-african-court-on-human-and-peoples-rights-begins-49th-ordinary-session-on-16-april>.

163. *Forty-four African countries sign a free-trade deal*, ECONOMIST, (Mar. 22, 2018), <https://www.economist.com/middle-east-and-africa/2018/03/22/forty-four-african-countries-sign-a-free-trade-deal>.

164. *Id.*

165. Loes Witschge, *African Continental Free-Trade Area: What You Need to Know*, AL JAZEERA (Mar. 20, 2018), <https://www.aljazeera.com/news/2018/03/african-continental-free-trade-area-afcfta-180317191954318.html>.

166. *The Single African Air Transport Market is Launched*, U.N. ECON. COMMISSION FOR AFR. (May 2, 2018), <https://www.uneca.org/stories/single-african-air-transport-market-launched>.

167. *Id.*

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2. *11th Extraordinary Session*

In November, the 11th Extraordinary Ordinary Session of the Assembly of Heads of State and Government convened with institutional reform as a major focus.¹⁶⁸ Key decisions related to senior leadership, the mandate of the AU Development Agency, and institutional reform of the African Peer Review Mechanism (APRM).¹⁶⁹

D. ECONOMIC COMMUNITY OF WEST AFRICAN STATES

1. *ECOWAS Moves toward Monetary Union*

The fifteen-country economic union made strides in 2018 toward a single currency for West Africa.¹⁷⁰ ECOWAS Commissioner for Macroeconomic Policy and Economic Research, Dr. Kofi Konadu Apraku, indicated that progress included the establishment of a fund to finance implementation and a model of the future central bank.¹⁷¹ He relayed that efforts were underway “to establish regional payment and settlement systems and the ECOWAS Investment Guarantee Mechanism.”¹⁷²

E. EAST AFRICAN COMMUNITY

1. *Bill Moves toward Single Currency; Burundi Mediation Talks*

In October, the EAC regional assembly passed the 2017 EAC Statistics Bureau Bill that, if approved, will establish a regional statistics bureau facilitating a single currency for the six-nation bloc.¹⁷³ In October, the EAC also hosted a five-day “final round” of the Inter-Burundi Dialogue at its Tanzanian seat.¹⁷⁴ Mediators for Burundi’s political parties, including journalists, civil society members, and activists attended—though not its government representatives.¹⁷⁵

168. *11th Extraordinary Summit: Summary of Key Decisions*, AFR. COMMISSION UNION (Nov. 18, 2018), <https://au.int/en/pressreleases/20181118/11th-extraordinary-summit-summary-key-decisions>.

169. *Id.*

170. *Member States*, ECOWAS, <http://www.ecowas.int/member-states/> (last visited Feb. 23, 2019); *ECOWAS makes strides to achieve single currency*, GHANAWEB (Sept. 24, 2018), <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/ECOWAS-makes-strides-to-achieve-single-currency-687220#>.

171. *Id.*

172. *Id.*

173. George Omondi, *Bill sets the stage for EAC single currency*, DAILY NATION (Nov. 3, 2018), <https://www.nation.co.ke/business/Bill-sets-the-stage-for-EAC-single-currency/996-4834818-2b37cg/index.html>.

174. *5th and Final Round of Inter-Burundi Dialogue comes to a close*, E. AFR. COMMUNITY (Oct. 30, 2018), <https://www.eac.int/press-releases/1271-5th-and-final-round-of-inter-burunid-dialogue-comes-to-a-close>.

175. *Id.*

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F. AFRICAN DEVELOPMENT BANK

1. *Innovative US\$1bn Securitization*

In September, the AfDB and European Commission with private investors announced the pricing of the US\$1 billion “Room2Run,” a portfolio synthetic securitization.¹⁷⁶ In doing so, the AfDB “demonstrate[d] a new technique that could expand its firepower and the European Commission, as a condition of its guarantee, . . . asked the AfDB to reinvest . . . in renewable energy.”¹⁷⁷

2. *Nordic Country Roadshows; Continental Expansion Aims*

In September and October, the AfDB showcased investment opportunities to private sector companies, investors, and government and public institutions in Norway, Sweden, Finland, and Denmark.¹⁷⁸ The event aimed at increasing understanding of the Bank’s strategy for transforming African economies.¹⁷⁹ The AfDB had earlier announced its intention to increase its presence on the African continent by expanding to five regional bureaus including in Tunisia, Kenya, and South Africa.¹⁸⁰

G. AFRICAN EXPORT-IMPORT BANK

1. *US\$650 Million Loan for Nigerian Oil Refinery*

In July, the “Dangote Group, the West African conglomerate founded by Africa’s richest man, Aliko Dangote, . . . signed a US\$650 million loan facility with . . . Afreximbank to . . . complete a \$10 billion oil refinery . . . in Nigeria.”¹⁸¹ Dangote’s refinery in “the Olokola Liquefied Natural Gas (OKLNG) Free Trade Zone . . . will be Nigeria’s first private and Africa’s

176. *African Development Bank, Mariner Investment Group, and Africa50 Price Landmark \$1 Billion Impact Securitization*, AFR. DEV. BANK GROUP (Sept. 18, 2018), <https://www.afdb.org/en/news-and-events/african-development-bank-mariner-investment-group-and-africa50-price-landmark-1-billion-impact-securitization-18494/>.

177. *The African Development Bank, the European Commission, Mariner Investment Group, LLC (Mariner), Africa50, and Mizubo International plc today announce the pricing of Room2Run*, EUR. COMMISSION (Sept. 18, 2018), https://ec.europa.eu/commission/news/breakthrough-supranationals-african-development-bank-debuts-securitization-2018-sep-18_en.

178. *African Development Bank showcases investment opportunities in Africa to Nordic investors*, AFRICANEWS (Oct. 15, 2018), <http://www.africanews.com/2018/10/15/african-development-bank-showcases-investment-opportunities-in-africa-to-nordic-investors/>.

179. *Id.*

180. Nassoumi Nyang, *African Development Bank Will Grow Presence on Continent in 2018*, AFRICA NEWS (Nov. 25, 2016), <https://www.afrika-news.com/african-development-bank-expansion-2018/>.

181. Mfonobong Nsehe, *Africa’s Richest Man Aliko Dangote Gets \$650 Million Loan From Afreximbank For Oil Refinery*, FORBES (July 15, 2018, 4:33 AM), <https://www.forbes.com/sites/mfonobongnsehe/2018/07/15/africas-richest-man-aliko-dangote-gets-650-million-loan-from-afreximbank-for-oil-refinery/#6672db632e6a>.

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largest petroleum refinery, with a projected daily production output of 600,000 barrels a day.”¹⁸²

H. UN ECONOMIC COMMISSION FOR AFRICA

1. *ECA Promoting Disruptive Technologies for Financial Inclusion*

In August, UNECA began collaborating with the World Bank’s private sector arm, the International Financial Corporation (IFC), and with Alibaba Group affiliate Ant Financial “to promote digital financial inclusion in Africa, through investment and technical capacity building.”¹⁸³ Ant Financial “runs one of the world’s largest online payment platforms valued at \$150 billion.”¹⁸⁴

I. SOUTHERN AFRICAN DEVELOPMENT COMMUNITY

1. *New Hope for SADC Tribunal*

A Pretoria High Court, pending confirmation by the South African Constitutional Court, has found the 2010 actions of the South African SADC presidency “unlawful, irrational and thus, unconstitutional,” which may see reinstatement of the SADC Tribunal created under the 1992 Treaty.¹⁸⁵ The SADC Tribunal had been shut down in 2010.¹⁸⁶

2. *SADC/ Russia MOU*

In July, SADC signed a Memorandum of Understanding on Military and Technical Cooperation with Russia.¹⁸⁷ In a later implementation meeting, the SADC Executive Secretary underscored that SADC countries could “benefit from the high technological and technical capacity and advanced security systems of the Russian Federation”¹⁸⁸

182. *Id.*

183. *The United Nations Economic Commission for Africa (ECA) promotes use of disruptive technology to enhance financial inclusion in Africa*, CNBC AFR. (Aug. 7, 2018), <https://www.cnbc africa.com/apo/2018/08/07/the-united-nations-economic-commission-for-africa-eca-promotes-use-of-disruptive-technology-to-enhance-financial-inclusion-in-africa/>.

184. *Id.*

185. *Law Society of South Africa and Others v. President of the Republic of South Africa and Others* 2018 (2) All SA 1 (GHCP), 78, ¶ 72 (S. Afr.).

186. *Southern African Development Community Tribunal*, INT’L JUST. RESOURCE CTR., <https://ijrcenter.org/regional-communities/southern-african-development-community-tribunal/> (last visited Feb. 23, 2019).

187. *SADC Executive Secretary and Director General of Russia’s Federal Agency on Military and Technical Cooperation discuss roadmap for Military and Technical Cooperation*, S. AFR. DEV. COMMUNITY (Oct. 26, 2018), <https://www.sadc.int/news-events/news/sadc-executive-secretary-and-director-general-russias-federal-agency-military-and-technical-cooperation-discuss-road-map-military/>.

188. *Id.*

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J. COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA

1. *First Female Secretary General*

In July, leaders, attending the 20th COMESA Summit, appointed its first female Secretary General, Zambian former deputy minister of finance, Chileshe Kapwepwe.¹⁸⁹ With nineteen countries and a population of 520 million, COMESA is the largest economic community on the continent.¹⁹⁰ Outgoing Secretary General Ngwenya confirmed that the 2018 annual budget for the Secretariat and its agencies would decline by 30 percent (US\$10 million) as several cooperating partners' grants had ended.¹⁹¹

K. INTERGOVERNMENTAL AUTHORITY ON DEVELOPMENT

1. *Regional Master Plan*

In August, the IGAD Executive Secretary signed a contract for development of a Regional Infrastructure Master Plan (IRIMP).¹⁹² Prepared with the financial assistance of the AfDB, the plan is important for the eight-country region to achieve economic integration.¹⁹³ Key objectives are to “develop regional infrastructure . . . to enhance economic integration through trade, [the] free movement of goods and persons, and poverty reduction”¹⁹⁴

L. ECONOMIC COMMUNITY OF CENTRAL AFRICAN STATES

1. *Joint ECOWAS Summit Pledges Peace Agreement*

A Joint Summit of the Heads of State and Government was held in July between ECOWAS and eleven-country ECCAS—jointly chaired by Togo and ECCAS Chair Gabon President Ali Bongo Ondimba.¹⁹⁵ The two economic communities pledged to sign an agreement before the end of 2018 to check insecurity in their regions.¹⁹⁶

189. *COMESA leaders congratulate new COMESA Secretary General*, LUSAKA TIMES (July 19, 2018), <https://www.lusakatimes.com/2018/07/19/comesa-leaders-congratulate-new-comesa-secretary-general/>.

190. *Overview of COMESA*, COMESA SECRETARIAT, <https://www.comesa.int/overview-of-comesa/> (last visited Feb. 23, 2019).

191. James Karuhanga, *COMESA 2018 budget down \$10m as donor funded projects end*, NEW TIMES (Oct. 30, 2017), <https://www.newtimes.co.rw/section/read/222659>.

192. *IGAD Signs Contract for the Development of Regional Infrastructure Master Plan*, IGAD (Apr. 30, 2018), <https://igad.int/divisions/economic-cooperation-and-social-development/1808-igad-signs-contract-for-the-development-of-regional-infrastructure-master-plan>.

193. *Id.*

194. *Id.*

195. *Final Communiqué: Joint Summit of ECOWAS and ECCAS Heads of State and Government*, TRADE L. CTR. (July 31, 2018), <https://www.tralac.org/news/article/13318-final-communique-joint-summit-of-ecowas-and-ccas-heads-of-state-and-government.html>.

196. *Id.*

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M. UNION DU MAGHREB ARABE

1. *Calls to Activate the UMA*

After Moroccan calls for dialogue in November, Algeria called on UMA Secretary General Tayeb Bakouche to convene a meeting of its Council of Foreign Ministers to reactivate the Union.¹⁹⁷ The call was “an extension of the recommendations of the recent extraordinary summit of the African Union held in Ethiopia which decided institutional reforms and procedures to integrate African countries.”¹⁹⁸

N. ORGANIZATION FOR THE HARMONIZATION OF BUSINESS LAW IN AFRICA

1. *Arbitration, Mediation Acts Enter into Force*

Adopted November 2017, OHADA’s new Uniform Acts on Arbitration Law¹⁹⁹ and Mediation²⁰⁰ entered into force for its seventeen Member States.²⁰¹

197. *Algeria calls for activating Arab Maghreb Union*, MIDDLE EAST MONITOR (Nov. 24, 2018, 11:55 AM), <https://www.middleeastmonitor.com/20181124-algeria-calls-for-activating-arab-maghreb-union/>.

198. *Id.*

199. *Uniform act on arbitration law*, ORG. FOR HARMONIZATION BUS. L. AFRICA, <https://www.ohada.org/index.php/en/aua-droit-de-l-arbitrage-en/aua-presentation-et-innovations-en> (last visited Nov. 25, 2018).

200. *Uniform Act on Mediation*, ORG. FOR HARMONIZATION BUS. L. AFRICA, <https://www.ohada.org/index.php/en/travailler-ou-faire-un-stage-a-l-ohada/saisir-le-secretaire-permanent/saisir-le-centre-d-arbitrage/saisir-la-ccja-pour-un-recours/saisir-la-ccja-pour-un-avis/obtenir-le-role-des-audiences-de-la-ccja/accéder-a-la-jurisprudence-ohada/obtenir-de-la-documentation-sur-l-ohada/vous-rendre-dans-une-institution-de-l-ohada/2016-04-29-12-30-39/current-uniform-acts/mediation> (last visited Nov. 25, 2018).

201. *State Members*, ORG. FOR HARMONIZATION BUS. L. AFRICA, <https://www.ohada.org/index.php/en/ohada-in-a-nutshell/ohada-space> (last visited Feb. 23, 2019).

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Canada

NATHANIA USTUN, JULIA WEBSTER, JESSE GOLDMAN,
JACOB MANTLE*

This article reviews significant legal developments in the Canadian Special Import Measures Act during 2018.

I. 2018 Special Import Measures Act Amendments

The *Special Import Measures Act* (SIMA) is Canada’s principal trade remedy legislation, which along with the *Special Import Measures Regulations* (SIMR) legislates on the application of anti-dumping and countervailing measures to goods imported into Canada. On April 26, 2018, significant amendments came into force (the “SIMA Amendments”).¹ The SIMA Amendments introduced two noteworthy additions to the SIMA that intended to align Canada’s legislation more closely with the United States: “scope proceedings” and “anti-circumvention proceedings.”²

II. Scope Proceedings

The legislative provisions for scope proceedings are set out in sections sixty-three to seventy of the SIMA. They provide authority for the Canada Border Services Agency (CBSA) to rule on whether specific goods fall within a product description of an anti-dumping or countervailing measure currently in force, to consider if goods originate in a country named in an order or finding and, accordingly, and to determine whether SIMA duties apply. Importantly, scope proceedings are not a process used to obtain exclusions for goods subject to existing anti-dumping or countervailing duty orders. Rather, the Canadian International Trade Tribunal (CITT) conducts product exclusion proceedings with respect to injury inquiries and reviews under the SIMA.³

Section sixty-three of the SIMA allows any interested person to apply to the President of the CBSA for a scope ruling with respect to any goods. The

* Nathania Ustun is the committee editor. The authors are Jesse Goldman, Julia Webster, and Jacob Mantle.

1. See generally *Special Import Measures Act*, R.S.C. 1985, c S-15 (Can.).

2. *Id.*

3. *Id.* §§ 42, 76.01, 76.03; See also *Guidelines to Making Requests for Product Exclusions*, CAN. INT’L TRADE TRIBUNAL 1 (May 20, 2014), http://www.citt.gc.ca/en/g_excl_e.

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process will take 150 to 255 days from the date the CBSA receives the application to rendering a decision.⁴

Within thirty days of receipt of an application, the CBSA President must determine whether the request should be rejected or if a scope proceeding should be initiated.⁵ The CBSA President may reject the application for a number of reasons. Those reasons include: “if the application is incomplete;” if there is already an active “scope ruling that applies to the goods” outlined in the application; and if “the goods . . . have not been produced” by the application date or “the application is frivolous, vexatious or made in bad faith.”⁶

The CBSA President has discretion to initiate a scope proceeding with respect to any goods at any time.⁷ The CBSA provides notice to the applicant, the government of the country of export, the exporter, the importer, and any domestic producers; the CBSA may also issue requests for information. The CBSA has 120 days to render a decision.⁸ A CBSA “scope proceeding” is a formal administrative process with the applicant and domestic industry entitled to participate. The CBSA will publish a “Statement of Essential Facts,” a public report that includes a summary of facts and a preliminary assessment as to whether the goods fall within the product description of the measure at issue.⁹ Interested parties may then submit written arguments in response.¹⁰

In making its determination, the CBSA will consider, amongst other things, the CITT’s reasons for the order or finding; the physical characteristics of the goods; and any relevant decisions of the CITT, the Federal Court of Appeal (FCA), the Supreme Court of Canada (SCC), or a bi-national panel.¹¹ All rulings take effect on the day they are made unless the CBSA President specifies otherwise.¹² All rulings are published and are binding on the CBSA.¹³ There is a statutory right of appeal to the CITT within ninety days of the ruling date.¹⁴ Rulings may be applied retroactively by the CBSA for up to two years.¹⁵

4. *Scope Proceedings*, CAN. BORDER SERV. AGENCY, <https://www.cbsa-asfc.gc.ca/sima-lmsi/sp-pp-eng.html> (last modified Oct. 24, 2018).

5. Special Import Measures Act § 63(2).

6. See Special Import Measures Regulations, SOR/84-927 § 54.2-3 (Can.).

7. Special Import Measures Act § 64.

8. *Id.* § 66(1). This period may be extended to 210 days. *Id.* § 66(2); Special Import Measures Regulations § 54.4.

9. Special Import Measures Act § 74(1).

10. *Scope Proceedings*, *supra* note 4.

11. Special Import Measures Act § 66(1); Special Import Measures Regulations § 54.6(a)-(b).

12. Special Import Measures Act § 66(4).

13. *Id.* § 69.

14. *Id.* § 61(1.1).

15. *Id.* § 70(1).

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Scope rulings may be reviewed “to give effect to a decision of the CITT, FCA or SCC” or under prescribed circumstances.¹⁶ A review will result in a confirmation, amendment, or revocation of the ruling.¹⁷

The first scope proceeding by application was initiated by the CBSA on July 26, 2018, regarding Fabricated Industrial Steel Components (FISC) from China, South Korea, and Spain.¹⁸ On November 23, 2018, the CBSA issued its decision.¹⁹ The second scope proceeding was initiated by way of application on October 26, 2018, regarding certain aluminum extrusions from the People’s Republic of China.²⁰

III. Anti-Circumvention Proceedings

Circumvention occurs when a trade practice is changed to avoid liability for SIMA duties.²¹ Sections seventy-one to seventy-six of the SIMA set out the legislative provisions for anti-circumvention proceeding. They afford the CBSA authority to investigate whether certain imported goods are circumventing existing anti-dumping or countervailing measures. If there is a finding of circumvention, the CITT will immediately amend the existing measure to ensure that duties apply to the goods at issue.

To make a finding of circumvention, three elements must be present: (1) a change in a trade pattern after the initiation of a dumping or subsidy investigation; (2) “a prescribed activity is occurring and imports of the goods to which that prescribed activity applies” undermine the effect of a CITT order or finding; and (3) “the principal cause of the change . . . is the imposition of [SIMA] duties.”²² The SIMR sets out factors that the CBSA President may consider when determining whether anti-circumvention occurred. These factors consider whether there has been: “any change in the volume of imports into Canada of goods” subject to antidumping or countervailing duties; “any change in the volume of imports into Canada of goods in respect of which circumvention may be occurring;” “any change in the volume of imports” of like goods or parts or components of like goods,

16. Scope Proceedings, *supra* note 4.

17. Special Import Measures Act §§ 67(3), 75.5(2).

18. *The CBSA Launches Scope Proceeding on Certain Fabricated Industrial Steel Components*, CAN. BORDER SERV. AGENCY (July 26, 2018, 12:00 PM), <https://www.newswire.ca/news-releases/the-cbsa-launches-scope-proceeding-on-certain-fabricated-industrial-steel-components-689243561.html>.

19. *Certain Fabricated Industrial Steel Components*, CAN. BORDER SERV. AGENCY (Nov. 23, 2018), <https://www.cbsa-asfc.gc.ca/sima-lmsi/sp-pp/fisc2018/fisc2018-nr-eng.html>.

20. *Certain Aluminum Extrusions*, CAN. BORDER SERV. AGENCY (Oct. 26, 2018), <https://www.cbsa-asfc.gc.ca/sima-lmsi/sp-pp/ae2018/ae2018-ni-eng.html>.

21. *Anti-circumvention Investigations Conducted Pursuant to the Special Import Measures Act*, CAN. BORDER SERV. AGENCY, <https://www.cbsa-asfc.gc.ca/sima-lmsi/ac-eng.html> (last modified Apr. 26, 2018).

22. Special Import Measures Act, R.S.C. 1985, c S-15 § 71 (Can.); *see also* Special Import Measures Regulations, SOR/84-927 §§ 57.12(a)–(c), 57.15–.16 (Can.) (describing prescribed activities, factors regarding undermining remedial effects, and factors regarding determining the principal cause of a change in trade pattern).

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from a country subject to anti-dumping or countervailing duties into a country where the goods are exported to Canada or listed as originating; and “any other relevant factor.”²³

A circumvention investigation into a specific exporter or country is self-initiated by the President of the CBSA or as a result of a written complaint.²⁴ A notice of initiation is provided to “the importer, the exporter, the government of the exporting country, the domestic producers and the complainant, if any,” and will specify the CBSA’s “reasons for initiating the investigation.”²⁵ Requests for information are also sent to importers, exporters, vendors, foreign producers, and domestic producers (of like goods). The CBSA President will publish a statement of essential facts, which includes a summary of facts and a preliminary assessment of whether there is a “reasonable indication of circumvention.”²⁶ Interested parties may respond by submitting written argument.

An investigation may be terminated prior to issuing a statement of essential facts if the goods subject to the investigation fall within the product description of existing anti-dumping or countervailing measures. This termination is a deemed scope ruling.²⁷

The CBSA President shall rule on the investigation within 180 days of initiation, and the CITT shall make an order amending the order or finding.²⁸ The decision will specify “the goods to which it applies . . . [and] the exporters and the exporting countries to which it applies.”²⁹ The CITT does not have jurisdiction to inquire into the matter or hear from interested parties. Its jurisdiction is limited to amending its finding or order as soon as possible. All anti-circumvention decisions are subject to judicial review by the Federal Court of Appeal.³⁰

Anti-circumvention decisions may be subject to interim review when the circumstances on which a circumvention decision was made have changed.³¹ Interim reviews will result in rescinding the decision or confirming it—with or without amendments.

23. Special Import Measures Regulations § 57.11.

24. Special Import Measures Act § 72(1)–(2).

25. *Id.* § 73(1).

26. *Id.* § 74(1).

27. *Id.* § 75(1), (4).

28. *Id.* §§ 75.1(1), 75.3. In prescribed circumstances, the President may also extend the time period to 240 days. *Id.* §§ 75.2(1); Special Import Measures Regulations, SOR/84-927 §§ 57.2 (Can.).

29. Special Import Measures Act § 75.1(3).

30. *Id.* § 96.1(1)(c.2).

31. *Id.* § 75.4(1).

Central/East Asia & China

ATHENA JIANGXIAO HOU, MICHAEL DEWEY, QING LYU,
STEVEN SHENGXING YU, JINGBING LI, YANLING ZHENG,
RAY CHENG XU, YING (JENNY) LU AND ASEN VELINOV*

I. Overview of China's First Financial Court

In light of rapid economic growth and increased financial disputes, China established the Shanghai Financial Court (“SFC”) in 2018. The SFC was formally inaugurated on August 20, 2018, and is an intermediate court focused on complicated, finance-related cases in the city.¹ It hears financial and administrative cases under the jurisdiction of the Shanghai Intermediate People’s Court.² The Supreme People’s Court (“SPC”) has clarified the jurisdiction of the SFC to cover commercial cases, including disputes involving securities, futures, trusts, insurance, and bills and financial lending, among others.³ The SFC also handles certain bankruptcy cases involving financial institution debtors and administrative cases involving financial regulators as defendants.

Shanghai is the financial hub of China. The city is home to a large number of banks, insurance companies, securities companies, and a variety of companies engaged in emerging financial derivatives services. The

* Athena Jiangxiao Hou, Michael Dewey and Qing Lyu, Chief Legal Officer and Corporate Counsels of Fuyao Glass America Inc., edited this article. Qing Lyu, corporate counsel of Fuyao Glass America Inc., authored Section I. Steven Shengxing Yu, partner of Hiways Law Firm (Shanghai), authored Section II. Jingbing Li and Yanling Zheng, senior partner and partner of ZY Partners in Beijing, China, respectively, authored Section III. Ying (Jenny) Lu, Legal Consultant of Perkins Coie LLP in Beijing, China authored Section IV. Michael Dewey, corporate counsel of Fuyao Glass America Inc., authored Section V. Ray Cheng Xu, LLM candidate at New York University and a Chinese Licensed Lawyer and Jiangxiao Athena Hou, Chief Legal officer of Fuyao Glass America Inc. authored Section VI. Asen Velinov, Foreign Counsel with Co-Effort Law Firm in Shanghai and Consultant with Shanghai Media Group, authored Section VII.

1. See generally Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Sheli Shanghai Jinrong Fayuan de Jueding (全国人民代表大会常务委员会关于设立上海金融法院的决定) [Decision of the Standing Comm. Nat’l People’s Cong. on the Establishment of Shanghai Financial Court] (promulgated by the Standing Comm. Nat’l People’s Cong., Apr. 27, 2018, effective Apr. 28, 2018) (China), available at http://www.npc.gov.cn/npc/xinwen/2018-04/27/content_2053982.htm.

2. *Id.* ¶ 2.

3. Zuigao Renmin Fayuan Guanyu Shanghai Jinrong Fayuan Anjian Guanxia de Guiding (最高人民法院关于上海金融法院案件管辖的规定) [Provisions of the Sup. People’s Ct. on the Jurisdiction of Shanghai Financial Court Cases] (promulgated by Sup. People’s Ct., Aug. 7, 2018, effective Aug. 10, 2018) (China), available at <http://www.court.gov.cn/zixun-xiangqing-111351.html> [hereinafter *Regulation*].

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Shanghai Stock Exchange is also located there. It comes as no surprise that Shanghai, which is also home to major arbitration institutions, was selected as the location for China's first financial court. In 2017 alone, "courts in Shanghai heard more than 179,000 finance-related cases."⁴ The number of such lawsuits in Shanghai grew on average 51 percent annually from 2013 to 2017.⁵

The SPC's seven-article Regulation details the jurisdiction of the SFC. Under Article 1 Provision 1, the SFC has jurisdiction over disputes involving securities, futures, trusts, insurance, negotiable instruments, letters of credit, financial lending contracts, bankcards, financial lease contracts, entrusting financial contracts, and pawns, among other issues.⁶ These financial cases are governed under Regulations of the Causes of Civil Cases ("RCCC").⁷ The SPC has clarified in the Regulations that the SFC also has jurisdiction over new types of civil and commercial disputes involving online payment of non-bank payment agencies, online lending, and internet-based equity crowdfunding that are not addressed by the RCCC or other judicial interpretations.⁸ The SFC only adjudicates certain types of bankruptcy cases involving financial institutions, not ordinary commercial entities. In addition, such bankruptcy cases usually involve substantial stakes and demand certain experience and understanding of financial matters. Having the SFC hear these financial cases helps set consistent judicial standards and promotes judicial efficiency.

Two major arbitration institutions, the Shanghai Arbitration Commission ("SAC" established in 1995) and the Shanghai International Arbitration Center ("SIAC" established in 1988), handle a number of financial disputes. Arbitration is a common resolution venue for financial disputes, including, in particular, international disputes. Arbitration has led to an increased number of court appeals of arbitral results. Before the establishment of the SFC, judicial review of arbitration awards was mainly accepted by the Shanghai No. 1 and No. 2 Intermediate People's Courts ("IPCs"). Article 1 Provision 5 provides more guidance on recognition and enforcement of foreign judgments or rulings involving international financial disputes.⁹ The Regulation also provides guidance on the recognition and enforcement of judgments of financial and commercial disputes by Hong Kong, Macao, and Taiwan courts.¹⁰

4. *China Launches First Financial Court in Shanghai*, XINHUA NET (Aug. 21, 2018, 2:49 PM), http://www.xinhuanet.com/english/2018-08/21/c_137407119.htm.

5. *Id.*

6. *Regulation*, *supra* note 3, art. 1.

7. *See generally* Minshi Anjian Anyou Guiding (民事案件案由规定) [Regulations of the Causes of Civil Cases] (promulgated by Nat'l People's Cong., effective Mar. 03, 2008) (China), *available at* http://www.npc.gov.cn/npc/xinwen/fztd/sfjs/2008-03/03/content_1425565.htm.

8. *Regulation*, *supra* note 3, art. 1.

9. *Id.* art. 1.

10. *See id.*

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In China, where there are no jury trials, judges play an important role in adjudicating disputes. This is particularly true in complex financial disputes involving massive financial companies where the substance of disputes is varied and complicated. Emerging financial innovations and regulatory concepts are changing rapidly. Therefore, the SFC selects judges with rich experience in trials of financial cases through a public selection and then transfers those judges from the Financial Trial Chamber of IPCs. The SFC Vice President, Kai Xiao, was previously the director of financial prosecutions of the Shanghai People's Procuratorate. Many adjudication division judges of the SFC are former judges of the Financial Division of IPCs. These judges bring a wealth of trial experience with financial disputes and also help establish practices to follow.

The establishment of the SFC is another achievement of judicial reform following the establishment of Internet Courts¹¹ and Intellectual Property Courts.¹² The first case accepted and heard since the SFC's establishment was the October 18, 2018, trial of *Orient Securities Co. Ltd. v. Beijing Honggaozhongtai Investment Co., Ltd.*, a securities pledge and repurchase contract dispute.¹³ In the two months following the establishment of the SFC, 1,100 cases were filed with a value of 14.8 billion yuan.¹⁴

As the first specialized financial court in China, the SFC is expected to handle more and more financial cases. The establishment of a unified financial court, centralized jurisdiction over financial cases, and reform of the financial trial system and mechanism will help to establish a mature rule of law environment and provide specialized judicial efficiency to pave the way for this judicial system to follow.

11. The first Internet Court was formally established on August 18, 2017 in Hangzhou, Zhejiang. See Sara Xia, *China Establishes Its First Cyber-Court in Hangzhou: Thank You Alibaba*, CHINA L. BLOG (Aug. 16, 2017), <https://www.chinalawblog.com/2017/08/china-establishes-its-first-cyber-court-in-hangzhou-thank-you-alibaba.html>. Later Internet Courts were established in Beijing on September 9, 2018, and in Guangzhou, Guangdong on September 28, 2018. See Nick Beckett et al., *China Establishes Two New Internet Courts in Beijing and Guangzhou*, LEXOLOGY (Sept. 13, 2018), <https://www.lexology.com/library/detail.aspx?g=ff00aa01b-7810-4b68-a4ae-544518a843fa>; *China's Third Internet Court Opens in Guangzhou*, CHINA INTELL. PROP. (Oct. 11, 2018), <http://www.chinaipmagazine.com/en/news-show.asp?id=10144>.

12. The first Intellectual Property Court was formally established on November 6, 2014 in Beijing. Later Intellectual Property Courts were established in Guangzhou, Guangdong on December 16, 2014, and in Shanghai on December 28, 2014. See *Updates on China's Specialized IP Courts and Tribunals*, LEXOLOGY (Jan. 27, 2019), <https://www.lexology.com/library/detail.aspx?g=365fea3e-d682-4b63-822d-d7c9f0959b5d>.

13. See *Shanghai Financial Court Held The First Court Hearing*, SHANGHAI FIN. CT., http://shjrfy.hshfy.sh.cn/jrfy/English/news_view.jsp?pa=aaWQ9MzAyz (last visited Mar. 30, 2019).

14. *Id.*

II. China's Anti-Unfair Competition Law

The Anti-Unfair Competition Law (“ACL”),¹⁵ which was first introduced in 1993, served as a primary economic law until China’s first Antitrust Law became effective in 2008.¹⁶ While the Antitrust Law now holds the so-called status of “China’s economic constitution,” the ACL continues to provide an important guide for Chinese market supervision agencies and courts to correct market misconduct.¹⁷ Based on rich experience gained from decades in a dynamic and complicated market environment, China amended the ACL and made the new version effective from January 2018, aiming at expanding its jurisdiction and strengthening enforcement to meet the public expectation for market discipline.

A. ANTI-BRIBERY CAMPAIGN

Among its highlights, the newly amended ACL provides a strong hammer against commercial bribery that results in unfair competition. First, it includes new norms such as seeking “trading opportunities” and gaining “competitive advantage” in the categories of illegal benefits of bribery under the ACL, and it expands the narrow definition of “purchase and sales of commodity.”¹⁸ This legislative step endorsed the standard set by the Central Anti-Commercial-Bribery Regulatory Leading Group—an enforcement agency under the guidance of SPC and Supreme People’s Procuratorate (“SPP”)—back in 2007 and 2008.

Second, the amended ACL grants greater power to enforcement agencies, allowing them to seize and detain property gained from unfair competition. Further, enforcement officers can inquire into bank account information of an investigated business in an unfair competition investigation and can sanction a party who fails to cooperate.¹⁹

The amended ACL imposes enhanced enforcement measures against non-compliance with fair competition. A commercial bribery can be fined between RMB 100,000 to RMB 3 million (more than ten times higher than the previous range of RMB 10,000 to RMB 200,000).²⁰ In matters involving

15. See generally Zhonghua Renmin Gongheguo Fanbuzhengdang Jingzheng Fa (中华人民共和国反不正当竞争法) [Anti-Unfair Competition Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Nov. 4, 2017, effective Jan. 1, 2018) (China), available at http://www.npc.gov.cn/npc/xinwen/2017-11/04/content_2031432.htm [hereinafter *ACL*].

16. See Zhengquan Gu & Elliot Papageorgiou, *China’s new Anti-unfair Competition Law- More extensive and detailed protection*, LEXOLOGY (Jan. 12, 2018), <https://www.lexology.com/library/detail.aspx?g=9a5bafd2-45ec-4f2c-bece-895eb915a109>.

17. See Youngjin Jung & Qjan Hao, *The New Economic Constitution in China: A Third Way for Competition Regime?*, 24 Nw. J. INT. L. & BUS. 107, 107–108 (2003).

18. *ACL*, *supra* note 15, art. 7.

19. *Id.* art. 7, 13, 31.

20. Hui Xu et al., *China’s Newly Amended Anti-Unfair Competition Law Changes the Rules of the Game*, ASIAN-MENA COUNSEL Vol. 15, Issue 6, at 22 (2018), available at <https://www.lw.com/thoughtLeadership/china-newly-amended-anti-unfair-competition-law-latham>.

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serious violations, the enforcement authority may revoke a violator's business license.²¹ This enforcement power was not in the 1993 version of the ACL.

B. ONLINE COMPETITION

China is the second largest economy globally, having a substantial online component. In response to calls for regulation of e-commerce, the amendment adds a new article to address online business activities, which are complex and increasingly intensified. Article 12 of the amended ACL prohibits a business operator from hindering or undermining the operation of network products or services legally provided by other business operators.²² The amended ACL leaves some discretion to the enforcement agencies for further interpretation and case-by-case determination.

The amended ACL expressly prohibits inserting a link or forcing a URL redirection in an online product or service legally provided by another operator to compel a destination diversion without the approval of such operator.²³ This new provision is consistent with the judgment in *Baidu v. Qingdao Aoshang*, where the court ruled against the "bad" behavior, blaming a breach of good faith and business ethics that hinders the normal operation of other operators and jeopardizes their legitimate interests.²⁴ With the new law, a government agency or court will directly apply such provision to address the misconduct.

Indeed, some big platform companies with dominant positions seek to build walls that unfairly discriminate against competitors. In *Tencent v. Sogou*, defendant Sogou, a power search engine associated with Sohu.com, used its technical tools to direct Sogou users to delete Tencent products.²⁵ The case clearly demonstrated online unfair competition. The amended ACL now provides that any action "misleading, deceiving, [or] forcing users to modify, close, or uninstall network products or services legally provided

21. *ACL*, *supra* note 15, art. 18.

22. *Id.* art. 12.

23. *Id.*

24. Zhongguo Lianhe Wangluo Tongxin Youxiang Qingdaoshi Feng Qingdao Ao Shang Wangluo Jishu Beijing Baidu Wang Xun Keji Zhongguo Lianhe Wangluo Tongxin Youxiang Shandong Sheng Feng Buzheng Dangjing Zheng (中国联合网络通信有限公司青岛市分公司、青岛奥商网络技术有限公司、北京百度网讯科技有限公司、中国联合网络通信有限公司山东省分公司不正当竞争 [Beijing Baidu Netcom Science and Technology Co. v. Qingdao Aoshang Network Technology Co., Higher People's Court of Shandong], Lu Min San Zhong Zi No. 5-2 (Mar. 20, 2010) (China), *available at* <https://cgc.law.stanford.edu/judgments/shandong-2010-lu-min-san-zhong-zi-5-2-civil-judgment/>.

25. Tengxun Keji Shenzhen Youxian Gongsu Beijing Sougou Keji Fazhan Youxian Gongsu Deng Buzheng Dangjingzheng Jiufenan (腾讯科技(深圳)有限公司诉北京搜狗科技发展有限公司等不正当竞争纠纷案 [Tencent Technology (Shenzhen) Co., Ltd. v. Beijing Sogou Technology Development Co., Ltd.], Yi Zhong Min Chu Zi No. 16849, June 17, 2010 (Beijing No.1 Intermediate People's Court), *available at* http://www.pkulaw.cn/case/pfnl_117816331.html?match=Exact&_sm_au_=_iVV7JJjWj7GRQGTH.

by other business operators” is illegal and shall be subject to punishment, or else the operator must compensate its unfairly damaged competitor.²⁶

The third type of misconduct the amended ACL cracks down on is causing, maliciously or in bad faith, incompatibility with an online product or service legally provided by another operator.²⁷ But it is unclear how government enforcement will evaluate and determine what conduct is malicious. Reading the plain statutory language, actions in bad faith that are deliberately implemented or specifically targeted, or that impair the trading opportunities of other operators, may be considered unfair competition.²⁸

With the new and fast changing ecosystem, legislators are aware it is impossible to list all circumstances in which a business operator could take advantage of technology to change users’ choices or otherwise impede or disrupt the normal operation of network products or services duly provided by another. Thus, the amendment includes a catch-all clause, leaving room for judicial interpretation and administrative enforcement discretion.

An example of how China has reacted to legislation and enforcement on e-commerce is the establishment of three Internet Courts nationally, in Hangzhou, Beijing, and Guangzhou.²⁹ These courts are equipped to hear disputes arising from online activities, mostly from the signing or performance of online shopping contracts through e-commerce platforms. Looking forward, there is good reason to believe cases arising from online unfair competition will keep the courts busy.

Beyond its anti-bribery and online wrongdoing prohibitions, the amended ACL has other notable components. For example, it extends protection from business operators and market competition to include consumers, which is a big step forward. Furthermore, the amendment has borrowed from international experience and followed the mainstream by adopting a broadened definition of trade secret.

III. Trademark Law Development in China

Trademark law in China has developed in relation to the following three issues concerning the security of US companies sourcing goods from China and the defense against bad faith infringement allegation: (1) whether the use of a Chinese registered trademark merely for manufacturing and exporting from China but not for sale (the “OEM use of a trademark”) is sufficient to defend a non-use cancellation action; (2) whether the OEM use of a trademark constitutes trademark infringement if the trademark used for sourcing is not registered in China but is similar to a trademark registration owned by a third party; and (3) whether the legitimate right owner can be

26. *ACL*, *supra* note 15, art. 12.

27. *Id.*

28. *See id.* art. 2.

29. Meng Yu & Guodong Du, *China Establishes Three Internet Courts to Try Internet-Related Cases Online*, CHINA JUST. OBSERVER (Dec. 16, 2018), <https://www.chinajusticeobserver.com/insights/china-establishes-three-internet-courts-to-try-internet-related-cases-online.html>.

insulated from trademark infringement lodged by a subsequent bad faith registrant.

A. OEM USE OF A TRADEMARK

1. *Non-use Cancellation Action*

Numerous foreign companies have registered trademarks in China, but they primarily use such trademarks for sourcing activities rather than for sale in China. In practice, the China Trademark Office (“TMO”), the Trademark Review and Adjudication Board (“TRAB”), and the courts generally will accept OEM use evidence to sustain the registrations of such trademarks in non-use cancellations. For example, in the non-use cancellation action against the trademark VAN registered by a Japanese company, the Higher People’s Court of Beijing affirmed the TRAB decision and the trial judgment and illustrated the relevant policy considerations. First, the legislative intent of a non-use cancellation mechanism is to encourage active trademark use and to clear those idle trademarks. Using a trademark for OEM is sufficient to show the active use state of such a mark. Second, denying the OEM use of a trademark as a valid trademark use would go against China’s national policy to encourage the development of foreign trade.³⁰

2. *Trademark Infringement Litigation*

In a trademark infringement case where the defendant (the Chinese manufacturer) used the trademark 东风 (Dong Feng in Chinese characters) for manufacturing diesel engines according to the authorization from the Indonesian trademark owner and then exported such products to Indonesia, the SPC dismissed the infringement claims by Shanghai Diesel Engine Co., Ltd. (“SDEC”), who owned a Chinese trademark registration for the same Dong Feng mark.³¹ In this widely-cited case, the SPC provided the following guidance: first, the use of a mark by the Chinese manufacturer during the manufacturing and exportation of products will not cause a likelihood of confusion among Chinese consumers because those goods would not enter Chinese markets. Accordingly, the OEM use of a trademark by the manufacturer does not constitute trademark use. Second, if the Chinese manufacturer has duly examined the valid status of the authorized trademark in the destination country when it accepts the commission from a foreign company, the court determined that the manufacturer has fulfilled the duty of care unless there is evidence to the contrary. Third, when the courts try trademark infringement cases, on the

30. [Fortune Trade Consultants Co., Limited v. TRAB & Kent Japan Kabushiki Kaisha], Gao Xing Zhong No. 5390, Dec. 11, 2017 (Higher People’s Court of Beijing).

31. *SPC Overturns the “Dong Feng” Case and Revisits the Factors Which Constitute Infringement in OEM Arrangement*, DEACONS (BEIJING) INTELL. PROP. AGENCY CO. LTD. (June 05, 2018), <https://www.deaconschinaip.com/en/news/spc-overturns-the-dong-feng-case-and-revisits-the-factors-which-constitute-infringement-in-oem-arrangement>.

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one hand, they shall strictly follow the law and protect the lawful rights and interests of the trademark registrants, and on the other hand, they shall be careful about the potential over-protection for trademark registrants because otherwise, the normal trade and fair competition order would be disrupted.³²

B. SQUATTER’S DEFENSE AGAINST INFRINGEMENT ALLEGATIONS

The notorious New Balance case caused grave concern among foreign companies two years ago when the trial court ordered New Balance to pay the trademark squatter damages of RMB 98,000,000 (around USD 14,107,600) although the appellate court finally lowered the damage to RMB 5,000,000 (around USD 720,000).³³ In 2017, the SPC published its official Guiding Case No. 82.³⁴ The SPC held if concerned parties obtained a trademark registration via improper means and then enforced their trademark rights in bad faith, courts should dismiss their claims on the ground of abuse of civil rights.³⁵ 2018 has witnessed encouraging developments where Chinese courts took measures to discourage bad faith complaints and lawsuits lodged by the trademark squatters.

For example, in the Coppertone case, Yuhang District Court supported Bayer’s claims and found the defendant’s bad faith complaints with Taobao based on their bad faith trademark registrations had interfered with the normal business of the legitimate right owner, Bayer, and thus constituted unfair competition against Bayer.³⁶

In another case, where the defendant preemptively registered the generic name CPU (abbreviation of casting polyurethane elastomers) for various kinds of road materials and building materials and then filed a lawsuit and administrative raid actions against its competitor (the plaintiff), the Zhejiang Higher Court affirmed the trial judgment.³⁷ The court determined that the defendant’s bad faith enforcement actions based on its bad faith registration had damaged the plaintiff’s legitimate rights and interests and the defendant should pay the plaintiff for the economic losses caused by the bad faith

32. *Id.*

33. *China’s Top 25 Typical Trademark Cases in 2016*, CHINA INTELL. PROP. MAG., <http://www.chinaipmagazine.com/en/journal-show.asp?id=1386> (last visited Apr. 01, 2019).

34. See Wang Sui Yong Su Shenzhen Ge Li Si Fushi Gufenyouxiang Hangzhou Yin Tai Shiji Baihuo Youxiang Qin Hai Shangbiao Quan Jiufen An (王碎永诉深圳歌力思服饰股份有限公司、杭州银泰世纪百货有限公司侵害商标权纠纷案 [Wang Suiyong v. Shenzhen Ellassay Fashion Co., Ltd. and Hangzhou Intime Century Department Store Co., Ltd., A Trademark Infringement Dispute], Sup. People’s Ct. Judgment Comm., Guiding Case No. 82 (Mar. 6, 2017) (China), available at <https://www.chinacourt.org/article/detail/2017/03/id/2574902.shtml>.

35. *Id.*

36. Maritza Schaeffer, *China: Brand Owner Prevails in Unfair Competition Action Against Bad Faith Squatter*, LEXOLOGY (Dec. 31, 2018), <https://www.lexology.com/library/detail.aspx?g=bd59e2a6-3a44-4449-8948-4f4ed0a292b7>.

37. [Shaoying City Keshun Building Materials Co., Ltd. v. Xinchang County Gongli Innovative Building Materials Co., Ltd.], Zhe Min Zhong No. 37 Civil Judgment, April 12, 2018 (Higher People’s Court of Zhejiang).

enforcement (including the reasonable expenses incurred for defending the infringement allegation).³⁸

IV. Chinese Court Recognizes Blockchain-Verified Evidence

On June 27, 2018, the Chinese Hangzhou Internet Court announced its decision on a case regarding the infringement of the right to disseminate work over the internet.³⁹ This is the first time for a Chinese court to accept electronic data that was stored using blockchain technology as legal evidence. The court also clarified the examination standards for such electronic data.

A. FACTUAL BACKGROUND

This case was filed by Hangzhou Huatai Yimei Culture Media Co., Ltd. (“Huatai”) against Shenzhen Daotong Technology Development Co., Ltd. (“Daotong”). On July 24, 2017, a newspaper published an article discussing an incident and granted Huatai an exclusive right of communication through information networks to the article. But the same article was then published on a website owned by Daotong without permission.

Although Huatai subsequently requested Daotong to stop the infringement, Daotong ignored the request. As a result, Huatai filed a lawsuit against Daotong in the Hangzhou Internet Court. Huatai submitted evidence of the alleged infringement, including webpage screenshots and website source code, which were all uploaded to Factom and Bitcoin blockchains through Baoquan.com, a third-party evidence preservation platform based on the blockchain technology.

B. COURT EXAMINATION

At the outset, the court held that “for electronic data that is perpetuated and preserved by blockchain or similar technical means, an open and neutral attitude should be taken by the court, and the analysis and determination should be conducted on a case-by-case basis.”⁴⁰

To determine whether Huatai’s approaches to storing evidence complied with Chinese laws and regulations regarding electronic data and to determine the validity of the evidence, the court considered the following

38. *Id.*

39. Hangzhou Huatai Yimei Wenhua Chuanmei Youxian Gongsi Su Shenzhenshi Daotong Keji Fazhan Youxian Gongsi (杭州华泰一媒文化传媒有限公司诉深圳市道同科技发展有限公司) [Hangzhou Huatai Yimei Culture Media Co., Ltd. v. Shenzhen Daotong Technology Development Co., Ltd.], Zhe 0192 No. 81 (Hangzhou Int. People’s Ct., June 28, 2018) (China), translated in *In the matter: Plaintiff 1: Hangzhou Huatai Yimei Culture Media Co., Ltd. / Defendant 1: Shenzhen Daotong Technology Development Co., Ltd.*, DENNEMEYER, https://go.dennemeyer.com/hubfs/blog/pdf/Blockchain%2020180726/20180726_BlogPost_Chinese%20Court%20is%20first%20to%20accept%20Blockchain_Judgment_EN_Translation.pdf?t=1533233132812 (last visited Apr. 01, 2019).

40. *Id.*

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aspects: (1) the qualification of the evidence preservation platform, (2) the credibility of the technical method to obtain the evidence on the infringing website, and (3) the integrity of blockchain electronic evidence preservation.⁴¹

Regarding the qualification of the evidence preservation platform, the court recognized that Baoquan.com is neutral with regard to Huatai and is qualified as a third-party electronic evidence preservation platform.⁴²

Regarding the credibility of the data capturing method, the court noted that Baoquan.com captures images from target webpages by automatically invoking Puppeteer (a Google open source program). Baoquan.com also obtains the source code of the target webpages by invoking the curl command. The whole system is open to the public equally, and the operational process is automatically completed. Therefore, the court concluded the source of the electronic data obtained via this system was highly reliable. In this case, the screenshots captured through Puppeteer indicated the above-mentioned article published on the website of Daotong in 2017 was exactly the same as the article at issue.

Finally, with regard to the integrity of the blockchain electronic evidence preservation, the court analyzed the theory of the blockchain technology and confirmed the distributed database of blockchain makes it difficult to tamper with or delete the data stored on the blockchain. Accordingly, if the electronic data at issue can be proven to have been saved to a blockchain, this method of maintaining the integrity of contents should be reliable.⁴³

The court further examined the two following aspects to determine that the electronic data had been uploaded to the blockchain: (i) whether the electronic data had truly been uploaded; and (ii) whether the uploaded electronic data is the electronic data at issue. The court calculated and compared the hash value of the contents contained in the block node in the Bitcoin blockchain, the contents stored in the Factom blockchain, and the file that packaged and compressed the webpage screenshots, source code, and invocation information downloaded from Baoquan.com. Because all the values were confirmed to be consistent, the court found the electronic data had been actually uploaded into the Factom and Bitcoin blockchains, and such electronic data had been preserved completely without any change since being uploaded.⁴⁴

The court concluded the standard for determining the validity of electronic evidence should not be raised because the relevant technologies are novel, nor should it be lowered because of the difficulty to tamper with or delete the electronic data. The effectiveness of evidence should be determined in a comprehensive manner according to relevant laws and

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

regulations, where the emphasis should be on the examination of the data source and content integrity, and security of the technical method.⁴⁵

In this case, the court recognized the reliability and integrity of the blockchain-based electronic data at issue and held that the actions of Daotong infringed Huatai's right of communication through the internet.⁴⁶

This is the first case in China where a court allowed evidence obtained from blockchain technology to be used in litigation. It shows China is attaching more and more importance to and anticipates the development of blockchain technology.

V. Most Recent SPC Guiding Case Focuses on Justifiable Defense

The Supreme People's Court of China has continued its work to build a more robust system of case law to guide Chinese courts. On June 20, 2018, the SPC released its eighteenth batch of Guiding Cases, containing one employment case, two civil commercial cases, and one criminal case.⁴⁷

A. GUIDING CASES AND STANFORD LAW'S DATABASE

Chinese Guiding Cases draw their origin from November 2010, when the SPC issued the Provisions of the Supreme People's Court Concerning Work on Case Guidance.⁴⁸ These provisions are aimed at establishing a new system for summarizing adjudication experiences, unifying the application of law, enhancing adjudication quality, and safeguarding judicial impartiality. To achieve the goals of this new system, the SPC uniformly releases Guiding Cases, which have guiding effect on adjudication and enforcement work in courts throughout the country. Each Guiding Case contains a summary of the original ruling or judgment and is supplemented with a section titled "Main Points of the Adjudication." The Guiding Cases also summarize the legal rules considered in the case, the facts, the outcomes of legal proceedings, and the reasons for the final ruling. With the four cases on June 20, 2018, the SPC has now released ninety-six Guiding Cases.

Just months after the SPC issued its November 2010 provisions, Dr. Mei Gechlik of Stanford Law School founded the China Guiding Cases Project (the "CGCP"). The mission of the CGCP is "to advance the understanding of Chinese law and help to develop a more transparent and accountable

45. *Id.*

46. *Id.*

47. See *Zuigao Renmin Fayuan Guanyu Fabu Di 18 Pi Zhidao Xing Anli de Tongzhi* (最高人民法院关于发布第18批指导性案例的通知) [*Notice of the Supreme People's Court on Issuing the Eighteenth Group of Guiding Cases*] (promulgated by Sup. People's Ct., June 20, 2018) (China), available at http://www.lawinfochina.com/display.aspx?id=28473&lib=law.http://rmfyb.chinacourt.org/paper/html/2018-06/28/content_140564.htm?div=-1 [hereinafter Notice].

48. Mei Gechlik & Jennifer Ingram, *China's Fifty-Seven Civil Guiding Cases*, STAN. L. SCH. CHINA GUIDING CASES PROJECT, GUIDING CASES ANALYTICS, ISSUE NO. 7, at 2 (Sept. 2018), available at <https://cgc.law.stanford.edu/guiding-cases-analytics/issue-7/>.

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judiciary in China by engaging experts and other stakeholders around the world to contribute to a unique knowledge-base, undertaking capacity-building activities for legal actors, and promoting public education and participation.”⁴⁹ Since its beginning as a project supported by a few law students, the CGCP has grown to a current team of nearly 200 members and more than fifty advisers. The activities of the CGCP have likewise multiplied, ranging from the translation and analysis of Guiding Cases to the implementation of new initiatives such as the Belt and Road Series.

While translations of the first ninety-two Guiding Cases can be found online at the CGCP website, the four most recent cases are not yet available. This section provides an overview of Guiding Case No. 93, the criminal case in batch eighteen, known as “Intentional Injury by Yu Huan.” The case arises from a loan sharking arrangement gone awry, resulting in the death of the loan shark’s henchman.

B. GUIDING CASE NO. 93: INTENTIONAL INJURY BY YU HUAN

The background of this case begins in the summer of 2014, when Su Yinxia and her husband borrowed the equivalent of about \$145,000 from Wu Xuezhao at a monthly interest rate of 10%.⁵⁰ When, on April 14, 2016, Wu determined Su had defaulted on the loan, Wu sent a group of individuals, including Du Zhihao, to Su’s workplace to demand repayment. Prior to the incident, the loan shark’s henchmen had conflicts with Su Yinxia and her family on several occasions to pressure them to pay the loan. The henchmen did not bring any weapons or use physical violence against Su or her family.

Upon finding Su and Yu Huan, who is Su’s son, employee, and defendant in the subsequent court case, at their corporate office, Du verbally abused them and exposed his genitalia to Su while in her son’s presence. Du also slapped Yu Huan across his face and pressed him forcefully by the shoulders to prevent him from standing.

Du had been at the workplace for more than an hour when another employee called the police, who, upon arrival, advised the parties against fighting and left to speak with the employee who phoned in the complaint. Before the police had left the premises, Yu Huan attempted to leave but was prevented by Du. Du and other debt collectors then surrounded Yu Huan in a corner of the room and Yu Huan brandished a knife to warn them against approaching further. They persisted, however, and Yu Huan stabbed them. Du died from his injuries the following day.

On February 17, 2017, Yu Huan was convicted of intentional injury and sentenced to life in prison by the Intermediate People’s Court of Liaocheng City, Shandong Province.⁵¹ On appeal, the Higher People’s Court of Shandong Province reduced his sentence to a fixed-term imprisonment of

49. *Mission and Major Achievements*, STAN. L. SCH. CHINA GUIDING CASES PROJECT, <https://cgc.law.stanford.edu/mission/> (last visited Mar. 31, 2019).

50. *Notice*, *supra* note 47.

51. *Id.*

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five years for intentional injury. The SPC stated in the Guiding Case that the original judgment was correct in finding Yu Huan guilty of intentional injury. It affirmed that the trial court applied appropriate trial procedure but held that the trial court failed to consider facts comprehensively. The SPC concluded: the court was erroneous in determining the self-defense principal under criminal law, and the sentence was too heavy. The SPC endorsed the Higher People's Court's ruling that reduced Yu Huan's sentence to five years.

In the Guiding Case, the SPC set forth four primary takeaways. First, an ongoing act of illegally restricting the personal freedom of a person is unlawful infringement under paragraph 1, Article 20 of the Criminal Law, and justifiable defense may be exercised against such infringement.⁵² Next, illegally restricting one's personal freedom while insulting him and giving him minor beatings is not a violent crime that seriously endangers his personal safety for the purposes of paragraph 3, Article 20 of the Criminal Law. Third, the court must consider such factors as the nature, means, intensity, and harm of the unlawful infringement, as well as the nature, timing, means, intensity, environment, harmful consequence, and other circumstances of the defense against it in judging whether defense is justifiable.⁵³ If death or serious injury results from a defense against illegal restriction coupled with insults and minor beatings, then paragraph 2, Article 20 of the Criminal Law dictates the defense obviously exceeds the necessary limit and causes material damage.

Finally and significantly, when an unjustifiable defense results from the victim's unlawful infringement that "seriously degrades another person or desecrates human relations," the victim's contemptible conduct must be considered in sentencing in order to ensure the judicial adjudication withstands the legal test and aligns with the public concept of equity and justice.⁵⁴ The SPC noted that Du's genitalia exposure to Su in the presence of Yu Huan and the insulting conduct toward Yu Huan were key factors provoking Yu Huan's aggressive response. But Yu Huan's conduct was excessive because the police officer was still waiting in the courtyard of Su's office building at the time when Yu Huan stabbed the henchmen in Su's reception room, and Yu Huan caused one death, two serious injuries (including stabs to the back), and one other injury.

This case has received much media attention and public outcry in China over what many viewed as, in light of the circumstances, a harsh original prison sentence for Yu Huan. It is a challenging determination of whether Yu Huan used excessive force in self-defense. The SPC directed courts to consider the totality of circumstances, including not only the threat of imminent serious bodily harm but also provocation by the victim, the latter of which is similar to the US concept of "heat of the moment" defense.

⁵². *Id.*

⁵³. *Id.*

⁵⁴. *Id.*

VI. China's New Regulations and Policy on Internet Medical Services

On July 17, 2018, the National Health Commission of China (“MOH”) issued a set of new regulations to set forth the entrance and operation standards for businesses seeking to provide medical services over the internet.⁵⁵ These regulations are: (1) the Administrative Measures of Internet Diagnostic and Treatment (Trial) (“AMIDT”),⁵⁶ (2) the Administrative Measures of The Internet Hospitals (Trial) (“AMIH”),⁵⁷ and (3) the Administrative Measures of Tele-Medicine Services (Trial) (“AMTMS”).⁵⁸

A. ENTRANCE REQUIREMENTS FOR INTERNET MEDICAL SERVICE PROVIDERS

The new regulations permit a limited scope of “internet diagnostic and treatment activities,” which include only (1) follow-up medical examinations for certain common diseases and chronic diseases provided by licensed medical institutions, and (2) chronic disease services provided by licensed family doctors who have existing contracts with patients.⁵⁹ In addition, the regulations prohibit MOH’s counterparts from approving any internet medical services before the local governments’ establishment of corresponding on-line inspection platforms.⁶⁰

Apart from internet medical services directly provided by licensed medical institutions, the new regulations permit third-party entities without a medical institution license to jointly establish “internet hospitals” with licensed medical institutions.⁶¹ Third-party entities may provide qualified

55. Guan Yu Yin Fa Hu Lian Wang Zhen Liao Guan Li Ban Fa (Shi Xing) Deng San Ge Wen Jian de Tong Zhi (关于印发互联网诊疗管理办法(试行)等三个文件的通知) [Notice on Releasing the Administrative Measures of Internet Diagnostic and Treatment (Trial) and Other Documents] (jointly promulgated by National Health Commission and State Administration of Traditional Chinese Medicine, July 17, 2018, effective July 17, 2018) (China), *available at* http://www.cbdi.com/BigData/2018-09/18/content_5839161.htm [hereinafter *Circular 25*].

56. *See generally* Hu Lian Wang Zhen Liao Guan Li Ban Fa (Shi Xing) (互联网诊疗管理办法(试行)) [Administrative Measures of Internet Diagnostic and Treatment (Trial)] (jointly promulgated by National Health Commission and State Administration of Traditional Chinese Medicine, July 17, 2018) (China), *available at* <http://www.dffyw.com/faguixiazai/xzf/201809/44783.html> [hereinafter *AMIDT*].

57. *See generally* Hu Lian Wang Yi Yuan Guan Li Ban Fa (Shi Xing) (互联网医院管理办法(试行)) [Administrative Measures of Internet Hospitals (Trial)] (jointly promulgated by National Health Commission and State Administration of Traditional Chinese Medicine, July 17, 2018) (China), *available at* <http://www.dffyw.com/faguixiazai/xzf/201809/44782.html>.

58. *See generally* Yuan Cheng Yi Liao Fu Wu Guan Li Gui Fan (Shi Xing) (远程医疗服务管理规范(试行)) [Administrative Measures of Tele-Medicine Services (Trial)] (jointly promulgated by National Health Commission and State Administration of Traditional Chinese Medicine, July 17, 2018), *available at* <http://www.dffyw.com/faguixiazai/xzf/201809/44781.html>.

59. *AMIDT*, *supra* note 56, art. 2.

60. *See id.* art. 6.

61. *See id.* art. 5.

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medical professionals and information platform services to the internet hospitals.⁶²

On the other hand, medical institutions that provide medical services should submit an application to the governing authority and, upon approval of the filing, add internet diagnostic and treatment services into the business scope on their medical institution license.⁶³ The service scope of these medical institutions should be compliant with their medical institution license.⁶⁴

B. RULES OF INTERNET DIAGNOSTIC AND TREATMENT PRACTICE

The new regulations provide some clarification about how the internet medical services will be distributed. The medical institutions and third parties engaged in services should execute an internet service agreement, and, in the chronic disease service agreement, the community medical institutions should clarify the process for rendering these services, each party's rights and obligations, and the risks of medical damages and divulgence of patients' health data.⁶⁵

In addition, medical institutions will be prohibited from using medical services for the initial diagnosis, prescribing narcotic drugs, psychotropic drugs, and other specially regulated drugs. Likewise, for patients whose conditions have deteriorated and who require in-person diagnosis, the medical institution should immediately cease providing internet medical services and advise the patients to seek treatment at a medical institution.⁶⁶

Moreover, medical institutions providing internet medical services employ licensed medical practitioners and should be properly equipped with the internet technology, equipment, technical personnel, information security systems, and electronic medical records management systems.

C. PROMOTING TELE-MEDICINE SERVICES AND INFORMATION SHARING PLATFORMS BETWEEN DIFFERENT LEVEL HOSPITALS

The new regulations encourage Class III hospitals to provide tele-medicine services to other hospitals at or below Class II level and encourage on-line education and communication of clinical knowledge and technology between doctors and medical institutions.⁶⁷ Furthermore, the new regulations advise medical institutions at different levels to establish

62. *See id.* art. 17

63. *Id.* art. 9.

64. *Id.* art. 11.

65. *Id.* art. 10, 15.

66. *Id.* art. 16, 19.

67. Hospitals in China are generally divided into three classes according to the types and scale of medical services, number of departments, and characteristics of the medical practitioners.

information sharing platforms to enable efficient sharing of patients' electronic medical records and improve the patient referral process.⁶⁸

D. IMPLICATIONS FOR THE MARKET

These regulations, for the first time, set forth the requirements for licensing, medical practice, and inspection of the business activities of the internet medical service providers. They also seek to raise the market entry requirements and narrow the scope of permissible internet medical services. As explained by Jiao Yahui, Deputy Director of the Medical Institution Reform Bureau of MOH, the Government will continue to enhance the entry level and inspection on the new businesses of internet medical services to protect the public health.⁶⁹

VII. Judgment Enforcement in China Under Belt & Road Policy

China established International Commercial Courts with the objective of addressing Belt and Road disputes on the fifth anniversary of the initiative, continuing the optimization of the legal system for international business activity trend.

Internationalization of the Chinese court system continued in 2018. Despite unexpected shakeups in the global system and a slowdown in outbound investment activity, Chinese courts continued the trend of indicating to new foreign investors and traditional stakeholders a willingness to recognize and enforce foreign commercial court judgments. For example, a Chinese court in Wuhan recognized and enforced a California judgment based on preexisting reciprocity, a Polish judgment based on a bilateral legal cooperation treaty, and a Singaporean judgment based on “proactive” reciprocity.⁷⁰ The Supreme People’s Court is also said to be “drafting a regulation on understanding and implementing civil and commercial judgments from foreign courts.”⁷¹

In 2018, for the fifth anniversary of the Belt and Road Initiative (“BRI”) (which was incorporated in China’s Constitution in late 2017,⁷² signifying long-term commitment to the initiative on the part of China despite

68. *AMIDT*, *supra* note 56, art. 22–23.

69. See Wang Bingyang (王秉阳), *Guojia Jiankangwei Fabu 3 Wenjian Guifan Huiianwang Zhenliao Xingwei* (国家卫健委发布3文件规范互联网诊疗行为) [*MOH Released Three Documents in Regulation of Internet Diagnostic and Treatment Activities*], XINHUA NET (Sept. 14, 2018, 5:58 PM), http://www.xinhuanet.com/politics/2018-09/14/c_1123432526.htm (China).

70. Suni Gong, *The Chinese Court’s Enforcement of a U.S. Civil Judgement*, NYU L.: TRANSNAT’L NOTES (Apr. 17, 2018), <https://blogs.law.nyu.edu/transnational/2018/04/the-chinese-courts-enforcement-of-a-u-s-civil-judgement/>.

71. Hannah Feldshuh, *Opinion: There Are Better Ways to Boost Belt and Road’s Appeal Than Blaming ‘China Bashing’*, CAIXIN GLOBAL (Nov. 9, 2018, 4:37 PM), <https://www.caixinglobal.com/2018-11-09/opinion-there-are-better-ways-to-boost-belt-and-roads-appeal-than-blaming-china-bashing-101345032.html>.

72. “*Belt and Road*” incorporated into CPC Constitution, PEOPLE’S DAILY ONLINE (Oct. 24, 2017, 12:54 PM), <http://en.people.cn/n3/2017/1024/c90000-9284135.html>.

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pushbacks from members of the global community and some notable, unsuccessful BRI projects), various measures were taken with the aim to strengthen the credibility of the BRI and “boost legal cooperation, making BRI projects sustainable and legally defensible for nations regardless of their internal judicial system.”⁷³

This major step toward credibility, further openness, and transparency of doing business with China represents institutional upgrades, as does the establishment of China-based International Commercial Courts.⁷⁴ Under the Belt and Road banner, these measures aim to create a “stable, fair, transparent, and predictable business environment under the rule of law.”⁷⁵

The SPC established three International Commercial Courts (initially announced and referred to as Belt and Road courts) based in Beijing (HQ), Xi’an (focusing on cases arising from the Silk Road Economic Belt, which connects China, Central Asia, the Middle East, and Europe), and Shenzhen (to take cases arising along the Maritime Silk Road, which connects China, Southeast Asia, Africa, and Europe). These Belt and Road courts aim to be one-stop, comprehensive dispute resolution entities, addressing Belt and Road and other international related commercial disputes.

Article 2 of the Provisions lists the types of cases the courts will be considering and gives broad discretion to the SPC to assign cases to the ICCs if they are considered “appropriate.” Article 4 suggests the judges will be Chinese, be proficient in both English and Chinese, and have relevant international experience. Eight judges have been appointed to date.⁷⁶ The SPC also established an International Commercial Expert Committee,⁷⁷

73. Feldshuh, *supra* note 70.

74. See Zuigao Renmin Fayuan Fuanyu Sheli Guoji Shangshi Fating Ruogan Wenti de Guiding (最高人民法院关于设立国际商事法庭若干问题的规定) [Provisions of the Supreme People’s Court on Several Issues Regarding the Establishment of the International Commercial Court] (promulgated by the Sup. People’s Ct., June 25, 2018, effective July 1, 2018), SUP. PEOPLE’S CT., June 27, 2018, art. 1, (China), available at <https://cgclaw.stanford.edu/zh-hans/belt-and-road/b-and-r-texts/20180701-provisions-re-intl-commercial-courts/>.

75. Zhong Gong Zhong Yang Bang Guo Wu Yuan Bang Yinfa Guanyu Jianli Yidai Yilu Guoji Shang Shi Zheng Duan Jiejue Jizhi He Jigou de Yijian (中共中央办公厅、国务院办公厅印发《关于建立“一带一路”国际商事争端解决机制和机构的意见》) [The General Office of the Central Committee of the Communist Party of China and the General Office of the State Council issued the “Opinions on Establishing the ‘One Belt, One Road’ International Commercial Dispute Resolution Mechanism and Institutions”], CHINA INT’L COMM. CT. (June 27, 2018), <http://cicc.court.gov.cn/html/1/218/149/192/602.html>, translated in *Opinion Concerning the Establishment of the Belt and Road International Commercial Dispute Resolution Mechanism and Institutions*, CHINA INT’L COMM. CT. (June 27, 2018), <http://cicc.court.gov.cn/html/1/219/208/210/819.html>.

76. Zuigao Renmin Fayuan Renming Guoji Shang Shi Fating Faguan (最高人民法院任命国际商事法庭法官) [Eight Judges of China International Court were Appointed] CHINA INT’L COMM. CT. (July 3, 2018), <http://cicc.court.gov.cn/html/1/218/149/192/820.html>, translated in *Eight Judges of China International Court were Appointed*, CHINA INT’L COMM. CT. (July 3, 2018), <http://cicc.court.gov.cn/html/1/219/208/210/821.html>.

77. Zuigao Renmin Fayuan Guanyu Chengli Guoji Shangshi Zhuanjia Weiyuanhui de Jueding (最高人民法院关于成立国际商事专家委员会的决定) [Decision of the Supreme People’s Court on the Establishment of an International Committee of Experts on Commerce] CHINA INT’L COMM. CT.

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which as of November 10, 2018, consisted of thirty-two Chinese and foreign experts.⁷⁸ The Committee “aim[s] to enhance international exchange and cooperation, ensure operation and promote adjudication of the International Commercial Court, and support parties to resolve international commercial disputes through arbitration, mediation, litigation and other diversified commercial dispute settlement methods.”⁷⁹ In addition to the Courts and the Committee, the China Council for the Promotion of International Trade (“CCPIT”) also established an International Dispute Prevention & Settlement Center.⁸⁰

These multiple developments signal the commitment of Chinese authorities to streamline dispute resolution and make the business environment more attractive to foreign parties. But there are areas of uncertainty, as the piecemeal approach and top down controls attract criticism by foreign commentators. Against the backdrop of a global system that is becoming more complex and uncertain, Chinese authorities want to reassure investors and other stakeholders that their interests will be adequately protected. But there are concerns about creating high profile dispute resolution venues when disputes have traditionally been left to the relevant business parties or neutral, third jurisdictions. There are also concerns Chinese investors might be encouraged to attempt to select these venues in their contracts with foreign parties, and whether they are successful will then depend on the relative leverage of the parties.

The ICCs have not yet rendered decisions as of November 10, 2018, and there is no information on whether they have already taken cases, so their viability remains to be determined.

(Aug. 24, 2018), <http://cicc.court.gov.cn/html/1/218/149/192/947.html>, translated in *The Decision on the Establishment of International Commercial Expert Committee of the Supreme People's Court*, CHINA INT'L COMM. CT. (Aug. 24, 2018), <http://cicc.court.gov.cn/html/1/219/235/243/index.html>.

78. See *Guoji Shangshi Zhanjia Weiyuanhui Zhanjia Weiyuan Jianli* (国际商事专家委员会专家委员简历 [*Resume of the Expert Committee of the International Committee of Commercial Experts*]) CHINA INT'L COMM. CT., <http://cicc.court.gov.cn/html/1/218/226/234/index.html> (last visited Apr. 1, 2019), translated in *Expert Directory*, CHINA INT'L COMM. CT., <http://cicc.court.gov.cn/html/1/219/235/237/index.html> (last visited Apr. 1, 2019).

79. *Guoji Shangshi Zhanjia Weiyuanhui Zhanjia Zuigao Renmin Fayuan Chengli Guoji Shangshi Zhanjia Weiyuanhui* (最高人民法院成立国际商事专家委员会) [*The Supreme People's Court established the International Committee of Experts on Commerce*] CHINA INT'L COMM. CT. (Aug. 26, 2018), <http://cicc.court.gov.cn/html/1/218/149/156/945.html>, translated in *The Supreme People's Court Established the International Commercial Expert Committee*, CHINA INT'L COMM. CT. (Aug. 26, 2018), <http://cicc.court.gov.cn/html/1/219/208/209/981.html>.

80. *A Symposium on the Establishment of International Dispute Prevention & Settlement Center Held in Beijing*, CHINA COUNCIL FOR THE PROMOTION OF INT'L TRADE (Jan. 31, 2018, 4:45 PM), http://en.ccpit.org/info/info_4028811760d8d5d401614b64c12e0024.html.

European Law Committee

JAMES HENRY BERGERON, MATTHEW SOPER, ISABEL MONTOJO,
SHEKINAH APEDO, MARC WEITZ, KONSTANTINOS TSIMARAS AND
HARRY STAMELOS, ANGÉLIQUE DEVAUX, JÖRG REHDER,
ELISABET ROJANO-VENDRELL*

This Article updates selected international legal developments in 2018 in European Law.

I. Brexit Developments

The United Kingdom (UK) Parliament is expected to vote on the European Union (EU) (Withdrawal Agreement) Bill on December 12, 2018, with no guarantees of adoption.¹ In December 2017, the UK and EU issued a Joint Report on the progress of Phase I of negotiating a Withdrawal Agreement, which stated principles important to the parties.² The process for the UK's withdrawal is defined in Article 50 of the Treaty of the EU, which also provides that a withdrawal agreement will set out the arrangements for a Member State withdrawing from the Union. Such an agreement will also take into account the Political Declaration on the future relationship between the parties.

On March 19, 2018, the UK and EU published draft elements of a Withdrawal Agreement in which the Joint Report's acknowledged principles were transformed into a legal text, which included provisions for citizens' rights, financial settlement, and the Irish backstop.³ The UK and EU published a Joint Statement on June 19, which revised the March draft.⁴ On

* James Henry Bergeron, Matthew Soper (Brexit developments), James Henry Bergeron (Major Decisions of the European Court of Justice), Isabel Montojo (EU-Turkey Statement on Irregular Migration), Shekinah Apedo (Developments in Migrant Protection at Sea), Mark Weitz (European attempts to Tackle Fake News), Konstantinos Tsimaras and Harry Stamelos (Cyprus and Greece Legal Developments), Angélique Devaux (French Wealth Tax developments), Jörg Rehder (German Developments in Personal Liability of Managing Directors of a GMBH), Elisabet Rojano-Vendrell (Spanish Legal Developments in Corporate Governance).

1. *EU leaders agree UK's Brexit Deal at Brussels Summit*, BBC (Nov. 25, 2018), <https://www.bbc.com/news/uk-46334649>.

2. Explainer for the agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union, HM Gov't 4 (Nov. 14, 2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759020/14_November_Explainer_for_the_agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union.pdf.

3. *Id.* at 3-4.

4. *Id.* at 4.

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July 24, the Cabinet published a White Paper setting out the “Government’s plans for legislating for the withdrawal agreement and implementation period.”⁵ Several Cabinet ministers quit their posts in the lead-up to the Government’s announcement on November 14 that a draft withdrawal deal had been reached with EU negotiators and agreed to by the Cabinet.⁶

At a special meeting of the European Council in Brussels on November 25, 2018, the UK and EU agreed to the terms of a 599-page Withdrawal Agreement.⁷ Under section 13, EU (Withdrawal) Act 2018, the House of Commons must vote to approve the Withdrawal Agreement and Political Declaration before the “Brexit deal” can be ratified and enter into force.⁸ The EU (Withdrawal Agreement) Bill must receive Royal Assent before the UK leaves the EU on March 29, 2018, in order to have domestic legal effect.⁹ The UK’s future relationship with the EU will not be finalized until after the withdrawal has occurred.¹⁰

A major legal challenge is how to ensure no hard border divides Northern Ireland from the Republic, which would otherwise undermine the peace process or de-stabilize the EU’s Single Market.¹¹ The guarantee of no hard border is referred to as the “backstop,” intended to hedge against a political stalemate on future trading relations.¹² Regardless of whether the EU (Withdrawal Agreement) Bill is adopted and ratified or not, or if a post-Brexit economic association proves elusive, “the backstop would remain in force indefinitely.”¹³

The backstop is incorporated under Article 185 of the Agreement on the Withdrawal of the UK from the EU and the Protocol on Ireland/Northern Ireland.¹⁴ The Protocol effectively makes Northern Ireland part of the UK’s internal market and the EU’s single market.¹⁵ The Union Customs Code

5. 645 Parl Deb HC (6th ser.) (2018) col. 891 (UK), <https://hansard.parliament.uk/commons/2018-07-24/debates/D49F4F4C-FC7C-403A-8BFE-CD9999DF1F2B/EUWithdrawalAgreementLegislation>.

6. Jacob Jarvis, *Brexit Resignations in Full: The List of Ministers to Quit Theresa May’s Cabinet*, EVENING STANDARD (Nov. 15, 2018, 12:48), <https://www.standard.co.uk/news/politics/brexit-resignations-latest-the-full-list-of-ministers-to-quit-so-far-over-theresa-mays-deal-a3990691.html>.

7. *Withdrawal Agreement and Political Declaration*, DEP’T FOR EXITING THE EUROPEAN UNION (Nov. 25, 2018), <https://www.gov.uk/government/publications/withdrawal-agreement-and-political-declaration>.

8. European Union (Withdrawal) Act 2018, c. 16, § 13 (Eng.).

9. HM GOV’T, *supra* note 2, at 5.

10. *Id.*

11. Alex Barker, *Irish Backstop Explained: How the EU Hopes to Unlock Brexit*, FINANCIAL TIMES (Sept. 19, 2018), <https://www.ft.com/content/f18fda2e-bc0b-11e8-94b2-17176fbf93f5>.

12. *Id.*

13. *Id.*

14. *Draft Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community on Nov. 25, 2018*, at 301, COM (2018).

15. *Id.* at 303.

will remain applicable in Northern Ireland after March 29, 2019.¹⁶ Because the UCC covers all provisions for a good to be released onto the single market, once a good has completed these formalities it can be released into the EU's single market.

II. European Union Law Developments

A. MAJOR DECISIONS OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

In a busy year for the Court of Justice of the European Union (CJEU), the following landmark judgements stand out:

On March 6, the CJEU issued an important judgement in *Slovakische Republik (Slovak Republic) v. Achmea BV*, holding that a Netherlands-Slovakia bilateral investment treaty was in violation of EU Law where an investment tribunal (Investor-State Dispute Settlement or ISDS) established under the agreement was capable of interpreting EU Law in a dispute between the Member State and investors.¹⁷ Such an arrangement would disrupt the EU legal order by removing the CJEU's ability to rule on the interpretation of EU Law. The *Achmea* judgement is expected to have a significant impact on the Belgian reference pending before the CJEU on the compatibility of the Investor Court System in the EU-Canada Comprehensive Economic and Trade Agreement (CETA).¹⁸

A landmark judgement on gender equality was issued on June 5, when the CJEU in *Coman v. Inspectoratul General pentru Imigrari* declared that where an EU citizen had exercised rights of free movement in another EU Member State, the same-sex spouse of that EU citizen is to be considered a "spouse" under EU law relating to family reunification rights.¹⁹ This holds even where the recipient Member State does not recognize same-sex unions. This also serves to overturn the Court's 2001 judgement in *D v. Council* where it held that "marriage" implied a union of opposite sex couples.²⁰

On October 8, the Court issued another landmark judgement, on the obligation of a Member State court to refer a question of EU law to the CJEU under the Preliminary Reference procedure of Article 267(3). C-416/17 *Commission v. France* involved a decision of the French Counsel d'Etat relating to measures to prevent double taxation of dividends.²¹ In 2009, the Counsel made a Preliminary Reference on the compatibility of French rules

16. *Id.* at 4, 303.

17. Case C-284/16, *Slovakische Republik (Slovak Republic) v. Achmea BV*, 2018 ECLI:EU:C:2018:158.

18. See Belgian Request for an Opinion from the European Court of Justice (Sept. 2017), https://diplomatie.belgium.be/sites/default/files/downloads/ceta_summary.pdf.

19. Case C-673/16, *Coman v. Inspectoratul General pentru Imigrari*, 2018 ECLI:EU:C:2018:385.

20. Joined cases C-122 & 125/99 P, *D v. Council*, 2001 ECLI:EU:C:2001:304.

21. Case C-416/17, *Comm'n v. Fr.*, 2018 ECLI:EU:C:2018:811.

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with EU Law.²² In its response in *Ministre du Budget v. Accor SA*, the CJEU held that the national rules infringed Articles 49 and 63 of the Treaty of the Functioning of the European Union (TFEU) and laid out principles for reimbursement of payments made contrary to EU Law.²³ In 2012, the Counsel applied these principles in two cases that also raised an issue not raised in *Accor*, but which had been addressed by the CJEU in another case, *Test Claimants in the FII Group Litigation v. Commissioner of Inland Revenue*.²⁴ In *Commission v. France*, the Court held that the Counsel's lack of a Preliminary Reference on the issue, where there was reasonable doubt of compatibility with EU Law, constituted breach of Article 267(3) TFEU, requiring a Preliminary Reference from the Counsel where a question of compatibility with EU Law was raised.²⁵

Finally, in late November, the CJEU heard arguments in *Wightman v. Secretary of State for Exiting the EU*, in what might be a last legal throw of the Brexit dice.²⁶ On September 21, the Court of Session in Scotland made a preliminary reference to the CJEU asking:

Where, in accordance with Article 50 of the TFEU, a Member State has notified the European Council of its intention to withdraw from the European Union, does EU law permit that notice to be revoked unilaterally by the notifying Member State; and, if so, subject to what conditions and with what effect relative to the Member State remaining within the EU.²⁷

The judgement of the CJEU was expected on December 10.

**B. IMPLEMENTATION OF THE EU-TURKEY STATEMENT ON
IRREGULAR MIGRATION**

As of November 2018, Turkey hosts 3,954,638 registered refugees.²⁸ The number of Syrian refugees living in Turkey is assessed at 3,597,938, while 170,000 came from Afghanistan, 142,000 from Iraq, 39,000 from Iran, and 5,700 arrived from Somalia.²⁹

On October 15, 2015, the European Union and Turkey adopted a joint action plan aiming to address the migration crisis prompted by the situation in Syria.³⁰ As a result, on March 18, 2016, the European Council and

22. Case C-310/09, *Ministre du Budget v. Accor SA*, 2011 ECLI:EU:C:2011:581.

23. *Id.*

24. Case C-35/11, *Test Claimants in the FII Group Litig. v. Comm'r of Inland Revenue*, 2012 ECLI:EU:C-707.

25. 18(a): Case C-416/17, *Comm'n v. Fr.*, 2018 ECLI:EU:C:2018:811.

26. *Wightman v. Sec'y of State for Exiting the EU* [2018] CSIH 62 (Scot.).

27. *Wightman v. Sec'y of State for Exiting the EU* [2018] CSIH 62 (Scot.), app. at 3.

28. *The World Factbook: Turkey*, CENTRAL INTELLIGENCE AGENCY (last updated Feb. 25, 2019), <https://www.cia.gov/library/publications/the-world-factbook/geos/tu.html>.

29. *Id.*

30. European Commission Press Release IP/15/5860, *The Commission, EU-Turkey Joint Action Plan*, (Oct. 15, 2015).

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Turkey reached an agreement directed at stopping the influx of irregular migrants to Europe via Turkey and creating legal channels of resettlement of Syrian refugees to the European Union.³¹ In this so-called “EU-Turkey Statement,” both parties agreed: (1) to return to Turkey new migrants or asylum seekers crossing from Turkey to the Greek islands whose applications were declared inadmissible; (2) to resettle directly to the EU from Turkey one Syrian for every Syrian being returned to Turkey from the Greek islands; (3) for Turkey to take the required steps to prevent new sea or land routes for irregular migration to the EU; (4) to activate a “Voluntary Humanitarian Scheme”; (5) to fulfill the visa liberalization process for Turkish citizens; and (6) to accelerate the disbursement of €3 billion under the “Facility for Refugees in Turkey” and mobilize additional funding once these resources are about to be used.³²

The European Commission claims that the EU-Turkey Statement has delivered tangible results.³³ As of April 2018, irregular arrivals remain ninety-seven percent lower than the period before the enforcement of the Statement, and the number of lives lost in the Aegean Sea has dropped significantly.³⁴ The Commission states that over 12,476 persons have been resettled from Turkey to EU Member States.³⁵

Greek authorities have improved migration management procedures and reception conditions with support received from the Commission and the EU Member States, with the reception capacity in the Greek islands rising from 2,000 in October 2015 to 49,349 in April 2018.³⁶ But the pace of returns from the Greek islands to Turkey has not improved, due mainly to the slow pace of processing asylum applications.

The Commission has pressed Member States to implement the pledges that they have made to support the essential work of the European Border and Coast Guard Agency at the external border, increase the effective rate of return, make progress on migrant protection, and the fight against smuggling along the Central Mediterranean Route.³⁷ At the end of June 2018, an estimated 62,938 migrants and refugees were stranded in Greece,

31. See Press Release, European Council, EU-Turkey Statement (March 18, 2016), <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>.

32. *Id.*

33. See *Report from the Commission to The European Parliament, The European Council and The Council: Seventh Report on the Progress Made in the Implementation of the EU-Turkey Statement*, COM (2017) 470 final (Sept. 6, 2017).

34. See *EU-Turkey Statement Two Years on* (Apr. 2018), https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20180314_eu-turkey-two-years-on_en.pdf.

35. See *id.*

36. See *id.*

37. See *Communication from the Commission to The European Parliament, The European Council and The Council: Progress Report on the Implementation of the European Agenda on Migration*, at 1, COM (2018) 301 final (May 16, 2018).

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meaning that there is still need for improvement in the Statement's implementation.³⁸

C. DEVELOPMENTS IN MIGRANT RESCUE AT SEA: A LEGAL GAP IN PROTECTION

The human rights of migrants escaping war and poverty to Europe has triggered a major debate over national responsibility. In 2018, the most contentious dispute surrounds the subject of illegal immigration and the criminalization of Non-Governmental Organizations (NGOs) for aiding asylum-seekers. In Hungary, the parliament passed anti-immigration legislation, subjecting any individual or group found helping migrants on asylum claims to fines and incarceration.³⁹

A number of EU coastal states have worked to block refugee arrivals by outlawing NGO rescue operations. In April, Italy's Supreme Court rejected the appeal of German charity Jugend Rettet to release the *Iuventa* rescue ship seized in Sicily.⁴⁰ This decision was delivered a week after a lower court in Ragusa released a Spanish ship, stating the rescue was justified because of human rights violations in Libya.⁴¹

In June, the Italian and Maltese governments closed their ports to NGO⁴² and merchant ships,⁴³ attempting to offload hundreds of migrants. Despite deals struck between EU states to distribute the rescued,⁴⁴ Malta impounded three NGO ships⁴⁵ and grounded a rescue plane.⁴⁶ Amongst the seized

38. *The World Factbook: Greece*, CENTRAL INTELLIGENCE AGENCY (last updated Feb. 27, 2019), <https://www.cia.gov/library/publications/the-world-factbook/geos/gr.html>.

39. Marton Dunai, *Hungary Approves 'STOP Soros' Law, Defying EU, Rights Groups*, REUTERS (June 20, 2018), <https://www.reuters.com/article/us-hungary-soros/hungary-approves-stop-soros-law-defying-eu-rights-groups-idUSKBN1JG1VN>.

40. Ylenia Gostoli, *Italian Court Rules Iuventa Rescue Vessel Will Remain Impounded*, AL-JAZEERA (Apr. 24, 2018), <https://www.aljazeera.com/news/2018/04/italian-court-rules-iuventa-rescue-vessel-remain-impounded-180424115151621.html>.

41. Steve Scherer, *Italy Court Releases Migrant Rescue Ship Seized Last Month*, REUTERS (Apr. 16, 2018), <https://af.reuters.com/article/africaTech/idAFL8N1RT4FQ>.

42. Camila Domonoske, *Italy And Malta Close Their Ports to Migrant Rescue Ship; Spain Takes it in*, NATIONAL PUBLIC RADIO (June 11, 2018), <https://www.npr.org/2018/06/11/618849580/italy-and-malta-close-their-ports-to-migrant-rescue-ship-spain-takes-it-in>.

43. Megan Specia, *Italy and Malta Block Another Rescue Ship Carrying Migrants*, N.Y. TIMES (June 24, 2018), <https://www.nytimes.com/2018/06/24/world/europe/migrant-ship-mediterranean.html>.

44. Elisabetta Povoledo, *Rescue Ship Docks in Malta as 8 Nations Agree to Take its Migrants*, N.Y. TIMES (June 27, 2018), <https://www.nytimes.com/2018/06/27/world/europe/migrants-ship-malta.html>.

45. Philip Leone Ganado, *Impounded Migrant Rescue Ships Still Awaiting Answers*, MALTA TIMES (July 31, 2018), <https://www.timesofmalta.com/articles/view/20180731/local/impounded-migrant-rescue-ships-still-awaiting-answers.685639>.

46. Lucy Pasha-Robinson, *Malta Blocks Migrant Search Plane from Operating in Mediterranean as EU Toughens Stance on Refugee Rescues*, THE INDEPENDENT (July 4, 2018), <https://www.independent.co.uk/news/world/europe/malta-blocks-moonbird-plane-mediterranean-refugee-crisis-ngo-sea-watch-italy-libya-eu-a8430756.html>.

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ships, the captain of a German ship was arrested and charged with illegally entering Maltese territorial waters without proper registration.⁴⁷

The closing of ports and criminalization of rescue challenges the current interpretation of longstanding maritime law. A legal gap arises where there is no positive obligation on states to accept a rescued person. While Hungary's "Stop Soros" law is considered to violate fundamental rights,⁴⁸ Italy and Malta's port closures are not necessarily illegal. The International Convention on Maritime Search and Rescue stipulates that coastal states have a duty to help regardless of the rescued person's intent to illegally enter.⁴⁹ For a ship master to complete a rescue, the rescued person must be delivered to a safe place.⁵⁰ This duty is stalled where the law does not provide a definition for place of safety. The place of safety could be the nearest port, the rescue ship's home port, a port in the rescued person's home country, or the next port of call.⁵¹ If a receiving state denies entry, the rescuing ship is not allowed to return the asylum-seekers to their home country. Here, maritime law and the law on refugees create a conflict over who is responsible for accepting migrants rescued at sea.

D. EUROPE ATTEMPTS TO TACKLE "FAKE NEWS" WITH NEW LAWS AND APPROACHES

As a response to the influence of disinformation in the U.S. elections and Brexit vote in 2016, the EU and its Member States are attempting to rein in "fake news" through a series of news laws and approaches while balancing rights of free speech and freedom of the press. A healthy democracy requires a voting population that is well informed by correct information.⁵² Fake news and other disinformation spread through social media has been used by political groups, both domestic and foreign, to improperly influence voters and is seen as a threat to democratic elections.⁵³

Earlier this year, the European Commission set up a High-Level Expert Group to study the problem by defining what is fake news and discussing

47. Claire Corkery, *Captain of Migrant Rescue Ship Lifeline Charged in Malta*, THE NATIONAL (July 3, 2018), <https://www.thenational.ae/world/europe/captain-of-migrant-rescue-ship-lifeline-charged-in-malta-1.746786>.

48. Jennifer Rankin, *Brussels Opens Legal Proceedings Over Hungary's 'Stop Soros' Law*, THE GUARDIAN (July 19, 2018), <https://www.theguardian.com/world/2018/jul/19/brussels-begins-legal-action-against-hungary-over-stop-soros-law>.

49. International Convention on Maritime Search and Rescue ch. 2.1.10, Apr. 27, 1979, 1405 U.N.T.S. 119.

50. *Id.* at ch. 5.

51. Kathleen Newland, *Troubled Waters: Rescue of Asylum Seekers and Refugees at Sea*, MIGRATION POLICY INSTITUTE (Jan. 1, 2003), <https://www.migrationpolicy.org/article/troubled-waters-rescue-asylum-seekers-and-refugees-sea>.

52. Yasmeen Serhan, *Italy Scrambles to Fight Misinformation Ahead of Its Elections*, THE ATLANTIC (Feb. 24, 2018), <https://bit.ly/2QzaPZA>.

53. *Id.*

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different approaches.⁵⁴ As a result, the EU adopted a voluntary “code of practice,” encouraging social media platforms to close fake accounts, flag sponsored content, and work with independent fact checkers.⁵⁵ This is a first step that could lead to actual regulation if the voluntary system proves ineffective.⁵⁶

Certain EU Member States have taken their own approaches. In July, France passed a law allowing courts to review “manipulative content” during election periods to determine whether it is credible or should be taken down.⁵⁷ But the law is subject to review of France’s Constitutional Council to determine if it violates rights of free speech or freedom of the press.⁵⁸

Italy has taken a different approach, putting the onus on social media platforms to work with fact checkers and flag potentially false information.⁵⁹ Furthermore, it has implemented a program to educate readers on how to determine for themselves the credibility of information.⁶⁰

Germany, last year, instituted a law requiring social media platforms to take down, within twenty-four hours, “manifestly unlawful” content, considered “everything from hate speech and propaganda to incitement.”⁶¹

In January, the UK set up a task force to define and tackle fake news, viewing it as a threat to national security.⁶²

The Czech Republic has taken a similar strategy. The Centre Against Terrorism and Hybrid Threats works with twenty specialists to identify disinformation and counter it via social media.⁶³ The Czech Republic also views this a national security threat by actors such as the Russian Federation in Czech elections.⁶⁴

These new laws and task forces raise questions about limiting free speech and freedom of the press. While the initial intention is to fight false information with truth, there is the opposite worry of abuse, that these new rules and approaches might also be used to quiet truth and push the government’s agenda.

54. Jennifer Baker, *Europe Wants to Tackle Fake News — if it Could Only Define it First*, THE NEXT WEB (Mar. 11, 2018), <https://bit.ly/2Gi0Hj1>.

55. *Fake News and Online Disinformation*, EUROPEAN COMMISSION (last updated Dec. 11, 2018), <https://bit.ly/2OAzACr>; see Mahreen Kahn, *EU to Threaten Tech Regulation Over Spread of ‘Fake News’*, FINANCIAL TIMES (Apr. 12, 2018), <https://on.ft.com/2GWwSnL>.

56. Kahn, *supra* note 55.

57. Zachary Young, *French Parliament Passes Law Against ‘fake news,’* POLITICO (July 4, 2018), <https://politi.co/2KOwDwG>.

58. *Id.*

59. Serhan, *supra* note 52.

60. *Id.*

61. *Id.*

62. Mathew Ingram, *The Media Today: Britain Sets up a ‘Fake News’ Security Task Force*, COLUMBIA JOURNALISM REVIEW (Jan. 24, 2018), <https://bit.ly/2zIAKWT>.

63. James Shotter, *Czechs Fear Russian Fake News in Presidential Election*, THE FINANCIAL TIMES (Jan. 8, 2018), <https://on.ft.com/2E19D4T>.

64. *Id.*

III. National Legal Developments

A. CYPRUS: MAIN LEGAL DEVELOPMENTS

Cyprus is a small islandic state in the southeastern Mediterranean Sea, and has been a Member State of the EU since 2004. Its capital, Nicosia, is the last divided capital in Europe, due to the 1974 invasion of Cyprus by Turkey that established The Turkish Republic of Northern Cyprus covering forty-two percent of the island, a state recognized only by Turkey.⁶⁵ UN Resolutions legally recognize the sovereignty of the Republic of Cyprus on the entire territory of Cyprus.⁶⁶ This survey analyzes the legal developments of the Republic of Cyprus.

Cyprus is no longer obligated under any mandatory program of financially-related legal reforms imposed by the EU or the IMF. But Cyprus still reforms its laws rapidly and nowadays has a steady rate of economic development.

The international relations of Cyprus have seen significant developments. The signing of three parties' agreements with Greece and Israel (Cyprus-Greece-Israel) and with Greece and Egypt (Cyprus-Greece-Egypt) aimed at energy cooperation will boost the economy of the island.⁶⁷ At the same time, US, European, and Israeli companies are ready to start searching and drilling for oil and gas in the sea areas agreed by the parties in relation to the arrangement of their Exclusive Economic Zones. Turkey, however, has unsuccessfully challenged the legality of these arrangements.

On March 7, 2018, the European Commission published a Country Report for Cyprus, including an in-depth review on the prevention and correction of macroeconomic imbalances.⁶⁸ Accompanying this document is the Commission Communication "2018 European Semester: Assessment of progress on structural reforms, prevention and correction of macroeconomic imbalances, and results of in-depth reviews under Regulation (EU) No 1176/2011."⁶⁹

According to the Communication, efficient public administration in Cyprus remains a challenge. To address this, efforts are being made to improve and broaden Cyprus' digital public services (e-government). In

65. Helena Smith, *In Nicosia, The World's Last Divided Capital, a Spirit of Reconciliation is Stirring Across the Fence*, THE GUARDIAN (Jan. 14, 2017), <https://www.theguardian.com/world/2017/jan/15/in-nicosia-cyprus-spirit-of-reconciliation-is-stirring>.

66. S.C. Res. 365 (Dec. 13, 1974); S.C. Res. 367, ¶ 1 (Mar. 12, 1975).

67. Agreement between the Government of the State of Israel and the Government of the Republic of Cyprus on the Delimitation of the Exclusive Economic Zone, Isr.-Cyprus, art. 2, Dec. 17, 2010, 2740 U.N.T.S. 48387; Agreement Between the Republic of Cyprus and the Arab Republic of Egypt on the Delimitation of the Exclusive Economic Zone, Isr.-Egypt, Feb. 17, 2003, 2488 U.N.T.S. 44649; Cyprus, U.N. (Oct. 16, 2018), <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/CYP.htm>.

68. *Country Report Cyprus 2018*, 211 final (Mar. 7, 2018), <https://ec.europa.eu/info/sites/info/files/2018-european-semester-country-report-cyprus-en.pdf>.

69. Regulation of the European Parliament and of the Council 1176/2011 of Nov. 16, 2011, Prevention and Correction of Macroeconomic Imbalances, 2011 O.J. (L 306) 25 (EU).

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2017, there were about 38,000 users in the government gateway portal “Ariadni” and over 300,000 users in “TaxisNet,” the electronic income tax returns system (the same name is also used in Greece).⁷⁰ “Sixty-eight e-services have been developed in Cyprus in line with the “once-only” principle and thirty more are expected to be made available in the course of 2018.”⁷¹

Digitalization of justice is a very important issue in the EU and Cyprus. E-government and e-justice may evolve in the next few years to improve system interoperability and provide better services. But the justice system continues to face serious challenges in regard to its efficiency.⁷² There is a large backlog of pending cases and the digitalization of courts remains at a low level.

One serious problem is the lack of formal, life-long training of judges. The Supreme Court intends to create a special section in charge of life-long training for judges to become fully operational in 2018-2019.⁷³ Also, “the establishment of a commercial court is envisaged in 2018,” which “will be responsible for cases involving amounts of over two million EUR.”⁷⁴ New rules of procedure shall be drafted in 2018-2019.⁷⁵ It is also expected that a Court of Appeals will be created in 2018/2019 to rule on civil, criminal, and administrative cases at second instance. Further, “a bill has been submitted to the House of Representatives for the establishment of an administrative court of international protection” of asylum seekers, as the Syria conflict goes on and refugees struggle to enter Cyprus to get access to the EU.⁷⁶

Two major judgments of the General Court of the EU were issued in July 2018 relating to Cyprus, T-680/13, *Chrysostomides v. Council*, and T-786/14, *Bourdouvali v. Council*.⁷⁷ These cases involved companies and citizens as depositors and shareholders or bondholders of Laiki Bank and Bank of Cyprus who suffered financial losses due to “haircuts” following measures to deal with the financial crisis. Under the European Financial Stabilisation Mechanism procedure, financial assistance was granted to Cyprus in return of reforms and procedures to impose specific measures, including mandatory losses on investments. The CJEU said that the EU was not contractually liable to the companies and citizens as there was no unlawful conduct of an EU institution (Cyprus had applied for financial assistance voluntarily) and, as a result, the CJEU rejected the claims for compensation.

70. Country Report Cyprus 2018, *supra* note 68, at 45.

71. *Id.*

72. *Id.* at 2.

73. *Supreme Court Approves Set up of Judicial Training School*, CYPRUS MAIL (July 17, 2017), <https://cyprus-mail.com/2017/07/17/supreme-court-approves-set-judicial-training-school/>.

74. Country Report Cyprus 2018, *supra* note 68, at 45.

75. Giorgos Michaelides, *Cyprus Wants its Own School for Judges*, OFFSITE (Nov. 18, 2018), <https://www.offsite.com.cy/eidiseis/topika/i-kypros-thelei-ti-diki-tis-sholi-dikaston>.

76. Country Report Cyprus 2018, *supra* note 68, at 45.

77. Case T-680/13, *Chrysostomides v. Council*, 2018 ECLI:EU:T:2018:486; Case T-786/14 *Bourdouvali v. Council*, 2018 ECLI:EU:T:2018:487.

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Provisions of the EU Directive 2014/104 on private enforcement of EU competition law have been implemented in Cyprus, which allow private parties to sue other companies for infringement of EU and/or Cypriot competition law.⁷⁸

B. FRANCE: 2018 WEALTH TAX REFORM

There are only a few countries in the world that levy direct wealth taxes. But in recent times more countries have shown an interest in them as a means to raise state revenue and address wealth inequality.⁷⁹ France has applied a wealth tax since 1982 to rebalance and redistribute wealth.

The tax has long been criticized for moral, tax, and economic reasons reflecting political and ideological divisions.

In 2017, President Emmanuel Macron decided to modify the wealth taxation, introducing a taxation based on real estate wealth only on January 2018.⁸⁰ The 2018 reform applies to French and non-French residents, limited to those who own—directly or indirectly—real estate in France whose net value is greater than €1,300,000 on January 1st of the tax year. The new article 965 of the French tax code states that the tax base is constituted by the net value of (a) All property and property rights and (b) Units or shares of companies and organizations established in France or outside France, for the fraction of their value representing real estate assets or rights held directly or indirectly by the company or body.

Taxation is thus no longer limited to securities of companies with a predominance of real estate. Subject to bilateral tax treaties, the new French tax applies to all securities of companies, whether listed or not, whatever the social form, the tax regime, and the place of establishment (in France or abroad). Assets placed in a trust are also included in the patrimony of the settlor or in that of the beneficiary who is deemed to be a settlor.

Nevertheless, some properties are excluded from the wealth tax, such as properties and immovable rights held by the individual and assigned to his professional activity, or properties and immovable rights held by the directors of companies' subject to corporation tax, held directly or indirectly. The exclusion is only applicable to the fraction of the value of the securities of companies representing property and real estate rights assigned by the owner company to its own operational activity.

78. Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on Certain Rules Governing Actions for Damages Under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union, O.J. (L 349) 1; Law 113(I)/2017, No.4614, July 7, 2017 (Cyprus) (implementing Directive 2014/104/EU to Cypriot law).

79. OECD, OECD TAX POLICY STUDIES, NO. 26, THE ROLE AND DESIGN OF NET WEALTH TAXES IN THE OECD (2018).

80. Loi 2017-1837 du 30 décembre 2017 de finance for 2018 (1) [Law 2017-1837 of December 30, 2017 of Finance for 2018 (1)], Journal Officiel de la République Française [J.O.] [Official Gazette of France], Dec. 30, 2008.

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The 2018 reform also introduced declarative obligations on taxpayers, companies, or organizations that are direct or indirect owners of real estate in France. The declarative obligations include revealing the identity of shareholders, such as Delaware companies. Opacity is over. This new law creates fiscal transparency between the owner of the shares and the property located in France.

C. GERMANY: DEVELOPMENTS IN PERSONAL LIABILITY OF
MANAGING DIRECTORS OF A GMBH

A German privately-held entity in the form of a GmbH (*Gesellschaft mit beschränkter Haftung* or Company with Limited Liability) is represented by one or more managing directors who are appointed by the company's shareholders.⁸¹ Managing directors must be natural persons. A GmbH may hold a managing director personally liable for failing to observe any number of statutory obligations, including the duty to act in the best interests of the company, the duty to arrange for the payment of the GmbH's social security obligations, or the duty to file for bankruptcy on behalf of the GmbH in a timely manner if it is bankrupt. The managing director may be subject to other obligations if set forth in the GmbH's articles of association or shareholders' resolutions. Finally, the GmbH often enters into an individual service agreement with a managing director. This contract may also prohibit the managing director from entering into certain actions without first obtaining the shareholder's approval. Breaching any of these obligations may lead to personal liability.

A 2018 opinion by the Munich Court of Appeals further crystalized a managing director's potential personal liability.⁸² In that case, a managing director represented a GmbH (GmbH 1) that brokered investment real estate.⁸³ GmbH 1 had concluded a framework agreement with a second GmbH (GmbH 2) permitting GmbH 1 to offer to sell real estate listed by GmbH 2 to GmbH 1's own customer base. If a sale came to fruition, GmbH 1 would earn a twelve percent commission from GmbH 2. The framework agreement also included a customer protection clause prohibiting GmbH 2 from directly contacting GmbH 1's customer base; the purpose of this clause was to ensure that GmbH 1 would earn a commission if a sale was made to any of its customers.

GmbH 1 and GmbH 2 eventually amended the framework agreement. In the amended amendment, the parties not only reduced the commission from twelve percent to eleven percent, but they also removed the customer

81. See *Doing Business in Germany: The Different Legal Entities and Tax Law Issues*, HOGAN LOVELLS 2 (2014), https://www.hoganlovells.com/~media/germany_folder-for-german-team/broschueren/brochure_doing_business_in_germany.pdf.

82. Oberlandesgericht [OLG] München [Higher Regional Court Munich] Feb. 8, 2018, 23 U 2913/17.

83. *Id.* In Germany, the courts do not disclose the names of the parties. This is the reason for using "GmbH 1" and "GmbH 2" in the case description.

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protection clause. Upon learning of these amendments, GmbH 1's shareholder filed an action against the managing director of GmbH 1 seeking to hold him personally liable for breaching his statutory duty of acting in the best interests of the company. The shareholder argued that failing to include the customer protection clause in the amended agreement gave GmbH 2 free access to GmbH 1's trade secret—its customer list—resulting in significant financial damages to GmbH 1. This should have been clear to the managing director when he entered into the amended framework agreement. The defendant argued that he was not personally liable because his actions were protected by the business judgment rule, i.e., the decision to enter into the amended framework agreement was within his authority as a managing director and he entered into the revised agreement in good faith in the best interests of GmbH 1.⁸⁴

The Munich Court of Appeals first addressed whether the decision to enter into the revised framework agreement without obtaining the shareholder's prior approval was within the managing director's authority.⁸⁵ If not, then the court did not need to address the follow-up issue of immunity from personal liability under the business judgment rule. The court held that, because the managing director breached his duty of acting in the best interests of the company, he did not act within his authority. Accordingly, there was no need to review the business judgment rule issue. The court cited German Federal Supreme Court precedent, which held that if it is unavoidable that an entity will suffer damages as a result of a managing director's actions, and there is no reasonable business interest for taking such actions, then the managing director cannot be deemed to have acted within his authority.⁸⁶ This was precisely the situation in the instant case, because entering into the revised framework agreement exposed GmbH 1 to damages; there was no upside for GmbH 1 to enter into such a transaction.

This opinion illustrates the importance of documenting a managing director's decision-making process, in case an entity subsequently files a claim. This problem is exacerbated if the managing director has since been terminated and is, therefore, without access to corporate documentation that can provide evidence of his decision-making. As a result, when negotiating an individual service agreement, a managing director should insist on a right to such corporate documentation, even after leaving the company. Too often, the consequences for failing to include such a clause become clear only after the agreement has been concluded and the managing director is no longer with the company, i.e., too late.

84. *Id.* When German courts opine on the business judgment rule, they typically use the English terminology, i.e., there is no real term for “business judgment rule” in the German language.”

85. *Id.*

86. Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 21, 2005, II ZR 54/03.

D. GREECE: MAIN LEGAL DEVELOPMENTS

After a severe economic and financial crisis and three major legal reforms, Greece now seems to be recovering and on track towards economic development. Parliamentary elections will be held in 2019, which offer the prospect of four years of political stability to underpin recovery.⁸⁷

The OECD cites Greece as having a well-developed framework to ensure the quality of regulation.⁸⁸ The 2012 Law on Better Regulation states basic principles for regulation, such as efficiency and transparency.⁸⁹ Draft regulations and laws are published on a portal (www.opengov.gr). This is a significant development toward improving the level of democracy and lawful operation of the institutions of the state.

But public consultations are not always considered to be important by the legislature. To address this, the Law of Better Regulation requires an *ex ante* regulatory impact assessment (RIA) for every legislative draft, or amendment to existing regulations and an *ex post* impact assessment. But as *ex post* reviews have been rare in 2017 and 2018, the Ministry of Administrative Reconstruction is beginning an extensive evaluation of existing legislation, with the goal of curtailing the large “stock” of regulations.⁹⁰

The Better Regulation Office (BRO) still lacks a sufficient budget and skilled employees in 2018.⁹¹ The OECD Survey calls for simplification of the allocation of responsibilities among different agencies assessing the quality of regulation. Training civil servants on regulatory quality would build the skills of staff at the BRO. This would be crucial for the next years regarding the Greek legislation and the new laws.

Further, in 2017 and 2018, new Bankruptcy Code rules were established to form the legal framework for insolvencies and for companies to have a second chance to be reconstructed instead of being dissolved.⁹² Public sector reforms and the National Anti-Corruption Action Plan are being implemented through a joint project of Greece and OECD on anti-corruption. Electronic auctions, even if challenged by notaries and citizens who lose their houses, are now on track. This is controversial, and there is an effort to find solutions to strike a balance between the pending loans of

87. *Greece's Big 2019: Bad Loans, Elections, Political Infighting*, THE NATIONAL HERALD (Jan. 2, 2019), <https://www.thenationalherald.com/225249/greeces-big-2019-bad-loans-elections-political-infighting/>.

88. *OECD Economic Survey of Greece 2018*, OCED (Apr. 30, 2018), <http://www.oecd.org/eco/surveys/economic-survey-greece.htm>.

89. OECD, *BETTER REGULATION IN EUROPE: GREECE 2012 18* (OECD Publishing 2012) (discussing the Law on Better Regulation in Greece).

90. OECD, *GREECE AT A GLANCE: POLICIES FOR A SUSTAINABLE RECOVERY 2* (OECD Publishing 2010).

91. OECD, *OECD ECONOMIC SURVEYS: GREECE 50* (OECD Publishing 2018).

92. Lambros E. Kotsiris, *The New Bankruptcy Code Introduction*, GREEK LAW DIGEST (Nov. 1, 2018), <http://www.greeklawdigest.gr/topics/insolvency-bankruptcy/item/284-the-new-bankruptcy-code-introduction>.

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the banks and the need of the citizens to be protected, at least in regards to their own homes.

In employment law, Greek law 4554/2018, published in the Government Gazette on July 18, 2018, introduces measures aiming at enhancing the protection of outsourced employees and tackling undeclared work.⁹³ The key changes introduced by the new law include: (a) measures enhancing the protection of outsourced employees; (b) an updated sanction system for undeclared work, amounting to losses for the state taxes and social contributions causing instability to the pension systems; (c) notification requirements for internships; (d) communication of administrative acts of the Labor Inspectorate by electronic means; (e) and establishing December 26th as a mandatory public holiday. Law 4554/2018 further “imposes a fine of 10,500 EUR for every employee found to be undeclared in the personnel list during an inspection by the Labor Inspection Authorities.”⁹⁴

Moreover, Law 4548/2018 amends the tax laws as well as the definition of Bond Loan and Ministerial Decision Pol.⁹⁵ 1131/2018 provides clarifications on tax exemptions.⁹⁶ Law 4549/2018 introduces changes to corporate, individual, and real estate taxation and Value Added Tax.⁹⁷ Law

93. Nomos (2018:4554) *Asfaltikés kai syntaxiodotikés rythmíseis - Antimetópsi tis adfílotis ergasías - Eníschysi tis prostasías ton ergazoménon - Epitepoeía asynódefton anílikon kai álles diatáxeis* [Insurance and Pension Arrangements - Addressing Undeclared Work - Enhancing Protection of Workers - Commission of Unaccompanied Minors and Other Provisions], EPHEMERIS TES KYVERNESEOS TES HELLENIKES DEMOKRATIAS [E.K.E.D.] 2018, A:130 (Greece).

94. *Recent Changes in Greek Employment Law*, ZEPOS & YANNOPOULOS (July 25, 2018), https://zeya.com/sites/default/files/docs/articles/employment_labour_newsletter_25_july_2018_eng.pdf.

95. Nomos (2018:4548) *Anamórfosi tou dikaíou ton anonýmou etaireión* [Reform of the Law of Public Limited Companies], *Ephemeris tes Kyverneseos tes Hellenikes Demokratias* [E.K.E.D.], 2018, A:104 (Greece); *The Long-Awaited Reform of the Greek Law on Sociétés Anonymes*, KYRIAKIDES GEORGOPOULOS LAW FIRM (2018), https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=2ahUKEwikqbDgpOTgAhVSRK0KHU_dCI4QFjABegQICBAC&url=http%3A%2F%2Fwww.kglawfirm.gr%2Fdownload.php%3Furl%3D5b31e29b8f06f.pdf%26name%3DThe%2520long-awaited%2520reform%2520of%2520the%2520Greek%2520Law%2520on%2520Soci%25C3%25A9t%25C3%25A9s%2520Anonymes&usq=AOvVaw2AFZYxi9aEekyQri_0Hdvz.

96. Ministry of Finance, Independent Public Revenue Authority, *Koinopópsi tis typ' arithm. 43/2018 Gnomodótisis tou Nomikou Symvoulou tou Krátou perí themáton ermineías kai efarmogís ton diatáxeon tou n. 3156/2003* [Notification No 43/2018 Opinion of the State Legal Council on the Interpretation and Application of the Provisions of Law 3156/2003] (July 5, 2018) (Greece).

97. Nomos (2018:4549) *Diatáxeis gia tin oloklírosi tis Symfonías Dimosionomikón Stóchon kai Diarthrotikón Metarrythmíseon - Me- sopróthesmo Pláfsio Dimosionomikís Stratigikís 2019-2022 kai loipés diatáxeis* [Provisions for the Completion of the Agreement on Financial Targets and Structural Reforms - Medium-term Financial Strategy Framework 2019-2022 and Other Provisions], EPHEMERIS TES KYVERNESEOS TES HELLENIKES DEMOKRATIAS [E.K.E.D.], 2018, A:105 (Greece); *Greece: Law 4549/2018 Publishes in Official Gazette*, REGFOLLOWER (June 20, 2018), <https://regfollower.com/2018/06/20/greece-law-4549-2018-publishes-in-official-gazette/>.

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4548/2018 (article 59 par. 1) amended the Codified Law 2190/1920 for the *Societes Anonymes* (Limited Liability Companies).⁹⁸ The new legislation will be effective as of January 1, 2019. It reforms the legal provisions on bonds—abolishing articles 1-9 and 12 (except for art. 2 par. 4) of Law 3156/2003.⁹⁹ In accordance with the new provisions, an SA company may issue single-note bond loans, subscriptions to bond loans can only be made by one person, and all bonds may be held by one bondholder.

Following the enactment of Law 4548/2018 and Opinion No. 43/2018 of the Legal Council of State, the Independent Authority of Public Revenues issued Pol. 1131/2018, which provides clarification on the tax exemptions relating to bond loans.¹⁰⁰ Tax exemptions may apply to the following cases: (a) bond loans where all bonds are held by only one bondholder; (b) bond loans where the majority of the bonds are held by a legal person and the minority by another legal person; (c) bond loans where the bondholders are affiliate legal entities of the issuer, as defined by the Greek Accounting Principles (Law 4308/2014), Article 42e of Codified Law 2190/1920, or Article 2 of Law 4172/2013.¹⁰¹

Obligatory mediation in trademark and other disputes under Law 4512/2018 has been suspended until September 16, 2019, following an amendment adopted on September 27, 2018.¹⁰² Lawyers and Bars raised a serious legal argument: mediation must be the outcome of a voluntary process, not a mandatory legal obligation. If obligatory, mediation would require a court-like procedure. Finally, Directive 2014/104 on private enforcement of competition law became Law 4529/2018 in Greece.¹⁰³

98. Nomos (1920:2190) Νόμος 2190/1920 «Περί Ανωνύμων Εταιρειών» [Law 2190/1920 “On Societe Anonymes”], EPHEMERIS TES KYVERNESEOS TES HELLENIKES DEMOKRATIAS [E.K.E.D.], 1963, A:37 (Greece) (codified by Royal Decree 174/1963).

99. Nomos (2003:3156) Omologiaká dáneia, titlopoísi apaitíseon kai apaitíseon apó akínita kai álles diatáxeis [Bond Loans, Securitization of Property Receivables and Receivables and Other provisions], EPHEMERIS TES KYVERNESEOS TES HELLENIKES DEMOKRATIAS [E.K.E.D.], 2003, A:157 (Greece).

100. Ministry of Finance, *supra* note 96.

101. Nomos (2014:4308) Elliniká Logistiká Prótypa, synafeís rythmíseis kai álles diatáxeis [Greek Accounting Standards, Related Regulations and Other Provisions], EPHEMERIS TES KYVERNESEOS TES HELLENIKES DEMOKRATIAS [E.K.E.D.], 2014, A:251 (Greece); Nomos (2013:4172) Forología eisodímatos, epeígonta métra efarmogís tou n. 4046/2012, tou n. 4093/2012 kai tou n. 4127/2013 kai álles diatáxeis [Taxation of Income, Emergency Measures Implementing Law 4046/2012, Law 4093/2012 and Law 4127/2013 and Other Provisions], EPHEMERIS TES KYVERNESEOS TES HELLENIKES DEMOKRATIAS [E.K.E.D.], 2013, A:167 (Greece); *Recent Developments in Tax Legislation*, BERNITSAS LAW (June 2018), <https://www.bernitasslaw.com/wp-content/uploads/2018/07/June-2018-Monthly-Insight.pdf>.

102. *Greece: Halt on Compulsory Mediation for IP Disputes*, PRENTOULIS (Sept. 27, 2018), <http://prentoulis.gr/greece-halt-compulsory-mediation-ip-disputes/>; *Obligatory Mediation in Trademark and Other Disputes*, TSIBANOULIS & PARTNERS (2018), <https://tsibanoulis.gr/news/45-obligatory-mediation-in-trademark-and-other-disputes>.

103. Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on Certain Rules Governing Actions for Damages Under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union, *supra*

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In the field of legal education, article 16 of the Greek Constitution forbids private universities. But law graduates from the private Cypriot European University Cyprus (EUC) Law School now have equal standing with graduates of the public Athens, Thessaloniki, and Thrace University Law Schools, based on their taking the same exams and following the same curriculum as in Greece. This decision was delivered in the judgment of the Greek Council of State (Supreme Administrative Court) 1755/2017 and a follow-on judgment in 2018.¹⁰⁴ After these two judgments, the Greek authorities are obligated to recognize the law degrees of EUC Law School as equal to the Greek law degrees of public universities, and the Bars are obligated to accept the registration of those law degree holders to their registries to make their practice and become lawyers in Greece.

**E. SPANISH LEGAL DEVELOPMENTS IN CORPORATE GOVERNANCE:
NEW SUPREME COURT JUDGMENT ON DIRECTORS'
COMPENSATION**

Over the past few years, several amendments have been introduced in the Spanish Corporate Enterprises Act¹⁰⁵ for the purpose of converting EU corporate governance recommendations on directors' compensation¹⁰⁶ into statutory law. Law 31/2014 of December 3 for the improvement of Corporate Governance¹⁰⁷ introduced the most significant amendments. As a result, at present, the Spanish Corporate Enterprises Acts provides that directors can only be compensated if the articles of association expressly state that directors are entitled to receive compensation for their services and

note 78; Nomos (2018:4529) Ensomátosi stin ellinikí nomothesiá tis Odigías 2014/104/EE tou Evropaiikou Koinovouliou kai tou Symvouliou tis 26is Noemvriou 2014, schetiká me orisménous kanónes pou diépoun tis agogés apozimíosis vásei tou ethnikoú dikaiou gia paraváseis ton diatáxeon tou dikaiou antagonismou ton kratón-melón kai tis Evropaiikís Énosis kai álles diatáxeis [Integration into Greek Legislation of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on Certain Rules Governing Claims for Damages under National Law for Infringements of the Competition Law of the Member States and of the European Union and Other Provisions], EPHEMERIS TES KYVERNESEOS TES HELLENIKES DEMOKRATIAS [E.K.E.D.], 2018, A:56 (Greece); Stamelos H, *The Lawsuit for Damages in the US and the EU Law of Competition*, 2 BUSINESS AND COMPANY LAW (Greek Periodical by Nomiki Bibliothiki), 170.

104. *Symboulion Epikrateias [S.E.] [Supreme Administrative Court] 1755/2017 (Greece).*

105. Royal Legislative Decree 1/2010, of 2 July, Approving the Consolidated Text of the Corporate Enterprises Act (B.O.E. 2010, 161) (Spain) [Corporate Enterprises Act].

106. See *Report on the Application by Member States of the EU of the Commission 2009/385/EC Recommendation (2009 Recommendation on Directors' Remuneration) Complementing Recommendations 2004/913/EC and 2005/162/EC as Regards the Regime for the Remuneration of Directors of Listed Companies*, SEC (2010) 670 final (May 26, 2010) (accompanying document to the *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, COM (2010) 285 final (May 26, 2010)); Commission Recommendation 2004/913 of Dec. 14, 2004, *Fostering an Appropriate Regime for the Remuneration of Directors of Listed Companies*, 2004 O.J. (L 385) 55 (EC).

107. Law 31/2014, of December 3, Which Modifies the Companies Law of Capital for the Improvement of Corporate Governance (B.O.E. 2014, 293) (Spain).

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specifies the type of compensation. The maximum amount of compensation to be paid to all directors annually is subject to shareholder approval. In determining this amount, shareholders need to consider the current financial situation of the enterprise and the market standards applied by comparable enterprises. The board decides how the total amount is distributed among the directors, unless otherwise agreed by the shareholders.¹⁰⁸

Regarding members of the board of directors, the Corporate Enterprises Act requires each director with executive or managing authority to enter into a services agreement with the enterprise, which, among other aspects, will regulate the compensation the director is entitled to. The services agreement must be approved by the board of directors.¹⁰⁹

The General Directorate for Registers and Notaries (DGRN), which belongs to the Spanish Ministry of Justice, is the body that sets precedence concerning the interpretation of regulations by commercial registers when registering articles of associations. It ruled that the disclosure of information on directors' compensation in the articles of association and the submission of the annual compensation to the approval of the shareholders were requirements applicable to directors of the board with supervisory authorities only, but not to directors with executive or managing authorities, to the extent their remuneration was already regulated under the services agreement they had to enter into with the company. This interpretation was also supported by jurisprudence.

The judgment of the Spanish Supreme Court, dated February 26, 2018¹¹⁰, changed the interpretation of the DGRN in the following terms: the compensation of the executive or managing directors must also be framed within the articles of association of each company and subject to shareholder approval.

The DGRN, in its interpretation of the Court's decision, has also considered a legal and registrable clause of the articles of association, which differentiates between the total maximum compensation that may be paid to directors with supervisory authorities, and the total maximum compensation that may be paid to directors with executive or managing authorities.¹¹¹

108. Corporate Enterprises Act, *supra* note 105, at art. 217.

109. *Id.* at art. 249.

110. S.T.S., Feb. 26, 2018 (J.T.S. No. 98) (Spain).

111. Resolution of October 31, 2018, from the General Directorate of the Registries and Notaries (B.O.E. 2018, 280) (Spain).

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Mexico

ESTEFANÍA DÍAZ GONZÁLEZ, ANA PAULA MADRIGAL GARZA,
EDUARDO SÁNCHEZ MADRIGAL, EDITOR,
JUAN CARLOS PARTIDA POBLADOR, JUAN ILICH PÉREZ GARCÍA,
ANA SOFÍA VILLA HERNÁNDEZ, ARCIRIA IRERI IRETA AMADOR

2018 has been a year of transition for Mexico. The results of the presidential elections brought a renewed air of optimism among Mexicans, who above all else demanded a departure from the traditional politics of the dominant parties. Nevertheless, the entering administration's new dynamics are yet to be tested, and stability has fluctuated as voices of concern have started to rise, questioning mainly the legitimacy of the so-called "popular consultations" and an apparent tendency towards centralization. Mexico has also been in the international spotlight as the renegotiation of the former North American Free Trade Agreement finally concluded and a new agreement, the United States-Mexico-Canada Agreement (or "USMCA"), was born. Moreover, a few victories in the field of human rights, particularly in regard to conscientious objection and religious freedom, contrast with the passing of "migrant caravans" through Mexico's territory and the humanitarian crisis currently at hand in the Northern Triangle of Central America.

I. Human Rights

A. THE "MIGRANT CARAVAN'S" PASS THROUGH MEXICO¹

Unemployment and insecurity are certainly some of the factors that can lead a person to look for better living conditions outside his or her country of birth. Currently, a persistent influx of people are crossing the Mexico-United States border either as asylum-seekers or illegally. This year, two large groups of migrants heading to the United States from Honduras, El Salvador, and Guatemala—countries that are jointly known as the "Northern Triangle of Central America"—have gained notoriety.² The first

1. The author, Estefanía Díaz González, is a graduate from Escuela Libre de Derecho de Puebla, and currently holds a position as associate-attorney at Rivadeneyra, Treviño y De Campo, S.C.

2. See GOV'TS OF EL SAL., GUAT., AND HOND., TRIÁNGULO NORTE: CONSTRUYENDO CONFIANZA, CREANDO OPORTUNIDADES [NORTHERN TRIANGLE: BUILDING TRUST, CREATING OPPORTUNITIES] (Nov. 20, 2018), https://www.un.int/honduras/sites/www.un.int/files/Honduras/1-acciones_estrategicas_del_plan_de_la_alianza_para_la_prosperidad_del_triangulo_norte_folleto_07abril20151.pdf.

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of these groups, the so-called “Migrant Via Crucis,”³ entered Mexico in March 2018 with approximately 1,000 members, while the second group, composed of approximately 3,000 people and known as the “Migrant Caravan,” entered in October 19, 2018, through the Mexico-Guatemala border city Ciudad Hidalgo in the southern state of Chiapas. Members of both groups are mostly Hondurans and include women, children, and elders seeking an escape from the organized crime that has turned the Triangle into “one of the most dangerous sub-regions in the world.”⁴

The migrants’ fears are not unfounded. San Salvador, El Salvador’s capital city, is the seventeenth most dangerous city in the world, with a rate of 59.06 homicides per 1,000 inhabitants. Guatemala City, Guatemala, is in twenty-fourth place, with 53.49 murders per 1,000 inhabitants. San Pedro Sula, Honduras, is in twenty-sixth place, with 51.18 homicides per 1,000 inhabitants, while Distrito Central, Honduras, is in thirty-fifth place, with forty-eight murders per 1,000 inhabitants.⁵

Considering such figures, it is easy to understand why for many Central American asylum-seekers reaching the United States of America is a matter of life or death, and the presence of death is certainly common while crossing the territory of Mexico—this route is considered “one of the most dangerous in the world.”⁶ Consequently, one of the aims of the caravans is to highlight the humanitarian crisis existing in the countries of the Triangle, hoping to attract international attention and support.

Accordingly, Mexico must comply with several national regulations, particularly with article 11 of its Constitution, which provides the following: “In cases of political persecution, any person has the right to seek political asylum, which will be provided for humanitarian reasons.”⁷ Mexico must also comply with its international obligations regarding asylum and refuge, such as the obligations assumed under the Convention Relating to the Status

3. “Migrant Via Crucis” translates as “The Way of the Cross”—a clear reference to the events leading to Jesus Christ’s crucifixion and death from the moment of His arrest.

4. See AMNESTY INT’L, *¿HOGAR DULCE HOGAR? EL PAPEL DE HONDURAS, GUATEMALA Y EL SALVADOR EN LA CRECIENTE CRISIS DE REFUGIADOS [HOME SWEET HOME? THE ROLE OF HONDURAS, GUATEMALA AND EL SALVADOR IN THE GROWING REFUGEE CRISIS]* (Nov. 19, 2018), <https://www.amnesty.org/download/Documents/AMR0148652016SPANISH.pdf>.

5. SEGURIDAD, JUSTICIA Y PAZ, *METODOLOGÍA DEL RANKING (2017) DE LAS 50 CIUDADES MÁS VIOLENTAS DEL MUNDO [METHODOLOGY OF THE RANKING (2017) OF THE 50 MOST VIOLENT CITIES IN THE WORLD]* (Mar. 5, 2018), <http://www.seguridadjusticiaypaz.org.mx/biblioteca/prensa/download/6-prensa/242-las-50-ciudades-mas-violentas-del-mundo-2017-metodologia>.

6. See AMNESTY INT’L, *VÍCTIMAS INVISIBLES: MIGRANTES EN MOVIMIENTO EN MÉXICO [INVISIBLE VICTIMS: MIGRANTS ON THE MOVE IN MEXICO]* (Nov. 17, 2018), <https://www.acnur.org/fileadmin/Documentos/archivo/7756.pdf?view=1..org/fileadmin/Documentos/archivo/7756.pdf?view=1>.

7. Constitución Política de los Estados Unidos Mexicanos, CP, art. 11, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 27-08-2018 (Mex.).

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of Refugees,⁸ the Convention on the Status of Aliens,⁹ and the Protocol Relating to the Status of Refugees,¹⁰ among others.¹¹

From January to August 2018, Mexico received 14,544 refuge requests, mainly from Central Americans. Specifically, 6,523 of the requests were from Hondurans, 3,063 from Salvadorans, and 684 from Guatemalans. Of all such requests, 1,005 were considered founded on the grounds of widespread violence in the requestors' country of origin, and 325 on the presence of human rights violations.¹²

B. CONSCIENTIOUS OBJECTION IN MEXICAN HEALTHCARE¹³

On May 11, 2018, an executive decree was published in the Official Gazette of the Federation, by which Mexico's General Healthcare Act (*Ley General de Salud*) was amended to include article 10 *bis* in its text, effectively introducing the regulation of conscientious objection in the field of Mexican healthcare. The new article reads as follows:

Article 10 Bis. – Health professionals that are part of the National Healthcare System may exercise conscientious objection and excuse themselves from providing the services hereby regulated.

Conscientious objection may not be invoked in cases of medical emergency or where the life of a patient is at threat, under penalty of law for professional misconduct. The exercise of conscientious objection shall not be cause for any sort of labor discrimination.¹⁴

Conscientious objection was previously defined by the Federal Senate's Decree Draft Opinion of March 21, 2018, as "holding one's own conscience to be more imperative than compliance with a certain law, according to

8. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150.

9. Convention on the Status of Aliens, Feb. 20, 1928, 46 Stat. 2753, 132 L.N.T.S. 301.

10. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

11. See *Tratados internacionales de los que el Estado Mexicano es parte en los que se reconocen derechos humanos* [*International Treaties of Which the Mexican State is a Party in Which Human Rights are Recognized*], SUPREMA CORTE DE JUSTICIA DE LA NACIÓN (2012), formato HTML, <http://www2.scjn.gob.mx/red/constitucion/TI.html> (Mex.).

12. *Boletín Estadístico de Solicitantes de refugio en México* [*Statistical Bulletin of Refugee Applicants in Mexico*], SECRETARÍA DE GOBERNACIÓN, formato HTML, http://www.politicamigratoria.gob.mx/es_mx/SEGOB/CuadrosCOMAR?Anual=2018&Secc=1 (last visited Apr. 5, 2019).

13. The author, Ana Paula Madrigal Garza, is a law student from Universidad Panamericana, campus Guadalajara. She currently holds an intern position in the field of administrative and tax law at Ramos & Hermosillo Abogados.

14. Decreto por el que se adiciona un artículo 10 Bis a la Ley General de Salud, Diario Oficial de la Federación [DOF] 11-05-2018 (Mex.).

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which an objector, as part of a belief system, may not be compelled to perform certain services in favor of society as required by law.”¹⁵

Recognizing conscientious objection has been an arduous task throughout the years, due mainly to its controversial nature and to the thin line between respect for authority and potential abuse of law. Nevertheless, regulating conscientious objection is a necessity of utmost relevance, as it implies the protection of the fundamental right of freedom of thought, conscience, and religion.

Even though Mexico’s legal system had already regulated conscientious objection implicitly in specific articles of the Federal Constitution¹⁶ and in various forms of legislation, the introduction of an explicit regulation was the result of several factors. One of the most important factors was international pressure, as Mexico was significantly behind in this matter compared to other countries. For example, forty-seven states and the District of Columbia of the United States of America have already enacted legislation regulating conscientious objection in abortion-related issues.¹⁷ Moreover, in France, conscientious objection to performing abortions is guaranteed by law no. 79-1204 of December 31, 1979—amending article L162-8 of the French Code of Public Health—as an absolute and unlimited right.¹⁸ Lastly, in Germany, the 5th Criminal-Law Reform Act of 1974 states in its article 2 that “[n]o one is required to participate in [the] termination of pregnancy,” but this rule “does not apply if participation is necessary in order to avert an otherwise unavoidable risk of death or serious health damage.”¹⁹

The right to conscientious objection, now regulated by article 10 *bis* of Mexico’s General Healthcare Act—although with clear limitations—is a noteworthy advancement for Mexico. By recognizing this right, Mexico is closer to becoming a nation that respects, guarantees, and promotes human rights. The reform generated and will keep generating vast consequences for Mexico’s internal and external sovereignty. In the case of its internal sovereignty, the spirit of these laws may expand into other fields, such as mandatory military service and the practice of traditional indigenous customs.

15. Dictamen de las Comisiones Unidas de Salud; de Derechos Humanos; y de Estudios Legislativos, con proyecto de decreto que adiciona un artículo 10 Bis a la Ley General de Salud, en materia de objeción de conciencia, Diario de los Debates, 22 de marzo de 2018 (Mex.), formato PDF, http://www.diputados.gob.mx/sedia/biblio/prog_leg/Prog_leg_LXIII/237_DOE_11may18.pdf.

16. See Constitución Política de los Estados Unidos Mexicanos, CP, arts. 1, 5, 24, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10-02-2014 (Mex.).

17. Claire Marshall, *The Spread of Conscience Clause Legislation*, 39 HUM. RTS. 15 (2013).

18. Loi 79-1204 du 31 décembre 1979 relative à l’interruption volontaire de la grossesse [Law 79-1204 of December 31, 1979 on the Voluntary Interruption of a Pregnancy], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], January 1, 1980, p. 3 (amending Code de la Santé Publique [Code of Public Health] art. L162-8).

19. Fünftes Gesetz zur Reform des Strafrechts [5. StrRG] [Fifth Law on the Reform of the Criminal Law], June 18, 1974, BUNDESGESETZBLATT I [BGBL I] at 1297, art. 2 (Ger.).

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C. A CASE FOR RELIGIOUS FREEDOM²⁰

On August 15, 2018, the first chamber of Mexico's Supreme Court of Justice upheld the decision that "the medical decisions of parents about their children, although initially protected by a clear field of autonomy . . . can not be sustained if they put at risk the health of the child;" the State "is justified to intervene" in these instances.²¹ The decision resulted from a delicate case in which the parents of Clara, a six-year-old Rarámuri²² girl, refused on religious grounds to allow a blood transfusion to be performed on their daughter to treat her leukemia because they were both practicing Jehovah's Witnesses.

On April 19, 2017, because of Clara's parents' refusal, the Morelos Judicial District Office of the Deputy Attorney for the Auxiliary Protection of Children and Teenagers (Subprocuraduría de Protección Auxiliar de Niñas, Niños y Adolescentes del Distrito Judicial Morelos) initiated an administrative procedure and assumed provisional guardianship of the child to allow the blood transfusion that would save her life. Clara's mother appealed this decision through an indirect *amparo*, arguing that she was unlawfully denied her right to make a decision regarding her daughter's health. She further argued that the District Office disregarded her religious beliefs before there was certainty as to the effectiveness of an alternative treatment and before a second medical opinion could be offered.

On June 30, 2017, Chihuahua's Eighth District Court agreed with Clara's mother, finding that there were insufficient grounds to allow the Office of the Deputy Attorney to gain provisional guardianship, and held that a blood transfusion must only be performed as a last resort measure of proven urgency. The case was then taken to the Supreme Court for review under file number 1049/2017.²³

In the review, the Office of the Deputy Attorney argued that its actions were not arbitrary but were influenced by the urgency of the situation; the Office asserted that an alternative treatment could not have been efficiently

20. The author, Eduardo Sánchez Madrigal, is a Law School graduate from Universidad Panamericana, Campus Guadalajara and an LL.M. in U.S. Law graduate from the University of St. Thomas School of Law.

21. Sentencia dictada respecto al amparo en Revisión 1049/2017, la Primera Sala de la Suprema Corte de Justicia de la Nación [SCJN], (Mex.), formato PDF, https://www.scjn.gob.mx/sites/default/files/listas/documento_dos/2018-06/AR-1049-2017-180606.pdf. See also Press Release, Supreme Court of Justice of the Nation, The State Should Say the Measures Necessary to Protect the Health of a Minor, even when Their Parents Refuse Treatment (Aug. 15, 2018) (Mex.), formato HTML, <http://www.internet2.scjn.gob.mx/red2/comunicados/noticia.asp?id=4743>.

22. The Rarámuri or Tarahumara are a group of indigenous people who mainly inhabit the Chihuahua state region and are renowned for their long-distance running traditions. As one of the indigenous nations recognized by Mexico's Federal Constitution, they are subject to special considerations and affirmative action policies.

23. The review was originally heard by the Seventeenth Circuit's Second Collegiate Court of Civil and Labor Matters, but it was remitted to the Supreme Court on the grounds of lack of competency.

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applied without compromising the minor's life. Clara's mother offered a threefold argument against the treatment: she described the risks associated with blood transfusions, pointed out the existence of alternative treatments, and asserted that the nature of blood transfusions is in direct contradiction to her religious beliefs.²⁴ Elaborating on this last point, Clara's mother explained that blood transfusions represent an imposition from an inherently biased health system that favors majoritarian opinions over the rights of the Jehovah's Witness community to be treated with respect and dignity.²⁵ The Supreme Court had to weigh the right of parents to autonomously make decisions about their children's education and health against the State's interest in defending every child's constitutionally protected right to health.²⁶ Noting this conflict in its considerations of the sentence, the Court wrote the following:

The case of Jehovah's Witnesses in need of medical attention implies a notable challenge for clinical services and authorities. Being used to the availability of blood transfusions to immediately stabilize the loss of vital components, health professionals face in such cases a firm refusal based on faith and protected by the autonomy of individuals. The challenge becomes especially complex when the stakes involve a minor's future, since her parents are called to decide on her behalf, despite the State's duty to protect her rights.²⁷

In its decision, the Supreme Court ruled that a parent's right to decide on behalf of his or her child is limited by the child's right to life. In other words, according to the Court, the exercise of religious freedom may not include practices that jeopardize a child's health or put the child's life at risk, such as refusing a treatment considered by the medical community to be the most effective against a lethal condition.²⁸ Not surprisingly, the case has been controversial, and voices of concern have risen throughout the judicial process.²⁹ Particularly, critics of the decision and defendants of religious freedom have questioned the Supreme Court's aptness to rule on scientific matters and the Court's indifference towards considering alternative treatment methods. These critics have also noted the consequences that a forceful blood transfusion may carry for Clara's family's role within her community.

24. Sentencia dictada respecto al amparo en Revisión 1049/2017, la Primera Sala de la SCJN, Página 13 (Mex.).

25. *Id.* at 14.

26. Constitución Política de los Estados Unidos Mexicanos, CP, art. 4, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 27-08-2018 (Mex.).

27. Sentencia dictada respecto al amparo en Revisión 1049/2017, la Primera Sala de la SCJN, Página 18 (Mex.).

28. *Id.* at 38.

29. Daniel Quintanilla Castro, *Testigos de Jehová, ciencia e infancia ante la Suprema Corte*, NEXOS (Aug. 1, 2018), <https://eljuegodelacorte.nexos.com.mx/?p=8761>.

II. Legislative Innovation

A. NAFTA RENEGOTIATED: THE UNITED STATES-MEXICO-CANADA AGREEMENT³⁰

In the late hours of September 30, 2018, Canada, Mexico, and the United States concluded their negotiations for the modernization of the North American Free Trade Agreement (“NAFTA”), of which the three countries have been parties since 1994. The renegotiation was the result of the Trump administration’s trade policy goal to renegotiate NAFTA with terms more favorable to the U.S.; the renegotiation lasted for more than twelve months and required flexibility from the three state parties.

The three countries chose a new name for the modernized NAFTA agreement: “The United States-Mexico-Canada Agreement” (“USMCA”), although many continue to refer to it as NAFTA. Unlike NAFTA, which included twenty-two chapters, the USMCA contains thirty-four chapters, among which the following novelties may be found:

- (i) Recognition of the United Mexican State’s Direct, Inalienable, and Imprescriptible Ownership of Hydrocarbons (Chapter 8);
- (ii) Temporary Entry for Business Persons (Chapter 16);
- (iii) Digital Trade (Chapter 19);
- (iv) Competition Policy (Chapter 21);
- (v) Labor (Chapter 23);
- (vi) Environment (Chapter 24),
- (vii) Small and Medium-Sized Enterprises (Chapter 25);
- (viii) Competitiveness (Chapter 26);
- (ix) Anticorruption (Chapter 27); and
- (x) Macroeconomic Policies and Exchange Rate Matters (Chapter 33).³¹

Undoubtedly, the automotive sector will receive the most significant impact from the USMCA—at least for Mexico—due to changes to several provisions in the rules of origin, which include, among others, (1) a transition period of five years so that the regional value content is increased from the current level of 62.5 percent to 75 percent;³² and (2) an obligation providing that between 40 percent and 45 percent of the value of vehicles must come from companies who pay their employees a salary of at least \$16.00 (U.S.) per hour.³³ The regulation of “side letters” is also an

30. The author, Juan Carlos Partida Poblador, is a law graduate from Fundación Universidad de las Américas Puebla and holds a master’s degree (LL.M) in International Trade from Georgetown University Law Center. He is currently a partner in the International Trade practice group at EC Legal Rubio Villegas.

31. See United States-Mexico-Canada Agreement, Nov. 30, 2018 [hereinafter USMCA], formato HTML, <https://www.gob.mx/tlcan/acciones-y-programas/resultados-de-la-modernizacion-del-acuerdo-comercial-entre-mexico-estados-unidos-y-canada?state=published> (last visited Apr. 5, 2019).

32. *Id.* ch. 4, app., art. 2.

33. *Id.* ch. 4, app., art. 4.

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important aspect of this chapter because these rules provide for a quota of vehicles and auto parts to be exempted from the application of national-security restriction measures by the U.S. (the so-called Section 232 measures).

Notwithstanding, throughout the hundreds of pages of the draft agreement that are yet to be analyzed and approved by the three countries' legislative branches, there are several provisions which deserve special consideration:

- Regarding rules of origin, it is foreseen that no formal certificate of origin has to exist, and tariff preferential treatment may be requested by any other means, including commercial documents. Also, the tariff preference due to the origin of the merchandise may be requested and certified by the importers.³⁴ Further, origin verification visits will continue to be permitted, proceeding to verify the origin of imported merchandise, including visits that may be conducted on the importers.³⁵
- With respect to trade remedies (safeguards, antidumping, and countervailing duties), the agreement preserves NAFTA's provisions on safeguard measures, which provide exemptions to imports originating in Mexico and Canada when certain conditions are met at the moment of the imposition of global safeguards. The agreement also seeks to ensure cooperation from the three parties to prevent circumvention of the safeguards, antidumping, and countervailing duties by sharing information among them regarding imports, exports, and the transit of merchandise.
- The USMCA also provides that, if any of the parties engages in negotiations for a free-trade agreement with a country that is considered a non-market economy, the other parties may terminate the agreement with that party.³⁶ Such provisions are an apparent measure to discourage commercial relationships with China and Venezuela.
- Finally, the Agreement establishes that its initial duration is sixteen years. No later than the sixth anniversary of the agreement, the parties shall review the operation of the agreement and determine if it is their desire to extend the agreement for an additional sixteen years as of the conclusion of the review, in which case the agreement will be reviewed again no later than the sixth anniversary of such extension.³⁷

34. *Id.* ch. 5, art. 5.2.

35. *Id.* ch. 5, art. 5.9.

36. *Id.* ch. 32, art. 32.10.

37. *Id.* ch. 34, art. 34.7.

B. A NEW OPPORTUNITY IN THE QUEST FOR GROWTH: LEGAL FRAMEWORK OF SMEs UNDER USMCA³⁸

The United States, Canada, and Mexico have had a peculiar relationship long before their territories were formally established as independent countries. While legally and economically challenging, the North America region was more integrated than ever upon the signing of the original free-trade agreement (“NAFTA”) in 1993. But a quarter-century later, the renegotiated free-trade agreement (“USMCA”) is widely regarded as an incomplete deal by analysts.³⁹

One of the innovations brought by the renegotiated agreement is the inclusion of chapter 25, a section that regulates small and medium-sized enterprises (or “SMEs”) “to increase trade and investment opportunities” among the parties.⁴⁰ New rules of origin in the agreement should encourage local vendors to improve salaries and develop cutting-edge technologies, which could reorient the supply chain back to North America.⁴¹

Private International Law should, therefore, focus on regulating SMEs adequately, recognizing the key role they play in today’s North American economy. One of chapter 25’s greatest weaknesses is that it is clearly oriented towards creating a legal basis to subsidize small businesses with scarce exponential growth and a lack of labor formality,⁴² instead of well-structured companies and formal labor markets with better probabilities of thriving in a transnational setting.⁴³ It is likewise relevant to note that the dispute settlement mechanisms of chapter 31 are not applicable to matters related to SMEs⁴⁴—a condition that prevents small and medium companies from engaging in more sophisticated and efficient methods of solving their disagreements.

38. The author, Juan Ilich Pérez García, holds a law degree and a PhD in Global Development Studies from the Autonomous University of Baja California (UABC) and a law degree from University of Salamanca, Spain; he has completed studies at The Hague Academy of International Law, Complutense University of Madrid, University of Buenos Aires, University of Chile, and National University of San Marcos and currently serves as Legal & Compliance Head of Samsung SDS in North America II Branches and as LLM professor at the Trade & Law College.

39. Kevin Carmichael, *USMCA: A Trade Deal that Does No Harm, but Breaks No Ground*, FIN. POST (Oct. 1, 2018), <https://business.financialpost.com/news/economy/usmca-a-trade-deal-that-does-no-harm-but-breaks-no-ground>.

40. USMCA, *supra* note 31, ch. 25, art. 25.2.

41. Guy Taylor and David Sands, *Mexico, Canada Trade Deal Gives Trump China Leverage*, WASH. TIMES (Oct. 1, 2018), <https://www.washingtontimes.com/news/2018/oct/1/mexico-canada-trade-deal-gives-trump-china-leverag/>.

42. As of 2014, about 60 percent of Mexico’s labor market is informal. INT’L LABOR ORG., *INFORMAL EMPLOYMENT IN MEXICO: CURRENT SITUATION, POLICIES AND CHALLENGES I* (2014).

43. Santiago Levy, *Esfuerzos mal recompensados: La elusiva búsqueda de la prosperidad en México*, BANCO INTERAMERICANO DE DESARROLLO (2018), <https://imco.org.mx/wp-content/uploads/2018/08/Esfuerzos-Mal-Recompensados-Mexico-Evalua-IMCO.pdf>.

44. See USMCA, *supra* note 31, ch. 25, art. 25.7.

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To survive, SMEs must adapt to emerging technologies such as the blockchain and artificial intelligence. In that sense, one of the virtues of the USMCA's text is its improved regulation on local industry matters, which strengthens its capacities by compelling the state-parties to tailor their public policies in a manner that is favorable to the protection and encouragement of the entrepreneurial activity of their citizens, while introducing them to a global network of professionals, creating assistance and export centers, paying particular attention to vulnerable sectors, and establishing a multinational committee aimed at regulating such aspects.⁴⁵

There appears to be an inclination in the international legal community towards promoting the creation of true value-added SMEs as the most appropriate instrument to improve work and market conditions. In fact, USMCA's chapter 25 classifies SMEs as mandatory recipients of public policies with preferential treatment for investment in the fields of intellectual property, agriculture, environment, and digital trade,⁴⁶ all of which can amount to considerable benefits for the national economies of the three parties if the policies are appropriately complied with.

Although USMCA's state-parties certainly possess different business models, in today's globalized world it is easier to identify common ground among them. Being part of the largest trade network in the globe is an exceptional opportunity for the three governments to cooperate and benefit.

C. MEXICO'S INDUSTRIAL PROPERTY ACT REFORM⁴⁷

On May 18, 2018, the "[d]ecree by which various provisions of [Mexico's] Property Law [“LPI” by its acronym in Spanish] are amended, added and repealed,” was published in the Official Gazette of the Federation (*Diario Oficial de la Federación*).⁴⁸ In accordance with the first transitory article of the decree, the reform entered into force on August 10, 2018, and was motivated by the necessity to harmonize Mexico's legislation on the matter with the compromises⁴⁹ adopted in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (“CPTPP”), which was recently ratified by the Senate.⁵⁰ Some of the added or reformed provisions were already regulated

45. Dainzú Patiño, *PYMEs Globales, un deseo del USMCA*, EXPANSIÓN (Oct. 3, 2018), <https://expansion.mx/economia/2018/10/03/el-usmca-busca-que-las-ymes-sean-globales>.

46. See USMCA, *supra* note 31, ch. 25, arts. 25.2, 25.6.

47. This section is authored by Ana Sofía Villa Hernández, a law school graduate from Universidad Panamericana, Campus Guadalajara. She currently works as in-house counsel at Puerta de Hierro Hospital.

48. Decreto por el que se reforman, adicionan y derogan diversas disposiciones de la Ley de la Propiedad Industrial, Diario Oficial de la Federación [DOF] 18-05-2018 (Mex.).

49. Most of the compromises adopted by the state-parties may be found in Chapter 18 of the CPTPP. See Comprehensive and Progressive Agreement for Trans-Pacific Partnership ch. 18, § C, Mar. 8, 2018, <https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/toc-tdm.aspx?lang=eng>.

50. Rafael Amador, *Conoce las reformas a la Ley de la Propiedad Industrial*, CONSEJERO EMPRESARIAL (June 18, 2018), <https://coem.mx/reformas-propiedad-industrial/>.

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in other countries, and it became necessary to include them in Mexico's LPI as it continuously grows in complexity and sophistication.

Primarily, the LPI reform redefines the term "trademark" to mean "any sign recognizable by human senses and subject to representation in a manner that allows a clear and precise determination of the object of protection."⁵¹ Previously, the LPI limited the concept of "trademark" to any visible sign, excluding the possibility to register marks that are perceptible by other senses. The reformed LPI allows the registration of trade dresses, which includes "letters, numbers, combinations of colors, holographic signs, sounds, scents and picture elements such as size, design, color, form, label, packaging, decoration or any other element that, when combined, differentiates products or services in the market."⁵²

According to the published text of the reform, non-registrable trademarks are now, among others, elements, letters, colors, holograms of public domain, and those that lack the distinctive character given by continuous commercial use.⁵³

Before the reform, the LPI already regulated the registration of collective trademarks by associations or groups of producers, fabricants, or traders. But the reformed text added an express prohibition on licensing or transmitting collective trademarks to third parties and added new requirements to the registration process, such as the obligation to accompany every registration request with the corresponding rules of usage and the need for the protected products or services to possess qualities or characteristics that are common among them but different from those of third parties.⁵⁴

Moreover, inside the new scope of protection of the reformed LPI are certification trademarks, which distinguish products and services whose qualities and other characteristics have been certified by their owners, such as their components and the conditions under which they have been produced or lent, as well as their quality, processes, characteristics, and geographical origin. Only authorized individuals may use the term "registered certification trademark" ("marca de certificación registrada") along with a certification trademark; and, as in the case of collective trademarks, they may not be licensed. Further, usage rules must be filed along with the registration request.⁵⁵

Another relevant aspect of the reform is that the Mexican Institute of Industrial Property ("IMPI" by its acronym in Spanish) must notify the registration requester directly in case an opposition is filed by third parties.

51. Ley de la Propiedad Industrial [LPI] art. 88, Diario Oficial de la Federación [DOF] 18-05-2018, últimas reformas DOF 27-06-1991 (Mex.).

52. Tracy Delgadillo, *Reformas a la Ley de la Propiedad Industrial*, J.A. TREVIÑO ABOGADOS (July 3, 2018), http://www.jatabogados.com/publications/articles/JATA_-_Reforma_a_Ley_de_la_Propiedad_Industrial.pdf.

53. LPI art. 89, DOF 18-05-2018, últimas reformas DOF 27-06-1991 (Mex.).

54. *Id.* art. 96.

55. *Id.* art. 98 bis 4.

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Previously, the IMPI published a list of opposed trademark registration requests in its Gazette. Similarly, the reformed LPI provides the possibility for the parties to submit any sort of evidence during the opposition process, except for non-written confessions and testimonies and “all those [kinds of evidence] that are contrary to accepted morality and law.”⁵⁶ The prohibition on registering descriptive trademarks continues in effect, which means, for example, that scent trademarks could not be registered for perfumes.⁵⁷

Undoubtedly, the reform to the LPI enriches the Mexican industrial property legal system with a regulation that provides greater tools for the protection of the rights of trademark owners and of third parties. Nevertheless, the reform is far from perfect, and the IMPI must still publish guidelines that clarify the new obligations for trademarks registered before the reform.

D. SOCIAL COMMUNICATION ACT: CONTROVERSY AND LEGISLATION⁵⁸

In February 2014, the “Decree by which the General Law of Social Communication is issued” was published in the Official Gazette of the Federation.⁵⁹

The third transitory article of the decree clearly establishes a legislative obligation on the federal Congress to provide for the enactment of regulations complying with the eighth paragraph of article 134 of the Constitution (regarding the application of public spending limitations to expenditure budgets in social communication matter). The deadline for the enactment was April 30, 2014, and Congress did not take any action to fulfill its obligations under the decree before or at any time since the deadline.

On May 23, 2014, the NGO Campaña Global por la Libertad de Expresión A19 (“Article 19”)⁶⁰ filed an *amparo* lawsuit against the federal Congress, arguing that several human rights violations⁶¹ were caused by its inaction, including restrictions on freedom of speech and access to information. The *amparo* brought by Article 19 was dismissed on July 18, 2014, by the eleventh district court of administrative affairs of the Federal District (now Mexico City) on the grounds that (1) it was not the appropriate procedural device to appeal controversies arising from electoral

56. *Id.* art. 120 bis 1.

57. Amador, *supra* note 50.

58. This section is authored by Arciria I. Ireta Amador, a law school graduate from Universidad Panamericana, Campus Guadalajara.

59. Ley General de Comunicación Social [LGCS], Diario Oficial de la Federación [DOF] 11-05-2018 (Mex.).

60. Article 19 is a British non-governmental organization devoted to the defense and promotion of freedom of expression and freedom of information around the globe. Article 19 has regional offices worldwide, including Mexico. See generally *What We Do*, ARTICLE 19, <https://www.article19.org/> (last visited Apr. 5, 2019).

61. Particularly, Article 19 alleged violations of articles 1, 6, 7, 14, 16, 49, and 134 of Mexico’s Constitution, among various other international provisions adopted by Mexico.

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matters or violations to political rights; and (2) it was not the appropriate procedural device to appeal controversies arising from legislative omissions, as its interpretation would have general effects over the population and would, therefore, represent a direct contradiction to the principle of relativity in *amparo* rulings.⁶²

Article 19 filed a review appeal on November 3, 2014, arguing that, while the name of the decree suggests a “political and electoral reform,” the enactment of the regulations for the eighth paragraph of Article 134 of the Constitution is clearly not within such parameters, as social communication is not in any way linked to electoral actors, but rather to the protection of the human rights of freedom of expression and press. It also argued that the principle of relativity in *amparo* rulings is not contradicted, because upholding the *amparo* would not imply ordering the enactment of a new body of laws, but rather the fulfillment of Congress’ legislative obligations under the decree.

On August 5, 2015, the First Chamber of the Supreme Court took the appeal proceeding for judicial review under file number 1359/2015. On November 15, 2017, the Supreme Court overturned the district court’s decision and ruled in favor of Article 19, holding that “Article 19 proved to have a special interest in the defense and promotion of freedom of speech, and the legislative omission affects its capacity of accomplishing such purpose.”⁶³ It is relevant to notice the logical-juridical argument upon which the First Chamber of Mexico’s Supreme Court based its ruling. This reasoning establishes a clear precedent regarding the standing that a non-governmental organization may possess in an *amparo* trial and the procedural admissibility of an *amparo* suit against legislative omissions.

Through its decision, the Supreme Court broadens the scope of the checks and balances principle in Mexico, providing the judiciary with jurisdiction to hear from disputes arising from Congress’ inaction. In compliance with Supreme Court’s sentence, Mexico’s federal Congress enacted the *Ley General de Comunicación Social* (Social Communication General Act) and published its definitive text on May 11, 2018, which will enter into force on January 1, 2019.⁶⁴ Despite such apparent achievement, the new act has faced much criticism since the bill was passed by Congress on April 25 (only five days before the deadline imposed by the Supreme Court),⁶⁵ as it permits further excessive and unlimited spending in the

62. The principle of relativity states that the effects of every sentence issued in an *amparo* trial must only encompass the individual parties and must not issue general rules regarding the law or action that caused it.

63. Sentencia dictada respecto al amparo en Revisión 1359/2015, la Primera Sala de la SCJN, Página 38 (Mex.), formato PDF, https://www.scjn.gob.mx/sites/default/files/listas/documento_dos/2017-10/AR-1359-2015-171025.pdf.

64. LGCS, DOF 11-05-2018 (Mex.).

65. Sentencia dictada respecto al amparo en Revisión 1359/2015, la Primera Sala de la SCJN, Página 58 (Mex.).

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government's official publicity.⁶⁶ The upcoming year will certainly bring new challenges, but small victories such as that of Article 19 certainly provide hopefulness to advocates of civil liberties.

⁶⁶ *Por qué es cuestionada la Ley de Comunicación Social?*, EL FINANCIERO (Apr. 26, 2018), <http://www.elfinanciero.com.mx/elecciones-2018/por-que-es-cuestionada-la-ley-de-comunicacion-social>.

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Middle East

REBECCA LEE KATZ, ADAM AL-SARRAF, MUSTAFA ALI,
HANNAH JUNG, FARRAH QAZI, MYRIAM KHEDAIR,
SEYED MOHSEN ROWHANI, BENJAMIN LEVENTHAL, OMAR NIMRI,
IBRAHIM SATTOUT, DANIA DIB, FOUAD DEBS, HOWARD STOVALL,
FAROOQ BSHARAT, AND SALAH SHAWA*

* Rebecca Lee Katz is an Associate at Locke Lord LLP in Los Angeles, California, where she specializes in real estate finance and private equity venture capital. She received her B.S. in Regional & Comparative Studies from Georgetown University and her JD from the George Washington University Law School. Adam al-Sarraf is an Attorney Advisor-International with the Commercial Law Development Program (CLDP) of the US Department of Commerce Office of the General Counsel where he manages technical assistance programming in Bahrain, Kuwait, Morocco, Tunisia, Saudi Arabia and the Dominican Republic. He is a graduate of George Washington University Law School. Mustafa Ali is a recently-appointed judge of the Court of First Instance in Qena, Egypt. He worked over eight years as a prosecutor and received an LLM from Boston University School of Law in 2019. Hannah Jung is a first year student at Cornell Law School. She has an undergraduate degree in International Relations from the Ewha Women's University in Seoul, South Korea and a master's degree in Near and Middle Eastern Studies from the School of Oriental and African Studies, University of London. Farrah Qazi is an attorney practicing in the areas of immigration and human rights law, with a specialization in cases dealing with gender-based violence and persecution of minorities. She has a law degree from DePaul University Law School. Myriam Khedair is an LLM candidate at Columbia Law School. She also has a master's degree in Economic Law and Global Governance Studies from Sciences Po, University of Paris. Seyed Mohsen Rowhani is currently a JSD candidate at Cardozo Law School and serves in the Economic and Social Council of the United Nations as an NGO representative with special consultant status. He has an LLB in Islamic Law and a master's degree in private law from the Imam Sadiq University. He has an LLM in Transnational Legal Practice from St. Johns University and an LLM from Fordham Law School in International Law. Benjamin Leventhal is an attorney with Siegel, Goldschmidt & Leventhal in Herzliya, Israel, where he practices in the area of domestic and international arbitration. He is an LLM graduate in commercial law from Tel Aviv University. His contribution was assisted by Michael Traison. Omar Nimri is a second-year law student at Albany Law School concentrating in international law. Ibrahim Sattout is a partner at ASAR Al Ruwayeh & Partners in Kuwait City and has been with the firm since 2005. He has a BA in Lebanese Law from St. Joseph University and the Lebanese University, Beirut. He has an LLB in French law and a DEA in Private International Law from University of Paris II. He is a member of the Lebanese Bar. Dania Dib is an associate at ASAR Al Ruwayeh & Partners and is a member of the Lebanese Bar and the Bar of Quebec. She has a BA in Lebanese Law from St. Joseph University and a DEA in International Business Law from the Lebanese University/University Pierre-Mendes in Grenoble, France. Fouad Debs is currently an LLM candidate at Cornell Law School. He previously worked as an attorney with the firm Adolphe Debs & Associates in Beirut, Lebanon. He has a BA in political science from the American University of Beirut and a LLB from the Université la Sagesse in Beirut. Howard Stovall is a Chicago-based attorney and a graduate of the University of Texas School of Law. He devotes his practice exclusively to commercial matters in the Arab Middle East. Farooq Bsharat is currently a second year law student at Touro Law Center. He has a bachelor's degree in political science from Rutgers University. Salah Shawa is an attorney licensed to practice in Syria. He has a JD

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This article discusses significant international legal and political developments in the Middle East and North Africa (MENA) region.

I. Algeria

In July 2018, President Abdelaziz Bouteflika demonstrated that he would likely seek a fifth five-year presidential term in the upcoming 2019 election.¹ Bouteflika has made few public appearances since suffering a stroke in 2013 that inhibits his capacity to speak.² The endorsement of Bouteflika, despite his failing health, may indicate that Algeria's political and military elite have been unable to appoint a new leader.³

Opponents caution that Bouteflika's campaign will result in the government postponing urgently needed economic reforms to prevent national protests.⁴ Algeria's stagnant, state-dominated economy faces multiple challenges.⁵ Youth unemployment hovers at one third, and economic growth was 1.6 percent in 2017.⁶ The government has depleted its foreign exchange reserves since 2014, when oil prices plummeted.⁷ Reserves dropped from \$178 billion in 2014 to \$88.6 billion in June 2018.⁸ In fact, the draft budget for next year features a seven percent increase in subsidies, including for housing and food products, accounting for twenty-one percent of the budget.⁹ Although the government had approved new taxes on certain goods and increased subsidized fuel prices, these reforms will no longer take effect next year.¹⁰

from Brooklyn Law School and an LLM from University of Paris V in International Business Law.

1. *Algeria's Bouteflika to Seek Re-election Next Year: Party Chief*, ALJAZEERA (Oct. 28, 2018), <https://www.aljazeera.com/news/2018/10/algeria-bouteflika-seek-election-year-party-chief-181028181718161.html>.

2. Lamine Chikhi, *Rare appearance fuels speculation Algeria's Bouteflika will run again*, REUTERS (Apr. 10, 2018), <https://www.reuters.com/article/us-algeria-politics/rare-appearance-fuels-speculation-algerias-bouteflika-will-run-again-idUSKBN1HH2FZ>.

3. Heba Saleh, *Bouteflika heads for fifth term as Algeria economy worsens*, FINANCIAL TIMES (Nov. 18, 2018), <https://www.ft.com/content/58f31a68-e340-11e8-8e70-5e22a430c1ad>.

4. Hamid Ould Ahmed, *Algeria shelves subsidy reforms before presidential elections*, REUTERS (Nov. 16, 2018), <https://uk.reuters.com/article/uk-algeria-economy/algeria-shelves-subsidy-reforms-before-presidential-elections-idUKKCN1NL1IC>.

5. *See id.*

6. *See Algeria Youth Unemployment Rate*, TRADING ECONOMICS, <https://tradingeconomics.com/algeria/youth-unemployment-rate> (last visited Feb. 27, 2019); *Algeria GDP Growth Rate*, TRADING ECONOMICS, <https://tradingeconomics.com/algeria/gdp-growth> (last visited Feb. 27, 2019).

7. *See* Ahmed, *supra* note 4.

8. *See* Saleh, *supra* note 3.

9. *See* Ahmed, *supra* note 4.

10. *See id.*

II. Bahrain, Morocco, Saudi Arabia—Bankruptcy Legislation

For years, countries in the MENA region have been trying to increase entrepreneurship rates; but this year has witnessed one of the most potentially transformative reforms to actually achieve that goal for three countries in the region: the introduction of reorganization statutes.¹¹ This year, Bahrain,¹² Saudi Arabia¹³ and Morocco¹⁴ passed new bankruptcy statutes that provide alternatives, such as, reorganization and preventative settlement for failing businesses.

Prior to the enactment of these statutes, these legal frameworks were characterized by punitive insolvency procedures, and most companies avoided legal proceedings when faced with financial distress.¹⁵ According to an eighteen-month survey conducted by the World Bank, INSOL, and other partners, insolvency systems in the Middle East and North Africa did not include the necessary incentives for companies to enter into an insolvency process, such as restructuring procedures.¹⁶ On the contrary, the survey found that the systems deterred debtors from attempting to reorganize their debts or start new businesses.¹⁷

Seeing the importance of reform, these three countries adopted statutes that include multiple alternatives to failing companies to avoid liquidation, including, but not limited to, a court supervised reorganization process.¹⁸

11. Adam Al-Sarraf, *The Wave of Insolvency Reform Across the MENA Region: Analysing Saudi Arabia's New Bankruptcy Law*, 2 THE MENA BUS. L. REV. 34, 34 (2018), <https://ssrn.com/abstract=3251350>.

12. *See* حماية المنافسة قوانين اصدار يضمن بالاسثمار المتعلقة التشريعات تطوير [Development of Investment Legislation Includes The Issurance of Competition Law, Data Protection, and Bankruptcy Law], BAHRAIN NEWS AGENCY (Oct. 3, 2018), <https://www.bna.bh/ArchiveDetails.aspx?archiveId=496630>.

13. *See* Tom Arnold, et al., *In Boost to Reform, Saudi Arabia's Cabinet Approves Bankruptcy Law*, REUTERS (Feb. 18, 2018), www.reuters.com/article/us-saudi-bankruptcy/in-boost-to-reform-saudi-arabias-cabinet-approves-bankruptcy-law-idUSKCN1G20PJ.

14. *See* Youssef Lakhdar, *صعبة وضعية المغربية في وضعيات صعبة* [Parliament Passes a Law to Help Moroccan Businesses in a Difficult Situation], HESPRESS (Apr. 10, 2018), <https://www.hespress.com/economie/387545.html>.

15. Mahesh Uttamchandani, "No Way Out": *The Lack of Efficient Insolvency Regimes in the MENA Region*, WORLD BANK GROUP [WBG] 1,1 (2011), <https://openknowledge.worldbank.org/handle/10986/3375>.

16. *Hawkamah/World Bank/OECD/INSOL International: Survey on Insolvency Systems in the Middle East and North Africa*, WORLD BANK 1, 16 (2009), available at <http://documents.worldbank.org/curated/en/800201468052730159/Hawkamah-World-Bank-OECD-INSOL-international-survey-on-insolvency-systems-in-the-Middle-East-and-North-Africa> (At the time of the report, they found that creditors recover under thirty cents on the dollar on defaulted debts in MENA countries compared with nearly seventy cents in OECD countries).

17. *Id.* at 16 ("Systems impose severe legal sanctions (e.g., depriving debtors of their civil and political rights) that harm the image of honest entrepreneurs.")

18. *See* *Resolving Insolvency*, WORLD BANK – DOING BUS. <http://www.doingbusiness.org/en/data/exploretopics/resolving-insolvency/reforms> (last visited Apr. 12, 2019); *see* Saifuddin Mahmood, *Bahrain's new bankruptcy code: A move towards global conformity*, IFLR1000 (Nov. 12, 2018), <https://www.iflr1000.com/NewsAndAnalysis/Bahrain-new-bankruptcy-code-A-move->

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The statutes allow for companies that are not balance sheet insolvent to take advantage of the legal remedies.¹⁹ By including such broad eligibility, these countries can help companies address financial difficulties before it is too late. Under both the Saudi and Moroccan statutes, companies can seek relief through a more streamlined and creditor-negotiated procedure with more limited court involvement than a judicial reorganization. Under the Moroccan law, this is referred to as a rescue procedure,²⁰ and the Saudi law uses the term “preventive composition proceeding.”²¹

Both procedures are designed to rescue viable businesses by promoting settlements between debtors and creditors prior to default. Additional key features of the new statutes include the ability of the debtor to manage the operations of the business²² and to obtain unsecured financing²³ during the rescue and reorganization procedures. These two features, which were not available previously, can significantly increase the viability of the failing business in contrast to a system that transfers operation of the business to a trustee or prohibits debtors from seeking new financing. While these new statutes represent a major paradigm shift in the region, the success of these new statutes will depend largely on how efficiently, transparently, and predictably courts resolve disputes during the bankruptcy process.

III. Egypt

A. CYBER CRIMES LAW

A new law has been enacted in Egypt to fight cybercrimes.²⁴ It criminalizes new actions and describes investigative procedures.²⁵ One new crime introduced by the law is unauthorized access or access in excess of authorization to a computer system.²⁶ Other new crimes include intercepting and destroying data, hacking or destroying an email account or

towards-global-conformity/Index/8792; Law on Insolvency 264 (Cabinet Decision No. 264/1439) (Saudi Arabia) (2018).

19. See Law No. 73-17, art. 561, Part 4 (“Rescue procedures may be started upon the request of the corporation without being in default”); Law No. 22, art. 6(a) (If the company “failed to cover debt within 30 days of its due date or will fail to cover date on its due date”); Law on Insolvency 264 (bankruptcy eligibility includes companies that are “likely to suffer financial distress.”).

20. See Law No. 73-17, Part 3 (Rescue Procedures).

21. See Law on Insolvency 264, ch. 3.

22. See Law No. 73-17, art. 566 (the debtor is responsible for everyday operations but under supervision of trustee); Law No. 22, art. 11; Law on Insolvency 264 (trustee is appointed for reorganization but not for preventive composition).

23. See Law on Insolvency 264, ch. 10; Law No. 22, ch. 5; Law No. 73-17, art. 562.

24. Law No. 175 of 2018 (Cybercrimes Law) *al-Jarida al-Rasmiyya*, vol. 32 bis (c), 14 Aug. 2018 (Egypt).

25. See *id.* art. 5–11 (procedural rules), art. 12–42 (Crimes and punishments).

26. See 18 U.S.C. §1030 (Equivalent to the crime first introduced in The Computer Fraud and Abuse Act enacted by the US Congress in 1984).

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a website, disrupting Internet services, and identity theft.²⁷ Furthermore, the new law criminalizes the unauthorized possession of programs or tools for the purpose of committing any of the introduced crimes.²⁸

Article 6 of the new law allows investigative authorities, which are judges or prosecutors, to issue warrants that allow the government to search and seize, pull, or trace data and information *anywhere* or in any computer it is found.²⁹ These warrants allow the government to enter and access a computer system for the purpose of collecting data.³⁰

A similar approach adopted in the United States, granting access to targets outside its territorial border, has been criticized for undermining the sovereignty of states.³¹ Investigations conducted in another country without its prior consent, indeed, collides with international law principles of non-intervention, state sovereignty, and jurisdiction.³² But cyberspace is developing faster than the law in general, and international law, in particular, cannot keep up.

B. NON-GOVERNMENTAL ORGANIZATIONS

President Abdel Fattah El-Sisi took an unexpected step during the World Youth Forum 2018 in Sharm El-Sheikh, Egypt, when he announced his approval for a committee that would oversee amendments to Law 70 of 2017 for Regulating the Work of Associations and Other Institutions Working in the Field of Civil Work.³³ The law, which was ratified in May 2017, imposes

27. See Law No. 175 of 2018.

28. See *id.*

29. Compare *id.* art. 6(1) with Fed. R. Crim. P. 41(b)(6)(a) (2016) (In comparison, Federal Rules of Criminal Procedures in The United States allows a magistrate judge to issue a warrant to remotely access computers outside the district if the location of that district has been concealed through technological means); see Law No. 150 of 1950 (Criminal Procedures Law) *al-Jarida al-Rasmiyya*, vol. 90, 15 Oct. 1951, art. 64–199 (Egypt) (Criminal Investigations in Egypt are conducted by judges or prosecutors); see also CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 58, 189 (Warrants, despite being mostly issued by prosecutors, are judicial warrants, as Egyptian prosecution is part of the judiciary).

30. See Cybercrimes Law, art. 6 (2) (Egypt). The terms used by the law, دخول and نفوذ, are translated as “entering” and “penetration”. See G. Lecomte, *Arabic-English Dictionary, The Hans Wehr Dictionary of Modern Arabic*, edited by J. M. COWAN, Pocket Book Edition, Ithaca, New York 1976, 24 ARABICA 103–103 (1977).

31. See Ahmed Ghappour, *Searching Places Unknown: Law Enforcement Jurisdiction on the Dark Web*, 69 Stanford L. Rev. 1075, 1082 (2017), <https://ssrn.com/abstract=2742706> (citing Letter from Richard Salgado, Dir. of Law Enft & Info. Sec., Google Inc., to the Advisory Comm. on Rules of Criminal Procedure 2–3 (Feb. 13, 2015), <https://www.regulations.gov/contentStream?documentId=USC-RULES-CR-2014-0004-0029&attachmentNumber=1&contentType=pdf>).

32. See *id.* at 1117, n.130.

33. *ElSisi agrees to modify current NGO law*, WORLD YOUTH FORUM (May 11, 2018), <https://wyfegypt.com/news/elsisi-agrees-to-modify-current-ngo-law/>.

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various restrictions on non-governmental organizations (NGOs) and their activities in Egypt.³⁴

Law 70 provides the Ministry of Social Solidarity with the power to withdraw an organization's permit on grounds of national security and to carry out inspections at will.³⁵ In particular, the law forbids any activity of a political nature.³⁶ Regulations contained in Law 70 also include a requirement of pre-approval for donations,³⁷ notification process including submission of founders' personal information,³⁸ authorization to deny establishment and limit activities of NGOs to those prioritized by the government,³⁹ and punishment through imprisonment for up to five years and a fine of no less than 50,000–1 million EGP.⁴⁰

The President's statement was followed by the Prime Minister's decree on November 7, 2018, which formed the committee headed by the Minister of Social Solidarity and composed of representatives of relevant ministries and bodies.⁴¹ The process is expected to include input from NGOs within Egypt and youth involved in civil work. While it remains unclear what the results of such restructuring will be, the President's statements reflect an intention to balance Egypt's national security interests with the concerns of civil society organizations and a possible alleviation of current restrictions.

IV. Iraq

A. GENOCIDE OF THE YAZIDI PEOPLE

In March 2017, famed human rights attorney Amal Clooney walked into the United Nations headquarters and delivered a damning report on ISIS's genocide against Yazidis in Syria and Iraq, calling for the prosecution of ISIS for crimes against humanity and genocide.⁴² The Yazidis are a religious minority living in Iraq. Their religion mixes elements of Islam, Christianity, and Zoroastrianism. Historically, the Yazidis have been branded as heretics and devil-worshippers by others.

34. See Law No. 70 of 2017 (Law of Associations and Other Foundations Working in the Field of Civil Work) *al-Jarida al-Rasmiyya*, vol. 20, 24 May 2017 (Egypt), available at <http://www.refworld.org/docid/5a4cbae14.html>.

35. See *id.* art. 26–27.

36. See *id.* art. 13.

37. See *id.* art. 23.

38. See *id.* art. 8.

39. See *id.* art. 14.

40. See *id.* art. 87.

41. *The Issue of Civil Associations and Foreign Institutions in Egypt*, THE ARAB REPUBLIC OF EGYPT: CABINET NEWS (Nov. 7, 2018), <http://www.cabinet.gov.eg/English/MediaCenter/CabinetNews/Pages/The-issue-of-civil-associations-and-foreign-institutions-in-Egypt.aspx>.

42. Peter Walker, *Amal Clooney; Full Transcript of Human Rights Lawyer's UN Speech on Isis*, INDEP. (Mar. 10, 2017), <https://www.independent.co.uk/news/world/americas/amal-clooney-speech-in-full-transcript-human-rights-lawyer-isis-iraq-speech-un-united-nations-a7622176.html> (Read the full transcript of Clooney's speech).

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Clooney's call for the prosecution of ISIS, if granted, is significant because it marks the first time ISIS would be prosecuted in the International Criminal Court (ICC) for "crimes against humanity." Under the Preamble of the Rome Statute, the treaty that established the ICC, the main purpose of the ICC is to prevent the "most serious crimes of concern to the international community" because these crimes "*must not go unpunished.*"⁴³ These crimes include genocide, crimes against humanity, war crimes, and the crime of aggression.⁴⁴ The ICC strives to prevent atrocities from happening by holding perpetrators accountable to an international community.

Thus far, the ICC has prosecuted military and political leaders from various countries.⁴⁵ But many atrocities today are committed by rebellious, extremist factions. Most telling are the heinous crimes committed by such groups as ISIS or Boko Haram.

In order for a crime to be considered a "crime against humanity," several elements must be satisfied. First, the crime must be one of the enumerated ones detailed in the Rome Statute's Article 7.⁴⁶ Among these elements is a "widespread or systematic attack directed against any civilian population."⁴⁷

The Independent International Commission of Inquiry on the Syrian Arab Republic's report to the United Nations details a concerted and systemic ISIS campaign to destroy and eradicate the Yazidi people.⁴⁸ ISIS's crimes against the Yazidis include torture, sexual enslavement of girls and women, forced conversion of adults, inhumane conditions, degrading treatment, and mental trauma—actions clearly outlined as acts of genocide in the Genocide Convention.⁴⁹

But it is the "State or organizational policy" requirement that has created debate over whether the ICC has jurisdiction over ISIS. Of the six elements outlined within the Rome Statute, ISIS seems to satisfy most, if not all, of them. These factors include an established hierarchy,⁵⁰ control over

43. Rome Statute for the International Criminal Court, preamble, July 17, 1998, 2187 U.N.T.S. 3, 4 (emphasis added) [hereinafter Rome Statute].

44. *Id.* art. 5.

45. *See Cases*, COUR PÉNALE INTERNATIONALE [INTERNATIONAL CRIMINAL COURT], <https://www.icc-cpi.int/Pages/cases.aspx> (last visited Mar. 1, 2019).

46. *See* Rome Statute, art. 7.

47. *Id.*

48. *See* Human Rights Council, *They Came to Destroy: ISIS Crimes Against the Yazidis*, para. U.N. Doc. A/HRC/32/CRP.2 (2016), <https://www.ohchr.org/en/hrbodies/hrc/regularsessions/session32/pages/listreports.aspx>; UN *Commission of Inquiry on Syria: ISIS is committing genocide against the Yazidis*, UNITED NATIONS HUMAN RIGHTS, <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20113> (last visited March 5, 2019).

49. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 1951 U.N.T.S. 278, 280, <https://treaties.un.org/doc/publication/unts/volume%2078/volume-78-i-1021-english.pdf>.

50. *See* Nick Thompson and Atika Shubert, *Anatomy of ISIS: How the 'Islamic State' is Run, From Oil to Beheadings*, CNN (Jan. 14, 2015), <https://www.cnn.com/2014/09/18/world/meast/isis-syria-iraq-hierarchy/index.html>.

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multiple territories,⁵¹ an expressed intent to attack civilians, a primary purpose of committing criminal acts, and the means of carrying out widespread attacks.⁵²

While a case against ISIS, if brought forward, would be unprecedented and complicated, its consequences are far-reaching. Whether Nadia Murad, the Yazidi survivor⁵³ who will be represented by Clooney in the case, prevails remains to be seen. But the impact of turning international attention to this modern-day genocide and the willingness to hold ISIS accountable in international court cannot be overstated.

B. INVESTMENT LAW

Iraq has taken impressive steps towards encouraging and attracting foreign investment in the past year. The reasons for those steps are linked to the economic instability and the need to attract foreign funds—because the government by itself is unable to fund the infrastructure of the areas liberated from ISIS. Earlier this year, the Iraqi Prime Minister, Haider Al Abadi, issued a statement calling on foreign investors to come to Iraq to invest in the infrastructure reconstruction— particularly in the liberated north of Iraq.⁵⁴

To further attract foreign investment and businesses and following the signature of the International Centre for Settlement of Investment Disputes (ICSID) Convention in 2015, Iraq has finally taken the first official step towards the signature of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.⁵⁵ The accession to the New York Convention was under parliamentary deliberation and discussion for several years—especially on whether it was beneficial for the Iraqi economy to accede to the New York Convention given that there were arbitration awards issued against Iraq before 2003 and a general fear of bias against Iraq.⁵⁶ The Cabinet finally voted for the accession to the New York Convention on

51. See *Islamic State and The Crisis in Iraq and Syria in Maps*, BBC NEWS (Mar. 28, 2018), <https://www.bbc.com/news/world-middle-east-27838034>.

52. See Kabir Taneja, *Understanding ISIS: From Conception to Operations*, OBSERVER RESEARCH FOUNDATION (Aug. 31, 2017), <https://www.orfonline.org/research/understanding-isis-from-conception-to-operations/>.

53. Meghan Werft, *Amal Clooney Agrees to Represent Nadia, ISIS Sex Slave, in International Court*, GLOBAL CITIZEN (June 9, 2016), <https://www.globalcitizen.org/en/content/amal-clooney-nadia-sex-slavery-isis-icc/>.

54. See Yara Bayoumy & Dmitry Zhdannikov, *Iraq Calls on Investors to Help \$100 Billion Reconstruction Drive*, REUTERS (Jan. 25, 2018), <https://www.reuters.com/article/us-davos-meeting-iraq/iraq-calls-on-investors-to-help-100-billion-reconstruction-drive-idUSKBN1FE20F>.

55. See Sami Tannous & Amr Omran, *Middle East*, GLOBAL ARBITRATION REVIEW (GAR) (May 11, 2018) [https://globalarbitrationreview.com/benchmarking/the-middle-eastern-and-african-arbitration-review-2018/1169358/middle-east%20\(last%20visited%20nov%2018,%202018\)](https://globalarbitrationreview.com/benchmarking/the-middle-eastern-and-african-arbitration-review-2018/1169358/middle-east%20(last%20visited%20nov%2018,%202018)).

56. See Alain Hannouche & Amanda Mezher, *Enforcement of International Arbitral Awards and Foreign Judgments in Iraq*, LEXOLOGY, (Nov. 9, 2017), <https://www.lexology.com/library/detail.aspx?g=5a5d2d6c-2ffe-4def-8d4c-c1c6fc1dca2c>.

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February 6, 2018. The next step would be the vote of the Iraqi parliament to officially ratify the accession, which is expected to happen soon.⁵⁷

In the meantime, discussions involving the Office of Financial Supervision and the Central Bank and the Department of Government Contracts in the Ministry of Planning, headed by the President of the Supreme Judicial Council, were held. The aim of the discussions is to create familiarity with the particularities of the New York Convention within the different branches and agencies of the government that might be involved in contract negotiations, in order to be able to effectively provide legal support if needed. These discussions include training commercial court judges and experts.⁵⁸

V. Iran

A. DISABILITY RIGHTS LAW

In March 2018, the Iranian Parliament enacted a new Law of Protection of the Rights of Disabled People, which succeeded the former Comprehensive Law of Protection of the Rights of Disabled People⁵⁹ and entered into force on September 11, 2018.⁶⁰ The new law attempts to conform the Law of Protection of the Rights of Disabled People to the norms laid down in the Convention on the Rights of Persons with Disabilities (CRPD).⁶¹ Most distinctly, the new Law of Protection of the Rights of Disabled People urged the government to meet the transportation necessities of the affected people.⁶² The government must devote 3 percent of its appropriate positions to disabled individuals.⁶³ Furthermore, families of the individuals affected are discharged of liability for some taxes, and they receive a monthly salary.⁶⁴

57. See Tannous & Omran, *supra* note 55.

58. See التجارة المحاكم قضاة مع نيويورك لاتفاقية الانضمام إلى مناقش الأعلی القضاء مجلس نيس [The President of the Supreme Judicial Council Discusses Joining the New York Convention with Judges of Commerical Courts], IRAQI MEDIA NETWORK (Oct 24, 2018), <http://imn.iq/archives/2535>.

59. Law of May 2004 (The Comprehensive Law of Protection of the Rights of Disabled People) (Iran), <http://rc.majlis.ir/fa/law/show/94044>.

60. See *Iran Events of 2018*, HUMAN RIGHTS WATCH, <https://www.hrw.org/world-report/2019/country-chapters/iran> (last visited Mar. 1, 2019).

61. See U.N. High Commissioner for Human Rights, *Thematic Study on the Right of Persons with Disabilities to Live Independently and be Included in the Community*, U.N. Doc A/HRC/28/37 (Dec. 12, 2014), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/241/66/pdf/G1424166.pdf?OpenElement>.

62. See Law of May 2004, art. 2.

63. See *id.* art. 11.

64. See *id.* art. 27.

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B. LAW RELATING TO U.S. ECONOMIC SANCTIONS

On May 8, 2018,⁶⁵ the Trump Administration withdrew from the Joint Comprehensive Plan of Action (JCPOA).⁶⁶ The Iranian administration then passed legislation to mitigate the effects of the crippling primary and secondary economic sanctions.

The Board of Ministers enacted new resolutions that authorized currency exchange offices to commence importing foreign bills in cash. The goal of this measure was to stop the inflation of Iranian currency—the Rial. Some of these embargoes were imposed earlier as anti-money laundering measures. This resolution may form new systems to corrupt and expedite money laundering. In other words, the economic sanctions are practically acting against their missions. This provision proclaims:

All approved exchanges can take foreign exchange currencies in the structure of trading transactions following foreign exchange regulations, especially anti-money laundering regulations. Authorized exchange offices permitted the sale of foreign currency following the current laws assigned by the Central Bank of the Islamic Republic of Iran. The entry of foreign currency into banknotes and gold inside the country is permitted without any restriction by the regulations of the Central Bank of the Islamic Republic of Iran and the rules for combating money laundering by persons. Gold imported are immune to any taxes, legal fees and value-added tax following the provisions of the Central Bank of the Islamic Republic of Iran.⁶⁷

VI. Israel

A. CIVIL LITIGATION AND PROCEDURE

Civil and commercial litigation in Israel is about to change dramatically during 2019, in light of new Civil Procedure Regulations⁶⁸ just recently legislated by Minister of Justice Ayelet Shaked. The new regulations will enter into force in October 2019 and include considerable changes such as a focus on oral testimony rather than written affidavit submissions, limitations on written pleadings, limitations on postponing hearings, and strict timetables for adjudicating cases and rendering judgments. New regulations are expected to considerably reduce the lifetime of cases—so that average cases that used to take roughly two to three years might be cut in half.

65. Amanda Holpuch, *Donald Trump Says US Will No Longer Abide By Iran Deal-As It Happened*, GUARDIAN (May 8, 2018), <https://www.theguardian.com/world/live/2018/may/08/iran-nuclear-deal-donald-trump-latest-live-updates>

66. Exec. Order No. 13846, 83 FR 38939, 38939 (2018), AD Executive Order 13846, Federal Register, (Aug. 6, 2018), <https://www.federalregister.gov/documents/2018/08/07/2018-17068/reimposing-certain-sanctions-with-respect-to-iran>.

67. *New Government Decisions: Allowed Exchange Plans Can Sell Traveler's Currency*, BBC PERSIAN (Aug. 5, 2018), <http://www.bbc.com/persian/iran-45077833> (translated by author).

68. See Knesset Election (Civil Procedure Regulations), 5778-2018, cl.8 (Isr.).

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An additional notable change will be in determination of actual reimbursement of costs and legal fees to the prevailing litigating party—as opposed to the current regime where courts had no real guidelines regarding reimbursement resulting often in disproportionate awards of costs usually covering a mere fraction of the cost of litigation. This change is expected to reflect also upon the submission of baseless lawsuits.

B. TRADEMARKS

Within the sphere of international trademark protection, Israeli courts have recently proved once more that Israel is committed to upholding trademark rights and how far courts are willing to go to protect such rulings.

Protection of trademark rights has been implemented even in instances where a trademark is not actually being used in Israel by its owner. For instance, a court held that imitations or branding in a manner resembling a trademark (especially if in a similar field of business) are forbidden, and thus awarded injunctive relief, in the recent case of the Japanese-based MINISO design brand against MINNIMAX—an Israeli brand.⁶⁹ Similar reference was made in the matter of the Barilla brand, as held by the Supreme Court,⁷⁰ where the local manufacturer was ordered to refrain from manufacturing a local brand of pasta resembling the Barilla brand. Such rulings correspond with consistent legal policy over the years, such as the case banning use of the word “champagne” that was used by an Israeli mineral water company to describe the bottled water it sells.

VII. Jordan

As of February 2018, the UNHCR ranks Jordan as having the second highest number of refugees per capita, with approximately eighty-nine refugees per 1000 inhabitants.⁷¹ The precipitously increased burden of providing these refugees assistance aggravates previous difficulties faced within the kingdom, such as increased competition for jobs, housing, and healthcare, as well as a lowered quality of education and a greater unemployment rate.⁷² These deteriorating living standards, coupled with what many residents see as government inaction, presents an increased risk of further instability in the already tempestuous region.⁷³

69. CA 58062/04/18 Guangdong Saiman Lnvstment Co. Ltd v. Max Management Israel Ltd. ##(#) PD #,# (2018) (Isr.).

70. HCJ 1521/18 Barilla G. e R. Fratlli v. RamiLevy Shivuk Hashikma 2006 Ltd. ##(#) PD #,# (2018) (Isr.).

71. See *Fact Sheet Jordan February 2018*, UNHCR, https://reliefweb.int/sites/reliefweb.int/files/resources/FactSheetJordanFebruary2018-FINAL_0.pdf (last visited Mar. 2, 2019).

72. See *Syrian Crisis: Impact on Jordan*, EUROPEAN PARLIAMENT: THINK TANK, Feb. 7, 2017, [http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/599258/EPRS_BRI\(2017\)599258_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/599258/EPRS_BRI(2017)599258_EN.pdf).

73. *Id.*

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By the end of 2016, Jordanian public debt had reached approximately \$37 billion, 95 percent of the kingdom's GDP.⁷⁴ Tasked with reducing the country's rising debt, Prime Minister Hani Mulki introduced an ambitious IMF-backed austerity program seeking to lower these figures to 77 percent of GDP by 2021. Under the terms of the program, Jordan was granted a \$723 million line of credit, with the ultimate goal of fostering the advancement of fiscal consolidation in the kingdom.⁷⁵ But austerity measures accompanying the program included a 2018 replacement of a 1996 bread subsidy program—nearly doubling the prices of the culinary staple⁷⁶—as well as a unification of the general sales tax (GST) to 16 percent, which resulted in tax hikes on popular items such as cigarettes, gasoline, and soft drinks.⁷⁷

In May, the Jordanian cabinet proposed to Parliament an amendment to the Income Tax Law (ITL), with the goal of producing an estimated \$1.2 billion in additional annual tax revenue.⁷⁸ The proposal included tax increases on banks and other companies; a reduction of the threshold for exemption from personal income taxation from 12,000 to 8,000 Dinars; and the removal of a 4,000 Dinar exemption towards medical treatment, education, rent, and other services, as well as the establishment of new tax brackets, which would result in tax increases of up to 8 percent on citizens earning over 5,000 Dinars annually.⁷⁹ The draft law was met with widespread furor and public protests—resulting in the resignation of Mulki as prime minister and the removal of the controversial amended ITL by his successor, Omar al-Razzaz.⁸⁰ As of November 2018, members of parliament have begun deliberations over a newly drafted amendment to the ITL—

74. See *Jordan National Debt*, COUNTRYECONOMY.COM, <https://countryeconomy.com/national-debt/jordan> (last visited Mar. 3, 2019).

75. See David Lipton, *IMF Executive Board Approves US\$723 Million Extended Arrangement Under the Extended Fund Facility for Jordan*, INT'L MONETARY FUND (Aug. 25, 2016), <https://www.imf.org/en/News/Articles/2016/08/25/PR16381-Jordan-IMF-Executive-Board-Approves-US-723-million-Extended-Arrangement>.

76. Mohamed Khraishy and Mariano J. Beillard, *Jordan Ends Bread Subsidies, Implements USDA-Style SNAP EBT Program*, USDA FOREIGN AGRIC. SERV. (Jan. 15, 2018), [https://gain.fas.usda.gov/Recent GAIN Publications/Jordan Ends Bread Subsidies and Implements USDA-Style SNAP EBT Progr_Amman_Jordan_1-22-2018.pdf](https://gain.fas.usda.gov/Recent%20GAIN%20Publications/Jordan%20Ends%20Bread%20Subsidies%20and%20Implements%20USDA-Style%20SNAP%20EBT%20Progr_Amman_Jordan_1-22-2018.pdf).

77. *Jordan Amends GST Law for 2018*, ERNST & YOUNG (Jan. 24, 2018), [https://www.ey.com/Publication/vwLUAssets/Jordan_amends_GST_Law_for_2018/\\$FILE/2018G_00449-181Gbl_Indirect_Jordan_amends_GST_law_for_2018.pdf](https://www.ey.com/Publication/vwLUAssets/Jordan_amends_GST_Law_for_2018/$FILE/2018G_00449-181Gbl_Indirect_Jordan_amends_GST_law_for_2018.pdf).

78. Suleiman Al-Khalidi, *Jordanian cabinet approves new IMF-guided tax law to boost finances*, REUTERS (May 21, 2018), <http://news.trust.org/item/20180521192918-r5z8f/>.

79. *Jordan: Proposed amendments to the Income Tax Law*, PwC, 2018, <https://www.pwc.com/m1/en/services/tax/me-tax-legal-news/2018/jordan-proposed-amendments-to-the-income-tax-law.html> (last visited Mar. 3, 2019).

80. Ellen Francis and Suleiman Al-Khalidi, *Jordan's Next PM Says to Drop Tax Bill that Angered Protesters*, REUTERS (June 7, 2018), <https://www.reuters.com/article/us-jordan-protests/jordans-next-pm-says-to-drop-tax-bill-that-angered-protesters-idUSKCN1J311I>.

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having to balance preventing insolvency of the state with protecting the economic and social well-being of its citizens.⁸¹

VIII. Kuwait

A. FOREIGN INVESTMENT LAW

In 2013, to promote direct investment in Kuwait, the parliament promulgated Law No. 116 of 2013.⁸² Among the incentives granted pursuant to the law,⁸³ investors are entitled to receive tax credits for up to ten years. But the criteria for granting the incentives, including the tax credit, were not determined in the law. In 2016⁸⁴ and 2018,⁸⁵ KDIPA's Director General issued decisions clarifying the mechanism and criteria for granting such tax credits.

B. CONFLICT OF INTEREST LAW

Kuwait's conflict of interest law⁸⁶ was recently enacted to address the possible conflicting interests of public employees and government institutions. Employees of the government, public authorities, and institutions are subject to this new law.

Conflict of interest amounting to a corruption crime would occur in the following events: (a) procuring a material or moral interest for oneself or any related person by doing or abstaining from doing any action concerning his or her job either solely or jointly; or (b) if the concerned person owns any share or portion of business that has financial dealings with his or her employer.⁸⁷

In any of the applicable conflicts of interest, the individual subject to the law is required to disclose the conflict subject to controls set by the law and to submit a financial disclosure to the relevant bodies. The person is also entitled to remove this conflict either by assigning its conflicting interest or resigning from the position or public job that creates the conflict. In all such cases, the concerned person should take all necessary measures to prevent

81. *Joint Cabinet-Lower House Meeting Identifies Government Priorities for Coming Period*, JORDAN TIMES, Nov. 13, 2018, <http://www.jordantimes.com/news/local/joint-cabinet-lower-house-meeting-identifies-government-priorities-coming-period>.

82. See Law no. 116 of 2013 (Regarding the Promotion of Direct Investment in the State of Kuwait), Al Kuwait Al Yom, No.1136 of June 16, 2013, p.113(A) (Kuwait), available at <https://e.kdipa.gov.kw/main/law1162013.pdf>.

83. See Sarah A. Oliai et al., *Middle East Committee*, 8 ABA/SIL (2015), available at <https://www.slideshare.net/AbdulazizAlHussan/2015-middle-east-legal-developments-in-review>.

84. See Director General Decisions no. 16 of 2016 on the Mechanism for Granting Tax Exemption (Dec. 1, 2016), available at <http://kdipa.gov.kw/wp-content/uploads/dgd162016.pdf>.

85. See Director General Decisions no. 76 of 2018 Regarding the Amendment of the Mechanism for Granting Tax Exemption (Feb. 25, 2018), available at <https://kdipa.gov.kw/E.kdipa.gov.kw/main/dgd762018-.pdf>.

86. See Law no. 13 of 2018, Al Kuwait Al Yom, No. 1388 of April 13, 2018, p. 2(A) (Kuwait).

87. *Id.* art. 4.

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harm to public interest and may not act as mediator, agent, guarantor, or a consultant for any company or corporation that has a business connecting to his employer.⁸⁸

In case of violations to the law, the concerned person may be subject to fines and imprisonment. In all cases, the concerned person shall be terminated, and the relevant transaction may be rescinded. In addition, the law states that penalties may be applied to “persons who are not included under this law,” such as employees and managers of private companies—if such parties knowingly receive a benefit from the conflict.⁸⁹ Such penalty shall be half of the punishments set out in the law⁹⁰ (i.e., violators may be punished with a fine of up to KD 5,000 and imprisonment for up to two and a half years).

IX. Lebanon

2018 brought more of the same—political corruption, crackdown on freedoms, and economic free fall—to a country fighting a war on each of its borders: to the North and East, with the influx of more than a million refugee arrivals from war-torn Syria, to the South, in the ever-tense blue line separating it from its official enemy Israel, and even to the West, on its highly polluted shore of the Mediterranean Sea over which the ongoing national garbage crisis has literally spilled.

Still, at the onset of the year, there was reason to be optimistic. After being unconstitutionally postponed three consecutive times over a period of nine years, parliamentary elections were finally held in May 2018 on the basis of a new law drafted by the same politicians who have been ruling the country for decades, first as warlords and militia men during the Lebanese Civil War (1975-1990) and subsequently as government officials. The new election law was designed to maintain their firm grip on power.

Shortly before, following a twelve-year hiatus, a new budget was passed.⁹¹ Another international conference in support of Lebanon’s economy (CEDRE) was held in Paris, giving conditioned loans and grants amounting to 11 billion USD to the country for infrastructure projects⁹²—plunging Lebanon into more potential debt.

Again, there is reason to be skeptical if not entirely pessimistic—the infrastructure is crumbling. In 2018, electricity cuts are still daily—ranging

88. *Id.*

89. *Id.* art. 12.

90. *Id.* art. 11.

91. *Law 79 of Apr. 18, 2018 (Leb.)*, available at <http://www.finance.gov.lb/en-us/Finance/BI/ABDP/Documents/Budget%20Law%202018.pdf>; Lisa Barrington, *UPDATE 2-Lebanon’s Cabinet Agrees 2018 Budget with Lower Deficit*, REUTERS (Mar. 12, 2018), <https://www.reuters.com/article/lebanon-economy-budget/update-2-lebanons-cabinet-agrees-2018-budget-with-lower-deficit-idUSL8N1QU5KH>.

92. *CEDRE: Economic Conference for Development through Reforms with the Private sector*, FRANCE DIPLOMATIE (Apr. 6, 2018), https://www.diplomatie.gouv.fr/IMG/pdf/cedre_state_ment-en-_final_ang_cle8179fb.pdf.

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from three hours in Beirut to over sixteen hours outside the capital. The unreliable electricity issues force people to rely on a mafia-like bunch of electricity generator owners—paying them hefty monthly subscription fees. Summer season means substantial chronic water shortages—leaving people at the mercy of those who illegally and in an environmentally hazardous way extract and sell waters from aquifers. Despite the installation of fiber optic cable, Internet speed and quality are still among the worst and most expensive in the world.

Public space is being encroached upon at an alarmingly fast rate. The biggest green public space in Beirut, Horsh Beirut, is losing another battle—this time to build a private hospital on its ever-diminishing land. Most of the Lebanese coast is no longer accessible to the public. In 2018, Eden Bay, a private resort built on publicly-owned land on the last remaining sandy stretch in Beirut, opened its doors despite irrefutable evidence of fraud and legal violations and despite Lebanon's signature of the Madrid protocol on Integrated Coastal Zone Management in the Mediterranean.⁹³ Aside from law, electoral promises of projects to be executed in 2018 are also being broken, and Lebanon's much-needed public transportation network will have to wait for another year or more.

Three years after the breakout of the Garbage Crisis that saw trash piling up on the streets, valleys, and rivers of the country, a sustainable environmental solution is yet to be found. Even worse, the cabinet is considering adoption of a plan that relies on incineration, which has been criticized as being detrimental to the environment and the health of the population—especially if left unregulated.

Public debt has reached record levels, surpassing 80 billion USD, creating a debt to GDP ratio higher than 150 percent⁹⁴—the third highest in the world after Japan, a country renowned for its manufacturing industry, and Greece, a country that crashed with a very strong tourist sector. The World Bank has revised downwards the GDP growth for 2018 to 1 percent,⁹⁵ which in itself is a disaster considering that the population has increased by at least a quarter with the influx of refugees from Syria. The debt has multiplied by more than seven in the past thirty years, with 80 percent of it held by the local banking sector that has become a pillar of the economy.⁹⁶ This directly points at the interdependence of the success of local banks and the

93. Cynthia Bou Aoun, *Legal framework for the Lebanese coast: Promoting investment or achieving public interest*, AL-AKHBAR (July 2, 2018), <https://www.al-akhbar.com/Capital/253310?fbclid=IwAR3E86oKV9WClQTonNkvAX5EcTzDF0Dect2QOf2LAy0JJSO0Q3ZQVdD-63kY>.

94. Phillippe Hage Boutros, *Charbel Nahas challenges the "leaders" on the deterioration of the economy*, L'ORIENT LE JOUR (Oct. 12, 2018), https://www.lorientlejour.com/article/1138458/charbel-nahas-interpelle-les-responsables-sur-la-degradation-de-leconomie.html?fbclid=IwAR0rRFj-iHaf0LtmV_EHbDKUUIHvB1usVK9kxF1WH9U-z3dRKIL104rybQ.

95. Wissam Harake et al., *Lebanon Economic Monitor- De-Risking Lebanon*, WORLD BANK (Oct. 30, 2018), <http://documents.worldbank.org/curated/en/147191540833250547/pdf/131463-ARABIC-WP-PUBLIC-OCT-30-8AM-DC-TIME-ADD-SERIES-Final-Arabic.pdf>.

96. See generally Adib Y. Tohmé et al., *COLLECTION OF ECONOMY AND FINANCE PUBLIC DEBT AND TVA* (3V Lebanon Third Voice 2018).

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indebtedness of the State, with the former garnering most of their profits from the State's debt. In fact, "[t]he current-account deficit is more than 20% of GDP."⁹⁷ In March of this year, the Central Bank stopped subsidizing mortgages for low- and middle-income families. In a dire need to attract capital, banks are giving interest rates as high as 12 percent on deposits. Unemployment is around 25 percent, with youth unemployment reaching more than 40 percent.⁹⁸

X. Libya

Libya was plagued by another year of internal political divisions, armed conflict, and violence. The Government of National Accord (GNA), based in Tripoli, struggled to maintain some semblance of control inside that city. Moreover, the GNA faced challenges from numerous rival forces, including the competing government based in Benghazi and supported by the Libyan National Army. Clashes between militias and armed forces loyal to these two governments largely destroyed the national economy and public services (including the health system and the judiciary).⁹⁹ The GNA declared a state of emergency in early September after days of fighting in Tripoli between rival groups left at least thirty-nine people dead and dozens more injured. During the fighting, approximately 400 prisoners escaped from the Ain Zara prison by forcing the facility's doors open.¹⁰⁰

The United Nations (and various interested Western powers) failed to reconcile the feuding parties. In May 2018, France persuaded the major Libyan parties to verbally agree to elections in December as a way of ending the repeated rounds of bloodshed. But the continued fighting between rival militias and the deadlock between the competing Libyan governments made that goal unreachable this year.¹⁰¹

XI. Palestine

The Palestinian Authority (PA) faced an unprecedented stream of effects this year due to significant foreign policy decisions made by the U.S.,

97. *Lebanon's economy has long been sluggish. Now a crisis looms*, *ECONOMIST* (Aug. 30, 2018), <https://www.economist.com/middle-east-and-africa/2018/08/30/lebanons-economy-has-long-been-sluggish-now-a-crisis-looms>.

98. Nada Andraos Aziz, *REPORT: Alarming figures on unemployment in Lebanon*, *LBC AMERICA* (May 6, 2017), <https://www.lbcgroup.tv/news/d/news-bulletin-reports/314820/report-alarming-figures-on-unemployment-in-lebanon/en>.

99. *See generally, Libya Events of 2017*, *HUMAN RIGHTS WATCH*, <https://www.hrw.org/world-report/2018/country-chapters/libya> (last visited Mar. 7, 2018).

100. *See* Martina Bet, *'STATE of EMERGENCY': 400 Prisoners and Gaddafi ESCAPE Prison in Tripoli, Libya*, *DAILY EXPRESS* (Sept. 3, 2018), <https://www.express.co.uk/news/world/1012143/Lybia-civil-war-prisoners-gaddafi-prison-tripoli-libya>.

101. *See* Ulf Laessing and Aidan Lewis, *Exclusive: U.N., Western Powers Quietly Bury December Plan for Libya Election*, *REUTERS*, Nov. 7, 2018, <https://www.reuters.com/article/us-libya-security-exclusive/exclusive-u-n-western-powers-quietly-bury-december-plan-for-libya-election-idUSKCN1NC25U>.

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including a capital move and budgetary cuts on humanitarian aid. The “U.S. has always played the role of fireman in the Israeli-Palestinian conflict. But now it is inexplicably playing the role of arsonist throwing more fuel on the flames instead of calming things down.”¹⁰² Ilan Goldenberg, a former state official, anticipated a Palestinian “explosive reaction” but is now among the many witnesses to an unforeseen set of socio-political circumstances. The demands for a new “intifada” by Hamas, the militant group, “fell flat.” It appears that the short-lived reactions resulted from the Palestinians’ exhaustion, fear of Israel’s overwhelming force, and dissatisfaction of leadership.¹⁰³ In regard to the potentially destabilizing budget cuts, PA officials “accus[ed] Washington of ‘weaponizing’ humanitarian assistance by using it as a tool to coerce political concessions.”¹⁰⁴ Thus, the fact that the PA did not react chaotically was astounding.

Despite President Abbas warning President Trump that the decision to recognize Jerusalem as Israel’s capital would bring dangerous consequences and may destabilize the region, Palestinians reacted surprisingly civilly.¹⁰⁵ In September, “Palestinians . . . filed a lawsuit in the International Court of Justice [against the U.S.] for violating international law”¹⁰⁶ The court’s original jurisdiction is contingent on a determination of Palestine’s “statehood.”¹⁰⁷

In October, the PA announced that it would implement a new Social Security law for the purpose of stabilizing a frail economy.¹⁰⁸

Finally, nearing an end to 2018, President Abbas has promised to hold elections for the first time since 2006—a noteworthy result reached amicably with the inclusion of all political factions of the PA.¹⁰⁹ Regardless of prospective effects, these decisions shed new hope for possible international

102. Nahal Toosi, *Trump’s Jerusalem bet defies direst predictions*, POLITICO, May 13, 2018, <https://www.politico.com/story/2018/05/13/trump-israel-jerusalem-embassy-584416>.

103. *Id.*

104. Isabel Kershner, *Palestinians Blast Trump’s Aid Cut as Political ‘Blackmail’*, N.Y. TIMES (Aug. 25, 2018), <https://www.nytimes.com/2018/08/25/world/middleeast/israel-palestian-aid-cut.html>.

105. Colin Dwyer and Scott Neuman, *How The World Is Reacting To Trump Recognizing Jerusalem As Israel’s Capital*, NPR (Dec. 6, 2017), <https://www.npr.org/sections/thetwo-way/2017/12/06/568748383/how-is-the-world-reacting-to-u-s-plan-to-recognize-jerusalem-as-israeli-capital>.

106. AFP and TOI Staff, *Palestinians File Claim Against US at UN Court over Jerusalem Embassy Move*, TIMES ISRAEL (Sept. 29, 2018), <https://www.timesofisrael.com/palestinians-file-claim-against-us-at-un-court-over-jerusalem-embassy-move/>.

107. Victor Kattan, *It’s Time to Take Palestine v. United States of America Seriously*, OPINIOJURIST (Oct. 16, 2018), <http://opiniojuris.org/2018/10/16/its-time-to-take-palestine-v-united-states-of-america-seriously/#comments>.

108. *PA’s Social Security Law to Come into Force Despite Public Outcry*, MIDDLE E. MONITOR (Oct. 31, 2018), <https://www.middleeastmonitor.com/20181031-pas-social-security-law-to-come-into-force-despite-public-outcry/>.

109. *Rival Palestinian Parties Fatah and Hamas Agree to Hold Elections by End of 2018*, DW.COM (Nov. 22, 2017), <https://www.dw.com/en/rival-palestinian-parties-fatah-and-hamas-agree-to-hold-elections-by-end-of-2018/a-41492435>.

relief through a judicial institution, a possible independent economy, and as a potential move towards unified leadership.

XII. Qatar

Qatar has survived a historic blockade imposed by its regional players. On May 23, 2017, the United Arab Emirates (UAE) orchestrated the hacking of Qatari state news and social media sites to post incendiary statements falsely attributed to Qatar's Emir, Sheikh Tamim Bin Hamad al-Thani.¹¹⁰ The remarks included praise for Hamas and reference to Iran as an Islamic power, which aired on several UAE and Saudi-owned networks.¹¹¹ On May 24, 2018, Saudi Arabia and the UAE blocked the website of news agency Al Jazeera, which is owned by Qatar.¹¹²

On June 5, 2018, the quartet of Saudi Arabia, Bahrain, Egypt, and the UAE severed diplomatic, political, and economic ties with Qatar and imposed a land, maritime, and air blockade.¹¹³ The quartet indicted Qatar with endorsing terrorism, a charge it denies, and demanded that Qatar satisfy thirteen conditions within ten days, including paying monetary damages to the quartet, closing down Al Jazeera, and cutting military ties with NATO-member Turkey.¹¹⁴ Analysts contend that the quartet designed the demands to be impossible to meet in order to justify the blockade itself.¹¹⁵

Only weeks before the blockade, U.S. Senior Advisor to the President Jared Kushner asked Qatari Finance Minister Ali Sharif Al Emadi to bail out his family from their failed real estate investment in 666 Fifth Avenue.¹¹⁶ The Kushner family owes on a \$1.2 billion mortgage due in early 2019, as well as an \$80 million high-interest loan—although the building is valued at significantly less than the debt incurred.¹¹⁷ Currently, Kushner's requests

110. Karen DeYoung and Ellen Nakashima, *UAE Orchestrated Hacking of Qatari Government Sites, Sparking Regional Upheaval, According to U.S. Intelligence Officials*, WASH. POST (July 16, 2017), https://www.washingtonpost.com/world/national-security/uae-hacked-qatari-government-sites-sparking-regional-upheaval-according-to-us-intelligence-officials/2017/07/16/00c46e54-698f-11e7-8eb5-cbccc2e7bfbf_story.html?utm_term=.d24c277314e1.

111. *Id.*

112. Alia Chughtai, *Understanding the Blockade Against Qatar*, AL JAZEERA (June 5, 2018), <https://www.aljazeera.com/indepth/interactive/2018/05/understanding-blockade-qatar-180530122209237.html>.

113. *US Pushing Saudi Arabia to End GCC Crisis, Yemen War: Bloomberg*, AL JAZEERA (Oct. 30, 2018), <https://www.aljazeera.com/news/2018/10/pushing-saudi-arabia-gcc-crisis-yemen-war-bloomberg-181030052111400.html>.

114. *Id.*

115. *Id.*

116. Bess Levin, *Did Jared Kushner Punish Qatar Because It Wouldn't Lend His Family Money?*, VANITY FAIR (Mar. 2, 2018), <https://www.vanityfair.com/news/2018/03/did-jared-kushner-punish-qatar-because-it-wouldnt-lend-his-family-money>.

117. Clayton Swisher and Ryan Grim, *Jared Kushner's Real-Estate Firm Sought Money Directly From Qatar Government Weeks Before Blockade*, INTERCEPT (Mar. 2, 2018), <https://theintercept.com/2018/03/02/jared-kushner-real-estate-qatar-blockade/>.

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for investment from Qatar are under investigation by U.S. Special Counsel Robert Mueller.¹¹⁸ Two days before the UAE hacking, President Trump met Arab and Muslim leaders in Saudi Arabia.¹¹⁹ But Qatar remains a critical U.S. ally and hosts the largest U.S. airbase in the Middle East.¹²⁰

Qatar has overcome the blockade by reforming and growing its economy.¹²¹ In November 2018, the IMF forecasted that Qatar's annual GDP growth would be above 3 percent in 2019 and stabilize at 2.7 percent through 2023—fueled by gas exports, major infrastructure development, and the hosting of the World Cup 2022.¹²² As the country is the world's largest exporter of liquefied natural gas, the blockade remains unable to quell its primary source of income.¹²³

Integral to Qatar's resilience is the support of military and trade partners beyond the quartet. Following the blockade, Turkey immediately sent 200 cargo planes, sixteen trucks, and one ship of supplies within the first month and signed over a dozen trade agreements.¹²⁴ Turkey also accelerated its planned deployment of troops to Qatar to deter a Saudi invasion.¹²⁵ In addition, Oman allowed Qatar to relocate its regional trans-shipment hub from the UAE to Oman's Sohar port.¹²⁶

Omani investors also ratcheted up their activity in Qatar, where trade is estimated to have skyrocketed over 1,000 percent from January to September 2017.¹²⁷ Qatar's utilization of the Hamad Port has reduced shipping costs by one third and made possible enhanced trade with India and Pakistan as well as a fifteen-year liquid gas contract with Bangladesh.¹²⁸ With new trade deals inked with the U.S., U.K., E.U., and Iran, Qatar has more deeply engaged other countries.¹²⁹

Announcing its second five-year National Development Strategy for 2018 to 2022, Qatar will reduce its dependence on foreign expertise and imports

118. *Id.*

119. *Id.*

120. *Qatar's Emir: Gulf Crisis Will Pass, Economy Is Stronger*, AL JAZEERA (Nov. 6, 2018), <https://www.aljazeera.com/news/2018/11/qatar-emir-gulf-crises-pass-economy-stronger-181106070435930.html>.

121. Hassan, *Qatar Won the Saudi Blockade*, FOREIGN POL'Y (June 4, 2018), <https://foreignpolicy.com/2018/06/04/qatar-won-the-saudi-blockade/>.

122. *Qatar Economy Growing Despite Crisis: IMF*, BUS. TIMES (Nov. 15, 2018), <https://www.businesstimes.com.sg/government-economy/qatar-economy-growing-despite-crisis-imf>.

123. Hanaa Hasan, *The Qatar Guide to Surviving an Economic Boycott*, MIDDLE E. MONITOR (Mar. 23, 2018), <https://www.middleeastmonitor.com/20180323-the-qatar-guide-to-surviving-an-economic-boycott/>.

124. *Id.*

125. Ali Bakeer and Giorgio Cafiero, *Deepening the Ankara–Doha Alliance*, CARNEGIE ENDOWMENT INT'L PEACE (Sept. 19, 2018), <http://carnegieendowment.org/sada/77289>.

126. Hasan, *supra* note 123.

127. *Id.*

128. *Id.*

129. *Id.*

and promote greater self-reliance.¹³⁰ Specifically, Qatar aims to satisfy 30 percent of its demand for livestock and 65 percent of its demand for fish domestically, invest in local entrepreneurship, and promote the use of renewable energy.¹³¹ Qatar plans to award \$8 billion in contracts in the private sector to pivot away from gas dependency.¹³² The strategy is enconced in National Vision 2030, which aims to foster a nation premised on justice, equality, and stability through the utilization of local resources.¹³³

Following its policy innovations, Qatar is increasingly viewed as both a potential target and a source for foreign investment with an estimated \$40 billion in spare cash following shrewd plays in the banking sector.¹³⁴ Although deposits from the blockading countries were withdrawn and depositors from other countries demanded higher interest rates, Qatar poured in public sector deposits and pushed for greater domestic production of goods over dependency on imports.¹³⁵ Also in Qatar's favor was the immediate recovery of oil prices following the blockade.¹³⁶

XIII. Syria

As of March 2018, the UN reported that the conflict in Syria has produced more than 5.6 million Syrian refugees and 6.1 million internally displaced people.¹³⁷ At the end of 2017, more than a third of the country's homes had been destroyed, making Syria the largest refugee and internal displacement crisis globally.¹³⁸ The war tore Syria apart—turning a beautiful country with great history and culture to a field of proxies' war.

On April 2, 2018, the Syrian government enacted the Law No. 10 of 2018 (Law No. 10), establishing redevelopment zones across Syria that will be designated for reconstruction.¹³⁹ Law No. 10 is the anchor of a chain of laws and regulations relating to property rights that have been enacted by the Syrian government since the start of the Syrian war in 2011.¹⁴⁰ The enactment of the law was met with general fear among the public and a

130. *Qatar launches self-sufficiency plan amid Gulf rift*, MIDDLE E. MONITOR (Mar. 15, 2018), <https://www.middleeastmonitor.com/20180315-qatar-launches-self-sufficiency-plan-amid-gulf-rift/>.

131. *Id.*

132. *Id.*

133. *Id.*

134. George Hay, *Breakingviews - One Alternative to Tainted Saudi Cash: Qatar*, REUTERS (Oct. 22, 2018), <https://www.reuters.com/article/us-saudi-khashoggi-total-breakingviews/breakingviews-one-alternative-to-tainted-saudi-cash-qatar-idUSKCN1MX03Q>.

135. *Qatar launches self-sufficiency plan amid Gulf rift*, *supra* note 130.

136. Jonathan Wheatley, *Banks Sbrug Off Impact of Qatar Blockade*, FIN. TIMES (Oct. 10, 2018), <https://www.ft.com/content/c5c389b2-9bf5-11e8-88de-49c908b1f264>.

137. *Id.*

138. *Syria*, UN NEWS, <https://news.un.org/en/focus/syria> (last visited Mar. 4, 2019).

139. Law no. 10 of 2018 (Syrian Arab News Agency) (Syria); Sune Haugbolle, *Law No. 10: Property, Lawfare, and New Social Order in Syria*, SYRIA UNTOLD (July 26, 2018), <https://syriauntold.com/2018/07/26/law-no-10-property-lawfare-and-new-social-order-in-syria/>.

140. *Id.*

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charge that Law No. 10 will likely be used to deprive residents (or inhabitants or citizens) of their property rights without due process. As such, this law will be a significant obstacle to those residents' return.¹⁴¹

Law No. 10 amends Decree No. 66 of 2012, which pertains to the redevelopment of two areas of Damascus and extends the Decree's application across the country.¹⁴² Upon the formation of the administrative unit in any designated area, Article 6 of the Law states that the owners or the "in-rem" right holders of real property (or any of their authorized agents or close relatives) must provide proof of their rights within thirty days.¹⁴³ If they fail to do so, they will not be compensated, and ownership reverts to the province, town, or city where the property is located. Those who succeed in proving property ownership will get shares in the zone.¹⁴⁴

Following widespread international criticisms, Syrian Minister of Foreign Affairs Waleed Al Mualem announced that the thirty-day period is to be extended to one year, further emphasizing that this law will facilitate the return of the refugees. Accordingly, on November 11, 2018, the Syrian government enacted Law No. 42 of 2018, amending Law No. 10 in relation to the period of extension to one year and to establish a judicial committee for challenges of the administrative units' decisions.¹⁴⁵

Notwithstanding these amendments to the law, many barriers may prevent owners or right holders from presenting their proof of rights according to the Law No. 10. These barriers include, but are not limited to, four general areas. First, a great majority of the 11 million displaced residents do not have basic identification documentation to demonstrate their rights, several of the Syrian local land registries have been destroyed during the conflict, and only 50 percent of Syrian land was officially registered even before the war.¹⁴⁶ Second, a significant number of the displaced residents are considered anti-government and, therefore, they and any of their close relatives will likely refrain from making any claim in a fear of retaliation or abusive treatment from the security forces. Third, the Syrian authorities require a security clearance for any power of attorney to be effective. Fourth, thousands of people are forcibly disappeared during the conflict, and it is impossible for them to claim their property.¹⁴⁷

In light of the above barriers, many human rights organizations and countries affected by the refugee crises called Law No. 10 "unlawful"

141. *Q&A: Syria's New Property Law*, HUMAN RIGHTS WATCH (May 29, 2018), https://www.hrw.org/news/2018/05/29/qa-syrias-new-property-law#_What_is_Law.

142. Law no. 10 of 2018; *A legal framework for the creation of high quality regulatory areas while preserving the rights of the parties*, SANA (Apr. 16, 2018), <https://www.sana.sy/?p=739408>.

143. President al-Assad issues a law amending certain articles of Law No. 10 of 2018, SANA (Nov. 11, 2018), <https://sana.sy/?p=842393>.

144. *Id.*

145. *Id.*

146. *Housing Land and Property (HLP) in the Syrian Arab Republic*, NORWEGIAN REFUGEE COUNCIL, 1, 5, available at <https://www.nrc.no/globalassets/pdf/reports/housing-land-and-property-hlp-in-the-syrian-arab-republic.pdf>.

147. *Q&A: Syria's New Property Law*, *supra* note 141.

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because it entails seizure of property rights without due process or compensation, invoking many international conventions such as the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Universal Declaration of Human Rights, and the Arab Charter on Human Rights.¹⁴⁸

Law No. 10 should not be read in isolation of the Syrian officials' policies and behavior during and before the war. The problematic issue in Syria is not the wording of the laws. The real problem is the legitimacy of these rules and the way they operate and are implanted in the absence of any effective institutes that represent the legislative and judicial powers, which are both a mere tool in the hands of the brutality of the security forces.

The need of a legal framework for the urban planning of the reconstruction in Syria is recognizable; such framework, however, cannot be enacted by one party of the conflict who is widely accused to be the cause of all the destruction—the framework must be part of the final solution to the conflict, which should guarantee fair and non-discriminatory treatment for the displaced residents and to construct a legal state of law and order.

XIV. Yemen

The ongoing war in Yemen has led to “the worst humanitarian crises in the world.”¹⁴⁹ 14 million Yemenis are facing starvation, and disease is widespread—including the worst outbreak of cholera in modern times. Tens of thousands of civilians have been killed in the war—many from inaccurate air strikes by a Saudi Arabian-led military coalition fighting the Houthis, a Yemeni religious, political, and armed movement loosely allied with Iran.

The internationally recognized government of Abdu Rabbu Mansour Hadi is nominally in control of some territory in the southern part of Yemen. Meanwhile, the Houthis remain in control over much of the remainder of the country—including the government apparatus in Sana'a, the capital city. The Houthis dissolved the Yemeni parliament in early 2015 and replaced it with a Supreme Political Council.¹⁵⁰

Beginning in mid-2018, some local militias backed by the United Arab Emirates (the other main foreign force in the Saudi-led coalition) attempted to wrest control of the port city of Hodeidah from the Houthis. Yemen was already suffering from inadequate imports of food and medicines as the coalition maintained a naval blockade of the country. United Nations

148. Haugbolle, *supra* note 139.

149. Ben Watson, *The War in Yemen and the Making of a Chaos State*, ATLANTIC (Feb. 3, 2018), <https://www.theatlantic.com/international/archive/2018/02/the-war-in-yemen-and-the-making-of-a-chaos-state/551987/>.

150. See *generally War in Yemen*, COUNSEL FOREIGN REL. (Feb. 27, 2019), <https://www.cfr.org/interactive/global-conflict-tracker/conflict/war-yemen> (last visited Mar. 4, 2019).

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officials continued to seek a negotiated respite from the conflict—as misery within the country only deepened.¹⁵¹

151. Robert F. Worth, *How the War in Yemen Became a Bloody Stalemate*, N.Y. TIMES (Nov. 4, 2018), <https://www.nytimes.com/interactive/2018/10/31/magazine/yemen-war-saudi-arabia.html?mtrref=www.google.com>.

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Russia/Eurasia

KIMBERLY REED, MARINA AKCHURINA, NATALIA ANDREEVA,
ALEXANDER ARTEMENKO, TIMUR BONDAREV, MARIA GRECHISHKINA,
VIKTORIYA HUT, DMITRY KAYSIN, MARKIYAN KLIUCHKOVSKIY,
OLES KVIAT, ALEXANDER NAZAROV, BOHDAN SHMORHUN,
MYKHAILO SOLDATENKO, SERHII SVIRIBA, AND KSENIA TARKHOVA*

This article discusses significant legal developments in corporate, antitrust & competition, financial transactions, foreign investment, and arbitration law in Russia and Ukraine in 2018.

I. Russia

A. CIVIL CODE REFORM

On June 1, 2018, amendments to Part One and Part Two of the Russian Civil Code (the “Civil Code”)¹ and to other federal laws introduced in 2017 by Federal Law 212-FZ (together, the “Civil Code Amendments” or “Amendments”)² came into force. The Civil Code Amendments further the reforms of Russian civil legislation, which began several years ago,³ to facilitate the development of basic civil law principles in keeping with a market economy, to codify existing practices, and to achieve uniformity in

* Editor and co-author: Kimberly Reed (Shulman, Rogers, Gandal, Pordy & Ecker, Washington, DC). Authors: Marina Akchurina (Cleary Gottlieb Steen & Hamilton LLC, Moscow, Russia); Natalia Andreeva (Egorov Puginsky Afanasiev & Partners, Moscow, Russia); Alexander Artemenko (ALRUD Law Firm, Moscow, Russia); Timur Bondarev (Arzinger Law Firm, Kiev, Ukraine); Maria Grechishkina (Marks & Sokolov, LLC, Philadelphia, PA); Viktoriya Hut (Asters Law Firm, Kiev, Ukraine); Dmitry Kaysin (Egorov Puginsky Afanasiev & Partners, Moscow, Russia); Markiyan Kliuchkovskiy (Asters Law Firm, Kiev, Ukraine); Oles Kviat (Asters Law Firm, Kiev, Ukraine); Alexander Nazarov (ALRUD Law Firm, Moscow, Russia); Bohdan Shmorhun (Arzinger Law Firm, Kiev, Ukraine); Mykhailo Soldatenko (Asters Law Firm, Kiev, Ukraine); Serhii Sviriba (Asters Law Firm, Kiev, Ukraine); Ksenia Tarkhova (ALRUD Law Firm, Moscow, Russia).

1. GRAZHDANSKII KODEKS ROSSIOSKOI FEDERATSII [GK RF] [Civil Code] Part I, Part II (Russ.).

2. See Federal’nyi Zakon RF o [Vnesenii Izmeneni’ v Chast’ Pervuyu I Vtoruyu Grazhdanskogo Kodeksa Rossiiskoi Federatsii i Otdelnye Zakonodatelnye Acti Rossiiskoy Federatsii] [Federal Law of the Russian Federation on Introduction of Amendments in Parts One and Two of the Civil Code of the Russian Federation and Other Legal Acts of the Russian Federation], ROSSIISKAIA GAZETA [Ros. Gaz.] Jul. 31, 2017.

3. See Ukaz Prezidenta RF No. 1108 o Sovershenstvovanii Grazhdanskogo Kodeksa Rossiiskoi Federatsii (v redatsii Jul. 29, 2014) [Decree of the President of the Russian Federation No. 1108 on Improvements to the Civil Code of the Russian Federation (as amended on Jul. 29, 2014)], available at <http://kremlin.ru/acts/bank/27787>.

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the interpretation of the law. The Civil Code Amendments significantly impact the regulation of Russia's financial sector, codify new instruments, and elevate some existing practices to the level of federal law.⁴

1. *Escrow*

The Civil Code Amendments introduced the “agreement of conditional deposit” (i.e., escrow).⁵ Previously, the Civil Code provided for general escrow accounts, but only a banking institution could act as a party and assets which could be deposited into an escrow account were limited to cash only.⁶ Under the Amendments, any party may act as an escrow agent⁷ and any movable property (such as cash funds, certified securities, and documents), cashless funds, or uncertified securities may be deposited.⁸

2. *Loans*

a. Loans of Securities

The Civil Code Amendments expressly allow agreements for loans of securities between any parties.⁹ In practice, loans of securities most often take place between Russian licensed brokers and their clients in the context of “marginal deals” under federal securities law.¹⁰ While the Civil Code previously limited the subject of such loan transactions to assets “defined by generic qualities,” Russian courts did not always recognize agreements for loans of securities as valid, so allowance of such loans is now explicitly allowed.¹¹

b. Consensual Loans

In contrast with prior law, which considered loan agreements to be, by default, “real contracts” (i.e., agreements concluded after the object of a loan had passed from lender to borrower), the new law changes the default presumption for loan transactions, provided the lender is not an individual, to “consensual contracts.” This means the parties can agree that the lender will undertake to provide a loan in the future, as in the case of credit agreements.¹²

4. See GRAZHDANSKII KODEKS ROSSIOSKOI FEDERATSII [GK RF] [Civil Code] Part I, Part II.

5. See *id.* at art. 926.1.

6. See *id.*

7. See *id.*

8. *Id.* at art. 926.1, part 3.

9. See *id.* at art. 807, part 1.

10. See Federal'nyi Zakon RF O Rynke Tsennih Bumag [Federal Law of the Russian Federation on the Securities Market] ROSSIISKAIA GAZETA [Ros. Gaz.] Apr. 1996.

11. See, e.g., Resol. of Fed. Arbitrazh Court for the Urals Region, Case N 776-2490/2007, (finding loans of securities invalid); GRAZHDANSKII KODEKS ROSSIOSKOI FEDERATSII [GK RF] [Civil Code] art. 807, part 1.

12. See GRAZHDANSKII KODEKS ROSSIOSKOI FEDERATSII [GK RF] [Civil Code] art. 807, part 3.

c. Usury Interest

The Civil Code Amendments limit the interest rate on loans extended for “consumer purposes” between individuals, and between individuals and companies, who are not professional lenders.¹³ If the interest rate exceeds double the interest rate charged under similar circumstances, it can be decreased by a court to the normally-charged rate.¹⁴

3. *Factoring*

The Civil Code Amendments are intended to contribute to the ongoing development of factoring arrangements and securitization practices in Russia. The Amendments re-define “factoring,”¹⁵ aligning that term with the definition set out in the International Institute for the Unification of Private Law Convention on International Factoring (the “UNIDROIT Convention”),¹⁶ which took effect in Russia on March 1, 2015.¹⁷

Pursuant to the new Civil Code definition, the “factor” (i.e., financial agent) undertakes to perform at least two of the following functions in relation to the assigned claims:

- (1) finance the client/supplier;
- (2) maintain accounts (ledgers) relating to the claims (receivables) from customer-debtors;

13. *See id.* at art. 809, part 5.

14. *Id.*, discussed in *Information About the Average Market Values of the Total Cost of Consumer Credit (Loan)*, Bank of Russia (2019), http://www.cbr.ru/analytics/consumer_lending/inf/ (regarding information on median market cost of consumer credits), *Indicators of the Rates of the Interbank Market from Aug. 1, 2000*, Bank of Russia (2019), http://www.cbr.ru/hd_base/mkr/mkr_base/ (regarding inter-banking market rates), and *The Actual Average Rate on Loans Granted by Moscow Banks (MLACR, MLACR-IG, MLACR-B)*, Bank of Russia (2019), http://www.cbr.ru/hd_base/mkr/mkr_monthes/ (regarding actual monthly rates on loans extended by Moscow Banks).

15. GRAZHDANSKII KODEKS ROSSIOSKOI FEDERATSII [GK RF] [Civil Code] art. 824.

16. UNIDROIT Convention on Int’l Factoring (Ottawa, May 28, 1988), *available at* <https://www.unidroit.org/instruments/factoring> (defining “factoring contract” as “a contract concluded between one party (the supplier) and another party (the factor) pursuant to which:

- (a) the supplier may or will assign to the factor receivables arising from contracts of sale of goods made between the supplier and its customers (debtors) other than those for the sale of goods bought primarily for their personal, family or household use;
- (b) the factor is to perform at least two of the following functions:
 - finance for the supplier, including loans and advance payments;
 - maintenance of accounts (ledgering) relating to the receivables;
 - collection of receivables;
 - protection against default in payment by debtors;
- (c) notice of the assignment of the receivables is to be given to debtors.”).

17. *See* Federal’niy Zakon RF O Prisoedinenii Rossiyskoi Federatsii k Konventsii UNIDROIT po Mezhdunaridnim Factoringovim Operativam” [Federal Law on the Russian Federation on Acceding to the UNIDROIT Convention on Int’l Factoring] “ROSSIISKAIA GAZETA [Ros. Gaz.] May 2014.

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- (3) collect payments from the customer-debtors; or
- (4) exercise rights under collateral agreements (such as securing payments of customer-debtors) and protect the client/supplier against default on such debts.¹⁸

The factor's extension of financing to the client/supplier, which used to be a necessary element of any factoring agreement, is now only one of the factor's possible actions under the factoring agreement.¹⁹ Moreover, unless otherwise stated in the factoring agreement, the client/supplier will be liable to the factor if the assigned claim is invalid.²⁰ This amendment shifts the risk of a debtor's objection to the client/supplier.²¹ The Civil Code Amendments abolished the previous definition of a "valid claim," which had presumed the claim was valid if the client/supplier was not aware of the circumstances which allowed the customer/debtor to refuse to make payment.²²

Another change in the factoring provisions is that in cases between a customer-debtor and client/supplier over the latter's non-performance, the customer/debtor, not the factor as previously provided for, will be entitled to recover the amounts paid to the factor from the client/supplier.²³

4. *Assignment*

a. Assignment of Monetary Claims Arising from an Agreement Concluded Through Tender

The Civil Code Amendments explicitly allow the assignment of monetary claims arising from contracts concluded through a tender process.²⁴ The Amendments also state that where a supplier assigns a debtor's debt under a contract concluded through a tender, and the debtor objects to paying the debt, if the facts or circumstances underlying such refusal to pay arose *before* the debtor was notified of the assignment to a third party (such as a factor), then the debtor must raise any objections against the assignee within a reasonable time after being notified of the assignment, or he loses the right to rely on those grounds later.²⁵

b. Non-Recourse Assignment

Under the Civil Code Amendments, an assignor and assignee may agree that the assignor will not be liable for the invalidity of assigned claims, provided (1) the original agreement between the assignor and the debtor

18. See GRAZHDANSKII KODEKS ROSSIOSKOI FEDERATSII [GK RF] [Civil Code] art. 824.

19. *See id.*

20. *Id.* at art. 827.

21. *Id.*

22. *Id.*

23. *Id.* at art. 833.

24. *See id.* at art. 448, part 7 (differing from the previous law that prohibited assignment of any rights, including monetary payments, arising under such contracts).

25. *Id.*

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(which underlies the assigned claim) relates to the business activities of the assignor and assignee; and (2) the invalidity of the assigned claim is caused by either (a) circumstances the assignor was not and could not have been aware of, or (b) circumstances about which the assignor informed the assignee.²⁶

5. *Letters of Credit*

The Amendments allow for transferable letters of credit (LOCs), wherein a payee may specify a third-party beneficiary.²⁷ This is the first time such an option has been codified into Russian federal law.²⁸ In addition, the Civil Code Amendments provide for:

- 1) the ability to issue a LOC payable not only by the acceptance of a bill of exchange but also by “other means;”²⁹
- 2) a maximum of five business days for the confirming bank or issuing bank to examine the documents presented by the recipient of the payment;³⁰ and,
- 3) the right of the nominee bank not to honor uncovered LOC’s until it receives funds from the bank-issuer of the LOC.³¹

6. *Deposits in Precious Metals*

The Civil Code Amendments provide for a new type of bank account: a bank deposit in precious metals.³² This type of account previously was covered by Russian Central Bank Regulation #50 “On Executing Transactions with Precious Metals by Credit Organizations in the Territory of the Russian Federation and the Order of Banking Transactions with Precious Metals” dated November 1, 1996 (as amended). The new federal law describes such precious metals accounts and bank operations associated with opening and maintaining such accounts.³³

26. *Id.* at art. 390, part 1.

27. *Id.* at art. 870.1.

28. See Polozheniye o pravilah osushesvleniya perevoda denezhnykh sredstv [Regulation on Rules of money transfers], VESTNIK BANKA ROSSIYI, NO 34, JUNE 28, 2012 (differing from when such an option was previously mentioned only in Russian Central Bank Regulation # 383-P).

29. See GRAZHDANSKII KODEKS ROSSIOSKOI FEDERATSII [GK RF] [Civil Code] art. 871, part 1(3) (demonstrating that “other means” can include “negotiation”, used in international banking practice, i.e. payment by way of purchase of bills of exchange drawn on a different bank).

30. *Id.* at art. 871, part 2, 6.

31. *Id.* at art. 867, part 3.

32. See Federal’nyi Zakon RF O bankah I bankovsloi deyatelnosti [Federal Law on Banks and Banking Activity] ROSSIISKAYA GAZETA [Ros. Gaz.] Feb. 1996, art. 5, part 7.

33. *Id.*

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B. ANTIMONOPOLY LAW

Throughout 2018, the topics of market globalization and digitalization of the economy were actively discussed by Russian government authorities and the business community, particularly with respect to promoting competition in the digital era.³⁴ As a result of these discussions, the Federal Antimonopoly Service (the “FAS”) proposed reforms to the antimonopoly law (the “Fifth Antimonopoly Package”),³⁵ mostly related to changes in merger control regulation. The Fifth Antimonopoly Package is a complex set of large-scale amendments to antimonopoly legislation, and although currently under debate, it is expected to be passed in Spring 2019.³⁶ Once enacted, the package will significantly change the current legal regime and create necessary conditions for the FAS to meet the challenges of a modern economy. The most important features of these proposed amendments are presented below.

1. Changes in Merger Control Procedures

a. New Deadlines for Consideration of Global Transactions

Current Russian antimonopoly law limits the FAS to three months for review and consideration of an application.³⁷ This term is comprised of an initial thirty-day period and an extension for two additional months.³⁸ Theoretically, the term may be prolonged up to nine months in order to secure the applicant’s implementation of preliminary conditions, after which the FAS approves the transaction.³⁹ In practice, however, the FAS rarely utilizes the entire nine-month period.⁴⁰ In contrast, in other developed countries (e.g., the European Union and the United States), antimonopoly authorities’ consideration of large-scale transactions in digital markets, due to the complexity of their analysis, often takes much more time.⁴¹ Thus, the

34. Vladimir Putin, President of Russ., Meeting of the State Council on promoting competition (Apr. 5, 2018), <http://en.kremlin.ru/events/president/news/57205>.

35. О внесении изменений в Федеральный закон «О защите конкуренции» и иные законодательные акты Российской Федерации [On Amendments to the Federal Law “On Protection of Competition” and other legislative acts of the Russian Federation], [hereinafter Draft Fifth Antimonopoly Package] *available in Russian at* <https://regulation.gov.ru/projects#search=%D0%BE%20%D0%B7%D0%B0%D1%89%D0%B8%D1%82%D0%B5%20%D0%BA%D0%BE%D0%BD%D0%BA%D1%83%D1%80%D0%B5%D0%BD%D1%86%D0%B8%D0%B8&departments=41&npa=79428>.

36. *See id.*

37. О защите Конкуренции No.135-ФЗ (с изменениями и дополнениями) [On Protection of Competition No. 135-FZ, as amended], *Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF]* [Russian Federation Collection of Legislation] 2006, ? 31 (1 p.). Art. 3434 (Russ.) (“Competition Law”).

38. *Id.*

39. *Id.*

40. *Id.*

41. *See* Donald G. Kempf, Jr., U.S. Dept. of Justice, Merger Reviews: Do They Take Too Long?, Remarks as Prepared for Delivery at A.B.A. Antitrust Section Fall Forum (Nov. 17,

FAS has proposed extending the consideration period for cross-border mergers with competition concerns to ensure sufficient time for the required level of expertise and detailed examination of market analyses.⁴² The Fifth Antimonopoly Package provides for further extension of the review period upon the consent of the federal government.⁴³ The FAS is urging against a pre-defined length for such extension periods, preferring that it be determined by the government on a case-by-case basis.⁴⁴

b. Voluntary Commitments

According to the Fifth Antimonopoly Package, the parties to a transaction under review could provide to the FAS, at any time before a clearance is issued, their voluntary commitments to taking specific steps to ensure competition in the relevant markets (“pre-notification procedure”).⁴⁵ Current Russian law provides only for offering such commitments before the formal submission of notification.⁴⁶ The proposed initiative is designed to increase the effectiveness of remedies and obligations imposed by the competition authority on the parties to transactions.

c. “Statement of Objections” and Case Hearings for Merger Control Cases

Currently, a “statement of objections” is used only when investigating antimonopoly violations,⁴⁷ but the FAS proposes introduction of such statements into merger control procedures. The Fifth Antimonopoly Package would require that before issuing a decision, the FAS will prepare a document containing: (1) the main results of its internal analysis, with reference to relevant facts and conclusions; and (2) the proposed conditions being considered by the FAS on the acquirer and other transaction parties in order to ensure competition.⁴⁸ If the FAS ultimately adopts statements of objections for merger control, such statements would be followed by hearings for which procedures will be established by the FAS.⁴⁹ While the details of these procedures are unclear, it is expected that the rules would be similar to those used in antimonopoly investigations. Introduction of these procedural options would promote dialogue between the business

2017), <https://www.justice.gov/opa/speech/file/1012156/download>; *Merger control procedures*, EUROPEAN COMMISSION (Aug. 13, 2013), http://ec.europa.eu/competition/mergers/procedures_en.html.

42. Fifth Antimonopoly Package, *supra* note 35.

43. *Id.*

44. *Id.*

45. *Id.*; see also Article 6(2) of Council Reg. (EC) No. 139/2004 (showing that such commitments are largely similar to the existing procedure in European competition regulation, which allows merging companies to offer their own remedies, thus minimizing the risks that imposed remedies will be unenforceable).

46. Competition Law, *supra* note 37, Art. 3434.

47. *Id.*

48. Fifth Antimonopoly Package, *supra* note 35.

49. *Id.*

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community and the FAS and lead to better market analysis and merger control decisions.

2. *New Mechanisms for Market Assessment and Ensuring Competition*

a. *New Approach to Market Assessment*

Another substantial development in the Fifth Antimonopoly Package concerns the use of “big data” by global companies that may create significant market-entry barriers for their competitors and thus potentially restrict competition in Russia.⁵⁰ When examining the impact of transactions involving parties with access to “big data,” the FAS has deviated from its conventional examination of market power, which was based only on existing market shares of competitors and overlap of the transaction parties’ activities.⁵¹ Instead, the FAS will now assess the influence of the parties’ digital platforms, big data, and network effects on general market conditions in Russia.⁵²

For example, in the *Bayer/Monsanto* case,⁵³ where the FAS considered the transaction between two major agricultural producers in the Russian market, it applied a new method for analyzing a transaction’s effects on markets.⁵⁴ Rather than adopting the traditional approach, the FAS repeatedly stressed that the transaction in question actually had nothing to do with particular markets, such as the markets for seeds or crop protection products, where the parties’ products overlapped in Russia or even globally.⁵⁵ Instead of analyzing the effects of the transaction in overlapping markets, the FAS focused on evaluating the knowledge, innovations, platforms, algorithms, and technologies possessed by each company that, when combined, might enable them to influence market conditions, create entrance barriers for other participants, and dictate terms for further development of the agro-industrial complex in future decades.⁵⁶

Another example is the *Uber/Yandex* case,⁵⁷ wherein the FAS considered a transaction between the two main taxi aggregators in the Russian market. Issuing a conditional decision, the FAS found that although taxi aggregators

50. *See id.*

51. *See id.*

52. *Id.*

53. Решение ФАС России №ИА/28184/18 ПРЕДПИСАНИЕ по итогам рассмотрения ходатайства компании «Бай...» от 20 апреля 2018 г. [Decision of the FAS of Russia № IA / 28184/18 Prescription on the basis of the consideration of the petition of the company “Bai” (Apr. 20, 2018), *available in Russian* at <https://br.fas.gov.ru/ca/upravlenie-kontrolya-agropromyshlennogo-kompleksa/ia-28184-18/>.

54. *Id.*

55. *Id.*

56. *Id.*

57. Решение ФАС России №АГ/82030/17 ПРЕДПИСАНИЕ (Яндекс) от 24 ноября 2017 г. [Decision of the FAS of Russia №AG / 82030/17 Prescription (Yandex) of November 24, 2017] (Nov. 24, 2017), *available in Russian* at <https://br.fas.gov.ru/ca/upravlenie-regulirovaniya-svyazi-i-informatsionnyh-tehnologiy/ag-82030-17/>.

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do not render transport services themselves, they organize trips by connecting drivers with passengers, and given the large number of users of their applications, the aggregators nevertheless hold serious market power.⁵⁸ The resulting effect of a merger upon digital networks was a particularly important factor for the FAS in determining the market power of the parties.⁵⁹

b. Technology Transfer

In order to serve the needs of a digital economy, the FAS has proposed controversial new mechanisms to ensure healthy competition. The Fifth Antimonopoly Package introduces the mandatory transfer of technologies, or provision of non-discriminatory access to intellectual property rights, to third parties with respect to certain unique technologies and data instead of other traditionally issued behavioral or structural remedies.⁶⁰

If the parties to a transaction fail to comply with remedies ordered by the FAS and evade the transfer of technologies or access to intellectual property rights to third parties, the FAS may file a lawsuit to mandate the violator's IP being utilized by any third party necessary to ensure robust market competition ("compulsory licensing").⁶¹ Moreover, the FAS may file a lawsuit to prohibit or limit the sale of products in Russia by the party that has not fulfilled the obligations imposed by the FAS.⁶²

These controversial provisions are still under serious discussion between the FAS and the business and legal communities.⁶³ It remains to be seen how the FAS will "motivate" parties to undertake the ordered actions after the amendments are passed.

58. *See id.*

59. It is proposed by the Fifth Antimonopoly Package to define "network effects" as "dependence of customer value of the product on (i) a number of network users (direct network effects), or (ii) increase of customer value for one network group, in the case of increase of a number of network users of another network group and vice-versa (indirect network effects/network externalities)." Draft Fifth Antimonopoly Package, *supra* note 35. A growing number of global transactions in innovative digital markets will trigger such changes in the FAS' enforcement practices and influence future antimonopoly analyses. Thus, in order to keep abreast of the times, it is hoped that the FAS will follow this new approach and take into account all peculiarities and elements of digital markets. *See id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. ЗАКЛЮЧЕНИЕ об оценке регулирующего воздействия на проект федерального закона «О внесении изменений в Федеральный закон «О защите конкуренции» [Conclusion on the assessment of the regulatory impact on the draft federal law "On Amendments to the Federal Law "On Protection of Competition"], Sept. 18, 2018, Russian Ministry of Economic Development No. 26742-SSh / D26i, *available in Russian at* <https://regulation.gov.ru/projects#search=%D0%BE%20%D0%B7%D0%B0%D1%89%D0%B8%D1%82%D0%B5%20%D0%BA%D0%BE%D0%BD%D0%BA%D1%83%D1%80%D0%B5%D0%BD%D1%86%D0%B8%D0%B8&departments=41&npa=79428>.

c. Trustee and Expert Involvement

If remedies related to technology transfer and usage of IP rights are adopted, the FAS could also institute the appointment of an “authorized person” (similar to the European concept of a “trustee”) to monitor and assist the implementation by transaction parties of the FAS’s preliminary conditions or remedies imposed upon them.⁶⁴ The criteria for selecting such trustees would have to be determined prior to the enactment of such a requirement.

The FAS also may involve experts on assessing markets and on cutting-edge technology transfer regulation. Such expert input is particularly necessary considering the ongoing digitalization of markets and the ensuing complexity of economic relationships, and as utilized on a case-by-case basis, would improve the quality of analyses undertaken by the authorities.

C. FOREIGN INVESTMENT LAW

In 2018, the Russian Government continued to enact legislation to implement bilateral investment treaty (BIT) guidelines that were initially set out in September 2016 (the “2016 BIT Guidelines”).⁶⁵ In May, the Duma enacted amendments to the 1999 Law on Foreign Investments,⁶⁶ making three major changes to foreign investment law.

1. “Investor” Redefined

The definition of “investor” has been changed substantially by the Foreign Investment Amendments.⁶⁷ The concept of a “controlled entity,” which is used in Russian civil, antimonopoly, and bankruptcy law, was introduced to foreign investment law.⁶⁸ The result is that foreign companies ultimately controlled by Russians are no longer treated as foreign investors. Foreign nationals who hold Russian citizenship (i.e., dual citizens) are excluded from the definition of “foreign investor” and thus not entitled to

64. Commission notice on remedies acceptable under Council Regulation No 139/2004 and under Commission Regulation, No. 802/2004.

65. О заключении международных договоров Российской Федерации по вопросам поощрения и защиты инвестиций [Guidelines for conclusion of treaties of the Russian Federation on promotion and protection of investments. Annex to Resolution of the Government of the Russian Federation] No. 992, Sept. 30, 2016, *available at* <http://pravo.gov.ru/proxy/ips/?docbody=&nd=102412234>.

66. Федеральный закон от 31.05.2018 № 122-ФЗ “О внесении изменений в отдельные законодательные акты Российской Федерации в части уточнения понятия “иностранный инвестор” [Federal Law of the Russian Federation on Amendments in certain legislative acts of the Russian Federation in terms of clarifying the concept of “foreign investor”] No. 122-FZ, May 31, 2018, *available at* <http://publication.pravo.gov.ru/Document/View/0001201806010001> (“the Foreign Investment Amendments”).

67. *Id.*

68. *See id.*

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protection against the Russian Government for their investments in Russia.⁶⁹ In the past, UNCITRAL tribunals have allowed dual nationals to sue one of their citizenship states, and currently, at least one UNCITRAL arbitration is pending against Russia by a Russian-French businessman.⁷⁰ Whether Russia's new exclusion of dual citizens from foreign investment protection will persuade UNCITRAL to change its own policy remains to be seen, but in the meantime, Russia's law on this subject differs from UNCITRAL's past decisions.

2. *“Investment” to Exclude Indirect Investment*

The second major change enacted by the Foreign Investment Amendments is the narrowed definition of “investment” to exclude indirect investments.⁷¹ Thus, “investments” are only those made *directly* and *individually*.⁷² While several current Russian BITs (e.g., a 1989 BIT with the Netherlands, a 1989 BIT with Canada, and a 1995 BIT with Sweden) explicitly cover both direct and indirect investments, most Russian BITs include very broad definitions of “investment” (e.g., “every kind of assets”) without specifying whether they may be direct and/or indirect.⁷³

Notably, in *Sedelmayer v. Russia*,⁷⁴ Russia argued unsuccessfully for a restrictive interpretation of “investments,” as that term was used in a 1989 BIT with Germany, to mean only direct investments. A requirement that

69. *Id.* (demonstrating that by changing the definition of “foreign investor,” Russian authorities primarily intended to prevent Russian companies and citizens from “gaining . . . unfounded advantages” from rules that were intended to benefit non-Russian investors); *see also* “Explanatory note to the federal bill ‘On amendment of several legislative acts of the Russian Federation’”, Dec. 25, 2017, *available at* <http://sozd.parliament.gov.ru/download/542F0D4E-962B-4663-A532-9F0CB0BB936C> (differing from before this change when Russians who held a second citizenship could have an advantage over regular Russian nationals by claiming privileges and guarantees available only to “foreign” parties).

70. Sebastian Perry, *Decision on dual nationals is partially set aside*, GLOBAL ARB. REV., Apr. 26, 2017, <https://globalarbitrationreview.com/article/1140052/decision-on-dual-nationals-is-partially-set-aside>.

71. О заключении международных договоров Российской Федерации по вопросам поощрения и защиты инвестиций [Guidelines for conclusion of treaties of the Russian Federation on promotion and protection of investments. Annex to Resolution of the Government of the Russian Federation] No. 992, Sept. 30, 2016, *available at* <http://pravo.gov.ru/proxy/ips/?docbody=&nd=102412234>.

72. *Id.*

73. *See e.g.* Can.-U.S.S.R., Nov. 20, 1989, 852 U.N.T.S. 215 (demonstrating an agreement for the promotion and reciprocal protection of investments); Neth.-U.S.S.R., Oct. 5, 1989, 2242 U.N.T.S. 175 (demonstrating an agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Union of Soviet Socialist Republics); U.K.-U.S.S.R., Apr. 6, 1989, 1670 U.N.T.S. 27 (demonstrating an agreement for the promotion and reciprocal protection of investments); Ger.-U.S.S.R., June 13, 1989, 1707 U.N.T.S. 171 (demonstrating an agreement concerning the promotion and reciprocal protection of investments).

74. Mr Franz Sedelmayer v. Russia, SCC Case, Award (Jul. 7, 1998), Section 4.1 at 36-37, *available at* <https://www.italaw.com/sites/default/files/case-documents/ita0757.pdf>.

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investments be direct had never been reflected in Russian law until the 2016 BIT Guidelines.⁷⁵ But on the basis that adversarial arguments made by an investor's country of nationality should not be held against that investor,⁷⁶ and that the Russian Constitution provides that an international treaty trumps domestic law when the two conflict,⁷⁷ the new restriction on investments as only "direct and individual" should not apply to already-concluded Russian BITs containing broader definitions of investments. But new investors from foreign states that are not parties to current Russian BITs should bear this change in mind.⁷⁸

3. *Availability of Arbitration for BIT-Related Disputes*

With respect to dispute resolution, the 2016 BIT Guidelines provide that disputes between a state and an investor shall be resolved in a domestic court or via an *ad hoc* or institutional arbitration.⁷⁹ Likewise, the Foreign Investment Amendments contain a blanket provision allowing resort to international arbitration only if it is expressly set out in the relevant BIT or a federal law.⁸⁰ While neither the Guidelines nor the Foreign Investment Amendments refers to or provides for permanent investments courts, Russia has not rejected the possibility of establishing such supranational bodies. In July 2017, the UNCITRAL Working Group III was mandated to consider

75. О заключении международных договоров Российской Федерации по вопросам поощрения и защиты инвестиций [Guidelines for conclusion of treaties of the Russian Federation on promotion and protection of investments. Annex to Resolution of the Government of the Russian Federation] No. 992, Sept. 30, 2016, available at <http://pravo.gov.ru/proxy/ips/?docbody=&nd=102412234>.

76. Enron Corp. and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Decision on Jurisdiction (Jan. 14, 2004) at 48, available at <https://www.italaw.com/sites/default/files/case-documents/ita0290.pdf>.

77. KONSTITUTSIA ROSSIJSKOI FEDERATSII [Konst. RF] [Constitution], art. 15 Sec. 4.

78. Russia is not alone in changing its approach to BITs and foreign investments laws. For example, in 2018, Ecuador sent proposals to several states and invited them to renegotiate cancelled treaties, and in 2017, India terminated many of its BITs which were about to expire, including the one with Russia. In essence, these states have started building a new investment framework by setting up more rigid requirements and criteria in respect of foreign investors and investments. *Ecuador Begins Talks Over New BITs*, GLOBAL ARB. REV., Feb. 23 2018, available at <https://globalarbitrationreview.com/article/1159285/ecuador-begins-talks-over-new-bits>. See *Recent developments in the international investment regime*, UNCTAD IIA ISSUES NOTE https://unctad.org/en/PublicationsLibrary/diaepcbinf2018d1_en.pdf; *India — Bilateral Investment Treaties*, UNCTAD, <http://investmentpolicyhub.unctad.org/IIA/CountryBits/96>.

79. О заключении международных договоров Российской Федерации по вопросам поощрения и защиты инвестиций [Guidelines for conclusion of treaties of the Russian Federation on promotion and protection of investments. Annex to Resolution of the Government of the Russian Federation] No. 992, Sept. 30, 2016, available at <http://pravo.gov.ru/proxy/ips/?docbody=&nd=102412234>.

80. Федеральный закон от 31.05.2018 № 122-ФЗ "О внесении изменений в отдельные законодательные акты Российской Федерации в части уточнения понятия "иностранний инвестор" [Federal Law of the Russian Federation on Amendments in certain legislative acts of the Russian Federation in terms of clarifying the concept of "foreign investor"] No. 122-FZ, May 31, 2018, available at <http://publication.pravo.gov.ru/Document/View/0001201806010001>.

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an initiative of several EU countries and Canada to reform the current system of investor-state dispute resolution.⁸¹ In its Note of September 5, 2018, the UNCITRAL Secretariat proposed a list of concerns and a framework for further discussion of this subject.⁸²

D. ARBITRATION

Three court decisions in 2018 regarding arbitration proceedings were especially noteworthy in their rulings. These decisions pertained to insolvency creditors challenging foreign arbitral awards against an insolvent debtor; the enforceability of arbitral awards without an original or certified copy of the arbitration agreement; and the arbitrability of disputes related to procurement contracts with state-owned entities.

1. *Grain Export LLS v. LLC RIF*⁸³

Grain Export LLS, a Seychelles company, had sought a trial court order to enforce its arbitral award under the Arbitration Rules of the Grain and Feed Trade Association (“GAFTA”) against defendant RIF LLC, a Russian company (“RIF”).⁸⁴ The trial court granted the enforcement, but thereafter, insolvency proceedings were initiated against RIF.⁸⁵ RIF’s insolvency manager and one of its insolvency creditors appealed to the cassation court, arguing that enforcement of the award would violate Russian public policy because the debt under the arbitral award was allegedly a sham.⁸⁶

The Supreme Court upheld the ruling granting enforcement, finding that while generally, an insolvency manager and insolvency creditor may challenge the enforcement of an arbitral award if such enforcement would violate the rights of the insolvency creditor, in order to establish such a violation, the insolvency creditor must demonstrate *prima facie* evidence of the invalidity of the underlying debt.⁸⁷ Specifically, the insolvency creditor must establish that there is reasonable cause to believe that the parties’ conduct at arbitration was aimed at siphoning off the bankruptcy debtor’s property and/or abusing rights in other ways.⁸⁸ In the specific dispute at issue, the applicants failed to make such a case.⁸⁹

81. Rep. of the U.N. Comm’n on Int’l Trade Law, U.N. Doc. A/72/17 (Jul. 3–21, 2017).

82. U.N. Comm’n on Int’l Trade Law, Possible Reform of investor-State dispute settlement (ISDS), Note by the Secretariat, U.N. Doc. A/CN.9/WG.III/WP.149 (Sept. 5, 2018).

83. *Grain Export LLS v. LLC RIF*, Case: 132-1593/2016, Supreme Court of the Russian Federation, Commercial Division (Feb. 28, 2018), available at https://kad.arbitr.ru/PdfDocument/7cd45912-5047-4513-bdea-f0a4bedbf2c5/121e375b-8a89-46e0-8d8a-6680382d4c7d/A32-1593-2016_20180228_Opredelenie.pdf.

84. *Id.*

85. *Id.*

86. *Id.* at 5.

87. *Id.*

88. *Id.*

89. *Id.*

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2. *Korean National Insurance Corporation (DPRK) v. VTB Insurance*⁹⁰

In *Korean National Insurance Corporation (DPRK) v. VTB Insurance*, the claimant applied to the Moscow City Commercial Court for enforcement of twelve *ad hoc* arbitral awards rendered in London in a dispute arising from reinsurance contracts.⁹¹ The claimant was not able to present to the court either the originals or certified copies of reinsurance contracts with arbitration clauses.⁹² Both the trial and appeals courts refused to enforce the arbitral awards, holding that enforcement of arbitral awards in the absence of the originals or certified copies of the underlying contracts violates the right to a fair trial, which is a fundamental principle of public policy.⁹³ Rejecting the claimant's argument that the parties' performance of the underlying contracts essentially demonstrated the existence and validity thereof, the courts ruled that performance of the contracts does not prove that the parties entered into valid arbitration agreements.⁹⁴

3. *JSC Mosteplosetstroy v. JSC Mosinzhproekt*⁹⁵

In 2013, JSC Mosteplosetstroy (MTP) and JSC Mosinzhproekt (MIZ) entered into a construction contract for work in the Moscow Metro system⁹⁶ pursuant to public procurement requirements.⁹⁷ Years later, under the contract's arbitration clause, MTP initiated and won arbitral proceedings to recover payment for its completed work. MTP sought to enforce the arbitral award in court.

MIZ opposed the enforcement of the award, stating that the underlying dispute was not arbitrable under Russian law because the parties had entered into the contract "in the public interest" pursuant to public procurement procedures.⁹⁸ Specifically, MIZ argued that the contract was "in the public

90. *Korean National Insurance Corporation (DPRK) v. VTB Insurance*, Case: A40-60583/16-68-517, Supreme Court of the Russian Federation, Commercial Division (Jun. 20, 2018), available at https://kad.arbitr.ru/PdfDocument/d9ad5ac7-f5a6-4565-99af-63a2993a4e4d/b91fc703-2d28-45c1-bc2e-1728a52f6f38/A40-60583-2016_20180620_Opredelenie.pdf.

91. *Id.*

92. *Id.*

93. *Id.* The courts also noted that the claimant failed to provide documentary support for the authority of the signatory of the respective arbitration agreements. *Id.* at p. 16.

94. The Supreme Court denied the claimant's request to transfer the appeal to the Supreme Court's Judicial Board. *Id.* at p. 4.

95. *JSC Mosteplosetstroy v. JSC Mosinzhproekt*, Supreme Court of the Russian Federation July 11, 2018, A40-165680/2016 (Russ.), available at https://kad.arbitr.ru/PdfDocument/692507fe-d800-4152-b90f-77af1b4a9444/d3cee1bc-9974-4791-948f-e62880bb8672/A40-165680-2016_20180711_Opredelenie.pdf (demonstrating that the Supreme Court denied the claimant's request to transfer the appeal to the Supreme Court's Judicial Board).

96. *Id.*

97. Federal Law of the Russian Federation on Procurement of Goods, Work and Services by Certain Types of Legal Entities, [FZ] [Federal Law] 2011, No. 223.

98. The state court must refuse to enforce the award if the dispute considered by the arbitral tribunal may not be the subject of arbitral proceedings in accordance with federal law. Commercial Procedural Code, art. 239(4) (Russ.).

interest” because MIZ was wholly owned by the city of Moscow and therefore was acting in the interests of the state in entering the contract with MTP. Furthermore, MIZ alleged that the work under the construction contract was paid for by government budgetary funds. The basis for MIZ’s arguments was the prevailing position of Russian state courts at the time, under which disputes arising out of contracts entered pursuant to public procurement procedures are not arbitrable.⁹⁹ But the trial and cassation courts rejected MIZ’s arguments and agreed to enforce the arbitral award, finding no reason to refuse enforcement.¹⁰⁰

On appeal to the Supreme Court, this ruling was upheld.¹⁰¹ The Supreme Court emphasized that disputes related to public procurement contracts involving state-owned entities are of a civil law nature, and Russian law has never limited the arbitrability of disputes between state-owned companies, even when the underlying contract between them is subject to public procurement procedures. Therefore, such disputes are, as a general rule, arbitrable.¹⁰² The Supreme Court noted, however, that a claimant nevertheless may prove that the dispute involves a public policy element if, for example, the contract involves the spending of government budgetary funds, which may result in rejecting the enforcement of an arbitral award.¹⁰³ In this case, MIZ alleged but failed to prove that government budgetary funds were involved.

II. UKRAINE

Ukraine’s goal of improving its legal system and laws to match those of the progressive international community has driven its legal reform efforts over the last several years.¹⁰⁴ Addressing the need for legal reform to accommodate globalization and digitalization, these efforts generally have been aimed at increasing transparency and implementing global best practices. The main problem facing Ukraine has been its obsolete, post-Soviet legal foundation, which can no longer support progressive legal reform.¹⁰⁵

99. See, e.g., *Kazan (Volga) Federal University v. LLC Promsnab*, Povolzhsky District Commercial Court Oct. 6, 2015, ¶72-2703/2015, Resolution, available at https://kad.arbitr.ru/PdfDocument/d63d8e4c-dd98-4fff-a258-774639f8967f/8aeb2d9b-2901-4e8c-a48d-89447659e209/A72-2703-2015_20151006_Postanovlenie_kassacionnoj_instancii.pdf

100. *Id.* at 3.

101. *JSC Mosteplosetstroy v. JSC Mosinzhprouekt*, ¶40-165680/2016 (Russ.).

102. *Id.* at 12-13.

103. *Id.* at 14.

104. See Balázs Jarábik, Thomas de Waal, *Ukraine Reform Monitor: March 2018*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, <https://carnegieendowment.org/2018/03/27/ukraine-reform-monitor-march-2018-pub-75909>; see also Vox Ukraine Editorial Board, *Three Years of Reforms. Has Ukraine Reformed Enough to Survive?*, VOXUKRAINE, <https://voxukraine.org/longreads/three-years-of-reforms/index-en.html>.

105. Paul Babeie, *Ukraine’s Transition from Soviet to Post-Soviet Law: Property as a Lesson in Failed Regulation*, 3 EAST/WEST; JOURNAL OF UKRAINIAN STUDIES (2016), <https://www.ewjus.com/index.php/ewjus/article/viewFile/167/61>.

The importance of attracting both domestic and foreign financial investment in Ukraine means that laws and rules for businesses should be clearly stated, transparent, functional, and include workable enforcement mechanisms.¹⁰⁶ Ongoing reforms are expected to continue modernizing Ukrainian law to encourage more investment.

A. CORPORATE AND FOREIGN INVESTMENT LAW

In 2018, the Ukrainian Parliament (*Verkhovna Rada*) passed several important laws and amendments pertaining to Ukrainian companies and foreign investors, which have produced a more attractive and transparent legal environment that is consistent with modern legal systems globally. First, the outdated regulations for limited liability companies (LLCs)¹⁰⁷ were abolished by the new Law on Limited and Additional Liability Companies (the “UKR LLC Law”), which instituted crucial changes regarding corporate governance and LLCs as legal entities;¹⁰⁸ second, joint stock companies (JSCs) were subject to amendments by several legal acts regulating JSCs and the stock market in general;¹⁰⁹ third, the High Anti-Corruption Court was created; and fourth, changes to currency regulation were adopted. Details on the changes in each of these categories are as follows:

1. *Limited Liability Companies*

a. Shareholders/Members Agreements

Under the UKR LLC Law, for the first time Shareholders’ or Members’ Agreements (called “Corporate Agreements” in Ukraine) may be created by LLC members to distribute rights and obligations among themselves and to agree on the rules for their participation in and governance of the LLC, e.g., buy-sell triggers, lock-up periods, special rules regarding voting rights.¹¹⁰ Such agreements should render the corporate governance of LLCs more flexible and more attractive to investors.

106. See *Reforms in Ukraine: Progress in 2017 & Priorities for 2018*, CABINET OF MINISTERS OF UKRAINE, <https://www.kmu.gov.ua/storage/app/media/reform%20office/book-web-smallest-size.pdf>.

107. See *Zakon Ukrainy Pro Hospodarski Tovarystva* [The Law of Ukraine on Business Entities, the Commercial Law], No. 1576-XII (Sept. 19, 1991), <http://zakon.rada.gov.ua/laws/show/1576-12> [hereinafter *The Commercial Law*].

108. See *Zakon Ukrainy Pro Tovarystva Z Obmezhenoyu Ta Dodatkovoyu Vidpovidalnistiu* [The Law of Ukraine on Limited and Additional Liability Companies, the UKR LLC Law], No. 2275-VIII (Feb. 6, 2018), <http://zakon.rada.gov.ua/laws/show/2275-19> [hereinafter *The UKR LLC Law*].

109. See *Zakon Ukrainy Pro Vnesennia Ymin Do Deyakikh Zakonodavchyykh Aktiv Ukrainy Shchodo Sprosbchennia Vedennia Biznesu Ta Zaluchennia Investytsij Emitentamy Tsinnyykh Paperiv* [The Law of Ukraine on Amendment of Several Laws of Ukraine Regarding Simplification of Doing Business and Investment Attraction by Issuers of Securities], No. 2210-VIII (Nov. 16, 2017), <http://zakon.rada.gov.ua/laws/show/2210-19#n715>.

110. *The UKR LLC Law*, *supra* note 108, art. 7 (In a holdover from Soviet law, such agreements were not regulated before this change).

b. Corporate Governance

New rules were set out for the corporate governance of Ukrainian LLCs:¹¹¹

- (1) Significantly decreasing the amount of mandatory information in a charter, which no longer must replicate multiple standard legal provisions or be revised for minor adjustments to a corporate structure or governance model.¹¹² The necessary provisions in an LLC's charter are now only the name of the company, the management bodies of the company, their powers and decision-making procedures, and terms and conditions for the interest-holders regarding their participation in the LLC;¹¹³
- (2) Abolishing the maximum number of 100 participants,¹¹⁴ which has resulted in the reorganization into LLCs of many private JSCs which were operating, *de facto*, more like LLCs than public companies;¹¹⁵
- (3) Allowing General Participant's Meetings ("GPMs") to be held by video conference;
- (4) Allowing LLCs to create Supervisory Boards and to delegate certain powers of the GPM to them;¹¹⁶
- (5) Establishing the liability of an executive body's and a supervisory board's members for losses borne by the company, but only if such losses occurred due to their fault;¹¹⁷
- (6) Making audit committees optional rather than mandatory;
- (7) Providing that an LLC's financial statements may be requested and obtained by the owners of 10% of the company's charter capital;
- (8) Allowing issuance of irrevocable powers of attorney to individuals to represent the LLC in corporate matters;¹¹⁸
- (9) Setting out rules for certain operations regarding membership interests (e.g., acquisition, disposal, inheritance, pledge, dividend distribution);¹¹⁹
- (10) Allowing debt-to-equity swaps to be used by LLCs to effectively restructure its debts;¹²⁰
- (11) Introducing detailed procedures for absentee- and poll-voting, thus simplifying decision-making by a sole-member LLC;¹²¹ and,

111. *Id.* § 4.

112. *Id.* §2, art. 11.

113. *Id.* §2, art. 11(5).

114. *The Commercial Law*, *supra* note 107, art. 50.

115. *The UKR LLC Law*, *supra* note 108, §6, art. 52.

116. *Id.* §4, art. 38.

117. *Id.* §4, art. 40. The criteria of such fault are not stipulated by the LLC Law and will be decided by courts on a case-by-case basis. *Id.*

118. *Id.* §1, art. 8.

119. *Id.* § 3.

120. *Id.* § 8.

121. *The UKR LLC Law*, *supra* note 108, § 4, art. 35–37.

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(12) Introducing the concepts of substantial and interested party transactions (which previously were applicable only to JSCs), with accompanying rules for their approval and execution.¹²²

2. *Joint Stock Companies*

(a) JSCs now will be categorized as “public” or “private” depending on whether their shares are publicly offered and/or listed on a stock exchange (public) or not (private). Previously, the distinction was based ineffectively on the number of shareholders in the JSC;¹²³

(b) Information disclosure procedures at the Ukrainian stock market were liberalized;¹²⁴

(c) JSC supervisory boards’ independence was strengthened by providing that matters of its exclusive competence cannot be subject to the control (or shared competence) of the shareholders’ meeting;¹²⁵ and,

(d) The introduction of a quorum restriction under which shares of the JSC that are owned by a legal entity controlled by the JSC are not considered for quorum determination and do not participate in voting.¹²⁶

The new amendments on LLCs and JSCs are not without their drawbacks. For example, participants holding more than 50% of an LLC’s authorized capital can withdraw from the company only with the approval of the remaining participants.¹²⁷ The approval of a “material” deal requires holding a general members’ or shareholders’ meeting, even for minor transactions.¹²⁸ Nonetheless, the expected results of the amendments to LLC and JSC laws are greater flexibility and owner security in the Ukrainian business and stock markets. In order to take advantage of the new changes, JSCs and LLCs should bring their charters and by-laws into compliance with these amendments within the time limits set by the new laws (June 17, 2019 for LLCs,¹²⁹ January 1, 2019 for public JSCs and banks, and January 1, 2020 for other JSCs¹³⁰).

122. *Id.* § 5, art. 44–46.

123. See *Zakon Ukrainy Pro Aktsionerni Tovarystva* [*The Law of Ukraine on Joint-Stock Companies, the UKR JSC Law*], No. 514-VI (Sept. 17, 2018), <http://zakon.rada.gov.ua/laws/show/514-17#n925> [hereinafter *The UKR JSC Law*].

124. See *Zakon Ukrainy Pro Tsinni Papery I Fondovyy Rynok* [*the Law of Ukraine on Securities and Stock Market*], No. 3480-IV (Feb. 23, 2006), <http://zakon.rada.gov.ua/laws/show/3480-15#n389>; at art. 39.

125. *The UKR JSC Law*, *supra* note 123, art. 33.

126. *Id.* art. 42-1.

127. *The UKR LLC Law*, *supra* note 108, art. 24.

128. *Id.* art. 44.

129. *Id.* pt. 5, § 8.

130. *The UKR JSC Law*, *supra* note 123, §2(13).

3. *Creation of the High Anti-Corruption Court*

The Law on the High Anti-Corruption Court (the “HACC Law”) is an important instrument for the protection of investors’ interests.¹³¹ Praised by Ukraine’s international partners and the global business community, the HACC Law created a new judicial structure aimed at fighting corruption in Ukraine. The purpose of the new Court is to hear corruption cases initiated by the National Anti-Corruption Bureau of Ukraine, the government authority undertaking corruption investigations.¹³² The High Anti-Corruption Court (“HACC”) is scheduled to begin its work in Spring 2019.¹³³

In order to ensure the independence and fairness of the HACC, a Public Council of International Experts is to be created¹³⁴ to background-check all candidates nominated as judges on the HACC.¹³⁵ This process will be transparent, with information on each stage of the candidates’ review and progression toward judgeship publicly available online.¹³⁶ It is hoped that the HACC will effectively contribute to a better climate for business in Ukraine, including for potential foreign investors.

4. *Changes in Currency Regulation*

Currency regulation reforms in the June 2018 amendments “On Currency and Currency Operations” (the “Currency Law”)¹³⁷ established new rules for the Ukrainian currency market. Taking effect on February 7, 2019, these changes provide for better, clearer, and more efficient regulation of currency operations, especially in cross-border transactions. The Currency Law is an overdue replacement for the previous statute, which was adopted about twenty-five years ago and aimed at protecting the national currency.

The main amendments introduced by the Currency Law are:

131. HACC Law, Law No. 2447-VIII, issued Jun. 7, 2018, effective Jun. 14, 2018, *available at* <http://zakon.rada.gov.ua/laws/show/2447-19/ed20180607> (Ukrainian only).

132. *Id.*

133. As per communication of the Chairman of the High Qualification Commission of Judges of Ukraine (HQCJU), there remain a few technical formalities to accomplish before launch of the High Anti-Corruption Court. For instance, special legislation on creation of such court should be adopted. Such legislation (which includes inter alia bylaw adopted by HQCJU) should specify in detail the procedures for nomination of the judges, etc. *See Chairman of the HQCJU’s interview*, VKKSU.GOV.UA, *available at* <https://www.vkksu.gov.ua/ua/about/golowa-wkks-siergij-koziakow-antikorupcijnij-sud-sam-po-sobi-nie-wirishit-problemu-korupcii-w-ukraini> (Ukrainian only).

134. HACC Law, *supra* note 131, art. 9, pt. 1.

135. *Id.* art. 8, pt. 4.

136. *Id.* Art. 8, part 7.

137. Law on Currency and Currency Operations, No. 2473-VIII, (Jun. 21, 2018), (Ukr.), [hereinafter Currency Law], *available at* <http://zakon.rada.gov.ua/laws/show/2473-19>.

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- (1) Elimination of a requirement for corporate bylaws to include a provision on obtaining an individual license for external financial operations;¹³⁸
- (2) Allowance of Ukrainian legal entities and private persons to open bank accounts outside of Ukraine;¹³⁹
- (3) Elimination of the requirement to declare costs in foreign currency placed abroad;¹⁴⁰
- (4) Elimination of currency control for money paid to non-residents of Ukraine if the amount is below UAH 150,000.00 (approx. US\$5,400 or EUR 4,700);¹⁴¹
- (5) Cancellation of the requirement for Ukrainian residents to pay international contracts to which they are party within 180 days of the date of execution. The National Bank of Ukraine may set another time limit, but such contracts cannot be terminated based on violation of the payment term;¹⁴²
- (6) Allowance of currency receipts to be saved without converting half of them into Ukrainian currency (as was required previously);¹⁴³ and
- (7) Elimination of the requirement to register international contracts with the National Bank of Ukraine.¹⁴⁴

In the future, new trends in Ukrainian legal reform may include deregulation, which is expected to boost the development of strong national and regional economies.¹⁴⁵ This trend should continue in the near future, as should the digitalization of public services, both of which would further the goal of shortening currently lengthy procedures and making them more transparent, making the Ukraine a more favorable environment for economic development.

B. ARBITRATION

In December 2017, long-awaited arbitration reforms were introduced in Ukraine in the form of amendments to the Civil Procedure Code, the Commercial Procedure Code, and the Law of Ukraine on International

138. Decree of the Cabinet of the Ministers of Ukraine, No. 15-93 (Feb. 19, 1993), (Ukr.) [hereinafter CMU Decree], *available at* <http://zakon.rada.gov.ua/laws/show/15-93>.

139. Currency Law, *supra* note 137, art. 4, pt. 3.

140. CMU Decree, *supra* note 138, art. 9, pt. 1.

141. *Id.* art. 13, pt. 1.

142. Currency Law, *supra* note 137, art. 13, pt. 3.

143. Ruling of the Board National Bank of Ukraine, No. 65 (Jun. 12, 2018), *available at* <https://bank.gov.ua/document/download?docId=71584909>.

144. Order of the President of Ukraine, No. 734/99, (Jun. 27, 1999), *available at* <http://zakon.rada.gov.ua/laws/show/734/99> (“On Regulation of the Procedure of the Credits Receipt by Residents, Loans in Foreign Currency Landed by Non-Residents and Application of the Fines for the Violation of the Currency Legislation”).

145. *See* Reforms in Ukraine: Progress in 2017 & Priorities for 2018, CABINET OF MINISTERS OF UKRAINE, <https://www.kmu.gov.ua/storage/app/media/reform%20office/book-web-small-est-size.pdf>.

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Commercial Arbitration (together, the “Arbitration Amendments”).¹⁴⁶ These changes substantially upgraded the Ukrainian arbitration regime at the same time that extensive judicial reform was undertaken, including formation of a new Supreme Court. Below are summarized some of the major developments and case law related to the reforms.

1. *New Court Jurisdiction for Arbitration-Related Matters*

The Arbitration Amendments reduced the maximum number of court instances for arbitration-related matters (e.g., enforcement or setting aside of arbitral awards or interim measures to aid arbitration) from four to two. Now, the appellate courts are the courts of first instance for such matters,¹⁴⁷ and the new Supreme Court hears the appeals from those courts.¹⁴⁸ Parties can no longer file cassation appeals before going to the Supreme Court, which normally were available after appellate proceedings.¹⁴⁹

Notably, cases regarding enforcement of *foreign* arbitral awards are to be considered in the first instance exclusively by the Kyiv Court of Appeals.¹⁵⁰ The Arbitration Amendments thus have eliminated district courts from the process altogether, largely due to district court judges not always having the time or expertise to deal with arbitration matters appropriately. This streamlining of arbitration-related procedures should improve their efficiency and effectiveness, enhance the quality of judicial decisions regarding arbitrations, and mitigate corruption risks.

2. *Enforceability of Arbitration Agreements*

Article 22(3) of the updated Commercial Procedural Code of Ukraine¹⁵¹ provides that any inaccuracies in an arbitration agreement’s text or any doubts regarding its validity and enforceability shall be interpreted by courts in favor of its operation. This provision is aimed at countering a popular formalistic philosophy among Ukrainian judges under which they often have refused to enforce arbitration clauses unless the precise name of the arbitral institution was provided in the arbitration clause.¹⁵² In a recent decision, the Supreme Court applied Article 22(3), concluding that the exact designation

146. Law of Ukraine on Amendments to the Commercial Procedure Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Proceedings of Ukraine and other laws, No. 2147-VII (Dec. 15, 2017) (Ukr.) <http://zakon.rada.gov.ua/laws/show/2147-19>.

147. The Civil Procedure Code of Ukraine, art. 23(2) (Nov. 4, 2018) (Ukr.), <http://zakon.rada.gov.ua/laws/show/1618-15> (explaining that the appellate courts will remain appeals courts for other matters, but for the specific purpose of arbitration matters they will perform the functions of trial courts).

148. *Id.* art. 24(2).

149. *Id.* art. 389(3)(1).

150. *Id.* article 23(3)(2).

151. Commercial Procedure Code of Ukraine (Aug. 28, 2018) (Ukr.), <http://zakon.rada.gov.ua/laws/show/1798-12#n1663>.

152. *See, e.g.*, Resolution of the Supreme Economic Court of Ukraine, Case No. 910/8259/13, 27, (Nov. 2013), <http://reyestr.court.gov.ua/Review/35691495>.

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of the institution is not necessary when the parties obviously intended to refer their disputes to a specific institution and no other institution can be inferred from the contract.¹⁵³

3. *Court-Ordered Interim Measures and Preservation/Taking of Evidence*

The Arbitration Amendments empower Ukrainian courts to order interim measures in support of international arbitrations regardless of the seat of arbitration¹⁵⁴ and to preserve or take evidence for arbitral proceedings.¹⁵⁵ Previously, Ukraine had allowed court-ordered interim measures only at the stage of recognition and enforcement of arbitral awards, and the preservation or taking of evidence was completely unavailable. Although the Law of Ukraine on International Commercial Arbitration had mentioned “interim measures,”¹⁵⁶ there were no attendant procedures, making these provisions impossible to utilize.

The new provisions already have been used by Ukrainian courts to grant interim measures aiding arbitration.¹⁵⁷ For example, in September 2018, the Ukrainian Supreme Court upheld interim measures in support of a GAFTA arbitration ordered by the Appellate Court of the Odessa Region. Notably, the Supreme Court refused to review the merits even on a *prima facie* basis, saying that such considerations are the purview of the GAFTA tribunal.¹⁵⁸ In another case, the Kyiv Appellate Court rejected interim measures for an ICAC¹⁵⁹ arbitration, reasoning, *inter alia*, that the requested measures were not proportionate and not related to the arbitral claims.¹⁶⁰

The Arbitration Amendments did not incorporate provisions on enforcement of arbitral interim measures akin to Articles 17H and 17I of the UNCITRAL Model Law.¹⁶¹ Although some Ukrainian case law applies the New York Convention to such measures,¹⁶² the matter is unsettled because,

153. Resolution of the Supreme Court of Ukraine, Case No. 904/4384/17 (Apr. 17, 2018), ¶32, <http://reyestr.court.gov.ua/Review/73702604>.

154. Civil Procedure Code at art. 149(3).

155. *Id.* at arts. 116(7), 84(11).

156. The Law of Ukraine on International Commercial Arbitration (Dec. 15, 2017), art. 9, <http://zakon.rada.gov.ua/laws/show/4002-12>.

157. *See* Resolution of the Supreme Court, Case No. 785/1018/18, Sept. 24, 2018, <http://reyestr.court.gov.ua/Review/76812069>.

158. *Id.*

159. International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry

160. *See* Ruling of the Kyiv Court of Appeal, Case No. 125/2018 (Sept. 17, 2018), <http://reyestr.court.gov.ua/Review/76647326>.

161. UNCITRAL Model Law on International Commercial Arbitration 1985, art. 17H, 17I, http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (amended in 2006).

162. *See* Resolution of the Supreme Court, Case No 757/5777/15-?, (Sept. 19, 2018) http://www.reyestr.court.gov.ua/Review/76596637?fbclid=IwAR1aUd0i67g8UbN7xQkz9uQkRjY_p2IZHultXPaHHa9y9A4RdkxqMpxqMc.

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in those cases, the New York Convention's applicability was not challenged by the parties.¹⁶³

4. *Voluntary Enforcement of Arbitral Awards, Interests and Penalties*

Certain Ukrainian foreign currency regulations complicate voluntary compliance with arbitral awards. Under these regulations, banks required a writ of execution from Ukrainian companies to process foreign currency payments in compliance with arbitral awards in favor of foreign companies.¹⁶⁴ Prior to the Arbitration Amendments, such a writ could be received only after enforcement proceedings were completed. But the amended Civil Procedure Code now enables a debtor to obtain a writ of execution in an expedited manner through a voluntary enforcement procedure. Specifically, a debtor may file an application for voluntary enforcement which must be heard within ten days of its submission, by a single judge reviewing only the arbitrability¹⁶⁵ of the dispute and any relevant matters of public policy.¹⁶⁶ Since the Arbitration Amendments were enacted, at least one such enforcement has taken place: the Kyiv Appellate Court allowed voluntary enforcement of a London Court of International Arbitration award requiring the debtor to compensate the creditor for its arbitration costs and legal fees.¹⁶⁷

In the past, Ukrainian courts were reluctant to enforce interest and penalties, which had to be calculated under conditions prescribed in the arbitral award. The updated Civil Procedure Code resolved this issue by establishing that the enforcement court shall calculate the sums up to the date of its decision, while sums accrued afterward shall be defined by the Ukrainian enforcement officers.¹⁶⁸ Although the relevant provisions do not enter into force until January 1, 2019,¹⁶⁹ the Supreme Court began applying this approach in late 2018.¹⁷⁰

163. *Id.*

164. *See* Decree of the Cabinet of Ministers of Ukraine, No. 15-93 (Feb. 19, 1993) (discussing the system of currency regulation and control). This decree and related regulations were repealed as of February 7, 2019 and the new Law of Ukraine on currency and currency operations and new regulations of the National Bank of Ukraine entered into force. Whether banks would require a writ of execution under the new currency regulations is as yet unclear.

165. Unlike in the U.S., in Ukraine, "arbitrability" is a narrow concept defining whether a particular type of dispute can be referred to arbitration.

166. *See* Civil Procedure Code at art. 480.

167. *See* Ruling of the Kyiv Appellate Court, Case No. 796/111/2018 (May 21, 2018), <http://reyestr.court.gov.ua/Review/74121260>.

168. Civil Procedure Code at art. 479 (4)-(5).

169. Civil Procedure Code Concluding Provisions at ¶2.

170. *See* Ruling of the Grand Chamber of the Supreme Court, Case No. 759/16206/14-? (May 15, 2018), <http://reyestr.court.gov.ua/Review/74630452>.

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5. *Redefined Scope of Arbitrability*

Corporate disputes were not arbitrable in Ukraine until the amended Commercial Procedure Code provided that corporate disputes arising out of a contract can be referred to arbitration, but only under an arbitration agreement that is between the company and all of its participants/shareholders.¹⁷¹ Further, the amended Commercial Procedure Code explicitly allows for the arbitration of civil aspects of disputes related to (1) the privatization of property, (2) competition matters, and (3) disputes arising from public procurement contracts.¹⁷²

171. Commercial Procedure Code art. 22(2).

172. *Id.*

South Asia/Oceania & India

KAVITA MOHAN, AMY TOLBERT HARRIS, ASEEM CHAWLA,
CHANDNI JAVERI, JONATHAN BLANK, NIKHIL NARAYANAN,
SHRUTI SINGH, TARANG SHASHISHEKAR, SUPRATIM CHAKRABORTY,
SUMANTRA BOSE, NAMRATA PATODIA RASTOGI,
KATHERINE MADDOX DAVIS, DANIEL R. COOPER

This article surveys significant legal developments in South Asia and Oceania during the calendar year 2018.¹

I. The Indian Insolvency REGIME

The Insolvency and Bankruptcy Code, 2016 (IBC) came into force in late 2016 to overhaul India's corporate insolvency regime and address India's rising non-performing assets.² The IBC provides for a "UK-style" administration process known as the corporate insolvency resolution process (CIRP), which can be initiated on the occurrence of a default of INR 100,000 or more³ by a financial creditor or operational creditor⁴ or by the corporate debtor itself,⁵ as well as mandatory liquidation if the CIRP fails.⁶

During the CIRP, the corporate debtor's board ceases to exercise its powers and a court appointed administrator called a "resolution

* The committee editors were Kavita Mohan, Of Counsel, GDLSK LLP (Washington D.C.); Amy Tolbert Harris, GDLSK LLP (Washington D.C.); Aseem Chawla, Founder, ASC Legal, Solicitors & Advocates (New Delhi, India); Chandni Javeri, ASC Legal, Solicitors & Advocates (New Delhi, India); and Jonathan Blank, North American Representative, Surana & Surana International Attorneys (Chennai, India). Section I was authored by Nikhil Narayanan, Partner, Shruti Singh, Partner, and Tarang Shashishekar, Senior Associate, Khaitan & Co (New Delhi, India); Section II was authored by Supratim Chakraborty, Partner, and Sumantra Bose, Senior Associate, Khaitan & Co (Kolkata, India); Section III was authored by Namrata Patodia Rastogi, Senior Consultant, Institute for Sustainable Communities; Section IV was authored by Katherine Maddox Davis, Associate, Gibson, Dunn & Crutcher (Washington D.C.); Section V was authored by Daniel R. Cooper, Attorney at Law, Cooper & Kurz (Stamford, CT).

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

2. Rajeswari Sengupta & Harsh Vardhan, *Non-Performing assets in Indian Banks: This time it is different*, INDIRA GANDHI INSTITUTE OF DEV. RES. (Sept. 2017), <http://www.igidr.ac.in/pdf/publication/WP-2017-019.pdf>.

3. Insolvency & Bankr. Code, No. 31 of 2016, INDIA CODE (2016), vol. 1, § 4.

4. *Id.* § 6.

5. *Id.* § 10.

6. *Id.* § 33.

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professional” (RP)⁷ manages the corporate debtor in accordance with instructions of a committee comprising the secure and unsecured financial creditors of the corporate debtor (COC).⁸ The RP invites resolution plans for revival of the corporate debtor from eligible bidders.⁹ The COC votes to approve the most viable plan, which is thereafter submitted for approval before the National Company Law Tribunal (NCLT).¹⁰ The CIRP concludes on the earliest of: (i) approval of a plan by NCLT; (ii) expiration of 180 or 270 days after commencement of the CIRP; or (iii) COC deciding to liquidate the corporate debtor.¹¹

Regulatory changes and case law have resulted in a number of developments in 2018 in relation to the Indian insolvency regime.

A. IBC AND RELATED REGULATIONS

In 2018, IBC and the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations) were amended multiple times¹² to, amongst others, provide for the following changes:

Bidder Eligibility: In 2017, IBC was amended to disqualify certain classes of persons (persons in control of companies under default, criminal offenders, etc.) from bidding during the CIRP (Section 29A).¹³ But the wide impact of this provision led to protracted litigation and unintended disqualifications since its introduction. In June 2018, exemptions from some provisions of Section 29A were granted to “pure play” financial entities, bidders that have acquired assets under IBC, and bidders of small-scale industries.¹⁴ In a recent order that analyzed the scope of Section 29A, the Supreme Court held that the corporate veil may be pierced to assess whether a bidder is eligible under Section 29A and that “control” of a company for the purpose of Section 29A eligibility will not include negative control or veto rights.¹⁵ Section 29A has disqualified many promoters from bidding for their

7. *Id.* § 5.27.

8. *Id.* § 23 and 28

9. *Id.* § 25.2(h).

10. *Id.* §§ 30.4, 60.2.

11. *Id.* §§ 31, 5.14, 12.3, 33.2.

12. IBC has been amended through the (i) Insolvency and Bankruptcy Code (Amendment) Act, 2018 on 18 January 2018; (ii) Insolvency and Bankruptcy (Amendment) Ordinance, 2018 on 6 June 2018; and (iii) Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 on 17 August 2018. The CIRP Regulations have been amended 4 times in 2018 on 5 October 2018, 4 July 2018, 27 March 2018 and 6 February 2018. *Amendments to Regulations for Corporate Insolvency Resolution – Too Prescriptive or necessary for increasing efficiency?*, KHAITAN & CO. (July 26, 2018), [https://www.khaitanco.com/PublicationsDocs/Khaitan%20&%20Co-Ergo-News flash-26July2018CIRP.pdf](https://www.khaitanco.com/PublicationsDocs/Khaitan%20&%20Co-Ergo-News%20flash-26July2018CIRP.pdf).

13. Insolvency and Bankr. Code (Amendment) Ordinance, 2017, No. 7 of 2017.

14. Insolvency and Bankr. Code (Amendment) Ordinance, 2018, No. 6 of 2018, at §22, 37.

15. *Arcelormittal India Pvt. Ltd. v. Satish Kumar Gupta*, (2018) 9402 SCJ 74 (India).

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companies and its constitutionality has been challenged before the Supreme Court in an ongoing case.¹⁶

Withdrawal: Previously, an application to commence CIRP could only be withdrawn if allowed by the Supreme Court under its inherent powers.¹⁷ But in June 2018, IBC was amended to provide for withdrawal of CIRP with 90 percent financial creditor approval.¹⁸

Consent Threshold: In June 2018, while specifying that IBC's objective is resolution over liquidation, the threshold for plan approval and other key decision was reduced from 75 percent to 66 percent vote share of the COC.¹⁹ The voting threshold for all other decisions was reduced to 51 percent.²⁰

Prescriptive Process: Under IBC's original scheme, the process to invite and approve resolution plans was left to the discretion of the COC and the RP. But the market-developed process has now been codified into a two-step process involving submission of a non-binding expression of interest followed by a binding plan.²¹

Contingent Claims: While IBC provides the regime for creditors to file their claims with the RP, it does not prescribe any treatment for claims not filed during CIRP. This has led to significant uncertainty about whether unfiled pre-CIRP claims are capable of being extinguished under the plan. This uncertainty increased due to a recent judicial order in which IBC's appellate authority held that a contingent liability claimant may choose to step out of the insolvency resolution process and not file a claim.²²

Previously, creditors were allowed to file their claims with the RP until approval of the plan by the COC.²³ Therefore, while submitting its plan, a bidder could not know the aggregate amount of debt that needed to be settled under the plan. In July 2018, this deadline was shortened to ninety days after commencement of CIRP.²⁴

B. DEBT RESTRUCTURING

With a view to simplifying the regulatory mechanism for debt restructuring, in February 2018, the Reserve Bank of India (RBI) replaced all existing mechanisms for debt restructuring with a single mechanism to be

16. *Swiss Ribbons Pvt. Ltd. v. Union of India*, (2019) 99 SCC 3 (India).

17. *Lokhandwala Kataria Constr. Private Limited v. Nisus Finance & Inv. Managers LLP*, 2017, 9279 Gen. S.R. & O. 1 (India).

18. Insolvency and Bankr. Code (Amendment) Ordinance, 2018 at §9.

19. *Id.* at §23, 16, 21.

20. *Id.* at §15.

21. Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2018, Gazette of India, pt. III sec. 4 (July 4, 2018).

22. *Andhra Bank v. F.M. Hammerle Textile Ltd.*, (2018) 61 NCLAT 3 (India).

23. Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Gazette of India, pt. III sec. 4 (November 3, 2016), §12.2

24. Insolvency Resolution Process for Corporate Persons (Third Amendment) at § 11 (b).

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implemented immediately upon default.²⁵ If the default is unable to be resolved under this mechanism within the prescribed time period, the defaulter is necessarily required to be referred for CIRP.²⁶

A recently instituted committee on stressed assets resolution submitted its report in July 2018 recommending a five-pronged approach for resolution of stressed assets including: establishment of a reconstruction company as well as an investment fund for acquisition and turnaround of stressed assets, and setting up of a trading platform for trading loan assets to increase liquidity in the banking system.²⁷ These recommendations have not been implemented yet.²⁸

C. OTHER LAWS

Securities Regulations: In 2018, a number of reliefs and measures were introduced in relation to acquisition of listed corporate debtors under a resolution plan, including a simplified delisting process,²⁹ a longer time period for meeting the minimum public shareholding requirements,³⁰ and exemption from prior consent (of the securities regulator or shareholders) for specified corporate actions.³¹

Tax: Debt write-off may lead to incidence of minimum alternate tax (MAT) on the corporate debtor. In January 2018, the Indian government issued a clarification to mitigate this liability by allowing corporate debtors to reduce the total loss brought forward, including unabsorbed depreciation from the book profit for the purposes of levy of MAT.³² This relief is not applicable to pre-IBC debt restructuring.³³

25. Resolution of Stressed Assets – Revised Framework, 2018, Reserve Bank of India, RBI/2017-18/131, ¶ 1 (Feb. 12, 2018).

26. RBI has prescribed 180 days for resolution of defaulters with loans exceeding INR 20,000,000,000. RBI has not prescribed the time period for resolution of smaller accounts as yet. *Id.* ¶ 8.

27. Sunil Mehta, Committee Chairman; Rajnish Kumar, Committee Member; PS Jayakumar, Committee Member; and C Venkat Nageswar, Committee Member; *Committee Report on Resolution of Stressed Assets Project Sashakt*, (July 2, 2018).

28. See Ashwini Mehra, Sashakt will not solve the NPA problem (August 6, 2018) (<https://www.livemint.com/Opinion/vu3BuEstOWodcv5G2MUFJ/Sashakt-will-not-solve-the-NPA-problem.html>).

29. Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2009, Gazette of India, pt. III sec. 4 (June 10, 2009).

30. Securities Contracts (Regulation) Rules, 1957, 576 Gen. S.R. & O. 19 (India).

31. Sudhir Bassi *et al.*, *Amendments to SEBI Circular on Schemes of Arrangements by Listed Entities*, LEXOLOGY (Jan. 10, 2018), <https://www.lexology.com/library/detail.aspx?g=9b1401f6-a8c9-44d2-a286-63ff520dafd1>.

32. Press Release, Cent. Bd. of Direct Taxes, Relaxation in the provisions relating to levy of Minimum Alternate Tax (MAT) in case of companies against whom an application for corporate insolvency resolution process has been admitted under the Insolvency and Bankruptcy Code (Jan. 6, 2018) (on file with Government of India).

33. *See id.*

D. CONCLUSION

The Indian insolvency regime is undergoing rapid change and even as some issues are addressed, others arise or persist. Further changes to the legal regime are bound to take place in the coming year, whether in the form of amendments, statutes, promulgations of new regulations, or new case law.

II. Indian Data Privacy Legal Framework

A. INTRODUCTION

The current Indian legal framework governing data privacy and protection in India is fragmented across legislations, such as the Information Technology Act of 2000, the India Penal Code of 1860, and sectoral regulations, all of which have proven to be inadequate to protect personal data. But recently there have been several legislative and judicial developments in this sphere.

B. LEGISLATIVE DEVELOPMENTS

1. *The Personal Data Protection Bill of 2018*

On July 27, 2018, the draft Personal Data Protection Bill of 2018 (Bill) was presented to the Ministry of Electronics and Information Technology by a Committee of Experts formed under the Chairmanship of Justice B. N. Srikrishna.³⁴ The Bill seeks to regulate the processing of personal data of data principals (i.e. natural persons) by entities and individuals, including the State (termed as “data fiduciaries” akin to data controllers) or by entities and individuals, including the State engaged by a data fiduciary for the same (termed as “data processors”).³⁵ Data fiduciaries and data processors are required to comply with certain regulations while processing personal data such as purpose and collection limitation and ensuring adequate security safeguards.³⁶

2. *Proposed Data Protection Authority and Enhanced Rights*

A Data Protection Authority of India has been proposed to implement the provisions of the Bill, as well as to adjudicate penalties under the Bill through a separate adjudicating wing.³⁷ The Bill envisages principles such as privacy by design and transparency in the processing of personal data.³⁸ The Bill also provides data principals with rights in relation to personal data, such as the right to access, edit, and seek portability.³⁹

34. The Personal Data Protections Bill, 2018, Acts of Parliament, 2018 (India) *available at* https://meity.gov.in/writereaddata/files/Personal_Data_Protection_Bill%2C2018_0.pdf.

35. The Personal Data Protections Bill, 2018, Acts of Parliament, 2018 § 2.1(a)-(b) (India).

36. *Id.* §§ 4–6.

37. *Id.* § 49, § 68.

38. *Id.* §§ 29–30.

39. *Id.* §§ 24–26.

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3. *Data Localization – The Buzzword*

An important obligation under the Bill is the requirement to store at least one copy of personal data on a server or data center located in India.⁴⁰ Further, the Central Government may by notification designate certain personal data as critical personal data that will be mandatorily required to be processed in a server or data center located in India.⁴¹ It may be pertinent to note that the Government of India seems to be inclined toward data localization in several spheres. For example, the Reserve Bank also mandated system providers that are registered under the Payment and Settlement Systems Act of 2007 to localize payment system data by October 15, 2018.⁴²

4. *Protecting Digital Health Data*

Another draft legislation, the Digital Information Security in Healthcare Act was released on March 21, 2018 by the Ministry of Health and Family Welfare, inviting comments from the public.⁴³ The legislation aims to regulate the transmission, storage, and processing of digital health data.⁴⁴

C. JUDICIAL DEVELOPMENTS

1. *Privacy a Fundamental Right*

In its landmark judgement in *Justice K.S. Puttaswamy v. Union of India*, the Supreme Court of India held that the right to privacy is a fundamental right under the Constitution of India.⁴⁵ The Supreme Court recognized that the right to privacy forms part of the fundamental right to life and liberty guaranteed under the Constitution of India⁴⁶. Further, informational privacy in relation to data of an individual has been held to be a part of the right to privacy.⁴⁷

2. *The Aadhaar Decision*

In a separate ruling under the above-mentioned case, the Supreme Court also upheld the constitutionality of the Aadhaar (Targeted Delivery of Financial and other Subsidies, Benefits, and Services) Act of 2016 (Act).⁴⁸

40. *Id.* § 40(1).

41. *Id.* § 40(2)-(3).

42. Letter from Nada S. Dave, Chief General Manager-in-charge, Reserve Bank of India, to all Indian banks, (Apr. 6, 2018), available at <https://rbi.org.in/Scripts/NotificationUser.aspx?Id=11244&Mode=0>.

43. Digital Information Security in Healthcare, Act, 2017, No. Z-18015/23/2017-eGov, Acts of Parliament, 2017 (India).

44. *Id.* at Chapter IV.

45. *Justice K.S. Puttaswamy (Retd) v. Union of India*, (2012) 494 SCC 1, 255 (India).

46. *Id.*

47. *Id.* at 37.

48. *Justice K.S. Puttaswamy (Retd) v. Union of India Writ Petition (Civil) 494 of 2012*, delivered on 26 September 2018.

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The Act provides the legislative framework for the Aadhaar scheme, which is India's biometric-based unique identity project aimed at ensuring that only persons eligible for certain governmental benefits, subsidies and services receive them after digital authentication of their biometric information.⁴⁹ But the Supreme Court struck down certain provisions of the Act for violating the right to privacy, among other grounds.⁵⁰

D. CONCLUSION

The right to privacy in India has now been given judicial backing. It appears that a proper legislative framework adequately safeguarding the same is imminent. This paradigm shift not only has major implications for the lives of millions of Indians, it may be a game changer for businesses, both domestic and foreign.

III. Australia, New Zealand, And India Climate Change and Clean Energy Update

A. AUSTRALIA

Australia had a tumultuous year in relation to climate policy. The National Energy Guarantee (NEG), the signature climate policy proposed by the Turnbull administration as a pathway to meet Australia's commitment under the Paris Agreement, was abandoned due to inadequate support from conservatives.⁵¹ The inability to pass climate legislation, the Turnbull government's third attempt to do so, became a politically charged issue that led to the toppling of his government, bringing Prime Minister Scott Morrison in as his replacement.⁵²

The NEG was a broad energy policy mechanism that aimed to provide both energy reliability while at the same time reduce greenhouse gas emissions.⁵³ It mandated energy suppliers and retailers to guarantee a minimum amount of power (energy reliability) at certain average emissions

49. AADHAAR (Targeted Delivery of Financial and Other Subsidies, Benefits, and Services) Act, 2016, No. 18, Acts of Parliament, 2016 (India).

50. Justice K.S. Puttaswamy (Retd) v. Union of India Writ Petition (Civil) 494 of 2012, delivered on 26 September 2018, at page 546.

51. Damien Cave & Isabella Kwai, *Australian Prime Minister Abandons Climate Targets, Bowing to Party Pressure*, N.Y. TIMES (Aug. 20, 2018), <https://www.nytimes.com/2018/08/20/world/australia/turnbull-energy-emissions-climate-change.html>.

52. *Id.*; Adrian Beaumont, *How the Hard Right Terminated Turnbull, only to See Scott Morrison become PM*, THE CONVERSATION (Aug. 24, 2018, 2:09 AM), <http://theconversation.com/how-the-hard-right-terminated-turnbull-only-to-see-scott-morrison-become-pm-102036>.

53. Brittnay Hope Flamik, *'The NEG' Aims to Be Australia's Latest Energy Solution. Will It Work?*, N.Y. TIMES (Aug. 9, 2018), <https://www.nytimes.com/2018/08/09/world/australia/neg-energy-emissions.html>.

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levels that would ensure meeting Australia's commitments under the Paris Agreement.⁵⁴

The new Morrison administration has confirmed that there will be no policy to replace or extend the existing Renewable Energy Target (RET) policy in Australia.⁵⁵ It has also confirmed that as the largest exporter of coal, the current administration will continue to support coal as "renewable energy cannot replace baseload coal power."⁵⁶

In spite of the lack of a national agenda, several states in Australia are continuing to pursue renewable energy. The announcement by the state of Victoria of the "outcome of its renewable energy auction and new support for household solar and storage," and the state of South Australia "outlining the details of its home battery scheme," is encouraging.⁵⁷ State leadership will be critical in the absence of a national climate agenda.⁵⁸

B. NEW ZEALAND

As part of the Paris Agreement, New Zealand announced its Nationally Determined Contribution as reducing emissions by 30 percent below 2005 levels by 2030.⁵⁹ New Zealand also has a long-term target of reducing greenhouse gas emissions to 50 percent below 1990 levels by 2050, which was announced in 2011.⁶⁰ The government is, however, reviewing its 2050 target as part of a Zero Carbon Bill that it is considering.⁶¹ The Zero Carbon Bill (which is currently in consultation phase and the government plans to enforce it by June 2019) would reduce emissions to net zero by 2050

54. *Australia's Energy Transformation*, CLEAN ENERGY COUNCIL, <https://www.cleanenergy.council.org.au/advocacy-initiatives/energy-transformation> (last visited Feb. 14, 2019); Katherine Murphy, *What is the national energy guarantee and why is it taking so long?*, THE GUARDIAN, July 25, 2018, available at <https://www.theguardian.com/australia-news/2018/jul/26/what-is-the-national-energy-guarantee-and-why-is-it-taking-so-long>; Charis Chang, *What is the National Energy Guarantee and Will it Reduce Power Prices?*, NEWS.COM.AU (Aug. 16, 2018), <https://www.news.com.au/technology/environment/climate-change/what-is-the-national-energy-guarantee-and-will-it-reduce-power-prices/news-story/252c6aea07a501bd1d206f2056321a76>.

55. Marija Maisch, *Australian energy policy vacuum beyond 2020 officially confirmed*, PV MAG. (Sept. 25, 2018), <https://www.pv-magazine.com/2018/09/25/australian-energy-policy-vacuum-beyond-2020-officially-confirmed/>.

56. Paul Karp, *Australian government backs coal in defiance of IPCC climate warning*, GUARDIAN (Oct. 8, 2018), <https://www.theguardian.com/australia-news/2018/oct/09/australian-government-backs-coal-defiance-ipcc-climate-warning>.

57. Louis Brailsford *et al.*, *Powering Progress States Renewable Energy Race*, CLIMATE COUNCIL (2018), <https://www.climatecouncil.org.au/wp-content/uploads/2018/10/States-Renewable-Energy-Report.pdf>.

58. *Id.*

59. *About New Zealand's emissions reduction targets*, MINISTRY FOR THE ENV'T (June 6, 2018), <http://www.mfe.govt.nz/climate-change/what-government-doing/emissions-reduction-targets/about-our-emissions-reduction>.

60. *Id.*

61. Hon James Shaw, *First Important Step towards the Zero Carbon Act*, BEEHIVE (Dec. 18, 2017), <https://www.beehive.govt.nz/release/first-important-step-towards-zero-carbon-act>.

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and place the country on a path to a low emission and climate resilient future.⁶² As part of this bill, New Zealand is establishing an independent Climate Change Commission; and New Zealand's Emission Trading Scheme (NZETS), first enforced in 2008, is being strengthened as well.⁶³

The New Zealand Productivity Commission, an independent organization that advises on increasing New Zealand's productivity, released its Low Emissions Economy report in August of this year,⁶⁴ which will be used to inform the government on its Zero Carbon Bill.⁶⁵ The Report outlines the opportunities and challenges that New Zealand faces in becoming a low-emissions economy, highlighting that early action is needed. It further emphasizes that the country's economy must shift in three fundamental ways: end the burning of fossil fuels and transition to use of electricity and other low-emission energy sources; undertake efforts for new afforestation; and make structural and methodological changes to agricultural production.⁶⁶

C. INDIA

India made significant strides in its renewable energy policy and energy efficiency policy in 2018, with the announcement of new policies and measures, as well as strengthening several of its existing ones.

1. *Energy Efficiency Policy*

Under the leadership of the Bureau of Energy Efficiency, India developed its first State Energy Efficiency Index.⁶⁷ The aim is to “track progress in managing states’ and India’s energy footprint[,] encourage healthy competition among Indian states[,] provide a foundation to set state-specific” energy efficiency targets, and spearhead “program implementation at the state and local level[.]”⁶⁸ The states that have been leaders (or front-

62. *Id.*

63. *The transition to a low-emissions and climate-resilient Aotearoa New Zealand*, MINISTRY FOR THE ENV'T (Aug. 13, 2018), <http://www.mfe.govt.nz/climate-change/what-government-doing/emissions-reduction-targets/about-our-emissions-reduction>.

64. *Low-emissions economy: Final report*, N.Z. PRODUCTIVITY COMMISSION (Aug. 2018), https://www.productivity.govt.nz/sites/default/files/Productivity%20Commission_Low-emissions%20economy_Final%20Report_FINAL.pdf.

65. Hon James Shaw, *Productivity Commission's path to a low carbon emissions economy*, BEEHIVE (Sept. 4, 2018), <https://www.beehive.govt.nz/release/productivity-commissions-path-low-emissions-economy>.

66. *Id.*

67. *State Energy Efficiency Preparedness Index*, ALLIANCE FOR AN ENERGY EFFICIENT ECON. (July 2018), http://www.aeee.in/state-ee-index/wp-content/uploads/2018/08/State-EE-Preparedness-Index-FINAL_July2018.pdf; Utpal Bhaskar, *To combat climate change, India comes up with first energy efficiency index*, LIVEMINT (July 31, 2018), <https://www.livemint.com/Industry/wSLu5BSfzVuEDYYTRz9mLI/To-combat-climate-change-India-comes-up-with-first-state-en.html>.

68. *State Energy Efficiency Preparedness Index*, *supra* note 67, at vi.

runners) in energy efficiency implementation in this inaugural edition of the index are “Andhra Pradesh, Kerala, Maharashtra, Punjab, and Rajasthan.”⁶⁹

2. *Renewable Energy*

The Modi government announced that it had met its target of 100% Rural Electrification of Indian villages (that was set in 2015) ahead of schedule.⁷⁰

In late 2017, the Modi government announced the Saubhagya Scheme to provide electricity to all households in rural and urban areas by December 2018.⁷¹ To encourage states to meet their goals early under this scheme, the Modi government announced a INR one hundred crore award and a INR fifty lakh award for employees of discoms (distribution companies).⁷²

To incentivize farmers in remote areas, the government of India announced the KUSUM Scheme.⁷³ The Scheme provides solar water pumps to farmers to make them independent of the grid while enabling them to sell their surplus electricity to discoms and generate additional income.⁷⁴ Aspects of the scheme call for the “installation of grid-connected solar power plants each with capacity of up to 2 MW in the rural areas”; the “installation of standalone off-grid solar water pumps to fulfill irrigation needs of farmers not connected to grid”; the “solarization of existing grid-connected agriculture pumps to make farmers independent of grid supply and also enable them to sell surplus solar power generated to DISCOM and get extra income”; and the “solarization of tube-wells and lift irrigation projects of Government sector.”⁷⁵

India announced the establishment of a National Energy Storage Mission (NESM). This mission aims to establish India as a leader in the energy storage sector by “creating an enabling policy and regulatory framework that encourages manufacturing, deployment, innovation and further cost reduction.”⁷⁶ Based on a joint report by NITI Aayog and Rocky Mountain

69. *Id.*

70. *After 100% electrification, focus on generation, distribution, pricing*, HINDUSTAN TIMES (Apr. 30, 2018), <https://www.hindustantimes.com/editorials/after-100-electrification-focus-on-generation-distribution-pricing/story-vAltkFTufWBOKlvmvpU8sL.html>.

71. *PM launches ‘Saubhagya’ scheme to provide power to all*, HINDU BUS. LINE (Sept. 25, 2017), <https://www.thehindubusinessline.com/news/pm-launches-saubhagya-scheme-to-provide-power-to-all/article9872678.ece>.

72. *States to get Rs 100 cr award for being efficient under Saubhagya scheme*, ECON. TIMES (Oct. 15, 2018, 7:21 PM), <https://economictimes.indiatimes.com/industry/energy/power/states-to-get-rs-100-cr-award-for-being-efficient-under-saubhagya-scheme/articleshow/66223925.cms>.

73. Press Release, Press Information Bureau Government of India Ministry of New and Renewable Energy, Kusum Scheme – harnessing solar power for rural India (Mar. 15, 2018) (on file with author).

74. *Id.*

75. *Id.*

76. *National Energy Storage Mission*, PRESS INFO. BUREAU GOV'T OF INDIA MINISTRY OF NEW AND RENEWABLE ENERGY (Aug. 9, 2018), <http://pib.nic.in/newsite/PrintRelease.aspx?relid=181698>; see also Andy Colthorpe, *India's draft National Energy Storage Mission focuses on reducing costs of domestic EV batteries*, ENERGY STORAGE NEWS (Aug. 13, 2018, 2:34 PM), <https://www>

Institute the draft focuses on a three-stage solution approach: creating an environment for battery manufacturing growth; scaling supply chain strategies; and scaling of battery cell manufacturing.⁷⁷

IV. India Permits Capital Punishment for Rape of Female Children

In an era when most states disallow or strictly limit capital punishment, India expanded its capital-eligible crimes.⁷⁸ The 2018 Criminal Law Amendment Ordinance amended Indian Penal Code 376 to raise the minimum sentence for rape of a female less than 16 years old to 20 years old, and to permit a lifetime sentence; and added Section 376AB, which permits capital punishment for the rape of a female less than 12 years old.⁷⁹ While the amendments respond to an undeniable crisis, analysts question whether this law will deter the crime.

The first known death sentence issued under Section 376AB was handed down to a 19-year old man convicted of raping an infant.⁸⁰ India is home to more child sexual abuse victims than any other nation.⁸¹ According to a 2007 study commissioned by India's Ministry of Women and Child Development, 53 percent of children surveyed were sexual abuse victims.⁸² Thereafter, rapes reported in India rose from 25,000 in 2012 to 38,000 in 2016.⁸³

Rape in India has received persistent international coverage since the 2012 gang rape and murder of a twenty-three year old female college student by six men in New Delhi.⁸⁴ In response, the Indian government commissioned

.energy-storage.news/news/indias-draft-national-energy-storage-mission-focuses-squarely-on-reducing-c.

77. *India's Energy Storage Mission: A Make-in-India Opportunity for Globally Competitive Battery Manufacturing*, NITI AAYOG AND ROCKY MOUNTAIN INST. (2017), http://niti.gov.in/writereaddata/files/document_publication/India-Energy-Storage-Mission.pdf.

78. Ministry of Law and Justice (Legislative Department) *The Criminal Law (Amendment) Act, 2018*, Gazette of India, pt. II sec. 1 (Aug. 11, 2018); Press Release, Amnesty Int'l, *The Death Penalty in 2017: Facts and Figures* (Apr. 12, 2018) (on file with author).

79. *The Criminal Law (Amendment) Act*, at 2.

80. Harley Tamplin, *Teenager Given Death Penalty for Raping Seven-Month-Old Baby in India*, METRO (July 23, 2018, 6:07 PM), <https://metro.co.uk/2018/07/23/teenager-given-death-penalty-raping-seven-month-old-baby-india-7750340/>.

81. *Why an MP Wants India to Talk About Child Sex Abuse*, BBC (Dec. 5, 2015), <https://www.bbc.com/news/world-asia-india-34971791>.

82. Geeta Pandey, *Abuse of Indian Children 'Common'*, BBC (Apr. 9, 2007), http://news.bbc.co.uk/2/hi/south_asia/6539027.stm.

83. Annie Gowen, *India's Supreme Court Reaffirms Death Penalty for 'Diabolical' Assaults in 2012 Fatal Gang Rape*, WASH. POST (July 9, 2018), https://www.washingtonpost.com/world/asia_pacific/indias-supreme-court-reaffirms-death-penalty-for-diabolical-assaults-in-2012-fatal-gang-rape/2018/07/09/c37c5239-4961-4580-b5ae-8c96eec49454_story.html.

84. *Id.*; Prachi Sharma, *et al.*, *Sexual violence in India: addressing gaps between policy and implementation*, OXFORD U. PRESS (Mar. 10, 2014), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.894.3386&rep=rep1&type=pdf>.

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an expert judicial panel to address sexual assault reform.⁸⁵ That panel, led by former India Supreme Court Chief Justice J.S. Verma,⁸⁶ published 630 pages of recommendations to combat sexual assault in India.⁸⁷ The commission expressly denounced making rape a capital-eligible crime:

In our considered view, taking into account the views expressed on the subject by an overwhelming majority of scholars, leaders of women’s organisations, and other stakeholders, there is a strong submission that the seeking of the death penalty would be a regressive step in the field of sentencing and reformation.⁸⁸

The Indian government ignored most Verma Report recommendations.⁸⁹ Indeed, the Criminal Law Amendment Ordinance of 2013 increased capital-eligible crimes to include rape that ultimately led to death.⁹⁰

Now, an array of critiques decry the 2018 amendment. Journalist Amrit Dhillon deemed Section 376AB powerless “because no effort is made to alter the way many men regard women as objects, [thus] the rape figures continue to rise.”⁹¹ Dr. Anup Surendranath, Executive Director of National Law University’s Project 39A, warns that Section 376AB could easily decrease victim reporting: most Indian rapists are known to their victims, and the “further burden” of “sending a person they know to the gallows” will mute already-low reporting rates.⁹² Others posit that rapists will now be more likely to kill their victims rather than risk the gallows themselves.⁹³ Section 376AB is also critiqued for failing to address the rape of boys—particularly given the government’s own 2007 study, which found that Indian girls and boys are equally sexually victimized.⁹⁴

While much of the world abolished capital punishment over the twentieth century, India’s support strengthened. In 2018, the Indian Express reported that twelve of fourteen states and Union Territories opposed a Home

85. Jim Yardley & Neha Thirani Bagri, *Notorious Attack Spurs India to Approve New Rape Laws*, N.Y. TIMES (Feb. 3, 2013), <https://www.nytimes.com/2013/02/04/world/asia/india-approves-tougher-rape-laws.html>.

86. *Id.*

87. Comm. Report 11003, CODE CRIM. PROC. (2013) (India).

88. *Id.* at 245-46; *see also* Aditi Malhotra et. al., *We Pored Over the Verma Report So You Don’t Have to*, WALL S. J. (Jan. 31, 2013, 9:00 AM), <https://blogs.wsj.com/indiarealtime/2013/01/31/we-pored-over-the-verma-report-so-you-dont-have-to/?ns=prod/accounts-wsj>.

89. Sharma, *et al.*, *supra* note 84, at 657.

90. *India: Crime of Sexual Assault Penalized*, U.S. LIBR. OF CONGRESS: GLOBAL LEGAL MONITOR (Feb. 11, 2013), <http://www.loc.gov/law/foreign-news/article/india-crime-of-sexual-assault-penalized/>.

91. Amrit Dhillon, *The death penalty won’t stop child rape in India*, GLOBE & MAIL (Aug. 7, 2018), <https://www.theglobeandmail.com/opinion/article-the-death-penalty-wont-stop-child-rape-in-india/>.

92. Divya Arya, *India death penalty: Does it actually deter rape?*, BBC (July 31, 2018), <https://www.bbc.com/news/world-asia-india-44922084>.

93. Abhishek Gupta, *Decoding ‘Deterrence’: A Critique of the Criminal Law (Amendment) Act, 2018*, ILL. L. REV., 136, 146 (2018).

94. *Why an MP Wants India to Talk About Child Sex Abuse*, *supra* note 81.

Ministry proposal to abolish the death penalty.⁹⁵ By comparison, just after gaining independence, India's Constituent Assembly debated everything from the death penalty's disproportionate impact on the impoverished to potential false identification of perpetrators.⁹⁶ From 1958 to 1962 alone, three capital punishment abolition resolutions were proposed.⁹⁷

In regional perspective, rape has long been capital-eligible in Pakistan, Bangladesh, and Afghanistan;⁹⁸ countering Nepal, Bhutan, and Sri Lanka, which abolished capital punishment entirely.⁹⁹ While Nepal abolished its death penalty in 1990, India's Section 376AB is prompting some Nepalese to consider resurrecting the measure.¹⁰⁰

As India grows in international standing, the nation measures itself less against regional neighbors and more against other major powers. That stage is varied: while a majority of the world's states have abolished capital punishment, major powers such as China, Japan, and the United States practice capital punishment without notable repercussion.¹⁰¹ Section 376AB will not likely spawn an international relations fallout. Still, in 2019 and beyond, analysts should monitor whether this new threat of capital punishment effectively increases reporting or reduces child rape.

V. Singapore - Choice of Law and Jurisdiction

Singaporean law underwent a significant change in how it handles enforcement of jurisdiction clauses in international commercial contracts. In *Vinmar Overseas (Singapore) Pte. Ltd. v. PTT Int'l Trading Pte. Ltd.*, the Court of Appeals of Singapore, the country's highest court, reevaluated the standards by which to determine whether an application for a stay of proceedings should be granted in favor of a forum in another country, pursuant to a commercial agreement.¹⁰² The *Vinmar* Court held that its earlier approach of considering the merits of a stay applicant's defense was no longer good law.¹⁰³ Such an inquiry would be henceforth limited to

95. Ragul Tripathi, *Death penalty should stay, say 12 out of 14 states, UTs*, INDIAN EXPRESS (Mar. 12, 2018, 9:26 AM), <https://indianexpress.com/article/india/death-penalty-should-stay-say-12-out-of-14-states-union-territories-5094533/>.

96. Rahul Tripathi, *Beyond The News: The Debate over Death*, INDIAN EXPRESS (Mar. 14, 2018, 8:57 AM), <https://indianexpress.com/article/explained/the-debate-over-death-penalty-law-commissions-supreme-court-on-capital-punishment-5096813/>.

97. *Id.*

98. See Arya, *supra* note 92.

99. Deepika Thapa Magar, *Down with the death penalty*, KATHMANDU POST (May, 4, 2018), <http://kathmandupost.ekantipur.com/news/2018-05-04/down-with-the-death-penalty.html>.

100. *Id.*

101. AMNESTY INT'L, *supra* note 78.

102. *Vinmar Overseas Singapore PTE LTD v. PTT International Trading PTE LTD*, Court of Appeals of the Republic of Singapore, [2018] SGCA 65, [https://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/final-version-for-release-\(v1\)-pdf-1.pdf](https://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/final-version-for-release-(v1)-pdf-1.pdf).

103. *Id.* ¶ 127.

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examining whether the application for a stay in favor of a chosen forum constituted an abuse of process.¹⁰⁴

Choice of jurisdiction or, in this context, choice of forum clauses are integral parts of all commercial agreements, especially those with a multinational dimension. As Justice of Appeal Steven Chong noted, such clauses are “ubiquitous” in international commercial contracts.¹⁰⁵ The jurisdiction chosen as the forum by these types of agreements is usually stipulated to be the exclusive jurisdiction for resolution of disputes and the commercial relationship between the parties. Logically, then, because the parties have agreed on a given forum, a party to a proceeding related to an application of the agreement that is initiated in a forum not contemplated by the agreement is entitled to have that proceeding stayed in favor of proceedings in the jurisdiction specified by the contract.

But rather than automatically staying proceedings, Singaporean courts (and courts in other Commonwealth countries) previously took the view that exclusive jurisdiction clauses apply only if the defendant—who is usually the party applying for the stay of proceedings—has a “genuine” defense against the plaintiff’s claims.¹⁰⁶ Therefore, Singaporean courts first analyzed whether the defendant had a meritorious defense to a case in order to determine whether a stay should be granted.

The theory underlying this evaluation on the merits is that only “genuine” disputes should be litigated in the chosen forum, because it does not matter what forum hears a non-meritorious claim.¹⁰⁷ A defendant without a meritorious defense, therefore, was deemed to be merely forum shopping for procedural advantage rather than genuinely seeking to enforce an exclusive jurisdiction clause. On the other hand, as recent court decisions from other Commonwealth countries have made clear, an overly substantial analysis of the merits of the defendant’s case as a precondition for a stay should be avoided as not keeping with the expectations of parties to an agreement containing an exclusive jurisdiction clause and, at best, it is irrelevant to the inquiry of whether to enforce a jurisdiction clause.¹⁰⁸

Originally, the required meritorious defense was one factor among several to be considered in whether to grant the stay application.¹⁰⁹ In general, an exclusive jurisdiction clause is to be enforced unless there is “strong cause”

104. *Id.* ¶ 128.

105. *Id.* at ¶ 1.

106. Colin Chow, *et al.*, *Singapore Court of Appeal Restates Law Governing Stay Applications Pursuant to Exclusive Jurisdiction Clause*, ALLEN & GLEDHILL (Dec. 20, 2018), <https://www.allenandgledhill.com/media/3511/ag-singapore-court-of-appeal-restates-law-governing-stay-applications-pursuant-to-exclusive-jurisdiction-clause.pdf>.

107. *Id.*

108. *Id.*; *See, e.g., Euromark Ltd. v. Smash Enterprises Pty Ltd.*, [2013] EWHC 1627 (noting that the party applying for a stay has a “right to rely on the exclusive jurisdiction clause which was agreed as part of the contract.”); *Hyundai Engineering & Const. Co., Ltd. v. UBAF (Hong Kong) Ltd.*, [2012] H.K.C. 175 (holding that courts cannot proceed to hear a claim in defiance of an exclusive jurisdiction clause in another forum).

109. *Id.*

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to refuse enforcement and deny a stay of proceedings in favor of the chosen jurisdiction.¹¹⁰ Singaporean courts, adopting a similar test from their English judicial fellows, identified five factors to be considered in determining whether strong cause was present, the fourth factor of which was the merits of the stay applicant's defense.¹¹¹

Over time, however, the meritorious defense factor gained outsized importance. In a succession of decisions by Singaporean courts, the existence of a meritorious defense to a plaintiff's claims came to be considered the *sine qua non* for the granting of an application for a stay.¹¹² The enforcement of an exclusive jurisdiction clause and the "strong cause" standard came to be synonymous with the existence of a meritorious defense by the stay applicant. In the *Jian He* case and its progeny, the Court of Appeal routinely held that strong cause existed to refuse a stay of proceedings if the applicant did not have a *bona fide* defense to the claim.¹¹³ This was true even in absence of other *Eleftheria* factors tending to support the enforcement of an exclusive jurisdiction clause. The preeminence of the meritorious defense inquiry remained the law in Singapore even as other Commonwealth jurisdictions were moving away from such an approach.¹¹⁴ This movement away from the meritorious defense inquiry appears to have caused the Court of Appeal to reexamine its views.

In the end, the *Vinmar* Court held that the lack of a meritorious defense only relates to the "strong cause" inquiry in respect to whether the defendant's application for a stay constitutes an abuse of process.¹¹⁵ This substantially diminishes the importance of the meritorious defense inquiry. As the Court emphasized, diminishing this inquiry in relevance to a stay application upholds the expectations of the parties to the jurisdiction

110. Rebecca Saunders, *UK: Forum Non Conveniens—The English Approach to Deciding Which Jurisdiction Governs a Dispute*, MONDAQ (Aug. 21, 2006), <http://www.mondaq.com/uk/x/42210/Forum+Non+Conveniencis+The+English+Approach+to+Deciding+Which+Jurisdiction+Governs+a+Dispute>.

111. *Amerco Timbers Pte. Ltd. v. Chatsworth Timber Corp. Pte. Ltd.*, [1977-78] SLR(R) 112, ¶ 11 (the other factors being the accessibility of evidence, the similarities or differences of the law of the forum with Singaporean law, the connections between the parties and either Singapore or the contracted forum, and whether the plaintiff would be prejudiced by having to sue in the contracted forum).

112. Lawrence Teh, *Starboard News: "EXCLUSIVE" MEANS EXCLUSIVE*, DENTONS (Jan. 31, 2019), <https://dentons.rodyk.com/en/insights/alerts/2019/january/31/starboard-news-exclusive-means-exclusive>.

113. *Id.*; *Singapore Court of Appeals Establishes Law on Exclusive Jurisdiction Clauses, Rajah & Tann Asia* (Nov. 2018), https://eoasis.rajahtann.com/eoasis/lu/pdf/2018-11_SG-Establishes-Law-Exclusive-Jurisdiction-Clauses.pdf.

114. See, e.g., *CH Offshore Ltd. v. PDV Marina SA*, [2015] EWHC 595 (Comm) at para. 64 (holding that it is "irrelevant" whether a plaintiff's claim is likely to succeed in the non-contractual forum); *Deltatre Spa v. Hong Kong Sports Indus. Dev. Ltd.*, [2018] HKCU 2939, at para. 89 (holding that the lack of a meritorious defense did not amount to strong cause to deny a stay application *per se*).

115. *Vinmar Overseas Singapore PTE LTD v. PTT International Trading PTE LTD*, *supra* note 71, ¶ 146-47.

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agreement and provides greater certainty to commercial litigants that a chosen forum for the resolution of disputes will be upheld.¹¹⁶ In short, *Vinmar* presents a notable change in the Singaporean approach to choice of forum clauses that will have significant reverberations in international commercial law beyond 2018.

116. *Id.* ¶ 137.

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AMERICAN BAR ASSOCIATION
321 N. CLARK STREET
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